

SCHEDULE B.1

PROPOSED AMENDMENTS TO DRAFT FAD NON-PRICE TERMS



[DRAFT]

Final Access Determination No. X of 2011 (LSS)

Final Access Determination No. X of 2011 (LCS)

Final Access Determination No. X of 2011 (PSTN OA)

Final Access Determination No. X of 2011 (PSTN TA)

Final Access Determination No. X of 2011 (ULLS)

Final Access Determination No. X of 2011 (WLR)

Competition and Consumer Act 2010

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

Date of decision:

Note: Part C of Telstra's response to the Discussion Paper sets out proposed amendments to the draft FADs in light of Telstra's submissions on exemptions. Those amendments are not reflected in this Schedule B.1.

1 Application

- 1.1 This instrument sets out final access determinations in respect of the declared services ('relevant declared service') specified in the table.

Declared service	Expiry of declaration	Title of final access determination	Applicable schedules
Line Sharing Service ('LSS')	31 July 2014	Final Access Determination No. X of 2011 (LSS)	1, 2, 8, 9, 10, 11, 12, 13, 14, 16
Local Carriage Service ('LCS')	31 July 2014	Final Access Determination No. X of 2011 (LCS)	1, 3, 8, 9, 10, 11, 12, 13 , 14
Domestic PSTN Originating Access Service ('PSTN OA')	31 July 2014	Final Access Determination No. X of 2011 (PSTN OA)	1, 4, 8, 9, 10, 11, 12, 13 , 14
Domestic PSTN Terminating Access Service ('PSTN TA')	31 July 2014	Final Access Determination No. X of 2011 (PSTN TA)	1, 5, 8, 9, 10, 11, 12, 13 , 14
Unconditioned Local Loop Service ('ULLS')	31 July 2014	Final Access Determination No. X of 2011 (ULLS)	1, 6, 8, 9, 10, 11, 12, 13, 14, 15, 16
Wholesale Line Rental Service ('WLR')	31 July 2014	Final Access Determination No. X of 2011 (WLR)	1, 7, 8, 9, 10, 11, 12, 13 , 14

Explanation for amendments to clause 1.1 - Please refer to section 2.7.2 (Schedule 13 and WLR, LCS, PSTN OA and PSTN TA) of the submissions.

- 1.2 These FADs do not apply to WLR services provided by a carrier or carriage service provider over the National Broadband Network.

Note:

1. From 1 January 2011:
 - a carrier licence held by a carrier is subject to a condition that the carrier must comply with any access determinations that are applicable to the carrier; and
 - a carriage service provider must comply with any access determinations that are applicable to the provider.
2. An Access Provider and Access Seeker may enter into an Access Agreement relating to a declared service. Access Agreements prevail over inconsistent access determinations: section 152BCC of the *Competition and Consumer Act 2010*.
3. The declared services that are the subject of these final access determinations are commonly referred to as the 'fixed line services'.

2 Definitions and interpretation

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

3 Commencement and duration

3.1 These final access determinations commence on 1 January 2011.

3.2 These final access determinations remain in force up until and including 30 June 2016.

Note:

1. An access determination may come into force on a day which is earlier than the day the determination is made: subsections 152BCF(1) and 152BCF(2) of the *Competition and Consumer Act 2010*.
2. These final access determinations revoke the interim access determinations for these declared services, made on 2 March 2011 by the operation of subsection 152BCF(9A) of the *Competition and Consumer Act 2010*.

3.3 The terms, including price and non-price terms, conditions and limitations set out in these final access determinations do not have effect in respect of each relevant declared service in relation to the time period 1 August 2014 to 30 June 2016, unless by 1 August 2014 the Australian Competition and Consumer Commission ('ACCC') makes a decision to:

- (a) extend or further extend the expiry date of the declaration for the relevant declared service; or
- (b) allow the declaration to expire and to make a new declaration for the relevant declared service

under 152AL of the *Competition and Consumer Act 2010*.

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 of a relevant declared service, 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 final access determination apply only to those terms and conditions where an Access Agreement cannot be reached, no special access undertaking is in operation and no binding rules of conduct have been made: section 152AY of the *Competition and Consumer Act 2010*.

4.2 If the carrier or carriage service provider is required to supply the relevant declared service to a service provider, the carrier or carriage service provider must supply the service:

- (a) at the price specified in the applicable schedule set out in the table below; and

Declared service	Applicable schedule
LSS	2
LCS	3
PSTN OA	4
PSTN TA	5
ULLS	6
WLR	7

- (b) on the non-price terms and conditions specified in the applicable schedules set out in the table

Declared service	Applicable schedule
LSS	8,9,10,11,12,13,14,16
LCS	8,9,10,11,12, 13 ,14
PSTN OA	8,9,10,11,12, 13 ,14
PSTN TA	8,9,10,11,12, 13 ,14
ULLS	8,9,10,11,12,13,14,15,16
WLR	8,9,10,11,12, 13 ,14

Explanation for amendments to clause 4.2(b) - Please refer to section 2.7.2 (Schedule 13 and WLR, LCS, PSTN OA and PSTN TA) of the submissions.

4.3 This clause 4 is subject to clause 5.

5 Limitation on final access determination – previous exemptions

5.1 This clause applies where a determination ('exemption'):

- (a) was made under section 152AS or 152AT of the *Competition and Consumer Act 2010*; and
- (b) was in force immediately before these final access determinations came into force, to the extent that the determination relates to a relevant declared service.

5.2 The standard access obligations do not apply to a carrier or carriage service provider in respect of a relevant declared service to the extent that the exemption would have applied under item 202 or 203 of Schedule 1 to the *Telecommunications Legislation (Competition and Consumer Safeguards) Act 2010* prior to an access determination in relation to that service coming into force.

5.3 This clause 5 continues the operation of the following exemptions as part of these final access determinations:

- (a) LCS, PSTN OA and WLR class exemptions as varied by the ACCC on 18 November 2009; and
- (b) The Australian Competition Tribunal's ('Tribunal') LCS, PSTN OA and WLR 2009 individual exemptions orders as made, affirmed and varied on 24 August 2009 (in the case of LCS and WLR) and 9 September 2009 (in the case of PSTN OA)

5.4 For the avoidance of doubt:

- (a) clause 5.2 is subject to any conditions or limitations specified in the exemptions; and
- (b) these final access determinations provide for the ACCC to perform the following functions, and exercise the following powers, in order to continue the operation of the exemptions in accordance with clause 5.2:
 - (i) collect data from industry on a six-monthly basis for the purpose of calculating which ESAs are to be 'Exemption ESAs' for the purpose of the exemptions;
 - (ii) make the necessary calculations to determine which ESAs are Exemption ESAs for the purpose of the exemptions; and
 - (iii) publish on its website a list of those Exemption ESAs in accordance with the exemptions.

5.5 This clause 5 expires:

- (a) on 24 August 2014 in relation to the WLR and the LCS FADs; and
- (b) on 9 September 2014 in relation to the PSTN OA FAD.

Note:

1. Prior to 1 January 2011, sections 152AS and 15A2T of the *Competition and Consumer Act 2010* provided for the ACCC to make ordinary class exemptions and ordinary individual exemptions from the standard access obligations. These sections were repealed by the *Telecommunications Legislation (Competition and Consumer Safeguards) Act 2010* from 1 January 2011. Items 202 and 203 of Schedule 1 to that Act set out transitional arrangements. Under these provisions, the exemptions continue to have effect until the first access determination relating to access to the relevant declared service comes into force. An access determination may:

- provide that any or all of the standard access obligations are not applicable to a carrier or carriage service provider (either unconditionally or subject to conditions or limitations); or
- restrict or limit the application to a carrier or carriage service provider of any or all of the standard access obligations.

An access determination may also provide for the ACCC to perform functions, and exercise powers, under the determination: section 152BC of the *Competition and Consumer Act 2010*.

2. These exemptions provide for the ACCC to calculate 'Exemption ESAs' every six

Months and publish a list of those Exemption ESAs on the ACCC's website. See: <http://www.accc.gov.au/content/index.phtml/itemId/934407>

6 Fixed principles provisions

- 6.1 This clause 6 sets out fixed principles provisions that apply to the six FADs contained in this document.
- 6.2 The six FADs contained in this document must not be varied so as to remove or alter any of the fixed principles provisions below.
- 6.3 The below fixed principles provisions apply from 1 January 2011. The nominal termination date for the fixed principles provisions is 30 June 2021.
- 6.4 The initial opening regulatory asset base (RAB) for the calculation of prices for the six declared fixed line services is \$17.75 billion as at 1 July 2009.
- 6.5 The RAB is to be rolled forward each year according to the formula below:

$$RAB_{t+1} = RAB_t + capex_t - depreciation_t - asset\ disposals_t$$

where RAB_{t+1} = opening RAB for the next regulatory year

RAB_t = opening RAB for the current year

$capex_t$ = forecast capital expenditure during the current year (after the half-WACC adjustment)

$depreciation_t$ = depreciation during the current year

$asset\ disposals_t$ = asset disposals during the current year

- 6.6 Forecasts for operating expenditures during the regulatory period must be based on reasonable assumptions of the efficient costs likely to be incurred in this period. In making an assessment of the prudent and efficient operating expenditure for the next regulatory period, the ACCC will take into account:
- (a) the access provider's level of operating expenditure in the previous regulatory period,
 - (b) the reasons and evidence supporting changes to operating expenditure in the next regulatory period, and
 - (c) any other relevant information.
- 6.7 Forecasts for capital expenditures during the regulatory period must be based on reasonable assumptions of the efficient costs likely to be incurred in this period. In making an assessment of the prudent and efficient capital expenditure for the next regulatory period, the ACCC will take into account:
- (a) the access provider's level of capital expenditure in the previous regulatory period,
 - (b) the reasons and evidence supporting changes to capital expenditure in the next regulatory period,
 - (c) whether or not the access provider's asset management and planning framework reflects best practice, and
 - (d) other relevant information.

- 6.8 A real vanilla weighted average cost of capital (WACC) will be used in estimating prices.
- 6.9 The initial opening tax RAB at 1 July 2009 is to be set equal to the initial opening RAB as at 1 July 2009, as specified in clause 6.4. The tax RAB is to be rolled forward.
- 6.10 The tax rate used in determining tax liabilities in the building block model will be set equal to the corporate tax rate as specified in subsection 23(2) of the *Income Tax Rates Act 1986* (Cth).
- 6.11 In forecasting demand for the declared fixed line services for the next regulatory period, the ACCC will take into account any forecasts provided by the access provider. In assessing the access provider's forecasts, the ACCC will consider whether the forecasts provided by the access provider:
- (a) based on an appropriate forecasting methodology,
 - (b) based on reasonable assumptions about the key drivers of demand,
 - (c) utilise the best available information, including historical data that can identify trends in demand, and
 - (d) take account of current demand and economic conditions.
- 6.12 Cost allocation factors
- (a) The allocation of the costs of operating the PSTN should reflect the relative usage of the network by various services to the extent that it is possible to obtain reliable information on their usage of the network.
 - (b) To the extent it is possible to obtain reliable information on the direct costs incurred in providing specific services, direct costs should be attributed to the service to which they relate and not more than once to any category of service.
 - (c) The cost allocation factors for shared costs should reflect causal relationships between supplying services and incurring costs where such relationships can be reliably identified without undue cost and effort.
 - (d) No cost should be allocated more than once to any service.

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Schedule 1 – Interpretation & Definitions

Interpretation

In these FADs, 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 CCA 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 as specified in clause 10.10 of Schedule 10

ACMA means the Australian Communications and Media Authority

Band means the geographic classification of exchange service areas (ESAs)

Band 1 means the following ESAs located in central business districts:

- (a) NSW (City South, Dalley, Haymarket, Pitt, Kent);
- (b) QLD (Charlotte, Edison, Roma Street, Spring Hill);
- (c) South Australia (Flinders, Waymouth);
- (d) Victoria (Batman, Exhibition, Lonsdale); and
- (e) WA (Bulwer, Pier, Wellington)

Band 2 means an ESA with more than 108.4 services in operation in a square kilometre area at the time this determination is made, which is not a Band 1 ESA

Band 3 means an ESA with 6.56 or more, but less than 108.4, services in operation in a square kilometre area at the time this determination is made

Band 4 means an ESA with 6.55 or less services in operation in a square kilometre area at the time this determination is made.

Note: These Band definitions are taken from Annexure A (Key Performance Indicators Operational Document) to Telstra's Service Quality Strategy dated 23 June 2006 (available at http://telstrawholesale.com//dobusiness/customer-commitment/docs/op_sep_quality_strategy.pdf).

Bank Guarantee means an irrevocable and unconditional undertaking by a financial institution (acceptable to the Access Provider) carrying an Australian banking licence, requiring the financial institution to pay on demand whether by one or more requests.

Explanation for new definition of "Bank Guarantee" - This definition has been proposed as a result of amendments to clause 9.4 in relation to Bank Guarantees.

Billing Dispute means a dispute relating to any alleged inaccuracy, omission or error in relation to a Charge in an invoice issued by the Access Provider to the Access Seeker ~~a Charge or an invoice issued by the Access Provider~~

Explanation for new definition of "Billing Dispute" - Please refer to section 2.2.2 (Definition of "Billing Dispute") of the submissions.

Billing Dispute Notice means a notice given pursuant to clause 8.11 in Schedule 8 in a form and containing the particulars or information reasonably required by the Access Provider.

Explanation for new definition of "Billing Dispute Notice" - The FADs should provide guidance on the form and content of the Billing Dispute Notice. A consistent form of notice will be administratively easier to work with for both parties and will assist the Access Provider in responding in a timely manner. To this end, the Access Provider will require the notice to be accompanied by information such as the Service affected, the invoice(s) to which the Billing Dispute Notice relates, the account and the amount(s) disputed, and the basis of the dispute etc. Bearing in mind that the Access Provider has a finite period within which to resolve the dispute, this amendment, along with the proposed amendments to clause 8.17, will ensure that the Access Provider receives all relevant information either at the time of receiving the Billing Dispute Notice, or (in the case of the proposed amendments to clause 8.17 below) very shortly thereafter.

Billing Dispute Procedures means the procedures set out in clauses 8.11 to 8.29 in Schedule 8

Breach Notice has the meaning set out in clause 14.5 of Schedule 14

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 CAN means a customer access network

Capped Exchange means an exchange that is included on a list that the Access Provider has published of exchanges that are subject to capacity constraints

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 set out in this FAD for the supply of a Service by the Access Provider to the Access Seeker under this FAD

Explanation for new definition of "Charge" - Please refer to section 2.2.1 (Definitions of "Service" and "Charge") of the submissions.

