

such as in the offices of their own solicitors, from a local library or other community organisation, from their own homes and business premises.

What might be the costs of such a convention, and who would benefit? Would there be winners and losers, or just winners? It is likely that the major costs of such a scheme would be the establishment and running costs of the organisation established to implement the convention. As it is necessarily a public sector initiative, funds required for it would come from governments (taxpayers). The direct and indirect

advantages to taxpayers however, in implementing such a scheme, would be immeasurably positive.

Other costs may include "compliance costs" which would be imposed upon vendors required to comply with the new regulatory scheme. What would that involve? Virtually nothing. A vendor would be required to register with a local national authority, possibly display some kind of certificate on their website, and implement a sub-system in their website-handling software to provide transmission of their unique identity-data to potential customers. All of these costs

would, in the wider scheme of general business activities conducted via the Internet, be utterly trivial. Would such costs be a problem if they were passed on to Internet consumers by vendors? They would be virtually un-noticeable; and would undoubtedly amount to a cheap form of transaction insurance the average consumer would be more than willing to pay for.

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Love Thy Competitor - Introducing the Facilities Access Code

Matthew McLennan explains the intricacies of the new Facilities Access Code.

Are you the proud owner of a telecommunications transmission tower? Are you planning to expand your existing network by building new telecommunications transmission towers or laying more underground cables? Would you like to hang your transmission equipment from one of your competitors' transmission towers?

If you answered "yes" to any of these questions, you will be interested in the Australian Competition and Consumer Commission's ("ACCC") new Facilities Access Code ("Code"). The Code sets the parameters for any future negotiations between carriers about access to certain telecommunications facilities. It came into effect on 13 October 1999.

WHAT IS THE FACILITIES ACCESS CODE?

The Code sets out the conditions on which a carrier who owns a facility (referred to as the "First carrier") is to provide another carrier (referred to as the "Second carrier") with access to the following telecommunications facilities ("Eligible Facilities"):

- telecommunications transmission towers (such as mobile towers);
- the sites of telecommunications transmission towers; and

- eligible underground facilities (such as the underground duct through which a wire, cable, or optical fibre may be laid).

The Code has been drafted by the ACCC in accordance with Part 5 of Schedule 1 of the *Telecommunications Act 1997*. Part 5 provides, in general terms, that telecommunications carriers must give each other access to Eligible Facilities. The Code supplements this general obligation with detailed administrative and operational procedures.

According to the ACCC, the objective of the Code is *to facilitate or encourage co-location (of telecommunications facilities) by mandating processes and procedures for timely access to facilities, to apply in circumstances where commercial agreement between carriers cannot be reached*. On this view, the Code is the safety net into which will fall access disputes which cannot be resolved commercially.

KEY FEATURES OF THE CODE

The Code is divided into 3 parts:

- Chapters 1 to 6, which contain the rules and procedures applicable to all types of Eligible Facilities;

- Annexure A, which deals with access to telecommunications transmission towers and the sites of those towers; and
- Annexure B, which deals with access to eligible underground facilities.

In this article our focus is on the general rules contained in chapters 1 to 6 of the Code.

First Principles

The freedom to negotiate is tempered by a requirement that the First and Second carrier comply with the timeframes specified in the Code. This requirement reflects the ACCC's goal of allowing commercial negotiation at the same time as preventing a reluctant First carrier from delaying the provision of access to a Second carrier.

Mandatory conditions of access

Chapter 2 of the Code contains the rules which are not open to negotiation. These are clearly the rules which the ACCC considers essential to the operation of the new access regime.

In the course of providing access, carriers must provide each other with information about their Eligible Facilities and technical needs. In order to ensure the unhindered flow of this information the

Code provides that carriers must keep confidential all confidential information provided to them and only use that information for the purposes of the Code.

