



FINAL ACCESS DETERMINATION: NON-PRICE TERMS AND SUPPLEMENTARY PRICES

Response to the
Australian Competition and
Consumer Commission's Position Paper

15 July 2014



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1. Executive summary

Vodafone Hutchison Australia Pty Limited (**VHA**) welcomes the opportunity to participate in the ACCC's consultation on its final access determination (**FAD**) position paper for non-price terms and conditions and supplementary prices (**Position Paper**) for the Domestic Transmission Capacity Service (**DTCS**); the Mobile Terminating Access Service (**MTAS**); and fixed line services.

The critical issue the ACCC must grapple with is the significant, deeply problematic, advantages Telstra enjoys in the self-supply of these foundational telecommunication services. For too long Telstra has gained substantial and unacceptable advantages from regulatory decisions that have not adequately assessed Telstra's self-supply. No other Telco can replicate this self-supply advantage. For example the ACCC has:

- ignored the impacts of the de-averaged Unconditional Local Loop pricing on regional fixed line competition;
- not adequately assessed the lack of pass through of the substantial MTAS price reductions and ignored the subsequent impacts on mobile competition; and
- delivered regulated DTCS pricing that is many multiples above the transmission prices of competitive providers.

Vodafone welcomes the ACCC's new aspiration to take a holistic perspective on these issues and overcome clear roadblocks in achieving a level competitive playing field for telecommunications in Australia.

The ACCC should focus its regulatory attention (and its resources) on the area that will best promote the long-term interests of end-users (**LTIE**). For this reason, we believe the ACCC should prioritise its assessment of the DTCS. The ACCC's historical regulatory oversight of Telstra's DTCS product suite has manifestly failed to deliver a level competitive playing field in Australia. This has deprived consumers of the benefits of competition and innovation throughout the telecommunications sector. The impact of these regulatory failures to overcome Telstra's monopoly power has increased in severity over time. Regulation has not kept pace with the increasing prominence of the DTCS in telecommunications networks – regulation has not delivered a cost-based pricing nor has it delivered the balanced non-price terms that typically occur in a competitive market. This cannot continue. The ACCC now has an opportunity to take decisive action on the price and non-price terms for the DTCS and ensure an outcome that will promote competition and the LTIE.

The current terms and conditions for DTCS are heavily weighted in favour of the monopoly provider and the terms of conditions have not had the level of regulatory oversight compared to the fixed services. The DTCS has transitioned from a service, whose technical requirements were essential but where the cost was often marginal to the delivery of telecommunications services, to one where the high capacity requirements (when coupled with high pricing) could make it the limiting factor on network links and broader regional investment decisions. A review by the ACCC is therefore long overdue.



This FAD consultation presents a unique opportunity for the ACCC to right the wrongs of the past and, even more importantly, fix regulation of the DTCS going forward. It must seize that opportunity – comprehensively and rigorously but also quickly. It can only do that by explicitly prioritising consideration of the price and non-price terms of the DTCS.

While VHA is pleased that the ACCC intends to undertake a comprehensive and coordinated assessment of DTCS, MTAS and the fixed services, it has two fundamental concerns about the ACCC's proposed approach:

1. The proposed timeframe for the DTCS FAD process to be excessive and contrary to the promotion of the LTIE. We are particularly concerned the extended timeframe will add uncertainty to industry responses for the Australian Government's \$100 million Mobile Black Spot Programme.¹
2. VHA considers the proposed separation of 'primary' and 'supplementary' prices to be flawed from an economic perspective.

These concerns are particularly acute in respect of the DTCS given its foundational importance for competition in downstream markets and its lack of adequate regulatory oversight to date.

¹For more details see: http://www.communications.gov.au/mobile_services/mobile_black_spot_programme



2. Focus on non-price terms for the DTCS

VHA will provide comments on the general legal and commercial framework required for all three access determinations. However, it will confine its comments on service-specific non-price terms to the DTCS. VHA does not believe specific non-price terms for the MTAS and fixed line services require the same level of attention as the DTCS. In VHA's experience, the non-price terms for the MTAS have not played a crucial role in the mobile industry and have generally not been a source of contention between carriers. The non-price terms for fixed line services have been well-established for some time now and VHA is not aware of any specific areas of concern in relation to their operation.

The DTCS requires urgent regulatory attention. The current regulatory pricing is multiples above the economically efficient cost of providing the service and the DTCS' heterogeneous product and geographic specifications require more complex non-price terms than the other declared services. These issues warrant a careful assessment by the ACCC and must be addressed in the FAD for the DTCS.

