

ANNEXURE A

PROPOSED AMENDMENTS TO DRAFT FAD NON-PRICE TERMS

Note: Annexure A does not reflect any amendments which Telstra proposes should be made to Schedule 1 of the Draft FAD.



Draft Final Access Determination No. X of 2012 (DTCS)

Competition and Consumer Act 2010

The AUSTRALIAN COMPETITION AND CONSUMER COMMISSION makes this final access determination under section 152BCG of the *Competition and Consumer Act 2010*.

Date of decision: [Insert Date] 2012

.....

Rod Sims
Chairman
Australian Competition and Consumer Commission

1. Application

1.1 This instrument sets out a final access determination in respect of the declared service ('relevant declared service') specified in the table below.

Declared service	Expiry of declaration schedules	Title of final access determination	Applicable schedules
Domestic Transmission Capacity Service (DTCS)	31 March 2014	Final Access Determination No. X of 2012 (DTCS)	1-10

Note:

1. From 1 January 2011:
 - a carrier licence held by a carrier is subject to a condition that the carrier must comply with any access determinations that are applicable to the carrier; and
 - a carriage service provider must comply with any access determinations that are applicable to the provider.
2. An Access Provider and Access Seeker may enter into an Access Agreement relating to a declared service. Access Agreements prevail over inconsistent access determinations: section 152BCC of the *Competition and Consumer Act 2010*.

1.2 For the avoidance of doubt, the terms and conditions of access set out in clause 4 apply to any transmission point used in the domestic transmission capacity service covered by the declaration specified in the table in clause 1.1.

2. Definitions and interpretation

2.1 Schedule 1 applies to the interpretation of this instrument. The Schedules form part of this instrument.

3. Commencement and duration

3.1 This final access determination commences 21 days after ~~on~~ the day on which it is published.

Explanation for above amendment to clause 3.1 - In relation to this amendment, please refer to section 2 (Commencement and expiry date) of the submissions.

3.2 Unless sooner revoked, this final access determination remains in force up until and including 31 December 2014.

Note:

1. An access determination may come into force on a day which is earlier than the day the determination is made: subsections 152BCF(1) and 152BCF(2) of the *Competition and Consumer Act 2010*.

-
2. An interim access determination is revoked when the final access determination comes into force: subsection 152BCF(9A) of the Competition and Consumer Act 2010.

4. Terms and conditions of access

- 4.1 If a carrier or carriage service provider is required to comply with any or all of the standard access obligations as defined in the *Competition and Consumer Act 2010* in respect of a relevant declared service, the carrier or carriage service provider must comply with those obligations on the terms and conditions set out in this clause 4.

Note. Note: The terms and conditions in a final access determination apply only to those terms and conditions where an Access Agreement cannot be reached, no special access undertaking is in operation and no binding rules of conduct have been made: section 152AY of the *Competition and Consumer Act 2010*.

- 4.2 ~~If the carrier or carriage service provider is required to supply the relevant declared service to a service provider, the carrier or carriage service provider must supply the service:~~
- (a) at the price specified in Schedule 1; and
 - (b) on the non-price terms and conditions specified in schedules 2-9.

INDEX TO SCHEDULES

Schedule			Page
1	Price	DTCS	4
2	Non-price	Billing and notifications	6
3		Creditworthiness and security	12
4		General dispute resolution procedures	16
5		Confidentiality provisions	20
6		Suspension and termination	28
7		Liability and indemnity	32
8		Network upgrade and modernisation	34
9		Facilities Access	39
10	Definitions and interpretation		46

Schedule 1 – Price terms for the domestic transmission capacity service (DTCS)

- 1.1. This Schedule sets out the method for ascertaining the price of each individual DTCS service.
- 1.2. The annual charge for an individual DTCS service is to be determined by the formula in Table 1 below.
- Note: A DTCS Pricing Calculator that can be used to ascertain the price for a particular DTCS service in accordance with Table 1 can be found on the ACCC website (www.accc.gov.au).
- 1.3. The annual charge for an individual DTCS service derived from the formula in Table 1 below is a maximum annual charge for that DTCS service.
- Note: A DTCS Pricing Calculator that can be used to ascertain the price for a particular DTCS service in accordance with Table 1 can be found on the ACCC website (www.accc.gov.au).
14. For the purposes of Table 1:
- ~~a.~~(a) the value for 'Speed' ranges from the data rates of 2 to 622 Mbps;
 - ~~b.~~(b) the value for 'Distance' ranges from 0 to 4000 kilometres, based on the radial distance from the start to the end point of a service;
 - ~~c.~~(c) the distance for a Tail-End route is 2 kilometres;
 - ~~d.~~(d) the value for coefficient "c" is determined by whether the Service is provided with protection in the form of geographic path diversity;
 - ~~e.~~(e) the value for coefficient "t" is determined by whether the Service is Metropolitan (metro) or Regional;
 - ~~f.~~(f) a Service between Darwin and another Capital City is classified as Regional;
 - ~~g.~~(g) a Service between Hobart and another Capital City is classified as Regional;
 - ~~h.~~(h) for a Service from any point on the mainland to any point in Tasmania, the price determined in accordance with Table 1 for the proportion of the subsea component is to be increased by 40 per cent.

Table 1: Price terms for DTCS services

$$\text{Price (\$)} = \exp [\log_e(\text{Annual Charge})] \times 1.102$$

In the equation above the term $\log_e(\text{Annual Charge})$ is defined as set out below

$$\log_e(\text{ Annual Charge}) =$$

Note: The “t” coefficients have been established based on a network having QOS 1 (Quality of Service 1).

- 1.5. The non-recurring connection charge for a DTCS service is to be determined according to Table 2 below.

Table 2: Non-recurring (connection) charges for DTCS services

	SDH	Ethernet
2Mbps	\$3,100	\$2,500
10Mbps	\$6,500	\$2,500
34/45Mbps	\$19,000	-
100Mbps	-	\$5,000
155Mbps	\$36,000	-



Schedule 2 – Billing and Notifications

- 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~~ Month in respect of Charges payable for the Service unless the parties agree otherwise.

Explanation for above amendment to clause 2.3 - This is a reference to the defined term.

- 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 six Months have elapsed since the date the relevant amount was incurred by the Access Seeker's customer, except where the Access Seeker gives written consent to a longer period (such consent not to be unreasonably withheld).
- 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) and the provisions of any applicable industry code registered pursuant to Part 6 of the Telecommunications Act 1997 (Cth) in relation to billing.
- 2.6. Subject to any Billing Dispute notified in accordance with this FAD, 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. 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. 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 percent.
- 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 amendments to clause 2.7 - In relation to this amendment, please refer to section 1.1.3 (Taking action for unpaid amounts) of the submissions.

28. 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.
29. 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 or regulatory 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 as the Billing Dispute has been resolved. 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).
- 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~~~~may not~~ be given to the Access Provider in relation to a Charge ~~within~~~~later than~~ six Months ~~of~~~~after the due date for~~ the invoice for the Charge ~~being~~ issued in accordance with 2.6.

Explanation for amendments to clause 2.14 – This amendment ensures consistency with industry practice for Billing Disputes to be notified within 6 months of the invoice being issued, as opposed to giving Access Seekers, in effect, seven months to notify a Billing Dispute.

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.

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

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

- 2.17. 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 ~~acknowledging~~ 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 2.17 (such consent not to be unreasonably withheld).

Explanation for above amendment to clause 2.17 - The time should not begin to run for the Access Provider's proposed resolution until the Access Provider has accepted the Billing Dispute as set out in clause 2.15 above, as this will be the point at which the Access Provider accepts that it has sufficient information to begin considering the dispute. Further, it is inconsistent to use the term "accepting" in relation to the Billing Dispute notice at the start of the clause, and then use the term "acknowledging" in relation to the same time frame at the end of the clause.

- 2.18. 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~~ five Business Days of being notified of such decisions (or such longer time agreed between the parties). Any objection lodged by the Access Seeker with the Access Provider must be in writing and state:

Explanation for above amendment to clause 2.18 - The time limit for objections by the Access Seeker should be limited to five Business Days as this will ensure the efficient resolution of Billing Disputes while still providing the Access Seeker with sufficient time to consider the Access Provider's decision.

- 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.

2.19. 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.

2.20. 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.

2.21. 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.

2.22. If

- a. the Access Provider has not proposed a resolution according to clause 2.17 or within the timeframe specified in clause 2.17, or
- b. if the Access Seeker having first submitted an objection under clause 2.18 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 2.18,

the Access Seeker may escalate the matter under clause 2.23. If the Access Seeker



does not do so within ~~15~~ five Business Days (or such longer period of up to 10 Business Days which the Access Seeker may request and which the Access Provider must either accept or reject, acting reasonably) after the time period stated in clause 2.17 or after being notified of the Access Provider's Revised Proposed Resolution under clause 2.18(e) or confirmed proposed resolution under clause 2.18(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 2.17 or Revised Proposed Resolution made under clause 2.18(e) or confirmed proposed resolution under clause 2.18(f) and clauses 2.20 and 2.21 apply.

Explanation of amendments to clause 2.22

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 (with a possible extension) 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. Having the shorter default period together with the ability for a possible extension to be granted, where reasonable, strikes the appropriate balance between ensuring that such matters are resolved as quickly as possible and allowing for the fact that some matters might be more complicated and take longer to resolve than other. It is also consistent with the other clauses which allow that, on occasion, it might be necessary for a longer period to be agreed.

Thus, the proposed amendments strike 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.

2.23. 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 ~~proposed resolution~~ Revised Proposed Resolution; and

Explanation of amendments to clause 2.23 - This amendment clarifies that a Billing Dispute may only be escalated following completion of the procedure set out in clause 2.18.

- b. seeking escalation of the Billing Dispute.

2.24. A notice under clause 2.23 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 2.23 (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.
- 2.25. 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 2.24 (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 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 2.25(a) or are unable to resolve the entire Billing Dispute by mediation, either party may commence legal or regulatory proceedings to resolve the matter.
- 2.26. 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.
- 2.27. Each party must continue to fulfil its obligations under this FAD while a Billing Dispute and the Billing Dispute Procedures are pending.
- 2.28. 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 2.24 (or their respective nominees).
- 2.29. 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.



Clause 2.30 – Telstra considers that clause 2.30 should be deleted. Although the Commission proposes to retain clause 2.30 on the basis that it “adequately incentivises the access provider to provide accurate billing information”, the following provisions in Schedule 2 already provide sufficient and proportionate discouragement to the Access Provider from issuing incorrect invoices:

- clause 2.10 provides that an Access Seeker is entitled to invoke the Billing Dispute Procedures;
- clause 2.12 provides that an Access Seeker is entitled to withhold payment of the disputed Charge until the Billing Dispute is resolved; and
- clause 2.20 provides that interest is payable on any amount refunded to the Access Seeker.

