ACCC DRAFT DECISION TO VARY FACILITIES ACCESS CODE

RESPONSE TO THE
ACCC'S DRAFT DECISION

31 May 2013

1. Executive summary

Vodafone Hutchison Australia Pty Limited (**VHA**) welcomes the Australian Competition and Consumer Commission's (**ACCC**) draft decision to update "*A Code of Access to Telecommunications Transmission Towers, Sites of Towers and Underground Facilities (October 1999)*" (**Code**) while retaining the basic protections offered by the Code. Subject to the issues identified in this response, VHA encourages the ACCC to implement the changes it has proposed to address outdated references, ensure consistency with current regulatory requirements and industry practices, and improve the effectiveness of the Code. The ACCC's proposed changes will assist in ensuring that the Code remains relevant in light of the ongoing structural change in parts of the telecommunications industry.

VHA also welcomes the ACCC's stated intention to continue to monitor aspects of the Code which, while not warranting amendment at this time, may need to be revisited once the NBN rollout is further progressed and other changes in the industry take effect. In particular, we agree it is desirable to monitor the operation of the mandatory dispute resolution procedures (see **section 3**) and the need for declaration of access to any particular facilities under Part XIC of the *Competition and Consumer Act 2010 (Cth)* (**CCA**) (see **section 5**). We also welcome the ACCC's intention to consult on facilities access issues more broadly as part of its upcoming Fixed Services Review and look forward to engaging with the ACCC in that context.

The Code has been, and remains, a necessary tool for facilitating efficient commercial outcomes between carriers in relation to access to towers and underground facilities including by providing efficient sharing of infrastructure. The changes that have been proposed by the ACCC will assist the Code to remain effective and relevant. However VHA considers that a few additional changes are still required.

As discussed in **section 2**, VHA welcomes the ACCC's decision to include the timeframes for applying for and providing access to facilities in the mandatory provisions of the Code. However we are concerned that these provisions may still afford facility owners too much discretion.

In **section 6**, we query whether the proposed amendments relating to reserved capacity vary the Code in a manner which may discourage consultation between carriers at the planning stage. The proposed changes may also be susceptible to exploitation, and seem primarily intended to accommodate Telstra. This is neither appropriate (given the purpose of the Code) nor necessary (given the limited overlap between the Code and Telstra's Structural Separation Undertaking (**SSU**)).

2. Timeframes

VHA welcomes the ACCC's proposal to elevate requirements relating to the timeframes for applying for and providing access to facilities to the mandatory provisions of the Code This appropriately reflects their role as a key aspect of non-discriminatory access.

However we remain concerned that the carrier's obligation to comply with these timeframes is qualified by the words ""*unless a Carrier considers it would not be reasonably practicable for it to comply with the specified timeframes*".

VHA considers that making requirements relating to timeframes mandatory is necessary to address a key problem VHA (and other carriers) have experienced in relation to access arrangements. Delays experienced by VHA and other carriers in obtaining access to facilities have caused significant detriment, both in terms of network planning and network rollout costs. These delays have also placed those carriers seeking access at a significant competitive disadvantage, with a concomitant impact on downstream competition.

To help address those concerns, VHA suggests that additional procedural requirements be included to reduce the possibility of carriers relying on the "*not reasonably practicable"* qualification to undermine the primary obligation. In particular, we propose that carriers who seek to rely on it be required to provide detailed reasons as to why it is not practicable to meet the timeframes. As well as providing discipline, this will assist in the carriers' efforts to agree amended timeframes and in any dispute resolution that may follow. Proposed amendments are at **Annexure A**.

3. Dispute resolution

VHA remains of the view that, while the mandatory dispute resolution provisions in clauses 2.4 and 2.5 of the Code generally strike a good balance between encouraging a commercially agreed dispute resolution process and providing a safety net where parties are unable to agree, two aspects (namely mandated mediation and referral of a dispute to an arbitrator other than the ACCC) are undesirable. VHA welcomes the ACCC's stated intention to continue to monitor facilities access issues to determine whether the dispute resolution provisions of the Code may need to be varied.

4. Non mandatory provisions

VHA's proposed amendments to the non-mandatory provisions were intended to increase the relevance of these provisions by ensuring, so far as possible, that they remain consistent with positions have been generally accepted within the telecommunications industry. They also sought to address particular issues that have arisen in the negotiation and implementation of VHA's facilities access arrangements. While VHA understands the ACCC's reluctance to make too many changes, there are a couple we would like it to reconsider.

4.1 Application requirements

An ongoing area of concern for VHA has been the amount of information it is required to provide for applications, and the tendency of other carriers to require information that is unnecessary. This, in turn, has delayed access. VHA requests that provisions dealing with application requirements specify that only information that is *reasonably necessary* be required.

5. Telstra's SSU and NBN Co facilities

VHA welcomes the ACCC's intention to monitor access issues in relation to NBN Co points of interconnection, and to consult on facilities access issues more broadly as part of its upcoming review of declared fixed line services and the domestic transmission capacity service. Subject to the specific concerns identified here, VHA considers that the existing regulatory regime, including the Code, remains largely effective in promoting efficient access to facilities. As a result, it is not necessary for the ACCC to declare access to any particular facilities under Part XIC of the CCA at this stage.

