



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



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Glossary

ACCC	Australian Competition and Consumer Commission
ACMA	Australian Communications and Media Authority
AIP	Accelerated Investigation Process
CACS Act	<i>Telecommunications Legislation Amendment (Competition and Consumer Safeguards) Act 2010</i>
CCA	<i>Competition and Consumer Act 2010</i>
DTCS	Domestic Transmission Capacity Service
Eligible facilities	Transmission towers, Sites of towers and Underground facilities
EIFs	External Interconnect Facilities
FAD	Final Access Determination
Fibre Deployment Act	<i>Telecommunications Legislation Amendment (Fibre Deployment) Act 2011</i>
FRLI	Federal Register of Legislative Instruments
ITA	Independent Telecommunications Adjudicator
LSS	Line Sharing Service
NBN	National Broadband Network
NBN POIs	NBN Points of Interconnection
SSU	Telstra's Structural Separation Undertaking
SAU	Special Access Undertaking
TAF	Telecommunications Access Forum
TEBA	Telstra Equipment Building Access

Telco Act	<i>Telecommunications Act 1997</i>
TEM	Telstra Economic Model
The Code	<i>A Code of Access to Telecommunications Transmission Towers, Sites of Towers and Underground Facilities</i>
ULLS	Unconditioned Local Loop Service

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1 Introduction

1.1 Background

In October 1999 the Australian Competition and Consumer Commission (ACCC) published *A Code of Access to Telecommunications Transmission Towers, Sites of Towers and Underground Facilities* (the Code). The Code was developed under Part 5 of Schedule 1 to the *Telecommunications Act 1997* (Telco Act) and applies to the following facilities:

- telecommunications transmission towers
- sites of telecommunications transmission towers
- underground facilities designed to hold lines

(collectively the ‘the eligible facilities’).

The 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 facilitate access to the eligible facilities in a timely and efficient manner.¹

Compliance with the Code is a standard carrier licence condition² and 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 Code (the Mandatory Conditions of Access) apply notwithstanding any agreement to the contrary. In this way, the Code operates as a safety net should a carrier not be able to secure a commercial arrangement on satisfactory terms.

The Code has not been formally reviewed or updated since it was first introduced. 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 (sub-clause 1.1.3 of the Code).

1.2 Purpose

Since the introduction of the Code in October 1999, the structure and regulation of the telecommunications industry has changed significantly and there have been a number of legislative changes relating to access to facilities. In particular, the *Telecommunications Legislation Amendment (Competition and Consumer Safeguards) Act 2010* (CACS Act) and the *Telecommunications Legislation Amendment (Fibre Deployment) Act 2011* (Fibre Deployment Act) have resulted in changes to the Telco Act that are not currently reflected in the Code. There have also been other organisational changes such as changes to agency names and responsibilities.

The ACCC commenced the Code inquiry in July 2012 to gauge industry views on whether the Code is still useful for stakeholders in accessing the eligible facilities, whether the Code

¹ ACCC, *A Code of Access to Telecommunications Transmission Towers, Sites of Towers and Underground Facilities*, October 1999 (the Code), pp. 40 and 42.

² 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 Code.

should be reviewed in light of the legislative changes noted above and whether there were any wider facilities access issues which the ACCC could address by varying the Code, or by other means.

2 Review of the Code

The ACCC commenced the inquiry into the Code in July 2012 when it published *An ACCC Discussion Paper to examine 'A Code of Access to Telecommunications Transmission Towers, Sites of Towers and Underground Facilities (October 1999)'* (the Discussion paper).³

In August 2012 the ACCC received submissions in response to the Discussion paper from:

- Telstra Corporation Ltd (Telstra)
- NBN Co Limited (NBN Co)
- SingTel Optus Pty Limited (Optus)
- AAPT Limited (AAPT)
- Vodafone Hutchison Australia Limited (VHA)
- iiNet Limited (iiNet)
- Adam Internet Pty Ltd (Adam)
- Vocus Communications Ltd (Vocus).

In May 2013 the ACCC released *An ACCC Draft Decision to vary the "A Code of Access to Telecommunications Transmission Towers, Sites of Towers and Underground Facilities (October 1999)"* (Draft decision). The ACCC received submissions on the Draft decision in May and June of 2013 from:

- Telstra
- Optus
- AAPT
- VHA.

The public submissions and briefings that were lodged are also available on the ACCC's website at www.accc.gov.au. A list can also be found in Appendix 1 of this Final decision.

2.1 Summary of findings of the inquiry

The ACCC has decided to vary the Code in accordance with the variations set out in the Draft decision with the exception of the proposed amendment to the Code's queuing policy in sub-clause 2.3. Submissions and the reasons for the ACCC's decision on sub-clause 2.3 and other proposed changes to the Code are set out in Section 3 of this Final decision.

In summary, the ACCC has decided to vary the Code to:

³See: <http://www.accc.gov.au/content/index.phtml/itemId/723176>

- account for changes in legislation since the Code was made in 1999
- make timeframes for accessing the eligible facilities a mandatory provision of the Code
- remove obsolete references, and
- make minor typographical changes.

The ACCC has made its final decision to vary the Code. As the Code is a legislative instrument, the variation to the Code is required to be registered on the Federal Register of Legislative Instruments (FRLI). The variation to the Code became operative on 24 September 2013, the day after registration on FRLI.

A Code of Access to Telecommunications Transmission Towers, Sites of Towers and Underground Facilities Variation 2013 is available on the ACCC's website at www.accc.gov.au.

3 Issues raised in the review process

The ACCC has received submissions on the following broad issues:

- continuing relevance of the Code
- continuing relevance of the mandatory provisions of the Code
- continuing relevance of the non-mandatory provisions of the Code
- obsolete and out-dated references
- need for a Third Party Access Code
- implications of Telstra's structural separation undertaking
- facilities access issues relating to the National Broadband Network
- whether declaration of access to some types of facilities is necessary.

3.1 Continuing relevance of the Code

The original purpose of the Code was to encourage the co-location of facilities, improve environmental amenity and promote competition by facilitating the entry of new mobile and fixed line telecommunications operators.⁴ In the July 2012 Discussion paper, the ACCC sought views on whether the Code continues to be relevant to industry, whether it has been effective in assisting the co-location of facilities and the costs (if any) to industry of complying with the Code.

Stakeholder views

Submissions broadly agree that the Code has worked well to date and has been a useful tool in guiding commercial negotiations on access to the eligible facilities.⁵ Briefly, submissions note that the Code:

- has promoted competition in downstream markets by facilitating timely access to infrastructure where ownership of such infrastructure is heavily concentrated⁶
- plays an important role in influencing non-price terms of access and limiting the ability of access providers to utilise non-price terms (such as queuing rules) to discriminate against access seekers⁷

⁴ Explanatory Memorandum to the Code, p. 98.

⁵ SingTel Optus Pty Ltd, *Optus Submission to the Facilities Access Code 1999 Review* (public version), 24 August 2012 (Optus Submission on the Discussion paper), p. 1. Vocus Ltd, *Response to the ACCC's July 2012 Discussion Paper to examine "A Code of Access to Telecommunications Transmission Towers, Site of Towers and Underground Facilities (October 1999)"* (public version), August 2012 (Vocus Submission on the Discussion paper), p. 3. AAPT Ltd, *Submission to ACCC Discussion Paper to examine "A Code of Access to Telecommunications Transmission Towers, Site of Towers and Underground Facilities (October 1999)"* (public version), August 2012 (AAPT Submission on the Discussion paper), p. 3. NBN Co, *Submission to ACCC's Facilities Access Code Discussion Paper*, August 2012 (NBN Co Submission on the Discussion paper), p. 2. Telstra Corporation Pty Ltd, *Response to the Commission's Discussion Paper on the Facilities Access Code*, August 2012 (Telstra Submission on the Discussion paper), p. 3. Vodafone Hutchison Pty Ltd, *Response to the ACCC*, August 2012 (VHA Submission on the Discussion paper), p. 2.

⁶ VHA Submission on the Discussion paper, p. 3.

⁷ Optus Submission on the Discussion paper, p. 1.

