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By email

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### **Public Inquiry to Make a Final Access Determination for the Wholesale ADSL Service**

Macquarie Telecom Pty Limited ("**Macquarie**") welcomes the opportunity to make this submission to the Australian Competition and Consumer Commission ("**ACCC**") in relation to its issues paper concerning the above.<sup>1</sup> Macquarie welcomes the ACCC's decision to declare the wholesale ADSL service and thereby bring this service within the scope of the ACCC's oversight.

Macquarie is, however, concerned that the Issues Paper addresses a range of matters which Macquarie understood were closed. In addition, Macquarie is concerned that the ACCC has not addressed the final pricing of the wholesale ADSL service although it is understood that the ACCC will address pricing in a further round of industry consultation. In this context, Macquarie urges the ACCC to push ahead with the finalisation of the wholesale ADSL FAD and to bring this matter to a close without delay.

While Macquarie has, in this submission, addressed each of the consultation questions as set out in the Issues Paper there are some important points which Macquarie wishes to emphasise. In particular, Macquarie considers that:

- the time for the consideration "geographic exemptions" for the wholesale ADSL service was in the ACCC's declaration inquiry which of course has now passed. Therefore, the ACCC and Telstra should and must accept that this matter is closed;
- on the basis of effective and efficient regulation, the SAOs in respect of the wholesale ADSL service should only apply to the dominant market supplier and the only supplier which has a history of competition complaints, i.e., Telstra; and
- to provide the greatest flexibility for access seekers to meet the demands of end-users and to develop wholesale transmission markets, the supply of the wholesale ADSL service should be unbundled from the PSTN service and from the AGVC service.

### Responses to Consultation Questions

In this section, Macquarie has addressed each of the consultation questions as set out in the Issues Paper. For ease of reference, each consultation question has been reproduced in a shaded text box which is then followed by Macquarie's response.

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<sup>1</sup> ACCC, Public inquiry to make a final access determination for the wholesale ADSL service, Issues Paper (a Second Discussion Paper), July 2012 ("**Issues Paper**")



*1. Do you agree with the approach to considering the need for backdating of a FAD that is reflected above?*

The ACCC proposes that the wholesale ADSL FAD will not be “backdated” to apply from the date of the IAD. This is despite legislative provision in the *Competition and Consumer Act 2010* which allows the ACCC to do so. The underlying rationale for this provision is to limit regulatory gaming. In this context, Macquarie is particularly concerned that the ACCC would propose not to backdate the wholesale ADSL FAD as *prima facie* this will be detrimental to access seekers.

Macquarie is strongly of the view that the effect of the wholesale ADSL FAD should be backdated to apply from the date of the IAD. Macquarie submits that the process for bringing the wholesale ADSL service under the purview of the ACCC has already been subject to regulatory gaming. Backdating the wholesale ADSL FAD will claw-back part of the time that access seekers have already been denied access to the wholesale ADSL service on regulated terms.

The ACCC will be aware that Macquarie and other access seekers have over many years called for the ACCC to declare the wholesale ADSL service. In response to the ACCC’s open letter of 20 October 2010 (reference T42780) concerning a possible declaration of the wholesale ADSL service, Macquarie confirmed its support for such an inquiry.<sup>2</sup> In the face of Telstra’s opposition, the ACCC did not proceed with a declaration inquiry at that time. The ACCC’s present inquiry to make a final access determination for the wholesale ADSL service vindicates the position that Macquarie and other access seekers has long held. Macquarie submits that any further delay caused by the ACCC in reaching a regulated price for this service will be to the disadvantage of access seekers and will be more evidence of gaming.

Macquarie notes that the pricing of the wholesale ADSL service is not addressed in the Issues Paper. It is understood that pricing will be addressed by the ACCC in a further round of industry consultation. Macquarie is particularly concerned that the ACCC’s current proposal to not backdate the wholesale ADSL FAD will be likely to mean that access seekers will be denied the benefit of anticipated lower prices. Macquarie reserves its right to comment further on this matter in the forthcoming pricing consultation on the wholesale ADSL service.

*2. Telstra has proposed one way a term or condition exempting certain geographic areas could be delineated. The ACCC seeks submissions on Telstra’s proposed test and submissions on alternative measures of where competition is effective.*

Macquarie wishes to comment on several aspects of this question. Specifically, Macquarie considers that:

- the ACCC’s declaration of the wholesale ADSL service has of itself closed off consideration of exempting certain geographic areas from the SAOs;
- there is some doubt that “geographic exemptions” has any legal legitimacy;
- that “geographic exemptions” would be incompatible with Telstra’s structural separation undertaking; and

<sup>2</sup> Macquarie, Letter to Michael Cosgrave, 29 October 2010 (reference RG 101002)



- competition in the supply of wholesale ADSL services is not effective and is weakening.

#### *Wholesale ADSL Declaration*

Macquarie submits that the ACCC is overly and inappropriately presumptive in posing this question. The appropriate place for the ACCC to consider “geographic exemptions” was in its inquiry into the declaration of the wholesale ADSL service. The ACCC declared the wholesale ADSL service on 14 February 2012 and this declaration will expire on 13 February 2017. In the course of the ACCC’s declaration inquiry, the ACCC considered whether the geographic scope of the wholesale ADSL service description should be restricted. It is an unequivocal outcome of the ACCC’s declaration inquiry that the ACCC rejected Telstra’s submissions that the geographic scope of the wholesale ADSL service description should be restricted. Accordingly, Macquarie submits in the strongest possible terms that the question of “geographic exemptions” is closed until at least 13 February 2017 when the ACCC’s declaration expires.

Macquarie also notes that in respect of its inquiry into making a final access determination for the DTCS, the ACCC took the view that the declaration inquiry rather than the final access determination inquiry is the appropriate place to consider geographic exemptions. In particular, the ACCC stated that the declaration inquiry is the:

*“... the more appropriate vehicle to test any further information that parties may wish to provide around the geographic scope of DTCS regulation.”<sup>3</sup>*

As such, Macquarie submits that the ACCC has set a precedent which means that it should not consider “geographic exemptions” in this present final access determination inquiry.

