

ANNEXURE A

PROPOSED AMENDMENTS TO DRAFT FAD NON-PRICE TERMS

Appendix B – FAD instrument for the domestic mobile terminating access service



Final Access Determination No. 7 of 2011

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: [insert date] 2011

1 Application

- 1.1 This instrument sets out final access determination (FAD) in respect of the declared domestic mobile terminating access service ('MTAS').
- 1.2 The price in this FAD is exclusive of Goods and Services Tax (GST).

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*

2 Definitions and interpretation

- 2.1 Schedule 7 applies to the interpretation of this instrument. The Schedules form part of this instrument.

3 Commencement and duration

- 3.1 This final access determination commences on 1 January 2012.
- 3.2 This final access determination remains in force up until and including 30 June 2014.

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), 152BCF(2) and 152BCF(2A) 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 terms and conditions on that matter in an Access Agreement cannot be reached, no special access undertaking is in operation setting out terms and conditions on that matter and no binding rules of conduct have been made setting out terms and conditions on that matter: section 152AY of the *Competition and Consumer Act 2010*.

- 4.2 If the carrier or carriage service provider is required to supply the relevant declared service to a service provider, the carrier or carriage service provider must supply the service:
 - (a) at the price specified in Schedule 1; and
 - (b) on the non-price terms and conditions specified in Schedules 2–6.

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Schedule 1 – Price terms for the domestic mobile termination access service (MTAS)

- 1.1 The prices applicable to the MTAS for the period 1 January 2012 to 30 June 2014 are as follows:

Time Period	cpm
1 January 2012 – 31 December 2012	6
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Schedule 2 – Billing and Notifications

- 2.1. The Access Seeker's liability to pay Charges for the Service to the Access Provider arises at the time the Service is supplied by the Access Provider to the Access Seeker, unless the parties agree otherwise.
- 2.2. The Access Seeker must pay Charges in accordance with this FAD, including but not limited to this Schedule 2.
- 2.3. The Access Provider shall provide the Access Seeker with an invoice each ~~month~~ Month in respect of Charges payable for the Service unless the parties agree otherwise.

Explanation for above amendment to clause 2.3 - This is a reference to the defined term.

- 2.4. 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 2.5, no more than ~~five~~ six Months have elapsed since the date the relevant amount was incurred by the Access Seeker's customer, except where the Access Seeker gives written consent to a longer period (such consent not to be unreasonably withheld).

Explanation for above amendments to clause 2.4(b) -The time period above should be six months as this is consistent with standard commercial practice. There is no reason to reduce that period, and it is not practicable to have varying time periods between the FAD and the parties' standard commercial arrangements. A period of six months is consistent with the Communications Alliance Ltd, Industry Code Telecommunications Consumer Protections Code C628:2007, which provides for a maximum period for billing of *190 days* from the date the customer incurred the charge (clause 6.5.4(d)). Further, any concerns in this regard are addressed by the clause being subject to clause 2.5 below.

- 2.5. The parties must comply with the provisions of any applicable industry standard made by the ACMA pursuant to Part 6 of the *Telecommunications Act 1997* (Cth) and the provisions of any applicable industry code registered pursuant to Part 6 of the *Telecommunications Act 1997* (Cth) in relation to billing.
- 2.6. 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 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 percent.

- 2.7. In addition to charging interest in accordance with clause 2.6 or exercising any other rights the Access Provider has at law or under this FAD, where an amount is outstanding and remains unpaid ~~for more than 20 Business Days~~ after it is due for payment, and is not an amount subject to any Billing Dispute notified in accordance with this FAD, the Access Provider may take action, without further notice to the Access Seeker, to recover any such amount as a debt due to the Access Provider.

Explanation for amendments to clause 2.7 - In relation to this amendment, please refer to section 5.2.2.3 (Taking action for unpaid amounts) of the submissions.

28. 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.
- 2.9. The Access Provider must, at the time of issuing an invoice, provide to the Access Seeker all information reasonably required by the Access Seeker to identify and understand the nature and amount of each Charge on the invoice. Nothing in this clause 2.9 is intended to limit subsections 152AR(6) and 152AR(7) of the CCA.
- 2.10. If the Access Seeker believes a Billing Dispute exists, it may, invoke the Billing Dispute Procedures by providing written notice to the Access Provider (**Billing Dispute Notice**). A Billing Dispute must be initiated only in good faith.
- 2.11. 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.
- 2.12. If a Billing Dispute Notice is given to the Access Provider by the due date for payment of the invoice containing the Charge which is being disputed, the Access Seeker may withhold payment of the disputed Charge until such time as the Billing Dispute has been resolved. 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).
- 2.13. Except where payment is withheld in accordance with clause 2.12, the

Access Provider is not obliged to accept a Billing Dispute Notice in relation to an invoice unless the invoice has been paid in full.

- 2.14. A Billing Dispute Notice may not be given to the Access Provider in relation to a Charge later than six Months after the due date for the invoice for the Charge issued in accordance with 2.6.
- 2.15. (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 2.15(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 2.15(a), the Access Provider is taken to have accepted the Billing Dispute Notice.
- 2.16. The Access Seeker shall, as early as practicable and in any case within five Business Days after the Access Provider acknowledges 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).

