

TELSTRA CORPORATION LIMITED

FAD inquiry on non-price terms and conditions

Response to the ACCC's proposed non-price draft terms

14 January 2014

Executive summary

Telstra provides this submission in response to the Australian Competition and Consumer Commission's (**ACCC**) request for comments on proposed drafting of non-price terms (**Draft Terms**) which may be included in the relevant draft and Final Access Determinations (**FADs**). The ACCC consultation also invited comment on a number of other matters as set out in an email dated 8 December 2014. Telstra's response to those matters will be addressed in a separate submission to the ACCC. This submission deals only with the Draft Terms.

As set out in its submissions in response to the ACCC's Position Paper and Discussion Paper, Telstra maintains that non-price terms and conditions (**NPTCs**) are not required in the FADs. However, if NPTCs are to be made, then the long term interests of access providers, access seekers and end users (**LTIE**) will be best promoted by the ACCC maintaining its current approach of including only a targeted set of NPTCs in the FADs. There is no compelling case or recent driver to include even an additional limited number of NPTCs in the new FADs.

NPTCs in contracts are agreed through established and efficient commercial negotiations and there have been no formal disputes notified in respect of any such NPTCs since 2009. Terms which are commercially negotiated and well accepted in the industry are recognised by the legislature to produce more efficient outcomes for access seekers and end users.

Should the ACCC nevertheless continue to regulate NPTCs, it should limit its regulation to a targeted set of terms which have been shown to be the subject of industry contention or actual competition concerns. In this regard, neither the ACCC nor any access seekers (in their submissions) has illustrated a need to expand the set of NPTCs included in the current FADs.

Telstra has previously set out in its response to the ACCC's Position Paper its views on which Schedules of the Draft Terms it considers should not apply to any of the FADs, and which should only apply to FADs for certain services. Telstra has reiterated its views below, for convenience.

Telstra has provided proposed amendments to the ACCC's Draft Terms in Annexure 1 of this submission, together with explanations for those proposed amendments. In addition, Telstra makes some specific comments relating to the Draft Terms in Section 3 of this submission.

1. Introduction

The ACCC seeks views on Draft Terms and Other Matters, namely, terms about recourse to regulated terms, disclosure of information to regulators and other matters in relation to equivalence and a dispute resolution role for the ACCC. The Draft Terms relate to the FADs for the fixed line services, wholesale ADSL service (**WDSL**), mobile terminating access service (**MTAS**) and the domestic transmission capacity service (**DTCS**).

This submission provides Telstra's response to the ACCC's Draft Terms. The Other Matters being consulted on by the ACCC will be addressed in a separate submission.

Telstra may make further submissions to the ACCC once it has had an opportunity to review access seekers' response to the Draft.

This submission is structured as follows:

- Section 2 sets out Telstra's overall position in relation to the Draft Terms provided by the ACCC.
- Section 3 provides Telstra's position on some specific proposed changes to the Draft Terms.
- Annexure 1 sets out Telstra's proposed amendments to the Draft Terms in marked-up form.

2. Response to the Draft Terms

The Draft Terms provided by the ACCC are essentially the same as those contained in the current FADs, most notably the ACCC's most recent non-price FAD determination in 2012 for WDSL. Telstra has previously provided drafting comments on those terms during the consultations for the current FADs, including in the recent FAD inquiry for WDSL. Telstra notes that most of those comments, as well as proposed amendments, have not been incorporated into the ACCC's Draft Terms. However, Telstra considers the comments and suggested amendments that have been made previously continue to be appropriate and should be further considered by the ACCC. Accordingly, Telstra has reiterated a number of those comments and proposed amendments in this submission – specifically those which Telstra considers to be of commercial significance.

While Telstra has provided comments on the Draft Terms provided by the ACCC, these should not be taken as acceptance by Telstra that such terms need to be included in the FADs. Telstra's primary position (as previously submitted in response to the Discussion Paper) is that there is no compelling case or recent driver to include even a limited number of NPTCs in the new FADs. NPTCs in contracts are agreed through established commercial negotiations and there have been no formal disputes notified in respect of any such NPTCs since 2009.

However, given that the ACCC has indicated it is minded to continue to include at least some NPTCs in the FADs, Telstra considers that the ACCC should, in general, maintain the status quo for each of the declared services in terms of the scope of NPTCs currently included in the FADs. That said, where FAD NPTCs apply to multiple declared services, Telstra considers that these should be consistent across those services in order to promote certainty and reduce the costs of compliance.

Telstra also considers that, above all, NPTCs need to be commercially relevant and practicable, as well as appropriately balance the interests of access seekers and access providers. This is particularly important in relation to the creditworthiness and security and dispute resolution clauses in the Draft Terms.

Telstra has had a number of costly experiences with customers that have become insolvent or failed to meet their payment obligations. In some instances, such customers will generally look for, and exploit, ambiguities or opportunities for delay presented by their contract. In Telstra's view, an access provider should not be put in a position where it is obliged to continue to provide declared services to a party that is unable or unwilling to pay for them. That position can arise if, for example, Telstra is compelled to follow lengthy processes or demonstrate reasonableness to an adjudicator, before it can obtain adequate security or suspend or terminate services.

Telstra notes that the ACCC is considering the inclusion of a FAD term that would allow an access provider to disclose an access seeker's confidential information to meet a reporting obligation or request made by a regulator under Telstra's Structural Separation Undertaking. Telstra's views in support of such a term will be provided in its separate submission on Other Matters.

Further, Telstra notes that the ACCC's proposed Draft Terms appear to be inconsistent with the general trend towards simplicity and "Plain English". While this is not of particular concern with respect to the current set of NPTCs included in the current FADs given that they are well understood by industry, Telstra considers that this will be a significant issue should the ACCC decide to develop a comprehensive set of terms or reference offer as suggested in previous consultations. The failure of NPTCs as drafted to reflect good commercial practice (and commercial contracts) may represent a barrier to smaller industry players in, for example, appropriately using the regulated NPTCs in commercial negotiations.

Finally, Telstra maintains, as previously submitted,¹ that the following NPTC Schedules *should not apply to any of the services* in the FADs:

- liability and indemnity (Schedule 7 of the Draft Terms);
- changes to operating manuals (Schedule 10 of the Draft Terms); and
- resale services (Schedule 11 of the Draft Terms).

Telstra also previously submitted² that the following Schedules should only apply to FADs for certain services:

- communications with end users (Schedule 8 of the Draft Terms) – should apply to the fixed line services and WDSL only;
- network modernisation and upgrade (Schedule 9 of the Draft Terms) – should apply to the fixed line services and WDSL only; and
- ordering and provisioning (Schedule 12 of the Draft Terms) – should apply to ULLS and LSS only.

These views are summarised in the below table:

NPTCs	Fixed line	MTAS	DTCS	WDSL
Billing and notifications	✓	✓	✓	✓
Creditworthiness and security	✓	✓	✓	✓
General dispute resolution	✓	✓	✓	✓
Confidentiality provisions	✓	✓	✓	✓
Suspension and termination	✓	✓	✓	✓
Communications with end users	✓	x	x	✓
Liability and indemnity	x	x	x	x
Network modernisation and upgrade	✓	x	x	✓
Changes to operating manuals	x	x	x	x
Ordering and provisioning	ULLS and LSS	x	x	x
Resale services	x	x	x	x

¹ Telstra Corporation Limited, Response to the ACCC's Discussion paper on NPTCs, July 2014, page 8.

² Telstra Corporation Limited, Response to the ACCC's Discussion paper on NPTCs, July 2014, page 7.

3. Proposed changes to Draft Terms

In this section, Telstra makes submissions in respect of the proposed Draft Terms provided by the ACCC. For this purpose, Telstra has provided proposed amendments to the Draft Terms in Annexure 1 of this submission. This section does not refer to all Telstra's proposed amendments as a number are minor amendments made for the purpose of clarification or consistency.

3.1. Interpretation and definitions

3.1.1 Definition of Bank Guarantee

The term "Bank Guarantee" is used in clause 3.4 but not defined. For clarity Telstra proposes the inclusion of a definition of Bank Guarantee.

3.1.2 Definition of Billing Dispute

As in previous submissions,³ Telstra maintains that the definition of "Billing Dispute" should be confined to a dispute about an alleged inaccuracy, omission or error in a Charge in an invoice. To the extent that the dispute relates to something outside the proposed definition of Billing Dispute, the Access Seeker may avail itself of the general dispute resolution process in Schedule 4. Further, the amendment proposed in Annexure 1 in fact removes any uncertainty as to which disputes fall within the remit of the Billing Dispute procedures and those which are subject to the general dispute resolution procedures in Schedule 4.

The current definition of "Billing Dispute" is unclear as to what it may cover, and is excessively broad in its potential scope, for two reasons.

First, the words "or an invoice" could be interpreted as covering charges which are not the subject of the FAD. Any billing dispute in relation to such charges should be covered by the commercial agreements in place between the parties and should not be dealt with by the FAD. This should be clarified in order to avoid uncertainty between the parties as to which terms apply to which services. Such uncertainty is not in the interests of either the Access Provider or the Access Seeker.

Second, it is arguable that the words "relating to a Charge" could include issues which should be subject to the general dispute resolution procedures in Schedule 4, not the Billing Dispute Procedures. The intent of the process should be to discourage inaccurate bills rather than encourage other disputes to be dealt with under this process. Given that an Access Seeker is entitled to withhold payment if it initiates a Billing Dispute (under clause 2.12), the circumstances in which it is entitled to do so should be limited to those set out above.

Telstra's proposed amendment is consistent with the statutory criteria as the Access Provider's direct costs of providing access will increase if the Access Provider faces the risk of having to wait longer to recover invoiced amounts. For the same reasons, the current drafting is not in the Access Provider's legitimate business interests.

3.1.3 Definition of Confidential Information

Telstra proposes an amendment to the Confidential Information definition to include additional protections that ensure that the public domain exception cannot be misused by any party to avoid confidentiality obligations. This is consistent with the definition used in the FAD for declared fixed line services and will thereby ensure consistency across the declared services.

3.2. Billing and notification

3.2.1 Taking action for unpaid amounts (Clause 2.7)

Telstra considers that clause 2.7 should be amended so that an Access Provider does not have to wait 20 Business Days before taking action to recover an unpaid amount as a debt (in addition to any other rights that the Access Provider may have). Telstra wishes to emphasise that clause 2.6

³ See, for example, Telstra Corporation Limited, Response to the ACCC's Issues Paper (a second discussion paper) into the public inquiry to make a final access determination for the wholesale ADSL service – Non-Price Terms, August 2012.

provides the Access Seeker with 30 Calendar Days in which to pay the invoice. Thus, in circumstances where a billing dispute has not been raised, the additional 20 Business Days' waiting time proposed is contrary to the Access Provider's legitimate interest in the timely recovery of payment for services provided.

