ACCC DISCUSSION PAPER ON FACILITIES ACCESS CODE

RESPONSE TO THE AUSTRALIAN COMPETITION AND CONSUMER COMMISSION

August 2012

Contents

1. Executive summary

Vodafone Hutchison Australia Pty Limited (**VHA**) welcomes the Australian Competition and Consumer Commission's (**ACCC**) decision to consult on whether it is appropriate to update "*A Code of Access to Telecommunications Transmission Towers, Sites of Towers and Underground Facilities (October 1999)*" (**Code**) in light of the ongoing structural change in parts of the telecommunications industry.

The Code has been, and remains, a necessary tool for facilitating commercial negotiations and efficient outcomes between carriers in relation to access to towers and underground facilities. For that reason, VHA considers that there is clearly an ongoing role for the Code, notwithstanding the rollout of the NBN and the associated regulatory reforms. Indeed there are some areas where it may be desirable to strengthen parts of the Code so as to address specific issues that have proven to be difficult to resolve commercially. These include, in particular, the agreement and enforcement of timeframes for dealing with access and co-location requests.

As described in **section 3** of this submission, VHA considers that timeframes relevant to the processes for applying for and providing access to facilities should be included as mandatory provisions of the Code and qualifications relating to compliance with these timeframes should be removed. These amendments are required to address the key problem of delay in obtaining access that VHA (and other carriers) have experienced in relation to arrangements established under Part 5 and the Code. These delays have caused significant detriment, both in terms of network planning and network rollout costs, and have placed carriers seeking access at a significant competitive disadvantage, as compared to the facility owner, with a concomitant impact on downstream competition.

VHA also considers that other changes to the Code (as set out in **sections 2-5** of this submission) could be made to address outdated references, ensure consistency with current regulatory requirements and industry practices, and improve the effectiveness and relevance of provisions of the Code.

In addition, it makes sense to extend the scope of the Code so that it also covers the new third party access regime for pit and pipe infrastructure in Greenfields estates. Having a consistent regulatory regime will enhance efficiency by providing greater certainty for carriers and facility owners alike, as well as by reducing transaction costs.

In relation to access to the NBN, VHA considers that the Code and the obligations in Parts 3 and 5 of Schedule 1 are sufficient to enable access to facilities required to interconnect with the NBN. However, given the importance of NBN access seekers being able to access Telstra facilities for the purpose of interconnecting with the NBN, and given deficiencies in Telstra's Structural Separation Undertaking (**SSU**) (as described in **section 7** of this submission), VHA submits that clarification to confirm the scope of these access obligations in relation to the NBN may be warranted.

Subject to the specific concerns identified in this submission (particularly in relation to delays in processes to apply for and provide facilities access), VHA considers that the existing regulatory regime, including the Code, remains largely effective in promoting efficient access to facilities specified in Part 5. Accordingly, declaration of access to any particular facilities under Part XIC of the *Competition and Consumer Act 2010 (Cth)* (**CCA**) is not necessary at this time. However it may be desirable for the ACCC to revisit this issue in 12 or 18 months time, when the NBN rollout is further progressed.

2. Relevance of Facilities Access Code

1. *Is the Facilities Access Code still relevant for industry?*
2. *Is there a need for the ACCC to vary the Facilities Access Code? If so, what changes should be made?*
3. *What factors should be considered if the Facilities Access Code was to be varied?*
4. *Has the Facilities Access Code been effective in assisting the co-location of facilities?*
5. *What have been the costs, if any, to industry in complying with the Facilities Access Code?*

2.1 The Code is still relevant

Despite the significant changes that have occurred since its introduction, VHA agrees with the ACCC that the original purpose of the Code is still relevant in terms of the efficiencies to be gained from co-location and reducing environmental impact of telecommunications towers. Recent public concern over the erection of new facilities by NBN Co provides evidence of this.

