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Public Inquiry - Final Access Determinations - Fixed Line Services

Macquarie Telecom Pty Limited ("**Macquarie**") appreciates the opportunity to make this submission to the Australian Competition and Consumer Commission ("**ACCC**"). This submission is in response to the ACCC's discussion paper concerning the above.[1]

Macquarie wishes to emphasise the importance of the Final Access Determinations ("**FADs**") and the essential role that they play in laying the foundation for competition in fixed line services. The ACCC must appreciate that the FADs must be appropriately set to promote and support competition. Unless this is the case, there is a real danger that the FADs will jeopardise fixed line service competition.

This submission is set out in two main parts. The first part comments on a number of price related matters while the second part responds to each of the consultation questions raised in the Discussion Paper.

Price Related Matters

Macquarie notes that the Discussion Paper does not raise any specific questions on price related matters. This reflects the ACCC's belief that "... many of the pricing issues are substantially resolved." [2] However, Macquarie wishes to make comments on the following pricing matters which it believes are important:

- the opening value of the RAB;
- the length of regulatory period; and
- the averaging of PSTN OTA charges.

[1] ACCC, Public inquiry to make final access determinations for the declared fixed line services, Discussion paper, April 2011 ("**Discussion Paper**")
[2] ibid, page 2

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Opening value of the RAB

In its earlier consultation on this matter, the ACCC proposed that it would adopt the cost-based depreciated actual cost ("**DAC**") valuation method for setting the value of the initial RAB. [3] In particular, this would involve taking values from the regulatory accounting framework ("**RAF**") data as provided by Telstra to the ACCC. Macquarie supported this conservative approach even though it would seem that a lower valuation would be justified given that no adjustment was made to account for the likelihood that Telstra would have recovered more than straight line depreciation.[4]

The ACCC has now decided that the opening value of the RAB should be determined as that value which is consistent with a $16 ULLS. That is, the ACCC has decided that a $16 ULLS is important to "protect the legitimate business interests of both access seekers and Telstra".[5] The ACCC has then "reverse engineered" through a net present value calculation the initial value of the RAB to achieve this outcome. The ACCC has then reconciled the RAB net present value calculation to the DAC valuation by allowing an adjustment for the indexation of land values and by increasing the value assigned to the "ducts and pipes" asset class.

Macquarie is concerned with the ACCC's approach to the setting of the initial value of the RAB. In particular, Macquarie believes that:

- the ACCC has effectively abandoned an objective and credible approach to RAB valuation in favour of a subjective and contrived approach;
- the ACCC has set a dangerous precedent for its on-going approach to access price setting; and
- the ACCC's subjective and contrived approach to RAB valuation irresponsibly increases the cost of declared fixed services to the direct disadvantage of access seekers.

Macquarie urges the ACCC to revisit its decision on the initial RAB valuation and return to a more objective and principled approach. Such an approach would consist of a DAC valuation based on RAF data adjusted downwards for over recovery of past compensation and adjusted upwards for the indexation of land values. This approach would result in a lower RAB value which would in turn reduce the prices of the declared fixed-line services.

Length of Regulatory Period

In its earlier consultation on this matter, the ACCC proposed to have an initial regulatory period of four years. [6] Macquarie agreed with the ACCC's proposal subject to the proviso that Macquarie could be satisfied that the ACCC's forecasts of service demand and Telstra's costs are reasonable. [7]

Macquarie is somewhat surprised that the ACCC has now decided that the regulatory period will be five years given that there was no support for a regulatory period beyond four years among the responses to the ACCC's Draft Report. The ACCC's reason for choosing a five

[3] ACCC, Review of the 1997 telecommunications access pricing principles for fixed line services, Draft report, September 2010. ("**Draft Report**"), page 27
[4] Macquarie, Submission to ACCC, (Ref: RG101001 22 October 2010 ("**Macquarie Submission**")
[5] Draft Report, page 47
[6] ibid, page 48
[7] Macquarie Submission, page 7

year regulatory period is "... to provide certainty during the transition to the NBN." [8] This appears odd given that those that desire such certainty supported a regulatory period of no more than four years. Macquarie notes, in particular, the views of Telstra as expressed by the ACCC:

> *"Telstra advocated a two year regulatory period on the grounds that a longer period would be subject to substantial forecasting error, which would result in uncertainty, unpredictability and potential dispute."* [9]

Having considered this further in the light of its earlier concerns about the accuracy of Telstra's forecasts, Macquarie is now of the view that the initial regulatory period should be three years. Accordingly, Macquarie urges the ACCC to adopt a three year initial regulatory period.

