



AUSTRALIAN COMPETITION  
& CONSUMER COMMISSION

# Facilities Access Code

An ACCC Discussion Paper reviewing “A Code of Access to Telecommunications Transmission Towers, Sites of Towers and Underground Facilities”

August 2018

Australian Competition and Consumer Commission  
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## List of abbreviations

|                        |   |
|------------------------|---|
| ACCC                   | Australian Competition and Consumer Commission  |
| ACMA                   | Australian Communications and Media Authority   |
| AMTA                   | <i>Australian Mobile Telecommunications Association</i>   |
| CCA                    | <i>Competition and Consumer Act 2010</i>  |
| DAS                    | Distributed antenna system  |
| DoCA                   | Department of Communications and the Arts   |
| Eligible facilities    | Transmission towers, Sites of towers and Underground facilities   |
| Facilities Access Code | <i>A Code of Access to Telecommunications Transmission Towers, Sites of Towers and Underground Facilities</i> |
| MBSP                   | Mobile black spot program   |
| MNO                    | Mobile network operator   |
| NBN                    | National Broadband Network  |
| NBN POIs               | NBN Points of Interconnection   |
| RFNSA                  | Radio frequency national site archive   |
| SSU                    | Telstra's Structural Separation Undertaking   |
| SAU                    | Special Access Undertaking  |
| Telco Act              | <i>Telecommunications Act 1997</i>  |

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# 1. About this review

## 1.1. Background

In 1999 the ACCC made 'A Code of Access to Telecommunications Transmission Towers, Sites of Towers and Underground Facilities' (the Facilities Access Code).<sup>1</sup> The Facilities Access Code was made under Part 5 of Schedule 1 to the *Telecommunications Act 1997* (Telco Act). It applies to the following facilities:

- telecommunications transmission towers
- sites of telecommunications transmission towers, and
- eligible underground facilities

(collectively 'the eligible facilities').

The Facilities Access Code provides administrative and operational procedures that must be complied with by carriers providing access to the eligible facilities. The purpose of the Code is to encourage co-location of facilities and to facilitate access to the eligible facilities in a timely and efficient manner.

Compliance with the Facilities Access Code is a carrier licence condition.<sup>2</sup> Carriers must comply with the administrative conditions set out in the Code unless they have reached a commercial agreement that overrides the specified provisions. Clauses contained in Chapter 2 of the Facilities Access Code (the mandatory conditions of access) apply notwithstanding any agreement to the contrary. In this way, the Facilities Access Code operates as a safety net should a carrier not be able to secure a commercial arrangement on satisfactory terms.

The ACCC varied the Facilities Access Code in 2013 to, among other things, make timeframes for accessing facilities a mandatory provision of the code.

The Facilities Access Code has not been reviewed or amended since 2013. There is no legislative obligation to conduct a review of the Code under the Telco Act. However, the ACCC may vary provisions of the Code from time to time.<sup>3</sup>

A copy of the [Facilities Access Code](#), as amended in 2013, is available on the ACCC website.

## 1.2. Purpose

During the 2016-2017 inquiry into the declaration of a domestic mobile roaming service (the Mobile Roaming Inquiry), the ACCC received a number of submissions regarding mobile issues in regional Australia, including facilities access issues.

In October 2017, the ACCC published a paper, *Measures to address regional mobile issues*,<sup>4</sup> which proposed actions to address some of the issues raised during the inquiry. Among other things, the paper identified measures that may reduce the costs of deploying and improving mobile networks, including aspects of the Facilities Access Code designed to

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<sup>1</sup> *A Code of Access to Telecommunications Transmission Towers, Sites of Towers and Underground Facilities*, October 1999 (the Facilities Access Code).

<sup>2</sup> Section 61 of the *Telecommunications Act 1997* (Telco Act) provides that a carrier licence is subject to the conditions specified in Schedule 1, and subclause 37(2) of Schedule 1 to the Telco Act provides a carrier must comply with the Facilities Access Code.

<sup>3</sup> Sub-clause 1.1.3 of the Facilities Access Code.

<sup>4</sup> ACCC, *Measures to address regional mobile issues*, October 2017.

facilitate access to mobile towers and the sites of towers. The ACCC considered that, while the Code appeared to be working well, a review was necessary to identify and remove any barriers to the timely deployment of mobile infrastructure, particularly in regional areas (Proposed Action 5.)

Further, in the recent *Communications Sector Market Study Final Report*, the ACCC committed to reviewing the Facilities Access Code, particularly around the issues of co-location at greenfield sites.<sup>5</sup>

In October 2017, the Australian Government released its 5G strategy which undertook to review existing telecommunications regulatory arrangements to ensure they are fit for purpose to enable the introduction of 5G technologies in Australia. The ACCC considers that a review of the Facilities Access Code will assist in ensuring that regulatory settings promote investment in 5G technologies.

The Facilities Access Code was last reviewed in 2013. The ACCC considers it timely that, in conjunction with the mobile issues noted above, it conducts a broader review to take into account the substantial changes in the industry over the last 5 years, including the roll out of the NBN.

A number of submissions regarding the Facilities Access Code were made to the Mobile Roaming Inquiry and at the ACCC's Regional Mobile Issues forum held in February 2018.<sup>6</sup> The ACCC will take these submissions into account to inform the current review of the Code.

Submissions are also sought on the matters identified in Section 5 of this discussion paper, and any other matters relevant to this review of the Code.

### 1.3. Structure of this paper

This Discussion Paper is structured as follows:

- Section 2 provides a background to the facilities access regime
- Section 3 provides an overview of the Facilities Access Code
- Section 4 outlines the background to this inquiry, including an overview of the Mobile Roaming Inquiry
- Section 5 discusses and seeks submissions on the key issues for review
- [Appendix A](#) has a consolidated list of questions
- [Appendix B](#) provides an overview of the regulatory framework for access to facilities.

### 1.4. Timetable for the inquiry

The ACCC requests written submissions by 30 September 2018.

After considering submissions from interested parties, the ACCC will set out its preliminary findings in a draft report. The ACCC will provide an opportunity for comment on its preliminary findings before preparing a final report.

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<sup>5</sup> ACCC, *Communications Sector Market Study – Final Report*, April 2018, p.163  
<https://www.accc.gov.au/publications/communications-sector-market-study-final-report>.

<sup>6</sup> ACCC, Domestic mobile roaming declaration inquiry, <https://www.accc.gov.au/regulated-infrastructure/communications/mobile-services/domestic-mobile-roaming-declaration-inquiry-2016> and ACCC, Regional Mobile Issues Summary Report, March 2013, <https://www.accc.gov.au/regulated-infrastructure/communications/mobile-services/regional-mobile-issues/regional-mobile-issues-forum>.

## 1.5. Making submissions

The ACCC encourages industry participants, other stakeholders and the public more generally to consider and make submissions on the issues set out in this discussion paper.

Submissions are preferred in electronic form, either in PDF or Microsoft Word format. A full list of questions is also set out at [Appendix A](#).

To foster an informed and consultative process, all submissions will be considered as public submissions and will be posted on the ACCC's website. Interested parties wishing to submit commercial-in-confidence material to the ACCC should submit both a public and a commercial-in-confidence version of their submission. The public version of the submission should clearly identify the commercial-in-confidence material by replacing the confidential material with an appropriate symbol or 'c-i-c'.

The ACCC has published a [guideline](#)<sup>7</sup> as to the process that parties should follow when submitting confidential information to communications inquiries by the ACCC. The [ACCC-AER information policy: the collection, use and disclosure of information](#) also sets out the general policy of the ACCC on the collection, use and disclosure of information. Both policies are available on the ACCC website.

Submissions should be emailed to:

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<sup>7</sup> ACCC, *Confidentiality Guideline for submitting confidential material to ACCC communications inquiries*, April 2014.

## 2. Regulatory framework for access to facilities

Access seekers depend on access to telecommunications networks and facilities in order to inter-connect their networks, and supply telecommunication services to users in downstream markets.

The Facilities Access Code operates in conjunction with other regulatory mechanisms that promote access to facilities. These include the facilities access provisions of the Telco Act, the Part XIC access regime provisions of the *Competition and Consumer Act 2010* (CCA), and the facilities access provisions of Telstra's Structural Separation Undertaking (SSU). An overview of the regulatory framework for access to facilities in the Telco Act and CCA is at [Appendix B](#).

Section 2.1 below provides an outline of the facilities access regime in Schedule 1 to the Telco Act.

