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Macquarie Telecom Pty Limited ("**Macquarie**") welcomes the opportunity to make this submission to the panel conducting a cost-benefit analysis and review of the regulatory arrangements for the national broadband network ("**Panel**"). This submission responds to the matters raised in the Panel's consultation paper[1] concerning the Panel's review of the access arrangements provided under Part XIC of the *Competition and Consumer Act 2010* ("**CCA**") and the provisions of the *National Broadband Network Companies Act 2011* ("**NBN Act**"). The Panel's review of these matters fulfils a statutory requirement under section 152EOA of the CCA.

Macquarie has addressed the specific issues raised by the Panel in this submission. Macquarie broadly endorses the new landscape that the market is currently transitioning towards (namely, a "structurally separated" Telstra, the NBN being rolled out as quickly and efficiently as possible, and an access regime governed by the CCA). Macquarie further notes that many of the issues raised in the Consultation Paper have been significantly and comprehensively debated and addressed as part of various reviews and consultations with industry stakeholders over the past four years. Macquarie is concerned that the Consultation Paper appears to reopen many issues which have been comprehensively dealt with. Further, Macquarie is concerned that the Consultation Paper also calls for submissions on "more fundamental reforms".

Macquarie submits that, given the above, the Panel's primary focus should be considering the very significant implementation issues which have and are likely to arise as stakeholders transition to the new telecommunications landscape as opposed to devoting too much attention to covering areas which have been comprehensively dealt with under previous reviews or focussing on "more fundamental reforms". Further, Macquarie's overarching view is that while the new telecommunications landscape is not without its issues (and many

[1] Panel conducting a Cost-Benefit Analysis and Review of Regulatory Arrangements for the National Broadband Network, Telecommunications Regulatory Arrangements, Consultation Paper for the Purposes of Section 152EOA of the Competition and Consumer Act 2010, March 2014, ("**Consultation Paper**")

uncertainties still exist), the current regime is functional and the problems which do exist are best addressed by incremental improvements.

In line with the structure of the Consultation Paper, Macquarie's submission is set out in two main parts. The submission responds to the matters raised in the Consultation Paper concerning firstly, Part XIC and secondly, the NBN Act. The submission also comments on a related matter where the efficiency of a specific regulatory process may be improved.

1. Part XIC

1.1 Functional Focus of Part XIC

The Panel raises whether Part XIC should give greater emphasis to access to lower level service functionality and the relationship between Part XIC and the facilities access regime in the *Telecommunications Act 1997*. Macquarie notes that this matter is currently being considered by the Australian Competition and Consumer Commission ("**ACCC**") in the context of its Fixed Services Review. In particular, the ACCC has sought comments from industry stakeholders on whether it should commence an inquiry to consider whether certain facilities access services should be declared.

Macquarie considers that the existing framework for the regulation of access to telecommunications facilities is inadequate. Schedule 1 of the *Telecommunications Act 1997* provides that carriers are obliged to provide other carriers with access to "supplementary facilities", "telecommunications transmission towers" and to "underground facilities". In addition, the ACCC has developed the Facilities Access Code[2] pursuant to Schedule 1.

Macquarie considers that the shortcomings of this regime drive the need for facilities access services to be properly and appropriately regulated by the ACCC through the Part XIC declaration process. Such shortcomings include:

- the absence of any regulated charges for facilities access services; and
- the limited scope of services covered by the Facilities Access Code.

Macquarie is of the view that its concerns with the regulation of access to telecommunications facilities would be addressed in the short-term if the ACCC commenced an inquiry to consider whether certain facilities access services should be declared. That is, it would be presumed that relevant services would be declared and consequently the ACCC would set terms (including charges) on which they are supplied. Relevant facilities access services that Macquarie believes should be declared include:

- the Telstra Exchange Building Access service;
- the duct access service; and
- the External Interconnect Cable access service.