The Access Provider's direct costs of providing access will increase if the Access Provider faces the risk of having to wait to recover invoiced amounts. Unless the other statutory criteria weigh in favour of the clause as drafted, the clause will not be consistent with the statutory criteria. It is reasonable for the Access Provider to expect that it is to be paid invoiced amounts in a timely manner and if that does not occur, the Access Provider is entitled to seek to recover such sums without further delay. The ability to promptly recover invoiced amounts reduces the risk of non-payment and ultimately promotes the LTIE by enabling the efficient investment in infrastructure.

3.2.2 Notification of billing dispute (Clause 2.23)

Telstra considers that allowing the Access Seeker 15 Business Days in which to decide whether or not to notify a Billing Dispute is unnecessarily long and that 5 Business Days is more appropriate.

The revised time period reflects the fact that the Access Seeker is likely to be withholding potentially large sums of money from the Access Provider, and the fact that the timely resolution of Billing Disputes is preferable for both the Access Provider and the Access Seeker.

Telstra considers that 5 Business Days gives an Access Seeker sufficient time to review and consider the proposed resolution (and other supporting material) and decide whether or not to escalate the Billing Dispute.

The shorter time period proposed strikes an appropriate balance between ensuring that Billing Disputes are resolved in a timely manner, and ensuring that an Access Seeker has sufficient time to review and consider the Access Provider's proposed resolution and decide whether or not to escalate the Billing Dispute.

In contrast, a longer Billing Dispute escalation period encourages a slower Billing Dispute resolution process which is neither in the legitimate business interests of the Access Provider (whose interests are in getting paid promptly) or the interests of the Access Seekers (whose interests are to know the outcome so they can bill their end users appropriately).

3.2.3 Billing Dispute Procedures (Clause 2.31)

Telstra considers that only the Billing Dispute Procedure, or agreement between the parties, should properly result in a finding that invoices are incorrect and therefore that additional interest is applicable. Any other dispute resolution procedure should not impact upon the accuracy of invoices and additional interest should not apply, and those dispute resolution procedures should therefore be removed from the clause. Further, Telstra proposes an additional sub clause (b) to ensure that the operation of clause 2.31 applies to situations where the reasons or basis for the error is the same.

Further Telstra considers that an Access Seeker should not be able to take advantage of the clause in circumstances where an invoice error is being rectified and the Access Provider has implemented a process to ensure that correct invoices are rendered but such a process will take time to implement. Telstra also considers that it is inappropriate to penalise the Access Provider for an error of which it is or was not aware.

Furthermore, unless the clause is triggered only if the Access Provider is aware of that error, an Access Seeker will have an incentive not to notify a Billing Dispute until after clause 2.31 is triggered (i.e. until after three consecutive invoices are inaccurate) in order to take advantage of the higher interest rate payable by the Access Provider under clause 2.31.

Telstra's proposed amendments to clause 2.31 ensure that both parties behave appropriately and discharge their obligations to each other. In order for the terms to be more balanced, similar penalty interest should be payable by the Access Seeker (as is payable by the Access Provider under clause 2.31) if three out of five consecutive Billing Disputes are resolved against it. That is because such a trigger would likely evidence bad faith on the part of the Access Seeker more than is the case on the part of the Access Provider under the current clause 2.31. Telstra considers that it is reasonable that a similar measure should be introduced to deter the inappropriate use of the provisions of clause 2.31 by the Access Seeker.

3.3. Creditworthiness and Security

3.3.1 Supply not conditional on provision of Security (Clause 3.1 and 3.3)

Telstra proposes that in clause 3.1:

- the provision of Security should be a precondition to the supply of a service under the FAD; and
- the Access Provider should determine the amount and form of Security.

Telstra submits that supply should be conditional upon the provision of Security, in order to mitigate the Access Provider's financial exposure and risk. This is consistent with the statutory criteria of Part XIC of *Competition and Consumer Act 2010* (Cth) (**CCA**) which provides an exception to the SAOs in circumstances where the Access Seeker is not creditworthy. Subsection 152BCB(1)(g)(i) provides that the ACCC must not make a FAD which would have the effect of requiring an Access Provider to provide an Access Seeker with access to a declared service if there are reasonable grounds to believe that the Access Seeker would fail, to a material extent, to comply with the terms and conditions on which the Access Provider provides, or is reasonably likely to provide, that access. Subsection 152BCB(2)(a) provides that one such ground is evidence that the Access Seeker is not creditworthy. Similar provisions also appear in s 152AR of the CCA, which makes it clear that the Access Provider need not supply the Service in those circumstances.

If provision of access is not conditional upon the provision of Security, this could oblige the Access Provider to provide access, even if it has evidence that the Access Seeker is not creditworthy which would be contrary to ss152BCB(1)(g)(i) (because of the application of ss152BCB(2)(a)). Telstra considers it to be inappropriate for the ACCC to make a FAD so as to have that effect. Accordingly, clause 3.1 should be amended to provide that, before the supply of the service under the FAD to an Access Seeker, the Access Seeker must provide Security to the Access Provider, unless otherwise agreed.

Further, an Access Provider should be able to assess, before supplying a Service, whether or not an Access Seeker creates an unacceptable credit risk. If the Access Seeker does create such a risk, the Access Provider should be entitled to obtain Security to mitigate that risk before any supply commences. If the Access Provider does not have this option under the current proposed terms, it will have to wait a substantial period before suspending under clause 6.2. This is because the Access Provider would request the Security at the time that supply is commenced under the FAD. The Access Provider would then have to wait for the provision of Security by the Access Seeker, and only after it becomes apparent that the Access Seeker has failed to provide the Security could the Access Provider issue a Suspension Notice under clause 6.2 and commence the 10 Business Day Remedy Period which may lead to suspension. During all of this time, under the ACCC's proposed wording the Access Provider would be obliged to supply the Service to the Access Seeker, which exposes the Access Provider to an unacceptable and significant credit risk.

Further, in light of the significant financial exposure an Access Provider faces if "upfront" security is not required, Telstra submits that a mechanism needs to be included in the FAD to protect it in the event that security is never supplied by providing for a right to immediately suspend supply.

Telstra's suggested amendment is consistent with the statutory criteria as:

- it is not in the Access Provider's legitimate business interests to supply services when there is no security in place. That is because it increases the Access Provider's financial exposure and risk should the Access Seeker not pay;
- the current clause does not promote efficient investment in infrastructure because it reduces the certainty that the Access Provider has in recouping its investment costs of providing access. This is also not in the LTIE; and
- in considering the interests of Access Seekers, Telstra submits that requiring security before supply of the service is neither unnecessary nor excessive particularly given that an Access Provider is subject to significant financial exposure without any security. Rather, it is in line with normal commercial practice.

Both clause 3.1 and 3.3 should be amended so that the Access Provider, acting reasonably, can determine the amount and form of Security to be provided by the Access Seeker to protect their legitimate interests.

Such an amendment is necessary because clause 3.3 does not make clear who, out of the Access Seeker and the Access Provider, can determine the amount and form of Security. Given that it is the Access Provider that both bears the financial exposure and risk of supplying the Service to an Access Seeker, and assesses the Access Seeker's creditworthiness, the Access Provider is in the best position to determine the amount and form of Security necessary to mitigate its financial exposure and risk. For example, a security deposit could be the appropriate form of Security for a particular type of Access Seeker, but not others. Provided that the Access Provider acts reasonably in determining the form and amount of Security, Telstra submits that such a determination should not be subject to agreement between the parties.

Further, the proposed amendment that the Access Provider acts reasonably in determining the form and amount of Security addresses any concerns that an Access Provider may determine an amount and form of Security which is unreasonable.

Telstra disagrees with the requirement in proposed clause 3.3 that Security "may only be requested where an Access Provider has reasonable grounds to doubt the Access Seeker's ability to pay for services". Such a provision is inconsistent with section 152BCB(g)(i) of the CCA, because that provision precludes access determinations from requiring an Access Provider to supply a service in circumstances in which it has reasonable grounds to believe that the Access Seeker is not creditworthy. Accordingly, such a provision would be of no effect. It is also entirely inconsistent with normal commercial practice to require an Access Provider to have objectively "reasonable" grounds to doubt that an Access Seeker is able to pay for the services in order for it to require a security to be paid. Such a requirement would also place an unnecessary administrative burden on an Access Provider.

The amendments set out in this section are consistent with the statutory criteria as it is not in the Access Provider's legitimate business interests for its financial exposure and risk to be covered by Security which is of an inadequate form and/or amount. For the reasons set out above, Access Providers are less likely to invest in infrastructure if their investment is not covered by an appropriate amount and form of Security.

The proposed amendments also clarify the interaction of clause 3.1 with clauses 3.2, 3.3 and 3.4.

3.3.2 Alteration of Security (Clause 3.5)

Telstra proposes that clause 3.5 be amended to form three sub paragraphs, each dealing with a separate issue.

The proposed amendment to sub clause (b) would change the period in which an Access Seeker must provide altered Security from 20 Business Days to 10 Business Days. This is because Telstra considers the period of 20 Business Days to be too long where the Access Provider's exposure is increasing daily.

The proposed new clause 3.5(c) sets out additional triggers for requesting an altered Security. There are a number of circumstances in which it would be appropriate for an Access Provider to require the alteration of the Security held by an Access Seeker. However, clause 3.5 as currently drafted is too restrictive in the circumstances in which it entitles the Access Provider to do so. Thus, clause 3.5 is out of step with commercial practice.

The clause currently limits an Access Provider's right to alter the Security of an Access Seeker to the following three circumstances:

- if an Access Seeker provides Ongoing Creditworthiness Information ("OCI") and, as a result of that OCI, an Access Provider reasonably requires an alteration to the Security;
- if an Access Seeker fails to provide OCI; and
- if an Access Seeker fails to provide altered Security.

Other circumstances which, in commercial practice, entitle the Access Provider to require an alteration of Security include, for example, if an Access Seeker significantly increases the amount of services supplied to it by the Access Provider under the FAD.

In such circumstances, the existing Security will be insufficient to secure the new or increased risk and it would be entirely reasonable for the Access Provider to require alteration of the existing Security. Similarly, if an Access Seeker fails to comply with the terms and conditions of a particular type of Security, an Access Provider may need to alter the form of that Security in order to ensure that the Security sufficiently covers the Access Provider's financial exposure and risk. For example, if an Access Seeker sells property which is subject to a floating charge in favour of the Access Provider, the Access Provider should be entitled to require an alteration of the Security so as to cover its financial exposure and risk.

Pursuant to subsection 152BCB(1)(g) of the CCA, the ACCC cannot make a FAD that would have the effect of requiring an Access Provider to provide access where the Access Seeker is not creditworthy. One such piece of evidence of creditworthiness is that the Access Seeker provides (and continues to provide) adequate Security. It follows that the current drafting of clause 3.5 should be amended to reflect the protection that should be afforded to the Access Provider.

