



ACCC submission

Submission in response to the DITRDCA Facilities and Tower Access Regimes and Mobile Network Infrastructure Providers Issues Paper

5 April 2024

Acknowledgement of country

The ACCC acknowledges the traditional owners and custodians of Country throughout Australia and recognises their continuing connection to the land, sea and community. We pay our respects to them and their cultures; and to their Elders past, present and future.

Australian Competition and Consumer Commission

Land of the Ngunnawal people

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Executive summary

The ACCC welcomes the opportunity to make a submission to the Department of Infrastructure, Transport, Regional Development, Communication and the Arts' issues paper on facilities and tower access regimes and mobile network infrastructure providers.

Facilities access regulation has remained relatively unchanged since its introduction in the 1990s. The telecommunications industry however is dynamic and constantly changing and evolving. There has been a recent and significant move by mobile network operators to sell or divest their tower infrastructure to new entities, referred to as 'mobile network infrastructure providers'.

As the ACCC's recent Regional Mobile Infrastructure Inquiry final report outlined, these tower sales and divestments have highlighted an unevenness in the facilities access regulatory framework. Our submission focusses on why we consider this is the case and outlines particular aspects of the regime that could be improved.

Our view is that the dynamics of the telecommunications industry has changed since the access regime was first introduced. Markets have matured, new technologies have emerged and there have been a number of significant structural changes across the industry in the manner and form by which telecommunications services are delivered.

Historically, the telecommunications industry was characterised by vertically integrated industry players that would seek access from each other under the 'carrier-to-carrier' access regime in Schedule 1 of the *Telecommunications Act 1997* (Telecommunications Act). Vertically integrated carriers remain. However, the form of vertical integration has changed from ownership and control to a complex array of ownership structures and commercial arrangements that maintains a significant degree of market power with the mobile network operators. While the mobile network infrastructure providers, who may or may not be carriers, represent the new infrastructure-only intermediaries providing tower access, the mobile network operators retain contractually preserved and favourable positions as if they were still vertically integrated entities.

The mobile network infrastructure providers themselves might have different incentives for providing access to their infrastructure than the carriers, but these strong commercial and ownership relationships with the mobile network operators continue to entrench market power in the dominant players in the industry. Amplitel (51% owned by Telstra) and Telstra account for around 70% of mobile towers and roof tops in regional and remote Australia. This makes an effective access regime more critical, not only for the increasing number of small industry players such as the smaller mobile network operators, private fixed wireless operators and neutral host operators who require access to towers and sites of towers, but also for existing mobile network operators who seek to expand their networks.

Due to these changed industry dynamics, we are concerned that the current facilities access regime is not operating as effectively as intended to restrain the market power of mobile network infrastructure providers as it currently does for carriers that are access providers. The Schedule 1 carrier-to-carrier access regime provides the right to access infrastructure, largely on a reciprocal basis between carriers. This created some countervailing power which we consider supported access seeker's negotiations with those carriers providing access. While the new non-carrier provisions under Part 34B of the Telecommunications Act attempt to mirror Schedule 1, there is not the same level of reciprocity, since mobile network infrastructure providers do not themselves access other infrastructure. Rather, MNOs' interests are largely held through long term contractual arrangements with related mobile

network infrastructure providers. This may unduly affect the ability of small access seekers to gain access to towers and other infrastructure on reasonable terms.

Our view is that the negotiate-arbitrate model remains appropriate given that the costs of access to towers are tower specific and the access arrangements and commercial transactions are highly bespoke. However, it is limited in its ability to address issues of market power, potentially resulting in significant delays in gaining access and services becoming available to end-users. We consider that there is potentially scope to improve the existing negotiate-arbitrate model by reducing the cost of arbitration, improving timeliness and fully encouraging the parties to consider all avenues of commercial negotiation (including mediation) before progressing to arbitration.

However, we consider that amendments to Part XIC, such as the declaration of certain non-tower facilities, should also be considered to enable upfront certainty of access and pricing to those facilities where this would be appropriate to do so, particularly for those services where upfront pricing is possible.

We also consider the ACCC's Facilities Access Code has played an important role in supporting carrier-to-carrier commercial negotiations. While the ACCC also has the ability to make a code under Part 34B, we have not yet done so. We have concerns that any Part 34B Code could be more limited in its operation compared to the existing Facilities Access Code because it would be restricted to access to towers only, and not facilitate access to the sites of towers or other facilities. This would create uneven access obligations according to the type of entity owning or operating a tower or facilities, and impact on the effectiveness of a code made under Part 34B.

We consider that the concept of a 'carrier' does not suit the current industry structure where, under complex corporate structures, mobile network infrastructure providers could be either a carrier or a non-carrier. The applicability of the access regime should not be dependent on the type of entity that owns or operates the infrastructure (or whether that entity holds a carrier licence or not), but on the type and purpose of the infrastructure itself used to provide services to end-users.

Ownership and carrier licence status can be obscured by complex legal and ownership structures within a *carrier company group* controlling a portfolio of towers. The relative position of the licensee in the group's structure may result in access obligations arising under Schedule 1 or Part 34B of the Telecommunications Act.

The ACCC questions the desirability of two separate regimes (Schedule 1 and Part 34B) for regulating facilities and tower access. Alternatively, access to facilities may be better achieved by the integration of Part 34B with the facilities access regime in Schedule 1 of the Telecommunications Act.

1. Background

1.1. The ACCC's role

The Australian Competition and Consumer Commission (ACCC) is an independent Commonwealth statutory agency that promotes competition, fair trading and product safety for the benefit of consumers, businesses and the Australian community. The primary responsibilities of the ACCC are to enforce compliance with the competition, consumer protection, fair trading and product safety provisions of the *Competition and Consumer Act 2010* (CCA), regulate national infrastructure and undertake market studies.

The CCA also contains the Australian Consumer Law, which is also enforced by state and territory Australian Consumer Law regulators alongside the ACCC under a one law, multi-regulator model.

The ACCC currently has the following roles specifically relating to the telecommunications industry:

- Economic regulator for telecommunications – Part XIC of the CCA allows the ACCC to declare certain services following a public inquiry, if it is satisfied that to do so, would promote the long-term interests of end-users. Once a service is declared, the ACCC can set regulated prices and other terms and conditions of access. These decisions are generally reviewed every 3 to 5 years.
- The Telecommunications Act 1997 contains a number of provisions enabling access to telecommunications infrastructure (see Schedule 1 and 3). As part of this, the ACCC is designated specific roles in the arbitration of access disputes and the making of 'Codes of Access'.
- National Broadband Network (NBN) – the ACCC has a number of responsibilities regarding the NBN under Part XIC of the CCA.
- Monitoring – we have a number of record-keeping and information gathering powers that assist us with our regulatory processes and promote transparency for consumers.
- Compliance – we monitor and enforce compliance with telecommunications-specific legislation as well as the general consumer protection and anti-competitive conduct provisions in the CCA and those protections afforded by the Australian Consumer Law.

