

National  
Broadband  
Network

**Dispute Management Agreement**

**Approved Resolution Advisor Terms of  
Appointment**

NBN Co Limited

## **Resolution Advisor Terms of Appointment**

These terms and the Resolution Advisor candidate were approved by ACCC on 03/04/2014

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### **Environment**

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# Resolution Advisor 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
- Endispute Pty Ltd (ABN 81 134 985 452) of [REDACTED] (**Resolution Advisor**).

## Background

1. NBN Co has entered into Access Agreements with its Customers which set 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. Under the SAU Dispute Management Provisions and the Dispute Management Rules, a Resolution Advisor must be appointed by NBN Co on the terms and conditions set out in this agreement.
5. The parties acknowledge that this agreement 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 which includes identical provisions to the Dispute Management Rules in an SFAA.

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

**Alternate Advisor** means such other person(s) appointed by NBN Co to perform the same role as the Resolution Advisor.

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

**Associated Entity** has the meaning given by section 50AAA of the *Corporations Act 2001* (Cth).

**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).

**Conflicting Relationship** means any of the following types of relationships between NBN Co or a Customer and the Resolution Advisor, whether within or outside of Australia:

- (a) NBN Co or a Customer and the Resolution Advisor's employer(s) are Associated Entities;
- (b) NBN Co or a Customer is an Entity Connected with the Resolution Advisor;
- (c) the Resolution Advisor's employer is an Entity Connected with NBN Co or a Customer;
- (d) NBN Co or a Customer and the Resolution Advisor's employer are Related Entities;
- (e) NBN Co or a Customer and the Resolution Advisor's employer are Related Parties;
- (f) any Related Party, Related Entity or Entity Connected with NBN Co or a Customer is a Related Party, Related Entity or Entity Connected with the Resolution Advisor;
- (g) NBN Co and the Resolution Advisor or the Resolution Advisor's employer have a contractual relationship or had one within the past three years, other than those attached to the Resolution Advisor Nomination Form (excluding any prior or existing appointment to the role of Resolution Advisor);
- (h) the Resolution Advisor's employer is a supplier of NBN Co or a Customer or has been in the past three years (excluding any prior or existing appointment to the role of Resolution Advisor); or
- (i) any other relationship between NBN Co or a Customer and the Resolution Advisor or the Resolution Advisor's employer that allows one to affect the business decisions of the other,

but does not include where NBN Co or any Customer is a supplier of the Resolution Advisor or the Resolution Advisor's employer (if applicable) or has been in the past three years.

**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 an 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-Related Fee** means the fees payable to the Resolution Advisor for performing its functions in respect to a specific Dispute, as set out in the Remuneration Schedule attached to this agreement.

**Entity Connected** has the meaning given in section 64B of the *Corporations Act 2001* (Cth).

**Expert** means an expert appointed by NBN Co and Customer to determine a Dispute in accordance with the Dispute Management Rules.

**Fee** means the fees payable to the Resolution Advisor, as set out in the Scope of Works and Remuneration Schedule attached to this agreement, excluding Dispute-Related Fees.

**IAMA** means the Institute of Arbitrators & Mediators Australia.

**Indirect Loss** means any Loss, which does not arise naturally and according to the usual course of things as a result of a breach of this Agreement or other event giving rise to the Loss (including an omission), whether or not such Loss may reasonably be supposed to have been in the contemplation of both parties at the time they made the agreement as the probable result of the relevant breach or other event, provided that the reasonable costs incurred in remedying the impact of the breach, action or inaction in question, including steps to terminate this Agreement and/or to appoint an alternative Resolution Advisor (including any costs relating to the retention of, and establishment of facilities in respect to, that person acting as an alternative Resolution Advisor) will not be considered Indirect Loss.

**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).

**Loss** means loss, damage, liability, charge, expense, outgoing or cost (including all legal and other professional costs on a full indemnity basis) of any nature or kind, however it arises and whether it is present or future, fixed or unascertained, actual or contingent.

