



# **ACCC DISCUSSION PAPER FACILITIES ACCESS CODE**

**SUBMISSION BY  
VODAFONE HUTCHISON AUSTRALIA**

**September 2018**

## Introduction

Vodafone Hutchison Australia Pty Ltd (**VHA**) welcomes the Australian Competition and Consumer Commission's (**ACCC**) consultation on its review of the Facilities Access Code (**the Code**).

The Code remains a necessary tool for facilitating commercial negotiations between carriers in relation to eligible facilities however it has some limitations which should be addressed. In this regard, we support a number of the ACCC's proposed changes to the Code however we encourage the ACCC to consider these changes as part of a holistic approach to telecommunications reform. VHA maintains that the most appropriate form of regulatory intervention in promoting competition and efficient investments in mobile network infrastructure in regional Australia is to promote network sharing.

While in metropolitan areas there is little commercial incentive for a Mobile Network Operator (**MNO**) to deny another MNO access to its towers and sites, the situation in regional areas is very different. In our experience, the Code has not been as effective as it could be in overcoming circumstances where a facilities owner has sought to impede access to its mobile towers and sites in regional areas. To ensure the Code is more effective in enabling infrastructure sharing, we support a 'use it or lose it' obligation on facilities owners as a mandatory condition of the Code. If a facilities owner does not have a finalised proposal in its current program of works, which typically covers the next two years, then it shouldn't be able to reserve space on its towers or sites to the detriment of access-seekers. A similar obligation is not necessary for access-seekers given existing bilateral facilities access agreements, which operate in conjunction with the Code, already include time periods for access-seekers to commence construction activity.

The Code does not currently require carriers to consult with other carriers on co-location in developing plans for new eligible facilities. While there is some sharing of information via the Mobile Carriers Forum (**MCF**) of which the MNOs are members, there is not currently a formal process in place for MNOs to share deployment plans with other MNOs. MNOs tend to make contact with other MNOs once building has already commenced, yet early engagement between MNOs provides the opportunity to collaborate in the pre-design and construction of these towers and sites in particular, thereby reducing the costs of deployment. This in turn may lead to an environment where MNOs are incentivised to consider co-building options earlier in their planning process than they do now, which may foster a more collaborative approach to site building and result in towers being built at locations that may not otherwise be commercially viable for an individual MNO, particularly in regional areas.

We support strengthening MNO compliance with the co-location consultation process for new facilities outlined in Clause 4.5 of the Code as well as making this process a mandatory condition of the Code so that it will apply to towers and sites of towers. We also support further clarification of 'reasonable' in sub-clause 4.5 (2). Rather than issuing a public notice however we propose that the requesting carrier should notify other carriers via the existing quarterly meetings of the industry's Mobile Carriers Forum (**MCF**).

## VHA's specific responses to the ACCC's questions

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

1. Should the words 'may choose to' be deleted and replaced with 'must' in Sub-clause 4.5.1 of the Facilities Access Code?
2. Should the words 'including by public notice' be inserted in to Sub-clause 4.5.2?
3. Should the co-location consultation process in Clause 4.5 of the Facilities Access Code be made a mandatory condition of the Code? If so, should it relate to all eligible facilities? If not, please specify the eligible facilities to which Clause 4.5 should apply?
4. Should any of the co-location negotiation processes be changed? If so, why?
5. Do any of these co-location negotiation processes require further clarification? For example, should 'reasonable' in clause 4.5.2 of the Facilities Access Code be defined?
6. Are there any new processes that should be added to Clause 4.5, or any other part of the Facilities Access Code to promote co-location of eligible facilities?

The Code does not currently require carriers to consult with other carriers on co-location in developing plans for new eligible facilities. VHA believes MNOs with plans for new towers and sites should be required to undertake the co-location consultation process outlined in Clause 4.5 of the Code, but does not consider it necessary for this to include eligible underground facilities.

We agree with the ACCC that compliance with the co-location consultation process could be strengthened by replacing the words 'may choose to' with 'must' in Sub-clause 4.5(1):

#### Clause 4.5

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

We also support the co-location consultation process in Clause 4.5 becoming a mandatory condition of the Code for new towers and sites.

VHA does not consider it is necessary for the Code to require carriers to issue a public notice for all proposed new towers and sites as this is already required under Industry Code *C564:2011 Mobile Phone Base Station Deployment*.

VHA believes the MCF is the most appropriate forum for information sharing between carriers in relation to deployment plans for new sites and towers.

As such, we propose that the words 'including by notice at Mobile Carriers Forum meetings' be inserted into Sub-clause 4.5(2) as follows:

## Clause 4.5

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

The ACCC has previously recognised the economic challenges of deploying mobile network infrastructure outside metropolitan areas in both the domestic mobile roaming inquiry in 2017 and the Communications Sector Market Study in 2018. The Regional Telecommunications Independent Review Committee has also recognised that low population density and higher operational costs present barriers to infrastructure-based competition in regional and rural Australia<sup>1</sup>, owing to the natural monopoly characteristics of these areas.