1.2. Background to the issues paper

On 23 February 2024, the Department of Infrastructure, Transport, Regional Development, Communications and the Arts (the Department) published its *Facilities and Tower Access Regimes and Mobile Network Infrastructure Providers* issues paper.

The issues paper follows the ACCC's *Regional Mobile Infrastructure Inquiry* final report.¹ The Inquiry's final report made two main findings relating to the facilities access regimes. These findings questioned whether commercial arrangements for access to towers are working effectively, and whether the facilities access regime is currently fit for purpose.

¹ ACCC, [Regional mobile infrastructure inquiry 2022-23 – final report](#), 23 October 2023, accessed 8 March 2024.

Our submission discusses the key aspects of the current access regimes under Schedule 1 and Part 34B of the Telecommunications Act, the ACCC's roles in making codes under those regimes and the negotiate-arbitrate model as a dispute resolution mechanism.

1.3. Overview of the facilities access regime

Access seekers depend on access to telecommunications networks and facilities in order to inter-connect their networks, and supply telecommunication services to users in downstream markets. The Facilities Access Code operates in conjunction with other regulatory mechanisms that promote access to facilities. These include the facilities access provisions of the Telecommunications Act and the Part XIC access regime provisions of the *Competition and Consumer Act 2010* (CCA).

The facilities access regime applying to facilities owned or operated by carriers is set out in Parts 3 and 5 of Schedule 1 to the Telecommunications Act. It sets out the conditions of access to certain infrastructure and establishes a negotiate-arbitrate framework, where the ACCC acts as the arbitrator of last resort. Compliance with the facilities access regime is a carrier license condition, directly enforceable by the ACCC.² Schedule 1 establishes obligations on 'carriers' to provide 'other carriers' with access to facilities and sites used for the supply of a carriage service by means of radiocommunications with the aim of ensuring as far as possible that these facilities are co-located.³

At the time, the Government was conscious of the public concern about possible degradation of environmental amenity due to the installation of aerial cabling and the construction of mobile towers. The purpose of the regime established under the Telecommunications Act was to require that carriers co-locate mobile facilities on radiocommunications towers and radiocommunications sites (and, relatedly facilities in ducts) as far as possible unless it is not technically feasible to do so.⁴

However, the industry and technology has significantly moved on since the current framework was introduced. Access is required beyond just carrier-to-carrier relationship. The new Part 34B attempts to address this, however, the ACCC considers there is a need for an 'overall' refresh of facilities access arrangements to account not only for current technology and industry changes but to ensure the regime remains appropriate in the future.

Schedule 1 of the Telecommunications Act (carrier-to-carrier)

Parts 3 and 5 of Schedule 1 of the Telecommunications Act allow a carrier to access the facilities owned or operated by another carrier, including by allowing co-location of facilities.⁵

Under Part 3 of Schedule 1 to the Telecommunications Act, a carrier can *reasonably* request access to facilities owned or operated by the first carrier.⁶ This includes any part of the infrastructure of a telecommunications network (or other things used in connection with the network), land, buildings, and customer equipment or cabling connected to the network.⁷ Whether a request is reasonable is assessed by reference to whether compliance with the

² Section 61 of the Telecommunications Act and Sub-clause 37(2) of Schedule 1 to the Telecommunications Act.

³ Telecommunications Bill 1996, Explanatory Memorandum Volume 3, p.8

⁴ Telecommunications Bill 1996, Second Reading Speech, p.8

⁵ See also [Explanatory Memorandum \(Volume 1\)](#) to the Telecommunications Bill 1996, p 7.

⁶ See cl 17(2)(b) of Part 3 of Schedule 1 to the Telecommunications Act.

⁷ See cl 17(5) of Part 3 of Schedule 1 to the Telecommunications Act.

request will promote the long-term interests of end-users (in the same manner as for Part XIC of the CCA).⁸

If parties are unable to agree as to the terms and conditions of access to the facilities then they may seek arbitration by an agreed arbitrator, or if the parties fail to agree on the appointment of an arbitrator, the ACCC is to be the arbitrator. The Minister for Communications also has the authority to determine price-related terms and conditions of access under clause 19 of Part 3 to Schedule 1.

Under Part 5, a carrier may request access to telecommunications transmission towers, the sites of such towers and underground facilities that are designed to hold lines, to install equipment connected with the supply of a carriage service.⁹ As with Part 3, the terms and conditions of access may be determined by agreement, an agreed arbitrator or if the parties cannot agree on an arbitrator, the ACCC.

The ACCC has the power to make a facilities access code, under Clause 37 of Part 5 of Schedule 1 of the Telecommunications Act, which governs how access to certain telecommunications facilities owned or operated by carriers, including mobile towers, the sites of towers and underground ducts, is provided to other carriers seeking to install their equipment on or in those facilities. The ACCC is empowered pursuant to clause 37 to make a code which sets out terms and conditions that are to be complied with in relation to the provision of access under Part 5.

The ACCC has created such a code, *A Code of Access to Telecommunications Transmission Towers, Sites of Towers and Underground Facilities* (the Facilities Access Code).¹⁰ Compliance with the ACCC's Facilities Access Code is a standard carrier licence condition.¹¹

Access to facilities under Part 5 differs to access under Part 3 in that:

- the obligation in Part 5 exists unless it is not technically feasible
- the Minister does not have the power to determine price terms and conditions of access under Part 5
- the ACCC can make (and has made) a Code relating to access under Part 5 (the Facilities Access Code).

Part 34B of the Telecommunications Act (eligible company-to-carrier)

Part 34B of the Telecommunications Act is a relatively new addition to the Telecommunications Act that commenced on 14 December 2021.¹² The new Part 34B attempts to mirror the carrier-to-carrier facilities access regime contained in Parts 3 and 5 of Schedule 1 to the Telecommunications Act.¹³ It applies to telecommunications transmission towers and supplementary facilities owned by a body corporate that does not itself have a carrier licence (termed an eligible company) but is part of a 'carrier company group'.

⁸ See cl 17(3) of Part 3 of Schedule 1 to the Telecommunications Act.

⁹ See cl 33, 34 and 45 of Part 5 of Schedule 1 to the Telecommunications Act.