- has reduced costs for industry by encouraging co-location of facilities, particularly towers, which has meant that industry participants have been able to share access in a logical fashion.⁸

VHA submits that the Code continues to be relevant in terms of efficiencies to be gained from co-location and reducing environmental impacts of telecommunications towers. VHA also notes that the Code promotes competition in downstream markets by facilitating timely access to critical infrastructure.⁹

Optus considers that the Code has played an important role in enabling access to mobile towers and duct infrastructure in an efficient and effective manner. In Optus's experience, the Code has assisted in the finalisation of commercial discussions on the terms and conditions of access.¹⁰

Telstra considers that the Code is generally consistent with current industry arrangements and has been effective in assisting the co-location of facilities by providing carriers with guidance as to the terms that may be appropriate for their agreements without being overly prescriptive.¹¹ NBN Co submits that the Code will assist NBN Co in respect of eligible facilities of other carriers and other carriers in respect of NBN Co's eligible facilities.¹²

AAPT submits that although the Code is relevant it has not sought to rely on the Code because co-location is a mandatory obligation under Schedule 1 of the Telco Act and the Code has not been effective in ensuring reasonable co-location terms.¹³

ACCC's views

The ACCC considers that, on balance, the Code remains relevant and continues to serve as a useful tool in facilitating access to eligible facilities.

3.2 Relevance of the mandatory provisions of the Code

The Code defines a First Carrier as a carrier which owns and operates or controls eligible facilities to which access may be sought, the Second Carrier is a carrier which has requested, or has been granted, access to another carrier's eligible facilities.¹⁴ Carriers must comply with the mandatory provisions of access set out in the Code (Chapter 2) dealing with confidentiality of information, dispute resolution and non-discriminatory access.

Stakeholder views

Mandatory conditions

Telstra submits that it is no longer appropriate to mandate core principles of access and that the Code should not be binding where parties have an agreement in force which deals with matters prescribed by the Code. Telstra argues that this would be consistent with subsection 36(8) of Part 5 of Schedule 1 to the Telco Act, which provides that a determination made by

⁸ Telstra Submission on the Discussion paper, p. 3.

⁹ VHA Submission on the Discussion paper, p.3.

¹⁰ Optus Submission on the Discussion paper, p.2.

¹¹ Telstra Submission on the Discussion paper, p.5.

¹² NBN Co Submission on the Discussion paper, pp. 2 and 13.

¹³ AAPT Submission on the Discussion paper, p. 3.

¹⁴ The Code, Chapter 6.

an arbitrator has no effect to the extent to which it is inconsistent with an agreement in force.¹⁵

VHA makes a number of submissions which seek to strengthen and expand the mandatory conditions of the Code on confidential information and timeframes for access applications.¹⁶

AAPT and Vocus submit if the mandatory conditions of access listed in Chapter 2 were no longer mandatory, then it is very likely that Telstra would amend access agreements to remove its obligations, further weakening the position of carriers seeking competitive access to Telstra's facilities.¹⁷

Dispute resolution

The dispute resolution provisions in sub-clause 2.4 of the Code require that carriers engage in their own dispute resolution process including inter-party dispute resolution and, if necessary, mediation. In the event that carriers cannot resolve disputes in this way, carriers must make reasonable endeavours to refer the matter to an agreed independent expert other than the ACCC before referring the matter to the ACCC for arbitration.

Vocus, AAPT and VHA submit that the Code should be amended so that carriers have the option of referring a dispute directly to the ACCC without attending mediation or referring the dispute to an independent expert first. They submit that the mandatory dispute resolution procedures of the Code are cumbersome, a source of delay¹⁸ and entail extra cost without necessarily assisting access seekers to achieve a reasonable resolution.¹⁹

Vocus, AAPT and VHA note that it is also difficult to find a person with sufficient telecommunications expertise who has not worked for Telstra or one of its main competitors and who also has expert knowledge of competition law and economics. They submit that there are difficulties with this process as there is no obligation on a carrier to provide relevant information to an expert nor does the expert have power to compel the provision of this information.²⁰

Confidentiality

VHA submits that the Code permits disclosure of confidential information 'with the consent of the other Carrier' (sub-clause 2.1(4)(f)) but that the use of that information remains prohibited to the situations outlined in clause 2.1(3).²¹

Sub-clause 2.1(3) of the Code provides that:

- 2.1(3) Subject to sub-clause 2.1(4), Confidential Information obtained by a First Carrier about a Second Carrier's facilities and Confidential Information

¹⁵ Telstra Submission on the Discussion paper, pp. 7 & 16. Telstra, *Response to ACCC's Draft Decision on the Facilities Access Code* (public version), 31 May 2013 (Telstra Submission to the Draft Decision), p. 2

¹⁶ VHA Submission on the Discussion paper, p. 6.

¹⁷ AAPT Submission on the Discussion paper, p.9. Vocus Submission on the Discussion paper, p.5.

¹⁸ Vocus Submission on the Discussion paper, p. 3. VHA Submission on the Discussion paper, p. 6. AAPT Submission on the Discussion paper, p. 6.

¹⁹ AAPT Submission on the Discussion paper, p. 8.

²⁰ VHA Submission on the Discussion paper, p. 6. Vocus Submission on the Discussion paper, pp. 3-5. AAPT Submission on the Discussion paper, pp. 4-8.

²¹ VHA Submission on the Discussion paper, p. 6.

obtained by a Second Carrier about a First Carrier's facilities **must** only be:

- (a) used for the technical purpose of undertaking work necessary to allow for facilities access or as required by the ACA, the ACCC or an independent expert appointed in accordance with this Code; and
- (b) as far as is reasonably practical, used by technical and related personnel directly involved in the facilities access task or in accordance with sub-clause 2.1(4).

VHA submits that carriers should be allowed to agree to use confidential information in additional situations to those listed in sub-clause 2.1(3) and proposes an amendment that would allow confidential information to be used 'as otherwise agreed by the First and Second Carrier (sub-clause 2.1(3(c)))'.²²

Non-discriminatory access to Eligible Facilities

Clause 2.2 of the Code mandates that access to the eligible facilities must be provided in a non-discriminatory manner. Sub-clause 2.2 (1) provides that:

- 2.2(1) Carriers **must**, in relation to the provision of access to Eligible Facilities, as far as practicable, treat other Carriers on a non-discriminatory basis. For a First Carrier, this would include taking all reasonable steps to ensure that, as far as practicable, having regard to its legitimate business interests and the interests of third parties, that the Second Carrier receives timely provision of access that is equivalent to that which the First Carrier provides to itself.

Telstra submits that the first sentence of sub-clause 2.2(1) be amended to expressly state that the requirement to treat other carriers on a non-discriminatory basis is a requirement that applies to the First Carrier vis a vis its treatment of the Second Carrier. Telstra submits that it should not prevent the First Carrier from differentiating between different Second Carriers.²³

Timeframes

VHA considers that timeframes (for applying and providing access to facilities) is a key aspect of non-discrimination and as such, should be included as a mandatory condition in the Code. In its submission to the Discussion paper VHA proposed the following new mandatory provision on timeframes be introduced as sub-clause 2.6 to the Code:

2.6 Timeframes

- (1) The timeframes for particular processes associated with the provision of access, as set out in the Code, **must** apply unless the First and Second Carriers agree to amend those timeframes.
- (2) If a First or Second Carrier wishes to amend a timeframe set out in the Code and the other Carrier does not agree to that amendment, the First and Second Carriers **must** engage in dispute resolution, as set out in Chapter 2 of the main Code. The timeframes set out in the Code will apply unless a different timeframe is agreed or determined pursuant to the dispute resolution process.

²² VHA Submission on the Discussion paper, p. 6.

²³ Telstra Submission on the Discussion paper, p. 15.

- (3) The First and Second Carriers must comply with any timeframe that applies in accordance with this clause 2.6.²⁴

In the Draft decision, the ACCC agreed to make timeframes a mandatory condition of the Code. The new mandatory condition (sub-clause 2.6) in the Draft decision provides that:

2.6 Timeframes

- (1) The timeframes for particular processes associated with the provision of access, as set out in the Code, must apply unless a Carrier considers it would not be reasonably practicable for it to comply with the specified timeframes. In these circumstances, Carriers must make reasonable endeavours to agree to amended timeframes.
- (2) Carriers must engage in dispute resolution, as set out in Chapter 2 of the main Code, if agreement cannot be reached on amended timeframes.

VHA's submissions on the Draft decision note that a carrier's obligation to comply with sub-clause 2.6 is qualified by the words 'unless a Carrier considers it would not be reasonably practicable for it to comply with these timeframes'. VHA submits that additional procedural requirements be included in sub-clause 2.6 to reduce the possibility of carriers relying on the 'not reasonably practicable' qualification in the clause.²⁵ VHA proposed the following drafting changes (amendments are in italics):

2.6 Timeframes

- (1) The timeframes for particular processes associated with the provision of access, as set out in the Code, **must** apply unless a Carrier considers it would not be reasonably practicable for it to comply with the specified timeframes. In these circumstances:;
 - a. *if requested by the other Carrier, the Carrier must provide the other Carrier with detailed written reasons explaining why it considers it would not be reasonably practicable for it to comply with the specified timeframes; and*
 - b. the Carriers must make reasonable endeavours to agree to amended timeframes.²⁶
- (2) Carriers **must** engage in dispute resolution, as set out in *Clauses 2.4 and 2.5* ~~Chapter 2~~ of the main Code, if agreement cannot be reached on amended timeframes.²⁷

Telstra disagrees with the inclusion of the new mandatory clause on timeframes (sub-clause 2.6). Telstra notes that it already includes timeframes in its agreements with access seekers and that the new mandatory condition is overly prescriptive and will reduce Telstra's flexibility to respond to peaks in requests for access to its facilities.²⁸

²⁴ VHA Submission on the Discussion paper, p. 13.

