

EXPLANATORY STATEMENT

Prepared by the Australian Competition and Consumer Commission

A Code of Access to Telecommunications Transmission Towers, Sites of Towers and Underground Facilities Variation 2013

Telecommunications Act 1997

Name of the instrument

A Code of Access to Telecommunications Transmission Towers, Sites of Towers and Underground Facilities Variation 2013.

Authority

A Code of Access to Telecommunications Transmission Towers, Sites of Towers and Underground Facilities Variation 2013 is made by the Australian Competition and Consumer Commission (ACCC) under clause 37 of Part 5 of Schedule 1 to the *Telecommunications Act 1997*.

Purpose

On 7 October 1999 the ACCC made *A Code of Access to Telecommunications Transmission Towers, Sites of Towers and Underground Facilities* (the Code). 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 (the eligible facilities), and includes both mandatory and non-mandatory conditions of access.

The purpose of this instrument is to vary the Code to:

- remove obsolete references
- account for recent changes in legislation
- make timeframes for accessing the eligible facilities a mandatory provision of the Code, and
- make minor typographical changes.

Operation

The Code applies to telecommunications carriers that own or operate the eligible facilities. Under Schedule 1 to the *Telecommunications Act 1997* (Telecommunications Act), carriers must provide other carriers with access to the eligible facilities. The Code imposes on carriers mandatory and non-mandatory conditions of access to those facilities. The Code is varied to, among other things, impose a mandatory obligation on carriers to comply with timeframes for providing access to eligible facilities to other carriers.

Section 61 of the Telecommunications Act provides that a carrier licence is subject to the conditions specified in Schedule 1. Therefore compliance with the mandatory provisions of the Code is a standard carrier licence condition under the Telecommunications Act.

The date of commencement is the day after *A Code of Access to Telecommunications Transmission Towers, Sites of Towers and Underground Facilities Variation 2013* is registered.

Consultation

Section 17 of the *Legislative Instruments Act 2003* (LIA) requires the ACCC to be satisfied that any consultation it considers to be appropriate and reasonably practicable to undertake has been undertaken before making a legislative instrument.

A discussion paper to examine the Code was published on 4 July 2012. The discussion paper sought submissions on a number of issues, including the ongoing relevance of the Code and whether any changes to the Code were necessary. The discussion paper was published on the ACCC's website.

The ACCC received eight submissions in response to the discussion paper. Broadly, submitters agreed that the Code should be maintained but varied to take account of obsolete references and changes to legislation.

In May 2013, the ACCC published its draft decision to vary the Code, having considered the issues raised by submitters in response to the discussion paper. The draft decision was published on the ACCC's website and carriers, carriage service providers and other industry stakeholders likely to be affected by the decision to vary the Code were given the opportunity to make comments on the proposed amendments.

The ACCC received four submissions in response to the draft decision. The submitters endorsed the majority of the changes proposed to the Code in the draft decision, including changes to update the Code to remove obsolete references and make sure the Code aligned with legislative changes since the Code was made in 1999.

Two submitters raised concerns about one proposed variation to the Code to align the Code with the Structural Separation Undertaking given by Telstra to the ACCC on 23 February 2012. Having considered those submissions, the ACCC decided not to vary that provision of the Code, as proposed in the draft decision.

The ACCC is satisfied that the consultation undertaken was appropriate in the circumstances and met the requirements of section 17 of the LIA.

Details of the accompanying instrument are set out in Attachment 1.

Statement of compatibility with human rights

Subsection 9(1) of the *Human Rights (Parliamentary Scrutiny) Act 2011* requires a rule maker in relation to a legislative instrument to which section 42 (disallowance) of the *Legislative Instruments Act 2003* applies to cause a statement of compatibility to be prepared in respect of that legislative instrument. This statement is at Attachment 2.

Regulation Impact

A regulatory impact analysis assessment has also been carried out and based on this assessment, the Office of Best Practice regulation (OBPR) has determined that the amendments will have minor impacts on business and the not-for-profit sector and that no further analysis (in the form of a Regulation Impact Statement) is required – OBPR reference number 15289.

NOTES ON SECTIONS

Section 1 – Name of instrument

Section 1 provides the name of the instrument is the *Code of Access to Telecommunications Transmission Towers, Sites of Towers and Underground Facilities Variation 2013*.

Section 2 – Commencement

Section 2 provides that the varied code commences on the day after it is registered on the Federal Register of Legislative Instruments.

Section 3 – Authority

Section 3 provides that the Code is made under subclause 37(1) of Part 5 of Schedule 1 to the Telecommunications Act 1997 (Cth).

Section 4 – Schedule 1 – Variations

Item 1

Updates the date in the title of the instrument.

Item 2

Section 1.2.1 has been varied to ensure the Code does not apply to the extent that it imposes an obligation on Telstra that has the effect of preventing Telstra from complying with an undertaking in force under section 577A, 577C or 577E of the Telecommunications Act. It also specifies that for the purposes of this Code, an NBN corporation is not taken to be the operator or controller of an Eligible Facility if:

- (1) there is an agreement in force between Telstra and an NBN corporation,
- (2) the agreement relates to an NBN corporation's access to an Eligible Facility owned or operated by Telstra, and
- (3) apart from this provision, the agreement would result in the NBN corporation being the operator or controller of the Eligible Facility

Items 3 and 4

Amend the notes to section 1.2.1 to include references to legislation.