Macquarie also submits that Telstra, by proposing a method for exempting certain geographic areas, is demonstrating very clearly that it is gaming the regulation of the wholesale ADSL service. As such, Macquarie re-iterates its concern with the ACCC’s proposal to backdate the wholesale ADSL FAD as discussed in Macquarie’s response to the previous question.

#### *Legitimacy of “geographic exemptions”*

The concept of “geographic exemptions” as expressed by the ACCC has, in Macquarie’s view, doubtful, if any, legal legitimacy. Therefore, seeking views on how “geographic exemptions” can be delineated implies the legitimacy of “geographic exemptions” - a proposition that Macquarie strongly disputes.

Macquarie submits that the term “geographic exemptions” does not exist in the legislative framework which governs Australia’s telecommunications sector. As such, there is no specific legal authority on which the ACCC can take any action in respect of “geographic exemptions” such as defining, granting, amending or rescinding them.

Macquarie notes that Exemption Determinations in respect of certain fixed line services were once used to exempt certain geographic areas from the scope of the ACCC’s regulatory

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<sup>3</sup> ACCC, Final Access Determination for the Domestic Transmission Capacity Service, Explanatory Statement, June 2012



purview.<sup>4</sup> However, the legislation authority on which the Exemption Determinations were based, i.e., sections 152AS and 152AT of the *Competition and Consumer Act 2010* (“Act”) have now been repealed.

The ACCC in effect would rely on the provisions of section 152BC of the Act to make “geographic exemptions”. Section 152BC *inter alia* enables the ACCC to make an access determination which varies the application of any or all standard access obligations (“SAOs”) to a carrier or carriage service provider which application may or may not be conditional.

The SAOs as set out in section 152AR of the Act comprise basic terms and conditions on which declared services must be supplied. The SAOs essentially provide for the supply of declared services:

- on request;
- on technical and operational equivalence; and
- with billing and service fault information.

Macquarie submits that this framework is neither designed, or intended to be used, for the purpose and effect of carving out the ACCC’s regulatory authority in specific geographic areas. Given that the Federal Parliament has expressly removed the legal authority on which the Exemption Determinations were made, Macquarie is of the view that if the ACCC were to make “geographic exemptions” such action would be contrary to the Parliament’s intention. At the very least, Macquarie believes that it is incumbent on the ACCC to state clearly which of the section 152AR SAOs it would vary the application of and how they would be varied in order to make “geographic exemptions”. Otherwise, it would seem that “geographic exemptions” are merely imaginary.

#### *Incompatibility with Telstra’s SSU*

Macquarie is concerned that a “geographic exemption” applied to the provision of the wholesale ADSL service would be incompatible with Telstra’s structural separation undertaking. Under the provisions of section 577A of the *Telecommunications Act 1997*, the ACCC must not accept a SSU unless it provides for the transparency and equivalence in relation to the supply by Telstra of “regulated services”.

As a declared service, the wholesale ADSL service is a regulated service. Macquarie submits that a “geographic exemption” applied to the provision of the wholesale ADSL service would allow the equivalence requirement to be breached. For example, Telstra could refuse to supply service in an exempt area to an access seeker while at the same time supplying an equivalent service to its retail arm.

#### *Competition*

If it was assumed that “geographic exemptions” could be contemplated by the ACCC under the legislative framework, Macquarie makes the following observations about the effectiveness of competition in the supply of wholesale ADSL services:

- Telstra has an overwhelming market share for the supply of wholesale ADSL service<sup>5</sup>

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<sup>4</sup> The term “Exemption Determinations” as used here is defined in ACCC, Public inquiry to make final access determinations for the fixed line services, Discussion Paper, April 2011.

<sup>5</sup> Discussion Paper, p 18



- which provides it with market power;
- the telecommunications market is undergoing consolidation making competitive market structures unstable, i.e., the number of DSLAM providers in a given ESA can be immediately reduced through an acquisition; and
  - end-users and suppliers alike are transitioning away from copper to fibre networks draining the market of fundamental competitive rivalry; and
  - with Telstra's dominant market share and the transition to fibre networks there is insufficient scale for alternative suppliers to enter the market for the supply of wholesale ADSL services.

*3. Are there any limits, other than large pair gain systems, on the substitutability of ULLS and LSS-based services for wholesale ADSL?*

Macquarie does not accept that combining ULLS, LSS, DSLAMs and backhaul is a viable infrastructure alternative to wholesale ADSL. To take the "alternative", an access seeker faces a number of practical barriers including:

- acquiring the technical expertise to combine the components in the appropriate quantities on a cost effective basis;
- making an investment in copper infrastructure while the industry is transitioning to the NBN;
- having sufficient scale to make a viable investment; and
- uncertainty of network availability given that the network is subject to Telstra's own plans for network upgrading, decommissioning etc.

Macquarie notes that a prerequisite for the supply of the ULLS is an unconditioned wire line between an exchange and an end-user's premises.<sup>6</sup> Where a pair gain system has been installed the prerequisite is not met. Moreover, the acquisition of ULLS is also constrained by long line-length, poor copper quality, copper availability and blocking.

*4. To what extent does the use of LPGS in the CAN limit the competitive constraint posed by infrastructure based alternatives?*

Macquarie considers that the use of LPGS in the CAN together with other problems as noted in Macquarie's response to the previous question is a significant constraint on the extent to which infrastructure alternatives to the wholesale ADSL service can be used by access seekers. This constraint is exacerbated to the extent that such problems are essentially unpredictable. That is, for any service request by an access seeker, such problems may or may not occur.

It is Macquarie's experience that up to 10 *per cent* of installations currently encounter problems with pair gain systems. Macquarie notes that this figure is growing. Of further concern is Telstra's "Project Top Hat" which will effectively block the use of copper lines for the provision of ULLS. This project will have a significant and increasing impact on ULLS availability as it is understood that it will reach 2,000 out of Telstra's total of 5,000 street side cabinets.

