



Australian  
Competition &  
Consumer  
Commission

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

## Draft decision report

January 2017

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## List of abbreviations and acronyms

ACCC	Australian Competition and Consumer Commission
ADSL	Asymmetric Digital Subscriber Line
AVC	Access Virtual Circuit
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
DSL	Digital Subscriber Line
DSLAM	Digital Subscriber Line Access Multiplexer
FAB	Fibre Access Broadband
FAD	Final Access Determination
FTTB	Fibre to the basement
FTTN	Fibre to the node
FTTP	Fibre to the premises
Gbps	Gigabits per second
HFC	Hybrid fibre-coaxial
IAD	Interim Access Determination
LBAS	Local bitstream access service
LTIE	Long-term interests of end-users
Mbps	Megabits per second
NBN	National Broadband Network
POI	Point of Interconnection
RSP	Retail Service Provider
SAOs	Standard Access Obligations
SBAS	Superfast broadband access service
SAU	Special Access Undertaking
SIO	Services in Operation
ULLS	Unconditioned Local Loop Service
VDSL	Very-high-bit-rate digital subscriber line

## 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).
cable sheath	A cable sheath is the covering on the outside of a cable that holds and protects the copper pairs that are used to supply services to end-users.
CBD	Central Business District.
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.
LBAS	The declared Local Bitstream Access Service. A point-to-point service used to carry communications in digital form between an access provider's network and an end-user. Access seekers use the service to supply superfast broadband services to end-users, connected to non-NBN networks, primarily in new housing estates.
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	Company that offer 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</li> </ul>

	<p>equivalent to that which it provides to itself, and</p> <ul style="list-style-type: none"> <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 supply at a download rate of 25 Mbps or more.
transmission	The point-to-point carriage of voice, data or other communications at a fixed data rate.
ULLS	The declared Unconditioned Local Loop Service. Allows access seekers to use the copper line connecting end-users to the local telephone exchange, allowing them to provide both fixed internet (broadband) and voice services using their own DSLAMs and other exchange equipment.
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.
WLR	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

On 9 January 2017, we released our draft decision to set price and non-price terms and conditions of access to the superfast broadband access service (SBAS) and Local Bitstream Access Service (LBAS), along with draft FAD instruments.

The draft decision prices to apply for anchor product (residential grade) SBAS and LBAS services under the draft FADs are listed in the table below.

### 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	\$23.45	\$23.76	\$24.07	\$24.07	\$24.07
Port Zone 2/3 per month	\$28.46	\$28.84	\$29.22	\$29.22	\$29.22
Aggregation per Mbps/month	\$16.65	\$14.12	\$11.63	\$11.63	\$11.63

Prices and other terms and condition contained in FADs only apply in circumstances where access seekers and access providers are unable to reach commercial agreement.

In making this draft decision a key objective has been 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 means that the draft FAD prices have been set in line with the NBN's prices and designed to change with these prices over time. 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 also be reflected in the prices RSPs charge their customers.

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 are expected to move to the NBN within the next few years. These prices have been benchmarked to the service-specific costs of the wholesale ADSL service, to which the FAB service has similar characteristics.

Provision has also been made in the draft FADs for price adjustments if the Government introduces an industry levy on superfast local access lines to help fund NBN's supply of non-commercial regional fixed wireless and satellite services. This will mean that if the levy is embedded in NBN Co's prices, SBAS and LBAS operators will not be able to add a levy on top of these prices, but will be free to do so if the NBN's prices do not include the levy.



Our draft decision is to apply an exemption to the standard access obligations (SAOs) to SBAS providers supplying less than 12,000 SBAS and LBAS end users. This is on the basis that the compliance costs for these operators are expected to be high relative to the expected wholesale revenues and the benefits to end users.

The major SBAS and LBAS networks expected to be subject to the FADs under the draft decision will include those operated by Telstra (South Brisbane and Velocity Estates networks), TPG, Vocus, LBN Co, Opticomm and OPENetworks.

The draft decision price terms and condition are expected to deliver improved consistency of price regulation (compared to current price regulation) for the various monopoly fixed line superfast broadband services supplied in different parts of Australia as alternatives to the NBN and be in the long terms interests of end-users (LTIE).

# 1. Introduction

This report details our draft decision on final access determinations (FAD) 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 has been extended and will not expire until a new FAD is made as part of this inquiry.

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. These submissions have been considered by us in making this draft decision.

## 1.1. Consultation on the draft decision

In issuing this draft decision report and the draft FADs (see Appendix A) for the SBAS and the LBAS, we are seeking further public comment before publishing a final decision. We may also issue further discussion papers or undertake targeted consultation on discrete issues if that is considered appropriate to inform a final decision.

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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

We encourage industry participants, other stakeholders and the public to consider the draft decision report and make a submission.

We seek written submissions by **no later than close of business on Friday 17 February 2017**.

We prefer to receive electronic copies of submissions, either in PDF or Microsoft Word format allowing for the submission text to be searched.

Please forward submissions and enquiries by email to:  
[superfastbroadbandinquiry@acc.gov.au](mailto:superfastbroadbandinquiry@acc.gov.au) cc to: [Nicole.Ross@acc.gov.au](mailto:Nicole.Ross@acc.gov.au)

Please contact Nicole Ross on (03) 9290 1957 regarding any questions you have with respect to this inquiry.

We expect to release our final decision on the LBAS and SBAS FADs in the first half of 2017.

## 1.2. Confidentiality

To foster an informed and consultative process, all submissions will be considered as public submissions and will be posted on our website. Interested parties wishing to submit commercial-in-confidence material to the ACCC should submit both a public and a commercial-in-confidence version of their submission. The public version of the submission should clearly identify the commercial-in-confidence material by replacing the confidential material with an appropriate symbol or 'c-i-c'.

We have published a Confidentiality Guideline which sets out the process parties should follow when submitting confidential information to communications inquiries commenced by us. The Guideline describes our legal obligations with respect to confidential information, the process for submitting confidential information and how we will treat confidential information provided in submissions. A copy of the Guideline can be downloaded from our [website](#).

*The ACCC-AER information policy: the collection, use and disclosure of information* is also a useful reference and can be downloaded from our [website](#).

## 1.3. Structure of the draft report

**Chapter 2** provides background on superfast broadband services, the current SBAS and LBAS declarations, the LBAS FAD and the SBAS IAD and also the access determination assessment framework.

**Chapter 3** details the draft pricing approach and price terms and conditions consistent with the section 152BCA criteria of the CCA.

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

**Chapter 5** details the draft exemptions from the SAOs for the draft SBAS FAD.

**Chapter 6** outlines other declaration coverage issues that are not addressed in the draft FADs.

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

**Appendix A** provides the draft 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 capable of a transmission rate of 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 speeds of at least 25 Mbps) 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 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 CSP 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 consider the relevant markets to have regard to when 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 current 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, 25 Mbps service 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:

- Opticomm

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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.

- 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 typical download rate of 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](#).

## 2.4. The current 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 comes into force.

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 the existing LBAS FAD are outlined section 3.1 of this draft decision report.

The LBAS non-price terms cover 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 sets 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 are applied to specific entry-level products including:

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

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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.]

The SBAS IAD also includes 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 draft decision. In contrast to the 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 further into the network to a Point of Interconnection (POI).

SBAS providers can 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 does not prevent Telstra from only supplying a FAB service with an active voice service. We note that this does 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>

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 draft decision on the pricing methodology and price terms and conditions of SBAS and LBAS. The CCA requires that an access determination contain terms and conditions relating to price or a method of ascertaining price.

In determining the draft 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 draft price terms and conditions against these criteria and matters is provided at various points within the chapter and overall in section 3.6.3.

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

At present, different charges apply for the various SBAS and LBAS products.

The SBAS IAD access charges comprise:

- the current regulated NBN port (AVC) and aggregation (CVC) charges for non-Telstra operators and
- the wholesale ADSL charges set in the ACCC's 2015 fixed line services FAD for Telstra.

The LBAS FAD sets the access charge equal to the current regulated NBN port charge only.

For SBAS, price regulation applies to the 30/1 Mbps product tier for Telstra FAB services and for other (non-FAB) services to the 25/5 Mbps product tier.

For LBAS, price regulation applies to the 25/5 Mbps product tier.

The charges and the benchmarks on which they are based are shown in Table 3.1 below.

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

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

The non-Telstra product prices were adopted on the basis of there being significant similarity between the entry level 25/5 Mbps LBAS and SBAS products and the 25/5 Mbps NBN product.

Similarly, we decided to benchmark Telstra’s FAB service to the current regulated prices for wholesale ADSL (and its component charges) on the basis that Telstra’s commercial supply of the FAB service is on a similar basis to the wholesale ADSL service plus wholesale line rental.

## 3.2. Possible pricing methodologies for SBAS and LBAS

### 3.2.1. Background

In the FAD discussion paper we expressed the view that in the case of the SBAS and LBAS, a strict cost-based pricing methodology using total service long run incremental costs plus a contribution to common costs (TSLRIC+) or a building block model (BBM) was not likely to be suitable.

One reason for this was that LBAS and SBAS products are provided by a number of different access providers using a range of network types, all of which are likely to have differing input costs. In these circumstances, application of a robust cost-based pricing approach would

<sup>10</sup> ACCC, *Public inquiry into final access determinations for fixed line services*, Final Decision, October 2015.

<sup>11</sup> *Ibid.*

<sup>12</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>13</sup> *Ibid.*

necessarily involve obtaining detailed cost and technical information from a number of different suppliers and constructing a number of different cost models to reflect the diversity of network operators.