²⁵ VHA, ACCC Draft Decision to vary Facilities Access Code, Response to the ACCC's Draft Decision, 31 May 2013 (Submission on the Draft decision), p. 2.

²⁶ VHA, Submission on the Draft Decision, pp. 16-17.

²⁷ VHA, Submission on the Draft Decision, pp. 6-7.

²⁸ Telstra, Submission on the Draft Decision, p.3.

ACCC's views

Mandatory conditions

The ACCC notes that the mandatory provisions of the Code enhance existing statutory rights of access, which are set out in Part 5 of Schedule 1 to the Telco Act, by providing a number of high level principles to guide commercial negotiations. While parties are able to negotiate their own commercial arrangements, the Code provides an important 'safety net' by prescribing matters that are considered to be essential for effective facilities access arrangements.

While sub-clause 36(8) of Schedule 1 to the Telco Act will invariably guide the ACCC when making an arbitral determination under Schedule 1, the ACCC considers that sub-clause 36(8) and the dispute resolution clauses in the Code (2.4 to 2.5) operate together as the Code provides guidance on dispute resolution processes and ongoing implementation of access requirements. Therefore, the ACCC does not consider it necessary to amend the Code to explicitly reflect sub-clause 36(8) of Schedule 1.

Dispute resolution

The ACCC considers that the legislative framework provided by the Telco Act is intended to encourage dispute resolution by commercial means when it states that carriers must first agree on the terms and conditions of access. The Code provides that parties, if they cannot commercially agree on conditions for access, first seek mediation prior to (and as an alternative to) arbitration. If parties are still unable to agree, clause 36 of Part 5 of Schedule 1 to the Telco Act also provides that the matter be referred to an arbitrator appointed by the parties. If the parties fail to agree on the appointment of an arbitrator, the ACCC is to be the arbitrator. The ACCC considers that the existing dispute resolution provisions in the Code are consistent with Part 5 of Schedule 1 to the Telco Act.

The ACCC regards the requirement to engage in mediation (sub-clause 2.4 of the Code) as a useful alternative to dispute resolution by arbitration. When undertaken in good faith, mediation can be a method of resolving disputes that achieves outcomes that are satisfactory to all parties involved. The ACCC has not received complaints outside of the submissions on significant issues or delays resulting from parties undertaking mediation or difficulties for parties in accessing confidential information during a dispute resolution process. Therefore, the ACCC does not consider it appropriate to vary sub-clause 2.4 of the Code at this time. The ACCC will however continue to monitor facilities access issues to determine whether the dispute resolution provisions of the Code are adequate or need to be varied.

Confidentiality

The Code allows carriers to negotiate additional permitted uses of their confidential information if they have the consent of the other carrier and the confidential information is being used for the technical purpose of undertaking work necessary to allow for facilities access or as required by the ACMA, the ACCC or an independent expert appointed in accordance with this Code.

The ACCC considers that the provisions in the Code on the use of confidential information adequately protect confidential information and allow for a degree of flexibility to carriers should they agree to use the confidential information for a technical purpose. The ACCC has therefore decided not to amend these provisions.

Non-discriminatory access to Eligible Facilities

The ACCC does not accept that sub-clause 2.2(1) of the Code is intended to allow a First Carrier to differentiate between different Second Carriers. As explained in the Explanatory Memorandum to the Code:

A First Carrier is only exempted from the non-discriminatory requirements to the extent it would not be reasonably practical for a First Carrier to provide the same level of access as it does to itself. Such an instance would be where a First Carrier has positioned its own Equipment at the top of a Tower prior to a request being received for access and to accommodate that request, without dismantling that Equipment, it would be able to only offer a lower, inferior position on the Tower - an inferior quality of access - to the Second Carrier. In such circumstances, the Second Carrier's request would be subject to a queuing policy (see clause 2.3).²⁹

The ACCC does not consider that the Code should provide for the First Carrier to discriminate between Second Carriers or that sub-clause 2.2 of the Code should be varied.

Timeframes

The ACCC notes that the Code provides guidance on timeframes in the preliminary part of the Code (sub-clause 1.2.3) and more detailed timetables in Annexures A and B. The ACCC accepts that timeframes for applying and providing access to facilities is an essential element to promote timely access to eligible facilities and potentially a source of discrimination between First and Second Carriers. Therefore, the ACCC considers it is appropriate to make timeframes in the Code a mandatory condition of the Code.

The ACCC considers it appropriate to vary the Code and adopt the new sub-clause 2.6 on timeframes as set out in the Draft decision. In the Draft decision the ACCC noted that the drafting proposed by VHA to vary sub-clause 2.6 differed to sub-clause 1.2.3 of the Code without adding substantially to the principles already in the Code. For this reason, it decided that the variation proposed by VHA should not be accepted but that sub-clause 1.2.3 be inserted as sub-clause 2.6.

The ACCC considers that the new sub-clause 2.6 strikes an appropriate balance between mandating timely access without being prescriptive about the terms of access. The ACCC does not propose to adopt the additional procedural requirements proposed by VHA as they will add an extra administrative task without necessarily reducing reliance on the 'not reasonably practicable' qualification in the clause. The ACCC also does not consider that sub-clause 2.6 will serve to constrain a carrier's ability to respond to peaks in requests as sub-clause 2.6 allows a carrier the flexibility to amend timeframes where it is not reasonably practicable to comply with the specified timeframes.

3.3 Relevance of the non-mandatory provisions of the Code

The Code sets out non-mandatory administrative conditions to assist carriers with the process of applying, negotiating and implementing access to the eligible facilities. They include, for example, procedures for developing master access agreements or resolving financial matters, arrangements on maintenance of eligible facilities, procedures for emergency situations, or terms on which access to facilities may be suspended or terminated. The ACCC has sought

²⁹ Explanatory Statement to the Code, p. 112.

views in this inquiry on whether it is common commercial practice to include the non-mandatory provisions in agreements, whether these provisions continue to form a useful basis for negotiations, and whether they should be varied.

Stakeholder views

Most stakeholders submit that it is not common commercial practice to include the non-mandatory provisions of the Code in facilities access agreements. AAPT submits that non-mandatory provisions of the Code are not commonly referred to in the course of negotiations³⁰ and that changing the non-mandatory provisions of the Code would be of limited benefit. Vocus, AAPT, iiNet and Adam agree that, rather than varying the non-mandatory provisions of the Code, declaration is the most effective form of regulating access to facilities.³¹

VHA and Telstra consider the non-mandatory provisions a useful reference point to guide and encourage commercial negotiations.³²

NBN Co submits that the roll-out of the NBN should inform any variations to the Code. However it notes that although the NBN roll-out is well underway, it is not yet possible for it to comment on the extent to which practical experience from the roll-out may inform any variations to the Code. NBN Co suggests that options to vary or update the Code should be open for the near to medium term.³³

Facilities Access Application

Annexures A and B to the Code set out the administrative and operational procedures for access to eligible facilities including a process for a Second Carrier to lodge a ‘facilities access application’.

VHA submits that only information reasonably necessary to enable a carrier to assess the technical feasibility of a facilities access application, or the creditworthiness of the requesting carrier, be required in a facilities access application.³⁴ VHA proposes changes to sub-clause 2.1(2), Part 2 of Annexure A and sub-clause 2.1(2), Part 2 of Annexure B (these clauses mirror each other) and the insertion of sub-clauses 2.1(10) and (11). VHA’s proposed drafting (in italics) is as follows:

2.1: Lodgement of Application

A Second Carrier seeking access to an existing Tower and/or Tower Site is required by this clause to submit a Facilities Access Application.

Sub-clause 2.1(2) requires that a Facilities Access Application must, in the absence of any Master Access Agreement covering standard terms and conditions of access, include creditworthiness information that would be common to any access application to a particular Eligible Facility. *To avoid doubt, the First Carrier is not required to provide information required by this sub-clause 2.1(2) to the extent it has already provided that information to the*

³⁰ AAPT Submission on the Discussion paper, p. 9.

