



## **Final Access Determination No. 7 of 2011 (MTAS)**

### *Competition and Consumer Act 2010*

---

The AUSTRALIAN COMPETITION AND CONSUMER COMMISSION makes these final access determinations under section 152BC of the *Competition and Consumer Act 2010*.

Date of decision: 7 December 2011

## **1. Application**

1.1 This instrument sets out final access determination (FAD) in respect of the declared domestic mobile terminating access service ('MTAS').

1.2 The price in this FAD is exclusive of Goods and Services Tax (GST).

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*.

## **2. Definitions and interpretation**

2.1 Schedule 7 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 on 1 January 2012.

3.2 This final access determination remains in force up until and including 30 June 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), 152BCF(2) and 152BCF(2A) 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 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: The terms and conditions in a final access determination apply only to those terms and conditions where terms and conditions on that matter in an Access Agreement cannot be reached, no special access undertaking is in operation setting out terms and conditions on that matter and no binding rules of conduct have been made setting out terms and conditions on that matter: 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 2–6.

## INDEX TO SCHEDULES

<b>Schedule</b>			<b>Page</b>
1	Price terms for the MTAS		3
2	Non-price	Billing and notifications	4
3		Creditworthiness and security	10
4		General dispute resolution procedures	14
5		Confidentiality provisions	18
6		Suspension and termination	21
7	Interpretation and definitions		25

## **Schedule 1 – Price terms for the domestic mobile termination access service (MTAS)**

- 1.1 The prices applicable to the MTAS for the period 1 January 2012 to 30 June 2014 are as follows:

<b>Time period</b>	<b>cpm</b>
1 January 2012 – 31 December 2012	6
1 January 2013 – 31 December 2013	4.8
1 January 2014 – 30 June 2014	3.6

## 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 shall provide the Access Seeker with an invoice each month in respect of Charges payable for the Service unless the parties agree otherwise.
- 2.4. The Access Provider shall be 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.

- 2.8. Unless the parties otherwise agree, there shall be 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 shall consider in good faith set-off procedures for inter-party invoices which may require the alignment of the parties' respective invoice dates and other procedures to allow set-off to occur efficiently.
- 2.9. The Access Provider must, at the time of issuing an invoice, provide to the Access Seeker all information reasonably required by the Access Seeker to identify and understand the nature and amount of each Charge on the invoice. Nothing in this clause 2.9 is intended to limit subsections 152AR(6) and 152AR(7) of the CCA.
- 2.10. If the Access Seeker believes a Billing Dispute exists, it may, invoke the Billing Dispute Procedures by providing written notice to the Access Provider (**Billing Dispute Notice**). A Billing Dispute must be initiated only in good faith.
- 2.11. Except where a party seeks urgent injunctive relief, the Billing Dispute Procedures must be invoked before either party may begin legal 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 may not be given to the Access Provider in relation to a Charge later than six Months after the due date for the invoice for the Charge issued in accordance with 2.6.
- 2.15. (a) The Access Provider shall 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 shall, 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 shall 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 shall:

- (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 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).

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 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:

- (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 shall pay interest (at the rate set out in clause 2.6) on any refund. Interest shall accrue 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 shall pay interest (at the rate set out in clause 2.6) on the amount to be paid. Interest



shall accrue 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) 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 Business Days 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 shall be deemed to have accepted the Access Provider's proposed resolution made under clause 2.17 or Revised Proposed Resolution under clause 2.18(e) or confirmed proposed solution under clause 2.18(f) and clauses 2.20 and 2.21 shall apply.

