

Vocus

**Submission to the ACCC
in reply to the May 2014 position paper on the
Telecommunications Final Access Determination inquiries into
non-price terms and conditions and supplementary prices**

This submission is provided on behalf of Vocus

1. Executive summary

Vocus submits that the duct access service should be declared. Duct access is not usually ancillary to an access seeker's acquisition of a currently declared service, however, as a base component of all fixed line services and to a lesser but still material degree to mobile services, it is vital to wholesale and retail telecommunications markets. Telstra owns the overwhelming majority of underground ducts and they are an integral part of the network that it uses to provide retail and wholesale services, including the currently declared services. All carriers operating fixed line networks that compete with Telstra's networks and services require access to Telstra's vast underground duct network. Some of the wholesale services provided by these competing carriers using Telstra's ducts, such as backhaul and interexchange transmission, are linked to the acquisition of declared services. Though Telstra is required to provide access to its ducts, the terms of access have never been set via regulation and the charge terms are unilaterally determined by Telstra at a constantly increasing rate that has no regard to actual or efficient costs. Telstra has the ability and incentive to leverage its dominant position in ways that hinder competition at the wholesale level and result in market conditions that are detrimental to the LTIE. This is readily apparent in Telstra's duct access charges, which are several times higher than the efficient costs that Telstra incurs to provide the service, and when scrutinised cannot be considered to be anything other than what they are: monopoly rents designed to protect Telstra's place in the market by inhibiting competitive growth. Declaration would provide the ACCC with the tools to address these concerns.

2. Background

Vocus first acquired facilities access services from Telstra in June 2011 upon the acquisition of Digital River's fibre network. Digital River's fibre licence agreements with Telstra were novated to Vocus and Vocus entered into an access agreement with Telstra to use its underground ducts in which the existing fibre cables were located. Vocus's business plans included investment in expansion of the fibre network, and therefore duct access charges represented a material cost component. Vocus engaged economic experts to ascertain the efficient costs that Telstra incurred to provide the duct access service in order to evaluate what charge would be likely to exist in a competitive market and what charge would apply if the matter were arbitrated with regard to the criteria set out in the *Telecommunications (Arbitration) Regulations 1997 (the Regulations)*¹. The economists' reports, which analysed Telstra's costs using the same modelling techniques as the ACCC's Fixed Line Services Model (*FLSM*), showed that Telstra's duct access charges were manifestly excessive. The economists' views were supported by international benchmarking, which shows that internationally duct access charges are a fraction of the rates imposed by Telstra in Australia². Vocus's subsequent attempts to negotiate the access charge with Telstra were unsuccessful and in July 2011, Vocus made its first attempt to refer a dispute about Telstra's duct access charges to the ACCC, however, the ACCC declined to arbitrate the dispute on the basis that Vocus's acquisition of the duct access service should continue to operate under the agreement with Telstra. Following Telstra's notification of an increase in the duct access charge, Vocus again entered into a dispute with Telstra, which was again notified to the ACCC in September 2012 and this time the ACCC accepted jurisdiction to arbitrate the dispute. Telstra

¹ The criteria in Regulation 8(1) of the Regulations apply because facilities access is provided under Schedule 1 of the Telco Act rather than the CCA. The criteria that must be considered when arbitrating a dispute under the Regulations are very similar to the criteria in the CCA that the ACCC must consider when deciding whether to declare a service.

² See table at the end of this submission.

appealed the ACCC's decision that it has jurisdiction to the Federal Court, which at first instance decided that the parties had failed to agree and that the ACCC had jurisdiction. However, Telstra successfully appealed this decision to the Full Federal Court, which on 2 July 2014 determined that the ACCC has no jurisdiction to arbitrate a dispute where there is an existing agreement between the parties.³ Accordingly, the ACCC terminated the arbitration.

3. The result of the Federal Court's decision is that facilities access seekers must take Telstra's access terms on a take it or leave it basis

The Full Court's interpretation of the ACCC's jurisdiction pursuant to Schedule 1 of the *Telecommunications Act 1997 (the Telco Act)* places carriers wishing to acquire facilities access services in the position where their options are:

1. accept the unreasonable terms offered by Telstra; or
2. refuse to accept Telstra's terms and put their business on hold until they have traversed the complex steps set out in the Telco Act, the Facilities Access Code⁴, and the Regulations (the **Legislative Arbitration Scheme**) in an attempt to obtain reasonable access charges via ACCC arbitration.

Of course, the Full Court made it clear that Option 2 is not available to a carrier that already has an access agreement in place with Telstra. We expect that this applies to most existing carriers in Australia.

