

**29 May 2015**

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Australian Competition and Consumer Commission

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**Submission in response to the Telecommunications Final Access Determination Inquiries – Non-price terms and conditions and connection charges for fixed line services – draft decision of 25 March 2015**

Macquarie Telecom welcomes the opportunity to make a submission in response to the ACCC's draft decision on the Telecommunications Final Access Determination Inquiries – Non-price terms and conditions and connection charges for fixed line services – draft decision of 25 March 2015.

**Background**

On 25 March 2014 the ACCC made a draft decision on the non price terms and conditions for the Declared Services and for connection charges for the ULLS, LSS and WDSL (**Draft Decision**). Coupled with the Draft Decision, the ACCC released a draft FAD (**Draft FAD**) including proposed drafting of the regulated NPTs (together **Draft Instruments**).

The history behind the draft instrument includes a Position Paper and Discussion Paper released by the ACCC and submissions from Macquarie Telecom, and other providers, in response to those papers.

Macquarie Telecom's comments in response to the Draft Instruments are set out in this submission.

**Summary**

Macquarie Telecom makes the following points in response to the Draft Instruments. Macquarie Telecom's position is set out in more detail in the subsequent sections of this submission:

1. Macquarie Telecom accepts the ACCC's decision to make Targeted NPTCs rather than to issue a comprehensive set of NPTCs. However, Macquarie Telecom considers that the LTIE would be better served if there was a comprehensive set of applicable terms and conditions as this would promote the ability for smaller companies to obtain wholesale services on reasonable terms and conditions without the need for the extensive resources required to negotiate Access agreements or be left in a position where the dominant market power of the Access Provider renders those negotiations illusory.

2. Macquarie strongly supports ACCC's proposed inclusion of Schedule 14 allowing for review of access agreements or termination of access agreements when there is a Regulatory Determination by the ACCC. Macquarie submits that this is in the LTIE because it ensures that key regulatory safeguards arising from an ACCC determination or a binding rule of conduct can be incorporated into Access agreements or that service providers have the option to terminate Access agreements where those variations cannot be agreed. Macquarie Telecom considers that the proposed Schedule 14 strikes a fair balance between ensuring that commercially negotiated agreements, which sit at the top of the statutory hierarchy, will be given primacy and ensuring that those agreements do not in effect prevent regulatory determinations from having any effect at all. The proposed Schedule 14 is critical to Macquarie Telecom in the context of the ACCC's decision to make a targeted set of NPTCs rather than a reference offer.
3. Macquarie Telecom has proposed some drafting amendments as set out in this submission. Macquarie Telecom largely accepts the revised draft proposed NPTCs and we have confined our comments to the key points we have identified as necessary to ensure that the proposed clauses have the intended effect as set out in the Draft Decision.
4. Macquarie Telecom welcomes the ACCC's decisions to:
  - a. review and update the relevant costs model for connection charges for the ULLS and the LSS and to set connection charges for WDSL ; and
  - b. not to allow Telstra to impose an LSS disconnection charge or an early termination charge for the WDSL.

Macquarie Telecom submits however, that the updated costs model used by the ACCC may not reflect possible changes to the relevant Telstra processes, resulting in the updated model still not accurately reflecting Telstra's cost base for connections. Macquarie Telecom also submits that the ACCC's decision not to allow Telstra to impose an LSS disconnection charge or an early termination charge for the WDSL needs to have retrospective effect to recover the windfall gains that Telstra has achieved by imposing those unjustifiable charges previously.

5. Macquarie Telecom submits that there is an urgent need for TEBA services to have regulated prices.

## **Analysis**

### ***Regulatory approach: Targeted set of NPTCs***

The ACCC has decided that a FAD that sets out a comprehensive set of all the terms and conditions of access is not warranted at this point. Instead, the ACCC's draft decision sets out a targeted set of non-price terms which focus only upon those aspects of access where the ACCC considers that "*commercial agreements are less likely to ensue and where specific competition concerns are likely to arise*". Together with the Targeted FAD, the ACCC intends to continue to monitor any unreasonable NPTCs or conduct around the NPTCs and will consider enforcement under Part XIB or other sections of the CCA.

