

WIK MOBILE NETWORK AND COST MODEL ACCESS DEED

THIS DEED is made on the _____ day of _____ 2007

BETWEEN

The Australian Competition and Consumer Commission, a body corporate established under section 6A of the *Trade Practices Act 1974* (Cth) ('the ACCC')

AND

[Full name of party receiving the Cost Model] ABN [XX XXX XXX XXX], [insert address] ('the Receiving Party')

BACKGROUND:

- A. The ACCC has retained WIK-Consult GmbH ('WIK') to provide to the ACCC consultancy services which include the building of a regulatory tool to inform the ACCC about the efficient cost of providing services on mobile networks in an Australian context. The regulatory tool is a mobile network and cost model in relation to the mobile terminating access service (the 'MTAS') for the purpose of informing the ACCC's determination of pricing principles in respect of that service under section 152AQA(1) of the *Trade Practice Act 1974* (Cth). WIK has developed that regulatory tool.
- B. In accordance with the ACCC's *Discussion Paper on the WIK Mobile Network and Cost Model to inform the MTAS Pricing Principles Determination 1 July 2007 to 30 June 2009* (the 'Discussion Paper'), the ACCC wishes to give interested parties an opportunity to use, and make submissions to the ACCC on, the Cost Model. The Receiving Party seeks access to the Cost Model in accordance with the Discussion Paper.
- C. The ACCC requires, and the Receiving Party agrees, that it is necessary to take all reasonable steps (including the execution of this deed, including schedule 2 and schedule 3 to this deed) to ensure that the Cost Model is protected and that the use of the Cost Model is restricted to the Specified Purpose.
- D. The ACCC has agreed to make the Cost Model available to the Receiving Party only for the Specified Purpose on the terms set out in this deed.

IT IS AGREED AS FOLLOWS:

1. Interpretation

In this deed, unless the contrary intention appears:

- (a) 'Cost Model' means the mobile network and cost model computer program created by WIK for the ACCC for the mobile terminating access service for the purpose of informing the ACCC's determination of pricing principles in respect of that service under section 152AQA(1) of the *Trade Practice Act 1974* (Cth) including, without limitation, any unpatented inventions, ideas, know-how, concepts, trade secrets, processes, techniques, software, algorithms, products and any other intellectual property, financial and business information and any other commercially valuable information contained in that cost model computer program;
- (b) 'Intellectual Property Rights' means all statutory and other proprietary rights in respect of all intellectual and industrial property including, without limitation, in respect of all trademarks, patents, circuit layouts, copyrights, confidential information and all other intellectual property as defined in article 2 of the Convention Establishing the World Intellectual Property Organisation of July 1967;
- (c) 'Specified Personnel' means those employees of the Receiving Party set out in schedule 1 who need to have access to the Cost Model for the Specified Purpose;
- (d) 'Specified Purpose' means to use the Cost Model only for the purpose of making a submission to the ACCC on the Cost Model and the outcomes obtained from using the Cost Model in accordance with the Discussion Paper;
- (e) 'User Manual' means the guide prepared by WIK and supplied by the ACCC which assists users to install and use the Cost Model;
- (f) headings are inserted for convenience only and do not affect the interpretation of this deed;
- (g) words importing a gender include any other gender;
- (h) words in the singular number include the plural and words in the plural number include the singular;
- (i) where a word or phrase is given a particular meaning, other parts of speech and grammatical forms of that word or phrase have corresponding meanings;
- (j) a reference to:
 - (i) a person includes a natural person, partnership, joint venture, government agency, association, corporation or other body corporate;
 - (ii) a reference to legislation or to a provision of legislation includes a modification or re-enactment of it, a legislative provision substituted for it and a regulation or statutory instrument issued under it;

- (iii) a thing (including, without limitation, a chose in action or other right) includes a part of that thing;
- (iv) a party includes its successors and permitted assigns;
- (v) a document includes all amendments or supplements to that document; and
- (vi) this deed includes all schedules to it;
- (k) the meaning of general words is not limited by specific examples introduced by “including” or “for example”, or similar expressions; and
- (l) no rule of construction applies to the disadvantage of a party because that party was responsible for the preparation of this deed or any part of it.