Common Infrastructure Works means where an Access Seeker increases the capacity of existing Facilities at an Exchange that could be used by itself and other service providers.

Complex Service means any service which is not a fixed service comprising:

- (a) a connection from a carrier or carriage service provider network boundary to the local exchange;
- (b) a telephone number; and
- (c) access to other kinds of telecommunication services which is indicated by dial-tone

Connect Outstanding process has the meaning set out in clauses 16.24 and 16.25 of Schedule 16

Confidential Information means all information (which in respect of an Access Seeker only, includes End-User Details), 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 Services supplied under this FAD ~~business of a party~~ **(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 or a breach of any other obligation of confidence in favour of the provider of the Confidential Information or by any other unlawful means of which the acquirer of the confidential information is aware);
- (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 information or any part of it cannot be identified with, or attributed to, the Access Seeker.

Explanation for amendments to definition of "Confidential Information" - Please refer to section 2.6.1 (Confidential Information Definition) of the submissions.

Coordinated Capital Works Program means a planned Major Network Modernisation and Upgrade with respect to the LSS or the ULLS that extends across more than one exchange service area but does not include an Emergency Network Modernisation and Upgrade

Coordinated Capital Works Program Forecast has the meaning set out in clause 13.10 of Schedule 13

Coordinated Capital Works Program Schedule has the meaning set out in clause 13.14 of Schedule 13

Disclosing Party has the meaning set out in clause 11.5 in Schedule 11 of this FAD

[Draft Report](#) has the meaning set out in clause 11.11(l) of this FAD.

Explanation for new definition of "Draft Report" - This definition has been proposed as a result of amendments to clause 11.11(l).

Emergency means [a national security alert or](#) an emergency due to an actual or potential occurrence (such as fire, flood, storm, earthquake, explosion, accident, epidemic, [vandalism, theft](#) 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; ~~and;~~
- (c) [for the purposes of Schedule 13, being an emergency which](#) requires a significant and co-ordinated response

Explanation for amendment to definition of "Emergency" -

The first amendment makes clear that "Emergency" includes, for example, activation of the government's "Emergency Alert" notification system.

The second amendment has been made in order to bring the definition of "Emergency" into line with the definition in a previous, publicly available FD.

As to the third amendment, other than for the purposes of Schedule 13, it is not appropriate that the emergency require a "significant and co-ordinated response". For example, where an Access Provider can suspend the provision of a Service, or where it might need to contact only one or a few end users of an Access Seeker.

Emergency Network Modernisation and Upgrade means a Major Network Modernisation and Upgrade that is required and is reasonably necessary and a proportionate response to address an Emergency

End-User Details means [information concerning an Access Seeker's end-user who utilises a Service \(or a service derived from a Service\) and which is supplied by the Access Seeker to the Access Provider under this FAD \(including end-user name and address, end-user contact details, account number and service number, but does not include product or service usage information\).](#)

Explanation for new definition of "End-User Details" - This definition has been proposed as a result of amendments to Schedule 11 (specifically clauses 11.11 and proposed new clause 11.Y).

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

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

Exemption ESA has the same meaning given to that term in the Australian Competition Tribunal's 2009 WLR, LCS and PSTN OA Individual Exemption Orders.

Expert Committee means a committee established under clause 10.11 in Schedule 10

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

[Final Report has the meaning set out in clause 11.11\(m\) of this FAD.](#)

Explanation for new definition of "Final Report" - This definition has been proposed as a result of amendments to clause 11.11(m).

General Notification has the meaning set out in clause 13.1

Independent Auditor means a person appointed as an independent auditor in accordance with clause 11.11 of Schedule 11

Individual Notification has the meaning set out in clause 13.1 of Schedule 13 Initiating Notice has the meaning as set out in clause 10.11 of Schedule 10 LCS means local carriage service

Limitation Notice has the meaning set out in clause 16.10 of Schedule 16

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

LSS means line sharing service

Major Network Modernisation and Upgrade means a modernisation or upgrade that:

- (a) involves the installation of Telstra customer access modules closer to end- users than a Telstra exchange building;
- (b) requires the removal/relocation of the LSS or the ULLS provided from Telstra exchange buildings and the establishment of a new POI (or relocation of an existing POI) for the LSS or the ULLS, or alteration of deployment classes of equipment used on the LSS or the ULLS; or
- (c) 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 (NBN) related upgrade

MDF means a main distribution frame

MNM means managed network migration

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 9.87 of Schedule 9 of this FAD

Payment Breach means a failure by the Access Seeker to pay any amount owing under this FAD by the due date for payment.

Explanation for new definition of "Payment Breach" - This definition has been proposed as a result of amendments to Schedules 9.5(c)(ii), 11.X(a)(A), 14.1(e) and 14.4(a).

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

Proof of Occupancy means a document that verifies occupancy by the end-user at the service address

PSTN means public switched telephone network

PSTN OA means public switched telephone network originating access service

PSTN TA means public switched telephone network terminating access service

Reseller means a person who acquires:

- (a) a Service or a service derived from a Service, from the Access Seeker; or
- (b) a service from a person described in (a) above,

for the purposes of reselling, or transforming and then selling, to end-users.

Explanation for new definition of "Reseller" - This definition has been introduced as a result of the insertion of clause 12.Y.

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.

Explanation for new definition of "Security Deposit" - This definition has been proposed as a result of amendments to clause 9.4.

Security means the amount and form ~~type~~ of security ~~provided, or~~ required to be provided; to the Access Provider in respect of the provision by the Access Provider of Services, under ~~as set out in~~ Schedule 9

Explanation for amendment to definition of "Security" - This is a consequential amendment as a result of the proposed amendment to clause 9.3.

Service means a service declared under section 152AL of the CCA and set out in clause 1.1 of this FAD

Explanation for amendment to definition of "Service" - Please refer to section 2.2.1 (Definitions of "Service" and "Charge") of the submissions.

Service Qualification is a desktop process where the Access Provider checks:

- (a) the availability of the ULLS from the end user side of the customer access module to the end-user's property boundary point; and
- (b) that the use on that ULLS of the Access Seeker nominated deployment class complies with the Network Deployment Rules Industry Code

Structural Separation Undertaking means:

- (a) the undertaking given by Telstra under subsection 577A(1) of the Telecommunications Act 1997 (Cth) which comes 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) the migration plan approved by the ACCC under Subdivision B of Division 2 of Part 22 of the Telecommunications Act 1997 (Cth) which, pursuant to subsection 577BE(5), forms 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 schedules, annexures and attachments to such documents.

Explanation for new definition of "Structural Separation Undertaking" - This definition has been proposed as a result of amendments to Schedules 10 and 11.

[STS has the meaning given by section 6 of the Telecommunications \(Consumer Protection and Services Standards\) Act 1999 \(Cth\)](#)

Explanation for new definition of "STS" - This is a consequential amendment as a result of the proposed amendments to clause 16.25.

Suspension Event has the meaning set out in clause 14.2 of Schedule 14

Suspension Notice has the meaning set out in clause 14.2 of Schedule 14

TEBA space means Telstra Exchange Building Access space

Transfer means the transfer of a LSS to a ULLS where there is no change of service provider.

ULL means unconditioned local loop

ULLS means unconditioned local loop service

[Undertaking means an undertaking of the Access Provider accepted or taken to be accepted by the ACCC or the Australian Competition Tribunal under Division 5 of Part XIC of the CCA, including any Structural Separation Undertaking.](#)

Explanation for new definition of "Undertaking" - This definition has been proposed as a result of a proposed new clause at the end of Schedule 14 in relation to the withdrawal of a Service to comply with an Undertaking.

WLR means wholesale line rental service

Schedule 8 – Billing and Notifications

- 8.1. The Access Seeker’s liability to pay Charges for a 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.
- 8.2. The Access Seeker must pay Charges in accordance with this FAD, including but not limited to this Schedule 8.
- 8.3. Subject to clause 8.4, the Access Provider shall provide the Access Seeker with an invoice each Month in respect of Charges payable for Services ~~and associated work supplied in each billing period. A billing period shall be a period of one Month~~, unless the parties agree otherwise.

Explanation for above amendments to clause 8.3 - The original wording of this clause appeared to be dealing with two concepts - billing period and billing frequency - which made it unclear as to what it was seeking to achieve. Assuming that the main intent of the clause was to dictate billing frequency, Telstra has suggested the above amendments to clarify that issue.

~~Clause should be limited to the frequency of invoicing, not the period over which charges may accrue, and should provide for invoices to be issued monthly unless otherwise agreed. Other charges shall be invoiced by the Access Provider at the following times:~~

- ~~(a) — as stated in an applicable price list;~~
- ~~(b) — as stated in any applicable billing and settlement procedures;~~
- ~~(c) — as stated in or incurred under this FAD; or~~
- ~~(d) — as otherwise agreed by the Access Provider and the Access Seeker or, failing agreement, at the option of the Access Provider, on completion of the relevant work or when the outstanding amount reaches \$50,000 (as the case requires).~~

Explanation for the above proposed deletion in clause 8.3 - The proposed deletion above is a consequential amendment given that the FAD non-price terms should be limited to “Charges” payable for the Services supplied under this FAD, for the reasons set out in 2.2.1 (Definitions of “Service” and “Charge”) of the submissions.

- 8.4. As a statement of general principle, the Access Provider may invoice the Access Seeker more frequently than once a Month, where there has been a decline in the Access Seeker’s creditworthiness as assessed in accordance with Schedule 9.
- 8.5. The Access Provider shall be 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 8.6, no more than six Months have elapsed since the date the relevant amount was incurred by the Access Seeker’s customer, except:

- (i) where 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 a new Service, or a new Charge or a new component of a Charge and are being billed for the first time, in which case such Charges may be invoiced up to eight Months after the relevant amount was incurred by the Access Seeker's customer, provided that, as soon as reasonably practicable after becoming aware that invoicing for the relevant Charges will be delayed, the Access Provider notifies the Access Seeker that the relevant Charges will be invoiced at a later time ~~subject to agreement with the Access Seeker (such agreement not to be unreasonably withheld)~~; or

Explanation for amendments to clause 8.5(b)(ii) - The extended time period should apply to a new Charge (in the event that the FADs are varied) or a new component of a Charge charged for the first time (eg ACT utilities tax) so long as notice is provided. This is because in certain situations the Access Provider may need that extended time period in order to update or amend its billing systems to be able to bill for the relevant new Charge, or component of a Charge billed for the first time, as the case may be. Telstra does not believe that it is appropriate for the extension to be subject to agreement by the Access Seeker where the reason for such an extension is outside the control of the Access Provider.

- (iii) 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.

8.6. 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) and the provisions of any applicable industry code registered pursuant to Part 6 of the *Telecommunications Act 1997* (Cth) in relation to billing.

8.7. Subject to any Billing Dispute notified in accordance with this FAD, 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. 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. All amounts owing and unpaid after the due date shall accrue ~~incur a liability for~~ interest daily from the due date up to and including the date it is paid at the rate per annum of the 90 day authorised dealers bank bill rate published in the *Australian Financial Review* on the first Business Day following the due date for payment, plus 2.5%.

Explanation for amendments to clause 8.7 - Consistent with clause 8.20, interest on overdue amounts covered by this clause should accrue on a daily basis.

8.8. In addition to charging interest in accordance with clause 8.7 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. ~~For the avoidance of doubt, this clause 8.8 shall be subject to the Billing Dispute Procedures.~~

Explanation for amendments to clause 8.8 - In relation to the first amendment to clause 8.8, please refer to section 2.2.3 (Taking action for unpaid amounts) of the submissions. The second amendment to clause 8.8 clarifies that a Billing Dispute must be *notified in accordance with the FAD*. The third amendment, being the proposed deletion of the last sentence, has been proposed as Telstra considers that the issue it is seeking to address is covered by the second proposed amendment.

- 8.9. Unless the parties otherwise agree, there shall be 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 the administration and financial costs, the parties shall 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.
- 8.10. 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 ~~component of~~ the invoice. Nothing in this clause 8.10 is intended to limit subsections 152AR(6) and 152AR(7) of the CCA.

Explanation for amendment to clause 8.10 - The obligation should relate only to Charges in an invoice, rather than other charges which will be covered by separate commercial agreements between the parties. For example, information regarding the IDD rates payable by the Access Seeker might be listed on the relevant invoice, but that information should not be the subject of these FAD terms.

- 8.11. If the Access Seeker believes a Billing Dispute exists, it may, by written notice to the Access Provider, invoke the Billing Dispute Procedures (**Billing Dispute Notice**). A Billing Dispute must be initiated only in good faith.
- 8.12. Except where a party seeks urgent injunctive relief, the Billing Dispute Procedures must be invoked before either party may begin legal or regulatory proceedings in relation to any Billing Dispute.
- 8.13. 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. 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).
- 8.14. Except where payment is withheld in accordance with clause 8.13, 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.

- 8.15. A Billing Dispute Notice may not be given to the Access Provider in relation to a Charge later than 65 Business Days (for Charges relating to WLR or LCS) or six Months (for any other Charges) after the due date for the invoice for the Charge issued in accordance with 8.7.

Explanation for amendment to clause 8.15 - The six month period is not appropriate for rebill services, such as WLR and LCS. This is because the Communications Alliance Ltd "Telecommunications Consumer Protections Code" provides that a Supplier (the Access Provider) must not delay the billing of charges to another Supplier (the Access Seeker) in the billing chain by more than 95 days from the date that the charge was incurred by the Customer (end user). Accordingly, the Access Provider needs time to consider the Billing Dispute Notice and render an adjusted bill (if applicable) within that 95 day timeframe.

8.16.

- (a) The Access Provider shall 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 8.16(a), the Access Provider must:
- (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 8.16(a), the Access Provider is taken to have accepted the Billing Dispute Notice.

Explanation for amendments to clause 8.16 - Telstra is concerned that clause 8.16, as originally drafted, did not set a clear process for how Billing Dispute Notices should be lodged and dealt with. It is proposed that the Access Provider should be able to reject a Billing Dispute Notice if, based on the information provided by the Access Seeker, there are legitimate grounds to do so. Five Business Days for making the decision strikes a balance between timely resolution of the dispute and giving the Access Provider an opportunity to consider whether it has sufficient and correct information from the Access Seeker in order to commence the process of making a determination.

- 8.17. The Access Seeker ~~Each party~~ shall, as early as practicable and in any case within five Business Days after the Access Provider accepts a Billing Dispute Notice, provide to the other party any further relevant information or materials (which was 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).

