Macquarie
CORPORATE

5 December 2003

Mr. Andrew J. Haire
Senior Director (Policy and Regulation)
Infocomm Development Authority of Singapore
8 Temasek Boulevard
#14-00 Suntec Tower Three
Singapore 038988

By Fax: (65) 6211 2116

By Email: hema_ramnani@ida.gov.sg.

Dear Mr Haire

MACQUARIE'S SUBMISSION ON COMPETITION CODE REVIEW

In response to the Infocomm Development Authority of Singapore's consultation document "First Triennial Review Of The Code Of Practice For Competition In The Provision Of Telecommunications Services", please find following Macquarie Corporate Telecommunications Pte Ltd's comments for your consideration.

Please feel free to contact me on **+61 3 9206 6883** or **mkrishnapillai@macquarie.net.au** if you would like to discuss Macquarie's submission further.

Yours faithfully

MAHA KRISHNAPILLAI
National Executive, Strategy
Head of Regulatory, Asia and Australia

MACQUARIE'S SUBMISSION IN RESPONSE TO IDA'S CONSULTATION DOCUMENT

FIRST TRIENNIAL REVIEW OF THE CODE OF PRACTICE FOR COMPETITION IN THE PROVISION OF TELECOMMUNICATIONS SERVICES

EXECUTIVE SUMMARY

- Macquarie welcomes the opportunity to comment on the triennial review of the Code. We believe that the Code establishes a sound framework for competition in Singapore. However, the Code Review provides a good opportunity for IDA to strengthen the framework so that the Code is as effective as possible in practice as well as on paper.

- Macquarie considers that the Code Review should not take place in a vacuum. The IDA must be guided by competitive conditions and in particular the fact that SingTel still dominates all key telecommunications markets.

- The IDA should also have regard to the RIO and changes industry has proposed to that document. It should also consider the regulatory regime as a whole, including whether it is time to amend licensing obligations. Such changes may need to be reflected in the revised Code.

- As examples, IDA should remove unnecessary licensing obligations on non-dominant operators such as accounting separation and instead include these as Dominant Licensee obligations under the Code.

- IDA should also amend the Code to lay the groundwork for proposed RIO changes. For example, the Code should specify that the RIO must include binding SLAs with real penalties. The Code should also contain stronger obligations for ULL provision including technical specifications and also details of network information that SingTel must provide.

- Given that the RIO review has now been substantially delayed, Macquarie believes that some of these issues may need to be addressed on an urgent interim basis, without waiting for a complete Code and RIO review. Industry should not have to suffer loss of business for the sake of process.

- In terms of guiding principles for the Code Review, IDA should take a more balanced approach between facilities and service based competition. Where new entrants need to supplement built network with bought network, they should be supported by Code provisions and in particular wholesale obligations.

- The Code wholesale regime should be strengthened and clarified. Under the tariff rules, there should be an obligation for SingTel to provide retail services to other licensees for resale at retail minus prices to recognise avoided costs and to allow for downstream competition.

- There should be an obligation for SingTel to provide services it has developed for wholesale use (ie. no retail equivalent) under tariff and on a non-discriminatory basis. Pricing should be set on a non-discriminatory basis with regard to benchmarks. This category should cover services that SingTel has developed for itself or affiliates.

- Wholesale services that are so critical to competition that they are like IRS should be provided under the RIO on the same basis as IRS ie. at cost. The IDA could reserve the right to use retail minus for certain services.

- On this basis, LLCs should be included as a wholesale service under the RIO and cost based access pricing ought be considered.

- The IDA should more generally improve the Code by developing guidelines that explain the approach it will take under various provisions. These guidelines should be referred to in the Code as binding.

- Key areas where guidelines are necessary include: dominance/SMP; typical abuses of dominance; price/cost models and tariff process; enforcement criteria.

- While tariff obligations have been improved, there is need for further strengthening by way of the Code requiring transparent setting/approval/implementation of tariffs as well as detailing a clear publication process.

- Section 4 of the Code and RIO related provisions should be amended to include QoS obligations on dominant licensees.

- Dispute resolution and enforcement procedures continue to be a key area of concern for Macquarie. These need to be simplified and IDA needs to take a more proactive role in disputes. The key change required is a policy shift by IDA so that it recognises that dealings with SingTel are generally *not* commercial.

- IDA also needs to address information asymmetries in the industry by using its information gathering powers to obtain data from SingTel in support of competitor complaints.

- The Code should provide for IDA to take on an informal dispute resolution role where it guides parties on implementation issues such as QoS.

- Code enforcement would also be improved with private rights of action and increased penalties with a real deterrent value.