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 Revised Proposed Resolution or confirmed proposed solution under clause 2.18; and
- (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 shall 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 shall 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 shall ensure that any person appointed or required to resolve a Billing Dispute shall take into account the principle that the Access Seeker shall be 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 shall apply only to the extent to which the Billing Dispute is resolved against the Access Provider; and
  - (b) such principle shall apply 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 shall be a presumption that all communications between the parties during the course of a Billing Dispute are made on a without prejudice and confidential basis.
- 2.30. If it is determined by the Billing Dispute Procedures, any other dispute resolution procedure, or by agreement between the parties, that three or more out of any five consecutive invoices for a given Service are incorrect by five percent or more, then, for the purposes of clause 8.20, the interest payable by the Access Provider in respect of the overpaid amount of the invoices in question shall be the rate set out in clause 8.7, plus 2 percent. The remedy set out in this clause 2.30 shall be without prejudice to any other right or remedy available to the Access Seeker.

## Schedule 3 – Creditworthiness and security

- 3.1. Unless otherwise agreed by the Access Provider, the Access Seeker must (at the Access Seeker's sole cost and expense) provide to the Access Provider and maintain, on terms and conditions reasonably required by the Access Provider and subject to clause 3.2, the Security (as shall 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.
- 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 the last to occur of:
- (i) cessation of supply of a Service or Services under this FAD, and
  - (ii) payment of all outstanding amounts under this FAD.
- (b) Notwithstanding clause 3.2(a), the Access Provider has no obligation to release the Security if, at the date the Access Provider would otherwise be required to release the Security under clause 3.2(a), the Access Provider reasonably believes any person, including a provisional liquidator, administrator, trustee in bankruptcy, receiver, receiver and manager, other controller or similar official, has a legitimate right to recoup or claim repayment of any part of the amount paid or satisfied, whether under the laws or preferences, fraudulent dispositions or otherwise.
- 3.3. The Security (including any varied Security) shall only be requested when the Access Provider has reasonable grounds to doubt the Access Seeker's ability to pay for Services. The Security 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 shall be calculated by reference to:
- (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 under this FAD but unpaid (excluding any amounts in respect of which there is a current Billing Dispute notified in accordance with this FAD).
- For the avoidance of doubt, any estimates, forecasts or other statements made or provided by the Access Seeker may be used by the Access Provider in determining the amount of a Security.
- 3.4. Examples of appropriate forms of security, having regard to the factors referred to in clause 3.3, may include without limitation:
- (a) fixed and floating charges;

- (b) personal guarantees from directors;
- (c) bank guarantees;
- (d) letters of comfort;
- (e) mortgages;
- (f) a right of set-off;
- (g) a Security Deposit; or
- (h) a combination of the forms of security referred to in paragraphs (a) to (g) above.

If any Security is or includes a Security Deposit, then:

- (i) the Access Provider is not obliged to invest the Security Deposit or hold the Security Deposit in an interest bearing account or otherwise; and
- (j) the Access Seeker is prohibited from dealing with 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 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. 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. 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.

- 3.6. The Access Seeker may from time to time request the Access Provider to consent (in writing) to a decrease in the required Security and/or alteration of the form of the Security. The Access Provider must, within 15 Business Days of the Access Seeker's request, comply with that request if, and to the extent, it is reasonable to do so (having regard to the factors referred to in clause 3.3). The Access Provider may request, and the Access Seeker shall promptly provide, Ongoing Creditworthiness Information, for the purposes of this clause 3.6.
- 3.7. In the event that 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. In the event that there has been a material adverse change in the Access Seeker's financial position between the date the information was prepared and the date it was received by the Access Provider, the Access Seeker must disclose the nature and effect of the change to the Access Provider at the time the information is provided.
- 3.8. For the purposes of this Schedule 3, **Ongoing Creditworthiness Information** means:
- (a) a copy of the Access Seeker's most recent published audited balance sheet and published audited profit and loss statement (together with any notes attached to or intended to be read with such balance sheet or profit and loss statement);
  - (b) a credit report in respect of the Access Seeker or, where reasonably necessary in the circumstances, any of its owners or directors (Principals) from any credit reporting agency, credit provider or other third party. The Access Seeker shall 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.
- 3.9. The Access Seeker may require a confidentiality undertaking to be given by any person 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 Access Provider may, in its absolute discretion, deem a failure by the Access Seeker to provide Ongoing Creditworthiness Information or an altered Security in accordance with clause 3.5 as:
- (a) an event entitling the Access Provider to alter the amount, form and terms of the Security of the Access Seeker; or
  - (b) a breach of a material term or condition of this FAD.
- 3.11. Any disputes arising out of or in connection with Schedule 3 shall be dealt with in accordance with the procedures in Schedule 4.

