

**Assessment of Telstra's Structural Separation Undertaking
and draft Migration Plan**

ACCC Discussion Paper

Submission by Vocus Communications Ltd

27 September 2011

1. INTRODUCTION

This submission is made by Vocus Fibre Pty Ltd, which is ultimately owned by Vocus Communications Limited (**Vocus**) in response to the ACCC's discussion paper of 30 August 2011 entitled *Assessment of Telstra's Structural Separation Undertaking and draft Migration Plan (the Discussion Paper)*. Vocus is a licensed carrier and an ASX listed telecommunications provider of wholesale data centre, voice, peering and international Internet connectivity to telecommunications companies and ISPs across Australia, NZ and the US. As well as acquiring bandwidth on other carriers' networks, Vocus also owns and operates its own optical fibre network in Melbourne, Sydney, Brisbane, Adelaide and Perth (**Vocus' network**).

The bulk of Vocus' network is located in Telstra's underground network. Vocus is concerned that the agreement between Telstra and NBN Co relating to the use of Telstra's duct network may put the networks of Vocus and many other carriers using Telstra's ducts at risk. Vocus submits that such an outcome would be detrimental to competition in broadband and other telecommunications markets and should be assessed during the ACCC's consideration of Telstra's Structural Separation Undertaking (**SSU**).

2. EXECUTIVE SUMMARY

There is potential for both Telstra and NBN Co to engage in discrimination in relation to facilities access, including Telstra's ducts where space is frequently scarce. Telstra's past and current practices strongly suggest that Telstra will use its control of this infrastructure to impede competition. The clear incentive remains for Telstra to use its control of necessary infrastructure in a manner that favours its retail business units, which will impede the competitive benefits that should be promoted by structural reform.

3. THE IMPORTANCE OF TELSTRA'S DUCT NETWORK

The size and reach of Telstra's underground duct network is such that the few alternative duct networks owned by other carriers are extremely insignificant in comparison. To our knowledge, all carriers with underground cables utilise Telstra ducts. Though Schedule 1 of the Telecommunications Act (**the Act**) requires Telstra to provide other carriers with access to its ducts, its ownership of the network gives Telstra a considerable competitive advantage. Vocus considers that Telstra's duct charges are excessive and not based upon Telstra's costs in providing access, particularly as the cost of the duct network has been depreciated over many years. However, there is of course, no alternative unless a carrier installs its own ducts, which is expensive and difficult in modern urban environments, as well as inefficient when space is available in Telstra's existing ducts. Access seekers are also required to sub-duct when using Telstra ducts, i.e. the access seeker installs a 32mm sub-duct into the Telstra duct and places its cable into the subduct. This adds to the access seeker's costs and takes up a lot more duct space. Telstra cables are not commonly sub-ducted.

Details of the Telstra/NBN Definitive Agreements have not been made public. Though summaries of the agreements have been published on the website of each company, the reality is that the brief overview provided is totally insufficient to explain details of all aspects of the arrangements including those relating to NBN Co's use of Telstra's ducts. There is a real concern that NBN Co will be given priority of duct space over other carriers, including those currently using Telstra ducts for competitive networks.

Pursuant to Part 5 of Schedule 1 of the Act, Telstra continues to have a statutory obligation to provide other carriers with access to its ducts. All carriers have a similar obligation in relation to a wide range of facilities. Schedule 1 provides that access will be on terms agreed

between the carriers. Use of the ducts is commonly effected by a duct access agreement between Telstra and the second carrier, which is of course drafted by Telstra in a manner that protects its interests. Vocus' access to Telstra's ducts is regulated by such an agreement. Where the duct access agreement provides that Telstra can continue to deal with the licensed duct and the second carrier's occupation can be terminated upon notice by Telstra, then the second carrier's continued tenancy in Telstra's ducts is subject to Telstra requiring the duct for its own use or leasing the duct to somebody else, such as NBN Co.

Telstra's duct lease to NBN Co is clearly relevant to assessing the likelihood of whether existing carriers will be evicted from Telstra's ducts, though as the deal documents are not public we are uncertain to what extent. Any negative impact on other carriers whereby Telstra demands that a carrier remove its cables to make way for the NBN will depend on the amount of free space in the relevant ducts. We are aware that in some areas there is very limited capacity in Telstra's ducts. This includes areas where Vocus' cables are installed in Telstra's ducts, such as South Melbourne. Verifying the availability of space would most likely require physical inspection of the ducts, which would be a vast undertaking. We understand that Telstra's records of duct utilisation are often incomplete and further, will not always explain if ducts are blocked or otherwise unusable. News reports regarding NBN Co's rollout in the inner city Melbourne suburb of Brunswick said that a lot of the underground duct in that location was blocked and unusable. If this is widespread, then there appears to be a reasonable likelihood that there will be areas where there is insufficient space in the ducts for NBN Co's cables unless other cables are removed. We consider it unlikely that Telstra will be removing any of its own cables where they can remain in use, and as such cables belonging to other carriers may be forcibly removed. This would have a seriously deleterious effect on existing arrangements, impact business continuity and the ability of existing competing carriers to continue to provide services.

