



Domestic Transmission Capacity Service
ACCC Discussion Paper – March 2018
Submission by Commpete

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1. Introduction

Commpete – Alliance for Competition in Digital Communications (**Commpete**) welcomes the opportunity to make this submission to the Australian Competition and Consumer Commission (**ACCC**) in response to the *ACCC Discussion Paper reviewing the declaration for the Domestic Transmission Capacity Service – March 2018 (Discussion Paper)*. The members of Commpete also look forward to engaging further with the ACCC in relation to this inquiry as it progresses. We note that individual members are likely to provide additional and more detailed input to the ACCC during the course of the inquiry.

In Commpete's view, the DTCS declaration should be extended with some modification to prevent gaming of the declaration and to ensure that regulation is not withdrawn in areas in which competitive supply is theoretically feasible, but does not actually exist.

Access to competitive wholesale transmission services has become even more critical during the ongoing transition to an NBN environment. However, in the experience of Commpete's members, the market for wholesale transmission services has become less, rather than more competitive. In addition, the dominant provider of DTCS, Telstra, has deliberately structured its service offerings in such a way that it creates a strong disincentive for wholesale customers to acquire the declared DTCS service. The success of this ploy on Telstra's behalf, which constitutes little more than a type of "bait and switch" sleight of hand, has encouraged other vertically integrated operators to adopt a similar approach. The result of this approach has been to dramatically reduce the effectiveness of the DTCS declaration.

Commpete considers that the DTCS declaration needs to be extended and strengthened. In particular, the test for exemption of an area from declaration needs to ascertain that actual and effective competitive wholesale supply of DTCS exists and the service description needs to be broadened to ensure that access providers are not able to avoid its operation simply by adding elements (which may or may not be required by wholesale customers) to the base service.

In the absence of an appropriately targeted DTCS declaration:

- retail service providers will be unable to offer a full range of services to existing customers, and may well be unable to offer services to customers in certain areas, potentially limiting any-to-any connectivity.
- competition in downstream markets will be reduced, as access seekers will be denied access to vital inputs into downstream services; and
- economically efficient use of, and investment in, infrastructure will be undermined, as the full potential of the NBN to foster vibrant retail competition will not be able to be realised, and incentives for inefficient duplication of infrastructure may be created.

It is Commpete's strong view that regulation of the DTCS by the ACCC continues to make an important contribution to the aspiration of a competitive telecommunications market in Australia.

Commpete has set out its substantive views in the body of this submission and has listed the specific questions asked by the ACCC at section 6 below. We have provided additional responses to those questions which have not already been directly answered in the body of the submission.

2. Competition for the DTCS

- 2.1 One of the central themes of the Discussion Paper is the fact that the DTCS was initially (and has continued to be) regulated by the ACCC in order to ensure that there is effective competition or contestability for transmission services. While Commpete acknowledges that there have been significant developments in the market with the roll-out of the NBN, Commpete does not agree that this has resulted in increased competition among transmission providers such that the DTCS is no longer required to be a declared service to ensure access for access seekers.
- 2.2 Commpete understands that the intention of the ACCC's regulation of the DTCS was to facilitate the promotion of a vibrant wholesale transmission market so that the ACCC could ultimately 'step back' from regulation of this service. However, in Commpete's view, no such vibrant wholesale market exists to warrant the ACCC stepping back at this stage. Indeed, the piecemeal approach to regulation, where the DTCS is regulated in some geographic areas and not in others, appears to have simply encouraged regulatory gaming by Telstra designed to undermine the effectiveness of the declaration.
- 2.3 As the ACCC recognises in the Discussion Paper, there has been significant consolidation in the industry as the larger providers have become more vertically integrated. In particular, the vertical integration of TPG and Vocus means that rather than there being two vertically integrated transmission service providers (i.e. Optus and Telstra), there are now four. While this may have resulted in a potential increase in competition at the retail level, this has not resulted in a viable increase in competition for transmission services at the wholesale level.
- 2.4 This is largely because there is little commercial incentive for these vertically integrated providers to prioritise wholesale services over retail services. This is especially so because, by providing transmission services on a wholesale basis, these providers are facilitating the increase of competition in the retail space which will therefore have a negative impact on their retail revenue.
- 2.5 The continued regulation of the DTCS by the ACCC is vital to the promotion of competition in the telecommunications markets. The DTCS is an essential input for retail service providers to connect their core network with customers and other networks in order to offer end-to-end services to their customers. The transition to an NBN environment, and the NBN structure of 121 points of interconnect, has only increased the importance of this service. In order to provide services over the NBN, RSPs must either acquire transition services to, or build out their own infrastructure to, each of the POIs at which they propose to offer services. For most actual and potential RSPs, such an infrastructure roll-out is not financially viable. In addition the construction of additional infrastructure to duplicate existing infrastructure is unlikely to constitute economically efficient investment in infrastructure.
- 2.6 The only alternative to this approach is to purchase re-sold NBN services from one of the vertically integrated operators. However, in the experience of Commpete's members, the market for re-sale of NBN services is not well developed, and such offerings as do exist do not allow operators to differentiate their offerings or compete effectively with the offerings provided by vertically integrated operators.
- 2.7 While the POI locations were chosen on the basis that potential competition for transmission services existed at those locations, the experience of Commpete's members is that this potential has not been translated into genuine and effective wholesale competition. Increased vertical integration has reduced genuine wholesale competition as vertically