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

Explanation for above amendment to clause 2.30 - This amendment is necessary because only the Billing Dispute Procedures should properly result in a finding that invoices are incorrect. The outcome of other dispute resolution procedures will not impact upon the accuracy of invoices.

a. three or more out of any five consecutive invoices for a given Service are incorrect by 5 percent or more; and

a.b. the reason or basis for the inaccuracy of those invoices is the same,

Explanation for above amendment to clause 2.30 - This amendment ensures that the operation of the clause is limited to situations where the Access Provider is aware of the inaccuracy.

~~,~~ then, for the purposes of clause 2.20, 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 2.6, plus 2 percent. The remedy set out in this clause 2.30 is without prejudice to any other right or remedy available to the Access Seeker.

This clause 2.30 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.

Explanation for above amendment to clause 2.30 - Telstra considers that this amendment is reasonable because the Access Seeker should not be able to take advantage of the clause in circumstances where the 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. It is inappropriate to penalise the Access Provider for an error of which it is 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 2.30 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 2.30.

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 2.30 shall be without prejudice to any other right or remedy available to the Access Provider.

Explanation for above amendment to clause 2.30 - This amendment ensures that the 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 2.30) 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 2.30. If clause 2.30 is to remain, it is reasonable that a similar measure should be introduced to deter the inappropriate use of such provisions by the Access Seeker.



Schedule 3 – Creditworthiness and security

Explanation for amendments to clause 3.1 -

Telstra proposes that in clause 3.1:

- (a) the provision of Security should be a precondition to the supply of a Service under the FAD (please see section 1.2.1 (Supply not conditional upon provision of Security) of the submissions); and
- (b) the Access Provider should determine the amount and form of Security (please see section 1.2.2 (Amount and Form of Security) of the submissions) subject to the limitations in clause 3.3.

Option 1 - Security as a precondition for supply. Please refer to section 1.2.1 (Supply not conditional upon provision of Security) of the submissions.

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;

(b) maintained for the period set out in clause 3.2; and

(c) in the amount and form determined by the Access Provider having regard to the matters set out in clauses 3.3 and 3.4. ~~and subject to clause 3.2, 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(b) and (c): This amendment clarifies the interaction of clause 3.1 with clauses 3.2, 3.3 and 3.4.

Option 2 - If the Commission decides that Security should not be a precondition for supply, then Telstra proposes the following clause 3.1 which clarifies the interaction of clause 3.1 with clauses 3.2, 3.3 and 3.4.

Unless otherwise agreed by the Access Provider, the Access Seeker must (at the Access Seeker's sole cost and expense) provide the Security to the Access Provider. The Security must be:

(a) maintained on terms and conditions reasonably required by the Access Provider;

(b) maintained for the period set out in clause 3.2; and

(c) in the amount and form determined by the Access Provider having regard to the matters set out in clauses 3.3 and 3.4.



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 ~~to~~ occurs ~~of~~:

Explanation for above amendments to clause 3.2(a) - In order to cover the insolvency risks that this clause seeks to address, it is necessary that a clear period of six Months is allowed to elapse before the Access Provider is obliged to return the Security. This is consistent with normal commercial practice.

- ~~(a)~~(i) cessation of supply of a the Service or Services under this FAD, and

Explanation for above amendment to clause 3.2(a)(i) - This amendment clarifies that clause 3.2(a)(i) can only apply when the supply of the DTCS generally to an Access Seeker under the FAD has ceased.

- ~~(b)~~(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 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 which is reasonable in all the circumstances. ~~As a statement of general principle the amount of any Security is calculated by reference to:~~ having regard to:

Explanation for above amendments to clause 3.3 - Please refer to section 1.2.2 (Amount and form of Security) of the submissions.

- (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 ~~under this FAD~~ but unpaid (excluding any amounts in respect of which there is a current Billing Dispute notified in accordance with this FAD).



Explanation for above amendment to clause 3.3(b) - This amendment takes account of the fact that amounts invoiced in respect of the Service will be more than those amounts invoiced under the FAD. There should only be one security applying in respect of the supply arrangement between the parties for the Service.

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 ~~s~~Security, having regard to the factors referred to in clause 3.3, may include without limitation:

(a) fixed and floating charges;

~~(a)~~(b) personal guarantees from directors;

~~(b)~~(c) ~~b~~Bank ~~G~~uarantees;

Explanation for amendments to clause 3.4(c) - "Bank Guarantee" is referenced below as a defined term. Telstra has proposed a definition of "Bank Guarantee" to clarify the nature of that form of Security.

~~(e)~~(d) letters of comfort;

~~(d)~~(e) mortgages;

~~(e)~~(f) a right of set-off;

~~(f)~~(g) a Security Deposit; or

~~(g)~~(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:

~~(b)~~(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 made 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 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 may, as a result of such Ongoing Creditworthiness Information, 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 Business Days of being notified by the Access Provider in writing of that requirement.

Explanation for above amendment to clause 3.5(b) - The reference to "security" above should be to the defined term.

(c) In addition to clause 3.5(b), the Access Provider may reasonably 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 committed two or more Payment Breaches 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 clause 3.5 - It is proposed that clause 3.5 should be broken up into three subparagraphs, each dealing with a separate issue. The proposed new clause 3.5(c) sets out additional triggers for requesting



an altered Security. For an explanation of this proposed new clause 3.5(c) please refer to section 1.2.3 (Alteration of Security) of the submissions.

- 3.6. The Access Seeker may from time to time where circumstances reasonably require request the Access Provider to consent (in writing) to a decrease in the ~~required amount of the~~ 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.

Explanation for amendments to clause 3.6 - The first amendment, consistent with clause 3.5(a), limits the frequency of requests to ensure that they are made only when there is a reasonable basis for them.

- 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) ~~copies~~~~a copy~~ 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;

(iii) ~~and published audited~~ profit and loss statement

(together with any notes attached to or intended to be read with such cash flow, balance sheet or profit and loss statement);

~~(a)~~(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.

Explanation for amendments to clause 3.8 - Please refer to section 1.2.4 (Meaning of Ongoing Creditworthiness Information) of the submissions.

Clause 3.9 below should be deleted, but if not, it is proposed that the clause be amended as marked up below.

Please refer to section 1.2.5 (Confidentiality undertaking for Ongoing Creditworthiness Information) of the submissions.

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 having access to confidential information contained in its Ongoing Creditworthiness Information prior to such information being provided to that person.

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

- (a) ~~the Access Provider may, in its absolute discretion, deem~~ a failure by the Access Seeker to provide the warranties set out in clause 3.7 or to provide Ongoing Creditworthiness Information constitutes: ~~or an altered Security in accordance with clause 3.5 as:~~

Explanation for proposed new clause 3.10(a) - A failure to provide a warranty as set out in clause 3.7 should lead to the same consequences as



a failure to provide Ongoing Creditworthiness Information as otherwise the Access Provider cannot reasonably rely on that information.

- (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](#)

Explanation for proposed new clause 3.10(a)(i) - The words "alter the amount, form or terms of the Security (including an entitlement to an additional Security)" in the proposed clause 3.10(a)(i) clarify what it means for the Access Provider to "alter" the Security. They also ensure consistency with clause 3.5

The reason for proposing a timeframe of 15 Business Days to provide the altered Security is that there should be a timeframe for the provision of Security which is consistent with the timeframe in clause 3.5 in that the Access Seeker should provide the altered Security within 15 Business Days.

The Access Provider should have the ability to choose one or both of subclauses (i) and (ii) in (a) and (b) as a remedy, rather than having to choose one or the other.

- (ii) a breach of a material term or condition of this FAD.

Explanation for proposed new clause 3.10(a)(ii) -

The Access Provider should have the ability to choose one or both of subclauses (i) and (ii) in (a) and (b) as a remedy, rather than having to choose one or the other.

- (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.X; and

- (ii) a breach of a material term or condition of this FAD for the purposes of clause 6.1(c).

Explanation for proposed new clause 3.10(b) - This amendment is necessary to give effect to proposed new clause 6.X. Further, clause 3.10(b) provides certainty to the parties as to the meaning of the words "breach of a material term or condition" in clause 6.1(c).

- 3.11. 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 3.11 or Schedule 4 prevents the Access Provider from exercising any of its rights to suspend the supply of a Service under Schedule 6.

Explanation for amendments to clause 3.11 - Please refer to section 1.5.1 (Circumstances giving rise to an immediate right to suspend) of the submissions.



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 ~~under this FAD~~, the dispute must be managed as follows:

~~(e)~~(a) in the case of a Billing Dispute, the dispute must be managed in accordance with the Billing Dispute Procedures; or

~~(d)~~(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.

[The Access Seeker cannot initiate both a Non-Billing Dispute and a Billing Dispute in relation to the same subject matter.](#)

Explanation for amendments to clause 4.1 -

The first amendment above ensures that only disputes concerning the terms and conditions of the FAD are governed by the dispute resolution procedures in the FAD. To the extent that other disputes arise about terms not set out in the FAD, these will be covered by the relevant commercial agreement between the parties.

The second amendment ensures that the parties are precluded from initiating both the Billing Dispute and Non-Billing Dispute procedures simultaneously, or from using one after the other, in relation to a dispute concerning the same subject matter.

Please refer to section 1.3 of the submissions.

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 the Access Provider otherwise determines, that Non-Billing Dispute must be resolved in accordance with the Billing Dispute Procedures. ~~If~~ [The Access Provider provides written notice to the Access Seeker that a](#) ~~may seek a determination from an independent third party on whether a~~ dispute initiated by the Access Seeker as a Billing Dispute is, [in the Access Provider's reasonable opinion,](#) a Non-Billing Dispute, [then the dispute shall be deemed to be a Non-Billing Dispute and the Access Seeker must](#) ~~If the independent or 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 amounts 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.

Explanation for amendments to clause 4.2 - The Access Provider should have the ability, acting reasonably, to determine that a dispute initiated as a Billing Dispute is in fact a Non-Billing Dispute. It is not practicable to have an independent third party determine that question, as issues such as the selection of an appropriate person and the procedure to be followed will unduly protract the



determination of the issue. Such a process would also be costly, and would raise issues as to who is to pay those costs. This is essentially a preliminary step to the resolution of a dispute, which should be resolved quickly and cost effectively. Given the ability of the Access Seeker to withhold the payment of any amounts owing under the FAD by initiating a Billing Dispute, the Access Seeker should not be able to do so in circumstances where the dispute is in substance a Non-Billing Dispute. Thus, the Access Provider should be entitled to make this determination, acting reasonably.