**NBN Co Network** means the telecommunications network, and any equipment used as part of, or in connection with the provision of services by NBN Co (or any Related Body Corporate of NBN Co), that is owned or controlled by, or operated by or on behalf of, NBN Co (or any Related Body Corporate of NBN Co).

**Nominated Person** means an officer, employee, agent or subcontractor of the Resolution Advisor who is listed in Schedule 2.

**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.

**Permitted Purpose** means the purpose of facilitating the resolution of disputes in relation to access to, or the provision of services via, the NBN Network, and any activities ancillary to the establishment, operation, maintenance or variation of a dispute resolution regime established for the purpose of resolving such disputes.

**Personnel** means, in relation to a party or third party, that party's officers, employees, agents, contractors, subcontractors and consultants.

**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.

**RA IT Platform** means all computer software that is embodied in, or used to develop or provide any of, the operational or functional elements of the Website and any documentation developed for the operation or maintenance of that software.

**RA Work Product** means all written materials (in any form) provided or otherwise made available by or on behalf of the Resolution Advisor to NBN Co, any Panel Member, any Customer or any Expert, in connection with this agreement, but excluding the RA IT Platform.

**Related Body Corporate** has the meaning given in section 50 of the *Corporations Act 2001* (Cth).

**Related Customer Party** means, in relation to a Customer, that Customer's officers, employees, agents, contractors, subcontractors and consultants.

**Related Entity** has the meaning given in the *Corporations Act 2001* (Cth).

**Related Party** has the meaning given in the *Corporations Act 2001* (Cth).

**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.

**Third Party Contract** means any contract between the Resolution Advisor (or any of its Related Bodies Corporate) and any third party (which may include a Related Body Corporate of the Resolution Advisor) for:

- (a) the provision by that third party of any products or services in relation to the development, maintenance or operation of the RA IT Platform; or
- (b) the license of any Third Party IPR to the Resolution Advisor (or any of its Related Bodies Corporate) which is comprised in the RA IT Platform, including the licence to use the domain name associated with the Website.

**Third Party IPR** means Intellectual Property Rights of a third party.

**Website** means the website that the Resolution Advisor is required to develop in accordance with Schedule 1.

## **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 Resolution Advisor**

### **2.1 Appointment**

- (a) NBN Co appoints the Resolution Advisor, and the Resolution Advisor accepts the appointment, for the Term in accordance with the terms and conditions set out in this agreement.
- (b) The Parties acknowledge that NBN Co may appoint Alternate Advisors. NBN Co must inform the Resolution Advisor of the contact details of any Alternate Advisors.

### **2.2 Fees and expenses**

NBN Co agrees to pay the Resolution Advisor the Fee, payable monthly in arrears.

### **2.3 Performance of Resolution Advisor's functions by a Nominated Person**

- (a) The Resolution Advisor will delegate the performance its functions under this agreement to the Nominated Person.
  - (b) Notwithstanding clause 2.3(a), the Resolution Advisor remains liable in respect of the performance of its obligations under this agreement.
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## **3 Functions and obligations of the Resolution Advisor**

### **3.1 Functions**

- (a) Subject to the SAU Dispute Management Provisions and the Dispute Management Rules, the functions of the Resolution Advisor include:
  - (i) where there is no Dispute, administrative functions to establish and maintain the arrangements set out in the SAU Dispute Management Provisions and the Dispute Management Rules, including those set out in Schedule 1;
  - (ii) in respect of a Dispute that is referred to the Resolution Advisor:

- (A) selection of the expert where the parties have not appointed an expert within the timeframe specified in the SAU Dispute Management Provisions and the Dispute Management Rules;
  - (B) selection for appointment as Panel Members in accordance with the SAU Dispute Management Provisions and the Dispute Management Rules; and
  - (C) administrative functions on behalf of the Panel Members (but not as a delegate of the Panel for the performance of the decision-making functions of the Panel in relation to a Dispute), including those set out in Schedule 1.
- (b) The Resolution Advisor is not, and will not act as, an arbitrator for the purpose of the CAA in respect of any Dispute. The Resolution Advisor will not act as a mediator in respect to the substance of a Dispute, unless otherwise stated in the Dispute Management Rules or as agreed by the parties.
  - (c) The Resolution Advisor may, in accordance with the Dispute Management Rules, select for appointment to the Panel a person whom he or she reasonably considers to be eligible and sufficiently skilled and experienced, but who is not a member of the Pool and notify the ACCC and NBN Co of such selection.