³¹ Vocus Submission on the Discussion paper, p. 7. AAPT Submission on the Discussion paper, p. 13. iiNet Submission on the Discussion paper, pp. 6-7. Adam Submission on the Discussion paper, p. 5.

³² VHA Submission on the Discussion paper, p. 3 and p 6. Telstra Submission on the Discussion paper, p. 22.

³³ NBN Co Submission on the Discussion paper, p. 1.

³⁴ VHA, Submission on the Discussion paper, p. 7. VHA, Submission to the Draft Decision, p.3.

First Carrier or otherwise has agreed arrangements with the First Carrier relating to the Second Carrier's creditworthiness.

(10)³⁵ *Notwithstanding sub-clauses 2.1(2), (5), (6), (7) and (9) the Second Carrier is not required to include in a Facilities Access Application, and the First Carrier is not entitled to require that the Second Carrier provide, information which is not reasonably necessary to enable the First Carrier to assess either the technical feasibility of the Facilities Access Request or the creditworthiness of the Second Carrier.*

(11)³⁶ *Notwithstanding 2.1(2), (5) and (7), the Second Carrier it not required to include in a Facilities Access Application, and the First Carrier is not entitled to require that the Second Carrier provide, information which is not reasonably necessary to enable the First Carrier to assess either the technical feasibility of the Facilities Access Request or the creditworthiness of the Second Carrier.*³⁷

ACCC's views

The ACCC considers that a key purpose of the Code is to establish a set of default or minimum administrative standards and processes to facilitate timely access to eligible facilities. The ACCC further considers that overly prescriptive provisions may limit or delay the facilities access arrangements which reflect individual inter-carrier relationships. In relation to the non-mandatory provisions of the Code, the ACCC notes that stakeholders do not support a variation of the non-mandatory conditions of the Code except in relation to the facilities access application provisions (addressed below). The ACCC does not therefore propose to vary the non-mandatory conditions of the Code except where there are obsolete and out-dated references.

Facilities Access Application

The ACCC is aware of the complexities involved for First Carriers when assessing facilities access applications and providing access to Second Carriers. The ACCC is also aware that sufficient information must be provided to the First Carrier to allow an assessment to take place. However, it is not clear to the ACCC whether specific harm flows from the disclosure of specific information in support of an access application, which information would not be reasonably necessary to allow the First Carrier to assess the technical feasibility or creditworthiness of the Second Carrier. The ACCC has not received submissions from other carriers on this issue. VHA did not make further submissions on this issue in its submission on the Draft Decision. In the absence of any other evidence that this is a cause for concern, the ACCC does not consider it appropriate to amend sub-clause 2.1.

3.4 Obsolete and out-dated references

Stakeholder views

Carriers agree that the Code contains out-dated references and that it should be updated to remove obsolete references, including those arising from legislative changes. For example, Telstra and VHA note that some of the functions that the ACCC is now responsible for, such as assessing technical feasibility of access, were previously exercised by the Australian Communications and Media Authority (ACMA), formerly the Australian Communications

³⁵ VHA's submission lists this as 2.1(12).

³⁶ VHA's submission lists this as 2.1(10) at p. 16.

³⁷ VHA Submission on the Discussion paper, p. 7.

Authority. Out-dated references to the Telecommunications Access Forum (TAF) and provisions in the *Bankruptcy Act 1966* are also identified.³⁸

Telstra suggests that the definition and associated references to the Access Pricing Principles in sub-clause 6.1 of the Code and the Pricing Considerations in Attachment 1 to the Code be deleted because they do not reflect the ACCC's current approach when setting price terms for facilities access.³⁹ Telstra also identifies different definitions for an *eligible underground facility* in the Code and Telco Act.⁴⁰

VHA submits that the Code incorporate the legislative changes introduced by the CACS Act which:

- amends sub-clauses 33(3), 34(3) and 35(3) of Schedule 1 to the Telco Act to transfer the responsibility for issuing written certificates regarding technical feasibility from the ACMA to the ACCC
- inserts sub-clauses 33(6), 34(6) and 35(6) of Schedule 1 to the Telco Act to take away any obligation to provide access to a particular facility to the extent to which it would prevent Telstra from complying with an undertaking in force under section 577A, 577C or 577E⁴¹ or matters covered by the final migration plan
- inserts sub-clauses 33(8), 34(8) and 35(8) of Schedule 1 to the Telco Act so that NBN Co will not be taken to be the operator or controller of a facility if there is an agreement in force between Telstra and an NBN corporation relating to the NBN corporation's access to the facility.⁴²

In the Draft decision, the ACCC proposed to vary sub-clause 1.2.1 on the Scope and Operation of the Code so that the Code does not apply to an NBN corporation where it has an agreement in force with Telstra in relation to an eligible facility. The proposed drafting is as follows (the changes are in italics):

1.2 Scope and application of the Code

1.2.1 Facilities

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.*

³⁸ Telstra Submission on the Discussion paper, pp. 15-17. VHA Submission on the Discussion paper, p. 7.

³⁹ Telstra Submission on the Discussion paper, pp. 15-16.

⁴⁰ Telstra Submission on the Discussion paper, pp. 16-17.

⁴¹ Sections 577A, 577C or 577E relate to Telstra's undertakings on structural separation, hybrid fibre-coaxial networks and subscription television broadcasting licensing.

⁴² VHA Submission on the Discussion paper, pp. 7-8.

Optus submits that the new proposed clause 1.2.1 should apply more broadly to other carriers when they acquire access to Telstra's eligible facilities and not just NBN Co.⁴³

ACCC's views

Clause 1.2.1 is varied in the Draft decision in order to reflect legislative changes introduced by the CACS Act. The CACS Act introduced sub-clauses 33(8), 34(8) and 35(8) to Schedule 1 of the Telco Act so that NBN Co will not be taken to be the operator or controller of a facility if there is an agreement in force between Telstra and an NBN corporation in relation to the NBN corporation's access to the facility.⁴⁴ Where an NBN Corporation owns or operates or controls an eligible facility and those eligible facilities are not covered by an agreement with Telstra (as outlined in the proposed variations to sub-clause 1.2.1) the Code will still apply to that NBN Corporation. The ACCC considers that extending the scope of clause 1.2.1 of the Code to include other carriers (in addition to NBN Co) would be beyond the scope of the Telco Act and beyond the scope of the legislative amendments introduced by the CACS Act.

The ACCC has decided to update the Code to account for obsolete or out-dated references and changes in legislation since 1999. Where terms are undefined, the ACCC has also added definitions of terms in the Code which are undefined to Chapter 6 (Glossary and Interpretation of the Code). The proposed changes are the same as those listed in the Draft decision and are set out in the Final decision at [Section 4](#).

3.5 Third Party Access Code

The *Fibre Deployment Act* amended the Telco Act to support the Government's policy on how fibre-to-the-premises infrastructure should be installed in new developments such as 'greenfield' estates. In particular, the Fibre Deployment Act introduced a 'third party access regime' under Part 20A of the Telco Act. The third party access regime 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 carrier⁴⁵ such as a developer, utility, council or private property owner.

The third party access regime allows for carriers to seek access to *non-carrier* fixed-line facilities with a view to supporting the roll-out of optical fibre. Such facilities may be owned, for example, by developers or councils.⁴⁶ Fixed line facilities include underground facilities such as pits and ducts, and poles where the terrain makes it necessary to deploy lines above ground.⁴⁷

The third party access regime mirrors the access provisions set out in clauses 35-37 of Part 5 of Schedule 1 to the Telco Act. Similarly to Part 5 of Schedule 1, the third party access regime encourages parties to negotiate access to fixed line facilities via commercial negotiations. If commercial negotiations fail, parties may seek a determination from an agreed arbitrator or the ACCC may arbitrate as a last resort.

⁴³ Optus, *ACCC's draft decision to vary the Facilities Access Code*, 31 May 2013 (Submission on the Draft Decision), p.2.

⁴⁴ Explanatory Memorandum to the *Telecommunications Legislation Amendments (Competition and Consumer Safeguards) Act 2010*, p. 160.

⁴⁵ Subsection 372L(1) of the Telco Act.

⁴⁶ Explanatory Memorandum to the *Fibre Deployment Act 2011*, p.34.

⁴⁷ *Telecommunications Legislation Amendment (Fibre Deployment) Bill 2011*, Explanatory Memorandum, p. 2.