¹⁰ [A Code of Access to Telecommunications Transmission Towers, Sites of Towers and Underground Facilities](#), 1 January 2023.

¹¹ Section 61 of the Telecommunications Act provides that a carrier licence is subject to the conditions specified in Schedule 1, and subclause 37(2) of Schedule 1 to the Telecommunications Act provides a carrier must comply with the Code.

¹² Part 34B commenced on 14 December 2021, see [Telstra Corporation and Other Legislation Amendment Act 2021](#) s 2. However, the ACCC's review of the corporate control percentage (under s 581ZH(1) of the Telecommunications Act) meant that this Part 34B was not operational until six months later.

¹³ [Explanatory Memorandum](#) to the Telstra Corporation and Other Legislation Amendment Bill 2021, p 58.

Part 34B requires an 'eligible company' to give a carrier access to facilities owned or operated by the eligible company.

Similar negotiate-arbitrate provisions to those in Schedule 1 are provided for in Part 34B, where the ACCC is also the arbitrator of last resort.¹⁴

Part 34B also provides that the ACCC can make a code of access relating to facilities encompassed under Division 3 of Part 34B.

Negotiate-arbitrate

Both Schedule 1 and Part 34B prioritise commercial negotiation as the mechanism to gain access to infrastructure. Under both Schedule 1 and Part 34B, the ACCC can be the 'arbitrator of last resort' with respect to disputes about access to various telecommunications facilities.

The *Telecommunications (Arbitration) Regulations 2018* (Telecommunications Arbitration Regulations) enable the conduct of arbitrations by the ACCC under both Schedule 1 and Part 34B of the Telecommunications Act, and deal with issues like the form of notification of a dispute, the ACCC's role as an arbitrator and the conduct of arbitration hearings.

The following chapter examines why an effective facilities access regime is essential.

¹⁴ Telecommunications Act ss 581Z and 581ZE.

2. Why does a facilities access regime matter?

The ACCC considers:

- access to telecommunications networks and facilities is necessary in order to provide services or inter-connect networks to users and remains important.
- the 'access regime' recognises that, under certain circumstances, owners of infrastructure may have substantial market power particularly in regional and remote areas.
- where entities are vertically integrated, whether by ownership links or very long-term contractual relationships, an access regime is important to ensure competitive entry into related markets.
- Amplitel and Telstra continue to have a strong advantage in regional and remote areas.
- access to existing (and new) towers will continue to be an important investment consideration for mobile network operators and other access seekers.
- the access regime is likely to play an important role in ensuring access on reasonable terms.

2.1. Facilitating competition in the mobile services market

As noted in the Department's discussion paper, this access regime is intended to facilitate competition in the mobile services market.¹⁵ The access regime was designed to do this by enabling mobile network operators to operate in areas where there is existing infrastructure, rather than establishing new infrastructure, which can be considerably more costly and inefficient.¹⁶ We consider that the access regime is not effectively meeting this intention and is unlikely to do so.

An access regime recognises that under certain circumstances, owners and operators of infrastructure may have substantial market power and be in a position to distort competition in that market and related markets. Where they are vertically integrated into competitive upstream or downstream markets, service providers may have incentives to restrict competitor access to the facilities' services in those markets or to offer terms and conditions of access which discriminate against them. Even when services are vertically separated, the service providers may be in a position to use that market power to charge higher prices at the expense of consumers and economic efficiency.

¹⁵ Department's discussion paper, p 5.

¹⁶ Department's discussion paper, p 5.

Co-location on mobile infrastructure is limited outside major metropolitan areas

The Regional Mobile Infrastructure Inquiry final report provided a breakdown of towers and rooftop structures owned or operated by the major industry players. Telstra and Amplitel control a large proportion (5,899 out of 8,147) of tower and rooftop structures in very remote, remote and outer regional Australia (see Table 1 below).

Table 1: Number of towers and rooftop structures owned or operated by each entity as at December 2022¹⁷

Geographic Area	Amplitel	BAI	Indara	NBN Co	Optus	Telstra	TPG	Waveconn	Total
Very Remote Australia	1,688	115	31	5	3	474	-	0	2,316
Remote Australia	1,033	79	159	51	11	191	-	11	1,535
Outer Regional Australia	1,915	211	839	579	76	598	-	78	4,296
Inner Regional Australia	1,668	120	1,141	880	58	529	-	136	4,532
Major Cities of Australia	1,788	79	2,064	117	36	670	-	1,108	5,862
Total	8,092	604	4,234	1,632	184	2,462	0	1,333	18,541

Note 1: At the time these counts were provided, there were a number of Telstra's towers which had been purchased by Amplitel but had not yet transferred. There is likely some double counting between Amplitel and Telstra's site counts. Telstra's site count also includes rooftop sites on the top of Telstra exchange building and structures used to install small cells. Small cells are generally not capable of being upgraded to support multiple carriers.

Note 2: Not all towers or rooftops will have mobile network operator active equipment mounted on them.

Amplitel and Telstra together own or operate around 57% of the infrastructure assets identified in Table 1. This far exceeds the next competitor, Indara, which has around 23% of towers and rooftop structures. In addition, Amplitel and Telstra's dominance increases as remoteness increases. Telstra and Amplitel account for nearly 70% of towers and rooftop structures in regional and remote areas.

Table 2 below shows the rate of co-location on active sites used by mobile network operators.

¹⁷ Information provided by stakeholders.

Table 2: Total number of active sites used by mobile network operators by co-location and by remoteness area, as at January 2021, January 2022 and January 2023

Region	Type of site	2021	Rate of colocation in 2021	2022	Rate of colocation in 2022	2023	Rate of colocation in 2023
Major Cities of Australia	Co-located sites	4,335	51%	4,379	51%	4,401	49%
	Single operator sites	4,106		4,169		4,524	
Inner Regional Australia	Co-located sites	1,086	33%	1,110	33%	1,125	33%
	Single operator sites	2,160		2,240		2,272	
Outer Regional Australia	Co-located sites	645	24%	654	24%	648	24%
	Single operator sites	2,047		2,100		2,108	
Remote Australia	Co-located sites	101	12%	105	12%	108	12%
	Single operator sites	766		788		806	
Very Remote Australia	Co-located sites	40	4%	45	4%	51	5%
	Single operator sites	933		972		1,004	
Total all Australia	Co-located sites	6,207	38%	6,293	38%	6,333	37%
	Single operator sites	10,012		10,269		10,714	

Source: [Mobile Infrastructure Report 2023](#), output tables, 27 November 2023.

