



FOXTEL SECTION 87B UNDERTAKING

SCHEDULE 2:

FOXTEL Digital Access Agreement

FOXTEL Digital Access Agreement

FOXTEL Management Pty Ltd

[Access Seeker]

[Date]

Digital Access Agreement

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Date	
Parties	
1.	FOXTEL Management Pty Ltd (ACN 068 671 938) of Wharf 8, Pyrmont, Sydney, New South Wales, for and on behalf of the FOXTEL Partnership (FOXTEL)
2.	[Access Seeker] [(ACN [*])] of [*] (Access Seeker)
Recitals	
A	FOXTEL broadcasts digital Subscription Television Services and Related Services which are received via Digital Subscriber Equipment.
B	The Access Seeker has arranged for the carriage of its digital Subscription Television Services and Related Services to and between the Interface Points (and from the Interface Points except the Network Termination Point) with a Carriage Service Provider.
C	The Access Seeker has requested that FOXTEL provide it with access to FOXTEL's Digital Subscriber Equipment for the purpose of the Access Seeker providing digital Subscription Television Services and Related Services to Subscribers.
D	This Agreement sets out the terms (including price) on which FOXTEL provides, and the Access Seeker acquires, the Digital Set Top Unit Services.
E	The parties agree that this Agreement relates solely to the terms on which the Access Seeker is granted access by FOXTEL to the Digital Subscriber Equipment and that it is the Access Seeker's responsibility to arrange for the provision of all services, other than the Digital Set Top Unit Services, that may be required in order for the Access Seeker to provide digital Subscription Television Services and Related Services to Subscribers.

The dictionary in Schedule 8 contains the meaning of terms defined in this Agreement and rules to assist in its interpretation.

It is agreed as follows.

1. Term

1.1 Commencement

This Agreement binds the parties as from the Execution Date.

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1.2 Period of Agreement

Subject to Clause 2, this Agreement commences on the Execution Date and continues until the 5th anniversary of the Service Date unless earlier terminated as provided in this Agreement or by operation of the Law (the **Term**). Prior to the expiry of the Term, the parties may agree to extend the Term, or to replace or re-negotiate this Agreement.

2. Conditions Precedent

2.1 Conditions Precedent

This Agreement is (and is intended to be) legally binding. However, all provisions (except for Clauses 2, 14, 25 and 28 and Schedule 8), are conditional upon and shall not take effect unless and until all of the following occur:

- (a) FOXTEL has received the consent from the lessors of the Digital Subscriber Equipment to use of the Digital Subscriber Equipment to supply the Digital Set Top Unit Services to the Access Seeker in accordance with the terms of this Agreement; and
- (b) the Access Seeker has, at its own cost, arranged for the issue of a Bank Guarantee in an amount reasonably determined by FOXTEL from time to time (which amount shall be deemed to be reasonable if it is sufficient to enable the performance of the Access Seeker's obligations under this Agreement, including the payment of Access Charges, Other Payments and any loss which may be suffered directly or indirectly by the FOXTEL Group as a result of the default of the Access Seeker under this Agreement), which Bank Guarantee must be delivered by the Access Seeker to FOXTEL and will be held by FOXTEL during the Term,

each a **condition precedent**.

2.2 Waiver

The Access Seeker acknowledges that each of the conditions precedent in Clause 2.1 is for the benefit of FOXTEL and may only be waived in writing by FOXTEL.

2.3 Satisfaction

- (a) Subject to Clause 2.5, FOXTEL will use its reasonable endeavours to procure the satisfaction of the condition precedent in Clause 2.1 (a); and
- (b) The Access Seeker must, at its cost, provide such assistance and information as FOXTEL requests to procure the satisfaction of the condition precedent in Clause 2.1(a).

2.4 Non Satisfaction

- (a) If all of the conditions precedent in Clause 2.1 have not been satisfied (or waived by FOXTEL in accordance with Clause 2.2) within 6 months of the Execution Date, then this Agreement will lapse and will be taken never to have been executed.