Item 5

Section 1.2.3 has been repealed and an identical provision has now been inserted in Part 2 of the Code, to make timeframes a mandatory condition of the Code.

Items 6 and 7

Replace references to Australian Communication Authority (ACA) with Australian Communications and Media Authority (ACMA) in paragraphs 2.1(3)(a), 2.1(4)(g)

Items 8 and 9

Vary subsection 2.4(1) to remove all references to the TAF and the TAF Code which is no longer operational, therefore the words ‘inter party dispute resolution’ and the notes to this section have been removed.

Item 10

Replaces obsolete references to ACA with ACMA in subsection 2.4(5) of the Code.

Item 11

Inserts section 2.6 to make timeframes for the provision of access to the eligible facilities a mandatory condition of the Code. It replicates the (now repealed) timeframes provision at section 1.2.3 of the Code.

Item 12

Inserts an abbreviation ‘MRW’ for the term ‘Make Ready Work’ at subsection 4.4(1), clarifying the use of this term elsewhere in the Code.

Items 13 and 14

Correct typographical errors at subsections 4.5(7) and 5.6(3).

Item 15

Varies paragraph 5.8(4)(g) of the Code to remove obsolete references to legislation and to reflect legislative changes. The variation updates references to relevant provisions in subsection 40(1) of the *Bankruptcy Act 1966* in Chapter 5 of the Code.

Item 16

Corrects a typographical errors at paragraph 5.8(4)(o).

Items 17, 19, 21, 23, 24, 25, 26, 30, and 32

Insert the following definitions to Section 6.1 (Glossary and Interpretation) for clarification:

ACMA refers to the Australian Communications and Media Authority.

Act refers to the *Telecommunications Act 1997*(Cth)

Detailed field study means a field study as defined by Annexure A or Annexure B of this Code (as appropriate)

Facilities Access Application means an application as defined by Annexure A or Annexure B of this Code (as relevant).

Information package includes information established and maintained by a First Carrier in relation to the provisions of access to particular Eligible Facilities of classes of Eligible Facilities.

Master Access Agreement means an agreement as defined by Clause 4.2 of this Code, which covers general or standard terms and conditions by which the Second Carrier will obtain access to the Eligible Facilities of the First Carrier (or a class thereof).

NBN Corporation has the meaning as in section 5 of the *National Broadband Network Companies Act 2011* (Cth)

Sharing Proposal means a proposal as defined by sub-clause 4.5(4) of this Code.

Telstra means Telstra Corporation Limited (ABN 33 051 775 556)

Item 18

Repeals the obsolete definition of ACA.

Item 20

Varies the definition of ‘Confidential Information’ in Section 6.1 (Glossary and Interpretation) to clarify that confidential information does not include information which is public, and to limit the definition to information which relates to access to the eligible facilities (only).

Item 22

Amends the definition of ‘eligible facility’ to insert the words ‘installed ready to be used’ to align with the definition of ‘eligible facility’ in clause 31 of Part of Schedule 1 to the *Telecommunications Act 1997*.

Items 27, 28, 29, 31 and 33

Repeal or vary the following definitions in Section 6.1 (Glossary and Interpretation) to remove obsolete references to Commonwealth legislation and statutory agencies, include accurate legislative references, and correct typographical errors:

Potential Second Carriers

PMTS

TAF

TPA

Items 34 and 39

Amend the heading to Part 1 of Annexures A and B to correct a typographical error.

Items 35, 36, 37, 38, 40, 41, 42 and 43

Make amendments to remove obsolete references to Commonwealth legislation and statutory agencies, include accurate legislative references, and correct typographical errors to these provisions:

- Subclause 1.1(1) of Annexure A
- Subclauses 2.3(2) and (3) of Annexure A
- Subclause 4(4) of Schedule A1
- Subclause 1.1(1) of Annexure B
- Subclause 1.1(4) of Annexure B
- Subclauses 2.3(2) and (3) of Annexure B

Statement of Compatibility with Human Rights

Prepared in accordance with Part 3 of the Human Rights (Parliamentary Scrutiny) Act 2011

A CODE OF ACCESS TO TELECOMMUNICATIONS TRANSMISSION TOWERS, SITES OF TOWERS AND UNDERGROUND FACILITIES VARIATION 2013

This Legislative Instrument is compatible with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*.

Overview of the Legislative Instrument

Provides a default set of non-price terms of access to telecommunications transmission towers, sites of towers and undergrounds facilities. The proposed *A Code of Access to Telecommunications Transmission Towers, Sites of Towers and Underground Facilities Variation 2013* will:

1. remove obsolete references to Commonwealth legislation and statutory agencies.
2. reflect legislative changes introduced by the *Telecommunications Legislation Amendment (Competition and Consumer Safeguards) Act 2010*.
3. make timeframes for the provision of access to facilities a mandatory condition.
4. make minor typographical changes.

Human rights implications

This Legislative Instrument does not engage any of the applicable rights or freedoms.

Conclusion

This Legislative Instrument is compatible with human rights as it does not raise any human rights issues.