



**nbn™** submission in response to  
ACCC Discussion Paper reviewing “A Code of  
Access to Telecommunications Transmission  
Towers, Sites of Towers and Underground  
Facilities”

12th October 2018



## 1 Executive Summary

**nbn** thanks the ACCC for the opportunity to provide a submission to its Discussion Paper reviewing “A Code of Access to Telecommunications Transmission Towers, Sites of Towers and Underground Facilities” (**the Code**).

**nbn** continues to support the Code’s approach of mandating compliance to specific provisions dealing with confidentiality, non-discriminatory access, queuing policies and dispute resolution. We also support the Code encouraging compliance with non-mandatory administrative and operational terms where a separate commercial agreement has not been reached. The Code continues to strike the right balance of allowing flexibility where carriers can reach agreement over and above the minimum terms of the Code but also support those carriers, including new entrants to the telecommunications market, who may be less able to negotiate access to other carriers’ facilities.

**nbn** agrees in principle that co-location is to be encouraged wherever reasonably practicable. Any amendment to the Code should be on the basis that it contributes to good regulation. In the Facilities Access space, a good resolution should allow efficient and timely processes that facilitate access to all infrastructure under the Code and, at the same time, allow carriers the flexibility of managing their own assets without being delayed by overly burdensome access provisions. This approach should be generally adhered to irrespective of the particular network technology in respect of which a carrier is seeking to access eligible facilities to rollout.

**nbn** does and will continue to share infrastructure in accordance with the regulatory framework, including relevant provisions of the Code but does not believe it, or its network, should be treated differently to other carriers or networks offering competitive services. **nbn**’s infrastructure is already adequately accessible under the regime and through bilateral access agreements.

5G technology should not be treated separately to other existing technologies. In order to create a level playing field (and encourage a competitive landscape across emerging and competing technologies), the ACCC should focus on ensuring access and application processes in the Code are suitable for all.

Finally **nbn** suggests that the timelines for some processes could be streamlined. These include:

- The timeframe specified under 4.5.5 of the Code for non-Requesting Carriers to respond to a co-location consultation proposal could be reduced; and
- A two-tier process could be developed to simplify the application process for smaller build and/or access applications for towers, where less complex application assessments are needed.

This submission addresses the questions the ACCC has raised in its Discussion Paper. We offer the following comments.

## 2 Cooperation between carriers in the planning stages

1. *Should the words ‘may choose to’ be deleted and replaced with ‘must’ in Sub-clause 4.5.1 of the Facilities Access Code?*

No, **nbn** does not believe this clause should be made mandatory because the Code is designed to “encourage the co-location of facilities, where reasonably practicable...”<sup>1</sup>. **nbn** has experienced good collaboration with

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<sup>1</sup> A Code of Access to Telecommunications Transmission Towers, Sites of Towers and Underground Facilities, September 2013, Background, p1.



other carriers where a new facility is planned and there is already proactive consultation at the operational level amongst carrier representatives.

The focus of the Discussion Paper on whether pre-build cooperation should be made mandatory within the Code has been directed entirely on mobile towers. However an amendment to 4.5.1 of the Code will impact new site development for all eligible facilities.

**nbn** believes making this provision mandatory for underground facilities would be overly onerous. **nbn** has is not aware of any evidence that a mandatory process for co-building ducts has been sought or desired by any party.

Most tower and tower site applications made and received are requests to share infrastructure on existing structures. In relation to towers and new tower sites where existing infrastructure is not available to augment, **nbn** has observed that industry practice has already shown a propensity toward making co-location arrangements in the planning stages for the sake of reducing costs or deploying more costly greenfield alternatives. Therefore a mandatory obligation is not needed at this point in time.

A mandatory obligation that applied to all new developments is likely to be detrimental to efficient and rapid network deployment and carriers' ability to be responsive to consumer needs. Making the co-location consultation process mandatory is likely to delay opportunities a Requesting Carrier wishes to take up to enhance their network. Each carrier will have its own particular timeframes and budgets it is required to meet to carry out their program of works on structures.

Placing a mandatory obligation under sub-clause 4.5.1 of the Code on the consultation process for a new development would result in a minimum 30 Business Day delay to wait for a non-Requesting Carrier to respond under sub-clause 4.5.3 regardless of whether a) any response from non-Requesting Carriers is forthcoming, and b) it is reasonably practicable for the Requesting Carrier to offer the co-location consultation process.