NBN Co has not publicly indicated that it will force other carriers to vacate Telstra's ducts when its lease takes effect, though such a result does seem entirely plausible if NBN Co deems that it needs to use the duct space that another carrier is using. Currently, proposed amendments to the *Telecommunications (Low-impact facilities) Determination 1997* will give NBN Co the right to install aerial cables. However, we expect that NBN Co will only install aerial cables as a matter of last resort as they are visually ugly and broadly disliked by residents and local councils. NBN Co is unlikely to take on such public outcry unless it has no other option. Objections to NBN Co's aerial cabling will be subject to the mandatory objection process provided by Chapter 4 of the *Telecommunications Code of Practice 1997 (the Code)*. The Code's objection process adds considerable costs and significant delays to network rollouts, which NBN Co will hope to avoid. Accordingly, NBN Co is likely to consider installation of its cables in Telstra's ducts a far more preferable approach.

The summary of the Telstra/NBN Definitive Agreements on NBN Co's website says that Telstra will suffer monetary consequences for failing to make infrastructure available. We consider that this suggests that it is in Telstra's financial interests to give NBN Co priority of access to ducts over other carriers. In turn, this suggests that Telstra will be inclined to exercise any contractual right it has to terminate the access rights of other carriers in its ducts.

The \$4 Billion that NBN Co is reportedly paying to lease Telstra's ducts over 30 years is clearly not related to the value of the ducts or Telstra's costs in providing the service. In 2009, an ACCC report stated that the 2007-08 depreciated historic value of Telstra's ducts was about \$3.9 Billion. If NBN Co wanted to exercise its right as a carrier and to obtain duct access at reasonable rates, then failing agreement with Telstra, it could seek that the ACCC determine access rates via arbitration under Schedule 1 of the Act. It is hard to believe that the ACCC would determine that a reasonable charge for using part of Telstra's ducts would be more than the total depreciated historic value of the duct network. Clearly, the political

imperatives of rapid NBN rollout and having Telstra on board outweighed the need for a reasonable commercial deal. Again, this suggests that NBN Co will be given priority in duct space as the financial benefit to Telstra is vast. Though access seekers pay Telstra considerable sums for duct use, it is a very small amount compared to the amount Telstra will receive from NBN Co.

There are also competitive advantages to Telstra in evicting wholesale customers, which are also its competitors, from its ducts. Telstra will still be able to provide services such as backhaul. Many users of Telstra's ducts also provide such services, but can't do so without access to the ducts. Other access seekers in Telstra's ducts provide dark fibre or managed services to government and corporate clients. If these access seekers are evicted from Telstra's ducts, Telstra has the opportunity to take over the services provided over disconnected cabling via the NBN, its wireless network, or its own backhaul network.

Section 4(d) of the *Telecommunications (Acceptance of Undertaking about Structural Separation - Matters) Instrument 2011* provides that for the purposes of s.577A()(a) of the Act, in deciding whether to accept Telstra's SSU, the ACCC must have regard to the conduct that would as a consequence be authorised under s.577BA of the Act. Section 577BA(3)(f)(iv) provides that once the SSU is accepted, conduct engaged in by Telstra or NBN Co to give effect to a provision to their agreement is authorised for the purposes of s.51(1) of the *Competition and Consumer Act 2010 (the CCA)* and will be disregarded in deciding whether the parties have breached the provisions in Part IV of the CCA prohibiting restrictive trade practices. As such, if the SSU is accepted and the Telstra/NBN agreement gives NBN Co priority access to Telstra's ducts, it will be difficult for affected carriers to seek redress for conduct that would clearly affect their ability to compete in telecommunications markets. The ACCC has stated in its discussion paper that the acquisition of assets and rights of use of Telstra's infrastructure by NBN Co will have the benefit of the legislative authorisation¹. This could be very detrimental to existing and future competition that relies on duct access. Accordingly, we ask that the ACCC give this issue serious consideration when having regard to s.577A(6)(a) and (ab)(ii) of the Act at the time of deciding whether to accept Telstra's SSU. It is Vocus' submission that unless the ACCC is satisfied that the existing infrastructure of competitive carriers and the valuable competition that they provide is protected under the SSU and the terms of agreements between Telstra and NBN Co, then the ACCC should not accept the SSU.

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¹ ACCC, *Acceptance of Telstra's Structural Separation Undertaking and draft Migration Plan - Discussion Paper*, 30 August 2011, p.29, p.43.