



Australian  
Competition &  
Consumer  
Commission

# Superfast Broadband Access Service and Local Bitstream Access Service Final Access Determination joint inquiry

## Final decision report

May 2017

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## List of abbreviations and acronyms

ACCC	Australian Competition and Consumer Commission
ADSL	Asymmetric Digital Subscriber Line
AGVC	Aggregation Virtual Circuit
AVC	Access Virtual Circuit
B2B	Business-to-business
CBD	Central Business District
CCA	<i>Competition and Consumer Act 2010</i>
c-i-c	commercial in confidence
CLC	Carrier Licence Conditions
CVC	Connectivity Virtual Circuit
DSLAM	Digital Subscriber Line Access Multiplexer
DTCS	Domestic Transmission Capacity Service
FAB	Fibre Access Broadband
FAD	Final Access Determination
FLSM	Fixed-line services model
FTTB	Fibre to the basement
FTTN	Fibre to the node
FTTP	Fibre to the premises
HFC	Hybrid fibre-coaxial
IAD	Interim Access Determination
kbps	Kilobits per second
LBAS	Local bitstream access service
LTRCM	Long Term Revenue Constraint Methodology
LTIE	Long-term interests of end-users
Mbps	Megabits per second
MTAS	Mobile Terminating Access Service
NBN	National Broadband Network
NPTCs	Non-price terms and conditions
POI	Point of Interconnection
RBS	Regional Broadband Scheme
RIS	Regulatory Impact Statement

RKR	Record Keeping Rule
RSP	Retail Service Provider
SAOs	Standard Access Obligations
SAU	Special Access Undertaking
SBAS	Superfast broadband access service
SFAA	Standard form of access agreement
SIO	Service in Operation
ULLS	Unconditioned Local Loop Service
VDSL	Very-high-bit-rate digital subscriber line
WBA	Wholesale Broadband Agreement

## Glossary

access agreement	A commercial contract between the access provider and an access seeker which sets out negotiated terms and conditions of supply for an agreed period of time.
access determination	Written determination made by the ACCC relating to access to a declared service after conducting a public inquiry, specifying any or all of the terms and conditions for compliance with any or all of the standard access obligations.
access multiplexer	A device that separates communications carried by means of guided electromagnetic energy to enable an end-user to make use of high data rate services.
access seeker	Telecommunications companies that seek access to the declared service (that is, the right to use the declared service).
access provider	Telecommunications companies that provide access to a declared service.
aggregation service	A service that transports customer traffic from multiple end-users on an aggregated basis to a network-network interface at a point of interconnection.
ADSL	Asymmetric Digital Subscriber Line. A technology for transmitting digital information at high data rates on existing copper phone lines. It is called asymmetric because the download and upload data rates are not symmetrical (that is, download is faster than upload).
backhaul	The line carrying traffic from a transmission point (generally an exchange) to a central point (in the IP core).
declaration inquiry	The process by which the ACCC holds a public inquiry to determine whether a service should be declared.
declared service	A service that the ACCC regulates under Part XIC of the CCA. Once declared, a service provider must supply the service to other parties in accordance with the standard access obligations and the terms and conditions set in any final access determination.
downstream	Further along the supply chain. For example, mandating access to network services can promote competition in downstream retail broadband services.
DSLAM	Digital Subscriber Line Access Multiplexer. A device which makes use of the copper access lines to provide high data rate services, enabling broadband services to be provided over copper lines. It is generally located in a telephone exchange (or a node) that links many customer DSL connections (copper wires) to a core IP network via a backhaul system. It may also be located in a building to enable FTTB services.
end-user	A retail consumer of telecommunication services.

exchange	A network location housing various types of communication equipment that enables connection to end users.
enduring bottleneck	A network element or facility that exhibits natural monopoly characteristics, and is essential in providing services to end-users in downstream markets.
FAD	Final Access Determination. The FAD is made by the ACCC and sets the terms and conditions (including prices) on which a service provider may be required to supply a declared service.
fixed-line services	Telecommunications services provided over fixed networks, such as Telstra's copper network and HFC networks. The 'declared fixed line services' are the ULLS, LSS, WLR, LCS, wholesale ADSL, FOAS and FTAS.
Interim access determination	An access determination made under section 152BCG of the <i>Competition and Consumer Act 2010</i> .
HFC network	Hybrid Fibre-Coaxial Cable network. A combination of fibre optic and copper coaxial cables able to deliver large amounts of data. Typically used to deliver internet services and pay television services.
NBN Co	NBN Co means NBN Co Limited (ACN 136 533 741), as the company exists from time to time (even if its name is later changed). It operates the National Broadband Network (NBN).
PSTN	Public Switched Telephone Network. The circuit-switched fixed telephone network that allows end-users to make and receive telephone calls via switching and transmission facilities and utilising analogue and digital technologies.
retail service provider	A company that offers telecommunications services to end-users.
SAOs	Standard Access Obligations. Under section 152AR of the CCA. The category A SAOs require an access provider to: <ul style="list-style-type: none"> <li>• supply the service to an access seeker on request</li> <li>• take all reasonable steps to ensure that the technical and operational quality and fault detection, handling and rectification of the service provided to the access seeker is equivalent to that which it provides to itself, and</li> <li>• allow interconnection.</li> </ul>
SAU	Special access undertaking. A document given by the access provider proposing the terms and conditions on which it will offer access to its services (if approved by the ACCC, access seekers can obtain supply on these terms).
SIO	Service In Operation. Refers to an active telecommunications service provided to an end-user.

Superfast broadband services	Broadband services that are capable of a download transmission speed of normally 25 Mbps or more.
transmission	The point-to-point carriage of voice, data or other communications at a fixed data rate.
Wholesale ADSL	The declared Wholesale ADSL service. Allows access seekers to purchase a Wholesale ADSL product from an access provider and resell internet services to end-users.
Wholesale line rental	The declared Wholesale Line Rental service. For a monthly 'per-user' charge, it allows access seekers to purchase a line rental service from an access provider, which includes access to the copper line and associated services (including a dial tone and telephone number) supplied using Telstra's equipment.



## Executive Summary

This decision sets prices and other terms and conditions for wholesale high speed internet services supplied by non-NBN fixed line networks. The services are used by retailers of communications services to supply internet services to their end-customers.

The networks largely supply high speed internet services in new housing estates and apartment buildings in central city locations. They provide similar services to those supplied by the NBN. In many areas these networks supply internet services where the NBN does not offer services and provide end-customers in these areas with only a limited choice of retailers of internet services.

The major providers of these services are Telstra (South Brisbane and Velocity Estates fibre networks), TPG, Vocus, LBN Co, Opticomm, and OPENetworks. Smaller providers of some high speed internet services (supplying up to 12,000 end-customers) will not be regulated by the decision on the basis that it would apply an unreasonable burden with little benefit to end-customers.

The internet services subject to the decision are called the superfast broadband access service (SBAS) and the Local Bitstream Access Service (LBAS). These are wholesale 'superfast' fixed-line broadband services capable of download speeds of normally 25 Mbps or more.

One of the main aims of the decision has been to ensure that retailers and their end-customers supplied via the non-NBN networks will not be worse off than if they were supplied internet services by the NBN. The regulated prices and other terms and conditions are expected to provide end-customers with a larger number of retailers to choose from and deliver them better prices and services.

Our decision provides for price terms and other terms of access to the SBAS and LBAS under final access determinations (FADs) for the two services. Terms set in the final decision only apply if access providers and access seekers cannot reach their own commercial agreements on prices and other terms for the relevant services. A summary of our final decision prices to apply for the base-level SBAS and LBAS services under the FADs is provided in the table below.

### Final decision SBAS and LBAS prices

#### *SBAS and LBAS (excluding Telstra FAB services)*

Charge component	Initial price	Subsequent prices
Port (25/5 Mbps)	\$27.00 per month	The price for the NBN Co product AVC TC-4 25/5 Mbps as amended from time to time (including discounts)
Aggregation to POI	Price between \$8.00 and \$17.50 per Mbps per month depending on dimensioning by an RSP per port (in kbps)	The price for the NBN Co product CVC TC-4 as amended from time to time (including discounts)

**Telstra FAB services**

<b>Charge component</b>	<b>2016-17</b>	<b>2017-18</b>	<b>2018-19</b>	<b>2019-20</b>	<b>2020-21</b>
Port Zone 1 per month (30/1 Mbps)	\$18.06	\$16.03	\$13.01	\$13.01	\$13.01
Port Zone 2/3 per month (30/1 Mbps)	\$23.07	\$21.10	\$18.15	\$18.15	\$18.15
Aggregation per Mbps/month	\$29.27	\$29.27	\$29.27	\$29.27	\$29.27

The prices have been set in line with the NBN's prices and designed to change with these prices over time, but not to the extent this would lead to LBAS and SBAS providers being unable to recover their costs of supplying the 25/5 Mbps service. To help ensure such cost recovery by LBAS and SBAS providers, we have made provision for providers to be able to pass on any Regional Broadband Scheme (RBS) charge on top of the benchmark prices specified in the FADs if this charge is legislated by the Government.

The dynamic element to the prices reflects, in particular, forecasts of continuing high traffic growth across the superfast broadband sector that will continue to drive down the average cost of aggregation services. We expect these prices to encourage RSPs to use the wholesale services of LBAS and SBAS networks, thereby promoting competition in the supply of retail services to end users via improved price and quality of service offerings, greater incentives to innovate and provide a wider array of retail products.

Different prices apply for Telstra's fibre access broadband (FAB) services supplied in South Brisbane and its Velocity Estates. This is because these networks were built to work with Telstra's legacy copper-based systems and because they may be transferred to the NBN within the FAD period (although we note no agreement has been reached between Telstra and NBN Co about a transfer). These prices have been benchmarked to the service-specific costs of the wholesale ADSL service, to which the FAB service has similar characteristics. We do not expect that this separate pricing arrangement could be justified for subsequent FAD periods.

Our final decision is to apply an exemption to the standard access obligations (SAOs) to SBAS providers supplying up to 12,000 end users. This means that these providers are not required to offer regulated wholesale access to their networks. This is because the compliance costs for these operators are expected to be high relative to the expected wholesale revenues at our regulated SBAS prices and the aggregate benefits to end users from retail competition on these smaller networks

To ensure that regulation continues to meet the legislative criteria we intend to monitor the market as part of our informal communications market monitoring activities during the declaration period. We will monitor pricing (including exempt SBAS small provider retail offers) and other industry developments (such as the supply and take-up of fixed wireless services) that may affect the potential scope of the SBAS declaration.

# 1. Introduction

This report details our final decision on final access determinations (FADs) under section 152BC of the *Competition and Consumer Act 2010* (CCA) for the following declared services:

- the superfast broadband access service (SBAS), and
- the local bitstream access service (LBAS).

The SBAS and LBAS are fixed line wholesale services supplied over non-NBN networks that can be used by access seekers to supply superfast broadband services to end-users.

The LBAS was declared on 24 February 2012, following changes to the telecommunications access regime in Part XIC of the CCA and the *Telecommunications Act 1997* (the Telecommunications Act) to implement the National Broadband Network (NBN). These changes required the ACCC to declare the LBAS on an on-going basis to ensure that providers of fixed line superfast carriage services built or substantially extended after 1 January 2011 were subject to the same conditions as NBN Co – that is that they offered a wholesale Layer 2 bitstream access service and operated on a wholesale only basis. In October 2012, we made a FAD for the LBAS. This FAD expires with the making of the new FAD under this final decision.

Pre-existing fixed line superfast networks that were not substantially extended after 1 January 2011 were exempt from such conditions (which are set out in the ‘level playing field’ provisions in Parts 7 and 8 of the Telecommunications Act), as were those exempted by the Minister for Communications under section 141A of the Telecommunications Act.<sup>1</sup>

Following the Vertigan Committee’s concerns about the potential for small non-NBN monopolies to appear and the conclusion of our investigation into TPG’s compliance with the level playing field provisions in its supply of superfast broadband services on its fibre-to-the-basement (FTTB) network, we commenced the SBAS declaration inquiry.

This inquiry resulted in the declaration of SBAS on 29 July 2016. We subsequently commenced an SBAS FAD inquiry and made an SBAS Interim Access Determination (IAD), as allowed under the CCA.<sup>2</sup> Following the commencement of the SBAS FAD inquiry we announced that we would combine the SBAS FAD public inquiry with the LBAS FAD public inquiry process. This was done given the common issues that apply across the two services and to enable us to consider consistency of regulation across these similar services.

We issued a discussion paper for the joint SBAS and LBAS FAD inquiry on 15 September 2016 and requested submissions on the issues and questions raised in the paper by 21 October 2016. We received ten submissions in response to the discussion paper which were considered by us in making a draft decision on the FADs.

Our draft decision report and draft FAD instruments were released on 9 January 2017. We invited submission on the draft decision report and draft FAD instruments by 17 February 2017. We received four submissions in response to the draft decision report. We also had meetings to discuss aspects of the draft decision with NBN Co, Telstra, OPENetworks, Opticomm and the Department of Communications and the Arts.

Following our review of submissions and other feedback on the draft decision we decided to undertake a further consultation on three proposed changes to the pricing approach prior to

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<sup>1</sup> These include Telstra’s South Brisbane exchange and Velocity estate networks and the iiNet/TransACT (now TPG’s) VDSL and HFC networks in the Australian Capital Territory and regional Victoria

<sup>2</sup> Section 152BCG

making a final decision to incorporate them into the FADs. We released a further consultation paper on these proposed pricing changes on 24 March 2016 and requested comments by 7 April 2017. We received three submissions in response.

Submissions on the draft decision and the further consultation paper have been considered by us in making this final decision on the FADs.

## **1.1. Structure of the final report**

**Chapter 2** provides background on superfast broadband services, the current SBAS and LBAS declarations, the LBAS FAD and the SBAS IAD that will be replaced by the new FADs and the access determination assessment framework.

**Chapter 3** details the final pricing approach and price terms and conditions.

**Chapter 4** details the final non-price terms and conditions for the SBAS and LBAS.

**Chapter 5** details the final exemptions from the SAOs under the SBAS FAD.

**Chapter 6** outlines our final decision on other declaration coverage issues that are not covered by the FADs.

**Chapter 7** sets out the commencement and expiry dates of the FADs.

**Appendix A** contains the SBAS and LBAS FAD instruments.

## 2. Background and regulatory framework

This chapter provides background information including an overview of the regulatory framework relevant to making FADs for the SBAS and LBAS.

### 2.1. Overview of the services

SBAS and LBAS are declared fixed line broadband wholesale services able to be used by access seekers to supply downstream superfast broadband retail markets. Both services are Layer 2 bitstream services with a download transmission speed of normally 25 Mbps or more. The SBAS and LBAS declarations do not apply to the NBN, HFC networks to be transferred to the NBN or in other specific cases which are noted in section 2.3 below.

Other technologies capable of supplying superfast broadband services (defined as services capable of download transmission speeds of normally 25 Mbps or more) that are not covered by the SBAS and LBAS declarations are fixed wireless, satellite and mobile.

The LBAS encapsulates fixed line networks used, or proposed to be used, to supply residential or small business customers and built, upgraded or altered by more than one kilometre after 1 January 2011.<sup>3</sup> The SBAS covers remaining eligible networks, including those built before 1 January 2011 other than services supplied exclusively to business customers, public bodies or charity customers within the CBDs of the capital cities. LBAS networks are subject to legislative structural separation requirements, but for SBAS networks this is not necessarily the case.

### 2.2. Access determination framework

Part XIC of the CCA establishes a telecommunications access regime under which service providers can access declared telecommunications services in order to supply end-users.

Declaration of a service means that an access provider is subject to Standard Access Obligations (SAOs). These require the access provider to provide access to the declared service, on request, to an access seeker. In doing so the access provider must take all reasonable steps to ensure that the technical and operational quality of the service is equivalent to that which the access provider provides to itself.

Where an access provider is subject to the SAOs, they must be complied with on terms and conditions either commercially negotiated or set out in an access agreement, or as determined via the regulatory hierarchy in the CCA.

An access determination, including a FAD, can provide a 'fall back' set of terms and conditions that access seekers can rely on if they are unable to reach agreement with an access provider on the terms and conditions of access to a declared service. Access determinations by the ACCC can shape the negotiation of an access agreement and the formulation of an SAU. This means that the FAD, and the structure and level of prices (and other terms) it establishes, serves a fundamental role in facilitating the private negotiation of terms and conditions of access that are broadly consistent with efficient outcomes and promoting the LTIE.

The requirements and criteria we must have regard to in making an access determination are detailed section 152 BCA of the CCA. These include the following subsection 152BCA(1) matters:

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<sup>3</sup> See section 152AGA(6) including the '1km' rule at subsection (6).

(a) whether the determination will promote the long terms interests of end users (LTIE) of carriage services or services supplied by means of carriage services. This includes the objectives of:

- Promoting competition
- Any-to-any connectivity (if relevant)
- Efficient use of, and investment in infrastructure

(b) the legitimate business interests of a carrier or carriage service provider who supplies, or is capable of supplying, the declared service, and the carrier's or provider's investment in facilities used to supply the declared service

(c) the interests of all persons who have rights to use the declared service

(d) the direct costs of providing access to the declared service

(e) the value to a person of extensions, or enhancement of capability, whose cost is borne by someone else

(f) the operational and technical requirements necessary for the safe and reliable operation of a carriage service, a telecommunications network or a facility, and

(g) the economically efficient operation of a carriage service, a telecommunications network or a facility.

In addition, subsection 152BCA(3) allows us to take into account any other matters that we think are relevant.

Consistent with our most recent declaration report for the SBAS, and for the same reasons, we considered that the relevant markets to have regard to in considering the statutory criteria to be the wholesale and retail markets for fixed line superfast broadband services.<sup>4</sup>

Further details of the coverage of the declarations and the previous pricing determinations for the LBAS and the SBAS are detailed below.

## **2.3. Current declarations**

### **2.3.1. LBAS declaration**

The LBAS declaration requires operators of fixed line superfast broadband networks used, or proposed to be used, to supply residential or small business customers and built, upgraded, altered or extended by more than 1 km after 1 January 2011 to provide access to a Layer 2 bitstream service with a download transmission speed of normally 25 Mbps or more upon request. This declaration commenced on 13 April 2012. It does not expire and cannot be varied or revoked under current legislation.

The LBAS applies to all applicable networks, local access lines and carriers unless they have received a Ministerial exemption under the Telecommunications Act or are otherwise exempt under the provisions of Part 7 of the Telecommunications Act.<sup>5</sup>

The LBAS currently applies to services supplied on the following networks:

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<sup>4</sup> ACCC, *Superfast broadband access service declaration inquiry*, Final decision, July 2016, Ch. 3.

<sup>5</sup> Ministerial exemptions are granted under section 141A of the Telecommunications Act. Statutory exemptions operate pursuant to subsections 141B(3) and 141B(4) of the Telecommunications Act.

- Opticomm
- OPENetworks
- The Local Broadband Network company (LBN Co), and
- Other networks that supply superfast carriage services that were built, altered or extended after 1 January 2011.

For further information please see our LBAS declaration final decision available [here](#).

### **2.3.2. SBAS declaration**

The SBAS was declared by the ACCC on 29 July 2016 and is due to expire on 28 July 2021. The SBAS is a point to point service that is either

- a Layer 2 bitstream service and a superfast carriage service (that is, with a download transmission speed of normally 25 Mbps or more), or
- Telstra's Fibre Access Broadband (FAB) service.

The SBAS does not include:

- services supplied where there appears to be effective competition – that is, services supplied exclusively to business customers, public bodies or charity customers from a multiplexer or node in CBD areas of Australian capital cities
- services supplied by the NBN
- services supplied using a HFC network that will be transferred to the NBN
- the LBAS or
- the Domestic Transmission Capacity Service (DTCS).

The SBAS applies to services supplied on the following networks:

- Telstra's FTTP networks in South Brisbane and Velocity Estates
- TPG's (formerly iiNet's) VDSL network in the ACT and HFC networks in regional Victoria
- TPG's FTTB networks in capital cities
- Other networks that supply superfast carriage services, including superfast broadband networks that existed before 1 January 2011 (which are not subject to Part 7 of the Telecommunications Act).

For further information please see our SBAS declaration final decision available [here](#).

The SBAS IAD previously provided for some additional exemptions from the SBAS declaration beyond those in the declaration decision itself (see section 2.4.2 below). The SBAS FAD made under this final decision also provides for a number of exemptions beyond those in the declaration decision (see Chapter 5).

## 2.4. Previous access determinations

### 2.4.1. LBAS – final access determination

We made a FAD for the LBAS on 3 October 2012, which although was due to expire on 5 October 2015, has been extended until the day before a new FAD (i.e. the FAD under this final decision) comes into force via a number of extensions to the inquiry period required to make a new FAD.

The FAD specifies terms and conditions of access, including price and non-price terms for a LBAS with the following characteristics:

- a downstream data transfer rate of 25 Mbps (peak information rate)
- an upstream data transfer rate of 5 Mbps (peak information rate)
- residential-grade service characteristics
- use of a data port (user-network interface – e.g. Ethernet connector) on the data termination device at the end-user's premises
- if requested by the access seeker, a prioritised, symmetric bitstream of sufficient capacity to provide a voice service
- if available and requested by the access seeker, use of an analogue voice port on the network termination unit at the end-user's premises.<sup>6</sup>

An LBAS access provider is also not restricted from supplying the declared service with additional wholesale products. LBAS access providers can also offer other LBAS products not specified in the FAD at commercially negotiated prices.

The regulated price terms and conditions under this previous LBAS FAD are outlined in section 3.1 of this final decision report.

The previous LBAS FAD non-price terms covered issues including: billing and notifications; creditworthiness and security; general dispute resolution procedures; confidentiality provisions, and suspension and termination.

For further information please see our 2012 LBAS FAD available [here](#).

### 2.4.2. SBAS – interim access determination

We made an interim access determination (IAD) for the SBAS on 29 July 2016. This IAD was made as we considered it unlikely that a final access determination would be made within six months after the commencement of the public inquiry.<sup>7</sup>

The SBAS IAD set some different terms and conditions (including prices) for the Fibre Access Broadband (FAB) services supplied in Telstra's South Brisbane and Velocity Estate networks compared to other SBAS services.

The SBAS IAD terms and conditions were applied to specific entry-level products including:

- a 25/5 Mbps data rate tier product for all non- FAB services and

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<sup>6</sup> For the avoidance of doubt, the declared service, and therefore the wholesale product/s defined here, does not include backhaul between a network-network interface and a service provider's point-of-presence.

<sup>7</sup> Section 152BCG(1)(d) of the CCA.]



- a 30/1 Mbps data rate tier product for all FAB services (this is the FAB service product tier already supplied on Telstra's South Brisbane and Velocity estate networks closest to the general entry-level 25/5Mbps product tier).

The SBAS IAD also included the following service characteristics (for the entry level) non-FAB product:

- residential-grade service characteristics
- if requested by the access seeker, a prioritised, symmetric bitstream of sufficient capacity to provide a voice service.

The price terms and conditions set under the IAD are detailed in section 3.1 of this final decision. In contrast to the previous LBAS FAD, the SBAS IAD included a regulated aggregation charge on the basis that the SBAS, as supplied by a number of providers, was expected to provide relatively more aggregation services back to a Point of Interconnection (POI) within the network.

The IAD allowed that SBAS providers could also offer other SBAS products not specified in the IAD at commercially negotiated prices.

Consistent with our approach in the wholesale ADSL FAD inquiry<sup>8</sup> the IAD did not prevent Telstra from only supplying a FAB service with an active voice service. We noted that this did not prevent Telstra from supplying a FAB service without an active voice service should it decide to do so.

In the SBAS IAD we set non-price terms and conditions consistent with those included in the recent Domestic Transmission Capacity Service (DTCS) FAD.<sup>9</sup>

The SBAS IAD provided for exemptions from the SAOs under the SBAS declaration to:

- SBAS providers that supplied the SBAS and LBAS to 20,000 end-users or less
- TransACT's FTTN (VDSL) network in the ACT and its HFC networks in parts of regional Victoria (now owned by TPG) for a period of 12 months.

For further information please see our SBAS IAD available [here](#).

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<sup>8</sup> ACCC, Public inquiry to make a final access determination for the Wholesale ADSL service, Final Report, May 2013, Public version, pp. 74-78.

<sup>9</sup> Final Access Determination No. 1 of 2016 for the Domestic Transmission Capacity Service.

### 3. Price terms and conditions for the SBAS and LBAS

This chapter details our final decision on the pricing methodology and price terms and conditions of contained in the SBAS and LBAS FADs. The CCA requires that an access determination contain terms and conditions relating to price or a method of ascertaining price.

In determining the final pricing methodology and price terms and conditions, we have taken into account the criteria in subsection 152BCA(1) of the CCA as well as other relevant matters permitted under subsection 152BCA(3). Our assessment of the final price terms and conditions against these criteria and matters is provided at various points within the chapter and overall in section 3.6.4.

#### 3.1. Previous regulated prices for SBAS and LBAS

The regulated prices that applied for the SBAS and LBAS entry level product tiers under the SBAS IAD and the previous LBAS FAD are shown in Table 3.1 below. Further information is provided in section 2.4 above and the relevant determinations and accompanying documentation.

**Table 3.1: Previous SBAS and LBAS regulated prices**

<b>Services</b>	<b>Port (end-user access) charge (Per port per month)</b>	<b>Aggregation charge (Per Mbps per month)</b>	<b>Benchmark charges</b>
<b><u>SBAS</u></b>			
Non-Telstra SBAS providers (25/5 Mbps)	\$27.00	\$17.50	Port: NBN AVC charge 25/5 Mbps Aggregation: NBN CVC charge <sup>10</sup>
Telstra FAB services – Zone 1 (30/1 Mbps)	\$22.14	\$29.27	Port: Telstra wholesale ADSL Zone 1 Aggregation: Telstra wholesale ADSL AGVC/VLAN charge <sup>11</sup>
Telstra FAB services – Zones 2/3 (30/1 Mbps)	\$26.87	\$29.27	Port: Telstra wholesale ADSL Zone 2/3 Aggregation: Telstra wholesale ADSL AGVC/VLAN charge <sup>12</sup>
<b><u>LBAS</u></b>			
All providers (25/5 Mbps)	\$27.00	-	NBN AVC charge <sup>13</sup>

<sup>10</sup> NBN, *Wholesale Broadband Agreement Price List* (as varied from time to time) and NBN, *NBN Co Special Access Undertaking*, 18 December 2012 varied on 18 November 2013

<sup>11</sup> ACCC, *Public inquiry into final access determinations for fixed line services*, Final Decision, October 2015.

<sup>12</sup> *Ibid.*

<sup>13</sup> *Ibid.*

## 3.2. Draft decision SBAS and LBAS prices

Our draft decision was to use an adjusted benchmarks approach to setting non-Telstra SBAS and LBAS prices and to benchmark the Telstra FAB services to the service-specific costs of Telstra's wholesale ADSL service. The draft decision was to specify prices only for the entry-level residential grade products for these services. The draft decision prices are shown in Table 3.2 below.

**Table 3.2: Draft decision SBAS and LBAS prices**

### ***SBAS and LBAS (excluding Telstra FAB services)***

Charge component	Initial price	Subsequent price
Port per month (25/5 Mbps)	\$27.00	The price for the NBN Co product AVC TC-4 25/5 Mbps as amended from time to time
Aggregation charge per Mbps/month	\$15.25	The price for the NBN Co product CVC TC-4 as amended from time to time

### ***Telstra FAB services***

Charge component	2016-17	2017-18	2018-19	2019-20	2020-21
Port Zone 1 per month (30/1 Mbps)	\$23.45	\$23.76	\$24.07	\$24.07	\$24.07
Port Zone 2/3 per month (30/1 Mbps)	\$28.46	\$28.84	\$29.22	\$29.22	\$29.22
Aggregation per Mbps/month	\$16.65	\$14.12	\$11.63	\$11.63	\$11.63

In making the draft decision prices a key objective was that retail service providers (RSPs) and end users supplied via SBAS and LBAS networks should not be any worse off than if they were supplied by the NBN. This meant that the draft FAD prices were set in line with the NBN's prices and designed to change with these prices over time. The dynamic element to the prices reflected, in particular, forecasts of continuing high traffic growth across the superfast broadband sector that were expected to continue to drive down the average cost of aggregation services.

Different prices were applied to Telstra's FAB services supplied in South Brisbane and its Velocity Estates because these networks were built to work with Telstra's legacy copper-based systems and because they were expected to move to the NBN within a few years. These prices were benchmarked to the service-specific costs of the wholesale ADSL service because like with the FAB service, it also requires operation with Telstra's legacy copper-based systems.

Provision was also made in the draft FADs for adjustment to the SBAS and LBAS prices if the Government were to introduce a Regional Broadband Scheme (RBS) charge on superfast local access lines to help fund NBN's supply of non-commercial regional fixed wireless and satellite services. It was reasoned that if the charge was embedded in NBN Co's prices used as the price benchmarks for non-Telstra services, SBAS and LBAS operators would not be able to add a charge on top of these prices, but would be free to do so if NBN's benchmark prices were specified on a charge-exclusive basis. Given that the Telstra FAB service prices were not based on the NBN prices, provision was allowed for any RBS charge to be added to these prices if the FAB services were made subject to the charge.