CONTENTS OF SUBMISSION

MAHA KRISHNAPILLAI **1**

CONTENTS OF SUBMISSION 4

SECTION 1: MACQUARIE'S INTEREST IN THIS CONSULTATION 7

SECTION 2: PRELIMINARY COMMENTS ON CONTEXT OF REVIEW 8

2.1 RIO-RELATED CONCERNS 8

2.1.1 Timing of reviews 8

2.1.2 RIO submission issues 8

2.2 BROADER REGIME REQUIRES REASSESSMENT 9

2.3 NEED FOR REVIEW TO REFLECT ACTUAL (RATHER THAN IDEAL) SINGAPORE CONDITIONS 10

SECTION 3: KEY CONCERNS WITH CURRENT AND PROPOSED CODE 11

3.1 NEED TO PROMOTE SERVICE BASED COMPETITION 11

3.2 EFFECTIVE WHOLESALE AND RESALE REGIME REQUIRED TO PROMOTE COMPETITION 11

3.2.1 Wholesale pricing should be required for services supplied to other operators 11

3.2.2 Critical wholesale services need to be designated, especially LLCs 12

3.3 NEED FOR GREATER IDA TRANSPARENCY INCLUDING BY ISSUE OF DETAILED GUIDELINES 12

3.3.1 Dominance and SMP 13

3.3.2 Typical abuses of dominance 13

3.3.3 Pricing/tariff transparency 14

3.3.4 Criteria for when IDA will act on an industry complaint 14

3.3.5 Generally 14

3.4 NEED FOR IMPROVED PRICING RULES 14

3.4.1 Scope of tariff obligations 14

3.4.2 Implementation transparency 14

3.5 QOS REGULATION ESSENTIAL FOR EFFECTIVE INTERCONNECTION 15

3.6 DISPUTE RESOLUTION AND ENFORCEMENT PROCEDURES MUST BE MORE USER FRIENDLY 16

3.6.1 Strengthening of information gathering powers 16

3.6.2 Need for streamlined dispute resolution and enforcement 16

3.6.3 IDA guidance required with RIO implementation disputes eg. QoS issues 17

3.6.4 Private rights of action are critical 18

3.6.5 Need for greater penalties, both threatened and actual 18

SECTION 4: COMMENTS ON SPECIFIC CODE PROVISIONS 20

4.1 PROPOSED SECTION 1 20

4.1.1 1.1, 1.5.1 Industry self-regulation 20

4.1.2 1.5.3 Facilities-based competition 20

4.1.3 1.5.6-7 IDA decision-making 20

4.1.4 1.6.2-3 Code modification 20

4.1.5 1.7.1 Code exemptions 20

4.2 PROPOSED SECTION 2 20

4.2.1 2.2(b) Licensed entity only 21

4.2.2 2.3(b)(i), 2.5.2) Dominance reclassification and exemption 21

4.3 PROPOSED SECTION 3 21

4.3.1 3.2.3 Penalties ... 21
4.3.2 3.2.7 Complaint publication ... 21
4.4 PROPOSED SECTION 4 ... 22
4.4.1 4.2.1.2 Non-discrimination ... 22
4.4.2 4.2.1.3 Unbundling ... 22
4.4.3 4.2.2.2 Resale ... 23
4.4.4 4.3 Wholesale services ... 23
4.4.5 4.4.2.1 Tariff information ... 23
4.4.5 4.4.3.1 Tariff review ... 23
4.4.6 4.6 Supply on tariff ... 23
4.4.7 4.7 Periodic review ... 23
4.5 PROPOSED SECTION 5 ... 24
4.5.1 5.3(a)(ii), 5.6.1.1(a)(ii) Submission of agreement to IDA / modification ... 24
4.5.2 5.4 Minimum interconnection duties ... 24
4.6 PROPOSED SECTION 6 ... 24
4.6.1 6.2.1 RIO term ... 24
4.6.2 6.3 RIO content ... 24
4.6.3 6.3.1 Development of RIO ... 25
4.6.4 6.3.3.3 Collocation space ... 25
4.6.5 6.3.3.4 UNE/UNS ... 25
4.6.6 6.3.3.5 Wholesale services ... 25
4.6.7 6.3.4.1 Discrimination ... 25
4.6.8 6.3.5(b) Retail minus pricing ... 25
4.6.9 6.3.6 Modification of RIO ... 25
4.6.10 6.3.7 Review of RIO ... 25
4.7 6.6 Enforcement ... 26
4.8 PROPOSED SECTION 7 ... 26
4.8 PROPOSED SECTION 8 ... 26
4.8.1 Abuse of dominance ... 26
4.8.2 Removal of provisions governing false and misleading claims ... 26
4.8.3 8.2.1.2 Price squeezes ... 26
4.9 PROPOSED SECTION 11 ... 27
4.9.1 11.2 Conciliation ... 27
4.9.2 11.3 Dispute resolution ... 27
4.9.3 11.4 IDA enforcement actions ... 27
4.9.4 11.4.1.1(v) Private requests for enforcement ... 27
4.9.5 11.9 Review process ... 28
4.10 PROPOSED SECTION 12 ... 28
4.10.1 12.4.3 Tariffs ... 28
4.10.2 12.4.5 RIO ... 28
4.11 PROPOSED APPENDIX 1 ... 28
4.12 PROPOSED APPENDIX 2 ... 29
4.12.1 Miscellaneous ... 29
4.12.2 2.4 Virtual interconnection ... 29
4.12.3 3 OT&T ... 29
4.12.4 4.2.1.3 Collocation space limitations ... 29
4.12.5 ULL ... 30
4.13 DISPUTE RESOLUTION GUIDELINES ... 30

SECTION 1: MACQUARIE'S INTEREST IN THIS CONSULTATION

Macquarie Corporate Telecommunications Pte Ltd (**Macquarie**) provides this submission in response to IDA's "Consultation Document: First Triennial Review of the Code of Practice for Competition in the Provision of Telecommunications Services" issued on 7 October 2003 (**Code Review**).

Macquarie is the holder of an SBO (Individual) Licence (**SBO(I)**). Under this licence, we provide a wide range of telecommunications services to corporate customers in Singapore. As an SBO(I) and more generally as a corporate citizen in Singapore, Macquarie has a strong interest in ensuring that the Code of Practice for Competition in the Provision of Telecommunications Services (**Code**) is an effective document in promoting competition in the telecommunications industry and enhancing the experience of Singapore telecommunications users.

We also have a particular interest in improving Code provisions as they relate to interconnection matters. As the IDA is aware, in order to provide our services, we interconnect with SingTel under the Reference Interconnection Offer (**RIO**). Currently, we acquire Virtual Interconnection and Call Origination, Transit and Termination (**OT&T**) such that review of Code and RIO provisions relating to these services is directly relevant to us. However, Macquarie has a broader interest in the Code and RIO review as an operator considering expansion opportunities including acquisition of additional RIO services. Further, effective operation of the Code and RIO at an upstream FBO supplier level is critical to ensuring our competitiveness.

Given our interest, we thank IDA for the opportunity to comment as part of the Code Review. Our submission first sets out some comments on the context for the Code Review before outlining key concerns we have with the Code. We then follow with comments on specific provisions identified in the Code Review as well as a provision by provision discussion of Code rules of interest to Macquarie.

SECTION 2: PRELIMINARY COMMENTS ON CONTEXT OF REVIEW

2.1 RIO-related concerns

2.1.1 Timing of reviews

In its RIO submission, Macquarie commented that the Code Review should take place prior to review of the RIO. We applaud the IDA's subsequent decision to reorder its reviews accordingly. However, it is disappointing that this now means completion of the RIO review will now be substantially delayed. We consider that this could easily have been avoided if there had been advance discussion between IDA and operators about review issues. In this regard, we reiterate earlier submissions that IDA should hold regular meetings with industry to discuss such matters and to develop and publish periodic work plans. We refer again to the precedent of OFTA's work plans published in relation to Hong Kong regulatory projects.

2.1.2 RIO submission issues

A number of the concerns that Macquarie has with the Code have already been identified by us in our RIO submission. In many instances where we have proposed changes to the RIO, we believe that these should be supported by new or amended Code provisions, rather than left to SingTel interpretation when redrafting the RIO. We briefly restate these here for IDA's ease of reference but also cross refer you to our earlier submission:

- Macquarie believes the Singapore RIO has largely been a success, particularly in terms of facilitating and expediting interconnect negotiations with the incumbent.
- However, review is needed to make the RIO more effective and competition friendly.
- Review should extend beyond administrative provisions to policies underlying the RIO.
- All elements of the RIO give extensive discretion to SingTel in relation to interpretation, delays, discrimination etc. This is not a commercial market and SingTel should not be the adjudicator – IDA should.
- The most fundamental change needed is to treat service based competition as being just as important as facilities competition.
- The RIO should also allow new entrants greater control over the manner of interconnect. SBOs should have rights to more than 2 IGS in line with FBOs..
- Operators should be able to acquire interconnect links from an operator of their choice. We note and support the proposed amendment to Appendix 2 of the Code in this regard.
- Another critical improvement to the RIO would be introduction of proper SLAs, with streamlined processes, shortened timeframes and real penalties for non-compliance that provide compensation to interconnecting operators.
- Macquarie also believes that formal dispute resolution processes under the RIO need to be streamlined and shortened with improved rights to request IDA intervention.
- There should be a further dispute resolution process for implementation disputes over matters such as QoS, with parties able to require IDA informal intervention.
- It is impossible for the IDA to forecast and include in the RIO every possible issue, indeed SingTel will always find and exploit loopholes no matter how prescriptive the RIO is. The

better solution is for IDA to set “interpretative rulings” that guide and facilitate industry cooperation.

- A major policy shift is also required in terms of price transparency. The way in which SingTel calculates and justifies costs and IDA incorporates into its FLEC methodology should be subject to broader industry scrutiny, particularly those experienced themselves in building networks.

- As a general principle, the IDA should significantly reduce SingTel's discretion under the RIO in relation to both price and non-price terms.

- There are also a number of concerns that Macquarie has with specific RIO provisions or responses to IDA questions, which are contained in our RIO submission.

- Of import, Macquarie is troubled by current regulation of unbundled local loop (**ULL**) under the RIO (and Code) and consequent poor take up of this service in Singapore (we refer to OFTA’s 2003 Study of International Competitiveness).

- In particular, there should be improved ULL QoS requirements, preferably in the form of real SLAs.

- Proper ULL technical specifications must also be included, whether they be for xDSL, or POTS specifications at worst case.

- The RIO should also contain adequate information on SingTel’s network.

- The term of ULL licences and related services or facilities should be in line with what SingTel offers its customers for retail xDSL services so that other operators have some ability to compete.

- Collocation procedures should be operator friendly and the RIO should not dictate the design of a licensee’s network by way of collocation requirements.

Some of these issues are addressed in more detail below as part of section 3.

2.2 Broader regime requires reassessment

Macquarie believes that IDA should proactively review or encourage the Government to review the broader telecommunications regime in Singapore. Improvements to the Code will only go part way to promoting competition and represent a piecemeal approach to reform. The time is ripe to also look at other regulations affecting the industry including the following:

- Removal of unnecessary licensing obligations imposed on non-dominant licensees such as accounting separation. This is out of line with international precedent and appears to serve no useful purpose in the Singapore context.

- Inclusion of accounting separation as an obligation specific to dominant licensees under the Code, rather than limiting to a licence obligation. This would improve transparency and accountability for compliance with the relevant rules, particularly if a publication obligation were imposed.

- Reduction of licence fees for FBOs to ensure a level playing field with SBOs who provide the same services. Lower fees would also allow Singapore operators to remain viable and competitive in an increasingly difficult economic environment. A change to the licence fee regime may also be necessary to ensure that it is more in line with best practice principles.

The above should be examined concurrently with the Code Review as in some cases such matters may require Code amendment or have an impact on the competitive environment to which the Code applies.

2.3 Need for review to reflect actual (rather than ideal) Singapore conditions

Macquarie believes that the Code is an extremely critical document and we fully support the need for its periodic review in order to ensure it remains effective and in line with international best practice.

At the same time, it is critical that Singapore regulation reflects the actual state of competition in Singapore. Following best practice does not mean rolling back regulation as a means of demonstrating that Singapore is as competitive as other jurisdictions that have done so. Rather, the IDA must make sure that it retains appropriate control over the industry. In particular, the current Code review must take into account that, while Singapore markets have been liberalised, SingTel remains dominant across all key telecommunications markets. In the absence of effective competition, SingTel must therefore be controlled by regulation. Where Code rules have to date proven ineffective in curbing SingTel dominance, the IDA should take the opportunity of the Code Review to strengthen the rules, rather than slavishly following an 'ideal' notion of deregulation and better target regulation of such dominance.

