



Declaration of the Domestic Transmission Capacity Service

**Submission to the Australian Competition
and Consumer Commission**

Public version

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1. Introduction

Vodafone Hutchison Australia Pty Ltd (**VHA**) welcomes the opportunity to participate in the Australian Competition and Consumer Commission's (**ACCC**) inquiry about the declaration of the Domestic Transmission Capacity Service (**DTCS**) to determine whether the declaration should be remade, extended, revoked, varied, allowed to expire or extended and then allowed to expire. The current declaration is set to expire on 31 March 2019.

VHA considers that the DTCS should be remade and updated to include features of transmission services that are generally available in the market. The DTCS remain an essential input to a range of communication services. Availability of DTCS at competitive terms remains critical to downstream competition in relevant markets as consumer demand for data continues to increase at a rapid pace. Without access to competitive terms for transmission, non-vertically integrated carriers will be at a material competitive disadvantage vis-à-vis integrated carriers.

VHA considers the ACCC's use of competition criteria to assess the state of competition on DTCS routes remains appropriate. VHA generally agrees with the ACCC's approach to identifying areas where regulation of DTCS should be maintained or removed.

Updating the DTCS

A key focus of the ACCC's discussion paper is on whether the DTCS is aligned with transmission services that are generally available in the market today. In that regard, the DTCS does not reflect the way in which transmission services are current sold and purchased in the market. VHA considers that the DTCS should be updated to align closer with transmission services that are generally available in areas where there is effective competition.

Hindering access to the DTCS

VHA notes that access providers can prevent access to the DTCS and circumvent the objectives of Part XIC of the *Competition and Consumer Act 2010* (**CCA**). For example, Telstra continues to assert that access seekers cannot purchase DTCS on one route and Telstra's unregulated managed transmission service, i.e., the Managed Lease Line Ethernet (**MLL-E**), on another route. This all-or-nothing requirement is detrimental to the long-term interests of end-users (**LTIE**).

Telstra's all-or-nothing requirement creates a barrier to accessing the DTCS. Access seekers cannot benefit from competition on deregulated routes without foregoing the ability to access the DTCS on routes where competition is ineffective (i.e., access seekers have to pay supra-competitive pricing). If an access seeker opts to acquire DTCS, it would forego the benefits of competition on deregulated routes and unable to acquire a commercial service from Telstra on those deregulated routes (i.e., access seekers have to acquire a worse-off service).



VHA's submissions on these issues are set out below. VHA's responses to the ACCC's questions raised in its discussion paper are provided in Appendix A.

2. State of competition

DTCS remains a critical input in various downstream markets. Consumer demand for data continues to increase at a rapid pace. As a non-vertically integrated mobile network operator (**MNO**), being able to acquire access to foundational inputs like backhaul transmission on competitive terms remains crucial for VHA and its ability to be competitive in relevant downstream markets.

Since the ACCC's 2014 inquiry into the declaration of the DTCS, VHA has not observed any market developments that would warrant a wholesale change to the way the ACCC approaches the regulation of DTCS.

While the DTCS market may undergo material structural change due to the roll out of the national broadband network (**NBN**) in the future, it is unclear how DTCS markets will be affected until after the NBN roll out is complete and market participants (including NBN Co) has had sufficient time to adjust. In that regard, VHA notes that NBN Co [c-i-c] and VHA has not observed any material impacts the NBN has caused in transmission markets today. It is therefore premature to conclude what the likely long-term impact the NBN will have on DTCS markets, if any.

Telstra remains the only supplier of transmission services, particularly in regional and rural areas. The ACCC should continue to regulate the DTCS and recognise Telstra's enduring ability to exert market power by virtue of its interconnected, nationwide and ubiquitous fibre transmission network.

3. Updating the DTCS

The existing DTCS does not reflect the way in which transmission services are current sold and purchased in the market. VHA considers that the DTCS should be updated to require at least the following:

- on-line ordering to be standard;
- aggregation at the access seeker end to be standard; and
- option to acquire DTCS as wavelength as well as Ethernet.

These are the product parameters on commercial services that are available in area where there is effective competition. Such product parameters should be imported into the DTCS. On-line ordering and aggregation at the access seeker end will promote efficiencies in service delivery and reduce costs. Having the option to acquire DTCS as wavelength enables access seekers to have greater control over the way the service is used, creating an environment which increases an access seeker's ability to innovate (compared to the status quo).

In addition, VHA notes that transmission speeds are often acquired from 10 mbps (and upwards) on commercial basis. Path protection is also commercially available.



Modernising the DTCS would promote the LTIE as it aligns the DTCS closer with transmission services that are currently available in areas where competition is effective. A closer alignment means that areas where competition is ineffective would be served by transmission services as if competition is effective. This would promote competition and promote efficient investment in infrastructure.