## **Schedule 4 – General dispute resolution procedures**

- 4.1. If a dispute arises between the parties in connection with or arising from the supply of the Service under this FAD, the dispute shall be managed as follows:
  - (a) in the case of a Billing Dispute, the dispute shall be managed in accordance with the Billing Dispute Procedures; or
  - (b) subject to clause 4.2, in the case of a Non-Billing Dispute, the dispute shall be managed in accordance with the procedures set out in this Schedule 4.
- 4.2. To the extent that a Non-Billing Dispute is raised or arises in connection with, or otherwise relates to, a Billing Dispute, then unless the Access Provider otherwise determines, that Non-Billing Dispute shall be resolved in accordance with the Billing Dispute Procedures. The Access Provider may seek a determination from an independent third party on whether a dispute initiated by the Access Seeker as a Billing Dispute is a Non-Billing Dispute. If the independent third party deems the dispute to be a Non-Billing Dispute, the Access Provider may provide written notice to the Access Seeker to pay any withheld amount to the Access Provider on the due date for the disputed invoice or if the due date has passed, immediately on notification being given by the Access Provider.
- 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 3. A Non-Billing Dispute must be initiated only in good faith.
- 4.4. Any Non-Billing Dispute notified under clause 4.3 shall be referred:
  - (a) initially to the nominated manager (or managers) for each party, who shall endeavour to resolve the dispute within 10 Business Days of the giving of the notice referred to in clause 4.3 or such other time agreed by the parties; and
  - (b) if the persons referred to in paragraph (a) above do not resolve the Non-Billing Dispute within the time specified under paragraph (a), then the parties may agree in writing within a further five Business Days to refer the Non-Billing Dispute to an Expert Committee under clause 4.11, or by written agreement submit it to mediation in accordance with clause 4.10.
- 4.5. If:
  - (a) under clause 4.4 the Non-Billing Dispute is not resolved and a written agreement is not made to refer the Non-Billing Dispute to an Expert Committee or submit it to mediation; or,
  - (b) under clause 4.10(f), the mediation is terminated; and

- (c) after a period of five Business Days after the mediation is terminated as referred to in paragraph (b), the parties do not resolve the Non-Billing Dispute or agree in writing on an alternative procedure to resolve the Non-Billing Dispute (whether by further mediation, written notice to the Expert Committee, arbitration or otherwise) either party may terminate the operation of this dispute resolution procedure in relation to the Non-Billing Dispute by giving written notice of termination to the other party.
- 4.6. A party may not commence legal proceedings in any court (except proceedings seeking urgent interlocutory relief) in respect of a Non-Billing Dispute unless:
- (a) the Non-Billing Dispute has first been referred for resolution in accordance with the dispute resolution procedure set out in this Schedule 4 or clause 4.2 (if applicable) and a notice terminating the operation of the dispute resolution procedure has been issued under clause 4.5; or
  - (b) the other party has failed to substantially comply with the dispute resolution procedure set out in this Schedule 4 or clause 4.2 (if applicable).
- 4.7. Each party must continue to fulfil its obligations under this FAD while a Non-Billing Dispute and any dispute resolution procedure under this Schedule 4 are pending.
- 4.8. There shall be a presumption that 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 shall, 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 shall include:
    - (i) a statement of the disputed matters in the Non-Billing Dispute; and
    - (ii) the procedure to be followed during the mediation,and the mediation must take place within 15 Business Days upon the receipt by the mediator of such agreement;
  - (b) it must be conducted in accordance with the mediation guidelines of the ACDC in force from time to time (**ACDC Guidelines**) and the provisions of this clause 4.10. In the event of any inconsistency between them, the provisions of this clause 4.10 shall prevail;