2. Operation of deed

- 2.1 This deed records the entire agreement between the parties in relation to its subject matter.
- 2.2 Any reading down or severance of a particular provision does not affect the other provisions of this deed.

3. Access to the Cost Model

- 3.1 During the period commencing at 9am on 16 February 2007 and expiring at 5pm on 16 March 2007, the Receiving Party, can collect one copy only of the Cost Model and User Manual from the ACCC’s offices in Melbourne or Sydney provided the Receiving Party follows the ACCC’s directions in relation to arranging for the collection of the copy of the Cost Model and User Manual.
- 3.2 The Receiving Party may install one copy of the Cost Model on any computer which is located at all times on the Receiving Party’s premises provided the copy of the Cost Model on that computer is only used by an employee of the Receiving Party set out in schedule 1 and only for the Specified Purpose.
- 3.3 The ACCC reserves the right to make changes to the Cost Model and User Manual at any time and the Receiving Party acknowledges that the version of the Cost Model provided to the Receiving Party under this deed may not be the version which informs the ACCC’s determination of pricing principles in respect of the MTAS under section 152AQA(1) of the *Trade Practice Act 1974* (Cth).
- 3.4 Subject to the *Copyright Act 1968* (Cth), the Receiving Party must not:
 - (a) alter, enhance or otherwise modify the Cost Model; or

(b) cause, or permit either through its direct efforts or through any third party, the modification, disassembly, de-compilation or reverse engineering of the Cost Model.

3.5 The Receiving Party acknowledges that it owns no copyright or other Intellectual Property Rights in the Cost Model and User Manual and obtains no such rights by virtue of this deed.

3.6 The Receiving Party must not rent, lease, license, sub-license, loan, sell, distribute or network the Cost Model or any part of it.

3.7 The benefit of the Cost Model access given to the Receiving Party under this deed is personal to the Receiving Party and the Receiving Party must not mortgage, charge, assign, rent, lease, license, sub-license, sell or otherwise dispose of or transfer that access to any third party.

4. Disclosure

4.1 The Receiving Party must not disclose, publish or communicate information about the workings of (including input parameters and outputs), give access to or provide a copy of the Cost Model or User Manual to any person (other than the ACCC) without the prior written consent of the ACCC.

4.2 The ACCC may grant or withhold its consent in its absolute and unfettered discretion. If the ACCC grants its consent, it may impose conditions on that consent including, without limitation, requiring the Receiving Party to procure the execution of a deed in these terms by the person to whom the Receiving Party proposes to disclose information about, give access to or provide a copy of the Cost Model or User Manual. If the ACCC grants its consent subject to conditions, the Receiving Party must comply with those conditions.

4.3 Nothing in this deed obliges the ACCC to disclose any particular information to the Receiving Party or any other person.

5. Restrictions on use

5.1 The Receiving Party will use the Cost Model for the Specified Purpose and for no other purpose.

5.2 The Receiving Party will take all action necessary to maintain the confidential nature of the Cost Model and User Manual.

5.3 The Receiving Party:

(a) must only provide access to the Cost Model to the Specified Personnel on a strictly need to know basis for the Specified Purpose only. The Receiving Party must before giving access to the Cost Model to any of the Specified Personnel:

- (i) supply a copy of this agreement to that person;
 - (ii) cause that person to sign an undertaking in the form of that set out in schedule 2; and
 - (iii) deliver the signed undertaking to the ACCC.
- (b) must not disclose information about the workings of (including input parameters and outputs), give access to or provide a copy of the Cost Model or User Manual to any other person, whether or not employed or engaged by the Receiving Party, (other than the ACCC); and
- (c) the Receiving Party must ensure that the Specified Personnel do not disclose information about the workings of (including input parameters and outputs), give access to or provide copies of the Cost Model or User Manual to any other person contrary to the provisions of this deed.
- 5.4 The confidentiality obligations of the Receiving Party contained in this deed will not be taken to have been breached if any information disclosed by the ACCC to the Receiving Party under this deed:
- (a) is legally required to be disclosed. In which case, the Receiving Party will provide the ACCC with sufficient notice to enable the ACCC to seek a protective order or other remedy. The Receiving Party must provide the ACCC with all assistance and co-operation which the ACCC considers necessary to prevent that disclosure; or
 - (b) enters the public domain other than by way of a breach of an obligation or provision of this deed.