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- (b) If the condition precedent in Clause 2.1(b) is not likely to be, in FOXTEL's opinion acting reasonably, satisfied by the Access Seeker then, if FOXTEL requires and upon FOXTEL's notification to the Access Seeker, this Agreement will lapse and be taken never to have been executed.

2.5 FOXTEL costs

The Access Seeker must pay to FOXTEL, on demand, all costs incurred or reasonably anticipated to be incurred by FOXTEL in procuring the satisfaction of the condition precedent in Clause 2.1 (a), even if such condition precedent is not able to be satisfied.

3. Bank Guarantee

3.1 Bank Guarantee

- (a) If at any time during the Term, FOXTEL considers that the creditworthiness of the Access Seeker does not meet FOXTEL's reasonable requirements, then FOXTEL may require the Access Seeker, at its own cost, to provide a new Bank Guarantee or to vary the amount or type of an existing Bank Guarantee. The amount of any new or varied Bank Guarantee shall be deemed to meet FOXTEL's reasonable requirements if it is sufficient to enable the performance of the Access Seeker's obligations under this Agreement, including the payment of Access Charges, Other Payments and any loss which may be suffered directly or indirectly by the FOXTEL Group as a result of the default of the Access Seeker under this Agreement.
- (b) Where FOXTEL requests a new or varied Bank Guarantee under Clause 3.1(a), the Access Seeker must provide the new or varied Bank Guarantee within 15 Business Days of the request being made.
- (c) The Access Seeker must, unless otherwise agreed by FOXTEL:
 - (i) ensure that any Bank Guarantee is kept current and enforceable until the expiry of a 6 month period after the last to occur of:
 - (A) the termination or expiry of this Agreement; or
 - (B) payment to FOXTEL of all outstanding Access Charges, Other Payments and other amounts payable by the Access Seeker under this Agreement, and
 - (ii) ensure that the terms of any Bank Guarantee provided to FOXTEL are complied with fully.
- (d) In the event of any default by the Access Seeker in the payment of Access Charges or Other Payments as applicable under this Agreement or the performance of any other obligation on the part of the Access Seeker contained in this Agreement, FOXTEL will, without limiting or waiving any rights which FOXTEL may have under this Agreement or otherwise, be entitled to demand payment of the whole or a proportionate part of the amount secured by any Bank Guarantee to compensate FOXTEL for the loss suffered directly or indirectly by it as a result of the default by Access Seeker.

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- (e) Where FOXTEL makes a demand on any Bank Guarantee, the Access Seeker must provide a replacement or additional Bank Guarantee so that the total amount of the Bank Guarantee required by FOXTEL under this Agreement is restored.
- (f) Subject to the provisions of this Clause 3, FOXTEL shall ensure that any Bank Guarantee is forwarded to the Access Seeker within 7 days after the date that the Access Seeker is required to ensure that any Bank Guarantee is kept current and enforceable under Clause 3.1(c)(i).

4. Supply of Digital Set Top Unit Services

4.1 Supply

- (a) From the Service Date, FOXTEL agrees to supply to the Access Seeker and the Access Seeker agrees to acquire from FOXTEL on the terms and conditions of this Agreement, the Digital Set Top Unit Services in respect of the Access Seeker's digital Subscription Television Services and Related Services.
- (b) FOXTEL is only obliged to supply Digital Set Top Unit Services to the Access Seeker to the same standard as it provides Digital Set Top Unit Services to itself.
- (c) FOXTEL is only obliged to supply and continue to supply Digital Set Top Unit Services to the Access Seeker:
 - (i) (A) in the case of services broadcast via cable, where the Digital Set Top Unit to which the Digital Set Top Unit Services are to be supplied is actually in use by a Subscriber for reception of FOXTEL's digital Subscription Television Services; or
(B) in the case of services broadcast via satellite, where the Digital Set Top Unit to which the Digital Set Top Unit Services are to be supplied is actually in use by a Subscriber for reception of FOXTEL's expanded digital Subscription Television Services;
 - (ii) as a total package and not as one or more component parts;
 - (iii) where the Access Seeker's digital Subscription Television Service and Related Services are broadcast via satellite, provided that these are broadcast using the Satellite Network or otherwise using the same transmission configuration and same satellite orbital location as FOXTEL's digital Subscription Television Services;
 - (iv) where the Access Seeker's digital Subscription Television Services and Related Services:
 - (A) are transmitted using the Telstra Network, provided that only Digital Set Top Units for cable are used; and
 - (B) are transmitted using the Satellite Network, provided that only Digital Set Top Units for satellite are used; and
 - (v) for so long as the Access Seeker's broadcast signal comprising the Access Seeker's digital Subscription Television Services and Related Services

