

- D. The ACCC wishes to give interested parties the opportunity to access version 1.2 of the WIK Model for the Specified Purpose.
- E. The ACCC requires, and the Receiving Party agrees, that it is necessary to take all reasonable steps (including the execution of this deed and schedule 2 and schedule 3 to this deed) to ensure that version 1.2 of the WIK Model is protected and that version 1.2 of the WIK Model is only used for the Specified Purpose.
- F. The ACCC has agreed to make version 1.2 of the WIK Model available to the Receiving Party only for the Specified Purpose on the terms set out in this deed.

IT IS AGREED AS FOLLOWS:

1. Interpretation

In this deed, unless the contrary intention appears:

- (a) 'Act' means the *Trade Practices Act 1974* (Cth);
- (b) 'Advice' means the provision of professional advice or services to a third party for a Specified Purpose provided that third party entered into a deed with the ACCC substantially on the same terms as this deed;
- (c) 'Adviser' means an economic or engineering adviser, or a firm of solicitors, who has been engaged to provide Advice to a third party for a Specified Purpose provided that third party entered into a deed with the ACCC substantially on the same terms as this deed;
- (d) 'Intellectual Property Rights' means all statutory and other proprietary rights in respect of all intellectual and industrial property including, without limitation, in respect of all trademarks, patents, circuit layouts, copyrights, confidential information and all other intellectual property as defined in article 2 of the Convention Establishing the World Intellectual Property Organisation of July 1967;
- (e) 'Specified Personnel' means those employees of the Receiving Party set out in schedule 1 who need to have access to the WIK Model for the Specified Purpose;
- (f) 'Specified Purpose' means to use the WIK Model only for one or more of the following purposes:
 - (i) if the Receiving Party is an access seeker or provider (within the meaning of Division 8 of Part XIC of the Act) in relation to the MTAS – to assist the Receiving Party in its consideration of the *MTAS Pricing Principles Determination 1 July 2007 to 31 December 2008* made on 28 November 2007 and the *MTAS Pricing Principles Determination 1 July 2007 to 31 December 2008 Report* published by the ACCC in November 2007;

- (ii) making a submission in relation to any arbitration to which the Receiving Party is a party, or in relation to which the Receiving Party has been engaged by a party to the arbitration as an Adviser for the purposes of the arbitration, being an arbitration of an access dispute in relation to the price for the MTAS which is to apply to all or any part of the period 1 July 2007 to 31 December 2008 (inclusive) provided that access dispute is notified to the ACCC under Part XIC of the Act;
 - (iii) preparing, or making a submission regarding, any ordinary access undertaking given to the ACCC under Part XIC of the Act in relation to the price for the MTAS which is to apply to all or any part of the period 1 July 2007 to 31 December 2008 (inclusive); and
 - (iv) any other purpose notified by the ACCC to the Receiving Party from time to time provided that purpose is connected with a regulatory function of the ACCC;
- (g) 'Technical Specification Manuals' means the following manuals prepared by WIK and published by the ACCC:
- (i) *Specification of the Cost Module of the WIK Mobile Network and Cost Model*; and
 - (ii) *Specification of the strategic network planning tool GSM-CONNECT for implementing the WIK-MNCM*;
- (h) 'User Manual' means the *WIK Mobile Network and Cost Model Version 1.2 User Guide* prepared by WIK and published by the ACCC which assists users to install and use the WIK Model;
- (i) 'WIK Model' means the mobile network and cost model computer program version 1.2 created by WIK for the ACCC for the mobile terminating access service for the purpose of informing the ACCC's determination of pricing principles in respect of that service under section 152AQA(1) of the Act including, without limitation, any unpatented inventions, ideas, know-how, concepts, trade secrets, processes, techniques, software, algorithms, products and any other intellectual property, financial and business information and any other commercially valuable information contained in that version of the cost model computer program;
- (j) 'WIK Report' means the report dated January 2007 prepared by WIK for the ACCC entitled *Mobile Termination Cost Model for Australia*;
- (k) headings are inserted for convenience only and do not affect the interpretation of this deed;
- (l) words importing a gender include any other gender;