Explanation for above amendments to clause 8.17 -

Upon acceptance of the Billing Dispute Notice by the Access Provider, the Access Seeker should provide any additional relevant materials to that provided with the Billing Dispute Notice, on which it intends to rely. A period of five Business Days ensures that any such information is provided in a timely manner.

Second, whilst a mutual exchange of information on its face seems a reasonable concept, in reality the current drafting fails to recognise the iterative nature of the billing dispute process. In practice, the Access Seeker will first provide its information to the Access Provider to enable the Access Provider to consider that material. At this stage, the Access Seeker will not require any information from the Access Provider, as the Access Provider will not have made a proposed resolution. Rather, the Access Provider should provide or reference (eg where it is referencing a contractual provision) the information it relies upon in making its proposed resolution *at the time of notifying the other party of that resolution* (this is set out in our proposed amendment to **clause 8.18** below). Providing the material at the time of making the determination enables the Access Seeker to consider whether it needs to escalate the dispute, if the determination is not in its favour.

Without affecting the time within which the Access Provider must make the proposed resolution under clause 8.18, the Access Provider may request any additional information from the Access Seeker that it reasonably requires for the purposes of making a proposed resolution at any time prior to 10 Business Days of the date on which the Access Provider must make the proposed resolution under clause 8.18. 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.

Explanation for above amendments to clause 8.17 - In its consideration of the information provided by the Access Seeker in relation to the Billing Dispute, the Access Provider may form the view that further information is required in order to make a proposed resolution.

Five Business Days for the provision of the information by the Access Seeker balances the need for a swift response so that the information can be considered by the Access Provider in making its proposed resolution of the dispute, and providing sufficient time to the Access Seeker to enable it to provide such a response. Finally, if the Access Seeker does not provide the information, that should be able to be taken into account by the Access Provider.

8.18. The Access Provider shall try to resolve any Billing Dispute as soon as practicable and in any event within 30 Business Days of ~~accepting receipt of~~ a Billing Dispute Notice under clause 8.16 (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 shall:

Explanation for above amendments to clause 8.18 - The time should not begin to run for the Access Provider's proposed resolution until the Access Provider has accepted the Billing Dispute, as this will be the point at which the Access Provider accepts that it has sufficient information to begin considering the dispute.

(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

Explanation for above amendments to clause 8.18(a) - Please refer to the comments in clause 8.17. The Access Provider should be obliged to provide the information that it has relied upon in making its proposed resolution *at the time of notifying the Access Seeker of that resolution*. If the Access Provider relies on a contract term, a reference to that contract will be included in the resolution, but a copy of the contract will not be provided, as the Access Seeker will already have a copy.

(b) set out any action to be taken by:

(i)~~(a)~~ the Access Provider (e.g. withdrawal, adjustment or refund of the disputed Charge); or

(ii)~~(b)~~ 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 8.18 (such consent not to be unreasonably withheld).

Explanation for above amendment to clause 8.18(b) - While in the ordinary case a timeframe of 30 Business Days to provide a proposed resolution is appropriate, such a timeframe may not be suitable in all situations, particularly where the Billing Dispute is complex. For this reason, the Access Provider should have an ability to ask the Access Seeker for an extension of time to provide a proposed resolution, with the agreement from the Access Seeker not to be unreasonably withheld.

Explanation for proposed new clause - The additional step of permitting an Access Seeker to request the Access Provider to review its proposed resolution has historically enabled parties to resolve the vast majority of such disputes without the need for further escalation. Whilst adding another step into the process, it appears that this further iterative step prior to escalation often results in the parties being able to resolve whatever issue exists between them. This amendment will require consequential changes to relevant clauses in this Schedule.

8.X If the Access Seeker does not agree with the Access Provider's proposed resolution, it must object to the proposed resolution within five Business Days of notification of the

proposed resolution (or such longer time 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 8); or
- (f) confirm its proposed resolution.

8.19. 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 ~~within~~ as soon as practicable and in any event within one Month of the Access Provider's notice of its proposed resolution under clause 8.18 or its Revised Proposed Resolution under clause 8.X (as applicable), unless the Access Seeker escalates the Billing Dispute under clause 8.23. 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 24 hours of its proposed resolution under clause 8.18 or its Revised Proposed Resolution under clause 8.X (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.

Explanation for amendments to clause 8.19 - This amendment takes into account the circumstance in which an Access Provider cannot - for practical reasons - withdraw, adjust or refund the disputed Charge to an Access Seeker within one month. Telstra agrees with the concept that adjustment or payment as a result of the resolution of a Billing Dispute should occur as soon as practicable. However, depending on the timing of issuing the Access Seeker's invoice and the timing of the resolution of the Billing Dispute, it may not be able to do so within one month. That is because invoices for Access Seekers are issued monthly. Thus, Telstra may not be able to change the next invoice in time if the Billing Dispute is resolved shortly before the invoice for that month is issued. In those circumstances, the withdrawal, adjustment or refund of the disputed Charge by the Access Provider may not be able to occur until the issuing of the next month's invoice.

8.20. Where the Access Provider is to refund a disputed Charge, the Access Provider shall pay interest (at the rate set out in clause 8.7) on any refund. Interest shall accrue 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.

8.21. Where the Access Seeker is to pay a disputed Charge, the Access Seeker shall pay interest (at the rate set out in clause 8.7) on the amount to be paid. Interest shall accrue 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.

8.22.

(a) If the Access Seeker, having first submitted an objection to the Access Provider under clause 8.X, is not satisfied with the Access Provider's ~~proposed resolution~~ Revised Proposed Resolution or confirmation of its proposed resolution made under clause 8.X in relation to a Billing Dispute, or if the Access Provider has not provided the Access Seeker with a proposed resolution or Revised Proposed Resolution to the Billing Dispute within the timeframes set out in clauses 8.18 and 8.X (as applicable), the Access Seeker may escalate the matter under clause 8.23.

(b) If the Access Seeker does not do so within five~~30~~ Business Days of the earlier of:

(i) the end of the period for making a proposed resolution under clause 8.18 or Revised Proposed Resolution under clause 8.X (as applicable); and

(ii) the date on which the Access Seeker is ~~being~~ notified of the Access Provider's proposed resolution or Revised Proposed Resolution (or a longer period if agreed by the parties),

the Access Seeker shall be deemed to have accepted the Access Provider's proposed resolution or Revised Proposed Resolution (as applicable) and clauses 8.20 and 8.21 shall apply.

Explanation of amendments to clause 8.22(b) - please refer to section 2.2.4 (Time period for escalating Billing Dispute) of the submissions in relation to the first proposed amendment concerning the time frame for escalating the Billing Dispute.

Further, the time from which the escalation time period commences must include a situation where the Access Provider does not provide a resolution to the Billing Dispute by the expiry of the time period in clause 8.18. The amendment above ensures that the Access Seeker can escalate a dispute within 5 Business Days of the earlier of: (i) the expiry of the period set out in clause 8.18 or Revised Proposed Resolution under clause 8.X (as applicable); or (ii) the time at which it is notified of the Access Provider's proposed resolution or Revised Proposed Resolution.

8.23. 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 ~~proposed resolution~~; and

(b) seeking escalation of the Billing Dispute.

8.24. A notice under clause 8.23 must be submitted to the nominated billing manager for the Access Provider, who shall 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 8.23 (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.

Explanation for amendments to clause 8.24 - This amendment provides for escalation to commercial managers if there is no resolution following discussion between billing personnel. In practice, this tends to be a speedier and cheaper option for the resolution of disputes than any option involving third parties.

- 8.25. 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 ~~matter cannot be resolved~~ under clause 8.24 ~~within five Business Days of notice being given under clause 8.23 (or such longer period as agreed between the parties):~~

Explanation for amendments to clause 8.25 - Consequential amendment as a result of amendment to clause 8.24.

- (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 shall be conducted in accordance with the mediation guidelines of the 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 8.25(a) or are unable to resolve the entire Billing Dispute by mediation, either party may commence legal or regulatory proceedings to resolve the matter.

Explanation for amendments to clause 8.25(b) - In the interests of certainty, the parties should be required to agree (or not agree) to proceed to mediation within a defined timeframe. Telstra suggests 5 Business Days.

- 8.26. The parties shall ensure that any person appointed or required to resolve a Billing Dispute shall take into account the principle that the Access Seeker shall be 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 shall apply only to the extent to which the Billing Dispute is resolved against the Access Provider; and
- (b) such principle shall apply 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.
- 8.27. Each party must continue to fulfill its obligations under this FAD while a Billing Dispute and the Billing Dispute Procedures are pending.
- 8.28. 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 8.24 (or their respective nominees).

8.29. There shall be a presumption that all communications between the parties during the course of a Billing Dispute are made on a without prejudice and confidential basis.

Clause 8.30 should be deleted, but if not, it is proposed that the clause be amended as marked up below.

8.30. If it is determined by the Billing Dispute Procedures, any other dispute resolution procedure, or by agreement between the parties, that:

(a) three or more out of any five consecutive invoices for a given Service are incorrect by 5% or more; and;

(b) the reason or basis for the inaccuracy of those invoices is the same,

Explanation for above amendment to clause 8.30 - Please refer to section 2.2.5 (Consequences of inaccurate invoicing) of the submissions.

then, for the purposes of clause 8.20, the interest payable by the Access Provider in respect of the overpaid amount of the invoices in question shall be the rate set out in clause 8.7, plus 2%. The remedy set out in this clause 8.30 shall be without prejudice to any other right or remedy available to the Access Seeker.

This clause 8.30 does not apply if:

(c) the inaccuracy in the invoices was caused by an error and that error was unknown to the Access Provider at the time of issuing the relevant invoices; and

(d) the Access Provider has agreed to rectify any incorrect invoices.

Explanation for above amendment to clause 8.30 - Please refer to section 2.2.5 (Consequences of inaccurate invoicing) of the submissions.

If three or more out of any five consecutive Billing Disputes initiated by the Access Seeker under this FAD are resolved against the Access Seeker through the Billing Dispute Procedures, then for the purposes of clause 8.21 the interest the Access Seeker must pay on any disputed Charges found to be payable shall be the rate set out in clause 8.7, plus 2%. The remedy set out in this clause 8.30 shall be without prejudice to any other right or remedy available to the Access Provider.

Explanation for above amendment to clause 8.30 - Please refer to section 2.2.5 (Consequences of inaccurate invoicing) of the submissions.

Clause 8.31 should be deleted, but if not, it is proposed that the clause be amended as marked up below.

8.31. If it is determined by the Billing Dispute Procedures, any other dispute resolution procedure, or by agreement between the parties that:

(a) three or more out of any five consecutive invoices for a given Service are incorrect by 5% or more; and

(b) the reason or basis for the inaccuracy of those invoices is the same,

then without prejudice to any other right or remedy available to the Access Seeker, the Access Provider shall be deemed to have breached this FAD and the Access Seeker shall have a right to damages for such a breach.

This clause 8.31 does not apply if:

(c) the inaccuracy in the invoices was caused by an error and that error was unknown to the Access Provider at the time of issuing the relevant invoices;
and

(d) the Access Provider has agreed to rectify any incorrect invoices.

Explanation for above amendment to clause 8.31 - Please refer to section 2.2.5 (Consequences of inaccurate invoicing) of the submissions.

Schedule 9 – Creditworthiness and Security

Explanation for amendments to clause 9.1 -

Telstra proposes that in clause 9.1:

- (a) the provision of Security should be a precondition to the supply of a Service under the FAD (please see section 2.3.1 (Supply not conditional upon provision of Security) of the submissions); and
- (b) the Access Provider should determine the amount and form of Security (please see section 2.3.2 (Amount and Form of Security) of the submissions).

Option 1 - Security as a precondition for supply. Please refer to section 2.3.1 (Supply not conditional upon provision of Security) of the submissions.

- 9.1 Unless otherwise agreed by the Access Provider, prior to the supply of a Service under this FAD the Access Provider must determine the amount and form of any Security and the Access Seeker must (at the Access Seeker's sole cost and expense) provide the Security to the Access Provider. ~~and~~ The Security must be:
- (a) maintained; on terms and conditions reasonably required by the Access Provider ~~and~~
 - (b) maintained for the period set out in clause 9.2; and
 - (c) in the amount and form determined by the Access Provider having regard to the matters set out in clauses 9.3 and 9.4.

Explanation for amendments to clause 9.1(b) and (c): This amendment clarifies the interaction of clause 9.1 with clauses 9.2, 9.3 and 9.4.

~~subject to clause 9.2, the Security (as shall be determined having regard to clause 9.3 and as may be varied pursuant to clause 9.4) in respect of amounts owing by the Access Seeker to the Access Provider under this FAD.~~

Option 2 - If the Commission decides that Security should not be a precondition for supply, then Telstra proposes the following clause 9.1. (Please refer to section 2.3.1 (Supply not conditional upon provision of Security) of the submissions. Please also refer to the corresponding ability to suspend for failure to provide the Security within 10 Business Days after commencement of supply.)

Unless otherwise agreed by the Access Provider, the Access Seeker must (at the Access Seeker's sole cost and expense) provide the Security to the Access Provider. The Security must be:

- (a) maintained on terms and conditions reasonably required by the Access Provider;
- (b) maintained for the period set out in clause 9.2; and
- (c) in the amount and form determined by the Access Provider having regard to the matters set out in clauses 9.3 and 9.4.

9.2.

(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 9.1 for a period of six Months following (but not including) the date on which the last ~~to of following~~ occurs ~~of~~:

(i) cessation of supply of all ~~Service or~~ Services under this FAD, and

Explanation for proposed new clause 9.2(a)(i) - Clause 9.2 should be clarified so that it refers to cessation of the supply of "all Services" and not just a single Service.

(ii) payment of all outstanding amounts under this FAD.

(b) Notwithstanding clause 9.2(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 9.2(a), the Access Provider reasonably believes that 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 of preferences, fraudulent dispositions or otherwise.

Explanation for amendments to clause 9.2(b) - Consistent with normal commercial practice, this amendment is necessary to ensure that the Access Provider is not obliged to release the Security, if during the relevant six Month period following payment of all outstanding amounts under the FADs, it becomes clear that those amounts may be clawed back (ie in an insolvency context). This would apply, for example, if a liquidator is appointed to the Access Seeker during that six Month period.

9.3. In determining the amount and form of ~~T~~the Security (including any ~~varied-altered or additional~~ Security) the Access Provider must only seek such ~~shall only be requested when it is an amount and form of Security as is~~ reasonably necessary to protect the legitimate business interests of the Access Provider and as is ~~shall be of an amount and in a form which is~~ reasonable in all the circumstances. ~~As a statement of general principle the amount of any Security shall~~ having regard ~~be calculated by reference~~ to:

Explanation for above amendments to clause 9.3 - Please refer to section 2.3.2 (Amount and form of Security) of the submissions.