<sup>6</sup> Australian Competition Tribunal, ACompT 4, 24 August 2009



*5. How should the ACCC take into account the existence of LPGS in making terms and conditions for the wholesale ADSL service?*

The already significant effect of LPGS together with the significant and increasing impact of “Project Top Hat” on the use of the ULLS demonstrates the need for Telstra to provide the wholesale ADSL service on an unconditional basis to access seekers. That is, these factors demonstrate that the competitive constraint of alternative infrastructure to the wholesale ADSL service is weak. Accordingly, Macquarie is very strongly of the view that the ACCC must reject Telstra’s proposals to limit the availability of the wholesale ADSL service in certain geographic areas which Telstra purports to be “competitive”.

*6. Telstra: What forward-looking plans does Telstra have regarding the use of pair gain systems on the CAN?*

Not applicable to Macquarie.

*7. What market evidence is there that the availability of substitutes has acted as a competitive constraint on Telstra’s terms and conditions in relation to the wholesale ADSL service in particular ESAs?*

Macquarie does not believe that the availability of substitutes has acted as a competitive constraint on Telstra’s terms and conditions in relation to the wholesale ADSL service in particular ESAs. Macquarie notes in particular that:

- Telstra effectively sets the prices at which its wholesale competitors offer services, i.e., competitors do not command higher prices than those set by Telstra; and
- while unbundled wholesale ADSL services are available in the market through non-Telstra suppliers, Telstra has not faced sufficient competitive pressure to also offer an unbundled service.

*8. If the FAD was to provide a geographic exemption in ESAs that have attracted a higher degree of infrastructure-based investment, do you consider that Telstra would be likely to:*  
*(a) charge prices for wholesale ADSL that are above competitive levels in all ESAs?*  
*(b) engage in inefficient price discrimination?*  
*(c) impose anti-competitive terms and conditions of supply? If so, what terms?*  
*Please provide evidence in support of your response.*

As noted in its responses to earlier questions, Macquarie is strongly opposed to “geographic exemptions” being provided for in the FAD. Macquarie submits that the declaration of the wholesale ADSL service means that the question of “geographic exemptions” is closed until at least 13 February 2017 when the ACCC’s declaration expires.

If it was presumed that “geographic exemptions” were allowed, Macquarie would be very concerned that Telstra would exploit “geographic exemptions” to engage in anti-competitive behaviour. In particular, Telstra has the market power, the motivation and the form to do so.



Macquarie notes the following:

- Telstra has an overwhelming market share for the supply of wholesale ADSL services;<sup>7</sup>
- Telstra has an incentive to discriminate against access seekers in favour of its own retail business units to build its customer base and to weaken its competitors especially in the transition to the NBN;
- Telstra has already demonstrated its willingness to increase the prices of fixed line services in areas which were previously deemed exempt; and
- only Telstra's access terms have given rise to competition concerns with regard to the wholesale ADSL service.<sup>8</sup>

Macquarie notes that instances of access providers engaging in anti-competitive behaviour is not without precedent. The ACCC should note the recent decision of New Zealand's Court of Appeal to reject Telecom NZ's appeal against a NZD12 million fine imposed by the Auckland High Court. In an action brought by the Commerce Commission, Telecom NZ was fined for leveraging its market power to charge disproportionately high prices to its downstream competitors for wholesale network access preventing competitors from offering retail end-to-end services at a competitive price. This example demonstrates very clearly the danger of leaving open opportunities for dominant market players to engage in anti-competitive behaviour.

*9. Some submissions consider that geographic exemptions could affect market outcomes in other geographic areas. How so?*

Macquarie is primarily concerned that geographic exemptions would affect market outcomes in the supply of services in the exempt areas. In particular, anti-competitive practices such as refusal to supply, excessive pricing, undue delay in service provision, preferential service provision and so on. Any additional detrimental market outcomes which may arise in other geographic areas which result from geographic exemptions exacerbate Macquarie's primary concerns.

*10. What does market shares and the market conduct of non-dominant network providers indicate about the degree of competitive constraint non-dominant network providers face?*

Market share and market conduct are key factors in assessing the competitiveness of any given market. Relevant considerations in the present situation are Telstra's overwhelming market share and Telstra's motivation and form to engage in anti-competitive behaviour. In this context, non-dominant suppliers face a considerable constraint on their ability to compete effectively with Telstra in the supply of wholesale ADSL services.

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<sup>7</sup> Discussion Paper, p 18

<sup>8</sup> Discussion Paper, p 8



*11. Would applying the SAOs to non-dominant network providers promote competition? How would a term exempting non-dominant network providers from the SAOs promote competition?*

In Macquarie's view, applying the SAOs to non-dominant network providers would not promote competition. This is because non-dominant network providers already face a considerable competitive constraint given Telstra's "... overwhelming market share for the supply of wholesale ADSL ..." <sup>9</sup> and their effective inability to set prices above the level set by Telstra.

Macquarie supports the exemption of non-dominant networks from the application of the SAOs. This view is based on the following grounds:

- it is apparent that only Telstra's supply of the wholesale ADSL service has been the subject of competition concerns;
- to be effective, regulation should focus on moderating detrimental market behaviour where the market is unable to reach a timely and efficient outcome itself, i.e., competition concerns in the supply of the wholesale ADSL service lie with Telstra rather than with non-dominant networks; and
- there is a risk that imposing SAOs on non-dominant network suppliers would be detrimental to them, e.g., if they were required to invest in operational systems to enable them to supply services.

Macquarie also notes that the exemption of non-dominant networks from the application of the SAOs is entirely consistent with the intent and the provisions of section 152BC of the Act. See discussion on this point in Macquarie's response to question 2 above.

