

**Dispute Management Agreement**

**Approved Panel Member Terms of  
Appointment**

**3 APRIL 2014**

**FOUO: COMMERCIAL IN CONFIDENCE**

NBN Co Limited

## **Approved Panel Member Terms of Appointment**

03/04/14

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### **Environment**

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# Panel Member Terms of Appointment

## Parties

This agreement is entered into between:

- NBN Co Limited (ABN 86 136 533 741) of Level 11, 100 Arthur Street, North Sydney NSW 2060 (**NBN Co**);
- [insert full name of person] of [insert address of person] (**Customer**); and
- [insert full name of person] of [insert address of person] (**Panel Member**).

## Background

1. NBN Co has entered into Access Agreements with its Customers which sets out the terms on which NBN Co's Customers may order products from NBN Co and NBN Co will supply products to its Customers.
2. NBN Co is bound by the terms of a Special Access Undertaking (**SAU**) given by NBN Co to the ACCC under section 152CBA(2) of the *Competition and Consumer Act 2010* (Cth) (**CCA**) and accepted by the ACCC on 13 December 2013.
3. NBN Co and its Customers are subject to a dispute management regime governing Disputes. The terms governing the management and operation of the dispute management regime in Access Agreements are set out in the SAU Dispute Management Provisions and the Dispute Management Rules.
4. The SAU Dispute Management Provisions and the Dispute Management Rules provide for panel arbitration to be used as a mechanism to resolve Disputes. Panel Members are selected from a Pool of Pool Members. The terms of appointment of Panel Members are set out in this agreement and will be signed on a per Dispute basis. The Panel will be dissolved at the end of each Dispute.
5. The parties acknowledge that these terms of appointment will be published on NBN Co's website in accordance with the SAU Dispute Management Provisions.

## Operative provisions

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### 1 Definitions and Interpretation

#### 1.1 Definitions

**Access Agreement** means an agreement made between a Customer and NBN Co within the meaning of section 152BE of the CCA, and which includes identical provisions to the Dispute Management Rules in an SFAA.

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

**Approved Dispute Guidelines** has the meaning in the SAU Dispute Management Provisions.

**Billing Dispute** means a dispute between NBN Co and a Customer which arises because Customer, acting reasonably, considers there is an error in:

- (a) the amount of an invoice payable by Customer under the Access Agreement between NBN Co and Customer; or
- (b) the amount of any Discount (as defined in the SAU Dispute Management provisions) provided by NBN Co under the Access Agreement between NBN Co and Customer.

**CAA** means the *Commercial Arbitration Act 2010* (NSW).

**Customer** means a customer of NBN Co that has entered into an Access Agreement with NBN Co.

**Dispute** means a dispute arising between NBN Co and a Customer under or in relation to the Access Agreement between NBN Co and a Customer that is not a Billing Dispute.

**Dispute Management Rules** means the provisions in relation to dispute management contained in an Access Agreement.

**Dispute Parties** means NBN Co and Customer.

**Intellectual Property Rights** means any patent, copyright, design right, trade name, trade mark, service mark, domain name right, semiconductor or circuit layout right or any other form of protection of a similar nature to any of these, anywhere in the world (whether registered or not and including applications for any such right).

**Panel** means a panel of three arbitrators selected by the Resolution Advisor to resolve a Dispute in accordance with the Dispute Management Rules.

**Pool** means the pool of arbitrators appointed to the Pool in accordance with the SAU Dispute Management Provisions.

**Pool Member** means an arbitrator appointed to the Pool.

**Resolution Advisor** means the person or persons appointed as such in accordance with the SAU Dispute Management Provisions.

**SAU Dispute Management Provisions** means Annexure 1 of Schedule 1H of the SAU.

**Standard Form Access Agreement** or SFAA means a standard form of access agreement published on NBN Co's website for the purposes of section 152CJA of the CCA.

## **1.2 Interpretation**

- (a) In this agreement headings are for convenience only and do not affect interpretation; and unless the context indicates a contrary intention:
- (b) an obligation or a liability assumed by, or a right conferred on, 2 or more persons binds or benefits them jointly and severally;
- (c) person includes an individual, the estate of an individual, a corporation, an authority, an association or a joint venture (whether incorporated or unincorporated), a partnership and a trust;
- (d) a reference to a party includes that party's executors, administrators, successors and permitted assigns, including persons taking by way of novation and, in the case of a trustee, includes a substituted or an additional trustee;

- (e) a reference to a document (including this agreement) is to that document as varied, novated, ratified or replaced from time to time;
  - (f) a reference to a statute includes its delegated legislation and a reference to a statute or delegated legislation or a provision of either includes consolidations, amendments, re-enactments and replacements;
  - (g) a word importing the singular includes the plural (and vice versa), and a word indicating a gender includes every other gender;
  - (h) a reference to a party, clause, schedule, exhibit, attachment or annexure is a reference to a party, clause, schedule, exhibit, attachment or annexure to or of this agreement, and a reference to this agreement includes all schedules, exhibits, attachments and annexures to it;
  - (i) if a word or phrase is given a defined meaning, any other part of speech or grammatical form of that word or phrase has a corresponding meaning;
  - (j) includes in any form is not a word of limitation; and
  - (k) a reference to \$ or dollar is to Australian currency.
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## **2 Appointment of the Panel Member**

### **2.1 Appointment**

The Panel Member acknowledges that he or she has been selected by the Resolution Advisor to be appointed to a Panel by the Dispute Parties in relation to the Dispute described in Schedule 1 and is appointed to the Panel by the Dispute Parties on the terms of this agreement.