### **3.2 Obligations**

- (a) The Resolution Advisor must:
  - (i) follow any direction given to him or her by the ACCC in relation to the performance of his or her functions as Resolution Advisor in accordance with the SAU Dispute Management Provisions;
  - (ii) comply with the Dispute Management Rules and the SAU Dispute Management Provisions;
  - (iii) comply with this agreement;
  - (iv) have regard to any Approved Dispute Guidelines published in accordance with the SAU Dispute Management Provisions;
  - (v) immediately report to the ACCC and NBN Co any issues that arise in relation to the performance of his or her functions as Resolution Advisor or in relation to compliance with the SAU Dispute Management Provisions or Dispute Management Rules; and
  - (vi) to the extent requested by NBN Co, cooperate with the Alternate Advisor(s) in respect to his or her functions where there is no Dispute.

### **3.3 Delegation of functions**

- (a) The Resolution Advisor to whom a Dispute is referred may delegate his or her functions in respect of that Dispute to an Alternate Advisor where necessary for the purpose of performing his or her responsibilities under the Dispute Management Rules (for example, in the event of temporary illness or holiday absence).
- (b) When an Alternate Advisor delegates management of a Dispute to the Resolution Advisor, the Resolution Advisor is responsible for that Dispute and must perform his or her functions



in respect of that Dispute in accordance with the Dispute Management Rules until such time as the Dispute is determined, settled or delegated to an Alternate Advisor.

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## **4 Conflicts of interest**

### **4.1 Advance disclosure**

The Resolution Advisor acknowledges that he or she has disclosed to NBN Co, Customer and/or the ACCC as appropriate, to the best of his or her knowledge:

- (a) any prior dealings he or she has had with NBN Co or any of its Customers;
- (b) any Conflicting Relationships;
- (c) any interest he or she has in a Dispute(s); and
- (d) any other matters which could reasonably be considered to be relevant to his or her capacity to act impartially.

### **4.2 Obligation on Resolution Advisor**

The Resolution Advisor must:

- (a) maintain his or her independence from each of NBN Co and Customers;
- (b) avoid any conflict of interest, potential conflict of interest or other circumstances that might reasonably be considered to adversely affect his or her capacity to act independently or impartially; and
- (c) not form or maintain any Conflicting Relationships for the duration of the Term.

### **4.3 Disclosure during Term of appointment**

If during the Term of this agreement, the Resolution Advisor becomes aware of any circumstances that might reasonably be considered to affect the Resolution Advisor's capacity to act independently or impartially, the Resolution Advisor must as soon as reasonably practicable inform:

- (a) the parties to a Dispute (if applicable) that such circumstances do, or are likely to, exist; and
- (b) the ACCC and NBN Co of the nature of the relevant circumstances.

### **4.4 Reporting conflict of Pool Member**

If during the Term of this agreement, a Pool Member informs the Resolution Advisor:

- (a) 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) that the Pool Member has an interest in a Dispute that is referred to him or her,

the Resolution Advisor will inform the parties to the Dispute (if applicable), the ACCC and NBN Co.

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## 5 Confidential information

### 5.1 Agreement about use of confidential information

All information, including documents, disclosed to the Resolution Advisor by NBN Co or its Customers or their respective advisers, an Alternate Advisor or a Pool Member, during the course of the Resolution Advisor's appointment is confidential information and the Resolution Advisor must take all necessary steps to:

- (a) keep that information confidential;
- (b) only use that information for the purpose of performing his or her functions as Resolution Advisor; and
- (c) not disclose any of that information, whether expressly or by implication, without the written consent of the party who disclosed the information, except where required by law, or permitted under the Dispute Management Rules (for example, to disclose confidential information to Panel Members) or this agreement (for example, clause 4.4).

