IT'S HOW WE CONNECT

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Public version

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Dear Ms Balachandran

Response to ACCC's Draft Decision on the Facilities Access Code

Telstra welcomes the opportunity to respond to the Australian Competition and Consumer Commission's (**ACCC**) publication Facilities Access Code: An ACCC Draft Decision to vary "A Code of Access to Telecommunications Transmission Towers, Sites of Towers and Underground Facilities (October 1999)" (**Draft Decision**).

Telstra generally welcomes the ACCC's Draft Decision to update the Facilities Access Code (**Code**), which has not been updated since 1999. As stated in its August 2012 submission, Telstra believes that the Code has worked well to date and remains relevant today. It has reduced the costs for industry by encouraging the co-location of facilities, hence industry has been able to share access in a logical way. The updates proposed by the ACCC serve to remove obsolete references from the Code and to reflect legislative changes since 1999.

Telstra agrees with the ACCC's Draft Decision not to declare facilities access. As stated in its August submission, Telstra believes that the ACCC does not have the power to declare facilities access, nor would it be appropriate to do so. Parliament has established a specific regime to regulate access to facilities, which is set out in Parts 3 and 5 of Schedule 1 of the Telecommunications Act 1997 (**Telco Act**). In Telstra's view, it could not have been Parliament's intent to have two different access regimes (the Telco Act regime and the regime in Part XIC of the Competition and Consumer Act 2010 (**CCA**)) both apply to access to the same facilities. Accordingly, Telstra considers that it is beyond the scope of the ACCC's powers to declare access to facilities under Part XIC of the CCA and that the appropriate legislative regime for regulating facilities access is set out in Schedule 1 to the Telco Act.

Nevertheless, Telstra is disappointed with some aspects of the ACCC's Draft Decision. In particular, Telstra reiterates that it believes that the mandatory nature of the provisions relating to confidentiality, dispute resolution and non-discriminatory access is unnecessary. Carriers have been negotiating agreements for the co-location of facilities under the Telco Act framework for some time and the industry is far more sophisticated today than it was

when the Code was first introduced. Furthermore, carriers typically have commercial agreements in place which govern the supply of a range of services. By mandating specific confidentiality, dispute resolution and non-discrimination terms for some services, carriers are forced to comply with multiple (and potentially inconsistent) regimes. Where parties have been able to reach commercial agreement, it is no longer appropriate to mandate core principles in respect of such matters. **Annexure A** to this letter briefly sets out Telstra's views and proposed amendments to the mandatory conditions relating to confidentiality, dispute resolution and non-discriminatory access.

Telstra strongly disagrees with the ACCC's Draft Decision to insert a new mandatory condition on timeframes as sub-clause 2.6. Telstra considers that this change is unnecessary as – at least in Telstra's case –timeframes are already included in its agreements with its customers. Further, including the timeframes as a mandatory condition is overly prescriptive and will reduce Telstra's flexibility to respond to peaks in requests for access. For example, it is normal practice for Telstra to request non-binding forecasts of requests for access every six months. These forecasts are not always provided, indeed **[c-i-c]** rarely provides these. Telstra sometimes then receives requests for access with minimal notice and these requests can number up to **[c-i-c]** at a time. Telstra does not resource to meet these peaks and it is unreasonable to expect it to do so. Nevertheless, Telstra does work with its customers to develop plans to process un-forecast order demand, although it should be noted that such large quantities of un-forecast orders can delay order queues and other customers in those queues.

This example demonstrates the need for flexibility in timeframes and Telstra reiterates its strong belief that timeframes are most appropriately dealt with in customer agreements. Telstra is already incentivised to comply with the timeframes agreed with its customers. The flexibility required to respond to such large peaks in requests for access (which are not rare occurrences) would be severely constrained if the timeframes were to become a mandatory condition of the Code.

Telstra would be happy to further explain to the ACCC the issues that may result from making timeframes a mandatory condition and strongly urges the ACCC to reconsider its Draft Decision in this regard.

Please contact Pauline Crichton on (03) 8649 2010 or Pauline.Crichton@team.telstra.com if you have any questions regarding this submission.

Yours sincerely,

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Annexure A

Telstra's views and proposed amendments to the mandatory conditions relating to confidentiality, dispute resolution and non-discriminatory access

Clause of Code	Comment	Changes required
Chapter 1 – Introduction and scope		
1.1.3 (Variations)	To ensure that the industry has sufficient warning to implement any changes to the Code, Telstra requests that the Commission provide reasonable prior notice of amendments to the Code.	Telstra suggests amending clause 1.1.3(2) as follows: *"Carriers will be notified of variations to the Code ~~before~~ a reasonable period prior to the date of effect of such variations."*
1.2.2 (Agreements)	For the reasons noted in section 2.2 of this submission, Telstra proposes amending subclause 1.2.2(3) to permit carriers to agree provisions that differ from the mandatory provisions.	Replace subclause 1.2.2(3) with the following: *"Clauses contained in Chapter 2 of the Code do not apply to the extent (if any) they would require a Carrier to engage in conduct in connection with matters covered by a written agreement between that Carrier and another Carrier."*
Chapter 2 – Mandatory conditions of access		
Clause 2.2 (Non-discriminatory access to Eligible Facilities)	The first sentence of this clause should 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 and does not constrain the First Carrier from differentiating between different Second Carriers. The second sentence of sub-clause 2.2(1) confirms that this is the intended interpretation of the first paragraph of sub-clause 2.2(1). This interpretation is also confirmed by the Explanatory Statement to the Code.	Telstra suggests that the first paragraph of sub-clause 2.2(1) be amended to read as follows: *The First Carrier must, in relation to the provision of access to Eligible Facilities, as far as practicable, treat a Second Carrier in an equivalent manner to itself.*

Clause of Code	Comment	Changes required
Clause 2.4(2) (Dispute Resolution – the giving of access)	The note under this clause refers to the Access Pricing Principles — Telecommunications, ACCC, November 1998. Following amendments to Part XIC of the CCA, the Access Pricing Principles are no longer relevant and so these references should be deleted.	The references to Access Pricing Principles should be deleted.
Clause 2.4(4) (Dispute Resolution – the giving of access)	This clause should be amended to clarify that, in accordance with section 36(8) of Part 5 of Schedule 1 of the Telco Act, the determination of an arbitrator (whether that be an arbitrator appointed by the parties or the Commission) will have no effect to the extent to which it is inconsistent with a written agreement for the provision of facilities access. Presently it is not clear if section 36(8) of Part 5 of Schedule 1 of the Telco Act applies to determinations made under the Code.	Clarity could be achieved by inserting the following new sub-clause and making sub-clause 2.4(4) subject to it: *A determination under subclause 2.4(3) has no effect to the extent to which it is inconsistent with a written agreement that is in force between the relevant Carriers.*
Clause 6.1, definition of "ACCC Pricing Principles"	As noted above, the Commission Pricing Principles are no longer relevant following changes to Part XIC of the CCA.	This definition and associated references should be deleted.