If the ACCC declined to update the DTCS to align with transmission products available in areas where there is effective competition, it would forego the benefits of competition. Such a position would harm the LTIE.

4. Hindering access to the DTCS

Telstra hinders access to the DTCS. Telstra does not permit access seekers from acquiring the DTCS and MLL-E at the same time. This means that an access seeker cannot acquire the DTCS on one route and the MLL-E on another route, from Telstra.

Telstra's conduct is loosely analogous to anticompetitive bundling which the ACCC is familiar with. Telstra bundles contestable services (i.e., MLL-E in areas where there is effective competition) with non-contestable services (i.e., MLL-E in areas where there is ineffective competition) to limit access seekers' ability and incentives to acquire the DTCS in non-contestable areas. The only variation is Telstra supplies both the regulated DTCS and the non-regulated MLL-E.

This all-or-nothing requirement enables Telstra to command supra-competitive pricing for its MLL-E products as a bundle, specifically:

- access seekers are forced to utilise Telstra's transmission services in certain geographical markets where there are no viable alternative suppliers present;
- due to Telstra's all-or-nothing requirement, access seekers either acquire DTCS or MLL-E products and cannot mix and match (e.g., acquire MLL-E in areas where competition is effective and DTCS in areas where competition is ineffective); and
- access seekers are faced with the options of: (i) acquire a bundled MLL-E service that costs more than it would otherwise cost with appropriate regulation, or (ii) acquire a basic DTCS service without the qualitative improvements (improvements due to competition) but at a regulated price.

VHA notes that the ACCC stated:¹

In relation to this issue, we note that where there is no current access agreement for declared DTCS in place and where there is no commercial agreement requiring all transmission services to be acquired under a particular wholesale agreement, an access provider is obliged to supply the services under the standard access obligations (unless the circumstances in s. 152AR(4) CCA apply). However, under the

¹ ACCC, Communications Sector Market Study, Final Report, April 2018, page 69.



regulatory hierarchy, the terms and conditions (including price) in an access agreement will take precedence over the terms and conditions in the Final Access Determination for a declared service. Therefore, if an access provider has negotiated terms and conditions that require an access seeker to purchase all new/future transmission services under an existing agreement, then this may preclude the access seeker from purchasing DTCS services without first terminating that agreement.

It is unclear as to how the ACCC has arrived at this particularly view. It is a difficult reading of s 152BCC of the CCA to suggest that this provision enables Telstra to foreclose access to a declared service altogether simply by: (i) slightly amending the attributes of the relevant service, and (ii) inserting an all-or-nothing term in commercial agreements which applies to all existing and potentially new services.

A better reading of the s 152BCC is that it only precludes the operation of regulated *terms and conditions* to the extent of their inconsistency with *corresponding terms and conditions* in an applicable access agreement as defined in s 152BE of the CCA. Terms of an access determination are presumed to be applicable unless a specific term in the access determination is overridden by a term in a relevant access agreement. The question to ask in respect of s 152BCC is not, whether a relevant access agreement precludes an access seeker from seeking access to the DTCS entirely.

This means, for example, s 152BCC would apply so that the price specified in an access agreement overrides a price specified by a relevant ACCC access determination in relation to a particular route (i.e., where the MLL-E and the DTCS directly overlap). However, s 152BCC would not be applicable to a term which, as the ACCC puts it, “*require an access seeker to purchase all new/future transmission services under an existing agreement*”.

Such a term is inconsistent with the standard access obligations (**SAOs**) to provide access to a declared service as specified in s 152AR and an access provider’s obligations to comply with the SAOs under s 152AY. The SAOs are unequivocally in requiring an access provider to supply a declared service upon the request of an access seeker (subject to limitations in s 152AR(4)). The SAOs do not permit an access provider to create commercial conditions to refuse to supply a declared service.

Furthermore, the ACCC has available to it ex-post regulatory tools that would enable the ACCC to examine terms of commercial agreements if such terms were anticompetitive in purpose or effect.

5. Conclusion

VHA considers that the ACCC’s competition criteria to assessing competition in transmission markets remain fit for purpose and that it is still necessary to maintain the regulation of the DTCS in many parts of Australia where Telstra is the only effective supplier of transmission services.

However VHA considers that the DTCS should be updated to align closer with the transmission services that are available in the market today, and that the ACCC should stop Telstra from preventing access seekers from acquiring the DTCS.



Appendix A – VHA’s responses to the ACCC’s questions

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?

VHA has not observed any significant changes to the state of competition in the market for the DTCS in currently deregulated routes and ESAs. However VHA notes that there has been a decline in investments to extending infrastructure to regional and/or remote locations. This suggests that in some areas, there is still a critical need for regulating the DTCS.