[2] ACCC, *A Code of Access to Telecommunications Transmission Towers, Sites of Towers and Underground Facilities*, October 1999, ("**Facilities Access Code**")

The Panel states that "many declared services are of a resale nature" and that "this could be seen as limiting the scope for innovation in the delivery of retail services by access seekers". Macquarie strongly disagrees with this proposition. In considering service declaration, the ACCC has looked wherever possible to give access to the network, and to encourage facilities based competition wherever practical. Where resale services are declared (such as WLR or LCS), this is because the availability of these declared services is essential to the maintenance of broad based competition in the market. Such services are only declared (or the declarations maintained) where it is clear that it will be detrimental to competition, including the encouragement of facilities based competition if such services were not available to access seekers. Macquarie considers that, in this regard, the right balance has been struck between resale and quasi-infrastructure services, although, as noted above, Macquarie considers that it would be appropriate for facilities access to be brought within the scope of Part XIC. Macquarie also considers that there may be scope to declare additional lower level services such as dark fibre, but considers that the ACCC has adequate powers to consider such service declarations under the current regime.

1.2 Part XIC and the Concept of Significant Market Power

The Panel raises whether Part XIC should focus on parties with significant (or a substantial degree of) market power ("**SMP**") rather than be of general application as it is at present. This would mean that only those parties that have SMP would be required (if requested by access seekers) to provide access to their networks on terms that would subsequently be set by the ACCC in access determinations.

Macquarie does not consider that there is a need to change Part XIC such that it applies only to those parties that have SMP. This is because:

- there does not appear to be concern arising from parties without SMP who have had to comply with Part XIC and suffered detriment;
- deciding whether a party has SMP is a judgement which may or may not be a complex exercise and may be subject to challenge thereby creating potentially unnecessary regulatory processes; and
- as noted in the Consultation Paper, the ACCC may make special provision for particular access providers in access determinations to the effect that an access determination applies only to specific access providers, for example, those with SMP.

1.3 Part XIC and Vectored VDSL 2

An emerging solution to the high cost and complexity of rolling out the NBN to individual properties in multi-dwelling units ("**MDUs**") is the use of vectored VDSL2. Essentially this involves using VDSL2 over copper lines into individual properties from the node or the main distribution frame. However, there is a degradation in service performance where multiple operators seek to use the same copper bundle to deliver DSL services. As such, optimal performance may only be achieved by a single provider.

The Panel raises whether it is appropriate for access to be declared to services over such networks so that end-users are offered the benefits of competition and choice. Macquarie is of the view that the benefits of competition and choice are paramount and supports a regime under which access seekers have rights of access to such services on terms set by the ACCC via an access determination. Macquarie notes that such a regime has a range of benefits including:

- overcoming the technical limitations on the use of VDSL2;
- avoiding the cost of duplicating infrastructure;
- avoiding the disruption and inconvenience to property owners and residents arising from the duplication of network roll-out;
- maximising the choice of service providers available to the residents of MDUs; and
- maximising the quality of service available to residents of MDUs by limiting potential interference.

Macquarie understands that the construction of VDSL2 network infrastructure would be caught by the provisions of Parts 7 and 8 of the *Telecommunications Act 1997*. Under these provisions any such network infrastructure built after 1 January 2011 must be wholesale-only, and that the operator of such a network must offer a layer 2 bitstream service on an open-access and non-discriminatory basis. However, such requirements may be overcome where networks built prior to this date are extended by no more than one kilometre.

As expressed in its earlier submission to the Panel in response to the Panel's Framing Paper, Macquarie is of the view that this exemption should be scrapped.[3] This is because Macquarie believes that it has serious detrimental implications for competition and the NBN. Further (leaving aside the exemption provisions) Macquarie does not consider that services provided over network infrastructure built under the provisions of Parts 7 and 8 of the *Telecommunications Act 1997* need to be declared under Part XIC. This is because providers of services using such infrastructure would be willing providers of access services.[4] Macquarie is of the view that NBN Co ought be the ubiquitous access network operator and the only effective provider of VDSL2 services.

1.4 Declaration

With regard to the declaration of services under Part XIC, the Panel raises two matters for consideration:

- whether the LTIE test needs to be revised and if so, to what end; and
- whether there are services which should be declared on an enduring basis.

1.4.1 LTIE

The ACCC must be satisfied that the declaration of a given service will promote the LTIE before it can declare that service. In turn, the LTIE involves an assessment against the following three objectives:

- promoting competition in markets for telecommunications services;
- achieving any-to-any connectivity; and
- encouraging efficient use and investment in infrastructure by which the service is supplied.