The same comments apply to any broader regime review if conducted by IDA in line with our above proposal.

SECTION 3: KEY CONCERNS WITH CURRENT AND PROPOSED CODE

3.1 Need to promote service based competition

Macquarie submits that an absolutely fundamental issue for the IDA to consider as it is carrying out all regulatory reviews is the extent to which it should continue to overly favour facilities based over service based competition. It should also consider the extent to which it should protect SingTel facilities over new entrant investment.

The government policy to date of promoting facilities based competition has clearly driven many of the provisions found in the current Code and RIO. We believe that this Code Review provides a good opportunity to assess the continued relevance of this policy. Macquarie is of the firm view that as Singapore telecoms markets mature, service based competition should be treated as equally, if not more, important in promoting consumer choice and quality of services. To this end, changes to the Code and RIO must be made. Issues such as eligibility for RIO services or specific RIO procedures make life more difficult in instances where an operator makes an informed business decision to buy SingTel services rather than to build.

Macquarie submits that improving the position under the Code and RIO of licensees where they elect not to build, will be largely neutral in terms of incentives for FBOs to build alternative networks. This is because, even with the current regulatory policy, given current economic conditions and forecasts for the future it is highly unlikely that Singapore will see alternative ubiquitous telecommunications networks appear within the next few years.

3.2 Effective wholesale and resale regime required to promote competition

3.2.1 Wholesale pricing should be required for services supplied to other operators

Macquarie submits that the proposed Code does not go far enough in regulating wholesale competition. While we support the improvements to wholesale regulation in the form of requirements for dominant licensees to publish wholesale tariffs *if* the have a wholesale product, such requirements are relatively meaningless in the absence of an obligation to provide the services in the first place. Macquarie strongly urges the IDA to take a more pro-competitive stance and require SingTel to provide services to other operators at wholesale rates, in line with the approach taken in other jurisdictions such as the United States. This approach would not be counter to facilities based competition as it would simply recognise the costs avoided by SingTel in supplying at the wholesale rather than retail level.

IDA has already acknowledged the well recognised principle of avoided costs at the wholesale level in proposing that mandated wholesale services be supplied at a retail minus price. We see no reason for a different approach to be taken for any service supplied by SingTel to other operators. Wherever SingTel supplies a retail service, it should be mandatory for it to provide that service or a wholesale equivalent to other operators at a transparent discount that allows other operators to compete with it downstream. In other words, the IDA should strengthen its proposal to require resale to require <u>an obligation to provide any retail services for resale at retail minus prices under the tariff regime</u>.

Macquarie does not suggest that IDA go so far as to mandate that SingTel supply any possible wholesale service requested in addition to this resale obligation. However, where SingTel does supply a special wholesale service (as distinct from a retail service for resale) to itself or other operators, such <u>wholesale specific services should also be subject to a mandatory supply obligation under the tariff regime at prices that are both non-discriminatory and in line with benchmarking. Retail minus may not be appropriate as there may be no equivalent retail product</u>. This category of mandated service is essential to prevent anti-competitive and discriminatory conduct on the part of

SingTel. We note that the proposed Code addresses this requirement but then confuses resale and wholesale services and the pricing that should apply.

Macquarie also submits that there should be a third category of service regulated at the wholesale level. These are services that IDA deems to be so critical to competition that it should designate them as special wholesale services under the RIO and impose obligations over and above those suggested for basic resale and wholesale services. For example:

- Cost based pricing might be required for certain resale services which are essential to competitors (such as LLCs), where retail minus pricing does not allow them to viably compete.

- Certain wholesale services not otherwise supplied by SingTel might be mandated to ensure effective competition, with IDA imposing either retail minus or cost based pricing depending on the nature of the service.

This category is simply a broader version of the IDA's proposed Code provisions for designated wholesale services, which allows for critical services to be brought under the RIO. However, Macquarie believes that the Code should retain flexibility by providing that designated wholesale services may be subject to cost based pricing. Where services are so essential to competition that they are equivalent to interconnect services (such as LLCs), retail minus pricing will be inappropriate. We refer to our earlier LLC submission in this regard.

To the extent that retail minus pricing is adopted for all basic wholesale and retail services as suggested above, Macquarie urges the IDA to set a specific discount in order to avoid the difficulties and delays inherent in actual calculations of avoidable costs for each service. As an example, we refer to the EU benchmarks that set a blanket retail minus 25%. Where services are more critical to competition, such as wholesale designated services, a more thorough analysis will be required including consideration of the application of cost based pricing if needed. Given the importance of these services to downstream competition, access pricing methodology must be detailed and transparent. Even if the IDA insists on applying retail minus for these critical services it should again set prices based on a rigorous basis rather than across the board discounts.

3.2.2 Critical wholesale services need to be designated, especially LLCs

While the Code contains provision for IDA to designate special wholesale services as referred to above, Macquarie is extremely concerned that the draft Code does not mention any such services in Appendix 2. Macquarie refers to its previous submissions to IDA that LLCs should be included as an IRS under the Code and RIO. We are aware that IDA is considering this matter alongside the Code and RIO reviews. However, we believe it is critical that any changes to the Code which would allow for appropriate treatment of LLCs should be made now, rather than delaying matters by making amendments post the general Code review.

In this regard, we maintain the position that LLCs should be included under the Code and RIO as broadband OT&T services ie. core IRS subject to cost based pricing. This should not require amendment to the main body of the Code but would involve a new provision in section 3 of Appendix 2 providing a high level overview of the LLC service in terms of its use as a wholesale access product (rather than a retail end to end service).

3.3 Need for greater IDA transparency including by issue of detailed guidelines

At a high level, the Code seeks to reflect global best practice as tailored for the Singapore context. Nevertheless, Macquarie believes that there is real industry concern with the Code at a more detailed or implementation level. Given the limited history of competition law and telecommunications deregulation in Singapore, there is substantial confusion as to how IDA intends

to apply many Code provisions and when or whether IDA will use its enforcement powers. The existing generic Code provisions and even the more specific dispute resolution and enforcement guidelines are insufficient to provide the certainty that industry requires, particularly given our reliance on the IDA in the absence of third party Code enforcement rights.

We propose that the IDA develop guidelines for key Code provisions in advance of issues arising. This will assist the IDA in being prepared for such issues and ensure regulatory certainty and transparency for licensees and consumers. Examples of areas where we believe guidelines are essential include the following.

3.3.1 Dominance and SMP

The proposed Code, in our view, has increased the ambiguity surrounding determinations of dominance and SMP. We believe that this should be addressed by the issue of detailed guidelines that would apply whether for the purposes of classification or exemption.

The recent example of SingTel's request for exemption from dominance obligations in the ITS market illustrates the lack of transparency in terms of IDA's approach to dominance issues. While the Code Review suggests that the new dominance definition is more in line with international precedent, Macquarie does not believe that this addresses the core problem that there is no clear Singapore precedent or documented approach that industry can refer to. The fact that the IDA's merger guidelines may include some indications of IDA's approach to competition analysis does not really go far enough either.

As proposed in our earlier ITS dominance submission, any guidelines on dominance and SMP assessment should include market share tests. While market share may not be determinative of dominance, use of threshold tests would substantially simplify the task of IDA when assessing dominance and also provide industry with a basic level of certainty. In line with international best practice, we believe the guidelines should include presumptive market share thresholds that can be rebutted by clear evidence of other market conditions eg. entry barriers. We refer to the examples mentioned in our ITS dominance submission.

We also submit that any guidelines in this area should also emphasise that an operator who dominates a particular market and has the ability to leverage its power into related markets can be deemed to be dominant in those related markets, despite the existence of other competitors. The concept of leveraged market power is well recognised overseas and should be documented as part of the Singapore approach.

3.3.2 Typical abuses of dominance

To date, the Code provisions on abuse of dominance remain under-utilised. This does not reflect the fact that SingTel does not engage in abuses but rather the fact that there are significant information asymmetries in competitors making complaints, both in terms of obtaining data from SingTel but also how the IDA will treat such complaints. The current and proposed Code provisions, while containing a basic outline of the IDA's proposed approach, do not go far enough. Given the absence of local precedent, industry needs to know which, if any, of the detailed approaches taken overseas the IDA will adopt. To address this, we believe that the IDA should issue detailed guidelines as to when it will find that conduct falls into a typical category of abuse such as predatory pricing or price squeezing. It could pick and choose from international approaches and tailor for Singapore. However, the key point is that the approach should be documented to ensure certainty and transparency in advance.

