

EXPLANATORY STATEMENT

Approved by the Australian Competition and Consumer Commission

Telecommunications Act 1997

A Code of Access to Telecommunications Transmission Towers, Sites of Towers and Underground Facilities Amendment 2020 (No. 1)

Authority

The Australian Competition and Consumer Commission (**the ACCC**) has made the *A Code of Access to Telecommunications Transmission Towers, Sites of Towers and Underground Facilities Amendment 2020 (No. 1)* (**the Amendment Instrument**) under subclause 37(1) of Part 5 of Schedule 1 to the *Telecommunications Act 1997* (Cth) (**the Telco Act**) and subsection 33(3) of the *Acts Interpretation Act 1901* (**the AIA**).

Under subclause 37(1) of Part 5 of Schedule 1 to the Telco Act, the ACCC may, by legislative instrument, make a Code setting out conditions that are to be complied with in relation to the provision of access to telecommunications transmission towers, sites of towers and underground facilities.

Subsection 33(3) of the AIA relevantly provides that where an Act confers a power to make a legislative instrument, the power shall be construed as including a power exercisable in the like manner and subject to the like conditions (if any) to repeal, rescind, revoke, amend, or vary any such instrument.

Purpose and operation of the instrument

On 7 October 1999, under subclause 37(1) of Part 5 of Schedule 1 of the Telco Act, the ACCC made *A Code of Access to Telecommunications Transmission Towers, Sites of Towers and Underground Facilities* (**the Code**) following a request from the then Minister for Communications, Information Technology and the Arts to examine whether a code was necessary to assist network rollouts by new and existing mobile network operators.

The Code provides a default set of non-price terms of access to telecommunications transmission sites and towers and underground facilities that are designed to hold lines (**eligible facilities**), and includes both mandatory and non-mandatory conditions of access.

The Code applies to carriers (within the meaning of that term in section 7 of the Telco Act) that own or operate eligible facilities. Pursuant to section 61 of, and subclause 37(2) of Part 5 of Schedule 1 to, the Telco Act, carriers must comply with the Code and the Code is a condition of a carrier licence.

The purpose of the Amendment Instrument is to amend the Code in accordance with the recommendations contained within the ACCC's *Facilities Access Code Review – Final Report* as published on the ACCC's website (www.accc.gov.au) in June 2020. Specifically, the amendments to the Code made by the Amendment Instrument:

- require a carrier, on request from another carrier, to provide information about new and planned telecommunications tower builds;
- introduces a 'use it or lose it' timeframe of 24 months for carriers to use reserved tower capacity; and
- require a second carrier to inform a first carrier when co-location installation work is complete.

A provision-by-provision description of the Amendment Instrument is set out in the notes at **Attachment A**.

The Amendment Instrument is a disallowable instrument for the purposes of the *Legislation Act 2003 (the LA)*.

Documents incorporated by reference

The Amendment Instrument does not incorporate any other document by reference.

Consultation

Before the Amendment Instrument was made, the ACCC was satisfied that consultation was undertaken to the extent appropriate and reasonably practicable, in accordance with section 17 of the LA

A discussion paper to facilitate the ACCC's review of the Code was published on the ACCC's website on 3 August 2018, commencing a two-month consultation process. Key stakeholders, including those who participated in the ACCC's Mobile Roaming Declaration Inquiry and Regional Mobile Issues Forum, where related matters were considered, were advised of the ACCC's discussion paper and consultation process by electronic mail. The discussion paper sought submissions on whether the Code was operating effectively, with a principle focus on whether the Code was adequately promoting co-location arrangements on telecommunications towers and related infrastructure.

The ACCC received eight public submissions and two confidential submissions in response to the discussion paper. There were submissions from one consumer representative organisation (Australian Communications Consumer Action Network), one industry representative organisation (Australian Mobile Telecommunications Association), one state government transport department (Queensland Department of Transport and Main Roads) and five telecommunications carriers. Submitters broadly agreed that the Code was operating effectively in facilitating pre-build discussions, but that the Code could be improved to take account of changes in industry practices since the Code was last amended in 2013, including in relation to co-location consultation processes.

On 5 July 2019, the ACCC commenced a further three-week targeted consultation with Telstra, Optus, Vodafone, NBN Co, TPG and Superloop, seeking further submissions from key stakeholders on the major issues raised in consultation on the Discussion Paper. These issues included making changes to the pre-build consultation process, introducing a 'use it or lose it' obligation and other emerging facilities access issues.

The ACCC received four public submissions and one confidential submission from these stakeholders. These submissions narrowed the broad discussions into specific areas of the Code's operation that could be improved, and eliminated areas which stakeholders generally believed were working well and did not require any amendment. In relation to the pre-build consultation process, submitters were generally supportive of the proposed changes, however there were varying positions on whether these processes should be mandated or left as voluntary.

On 21 November 2019, the ACCC published, on its website, a Draft Report indicating its disposition to amend the Code, having considered the issues raised by stakeholders. Carriers, carriage service providers and other potentially affected stakeholders were invited to make comment on the Code amendments proposed as part of a four-week consultation process.

The ACCC received five public submissions in response. The submitters endorsed the majority of the changes proposed to the Code which are set out in the Amendment Instrument. A particular proposal to amend the Code in relation to the pre-build consultation

process did not receive wide stakeholder support and the ACCC, having regard to the submissions received, decided not to progress that particular proposal.

Regulation impact assessment

A preliminary assessment of the proposal to make the Amendment Instrument was conducted by the Office of Best Practice Regulation (**OBPR**), based on information provided by the ACCC, for the purposes of determining whether a Regulation Impact Statement (**RIS**) would be required. OBPR advised that a RIS would not be required because the amendments proposed were unlikely to have more than a minor regulatory impact (OBPR reference number: 42530).