Further information on how we arrived at these prices is contained in our draft decision report available [here](#).

### **3.3. Submissions to draft decision**

Submissions to the draft decision raised three key issues of concern in relation to the price terms and conditions. These were: the treatment of the RBS charge; Telstra's FAB pricing; and the application of CVC discounting. Submissions on each of these issues are summarised below.

#### **3.3.1. Treatment of the proposed RBS charge**

OPENetworks, LBN Co and CNT Corp (jointly as the 'NBN Comparable Carriers') were critical of the design of the Government's proposed RBS charge and the draft decision's position that the charge should potentially be absorbed within the FAD price caps. They challenged the notion that NBN Co's prices include the charge. They claimed, as evidence for this, that NBN Co's prices were determined many years before the RBS scheme or the current regional and remote fixed wireless and satellite solutions were proposed by the present government. They also questioned the transparency and reliability of both the RBS costs and the treatment in NBN Co's prices.

They further stated that to impose a price cap incorporating the RBS charge the ACCC would undermine their legitimate business interests and competition with the NBN and would not take into account their higher costs structures. They noted they are unable to share the costs with retail services like SBAS carriers and would be forced to disconnect unprofitable services and connections. They further noted that the Bureau of Communications Research (BCR) had recommended that if the RBS charge were introduced, the wholesale price caps for the 25/5 Mbps service should be reassessed if they meant that the charge could not be passed on.<sup>14</sup>

NBN Co indicated that based on what is stated in the Regulatory Impact Statement (RIS) for the RBS, the Government's policy is that the net proceeds of the RBS charge do not need to be reflected in an immediate drop in NBN Co's prices, but rather be considered as revenues for the purposes of the SAU.<sup>15</sup>

Both the NBN Comparable Carriers and NBN Co raised some broader issues with how the ACCC should consider the Government's proposed communications reform bills, including the RBS scheme for the purpose of the FAD. The NBN Comparable Carriers argued that if they are to be covered by the FAD, it should not take effect until the RBS bills are enacted.<sup>16</sup> NBN Co stated that the FADs should be based on the legislation as it exists at the time and should not anticipate the nature and extent of future legislative changes.<sup>17</sup>

#### **3.3.2. Telstra FAB pricing**

Telstra submitted that Telstra's FAB and wholesale ADSL traffic are aggregated on the same aggregation virtual circuit (AGVC) and the current network, systems and process are not able to accommodate different aggregation charges between the two services. It indicated that to do so would require Telstra to incur significant implementation costs within a limited timeframe prior to the incorporation of the South Brisbane and Velocity networks into the NBN, and which would need to be recovered in wholesale prices.

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<sup>14</sup> NBN Comparable Carriers submission to the draft decision.

<sup>15</sup> NBN Co submission to the draft decision.

<sup>16</sup> NBN Comparable Carriers submission to the draft decision.

<sup>17</sup> NBN Co submission to the draft decision.

Telstra proposed that for these and other reasons that the preferred option would be for the ACCC to benchmark FAB prices to regulated wholesale ADSL prices. However, as a less preferred alternative, Telstra proposed that the ACCC could peg the FAB aggregation charge to the higher regulated charge for wholesale ADSL aggregation and adjust the port price downwards so the equivalent revenue requirement could be achieved based on the service specific modelling and charges determined using the fixed-line services model (FLSM).<sup>18</sup>

Aside from this particular issue, Telstra was supportive of the ACCC's approach to the pricing of the FAB service detailed in the draft decision.<sup>19</sup>

NBN Co took issue with the ACCC's assumption in the draft decision report that the South Brisbane and Velocity Estimate networks will be transferred to the NBN within the next several years. NBN Co stated that the status quo may continue for an unknown period and that it can only be assumed that the networks may be transferred to the NBN.

It also submitted that in ignoring WLR prices, the ACCC did not apply the objective that it applied for non-FAB services – that RSPs and end users should not be any worse off than if supplied by the NBN. NBN Co considered that this is further compounded if the RBS charge is added to Telstra's prices, but must be absorbed by other SBAS and LBAS providers.<sup>20</sup>

### **3.3.3. Application of CVC discounting**

To reflect its move to dimension based discounting (DBD) based on an individual RSP's own CVC dimensioning per AVC, NBN Co proposed that the CVC price that applies on a given SBAS/LBAS network should reflect the dimensioning by the RSP on a given SBAS/LBAS network. This would see the charge based on NBN Co's applicable discounted charge for the equivalent level of dimensioning applying under its standard form access agreement (SFAA).

NBN Co also queried whether the ACCC had accounted for all the credits that NBN Co offers on AVC and CVC charges to enable access seekers to offer voice services in accordance with the ACCC's objective that RSPs and end-users should not be any worse off than if they were supplied by the NBN.<sup>21</sup>

## **3.4. Further consultation paper**

In response to the issues raised by submitters to the draft decision on the treatment of the RBS charge, Telstra's FAB pricing and the application of CVC discounting, we considered it appropriate to make some modification to our draft decision positions on these issues.

Given these proposals were not flagged in our draft decision, we decided to issue a further consultation paper detailing these proposal prior to making a final decision. This consultation paper was issued on 24 March 2017, with submissions due by 7 April 2017.

The proposals as flagged in the further discussion paper and the basis for them are summarised below. Further detail is available in the further consultation paper available [here](#).

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<sup>18</sup> Telstra submission to the draft decision, pp. 5-8.

<sup>19</sup> *Ibid*, p.4.

<sup>20</sup> NBN Co submission to the draft decision.

<sup>21</sup> *Ibid*.

### 3.4.1. Treatment of the proposed RBS charge

Prompted by the views put in the submission to our draft decision from the NBN Comparable Carriers, we gave further consideration to how the NBN's prices for the 25/5 Mbps had been set and whether there was likely to be a significant cross-subsidy for regional fixed wireless and satellite services in these prices. We reached the view that because the NBN's prices for the 25/5 Mbps service were set to enable RSPs to match pre-existing broadband offers and NBN Co has an objective of recovering costs from higher priced products and growth in usage over time, the existing prices for the 25/5 Mbps service may not contain a significant cross-subsidy. We also accepted that requiring LBAS and SBAS providers to absorb the proposed RBS charge could push their revenues per line after subtracting the charge, below their per line costs of supplying the service. It was therefore proposed to treat the NBN prices as approximate cost benchmarks for LBAS and SBAS providers and allow the RBS charge to be added on top of the benchmark prices.

### 3.4.2. Telstra FAB pricing

The second proposal in the consultation paper was aimed at addressing Telstra's advice as to its current inability to charge different aggregation prices across its fibre and wholesale ADSL services and the potential costs it would need to incur to do so. We proposed rebalancing the draft decision charges for Telstra's fibre services by setting the aggregation charge to be the same as the regulated aggregation charge for wholesale ADSL and lowering the port charges to compensate for the rise in aggregation revenue that Telstra would be expected to receive. The resulting rebalanced charges are shown in Table 3.3 below.

**Table 3.3: Further consultation paper rebalanced Telstra FAB service price benchmarks**

Charge component	2016-17	2017-18	2018-19	2019-20	2020-21
Port Zone 1 per month	\$18.06	\$16.03	\$13.01	\$13.01	\$13.01
Port Zone 2/3 per month	\$23.07	\$21.10	\$18.15	\$18.15	\$18.15
Aggregation per Mbps/month	\$29.27	\$29.27	\$29.27	\$29.27	\$29.27

### 3.4.3. Application of CVC discounting

The third proposal, prompted by the suggestion by NBN Co in its submission to the draft decision, was to require SBAS and LBAS providers to give discounts to each RSP based on their respective aggregation capacity acquired per port on each SBAS and LBAS network using NBN Co's new schedule of RSP-specific CVC discounts. This approach was considered to have better efficiency properties than use of a uniform discount for all RSPs proposed in the draft decision.

We also flagged that in order to maintain appropriate regulatory oversight of NBN Co's CVC prices it would be necessary to require NBN Co to provide the CVC discounting information to the ACCC via a record keeping rule (RKR), which we would use to publish the discounts and reference in the FADs. We also stated that were NBN Co to make major changes to the structure or application of these discounts, we may need to consider whether it would be appropriate to vary the FADs.

## 3.5. Submissions to further consultation paper

### 3.5.1. Treatment of the proposed RBS charge

OPENetworks, LBN Co, CNT Corp and Opticomm (jointly as the 'NBN Comparable Carriers including Opticomm') stated that they supported the ACCC's proposal in the further consultation paper to allow the amount of the RBS charge to be added to the benchmark prices regulated by the ACCC.<sup>22</sup>

NBN Co challenged our proposition that there was not a cross-subsidy in its 25/5 Mbps prices. It referred us to a statement in the Government's Telecommunications Regulatory and Structural Reform policy paper as evidence to indicate there is a cross-subsidy to fund fixed wireless and satellite services in its wholesale prices and claimed that we had provided no evidence or analysis to assert that the 25/5 Mbps service does not contain a significant cross-subsidy.

NBN Co also questioned our assumptions about the impact of the RBS charge on SBAS and LBAS providers. In particular it:

- disputed that the long-term revenue constraint methodology (LTRCM) provides NBN Co with a unique advantage in being able to recovery cross-subsidies over time and noted that SBAS and LBAS providers in fact have greater pricing flexibility than NBN Co does.
- questioned whether the proposed draft decision prices could push SBAS and LBAS prices below costs, noting that providers will receive both AVC and CVC revenues and the ACCC has said in its initial consultation paper they operate mainly in lower cost to serve areas.
- pointed to the Government's policy expectation that there should be no additional costs to consumers relative to current NBN pricing from the introduction of an industry-funding mechanism for the cross-subsidy.
- questioned the countervailing power that RSPs would have in making sure SBAS and LBAS providers were unable to pass on the RBS-charge in areas where these provides were not in competition with the NBN.<sup>23</sup>

### 3.5.2. Telstra FAB pricing

Telstra stated that it prefers the proposed rebalancing of prices detailed in the further consultation paper less than the alternative of adopting the regulated wholesale ADSL prices in their entirety because it introduces the risk of cost under-recovery as not all FAB costs are captured within the FLSM. It also sought to ensure that the aggregation charge be tied to the regulated wholesale ADSL aggregation price so that it can move in response to any change in this regulated price (notably any change that occurs at the end of the current fixed line services FAD).<sup>24</sup>

NBN Co reiterated its position of earlier submissions that no binding agreement exists for any transfer of the FAB networks to the NBN and it can only be assumed by the ACCC that they may be transferred.<sup>25</sup>

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<sup>22</sup> NBN Comparable Carriers including Opticomm submission to the further consultation paper.

<sup>23</sup> NBN Co submission to the further consultation paper.

<sup>24</sup> Telstra submission to the further consultation paper.

<sup>25</sup> NBN Co submission to the further consultation paper.

### 3.5.3. Application of CVC discounting

The NBN Comparable Carriers including Opticomm stated that they strenuously oppose the proposal to link the CVC charges of LBAS operators to NBN's discounts. The reasons given for this were that: (1) NBN Co doesn't operate on a level playing field, could reduce charges for non-commercial motives and predatory price; (2) LBAS operators face different cost of backhaul to the POIs in the capital cities than NBN Co does to its 121 POIs; (3) NBN Co has not provided backhaul to LBAS and SBAS providers commercially; and (4) LBAS operators cannot sustain the capped CVCs and discounts with a view to raising them in the future in the same way that NBN Co can. They also proposed that should we proceed with the proposal to link CVC charges to the NBN's, an exemption of up to 50,000 end users should be introduced.<sup>26</sup>

NBN Co stated in its submission that we may have misunderstood its previous submission on how the NBN's new dimension based discounting should be accounted for in the FADs and rejected the need for, and use of, an RKR to gather the required information.<sup>27</sup>

## 3.6. Final decision

### 3.6.1. Treatment of the proposed RBS charge

The application of the RBS charge to particular technologies or superfast broadband line providers is ultimately a matter for the Government. Our role is to consider how to best deal with a particular RBS charge in access prices in accordance with the CCA legislative criteria.

In response to the NBN Comparable Carriers' claim that NBN Co's prices do not include provision for the RBS charge, we note that this does not mean that there is an absence of a cross-subsidy for uneconomic services in at least some of the NBN's prices either now or into the future. The potential existence of such a cross-subsidy is given added weight by the NBN's nationally uniform price construct, which has been a feature of the NBN since it was first conceived.

However, we do not consider that there is sufficient evidence there is a cross-subsidy currently embedded in the prices (or more accurately current yields per customer) for the 25/5 Mbps service based on:

- NBN Co stating in its SAU documents that it set prices to enable RSPs to match legacy broadband offers and the fact that the wholesale prices on which these offers were based, do not incorporate a subsidy for regional fixed wireless and satellite services; and
- NBN Co also stating that it expects to recover its costs from take-up of higher priced products and the growth in usage over time.<sup>28</sup>

Further we are not persuaded by NBN Co's efforts to claim otherwise in its response to our further consultation paper. We consider that the Government's policy document referred to by NBN Co is making a broad statement there is an internal cross-subsidy, rather than suggesting that all NBN Co's wholesale prices incorporate a cross-subsidy.<sup>29</sup> We note also that NBN did not provide any internal material in relation to the nature or extent of cross-subsidies in its prices for the 25/5 Mbps service.

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<sup>26</sup> NBN Comparable Carriers including Opticomm submission to the further consultation paper.

<sup>27</sup> NBN Co submission to the further consultation paper.

<sup>28</sup> NBN Co, *Supporting Submission NBN Co Special Access Undertaking*, 28 September 2012, pp. 8, 100, 113-114.

<sup>29</sup> Australian Government, *Telecommunications Regulatory and Structural Reform*, December 2014, p. 6.



On the question of the costs faced by SBAS and LBAS networks, we note several LBAS networks operate in outer suburban locations that are higher cost to serve than inner-suburban and CBD locations. This means that these networks could incur higher costs per line than the NBN in supplying fixed line services. While we accept that SBAS and LBAS providers may have greater flexibility in adjusting their headline prices for other services than the NBN, their ability to obtain revenue would in several cases be hampered by their customer mix, locations of their networks and access to finance to fund any deferral relative to the NBN (see below). We have also considered both AVC (port) and CVC (aggregation) revenues in assessing the prospect of cost-recovery by SBAS and LBAS operators.

Lastly, our view on the countervailing power of RSP is based on the relatively small market share of non-NBN networks and the preference of RSPs to be able to offer national pricing rather than prices that vary by network.

Our final decision is therefore not to require the RBS charge to be subtracted from the NBN benchmark prices. To do so would run the risk of pricing the service below costs for several SBAS and LBAS operators. We believe these operators would find the revenue shortfall difficult to recover via other means for the following reasons:

- *A residential customer focus* – that limits potential cross-subsidisation from higher margin business services
- *Outer urban network locations serving new estates* – that limits potential cross-subsidisation from higher margin inner-urban fixed services
- *The inability to access finance on similar terms to the NBN* – which reduces the ability to defer the charge liability in the same way as the NBN.

We consider that to overlook these difficulties would be contrary to these providers legitimate business interests and impose a disproportionate regulatory impost. Our decision enables SBAS and LBAS operators to pass on the proposed RBS charge to their wholesale customers to the extent they are able to do so.

On NBN Co's point about how it was planning to treat the RBS charge proceeds from SBAS and LBAS providers, this suggests that NBN Co is not planning to alter its prices as a result of the introduction of the RBS, but to book any external revenue received as a revenue offset under the SAU's LTRCM (which would enable lower prices to be charged sometime in the future). We estimate that the immediate forgone price reduction from treating the external proceeds in this manner is up to \$0.78 cents per line per month in 2017-18 (using revenue estimates from the Government's RIS). However, consistent with our view that the current NBN prices for the 25/5 Mbps service do not include a cross-subsidy and represent an approximate cost benchmark for SBAS and LBAS providers' costs per line of supplying the 25/5 Mbps service, we do not believe it is warranted to subtract this amount from the NBN price benchmarks.

In relation to the broader question raised by the NBN Comparable Carriers and NBN Co about the appropriate treatment of prospective legislative changes contained in the communications reform bills, we reiterate that the FADs have been made in accordance with legislation that applies at present. However we consider that the if the FADs can be written to accommodate the introduction of the Government's proposed RBS charge without the need for subsequent modification, then this can meet the legislative criteria by lowering regulatory costs and providing for greater industry certainty. Were the final RBS charge to be significantly different to that anticipated in the RBS bills, we would review the changes and consider varying the FADs if necessary.

### **3.6.2. Telstra FAB pricing**

In response to Telstra's submission to the further discussion paper, we accept that the FLSM does not include all of the costs of the FAB services – and use of wholesale ADSL costs is a proxy for these costs. However the geographically averaged nature of the modelling means that it may over-estimate the costs of supplying the wholesale ADSL service – and the FAB – in lower cost locations such as South Brisbane. A similar argument can be made in relation to the wholesale line rental service which must be purchased by RSPs to obtain the FAB service.

In response to NBN Co's criticisms in its submission to the draft decision about applying a different standard to Telstra's prices, we note that the different arrangements that apply to Telstra arise due to the cost that would need to be incurred to remove legacy network and system requirements to offer a stand-alone SBAS. Otherwise the prices are considered to be in line with NBN prices. We also had access to an existing cost model that can readily be used to determine proxy costs of the Telstra FAB service that is not the case for other SBAS and LBAS operators.

It is, however, accepted that part of the rationale for treating Telstra differently for the draft decision than other SBAS networks was that it was expected the FAB networks would be transferred to the NBN within the next few years. We consider that this may still occur based on statements made by Telstra and NBN Co, but note also that NBN Co has emphasised to us that no agreement for the transfer of these networks has been made.

As we stated in the draft decision, the case for treating the Telstra networks differently weakens substantially if these networks are not transferred or over-built within 3 years. However, trying to accommodate this within a four-year FAD, including allowance for lead-time, in a manner that meets the s 152BCA legislative criteria is a difficult proposition.

Our final decision is therefore to maintain the separate prices for the Telstra FAB services over the course of the FAD (unless of course they are transferred to the NBN in which case the NBN prices would apply). We nonetheless consider that it would be very hard to justify separate prices continuing under a subsequent FAD if the FAB services have not been transferred to the NBN by then.

Our intention is to allow the Telstra FAB prices to move with any changes to the regulated wholesale ADSL prices. However, we consider it is problematic to include an explicit provision in the SBAS FAD for this to occur given uncertainty about both wholesale ADSL costs and the pricing methodology that might be adopted when the fixed line services FAD expires on 30 June 2019. We consider the most practical solution is for a variation to the SBAS FAD to be made, if needed, following the making of the new fixed line services FAD. In the meantime we have specified the FAB prices in the FAD for 2019-20 and 2020-21 to be the same as those for 2018-19.

### **3.6.3. Application of CVC discounting**

We make a number of comments in response to the NBN Comparable Carriers including Opticomm's submission to the further consultation paper about the possible use of RSP and network-based discounting for the regulated CVC charge using NBN Co's schedule of discounts.

Our draft decision proposed to link the SBAS and LBAS operators' aggregation prices to the NBN's CVC prices on an averaged basis and our revised proposal in the further consultation paper proposed to make discounts specific to each RSP and network. The NBN Comparable Carriers including Opticomm's submission does not address which would be preferable,

although it seems to indicate that it is inappropriate to apply any linking to NBN's CVC prices.

Our view was, and remains, that the specific discounting will send better cost and investment signals than a uniform charge based on an industry average and be in the LTIE.

We do not consider that it likely that NBN Co would predatory price in setting these discounts as it would need to forgo a large amount of revenue from its own customers to obtain a very small increase in market share should it be successful in driving LBAS or SBAS competitors from the market.

On the question of backhaul costs faced by LBAS providers to CBD POIs, UXC Consulting considered the costs of transmission to CBD locations as part of its analysis for the SBAS small provider exemption, suggesting that it would not be an impediment for the supply of 12,000 end user services or more. Accordingly, we also do not believe that a higher exemption threshold for the application of regulated aggregation prices is justified.

We also rely on an expectation that the projected growth in data usage over the next several years (as detailed in the draft decision report) will drive down the average cost of aggregation (and the price per Mbps) on SBAS and LBAS networks as well as the NBN.

Further we note that although LBAS providers make POIs available in the CBD of capital cities, they could under the terms of the declaration, specify or establish POIs closer to the end customer locations they serve for regulated aggregation charging purposes and charge additionally for an aggregation product to a POI in a CBD location if that is what access seekers would prefer to purchase (rather than purchase their own transmission services to the CBD location).

Our final decision is therefore to utilise NBN Co's schedule of discounts to require SBAS and LBAS operators to determine aggregation prices for each RSP based on the amount of aggregation capacity purchased per port by each RSP on a given SBAS or LBAS network.

In response to NBN Co's comment in its submission to the further discussion paper, we confirm that this is the same approach for setting aggregation prices as suggested by NBN Co in its submission to the draft decision.

In response to NBN's query in its submission to the draft decision whether we fully accounted for all the credits that NBN offers RSPs to provide voice services, our SBAS and LBAS draft determinations specified that the anchor product included, if requested by an RSP, provision of bitstream of sufficient capacity to provide a voice service. The anchor price we specified for the draft FADs was therefore determined to be inclusive of capacity for an RSP to offer a voice service. Our approach was consistent with NBN providing 150kbps of TC-1 for each AVC TC-4 purchased at no extra charge, and offering an ongoing 50 kbps CVC credit for each AVC TC-4 purchased.<sup>30</sup> We did not include allowance for the CVC discount available under the NBN's 'CVC transitional pricing credit' on the basis that this was considered to be a connection incentive and it is not offered on an ongoing basis. Our final decision is to carry over the draft decision's approach to voice capacity inclusions, and treat the prices as specified in the FADs for AVC and CVC as inclusive of bitstream capacity to provide a voice service if requested by an RSP.

To maintain the link to NBN Co's prices (including CVC discounts) over time, the FADs reference NBN Co's prices discounts for its AVC TC-4 25/5 Mbps and CVC-TC-4 products contained in its Wholesale Broadband Agreement (WBA) as amended from time to time. NBN has indicated to us that it will continue to list its CVC discounts in this document. Were

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<sup>30</sup> NBN Co submission to the draft decision and NBN Co *WBA Price List* pp. 23-24.

NBN to cease doing so, we would seek to obtain a commitment from NBN Co to recommence doing so either in its WBA or elsewhere on its website or obtaining the information from NBN Co for publication by the ACCC, using our RKR powers if need be.

### 3.6.4. Final decision prices

Our final decision prices for the SBAS and LBAS are specified in Table 3.4 below.

**Table 3.4: Final decision SBAS and LBAS prices**

*SBAS and LBAS (excluding Telstra FAB services)*

Charge component	Initial price	Subsequent prices
Port (25/5 Mbps)	\$27.00 per month	The price for the NBN Co product AVC TC-4 25/5 Mbps as amended from time to time (including discounts)
Aggregation dimensioning by RSP per port (kbps)	Price charged per Mbps per month	
0 to 399	\$17.50	
400 to 549	\$16.75	
550 to 699	\$16.25	
700 to 849	\$15.75	
850 to 999	\$15.00	
1000 to 1149	\$14.25	
1150 to 1299	\$13.50	
1300 to 1449	\$12.75	
1450 to 1599	\$12.00	The price for the NBN Co product CVC TC-4 as amended from time to time (including discounts)
1600 to 1749	\$11.25	
1750 to 1899	\$10.75	
1900 to 2049	\$10.25	
2050 to 2199	\$9.75	
2200 to 2349	\$9.50	
2350 to 2499	\$9.25	
2500 to 2649	\$9.00	
2650 to 2799	\$8.75	
2800 to 2949	\$8.50	
2950 to 3099	\$8.25	
3100 and above	\$8.00	

### **Telstra FAB services**

<b>Charge component</b>	<b>2016-17</b>	<b>2017-18</b>	<b>2018-19</b>	<b>2019-20</b>	<b>2020-21</b>
Port Zone 1 per month (30/1 Mbps)	\$18.06	\$16.03	\$13.01	\$13.01	\$13.01
Port Zone 2/3 per month (30/1 Mbps)	\$23.07	\$21.10	\$18.15	\$18.15	\$18.15
Aggregation per Mbps/month	\$29.27	\$29.27	\$29.27	\$29.27	\$29.27

To provide time for SBAS and LBAS operators to implement pricing changes, the FADs make provision for any changes to the applicable NBN prices (including discounts) to take effect on the greater of three calendar months after NBN Co has published such a change in its WBA or when the change is due to take effect for NBN Co's customers. The three month period corresponds to the minimum period of notice that NBN Co provides to its wholesale customers of pricing changes in its latest discount notice for the CVC charge.

We also wish to flag that were NBN Co to make major changes to the structure or application of its prices or price discounts, we may need to consider whether it would be appropriate to vary the FADs.

As indicated above, we also consider that it would be very hard to justify separate prices continuing for Telstra's FAB service under a subsequent FAD if the FAB services have not been transferred to the NBN during the period of the current FAD.

### **3.6.5. Achievement of s 152BCA objectives**

As set out in section 2.2 of this report, section 152BCA of the CCA sets out the matters the ACCC must take into account in making an access determination.

In benchmarking LBAS and SBAS provider prices to those of the NBN on a dynamic basis, we are seeking to ensure that these prices encourage RSPs to use the wholesale services of LBAS and SBAS networks, thereby promoting competition in the supply of retail services to end users via improved price and quality of service offerings, greater incentives to innovate and provide a wider array of retail products. As a result of this competition, productive and allocative efficiency and any-to-any connectivity are likely to be promoted as well as the LTIE on an ongoing basis.

Further, linking the SBAS and LBAS prices to NBN prices provides consistency with the NBN price terms and conditions that we considered against the section 152BCA matters in accepting NBN Co's SAU. This includes matters related to the efficient use of, and investment in infrastructure and the economically efficient operation of a carriage service, network or facility.

We have also attempted to ensure, however, that the NBN-linked prices do not mean that LBAS and SBAS providers are unable to recover their direct costs in supplying the 25/5 Mbps service. On this basis, we have allowed the Government's proposed RBS charge liability to be added to the NBN price benchmarks for the 25/5 Mbps service. This is because if we were to require SBAS and LBAS providers to absorb the charge it could push their prices below costs and present them with difficulties in recovering the shortfall in costs by other means relative to the NBN, which we consider would be contrary to their legitimate business interests. We also believe it would also be a disproportionate regulatory imposition given these providers' small overall market share.

In relation to the Telstra FAB pricing, these prices are based on the modelled annual service-specific costs of the wholesale ADSL service using the FLSM, which we consider a better proxy for the direct costs of the FAB service over time (compared to NBN pricing). Use of these costs to determine the FAB prices means that Telstra's legitimate business interests are also likely to be better met.

We consider that the application of anchor pricing will aid the achievement of the section 152BCA objectives by reducing regulatory costs and help provide for flexibility and innovation in pricing. These are in turn expected to help to encourage efficient investment and protect the legitimate business interests of access providers.

We do not consider that the FADs will impact on the safe and reliable operation of LBAS or SBAS services or the relevant facilities or networks. We also do not consider that the value of extensions, or enhancements whose costs are borne by someone else, is relevant in relation to these FADs.

We also consider that the overall price terms and conditions achieve some other important objectives that we consider are relevant in the circumstances (under section 152BCA(3)). These include that they:

- provide for reasonable consistency of regulation of all superfast broadband services (on NBN and non-NBN networks and between LBAS and SBAS services)
- can be implemented quickly and at relatively low regulatory cost for both providers and the ACCC, rather than approaches involving more extensive costing or adjustment
- take into account the views of submitters, which were generally against a more extensive costing exercise for setting prices.

We have also taken into account the section 152BCA matters in including a small provider exemption in the SBAS FAD. This is detailed further in chapter 5.

## 4. Non-Price terms and conditions

This chapter provides our final decision on non-price terms and conditions (NPTCs) for the SBAS and LBAS FADs.

Our general approach to making a FAD is to address the key commercial terms of access that would facilitate the supply of the service to occur, and to base these upon a set of model terms.

In 2015 we released a report setting out our final decision on NPTCs for the mobile terminating access service (MTAS) and views on the NPTCs for fixed line services and the domestic transmission capacity service (DTCS) (the NPTC report).<sup>31</sup> In April 2016 the ACCC adopted the common NPTCs in the DTCS FAD alongside a number of service-specific NPTCs.

The NPTC report provides a list of general commercial and service specific conditions that can be utilised in subsequent FADs.<sup>32</sup>

### 4.1. Previous LBAS FAD non-price terms and conditions

The NPTCs for the previous LBAS FAD are set out in Schedules 2 to 6 of the *Final Access Determination No. 2 of 2012 (LBAS)* and include:

- (a) billing and notifications
- (b) creditworthiness and security
- (c) general dispute resolution procedures
- (d) confidentiality provisions
- (e) suspension and termination

### 4.2. SBAS IAD non-price terms and conditions

We set NPTCs in the SBAS IAD consistent with those in the most recent DTCS FAD. The NPTCs were set out in Schedules 2-10 of the *Interim Access Determination No.1 of 2016 (SBAS)* and include:

- (a) billing and notifications
- (b) creditworthiness and security
- (c) general dispute resolution procedures
- (d) confidentiality provisions
- (e) suspension and termination
- (f) liability and indemnity
- (g) communication with end-users
- (h) network modernisation and upgrade notice periods
- (i) changes to operating manuals

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<sup>31</sup> ACCC, Telecommunications Final Access Determination Inquiries - Non-price terms and conditions - Final decision for MTAS and views for fixed line services and DTCS, Final Report, August 2015

<sup>32</sup> ACCC, Telecommunications Final Access Determination Inquiries - Non-price terms and conditions – Appendix to the Final decision for MTAS and views for fixed line services and DTCS, Final Report, August 2015

(j) recourse to regulated terms.

