

**ACCC Discussion Paper reviewing the declaration for the
Domestic Transmission Capacity Service**

Submission by Herbert Geer Lawyers on behalf of:

iiNet Limited

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A. INTRODUCTION

This submission is made on behalf of iiNet Limited (**iiNet**).

The declaration for the Domestic Transmission Capacity Service (**DTCS**) is due to expire on 31 March 2014. Accordingly, the Australian Competition and Consumer Commission (**ACCC**) is holding a public inquiry relating to the declaration of the DTCS and the ACCC has released a discussion paper: *An ACCC Discussion Paper reviewing the declaration for the Domestic Transmission Capacity Service (the Discussion Paper)* which lists specific questions that the ACCC is seeking responses to from interested stakeholders.

iiNet welcomes the ACCC's review of the DTCS declaration and the opportunity to provide a response to the Discussion Paper.

B. EXECUTIVE SUMMARY

iiNet believes that the DTCS declaration inquiry raises two broad issues. These are:

- should the DTCS continue to be declared beyond the expiry of the current declaration; and if so,
- should the DTCS service description remain the same.

iiNet submits that:

- The DTCS should be re-declared because it remains essential to the promotion of competition and the long term interests of end-users of telecommunications services in downstream markets (**LTIE**) in which the DTCS is a vital input. Telstra's fixed network has the characteristics of an enduring bottleneck. As a vertically integrated incumbent, Telstra has an incentive either to deny access to its bottleneck infrastructure or to charge monopoly rents. Alternative technologies are not substitutes to the DTCS.
- Largely, iiNet considers that the current service description is acceptable. However, iiNet considers that the 1km rule (whereby a transmission route is considered competitive if there are three fibre operators within 1km of a regional post office (**RPO**)) should be amended to require that each fibre operator is actually connected to the Telstra exchange and, in the case of NBN points of interconnection (**POIs**) that are at a different site from the Telstra exchange, the NBN POI site. iiNet also considers that the DTCS service description should be updated to include a definition for protected DTCS services and that it is appropriate to adopt the definition for protection in the current DTCS final access determination (**FAD**).
- Telstra is the owner of the ubiquitous exchange buildings, ducts and external interconnect facilities. It is not economically viable for other carriers to replicate these facilities on anything approaching a national basis. The charges imposed on access seekers to use these facilities are excessive and are a barrier to entry for carriers that could provide alternatives to the DTCS. This is compounded by inherent problems with the negotiate/arbitrate mechanism in Schedule 1 of the *Telecommunications Act 1997* (**Telco Act**) that limits the ACCC's jurisdiction to make binding determinations and does not provide the ACCC

with the power to make upfront access terms that can apply as a fall-back position where carriers cannot agree on access terms.

ANSWERS TO ACCC QUESTIONS IN THE DISCUSSION PAPER

1. **Are there any issues over access to different types of DTCS services in the deregulated areas? If there are any issues, please identify what those issues are, including where possible, details of those issues.**

Beyond transmission charges in Australia being high from an international perspective, iiNet has no other comments about access to DTCS in deregulated areas.

2. **The ACCC has previously identified that the relevant downstream markets for the DTCS include national long distance, international call, data and IP-related markets, mobile voice and mobile data. Are these the relevant downstream markets for which the DTCS continues to constitute an input?**

iiNet agrees with the ACCC's views regarding the relevant downstream markets that require the DTCS. Further, iiNet considers that the particularly demanding requirements of government and corporate end-users are such that it is appropriate to consider them as a separate market for DTCS or at least a separate submarket in each downstream market. For example, potential alternative transmission technologies are less likely to be acceptable DTCS substitutes to government and corporate end-users requiring stringent service levels. The difference between the markets for residential and business end-users is recognised in telecommunications legislation. For example:

- The objects of the Telco Act distinguish between places of residence and business.¹
- The Telecommunications (Customer Service Guarantee) Standard 2011 provides that higher levels of compensation are payable to business than residential end-users affected by a service provider's failure to meet mandatory provisioning and fault rectification timeframes.
- The level playing field provisions of Parts 7 and 8 of the Telco Act provide that new superfast networks are prohibited from servicing residential or small business customers but can service large business or government clients.

iiNet submits that it is important that the different requirements of corporate and government end-users are taken into account by the ACCC if it is considering any regulatory reduction.