- 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:
- ~~(e)~~(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
 - ~~(f)~~(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:
- ~~(e)~~(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

-
- ~~(a)~~(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 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:
- ~~(a)~~(i) a statement of the disputed matters in the Non-Billing Dispute; and
- ~~(b)~~(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;

~~(b)~~(f) it must terminate in accordance with the ACDC Guidelines;

~~(e)~~(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

~~(d)~~(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:

~~(e)~~(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.

~~(a)~~(b) An Expert Committee acts as an expert and not as an arbitrator.

~~(b)~~(c) The parties are each represented on the Expert Committee by one appointee.

~~(e)~~(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.
 - (l) 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:

- ~~(b)~~(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)
- ~~(e)~~(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:

~~(i)~~(a) use or copy such Confidential Information except as set out in ~~for the purposes of~~ this FAD; or

~~(ii)~~(b) disclose or communicate, cause to be disclosed or communicated or otherwise make available such Confidential Information to any third person.

Explanation for amendments to clause 5.1 - Please refer to section 1.4.2 (Permitted Use of Confidential Information) of the submissions.

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 ~~the information that falls within paragraph (d) of the definition of Confidential Information~~ ~~aggregate Network information of the Access Provider and all Access Seekers to whom the relevant Service is supplied~~) is the Confidential Information of the Access Seeker.

Explanation of proposed amendments to clause 5.2 - The first amendment is necessary 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 DTCS supplied to the Access Seeker that is generated in this way should be considered the Confidential Information of the Access Seeker.

The second amendment is a result of the proposed amendment to the definition of Confidential Information. For an explanation of those amendments, please refer to section 1.4.1 (Confidential Information definition) of the submissions.

Aggregated information should not be Confidential Information if, as a result of the aggregation, it is not possible to ascertain the identity of any particular Access Seeker or that the information is that of any particular Access Seeker. The clause currently suggests that only information of *all* Access Seekers acquiring the Service will be excluded, and only when that information is aggregated with the Access Provider's aggregate Network information. This approach is unnecessarily restrictive of what should constitute aggregated information and has the potential to constrain the usual operations for Access Providers.

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 ~~referred to in clause 5.2~~ 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 ~~this FAD~~ [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](#) ~~directly involved in~~ the purposes referred to in paragraph (a) above.

Explanation of amendments to clause 5.4 -

In relation to the proposed deletion of the words "referred to in clause 5.2", please refer to section 1.4.2 (Permitted Use of Confidential Information) of the submissions.

In relation to the proposed amendment to clause 5.4(a)(ii) above, please refer to section 1.4.2 (Permitted use of Confidential Information) of the submissions.

In relation to *whom* the Confidential Information may be disclosed, disclosure as contemplated in clause 5.4(b) above should be permitted on a "need to know" basis, rather than only to personnel "directly involved" in the purposes outlined in clause 5.4(a). There may be a number of people who need to know information about the supply of services who are not directly involved in the supply of those services. For example, senior management, in circumstances where those persons have a legitimate need (in connection with the clause 5.4(a) activities) to access the information, but where their involvement in the actual clause 5.4(a) activities may not necessarily be "direct".

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:

Explanation for above amendment to clause 5.5 - Please refer to section 1.4.3 (Disclosure of Confidential Information) of the submissions.

- (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 for above amendment to clause 5.5(a) - Please refer to section 1.4.3 (Disclosure of Confidential Information) of the submissions.

- ~~(b)~~ [\(b\)](#) 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;



~~(g)~~(c) to an auditor acting for the Disclosing Party to the extent necessary to permit that auditor to perform its audit functions;

~~(h)~~(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, ~~or for the purpose of seeking advice from a professional person in relation thereto;~~

Explanation for above amendment to clause 5.5(d) - Disclosure to professional persons is covered by clause 5.5(b).

~~(a)~~(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;

~~(a)~~(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

(ii) if required by the other party as a condition of giving its consent, the Disclosing Party must comply with clause 5.6;

Explanation for above amendment to clause 5.5(f) - These amendments provide additional protection to the 'other party' in respect of its Confidential Information by ensuring that the Disclosing Party informs the third person of the confidential nature of the information to be disclosed, and procures a signed confidentiality undertaking in the form set out in Annexure 1 of this Schedule 5 if required by the other party.

~~(i)~~(g) in accordance with a lawful and binding directive issued by a regulatory authority;

~~(b)~~(h) if reasonably required to protect the safety of personnel or property or in connection with ~~in~~ an eEmergency;



Explanation for above amendments to clause 5.5(h) - Disclosure of the other party's Confidential Information (where reasonably required) should be allowed not only "in" an Emergency, but also in preparation for or following an Emergency.

In relation to the second amendment, the reference to emergency should be to the defined term in Schedule 10.

~~(i)~~(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

Explanation for above amendment to clause 5.5(j) - The Access Provider 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.

~~(e)~~(k) 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 for above amendment to clause 5.5(k) - The Access Provider should be able to disclose Confidential Information to a regulator or government body in response to a request for information relating to interception capability.

5.6. Each party must co-operate in any action taken by the other party to:

~~(d)~~(a) protect the confidentiality of the other party's Confidential Information; or

~~(e)~~(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

~~(i)~~(b) ~~pursuant to this FAD, and~~ 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,

Explanation for above amendment to clause 5.10 - The notification rights in sub-paragraphs (a) and (b) should apply not only to the suspension or cessation of supply as a result of payment breaches, but also to other instances of suspension or cessation of supply. For example, the notification rights should apply where the Access Provider ceases supply as a result of an event in clause 6.7 occurring in respect of an Access Seeker.

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

(a) 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

~~(a)~~(b) without limiting clause 5.10, disclose to a credit reporting agency:

~~(i)~~(i) the defaults made by the Access Seeker to the Access Provider; and

~~(ii)~~(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:

~~(iv)~~(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);

~~(v)~~(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:
- ~~(a)~~(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;
 - ~~(b)~~(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) if required to do so by law; 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 that is in my possession from unauthorised access, use, copying, reproduction or disclosure and use the same degree of care as a prudent person in my position would use to protect that person's confidential information.

~~7 Not used Except as required by law and subject to paragraph 10 below, within a reasonable time after whichever of the following first occurs:~~

~~(i) _____ termin
ation of this Undertaking;~~

~~(ii) _____ 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.~~

Explanation for above amendment to paragraph 7 – Please refer to section 1.4.4 (Form of Confidentiality Undertaking) of the submissions.

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

- (a) which is in the public domain; or
- (b) which has been obtained by me otherwise than from [Provider] in relation to this Undertaking;

provided that the information is in the public domain and/or has been obtained by me by reason of, or in circumstances which do not involve any breach of a confidentiality undertaking or a breach of any other obligation of confidence in favour of [Provider] or by any other unlawful means, of which I am aware.

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 Not used The obligations of confidentiality imposed by this Undertaking survive the destruction or delivery to [Provider] of the Confidential Information pursuant to paragraph 7 above.~~

Explanation for above amendment to paragraph 10 – This is a consequential amendment as a result of the proposed deletion of paragraph 7 above.

Signed: _____ Dated:

Print name:

ATTACHMENT 1

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

ATTACHMENT 2

[Approved purpose(s)]

Schedule 6 – Suspension and termination

Explanation for proposed new clause - Please refer to section 1.5.1 (Circumstances giving rise to a right to suspend) of the submissions.

6.X. 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;
- (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);
- (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;
- (e) where an event set out in clauses 6.7(a) to (i) occurs;
- (f) 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,

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.

6.1. If:

~~(e)~~(a) the Access Seeker commits a Payment Breach~~has failed to pay monies payable~~ under this FAD;

(b) the Access Seeker's use ~~either~~ of:

(i) its Facilities;

~~(d)~~ (ii) ~~or~~ the Access Provider's Facilities or Network; or

~~(e)~~ (iii) any Services supplied to it by the Access Providers.

Explanation for above amendments to clause 6.1(b) - "Facility" under the FAD has the meaning given to that term in section 7 of the *Telecommunications Act 1997* (Cth). That definition is directed primarily towards the physical infrastructure associated with a telecommunications network (for example, towers, ducts, poles, structures etc). The amendment makes clear that use by the Access Seeker of not just Facilities

but also a Service or Network in contravention of law, may lead to suspension. Please also refer to section 1.5.1 (Circumstances giving rise to a right to suspend) in the submissions.

~~(f)~~ (iv) is in contravention of any law; ~~or;~~

~~(g)~~(c) the Access Seeker breaches a material obligation under this FAD; ~~or~~

~~(d) any of the events described in clause 6.7 occurs in respect of the Access Seeker;~~

Explanation for deletion - Clause 6.1(d) should be deleted because first, it is inconsistent with the right to cease supply set out in clause 6.7. Second, clause 6.1(d) does not consider the effect of the relevant provisions of the *Corporations Act 2001* (Cth), which, in the context of an administration, is likely to extend the duration of the remedy period such that the Access Provider would not, in fact, be able to exercise its right to suspend supply of the Service to the Access Seeker.

(Suspension Event) and:

~~(d)~~(e) as soon as reasonably practicable after becoming aware of the Suspension Event, the Access Provider gives a written notice to the Access Seeker:

~~(a)~~(i) citing this clause;

~~(b)~~(ii) specifying the Suspension Event that has occurred;

~~(a)~~(iii) requiring the Access Seeker to ~~institute complete~~ remedial action (if any) in respect of that ~~event~~Suspension Event; and

~~(b)~~(iv) specifying the action which may follow due to a failure to comply with the notice,

(Suspension Notice) and:

~~(e)~~(f) the Access Seeker fails to ~~institute complete the~~ remedial action as specified in the Suspension Notice within 10 Business Days after receiving the Suspension Notice (in this clause 6. 1, the **Remedy Period**),

Explanation for amendment to new clause 6.1(e) - The proposed amendment to new clause 6.1(e) above clarifies that the remedial action should be completed, and not merely commenced, by the end of the Remedy Period. In that regard, Telstra disagrees with the Commission's statement that it would be "onerous on an access seeker to complete remediation within 10 Business Days" (Discussion Paper, p 60). Telstra considers that, in light of the severe consequences should a Suspension Event occur, 10 Business Days is a reasonable period of time within which to remedy that Suspension Event. Further, any such remedial action should be initiated immediately. The Access Seeker should not be given up to a 10 Business Day "grace period" within which it need not act.

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;~~

(g) suspend the provision of the Service

until the remedial action specified in the Suspension Notice is completed or the Suspension Event otherwise ceases to exist.