The ACCC must recognise and, where necessary, prioritise its consideration of the following matters:

- The DTCS FAD must specify a comprehensive set of both price and non-price terms and conditions which are commercially implementable in the absence of a negotiated agreement so as to present a viable alternative to an access agreement in circumstances where the parties cannot agree.
- The most effective way to achieve a comprehensive set of FAD terms would be for the ACCC to hold an open consultation based on the terms of Telstra's new Telstra Wholesale Agreement (**TWA**). If Telstra believes that its contractual terms are reasonable, then it should welcome this approach.
- The ACCC should have a dispute resolution role. The FAD for each service should include a dispute resolution mechanism which provides for recourse to the ACCC in the event that the parties are unable to agree and an appropriate regulatory review clause.
- The ACCC's current distinction between the treatment of "primary" and "supplementary" prices is without merit. The approach of separating "primary" and "supplementary" prices creates a significant risk that regulatory arrangements will permit access providers to generate economic rents and lead to cost over-recovery. If the ACCC maintains this artificial distinction it risks embedding pricing structures that are to the detriment of competition and the LTIE. The ACCC should combine its consideration of "primary" and "supplementary" price terms into one review and explicitly link pricing structures to the efficient cost of supplying the declared services.



3. The current state of competition in Australian telecommunications markets

Australia continues to suffer from the highest fixed line prices in the OECD, limited regional competition, and a vertically integrated incumbent that is crowding out competitive investment. It is crucial that the ACCC fundamentally change the way fixed services are regulated so that Telstra's self supply of these services does not put the rest of the industry at significant competitive disadvantage. While the rollout of the NBN and the progressive structural separation of Telstra will in time, address some of these issues, it is not enough for the ACCC to simply point to the NBN as the solution to all of the structural problems that beset Australian telecommunications markets. The determination of price and non-price terms for access services is now being undertaken when there is significantly more clarity over the scope of payments NBN Co will make to Telstra. To that end, Telstra will receive new revenue streams for assets used to provide fixed line services and potentially for assets used to provide transmission capacity services. It is imperative the ACCC carefully considers the impact of these payments on Telstra's levels of cost-recovery.

The market for the supply of the DTCS has become more consolidated since the ACCC last made an FAD. Moreover, three of the four major suppliers of the DTCS – Telstra, Optus and TPG/Pipe/AAPT – are vertically integrated, which can lead to strategic behaviour in their supply of the DTCS because of incentives to favour their downstream business interests. In addition, vertical integration also means self-supply of the DTCS which will impact competitive market dynamics in both the supply of the DTCS and in relevant downstream markets. Within this context, the regulation of the monopoly DTCS service has been wholly inadequate. Despite it being a bottleneck service and an essential input to both fixed and mobile voice and broadband services, the DTCS has suffered from lax regulatory oversight since its inception. The ACCC's information on critical elements of its non-price regulation (e.g. the equivalence of service levels and fault rectification) appears limited or non-existent. This cannot continue any longer. The DTCS is a foundational product critical to promoting downstream competition in fixed and mobile services, particularly those offered in regional areas.

4. Inadequacy of the current DTCS FAD

The pricing of DTCS is fundamental to the promotion of the LTIE as DTCS is a key input for effective competition in both fixed and mobile telecommunications markets. The current DTCS FAD has failed to promote the LTIE, because it does not provide for reasonable alternative non-price terms and conditions of access in circumstances where the parties cannot agree. In addition, the ACCC's regression model is fundamentally flawed, in particular, the fit of the model to the data is extremely poor and the use of average prices in the ACCC's regulated pricing is likely to result in pricing that is well above the efficient, cost-based price of supplying the DTCS. These theoretical observations are borne out by VHA's experience of pricing on "competitive" routes, where the pricing is often a fraction of the ACCC-observed benchmarks.

Unfortunately, the flaws in the approach used to set regulated prices for the DTCS have been entrenched until 31 December 2014. The current FAD has allowed DTCS access providers to engage in rent seeking in areas where they are the monopoly provider or competition is limited (e.g. many rural and regional markets).



Comments in the ACCC's discussion paper on non-price terms suggest it could extend these deeply problematic pricing terms for the DTCS into the middle of next year. This has left, and continues to leave, access seekers with little alternative but to accept the terms and conditions offered by Telstra, even though they appear to bear little or no relationship to the costs of supplying DTCS.

5. Process and timing

5.1 Process

The ACCC's proposal to consult on "supplementary prices" and non-price terms and conditions separately from primary prices is seriously flawed for a number of reasons.

First, from an economic perspective, the cost of access to the declared service should be considered as a whole, especially when the distinction between different pricing components is not reflective of industry practice. The ACCC's task is to determine charges that allow an access provider to recover its costs (including a reasonable return on its investment) of supply the declared services **as a whole**.² Considering particular charges in isolation makes this task almost impossible and substantially increases the risk of costs being under or (more likely) over recovered. It also creates a significant risk of double counting of the access provider's costs, for example, if the cost of the installation of a special linkage were recovered through a special linkage charge and included in the access provider's regulated asset base.

In this regard, VHA agrees with Telstra's view³ that the ACCC should consider pricing for declared services in a holistic manner and that a failure to do so increases the risk of regulatory error.

Second, the distinction between 'primary' and 'supplementary' prices is inevitably arbitrary and not all charges sit comfortably in one category or the other. This issue is exacerbated by the industry tendency to bundle charges. For example, connection and disconnection costs for the DTCS are ordinarily only recovered via connection and disconnection charges under access agreements with a term of one year or less. Agreements with a longer term frequently incorporate the costs of connection and disconnection into the annual charge. This clearly demonstrates that access providers make no commercial distinction between upfront and recurring charges.