Macquarie Telecom initially supported the idea of a Targeted FAD in response to the ACCC's Position Paper; however, on further consideration of the issues confronting Macquarie Telecom in

negotiations during the period that elapsed between the Position Paper and the Discussion Paper, Macquarie Telecom supported a Comprehensive FAD as more likely to serve the LTIE.

Macquarie Telecom acknowledges and agrees with the ACCC's reasons for including a targeted set of NPTCs rather than a comprehensive set of terms at this stage. However Macquarie Telecom submits that it is ultimately in the best interest of LTIE to have a regulated set of comprehensive terms which form a "reference" offer for price and non-price terms, and which apply in the absence of a commercially negotiated agreement. This would remove from the industry cost base the extensive costs of lengthy negotiations to align the Access Provider's offer with the regulated NPTCs, providing a dual benefit to consumers in lower costs and more timely availability of services and a benefit to Access Seekers in removing the business uncertainty implicit in contracts under negotiation but not agreed.

In the circumstances where the ACCC has rejected the option of making a comprehensive set of terms, it is vitally important to Macquarie Telecom that the targeted NPTCs should be incorporated into the terms offered by Access Providers.

Macquarie Telecom welcomes the ACCC's statement that *"the ACCC intends to continue to monitor any unreasonable NPTCs or conduct around the NPTCs and will consider enforcement under Part XIB or other sections of the CCA"*.

It appears that the way the ACCC intends to do this is to include the regulatory recourse terms proposed in Schedule 14. Macquarie Telecom has some concerns about the effectiveness of this approach outlined in the next section.

#### ***Regulatory safety net terms and conditions: Schedule 14***

The terms and conditions only apply where agreement on the relevant matter cannot be reached in an Access agreement unless a special access undertaking is in operation or binding rules of conduct have been made.

The ACCC has considered submissions raising concerns about a lack of recourse to regulated terms during the access agreement term. The ACCC's Draft Decision is intended to preserve recourse to the regulated terms and to act as a regulatory benchmark for access terms. The ACCC considers that there *"there is a need to provide for recourse to regulatory terms to promote competitive outcomes and the long term interests of end-users"*.

Macquarie Telecom shares the ACCC's concern, and that of other parties as set out in their submissions in response to the Draft Instruments, that Access Providers may seek to include clauses in access agreements that could have the effect of entirely excluding the application of current and future regulated terms during the agreed contract term (**Exclusion Clauses**). The issue here is that the commercial terms have primacy in the interpretation hierarchy thereby trumping any regulated terms.

Even if the ACCC's regulated terms act as a regulatory guide to inform commercial negotiations, Macquarie Telecom suggests that these Exclusion Clauses may also become an impediment for future access agreements between the parties as they will inevitably be used as a baseline for negotiations and therefore could become embedded as previously "agreed" terms, usurping the regulatory benchmark terms.

Macquarie Telecom agrees with the ACCC that Access agreements should include terms that allow Access Seekers to have recourse to new or varied regulatory terms on a timely basis and agrees with the proposed inclusion of Schedule 14 into the draft NPTCs.

Macquarie Telecom is concerned that Access Providers will not include allow recourse to those regulated terms in their offers. This concern would appear to be reasonable based on the ACCC's review of access agreements lodged with it, and Telstra's submission in response to this Draft Decision arguing against the inclusion of Schedule 14.