Explanation for above amendments to clause 6.1(f) to (g) - The suspension of the supply of the Service should not be limited in time to Services supplied after the date of breach. Where a Suspension Event is subsisting, the right of suspension should apply to *any* supply of the Service to the Access Seeker, and not just to any requests for supply made after the date of breach.

- 6.2. For the avoidance of doubt, subclause 6.1(a) does not apply to a Billing Dispute that has been validly notified by the Access Seeker to the Access Provider in accordance with the Billing Dispute Procedures set out in this FAD.

Explanation for amendment to clause 6.2 - This amendment ensures that a failure to pay monies owing under the FADs will not constitute a "Suspension Event" only where the Access Seeker has properly complied with the Billing Dispute Procedures in the FADs.

- 6.3 In the case of a suspension pursuant to clause 6.1, 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.

- 6.4. If:
- (a) an Access Seeker party ceases to be a carrier or carriage service provider; or
 - (b) an Access Seeker a party ceases to carry on business for a period of more than 10 consecutive Business Days or
 - (c) in the case of ~~the-an~~ Access Seeker, any of the reasonable grounds specified in subsection 152AR(9) of the CCA apply; or
 - (d) an Access Seeker party breaches a material obligation under this FAD, and:
 - ~~(a)~~(i) that breach materially impairs or is likely to materially impair the ability of the ~~other-Access Provider party~~ to deliver Listed Carriage Services to its customers; and

Explanation for above amendments to clause 6.4(a) to (d) - Please refer to the explanation at the end of clause 6.4 below.

~~(b)~~(ii) the Access Provider other party has given a written notice to the first-mentioned party as soon as reasonably practicable after within 20 Business Days of becoming aware of the breach (**Breach Notice**); and

Explanation for amendment to clause 6.4(d)(ii) - In relation to the first amendment, please refer to the explanation at the end of clause 6.4 below.

In relation to the second amendment, consistent with clause 6.1 above, there should not be a fixed timeframe for the giving of a Breach Notice because this limits the ability of the parties to attempt to commercially resolve a dispute before a Breach Notice is issued.

- (iii) the Access Seeker ~~other party~~ fails to ~~institute~~ complete the remedial action as specified in the Breach Notice within ~~20~~ 10 Business Days after receiving the Breach Notice (in this clause 6.4, the **Remedy Period**), or

Explanation for amendments to clause 6.4(d)(iii) - In relation to the first amendment, please refer to the explanation at the end of clause 6.4 below.

In relation to the second amendment, this amendment clarifies that the remedial action should be completed, and not merely commenced, by the end of the Remedy Period. In addition, consistent with clause 6.1(e) above, the Remedy Period should be 10 Business Days.

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

Explanation for proposed new clause 6.4(e) - The Access Provider should have the right to immediately cease to supply where the Access Seeker commits a material breach which is incapable of being remedied. It does not make sense to have a remedial period applying to a material breach of this nature.

- ~~(d)~~ ~~(e)~~ (f) ~~(e)~~ 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 ~~other party~~ 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 for amendments to 6.4 - In relation to the first amendment, and the corresponding amendments to clauses 6.4(a) to (d) above, this clause should be expressed to apply in favour of the Access Provider as against the Access Seeker (and not in reverse). This is because only the Access Provider can cease to supply the Service under the FAD, and therefore under this clause 6.4.

In relation to the second amendment, these are consequential amendments which cover the scenarios in proposed clause 6.1(e) and existing clause 6.1(f) above.

- 6.5. A party must not give the other party both a Suspension Notice under clause 6.1 and a Breach Notice under clause 6.4 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:

~~(a)~~(c) where a Suspension Notice has previously been given to the Access Seeker by the Access Provider in accordance with clause 6.1 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 6.1; and

~~(b)~~(d) where an Access Seeker has not rectified a Suspension Event, then notwithstanding clause 6.4(d)(ii), the time period for the purposes of clause 6.4(d)(ii) will be ~~Access Provider has given written notice to the Access Seeker within~~ 20 Business Days ~~of~~ from the expiry of the time available to remedy the Suspension Event, rather than 20 Business Days from the date the Access Provider becomes aware of the breach.

Explanation for amendment to clause 6.5(d) - If Telstra's proposed amendments to clause 6.4(d)(ii) above are not accepted, this amendment clarifies that the time limitation in clause 6.4(d)(ii) will not operate to prevent the issuing of a Breach Notice in the circumstances contemplated by subparagraphs (c) and (d).

- 6.6. For the avoidance of doubt, a party is not required to provide a Suspension Notice under clause 6.1 in respect of a breach before giving a Breach Notice in respect of that breach under clause 6.4.
- 6.7. 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
 - ~~(a)~~(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
 - ~~(b)~~(c) a holder of an encumbrance takes possession of ~~the whole or any substantial part 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

Explanation for proposed deletion 6.7(c) - The suggested deletion should be made because, in circumstances in which the holder of an encumbrance takes possession, the Access Seeker is clearly not creditworthy. Pursuant to subs 152BCB(1)(g) of the CCA, the Access Provider cannot be required to continue to supply the Service to the Access Seeker (irrespective of whether or not the holder of an encumbrance takes possession of "the whole or a substantial part" of an undertaking).

~~(e)~~

- ~~(b)~~(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)~~(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
- ~~(d)~~(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
- ~~(e)~~(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
- ~~(e)~~(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.

6.8. The cessation of the operation of this FAD:

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

6.9. 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

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

~~(a)~~ any Liability (other than the Liability referred to in clause 7.1(c)) arising in the 12 month period commencing on the date of the first supply of the Service under this FAD is limited to the greater of:

(i) 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; and

(ii) \$1 million;

~~(b)~~ any Liability (other than the Liability referred to in clause 7.1(c)) arising in 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 greater of:

(i) 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; and

(ii) \$1 million; and;

(c) any Liability for personal injury, or loss or damage to property, arising from any access to Access Provider Facilities (including access to TEBA space) acquired or provided under this FAD, will not exceed \$20 million per event of Liability.

Explanation for introduction of clause 7.1 – Please refer to section 1.6.2 of Telstra's submission.

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.

Explanation for introduction of sub-paragraph – This amendment clarifies for the Access Seeker and Access Provider when liability arises and thus avoids the risk that a liability cap is "gamed" by the timing of the claims being made.

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

Explanation for above amendment to clause 7.2 – This amendment clarifies that clause 7.2 is limited in its application.

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

Explanation for above amendment to clause 7.3 – This amendment is intended to make the language used in the clause consistent with clauses 7.4, 7.5 and 7.6.

- (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.

74 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:

(i) an act or omission that is intended to cause loss or damage to property;
or

(ii) a negligent act or omission.

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

Explanation for above amendment to clause 7.4 – This amendment makes it clear that the reference to is to a “Representative”, being a defined term, and for consistency with the remainder of this clause 7.

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.

Explanation for new clause 7.5 –Please refer to section 1.6.3 of Telstra’s submission.

7.6 The Access Seeker indemnifies the Access Provider against all Loss arising from the reproduction, broadcast, use, transmission, or communication or making available of any material (including data and information of any sort) by the Access Seeker, its Representatives, or an end-user of the Access Seeker using the Service.

Explanation for new clause 7.6 –Please refer to section 1.6.3 of Telstra’s submission.

7.7 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 ~~(including without limitation any~~ loss of profits or data).

Explanation for above amendments to clause 7.7 – These amendments clarify that loss of profits or data is to be excluded by this clause, whether or not it is an indirect Loss. This brings the clause in line with equivalent terms in standard commercial agreements. For example, both the WBA (clause E2.5) and the BT Master Services Agreement (clause 12.3) contain exclusions for loss of profits or revenue *independently* of indirect losses (for which separate exclusions apply).

7.8 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.

~~7.97~~ The Indemnifying Party is not obliged to indemnify the Innocent Party under this Schedule 7 to the extent that the ~~L~~iability the subject of the indemnity claim is the direct result of:

~~1.(a)~~ a breach of this FAD;
~~2.(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.

7.10 The Indemnifying Party is not obliged to indemnify the Innocent Party under this Schedule 7 for or 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 Liability actually was excluded or reduced) by the Innocent Party in its contract with the end-user or third person.

Explanation for new clause 7.10 –Please refer to section 1.6.3 of Telstra’s submission.

~~7.118~~ 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.

~~7.129~~A Party’s ~~L~~iability 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.

~~7.130~~ The Innocent Party must give the Indemnifying Party notice of any third party claim that is the subject of any indemnity under this Schedule 7. The Indemnifying Party may then notify the Innocent Party that the Indemnifying Party is to ~~must~~ be given full conduct of the defence of any claim by a third party to the extent that the claim is the subject of an indemnity under ~~this Schedule 7-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.

Explanation for above amendments to clause 7.13 – The first and second amendments clarify that an Indemnifying Party *may* (but is not required to) conduct the defence of a third party claim against an Innocent Party, upon receiving notice of that claim. In circumstances where the Indemnifying Party has only indemnified the Innocent Party against a small proportion of the loss claimed by the third party, it is inappropriate to compel the Indemnifying Party to conduct the full defence of the Innocent Party. It is normal commercial practice for Innocent Parties to conduct proceedings in such circumstances.

The third and fourth amendments make it clear that clause 7.13 applies in respect of *all* liability claims which are the subject of an indemnity under Schedule 7 (not solely claims contemplated by clauses 7.3 and 7.4), but only to the extent that the claim is the subject of an indemnity – otherwise the Indemnifying Party would have a right to conduct the entirety of the claim even though it was providing an indemnity for only a small proportion of it.

[7.14 Where the Indemnifying Party has been given conduct of the defence of a third party claim under clause 7.13, the Innocent Party must provide all cooperation which the Indemnifying Party considers reasonably necessary to conduct the defence.](#)

Explanation for new clause 7.14 – This amendment complements the amended clause 7.13 and provides additional protection for Indemnifying Parties. If an Indemnifying Party is given the conduct of the defence against a third party claim, it is critical that the Innocent Party assists the Indemnifying Party by (for example) providing all relevant documentation, making witnesses available to give evidence, making no admissions relating to any allegations raised (without the consent of the Indemnifying Party) and assisting in the conduct of negotiations. The inclusion of such a clause is standard commercial practice: see, for example, clause 13.4 of the BT Master Services Agreement.

Schedule 8 – Network upgrade and modernisation

Notice to be provided where Access Provider undertakes a Major Network Modernisation and Upgrade

8.1. Except were the parties agree otherwise, the Access Provider may make a Major Network Modernisation and Upgrade by:

~~3.~~(a) providing the Access Seeker with notices in writing in accordance with clauses 8.2 and 8.4 (**General Notification**) and clauses 8.3 and 8.5 (**Individual Notification**); and

~~4.~~(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 8.1 does not apply to an Emergency Network Modernisation and Upgrade.