### 2.1. Telecommunications Act 1997

The facilities access regime is set out in Parts 3 and 5 of Schedule 1 to the Telco Act. It establishes a negotiate-arbitrate framework, where the ACCC acts as the arbitrator of last resort.<sup>8</sup> Compliance with the facilities access regime is a carrier licence condition, directly enforceable by the ACCC.<sup>9</sup>

#### **Part 3 of Schedule 1 – Access to supplementary facilities**

Part 3 of Schedule 1 to the Telco Act contains provisions for access to supplementary facilities. It provides that a carrier (the first carrier) must, if requested to do so by another carrier (the second carrier), give the second carrier access to facilities owned or operated by the first carrier.<sup>10</sup>

Under Section 7 of the Telco Act, a facility is defined as:

- i. any part of the infrastructure of a telecommunications network; or
- ii. any line, equipment, apparatus, tower, mast, antenna, tunnel, duct, hole, pit, pole or other structure or thing used, or for use, in or in connection with a telecommunications network.

The meaning of a supplementary facility also extends to land on which a facility is located, a building or structure on that land and customer equipment, or customer cabling, connected to a telecommunications network owned or operated by a carrier.<sup>11</sup>

#### **Part 5 of Schedule 1**

Part 5 of Schedule 1 to the Telco Act contains facilities access provisions that specifically apply to telecommunication transmission towers, the sites of towers and eligible underground facilities that are designed to hold lines (referred to as the eligible facilities).

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<sup>8</sup> See Sub-clauses 18(1), 36(1), 36(2 and 3) to Schedule 1 to the Telco Act.

<sup>9</sup> Section 61 of the Telco Act and Sub-clause 37(2) of Schedule 1 to the Telco Act.

<sup>10</sup> Subject to certain exceptions, such as where access is not technically feasible. See Sub-clauses 33(3), 34(3) and 35(3) of Schedule 1 to the Telco Act.

<sup>11</sup> Sub-clause 17(5) of Part 3 of Schedule 1 to the Telco Act.

Under this Part:

- a telecommunications transmission tower means a tower, pole, mast or similar structure used to supply a carriage service by means of radio communications
- sites of telecommunications transmission towers include land, a building on land, or a structure on land, and
- eligible underground facilities refers to an underground facility that is used, installed ready to be used, or intended to be used to hold lines.<sup>12</sup>

Similar to Part 3, Part 5 requires carriers to provide other carriers with access to these facilities upon request. Under Part 5, the ACCC also has the power to make a code<sup>13</sup> setting conditions that are to be complied with in relation to the provision of access to eligible facilities.

The ACCC first made a code of access relating to telecommunications transmission towers, sites of telecommunications transmission towers and eligible underground facilities in October 1999.

### **The Facilities Access Code**

The Facilities Access Code encourages co-location of eligible facilities and is designed to promote competition by facilitating access to telecommunications infrastructure.

The Code contains mandatory conditions of access, which carriers must comply with, and other conditions that will apply unless parties negotiate their own terms.

In 2013, the ACCC varied the Facilities Access Code to, among other things, make timeframes for accessing the eligible facilities a mandatory provision of the Facilities Access Code.<sup>14</sup>

The Facilities Access Code is set out in more detail in Section 3 of this Discussion Paper.

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<sup>12</sup> Clause 31 of Schedule 1 to the Telco Act.

<sup>13</sup> Clause 37 of Part 5 of Schedule 1 to the Telco Act.

<sup>14</sup> See ACCC, *Facilities Access Code Final decision - An ACCC Final Decision to vary "A Code of Access to Telecommunications Transmission Towers, Sites of Towers and Underground Facilities (October 1999)"*, September 2013. Both the ACCC's final decision and a copy of the code (as varied) are available on the [ACCC website](#).

## 3. Facilities Access Code

The ACCC made the Facilities Access Code in 1999, following a request from the Minister for Communications, Information Technology and the Arts, to examine whether a code of practice was necessary to assist network rollout by new and existing mobile network operators (MNOs).

### 3.1. Scope

As discussed in Section 2.1, the Facilities Access Code only applies to carriers that own or operate eligible facilities and, to carriers seeking access to those facilities. As such, the Code does not apply to facilities that are owned or operated by non-carriers or, to facilities that are not eligible facilities as specified in Part 5 of Schedule 1 to the Telco Act.

In addition, the Facilities Access Code does not apply to the extent (if any) it imposes an obligation on Telstra that has the effect of preventing Telstra from complying with its Structural Separation Undertaking (SSU).<sup>15</sup>

### 3.2. Purpose

The purpose of the Facilities Access Code is to ensure that, as far as possible, facilities are shared and/or co-located. This policy of co-location is intended to:

- improve environmental amenity by avoiding a proliferation of mobile towers and overhead cables associated with new entrants to the telecommunications market, and
- promote competition and efficiency in the provision of telecommunications services by facilitating the entry of new mobile and fixed line telecommunications operators, who could use existing towers without the need to invest in constructing their own towers.

### 3.3. Compliance

The Facilities Access Code provides the minimum standards of practice for administrative and operational procedures that allow access to eligible facilities in a timely manner.

Compliance with the Facilities Access Code is a carrier licence condition.<sup>16</sup> Carriers must comply with the administrative conditions set out in the Code unless they have reached a commercial agreement that overrides specified provisions. The Code's mandatory conditions of access, however, apply notwithstanding any agreement to the contrary.<sup>17</sup>

### 3.4. Mandatory provisions

The Facilities Access Code contains 'mandatory conditions of access' which must apply to all facilities sharing arrangements. The mandatory conditions of access are set out in Chapter 2 of the Code. They are summarised as follows.

#### **Confidential information**

Carriers must keep confidential all 'confidential' information disclosed, communicated or delivered in an application or agreement relating to facilities access.

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<sup>15</sup> Clause 1.2.1 of the Facilities Access Code

<sup>16</sup> See Sub-clause 37(1) of Schedule 1 to the Telco Act.

<sup>17</sup> Clause 1.2.2 of the Facilities Access Code.

### **Non-discriminatory access to eligible facilities**

A carrier (the first carrier), in providing access to another carrier (the second carrier), must provide access that is equivalent to that which the first carrier provides itself.

### **Queuing policy**

The first carrier must develop a queuing policy for applications for the supply of access to a facility. The queuing policy must be non-discriminatory and the carrier must seek to maximise the efficiency of its queuing policy. Both the review of access applications and the actual provision of access for successful applications should be prioritised according to the time at which a request for access has been made.

The first carrier is required to treat its own plan to use its eligible facility as if it were an external access application and place its application in a queue.

### **Dispute resolution (the giving of access)**

Carriers must engage in their own dispute resolution, including inter-party dispute resolution and, if necessary, mediation. Sub-clause 2.4(6) states that in the event that carriers cannot resolve a dispute pursuant to Sub-clause 2.4(3), carriers must refer the matter in dispute to the ACCC for arbitration. The ACCC is the arbitrator of last resort if carriers are unable to agree on the appointment of an arbitrator.

### **Dispute resolution (implementation of access)**

The terms and conditions on which access is agreed must include arrangements for the settlement of a dispute about the ongoing provision or implementation of access, consistent with sub-clauses 2.4(1)-(5). Carriers must make reasonable endeavours to resolve any dispute in accordance with the agreed dispute resolution arrangements.

### **Timeframes**

The timeframes for particular processes associated with the provision of access, as set out in the Facilities Access Code, must apply unless a carrier considers that it is not reasonably practicable to do so. In these circumstances, carriers must make reasonable endeavours to agree to amended timeframes.

Carriers must also engage in dispute resolution, as set out in clauses 2.4 and 2.5 of the Code, if agreement cannot be reached on amended timeframes.

## **3.5. Non-mandatory provisions**

In addition to the mandatory conditions, the Facilities Access Code contains administrative procedures relating to applications for facilities access, negotiating facilities access and implementing facilities access.

The Code allows carriers to reach a commercial agreement with terms and conditions that are not in accordance with those prescribed in the non-mandatory provisions of the Facilities Access Code, provided that such an agreement is consistent with the mandatory conditions of access.

### **Application provisions**

The Facilities Access Code sets out administrative requirements to assist carriers with the process of applying for access to an eligible facility. These provisions require the first carrier

to establish and maintain an information package<sup>18</sup> in relation to the provision of access to particular eligible facilities or classes of eligible facilities. The provisions also establish the formal requirements for applying for access, including the requirement to submit a facilities access application, and the timeframes for each process.

### **Negotiation provisions**

The negotiation provisions set out general matters carriers must take into account while negotiating facilities access. These include negotiating a master access agreement, financial matters, make ready work and the co-location consultation process.

The Facilities Access Code requires carriers to conduct these negotiations in good faith and in a timely manner.

### **Implementation provisions**

The implementation provisions relate to the process of providing access to facilities after an agreement has been reached. They cover issues such as maintenance, emergency work, indemnity for property damage, third party equipment, suspension or termination of access and potential native title claims on eligible facilities.

Annexures A and B to the Code set out the administrative and operational procedures that are to apply for access to telecommunications transmission towers and sites of towers.

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<sup>18</sup> The minimum requirements for the content of the information package are set out in Sub-clause 3.1(4).