(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 under this FAD but unpaid (excluding any amounts in respect of which there is a current Billing Dispute notified in accordance with this FAD);

Explanation for proposed amendment to clause 9.3(b) - Unpaid amounts should only be excluded in paragraph (b) if they are the subject of a Billing Dispute that has been properly notified in accordance with the procedures contained in Schedule 8.

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.

9.4. Examples of appropriate forms of ~~s~~Security, having regard to the factors referred to in clause 9.3, may include without limitation:

(a) fixed and floating charges;

(b) personal guarantees from directors;

(c) ~~b~~Bank ~~g~~Guarantees;

(d) letters of comfort;

(e) mortgages;

(f) a right of set-off; or

(g) a Security Deposit;

~~(h)(g)~~ a combination of the forms of security referred to in paragraphs (a) to ~~(g)(f)~~ above.

Explanation for above amendments to clause 9.4 - Clause 9.4 should include a "Security Deposit" as this is a very common form of security, especially for smaller Access Seekers.

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).

Explanation for above amendments to clause 9.4 - Given that Security Deposits are common, the proposed inclusion above to clause 9.4 provides certainty in relation to the parties' rights in respect of Security Deposits.

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 not 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.

Explanation for above amendments to clause 9.4 - Bank guarantees are a common form of security. These above amendments ensure that the parties' rights and obligations in relation to replacement of bank guarantees are clearly expressed, so that the Access Provider is not left without any Security.

9.5

- (a) 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.
- (b) The Access Provider may, as a result of such Ongoing Creditworthiness Information, having regard to the factors referred to in clause 9.3 and subject to clause 9.7, reasonably require the Access Seeker to alter the amount, form or 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.

Explanation for amendment to clause 9.5(b) - This amendment clarifies what it means to require the Access Seeker to "alter" the Security.

- (c) In addition to clause 9.5(b), the Access Provider may reasonably require the Access Seeker to alter the amount, form or terms of Security (which may include a requirement to provide additional Security) if:
- (i) the Access Seeker fails to comply with the terms and conditions of any Security provided to the Access Provider;
 - (ii) the Access Seeker fails to restore (within five Business Days) the value of the existing Security in circumstances where the Access Provider exercises its rights in respect the Security (or part of it);
 - (iii) the Access Seeker has committed two or more Payment Breaches in any six Month period;
 - (iv) the Access Seeker applies for a new Service or increases the value of its existing Services by 20% or more.

and the Access Seeker must provide that altered Security within 20 Business Days of a written request being made by the Access Provider.

Explanation for amendments clause 9.5 - It is proposed that clause 9.5 should be broken up into three paragraphs, each dealing with a separate issue. The proposed new clause 9.5(c) sets out additional triggers for requesting an altered Security. For an explanation of this proposed new clause 9.5(c) please refer to section 2.3.3 (Alteration of Security) of the submissions for an explanation of this proposed amendment.

- 9.6. The Access Seeker may from time to time where the circumstances reasonably require request the Access Provider to consent (in writing) to a decrease in the amount of 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 9.3). The Access Provider may request, and the Access Seeker shall promptly provide, Ongoing Creditworthiness Information, for the purposes of this clause 9.6.

Explanation for amendments to clause 9.6 - The first amendment, consistent with clause 9.5(a), limits the frequency of requests to ensure that they are made only when there is a reasonable basis for them.

The second amendment clarifies that the Access Seeker may *only* request that the amount of the Security be decreased. Otherwise, the reference to alteration suggests that the Security may be replaced with alternative Security, which the clause does not seem to contemplate.

- 9.7 In the event that the Access Seeker provides Ongoing Creditworthiness Information to the Access Provider as required by this Schedule 9, 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. In the event that 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.

Explanation for amendments to clause 9.7 - This amendment ensures that there is no discrepancy between the time that the Ongoing Creditworthiness Information is prepared (for example, an audit current as at 30 June) and the time that it is provided to the Access Provider, or if there is, that discrepancy is disclosed to the Access Provider.

- 9.8 For the purposes of this Schedule 9, **Ongoing Creditworthiness Information** means:

- (a) ~~a copy~~ copies of the Access Seeker's most recent management prepared (and if available the most recent annual audited):
- (i) statement of cash flow; ~~published audited~~
 - (ii) balance sheet; and ~~published audited~~
 - (iii) profit and loss statement
- (together with any notes attached to or intended to be read with such cash flow, 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 ~~independent~~ third party. The Access Seeker shall 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:

Explanation for amendments to clause 9.8(b) - A reference to "third party" makes it clear that it is any party other than the Access Seeker, thus avoiding disputes as to who is "independent".

- (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 by the Access Provider to assess the Access Seeker's creditworthiness.

Explanation for amendments to clause 9.8 - Please refer to section 2.3.4 (Meaning of Ongoing Creditworthiness Information) of the submissions.

Clause 9.9 below should be deleted, but if not, it is proposed that the clause be amended as marked up below. Please also refer to section 2.3.5 (Confidentiality undertaking for Ongoing Creditworthiness Information) of the submissions.

- 9.9. The Access Seeker may require a confidentiality undertaking to be given by any third party ~~person~~ having access to confidential information contained in its Ongoing Creditworthiness Information prior to such information being provided to that person.
- 9.10. Subject to this Schedule 9, the parties agree that: ~~the Access Provider may, in its absolute discretion, deem~~
 - (a) a failure by the Access Seeker to provide the warranty set out in clause 9.7 or to provide Ongoing Creditworthiness Information constitutes:

Explanation for proposed new clause 9.10(a) - A failure to provide a warranty as set out in clause 9.7 should lead to the same consequences as a failure to provide Ongoing Creditworthiness Information as otherwise the Access Provider cannot reasonably rely on that information.

- (i) an event entitling the Access Provider to alter the amount, form or terms of the Security (including an entitlement to additional Security) and the Access Seeker must provide the altered Security within 15 Business Days after the end of the period set out in clause 9.5 for providing the Ongoing Creditworthiness Information; and ~~or~~

Explanation for proposed new clause 9.10(a)(i) - The words "alter the amount, form or terms of the Security (including an entitlement to an additional Security)" in the proposed clause 9.10(a)(i) have been inserted for the reasons outlined in relation to clause 9.5(b).

The reason for proposing a timeframe of 15 Business Days to provide the altered Security is that there should be a timeframe for the provision of Security which is consistent with the timeframe in clause 9.5 in that the Access Seeker should provide the altered Security within 15 Business Days.

- (ii) a breach of a material term or condition of this FAD that, without prejudice to any other rights the Access Provider might have either at law or under this FAD, entitles the Access Provider to a right to damages; and

Explanation for proposed new clause 9.10(a)(ii) - If clause 8.31 is retained, consistent with clause 8.31, this amendment in new clause 9.10(a)(ii) and (b)(ii) provides similar remedies for the Access Provider. Refer to section 2.3.6 (Failure to provide Ongoing Creditworthiness Information or altered Security) of the submissions.

Further, the Access Provider should have the ability to choose one or both of subclauses (i) and (ii) in (a) and (b) as a remedy, rather than having to choose one or the other.

- (b) a failure by the Access Seeker to maintain the Security under clause 9.1, provide an altered Security in accordance with clause 9.5 or 9.10(a)(i) or the occurrence of any event set out in clause 9.5(c)(i) to 9.5(c)(iii) constitutes as:

- (i)(a) an event entitling the Access Provider to immediately suspend the supply of Service(s) to the Access Seeker under clause 14.1; and alter the Security of the Access Seeker; or

Explanation for proposed new clause 9.10(b)(i) Please refer to section 2.3.6 (Failure to provide Ongoing Creditworthiness Information or altered Security) of the submissions.

- (ii)(b) a breach of a material term or condition of this FAD that, without prejudice to any other rights the Access Provider might have either at law or under this FAD, entitles the Access Provider to a right to damages for such a breach.

Explanation for above amendment to clause 9.10(b)(ii)
- Please refer to note for proposed new clause 9.10(a)(ii).

- 9.11. Any disputes arising out of or in connection with Schedule 9 shall be dealt with in accordance with the procedures in Schedule 10. Notwithstanding that a dispute arising out of or in connection with Schedule 9 has been referred to the procedures in Schedule 10 and has not yet been determined, nothing in this clause 9.11 or Schedule 10 prevents the Access Provider from exercising any of its rights to suspend the supply of a Service under Schedule 14.

Explanation for amendments to clause 9.11 - Please refer to section 2.8.1 (Circumstances giving rise to a right to suspend) of the submissions.

Schedule 10 – General dispute resolution procedures

- 10.1. 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 a Service ~~under this FAD~~, the dispute shall be managed as follows:
- (a) in the case of a Billing Dispute, the dispute shall be managed in accordance with the Billing Dispute Procedures; or
 - (b) subject to clause 10.2, in the case of a Non-Billing Dispute, the dispute shall be managed in accordance with the procedures set out in this Schedule 10.

[The Access Seeker cannot initiate both a Non-Billing Dispute and a Billing Dispute in relation to the same subject matter.](#)

Explanation for amendments to clause 10.1 -

The first amendment above ensures that only disputes concerning the terms and conditions of the FADs are governed by the dispute resolution procedures in the FADs. To the extent that other disputes arise about terms not set out in the FADs, these will be covered by the relevant commercial agreement between the parties.

The second amendment ensures that the parties are precluded from initiating both the Billing Dispute and Non-Billing Dispute procedures simultaneously, or from using one after the other, in relation to a dispute concerning the same subject matter.

- 10.2. To the extent that a Non-Billing Dispute is raised or arises in connection with, or otherwise relates to, a Billing Dispute, then unless the Access Provider otherwise determines, that Non-Billing Dispute shall be resolved in accordance with the Billing Dispute Procedures. [If the Access Provider provides written notice to the Access Seeker that a dispute initiated by the Access Seeker as a Billing Dispute is, in the Access Provider's reasonable opinion, a Non-Billing Dispute, then the dispute shall be deemed to be a Non-Billing Dispute and the Access Seeker must pay any withheld amounts 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.](#)

Explanation for amendments to clause 10.2 - The Access Provider should have the ability, acting reasonably, to determine that a dispute initiated as a Billing Dispute is in fact a Non-Billing Dispute. Given the ability of the Access Seeker to withhold the payment of any amounts owing under the FADs by initiating a Billing Dispute, the Access Seeker should not be able to do so in circumstances where the dispute is in substance a Non-Billing Dispute. The remaining suggested changes deal with the consequences of a Billing Dispute being deemed a Non-Billing Dispute.

- 10.3. 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 10. A Non-Billing Dispute must be initiated only in good faith.
- 10.4. Any Non-Billing Dispute notified under clause 10.3 shall be referred:
- (a) initially to the nominated manager (or managers) for each party, who shall endeavour to resolve the dispute within 10 Business Days of the giving of the notice referred to in clause 10.3 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 10.11, or by written agreement submit it to mediation in accordance with clause 10.10.
- 10.5. If:
- (a) under clause 10.4 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 10.10(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.
- 10.6. A party may not commence legal proceedings in any court or commence any arbitration (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 10 or clause 10.2 (if applicable) and a notice terminating the operation of the dispute resolution procedure has been issued under clause 10.5; or
- (b) the other party has failed to substantially comply with the dispute resolution procedure set out in this Schedule 10 or clause 10.2 (if applicable).
- 10.7. Each party must continue to fulfill its obligations under this FAD while a Non-Billing Dispute and any dispute resolution procedure under this Schedule 10 are pending.
- 10.8. There shall be a presumption that all communications between the parties during the course of a Non-Billing Dispute are made on a without prejudice and confidential basis.
- 10.9. Each party shall, as early as practicable after the notification of a Non-Billing Dispute pursuant to clause 10.3, 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).
- 10.10. Where a Non-Billing Dispute is referred to mediation by way of written agreement between the parties, pursuant to clause 10.4(b):
- (a) any agreement shall include:
- (i) _____ - a statement of the disputed matters in the Non-Billing Dispute; and
- (ii) _____ the procedures 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;

Explanation for amendments to clause 10.10 - The amendment in subclauses (a) and (b) has been made because the steps set out in the ACDC Guidelines and the timeline for those steps are inconsistent with the 15 Business Days provided for in clause 10.10(a). As a result, clause 10.10(a) has been amended so that the parties' mediation agreement will address the procedures to be followed in the mediation in a manner that complies with the timeline above.

- (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 10.10. In the event of any inconsistency between them, the provisions of this clause 10.10 shall prevail;
 - (c) it is to be conducted in private;
 - (d) in addition to the qualifications of the mediator contemplated by the ACDC Guidelines, the mediator should:
 - (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 shall 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 shall terminate in accordance with the ACDC Guidelines;
 - (g) the parties shall bear their own costs of the mediation including the costs of any representatives and shall each bear half the costs of the mediator; and
 - (h) any agreement resulting from mediation shall bind the parties on its terms.
- 10.11. The parties may by written agreement in accordance with clause 10.4(b), submit a Non-Billing Dispute for resolution by an Expert Committee (**Initiating Notice**), in which case the provisions of this clause 10.11 shall apply as follows:
- (a) The terms of reference of the Expert Committee shall be 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 shall be deemed to be terminated.
 - (b) An Expert Committee shall act as an expert and not as an arbitrator.
 - (c) The parties shall each be 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 10.10(d)(i), (ii) and (iii).
- (e) Each party shall 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~~ the parties shall 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.

Explanation for amendment to clause 10.11(g) - The parties should be able to agree to extend the timeframe for the making of a decision by the Expert Committee where this is considered appropriate.

- (h) If the dispute is not resolved within the timeframe referred to in clause 10.11(g), either party may by written notice to the other party terminate the appointment of the Expert Committee.
- (i) The Expert Committee shall have 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 shall 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 shall each bear half the costs of the independent member of the Expert Committee.

Proposed new clause - To the extent that there are dispute resolution procedures pursuant to various other regulatory obligations (such as a potential Structural Separation Undertaking, for example), the amendment marked up below ensures that if a party commences a dispute resolution process under any of these other regulatory obligations, that party is prevented from engaging, whether at the same time or subsequently, the dispute resolution procedures in the FADs.

10.X This Schedule 14 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 10.12(a); and

(c) the issue the subject of that dispute is the same issue in dispute in the Non-Billing Dispute.

Schedule 11 – Confidentiality provisions

- 11.1. Subject to clause 11.4 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 ~~for the purposes of~~ 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.

