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Australian Competition and Consumer Commission

fixedservices@acc.gov.au

jane.goldwater@acc.gov.au

annette.weier@acc.gov.au

Fixed Line Services FAD Inquiry - Disclosure of Report Provided by Telstra

Your Reference

Our Reference IP 041403

Macquarie Telecom Pty Limited (“**Macquarie**”) appreciates the opportunity to make this submission to the Australian Competition and Consumer Commission (“**ACCC**”) in response to the ACCC’s consultation paper concerning the above.¹ The report provided by Telstra to the ACCC contains relevant information for the setting of prices for the declared fixed-line services in the context of the ACCC’s fixed-line services FAD Inquiry. The subject of this particular consultation is the framework within which the information in Telstra’s report and other related material (“**Telstra Material**”) may be disclosed by the ACCC to stakeholders.

Macquarie is strongly of the view that the ACCC’s task of setting prices for the fixed-line services is fundamentally important to protecting competition in Australia’s communications sector. Moreover, Telstra has the incentive and capability to claim that such prices should be as high as possible. Accordingly, Macquarie submits that it is essential that the Telstra Material is subject to appropriate review and scrutiny in order for the ACCC to reach a credible outcome on the pricing of the fixed-line services in its FAD Inquiry. As such, Macquarie favours the widespread disclosure of the Telstra Material.

On the basis of the structure of the Consultation Paper and the matters on which the ACCC has specifically invited comments from stakeholders, this submission addresses the ACCC’s proposals with regard to the following matters:

- the parts of the Telstra Material for disclosure;
- the persons to whom the Telstra Material is disclosed;
- the terms and conditions on which disclosure is made; and
- inspection and purchase of material.

For ease of reference, in the discussion below and as appropriate, the ACCC’s invitation to comment is reproduced followed by Macquarie’s response.

¹ ACCC, Fixed line services FAD inquiry: Disclosure of report provided by Telstra under the Building Block Model Record Keeping Rule, Consultation paper, March 2014 (“**Consultation Paper**”)

The Parts of the Telstra Material for Disclosure

Invitation to comment:

The ACCC invites stakeholders to make submissions on the ACCC's proposed approach to specifying the parts of the Telstra material for disclosure.

The ACCC has formed the preliminary view that some parts of the Telstra Material are more sensitive than others due to the characteristics of the information. Therefore, it proposes to differentiate between parts of the Telstra Material which are considered to be commercially sensitive and those parts which are not considered to be commercially sensitive.

The ACCC notes that Telstra considers that four main categories of the Telstra Material are commercially sensitive and if disclosed would cause it harm. Telstra claims that such harm would be manifest in terms of giving its competitors unfair advantages, creating a risk of misuse of the information and reducing the likelihood of Telstra obtaining confidential information from information providers in the future.

The ACCC considers that the disclosure of the four main categories of the Telstra Material, i.e., actual and forecast capital expenditure, operational expenditure and demand data, proprietary information and information relating to faults should be limited to specified persons and subject to restrictions. All other parts of the Telstra Material would be publicly disclosed. The ACCC refers to these two categories of the Telstra Material as “public extracts” and “restricted extracts” respectively.

Macquarie cautions the ACCC about accepting Telstra’s claims of commercial harm which would arise from the disclosure of the “restricted extracts”. That is, any such claims of harm must be seen in the context of Telstra’s dominant market position across the fixed, mobile, Pay TV and Internet service segments of Australia’s communications sector.

Macquarie submits that the public disclosure of certain information relating to Telstra’s fixed services business, that is, a business that it dominates and that it has effectively agreed to decommission in its \$11 billion deal with the Government is not likely to cause material detrimental harm to Telstra. Moreover, the disclosure of “confidential” information about the gross historic cost value (around \$17 billion) and the depreciated historic cost value (around \$8 billion) of Telstra’s CAN in October 2009 hardly caused Telstra harm. That is, Telstra’s dominance in fixed services remains unchallenged and its revenue and profits have continued to grow.

Macquarie accepts in principle that some parts of the Telstra Material may be more sensitive than other parts of the Telstra Material. Therefore, some parts of the Telstra Material should not be publicly disclosed. Macquarie cautions that only that material which, if it were disclosed, would cause material detrimental harm to Telstra should be included in the “restricted extracts” category. That is, the ACCC should not merely agree with Telstra’s view that certain material should be regarded as confidential, rather Telstra’s claims of confidentiality should be closely scrutinised.

The Persons to Whom the Telstra Material is Disclosed

Invitation to comment:

The ACCC invites submissions from stakeholders on the ACCC's proposed approach to specifying the persons to whom the Telstra material should be disclosed.

The ACCC has identified three options concerning to whom the Telstra Material should be disclosed:

- the general public;
- specified classes of persons; and
- individuals.

The ACCC has reached various preliminary views concerning this matter. First, and consistent with subsection 151BUA(2)(c) of the *Competition and Consumer Act 2010* (“CCA”) is the ACCC’s view that the Telstra Material that the ACCC refers to as “public extracts” should be disclosed to the public. Macquarie supports this view noting that the greater disclosure of Telstra’s commercial information is conducive to promoting competition in general and in appropriately informing the ACCC in its FAD Inquiry.

Second, and consistent with subsection 151BUA(2)(d) of the CCA, is the ACCC’s view that the Telstra Material that the ACCC refers to as “restricted extracts” should be disclosed to the class of persons consisting of access seekers (and their advisers) but should not be disclosed to the classes of persons identified as “potential suppliers or contractors to Telstra” and “NBN Co and its related bodies corporate”. In addition, the ACCC is open to consider whether other classes of persons may be identified and given access to the “restricted extracts”.