## 4. Background to this review

The ACCC considers it is timely to review the Facilities Access Code given the last review of the Code was in 2013 and changes to the telecommunications sector since then. In addition, submissions made to the 2016-17 Mobile Roaming Inquiry and the recent Regional Mobile Issues Forum raised potential issues regarding facilities access, particularly to mobile towers and sites of towers in regional areas.

Below is a summary of the key facilities access issues raised during these processes. The ACCC will take these submissions into account to inform its review of the Code.

### 4.1. The ACCC's domestic mobile roaming declaration inquiry

In October 2016, the ACCC commenced a public inquiry into whether it should declare a domestic mobile roaming service. As part of this inquiry, the ACCC sought submissions on whether the facilities access regime was effective in allowing MNOs to extend their mobile networks, and the extent to which the regime was being used in metropolitan and regional areas.<sup>19</sup>

#### Discussion paper

Submissions to the inquiry's discussion paper were divided over the effectiveness of the facilities access regime.

Telstra Corporation Ltd (Telstra) and Singtel Optus Pty Ltd (Optus) considered the regime to be effective, noting that there had been extensive tower sharing (MNO and third party owned) under it. Telstra cited extensive tower sharing on its mobile infrastructure and provided data in support. Telstra also noted that it co-locates on many sites that it does not own, many of which also host other MNOs. However, Telstra noted that while network sharing had encouraged competitive expansion of mobile networks, it also considered that the regime could be improved.

Optus cited its infrastructure sharing arrangement with Vodafone Hutchison Australia Pty Ltd (VHA), signed in 2004, and subsequently revised and extended in 2012. Optus noted that this agreement had enabled both carriers to almost double the size of the areas they can cover for a given level of investment.<sup>20</sup> It also noted that it extensively utilises co-location both as a tenant and as an asset owner. Other MNOs are co-located on 65 per cent of its towers.<sup>21</sup>

Optus considered that the facilities access regime could facilitate greater upfront collaboration between MNOs prior to a site being constructed. It noted the obligations under the mobile black spot program (MBSP), whereby an MNO receiving funding from the Federal Government, had to make access to a facility available prior to the construction of that facility.<sup>22</sup>

Telstra also considered that it would be useful to undertake a review of the facilities access arrangements involving MNOs and third-party tower owners.<sup>23</sup>

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<sup>19</sup> ACCC, *Domestic mobile roaming declaration inquiry discussion paper*, October 2016, questions 2-5, p. 19.

<sup>20</sup> Optus, *Submission in response to the ACCC Discussion Paper: Domestic Mobile Roaming Declaration Inquiry*, 25 November 2016, pp.16-17 & 22.

<sup>21</sup> Optus, *Submission in response to the ACCC Draft Decision: Domestic Mobile Roaming Declaration Inquiry*, June 2017, p. 4.

<sup>22</sup> Optus, *Submission in response to the ACCC Discussion Paper: Domestic Mobile Roaming Declaration Inquiry*, 25 November 2016, pp.16-17 & 22.

<sup>23</sup> Telstra, *Response to the ACCC's discussion paper in the domestic mobile roaming declaration inquiry*, 2 December 2016, p. 71.

However, VHA submitted that the facilities access regime had not been as effective in enabling co-location in regional areas as it had in metropolitan areas. It added that the regime was most effective in promoting commercial arrangements where both carriers sought to share a tower.<sup>24</sup>

VHA reasoned that Telstra had an incentive not to share its tower infrastructure in regional areas where it could increase retail revenues and impede competitive network deployment by other MNOs. By contrast, in metropolitan areas, there was little commercial incentive for an MNO to deny sharing its tower and as a consequence, significant sharing of mobile infrastructure occurred.<sup>25</sup>

In its submissions, VHA asserted that Telstra had engaged in extensive gaming in order to delay and frustrate the sharing of its regional mobile tower infrastructure with its rivals and that, in this context, the facilities access regime had limitations. VHA noted that a carrier could impede access by:

- building a tower with enough space to only host one occupant
- reserving spare capacity on the tower for itself
- over-charging for access, or
- locating a competitor at a lower height on a tower, thereby giving that competitor less geographic signal coverage.<sup>26</sup>

VHA also added that, notwithstanding the limitations of the regime, it would be concerned if the existing regime were removed from the Telco Act and replaced by access regulation under Part XIC. It noted that while the facilities access regime was not perfect, it did provide for direct ACCC intervention by way of arbitration. In contrast, the ACCC's ability to intervene under Part XIC to address anti-competitive conduct by Telstra was, in VHA's view, severely curtailed.<sup>27</sup>

## Draft Decision

In its [Draft Decision](#), the ACCC found that there was evidence to support a finding that the facilities access regime had been effective in providing for co-location arrangements. The ACCC noted that all MNOs (Optus, Telstra and VHA) had used site-sharing or co-location across Australia, including at sites owned by non-MNOs. Telstra's site-sharing arrangement data also showed that a large proportion of applications for co-locations had been approved.

However the ACCC considered it timely to review some aspects of the facilities access regime including whether:

- towers not owned by carriers should be incorporated into the facilities access regime to provide more transparency and consistency regarding the use of such facilities
- MNOs should be required to conduct pre-build discussions, particularly in areas where there was limited infrastructure based competition, and

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<sup>24</sup> VHA, *Domestic Mobile Roaming Declaration Inquiry Part A of the submission by VHA*, 5 December 2016, pp. 97-98. VHA, *Domestic Mobile Roaming Declaration Inquiry – Part B of the submission by VHA – Response to specific questions by the ACCC*, 5 December 2016, pp. 13-16.

<sup>25</sup> *ibid.*

<sup>26</sup> *ibid.*

<sup>27</sup> *ibid.*

- a ‘use it or lose it’ obligation should be imposed on MNOs when nominating a position on a mobile base station.<sup>28</sup>

Submissions to the inquiry’s Draft Decision broadly supported the need to mandate pre-build discussions and/or improve infrastructure sharing on existing sites.

However, stakeholders were divided on whether access to non-carrier facilities should be regulated under the same regime. Telstra and the NSW Farmers Association (NSW Farmers) supported a review that explored whether non-carrier infrastructure providers should be subject to the regime<sup>29</sup> while non-carriers Axicom Pty Ltd (Axicom) and BAI Communications Pty Ltd (Broadcast Australia) submitted that regulation was unnecessary as it was in their interests to maximise the number of customers utilising their sites.<sup>30</sup>

## Final Decision

In October 2017, the ACCC released:

- its *Domestic mobile roaming declaration inquiry – Final report*,<sup>31</sup> and
- a separate paper, *Measures to address regional mobile issues*, setting out the ACCC’s views on measures which could improve outcomes for regional mobile users. The paper considered, amongst other things, access to, and co-location of, mobile facilities such as towers.

In line with its Draft Decision, the ACCC found that, while the Facilities Access Code appeared to be generally working well, a review was necessary to ensure that any barriers to the timely deployment of infrastructure are removed. This included considering:

- whether ‘use it or lose it’ provisions should be introduced
- mandatory requirements for MNOs to conduct pre-build discussions, and
- any other changes that might promote co-location or infrastructure sharing.

The ACCC also added that a review could examine whether changes to the Code are required to facilitate the rollout of 5G networks.<sup>32</sup>

## 4.2. Regional mobile issues forum

On 28 February 2018, the ACCC held a [forum](#) on regional mobile issues. The forum discussed current facilities access issues, particularly focussing on the matter of pre-build discussions. In particular:

- the Australian Communications Consumer Action Network (ACCAN) noted that there needed to be a better approach to the pre-build process, in order to ensure fairness in the location and design of the new towers
- both Optus and VHA expressed the view that co-location on brownfield sites generally worked well

<sup>28</sup> ACCC, *Domestic mobile roaming declaration inquiry – draft decision*, May 2017, pp.80-81.

<sup>29</sup> Telstra, *Response to the ACCC’s discussion paper in the domestic mobile roaming declaration inquiry*, 2 December 2016, p. 108. Telstra, *Response to the ACCC’s draft decision in the domestic mobile roaming declaration inquiry*, 16 June 2017, p. 49. NSW Farmers Association, *Draft decision to not declare a domestic mobile roaming service*, 16 June 2017, p. 2.

<sup>30</sup> Axicom, *Submission to the Domestic Mobile Roaming Inquiry*, 16 June 2017, pp. 1-2. Broadcast Australia, *Submission to the ACCC for the Domestic Mobile Roaming Declaration Inquiry*, 16 June 2017, pp. 1-2.

<sup>31</sup> ACCC, *Domestic mobile roaming declaration inquiry – final report*, October 2017. The ACCC decided not to declare a domestic mobile roaming service.

<sup>32</sup> ACCC, *Measures to address regional mobile issues*, October 2017, p .21.