Vocus has firsthand experience of Option 1 and though its disputes occurred whilst agreements were on foot, it also has an extremely detailed experience that is directly relevant to Option 2. Vocus's experience demonstrates that the negotiate/arbitrate regime provided by Schedule 1 of the Telco Act is woefully inadequate and that if the aims of promoting competition and the long term interests of end-users of carriage services provided via facilities access services are to be met, then there is a clear need to declare facilities access services and to make reasonable access terms available. Based on Vocus's experience, it is reasonable to expect that a new carrier attempting to negotiate duct access terms that differ from the rates offered by Telstra would face the following hurdles:

- Acquisition of the service would be delayed for many months and probably over 2 years. Though Schedule 1 of the Telco Act requires that Telstra provide facilities access to another carrier upon request, it has no obligation to do so unless there is an agreement between the carriers or the ACCC sets the terms after arbitration. The Legislative Arbitration Scheme requires the parties to engage in interparty dispute resolution, including mediation, before referring an unresolved dispute to the ACCC. Telstra is skilled and experienced in delaying the process of such disputes. Once the dispute is before the ACCC, it must carefully consider the mandatory criteria before making a determination. This is a complex and slow task that is likely to require the ACCC to prepare a detailed cost model or make material changes to the FLSM and to consider several competing submissions from Telstra and the access seeker. Even once a determination is made, there is the distinct likelihood that it will be further delayed by Telstra seeking judicial review.
- Arbitration is expensive. The new carrier would incur the costs of legal and economic experts if they wanted to have any hope of achieving a reasonable

³ *Telstra Corporation Limited v Vocus Fibre Pty Ltd* [2014] FCAFC 77

⁴ Clauses 2.4 and 2.5 of *A Code of Access to Telecommunications Transmission Towers, Sites of Towers and Underground Facilities*

outcome. Combined with the limited income that results from putting business plans on hold for months or years, this large additional expense would be untenable for most market entrants.

The unfortunate result of this is that, without declaration, new and existing acquirers of duct access have little option but to take the unreasonable access terms that are placed on the table by Telstra.

4. Consideration of the LTIE

In deciding whether to declare the duct access service, the ACCC must consider whether declaration would promote the long-term interests of end-users (LTIE) of carriage services, or of services supplied using carriage services.⁵ When determining whether something promotes the LTIE, regard must be had to the extent to which it is likely to result in the achievement of the following objectives:

- promoting competition in markets for listed services⁶
- achieving any-to-any connectivity in relation to carriage services that involve communication between end-users⁷
- encouraging the economically efficient use of, and economically efficient investment in, infrastructure.⁸

In a market that is fully competitive, with low barriers to entry, the objective of promoting the LTIE will be achieved naturally⁹. In other words, the LTIE objective will take care of itself. Given the nature of telecommunications markets and the market that the duct access service is a part of (which exhibits natural monopoly characteristics – i.e. it requires the use of ubiquitous infrastructure with high sunk costs, thereby making barriers to entry high), meeting the LTIE objective in regards to services that rely upon ducts can only be achieved with the aid of regulatory intervention.

4.1 Promoting competition in markets for listed services

4.1.1 Relevant markets

As stated by the ACCC in its decision to declare Wholesale ADSL¹⁰:

In the Part XIC declaration inquiry context, identification of the relevant markets provides the ACCC with a field within which it can meaningfully analyse the effectiveness of competition. Once the boundaries of the relevant markets have been identified, the ACCC can then consider the state of competition in these

⁵ section 152AL of the CCA

⁶ See subsection 152AB(2) of the CCA. In determining the extent to which a particular thing is likely to result in the achievement of promoting competition, regard must be had to other matters listed in subsections 152AB(4) of the CCA.

⁷ This is the ability of end-users of different networks to communicate — the value of the network to an end-user depends on the number of other users that network allows the end-user to reach. Without any to any connectivity, smaller networks could only offer services to their own end-users, and would therefore find it difficult to attract new users, regardless of their long-term efficiency.

⁸ See subsection 152AB(2) of the CCA. In determining the extent to which a particular thing is likely to result in the achievement of encouraging the economically efficient use of, and the economically efficient investment in, the infrastructure, regard must be had to other matters listed in subsections 152AB(6) and (7A) of the CCA.

⁹ i.e. competition leads to productive and dynamic efficiency.

¹⁰ ACCC, Declaration of the wholesale ADSL service under Part XIC of the *Competition and Consumer Act 2010*, Final Decision February 2012, p. 9.

markets, and whether competition will be promoted by declaration of the wholesale ADSL service.