In the discussion paper we invited views on whether the current NPTCs for the LBAS FAD and the SBAS IAD should continue.

### **4.3. Other non-price terms and conditions**

The LBAS FAD included service specifications with respect to the use of data and voice ports on a network termination device at the end-user premises. This was not included in the SBAS IAD because of the range of different network configurations that can be used to supply the SBAS (e.g. FTTB, FTTN) and the potential for end-users to self-supply their own network termination devices.

In the FAD discussion paper we sought parties' views on whether specifications for the use of these ports should continue to be included in any FAD for the LBAS and/or whether they should also be specified in a FAD for the SBAS and the reasons for this.

### **4.4. Draft decision**

Our draft decision was to include the NPTCs specified in the SBAS IAD in the draft FADs for both the LBAS and the SBAS. The SBAS and LBAS draft FADs included the following NPTCs:

- billing and notification
- creditworthiness and security
- general dispute resolution procedures
- confidentiality
- suspension and termination
- liability and indemnity
- communication with end-users
- network modernisation and upgrade notice periods
- changes to operating manuals
- recourse to regulated terms.

We considered that including these NPTCs in the SBAS and LBAS FADs would provide a suitable fall-back position for parties if they could not agree on commercial terms. We noted these terms were subject to extensive industry consultation during our review in 2014-2015 of the NPTCs and were likely to be widely accepted by industry.

In relation to other NPTCs, our draft decision was not to include in the draft FADs for the SBAS and LBAS, service specifications with respect to the use of data and voice ports on a network termination device at the end-user premises. This was because we considered that any specification for voice and data services will be difficult to prescribe because of the range of different network configurations that could be used to supply the SBAS and LBAS, and the potential for end-users to self-supply their own network termination devices.



## **4.5. Submissions**

Telstra stated it supported the NPTCs as contained in the IAD and was of the view these should be as uniform as possible between the SBAS and LBAS. It also supported not including service specifications for the use of data and voice ports at end-user premises.<sup>33</sup>

## **4.6. Final decision**

Our final decision is to maintain the draft decision position on the NPTCs for the SBAS and LBAS FADs on the basis that we have not received any objections to this position in submissions.

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<sup>33</sup> Telstra submission to the draft decision, p. 9.

## 5. Exemptions

Under paragraph 152BC(3)(h) of the CCA we can include terms and conditions in an access determination which provide that any or all of the SAOs do not apply to a carrier or carriage service provider – either unconditionally or subject to such conditions and limitations as are specified in the FAD.<sup>34</sup> An access determination can make provisions for these conditions to apply to different carriers or access seekers or classes of carriers or access seekers.<sup>35</sup>

Under the CCA we cannot exempt LBAS access providers from the SAOs for delivery of a Layer 2 bitstream service.<sup>36</sup> Our final decision therefore only determines whether there should be an exemption from some or all of the SAOs for one or more SBAS providers.

### 5.1. Previous exemptions

In making the SBAS IAD, we exempted from the SAOs:

- Small scale access providers who supply the SBAS and LBAS to 20,000 end-users or less (prior to considering the issue fully in this FAD inquiry)
- Supply of the SBAS on TransACT's (now TPG's) FTTN (VDSL) network in the ACT and its HFC networks in parts of regional Victoria for a period of 12 months. This was to provide a suitable transition period to allow TPG to transform its wholesale service from a Layer 3 product to a Layer 2 product.

### 5.2. Draft decision

Our draft decision on exemptions to apply to the SBAS FAD was detailed in Chapter 5 of the draft decision report. A summary of this decision is provided below.

Our draft decision was that, based on the analysis undertaken by UXC of compliance costs of providing a wholesale SBAS service, a small provider exemption should continue and that this should apply to providers having up to 12,000 SBAS and LBAS end customers (taken on a combined basis). This applied the exemption at the top of UXC's estimated range at which wholesale services are likely to be profitably provided. The draft decision to provide this exemption was reinforced by our view that there was expected to be limited (if any) RSP interest in connecting to smaller SBAS networks based on statements made in several submissions.

Although we considered other potential means of providing exemptions, our draft decision was that an exemption based on the number of end user services is the simplest mechanism for exempting those providers for which the costs of compliance will be high relative to the potential benefits to end users, having regard to the section 152BCA objectives.

In making the draft decision we also noted the potential constraint that operates under the provisions of the Government's policy on the provision of telecommunications infrastructure in new developments. This states that where providers of superfast carriage services do not provide "NBN-consistent outcomes", NBN Co will be permitted to overbuild them.<sup>37</sup> To the extent exempt providers are not providing NBN-consistent outcomes they are likely to face competitive pressure from the NBN and NBN-based RSPs in the future – with or without regulation of the SBAS FAD.

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<sup>34</sup> Section 152BC(3)(h)(ii) of the CCA

<sup>35</sup> Section 152BC(5) of the CCA

<sup>36</sup> Section 152(4AA) of the CCA

<sup>37</sup> Australian Government, *Telecommunications infrastructure in new developments – A new approach to competition*, 1 March 2015, pp. 19-20.

Nevertheless we noted that the roll out of the NBN will continue to take some time and we proposed to continue to monitor the retail price and service offerings provided on the exempt networks to help ensure that the end users served by these networks were not made significantly worse off over time.

In the draft decision report we also noted the number of comments in submissions to the discussion paper about the costs of RSPs establishing multiple interfaces and in obtaining access to competitively priced transmission, and the proposed solution of being able to interconnect with SBAS and LBAS networks via the NBN using B2B interfaces and access to NBN's CVC (in the absence of end user access).

Our draft decision was that the question of access to an NBN B2B interface and CVC was best considered in the communications market study being undertaken by the ACCC.<sup>38</sup> This was because this matter raised issues that went beyond what could be addressed under the SBAS and LBAS FADs, as such arrangements would necessitate obligations being placed upon NBN Co – and NBN Co does not supply an SBAS or an LBAS.

Our draft decision was also to allow the temporary exemption for TPG to transform its wholesale services from a Layer 3 product to a Layer 2 product to continue until the existing cut-off date of 28 July 2017 (coinciding with the nominal expiry of the SBAS IAD), given TPG's advice that it would take 12 months to undertake the necessary systems and network changes.<sup>39</sup>

### 5.3. Submissions to draft decision

Spirit Telecom submitted that a small provider exemption should be at least 20,000 services rather than 12,000 proposed in draft decision. It was concerned that the regulatory burden on small providers had been underestimated by failing to consider the diversion of existing management attention to wholesale and regulatory functions. Spirit noted that its network [start c-i-c] [end c-i-c] and it brings a competitive element to the market mainly dominated by larger RSPs operating on the NBN that could be put at risk by regulatory requirements. It also claimed that [start c-i-c] [end c-i-c].<sup>40</sup>

NBN Co expressed concern that the ACCC's proposed exemption threshold of up to 12,000 end users is significantly higher than the Government's proposed exemption threshold for the separation obligation of up to 2,000 residential end users. It also queried why the additional costs of supplying the SBAS by small providers modelled by UXC Consulting included incremental transmission costs.<sup>41</sup>

In a later submission to our further consultation paper NBN Co stated that a small provider exemption is inconsistent with the ACCC's view in the draft decision that RSPs and end users should not be any worse off than if supplied by the NBN, and NBN Co's previously stated view that a small fixed line monopoly should not be of any less concern than a large fixed line monopoly in promoting the LTIE.<sup>42</sup>

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<sup>38</sup> See <http://www.accc.gov.au/about-us/market-studies/communications-sector-market-study>

<sup>39</sup> ACCC, Interim access determination for the superfast broadband access service, Explanatory note, July 2016.

<sup>40</sup> Spirit Telecom submission to the draft decision.

<sup>41</sup> NBN Co submission to the draft decision.

<sup>42</sup> NBN Co submission to the further consultation paper.

## 5.4. Final decision

In response to Spirit Telecom's criticism in its submission to the draft decision of the level of the exemption threshold, we note that the threshold of 12,000 fixed line superfast broadband end users was considered to be a high estimate based on the UXC Consulting analysis.

To address Spirit Telecom's concerns and other factors that might affect the level of the exemption threshold we requested that UXC Consulting revisit its analysis to take into account: likely final decision pricing; the potential costs of diversion of managerial effort in supplying wholesale services; the impact of the RBS charge under the assumption it could be difficult for providers to pass it on fully to wholesale customers; and sensitivity on the number of wholesale end-users relative to the number of retail end-users.

In its updated analysis UXC Consulting modelled the impact of a lower representative CVC charge of \$14.25 per Mbps per month and adding an RBS charge of \$7.10 per line per month to wholesale costs. While it found these in combination had a substantial impact on wholesale profitability, it did not affect the ability of a business supplying 12,000 services in total to generate positive cash flows after two years.

UXC Consulting advised that the proportion of wholesale to retail services within an overall threshold number is not determinative of the recommended threshold for the exemption on the basis that the modelling assumes that the less wholesale services supplied, the greater the number of more profitable retail services are supplied.

Finally, UXC Consulting considered that the opportunity cost of diverted management effort was not something it could determine with any accuracy.

Its overall conclusion was that the 12,000 or less exemption level recommended in its earlier report remained appropriate.<sup>43</sup>

In response to the concern raised by NBN Co in its submission to the draft decision that an exemption threshold of above 2,000 would be inconsistent with the Government's threshold for the separation obligation we note that under the exposure draft of the relevant telecommunications reform bill, the ACCC will have the power to extend the separation exemption threshold beyond this level.<sup>44</sup>

On NBN Co's query about why incremental transmission costs are incurred in offering wholesale services, the UXC Consulting analysis assumes that wholesale provision of the SBAS would be additional to existing retail supply by the SBAS provider rather than a replacement for it, and would require additional transmission services for each RSP supplied.

In response to NBN Co's comments made in its submission to the further consultation paper that the exemption was inconsistent with the 'no worse-off' proposition of the draft decision, our draft decision was always qualified by the small provider exemption, so we reject this criticism both for both the draft decision and this final decision.

We also reject NBN's view that smaller and large monopolies are of equivalent concern on the basis that the regulatory costs to smaller networks account for a higher proportion of business costs and relative to the aggregate benefits of regulation that accrue to end-users connected to these networks in comparison to larger networks.

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<sup>43</sup> UXC Consulting, *Addendum – Analysis of Costs for Small Providers to Provide SBAS Layer 2 Services*, Report for ACCC, 18 April 2017.

<sup>44</sup> *Telecommunications Legislation Amendment (Competition and Consumer) Bill 2017*, Exposure Draft, 28 November 2016.

Our final decision is to apply an exemption for SBAS providers with 12,000 or less fixed line superfast broadband end-users. This is considered to meet the section 152BCA objectives by helping to ensure the ongoing provision of superfast broadband services to customers on these networks. In this regard, the objective of maintaining connectivity for end-users has been of prime concern, given the risk excessive compliance costs could jeopardise the financial viability of smaller providers' operations. Similarly, we consider the exemption will also help to promote the efficient use of, and investment in infrastructure and protect the legitimate business interests of the smaller providers by ensuring that regulation is proportional to their size. We acknowledge that while some market entry is possible, the exemption is unlikely to have a significant negative impact on competition in relevant markets due to the limited demand expected for wholesale access to these networks.

## 6. Other declaration coverage issues

This chapter responds to some coverage issues raised in submissions in response to the draft decision.

### 6.1. Draft decision

Our draft decision on coverage of the SBAS FAD was detailed in Chapter 6 of the draft decision report.

We clarified the intended scope of the SBAS declaration, confirming that it applies to business services except those that are explicitly excluded under the terms of the declaration. We also clarified that the anchor price regulation specified under the draft FAD (and which applied under the IAD) was for residential grade services only.

We also stated that we would not consider the technological scope of the SBAS declaration (the possibility of incorporating wireless services) as part of the FAD process.

### 6.2. Submissions to draft decision

The NBN Comparable Carriers submitted that they offer price and non-price terms and conditions less than or equal to the NBN already and should be exempt from the FAD on the basis that market forces determine the price and non-price terms without the need for regulation.<sup>45</sup>

NBN Co restated its view provided in response to the discussion paper that the ACCC should adopt a technologically neutral approach to the declaration.

It also submitted that transparency obligations such as RKR and disclosure directions should apply to SBAS and LBAS providers.<sup>46</sup>

### 6.3. Final decision

On the matter of whether SBAS and LBAS prices and non-price terms warrant regulation, we repeat the finding of that SBAS declaration that LBAS and SBAS services can be supplied monopolistically giving the carriers supplying them pricing power, particularly prior to, or in place of, entry by the NBN. Applying price regulation in these circumstances is considered to be in the LTIE.

We also do not consider developments in the roll out of wireless services or pricing offers on mobile networks that have occurred since the SBAS declaration and the draft decision warrant any change to the technological or other scope of the declaration. We will, however, continue to monitor the market in these respects, initially in the context of our communications market study which is currently underway.

In response to NBN Co's call for similar transparency obligations to be applied to SBAS and LBAS providers that it faces, we consider it to be disproportionate to apply the same obligation on SBAS and LBAS providers as the benefits for competition are expected to be much smaller relative to the regulatory costs. We note also that the CCA requires suppliers of declared services to report to the ACCC on their wholesale access agreements in place on a quarterly basis and the ACCC informally monitors retail broadband offers by RSPs on all networks. Carrier Licence Conditions (CLCs) also impose a range of reporting requirements on SBAS and LBAS providers.

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<sup>45</sup> NBN Comparable Carriers submission to the draft decision.

<sup>46</sup> NBN Co submission to the draft decision.

Our final decision is therefore not to apply any changes to the coverage of the SBAS FAD. However, to ensure that regulation continues to meet the legislative criteria, we intend to monitor the market during the declaration period for pricing (including exempt SBAS small provider retail offers) and other industry developments (such as the supply and take-up of fixed wireless services), that may affect the potential scope of the SBAS declaration.

## 7. Commencement and expiry

In general a FAD commences on the day specified in the determination as the day on which the determination comes into force, and ceases on the expiry date identified in the determination.<sup>47</sup> A FAD can be retrospective<sup>48</sup>, can be expressed to commence at a time following the expiry of an existing FAD<sup>49</sup> or to not commence prior to the commencement of a declaration.<sup>50</sup>

In the discussion paper we proposed that when FADs for the SBAS and for the LBAS were developed, they would commence upon publication. We also expressed the view that the expiry date should align with the expiry of the declaration unless there are circumstances that warrant a different expiry date. Because the LBAS declaration does not expire, it is not possible to align the expiry date of the access determination with the expiry of the declaration as envisaged by subsection 152BCF(6) of the CCA.

As the declaration for the SBAS expires on 28 July 2021 we proposed that the FAD for the SBAS should expire on this date. This would result in a regulatory period for the SBAS FAD of around four years.

We considered that this period would be long enough to provide sufficient stability and certainty to support industry investment planning and noted that if concerns about the appropriateness of pricing (or other terms) in the FADs arose during their operation, we could conduct a variation inquiry if necessary.<sup>51</sup>

### 7.1. Draft decision

Our draft decision was that both FADs should expire at the end of the SBAS declaration on 28 July 2021. This reflected that this period seemed to be supported by those submissions expressing a view on the duration of the FADs and the period is long enough to provide for industry certainty. We also proposed to monitor the market during this period for pricing and other industry developments that may affect the potential scope of the SBAS declaration.

### 7.2. Submissions to draft decision

Telstra submitted that the SBAS FAD should expire at the same date of the declaration of the service on 28 July 2021.<sup>52</sup>

### 7.3. Final decision

Our final decision is that both FADs should expire at the end of the SBAS declaration on 28 July 2021. This reflects that this period has the support of industry as expressed in submissions made to the discussion paper and the draft decision and the period is considered to be long enough to provide for industry certainty.

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<sup>47</sup> Section 152BCE(1) of the CCA.

<sup>48</sup> Section 152BCE(2) of the CCA.

<sup>49</sup> Section 152BCE(1) of the CCA.

<sup>50</sup> Section 152BCE(4A) of the CCA.

<sup>51</sup> Section 152BCN (2) of the CCA

<sup>52</sup> Telstra submission to the draft decision, p. 9.



## Appendix A: SBAS and LBAS FAD instruments



## **Final Access Determination No. 1 of 2017 (SBAS)**

*Competition and Consumer Act 2010*

The AUSTRALIAN COMPETITION AND CONSUMER COMMISSION makes this final access determination under section 152BC of the *Competition and Consumer Act 2010*.

Date of decision: 24 May 2017

## **1. Application**

- 1.1 This instrument sets out the final access determination (FAD) in respect of the superfast broadband access service (SBAS) which was declared on 29 July 2016.
- 1.2 The prices in this FAD are exclusive of tax payable under *The Utilities (Network Facilities Tax) Act 2006* (ACT).
- 1.3 The prices in this FAD are exclusive of Goods and Services Tax (GST).
- 1.4 The prices in the FAD are exclusive of an industry charge or tax, however described, introduced by Government for the purpose of funding regional fixed wireless and satellite broadband services.

## **2. Definitions and interpretation**

- 2.1 Schedule 1 applies to the interpretation of this instrument.
- 2.2 The Schedules form part of this instrument.

## **3. Commencement and duration**

- 3.1 This FAD commences on 26 May 2017.

Note: This FAD revokes the IAD made on 29 July 2016. An IAD is revoked when the final access determination comes into force: subsection 152BCF(9A) of the *Competition and Consumer Act 2010*.

- 3.3 Unless sooner revoked this FAD remains in force up until and including 28 July 2021.

## **4. Terms and conditions of access**

- 4.1 If a carrier or carriage service provider is required to comply with any or all of the standard access obligations in respect the SBAS, the carrier or carriage service provider must comply with those obligations on the terms and conditions set out in this clause 4.

Note: The terms and conditions in a FAD apply only to those terms and conditions where terms and conditions on that matter in an Access Agreement cannot be reached, no special access undertaking is in operation setting out terms and conditions on that matter and no binding rules of conduct have been made setting out terms and conditions on that matter: section 152AY of the *Competition and Consumer Act 2010*.

- 4.2 If the Carrier or Carriage Service Provider is required to supply the SBAS to a service provider, the Carrier or Carriage Service Provider must supply the service at the price specified in Schedule 2. The non-price terms and conditions set out in Schedules 3–12 apply to access to the SBAS.

- 4.3 A Carrier or Carriage Service Provider, if it is required to supply the declared service is required to supply upon request the following wholesale product/s:

(a) in the case of Telstra Corporation Limited, a Fibre Access Broadband service that is offered with the following maximum transmission speeds:

- (i) download transmission speed of 30 Mbps; and
- (ii) upload transmission speed of 1 Mbps;

(b) in the case of other carriers or carriage service providers, a SBAS with the following

characteristics (25/5Mbps):

- (i) a download data transfer rate of 25Mbps (peak information rate)
- (ii) an upstream data transfer rate of 5 Mbps (peak information rate)
- (iii) residential grade service characteristics
- (iv) if requested by the access seeker, a prioritized, symmetric bitstream of sufficient capacity to provide a voice service.

4.4 Nothing in this final access determination restricts a Carrier or Carriage Service Provider that is required to supply the declared service from supplying additional wholesale products to those specified in 4.3.

4.5 This clause is subject to clauses 5 and 6.

## **5. Application to Small Providers**

5.1 A Carrier or Carriage Service Provider is not required to comply with any of the standard access obligations as defined in the *Competition and Consumer Act 2010* in respect of the SBAS while the Carrier or Carriage Service Provider is a Small Provider.

5.2 A Carrier or Carriage Service Provider is a Small Provider if the total number of end-users supplied using a Specified Service provided by:

(a) the Carrier or Carriage Service Provider;

(b) any Carrier or Carriage Service Provider that is an Associate of the first- mentioned Carrier or Carriage Service Provider or of whom the first-mentioned Carrier or Carriage Service Provider is an Associate; or

(c) any Carrier or Carriage Service Provider that is an Associate of another person of whom the first-mentioned Carrier or Carriage Service Provider is also an Associate,

taken together, does not exceed 12,000.

5.3 For the avoidance of doubt, for the purposes of clause 5.2 an end-user will be supplied using a Specified Service provided by a Carrier or Carriage Service Provider whether or not the Carrier or Carriage Service Provider:

(a) supplies the end-user itself:

(b) provides the Specified Service to another service provider and that service is used to supply an end-user.

Note: An access determination may provide that any or all of the standard access obligations are not applicable to a carrier or carriage service provider, or restrict or limit the applications to a carrier or carriage service provider: section 152BC(3)(h) and (i) of the *Competition and Consumer Act 2010*.

## 6. Application to TransACT

6.1 The standard access obligations as defined in the *Competition and Consumer Act 2010* are not applicable to TransACT in respect of the supply of SBAS up to and including 28 July 2017:

(a) on:

(i) VDSL networks in the areas designated as ‘VDSL Cable’ in the map at Schedule 1 of the *Telecommunications (Network Exemption – TransACT Upgraded VDSL Networks) Instrument 2012*; and

(ii) those local access lines or parts of access lines located outside the areas specified in clause 6.1(a)(i) necessary for the provision of superfast carriage services to premises located within the areas specified in clause 6.1(a)(i);

(b) on HFC networks located within the network footprints that are shown on maps 3(Ballarat), 4 (Geelong), or 5 (Mildura) at Annexure A to Schedule 1 of the *Telecommunications (Network Exemption – TransACT Very Small Scale Networks) Instrument 2012*;

Subject to the following conditions:

(c) to the extent that the TransACT VDSL Layer 3 Wholesale Interconnection Service defined in the *Telecommunications (Network Exemption – TransACT Upgraded VDSL Networks) Instrument 2012* is an SBAS, TransACT meets the conditions in clauses 4(3)(a) and (b), 4(4) and 4(5) of that instrument.

6.2 All references in this clause to the *Telecommunications (Network Exemption – TransACT Upgraded VDSL Networks) Instrument 2012* or the *Telecommunications (Network Exemption – TransACT Very Small Scale Networks) Instrument 2012* are references to those instruments as at 29 July 2016.

Note: An access determination may provide that any or all of the standard access obligations are not applicable to a carrier or carriage service provider, or restrict or limit the applications to a carrier or carriage service provider: section 152BC(3)(h) and (i) of the *Competition and Consumer Act 2010*.

## INDEX TO SCHEDULES

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# Schedule 1 - Interpretation and definitions

## *Interpretation*

In this FAD, unless the contrary intention appears:

- (a) the singular includes the plural and vice versa;
- (b) the words “including” and “include” mean “including, but not limited to”; and
- (c) terms defined in the *Competition and Consumer Act 2010* or the *Telecommunications Act 1997* have the same meaning.

## *Definitions*

**ACCC** means the Australian Competition and Consumer Commission

**Access Agreement** has the same meaning as given to that term in section 152BE of the CCA

**Access Provider** has the same meaning as given to that term in subsection 152AR(2) of the CCA

**Access Seeker** has the same meaning as given to that term in section 152AG of the CCA

**ACDC** means the Australian Commercial Disputes Centre Limited

**ACDC Guidelines** means the mediation guidelines of the ACDC in force from time to time

**ACMA** means the Australian Communications and Media Authority

**Aggregation Charge** means a charge for the transport of customer traffic from multiple end-users on an aggregated basis

**AVC TC-4** refers to the NBN Co product AVC TC-4 which is an Ethernet-based Layer 2 virtual connection on the NBN Co network that carries traffic to and from a user-network interface used to serve a premises, in traffic class 4. See section 3.1 and 3.2 of the Product Description of NBN Co Ethernet Bitstream Service at [http://www.nbnco.com.au/content/dam/nbnco2/documents/sfaa-wba2-product-catalogue-nebs-product-description\\_20141219.pdf](http://www.nbnco.com.au/content/dam/nbnco2/documents/sfaa-wba2-product-catalogue-nebs-product-description_20141219.pdf) as amended from time to time

**Billing Dispute** means a dispute relating to a Charge or an invoice issued by the Access Provider

**Billing Dispute Notice** means a notice given pursuant to clause 3.10 in Schedule 3

**Billing Dispute Procedures** means the procedures set out in clauses 3.10 to 3.30 in Schedule 3

**Breach Notice** has the meaning set out in clause 7.5 of Schedule 7

**Business Hours** means 8.00 am to 5.00 pm Monday to Friday, excluding a day which is a gazetted public holiday in the place where the relevant transaction or work is to be performed

**Business Day** means any day other than Saturday or Sunday or a day which is a gazetted public holiday in the place concerned

**Calendar Day** means a day reckoned from midnight to midnight

**Carriage Service Provider** has the same meaning given to that term in section 87 of the *Telecommunications Act 1997* (Cth)

**Carrier** has the same meaning given to that term in section 7 of the *Telecommunications Act 1997* (Cth)

**Carriage Service** has the same meaning given to that term in section 7 of the *Telecommunications Act 1997* (Cth)

**CCA** means the *Competition and Consumer Act 2010* (Cth)

**Charge** means a charge for the supply of a Service

**Confidential Information** means all information, know-how, ideas, concepts, technology, manufacturing processes, industrial, marketing and commercial knowledge of a confidential nature (whether in tangible or intangible form and whether coming into existence before or after the commencement of this FAD) relating to or developed in connection with or in support of the Service supplied under this FAD (the “**first mentioned party**”) but does not include:

- (a) information which is or becomes part of the public domain (other than through any breach of this FAD);
- (b) information rightfully received by the other party from a third person without a duty of confidentiality being owed by the other party to the third person, except where the other party has knowledge that the third person has obtained that information either directly or indirectly as a result of a breach of any duty of confidence owed to the first mentioned party; or
- (c) information which has been independently developed or obtained by the other party;



or

- (d) information about Services supplied by the Access Provider (including where that information is generated by the Access Provider) that has been aggregated with other information of a similar or related nature, such that the Access Seeker cannot be identified by the information or any part of it

**CVC TC-4** refers to the NBN Co product CVC TC-4 which is Ethernet-based Layer 2 virtual capacity on the NBN Co Network used to carry customer traffic between multiple access virtual circuits in a connectivity serving area on an aggregated basis and the network-network interface at the point of interconnection serving that connectivity serving area, in traffic class 4. See section 2.1 and 2.2 of the Product Description of NBN Co Ethernet Bitstream Service at [http://www.nbnco.com.au/content/dam/nbnco2/documents/sfaa-wba2-product-catalogue-nebs-product-description\\_20141219.pdf](http://www.nbnco.com.au/content/dam/nbnco2/documents/sfaa-wba2-product-catalogue-nebs-product-description_20141219.pdf) as amended from time to time

**Disclosing Party** has the meaning set out in clause 6.5 in Schedule 6 of this FAD

**Emergency** means an emergency due to an actual or potential occurrence (such as fire, flood, storm, earthquake, explosion, accident, epidemic or war-like action) which:

- (a) endangers or threatens to endanger the safety or health of persons or
- (b) destroys or damages, or threatens to destroy or damage property, being an emergency which requires a significant and co-ordinated response

**Emergency Network Modernisation and Upgrade** means a modernisation or upgrade of a Network that is required or reasonably necessary and is a proportionate response to address an Emergency

**Equivalent Period of Notice** means a period of notice commencing at the time that the Access Provider has approved and allocated the capital expenditure or otherwise approved and made a decision to commit to a Major Network Modernisation and Upgrade

**Ethernet** has the same meaning given to that term by the Institute of Electrical and Electronics Engineers

**Event** means an act, omission or event relating to or arising out of this FAD or part of this FAD

**Exchange** means a building in which telephone switching or other equipment of an Access Provider or Access Seeker has been installed for use in connection with a telecommunications network

**Expert Committee** means a committee established under clause 5.11 in Schedule 5

**Facility** has the same meaning given to that term in section 7 of the *Telecommunications Act 1997* (Cth)

**FAD** means Final Access Determination

**Fault** means:

- (a) a failure in the normal operation of a Network or in the delivery of a Service; or
- (b) any issue as to the availability or quality of a Service supplied to an end-user via the Access Seeker, notified by the end-user to the Access Seeker's help desk, that has been reasonably assessed by the Access Provider as being the Access Provider's responsibility to repair

**General Notification** has the meaning set out in clause 10.1 in Schedule 10

**HFC network** has the same meaning as hybrid fibre-coaxial network in section 7 of the *Telecommunications Act 1997* (Cth)

**Indemnifying Party** means the Party giving an indemnity under this FAD

**Individual Notification** has the meaning set out in clause 10.1 of Schedule 10

**Initiating Notice** has the meaning as set out in clause 5.11 of Schedule 5

**Innocent Party** means the Party receiving the benefit of an indemnity under this FAD

**Liability** (of a party) means any liability of that party (whether in contract, in tort, under statute or in any other way and whether due to negligence, wilful or deliberate breach or any other cause) under or in relation to this FAD, or part of this FAD or in relation to any Event or series of related Events