On balance therefore, **nbn** does not agree with the proposal to replace 'may choose to' with 'must' in sub-clause 4.5.1 and believes cooperation between carriers in the planning stages should remain optional within the terms of the Code.

## *2. Should the words 'including by public notice' be inserted in to Sub-clause 4.5.2?*

**nbn** also strongly believes there is no need to make provision for a public notice when notifying non-Requesting Carriers of plans to develop a new facility.

This suggestion is not conducive to a streamlined consultation process and is inconsistent with the processes already required for carriers to comply with when taking their plans to local councils under existing planning instruments (including local government legislation).

Public notification is undertaken in accordance with the development application submitted to local authorities. The co-location consultation process takes place before any confirmed plan can be developed (with or without input from non-Requesting Carriers) to submit to local authorities. The proposal of an additional public notice under the Code effectively requires a Requesting Carrier to provide two separate notices.



3. *Should the co-location consultation process in Clause 4.5 of the Facilities Access Code be made a mandatory condition of the Code? If so, should it relate to all eligible facilities? If not, please specify the eligible facilities to which Clause 4.5 should apply?*

As above, **nbn** does not see there is an imperative to make clause 4.5 of the Code a mandatory condition.

4. *Should any of the co-location negotiation processes be changed? If so, why?*

**nbn** suggests the timeframe specified under sub-clause 4.5.5 of the Code, where the Proposed Sharer must notify the Requesting Carrier of such a proposal, could be reduced from 20 business days to 10 business days.

5. *Do any of these co-location negotiation processes require further clarification? For example, should 'reasonable' in clause 4.5.2 of the Facilities Access Code be defined?*

**nbn** believes the current co-location negotiation process under the Code is sufficient.

As a matter of principle, **nbn** believes requirements of reasonableness must always be considered in the context of the individual circumstances of each case. Therefore to be prescriptive in the context of how or when a Requesting Carrier can make attempts to inform other carriers of a proposed co-location consultation process is likely to result in some circumstances not being prescribed and therefore not being deemed as a 'reasonable attempt'.

References to 'reasonableness' in moderating carrier behaviour is consistent with the rest of the terms expressed under the Code and in other legislation.

6. *Are there any new processes that should be added to Clause 4.5, or any other part of the Facilities Access Code to promote co-location of eligible facilities?*

**nbn** is comfortable with the current terms of clause 4.5 of the Code and does not see evidence that additional changes other than the timeframes under sub-clause 4.5.5 are needed.

On a separate note, **nbn** suggests it may be useful for Chapter 3 of the Code allow Second Carriers to make enquiries as to whether a particular facility is available, or to request and receive information on initial enquiry, before the full pricing and terms negotiated under the terms of a Master Access Agreement must be completed. This clarification may allow a more efficiently streamlined process when initial explorations to co-locate are deemed necessary. This practice may assist in reducing overbuild in areas where facilities access in a particular area is already available, and is in spirit of the objectives of the Code. Carriers must be required to have a reasonable information package that complies with the Code and this requirement needs to be enforced so that unreasonable terms applied to the provision of an information package do not have the effect of impinging on co-location opportunities.

### 3 Review of existing Code processes

7. *Should the Facilities Access Code impose a 'use it or lose it' obligation as a mandatory or non-mandatory Code condition. If so, should it apply to all eligible facilities and carriers using the facility? What time period should apply?*



**nbn** does not believe a ‘use it or lose it’ obligation should be included into the Code and certainly should not be made as a mandatory condition. Our reasons differ slightly when considering this suggestion across both towers and underground facilities.

### Towers

The current queuing policy and requirement for non-discriminatory treatment of other carriers in providing access to eligible facilities is sufficient to meet the objectives of the Code, that is, to encourage co-location and promote competition. Any further prescription on how carriers are able to use their own towers or sites of towers would be difficult to govern and impinge on a carrier’s ability to carry out their legitimate business interests as is currently allowed under 2.2.1.

A ‘use it or lose it’ requirement would suppress a carrier’s ability to adequately forecast for its own business needs and make it difficult to determine whether new sites or towers are required to be developed.

### Underground facilities

Simply due to the nature of the type of facility, there are a greater number of ducts available than towers nationally and, as a result, there are a greater range of options available to offer to Requesting Carriers when they seek access to an underground facility.