It is important to note that Part XIC of the CCA does not require the ACCC to precisely define the scope of relevant markets for the purpose of a declaration inquiry. It may be sufficient to broadly identify the scope of the markets likely to be affected by the relevant service declaration. Accordingly, a market definition analysis under Part XIC of the CCA should be seen in the context of determining whether declaration would promote competition.

A market includes any goods or services that are substitutable for, or otherwise competitive with, the goods and services under analysis. Typically, the ACCC considers the product, geographic, functional and temporal dimensions of a market.

For a carrier to install cabling or to rollout a fixed line network, the potential substitutes to using Telstra's duct network are:

- install its own underground duct network;
- use an underground duct network owned or operated by a third party carrier;
- install the cabling aerially.

None of these substitutes are realistically feasible alternatives to the use of Telstra's ubiquitous duct network.

Though carriers have a statutory right to install underground ducts¹¹, it is rare for this right to be exercised when another carrier's ducts are available. This is because:

- It is very expensive to install underground ducts. Without adequate scale the cost of installing a single or a low number of underground ducts is uneconomic, particularly in CBD and metro areas where competitive carriers usually install cabling. The installation work requires road closures and significant urban disruption in order to dig trenches through concrete, bitumen or paved roads and paths, which must be carefully reinstated following the carrier's work. Telstra's duct network commonly consists of large nests of ducts, which provide the benefit of scale and usually have available space for other carriers to install cables.
- The *Telecommunications Code of Practice 1997 (the Code)* requires that carriers installing underground ducts take all reasonable steps to ensure that the activity interferes as little as possible with public roads and paths, the movement of traffic, and the use of land.¹² Further, the Code requires that carriers must take all reasonable steps to use the existing conduits of another carrier that is available for its activity.¹³ Accordingly, a carrier risks breaching mandatory conditions in the Code if it decides to dig up roads to install its own underground ducts where Telstra's duct network has available capacity.¹⁴

¹¹ This right is provided by a legislative scheme consisting of Schedule 3 to the *Telecommunications Act 1997*, the *Telecommunications Code of Practice 1997* and the *Telecommunications (Low-impact Facilities) Determination 1997*.

¹² Section 4.5 of the *Telecommunications Code of Practice 1997*

¹³ Section 4.13 of the *Telecommunications Code of Practice 1997*

¹⁴ Clause 15(2) of Schedule 3 of the *Telecommunications Act 1997* provides that carriers must comply with the Code.

Vocus has installed its own underground ducts, however, only for a small number of short runs when there was no option to use existing ducts. Apart from Telstra, the duct networks of other carriers are of very limited geographic reach and even where they exist it is not always technically feasible to share the ducts. This is because other carriers sometimes install ducts of a smaller diameter because their anticipated need for future capacity is not great. For example, if a 50mm diameter duct is used rather than the 100mm diameter ducts usually used in Telstra's duct nests then it may not be technically feasible to haul a 32mm subduct through the 50mm duct across the existing cable. Subducting of second and subsequent carrier cabling is commonly required in order to ensure the integrity of the first carrier's cables in a duct.

Apart from rights to install aerial cabling that are granted specifically and only to NBN Co, carriers have no statutory right to install aerial cabling.¹⁵ Provisions in the Telco Act that permitted the rollout of existing aerial cabling by Telstra and Optus grandfathered in July 2000 and no longer apply. Accordingly, a carrier wanting to install aerial cabling would require planning consent and the agreement of the owners of affected utility infrastructures. Aerial cabling is considered unacceptable by large sections of the community and the likelihood of obtaining planning consent is extremely low. Further, one of the objects of the Telco Act is to promote underground placement of lines¹⁶, which would mean that a carrier would have little chance of appeal in the event that a planning authority refuses the carrier's request for permission to install aerial cables. Infrastructure owners, such as the electricity transmission companies that own urban power poles are reluctant to share their assets with telecommunications carriers, often stating that OHS issues related to working close to electrical supply infrastructure and additional load on the poles make the risks unacceptable, and where they are willing will often impose monopoly rents¹⁷. Of course, aerial cabling is a non-issue in CBDs, where there are no power poles. Accordingly, aerial cable is not a realistic substitute to using existing underground ducts.