Explanation for amendments to clause 11.1 - Please refer to section 2.5.2 (Permitted Use of Confidential Information) of the submissions.

- 11.2. For the avoidance of doubt, information about a particular Service supplied to the Access Seeker that is 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 other than the aggregate Network information of the Access Provider and all Access Seekers to whom the relevant Service is supplied~~) is the Confidential Information of the Access Seeker.

Explanation of proposed amendments to clause 11.2 - The first amendment is necessary because not all information which is generated within the Access Provider's Network which satisfies the conditions of clause 11.2 as currently drafted will be confidential information of the Access Seeker. Only information concerning the particular Service supplied to the Access Seeker that is generated in this way should be considered the Confidential Information of the Access Seeker.

The second amendment is a result of the proposed amendment to the definition of Confidential Information. For an explanation of those amendments, please refer to section 2.5.1 (Confidential Information Definition) of the submissions.

- 11.3. The Access Provider shall 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.

- 11.4. Subject to clauses 11.5, 11.X and 11.Y, Confidential Information of the Access Seeker ~~:~~

~~(a) referred to in clause 11.2; or~~

~~(b) relating to or concerning the Access Seeker's end-users, may be:~~

~~(c) may be~~ used by the Access Provider:

(a)(i) for the purposes of undertaking planning, maintenance, provisioning, operations or reconfiguration of its Network;

(b)(ii) for the purposes of supplying services to the Access Seeker ~~this FAD~~;

~~(c)(iii)~~ for the purpose of billing; or

~~(d)(iv)~~ for another purpose agreed to by the Access Seeker; and

~~(d)~~ —disclosed only to personnel (including contractors and sub-contractors) who, in the Access Provider’s reasonable opinion, require the information to carry out or otherwise give effect to ~~directly involved in~~ the purposes referred to in paragraphs (a) to (d)(e) above.

Explanation of amendments to clause 11.4 -

In relation to the proposed deletion of the old clause 11.4(a) and (b), please refer to section 2.5.2 (Permitted Use of Confidential Information) of the submissions, particularly paragraphs 121 and 122.

In relation to the proposed amendment to the new clause 11.4(b) above, please refer to section 2.5.2 (Permitted use of Confidential Information) of the submissions.

In relation to *whom* the Confidential Information may be disclosed, Telstra makes the following comments:

- first, it should be made clear that personnel includes a party’s contractors and subcontractors (for the same reasons set out in section 2.5.3 (Disclosure of Confidential Information) of the submissions); and
- second, disclosure as contemplated in the old clause 11.4(d) above should be permitted on a “need to know” basis, rather than only to personnel “directly involved” in the purposes outlined in clause 11.4(c). There may be a number of people who need to know information about the supply of services who are not directly involved in the supply of those services. For example, senior management, in circumstances where those persons have a legitimate need (in connection with the clause 11.4(c) activities) to access the information, but where their involvement in the actual clause 11.4(c) activities may not necessarily be “direct”.

- 11.5. 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:

Explanation for above amendment to clause 11.5 - Please refer to section 2.5.3 (Disclosure of Confidential Information) of the submissions.

- (a) to those of its directors, officers, employees, agents, contractors (including sub-contractors) and representatives to whom the Confidential Information is reasonably required to be disclosed ~~for the purposes of this FAD~~;

Explanation for above amendment to clause 11.5(a) - Please refer to section 2.5.3 (Disclosure of Confidential Information) of the submissions.

- (b) to any professional person ~~acting for the Disclosing Party to permit that person to protect or advise on~~ for the purposes of obtaining advice in relation to matters ~~the rights of the Disclosing Party in respect of the obligations of the~~

~~Disclosing Party~~ arising out of or in connection with the supply of a Service under this FAD;

Explanation for above amendment to clause 11.5(b) - Absent these amendments, clause 11.5(b) is very narrow. The clause is limited to disclosures to protect or advise on the rights of the Disclosing Party under the FADs. It, for example, does not make clear that disclosure is allowed to determine the rights and obligations of the party to whom the disclosure has been made. Therefore, a broader approach should be adopted.

- (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 ~~or for the purpose of seeking advice from a professional person in relation thereto;~~

Explanation for above amendment to clause 11.5(d) - This amendment reflects a standard protection applicable to such disclosures which allows the party whose information it is to take steps to either prevent (where possible) the relevant information from being disclosed, or to ensure that the information is only disclosed upon the execution of appropriate confidentiality undertakings.

- (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 152 BEA of the CCA;

Explanation for above amendment to clause 11.5(e) - The Access Provider should not be obliged to provide notice to the relevant Access Seeker each time it provides an access agreement to the Commission pursuant to subs 152BEA of the CCA as this would be unduly onerous.

- (f) with the written consent of the other party provided that if required by the other party as a condition of giving its consent, the Disclosing Party must comply with clause 11.6;
- (g) in accordance with a lawful and binding directive issued by a regulatory authority 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 ~~which is duly authorised to do so;~~

Explanation for above amendment to clause 11.5(g) - See the note in relation to clause 11.5(d) above.

- (h) if reasonably required to protect the safety of personnel or property or in connection with an Emergency;

Explanation for above amendment to clause 11.5(h) - Clause 11.5 does not expressly cover disclosure of Confidential Information in situations of emergency. In the interests of safety, the extent to which an Access Provider can make use of information in these circumstances is something which should be clearly and sensibly set out. Accordingly clause 11.5 should allow disclosure of Confidential information in connection with an emergency. While such communications are contemplated by clause 12.2(e), the amendments above clarify that use and disclosure of Confidential Information can be made in those circumstances.

- (i) as required by the listing rules of any stock exchange where that party's securities are listed or quoted; ~~or~~
- (j) as reasonably required to facilitate an Access Seeker gaining access to Services (including by undertaking Common Infrastructure Works) at a particular Exchange, ~~provided that the Disclosing Party must comply with clause 11.6~~;

Explanation for above amendment to clause 11.5(j) - The Access Provider should not be obliged to comply with the requirements of clause 11.6 every time an Access Seeker is exposed to Confidential Information when gaining access to Services, because obligations of confidence are already imposed on such Access (for example, through existing contracts), and the process of obtaining undertakings would be administratively onerous.

- (k) in the case of the Access Provider, in accordance with a reporting obligation or request from a regulatory authority or any other Government body in connection with the Access Provider's Structural Separation Undertaking; or

Explanation for above amendment to clause 11.5(k) - The Access Provider should be able to disclose Confidential Information to a regulator or government body in response to a request for information relating to a Structural Separation Undertaking.

- (l) in the case of the Access Provider, 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 a Service provided by the Access Provider to the Access Seeker under this Agreement.

Explanation for above amendment to clause 11.5(l) - The Access Provider should be able to disclose Confidential Information to a regulator or government body in response to a request for information relating to interception capability.

Proposed new clause - The Access Provider should have the right to disclose Access Seeker Confidential Information to a credit reporting agency or collection agent following the termination or cessation of supply of Services due to a payment breach or insolvency event, as set out in the proposed clause below.

11.X If:

(a) the Access Provider has the right to suspend or cease the supply of a Service under:

(A) Schedule 14 due to a Payment Breach; or

(B) under clause 14.8; or

(b) after suspension or cessation of the supply of a Service under this FAD, the Access Seeker fails to pay amounts due and 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 11.X(c), disclose to a credit reporting agency:

(A) the defaults made by the Access Seeker to the Access Provider; and

(B) the exercise by the Access Provider of any right to suspend or cease the supply of any Service under this FAD or any service.

Proposed new clause - The proposed clause set out below enables the Access Provider to supply End User Details to another Access Seeker for the purposes set out in subclauses (i) and (ii) below where an end user acquires services from that other Access Seeker (eg where the end user pre-selects to the other Access Seeker).

11.Y If an end user acquires telecommunications services from a carrier or carriage service provider (including the Access Provider) other than Access Seeker (eg, by dialling an override code or Carriage Service Provider specific access code), then:

(a) the Access Seeker authorises the Access Provider to provide End-User Details to the relevant carrier or carriage service provider, or to use End-User Details itself if the telecommunication services are being supplied by the Access Provider:

(i) for the purposes of billing and marketing to the end-user; or

(ii) as required or authorised by Part XIC of the CCA, or any industry code (such as the ACIF C515:2005 Preselection Code) or any other law or regulation with which the Access Provider or the relevant carrier or carriage service provider complies; and

(b) the end-user will also become a customer of that carrier or carriage service provider.

- 11.6. If required by another party as a condition of giving its consent to the disclosure of the Confidential Information of that other party, ~~or where the information is reasonably required to facilitate an Access Seeker gaining access to Services (including by undertaking Common Infrastructure Works) at a particular Exchange~~, the Disclosing Party, before disclosing Confidential Information to a third person, must:

Explanation for amendment to clause 11.6 - This is a consequential amendment if the proposed change to clause 11.5(j) above is adopted.

- (a) impose an obligation upon the disclosee by way of a confidentiality undertaking in the form set out in Annexure 1 of this Schedule 11:
 - (i) to use the Confidential Information disclosed solely for the purposes for which the disclosure is made and to observe appropriate confidentiality requirements in relation to such information; and
 - (ii) not to disclose the Confidential Information without the prior written consent of the other party;
 - (b) obtain an acknowledgment by way of a confidentiality undertaking in the form set out in Annexure 1 of this Schedule 11 from such a disclosee that:
 - (i) the Confidential Information is and at all times remains proprietary to the other party; and
 - (ii) that misuse or unauthorised disclosure of the Confidential Information may cause serious harm to the other party.
- 11.7. 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.
- 11.8. Each party must establish and maintain security measures to safeguard the other party's Confidential Information from unauthorised access, use, copying, reproduction or disclosure.
- 11.9. 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.
- 11.10. Each party acknowledges that a breach of this Schedule 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 11.

11.11. If the Access Seeker ~~has believes there is~~ prima facie evidence which tends to show that the Access Provider has used ~~or~~ is using ~~or is likely to use Confidential Information End-User Details relating to the Access Seeker's end-users~~ for a purpose other than as permitted under clause 11.4, the Access Seeker may invoke the audit procedures set out in this clause 11.11 as follows:

Explanation for amendment to above clause 11.11 - Please refer to section 2.5.4 (Concerns Relating to the Audit Procedures) of the submissions. A consequential amendment should also be made to clauses 11.1(c), (g), (l) and the old clause 11.1(n) below.

- (a) The audit procedures in this clause 11.11 must be initiated only in good faith.
- (b) The Access Seeker shall give the Access Provider a written notice that it intends to initiate an audit in accordance with this clause 11.11.
- (c) The Access Seeker shall nominate an Independent Auditor to conduct an audit of the Access Provider's systems for the purpose of determining whether the Access Provider has used ~~or~~ is using ~~End-User Details or is likely to use Confidential Information relating to the Access Seeker's end-users~~ for a purpose other than as permitted under clause 11.4.
- (d) If the Access Provider objects to the person nominated by the Access Seeker or the parties have not agreed on an Independent Auditor within five Business Days of the notice given under clause 11.11(b), then the Independent Auditor shall be a person nominated by the President for the time being of the Institute of Chartered Accountants in the state in which the Access Provider holds its registered office.
- (e) The Access Seeker shall bear all reasonable costs of the Access Provider relating to the audit, as well as the costs of the Independent Auditor.
- (f) The Independent Auditor shall be required to give a confidentiality undertaking to the Access Provider in terms as set out in Annexure 1 of this Schedule 11.
- (g) The Independent Auditor's first task shall be to determine whether there is prima facie evidence which tends to show that the Access Provider has used ~~or~~ is using ~~End-User Details or is likely to use Confidential Information relating to the Access Seeker's end-users~~ for a purpose other than as permitted under clause 11.4. The Independent Auditor may obtain advice from a barrister or solicitor (who does not act for and has not acted for either of the parties in relation to any matter in question) in determining whether such prima facie evidence exists.
- (h) If the Independent Auditor so determines, then he/she shall be required to proceed with the audit.
- (i) If the Independent Auditor is required to proceed with the audit in accordance with clause 11.11(h), he/she shall be required to consult the Access Provider over the most expeditious means by which to conduct an audit of the Access Provider's systems (including but not limited to its computer systems, databases, records and processes) for the purpose specified in clause 11.11(c), and to thereafter conduct the audit as he/she considers reasonably appropriate.

Explanation for amendment to clause 11.11(i) - The Independent Auditor should conduct the audit in a reasonable

manner following the consultation with the Access Provider. Given the potential for significant disruption to the Access Provider's business that such an audit might cause, it is not unreasonable to impose a "reasonableness" requirement on the conduct of the audit.

- (j) The audit shall be conducted expeditiously and in any event for no longer than 20 consecutive Business Days (excluding any delays caused by the Access Provider).

Explanation for amendment to clause 11.11(j) - This amendment clarifies that the audit is to be conducted expeditiously, ensuring minimum disruption to the Access Provider's business.

- (k) The Access Provider must permit the Independent Auditor to audit and inspect its systems (including but not limited to its computer systems, databases, records and processes) by allowing the Independent Auditor to view any information contained on its systems that may be relevant to the purpose specified in clause 11.11(c). During the audit, any use of or access to the Access Provider's systems shall be carried out by the Access Provider only. The Access Provider is not obliged to give the Independent Auditor personal access to its systems provided that ~~and~~ the Access Provider must provide the Independent Auditor with such assistance as he/she reasonably requires in order to conduct the audit.

Explanation for amendment to clause 11.11(k) - The Access Provider's personnel should access the systems at the direction of the Independent Auditor, rather than the Independent Auditor accessing the systems himself or herself. As the Access Provider's personnel will be familiar with the systems, this will prevent any operation of those systems which would have the effect of damaging them, or of otherwise interfering with their ordinary operation.

- (l) Within 20 Business Days after ~~At~~ the conclusion of the audit, the Independent Auditor shall be required to provide a draft report to both parties setting out his/her proposed findings and conclusions as to whether the Access Provider has used, or is using End-User Details ~~or is likely to use Confidential Information relating to the Access Seeker's end-users~~ for a purpose other than as permitted under clauses 11.4 and 11.5 (Draft Report).
- (m) Within 5 Business Days after receiving the Draft Report, the parties may submit to the Independent Auditor a written response in relation to the matters contained in the Draft Report and the Independent Auditor must consider any responses received from the parties in preparing his/her final report (Final Report);
- (n) Within 10 Business Days after the end of the period set out in clause 11.11(m) for submitting a response to the Draft Report, the Independent Auditor shall be required to provide a Final Report to both parties setting out his/her final findings and conclusions as to whether the Access Provider has used or is using End-User Details for a purpose other than as permitted under clause 11.4.