*12. How would terms and conditions providing geographic exemptions or carrier-specific exemptions affect the efficient use of existing infrastructure by access seekers and access providers?*

Macquarie reiterates its view that it is strongly opposed to "geographic exemptions" being provided for in the FAD. If it was presumed that the ACCC decided to provide geographic exemptions, Macquarie agrees with the ACCC's preliminary views that:

- access seekers who have already invested in infrastructure are not likely to decommission such infrastructure noting that such investments were effectively made prior to the wholesale ADSL service being declared; and
- Telstra is likely to continue to efficiently use its copper infrastructure noting that its cost of such infrastructure is effectively sunk.

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<sup>9</sup> Discussion Paper, p 18



*13. The ACCC considers that the application of the SAOs would not have a material negative effect on the deployment of competing DSLAMs and that where it is efficient to do so, access seekers will continue to invest in DSLAMs. The ACCC seeks any relevant submissions on this view.*

Macquarie agrees with the ACCC's view that the application of the SAOs to Telstra of itself would not have a material negative effect on the deployment of competing DSLAMs and that where it is efficient to do so, access seekers will continue to invest in DSLAMs. This is because:

- such investment in competing DSLAMs is sunk, i.e., such investment cannot be switched to an alternative investment opportunity;
- investment in the copper network has already been dulled by the emergence of the NBN, i.e., additional major investment in DSLAMs is already unlikely; and
- *ceteris paribus* access seekers prefer to use their own infrastructure to that of Telstra on the bases of cost effectiveness and operational control.

*14. Access seekers: Do you intend to still use existing DSLAMs? Will you decommission any DSLAMs if the SAOs apply to Telstra in particular ESAs? In those ESAs where you have existing infrastructure, will you supply retail ADSL based on your own DSLAM infrastructure or based on wholesale ADSL inputs?*

Macquarie owns and operates its own Metro Access Network (“**MAN**”) in the Sydney and Melbourne metropolitan areas. The MAN is used to provide broadband and ISDN voice services to customers. Macquarie’s clear preference for delivering such services to end-users is via the MAN. The MAN delivers superiority over ADSL services in terms of service quality and pricing.

Save for the migration of end-users to the NBN, Macquarie intends to continue to use this infrastructure. Macquarie would not decommission such infrastructure merely because SAOs apply to Telstra. Macquarie will, however, be forced to decommission such infrastructure when Telstra decommissions its copper network as part of the migration to the NBN. Macquarie has an in-principle preference to use its own infrastructure where an alternative is available.

*15. Access seekers: What are your current plans to invest in DSLAM and other infrastructure? In the context of considering geographic exemptions, submitters should consider their likely investment within the existing competitive footprint and/or at ESAs that have a number of access-seekers present rather than expansion of the competitive footprint.*

Macquarie has no current plans to invest in DSLAM and other copper based infrastructure irrespective of the competitive footprint. Macquarie has already formed the view that such investments are not viable. Moreover, there is a recognition that the telecommunications sector is fast transitioning to the NBN and as such investments in the copper network are increasingly less attractive. With scarce investment resources, Macquarie has a preference to invest in NBN related investment opportunities such as data centres.



*16. Is the application of the SAOs to Telstra in particular ESAs likely to reduce Telstra's incentives to efficiently invest in infrastructure?*

Macquarie is concerned about the relevance of this question to the ACCC's current inquiry concerning the making of a FAD for the wholesale ADSL service. Macquarie reiterates that the ACCC declared the wholesale ADSL service on 14 February 2012 and this declaration will expire on 13 February 2017. As consequence of this declaration, the SAOs apply to Telstra in all ESAs.

Whether or not the application of the SAOs in particular ESAs may reduce Telstra's incentives to efficiently invest in infrastructure may be relevant for considering whether to declare the wholesale ADSL service. However, in Macquarie's view this matter is not relevant for the ACCC's current inquiry into making a FAD.

Macquarie understands that Telstra proposes that the SAOs should not apply to 289 ESAs where the three largest DSLAM network operators have a presence. Macquarie questions what burden this would relieve Telstra from. In particular, Macquarie notes that:

- Telstra's capacity to supply wholesale ADSL services in such ESAs does not change given that Telstra has already established operational processes for ordering, provisioning, billing etc; and
- the demand for Telstra services would not change if as Telstra contends competition is effective in those ESAs.

With no apparent change in (i) Telstra's capacity to supply services or (ii) in the demand for Telstra's services arising from removing the SAOs in certain ESAs, Macquarie is of the view that Telstra's motivation for removal of the SAOs is to provide it with an opportunity to exploit its market power. That is, with the SAOs removed, Telstra could immediately raise prices, refuse to supply, supply with lower service standards etc.

Macquarie also notes that the competition benefits of the structural separation of Telstra are not yet apparent. While pockets of competitive rivalry may exist in certain ESAs, the application of the SAOs in such ESAs would not impose any detriment on Telstra. Importantly the application of the SAOs provides a safety net to competition in the event that emerging competition fails.

Notwithstanding the above, Macquarie is of the view that Telstra's incentives to invest in copper infrastructure are most likely to be influenced by the emergence of the NBN and Telstra's contractual agreement with NBN Co to decommission its copper network and migrate its customers to the NBN. As such, Macquarie submits that Telstra has a significant disincentive to invest in copper infrastructure irrespective of whether or not SAOs apply in all or some of Telstra's ESAs.

*17. How would exemptions (geographic or carrier-specific) affect the legitimate business interests of access providers (including potential access providers) and the access providers' investments in facilities?*

Macquarie reiterates its view that it is strongly opposed to "geographic exemptions" being provided for in the FAD. Macquarie considers that the business interests of Telstra whether or not such interests are fair or foul would be enhanced if "geographic exemptions" were



provided for in the FAD. This is because in exempt ESAs Telstra could exercise its market power to engage in anti-competitive activities such as refusal to supply, excessive pricing, undue delay in service provision, preferential service provision and so on.

*18. Access providers (DSLAM network operators): Do you currently supply wholesale ADSL services to third parties?*

Not applicable to Macquarie.