4.1.2 State of competition

There is no effective competition in the provision of the duct access service. There are no feasible alternatives or substitutes to obtaining the service from Telstra, which is in the dominant position of owning and controlling the only ubiquitous underground duct network in Australia. Though Telstra is required to provide duct access to its competitors¹⁸, with its highly vertically integrated business model, Telstra has the clear ability and incentive to inhibit the development of competition in markets that rely on fixed line services by only providing duct access on unreasonable terms. The lack of substitute services means that there is virtually no competitive constraint on Telstra and as a result it has been able to impose pricing constructs that favour Telstra's retail divisions and which have limited the entry, development, and expansion of infrastructure based competitors.

It is clear that Telstra will retain this dominant position as there is no chance of alternative duct networks of any scale being constructed and there has been no suggestion of Telstra's duct network being sold to NBN Co. Accordingly, the lack of regulation will continue to have serious detrimental effects on competition.

¹⁵ See clause 6 of Schedule 3 to the *Telecommunications Act 1997* and the list of low-impact facilities in the Schedule to the *Telecommunications (Low-impact Facilities) Determination 1997*, which provide that only NBN Co can rely upon its rights to install aerial cabling as a low-impact facility.

¹⁶ section 3(2)(i) *Telecommunications Act 1997*

¹⁷ The difficulties that NBN Co has faced in gaining access to Ausgrid's power poles in NSW are an example of this, even despite NBN Co having a statutory right to install aerial cables on Ausgrid's infrastructure.

¹⁸ Clause 35 of Schedule 1 of the *Telecommunications Act 1997*

4.1.3 Extent to which declaration would promote competition in relevant markets

In determining whether the declaration of the duct access service will promote the LTIE, the ACCC must have regard to the extent to which declaration is likely to promote competition in the relevant markets. As part of this assessment the ACCC usually considers the likely future state of competition in the relevant markets with and without the declaration.

As discussed in this submission, economists engaged by Vocus concluded that Telstra's duct access charges are orders of magnitude higher than the rates that an efficient access provider would charge in a competitive market, are substantially higher than the charges would be if based on the allocation of costs under the ACCC's FLSM, and are materially higher than the charges for duct access in all foreign jurisdictions where pricing data was available. It is clear that Telstra imposes excessive access charges because it is in an uncontested dominant position that allows it to set monopoly rents. Without regulation, this situation will not change.

We have considered whether Part XIB of the CCA provides a means to address Telstra's conduct. Part XIB and Part XIC impose different tests – while Part XIB generally uses a “substantial lessening of competition” threshold, Part XIC is a forward-looking analysis concerned with whether intervention is in the LTIE. We consider it would be more effective to ensure that Telstra's conduct with regard to facilities access does not breach the section 151AK competition rule via declaration than a competition notice, because Telstra's conduct flows from structural issues that will not be resolved if other carriers and new entrants seek access to the duct access service after the notice is issued. Further declaration, and the provision of regulated terms of access, can promote competition even where Telstra's conduct does not breach specific anti-competitive conduct provisions. In short, declaration of duct access would be a far more effective mechanism to promote competition as it provides a means to set upfront access terms that can be relied on by new market entrants or current carriers when existing access agreements expire.

Vocus's efforts to negotiate reasonable access terms with Telstra have been fruitless. The Full Federal Court has made it clear that carriers with existing duct access agreements have no recourse to ACCC arbitration via Schedule 1 of the Telco Act. An obvious difference and clear competitive failing with regard to facilities access services is that they are not declared and there are no applicable FADs for these services. Whereas FADs provide a fall-back position for declared services that can be relied upon when an access agreement expires or to assist in negotiation for initial access, the ability to reasonably resolve disputes over the terms of access for facilities regulated by Schedule 1 is far more limited. This gives Telstra unfettered control over the most significant assets in its network. When this control is combined with Telstra's dominant market position, vertical integration, and long history of repeated conduct that is damaging to competition in telecommunications markets, it is clear that regulation of facilities access services is required.

Unless the ACCC declares the duct access service, there are no available options, either through interparty negotiation or regulatory action, that can enable access on competitive terms. The anti-competitive effect of Telstra's duct access pricing is amplified by provisions in its access agreements that give Telstra a unilateral right to increase its access charges. Telstra's implementation of such a price hike resulted in the dispute with Vocus that came before the ACCC, however, the Full Federal Court determined that Telstra has a contractual right to impose price increases without an access seeker having recourse to arbitration. Declaration of the duct access service has the potential to promote competition in wholesale and retail fixed-line telecommunications markets by constraining Telstra's ability to act on its underlying incentives and providing greater

certainty to access seekers that the duct access service will be supplied on competitive terms. Based on the analysis of economic experts engaged by Vocus, we consider it is reasonable to expect that declaration will result in materially lower charges for the duct access service. Lower prices will encourage vigorous competition in services that use the duct access service, which will provide significant benefits to consumers by promoting diverse and innovative services and competitive retail prices.

