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By email

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Macquarie Telecom's Supplementary Submission in relation to the ACCC's Review of Domestic Mobile Termination Access Service (MTAS) – June 2011 – Discussion Paper

Dear Lauren,

Macquarie Telecom Pty Limited ('**Macquarie**') wishes to make this supplementary submission to the Australian Competition and Consumer Commission ('**ACCC**') in relation to the ACCC's discussion paper concerning the above.¹ In this supplementary submission, Macquarie wishes to address comments made in Telstra's submission to the ACCC concerning this subject.² In particular, the view expressed by Telstra that the ACCC's proposal as contained in the Discussion Paper to "impose a pass-through obligation on fixed or integrated operators in respect of the FTM termination price" may be *ultra vires*.³

Macquarie strongly disagrees with Telstra's position, and considers that this argument, similar to the approach taken by many global incumbents, is merely intended to encourage the ACCC to take a more cautious approach to the quantum of any MTAS price reductions and to the imposition of rules to ensure that such MTAS price reductions are passed on to consumers. Macquarie considers that legally the ACCC is able to mandate a workable scheme to secure its stated public policy goals, as is detailed in this submission.

Telstra's arguments concerning the legality of MTAS reduction pass-through obligation

Telstra argues that the pass-through pricing proposal as detailed in the Discussion Paper goes beyond the scope of regulating access to MTAS which is detailed in section 152BC(1) of the *Competition and Consumer Act 2010* ('**CCA**'). Instead, Telstra contends that this proposal could be considered an attempt to regulate prices in the downstream retail market over which the ACCC has no regulatory jurisdiction and which are regulated via a separate

¹ ACCC, *Domestic Mobile Terminating Access Service (MTAS): Public Inquiry to make an Access Determination, June 2011* ("**Discussion Paper**")

² Telstra, *Response to the Commission Discussion Paper on Domestic Mobile Terminating Access Services (MTAS), Public Version*, July 2011,

³ *ibid*, pages 43 to 45

regime.⁴

Telstra states that based on section 152BC(1) of the CCA (i) the ACCC may make a written determination relating to access to a declared service and (ii) the remaining provisions of section 152BC, which detail the ACCC's power to make access determinations, are all concerned with the principal objective contained in subsection 152BC(1). That is, the provisions empower the ACCC to set terms and conditions governing access to the relevant declared service. Telstra goes on to argue that the ACCC must have regard to the factors in section 152BCA in making final access determination ('FAD') (especially the long term interests of end users ('LTIE')) but that these factors apply in the context of the ACCC regulating access to MTAS. Telstra submits that this section does not have the effect of extending the power in section 152BC beyond the scope of access to the relevant declared service, and into the area of the supply of downstream services.

Legality of MTAS reduction pass-through obligation in relation to the access regime

Macquarie disagrees with Telstra's interpretation and is strongly of the view that the ACCC is able to mandate that an integrated operator must satisfy the ACCC that retail FTM prices have been reduced (including the impact of past MTAS price reductions) before further MTAS price reductions are made available. The ACCC can monitor changes in retail FTM prices through the use of record keeping rules ('RKRs').

In contrast to Telstra's view, Macquarie contends that while section 152BC is the operative provision of the CCA it must be read expansively. This is because section 152BC(3) states that:

"An access determination may:

....

(b) specify any other terms and conditions of an access seeker's access to the declared service; or

.....

(j) deal with any other matter relating to access to the declared service."

In addition, other subsections of section 152BC state that:

"(4) Subsection (3) does not limit subsection (1).

(5) An access determination may make different provision with respect to:

(a) different carriers or carriage service providers; or

(b) different classes of carriers or carriage service providers; or

(c) different access seekers; or

(d) different classes of access seekers.

....

(7) An access determination may provide for the Commission to perform functions, and exercise powers, under the determination.

(8) Terms and conditions specified in an access determination as mentioned in paragraph (3)(a), (b) or (f) must include terms and conditions relating to price or a method of ascertaining price."