Such an amendment is consistent with the statutory criteria as it is not in the Access Provider's legitimate business interests for its financial exposure and risk to be insufficiently covered by Security. Further, Access Providers are - understandably - less likely to invest in infrastructure if their investment is insufficiently covered by Security.

3.3.3 Meaning of Ongoing Creditworthiness Information (Clause 3.8)

Clause 3.8 should be amended to provide that Ongoing Creditworthiness Information (**OCI**) includes, in addition to those types of information already set out, management prepared balance sheets, profit and loss statements or cash flow statements and any other information reasonably required by the Access Provider to assess the Access Seeker's creditworthiness.

Such an amendment is needed because some smaller Access Seekers may not be able to provide the types of OCI listed in clause 3.8 (e.g. because they do not have audited balance sheets or profit and loss statements, only management prepared ones). In addition, in light of the fact that Access Seekers come in different shapes and sizes, it is unhelpful to set out an exhaustive list of the types of information which constitute OCI. Rather, it is preferable - and consistent with commercial practice - for the Access Provider and the Access Seeker to have the flexibility to determine which information is the most appropriate for the assessment of that Access Seeker's creditworthiness. Further, in light of how quickly an Access Seeker's creditworthiness could change in today's volatile economic environment, relying on a previous year's audited balance sheet (for example) may not reflect an Access Seeker's creditworthiness as accurately as a current, management prepared balance sheet. Accordingly, clause 3.8 should allow the Access Provider to request "any other information reasonably required to assess the Access Seeker's creditworthiness".

This amendment is consistent with an Access Provider's assessment of the creditworthiness of an Access Seeker being based on the best available information, so that the Access Provider determines an appropriate form and amount of Security (or altered Security, as the case may be).

Such an amendment is consistent with the statutory criteria as it is not in an Access Provider's legitimate business interests or in the interests of Access Seekers for the Access Provider to have either no - or little - information available to it to assess the Access Seeker's creditworthiness. If the Access Provider cannot satisfactorily assess the creditworthiness of the Access Seeker, it could result in the Access Provider supplying services with inadequate Security or being forced to increase the amount of the Security to a level beyond what it would otherwise require.

3.3.4 Confidentiality Undertaking for Ongoing Creditworthiness Information (Clauses 3.9 and 3.10)

Telstra agrees that an Access Seeker's confidential information should be protected. However, clause 3.9 is unnecessary and should be deleted. That is because any such confidential OCI would fall within the definition of "Confidential Information" and therefore attracts the protection of Schedule 5.

If, however, clause 3.9 is to be retained, in light of the above, it should be amended so that only third parties accessing the Access Seeker's confidential information are required to give a confidentiality undertaking to the Access Seeker. That is because the Access Provider's employees would already be subject to confidentiality obligations as part of their contract of employment and in any event, would be bound by the confidentiality obligations imposed by the Access Provider.

These amendments are consistent with the statutory criteria as it is not in the Access Provider's legitimate business interests to execute confidentiality undertakings if it is not necessary to do so - this would increase direct costs.

In relation to the form of any such confidentiality undertaking, Telstra has proposed amendments to clause 3.9 to ensure that the confidentiality undertaking in Schedule 5 is used (subject to the amendments suggested by Telstra).

Telstra has also proposed amendments to clause 3.10 as an Access Provider should have the ability to choose one or both of an altered security and breach of a material term or condition as a remedy, rather than having to choose one or the other. Further, Telstra considers that a new sub clause (b) is necessary to give effect to the proposed new clause 6.1(g) (which reflects in these terms and conditions what is prescribed by the CCA).

3.4. Confidentiality provisions

3.4.1 Confidential information of the Access Seeker (Clause 5.2)

Telstra proposes an amendment to clause 5.2 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 services supplied to the Access Seeker that is generated in this way should be considered the Confidential Information of the Access Seeker.

3.4.2 Disclosure of Confidential Information (Clause 5.5)

Telstra submits that the words "for the purposes of this FAD" should be removed from clause 5.5(a) due to the possible limitations that the words impose. Restricting the use of Confidential Information in clause 5.5(a) to the purposes of the FAD fails to recognise that the supply arrangement with respect to the particular service may not be the only supply arrangement in place between the parties. Telstra submits that the words "reasonably required" alone are sufficient to govern appropriate disclosure of Confidential Information to the persons listed in clause 5.5(a).

Telstra's proposed amendments promote both certainty for the parties and the efficient use and disclosure of information. Such outcomes are essential in ensuring that services are provided in the most efficient manner, minimising direct costs and promoting the legitimate business interests of the Access Provider.

Telstra has proposed new sub clauses 5.5(j) and (k) as Telstra considers that Access Providers 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 or to interception capability. Telstra will explain further its reasons in its separate submission on Other Matters, but has included the proposed drafting in the Draft Terms for completeness.

3.5. Suspension and termination

3.5.1 Circumstances giving rise to an immediate right to suspend (Clause 6.1)

Telstra submits that clause 6.1 should include immediate rights of suspension in circumstances where the Access Seeker breaches a "key" security or creditworthiness obligation in Schedule 3. For example, if the Access Seeker fails to provide an altered Security if required by the Access Provider to do so, or if the Access Seeker fails to maintain the Security (consistent with the UCLL Terms and WBA).

Telstra considers that a right to immediately suspend supply of the Service to the Access Seeker is appropriate in such circumstances for the following reasons.

First, the Access Seeker is already given a significant period of time to discharge certain of these obligations elsewhere in these terms. For example, the Access Seeker is given 15 Business Days within which to provide OCI, and 20 Business Days within which to provide altered Security. Thus, if the Access Seeker does not discharge its obligations within those time periods, it is reasonable for the Access Provider to be concerned about the likelihood of the Access Seeker remedying the breach at all, let alone within a remedy period.

Second, the Access Provider's financial exposure and risk if the Access Seeker does not discharge its financial obligations is likely to be so significant as to justify immediate suspension.

None of the circumstances set out above are trivial and they have the potential to expose the Access Provider to substantial financial risk. Thus, in order to protect the Access Provider's legitimate business interests, a right to suspend supply of the Service to the Access Seeker immediately should be available in such circumstances. Telstra notes that, as an Access Seeker, it would ordinarily expect the imposition of these rights by an Access Provider.

It is not in the Access Provider's legitimate business interests to be prevented from suspending supply in the above circumstances, as those circumstances increase the Access Provider's risk. Those increased risks will in turn increase direct costs. Those costs are not currently being recovered, as commercial agreements generally include, as a matter of commercial practice, an immediate right of suspension in those circumstances. The ACCC should not impose those costs without considering how those costs will be recovered in the price of the services. In addition, the current clause does not promote efficient investment in infrastructure because an Access Provider will not invest in infrastructure if doing so exposes it to unacceptable levels of risk.

3.5.2 Suspension of service (Clause 6.5)

Telstra considers that any period of an Access Seeker ceasing to carry on business should trigger clause 6.5 and proposes an amendment to sub clause (b) in line with this. Further it should not be relevant whether an Access Seeker breaching a material obligation under the FAD affects the Access Provider's ability to provide services to other customers. Sub clause (d) should be amended to remove this requirement. Telstra submits that sub clause (d) should also be amended to clarify that the remedial action should be completed, rather than merely commenced, by the end of the Remedy Period.

Telstra also proposes an additional sub clause (e) which allows an Access Provider to have the right to immediately cease to supply where the Access Seeker commits a material breach which is incapable of being remedied. Telstra considers that it does not make sense to have a remedial period applying to a material breach of this nature.

3.6. Schedule 10 - Changes to operating manuals

Telstra is concerned at the breadth of the term "Operational documents". Telstra has many operational documents, but not all of them impose obligations on the Access Seeker. This clause should as a minimum be limited to operational documents that are provided to the Access Seeker, and the obligations in relation to changes to these documents should only apply where the change would have a material adverse impact on the Access Seeker.

3.7. Schedule 11 - Resale services (Wholesale ADSL only)

3.7.1 Obligations of resellers (new Clause 11.3)

As noted above, Telstra considers that Schedule 11 (Resale services (Wholesale ADSL only)) should not apply to any of the services in the FADs. However, to the extent that Schedule 11 does apply, and applies to Wholesale ADSL only, Telstra considers that clause 11.3 should apply.

If resale is to be permitted in relation Wholesale ADSL, Telstra considers that it is important that resellers, in relation to resale services, are subject to Telstra's terms and conditions of access, in the same way as Access Seekers are, to ensure that Telstra's network and supply of services are not compromised in any way. To ensure that Access Seekers' obligations in relation to resale services flow through to resellers, who have the direct relationship with the ultimate end user, it is necessary that Access Seekers ensure that their resellers do not engage in any act or omission that would not be permitted by the Access Seeker. Telstra's proposed new clause 11.3 obliges Access Seekers to put in place mechanisms to prevent their resellers from engaging in any conduct which, if performed by the Access Seeker, would constitute a breach of the FADs. As noted in previous submissions⁴, the inclusion of an appropriate reseller clause is necessary to ensure that resellers are subject to Telstra's terms and conditions of access, rather than to impede or restrict resale of Telstra's wholesale services.

It is also necessary for the Access Provider to have a remedy available to it in the event that a reseller does engage in an act or omission, which, had it been performed by the Access Seeker, would have constituted a breach of the FADs. Where a reseller does not comply with the same obligations that would apply to an Access Seeker, Telstra considers it appropriate that an Access Provider should be able to limit, restrict, suspend or terminate the supply of the service (as it would for an Access Seeker). Accordingly, if the ACCC is minded to retain Schedule 11, a consequential amendment needs to be made to clause 6.1(g) to provide for such a right.

⁴ See for example. Telstra Corporation Limited, Response to the ACCC's Issues Paper (a second discussion paper) into the public inquiry to make a final access determination for the wholesale ADSL service – Non-Price Terms, August 2012, p.74-75

Annexure 1

Schedule 1 Interpretation and definitions

Interpretation

In these FADs, 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

Access Agreement has the same meaning as given to that term in section 152BE of the CCA

Access Provider has the same meaning as given to that term in subsection 152AR(2) of the CCA

Access Seeker has the same meaning as given to that term in section 152AG of the CCA

ACDC means the Australian Commercial Disputes Centre Limited

ACDC Guidelines means the mediation guidelines of the ACDC in force from time to time

ACMA means the Australian Communications and Media Authority

Band means the geographic classification of exchange service areas (ESAs)

Band 1 means the following ESAs located in central business districts:

- (a) NSW (City South, Dalley, Haymarket, Pitt, Kent);
- (b) QLD (Charlotte, Edison, Roma Street, Spring Hill);
- (c) South Australia (Flinders, Waymouth);
- (d) Victoria (Batman, Exhibition, Lonsdale); and
- (e) WA (Bulwer, Pier, Wellington)

Band 2 means an ESA with more than 108.4 services in operation in a square kilometre area at the time this determination is made, which is not a Band 1 ESA

Band 3 means an ESA with 6.56 or more, but less than 108.4, services in operation in a square kilometre area at the time this determination is made

Band 4 means an ESA with 6.55 or less services in operation in a square kilometre area at the time this determination is made.