[3] Macquarie, Submission to NBN Regulatory Review, 14 March 2014, (reference IP 031401), page 6
[4] ibid, page 11

Macquarie considers that the LTIE is and will continue to be a valid criterion for the declaration of a given service. That is, the promotion of end-user benefits is an appropriate test for regulatory intervention. Of the three objectives that make up the LTIE assessment, Macquarie considers that the objective of any-to-any has become less relevant. This is because in the case of resale services (e.g., wholesale line rental) and access services (e.g., unconditioned local loop) there is no connectivity between the users of different networks unlike in the case of interconnection services (e.g., PSTN terminating access). This means that for many services which may be sought by access seekers any-to-any connectivity is not specifically an issue. However, the principle of any-to-any connectivity remains an important underpinning of the regulatory regime.

Macquarie supports the continued use of the LTIE as a valid basis for deciding whether to declare a given service. In situations where any-to-any connectivity is essentially irrelevant, the ACCC has given it little or no weight. As such, its existence has not resulted in inappropriate regulatory decisions. Accordingly, Macquarie sees no material basis for change in relation to this matter.

1.4.2 Duration of Declaration

As a principle, Macquarie is not in favour of enduring regulatory decisions. This is because the communications industry is the subject of on-going change and there is a danger that enduring regulatory decisions would quickly become dated and impose unnecessary burdens on market participants. The recent removal of outdated legislation and regulations under the Australian Government's "red-tape review" demonstrates the downside of enduring regulatory decisions.

Macquarie accepts that strong arguments could be made in favour of the enduring declaration of terminating access services and NBN Co's supply of bitstream services. This is because in the case of terminating access, operators will always control access to their networks and can set anti-competitive terms of access. In the case of the bitstream service, this is the basic service that NBN Co will provide. However, Macquarie does not believe that legislative change to enable enduring declaration of services is justified. This is because the five year declaration that the ACCC has recently made, for example, in respect of the mobile terminating access service provides access seekers with sufficient certainty. In addition, NBN Co's 30 year SAU provides sufficient certainty for access seekers on its supply of bit stream services. That is, existing arrangements are sufficient and evidently have not caused material detriment to access seekers.

1.5 Standard Forms of Access Agreements

The Panel is seeking views on whether the Standard Forms of Access Agreements ("**SFAA**") processes work effectively and, if not, how they could be improved. The Panel notes that the "SFAA processes may be seen as problematic because of NBN Co's ability to split its terms and conditions between its SAU and SFAA. This has the potential to cause complexity and confusion, particularly in terms of the hierarchy of terms and conditions". The Panel further notes that "there may also be concern that NBN Co's market power – particularly in the long term once its network is constructed – may encourage it to issue SFAAs on a 'take it or leave it' basis".

Macquarie agrees that this is a potential problem, particularly given the current legislative hierarchy issues (discussed in detail below in section 1.11). In the past, the ACCC has

inferred that there is some degree of choice whether or not to use NBN Co's network:

> *Entry into an Access Agreement based on a Standard Form of Access Agreement is a commercial decision for persons who may wish to provide services utilising the NBN Co Network.*[5]

Macquarie submits that in practical terms this is clearly not the case. Far from being a "commercial decision", entry into access agreements based on a "take it or leave it" style SFAA may be the ***only*** viable option for access seekers at that time. In other words, the access seeker is in a position whereby it is unable to wait for a regulated decision and if it does not enter into an access agreement based on the "take it or leave it" SFAA it simply cannot gain access to the service. The access seeker then becomes bound by unfavourable terms and cannot later take the benefit of better terms of access subsequently provided for in a regulated decision.

This hierarchy issue has been a primary concern for access seekers ever since the new access regime was introduced five years ago. Addressing this issue continues to be a critical focus for access seekers.

Macquarie notes that NBN Co had an opportunity to "voluntarily" address the hierarchy issue by including clauses in its Wholesale Broadband Access Agreement (**WBA**) which clarified that access seekers could take the benefit of regulated decisions which were subsequently introduced (to the extent such decisions were inconsistent with the WBA). NBN Co did not voluntarily address this issue in its WBA. Access seekers then went on to specifically advocate for this issue to be addressed during the ACCC's consultation regarding NBN Co's SAU[6]. This issue was not addressed as part of that consultation.

Given NBN Co's reluctance to voluntarily address the hierarchy issue and the ongoing and genuine concern of access seekers, Macquarie submits that the argument for legislative change to address this long standing hierarchy issue are even more compelling. Subject to the hierarchy issue being addressed, Macquarie is otherwise comfortable with the current processes regarding SFAAs.