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

VHA has not observed any significant competition issues over access to DTCS type services in deregulated areas.

However VHA notes that Telstra prevents access seekers from acquiring the DTCS on one route and Telstra’s MLL-E service on another route. This negatively affects an access seeker’s ability and incentives to purchase DTCS in areas where competition is ineffective.

Telstra’s all-or-nothing requirement creates a barrier to accessing the DTCS. Access seekers cannot take advantage of competition on deregulated routes without foregoing the ability to access regulated DTCS on routes where competition is ineffective. If an access seeker opts to acquire DTCS, it would forego the benefits of competition on deregulated routes where commercial transmission services include product features that are not currently provided in the DTCS.

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?

VHA considers that the relevant downstream markets for the DTCS identified in 2014 continues to be relevant downstream markets for which the DTCS continues to constitute an input.

Have the DTCS geographic markets changed since 2014?

VHA has not observed any significant changes in the market that would suggest the DTCS geographic markets have changed since 2014.



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

VHA considers that distinguishing regulation affecting the supply of mobile services in remote and regional areas of Australia should not be limited to transmission services. VHA has consistently advocated for regulation to expressly recognise the economic challenges of deploying mobile network infrastructure outside of metropolitan areas.

The ACCC itself has recognised the economic challenges of deploying mobile network infrastructure outside the metropolitan areas in both the ACCC's domestic mobile roaming inquiry 2017 and the ACCC's Communications Sector Market Study 2018. These challenges are also consistently recognised by the Regional Telecommunications Independent Review Committee. However these recognition have not always translated to regulatory action.

While recognising these challenges in respect of the declaration of DTCS may have a positive impact on a limited number of marginal business cases to deploy new mobile sites, it would unlikely achieve any meaningful impact given that a significant part of Australia can only economically support one mobile network.

VHA supports the ACCC's current focus on the inadequacies of mobile communication in regional and rural Australia. VHA notes that the scale of the competition problem in regional and rural Australia is unsolvable by the piecemeal approach the ACCC appears to be favouring. The various measures identified by the ACCC in its *Regional mobile issues paper 23 October 2017* (and its roundtable consultation) are unlikely to be sufficient, separately or cumulatively, to encourage investment by non-Telstra mobile network operators in mobile coverage beyond the limited marginal cases unless publically subsidised.

VHA maintains that the most appropriate form of regulatory intervention in promoting competition and efficient investments in mobile network infrastructure in regional and rural Australia is to promote network-sharing (this includes domestic mobile roaming).

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?

Telstra has put in place barriers to prevent access seekers from purchasing the DTCS for services to mobile towers in regional and remote parts of Australia (where Telstra is likely the only supplier of transmission services).

[c-i-c].



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

At a high level, the DTCS service and relevant transmission services to NBN POIs are similar in functionality, i.e., both services can be used by carriers and service providers to link network elements to customers.

In that regard, VHA does not consider it is necessary for the ACCC to examine DTCS and transmission services to NBN POIs separately. However, [c-i-c].

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

There are commercial transmission services offered by various providers that are substitutes for the DTCS.

However VHA notes that in regional and rural parts of Australia where competition is not effective, there are a limited number of providers and Telstra is often the only supplier of transmission services. Therefore access seekers are still likely to be constrained in their ability to switch to alternative sources of transmission supply in areas that are still primarily dominated by Telstra.

Are the current geographic classifications for the DTCS appropriate?

VHA considers that the current geographic classifications for the DTCS remain appropriate.

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

VHA considers that the DTCS should be updated to align with transmission services that are generally available in the market today. [c-i-c] so is unable to comment on the impact of the NBN roll out on the DTCS service description further.

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?

VHA considers it is still appropriate to identify the geographic boundary of telecommunications networks using ESAs. VHA does not consider there are appropriate alternative methods to identify the geographic boundaries of transmission networks at this point in time.

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

[c-i-c].



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

[c-i-c] so is unable to comment on whether transmission services to NBN POIs should be added as a separate route category in detail.

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?

VHA considers that a minimum capacity of 2Mbps remains appropriate.

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

VHA considers that it is still appropriate to continue to define the DTCS as 'symmetric' and 'uncontended'.

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

VHA considers that path protection and equipment protection should be included. VHA notes that protected transmission services are commercially available in areas where competition is effective.

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?

VHA consider the DTCS service description is adequately to capture the service that is generally provided in the transmission market.

However, VHA notes that the terms and conditions of the DTCS should be updated to require at least the following:

- on-line ordering to be standard;
- aggregation at the access seeker end to be standard; and
- option to acquire DTCS as wavelength as well as Ethernet.

This would align the DTCS closer to the transmission service that is generally available in the market today.