Telstra attempts to make an argument that the entire commercial bargain will hinge on the regulatory environment at the time the deal is struck and should not be overturned by a change in regulated terms because this could "*significantly change the value of the deal negotiated between the parties.*" This position appears to be one of a dominant provider, because in an open and transparent competitive market, regulation of terms would be unnecessary and there would be no inherent value in preserving the status quo via exclusion terms. Any steps taken by the ACCC to issue a binding rule of conduct or a FAD can only be taken in the context of extensive evidence of failure of the commercial markets to achieve a fair and competitive outcome. Any regulated terms therefore necessarily come about because of a commercial bargaining imbalance.

As noted by the examples seen by the ACCC in its review of access agreements lodged with it, providers do seek to exclude the protection that should be available in a competitive market. In those circumstances Macquarie Telecom welcomes the ACCC's invitation to approach the ACCC if it becomes clear that Schedule 14 is not effective in practice.

To ensure that Schedule 14 is as effective as possible, Macquarie Telecom suggests that only the Access Seeker should have the right to terminate the Access agreement under clause 14.2. This will neatly avoid any timing issue associated with an Access Provider terminating an Access agreement and ensures that the Access Seeker can be guaranteed continuity of supply by aligning termination of the Access agreement with the date that any Regulatory Determination takes effect.

Macquarie Telecom submits that any right of termination to take advantage of an access determination or a binding rule of conduct does not properly sit with the Access Provider, who is probably the entity that will be subject to the regulatory intervention. This also ensures consistency with the ACCC's determination that the Suspension and Termination clauses in Schedule 7 properly sit with the Access Provider and should not be reciprocal.

Macquarie Telecom further submits that any right of termination under clause 14.2 should not result in the Access Provider having any right to terminate, interrupt or suspend the declared service and that the Access Provider should be subject to an obligation to continue supply the declared service under the terms of the access determination, binding rules of conduct or a replacement access agreement.

### ***Proposed draft Targeted FAD terms***

The Targeted FAD non-price terms cover commercial and operational matters, such as billing and notification, general dispute resolution processes, and some ordering and provisioning processes for certain regulated services.

The ACCC has developed a common set of NPTCs to apply across all relevant declared services except where there are service specific reasons to justify a different approach. Macquarie Telecom supports the ACCC's approach to applying the consistent set of common terms across all relevant

declared services. Macquarie Telecom supports the ACCC's finding that terms (which Telstra argued should only apply to some services) regarding liability and indemnity and communications with end-users, network modernisation and upgrade notice periods and changes to operating manuals should apply to all services and agrees with the concept of promoting consistency across services. Macquarie Telecom agrees that this should promote efficiency in contract management and lower compliance costs.

Macquarie Telecom agrees generally with the proposed common terms (subject to the drafting notes set out below in this submission).

- *BILLING AND NOTIFICATION*
- *CREDITWORTHINESS AND SECURITY*
- *GENERAL DISPUTE RESOLUTION*
- *CONFIDENTIALITY (INCLUDING DISCLOSURE OF CONFIDENTIAL INFORMATION TO REGULATORY BODIES)*
- *COMMUNICATION WITH END-USERS*
- *SUSPENSION AND TERMINATION*
- *CHANGES TO OPERATING MANUALS*
- *LIABILITY (RISK ALLOCATION) AND INDEMNITY*
- *NETWORK MODERNISATION AND UPGRADE NOTICE PERIODS*
- *CHANGES TO OPERATING MANUALS*
- *RECOURSE TO REGULATED TERMS*

*AND*

- *RESALE SERVICES (FOR WHOLESALE ADSL)*
- *ORDERING AND PROVISIONING PROCESSES (MANAGED NETWORK MIGRATIONS AND UNCONDITIONED LOCAL LOOP SERVICES (ELLS) TO LINE SHARING SERVICE (LSS) TRANSFER (FOR ULLS AND LSS ONLY)*

### ***Timing Alignment***

The ACCC has decided that the regulated terms will commence on 1 July 2015 and expire on 30 June 2019 in line with the Fixed Line Services Price FAD. Macquarie Telecom supports this timing alignment as long as there is sufficient regulatory force to ensure that the regulated terms are not excluded in access agreements as discussed above in the context of the new proposed regulatory recourse terms in Schedule 14.

