

13 June 2013

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Dear Mr Riordan

**Submission in response to ACCC Discussion Paper - Resubmitted draft required  
measure 6: NBN Information Security Plan**

**Your Reference**

**Our Reference** IP 061301

Macquarie Telecom Pty Limited (“**Macquarie**”) appreciates the opportunity to make this submission to the Australian Competition and Consumer Commission (“**ACCC**”). This submission is made in response to the ACCC’s discussion paper<sup>1</sup> concerning the NBN Information Security Plan (“**NBN ISP**”) which was resubmitted to the ACCC for consideration by Telstra Corporation Limited (“**Telstra**”) on 18 April 2013.

**1. Executive Summary**

- 1.1 The NBN ISP will function as the sole mechanism to protect certain information which flows between NBN Co and Telstra during what may become a lengthy implementation period. Delays in the implementation of the national broadband network (“**NBN**”) have already occurred and it is reasonable to expect that additional delays may be experienced, noting the upcoming federal election.
- 1.2 Macquarie therefore submits that the NBN ISP must be drafted to provide ongoing certainty for all access seekers. The measures which it establishes to protect the NBN Co Migration Information (as defined by the NBN ISP) will be relied upon to fulfil an increasingly important role. The NBN ISP must therefore contain measures which are adequately robust and unambiguous, to serve its intended purpose and to facilitate the development of a level playing field during the potentially extremely protracted transition to an NBN environment.
- 1.3 Macquarie acknowledges that in preparing the current draft of the NBN ISP, Telstra has made a number of amendments to address concerns which were expressed by

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<sup>1</sup> ACCC, Resubmitted draft required measure 6: NBN Information Security Plan, Discussion Paper, May 2013 (Discussion Paper).

the ACCC and by access seekers in response to the initial draft of the NBN ISP (“**Initial Draft**”). In particular, Telstra has proposed amendments to the NBN ISP to address the key issues of concern detailed by the ACCC in its Final Decision<sup>2</sup>.

- 1.4 However, despite these amendments, Macquarie submits that there are a number of areas in which the NBN ISP fails to adequately address the concerns previously raised (as outlined below). Macquarie submits that these issues must be addressed prior to acceptance of the NBN ISP by the ACCC.

## 2. Objective of the NBN ISP

- 2.1 The ‘Objective’ of the NBN ISP, as defined at clause 2, mirrors the objective which is set out at Schedule 6 of the Migration Plan. It provides:

*The objective of the NBN Information Security Plan is to set out effective and appropriate measures through which Telstra will ensure that any NBN Co Migration Information ...*

- 2.2 The Objective of the NBN ISP is therefore defined within the NBN ISP with reference to the measures through which Telstra will achieve compliance, rather than by reference to the fact of compliance itself.

- 2.3 This approach is problematic where Telstra then proceeds to define its commitments under the NBN ISP with reference back to the Objective. This approach ties each commitment back to an obligation to implement ‘effective and appropriate measures’, rather than a commitment to actually achieve compliance.<sup>3</sup>

- 2.4 Macquarie submits that the Objective of the NBN ISP should be to ensure that NBN Co Migration Information is not used or disclosed by Telstra to gain or exploit an unfair commercial advantage over Telstra’s wholesale customers.

## 3. Definition of NBN Co Migration Information

- 3.1 The information which falls within the scope of the NBN ISP (the NBN Co Migration Information), still excludes certain categories of information in addition to the exclusions which are provided for by clause 24.1 of the Migration Plan.

- 3.2 To address concerns raised by the ACCC and access seekers on this point, Telstra has introduced a ‘new’ commitment at clause 11 of the NBN ISP by which Telstra purports to restrict any use of the NBN Co Migration Information, or any information relating to transit or backhaul capacity, for the purpose of making decisions regarding installation of equipment to be used to interconnect Telstra infrastructure to the NBN Points of Interconnection.

- 3.3 The commitment which has been made is limited in its application to only certain Telstra Personnel with specific responsibilities. In addition, it addresses only a single potential use of the information which is otherwise excluded from the definition of NBN Co Migration Information under Schedule 1.

<sup>2</sup> ACCC, Assessment of Telstra’s draft Migration Plan Required Measures, Final Decision, February 2013 (Final Decision).

<sup>3</sup> See, for example, clauses 5.2(a)(iv) and 6, and paragraph (b) of Schedule 4 of the NBN ISP.

3.4 Macquarie submits that the scope of NBN Co Migration Information covered by the NBN ISP should mirror the categories of information provided for under clause 24.1 of the Migration Plan and that proposed paragraph 1(d)(iii) of Schedule 1 of the NBN ISP, in particular, creates an unjustified limitation on that scope.

#### 4. **Overarching commitment**

4.1 Telstra has introduced an ‘overarching commitment’ at clause 5.2(c) of the NBN ISP, which is designed to provide a ‘baseline position’ for the treatment of all NBN Co Migration Information regardless of whether it has been identified and listed in Schedule 1.

4.2 The overarching commitment allows for use of information for a ‘Permitted Purpose’, which is in turn defined to include accessing the information for a ‘Telstra Permitted Purpose’. In turn, the definition of a ‘Telstra Permitted Purpose’ includes (at sub-paragraph (c)), the:

*... planning, design, build, installation, repair, replacement, removal, augmentation and provisioning of facilities or equipment, operation, management, maintenance and improvement of, and including the supply of services and products over or in connection with the use of, facilities.*

4.3 This definition provides Telstra with a significant degree of latitude to use certain information in practice without being in breach of its obligations under the NBN ISP, notwithstanding the restriction under clause 5.2(c)(ii) of the NBN ISP.