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complies with the relevant Interface Specifications at each of the Interface Points (including the Network Termination Point).

- (d) FOXTEL agrees that the Interface Specifications at the Network Termination Point (NTP Interface Point) will be the same as those specifications required by FOXTEL of its Carriage Service Providers in the provision of Digital Set Top Unit Services by FOXTEL to itself.

For the avoidance of doubt, in circumstances where the Access Seeker both enters into this Agreement in respect of part of the delivery of Subscription Television Services and installs or arranges for the installation of its own digital set top units in respect of other parts of the delivery of Subscription Television Services, then Clause 4.1(c)(iv) will not apply in respect of the Access Seeker's digital set top units.

4.2 Excluded Services

- (a) The Access Seeker acknowledges and agrees that the Digital Set Top Unit Services do not include the provision by FOXTEL of:
 - (i) Carriage Services up to the Network Termination Point (including LANs, WANs or any Carriage Services from, to and between all Interface Points);
 - (ii) interconnection or interfacing with any points other than Interface Points;
 - (iii) call centre services;
 - (iv) Subscriber management and related services (including billing);
 - (v) Electronic Program Guide services;
 - (vi) Interactive Services;
 - (vii) access to or use of Flash Memory but only to the extent that Flash Memory is used or intended to be used for operational purposes;
 - (viii) marketing;
 - (ix) magazine and program guide listings; or
 - (x) content creation payout or management.
- (b) FOXTEL does not have an obligation to change the specifications of any Digital Subscriber Equipment or otherwise modify or upgrade any Digital Subscriber Equipment in a Subscriber Premises, for the Access Seeker.
- (c) The Access Seeker acknowledges that the specification and configuration of the Digital Subscriber Equipment is at the sole discretion of FOXTEL and may be changed by FOXTEL from time to time.
- (d) If the Access Seeker wishes to obtain Electronic Program Guide services (*EPG Services*) from FOXTEL, then FOXTEL agrees to negotiate in good faith the supply by it of EPG Services to the Access Seeker including, without limitation, terms relating to price and content. A dispute in relation to the provision of EPG Services will be a Dispute for the purposes of Clause 25.

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4.3 Conditions precedent to Supply

- (a) FOXTEL has no obligation to supply the Digital Set Top Unit Services to the Access Seeker or make the Digital Set Top Unit Services available for acquisition by the Access Seeker unless and until all of the following requirements have been satisfied:
 - (i) any Required Network Enhancements have been completed (and the Access Seeker acknowledges that such completion depends upon the timely and proper performance by third parties of their obligations to FOXTEL) and the Access Seeker has paid FOXTEL the full amount of the Enhancement Charges for the Required Network Enhancement in accordance with Clause 7;
 - (ii) the Access Seeker's broadcast signal comprising the Access Seeker's digital Subscription Television Service and Related Services complies with the relevant Interface Specifications at each of the Interface Points (including the Network Termination Point), following 5 Business Days of technical testing by FOXTEL;
 - (iii) the Digital Subscriber Equipment to which the Digital Set Top Unit Services are to be supplied is actually in use by a Subscriber for reception of FOXTEL's Commercial retail digital cable Subscription Television Service; and
 - (iv) the Access Seeker has met all of the operational requirements specified in the Operational Procedures and provided FOXTEL with all information necessary to enable FOXTEL to provide the Digital Set Top Unit Services.
- (b) FOXTEL will notify the Access Seeker in writing once all of the requirements in Clause 4.3(a) have been satisfied and the Digital Set Top Unit Services are available for acquisition by the Access Seeker (the **Service Date**).
- (c) The Access Seeker will pay charges in relation to any technical testing undertaken by FOXTEL in accordance with Clause 4.3(a)(ii), at the standard rates advised in writing by FOXTEL from time to time, in accordance with the payment terms in Clause 13.2.
- (d) The Access Seeker must, at its cost, provide such assistance and information as FOXTEL requests to procure the satisfaction of the conditions precedent to supply in Clause 4.3(a)(i).
- (e) The Access Seeker will use its reasonable endeavours to ensure that any enhancements and extensions that are required by Telstra, to enable Telstra's digital service to be supplied to the Access Seeker, are completed as soon as possible. Upon completion of such enhancements and extensions, the Access Seeker will promptly notify FOXTEL of completion. The Access Seeker acknowledges that completion of such enhancements and extensions is required to enable the Access Seeker's broadcast signal comprising the Access Seeker's digital subscription television service to comply with the Interface Specifications at the Network Termination Point (NTP Interface Point).