- Optus noted that other MNOs co-locate on around 65 per cent of the sites that it owns and operates. However, it considered that a process to encourage a true co-build model was needed as there is currently no adequate process to share information on future investment planning
- VHA also expressed support for further co-build arrangements with other MNOs, and
- Telstra was keen to ensure that the facilities access regime worked, but did not provide specific comments on pre-build processes.<sup>33</sup>

Co-location on sites funded as part of the MBSP was also raised, and there were mixed views on whether this process worked well. In particular:

- VHA noted that even though Telstra was required to build sites to accommodate one additional MNO under Round 1 of the MBSP, the sites did not accommodate VHA's equipment
- Optus noted that it was able to co-locate on all the sites it wanted to under the MBSP
- the Department of Communications and Arts (DoCA) explained the different co-location requirements under the three rounds of the MBSP, noting the 167 sites that had co-location under the first two rounds, and
- NBN Co considered that the Facilities Access Code and co-location process on its fixed wireless infrastructure worked well. However, it considered there to be a limitation to the use of its infrastructure given that its fixed wireless footprint largely overlaps with the MNOs' coverage.<sup>34</sup>

### 4.3. Australian Government's 5G strategy

On 12 October 2017, the Australian Government published its '*5G: Enabling the future economy*' strategy. The Government's intention is to create an environment that enables the benefits of 5G to be realised across the economy and the strategy outlines a number of actions to be taken by Government to enable the telecommunications industry to introduce 5G in line with international developments. Relevant to this process, the final action is to review existing telecommunications regulatory arrangements to ensure they are fit for purpose.

As the Government's strategy notes:

"5G will require radically different structures of networks if it is to achieve successful deployment in Australia. As 5G will likely utilise different frequencies, new equipment will be necessary. Additionally, the higher frequency 5G spectrum can only travel a small distance and will need more cells to ensure adequate coverage. However, antennas and equipment will be smaller, making it easier to attach these cells to existing infrastructure such as street lights and buildings."<sup>35</sup>

The ACCC considers that it is timely to review the Facilities Access Code to consider whether it supports the rollout of 5G infrastructure.

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<sup>33</sup> ACCC, *Regional mobile issues forum 28 February 2018 – summary report*, April 2018, p. 8.

<sup>34</sup> *ibid.*, pp. 8-9.

<sup>35</sup> Australian Government, '*5G—Enabling the future economy*' October 2017, p. 7.

## 5. Issues for consultation

This section seeks further submissions on the key areas identified in the Mobile Roaming Inquiry and any other changes that might promote co-location of eligible facilities. The key areas for review include:

- co-build infrastructure arrangements for new eligible facilities
- co-location and infrastructure sharing arrangements on established eligible facilities, and
- the impact of any emerging issues concerning access to facilities.

### 5.1. Co-build infrastructure arrangements for new eligible facilities

As discussed above, most stakeholders agreed that there is scope to improve the facilities access regime, particularly in regard to pre-build discussions for new towers. For example:

- Optus considered improvements should be made to the regime to facilitate greater upfront collaboration between MNOs before sites are constructed<sup>36</sup>
- Telstra was of the view that MNOs should be required to conduct pre-build discussions, particularly in areas where there is limited infrastructure, to address concerns that base stations cannot accommodate equipment from other MNOs. It advised that it already actively seeks to maximise tower sharing opportunities at new tower build sites<sup>37</sup>
- Regional Development Australia Central West believed greater incentives for co-location and infrastructure-sharing were required (including at the post-construction stage) to ensure the most efficient use of infrastructure in regional areas,<sup>38</sup> and
- ACCAN submitted the difficulties around co-location could be avoided if MNOs agreed to co-build sites.<sup>39</sup>

Similar sentiments were expressed at the Regional Mobiles Issues Forum. For example:

- Optus pointed out that there was no adequate process to share information on future planning on investment,<sup>40</sup> and
- ACCAN believed there needed to be a better approach to the pre-build process to ensure fairness in the location and design of the new towers.<sup>41</sup>

#### Facilities Access Code co-location consultation process

Clause 4.5 of the Facilities Access Code contains a non-mandatory pre-build co-location consultation process for new eligible facilities. Under Clause 4.5, a carrier with plans to establish a new eligible facility may decide to initiate or participate in the co-location consultation process. Once a decision is made to use the process, carriers must comply with

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<sup>36</sup> Optus, *Submission in response to the ACCC Discussion Paper: Domestic Mobile Roaming Declaration Inquiry*, 25 November 2016, p. 22. Optus, *Submission in response to the ACCC Draft Decision: Domestic Mobile Roaming Inquiry*, public version, June 2017, p.13.

<sup>37</sup> Telstra, *Response to ACCC Draft Decision in the domestic mobile roaming declaration inquiry*, public version, June 2017, p.49.

<sup>38</sup> Regional Development Australia Central West, *Submission to the ACCC draft decision for the domestic mobile roaming inquiry*, May 2017, p.2. Regional Development Australia Central West is a not-for-profit organisation, funded by the Commonwealth and State Governments, responsible for the economic development and long term sustainability of the NSW Central West region. Approximately 174,000 people live in the region, which comprises the Local Government Areas of Lithgow, Oberon, Bathurst, Blayney, Orange, Cabonne, Cowra, Parkes, Forbes, Weddin and Lachlan.

<sup>39</sup> ACCAN, *Submission to the ACCC Mobile Roaming Inquiry*, 16 June 2017, pp. 3 & 5.

<sup>40</sup> ACCC, *Regional mobile issues forum 28 February 2018 – summary report*, April 2018, p.8.

<sup>41</sup> *ibid.*

the processes set out in that clause unless they reach a commercial agreement that overrides them.

Clauses concerning timeframes, dispute resolution processes and the protection of confidential information must, as mandatory conditions of the Code, be complied with notwithstanding any agreement to the contrary.

For convenience, Clause 4.5 is reproduced below.

#### **4.5 Co-location consultation process**

- (1) Carriers may choose to initiate or participate in a Co-location Consultation Process, as defined in this clause, in relation to the development of a new Eligible Facility or Facilities.

Note: Clause 38 of part 5 of Schedule 1 of the Act requires Carriers, in planning the provision of future carriage services, to co-operate to share sites and eligible underground facilities.

- (2) A Co-location Consultation Process involves a Carrier (Requesting Carrier) making reasonable attempts to inform all other Carriers (Non-requesting Carriers) that it has plans to establish a new Eligible Facility in a particular Postcode area and that it requests other Carriers to consider establishing a Shared New Site or Shared New Underground Facility, including as a result of a request from a local council or other relevant body.
- (3) As part of the Co-location Consultation Process a Non-requesting Carrier(s) **must** inform the Requesting Carrier whether it wishes to establish a Shared New Site or Shared New Underground Facility within thirty Business Days of the Requesting Carrier's request. If a Non-requesting Carrier does not respond during that period then that Carrier will be deemed to have rejected that request.
- (4) If carriers agree, pursuant to sub-clause(2), to establish a Shared New Site or Shared New Underground Facility, upon identification of a site as a potential Shared New Site or location of a Shared New Underground Facility, the Requesting Carrier **must** submit to those other Carriers which propose to share that Share New Site or Shared New Underground Facility (the Proposed Sharers), a proposal for sharing the Site or Facility (a Sharing Proposal), containing particulars of the Site or Facility including:
  - its location;
  - an estimate of the make ready costs;
  - the Requesting Carrier's proposal as to development of the Site or Facility;
  - the time frame in which that development will occur; and
  - nomination as to which Carrier will be the Site or Facility owner and the party with power to grant rights of occupation thereon.
- (5) Within twenty Business Days of receipt of a Sharing Proposal, each Proposed Sharer **must** notify the requesting carrier in writing that:
  - i. it accepts the Sharing Proposal; or
  - ii. it requires more information in relation to the Sharing Proposal whereupon the Requesting Carrier must provide the requested information within five Business Days of the date on which the request is made; or
  - iii. it rejects the Sharing Proposal.
- (6) If parties to a Sharing Proposal are unable to agree on any aspect of the Sharing Proposal, including the terms and conditions of the Sharing Proposal, then the parties **must** at the request of any party, seek to resolve the dispute in accordance with Chapter 2 of the main Code.
- (7) If a request, under sub-clause 4.5(2), or a Sharing Proposal, under 4.5(4), is rejected:
  - (a) if requested, the rejecting Carrier **must** produce a written explanation of why it has rejected the request or sharing proposal;
  - (b) following (a), the rejecting Carrier or the Requesting Carrier may request a meeting to discuss the reasons for the rejection. If such a request is made, the Carriers **must** meet within five Business Days and **must** use their reasonable endeavours to develop an amended Sharing

Proposal or a strategy for managing the sharing of the Site or Facility which addresses the reasonable concerns of the Proposed Sharer;

- (c) the Requesting Carrier or the Proposed Sharer may submit an amended Sharing Proposal in respect of the same Eligible Facility at any time, and the proposal will be considered as though it were a new Sharing Proposal submitted in accordance with paragraph 4.4(4).
- (8) The Carriers **must** co-operate in the provision of information to one another and the submission of relevant plans regarding proposed future uses of an Eligible Facility each is seeking, including specifications or plans for the Equipment that each of them intends to locate on or in the Eligible Facility.
- (9) In recognising the commercial sensitivity and value of information which each Carrier may provide to the other in relation to the Sharing Proposal, each carrier **must** protect the confidentiality of information disclosed by the other carrier in relation to the sharing proposal as contemplated by the confidentiality provisions of Chapter 2 of the main Code.