Averaging of PSTN OTA Charges

Macquarie is concerned with the ACCC's decision regarding PSTN OTA charges. The ACCC has decided to abandon the disaggregated rate structure and in its place has set a national average PSTN OTA price. Moreover, the ACCC will leave it to access seekers to negotiate appropriate disaggregated charges with Telstra.

Macquarie is of the view that it is naive and irresponsible for the ACCC to believe that access seekers would be in a position to negotiate PSTN OTA charges with Telstra. Macquarie reminds the ACCC of the utter failure of the "negotiate - arbitrate" model which lead to the reform of the access regime in 2010. In Macquarie's view, the ACCC's expectation that access seekers will negotiate disaggregated PSTN OTA charges will also fail. Access seekers with a low-cost traffic pattern who seek to negotiate with Telstra will only be offered the national average price, i.e., Telstra has no incentive to offer them the lower disaggregated prices. With no effective bargaining power, such access seekers will be forced accept Telstra's offer. On the other hand, access seekers with a high-cost traffic pattern will accept the national average price and will not seek to negotiate with Telstra. As such, only the national average price will prevail in agreements between Telstra and access seekers.

The ACCC's decision to switch from a disaggregated pricing structure to a national average pricing structure for PSTN OTA charges creates inherent uncertainty for access seekers. Macquarie is concerned that the ACCC evidently believes that the principles of stability and certainty as they apply to pricing do not apply here. That is, while the ACCC argues that the five year initial regulatory period is justified "to provide certainty" [10] it is evident that the ACCC does not believe that certainty should apply to PSTN OTA charges.

In Macquarie's view the ACCC should not adopt the national average PSTN OTA price. Instead, the ACCC should adopt the revised PSTN OTA pricing matrix as per the ACCC's Option 1. [11] This approach, which is consistent with the existing pricing structure, provides access seekers with certainty and stability as well as enabling competitors to match the price of end user services with the cost of their provision. Moreover, this approach has been updated to reflect current traffic patterns. Macquarie urges the ACCC to revisit its decision on this matter.

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[8] Discussion Paper, page 36
[9] ibid, page 35
[10] ibid, page 36
[11] ibid, page 148

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Specific Consultation Questions

This section responds to the specific consultation questions raised in the Discussion Paper. For ease of reference, the consultation question is reproduced in *italics* which is then followed by Macquarie's response. The numbering and sequencing of the questions follows that of the Discussion Paper.

1. Should liability (risk allocation) provisions be included in the FADs for all or any of the declared fixed line services?

Yes. Macquarie understands that the provisions of Clause C of the 2008 Model Terms have the effect of limiting the liability of either party to the other. Given that there is a fundamental imbalance of market power and bargaining strength between access seekers on the one hand and Telstra on the other, Macquarie believes that the provisions of Clause C are likely to be of benefit to access seekers. That is, it is not likely that Telstra would agree to such provisions in the context of a bi-lateral negotiation. While Macquarie would in principle prefer less regulation to more regulation, in this case it would be beneficial to the interests of access seekers for the liability (risk allocation) provisions of Clause C of the 2008 Model Terms to be included in the FADs for all declared fixed line services.

2. Should an iVULLS ordering and provisioning process be contained in the FAD for ULLS?

Yes. Macquarie is of the view that an iVULLS ordering and provisioning process should be contained in the FAD for ULLS. Given that there is a fundamental imbalance of market power and bargaining strength between access seekers on the one hand and Telstra on the other, Macquarie believes that the inclusion of such a process is likely to be of benefit to access seekers. That is, it is not likely that Telstra would agree to such provisions in the context of a bi-lateral negotiation.