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4.4 Changes to Digital Set Top Unit Services

- (a) The Access Seeker acknowledges that the Digital Set Top Unit Services, and the terms and conditions on which they are provided, may be subject to disruption or require variation (other than Schedule 3):
 - (i) during the initial 12 months after the Service Date due to technical and related problems;
 - (ii) due to technological changes;
 - (iii) if there is a change in market practice; or
 - (iv) otherwise where FOXTEL wishes to vary the services it provides to its Subscribers using the Digital Subscriber Equipment.
- (b) FOXTEL may, at any time, vary, remove or replace (**Change**) the Digital Set Top Unit Services and any provision in this Agreement (other than Schedule 3):
 - (i) with immediate effect and without giving the Access Seeker notice if required to remedy a Fault or in an Emergency;
 - (ii) by giving the Access Seeker not less than 1 months notice of the Change if due to the reasons set out in Clause 4.4(a); or
 - (iii) by giving the Access Seeker not less than 3 months notice of the Change in all other cases.
- (c) If , within 5 Business Days of the date of a notice from FOXTEL under Clause 4.4(b)(ii) or 4.4(b)(iii), the Access Seeker has notified FOXTEL in writing of its concerns in relation to the proposed Change, then FOXTEL will use its reasonable endeavours to take into account any reasonable material technical concerns so notified by the Access Seeker, when considering how it will implement the proposed Change.
- (d) Notwithstanding the foregoing, FOXTEL may implement any Change in any manner it deems appropriate.
- (e) Where the implementation of any Change necessitates an amendment to this Agreement (other than Schedule 3), then this Agreement will be amended accordingly and Clause 28.2 will not apply.
- (f) If a Change is necessitated or caused by the act or omission of the Access Seeker then the Access Seeker shall reimburse FOXTEL, on demand, for all costs incurred by FOXTEL in the implementation of that Change, in accordance with the payment terms in Clause 13.2.

4.5 Use of Interface Points

- (a) The Access Seeker must comply with the Interface Specifications and the Operational Procedures when using each of the Interface Points.
- (b) The Access Seeker must interconnect with each of the Interface Points.

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4.6 MDU / MRE Installations

- (a) The Access Seeker acknowledges and agrees that it is responsible for obtaining, at its cost, any consents or approvals required from any third party (including any Governmental Agency) to use any MDU/MRE Installations and any other equipment which is not Digital Subscriber Equipment, where such use is necessary to acquire the Digital Set Top Unit Services.
- (b) The Access Seeker must provide to FOXTEL, at its cost and on demand, such proof of the Access Seeker's compliance with Clause 4.6(a) as FOXTEL may require.
- (c) The Access Seeker indemnifies each member of the FOXTEL Group for any loss suffered by a third party or charges or penalties imposed by a third party (including a Governmental Agency) as a result of the Access Seeker's access to or use of the MDU/MRE Installations and any other equipment which is not Digital Subscriber Equipment.