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” – Please refer to section 3.1.1 (Definition of Bank Guarantee) of the submission.

Billing Dispute means a dispute relating to [any alleged inaccuracy, omission, or error in relation to](#) a Charge or [in](#) an invoice issued by the Access Provider

Explanation for new definition of “Billing Dispute” – Please refer to section 3.1.2 (Definition of Billing Dispute) of the submission.

Billing Dispute Notice means a notice given pursuant to clause 2.10 in Schedule 2

Billing Dispute Procedures means the procedures set out in clauses 2.10 to 2.30 in Schedule 2

Breach Notice has the meaning set out in clause 6.5 of Schedule 6

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

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

CAN means a customer access network

Capped Exchange means an exchange that is included on a list that the Access Provider has published of exchanges that are subject to capacity constraints

Carriage Service has the same meaning given to that term in section 7 of the *Telecommunications Act 1997* (Cth)

Central Business District Area means the exchange service areas that are classified as CBD for the purposes of the ordering and provisioning procedures set out in the Telstra Ordering and Provisioning Manual as in force on the date of effect of the renewed declaration.

CCA means the *Competition and Consumer Act 2010* (Cth)

Charge means a charge for the supply of a Service

Common Infrastructure Works means where an Access Seeker increases the capacity of existing Facilities at an Exchange that could be used by itself and other service providers.

Complex Service means any service which is not a fixed service comprising:

- (a) a connection from a carrier or carriage service provider network boundary to the local exchange;
- (b) a telephone number; and
- (c) access to other kinds of telecommunication services which is indicated by dial-tone

Connect Outstanding process has the meaning set out in clauses 12.23 and 12.24 of Schedule 12

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 FAD) relating to or developed in connection with or in support of the 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 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 Access Seeker cannot be identified by the information or any part of it.

Explanation for amendments to definition of “Confidential Information” – Please refer to section 3.1.3 (Definition of Confidential Information) in the submission.

Coordinated Capital Works Program means a planned Major Network Modernisation and Upgrade with respect to the Service that extends across more than one ESA but does not include an Emergency Network Modernisation and Upgrade.

Coordinated Capital Works Program Forecast has the meaning set out in clause 9.10 of Schedule 9

Coordinated Capital Works Program Schedule has the meaning set out in clause 9.14 of Schedule 9

Disclosing Party has the meaning set out in clause 5.5 in Schedule 5 of this FAD

Distribution Area has the same meaning as in the Network Deployment Rules

Emergency means an emergency due to an actual or potential occurrence (such as fire, flood, storm, earthquake, explosion, accident, epidemic 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.

Emergency Network Modernisation and Upgrade means a Major Network Modernisation and Upgrade that is required and is reasonably necessary and a proportionate response to address an Emergency

Equivalent Period of Notice means a period of notice commencing at the time that the Access Provider has approved and allocated the capital expenditure or otherwise approved and made a decision to commit to a Major Network Modernisation and Upgrade

ESA means an exchange service area which is a geographic area generally serviced by a single Exchange

Event means an act, omission or event relating to or arising out of this FAD or part of this FAD;

Exchange means a building in which telephone switching or other equipment of an Access Provider or Access Seeker has been installed for use in connection with a telecommunications network

Expert Committee means a committee established under clause 4.11 in Schedule 4

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 a Service; or

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

General Notification has the meaning set out in clause 9.1

IIC means the internal interconnection cable

Indemnifying Party means the Party giving an indemnity under this FAD;

Independent Auditor means a person appointed as an independent auditor in accordance with clause 3.11 of Schedule 3

Individual Notification has the meaning set out in clause 9.1 of Schedule 9

Initiating Notice has the meaning as set out in clause 4.11 of Schedule 4

Innocent Party means the Party receiving the benefit of an indemnity under this FAD;

Internal Interconnection Cable means a twisted pair of copper wires forming a cable that connects an access seeker's intermediate distribution frame to Telstra's main distribution frame

LCS means local carriage service

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 FAD, or part of this FAD or in relation to any Event or series of related Events;

Limitation Notice has the meaning set out in clause 12.10 of Schedule 12

Listed Carriage Service has the same meaning given to that term in section 7 of the *Telecommunications Act 1997* (Cth)

Loss includes liability, loss, damage, costs, charges or expenses (including legal costs)

LSS means line sharing service

Major Network Modernisation and Upgrade means a modernisation or upgrade that:

- (a) involves the installation of the Access Provider's customer access modules closer to end-users than an Exchange;
- (b) requires the removal/relocation of the Service provided from Exchanges and the establishment of a new POI (or relocation of an existing POI) for the Service; or
- (c) results in a Service no longer being supplied or adversely affects the quality of that Service (or any services supplied by an Access Seeker to their end-users using the Service), but does not mean, or include, an Emergency Network Modernisation Upgrade or an NBN related upgrade

MDF means a main distribution frame

MNM means managed network migration

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

National Broadband Network means a national telecommunications network for the high-speed carriage of communications, where NBN Co has been, is, or is to be, involved in the creation or development of the network. To avoid doubt, it is immaterial whether the creation or development of the network is, to any extent, attributable to:

- (a) the acquisition of assets that were used, or for use, in connection with another telecommunications network; or
- (b) the obtaining of access to assets that are also used, or for use, in connection with another telecommunications network

NBN Co means NBN Co Limited (ACN 136 533 741), as the company exists from time to time (even if its name is later changed).

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 energy

Network Deployment Rules means the industry code entitled “ACIF C559:2012 Unconditioned Local Loop Service (ULLS) – Network Deployment Rules” registered by the ACMA under section 117 of the *Telecommunications Act 1997* (Cth) and as amended from time to time.

Non-Billing Dispute means a dispute other than a Billing Dispute

Ongoing Creditworthiness Information has the meaning as set out in clause 3.8 of Schedule 3 of this FAD

Pair means the twisted pair of copper wires forming the internal interconnection cable

Party means a party to this FAD

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;

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

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

Proof of Occupancy means a document that verifies occupancy by the end-user at the service address

PSTN means public switched telephone network

PSTN OA means public switched telephone network originating access service

PSTN TA means public switched telephone network terminating access service

Representative 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;

Reseller means a person that acquires the Service, or a service derived from the Service, from an Access Seeker, for the purpose of reselling, or transforming and then selling, a service to end-users.

Retail Business Unit has the same meaning given to that term in Schedule 1 of Telstra’s Structural Separation Undertaking;

Security means the amount and type of security provided, or required to be provided, to the Access Provider in respect of the provision by the Access Provider of Services, as set out in Schedule 3

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;

Service means a service declared under section 152AL of the CCA

Service Number means the Customer's fixed network billing service number which is identifiable by a full national number. For the avoidance of doubt, Service Numbers may be associated with voice and data services.

Service Qualification is a desktop process where the Access Provider checks:

- (a) the availability of the ULLS from the end user side of the customer access module to the end-user's property boundary point; and
- (b) that the use on that ULLS of the Access Seeker nominated deployment class complies with the *Network Deployment Rules* Industry Code

Standard zone has the same meaning as in Part 4 of the *Telecommunications (Consumer Protection and Service Standards) Act 1999*

Structural Separation Undertaking means:

- (a) an undertaking given by Telstra under subsection 577A(1) of the *Telecommunications Act 1997* (Cth) which came 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) a migration plan approved by the ACCC under Subdivision B of Division 2 of Part 33 of the *Telecommunications Act 1997* (Cth) which, pursuant to subsection 577BE(5), formed 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 binding schedules, annexures and attachments to such documents;

Suspension Event has the meaning set out in clause 6.2 of Schedule 6

Suspension Notice has the meaning set out in clause 6.2 of Schedule 6

TEBA space means Telstra Exchange Building Access space

Transfer means the transfer of a LSS to a ULLS where there is no change of service provider.

ULL means unconditioned local loop

ULLS means unconditioned local loop service

Wholesale ADSL Service means the wholesale asymmetric digital subscriber service declared under subsection 152AL(3) of the CCA.

WLR means wholesale line rental service

Schedule 2 - Billing and notification

- 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 must provide the Access Seeker with an invoice each month in respect of Charges payable for the Service unless the parties agree otherwise.
- 2.4. The Access Provider is 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 6 Months have elapsed since the date the relevant amount was incurred by the Access Seeker's customer, except where:
 - i. the Access Seeker gives written consent to a longer period (such consent not to be unreasonably withheld); or
 - ii. to the extent that the Charges relate to services supplied by an overseas carrier and the Access Provider has no control over the settlement arrangements as between it and the overseas carrier, in which case the Access Provider shall invoice such amounts as soon as is reasonably practicable.
- 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)* (Standard) and the provisions of any applicable industry code registered pursuant to Part 6 of the *Telecommunications Act 1997 (Cth)* (Code) in relation to billing. Where the effect of a Standard or Code is that an Access Seeker is not permitted to invoice its customers for charges that are older than a specified number of days, weeks or months (the Backbilling Period), the Access Provider must not invoice the Access Seeker for a Charge which was incurred by the Access Seeker's customers that, as at the date the invoice is issued, is older than the Backbilling Period.
- 2.6. Subject to clause 2.12:
 - a) 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.
 - b) 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.
 - c) 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 per cent.

Subject to clause 2.12:

- 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 deletion of “for more than 20 Business Days” – Please refer to section 3.2.1 (Taking action for unpaid amounts) of the submission.

- 2.8. Unless the parties otherwise agree, there is 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 must 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 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~~ the Billing Dispute Procedure has been ~~resolved~~ completed or terminated. 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).

Explanation for adding “Procedure” and amending “resolved” to “completed or terminated” – This amended drafting provides more certainty as to when payment should be made, noting that this should occur upon completion or termination of the process.

- 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 must be given to the Access Provider in relation to a Charge within six Months of the invoice for the Charge being issued in accordance with clause 2.6.

2.15.

- a) The Access Provider must 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, by written notice to the Access Seeker:
 - 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.
- d) For avoidance of doubt, if the Access Provider rejects a Billing Dispute Notice under clause 2.15(b)(ii)C, the Access Seeker is not prevented from providing an amended Billing Dispute Notice to the Access Provider relating to the same dispute provided that the amended Billing Dispute Notice is provided within the timeframe under clause 2.14.

2.16. The Access Seeker must, as early as practicable and in any case within five Business Days, unless the Parties agree on a longer period, after the Access Provider acknowledges a Billing Dispute Notice, provide to the other party any further relevant information or materials (which were 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).

2.17. Without affecting the time within which the Access Provider must make the proposed resolution under clause 2.18, 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 2.18. 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 2.18. 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.

2.18. The Access Provider must try to resolve any Billing Dispute as soon as practicable and in any event within 30 Business Days of 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 must:

- 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 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 2.18 (such consent not to be unreasonably withheld).