In addition, the Code promotes competition in downstream markets by facilitating timely access to critical infrastructure. This is important because ownership of 'layer 0' infrastructure such as ducts and towers is still heavily concentrated, with Telstra possessing significant market power. Of particular concern to VHA is Telstra's power in the market for access to towers in regional areas, given its plans to expand its mobile networks into those areas.

The Code has been, and remains, an effective tool for facilitating commercial negotiation and agreement between carriers. The mandatory provisions of the Code provide a safety net by establishing threshold requirements in relation to critical issues, such as the need for non-discriminatory access to facilities. Equally, the non-mandatory provisions, while not always adopted as contractual terms between carriers, provide a useful reference point and discipline to guide and encourage commercial outcomes.

Although facilities access agreements have been established between the key carriers in relation to most types of access, the terms of the Code continue to be relevant. The balance struck in the Code between mandatory provisions (which set key principles which must apply to all access agreements) and non-mandatory provisions (which can be displaced by agreed contractual terms) ensures the ongoing relevance of the Code by providing the flexibility for it to accommodate existing contractual agreements. To the extent that existing facilities access agreements are in place, many of the Code's terms will no longer be directly relevant. However, they continue to set the requirements and provide guidance for amendments to those existing agreements. They also perform these functions for new agreements, which may be entered into with new carriers or to cover new or additional facilities access, including in regional areas.

2.2 Some Parts of the Codes should be varied

In addition to variations to the Code to address out-dated references and ensure consistency with current regulatory requirements (as proposed in **section 5** below), VHA considers that some amendments to the Code could be implemented to make it more effective in achieving the statutory objects.

As described in more detail in **section 3** below, VHA considers that requirements relating to timeframes relevant to the processes for applying for and providing access to facilities need to be included as mandatory provisions of the Code. Qualifications relating to when a carrier is obliged to comply with these timeframes should also be removed. VHA considers that these amendments are required to address a key problem that VHA (and other carriers) have experienced in relation to access arrangements established under Part 5 and the Code. 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, as compared to the facility owner, with a concomitant impact on downstream competition.

VHA also believes that some amendments could be made to improve the effectiveness and relevance of the non-mandatory provisions of the Code. These are described in more detail in **section 4** below.

In considering whether and how to vary the Code, VHA does not believe that the existence of established facilities access agreements should be a key factor. Although the telecommunications industry in Australia is relatively mature, the Code must not assume that existing agreements will not be amended or that new agreements will not be required. Moreover, the balance between mandatory and non-mandatory provisions in the Code provides the flexibility to enable the Code to accommodate existing agreements.

Variations to the Code should be considered having regard to the purposes of the Code to encourage co-location (and thereby improve environmental amenity) and to promote competition and efficiency in the provision of telecommunications services, including by removing the need for inefficient duplication of facilities. The Code should not be varied where it has, and continues to, fulfil these purposes. Amendments should only be made where there have been failures to meet these purposes, such as delays that have been experienced by carriers in obtaining access to facilities.

2.3 The Code has promoted the co-location of facilities

Although provisions relating to the co-location consultation process are not mandatory and may not have been adopted as contractual terms by all or many carriers, the Code has provided an effective framework for cooperation between carriers to ensure co-location. VHA does not believe this aspect of the Code requires amendment.

2.4 Minimal costs to industry

VHA does not believe that the Code has imposed significant costs on industry, over and above the costs that would otherwise likely be incurred to ensure compliance with obligations in Part 5.

The balance between mandatory and non-mandatory provisions in the Code provides flexibility for carriers to agree, on a bilateral basis, efficient and cost-effective operational arrangements. Except in relation to the requirement to develop a queuing policy, the Code does not impose any mandatory operational requirements on carriers. However the indicative operational requirements in the non-mandatory provisions (when coupled with the threat of arbitration if contractual terms cannot be agreed) provides a discipline which has, on many occasions, enabled carriers to avoid unnecessary costs and delays associated with prolonged contractual negotiations and dispute resolution processes.