### **Should the Facilities Access Code mandate pre-build discussions?**

Sub-clause 4.5(1) is optional and provides carriers with the power to choose whether to contact other carriers with respect to their development plans for new eligible facilities.

The ACCC seeks submissions on whether carriers with plans for new eligible facilities should be required to undertake the co-location consultation process. The ACCC considers that compliance with the co-location consultation process could be strengthened by replacing the words 'may choose to' with 'must' in Sub-clause 4.5(1). This change (marked-up) would be as follows:

#### **Clause 4.5**

- (1) Carriers ~~may choose to~~ **must** initiate ~~or participate~~ in a Co-location Consultation Process, as defined in this clause, in relation to the development of a new Eligible Facility or Facilities.

The ACCC also seeks submissions on whether the Requesting Carrier should, when undertaking the co-location consultation process, issue a public notice when making reasonable attempts to inform all other carriers. The ACCC considers that publication of a notice may assist in informing other carriers with an interest in the eligible facility. As such, the ACCC proposes that the words 'including by public notice' be inserted into Sub-clause 4.5(2). This change (marked-up in bold) would be as follows:

#### **Clause 4.5**

- (2) A Co-location Consultation Process involves a Carrier (Requesting Carrier) making reasonable attempts, **including by public notice**, to inform all other Carriers (Non-requesting Carriers) that it has plans to establish a new Eligible Facility in a particular Postcode area and that it requests other Carriers to consider establishing a Shared New Site or Shared New Underground Facility, including as a result of a request from a local council or other relevant body.

The ACCC seeks submissions on the above suggested changes to Sub-clauses 4.5(1) and (2).

The ACCC also seeks submissions on whether the co-location consultation process should be made a mandatory condition of the Facilities Access Code. The ACCC notes that if this consultation process remains a non-mandatory condition, carriers must comply with Clause 4.5 unless they reach a commercial agreement that overrides the processes in Clause 4.5. However if the co-location consultation process is made a mandatory condition of the Code, it will apply notwithstanding any agreement to the contrary.

The ACCC also notes that while the discussion in the Mobile Roaming Inquiry generally supported pre-build discussions for mobile towers, Clause 4.5 applies to all eligible facilities. As such, the ACCC seeks clarification on whether the Facilities Access Code should also mandate pre-build discussions for eligible underground facilities and sites of telecommunication transmission towers.

*Questions on which the ACCC seeks views:*

1. Should the words 'may choose to' be deleted and replaced with 'must' in Sub-clause 4.5.1 of the Facilities Access Code?
2. Should the words 'including by public notice' be inserted in to Sub-clause 4.5.2?
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?

### **Other changes to the co-build process**

Clause 4.5 of the Facilities Access Code sets out a number of processes concerning:

- discussions between carriers over plans for shared new sites or shared new underground facilities
- the provision by the requesting carrier of a sharing proposal for the new site and/or new underground facility and negotiations between carriers over the sharing proposal
- dispute resolution processes and negotiations in the event a request or sharing proposal is rejected
- the provision of information between carriers and the submission of relevant plans regarding proposed future uses of the eligible facility
- the protection of information provided for the sharing proposal, and
- timeframes for each process.

The ACCC seeks stakeholder views as to whether any aspect of the co-location consultation process should be changed and/or clarified. Comments are also sought with regard to new processes that might further encourage carriers to co-build and/or facilitate a more robust consultation process.

In submissions to the Mobile Roaming Inquiry, Telstra advised that currently, when a carrier is planning to build a new tower, details of the proposed location are published on the radio frequency national site archive (RNFSAs) and provided to the Mobile Carriers' Forum (attended five times a year by Telstra). The Mobile Carriers' Forum collates and sends a complete list of proposed builds to each carrier on a six-monthly basis.

Once Telstra identifies an opportunity to co-locate, it will approach the carrier to determine whether its requirements may be met. If they can be, and an agreement is reached, one carrier will take primary responsibility for the build, and the other will seek to co-locate. Through this process, the parties co-operate to ensure that the new facility meets both carrier requirements. Occasionally, the co-locating carrier may make a contribution to the costs of installation.

Telstra observed that this process leads to reduced costs and less administration, as only one carrier needs to go through the development approval and community consultation process prior to the installation works.<sup>42</sup>

However, Optus noted that current informal processes, such as the Mobile Carriers' Forum, are not sufficiently robust. It stated that while the Mobile Carriers Forum could, in theory, enable MNOs to plan co-builds, it was rarely used for such purposes. In practice, MNOs lodged separate development applications and had different contractors supplying information and designs.<sup>43</sup>

Optus submitted that the information-sharing processes for future planning on investment be improved to reduce duplication and provide greater certainty. It suggested co-build processes should include:

- a formal process every quarter, declaring areas where MNOs wish to invest in new sites. Under this process, MNOs would then be able to notify any intent to co-locate, which would then trigger a formal process similar to the declaration period under the MBSP
- reference offer designs for sites that accommodate one, two and three MNOs, so that the lead MNO does not change their design in order to game the system, or impose costs on the co-locating party
- assigning the lead carrier responsibility to issue a development application that covers itself and all aspects of co-location, including the provision of space on the tower under sub-leasing arrangements, and
- engaging only one crew to install and rig the site. Cost savings are unlikely to materialise if each MNO uses its own building company for site works.<sup>44</sup>

Optus also identified three processes where it considered co-build arrangements to have worked well:

- the Victorian rail project.
- the long standing memorandum of understanding for installation of in-building coverage, and
- Round 2 of the MBSP.

Optus noted the Victorian rail tender had resulted in the three MNOs working together to build/upgrade sites for the benefits of customers across all three carriers. It believed that there were elements of these arrangements which could be extended more widely to increase the benefits of co-building. They included:

- the sharing of design requirements upfront and the inclusion in all parts of the lead carrier's site acquisition works (for example, community consultation and development approvals)
- lead carriers undertaking subleases for co-locating parties
- power runs being shared equally between co-locating parties, and
- co-locating parties contributing to incremental capital costs of a tower to support individual MNO requirements.<sup>45</sup>

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<sup>42</sup> Statement of Robert John Joice, 1 December 2016, pp. 9-10. Annex 2 of 6 to Telstra, *Response to the ACCC's discussion paper in the domestic mobile roaming declaration inquiry*, 2 December 2016.

<sup>43</sup> Optus, *Submission in response to the ACCC Draft Decision: Domestic Mobile Roaming Inquiry*, public version, June 2017, p.13.

<sup>44</sup> *ibid.*, pp. 13-14.

<sup>45</sup> *ibid.*, p. 14.

Optus also highlighted key elements of the MBSP (round 2) system that incentivised MNOs to engage in co-build activities, in particular:

- a requirement for the lead MNO to offer other MNOs the opportunity to participate in the pre-design of sites
- a minimum two-month period for other MNOs to nominate the sites that they wished to participate in the pre-design process (the obligation to facilitate co-location falls away when no nomination is received), and
- for nominated sites, the following requirements:
  - each site to be built to accommodate at least one co-locating MNO
  - explicit minimum co-location specifications for each site
  - sufficient AC power and hut space for at least one co-locating MNO, and
  - the lead MNO can only charge for the incremental costs for specifications that are additional to the minimum.<sup>46</sup>

Following the ACCC's 2018 Regional Mobiles Issues Forum, the Australian Mobile Telecommunications Association (AMTA) wrote to the ACCC to advise that it will be working with its members to review its Mobile Carriers Forum framework and underlying contractual agreements (including site share information) regarding its co-building and co-location processes.<sup>47</sup>

The ACCC seeks submissions on whether the Facilities Access Code should adopt any of the processes proposed by Optus as outlined in the Victorian rail tender or MBSP (round 2) program.

Submissions are also sought with regard to any other potential changes to Clause 4.5 of the Facilities Access Code.

*Questions on which the ACCC seeks views:*

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

## 5.2. Co-location and infrastructure sharing arrangements for established eligible facilities

A number of stakeholders to the Mobile Roaming Inquiry were of the view that the facilities access regime could be improved with regard to co-location and infrastructure sharing arrangements on existing mobile telecommunication towers.