2.19. If the Access Seeker does not agree with the Access Provider's decision to reject a Billing Dispute Notice under clause 2.15 or the Access Provider's proposed resolution under clause 2.17, it must object within 15 Business Days of being notified of such decisions (or such longer time as 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

2.20. 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.

2.21. Where the Access Provider is to refund a disputed Charge, the Access Provider must pay interest (at the rate set out in clause 2.6) on any refund. Interest accrues 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.

2.22. Where the Access Seeker is to pay a disputed Charge, the Access Seeker must pay interest (at the rate set out in clause 2.6) on the amount to be paid. Interest accrues 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.

2.23. If

- a) the Access Provider has not proposed a resolution according to clause 2.18 or within the timeframe specified in clause 2.18, or
- b) the Access Seeker, having first submitted an objection under clause 2.19 is not satisfied with the Access Provider's Revised Proposed Resolution, or the Access Provider's confirmed proposed resolution, within the timeframes specified in clause 2.19,

the Access Seeker may escalate the matter under clause 2.24. If the Access Seeker does not do so within ~~five~~ **15** Business Days after the time period stated in clause 2.18 or after being notified of the Access Provider's Revised Proposed Resolution under clause 2.19(e) or confirmed proposed resolution under clause 2.19(f) (or a longer period if agreed by the parties), the Access Seeker is deemed to have accepted the Access Provider's proposed resolution made under clause 2.18 or Revised Proposed Resolution under clause 2.19(e) or confirmed proposed solution under clause 2.19(f) and clauses 2.21 and 2.22 apply.

Explanation for amending "15" Business Days to "five" Business Days – please refer to section 3.2.2 (Notification of billing dispute) in the submission.

2.24. 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 Revised Proposed Resolution or confirmed proposed resolution; and
- b) seeking escalation of the Billing Dispute.

2.25. A notice under clause 2.24 must be submitted to the nominated billing manager for the Access Provider, who must 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 2.24 (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.

2.26. 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 2.25 (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 must be conducted in accordance with the mediation guidelines of the Australian Commercial Disputes Centre (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 2.26(a) or are unable to resolve the entire Billing Dispute by mediation, either party may commence legal proceedings to resolve the matter.

2.27. The parties must ensure that any person appointed or required to resolve a Billing Dispute takes into account the principle that the Access Seeker is 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 applies only to the extent to which the Billing Dispute is resolved against the Access Provider; and
- b) such principle applies 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.

2.28. Each party must continue to fulfil its obligations under this FAD while a Billing Dispute and the Billing Dispute Procedures are pending.

2.29. 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 2.25 (or their respective nominees).

2.30. There is a presumption that all communications between the Parties during the course of a Billing Dispute are made on a without prejudice and confidential basis.

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

- a) three or more out of any five consecutive invoices for a given Service are incorrect by 5 per cent or more; and
- b) the reason or basis for the inaccuracy of those invoices is the same,

then, for the purposes of clause 2.21, the interest payable by the Access Provider in respect of the overpaid amount of the invoices in question is the rate set out in clause 2.7, plus 2 per cent. The remedy set out in this clause 2.31 is without prejudice to any other right or remedy available to the Access Seeker.

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.

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 2.6, plus 2%. The remedy set out in this clause 2.31 shall be without prejudice to any other right or remedy available to the Access Provider.

Explanation for amendments to clause 2.31 – please refer to section 3.2.3 (Billing Dispute Procedures) in the submission.

Schedule 3 - Creditworthiness and Security

3.1. Unless otherwise agreed by the Access Provider, the Access Seeker, prior to the supply of a Service under this FAD, must (at the Access Seeker's sole cost and expense) provide Security to the Access Provider. The Security must be:

- a) ~~and maintained~~, on terms and conditions ~~reasonably~~ required by the Access Provider, acting reasonably;
- b) maintained for the period set out in ~~and subject to~~ clause 3.2; and
- c) in the amount and form determined by the Access Provider, acting reasonably, having regard to the matters set out in clauses 3.3 and 3.4. ~~the Security (as 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.~~

Explanation for amendments to clause 3.1 – please refer to section 3.3.1 (Supply not conditional on provision of Security) in the submission.

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 of the following occurs:
 - i. cessation of supply of the Service under this FAD, and
 - 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.

3.3. The Security (including any altered or modified ~~varied~~ Security) may only be requested by, when it is reasonably necessary to protect the legitimate business interests of the ~~where an Access Provider has reasonable grounds to doubt the Access Seeker's ability to pay for services,~~ and shall be of an amount and in a form determined by; the Access Provider, acting reasonably, ~~which is reasonable in all the circumstances.~~ As a statement of general principle the amount of any Security is calculated by reference to:

Explanation for amendments to clause 3.3 – please refer to section 3.3.1 (Supply not conditional on provision of Security) in the submission.

- 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 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).

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 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) Bank Guarantees;
- 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 (g) 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 may 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, acting reasonably, 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, acting reasonably, may, as a result of such Ongoing Creditworthiness Information, and 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), and the Access Seeker must provide that altered Security within ~~20~~10-Business Days of being notified by the Access Provider in writing of that requirement.

-c) In addition to clause 3.5(b), the Access Provider, acting reasonably, may 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 failed to pay Charges in accordance with this FAD on 2 or more occasions 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 to clause 3.5 – please refer to section 3.3.2 (Alteration of Security) in the submission.

3.6. The Access Seeker may from time to time request the Access Provider to consent (in writing) to a decrease in 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 must promptly provide, Ongoing Creditworthiness Information, for the purposes of this clause 3.6.

3.7. If 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. If 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;
 - ii) ~~published audited~~ balance sheet; ~~and published audited~~
 - iii) profit and loss statement.

Explanation for amendments to clause 3.8 – please refer to section 3.3.3 (Meaning of Ongoing Creditworthiness Information) in the submission.

(together with any notes attached to or intended to be read with such 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 must 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.

- 3.9. The Access Seeker may require a confidentiality undertaking in the form set out in Annexure 1 of Schedule 5 (Confidentiality provisions) of this FAD to be given by any ~~person~~ third party person having access to confidential information contained in its Ongoing Creditworthiness Information prior to such information being provided to that person.

Explanation for amendments to clause 3.9 – please refer to section 3.3.4 (Confidentiality Undertaking for Ongoing Creditworthiness Information) in the submission.

- 3.10. Subject to this Schedule 3, the parties agree that:

a) a failure by the Access Seeker to provide the warranties set out in clause 3.7 or to provide Ongoing Creditworthiness Information constitutes:

- ~~a)~~ i. an event entitling the Access Provider to alter the amount, form or terms of the Security (including an entitlement to additional Security) of the Access Seeker and the Access Seeker must provide that altered Security within 15 Business Days after the end of the period set out clause 3.5(a); ~~or~~ and
- ~~b)~~ ii. breach of a material term or condition of this FAD.

Explanation for amendment to clause 3.10 to insert new sub clause 3.10(a)– The Access Provider should have the ability to choose one or both of subclauses (i) and (ii) in (a) as a remedy, rather than having to choose one or the other.

~~(e)-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:

- i. an event entitling the Access Provider to immediately suspend the supply of the Service(s) to the Access Seeker under clause 6.1(f); and
- ii. a breach of a material term or condition of this FAD for the purposes of clause 6.1(c).

Explanation for amendments to clause 3.10 – This amendment is necessary to give effect to proposed new clause 6.1(f). The Access Provider should have the ability to choose one or both of sub clauses (i) and (ii) in (b) as a remedy, rather than having to choose one or the other.

Any disputes arising out of or in connection with Schedule 3 must 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 3.10 or Schedule 4 prevents the Access Provider from exercising any of its rights to suspend the supply of a Service under Schedule 6.

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, the dispute must be managed as follows:
- a) in the case of a Billing Dispute, the dispute must 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 must be managed in accordance with the procedures set out in this Schedule 4.
- 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 otherwise determined, that Non-Billing Dispute must be resolved in accordance with the Billing Dispute Procedures. The Access Provider may seek a determination from an independent third party on whether a dispute initiated by the Access Seeker as a Billing Dispute is a Non-Billing Dispute. If the independent third party deems the dispute to be a Non-Billing Dispute, the Access Provider may provide written notice to the Access Seeker to pay any withheld amount 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. For the purposes of this clause 4.2, the independent third party may include an arbiter from the ACDC.
- 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 4. A Non-Billing Dispute must be initiated only in good faith.
- 4.4. Any Non-Billing Dispute notified under clause 4.3 must be referred:
- a) initially to the nominated manager (or managers) for each party, who must 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 fulfil its obligations under this FAD while a Non-Billing Dispute and any dispute resolution procedure under this Schedule 4 are pending.
- 4.8. 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 must, as early as practicable, and in any case within 14 Calendar Days unless a longer period is agreed between the parties, 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 must 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 prevail;
 - c) it must be conducted in private;
 - d) in addition to the qualifications of the mediator contemplated by the ACDC Guidelines, the mediator must:
 - 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 will 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 must terminate in accordance with the ACDC Guidelines;
- g) the parties must bear their own costs of the mediation including the costs of any representatives and must each bear half the costs of the mediator; and
- h) any agreement resulting from mediation binds 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 apply as follows:

- a) The terms of reference of the Expert Committee are 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 is deemed to be terminated.
- b) An Expert Committee acts as an expert and not as an arbitrator.
- c) The parties are each 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 must 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 must 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 has 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.

- 1) Each party must 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 must 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)
- b) a party has initiated a dispute under the dispute resolution process referred to in clause 4.12(a), and
- c) 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 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.
- 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) is the Confidential Information of the Access Seeker.

Explanation of amendment to clause 5.2 – Please refer to section 3.4.1 (Confidential information of the Access Seeker) of the submission

- 5.3. The Access Provider must 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 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 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 who, in the Access Provider's reasonable opinion require the information to carry out or otherwise give effect to the purposes referred to in paragraph (a) above.
- 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:
- 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 of amendment to clause 5.5(a) – Please refer to section 3.4.2 (Disclosure of Confidential Information) of the submission.

- b) to any professional person for the purpose of obtaining advice in relation to matters arising out of or in connection with the supply of a Service under this FAD;
- 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;
- 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 confidentiality undertaking in the form set out in Annexure 1 of this Schedule 5 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;
- g) in accordance with a lawful and binding directive issued by a regulatory authority;
- h) if reasonably required to protect the safety of personnel or property or in connection with an emergency;
- 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
- j) 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 of adding sub clauses 5.5 (j) and (k) - Telstra considers that Access Providers 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 or to interception capability. Telstra will explain further its reasons in its separate submission on Other Matters.

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:
 - i. Schedule 6 due to a payment breach
 - ii. ~~under~~ clause 6.7; 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,

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

- a) ~~c)~~ c) 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) ~~d)~~ d) 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.