The recent example of industry complaints about LLC price squeezes demonstrates the delays in dealing with abuses that result if industry and the regulator do not have a clear and consistent approach. In this regard, Macquarie submits that should the IDA issue any price squeeze guidelines, they should incorporate accepted principles such as that wherever a wholesale price is higher than

the retail price for the same service (rather than any other downstream service), a price squeeze has occurred.

We also consider that the Code should contain more examples of abuses of dominance such as excessive pricing and forms of non-price predation. To the extent that IDA has reservations about including in the Code, given the general prohibition on abuse of dominance, it could still usefully elaborate examples in guidelines.

3.3.3 Pricing/tariff transparency

Where the Code refers to pricing or cost models such as LRIC, marginal cost, retail minus etc, guidelines would be useful in elaborating the IDA's implementation approach. It is critical that the IDA is transparent in implementing pricing or tariff rules.

As an example, the Code currently refers in loose terms to use of retail minus for wholesale services but at no point is this model detailed. As pointed out elsewhere in this submission, it is critical for industry to have some certainty as to how IDA will select the retail price benchmark, that it will use actual rather than published prices, and that it will have a transparent method for setting the appropriate discount (even if simply a standard percentage).

3.3.4 Criteria for when IDA will act on an industry complaint

Macquarie believes that the dispute resolution and enforcement guidelines are inadequate as they only set out applicable processes and avoid the key question of what factors the IDA will consider in deciding whether to use its resources in pursuing an industry complaint or dispute. We submit that the IDA should issue guidelines to address this.

3.3.5 Generally

Macquarie observes that regulators in other jurisdictions often take the approach of issuing competition guidelines in support of broader competition rules. In particular, we point to the detailed guidelines issued by the EU and in Australia in the competition and telecommunications arenas. These should serve as a precedent both in terms of the value of having guidelines as well as in terms of their actual content.

We also stress that the fact that guidelines will be issued should be mentioned in the Code. Again, this ensures regulatory accountability and gives the guidelines a critical legal basis.

3.4 Need for improved pricing rules

3.4.1 Scope of tariff obligations

Macquarie is concerned that retail tariff rules only apply to services where an operator is dominant. We fear that this will leave the IDA and industry without adequate published records of SingTel's pricing to prove anti-competitive conduct claims. Even though IDA may believe SingTel does not dominate a downstream market, it may for example be price squeezing an upstream market where it is dominant. To check the price squeeze, IDA and industry need to be able to monitor the price of retail products for which the wholesale service is an input. Similar needs arise in the case of anti-competitive cross subsidisation. This again reinforces the need for the IDA to acknowledge the existence of leverage of SMP into related "non dominant" markets.

3.4.2 Implementation transparency

Currently, interconnect prices are calculated and retail tariffs approved without any industry oversight to act as a check and balance. With the new wholesale tariff regime, again there is no

opportunity for industry to comment on IDA's approval process. Further, all pricing is implemented without any industry or public visibility.

While Macquarie supports the increased pricing transparency in the proposed Code, in terms of the new obligation to publish tariffs, we note that this obligation requires more substance if it is to be effective. In addition to publication of basic terms, key improvements needed include:

- An obligation to include detailed eligibility requirements.
- An obligation to include a clear service description, which leaves no room for doubt as to the exact scope of the service and any additional elements that may need to be acquired separately.
- Disclosure of how prices are calculated and how the published price and any discounts will be implemented.
- Opportunity for industry to provide input on whether prices are appropriate, including by reference to best practice as well as local conditions eg. whether licensees will be able to compete or will suffer a price squeeze.

We do not believe that the proposal for published tariffs to contain only basic terms can be justified on the basis that a dominant licensee needs to be able to complete. The reason why the tariffs must be published in the first place is because there is no effective competition in relation to the tariffed service.

Macquarie is also concerned in relation to the absence of clear processes for tariff obligations. For example, there should be a set timeframe for filing of resale tariffs and this should be short given that the tariffs will be based on existing retail filings. There should also be a format for filings to ensure that all necessary service details are provided.

Macquarie further supports current industry suggestions that some form of price control should be built into the tariff regime to encourage SingTel to be more efficient. In this regard we point to the fact that SingTel's LLC tariffs have not come down over the past 10 years despite changes to supply conditions. A price control mechanism would ensure that SingTel could no longer benefit from these monopoly rents.

We also believe the IDA should make clear that industry participants are entitled to initiate enforcement action for any SingTel failure to supply services on tariff. The Code should provide that they would be considered as parties injured by a tariff rule breach under s11.4 given the effect that a breach has on competition and thus competitors.

3.5 QoS regulation essential for effective interconnection

Regulators worldwide recognise that quality of service is a critical issue in interconnect regulation. If quality is inadequate, interconnection becomes meaningless, competitors cannot compete and consumers suffer.

There are two principle angles from which QoS can be approached:

- Ensuring that the incumbent offers interconnecting parties QoS no worse than the QoS levels the incumbent or its affiliates experience ie. non-discrimination.
- Ensuring that the incumbent offers interconnecting parties QoS that is in line with industry best practice or global benchmarks.

The latter approach will generally tend to support the former or be a mechanism to check for discrimination. In contrast, non-discrimination obligations do not of themselves ensure high quality nor do they provide any means of measuring compliance – they are just guiding principles. As is seen in most jurisdictions throughout the world, these are exceptionally difficult to enforce. Aggregate QoS standards will mask targeted QoS 'degradation' at certain exchanges (eg. IGS), and for certain wholesale customers (eg. in the corporate market). Macquarie therefore submits that the best approach is to supplement non-discrimination obligations with actual SLAs based on best practice benchmarks.

Currently, the Code and RIO lack any real QoS standards and are limited to non-discrimination principles and weak timeframes for SingTel performance. This should be addressed by the Code requiring inclusion of binding SLAs in the RIO for all key processes; from ordering, to provisioning, delivery, and fault management. Real penalties that reflect the loss to interconnecting operators should replace the current cosmetic RIO provisions included by SingTel that merely allow for reduction in payment of service charges. Even then, there are limited cases of enforceable QoS where the current cosmetic penalties apply.

Regulatory best practice would support inclusion of enforceable SLAs in SingTel's RIO. We refer the IDA in this regard to Oftel's approach to interconnect QoS. As Macquarie outlined in its LLC submission, Oftel itself specifies key provisions to be included in RIOs and also requires enforceable SLAs to be developed for the whole interconnect process. It has stressed the importance of including meaningful penalties given that an incumbent has no other incentive to provide adequate quality of service.

Macquarie does not detail in this submission appropriate SLAs as we believe that this should involve a proper review exercise with industry input on local and global best practice. However, at worst case if the IDA will not conduct such a review, it should at least shorten and fix current Code and RIO timeframes as binding and require SingTel to include penalties of a real, compensatory nature. QoS should also be specified in s4 of the Code as a dominant operator obligation.

3.6 Dispute resolution and enforcement procedures must be more user friendly

3.6.1 Strengthening of information gathering powers

Macquarie submits that the IDA needs to be more aggressive in using its information gathering powers. In particular, when competitors bring an issue to the attention of IDA, which relates to SingTel, IDA should go beyond merely asking SingTel for a basic response and should require detailed information and real evidence from it.

We note that IDA already has information gathering powers and that the proposed Code seems to indicate that IDA plans to be more proactive in this area such as by taking enforcement action for failure to provide information. However, we believe that this area may require more of a policy shift by IDA rather than just Code amendments. In particular, the IDA should focus its information gathering attempts on SingTel, rather than unduly burdening complaining competitors with information requests. This is because competitors cannot possibly access the same quality of information as IDA can obtain from SingTel, given the huge information asymmetries that exist in telecommunications markets.

3.6.2 Need for streamlined dispute resolution and enforcement

Macquarie believes that the Code dispute resolution and enforcement processes in section 11 are unwieldy. They represents a typical incumbent approach to dispute resolution where the aim is to delay resolution of disputes as long as possible. Delays serve the incumbent's interests as generally disputes will relate to concerns raised by new entrants. Delay in resolution will therefore hamper

their ability to compete in the meantime and is used by SingTel's retail business to raise 'fear, uncertainty and doubt' in the minds of potential customers.