3. Mandatory provisions of the Facilities Access Code

> 6. *Are the mandatory provisions of the Facilities Access Code still relevant to current commercial agreements?*
> 7. *Should the mandatory provisions of the Facilities Access Code be changed? If so, what changes should be made?*

As outlined above, VHA considers that the mandatory provisions of the Code remain relevant to current commercial agreements. Although facilities access agreements have been established between the key carriers in relation to most types of access, the mandatory provisions of the Code continue to set the requirements and provide guidance for amendments to those existing agreements.

However, VHA believes that it is appropriate and necessary to take this opportunity to make some amendments to the mandatory provisions, so as to ensure the ongoing effectiveness and relevance of the Code.

3.1 Tighter timeframes are required

A key area of ongoing concern for VHA has been the failure by facility owners and operators to comply with appropriate timeframes regarding access to their facilities. Delays experienced by VHA in obtaining access to facilities have caused significant detriment, both in terms of network planning and network rollout costs. These delays have also placed VHA at a significant competitive disadvantage as compared to the facility owner and, unless addressed, will continue to do so.

Under the Code, timeframes for obtaining access are currently set out in the non-mandatory provisions. Clause 1.2.3 in Chapter 1 provides that these timeframes must apply "*unless a Carrier considers it would not be reasonably practicable for it to comply with the specified timeframes*". In that case, carriers must make reasonable endeavours to agree to amended timeframes, with the mandatory dispute resolution provisions applying where agreement cannot be reached. In addition, the mandatory provisions in the Code include an obligation for a carrier to "as far as practicable," treat other carriers on a non-discriminatory basis in relation to the provision of access to facilities. However no guidance is provided as to how a carrier's treatment of other carriers will be assessed, particularly in circumstances where the 'practicability' of timeframes is concerned.

The provision of access which is equivalent in terms of timeliness to that which a carrier provides to itself is a key component of the mandatory non-discrimination requirement. However the Code also includes requirements relating to timeliness in the non-mandatory provisions and qualifies carriers' obligations to comply with these requirements. For example, clause 2.2 in Part 2 of each of Annexures A and B specifies the timeframe within which a carrier must consider and respond to a facilities access application, but allows that timeframe to be varied by agreement.

VHA considers that requirements relating to timeframes relevant to the processes for applying for, and providing, access to facilities need to be elevated to the mandatory provisions of the Code, as they are key aspects of non-discriminatory access. Additionally, carriers should be obliged to comply with these timeframes, without qualification. We have proposed amendments to this effect in **Annexure A**.

3.2 Confidentiality

The confidentiality provisions in clause 2.1 are generally consistent with those adopted by carriers in commercial agreements. However, while clause 2.1 provides flexibility for carriers to agree to additional circumstances in which *disclosure* of confidential information may be permitted (clause 2.1(4)(f), permits disclosure "with the consent of the Other Carrier"), the *use* of that information remains prohibited in the limited situations in clause 2.1(3). VHA submits that clause 2.1 should be amended to allow carriers to agree additional permitted uses of their confidential information.

3.3 Dispute resolution processes could be streamlined

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. However VHA considers that two aspects of these provisions are unnecessary. First, clause 2.4(1) assumes that mediation will be undertaken. VHA considers it more appropriate that carriers be given the option to agree whether to undertake mediation. In some scenarios, it will be clear that mediation will not be successful. Requiring carriers to mediate in those circumstances creates unnecessary cost and delay. In additional, mandated mediation could be used by facility owners or operators to frustrate access by deliberately prolonging the resolution of disputes.

Secondly, the requirement to refer a dispute to an arbitrator other than the ACCC imposes an unnecessary additional step and is not consistent with industry practice. If there is a failure to reach agreement or a dispute arises in connection with an existing agreement, carriers will generally agree that the ACCC is the appropriate arbitrator to deal with the dispute. However the Code mandates reference to an independent expert first. While it may be that carriers agree, in particular cases, that this additional step is appropriate (in which case it can be included in their agreed dispute resolution processes), it should not be mandated. Rather, carriers should have the option to refer a dispute directly to the ACCC if it cannot be resolved commercially. Proposed amendments to this effect are set out in **Annexure A**. Consequential amendments to non-mandatory provisions which refer to the dispute resolution process are set out in **Annexure B**.