8.2. 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.

8.3. An Individual Notification must be provided by the Access Provider to the Access Seeker as soon as practicable after the General Notification, but, in any event, not less than 26 weeks prior to the anticipated commencement date of the Major Network Modernisation and Upgrade.

Information to be provided in the notices

8.4. A General Notification must include information on:

~~(e)~~(a) the ESA affected by the proposed Major Network Modernisation and Upgrade;

~~(d)~~(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.

8.5. 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;

~~(a)~~(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;

~~(b)~~(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 Services); and

(d) details of who the Access Seeker may contact to obtain further information about the Major Network Modernisation and Upgrade.

8.6. 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.

8.7. 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:

~~(a)~~(i) any update or change to the information provided in the Individual Notification;

~~(b)~~(ii) any new information available at the time of the update about:

~~(a)~~1. services provided by the Access Provider in the relevant ESA that may be available to the Access Seeker;

~~(a)~~2. how the Access Seeker may be impacted by the Major Network Modernisation and Upgrade; and

~~5.3.~~ 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

8.8. The updates referred to in subclause 8.7(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

- 8.9. 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 forecast

- 8.10. The Access Provider must provide the Access Seeker with a written three year Coordinated Capital Works Program forecast in accordance with clause 8.11 ~~14 Calendar Days from the date this Schedule 8 of the FAD takes effect between the parties~~ **(Coordinated Capital Works Program Forecast)**.

Explanation for amendments to clause 8.10 – Telstra has already provided Access Seekers with a Coordinated Capital Works Program (**CCWP**) Forecast as required by the Interim Access Determination dated 18 April 2011 (**IAD**). The CCWP Forecast confirmed that there are no CCWPs forecast for the next three years. Accordingly, requiring Telstra to again issue a CCWP Forecast 14 Calendar Days from the date that Schedule 8 of the FAD takes effect unnecessary and would result in the incurrence of costs by Telstra which is not efficient.

Instead, the CCWP Forecast should be provided less than 6 months from the date of the previous CCWP Forecast having been provided in accordance with the IAD.

- 8.11. The Coordinated Capital Works Program Forecast must:
- ~~(h)~~(a) be for the three year period commencing on the date the forecast is provided;
 - ~~(i)~~(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;
 - ~~(j)~~(c) include an evaluation of the impact that the Access Provider's indicative investment plans may have on individual ESAs areas and distribution areas; and
 - ~~(a)~~(d) specify anticipated timeframes for implementation.
- 8.12. The Access Provider must update the Coordinated Capital Works Program Forecast (and provided the update forecasts in writing to the Access Seeker) regularly, at not less than six Month intervals. The first Coordinated Capital Works Program Forecast

provided under the FAD must be provided less than six Months from the date of the Coordinated Capital Works Program Forecast which was provided under the interim access determination in respect of the Service dated 18 April 2011.

Explanation for amendment to clause 8.12 – See explanation for amendment to clause 8.1 above.

- 8.13. At the same time as the Access Provider provides a Coordinated Capital Works Program Forecast under clause 8. 10, the Access Provider must provide a copy of the Coordinated Capital Works Program Forecast to the ACCC.

Coordinated Capital Works Program Schedule

- 8.14. 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 8.15 (**Coordinated Capital Works Program Schedule**).

- 8.15. The Access Provider must provide the Coordinated Capital Works Program Schedule and make its best endeavours to identify:

~~i.~~(a) the ESAs and distribution areas affected;

~~ii.~~(b) the Access Provider's plan for the Coordinated Capital Works Program for each ESA;

~~iii.~~(c) the Access Seeker's Service(s) in that Exchange that will be affected and the expected impact of the Coordinated Capital Works Program on the Access Seeker's Service(s); and

~~iv.~~(d) the anticipated timeframe for the implementation of the Coordinated Capital Works Program.

- 8.16. At the same time as the Access Provider provides a Coordinated Capital Works Program Schedule under clause 8.14, the Access Provider must provide a copy of the Coordinated Capital Works Program Schedule to the ACCC.

- 8.17. For the avoidance of doubt, the Access Provider must also comply with clauses 9.1-9.8 when complying with clauses 8.10-8.16.

Negotiations in good faith

- 8.18. Except where the parties agree otherwise, the Access Provider must not commence implementation of a Major Network Modernisation and Upgrade unless:

~~v.~~(a) it complies with clauses 8.1 to 8.8; and

~~vi.~~(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.

8.19. Except where the parties agree otherwise, the Access Provider must not commence the implementation of a Coordinated Capital Works Program unless:

~~(ii)~~(a) _____ it complies with clauses 8.14 to 8.16; and

~~(iii)~~(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.

8.20. Notwithstanding any continuing negotiations between the Access Provider and the Access Seeker pursuant to clauses 8.1, 8.18 and 8.19, if the Access Provider has complied with this Schedule 8, a Major Network Modernisation and Upgrade may proceed 26 weeks after an Individual Notification has been issued, unless both parties agree otherwise.

8.21. In attempting to reach a mutually acceptable resolution in relation to a variation under clauses 8.1, 8.18 and 8.19, 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

8.22. 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

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

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

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

(a) involves the installation of Telstra customer access modules closer to end- users than a Telstra exchange building;

(b) requires the removal/relocation of the DTCS provided from Telstra exchange buildings and the establishment of a new POI (or relocation of an existing POI) for the DTCS, ~~or alteration of deployment classes of equipment used on the DTCS;~~ or

Explanation for above amendment to definition of "Major Network Modernisation and Upgrade"- The concept of "deployment classes" is a ULLS-specific concept that has no application to DTCS.

(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;

'POI' means point of interconnection and is a location for the interconnection of Networks~~facilities~~;

Explanation for above amendment to definition of "POI"- The reference to "interconnection of facilities" is likely to result in confusion and uncertainty. This amendment reflects general commercial understanding of the expression "POI" as a point of interconnection between networks. Given the definition of "Facilities", the concept of interconnection of "facilities" will not make sense in every context.

Schedule 9 - Facilities access

Decisions affecting access to Facilities

- 9.1. Where an Access Provider receives a request from an Access Seeker for access to an Exchange, for the purpose of acquiring TEBA space for DTCS (request for access to an exchange), the Access Provider must give its decision to the Access Seeker as soon as practicable and use reasonable endeavors for this to be ~~but in any event~~ not more than 10 Business Days from when the request is received.

Explanation for above amendments to clause 9.1: The first amendment limits the application of clause 9.1 (and subsequent clauses) to a DTCS context, which is appropriate given the scope of the draft FAD. This provides certainty that the FAD only applies to facilities access when such access relates to DTCS.

The second amendment takes account of the fact that, in some cases (and often as a result of factors outside an Access Provider's control), it is not possible for an Access Provider to give a decision to an Access Seeker in relation to a request for access to an Exchange within 10 Business Days from the date of receiving the request. This amendment is consistent with standard commercial terms and ensures that where an Access Provider has used reasonable endeavours to give a decision within a 10 Business Day timeframe, but has been unable to do so, it will not be in contravention of the FAD. In that regard, Telstra currently meets the 10 Business Day time target 99% of the time.

- 9.2. Before giving its decision to an Access Seeker in relation to a request for access, ~~to an Exchange~~, an Access Provider must make all reasonable enquiries and have regard to forecasted demand made by Access Seekers currently at the Exchange, before deciding whether:

Explanation for above amendments to clause 9.2: The amendment is intended to clarify the operation of the clause, so it is clear that it only applies to requests for access *to an Exchange* (rather than requests for access *generally*) and is consistent with clause 9.1.

- (a) a request for access to an Exchange made by an Access Seeker should be rejected ~~denied~~ on the basis that the Facilities at the Exchange do not have available capacity;

Explanation for above amendments to clause 9.2(a): These amendments make the language used in the clause consistent with that in clauses 9.3, 9.4, 9.5, 9.6, 9.9 and 9.10.

- (b) an Exchange should be listed as a Capped Exchange; or

- (c) ~~(e)~~ permission should be withheld from an Access Seeker wishing to gain access to a Facility on the basis that works arising from an earlier received request for access have not yet been completed and inspected.

References to forecasted demand in this clause 9 means TEBA space orders and forecasts for TEBA space received by the Access Provider (excluding forecasts that the Access Provider reasonably believes are inaccurate or not made in good faith).

Explanation for above amendments to clause 9.2: Telstra considers that an Access Provider should not be required to take a forecast into account where it does not reasonably believe that forecast is accurate or has been made in good faith. Accounting for such forecasts would skew the decision-making process under clause 9.2, and may result in the unnecessary reservation of exchange capacity for one Access Seeker (at the expense of another), particularly where there is no obligation on the Access Seekers to make their forecasts in good faith. This would result in an inefficient use of infrastructure (possibly distorting investment incentives), and would be contrary to the LTIE.

Note: This does not require the Access Provider to perform regular inspections of all its Exchanges nor prevent an Access Provider from using recently compiled or verified floor plans or inventories etc where it is reasonable to do so.

Explanation for above amendments to the note following clause 9.2: Clause 9.2 should not require an Access Provider to carry out regular inspections of its Exchanges to assess which (if any) Exchanges are at, or are approaching, full capacity. Such inspections would be extremely costly for Access Providers and would have limited utility (given the data collected would be superseded upon any change occurring in the Exchange).

9.3. Before making any decision to reject~~deny~~ a request for access to an Exchange made by~~to~~ an Access Seeker, an Access Provider must consider:

Explanation for above amendments to clause 9.3: The first and third amendments make the language used in the clause consistent with that in clauses 9.2, 9.4, 9.5, 9.6, 9.9 and 9.10.

The second amendment clarifies that clause 9.3 applies to Access Providers' decisions to reject *requests for access* to space at an Exchange, rather than denial of access to an Exchange generally (which may be for reasons relating to security or health and safety requirements). This amendment is consistent with the language used in clauses 9.1 and following.

~~(e)~~(a) the potential for the use of Facilities at an Exchange to be optimised;
and

~~(d)~~(b) the capability of those Facilities to be extended or enhanced;

including (but not limited to) the potential for:

~~(e)~~(c) existing TEBA space to be increased or a second TEBA space to be constructed;

- ~~(f)~~(d) reclassifying non-TEBA space as TEBA space;
- ~~(a)~~(e) use of the existing TEBA space to be optimised, including by removing redundant equipment;
- ~~(g)~~(f) an external cabinet to be built adjacent to the Exchange building;
- (g) permitting interconnection of Facilities on the line side of the MDF instead of the exchange side;
- ~~(a)~~(h) use of the MDF to be optimised, including by reassigning MDF blocks, removing redundant junction and CAN cables or using an intermediate distribution frame;
- ~~(b)~~(i) the capability of the MDF to be extended or enhanced, including by:
 - ~~(e)~~(i) adding modules; or
 - ~~(d)~~(ii) replacing current modules with modules that support a larger number of terminal blocks (**MDF compression**); and
- (j) an additional distribution frame to be constructed.