Table 2 shows that the vast majority of active sites outside of capital cities have a single mobile network operator using that site. While the number of sites has increased between 2021 and 2023, Table 2 also shows that the rate of co-location has remained virtually unchanged over the same period. Despite the tower sales, there has not been an increase in the rate of co-location.

2.2. The facilities access regime is important in rural, regional and remote areas

The Regional Mobile Infrastructure Inquiry noted that Telstra and Amplitel's advantage in regional areas could raise barriers to expansion for rival mobile network operators and other access seekers. Expanding coverage and improving the quality of mobile services is highly capital intensive and costly. This challenge is significant in a country like Australia with a large geographical area, much of which is sparsely populated.

Mobile network operators incur significant costs to increase regional, rural and remote coverage. This may result in only a small amount of gain in incremental population coverage and may make it more difficult to justify investments in regional areas. The commercial incentives of mobile network operators will be influenced by a range of factors in deciding where to extend coverage, including the cost and benefits arising from new or improved mobile coverage and ease of access to existing infrastructure.

We consider that the competitive advantage enjoyed by Amplitel and Telstra in regional areas remains strong and will likely continue to impact Optus and TPG Telecom's incentives to invest more significantly in regional areas. Both mobile coverage and the provision of access to towers in significant parts of regional and remote Australia constitute a natural monopoly.

As such, access to existing towers will continue to be an important investment consideration for mobile network operators and other access seekers. The access regime in the Telecommunications Act is likely to play an important role in ensuring access on reasonable terms and improved competition and the services it delivers to consumers.

3. Issues with the Part 34B non-carrier regime

The ACCC considers:

- all entities that house facilities for telecommunications services provided by or for the use of carriers should be subject to facilities access obligations that are consistently applied.
- the facilities and tower access processes that are contained in Schedule 1 and Part 34B should include all telecommunications network infrastructure providers, not just carriers or those related to a mobile network operator.
- there should be consistency in application between Part 34B and Schedule 1 of the Telecommunications Act.
- all entities that provide telecommunications facilities should be able to be subjected to an access code made by the ACCC. Carriers and non-carriers should be treated equally under such a code.
- access arrangements for some types of telecommunications facilities may be better addressed under Part XIC.

In this section of our submission, we cover the following questions from the Department's issues paper:

3. *Should mobile network infrastructure providers outside carrier company groups have facilities and tower access obligations?*
4. *Should facilities and tower access provisions in Schedule 1 be expanded to include mobile network infrastructure providers?*
5. *Is Part 34B working effectively, and should it be expanded to cover mobile network infrastructure providers not in a carrier company group?*
6. *Should all mobile network infrastructure providers be subject to a facilities access code?*

3.1. Which entities should be subject to facilities access obligations?

From the competition and economic regulation perspective, we view the following issues as relevant when considering which entities should be required to provide access to their infrastructure:

- the infrastructure is significant
- there is market power
- the infrastructure is monopoly or near-monopoly, and duplicating infrastructure is inefficient
- a right to access will promote competition in related markets
- access will encourage efficient investment in infrastructure.

All of these issues appear in the telecommunications sector, and are particularly apparent in regional and remote areas of Australia.

High-cost infrastructure including trenches, ducts and pits are often provided by only one company, or at best two, outside of major cities. Our experience is that most disputes that arise in relation to infrastructure access are primarily due to pricing. This demonstrates the market power of facility owners or providers. In the ACCC's view, the scope of regulation should be sufficient to address market power issues but should not overreach so as to create unnecessary costs which deter efficient investments.

We note that there are also wider issues that regulation may consider, such as reducing environmental impacts by sharing of infrastructure or avoiding duplication.

Using the concept of a 'carrier' to identify access providers is no longer effective

The Telecommunications Act identifies 'carriers' and 'carriage service providers' as the main participants regulated in the telecommunications industry. Historically, this was the case, as vertically integrated entities such as the mobile network operators would own physical telecommunications infrastructure and also provide retail services to the public. The Telecommunications Act defines 'carrier' as 'the holder of a carrier licence'.¹⁸ Before physical telecommunications infrastructure owned by a person (a 'network unit'), can be used to supply a 'carriage service' to the public, unless an exemption applies, the owner must hold a carrier licence, or a nominated carrier declaration must be in force in relation to the unit.¹⁹

Carriers as access providers

The sale of telecommunications transmission towers has highlighted other participants that are becoming increasingly important in the industry. Specialist infrastructure owners, such as the mobile network infrastructure providers, do not necessarily fit within the definition of a carrier. This may be because the mobile network infrastructure provider generally does not supply carriage services to the public, or that the infrastructure it holds does not fit within the definition of a 'network unit'.²⁰

More broadly, there is a changing telecommunications landscape with new models of infrastructure ownership developing. There are entities focussing on pure infrastructure provision, those providing neutral host capabilities and entities that focus on providing radio access or private wireless network connectivity.

Like Schedule 1, Part 34B of the Telecommunications Act also relies on the concept of a 'carrier'. Part 34B requires an eligible company to give a 'carrier' access to infrastructure owned or operated by the eligible company. An 'eligible company' means a body corporate that is in a 'carrier company group' and is not a carrier.²¹ A carrier company group means 2 or more related companies, of which at least one is a carrier.²²

¹⁸ Telecommunications Act s 7. A carrier licence is granted under s 56 of the Telecommunications Act.

¹⁹ Telecommunications Act s, 42.

²⁰ See e.g. Amplitel, [Submission in response to ACCC's Regional Mobile Infrastructure Inquiry preliminary report](#), 16 May 2023, p 6.

²¹ Telecommunications Act s 581X.

²² The question of whether companies are related is to be determined in accordance with s 50 of the *Corporations Act 2001*, which provides that a holding company of another body corporate, a subsidiary of another body corporate, or 2

It is relatively easy to identify which entities have a carrier licence and are therefore subject to Schedule 1 of the Telecommunications Act.²³ However, we have found that there can be complex corporate structures which makes it difficult to identify whether there is a carrier licence within a particular corporate group.

It is possible that some entities in a corporate group may be subject to Schedule 1 while other entities in the group may be subject to Part 34B. The two regimes mean that in some corporate groups, Schedule 1 will apply to an entity that holds a carrier licence and Part 34B may apply to other entities in that corporate group if they own or operate relevant infrastructure. Which, if any, obligations apply to a particular entity will depend on which entity owns or operates the relevant infrastructure and whether the entity holds a carrier licence. It could be the case that entities pick and choose the most appropriate entity that suits their commercial considerations.

We consider that the applicability of the access regime should not be dependent on the type of entity that holds the infrastructure. Applicability should be centred on the infrastructure itself.