However, VHA welcomes the ACCC's proposed consideration of these issues in the broader context of the fixed line services review. Ongoing structural change in parts of the telecommunications industry, including as a result of the NBN rollout and the development of new wireless technologies, continues to blur the distinction between fixed line and mobile services and related facilities.

6. Telstra Reserved Capacity

VHA has significant concerns regarding the ACCC's proposed changes to the queuing policy provisions to address perceived inconsistencies between the Code and Telstra's SSU. We also query the necessity for these changes, given the limited scope of overlap between the Code and Telstra's SSU. What is of most importance is to ensure a regime that encourages industry cooperation and limits opportunity for access providers gaming the process for inefficient outcomes. VHA makes some suggestions to ensure that the current balance is retained.

It has been industry practice for facility owners to reserve capacity for their own planned requirements. This is a legitimate business requirement. For this reason, the Explanatory Statement to the Code includes the concept of Currently Planned Requirements. It provides that:

> *Unless there are reasons in a particular case to consider otherwise, the ACCC considers that:*
>
> - *Where there has been a Co-location Consultation Process in relation to any facility, Currently Planned Requirements are the genuine plans of the First Carrier, within 36 months of the date of the Facilities Access Application in relation to the use of the capacity to commence:*
>   - *a) the process of obtaining landlord or government approval where such approval is necessary for the planned use of that facility; or*
>   - *b) ordering and/or installing equipment on that facility*

- *Where there has not been a Co-location Consultation Process in regard to any facility Currently Planned Requirements will be genuine plans, within 12 months of the date of the Facilities Access Application, in relation to the use of the capacity to commence:*
    a) *the process of obtaining landlord or government approval where such approval is necessary for the planned use of that facility; or*
    b) *ordering and/or installing equipment on the facility.*

This two tiered approach to reserved capacity encourages consultation between carriers in relation to the co-location of facilities. This, in turn promotes competition and efficiency, including by removing the need for inefficient duplication of facilities. It also protects access seekers' interests by deterring facility owners from constructing facilities for their own purposes only, and then reserving all capacity on the facility. It is strongly recommended that the Code retains the ability to reserve capacity for 36 months only when there has been a consultation with industry about what would be the most suitable amount of capacity for all carriers. This approach encourages an access provider to consult with industry about capacity requirements. This would ensure that the most suitable (i.e. economically efficient) site is built and legitimate interests of relevant parties are protected.

The proposed adoption of a blanket 36 month period for reservation of capacity in the queuing policy provisions, without the need for a co-location consultation process, significantly diminishes these benefits. VHA therefore submits that the current concept of Currently Planned Requirements should be maintained. VHA is also concerned that the proposed amendments may not apply to all carriers. While the proposed amendments to clause 2.3(2) and the new clause 2.3(7) refer generically to "First Carrier" and "Second Carrier", the proposed definition of "Reserved Capacity" is limited to Telstra reserved capacity as defined in the SSU. To the extent changes are made to the queuing policy provisions (or any other provision of the Code), VHA submits that they should apply to all carriers on a non-discriminatory basis.

Finally, VHA queries whether the proposal to rely on "bona fide documented plans" of the First Carrier to establish reserved capacity provides sufficient protection for access seekers. As the ACCC is aware, carriers have previously experienced significant difficulties in being refused access to facilities by Telstra on the basis of alleged capacity constraints. In *ACCC v Telstra Corporation Limited* (2010) 188 FCR 238 at [253] and [259], the Federal Court observed that:

> *However, it is to be recalled that in respect of access to exchange facilitates Telstra has an overwhelming position of bargaining strength. It has control over its exchanges and the power to allow or refuse access. Telstra also has a substantial information advantage compared to access seekers. It is very difficult for access seekers to review or challenge Telstra's decisions to refuse access on the basis that an exchange has no available capacity or for any other reason given to them by Telstra, although as the evidence shows, not impossible. The contraventions in this proceeding would probably not have come to light but for the ACCC's intervention in October 2007 and an investigation thereafter.*

To reduce the risk of this type of contravention occurring in respect of facilities that are covered by the Code, VHA proposes that the First Carrier be required to provide written reasons for its reservations to the Second Carrier, and that

the Second Carrier 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.

A Suggested amendments to draft mandatory timing provisions

CHAPTER 2 MANDATORY CONDITIONS OF ACCESS

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.

(2A) A First Carrier may reserve space for supply of its own retail or wholesale services in respect of a particular Eligible Facility~~ies~~ where it has bona fide documented plans to use that Eligible Facility:

(a) if the First Carrier engaged in a Co-location Consultation Process (as defined in clause 4.5 of Chapter 4) in relation to the Eligible Facility, ~~where it has bona fide documented plans to use the particular Eligible Facility~~ within 36 months from the date of the reservation; or

~~(a)~~(b) in all other cases, within 12 months from the date of the reservation.

(2B) If requested by the Second Carrier, the First Carrier must provide the Second Carrier with written reasons for its reservation of space on or in a particular Eligible Facility. If the Second Carrier disputes the content or bona fides of the First Carrier's reservation, the Carriers **must** engage in dispute resolution as set out in clauses 2.4 and 2.5 of the Code.

....

(7) Subject to clause 2.3(2B), a~~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.

[***Note*** *– The related definition of "Reserved Capacity" (and Structural Separation Undertaking) is not used in the amended Code provisions and should be deleted.]*

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.

(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.