Statement of compatibility with human rights

Subsection 9(1) of the *Human Rights (Parliamentary Scrutiny) Act 2011* requires the rule-maker in relation to a legislative instrument to which section 42 (disallowance) of the LA applies to cause a statement of compatibility with human rights to be prepared in respect of that legislative instrument.

The statement of compatibility set out below has been prepared to meet that requirement.

Overview of the instrument

A *Code of Access to Telecommunications Transmission Towers, Sites of Towers and Underground Facilities (the Code)* was made by the ACCC under subclause 37(1) of Part 5 of Schedule 1 of the *Telecommunications Act 1997 (the Telco Act)*. The Code provides a default set of non-price terms of access to telecommunications transmission sites and towers and underground facilities that are designed to hold lines (**eligible facilities**), and includes both mandatory and non-mandatory conditions of access. The Code applies to carriers (within the meaning of that term in section 7 of the Telco Act) that own or operate eligible facilities.

In 2018, the ACCC commenced a review of the Code to determine whether the Code was operating effectively, with a principle focus on whether the Code was adequately promoting co-location arrangements on telecommunications towers and related infrastructure. In response to a series of consultations, stakeholders broadly agreed that the Code was operating effectively, but that the Code could be improved to take account of changes in industry practices since the Code was last amended in 2013.

In June 2020, the ACCC concluded its review of the Code and published, on its website, the *Facilities Access Code Review – Final Report*. That report recommended a number of amendments to the Code. Those recommended amendments were generally endorsed by stakeholders.

A *Code of Access to Telecommunications Transmission Towers, Sites of Towers and Underground Facilities Amendment 2020 (No. 1) (the Amendment Instrument)* gives effect to the recommendations contained within the ACCC's *Facilities Access Code Review – Final Report*.

The Amendment Instrument amends the Code by:

- requiring a carrier, on request from another carrier, to provide information about new and planned telecommunications tower builds;
- implementing a timeframe of 24 months for carriers to use reserved tower capacity; and
- requiring a second carrier to inform a first carrier when co-location installation work is complete.

Human rights implications

The ACCC has assessed whether the Amendment Instrument is compatible with human rights, being the rights and freedoms recognised or declared by the international instruments listed in subsection 3(1) of the *Human Rights (Parliamentary Scrutiny) Act 2011* as they apply to Australia.

Having considered the likely impact of the Amendment Instrument and the nature of the applicable rights and freedoms, the ACCC has formed the view that the instrument does not engage any of those rights or freedoms.

Conclusion

The instrument is compatible with human rights as it does not raise any human rights issues.

Notes to the *Code of Access to Telecommunications Transmission Towers, Sites of Towers and Underground Facilities Amendment 2020 (No. 1)*

Section 1 – Name

This section provides for the Amendment Instrument to be cited as the *A Code of Access to Telecommunications Transmission Towers, Sites of Towers and Underground Facilities Amendment 2020 (No. 1)*.

Section 2 – Commencement

This section provides for the Amendment Instrument to commence at the start of the day of the day after it is registered on the Federal Register of Legislation.

The Federal Register of Legislation may be accessed free of charge at www.legislation.gov.au.

Section 3 – Authority

This section provides that the Amendment Instrument is made under subclause 37(1) of Schedule 1 to the *Telecommunications Act 1997*.

Section 4 – Amendments

This section identifies that the *A Code of Access to Telecommunications Transmission Towers, Sites of Towers and Underground Facilities*, specified in Schedule 1, is amended as set out in the items in that Schedule.

Schedule 1 – Amendments

A Code of Access to Telecommunications Transmission Towers, Sites of Towers and Underground Facilities [F2005B01098]

Item 1

Item 1 amends paragraph 2.3(3)(ii) of the Code to include a requirement, subject to new sub-clauses 2.3(7) and 2.3(8), that where a Carrier has not commenced ordering or installing Equipment in respect of a Facilities Access Application related a Tower or Tower Site within 24 months of that Facilities Access Application being accepted, that Facilities Access Application must be removed from the queue. The Carrier may then lodge a new Facilities Access Application.

Item 2

Item 2 amends clause 2.3 of the Code by inserting transitional provisions in respect of the amendment made by Item 1. Item 2 inserts new sub-clause 2.3(7) which provides that where a Facilities Access Application has been made before the commencement of the Amendment Instrument, paragraph 2.3(3)(ii) of the Code does not apply. Item 2 also inserts new sub-clause 2.3(8) which provides that where a Facilities Access Application was accepted in the period ending six months after the commencement of the Amendment Instrument, and the Carrier that submitted that Facilities Access Application has not, within 30 months of that application being accepted, commenced ordering or installing Equipment on or in a Tower or Tower Site to which that application relates, that Facilities Access Application must be removed from the queue.

Item 3

Item 3 amends sub-clause 3.2(1) of the Code by requiring a First Carrier, upon request from a Second Carrier, to provide information about any plans the First Carrier has to establish new Towers or Tower Sites.

Items 4, 5, 6, 7 and 8

Items 4, 5, 6, 7 and 8 repeal and replace clause 9 of Schedule A1, clause 1.4 of Schedule A2, clause 2.4 of Schedule A2, clause 9 of Schedule B1 and clause 4 of Schedule B2 of the Code, to insert sub-clauses into those provisions that require, unless otherwise agreed, a Second Carrier, within 20 Business Days of completion of that Second Carrier's installation work, to provide written notification to a First Carrier that the installation work is complete.