Under section 372NA of Part 20A of the Telco Act, the ACCC may also make a code in relation to third party access to fixed-line facilities in greenfield estates (the Third Party Access Code). The ACCC may include third party access arrangements in the current Code, or make a separate code for third party access. In the July 2012 Discussion paper, the ACCC sought industry views on whether a Third Party Access Code should be developed.⁴⁸

Stakeholder views

VHA submits that it would be appropriate to extend the scope of the current Code to include a Third Party Access Code.⁴⁹

Vocus and Telstra prefer a Third Party Access Code which is a *separate code*.⁵⁰ Telstra notes that third party owners are likely to have less experience in maintaining telecommunications facilities and that this should be reflected in a separate Third Party Access Code by prescribing maintenance standards in greater detail. Telstra also notes that some aspects of the Code may not be relevant to owners of pit and pipe infrastructure in new developments and that reciprocal access is not necessary or relevant for non-carriers.⁵¹

Telstra also considers that a Third Party Access Code should require third party providers to maintain their facilities to an appropriate fibre ready standard. Telstra suggests that a Third Party Access Code be limited to infrastructure installed by a non-carrier under Part 20A of the Telco Act which has not been transferred to a carrier and to allow parties the flexibility to 'contract out' of the code terms (via agreements).⁵²

VHA and NBN Co consider that a Third Party Access Code should be consistent with the existing Code where possible.⁵³ If a Third Party Access Code is developed, NBN Co maintains that it should depend on the extent to which:

- the fixed-line facility was installed after the commencement of section 372L of the Telco Act (27 September 2011)⁵⁴
- access is likely to be sought to such facilities
- whether parties are likely to be unable to agree appropriate terms and conditions without a code.⁵⁵

ACCC's views

Apart from the submissions made in response to the Discussion paper the ACCC has not received any further submissions on the Third Party Access Code in the public inquiry on the Code. The ACCC therefore maintains the view set out in the Draft decision which is that:

- if a Third Party Access Code is to be developed, it should be a standalone code (rather than incorporated into the Code)

⁴⁸ ACCC, *An ACCC Discussion Paper to examine 'A Code of Access to Telecommunications Transmission Towers, Sites of Towers and Underground Facilities'* (October 1999), July 2012, pp. 13-14.

⁴⁹ VHA Submission on the Discussion paper, p. 8.

⁵⁰ Vocus Submission on the Discussion paper, p. 6. Telstra Submission, p. 8.

⁵¹ Telstra Submission on the Discussion paper, pp. 9-10.

⁵² Telstra Submission on the Discussion paper, pp. 10 and 21.

⁵³ VHA Submission on the Discussion paper, p.8. NBN Co Submission on the Discussion paper, p. 2.

⁵⁴ Section 372L of the Telco Act relates to the Third Party Access Regime for fixed line facilities installed in Australia.

⁵⁵ NBN Co Submission on the Discussion paper, p. 2.

- the Third Party Access Code would need to address issues likely to arise as a result of interactions between carriers and non-carriers where, for example, non-carriers have less experience maintaining telecommunications infrastructure
- reciprocal access may not be relevant for non-carriers
- the Third Party Access Code need not apply to mobile network infrastructure (such as telecommunication towers and sites of towers) which is usually owned by carriers to support their mobile networks.

The ACCC notes that to date, there have been no formal complaints from carriers being unable to access non-carrier facilities in greenfield estates. The ACCC will however continue to monitor any issues that arise as more greenfield sites become operational and consider developing a Third Party Access Code, should issues of access to facilities arise.

3.6 Implications of Telstra’s Structural Separation Undertaking

Dispute resolution - Access to External Interconnect Facilities

The Code mandates a process of inter-party dispute resolution, mediation and arbitration by an agreed independent expert other than the ACCC before arbitration by the ACCC while the Structural Separation Undertaking given by Telstra to the ACCC on 23 February 2012 (the SSU)⁵⁶ seeks to resolve access seeker complaints for access to external interconnection facilities (EIFs) via an accelerated investigation process (AIP) and an independent telecommunications adjudicator (ITA). EIFs are:

- external interconnection cables - cables that run from a point in an exchange building to a point external to that exchange building
- external interconnect ducts – ducts that are used, or for use, in connection with an external interconnection cable
- pits associated with an external interconnect ducts.⁵⁷

Stakeholder views

Telstra argues that the Code should not apply to the extent that it relates to matters covered by the SSU⁵⁸ as there is likely to be ambiguity about how the different obligations interact and costs and inefficiencies associated with complying with two different regimes. Telstra notes the inconsistency between the Code and SSU in relation to access to EIFs. Telstra submits that the SSU should apply to the exclusion of the Code where Telstra provides access to an EIF in relation to the supply of an active declared service. Telstra proposes that the following drafting be inserted into Chapter 1 of the Code:

This Code does not apply to the extent (if any) it would require Telstra to engage in conduct in connection with matters covered by an undertaking in force under section 577A, 577C or 577E of the Telecommunications Act 1997.⁵⁹

Telstra reserved capacity

⁵⁶ The Structural Separation Undertaking was made pursuant to section 577A of the *Telecommunications Act 1997* (Telco Act).

⁵⁷ Schedule 1, Telstra Structural Separation Undertaking, p. 65.

⁵⁸ Telstra Submission on the Discussion paper, p. 10.

⁵⁹ Telstra Submission on the Discussion paper, p. 11.

Telstra submits that the queuing policy in sub-clause 2.3 of the Code be amended so that a First Carrier (1) has a right to reserve space on or in an eligible facility for the supply of its own retail or wholesale services and (2) has the right to reject a request for facilities access from a Second Carrier where space has been reserved.

Telstra submits that this is consistent with the concept of ‘Currently Planned Requirements’ in the Explanatory Statement to the Code and is also consistent with the SSU. Telstra proposes the following changes to sub-clause 2.3(2) and the inclusion of a new sub-clause 2.3(7) (Telstra drafting is in italics):

2.3 Queuing policy

- (1) The First Carrier **must** develop a queuing policy for applications for the supply of access to an Eligible Facility
- (2) Subject to the legislative requirements of Part 5 to provide access to Second Carriers, the queuing policy **must** include the First Carrier’s *reserved capacity*, applications and orders. *A First Carrier may reserve space for supply of its own retail or wholesale services in respect of particular Eligible Facilities where it has bona fide documented plans to use the particular Eligible Facility within 36 months from the date of the reservation.*
- (7) *A First Carrier is entitled to reject an application or Facilities Access Application from a Second Carrier where capacity of an Eligible Facility has been reserved.*⁶⁰

In the Draft decision, the ACCC accepted Telstra’s submissions and adopted Telstra’s drafting changes to clause 2.3(2) and new sub-clause 2.3(7).

Both Optus and VHA made submissions on the proposed changes in the Draft decision. Optus argues that sub-clause 2.3 of the Code should not be amended as the arrangements in the SSU are specific to Telstra to reflect its position in the market as a vertically integrated supplier and because they relate to the Telstra Exchange Building Access (TEBA) service (which is not covered by the Code).⁶¹

Optus notes that both the SSU and the ACCC Draft decision on the Code allow Telstra to reserve capacity at particular facilities, however only the SSU includes compliance and monitoring obligations in relation to Telstra’s reservation of exchange capacity.⁶² Optus considers that without related compliance and monitoring processes, Telstra could use the Code to reserve capacity at the eligible facilities and deny access to access seekers.⁶³

VHA submits that the Code should allow a First Carrier to reserve capacity for 36 months only when there has been a Co-location Consultation Process with industry about what would be the most suitable amount of capacity for all carriers.⁶⁴ VHA considers that this approach would encourage an access provider to consult with industry about capacity requirements, ensure that the most suitable site is built and protects the legitimate interests of relevant parties.

⁶⁰ Telstra Submission on the Discussion paper, p. 15.

⁶¹ Optus, Submission on the Draft Decision, 31 May 2013, p. 2.

⁶² See sub-clauses 12.1(b)-(d), SSU.

⁶³ Optus, Submission on the Draft Decision, 31 May 2013, p. 3.

⁶⁴ VHA, Submission on the Draft Decision, 31 May 2013, p. 4.

