IT'S HOW WE CONNECT

TELSTRA CORPORATION LIMITED

Response to the Commission's Discussion Paper on the Facilities Access Code

24th August 2012

Contents

Executive Summary

1. This submission has been prepared in response to the Australian Competition and Consumer Commission's (**Commission's**) Discussion Paper on the Facilities Access Code (**Code**) published on 4 July 2012 (**Discussion Paper**). The Discussion Paper was prepared in order to consider if the Code requires updating. The Code has not been reviewed or updated since its inception in 1999, although changes in the telecommunications industry have occurred in that time. A summary of Telstra's views on the Discussion Paper is set out below.

Relevance of Code

2. Telstra considers that the Code has worked well to date and remains relevant today. It has reduced the costs for industry by forcing co-location of facilities, particularly towers, which has meant that industry parties have been able to share access in a logical way. That said, Telstra considers that some sections of the Code are outdated and that amendments are required to reflect: (a) current industry practice (b) changes to the *Telecommunications Act 1997* (Cth) (**Telco Act**) and (c) the introduction of Telstra's Structural Separation Undertaking (**SSU**).

Mandatory provisions

3. The mandatory provisions of the Code need be updated to reflect current industry practices and regulatory regime changes to ensure they are up-to-date.

4. Further, the mandatory *nature* of the provisions relating to confidentiality, dispute resolution and non-discrimination is no longer necessary and may give rise to costs and inefficiencies by discouraging the evolution of technology and processes, preventing parties from agreeing terms that suit their particular relationship and requiring carriers to comply with multiple confidentiality, dispute resolution and non-discrimination regimes for the same services. Accordingly, the mandatory nature of such provisions should be reconsidered.

5. In the event that the Commission proposes any major changes to the mandatory provisions of the Code, those changes should be subject to further consultation to ensure that all interested parties are provided with the opportunity to comment.

Non-mandatory provisions

6. The non-mandatory provisions of the Code should be updated to reflect current industry practices and regulatory regime changes to ensure they are up-to-date.

7. In the event that the Commission propose any major changes to the non-mandatory provisions of the Code, those changes should be subject to further consultation to ensure that all interested parties are provided with the opportunity to comment.

Obsolete references

8. Telstra has identified obsolete references in the Code which require updating.

Third party access

9. Telstra believes an appropriately drafted separate third party access code would provide useful guidance to third party owners or operators of pit and pipe installed on or after 28 September 2011 as to the terms that may be appropriate to include in their agreements for access to those facilities (i.e. similar to the benefits of the Code for carriers).

Structural Separation Undertaking

10. There is currently overlap and inconsistency between the provisions of the SSU relating to External Interconnect Facilities and the Code. To avoid unnecessary inefficiencies associated with complying with two regimes, the Code should not apply to the extent it relates to matters that are covered by the SSU.

11. Telstra does not foresee access to External Interconnect Facilities being a "bottleneck" to access seekers looking to provide services over the NBN.

NBN Co facilities

12. At this stage, Telstra does not have any comments regarding the facilities access issues that are likely to arise in relation to access to the NBN.

13. Telstra does not believe that entry rights to towers, sites of towers and eligible underground facilities should be covered by the Code, as commercial negotiations have been successful in dealing with this issue.

Declaration of facilities access

14. In Telstra's view, the Commission does not have jurisdiction to declare facilities access under Part XIC of the Competition and Consumer Act 2010.

15. To the extent the Commission adopts a different view, Telstra considers that declaration of facilities access under Part XIC is not warranted and is not in the long term interests of end users as it would neither promote competition nor encourage investment in new infrastructure relative to the current regime that is well established, understood by industry and overall working effectively.

01 Introduction

16. Telstra welcomes the opportunity to comment on the Commission's Discussion Paper.

17. This submission sets out Telstra's comments in relation to the Commission's Discussion Paper on the Code published on 4 July 2012.

18. Section 2 of this submission contains Telstra's responses to the questions set out in the Discussion Paper, and a summary of Telstra's responses is contained in Annexure 3.

19. In addition, Telstra sets out its responses to the amendments required to the Code in Annexure 1 and detail of the key matters that should be addressed in the third party access code in Annexure 2.

02 Telstra's responses to the questions raised in the Discussion Paper

2.1 Relevance of the Code

20. In Telstra's view, the Code is still relevant for industry. However, Telstra believes that some minor amendments to the Code are needed to ensure the Code is up-to-date. In addition, the mandatory nature of those provisions of the Code related to confidentiality, dispute resolution and non-discriminatory access should be reconsidered.