### 5.2 Methods of compliance

The Resolution Advisor must assist with compliance with clause 5.1 by:

- (a) storing the information in encrypted files;
- (b) storing the information in a secure off-site back-up facility;
- (c) upon termination of the agreement, securely deleting the information using secure document disposal or ensuring deletion and destruction of encrypted data storage files.

### 5.3 Survival

The obligations in clause 5.1 survive the expiry or termination of this agreement.

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## 6 Intellectual property

### 6.1 General Principles

- (a) Except as provided in this clause 6 **Error! Reference source not found.**, nothing in this agreement operates to:
  - (i) transfer or assign ownership of any Intellectual Property Rights; or
  - (ii) 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.
- (b) Nothing in this clause 6 limits a party's obligations under clause 5 and any exercise by a party of a right under this clause 6 is subject to that party's obligations under clause 5.

### 6.2 RA Work Product

The Resolution Advisor grants to NBN Co a perpetual, non-exclusive, royalty-free, transferrable, irrevocable, worldwide licence (with a right to sub-license) to adapt, modify, develop, copy or use in any other way any RA Work Product for any purpose.

### 6.3 RA IT Platform

- (a) The Resolution Advisor must give any Alternate Advisor sufficient access to the RA IT Platform operated by the Resolution Advisor to enable such Alternate Advisor to perform its functions in accordance with the terms of its appointment.
- (b) In order to ensure that the functions performed by the Resolution Advisor in operating the RA IT Platform are able to transfer smoothly to a subsequent person appointed to the role of Resolution Advisor (or other nominee of NBN Co) and to ensure the ongoing operation of the RA IT Platform following the expiration or termination of this agreement, the Resolution Advisor:
  - (i) must (and must procure that its Related Bodies Corporate), on request by NBN Co, use its or their best endeavours to assign or novate (including executing any required documents or effecting any required registrations) any Third Party Contract to NBN Co (or its nominee);
  - (ii) grants to NBN Co a perpetual, non-exclusive, royalty-free, transferrable, irrevocable, worldwide licence (with a right to sub-license) to adapt, modify, develop, copy or use in any other way any Intellectual Property Rights of the Resolution Advisor comprised in the RA IT Platform (or any part of it) solely for the Permitted Purpose; and
  - (iii) must otherwise do all things reasonably requested by NBN Co to assist such transfer, including delivering a copy of all RA Work Product and, to the extent that it is in its possession, the RA IT Platform, to NBN Co (or its nominee) in an industry standard file format that enables it to be used in the same manner as used by the Resolution Advisor.

### 6.4 Warranties

The Resolution Advisor warrants to NBN Co that:

- (a) the licenses granted by the Resolution Advisor pursuant to this clause 6 **Error! Reference source not found.** will not infringe any Third Party IPRs; and
- (b) each Third Party Contract is or will be on commercial arm's length terms (unless otherwise agreed in writing by NBN Co).

### 6.5 Disputes

Where a dispute arises between NBN Co and the Resolution Advisor in relation to this clause 6, before a party commences court proceedings other than for urgent interlocutory relief, the parties must take the following steps to endeavour to settle the dispute:

- (a) the party claiming that a dispute has arisen must notify the other party in writing specifying the dispute;
- (b) upon receipt of the notice of dispute, the parties must negotiate in good faith to seek to agree an appropriate resolution of the dispute;
- (c) if within 7 days of the receipt of the notice of dispute the dispute is not resolved, the parties must endeavour to mediate the dispute. Such mediation is to be conducted by a mediator who is independent of the parties and appointed by agreement of the parties, or failing

agreement within 7 days of receiving the notice of dispute, by a person appointed by IAMA in accordance with IAMA's mediation rules; and

- (d) the parties must cooperate with the mediator agreed between the parties or the mediator selected by IAMA.