4.2 Achieving any-to-any connectivity in relation to carriage services that involve communication between end-users

We do not consider that declaration of the duct access service will affect any-to-any connectivity. Carriers can currently acquire duct access to connect with other networks or other parts of their own networks, it is just that the terms of the acquisition are very unreasonable.

4.3 Encouraging the economically efficient use of, and economically efficient investment in, infrastructure.

Supply of the duct access service is technically feasible, as demonstrated by the fact that Telstra currently supplies such services on a commercial basis. Telstra has already made the investments required to supply the service on a national basis. The fact of declaration will not of itself affect Telstra's ability to exploit economies of scale and scope or its ability to make a return on its investment. The duct access service provides a relatively small component of the revenue that Telstra earns from the investment in its network, though it will grow as the NBN is rolled out. Future expansion of Telstra's network depends on greenfield developments where developers bear the costs of trenching and providing fibre ready installations of pit and pipe. Declaration of the duct access service is therefore unlikely to affect Telstra's incentives for efficient investment in its infrastructure, with regard to maintenance or rollout. It will, however, provide carriers with the ability to make informed build/buy decisions that are likely to lead to more efficient and increased use of Telstra's duct network by carriers that compete with Telstra.

5. Summary

Vocus submits that there is a clear need to declare the duct access service in order to promote the LTIE that acquire carriage services that rely upon duct access. The access charges that Telstra imposes upon its competitor access seekers have no regard to the costs that Telstra incurs to provide access and represent market failure. Vocus's concern is predominantly with access to Telstra's underground duct facilities, however the same issues apply equally to access to Telstra's other facilities such as TEBA. The Federal Court has made it clear that there are no other regulatory means to address Telstra's ability and incentive to impose monopoly rents, accordingly declaration is required if the LTIE is to be achieved.

Duct Access pricing comparison table - by Country

Country	Year	Company	Price		Price source
			Local currency	Converted ¹⁹	
Australia	2013	Telstra	AUD\$[Telstra c-i-c]/metre/year	AUD\$[Telstra c-i-c]/metre/year ²⁰	
Canada ²¹	2010	Bell Aliant (Atlantic provinces)	CAN\$1.64/30m/month	AUD\$0.63/metre/year	Canadian Radio-television and Telecommunications Commission - Telecom Decision CRTC 2010-900
		Bell Aliant (Ontario and Quebec)	CAN\$1.76/30m/month	AUD\$0.67/metre/year	
		Bell Canada	CAN\$1.76/30m/month	AUD\$0.67/metre/year	
		MTS Allstream	CAN\$3.15/30m/month	AUD\$1.20/metre/year	
		Telebec	CAN\$4.80/30m/month	AUD\$1.84/metre/year	
		TCC (Alberta/British Columbia)	CAN\$2.25/30m/month	AUD\$0.86/metre/year	
		TCC (Quebec)	CAN\$2.14/30m/month	AUD\$0.82/metre/year	
France	2010	France Telecom	€1.20/metre/year	AUD\$1.52/metre/year	OFCOM, Economics of Shared Infrastructure - Final Report (Feb 2010)
Portugal ²²	2010	Portugal Telecom	€7.50-€10.60 /km/cm ² /month	AUD\$0.114- AUD\$0.161/metre/cm ² /year	OFCOM, Economics of Shared Infrastructure - Final Report (Feb 2010)

¹⁹ Conversion estimate only, based on standard currency rates of exchange to Australian Dollars as at 29 April 2013

²⁰ Telstra's prices are subject to confidentiality obligations set out in its access agreements. We invite the ACCC to compare the international prices in the above table with the duct access prices in the access agreements that Telstra has provided to the ACCC.

²¹ Canada pricing metric CAN\$/30m/month, converted to AUD\$/metre/year to assist comparison

²² Portugal pricing metric €/km/cm²/month, converted to AUD\$/metre/cm²/year to assist comparison

Country	Year	Company	Price		Price source
USA	2010	Verizon / AT&T	US\$0.50- \$5.00/metre/year	AUD\$0.49- \$4.88/metre/year	OFCOM, <i>Economics of Shared Infrastructure - Final Report (Feb 2010)</i>
UK	2012	British Telecom	£0.37- £1.34/metre/year	AUD\$0.56- \$2.02/metre/year	British Telecom website