Relevance of the Code

21. Telstra considers that the Code provides a useful guide to carriers as to the terms that may be appropriate in their agreements, and that could apply as default provisions if carriers are unable to reach agreement.

22. The Code 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 rigid and prescriptive. Rigid or prescriptive requirements are more likely to increase compliance costs and stifle infrastructure investment.

23. Relevantly, Telstra notes that the Code is generally consistent with current industry arrangements.

Minor amendments to the Code are required

24. Telstra considers that some sections of the Code are outdated and that certain amendments are required to reflect:

    a. current industry practice;

    b. relevant changes to the Telco Act; and

    c. the introduction of Telstra's SSU.

Further details of the amendments which Telstra considers need to be factored into the Code are set out in sections 2.2 to 2.4 and 2.6, and in Annexure 1 of this submission.

25. Telstra does not believe that the Code requires expansion or any other variation, beyond the extent outlined in sections 2.2 to 2.4 and 2.6 and Annexure 1 of this submission.

26. In the event that the Commission proposes any major changes to the Code, those changes should be subject to further consultation to ensure that all interested parties are provided with the opportunity to comment. The Commission should consider the following factors when determining whether the proposed changes are required:

    a. the need to ensure consistency with current industry practice;

    b. the financial impact on carriers of complying with any proposed changes;

    c. the need to ensure that the same type of facilities access is not subject to different (possibly inconsistent) regimes under the Code and the SSU; and

    d. the benefits of providing carriers with flexibility to agree terms that reflect their particular relationship and the flexibility to adjust contractual arrangements as technology, processes and the industry continue to evolve.

What are the costs to industry of complying with the Code?

27. While Telstra has not undertaken a review of its costs associated with complying with the Code, Telstra considers that the co-location process required by the Telco Act and described in the Code would have reduced the overall costs of carriers generally by encouraging the efficient use of resources. However, as discussed in section 2.2 of this submission, the requirement that some provisions of the Code are mandatory may:

    a. discourage the evolution of more effective and efficient processes and procedures over time and investment in technology;

    b. prevent carriers from making facilities access arrangements that reflect their particular requirements; and

    c. result in multiple dispute resolution, confidentiality and non-discrimination regimes applying to facilities access and other telecommunications access arrangements under the same agreement.

    This, in turn, may give rise to inefficiencies and compliance costs that are higher than they should be.

2.2 Mandatory Provisions of the Code

Mandatory nature of confidentiality, dispute resolution and non-discrimination provisions

28. Telstra believes that confidentiality, dispute resolution and non-discriminatory access are relevant aspects of access to facilities covered by Part 5 of Schedule 1 of the Telco Act.

However, in Telstra's view, carriers should be free to agree terms dealing with these issues that are different to the provisions in the Code for the following reasons:

a. Part 5 of Schedule 1 of the Telco Act has been in existence for a number of years. Accordingly, carriers have been negotiating agreements for the co-location of facilities under this framework for some time. The industry is far more sophisticated today than it was when the Code was first introduced. It is therefore no longer appropriate to mandate core principles of access in a way that does not allow deviations by agreement. Telstra recognises that core principles are an effective instrument to guide parties as to the terms that may be appropriate in their agreements and/or to apply as default provisions if parties are unable to agree on the matters covered by the mandatory provisions. However, Telstra considers that, where parties have a written agreement in place dealing with matters, the current mandatory provisions should not bind those parties in respect of such matters.

b. It would be consistent with the approach under Part 5 of Schedule 1 of the Telco Act and, in particular, section 36(8)), which provides that determinations made by an arbitrator (appointed by the parties or, by default, the Commission) are of no effect to the extent to which they are inconsistent with a written facilities access agreement. Applying a consistent approach here, written agreements should prevail over the Code provisions.

c. Requiring carriers to comply with the mandatory provisions may prevent the evolution of more effective and efficient processes and procedures over time in line with changes in technology. It is difficult to see the Code being updated to capture such changes on a regular basis.