A further reason was that the regulatory costs to us and network operators to determine the costs of SBAS and LBAS on these various networks using TRLRIC+ or a BBM were expected to be excessively high relative to the likely benefits that would result for end-users. This reflects both the relatively small number of end-users supplied via these networks and the existence of other timelier and lower-cost pricing options available to us.

We also considered the competitive service and international benchmarking approaches as unsuitable for SBAS and LBAS on the basis that:

- It is not evident that there is a broad-based market for competitively supplied wholesale SBAS and LBAS in the same way as there is for many transmission services in Australia. This reflects that the areas of competitive supply of SBAS and LBAS are confined largely networks or parts of networks in CBD areas that exclusively service business, public body and charity customers.<sup>14</sup>
- Our review of regulated wholesale superfast broadband products and pricing offered overseas indicates that there would be substantial difficulty in establishing suitable overseas benchmarks for the locally supplied services. This is due to the differences in provider and service characteristics among overseas networks and also between the various local networks in Australia.

In light of these identified difficulties with the cost-modelling, competitive service and international benchmarking approaches, two potential alternative approaches for determining SBAS and LBAS prices in the FAD were proposed in the discussion paper.

The first, termed the 'adjusted regulated benchmarks' would involve making adjustments to the current regulated price benchmarks to more accurately reflect the specific characteristics of SBAS and LBAS providers. We flagged the possibility of adjustments to account for factors such as narrower geographic coverage of SBAS and LBAS networks than the NBN (including the absence of a need to fund non-commercial services); growth in traffic levels since the benchmark charges were set; and potential scale diseconomies of SBAS and LBAS providers relative to the NBN.

The second was a retail minus approach, which would involve determining wholesale SBAS and LBAS prices by subtracting estimates of the per unit retail costs and other avoided costs for providers from the prices of retail services being supplied with the use of SBAS and LBAS services.

The discussion paper also invited submitters to put forward other approaches.

### **3.2.2. Submissions**

A number of SBAS and LBAS providers had concerns with adjustments that would see the regulated rates adjusted below those of the existing NBN benchmark rates.

Opticomm considered that for various reason SBAS and LBAS providers are likely to operate from a higher cost base than NBN Co, so it is not appropriate to discount the NBN wholesale rates for setting prices for these networks, nor to peg them to changes in NBN Co's wholesale rates over time. It stated that it also provides networks in outer metropolitan and regional areas and due to its smaller scale faces higher set-up and ongoing costs, such

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<sup>14</sup> ACCC, *Superfast Broadband Access Service Declaration Inquiry*, July 2016, p. 40.

as backhaul, than the NBN, in servicing these areas. It also stated it will often take several years to be able to recover aggregation links costs to new estates.<sup>15</sup>

Accordingly Opticomm believed it appropriate to benchmark initial prices against NBN Co's current wholesale rates and be subject to an annual increase of the lesser of CPI or 2.5%.<sup>16</sup>

OPENetworks was concerned that the cost of obtaining reliable and affordable 'CVC' (assumed to mean aggregation) within the regulated price of SBAS is an issue and suggested that NBN's CVC should be available to other SBAS and LBAS providers at regulated prices.<sup>17</sup>

Clublinks suggested that **[start c-i-c] [end c-i-c]**.<sup>18</sup>

Telstra did not support the adjusted benchmarking methodology as it would lead to prices inconsistent with the NBN and undermine level playing field provisions, increase the risk of errors in making adjustments and produce added complexity. In lieu of the use a BBM (for which problems are recognised in this particular context), Telstra therefore favoured the use of unadjusted NBN and Telstra ADSL benchmarks for pricing the services.<sup>19</sup>

ACCAN considered that the prices, product design, interfaces and conditions should at least be consistent with NBN Co to encourage RSPs to operate across all networks with national plans.<sup>20</sup>

In somewhat similar vein the National Farmers Federation (NFF) stated it would not like to see any extension in differences in end user access charges and download limits between rural and remote locations and capital cities.<sup>21</sup>

NBN Co considered it is appropriate that NBN Co's comparable products should serve as price ceilings for the LBAS and SBAS products, with the possible exception of the Telstra FAB product. For AVC, NBN Co proposed that this be set to NBN Co's 25/5 Mbps AVC product, with provision for indexing such as via the CPI-1.5% price increase constraint specified in NBN Co's SAU.<sup>22</sup>

For CVC, NBN Co proposed that the charge be adjusted to account for differences in access providers' geographic circumstances, but specified as a method of ascertaining a price, rather than an actual price. This method would specify that the access price be determined so that an RSP (access seeker) would be no worse off than if they were able to acquire services to the relevant premises via the NBN after allowing for the costs that would be incurred in acquiring backhaul from the access provider's POI to the vicinity of the relevant NBN POI.<sup>23</sup>

NBN Co also considered it premature to incorporate any adjustment for the non-commercial service levy, noting that the ACCC could vary the FAD to account for it if required.<sup>24</sup>

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<sup>15</sup> Opticomm submission to discussion paper, pp. 3-4.

<sup>16</sup> *Ibid*, pp. 2, 4.

<sup>17</sup> OPENetworks submission to discussion paper, pp.3-4.

<sup>18</sup> Clublinks submission to discussion paper, pp. 2, 6.

<sup>19</sup> Telstra submission to discussion paper, pp. 4-5.

<sup>20</sup> ACCAN submission to discussion paper, p. 1.

<sup>21</sup> NFF submission to discussion paper, p.1.

<sup>22</sup> NBN Co submission to discussion paper, pp.1-2.

<sup>23</sup> *Ibid*. pp. 2-3.

<sup>24</sup> *Ibid*. p. 3.

There was no support among submitters for the use of a retail minus approach as a means of setting regulated access charges for reasons including its perceived complexity to apply and, expected large variation in the retail costs among providers.<sup>25</sup> ACCAN was concerned that it would maintain monopoly profits and not result in quality services being delivered in an economically efficient manner.<sup>26</sup>

### 3.2.3. Draft decision

In light of the views in submissions and other considerations, we consider that a benchmarking approach to rate setting is appropriate. However our draft decision is to tie non-Telstra rates to changes in NBN rates so that RSPs and end users using SBAS and LBAS networks are no worse off than if they were able to use NBN services. This would see the rates change to reflect adjustments in NBN Co's CVC charges and other changes (including the removal of any cross-subsidy for non-commercial regional wireless and satellite services if the government were to proceed with its wider industry levy arrangement). This is discussed further in section 3.6.1 below

Given the enduring differences between the Telstra FAB service and other SBAS services, we consider it appropriate to maintain separate price benchmarks for this service. However, our draft decision is that these price benchmarks be altered from those used in the SBAS IAD to make them more cost-reflective than the wholesale ADSL prices contained in the 2015 fixed line services FAD and applied in the IAD. This is discussed further in section 3.6.2 below.

In making our draft decision to make the aggregation charges dynamic by tying these to expected movements in NBN Co's CVC charge and Telstra's wholesale ADSL cost-based prices, we have given consideration to public and confidential historical and forecast data on data consumption.

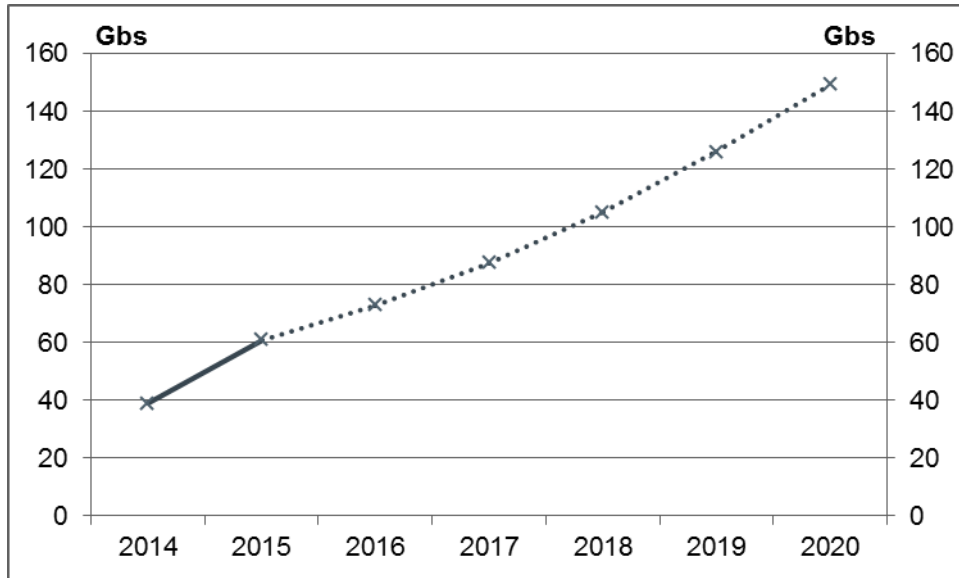
Recent and forecast internet traffic generated per household per month as estimated by CISCO is shown in Figure 3.1 below. For the period 2015 to 2020 CISCO has forecast a 20 per cent compound annual an annual growth rate in internet traffic generated per household. Between 2014 and 2015 actual traffic per household grew by 56 per cent.

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<sup>25</sup> Opticomm submission to discussion paper p. 3, Telstra submission to discussion paper pp. 4, 14 and [start c-i-c] [end c-i-c]

<sup>26</sup> ACCAN submission to discussion paper p. 2.

**Figure 3.1: Recent and forecast Internet traffic per household per month**



Source: CISCO Visual Networking Index (VNI) Forecast 2015

Commercial-in-confidence data of Telstra's forecast wholesale ADSL peak AGVC usage per SIO shown in Figure 3.2 points to [start c-i-c] [end c-i-c].