We are curious as to how often parties have escalated disputes right through the Code process to date. Macquarie would suspect that the provisions are not well used but does not believe this reflects successful resolution of all disputes at an initial low level stage. Rather, we believe that other operators, like Macquarie, find the process too difficult and drawn out to use. They will more likely give up, particularly where disputes may relate to smaller implementation issues that crop up regularly. This leads to the well recognised incumbent strategy of 'death by a thousand cuts' – no single issue warrants the enormous time required in undertaking a dispute resolution process but a multitude of smaller issues effectively bogs down new entrants.

3.6.3 IDA guidance required with RIO implementation disputes eg. QoS issues

Macquarie is concerned that the RIO and Code do not provide sufficient opportunity for IDA facilitation of dispute resolution. Macquarie proposes that the Code should widen the areas in which disputes may be escalated (particularly to quality of service issues). We believe IDA can play a critical role particularly in relation to smaller implementation disputes that occur regularly and which are not well suited to a formal dispute resolution process such as in the current RIO or ADR such as arbitration.

A key example would be disputes over whether SingTel has provided adequate quality of service and whether it should be billing in full where it has failed to do so. Macquarie has had experience in this regard which demonstrates that such disputes cannot readily be resolved through SingTel dialogue yet ADR and court action are unwieldy and inappropriate. We have sought IDA involvement yet IDA has not found itself in a position to intervene and consequently Macquarie's loss has not been compensated by SingTel.

To address this sort of situation, Macquarie submits that the Code should provide for IDA to be approached in relation to a broader range of issues. The new procedure would allow either party to unilaterally refer to the IDA for 'informal' dispute resolution at any stage of a dispute. By this, we mean that IDA could take on a role similar to a mediator. It would hear the issues as presented by both parties and then facilitate a resolution, rather than making a binding decision as under arbitration. The IDA would facilitate the decision by providing the parties with an "advisory opinion" setting out what it believes is the correct position and in whose favour the dispute should be resolved. We believe that such an opinion would be influential on the parties even if not binding.

Macquarie has experienced a similar dispute resolution process in Australia and found this to be extremely helpful in ensuring disputes are dealt with in a timely fashion. It has been particularly successful in the case of reaching agreement to resolve real implementation issues.

We stress that this process will only work for important areas such as QoS disputes if the IDA has properly set QoS parameters by requiring SingTel to include SLAs in the RIO, with such an obligation having its basis in a new Code provision. If SingTel retains all of its current discretions then clearly it is extremely difficult for other operators to establish a dispute. SingTel can argue that it can do as it likes even if competitors are aggrieved and suffer loss. IDA must therefore take a holistic approach to its review of the Code and RIO and ensure it recognises all the interlinking issues. Clear interconnect obligations must be specified to ensure disputes can be resolved on clear grounds.

Macquarie submits that in addition to amending the Code and RIO to provide for IDA involvement in disputes, IDA must also completely revise its "Dispute Resolution Framework To Resolve Any Dispute Arising Out Of The Implementation Of An Interconnection Agreement Between IDA's Licensees". This framework attempts to treat interconnection disputes as 'commercial', rather than

recognising that telecommunications is a monopolised, networked industry, where the substantial imbalances in negotiating power mean that agreements are not commercial. The policy needs to dispense with the notion that these discussions are indeed 'commercial'. By definition, 'commercial' means that the 'discussions' in a market exist and should a purchaser not like terms of supply it can go elsewhere. This is not the case with interconnection and is the precise reason for development of the RIO. In this regard, the new draft framework released as part of the Code Review does nothing to address our concerns.

The key problem with the framework is the principle that "IDA will not involve itself in the implementation of the interconnection agreement". There is little point in IDA facilitating negotiation of an agreement if it does not help parties make it work – the agreement would only be satisfactory in form but not substance. A further concern arises from the fact that, even where parties fail to deal with a dispute 'commercially', IDA may still use discretion to reject requests for assistance if it thinks intervention would not be 'appropriate'. IDA's reticence to get involved serves to favour an incumbent such as SingTel as most interconnection disputes will relate to its failure to provide adequate interconnect. Macquarie therefore submits that a review of the entire interconnect dispute resolution regime in Singapore needs overhaul.

3.6.4 Private rights of action are critical

Macquarie is disappointed that the proposed Code does not include any third party rights of action, despite longstanding industry demand. Such rights would ensure that the Code was a much more meaningful competition tool than it is today. IDA resources would be supported by industry resources and those that really suffer from anti-competitive conduct would be able to stop that conduct and obtain compensation for any losses.

Macquarie notes the IDA position that third party rights may be part of the generic competition law to be introduced over the next few years. We are happy that Singapore is bringing itself in line with international practice in this regard but still believe that licensees and consumers should be able to take private action under the industry specific Code as the provisions of this Code are tailored to the needs of telecommunications markets.

3.6.5 Need for greater penalties, both threatened and actual

Current potential penalties do not provide SingTel with incentives to avoid contravention. We strongly submit that the maximum penalties for abuse of dominance under the Code should be substantially increased in line with global best practice. The current maximum of SGD1M is very low when one considers how much an operator like SingTel could make from engaging in anti-competitive conduct. It is also extremely low when one refers to overseas jurisdictions which impose penalties substantially in excess of any possible reward In Australia there is the use of a high flat maximum such as the $10M penalty, with additional $1M per day of continuing contravention. Other options include penalties linked to percentage of over-all revenue, as is adopted in USA anti-trust actions.

While this may require amendment to the Telecommunications Act as well as the Code, it is clear that the IDA is in a position to push this approach with the Government, given that other proposed Code changes require legislative amendment.

The IDA also needs to strengthen the threat of penalties by actually issuing higher fines. Macquarie believes that both the current penalty level and any increase thereto will only have a deterrent value if operators believe that IDA will use its powers to the full extent. The penalties that IDA has imposed to date for matters such as misleading conduct have been ridiculously low by reference to international precedent, with no regard to the severity of conduct and whether the penalty outweighs

any benefits to the party engaging in the conduct. We urge the IDA to increase the penalties imposed on SingTel so that it is forced to have greater respect for Code provisions. If Singapore is to be considered a competitive international hub for telecommunications then it is no longer appropriate for SingTel to simply be reprimanded with a few words and a slap on the hand. Investors must be shown that the incumbent will be penalised on an arms length basis with penalties having a deterrent and punitive effect as part of a truly liberalised market.

As a separate issue, we note our view that penalties should apply from the date of an initial IDA decision to minimise parties seeking to delay judgment by use of the review or appeal process.

Further, Macquarie urges the IDA to pursue the possibility of criminal sanctions under the Code such as against directors of a licensee involved in abuse of dominance. The existence of such sanctions appears to have a substantial deterrent effect given that the sanction has such a personal effect on decision makers within a company.

SECTION 4: COMMENTS ON SPECIFIC CODE PROVISIONS

Macquarie comments in this section on proposed amendments mentioned by IDA in the Code Review, as well as other amendments, which have not been highlighted by IDA. We also refer to existing Code provisions which we believe should be improved.

4.1 Proposed Section 1

4.1.1 1.1, 1.5.1 Industry self-regulation

Macquarie observes that IDA is meant to promote industry self regulation. We stress the need for IDA to assist with establishing a body for this purpose, such as the Telecommunications Industry Forum recently proposed to IDA by our grouping of licensees, APCCC. To this end, we are concerned that there is no longer any reference to an industry body in the Code. We propose that the Code should retain the current reference to IDA establishing an industry body. Further its function should be broadened to industry self-regulation generally (rather than limiting to technical and operational matters).

4.1.2 1.5.3 Facilities-based competition

Macquarie supports this new provision in recognising that network build is not always the ideal such that service-based competition should be supported. We hope that this policy will increasingly filter through to decisions that IDA makes in practice. In particular, the IDA should provide further support for service-based competition by improving specific provisions including those mentioned in our RIO and Code submissions eg. strengthening requirements to provide wholesale services.

4.1.3 1.5.6-7 IDA decision-making

The Code provides that IDA decisions are to be open, reasoned, quick etc. However, this is not reflected in the limited detail of decisions on IDA's website or the length of time taken to consider key matters such as LLC regulation. Macquarie also considers that this key regulatory principle should be reflected in improvements to the Code dispute resolution provisions, particularly with regard to shortened timeframes and less cumbersome processes.

4.1.4 1.6.2-3 Code modification

The draft Code retains the current right for IDA to modify the Code on its own initiative or to do so on licensee petition. While Macquarie agrees that this right is essential, we believe that there should be an opportunity for industry to comment on proposed modifications, particularly where their interests may be adversely affected. This would be in line with the approach taken for Code modifications pursuant to the triennial review where public consultation is required. It would also be in line with the principle of transparent decision-making.