As discussed in Section 4.1, VHA submitted that the facilities access regime needed to be more effective in enabling co-location, particularly in regional areas. It noted that a carrier could impede access by:

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<sup>46</sup> *ibid.*

<sup>47</sup> ACCC, AMTA letter to ACCC, 21 March 2018, <https://www.accc.gov.au/regulated-infrastructure/communications/mobile-services/regional-mobile-issues/industry-engagement-on-implementing-proposed-measures>.

- building towers for one occupant only
- reserving excessive spare capacity on the tower for itself
- over-charging for access, or
- locating a competitor at a low height, giving the competitor less geographic signal coverage.<sup>48</sup>

Optus observed that the benefits of co-locating on existing sites depended on the practical considerations of each individual site. If a facility is not sufficiently engineered and does not have adequate height, co-location may not be cheaper than building a stand-alone facility. The location of the incoming MNO on the site (that is, the height of their antennas) also had a significant impact on the propagation characteristics of the site.<sup>49</sup>

Optus did not believe it necessary to change existing co-location rules, noting it used co-location extensively as an asset owner and tenant on carrier and non-carrier towers. It considered that industry negotiation worked well, within the restrictions of locating on a tower or structure that is designed for other purposes.<sup>50</sup>

Optus also noted that it had not seen any evidence of procedural, behavioural or structural impediments to co-location.<sup>51</sup>

Telstra considered that the current facilities access regime worked effectively, noting that carriers (and non-carriers) mostly used the same co-location application process.

Telstra advised that it was presently reviewing its internal facilities access processes to determine whether there was scope for cost and efficiency improvements. It is considering the merits of digitising some information and processes to assist access seekers in ascertaining site capacity upfront prior to submission of an application for co-location.<sup>52</sup>

### **‘Use it or lose it’ obligation**

In the Mobile Roaming Inquiry’s Draft Decision the ACCC noted that:

- a ‘use it or lose it’ obligation on MNOs, when nominating a position on a mobile base station, might encourage more effective infrastructure-sharing and overcome the potential for one MNO to prevent others from being able to access a preferred position on the base station, and
- requiring MNOs to conduct pre-build discussions, particularly in areas of limited infrastructure-based competition, might address concerns that base stations cannot accommodate equipment from other MNOs.<sup>53</sup>

Both Telstra and NSW Farmers supported the ‘use it or lose it’ obligation in submissions to the inquiry.<sup>54</sup>

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<sup>48</sup> VHA, *Domestic Mobile Roaming Declaration Inquiry Part A of the submission by VHA*, 5 December 2016, p. 98.

<sup>49</sup> Optus, *Submission in response to the ACCC Draft Decision: Domestic Mobile Roaming Inquiry*, public version, June 2017, p.12.

<sup>50</sup> *Ibid.*, p. 13.

<sup>51</sup> *Ibid.*, pp. 12-13.

<sup>52</sup> Statement of Robert John Joice, 1 December 2016, p. 14. Annex 2 of 6 to Telstra, *Response to the ACCC’s discussion paper in the domestic mobile roaming declaration inquiry*, 2 December 2016. Telstra, *Response to the ACCC’s Draft Decision in the domestic mobile roaming declaration inquiry*, public version, 16 June 2017, p. 49.

<sup>53</sup> ACCC, *Domestic mobile roaming declaration inquiry – draft decision*, May 2017, p. 81.

<sup>54</sup> NSW Farmers Association, *Draft decision to not declare a domestic mobile roaming service*, 16 June 2017, p.2; Telstra, *Response to the ACCC’s Draft Decision in the domestic mobile roaming declaration inquiry*, Public Version, 16 June 2017, p. 49.

Telstra noted that its current access arrangements already provided a type of ‘use it or lose it’ obligation. Following a request for access, Telstra’s “approval in principle” provides an access seeker with a reservation of space on a Telstra tower for a period determined by the relevant access arrangement. This timeframe includes a maximum time for the access seeker to commence its construction activity once the design and construction proposal is approved.<sup>55</sup> (The ACCC understands that, currently, the access seeker has two years in which to commence construction activity.)

The ACCC seeks comment from stakeholders as to whether the Facilities Access Code should contain a ‘use it or lose it’ obligation and, if so, whether it should be a mandatory or non-mandatory condition of the Code.

The ‘use it or lose it’ obligation described by Telstra appears to only apply to access seekers seeking to reserve space on its own towers. The ACCC seeks submissions on whether any ‘use it or lose it’ obligation should also apply to owners and/or operators of eligible facilities. The ACCC notes that the queuing policy in the Facilities Access Code<sup>56</sup> (a mandatory condition of the Code) applies, on a non-discriminatory basis, to both second carriers (access seekers) and first carriers (facility owners and/or operators).

The ACCC also notes that while recent discussion on the ‘use it or lose it’ obligation mainly concerned mobile towers, the Facilities Access Code also applies to sites of towers and eligible underground facilities. Stakeholder views are sought on whether a ‘use it or lose it’ obligation, if adopted, should apply to all eligible facilities.

Further, submissions are sought with regard to the time period in which the ‘use it’ obligation would apply, and whether a carrier that only uses only a part of its reserved space on a tower (or eligible facility) should ‘lose’ the part that is not used within the designated timeframe.

*Questions on which the ACCC seeks views:*

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?
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?

## **NBN fixed wireless towers and other infrastructure**

In the Mobile Roaming Inquiry’s Draft Decision, the ACCC noted that MNOs could seek access to NBN’s fixed wireless towers to locate their own mobile equipment (under the facilities access regime). The ACCC considered that, while the NBN fixed wireless footprint largely overlapped the existing MNO coverage areas, there might be scope for MNOs to share NBN infrastructure to improve the quality of their networks.<sup>57</sup>

Both Telstra and NBN Co agreed with the ACCC in regard to the limitations of NBN Co’s fixed wireless network to extend an MNO’s coverage in rural and regional Australia. However, Telstra also considered it possible for NBN infrastructure to enhance coverage or

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<sup>55</sup> Statement of Robert John Joice, 1 December 2016, p. 7. Annex 2 of 6 to Telstra, *Response to the ACCC’s discussion paper in the domestic mobile roaming declaration inquiry*, 2 December 2016.

<sup>56</sup> Clause 2.3 of the Facilities Access Code.

<sup>57</sup> ACCC, *Domestic mobile roaming declaration inquiry – draft decision*, May 2017, p. 79.

competition in areas within its footprint where it was "...commercially preferable to MNOs making alternative investments, such as new or upgraded sites."<sup>58</sup>

Optus noted 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>59</sup> In the Regional Mobiles Issues Forum, NBN Co agreed, acknowledging that both the Facilities Access Code and co-location on its fixed wireless infrastructure worked well.<sup>60</sup>

In its paper, *Measures to Address Regional Mobiles Issues*, the ACCC observed that MNOs were generally using NBN infrastructure to extend their networks where possible, and noted that there may be scope for MNOs to extend their network if there is NBN fixed wireless infrastructure outside their existing footprint.<sup>61</sup> In May 2018, the ACCC wrote to MNOs, encouraging them to work with their peers and industry representative bodies to identify ways to improve mobile coverage and provide more accurate information for customers.

The ACCC seeks comment on whether there are any potential improvements that could be made to the Facilities Access Code to further facilitate access to NBN fixed wireless facilities.

*Questions on which the ACCC seeks views:*

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 ACCC notes that the Government introduced the *Telecommunications Legislation Amendment Bill 2018* into Parliament on 26 June 2018. The legislation contains a new tower and site access regime to allow eligible persons who are neither carriers nor service providers, such as police, fire, ambulance and other emergency service organisations, to gain access to towers and related sites owned or operated by NBN Co in order to improve their operational efficiency.<sup>62</sup>

### **Telecommunication transmission towers owned by non-carriers**

In the Mobile Roaming Inquiry's Draft Decision, the ACCC raised the possibility that towers not owned by carriers could potentially be incorporated into the facilities access regime, noting that this would provide more transparency and consistency regarding the use of these facilities.<sup>63</sup>

While Telstra and NSW Farmers supported a review of the Facilities Access Code that explored whether non-carrier owned towers should be covered by the Code,<sup>64</sup> this was

<sup>58</sup> Telstra, *Response to the ACCC's Draft Decision in the domestic mobile roaming declaration inquiry*, public version, 16 June 2017, p. 49. ACCC, *Regional mobile issues forum 28 February 2018 – summary report*, April 2018, p. 9.

<sup>59</sup> Optus, *Submission in response to ACCC Draft Decision: Domestic Mobile Roaming Declaration Inquiry*, public version, June 2017, p. 14.

<sup>60</sup> ACCC, *Regional mobile issues forum 28 February 2018 – summary report*, April 2018, p. 9.