1.6 Standard Access Obligations

As noted in the Consultation Paper, the Standard Access Obligations ("**SAOs**") are the key requirement on access providers, i.e., the obligation to provide access to a declared service in a form that allows an access seeker to use the declared service to provide its own carriage or content service. The additional elements of the SAOs are intended to require access providers to supply the service to access seekers in a manner that is equivalent to how it supplies it to itself.

The Panel has asked in the Consultation Paper if the SAOs need to be revised, and if so, what should the SAOs cover? As a general comment, Macquarie believes it is important for the Panel to acknowledge that the effectiveness of the equivalence objectives of the SAO have been impacted to a degree by the provisions of Telstra's Overarching Equivalence Commitment ("**OEC**") provided for in Telstra's Structural Separation Undertaking ("**SSU**").

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[5] See page 19, ACCC's Consultation Paper entitled NBN Co Limited Special Access Undertaking Consultation Paper, dated December 2011

[6] See submissions by Macquarie and joint submissions by iiNet, Internode, and TrasAct Capital Communications Pty Limited to the ACCC's Consultation Paper entitled NBN Co Limited Special Access Undertaking Consultation Paper, dated December 2011.

Under the OEC, Telstra undertakes that the supply of certain regulated services to wholesale customers will, overall, be equivalent to the comparable retail services Telstra provides itself. However, Telstra's OEC is subject to many restrictions, carve outs and limitations that undermine the overall objective of providing equivalence. Further, there are some uncertainties regarding the interaction between the SSU and the SAOs. These uncertainties were discussed in detail during public consultation over the SSU. At that time Macquarie provided detailed submission on the issues.[7]

Given the impact that the SSU has on the SAOs, Macquarie submits that the Panel should consider including in the SAOs a hard obligation on access providers to genuinely provide services on an equivalent basis to that which it supplies itself. In addition, the SAOs should contain clear and enforceable consequences for a failure by access providers to provide declared services on an equivalent basis.

1.7 Access Determinations

Macquarie notes that the power for the ACCC to make access determinations was introduced in 2010 to replace the unworkable "negotiate-arbitrate" model. This model was inadequate because of the significant differences in bargaining power between Telstra as the dominant market player and access provider on the one hand and access seekers on the other. Empowering the ACCC to make access determinations has been effective in reaching timely regulated outcomes and as such has been welcomed by access seekers such as Macquarie.

The Panel has sought comment from stakeholders on a number of matters relating to access determinations. These matters and Macquarie's comments are set out below.

1.7.1 Effectiveness of Access Determinations

Macquarie is satisfied with the general effectiveness of the access determinations framework of Part XIC. This is particularly so given the unworkable negotiate-arbitrate model that it replaced. Macquarie does not believe that a reference offer model would be better than the Part XIC model. The reference offer model was essentially an initiative of the World Trade Organisation in the mid 1990s and was introduced into country markets which were in their early stages of liberalisation in order to force incumbent operators to offer terms of access to new market entrants. Macquarie submits that despite its imperfections the Australian communications market is more mature and demands a sophisticated access framework. Moreover, a move to a reference offer model to replace the existing Part XIC framework would be a major leap backwards.

1.7.2 Criteria for Access Determinations

The criteria for making an access determination includes the LTIE and the need to balance the interests of access seekers and access providers. Macquarie considers that these criteria are satisfactory and are likely to remain so, thereby obviating the need for change. That is, Macquarie is not aware of any sub-optimal access determination which was made as a result of the criteria on which it was made.

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[7] Macquarie provided a detailed review of the OEC at the time Telstra's SSU was being considered. See *Competitive Carriers' Coalition Response – Industry Forum and Further Assessment of Telstra's Structural Separation Undertaking and Additional Proposals*, dated November 2011

1.7.3 Different Terms and Conditions for Different Parties

The Panel seeks views on whether the ACCC should have the power to specify different terms and conditions for different access providers and access seekers. Macquarie considers that this is appropriate in the case of access providers, particularly where a given access seeker controls significant bottleneck network infrastructure. That is, it may be appropriate for some access providers to be free from the obligations arising from an access determination because, for example, their relatively small scale of operations and impact on the overall market.