- (m) words in the singular number include the plural and words in the plural number include the singular;
- (n) where a word or phrase is given a particular meaning, other parts of speech and grammatical forms of that word or phrase have corresponding meanings;
- (o) a reference to:
 - (i) a person includes a natural person, partnership, joint venture, government agency, association, corporation or other body corporate;
 - (ii) a reference to legislation or to a provision of legislation includes a modification or re-enactment of it, a legislative provision substituted for it and a regulation or statutory instrument issued under it;
 - (iii) a thing (including, without limitation, a chose in action or other right) includes a part of that thing;
 - (iv) a party includes its successors and permitted assigns;
 - (v) a document includes all amendments or supplements to that document; and
 - (vi) this deed includes all schedules to it;
- (p) the meaning of general words is not limited by specific examples introduced by “*including*” or “*for example*”, or similar expressions; and
- (q) no rule of construction applies to the disadvantage of a party because that party was responsible for the preparation of this deed or any part of it.

2. Operation of deed

- 2.1 This deed records the entire agreement between the parties in relation to its subject matter.
- 2.2 Any reading down or severance of a particular provision does not affect the other provisions of this deed.

3. Term and termination

- 3.1 Subject to this clause 3, this deed commences on the date of this deed and continues from that date until it expires on 31 December 2008.
- 3.2 The ACCC may terminate this deed immediately by giving notice to the Receiving Party if:
 - (a) in the ACCC’s complete discretion:

- (i) there is a change in the MTAS pricing principles framework used by, or to be used by, the ACCC which is materially different to that used in the WIK Model; or
 - (ii) the ACCC is of the view that the WIK Model should no longer be made available as a consequence of any decision or judgment made by any court or the Australian Competition Tribunal; or
 - (b) the Receiving Party:
 - (i) breaches any term of this deed and fails to remedy that breach within 7 days after being requested to do so in writing by the ACCC; or
 - (ii) goes into liquidation, has a receiver or receiver and manager appointed to it or any part of its assets, enters into a scheme of arrangement with creditors or suffers any other form of external administration.
- 3.3 The ACCC may terminate this deed by giving at least 14 days' notice to the Receiving Party if the ACCC releases a new version of the WIK Model.
- 3.4 Either party may terminate this deed by giving at least 2 months' notice to the other party.
- 3.5 If the Receiving Party is an Adviser, this deed will immediately and automatically terminate once the Receiving Party's engagement to provide the Advice has effectively ceased.
- 4. Access to the WIK Model**
- 4.1 The Receiving Party, can collect one copy only of the WIK Model from the ACCC's offices in Melbourne or Sydney provided the Receiving Party follows the ACCC's directions in relation to arranging for the collection of the copy of the WIK Model.
- 4.2 The Receiving Party may install one copy of the WIK Model on any computer which is located at all times on the Receiving Party's premises provided the copy of the WIK Model on that computer is only used by an employee of the Receiving Party set out in schedule 1 and only for the Specified Purpose.
- 4.3 The ACCC reserves the right to make changes to the WIK Model, User Manual and Technical Specification Manuals at any time and the Receiving Party acknowledges that the version of the WIK Model provided to the Receiving Party under this deed may not be the version which informs the ACCC's:
- (a) potential future determination of any pricing principles in respect of the MTAS under section 152AQA(1) of the Act;
 - (b) determination of any arbitration of an access dispute in relation to the price for the MTAS under Part XIC of the Act; or

- (c) decision regarding any ordinary access undertaking given to the ACCC under Part XIC of the Act in relation to the price for the MTAS.

4.4 Subject to the *Copyright Act 1968* (Cth), the Receiving Party must not:

- (a) alter, enhance or otherwise modify the WIK Model; or
- (b) cause, or permit either through its direct efforts or through any third party, the modification, disassembly, de-compilation or reverse engineering of the WIK Model.

4.5 The Receiving Party acknowledges that it owns no copyright or other Intellectual Property Rights in the WIK Model, User Manual and Technical Specification Manuals and obtains no such rights by virtue of this deed.

4.6 The Receiving Party must not rent, lease, license, sub-license, loan, sell or distribute the WIK Model (or any part of it) or make the WIK Model (or any part of it) accessible through a computer network.

4.7 The benefit of the WIK Model access given to the Receiving Party under this deed is personal to the Receiving Party and the Receiving Party must not mortgage, charge, assign, rent, lease, license, sub-license, sell or otherwise dispose of or transfer that access to any third party.

