

# Submission to ACCC Fixed Services Review 2013 – Public version

## 1. Introduction

Megaport Pty Ltd (**Megaport**) welcomes the opportunity to provide input into the Australian Competition and Consumer Commission's (**ACCC**) public inquiry relating to the declaration of fixed line services. This submission is in response to the ACCC's discussion paper: *Fixed Services Review Discussion Paper on the Declaration Inquiry dated July 2013* (the **Discussion Paper**).

## 2. The need to declare the duct access service

Megaport is a new entrant into the Australian telecommunications market, having been granted a carrier licence on 18 June 2013. As such, Megaport does not intend canvassing all the issues raised by the ACCC in the Discussion Paper, but rather will focus on the question of whether it is appropriate to declare facilities access services as this is an area in which Megaport has recent and relevant experience that we consider will assist the ACCC's in its consideration of regulatory requirements. Despite being a new market entrant, Megaport's management team have substantial experience within the Australian telecommunications market from their previous roles, including negotiating terms of access to Telstra's duct network, and using the existing dispute resolution processes to attempt to resolve.

As a result of Megaport's efforts to negotiate the terms of access to Telstra's underground duct facilities, Megaport is firmly of the view that it is necessary to declare and regulate the duct access service in order to promote competition, ensure efficient use and investment in underground facilities, and enhance the long-term interests of end-users (**LTIE**) of carriage services.

## 3. Why Telstra ducts are bottleneck facilities necessary for competitive services

Telstra's duct network is geographically widespread, particularly in towns and cities. Megaport has recently investigated the extent that other carriers have competing networks of underground duct via a series of requests for information packages under clause 3.1 of *A Code of Access to Telecommunications Transmission Towers, Sites of Towers and Underground Facilities* (the **Facilities Access Code**). Our conclusion is that alternative duct networks are extremely limited and in most locations non-existent. Where alternative duct does exist, it has generally been built to bypass locations within Telstra's duct network where no duct is available to access seekers, and hence accessing it is of no utility if access to Telstra's duct cannot also be obtained.

Quite clearly, carriers that operate cable networks rely upon Telstra's ducts to carry the cable. Of course, this includes NBN Co which chose to rent access to Telstra's ducts rather than build its own.

There are clear financial and legislative reasons to utilise Telstra's existing infrastructure rather than install further duct networks:

- It is expensive and disruptive to install ducts. In urban locations it would be necessary to dig up busy streets and footpaths, causing considerable disruption to people living and working in the

area. Trench digging and reinstatement of concrete, bitumen and paving stones is slow and costly. It is inconceivable for such work to be economic for most competitive carriers with a relatively small market share, let alone for a new entrant such as Megaport that is seeking to obtain new customers.

- It is questionable whether the installation of alternative duct infrastructure is a proper use of the installation powers granted to carriers under clause 6 of Schedule 3 of the Telecommunications Act 1997 (the Act). Clause 15(2) of Schedule 3 of the Act provides that carriers must comply with the Telecommunications Code of Practice (the Code). Section 4.13 of the Code states:

#### **4.13 Co-location**

- (1) Before engaging in a low-impact facility activity, a carrier must take all reasonable steps to find out whether any of the following things (existing facilities) is available for the activity:
  - (a) cabling, conduits or other facilities of the carrier or another carrier; or
  - (b) a facility of a public utility; or
  - (c) an easement attaching to the land for a public purpose.
- (2) The carrier must take all reasonable steps to use existing facilities for the activity.

So, as well as being economically unfeasible and disruptive to the community, installing further undergrounds ducts when existing duct are available would be contrary to a carrier's statutory obligations. It is Megaport's understanding that Telstra ducts are likely to be present on the particular geographic routes where Megaport anticipates rolling out cable and in most instances will be the only available duct. Accordingly, it is clear that the ducts are bottleneck facilities that are subject to Telstra's control and necessary for the supply of competitive carriage services.