**Listed Carriage Service** has the same meaning given to that term in section 7 of the *Telecommunications Act 1997* (Cth)

**Loss** includes liability, loss, damage, costs, charges or expenses (including legal costs)

**Major Network Modernisation and Upgrade** means a modernisation or upgrade that results in a Service no longer being supplied or adversely affects the quality of that Service (or any services supplied by an Access Seeker to their end-users using the Service), but does not mean, or include, an Emergency Network Modernisation Upgrade or an National Broadband Network related upgrade

**Month** means a period commencing at the beginning of any day of a named month and

ending:

- (a) at the end of the day before the corresponding day of the next named month; or
- (b) if there is no such corresponding day – at the end of the next named month

**National Broadband Network** means a national telecommunications network for the high-speed carriage of communications, where NBN Co has been, is, or is to be, involved in the creation or development of the network. To avoid doubt, it is immaterial whether the creation or development of the network is, to any extent, attributable to:

- (a) the acquisition of assets that were used, or for use, in connection with another telecommunications network; or
- (b) the obtaining of access to assets that are also used, or for use, in connection with another telecommunications network

**NBN Co** means NBN Co Limited (ACN 136 533 741), as the company exists from time to time (even if its name is later changed)

**Network** of a party, means that party's system, or series of systems, that carries, or is capable of carrying communications by means of guided or unguided electromagnetic energy

**Non-Billing Dispute** means a dispute other than a Billing Dispute

**Ongoing Creditworthiness Information** has the meaning as set out in clause 4.8 of Schedule 4 of this FAD

**Party** means a party to this FAD

**People** of a party, means each of that party's directors, officers, employees, agents, contractors, advisers and representatives but does not include that party's end-users or the other party

**Prohibited Traffic** means traffic offered across a POI for which there is no agreement between the Access Provider and the Access Seeker that the Access Provider will carry such traffic or provide a related service to the Access Seeker

**Regulatory Determination** means an access determination or a binding rule of conduct

**Representative** of a Party means each of that party's directors, officers, employees, agents, contractors, advisers and representatives, but does not include that Party's end-users or the other Party

**Security** means the amount and type of security provided, or required to be provided, to the Access Provider in respect of the provision by the Access Provider of Services, as set out in Schedule 4

**Security Deposit** means any sum of money deposited by the Access Seeker with the Access Provider, from time to time, for the purposes of fulfilling in whole or in part the requirement under this FAD that the Access Seeker provide Security to the Access Provider

**Service** means a service declared under section 152AL of the CCA

**Structural Separation Undertaking** means:

- (a) an undertaking given by Telstra under subsection 577A(1) of the *Telecommunications Act 1997* (Cth) which came into force in accordance with section 577AB, and any amendment to that undertaking which comes into force in accordance with subsection 577B(6); and
- (b) a migration plan approved by the ACCC under Subdivision B of Division 2 of Part 33 of the *Telecommunications Act 1997* (Cth) which, pursuant to subsection 577BE(5), formed part of the undertaking referred to in paragraph (a), and any amendment to that plan which is approved by the ACCC in accordance with section 577BF, and includes all binding schedules, annexures and attachments to such documents

**Suspension Event** has the meaning set out in clause 7.2 of Schedule 7

**Suspension Notice** has the meaning set out in clause 7.2 of Schedule 7

## Schedule 2 - Price

2.1 This Schedule sets out monthly prices for the wholesale products specified in clause 4.3 of this FAD.

2.2 In the case of Telstra Corporation Limited and the products specified in clause 4.3(a) the following charges apply in the financial years indicated:

Charge component	2016-17	2017-18	2018-19	2019-20	2020-21
Port Zone 1 per month	\$18.06	\$16.03	\$13.01	\$13.01	\$13.01
Port Zone 2/3 per month	\$23.07	\$21.10	\$18.15	\$18.15	\$18.15
Aggregation per Mbps/month	\$29.27	\$29.27	\$29.27	\$29.27	\$29.27

2.3 In the case of other Carriers or Carriage Service Providers and the products specified in 4.3(b) the following charges apply:

Charge component	Initial price	Subsequent prices
Port (25/5 Mbps)	\$27.00 per month	The price for the NBN Co product AVC TC-4 25/5 Mbps as amended from time to time (including discounts)
Aggregation dimensioning by RSP per port (kbps)	Price per Mbps per month	
0 to 399	\$17.50	
400 to 549	\$16.75	
550 to 699	\$16.25	
700 to 849	\$15.75	
850 to 999	\$15.00	The price for the NBN Co product CVC TC-4 as amended from time to time (including discounts)
1000 to 1149	\$14.25	
1150 to 1299	\$13.50	
1300 to 1449	\$12.75	
1450 to 1599	\$12.00	
1600 to 1749	\$11.25	
1750 to 1899	\$10.75	
1900 to 2049	\$10.25	

2050 to 2199	\$9.75
2200 to 2349	\$9.50
2350 to 2499	\$9.25
2500 to 2649	\$9.00
2650 to 2799	\$8.75
2800 to 2949	\$8.50
2950 to 3099	\$8.25
3100 and above	\$8.00

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The initial price listed above for port per month corresponds to the NBN Co price for AVC TC-4 25/5 Mbps. The initial price for aggregation per Mbps/month corresponds to the NBN Co pricing for CVC TC-4. The initial price will apply until such time as NBN Co publishes subsequent pricing for either, or both, of these two NBN Co products. The subsequent pricing will apply to carriers and carriage service providers three calendar months from the date of publication of the subsequent pricing on the NBN Co website, or the date that the published subsequent pricing takes effect, whichever is the later date.

## Schedule 3 - Billing and notification

- 3.1 The Access Seeker's liability to pay Charges for the Service to the Access Provider arises at the time the Service is supplied by the Access Provider to the Access Seeker, unless the parties agree otherwise.
- 3.2 The Access Seeker must pay Charges in accordance with this FAD, including but not limited to this Schedule 3.
- 3.3 The Access Provider must provide the Access Seeker with an invoice each month in respect of Charges payable for the Service unless the parties agree otherwise
- 3.4 The Access Provider is entitled to invoice the Access Seeker for previously uninvoiced Charges or Charges which were understated in a previous invoice, provided that:
- a) the Charges to be retrospectively invoiced can be reasonably substantiated to the Access Seeker by the Access Provider; and
  - b) subject to clause 3.5, no more than 6 Months have elapsed since the date the relevant amount was incurred by the Access Seeker's customer, except where:
    - i. the Access Seeker gives written consent to a longer period (such consent not to be unreasonably withheld); or
    - ii. to the extent that the Charges relate to services supplied by an overseas carrier and the Access Provider has no control over the settlement arrangements as between it and the overseas carrier, in which case the Access Provider shall invoice such amounts as soon as is reasonably practicable.
- 3.5 The parties must comply with the provisions of any applicable industry standard made by the ACMA pursuant to Part 6 of the *Telecommunications Act 1997 (Cth)* (Standard) and the provisions of any applicable industry code registered pursuant to Part 6 of the *Telecommunications Act 1997 (Cth)* (Code) in relation to billing. Where the effect of a Standard or Code is that an Access Seeker is not permitted to invoice its customers for charges that are older than a specified number of days, weeks or months (the Backbilling Period), the Access Provider must not invoice the Access Seeker for a Charge which was incurred by the Access Seeker's customers that, as at the date the invoice is issued, is older than the Backbilling Period.
- 3.6 Subject to clause 3.12
- a) An invoice is payable in full 30 Calendar Days after the date the invoice was issued or such other date as agreed between the parties.
  - b) The Access Seeker may not deduct, withhold, or set-off any amounts for accounts in credit, for counter-claims or for any other reason or attach any condition to the payment, unless otherwise agreed by the Access Provider.
  - c) All amounts owing and unpaid after the due date shall accrue interest daily from the

due date up to and including the date it is paid at the rate per annum of the 90 day authorized dealers bank bill rate published in the *Australian Financial Review* on the first Business Day following the due date for payment, plus 2.5 per cent.

- 3.7 In addition to charging interest in accordance with clause 3.6 or exercising any other rights the Access Provider has at law or under this FAD, where an amount is outstanding and remains unpaid for more than 20 Business Days after it is due for payment, and is not an amount subject to any Billing Dispute notified in accordance with this FAD, the Access Provider may take action, without further notice to the Access Seeker, to recover any such amount as a debt due to the Access Provider.
- 3.8 Unless the parties otherwise agree, there is no setting-off (i.e. netting) of invoices except where a party goes into liquidation, in which case the other party may set-off. However, in order to minimise administration and financial costs, the parties must consider in good faith set-off procedures for inter-party invoices which may require the alignment of the parties' respective invoice dates and other procedures to allow set-off to occur efficiently.
- 3.9 The Access Provider must, at the time of issuing an invoice, provide to the Access Seeker all information reasonably required by the Access Seeker to identify and understand the nature and amount of each Charge on the invoice, and the service the Charge relates to. Nothing in this clause 3.9 is intended to limit subsections 152AR(6) and 152AR(7) of the CCA.
- 3.10 If the Access Seeker believes a Billing Dispute exists, it may invoke the Billing Dispute Procedures by providing written notice to the Access Provider (Billing Dispute Notice). A Billing Dispute must be initiated only in good faith.
- 3.11 Except where a party seeks urgent injunctive relief, the Billing Dispute Procedures must be invoked before either party may begin legal proceedings in relation to any Billing Dispute.
- 3.12 If a Billing Dispute Notice is given to the Access Provider by the due date for payment of the invoice containing the Charge which is being disputed, the Access Seeker may withhold payment of the disputed Charge until such time as the Billing Dispute has been resolved or otherwise terminated. Otherwise, the Access Seeker must pay the invoice in full in accordance with this FAD (but subject to the outcome of the Billing Dispute Procedures).
- 3.13 Except where payment is withheld in accordance with clause 3.12, the Access Provider is not obliged to accept a Billing Dispute Notice in relation to an invoice unless the invoice has been paid in full.
- 3.14 A Billing Dispute Notice must be given to the Access Provider in relation to a Charge, at the earlier of:
  - a) as soon as reasonably practicable after the Access Seeker becomes aware a Billing Dispute exists, or
  - b) within six Months of the invoice for the Charge being issued in accordance with clause 3.6.

3.15



- a) The Access Provider must acknowledge receipt of a Billing Dispute Notice within two Business Days by providing the Access Seeker with a reference number.
  - b) Within five Business Days of acknowledging a Billing Dispute Notice under clause 3.15(a), the Access Provider must, by written notice to the Access Seeker:
    - i. accept the Billing Dispute Notice; or
    - ii. reject the Billing Dispute Notice if the Access Provider reasonably considers that:
      - A. the subject matter of the Billing Dispute Notice is already being dealt with in another dispute;
      - B. the Billing Dispute Notice was not submitted in good faith; or
      - C. the Billing Dispute Notice is incomplete or contains inaccurate information.
  - c) If the Access Provider fails to accept or reject the Billing Dispute Notice within five Business Days of acknowledging the Billing Dispute Notice under clause 3.15(a), the Access Provider is taken to have accepted the Billing Dispute Notice.
  - d) For avoidance of doubt, if the Access Provider rejects a Billing Dispute Notice under clause 3.15(b)(ii)C, the Access Seeker is not prevented from providing an amended Billing Dispute Notice to the Access Provider relating to the same dispute provided that the amended Billing Dispute Notice is provided within the timeframe under clause 3.14.
- 3.16 The Access Seeker must, as early as practicable and in any case within five Business Days, unless the Parties agree on a longer period, after the Access Provider acknowledges a Billing Dispute Notice, provide to the other party any further relevant information or materials (which were not originally provided with the Billing Dispute Notice) on which it intends to rely (provided that this obligation is not intended to be the same as the obligation to make discovery in litigation).
- 3.17 Without affecting the time within which the Access Provider must make the proposed resolution under clause 3.1, the Access Provider may request additional information from the Access Seeker that it reasonably requires for the purposes of making a proposed resolution pursuant to clause 3.18. This additional information may be requested up to 10 Business Days prior to the date on which the Access Provider must make the proposed resolution under clause 3.18. The Access Seeker must provide the requested information within five Business Days of receiving the request. If the Access Seeker fails to do so within five Business Days, the Access Provider may take the Access Seeker's failure to provide additional information into account when making its proposed resolution.
- 3.18 The Access Provider must try to resolve any Billing Dispute as soon as practicable and in any event within 30 Business Days of accepting a Billing Dispute Notice under clause 3.15 (or longer period if agreed by the parties), by notifying the Access Seeker in writing of its proposed resolution of a Billing Dispute. That notice must:

- a) explain the Access Provider's proposed resolution (including providing copies where necessary of all information relied upon in coming to that proposed resolution); and
- b) set out any action to be taken by:
  - i. the Access Provider (e.g. withdrawal, adjustment or refund of the disputed Charge); or
  - ii. the Access Seeker (e.g. payment of the disputed Charge)

If the Access Provider reasonably considers that it will take longer than 30 Business Days after accepting a Billing Dispute Notice to provide a proposed resolution, then the Access Provider may request the Access Seeker's consent to an extension of time to provide the proposed resolution under this clause 3.18 (such consent not to be unreasonably withheld).

3.19 If the Access Seeker does not agree with the Access Provider's decision to reject a Billing Dispute Notice under clause 3.15 or the Access Provider's proposed resolution under clause 3.17, it must object within 15 Business Days of being notified of such decisions (or such longer time as agreed between the parties). Any objection lodged by the Access Seeker with the Access Provider must be in writing and state:

- a) what part(s) of the proposed resolution it objects to;
- b) the reasons for objection;
- c) what amount it will continue to withhold payment of (if applicable); and
- d) any additional information to support its objection.

If the Access Seeker lodges an objection to the proposed resolution under this clause, the Access Provider must, within 5 Business Days of receiving the objection, review the objection and

- e) provide a revised proposed resolution (Revised Proposed Resolution in this Schedule 3); or
- f) confirm its proposed resolution

3.20 Any:

- a) withdrawal, adjustment or refund of the disputed Charge by the Access Provider; or
- b) payment of the disputed Charge by the Access Seeker (as the case may be),

must occur as soon as practicable and in any event within one Month of the Access Provider's notice of its proposed resolution under clause 3.18 or its Revised Proposed Resolution under clause 3.19 (as applicable), unless the Access Seeker escalates the Billing Dispute under clause 3.23. If the Access Provider is required to make a withdrawal, adjustment or refund of a disputed Charge under this clause but its next

invoice (first invoice) is due to be issued within 48 hours of its proposed resolution under clause 3.18 or its Revised Proposed Resolution under clause 3.19 (as applicable), then the Access Provider may include that withdrawal, adjustment or refund in the invoice following the first invoice notwithstanding that this may occur more than one Month after the Access Provider's notice of its proposed resolution or Revised Proposed Resolution.

3.21 Where the Access Provider is to refund a disputed Charge, the Access Provider must pay interest (at the rate set out in clause 3.6) on any refund. Interest accrues daily from the date on which each relevant amount to be refunded was paid to the Access Provider, until the date the refund is paid.

3.22 Where the Access Seeker is to pay a disputed Charge, the Access Seeker must pay interest (at the rate set out in clause 3.6) on the amount to be paid. Interest accrues daily from the date on which each relevant amount was originally due to be paid to the Access Provider, until the date the amount is paid.

3.23 If

- a) the Access Provider has not proposed a resolution according to clause 3.18 or within the timeframe specified in clause 3.18, or
- b) the Access Seeker, having first submitted an objection under clause 3.19 is not satisfied with the Access Provider's Revised Proposed Resolution, or the Access Provider's confirmed proposed resolution, within the timeframes specified in clause 3.19,

the Access Seeker may escalate the matter under clause 3.24. If the Access Seeker does not do so within 15 Business Days after the time period stated in clause 3.18 or after being notified of the Access Provider's Revised Proposed Resolution under clause 3.19(e) or confirmed proposed resolution under clause 3.19(f) (or a longer period if agreed by the parties), the Access Seeker is deemed to have accepted the Access Provider's proposed resolution made under clause 3.18 or Revised Proposed Resolution under clause 3.19(e) or confirmed proposed solution under clause 3.19(f) and clauses 3.21 and 3.22 apply.

3.24 If the Access Seeker wishes to escalate a Billing Dispute, the Access Seeker must give the Access Provider a written notice:

- a) stating why it does not agree with the Access Provider's Revised Proposed Resolution or confirmed proposed resolution; and
- b) seeking escalation of the Billing Dispute.

3.25 A notice under clause 3.24 must be submitted to the nominated billing manager for the Access Provider, who must discuss how best to resolve the Billing Dispute with the Access Seeker's nominated counterpart. If the Parties are unable to resolve the Billing Dispute within five Business Days of notice being given under clause 3.24 (or such longer period as agreed between the parties) the Billing Dispute must be escalated to the Access Provider's nominated commercial manager and the Access Seeker's nominated counterpart who must meet in an effort to resolve the Billing Dispute.

- 3.26 If the Billing Dispute cannot be resolved within five Business Days of it being escalated to the Access Provider's nominated commercial manager and the Access Seeker's nominated counterpart under clause 3.25 (or such longer period as agreed between the parties):
- a) either party may provide a written proposal to the other party for the appointment of a mediator to assist in resolving the dispute. Mediation must be conducted in accordance with the mediation guidelines of the Australian Commercial Disputes Centre (ACDC) and concluded within three Months of the proposal (unless the parties agree to extend this timeframe); or
  - b) if the parties either do not agree to proceed to mediation within five Business Days of being able to propose the appointment of a mediator under clause 3.26(a) or are unable to resolve the entire Billing Dispute by mediation, either party may commence legal proceedings to resolve the matter.
- 3.27 The parties must ensure that any person appointed or required to resolve a Billing Dispute takes into account the principle that the Access Seeker is entitled to be recompensed in circumstances where the Access Seeker is prevented (due to regulatory restrictions on retrospective invoicing) from recovering from its end-user an amount which is the subject of a Billing Dispute (a Backbilling Loss), provided that:
- a) such principle applies only to the extent to which the Billing Dispute is resolved against the Access Provider; and
  - b) such principle applies only to the extent to which it is determined that the Backbilling Loss was due to the Access Provider unnecessarily delaying resolution of the Billing Dispute.
  - c) Each party must continue to fulfil its obligations under this FAD while a Billing Dispute and the Billing Dispute Procedures are pending.
- 3.28 Each party must continue to fulfil its obligations under this FAD while a Billing Dispute and the Billing Dispute Procedures are pending.
- 3.29 All discussions and information relating to a Billing Dispute must be communicated or exchanged between the parties through the representatives of the parties set out in clause 3.25 (or their respective nominees).
- 3.30 There is a presumption that all communications between the Parties during the course of a Billing Dispute are made on a without prejudice and confidential basis.
- 3.31 If it is determined by the Billing Dispute Procedures, any other dispute resolution procedure, or by agreement between the parties, that three or more out of any five consecutive invoices for a given Service are incorrect by 5 per cent or more, then, for the purposes of clause 3.21, the interest payable by the Access Provider in respect of the overpaid amount of the invoices in question is the rate set out in clause 3.6, plus 2 per cent. The remedy set out in this clause 3.31 is without prejudice to any other right or remedy available to the Access Seeker.

## Schedule 4 - Creditworthiness and Security

4.1 Unless otherwise agreed by the Access Provider, the Access Seeker must (at the Access Seeker's sole cost and expense) provide to the Access Provider and maintain, on terms and conditions reasonably required by the Access Provider and subject to clause 4.2, the Security (as is determined having regard to clause 4.3 and as may be varied pursuant to clause 4.4) in respect of amounts owing by the Access Seeker to the Access Provider under this FAD.

4.2

- a) The Access Seeker acknowledges that unless otherwise agreed by the Access Provider, it must maintain (and the Access Provider need not release or refund) the Security specified in clause 4.1 for a period of six Months following (but not including) the date on which the last of the following occurs:
  - i. cessation of supply of the Service under this FAD, and
  - ii. payment of all outstanding amounts under this FAD.
- b) Notwithstanding clause 4.2(a), the Access Provider has no obligation to release the Security if, at the date the Access Provider would otherwise be required to release the Security under clause 4.2(a), the Access Provider reasonably believes any person, including a provisional liquidator, administrator, trustee in bankruptcy, receiver, receiver and manager, other controller or similar official, has a legitimate right to recoup or claim repayment of any part of the amount paid or satisfied, whether under the laws or preferences, fraudulent dispositions or otherwise.

4.3 The Security (including any varied Security) may only be requested where an Access Provider has reasonable grounds to doubt the Access Seeker's ability to pay for services, and must be of an amount and in a form determined reasonably by the Access Provider taking into account all the relevant circumstances. As a statement of general principle the amount of any Security is calculated by reference to:

- a) the aggregate value of all Services likely to be provided to the Access Seeker under this FAD over a reasonable period; or
- b) the value of amounts invoiced in respect of the Service but unpaid (excluding any amounts in respect of which there is a current Billing Dispute notified in accordance with this FAD).

For the avoidance of doubt, any estimates, forecasts or other statements made or provided by the Access Seeker may be used by the Access Provider in determining the amount of a Security

4.4 Examples of appropriate forms of Security, having regard to the factors referred to in clause 4.3, may include without limitation:

- a) fixed and floating charges;
- b) personal guarantees from directors;
- c) Bank Guarantees;
- d) letters of comfort
- e) mortgages;
- f) a right of set-off;
- g) a Security Deposit; or
- h) a combination of the forms of security referred to in paragraphs (a) to (g) above.

If any Security is or includes a Security Deposit, then:

- i) the Access Provider is not obliged to invest the Security Deposit or hold the Security Deposit in an interest bearing account or otherwise; and
- j) the Access Seeker is prohibited from dealing with the Security Deposit or its rights to that Security Deposit (including by way of assignment or granting of security).

If any security is or includes a Bank Guarantee and that Bank Guarantee (Original Bank Guarantee) has an expiry date which is the last day by which a call may be made under a Bank Guarantee, the Access Seeker must procure a replacement Bank Guarantee for the amount guaranteed by the Original Bank Guarantee no later than two Months prior to the expiry date of the Original Bank Guarantee, such replacement Bank Guarantee to have an expiry date of no less than 14 Months from the date of delivery of the replacement Bank Guarantee.

If the Access Seeker fails to procure a replacement Bank Guarantee, then in addition to any other of the Access Provider's rights under this FAD, the Access Provider may, at any time in the Month prior to the expiry date of the Bank Guarantee, make a call under the Bank Guarantee for the full amount guaranteed. The amount paid to the Access Provider pursuant to a call on the Bank Guarantee will become a Security Deposit.

- 4.5 The Access Provider may from time to time where the circumstances reasonably require, request Ongoing Creditworthiness Information from the Access Seeker to determine the ongoing creditworthiness of the Access Seeker. The Access Seeker must supply Ongoing Creditworthiness Information to the Access Provider within 15 Business Days of receipt of a request from the Access Provider for such information. The Access Provider may, as a result of such Ongoing Creditworthiness Information, having regard to the factors referred to in clause 4.3 and subject to clause 4.7, reasonably require the Access Seeker to alter the amount, form or the terms of the Security (which may include a requirement to provide additional security), and the Access Seeker must provide that altered Security within 20 Business Days of being notified by the Access Provider in writing of that requirement.

- 4.6 The Access Seeker may from time to time request the Access Provider to consent (in writing) to a decrease in the required Security and/or alteration of the form of the Security. The Access Provider must, within 15 Business Days of the Access Seeker's request, comply with that request if, and to the extent, it is reasonable to do so (having regard to the factors referred to in clause 4.3). The Access Provider may request, and the Access Seeker must promptly provide, Ongoing Creditworthiness Information, for the purposes of this clause 4.6.
- 4.7 If the Access Seeker provides Ongoing Creditworthiness Information to the Access Provider as required by this Schedule 4, the Access Seeker must warrant that such information is true, fair, accurate and complete as at the date on which it is received by the Access Provider and that there has been no material adverse change in the Access Seeker's financial position between the date the information was prepared and the date it was received by the Access Provider. If there has been a material adverse change in the Access Seeker's financial position between the date the information was prepared and the date it was received by the Access Provider, the Access Seeker must disclose the nature and effect of the change to the Access Provider at the time the information is provided.
- 4.8 For the purposes of this Schedule 4, **Ongoing Creditworthiness Information** means:
- a) a copy of the Access Seeker's most recent published audited balance sheet and published audited profit and loss statement (together with any notes attached to or intended to be read with such balance sheet or profit and loss statement);
  - b) a credit report in respect of the Access Seeker or, where reasonably necessary in the circumstances, any of its owners or directors (Principals) from any credit reporting agency, credit provider or other third party. The Access Seeker must co-operate and provide any information necessary for that credit reporting agency, credit provider or other independent party to enable it to form an accurate opinion of the Access Seeker's creditworthiness. To that end, the Access Seeker agrees to procure written consents (as required under the *Privacy Act 1988* (Cth)) from such of its Principals as is reasonably necessary in the circumstances to enable the Access Provider to:
    - i. obtain from a credit reporting agency, credit provider or other independent party, information contained in a credit report;
    - ii. disclose to a credit reporting agency, credit provider or other independent party, personal information about each Principal; and
    - iii. obtain and use a consumer credit report;
  - c) a letter, signed by the company secretary or duly authorised officer of the Access Seeker, stating that the Access Seeker is not insolvent and not under any external administration (as defined in the *Corporations Act 2001* (Cth)) or under any similar form of administration under any laws applicable to it in any jurisdiction; and
  - d) the Access Seeker's credit rating, if any has been assigned to it; and

e) any other information reasonably required to determine the ongoing creditworthiness of the Access Seeker, as agreed between the parties before the request under clause 4.5 is made.

4.9 The Access Seeker may require a confidentiality undertaking to be given by any person having access to confidential information contained in its Ongoing Creditworthiness Information prior to such information being provided to that person.

4.10 Subject to this Schedule 4, the parties agree that a failure by the Access Seeker to provide the warranties set out in clause 4.7 or to provide Ongoing Creditworthiness Information constitutes:

a) an event entitling the Access Provider to alter the amount, form or terms of the Security (including an entitlement to additional Security) of the Access Seeker and the Access Seeker must provide that altered Security within 15 Business Days after the end of the period set out clause 4.5; or

b) breach of a material term or condition of this FAD.

Any disputes arising out of or in connection with Schedule 4 must be dealt with in accordance with the procedures in Schedule 5. Notwithstanding that a dispute arising out of or in connection with Schedule 4 has been referred to the procedures in Schedule 5 and has not yet been determined, nothing in this clause 4.10 or Schedule 5 prevents the Access Provider from exercising any of its rights to suspend the supply of a Service under Schedule 7.



## Schedule 5 - General dispute resolution procedures

- 5.1 If a dispute arises between the parties in connection with or arising from the terms and conditions set out in this FAD for the supply of the Service, the dispute must be managed as follows:
- a) in the case of a Billing Dispute, the dispute must be managed in accordance with the Billing Dispute Procedures; or
  - b) subject to clause 5.2, in the case of a Non-Billing Dispute, the dispute must be managed in accordance with the procedures set out in this Schedule 5.
- 5.2 To the extent that a Non-Billing Dispute is raised or arises in connection with, or otherwise relates to, a Billing Dispute, then unless otherwise determined, that Non-Billing Dispute must be resolved in accordance with the Billing Dispute Procedures. The Access Provider may seek a determination from an independent third party on whether a dispute initiated by the Access Seeker as a Billing Dispute is a Non-Billing Dispute. If the independent third party deems the dispute to be a Non-Billing Dispute, the Access Provider may provide written notice to the Access Seeker to pay any withheld amount to the Access Provider on the due date for the disputed invoice or if the due date has passed, immediately on notification being given by the Access Provider.

For the purposes of this clause 5.2:

- a) the independent third party must be a person who:
    - i. has an understanding of the relevant aspects of the telecommunications industry (or have the capacity to quickly come to such an understanding);
    - ii. have an appreciation of the competition law implications of his/her decisions; and
    - iii. not be an officer, director or employee of a telecommunications company or otherwise have a potential for a conflict of interest;
  - b) the independent third party may include an arbiter from the ACDC.
- 5.3 If a Non-Billing Dispute arises, either party may, by written notice to the other, refer the Non-Billing Dispute for resolution under this Schedule 5. A Non-Billing Dispute must be initiated only in good faith.
- 5.4 Any Non-Billing Dispute notified under clause 5.3 must be referred:
- a) initially to the nominated manager (or managers) for each party, who must endeavour to resolve the dispute within 10 Business Days of the giving of the notice referred to in clause 5.3 or such other time agreed by the parties; and
  - b) if the persons referred to in paragraph (a) above do not resolve the Non-Billing Dispute within the time specified under paragraph (a), then the parties may agree in writing within

a further five Business Days to refer the Non-Billing Dispute to an Expert Committee under clause 5.11, or by written agreement submit it to mediation in accordance with clause 5.10.