3. **Are there any additional markets in which the DTCS is an input?**

Please see our comments at Question 2.

4. **Are there any substitutes for the DTCS in any of the current geographic markets that have developed since the 2009 Declaration Decision?**

iiNet does not consider there are substitutes for the DTCS. Alternative technologies such as microwave, satellite or SHDSL via ULLS cannot compete with fibre's capacity

¹ Telco Act, section 2(a)(i).

and do not provide an effective commercial constraint on the DTCS. Alternative technologies will not usually meet the geographic point-to-point requirements that are achieved via the DTCS.

5. **How should the DTCS service description define the geographic boundaries of each capital city and regional centre listed in the service description? What competition criteria should be applied to determine these boundaries?**

iiNet has no comment.

6. **During commercial negotiations, how do parties typically interpret the geographic boundaries of each capital city and regional centre listed in the DTCS service description?**

iiNet has no comment.

7. **Should the revised terminology used in the DTCS FAD to identify the geographic route categories be adopted into the DTCS service description? That is, should references to capital-regional route in the service description be replaced with regional route and references to inter-exchange transmission be replaced with metropolitan route?**

iiNet has no comment.

8. **Is it appropriate to reclassify the Sydney-Campbelltown route in the DTCS service description as a deregulated metropolitan route?**

iiNet is not aware of the level of competition on the Sydney-Campbelltown route and whether it is sufficiently competitive to be deregulated.

9. **Should the DTCS service description be updated to include a definition for protected DTCS services? If so, is it appropriate to adopt the definition for protection provided in the DTCS FAD?**

iiNet considers that the DTCS service description should be updated to include a definition for protected DTCS services and that it is appropriate to adopt the definition for protection in the DTCS FAD. iiNet considers that the need for protection will be important when carrying NBN PSTN equivalent voice services that will require high quality networks with redundancy.

10. **Is it appropriate to continue to define the declared DTCS (in the DTCS service description) as 'symmetric' and 'uncontended'?**

iiNet considers that it is appropriate to continue to define the declared DTCS as symmetric and uncontended.

11. **Can service availability for the DTCS be described using another measure?**

Please see the comment at Question 10.

12. **Should the current definitions for 'a point of interconnect', 'an access seeker network location' and 'a customer transmission point' in the DTCS service description be clarified or re-drafted to promote clarity? If so, how should those terms be defined?**

iiNet has no comment.

13. **Should references to the term 'exempt' in the DTCS service description be replaced? What other term should be used?**

iiNet has no comment.

14. **What will be the likely impact of the NBN on the market structure for the DTCS over the next few years?**

iiNet hopes that all or most fibre operators will extend their networks to all NBN POIs and that this results in effective competition on routes from the NBN POIs to capital city POPs. iiNet does not have insight into the fibre operators' business plans, though iiNet's experience to date is that fibre operators are not willing to invest in network extensions to NBN POIs unless they have a guaranteed revenue stream from an anchor client. Currently it appears that this reluctance to invest will result in either lower than desirable levels of competition or delayed competition on these routes. Until a carrier actually builds fibre out to an NBN POI, it is not necessarily imposing any competitive constraint on Telstra so at this stage it is premature to roll back regulation on the basis of anticipated builds by other fibre operators.

15. **Will DTCS traffic be concentrated on any particular routes, such as routes between NBN POIs and capital cities?**

It is likely that there will be a high level of concentration on routes between NBN POIs and capital cities.

16. **Are the current high data rate NBN Access Service services (such as the 100/40Mbps service) a comparable substitute for low data rate DTCS services, such as the 2Mbps DTCS?**

The NBN's aggregation model restricts the ability of retail service providers (RSPs) to offer end-users the same physical point-to-point private network service that is available via the DTCS. This service is often used by corporate or government end-users for inter-office communications where the non-aggregated uncontended service is valuable because the service is not subject to potential peak congestion and the network is not operated with retail ratios that residential end-users are subject to. It could be possible to offer an uncontended service over the NBN by provisioning a separate CVC with enough capacity, but it is unclear whether this would be economically feasible.

17. **What is the level of competition on transmission routes serving the 121 NBN POIs? Is DTCS traffic concentrated on particular routes to NBN POIs? Are there any routes which are currently declared which could be deregulated? Are there any deregulated routes which should be re-declared?**

iiNet does not have data about the level of competition on transmission routes serving the 121 NBN POIs, though it is aware that fibre operators have not yet built to the 10 NBN POIs that are not located in Telstra exchanges. Please also see our comments at Question 14.