VHA also argues that instead of relying on ‘bona fide documented plans’ of the First Carrier to establish reserved capacity, the First Carrier should be required to provide written reasons for its reservations to the Second Carrier and that the Second Carrier should have an express right to challenge the content and bona fides of the First Carrier’s plans, including by way of referral to dispute resolution.⁶⁵

VHA considers that, to the extent that clauses are varied to allow Telstra to reserve capacity at particular eligible facilities, the proposed amendments should apply to all carriers on a non-discriminatory basis (not just Telstra).⁶⁶

Confidential information

Telstra’s submissions on the Discussion paper identify an inconsistency between the Code and the SSU with respect to how ‘Confidential Information’ is defined. The SSU specifies that protected information does not include information which is already public (sub-clause 10.1(f)) while the confidentiality provisions of the Code (sub-clauses 2.1 and 6.1 of the Code) do not make this distinction.⁶⁷

Telstra submits that the confidentiality provisions of clause 2.1(1) are drafted broadly and may capture information which does not relate to access to eligible facilities.⁶⁸ Telstra recommends that the Code be varied to clarify that the confidentiality provisions of the Code only apply to information relating to, or obtained in relation to the supply or acquisition of, access to eligible facilities. Telstra proposes that the definition of confidential information in sub-clause 6.1 of the Code be amended as follows (Telstra drafting is in italics):

- 6.1 **Confidential Information** *of a Carrier* includes all information, know-how, ideas, concepts, technology, manufacturing processes, industrial, marketing and commercial knowledge of a confidential nature (whether in tangible or intangible form) relating to or developed in connection with or in support of the business of that Carrier *and which relates to Eligible Facilities or is obtained in connection with the supply or acquisition of Eligible Facilities, but does not include information which:*
- (a) is or becomes part of the public domain (other than through any breach of the relevant agreement by the other Carrier or of an obligation of confidence to a third party); or*
 - (b) is rightfully received by the other Carrier from a third person (except where that party knew or should have reasonably known that the information was obtained in breach of an obligation of confidentiality or where the third person was under a duty of confidentiality to the relevant Carrier in respect of the relevant information).*⁶⁹

ACCC’s views

Dispute resolution procedures

⁶⁵ VHA, Submission on the Draft Decision, 31 May 2013, pp. 4-5.

⁶⁶ VHA, Submission on the Draft Decision, 31 May 2013, p. 4.

⁶⁷ Telstra Submission on the Discussion paper, p. 10.

⁶⁸ Telstra Submission on the Discussion paper, p. 14.

⁶⁹ Telstra Submission on the Discussion paper, p. 16.

The ACCC notes that there are distinctions between the dispute resolutions processes set out in clauses 19-20 of the SSU and arbitration provisions in the Code. The SSU provides for an internal Telstra complaint handling process and an independent adjudication process for non-price access issues to TEBA services and EIFs facilitating active declared services, while the Code provides for a process to deal with disputes arising in relation to price and non price access issues in relation to transmission towers, sites of towers and underground facilities (some of which are EIFs).

Despite these differences, the ACCC does not consider the proposed drafting by Telstra in relation to access to EIFs is necessary. This is because, under the SSU, the referring party (party making the initial complaint) may elect a dispute resolution process under the SSU or Telco Act and Code. Sub-clause 1.4 of the SSU provides that:

- 1.4 For clarification, nothing in this Undertaking constrains the ACCC’s powers or functions under the CCA or the Act to any greater extent than expressly provided in the CCA or the Act respectively.

The ACCC notes that sub-clause 1(b)(i) of Schedule 5 of the SSU also provides a similar provision:

- 1.(b)(i) nothing in this Schedule 5 constrains the ACCC’s powers under the CCA or the Act to a greater extent than the CCA or the Act expressly provide respectively;

The ACCC considers therefore that the different dispute resolution procedures under the Code and SSU are able to operate side by side. In addition, a referring party may, under sub-clause 6.1 of Schedule 5 of the SSU, request that the ACCC adjudicate a dispute under the SSU. Table 1 below provides a brief comparison of the dispute resolution provisions under the SSU and Code.

Table 1: Comparison of dispute resolution procedures under the SSU and the Code

	SSU (Clauses 19-20 and Schedule 5)	Code (Sub-clauses 2.3-2.4)
Relevant facilities	TEBA services and EIFs.	Transmission towers, sites of towers and underground facilities (which includes some EIFs).
Nature of dispute	Non-price issues in relation to active declared services	Price and non-price issues
Overview of dispute resolution procedures	Telstra has an internal process to resolve wholesale customer complaints by way of a ‘Rectification Plan’ which includes steps that Telstra will take to investigate and/or resolve the complaint (sub-clause 19.3(a)(iv)). If a wholesale customer rejects the Rectification Plan proposed by Telstra under	Under the Code, parties <ul style="list-style-type: none"> • engage in inter-party dispute resolution, and if necessary, mediation • refer the matter for arbitration by an agreed independent expert other

	<p>the AIP, it <i>may</i> refer the matter to the ITA Process and Telstra is required to comply with any binding determination issued by the ITA.</p> <p>Under the ITA process the referring party may elect whether the independent telecommunications adjudicator or the ACCC is responsible for hearing the dispute.</p>	<p>than the ACCC</p> <ul style="list-style-type: none"> • in the event that parties cannot resolve the matter via an independent expert, the ACCC will be the arbitrator of last resort
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The ACCC considers that the dispute resolution processes only overlap in relation to non-price issues about access to external interconnect ducts and pits (associated with external interconnect ducts) facilitating an active declared service and that where this occurs, the access seeker has a *choice* of whether to pursue dispute resolution under the SSU or the Code. In this regard, the ACCC notes that the ITA process under the SSU is only available to parties who have entered into an ITA Deed and paid an ITA process fee of \$8,000 to the adjudicator.

Telstra Reserved Capacity

The Draft Decision proposed to align the SSU and Code where possible in order to avoid confusion and cost and potential inconsistencies. As part of this approach, the Draft Decision proposed to adopt Telstra’s Reserved Capacity provisions into the Code.

The ACCC however notes that there are not many facilities which are covered by both the SSU and the Code and that any confusion caused by a different approach in the SSU and Code will only arise in relation to a small category of facilities (namely external interconnect ducts and the pits associated with them).

The ACCC also notes that there is no actual *inconsistency* between the SSU and Code with respect to access to facilities. The ACCC agrees with Optus that the SSU includes compliance and monitoring obligations in relation to Telstra’s reservation of exchange capacity which the Code does not and that these obligations provide a safeguard to access seekers.

The ACCC considers it therefore appropriate to maintain the original drafting contained in sub-clause 2.3 of the Code and not adopt the variations proposed in the Draft Decision. In relation to VHA’s submissions that a more consultative process in relation to Telstra’s Reserved Capacity be adopted, the ACCC notes that such a process will not be required if the Code is not varied to incorporate the SSU provisions on Telstra’s Reserved Capacity.

Confidential information

The ACCC agrees to clarify that confidential information does not include information which is public. The ACCC also agrees that the definition of confidential information should be limited to information which relates to access to the eligible facilities (only). The ACCC has decided therefore to vary the definition of confidential information in clause 6.1 of the Code as proposed by Telstra.

3.7 Facilities access issues relating to the National Broadband Network

Stakeholder views

VHA submits that the Code and the access obligations under Parts 3 and 5 of Schedule 1 to the Telco Act are sufficient to enable access to facilities required to interconnect with the NBN.⁷⁰

Adam Internet, iiNet, Vocus and AAPT submit that Telstra may impose unreasonable terms of access to Telstra exchanges which are used for interconnection with the NBN (NBN points of interconnection (NBN POIs)) to the detriment of competition and long-term interests of end-users. Submitters consider the Code is of limited use in addressing these problems and propose that the ACCC declare access to facilities.⁷¹

NBN Co submits that it has not experienced any major issues with respect to entry rights to towers, sites or eligible underground facilities. NBN Co suggests that provisions on entry rights be considered further into the roll-out of the NBN while Telstra does not consider that they should be covered by the Code at all, as commercial negotiations have been successful in facilitating entry to date.⁷²

ACCC's views

Access to facilities on reasonable terms is necessary for timely and efficient access to NBN POIs and interconnection with the NBN. The ACCC is not presently aware of any major problems in accessing NBN POI facilities. The ACCC notes however that the roll-out is in its early stages, with a relatively small number of consumers connected to the NBN through Listed POIs even though 63 of the 121 NBN POIs are currently listed as active. The ACCC does not propose to amend the Code to deal with NBN related access issues but will continue to monitor access issues in relation to NBN POIs as the NBN is rolled out.

3.8 Declaration of a facilities access service

Stakeholder views

Some access seekers express concern that a lack of regulated access to facilities (including non-eligible facilities such as the TEBA) has resulted in access being offered on a 'take it or leave it' basis. They also submit that the ACCC should declare access to eligible facilities (such as ducts) and non-eligible facilities (such as the TEBA) and issue a final access determination (FAD) in order to achieve efficient access.⁷³ AAPT notes that access charges imposed by Telstra are excessive and have increased each year rather than decreased to reflect efficient costs.⁷⁴ AAPT also considers that the ACCC should give full consideration to the issue of declaring access to facilities in the 2013 declaration reviews of the Domestic Transmission Capacity Service (DTCS) and fixed line services rather than treat facilities access as an ancillary service.⁷⁵

⁷⁰ VHA Submission on the Discussion paper, p. 2.