3. Should the FADs for the declared fixed line services include terms and conditions relating to facilities access?

Yes. Macquarie is of the view that the FADs for the declared fixed line services should include terms and conditions relating to facilities access. Given that there is a fundamental imbalance of market power and bargaining strength between access seekers on the one hand and Telstra on the other, Macquarie believes that the inclusion of such terms and conditions is likely to be of benefit to access seekers. That is, it is not likely that Telstra would agree to such provisions in the context of a bi-lateral negotiation.

4. Please provide comments on any of the proposed non-price terms and conditions and any appropriate amendments to them.

Macquarie notes that the draft FADs have effectively adopted the same terms and conditions as per the 2008 Model Terms with the exception of Schedule 13 - Network Modernisation and Upgrade Provisions. It is evident that under Schedule 13 the access provider must disclose more information to access seekers than its equivalent Clause G of the 2008 Model Terms. In principle, Macquarie welcomes the strengthening of this provision in the light of the experience of Telstra in closing its South Brisbane exchange. In particular, the need for the ACCC to intervene and to force Telstra to improve information disclosure to access seekers.

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5. Are there any additional non-price terms and conditions that are appropriate to be included in the FADs?

No. Macquarie does not believe that there are any additional non-price terms and conditions that are appropriate to be included in the FADs.

4. Should the effect of the PSTN OA CBD Orders (and the corresponding class order) be incorporated into the FAD for the PSTN OA service?

Macquarie has addressed this question in its response to question 5 below.

5. Should the effect of the Tribunal's Metropolitan Orders (and the corresponding class orders) be incorporated into the FADs for the WLR, LCS and PSTN OA services?

No. Macquarie is strongly of the view that the effect of the Tribunal's Metropolitan Orders and PSTN OA CBD Orders (and the corresponding class orders) should not be incorporated into the FADs for the PSTN OA, WLR, LCS and PSTN OA services. The Tribunal's Metropolitan Orders and PSTN OA CBD Orders (and the corresponding class orders) define the Exemption Determinations. [12] The Exemption Determinations have the effect of making specific geographic areas (i.e., particular CBD and metropolitan ESAs) outside the scope of the ACCC's regulatory powers. This is because such areas have been deemed to be competitive. The effect of the Exemption Determinations is that in the exempt areas Telstra is not obliged to provide declared services or obliged to offer those prices for such services which have been determined by the ACCC.

The reasons for Macquarie's view that Exemption Determinations should not be incorporated into the FADs encompass:

- the Exemption Determinations cease to have effect;
- there is doubt over the ACCC's powers to give effect to the Exemption Determinations;
- the detrimental impact of the Exemption Determinations on competition; and
- the access regime is in transition.

Exemption Determinations Cease to Have Effect

The Exemption Determinations were made pursuant to sections 152AS and 152AT of the *Competition and Consumer Act 2010* ("**CCA**"). Sections 152AS and 152AT of the CCA were repealed by the *Telecommunications Legislation Amendment (Competition and Consumer Safeguards) Act 2010* ("**CACS Act**"). As the ACCC itself notes, it therefore follows that:

> *"... the ACCC no longer has the power to make exemption determinations."* [13]

Macquarie also notes the following remarks of the ACCC:

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[12] The term "Exemption Determinations" is defined in the Discussion Paper at page 214

[13] ACCC, Interim access determinations for the declared fixed line services, Statement of Reasons, March 2011, page 4

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> *"The transitional provisions in the CACS Act state that once an access determination (AD) (including an IAD) in relation to a service commences, a determination made under the repealed sections 152AS and 152AT ceases to have effect.* [14]

Given the above, Macquarie finds it extraordinary that the ACCC would contemplate giving effect to the Exemption Determinations when the Federal Parliament has expressly and unambiguously:

- taken away the ACCC's powers to make Exemption Determinations; and
- ceased the effect of the existing Exemption Determinations.

Macquarie submits that the Federal Parliament made its intention clear, i.e., that the Exemption Determinations have no further part in the regulatory framework. Therefore, the course of action proposed by the ACCC is clearly contrary to this intention.