Without affecting the time within which the Access Provider must make the proposed resolution under clause 2.17, the Access Provider may request additional information from the Access Seeker that it reasonably requires for the purposes of making a proposed resolution pursuant to clause 2.17. This additional information may be requested up to 10 Business Days prior to the date on which the Access Provider must make the proposed resolution under clause 2.17. 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.

2.17. The Access Provider shall try to resolve any Billing Dispute as soon as practicable and in any event within 30 Business Days of ~~acknowledging~~ accepting a Billing Dispute Notice under clause 2.15 (or longer period if agreed by the parties), by notifying the Access Seeker in writing of its proposed resolution of a Billing Dispute. That notice shall:

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

If the Access Provider reasonably considers that it will take longer than 30 Business Days after ~~acknowledging~~ 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 2.17 (such consent not to be unreasonably withheld).

Explanation for above amendment to clause 2.17 - The time should not begin to run for the Access Provider's proposed resolution until the Access Provider has accepted the Billing Dispute as set out in clause 2.15 above, as this will be the point at which the Access Provider accepts that it has sufficient information to begin considering the dispute.

2.18. 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 2); or

(f) confirm its proposed resolution.

2.19. 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 as soon as practicable and in any event within one Month of the Access Provider's notice of its proposed resolution under clause 2.17 or its Revised Proposed Resolution under clause 2.18 (as applicable), unless the Access Seeker escalates the Billing Dispute under clause 2.22. If the Access Provider is required to make a withdrawal, adjustment or refund of a disputed Charge under this clause but its next invoice (**first invoice**) is due to be issued within 48 hours of its proposed resolution under clause 2.17 or its Revised Proposed Resolution under clause 2.18 (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.

2.20 Where the Access Provider is to refund a disputed Charge, the Access Provider shall pay interest (at the rate set out in clause 2.6) 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.

2.21 Where the Access Seeker is to pay a disputed Charge, the Access Seeker shall pay interest (at the rate set out in clause 2.6) 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.

2.22

(a) If the Access Seeker, having first submitted an objection to the Access Provider under clause 2.18, is not satisfied with the Access Provider's ~~proposed resolution~~ Revised Proposed Resolution or confirmation of its proposed resolution made under clause 2.18 ~~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 2.17 and 2.18 (as applicable), the Access Seeker may escalate the matter under clause 2.23.

Explanation of amendments to clause 2.22(a) - These amendments ensure that a Billing Dispute cannot be escalated until the procedure in clause 2.18 has been complied with and that the escalation applies if the timeline in clause 2.18 is not adhered to.

(b) If the Access Seeker does not do so within ~~30~~ five Business Days (or such longer period of up to 10 Business Days which the Access Seeker may request and which the Access Provider must either accept or reject, acting reasonably) of the earlier of:

(i) the end of the period for making a proposed resolution under clause 2.17 or Revised Proposed Resolution under clause 2.18 (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 and clauses 2.20 and 2.21 shall apply.

Explanation of amendments to clause 2.22(b) - please refer to section 5.2.2.4 (Time period for escalating Billing Disputes) 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 2.17 or the time period in clause 2.18. 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 2.17 or Revised Proposed Resolution under clause 2.18 (as applicable); or (ii) the time at which it is notified of the Access Provider's proposed resolution or Revised Proposed Resolution.

2.23 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 ~~proposed resolution~~ Revised Proposed Resolution; and

Explanation of amendments to clause 2.23 - This amendment clarifies that a Billing Dispute may only be escalated following completion of the procedure set out in clause 2.18.

(b) seeking escalation of the Billing Dispute.

2.24. A notice under clause 2.23 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 2.23 (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.

- 2.25. 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 under clause 2.24 (or such longer period as agreed between the parties):
- (a) either party may provide a written proposal to the other party for the appointment of a mediator to assist in resolving the dispute. Mediation 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 2.25(a) or are unable to resolve the entire Billing Dispute by mediation, either party may commence legal or regulatory proceedings to resolve the matter.
- 2.26. 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.
- 2.27. Each party must continue to fulfil its obligations under this FAD while a Billing Dispute and the Billing Dispute Procedures are pending.
- 2.28. 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 2.243 (or their respective nominees).
- 2.29. 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 2.30 should be deleted, but if not, it is proposed that the clause be amended as marked up below.

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

Explanation for above amendment to clause 2.30 - This amendment is necessary because only the Billing Dispute Procedures should properly result in a finding that invoices are incorrect. The

outcome of other dispute resolution procedures will not impact upon the accuracy of invoices.

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

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

Explanation for above amendment to clause 2.30 - Please refer to section 5.2.2.5 (Consequences of inaccurate invoicing) of the submissions.

then, for the purposes of clause 2.20, 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 2.6, plus 2 percent. The remedy set out in this clause 2.30 shall be without prejudice to any other right or remedy available to the Access Seeker.