Macquarie welcomes and supports the ACCC’s view that the “restricted extracts” should be disclosed to access seekers and their advisers. This view specifically recognises that access seekers are directly affected by the pricing of Telstra’s fixed services and have the interest and experience to make well-informed submissions to the ACCC.

Macquarie does, however, question the ACCC’s view that the “restricted extracts” should not be disclosed to the classes of persons identified as “potential suppliers or contractors to Telstra” and “NBN Co and its related bodies corporate”. The ACCC’s rationale is that the information contained in the “restricted extracts” could be used by potential suppliers and contractors to Telstra to Telstra’s detriment. Specifically, Macquarie queries whether given Telstra’s financial strength and the scale and scope of its operations its bargaining power in commercial negotiations would be materially and detrimentally affected by a wider disclosure of the “restricted extracts”. That is, the greater disclosure of Telstra’s commercial information is conducive to promoting competition in general.

Third, is the ACCC’s view that despite subsection 151BUA(2)(d) of the CCA, it is not desirable to specify individuals to whom the Telstra Material should be disclosed. Macquarie agrees with the ACCC’s view on the basis that the specification of individuals would not be practical.

The Terms and Conditions on which Disclosure is Made

Invitation to comment:

The ACCC invites submissions from Telstra and other stakeholders on the ACCC's proposed approach to specifying terms and conditions on which disclosure will be made, including the draft undertaking set out in Appendix B.

The ACCC has reached the preliminary view that the disclosure of the “restricted extracts” should be subject to specific conditions consistent with subsection 151BUA(2)(d) of the CCA. This requires recipients of the information to execute a confidentiality undertaking prior to receiving the information. The conditions proposed by the ACCC are:

- that the use of the information is limited to the ACCC’s current FAD Inquiry;
- that the further disclosure of the information is prohibited except as may be required for obtaining executive and board approval for submissions to the ACCC;
- that the information must be kept secure; and
- that, if used in submissions to the ACCC, the information must be redacted from public submissions and marked confidential in confidential submissions.

To the extent that parts of the Telstra Material are genuinely to be treated as confidential on the basis that public disclosure of such information would be likely to cause material detrimental harm to Telstra, the conditions on the disclosure as proposed by the ACCC are in Macquarie’s view practical and reasonable. Accordingly, Macquarie supports the ACCC’s preliminary views on this matter.

Macquarie also supports the draft undertaking as set out in Appendix B of the Consultation Paper. Macquarie notes that this draft undertaking is essentially the same as that which is currently in use by parties seeking access to the confidential information in submissions to various ACCC inquiries.

Macquarie does, however, note some typographical errors in the draft undertaking. These are summarised in the following table.

Table 1: Suggested Amendments to the Draft Undertaking

Reference	Current Text	Suggested Text
Paragraph 5 (b)	... paragraph 6(a) paragraph 5(a) ...
Paragraph 5 (c)(iv)	... confidential information Confidential Information ...
Paragraph 5 (b)(iv)	... and is subject of and is the subject of ...

Inspection and Purchase

In accordance with subsection 151BUA(8) of the CCA, the ACCC proposes to make the “public extracts” and “restricted extracts” available for inspection and purchase. In particular, the “public extracts” will be made available for public inspection at the ACCC’s Melbourne offices during standard business hours and at \$1 per page for purchase of a physical copy. In addition, the ACCC proposes that the “public extracts” will be available on its website for purchase and inspection at no charge. With regard to the “restricted extracts”, the ACCC

proposes that these will be available for purchase electronically at no charge on the lodgement of an executed confidentiality undertaking.

While Macquarie accepts that it is unlikely that the demand from the public to physically inspect the “public extracts” will be great, persons residing outside Melbourne would experience practical difficulty should they wish to inspect the “public extracts” under the ACCC’s proposal. Macquarie suggests that the ACCC should be prepared to make appropriate arrangements to enable inspection of the “public extracts” at its Sydney and Canberra offices if reasonably requested by interested persons.

Closing

Macquarie welcomes the opportunity to make this submission in response to the Consultation Paper. Macquarie is strongly of the view that the task of setting prices for the fixed-line services is fundamentally important to protecting competition in Australia’s communications sector. Given that Telstra has the incentive and capability to claim that such prices should be as high as possible, it is essential that the Telstra Material is closely scrutinised which requires that it be widely disclosed. Macquarie reiterates the following key points:

- Macquarie accepts in principle that some parts of the Telstra Material may be more sensitive than other parts of the Telstra Material, however, Macquarie cautions that only that material which, if it were disclosed, would cause material detrimental harm to Telstra should be included in the “restricted extracts” category;
- Macquarie welcomes and supports the ACCC’s view that the “restricted extracts” should be disclosed to access seekers and their advisers;
- To the extent that parts of the Telstra Material are genuinely to be treated as confidential on the basis that its public disclosure would be likely to cause material detrimental harm to Telstra, the conditions on the disclosure as proposed by the ACCC are practical and reasonable; and
- Macquarie supports the draft undertaking proposed by the ACCC.

Please do not hesitate to contact me should you have any queries in relation to this matter.

Yours sincerely



Chris Zull
Senior Manager, Industry & Policy

Phone 03 9206 6848

Email czull@macquarie.com