5. Disclosure

5.1 The Receiving Party must not give access to or provide a copy of the WIK Model to any person (other than the ACCC) without the prior written consent of the ACCC.

5.2 The ACCC may grant or withhold its consent in its absolute and unfettered discretion. If the ACCC grants its consent, it may impose conditions on that consent including, without limitation, requiring the Receiving Party to procure the execution of a deed in these terms by the person to whom the Receiving Party proposes to give access to or provide a copy of the WIK Model. If the ACCC grants its consent subject to conditions, the Receiving Party must comply with those conditions.

5.3 Nothing in this deed obliges the ACCC to disclose any particular information to the Receiving Party or any other person.

6. Restrictions on use

6.1 The Receiving Party will use the WIK Model for the Specified Purpose and for no other purpose.

6.2 The Receiving Party:

- (a) must only provide access to the WIK Model to the Specified Personnel on a strictly need to know basis for the Specified Purpose only. The Receiving Party must before giving access to the WIK Model to any of the Specified Personnel:

- (i) supply a copy of this deed to that person;
 - (ii) cause that person to sign an undertaking in the form of that set out in schedule 2; and
 - (iii) deliver the signed undertaking to the ACCC.
- (b) must not give access to or provide a copy of the WIK Model to any other person, whether or not employed or engaged by the Receiving Party, (other than the ACCC); and
- (c) the Receiving Party must ensure that the Specified Personnel do not give access to or provide copies of the WIK Model to any other person contrary to the provisions of this deed.

7. Party's representatives

- 7.1 The Receiving Party must ensure that its officers, employees, agents and advisers (whether or not still employed or engaged in that capacity) do not do, or omit to do, anything which, if done or omitted to be done by that party, would be a breach of the Receiving Party's obligations under this deed.
- 7.2 The Receiving Party must give the ACCC all assistance it requires to take any action or bring any proceedings for breach of any undertaking delivered under clause 6.2.

8. Return of WIK Model and destruction of copies

- 8.1 The Receiving Party must, at its expense, deliver to the ACCC any copy of the WIK Model provided to the Receiving Party by the ACCC and permanently delete in its entirety all copies of the WIK Model from every computer disk or electronic storage facility of any type owned or used by the Receiving Party on the earlier of:
- (a) if the Receiving Party is an Adviser, on the date on which the Receiving Party's engagement to provide the Advice has effectively ceased;
 - (b) demand by the ACCC provided a notice terminating this deed has been given to a party under clause 3;
 - (c) termination of this deed; and
 - (d) 31 December 2008,

and must cease to make use of the WIK Model or any part of it and confirm in writing when it has complied with all of these obligations by signing the certificate in the form of that set out in schedule 3 and forwarding the signed certificate to the ACCC.

- 8.2 Return or destruction of the WIK Model and any copies under clause 8.1, does not release the Receiving Party from its obligations under this deed.

9. Disclaimer of warranties and liability

- 9.1 To the extent permitted by law, all express or implied warranties, representations, terms and conditions other than those contained in this deed (the 'Excluded Representations') are excluded. The Receiving Party acknowledges that no reliance on any Excluded Representations has been made by it in entering into this deed.
- 9.2 Without prejudice to the generality of clause 9.1, the ACCC makes no warranty that the WIK Model is free from any computer virus.
- 9.3 The ACCC will not be liable in contract, tort (including negligence) or otherwise for any loss of whatsoever kind, howsoever arising, which is directly or indirectly incurred in connection with the use of the WIK Model.
- 9.4 The ACCC will not be liable in contract, tort (including negligence) or otherwise for any loss of revenue, business, savings or profits (anticipated or actual), loss of goodwill or data, loss from business interruption or for any indirect or consequential loss or damage whatsoever, howsoever arising, which is directly or indirectly incurred in connection with the use of the WIK Model and whether or not:
- (i) such loss or damage was foreseeable or contemplated; or
 - (ii) the ACCC was advised of the possibility of such loss or damage.
- 9.5 Without prejudice to the generality of clauses 9.3 and 9.4, in no event will the ACCC be liable to the Receiving Party for any loss relating in any way to:
- (i) the Receiving Party's inability or failure to use the WIK Model properly or completely, even if assisted by the ACCC or WIK, or any decision made or action taken by the Receiving Party in reliance on the WIK Model; or
 - (ii) any lost profits (whether direct or indirect) or any consequential, exemplary incidental, indirect or special damages relating in whole or in part to the Receiving Party's use of or inability to use the WIK Model even if the ACCC has been advised of the possibility of such loss or damages.