18. **What is an appropriate competition criteria for assessing DTCS competition at, or near, NBN POIs?**

iiNet considers that at least three alternative fibre networks need to be available to provide the DTCS at an NBN POI for a reasonable level of competition to exist. A fibre operator's impact on competition on routes to an NBN POI will be limited until it actually connects to the POI. Constructing fibre routes is a significant investment by a carrier, even if it is only a 1km spur line from an existing network. The cost of

construction varies on the location of the build, being significantly higher in built up areas. iiNet considers that the competition criteria should be based on actual competition rather than potential competition, i.e. in order to be assessed as relevant to competition, a fibre operator needs to be connected to an NBN POI rather than within 1km of it. Until the connection occurs, the potential fibre operator entrant is not impacting competition or constraining the other fibre operators that are already present at the NBN POI.

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

iiNet is not aware of any regional DTCS routes that are competitive and could be removed from the scope of DTCS declaration.

20. Is it appropriate to continue to use the capital-regional criteria for assessing competition on regional DTCS routes? If so, is it appropriate for the capital-regional criteria to:

- **require a minimum of three fibre providers to be present?**

iiNet considers that the availability of three fibre providers is the minimum to represent the existence of competition. Further, iiNet considers that each of the three fibre operators must provide protected DTCS services on a route. Protection will be particularly important when RSPs are providing PSTN equivalent voice services that will require high quality networks and high levels of reliability.

- **continue to use RPOs as the geographic location from which competitive fibre networks must be located in order to contest a regional DTCS route? If not, where should competition be assessed from?**

iiNet considers that the RPO should be replaced with the regional Telstra exchange as the appropriate place to measure competitive DTCS access on regional routes. In regards to NBN POIs not located in a Telstra exchange, the NBN POI is the appropriate geographic location rather than the RPO.

- **maintain the contestable distance to 1km? If not, what should be the contestable distance?**

iiNet considers that the 1km rule should be replaced with a criterion whereby an adequate level of competition is achieved if alternative fibre providers are connected to an exchange rather than within 1km of the RPO (or Telstra exchange or NBN POI).

21. If the capital-regional criteria should not be used to assess competition on declared regional routes, what should the competition criteria be?

As discussed in our answer to Question 20, iiNet considers that the capital-regional criteria may be maintained as a measure of competition, with the 1km rule being replaced with actual connection to an NBN POI or Telstra exchange.

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

iiNet is not aware of any metropolitan DTCS routes that are competitive and could be removed from the scope of DTCS declaration.

23. Is it appropriate to continue to use the inter-exchange criteria for assessing competition on metropolitan DTCS routes? If so, is it appropriate for the metropolitan criteria to require:

- **a minimum of three fibre providers to be present**

iiNet considers that the availability of three fibre providers is the minimum to represent the existence of competition. Further, iiNet considers that each of the three fibre operators must provide protected DTCS services on a route in order to meet this requirement. Protection will be particularly important when RSPs are providing PSTN equivalent voice services that will require high quality networks and high levels of reliability.

- **that competitors be located at a Telstra exchange**

iiNet agrees with this requirement.

- **that ESAs be connected in a contiguous cluster and adjoin a CBD ESA?**

iiNet agrees with this requirement.

24. Should the ACCC maintain regulation of tail-end services in the 17 CBD ESAs?

iiNet considers it is appropriate to maintain regulation of the tail-end services in the 17 CBD ESAs. This market remains heavily dominated by Telstra and is not competitive. Though there are other fibre networks in the CBDs, Telstra is the only carrier with cabling into most, if not all, buildings. Telstra's position as the incumbent has always provided it with a far easier means of access to CBD buildings than other carriers, as building owners recognise that their tenants require telecommunications services and consider that the incumbent operator is the easiest option to provide such services. In contrast, competitive carriers will frequently be subject to delay and considerable levels of negotiations with building owners in order to gain access. The high costs of cabling to and into buildings is a significant barrier to entry for other carriers that are considering network extensions into buildings that already contain existing Telstra cable. Carriers undertaking any such builds would also incur high ongoing costs in utilising Telstra's underground duct network. Removal of tail-end regulation would be contrary to the LTIE as it would remove choice and is likely to result in higher prices for end-users of downstream services that rely on tail-end DTCS.