### **2.2 Costs of Panel**

The Panel Member acknowledges that the costs of the Panel will be paid and determined in accordance with the Dispute Management Rules and will be on the basis of the rates detailed in the Schedule to the Panel Member's terms of appointment as a Pool Member.

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## **3 Obligations of the Panel Member**

### **3.1 Obligations**

The Panel Member must:

- (a) comply with the terms of this agreement;
- (b) comply with the responsibilities of an arbitrator under the CAA in respect of his or her functions as a Panel Member;
- (c) comply with the Dispute Management Rules in respect to Panel arbitrations;
- (d) have regard to any Approved Dispute Guidelines published in accordance with the SAU Dispute Management Provisions and any guidance notes published by a Resolution Advisor on its website in accordance with its terms of appointment;
- (e) on receipt of notice from NBN Co that the Panel Member through his or her acts or omissions has committed a material non-compliance with these terms of appointment, take steps to rectify the non-compliance within 5 Business Days following receipt of the notice from NBN Co;

- (f) maintain any qualifications, memberships or approvals of any kind that are held by the Panel Member at the time of his or her appointment and are relevant to the Panel Member acting on the Panel for the Dispute, including a legal practising certificate; and
- (g) have and maintain professional indemnity insurance cover of \$10 million per claim and \$30 million in aggregate for each year of cover for the term of this agreement and for a period of 6 years after this agreement has expired or is terminated.

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## 4 Intellectual property

Nothing in this agreement operates to:

- (a) transfer or assign ownership of any Intellectual Property Rights; or
- (b) confer on either party any right, title or interest in or to, any of the other party's, a Customer's or a third party's Intellectual Property Rights.

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## 5 Termination

### 5.1 Panel Member's rights to terminate once empanelled

The Panel Member may only terminate this agreement if after consultation with NBN Co and the ACCC, the Panel Member forms the view that he or she will be unable to perform his or her responsibilities or obligations as Panel Member in respect of the Dispute described in Schedule 1 for reasons that:

- (a) there is a real danger of bias on the part of the Panel Member in respect to the Dispute detailed in Schedule 1; or
- (b) he or she is, or is likely to be, incapacitated, including for reasons of ill health, for 10 Business Days or more.

### 5.2 NBN Co right to terminate

NBN Co or Customer may terminate this agreement and the appointment of the Panel Member where the Panel Member through his or her acts or omissions has committed a material non-compliance with these terms of appointment.

### 5.3 Dissolution of Panel

This agreement will terminate when the Dispute is resolved or otherwise ends in accordance with the Dispute Management Rules.

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## 6 Liability

### 6.1 Panel Member not liable

Subject to clause 6.2, the Panel Member is not liable for any damage suffered (directly or indirectly) by NBN Co and/or Customer arising in any way out of any act done or omitted to be done (including but not limited to, acts negligently done or omitted to be done) by the Panel Member in the performance of the Panel Member's obligations under this agreement.

### 6.2 Panel Member liable

The Panel Member is liable for anything done or omitted to be done in his or her capacity as a Panel Member which is not done in good faith.

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## 7 Variation

In accordance with the SAU Dispute Management Provisions, this agreement may be varied by:

- (a) the Resolution Advisor to the extent permitted by the Dispute Management Rules; or
- (b) the Panel appointed to determine the Dispute in Schedule 1 subject to agreement by the Dispute Parties.

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## 8 GST

### 8.1 GST payable

Unless otherwise stated, all amounts set out in this agreement are GST exclusive.

Notwithstanding any other provision in this agreement, if any party to this agreement (**Supplier**) is or becomes liable to pay GST in connection with any supplies made pursuant to this agreement (**the affected supplies**) for which GST is not otherwise included in the consideration:

- (a) the Supplier may, subject to clause 8.1(d), add to the price of all affected supplies an additional amount equal to the amount of GST for which the Supplier is or becomes liable in respect of those affected supplies, as calculated by Supplier in accordance with the GST law;
- (b) the party providing consideration for the affected supplies (**Recipient**) will pay the amounts or provide any other consideration required to be provided under other provisions of this agreement for the affected supplies (in this clause "**the price**") plus the additional amount on account of GST in accordance with clause 8.1(a);
- (c) the additional amount or amounts will be payable at the same time or times as the price is required to be provided to Supplier under the other provisions of this agreement; and
- (d) the Supplier is only entitled to the additional amount payable under clause 8.1(a) where the Supplier has issued a tax invoice to the Recipient in respect of the relevant supply.