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

It is unclear what the likely future impact of the NBN will be. VHA notes that NBN Co predominantly supplies internet connectivity, and except for the Cell Site Access Service (**CSAS**), NBN Co does not offer transmission services generally. VHA is one of the few purchasers of the CSAS service.

VHA also notes that access seekers cannot acquire an end-to-end transmission service on the NBN, which is typically how access seekers acquire transmission services commercially. This means an access seeker will still need to acquire transmission services from a third-party in order to utilise transmission services provided over the NBN (such as the CSAS) (i.e., NBN Co supplies CSAS to an NBN POI, a third-party supplies transmission from the NBN POI to the access seeker's core network).

Given this, the incentives for access seekers to acquire transmission services from NBN Co will continue to be limited unless the price terms improve to reflect the fact that access seekers will need to acquire a second transmission service from a third-party.

[c-i-c] so VHA is unable to comment on the likely impact of the NBN on the market structure for the DTCS further.

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

VHA considers that the CSAS is comparable to a transmission service. The CSAS only be purchased by mobile carriers and has limited geographic coverage.

However VHA notes that CSAS is not an end-to-end service and VHA will need to acquire a transmission service from another provider to connect traffic from a POI back to the VHA core network.

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

[c-i-c]. VHA notes that NBN Co does not offer any end-to-end transmission products. Any service acquired from NBN Co will terminate at a NBN POI, and an access seeker will still need to acquire a separate service to connect from the NBN POI to the core network.

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

[c-i-c]. VHA notes that NBN Co does not offer any end-to-end transmission products and current terms do not incentivise access seekers to acquire services from NBN Co (compared to an end-to-end service).



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

VHA has not observed any significant changes to the DTCS market structure that has had a major impact on the state of competition in the DTCS markets.

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

The roll out of the NBN is likely to have decreased investment incentives in transmission markets. It is unlikely there would be new market entry and the number of suppliers will likely remain static.

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

VHA considers there is a choice of active suppliers of transmission services at all of the 121 NBN POIs.

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

VHA considers there is some availability of dark fibre services at the NBN POIs. Dark fibre is more likely to be available in areas where there are multiple potential suppliers of dark fibre. Dark fibre is unlikely to be available in areas where the number of potential suppliers is limited.

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

VHA is unable to comment on any specific DTCS routes and ESAs.



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

- a minimum of three independent fibre providers to be present
- the presence at, or close proximity of, competing fibre providers to a Telstra exchange
- the route to be serviced by at least three of the four largest transmission fibre providers
- direct connectivity from that exchange to major transmission hubs in, or close to, the CBD of the major capital cities
- 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
- evidence of transmission services being supplied from the ESA.

VHA considers that it remains appropriate for the ACCC to continue to use all of the above criteria for assessing competition on DTCS routes.

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

VHA considers that it remains appropriate for the ACCC to continue to use all of the above competition criteria, therefore VHA is unable to comment on alternative competition criteria.

Should the ACCC maintain regulation of tail-end services?

VHA considers that it is appropriate for the ACCC to maintain regulation of tail-end services (directly and as part of a bundle). VHA acquires tail-end services bundled with the relevant capital to regional or metropolitan route. If tail-end services were not regulated, access providers will have the ability and incentive to leverage market power in the supply of tail-end services in areas where competition is not effective.

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

Generally, VHA considers that where a bundled service includes a regulated service as a component of the bundled service, it is appropriate to regulate the bundled service. This would limit the ability of access providers to circumvent the access regime, for example, offering a bundled service at supra-competitive rates as well as preventing an access seeker from acquiring the components of the bundled service



separately (as Telstra is currently doing by not allowing access seekers to acquire DTCS on one route and Telstra's managed transmission services on another route).

What substitutes are available for the tail-end DTCS?

Whether substitutes are available for tail-end DTCS depends on which provider is collocated at the relevant Telstra exchange. Generally speaking, any non-Telstra provider could provide a tail-end transmission service if they have network presence at the Telstra exchange.

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

VHA is not aware of any compelling reason for special competition criteria for assessing the level of competition in tail-end markets. VHA considers the ACCC's current approach to determining effective competition to be appropriate and applicable to tail-end markets.

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

VHA has no comment in respect of the above ACCC question.

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

VHA has no comment in respect of the above ACCC question. [c-i-c]. Therefore VHA cannot comment on this matter further.

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?

VHA considers that optical fibre remains the dominant technology for the provision of transmission services.

What are the substitutes for the DTCS?

VHA considers that optical fibre remains the dominant technology for the provision of transmission services and this is unlikely to change in the foreseeable future. In that regard, VHA does not consider there are effective substitutes for the DTCS.



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

VHA considers it is appropriate to amend and extend the DTCS declaration for a period of 5 years. This timeframe will enable the NBN roll out to complete and the transmission market to develop accordingly.