<sup>61</sup> ACCC, *Measures to address regional mobile issues*, October 2017, p. 22.

<sup>62</sup> [http://parlinfo.aph.gov.au/parlInfo/download/legislation/ems/s1131\\_ems\\_e6ae884f-32ff-4d39-ac9f-cc47c968dde7/upload\\_pdf/675753em.pdf;fileType=application%2Fpdf](http://parlinfo.aph.gov.au/parlInfo/download/legislation/ems/s1131_ems_e6ae884f-32ff-4d39-ac9f-cc47c968dde7/upload_pdf/675753em.pdf;fileType=application%2Fpdf)

<sup>63</sup> ACCC, *Domestic mobile roaming declaration inquiry – draft decision*, May 2017, p.81.

<sup>64</sup> Telstra, *Response to the ACCC's discussion paper in the domestic mobile roaming declaration inquiry*, 2 December 2016, p.108. Telstra, *Response to the ACCC's draft decision in the domestic mobile roaming declaration inquiry*, 16 June 2017, p.49. NSW Farmers Association, *Draft decision to not declare a domestic mobile roaming service*, 16 June 2017, p.2.

opposed by non-carriers Axicom and Broadcast Australia on the basis that such regulation was considered unnecessary given that there had been no evidence of market failure.<sup>65</sup>

The ACCC notes that submissions to the Mobile Roaming Inquiry recognised that co-location on non-carrier towers is common place. It understands that the co-location application process used by carriers is also used by non-carriers such as Axicom and Broadcast Australia.<sup>66</sup> The ACCC is not aware of any access issues associated with non-carrier towers.

The Facilities Access Code only applies to carriers that own or operate eligible facilities. As such, any inquiry into non-carrier towers would be outside the scope of the current review of the Code. Further, the ACCC has no power to make a code with respect to non-carrier towers under current legislation. As such, incorporation of non-carriers would require legislative amendment.

### 5.3. Emerging facilities access issues

The ACCC considers the current review to be an opportunity to examine whether the Facilities Access Code can be improved or amended to address areas where facilities access issues might emerge, as well as to enhance existing provisions so that access to eligible facilities is not a barrier to competition.

#### **Access to ‘towers’ and ‘sites of towers’ for distributed antenna systems**

Distributed antenna systems (DASs) are used to overcome isolated pockets of poor coverage, typically inside a large building or tunnel, by installing a network of relatively small antennas to serve as repeaters. Given the locations used in the deployment of DASs, sites will often be required to be shared to overcome physical constraints and to reduce the size and amount of equipment needed to be deployed.

Under the Telco Act, a transmission tower is broadly defined as a tower, pole, mast or similar structure used to supply a carriage service by means of radio communications.<sup>67</sup> This definition would include the structural infrastructure used to position and support carriers’ DAS equipment in confined spaces.

The ACCC notes that mobile operators may require access to existing and new towers, and sites of towers, for the purpose of locating equipment used in the deployment of DASs. Access to facilities for the deployment of DASs will be important for mobile network operators to provide coverage indoors and in road tunnels, for example. Given the low number of mobile infrastructure providers in Australia, there may be incentives to frustrate access to mobile towers and the sites of towers for the purpose of co-locating DAS or other equipment.

The ACCC is interested to know if the existing Code effectively facilitates the deployment of DASs. In this context, it would like to hear from industry as to whether access to towers, and the sites of towers, needs to be enhanced through changes to the Code either by:

- addressing such systems specifically in the Code, or
- facilitating access through existing provisions in the Code (such as through increased information on location and deployment intentions).

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<sup>65</sup> Axicom, *Submission to the Domestic Mobile Roaming Inquiry*, 16 June 2017, pp. 1-2. Broadcast Australia, *Submission to the ACCC for the Domestic Mobile Roaming Declaration Inquiry*, 16 June 2017, pp. 1-2.

<sup>66</sup> Statement of Robert John Joice, 1 December 2016, p.14. Annex 2 of 6 to Telstra, *Response to the ACCC’s discussion paper in the domestic mobile roaming declaration inquiry*, 2 December 2016.

<sup>67</sup> Part 5 of Schedule 1

*Questions on which the ACCC seeks views:*

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

### **Access to eligible underground facilities**

While we understand that access to eligible underground facilities (ducts) is most often negotiated through commercial arrangements, the Facilities Access Code may be an important tool in facilitating such access.

To connect to the telecommunications infrastructure, access seekers will require access to certain facilities and passive infrastructure. For example, at most NBN POIs, access to NBN Co's Fibre Access Service is reliant on access through underground facilities owned and operated by Telstra. This includes 111 of the 121 NBN Points of Interconnection (POI) sites which are located in Telstra exchange buildings.

In addition, access to data centres is increasingly more important as they become consolidated sites for the provision of content servers and content distribution networks. Data centres are dedicated facilities which house and operate IT equipment (including servers, routers, and 'racks') and other interconnection infrastructure. They range from simple 'in-house' facilities in a basement or IT room, to large-scale specialist facilities.

The *Communications Sector Market Study* noted that, in their most basic form, data centres provide the physical infrastructure for networks to co-locate equipment and interconnect. However, they are increasingly providing value-added services such as enabling storage for cloud storage services and managed storage services.<sup>68</sup>

As the digital economy continues to increase in size and scope, data centres are increasingly becoming central hubs where key activities of a range of service providers are taking place.

The ACCC invites submissions on whether there have been any barriers to accessing underground facilities, particularly underground facilities leading to NBN POI sites and or data centre locations.

*Questions on which the ACCC seeks views:*

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?

### **5G technologies**

There are encouraging signs of infrastructure-based competition in the roll out of 5G technologies. At least two MNOs have commenced trials of 5G technologies in some form. At this early stage, the nature and extent of 5G deployment, and the extent of infrastructure required, is unclear. While there still remains a degree of uncertainty as to the final roll-out, including the allocation of spectrum, what is becoming clearer is a requirement for more sites for the location of 5G equipment (including sites within buildings).

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<sup>68</sup> Communications Sector Market Study – Final Report p.76

### *Small cell infrastructure*

The *Communications Sector Market Study* noted that an important characteristic of 5G networks that differs from previous generations of mobile technology is the need for small cell infrastructure to support high frequency spectrum, as well as to improve the capacity of networks to meet higher data use, particularly in densely populated urban areas and in rural areas where macro cells might not be commercially viable.<sup>69</sup>

The Study also noted that the densification of cells is also a common practice to enhance network capacity. Small cell densification has already been occurring in recent years, particularly in metropolitan centres, as MNOs seek to improve capacity in response to growing demand for data.<sup>70</sup>

The *Communications Sector Market Study* recognised the importance of ongoing investment in small cell infrastructure to support 5G networks, and noted concerns raised that regulation may discourage investment, given that these networks are at a relatively early stage of development. The Study noted that a number of MNOs were already investing in separate small cell infrastructure in close proximity, which suggests there are currently no significant impediments to the deployment of these networks.<sup>71</sup>

However, the Study also noted stakeholders concerns about the possibility of barriers arising in the future.<sup>72</sup> For example, there is the potential for incumbent mobile operators, using their dominant position as holders of infrastructure assets (such as ducts, fibre and exchanges), to leverage this dominance in the roll-out of 5G.

While the *Communications Sector Market Study* did not make any pre-emptive conclusions, we consider that it is important to review the Facilities Access Code in light of the future deployment of 5G infrastructure. Accordingly, the ACCC seeks submissions on whether any changes to the Code are required to facilitate the roll-out of 5G technologies.

*Questions on which the ACCC seeks views:*

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

### **Any other issues**

Finally, submissions are also sought in relation to other changes that are not covered in this Discussion Paper but which would further facilitate access to eligible facilities.

*Questions on which the ACCC seeks views:*

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?

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<sup>69</sup> *ibid.*, p.143

<sup>70</sup> *ibid.*

<sup>71</sup> *ibid.*, p.144

<sup>72</sup> *ibid.*, p.143

## Appendix A: Consolidated list of questions

1. Should the words 'may choose to' be deleted and replaced with 'must' in Sub-clause 4.5.1 of the Facilities Access Code?
2. Should the words 'including by public notice' be inserted in to Sub-clause 4.5.2?
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?
4. Should any of the co-location negotiation processes be changed? If so, why?
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?
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?
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?
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?
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?
10. Are there any improvements that could be made to the Facilities Access Code to facilitate the deployment of distributed antenna systems?
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?
12. Are there any changes to the Facilities Access Code required to facilitate the roll-out of 5G technologies?
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?

## Appendix B: Regulatory framework for access to facilities

The Facilities Access Code operates in conjunction with various other regulatory mechanisms that promote access to facilities. These include the facilities access provisions of the Telco Act, the Part XIC access regime provisions of the CCA and the facilities access provisions of Telstra's SSU.