25. What substitutes are available for the tail-end DTCS?

Alternative technologies, such as ULLS, SHDSL, HFC, LMDS and MMDS cannot compete with DTCS's capacity, do not provide a competitive constraint on the incumbent, and are not viable substitutes to tail-end DTCS in most situations. This is particularly pertinent to government and corporate end-users of services provided via tail-end DTCS, who require highly reliable services and would not accept the lower service levels that apply to alternative technologies. Fibre from other providers can be a substitute if it is able to provide a point-to-point service to an end-user's premises. The high cost of installing new fibre to an end-user's premises often means that it is simply uneconomic as a substitute.

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

Assessing the level of competition in tail-end markets would require consideration of the level of effective point-to-point competition, i.e. available fibre capacity on a single route between two points on the DTCS network, such as from a POI to the business premises of a corporate or government end-user. If another fibre provider does not

provide the same point-to-point route then it is not a viable competitor that can service the particular end-user simply because it has fibre in an ESA.

27. Are high bandwidth NBN Access Services (such as the 100/40Mbps services) a comparable substitute for low bandwidth (such as 2Mbps) tail-end DTCS services?

The NBN's aggregation model restricts the ability of RSPs to offer end-users the same physical point-to-point private network service that is available via the DTCS. This service is often used by corporate or government end-users for inter-office communications where the non-aggregated uncontended service is valuable because the service is not subject to potential peak congestion and the network is not operated with retail ratios that residential end-users are subject to. It could be possible to offer an uncontended service over the NBN by provisioning a separate CVC with enough capacity, but it is arguable that this would not be economically feasible.

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

Facilities relevant to the DTCS include Telstra Exchange Building Access (**TEBA**), External Interconnect Cables, Acquirers' Cable, and Ducts. iiNet considers that facilities access provisioning processes and the charges imposed for access are barriers to entry that are relevant to the DTCS.

The ordering and provisioning process for TEBA are particularly cumbersome. As a result of Telstra's requirements relating to queuing and the design and construction process, it often takes an access seeker up to 90 days to access and install equipment in a Telstra exchange. Though it is important for Telstra to ensure proper care is taken of its facilities and exchanges, iiNet is concerned that this process provides an opportunity for Telstra to unnecessarily drag its feet and delay its competitors. This process is likely to be particularly pertinent when RSPs are connecting to the NBN, as all RSPs are likely to be seeking NBN connections builds at the same time.

Schedule 1 of the Telco Act requires carriers to provide other carriers with access to facilities. This obligation includes the provision of access to facilities that relate to the DTCS, such as underground ducts and TEBA. The main barriers to entry are the extremely high access charges imposed by Telstra on competitors using its facilities. The ACCC is currently arbitrating three facilities access disputes. This includes a TEBA access dispute between Telstra and iiNet subsidiary, Chime Communications. The issues on which the dispute is based have been set out in documents provided to the ACCC as part of the arbitration process.

iiNet has not undertaken economic assessment of whether Telstra's duct charges reflect the costs that Telstra incurs to provide the service, however, comparison with internationally available duct prices suggests that Telstra's rates are an order of magnitude higher than they would be if they were cost based. For example, 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.² This is considerably lower than the price available to access duct in Australia. Though there are problems with such simple benchmarking comparisons of international data, and analysis of cost data from the

²<http://www.openreach.co.uk/orpg/home/products/pricing/loadProductPriceDetails.do?data=z75T9D0yfFKL0UorCMMMA7OVMbA8c5ofXzFv23yZvBj9Z6rNZujnCs99NbIKJZPD9hXYmiiXh6wr%0ACQm97GZMyQ%3D%3D>

ACCC's Fixed Line Service Model would produce a more accurate Australian specific charge, the magnitude of the price difference between Australia and the UK strongly suggests that competitive fibre operators in Australia are paying far too much to use Telstra's duct network. Given that investment in fibre services by competitive backhaul providers underpins much of the competition in retail and wholesale markets, a cost based duct access charge is integral to the efficient use of underground infrastructure and the promotion of competition of services on both fixed lines and mobile networks that use the DTCS for backhaul.