**Figure 3.2: Wholesale ADSL forecast peak AGVC usage per SIO per month**

[start c-i-c]

[end c-i-c]

Source: Telstra forecasts for FLSM 2013-14

Our draft decision view is that the above expectations of growth in data usage per SIO suggest a dynamic element should be introduced to the aggregation charges specified in the FADs. To not do so runs the increased prospect of cost-over-recovery at the projected levels of demand, or the risk of choking off of economically efficient demand for data due to excessive prices. Neither of these outcomes would be in the LTIE.

We consider the use of a dynamic NBN price benchmark (for CVC in particular) for the SBAS and LBAS will be sufficient to allow access providers to recover their costs (including compliance costs) for the following reasons.

First, the projected growth in the requirements for data usage, as indicated above, will enhance the cost recovery of aggregation services given that average costs fall with usage.

Second, we are aware of commercial wholesale offerings for access and aggregation that have been set at levels below NBN rates (adjusting for the same level of contention for aggregation). The commercial prices for the LBAS providers **[start c-i-c] [end c-i-c]** are shown in in Table 3.2 below.

## Table 3.2: Commercially offered residential wholesale LBAS prices

[start c-i-c]

[end c-i-c]

Although less comparable to the above prices given the location of its operations, the TPG-owned FTTB Wholesale has recently set a CVC price for its FTTB services of \$4 per Mbps/month along with an access charge equal to NBN Co's of \$27.00 per month.<sup>27</sup>

Third is that a nationally geographically averaged rate applies for NBN's charges, but SBAS and LBAS provider services are more geographically concentrated in more urbanised areas.

Fourth is the use of anchor pricing, which provides for flexibility in pricing on non-entry level LBAS and SBAS services, and would enable SBAS and LBAS provider to recoup some of their entry level service costs from higher level products if necessary.

Fifth is the exemption we have proposed for small SBAS providers due to the costs of compliance (see section 5.2). This will negate potential scale and other cost issues for these providers in accessing transmission for providing wholesale services.

A more fundamental question is, however, why aggregation services of SBAS (and LBAS) should be price regulated at all, particularly if transmission services are price regulated under the DTCS declaration and DTCS FAD or are deemed to be competitively supplied. In this regard, we note that:

- As the aggregation service is price regulated for the NBN it would lack consistency not to apply such regulation to other networks that provide similar services. Moreover, as we noted in the SBAS declaration final decision, a key rationale for regulation of the SBAS (and LBAS) is that these networks, like the NBN, display characteristics of natural monopolies in the areas in which they operate.<sup>28</sup>
- Transmission is only one input into the aggregation service, and we are also going to examine concerns expressed about transmission costs and potential independent access to the NBN's CVC as part of the communications market study.

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<sup>27</sup> FTTB Wholesale's services are supplied largely within CBD or similar areas, which limit the general applicability of these charges. Prices were reported in *Communications Day*, 17 August 2016, p. 1.

<sup>28</sup> ACCC, *Superfast broadband access service declaration inquiry*, Final decision, July 2016, p. 29.



- The aggregation service also will be a bottleneck to obtain the SBAS and LBAS where the POI to access an SBAS or LBAS network is provided centrally, such as in a CBD location.

In response to NBN Co's proposal to tie the SBAS and LBAS aggregation charge to an RSP's cost of transmission from the access provider's POI to the nearest NBN POI, we are concerned it could excessively squeeze the LBAS and SBAS providers' aggregation charge through the price of transmission. This could occur if the transmission service could not be purchased by an RSP at a competitively supplied price or at an appropriate scale to make it comparable with the costs NBN Co faces in supplying aggregation with its products.

Further, the proposal could lead to the implementation of SBAS and LBAS prices that would lead SBAS and LBAS providers to under-recover the costs of providing these services and may lead them to the point of exiting the relevant markets. This could have potentially adverse consequences for end-users who may find that they can only obtain a voice service from Telstra under the Universal Service Obligation (under present arrangements) and poorer broadband services either in terms of service packages or price points, most likely via mobile networks only.

On the matter of price indexing to CPI, we note that NBN Co's individual product prices are subject to an annual allowable change equal to the greater of CPI-1.5% or 0%. Our draft decision is that to the extent NBN makes adjustments to its prices in accordance with this allowance, these should be reflected in the relevant SBAS and LBAS prices. This accords with the overall principle that prices should follow NBN's prices so that RSPs and end users are no worse off than if they were supplied by the NBN.

A further exposition of the resulting draft decision price benchmarks and rationale for adopting them is provided in section 3.6.

### **3.3. Differential treatment of Telstra FAB product**

As detailed above, the SBAS declaration specifically includes Telstra's FAB service, which is a separate limb to the more general SBAS service description. Telstra supplies the FAB service over its South Brisbane and Velocity Estate networks, and this service uses a Layer 2 tunnelling protocol that functions within Telstra's copper-based (PSTN) architecture, ordering and business systems. Telstra also requires an active voice product to be supplied on the line (to the end-user) in order to supply the FAB service.

In its final SBAS declaration decision, we incorporated the FAB service (as currently supplied using the Layer 2 tunnelling protocol) into the SBAS service description. This was to ensure that end users would receive some benefit from increased competition while also acknowledging that it would not promote the LTIE to declare the SBAS in a way that required Telstra to undertake significant network investments to modify the supply of the FAB service when ultimately the South Brisbane and Velocity Estate networks would be transferred to NBN Co.

We also accepted that the commercial supply of the FAB SBAS service is on a similar basis to the wholesale ADSL service and the wholesale line rental (WLR) service. This reflects that Telstra's FAB service has been developed to function within Telstra's PSTN network architecture and ordering and business systems. On this basis, we assessed that the regulated wholesale ADSL prices in the 2015 FAD were the best available prices on which to benchmark the SBAS FAB service in the SBAS IAD.

In the FAD discussion paper we sought parties' views on the ongoing suitability of benchmarking SBAS FAB prices to the wholesale ADSL FAD prices – particularly since the

wholesale ADSL prices (in total) are considerably higher than the NBN prices against which other SBAS prices are benchmarked. In the SBAS declaration inquiry Telstra noted that the Layer 2 FAB service it offers network areas is different to the Layer 2 bitstream service incorporated within the more general SBAS service description. Telstra stated that if it were required to develop a Layer 2 bitstream service consistent with the general service description, it would cost Telstra at least **[start c-i-c] [end c-i-c]** to transform its FAB product to an Ethernet Layer 2 product (like that supplied by NBN Co), and to remove the requirement for an active voice service to be supplied. However, in providing this estimate, Telstra did not separate out or itemise the costs for transforming to a Layer 2 Ethernet protocol as opposed to supplying a FAB service without an active voice service.<sup>29</sup>

We noted that the provision of an active voice service was considered necessary by Telstra to supply a wholesale ADSL service, in order to allow for testing of the copper line for suitability/availability of a line. However, it was not clear that this is necessary where the broadband service in question is supplied over a fibre line rather than a copper one. We observed that such a requirement does not operate with respect to broadband services on other fibre networks. In this regard, we sought submissions on whether it would be possible to supply a 'naked' FAB service without requiring the supply of a voice product on the line and what the likely costs of doing this would be.

We also sought views on whether an 'allowance' or additional charge should be applied to the FAB service prices in the FAD, to allow Telstra to recover the reasonable costs of providing the FAB while at the same requiring it to supply the FAB on an unbundled or 'naked' basis.

### 3.3.1. Submissions

In response to the discussion paper and a separate information request from us, Telstra re-stated that it would incur costs of well over **[start c-i-c] [end c-i-c]** in transitioning the FAB service in South Brisbane and the Velocity Estates to a Layer 2 bitstream service and removing the requirement for an active voice line to be provided as part of the service. **[start-c-i-c] [end c-i-c]**. Telstra also indicated that if it were required to incur these costs, these would translate into higher wholesale prices.<sup>30</sup>

However, Telstra has not been able to provide a breakdown of these costs due to the cost and time associated with doing so.<sup>31</sup> To support its case, Telstra also provided more information on the interaction between PSTN and FAB services and how its operating and business systems process and sequence orders to services on the South Brisbane and Velocity Estate networks.

OPENetworks expressed the view that Telstra should be subject to the same pricing and products regulation as other SBAS and LBAS networks, but gave no reasons in support of this view.<sup>32</sup>

NBN Co considered that it was appropriate to transition Telstra's FAB product pricing to that faced by other SBAS providers providing this was consistent with Telstra's legitimate business interests.<sup>33</sup>

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<sup>29</sup> Telstra, *Response to the Commission's Superfast Broadband Access Service Declaration Inquiry – Draft Decision*, Confidential version, 4 December 2015, pp.16-19.

<sup>30</sup> Telstra submission to discussion paper, pp. 9-10

<sup>31</sup> **[start c-i-c] [end c-i-c]**.

<sup>32</sup> OPENetworks submission to discussion paper, p. 5.

<sup>33</sup> NBN Co, Submission to discussion paper, pp. 3-4

### 3.3.2. Draft decision

The information provided by Telstra and internal engineering advice indicates that Telstra would incur material aggregate costs to remove the active voice requirement. On a per data customer (including voice service) basis and spread over three years, these costs do not appear to be excessive when compared to the price of wholesale line rental that would be saved by access seekers – we estimate in the order of [start c-i-c] [end c-i-c] against the current regulated price of wholesale line rental of \$248.28 per year.

However, given the networks are to be transferred to the NBN (although no date for this has been agreed between the parties), the expected time needed by Telstra to make the requisite changes (including 12 months for product development<sup>34</sup>) and uncertainty over the full magnitude of the costs, we consider there is a reasonable possibility that Telstra would not be able to recover these costs. This gives rise to concerns about economic efficiency and Telstra's legitimate business interests in requiring it to incur such costs.