4.7 Co-operation

- (a) Subject to Clause 4.7(b), each party must:
 - (i) promptly supply to the other such information and assistance as the other may reasonably request to enable it to perform its obligations under this Agreement; and
 - (ii) ensure that the information provided to the other party in accordance or in connection with this Agreement is correct to the best of its knowledge at the time that information is provided.
- (b) If the Access Seeker requests or requires information or assistance from FOXTEL in implementing this Agreement, FOXTEL will use its reasonable endeavours to provide that information or assistance (provided that the Access Seeker's request is reasonable, any confidentiality requirements are complied with, any information is limited to relevant access interface documents and otherwise that any information or assistance is ancillary to the provision of the Digital Set Top Unit Services). The Access Seeker must pay FOXTEL's reasonable costs of providing such information or assistance, in accordance with the payment terms in Clause 13.2.
- (c) FOXTEL will not engage in conduct for the purpose of preventing or hindering access by an Access Seeker to the Digital Set Top Unit Services. For the purposes of this clause, the term 'purpose' is to be interpreted in accordance with section 4F of the *Trade Practices Act 1974*.

4.8 Acknowledgements

The Access Seeker acknowledges and agrees that:

- (a) Digital Set Top Units can only unscramble signals when permitted by the Conditional Access Services and FOXTEL Equipment together with a Smartcard (in the manner and to the extent that the Subscriber to the Access Seeker's digital

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Subscription Television Service is entitled to receive such signals under this Agreement);

- (b) FOXTEL relies upon third parties for installation, maintenance and connection services for the Digital Subscriber Equipment and other FOXTEL equipment;
- (c) FOXTEL has no liability to the Access Seeker in relation to interference to the Access Seeker's signal caused by matters unrelated to the Digital Subscriber Equipment and other FOXTEL equipment;
- (d) FOXTEL may monitor and intercept the Access Seeker's Subscription Television Service and Related Services at the Interface Points and the Network Termination Point to verify compliance by the Access Seeker with this Agreement and for such other purposes associated with this Agreement as FOXTEL considers necessary (including, for example, for quality assurance purposes), provided that such interception or monitoring does not modify the content of the Access Seeker's services;
- (e) the Access Seeker is responsible for the provision of the Access Seeker's digital Subscription Television Services and Related Services; and
- (f) the Access Seeker is solely responsible, at its cost, for:
 - (i) its own service backup (including redundancy capabilities) sufficient to maintain the Access Seeker's digital Subscription Television Services and Related Services; and
 - (ii) the results and consequences of its supply to Subscribers of the Access Seeker's digital Subscription Television Services and Related Services.

5. Supply of Transitional Digital Set Top Unit Services

- (a) This Clause 5 only applies if under an Analogue Access Agreement, FOXTEL has agreed to provide and the Access Seeker has agreed to acquire, the Transitional Digital Set Top Unit Services.
- (b) During the Transitional Period, FOXTEL agrees to supply to the Access Seeker and the Access Seeker agrees to acquire from FOXTEL on the terms and conditions of this Agreement (in particular this Clause 5), the Transitional Digital Set Top Unit Services in respect of the Access Seeker's digital Subscription Television Services.
- (c) The Access Seeker agrees that FOXTEL has no obligation to provide enhancements or additions to the Access Seeker's digital Subscription Television Service, including any Related Services, as part of the Transitional Digital Set Top Unit Services.
- (d) FOXTEL will, as part of the Transitional Digital Set Top Unit Services, provide the Access Seeker with sufficient Transitional Digital Set Top Unit Services so that the Access Seeker can provide the same digital Subscription Television Service as those being provided by the Access Seeker to Subscribers to the Access Seeker's

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analogue Subscription Television Service at the date on which the Access Seeker provided to FOXTEL a notice under Clause 5 of the Analogue Access Agreement.