### ***Connection and disconnection charges for fixed line services***

The ACCC has set draft regulated connection charges for the ULLS, LSS and Wholesale ADSL services in table 9.1, chapter 9, part B of the Draft Decision. These draft regulated charges have been set having regard to:

- Telstra's new contractual arrangements with third party contractors; and
- UXC report commissioned by the ACCC to model the connection charges.

Macquarie Telecom supports the ACCC's decision to update the relevant costs models last updated in 2007 and 2008. However, Macquarie Telecom notes that the calculation of the relevant costs base used to determine connection charges includes the costs incurred by Telstra in following its internal processes used in its Data Activation Centre and Integrated Deployment Solutions. Macquarie

Telecom is concerned to ensure that the updated costs modelling undertaken by UXC includes any changes to Telstra's processes, which may have resulted in increased cost efficiencies that should be passed on to Access Seekers in the LTIE. The UXC reports includes statements to the effect that Telstra has updated its back of house processes but that Telstra *"has not provided any further information on those new terms or how those changes map to the previously named and described DAC and IDS processes and costs"*. UXC also states that it is *"reasonable to sue the same DAC activity time for single LSS connections for single ULLS and wholesale ADSL connections"*.

Macquarie Telecom submits that it is important for the connection charges to accurately represent the costs to Telstra so that there is no "windfall" gain obtained by Telstra in receiving connection charges for costs that it no longer incurs. Macquarie Telecom suggests that Telstra should be requested to provide additional information to clarify this point and justify the connection charges, particularly as the current DAC and IDS processes will be over 10 years old during the term of this determination.

Macquarie Telecom also welcomes the ACCC's decision not to allow Telstra to charge disconnection and early termination charges because this has the potential to seriously harm competition and the LTIE. In the context that Telstra charges a connection fee, and the connection and disconnection happen simultaneously, it appears that also charging a disconnection fee, which the ACCC has found does not represent any real underlying business cost, can only result in a windfall for Telstra. However, the draft FAD does not include any terms about disconnection charges, and therefore they technically are not regulated by it. Macquarie Telecom suggests that, to give effect to this decision, the draft determination should be amended so that it is clear that the disconnection charges are regulated and have been set at \$0 or to include a term prohibiting Telstra from imposing disconnection charges.

Macquarie Telecom also submits that the obligation on Telstra not to levy disconnection and early termination charges must be backdated so as to allow providers to recover payments unjustifiably charged by Telstra in the past.

### ***Regulated Prices for TEBA services***

Macquarie Telecom notes that the ACCC's 2014 Position paper included discussion around regulated access to facilities access services such as TEBA, however, pricing for TEBA rack and power charges have not been included. Macquarie Telecom submits that this is not in the LTIE and urges the ACCC to set regulated prices for TEBA services as soon as possible.

### ***Comments on the proposed draft NPTs***

Macquarie Telecom proposes the following amendments to the draft NPTCs:

#### ***BILLING AND NOTIFICATION***

**Clause 3.8** delete the word *"the"* before administration and financial costs (minor drafting point).

**Clause 3.9** Macquarie Telecom supports this change.

**Clause 3.14** add the word *"reasonably"* before the word practicable. This is consistent with other drafting in the FAD (eg: clause 3.4(b) (ii) which requires the Access Provider to invoice amounts as soon as is *reasonably* practicable.

Macquarie Telecom does not believe that the proposed changes to clause 3.14(b) are necessary because it is in an Access Seekers best interests to raise a dispute about an invoice as soon as possible and the intention of the clause is to set a deadline beyond which disputes cannot be raised. If the ACCC is minded to make the proposed changes then the drafting should reflect the fact that Access Providers can only seek to bar the Access Seeker from raising the dispute if the Access Seeker has unreasonably delayed.