### Part 20A of the Telco Act

In addition to Parts 3 and 5 of Schedule 1 to the Telco Act (discussed in Section 2 of the Discussion Paper), Part 20A to the Telco Act provides a 'third party access regime'.

#### **Telco Act third party access regime**

The third party access regime in Part 20A applies to fixed-line facilities installed in Australia after 27 September 2011 where the facility is owned or operated by a person other than a carrier, such as a developer, utility provider, council or private property owner.

For the purposes of the Telco Act, a fixed line facility is a facility (other than a line) used, or for use, in connection with a line, where the line:

- (a) is not on the customer side of the boundary of a telecommunications network; and
- (b) is used, or for use, to supply a carriage service to the public.<sup>73</sup>

Fixed line facilities include underground facilities such as pits and ducts, as well as poles where the terrain makes it necessary to deploy lines above ground.

The third party access regime is based on the facilities access regime in clauses 35-37 of Part 5 of Schedule 1 to the Telco Act. Similar to Part 5 of Schedule 1, Part 20A provides for access to fixed-line facilities on terms that are commercially negotiated or, failing agreement, determined by an agreed arbitrator. Failing agreement on an arbitrator, the ACCC is the arbitrator of last resort.<sup>74</sup>

The regime also sets out provisions for the ACCC to determine whether third party access is technically feasible and to make a code setting out conditions for third party access (the third party access code<sup>75</sup>).

Subsection 372NA(2) of the Telco Act provides that the owner or operator of a fixed-line facility must comply with the third party access code. This is a civil penalty provision and pecuniary penalties are payable for contraventions of civil penalty provisions.

### Part XIC of the CCA

Part XIC of the CCA sets out the telecommunications access regime. Carriers providing declared services are required under Part XIC to comply with the standard access obligations (SAOs) in relation to those services. Rather than the negotiate-arbitrate framework employed by the Telco Act, the CCA has an access determination framework. An access determination for a declared service specifies the terms and conditions of access.

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<sup>73</sup> See section 372V of the Telco Act.

<sup>74</sup> Sub-section 372M(1)(b).

<sup>75</sup> The ACCC has not yet made a third party access code.

However, obligations specified in access agreements take the highest order of precedence, followed by special access undertakings, binding rules of conduct and then access determinations.<sup>76</sup> An access determination or binding rule of conduct must also not have the effect of preventing Telstra from complying with the SSU or requiring Telstra to engage in conduct in connection with matters covered by the Migration Plan.

An access determination or binding rule of conduct has no effect to the extent to which it is inconsistent with the Definitive Agreements between Telstra and NBN Co.<sup>77</sup>

### **Declaring access to a facilities access service**

The ACCC can declare a facilities access service if it is considered an eligible service. An eligible service is defined in section 152AL of the CCA as a listed carriage service, or a service that facilitates the supply of a listed carriage service.

Declaring the service requires the ACCC to consider a number of things, including the legislative criteria, the ACCC's Declaration Guidelines and the adequacy of existing regulatory arrangements. The ACCC would also be required to undertake a public inquiry.

Services provided by an NBN corporation can also be declared through the publication of a standard form of access agreement<sup>78</sup> or through a special access undertaking (SAU) accepted by the ACCC<sup>79</sup>. Further issues related to the declaration of NBN Co facilities is discussed below.

### **Standard access obligations (SAOs)**

Service providers of active declared services are subject to the SAOs of section 152AR of the CCA. An access provider which provides a declared service to itself and/or others is required to provide the service to an access seeker upon request and must provide that service in accordance with specified requirements, subject to certain limitations.<sup>80</sup> Category A SAOs are applicable to access providers other than an NBN Corporation and category B SAOs apply specifically to the NBN Co.<sup>81</sup>

#### *Category A SAOs*

Category A SAOs impose interconnection requirements for suppliers of active declared services (the access provider). Subsection 152AR(5) of the CCA also stipulates that an access provider must (when requested) provide interconnection where it is the owner, controller or nominated carrier in relation to one or more facilities, for the purpose of enabling the supply of the declared service by it to the service provider.

#### *Category B SAOs*

Similarly, the NBN Corporation has a Category B SAO under subsection 152AXB(4) of the CCA. If NBN Co owns or controls one or more facilities or is a nominated carrier in relation to one or more facilities, it must, if requested to do so by a service provider, permit interconnection of those facilities with the facilities of a service provider, for the purpose of enabling the service provider to be supplied with declared services. In this context, the declared service would be another NBN service, such as the fibre access service. This SAO

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<sup>76</sup> Section 152AY specifies the hierarchy of access arrangements for compliance with the SAOs.

<sup>77</sup> See clauses 33(6), 34(6) and 35(6) of Part 5 of Schedule 1 to the Telco Act.

<sup>78</sup> See subsection 152AL(8D) of the CCA.

<sup>79</sup> See subsection 152AL(8E) of the CCA.

<sup>80</sup> Sub-section 152AR(4) of the CCA.

<sup>81</sup> See section 152AXB of the CCA.

only applies at listed points of interconnection within the meaning of section 151DB (152AXB(4A)).

### **Access determinations and binding rules of conduct**

Upon declaration of an eligible service, including particular facilities access services, the ACCC would have recourse to the full complement of regulatory powers under Part XIC. This includes the power to set up-front terms and conditions of access through an access determination and/or, if necessary, a binding rule of conduct.

In the event that the ACCC did decide to declare a facilities access service, it would be required to make an access determination. This access determination would have to set terms and conditions relating to the price of access or a method of ascertaining price. The ACCC can also regulate some facilities through section 152AR(5) of the CCA and through related final access determinations.

### **Telstra's Structural Separation Undertaking (SSU)**

On 27 February 2012, the ACCC accepted Telstra's SSU and approved its Migration Plan.<sup>82</sup> The SSU and migration plan will progressively implement the structural reform of the telecommunications sector. Under the SSU, Telstra will cease the supply of fixed-line voice and broadband services over its copper and HFC networks. Telstra is not required to structurally separate its passive infrastructure, including underground facilities such as ducts, pits and manholes, under the SSU. The SSU contains arrangements for access to Telstra facilities, including external interconnect ducts<sup>83</sup> and pits associated with those ducts (referred to as 'external interconnect facilities' in the SSU).

The arrangements include provisions to manage ordering processes, queues and common construction works at facilities. The provisions also allow Telstra to reserve space in external interconnection facilities for bonafide, documented future anticipated requirements and to reject an order from a wholesale customer where such capacity has been reserved.

Importantly, the facilities access provisions in the SSU only apply in respect of access for the purpose of interconnection with Telstra's active declared services. They do not apply to any supply of services or facilities by Telstra to NBN Co which are covered by the Definitive Agreements.

## **Facilities access and the NBN**

### **NBN Co facilities access service**

The NBN facilities access service product description was published in NBN Co's Wholesale Broadband Agreement (WBA) Product Catalogue on 4 April 2012.<sup>84</sup> It sets out the components of the NBN facilities access service, the terms of access and the applicable charges.

The NBN facilities access service refers to the connection cables, equipment racks and optical distribution frame termination points within the aggregation node site. As such, the components of the NBN facilities access service are not within the scope of the Facilities Access Code. Regulation of these facilities falls within the scope of Part 3 of Schedule 1 to the Telco Act.

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<sup>82</sup> Section 577A and 577BDA of the Telco Act.

<sup>83</sup> An external interconnect duct means a duct that is used, or for use, in connection with an external interconnection cable for interconnection with Telstra's active declared services.

<sup>84</sup> The Facilities Access Service Product was incorporated into the NBN Co Facilities Access Service Product in April 2012. The agreement can be accessed on the NBN Co website.

NBN Co's facilities access service also does not include any cabling or ducts leading into the aggregation node sites because this is beyond the scope of NBN Co's responsibilities, which end at the POI. In addition, under subclauses 17(4A) and 33(8) of Schedule 1 to the Telco Act, NBN Co is taken not to operate those facilities where there is an agreement in force with Telstra. In many cases, the aggregation node site, as well as the ducts and cabling leading into the site, will be operated by Telstra.

### **Declaration of NBN Co facilities access service under the CCA**

While NBN Co's facilities access service falls outside the scope of the Facilities Access Code, access can be enabled under Part XIC of the CCA as a declared service. There are three mechanisms through which access to an NBN Co's facilities may be declared under Part XIC of the CCA:

- the ACCC may declare a facilities access service (once the relevant legislative prerequisites are satisfied)
- the NBN Co facilities access service could be considered a declared service if NBN Co has published (on its website) a standard form access agreement in relation to access to that service,<sup>85</sup> and
- if a facilities access services is included in a SAU accepted by the ACCC, that service would also be considered a declared service.

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<sup>85</sup> Sub-section 152AL(8D)(d) of Part XIC of the CCA.