

Dispute Management Agreement

Approved Pool Member Terms of Appointment

3 APRIL 2014

FOUO: COMMERCIAL IN CONFIDENCE

NBN Co Limited

Approved Pool Member Terms of Appointment

03/04/14

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Pool 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**); and
- [insert full name of person] of [insert address of person] (**Pool 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 Pool Members are set out in this agreement.
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

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.

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 a 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.

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, and appointed by the parties, to resolve a Dispute in accordance with the Dispute Management Rules.

Panel Member means a member of the Panel.

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

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.

Term means two years from the date of execution of this agreement, provided that if the Pool Member is empanelled as a Panel Member during that two year period, this agreement will continue until the completion of the Dispute in respect of which the Pool Member is empanelled.

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 Pool Member

2.1 Appointment

NBN Co appoints the Pool Member to the Pool, and the Pool Member accepts the appointment to the Pool, for the Term in accordance with the terms and conditions set out in this agreement.

3 Obligations of the Pool Member

3.1 Obligations of Pool Member

The Pool Member must:

- (a) comply with the terms of this agreement;
- (b) comply with the dispute resolution process set out in the Dispute Management Rules;
- (c) use reasonable endeavours to make themselves available to act as a Panel Member if selected by the Resolution Advisor on the basis of the rates detailed in the Schedule of this agreement; and
- (d) inform the Resolution Advisor if any qualifications, memberships or approvals of any kind that are held by the Pool Member at the time of his or her appointment and are relevant to the Pool Member acting on a Panel, including legal practising certificate, lapse or are revoked during the Term; and
- (e) 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 and for a period of 6 years after this agreement has expired or is terminated.

3.2 NBN Co powers of enforcement

NBN Co may take any reasonable steps necessary to enforce any material non-compliance by the Pool Member with the terms of this agreement.

4 Termination

4.1 Pool Member rights to terminate

The Pool Member may terminate this agreement:

- (a) by providing [insert] Business Days written notice to NBN Co; or
- (b) immediately if, after consultation with NBN Co and the ACCC, the Pool Member forms the view that he or she will be unable to perform his or her obligations as Pool Member.

4.2 NBN Co rights to terminate

- (a) NBN Co may terminate this agreement and the appointment of the Pool Member in accordance with the SAU Dispute Management Provisions and the Dispute Management Rules.
- (b) NBN Co must not terminate the appointment of the Pool Member during a period in which the Pool Member is empanelled as a Panel Member for a Dispute.

5 Conflicts of interest

If during the Term of this agreement, the Pool Member:

- (a) becomes aware of any circumstances that might reasonably be considered to affect the Pool Member's capacity to act independently or impartially in respect to a Dispute; or
- (b) has an interest in a Dispute that is referred to him or her,

the Pool Member will immediately inform the Resolution Advisor of those circumstances.

6 Confidential information

6.1 Agreement about use of confidential information

All information, including documents, disclosed to the Pool Member during the course of their appointment is confidential information and the Pool Member must:

- (a) keep that information confidential;
- (b) only use that information for the purpose of performing his or her functions as Pool Member; and
- (c) not disclose any of that information, whether expressly or by implication, without the written consent of the party or parties to the Dispute to which that information relates, except where required by law, or permitted under the Dispute Management Rules or this agreement.

6.2 Survival

The obligations in this clause 6 survive the expiry or termination of this agreement.

7 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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8 Subsequent proceedings

The Pool Member will not accept appointment as an arbitrator, advocate or adviser to NBN Co or any of its Customers in any arbitral, judicial or adjudication proceedings relating to a Dispute to which the Pool Member has been appointed as a Panel Member, unless otherwise agreed by the parties to the Dispute.

9 Liability

9.1 Pool Member not liable

Subject to clause 9.2, the Pool Member is not liable for any damage suffered (directly or indirectly) by NBN Co arising out of or in connection with any act done or omitted to be done (including but not limited to, acts negligently done or omitted to be done) by the Pool Member in the performance of the Pool Member's obligations under this agreement.

9.2 Pool Member liable

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

10 Variations

Where the Approved Pool Terms are varied in accordance with the SAU Dispute Management Provisions, these terms will be varied 30 days following NBN Co issuing to the Pool Member a notice of the variation to the Approved Pool Terms.

11 General Terms

11.1 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

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

To Pool Member:

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 11.1(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 11.1(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).

11.2 Counterparts

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

11.3 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.

11.4 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 11.4(b)(i).

Execution

Executed as an agreement

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

Signature of authorised representative

Signature of authorised representative

Name of authorised representative

Name of authorised representative

Date of signature

Date of signature

Executed by **Pool Member**:

Signature of Pool Member

Name of Pool Member

Date of signature



Schedule of Rates

Where the Pool Member is appointed as a Panel Member for a Dispute, the rates for the performance of the Pool Member's functions as a Panel Member are agreed to be as follows (all amounts are GST exclusive):

[Note: Insert rates for the Pool Member that were agreed with the Pool Member prior to commencing consultation for appointment]