5.5 If:

- a) under clause 5.4 the Non-Billing Dispute is not resolved and a written agreement is not made to refer the Non-Billing Dispute to an Expert Committee or submit it to mediation; or,
- b) under clause 5.10(f), the mediation is terminated; and
- c) after a period of five Business Days after the mediation is terminated as referred to in paragraph (b), the parties do not resolve the Non-Billing Dispute or agree in writing on an alternative procedure to resolve the Non-Billing Dispute (whether by further mediation, written notice to the Expert Committee, arbitration or otherwise)

either party may terminate the operation of this dispute resolution procedure in relation to the Non-Billing Dispute by giving written notice of termination to the other party.

5.6 A party may not commence legal proceedings in any court (except proceedings seeking urgent interlocutory relief) in respect of a Non-Billing Dispute unless:

- a) the Non-Billing Dispute has first been referred for resolution in accordance with the dispute resolution procedure set out in this Schedule 5 or clause 5.2 (if applicable) and a notice terminating the operation of the dispute resolution procedure has been issued under clause 5.5; or
- b) the other party has failed to substantially comply with the dispute resolution procedure set out in this Schedule 5 or clause 5.2 (if applicable).

5.7 Each party must continue to fulfil its obligations under this FAD while a Non-Billing Dispute and any dispute resolution procedure under this Schedule 5 are pending.

5.8 All communications between the parties during the course of a Non-Billing Dispute and in connection with that Non-Billing Dispute, are made on a without prejudice and confidential basis.

5.9 Each party must, as early as practicable, and in any case within 14 Calendar Days unless a longer period is agreed between the parties, after the notification of a Non-Billing Dispute pursuant to clause 5.3, provide to the other party any relevant materials on which it intends to rely (provided that this obligation is not intended to be the same as the obligation to make discovery in litigation).

5.10 Where a Non-Billing Dispute is referred to mediation by way of written agreement between the parties, pursuant to clause 5.4(b):

- a) any agreement must include:

- i. a statement of the disputed matters in the Non-Billing Dispute; and
    - ii. the procedure to be followed during the mediation, and the mediation must take place within 15 Business Days upon the receipt by the mediator of such agreement;
  - b) it must be conducted in accordance with the mediation guidelines of the ACDC in force from time to time (**ACDC Guidelines**) and the provisions of this clause 5.10. In the event of any inconsistency between them, the provisions of this clause 5.10 prevail;
  - c) it must be conducted in private;
  - d) in addition to the qualifications of the mediator contemplated by the ACDC Guidelines, the mediator must:
    - i. have an understanding of the relevant aspects of the telecommunications industry (or have the capacity to quickly come to such an understanding);
    - ii. have an appreciation of the competition law implications of his/her decisions; and
    - iii. not be an officer, director or employee of a telecommunications company or otherwise have a potential for a conflict of interest;
  - e) the parties must notify each other no later than 48 hours prior to mediation of the names of their representatives who will attend the mediation. Nothing in this subclause is intended to suggest that the parties are able to refuse the other's chosen representatives or to limit other representatives from the parties attending during the mediation;
  - f) it must terminate in accordance with the ACDC Guidelines;
  - g) the parties must bear their own costs of the mediation including the costs of any representatives and must each bear half the costs of the mediator; and
  - h) any agreement resulting from mediation binds the parties on its terms.
- 5.11 The parties may by written agreement in accordance with clause 5.4(b), submit a Non-Billing Dispute for resolution by an Expert Committee (**Initiating Notice**), in which case the provisions of this clause 5.11 apply as follows:
- a) The terms of reference of the Expert Committee are as agreed by the parties. If the terms of reference are not agreed within five Business Days after the date of submitting the Initiating Notice (or such longer period as agreed between the parties), the referral to the Expert Committee is deemed to be terminated.
  - b) An Expert Committee acts as an expert and not as an arbitrator.
  - c) The parties are each represented on the Expert Committee by one appointee.
  - d) The Expert Committee must include an independent chairperson agreed by the parties or,

if not agreed, a nominee of the ACDC. The chairperson must have the qualifications listed in paragraphs 5.10(d)(i), (ii) and (iii).

- e) Each party must be given an equal opportunity to present its submissions and make representations to the Expert Committee.
- f) The Expert Committee may determine the dispute (including any procedural matters arising during the course of the dispute) by unanimous or majority decision.
- g) Unless the parties agree otherwise the parties must ensure that the Expert Committee uses all reasonable endeavours to reach a decision within 20 Business Days after the date on which the terms of reference are agreed or the final member of the Expert Committee is appointed (whichever is the later) and undertake to co-operate reasonably with the Expert Committee to achieve that timetable.
- h) If the dispute is not resolved within the timeframe referred to in clause 5.11(g), either party may by written notice to the other party terminate the appointment of the Expert Committee.
- i) The Expert Committee has the right to conduct any enquiry as it thinks fit, including the right to require and retain relevant evidence during the course of the appointment of the Expert Committee or the resolution of the dispute.
- j) The Expert Committee must give written reasons for its decision.
- k) A decision of the Expert Committee is final and binding on the parties except in the case of manifest error or a mistake of law.
- l) Each party must bear its own costs of the enquiry by the Expert Committee including the costs of its representatives, any legal counsel and its nominee on the Expert Committee and the parties must each bear half the costs of the independent member of the Expert Committee.

5.12 Schedule 5 does not apply to a Non-Billing Dispute to the extent that:

- a) there is a dispute resolution process established in connection with, or pursuant to, a legal or regulatory obligation (including any dispute resolution process set out in a Structural Separation Undertaking)
- b) a party has initiated a dispute under the dispute resolution process referred to in clause 5.12(a), and
- c) the issue the subject of that dispute is the same issue in dispute in the Non-Billing Dispute.

## Schedule 6 – Confidentiality

- 6.1 Subject to clause 6.4 and any applicable statutory duty, each party must keep confidential all Confidential Information of the other party and must not:
- a) use or copy such Confidential Information except as set out in this FAD; or
  - b) disclose or communicate, cause to be disclosed or communicated or otherwise make available such Confidential Information to any third person.
- 6.2 For the avoidance of doubt, information generated within the Access Provider’s Network as a result of or in connection with the supply of the relevant Service to the Access Seeker or the interconnection of the Access Provider’s Network with the Access Seeker’s Network (other than information that falls within paragraph (d) of the definition of Confidential Information) is the Confidential Information of the Access Seeker.
- 6.3 The Access Provider must upon request from the Access Seeker, disclose to the Access Seeker quarterly aggregate traffic flow information generated within the Access Provider’s Network in respect of a particular Service provided to the Access Seeker, if the Access Provider measures and provides this information to itself. The Access Seeker must pay the reasonable costs of the Access Provider providing that information.
- 6.4 Subject to clauses 6.5 and 6.10, Confidential Information of the Access Seeker may be:
- a) used by the Access Provider:
    - i. for the purposes of undertaking planning, maintenance, provisioning, operations or reconfiguration of its Network;
    - ii. for the purposes of supplying Services to the Access Seeker;
    - iii. for the purpose of billing; or
    - iv. for another purpose agreed to by the Access Seeker; and
  - b) disclosed only to personnel who, in the Access Provider’s reasonable opinion require the information to carry out or otherwise give effect to the purposes referred to in paragraph (a) above.
- 6.5 A party (**Disclosing Party**) may to the extent necessary use and/or disclose (as the case may be) the Confidential Information of the other party:
- a) to those of the Disclosing Party’s directors, officers, employees, agents, contractors (including sub-contractors) and representatives to whom the Confidential Information is reasonably required to be disclosed in connection with the provision of the Service to which this FAD relates;
  - b) to any professional person for the purpose of obtaining advice in relation to matters arising

out of or in connection with the supply of a Service under this FAD;

- c) to an auditor acting for the Disclosing Party to the extent necessary to permit that auditor to perform its audit functions;
- d) in connection with legal proceedings, arbitration, expert determination and other dispute resolution mechanisms set out in this FAD, provided that the Disclosing Party has first given as much notice (in writing) as is reasonably practicable to the other party so that the other party has an opportunity to protect the confidentiality of its Confidential Information;
- e) as required by law provided that the Disclosing Party has first given as much notice (in writing) as is reasonably practicable to the other party, that it is required to disclose the Confidential Information so that the other party has an opportunity to protect the confidentiality of its Confidential Information, except that no notice is required in respect of disclosures made by the Access Provider to the ACCC under section 152BEA of the CCA;
- f) with the written consent of the other party provided that, prior to disclosing the Confidential Information of the other party:
  - i. the Disclosing Party informs the relevant person or persons to whom disclosure is to be made that the information is the Confidential Information of the other party;
  - ii. if required by the other party as a condition of giving its consent, the Disclosing Party must provide the other party with a confidentiality undertaking in the form set out in Annexure 1 of this Schedule 6 signed by the person or persons to whom disclosure is to be made; and
  - iii. if required by the other party as a condition of giving its consent, the Disclosing Party must comply with clause 6.6;
- g) in accordance with a lawful and binding directive issued by a regulatory authority;
- h) if reasonably required to protect the safety of personnel or property or in connection with an emergency;
- i) as required by the listing rules of any stock exchange where that party's securities are listed or quoted;
- j) in accordance with a reporting obligation, or in response to a request from a regulatory authority or any other Government body, in connection with the Access Provider's Structural Separation Undertaking where the party cannot comply with the reporting obligation or request without using or disclosing the Confidential Information, provided that:
  - i. prior to disclosing the Confidential Information of the other party the Disclosing Party informs the relevant person or persons to whom disclosure is to be made

that the information is the Confidential Information of the other party; and

- ii. unless prohibited by law, the Disclosing Party informs the other Party in writing as soon as reasonably practicable after receiving the request that the Disclosing Party will disclose Confidential Information to the regulatory authority or any other Government body to fulfil that reporting obligation or respond to that request.
- k) in response to a request from a regulatory authority or any other Government body in connection with interception capability (as that term is used in Chapter 5 of the *Telecommunications (Interception and Access) Act 1979* (Cth)) relating to access to a declared service, where the party cannot comply with the request without using or disclosing the Confidential Information, provided that:
- i. prior to disclosing the Confidential Information of the other party the Disclosing Party informs the relevant person or persons to whom disclosure is to be made that the information is the confidential information of the other party; and
  - ii. unless prohibited by law, the Disclosing Party informs the other Party as soon as reasonably practicable after receiving the request that the Disclosing Party will disclose Confidential Information to the regulatory authority or any other Government body to respond to that request.

6.6 Each party must co-operate in any action taken by the other party to:

- a) protect the confidentiality of the other party's Confidential Information; or
- b) enforce its rights in relation to its Confidential Information.

6.7 Each party must establish and maintain security measures to safeguard the other party's Confidential Information from unauthorised access, use, copying, reproduction or disclosure.

6.8 Confidential Information provided by one party to the other party is provided for the benefit of that other party only. Each party acknowledges that no warranty is given by the Disclosing Party that the Confidential Information is or will be correct.

6.9 Each party acknowledges that a breach of this Schedule 6 by one party may cause another party irreparable damage for which monetary damages would not be an adequate remedy. Accordingly, in addition to other remedies that may be available, a party may seek injunctive relief against such a breach or threatened breach of this Schedule 6.

6.10 If:

- a) the Access Provider has the right to suspend or cease the supply of the Service under:
  - i. Schedule 7 due to a payment breach, or

- ii. under clause 7.8
- b) after suspension or cessation of supply of the Service under this FAD, the Access Seeker fails to pay amounts due or owing to the Access Provider by the due date for payment, then the Access Provider may do one or both of the following:
- c) notify and exchange information about the Access Seeker (including the Access Seeker's Confidential Information) with any credit reporting agency or the Access Provider's collection agent; and
- d) without limiting clause 6.10, disclose to a credit reporting agency:
  - i. the defaults made by the Access Seeker to the Access Provider; and
  - ii. the exercise by the Access Provider of any right to suspend or cease supply of the Service under this FAD.



## Annexure 1 of Schedule 6

### Confidentiality undertaking form

*[Amend where necessary]*

#### CONFIDENTIALITY UNDERTAKING

I, \_\_\_\_\_ of [employer's company name] ([undertaking company]) undertake to [full name of party who owns or is providing the confidential information as the case requires] ([Provider]) that:

1 Subject to the terms of this Undertaking, I will keep confidential at all times the information listed in Attachment 1 to this Undertaking (Confidential Information) that is in my possession, custody, power or control.

2 I acknowledge that:

(a) this Undertaking is given by me to [Provider] in consideration for [Provider] making the Confidential Information available to me for the Approved Purposes (as defined below);

(b) all intellectual property in or to any part of the Confidential Information is and will remain the property of [Provider]; and

(c) by reason of this Undertaking, no licence or right is granted to me, or any other employee, agent or representative of [undertaking company] in relation to the Confidential Information except as expressly provided in this Undertaking.

3 I will:

(a) only use the Confidential Information for:

(i) the purposes listed in Attachment 2 to this Undertaking; or

(ii) any other purpose approved by [Provider] in writing;

(the Approved Purposes);

(b) comply with any reasonable request or direction from [provider] regarding the Confidential Information.

4 Subject to clause 5, I will not disclose any of the Confidential Information to any other person without the prior written consent of [Provider].

5 I acknowledge that I may disclose the Confidential Information to which I have access to:

(a) any employee, external legal advisors, independent experts, internal legal or regulatory staff of [undertaking company], for the Approved Purposes provided that:

(i) the person to whom disclosure is proposed to be made (**the person**) is notified in writing to [Provider] and [Provider] has approved the person as a person who may receive the Confidential Information, which approval shall not be

unreasonably withheld;

(ii) the person has signed a confidentiality undertaking in the form of this Undertaking or in a form otherwise acceptable to [Provider]; and

(iii) a signed undertaking of the person has already been served on [Provider];

(b) other persons, if required to do so by law, but then only:

(i) if I notify [Provider] of that request within 7 days of receiving the request;

(ii) to the person(s) to whom I am obliged to provide the Confidential Information;

(iii) to the extent necessary as required by law; and

(iv) if I notify the recipient of the Confidential Information that the information is confidential and is the subject of this Undertaking to the [Provider]; and

(c) any secretarial, administrative and support staff, who perform purely administrative tasks, and who assist me or any person referred to in paragraph 5(a) for the Approved Purpose.

6 I will establish and maintain security measures to safeguard the Confidential Information from unauthorised access, use, copying, reproduction or disclosure and will protect the Confidential Information using the same degree of care as a prudent person in my position would use to protect their own confidential information.

7 Except as required by law and subject to paragraph 10 below, within 14 days after whichever of the following first occurs:

(a) termination of this Undertaking;

(b) my ceasing to be employed or retained by [undertaking company] (provided that I continue to have access to the Confidential Information at that time); or

(c) my ceasing to be working for [undertaking company] in respect of the Approved Purposes (other than as a result of ceasing to be employed by [undertaking company]);

I will destroy or deliver to [Provider] the Confidential Information and any documents or things (or parts of documents or things), constituting, recording or containing any of the Confidential Information in my possession, custody, power or control other than electronic records stored in IT backup system that cannot be destroyed or deleted.

8 Nothing in this Undertaking shall impose an obligation upon me in respect of information:

(a) that is in the public domain; or

(b) that has been obtained by me otherwise than from [Provider] in relation to this Undertaking;

provided that the information has not been obtained by me by reason of, or in

circumstances involving, any breach of this Undertaking, any other confidentiality undertaking in favour of [Provider] for the Approved purpose, or by any other unlawful means.

- 9 I acknowledge that damages may not be a sufficient remedy for any breach of this Undertaking and that [Provider] may be entitled to specific performance or injunctive relief (as appropriate) as a remedy for any breach or threatened breach of this Undertaking, in addition to any other remedies available to [Provider] at law or in equity.
- 10 The obligations of confidentiality imposed by this Undertaking survive the destruction or delivery to [Provider] of the Confidential Information pursuant to paragraph 7 above.
- 11 I acknowledge that this Undertaking is governed by the law in force in the State of [insert relevant state] and I agree to submit to the non-exclusive jurisdiction of the court of that place.

Signed: \_\_\_\_\_

Print name: \_\_\_\_\_

Dated: \_\_\_\_\_

Witness signature: \_\_\_\_\_

Witness name: \_\_\_\_\_

## **ATTACHMENT 1**

Any document, or information in any document provided by [provider] to [undertaking company] which [provider] claims is confidential information for the purposes of this Undertaking.

**ATTACHMENT 2**

**[Approved purpose(s)]**

## Schedule 7 – Suspension and Termination

7.1 The Access Provider may immediately suspend the supply of a Service or access to the Access Provider’s Network, provided it notifies the Access Seeker where practicable and provides the Access Seeker with as much notice as is reasonably practicable:

- a) during an Emergency; or
- b) where in the reasonable opinion of the Access Provider, the supply of that Service or access to the Access Provider’s Network may pose a threat to safety of persons, hazard to equipment, threat to Network operation, access, integrity or Network security or is likely to impede the activities of authorised persons responding to an Emergency;
- c) where, in the reasonable opinion of the Access Provider, the Access Seeker’s Network or equipment adversely affects or threatens to affect the normal operation of the Access Provider’s Network or access to the Access Provider’s Network or equipment (including for the avoidance of doubt, where the Access Seeker has delivered Prohibited Traffic onto the Access Provider’s Network);
- d) where an event set out in clauses 7.8(a) to (i) occurs
- e) and is entitled to continue such suspension until (as the case requires) the relevant event or circumstance giving rise to the suspension has been remedied.

7.2 If:

- a) the Access Seeker has failed to pay monies payable under this FAD;
- b) a Court determines that (and the decision is not subject to an appeal) the Access Seeker’s use of:
  - a. its Facilities in connection with any Service supplied to it by the Access Provider;
  - b. the Access Provider’s Facilities or Network; or
  - c. any Service supplied to it by the Access Providers,is in contravention of any law; or
- c) the Access Seeker breaches a material obligation under this FAD (**Suspension Event**) and:
- d) as soon as reasonably practicable after becoming aware of the Suspension Event, the Access Provider gives a written notice to the Access Seeker:
  - i. citing this clause;
  - ii. specifying the Suspension Event that has occurred;

- iii. requiring the Access Seeker to institute remedial action (if any) in respect of that event; and
  - iv. specifying the action which may follow due to a failure to comply with the notice, (**Suspension Notice**) and:
- e) the Access Seeker fails to institute remedial action as specified in the Suspension Notice within 10 Business Days after receiving the Suspension Notice (in this clause 7.2, the **Remedy Period**), the Access Provider may, by written notice given to the Access Seeker as soon as reasonably practicable after the expiry of the Remedy Period:
- f) refuse to provide the Access Seeker with the Service:
- i. of the kind in respect of which the Suspension Event has occurred; and
  - ii. a request for which is made by the Access Seeker after the date of the breach, until the remedial action specified in the Suspension Notice is completed or the Suspension Event otherwise ceases to exist; and
- g) suspend the provision of the Service until the remedial action specified in the Suspension Notice is completed.

7.3 For the avoidance of doubt, subclause 7.2(a) does not apply to any monies payable that are the subject of a Billing Dispute that has been notified by the Access Seeker to the Access Provider in accordance with the Billing Dispute Procedures set out in this FAD.

7.4 In the case of a suspension pursuant to clause 7.2, the Access Provider must reconnect the Access Seeker to the Access Provider's Network and recommence the supply of the Service as soon as practicable after there no longer exists a reason for suspension and the Access Provider must do so subject to payment by the Access Seeker of the Access Provider's reasonable costs of suspension and reconnection.

7.5 If:

- a) an Access Seeker ceases to be a carrier or carriage service provider; or
- b) an Access Seeker ceases to carry on business for a period of more than 10 consecutive Business Days or
- c) in the case of an Access Seeker, any of the reasonable grounds specified in subsection 152AR(9) of the CCA apply; or
- d) an Access Seeker breaches a material obligation under this FAD, and:
  - i. that breach materially impairs or is likely to materially impair the ability of the Access Provider to deliver Listed Carriage Services to its customers; and
  - ii. the Access Provider has given a written notice to the first-mentioned party within 20 Business Days of becoming aware of the breach (**Breach Notice**); and

- iii. the Access Seeker fails to institute remedial action as specified in the Breach Notice within 10 Business Days after receiving the Breach Notice (in this clause 7.5, the **Remedy Period**), or
  - e) the supply of the Service(s) to the Access Seeker has been suspended pursuant to the terms and conditions of this FAD for a period of three Months or more, the Access Provider may cease supply of the Service under this FAD by written notice given to the first-mentioned party at any time after becoming aware of the cessation, reasonable grounds or expiry of the Remedy Period specified in the Breach Notice (as the case may be).
- 7.5A If an Access Provider ceases to carry on business for a period of more than 10 consecutive Business Days, the other party may cease acquisition of the Service under this FAD by written notice given to the Access Provider at any time after becoming aware of the cessation.
- 7.6 A party must not give the other party both a Suspension Notice under clause 7.2 and a Breach Notice under clause 7.5 in respect of:
- a) the same breach; or
  - b) different breaches that relate to or arise from the same act, omission or event or related acts, omissions or events;
- except:
- c) where a Suspension Notice has previously been given to the Access Seeker by the Access Provider in accordance with clause 7.2 in respect of a Suspension Event and the Suspension Event has not been rectified by the Access Seeker within the relevant Remedy Period specified in clause 7.2; and
  - d) where an Access Seeker has not rectified a Suspension Event, then notwithstanding clause 7.5(d)(ii), the time period for the purposes of clause 7.5(d)(ii) will be 20 Business Days from the expiry of the time available to remedy the Suspension Event.
- 7.7 For the avoidance of doubt, a party is not required to provide a Suspension Notice under clause 7.2 in respect of a breach before giving a Breach Notice in respect of that breach under clause 7.5.
- 7.8 Notwithstanding any other provision of this FAD, either Party may at any time immediately cease the supply of the Service under this FAD by giving written notice of termination to the other Party if:
- a) an order is made or an effective resolution is passed for winding up or dissolution without winding up (otherwise than for the purposes of solvent reconstruction or amalgamation) of the other Party; or
  - b) a receiver, receiver and manager, official manager, controller, administrator (whether voluntary or otherwise), provisional liquidator, liquidator, or like official is appointed over the undertaking and property of the other Party; or



- c) a holder of an encumbrance takes possession of the undertaking and property of the other party, or the other party enters or proposes to enter into any scheme of arrangement or any composition for the benefit of its creditors; or
- d) the other party is or is likely to be unable to pay its debts as and when they fall due or is deemed to be unable to pay its debts pursuant to section 585 or any other section of the *Corporations Act 2001* (Cth); or
- e) as a result of the operation of section 459F or any other section of the *Corporations Act 2001* (Cth), the other party is taken to have failed to comply with a statutory demand; or
- f) a force majeure event substantially and adversely affecting the ability of a party to perform its obligations to the other party, continues for a period of three Months; or
- g) the other party breaches any of the terms of any of its loans, security or like agreements or any lease or agreement relating to significant equipment used in conjunction with the business of that other party related to the supply of the Service under this FAD; or
- h) the other party seeks or is granted protection from its creditors under any applicable legislation; or
- i) anything analogous or having a substantially similar effect to any of the events specified above occurs in relation to the other party.

7.9 The cessation of the operation of this FAD:

- a) does not operate as a waiver of any breach by a party of any of the provisions of this FAD; and
- b) is without prejudice to any rights, liabilities or obligations of any party which have accrued up to the date of cessation.

7.10 Without prejudice to the parties' rights upon termination of the supply of the Service under this FAD, or expiry or revocation of this FAD, the Access Provider must refund to the Access Seeker a fair and equitable proportion of those sums paid under this FAD by the Access Seeker which are periodic in nature and have been paid for the Service:

- a) for a period extending beyond the date on which the supply of the Service under this FAD terminates, or this FAD ceases to have effect, and/or,
- b) as applicable, in respect of a Service which has been suspended for a period of 10 or more consecutive Business Days under Schedule 7 of this FAD, for the period extending beyond that 10 Business Day suspension period to the extent the Service remains suspended under Schedule 7 of this FAD,

subject to any invoices or other amounts outstanding from the Access Seeker to the Access Provider. In the event of a dispute in relation to the calculation or quantum of a fair and equitable proportion, either party may refer the matter for dispute resolution in accordance

with the dispute resolution procedures set out in Schedule 5 of this FAD.

## Schedule 8 - Liability and Indemnity

8.1 Subject to clause 8.2, each Party's liability in respect of:

- a) the 12 Month period commencing on the date of the first supply of the Service under this FAD is limited to the aggregate amount paid or payable by the Access Seeker to the Access Provider for the Service provided by the Access Provider in that initial 12 Month period;
- b) any subsequent 12 Month period commencing on any anniversary of the date of the first supply of the Service under this FAD is limited to the aggregate amount paid or payable by the Access Seeker to the Access Provider for the Service provided by the Access Provider in the 12 Month period immediately prior to that anniversary.

For the purposes of this clause 8.1, Liability arises when the act or omission giving rise to the Liability occurs, not when any claim is made by a party under this FAD in connection with that Liability.

8.2 The liability limitation in clause 8.1 does not apply to the Access Seeker's liability to pay the Charges for the Service provided under this FAD, or the Parties' indemnification obligations under clauses 8.3 and 8.4.

8.3 Each Party indemnifies the other Party against all Loss arising from the death of, or personal injury to, a Representative of the other Party, where the death or personal injury arises from:

- a) an act or omission that is intended to cause death or personal injury; or
- b) a negligent act or omission;

by the first Party or by a Representative of the first Party.

8.4 Each Party indemnifies the other Party against all Loss arising from any loss of, or damage to, the property of the other party (or the property of a representative of the other Party), where the loss or damage arises from:

- a) an act or omission that is intended to cause death or personal injury; or
- b) a negligent act or omission;

by the first Party or by a Representative of the first Party.

8.5 Each Party indemnifies the other Party against all Loss arising from a claim by a third person against the Innocent Party to the extent that the claim relates to a negligent act or omission by the first Party or by a Representative of the first Party.

8.6 Subject to clauses 8.3 and 8.4, a Party has no Liability to the other Party for or in respect of any consequential, special or indirect Loss or any loss of profits or data.

- 8.7 A Party has no Liability to the other Party for or in relation to any act or omission of, or any matter arising from or consequential upon any act or omission of, any end-user of a Party or any other third person who is not a Representative of a Party.
- 8.8 The Indemnifying Party is not obliged to indemnify the Innocent Party under this Schedule 8 to the extent that the liability the subject of the indemnity claim is caused or contributed to by:
- a) a breach of this FAD;
  - b) an act intended to cause death, personal injury, or loss or damage to property; or
  - c) a negligent act or omission;
- by the Innocent Party.
- 8.9 The Indemnifying Party is not obliged to indemnify the Innocent Party under this Schedule 8 or for in respect of a claim brought against the Innocent Party by an end-user of the Innocent Party, or a third person with whom the Innocent Party has a contractual relationship, to the extent that the Loss under such claim could have been excluded or reduced (regardless of whether such a Liability actually was excluded or reduced) by the Innocent Party in its contract with the end-user or third person.
- 8.10 The Innocent Party must take all reasonable steps to minimise the Loss it has suffered or is likely to suffer as a result of an event giving rise to an indemnity under this Schedule 8. If the Innocent Party does not take reasonable steps to minimise such Loss then the damages payable by the Indemnifying Party must be reduced as is appropriate in each case.
- 8.11 A Party's liability to the other Party for Loss of any kind arising out of the supply of the Service under this FAD or in connection with the relationship established by it is reduced to the extent (if any) that the other Party causes or contributes to the Loss. This reduction applies whether the first Party's liability is in contract, tort (including negligence), under statute or otherwise.
- 8.12 The Indemnifying Party must be given full conduct of the defence of any claim by a third party that is the subject of an indemnity under clause 8.3 or 8.4, including, subject to the Indemnifying Party first obtaining the written consent (which must not be unreasonably withheld) of the Innocent Party to the terms thereof, the settlement of such a claim.
- 8.13 Nothing in this Schedule 8 excludes or limits a Party's entitlement to damages under Part 5 of the Telecommunications (Consumer Protection and Service Standards) Act 1999.

## Schedule 9 - Communication with end users

- 9.1 The Access Provider may communicate and deal with an Access Seeker's end-users as expressly provided in clauses 9.2 to 9.4 and as otherwise permitted by law.
- 9.2 Subject to clause 9.3, the Access Provider may communicate and deal with the Access Seeker's end-users:
- a) in relation to goods and services which the Access Provider currently supplies or previously supplied to the end-user provided that the Access Provider only communicates and deals through its retail division;
  - b) as members of the general public or a part of the general public or members of a particular class of recipients of carriage or other services;
  - c) where the Access Provider performs wholesale operations which require communications or dealings with such end-users, to the extent necessary to carry out such operations;
  - d) in a manner or in circumstances agreed by the Parties; or
  - e) in or in connection with an Emergency, to the extent it reasonably believes necessary to protect the safety of persons or property.
- 9.3 If:
- a) an end-user of the Access Seeker initiates a communication with the Access Provider in relation to goods and/or services supplied to that end-user by the Access Seeker, the Access Provider must advise the end-user that they should discuss any matter concerning the Access Seeker's goods and/or services with the Access Seeker and must not engage in any form of marketing or discussion of the Access Provider's goods and/or services;
  - b) an end-user of the Access Seeker initiates a communication with the Access Provider in relation to goods and/or services supplied to that end-user by the Access Provider, the Access Provider may engage in any form of marketing or discussion of the Access Provider's goods and/or services; and
  - c) an end-user of the Access Seeker initiates a communication with the Access Provider in relation to goods and/or services supplied to that end-user by the Access Provider and the Access Seeker, the Access Provider must advise the end-user that they should discuss any matter concerning the Access Seeker's goods and/or services, with the Access Seeker, but may otherwise engage in any form of marketing or discussion of the Access Provider's goods and/or services.
- 9.4 Where a Party communicates with the end-user of the other Party, that first mentioned Party must, where practicable, make and maintain records of that communication with the other Party's end-user in circumstances where that communication discusses anything concerning the other Party's goods or services with the end-user. For the avoidance of

doubt, the obligation in this paragraph does not include a requirement to provide such records to the other Party (however such a requirement may arise pursuant to any dispute resolution procedure).