*19. Access providers (DSLAM network operators): What would be the direct costs associated with providing access to the declared service to others upon reasonable request? For example, costs associated in provisioning and billing the service to access seekers. To what extent do you currently incur these costs?*

Not applicable to Macquarie.

*20. The ACCC seeks information on:*

*(a) Whether the costs involved in supplying and charging for the services are reasonable or likely to become reasonable; and*

*(b) the effects or likely effects that supplying and charging for the services would have on the operation or performance of telecommunications networks*

Macquarie does not have access to information sufficient to address this question.

*21. What are the costs of switching between wholesale ADSL providers?*

Macquarie considers that an access seeker may incur significant costs in switching between wholesale ADSL service providers which make switching suppliers unattractive. Moreover, the ability to switch suppliers is constrained by practical considerations including the availability of alternative services on equivalent terms and the ability to break existing supply agreements without incurring financial penalties. The costs of switching suppliers include agreement negotiation, relationship development, setting up ordering, billing and fault recording and reporting systems, system testing, etc.

A key and further concern is the impact of a switch-over on end-users. This carries considerable potential risks to access seekers including, inferior service performance, interruption to service provision. As such, there is an inherent aversion for access seekers to switch suppliers of access services once they are satisfactorily operational.



22. *If you currently acquire wholesale ADSL services from a provider other than Telstra, are you concerned about the application of the SAOs to that carrier provided in areas where those obligations apply to Telstra?*

Macquarie currently acquires wholesale ADSL services from a provider other than Telstra. Macquarie would be concerned if the SAOs were to be applied to that or any other non-Telstra provider. This is because any additional costs that the provider may incur as a result of the application of the SAOs, such as investment in ordering, billing and fault recording and reporting systems would be anticipated to be passed on to access seekers and in turn end-users. Such concern is irrespective of whether or not the SAOs apply to Telstra.

23. *Do you agree with the ACCC's preliminary assessment of the benefits of unbundling the PSTN service from the wholesale ADSL service?*

Yes. Macquarie has an in-principle preference for an unbundled service offering over a bundled service offering at the wholesale level. This is because an unbundled service offering provides the access seeker with the greatest flexibility to meet the diverse needs and preferences of end-users. Moreover, an unbundled service offering is conducive to the provision of least-cost services to end-users as the access seeker only acquires the wholesale services that it needs.

Macquarie understands that there is no technical barrier which requires or necessitates Telstra to bundle a PSTN service with its wholesale ADSL service. The fact that it does so is in fact further evidence of Telstra exercising its market power and the absence of an effective competitive constraint on its market behaviour. Accordingly, Macquarie considers that Telstra should be required to provide the wholesale ADSL service on an unbundled basis in order to promote economic efficiency and to promote the interests of end-users.

24. *Do you consider that a 'hybrid' option would have the same potential to promote competition as 'full' unbundling?*

Macquarie has a preference for the full unbundling option as this provides the best outcome for access seekers and end-users. While acknowledging that full unbundling may involve additional costs which may be avoided under the hybrid option, the hybrid option would still involve the provision of a PSTN service which may not be used or valued by the access seeker / end-user. However, *prima facie*, the hybrid option would appear to be preferable to Telstra's existing bundled wholesale ADSL service offering.

25. *What proportion of your total ADSL SIOs are attributable to a naked ADSL product?*

None. Macquarie does not acquire naked wholesale ADSL services. However, this does not mean, nor should it imply, that Macquarie would not seek naked wholesale ADSL services if such services were available.



*26. Would 'full' unbundling result in any economic efficiency gains?*

Yes. Macquarie considers that 'full' unbundling would result in an economic efficiency gain. In particular, Macquarie believes that allocative efficiency would be gained if full unbundling was practised. The wholesale ADSL service bundled with the PSTN service may result in the access seeker being supplied a PSTN service which it and / or the end-user does not require or value. If the access seeker only acquired the wholesale ADSL service that it and the end-user required, the resources allocated to the supply of the PSTN service could be reallocated to an alternative use thereby resulting in a gain in allocative efficiency. The proof of this efficiency gain is that neither the access seeker or end-user would be worse off if not supplied with the PSTN component while resources can be redeployed to make someone else better off.

*27. Would a 'hybrid' unbundling approach result in any economic efficiency gains?*

No. Macquarie does not believe that the 'hybrid' unbundling approach would result in any economic efficiency gains. This is essentially because the hybrid approach still results in the supply of a service that in some situations may not be valued by either the access seeker or the end-user. As such, there remains potential for scarce resources to be reallocated to other alternative productive uses.

*28. Telstra: What specific core systems/platform limitations prevent Telstra from offering a naked ADSL service?*

Not applicable to Macquarie.

*29. To what extent do you consider that 'full' unbundling or the 'hybrid' option takes into account the considerations under s. 152BCA?*

Macquarie's view on the extent to which 'full' unbundling and the 'hybrid' options take into account the statutory criteria under s. 152BCA (1) is summarised in the following table.



**Table 1: Assessment of s 152BCA (1) Statutory Criteria**

Statutory Criteria	Full Unbundling	Hybrid
Long-term interests of end-users promoted	<ul style="list-style-type: none"> <li>LTIE promoted as access seekers will have greatest flexibility to satisfy end-user requirements / needs and potential to provide services to end-users at lower prices</li> </ul>	<ul style="list-style-type: none"> <li>LTIE promoted as there is potential to provide services to end-users at lower prices</li> </ul>
Legitimate business interests of a carrier	<ul style="list-style-type: none"> <li>Telstra's ability to recover its costs and to earn a normal commercial return is preserved</li> </ul>	<ul style="list-style-type: none"> <li>Telstra's ability to recover its costs and to earn a normal commercial return is preserved</li> </ul>
Interests of all person who have rights to use	<ul style="list-style-type: none"> <li>Access seekers' interests are enhanced through greater choice and possibly lower costs</li> </ul>	<ul style="list-style-type: none"> <li>Access seekers' interests are enhanced through possibly lower costs</li> </ul>
Direct cost of providing access	<ul style="list-style-type: none"> <li>Unclear</li> </ul>	<ul style="list-style-type: none"> <li>Potential for service provision at lower cost than bundled service</li> </ul>
Value of extensions and enhancements of capability	<ul style="list-style-type: none"> <li>Telstra's ability to recover its costs of service enhancement is preserved</li> </ul>	<ul style="list-style-type: none"> <li>Access seekers would not profit from service enhancement funded by Telstra due to competitive pressure</li> </ul>
Safe and reliable operation	<ul style="list-style-type: none"> <li>Service safety and reliability should not be compromised</li> </ul>	<ul style="list-style-type: none"> <li>Service safety and reliability should not be compromised</li> </ul>
Economically efficient operations	<ul style="list-style-type: none"> <li>Allocative efficiency promoted</li> </ul>	<ul style="list-style-type: none"> <li>Allocative efficiency not promoted</li> </ul>