In these circumstances, our draft decision is that it is consistent with the section 152BCA objectives not to impose an obligation on Telstra to offer a 'naked' FAB service without the presence of an active voice line to the relevant premises and to continue to treat the FAB service differently for the purpose of setting price terms and conditions. Our draft decision on the specific price terms and conditions for the Telstra FAB service is detailed in section 3.6.2 below.

### 3.4. Transitional arrangements for pricing

The discussion paper raised the possibility that were we to require Telstra to charge the non-FAB SBAS benchmarks prices rather than the FAB-specific benchmark prices, whether it would be appropriate to transition the prices using a 'glide-path' mechanism.

We also flagged in the discussion paper that there may be other circumstances in which the use of similar arrangements could be considered for other network operators – for example, small scale operators not currently subject to wholesale price regulation.

#### 3.4.1. Submissions

Telstra stated it would not support a glide path given its preferred pricing approach is to maintain existing charges, and were Telstra required to introduce a Layer 2 Bitstream or naked broadband service, it would incur additional costs that it would need to recover as soon as possible.<sup>35</sup>

NBN Co considered that it was appropriate to transition Telstra's FAB product pricing to that faced by other SBAS providers providing this was consistent with Telstra's legitimate business interests.<sup>36</sup>

Clublinks considered [start c-i-c] [end c-i-c].<sup>37</sup>

OPENetworks considered that a number of regulatory arrangements should be put in place prior to price regulation in order not to damage competition in the provision of access services. These included: NBN Co required to sell CVC access at regulated prices to other wholesale providers; NBN to disclose where the NBN footprint will go within 3 years; outside

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<sup>34</sup> Telstra submission to discussion paper, p. 9.

<sup>35</sup> *Ibid.* p 18.

<sup>36</sup> NBN Co, Submission to discussion paper, pp. 3-4.

<sup>37</sup> Clublinks submission to discussion paper, p. 13.

the NBN footprint regulation of the 'entire CVC market' so that the LBAS price plus the CVC charge is within the SBAS regulated price; NBN Co should offer an aggregation point for all RSPs with a common gateway that permits access to other wholesale only access providers without charge.<sup>38</sup>

### 3.4.2. Draft decision

We do not consider a price glide path should be put in place for Telstra's FAB services. This is because we have continued to benchmark these prices to wholesale ADSL service prices rather than NBN benchmark prices, accepting the different nature of the FAB service. Moreover, the revised price benchmarks, which more closely reflect the service-specific costs of supply of the wholesale ADSL service, indicate that the price benchmark for the AGVC component set in the SBAS IAD was substantially above costs.

In response to OPENetwork's list of regulatory requirements upon the NBN and other aggregation service providers prior to any price regulation, our draft decision view is that these are beyond the scope of our powers in making a FAD. However the ACCC will consider the issues raised as part of its communications market study to determine if some form of regulatory intervention by the ACCC needs to be explored further, such as a formal declaration inquiry.<sup>39</sup>

Issues surrounding the costs of smaller providers are addressed in our draft assessment of the costs of compliance and exemption arrangements for small providers (see chapter 5).

## 3.5. The scope of price regulation

This section covers three issues related to the scope of the price regulation applied to the services under the FADs. These are:

- whether the LBAS should be treated differently to the SBAS in having no regulated charge for the aggregation component of the service
- whether charges other than port and aggregation should be regulated
- the continued use of anchor product regulation.

These are examined in turn below.

### 3.5.1. Differential treatment of the LBAS and the SBAS

Under the current price regulation applying to the SBAS (under the IAD) and the LBAS (under the FAD) a regulated aggregation charge is specified for the SBAS but not for the LBAS. Our discussion paper questioned whether there were grounds for treating the SBAS and LBAS differently.

#### *Submissions*

Information provided in the submissions to the discussion paper from Opticomm and OPENetworks suggests that LBAS providers supply aggregation services in a similar fashion to SBAS providers. This is confirmed by **[start c-i-c] [end c-i-c]**.

No submissions argued a case for LBAS aggregation being treated differently. On the contrary, the LBAS provider Opticomm stated that:

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<sup>38</sup> OPENetworks submission to discussion paper, p. 3.

<sup>39</sup> See <http://www.accc.gov.au/about-us/market-studies/communications-sector-market-study>

*LBAS and SBAS are very similar services and therefore should be subject to similar regulation.*<sup>40</sup>

### **Draft decision**

No aggregation charge was specified in the current FAD for the LBAS, on the basis that the aggregation required to obtain LBAS services from the networks captured under the declaration was considered to be relatively short in distance. Recognising however, that there is no real technical difference between LBAS and SBAS services and it is evident from the material noted above that LBAS providers offer aggregation services similar to SBAS providers, our draft decision is that a regulated aggregation charge should apply for LBAS at the same level as for SBAS.

The commercial wholesale pricing lists for residential services supplied by the LBAS providers **[start c-i-c] [end-c-i-c]** provided in Table 3.2 above suggest to us that the proposed draft decision prices for aggregation should allow these providers to recover their costs. However, we invite these providers to provide us with any more recent cost and pricing information to indicate otherwise.

We note that the regulated aggregation charge is a maximum charge (price ceiling), and to the extent that much less aggregation by distance is required to provide LBAS (or indeed SBAS) on a given network, a lower charge might be commercially negotiated using this charge as a reference point.

### **3.5.2. Price components regulated**

In the discussion paper we sought views on whether there was any requirement to regulate charges other than the port and aggregation charges currently regulated. We noted that the NBN has, in addition to these charges, recurring Network-Network Interface (NNI) charges and a charge for an additional User Network Interface (UNI) as part of its wholesale broadband service.<sup>41</sup>

### **Submissions**

Opticomm, Telstra and NBN Co stated in their submissions that they did not see a need for other charges to be regulated.<sup>42</sup>

ACCAN said it supported other charges being price regulated so RSPs have increased ability to connect to multiple networks.<sup>43</sup>

### **Draft decision**

We note that there is no evidence provided in submissions that SBAS and LBAS providers were setting other charges at excessive levels. In the absence of this information, our draft decision is not to apply price regulation to other price components. However, were this to change, and noting the overall pricing approach that has been adopted for the regulated port and aggregation charges in this draft decision, we would expect these other charges to be in line with NBN charges.

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<sup>40</sup> Opticomm submission to discussion paper, p. 2.

<sup>41</sup> NBN, Product Description NBN Co Ethernet Bitstream Service, Wholesale Broadband Agreement. [http://www.nbnco.com.au/content/dam/nbnco2/documents/sfaa-wba2-product-catalogue-nebs-prod-desc\\_20160630.pdf](http://www.nbnco.com.au/content/dam/nbnco2/documents/sfaa-wba2-product-catalogue-nebs-prod-desc_20160630.pdf)

<sup>42</sup> Opticomm submission to discussion paper p. 4, Telstra submission to discussion paper p. 14, NBN Co submission to discussion paper p. 3.

<sup>43</sup> ACCAN submission to discussion paper, p. 2.

### 3.5.3. Anchor pricing

The current IAD and FAD prices apply to the base product tiers for the relevant superfast broadband services covered by the service declarations. These products are the most widely purchased superfast broadband products in the relevant markets. In relation to the NBN, products within the 25 Mbps download speed product tier currently account for 78 per cent of the NBN's superfast services.<sup>44</sup>

There is theoretical and practical support for limiting price regulation to a single tier or limited number of tiers. To the extent the products have some substitution possibility, regulatory constraint on a lower tier product can constrain the price of higher tier products. This constraint is likely to diminish the further away a given broadband product tier is away from the anchor broadband product tier in terms of download and upload speed and other service functionality.

Regulating a base product can lower the costs of regulation and provide some constraint on other products while still allowing for some pricing flexibility on these other product tiers and service elements. This can be desirable for an emerging service in order to help promote efficient investment in infrastructure. On the other hand, to the extent that these other products are not reasonably substitutable with the base tier, the anchor price regulation might not constrain other product tiers and could lead to monopoly wholesale pricing and foreclosure of rivals in downstream markets.

#### *Submissions*

Most submissions supported the continued use of anchor product regulation for the SBAS and the LBAS.

Opticomm stated it does not believe other product tiers beyond the 25/5 Mbps service need to be regulated on the basis that it is not aware of concerns from RSP about other product tiers being unregulated and that it expects this product tier also constrains the prices of other tiers.<sup>45</sup>

Telstra stated it supports the continuation of regulation of the base product tiers only.<sup>46</sup>

Clublinks stated that **[start c-i-c] [end c-i-c]**.<sup>47</sup>

NBN Co considered that anchor pricing is appropriate for AVC and CVC and that for the time being the equivalent 25/5 AVC product (residential grade with voice capability) and CVC TC-1 and CVC TC-4 products to support the AVC product are suitable. It raised the possibility that over time the anchor product might be altered or expanded – to include for example a business-grade service as well.<sup>48</sup>

ACCAN favoured the application of pricing regulation to a range of products so choice of RSPs and equivalent prices to NBN supplied services can be offered across all products.<sup>49</sup>

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<sup>44</sup> ACCC NBN Wholesale Market Indicators Report 30 September 2016 <http://www.accc.gov.au/regulated-infrastructure/communications/national-broadband-network-nbn/nbn-wholesale-market-indicators-report/reports>

<sup>45</sup> Opticomm submission to discussion paper, p. 2..

<sup>46</sup> Telstra submission to discussion paper, p. 11.

<sup>47</sup> Clublinks submission to discussion paper, p. 8.

<sup>48</sup> NBN Co submission to discussion paper, p. 2.