9.5 For the purposes of clauses 9.2 to 9.4, a “**communication**” shall include any form of communication, including without limitation telephone discussions and correspondence.

9.6 Neither Party may represent that:

- a) it has any special relationship with or special arrangements with the other Party, including through the use of the other party’s trade marks, service marks, logos or branding unless otherwise agreed;
- b) there are no consequences for an end-user when an end-user signs an authority to transfer their accounts or services;
- c) a Service has any characteristics or functionality other than as specified in a relevant standard form of agreement or the service description for the Service or in any specifications, collateral or brochures published in relation to the Service; or
- d) the other Party participates in the provision of the first mentioned Party’s services, provided that a Party may, upon enquiry by an end-user, inform the end-user of the nature of its relationship with the other Party.

9.7 Where a Party communicates with an end-user of either Party, the first mentioned Party shall ensure that it does not attribute to the other Party:

- a) blame for a Fault or other circumstance; or
- b) the need for maintenance of a Network; or
- c) the suspension of a Service,

provided that this requirement does not require a Party to engage in unethical, misleading or deceptive conduct.

9.8 This Schedule 9 shall be subject to any applicable industry standard made by the ACMA pursuant to Part 6 of the *Telecommunications Act 1997* (Cth) and any applicable industry code registered pursuant to Part 6 of the *Telecommunications Act 1997* (Cth) in relation to communications or dealings with end-users.

## Schedule 10 - Network modernisation and upgrade notice periods

*Notice to be provided where Access Provider undertakes a Major Network Modernisation and Upgrade*

- 10.1 Except where the parties agree otherwise, the Access Provider may make a Major Network Modernisation and Upgrade by:
- a) providing the Access Seeker with notices in writing in accordance with clauses 10.2 and 10.4 (**General Notification**) and clauses 10.3 and 10.5 (**Individual Notification**); and
  - b) consulting with the Access Seeker, and negotiating in good faith, to address any reasonable concerns of the Access Seeker, in relation to the Major Network Modernisation and Upgrade.

This clause 10.1 does not apply to an Emergency Network Modernisation and Upgrade.

- 10.2 The period of notices given under a General Notification provided by the Access Provider to the Access Seeker:
- a) must be an Equivalent Period of Notice; and
  - b) in any event, must not be less than 30 weeks before the Major Network Modernisation and Upgrade is scheduled to take effect.
- 10.3 An Individual Notification must be provided by the Access Provider to the Access Seeker as soon as practicable after the General Notification, taking account of all the circumstances of the Major Network Modernisation and Upgrade.

*Information to be provided in the notices*

- 10.4 A General Notification must include a general description of the proposed Major Network Modernisation and Upgrade, including the indicative timing for the implementation of the Major Network Modernisation and Upgrade.
- 10.5 An Individual Notification must include the following information in addition to the information provided in the relevant General Notification:
- a) the anticipated commencement date for implementing the Major Network Modernisation and Upgrade
  - b) the anticipated amount of time it will take to implement the Major Network Modernisation and Upgrade;
  - c) details of the Access Seeker's activated Services, or Services in the process of being activated at the date of the notice, that are likely to be affected by the Major Network Modernisation and Upgrade;
  - d) the likely action required by the Access Seeker as a result of the Major Network

Modernisation and Upgrade (including the possible impact of the Major Network Modernisation and Upgrade upon the Access Seeker's Service); and

- e) details of who the Access Seeker may contact to obtain further information about the Major Network Modernisation and Upgrade.

10.6 An Individual Notification only needs to be given where a Service has been activated or the Access Provider is in the process of activating a service as at the date of the Individual Notification, and:

- a) the Major Network Modernisation and Upgrade will require the Access Seeker to take particular action in order to continue to use the Service; or
- b) the Major Network Modernisation and Upgrade will result in the Service no longer being supplied or the Service being suspended for a period of no less than 20 Business Days.

10.7 Where the Access Provider has provided the Access Seeker with an Individual Notification, the Access Provider must provide the Access Seeker with:

- a) updates about the Major Network Modernisation and Upgrade covered by the notice, including:
  - i. any update or change to the information provided in the Individual Notification;
  - ii. any new information available at the time of the update about:
    - 1. how the Access Seeker may be impacted by the Major Network Modernisation and Upgrade; and
    - 2. what steps the Access Seeker will be required to take to facilitate the Major Network Modernisation and Upgrade.

10.8 The updates referred to in subclause 10.7(a) must be provided regularly (which is not required to be any more frequently than Monthly) after the Individual Notification.

#### *Emergency Network Modernisation and Upgrade*

10.9 In the event of an Emergency, the Access Provider may conduct an Emergency Network Modernisation and Upgrade, and

- a) must use its best endeavours to provide the Access Seeker with an Individual Notification prior to the Emergency Network Modernisation and Upgrade being implemented; or
- b) where it is not practicable for prior notice to be given, the Access Provider must provide the Access Seeker with an Individual Notification as soon as reasonably practicable after the Emergency Network Modernisation and Upgrade is implemented.

#### *Negotiations in good faith*

10.10 Except where the parties agree otherwise, the Access Provider must not commence implementation of a Major Network Modernisation and Upgrade unless:



- a) it complies with clauses 10.1 to 10.8; and
  - b) it has consulted with the Access Seeker and has negotiated in good faith, and addressed the reasonable concerns of the Access Seeker in relation to the Major Network Modernisation and Upgrade.
- 10.11 Notwithstanding any continuing negotiations between the Access Provider and the Access Seeker pursuant to clauses 10.1 and 10.10, if the Access Provider has complied with this Schedule 10, a Major Network Modernisation and Upgrade may proceed within a reasonable time period, taking account of all the circumstances, after an Individual Notification has been issued, unless both parties agree otherwise.
- 10.12 In attempting to reach a mutually acceptable resolution in relation to a variation under clauses 10.1 and 10.10, the parties must recognise any need that the Access Provider may have to ensure that the specifications for the Services which the Access Providers supplies to more than one of its customers need to be consistent (including, without limitation having regard to the incorporation by the Access Provider of any relevant international standards).

#### *Dispute Resolution*

- 10.13 If a dispute arises in relation to a Major Network Modernisation and Upgrade, then the matter may be resolved in accordance with the dispute resolution procedures set out in Schedule 5 of this FAD.

#### *Miscellaneous*

- 10.14 A requirement for the Access Provider to provide information in written form includes provision of that information in electronic form.
- 10.15 Any information provided by the Access Provider in electronic form must be in a text-searchable and readable format.

## Schedule 11 - Changes to operating manuals

11.1 Operational documents concerning the Service that have been provided to the Access Seeker by the Access Provider, or should be provided because they affect the supply of the Service including the technical and operational quality of the Service, or affect the rights and/or obligations of an Access Seeker, may be amended:

- (a) by the Access Provider from time to time to implement or reflect a change to its standard processes, subject to:
  - i. giving 20 Business Days prior written notice to the Access Seeker including a documented list of all amendments, and a marked-up copy of the proposed new operational document that clearly identifies all amendments; and
  - ii. allowing the Access Seeker to provide comments during the notice period on the proposed amendments, and where provided, the Access Provider having reasonably considered those comments and implemented any such comments where the Access Provider considers it reasonable to do so; and
- (b) otherwise, by agreement of the parties.

11.1A Operational documents referred to in this clause include ordering and provisioning manuals, fault management procedures and operational manuals.

11.1B For the purposes of 11.1(a)(ii), an Access Provider in considering whether it is reasonable for it to implement any comments may consider whether the changes reflect all Access Seeker and the Access Provider's interests.

11.2 Upon completion of the process set out in clause 11.1, the Access Provider must notify the Access Seeker and make available to the Access Seeker a copy of the new operational document

11.3 Where operational documents concerning the Service are amended in accordance with clause 11.1 and the Access Seeker believes that the amendments:

- a) are unreasonable; or
- b) deprive the Access Seeker of a fundamental part of the bargain it obtained under this FAD;

the Access Seeker may seek to have the matter resolved in accordance with the dispute resolution procedures set out in Schedule 5 of this FAD.

## Schedule 12 - Recourse to regulated terms

12.1 Unless otherwise agreed by the parties, if

- (a) an Access Agreement between an Access Provider and an Access Seeker is in force and the Access Agreement relates to access to the same Service which this FAD relates to;
- (b) the ACCC makes or varies a Regulatory Determination in relation to the Service and the new Regulatory Determination or the variation deals with a matter other than price; and
- (c) a party to the Access Agreement proposes, by written notice, to the other party to vary the Access Agreement to reflect the terms and conditions in the new or varied Regulatory Determination about that matter,

each party must:

- (i) consider the proposed changes in good faith; and
- (ii) negotiate the proposed changes in good faith for a reasonable period not exceeding 20 Business days unless a longer period of time is agreed in writing, including, if requested by the other party, to meet with the other party to discuss the other party's proposal.

12.1A If the process under clause 12.1 does not result in a variation to the Access Agreement, this is not a Non-Billing Dispute or Billing Dispute for the purposes of this FAD.

12.2 Unless otherwise agreed by the parties, if

- (a) an Access Agreement between an Access Provider and an Access Seeker is in force and the Access Agreement relates to access to the same Service which this FAD relates to; and
- (b) the ACCC makes or varies a Regulatory Determination in relation to the Service and the new Regulatory Determination or the variation deals with a matter other than price;

either party may terminate the Access Agreement in respect of that Service (but only in respect of that Service) by providing the other party with a written notice, and termination will take effect on the expiry of the period specified in the notice, which must be no less than 120 Business Days after the day that notice is provided.



## **Final Access Determination No. 2 of 2017 (LBAS)**

*Competition and Consumer Act 2010*

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The AUSTRALIAN COMPETITION AND CONSUMER COMMISSION makes this final access determination under section 152BC of the *Competition and Consumer Act 2010*.

Date of decision: 24 May 2017

## **1. Application**

- 1.1 This instrument sets out the final access determination (FAD) in respect of the declared local bitstream access service (LBAS).
- 1.2 This FAD replaces the previous FAD for the LBAS (Final Access Determination No. 2 of 2012).
- 1.3 The prices in this FAD are exclusive of tax payable under the *Utilities (Network Facilities Tax) Act 2006 (ACT)*.
- 1.4 The prices in this FAD are exclusive of Goods and Services Tax (GST).
- 1.5 The prices in the FAD are exclusive of an industry charge or tax, however described, introduced by Government for the purpose of funding regional fixed wireless and satellite broadband services.

## **2. Definitions and interpretation**

- 2.1 Schedule 1 applies to the interpretation of this instrument.
- 2.2 The Schedules form part of this instrument.

## **3. Commencement and duration**

- 3.1 This FAD commences on 26 May 2017.
- 3.2 Unless sooner revoked this FAD remains in force up until and including 28 July 2021.

## **4. Terms and conditions of access**

- 4.1 If a Carrier or Carriage Service Provider is required to comply with any or all of the standard access obligations in respect the LBAS, the carrier or Carriage Service Provider must comply with those obligations on the terms and conditions set out in this clause 4.

Note: The terms and conditions in a FAD apply only to those terms and conditions where terms and conditions on that matter in an Access Agreement cannot be reached, no special access undertaking is in operation setting out terms and conditions on that matter and no binding rules of conduct have been made setting out terms and conditions on that matter: section 152AY of the *Competition and Consumer Act 2010*.

- 4.2 If the Carrier or Carriage Service Provider is required to supply the LBAS to a service provider, the carrier or Carriage Service Provider must supply the service at the price specified in Schedule 2. The non-price terms and conditions set out in Schedules 3–12 apply to access to the LBAS.
- 4.3 A Carrier or Carriage Service Provider, if it is required to supply the declared service, is required to supply upon request the following wholesale product/s:
  - (a) A LBAS with the following characteristics (25/5 Mbps):
    - (i) a downstream data transfer rate of 25 megabits per second (peak information rate)
    - (ii) an upstream data transfer rate of 5 megabits per second (peak information rate)
    - (iii) residential-grade service characteristics
    - (iv) if requested by the access seeker, a prioritized, symmetric bitstream of sufficient

capacity to provide a voice service.

- 4.4 Nothing in this final access determination restricts a Carrier or Carriage Service Provider that is required to supply the LBAS from supplying additional wholesale products to those specified in clause 4.3.

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# Schedule 1 - Interpretation and definitions

## *Interpretation*

In this FAD, unless the contrary intention appears:

- (a) the singular includes the plural and vice versa;
- (b) the words “including” and “include” mean “including, but not limited to”; and
- (c) terms defined in the *Competition and Consumer Act 2010* or the *Telecommunications Act 1997* have the same meaning.

## *Definitions*

**ACCC** means the Australian Competition and Consumer Commission

**Access Agreement** has the same meaning as given to that term in section 152BE of the CCA

**Access Provider** has the same meaning as given to that term in subsection 152AR(2) of the CCA

**Access Seeker** has the same meaning as given to that term in section 152AG of the CCA

**ACDC** means the Australian Commercial Disputes Centre Limited

**ACDC Guidelines** means the mediation guidelines of the ACDC in force from time to time

**ACMA** means the Australian Communications and Media Authority

**Aggregation Charge** means a charge for the transport of customer traffic from multiple end-users on an aggregated basis

**AVC TC-4** refers to the NBN Co product AVC TC-4 which is an Ethernet-based Layer 2 virtual connection on the NBN Co network that carries traffic to and from a user-network interface used to serve a premises, in traffic class 4. See section 3.1 and 3.2 of the Product Description of NBN Co Ethernet Bitstream Service at [http://www.nbnco.com.au/content/dam/nbnco2/documents/sfaa-wba2-product-catalogue-nebs-product-description\\_20141219.pdf](http://www.nbnco.com.au/content/dam/nbnco2/documents/sfaa-wba2-product-catalogue-nebs-product-description_20141219.pdf) as amended from time to time

**Billing Dispute** means a dispute relating to a Charge or an invoice issued by the Access Provider

**Billing Dispute Notice** means a notice given pursuant to clause 3.10 in Schedule 3



**Billing Dispute Procedures** means the procedures set out in clauses 3.10 to 3.30 in Schedule 3

**Breach Notice** has the meaning set out in clause 7.5 of Schedule 7

**Business Hours** means 8.00 am to 5.00 pm Monday to Friday, excluding a day which is a gazetted public holiday in the place where the relevant transaction or work is to be performed

**Business Day** means any day other than Saturday or Sunday or a day which is a gazetted public holiday in the place concerned

**Calendar Day** means a day reckoned from midnight to midnight

**Carriage Service** has the same meaning given to that term in section 7 of the *Telecommunications Act 1997* (Cth)

**CCA** means the *Competition and Consumer Act 2010* (Cth)

**Charge** means a charge for the supply of a Service

**Confidential Information** means all information, know-how, ideas, concepts, technology, manufacturing processes, industrial, marketing and commercial knowledge of a confidential nature (whether in tangible or intangible form and whether coming into existence before or after the commencement of this FAD) relating to or developed in connection with or in support of the Service supplied under this FAD (the “**first mentioned party**”) but does not include:

- (a) information which is or becomes part of the public domain (other than through any breach of this FAD);
- (b) information rightfully received by the other party from a third person without a duty of confidentiality being owed by the other party to the third person, except where the other party has knowledge that the third person has obtained that information either directly or indirectly as a result of a breach of any duty of confidence owed to the first mentioned party; or
- (c) information which has been independently developed or obtained by the other party;

or

- (d) information about Services supplied by the Access Provider (including where that information is generated by the Access Provider) that has been aggregated with other information of a similar or related nature, such that the Access Seeker cannot be identified by the information or any part of it

**CVC TC-4** refers to the NBN Co product CVC TC-4 which is Ethernet-based Layer 2 virtual capacity on the NBN Co Network used to carry customer traffic between multiple access virtual circuits in a connectivity serving area on an aggregated basis and the network-network interface at the point of interconnection serving that connectivity serving area, in traffic class 4. See section 2.1 and 2.2 of the Product Description of NBN Co Ethernet Bitstream Service at [http://www.nbnco.com.au/content/dam/nbnco2/documents/sfaa-wba2-product-catalogue-nebs-product-description\\_20141219.pdf](http://www.nbnco.com.au/content/dam/nbnco2/documents/sfaa-wba2-product-catalogue-nebs-product-description_20141219.pdf) as amended from time to time

**Disclosing Party** has the meaning set out in clause 6.5 in Schedule 6 of this FAD

**Emergency** means an emergency due to an actual or potential occurrence (such as fire, flood, storm, earthquake, explosion, accident, epidemic or war-like action) which:

- (a) endangers or threatens to endanger the safety or health of persons or
- (b) destroys or damages, or threatens to destroy or damage property, being an emergency which requires a significant and co-ordinated response

**Emergency Network Modernisation and Upgrade** means a modernisation or upgrade of a Network that is required or reasonably necessary and is a proportionate response to address an Emergency

**Equivalent Period of Notice** means a period of notice commencing at the time that the Access Provider has approved and allocated the capital expenditure or otherwise approved and made a decision to commit to a Major Network Modernisation and Upgrade

**Ethernet** has the same meaning given to that term by the Institute of Electrical and Electronics Engineers

**Event** means an act, omission or event relating to or arising out of this FAD or part of this FAD

**Exchange** means a building in which telephone switching or other equipment of an Access Provider or Access Seeker has been installed for use in connection with a telecommunications network

**Expert Committee** means a committee established under clause 5.11 in Schedule 5

**Facility** has the same meaning given to that term in section 7 of the *Telecommunications Act 1997* (Cth)

**FAD** means Final Access Determination

**Fault** means:

- (a) a failure in the normal operation of a Network or in the delivery of a Service; or

- (b) any issue as to the availability or quality of a Service supplied to an end-user via the Access Seeker, notified by the end-user to the Access Seeker's help desk, that has been reasonably assessed by the Access Provider as being the Access Provider's responsibility to repair

**General Notification** has the meaning set out in clause 10.1

**Indemnifying Party** means the Party giving an indemnity under this FAD

**Individual Notification** has the meaning set out in clause 10.1 of Schedule 10

**Initiating Notice** has the meaning as set out in clause 5.11 of Schedule 5

**Innocent Party** means the Party receiving the benefit of an indemnity under this FAD

**Liability** (of a party) means any liability of that party (whether in contract, in tort, under statute or in any other way and whether due to negligence, wilful or deliberate breach or any other cause) under or in relation to this FAD, or part of this FAD or in relation to any Event or series of related Events

**Listed Carriage Service** has the same meaning given to that term in section 7 of the *Telecommunications Act 1997* (Cth)

**LBAS** means local bitstream access service declared on 24 February 2012 under section 152AL(3) of the CCA

**Loss** includes liability, loss, damage, costs, charges or expenses (including legal costs)

**Major Network Modernisation and Upgrade** means a modernisation or upgrade that results in a Service no longer being supplied or adversely affects the quality of that Service (or any services supplied by an Access Seeker to their end-users using the Service), but does not mean, or include, an Emergency Network Modernisation Upgrade or an National Broadband Network related upgrade

**Month** means a period commencing at the beginning of any day of a named month and ending:

- (a) at the end of the day before the corresponding day of the next named month; or
- (b) if there is no such corresponding day – at the end of the next named month

**National Broadband Network** means a national telecommunications network for the high-speed carriage of communications, where NBN Co has been, is, or is to be, involved in the

creation or development of the network. To avoid doubt, it is immaterial whether the creation or development of the network is, to any extent, attributable to:

- (a) the acquisition of assets that were used, or for use, in connection with another telecommunications network; or
- (b) the obtaining of access to assets that are also used, or for use, in connection with another telecommunications network

**NBN Co** means NBN Co Limited (ACN 136 533 741), as the company exists from time to time (even if its name is later changed)

**Network** of a party, means that party's system, or series of systems, that carries, or is capable of carrying communications by means of guided or unguided electromagnetic energy

**Network-network interface** means an interface provided by an access provide at a point of interconnection where the access seeker's telecommunications network can interface to the access provider's designated superfast telecommunications network

**Non-Billing Dispute** means a dispute other than a Billing Dispute

**Ongoing Creditworthiness Information** has the meaning as set out in clause 4.8 of Schedule 4 of this FAD

**Party** means a party to this FAD

**People** of a party, means each of that party's directors, officers, employees, agents, contractors, advisers and representatives but does not include that party's end-users or the other party

**Prohibited Traffic** means traffic offered across a POI for which there is no agreement between the Access Provider and the Access Seeker that the Access Provider will carry such traffic or provide a related service to the Access Seeker

**Regulatory Determination** means an access determination or a binding rule of conduct

**Representative** of a Party means each of that party's directors, officers, employees, agents, contractors, advisers and representatives, but does not include that Party's end-users or the other Party

**Security** means the amount and type of security provided, or required to be provided, to the Access Provider in respect of the provision by the Access Provider of Services, as set out in Schedule 4

**Security Deposit** means any sum of money deposited by the Access Seeker with the Access Provider, from time to time, for the purposes of fulfilling in whole or in part the requirement under this FAD that the Access Seeker provide Security to the Access Provider

**Service** means a service declared under section 152AL of the CCA

**Structural Separation Undertaking** means:

- (a) an undertaking given by Telstra under subsection 577A(1) of the *Telecommunications Act 1997* (Cth) which came into force in accordance with section 577AB, and any amendment to that undertaking which comes into force in accordance with subsection 577B(6); and
- (b) a migration plan approved by the ACCC under Subdivision B of Division 2 of Part 33 of the *Telecommunications Act 1997* (Cth) which, pursuant to subsection 577BE(5), formed part of the undertaking referred to in paragraph (a), and any amendment to that plan which is approved by the ACCC in accordance with section 577BF, and includes all binding schedules, annexures and attachments to such documents

**Suspension Event** has the meaning set out in clause 7.2 of Schedule 7

**Suspension Notice** has the meaning set out in clause 7.2 of Schedule 7

**User-network interface** means an interface located at a physically defined end-user's premises where the access provider's designated superfast telecommunications network is present to an end-user

## Schedule 2 - Price

2.1 This Schedule sets out monthly prices for the wholesale product specified in clause 4.3 of this FAD:

<b>Charge component per month</b>	<b>Initial price</b>	<b>Subsequent prices</b>
Port (25/5 Mbps)	\$27.00 per month	The price for the NBN Co product AVC TC-4 25/5 Mbps as amended from time to time (including discounts)
Aggregation dimensioning by RSP per port (kbps)	Price per Mbps per month	
0 to 399	\$17.50	
400 to 549	\$16.75	
550 to 699	\$16.25	
700 to 849	\$15.75	
850 to 999	\$15.00	
1000 to 1149	\$14.25	
1150 to 1299	\$13.50	
1300 to 1449	\$12.75	
1450 to 1599	\$12.00	The price for the NBN Co product CVC TC-4 as amended from time to time (including discounts)
1600 to 1749	\$11.25	
1750 to 1899	\$10.75	
1900 to 2049	\$10.25	
2050 to 2199	\$9.75	
2200 to 2349	\$9.50	
2350 to 2499	\$9.25	
2500 to 2649	\$9.00	
2650 to 2799	\$8.75	
2800 to 2949	\$8.50	
2950 to 3099	\$8.25	
3100 and above	\$8.00	

The initial price listed above for port per month corresponds to the NBN Co price for AVC TC-4 25/5 Mbps. The initial price for aggregation per Mbps/month corresponds to the NBN Co pricing for CVC TC-4. The initial price will apply until such time as NBN Co publishes subsequent

pricing for either, or both, of these two NBN Co products. The subsequent pricing will apply to carriers and carriage service providers three calendar months from the date of publication of the subsequent pricing on the NBN Co website, or the date that the published subsequent pricing takes effect, whichever is the later date.

## Schedule 3 - Billing and notification

- 3.1 The Access Seeker's liability to pay Charges for the Service to the Access Provider arises at the time the Service is supplied by the Access Provider to the Access Seeker, unless the parties agree otherwise.
- 3.2 The Access Seeker must pay Charges in accordance with this FAD, including but not limited to this Schedule 3.
- 3.3 The Access Provider must provide the Access Seeker with an invoice each month in respect of Charges payable for the Service unless the parties agree otherwise
- 3.4 The Access Provider is entitled to invoice the Access Seeker for previously uninvoiced Charges or Charges which were understated in a previous invoice, provided that:
  - a) the Charges to be retrospectively invoiced can be reasonably substantiated to the Access Seeker by the Access Provider; and
  - b) subject to clause 3.5, no more than 6 Months have elapsed since the date the relevant amount was incurred by the Access Seeker's customer, except where:
    - i. the Access Seeker gives written consent to a longer period (such consent not to be unreasonably withheld); or
    - ii. to the extent that the Charges relate to services supplied by an overseas carrier and the Access Provider has no control over the settlement arrangements as between it and the overseas carrier, in which case the Access Provider shall invoice such amounts as soon as is reasonably practicable.
- 3.5 The parties must comply with the provisions of any applicable industry standard made by the ACMA pursuant to Part 6 of the *Telecommunications Act 1997 (Cth)* (Standard) and the provisions of any applicable industry code registered pursuant to Part 6 of the *Telecommunications Act 1997 (Cth)* (Code) in relation to billing. Where the effect of a Standard or Code is that an Access Seeker is not permitted to invoice its customers for charges that are older than a specified number of days, weeks or months (the Backbilling Period), the Access Provider must not invoice the Access Seeker for a Charge which was incurred by the Access Seeker's customers that, as at the date the invoice is issued, is older than the Backbilling Period.
- 3.6 Subject to clause 3.12
  - a) An invoice is payable in full 30 Calendar Days after the date the invoice was issued or such other date as agreed between the parties.
  - b) The Access Seeker may not deduct, withhold, or set-off any amounts for accounts in credit, for counter-claims or for any other reason or attach any condition to the payment, unless otherwise agreed by the Access Provider.
  - c) All amounts owing and unpaid after the due date shall accrue interest daily from the due date up to and including the date it is paid at the rate per annum of the 90 day



authorized dealers bank bill rate published in the *Australian Financial Review* on the first Business Day following the due date for payment, plus 2.5 per cent.

- 3.7 In addition to charging interest in accordance with clause 3.6 or exercising any other rights the Access Provider has at law or under this FAD, where an amount is outstanding and remains unpaid for more than 20 Business Days after it is due for payment, and is not an amount subject to any Billing Dispute notified in accordance with this FAD, the Access Provider may take action, without further notice to the Access Seeker, to recover any such amount as a debt due to the Access Provider.
- 3.8 Unless the parties otherwise agree, there is no setting-off (i.e. netting) of invoices except where a party goes into liquidation, in which case the other party may set-off. However, in order to minimise administration and financial costs, the parties must consider in good faith set-off procedures for inter-party invoices which may require the alignment of the parties' respective invoice dates and other procedures to allow set-off to occur efficiently.
- 3.9 The Access Provider must, at the time of issuing an invoice, provide to the Access Seeker all information reasonably required by the Access Seeker to identify and understand the nature and amount of each Charge on the invoice, and the service the Charge relates to. Nothing in this clause 3.9 is intended to limit subsections 152AR(6) and 152AR(7) of the CCA.
- 3.10 If the Access Seeker believes a Billing Dispute exists, it may invoke the Billing Dispute Procedures by providing written notice to the Access Provider (Billing Dispute Notice). A Billing Dispute must be initiated only in good faith.
- 3.11 Except where a party seeks urgent injunctive relief, the Billing Dispute Procedures must be invoked before either party may begin legal proceedings in relation to any Billing Dispute.
- 3.12 If a Billing Dispute Notice is given to the Access Provider by the due date for payment of the invoice containing the Charge which is being disputed, the Access Seeker may withhold payment of the disputed Charge until such time as the Billing Dispute has been resolved or otherwise terminated. Otherwise, the Access Seeker must pay the invoice in full in accordance with this FAD (but subject to the outcome of the Billing Dispute Procedures).
- 3.13 Except where payment is withheld in accordance with clause 3.12, the Access Provider is not obliged to accept a Billing Dispute Notice in relation to an invoice unless the invoice has been paid in full.
- 3.14 A Billing Dispute Notice must be given to the Access Provider in relation to a Charge, at the earlier of:
- a) as soon as reasonably practicable after the Access Seeker becomes aware a Billing Dispute exists, or
  - b) within six Months of the invoice for the Charge being issued in accordance with clause 3.6.
- 3.15
- a) The Access Provider must acknowledge receipt of a Billing Dispute Notice within two

Business Days by providing the Access Seeker with a reference number.