d. It would give carriers the flexibility to make facilities access arrangements that reflect their particular inter-carrier relationship and prevent inefficiencies arising from duplication. For example, many relationships between carriers are broader in scope than the Code (e.g. they cover the supply of telecommunications services generally or access to facilities in addition to facilities under Part 5 of Schedule 1 of the Telco Act). In these cases, carriers should have flexibility to agree on a confidentiality of information regime, a dispute resolution process and on other access terms that are to apply consistently in respect of all services and facilities access. Currently, as the provisions of the Code are mandatory, carriers need to have regard to (i) the Code provisions for facilities access that falls under Part 5 of Schedule 1 of the Telco Act and (ii) their agreement for all other facilities access/supply of other services. This creates confusion and inefficiencies. For example, if a confidential document provided by one party to another party contained information relating to both ducts and unconditioned local loop services supplied under the same agreement, that information could be subject to two different and possibly inconsistent confidentiality regimes – one negotiated by the parties, and the other imposed by the Code.

Amendments required to ensure mandatory provisions are up-to-date

29. Regardless of whether the provisions in Chapter 2 of the Code are retained as mandatory or not, Telstra has proposed some changes to those provisions:

a. so that they are consistent with relevant sections of Part 5 of Schedule 1 of the Telco Act (under which the Code is made);

b. to pick up some of the principles established in the SSU; and

c. to provide greater clarity.

30. Telstra's proposed amendments are set out in Annexure 1 to this submission. Telstra notes that it does not consider all changes to the Telco Act need to, or should, be carried across to the Code. It has listed the changes it considers are required in Annexure 1. To the extent that other changes are proposed, Telstra would expect to have the opportunity to make submissions on these changes.

2.3 Non-mandatory Provisions of the Code

31. While it is common industry practice for carriers to exclude the application of the non-mandatory provisions (and to agree provisions that differ from the non-mandatory provisions to some extent), Telstra considers that the non-mandatory provisions are still relevant to guide commercial negotiations.

32. In light of this continued relevance, Telstra has suggested some minor changes to the non-mandatory provisions to update them. These proposed amendments are as set out in Annexure 1. Again, to the extent that other changes are proposed, Telstra would expect to have the opportunity to make submissions on these changes.

33. While not suggested by the Discussion Paper, in the event that the Commission proposes changing a non-mandatory provision to a mandatory provision, such a proposal would need to be subject to further consultation.

2.4 Obsolete References

34. Telstra has identified some obsolete references in the Code, which it believes can be either removed or amended. Telstra has listed these references in Annexure 1.

2.5 Third Party Access Code

35. For the reasons set out below, Telstra considers that the Commission should develop a *separate* third party access code for Third Party Owners.

Relevance of a third party access code

36. An appropriately drafted third party access code would provide useful guidance to third party owners or operators of pit and pipe installed on or after 28 September 2011 ("**Third Party Owners**") as to the terms that may be appropriate to include in their agreements for access to those facilities (i.e. similar to the benefits of the Code for carriers). In turn, this may encourage Third Party Owners to:

a. ensure that pit and pipe are maintained in a fibre ready state to facilitate the rollout of the national fibre network; or

b. transfer pit and pipe to Telstra or NBN Co as contemplated by the Federal Government's "Fibre in new developments" policy issued 22 June 2011 (**Greenfields Policy**).[1]

37. Telstra believes this is particularly important for Third Party Owners because many are likely to have less experience in maintaining telecommunications facilities than carriers who are subject to the Part 5 access regime. Telstra also suggests that any third party access code should be the default standard with the ability of parties, as and where agreed, to contract out of the default Third Party Access Code terms.

38. There is currently no obligation under the Telco Act for Third Party Owners to maintain their pit and pipe at an appropriate fibre ready standard on an ongoing basis. However, it could not have been Parliament's intention that, after fibre ready facilities were installed, the relevant Third Party Owner should not maintain them to the standards required to facilitate the rollout of the national fibre network. A third party access code could assist to ensure that pit and pipe are maintained at the appropriate standards by clearly setting out Third Party Owners' ongoing maintenance obligations. The inclusion of maintenance requirements in a third party access code is consistent with the non-mandatory provisions of the Code.

39. A third party access code could also assist Third Party Owners to make an informed decision about whether they are willing to maintain those facilities to an appropriate standard, or if they would prefer to transfer ownership to a carrier with the experience and resources to maintain such facilities. Once Third Party Owners are provided with this information, they may be more inclined to transfer those facilities to NBN Co or Telstra (or another carrier) as contemplated by the Greenfields Policy.

Should a separate third party access code be developed?