In regional areas in particular, where it is uneconomic for competitors to duplicate infrastructure, there needs to be a much greater focus on the shared deployment of network infrastructure. With the exception of VHA's long-standing infrastructure sharing agreement with Optus, co-building is not common mobile industry practice in Australia.

In other markets, most notably New Zealand, the mobile industry has embraced infrastructure sharing as a means of overcoming the barriers raised by low population densities. New Zealand's three MNOs - Vodafone, Spark and 2degrees - formed a joint venture, The Rural Connectivity Group, to jointly build, own and operate around 500 mobile towers in regional areas. The project involves all three MNOs co-building towers and sharing one set of radio access network equipment and the capacity on each tower built by the partnership via Multi Operator Core Network (**MOCN**) technology. All antennas, equipment, transmission and power supply is shared and each operator pays a monthly fee based on the amount of capacity its customers use on each tower.<sup>2</sup>

The Victorian Regional Rail Connectivity Project (**VRRCP**) is another example of how co-building can deliver the best outcomes for mobile users. The \$18 million project will see 35 new towers built along the state's five busiest regional rail corridors through a partnership between Vodafone, Telstra and Optus. While each MNO installs their own radio access equipment and transmission, the project involves full sharing of designs, joint site acquisition and power sharing. While this approach uses a less effective model of infrastructure

---

<sup>1</sup> <https://www.communications.gov.au/sites/g/files/net301/f/rtirc-independent-committee-review-2015-final.pdf>

<sup>2</sup> <http://www.ruralconnectivitygroup.com/>

sharing than the one currently underway in New Zealand it is still effective in increasing both coverage and choice for end users.

In both case studies, there are overarching commercial and/or regulatory incentives which drive industry participants to come together and cooperate to efficiently deploy infrastructure in areas where the economics of infrastructure deployment is challenged on a standalone basis. It is not contentious that these co-build scenarios are pro-competitive, and VHA has consistently advocated for industry and government to work together to co-build in regional parts of Australia to provide mobile coverage sooner, cheaper and in a way that promotes downstream competition.

As Optus noted at the ACCC's Regional Mobile Issues Forum earlier this year, there is currently no adequate process to share information on future planning of investment<sup>3</sup>. VHA agrees with Optus' observation that current informal processes, such as the MCF's, are not sufficiently robust and are rarely used to plan co-builds<sup>4</sup>. There is no MCF formal agreement covering the circumstance where a MNO may be planning a tower and a site and wants to proactively query the interest of other MNOs in co-building.

The Australian Mobile Telecommunications Association (**AMTA**) has been working with its members, including VHA, to review existing MCF processes and agree a high-level process for the sharing of deployment plans for regional and remote areas via quarterly MCF meetings. While the MCF is the appropriate forum for the sharing of this information, VHA believes MNOs with plans for new towers and sites should be required to undertake the co-location consultation process outlined in Clause 4.5 of the Code. We note Optus has previously indicated that improvements could be made to the facilities access regime to facilitate greater upfront collaboration between MNOs before sites are constructed.<sup>5</sup>

While there are bilateral facilities access agreements between MNOs, VHA's experience is that these agreements are strongly biased towards vertically-integrated infrastructure owners. This bias can arise at many stages in the negotiation, including in the design of facilities themselves so as to hinder effective sharing. The commercial incentives for Telstra, in particular, in regional areas are not conducive to sharing, hence there are rarely any pre-build discussions between MNOs.

Telstra routinely builds towers that are dimensioned and structured in such a way that they are only practically suitable for a single tower occupant. This approach is usually justified by Telstra on the basis of speed of deployment and reduced build costs, however it effectively locks up these towers for Telstra's use and makes it significantly more expensive for MNOs to co-locate on these towers at a later date. These type

---

<sup>3</sup> ACCC, Regional mobile issues forum 28 February 2018 – summary report, April 2018, p.8.

<sup>4</sup> Optus, Submission in response to the ACCC Draft Decision: Domestic Mobile Roaming Inquiry, public version, June 2017, p.13.

<sup>5</sup> Optus, Submission in response to the ACCC Discussion Paper: Domestic Mobile Roaming Declaration Inquiry, 25 November 2016, p. 22.

of practices occur both in the context of commercial deployments as well as under the Government's Mobile Black Spot Program where deployments are subsidised by taxpayers.

In the context of the Mobile Black Spot Program, contrary to the spirit and letter of the Program's guidelines, Telstra negotiated a specification for co-location space on its towers which was substantially less than the minimum required for the standard space and weight requirements of co-location seekers. Telstra also insisted on standard co-location pricing despite having received substantial subsidies (~50 per cent) for the capital costs of building its towers. This approach goes against the intent of both the Mobile Black Spot Program and the facilities access regime and raises further barriers to Telstra's competitors investing in regional areas.

Given this situation, VHA is encouraged that Telstra has indicated it is supportive of promoting early information sharing in relation to intended greenfield sites to encourage co-location and avoid duplication of infrastructure and, where relevant, to allow access providers to share in construction costs in some circumstances<sup>6</sup>. Telstra has also expressed the view that MNOs should be required to conduct pre-build discussions, particularly in areas where there is limited infrastructure, to address concerns that base stations cannot accommodate equipment from other MNOs.<sup>7</sup> To ensure this occurs in practice, we support the ACCC's proposed strengthening and mandating of Clause 4.5 of the Code.