Doubt over the ACCC's Powers

Macquarie submits that there is at the very least considerable doubt over whether the ACCC is empowered to give effect to the Exemption Determinations in the FADs. As noted above, the ACCC is no longer empowered to make individual or class exemptions following the repeal of sections 152AS and 152AT of the CCA.

In the absence of an express power to make Exemption Determinations, the ACCC proposes to give effect to the Exemption Determinations in the FADs through the exercise of powers under section 152BC of the CCA. The ACCC states:

> *"Under the new regime, the ACCC is able to incorporate provisions in access determinations which provide that any or all of the SAOs are not applicable to a carrier or CSP. This may be either unconditional or subject to such conditions or limitations as are specified in the determination."* [15]

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 a carriage service provider which application may or may not be conditional.

In Macquarie's view, the ACCC's proposal to force the effect of the Exemption Determinations in the FADs by reliance on section 152BC of the CCA is fundamentally wrong. The SAOs (which are set out in section 152AR of the CCA) comprise basic terms and conditions on which services are supplied, for instance, supplying services on request, ensuring technological and operational equivalence, providing billing information and providing service fault information. The Exemption Determinations place geographic restrictions on the supply of services. None of the SAOs are in any way concerned with exemptions or limiting the geographic scope of regulation. Giving effect to the Exemption Determinations through section 152BC of the CCA (as the ACCC has done) is not a variation of the application of "any or all of the SAOs". Rather, the ACCC has in effect created a new SAO.

In Macquarie's view, it is incumbent on the ACCC to state clearly which of the section 152AR SAOs it is varying the application of in order to give effect to the Exemption Determinations. Otherwise, it must be concluded that the ACCC is not varying the application of any or all of

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[14] ibid, page 4
[15] Discussion Paper, page 214

the SAOs but is in effect creating a new SAO. It follows therefore that the ACCC is acting outside the scope of its authority.

Detrimental Impact of the Exemption Determinations on Competition

Macquarie considers that in the case of WLR the Exemption Determinations have a detrimental impact on competition. The ACCC's WLR IAD and proposed FAD reduced the price of the WLR compared to the ACCC's previously applicable indicative price. However, under its agreements with Telstra and with AAPT, Macquarie is already paying higher prices for WLR services.

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The application of the Exemption Determinations results in an absurd situation under which access seekers will pay more for WLR services in certain geographic areas which are deemed to be competitive than they will pay in other geographic areas in which the ACCC has set prices. That is, the ACCC's decision to give effect to the Exemption Determinations results in a price rise for access seekers. Price rises *per se* will deter access seeker demand for WLR services and to the extent possible, access seekers will seek to pass on increased costs to end users. Clearly this outcome is detrimental to competition.

Access Regime is in Transition

The CACS Act made some fundamental changes to the access regime in line with Government policy. Prior to the CACS Act, the access regime was driven by a belief that the market for access services would be best developed through encouraging competition and that eventually the market would become competitive and regulation would be gradually withdrawn. In contrast, the CACS Act marks a fundamental shift in policy which recognises that competition is not effective and that the regulated monopoly supply of access services is preferred. The centre-piece of the new access regime is the National Broadband Network ("**NBN**") which will be a wholesale-only supplier of access services.

The Exemption Determinations may have had their place in the pre-NBN access regime. That is, the Exemption Determinations had the intended effect of gradually withdrawing regulation as markets were deemed to be competitive. However, the Exemption Determinations have no place in an access regime which focuses on the regulation of monopoly. As such, Macquarie contends that the Exemption Determinations are inconsistent with, and unhelpful for achieving, the desired access regime contemplated by Government policy.

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6. Are there alternative suppliers of the PSTN OA, LCS and WLR services in the Attachment A ESAs, or is there a prospect of such alternative suppliers entering the Attachment A ESAs? Please provide evidence to support your response.

No. There are no alternative suppliers of the PSTN OA, LCS and WLR services in the Attachment A ESAs nor is there the prospect of alternative suppliers entering the Attachment A ESAs. This conclusion is a result of:

- Macquarie's efforts to seek alternative suppliers for such services;
- the fact that other carriers who are potential sources of supply choose not to supply such services; and
- the fact that it is not economically viable for Macquarie to self-supply such services.