Third, it is unreasonable to ask access seekers to formulate a position on supplementary prices and non-price terms in the absence of any information about what is proposed on primary prices. For the reasons set out above it

² Section 152BCA(1)(b) of the *Competition and Consumer Act 2010*.

³ Telstra's letter to the ACCC re: position paper on FAD Inquiries for Non Price Terms and Conditions and Supplementary Pricing Issues, 2 June 2014



also takes no account of commercial reality. An access seeker does not pay particular categories of charges in isolation. Rather, it is the entirety of the bargain, including all price and non-price terms, that determines whether an access seeker will be in a position to compete.

For these reasons, VHA submits that the ACCC should urgently reconsider its proposed approach and consolidate its consultations on all price and non-price terms. To do otherwise would be clearly contrary to the LTIE.

5.2 Timing

In its Position Paper the ACCC has stated that:

- its consultation on primary prices will take “most of the coming financial year”; and
- it is unlikely that it will be in a position to finalise its decisions on the aspects of the FADs relating to non-price terms and supplementary prices before early to mid-2015.

While VHA recognises the value in undertaking a thorough and considered assessment, it would like to draw the ACCC’s attention to the significant adverse consequences of such a long delay.

The proposed timing establishes a review timeframe of 12 to 18 months before the FAD inquiry process is finalised. VHA is concerned about the implications for its business of such a protracted process in circumstances where it continues to be forced to operate at a significant competitive disadvantage as a result of Telstra’s above cost pricing for the DTCS. These issues were covered in some detail in our submissions on the declaration of the DTCS.⁴ The extended timeframe will add uncertainty to industry responses for the Australian Government’s \$100 million Mobile Black Spot Programme.⁵

Finally, and perhaps most importantly from the ACCCs perspective, it is at odds with the timeframe prescribed by statute. These concerns are explained in more detail below.

Statutory timeframe for decisions

Section 152BCK of the *Competition and Consumer Act 2010* (CCA) requires the ACCC to make an FAD within 6 months of commencing an inquiry under Part 25 of the *Telecommunications Act 1997*. VHA acknowledges that

⁴ VHA submission to ACCC’s Discussion Paper on Declaration of the Domestic Transmission Capacity Service, 30 August 2013 at page 8; VHA submission to ACCC’s Draft Report on Declaration of the Domestic Transmission Capacity Service, 14 February 2014 at page 5

⁵For more details see: http://www.communications.gov.au/mobile_services/mobile_black_spot_programme



there is scope for the ACCC to extend the time for its decision making (section 152BCK(3)). However, the extension provision should only be relied upon in circumstances where, despite its best efforts, the ACCC finds itself unable to complete an inquiry within 6 months. The terms of section 152BCK(3) make this clear by requiring that the ACCC issue a notice “explaining why [it] *has been* unable to make a final access determination within that 6-month period” (emphasis added).

VHA submits that, the CCA does not permit the ACCC to commence an inquiry without the intention of complying with the initial 6 month timeframe, even where that later proves to be difficult. However, this appears to be precisely the approach the ACCC is proposing in its Position Paper given that the DTCS inquiry commenced on 22 May 2014.

Moreover the ACCC’s proposed timing will necessitate the extension of the existing, manifestly inadequate DTCS FAD far beyond its current expiry date of 31 December 2014. VHA is extremely concerned that the ACCC proposes to ignore the prescribed six month timeframe for consultation on the FAD particular in circumstances where this will result in the prolongation of inadequate regulation of the DTCS. This can only be contrary to the LTIE.

For the reasons set out above, we strongly urge the ACCC to reconsider its proposed timing for the conclusion of its FAD inquiry and to use its best efforts to issue a new DTCS FAD within 6 months or at the very least by the date of expiry of the current DTCS FAD (31 December 2014).

A level playing field required for the to Mobile Black Spot Programme

The Mobile Black Spot Programme is an Australian Government initiative to extend mobile phone coverage and competition in regional Australia. The Government has committed \$100 million over four years to deliver the Programme. The DTCS is a vital input in the delivery of mobile coverage in regional Australia. Certainty over genuine, cost-based pricing for the DTCS is essential to create a level competitive playing field for participation in the Programme.

The ACCC should accelerate its consideration of DTCS

If the ACCC cannot meet the statutory timeframe for making its FADs across all services, it should accelerate its consideration of the DTCS, with a view to making an FAD by no later than 1 January 2015, for the following reasons:

- The DTCS is an essential input for effective competition in fixed line and mobile markets, especially in regional areas.
- Extending the current DTCS FAD beyond its expiry date of 31 December 2014 would be extremely problematic given the concerns identified in section 3. The current DTCS FAD should not operate for longer than is absolutely necessary.
- Prioritising consideration of the terms of the DTCS FAD will ensure that those areas where regulation is manifestly inadequate are addressed first.