integrated providers prefer to favour their own retail operations rather than provide transmission services on reasonable terms to potential retail competitors.

3. Competition Methodology

- 3.1 The competition methodology adopted by the ACCC in 2014 (which the ACCC proposes to again apply to its assessment of the state of competition in transmission markets) is, in Commpete's view, insufficient to actually determine whether there is sufficient competition in the relevant areas
- 3.2 This is particularly so because even if there are three independent fibre providers (including Telstra) at a Telstra exchange, these providers are likely to be vertically integrated providers for whom retail services are more valuable than wholesale services, and who are therefore likely to avoid providing services to smaller access seekers which could facilitate increased competition among retail service providers.
- 3.3 Commpete considers that the current competition test should be made more stringent, especially for transmission services to connect an access seeker's POP to NBN POIs. The test for competition should, taking into account the circumstances of supply at a particular location, seek to determine whether there is genuine, viable and competitive supply at that location.
- 3.4 Alternatively, the ACCC should consider removing geographic exemptions to the DTCS declaration altogether. This would prevent the approach currently adopted by Telstra whereby their declared DTCS offering is deliberately made unattractive by forcing wholesale customers to choose exclusively between a DTCS product which is deliberately unattractive in the non-regulated areas, and a non-regulated service with 'additional features' which is able to be priced above regulated rates in regulated areas.
- 3.5 In Commpete's view, the extension of the DTCS declaration to cover all areas would avoid this regulatory gaming and would not create any downside for access providers in genuinely competitive areas, as prices in such areas would be at reasonable rates already.

4. DTCS service description

- 4.1 In Commpete's view, if geographic exemptions are not removed from the declaration, additional language should be included in the service description to ensure the intent of the declaration cannot be by-passed by forcing wholesale customers onto a product that includes additional features (which may or may not be required by the wholesale customer). In addition, the geographic routes listed in the current DTCS service description should be amended to reflect the failure of competitive wholesale transmission markets to emerge as anticipated.
- 4.2 As the ACCC has noted in the Discussion Paper, the four major transmission service providers have developed transmission products which, while being fundamentally a DTCS, offer other capabilities and features in addition to the basic DTCS and are therefore not considered by the ACCC to fall within the service description of the DTCS and are therefore not subject to the same regulation.

- 4.3 Commpete understands that, because Telstra provides certain 'add ons' on top of the more basic DTCS, the MLL service offered by Telstra is regarded as a 'managed service' and is therefore outside the regulatory reach of the DTCS. In contrast, Commpete considers that, given the fundamental underlying component of the MLL is the DTCS, this service should not fall outside the regulatory reach of the DTCS as it is entirely contrary to the reason the DTCS is a declared service.
- 4.4 To the extent that these services cover the DTCS, they should be included in the service description for the DTCS. Commpete therefore considers that the ACCC should amend the service description for the DTCS to include services which incorporate 'add-ons' such as those provided by Telstra via its MLL product.