⁷¹ Adam Submission on the Discussion paper, p. 4. iiNet Submission on the Discussion paper, p. 6. Vocus Submission on the Discussion paper, p. 7. AAPT Submission on the Discussion paper, p. 11.

⁷² NBN Co Submission on the Discussion paper, p. 2.

⁷³ AAPT Submission on the Discussion paper, pp.13-14. AAPT Submission on the Draft decision, p.1.

⁷⁴ AAPT Submission on the Discussion paper, p. 12. AAPT Submission on the Draft decision, p.2.

⁷⁵ AAPT Submission on the Draft decision, p.1.

Adam and iiNet note that their ability to receive arbitral relief from the ACCC may be limited because of recent legislative amendments to the Telco Act⁷⁶ which mean that an arbitral outcome is likely to depend on:

- (1) whether arbitration is permitted by the access agreement between the parties,
- (2) whether the arbitral determination is about a matter that is not included in the access agreement or
- (3) where the access seeker has not yet entered into an agreement with Telstra.⁷⁷

AAPT, iiNet and Adam submit that while the SSU requires Telstra to provide equivalent price terms between Telstra Retail and Telstra's wholesale customers, achieving equivalent pricing for TEBA by means of the SSU is problematic. This is because under the SSU, price equivalence is achieved by means of Telstra offering a 'Reference price' in respect of each of the regulated services. However, unlike for declared services (where the Reference price must match any applicable ACCC pricing), the Reference Price for TEBA is at Telstra's discretion.

AAPT, iiNet and Adam also note that there is no obligation in the SSU for Telstra to publish internal and external wholesale pricing in respect of TEBA. Therefore there is no basis on which to determine if the Telstra Reference Price for TEBA does deliver price equivalence between Telstra Retail and Telstra's wholesale customers.⁷⁸

VHA, on the other hand, submits that the existing access arrangements, including the Code, are effective in promoting efficient access to facilities under Part 5 of Schedule 1 to the Telco Act. VHA submits that it is unwarranted for the ACCC to declare access to facilities and requests that the ACCC instead revisit this issue in 12-18 month when the NBN roll-out has progressed.⁷⁹

NBN Co submits that it is unnecessary for the ACCC to declare access to any of NBN Co's facilities as access is most appropriately regulated under Schedule 1 to the Telco Act, an NBN Co Special Access Undertaking or a Standard Form Access Agreement.⁸⁰

Telstra considers that the ACCC does not have the power to declare access to facilities nor is it necessary for the ACCC to declare access to facilities. Telstra considers that it could not have been Parliament's intention to have two different access regimes (the Telco Act regime and the regime in Part XIC of the *Competition and Consumer Act 2010 (CCA)*) applying to the same facilities. Telstra also argues that, even if the ACCC can declare access to facilities, it would be unwarranted for the ACCC to do so as the existing regulatory regime under Schedule 1 of the Telco Act is already effective and any declaration would not be in the long-term interests of end-users.⁸¹

⁷⁶ The changes were introduced by the CACS Act. They provide that a determination (whether made by the ACCC or another arbitrator) will not be enforceable to the extent that it is inconsistent with the terms and conditions agreed to by the parties in a commercial agreement.

⁷⁷ Adam Submission on the Discussion paper, p. 3. iiNet Submission on the Discussion paper, p. 4.

⁷⁸ AAPT Submission on the Discussion paper, pp. 10-11. iiNet Submission on the Discussion paper, pp. 5-6. Adam Submission on the Discussion paper, p. 4.

⁷⁹ VHA Submission on the Discussion paper, p. 10. VHA Submission on the Draft decision, p. 3.

⁸⁰ NBN Co Submission, p. 3.

⁸¹ Telstra Submission on the Discussion paper, p.12. Telstra Submission on the Draft decision, p. 1.

ACCC's views

The ACCC is considering the issue of access to facilities, including access to TEBA, in the declaration review of the fixed line services and the declaration review of the DTCS. The ACCC will consider, as part of these reviews, whether access seekers are facing difficulties in accessing facilities to interconnect with and acquire the declared services. Any issues of access to facilities can also be addressed via the access determinations for the fixed line services or access determination for the DTCS.

In relation to the submissions raised on pricing equivalence under the SSU for TEBA, the ACCC considers that there is currently no requirement on Telstra under the SSU to publish internal wholesale pricing and external wholesale pricing for TEBA. However, the SSU provides 'step in' rights for the ACCC with respect to TEBA pricing by providing that should the ACCC choose to set price terms for TEBA through its existing regulation of the unconditioned local loop service (ULLS) and line sharing service (LSS), Telstra must:

- within 5 business days of the ACCC's decision, publish reference prices equal to the price specified by the ACCC
- within 3 months of the ACCC decision or such further period allowed by the ACCC, provide the ACCC with an explanation of how the internal wholesale price(s) and external wholesale price(s) will be calculated and included in the Telstra Economic Model (TEM) reports to take account of the new Reference Prices
- include the new internal wholesale price(s) and external wholesale price(s) in the TEM Report for each subsequent reporting period.⁸²

⁸² Schedule 8, Clause 1.2(d), Telstra SSU.

4 Consolidated list of amendments to the Code

Following is the consolidated list of amendments to the Code (variations are in italics or strikethrough):

1. insert the following at the end of sub-clause 1.2.1:

1.2.1 Facilities

The Code applies to the facilities specified in Part 5. For ease of reference, these facilities are collectively referred to as *Eligible Facilities* throughout the Code.

This 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 an undertaking in force under section 577A, 577C or 577E of the Telecommunications Act 1997 (the Act).

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*

2. Delete Clause 1.2.3:

1.2.3 Timeframes

- (1) The timeframes for particular processes associated with the provision of access, as set out in the Code, **must** apply unless a Carrier considers it would not be reasonably practicable for it to comply with the specified timeframes. In these circumstances, Carriers **must** make reasonable endeavours to agree to amended timeframes.
- (2) Carriers **must** engage in dispute resolution, as set out in Chapter 2 of the main Code, if agreement cannot be reached on the amended timeframes.

3. replace references to Australian Communication Authority (ACA) with Australian Communications and Media Authority (ACMA) in:

- sub-clause 2.1(3)(a)
- sub-clause 2.1(4)(g)
- sub-clause 2.4(5)

4. replace ACA with the ACCC in:

- sub-clause 1.1(1) of Annexure A
- sub-clause 2.3(2) of Annexure A
- sub-clause 2.3(3) of Annexure A
- sub-clause 1.1(1) of Annexure B
- sub-clause 2.3(2) of Annexure B
- sub-clause 2.3(3) of Annexure B

5. Delete the following in sub-clause 2.4(1):

2.4 Dispute Resolution – the giving of access

(1) In the event that a dispute arises in negotiations over the terms and conditions of a Master Access Agreement or over access to a particular Eligible Facility (or Facilities), Carriers **must** engage in their own dispute resolution, ~~including inter party dispute resolution~~ and, if necessary, mediation.

~~Note: Carriers may have regard to the inter party dispute resolution procedures set out in the TAF Telecommunications Access Code.~~

~~Carriers may have regard to the mediations procedures set out in the TAF Telecommunications Access Code.~~

6. Insert sub-clause 2.6:

2.6 Timeframes

(1) The timeframes for particular processes associated with the provision of access, as set out in the Code, **must** apply unless a Carrier considers it would not be reasonably practicable for it to comply with the specified timeframes. In these circumstances, Carriers must make reasonable endeavours to agree to amended timeframes.

(2) Carriers **must** engage in dispute resolution, as set out in Chapter 2 of the main Code, if agreement cannot be reached on amended timeframes.

7. Insert the following to sub-clause 4.4(1):

4.4 Perform Make Ready Work

(1) The Second Carrier may decide to perform the Make Ready Work (*MRW*) required for it to be provided with access to a First Carrier's Eligible Facility, subject to that Second Carrier, or its representatives, being suitably qualified to perform that Make Ready Work.

8. Make the following variation to sub-clause 4.5(7):

4.5 Co-location Consultation Process

(7) If a request, under sub-clause 4.44.5(2), or a Sharing Proposal, under 4.44.5(4) is rejected...

9. Make the following variation to sub-clause 5.6(3):

5.6 Third Party User Equipment

(3) If the equipment of a Third Party User needs to be moved, powered or turned off in order for the Second Carrier to install or maintain its Equipment, the Second Carrier is responsible for ~~liaising~~ *liaising* with that Third Party User.