- The DTCS is unique in that it is a complicated service and the principles by which regulated charges should be set are less well understood than for other declared services such as ULLS, LSS and MTAS. This justifies it being given priority.
- Without improved certainty and cost-based pricing for access to the DTCS, access seekers will not have a level competitive playing field to participate in the Mobile Black Spot Programme for the reasons identified in section 4.2.

VHA is willing to assist in whatever way possible to ease any resource constraints the ACCC may face. [c-i-c].

6. Non-price terms and conditions

6.1 FADs must offer an effective fall-back position

VHA welcomes the ACCC's decision to reconsider its approach to regulating the non-price terms and conditions upon which declared services, including the DTCS, are supplied. For too long this regulation has been unable to address Telstra's ability and incentive to refuse to negotiate on reasonable amendments to its standard wholesale contracts. Too often the regulatory focus has been on pricing terms without sufficient regulatory regard for how monopoly behaviour manifests with respect to the non-price terms of an agreement. It is only via the ACCC providing a comprehensive set of regulated non-price terms that the imbalance in negotiating power between access seekers and the access provider can be addressed.

VHA's responses to the ACCC's specific questions are set out below.

Question 1: What approach to regulating non-price terms and conditions of access do you consider would best promote the LTIE?

Under the current FAD, access providers are able to exploit their monopoly position to force access seekers to accept terms of supply that are unfair and unreasonable. Ultimately, access seekers reflect those economically inefficient non-price terms to their end users in one form or another, which is to the detriment of the LTIE. If the ACCC is to address this issue, the FAD must contain a comprehensive, fair and commercially implementable set of terms and conditions of access.

Question 2: Do you consider the FADs should be made as:

- ***a comprehensive set of terms and conditions which can act as a fall back or complete substitute for commercial agreement; or***
- ***a set of terms and conditions which only deal with a limited number of issues, which can be used when parties are unable to agree on a complete set of terms and conditions for access to a declared service or services; or***
- ***an alternative option (please describe).***



VHA strongly endorses the ACCC pursuing a comprehensive set of terms and conditions, which can act as a complete substitute for a commercial agreement. It is essential that the ACCC make FADs that present a viable alternative to an access agreement in circumstances where the parties cannot agree. That is, the FADs must provide a comprehensive set of both price and non-price terms and conditions which are commercially implementable in the absence of a negotiated agreement so as to level the playing field between access seekers and the monopoly access provider. Otherwise there is a real risk that an access provider may:

- be willing to incorporate the limited terms and conditions specified in an FAD into an access agreement, but simultaneously force access seekers to accept uncompetitive or unreasonable terms in the remainder of that agreement;
- add ancillary charges for services associated with the supply of declared services which result in excessive charges or double counting. [c-i-c]; or
- make declared service options less attractive by offering alternative, notionally 'undeclared' services with improved functionality, but at substantially higher prices. For example, Telstra previously suggested that its managed lease line service was not a declared service and has pointed to the CRA 166 Data Carriage Service as 'the declared service'. As the ACCC concluded in its recent declaration inquiry,⁶ this assertion was incorrect.

For these reasons it is paramount that the ACCC adopt a comprehensive set of terms in its DTCS FAD.

There is a successful international precedent for adopting a comprehensive approach to specifying terms and conditions in this way. In Singapore, the SingTel Reference Interconnection Offer (**RIO**) sets out Infocomm Development Authority-approved prices, terms and conditions for other telecommunications operators to interconnect with and access its network. The RIO acts as a template to facilitate the rapid adoption of reasonable access agreements between SingTel and other operators and has been successful in reducing the time frame for access negotiations and promoting effective competition.

VHA also agrees with Telstra's recommendation⁷ that the ACCC include draft non-price terms and conditions in an upcoming discussion paper so as to provide stakeholders with an opportunity to comment on the drafting prior to a draft decision being made. To facilitate the ACCC's preparation of a discussion paper, VHA has prepared a list of

⁷ Telstra's letter to the ACCC re: position paper on FAD Inquiries for Non Price Terms and Conditions and Supplementary Pricing Issues, 2 June 2014

⁷ Telstra's letter to the ACCC re: position paper on FAD Inquiries for Non Price Terms and Conditions and Supplementary Pricing Issues, 2 June 2014



the matters that it considers must, at a minimum, be dealt with by the ACCC in that paper. The list, which also sets out the reasons why each issue is significant, is at **Appendix 1** to these submissions.

Although it is critical that the ACCC not simply default to the Telstra “world view” when specifying FAD terms and conditions, a further option for creating a comprehensive, alternative set of terms and conditions would be for the ACCC to conduct an open consultation upon the terms of Telstra’s new wholesale agreement (**TWA**). Through this mechanism, participants in the FAD consultation process could provide comments on specific terms and conditions and/or mark-up the TWA. The ACCC could then form a view on what would constitute a reasonable, comprehensive set of terms and conditions for inclusion in its FADs.

In either case, VHA considers that transparent and informed stakeholder consultation on a comprehensive set of terms and conditions is essential.