Source: Macquarie Analysis

Overall, based on the above assessment, Macquarie considers that both options meet the statutory criteria. However, the criteria is better served by the 'full' unbundling option.

*30. What are your experiences with regards to the effect on the quality of service without a PSTN service on the line?*

As per its response to question 25, Macquarie does not acquire naked wholesale ADSL services.

*31. Access seekers: What system modifications were undertaken to enable a naked ADSL service to be provided? What costs were involved in the systems development process?*

As per its response to questions 25 and 30, Macquarie does not acquire naked wholesale ADSL services.

*32. What are the likely costs and benefits associated with establishing additional points of interconnection?*

Macquarie is of the view that Telstra should offer the wholesale ADSL service with the option for access seekers of also acquiring from Telstra the AGVC or backhaul component. This is because the option for access seekers to use their own backhaul service or those provided by a third party supplier would enhance competition in transmission services and ultimately lead to better outcomes for end-users, such as lower prices.



A key factor underlying Macquarie's view on this matter is the regulated charge for the AGVC component which is \$33.65 per megabit per month.<sup>10</sup> This compares to the price proposed by NBN Co for its CVC which is \$20 per megabit per month.

Macquarie submits that establishing additional points of interconnection for the wholesale ADSL service is not the appropriate remedy to the "existing problem". Macquarie considers that the existing problem is essentially an excessive backhaul component price of the wholesale ADSL service. Unbundling the backhaul component would, in Macquarie's view, address this problem.

Macquarie believes that the costs of establishing additional points of interconnection would include:

- the physical costs of network equipment required for interconnection;
- the on-going costs of housing, securing, powering, controlling and maintaining etc such network equipment;
- possible loss of scale economies; and
- possible loss of administration control.

On the other hand, Macquarie believes that the benefits of establishing additional points of interconnection would include:

- providing greater flexibility for access seekers to manage network interconnectivity;
- removing reliance on a single point of possible failure / compromise; and
- promoting development of transmission markets with flow-on benefits to downstream markets.

Overall, Macquarie believes that the benefits of establishing additional points of interconnection are likely to outweigh the costs.

*33. Transmission network operators: Would you use your transmission networks to transport wholesale ADSL data should additional points of interconnection be specified for the wholesale ADSL service? Would you invest further in transmission networks if the wholesale ADSL FAD provided for additional points of interconnection for the wholesale ADSL service?*

Not applicable to Macquarie.

*34. For the purpose of the wholesale ADSL FAD, are amendments required to the timeframe in clause 2.4 of **Appendix E**? If so, should the timeframes in clause 2.4 of **Appendix E** be consistent with the TCP Code? What if a new code is registered that provides a different timeframe?*

Macquarie agrees in principle that the timeframe for invoicing for uninvoiced charges as specified in the wholesale ADSL FAD should be consistent with the Telecommunications Consumer Protections Code C628:2012 ("**Code**"). The Code represents the industry's

<sup>10</sup> ACCC, Interim Access Determination No. 1 of 2012 (WDSL), page 5



contemporary view on this matter and should be adopted wherever it arises. Moreover, this promotes consistent, easily understood and administratively simple regulation.

Macquarie notes that the Code has now been registered by the ACMA. The Code has a provision at clause 5.4 by which a supplier must not bill a customer for charges later than 160 days from the date that the charges were incurred. Accordingly, Macquarie is of the view that this timeframe should be mirrored in the wholesale ADSL FAD.

*35. For the purpose of the wholesale ADSL FAD, should the timeframe for raising billing disputes be made consistent with the TIO timeframe?*

The DTCS FAD provides a six month timeframe for raising billing disputes. By contrast, the TIO allows consumers two years to raise billing disputes.

Macquarie supports consistency between the TIO's practices and the wholesale ADSL FAD regarding the timeframe for raising billing disputes. Therefore, the timeframe for raising billing disputes as specified in the FAD should be made consistent with the TIO timeframe. This promotes consistent, easily understood and administratively simple regulation. As a consequence, Macquarie further supports amending the equivalent clauses of the DTCS FAD.

*36. For the purpose of the wholesale ADSL FAD, are amendments required to the timeframe in clause 2.14 of **Appendix E**?*

Yes. Macquarie suggests that clause 2.14 be amended by deleting "six" and replacing it with "twenty - four".

*37. For the purpose of the wholesale ADSL FAD, are further refinements required to clauses 2.4 and 2.16 in **Appendix E**?*

No. Macquarie is satisfied with the current wording of clauses 2.4 and 2.16 in Appendix E.

*38. Is there a drafting inconsistency between clauses 2.6 and 2.12 in **Appendix E**? If so, what amendments are required to ensure consistency between these two clauses in the wholesale ADSL FAD?*

Macquarie believes that there is a drafting inconsistency between clauses 2.6 and 2.12 in Appendix E. Clause 2.6 provides that an access seeker may not withhold from payment an amount in dispute unless agreed by the access provider. Clause 2.12 provides that an access seeker may withhold payment of an amount in dispute until the dispute is resolved. That is, clause 2.6 requires the access provider's agreement while clause 2.12 does not.