40. Telstra believes that the Commission should develop a third party access code for Third Party Owners which is separate from the current Code. The main reasons to develop a separate third party code are as follows:

a. as noted above, Third Party Owners are likely to have less experience in maintaining telecommunications facilities compared with carriers to whom the existing Code applies, and these differing levels of experience should be reflected in the third party access code (e.g., by prescribing maintenance standards in greater detail);

b. the existing Code deals with access to underground facilities and towers. As a result, sections of the Code will not be relevant to Third Party Owners of pit and pipe. To avoid any confusion as to which sections apply to Third Party Owners, it would be most appropriate to develop a separate code; and

[1] Available at: http://www.dbcde.gov.au/__data/assets/pdf_file/0017/136421/Fibre_in_New_Developments_Policy_Update_Statement_22_June_2011.pdf. Relevantly, the Greenfields Policy states that in new developments of 100 premises or more, developers will transfer ownership of pit and pipe infrastructure to NBN Co, and in new developments of less than 100 premises, developers will transfer ownership of that infrastructure to Telstra (pages 3-4, Greenfields Policy).

c. while the existing Code is designed to provide for reciprocal access, Third Party Owners are unlikely to require access to a carrier's facilities and therefore the third party access code would not need to be reciprocal.

What issues should a third party access code address?

41. Telstra believes a third party access code should:

    a. outline the broad criteria and provisions (including the inclusions and exclusions) of the terms and conditions to be negotiated (and guide negotiations) between a carrier and facilities owner, for the purposes of carrier access; and

    b. be restricted to pit and pipe installed by a party under Part 20A of the Telco Act and which has not been transferred to a carrier.

42. Some key matters that Telstra believes should be addressed in the third party access code are listed in Annexure 2.

2.6 Telstra's Structural Separation Undertaking

43. In Telstra's view, the provisions of the SSU relating to External Interconnect Facilities (**EIF**) and the provisions of the Code currently overlap and are potentially inconsistent. To avoid costs and inefficiencies associated with complying with two different regimes, the Code should not apply to the extent it relates to matters that are covered by the SSU.

44. Telstra does not foresee access to EIF being a "bottleneck" to access seekers looking to provide services over the NBN.

Overlap between the SSU and the Code

45. As the Commission notes in the Discussion Paper, there is overlap between the SSU and the Code in relation to EIF, where such access is in connection with the supply of an active declared service by Telstra.

46. In many cases, the mandatory provisions in the Code and the SSU are not aligned. For example, in terms of confidentiality under the SSU, Protected Information does not include information which is already public (clause 10.1(f)). However, under the Code (clause 2.1), such information could nevertheless be Confidential Information.

47. In other cases, the SSU and the mandatory provisions of the Code create two entirely separate regimes to deal with the same issue. For example, the SSU (clauses 19-20) sets out a new dispute resolution process (which was negotiated at length with the Commission) to resolve access seeker complaints via an Accelerated Investigation Process and an Independent Telecommunications Adjudicator. It is unclear how this relates to the Code, which provides that carriers must:

    a. engage in their own dispute resolution, including inter-party dispute resolution and, if necessary, mediation (clause 2.4(1));

b. have regard to the criteria the Commission must take into account if it is required to make a determination on terms and conditions under clause 36 of Part 5 of Schedule 1 of the Telecommunications Act (clause 2.4(2)); and

c. refer the matter in dispute to the Commission for arbitration if an arbitrator is not agreed (clause 2.4(6)).

48. Telstra also notes that there are many parts of the Code which are no longer relevant in respect of EIF supplied by Telstra, because they are rendered redundant by the SSU. For example, Chapters 3 and 4 of the Code set out a prescriptive process for carriers to apply for access and then negotiate the terms of access to facilities. For example, the Code requires carriers to "make reasonable endeavours to negotiate a Master Access Agreement" upon a request for access, if a Master Access Agreement does not exist (clause 4.2(1)).

49. In Telstra's view, in terms of the requirements of Chapters 3 to 5 of the Code, it is not necessary to include an obligation to negotiate any particular type of agreement or for a separate arbitration process from what is in the SSU to apply.