Annexure 1 of Schedule 5

Confidentiality undertaking form

[Amend where necessary]

CONFIDENTIALITY UNDERTAKING

I, _____ of [employer's company name] ([undertaking company]) undertake to [full name of party who owns or is providing the confidential information as the case requires] ([Provider]) that:

- 1 Subject to the terms of this Undertaking, I will keep confidential at all times the information listed in Attachment 1 to this Undertaking (Confidential Information) that is in my possession, custody, power or control.
- 2 I acknowledge that:
 - (a) this Undertaking is given by me to [Provider] in consideration for [Provider] making the Confidential Information available to me for the Approved Purposes (as defined below);
 - (b) all intellectual property in or to any part of the Confidential Information is and will remain the property of [Provider]; and
 - (c) by reason of this Undertaking, no licence or right is granted to me, or any other employee, agent or representative of [undertaking company] in relation to the Confidential Information except as expressly provided in this Undertaking.
- 3 I will:
 - (a) only use the Confidential Information for:
 - (i) the purposes listed in Attachment 2 to this Undertaking; or
 - (ii) any other purpose approved by [Provider] in writing;
 (the Approved Purposes);
 - (b) comply with any reasonable request or direction from [provider] regarding the Confidential Information.
- 4 Subject to clause 5, I will not disclose any of the Confidential Information to any other person without the prior written consent of [Provider].
- 5 I acknowledge that I may disclose the Confidential Information to which I have access to:
 - (a) any employee, external legal advisors, independent experts, internal legal or regulatory staff of [undertaking company], for the Approved Purposes provided that:
 - (i) the person to whom disclosure is proposed to be made (**the person**) is notified in writing to [Provider] and [Provider] has approved the person as a person who may receive the Confidential Information, which approval shall not be unreasonably withheld;
 - (ii) the person has signed a confidentiality undertaking in the form of this Undertaking or in a form otherwise acceptable to [Provider]; and

(iii) a signed undertaking of the person has already been served on [Provider];

(b) other persons, if required to do so by law, but then only:

(i) if I notify [Provider] of that request within 7 days of receiving the request;

(ii) to the person(s) to whom I am obliged to provide the Confidential Information;

(iii) to the extent necessary as required by law; and

(iv) if I notify the recipient of the Confidential Information that the information is confidential and is the subject of this Undertaking to the [Provider]; and

(c) any secretarial, administrative and support staff, who perform purely administrative tasks, and who assist me or any person referred to in paragraph 5(a) for the Approved Purpose.

6 I will establish and maintain security measures to safeguard the Confidential Information from unauthorised access, use, copying, reproduction or disclosure and will protect the Confidential Information using the same degree of care as a prudent person in my position would use to protect their own -confidential information.

7 Except as required by law and subject to paragraph 10 below, within 14 days after whichever of the following first occurs:

(a) termination of this Undertaking;

(b) my ceasing to be employed or retained by [undertaking company] (provided that I continue to have access to the Confidential Information at that time); or

(c) my ceasing to be working for [undertaking company] in respect of the Approved Purposes (other than as a result of ceasing to be employed by [undertaking company]);

I will destroy or deliver to [Provider] the Confidential Information and any documents or things (or parts of documents or things), constituting, recording or containing any of the Confidential Information in my possession, custody, power or control other than electronic records stored in IT backup system that cannot be destroyed or deleted.

8 Nothing in this Undertaking shall impose an obligation upon me in respect of information:

(a) that is in the public domain; or

(b) that has been obtained by me otherwise than from [Provider] in relation to this Undertaking;

provided that the information has not been obtained by me by reason of, or in circumstances involving, any breach of this Undertaking, any other confidentiality undertaking in favour of [Provider] for the Approved purpose, or by any other unlawful means.

- 9 I acknowledge that damages may not be a sufficient remedy for any breach of this Undertaking and that [Provider] may be entitled to specific performance or injunctive relief (as appropriate) as a remedy for any breach or threatened breach of this Undertaking, in addition to any other remedies available to [Provider] at law or in equity.
- 10 The obligations of confidentiality imposed by this Undertaking survive the destruction or delivery to [Provider] of the Confidential Information pursuant to paragraph 7 above.
- 11 I acknowledge that this Undertaking is governed by the law in force in the State of [insert relevant state] and I agree to submit to the non-exclusive jurisdiction of the court of that place.

Signed: _____

Print name: _____

Dated: _____

Witness signature: _____

Witness name: _____

ATTACHMENT 1

Any document, or information in any document provided by [provider] to [undertaking company] which [provider] claims is confidential information for the purposes of this Undertaking.

ATTACHMENT 2

[Approved purpose(s)]

Schedule 6 – Suspension and termination

6.1. 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; or
 - 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); or
 - 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; or
 - ~~e~~) where an event set out in clauses 6.8(a) to (i) occurs; or
 - f) where a Reseller fails to comply with the obligations described in clause 11.3 of Schedule 11 of this FAD; or
 - 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;
- ~~e~~) 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.

Explanation of adding new sub clauses 6.1 (d) and (f) – Please refer to section 3.5.1 (Circumstances giving rise to an immediate right to suspend) of the submission.

6.2. If:

- a) the Access Seeker has failed to pay monies payable under this FAD;
- b) a Court determines that (and the decision is not subject to an appeal) the Access Seeker's use of:
 - ~~a~~ i. _____ its Facilities in connection with any Service supplied to it by the Access Provider;
 - ~~b~~ ii. _____ the Access Provider's Facilities or Network; or
 - ~~c~~ iii. _____ any Service supplied to it by the Access Providers,

is in contravention of any law; or

- c) the Access Seeker breaches a material obligation under this FAD (**Suspension Event**) and:
 - d) 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 remedial action (if any) in respect of that event; and
 - iv. specifying the action which may follow due to a failure to comply with the notice, (**Suspension Notice**) and:
 - e) the Access Seeker fails to institute remedial action as specified in the Suspension Notice within 10 Business Days after receiving the Suspension Notice (in this clause 6.2, 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:
 - f) refuse to provide the Access Seeker with the Service:
 - i. of the kind in respect of which the Suspension Event has occurred; and
 - ii. 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
 - g) suspend the provision of the Service until the remedial action specified in the Suspension Notice is completed.

6.3. For the avoidance of doubt, subclause 6.2(a) does not apply to any monies payable that are the subject of a Billing Dispute that has been notified by the Access Seeker to the Access Provider in accordance with the Billing Dispute Procedures set out in this FAD.

6.4. In the case of a suspension pursuant to clause 6.2, the Access Provider must 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 must do so subject to payment by the Access Seeker of the Access Provider's reasonable costs of suspension and reconnection.

6.5. If:

- a) an Access Seeker ceases to be a carrier or carriage service provider; or
- b) an Access Seeker ceases to carry on business; ~~for a period of more than 10 consecutive Business Days~~ or
- c) in the case of an Access Seeker, any of the reasonable grounds specified in subsection 152AR(9) of the CCA apply; or

d) 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 Access Provider to deliver Listed Carriage Services to its customers; and~~

~~ii. i.~~ the Access Provider has given a written notice to the first-mentioned party within 20 Business Days of becoming aware of the breach (**Breach Notice**); and

~~iii. ii.~~ the Access Seeker fails to ~~institute~~ complete the remedial action as specified in the Breach Notice within 10 Business Days after receiving the Breach Notice (in this clause 6.5, the **Remedy Period**); or

e) the Access Seeker (or its Reseller) has breached a material obligation under this FAD and that breach is incapable of being remedied; or

~~ef)~~ the supply of the 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,

the 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 of amendments to clause 6.5 – Please refer to section 3.5.2 (Suspension of service) of the submission.

6.6. A party must not give the other party both a Suspension Notice under clause 6.2 and a Breach Notice under clause 6.5 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 6.2 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 6.2; and
- d) where an Access Seeker has not rectified a Suspension Event, then notwithstanding clause 6.5(d)(ii), the time period for the purposes of clause 6.5(d)(ii) will be 20 Business Days from the expiry of the time available to remedy the Suspension Event.

6.7. For the avoidance of doubt, a party is not required to provide a Suspension Notice under clause 6.2 in respect of a breach before giving a Breach Notice in respect of that breach under clause 6.5.

6.8. 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 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
- d) the other party is or is 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.

6.9. The cessation of the operation of this FAD:

- a) does not operate as a waiver of any breach by a party of any of the provisions of this FAD; and
- b) is without prejudice to any rights, liabilities or obligations of any party which have accrued up to the date of cessation.

6.10. 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 - Liability and Indemnity

Telstra considers that these NPTCs should not apply to any of the services in the FADs.

7.1. Subject to clause 7.2, each Party's liability ~~in respect of~~ arising in:

Explanation for replacing "in respect of" with "arising in" - The "arising in" language is consistent with the last paragraph of this clause 7.1.

- a) the 12 Month period commencing on the date of the first supply of the Service under this FAD is limited to the aggregate amount paid or payable by the Access Seeker to the Access Provider for the Service provided by the Access Provider in that initial 12 Month period;
- b) any subsequent 12 Month period commencing on any anniversary of the date of the first supply of the Service under this FAD is limited to the aggregate amount paid or payable by the Access Seeker to the Access Provider for the Service provided by the Access Provider in the 12 Month period immediately prior to that anniversary.

For the purposes of this clause 7.1, Liability arises when the act or omission giving rise to the Liability occurs, not when any claim is made by a party under this FAD in connection with that Liability.

7.2. The liability limitation in clause 7.1 does not apply to the Access Seeker's liability to pay the Charges for the Service provided under this FAD, or the Parties' indemnification obligations under clauses 7.3 and 7.4.

7.3. Each Party indemnifies the other Party against all Loss arising from the death of, or personal injury to, a Representative of the other Party, where the death or personal injury arises from:

- a) an act or omission that is intended to cause death or personal injury; or
- b) a negligent act or omission;

by the first Party or by a Representative of the first Party.

7.4. Each Party indemnifies the other Party against all Loss arising from any loss of, or damage to, the property of the other party (or the property of a representative of the other Party), where the loss or damage arises from:

- a) an act or omission that is intended to cause loss or damage to property; or
- b) a negligent act or omission;

by the first Party or by a Representative of the first Party.

7.5. Each Party indemnifies the other Party against all Loss arising from a claim by a third person against the Innocent Party to the extent that the claim relates to a negligent act or omission by the first Party or by a Representative of the first Party.

7.6. Subject to clauses 7.3 and 7.4, a Party has no Liability to the other Party for or in respect of any consequential, special or indirect Loss or any loss of profits or data.