4. 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?*
9. *Should the non-mandatory provisions of the Facilities Access Code be changed? If so, what changes should be made?*

VHA does not consider that it is common commercial practice for the non-mandatory provisions of the Code to be included directly in agreements between carriers. Most carriers have developed contractual terms (some of which may have originally been based on aspects of the non-mandatory provisions), which form the basis for negotiations. However, the non-mandatory provisions have frequently provided a useful reference point and, when coupled with the protection of referral to arbitration if agreement cannot be reached, have imposed an invaluable discipline on carriers' conduct during negotiations. VHA is aware of several occasions where prolonged

disagreement or a failure to agree has been avoided by one carrier's position having the support of the Code's non-mandatory provisions.

However, VHA considers that targeted amendments to the Code's non-mandatory provisions could and should be made at this time. In addition to variations to ensure consistency with current regulatory requirements (as proposed in **section 5** below), VHA submits that the amendments set out in **Annexure B** should also be incorporated. These amendments are intended to:

- increase the relevance of the non-mandatory provisions by ensuring, so as far as possible, that they are consistent with positions that have been generally accepted within the telecommunications industry; and
- address particular issues that VHA has identified in the negotiation and implementation of its facilities access arrangements.

Some of the proposed amendments relate to the information that is required to be provided in a Facilities Access Application. An area of concern for VHA has been the scope of information that it is required to provide, and the tendency of other carriers to require information that is unnecessary and, in some circumstances, unreasonable. This, in turn, has delayed the application process. Currently the non-mandatory provisions set out minimum creditworthiness and technical information that must be provided in a Facilities Access Application. VHA submits that these provisions should be amended to specify that only information reasonably necessary to enable an access providing carrier to assess the technical feasibility of a Facilities Access Application or the creditworthiness of the requesting carrier should be required.

5. Outdated references

> *10. Are there other aspects of the Facilities Access Code that industry considers to be outdated?*
> *11. Are there any other provisions that should be reviewed to improve the accuracy and clarity of the Facilities Access Code?*

VHA submits that the following updates should be made:

(a) update references throughout from "Australian Communications Authority" or "ACA" to the "Australian Media and Communications Authority" or "ACMA";

(b) update references throughout from the "*Trade Practices Act 1975 (Cth)"* or "TPA" to the "*Competition and Consumer Act 2010 (Cth)*" or "CCA";

(c) delete references to the TAF and TAF Code; and

(d) update references to relevant provisions in the *Bankruptcy Act 1966* (Cth) in Chapter 5, sub-clause 5.8(4)(g).

VHA also considers that provisions should be included in the Code to address amendments made to Part 5 of Schedule 1 of the *Telecommunications Act 1997 (Cth)* (**Telco Act**) by the *Telecommunications Legislation Amendment (Competition and Consumer Safeguards) Act 2010 (Cth).* That amending Act:

(a) qualified the concept of an "operator" of facilities, deeming that an NBN corporation that has access to Telstra facilities under an agreement with Telstra is not an operator of those facilities;

(b) included exceptions to the general access obligation where compliance with the obligation would either prevent Telstra complying with the SSU, or require it to engage in conduct covered by its migration plan; and

(c) replaced references to the ACMA with references to the ACCC (in relation to the certification of the technical feasibility of access).

6. 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?*
> *13. If so, should a separate code be developed or should the new provisions be included in the existing Facilities Access Code?*
> *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?*

VHA considers that it is both appropriate and necessary to introduce a third party access code for fixed-line facilities under section 372N of the Telco Act. It also considers that the Code should either be extended or replicated for this purpose.