This clause 2.30 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 2.30 - Please refer to section 5.2.2.5 (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 2.21 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 2.30 shall be without prejudice to any other right or remedy available to the Access Provider.

Explanation for above amendment to clause 2.30 - Please refer to section 5.2.2.5 (Consequences of inaccurate invoicing) of the submissions.

Clause 2.31 should be deleted, but if not, it is proposed that the clause be amended as marked up below.

2.31. If it is determined by the Billing Dispute Procedures or by agreement between the parties that:

(a) three or more out of any five consecutive invoices for the Service are incorrect by 5 percent 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 2.31 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 2.31 - Please refer to section 5.2.2.5 (Consequences of inaccurate invoicing) of the submissions.

Schedule 3 – Creditworthiness and security

Explanation for amendments to clause 3.1 -

Telstra proposes that in clause 3.1:

- (a) the provision of Security should be a precondition to the supply of a Service under the FAD (please see section 5.2.3.1 (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 5.2.3.2 (Amount and Form of Security) of the submissions).

Option 1 - Security as a precondition for supply. Please refer to section 5.2.3.1 (Supply not conditional upon provision of Security) of the submissions.

- 3.1 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 3.2; and
 - (c) in the amount and form determined by the Access Provider having regard to the matters set out in clauses 3.3 and 3.4.

Explanation for amendments to clause 3.1(b) and (c): This amendment clarifies the interaction of clause 3.1 with clauses 3.2, 3.3 and 3.4.

~~-subject to clause 3.2, the Security (as shall be determined having regard to clause 3.3 and as may be varied pursuant to clause 3.4) 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 3.1. Please refer to section 5.2.3.1 (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 3.2; and

(c) in the amount and form determined by the Access Provider having regard to the matters set out in clauses 3.3 and 3.4.

3.2.

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

Explanation for above amendments to clause 3.2(a) - In order to cover the insolvency risks that this clause seeks to address, it is necessary that a clear period of six Months is allowed to elapse before the Access Provider is obliged to return the Security. This is consistent with normal commercial practice.

- (i) cessation of supply of a the Service ~~or Services~~ under this FAD, and

Explanation for above amendment to clause 3.2(a)(i) - This amendment clarifies that clause 3.2(a)(i) can only apply when the supply of the MTAS generally to an Access Seeker under the FAD has ceased.

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

- (b) Notwithstanding clause 3.2(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 3.2(a), the Access Provider reasonably believes any person, including a provisional liquidator, administrator, trustee in bankruptcy, receiver, receiver and manager, other controller or similar official, has a legitimate right to recoup or claim repayment of any part of the amount paid or satisfied, whether under the laws or preferences, fraudulent dispositions or otherwise.

33. ~~The~~ In determining the amount and form of the Security (including any ~~varied~~ ~~altered or modified~~ 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 having regard. ~~As a statement of general principle the amount of any Security shall be calculated by reference~~ to:

Explanation for above amendments to clause 3.3 - Please refer to section 5.2.3.2 (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~~ in respect of the Service but unpaid (excluding any amounts in respect of which there is a current Billing Dispute notified in accordance with this FAD)

Explanation for above amendment to clause 3.3(b) - This amendment takes account of the fact that amounts invoiced in respect of the Service will be more than those amounts invoiced under the FAD. There should only be one security applying in respect of the supply arrangement between the parties for the Service.

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.

3.4. Examples of appropriate forms of ~~s~~Security, having regard to the factors referred to in clause 3.3, may include without limitation:

- (a) fixed and floating charges;
- (b) personal guarantees from directors;
- (c) ~~b~~Bank ~~g~~Guarantees;

Explanation for amendments to clause 3.4(c) - "Bank Guarantee" is referenced below as a defined term. Telstra has proposed a definition of "Bank Guarantee" to clarify the nature of that form of Security.

- (d) letters of comfort;
- (e) mortgages;
- (f) a right of set-off;
- (g) a Security Deposit; or
- (h) a combination of the forms of security referred to in paragraphs (a) to (fg) above.

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

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

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

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

3.5.

[\(a\)](#) 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 3.3 and subject to clause 3.7, reasonably require the Access Seeker to alter the amount, form or the terms of the Security (which may include a requirement to provide additional ~~security~~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 above amendment to clause 3.5(b) - The reference to "security" above should be to the defined term.

[\(c\)](#) In addition to clause 3.5(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 3.5 - It is proposed that clause 3.5 should be broken up into three subparagraphs, each dealing with a separate issue. The proposed new clause 3.5(c) sets out additional triggers for requesting an altered Security. For an explanation of this proposed new clause 3.5(c) please refer to section 5.2.3.3 (Alteration of Security) of the submissions for an explanation of this proposed amendment.

- 3.6 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 3.3). The Access Provider may request, and the Access Seeker shall promptly provide, Ongoing Creditworthiness Information, for the purposes of this clause 3.6

Explanation for amendments to clause 3.6 - The first amendment, consistent with clause 3.5(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.

- 3.7. In the event that the Access Seeker provides Ongoing Creditworthiness Information to the Access Provider as required by this Schedule 3, 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.
- 3.8. For the purposes of this Schedule 3, **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 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:
- (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 3.8 - Please refer to section 5.2.3.4 (Meaning of Ongoing Creditworthiness Information) of the submissions.