Carriers as access seekers

There are numerous provisions in both Schedule 1 and Part 34B that identify the access seeking party as a carrier. We are not aware of any issues arising from defining an access seeker as a carrier.

We note however that there are a range of entities which seek access to infrastructure, not all of which may be carriers. Entities which seek access include:

- internet service providers and wireless network service providers
- mobile network operators
- radio and television broadcasters
- government entities that use wireless infrastructure such as the Bureau of Meteorology, Australian Maritime Safety Authority, ambulance, police, fire services, surf lifesaving entities
- mining and construction entities.

Other infrastructure providers who hold carrier licences

There are other infrastructure providers, such as electricity providers or their related entities, which hold carrier licences.²⁴ These typically use existing infrastructure (for example, optical ground wire on electricity transmission networks or optic fibre signalling cable on rail networks). Such entities could be subject to Parts 3 and 5 of Schedule 1 if they are the holder of the carrier licence, or if the entity is simply 'related' to a carrier then Part 34B of the Telecommunications Act would apply depending on their carrier licence status. Where some of these entities hold carrier licences, but other similar entities may not, further highlights the unevenness of the application of current regulation.

subsidiaries of the same holding company will be related bodies corporate. However, for the purposes of Part 34B of the Telecommunications Act a company will be a subsidiary of a second company if the second company can cast, or control the casting of, more than 15% of the votes that might be cast at a general meeting, or where the second company holds more than 15% of the issued share capital (referred to as the 'control threshold'). This modifies s 46 of the *Corporations Act 2001*, which provides for a 50% control threshold.

²³ See Australian Communications and Media Authority, [Register of licenced carriers](#), accessed 6 March 2024.

²⁴ See for example, Australian Communications and Media Authority, [Register of licenced carriers](#), accessed 6 March 2024.

During the Regional Mobile Infrastructure Inquiry, we heard frustration from some entities which are captured by facilities access regulation but do not provide telecommunications infrastructure as their core business. One stakeholder at an industry stakeholder forum raised that it is considering not keeping its carrier licence due to the extra regulation it adds.²⁵ This highlights that some entities could ‘choose’ whether or not the facilities access regimes apply to them, despite owning or operating relevant infrastructure.

What categories of co-locatable infrastructure are captured by the access regime is something that should be considered further.

3.2. What are the differences in scope between Schedule 1 and Part 34B?

Part 34B of the Telecommunications Act was introduced in December 2021 in response to Telstra’s restructure, to ensure ‘regulatory equivalency of obligations’.²⁶ Part 34B intended to ensure that the facilities access obligations in Schedule 1 of the Telecommunications Act continue to apply to subsidiaries or other related entities of a carrier, such as Telstra.²⁷

Schedule 1 captures a broader range of infrastructure than Part 34B

While Part 34B largely mirrors Schedule 1, there are differences in scope between the two. We consider these differences are relevant to the question of whether Part 34B should more effectively mirror Schedule 1 such that all the facilities covered by inter-carrier provisions should also apply to mobile network infrastructure providers-carrier relationships. The table below provides a summary of the comparison of the access framework contained in Schedule 1 and Part 34B.

Table 3: Comparison of access obligations in Schedule 1 and Part 34B of the Telecommunications Act

Schedule 1 obligation	Part 34B obligation	Comments
Cl 17 Part 3 – access to supplementary facilities Arbitration available (cl 18(1))	S 581Y in Division 2 – access to supplementary facilities Arbitration available (s 581Z(1))	The definition of ‘facilities’ in both regimes include the land (site) on which a facility is located, and also include a ‘tower’. There is no ability for the ACCC to make a code in relation to either of these obligations.
Cl 33 Part 5 – access to telecommunications transmission towers Arbitration available (cl 36(1))	S 581ZD in Division 3 – access to telecommunications transmission towers Arbitration available (s 581ZE(1))	The ACCC has the ability to make a Facilities Access Code in relation to Part 5 of Schedule 1. The ACCC has the ability to make a code in relation to Division 3 of Part 34B only.

²⁵ ACCC, [Regional mobile infrastructure inquiry 2022-23 stakeholder forums – Industry Consultation Exchange summary](#), 22 June 2023, p 9, accessed 8 March 2024.

²⁶ *Telstra Corporation and Other Legislation Amendments Bill 2021*, [Explanatory Memorandum](#), p. 2.

²⁷ *Telstra Corporation and Other Legislation Amendments Bill 2021*, [Explanatory Memorandum](#), pp. 2, 4-5.

Schedule 1 obligation	Part 34B obligation	Comments
Cl 34 Part 5 – access to the <u>sites</u> of telecommunications towers Arbitration available (cl 36(2))	No equivalent provision in Division 3, however sites is covered by Division 2 as noted above.	The ACCC has the ability to make a Facilities Access Code in relation to Part 5 of Schedule 1. The ACCC <u>does not</u> have the ability to make a Code in relation to sites of towers covered under Division 2.
Cl 35 Part 5 – access to eligible underground facilities Arbitration available (cl 36(3))	No equivalent provision.	Not currently relevant to non-carrier access providers.
Cl 38 Part 5 – Industry co-operation about sharing of sites	No equivalent provision	Potentially a key access issue Seems inconsistent not to apply to mobile network infrastructure providers under Part 34B.

There is a degree of overlap between Schedule 1 and Part 34B in that both make provision for access to facilities and to telecommunications transmission towers. Schedule 1 is broader in scope in that it separately specifies access obligations for sites of telecommunications towers and access to eligible underground facilities in addition to the general access to supplementary facilities contained in Clause 17 of Schedule 1.

We are not aware of access issues relating to non-carrier entities for access to underground facilities. We consider it problematic, however, that it appears a Part 34B Code could not apply to the sites of towers.

It is important that the regulatory framework be able to adapt to future changes in market structure. Internationally, mobile operators have been selling off their tower assets to specialist companies or to large infrastructure investors for several years. We also note that mobile network operators in overseas jurisdictions are also selling off parts of their radio access networks to tower operators. We anticipate that there will continue to be changes in infrastructure ownership in the future. We note that Schedule 1 and Part 34B apply to both infrastructure owners and operators, but these concepts are linked back to the possession by an entity of a carrier licence.

The regulatory framework could be improved by focussing access obligations on the infrastructure itself rather than the entity that owns or operates the infrastructure.

We see no benefit in having different regimes for carriers and for eligible companies

The carrier-to-carrier regime remains relevant in that there are a large number of assets that remain owned or controlled by carriers. For example, Telstra retained 2,462 tower and rooftop structures rather than passing them to Amplitel. Amplitel now owns or operates 8,092 such structures.²⁸

²⁸ ACCC, [Regional Mobile Infrastructure Inquiry – final report](#), October 2023, p 21.