Explanation for amendments to clauses 11.11(l) to new 11.11(n) above - The timeline and process set out in paragraphs (l) to (n) above ensures that the parties are given an opportunity to view a draft of the Independent Auditor's report prior to finalisation,

in order to highlight any obvious errors as well as to respond to any of the Independent Auditor's findings where appropriate.

- (o)(m) If the Independent Auditor's Draft Report or Final Report~~report~~ contains Confidential Information of the Access Provider, then he/she will mask such information in the version of the report provided to the Access Seeker, provided that the Access Seeker's external solicitors are given an unmasked copy of the report (subject to them first giving a confidentiality undertaking to the Access Provider in terms as set out in Annexure 1 of this Schedule 11 to the FAD).

Explanation for amendments in new clause 11.11(o) above

The first amendment is a consequence of the amendments to clauses 11.11(e) to (h) above.

The second amendment clarifies that the relevant "solicitors" should be the Access Seeker's external solicitors, rather than internal lawyers. Otherwise, when an unmasked version of the report is provided to an Access Seeker (albeit to specified personnel), it may be able to be accessed by other personnel.

- (p)(m) The parties acknowledge that the Independent Auditor's report shall be prima facie evidence of the matters contained in the report and (subject to any obligation of confidence attaching to the report or the information contained therein) may be used in connection with any dispute concerning whether the Access Provider has used, or is using End-User Details ~~or is likely to use Confidential Information relating to the Access Seeker's end-users~~ for a purpose other than as permitted under clause 11.4.

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 [pProvider] regarding the Confidential Information.

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

6 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) if required to do so by law; 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 that is in my possession from unauthorised access, use, copying, reproduction or disclosure and use the same degree of care as a prudent person in my position would use to protect that person's confidential information.

7 ~~Not used Except as required by law and subject to paragraph 10 below, within a reasonable time 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.~~

Explanation for amendment to paragraph 7 - Please refer to section 2.6.5 (Form of Confidentiality Undertaking) of submissions.

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

- (a) which is in the public domain; or
- (b) which has been obtained by me otherwise than from [Provider] in relation to this Undertaking;

provided that the information is in the public domain and/or has been obtained by me by reason of, or in circumstances which do not involve any breach of a confidentiality

undertaking or a breach of any other obligation of confidence in favour of [Provider] or by any other unlawful means, of which I am aware.

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 ~~Not used The obligations of confidentiality imposed by this Undertaking survive destruction or delivery to [Provider] of the Confidential Information pursuant to paragraph 7 above.~~

Explanation for amendment to paragraph 10 - This is a consequential amendment as a result of the proposed deletion of paragraph 7 above.

Signed: _____

Dated:

Print name:

ATTACHMENT 1

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

ATTACHMENT 2
[Approved purpose(s)]

Schedule 12 – Communications with end users

- 12.1. The Access Provider may communicate and deal with an Access Seeker's end-users as expressly provided in clauses 12.2 to 12.4 and as otherwise permitted by law.
- 12.2. Subject to clause 12.3, 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;
 - (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
 - (f) if the Access Provider has a right to suspend or terminate the Access Seeker's Service, to inform the end-user that:
 - (i) its Service has been, will be or may be suspended or terminated on a specified time or date; and
 - (ii) if the Access Seeker's Service is being terminated, the end-user may wish to transfer to another service provider before that time or date to ensure they continue to receive the Service,

and if the Access Provider contacts the end-user under clause 12.2(f), the Access Provider:

 - (iii) must notify the Access Seeker (either individually or as part of a collective notification) of this and if reasonably practicable, prior to making contact with the end-user;
 - (iv) must copy the Access Seeker on any correspondence or other information or advice which is given to the end-user in writing;
 - (v) must not disclose the reasons for the suspension or termination of the Access Seeker's service unless otherwise directed by the Access Seeker; and
 - (vi) must not recommend or suggest an alternative service provider.

Explanation for amendments in new clause 12.1(f) - Please refer to sections 2.6.1 (Communications Initiated by Access Providers) of the submissions.

Proposed new clause - Please refer to section 2.6.1 (Communications Initiated by Access Providers) of the submissions.

12.X The Access Seeker:

- (a) authorises the Access Provider to contact and deal with end-users in an Emergency and in connection with the testing or fault remediation of a service provided for the purpose of Emergency management or disaster planning;
- (b) if applicable, appoints each of its end users as its agent to activate or to add, remove or change a Service for that end-user in an Emergency;
- (c) will give the Access Provider all assistance (including provision of information and access to records) as required by the Access Provider for the purposes of connecting Services or remedying service faults in an Emergency;
- (d) must maintain and make available to the Access Provider on request account numbers, services, Emergency contact details and service details (including exchange information, cable pair information, the address of the end user premises and the location of the Service within the premises) in relation to a Service provided for the purpose of Emergency management or disaster planning, and end-users of that service; and
- (e) must comply with applicable national, state and local disaster and Emergency management plans and assist the Access Provider to comply with such plans.

12.3. If:

- (a) an end-user of the Access Seeker initiates a communication with the Access Provider and the Access Provider is or becomes aware that the communication is in relation to goods and/or services supplied to that end- user by the Access Seeker, the Access Provider must:
 - (i) advise the end-user that they should discuss any matter concerning the Access Seeker's goods and/or services with the Access Seeker; and
 - (ii) 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 and the Access Provider is or becomes aware that the communication is 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.

Explanation for amendments to clause 12.3 - Please refer to section 2.6.2 (Communications Initiated by End Users) of the submissions.

12.4. 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).

12.5. For the purposes of clauses 12.2 to 12.4, a "communication" shall include any form of communication, including without limitation telephone discussions and correspondence.

12.6. Neither party may represent that:

- (a) it has any special relationship with or special arrangements with the other party [\(including any representations relating to the provision of special pricing or services\)](#);

Explanation for amendment to clause 12.6(a) - This amendment provides greater clarity in relation to the concept of a special relationship/arrangement.

- (b) there are no consequences for an end-user when an end-user signs an authority to transfer their accounts or services;

Explanation for amendment to clause 12.6(b) - Telstra assumes that the original drafting of this clause contained an error as there are, in fact, consequences for an end user in transferring their accounts or services. The most obvious being that the service provider will be different, so it is likely that there will be different services and product sets, and different levels of customer service available to that end user.

- (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.

12.7. ~~Where a party communicates with an end-user of either party, the first mentioned~~ [Each](#) party shall ensure that it does not attribute to the other party:

Explanation for amendments to clause 12.7 above - Telstra considers that this clause should apply not only where a party communicates to the end-user of another party but more broadly. For example, the clause should also prevent a party from attributing fault or blame to the other party on their website.

- (a) blame for a fault or other circumstance [\(including termination of a Service\)](#);
or

Explanation for amendments to clause 12.7(a) -

In relation to the first amendment, "Fault" is defined as a fault which is the responsibility of the Access Provider, whereas this clause should cover a broader concept.

The second amendment includes "termination of a Service" as an example of "other circumstance".

- (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.

Proposed new clause - It is important when considering the respective obligations of the parties to appreciate that often there will not be a direct relationship between the Access Seeker and the ultimate end user of a Service. Often there will be a reseller interposed between the two, or even a reseller chain. In order to ensure that the obligations imposed on an Access Seeker flow through to those who have the direct relationship with the ultimate end user, it is necessary that the Access Seeker, so far as is reasonably possible, ensures that its resellers do not engage in any inappropriate behaviour. For example, if a reseller puts something on its website incorrectly blaming the Access Provider for the occurrence of a particular event, the Access Provider should be able to approach the Access Seeker who has the direct relationship with that reseller, and ask them to have the offending message removed. For that reason, the proposed clause below obliges Access Seekers to put in place mechanisms to prevent their resellers from engaging in any conduct which, if performed by the Access Seeker, would constitute a breach of the FADs. Please also refer to the new of definition of "Resellers" in Schedule 1.

[12.Y The Access Seeker must, so far as is reasonably practicable, ensure that any Reseller of Services that the Access Seeker acquires from the Access Provider does not do or omit to do anything which, if done or omitted by the Access Seeker, would constitute a breach of the FADs.](#)

- 12.8. This Schedule 12 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 13 – Network modernisation and upgrade provisions

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

- 13.1. Except were 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 13.2 and 13.4 (**General Notification**) and clauses 13.3 and 13.5 (**Individual Notification**); and
 - (b) consulting with the Access Seeker, and negotiating in good faith, any reasonable concerns of the Access Seeker, in relation to the Major Network Modernisation and Upgrade.

This clause 13.1 does not apply to an Emergency Network Modernisation and Upgrade.

- 13.2. 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.

- 13.3. An Individual Notification must be provided by the Access Provider to the Access Seeker as soon as practicable after the General Notification, but, in any event, not less than 26 weeks prior to the anticipated commencement date of the Major Network Modernisation and Upgrade.

Information to be provided in the notices

- 13.4. A General Notification must include information on:
- (a) the ESA affected by the proposed Major Network Modernisation and Upgrade;
 - (b) the distribution area affected by the proposed Major Network Modernisation and Upgrade; and
 - (c) 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.
- 13.5. 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) 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;
 - (c) 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 Services); and

- (d) details of who the Access Seeker may contact to obtain further information about the Major Network Modernisation and Upgrade.
- 13.6. 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.
- 13.7. 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. services provided by the Access Provider in the relevant ESA that may be available to the Access Seeker;
 - 2. how the Access Seeker may be impacted by the Major Network Modernisation and Upgrade; and
 - 3. what steps the Access Seeker will be required to take to facilitate the Major Network Modernisation and Upgrade; and
 - (b) weekly reports about the anticipated cutover dates for the Access Seeker's affected services, beginning no less than five weeks prior to the anticipated commencement date for the Major Network Modernisation and Upgrade.
- 13.8. The updates referred to in subclause 13.7(a) are to be provided regularly (which is not required to be any more frequently than Monthly) after the Individual Notification.

Emergency Network Modernisation and Upgrade

- 13.9. In the event of an Emergency, the Access Provider may conduct an Emergency Network Modernisation and Upgrade, and
- (a) will 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 will provide the Access Seeker with an Individual Notification as soon as reasonably practicable after the Emergency Network Modernisation and Upgrade is implemented.

Coordinated Capital Works Program forecast

- 13.10. The Access Provider must provide the Access Seeker with a written three year Coordinated Capital Works Program forecast in accordance with clause 13.11 14 Calendar Days from the date this Schedule 13 of the FAD takes effect between the parties (**Coordinated Capital Works Program Forecast**).
- 13.11. The Coordinated Capital Works Program Forecast will:
- (a) be for the three year period commencing on the date the forecast is provided;
 - (b) describe generally the Access Provider's indicative investment plans (as at the date of the forecast) for its Coordinated Capital Works Program over the next three years;
 - (c) include an evaluation of the impact that the Access Provider's indicative investment plans may have on individual ESAs areas and distribution areas; and
 - (d) specify anticipated timeframes for implementation.
- 13.12. The Access Provider must update the Coordinated Capital Works Program Forecast (and provided the update forecasts in writing to the Access Seeker) regularly, at not less than six Month intervals.
- 13.13. At the same time as the Access Provider provides a Coordinated Capital Works Program Forecast under clause 13.10, the Access Provider must provide a copy of the Coordinated Capital Works Program Forecast to the ACCC.

Coordinated Capital Works Program Schedule

- 13.14. The Access Provider must provide a written Coordinated Capital Works Program schedule to the Access Seeker by giving notice not less than 12 Months before the anticipated commencement date of the Coordinated Capital Works Program in accordance with clause 13.15 (**Coordinated Capital Works Program Schedule**).
- 13.15. The Access Provider must provide the Coordinated Capital Works Program Schedule and make its best endeavours to identify:
- (a) the ESAs and distribution areas affected;
 - (b) the Access Provider's plan for the Coordinated Capital Works Program for each ESA;
 - (c) the Access Seeker's Service(s) in that Exchange that will be affected and the expected impact of the Coordinated Capital Works Program on the Access Seeker's Service(s); and
 - (d) the anticipated timeframe for the implementation of the Coordinated Capital Works Program.
- 13.16. At the same time as the Access Provider provides a Coordinated Capital Works Program Schedule under clause 13.14, the Access Provider must provide a copy of the Coordinated Capital Works Program Schedule to the ACCC.

13.17. For the avoidance of doubt, the Access Provider must also comply with clauses 13.1-13.8 when complying with clauses 13.10-13.16.

Negotiations in good faith

13.18. 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 13.1 to 13.8; 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.

13.19. Except where the parties agree otherwise, the Access Provider must not commence the implementation of a Coordinated Capital Works Program unless:

- (a) it complies with clauses 13.14 to 13.16; 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.

13.20. Notwithstanding any continuing negotiations between the Access Provider and the Access Seeker pursuant to clauses 13.1, 13.18 and 13.19, if the Access Provider has complied with this Schedule 13, a Major Network Modernisation and Upgrade may proceed 26 weeks after an Individual Notification has been issued, unless both parties agree otherwise.

13.21. In attempting to reach a mutually acceptable resolution in relation to a variation under clauses 13.1, 13.18 and 13.19, 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

13.22. 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 10 of this FAD.

Application

13.23. This Schedule 13 commences 21 Calendar Days after the day this FAD is published by the ACCC.

Miscellaneous

13.24. A requirement for the Access Provider to provide information in written form includes provision of that information in electronic form.

13.25. Any information provided by the Access Provider in electronic form must be in a text-searchable and readable format.

Schedule 14 – Suspension and termination

14.1. 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; ~~or~~

Explanation for amendment to clause 14.1(b) - The original wording of this clause allowed the Access Provider to suspend Services only where Network Security was threatened, but not where Network operation, access or integrity was threatened. Telstra considers that it is entirely reasonable for an Access Provider to be able to suspend the supply of a Service where that supply threatens not only its Network security, but also its Network operation, access or integrity.

- (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 the Access Seeker has failed to provide the Security to the Access Provider under clause 9.1 within 10 Business Days after the commencement of the supply of Service\(s\) to the Access Seeker;](#)

Explanation for proposed new clause 14.1(d) - Please refer to section 2.8.1 (Circumstances giving rise to a Right to Suspend) of the submissions.

- (e) [where there are reasonable grounds to believe that an event set out in clauses 14.8\(a\) to \(i\) is likely to occur;](#)

Explanation for proposed new clause 14.1(e) - Please refer to section 2.8.1 (Circumstances giving rise to a Right to Suspend) of the submissions.