6.2 Setting specific non-price terms and conditions

Question 3: What terms and conditions do you consider should be covered in the FAD? Please provide reasons and examples.

As set out in section 6.1, VHA has prepared a list of the matters that it considers must, at a minimum, be dealt with by the ACCC in its DTCS FAD. This is set out in **Appendix 1** to this response.

VHA has developed its suggested terms on the basis of the following key principles:

- non-price terms and conditions must reflect the terms of a commercially reasonable agreement negotiated by parties with equal bargaining power;
- the service levels, fault management processes and other performance commitments within the terms must promote equivalence and offer no less protection to access seekers than those offered to the retail arms of vertically integrated access providers;
- an access seeker or service provider may refer a dispute in relation to the terms and conditions to the ACCC for determination. The ACCC shall determine any dispute referred to it in this manner, according each party with procedural fairness and having regard to the matters set out in section 152BCA and the parties shall be bound by the terms of any such determination. VHA notes that a similar approach has been adapted to the resolution of disputes arising in connection with NBN Co’s recently accepted special access undertaking and consider it would be likewise in the LTIE to do so here;
- the ACCC should ensure each of the fixed line, MTAS and DTCS FADs specifies an effective regulatory review clause to ensure that there is scope to incorporate terms and conditions specified in later regulatory instruments; and
- in relation to DTCS specifically, the non-price terms must reflect that transmission services are usually purchased as a bundle. i.e. the FAD should provide a framework that allows access seekers to acquire bundles of regulated services, without having to negotiate duplicate or inconsistent terms and



conditions. This will minimise transaction costs and ensure that the FAD is commercially useful. The framework should allow for bundles that consist solely of declared DTCS routes as well as bundles including both declared and 'deregulated' DTCS routes.

6.3 Requests for urgent consideration

Question 4: Are there any terms and conditions that the ACCC should consider as a matter of urgency? Please provide reasons.

VHA refers to its submissions in sections 2 to 5 above. Specifically, VHA considers that the ACCC should prioritise its consideration of the DTCS with a view to making an FAD by no later than 1 January 2015.

6.4 Applicability across declared services

Question 5: What terms and conditions do you consider should be 'common' (that is, identical) across all the declared services? Please provide examples and reasons.

Question 6: Are there non-price issues for which a different approach should be adopted for individual regulated services? Please provide examples and reasons.

VHA has not yet seen a copy of the new TWA. However, it recognises the general utility of a modular approach and considers that Telstra's CRA broadly represents a reasonable division between umbrella terms set out in the body of the agreement, and service-specific terms set out in service schedules.

The majority of areas to be addressed by the non-price terms need to be addressed across all declared services. For example, terms relevant to commercial terms, liability, confidentiality and disputes, and legal boilerplate provisions should be common across all services.

Terms dealing specifically with more technical matters, such as service descriptions, compliance with relevant standards, testing and service levels, will need to be included for each service, but will be modified to reflect the nature of the relevant service.

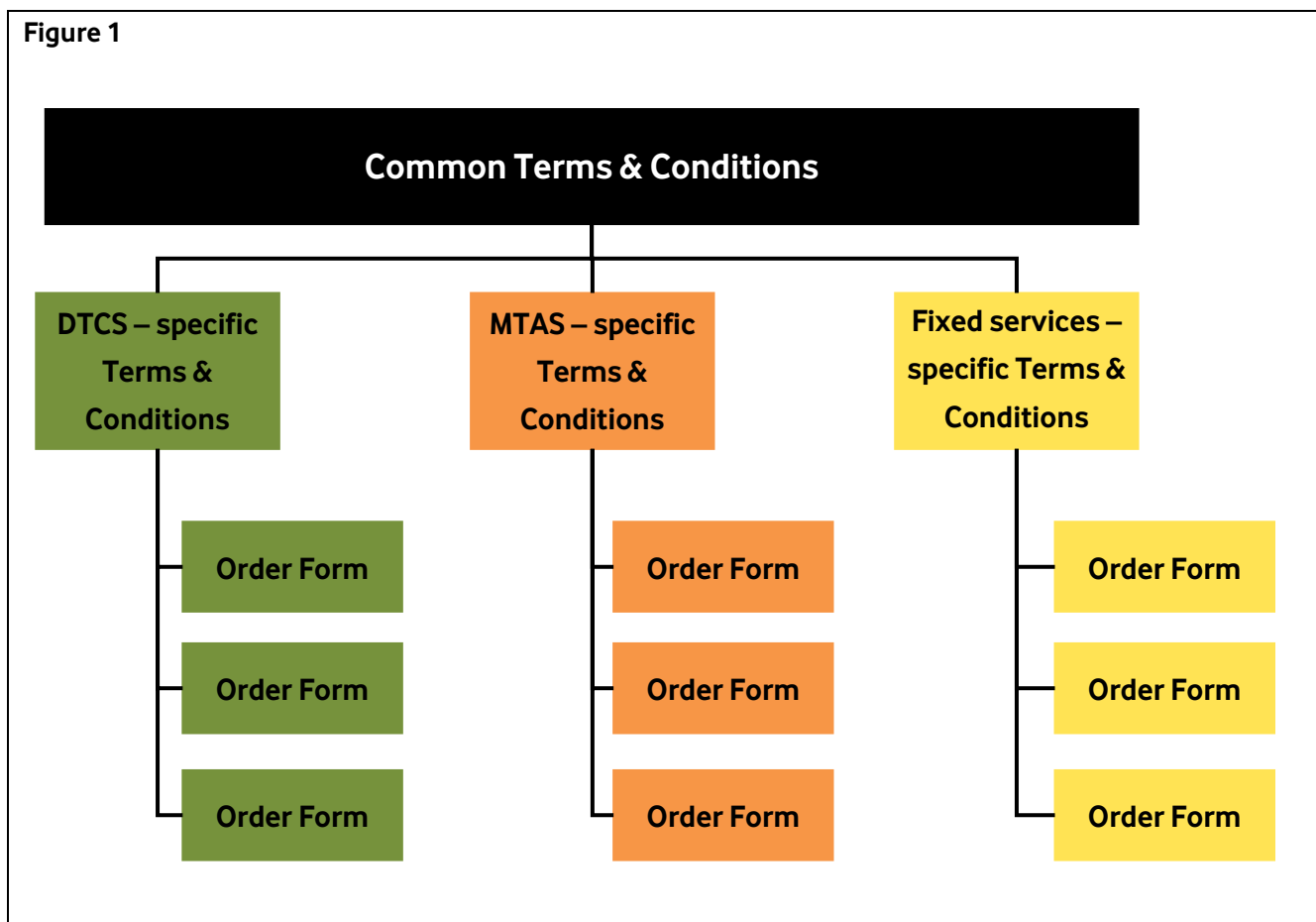
In **Appendix 1**, VHA has indicated where it considers a term may need to apply in different forms to different types of services.