### 8.2 Necessary adjustments

If the additional amount on account of GST recovered by the Supplier from the Recipient on any supply made under this agreement differs for any reason from the amount of GST paid or payable by the Supplier to the Commissioner of Taxation, including by reason of:

- (a) an amendment to the GST law;
- (b) the issue of or an alteration in a ruling or advice of the Commissioner of Taxation;
- (c) a decision of any tribunal or court; and
- (d) any adjustment to the consideration under this agreement,

then the difference between the two said amounts will be payable by the Supplier or the Recipient as appropriate. Where an adjustment event (as defined in the GST law) has occurred in relation to any supply under this agreement, the Supplier will provide an adjustment note to the Recipient within 14 days of the date of the adjustment event.

### 8.3 Reimbursements and similar payments

Any payment or reimbursement required to be made under this agreement for a cost, expense or other amount paid or incurred will be limited to the total cost, expense or amount less the amount of any input tax credit to which an entity is entitled for the acquisition to which the cost, expense or amount relates.

### 8.4 Definitions

“GST”, “GST law” and other terms used in this clause 8 have the meanings used in the *A New Tax System (Goods and Services Tax) Act 1999* (Cth), except that GST law includes any applicable rulings issued by the Commissioner of Taxation.

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## 9 General Terms

### 9.1 Notices and contacts

Each communication (including each notice, consent, approval, request and demand) under or in connection with this agreement:

- (a) must be in writing;
- (b) must be addressed as follows (or as otherwise notified by that party to each other party from time to time):

To NBN Co:

Name: Head of Regulatory Affairs and Industry  
Address: Level 11, 100 Arthur Street, North Sydney NSW 2060  
Fax: 02 9927 4132  
Email: [carolinelovell@nbnco.com.au](mailto:carolinelovell@nbnco.com.au)

and copied to:

Name: Chief Legal Counsel  
Address: Level 11, 100 Arthur Street, North Sydney NSW 2060  
Fax: 02 9927 4132  
Email: [justinforseil@nbnco.com.au](mailto:justinforseil@nbnco.com.au)

To Panel Member:

Name: [insert]  
Address: [insert]  
Fax: [insert]  
Email: [insert]

To Customer:

Name: [insert]



Address: [insert]

Fax: [insert]

Email: [insert]

- (c) must be signed by the party making it or (on that party's behalf) by the solicitor for, or any attorney, director, secretary or authorised agent of, that party;
- (d) must be:
  - (i) delivered by hand or posted by prepaid post to the address;
  - (ii) sent by fax to the number; or
  - (iii) sent by email, which includes a prominent statement that the email constitutes a notice under this agreement, to the email address,of the addressee, in accordance with clause 9.1(b); and
- (e) is taken to be received by the addressee:
  - (i) (in the case of prepaid post) on the fifth day after the date of posting;
  - (ii) (in the case of fax) at the time in the place to which it is sent equivalent to the time shown on the transmission confirmation report produced by the fax machine from which it was sent;
  - (iii) (in the case of delivery by hand) on delivery; and
  - (iv) (in the case of email) unless the party sending the email knows or reasonably ought to suspect that the email and the attached communication were not delivered to the addressee's domain specified in the email address in clause 9.1(b), when the email was sent,

but if the communication is taken to be received on a day that is not a working day or after 5.00 pm, it is taken to be received at 9.00 am on the next working day ("working day" meaning a day that is not a Saturday, Sunday or public holiday and on which banks are open for business generally, in the place to which the communication is posted, sent or delivered).

## **9.2 Counterparts**

This agreement may be executed in any number of counterparts and by each of NBN Co, Customer and the Panel Member on separate counterparts. Each counterpart constitutes an original of this agreement, and all together constitute one agreement.

## **9.3 Severability**

Any term of this agreement which is wholly or partially void or unenforceable will be severed to the extent that it is void or unenforceable and the remainder of this agreement continues unaffected.

## **9.4 Governing Law and jurisdiction**

- (a) This agreement is governed by and is to be construed according to the law applying in New South Wales.
- (b) Each party irrevocably and unconditionally:

- (i) submits to the non-exclusive jurisdiction of the courts of New South Wales, Commonwealth courts having jurisdiction in that state and the courts competent to determine appeals from those courts, with respect to any proceedings that may be brought at any time relating to this agreement; and
- (ii) waives any objection it may have now or in the future to the venue of any proceedings, and any claim it may have now or in the future that any proceedings have been brought in an inconvenient forum, if that venue falls within clause 9.4(b)(i).

## Execution

### Executed as an agreement

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Signed for **NBN Co Limited** by its authorised representatives:

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Signature of authorised representative

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Signature of authorised representative

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Name of authorised representative

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Name of authorised representative

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Date of signature

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Date of signature

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Signed for **[Customer]** by its authorised representatives:

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Signature of authorised representative

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Signature of authorised representative

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Name of authorised representative

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Name of authorised representative

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Date of signature

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Date of signature

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Executed by **Panel Member**:

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Signature of Panel Member

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Name of Panel Member

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Date of signature

## Schedule 1 Dispute

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### 1. Details of Dispute

[insert if applicable]

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### 2. Procedural Steps

[insert if applicable]

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### 3. Other

[insert if applicable]