In the eyes of the Code all carriers are equal and as such deserve equal access to Eligible Facilities. This principle is reflected in two important rules. The first is the non-discrimination rule. A First carrier is expected to take all reasonable steps to ensure that, as far as practicable having regard to its legitimate business interests and the interests of third parties, the access that a Second carrier receives is equivalent to that which the First carrier provides to itself. The second rule is the queuing rule. A First carrier is required to develop a queuing policy for applications for access to its Eligible Facilities. The queuing policy must be non-discriminatory and seek to ensure that Second carriers in the queue get access as soon as possible.

Finally, presumably to ensure that access disputes do not get bogged down in the courts, the Code requires carriers to engage in dispute resolution, including mediation.

Applying for access

Under the Code, the first step in the process of providing access is an exchange of information. Each First carrier must establish and maintain an "Information Package" in relation to the provision of access to its Eligible Facilities. This information package must set out, among other things, how access to Eligible Facilities is to occur and indicate the amount of time needed to gain access to an Eligible Facility.

A Second carrier's response, as it were, to a First carrier's Information Package is a "Facilities Access Application". Annexures A and B of the Code contain detailed rules about the content and timing of Facilities Access Applications. These rules vary according to whether the relevant Eligible Facility is a telecommunications transmission tower or an eligible underground facility.

Negotiating access

The general rule under the Code is that negotiations for access to Eligible Facilities must be undertaken in good faith and entered into and conducted in a timely manner. The goal of these

negotiations is the creation of a "Master Access Agreement" which deals with matters such as:

- access and maintenance procedures;
- dispute resolution procedures;
- charges for access;
- financial security requirements;
- technical specifications;
- such other procedures as the carriers may consider necessary for the due and proper joint operation of the Eligible Facility.

First carriers will undoubtedly often have concerns about the creditworthiness of those who wish to have access to their Eligible Facilities. The Code acknowledges the legitimacy of these concerns at the same time as seeking to prevent them from being used to delay access. Accordingly, the Code sets out a formal procedure by which a First carrier may object to the creditworthiness of a Second carrier and how the Second carrier is to respond to such an objection.

The provision of access will almost always require work to be done on an Eligible Facility. The Code refers to this as "Make Ready Work". It contains detailed rules about the performance of Make Ready Work which are intended to accommodate a First carrier's concerns that a Second carrier could damage its Eligible Facilities.

A key element of the philosophy underlying the Code is the conviction that it is economically more efficient for carriers to share Eligible Facilities. In order to promote sharing and the efficiencies it may bring the Code provides that carriers may choose to initiate or participate in what is known as a "Co-Location Consultation Process". A Co-Location Consultation Process involves a carrier informing all other carriers that it has plans to establish a new facility in a particular postcode area and requesting the other carriers to consider establishing a shared new site or facility.

Implementing access

The continuing viability of access to an Eligible Facility is preserved under the Code by rules on the maintenance and

use of Eligible Facilities. The First carrier is responsible for the maintenance of the Eligible Facility while both First and Second carriers are responsible for the maintenance of their own equipment installed at the Facility. A First carrier is entitled to undertake emergency repair work which may include turning-off a Second carrier's equipment. Otherwise carriers are not entitled to obstruct the use or operation of each other's equipment. These rules are supported by the First carrier's power to suspend access to an Eligible Facility in the event of abuse. Finally, by way of last resort the Code contains a long list of events which entitle either the First or Second carrier to terminate their access arrangements.

IMPLICATIONS FOR CARRIERS

It is unlikely that the Code will mean peace in our time in the realm of access disputes. Nevertheless, even if they do not want to love one another, carriers must learn to live with the Code. In broad terms, this means that they need to understand the Code and its effect on their business so that they can make an informed choice between:

- negotiating access terms freely with each other (subject to the mandatory provisions contained in chapter 2 of the Code);
- negotiating for access within the four corners of the minimum standards set by the Code; or
- failing agreement, resorting to arbitration (bearing in mind that, if carriers cannot agree on an arbitrator, the default arbitrator is the ACCC).

In addition, carriers planning to expand their networks will need to consider the impact of the Code. The Code may induce them to share facilities, and the cost of building them, with other carriers.

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