<sup>49</sup> ACCAN submission to discussion paper, p. 1



Optus questioned whether the SBAS declaration should apply to business services and notes that price benchmarks set for residential grade services are different to those that would be appropriate for business services.<sup>50</sup>

### **Draft decision**

We consider that forbearance from specifying regulated prices for other product tiers (for example 100/40 Mbps) reduces regulatory costs and helps 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.

Optus' concern about the scope of the declaration is addressed in chapter 6 of this report. We note that in applying the regulated price anchor to residential grade services, the purpose is not to require higher specification business services to be the same as this price.

## **3.6. Draft decision on FAD price terms for the SBAS and LBAS**

Our draft decision on the price terms for the SBAS and LBAS FADs is outlined below.

### **3.6.1. Non-Telstra services**

In relation to the non-Telstra SBAS and LBAS price regulated port and aggregation services (anchor products) our draft decision is that these:

- Should be initially set equal to NBN Co's current prices for its 25/5 Mbps TC-4 AVC and TC-4 CVC services of \$27.00 per port/month and \$15.25 per Mbps/month respectively.
- Change over time to reflect movements in NBN Co's prices for these services, including for example, changes in CVC prices as a result of capacity related adjustments or price movements in line with NBN Co's annual allowable change in individual prices equal to the greater of CPI-1.5% or 0%.
- Be adjusted if an industry-wide funding mechanism is introduced by the government for the NBN's non-commercial regional fixed wireless and satellite services as an industry levy on superfast local access lines as is proposed in a draft bill issued for public consultation on 12 December 2016.<sup>51</sup> We propose that the NBN's cross-subsidy cost per fixed line SIO for these non-commercial services should be subtracted from the total per customer charge to allow the amount of the industry levy to be added to the per customer wholesale charges of SBAS and LBAS providers.

In relation to the latter adjustment, based on analysis undertaken by the Bureau of Communications Research (BCR), we estimate that NBN's cross-subsidy cost for its non-commercial services per fixed line SIO is around \$8 per month.<sup>52</sup> This would be the amount that would be expected to be subtracted from the NBN benchmark charges on a per customer basis, and borne by SBAS and LBAS providers as a reduction in their per customer charges.

Assuming the above cross-subsidy amount is subtracted in this manner, the monthly levy amount would then be able to be added to the regulated wholesale customer charges of these providers in the equivalent way to the NBN. Alternatively, if the NBN charges are

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<sup>50</sup> Optus submission to discussion paper, p. 4.

<sup>51</sup> Draft *Telecommunications (Regional Broadband Scheme) Charge Bill 2017*.

<sup>52</sup> The BCR has quantified this cross-subsidy at \$397.7 million in FY2018 and rising to \$814.1 million in FY2022. Dividing these numbers by the forecast number of NBN fixed line SIOs in each of these years (4.3 million for FY2018 and 8.1 million in FY2022) points to an internal subsidy per line of \$7.71 per month in FY2018 and \$8.38 per month in FY2022. Figures are from BCR, NBN non-commercial services funding options, Final report, March 2016, p. 70, Table 11.

determined on a levy-inclusive basis, an additional levy amount would not be permitted to be added to the regulated wholesale charges of SBAS and LBAS providers.<sup>53</sup> The draft FADs provide for either of these possibilities.

This pricing approach reflects that due to traffic growth and lobbying by access seekers, NBN Co has reduced its CVC charge from \$17.50 to \$15.25 per Mbps/month under a trial formula that lowers the CVC charge as aggregate demand for CVC capacity per user increases.<sup>54</sup> It has also flagged publicly that it may reduce the charge to as low as \$10 per Mbps/month.<sup>55</sup> It also reflects that forecasts of data usage over the next five years point to continued very high growth, providing scope for lower charges to be borne across the industry as the average costs of aggregation falls (see section 3.2.3 above).

We note that NBN Co has also flagged the introduction of RSP-based discounting that would apply a similar formula as above for discounting of CVC on an individual RSP basis.<sup>56</sup> To take this into account in setting SBAS and LBAS prices will require NBN Co to publish an overall or weighted average, CVC charge.

As NBN Co does not at present regularly publish its discounted CVC charges, we will put in place arrangements to ensure that NBN Co does so in order that these charges are able to be referenced formally in the FADs. We will progress and settle these arrangements prior to making the final FADs.

Our draft decision view is that there should be a period of time before the published changes to NBN prices flow through to the regulated SBAS and LBAS prices to enable SBAS and LBAS providers with sufficient notice to reflect these into access agreements if need be. We consider 30 days would be a suitable period, but we would invite views from access providers and access seekers on the appropriateness of this timeframe.

We have adopted this pricing approach on the basis that it is considered in the LTIE for RSPs and end-users connected to LBAS or SBAS networks to be no worse off than if they were connected to the NBN. Further, given that NBN pricing has been found by the ACCC to meet the LTIE and other section 152BCA criteria, we consider that wider application of NBN pricing (to other providers) also meets these criteria. It is also considered to meet a number of other objectives we are permitted to take into account under subsection 152BCA(3), notably consistency of regulation, low regulatory cost and views of submitters (see section 3.6.3).

Furthermore, the commercial prices offered by the LBAS providers **[start c-i-c] [end c-i-c]** (see Table 3.2 above) and to a limited degree by TPG's wholesale business FTTB Wholesale suggest to us that setting charges in line with the NBN's prices would not be set at levels that would undermine the legitimate business interests of LBAS and SBAS providers.

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<sup>53</sup> The Government has flagged that the levy will commence in 2017-18 at \$7.09 per line per month and rise each year by the CPI. In addition there will be an administrative cost component of \$0.01266 per line per month fixed for the first 5 years and rising by the CPI in subsequent years. See Department of Communications and the Arts, Exposure Drafts, Telecommunications Legislation Amendment (competition and Consumer Bill 2017 and Telecommunications (Regional Broadband Scheme) Charge Bill 2017 – Explanatory Notes, p. 19.

<sup>54</sup> NBN Co has formally advised us that the CVC Dimension Based Discount for the quarter commencing 1 December 2016 is \$2.25, giving an effective price per Mbps of CVC TC-4 purchased of \$15.25.

<sup>55</sup> Bill Morrow (NBN Co CEO) statement to Senate Estimates, 18 October 2016, *Hansard*, p. 126

<sup>56</sup> NBN Co, CVC Pricing Industry Consultation Paper (PR137) October 2016 (Commercial-in-Confidence).



### 3.6.2. Telstra FAB services

Our draft decision is that there remains a case that the Telstra FAB services provided in South Brisbane and the Velocity Estates be subject to a different price benchmark than the other services. This reflects the expected cost and period of time required for Telstra to strip out the active voice requirement from the services and converting it to a Layer 2 Ethernet service given that the South Brisbane and Velocity Estate networks will be transferred to the NBN within the next several years.

In light of these considerations, we consider it appropriate to benchmark the prices of the FAB service to cost-based prices of Telstra's wholesale ADSL services, which is provisioned in a very similar manner to the FAB service. The cost-based prices for the wholesale ADSL service have been derived from the fixed line services model (FLSM) that has previously been used by the ACCC to set prices for the fixed line services FAD. However, for that application, the model derived prices for the fixed line services that achieved a uniform price reduction on the prices of fixed line services, including the wholesale ADSL service, that were set in previous FADs (these prices were also the ones used for the SBAS IAD). While this ensured that costs were recovered overall, prices of individual fixed line services did not necessarily accord with the costs allocated to them in the model. In the case of the wholesale ADSL service, the fixed services FAD prices over-recovered the service-specific costs allocated to the service over 4 years.

In order to set draft decision prices for the Telstra FAB service we have therefore derived price benchmarks from the wholesale ADSL prices that recover the annual costs allocated to the service within the FLSM. These price benchmarks, which will apply for the 30/1 Mbps service and the associated aggregation are shown in Table 3.3 below.

**Table 3.3: Telstra FAB price benchmarks**

Charge component	2016-17	2017-18	2018-19	2019-20	2020-21
Port Zone 1 per month	\$23.45	\$23.76	\$24.07	\$24.07	\$24.07
Port Zone 2/3 per month	\$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 modelling these price benchmarks, a constant share of costs is allocated to the port charges of **[start c-i-c] [end c-i-c]** (reflecting the proportion carried over from the 2013 wholesale ADSL FAD) and the remaining **[start c-i-c] [end c-i-c]** is recovered from the AGVC charge. The reduction in the AGVC charge reflects annual growth in forecast average peak usage per SIO for wholesale ADSL, using Telstra's forecasts for the FLSM originally dating from 2013-14 (but may not fully reflect the growth of video streaming that has occurred subsequently). The price difference between the Zone 1 and Zone 2/3 port charges also reflects the relativities from the 2013 wholesale ADSL FAD.

We note that the Telstra forecasts of the growth in peak AGVC usage used for modelling these charges **[start c-i-c] [end c-i-c]**. We are therefore of the view that the Telstra forecasts are reasonable.

Reflecting that the FLSM only extends to 2018-19, the modelled charges for that year have also been used as the price benchmarks for 2019-20 and 2020-21.

We have made provision in the draft FAD that if the Government introduces an industry levy for non-commercial regional fixed wireless and satellite broadband services – as discussed above at 3.6.1 – that Telstra will not be prevented from adding an amount up to the levy amount to its FAB charges if it is required pay the levy on its South Brisbane or Velocity Estates services under the legislative provisions.

We note that when the FAB networks are transferred to the NBN, under the NBN Special Access Undertaking (SAU) the applicable NBN charges will apply to these networks from the time of transfer.<sup>57</sup>

### **3.6.3. 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.

Overall, we consider that the draft decision price terms and conditions will promote the LTIE. In particular it will promote competition and the economically efficient investment in infrastructure by facilitating entry of RSPs into relevant superfast broadband markets, and allowing them to compete on their relative merits while leaving access providers free to offer other SBAS and LBAS products, which are not at this stage essential to enable access to these markets, at different prices. We consider that this protects the legitimate business interests of the providers of SBAS and LBAS services.