- (c) it is to be conducted in private;
- (d) in addition to the qualifications of the mediator contemplated by the ACDC Guidelines, the mediator should:
  - (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 shall attend the mediation. Nothing in this subclause is intended to suggest that the parties are able to refuse the other's chosen representatives or to limit other representatives from the parties attending during the mediation;
- (f) it shall terminate in accordance with the ACDC Guidelines;
- (g) the parties shall bear their own costs of the mediation including the costs of any representatives and shall each bear half the costs of the mediator; and
- (h) any agreement resulting from mediation shall bind 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 shall apply as follows:

- (a) The terms of reference of the Expert Committee shall be 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 shall be deemed to be terminated.
- (b) An Expert Committee shall act as an expert and not as an arbitrator.
- (c) The parties shall each be represented on the Expert Committee by one appointee.
- (d) The Expert Committee must include an independent chairperson agreed by the parties or, if not agreed, a nominee of the ACDC. The chairperson must have the qualifications listed in paragraphs 4.10(d)(i), (ii) and (iii).
- (e) Each party shall 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 shall 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 shall have 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 shall 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 shall each bear half the costs of the independent member of the Expert Committee.

4.12 Schedule 4 does not apply to a Non-Billing Dispute to the extent that:

- (a) there is a dispute resolution process established in connection with, or pursuant to, a legal or regulatory obligation (including any dispute resolution process set out in a Structural Separation Undertaking) and that process has been initiated; and
- (b) the issue the subject of that dispute is the same issue in dispute in the Non-Billing Dispute.

## Schedule 5 – Confidentiality provisions

- 5.1. Subject to clause 5.4 and any applicable statutory duty, each party must keep confidential all Confidential Information of the other party and must not:
- (a) use or copy such Confidential Information except for the purposes of this FAD; or
  - (b) disclose or communicate, cause to be disclosed or communicated or otherwise make available such Confidential Information to any third person.
- 5.2. For the avoidance of doubt, information 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 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.
- 5.3. The Access Provider shall 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 clause 5.5, 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;
    - (iii) for the purpose of billing; or
    - (iv) for another purpose agreed to by the Access Seeker; and
  - (b) disclosed only to personnel directly involved in the purposes referred to in paragraph (a) above.
- 5.5. A party (**Disclosing Party**) may to the extent necessary disclose the Confidential Information of the other party:
- (a) to those of its directors, officers, employees, agents, contractors (including sub-contractors) and representatives to whom the Confidential

Information is reasonably required to be disclosed for the purposes of this FAD;

- (b) to any professional person acting for the Disclosing Party to permit that person to protect or advise on the rights of the Disclosing Party in respect of the obligations of the Disclosing Party under this FAD;
- (c) to an auditor acting for the Disclosing Party to the extent necessary to permit that auditor to perform its audit functions;
- (d) in connection with legal proceedings, arbitration, expert determination and other dispute resolution mechanisms set out in this FAD, provided that the Disclosing Party has first given as much notice (in writing) as is reasonably practicable to the other party so that the other party has an opportunity to protect the confidentiality of its Confidential Information, or for the purpose of seeking advice from a professional person in relation thereto;
- (e) as required by law provided that the Disclosing Party has first given as much notice (in writing) as is reasonably practicable to the other party, that it is required to disclose the Confidential Information so that the other party has an opportunity to protect the confidentiality of its Confidential Information, except that no notice is required in respect of disclosures made by the Access Provider to the ACCC under section 152BEA of the CCA;
- (f) with the written consent of the other party provided that if required by the other party as a condition of giving its consent, the Disclosing Party must comply with clause 5.6;
- (g) in accordance with a lawful and binding directive issued by a regulatory authority;
- (h) if reasonably required to protect the safety of personnel or property or in an emergency;
- (i) as required by the listing rules of any stock exchange where that party's securities are listed or quoted.