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7. Have recent developments with regards to the NBN build affected the rationale for the exemptions? If so, please provide evidence.

In response to this question, Macquarie reiterates some of the views that it expressed in its response to question 5 above. In particular, that the CACS Act made some fundamental changes to the access regime in line with Government policy, i.e., a fundamental shift in policy which recognises that competition is not effective and that the regulated monopoly supply of access services is preferred. As such, the Exemption Determinations which are intended to gradually withdraw regulation as markets are deemed to be competitive have no place in an access regime which focuses on the regulation of monopoly.

8. Is there any other information or matters that the ACCC should have regard to when deciding whether to incorporate the effect of the Exemption Determinations into the FADs for the WLR, LCS and PSTN OA services?

Macquarie reiterates its view that the effect of the Exemption Determinations must be removed from the FADs because the ACCC no longer has the power to make them, they cease to have effect, they have an adverse impact on competition and they belong to the pre-NBN access regime.

9. Please provide comments on the ACCC's preliminary consideration of the subsection 152BCA(1) criteria in respect of including the effect of the Exemption Determinations in the relevant FADs. Where necessary, please provide supporting materials for your comments.

Macquarie is concerned that the ACCC claims that it is required to consider whether the effect of the Exemption Determinations should be incorporated into the FADs. The ACCC states:

> *"When making an FAD and deciding whether or not the effect of the Exemption Determinations should be incorporated into an FAD, the ACCC must have regard to criteria in subsection 152BCA(1) of the CCA, which includes the LTIE. The ACCC may also consider any other matters that it thinks are relevant, such as regulatory certainty and consistency."* [16]

The ACCC reiterates its claim:

> *"When deciding whether or not the effect of the Exemption Determinations should be incorporated into the relevant FADs, the ACCC must have regard to criteria in subsection 152BCA(1) of the CCA, which includes the promotion of the LTIE."* [17]

In contrast to the above, Macquarie considers that the ACCC is not required to consider whether the effect of the Exemption Determinations should be incorporated into the FADs. This is because subsection 152BCA(1) extends only to setting out criteria which the ACCC must consider when making an access determination *per se*. That is, despite the ACCC's claim, there is no requirement whatsoever for the ACCC to consider whether the effect of the Exemption Determinations should be incorporated into the FADs. For reference, subsection 152BCA (1) is set out below.

> *(1) The Commission must take the following matters into account in making an access determination:*
>
> > *(a) whether the determination will promote the long-term interests of end-users of carriage services or of services supplied by means of carriage services;*
> >
> > *(b) the legitimate business interests of a carrier or carriage service provider who supplies, or is capable of supplying, the declared service, and the carrier's or provider's investment in facilities used to supply the declared service;*
> >
> > *(c) the interests of all persons who have rights to use the declared service;*
> >
> > *(d) the direct costs of providing access to the declared service;*
> >
> > *(e) the value to a person of extensions, or enhancement of capability, whose cost is borne by someone else;*

[16] ibid, page 218
[17] ibid, page 223

> *(f) the operational and technical requirements necessary for the safe and reliable operation of a carriage service, a telecommunications network or a facility;*
>
> *(g) the economically efficient operation of a carriage service, a telecommunications network or a facility.*

As discussed above, the Federal Parliament, through the passing of the CACS Act, has expressly and unambiguously:

- taken away the ACCC's powers to make Exemption Determinations; and
- ceased the effect of the existing Exemption Determinations.

With the ACCC no longer possessing powers to make exemptions, and the Exemption Determinations themselves no longer having effect, it is illogical for the ACCC to consider whether the Exemption Determinations should be incorporated into the FADs. It would appear therefore, that the ACCC's decision to incorporate the Exemption Determinations into the FADs is primarily driven by ideology. That is, the ACCC fundamentally believes that the Exemption Determinations should be incorporated into the FADs and believes as an article of faith that it has the legislative authority to do so.

In summary, Macquarie rejects the ACCC's claim that it must evaluate the exemptions against the criteria in subsection 152BCA(1) of the CCA. That is, the criteria in this subsection is only relevant for the ACCC's decision to make an access determination *per se* and is not relevant for evaluating whether the effect of the Exemption Determinations should be incorporated into the FADs.