In adopting dynamic pricing, which benchmarks the non-FAB prices to the movements in NBN prices for anchor port and aggregation charges, we have taken into account the promotion of the LTIE along with the legitimate interests of parties who supply or are capable of supplying the SBAS and/or LBAS and the likely direct costs of supplying these services.

Our view is that the price terms and conditions will facilitate market entry and increased competition, which should also facilitate improved price and quality of service offerings, providing incentives to innovate and provide a wider array of differentiated retail products. In turn, with greater competition in retail superfast broadband markets, and regulated benchmark prices, productive and allocative efficiency are likely to be promoted.

The introduction of this pricing approach will meet the LTIE and the interests of access seekers who have rights to use the declared service by ensuring that they are no worse off than if they were connected to the NBN. Our view is that prices set in line with the NBN will mean that RSPs are more likely to use SBAS and LBAS networks, including offering services on these networks as part of their national pricing offers, and provide for retail competition by delivering price, quality and diversity benefits to end customer on SBAS and LBAS networks.

Further, benchmarking 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.

While benchmarking the SBAS and LBAS to NBN prices allows for the NBN's economies of scale and scope to be reflected in SBAS and LBAS pricing we also note that because SBAS and LBAS are supplied largely in urban areas, the average costs of supplying the services in these areas are likely to be lower than the average costs reflected in the NBN's prices, which apply across a more geographically diverse area. Therefore, based on this and previous and

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<sup>57</sup> NBN Co, *NBN Co Special Access Undertaking*, 18 December 2012 varied on 18 November 2013.

current market wholesale offers by LBAS and SBAS providers, we consider that the NBN dynamic prices will not be set at levels that are likely to undermine the legitimate business interests of SBAS and LBAS providers nor below the direct costs of supplying the LBAS and/or SBAS.

In relation to the Telstra FAB pricing, given that the prices are more in line with the dynamic NBN prices, similar LTIE objectives are achieved as with the non-FAB prices as detailed above. However, as the FAB pricing is based on the modelled annual service-specific costs of the wholesale ADSL service using the FLSM, which we consider a better proxy for the costs of the FAB service (compared to NBN pricing), economic efficiency is also better promoted, Telstra's direct costs are more likely to be recovered only and Telstra's legitimate business interests are 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.

Based on current submissions we do not consider that the draft FAD 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 is relevant in relation to these draft FADs. We have considered the objective of any-to-any connectivity in making our draft decision to provide a small provider exemption (see chapter 5).

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:

- contribute to 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 section considers the non-price terms and conditions (NPTCs) for the SBAS and LBAS draft FADs.

There are various types of NPTCs that could be included in a FAD. These can include:

- standard commercial terms, such as billing, creditworthiness and dispute resolution
- limitations or restrictions on the supply of the service, including limitations or restrictions on use of the Service for resale or other specified purposes, or
- operational or technical aspects of the service, such as the points of interconnection.

Our general approach to making a FAD has been 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>58</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>59</sup>

### 4.1.1. Current LBAS FAD non-price terms and conditions

The current NPTCs for the 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

### 4.1.2. Current SBAS IAD non-price terms and conditions

We set NPTCs in the SBAS IAD consistent with those in the recent DTCS FAD. The NPTCs are 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

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<sup>58</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>59</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

- (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
- (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.

#### **4.1.3. 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.

#### **4.1.4. Submissions**

We received three submissions to the FAD discussion paper on NPTCs. Both **[start c-i-c]** **[end c-i-c]** and Telstra considered that the NPTCs specified in the SBAS IAD were reasonable and Opticomm considered the ACCC's NPTCs more broadly, were reasonable.<sup>60</sup> All three submitters supported NPTCs applying uniformly to LBAS and SBAS.

Telstra submitted the use of data and voice ports on network termination devices at end-user premises should not be specified in the SBAS and LBAS FADs. Telstra considered that any specification would be overly prescriptive and difficult for network owners to implement, given the range of different network configurations and potential for end-users to self-supply their own network termination device.<sup>61</sup>

Clublinks noted that **[start c-i-c]** **[end c-i-c]**.<sup>62</sup>

#### **4.1.5. Draft decision**

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

- billing and notification
- creditworthiness and security
- general dispute resolution procedures
- confidentiality

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<sup>60</sup> **[start c-i-c]** **[end c-i-c]**, Opticomm submission in response to discussion paper, p. 6, Telstra submission in response to discussion paper p.19.

<sup>61</sup> Telstra submission in response to discussion paper, p.19.

<sup>62</sup> Clublinks submission in response to discussion paper , p.17.

- 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 consider that including these NPTCs in the SBAS and LBAS FADs will provide a suitable fall-back position for parties if they cannot agree on commercial terms. These terms were subject to extensive industry consultation during our review in 2014-2015 of the NPTCs and are likely to be widely accepted by industry.

Our views (at the time) and assessment against the legislative criteria can be found in the NPTCs final report available on the [ACCC website](#). We maintain and now adopt those views in the NPTCs final report as our draft decision on the NPTCs for the SBAS and LBAS draft FADs. The draft FAD instruments for the SBAS and LBAS containing all price and non-price terms for the services are provided at Appendix A of this report.

In relation to other NPTCs, our draft decision is 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 is because we consider that any specification for voice and data services will be difficult to prescribe because of the range of different network configurations that can be used to supply the SBAS and LBAS, and the potential for end-users to self-supply their own network termination devices.

## 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>63</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>64</sup>

Under the terms of the CCA we cannot exempt LBAS access providers from the SAOs for delivery of a Layer 2 bitstream service.<sup>65</sup> This chapter therefore deals only with the question of whether there should be an exemption from some or all of the SAOs for one or more SBAS providers.

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 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. This was to provide a suitable transition period to allow TPG/TransACT to transform its wholesale service from a Layer 3 product to a Layer 2 product.

### 5.1. Issues for small scale access providers

#### 5.1.1. Compliance costs for small operators

In the FAD discussion paper we sought information from parties on the compliance costs they will, or do, face in supplying the SBAS and/or LBAS. In particular, we sought information on the one-off implementation costs, such as the development of operating and ordering and provisioning systems for the SBAS and/or LBAS, as well as estimates of the likely recurrent costs for access providers. We also invited submissions as to how these costs may differ between small scale and large scale providers (for example, a smaller scale operator may be able to run its wholesale operations through the use of basic record keeping and billing methods and a single or partial staff member). We have considered compliance costs for the provision of both the SBAS and LBAS because the compliance costs are likely to be the same for both services, given their technical similarity.

#### *Submissions*

Spirit Telecom indicated **[start c-i-c] [end c-i-c]**.<sup>66</sup>

Frontier Networks provided information on the expected one-off and ongoing costs required to supply an SBAS into its retirement village estates. It estimated one-off costs of **[start c-i-c] [end c-i-c]** annually.<sup>67</sup>

Clublinks **[start c-i-c] [end c-i-c]**

OPENetworks submitted that compliance costs for an LBAS and SBAS increased administrative costs and the costs of accommodating different RSP interfaces. It also

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<sup>63</sup> Section 152BC(3)(h)(ii) of the CCA

<sup>64</sup> Section 152BC(5) of the CCA

<sup>65</sup> Section 152(4AA) of the CCA

<sup>66</sup> Spirit Telecom submission to discussion paper, p. 7.

<sup>67</sup> Frontier Networks submission to discussion paper, pp. 3-4.



suggested the cost of obtaining adequate 'CVC' (assumed to mean aggregation) is a cost of compliance.<sup>68</sup>

It further stated that it uses different technologies across its various networks and there would be additional interconnection costs to provide a consistent Layer 2 service across all these networks. It also noted that any requirement for common provisioning and interfaces with NBN would be more expensive.<sup>69</sup>

OPENetworks also submitted that if the ACCC proposes that SBAS pricing be regulated, that in order to not damage the competitiveness of the market, access providers will require government assistance to meet the additional compliance costs) Finally it proposed standardisation of RSP interfaces or access portals for those using the NBN or other major facilities providers to reduce the costs of compliance.<sup>70</sup>

### ***Draft decision***

To help assess the likely compliance costs to small operators of offering a wholesale service we engaged the consultancy firm UXC Consulting (UXC) to advise on the likely costs of compliance for small vertically-integrated retail superfast broadband service providers and, as necessary, to advise as to the scale at which a small provider exemption might reasonably apply. The findings of this report are discussed further in section 5.2 below that discusses the small provider exemption.

#### **5.1.2. Likelihood of retail entry for small networks**

A corollary to the questions of the costs of compliance for small operators in providing the SBAS is the likelihood of new RSPs entering retail markets to supply superfast broadband services to end-users connected to smaller scale networks – particularly if the retailers would face different operability standards, conditions and arrangements for different providers.

In the FAD discussion paper we asked whether there any thresholds that must be met (for example, size of addressable market (or submarket) before an RSP would consider obtaining the SBAS or LBAS from a given network. We also sought views on the extent to which operating standards, assurance systems and business interfaces can differ between providers, the reasons for adopting different standards, how these may act as a barrier to entry into retail markets by access seekers and the costs to SBAS and LBAS providers of implementing product constructs and systems/interfaces consistent with the NBN.

### ***Submissions***

Spirit Telecom stated that **[start c-i-c] [end c-i-c]**.<sup>71</sup>

Frontier Networks indicated that the small size of each of its networks would represent too small an addressable market for RSPs to express interest, even though Frontier Networks would have to incur the majority of costs regardless.<sup>72</sup>

Clublinks stated **[start c-i-c] [end c-i-c]**.<sup>73</sup>

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<sup>68</sup> OPENetworks submission to discussion paper, pp. 1-2.