Prima facie different terms and conditions for different access seekers suggests discriminatory terms of supply between access seekers to which Macquarie is opposed in principle. That is, it is not appropriate for some access seekers to have access to services from the one access provider on terms which may be more (or less) favourable than the terms that are applicable to other access seekers.

1.7.4 Methodology for Determining Prices

The ACCC has the flexibility to decide the methodology to be used for determining prices in making an access determination. Macquarie believes that this flexibility is appropriate for the ACCC to exercise as different circumstances apply to each situation and as regulatory practices develop. Macquarie does not consider that it would be appropriate for Ministerial pricing determinations to guide the ACCC on pricing matters. This is because the expertise of such a detailed matter lies more with the ACCC than within the Ministry.

1.7.5 Merits Review

The Panel has canvassed in the Consultation Paper if access determinations should be the subject of merits review and has outlined a number of perceived benefits that merits review may have in the area of general competition law. Macquarie strongly rejects the reintroduction of merits review in connection with access determinations.

Prima facie, merits review may appear to provide a relatively neutral process for all stakeholders involved. However, in practice and in Macquarie's experience, merits review tends to favour the incumbent both because of its deeper pocket, and because the additional delay involved in a merits review process tends to favour the incumbent's position, even if the review is ultimately unsuccessful. Merits review is a tool which has historically been used by the incumbent to create delay and uncertainty in the market. When merits review are "gamed" in this fashion by the incumbent, there is an increase in uncertainty and expense for access seekers.

It has been clearly documented, that the removal of merits review from Australia's access regulatory framework was essentially designed to address the issues outlined above and to provide certainty for market players regarding regulatory decisions and to end considerable waste in costs and time in participating in the review process.

While there is no mechanism or process for either access providers or access seekers to seek a review of an ACCC access determination this is essentially a trade-off. That is, a trade-off between the certainty of a regulatory decision (whether or not that decision is good or bad) against the uncertainty that a decision may be reviewed, the cost of participating in

the review and the consequences of a decision being overturned. In Macquarie's view, given the historical use of merits review by the incumbent, the absence of a merits review is the preferred situation.

Further, Macquarie's firm view, is that the benefits of merits review outlined by the Panel in the Consultation Paper, can only ever be realised where there is a true equality of bargaining power between access seekers and access providers. Such equality of bargaining position is only every likely to be achieved in the Australian communications market when (and if) the structural separation process has been fully completed.

1.7.6 Procedural Fairness and Interim Access Determinations

The Panel seeks views on whether the making of interim access determinations ("**IADs**") should be subject to procedural fairness and whether the effectiveness of IADs can be preserved with the imposition of procedural fairness requirements. Macquarie considers that by their nature IADs are a short-term construct which does not fit comfortably with procedural fairness of requirements such as stakeholder consultation and decision making transparency. That is, IADs are essentially used to fill time-gaps while final access determinations are made on the basis of procedural fairness requirements. As such, Macquarie does not believe that making IADs subject to procedural fairness requirements is warranted.

1.8 Binding Rules of Conduct

With regard to binding rules of conduct ("**BROC**"), the Panel raises two matters for consideration:

- whether the ACCC's powers to make BROC should be removed, retained or expanded; and
- whether BROC should be subject to procedural fairness and / or merits review and whether the effectiveness of BROC can be preserved with the imposition of procedural fairness requirements.

1.8.1 BROC and ACCC

Macquarie understands that the policy intention of empowering the ACCC to make BROC is to enable the ACCC to address an urgent need relating to the supply of a declared service. Accordingly, the duration of BROC are limited to a maximum of 12 months. While it is noted that the ACCC has not made BROC to date, this should not suggest that the ACCC's powers to make BROC should be removed. Macquarie considers that BROC are an essential mechanism for the ACCC to have at its disposal should a situation arise that requires immediate regulatory intervention.

1.8.2 BROC and Procedural Fairness

As per its response regarding IADs and procedural fairness (see section 1.7.6), Macquarie is of the view that the effectiveness of BROC would be compromised were procedural fairness requirements to be imposed. As such, Macquarie does not believe that making BROC subject to procedural fairness requirements is warranted.