4.1.5 1.7.1 Code exemptions

As per the above comment, we believe that there must be an opportunity for industry to comment on proposed exemptions in the case of a Dominant Licensee. We agree that this is likely to be unnecessary where other operators seek exemption from simple procedural requirements such as filing or publication rules.

4.2 Proposed Section 2

We refer to our earlier comments in relation to the weakness of section 2 definition of dominance and the need for guidelines to detail the IDA's approach.

4.2.1 2.2(b) Licensed entity only

IDA has highlighted in the Code Review that it will only apply a dominance classification on an entity specific basis. This is reflected in s2.2(b). Macquarie stresses again that the IDA should issue guidelines in relation to dominance and SMP classification, which make clear that despite s2.2(b), it will still have regard to the ability of a dominant licensee to leverage its power into related markets where it, or an affiliate may compete. The IDA must not take a 'black and white' approach to licensed entity classifications.

4.2.2 2.3(b)(i), 2.5.2) Dominance reclassification and exemption

We believe that there must be an opportunity for industry to comment on proposed dominance reclassifications and exemptions, particularly where their interests may be adversely affected.

Where IDA needs to extend the time for considering applications, it should also ensure that other licensees are aware of this as a matter of regulatory transparency.

4.3 Proposed Section 3

We note our support in general for winding back of obligations on non-dominant licensees.

We are concerned by the retained and strengthened distinction between end user obligations that must be contained in an end user agreement and those that must be complied with as a matter of law. Macquarie considers that if an obligation is important enough to be in the Code then it should apply as a general rule under s3.2. There is no need for an obligation to be included in an end user contract if the law requires a licensee to comply with the obligation anyway. An end user aggrieved by breach of a general rule can still go to IDA to complain and is unlikely, particularly in the case of a residential or small business customer, to take private legal action.

4.3.1 3.2.3 Penalties

Macquarie submits that IDA should make clear that an operator cannot avoid an early termination liability being a penalty merely by providing in the contract that any discount given is only given as a result of the term of the contract such that early termination results in return of the entire discount. We note that this sort of condition has become common in Singapore contracts and results in a lock in to the supplier. For example, if a customer has a 2 year contract and terminates 2 months before the end of the term, it should not have to return all discounts and the refund should be prorated in accordance with the 22 months that the service was taken.

4.3.2 3.2.7 Complaint publication

Macquarie considers that the requirement to publish customer complaints should be limited to those operators providing services to residential customers. Such customers are the usual target of consumer protection provisions. Macquarie submits that s3.2.7 should be amended to this end and would also go so far as to say that section 3 should be reviewed more generally to define relevant end users as residential customers. Large corporate customers often have the upper hand in negotiations with telecommunications suppliers and do not need special protection. This would be in line with the exclusion of wholesale licensee customers from this section.

If the IDA insists on retaining s3.2.7, we believe that the IDA should clarify that website publication is not the only way in which publication obligations can be met. It should be sufficient for necessary information to be available on request from a licensee at their offices.

4.4 Proposed Section 4

We refer to our comments above in relation to the need to improve proposed resale/wholesale obligations and tariff rules in section 4.

Macquarie considers the Code Review statement that a dominant licensee must modify a service to accommodate wholesale usage appears to be an improvement. However, we do not feel that this obligation is clearly detailed in the Code and suggest that further clarification is necessary to ensure that SingTel cannot evade this obligation. For example, it is not clear what is a reasonable modification, what SingTel can charge for such a modified service or the grounds it can refuse to make such modifications.

4.4.1 4.2.1.2 Non-discrimination

Macquarie supports the extension of this protection to services provided to other licensees.

4.4.2 4.2.1.3 Unbundling

Macquarie supports the extension of this protection to services provided to other licensees. However, we believe that s4.2.1.3 should be strengthened even further to ensure that it adequately captures bundling of telecommunications services with non-telecommunications products. For example, the use of loyalty programs by SingTel, which effectively bundle unrelated products, creates a barrier to consumers switching to new entrants. SingTel has an advantage in this regard due to its dominance over all key markets and huge customer base. Macquarie is further concerned that it may be difficult to prove when a bundle is imposed as a condition or is optional. International competition law supports that there may be an indirect forced bundle where discounts are substantial or other terms are particularly attractive. Once again, this is an area where IDA guidelines would be useful.

S4.2.1.3 should also make clear that any offerings which bundle a tariffed service with another product are covered by tariff filing and publication requirements *in toto* (ie. all parts of the bundle must then be filed). While this is the case under s4.4.2.1, a reference in s4.2.1.3 would avoid any confusion.

4.4.3 4.2.2.2 Resale

We refer to our earlier comments in relation to retail minus pricing of resale services.

Macquarie also suggests that this section be amended to provide that SingTel must amend all effective tariffs to remove resale restrictions upon finalisation of the Code rather than only when requested by a licensee.

4.4.4 4.3 Wholesale services

We refer to our earlier comments in relation to the need for an effective wholesale regime and clarification of the IDA's approach to implementing a retail minus model.

4.4.5 4.4.2.1 Tariff information

We refer to our comments above that published tariffs should contain greater detail than provided for in the proposed Code.

4.4.5 4.4.3.1 Tariff review

Macquarie submits that if the IDA does not adopt a specific pricing model with set discounts, resale and wholesale pricing should be reviewed with regard to matters such as end user prices, avoided costs, international benchmarks and the resale price that an efficient competitor would need to be able to viably compete. Macquarie sees no reason to deviate from the IDA's review criteria for end user tariffs in terms of the importance placed on international benchmarking.

We also consider that the end user tariff review criteria are problematic. For example, it is too difficult to police whether a dominant licensee tariff is not less than those offered by competitors. Further, the use of marginal cost as a measure is questionable (as in the case of predatory pricing provisions) and average incremental cost may produce a more pro-competitive tariff regime.

4.4.6 4.6 Supply on tariff

Macquarie supports the IDA taking a strong stance in relation to supply off tariff, which will often be discriminatory. However, we are concerned at the lack of recourse for competitors who may be adversely affected by such conduct. While private rights of action would be preferable, at worst case the IDA should clarify this section to reflect that IDA must act on complaints of other licensees and end users directly or indirectly affected by the conduct.

We also submit that s4.6(b)(iii) should be amended so that the IDA must penalise a dominant licensee as a matter of course for failure to file a tariff for an agreement in addition to requiring it to subsequently file the agreement so that it will become generally available.

4.4.7 4.7 Periodic review

Macquarie is concerned that this provision provides for periodic review of tariffs without detailing what this means. Without a specific and regular review period, there is no regulatory transparency and tariffs could remain unchecked. This would result in inefficient pricing that does not reduce over time in accordance with supply conditions, such as in the case of LLCs.

4.5 Proposed Section 5

4.5.1 5.3(a)(ii), 5.6.1.1(a)(ii) Submission of agreement to IDA / modification

Macquarie is not sure why the IDA has extended from 15 to 21 days the period it has to reject an interconnect agreement (or modification thereto) between non-dominant licensees. The same comments apply to approval of modifications under s5.6.1.1(a)(ii). Unless the IDA has sound experience to date that the 15 day period is unreasonably short, the Code should retain this period.

4.5.2 5.4 Minimum interconnection duties

Macquarie queries why these duties have been rephrased so that rather than obligating an operator to comply with a duty, the obligation is to include the duty in an agreement. This weakens the importance of the duty and enforcement approach as it is possible to say that once the duty is included in the agreement, it is not a breach of the Code to breach the duty – it is simply a breach of the agreement. Even if IDA treats non-dominant licensee disputes as private contractual matters, the same cannot apply to dominant licensee interconnection to which the minimum duties also apply.

Macquarie submits that s5.4 should be rephrased so that:

- The minimum interconnection duties must simply be included in an agreement where between non-dominant licensees, with those licensees able to take private action to enforce (similar to the end user agreement provision in s3.3).
- The minimum interconnection duties must be included in an agreement and must also be complied with as a general Code rule, such that licensees can take private action for breach of contract *and* can approach IDA to enforce the Code rule.

4.6 Proposed Section 6

4.6.1 6.2.1 RIO term

This section provides that the RIO is effective for 3 years, however, IDA has provided for a 3 year extension of the current Code. The IDA should make clear as part of the Code Review that any revised Code is subject to the same 3 year extension rather than commencing afresh. Otherwise RIO reviews will take place at intervals increasingly exceeding the 3 year period.

We also suggest that the Code provide that the RIO term continues until a review is finalised and a new RIO issued.