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

- (a) protect the confidentiality of the other party's Confidential Information;  
or
- (b) enforce its rights in relation to its Confidential Information.

5.7. Each party must establish and maintain security measures to safeguard the other party's Confidential Information from unauthorised access, use, copying, reproduction or disclosure.

5.8. Confidential Information provided by one party to the other party is provided for the benefit of that other party only. Each party acknowledges that no

warranty is given by the Disclosing Party that the Confidential Information is or will be correct.

- 5.9. Each party acknowledges that a breach of this Schedule 5 by one party may cause another party irreparable damage for which monetary damages would not be an adequate remedy. Accordingly, in addition to other remedies that may be available, a party may seek injunctive relief against such a breach or threatened breach of this Schedule 5.
- 5.10. If the Access Provider has the right to suspend or cease the supply of the Service pursuant to this FAD, and after suspension or cessation of supply of the Service, the Access Seeker fails to pay amounts due or owing to the Access Provider by the due date for payment;

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

- (a) notify and exchange information about the Access Seeker (including the Access Seeker's Confidential Information) with any credit reporting agency or the Access Provider's collection agent; and
- (b) without limiting clause 5.10, disclose to a credit reporting agency:
  - (i) the defaults made by the Access Seeker to the Access Provider; and
  - (ii) the exercise by the Access Provider of any right to suspend or cease supply of the Service under this FAD.

## Schedule 6 – Suspension and termination

6.1. If:

- (a) the Access Seeker has failed to pay monies payable under this FAD;
- (b) the Access Seeker's use either of its Facilities or the Access Provider's Facilities is in contravention of any law;
- (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,

**(Suspension Event)** and:

- (e) within 20 Business Days after becoming aware of the Suspension Event, the Access Provider gives a written notice to the Access Seeker:
  - (i) citing this clause;
  - (ii) specifying the Suspension Event that has occurred;
  - (iii) requiring the Access Seeker to institute remedial action (if any) in respect of that event; and
  - (iv) specifying the action which may follow due to a failure to comply with the notice,

**(Suspension Notice)** and:

- (f) the Access Seeker fails to institute remedial action as specified in the Suspension Notice within 20 Business Days after receiving the Suspension Notice (in this clause 6.1, the **Remedy Period**),

the Access Provider may, by written notice given to the Access Seeker as soon as reasonably practicable after the expiry of the Remedy Period:

- (g) refuse to provide the Access Seeker with the Service:
  - (iii) of the kind in respect of which the Suspension Event has occurred; and
  - (iv) a request for which is made by the Access Seeker after the date of the breach,

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

- (h) suspend the provision of the Service until the remedial action specified in the Suspension Notice is completed.

- 6.2. For the avoidance of doubt, subclause 6.1(a) does not apply to a Billing Dispute that has been notified by the Access Seeker to the Access Provider in accordance with the Billing Dispute Procedures set out in this FAD.
- 6.3. In the case of a suspension pursuant to clause 6.1, the Access Provider shall 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 shall do so subject to payment by the Access Seeker of the Access Provider's reasonable costs of suspension and reconnection.
- 6.4. If:
- (a) a party ceases to be a carrier or carriage service provider; or
  - (b) a party ceases to carry on business for a period of more than 10 consecutive Business Days or
  - (c) in the case of the Access Seeker, any of the reasonable grounds specified in subsection 152AR(9) of the CCA apply; or
  - (d) a party breaches a material obligation under this FAD, and:
    - (i) that breach materially impairs or is likely to materially impair the ability of the other party to deliver Listed Carriage Services to its customers; and
    - (ii) the other party has given a written notice to the first-mentioned party within 20 Business Days of becoming aware of the breach (**Breach Notice**); and
    - (iii) the other party fails to institute remedial action as specified in the Breach Notice within 20 Business Days after receiving the Breach Notice (in this clause 6.4, the **Remedy Period**),
- the other party 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 (as the case may be).
- 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:
- (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