- (e) The Access Seeker must, if requested by FOXTEL, allow its digital Subscription Television Service to be included in any trial or test by FOXTEL or any third party of the provision of Digital Set Top Unit Services and must, at its cost, co-operate with FOXTEL or the third party in any such trial or test.
- (f) The Access Seeker acknowledges and agrees that:
 - (i) FOXTEL may transition its Analogue Subscribers to Digital Set Top Units at any time, without liability to the Access Seeker or any third party, regardless of whether the Access Seeker is ready to provide digital Subscription Television Services and Related Services;
 - (ii) at all times during the Transitional Period references to the “Digital Set Top Unit Service” whenever appearing in this Agreement will be deemed to be references to “Transitional Digital Set Top Unit Services”;
 - (iii) at all times during the Transitional Period references to “digital Subscription Television Services and Related Services” will be deemed to be references to “digital Subscription Television Services”; and
 - (iv) upon expiry of the Transitional Period, this Clause 5 will cease to apply and FOXTEL will not be obliged to provide Transitional Digital Set Top Unit Services.

6. Maintenance, Faults

6.1 Maintenance and Planned Outages

- (a) Each party must comply with any maintenance procedure specified in FOXTEL’s Operational Procedures.
- (b) The Access Seeker agrees that FOXTEL may from time to time cease to supply all or any part of the Digital Set Top Unit Services if required to perform planned maintenance work.
- (c) FOXTEL must use reasonable endeavours in the circumstances to:
 - (i) minimise the duration of any planned maintenance work; and
 - (ii) undertake planned maintenance work between the hours of 2am and 6am (Sydney time) or such other hours as may be agreed by the parties.
- (d) Subject to Clause 6.1(e) FOXTEL will use reasonable endeavours to provide the Access Seeker with reasonable notice of any proposed planned maintenance work affecting the supply of Digital Set Top Unit Services.
- (e) For the avoidance of doubt, Clauses 6.1(b) and (c) do not apply to unplanned work associated with a Fault or Emergency which may require or result in FOXTEL ceasing to supply all or any part of the Digital Set Top Unit Services without advance notice.

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- (f) Clauses 6.1(b) and (c) do not apply, and no prior notice is required, where less than 100 Subscribers will be affected by the outage, or where the duration of an outage is, or is expected to be, less than 60 seconds per digital Subscription Television Service.

6.2 Emergency

The parties will comply with the Fault Management and Reporting procedures in Clause 6.3 except in the event of an Emergency in which case the parties will endeavour to comply with Clause 6.3 to the extent reasonably practicable.

6.3 Fault Management and Reporting

- (a) The Access Seeker must comply with its obligations in Schedule 1, including reporting any Faults in accordance with the Fault reporting procedures set out in Schedule 2.
- (b) FOXTEL will respond to Faults duly reported by the Access Seeker in accordance with the procedure set out in Schedule 2.
- (c) FOXTEL agrees that it will operate and maintain the Digital Subscriber Equipment, and remedy any Faults, deficiencies or failures in the Digital Subscriber Equipment in accordance with FOXTEL's fault rectification procedures from time to time.
- (d) To the extent that any services or equipment owned, operated, maintained or supplied by the Access Seeker do not operate correctly or are otherwise faulty or defective, the Access Seeker is solely responsible, at its own expense, for conducting a thorough diagnosis to isolate the source, nature or cause of any fault reported by Subscribers to the Access Seeker's digital Subscription Television Services and Related Services.
- (e) The Access Seeker is responsible for the management and correction of Access Seeker Faults. The Access Seeker must promptly remedy all Access Seeker Faults. If the Access Seeker fails to remedy an Access Seeker Fault within a reasonable period of time, and that Access Seeker Fault is, or is likely (in the opinion of FOXTEL, acting reasonably) to impact on the provision of the Digital Set Top Unit Services or use of the Digital Subscriber Equipment by Subscribers, then FOXTEL may remedy the Access Seeker Fault. The Access Seeker will pay FOXTEL the charges set out in paragraph 6 of Schedule 2 for any activities undertaken by FOXTEL in connection with this Clause 6.3(e), in accordance with the payment terms in Clause 13.2.
- (f) The Access Seeker must ensure that each Subscriber that acquires the Access Seeker's digital Subscription Television Services and Related Services notifies any Access Seeker Faults, including faults related to the Access Seeker's digital Subscription Television Services and Related Services, to the Access Seeker and not to FOXTEL. The Access Seeker acknowledges that FOXTEL will inform any Subscriber to the Access Seeker's digital Subscription Television Services and Related Services who contacts it to contact the Access Seeker, including in relation to any complaints they have in relation to the Access Seeker's digital Subscription