Clause 3.9 below should be deleted, but if not, it is proposed that the clause be amended as marked up below.

In relation to the first amendment, please refer to section 5.2.3.5 (Confidentiality undertaking for Ongoing Creditworthiness Information) of the submissions.

The second amendment ensures that there is a procedure for determining the form of the confidentiality undertaking.

- 3.9. 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. Any such confidentiality undertaking must be in a form acceptable to the Access Provider. The Access Provider must act reasonably in either accepting or rejecting a form of confidentiality undertaking proposed by the Access Seeker.
- 3.10. Subject to this Schedule 3, the parties agree that:~~the Access Provider may, in its absolute discretion, deem~~
- (a) a failure by the Access Seeker to provide the warranties set out in clause 3.7 or to provide Ongoing Creditworthiness Information constitutes:

Explanation for proposed new clause 3.10(a) - A failure to provide a warranty as set out in clause 3.7 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 for providing the Ongoing Creditworthiness Information; and ~~or~~

Explanation for proposed new clause 3.10(a)(i) - The words "alter the amount, form or terms of the Security (including an entitlement to an additional Security)" in the proposed clause 3.10(a)(i) clarify what it means for the Access Provider to "alter" the Security, and they also ensure consistency with clause 3.5

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 3.5 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 3.10(a)(ii) -

If clause 2.31 is retained, consistent with clause 2.31, this amendment in new clause 3.10(a)(ii) and (b)(ii) provides similar remedies for the Access Provider. Refer to section 5.2.3.6 (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 3.1, to provide an altered Security in accordance with clause 3.5 or 3.10(a)(i) or the occurrence of any event set out in clause 3.5(c)(i) to 3.5(c)(iii) constitutes-as:

~~(a)(i)~~ an event entitling the Access Provider to immediately suspend the supply of Service(s) to the Access Seeker under clause 6.X; and ~~alter the Security of the Access Seeker; or~~

Explanation for proposed new clause 3.10(b)(i)

Please refer to section 5.2.3.6 (Failure to provide Ongoing Creditworthiness Information or altered Security) of the submissions.

~~(b)(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 for such a breach.

Explanation for above amendment to clause

3.10(b)(ii) - Please refer to note for proposed new clause 3.10(a)(ii).

3.11. Any disputes arising out of or in connection with Schedule 3 shall be dealt with in accordance with the procedures in Schedule 4. Notwithstanding that a dispute arising out of or in connection with Schedule 3 has been referred to the procedures in Schedule 4 and has not yet been determined, nothing in this clause 3.11 or Schedule 4 prevents the Access Provider from exercising any of its rights to suspend the supply of a Service under Schedule 6.

Explanation for amendments to clause 3.11 - Please refer to section 5.2.6.1 (Circumstances giving rise to a right to suspend) of the submissions.

Schedule 4 – General dispute resolution procedures

- 4.1. If a dispute arises between the parties in connection with or arising from [the terms and conditions set out in this FAD for](#) the supply of the Service ~~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 4.2, in the case of a Non-Billing Dispute, the dispute shall be managed in accordance with the procedures set out in this Schedule 4.

[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 FAD are governed by the dispute resolution procedures in the FAD. To the extent that other disputes arise about terms not set out in the FAD, 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.

- 4.2. 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. ~~The Access Provider may seek a determination from an independent or third party on whether a dispute initiated by the Access Seeker as a Billing Dispute is a Non-Billing Dispute. If the independent or third party deems the dispute to be a Non-Billing Dispute, the~~ [If the Access Provider may 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 to](#) 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 4.2 - 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. It is not practicable to have an independent or third party determine that question, as issues such as the selection of an appropriate person and the procedure to be followed will unduly protract the determination of

the issue. Such a process would also be costly, and would raise issues as to who is to pay those costs. This is essentially a preliminary step to the resolution of a dispute, which should be resolved quickly and cost effectively. Given the ability of the Access Seeker to withhold the payment of any amounts owing under the FAD 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. Thus, the Access Provider should be entitled to make this determination, acting reasonably.

- 4.3. 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 3. A Non-Billing Dispute must be initiated only in good faith.
- 4.4. Any Non-Billing Dispute notified under clause 4.3 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 4.3 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 4.11, or by written agreement submit it to mediation in accordance with clause 4.10.
- 4.5. If:
- (a) under clause 4.4 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 4.10(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.
- 4.6. A party may not commence legal proceedings in any court (except proceedings seeking urgent interlocutory relief) in respect of a Non-Billing Dispute unless:
- (a) the Non-Billing Dispute has first been referred for resolution in accordance with the dispute resolution procedure set out in this Schedule 4 or clause 4.2 (if applicable) and a notice terminating the

operation of the dispute resolution procedure has been issued under clause 4.5; or

- (b) the other party has failed to substantially comply with the dispute resolution procedure set out in this Schedule 4 or clause 4.2 (if applicable).