Macquarie suggests that clause 2.6 should be amended to be consistent with 2.12. Refer to Macquarie's response to question 40 below. As a consequence, Macquarie further supports amending the equivalent clauses of the DTCS FAD.



39. For the purpose of the wholesale ADSL FAD, should the ACCC make amendments to the non-price terms as drafted in the relevant schedules of the DTCS FAD with regards to billing and notification?

Yes. Macquarie supports amending clause 2.6 to align it with clause 2.12 as per its response to the previous question.

40. If you consider amendments should be made, how do you consider specific clauses should be redrafted?

Macquarie proposes that the following sentence be deleted from clause 2.6.

*“The Access Seeker may not deduct, withhold, or set-off any amounts for accounts in credit, for counter-claims or for any other reason or attach any condition to the payment, unless otherwise agreed by the Access Provider.”*

This amendment will remove the inconsistency between clauses 2.6 and 2.12. That is, only clause 2.12 will deal with the capability of an access seeker to withhold payment to an access provider.

41. For the purpose of the wholesale ADSL FAD, should the ACCC make amendments to the non-price terms as drafted in the relevant schedules of the DTCS FAD with regards to creditworthiness and security?

No. Macquarie is satisfied with the non-price terms as drafted in the relevant schedules of the DTCS FAD with regards to creditworthiness and security. Accordingly, such terms should be mirrored in the wholesale ADSL FAD.

42. If you consider amendments should be made, how do you consider specific clauses should be redrafted?

Not applicable. Refer to Macquarie’s response to the previous question.

43. For the purpose of the wholesale ADSL FAD, should a timeframe be included in **Appendix E**, clause 4.9? If so, what should the timeframe be?

Yes. Macquarie supports the specification of a timeframe in clause 4.9 of Appendix E in order to provide clarity to the parties and to avoid possible abuse of the dispute resolution process. Macquarie proposes that the timeframe should be no more than 21 days unless the parties can agree a longer period.



44. For the purpose of the wholesale ADSL FAD, should the ACCC make amendments to the non-price terms as drafted in the relevant schedules of the DTCS FAD with regards to general dispute resolution procedures?

Yes. Macquarie supports making an amendment as discussed in its response to the previous question. In particular, Macquarie proposes amending clause 4.9 as follows:

*Each party must, ~~as early as practicable~~ within 21 days (unless a longer period is agreed between the parties) after ...*

As a consequence, Macquarie further supports amending the equivalent clauses of the DTCS FAD.

45. If you consider amendments should be made, how do you consider specific clauses should be redrafted?

Refer to Macquarie's response to the previous question.

46. Do you consider it impractical to destroy confidential information stored in back-up systems? If so, for the purpose of the wholesale ADSL FAD, what amendments are required to clause 7 of Annexure 1 of Schedule 5 in **Appendix E**?

Macquarie considers that it may be impractical for an individual employee to destroy confidential information stored in back-up systems particularly in a situation where the employee has no authority to administer such systems. In such a situation, the employee does not have "power" or "control" over the confidential information.

Having reviewed clause 7 of Annexure 1 of Schedule 5 in Appendix E, Macquarie does not believe that amendment is necessary to address this matter. In particular, this is because clause 7 requires the employee to destroy confidential information which is in the employee's power or control. In other words, under clause 7 the employee is not expected to destroy confidential information stored in back-up systems because such information is not within the employee's power or control.

47. For the purpose of the wholesale ADSL FAD, should the ACCC make amendments to the non-price terms as drafted in the relevant schedules of the DTCS FAD with regards to confidentiality?

No. Refer to Macquarie's response to the previous question.

48. If you consider amendments should be made, how do you consider specific clauses should be redrafted?

Not applicable. Refer to Macquarie's response to question 46.



*49. Is there any ambiguity under clause F.2(a) regarding marketing by the access provider to the access seeker's end-user? If so, does clause F.3(a) resolve this ambiguity?*

Clause F.2(a) allows the access provider to contact and market with the access seeker's end-user in relation to services that the access provider previously or currently provides to the end-user. Macquarie does not consider this to be uncertain or of doubtful meaning. That is, provided that the contact is in relation to services that the access provider previously or currently provides to the end-user, the access provider has a free hand to initiate contact with the access seeker's end-users. Macquarie does not consider this situation to be satisfactory.

Clause F.3(a) essentially provides that if the access seeker's end-user initiates contact with the access provider, the access provider must not engage in any marketing or discussion with the end-user. Macquarie considers that clause F.3(a) only prevents the access provider from marketing to the end-user if the end-user initiates contact. Nothing in clause F.3(a) would prevent the access provider initiating a discussion with an access seeker's end-users (provided that the contact is in relation to services that the access provider previously or currently provides to the end-user). As such, clause F.3(a) does not resolve Macquarie's concern with clause F.2(a).

*50. Does the record keeping requirement under clause F.4 impose a cost burden upon parties? If so, what amendments are required to clause F.4 to alleviate this cost burden?*

Macquarie considers that making and maintaining a record of a communication with end-users is a common and usual business practice. While this would necessarily involve some cost, this would be unlikely to be significant and would be incurred as part of standard business practice rather than as a direct result of clause F.4. As such, Macquarie does not propose amending this clause.

*51. Should the ACCC include terms and conditions relating to communications with end-users in the FAD?*

Yes. Macquarie supports the inclusion of terms and conditions relating to communications with end-users in the FAD. Such terms and conditions would be intended to prevent the access provider from inappropriately contacting and marketing to the access seeker's end-users.

*52. For the purpose of the wholesale ADSL FAD, should the ACCC make amendments to the non-price terms as they currently stand in the 2008 Model Terms with regards to communications with end-users?*

Yes. As per its response to the previous question, Macquarie considers that the ACCC should make amendments to the non-price terms as they currently stand in the 2008 Model Terms with regards to communications with end-users.