Part 20A of the Telco Act introduces a third party access regime which will require carriers to negotiated new agreements with non-carrier facility owners and operators. As outlined above, the Code has been an effective tool for facilitating commercial negotiation and agreement between carriers under Part 5. It has enabled carriers to avoid costly and prolonged disputes about the negotiation and implementation of contractual terms. A code under section 372N, made in similar terms to the Code, would have the same benefits for the third party access regime in Part 20A. In the absence of such a code, non-carrier facility owners and operators may seek to impose unrealistic or unreasonable terms of access to their facilities, and carriers may face resistance in attempts to negotiate reasonable terms of access. This in turn could frustrate the intended operation of the regime.

As the ACCC observes, the Part 20A third party access regime is based on the facilities access regime in Part 5. Similarly, the criteria and process for granting access (including the role of the ACCC in certifying if access is technically feasible) are substantially the same as those in Part 5. Given this and given the common purpose of the regimes (that is, to encourage co-location and promote competition, including by removing the need for duplication of facilities), it is both appropriate and efficient to adopt the established and proven provisions of the Code for the purposes of making a code under section 372N. Further VHA does not consider that the provisions of the Code will require significant amendment before being applied to the third party access regime under Part 20A.

7. 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?*
16. *To what extent is access to External Interconnect Facilities expected to be a bottleneck in providing services over the NBN?*

As the ACCC recognises, the facilities access provisions in the SSU do not apply to access to enable interconnection with the NBN Co facilities located in Telstra ducts or exchanges. As the structural separation of Telstra only occurs by virtue of the operation of the SSU, NBN access seekers will need to rely exclusively on the provisions in Schedule 1 of the Telco Act and the Code to obtain access to critical inputs for downstream competition.

These inputs include:

- access to Telstra exchange buildings (where that exchange building contains an NBN POI or Aggregation Node); and
- access to external interconnect ducts and pits where interconnection occurs remotely.

In both cases 'cross connect' will be required, something Telstra has successfully managed to have excluded from its provision of exchange access under the SSU.

As a consequence, the revisions to the Code and associated regulatory initiatives should be informed by the importance of access to these services and the potential incentives for Telstra to leverage market power from natural monopoly markets (such as layer 0/1 services) to distort competition in otherwise contestable markets (such as the market for supply of retail services over the NBN). Potential responses to these issues are considered at **sections 8** and **9** below.

8. 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?*
18. *Should the Facilities Access Code include provisions dealing with entry rights to towers, sites of towers and eligible underground facilities?*

VHA considers that the Code and the obligations in Parts 3 and 5 of Schedule 1 are sufficient to enable access to facilities required to interconnect with the NBN. However, given the deficiencies in the SSU and the importance of NBN access seekers being able to access Telstra facilities for the purpose of interconnecting with the NBN, VHA submits that clarification to confirm the scope of these access obligations in relation to the NBN may be warranted.

As the ACCC recognises, access to facilities of other carriers (primarily Telstra, where an NBN Co POI is located in a Telstra exchange building) may be required by a carrier in order to obtain access to the NBN. The access rights in Parts 3 and 5 of Schedule 1 of the Telco Act are not limited to access required to obtain services from the facility owner or operator. Therefore, VHA considers that they are sufficiently broad to cover access to Telstra ducts and exchanges for the purposes of accessing NBN Co facilities located in those ducts and exchanges. This is

necessary given that clauses 17(4A), 33(8) and 35(8) of Schedule 1 have the effect that a carrier must obtain access from Telstra, rather than NBN Co, where it wishes access to an NBN Co facility in a Telstra duct or building.

That said, VHA considers that there may be merit in the ACCC explicitly confirming this position in the Code (that is, that a carrier can obtain access under Part 5 to another carrier's facilities for the purposes of interconnecting with a third party), particularly given that Telstra's SSU arguably provides insufficient clarity in this regard.

This issue also arises under Part 3 of Schedule 1. Indeed, the most likely scenario where the issue will arise is in connection with access to a Telstra exchange building where an NBN POI is located. Given the Code does not apply to access under Part 3, and the Telco Act does not contemplate the Code being expanded to apply to exchange building access, clarification in relation the ACCC's expectations under Part 3 needs to be provided by some other means. For example, the ACCC could decide to publish arbitration guidelines relating to access under Part 3 which clarify this point.