6. Party's representatives

- 6.1 The Receiving Party must ensure that its officers, employees, agents and advisors (whether or not still employed or engaged in that capacity) do not do, or omit to do, anything which, if done or omitted to be done by that party, would be a breach of the Receiving Party's obligations under this deed.
- 6.2 The Receiving Party must give the ACCC all assistance it requires to take any action or bring any proceedings for breach of any undertaking delivered under clause 5.3.

7. Return of Cost Model and destruction of copies

- 7.1 The Receiving Party must, at its expense, deliver to the ACCC any copy of the Cost Model provided to the Receiving Party by the ACCC and:
- (a) permanently delete in its entirety all copies of the Cost Model and User Manual from every computer disk or electronic storage facility of any type owned or used by the Receiving Party;

- (b) destroy all paper copies of the User Manual held or made by the Receiving Party; and
- (c) destroy all paper copies of, and permanently delete in its entirety from every computer disk or electronic storage facility of any type owned or used by the Receiving Party, any thing produced from the Cost Model which is not something which was generated as a Cost Model output as a direct consequence of the Receiving Party's input of data into the Cost Model in accordance with the User Manual,

on the earlier of:

- (d) demand by the ACCC; and
- (e) 5pm on 16 March 2007,

and must cease to make use of the Cost Model or any part of it and confirm in writing when it has complied with all of these obligations by signing the certificate in the form of that set out in schedule 3 and forwarding the signed certificate to the ACCC.

7.2 Return or destruction of the Cost Model or User Manual, and any copies under clause 7.1, does not release the Receiving Party from its obligations under this deed.

8. Disclaimer of warranties and liability

8.1 To the extent permitted by law, all express or implied warranties, representations, terms and conditions other than those contained in this deed (the 'Excluded Representations') are excluded. The Receiving Party acknowledges that no reliance on any Excluded Representations has been made by it in entering into this deed.

8.2 Without prejudice to the generality of clause 8.1, the ACCC makes no warranty that the Cost Model is free from any computer virus.

8.3 The ACCC will not be liable in contract, tort (including negligence) or otherwise for any loss of whatsoever kind, howsoever arising, which is directly or indirectly incurred in connection with the use of the Cost Model.

8.4 The ACCC will not be liable in contract, tort (including negligence) or otherwise for any loss of revenue, business, savings or profits (anticipated or actual), loss of goodwill or data, loss from business interruption or for any indirect or consequential loss or damage whatsoever, howsoever arising, which is directly or indirectly incurred in connection with the use of the Cost Model and whether or not:

- (i) such loss or damage was foreseeable or contemplated; or
- (ii) the ACCC was advised of the possibility of such loss or damage.

8.5 Without prejudice to the generality of clauses 8.3 and 8.4, in no event will the ACCC be liable to the Receiving Party for any loss relating in any way to:

- (i) the Receiving Party's inability or failure to use the Cost Model properly or completely, even if assisted by the ACCC or WIK, or any decision made or action taken by the Receiving Party in reliance on the Cost Model; or
- (ii) any lost profits (whether direct or indirect) or any consequential, exemplary incidental, indirect or special damages relating in whole or in part to the Receiving Party's use of or inability to use the Cost Model even if the ACCC has been advised of the possibility of such loss or damages.

9. Indemnity

- 9.1 The Receiving Party indemnifies the ACCC against all costs, expenses, actions or claims directly or indirectly incurred or suffered by the ACCC as a result of any breach of this deed by the Receiving Party.
- 9.2 The indemnity in clause 9.1 extends to and includes all costs, damages and expenses incurred by the ACCC in defending and/or settling any such costs, expenses, actions, suits, proceedings, claims or demands (including legal costs and disbursements on a full indemnity basis).
- 9.3 The indemnity referred to in this clause 9 survives the expiration or termination of this deed.