1.9 SAUs

The Panel notes in the Consultation Paper that where a service has not previously been declared, or in the case of a service provided by NBN Co, has not been declared following a public inquiry and no access determination applies, an access provider can lodge an SAU with the ACCC, setting out its proposed terms of access for the service. Macquarie notes that in respect of the NBN Special Access Undertaking ("**NBN SAU**") there have unfortunately been some flaws in the negotiation process with NBN Co. These issues have been extensively documented by the media.[8]

Macquarie submits that, despite the somewhat protracted and complicated process for access seekers negotiating with NBN Co in respect of the NBN SAU the SAU process itself is not inherently flawed. In other words, the issues with finalising the NBN SAU are not necessarily due to the structural process set out in the legislative regime, but due in part to the inherent complexity of setting access arrangements in place for the NBN, and in part to the approach taken to the process by NBN Co itself.

1.10 Ministerial Pricing Determinations

The Panel seeks comments regarding whether concerns about government involvement in detailed administrative process remain valid and whether the power to make Ministerial pricing determinations should be repealed or retained as a reserve power only. As noted in its response above concerning "methodology for determining prices" (see section 1.7.4) Macquarie is of the view that it is not appropriate for governments to be involved in detailed administrative matters essentially because the necessary expertise does not reside within the Ministry.

While noting that no Ministerial pricing determination has ever been made, Macquarie believes that the power to make such a determination should remain as a reserve power. This is because this provides a discipline for the ACCC to ensure that the pricing methodologies that it adopts need to be appropriate for the circumstances in which they are applied. That is, the ACCC's choice of pricing methodology could be over-ruled by a Ministerial pricing determination.

1.11 Access Agreements and Hierarchy of Terms

Macquarie notes that Part XIC establishes a legislative hierarchy under which access agreements have primacy. In order, an SAU follows, then BROC and then an access determination. The Panel seeks comments on whether access agreements should continue to have primacy and, if not, how the hierarchy should be set.

Macquarie has a four year history[9] of strongly objecting to the current legislative hierarchy from the time it was first introduced in the *Telecommunications Legislation Amendment (Competition and Consumer Safeguards) Bill 2009*. Macquarie has always maintained that ACCC decisions and processes should generally have primacy over existing commercial arrangements unless the parties decide against incorporating the relevant ACCC decision or process into their arrangements subsequent to the regulatory decision being handed down.

[8] See articles published in the Financial Review including *NBN Co Accepts Special Access Undertaking*, published 20 November 2013 and *Telco's could walk out on 'inflexible NBN", iiNEt Warns*, published 4 July 2013

[9] See for example *Macquarie's Submission to Inquiry on Telecommunications Legislation Amendment (Competition and Consumer Safeguards) Bill 2009*, dated 7 October 2009 and the Competitive Carriers' Coalition Response – *Industry Forum and Further Assessment of Telstra's Structural Separation Undertaking and Additional Proposals*, dated November 2011

Macquarie is concerned that the access agreements have primacy over access determinations and BROC. This concern primarily stems from the severe imbalance in competitive strength and bargaining power between access providers (Telstra and NBN Co) on the one hand and access seekers like Macquarie on the other. In particular, it means that access seekers are essentially in a "take it or leave it" situation in reaching an agreement with access providers which in turn means that terms of access agreements are typically in the favour of access providers.

As a result, access seekers can be in a situation where unfavourable terms are locked into access agreements and regulatory intervention through access determinations and BROC not able to provide any relief. That is, even though the ACCC makes a ruling on a matter it will have no affect on the relevant terms which are set out in an access agreement.

The practical implications of this are discussed in detail above in Macquarie's discussion regarding SFAAs (see section 1.5). However, to reiterate, it is sometimes not a "commercial decision", to enter into access agreements but the ***only*** viable option for access seekers at that time. In other words, the access seeker is in a position whereby it is unable to wait for a regulatory decision and if it does not enter into the access agreement on offer, it simply cannot gain access to the service. The access seeker then becomes bound by unfavourable terms and cannot later take the benefit of better terms of access subsequently provided for in a regulated decision.

Macquarie submits that the arguments in favour of amending the legislative hierarchy are compelling (and have always been so). Accordingly, the Panel should seriously consider addressing this significant concern for access seekers by legislative amendments to the hierarchy regime.

Macquarie is of the view that the hierarchy (from highest to lowest) should be as follows:

- BROC;
- SAU;
- Access determinations; and
- Access agreements.