## **4. Existing regulation of facilities does not affect Telstra's incentive or ability to use its market power**

Megaport's recent experience in seeking access to ducts demonstrates that Telstra is willing and able to use control of bottleneck services in a manner that is contrary to the growth of competitive carriage services. Our main concern is that Telstra imposes access charges that are astoundingly high and quite clearly not based on the costs that Telstra incurs to provide the service. [c-i-c]

Disputes about the terms of access to facilities are subject to a complicated resolution process that flows from Schedule 1 of the Act. After consideration of the dispute process, Megaport has concluded that the process has extremely limited prospect of assisting competitive carriers to achieve reasonable terms of access. As such, it would be very rare for Schedule 1 to be able to be used as a means to achieve the ends that declaration of facilities access services could achieve, i.e. promotion of competition, the LTIE, and efficient use of and investment in infrastructure.

The reasons for Megaport's view on the limited regulatory value of Schedule 1 is demonstrated by the

following consideration of Schedule 1 and its associated instruments.

- Pursuant to clause 35 of Schedule 1 of the Act, carriers must provide other carriers with access to underground facilities.
- Clause 36 of Schedule 1 provides that access will be on terms agreed by the carriers or failing agreement determined by an arbitrator, with the ACCC being the arbitrator of last resort.
- Clause 36(8) of Schedule 1 provides that an arbitrator's determination has no effect to the extent that it is inconsistent with an existing facilities access agreement between the carriers.
- Clause 37 of Schedule 1 provides that carriers must comply with the Facilities Access Code.
- Clauses 2.4 and 2.5 of the Facilities Access Code provide that carriers must engage in inter-party dispute resolution, including mediation, and have regard to the same criteria as the ACCC.
- The Telecommunications (Arbitration) Regulations 1997 sets out how the ACCC will conduct an arbitration about facilities access and what matters must be taken into account.

The points that are extremely problematic from the position of a new entrant such as Megaport (and probably carriers that already acquire duct access) are:

- The costs involved in conducting mediation and an arbitration are high and as such represent a significant barrier to entry.
- The delay that would be suffered by undertaking this dispute process is considerable and would have an unacceptably adverse impact on [c-i-c]. Based on industry knowledge of the length of time involved in past ACCC arbitrations, we conservatively estimate that it would take between 1 and 2 years to achieve a determination via arbitration. [c-i-c] Telstra is aware of this and as a result the Schedule 1 dispute process provides extremely limited leverage for a new entrant seeking to negotiate reasonable access terms from an incumbent that sells services in the same downstream markets and knows that there is no substitute service or alternative supplier of facilities access services.
- As a result of Clause 36(8) of Schedule 1, access seekers cannot enter into an agreement with Telstra and then subsequently institute the dispute process in order to obtain reasonable terms. Unless an access seeker's agreement allows for incorporation of an arbitrated determination via some form of regulatory pass through clause [c-i-c], a determination seeking to vary the agreement by setting lower prices would have no effect because it would be inconsistent with the agreement.

For these reasons, we consider that a far more effective method to regulate facilities access services is by way of declaration, which would allow all access seekers to have recourse to the ACCC's regulated pricing once their individual access agreements expire.

## **5. International benchmarking of duct access charges demonstrates that Telstra's rates are excessive**

We have had the benefit of reviewing submissions already made in response to the ACCC's discussion paper. Megaport agrees with iiNet's statement that 'comparison with international duct prices suggests that Telstra's rates are an order of magnitude higher than they would be if they were cost based'. iiNet pointed out that 'in the UK, British Telecom's duct access charge ranges from £0.37/metre/year to £0.86/metre/year for facilities in network duct, with lead-in duct ranging from £0.37/metre/year to £1.34/metre/year' and that this is 'considerably lower than the price available in Australia'. Duct access prices in Portugal are even lower, ranging from A\$0.12 to A\$0.17/metre/year. In a 2010 report prepared for UK communications regulator Ofcom, the consulting firm CSMG compared duct access charges in several different countries. In each instance, the duct access charge was substantially lower than Telstra's charge. We accept that there are differences in the costs that are incurred to provide this service in different countries, but where the difference is an order of magnitude then there is clearly a fundamental problem suggesting that a dominant market player is imposing monopoly rents. After all, the duct access service is not fundamentally different just because it is being provided in different countries. Quite simply we are talking about the costs of digging and reinstating a trench containing pipes/ducts made of plastic or other materials, along with pits used to access the ducts and various administrative costs. The cost of building and maintaining a duct network will vary between countries because for instance different labour costs, but there is no plausible explanation as to why carrier's in the UK and Portugal pay a mere percentage of the charge that we are required to pay in order to utilise the incumbent's duct network in Australia. It is Megaport's view that Telstra is using its position as the owner of the only ubiquitous underground duct network to impose excessive rates and in doing so, is actively hindering competition in a range of telecommunications markets that utilise the duct access service in order to protect its own considerable market share. Given that investment in fibre access services by transmission providers underpins competition in retail and wholesale markets utilising fixed networks, a cost based duct access charge is integral to the efficient use of underground infrastructure and the promotion of competition on fixed lines as well as mobile services using fixed backhaul.