Access to facilities is regulated by a legislative scheme consisting of Schedule 1 of the Telco Act, the Facilities Access Code³, and the Telecommunications (Arbitration) Regulations (together the **Schedule 1 legislative scheme**). The Schedule 1 legislative scheme sets out a process for carriers to reach agreement about the terms of access to facilities and failing agreement, a mechanism for mediation and arbitration of disputes. Unfortunately, there are inherent problems in the practical implementation of the Schedule 1 legislative scheme's negotiate/arbitrate model such that it is extremely difficult, if not often impossible, for an access seeker to resolve a dispute under the scheme's dispute mechanism and acquire access on reasonable terms within a timeframe that is acceptable to ongoing business operations. In effect, the Schedule 1 legislative scheme reinforces the dominant position that the incumbent enjoys as a result of its ownership of the vast majority of network facilities and produces an access environment that inhibits competitive growth and should be regarded as a barrier to entry in the market for DTCS supply.

iiNet has firsthand and current experience of the inherent difficulties of utilising the Schedule 1 legislative scheme's negotiation and submits that it is difficult to obtain reasonable access terms pursuant to Schedule 1 for the following reasons:

- Clauses 18(7) and 36(8) of Schedule 1 of the Telco Act place strict limits on the effect of an arbitrator's determination if there is an existing facilities access agreement between the parties.
- Schedule 1 fails to recognise the practical reality that access seekers cannot spend months or years attempting to resolve disputes with an access provider. As a result, if an access seeker wants to proceed with business plans that involve facilities access, then it has little choice but to enter into an agreement with Telstra even if the access seeker consider that the terms are wildly unfavourable. Once the agreement is in place, the access seeker's subsequent ability to renegotiate or obtain reasonable terms via an arbitration are very limited because of clauses 18(7) and 36(8).
- Though clauses 18(7) and 36(8) were added to Schedule 1 at the same time as the negotiate/arbitrate model was removed from Part XIC of the Competition and Consumer Act 2010 (**CCA**), Schedule 1 does not provide a mechanism similar to the CCA by which the ACCC makes upfront Final Access Determinations that can operate as a fall back position in the event that carriers cannot agree on access terms. As such, there is no fall back option for a carrier faced with unreasonable terms or excessive prices when seeking to use Telstra's facilities to provide a competitive DTCS.

iiNet considers that this represents a barrier to entry for access to facilities related to the DTCS. As these facilities are also used in the acquisition of other services,

³ A Code of Access to telecommunications Transmission Towers, Sites of Tower and Underground Facilities

including undeclared services, iiNet has submitted to the ACCC in the Fixed Services Review that the facilities access service should be declared.

29. **Have the alternative technologies to fibre-optic cable become more or less viable in the provision of DTCS since the 2009 Declaration Decision? Are they likely to increase or decrease in importance in the future?**

Alternative technologies to fibre optic cable have not become more viable since 2009. Other technologies suffer from limited capacity. Growth in data requirements on both fixed and mobile downstream services since 2009 has emphasised that other technologies simply do not have sufficient capacity to be considered substitutes to the DTCS provided via fibre. Data use will grow exponentially in the future, increasing reliance on the DTCS and fibre.

30. **What are the substitutes for the DTCS?**

Please see the comments under Question 29.

31. **Can network capacity be viewed as a potential barrier to entry on certain DTCS routes?**

iiNet understands that fibre operators adjust network capacity to meet actual demand. As such it is reasonable to expect that if there is sufficient demand on a DTCS route to encourage a new entrant, then this would be countered by existing operators increasing capacity to absorb their demand prior to the new entrant's build.

32. **What should be the length of the regulatory period should the DTCS be re-declared?**

iiNet considers that DTCS should be redeclared for a period of five years. A shorter period will result in the substantially the same issues being revisited within too short a time-frame as the competitive landscape is unlikely to have undergone significant change. A five year period will provide sufficient time for the NBN rollout to proceed and for its impact on competition in relevant telecommunications markets to be fully assessed.

33. **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?**

As it is still early in the NBN rollout and also because most NBN POIs will be in Telstra exchanges, it seems reasonable to continue to use the ESAs.

34. **Would the service description adequately capture the DTCS markets while the NBN is being rolled out?**

Subject to the comments at Questions 9, 20 and 23 above, iiNet considers that the service description remains acceptable.

Herbert Geer Lawyers on behalf of iiNet Limited

30 August 2013