5. NBN

- 5.1 Transmission access to NBN POI's is particularly critical as access seekers require this service to connect from the NBN POI to their POP. Without this transmission service, RSPs who do not possess the infrastructure to connect directly to NBN POIs will not be able to provide NBN services other than as resellers.
- 5.2 As previously mentioned, there is little commercial incentive for wholesale providers to provide transmission services to NBN POIs and therefore, if these services are not regulated, vertically integrated providers will have every reason to increase prices or limit service offerings such that it will be impossible for smaller providers to compete in this space.
- 5.3 DTCS services to and from NBN POIs should be declared unless it is clear that there is a properly competitive wholesale market at that point.

6. ACCC's Questions

- 6.1 *Has there been any change to the state of competition in the market for the DTCS in the currently deregulated routes and ESAs? If so, what change has occurred?*

In Commpete's view, competition in the provision of DTCS services has, if anything, declined since the previous declaration.

- 6.2 *Are there any issues over access to DTCS type services in the deregulated areas?*

Yes, effective wholesale transmission markets have failed to emerge in many of these areas. In particular, effective competition for transmission to the NBN POIs is problematic for current and potential NBN RSPs.

- 6.3 *The ACCC has previously identified that the relevant downstream markets for the DTCS include the markets for data services such as business grade services, residential broadband and local, national and international services, mobile voice and mobile data services. Are these the relevant downstream markets for which the DTCS continues to constitute an input?*

Yes, it is also important to note that the provision of tail-end DTCS remains a crucial service for the provision of services to business customers even where the NBN has been rolled

out. This is because NBN has not fully developed appropriate business grade services and, in MTM areas, NBN infrastructure may not be sufficient to provide appropriate business grade services.

6.4 *Have the DTCS geographic markets changed since 2014?*

It is notable that since 2014, Telstra has used the structure of the current DTCS declaration to reduce its supply of the declared DTCS even in regulated areas by forcing wholesale customers to choose between the regulated DTCS and the unregulated MLL service for all their transmission requirements.

6.5 *Should transmission services that are used for the supply of mobile services in remote and regional areas be distinguished from other transmission services?*

No.

6.6 *Are access seekers able to access the DTCS (and regulated pricing under the 2016 DTCS FAD) for services to mobile towers in regional and remote areas?*

Not applicable as no Commpete's member is a Mobile Network Operator.

6.7 *Should transmission services to NBN POIs be examined separately from other DTCS services?*

Commpete does not consider that the current approach is appropriate and believes that access to the declared DTCS to NBN POIs is essential to vibrant competition in an NBN environment. These services should remain declared unless it can be unequivocally demonstrated that an effective wholesale market for such services is in place.

6.8 *Are there any substitutes for the DTCS in any of the geographic markets?*

No, Commpete does not consider that there are effective substitutes.

6.9 *Are the current classifications for the DTCS appropriate?*

See comments above, including comments re MML.

6.10 *Does the service description adequately capture the DTCS markets while the NBN is being rolled out?*

See comments above.

6.11 *Should the DTCS service description continue to identify the geographic boundary of telecommunications networks using ESAs? If not, what alternative geographic unit should be used?*

It may be more effective to link to the 121 POIs as the relevant geographic areas.

6.12 *Do the geographic route categories in the DTCS service description reflect the way the DTCS is sold and acquired in DTCS markets?*

See comments above.

6.13 *Should transmission services to NBN POIs be added as a separate route category?*

See comments above.

- 6.14 *Is it still appropriate to use 2 Mbps as the minimum capacity at which the DTCS is acquired? If not, what other capacity should it nominate?*

Further information on this to follow.

- 6.15 *Is it appropriate to continue to define the DTCS as 'symmetric' and 'uncontended'?*

Further information on this to follow.

- 6.16 *Should the DTCS service description be updated to include a definition for protected DTCS services? If so, what is the appropriate form of protection?*

Further information on this to follow.