As identified above, we consider there are definitional issues in the application of Part 34B that stem from the concept of an eligible company as the access provider:

- Part 34B aims to cover infrastructure assets owned or operated by an eligible company that were previously covered by Schedule 1. While the divested assets are the same the access obligations are not the same because Part 34B does not cover the same assets as Schedule 1.
- Carrier licence status and ownership of infrastructure can be obscured through corporate structures. To that extent, it may not be clear to an access seeker which access regime applies to an access provider.
- The relative position of the carrier license holder in a corporate group's structure can mean that there is some ambiguity as to whether an entity may be subject to access obligations – either under Schedule 1 or Part 34B.

Given the potential issues arising from the implementation of two access regimes in Schedule 1 and Part 34B, we question the desirability of two separate regimes (Schedule 1 and Part 34B) for governing infrastructure access.

3.3. What is the role of access codes?

The ACCC developed the Facilities Access Code under section 37 of Part 5 of Schedule 1 of the Telecommunications Act in 1999.²⁹ The Facilities Access Code was last reviewed in 2019. It applies to carriers seeking access to telecommunications transmission towers, sites of such towers, or certain underground facilities owned or operated by other carriers.

The current Facilities Access Code was put in place to facilitate access and promote co-location of telecommunication infrastructure. By mandating processes and procedures for timely access to infrastructure, which apply in circumstances where commercial agreements between carriers cannot be reached, the ACCC intended the Code to encourage the efficient use of telecommunications infrastructure, as well as establish a 'safety net' of provisions to underpin potential access disputes. The benefits of the current Facilities Access Code arise from:

- the mandatory provisions of the Code which must be applied to contractual arrangements
- the dispute resolution procedures inherent within the Code
- policies and provisions relating to administrative procedures such as queuing for access, timeframes for access and use, confidentiality arrangements and information sharing.

Division 3 of Part 34B of the Telecommunications Act empowers the ACCC to make a code setting out conditions that are to be complied with in relation to the provision of access under Division 3 of Part 34B, which relates to access to telecommunications transmission towers owned or operated by eligible companies.

We are considering whether to make a Part 34B code.

²⁹ [A Code of Access to Telecommunications Transmission Towers, Sites of Towers and Underground Facilities](#), 1 January 2023, accessed 6 March 2024.

A Part 34B code is restricted to towers only

As detailed in Table 3, Part 34B of the Telecommunications Act introduces access obligations in relation to two types of infrastructure assets:

- supplementary facilities (under Division 2 of Part 34B)
- telecommunications transmission towers (under Division 3 of Part 34B).

While Part 34B provides for access to these two types of infrastructure, the scope of an ACCC Part 34B code is restricted to only the provision of access under Division 3 of that Part.³⁰ This means that a potential Part 34B code would *only* apply to telecommunications transmission towers. In particular, we are concerned that any Part 34B code could not set conditions of access to other relevant facilities or the *sites of towers* because the definition of ‘telecommunications transmission tower’ does not expressly include the sites of such towers.

This is in contrast to a code made under the existing Schedule 1 of the Telecommunications Act, which expressly applies to a wider range of facilities owned or operated by a carrier:

- telecommunications transmission towers
- sites of telecommunications transmission towers, and
- eligible underground facilities.

We note that the explanatory memorandum accompanying the introduction of Part 34B to the Telecommunications Act states as follows:

“Proposed section 581ZF gives the ACCC the power to make a code setting conditions that are to be complied with in relation to the provision of access by Eligible Companies to the telecommunications transmission towers (**and related sites**).”³¹ [emphasis added]

This suggests that the intention was for any code made under Part 34B to encompass access to tower sites.

We consider that access to the *site* surrounding a tower and associated facilities is in practice inevitably linked to the granting of access to the tower structure itself. Excluding underground facilities, almost all clauses of the existing Facilities Access Code that deal with access to towers go hand in hand with conditions relating to access to the corresponding site. The ACCC considers that any code made under Part 34B could not set out conditions relating to access to facilities such as sites of towers, access roads and equipment buildings which may undermine the effectiveness of a code made under Part 34B.

Differences in compliance and enforcement mechanisms

A carrier’s compliance with the existing Facilities Access Code is a condition of its carrier licence. Failure to comply with a licence condition can give rise to pecuniary penalties of up to \$10 million for each contravention, by order of the Federal Court.³²

In relation to Part 34B, if an eligible company and a carrier fail to agree on the terms and conditions of access, either party could rely on the arbitration provisions.

³⁰ s 581ZF(1) of the Telecommunications Act.

³¹ *Telstra Corporation and Other Legislation Amendments Bill 2021*, [Explanatory Memorandum](#), p. 63.

³² Section 570 of the Telecommunications Act.

If a person is engaging in or proposes to engage in conduct in contravention of the Telecommunications Act, the ACCC may seek an injunction from the Federal Court restraining the person from engaging in the conduct.³³ Further, if a person has refused or failed or is refusing or failing or is proposing to refuse or fail to do something that would be in contravention of the Telecommunications Act, the ACCC may seek an injunction from the Federal Court, requiring the person do that act or thing.³⁴

These provisions would apply to both carriers and eligible companies, to the extent the relevant conduct by either a carrier or eligible company would be a contravention of the Telecommunications Act. The ACCC considers that an explicit penalty provision as to compliance with the Code would strengthen the regime. The ACCC notes that compliance with a code made under the Telecommunications Act is a carrier licence condition. Compliance with a Code under 34B is explicit for eligible companies under s 581ZF (2).

3.4. Is Part 34B operating effectively?

We consider that Schedule 1 of the Telecommunications Act, encouraged mobile network operators to co-locate on each other's infrastructure and share facilities. To our knowledge, this led to commercial arrangements that supported credible working relationships and relatively stable access terms.

However, following the divestment of the tower assets by the mobile network operators we consider there are now substantially different commercial incentives that factor into provision of access to towers and facilities. The new mobile network infrastructure providers do not access each other's infrastructure or access the infrastructure of carriers. Rather, they are the providers of facilities not the users. Consequently, there is little reciprocity in providing access and access seekers do not have that same level of countervailing power as mobile network operators held with each other in the carrier-to-carrier regime.