9.4.If it is possible to satisfy a request made ~~from an~~ by an Access Seeker for access to an eExchange by:

Explanation for above amendment to clause 9.4: The first amendment makes the language of the clause consistent with that in clauses 9.2, 9.3, 9.5, 9.6, 9.9 and 9.10. The second amendment makes it clear that the reference is to an "Exchange", being the defined term.

- (a) optimising the use of Facilities at an ~~exchange~~Exchange; or

Explanation for above amendment to clause 9.4(a): This amendment makes it clear that the reference is to an "Exchange", being the defined term.

- ~~(a)~~(b) extending or enhancing the capability of those Facilities
- the Access Provider and Access Seeker must negotiate in good faith to identify and implement the option that will satisfy the Access Seeker's request for access:
- ~~(b)~~(c) within a reasonable timeframe;
 - ~~(e)~~(d) at a reasonable cost; and
 - (e) by providing a technical and operational quality of interconnection between the Access Provider's Facilities and the Access Seeker's Facilities that:

(a)i. _____ is equivalent to that which the Access Provider provides to itself; or

(a)ii. _____ if the Access Seeker's request can only be satisfied by the use of an external cabinet or some other Facility located outside of the ~~exchange~~Exchange, is as close as reasonably possible to that which the Access Provider provides to itself.

Explanation for above amendments to clause 9.4(e)(ii): This first amendment makes it clear that the reference is to an "Exchange", being the defined term. The second amendment clarifies that the Access Provider need only do what is reasonable in the circumstances and would not, for example, require the Access Provider to build in a driveway.

Nothing in this clause requires the Access Provider to bear an unreasonable amount of the costs of extending or enhancing the capability of a Facility, or of maintaining extensions to or enhancements of the capability of a Facility.

9.5. An Access Provider must not ~~reject~~~~deny a request~~ ~~an Access Seeker~~for access to an Exchange made by an Access Seeker on the basis of its own reasonably anticipated requirements unless:

Explanation for above amendments to clause 9.5: These amendments make the language of the clause consistent with that in clauses 9.2, 9.3, 9.4, 9.6, 9.9 and 9.10.

~~(fa)~~ the Access Provider has a genuine plan for a specific use within the next 36 months~~communicated to the Access Seeker~~;

~~(i)~~ ~~how it makes assessments as to its reasonably anticipated requirements~~;

~~(a)~~ ~~the time frame over which it makes these assessments, which must not exceed 18 months~~; and

~~(b)~~ ~~the criteria by which it assesses whether requirements are reasonably anticipated~~;

Explanation for above amendments to clause 9.5(a): Telstra considers that this clause is unnecessary. The clause should be deleted or, alternatively, substantially amended to be consistent with the SSU (for the reasons set out in section 1.8.2 of Telstra's submission). Given the impending rollout of the NBN and the changing nature of the telecommunications market, Telstra considers that the proposed 18 month time frame for "reasonably anticipated requirements" is far too short. A longer investment horizon (of 36 months) is appropriate in the circumstances and is consistent with the statutory criteria (both in encouraging economic efficiency in investment decisions and promoting the legitimate business interests of carriage service providers).

It is inappropriate to compel an Access Provider to communicate to Access Seekers the manner in which it makes assessments as to its reasonably anticipated requirements, or the criteria by which it assesses whether its requirements are reasonably anticipated. Such information is likely to be highly commercially sensitive to the Access Provider. In addition, it would be costly for the Access Provider to supply such information to Access Seekers each time a request for access is rejected.

This amendment ensures that the interests of Access Seekers are adequately protected, while limiting the compliance burden for Access Providers. The amendment addresses Optus' request that exchange space "only be reserved for future requirements if the access provider has firm plans to use the space within a reasonable period of time".¹

Furthermore, by virtue of the requirement for an Access Provider to record its reasonably anticipated requirements in writing (in clause 9.5(c)) – and in light of the data already publicly available through the RKR (which is disseminated to Access Seekers on a monthly basis via Telstra's website) – Access Seekers have access to sufficient information in relation to Access Providers' "reasonably anticipated requirements".

(b) the Access Provider has measured its reasonably anticipated requirements for the relevant Exchange at the time, or an earlier time reasonably proximate to when, the Access Seeker's request for access was made; and

(c) details of its reasonably anticipated requirements for the relevant Exchange have been recorded in writing.

9.6. Subject to clause 9.7, the Access Provider must not:

(a) ~~refuse~~reject a ~~request~~request made by an Access Seeker for access ~~to Facilities~~to an Exchange; or

Explanation for above amendment to clause 9.6(a): The amendment makes the language in the clause consistent with that in clauses 9.1, 9.2, 9.3, 9.4, 9.5, 9.6, 9.7, 9.9, 9.10, 9.12 and 9.13.

(i)

(ii)(b) withhold permission to the Access Seeker accessing TEBA space for the purpose of installing its equipment causing the Access Seeker to queue;

on the basis that the Access Provider has already approved another Access Seeker's ~~request~~for access to Facilities at the Exchange and any works associated with that earlier approved request have not yet been completed and inspected.

9.7. An Access Provider may withhold permission to TEBA space being accessed where there are reasonable grounds to believe that access to that TEBA space would, at the

¹ Referred to on p. 66 of the Explanatory Statement.

time of the request for access, compromise [the health and safety of any person or](#) the safe and reliable operation of a Network or Facility.

Explanation for above amendment to clause 9.7: Please refer to section 1.8.3 of Telstra's submission.

9.8. Where an Access Provider withholds permission to TEBA space being accessed pursuant to clause 9.7, the Access Provider must grant permission as soon as practicable after the circumstances which gave rise to the potential compromise of [the health and safety of any person or](#) the safe and reliable operation of a network or facility no longer apply.

Explanation for above amendment to clause 9.8: Please refer to section 1.8.3 of Telstra's submission.

9.9. An Access Provider must not reject:

(a) a request [made](#) by an Access Seeker for access to ~~an~~[the](#) Exchange; or

Explanation for above amendments to clause 9.9(a): The first amendment makes the language in the clause consistent with that in clauses 9.1, 9.2, 9.3, 9.4, 9.5, 9.6, 9.7, 9.9, 9.10, 9.12 and 9.13.
The second amendment clarifies that clause 9.9 applies to requests for access to *an* (ie. any) Exchange, rather than a *particular* Exchange (as implied by the word "the").

~~(a)~~

(b) a design and construction order submitted by an Access Seeker;

on the basis that the scope of works extends beyond that necessary to meet the requirements of the Access Seeker, unless there are reasonable grounds to believe that the scope of works also extends beyond what is reasonably necessary to meet forecasted demand across all service providers that would use the relevant Facilities.

9.10. If, [as a result of a lack of available MDF or floor space capacity](#), an Access Provider:

Explanation for above amendment to clause 9.10: Telstra considers that as currently drafted this clause is unnecessarily broad. The Specified Information or the inspection contemplated by subparagraphs (d) and (e) will only be of utility to an Access Seeker where its request for access is rejected, an exchange is listed as capped or permission to access TEBA space is withheld *as a result of a lack of available MDF or floor space capability*. As a result, clause 9.10 should be limited to those circumstances. Where an Access Provider acts for any *other* reason, the information and inspection referred to in subclauses 9.10(d) and (e) will not be relevant.

(a) ~~rejects~~~~denies~~ a request made by an Access Seeker for access ~~to Facilities to~~
~~at~~ an Exchange;

Explanation for above amendments to clause 9.10(a): These amendments make the language in the clause consistent with that in clauses 9.2, 9.3, 9.5, 9.6 and 9.9.

~~(a)~~

(b) places an Exchange on a list of Capped Exchanges; or

(c) withholds permission for the Access Seeker to access TEBA space;

the Access Seeker may make a written request to the Access Provider:

(d) to make available requested Specified Information in regard to the particular Exchange; ~~or~~~~and~~

Explanation for above amendments to clause 9.10(d): The first amendment makes the language in the clause consistent with that in clause 9.11.

In relation to the second amendment, Telstra considers that an Access Provider should not be obliged to make available Specified Information in relation to an Exchange and allow the Access Seeker and/or an independent person to inspect the Exchange. This is both unnecessary (from an Access Seeker's point of view) and unduly burdensome (from an Access Provider's point of view). Compliance with *either* subparagraph (d) or (e) would readily enable an Access Seeker to verify an Access Provider's decision under subparagraph (a), (b) or (c). Accordingly, clause 9.10(d) should be amended so it is expressed as an alternative - rather than an adjunctive - to subparagraph (e).

~~(d)~~

(e) that the Access Seeker and/or an independent person (as agreed between the parties) be permitted to inspect the particular Exchange,

to which the request for access relates. Where clause 9.10(b) applies and the Access Provider has notified the Access Seeker that the Access Provider has complied with a written request in respect of clause 9.10(d) or (e) (as applicable) in respect of another Access Seeker, then the Access Provider is not required to comply with this clause 9.10.

Explanation for above amendment to clause 9.10: Where an Access Provider has supplied the information or permitted an inspection pursuant to subparagraphs (d) or (e) to *one* Access Seeker confirming the status of the exchange, it should not be obliged to supply the same information to, or allow an inspection by, each *subsequent* Access Seeker requesting access to the Exchange. Compliance with such a requirement would be unreasonably costly and burdensome, and would afford no apparent benefit to Access Seekers.

9.11. For the purposes of clauses 9.10(a),(b) and (c) and clause 9.15(c), an Access Seeker may request any or all of the following types of information to be made available (**Specified Information**) in regard to the particular Exchange to which the request relates:

~~(e)~~(a) a written explanation of the decision;

~~(f)~~(b) the floor plans of the particular Exchange;

(c) an inventory of active, inactive, and underutilised equipment of the Access Provider used to supply Services and/or permit interconnection of equipment for the purpose of supplying Services to end-users;

Explanation for above amendment to clause 9.11(c): An Access Provider should only be required to provide information in relation to *its own* inventory of active, inactive and underutilised equipment. It should not be required to provide such information in relation to the equipment of others, as that information is not available to the Access Provider. We assume that is what was intended.

~~(g)~~

Note: Examples of such equipment are distribution frames, racks, power and air conditioning equipment. Equipment at the Exchange that is not used to supply Services and/or permit interconnection of equipment, including the Access Provider's switching or data equipment, does not need to be included on this inventory.