4.7. Each party must continue to fulfill its obligations under this FAD while a Non-Billing Dispute and any dispute resolution procedure under this Schedule 4 are pending.

4.8. 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.

4.9. Each party shall, as early as practicable after the notification of a Non-Billing Dispute pursuant to clause 4.3, 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).

4.10. Where a Non-Billing Dispute is referred to mediation by way of written agreement between the parties, pursuant to clause 4.4(b):

(a) any agreement shall include:

- (i) a statement of the disputed matters in the Non-Billing Dispute; and

- (ii) the procedure to be followed during the mediation,

and the mediation must take place within 15 Business Days upon the receipt by the mediator of such agreement;

- (b) it must be conducted in accordance with the mediation guidelines of the ACDC in force from time to time (**ACDC Guidelines**) and the provisions of this clause 4.10. In the event of any inconsistency between them, the provisions of this clause 4.10 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.

4.11. The parties may by written agreement in accordance with clause 4.4(b), submit a Non-Billing Dispute for resolution by an Expert Committee (**Initiating Notice**), in which case the provisions of this clause 4.11 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 4.10(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 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.

- (h) If the dispute is not resolved within the timeframe referred to in clause 4.11(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.

4.12 Schedule 4 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) and that process has been initiated; and

Explanation for amendment to clause 4.12(a) - This amendment is necessary to clarify that the dispute resolution process has been not only established but also initiated.

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

Schedule 5 – Confidentiality provisions

- 5.1. Subject to clause 5.4 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 5.1 - Please refer to section 5.2.5.2 (Permitted Use of Confidential Information) of the submissions.

- 5.2. For the avoidance of doubt, information about the 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 5.2 - The first amendment is necessary because not all information which is generated within the Access Provider's Network which satisfies the conditions of clause 5.2 as currently drafted will be confidential information of the Access Seeker. Only information concerning MTAS 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 5.2.5.1 (Confidential Information definition) of the submissions. Aggregated information should not be Confidential Information if, as a result of the aggregation, it is not possible to ascertain the identity of any particular Access Seeker or that the information is that of any particular Access Seeker. The clause currently suggests that only information of *all* Access Seekers acquiring the Service will be excluded, and only when that information is aggregated with the Access Provider's aggregate Network information. This approach is unnecessarily restrictive of what should constitute aggregated information and has the potential to constrain the usual operations for Access Providers.

- 5.3. 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.

5.4. Subject to clauses [5.5](#), [and 5.10](#), Confidential Information of the Access Seeker ~~referred to in clause 5.2~~ may be:

- (a) used by the Access Provider:
 - (i) for the purposes of undertaking planning, maintenance, provisioning, operations or reconfiguration of its Network;
 - (ii) for the purposes of ~~this FAD~~ [supplying services to the Access Seeker](#);
 - (iii) for the purpose of billing; or
 - (iv) for another purpose agreed to by the Access Seeker; and
- (b) disclosed only to personnel [\(including contractors and sub-contractors\) 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 paragraph (a) above.

Explanation of amendments to clause 5.4 -

In relation to the proposed deletion of the words "referred to in clause 5.2", please refer to section 5.2.5.2 (Permitted Use of Confidential Information) of the submissions, particularly paragraphs 129 and 130.

In relation to the proposed amendment to clause 5.4(a)(ii) above, please refer to section 5.2.5.2 (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 reasons set out in section 5.2.5.3 (Disclosure of Confidential Information) of the submissions); and
- second, disclosure as contemplated in clause 5.4(b) above should be permitted on a "need to know" basis, rather than only to personnel "directly involved" in the purposes outlined in clause 5.4(a). 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 5.4(a) activities) to access the information, but where their involvement in the actual clause 5.4(a) activities may not necessarily be "direct".

5.5. 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 5.5 - Please refer to section 5.2.5.3 (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 5.5(a) - Please refer to section 5.2.5.3 (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 the rights of the Disclosing Party in respect of the obligations of the Disclosing Party~~ for the purposes of obtaining advice in relation to matters arising out of or in connection with the supply of the Service under this FAD;

Explanation for above amendment to clause 5.5(b) - Absent these amendments, clause 5.5(b) is very narrow. The clause is limited to disclosures to protect or advise on the rights of the Disclosing Party under the FAD. 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 5.5(d) - Disclosure to professional persons is covered by clause 5.5(b).

- (e) as required by law provided that the Disclosing Party has first given as much notice (in writing) as is reasonably practicable to the other party, that it is required to disclose the Confidential Information so that the other party has an opportunity to protect the confidentiality of its Confidential Information, except that no notice is required in respect of disclosures made by the Access Provider to the ACCC under section 152BEA of the CCA;

- (f) with the written consent of the other party provided that, prior to disclosing the Confidential Information of the other party:
- (i) the Disclosing Party informs the relevant person or persons to whom disclosure is to be made that the information is the Confidential Information of the other party;
 - (ii) if required by the other party as a condition of giving its consent, the Disclosing Party must provide the other party with a confidential undertaking (in a form acceptable to the other party, acting reasonably) signed by the person or persons to whom disclosure is to be made; and
 - (iii) if required by the other party as a condition of giving its consent, the Disclosing Party must comply with clause 5.6;

Explanation for above amendment to clause 5.5(f) - These amendments provide additional protection to the 'other party' in respect of its Confidential Information by ensuring that the Disclosing Party informs the third person of the confidential nature of the information to be disclosed, and procures a signed confidentiality undertaking in a form that is required by the other party.