**Clause 3.20 (b)** – the cross references need to be checked.

#### *CREDITWORTHINESS AND SECURITY*

**Clause 4.3** The effect of the changes is that Telstra decides what security is reasonable without necessarily having regard to the current circumstances between the parties. Macquarie Telecom supports the intention of the ACCC to clarify which party should nominate the proposed security and agrees in the circumstances that the Access Provider is best placed to do so. However, Macquarie Telecom has concerns that there is an important difference in practice between the Access Provider making that decision reasonably and making a decision that is reasonable in all the circumstances. Macquarie Telecom suggests that the words “*taking into account all the circumstances*” should be reinstated after “*Access Provider*” at the end of the second last sentence.

**Clause 4.8(e)** Macquarie Telecom supports the ACCC’s drafting intention in introducing this new clause to give both parties the flexibility to agree on additional information that may be required to assess the Access Seeker’s credit-worthiness. However, Macquarie Telecom has concerns about how the clause would work in practice given the timing of the notice. Macquarie Telecom suggests that the other information should be agreed at the time of entering into the access arrangement, otherwise the clause gives an open ended ability on the Access Provider to ask for “*any other information*” and could then lead to an open-ended situation where there is a dispute if the parties cannot agree that that information is in fact reasonably required.

#### *GENERAL DISPUTE RESOLUTION*

**Clause 5.2** Macquarie Telecom understands the ACCC’s reasons for not taking a role as an arbiter and supports the ACCC’s decision to include requirements for the third party judging the dispute to have certain qualifications and notes that these provisions are very similar to provisions set out in other SAUs.

#### *CONFIDENTIALITY (INCLUDING DISCLOSURE OF CONFIDENTIAL INFORMATION TO REGULATORY BODIES)*

**Clauses 6.5(j) and (k)** Macquarie Telecom supports the ACCC’s inclusion of these clauses to allow the government or regulatory authority to have as much access to information as possible, while balancing the interests of a party to protect Confidential Information.

Macquarie Telecom suggests that the Disclosing Party should be required to provide *written* notice to the other party that it intends to disclose the Confidential Information under these clauses and “*the opportunity to protect the confidentiality of its Confidential Information*” just as it has to do so under **clause 6.5(e)** where the disclosure is required by law.

Macquarie Telecom believes that a requirement to:

1. notify the Access Seeker where the Access Provider has received a request from a government or regulatory authority; and

2. give the Access Seeker input into how the Confidential Information is disclosed

provides an important safeguard to ensure that the Access Seeker can monitor that such requests are justified. It also removes an anomaly in the drafting to align the new clauses with the current clause 6.5(e). Macquarie Telecom submits that it is in the LTIE that the Access Seeker should be protected from disclosure of its confidential information in response to requests.

Macquarie Telecom also submits that the clauses must also be subject to the test that the Access Provider cannot comply with the request without making the disclosure by adding the words “*the Access Provider cannot comply with the reporting obligation without making the disclosure*” after “*provided that*”.

#### *SUSPENSION AND TERMINATION*

**Clause 7.5A** –Macquarie Telecom understands the ACCC’s reasons for not making all of the Termination and Suspension rights set out in this clause reciprocal and supports the introduction of a right for the Access Seeker to terminate if the Access Provider cannot supply the services.

Macquarie Telecom suggests that the drafting should be amended so that it references the cessation of supply of the Service for a period of 5 Business Days rather than having reference to the Access Provider ceasing to carry on business. This provides more objective certainty to the Access Seeker because the idea of ceasing to carry on business is a nebulous term and the impact on the Access Seekers business occurs when the Access Provider ceases supply for whatever reason not necessarily when it ceases to carry on business.

**Clause 7.10** (minor drafting point) To clarify the drafting Macquarie Telecom suggests that the words “*,as applicable,*” should be inserted after the “*or*” and the full stop at the end of sub-clause (b) should be a comma.