53. *If you consider amendments should be made, how do you consider specific clauses should be redrafted?*

Macquarie considers that amendments should be made to the effect that only the access provider's retail business unit may initiate contact with the access seeker's end-users. Macquarie suggests the following amendment to clause F.2(a):

- (a) *in relation to goods and services which the access provider currently supplies or previously supplied to the end-user **provided that the access provider only communicates and deals through its retail business unit;***

54. *For the purpose of the wholesale ADSL FAD, are amendments required to clause 6.2 of **Appendix E** to ensure the interests of access seekers are balanced with the legitimate business interests of the access provider?*

Macquarie understands that there are three potential concerns raised in the Issues Paper concerning clause 6.2:

- whether clause 6.2(a) would enable a billing dispute to trigger service suspension and / or termination;
- whether the period allowed for remedial action in clause 6.2(e) could be extended if reasonably required; and
- whether the "contravention of any law" test is too broad.

Macquarie considers that clause 6.3 makes it clear that clause 6.2(a) does not apply to a billing dispute. As such, there should be no concern that clause 6.2(a) would enable a billing dispute to trigger service suspension and / or termination.

Macquarie notes that the period allowed for remedial action in clause 6.2(e) is 20 days. Macquarie considers that this period should be sufficient to undertake remedial action. Therefore an extension of this period is not considered necessary.

Macquarie considers that the "contravention of any law" test may be open to abuse by an access provider. Whether a contravention of law has occurred should be the judgment of a competent authority, such as a police officer or a court or local government as opposed to the opinion of an access provider. In addition, to trigger suspension or termination of a service, the contravention should occur in relation to the use of the wholesale ADSL service. On this basis, Macquarie supports amendment to clause 6.2.

55. *For the purpose of the wholesale ADSL FAD, should the ACCC make amendments to the non-price terms as drafted in the relevant schedules of the DTCS FAD with regards to suspension and termination?*

Yes. Based on its response to question 54, Macquarie considers that the ACCC should make amendments to the non-price terms as drafted in the relevant schedules of the DTCS FAD with regards to suspension and termination.



56. *If you consider amendments should be made, how do you consider specific clauses should be redrafted?*

To address the concerns noted in its response to question 54 and to improve the grammar, Macquarie proposes that clause 6.2 be amended as follows:

(b) *in using the Service, the Access Seeker's use of:*

- (i) *its Facilities;*
- (ii) *the Access Provider's Facilities or Network;*
- (iii) *any Service supplied to it by the Access Provider~~s~~;*
- ~~(iv)~~ *is in contravention of any law as determined by a competent authority; or*

As a consequence, Macquarie further supports amending the equivalent clauses of the DTCS FAD.

57. *For the purpose of the wholesale ADSL FAD, should the ACCC make amendments to the non-price terms as drafted in the relevant schedules of the DTCS FAD with regards to liability and indemnity?*

Macquarie supports the inclusion of non-price terms which address the area of liability and indemnity in the wholesale ADSL FAD. This would provide access seekers with a safety net which ensures that minimum terms are available to access seekers which may not be obtained through commercial negotiation. Macquarie is satisfied with the non-price terms as drafted in the relevant schedules of the DTCS FAD with regards to liability and indemnity and believes that these should be mirrored in the wholesale ADSL FAD.

58. *If you consider amendments should be made, how do you consider specific clauses should be redrafted?*

Refer to Macquarie's response to the previous question.

59. *Should the ACCC include terms and conditions relating to ordering and provisioning in the FAD? How should these terms be included?*

Macquarie supports the inclusion of non-price terms which address the area of ordering and provisioning in the wholesale ADSL FAD. This would provide access seekers with a safety net which ensures that minimum terms are available to access seekers which may not be obtained through commercial negotiation.



*60. Should the ACCC include terms and conditions relating to changes to operating manuals in the FAD? How should these terms be included?*

Macquarie supports the inclusion of non-price terms which address changes to operating manuals in the wholesale ADSL FAD. This would provide access seekers with a safety net which ensures that minimum terms are available to access seekers which may not be obtained through commercial negotiation.

*61. For the purpose of the wholesale ADSL FAD, should the ACCC replicate the relevant terms in the SSU with regards to ordering and provisioning?*

Macquarie considers that the relevant terms in the SSU provide an appropriate base on which to develop suitable terms with regard to ordering and provisioning for inclusion in the wholesale ADSL FAD.

*62. Should the ACCC include terms and conditions relating to network modernisation and upgrade provisions in the FAD? Please take into account any overlap with similar terms in the SSU in your response.*

Macquarie supports the inclusion of non-price terms and conditions relating to network modernisation and upgrade provisions in the wholesale ADSL FAD. This provides access seekers with a safety net which ensures that minimum terms are available to access seekers which may not be obtained through commercial negotiation.

*63. If you consider terms and conditions relating to network modernisation and upgrade provisions should be included in the FAD, how do you consider specific clauses should be drafted?*

Macquarie considers that non-price terms and conditions relating to network modernisation and upgrade provisions to be provided in the wholesale ADSL FAD should be based on relevant clauses in Telstra's SSU.

#### Closing

Macquarie welcomes the opportunity to make this submission. Bringing the wholesale ADSL service under the ACCC's purview is an important pro-competitive intervention which has long been advocated by Macquarie among other access seekers. Macquarie urges the ACCC to push ahead with the finalisation of the wholesale ADSL FAD and bring this matter to a close. In particular, Macquarie looks forward to reviewing the ACCC's draft wholesale ADSL FAD in due course.

The key points which have been discussed in this submission and which Macquarie wishes to emphasise are that:

- the time for the consideration “geographic exemptions” for the wholesale ADSL service was in the ACCC’s declaration inquiry which of course has now passed;
- the SAOs in respect of the wholesale ADSL service should only apply to the dominant market supplier and the only supplier which has a history of competition complaints, i.e., Telstra; and
- the supply of the wholesale ADSL service should be unbundled from the PSTN service and from the AGVC service.

Should you have any queries arising from this submission, please do not hesitate to contact me.

Yours sincerely



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