During the Regional Mobile Infrastructure Inquiry, mobile network infrastructure providers submitted that they have an incentive to increase the incidence of co-location³⁵, as this would increase their revenue. However, we found that there are mutually dependent anchor tenant relationships in place between infrastructure providers and their associated mobile network operator.³⁶ Where a mobile network infrastructure provider has a long-term access agreement of this kind, it may not be incentivised to attract additional tenants to its towers or if it does to charge high access fees.³⁷

There are also many smaller operators, who are likely to have very limited bargaining power. We are concerned that access providers may favour those access seekers with whom they have an anchor tenant or corporate relationship to the detriment of other, particularly smaller, access seekers.

We do not consider that Part 34B is operating effectively to curb the market power of some access providers. We outline our reasons for this further in the following chapter.

³³ Subsection 564(1) of the Telecommunications Act.

³⁴ Subsection 564(2) of the Telecommunications Act.

³⁵ Discussions with stakeholders during the Regional Mobile Infrastructure Inquiry 2022-23.

³⁶ ACCC, [Regional Mobile Infrastructure Inquiry – final report](#), October 2023, p 64.

³⁷ ACCC, [Regional Mobile Infrastructure Inquiry – final report](#), October 2023, p 64.

4. Is the overarching regulatory framework effective?

The ACCC considers:

- the current regime for facilities and tower access is no longer adequate to deal with the significant changes in industry structure, technology and corporate relationships since the regime was first introduced. This is likely to require amending legislation to ensure effective regulation.
- the mobile network infrastructure providers are likely to preference related (whether by ownership relationships or long-term contractual obligations already in place due to divestment sales) entities in terms of access and pricing.
- the negotiate-arbitrate model should be improved to make it more accessible to smaller industry players and improve the timeliness with which access disputes are considered if they proceed to arbitration.
- independent commercial mediation is an important part of the current Facilities Access Code and could be given more priority in the access regime.
- there should be a mechanism to limit the cost and improve the timeliness of any arbitration process, such as legislated timeframes and incentives to use commercial arbitrators or mediators.

In this section, we seek to comment on the following questions from the Department's discussion paper:

1. *Are the current regulations governing facilities and tower access, outlined in Schedule 1 and Part 34B of the Tel Act, providing an adequate framework for access seekers to gain access to facilities and towers?*
2. *Is the negotiate-arbitrate model working effectively, or are there instances where access seekers, having been unable to reach agreement with a mobile network infrastructure provider, have been deterred from initiating an arbitration process?*
 - a. *If the latter, what is the reason for this (for example, not enough information about the process or an imbalance of negotiation resources)?*
 - b. *Should an alternative approach to setting terms of access be considered, and if so what would be its key features?*
7. *Have stakeholders experienced issues in gaining access that can be directly apportioned to inconsistency in the facilities access regulatory framework?*
8. *Have stakeholders experienced issues with preferencing or pricing when seeking access to a facility owned by a mobile network infrastructure provider, or can they foresee a situation where this may occur?*
9. *Are there unintended consequences of the current regulations that should be amended?*

Our comments in this section consider the regulatory framework for both access to facilities and telecommunications transmission towers. We also provide an overview of our experience with negotiate-arbitrate in the telecommunications context.

4.1. Would different frameworks for services and facilities work better?

A carrier's ability to access certain telecommunications infrastructure has long featured in the telecommunications regulatory framework. Access to infrastructure has had the intention of ensuring that infrastructure is co-located to the extent possible, promoting competition by facilitating the entry of new operators, and minimising the environmental impact of infrastructure. This facilities access component mainly resides in Schedule 1 and Part 34B of the Telecommunications Act.

There is also Part XIC of the CCA, which focuses on enabling access to certain telecommunications services. The overall objective of the Part XIC access regime is to promote the long-term interests of end-users. Part XIC contains an 'upfront' model of access, which enables the ACCC to 'declare' a service and then relevantly make an 'access determination' that sets out the price and non-price terms and conditions of access. The ACCC is also able to make binding rules of conduct.

This upfront approach can successfully constrain market power and ensure access on reasonable terms and prices. The upfront model is prescriptive and enforceable, and intended to prevent the regulated entity exerting market power before detriment to access seekers occurs. However, it requires complex analysis to inform and set prices.

The predecessor to the current Part XIC of the CCA contained a negotiate-arbitrate model which was removed in 2010 in favour of the upfront declare-determine model. That model was broadly consistent with the negotiate-arbitrate model currently in Part IIIA of the CCA, and in Schedule 1 and Part 34B of the Telecommunications Act. It provided for the terms and conditions of access to be resolved:

- by commercial negotiation between the parties
- through private arbitration, or
- by the ACCC as arbitrator as arbitrator of last resort.

There are providers with significant market power in both services and infrastructure, and there is also the potential for those providers to exert that power to the detriment of access seekers.

There is now a divergence between how access to telecommunications services (Part XIC of the CCA) are regulated compared with access to infrastructure facilities under the Telecommunications Act. Both require an access provider to agree with an access seeker on price and non-price terms and conditions for that access.

We consider that the distinction between services and infrastructure is becoming less relevant, except where there is a compelling reason to treat access to infrastructure differently, for example where the pricing of facilities involves a bespoke transaction. This is so in the case of telecommunications towers, where the cost of towers (and consequentially the price of access) varies depending on a range of factors including location, type of tower and engineering requirements. This is compared to other types of non-tower facilities access, which can be priced homogeneously and suit upfront pricing determinations.

4.2. Is negotiate-arbitrate working effectively?

Negotiate-arbitrate frameworks appear in access regimes as a regulatory measure to address market failure and facilitate access to specified infrastructure or services on reasonable terms and conditions, where those terms and conditions cannot be negotiated commercially. Such models are often considered 'light-touch' and can be a more flexible regulatory tool to achieve this objective compared with upfront pricing and decision models.

The negotiate-arbitrate approach was proposed by the Hilmer Review in the early 1990s as a mechanism to regulate newly privatised bottleneck infrastructure.³⁸ Negotiate-arbitrate was favoured to facilitate the evolution of 'more market-orientated solutions' over time.

The ACCC has relevant experience with negotiate-arbitrate models, including in relation to Part IIIA of the CCA in relation to gas pipelines, rail and more recently for cash equity clearing and settlement services. This section discusses our experiences with negotiate-arbitrate in the telecommunications context.

High level of disputes when negotiate-arbitrate was in Part XIC

In the Part XIC context, the negotiate-arbitrate model was widely criticised by stakeholders across industry for being 'very slow, cumbersome and open to gaming' and not providing sufficient certainty for investment.³⁹ Between 2000 and 2011 a large number of disputes were notified to the ACCC⁴⁰ in relation to access to services declared under Part XIC.