Amendments required to the Code to address the overlap

50. Telstra believes that these potential inconsistencies need to be resolved in order to provide certainty about Telstra's obligations under the SSU and the Code, how these obligations interact, and which set of obligations take precedence in respect of EIF. Telstra notes that the Telco Act provides that the facilities access obligations in Part 5 of Schedule 1 of the Telco Act do not apply to the extent they would prevent Telstra from complying with the SSU (e.g. Schedule 1, section 35(6)). At the very least, this exception should be set out in the Code to clarify that the provisions in the Code do not apply to the extent they would prevent Telstra from complying with the SSU.

51. Telstra suggests that the following provision should be included in 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."

This would have the effect of ensuring that:

a. where access to an EIF is provided in connection with the supply of an active declared service by Telstra, the SSU would apply to the exclusion of the Code; and

b. where access to an EIF is not provided in connection with the supply of an active declared service by Telstra (e.g. it is in relation to supply of a service by NBN Co), the Code would continue to apply.

Access to External Interconnect Facilities being a "bottleneck"

52. Telstra does not foresee access to EIF being a "bottleneck" to access seekers looking to provide services over the NBN. In particular competing infrastructure to Telstra's EIF exists in CBD areas and the demand for Telstra's EIF is low outside of CBD areas. In practice, this means that the EIF

is not a "bottleneck" for access seekers. Further, as noted above, to date the industry has been able to successfully negotiate access arrangements for these types of facilities.

2.7 NBN Co Facilities

53. At this stage, Telstra has no comments in relation to facilities access issues that are likely to arise in relation to access to the NBN.

54. Telstra does not believe that entry rights to towers, sites of towers and eligible underground facilities should be covered by the Code. In Telstra's experience, to date parties have been able to successfully reach commercial agreements regarding entry rights to these facilities and therefore Telstra does not consider it necessary to expand the Code to deal with this issue.

2.8 Declaration of Access to Facilities

55. In Telstra's view and for the reasons set out below:

    a. the Commission does not have the power to declare access to facilities that are subject to Part 5 of Schedule 1 to the Telco Act (or indeed, any other facilities) under Part XIC of the *Competition and Consumer Act 2010* (Cth) (**CCA**); but

    b. if the Commission adopts a different view that it does have power to declare access to those facilities, it would not be appropriate or necessary for the Commission to do so.

The Commission does not have power to declare facilities access

56. 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 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 CCA) applying to access to the same facilities. Accordingly, Telstra considers that it is beyond the scope of the Commission'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 of the Telco Act. In support of this view, Telstra notes:

    a. The separate operation and distinct application of parallel regulatory regimes has been endorsed by the recent changes to the Telco Act and the CCA. More particularly, despite making considerable changes to both Acts, Parliament has not sought to combine the two regimes;

    b. The Commission also appears to have endorsed the separate operation and distinct application of parallel regulatory regimes for access to facilities and access to services in the Commission's Final Access Determination for the Domestic Transmission Capacity Service dated June 2012. In that determination, the Commission decided not to include non-price terms relating to facilities access even though it had proposed such terms in its draft determination. The Explanatory Statement to that final access determination explains that this decision was made on the basis that there would already be arrangements for facilities access in place between the access seeker and the access provider. The Commission also notes as part of its reasons for this decision that

"facilities access remains subject to regulation under the Telecommunications Act and the ACCC Facilities Access Code."[2]

c. If two regulatory regimes were to apply to facilities, this would give rise to inefficiencies and confusion as carriers attempted to comply with two different, and potentially inconsistent, regimes and compliance costs would inevitably increase.

Declaration of facilities access is not necessary or appropriate

57. If, despite the above submission, the Commission took the view that it did have the power to declare facilities access under Part XIC, Telstra considers that it would not be necessary or appropriate for the Commission to do so.

58. In Telstra's view, declaration of facilities access is not warranted and is not in the long term interests of end users.

a. Declaration of access to facilities would not promote the long-term interests of end-users of carriage services or services provided by means of carriage services as it would:

i. neither promote competition nor encourage efficient investment in new infrastructure compared to the existing long standing regulatory framework for access to facilities which is well established, understood by industry and overall is working effectively;

ii. generate uncertainty because any potential inquiry (which would need to occur as a pre-requisite to any formal declaration) is likely to discourage investments and competitive conduct by current and potential service providers who wish to access each other's facilities at a time when regulatory certainty is especially important given the planned transition to the NBN and a new industry structure; and

iii. ignore the long term competitive dynamics that are being encouraged by the deployment of the NBN including in relation to the provision of competitive access to facilities (including from NBN Co.).

b. The existing regulatory regime is effective in providing efficient access to the facilities specified in Part 5 of Schedule 1 to the Telco Act, as demonstrated by the fact that:

i. since 1999, there have been a significant number of commercial agreements between Telstra and other carriers for facilities access. This shows that carriers have been able to successfully negotiate access arrangements that suit their long-term commercial needs under the existing regime; and

ii. in Telstra's view, the existing arbitration provisions in Part 5 of the Telco Act also support the view that it is not necessary to declare access to facilities, as there is already an effective regulatory remedy available to the Commission in the event that a dispute between carriers cannot be resolved commercially.