~~(h)~~(d) details of any approved plan to expand the capacity of the particular Exchange or Facilities, including the anticipated timeframe for completion;

~~(i)~~(e) details of any other potential means by which capacity of Facilities could be increased that have been identified; and

~~(j)~~(f) any other matters on which the decision was based, such as the reasonably anticipated requirements of the Access Provider and existing Access Seekers present at the Exchange.

9.12. If a request is made by an Access Seeker pursuant to clauses 9.10 or 9.15, an Access Provider must:

~~(b)~~(a) take all reasonable steps to make the Specified Information available to the Access Seeker; or

~~(e)~~(b) permit an Exchange inspection

within 10 Business Days of the request being received or such other agreed period.

Explanation for above amendment to clause 9.12: In some cases, an Access Provider may not be able to make Specified Information available to an Access Seeker, or permit an inspection, within 10 Business Days of receiving a request. For example, it may not be possible for an Access Provider to comply with the 10 Business Day timeframe where the Access Seeker delays in executing the proper confidentiality

undertakings. An Access Provider should be allowed a longer period within which to comply where it has so agreed with the Access Seeker.

.

9.13. If an Access Provider does not comply with a request made by an Access Seeker pursuant to clauses 9.10 or 9.15 within 10 Business Days, the Access Seeker may invoke the dispute resolution processes that have been agreed between the parties (if any) to resolve the dispute. If there is no dispute resolution process agreed between the parties, the matter may be resolved in accordance with the dispute resolution process for Non-Billing Disputes set out in Schedule 4 of this FAD.

Explanation for above amendment to clause 9.13: This amendment makes the language of the clause consistent with that in clause 9.12.

9.14. The terms and conditions on which information is to be made available (including confidentiality requirements), or an Exchange is to be inspected, including the persons who can receive information or inspect the Exchange, are to be agreed between the Access Provider and the Access Seeker as soon as practicable and in any event within 10 Business Days of a request made pursuant to clauses 9.10 or 9.15 being received by the Access Provider.

Explanation for above amendment to clause 9.14: This amendment clarifies that the terms and conditions on which information is to be made available may include confidentiality requirements.

9.15. Where an Access Seeker is considering in good faith increasing the capacity of existing Facilities at an Exchange that could be used by itself and other service providers (**Common Infrastructure Works**), the Access Seeker may make a written request to the Access Provider to supply details of the likely scope of Common Infrastructure Works for the Exchange including:

- (a) the current capability of Facilities at the particular Exchange;
- (b) the forecasted demand for access to those Facilities for all service providers based upon:

~~(a) Access Seeker forecasts;~~

Explanation for above amendment to clause 9.15(b): This amendment makes this clause consistent with clause 9.2.

~~(b)(i)~~ (i) documented reasonably anticipated requirements forecasts of the Access Provider; and

~~(ii)~~ (iii) ~~requests~~applications for access to those Facilities that have been received by the Access Provider for the particular Exchange;

Explanation for above amendment to clause 9.15(b)(ii): This amendment makes the language in the clause consistent with that in clauses 9.1, 9.2, 9.3, 9.4, 9.5, 9.6, 9.7, 9.9, 9.10, 9.12 and 9.13.

(c) any Specified Information relevant to the likely scope of Common Infrastructure Works for the particular Exchange.

9.16. Any information in respect of Common Infrastructure Works provided by the Access Provider in response to the Access Seeker's written request may be subject to a confidentiality undertaking as set out in Annexure 1 of this FAD.

9.17. An Access Provider must take reasonable steps to assist an Access Seeker commencing and completing works, including Common Infrastructure Works, as soon as practicable, including:

(a) making reasonably available its own staff so that any necessary approvals can be provided within agreed timeframes; and

Explanation for above amendment to clause 9.17(a): An Access Provider's obligation to make its staff available should be limited to where it is reasonable in the circumstances. It is not appropriate to require an Access Provider to make its staff immediately and fully available where those staff are engaged with other important tasks or projects (including the management of approvals for other Access Seekers' proposed works).

~~(a)~~

(b) where necessary:

(i) negotiating with the Access Provider~~Telstra~~ approved contractors where there is only one approved contractor for particular work; and

Explanation for above amendments to clause 9.17(b)(i): The first amendment accounts for the fact that Telstra may not be the only Access Provider. The clause should apply to Access Providers generally – not only to Telstra.

The second amendment clarifies that an Access Provider is only required to negotiate with its approved contractors where there is a single approved contractor for particular work. Where there is more than one approved contractor for particular work, it is neither feasible nor appropriate for an Access Provider to conduct negotiations with those contractors on an Access Seeker's behalf.

~~(a)~~

(ii) approving appropriately qualified additional contractors consistent with the Access Provider's reasonable approval procedures,

~~(b)~~

so that works can be completed within agreed timeframes.

Explanation for above amendments to clause 9.17(b)(ii): These amendments clarify that an Access Provider is not required to approve additional contractors to assist with the completion of Common Infrastructure Works unless such contractors are appropriately qualified and experienced to undertake work in the Access Provider's exchanges.

9.18. If:

- (a) the Access Provider requires that an Access Seeker's works are undertaken by a person certified or otherwise approved by the Access Provider; and
- (b) there is no certified or otherwise approved person who is able to undertake the Access Seeker's works within a reasonable time,

the Access Provider must, without additional cost to the Access Seeker, take all reasonable steps to certify or otherwise approve sufficient [appropriately qualified](#) persons to enable the Access Seeker's works to be undertaken within a reasonable time.

Explanation for above amendment to clause 9.18: This amendment mirrors the amendment made to clause 9.17(b)(ii) and should be made for the same reasons.

Notification of capacity limitations

9.19. The Access Provider must take reasonable steps to notify service providers who have rights to acquire the DTCS at particular Exchanges, that existing TEBA space or the MDF is at, or [the Access Provider has reason to believe it](#) is approaching, full capacity at those Exchanges. [This does not require the Access Provider to perform regular inspections of all its Exchanges. Where the Access Provider is Telstra, it will be taken to have complied with this obligation if it complies with the Access to Telstra Exchange Facilities Record Keeping and Reporting Rules 2011 made pursuant to section 151BU of the Competition and Consumer Act 2010.](#)

Explanation for above amendments to clause 9.19: Given that "approaching full capacity" is an uncertain concept, the second amendment makes it clear that an Access Provider does not have to carry out regular inspections of its Exchanges to assess which (if any) Exchanges are at, or are approaching, capacity, and to notify service providers accordingly. Telstra does not currently carry out such inspections. Telstra only assesses the available space at a given exchange when it receives a request for access to that exchange from an Access Seeker or for Telstra's own requirements at the Exchange. To carry out such inspections would entail considerable costs, including the cost of implementing an exchange-by-exchange inspection process and establishing (and maintaining) a new database recording exchange space availability information. Telstra estimates that such costs would be [start c-i-c] c-i-c [end c-i-c] of dollars in up front capital, plus [start c-i-c] c-i-c [end c-i-c]. Telstra submits that such costs are not commensurate with any likely benefits that would flow from this process.

Further, in accordance with its RKR obligations, Telstra already provides Access Seekers with notifications of capacity limitations in its exchanges. Telstra submits that the

obligations under clause 9.19 should be limited to make them consistent with the obligations imposed on Telstra under the RKR. This is made clear by the final amendment in this paragraph. The first amendment is consistent with these other amendments.

Queuing provisions

9.20. Where an Access Provider requires an Access Seeker to queue, the Access Provider must

(a) advise the Access Seeker of its place in the queue, the contact details of the other service providers in the queue (but not any other details concerning other service providers such as their forecasted demand at the Exchange) and an estimate of the likely date on which it will be able to access the Exchange; which may be based on standard provisioning timeframes; and

Explanation for above amendments to clause 9.20(a):

The date on which an Access Seeker is able to access an Exchange is dependent upon the date on which the prior Access Seeker completes its work in the Exchange. An Access Provider is unlikely to be aware precisely how long the prior Access Seeker may take and thus will not be able to provide the subsequent Access Seeker with an accurate estimate of the date on which the prior Access Seeker will finish its work. Similarly, an Access Provider should not be obliged to review the build plans (and/or progress) of each preceding Access Seeker in the queue and attempt to estimate their likely completion dates. For this reason, it is appropriate that clause 9.20 specify that Access Providers' estimates may be based on standard provisioning timeframes.

~~(e)~~

~~(a)~~(b) thereafter confirm to the Access Seeker its place in the queue on each occasion that other works at the Exchange pass a joint completion inspection.

9.21. An Access Seeker must take reasonable steps to complete its works within an agreed design and construction proposal validity period.

9.22. Where an Access Seeker becomes aware that it will not be able to complete works within an agreed validity period, it must promptly notify the Access Provider by submitting a written request for an extension of time.

9.23. Any written request for an extension of time made under clause 9.22 must include:

(a) the name of the Exchange;

~~(a)~~(b) contact details for the responsible employee of the Access Seeker;

~~(b)~~(c) an outline of the works being undertaken;

~~(e)~~(d) a brief outline of the reasons for delay;

~~(e)~~(e) the anticipated period within which the works should be completed;
and

(f) the potential for queued Access Seekers to be given access to the particular Exchange during any downtime.

9.24. On receiving an extension of time request, the Access Provider must forward the request and its decision regarding the extension to all queued Access Seekers.

9.25. The Access Provider must consider any requests it receives from queued Access Seekers for access to the Exchange during any downtime that is identified in the request for an extension of time.

9.26. The Access Provider must provide written notice to Access Seekers prior to implementing changes in technical specifications for design and construction proposals for an Exchange.

9.27. The Access Provider must not reject a design and construction proposal or proposed variation of a design and construction proposal for an Exchange that has been submitted by an Access Seeker on the basis of a technical specification that had not been notified to Access Seekers prior to the design and construction proposal being submitted except where the technical specification is reasonably required to comply with a change to ensure the health and safety of any person.

Explanation for above amendment to clause 9.27: Please refer to section 1.8.3 of Telstra's Submission.

9.28. The Access Provider must not unreasonably withhold consent to an Access Seeker making:

(a) minor variations to a design and construction proposal for an Exchange; or

(b) variations which would facilitate Common Infrastructure Works or an Access Seeker otherwise undertaking works for another queued Access

~~Seeker,~~ **but**
which would not result in other queued Access Seekers being delayed.

Explanation for above amendment to clause 9.28: This amendment clarifies that the final words in the clause are intended to apply in relation to both subclause (a) and subclause (b).

Feasibility studies

9.29. Where a technical feasibility study is required to be undertaken, for TEBA space for DTCS, the Access Provider must complete this process within a reasonable

period of time, having regard the complexity of the processes involved [and subject to the Access Provider's queuing policy](#).

