



31 May 2013

Mr Grahame O'Leary
Director
Communications Group
Australian Competition and Consumer Commission
Sydney NSW 2001
By email

Dear Grahame

ACCC's draft decision to vary the Facilities Access Code

This letter sets out Optus' comments on the ACCC's draft decision to vary the Facilities Access Code. Each of the issues covered in the ACCC's discussion paper are addressed below.

Continuing relevance of the Code

As indicated in its submission to the ACCC of 24 August 2012, Optus considers that the Facilities Access Code (FAC) continues to play a relevant and important role in facilitating efficient and effective access arrangements to mobile towers and sites and underground facilities. Optus, therefore, supports the ACCC's decision to maintain and update the Code.

Relevance of the mandatory provisions

The ACCC has indicated that it is not necessary to make amendments to the Code in respect of; the mandatory conditions; the dispute resolution arrangements; confidentiality arrangements; or the non-discriminatory obligations.

Optus supports the ACCC's position on these issues. In particular, Optus supports the ACCC's decision to reject Telstra's proposal that the Code should be amended to allow a First Carrier to differentiate between different Second Carriers. Such an outcome is unlikely to promote the interests of competition or end-users. It would be inappropriate to amend Code in the manner proposed by Telstra.

Relevance of non-mandatory provisions

With the exception of varying the FAC to include new definitions the ACCC has indicated that it proposes to retain the non-mandatory provisions within the Code without amendment.

Optus supports this position, including the ACCC's proposed new definitions.

Obsolete and out dated references

Optus generally supports the ACCC's proposed amendments to remove or update obsolete and out dated references in the Code.

However, Optus queries the following change to sub-clause 1.2.1 that is proposed in respect of NBN Co:

“ For the purposes of this Code, an NBN corporation is not taken to be the operator or controller of an Eligible Facility if:

- (1) there is an agreement in force between Telstra and an NBN corporation,*
- (2) the agreement relates to an NBN corporation’s access to an Eligible Facility owned or operated by Telstra, and*
- (3) apart from this provision, the agreement would result in the NBN corporation being the operator or controller of the Eligible Facility”.*

The principle to be applied under this proposed provision is that where NBN Co acquires facilities from Telstra (ducts and towers) then the obligations under the code should not apply to these facilities. Whilst Optus considers this principle to be reasonable, it should apply more broadly since it is not specific to NBN Co. Other carriers have and will continue to acquire access to Eligible Facilities owned by Telstra, there should be no presumption that the Code should apply to such facilities.

Optus submits that the ACCC’s drafting should be amended to reflect the broader application of this principle.

Third Party Access Code

The ACCC has indicated that it is not inclined to extend the Code to cover Third Party Access arrangements; rather it prefers deal with such access arrangements by developing a separate Code.

Optus supports this position.

Implications of Telstra Structural Separation Undertaking

The ACCC has considered changes proposed to be made to the Code to bring it into line with Telstra’s Structural Separation Undertaking (SSU). Optus has provided separate comment on each of these issues below.

Dispute resolution procedures

The ACCC proposes to make no changes to the dispute resolution arrangements under the Code on the basis that different dispute processes under the Code and Telstra’s SSU can operate side by side.

Optus supports this position.

Telstra Reserved capacity

The ACCC has proposed to amend the Code to reflect the queuing policy that has been established in Telstra’s SSU. This would require a supplier of Eligible Facilities to develop a queuing policy and enable it to use these processes to reserve space for its own requirements and reject requests for access for space that has been reserved.

Optus does not consider that the Code should be amended as proposed by the ACCC. The requirements within the SSU are specific to Telstra and reflect the nature of its position in the market as a vertically integrated supplier. Further, Optus notes that the arrangements that apply in the SSU are specific to TEBA access arrangements, which are not covered by the Code.

More significantly, Optus submits that without related compliance obligations and monitoring processes (as are applied in the SSU), these provisions are capable of being used to deny access seekers from accessing Eligible Facilities.

Confidential information

The ACCC has proposed to amend the provisions in the Code to clarify that confidential information does not include information which is in the public domain.

Optus supports this change.

Facilities Access issues relating to the National Broadband Network

Optus supports the ACCC's proposal to monitor access arrangements as the NBN is rolled-out.

Declaration of a facilities access service

Optus considers that there is merit in the ACCC undertaking a broader and more detailed assessment of the need for regulation in respect of access arrangements to facilities that are required to access declared services. Such a review is particularly relevant in respect of access to exchange space and related ancillary services that are necessary for the acquisition of many fixed line declared services, but which fall outside the provisions of the Code. However, Optus considers that such an assessment should be conducted separately from the present consultation on the Code.

Optus encourages the ACCC to consider the competitive implications of these broader facilities access arrangements as part of its forthcoming inquiry into the review of the declaration of fixed line services and the Domestic Transmission Capacity Service.

Yours sincerely

A handwritten signature in black ink, appearing to read 'AS', with a long horizontal flourish extending to the right.

Andrew Sheridan

Head of Interconnect and Economic Regulation
Optus