[2] See page 48 of the Explanatory Statement.

Annexure 1 - Detail of Amendments to the Facilities Access Code

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 a reasonable period prior to ~~before~~ the date of effect of such variations."*
1.2.1 (Facilities)	For the reasons noted in section 2.6 of this submission, the Code should not apply to matters, such as the External Interconnect Facility, which are covered by the SSU.	Telstra proposes including the following paragraph at the end of clause 1.2.1: *"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."*
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 2.1(1) (Confidential Information – all Carriers)	As noted in section 2.2 of this submission, it is common industry practice for facilities access to be provided under agreements that also contain terms relating to other telecommunications services (such as wholesale line rental services, etc). As the confidentiality obligation in clause 2.1(1) is drafted broadly, it may capture information which does not relate to access to Eligible Facilities but relates to other telecommunications services to which the Code does not apply but which are supplied under the same agreement as the Eligible Facilities. Amendments should be made to clarify that the confidentiality provisions of the Code only apply to information relating to, or obtained in the relation to the supply or acquisition of, access to Eligible Facilities. In addition, there should be an exception to these confidentiality obligations for information that is already in the public domain or which the carrier obtains legitimately from a third party. This is a standard exception commonly found in confidentiality provisions in the industry (and is	These issues could be addressed by amending the definition of "Confidential Information" in Chapter 6 as suggested below.

Clause of Code	Comment	Changes required
	also contained in the SSU).	
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 2.3 (Queuing policy)	The queuing policy provisions of the Code should be amended to be consistent with the Explanatory Statement by expressly acknowledging the First Carrier's right to reserve space on or in a facility for the supply of its own retail or wholesale services and its right to reject a request for facilities access from a Second Carrier where space has been so reserved. This is reflected in the concept of "Currently Planned Requirements" in the Explanatory Statement, which is used to explain the approach the Commission may take to determining the price of access if required to arbitrate in a facilities access dispute. This is also consistent with the principles that were negotiated and agreed with the Commission under the SSU as it applies to external interconnect facilities.	Telstra suggests: (a) amending sub-clause 2.3(2) by replacing it with the following: *(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.* (b) adding a new sub-clause 2.3(7) as follows *(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.*
Clause 2.4(1) (Dispute Resolution – the giving of access)	The note under this clause refers to the TAF Telecommunications Access Code, which was approved by the Commission under Division 4 of Part XIC of the Trade Practices Act 1974 (now the CCA). This Division was repealed by the Telecommunications Legislation Amendment (Competition and Consumer Safeguards) Act 2010. Accordingly, the references to the TAF Telecommunications Access Code are no longer relevant.	The references to the TAF Telecommunications Access Code and the TAF should be deleted.
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	The references to Access Pricing Principles should be deleted.

Clause of Code	Comment	Changes required
	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.*
Chapter 6		
Clause 6.1, definition of "ACA"	The ACA no longer exists.	This definition should be replaced with a new definition of the ACMA and references to "ACA" throughout the Code should be replaced with references to "ACMA" or the "ACCC" (as relevant).
Clause 6.1, definition of "Confidential Information"	For the reasons noted in the comments on clause 2.1 of this submission, Telstra proposes amendments to the definition of Confidential Information.	Telstra proposes amending the definition of Confidential Information as follows: ***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 ~~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).*
Clause 6.1, definition of "Eligible Facility"	The definition of "Eligible Facility" in chapter 6 states that under clause 31 of Part 5 of Schedule 1 of the Telco Act, "eligible underground facility" is defined to mean an underground facility that is used, or intended to be used, to hold lines.	Telstra suggests amending the reference to "eligible underground facility" in the Code to align with the definition in the Telco Act.

