



# Submission to Draft Decision on Domestic Transmission Capacity Service Declaration Review

February 2014

The CCC has been a participant in reviews of the DTCS for more than a decade.

It has long been understood that effective regulation of transmission, or backhaul services, is a prerequisite to effective and enduring downstream competition, especially in regional and corporate markets.

In those locations where sufficient competitors have established alternative infrastructure to provide genuine competition to incumbent providers, the result has been dramatic price reductions and the stimulation of competition in retail access services markets through enabling competitors to economically invest in DSLAMs in Telstra exchanges.

In locations that do not benefit from competitive transmission infrastructure, the cost of access provides a material barrier to competitive entry. This is most starkly illustrated in regional locations that have not benefitted from the falls in transmission prices seen in some metropolitan locations, but is also evident in some corporate markets.

The CCC submits that the dramatic improvement in downstream competition and consumer benefit in locations where transmission prices have responded to competitive entry provide a measure of the benefit that could be realised if transmission access prices more closely approximated cost on all routes. The CCC believes the lesson of competition in fixed and mobile markets is that market participants will respond with alternative, competitive services quickly as soon as it becomes economical to do so.

The Commission's draft decision to continue declaration of the DTCS and to clarify and revise the service description regarding tail end services to ensure it is clear that they are subject to regulation is therefore welcome and important.

The draft decision signals the Commission's understanding of the importance of continuing to drive toward improved conditions for access to this fundamental input service.

The CCC is aware of other issues with the DTCS that have been raised by access seekers in relation to the application of the competition test and gaps in regulation around such areas as facilities access and special linkage charges. The CCC commends these representations to the Commission. There are

clearly many situations where Telstra has the incentive and the ability to discriminate against access seekers to its own benefit.

This raises more generally the issue of equivalence and how the Commission applies this in the circumstances of the DTCS. The CCC acknowledges the difficulty for the Commission is identifying and dealing with the many instances where Telstra, as the sole national DTCS provider, is able to engineer opportunities to create advantage for itself.

However, the CCC remains deeply concerned that the ability to address this issue is constrained by the Commission's on going focus on identifying areas where it can withdraw from regulating. The CCC submits that the resources expended on this issue over the past decade has been disproportionate and has come at the expense of issues that might have a more immediate and material beneficial impact on consumer welfare and competition.

The CCC submits it is crucial that the Commission not lose sight of the fundamental reasons and circumstances that caused it to intervene in DTCS pricing and access arrangements.

The decision by the Commission to intervene in the DTCS market was taken as a consequence of evidence that the price of the service was hugely inflated and that this was a consequence of its bottleneck characteristics that allow Telstra to exercise market power.

Telstra continues to own the only ubiquitous national network for transmission services. This national footprint has allowed Telstra enormous discretion in the way it chooses to price transmission services.

However, repeatedly over the past decade, the Commission's regulatory processes have become fixated on where and how to determine that parts of the Telstra network should not be subject to regulation. This is despite the fact that many access seekers have broad, disparate access requirements given the national nature of the transmission market and fact many end users have broad and disparate transmission requirements.

The generally stated reasoning for this regulatory forbearance is to avoid the cost of unnecessary regulation and to encourage further investment. This cost of regulatory oversight is unquantified and especially difficult to identify in circumstances where Telstra is still required to meet regulatory obligations for most of the rest of its DTCS footprint.

It is also unclear how deregulation creates any positive market conditions to stimulate further investment or promote greater competition. If a particular route is competitive, it can be assumed that the regulated price would be irrelevant to Telstra's pricing decisions, as it would price to meet the market if it wished to continue to acquire customers. That is, Telstra should be assumed to have an incentive to price to meet the market if a route becomes competitive, and the existence of a regulated price would have no bearing on this.

Further, the investment required to create competition on these routes is made in a regulated environment. There is no evidence that deregulation of geographic segments of otherwise national markets creates conditions conducive to more investment. Indeed, in other markets where the Commission has removed regulation on the basis that, *inter alia*, this would stimulate competitors to

make additional investment to add to their networks' capabilities, this assumption proved to be misplaced.

The CCC submits that the cost, especially to consumers, of this deregulation focus has, however, been clear and profound.

The resources devoted to the examination of this issue by the Commission and the communications industry has come at the expense of greater time and effort in resolving the problems that are the underlying cause of the pricing problem that led the Commission to embark on regulation of this market in the first place. Again, an inordinate investment in time and resources has been made by the Commission in trying to improve its competition test and in conducting route-by-route analyses of the market to determine where the test indicated that competition existed. This has in turn driven the industry to follow the Commission by investing time and money into discussions about the test and the results of the application of the test.

The numerous cases of anomalies that have occurred from these Commission activities and the application of the competition tests have meant access seekers have had to be vigilant in reviewing the routes nominated as competitive to protect their interests.

The CCC submits these efforts do nothing to address the fundamental problem of the inequity between access prices and Telstra's cost of self-supply, and the subsequent distortions and harm this does to downstream retail competition in a range of markets.

The Commission's persistence in trying to find a robust means to remove regulation on a route-by-route basis also runs counter to the Commission's recent decisions to reverse its position on geographic exemption of other regulated services.

The Commission granted geographic exemptions in relation to fixed lines services after applying the same reasoning as it has applied in the case of DTCS exemptions, primarily; the "burden" of regulation should be removed where a market became competitive, and; removing regulation would stimulate further investment.

Access seekers objected to the decisions on the same grounds as noted above; that investment would not be stimulated; that the competition tests developed by the Commission were manifestly inadequate and artificial, and; that competition would be harmed because the nature of Telstra's market power reflected the fact that it was derived from its unique position as the owner of the only national network, allowing it to apply pricing discretion no other participant could replicate. This last point means Telstra is in a position to manipulate downstream retail market outcomes.

Such were the negative effects on competition of these fixed services exemptions that the Commission took the unprecedented action of reversing them and re-regulating services in those exchanges areas.

This leaves its approach to the route by route deregulation of DTCS an anomaly that is inconsistent with the Commission's recent reasoning and determinations in other communications markets.

Finally, the CCC does not consider it acceptable for the Commission to simply "plough on" with flawed decisions simply because it has reached what it regards as a late stage in its own processes.

The CCC submits that it is incumbent on the Commission to re-examine the validity of the geographic exemption principle as applied to the DTCS through the lens of reasoning that caused it to take the courageous decision to admit and correct errors in similar situations.

The CCC would be pleased to provide further information or respond to any questions the Commission might have.

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