<sup>69</sup> *Ibid.* pp. 4-5.

<sup>70</sup> *Ibid.* p. 3.

<sup>71</sup> Spirit Telecom submission to discussion paper, p. 7.

<sup>72</sup> Frontier Networks submission to discussion paper, p. 6.

<sup>73</sup> Clublinks submission to discussion paper, pp. 6, 13-14.



Telstra claimed that it does not interface with any LBAS and SBAS networks to supply retail services due to the costs involved, and that this would be a barrier to most RSPs as well. It considered that it would be desirable for NBN Co to provide a wholesale-to-wholesale interface to enable RSPs to access other networks via the NBN.<sup>74</sup>

OPENetworks stated that the most prevalent barriers to entry to retail market are:

- The cost of obtaining reliable and affordable 'CVC' (assumed to mean aggregation) within the regulated price of SBAS/LBAS and suggests that NBN's CVC should be available on a standalone basis to other SBAS and LBAS providers at regulated prices
- NBNs 121 POIs deters small RSPs
- The absence of a common RSP interface.<sup>75</sup>

It also alleged that the NBN Co definitive agreements with Telstra and Optus are restrictive as they oblige Telstra and Optus to use the NBN at the expense of connection to other competing networks. OPENetworks also questioned the logic of adopting consistent standards with the NBN on the basis that there are no "NBN standards".<sup>76</sup>

Opticomm identified NBN's refusal to provide a business-to-business (B2B) interface as an issue and expressed concerns about the likelihood of RSP entry given the need to have multiple interconnection arrangements and interfaces. However, it did not propose that the FAD should mandate standards.<sup>77</sup>

ACCAN submitted that RSPs may not offer services due to the difficulty of connecting to multiple networks.<sup>78</sup>

### ***Draft decision***

We note the number of comments in submission 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).

We consider that the question of access to an NBN B2B interface and CVC is best considered in the communications market study currently being undertaken by the ACCC.<sup>79</sup> This is because this matter raises issues that go beyond what can 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.

It is our draft decision view that the limited (if any) RSP interest in connecting to smaller SBAS networks, as outlined in several submissions, lends support to applying a small provider exemption for the SBAS. This is on the basis that the available information points to the possibility of small providers incurring a number of set-up costs for offering wholesale access that they have little likelihood of ever recovering in whole or part from wholesale customers.

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<sup>74</sup> Telstra submission to discussion paper, pp.6-7.

<sup>75</sup> OPENetworks submission to discussion paper, pp. 3-4.

<sup>76</sup> *Ibid.* pp. 4-5.

<sup>77</sup> Opticomm submission to discussion paper, pp. 1, 3, 5.

<sup>78</sup> ACCAN submission to discussion paper, p. 2.

<sup>79</sup> See <http://www.accc.gov.au/about-us/market-studies/communications-sector-market-study>

## 5.2. Small provider exemption

### *Submissions*

The smaller SBAS providers covered by the existing exemption supported the continuation of the exemption. Larger providers were less supportive or opposed an exemption for small providers. ACCAN was also opposed.

Spirit Telecom stated **[start c-i-c] [end c-i-c]**.<sup>80</sup>

Frontier Networks was in favour of the continuation of the exemption for less than 20,000 services as outlined in the SBAS IAD, or alternatively: less than 100,000 data services in total; less than 1 per cent of services in operation in the market (as defined as per the SBAS IAD or all data services); or for providers serving senior housing communities. Reasons it offered to justify a small provider exemption include the promotion of infrastructure competition, reducing retail prices, permitting seniors to receive products tailored to their needs, avoiding disproportionately burdensome compliance costs, permitting a return on the supply of specialised products.<sup>81</sup>

Clublinks **[start c-i-c] [end c-i-c]**.<sup>82</sup>

NBN Co submitted it does not support any exemptions to the FADs except on a transitional basis on the basis of regulatory symmetry in the treatment of monopolies.<sup>83</sup> A similar view was expressed by Opticomm.<sup>84</sup>

Telstra said it supports wide application of the FAD on level playing field grounds, but accepts that the costs of compliance for small providers may be disproportionate. It noted that the ACCC has the ability to monitor small providers and take action at a later date if required.<sup>85</sup>

ACCAN expressed the view that small networks should not be excluded as consumers on these networks are likely to need the guarantees and protections to a greater extent than those on larger networks and should have the ability to access retail services at the prices and quality available within the market more generally.<sup>86</sup>

### *Draft decision*

To inform our draft decision on the need for retaining a small provider exemption, we engaged UXC to assess the compliance costs to small vertically integrated retail providers of supplying a wholesale SBAS and to determine the number of end customers under which an exemption might reasonably apply. A public version of UXC's report can be found on our [website](#).

UXC observed that the small providers operate varying networks and business models which made generalisations difficult. Nevertheless it determined that the small providers would need to incur additional hardware, transmission, operational system and headcount

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<sup>80</sup> Spirit Telecom submission to discussion paper, p. 3.

<sup>81</sup> Frontier Networks submission to discussion paper, p. 7.

<sup>82</sup> Clublinks submission to discussion paper, pp. 6-7, 17-18.

<sup>83</sup> NBN Co submission to discussion paper, p. 3.

<sup>84</sup> Opticomm submission to discussion paper, p. 4.

<sup>85</sup> Telstra submission to discussion paper, p. 19.

<sup>86</sup> ACCAN submission to discussion paper, p. 2.

costs to provide wholesale services.<sup>87</sup> Based on making some key assumptions about the likely costs and wholesale take-up for a representative or 'typical' small provider offering 2,500 existing retail services, UXC determined that an economically viable wholesale business could be attained if 5,000 wholesale services could be provided in addition to the 2,500 retail services. On the basis of this, it estimated that a small provider would need to supply a minimum of 7,500 combined retail and wholesale services in order to profitably offer a wholesale service. However, in light of various contingencies and uncertainties, it was of the view that 12,000 services in total would be a low risk upper bound for the exemption.<sup>88</sup>

Our draft decision is that, based on the analysis undertaken by UXC, a small provider exemption should continue and that this should apply to providers having less than 12,000 SBAS and LBAS end customers (taken on a combined basis). This applies the exemption at the top of UXC's estimated range at which wholesale services are likely to be profitably provided.

Although we considered other potential means of providing exemptions, our draft decision is 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 (see section 5.3 below).

The exemption is considered to help promote the section 152BCA objectives by helping to ensure the ongoing provision of superfast broadband services to customer on these networks. (In this regard, the objective of promoting ongoing any-to-any 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, the exemption will also help to promote the efficient use of existing infrastructure and protect the legitimate business interests of the smaller providers by ensuring that regulation is proportional. 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.

Some of the small SBAS networks we understand have less than 12,000 end users at present, and are expected to be to be exempted, include Clublinks, Frontier Networks, Pivit, Spirit and Comverge.

In making this draft decision we also note 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>89</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.

Nevertheless the roll out of the NBN will continue to take some time and we will 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 are not made significantly worse off over time.

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<sup>87</sup> UXC Consulting, *Analysis of Costs for Small Providers to Provide a SBAS Layer 2 Service*, Report for the ACCC, 30 November 2016, p. 20.

<sup>88</sup> *Ibid.* pp. 18-20.

<sup>89</sup> Australian Government, *Telecommunications infrastructure in new developments – A new approach to competition*, 1 March 2015, pp. 19-20.

### 5.3. Other exemptions

In the discussion paper we sought views on whether any other exemptions should be provided for in the FAD.

#### *Submissions*

Spirit Telecom submitted that **[start c-i-c] [end c-i-c]**.<sup>90</sup>

Frontier Networks considered the ACCC might provide an exemption to providers serving senior housing communities on the basis of the special services being provided and because the market for the supply of networks to these communities is competitive.<sup>91</sup>

NBN Co submitted that where a provider needs time to develop a Layer 2 product the exemption period should be as short as possible.<sup>92</sup>

Opticomm was not in favour of any exemptions.<sup>93</sup>

#### *Draft decision*

On the basis that we have decided to apply a small provider exemption, our draft decision is there is no need for us to impose further (or alternative) exemptions to capture a particular class of SBAS providers. It is our view that a broad rule, such as that based on the number of end customers will better meet the s. 152BCA objectives through achieving regulatory consistency and simplicity.

Our draft decision is 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>94</sup>

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<sup>90</sup> Spirit Telecom submission to discussion paper, pp. 1-2.

<sup>91</sup> Frontier Networks submission to discussion paper, p. 3.

<sup>92</sup> NBN Co submission to discussion paper, p. 3.

<sup>93</sup> Opticomm submission to discussion paper, p. 6.

<sup>94</sup> ACCC, Interim access determination for the superfast broadband access service, Explanatory note, July 2016.

## 6. Other declaration coverage issues

In response to the discussion paper, Optus and NBN Co raised issues in relation to the coverage of the SBAS declaration. These issues and our response to them are discussed below.