9. 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?*
>
> *20. Should the ACCC consider declaring access to particular facilities? If so, which facilities should be declared?*

Subject to the specific concerns identified above (particularly in relation to delays in processes to apply for and provide facilities access), VHA considers that the existing regulatory regime, including the Code, remains largely effective in promoting efficient access to facilities specified in Part 5. As a result, VHA does not currently consider it necessary for the ACCC to declare access to any particular facilities under Part XIC of the CCA.

However, the early stage of the NBN rollout means that it may be desirable for the ACCC to revisit this issue in 12 or 18 months time, given the importance of access to these services and the potential incentives for Telstra to leverage its market power in the provision of these services into otherwise contestable markets (see **section 7** above). Revisiting the desirability of declaration at a later stage should enable any issues with accessing NBN Co facilities in Telstra ducts or buildings to be more apparent.

10. Other

> *21. Is there anything else the ACCC should consider in an update of the Facilities Access Code?*

VHA has no further comments regarding the ACCC's possible update of the Code.

A Suggested amendments to mandatory provisions

VHA submits that the mandatory provisions in the Code should be amended by:

(a) deleting clause 1.2.3 in the main Code; and

(b) amending Chapter 2 as follows -

CHAPTER 2 MANDATORY CONDITIONS OF ACCESS

2.1 Confidential information - all Carriers

(1) .....

(2) Information generated about a First or Second Carrier's network or facilities as a result of, or in connection with, the provision of access to Eligible F~~f~~acilities is the Confidential Information of that Carrier.

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

(a) used for the technical purpose of undertaking work necessary to allow for facilities access or as required by the ACMA, the ACCC or an independent expert appointed in accordance with this Code; ~~and~~

(b) as far as is reasonably practical, used by technical and related personnel directly involved in the facilities access task or in accordance with sub-clause 2.1(4);and

(c) as otherwise agreed by the First and Second Carriers.

(4) A First or Second Carrier (Disclosing Carrier) may disclose the Confidential Information of a Second or First Carrier (Other Carrier) respectively:

(a) .....

(g) in accordance with a lawful and binding direction issued by the ACMA or the ACCC or any Minister; and

(h) .....

2.4 Dispute Resolution – the giving of access

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

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

(2) In attempting to resolve disputes pursuant to sub-clause 2.4(1), Carriers **must** have regard to:

(a) the criteria the ACCC 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*; and

Note: see *Telecommunications (Arbitration) Regulations*, Statutory Rules 1997 No. 350, clause 8.

(b) any relevant principles or guidelines published by the ACCC that may be relevant to the arbitration of a dispute.

Note: See *Access Pricing Principles – Telecommunications*, ACCC, November 1998 and Attachment A of the Explanatory Statement.

(3) In the event that Carriers cannot resolve disputes pursuant to sub-clause 2.4(1), Carriers **must** ~~make reasonable endeavours to~~ refer a matter in dispute for arbitration by ~~an agreed independent expert other than~~ the ACCC. ~~Carriers may agree to accept a nominee of the Australian Commercial Disputes Centre.~~

~~(4) Pursuant to sub-clause 2.4(3), Carriers **must** comply with the determination of an independent expert.~~

(~~4~~5) In making a determination under sub-clause 2.4(3), ~~an independent expert~~the ACCC may consult with the AC<u>M</u>A.

~~(6) In the event that Carriers cannot resolve a dispute pursuant to sub-clause 2.4(3), Carriers **must** refer the matter in dispute to the ACCC for arbitration.~~

(~~5~~7) Carriers **must** ensure that dispute resolution measures required by this clause are conducted by persons with sufficient decision-making authority consistent with timely dispute resolution.

2.5 Dispute Resolution – implementation of access

(1) The terms and conditions on which access is agreed **must** include arrangements for the settlement of a dispute about the ongoing provision or implementation of access which are consistent with sub-clauses 2.4(1)-(~~4~~5).