10. Indemnity

- 10.1 The Receiving Party indemnifies the ACCC against all costs, expenses, actions or claims directly or indirectly incurred or suffered by the ACCC as a result of any breach of this deed by the Receiving Party.
- 10.2 The indemnity in clause 10.1 extends to and includes all costs, damages and expenses incurred by the ACCC in defending and/or settling any such costs, expenses, actions, suits, proceedings, claims or demands (including legal costs and disbursements on a full indemnity basis).
- 10.3 The indemnity referred to in this clause 10 survives the expiration or termination of this deed.

11. Applicable Law

This deed is governed by and construed in accordance with the law for the time being in force in the Australian Capital Territory and the parties submit to the non-exclusive jurisdiction of the courts of that Territory.

12. Waiver

12.1 If a party does not exercise (or delays in exercising) any of its rights, that failure or delay does not operate as a waiver of those rights.

12.2 A single or partial exercise by a party of any of its rights does not prevent the further exercise of any right.

12.3 In this clause, 'rights' means rights or remedies provided by this deed or at law.

13. Notices

13.1 A notice, approval, consent or other communication in connection with this deed:

- (a) must be by electronic mail;
- (b) must be sent by a person duly authorised by the sender;
- (c) must be delivered to the intended recipient by email to the email address below or the email address last notified by the intended recipient to the sender:

- (i) to the ACCC: Australian Competition and
Consumer Commission

Attention: Brett McCarthy

Email: brett.mccarthy@acc.gov.au

with a copy to Shane Adams at
shane.adams@acc.gov.au

- (ii) to Receiving Party: [insert name of Receiving Party]

Attention:

Email:

with a copy to [insert name] at [insert email
address]

- (d) will be taken to be duly given or made on receipt by the sender of an electronic acknowledgement that the electronic mail has been read by the intended recipient.

EXECUTED AS A DEED

SIGNED, SEALED AND DELIVERED by)
THE AUSTRALIAN COMPETITION)
AND CONSUMER COMMISSION)
in the presence of:)

.....
Signature

.....
Print name

.....
Print position

.....
Witness's signature

.....
Print name

Date:.....

SIGNED, SEALED AND DELIVERED by)
the **RECEIVING PARTY** by:)