- (f) [where the Access Seeker’s use of:](#)

- (i) [its Facilities;](#)

- (ii) [the Access Provider’s Facilities or Network; or](#)

- (iii) [any Services supplied to it by the Access Provider.](#)

[is in contravention of any law and causes the Access Provider to be in contravention of any law or regulatory obligation;](#)

Explanation for proposed new clause 14.1(f) - Please refer to section 2.8.1 (Circumstances giving rise to a Right to Suspend) of the submissions.

(g) where the Access Seeker is in breach of clause 14.X below;

Explanation for proposed new clause 14.1(g) - Please refer to comments in relation to the proposed new clause below.

(h) the Access Seeker fails to maintain the Security under clause 9.1, fails to provide an altered Security in accordance with clause 9.5 or 9.10(a)(i), or an event set out in clause 9.5(c)(i) to 9.5(c)(iii) occurs; or

Explanation for proposed new clause 14.1(h) - Please refer to section 2.8.1 (Circumstances giving rise to a Right to Suspend) of the submissions.

(i) the Access Seeker fails to vary or replace the amount of or form of an existing Security as required by the Access Provider under Schedule 9,

Explanation for proposed new clause 14.1(i) - Please refer to section 2.8.1 (Circumstances giving rise to a Right to Suspend) of the submissions.

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. ~~Emergency or threat has passed or until the normal operation of the Access Provider's Network or access to the Access Provider's Network or equipment is no longer adversely affected or threatened.~~

Explanation for above amendment to clause 14.1 - This is a consequential amendment as a result of the amendments above to clause 14.1.

Proposed new clause - The Access Provider should have an immediate right to suspend supply if the Access Seeker engages in any of the conduct set out in paragraphs (a) and (b) below. An immediate right of suspension is necessary in these circumstances in order for the Access Provider to protect its rights and the rights of others.

14.X The Access Seeker agrees that it will not and will ensure that its end-users do not:

(a) use any Service to send excessive unsolicited data to third parties; or

(b) use any Service (including any equipment and software used to access or connect to the Service) in such a manner that may:

(i) menace or harass any person or intentionally cause damage or injury to any person or property or incite hatred against any person;

(ii) expose either party to the risk of any legal or administrative action including prosecution under any law or which would bring that party into disrepute;

(iii) involve the publication of material that is illegal, or defamatory, or which may promote others to engage in such acts; or

(iv) infringe any person's Intellectual Property.

Explanation for proposed clause 14.Y below - Please refer to section 2.8.1 (Circumstances giving rise to a right to suspend) in the submissions. If this clause is included in the FADs, clause 14.2(a) is no longer required and should be deleted. This clause is essentially clause 14.2 below, with amendments marked up.

14.Y2. If

(a) the Access Seeker commits a Payment Breach~~has failed to pay monies owing~~ under this FAD;

~~(b)~~

~~the Access Seeker's use either of its Facilities or the Access Provider's Facilities is in contravention of any law;~~

~~(c) the Access Seeker breaches a material obligation under this FAD; or~~

~~(d) any of the events described in clause 14.8 occurs in respect of the Access Seeker;~~

~~(Suspension~~ Payment Breach ~~Event)~~ and:

~~(b)~~(e) ~~within 20 Business Days~~ as soon as reasonably practicable after becoming aware of the ~~Suspension~~ Payment Breach Event, the Access Provider gives a written notice to the Access Seeker:

Explanation for amendments to clause 14.Y(b) above

In relation to the first amendment, refer to the explanation in new clause 14.2(d) below.

(i) citing this clause;

(ii) specifying the ~~Suspension~~ Payment Breach Event and the Service in respect of which the Payment Breach ~~event~~ has occurred;

(iii) requiring the Access Seeker to ~~institute~~ complete remedial action (if any) in respect of that Payment Breach ~~event~~; and

(iv) specifying the action which may follow due to a failure to comply with the notice,

Payment Breach ~~Suspension~~ Notice) and:

~~(c)~~(f) the Access Seeker fails to ~~institute~~ complete the remedial action as specified in the Payment Breach -Suspension Notice within ~~1020~~ Business Days after receiving the Payment Breach Suspension Notice (in this clause 14.2, the Payment Breach Remedy Period),

Explanation for amendment to clause 14.Y(c) - In respect of the first amendment, refer to explanation in respect of clause 14.2(e) below.

In respect of the second amendment (being the change from 20 to 10 Business Days), refer to section 2.8.1 (Circumstances giving rise to a right to suspend) of the submissions.

the Access Provider may, by written notice given to the Access Seeker as soon as reasonably practicable ~~within 20 Business Days~~ after the expiry of the Payment Breach Remedy Period:

Explanation for above amendment to clause 14.Y - Refer to the explanation in respect of clause 14.2 below.

~~(d)(g)~~ refuse to provide the Access Seeker with ~~the any~~ Service;

~~(e)~~ reject or suspend the processing of:

~~(i)~~ any new orders of the Services (or, if an order has been accepted but not fulfilled, suspend the provisioning of that order);

~~(ii)~~ any adds, moves or changes in relation to the Service of the kind in respect of which the Payment Breach Event has occurred; and

~~(iii)~~ any service transfers, fault reports or requests for studies in respect of the Services (including any feasibility study, desk study, study of availability of infrastructure and study where costs or timing need to be ascertained for a Service prior to order issue),

~~(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 on or after the date of the ~~breach~~ Payment Breach Event, and

~~(f)~~ suspend the supply of all Services to the Access Seeker,

until the ~~remedial action~~ Payment Breach Event specified in the Payment Breach Suspension Notice is remedied ~~completed or the Suspension Event otherwise ceases to exist; and~~

~~(h)~~ suspend the provision of any Service of the kind in respect of which the Suspension Event has occurred, until the remedial action specified in the Suspension Notice is completed.

Explanation for proposed new clause 14.Y(d) to (f)- For the explanation for the new clauses 14.Y(e) to (g), please see the comments under clause 14.2(g) to (i) below.

14.2. If:

- (a) ~~Not used~~ ~~the Access Seeker has failed to pay monies owing under this FAD;~~

Explanation for proposed deletion of clause 14.2(a) - Please refer to the comments on the proposed clause 14.Y above.

- (b) the Access Seeker's use ~~either~~ of:

(i) its Facilities; ~~or~~

(ii) the Access Provider's Facilities or Network; or

(iii) any Services supplied to it by the Access Provider.

is in contravention of any law but does not cause the Access Provider to be in contravention of any law or regulatory obligation; or

Explanation for amendment to clause 14.2(b) - "Facility" under the FADs has the meaning given to that term in section 7 of the *Telecommunications Act 1997* (Cth). That definition is directed primarily towards the physical infrastructure associated with a telecommunications network (for example, towers, ducts, poles, structures etc). The amendment makes clear that use by the Access Seeker of not just Facilities but also a Service or Network in contravention of law, may lead to suspension. Please also refer to section 2.8.1 (Circumstances giving rise to a right to suspend) in the submissions.

- (c) the Access Seeker breaches a material obligation under this FAD (other than a Payment Breach Event); ~~or~~

- ~~(d) any of the events described in clause 14.8 occurs in respect of the Access Seeker;~~

Explanation for deletion - Clause 14.2(d) should be deleted because first, it is inconsistent with the right to cease supply set out in clause 14.8. Second, clause 14.2(d) does not consider the effect of the relevant provisions of the *Corporations Act 2001* (Cth), which, in the context of an administration, is likely to extend the duration of the remedy period such that the Access Provider would not, in fact, be able to exercise its right to suspend supply of the Service to the Access Seeker.

(Suspension Event) and:

- ~~(d)~~(e) as soon as reasonably practicable ~~within 20 Business Days~~ after becoming aware of the Suspension Event, the Access Provider gives a written notice to the Access Seeker:

Explanation for amendment to clause 14.2(d) above - This amendment promotes the informal resolution of matters covered by clause 14.2(a) to (d) above by not forcing the Access Provider to lodge a Suspension Notice within 20 Business Days after becoming aware of the Suspension Event. Instead, the amendments enable the lodgement of a Suspension Notice only when it is absolutely

necessary (that is, where any informal resolution processes have been unsuccessful). If the parties are pursuing the commercial resolution of a matter, given the potential consequences of clause 14.2, it is preferable that such an option be pursued rather than an Access Provider being forced to serve a Suspension Notice to protect its interests. Such an outcome would not be in the best interests of the parties or ultimately the end users of those services.

- (i) citing this clause;
- (ii) specifying the Suspension Event and the Service in respect of which the event has occurred;
- (iii) requiring the Access Seeker to ~~institute~~ complete remedial action (if any) in respect of that Suspension Event ~~event~~; and
- (iv) specifying the action which may follow due to a failure to comply with the notice,

(Suspension Notice) and:

- ~~(e)~~ (f) the Access Seeker fails to complete the ~~institute~~ remedial action as specified in the Suspension Notice within 20 Business Days after receiving the Suspension Notice (in this clause 14.2, the **Remedy Period**),

Explanation for amendment to new clause 14.2(e) above - The proposed amendment to new clause 14.2(e) above clarifies that the remedial action should be completed, and not merely commenced, by the end of the Remedy Period.

the Access Provider may, by written notice given to the Access Seeker as soon as reasonably practicable ~~within 20 Business Days~~ after the expiry of the Remedy Period;

Explanation for above amendment to clause 14.2 - There should be no fixed timeframe for when an Access Provider can exercise its rights under this clause, provided the preconditions for the exercise of that right have been satisfied. This will provide scope, for example, for a final attempt at a commercial resolution.

- ~~(f)~~ (g) refuse to provide the Access Seeker with any Services; ~~the Service~~;
- (g) reject or suspend the processing of
 - (i) any new orders of the Services (or, if an order has been accepted but not fulfilled, suspend the provisioning of that order);
 - (ii) any adds, moves or changes in relation to the Service of the kind in respect of which the Suspension Event has occurred; and
 - (iii) any service transfers, fault reports or requests for studies in respect of the Services (including any feasibility study, desk study, study of availability of infrastructure and study where costs or timing need to be ascertained for a Service prior to order issue),
- ~~(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 on or after the date of the Suspension Notice; ~~and breach,~~

(h) suspend the supply of all Services to the Access Seeker,

until the remedial action specified in the Suspension Notice is completed or the Suspension Event otherwise ceases to exist; ~~and~~

~~(h) suspend the provision of any Service of the kind in respect of which the Suspension Event has occurred, until the remedial action specified in the Suspension Notice is completed.~~

Explanation for above amendments to new clause 14.2(f) to new clause 14.2(h) above - Whilst the matters marked up above in clause 14.2(g) to (i) would likely fall within the ambit of the original clause 14.2(g) of the draft FADs, these amendments clarify the effect of suspension, giving the parties certainty as to the full consequences of a Suspension Event in practical terms.

In addition, the relevant date for the suspension should be the date of the Suspension Notice, rather than the date of breach. This is because the Access Provider will not necessarily know the date of breach.

- 14.3. For the avoidance of doubt, subclause 14.2(a) does not apply to a Billing Dispute that has been validly notified by the Access Seeker to the Access Provider in accordance with the Billing Dispute Procedures set out in this FAD.

Explanation for amendment to clause 14.3 - This amendment ensures that a failure to pay monies owing under the FADs will not constitute a "Suspension Event" only where the Access Seeker has properly complied with the Billing Dispute Procedures in the FADs.

- 14.4. In the case of a suspension pursuant to clause 14.2, the Access Provider shall reconnect the Access Seeker to the Access Provider's Network and recommence the supply of any suspended Services as soon as practicable after there no longer exists a reason for suspension and the Access Provider shall do so subject to payment by the Access Seeker of the Access Provider's reasonable costs of suspension and reconnection.

- 14.5. If:

- (a) a party ceases to be a carrier or carriage service provider; or
- (b) a party ceases to carry on business for a period of more than 10 consecutive Business Days ~~without the prior written consent of the other party (such consent not to be unreasonably withheld); or~~

Explanation for amendment to clause 14.5(b) - The operation of this clause is uncertain. When would it be reasonable for a party to consent to the other party ceasing to carry on business?

- (c) in the case of the Access Seeker, any of the reasonable grounds specified in subsection 152AR(9) of the CCA apply; ~~or~~
- (d) a party breaches a material obligation under this FAD, and:

- (i) that breach materially impairs or is likely to materially impair the ability of the other party to deliver Listed Carriage Services to its customers; and
- (ii) the other party has given a written notice to the first-mentioned party as soon as reasonably practicable after ~~within 20 Business Days of~~ becoming aware of the breach (**Breach Notice**); and

Explanation for amendment to clause 14.5(d)(ii) - There should not be a fixed timeframe for the giving of a Breach Notice because this limits the ability of the parties to attempt to commercially resolve a dispute before a Breach Notice is issued, as discussed above in the comment above clause 14.2(g).

- (iii) the other party fails to ~~institute complete the~~ remedial action as specified in the Breach Notice within 20 Business Days after receiving the Breach Notice (in this clause 14.5, the **Remedy Period**); or

Explanation for amendments to clause 14.5(d)(iii) -

This amendment clarifies that the remedial action should be completed, and not merely commenced, by the end of the Remedy Period.

- (e) the Access Seeker has breached a material obligation under this FAD and that breach is incapable of being remedied; or

Explanation for proposed new clause 14.5(e) - The Access Provider should have the right to immediately cease to supply where the Access Seeker commits a material breach which is incapable of being remedied. It does not make sense to have a remedial period applying to a material breach of this nature.

- (f) the supply of 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,

Explanation for proposed new clause 14.5(f) - The Access Provider should be able to cease to supply the Services to the Access Seeker if the supply of those Services has been suspended for a specified period of time. Telstra suggests a period of three months, which is consistent with clause 14.8(f). The relationship between the parties should not continue indefinitely following suspension if an Access Seeker fails to remedy the relevant breach. In such a scenario, the parties' relationship is effectively at an end.

the other party (or the Access Provider in the case of clause 14.5(e)) may cease supply of the Service(s) under this FAD by written notice given to the first-mentioned party ~~within 20 Business Days at any time~~ after becoming aware of the cessation, reasonable grounds, ~~or~~ expiry of the Remedy Period specified in the Breach Notice, ~~the~~ irremediable breach, or where the suspension has continued for a period of three Months or more (as the case may be).

Explanation for amendments to 14.5 above - these are all consequential amendments as a result of amendments to clauses 14.5(a) to

(f) above, save for the amendment to the time period. The explanation for that amendment is the same as set out in clause 14.2 above.

14.6. A party must not give the other party both a Suspension Notice under clause 14.2 and a Breach Notice under clause 14.5 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 where a Suspension Notice has previously been given to the Access Seeker by the Access Provider in accordance with clause 14.2 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 14.2.