10. Make the following variation to sub-clause 5.8(g):

5.8 Terminating of Access

~~4(g)~~

~~any director of the Other Party (where, in the reasonable opinion of the Notifying Party, such an event reduces the creditworthiness of the Other Party):~~

- ~~(i) — becomes bankrupt, presents a debtor's petition within the meaning of the *Bankruptcy Act 1966*, or at a meeting of any of his/her creditors, her or she consents to present a debtor's petition under, or to sign an authority under s.118 of the *Bankruptcy Act* or commits to any of the~~

- ~~acts of the bankruptcy specified in s.40(1)(h) to (n) of the Bankruptcy Act; or~~
(ii) ~~executes a deed of assignment or a deed of arrangement under the Bankruptcy Act; or~~

4(g) at any time during the term any director of the Other Party does any of the following things under the Bankruptcy Act 1966 (Cth)

- (i) becomes bankrupt;
- (ii) signs an authority under section 188;
- (iii) commits any of the acts of bankruptcy specified in section 40; or
- (iv) presents a debtors agreement or personal insolvency agreement or

11. Make the following variation to sub-clause 5.8(4)(o):

5.8 Terminating of Access

4(o) any application for a required consent or permit for the installation and use of the Eligible Facility as part of a telecommunication network and the telecommunication services is finally rejected or cancelled, lapses or is otherwise terminated and no further or replacement consent or permit can ~~reasonable~~ reasonably be obtained; or

12. Insert the following definitions to Clause 6.1 (Glossary and Interpretation):

Act refers to the *Telecommunications Act 1997*

Detailed field study means a field study as defined by Annexure A or Annexure B of this Code (as appropriate)

Facilities Access Application means an application as defined by Annexure A or Annexure B of this Code (as relevant).

Information package includes information established and maintained by a First Carrier in relation to the provisions of access to particular Eligible Facilities of classes of Eligible Facilities.

Master Access Agreement means an agreement as defined by Clause 4.2 of this Code, which covers general or standard terms and conditions by which the Second Carrier will obtain access to the Eligible Facilities of the First Carrier (or a class thereof).

NBN Corporation has the meaning as in section 5 of the *National Broadband Network Companies Act 2011*.

Sharing Proposal means a proposal as defined by sub-clause 4.5(4) of this Code.

Telstra means Telstra Corporation Limited (ABN 33 051 775 556)

13. Vary the following definitions in Clause 6.1 (Glossary and Interpretation):

ACMA refers to the Australian Communications *and Media* Authority.

Confidential Information includes all information, know-how, ideas, concepts, technology, manufacturing processes, industrial, marketing and commercial knowledge of a confidential nature (whether in tangible or intangible form) relating to or developed in connection with or in support of the business of a that Carrier *and which relates to Eligible Facilities or is obtained in connection with the supply or acquisition of Eligible Facilities, but does not include information which:*

- (a) *is or becomes part of the public domain (other than through any breach of the relevant agreement by the other Carrier or of an obligation of confidence to a third party); or*

(b) *is rightfully received by the other Carrier from a third person (except where that party knew or should have reasonably known that the information was obtained in breach of an obligation of confidentiality or where the third person was under a duty of confidentiality to the relevant Carrier in respect of the relevant information).*

Eligible Facility is a term intended to collectively refer to telecommunications transmission towers, sites of telecommunications transmission towers and eligible underground facilities specified in clauses 33, 34 and 35 respectively of Part 5 of *Schedule 1 of Telecommunications Act 1997*. Clause 31 of Part 5 provides that a ‘telecommunications transmission tower’ means a tower, a pole, a mast or a similar structure used to supply a carriage service by means of radiocommunications. That same clause provides that a ‘site’ means land, a building on land or a structure on land. An ‘eligible underground facility’ means an underground facility that is used, *installed ready to be used*, or intended to be used, to hold lines.

Potential Second Carriers includes persons who have submitted a current industry development plan to the *relevant Minister for Communications, Information, Technology and the Arts* as a part of applying for a Carrier licence.

PMTS means a public mobile ~~telephone~~ telecommunications service as defined in section 32 of the *Telecommunications Act 1997*.

14. Delete the following definitions in Clause 6.1 (Glossary and Interpretation):

TAF refers to the Australian Communications Access Forum Inc, declared to be the Telecommunications Access Forum under s.152AI of Part XIC of the Trade Practices Act.

TPA refers to the *Trade Practices Act 1974*

15. Vary sub-clause 1.1(1) to Annexure A:

1.1 Exchange of Information

(1) Where the Second Carrier wishes to explore the sharing of an Existing Tower and/or Tower Site of the First Carrier, the Carriers must exchange information within a reasonable period of time for the purpose of assisting the Second Carrier to make a preliminary assessment as to whether the Tower and/or Tower Site would be suitable for the Second Carrier to install Equipment for use in connection with the supply of a carriage service by means of radiocommunications. This information may include details of any relevant certificate relating to technical feasibility in respect of that

Tower and/or Tower Site issued by the ~~ACA~~ ACCC under Part of Schedule 1 to the *Telecommunications Act 1997*.

16. Vary sub-clause 4(4) of Schedule A1:

4 Response to Order for access

(4) The First Carrier is not obliged to deliver access on the Advised Delivery Date if Make Ready Work cannot be reasonably completed, due to ~~unforeseen~~ *unforeseen* circumstances...

17. Vary sub-clause 1.1(1) of Annexure B:

1.1 Exchange of information

(1) Where the Second Carrier wishes to explore the sharing of an existing Underground Facility of the First Carrier, the Carriers **must** exchange information

within a reasonable period of time to assist the Second Carrier to make a preliminary assessment as to whether the Underground Facility would be suitable for the Second Carrier to install Equipment for use in connection with the supply of a carriage service. This information may include details of any relevant certificate relating to technical feasibility in respect of that Underground Facility issued by the ~~ACA~~ ACCC under Part 5 of Schedule 1 to the *Telecommunications Act 1997*.

18. Vary sub-clause 1.1(4) of Annexure B:

1.1 Exchange of information

(4) Where an access request for the purpose of installing a Second Carrier's Equipment between two locations involves a large number of alternative Underground Facilities or routes, it may be impractical for the First Carrier to provide plans or maps for all available routes. In this situation, the Second Carrier may request that the First Carrier identify alternative suitable routes and that it undertake a subsequent preliminary study assessing alternative routes identified by the Second Carrier with a view to identifying the most appropriate Underground Facility or ~~Facilities~~ facilities. The identification of suitable alternative routes may include physical access to ~~Facilities~~ facilities, as set out in clause 1.2 of Annexure B.

A copy of the proposed varied Code is available on the ACCC website at <http://www.accc.gov.au/content/index.phtml/itemId/723176>.

Appendix 1 - List of submissions received by the ACCC

AAPT Limited, *Submission by AAPT Limited (31 May 2013) on Australian Competition and Consumer Commission (ACCC) Draft Decision to vary “A Code of Access to Telecommunications Transmission Towers, Sites of Towers and Underground Facilities (October 1999)” dated May 2013* (public and confidential version).

AAPT Limited, *Submission by AAPT Limited to Australian Competition and Consumer Commission Discussion Paper to examine “A Code of Access to Telecommunications Transmission Towers, Sites of Towers and Underground Facilities (October 1999)” dated July 2012, August 2012*, (public and confidential version).

Adam Internet Pty Ltd, *Response to the ACCC’s July 2012 Discussion Paper to examine “A Code of Access to Telecommunications Transmission Towers, Sites of Towers and Underground Facilities (October 1999)”*, August 2012.

iiNet Limited, *Response to the ACCC’s July 2012 Discussion Paper to examine “A Code of Access to Telecommunications Transmission Towers, Sites of Towers and Underground Facilities (October 1999)”*, August 2012.

NBN Co Limited, *Submission to ACCC’s Facilities Access Code Discussion Paper*, 28 August 2012.

SingTel Optus Pty Limited, *ACCC’s draft decision to vary the Facilities Access Code*, 31 May 2013.

SingTel Optus Pty Limited, *Optus submission to the Facilities Access Code 1999 Review*, August 2012 (public and confidential version).

Telstra Corporation Limited, *Response to ACCC’s Draft Decision on the Facilities Access Code*, 31 May 2013 (public and confidential version).

Telstra Corporation Limited, *Response to the Commission’s Discussion Paper on the Facilities Access Code*, 24 August 2012.

Vocus Communications Ltd, *Response to the ACCC’s July 2012 Discussion Paper to examine “A Code of Access to Telecommunications Transmission Towers, Sites of Towers and Underground Facilities (October 1999)”*, August 2012, (public and confidential version).

Vodafone Hutchison Australia Limited, *ACCC Discussion Paper on Facilities Access Code, Response to the Australian Competition and Consumer Commission*, August 2012.

Vodafone Hutchison Australia Limited, *ACCC Draft Decision to Vary Facilities Access Code, Response to the ACCC’s Draft Decision*, 31 May 2013.