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

- 7. Should the Facilities Access Code impose a 'use it or lose it' obligation as a mandatory or non-mandatory Code condition. If so, should it apply to all eligible facilities and carriers using the facility? What time period should apply?*
- 8. How would a 'use it or lose it' obligation operate? For example, should a carrier lose access to any portion of the facility that it does not use within the designated timeframe? Should the non-mandatory provisions of the Facilities Access Code be changed? If so, what changes should be made?*
- 9. Are there any improvements that could be made to the Facilities Access Code to further facilitate access to eligible facilities owned and/or operated by NBN Co?*

VHA supports a 'use it or lose it' obligation on facilities owners as a mandatory condition of the Code. If a facilities owner/access provider does not have a finalised proposal in its current program of works, which typically covers the next two years, then it shouldn't be able to reserve space on its towers or sites to the detriment of access-seekers.

---

<sup>6</sup> Telstra, Response to the ACCC's Discussion Paper in the domestic mobile roaming declaration inquiry, 2 December 2016, p.71

<sup>7</sup> Telstra, Response to ACCC Draft Decision in the domestic mobile roaming declaration inquiry, public version, June 2017, p.49.

A similar obligation is not necessary for access-seekers given existing bilateral facilities access agreements, which operate in conjunction with the Code, already include time periods for access-seekers to commence construction activity.

Vertically integrated firms which own more facilities have an incentive to raise the wholesale prices of upstream inputs such as co-location in order to slow or minimise the impact of downstream competition. Telstra has by far the largest portfolio of regional mobile towers and has every commercial incentive to deny access to, raise the price of access to and/or delay access to these critical upstream inputs in order to increase its revenues and impede competitive network deployment.

In our submission to the ACCC's domestic mobile roaming inquiry<sup>8</sup>, we stated that the facilities access regime has been effective in promoting commercial arrangements for passive sharing where both MNOs wish to share a tower, particularly in metropolitan areas. However, there are still various mechanisms that can be used by a facilities owner to impede access if it did not wish to share a tower (e.g., building a tower that can only host one occupant; reserving spare capacity on the tower for itself; over-charging for access; or locating a competitor at a lower height hence giving the competitor less geographic signal coverage).

The height at which an access-seeker's mobile equipment is located on a tower has a significant impact on the coverage that can be achieved from the tower and hence the effectiveness and efficiency of the deployment. Telstra routinely reserves not only the top of the tower for itself with actual equipment deployments, but also additional space on the top of the tower for so-called 'capacity reservations' for potential future deployments. Some of these capacity reservations are of a questionable nature and appear to raise issues of preferential treatment and discrimination. Consequently, access-seekers are left to install their equipment at a lower height on the tower which can be insufficient to achieve a viable level of coverage. This places access-seekers at a material competitive disadvantage to Telstra at the same location.

Telstra also has a policy in place that requires access-seekers to install their equipment shelter outside of the tower site compound when co-locating on its towers, even if there is space within the site compound. This means for example that even if an access-seeker enters into a sub-lease agreement with Telstra for the purposes of co-locating, Telstra forces the access-seeker to go off the site compound and enter into a separate, additional lease agreement with a landlord for the purposes of installing its equipment shelter. This behaviour by Telstra can mean that the co-location option may not end up being cheaper than building a separate tower.

---

<sup>8</sup> VHA, Domestic Mobile Roaming Declaration Inquiry Part A of the submission by VHA, 5 December 2016, pp. 97-98 VHA, Domestic Mobile Roaming Declaration Inquiry – Part B of the submission by VHA – Response to specific questions by the ACCC, 5 December 2016, pp. 13-16.

VHA does not propose specific improvements to the Code in relation to eligible facilities owned and/or operated by NBN Co. In our experience, access to NBN Co. facilities is currently working effectively.

### **Emerging facilities access issues**

- 10. Are there any improvements that could be made to the Facilities Access Code to facilitate the deployment of distributed antenna systems?*
- 11. Are there any barriers to accessing underground facilities, particularly leading to NBN POI sites and data centres? If so, how could the Facilities Access Code be amended to mitigate these barriers?*
- 12. Are there any changes to the Facilities Access Code required to facilitate the roll-out of 5G technologies?*
- 13. Are there any other changes to the Facilities Access Code that are not covered in this Discussion Paper but which would facilitate access to eligible facilities?*

VHA notes the ACCC is of the view that “transmission tower” for the purposes of Part 5 of Schedule 1 of the Telco Act would include the structural infrastructure for a distributed antenna system (**DAS**). As such, VHA does not propose any further amendments to the Code in respect of the deployment of DAS.

VHA does not propose specific amendments to the Code in relation to underground facilities owned and/or operated by NBN Co.

Similarly, VHA does not propose specific amendments to the Code to facilitate the roll-out of 5G technologies or consider that any further changes beyond what has been discussed above in response to the Discussion Paper are currently required.