Comments on clause 14.6 - If clause 14.5(d)(ii) is not amended as set out above, this clause should be amended as it is impossible to provide a Breach Notice after a Suspension Notice (as contemplated by this clause) due to the timing limitation in clause 14.5(d)(ii).

14.7. For the avoidance of doubt, a party shall not be required to provide a Suspension Notice under clause 14.2 in respect of a breach before giving a Breach Notice in respect of that breach under clause 14.5.

14.8. Notwithstanding any other provision of this FAD, either party may at any time immediately cease the supply of one or more Services 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 ~~and the order or resolution remains in effect for a continuous period of five Business Days~~; or

Explanation for proposed deletion in clause 14.8(a) - The suggested deletion should be made because in circumstances in which the Access Seeker is insolvent (and thus clearly is not creditworthy), the Access Provider cannot be required to continue to supply the Service to the Access Seeker, pursuant to subs 152BCB(1)(g) of the CCA. That is irrespective of how long the order or resolution for winding up the Access Seeker remains in effect.

- (b) a receiver, receiver and manager, official manager, controller, administrator (whether voluntary or otherwise), provisional liquidator, liquidator, or like official is appointed over ~~the whole or a substantial part of~~ the undertaking and property of the other party ~~and the appointment remains in effect for a continuous period of five Business Days~~; or

Explanation for proposed deletion in clause 14.8(b) - The suggested deletions should be made because, in circumstances in which the persons set out in clause 14.8(b) have been appointed, the Access Seeker is insolvent (and thus clearly is not creditworthy). Pursuant to subs 152BCB(1)(g) of the CCA, the Access Provider cannot be required to continue to supply the Service to the Access Seeker (irrespective of whether or not the appointment relates to

"the whole or a substantial part" of the undertaking, or for how long the appointment remains in effect).

- (c) a holder of an encumbrance takes possession of ~~the whole or any substantial part 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

Explanation for proposed deletion 14.8(c) - The suggested deletion should be made because, in circumstances in which the holder of an encumbrance takes possession, the Access Seeker is clearly not creditworthy. Pursuant to subs 152BCB(1)(g) of the CCA, the Access Provider cannot be required to continue to supply the Service to the Access Seeker (irrespective of whether or not the holder of an encumbrance takes possession of "the whole or a substantial part" of an undertaking).

- (d) the other party is or 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 a 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.

14.9. The cessation of the operation of this FAD:

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

14.10. Without prejudice to the parties' rights upon termination of the supply of a 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 a Service for a period extending beyond the date on which the supply of a Service under this FAD terminates, or this FAD ceases to have effect, 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 10 of this FAD.

Proposed new clause - Please refer to section clause 2.8.2 (Service No Longer Supplied) of the submissions. The ability to withdraw Service(s) would only be on giving 6 months' notice in order to enable the Access Seeker to reorganise their business -to adjust to the withdrawal.

14.Z The Access Provider may, by giving not less than six Months notice, withdraw or cease to supply a Service under this FAD in order to comply with an Undertaking.

Schedule 15 – Changes to operating manuals

- 15.1. [Notwithstanding that the Access Seeker may be seeking to invoke clause 15.3](#), Operational documents concerning the ULLS may be amended:

Explanation for amendments to clause 15.1 - consequential amendment if clause 15.3 is retained. Please refer to section 2.10 (Changes to Operating Manuals) of the submission.

- (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 giving reasonable consideration to any comments which the Access Seeker has made on the proposed amendments; and
- (b) otherwise, by agreement of the parties.

Note: operational documents concerning the ULLS include (i) *The Telstra Operations and Maintenance Manual Part 16 Fault Management Procedures for Telstra Unconditioned Local Loop Service*; and (ii) *The Telstra Ordering and Provisioning Manual Part 16 Telstra Unconditioned Local Loop Service Operations Manual and any replacement document*

- 15.2. Upon completion of the process set out in clause 15.1, the Access Provider must ~~give~~ [make the Access Seeker](#) a copy of the new operational document [available to the Access Seeker](#).

Explanation of amendment to clause 15.2 - It should be sufficient that the Access Provider makes a copy of the new operational document available online, as a requirement to provide each Access Seeker with a copy would be administratively onerous.

Clause 15.3 should be deleted, but if not, it is proposed that the clause be amended as marked up below for the reasons set out in section 2.10 (Changes to Operating Manuals) of the submission.

- 15.3. Where operational documents concerning the ULLS are amended in accordance with clause 15.1 and the ~~Access Seeker believes that the~~ amendments:

- (a) are unreasonable [having regard to \(amongst other things\):](#)
- (i) [the legitimate interest of the Access Provider in ensuring the terms and conditions relating to the ULLS supplied to more than one Access Seeker are consistent; and](#)
- (ii) [the impact of the amendment across all Access Seekers who acquire the ULLS, including whether the amendment will ~~be~~](#)
- ~~(b) —~~ deprive ~~the~~ Access Seekers of a fundamental part of ~~its~~ [their](#) rights contained in this FAD;

the Access Seeker may seek to have the matter resolved in accordance with the dispute resolution procedures set out in Schedule 10 of this FAD, provided that the Access Seeker provides notice of the dispute under clause 10.3 of this FAD within 15 Business Days of receiving the notice referred to in clause 15.1(a).

Schedule 16 – Ordering and provisioning

Provisions to apply to Managed Network Migrations (MNM) to the ULLS and the LSS

Minimum number of services

- 16.1. Except where the parties agree otherwise, it is at the discretion of the Access Seeker whether a particular Service is to be connected as part of a MNM, or outside of a MNM.
- 16.2. The Access Seeker will notify the Access Provider at the time the order is made whether a particular Service is to be connected as part of a MNM or outside of a MNM.
- 16.3. Except where the parties agree otherwise, ~~there is no~~ minimum number of services required as a pre-requisite for requesting an MNM is 30.

A minimum of 30 services should be required as a pre-requisite for requesting an MNM for the following reasons:

First, Telstra allows up to 15 single connections to be performed per day, per exchange. This means that 30 connections could be performed within two Business Days, without the need for the procedure set out in relation to MNMs and without the need to spend money and time on project management. It would be an inefficient use of the parties' time and resources to project manage a batch of less than 30 services. Thus, a MNM of less than 30 services is inefficient.

In addition, the time frame offered by a single connection process is shorter than that for a MNM process. The lead time for a single LSS connection is three Business Days and for a single ULLS connection is five Business Days. This was acknowledged by the Commission in a previous publicly available statement of reasons for a FD, in which the Commission stated that "Access Seekers may prefer the shorter connection timeframes offered by 'single' connection processes"¹

Second, Access Seekers have rarely requested a MNM for less than 30 services. In that regard, in the last two years, no Access Seeker requested a MNM for less than 30 services.

Third, Telstra designed the MNM process to project manage a large number of services, and that project management is not suited to migrations of less than 30 services.

Migration plan terms (forecasting timeframes)

- 16.4. Unless the parties agree otherwise, the period of notice that an Access Seeker must give for an MNM is 56 Calendar Days.
- 16.5. Subject to clause 16.6, the Access Provider must not cancel an MNM where the number of Services to be cutover as specified in the 20 Business Day forecast differs to the number of Services specified in the 56 Calendar Day forecast.

¹ See *Access Dispute between Chime Communications Pty Ltd and Telstra Corporation Limited, Final Determination (ULLS)* dated 7 April 2010, at [712].

16.6. If the cutover of Services cannot occur within the 56 Calendar Day forecast period because of a significant variation between the 56 Calendar Day forecast and the 20 Business Day forecast, the Access provider must ~~to~~ take all reasonable steps to ensure that cutover occurs as soon as practicable following the conclusion of that period.

16.7. For the purpose of this determination a reference to a significant variation refers to a variation of more than 10 per cent of the MNM forecast.

Note: For instance the cutover may not occur because of a significant variation between the 56 Calendar Day forecast and the 20 Business Day forecasts

Explanation for amendments to clause 16.7 - This Note is inconsistent with clause 16.7 which expressly defines the meaning of a "significant variation".

Connections outside Business Hours

16.8. Except where the parties agree otherwise, it is at the discretion of the Access Seeker whether a particular Service is to be connected within Business Hours or outside of Business Hours.

Note: additional charges may be payable for work done outside of Business Hours.

Limits on number of exchanges per state per day at which MNM cutovers can be scheduled

16.9. Except where the parties otherwise agree, ~~and subject to clause 16.10,~~ the Access Provider must not refuse to schedule a cutover for an MNM at an Exchange on a day requested by the Access Seeker ~~because unless~~ the Access Seeker has already requested ~~an~~ MNM cutovers at five ~~another Exchange or other~~ Exchanges ~~in that state~~ on ~~the~~ that same day.

Explanation for amendments to clause 16.9 - Please refer to 2.10.1 (Limits on the Number of Exchanges per State per day at which MNM Cutovers can be Performed) of the submission.

16.10. Not used ~~The Access Provider may refuse a requested MNM cutover date where it would be inconsistent with a capacity limitation notice (Limitation Notice) it has published.~~

16.11. Not used ~~The Limitation Notice must specify:~~

~~(a) — the limit that is to apply;~~

~~(b) — the period and the ESAs to which it applies; and~~

~~(c) — the reasons for the limit being necessary by reference to forecast demand and available capacity.~~

16.12. Not used ~~The Limitation Notice lapses 60 Calendar Days after it is published, unless withdrawn earlier.~~

Note: Another Limitation Notice may be issued to replace a lapsed notice.

16.13. Not used ~~The Access Provider must not unreasonably refuse to vary or withdraw the Limitation Notice on the request of an Access Seeker.~~

- 16.14. ~~Not used~~Where an Access Seeker disagrees with a decision made by the Access Provider not to vary or withdraw the Limitation Notice, the Access Seeker may seek dispute resolution in accordance with the dispute resolution procedures set out in Schedule 10 of this FAD.

Explanation for amendments to clauses 16.10-16.14 - Please refer to section 2.10.1 (Limits on the Number of Exchanges per State per day at which MNM Cutovers can be Performed) of the submission.

Capacity Limits on ULLS provisioning

- 16.15. Except where the parties otherwise agree, and subject to clause 16.16, the Access Provider must not unreasonably limit the number of Services that can be provisioned per day at a particular Exchange and must use its best endeavours to supply all requested cutovers for a particular day.
- 16.16. The Access Provider may refuse a requested cutover for a Service at a particular Exchange where it is not reasonably able to perform the cutover on that day having regard to the volume of work orders, for that Exchange or for all Exchanges, and the labour that is available on that day, ~~subject to the Access Provider performing the cutover the following Business Day.~~ Where the Access Provider refuses a cutover request, the Access Provider will use its reasonable endeavours to perform that cutover on the next available cutover date or at another date/time reasonably requested by the Access Seeker.

Explanation for amendments to clause 16.16 - Please refer to section 2.10.2 (Capacity Limits on ULLS Provisioning) of the submissions.

Advice regarding Complex Services affecting ULLS orders

Explanation for amendments to clause 16.17 below - Refer to section 2.10.3 (Advice regarding Complex Services) of the submissions.

- 16.17. Except where the parties agree otherwise, where:

- (a) an Access Seeker has submitted a ULLS request; and
- (b) the ULLS request is rejected ~~Service Qualification query fails~~ due to the presence of Complex Services on the line,

the Access Provider will provide to the Access Seeker a list of the Complex Services present on the line at the time it advises the Access Seeker of the results of the ~~Service Qualification query~~ ULLS request rejection. -This clause 16.17 commences four Months from the date of this FAD being made.

New ULLS ordering and provisioning processes

LSS to ULLS Transfer processes

Scope

- 16.18. Except where the parties subsequently agree otherwise, clauses 16.18 to 16.23 apply where an Access Seeker requests the Transfer of a LSS to a ULLS from the Access Provider.

Terms

- 16.19. The Access Seeker must provide instructions about whether or not the Transfer should occur as part of a MNM in accordance with the MNM forecasting timeframes and notice periods specified in clauses 16.4 to 16.7 of this FAD, or as otherwise agreed between the parties.
- 16.20. The Access Provider must take all reasonable efforts to comply with the Access Seekers instructions provided pursuant to clause 16.19.
- 16.21. Both the Access Provider and the Access Seeker must allow for the Transfer of the LSS to ULLS in accordance with the following minimum characteristics:
- (a) the period in which a LSS to ULLS Transfer is performed (that is, the period in which a LSS is disconnected and a ULLS is connected) will be no longer than four hours;
 - (b) a Transfer must not require end-user involvement with the Access Provider (including, without limitation, the making of a telephone call or sending of correspondence by the end-user to the Access Provider). A request for a LSS to ULLS Transfer will be deemed a cancellation of any existing PSTN line rental and LSS provided the Access Seeker has obtained the necessary customer authority for the cancellation of end- user PSTN services;
 - (c) a Transfer is commenced and executed by a single provisioning order from the Access Seeker to the Access Provider; and
 - (d) the Access Provider will charge the Access Seeker a single charge for undertaking a LSS to ULLS Transfer whether the Transfer occurs as a single connection or as part of an MNM.
- 16.22. The Access Provider must ensure that the development and implementation of the LSS to ULLS Transfer process will result in no changes to how the Access Seeker currently interfaces to the ULLS Carrier Interface System (ULLCIS).

Application

- 16.23. Clauses 16.19 to 16.22 commence on 15 September 2011, unless a prescribed LSS to ULLS Transfer process is established on an earlier date by the Access Provider, in which case clauses 16.19 to 16.22 commence on the date the prescribed LSS to ULLS Migration process is established by the Access Provider.

Note: The commencement date of this clause aligns with similar provisions contained in final determinations between Telstra and a number of Access Seekers in the context of access disputes involving the ULLS. Some of these final determinations have been published by the ACCC and are available on its website.

See: <http://www.accc.gov.au/content/index.phtml?itemId=793062>

Connect Outstanding process for ULLS orders

- 16.24. Except where the parties agree otherwise, the Access Provider will support a Connect Outstanding process for the ULLS, by no later than six Months from the Commencement Date.

16.25. The Connect Outstanding process for the ULLS must:

- (a) support the cancellation of an existing service on a line upon the Access Provider receiving [from the Access Seeker](#):
 - (i) [a warranty that the Access Seeker has obtained](#) Proof of Occupancy;
and
 - (ii) [a warranty that the end user service to be supplied using the ULLS is a STS, and](#);
- (b) facilitate the connection of a ULLS in response to a ULLS request submitted by an Access Seeker in respect of that line.

Explanation for amendments to clause 16.25 - Please refer to section 2.11.4 (Connect Outstanding Process for ULLS Orders) of the submission.