10. Should the Minimum Characteristics set out in the Tribunal's Metropolitan Orders be amended for the purpose of the FADs as follows: "any period which an end-user is unable to receive a broadband service by means of the copper pair servicing the end-user's Standard Telephone Service by reason of that migration is no longer than four hours or such other period determined by the Commission"

As per Macquarie's responses to questions 4 and 5 above, Macquarie is of the strong view that the effect of the Exemption Determinations should not be included in the FADs. Therefore, consideration of any amendment to the Exemption Determinations is irrelevant.

11. For the purpose of incorporating the Exemption Determinations into the FADs, should the reporting requirements (in respect of each Attachment A ESA) be revised to no longer require ULLS-based competitors to submit information on 'Number of installed DSLAMs'?

As per Macquarie's responses to questions 4 and 5 above, Macquarie is of the strong view that the effect of the Exemption Determinations should not be included in the FADs. Therefore, consideration of any revision to the Exemption Determinations is irrelevant.

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12. If the Exemption Determinations are incorporated into the FADs for the WLR, LCS and PSTN OA services, should the exemptions expire on 24 August 2014 for the WLR and LCS services; and on 9 September 2014 for the PSTN OA service?

As per Macquarie's responses to questions 4 and 5 above, Macquarie is of the strong view that the effect of the Exemption Determinations should not be included in the FADs. Therefore, consideration of the expiry dates of the Exemption Determinations is irrelevant.

In addition, as noted above in Macquarie's response to question 5, it is evident that the Exemption Determinations ceased to have effect when the ACCC issued IADs in March 2011. Therefore, the expiry date of the Exemption Determinations has no consequence and can be ignored.

13. Should the FADs for the WLR, LCS, PSTN OA and PSTN TA services apply [to] NBN-based wholesale services?

Macquarie understands that questions 13 to 15 are essentially concerned with the role of wholesalers / intermediaries who would buy services from NBN Co and on-sell these to retail service providers ("**RSPs**"). In particular, these questions are concerned with whether the FADs should be extended to cover the supply of WLR, LCS, PSTN OA and PSTN TA services which would be provided on NBN Co's fibre, fixed wireless or satellite network infrastructure given that such services are defined independently of network infrastructure.

It is Macquarie's initial view that it would be appropriate to exclude NBN-based wholesale services from the FADs. This view is based on the following rationale:

- the wholesaler / intermediary role should be allowed to develop through market forces and should not be at risk of being stifled by unnecessary regulation;
- the services and prices of services supplied by NBN Co will be subject to a high degree of regulation in any case;
- the wholesaler / intermediary is not the only source of NBN wholesale services, i.e., RSPs can source NBN Co services directly from NBN Co;
- wholesalers / intermediaries will compete with one another for business with RSPs; and
- regulatory resources are scarce and need not be put to the regulation of NBN-based wholesale services.

Macquarie feels that wholesalers / intermediaries have an inherent incentive to compete and to provide services for RSPs. This is in stark contrast to Telstra in its role as a wholesaler of services from its copper based network. In short, Macquarie does not believe that the wholesale / intermediary market is likely to fail in the near term. Therefore, regulation of this market is not necessary at this time. However, should this market fail to develop, it would then be appropriate to reconsider what, if any, form of regulation is required. Macquarie suggests that the ACCC should revisit this question in three years' time.

14. Should there be a time limit on the regulation of NBN-based wholesale services? For example, should such regulation be rolled-back as competition develops, or as the roll-out of the NBN reaches completion?

As per its response to question 13, Macquarie is of the view that it is not necessary to regulate the market for NBN-based wholesale services at this time. Instead of setting a time limit on such regulation, it would be appropriate to revisit the question of whether the market for NBN-based wholesale services should be regulated at a future date. Macquarie suggests that the ACCC should revisit this matter in three years' time.

15. If NBN-based wholesale services are covered by the FADs for the relevant services, what is an appropriate method of ascertaining a price for these services?