There are not the same queuing challenges for underground facilities as there have been for towers. In **nbn**’s experience it is rare for a queue to access a particular duct to be needed at the same or similar time. The queueing policy is largely not used by **nbn** for underground facilities. Therefore a ‘use it or lose it’ provision for underground facilities is not likely to be relevant either.

It is common practice across all carriers to recommend an alternative duct access route which will fulfil the Second Carrier’s requirements, should a particular facility be at capacity. Therefore there are few impediments in place that prevent **nbn** from assessing and typically accommodating a carrier’s request.

### *8. How would a ‘use it or lose it’ obligation operate? For example, should a carrier lose access to any portion of the facility that it does not use within the designated timeframe?*

As above, a ‘use or lose it’ obligation should not be included in the Code.

### *9. Are there any improvements that could be made to the Facilities Access Code to further facilitate access to eligible facilities owned and/or operated by NBN Co?*

The Code enables carriers to effectively co-locate on **nbn**’s eligible facilities. **nbn** agrees with the point the ACCC has highlighted in its Discussion Paper from Optus that ‘the industry was making extensive use of **nbn** wireless infrastructure and that there was no evidence of impediments to co-location on that infrastructure.’<sup>2</sup> **nbn** does not consider it necessary to make amendments to the Code specifically for **nbn** facilities.

As with other carriers, **nbn** must operate within the terms of the Code and Schedule 1 of the *Telecommunications Act 1997* (Cth) to allow other carriers access to our eligible facilities. We support the

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<sup>2</sup> ACCC, *Discussion Paper reviewing “A Code of Access to Telecommunications Transmission Towers, Sites of Towers and Underground Facilities”* (Discussion Paper), p25.



intent of the Code encourage the co-location on our facilities and to treat our own access requirements within the terms of the queuing policy.

**nbn** must also be able to utilise its own assets to the fullest extent possible to rollout our network as cost-effectively and seamlessly as possible. As **nbn's** Statement of Expectations states it must also be allowed to "compete and innovate like other companies" in the market environment<sup>3</sup>.

The types of eligible facilities in scope under the Code are also sufficient. Access to any other **nbn** facility is adequately regulated under the existing regime, including under Schedule 1 of the Telecommunications Act; and also terms under **nbn's** Wholesale Broadband Agreement (**WBA**), Standard Form of Access Agreement, and **nbn's** Special Access Undertaking.

## 4 New uses and the value of providing technology-neutral facilities access

10. *Are there any improvements that could be made to the Facilities Access Code to facilitate the deployment of distributed antenna systems?*

**nbn** suggests improvements could be made to the Code by streamlining some processes in relation to how carriers may access eligible facilities. However the Code should not make a distinction about, nor provide advantage for, specific types of equipment carriers intend to install on those facilities. The Code already provides guidance on maintaining good engineering, radiofrequency, electromagnetic practices within bilateral access agreements for the health and safety of staff and the wider community. The Code itself and the processes it provides guidance on should remain technology neutral when making directions in relation to facilitating access.

11. *Are there any barriers to accessing underground facilities, particularly leading to NBN POI sites and data centres? If so, how could the Facilities Access Code be amended to mitigate these barriers?*

Access into the **nbn** Ten Aggregation Node Depots (TANDs) to carriers are typically provided under the terms of the WBA where the carrier is reselling **nbn** services and are not in scope for the Code. It is **nbn's** strong view that these should not be incorporated into the scope of the Code. Separately, **nbn** already has existing arrangements in place with the relevant carriers where underground facilities are used to deploy cable to these sites for non-WBA purposes to allow carriers to provide **nbn** managed backhaul services. These terms can be adjusted to cater for future access requests. It is our reasonable expectation that these commercial-in-confidence arrangements should remain within our current commercial arrangements without the need for additional regulatory oversight.

For the underground facilities that are designed to hold lines and are currently an eligible facility under the terms of the Code, we find there is generally excellent cooperation between carriers (large or small) and **nbn**, to facilitate enquiries for duct access. **nbn** maintains good working relationships which include a pleasing level of trust and cooperation operating between parties; and with current timelines being met on most occasions. **nbn** believes this component of the market has shown itself to be working sufficiently well. Alternative routes

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<sup>3</sup> **NBN** Co Ltd, Statement of Expectations, 24 August 2016, p2.



are offered if original duct routes are not available and detailed information is provided. It is **nbn's** firm view there is no need for additional regulation as a result.