- b) Within five Business Days of acknowledging a Billing Dispute Notice under clause 3.15(a), the Access Provider must, by written notice to the Access Seeker:
  - i. accept the Billing Dispute Notice; or
  - ii. reject the Billing Dispute Notice if the Access Provider reasonably considers that:
    - A. the subject matter of the Billing Dispute Notice is already being dealt with in another dispute;
    - B. the Billing Dispute Notice was not submitted in good faith; or
    - C. the Billing Dispute Notice is incomplete or contains inaccurate information.
- c) If the Access Provider fails to accept or reject the Billing Dispute Notice within five Business Days of acknowledging the Billing Dispute Notice under clause 3.15(a), the Access Provider is taken to have accepted the Billing Dispute Notice.
- d) For avoidance of doubt, if the Access Provider rejects a Billing Dispute Notice under clause 3.15(b)(ii)C, the Access Seeker is not prevented from providing an amended Billing Dispute Notice to the Access Provider relating to the same dispute provided that the amended Billing Dispute Notice is provided within the timeframe under clause 3.14.

3.16 The Access Seeker must, as early as practicable and in any case within five Business Days, unless the Parties agree on a longer period, after the Access Provider acknowledges a Billing Dispute Notice, provide to the other party any further relevant information or materials (which were not originally provided with the Billing Dispute Notice) on which it intends to rely (provided that this obligation is not intended to be the same as the obligation to make discovery in litigation).

3.17 Without affecting the time within which the Access Provider must make the proposed resolution under clause 3.1, the Access Provider may request additional information from the Access Seeker that it reasonably requires for the purposes of making a proposed resolution pursuant to clause 3.18. This additional information may be requested up to 10 Business Days prior to the date on which the Access Provider must make the proposed resolution under clause 3.18. The Access Seeker must provide the requested information within five Business Days of receiving the request. If the Access Seeker fails to do so within five Business Days, the Access Provider may take the Access Seeker's failure to provide additional information into account when making its proposed resolution.

3.18 The Access Provider must try to resolve any Billing Dispute as soon as practicable and in any event within 30 Business Days of accepting a Billing Dispute Notice under clause 3.15 (or longer period if agreed by the parties), by notifying the Access Seeker in writing of its proposed resolution of a Billing Dispute. That notice must:

- a) explain the Access Provider's proposed resolution (including providing copies where necessary of all information relied upon in coming to that proposed resolution); and

- b) set out any action to be taken by:
  - i. the Access Provider (e.g. withdrawal, adjustment or refund of the disputed Charge); or
  - ii. the Access Seeker (e.g. payment of the disputed Charge)

If the Access Provider reasonably considers that it will take longer than 30 Business Days after accepting a Billing Dispute Notice to provide a proposed resolution, then the Access Provider may request the Access Seeker's consent to an extension of time to provide the proposed resolution under this clause 3.18 (such consent not to be unreasonably withheld).

3.19 If the Access Seeker does not agree with the Access Provider's decision to reject a Billing Dispute Notice under clause 3.15 or the Access Provider's proposed resolution under clause 3.17, it must object within 15 Business Days of being notified of such decisions (or such longer time as agreed between the parties). Any objection lodged by the Access Seeker with the Access Provider must be in writing and state:

- a) what part(s) of the proposed resolution it objects to;
- b) the reasons for objection;
- c) what amount it will continue to withhold payment of (if applicable); and
- d) any additional information to support its objection.

If the Access Seeker lodges an objection to the proposed resolution under this clause, the Access Provider must, within 5 Business Days of receiving the objection, review the objection and

- e) provide a revised proposed resolution (Revised Proposed Resolution in this Schedule 3); or
- f) confirm its proposed resolution

3.20 Any:

- a) withdrawal, adjustment or refund of the disputed Charge by the Access Provider; or
- b) payment of the disputed Charge by the Access Seeker (as the case may be),

must occur as soon as practicable and in any event within one Month of the Access Provider's notice of its proposed resolution under clause 3.18 or its Revised Proposed Resolution under clause 3.19 (as applicable), unless the Access Seeker escalates the Billing Dispute under clause 3.23. If the Access Provider is required to make a withdrawal, adjustment or refund of a disputed Charge under this clause but its next invoice (first invoice) is due to be issued within 48 hours of its proposed resolution under clause 3.18 or its Revised Proposed Resolution under clause 3.19 (as applicable), then the Access Provider may include that withdrawal, adjustment or refund in the invoice following the first invoice notwithstanding that this may occur more than one Month after

the Access Provider's notice of its proposed resolution or Revised Proposed Resolution.

- 3.21 Where the Access Provider is to refund a disputed Charge, the Access Provider must pay interest (at the rate set out in clause 3.6) on any refund. Interest accrues daily from the date on which each relevant amount to be refunded was paid to the Access Provider, until the date the refund is paid.
- 3.22 Where the Access Seeker is to pay a disputed Charge, the Access Seeker must pay interest (at the rate set out in clause 3.6) on the amount to be paid. Interest accrues daily from the date on which each relevant amount was originally due to be paid to the Access Provider, until the date the amount is paid.
- 3.23 If
- a) the Access Provider has not proposed a resolution according to clause 3.18 or within the timeframe specified in clause 3.18, or
  - b) the Access Seeker, having first submitted an objection under clause 3.19 is not satisfied with the Access Provider's Revised Proposed Resolution, or the Access Provider's confirmed proposed resolution, within the timeframes specified in clause 3.19,
- the Access Seeker may escalate the matter under clause 3.24. If the Access Seeker does not do so within 15 Business Days after the time period stated in clause 3.18 or after being notified of the Access Provider's Revised Proposed Resolution under clause 3.19(e) or confirmed proposed resolution under clause 3.19(f) (or a longer period if agreed by the parties), the Access Seeker is deemed to have accepted the Access Provider's proposed resolution made under clause 3.18 or Revised Proposed Resolution under clause 3.19(e) or confirmed proposed solution under clause 3.19(f) and clauses 3.21 and 3.22 apply.
- 3.24 If the Access Seeker wishes to escalate a Billing Dispute, the Access Seeker must give the Access Provider a written notice:
- a) stating why it does not agree with the Access Provider's Revised Proposed Resolution or confirmed proposed resolution; and
  - b) seeking escalation of the Billing Dispute.
- 3.25 A notice under clause 3.24 must be submitted to the nominated billing manager for the Access Provider, who must discuss how best to resolve the Billing Dispute with the Access Seeker's nominated counterpart. If the Parties are unable to resolve the Billing Dispute within five Business Days of notice being given under clause 3.24 (or such longer period as agreed between the parties) the Billing Dispute must be escalated to the Access Provider's nominated commercial manager and the Access Seeker's nominated counterpart who must meet in an effort to resolve the Billing Dispute.
- 3.26 If the Billing Dispute cannot be resolved within five Business Days of it being escalated to the Access Provider's nominated commercial manager and the Access Seeker's nominated counterpart under clause 3.25 (or such longer period as agreed between the parties):
- a) either party may provide a written proposal to the other party for the appointment of a mediator to assist in resolving the dispute. Mediation must be conducted in

accordance with the mediation guidelines of the Australian Commercial Disputes Centre (ACDC) and concluded within three Months of the proposal (unless the parties agree to extend this timeframe); or

- b) if the parties either do not agree to proceed to mediation within five Business Days of being able to propose the appointment of a mediator under clause 3.26(a) or are unable to resolve the entire Billing Dispute by mediation, either party may commence legal proceedings to resolve the matter.

3.27 The parties must ensure that any person appointed or required to resolve a Billing Dispute takes into account the principle that the Access Seeker is entitled to be recompensed in circumstances where the Access Seeker is prevented (due to regulatory restrictions on retrospective invoicing) from recovering from its end-user an amount which is the subject of a Billing Dispute (a Backbilling Loss), provided that:

- a) such principle applies only to the extent to which the Billing Dispute is resolved against the Access Provider; and
- b) such principle applies only to the extent to which it is determined that the Backbilling Loss was due to the Access Provider unnecessarily delaying resolution of the Billing Dispute.
- c) Each party must continue to fulfil its obligations under this FAD while a Billing Dispute and the Billing Dispute Procedures are pending.

3.28 Each party must continue to fulfil its obligations under this FAD while a Billing Dispute and the Billing Dispute Procedures are pending.

3.29 All discussions and information relating to a Billing Dispute must be communicated or exchanged between the parties through the representatives of the parties set out in clause 3.25 (or their respective nominees).

3.30 There is a presumption that all communications between the Parties during the course of a Billing Dispute are made on a without prejudice and confidential basis.

3.31 If it is determined by the Billing Dispute Procedures, any other dispute resolution procedure, or by agreement between the parties, that three or more out of any five consecutive invoices for a given Service are incorrect by 5 per cent or more, then, for the purposes of clause 3.21, the interest payable by the Access Provider in respect of the overpaid amount of the invoices in question is the rate set out in clause 3.6, plus 2 per cent. The remedy set out in this clause 3.31 is without prejudice to any other right or remedy available to the Access Seeker.

## Schedule 4 - Creditworthiness and Security

4.1 Unless otherwise agreed by the Access Provider, the Access Seeker must (at the Access Seeker's sole cost and expense) provide to the Access Provider and maintain, on terms and conditions reasonably required by the Access Provider and subject to clause 4.2, the Security (as is determined having regard to clause 4.3 and as may be varied pursuant to clause 4.4) in respect of amounts owing by the Access Seeker to the Access Provider under this FAD.

4.2

- a) The Access Seeker acknowledges that unless otherwise agreed by the Access Provider, it must maintain (and the Access Provider need not release or refund) the Security specified in clause 4.1 for a period of six Months following (but not including) the date on which the last of the following occurs:
  - i. cessation of supply of the Service under this FAD, and
  - ii. payment of all outstanding amounts under this FAD.
- b) Notwithstanding clause 4.2(a), the Access Provider has no obligation to release the Security if, at the date the Access Provider would otherwise be required to release the Security under clause 4.2(a), the Access Provider reasonably believes any person, including a provisional liquidator, administrator, trustee in bankruptcy, receiver, receiver and manager, other controller or similar official, has a legitimate right to recoup or claim repayment of any part of the amount paid or satisfied, whether under the laws or preferences, fraudulent dispositions or otherwise.

4.3 The Security (including any varied Security) may only be requested where an Access Provider has reasonable grounds to doubt the Access Seeker's ability to pay for services, and must be of an amount and in a form determined reasonably by the Access Provider taking into account all the relevant circumstances. As a statement of general principle the amount of any Security is calculated by reference to:

- a) the aggregate value of all Services likely to be provided to the Access Seeker under this FAD over a reasonable period; or
- b) the value of amounts invoiced in respect of the Service but unpaid (excluding any amounts in respect of which there is a current Billing Dispute notified in accordance with this FAD).

For the avoidance of doubt, any estimates, forecasts or other statements made or provided by the Access Seeker may be used by the Access Provider in determining the amount of a Security

4.4 Examples of appropriate forms of Security, having regard to the factors referred to in clause 4.3, may include without limitation:

- a) fixed and floating charges;
- b) personal guarantees from directors;
- c) Bank Guarantees;
- d) letters of comfort
- e) mortgages;
- f) a right of set-off;
- g) a Security Deposit; or
- h) a combination of the forms of security referred to in paragraphs (a) to (g) above.

If any Security is or includes a Security Deposit, then:

- i) the Access Provider is not obliged to invest the Security Deposit or hold the Security Deposit in an interest bearing account or otherwise; and
- j) the Access Seeker is prohibited from dealing with the Security Deposit or its rights to that Security Deposit (including by way of assignment or granting of security).

If any security is or includes a Bank Guarantee and that Bank Guarantee (Original Bank Guarantee) has an expiry date which is the last day by which a call may be made under a Bank Guarantee, the Access Seeker must procure a replacement Bank Guarantee for the amount guaranteed by the Original Bank Guarantee no later than two Months prior to the expiry date of the Original Bank Guarantee, such replacement Bank Guarantee to have an expiry date of no less than 14 Months from the date of delivery of the replacement Bank Guarantee.

If the Access Seeker fails to procure a replacement Bank Guarantee, then in addition to any other of the Access Provider's rights under this FAD, the Access Provider may, at any time in the Month prior to the expiry date of the Bank Guarantee, make a call under the Bank Guarantee for the full amount guaranteed. The amount paid to the Access Provider pursuant to a call on the Bank Guarantee will become a Security Deposit.

- 4.5 The Access Provider may from time to time where the circumstances reasonably require, request Ongoing Creditworthiness Information from the Access Seeker to determine the ongoing creditworthiness of the Access Seeker. The Access Seeker must supply Ongoing Creditworthiness Information to the Access Provider within 15 Business Days of receipt of a request from the Access Provider for such information. The Access Provider may, as a result of such Ongoing Creditworthiness Information, having regard to the factors referred to in clause 4.3 and subject to clause 4.7, reasonably require the Access Seeker to alter the amount, form or the terms of the Security (which may include a requirement to provide additional security), and the Access Seeker must provide that altered Security within 20 Business Days of being notified by the Access Provider in writing of that requirement.

- 4.6 The Access Seeker may from time to time request the Access Provider to consent (in writing) to a decrease in the required Security and/or alteration of the form of the Security. The Access Provider must, within 15 Business Days of the Access Seeker's request, comply with that request if, and to the extent, it is reasonable to do so (having regard to the factors referred to in clause 4.3). The Access Provider may request, and the Access Seeker must promptly provide, Ongoing Creditworthiness Information, for the purposes of this clause 4.6.
- 4.7 If the Access Seeker provides Ongoing Creditworthiness Information to the Access Provider as required by this Schedule 4, the Access Seeker must warrant that such information is true, fair, accurate and complete as at the date on which it is received by the Access Provider and that there has been no material adverse change in the Access Seeker's financial position between the date the information was prepared and the date it was received by the Access Provider. If there has been a material adverse change in the Access Seeker's financial position between the date the information was prepared and the date it was received by the Access Provider, the Access Seeker must disclose the nature and effect of the change to the Access Provider at the time the information is provided.
- 4.8 For the purposes of this Schedule 4, **Ongoing Creditworthiness Information** means:
- a) a copy of the Access Seeker's most recent published audited balance sheet and published audited profit and loss statement (together with any notes attached to or intended to be read with such balance sheet or profit and loss statement);
  - b) a credit report in respect of the Access Seeker or, where reasonably necessary in the circumstances, any of its owners or directors (Principals) from any credit reporting agency, credit provider or other third party. The Access Seeker must co-operate and provide any information necessary for that credit reporting agency, credit provider or other independent party to enable it to form an accurate opinion of the Access Seeker's creditworthiness. To that end, the Access Seeker agrees to procure written consents (as required under the *Privacy Act 1988* (Cth)) from such of its Principals as is reasonably necessary in the circumstances to enable the Access Provider to:
    - i. obtain from a credit reporting agency, credit provider or other independent party, information contained in a credit report;
    - ii. disclose to a credit reporting agency, credit provider or other independent party, personal information about each Principal; and
    - iii. obtain and use a consumer credit report;
  - c) a letter, signed by the company secretary or duly authorised officer of the Access Seeker, stating that the Access Seeker is not insolvent and not under any external administration (as defined in the *Corporations Act 2001* (Cth)) or under any similar form of administration under any laws applicable to it in any jurisdiction; and
  - d) the Access Seeker's credit rating, if any has been assigned to it; and



- e) any other information reasonably required to determine the ongoing creditworthiness of the Access Seeker, as agreed between the parties before the request under clause 4.5 is made.
- 4.9 The Access Seeker may require a confidentiality undertaking to be given by any person having access to confidential information contained in its Ongoing Creditworthiness Information prior to such information being provided to that person.
- 4.10 Subject to this Schedule 4, the parties agree that a failure by the Access Seeker to provide the warranties set out in clause 4.7 or to provide Ongoing Creditworthiness Information constitutes:
- a) an event entitling the Access Provider to alter the amount, form or terms of the Security (including an entitlement to additional Security) of the Access Seeker and the Access Seeker must provide that altered Security within 15 Business Days after the end of the period set out clause 4.5; or
  - b) breach of a material term or condition of this FAD.

Any disputes arising out of or in connection with Schedule 4 must be dealt with in accordance with the procedures in Schedule 5. Notwithstanding that a dispute arising out of or in connection with Schedule 4 has been referred to the procedures in Schedule 5 and has not yet been determined, nothing in this clause 4.10 or Schedule 5 prevents the Access Provider from exercising any of its rights to suspend the supply of a Service under Schedule 7.

## Schedule 5 - General dispute resolution procedures

- 5.1 If a dispute arises between the parties in connection with or arising from the terms and conditions set out in this FAD for the supply of the Service, the dispute must be managed as follows:
- a) in the case of a Billing Dispute, the dispute must be managed in accordance with the Billing Dispute Procedures; or
  - b) subject to clause 5.2, in the case of a Non-Billing Dispute, the dispute must be managed in accordance with the procedures set out in this Schedule 5.
- 5.2 To the extent that a Non-Billing Dispute is raised or arises in connection with, or otherwise relates to, a Billing Dispute, then unless otherwise determined, that Non-Billing Dispute must be resolved in accordance with the Billing Dispute Procedures. The Access Provider may seek a determination from an independent third party on whether a dispute initiated by the Access Seeker as a Billing Dispute is a Non-Billing Dispute. If the independent third party deems the dispute to be a Non-Billing Dispute, the Access Provider may provide written notice to the Access Seeker to pay any withheld amount to the Access Provider on the due date for the disputed invoice or if the due date has passed, immediately on notification being given by the Access Provider.
- For the purposes of this clause 5.2:
- a) the independent third party must be a person who:
    - i. has an understanding of the relevant aspects of the telecommunications industry (or have the capacity to quickly come to such an understanding);
    - ii. have an appreciation of the competition law implications of his/her decisions; and
    - iii. not be an officer, director or employee of a telecommunications company or otherwise have a potential for a conflict of interest;
  - b) the independent third party may include an arbiter from the ACDC.
- 5.3 If a Non-Billing Dispute arises, either party may, by written notice to the other, refer the Non-Billing Dispute for resolution under this Schedule 5. A Non-Billing Dispute must be initiated only in good faith.
- 5.4 Any Non-Billing Dispute notified under clause 5.3 must be referred:
- a) initially to the nominated manager (or managers) for each party, who must endeavour to resolve the dispute within 10 Business Days of the giving of the notice referred to in clause 5.3 or such other time agreed by the parties; and
  - b) if the persons referred to in paragraph (a) above do not resolve the Non-Billing Dispute within the time specified under paragraph (a), then the parties may agree in writing within

a further five Business Days to refer the Non-Billing Dispute to an Expert Committee under clause 5.11, or by written agreement submit it to mediation in accordance with clause 5.10.

5.5 If:

- a) under clause 5.4 the Non-Billing Dispute is not resolved and a written agreement is not made to refer the Non-Billing Dispute to an Expert Committee or submit it to mediation; or,
- b) under clause 5.10(f), the mediation is terminated; and
- c) after a period of five Business Days after the mediation is terminated as referred to in paragraph (b), the parties do not resolve the Non-Billing Dispute or agree in writing on an alternative procedure to resolve the Non-Billing Dispute (whether by further mediation, written notice to the Expert Committee, arbitration or otherwise)

either party may terminate the operation of this dispute resolution procedure in relation to the Non-Billing Dispute by giving written notice of termination to the other party.

5.6 A party may not commence legal proceedings in any court (except proceedings seeking urgent interlocutory relief) in respect of a Non-Billing Dispute unless:

- a) the Non-Billing Dispute has first been referred for resolution in accordance with the dispute resolution procedure set out in this Schedule 5 or clause 5.2 (if applicable) and a notice terminating the operation of the dispute resolution procedure has been issued under clause 5.5; or
- b) the other party has failed to substantially comply with the dispute resolution procedure set out in this Schedule 5 or clause 5.2 (if applicable).

5.7 Each party must continue to fulfil its obligations under this FAD while a Non-Billing Dispute and any dispute resolution procedure under this Schedule 5 are pending.

5.8 All communications between the parties during the course of a Non-Billing Dispute and in connection with that Non-Billing Dispute, are made on a without prejudice and confidential basis.

5.9 Each party must, as early as practicable, and in any case within 14 Calendar Days unless a longer period is agreed between the parties, after the notification of a Non-Billing Dispute pursuant to clause 5.3, provide to the other party any relevant materials on which it intends to rely (provided that this obligation is not intended to be the same as the obligation to make discovery in litigation).

5.10 Where a Non-Billing Dispute is referred to mediation by way of written agreement between the parties, pursuant to clause 5.4(b):

- a) any agreement must include:

- i. a statement of the disputed matters in the Non-Billing Dispute; and
  - ii. the procedure to be followed during the mediation, and the mediation must take place within 15 Business Days upon the receipt by the mediator of such agreement;
- b) it must be conducted in accordance with the mediation guidelines of the ACDC in force from time to time (**ACDC Guidelines**) and the provisions of this clause 5.10. In the event of any inconsistency between them, the provisions of this clause 5.10 prevail;
- c) it must be conducted in private;
- d) in addition to the qualifications of the mediator contemplated by the ACDC Guidelines, the mediator must:
- i. have an understanding of the relevant aspects of the telecommunications industry (or have the capacity to quickly come to such an understanding);
  - ii. have an appreciation of the competition law implications of his/her decisions; and
  - iii. not be an officer, director or employee of a telecommunications company or otherwise have a potential for a conflict of interest;
- e) the parties must notify each other no later than 48 hours prior to mediation of the names of their representatives who will attend the mediation. Nothing in this subclause is intended to suggest that the parties are able to refuse the other's chosen representatives or to limit other representatives from the parties attending during the mediation;
- f) it must terminate in accordance with the ACDC Guidelines;
- g) the parties must bear their own costs of the mediation including the costs of any representatives and must each bear half the costs of the mediator; and
- h) any agreement resulting from mediation binds the parties on its terms.

5.11 The parties may by written agreement in accordance with clause 5.4(b), submit a Non-Billing Dispute for resolution by an Expert Committee (**Initiating Notice**), in which case the provisions of this clause 5.11 apply as follows:

- a) The terms of reference of the Expert Committee are as agreed by the parties. If the terms of reference are not agreed within five Business Days after the date of submitting the Initiating Notice (or such longer period as agreed between the parties), the referral to the Expert Committee is deemed to be terminated.
- b) An Expert Committee acts as an expert and not as an arbitrator.
- c) The parties are each represented on the Expert Committee by one appointee.
- d) The Expert Committee must include an independent chairperson agreed by the parties or,

if not agreed, a nominee of the ACDC. The chairperson must have the qualifications listed in paragraphs 5.10(d)(i), (ii) and (iii).

- e) Each party must be given an equal opportunity to present its submissions and make representations to the Expert Committee.
- f) The Expert Committee may determine the dispute (including any procedural matters arising during the course of the dispute) by unanimous or majority decision.
- g) Unless the parties agree otherwise the parties must ensure that the Expert Committee uses all reasonable endeavours to reach a decision within 20 Business Days after the date on which the terms of reference are agreed or the final member of the Expert Committee is appointed (whichever is the later) and undertake to co-operate reasonably with the Expert Committee to achieve that timetable.
- h) If the dispute is not resolved within the timeframe referred to in clause 5.11(g), either party may by written notice to the other party terminate the appointment of the Expert Committee.
- i) The Expert Committee has the right to conduct any enquiry as it thinks fit, including the right to require and retain relevant evidence during the course of the appointment of the Expert Committee or the resolution of the dispute.
- j) The Expert Committee must give written reasons for its decision.
- k) A decision of the Expert Committee is final and binding on the parties except in the case of manifest error or a mistake of law.
- l) Each party must bear its own costs of the enquiry by the Expert Committee including the costs of its representatives, any legal counsel and its nominee on the Expert Committee and the parties must each bear half the costs of the independent member of the Expert Committee.

5.12 Schedule 5 does not apply to a Non-Billing Dispute to the extent that:

- a) there is a dispute resolution process established in connection with, or pursuant to, a legal or regulatory obligation (including any dispute resolution process set out in a Structural Separation Undertaking)
- b) a party has initiated a dispute under the dispute resolution process referred to in clause 5.12(a), and
- c) the issue the subject of that dispute is the same issue in dispute in the Non-Billing Dispute.

## Schedule 6 – Confidentiality

- 6.1 Subject to clause 6.4 and any applicable statutory duty, each party must keep confidential all Confidential Information of the other party and must not:
- a) use or copy such Confidential Information except as set out in this FAD; or
  - b) disclose or communicate, cause to be disclosed or communicated or otherwise make available such Confidential Information to any third person.
- 6.2 For the avoidance of doubt, information generated within the Access Provider’s Network as a result of or in connection with the supply of the relevant Service to the Access Seeker or the interconnection of the Access Provider’s Network with the Access Seeker’s Network (other than information that falls within paragraph (d) of the definition of Confidential Information) is the Confidential Information of the Access Seeker.
- 6.3 The Access Provider must upon request from the Access Seeker, disclose to the Access Seeker quarterly aggregate traffic flow information generated within the Access Provider’s Network in respect of a particular Service provided to the Access Seeker, if the Access Provider measures and provides this information to itself. The Access Seeker must pay the reasonable costs of the Access Provider providing that information.
- 6.4 Subject to clauses 6.5 and 6.10, Confidential Information of the Access Seeker may be:
- a) used by the Access Provider:
    - i. for the purposes of undertaking planning, maintenance, provisioning, operations or reconfiguration of its Network;
    - ii. for the purposes of supplying Services to the Access Seeker;
    - iii. for the purpose of billing; or
    - iv. for another purpose agreed to by the Access Seeker; and
  - b) disclosed only to personnel who, in the Access Provider’s reasonable opinion require the information to carry out or otherwise give effect to the purposes referred to in paragraph (a) above.
- 6.5 A party (**Disclosing Party**) may to the extent necessary use and/or disclose (as the case may be) the Confidential Information of the other party:
- a) to those of the Disclosing Party’s directors, officers, employees, agents, contractors (including sub-contractors) and representatives to whom the Confidential Information is reasonably required to be disclosed in connection with the provision of the Service to which this FAD relates;
  - b) to any professional person for the purpose of obtaining advice in relation to matters arising out of or in connection with the supply of a Service under this FAD;

- c) to an auditor acting for the Disclosing Party to the extent necessary to permit that auditor to perform its audit functions;
- d) in connection with legal proceedings, arbitration, expert determination and other dispute resolution mechanisms set out in this FAD, provided that the Disclosing Party has first given as much notice (in writing) as is reasonably practicable to the other party so that the other party has an opportunity to protect the confidentiality of its Confidential Information;
- e) as required by law provided that the Disclosing Party has first given as much notice (in writing) as is reasonably practicable to the other party, that it is required to disclose the Confidential Information so that the other party has an opportunity to protect the confidentiality of its Confidential Information, except that no notice is required in respect of disclosures made by the Access Provider to the ACCC under section 152BEA of the CCA;
- f) with the written consent of the other party provided that, prior to disclosing the Confidential Information of the other party:
  - i. the Disclosing Party informs the relevant person or persons to whom disclosure is to be made that the information is the Confidential Information of the other party;
  - ii. if required by the other party as a condition of giving its consent, the Disclosing Party must provide the other party with a confidentiality undertaking in the form set out in Annexure 1 of this Schedule 6 signed by the person or persons to whom disclosure is to be made; and
  - iii. if required by the other party as a condition of giving its consent, the Disclosing Party must comply with clause 6.6;
- g) in accordance with a lawful and binding directive issued by a regulatory authority;
- h) if reasonably required to protect the safety of personnel or property or in connection with an emergency;
- i) as required by the listing rules of any stock exchange where that party's securities are listed or quoted;
- j) in accordance with a reporting obligation, or in response to a request from a regulatory authority or any other Government body, in connection with the Access Provider's Structural Separation Undertaking where the party cannot comply with the reporting obligation or request without using or disclosing the Confidential Information, provided that:
  - i. prior to disclosing the Confidential Information of the other party the Disclosing Party informs the relevant person or persons to whom disclosure is to be made that the information is the Confidential Information of the other party; and

- ii. unless prohibited by law, the Disclosing Party informs the other Party in writing as soon as reasonably practicable after receiving the request that the Disclosing Party will disclose Confidential Information to the regulatory authority or any other Government body to fulfil that reporting obligation or respond to that request.
  - k) in response to a request from a regulatory authority or any other Government body in connection with interception capability (as that term is used in Chapter 5 of the *Telecommunications (Interception and Access) Act 1979* (Cth)) relating to access to a declared service, where the party cannot comply with the request without using or disclosing the Confidential Information, provided that:
    - i. prior to disclosing the Confidential Information of the other party the Disclosing Party informs the relevant person or persons to whom disclosure is to be made that the information is the confidential information of the other party; and
    - ii. unless prohibited by law, the Disclosing Party informs the other Party as soon as reasonably practicable after receiving the request that the Disclosing Party will disclose Confidential Information to the regulatory authority or any other Government body to respond to that request.
- 6.6 Each party must co-operate in any action taken by the other party to:
- a) protect the confidentiality of the other party's Confidential Information; or
  - b) enforce its rights in relation to its Confidential Information.
- 6.7 Each party must establish and maintain security measures to safeguard the other party's Confidential Information from unauthorised access, use, copying, reproduction or disclosure.
- 6.8 Confidential Information provided by one party to the other party is provided for the benefit of that other party only. Each party acknowledges that no warranty is given by the Disclosing Party that the Confidential Information is or will be correct.
- 6.9 Each party acknowledges that a breach of this Schedule 6 by one party may cause another party irreparable damage for which monetary damages would not be an adequate remedy. Accordingly, in addition to other remedies that may be available, a party may seek injunctive relief against such a breach or threatened breach of this Schedule 6.
- 6.10 If:
- a) the Access Provider has the right to suspend or cease the supply of the Service under:
    - i. Schedule 7 due to a payment breach, or
    - ii. under clause 7.8
  - b) after suspension or cessation of supply of the Service under this FAD, the Access Seeker



fails to pay amounts due or owing to the Access Provider by the due date for payment,

then the Access Provider may do one or both of the following:

- c) notify and exchange information about the Access Seeker (including the Access Seeker's Confidential Information) with any credit reporting agency or the Access Provider's collection agent; and
- d) without limiting clause 6.10, disclose to a credit reporting agency:
  - i. the defaults made by the Access Seeker to the Access Provider; and
  - ii. the exercise by the Access Provider of any right to suspend or cease supply of the Service under this FAD.