- (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;

Explanation for above amendment to clause 5.5(g) - 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 on a confidential basis.

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

Explanation for above amendments to clause 5.5(h) - Disclosure of the other party's Confidential Information (where reasonably required) should be allowed not only "in" an Emergency, but also in preparation for or following an Emergency.

In relation to the second amendment, the reference to emergency should be to the defined term in Schedule 7.

- (i) as required by the listing rules of any stock exchange where that

party's securities are listed or quoted;

- (j) 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 5.5(j) - 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.

- (k) 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 5.5(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 interception capability.

- 5.6. Each party must co-operate in any action taken by the other party to:
- (a) protect the confidentiality of the other party's Confidential Information; or
 - (b) enforce its rights in relation to its Confidential Information.
- 5.7. Each party must establish and maintain security measures to safeguard the other party's Confidential Information from unauthorised access, use, copying, reproduction or disclosure.
- 5.8. Confidential Information provided by one party to the other party is provided for the benefit of that other party only. Each party acknowledges that no warranty is given by the Disclosing Party that the Confidential Information is or will be correct.
- 5.9 Each party acknowledges that a breach of this Schedule 5 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 5.
- 5.10. If:

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

(A) Schedule 6 due to a Payment Breach; or

(B) under clause 6.7; ~~pursuant to this FAD, and~~ or

(b) after suspension or cessation of supply of the Service under this FAD, the Access Seeker fails to pay amounts due or owing to the Access Provider by the due date for payment;

Explanation for above amendment to clause 5.10 - The notification rights in sub-paragraphs (a) and (b) should apply not only to the suspension or cessation of supply as a result of payment breaches, but also to other instances of suspension or cessation of supply. For example, the notification rights should apply where the Access Provider ceases supply as a result of an event in clause 6.7 occurring in respect of an Access Seeker.

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

- (a) 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
- (b) without limiting clause 5.10, disclose to a credit reporting agency:
 - (i) the defaults made by the Access Seeker to the Access Provider; and
 - (ii) the exercise by the Access Provider of any right to suspend or cease supply of the Service under this FAD.

Schedule 6 – Suspension and termination

Explanation for proposed new clause - Please refer to section 5.2.6.1 (Circumstances giving rise to a right to suspend) of the submissions.

- 6.X. The Access Provider may immediately suspend the supply of a Service or access to the Access Provider’s Network, provided it notifies the Access Seeker where practicable and provides the Access Seeker with as much notice as is reasonably practicable:
- (a) during an Emergency; or
 - (b) where in the reasonable opinion of the Access Provider, the supply of that Service or access to the Access Provider’s Network may pose a threat to safety of persons, hazard to equipment, threat to Network operation, access, integrity or Network security or is likely to impede the activities of authorised persons responding to an Emergency;
 - (c) where, in the reasonable opinion of the Access Provider, the Access Seeker’s Network or equipment adversely affects or threatens to affect the normal operation of the Access Provider’s Network or access to the Access Provider’s Network or equipment (including for the avoidance of doubt, where the Access Seeker has delivered Prohibited Traffic onto the Access Provider’s Network);
 - (d) where the Access Seeker has failed to provide the Security to the Access Provider under clause 3.1 within 10 Business Days after the commencement of the supply of the Service to the Access Seeker;
 - (e) where an event set out in clauses 6.7(a) to (i) occurs;
 - (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;
 - (g) where the Access Seeker fails to maintain the Security, fails to provide altered Security, or fails to vary or replace an existing Security in circumstances where it is required to do so under this FAD,
- 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.

6.1. 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:

(i) _____ its Facilities; ~~or~~

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

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

Explanation for above amendments to clause 6.1(b) -
"Facility" under the FAD 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 5.2.6.1 (Circumstances giving rise to a right to suspend) in the submissions.

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 above amendment to clause 6.1(b) -
Where the Access Seeker's contravention of any law causes the Access Provider to be in contravention of any law or regulatory obligation, the Access Provider should have an immediate right to suspend the service (see proposed clause 6.X(f) above). Otherwise, the Access Seeker's contravention of any law should be a Suspension Event. This amendment provides for such an approach.