- 7.7. A Party has no Liability to the other Party for or in relation to any act or omission of, or any matter arising from or consequential upon any act or omission of, any end-user of a Party or any other third person who is not a Representative of a Party.
- 7.8. The Indemnifying Party is not obliged to indemnify the Innocent Party under this Schedule 7 to the extent that the liability the subject of the indemnity claim is the direct result of:
- a) a breach of this FAD;
 - b) an act intended to cause death, personal injury, or loss or damage to property; or
 - c) a negligent act or omission;
- by the Innocent Party.
- 7.9. The Indemnifying Party is not obliged to indemnify the Innocent Party under this Schedule 7 or for in respect of a claim brought against the Innocent Party by an end-user of the Innocent Party, or a third person with whom the Innocent Party has a contractual relationship, to the extent that the Loss under such claim could have been excluded or reduced (regardless of whether such a Liability actually was excluded or reduced) by the Innocent Party in its contract with the end-user or third person.
- 7.10. The Innocent Party must take all reasonable steps to minimise the Loss it has suffered or is likely to suffer as a result of an event giving rise to an indemnity under this Schedule 7. If the Innocent Party does not take reasonable steps to minimise such Loss then the damages payable by the Indemnifying Party must be reduced as is appropriate in each case.
- 7.11. A Party's liability to the other Party for Loss of any kind arising out of the supply of the Service under this FAD or in connection with the relationship established by it is reduced to the extent (if any) that the other Party causes or contributes to the Loss. This reduction applies whether the first Party's liability is in contract, tort (including negligence), under statute or otherwise.
- 7.12. The Indemnifying Party must be given full conduct of the defence of any claim by a third party that is the subject of an indemnity under clause 7.3 or 7.4, including, subject to the Indemnifying Party first obtaining the written consent (which must not be unreasonably withheld) of the Innocent Party to the terms thereof, the settlement of such a claim.
- 7.13. Nothing in this Schedule 7 excludes or limits a Party's entitlement to damages under Part 5 of the Telecommunications (Consumer Protection and Service Standards) Act 1999.

Schedule 8 - Communication with end users

Telstra considers that these NPTCs should apply only to Fixed Line and WDSL services.

- 8.1. The Access Provider may communicate and deal with an Access Seeker's end-users as expressly provided in clauses 8.2 to 8.4 and as otherwise permitted by law.
- 8.2. Subject to clause 8.3, the Access Provider may communicate and deal with the Access Seeker's end-users:
- a) in relation to goods and services which the Access Provider currently supplies or previously supplied to the end-user provided that the Access Provider only communicates and deals through its Retail Business Unit;
 - b) as members of the general public or a part of the general public or members of a particular class of recipients of carriage or other services;
 - c) where the Access Provider performs wholesale operations which require communications or dealings with such end-users, to the extent necessary to carry out such operations;
 - d) in a manner or in circumstances agreed by the Parties; or
 - e) in or in connection with an Emergency, to the extent it reasonably believes necessary to protect the safety of persons or property.
- 8.3. If:
- a) an end-user of the Access Seeker initiates a communication with the Access Provider in relation to goods and/or services supplied to that end-user by the Access Seeker, the Access Provider must advise the end-user that they should discuss any matter concerning the Access Seeker's goods and/or services with the Access Seeker and must not engage in any form of marketing or discussion of the Access Provider's goods and/or services;
 - b) an end-user of the Access Seeker initiates a communication with the Access Provider in relation to goods and/or services supplied to that end-user by the Access Provider, the Access Provider may engage in any form of marketing or discussion of the Access Provider's goods and/or services; and
 - c) an end-user of the Access Seeker initiates a communication with the Access Provider in relation to goods and/or services supplied to that end-user by the Access Provider and the Access Seeker, the Access Provider must advise the end-user that they should discuss any matter concerning the Access Seeker's goods and/or services, with the Access Seeker, but may otherwise engage in any form of marketing or discussion of the Access Provider's goods and/or services.
- 8.4. Where a Party communicates with the end-user of the other Party, that first mentioned Party must, where practicable, make and maintain records of that communication with the other Party's end-user in circumstances where that communication discusses anything concerning the other Party's goods or services with the end-user. For the avoidance of doubt, the obligation in this paragraph does not include a requirement to provide such records to the other Party (however such a requirement may arise pursuant to any dispute resolution procedure).

8.5. For the purposes of clauses 8.2 to 8.4, a “**communication**” shall include any form of communication, including without limitation telephone discussions and correspondence.

8.6. Neither Party may represent that:

- a) it has any special relationship with or special arrangements with the other Party;
- b) there are no consequences for an end-user when an end-user signs an authority to transfer their accounts or services;
- c) a Service has any characteristics or functionality other than as specified in a relevant standard form of agreement or the service description for the Service or in any specifications, collateral or brochures published in relation to the Service; or
- d) the other Party participates in the provision of the first mentioned Party’s services, provided that a Party may, upon enquiry by an end-user, inform the end-user of the nature of its relationship with the other Party.

8.7. Where a Party communicates with an end-user of either Party, the first mentioned Party shall ensure that it does not attribute to the other Party:

- a) blame for a Fault or other circumstance; or
- b) the need for maintenance of a Network; or
- c) the suspension of a Service,

provided that this requirement does not require a Party to engage in unethical, misleading or deceptive conduct.

8.8. This Schedule 8 shall be subject to any applicable industry standard made by the ACMA pursuant to Part 6 of the *Telecommunications Act 1997* (Cth) and any applicable industry code registered pursuant to Part 6 of the *Telecommunications Act 1997* (Cth) in relation to communications or dealings with end-users.

Schedule 9 - Network modernisation and upgrade notice periods

Telstra considers that these NPTCs should only apply to Fixed Line and WDSL services

9. *Notice to be provided where Access Provider undertakes a Major Network Modernisation and Upgrade*
- 9.1. Except where the parties agree otherwise, the Access Provider may make a Major Network Modernisation and Upgrade by:
- a) providing the Access Seeker with notices in writing in accordance with clauses 9.2 and 9.4 (**General Notification**) and clauses 9.3 and 9.5 (**Individual Notification**); and
 - b) consulting with the Access Seeker, and negotiating in good faith, any reasonable concerns of the Access Seeker, in relation to the Major Network Modernisation and Upgrade.

This clause 9.1 does not apply to an Emergency Network Modernisation and Upgrade.

- 9.2. The period of notices given under a General Notification provided by the Access Provider to the Access Seeker:
- a) must be an Equivalent Period of Notice; and
 - b) in any event, must not be less than 30 weeks before the Major Network Modernisation and Upgrade is scheduled to take effect.
- 9.3. An Individual Notification must be provided by the Access Provider to the Access Seeker as soon as practicable after the General Notification, taking account of all the circumstances of the Major Network Modernisation and Upgrade.

Information to be provided in the notices

- 9.4. A General Notification must include information on:
- a) the ESA affected by the proposed Major Network Modernisation and Upgrade;
 - b) the distribution area affected by the proposed Major Network Modernisation and Upgrade; and
 - c) a general description of the proposed Major Network Modernisation and Upgrade, including the indicative timing for the implementation of the Major Network Modernisation and Upgrade.
- 9.5. An Individual Notification must include the following information in addition to the information provided in the relevant General Notification:
- a) the anticipated commencement date for implementing the Major Network Modernisation and Upgrade;
 - b) details of the Access Seeker's activated Services, or Services in the process of being activated at the date of the notice, that are likely to be affected by the Major Network Modernisation and Upgrade;

- c) the likely action required by the Access Seeker as a result of the Major Network Modernisation and Upgrade (including the possible impact of the Major Network Modernisation and Upgrade upon the Access Seeker's Service); and
 - d) details of who the Access Seeker may contact to obtain further information about the Major Network Modernisation and Upgrade.
- 9.6. An Individual Notification only needs to be given where a Service has been activated or the Access Provider is in the process of activating a service as at the date of the Individual Notification, and:
- a) the Major Network Modernisation and Upgrade will require the Access Seeker to take particular action in order to continue to use the Service; or
 - b) the Major Network Modernisation and Upgrade will result in the Service no longer being supplied.
- 9.7. Where the Access Provider has provided the Access Seeker with an Individual Notification, the Access Provider must provide the Access Seeker with:
- a) updates about the Major Network Modernisation and Upgrade covered by the notice, including:
 - i. any update or change to the information provided in the Individual Notification;
 - ii. any new information available at the time of the update about:
 - 1. Services provided by the Access Provider in the relevant ESA that may be available to the Access Seeker;
 - 2. how the Access Seeker may be impacted by the Major Network Modernisation and Upgrade; and
 - 3. what steps the Access Seeker will be required to take to facilitate the Major Network Modernisation and Upgrade; and
 - b) weekly reports about the anticipated cutover dates for the Access Seeker's affected Services, beginning no less than five weeks prior to the anticipated commencement date for the Major Network Modernisation and Upgrade.
- 9.8. The updates referred to in subclause 9.7(a) must be provided regularly (which is not required to be any more frequently than Monthly) after the Individual Notification.

Emergency Network Modernisation and Upgrade

- 9.9. In the event of an Emergency, the Access Provider may conduct an Emergency Network Modernisation and Upgrade, and
- a) must use its best endeavours to provide the Access Seeker with an Individual Notification prior to the Emergency Network Modernisation and Upgrade being implemented; or

- b) where it is not practicable for prior notice to be given, the Access Provider must provide the Access Seeker with an Individual Notification as soon as reasonably practicable after the Emergency Network Modernisation and Upgrade is implemented.

Coordinated Capital Works Program

- 9.10. The Access Provider must provide the Access Seeker with a written three year Coordinated Capital Works Program forecast in accordance with clause 9.11 of this schedule 14 Calendar Days from the date this Schedule takes effect (**Coordinated Capital Works Program Forecast**).
- 9.11. The Coordinated Capital Works Program Forecast will:
 - a) be for the three year period commencing on the date the forecast is provided;
 - b) describe generally the Access Provider's indicative investment plans (as at the date of the forecast) for its Coordinated Capital Works Program over the next three years;
 - c) include an evaluation of the impact that the Access Provider's indicative investment plans may have on individual ESAs and Distribution Areas; and
 - d) specify anticipated timeframes for implementation.
- 9.12. The Access Provider must update the Coordinated Capital Works Program Forecast (and provide the update forecasts in writing to the Access Seeker) regularly, at not less than six Month intervals.
- 9.13. At the same time as the Access Provider provides a Coordinated Capital Works Program Forecast under clause 9.10 of this Schedule, the Access Provider must provide a copy of the Coordinated Capital Works Program Forecast to the ACCC.
- 9.14. The Access Provider must provide a written Coordinated Capital Works Program schedule to the Access Seeker by giving notice not less than 12 Months before the anticipated commencement date of the Coordinated Capital Works Program in accordance with clause 9.15 of this Schedule (**Coordinated Capital Works Program Schedule**).
- 9.15. The Access Provider must provide the Coordinated Capital Works Program Schedule and make its best endeavours to identify:
 - a) the ESAs and Distribution Areas affected;
 - b) the Access Provider's plan for the Coordinated Capital Works Program for each ESA;
 - c) the Access Seeker's Services in that Exchange that will be affected and the expected impact of the Coordinated Capital Works Program on the Access Seeker's Services; and
 - d) the anticipated timeframe for implementation of the Coordinated Capital Works Program.