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

## **6.6 Continuing performance**

The parties acknowledge that nothing in this clause 6 affects the continued performance by the Resolution Advisor of its functions under this agreement.

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## **7 Subsequent proceedings**

The Resolution Advisor 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, unless otherwise agreed by the parties to the Dispute.

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## **8 Termination**

### **8.1 Resolution Advisor rights to terminate**

The Resolution Advisor may terminate this agreement immediately if, after consultation with NBN Co and the ACCC, the Resolution Advisor forms the view for reasons detailed in the SAU Dispute Management Provisions or Dispute Management Rules, that he or she will be unable to perform his or her obligations as Resolution Advisor.

### **8.2 NBN Co rights to terminate**

NBN Co may terminate this agreement and the appointment of the Resolution Advisor in accordance with the SAU Dispute Management Provisions and the Dispute Management Rules.

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## **9 Liability**

### **9.1 Exclusion of liability**

- (a) Subject to clauses 9.1(b) and 9.2, the Resolution Advisor and Nominated Person are not liable for any loss or damage suffered (directly or indirectly) by NBN Co arising out of or in connection with any decision or conduct of the Resolution Advisor under the Dispute Management Rules or the SAU Dispute Management Provisions (including negligent acts or omissions) in the performance of the Resolution Advisor's obligations under this agreement.
- (b) Neither party is liable to the other for any Indirect Loss suffered in connection with this Agreement, whether arising under contract, tort (including negligence), statute, equity, under an indemnity or otherwise, except under 9.2(b).
- (c) The parties acknowledge that the Resolution Advisor is not responsible under the Dispute Management Rules or the SAU Dispute Management Provisions for the acts or omissions of any Pool Member or Panel Member.

## 9.2 Liability of Resolution Advisor

- (a) The Resolution Advisor is liable for any loss or damage suffered by NBN Co arising out of or in connection with a breach of this agreement by the Resolution Advisor.
- (b) The Resolution Advisor and Nominated Person are liable for any loss or damage suffered (directly or indirectly) by NBN Co arising out of or in connection with any acts or omissions of the Resolution Advisor or Nominated Person constituting fraud or otherwise done or made in bad faith.

## 9.3 Indemnity for claims against the Resolution Advisor

NBN Co must pay to the Resolution Advisor on demand an amount equal to all losses suffered or incurred by the Resolution Advisor from any claim by a Customer or Related Customer Party against the Resolution Advisor to the extent that the claim arises from any decision or conduct of a Resolution Advisor under the Dispute Management Rules or the SAU Dispute Management Provisions, except where the claim arises from or in connection with a breach of this agreement by the Resolution Advisor or any act or omission by the Resolution Advisor constituting fraud or otherwise done or made in bad faith.

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# 10 GST

## 10.1 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 10.1(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 10.1(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 10.1(a) where the Supplier has issued a tax invoice to the Recipient in respect of the relevant supply.

## 10.2 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.

### **10.3 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.

### **10.4 Definitions**

“GST”, “GST law” and other terms used in this clause 10 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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## **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](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 Resolution Advisor:

Name: Prof. Tania Sourdin  
Address: [REDACTED]  
Email: [REDACTED]

- (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 Resolution Advisor 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

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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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Executed by **Endispute Pty Ltd (ABN 81 134 985 452)** in accordance with section 127 of the *Corporations Act 2001* (Cth):

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Signature of director

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Signature of director / secretary

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Name of director

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Name of director / secretary

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Date of signature

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Date of signature

# Schedule 1 Scope of Works and Remuneration Schedule

See next page.