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Television Services and Related Services. The Access Seeker must pay FOXTEL the charges set out in paragraph 6 of Schedule 2 for any activities undertaken by FOXTEL in connection with this Clause 6.3(f), in accordance with the payment terms in Clause 13.2.

7. Required Network Enhancements

- (a) As soon as reasonably practicable, FOXTEL will notify the Access Seeker of any Required Network Enhancements and related works and FOXTEL's reasonably anticipated Enhancement Charges in respect of such works.
- (b) The Access Seeker acknowledges and agrees that it may be required to pay amounts for Required Network Enhancements and related works that are shared with other access seekers who acquire similar services from FOXTEL and, where such sharing occurs:
 - (i) the Access Seeker must fully cooperate, in good faith, with FOXTEL and such other access seekers in relation to such shared Required Network Enhancements and related works;
 - (ii) FOXTEL will pro rate the costs of such shared Required Network Enhancements and related works between the Access Seeker and such other access seekers (**Users**) on the basis of:
 - (A) the costs of such shared Required Network Enhancements and related works being treated as Attributable Costs and shared among all Users at that time in the same manner as set out in Schedule 3; or
 - (B) 20% of the actual costs of such shared Required Network Enhancements and related works,whichever is the lesser amount, and FOXTEL's decision on such pro rating will be final and binding in the absence of manifest error;
 - (iii) FOXTEL may commence ordering such shared Required Network Enhancements and related works before entry into this Agreement;
 - (iv) the Access Seeker will still be required to pay FOXTEL a contribution to the cost of shared Required Network Enhancements and related works even though such Required Network Enhancements and related works may have already been ordered or installed prior to the Execution Date. The level of payment will be determined by pro rating in accordance with Clause 7(b)(ii) as if FOXTEL had not already recovered the relevant cost. FOXTEL may distribute that payment to other access seekers in the form of a part refund of Enhancement Charges actually paid by them to FOXTEL for the relevant Required Network Enhancements and related work. FOXTEL's decision on any such refund will be final and binding in the absence of manifest error.

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- (c) FOXTEL will commence ordering the Required Network Enhancements or any related works (to the extent that FOXTEL has not already done so) as soon as the Access Seeker has paid FOXTEL the full amount, without dispute, of FOXTEL's reasonably anticipated Enhancement Charges.
- (d) The Access Seeker acknowledges that:
 - (i) FOXTEL must rely on third parties for the supply of Required Network Enhancements and related works;
 - (ii) there may be delays in the supply of Required Network Enhancements and related works (including delays relating to shared Required Network Enhancements);
 - (iii) FOXTEL is not responsible for any delay in the supply of Required Network Enhancements and related works; and
 - (iv) once installed, any Required Network Enhancements become the property of FOXTEL or its nominee.
- (e) Subject to paragraphs (c) and (d), FOXTEL will install or arrange for the installation of the Required Network Enhancements (to the extent that FOXTEL has not already done so) as soon as practicable after FOXTEL's receipt of FOXTEL's reasonably anticipated Enhancement Charges for the Required Network Enhancements and related works. For the avoidance of doubt, any such installation work will be limited to the necessary works required only for the supply of the Digital Set Top Unit Services.
- (f) Upon completion of the installation of the Required Network Enhancements, the Access Seeker shall pay FOXTEL, on demand, any subsequent payment comprising any difference between the Enhancement Charges paid by the Access Seeker under Clause 7(c) and the aggregate of the costs, charges and expenses (including labour, licensing and material costs) that FOXTEL actually incurred in acquiring, installing and undertaking the Required Network Enhancements and related works. If, upon completion of the installation of the Required Network Enhancements FOXTEL's, the Enhancement Charges paid by the Access Seeker under Clause 7(c) are in excess of the aggregate of the costs, charges and expenses (including labour, licensing and material costs) that FOXTEL actually incurred in acquiring, installing and undertaking the Required Network Enhancement Charges and related works, FOXTEL will repay the Access Seeker the amount over-charged.
- (g) The Access Seeker will pay monthly charges in relation to the operation and maintenance of the Required Network Enhancements, at the standard rates advised in writing by FOXTEL from time to time, in accordance with the payment terms in Clause 13.2.
- (h) If, at any time during the Term, the implementation of:
 - (i) any Change under Clause 4.4; or
 - (ii) any Modification under Clause 9.2,