VHA's suggested approach to the structure of the terms and conditions is similar to the approach currently taken in Telstra's CRA, and is illustrated in Figure 1 below.

Under this structure, the common terms and conditions for all services would form the key document between the parties. Terms specific to DTCS, MTAS and fixed services would be set out in service-specific terms which attach to the common terms. The 'Order Form' would be a contractually binding document put in place each time an individual service was ordered. The Order Form would set out the specifics for the service (for example the A-end and B-end and interface type for transmission services).



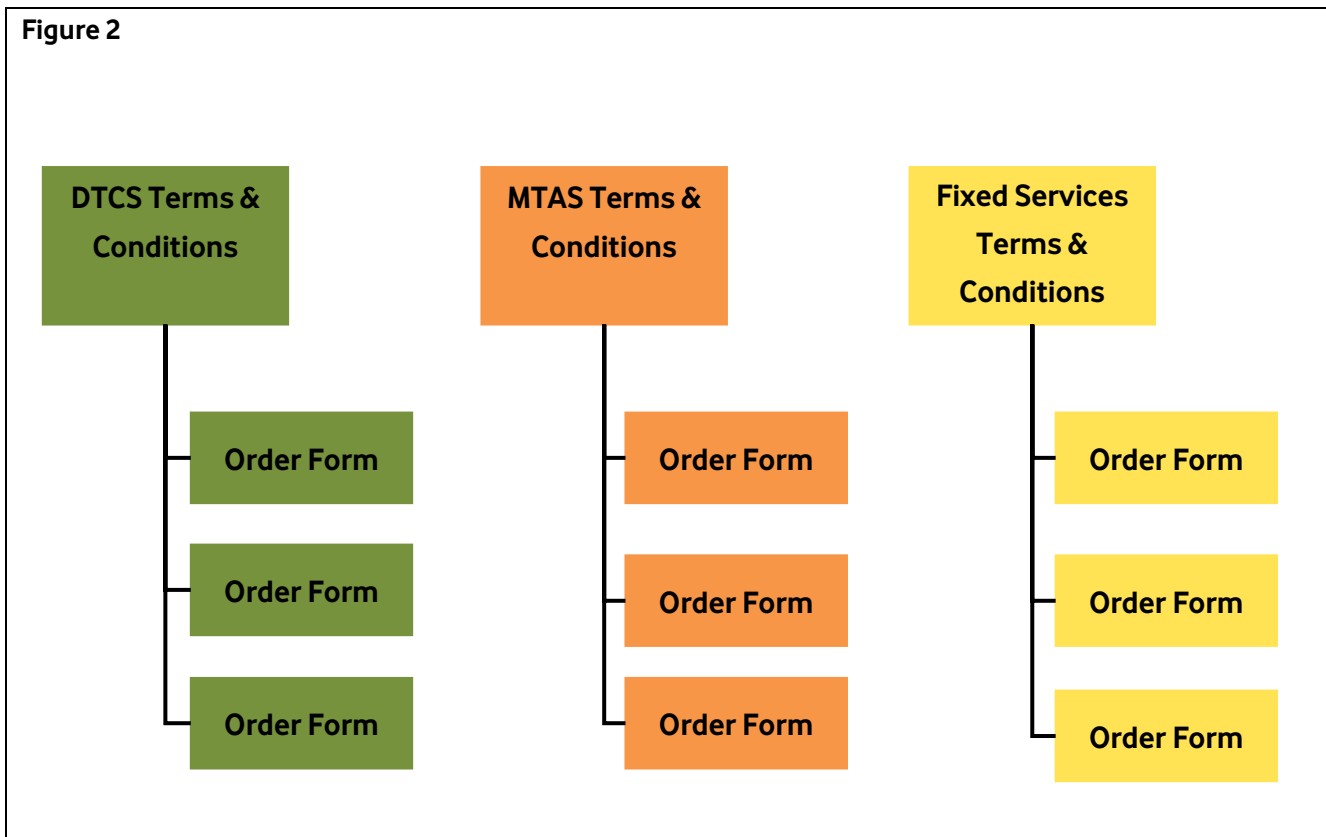
Figure 1



An alternate approach would be for three standalone contracts to be created, with separate terms applying to each type of declared service. The terms and conditions for each service would address both general matters such as liability and confidentiality, as well as the terms specific to the service category. This alternate approach is shown in Figure 2 below.



Figure 2



6.5 Other issues

Question 7: How frequently should the ACCC review the non-price terms and conditions included in the FADs?

Provided that the terms of the FADs are comprehensive, there should be no need to review non-price terms and conditions more often than every five years unless specific issues arise. In the event that they do, VHA would welcome confirmation from the ACCC that it would look to address them at that stage, either via a variation to the FAD or more likely, a Binding Rule of Conduct.

Question 8: Please provide your views on what steps the ACCC can take to facilitate active engagement and assistance from industry in the course of its consultation on non-price terms and conditions. For example, would there be benefit from holding an industry forum to discuss specific issues in relation to non-price terms and conditions (as proposed in chapter 2 of this paper)?

VHA supports the suggestion of an industry forum. A forum would enable stakeholders to give the ACCC a complete picture of the issues they face in a way that written submissions cannot. It would also provide an efficient forum for discussion of necessary amendments to the proposed terms included in the ACCC's discussion paper or Telstra's TWA (whichever approach the ACCC elects to take), much as the forums NBN Co holds for its WBA facilitate a similar approach.



For the forum to be effective, the ACCC should circulate in advance a copy of the proposed terms to be in the ACCC's discussion paper or Telstra's new TWA, together with the submissions made by access seekers, such as VHA, to the current consultation. This will enable a frank and balanced industry conversation on these crucial issues.

7. Supplementary prices

VHA welcomes the ACCC's decision to continue to set supplementary prices in the FADs given the market position enjoyed by Telstra and its ability to increase supplementary prices to compensate for profits lost through regulation of primary prices. However, it refers to its submissions above (section 5.1) in relation to the significant difficulties with conducting separate consultations on primary and supplementary prices.