## 12. *Are there any changes to the Facilities Access Code required to facilitate the roll-out of 5G technologies?*

The ACCC has stated it considers this review to be an opportunity to enhance existing provisions so that access to eligible facilities is not a barrier to competition<sup>4</sup>. **nbn** believes that creating facilitating or promoting one specific type of technology to have more favourable terms of access within the Code is not conducive to removing barriers to competition.

The manner in which carriers can access eligible facilities for 5G technology should not be treated separately or more favourably than other existing technologies. The existing Code caters for access requests, independent of the technology type and capability.

Focus should be applied on ensuring access and application processes are suitable for all rather than making special provisions for one particular type of technology or type of equipment. Any improvements made to the Code should have the ability to benefit all uses of eligible facilities. **nbn** suggests that streamlining some of the application processes, including how applications are managed and even more so what designs are produced for smaller and/or non-complex co-location requests are likely to benefit both 5G activity in the future and existing uses for eligible facilities now. Further detail is explored below.

## 5 Other issues

### 13. *Are there any other changes to the Facilities Access Code that are not covered in this Discussion Paper but which would facilitate access to eligible facilities?*

**nbn** offers two suggestions that could be made to the Code to facilitate applications for access to towers.

#### 1) A two tier co-location application process for towers

For some applications using the current procedures specified under Appendix A, a two tier or 'fast track' system could be introduced to streamline processes, where appropriate, to support timely and efficient deployment.

Applications can take between 23 – 50 weeks to complete from the point of receiving a request for preliminary information to arranging 'as-built' documentation and conducting post-construction quality inspection activity. The Code and timelines imposed by the carriers to assess applications do not contemplate nor discriminate on the nature of the proposal. It may be appropriate for 'Requests for Approval in Principle' and 'Requests to review detailed design' information submissions be assessed in one activity rather than separately assessing applications via different and sequential steps.

Smaller and relatively simple installations currently take the same period of time as a fully detailed and complex design submitted to the First Carrier. **nbn** suggests, for example, an application for a single dish and/or small antenna could take less time for both First and Second Carriers to administer.

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<sup>4</sup> Discussion Paper, p26.



**nbn** notes that it is not appropriate for all installation application requests to be streamlined and assessment of whether streamlining a process for an individual access request type would need to be considered on a case by case basis. Activities that include strengthening, replacing existing equipment or building tower extensions, for example, are forms of design solutions that may need the current steps.

Further discussion would be required with the telecommunications industry to determine type of installations could be considered to be suitable to use in a streamlined process. As a starting point for this discussion, **nbn** suggests a simple application could be processed within half the timeframes currently specified under Appendix A. It would be appropriate for the MCF and other industry stakeholders (including **nbn**) to work together in reducing cycle times for review with carrier submissions.

Underground facilities access requests (both inbound and outbound) are relatively low in volume and simple in nature. Therefore, applications are generally handled in the same manner regardless of the request. The planning stage for accessing underground facilities is very short and much simpler than a request to access a tower. Therefore **nbn** does not see an immediate need to differentiate between underground facilities access requests.

## 2) A future reservation process

**nbn** also suggests that at some point in the future an additional step to assist in managing use of access to towers could be to introduce a reservation process in relevant sections of Appendix A of the Code. A reservation process could include:

1. A provision for Second Carriers to initiate a request to reserve Structural Capacity (**Reserved Structural Capacity**), for a set period to be agreed between carriers on a commercial basis;
2. Terms that encourage each carrier to have a reciprocal arrangement with the other carrier to Reserve Capacity (**Reciprocal Reservations Arrangement**);
3. A requirement that the Second Carrier should be able to access the reserved capacity within mutually agreed timeframes (**Hold Over Period**) and then process its designs and constructs its equipment on the reserved capacity at the end of that period;
4. An ability for a Second Carrier to be able to access Reserved Structural Capacity during a Hold Over Period within reasonable timeframes;
5. In the absence of any installation of equipment at the end of the agreed reserve period i.e. Hold Over Period, the commercial arrangement for that allocated structural capacity on the tower could cease. Access to the tower could then be available for either the First Carrier or other carriers in the normal course of existing procedures under sections A1 or A2 of the Appendix.

**nbn** would be willing to explore the creation of a reservation process with other industry members. This suggestion has the potential to provide flexibility for access seekers to secure space on existing facilities that can allow them to anticipate future needs. At the same time, it may provide certainty for access providers to be able to recoup appropriate costs for their assets, whilst allowing provision for reservations not to last indefinitely.

Ends.