- (d) where an Access Seeker has not rectified a Suspension Event, notwithstanding clause 6.4(d)(ii), the Access Provider has given written notice to the Access Seeker within 20 Business Days of the expiry of the time available to remedy the Suspension Event.
- 6.6. For the avoidance of doubt, a party shall not be 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
  - (b) a receiver, receiver and manager, official manager, controller, administrator (whether voluntary or otherwise), provisional liquidator, liquidator, or like official is appointed over the undertaking and property of the other party; or
  - (c) a holder of an encumbrance takes possession of the 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
  - (d) the other party is or likely to be unable to pay its debts as and when they fall due or is deemed to be unable to pay its debts pursuant to section 585 or any other section of the *Corporations Act 2001* (Cth); or
  - (e) as a result of the operation of section 459F or any other section of the *Corporations Act 2001* (Cth), the other party is taken to have failed to comply with a statutory demand; or
  - (f) a force majeure event substantially and adversely affecting the ability of a party to perform its obligations to the other party, continues for a period of three Months; or
  - (g) the other party breaches any of the terms of any of its loans, security or like agreements or any lease or agreement relating to significant equipment used in conjunction with the business of that other party related to the supply of the Service under this FAD; or
  - (h) the other party seeks or is granted protection from its creditors under any applicable legislation; or
  - (i) anything analogous or having a substantially similar effect to any of the events specified above occurs in relation to the other party.



- 6.8. The cessation of the operation of this FAD:
- (a) shall not operate as a waiver of any breach by a party of any of the provisions of the FAD; and
  - (b) is without prejudice to any rights, liabilities or obligations of any party which have accrued up to the date of cessation.
- 6.9. 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 – Interpretation and definitions

### *Interpretation*

In this agreement, 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;

“**ACDC**” means the Australian Commercial Disputes Centre Limited;

“**ACMA**” means the Australian Communications and Media Authority;

“**Billing Dispute**” means a dispute relating to a Charge or an invoice issued by the Access Provider to the Access Seeker;

“**Billing Dispute Notice**” means a notice given pursuant to clause 2.11;

“**Billing Dispute Procedures**” means the procedures set out in clauses 2.11 to 2.29;

“**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;

“**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 for the supply of the Service;

“**Confidential Information**” means all information, know-how, ideas, concepts, technology, manufacturing processes, industrial, marketing and commercial knowledge of a confidential nature (whether in tangible or intangible form and whether coming into existence before or after the commencement of this FAD) relating to or developed in connection with or in support of the service supplied under this FAD (the “**first mentioned party**”) but does not include:

- (a) information which is or becomes part of the public domain (other than through any breach of this FAD);
- (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;

**“Emergency”** means an emergency due to an actual or potential occurrence (such as fire, flood, storm, earthquake, explosion, accident, epidemic or war-like action) which:

- (a) endangers or threatens to endanger the safety or health of persons; or
- (b) destroys or damages, or threatens to destroy or damage property,

being an emergency which requires a significant and co-ordinated response;

**“Event”** means an act, omission or event relating to or arising out of this agreement or part of this agreement;

**“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 Final Access Determination;

**“Month”** means a calendar month;

**“MTAS”** means the domestic mobile terminating access service declared under section 152AL of the CCA;

**“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 or optical energy;

**“Non-Billing Dispute”** means a dispute other than a Billing Dispute;

**“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 MTAS under Schedule 3’

**“Service”** means the MTAS.

**“Structural Separation Undertaking”** means:

- (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
- (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, annexure and attachments to such documents.