Clause of Code	Comment	Changes required
	However, under that clause "eligible underground facility" is actually defined to mean an underground facility that is used, installed ready to be used, or intended to be used, to hold line.	
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.
Clause 6.1, definition of "TPA"	The definition of "TPA" is currently not used in the Code.	Delete the reference to TPA or, if it is used in the revised Code it should be replaced with references to the Competition and Consumer Act 2010 (Cth).
Attachment 1. Arbitration and pricing considerations		
General comment	The pricing considerations in this Attachment are out of date.	This attachment should be updated to reflect the Commission's current approach when setting price terms for facilities access. Specifically, Telstra believes that no price terms should be set for facilities access and that the Commission should continue to allow commercial arrangements to have primacy over any specific price terms/methodology. Telstra also believes this approach to be consistent with the Commission's current approach to setting price terms for facilities access.

Annexure 2 – Key matters that should be addressed in the third party access code

Telstra suggests that the following matters be addressed in the third party access code:

- ordering and provisioning procedures for access;
- operation and maintenance procedures;
- arrangements for dealing with delays in the delivery of access;
- supervisory procedures required by either party, to the extent necessary, in relation to the performance of make ready work;
- dispute resolution procedures (prior to the Commission's mediation);
- financial security requirements;
- credit assessment procedures (both initial and ongoing);
- confidentiality;
- indemnities;
- any licence agreement to be entered into in respect of a grant of access to the relevant facilities;
- reasonable forecast information to be provided, as described in clause 3.5 of the existing Code;
- technical specifications relating to matters to be agreed by the parties;
- relevant operational and engineering practices and procedures as agreed between the parties;
- the parties' respective rights and obligations in relation to physical access to the relevant facilities, including what work should be carried out and when that work will be carried out;
- the parties' respective rights and obligations in relation to physical access to the relevant facilities for the purpose of maintenance, as well as security and access-coordination procedures;
- emergency response procedures; and
- procedures for access to the relevant facilities by third party users.

Annexure 3 - Summary of Telstra Response to the Commission's Questions

Question for Comment	Telstra Comment
Relevance of the Facilities Access Code	
1. Is the Facilities Access Code still relevant for industry?	The Code is still relevant for industry as it provides useful guidance to carriers as to the terms that may be relevant to include in facilities access agreements, and it is generally consistent with current industry arrangements.
2. Is there a need for the ACCC to vary the Facilities Access Code? If so, what changes should be made?	Telstra considers that some amendments to the Code are required, as further described in sections 2.2, 2.3, 2.4 and Annexure 1.
3. What factors should be considered if the Facilities Access Code was to be varied?	The Commission should consider the following factors when varying the Code: (a) consistency with current industry practice; (b) the financial impact on carriers in complying with any changes; (c) ensuring consistency with the SSU and the Telco Act; and (d) retaining flexibility for parties to agree terms and to change those terms as technology and the industry evolves.
4. Has the Facilities Access Code been effective in assisting the co-location of facilities?	Telstra believes that the co-location process in the Code has been effective to date, by providing guidance to carriers as to the terms that may be relevant for their facilities access agreements without being overly rigid and prescriptive.
5. What have been the costs, if any, to industry in complying with the Facilities Access Code?	Telstra considers that the co-location process set out in the Code has likely reduced the overall costs of carriers generally by encouraging the efficient use of resources. However, the mandatory nature of some provisions may give rise to costs and inefficiencies by discouraging the evolution of technology and processes, preventing parties from agreeing terms that suit their particular relationship and requiring carriers to comply with multiple confidentiality, dispute resolution and non-discrimination regimes for the same services.
Mandatory Provisions of the Facilities Access Code	
6. Are the mandatory provisions of the Facilities Access Code still relevant to current commercial agreements?	Telstra believes that the issues covered by the mandatory provisions in Chapter 2 of the Code are still relevant to the relationship between carriers with respect to facilities access, but that the mandatory provisions should not apply to the extent that the matters covered by those provisions are dealt with in written agreements between carriers.
7. Should the mandatory provisions of the Facilities Access Code be changed? If so, what changes should be made?	Amendments should to be made to the mandatory provisions to reflect current industry practice and the current regulatory regime, as set out in Annexure 1.