**RESOLUTION ADVISOR TERMS OF APPOINTMENT**  
**SCOPE OF WORK AND REMUNERATION**

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**1. SCOPE OF WORK**

**1.1 Dispute Activities**

The functions to be performed by the Resolution Advisor in relation to a specific Dispute include the following:

- (a) administrative functions to be performed by the Resolution Advisor on behalf of the Panel Members<sup>1</sup>, including the performance of case management on behalf of the Panel Members.
- (b) administrative and other activities:
  - (i) Initial enquiry and discussion with the parties (emails and informational material).
  - (ii) Considering the nature of the dispute – discussing with the parties the relevant issues, chronology, dramatis personae and expertise required.
  - (iii) Fixing initial and follow up meeting times to discuss issues, timelines, party and representative details
  - (iv) Consideration of notifications across the parties.
  - (v) Joinder issues in relation to Industry Relevant Disputes.
  - (vi) Investigating the qualifications of the Panel available to deal with the dispute. Consideration of Panel selection and liaison with Panel members to determine availability and material required.
  - (vii) Liaising with prospective Panel to hear the Dispute (conflict of interest issues, times, fees, availability, location and mode).
  - (viii) Gaining consent from the parties to the selection of the particular Panel members – discussion and liaison with prospective Panel recommendation.
  - (ix) Following Panel appointment, arranging the Panel and confirming logistical matters, and briefing the Panel Members on the nature of the Dispute with follow up communication.
  - (x) Setting timeframes (having regard to the timeframes in the Dispute Management Rules) and processes for the dispute resolution process to take place in consultation with the Panel and parties, along with case management as required.
  - (xi) Ensuring the processes are followed during the Dispute with referral to Panel and additional meetings as required.
  - (xii) Conducting case management as required on behalf of the Panel to support the timely and efficient resolution of disputes and compliance with any guidance notes, terms of reference and Approved Dispute Guidelines.

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<sup>1</sup> See clause 3.1(a)(iii) of the main body of this agreement.

- (xiii) Uploading / downloading / distributing relevant content & materials, and exchange of documentation as required. Liaison regarding confidentiality and other concerns. Creation of dispute specific protocols where required.
- (xiv) Issuing relevant guidance notes, emails, panel directions and logistical material as required.
- (xv) Circulation of award material and determination material as required and triage of similar industry dispute matters.

## 1.2 Establishment Activities

The administrative functions to be performed by the Resolution Advisor to *establish* the arrangements set out in the SAU Dispute Management Provisions and the Dispute Management Rules<sup>2</sup> (the **Establishment Activities**) include the following:

- (a) Project planning and management:
  - (i) Develop and agree with NBN Co a project plan for the completion of the Establishment Activities during the first four months of the appointment (the Establishment Phase).
  - (ii) Complete all of the Establishment Activities during the Establishment Phase in accordance with the agreed project plan, unless otherwise agreed with NBN Co.
- (b) Stakeholders:
  - (i) Identify and establish points of contact with NBN Co and each Customer.
  - (ii) Set up communication channels with NBN Co and each Customer to facilitate efficient and effective communications and information exchange.
  - (iii) Meet with NBN Co and each interested Customer by way of introduction and to discuss their expectations regarding the performance of the Resolution Advisor's functions and responsibilities.
  - (iv) Note: The Resolution Advisor must use its best efforts to conduct such meetings as effectively and efficiently as possible, including by meeting with interested Customers in small groups, using telephone/video conference facilities, etc.
- (c) Pool Members:
  - (i) Meet with each Pool Member by way of introduction and to discuss their expertise and experience in arbitrating Disputes.
  - (ii) Note: The Resolution Advisor must use its best efforts to conduct such meetings as effectively and efficiently as possible, including by meeting with Pool Members using telephone/video conference facilities, etc.
- (d) Experts:
  - (i) Create a list of persons who may be suitable for selection as Experts (**Expert List**).

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<sup>2</sup> See clause 3.1(a)(i) of the main body of this agreement.