As of mid-May 2009, 157 telecommunications access disputes had been notified to the ACCC since the commencement of the Part XIC regime in 1997. This experience led the ACCC to state that where an access provider has market power and an incentive to deny and delay access, a negotiate-arbitrate regime will be less effective than an ex-ante regime in delivering timely access on reasonable terms and conditions and providing regulatory certainty for access providers and access seekers. The high level of disputes was a key reason behind the move to the upfront declare-determine model introduced in Part XIC in 2010.

In the facilities access context, we have not experienced the same level of disputation or the high level of arbitrations. This may be due to the ACCC's Facilities Access Code playing a significant part in enabling carrier-to-carrier access on reasonable terms through the in-built dispute resolution processes or the administrative processes in the Code that enable fairer access. For example, carriers are required to develop a reservation or 'queuing policy'.⁴¹ The Facilities Access Code is also designed to alleviate barriers to co-location, such as the introduction of a 'use it or lose it' provision for capacity reservations on towers.⁴²

We have however seen a reluctance from access seekers to utilise the arbitration option available in the context of facilities access. Reasons cited for this reluctance are similar to the issues experienced with the Part XIC negotiate-arbitrate model, primarily that arbitrations are slow, costly and provide a high degree of uncertainty as to outcome.

³⁸ Frederick Hilmer (Chair), Mark Rayner, and Geoff Taperell, National Competition Policy – Report by the Independent Committee of Inquiry (25 August 1993, Australian Government Publishing Service, Canberra), p 255.

³⁹ [Replacement explanatory memorandum](#) to Telecommunications Legislation Amendment (Competition and Consumer Safeguards) Bill 2009, p 46.

⁴⁰ [As of mid-May 2009, 157 telecommunications access disputes had been notified to the ACCC since the commencement of the Part XIC regime in 1997.](#)

⁴¹ Facilities Access Code, subclause 2.3 (1).

⁴² See Facilities Access Code, subclause 2.3 (3).

Negotiate-arbitrate could be improved

In the ACCC's experience, the arbitrations process can be slow and resource intensive for all the parties involved. Terms of access are set on a case-by-case basis and its application cannot be extended to the rest of the industry. Legal costs tied to an arbitration are potentially a considerable financial burden for any party seeking to rely on this dispute resolution mechanism. Imbalance in the amount of resources each party is able to commit may also impact the effectiveness of the negotiate-arbitrate model.

Our experience with the arbitral process is that it does not quickly resolve issues. The bilateral nature of an arbitration creates a significant difficulty in that the ACCC can never finally determine prices, terms and conditions to apply across the industry and must arbitrate what could be essentially the same access dispute one by one. This means that arbitrations are often slow, costly and time-consuming processes for access seekers, access providers and the ACCC itself.

In an arbitration, parties will repeatedly be required to submit documents and evidence to justify their positions, drawing on the expertise of legal teams and consultants. Arbitration is consequently a significant resource burden for any party seeking to rely on it. We do not consider that negotiate-arbitrate is a 'light-touch' regulatory solution once the ACCC becomes involved as the arbitrator of last resort.

Further, under the Telecommunications Arbitration Regulations, the ACCC is not empowered to make an interim determination as to terms and conditions of access if there has been an access dispute lodged. For small carriers, the cost of participating in or utilising negotiate-arbitrate can be prohibitive, which consequently dulls the effectiveness of the regime. We have often only seen well-resourced parties utilise the negotiate-arbitrate model.

Smaller players are wary of the potential for significant costs to be incurred. This can create temporal issues, if a small player is waiting on a larger entity to utilise the regime. Additionally, there is no requirement for public transparency of outcomes for facilities access arbitrations. This means that any arbitrated outcome by the ACCC remains confidential and could not be referred to by other industry players.

It is the threat of arbitration, rather than progressing to an arbitration itself, that should have the primary effect on the behaviour of a facility owner.

We acknowledge that arbitration remains an important mechanism to address market power. The ACCC considers that formal mediation is a process which, if included as part of the arbitration process in Schedule 1 could produce more timely outcomes.

The importance of mediation

The current Facilities Access Code provides for mediation as a dispute resolution mechanism in relation to a master access agreement. Clause 2.5(1) of the Code requires terms and conditions of access to 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)-(5).

Mediation is an often-overlooked part of the dispute resolution process. Mediation is not explicitly part of Schedule 1 or Part 34B but the ACCC has been a long standing part of the current Facilities Access Code made under Schedule 1. While arbitration ends with a determination by the arbitrator, which is binding on both parties, the ACCC has found that formal, commercial mediation between the parties is a process by which the issues in

dispute can be identified and potentially resolved. Mediation is a structured negotiation process in which an independent mediator assists the parties to identify and assess options and negotiate an agreement to resolve their dispute. Mediation is a non-binding alternative to arbitration.

The current framework under both Schedule 1 and Part 34B is that if a 'first' carrier or an 'eligible company' cannot agree terms and conditions of access then failing agreement access is to be determined by an arbitrator appointed by the parties. If the parties are unable to agree on an arbitrator the ACCC is to be the arbitrator.

In the ACCC's experience, mediation is an intermediate process by which the issues in dispute can be identified and often resolved. In the ACCC's experience participation in the process of mediation provides an opportunity to positively resolve issues by both parties. It encourages openness around negotiations and enables both sides to a dispute to acknowledge all the issues in dispute. Mediation may also flesh out alternative resolutions that have yet to be considered.

Key benefits of the mediation process are that it avoids the uncertainty of an arbitrated outcome, may preserve relationships between the parties and brings the parties closer together to more fully sound out the issues. This is likely to provide a solution that better suits the needs of both parties.

The mediation process may also have the following advantages including that:

- a dispute may be resolved more quickly through mediation than through arbitration
- the costs of resolving a dispute through mediation are likely to be lower
- mediation offers the parties to the dispute more control over the outcome, and
- if mediation is successful both parties are likely to be satisfied with the outcome and less likely to activate further dispute processes.

The ACCC is likely to use mediation in two ways. First, if a dispute over access results in arbitration, then the first likely recourse of an ACCC arbitration process would be to 'direct' the parties to formal mediation. This is an attempt, during the early course of an arbitration, to bring the parties closer together (with the aid of an accredited mediator) in an attempt to resolve the dispute.

Second, if the dispute is subject to the current Facilities Access Code and commercial negotiations have failed, carriers must engage in their own dispute resolution and, if necessary, mediation. In this way, mediation or the existence of mediation in the dispute resolution process is an important step in dispute resolution under the current Code. This would not be possible in relation to access to facilities (for example, the sites of tower or equipment buildings) under Division 2 of Part 34B as the ACCC cannot make a Code of access in relation to facilities covered under Division.