⁴ Namely the *Telstra Carrier Charges – Price Control Arrangements, Notification and Disallowance Determination No. 1 of 2005*



As such, in Macquarie's view:

- Section 152BC(3) is not, given section 152BC(4), a case of *expressio unius est exclusio alterius* as section 152BC(3) does not exhaustively detail only what a FAD may contain (even though the proposed MTAS pass-through mechanism in its view would fall within the scope of subsection 152BC(3)(b) and/or (j)). As such, the scope of a FAD is not proscribed and may include, for example, pass-through obligations;
- In accordance with subsection 152BC(5) the FAD may distinguish, by having different provisions, between different access seekers or class of access seekers. This, Macquarie would submit, would allow pass-through obligations in the MTAS FAD to be imposed solely upon integrated operators as suggested by Macquarie in its main submission;
- Section 152BC(7) envisages the sort of checking and verification process by the ACCC on whether there has been pass-through of the MTAS price reductions as recommended by Macquarie in its main submission; and
- Section 152BC(8) specifically contemplates that a FAD need not specify an MTAS price but can also set a 'method of ascertaining price'. As such, a mechanism, whereby the ACCC, via the RKR assesses the degree of pass-through of the MTAS price reductions and then sets an MTAS price for integrated operators every 6 months would, would in Macquarie's view, more than satisfy this requirement.⁵

Importantly, the views above are consistent with the matters which the ACCC must take into account in making a FAD as detailed in section 152BCA and the *Objects* of Part XIC Telecommunications access regime as detailed in section 152AB. This is especially since, as Macquarie would argue, that in determining whether a particular thing promotes LTIE (see section 152AB(2)), requiring the pass-through of MTAS price reductions will promote competition in market for a range of listed services including fixed network services. Indeed it is arguable that making FTM calls more price competitive will mean that fixed network services will become competitive with mobile network services.

In summary, Macquarie contends that a MTAS FAD determined in accordance with section 152BC permits the ACCC to mandate the proposed pass-through regime.

Legality of MTAS reduction pass-through obligation in relation to the price control regime

On the secondary argument raised by Telstra, that the ACCC's proposal could be considered an attempt to regulate prices in the downstream retail market over which the ACCC has no regulatory jurisdiction and which are regulated via a separate regime, again Macquarie would disagree.

On this point, Macquarie has had the benefit of reviewing the Vodafone Hutchison Australia Pty Limited ('VHA') supplemental submission of 31 August 2011 and would concur with the arguments on this issue. That is, based on the CCA and the interpretation of similar provisions by the Australian Competition Tribunal⁶ the *Telstra Carrier Charges – Price Control Arrangements, Notification and Disallowance Determination No. 1 of 2005* is not in any way inconsistent with the proposed pass-through mechanism for MTAS price reductions being

⁵ Further, as indicated in Macquarie's main submission, in response to questions 9 and 10 of the MTAS Discussion Paper, a retail minus approach is not favoured, and may indeed lack the required level of specificity required by section 152BC(8).

⁶ See *Re Vodafone Network Pty Ltd* [2007] ACompT 1

included in the MTAS FAD.

Further, if as recommended by Macquarie, the MTAS price applicable to integrated operators is set by the ACCC via a variation to the MTAS FAD based on the ACCC's consideration of the data reported under the RKR, then as the FAD does not purport to set retail prices (say by example via a retail minus pricing mechanism) then there is even greater clarity that the proposed pass-through process does not involve retail price regulation.

Conclusion

In closing, Macquarie contends that a FAD in accordance with section 152BC permits the ACCC to impose a pass-through mechanism in relation to MTAS price reductions contrary to the position opined by Telstra in its submission to the ACCC on the MTAS Discussion Paper.

Macquarie would be pleased to engage directly with the ACCC going forward to elaborate on its thinking on these important matters. Should you have any queries concerning this submission, please feel free to contact me.

Yours sincerely



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