(2) In the event that a dispute arises in relation to the ongoing provision or implementation of access, Carriers **must** make reasonable endeavours to resolve the dispute in accordance with the agreed dispute resolution arrangements made pursuant to sub-clause 2.5(1).

(3) Carriers **must** ensure that dispute resolution measures required by this clause are conducted by persons with decision-making authority consistent with timely dispute resolution.

2.6 Timeframes

(1) The timeframes for particular processes associated with the provision of access, as set out in the Code, **must** apply unless the First and Second Carriers agree to amend those timeframes.

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

(3) The First and Second Carriers must comply with any timeframe that applies in accordance with this clause 2.6.

B Suggested amendments to non-mandatory provisions

VHA submits that the non-mandatory provisions in the Code should be amended as follows -

Chapter 3

- Delete clause 3.1((3)(a). If a Second Carrier is already being provided with access to an Eligible Facility, it will have a facilities access agreement in place and will be informed of changes to matters in the Information Package under contractual terms.

- Clause 3.5(2) –

  Any estimates of future requirements provided by the Second Carrier to the First Carrier **must** be given in good faith but will not be binding on either the First or Second Carrier.

Chapter 4

- Clause 4.2(5) (see related amendments to cl. 2 in Schedules A1 & B1 below) -

  The Master Access Agreement may also require the Second Carrier to maintain with independent and reputable insurers ~~approved by the First Carrier (which approval shall not be unreasonably withheld), in the name of the First Carrier and the Second Carrier, for their respective rights and interests,~~ workers' compensation, public risk and other insurances which a prudent person engaged in a similar business or undertaking to the Second Carrier would effect ~~or as reasonably specified by the First Carrier~~. If requested by the First Carrier, insurance policies taken out by the Second Carrier under this clause will note the interests of the First Carrier as the owner or operator of the Eligible Facilities that are being accessed

Chapter 5

- Clause 5.5 – a duty to mitigate should apply to the indemnity in clause 5.5. Add new sub-clause 5.5(2) as follows –

  (1) In relation to matters of, and relating to, liability between the Carriers not governed by the terms of any agreement, a Carrier which, through its acts or omissions (whether negligent or otherwise), causes damage to the Eligible Facility or the Equipment of another Carrier in use on or in an Eligible Facility, then that Carrier **must** indemnify the other Carrier against such damage to its Eligible Facility or its Equipment and any reasonable costs or expenses associated with such repair or replacement.

  (2) An indemnity provided under sub-clause 5.5(1) will not apply to the extent the indemnified Carrier:
  (a) contributes to the damage to the Eligible Facility or Equipment; and
  (b) fails to take reasonable steps to reduce the damage to, or minimise the costs or expenses associated with the repair or replacement of, the Eligible Facility or Equipment.

(3) Pursuant to sub-clause 5.5(1), in the event that Carriers are unable to agree on costs or expenses, Carriers **must** engage in dispute resolution, as set out in Chapter 2 of the main Code.

- Clause 5.8 (Termination) – Consistent with current industry practice, a First Carrier should not be entitled to terminate in the case of a sale and leaseback arrangement. Also, the right to terminate for unremedied breach should be clarified to exclude any bona fide billing or general dispute.

(2) The First Carrier may terminate an agreement to access an Eligible Facility by providing at least 12months prior written notice if it decides to:

(a) decommission that Eligible Facility; or

(b) ~~enter into a sale or leaseback arrangement in respect of~~sell that Eligible Facility.

Nothing in an agreement to access an Eligible Facility precludes the First Carrier from entering into a sale and leaseback or other similar arrangement with regard to that Eligible Facility, provided that the Second Carrier remains entitled to continue to have access to the Eligible Facility in accordance with the terms of the agreement.