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

~~(e) any of the events described in clause 6.7 occurs in respect of the Access Seeker;~~

Explanation for deletion - Clause 6.1(d) should be deleted because first, it is inconsistent with the right to cease supply set out in clause 6.7. Second, clause 6.1(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:

- (ed) as soon as reasonably practicable after becoming aware of the Suspension Event, the Access Provider gives a written notice to the Access Seeker:
 - (i) citing this clause;
 - (ii) specifying the Suspension Event that has occurred;
 - (iii) requiring the Access Seeker to ~~institute 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:

- (fe) the Access Seeker fails to ~~institute complete the~~ remedial action as specified in the Suspension Notice within 10 Business Days after receiving the Suspension Notice (in this clause 6. 1, the **Remedy Period**),

Explanation for amendment to new clause 6.1(e) above -
The proposed amendment to new clause 6.1(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 after the expiry of the Remedy Period:

- (gf) refuse to provide the Access Seeker with the Service;
 - ~~(i) of the kind in respect of which the Suspension Event has occurred; and~~
 - ~~a request for~~
 - ~~which is made by the Access Seeker after the date of the breach,~~
 - ~~until the remedial action specified in the Suspension Notice is completed or the Suspension Event otherwise ceases to exist; and~~
- (hg) suspend the provision of the Service,
until the remedial action specified in the Suspension Notice is completed or the Suspension Event otherwise ceases to exist.

Explanation for above amendments to clause 6.1(f) to (g) - The suspension of the supply of the Service should not be limited in time to Services supplied after the date of breach. Where a Suspension Event is subsisting, the right of suspension should apply to *any* supply of the Service to the Access Seeker, and not just to any requests for supply made after the date of breach.

- 6.2. For the avoidance of doubt, subclause 6.1(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 6.2 - 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.

- 6.3. In the case of a suspension pursuant to clause 6.1, the Access Provider shall reconnect the Access Seeker to the Access Provider's Network and recommence the supply of the Service as soon as practicable after there no longer exists a reason for suspension and the Access Provider shall do so subject to payment by the Access Seeker of the Access Provider's reasonable costs of suspension and reconnection.

- 6.4. If:

- (a) ~~a party~~ an Access Seeker ceases to be a carrier or carriage service provider; or
- (b) ~~a party~~ an Access Seeker ceases to carry on business for a period of more than 10 consecutive Business Days; or
- (c) in the case of ~~the~~ an Access Seeker, any of the reasonable grounds specified in subsection 152AR(9) of the CCA apply; or
- (d) ~~a party~~ an Access Seeker breaches a material obligation under this FAD, and:
 - (i) that breach materially impairs or is likely to materially impair the ability of the ~~other party~~ Access Provider to deliver Listed Carriage Services to its customer; and

Explanation for above amendments to clause 6.4(a) to (d) - Please refer to the explanation at the end of clause 6.4 below.

- (ii) the ~~other party~~ Access Provider 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 6.4(d)(ii) - In relation to the first amendment, please refer to the explanation at the end of clause 6.4 below.

In relation to the second amendment, consistent with clause 6.1 above, 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.

- (iii) the ~~other party~~ Access Seeker fails to ~~institute~~ complete the remedial action as specified in the Breach Notice within ~~20~~ 10

Business Days after receiving the Breach Notice (in this clause 6.4, the **Remedy Period**); ~~or~~;

Explanation for amendments to clause 6.4(d)(iii) -

In relation to the first amendment, please refer to the explanation at the end of clause 6.4 below.

In relation to the second amendment, this amendment clarifies that the remedial action should be completed, and not merely commenced, by the end of the Remedy Period. In addition, consistent with clause 6.1(e) above, the Remedy Period should be 10 Business Days.

(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 6.4(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 6.4(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 6.7(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~~ Access Provider may cease supply of the Service under this FAD by written notice given to the first-mentioned party at any time after becoming aware of: the cessation, reasonable grounds, ~~or~~ expiry of the Remedy Period specified in the Breach Notice, 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 6.4 above - In relation to the first amendment, and the corresponding amendments to clauses 6.4(a) to (d) above, this clause should be expressed to apply in favour of the Access Provider as against the Access Seeker (and not in reverse). This is because only the Access Provider can cease to supply the Service under the FAD, and therefore under this clause 6.4.

In relation to the second amendment, these are all consequential amendments as a result of amendments to clauses 6.4(d) to (f) above.

6.5. A party must not give the other party both a Suspension Notice under clause 6.1 and a Breach Notice under clause 6.4 in respect of:

- (a) the same breach; or
- (b) different breaches that relate to or arise from the same act, omission or event or related acts, omissions or events;

except:

- (c) where a Suspension Notice has previously been given to the Access Seeker by the Access Provider in accordance with clause 6.1 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 6.1; and
- (d) Where an Access Seeker has not rectified a Suspension Event, then notwithstanding clause 6.4(d)(ii), the time period for the purposes of clause 6.4(d)(ii) will be ~~Access Provider has given written notice to the Access Seeker within~~ 20 Business Days ~~of~~ from the expiry of the time available to remedy the Suspension Event, rather than 20 Business Days from the date that the Access Provider becomes aware of the breach.

Explanation for amendment to clause 6.5(d) - If Telstra's proposed amendments to clause 6.4(d)(ii) above are not accepted, this amendment clarifies that the time limitation in clause 6.4(d)(ii) will not operate to prevent the issuing of a Breach Notice in the circumstances contemplated by subparagraphs (c) and (d).