#### *LIABILITY (RISK ALLOCATION) AND INDEMNITY*

**Clause 8.8** Macquarie Telecom supports the change made in this clause. Macquarie Telecom submits that the amended clause reflect usual commercial practice and promotes a fair allocation of risk, which in turn promotes competition because it ensures that the market is operating commercially.

#### *COMMUNICATION WITH END-USERS*

**Clause 9.6(a)** – Macquarie Telecom welcomes the change to ensure that use of another party’s trademarks, logos or branding cannot be occur without consent, however Macquarie Telecom is concerned that the clause needs to specify that the parties may agree for each other to use trademarks/branding etc. This reflects the standard commercial practice of parties agreeing marketing rules and branding guidelines within wholesale relationships. To reflect this intention the clause will need to specify that a party cannot do so “*unless otherwise agreed*” by adding these words to the start of clause 9.6(a).

#### *NETWORK MODERNISATION AND UPGRADE NOTICE PERIODS*

**Clause 10.5(b)** Macquarie Telecom agrees with this amendment to give Access Seekers an idea of the time associated with implementation of a Major Network Upgrade.

**Clause 10.6(b)** Macquarie Telecom welcomes the addition of the obligation on Access Providers to give an Individual Notification where the Major Network Modernisation Upgrade will result in the



Service being suspended, but queries the requirement for the relevant service to be suspended for at least a month before this notification is required to be given. In the context of the importance of services to end users, 20 business days seems an extremely long period of time. Macquarie Telecom suggests that a shorter period of time can accommodate both the Access Seeker's and Access Provider's interests and that this is in the LTIE.

#### *CHANGES TO OPERATING MANUALS*

**Clause 11.1** Macquarie Telecom is concerned about the changes to clause 11.1. Macquarie Telecom understands the ACCC's intention was to ensure that only relevant operating manuals that are applicable to the services should be caught by an obligation to notify an Access Seeker of changes. However the drafting appears to leave open an unintended loophole allowing Telstra to avoid having to notify the Access Seeker of any operational changes by simply not providing the operating manuals in the first place. The changes appear to limit the operation of the clause so that it only applies to documents *provided* to the Access Seeker by the Access Provider.

Macquarie Telecom is concerned to ensure that all operating manuals concerning the Service can only be amended with the input of Access Seekers buying that Service. Otherwise changes to operating manuals represent a backdoor way of fundamentally changing the service. Telstra makes it very difficult to have access to operating manuals, which are typically posted somewhere on a website and not updated or easily found. These documents have a direct impact on the delivery and SLAs for the service and therefore a direct impact on the LTIE. Macquarie Telecom suggests that the clause as previously drafted already provided sufficient protection for Telstra or other Access Providers because it was limited to "*operational documents concerning the Service*". Macquarie Telecom submits that the clause should remain as previously drafted.

Macquarie Telecom agrees with the amendments to 11.1(ii) and the new 11.1A.

#### *RECOURSE TO REGULATED TERMS*

Macquarie Telecom has discussed the draft terms set out in Schedule 14 in detail earlier in this submission. As discussed above Macquarie Telecom supports these proposed new clauses set out in draft Schedule 14, with the amendments we have outlined above in this submission.

#### *ORDERING AND PROVISIONING*

Macquarie Telecom accepts the changes to clause 13.7.

#### *RESALE SERVICES (FOR WHOLESALE ADSL)*

Macquarie Telecom supports this clause.

### **Conclusion**

Macquarie Telecom welcomes the ACCC's step towards ensuring that the protection of regulated terms extends to Access Seekers as far as possible in the context of the current regulatory hierarchy by including draft terms to ensure regulatory review in schedule 14. Macquarie Telecom also welcomes the ACCC's open door offer should we find that those terms are not being put into effect in commercial negotiations.

Macquarie Telecom urges the ACCC to take steps to regulate prices for TEBA services.

**Macquarie Telecom Limited**

**29 May 2015**