4.6.2 6.3 RIO content

The Code is extremely vague in its requirements for RIO content. Of particular concern, s6.3.4.2 states that a RIO must set out QoS matters and O&P procedures but does not clearly require enforceable SLAs or otherwise provide guidelines to SingTel. The Appendices also are lacking in necessary detail. We refer to our comments above and RIO submission in this regard.

4.6.3 6.3.1 Development of RIO

Macquarie submits that the Code should retain the current 30 day period for drafting a RIO rather than the proposed 60 days to submit a RIO to IDA. As IDA keeps stressing, its RIO review is not going to result in a major overhaul of the RIO and SingTel should not have more time to make amendments as it did to draft this document initially.

4.6.4 6.3.3.3 Collocation space

Macquarie notes that the requirement for SingTel to inform of the amount of collocation space available has been removed from s6.3.3.3. While Macquarie agrees that the RIO cannot state upfront the amount of space at each location, the Code should still require that SingTel be obliged to provide this information under the RIO. One way this could be done is by SingTel or IDA maintaining a register of space or similar.

4.6.5 6.3.3.4 UNE/UNS

Macquarie observes that the current references in s5.3.5.3 of the Code to requirements for SingTel to condition, provision and combine UNE and UNS efficiently have been removed from the proposed draft. These obligations are essential if the IRS are to be useable by competitors and if effective wholesale competition is to be promoted. We propose that the wording of s5.3.5.3 should be retained.

4.6.6 6.3.3.5 Wholesale services

We refer to our comments above in relation to the need for an effective wholesale regime.

4.6.7 6.3.4.1 Discrimination

The Code simply requires that supply of IRS and wholesale services must be non-discriminatory, with no guidance as to how this principle can be enforced. We refer to our RIO submission and propose that measures such as introduction of enforceable SLAs and improved SingTel reporting/IDA monitoring would assist in making the non-discrimination obligation meaningful. We refer IDA to the recent Oftel publication on publication of Key Performance Indicators by dominant operators for services such as LLCs, interconnect links etc.

4.6.8 6.3.5(b) Retail minus pricing

In the same way that cost-based pricing for IRS is elaborated in Appendix 1, there should be further explanation of wholesale pricing beyond a simple reference to 'retail-minus'.

4.6.9 6.3.6 Modification of RIO

Macquarie submits that the Code should provide a clearer process for modification of the RIO, including how new services can be introduced or existing ones improved. For example, there should be provision for licensees and IDA to initiate the process, timeframes for IDA to deal with this and for SingTel to respond.

4.6.10 6.3.7 Review of RIO

Once again, we are extremely concerned as to the increased delays found in the draft Code. The timeframe for each stage of the RIO process has been doubled despite the fact that all parties should have more experience and be able to work through issues more efficiently than 3 years ago. The entire RIO process in the draft Code now appears to take at least 6 months. We submit that the

existing timeframes should be retained, although proposed public consultation periods should be incorporated.

We also query the loose reference in s6.3.7(c) to SingTel being able to modify the RIO. There should be a public notice and consultation process before any unilateral SingTel change to its RIO.

4.7 6.6 Enforcement

Macquarie is pleased that the Code provides for IDA involvement in disputes with a dominant licensee over implementation of an interconnect agreement by way of conciliation. However, the difficulty with this is that both parties are required to make the conciliation request. It is more likely that SingTel will not agree to such a request which would force the other party to use the s11.3 dispute resolution process. Our concern here is that this process is discretionary in that IDA can choose whether or not to intervene. We submit that IDA should have a responsibility to intervene so that it cannot ignore what it may see as small disputes but which cumulatively have a very damaging effect on SingTel's competitors.

At worst case, the IDA should issue clear guidelines as to when it will use its discretion to intervene in a dispute. It should also provide a less formal process for disputes under s 6.6 / 11.3(b)(i). We refer to our comments elsewhere in this submission.

4.8 Proposed Section 7

Macquarie notes that Code timeframes have been extended. Macquarie submits that the IDA should retain current timeframes unless there is clear justification to extend.

4.8 Proposed Section 8

4.8.1 Abuse of dominance

We restate our view that regardless of the changes made to section 8, IDA should issue clear guidelines setting out how it will investigate and assess different types of anti-competitive conduct engaged in by SingTel.

4.8.2 Removal of provisions governing false and misleading claims

Macquarie supports the addition of a prohibition on licensees using information obtained under the Code from another licensee to target that licensee's customers.

However, Macquarie is concerned by the principal change that IDA has proposed to section 8, being the removal of prohibitions on false and misleading claims. We do not believe that it is sufficient response that industry and consumers can instead rely on the forthcoming Fair Trading Act, given the Act's focus on consumers.

Should these provisions be retained, Macquarie also advocates that they be treated as sufficiently important for IDA to impose real sanctions where breached. It is absolutely critical that an operator is not able to make significantly more from breaching such prohibitions than it risks through penalties.

4.8.3 8.2.1.2 Price squeezes

We refer to our earlier comments that this provision should be supported by guidelines to avoid the confusion that has arisen to date for example in relation to LLC complaints.

4.9 Proposed Section 11

4.9.1 11.2 Conciliation

Macquarie submits that IDA should be prepared to act as a conciliator in relation to any telecommunications dispute that relates to the Code. We see no reason to restrict to interconnection issues. We also restate our view that the Code should provide more broadly for informal dispute resolution by IDA such as procedures for IDA to issue advisory guidelines. In this regard, the Code Review mentions that the Code will provide for informal ADR of non interconnect disputes but the proposed Code does not appear to actually do so.

4.9.2 11.3 Dispute resolution

Macquarie refers to its comments throughout this submission to the effect that IDA should be playing a stronger role in facilitating telecommunications disputes rather than its current discretionary approach and undue emphasis placed on commercial negotiation.

4.9.3 11.4 IDA enforcement actions

Macquarie is concerned that the timeframes for consideration of a complaint are too long. These timeframes are likely in practice to drag out due to information asymmetries etc. The open-ended provision for IDA to extend the timeframe for its decision should be deleted and a maximum included eg. a target of 30 days with a maximum 30 day extension subject to qualifications as in s11.4.1.2(b).

Where action is initiated by a third party, the periods for licensees to provide information should be 10 days each and IDA should decide a matter within 30 days of receiving the last right of reply

Where action is initiated by IDA, Macquarie submits that a licensee should have no more than 10 working days to respond to a complaint and IDA should decide a matter within 30 days of the response. If it is concerned about getting adequate information, it should start using its information gathering powers more aggressively against wrongdoers, rather than relying on input from licensees who cannot readily access such information.

Macquarie is also concerned at the IDA's apparent view that it is constrained from intervening in contractual matters, and taking enforcement action such as invalidating contracts. We note that the Code now contemplates that the IDA will intervene in such cases but believe that this should be more clearly emphasised in section 11. Macquarie also believes that this review is an opportune time to assess why IDA feels unable to intervene in contracts and make clear amendments to rectify this weakness. To the extent that changes are necessary to the Telecommunications Act, IDA Act or otherwise, these should be made as a priority. We also believe that the power should be detailed in s11 eg. as a clarification to s11.4.4.3.

We are also concerned about the fact that IDA has such an open discretion whether it will take enforcement action for breaches of the Code, given that private action is not possible. The IDA should make it clear when it will take action and then actually do this on a proactive basis. As commented earlier, we submit that IDA should also issue clear guidelines as to when it will take enforcement action for Code breaches, rather than exercising a broad discretion not to intervene.

4.9.4 11.4.1.1(v) Private requests for enforcement

We believe that it is unnecessary to show good faith efforts to resolve all disputes. Consider the case of misleading conduct or conduct by a competitor that denigrates your products. Clearly negotiation is inappropriate in such cases.

The Code needs to more clearly distinguish different types of disputes such that where a matter is commercial, it is relevant for IDA to consider whether parties have tried to resolve disputes prior to regulatory intervention, but in other cases IDA will intervene immediately as a matter of its regulatory obligation.

4.9.5 11.9 Review process

Macquarie supports IDA's proposal for a review process involving reconsideration by the IDA or the option of direct appeal to the Minister. We believe this option provides needed flexibility in contrast to the proposal for IDA review followed by Minister appeal. However, we do not agree with the IDA proposal that where the parties cannot agree between IDA reconsideration and Minister appeal that the Minister should be able to leave the matter to IDA reconsideration. This allows parties to delay the review process for the wrong reasons. We submit that where both parties are aggrieved by an IDA decision but cannot agree on the review process, the matter should go directly to the Minister.