(3) If:

(a) the Second Carrier ceases to be a Carrier; or

(b) the Second Carrier breaches a material obligation under this Code and/or the applicable terms and conditions of access and that breach materially impairs or is likely to materially impair the ability of the First Carrier to deliver access to other Second Carriers or provide services to its customers; and

(i) the First Carrier has given a notice to that effect to the Second Carrier (a Breach Notice) within ten Business Days of becoming aware of the breach; and

(ii) the Second Carrier fails to institute remedial action, which may be specified in the Breach Notice, within twenty Business Days after receiving the Breach Notice (Remedy Period); then

the First Carrier may terminate the supply of access to a particular Eligible Facility by notice given to the Second Carrier within twenty Business Days of becoming aware of a cessation or expiry of the Remedy Period specified in the Breach Notice (as the case may be). To avoid doubt, sub-clause 5.8(3)(b) does not apply to a bona fide dispute, including a bona fide billing dispute.

Chapter 6

- Clause 6.1 – A requirement of reasonableness should be included in the last paragraph of the definition of "Suspension Event".

Suspension Event means:

(a) the continued supply of access to a particular Eligible Facility poses a threat to the safety of persons, Equipment or network security; or

(b) the Second Carrier has failed to pay monies owing, other than amounts in bona fide dispute under an executed agreement for access to Eligible Facilities; or

(c) the Second Carrier's use, either of its Eligible Facility or the First Carrier's Eligible Facility is in contravention of any law; or

(d) the Second Carrier breaches a material obligation under an access agreement; or

(e) the Second Carrier has failed to provide creditworthiness information about its financial position when reasonably requested to do so by the First Carrier.

Annexures A and B

- Annexure A and B, Part 2, clause 2.1(2) – Provisions in Annexures A and B relating to the inclusion of creditworthiness information in a Facilities Access Application should be clarified to specify that this information need only be provided where reasonably required. Add the following sentence to the end of each of Annexure A, Part 2, clause 2.1(2) and Annexure B, Part 2, clause 2.1(2) -

  To avoid doubt, the First Carrier is not required to provide information required by this sub-clause 2.1(2) to the extent it has already provided that information to the First Carrier or otherwise has agreed arrangements with the First Carrier relating to the Second Carrier's creditworthiness.

- Annexure A and B, Part 2, clause 2. – Provisions in Annexures A and B relating to the inclusion of technical and creditworthiness information in a Facilities Access Application should be clarified to specify that this information need only be provided where reasonably required. Add the following sentence to the end of each of Annexure A, Part 2, clause 2.1 –

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

  And add the following sentence to the end of each of Annexure B, Part 2, clause 2.1 –

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

- Annexure A, Schedule 1A, sub-clause 2(3), (4) & (5) and Annexure B, Schedule B1, sub-clauses 2(3)(4) &(5) – consistent with the amendments proposed to the mandatory provisions relating to dispute resolution, amend sub-clauses 2(3)(, (4) & (5) in each of Schedules 1A and 1B as follows –

(3) In the event that ~~Carriers agree to the appointment of an independent expert to determine whether an extension should be given, or~~ the ACCC is required to ~~arbitrate~~ determine whether an extension should be given ~~on the matter~~, then ~~that expert or~~ the ACCC~~-~~ **must** consider the following factors to the extent that those factors are relevant:

- the complexity of the request for access;
- the complexity or remoteness of the Eligible Facility to which access has been sought;
- the number of requests, both internal and external, which the First Carrier has received;
- whether Detailed Field Studies have been previously undertaken in relation to the Eligible Facility;
- weather conditions in the area where the Eligible Facility is located;
- the time taken for the Second Carrier to provide additional information; and
- the time taken to evaluate any additional information provided by the Second Carrier.

(4) Any ~~time~~ extension granted by ~~an independent expert or~~ the ACCC **must** take effect immediately after the ~~expert or the~~ ACCC notifies the First and Second Carrier of its decision. If the ~~expert or~~ ACCC refuses to grant an extension, then the First Carrier **must** complete the Detailed Field Study within the period specified in sub-clause 1(5) or some other period determined by the ~~expert or~~ ACCC.

(5) The First Carrier **must** continue to carry out the Detailed Field Study, pending the decision of ~~an independent expert or~~ the ACCC and, where appropriate, it **must** inform ~~that expert~~the ACCC of the progress of performing the Detailed Field Study.