- 6.6. For the avoidance of doubt, a party shall not be required to provide a Suspension Notice under clause 6.1 in respect of a breach before giving a Breach Notice in respect of that breach under clause 6.4.
- 6.7. Notwithstanding any other provision of this FAD, either party may at any time immediately cease the supply of the Service under this FAD by giving written notice of termination to the other party if:
 - (a) an order is made or an effective resolution is passed for winding up or dissolution without winding up (otherwise than for the purposes of solvent reconstruction or amalgamation) of the other party; or
 - (b) a receiver, receiver and manager, official manager, controller, administrator (whether voluntary or otherwise), provisional liquidator, liquidator, or like official is appointed over the undertaking and property of the other party; or
 - (c) a holder of an encumbrance takes possession of ~~the 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 6.7(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 the Service under this FAD; or
 - (h) the other party seeks or is granted protection from its creditors under any applicable legislation; or
 - (i) anything analogous or having a substantially similar effect to any of the events specified above occurs in relation to the other party.
- 6.8. 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.
- 6.9 Without prejudice to the parties' rights upon termination of the supply of the Service under this FAD, or expiry or revocation of this FAD, the Access Provider must refund to the Access Seeker a fair and equitable proportion of those sums paid under this FAD by the Access Seeker which are periodic in nature and have been paid for the Service for a period extending beyond the date on which the supply of the Service under this FAD terminates, or this FAD ceases to have effect, 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 4 of this FAD.

Schedule 7 – Interpretation and definitions

Interpretation

In this ~~agreement~~FAD, unless the contrary intention appears:

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

Definitions

“ACCC” means the Australian Competition and Consumer Commission;

“ACDC” means the Australian Commercial Disputes Centre Limited;

“ACMA” means the Australian Communications and Media Authority;

~~“After Hours” means outside Business Hours;~~

Explanation for deletion of definition of “After Hours” - This term is not used in the draft FAD.

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” - The term “Bank Guarantee” is used in clause 3.4 but not defined.

“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 to the Access Seeker;~~

Explanation for new definition of “Billing Dispute” - Please refer to section 5.2.2.2 (Definition of “Billing Dispute”) of the submissions.

“Billing Dispute Notice” means a notice given pursuant to clause 2.11 in a form and containing the particulars or information reasonably required by the Access Provider;

Explanation for new definition of “Billing Dispute Notice” - The FAD 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 clause 2.16, will ensure that the Access Provider receives all relevant information either at the time of receiving the Billing Dispute Notice, or (where clause 2.16 applies) very shortly thereafter.

“**Billing Dispute Procedures**” means the procedures set out in clauses 2.11 to 2.29;

~~“**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.~~

Explanation for deletion of definition of “Business Hours” - This term is not used in the draft FAD.

“**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;

“**Calendar 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;

“**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 the Service [by the Access Provider to the Access Seeker under this FAD](#);

Explanation for new definition of “Charge” - Please refer to section 5.2.2.1 (Definition of “Charge”) of the submissions.

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

- (a) information which is or becomes part of the public domain (other than through any breach of this ~~agreement~~[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" - In relation to the amendments to subparagraph (a) of the definition, Telstra submits that these additional protections, which appear in the FADs for the declared fixed line services, should be included as they ensure that the public domain exception cannot be misused by any party to avoid confidentiality obligations.

In relation to the other amendments to the definition, please refer to section 5.2.5.1 (Confidential Information definition) of the submissions.

“**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;

~~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, 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. Telstra submits that these words are only applicable to network modernisation and upgrade provisions, which are not relevant to MTAS.

“**Event**” means an act, omission or event relating to or arising out of this agreement or part of this agreement;

“**Expert Committee**” means a committee established under clause 4.11;

“**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 the Service; or~~

~~(b) any issue as to the availability or quality of the 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;~~

Explanation for deletion of definition of “Fault” - This term is not used in the draft FAD.

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

Explanation for deletion of definition of “Liability” - This term is not used in the draft FAD.

~~“**Loss**” includes liability, costs or expenses (including legal costs);~~

Explanation for deletion of definition of “Loss” - This term is not used in the draft FAD.

“**Month**” means a ~~e~~Calendar ~~m~~Month;

“**MTAS**” means the domestic mobile terminating access service declared under section 152AL of the CCA;

“**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 or optical energy;

“**Non-Billing Dispute**” means a dispute other than a Billing Dispute;

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 clauses 3.5(c)(iii), 5.10 and 6.1(a).

~~“People” of a party, means each of that party’s directors, officers, employees, agents, contractors, advisers and representatives but does not include that party’s end-users or the other party;~~

Explanation for deletion of definition of “People” - This term is not used in the draft FAD.

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.

Explanation for new definition of “POI” - This definition, taken from the FADs for the declared fixed line services, has been introduced as a result of the introduction of the defined term “Prohibited Traffic”, as explained below.

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

Explanation for new definition of “Prohibited Traffic” - This definition, taken from the FADs for the declared fixed line services, has been introduced as a result of the use of that concept in proposed new clause 6.X(c).

“**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;

“**Security**” means the amount and form of security required to be provided to the Access Provider in respect of the provision by the Access Provider of MTAS under Schedule 3;

“**Service**” means the MTAS;

“**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 clause 4.12(a) and proposed new clause 5.5(j).