- 6.17 *Does the DTCS service description adequately capture the service that is generally provided in the transmission market? If not, what service features should be changed and/or added?*

No, as it does not pick up dark fibre or lightly "managed" services. "Added value" services ought not be applied to remove the DTCS from regulation.

- 6.18 *What is the current and likely impact of the NBN on the market structure for the DTCS over the next few years?*

In Commpete's view, NBN increases the need for a robust wholesale market for transmission services.

- 6.19 *Are there any NBN access services that are considered equivalent to the DTCS?*

NBN access services are not currently equivalent to DTCS services.

- 6.20 *Can access seeker transmission requirements be met by the NBN access services that are currently available?*

NBN does not currently offer access services that are an effective substitute for DTCS services.

- 6.21 *Do access seekers anticipate acquiring any of the services currently listed on NBN Co's roadmap once they are released to provide transmission services?*

Services in NBN's roadmap may provide a substitute to current transmission tail-end services in some, but not all, areas in the future. In particular, these are not likely to be an effective substitute in areas serviced by FTTN or HFC.

- 6.22 *Have changes to the DTCS market structure had an impact on the state of competition in DTCS markets?*

See discussion above.

- 6.23 *How has the NBN affected competition and investment in DTCS markets?*

See discussion above.

6.24 *Is there a choice of active suppliers of transmission services at all of the 121 NBN POIs?*

No.

6.25 *To what extent are dark fibre services available at the NBN POIs?*

Only to a very limited extent.

6.26 *Are there any DTCS routes and ESAs which are competitive and could be removed from the scope of the DTCS declaration?*

Commpete considers that competition for transmission services has, in general, declined and does not consider any current DTCS routes should be removed.

6.27 *Is it appropriate to continue to use criteria for assessing competition on DTCS routes? If so, is it appropriate for the criteria to require:*

6.27.1 *a minimum of three independent fibre providers to be present*

6.27.2 *the presence at, or close proximity of, competing fibre providers to a Telstra/NBN exchange*

6.27.3 *the route to be serviced by at least three of the four largest transmission fibre providers*

6.27.4 *direct connectivity from that exchange to major transmission hubs in, or close to, the CBD of the major capital cities*

6.27.5 *sufficient demand in that area to indicate likelihood of new investment and the potential for competition to develop a level of price competition in the area, and*

6.27.6 *evidence of transmission services being supplied from the ESA.*

Commpete considers that there are problems with the current piecemeal structure of the DTCS declaration for the reasons discussed above. In addition, given the current dominance of vertically integrated providers, Commpete considers that clear evidence of current competitive wholesale supply of transmission services is required in order to conclude that competition exists.

6.28 *If the above competition criteria should not be used to assess competition on declared routes, what should the competition criteria be?*

See comments above.

6.29 *Should the ACCC maintain regulation of tail-end services?*

Yes, while NBN services may, in time, become a substitute for some tail-end services, for many business customers, NBN services are not an adequate substitute.

6.30 *Should a deregulated inter-capital/metropolitan/regional route be regulated if it is bundled with a regulated tail-end service?*

See comments above.

6.31 *What substitutes are available for the tail-end DTCS?*

See comments above.

6.32 *What competition criteria should the ACCC use when assessing levels of competition in tail-end markets?*

See comments above.

6.33 *Are there any other matters that the ACCC should take into account?*

See comments above.

6.34 *Are there barriers to entry for access to facilities relating to the DTCS? If so, what are they?*

6.35 *Have the alternative technologies to fibre-optic cable become more or less viable in the provision of DTCS since the 2014 declaration report? Are they likely to increase or decrease in importance in the future?*

Fibre optic cable is likely to remain the dominant technology for the provision of transmission services for the foreseeable future. While other technologies may be viable for the provision of tail-end services to some customers, fibre optic services are essential for the provision of tail-end services to business customers.

6.36 *What are the substitutes for the DTCS?*

See comments above.

6.37 *What should be the length of the regulatory period in the event that the DTCS declaration is extended?*

5 years