Should the ACCC not accept our submission that all price and non-price terms should be considered together, VHA makes the following observations in relation the charges identified by the ACCC as "supplementary".

7.1 Connection and disconnection charges

Question 9: Please comment on whether the ACCC's previous approach to setting connection and disconnection charges for the fixed line services, Wholesale ADSL and the DTCS remains appropriate. If not, please propose an alternative approach and explain why it would be more appropriate and how it would be implemented.

[c-i-c] The incremental cost of connections and disconnections are negligible in terms of the cost of the supply of the service over all.

In addition, connection charges have the capacity to operate as a barrier to entry for new market participants with uncertain revenue streams given that it will be difficult for these participants to agree to the longer terms necessary to avoid connection charges. Disconnection charges impose switching costs, which introduce friction in changing suppliers and effectively create a barrier to exit that dampens competition in the supply of the DTCS.

For these reasons VHA submits that the DTCS FAD should not permit the levying of connection or disconnection charges at all.

Question 10: If you agree with maintaining the ACCC's previous approach to setting connection and disconnection charges, please provide any comments on the ACCC's proposal to update the contractor rates and other costs used in calculating these charges.

For the reasons set out above VHA does not agree with the ACCC's current approach to setting connection and disconnection charges for the DTCS as it bears little or no relationship with the costs actually incurred by an access provider in undertaking these connections or disconnections.



7.2 Special linkage charges

Question 14: Should the DTCS FAD address the issue of special linkage charges in relation to non-price terms and conditions? If so, what specific issues should be addressed?

Consistent with its submissions in the declaration inquiry, VHA considers that the DTCS FAD must address the issue of special linkage charges (SLCs). VHA welcomes the ACCC's acknowledgement that access seekers are concerned about Telstra's current method of determining SLCs and the general lack of transparency.⁸

As previously identified in VHA's submission on the ACCC's draft DTCS declaration report, significant variation exists in the SLCs levied by Telstra. As a result:

- access seekers cannot meaningfully estimate the likely SLCs at a given site which creates difficulties in terms of network investment planning and increases the risk of inefficient investments;
- high SLCs create a barrier to new infrastructure investment and a disincentive for access seekers to upgrade a service – this is particularly so as an access seeker that requires the special linkage service is ordinarily liable for most, or all, of the costs of installation, notwithstanding that the linkage is an investment in the infrastructure of the service provider which may be used to supply services to other access seekers; and
- there is an increased risk that SLCs do not reflect Telstra's cost of providing the service.