Explanation for above amendment to clause 9.29: The first amendment limits the application of clause 9.29 to a DTCS context. This provides certainty that the FAD only applies to facilities access when such access relates to DTCS.

In relation to the second amendment, please refer to section 1.8.4 of Telstra's Submission.

Schedule 10 – Interpretation and definitions

Interpretation

In this FAD, 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;

~~“After Hours” means outside Business Hours;~~

Explanation for deletion of definition of “After Hours” - This term is not used in the draft FAD.

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” - The term “Bank Guarantee” is used in clause 3.4 but not defined.

“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 to the Access Seeker;

Explanation for new definition of “Billing Dispute” - Please refer to section 5.2.2.2 (Definition of “Billing Dispute”) of the submissions.

“Billing Dispute Notice” means a notice given pursuant to clause 2.10, in a form and containing the particulars or information reasonably required by the Access Provider;

Explanation for new definition of “Billing Dispute Notice” - The FAD should provide guidance on the form and content of the Billing Dispute Notice. A consistent form of notice will be administratively easier to work with for both parties and will assist the

Access Provider in responding in a timely manner. To this end, the Access Provider will require the notice to be accompanied by information such as the Service affected, the invoice(s) to which the Billing Dispute Notice relates, the account and the amount(s) disputed, and the basis of the dispute etc. Bearing in mind that the Access Provider has a finite period within which to resolve the dispute, this amendment, along with clause 2.16, will ensure that the Access Provider receives all relevant information either at the time of receiving the Billing Dispute Notice, or (where clause 2.16 applies) very shortly thereafter.

“**Billing Dispute Procedures**” means the procedures set out in clauses 2.10 to 2.29;

~~“**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;~~

Explanation for deletion of definition of “Business Hours” - This term is not used in the draft FAD.

“**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;

“**Calendar 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;

“**CAN**” means a customer access network;

“**Capital City**” means Sydney, Melbourne, Brisbane, Adelaide, Perth, Darwin, Hobart or Canberra;

“**Capital City Boundary**” means, in respect of a Capital City, the collective boundary of all ESAs that are served by a Capital City Exchange;

Note: Maps showing each Capital City Boundary can be found in the document entitled “Route Category Workbook” available on the Australian Competition and Consumer Commission website (www.accc.gov.au).

“**Capital City Exchange**” means:

- (a) in the case of Sydney, an Exchange located within 50 kilometres of the City South Exchange;
- (b) in the case of Melbourne, an Exchange located within 45 kilometres of the Kooyong Exchange;
- (c) in the case of Brisbane, an Exchange located within 25 kilometres of the Edison Exchange;

- (d) in the case of Adelaide, an Exchange located within 25 kilometres of the Waymouth Exchange;
- (e) in the case of Perth, an Exchange located within 30 kilometres of the Wellington Exchange;
- (f) in the case of Darwin, an Exchange located within 10 kilometres of the Nightcliff Exchange;
- (g) in the case of Hobart, an Exchange located within 6 kilometres of the Bathurst Exchange;
- (h) in the case of Canberra, an Exchange located within 15 kilometres of the Barton Exchange;

“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);~~

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

“Charge” means a charge [set out in this FAD](#) for the supply of the Service [by the Access Provider to the Access Seeker under this FAD](#);

Explanation for new definition of “Charge” - Please refer to section 1.1.1 (Definition of “Charge”) of the submissions.

~~“Common Infrastructure Works” [has the meaning given in clause 9.15](#) means where an Access Seeker increases the capacity of existing Facilities at an Exchange that could be used by itself and other service providers;~~

Explanation for amendment to definition of “Common Infrastructure Works” - Telstra has amended clause 9.15 to set out a definition of “Common Infrastructure Works”.

“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~~ [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
- ~~(e)~~(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 information or any part of it cannot be identified with, or attributed to, the Access Seeker.

Explanation for amendments to definition of "Confidential Information" - In relation to the amendments to subparagraph (a) of the definition, Telstra submits that these additional protections, which appear in the FADs for the declared fixed line services, should be included as they ensure that the public domain exception cannot be misused by any party to avoid confidentiality obligations.

In relation to the other amendments to the definition, please refer to section 1.4.1 (Confidential Information definition) of the submissions.

"Coordinated Capital Works Program" means a planned Major Network Modernisation and Upgrade that extends across more than one exchange service area but does not include an Emergency Network Modernisation and Upgrade;

"Coordinated Capital Works Program Forecast" has the meaning set out in clause 8.10 of Schedule 8;

"Coordinated Capital Works Program Schedule" has the meaning set out in clause 8.14 of Schedule 8;

"Design and construction proposal validity period" means the period of time a design and construction proposal (lodged by an Access Seeker and approved by the Access Provider) remains valid;

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

"DTCS" means the domestic transmission capacity service declared under section 152AL of the CCA;

"Emergency" means a national security alert or an ~~emergency~~ due to an actual or potential occurrence (such as fire, flood, storm, earthquake, explosion, accident, epidemic, vandalism, theft or war-like action) which:

- ~~(b)~~(a) endangers or threatens to endanger the safety or health of persons; or
- (b) destroys or damages, or threatens to destroy or damage property; and
- (c) for the purposes of Schedule 8, being an emergency which requires a significant and co-ordinated response;

Explanation for amendment to definition of "Emergency" -

The first amendment makes clear that "Emergency" includes, for example, activation of the government's "Emergency Alert" notification system.

The second amendment has been made in order to bring the definition of "Emergency" into line with the definition in a previous, publicly available FD.

As to the third amendment, other than for the purposes of 8, it is not appropriate that the emergency require a "significant and co-ordinated response". For example, where an Access Provider can suspend the provision of a Service, or where it might need to contact only one or a few end users of an Access Seeker.

"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 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;~~

Explanation for deletion of definition of "Event" - This term is not used in the draft FAD.

"Exp []" means the mathematical exponential function;

"Exchange" means a building owned or operated by the Access Provider 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;

Explanation for amendment to definition of "Exchange" - This amendment clarifies that the provisions apply to exchanges where the Access Provider has the right to provide access, as opposed to Access Seeker buildings.

"Expert Committee" means a committee established under clause 4.11;

"Facility" has the same meaning given to that term in section 7 of the *Telecommunications Act 1997* (Cth);

"FAD" means this Final Access Determination for the DTCS;

~~**"Fault"** means:~~

~~(α) a failure in the normal operation of a Network or in the delivery of the Service; or
(β) any issue as to the availability or quality of the 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;~~

Explanation for deletion of definition of "Fault" - This term is not used in the draft FAD.

"General Notification" has the meaning set out in clause 8.1;

"Individual Notification" has the meaning set out in clause 8.1 of Schedule 8;

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

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

~~**"Intercapital"** means a route from an ESA within a Capital City Boundary to an ESA within another Capital City Boundary;~~

Explanation for deletion of definition of "Intercapital" - This term is not used in the draft FAD.

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

"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;

"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);

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

~~(a)~~ (a) involves the installation of Telstra customer access modules closer to end- users than a Telstra exchange building;

(b) requires the removal/relocation of the DTCS provided from Telstra exchange buildings and the establishment of a new POI (or relocation of an existing POI) for the DTCS; ~~or; or alteration of deployment classes of equipment used on the DTCS; or~~

(c) ~~(e)~~ 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;

Explanation for above amendment to definition of "Major Network Modernisation and Upgrade"- The concept of "deployment classes" is a ULLS-specific concept that has no application to DTCS.

"MDF" means a main distribution frame;

“**Metropolitan**” means a route that is wholly within a Capital City Boundary, but does not include a Tail-End route;

“**Month**” means a calendar month;

~~“**NBN Co**” means NBN Co Limited (ACN 136 533 741), as it exists from time to time (even if its name is later changed);~~

Explanation for deletion of definition of “NBN Co” - This term is not used in the draft FAD.

~~“**NBN Upgrade**” means a planned Major Network Modernisation and Upgrade by the Commonwealth of Australia and/or NBN Co that upgrades an existing access network as part of a fibre to the premises upgrade.~~

Explanation for deletion of definition of “NBN Upgrade” - This term is not used in the draft FAD.

“**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;

“**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;

Payment Breach means a failure by the Access Seeker to pay any amount owing under this FAD by the due date for payment;

Explanation for new definition of “Payment Breach” - This definition has been proposed as a result of amendments to clauses 3.5(c)(iii), 5.10 and 6.1(a).

“**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;~~

Explanation for deletion of definition of “People” - This term is not used in the draft FAD.

“**POI**” means point of interconnection and is a location for the interconnection of facilities;

Explanation for above amendment to definition of “POI”- The reference to “interconnection of facilities” is likely to result in confusion and uncertainty. This amendment reflects general commercial understanding of the expression “POI” as a point of interconnection between networks. The concept of interconnection of “facilities” does not make sense in every context, given the definition of Facilities in Schedule 10 of the FAD.

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

Explanation for new definition of "Prohibited Traffic" - This definition, taken from the FADs for the declared fixed line services, has been introduced as a result of the use of that concept in proposed new clause 6.X(c).

"Protected Service" means a DTCS service where an Access Provider has contractually agreed to provide more than one geographically diverse path between the A-end and B-end;

"Quality of service 1 (QOS 1)" means the quality of service that is available using a DTCS service that:

~~(b)~~(a) is a Protected Service;

~~(e)~~(b) is provided using a network that is capable of delivering the DTCS service by means of more than two geographically diverse paths; and

(c) has an overall service reliability of 99.9 per cent;

"Regional" means:

(a) a route from a location outside a Capital City Boundary to another location;
or

(b) a route to a location outside a Capital City Boundary from another location; but

does not include a Tail-End route;

"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;

"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;

"Security" means the amount and form of security required to be provided to the Access Provider in respect of the provision by the Access Provider of the DTCS under Schedule 3'

"Service" means the DTCS.

"Suspension Event" has the meaning set out in clause 6.1 of Schedule 6;

"Suspension Notice" has the meaning set out in clause 6.1 of Schedule 6;

"Structural Separation Undertaking" means:

~~(e)~~(a) an undertaking given by Telstra under subsection 577A(1) of the *Telecommunications Act 1997* (Cth) which comes into force in accordance with section 577AB, and any amendment to that undertaking which comes into force in accordance with subsection 577B(6); and

~~(e)~~(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), forms 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;

“**Tail-End**” means a route wholly within a single ESA;

“**TEBA space**” means the common area in an Exchange and allocated or to be allocated by Telstra for access~~Telstra Exchange Building Access space.~~

Explanation for amendment of definition of “TEBA space” - This amendment clarifies what constitutes “TEBA space”.