## Annexure 1 of Schedule 6

### Confidentiality undertaking form

*[Amend where necessary]*

#### CONFIDENTIALITY UNDERTAKING

I, \_\_\_\_\_ of [employer's company name] ([undertaking company]) undertake to [full name of party who owns or is providing the confidential information as the case requires] ([Provider]) that:

- 1 Subject to the terms of this Undertaking, I will keep confidential at all times the information listed in Attachment 1 to this Undertaking (Confidential Information) that is in my possession, custody, power or control.
- 2 I acknowledge that:
  - (a) this Undertaking is given by me to [Provider] in consideration for [Provider] making the Confidential Information available to me for the Approved Purposes (as defined below);
  - (b) all intellectual property in or to any part of the Confidential Information is and will remain the property of [Provider]; and
  - (c) by reason of this Undertaking, no licence or right is granted to me, or any other employee, agent or representative of [undertaking company] in relation to the Confidential Information except as expressly provided in this Undertaking.
- 3 I will:
  - (a) only use the Confidential Information for:
    - (i) the purposes listed in Attachment 2 to this Undertaking; or
    - (ii) any other purpose approved by [Provider] in writing;(the Approved Purposes);
  - (b) comply with any reasonable request or direction from [provider] regarding the Confidential Information.
- 4 Subject to clause 5, I will not disclose any of the Confidential Information to any other person without the prior written consent of [Provider].
- 5 I acknowledge that I may disclose the Confidential Information to which I have access to:
  - (a) any employee, external legal advisors, independent experts, internal legal or regulatory staff of [undertaking company], for the Approved Purposes provided that:
    - (i) the person to whom disclosure is proposed to be made (**the person**) is notified in writing to [Provider] and [Provider] has approved the person as a person who may receive the Confidential Information, which approval shall not be

unreasonably withheld;

(ii) the person has signed a confidentiality undertaking in the form of this Undertaking or in a form otherwise acceptable to [Provider]; and

(iii) a signed undertaking of the person has already been served on [Provider];

(b) other persons, if required to do so by law, but then only:

(i) if I notify [Provider] of that request within 7 days of receiving the request;

(ii) to the person(s) to whom I am obliged to provide the Confidential Information;

(iii) to the extent necessary as required by law; and

(iv) if I notify the recipient of the Confidential Information that the information is confidential and is the subject of this Undertaking to the [Provider]; and

(c) any secretarial, administrative and support staff, who perform purely administrative tasks, and who assist me or any person referred to in paragraph 5(a) for the Approved Purpose.

6 I will establish and maintain security measures to safeguard the Confidential Information from unauthorised access, use, copying, reproduction or disclosure and will protect the Confidential Information using the same degree of care as a prudent person in my position would use to protect their own confidential information.

7 Except as required by law and subject to paragraph 10 below, within 14 days after whichever of the following first occurs:

(a) termination of this Undertaking;

(b) my ceasing to be employed or retained by [undertaking company] (provided that I continue to have access to the Confidential Information at that time); or

(c) my ceasing to be working for [undertaking company] in respect of the Approved Purposes (other than as a result of ceasing to be employed by [undertaking company]);

I will destroy or deliver to [Provider] the Confidential Information and any documents or things (or parts of documents or things), constituting, recording or containing any of the Confidential Information in my possession, custody, power or control other than electronic records stored in IT backup system that cannot be destroyed or deleted.

8 Nothing in this Undertaking shall impose an obligation upon me in respect of information:

(a) that is in the public domain; or

(b) that has been obtained by me otherwise than from [Provider] in relation to this Undertaking;

provided that the information has not been obtained by me by reason of, or in

circumstances involving, any breach of this Undertaking, any other confidentiality undertaking in favour of [Provider] for the Approved purpose, or by any other unlawful means.

- 9 I acknowledge that damages may not be a sufficient remedy for any breach of this Undertaking and that [Provider] may be entitled to specific performance or injunctive relief (as appropriate) as a remedy for any breach or threatened breach of this Undertaking, in addition to any other remedies available to [Provider] at law or in equity.
- 10 The obligations of confidentiality imposed by this Undertaking survive the destruction or delivery to [Provider] of the Confidential Information pursuant to paragraph 7 above.
- 11 I acknowledge that this Undertaking is governed by the law in force in the State of [insert relevant state] and I agree to submit to the non-exclusive jurisdiction of the court of that place.

Signed: \_\_\_\_\_

Print name: \_\_\_\_\_

Dated: \_\_\_\_\_

Witness signature: \_\_\_\_\_

Witness name: \_\_\_\_\_

## **ATTACHMENT 1**

Any document, or information in any document provided by [provider] to [undertaking company] which [provider] claims is confidential information for the purposes of this Undertaking.

**ATTACHMENT 2**

**[Approved purpose(s)]**

## Schedule 7 – Suspension and Termination

7.1 The Access Provider may immediately suspend the supply of a Service or access to the Access Provider's Network, provided it notifies the Access Seeker where practicable and provides the Access Seeker with as much notice as is reasonably practicable:

- a) during an Emergency; or
- b) where in the reasonable opinion of the Access Provider, the supply of that Service or access to the Access Provider's Network may pose a threat to safety of persons, hazard to equipment, threat to Network operation, access, integrity or Network security or is likely to impede the activities of authorised persons responding to an Emergency;
- c) where, in the reasonable opinion of the Access Provider, the Access Seeker's Network or equipment adversely affects or threatens to affect the normal operation of the Access Provider's Network or access to the Access Provider's Network or equipment (including for the avoidance of doubt, where the Access Seeker has delivered Prohibited Traffic onto the Access Provider's Network);
- d) where an event set out in clauses 7.8(a) to (i) occurs
- e) and is entitled to continue such suspension until (as the case requires) the relevant event or circumstance giving rise to the suspension has been remedied.

7.2 If:

- a) the Access Seeker has failed to pay monies payable under this FAD;
- b) a Court determines that (and the decision is not subject to an appeal) the Access Seeker's use of:
  - a. its Facilities in connection with any Service supplied to it by the Access Provider;
  - b. the Access Provider's Facilities or Network; or
  - c. any Service supplied to it by the Access Providers,is in contravention of any law; or
- c) the Access Seeker breaches a material obligation under this FAD (**Suspension Event**) and:
- d) as soon as reasonably practicable after becoming aware of the Suspension Event, the Access Provider gives a written notice to the Access Seeker:
  - i. citing this clause;
  - ii. specifying the Suspension Event that has occurred;

- iii. requiring the Access Seeker to institute remedial action (if any) in respect of that event; and
  - iv. specifying the action which may follow due to a failure to comply with the notice, (**Suspension Notice**) and:
- e) the Access Seeker fails to institute remedial action as specified in the Suspension Notice within 10 Business Days after receiving the Suspension Notice (in this clause 7.2, the **Remedy Period**), the Access Provider may, by written notice given to the Access Seeker as soon as reasonably practicable after the expiry of the Remedy Period:
- f) refuse to provide the Access Seeker with the Service:
- i. of the kind in respect of which the Suspension Event has occurred; and
  - ii. a request for which is made by the Access Seeker after the date of the breach, until the remedial action specified in the Suspension Notice is completed or the Suspension Event otherwise ceases to exist; and
- g) suspend the provision of the Service until the remedial action specified in the Suspension Notice is completed.

7.3 For the avoidance of doubt, subclause 7.2(a) does not apply to any monies payable that are the subject of a Billing Dispute that has been notified by the Access Seeker to the Access Provider in accordance with the Billing Dispute Procedures set out in this FAD.

7.4 In the case of a suspension pursuant to clause 7.2, the Access Provider must reconnect the Access Seeker to the Access Provider's Network and recommence the supply of the Service as soon as practicable after there no longer exists a reason for suspension and the Access Provider must do so subject to payment by the Access Seeker of the Access Provider's reasonable costs of suspension and reconnection.

7.5 If:

- a) an Access Seeker ceases to be a carrier or carriage service provider; or
- b) an Access Seeker ceases to carry on business for a period of more than 10 consecutive Business Days or
- c) in the case of an Access Seeker, any of the reasonable grounds specified in subsection 152AR(9) of the CCA apply; or
- d) an Access Seeker breaches a material obligation under this FAD, and:
  - i. that breach materially impairs or is likely to materially impair the ability of the Access Provider to deliver Listed Carriage Services to its customers; and
  - ii. the Access Provider has given a written notice to the first-mentioned party within 20 Business Days of becoming aware of the breach (**Breach Notice**); and



- iii. the Access Seeker fails to institute remedial action as specified in the Breach Notice within 10 Business Days after receiving the Breach Notice (in this clause 7.5, the **Remedy Period**), or
  - e) the supply of the Service(s) to the Access Seeker has been suspended pursuant to the terms and conditions of this FAD for a period of three Months or more, the Access Provider may cease supply of the Service under this FAD by written notice given to the first-mentioned party at any time after becoming aware of the cessation, reasonable grounds or expiry of the Remedy Period specified in the Breach Notice (as the case may be).
- 7.5A If an Access Provider ceases to carry on business for a period of more than 10 consecutive Business Days, the other party may cease acquisition of the Service under this FAD by written notice given to the Access Provider at any time after becoming aware of the cessation.
- 7.6 A party must not give the other party both a Suspension Notice under clause 7.2 and a Breach Notice under clause 7.5 in respect of:
- a) the same breach; or
  - b) different breaches that relate to or arise from the same act, omission or event or related acts, omissions or events;
- except:
- c) where a Suspension Notice has previously been given to the Access Seeker by the Access Provider in accordance with clause 7.2 in respect of a Suspension Event and the Suspension Event has not been rectified by the Access Seeker within the relevant Remedy Period specified in clause 7.2; and
  - d) where an Access Seeker has not rectified a Suspension Event, then notwithstanding clause 7.5(d)(ii), the time period for the purposes of clause 7.5(d)(ii) will be 20 Business Days from the expiry of the time available to remedy the Suspension Event.
- 7.7 For the avoidance of doubt, a party is not required to provide a Suspension Notice under clause 7.2 in respect of a breach before giving a Breach Notice in respect of that breach under clause 7.5.
- 7.8 Notwithstanding any other provision of this FAD, either Party may at any time immediately cease the supply of the Service under this FAD by giving written notice of termination to the other Party if:
- a) an order is made or an effective resolution is passed for winding up or dissolution without winding up (otherwise than for the purposes of solvent reconstruction or amalgamation) of the other Party; or
  - b) a receiver, receiver and manager, official manager, controller, administrator (whether voluntary or otherwise), provisional liquidator, liquidator, or like official is appointed over the undertaking and property of the other Party; or

- c) a holder of an encumbrance takes possession of the undertaking and property of the other party, or the other party enters or proposes to enter into any scheme of arrangement or any composition for the benefit of its creditors; or
- d) the other party is or is likely to be unable to pay its debts as and when they fall due or is deemed to be unable to pay its debts pursuant to section 585 or any other section of the *Corporations Act 2001* (Cth); or
- e) as a result of the operation of section 459F or any other section of the *Corporations Act 2001* (Cth), the other party is taken to have failed to comply with a statutory demand; or
- f) a force majeure event substantially and adversely affecting the ability of a party to perform its obligations to the other party, continues for a period of three Months; or
- g) the other party breaches any of the terms of any of its loans, security or like agreements or any lease or agreement relating to significant equipment used in conjunction with the business of that other party related to the supply of the Service under this FAD; or
- h) the other party seeks or is granted protection from its creditors under any applicable legislation; or
- i) anything analogous or having a substantially similar effect to any of the events specified above occurs in relation to the other party.

7.9 The cessation of the operation of this FAD:

- a) does not operate as a waiver of any breach by a party of any of the provisions of this FAD; and
- b) is without prejudice to any rights, liabilities or obligations of any party which have accrued up to the date of cessation.

7.10 Without prejudice to the parties' rights upon termination of the supply of the Service under this FAD, or expiry or revocation of this FAD, the Access Provider must refund to the Access Seeker a fair and equitable proportion of those sums paid under this FAD by the Access Seeker which are periodic in nature and have been paid for the Service:

- a) for a period extending beyond the date on which the supply of the Service under this FAD terminates, or this FAD ceases to have effect, and/or,
- b) as applicable, in respect of a Service which has been suspended for a period of 10 or more consecutive Business Days under Schedule 7 of this FAD, for the period extending beyond that 10 Business Day suspension period to the extent the Service remains suspended under Schedule 7 of this FAD,

subject to any invoices or other amounts outstanding from the Access Seeker to the Access Provider. In the event of a dispute in relation to the calculation or quantum of a fair and equitable proportion, either party may refer the matter for dispute resolution in accordance

with the dispute resolution procedures set out in Schedule 5 of this FAD.

## Schedule 8 - Liability and Indemnity

8.1 Subject to clause 8.2, each Party's liability in respect of:

- a) the 12 Month period commencing on the date of the first supply of the Service under this FAD is limited to the aggregate amount paid or payable by the Access Seeker to the Access Provider for the Service provided by the Access Provider in that initial 12 Month period;
- b) any subsequent 12 Month period commencing on any anniversary of the date of the first supply of the Service under this FAD is limited to the aggregate amount paid or payable by the Access Seeker to the Access Provider for the Service provided by the Access Provider in the 12 Month period immediately prior to that anniversary.

For the purposes of this clause 8.1, Liability arises when the act or omission giving rise to the Liability occurs, not when any claim is made by a party under this FAD in connection with that Liability.

8.2 The liability limitation in clause 8.1 does not apply to the Access Seeker's liability to pay the Charges for the Service provided under this FAD, or the Parties' indemnification obligations under clauses 8.3 and 8.4.

8.3 Each Party indemnifies the other Party against all Loss arising from the death of, or personal injury to, a Representative of the other Party, where the death or personal injury arises from:

- a) an act or omission that is intended to cause death or personal injury; or
- b) a negligent act or omission;

by the first Party or by a Representative of the first Party.

8.4 Each Party indemnifies the other Party against all Loss arising from any loss of, or damage to, the property of the other party (or the property of a representative of the other Party), where the loss or damage arises from:

- a) an act or omission that is intended to cause death or personal injury; or
- b) a negligent act or omission;

by the first Party or by a Representative of the first Party.

8.5 Each Party indemnifies the other Party against all Loss arising from a claim by a third person against the Innocent Party to the extent that the claim relates to a negligent act or omission by the first Party or by a Representative of the first Party.

8.6 Subject to clauses 8.3 and 8.4, a Party has no Liability to the other Party for or in respect of any consequential, special or indirect Loss or any loss of profits or data.

- 8.7 A Party has no Liability to the other Party for or in relation to any act or omission of, or any matter arising from or consequential upon any act or omission of, any end-user of a Party or any other third person who is not a Representative of a Party.
- 8.8 The Indemnifying Party is not obliged to indemnify the Innocent Party under this Schedule 8 to the extent that the liability the subject of the indemnity claim is caused or contributed to by:
- a) a breach of this FAD;
  - b) an act intended to cause death, personal injury, or loss or damage to property; or
  - c) a negligent act or omission;
- by the Innocent Party.
- 8.9 The Indemnifying Party is not obliged to indemnify the Innocent Party under this Schedule 8 or for in respect of a claim brought against the Innocent Party by an end-user of the Innocent Party, or a third person with whom the Innocent Party has a contractual relationship, to the extent that the Loss under such claim could have been excluded or reduced (regardless of whether such a Liability actually was excluded or reduced) by the Innocent Party in its contract with the end-user or third person.
- 8.10 The Innocent Party must take all reasonable steps to minimise the Loss it has suffered or is likely to suffer as a result of an event giving rise to an indemnity under this Schedule 8. If the Innocent Party does not take reasonable steps to minimise such Loss then the damages payable by the Indemnifying Party must be reduced as is appropriate in each case.
- 8.11 A Party's liability to the other Party for Loss of any kind arising out of the supply of the Service under this FAD or in connection with the relationship established by it is reduced to the extent (if any) that the other Party causes or contributes to the Loss. This reduction applies whether the first Party's liability is in contract, tort (including negligence), under statute or otherwise.
- 8.12 The Indemnifying Party must be given full conduct of the defence of any claim by a third party that is the subject of an indemnity under clause 8.3 or 8.4, including, subject to the Indemnifying Party first obtaining the written consent (which must not be unreasonably withheld) of the Innocent Party to the terms thereof, the settlement of such a claim.
- 8.13 Nothing in this Schedule 8 excludes or limits a Party's entitlement to damages under Part 5 of the Telecommunications (Consumer Protection and Service Standards) Act 1999.

## Schedule 9 - Communication with end users

- 9.1 The Access Provider may communicate and deal with an Access Seeker's end-users as expressly provided in clauses 9.2 to 9.4 and as otherwise permitted by law.
- 9.2 Subject to clause 9.3, the Access Provider may communicate and deal with the Access Seeker's end-users:
- a) in relation to goods and services which the Access Provider currently supplies or previously supplied to the end-user provided that the Access Provider only communicates and deals through its retail division;
  - b) as members of the general public or a part of the general public or members of a particular class of recipients of carriage or other services;
  - c) where the Access Provider performs wholesale operations which require communications or dealings with such end-users, to the extent necessary to carry out such operations;
  - d) in a manner or in circumstances agreed by the Parties; or
  - e) in or in connection with an Emergency, to the extent it reasonably believes necessary to protect the safety of persons or property.
- 9.3 If:
- a) an end-user of the Access Seeker initiates a communication with the Access Provider in relation to goods and/or services supplied to that end-user by the Access Seeker, the Access Provider must advise the end-user that they should discuss any matter concerning the Access Seeker's goods and/or services with the Access Seeker and must not engage in any form of marketing or discussion of the Access Provider's goods and/or services;
  - b) an end-user of the Access Seeker initiates a communication with the Access Provider in relation to goods and/or services supplied to that end-user by the Access Provider, the Access Provider may engage in any form of marketing or discussion of the Access Provider's goods and/or services; and
  - c) an end-user of the Access Seeker initiates a communication with the Access Provider in relation to goods and/or services supplied to that end-user by the Access Provider and the Access Seeker, the Access Provider must advise the end-user that they should discuss any matter concerning the Access Seeker's goods and/or services, with the Access Seeker, but may otherwise engage in any form of marketing or discussion of the Access Provider's goods and/or services.
- 9.4 Where a Party communicates with the end-user of the other Party, that first mentioned Party must, where practicable, make and maintain records of that communication with the other Party's end-user in circumstances where that communication discusses anything concerning the other Party's goods or services with the end-user. For the avoidance of doubt, the obligation in this paragraph does not include a requirement to provide such

records to the other Party (however such a requirement may arise pursuant to any dispute resolution procedure).

9.5 For the purposes of clauses 9.2 to 9.4, a “**communication**” shall include any form of communication, including without limitation telephone discussions and correspondence.

9.6 Neither Party may represent that:

- a) it has any special relationship with or special arrangements with the other Party, including through the use of the other party’s trade marks, service marks, logos or branding unless otherwise agreed;
- b) there are no consequences for an end-user when an end-user signs an authority to transfer their accounts or services;
- c) a Service has any characteristics or functionality other than as specified in a relevant standard form of agreement or the service description for the Service or in any specifications, collateral or brochures published in relation to the Service; or
- d) the other Party participates in the provision of the first mentioned Party’s services, provided that a Party may, upon enquiry by an end-user, inform the end-user of the nature of its relationship with the other Party.

9.7 Where a Party communicates with an end-user of either Party, the first mentioned Party shall ensure that it does not attribute to the other Party:

- a) blame for a Fault or other circumstance; or
- b) the need for maintenance of a Network; or
- c) the suspension of a Service,

provided that this requirement does not require a Party to engage in unethical, misleading or deceptive conduct.

9.8 This Schedule 9 shall be subject to any applicable industry standard made by the ACMA pursuant to Part 6 of the *Telecommunications Act 1997* (Cth) and any applicable industry code registered pursuant to Part 6 of the *Telecommunications Act 1997* (Cth) in relation to communications or dealings with end-users.

## Schedule 10 - Network modernisation and upgrade notice periods

*Notice to be provided where Access Provider undertakes a Major Network Modernisation and Upgrade*

10.1 Except where the parties agree otherwise, the Access Provider may make a Major Network Modernisation and Upgrade by:

- a) providing the Access Seeker with notices in writing in accordance with clauses 10.2 and 10.4 (**General Notification**) and clauses 10.3 and 10.5 (**Individual Notification**); and
- b) consulting with the Access Seeker, and negotiating in good faith, to address any reasonable concerns of the Access Seeker, in relation to the Major Network Modernisation and Upgrade.

This clause 10.1 does not apply to an Emergency Network Modernisation and Upgrade.

10.2 The period of notices given under a General Notification provided by the Access Provider to the Access Seeker:

- a) must be an Equivalent Period of Notice; and
- b) in any event, must not be less than 30 weeks before the Major Network Modernisation and Upgrade is scheduled to take effect.

10.3 An Individual Notification must be provided by the Access Provider to the Access Seeker as soon as practicable after the General Notification, taking account of all the circumstances of the Major Network Modernisation and Upgrade.

*Information to be provided in the notices*

10.4 A General Notification must include a general description of the proposed Major Network Modernisation and Upgrade, including the indicative timing for the implementation of the Major Network Modernisation and Upgrade.

10.5 An Individual Notification must include the following information in addition to the information provided in the relevant General Notification:

- a) the anticipated commencement date for implementing the Major Network Modernisation and Upgrade
- b) the anticipated amount of time it will take to implement the Major Network Modernisation and Upgrade;
- c) details of the Access Seeker's activated Services, or Services in the process of being activated at the date of the notice, that are likely to be affected by the Major Network Modernisation and Upgrade;
- d) the likely action required by the Access Seeker as a result of the Major Network



Modernisation and Upgrade (including the possible impact of the Major Network Modernisation and Upgrade upon the Access Seeker's Service); and

- e) details of who the Access Seeker may contact to obtain further information about the Major Network Modernisation and Upgrade.

10.6 An Individual Notification only needs to be given where a Service has been activated or the Access Provider is in the process of activating a service as at the date of the Individual Notification, and:

- a) the Major Network Modernisation and Upgrade will require the Access Seeker to take particular action in order to continue to use the Service; or
- b) the Major Network Modernisation and Upgrade will result in the Service no longer being supplied or the Service being suspended for a period of no less than 20 Business Days.

10.7 Where the Access Provider has provided the Access Seeker with an Individual Notification, the Access Provider must provide the Access Seeker with:

- a) updates about the Major Network Modernisation and Upgrade covered by the notice, including:
  - i. any update or change to the information provided in the Individual Notification;
  - ii. any new information available at the time of the update about:
    - 1. how the Access Seeker may be impacted by the Major Network Modernisation and Upgrade; and
    - 2. what steps the Access Seeker will be required to take to facilitate the Major Network Modernisation and Upgrade.

10.8 The updates referred to in subclause 10.7(a) must be provided regularly (which is not required to be any more frequently than Monthly) after the Individual Notification.

#### *Emergency Network Modernisation and Upgrade*

10.9 In the event of an Emergency, the Access Provider may conduct an Emergency Network Modernisation and Upgrade, and

- a) must use its best endeavours to provide the Access Seeker with an Individual Notification prior to the Emergency Network Modernisation and Upgrade being implemented; or
- b) where it is not practicable for prior notice to be given, the Access Provider must provide the Access Seeker with an Individual Notification as soon as reasonably practicable after the Emergency Network Modernisation and Upgrade is implemented.

#### *Negotiations in good faith*

10.10 Except where the parties agree otherwise, the Access Provider must not commence implementation of a Major Network Modernisation and Upgrade unless:

- a) it complies with clauses 10.1 to 10.8; and
- b) it has consulted with the Access Seeker and has negotiated in good faith, and addressed the reasonable concerns of the Access Seeker in relation to the Major Network Modernisation and Upgrade.

10.11 Notwithstanding any continuing negotiations between the Access Provider and the Access Seeker pursuant to clauses 10.1 and 10.10, if the Access Provider has complied with this Schedule 10, a Major Network Modernisation and Upgrade may proceed within a reasonable time period, taking account of all the circumstances, after an Individual Notification has been issued, unless both parties agree otherwise.

10.12 In attempting to reach a mutually acceptable resolution in relation to a variation under clauses 10.1 and 10.10, the parties must recognise any need that the Access Provider may have to ensure that the specifications for the Services which the Access Providers supplies to more than one of its customers need to be consistent (including, without limitation having regard to the incorporation by the Access Provider of any relevant international standards).

#### *Dispute Resolution*

10.13 If a dispute arises in relation to a Major Network Modernisation and Upgrade, then the matter may be resolved in accordance with the dispute resolution procedures set out in Schedule 5 of this FAD.

#### *Miscellaneous*

10.14 A requirement for the Access Provider to provide information in written form includes provision of that information in electronic form.

10.15 Any information provided by the Access Provider in electronic form must be in a text-searchable and readable format.

## Schedule 11 - Changes to operating manuals

11.1 Operational documents concerning the Service that have been provided to the Access Seeker by the Access Provider, or should be provided because they affect the supply of the Service including the technical and operational quality of the Service, or affect the rights and/or obligations of an Access Seeker, may be amended:

- (a) by the Access Provider from time to time to implement or reflect a change to its standard processes, subject to:
  - i. giving 20 Business Days prior written notice to the Access Seeker including a documented list of all amendments, and a marked-up copy of the proposed new operational document that clearly identifies all amendments; and
  - ii. allowing the Access Seeker to provide comments during the notice period on the proposed amendments, and where provided, the Access Provider having reasonably considered those comments and implemented any such comments where the Access Provider considers it reasonable to do so; and
- (b) otherwise, by agreement of the parties.

11.1A Operational documents referred to in this clause include ordering and provisioning manuals, fault management procedures and operational manuals.

11.1B For the purposes of 11.1(a)(ii), an Access Provider in considering whether it is reasonable for it to implement any comments may consider whether the changes reflect all Access Seeker and the Access Provider's interests.

11.2 Upon completion of the process set out in clause 11.1, the Access Provider must notify the Access Seeker and make available to the Access Seeker a copy of the new operational document

11.3 Where operational documents concerning the Service are amended in accordance with clause 11.1 and the Access Seeker believes that the amendments:

- a) are unreasonable; or
- b) deprive the Access Seeker of a fundamental part of the bargain it obtained under this FAD;

the Access Seeker may seek to have the matter resolved in accordance with the dispute resolution procedures set out in Schedule 5 of this FAD.

## Schedule 12 - Recourse to regulated terms

12.1 Unless otherwise agreed by the parties, if

- (a) an Access Agreement between an Access Provider and an Access Seeker is in force and the Access Agreement relates to access to the same Service which this FAD relates to;
- (b) the ACCC makes or varies a Regulatory Determination in relation to the Service and the new Regulatory Determination or the variation deals with a matter other than price; and
- (c) a party to the Access Agreement proposes, by written notice, to the other party to vary the Access Agreement to reflect the terms and conditions in the new or varied Regulatory Determination about that matter,

each party must:

- (i) consider the proposed changes in good faith; and
- (ii) negotiate the proposed changes in good faith for a reasonable period not exceeding 20 Business days unless a longer period of time is agreed in writing, including, if requested by the other party, to meet with the other party to discuss the other party's proposal.

12.1A If the process under clause 12.1 does not result in a variation to the Access Agreement, this is not a Non-Billing Dispute or Billing Dispute for the purposes of this FAD.

12.2 Unless otherwise agreed by the parties, if

- (a) an Access Agreement between an Access Provider and an Access Seeker is in force and the Access Agreement relates to access to the same Service which this FAD relates to; and
- (b) the ACCC makes or varies a Regulatory Determination in relation to the Service and the new Regulatory Determination or the variation deals with a matter other than price;

either party may terminate the Access Agreement in respect of that Service (but only in respect of that Service) by providing the other party with a written notice, and termination will take effect on the expiry of the period specified in the notice, which must be no less than 120 Business Days after the day that notice is provided.