- (ii) Meet with each person on the Expert List by way of introduction and to discuss their expertise and experience in determining Disputes.
  - (iii) Note: The Resolution Advisor must use its best efforts to conduct such meetings as effectively and efficiently as possible, including by meeting with experts using telephone/video conference facilities, etc.
- (e) Dispute Guidelines:
- (i) Review and provide comments to NBN Co on the first version of the Dispute Guidelines before NBN Co releases the Dispute Guidelines for industry consultation.
  - (ii) Note: This work will need to be performed within 20 Business Days after the commencement of the appointment.
  - (iii) Note: This work is in addition to any comments that the Resolution Advisor may decide to make in response to NBN Co's industry consultation on the Dispute Guidelines.
- (f) Website:
- (i) Develop and agree with NBN Co the design [REDACTED] and development timetable for the Resolution Advisor's website (including all website content, a collaborative workspace and electronic document lodgement facility).
  - (ii) Complete the development of the Resolution Advisor's website (including all website content, the collaborative workspace and the electronic document lodgement facility) on time, on budget and on specification.
  - (iii) Note: The website content will include material that may be helpful to disputing parties, such as:
    - (A) documents produced by the Resolution Advisor under this agreement (including a summary of the operation of the Dispute Management Rules, guidance notes, consultation papers and other stakeholder communications).
    - (B) profiles of the Pool Members and persons on the Expert List (including their proposed fees).
    - (C) other relevant documents, such as the standard terms of appointment of Pool Members and Panel Members.
  - (iv) Note: The summary of the operation of the Dispute Management Rules will describe (in layman's terms) the sources of authority of the Resolution Advisor, the Pool Members and the Panel Members, as well as the way in which Disputes will be resolved in accordance with the Dispute Management Rules. The summary must contain a statement to the effect that 'the summary is provided for guidance purposes only and all Disputes will be managed and resolved in accordance with the terms of the Dispute Management Rules'. The summary may contain:
    - (A) an acknowledgement that the disputing parties have agreed to act in good faith in relation to the resolution of Disputes in accordance with the Dispute Management Rules; and

- (B) a statement to the effect that the Resolution Advisor is available to ‘assist the disputing parties to find early and efficient means to resolve their Disputes prior to needing to utilise, or as a means to discontinuing, a dispute resolution option provided for in the WBA’.

### 1.3 Maintenance Activities

The administrative functions to be performed by the Resolution Advisor to *maintain* the arrangements set out in the SAU Dispute Management Provisions and the Dispute Management Rules<sup>3</sup> (the **Maintenance Activities**) include the following:

- (a) Enquiries:
  - (i) Promptly attend to any enquiries that may be made by NBN Co and Customers from time to time.
  - (ii) Promptly refer any enquiries that may be made, for example by the media (including journalists, commentators and news organisations), back to NBN Co and Customers, unless otherwise agreed.
- (b) Stakeholders:
  - (i) Maintain points of contact with NBN Co and each Customer on an ‘as needed’ basis.
  - (ii) Promptly establish points of contact with new Customers.
  - (iii) Convene and chair an annual forum with NBN Co, Customers, Pool Members and persons on the Expert List to discuss feedback on:
    - (A) the Resolution Advisor’s performance of its functions and responsibilities; and
    - (B) the operation of the Dispute Management Rules.
- (c) Pool Members:
  - (i) Regularly review the composition of the Pool and make recommendations to NBN Co regarding new candidates for appointment to the Pool on an ‘as needed’ basis.
  - (ii) Regularly liaise with Pool Members, including in respect of their availability for appointment as Panel Members.
- (d) Experts:
  - (i) Regularly review the composition of the Expert List and make new appointments to the Expert List on an ‘as needed’ basis.
  - (ii) Regularly liaise with persons on the Expert List, including in respect of their availability for appointment as Experts.

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<sup>3</sup> See clause 3.1(a)(i) of the main body of this agreement.