10. Applicable Law

This deed is governed by and construed in accordance with the law for the time being in force in the Australian Capital Territory and the parties submit to the non-exclusive jurisdiction of the courts of that Territory.

11. Waiver

- 11.1 If a party does not exercise (or delays in exercising) any of its rights, that failure or delay does not operate as a waiver of those rights.
- 11.2 A single or partial exercise by a party of any of its rights does not prevent the further exercise of any right.
- 11.3 In this clause, 'rights' means rights or remedies provided by this deed or at law.

12. Notices

- 12.1 A notice, approval, consent or other communication in connection with this deed:
 - (a) must be by electronic mail;
 - (b) must be sent by a person duly authorised by the sender;
 - (c) must be delivered to the intended recipient by email to the email address below or the email address last notified by the intended recipient to the sender:

(i) to the ACCC: Australian Competition and
Consumer Commission

Attention: Brett McCarthy

Email: brett.mccarthy@acc.gov.au

with a copy to Gwenda Gleeson at
gwenda.gleeson@acc.gov.au

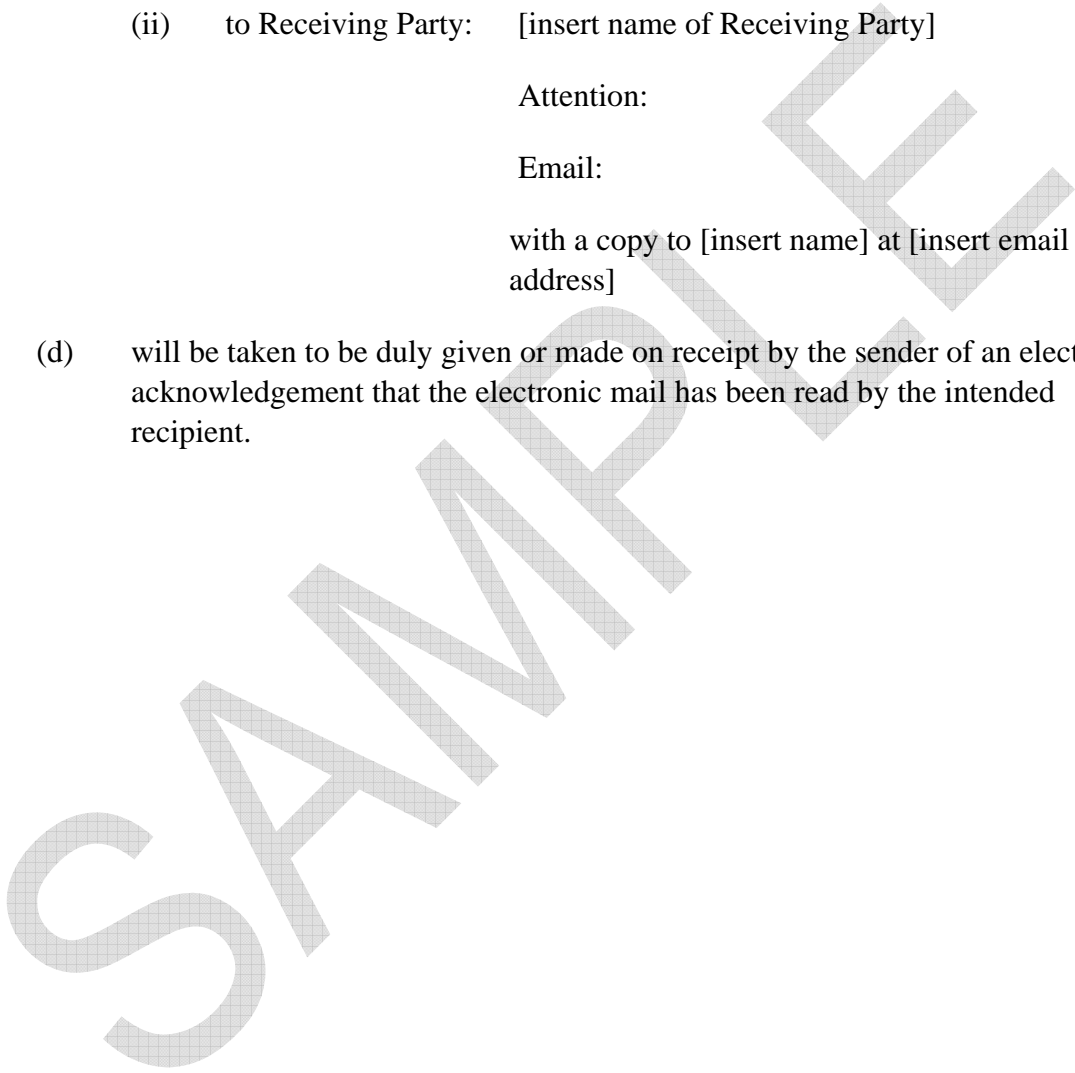
(ii) to Receiving Party: [insert name of Receiving Party]