### 6.1. Submissions

Optus expressed concern that the SBAS declaration extends to a range of business services that are not covered by the LBAS declaration. It claimed this wider coverage is inconsistent with Government NBN level playing field policies and also noted that price benchmarks set for residential grade services are different to those that would be appropriate for business services.<sup>95</sup>

Optus also requested that the ACCC clarify its intended scope of the SBAS declaration and provide the information it relied upon to determine that the inclusion of previously unregulated business services is consistent with legislative provisions.<sup>96</sup>

NBN Co suggested that based on recent activity by providers of wireless services, that the ACCC consider revisiting the SBAS declaration to make it technologically neutral.<sup>97</sup>

### 6.2. Draft decision

In response to Optus's concerns expressed in its submission about the intended scope of the SBAS declaration, we confirm that it is intended to cover business services other than those provided exclusively to business, government and charity customers from a multiplexer or node within CBD areas of Australian capital cities. The declaration excluded services supplied exclusively to business, government and charity customers within CBDs, but not elsewhere on the basis that in other areas these customers were not considered to be served by competitive infrastructure. In particular, we considered the likely market outcomes for businesses located in business parks where there was only one vertically integrated fibre provider.

Our draft decision is that it is not necessary to deal further with the issue of whether the regulated terms should apply to business customers beyond setting benchmark prices for the entry level 25/5 Mbps product (and the equivalent 30/1 Mbps FAB product).

On the issue of concern about the price regulation that that is to apply under the SBAS FAD (and that is currently applied under the IAD), it is for residential grade anchor products, and there is no requirement that these prices are to be applied to business grade services. In the note accompanying the SBAS IAD, we stated that 'SBAS operators can offer other SBAS products not specified in the IAD at commercially negotiated prices' and this is also intended to apply under the terms and conditions of the draft SBAS and LBAS FADs (see in particular clause 4.4 of the draft FADs).

In response to NBN Co's proposal that we consider making the SBAS declaration technologically neutral so that wireless services are captured, our view is that it is too early to determine whether these networks should fall within the scope of the declaration. In the declaration decision, they were not considered to be effective substitutes due to limited coverage. While a small number of new networks have emerged since this time, their

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<sup>95</sup> Optus submission to discussion paper, pp. 2-4

<sup>96</sup> *Ibid.* p. 1.

<sup>97</sup> NBN Co submission to discussion paper, p. 4.

coverage also remains small and it is unclear at this point the extent to which their implementation and coverage plans will be realised.

Our view is that the question of their inclusion in the declaration remains open. To the extent these networks are implemented in isolation they could be considered monopolies and regulation via declaration could be necessary. Alternatively these networks could increasingly be a substitute for services on fixed line superfast networks, which would justify a greater relaxation of access regulation on these fixed line networks.

We will, however, examine the growth of wireless networks in the communications market study.<sup>98</sup> Accordingly, our draft decision is that we will not consider the technological scope of the SBAS declaration as part of this FAD process.

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<sup>98</sup> See <http://www.accc.gov.au/about-us/market-studies/communications-sector-market-study>

## 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>99</sup> A FAD can be retrospective<sup>100</sup>, can be expressed to commence at a time following the expiry of an existing FAD<sup>101</sup> or to not commence prior to the commencement of a declaration.<sup>102</sup>

We propose that when FADs for the SBAS and for the LBAS have been developed, they would commence upon publication. A FAD must have an expiry date, which should align with the expiry of the declaration for that service 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.

In the discussion paper we stated that in specifying an expiry date for the SBAS FAD, we would seek to appropriately balance the need for sufficient stability and certainty to support industry investment and planning, and the potential for the FAD to fall out of step with industry changes.

We also expressed the view that as the declaration for the SBAS expires on 28 July 2021 the FAD for the SBAS should expire when the SBAS declaration expires. This would result in a regulatory period for the SBAS FAD of around four to four and a half 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>103</sup>

We invited submissions on the appropriate duration for any SBAS or LBAS FAD.

### 7.1. Submissions

Opticomm submitted that the FADs should commence at publication (no retrospectivity) and should both expire upon expiry of the SBAS declaration.<sup>104</sup>

Telstra stated that both FADs should expire in line with the SBAS declaration on 28 July 2021.<sup>105</sup>

Clublinks **[start c-i-c] [end c-i-c]**.<sup>106</sup>

NBN Co stated that while it is supportive of the proposed length of the terms for the FAD, these should not be 'set and forget' periods – and that the ACCC be open to the possibility of making variations if need be.<sup>107</sup>

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<sup>99</sup> Section 152BCE(1) of the CCA.

<sup>100</sup> Section 152BCE(2) of the CCA.

<sup>101</sup> Section 152BCE(1) of the CCA.

<sup>102</sup> Section 152BCE(4A) of the CCA.

<sup>103</sup> Section 152BCN (2) of the CCA

<sup>104</sup> Opticomm submission to discussion paper, p. 6.

<sup>105</sup> Telstra submission to discussion paper, p.20.

<sup>106</sup> Clublinks submission to discussion paper, p. 18.

<sup>107</sup> NBN Co submission to discussion paper, p. 4.

## **7.2. Draft decision**

Our draft decision is that both FADs should expire at the end of the SBAS declaration on 28 July 2021. This reflects that this period seems 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 will however monitor the market during this period for pricing and other industry developments that may affect the potential scope of the SBAS declaration.



## Appendix A: SBAS and LBAS draft FAD instruments



## **Final Access Determination No. X 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: X 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).

## **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 the day it is published.

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*.

- 3.2 Unless sooner revoked this FAD remains in force up until and including [insert date].

## **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

**EoSDH** means Ethernet over SDH, that is Ethernet carried in an SDH frame

**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

**ESA** means an exchange service area which is a geographic area generally serviced by a single Exchange

**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

**Metropolitan** means a route where both the transmission points for the beginning and end of the route are within the same Capital City Boundary

**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

**POI** means point of interconnection. A point of interconnection is a physical point of interconnection in Australia between a network operated by a carrier or carriage service provider and another network operated by a service provider

**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

**Regional** means a route where either one or both of the transmission points for the beginning and end of the route are outside a Capital City Boundary other than the Capital City Boundary in respect of Darwin or Hobart

**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

**SDH** means synchronous digital hierarchy and has the same meaning given to that term by the International Telecommunications Union

**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:

<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	\$23.45	\$23.76	\$24.07	\$24.07	\$24.07
Port Zone 2/3 per month	\$28.46	\$28.84	\$29.22	\$29.22	\$29.22
Aggregation per Mbps/month	\$16.65	\$14.12	\$11.63	\$11.63	\$11.63

2.3 In the case of other carriers or carriage service providers and the products specified in 4.3(b) the following charges apply:

<b>Charge component</b>	<b>Initial price</b>	<b>Subsequent price</b>
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

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 amended pricing for either or both of these two NBN Co products. The amended pricing will apply to carriers and carriage service providers from the date of publication of the amended pricing on the NBN Co website.

2.4 In the case of other carriers of carriage service providers and the products specified in 4.3(b) if an industry levy, however described, is introduced by Government with the purpose of funding regional fixed wireless and satellite broadband services then:

- a. If the NBN Co prices for the AVC TC-4 25/5 Mbps and CVC TC-4 are inclusive of the levy no further amount can be charged for the services set out in 4.3(b);
- b. If the NBN Co prices for the AVC TC-4 25/5 Mbps and CVC TC-4 are not inclusive of the levy a further amount equivalent to the levy can be charged for the services set out in 4.3(b).

2.5 Nothing in this Schedule prevents Telstra Corporation Limited from adding an amount equal to the levy described in clause 2.4 of this Schedule to the price specified in clause 2.2.

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## 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.

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## 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: \_\_\_\_\_

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## **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.

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**ATTACHMENT 2**

**[Approved purpose(s)]**

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## 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.

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## 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. X of 2017 (LBAS)**

*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: X 2017

## **1. Application**

- 1.1 This instrument sets out the final access determination (FAD) in respect of the declared local bitstream access service (LBAS).
- 1.4 This FAD replaces the previous FAD for the LBAS (Final Access Determination No. 2 of 2012).
- 1.5 The prices in this FAD are exclusive of tax payable under *the Utilities (Network Facilities Tax) Act 2006 (ACT)*.
- 1.6 The prices in this FAD are exclusive of Goods and Services Tax (GST).

## **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 the day it is published.
- 3.2 Unless sooner revoked this FAD remains in force up until and including [insert date].

## **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
  - (v) 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

**EoSDH** means Ethernet over SDH, that is Ethernet carried in an SDH frame

**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

**ESA** means an exchange service area which is a geographic area generally serviced by a single Exchange

**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

**Metropolitan** means a route where both the transmission points for the beginning and end of the route are within the same Capital City Boundary

**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 provider 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

**POI** means point of interconnection. A point of interconnection is a physical point of interconnection in Australia between a network operated by a carrier or carriage service provider and another network operated by a service provider

**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

**Regional** means a route where either one or both of the transmission points for the beginning and end of the route are outside a Capital City Boundary other than the Capital City Boundary in respect of Darwin or Hobart

**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

**SDH** means synchronous digital hierarchy and has the same meaning given to that term by the International Telecommunications Union

**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 products specified in clause 4.3 of this FAD:

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

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 amended pricing for either, or both, of these two NBN Co products. The amended pricing will apply to carriers and carriage service providers from the date of publication of the amended pricing on the NBN Co website.

- 2.2 In the case of other carriers of carriage service providers and the products specified in 4.3(b) if an industry levy, however described, is introduced by Government with the purpose of funding regional fixed wireless and satellite broadband services then:
- If the NBN Co prices for the AVC TC-4 25/5 Mbps and CVC TC-4 are inclusive of the levy no further amount can be charged for the services set out in 4.3(b);
  - If the NBN Co prices for the AVC TC-4 25/5 Mbps and CVC TC-4 are not inclusive of the levy a further amount equivalent to the levy can be charged for the services set out in 4.3(b).

## 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:

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

- g) provide a revised proposed resolution (Revised Proposed Resolution in this Schedule 3); or
- h) 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.

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## 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: \_\_\_\_\_

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## **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.

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**ATTACHMENT 2**

**[Approved purpose(s)]**

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## 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.

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## 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.