Macquarie's rationale for this view is explained as follows. In an operating environment where there is a severe imbalance in the bargaining power between access providers (Telstra and NBN Co) and access seekers, access agreements should be at the bottom of the hierarchy. This is because in this environment access agreements are essentially based on the access providers' "take it or leave it" terms. The superiority of an access determination over an access agreement reflects the role of the ACCC to independently set the basic terms of access on the basis of a public inquiry. This ensures that key terms of access agreements are independently decided.

The SAU provides regulator-approved terms on which an access provider is prepared to supply services to access seekers. The SAU out-ranks an access determination because of its longer-term and more comprehensive nature. BROC allow a short-term regulatory "fix" without the need for undertaking a public inquiry and is therefore at the top of the hierarchy. Moreover, the primacy of BROC in the hierarchy ensures that the regulator is the final arbiter on matters which are in dispute between access providers and access seekers.

2. NBN Corporations

The Panel seeks comments from stakeholders on a number of matters concerning the operations of NBN corporations. These matters and Macquarie's comments are given below.

2.1 NBN Co's Ability to Supply to Utilities

Macquarie notes that NBN Co is able to supply services directly to various types of utilities. This ability is an exception to the general rule that NBN Co should only supply services to carriers and service providers. Macquarie further notes that this exception has not been exercised.

Macquarie suggests that it may be too early in NBN Co's evolution to tell whether such ability is appropriate or not. Macquarie considers that the basis on which the exception was originally provided remains valid or at least untested. Accordingly, Macquarie sees no reason at this time for making any change.

2.2 NBN Co's Ability to Deal with End-Users

NBN Co is generally prevented from dealing with end-users as a fundamental aspect of its wholesale-only role. Macquarie strongly supports the principle that NBN Co should not deal with end-users. While recognising that there may be operational circumstances where this should be relaxed on the basis of efficiency, any departure from this requirement should be strictly limited.

2.3 NBN Co's Supply of Layer 2 Services

Macquarie submits that it is a key underlying principle of the policy framework that NBN Co provides Layer 2 services. It is, however, recognised that the efficient supply of satellite services may require NBN Co to provide some functionality at Layer 3. Given that this is not material in the sense that the satellite platform accounts for three *per cent* of NBN Co's services, Macquarie considers that this exception is acceptable. Moreover, as this is essentially an operational matter, Macquarie submits that it is not necessary to have NBN Co's supply of Layer 2 services and the basis of any exceptions to this requirement set out in legislation.

2.4 NBN Co's Supply of other Goods and its Investments

In order to focus on its core activities of supplying wholesale-only services, NBN Co faces restriction on the scope of services it may provide and the investments it may make. At this time, Macquarie does not see any need for changing the existing arrangements.

3. Other Related Matters

The ACCC is currently undertaking an inquiry into the making of a final access determination for the declared fixed-line services ("**Fixed Services FAD**"). The existing Fixed Services FAD expires on 30 June 2014. The ACCC has already stated that it will not be able to make a replacement Fixed Services FAD before the existing Fixed Services FAD expires.

Macquarie submits that this is a sub-optimal situation. An essential part of the ACCC's inquiry process is Telstra information acquired by the ACCC under the Building Block Model Record Keeping and Reporting Rule ("**BBM RKR**").

Macquarie submits that the inability of the ACCC to make a replacement Fixed Services FAD before the existing Fixed Services FAD expires, is in part caused by the processes set out in section 151BUA of the CCA concerning the disclosure of information obtained under instruments including the BBM RKR. In particular, the ACCC must consult with industry for a period of 28 days prior to issuing a disclosure notice to Telstra and following that Telstra has 28 days to comply with such notice. Macquarie submits that these time periods are simply too long.

4. Closing

Macquarie welcomes the opportunity to make this submission in response to the Panel's Consultation Paper. Macquarie's key views as set out in this submission are as follows:

- the ACCC should commence an inquiry to consider whether certain facilities access services should be declared;
- there is no need to change Part XIC such that it applies only to those parties that have SMP;
- the one kilometre exemption under Parts 7 and 8 of the *Telecommunications Act 1997* should be scrapped;
- it is not appropriate for Ministerial pricing determinations to guide the ACCC on pricing matters;
- the reintroduction of merits review in connection with access determinations is strongly rejected;
- the hierarchy (from highest to lowest) should be BROC, SAU, access determinations, and access agreements;
- there is no need to change those regulations which impose limitations on NBN Co's operations; and
- the time periods under section 151BUA of the CCA are too long.

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

Yours sincerely

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