## **6. Telstra's dominance will continue despite the NBN**

Telstra will retain ownership of ducts during and following the transition to the NBN. This ensures the continuation of Telstra's ability to exercise its market power with regard to the terms of access to facilities in a manner that hinders competition and is contrary to the LTIE. Given that Telstra will have a massive retail market presence, its clear incentive to engage in unregulated anticompetitive conduct by imposing unreasonable terms of access to ducts remains a weak link in Australia's ability to have an efficient telecommunications industry that promotes the interests of consumers of carriage services.

## **7. Declaration of facilities access services will promote competition**

Though Telstra is required to provide other carriers with access to its facilities, the access charges imposed by Telstra are excessive. This limits the ability of other carriers to compete with Telstra in retail and wholesale markets for telecommunications services as they are operating from a higher costs base. Though Schedule 1 of the Act has ensured that carriers have had access to Telstra's facilities for over a decade, Megaport is firmly of the view that there is no prospect of more competitive pricing via commercial negotiations. Telstra simply has no incentive to alter its rates as the lack of any viable substitute means there is no competitive pressure and fundamental flaws in Schedule 1 resulting from the 2010 amendment that added clause 36(8) without also providing the ACCC with the ability to make up front terms similar to those in Part XIC of the Competition and Consumer Act mean that there is little risk of regulatory intervention. Declaration would provide a means for the ACCC to promote competition by implementing cost based pricing in a FAD that can be relied on as a fall-back position for carriers that cannot agree on facilities access terms with the incumbent owner of the facilities. Megaport submits that this would help develop an environment where the long term interests of end-users are promoted by allowing for lower priced carriage services, better quality carriage services, and diverse carriage services being marketed by a mix of competitive carriage services providers eager to win market share.

## **8. Declaration of facilities access services will encourage economically efficient use of, and economical efficient investment in, the infrastructure by which carriage services and services provided by means of carriage services are supplied.**

A regulated duct access charge set by the ACCC following declaration and market enquiry will provide other carriers with the ability to make informed build/buy decisions that are likely to lead to more efficient use of Telstra's facilities and limit unnecessary builds. We expect that implementation of a duct access charge based on the costs that Telstra incurs to provide the service rather than the amount that Telstra deems as a 'commercial rate' would encourage new entry into the market and expansion of cable networks of competitive operators.

At the same time, declaration of duct access will not of itself impact upon Telstra's ability to exploit economies of scale and scope or its ability to make a return on its investment in its underground duct network. Duct access provides a relatively small component of the revenue that Telstra earns from the investment in its network, though the ducts are of course vital to the other services provided by Telstra in both wholesale and retail telecommunications markets. Declaration of the duct access services is therefore unlikely to affect Telstra's incentives for efficient investment in duct infrastructure, when considered in relation to either maintenance of existing ducts or rollout of further ducts.

## **9. Would regulating facilities access services through the FADs of any declared fixed line services be more or less effective in promoting the LTIE than declaring facilities access services in their own right?**

Where a facilities access service is used solely in the acquisition and use of a declared service, then there is potential that the terms of access to the facility could be effectively regulated via the FAD of the service. However, where a facility access service is used, whether partially or entirely, for the supply of services

that are not declared, then effective regulation could only be achieved via declaration of the facilities access service itself. For example, access seekers acquire the duct access service to supply a range of non-declared services to retail or wholesale customers. Megaport uses the duct access service to provide interconnection services for other carriers and cloud providers. These are not declared services. It is Megaport's view that the competitive benefits that could be achieved by declaration of the duct access service would only be achieved if it is declared in its own right and without being tied to a particular declared service.