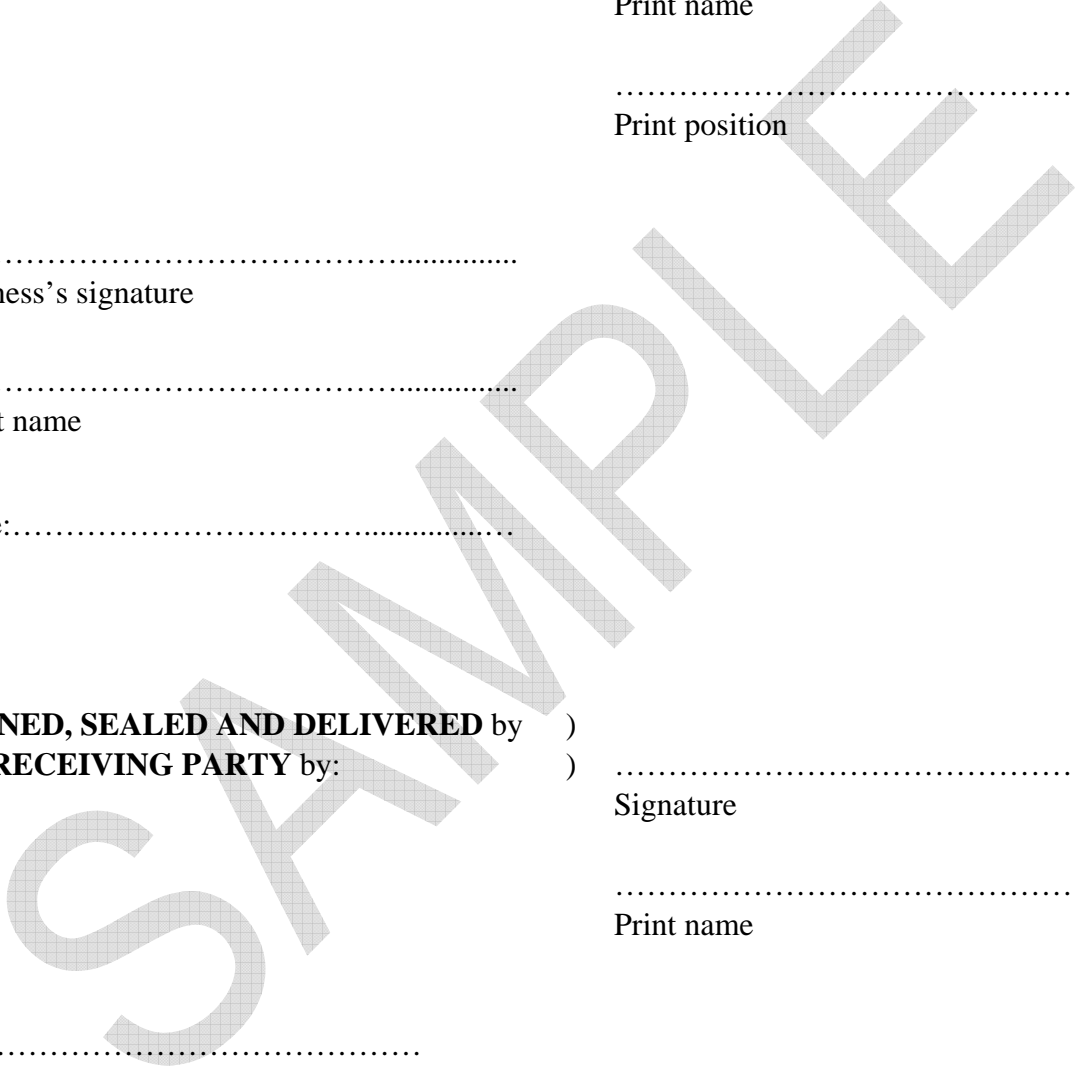
.....
Signature

.....
Print name

.....
Witness's signature

.....
Print name

Date:.....



SCHEDULE 1

SPECIFIED PERSONNEL

[insert names and job title of relevant employees]

SAMPLE

SCHEDULE 2
DEED POLL – WIK MOBILE NETWORK AND COST MODEL
ACCESS UNDERTAKING

I
(name)

of
(name and address of employer)

-
- (a) acknowledge that the Australian Competition and Consumer Commission (“the ACCC”) has arranged for the development of version 1.2 of the *WIK Mobile Network and Cost Model* in relation to the mobile terminating access service and that my employer and the ACCC entered into a deed under which my employer will be given access to the WIK Model subject to the terms of that deed (“WIK Model Access Deed”);
 - (b) acknowledge that I have been provided with a copy of the WIK Model Access Deed;
 - (c) agree that a term or expression starting with a capital letter which is used in this deed, but which is not defined in this deed, has the same meaning as that used in the WIK Model Access Deed;
 - (d) undertake to the ACCC:
 - (i) to use the WIK Model only for the Specified Purpose set out in the WIK Model Access Deed;
 - (ii) subject to the *Copyright Act 1968* (Cth), not to:
 - (1) alter, enhance or otherwise modify the WIK Model; or
 - (2) cause, or permit either through my direct efforts or through any third party, the modification, disassembly, de-compilation or reverse engineering of the WIK Model;
 - (iii) not to make a copy of the WIK Model except as permitted by the terms of the WIK Model Access Deed; and
 - (iv) not to give access to, or provide a copy of, the WIK Model to any person (other than my employer or the ACCC).

Executed as a Deed Poll.

Signed, Sealed and Delivered by:

Name.....

Signature.....

Date.....

SCHEDULE 3

COMPLIANCE CERTIFICATE

I
(name)

of
(name and address of employer)

.....

confirm that in accordance with clause 8 of the deed entered into by my employer and the Australian Competition and Consumer Commission (“the ACCC”) under which my employer was given access to version 1.2 of the *WIK Mobile Network and Cost Model* in relation to the mobile terminating access service, all copies of the WIK Model have been permanently deleted in their entirety from every computer disk or electronic storage facility of any type owned or used by my employer.

A term or expression starting with a capital letter which is used in this certificate, but which is not defined in this certificate, has the same meaning as that used in the deed referred to above.

Signature.....

Date.....