Regardless of which option IDA decides on, Macquarie considers that a party seeking review should not have to notify other parties to the dispute upon lodging its request for reconsideration/appeal. While such notification would usually be desirable, it may encourage abuse of the review process proposed by IDA. For example, under the proposed process of review or direct appeal, an operator given notification of intention to appeal could just say it wanted review to foil the other party's appeal strategy.

4.10 Proposed Section 12

4.10.1 12.4.3 Tariffs

Macquarie is confused as to why it should take SingTel 90 days to publish a tariff that is already prepared, filed and approved by IDA and in effect. We are also concerned that there is no limit on the time that IDA may allow SingTel to publish tariffs subsequently approved. We suggest a maximum 30 day period should be provided for publication of tariffs already in effect. New tariffs should be published upon approval by IDA so that there is no lapse between when the tariff becomes effective and when interested parties are made aware of its terms.

4.10.2 12.4.5 RIO

Macquarie observes that section 6 has a revised 60 day period for SingTel to submit a proposed RIO. However we are not sure why IDA amended this when it appears that it intends s12.4.5 to apply to the forthcoming RIO review and this provision only has a 30 day period. S12.4.5 also indicates that the s6.3.6 modification process will apply to the RIO review rather than the full RIO review process.

As highlighted earlier, if this is the case, Macquarie is concerned at the lack of detail as to how the modification process will work prior to IDA issuing directions eg. the consultation and response periods. These may not be so necessary in the case of minor modifications contemplated under s6.3.6 but is critical in the case of major modifications pursuant to a triennial review.

4.11 Proposed Appendix 1

Macquarie refers to our comments in our RIO submission to the effect that while we strongly support the use of LRAIC, the IDA must ensure that the prices SingTel is charging really are in line with this cost model. It would be assisted greatly in this regard if it would adopt a transparent regulatory approach and consult with industry while analysing SingTel costs and implementing the model.

Further, as indicated above, retail minus pricing should be elaborated on in the Code. While the broad concept may be understood, implementation generally gives rise to much confusion. Further detail is essential for industry certainty and to ensure regulatory accountability and transparency.

4.12 Proposed Appendix 2

4.12.1 Miscellaneous

The Code Review states that amendments have been made to the main body and this appendix of the Code so that Appendix 2 contains "all relevant details" in relation to IRS. As a general comment, we believe that the appendix is still extremely vague and leaves far too much discretion to SingTel in developing its RIO. We refer to our RIO submission in this regard and note that the proposed Code does nothing to address the concerns raised in that submission. As an example, Macquarie submits that Appendix 2 should detail matters such as QoS/SLAs for ULL, the SingTel network information that must be provided etc.

We note the IDA's specific request for comments on the proposed list of services in Appendix 2 but are concerned that no wholesale services are identified in the draft. We refer to our earlier comments in relation to designation of LLCs.

The current Appendix 2 provides that the IRS price list is only to be made available to licensees where applicable. In line with the objective of improved accountability and transparency, IRS price lists should be public. We are concerned that the proposed Code is silent on this point.

The current Code also provides that IRS prices and terms are to remain effective for 3 years. Again, the proposed Code is silent on this point. As submitted earlier, the IDA must ensure IRS terms roll over until after a review is completed rather than expire after a set period.

In any event, we believe that the 3 year period may be too long for price reviews given the dynamic nature of the market. While non price terms may be suited to a 3 year review, IRS prices should be reviewed on an annual basis to ensure consistency with international benchmarks and to reflect changes in costs.

4.12.2 2.4 Virtual interconnection

Macquarie is pleased to see that the proposed Code now allows an operator that is virtually interconnecting with SingTel to acquire the necessary links between nodes from any FBO and not just SingTel. We trust that this will remain in the final version of the revised Code and point again to our RIO submission comments that support this amendment being made.

4.12.3 3 OT&T

Macquarie refers to its earlier comments and its LLC submission to the effect that LLCs should be included as a core interconnect service, most appropriately as a broadband access service under section 3 of Appendix 2.

4.12.4 4.2.1.3 Collocation space limitations

We have some concern with the IDA's clarification of SingTel rights to reserve space for anticipated growth over a 24 month period. This type of provision is too open to abuse unless the IDA makes clear how it will assess what is a reasonable space reservation. Macquarie submits that the scope for abuse may be somewhat reduced if a shorter reservation period is included.

The current Code at least provides for checks on SingTel claims that collocation is unavailable such as requesting licensee rights to inspect premises and SingTel obligations to take measures to make space, however, these are not adequately reflected in the RIO or in practice.

We are concerned that the draft Code even further weakens the position of requesting licensees. It is inadequate to simply require SingTel to 'demonstrate' its need for space with no further detail such as what it needs to do to prove this and to whom. We believe current Code provisions should be retained and even strengthened. For example, IDA should consider a monitoring process where if SingTel fails to use space it must release it. Repeated failure by SingTel to use space it has reserved should result in a penalty.

4.12.5 ULL

We refer again to our RIO submission and other Macquarie-IDA correspondence in relation to improvements needed to the IDA's ULL regime including proper specifications for loop, QoS and SLAs, detailed network information etc.

We note the Code Review questions the need for a line sharing obligation but that the proposed Code still retains this as an IRS. Macquarie fully supports the need for line sharing to be provided under the RIO. This will provide greater flexibility to any FBO who decides to roll out an ULL network. Given the difficulty operators face in competing in this market, any additional regulatory support is beneficial.

For the same reason, we believe that the Code should retain the requirement for SingTel to construct new loops. While it may not be well used, it is important for the Code to provide for it. We are at a loss to understand the rationale behind the removal of this obligation on SingTel and call upon the IDA to provide industry with its reasons for the removal of it especially given the apparent lack of uptake and roll out of ULL network services.

4.13 Dispute Resolution Guidelines

Macquarie has real concerns with the underlying approach in these guidelines. Too much reliance is placed on commercial negotiation with the IDA avoiding involvement. The need for IDA to intervene in interconnection disputes rather than deciding whether and when it will assist has been identified in the Singapore – US FTA, which requires that operators have recourse to the regulator for such disputes within a reasonable period of time. It is not a true recourse option where IDA may and often does turn away complainants or requests them to continue to deal direct with SingTel. Macquarie strongly urges IDA to be more proactive in interconnection disputes involving implementation matters.

However, assuming IDA will not move from this approach, we comment below on the actual process in the proposed Dispute Resolution Guidelines.

Our general view is that the process for dispute resolution remains cumbersome and overly long. While we realise it reflects existing guidelines, this is no reason why improvements cannot be made now. In terms of specific stages in the process:

- Macquarie is not convinced that it is necessary to provide advance notice to a party that a dispute will be referred to IDA. Generally parties will be aware that this is likely when negotiations are failing. In any event, 15 days is far too long given parties existing awareness and the fact that time will already have been wasted on negotiations. A 3-5 day notice period would be more appropriate.

- The IDA should not require an undue amount of evidence that a party has attempted lengthy negotiations in good faith. In some cases, it will be self-evident from the start that negotiations will go nowhere and parties should not be forced to suffer competitive damage merely for the sake of process. The IDA should also take account of evidence of bad faith of the other party (such as one line letters responding to attempts to negotiate) and this should be given due weight in considering a request for intervention.

- 30 days is far too long for IDA to simply consider *whether* it will intervene. Rather it is a more appropriate timeframe for IDA to actually make a final decision. A maximum of 10 days from when the responding party provides its comments would be more appropriate.

- It is unnecessarily cumbersome and duplicative to then require a party to submit a petition for dispute resolution as a further step, given that it will already have submitted a request for intervention at the outset.

- The same can be said of the further requirement for a response to that petition when there has already been a response to the request for intervention. This step is unnecessary and any information that the IDA is intending to get at this stage should instead be sought at the outset. If the IDA insists on retaining this unnecessary step then 15 days is too long a timeframe given that a response will be largely based on the information already provided.

- The further 15+15 day right of reply and counter reply also unnecessarily delay dispute resolution.

- At worst case, there should be a process involving an initial request for intervention and response, an IDA decision on whether to intervene, and then an opportunity for rights of reply ie. omitting the petition stage.

- The 60 day period for IDA to make a decision after it has received all information, with a possibility for unlimited extension, is too long and does not ensure sufficient accountability. It also makes the dispute resolution process unworkable for all but the most major interconnection disputes. Parties will continue to be left with no recourse for lesser disputes such as those of a technical or operational nature. At worst case, the time frame for IDA to make decisions should be 30 days from when it receives the last response.