- 9.16. At the same time as the Access Provider provides a Coordinated Capital Works Program Schedule under clause 9.15 of this Schedule, the Access Provider must provide a copy of the Coordinated Capital Works Program Schedule to the ACCC.
- 9.17. For the avoidance of doubt, the Access Provider must also comply with clauses 9.1 to 9.8 of this Schedule when complying with clauses 9.10 to 9.16 of this Schedule.
- 9.18. The Access Provider is taken to have complied with clause 9.10 if it has complied with subparagraph 11.1(a) in Schedule 4 of the Structural Separation Undertaking.

Negotiations in good faith

- 9.19. Except where the parties agree otherwise, the Access Provider must not commence implementation of a Major Network Modernisation and Upgrade unless:
- a) it complies with clauses 9.1 to 9.8; and
 - b) it has consulted with the Access Seeker and has negotiated in good faith, and addressed the reasonable concerns of the Access Seeker in relation to the Major Network Modernisation and Upgrade.
- 9.20. Except where the parties agree otherwise, the Access Provider must not commence the implementation of a Coordinated Capital Works Program unless:
- a) it complies with clauses 9.14 to 9.16 of this Schedule; and
 - b) it has consulted with the Access Seeker and has negotiated in good faith, and addressed the reasonable concerns of the Access Seeker in relation to the Coordinated Capital Works Program.
- 9.21. Notwithstanding any continuing negotiations between the Access Provider and the Access Seeker pursuant to clauses 9.1, 9.19 and 9.20, if the Access Provider has complied with this Schedule 9, a Major Network Modernisation and Upgrade may proceed within a reasonable time period, taking account of all the circumstances, after an Individual Notification has been issued, unless both parties agree otherwise.
- 9.22. In attempting to reach a mutually acceptable resolution in relation to a variation under clauses 9.1, 9.19 and 9.20, the parties must recognise any need that the Access Provider may have to ensure that the specifications for the Services which the Access Providers supplies to more than one of its customers need to be consistent (including, without limitation having regard to the incorporation by the Access Provider of any relevant international standards).

Dispute Resolution

- 9.23. If a dispute arises in relation to a Major Network Modernisation and Upgrade, then the matter may be resolved in accordance with the dispute resolution procedures set out in Schedule 4 of this FAD.

Miscellaneous

- 9.24. A requirement for the Access Provider to provide information in written form includes provision of that information in electronic form.

9.25. Any information provided by the Access Provider in electronic form must be in a text-searchable and readable format.

Schedule 10 - Changes to operating manuals

Telstra considers that these NPTCs should not apply to any of the services in the FADs. If they are to be included, the following amendments should also be made.

10.1. Operational documents concerning the Service that have been provided to the Access Seeker by the Access Provider may be amended:

a) by the Access Provider from time to time to implement or reflect a change to its standard processes, ~~subject to~~ provided that where the amendment would have a material adverse impact on the Access Seeker, the Access Provider must:

i. ~~giving a)~~ give 20 Business Days prior written notice to the Access Seeker including a documented list of all amendments, and a marked-up copy of the proposed new operational document that clearly identifies all amendments; and

ii. ~~allowing b)~~ give the Access Seeker to provide comments during the notice period on the proposed amendments, and giving reasonable consideration to any comments which the Access Seeker has made on the proposed amendments; ~~and.~~

~~b) otherwise, by agreement of the parties.~~

Explanation for amendments to clause 10.1 - Please refer to section 3.6 (Changes to operating manuals) of the submission.

10.2. Upon completion of the process set out in clause 10.1, the Access Provider must notify the Access Seeker and make available to the Access Seeker a copy of the new operational document.

10.3. Where operational documents concerning the Service are amended in accordance with clause 10.1 and the Access Seeker believes that the amendments:

- a) are unreasonable; or
- b) deprive the Access Seeker of a fundamental part of the bargain it obtained under this FAD;

the Access Seeker may seek to have the matter resolved in accordance with the dispute resolution procedures set out in Schedule 4 of this FAD.

Schedule 11 – Resale services (Wholesale ADSL only)

Telstra considers that these NPTCs should not apply to any of the services in the FADs. If they are to be included, the following amendments should also be made.

11.1. The Access Seeker can acquire a Service for the purpose of supplying to a Reseller.

11.2. The Access Seeker is not required to:

- a) notify the Access Provider when the Access Seeker acquires, or seeks to acquire, a Service for the purpose of supplying a Reseller; and/or
- b) obtain the Access Provider's consent to that supply.

11.3 The Access Seeker:

- a) must ensure that its Resellers comply with all of the obligations which, if done or omitted by the Access Seeker, would constitute a breach of the FADs, as if references in those obligations to the Access Seeker were references to the Reseller; and
- b) is liable for any non-compliance by its Resellers with those obligations.

Explanation of new clause 11.3 – Please refer to section 3.7.1 (Obligations of resellers) in the submission.

Schedule 12 (a) – Ordering and provisioning (Managed Network Migrations to the ULLS and the LSS)

Telstra considers that these NPTCs should only apply to ULLS and LSS.

Minimum number of services

- 12.1. Except where the parties agree otherwise, it is at the discretion of the Access Seeker whether a particular Service is to be connected as part of any managed network migration (MNM), or outside of an MNM.
- 12.2. The Access Seeker will notify the Access Provider at the time the order is made whether a particular Service is to be connected as part of an MNM or outside of an MNM.
- 12.3. Except where the parties agree otherwise, there is no minimum number of services required as a pre-requisite for requesting an MNM.

Migration plan terms (forecasting timeframes)

- 12.4. Unless the parties agree otherwise, the period of notice that an Access Seeker must give for an MNM is 56 Calendar Days.
- 12.5. Subject to clause 12.6, the Access Provider must not cancel an MNM where the number of Services to be cutover as specified in the 20 Business Day forecast differs to the number of Services specified in the 56 Calendar Day forecast.
- 12.6. If the cutover of Services cannot occur within the 56 Calendar Day forecast period because of a significant variation between the 56 Calendar Day forecast and the 20 Business Day forecast, the Access Provider must take all reasonable steps to ensure that cutover occurs as soon as practicable following the conclusion of that period.
- 12.7. For the purpose of this determination a reference to a significant variation refers to a variation of more than 10 per cent of the MNM forecast.

Note: for instance the cutover may not occur because of a significant variation between the 56 Calendar Day forecast and the 20 Business Day forecasts.

Connections outside Business Hours

- 12.8. Except where the parties agree otherwise, it is at the discretion of the Access Seeker whether a particular Service is to be connected within Business Hours or outside of Business Hours.

Note: additional charges may be payable for work done outside of Business Hours.

Limits on the number of exchanges per state per day at which MNM cutovers can be scheduled

- 12.9. Except where the parties otherwise agree, and subject to clause 12.10, the Access Provider must not refuse to schedule a cutover for an MNM at an Exchange because the Access Seeker has requested an MNM cutover at another Exchange or other Exchanges in that state on the same day.

12.10. The Access Provider may refuse a requested MNM cutover date where it would be inconsistent with a capacity limitation notice (Limitation Notice) it has published.

12.11. The Limitation Notice must specify:

- a) the limit that is to apply
- b) the period and the ESAs to which it applies; and
- c) the reasons for the limit being necessary by reference to forecast demand and available capacity.

12.12. The Limitation Notice lapses 60 Calendar Days after it is published, unless withdrawn earlier.

Note: Another Limitation Notice may be issued to replace a lapsed notice.

12.13. The Access Provider must not unreasonably refuse to vary or withdraw the Limitation Notice on the request for an Access Seeker.

12.14. Where an Access Seeker disagrees with a decision made by the Access Provider not to vary or withdraw the Limitation Notice, the Access Seeker may seek dispute resolution in accordance with the dispute resolution procedures set out in Schedule 4 of this FAD.

Capacity Limits on ULLS provisioning

12.15. Except where the parties agree, and subject to clause 12.16, the Access Provider must not unreasonably limit the number of Services that can be provisioned per day at a particular Exchange and must use its best endeavours to supply all requested cutovers for a particular day.

12.16. The Access Provider may refuse a requested cutover for a Service at a particular Exchange where it is not reasonably able to perform the cutover on that day having regard to the volume of work orders, for that Exchange or for all Exchanges, and the labour that is available on that day, subject to the Access Provider performing the cutover the following Business Day.

Advice regarding Complex Services affecting ULLS orders

12.17. Except where the parties agree otherwise, where:

- a) an Access Seeker has submitted a ULLS request; and
- b) the Service Qualification query fails due to the presence of Complex Services on the line,

the Access Provider will provide to the Access Seeker a list of the Complex Services present on the line at the time it advises the Access Seeker of the results of the Service Qualification query.

Schedule 12 (b) - New ULLS ordering and provisioning processes (LSS to ULLS Transfer processes)

Telstra considers that these NPTCs should only apply to ULLS and LSS.

Scope

12.18. Except where the parties subsequently agree otherwise, clauses 12.18 to 12.23 apply where an Access Seeker requests the Transfer of a LSS to a ULLS from the Access Provider.

Terms

12.19. The Access Seeker must provide instructions about whether or not the Transfer should occur as part of a MNM in accordance with the MNM forecasting timeframes and notice periods specified in clauses 12.4 to 12.7 of this FAD, or as otherwise agreed between the parties.

12.20. The Access Provider must take all reasonable efforts to comply with the Access Seekers instructions provided pursuant to clause 12.19.

12.21. Both the Access Provider and the Access Seeker must allow for the Transfer of the LSS to ULLS in accordance with the following minimum characteristics:

- a) the period in which a LSS to ULLS Transfer is performed (that is, the period in which a LSS is disconnected and a ULLS is connected) will be no longer than four hours;
- b) a Transfer must not require end-user involvement with the Access Provider (including, without limitation, the making of a telephone call or sending of correspondence by the end-user to the Access Provider). A request for a LSS to ULLS Transfer will be deemed a cancellation of any existing PSTN line rental and LSS provided the Access Seeker has obtained the necessary customer authority for the cancellation of end-user PSTN services;
- c) a Transfer is commenced and executed by a single provisioning order from the Access Seeker to the Access Provider; and
- d) the Access Provider will charge the Access Seeker a single charge for undertaking a LSS to ULLS Transfer whether the Transfer occurs as a single connection or as part of an MNM.

12.22. The Access Provider must ensure that the development and implementation of the LSS to ULLS Transfer process will result in no changes to how the Access Seeker currently interfaces to the ULLS Carrier Interface System (ULLCIS).

Connect Outstanding process for ULLS orders

12.23. Except where the parties agree otherwise, the Access Provider will support a Connect Outstanding process for the ULLS, by no later than six Months from the Commencement Date.

12.24. The Connect Outstanding process for the ULLS must:

- a) support the cancellation of an existing service on a line upon the Access Provider receiving from the Access Seeker advice that the Access Seeker has obtained Proof of Occupancy; and,
- b) facilitate the connection of a ULLS in response to a ULLS request submitted by an Access Seeker in respect of that line.