4.4 Macquarie submits that, as currently drafted, the overarching commitment under clause 5.2(c) of NBN ISP does not appropriately and effectively protect NBN Co Migration Information which is not specified in Schedule 1 of the NBN ISP, particularly given the width of the Permitted Purpose definition.

#### 5. **The ‘need to know’ principle**

5.1 In response to the comments made in the Final Decision, Telstra has proposed amendments to clause 9 of the NBN ISP to remove the ‘qualifying phrases’ which previously appeared at paragraphs 9.1(c)(i) – (iv).

5.2 However, the ‘need to know’ principle, at clause 9.1(d), is still defined to include circumstances where access to information systems is ‘reasonably necessary’ for Personnel or groups to perform their duties effectively ‘in accordance with a Permitted Purpose’. As discussed above, the definition of Permitted Purpose in turn refers to a ‘Telstra Permitted Purpose’ which has been defined in an extremely broad manner.

5.3 Macquarie considers that the changes which have been made to clause 9 of the NBN ISP do not fully address the concerns which were detailed by the ACCC in the Final Decision in relation to the need to know principle, and that the need to know principle remains inconsistent with paragraph 3.1 of Schedule 6 to the Migration Plan.

## 6. Physical security measures

- 6.1 In response to concern regarding the lack of measures relating to physical security of NBN Co Migration Information within the Initial Draft, Telstra has proposed a series of amendments to Schedule 3 (Training) of the NBN ISP.
- 6.2 The amendments proposed, however, merely require Telstra to deliver training to its 'Authorised Personnel' in relation to matters which include, among other things, physical security measures. Macquarie submits that Telstra should also be subject to a specific obligation under the NBN ISP, to ensure the physical security of NBN Co Migration Information.

## 7. Mechanisms for future amendment or variation

- 7.1 Telstra has proposed amendments to the Initial Draft to address concerns regarding appropriate mechanisms for future amendment or variation of the NBN ISP. As currently drafted, the NBN ISP provides that most variations must be made in accordance with the formal variation process governing changes to the Migration Plan under the *Telecommunications Act 1997*.
- 7.2 However, the NBN ISP provides that this requirement will not apply to 'minor' variations to the NBN ISP, which include: internal changes to the names (but not the function) of groups or roles; and, changes to Schedule 3 (Training) which Telstra (acting reasonably and in accordance with the objective of the NBN ISP<sup>4</sup>) identifies as necessary.
- 7.3 Although in its supporting submission<sup>5</sup> Telstra states that such changes remain subject to ACCC approval, that is not clearly spelt out within the NBN ISP itself. Schedule 4 of the NBN ISP refers to Telstra submitting a 'request' to the ACCC to vary the NBN ISP 'to reflect changes of this kind' on a quarterly basis, following consultation with NBN Co. It appears, from the drafting proposed, that Telstra intends to implement such changes to its practices immediately, and to subsequently request that the ACCC formally update the NBN ISP to reflect those changes which it has already implemented in practice.

## 8. Further comments

- 8.1 Changes to categories of NBN Co Migration Information (clause 5.2)

It is not clear from the drafting of clause 5.2 of the NBN ISP whether Telstra intends that changes to the information categories set out at Schedule 1 and Schedule 2 of the NBN ISP will be treated as variations in accordance with the formal variation process governing changes to the Migration Plan.

- 8.2 The NBN Interface Group (clause 7(c)(ii))

The commitment at clause 7(c)(ii) of the NBN ISP restricts the involvement of Telstra Personnel in both the Retail Business Unit and the NBN Interface Group at

<sup>4</sup> Please note the comments above regarding the definition of the 'Objective'.

<sup>5</sup> Telstra, Required Measure 6 – NBN Information Security Plan, Supporting Submission on resubmitted draft required measure, 18 April 2013 (Supporting Submission).

the same time. However, this clause does not address the potential for a flow of staff between these groups over time.

## 9. Summary

- 9.1 Macquarie considers that the drafting of the NBN ISP provides Telstra a great deal of flexibility and could in some cases enable Telstra to avoid strict compliance with the terms of the NBN ISP, without materially breaching its terms. In a number of places throughout the NBN ISP, Telstra has adopted loose or subjective language, which has the effect of watering down the commitments being made.<sup>6</sup>
- 9.2 As noted above, Macquarie considers that the measures implemented under the NBN ISP will hold increasing importance for all access seekers for the foreseeable future, as the NBN roll-out continues (particularly where transition to the NBN may be further delayed). The NBN ISP must therefore be adequately robust and unambiguous, to ensure it is able to adequately serve its intended purpose.
- 9.3 Macquarie submits that each of the issues detailed above must be addressed prior to acceptance of the NBN ISP by the ACCC.

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

Yours sincerely



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<sup>6</sup> See, for example, clause 5.2, pursuant to which Telstra commits to keep information categories 'under review' and commits to 'promptly' provide the ACCC and NBN Co with certain information, without providing any specific commitments as to the actions it will take, or the timeframes it will meet.