Non-mandatory Provisions of the Facilities Access Code	
8. Is it common commercial practice to include the non-mandatory provisions of the Facilities Access Code in agreements? If not, do they form a useful basis for negotiations?	While it is common industry practice to exclude the non-mandatory provisions, Telstra considers that the non-mandatory provisions are still relevant to guide commercial negotiations.
9. Should the non-mandatory provisions of the Facilities Access Code be changed? If so, what changes should be made?	Telstra believes minor amendments should be made to update the non-mandatory provisions, as set out in Annexure 1.
Obsolete References	
10. Are there other aspects of the Facilities Access Code that industry considers to be outdated?	Telstra considers minor amendments should be made to the Code to update it to reflect current industry practice, as set out in Annexure 1.
11. Are there any other provisions that should be reviewed to improve the accuracy and clarity of the Facilities Access Code?	Telstra considers minor amendments should be made to the Code to improve its accuracy and clarity, as set out in Annexure 1.
Third Party Access Code	
12. Is there a need for the ACCC to introduce a third party access code for fixed-line facilities under section 372NA of the Telco Act? If so, why?	Telstra believes that an appropriately drafted third party access code would provide useful guidance to Third Party Owners as to the terms that may be appropriate to include in their agreements for access to those facilities, in the same way that the Code provides guidance to carriers. It will also encourage Third Party Owners to: (a) ensure that pit and pipe are maintained in a fibre ready state to facilitate the rollout of the national fibre network; and (b) transfer pit and pipe to Telstra or NBN Co as contemplated by the Federal Government's Greenfields Policy.
13. If so, should a separate code be developed or should the new provisions be included in the existing Facilities Access Code?	A separate code is recommended. This is because: (a) the code should be tailored to reflect that third party owners are likely to have less experience in maintaining telecommunications facilities, compared with the carriers to whom the existing Code applies; (b) the existing Code deals with access to underground facilities and towers, and therefore sections of the Code will not be relevant to Third Party Owners of pit and pipe; and (c) unlike the existing Code, there is no need for the third party access code to be reciprocal.

14. What should be considered in a third party access code? Is it appropriate to mirror the provisions in the existing Facilities Access Code in a third party access code?	A third party access code should: (a) outline the broad criteria of the terms and conditions to be negotiated between a carrier and facilities owner, for the purposes of carrier access; (b) be restricted to pit and pipe installed by a party under Part 20A of the Telco Act which have not been transferred to a carrier; and (c) clarify that the owner/operator of pit and pipe has continuing obligations relating to their facilities (including maintaining to a fibre ready standard and complying with any other applicable industry standard). Telstra has listed some other issues that should be included in the third party access code in Annexure 2. For the reasons noted in Telstra's response to question 13 above, the provisions of the current Code should not be mirrored for a third party access code.
Telstra's SSU	
15. Should the ACCC consider any changes to the Facilities Access Code in light of the SSU? If so, what should be considered?	The Code should not apply to the extent it relates to matters that are covered by the SSU. Otherwise, there will be ambiguity about how different obligations interact and there are likely to be costs and inefficiencies associated with complying with two different regimes.
16. To what extent is access to External Interconnect Facilities expected to be a bottleneck in providing services over the NBN?	Telstra does not foresee access to External Interconnect Facilities being a "bottleneck" to access seekers looking to provide services over the NBN. To date, the industry has been able to successfully negotiate access arrangements for these types of facilities.
NBN Co Facilities	
17. What facilities access issues are likely to arise in relation to access to the NBN? How could such issues be addressed in the Facilities Access Code?	At this stage, Telstra does not have any comments regarding the facilities access issues that are likely to arise in relation to access to the NBN.
18. Should the Facilities Access Code include provisions dealing with entry rights to towers, sites of towers and eligible underground facilities?	Telstra does not believe that entry rights to towers, sites of towers and eligible underground facilities should be covered by the Code, as the parties have been able to successfully negotiate entry rights to date.
Declaration of Access to Facilities	
19. How effective is the existing regulatory regime, including the Facilities Access Code, at providing efficient access to the facilities specified in Part 5 of Schedule 1 to the Telco Act?	The existing regulatory regime is effective in providing efficient access to telecommunications transmission towers, the sites of telecommunications transmission towers and eligible underground facilities.

20. Should the ACCC consider declaring access to particular facilities? If so, which facilities should be declared?	Telstra considers that it is beyond the scope of the Commission's powers to declare access to facilities under Part XIC of the CCA and that the appropriate legislative regime for regulating facilities access is the Telco Act regime.
Other	
21. Is there anything else the ACCC should consider in an update of the Facilities Access Code?	Telstra has no additional comments at this stage.