These concerns are amplified in the context of significant network extensions and upgrades that are subject to multiple special linkage charges.

Whilst Telstra has indicated that it is introducing better quote tools to provide greater price certainty, this should not deter the ACCC from regulating SLCs to ensure that they better reflect Telstra's costs of supply and its ability to subsequently reuse/resell capacity on the link. In addition, there is no basis for Telstra insisting upon charging SLCs on a 'time and materials' basis. Rather, as with other DTCS services, the charge should be a recurring one that recovers a reasonable proportion of the capex and opex involved over the life of the asset.

Accordingly, VHA submits that the ACCC should, in making its DTCS FAD:

- require the access provider to obtain three quotes for undertaking the necessary work;

⁸ An ACCC Final Report on the review of the declaration for the Domestic Transmission Capacity Service, March 2014, page 54.



- require the access provider to consult with the access seeker on the proposed installation approach and to consider any suggestions it makes to improve the efficiency and/or cost effectiveness of the installation;
- only permit the access provider to cover a reasonable amount of the cost of installation, recognising that the SLC will ultimately amounts to an enhancement of its network;
- ensure that, to the extent that the cost of a network extension is recovered via levying an SLC, that cost never forms part of the access provider's regulated asset base for the purpose of determining annual charges; and
- require that the access provider offer to recover the SLC as an increment to the recurring charge for the DTCS link in question.

7.3 Facilities access services

Question 15: Which facilities access services are ancillary to currently declared services and should be regulated through the FADs for those services? Please provide:

- ***a detailed description of each facilities access service that is ancillary to a declared service***
- ***an explanation of the nexus between the declared service and each facilities access service that make these facilities access services ancillary to declared services***
- ***how regulating these facilities access services in the FADs would be likely to promote the long term interests of end-users (LTIE).***

Question 16: Are there any other facilities access services (that are not acquired as ancillary to a declared service) that should be the subject of a declaration inquiry into facilities access services? Please provide:

- ***a detailed service description of the each facilities access service sufficient to precisely identify the service***
- ***an explanation of how declaring these facilities access services would be likely to promote the LTIE.***

VHA has no objection to charges for facilities access services provided in connection with declared services being specified in the DTCS FAD. Nor would it object to these services being separately declared. However, to the extent that the ACCC determines and specifies facilities access charges, VHA submits that the charges should be cost based as this approach is most likely to promote the LTIE. VHA proposes to make more detailed submissions on these issues once the ACCC's initial purposes become clearer.



7.4 Other supplementary prices

Question 17: Are there any other supplementary charges relating to acquiring declared services that should be regulated through the FADs for those services? Please provide:

- ***a detailed description of each supplementary charge***
- ***an explanation of how and why the supplementary charge is incurred in relation to the use of a declared service***
- ***how regulating this charge in the FADs would be likely to promote the LTIE***
- ***the materiality of the charge in relation to the supply of services to end-users using the relevant declared service.***

VHA submits that, as with non-price terms, the DTCS FAD should be comprehensive and exhaustive in terms of the charges an access provider may levy in relation to the supply of a declared service. Otherwise, the FAD will allow Telstra to recover any loss of margin on regulated charges through the imposition of ancillary charges. This is not in the LTIE because it gives Telstra scope to over-recover its costs (including a reasonable return on investment).

[c-i-c]

For the reasons set out at section 5.2 above, VHA is not satisfied that these charges can be meaningfully considered in isolation from recurring charges. For this reason VHA proposes to put forward its detailed submissions on these, and any other relevant charges, in conjunction with its submissions on what the ACCC refers to as “primary prices”.

8. Conclusion

The ACCC’s consultation on FADs for fixed services presents a unique opportunity for it to finally and comprehensively address some of the issues that have beset its approach to regulation since 1997. Without a doubt, fixing the fundamental flaws in DTCS regulation sits high on that list. However, to VHA’s disappointment, the initial signs are not promising.

Despite allowing itself almost a year and a half to complete the FAD inquiry process the position paper gives little indication that the ACCC proposes to grapple with the key issues around DTCS charges and the ability to Telstra to use them (as it routinely does) to foreclose competition in regional markets. Rather it “tinkers at the edges” by focusing on what the ACCC terms “supplementary prices”. The very fact that the ACCC is content to embrace Telstra’s self-serving breakdown of charges into connection and disconnection charges, ancillary charges and monthly charges demonstrates its reluctance to grapple with the real issue of entrenched above cost pricing for the DTCS.

VHA strongly encourages the ACCC to reconsider its approach. Otherwise, that unique opportunity will be lost.



Appendix 1 - Proposed non-price terms and conditions

Attached