As per its response to question 13, Macquarie is of the view that it is not necessary to regulate the market for NBN-based wholesale services at this time. In any case, the method of ascertaining the price of NBN-based services must first be addressed by the ACCC in its review of NBN Co's special access undertaking. As such, this question need not be addressed as part of the ACCC's current consultation on the FADs.

16. What fixed principles provisions should be included in FADs in respect of the pricing framework?

Macquarie believes in principle that it would be appropriate in the interests of consistency and certainty for the FADs to include fixed principles provisions. Macquarie understands that the ACCC proposes fixed principles provisions in respect of:

- the initial RAB value;
- the RAB roll-forward mechanism;
- the processes for assessing operating and capital expenditure forecasts;
- the adoption of a real vanilla WACC;
- the demand forecasts; and
- the cost allocation factors.

In general, Macquarie supports the ACCC's proposal. However, it must be noted that the ACCC has not put forward specific fixed principles provisions and has sought industry views on several matters. As such, it would be appropriate for the ACCC to consult further with industry on this matter.

Macquarie makes the following comments on specific matters raised by the ACCC:

Differences between Actual and Forecast Expenditures

Macquarie believes that adjustments should be made for under and over expenditure forecasts. Otherwise the access provider would have an incentive to repeatedly over forecast expenditures to the detriment of access seekers.

Cost pass Throughs

Macquarie believes that it would be appropriate to specify a fixed principles provision which makes allowances in respect of uncontrollable and unforeseeable events, such as a major natural disaster.

Debt Issuance Costs

Macquarie believes that it would be appropriate to specify a fixed principles provision in respect of the methodology for estimating debt issuance costs. This is because the proposed methodology has become a widely accepted practice.

WACC Parameters

Macquarie believes that a fixed principles provision should be specified which sets out the methods for determining the component values of the real vanilla WACC. That is, it would not be appropriate to set actual values for any WACC component. In respect of gamma, Macquarie believes that it would be inappropriate to set a fixed principles provision until such time as a widely accepted practice for setting gamma emerges.

17. Should any non-price terms and conditions be included in fixed principle provisions in the FADs? If yes, give details.

Yes. The non-price terms and conditions as proposed by the ACCC in the Discussion Paper (and which are included in the draft FADs) are essentially derived from the 2008 Model Terms. These provide the basis for setting non-price fixed principles provisions. Such provisions may be made in respect of:

- billing and notification;
- credit worthiness and security;
- general dispute resolution procedures;
- confidentiality provisions;
- communications with end users;
- network modernisation and upgrade provisions;
- suspension and termination;
- changes to operating manuals;
- ordering and provisioning; and
- liability (risk allocation) provisions.

Macquarie submits that the ACCC should propose specific non-price fixed principles provisions in respect of the above items. However, this task should not be considered as a high priority.

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18. What 'nominal termination date' should be set for these provisions?

The ACCC proposes that the 'nominal termination date' is 30 June 2021, which essentially means that the fixed principles provisions would apply for a ten year period. Macquarie supports the ACCC's proposal on the basis that such provisions by their nature are unlikely to change in the short-term and that they provide industry an acceptable degree of certainty during the transition to the NBN. Macquarie also notes that the proposed termination date sits comfortably with a three year regulatory period.

<u>Closing</u>

Macquarie welcomes the opportunity to participate in this important consultation. Major progress has been made on reforming the regulation of access to fixed services. However, further progress must be made before a successful outcome can be claimed. In this context, Macquarie wishes to emphasise the following points:

- the effect of the Exemption Determinations must be removed from the FADs because the ACCC no longer has the power to make them, they cease to have effect, they have an adverse impact on competition and they belong to the pre-NBN access regime;
- the opening RAB value should be based on DAC rather than on a $16 ULLS price;
- the length of the regulatory period should be three years given inherent uncertainty concerning Telstra's forecasts;
- PSTN OTA charges should be based on the updated disaggregated rate structure and not on the national average price because negotiation with Telstra will fail; and
- the FADs need not be extended to cover the supply of WLR, LCS, PSTN OTA services over NBN network infrastructure at this time.

Please feel free to contact me should you have any queries on this submission. Macquarie would be pleased to discuss the matters raised in this submission with appropriate ACCC staff.

Yours sincerely

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