Attention:

Email:

with a copy to [insert name] at [insert email
address]

(d) will be taken to be duly given or made on receipt by the sender of an electronic
acknowledgement that the electronic mail has been read by the intended
recipient.



EXECUTED AS A DEED

SIGNED, SEALED AND DELIVERED by)
THE AUSTRALIAN COMPETITION)
AND CONSUMER COMMISSION)
in the presence of:)

.....
Signature

.....
Print name

.....
Print position

.....
Witness' signature

.....
Print name

Date:.....

SIGNED, SEALED AND DELIVERED by)
the **RECEIVING PARTY** by:)

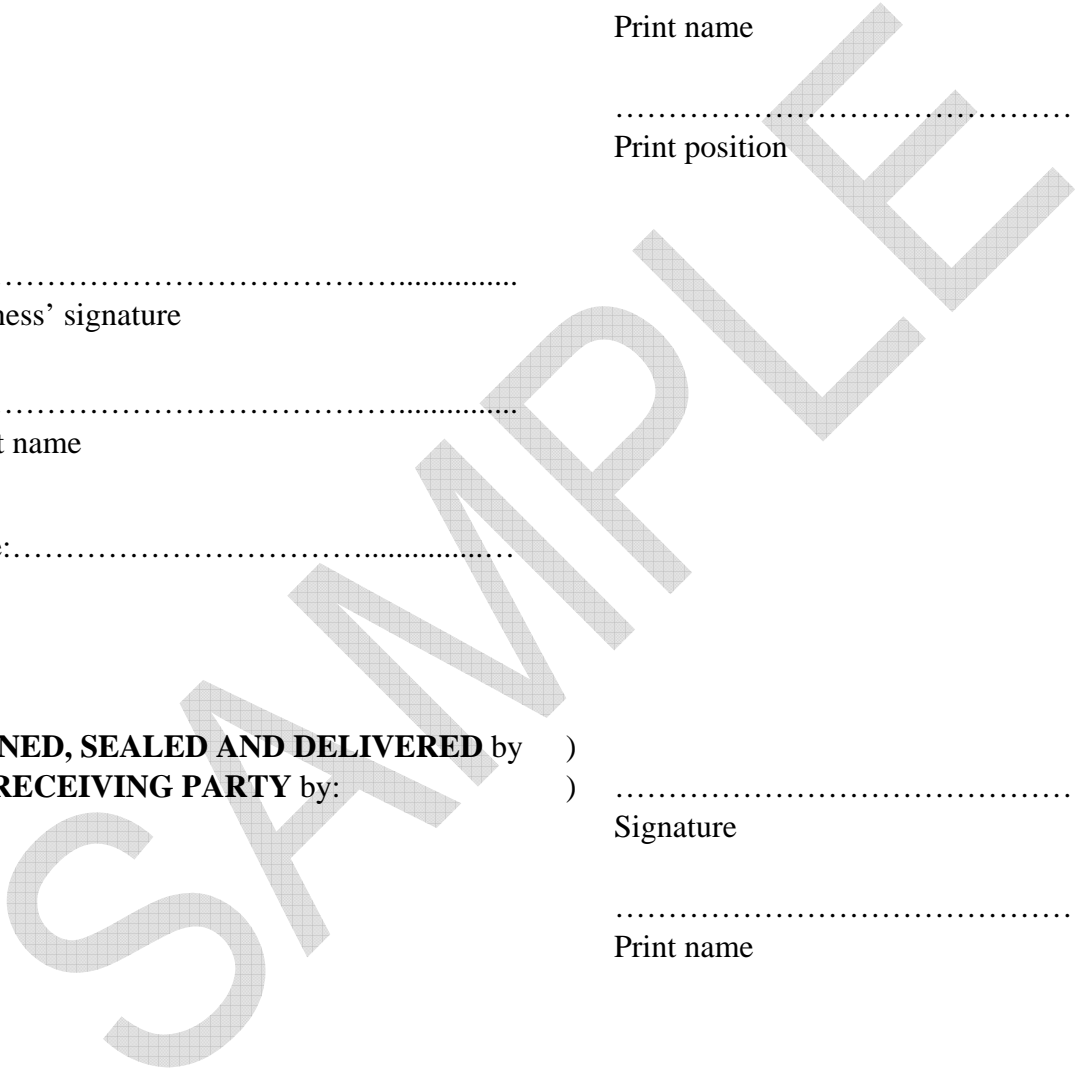
.....
Signature

.....
Print name

.....
Witness' signature

.....
Print name

Date:.....



SCHEDULE 1

SPECIFIED PERSONNEL

[insert names and job title of relevant employees]

SAMPLE

SCHEDULE 2

**DEED POLL – WIK MOBILE NETWORK AND COST MODEL
ACCESS UNDERTAKING**

I
(name)

of
(name and address of employer)

- (a) acknowledge that the Australian Competition and Consumer Commission (“the ACCC”) has arranged for a mobile network and cost model to be developed in relation to the mobile terminating access service (“Cost Model”) and that during 2007 my employer and the ACCC entered into a deed under which my employer will be given access to the Cost Model subject to the terms of that deed (“Cost Model Deed”);
- (b) acknowledge that I have been provided with a copy of the Cost Model Deed;
- (c) agree that the expressions used in this deed have the same meaning as those used in the Cost Model Deed;
- (d) acknowledge that the Cost Model and any other information and material provided by the ACCC in relation to the Cost Model is provided by the ACCC in confidence;
- (e) undertake to the ACCC:
 - (i) to use the Cost Model and such information only for the Specified Purpose set out in the Cost Model Deed; and
 - (ii) not to copy, disclose, publish or communicate to any other person or otherwise make public:
 - (1) the Cost Model or any such information or material provided by the ACCC; and
 - (2) any information produced in connection with the use of the Cost Model, except as permitted by the terms of the Cost Model Deed or otherwise with the prior approval in writing of the ACCC.

Executed as a Deed Poll.

Signed, Sealed and Delivered by:

Name.....

Signature.....

Date.....

SCHEDULE 3

COMPLIANCE CERTIFICATE

I
(name)

of
(name and address of employer)

.....
confirm that in accordance with clause 7 of the deed entered into by my employer and the Australian Competition and Consumer Commission (“the ACCC”) during 2007 under which my employer was given access to the cost model for the mobile terminating access service (“Cost Model”), I have or have arranged to have:

- (a) permanently deleted in its entirety all copies of the Cost Model and its accompanying user manual from every computer disk or electronic storage facility of any type owned or used by my employer;
- (b) destroyed all paper copies of that user manual held or made by my employer; and
- (c) destroyed all paper copies of, and permanently deleted in its entirety from every computer disk or electronic storage facility of any type owned or used by my employer, any thing produced from the Cost Model which is not something which was generated as a Cost Model output as a direct consequence of my employer’s input of data into the Cost Model in accordance with the User Manual.

Signature.....

Date.....