- (e) Guidance notes
- (i) Develop 'guidance notes' (on an 'as needed' basis) in regard to the performance of key functions and responsibilities of the Resolution Advisor and the operation of the Dispute Management Rules generally, which may include:
    - (A) Selection and appointment of experts.
    - (B) Extension of the period of review of the expert's determination.
    - (C) Requirements for Referral Notices.
    - (D) Varying timeframes and procedures.
    - (E) Reporting issues to NBN Co and the ACCC.
    - (F) Conflicts of interest.
    - (G) Confidentiality and document management.
  - (ii) Consult with, and have regard to the feedback given by, NBN Co, Customers, Access Seekers, Pool Members and persons on the Expert List on the guidance notes.
  - (iii) Settle the guidance notes following consultation and publish those settled notes on the Resolution Advisor's website.
  - (iv) Note: The guidance notes are intended to provide guidance to NBN Co, Customers, Pool Members, Panel Members and persons on the Expert List in regard to the performance of key functions and responsibilities of the Resolution Advisor and the operation of the Dispute Management Rules generally.
  - (v) Note: The guidance notes must be consistent with the Dispute Management Rules and the Approved Dispute Guidelines, and must not create rules, processes or procedures that are different from those established by the Dispute Management Rules or the Dispute Guidelines.
  - (vi) Note: The guidance notes must not ascribe any functions or responsibilities to the Resolution Advisor that are not otherwise ascribed to the Resolution Advisor by the Dispute Management Rules.
- (f) Compliance with and variations to any terms of reference, guidance notes and Approved Dispute Guidelines:
- (i) Comply with the terms of reference and guidance notes.
  - (ii) Consult with, and have regard to the feedback given by, NBN Co, Customers, Access Seekers, Pool Members and persons on the Expert List on any variations to the terms of reference / guidance notes.
  - (iii) Settle the varied terms of reference / guidance notes following consultation and publish them on the Resolution Advisor's website.

- (g) Website:
    - (i) Host and maintain the Resolution Advisor’s website (including all website content, the collaborative workspace and the electronic document lodgement facility).
    - (ii) Respond to maintenance requests within 48 hours.
  - (h) Reporting:
    - (i) Prepare and deliver to NBN Co an annual report relating to the performance of the functions and responsibilities of the Resolution Advisor, including:
      - (A) data concerning the number of enquiries received and disputes notified.
      - (B) description of issues regarding the operation or interpretation of the Dispute Management Rules, including de-identified case studies and feedback (including anecdotal feedback) from stakeholders, where available.
      - (C) feedback on the availability and performance of Pool Members, Panel Members and persons on the Expert List .
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## **2. REMUNERATION**

### **2.1 Dispute Activities**

Where a Dispute is referred to the Resolution Advisor to arrange for Panel Arbitration under clause G2.1(c)(iii) of the Dispute Management Rules, the costs of the Resolution Advisor will be

[REDACTED]

(ii) [REDACTED]

(b) For clarity, if the Panel does not incur any costs in respect of a Dispute (e.g. the Dispute is settled before the Panel is constituted), the costs of the Resolution Advisor will be \$0.

### **2.2 Establishment Activities and Maintenance Activities**

(a) NBN Co will pay the Resolution Advisor a retainer for each month of the appointment on a ‘monthly in arrears’ basis.

[REDACTED]

[REDACTED]

[REDACTED]





[REDACTED]

The Resolution Advisor must keep and maintain records of the time spent by the Resolution Advisor on the performance of Establishment Activities and Maintenance Activities. The Resolution Advisor must provide copies of such records to NBN Co on request.

[REDACTED]

(f) [REDACTED]

**2.3 Costs associated with appearances before Senate Committee, subpoenas, etc**

If the Resolution Advisor is:

- (a) subpoenaed to give evidence or produce documents in respect of a court or arbitral proceeding; or
- (b) required to appear before a Senate Committee or other Government committee, commission, inquiry or investigation,

in connection with the performance of the functions or responsibilities of the Resolution Advisor, NBN Co will pay the Resolution Advisor for:

- (c) the time reasonably spent by the Resolution Advisor preparing to give that evidence, produce those documents or make that appearance at a rate of [REDACTED];
- (d) the time spent by the Resolution Advisor giving that evidence or making that appearance at a rate [REDACTED] and

[REDACTED]

**2.4 No other fees or charges payable**

No other fees or charges are payable by NBN Co to the Resolution Advisor in connection with this agreement.



## Schedule 2 Nominated Person

**Name:** Tania Sourdin

**Position:** Director