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necessitates additional Required Network Enhancements or the variation, removal or replacement of any existing Required Network Enhancements (**Change to Required Network Enhancements**), and the Change to Required Network Enhancements is not required due to a Fault or an Emergency, then FOXTEL will give the Access Seeker reasonable prior notice of the proposed Change to Required Network Enhancements.

- (i) If, within 5 Business Days of the date of a notice from FOXTEL under Clause 7(h) the Access Seeker has notified FOXTEL in writing of its concerns in relation to the proposed Change to Required Network Enhancements, then FOXTEL will use reasonable endeavours to take into account any reasonable material, technical concerns so notified by the Access Seeker, when considering how it will implement the proposed Change to Required Network Enhancements. Notwithstanding the foregoing, FOXTEL may implement any Change to Required Network Enhancements in any manner it deems appropriate and undertake the ordering, provisioning and installing of any Required Network Enhancements. The Access Seeker must pay FOXTEL, in accordance with the payment terms in Clause 13.2, for the costs, charges and expenses incurred by FOXTEL relating to any Change to Required Network Enhancements.

8. Numbering of Access Seeker's Subscription Television Services

The Access Seeker agrees and acknowledges that:

- (a) the numbering of the Access Seeker's digital Subscription Television Services and Related Services on any Digital Set Top Unit (**numbers**) will be at FOXTEL's sole and absolute discretion;
- (b) subject to Clause 8(e), FOXTEL will endeavour, to the extent it is reasonably practicable, to ensure that the numbers are contiguous, although this will be dependent on a first come, first served basis;
- (c) the numbers of the Access Seeker's digital Subscription Television Services and Related Services on any Digital Set Top Unit will be allocated within FOXTEL's Bouquet as determined by FOXTEL in its absolute discretion;
- (d) the numbers are virtual and are completely different to the allocation used in analogue;
- (e) no reservation of numbers will be allowed and numbers may not be contiguously assigned; and
- (f) FOXTEL may change the numbers at any time on 20 Business Days written notice to the Access Seeker, provided that FOXTEL does not implement a change to the numbers which will prejudice the Access Seeker to a greater extent than any other access seeker of digital Subscription Television Services.

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9. FOXTEL Equipment

9.1 Access Seeker acknowledgements

The Access Seeker acknowledges and agrees that:

- (a) FOXTEL is unable to guarantee that the FOXTEL Equipment will be fault-free or that the Digital Set Top Unit Services will be provided uninterrupted or error free at all times or that the Access Seeker will be able to use the Digital Set Top Unit Services if there is an interruption to the Carriage Services being supplied by a Carriage Service Provider;
- (b) the Digital Subscriber Equipment is owned by and/or leased to FOXTEL and remains the property of FOXTEL or the third party lessor, as the case may be;
- (c) other than as expressly provided for in this Agreement, the Access Seeker obtains no rights in or to the FOXTEL Equipment;
- (d) nothing in this Agreement limits FOXTEL's rights at Law or under an agreement with its Subscribers to demand that the Subscriber return the Digital Subscriber Equipment, to remove any Digital Subscriber Equipment from Subscriber Premises or otherwise to deal with the Digital Subscriber Equipment, including upon that Subscriber ceasing to subscribe to FOXTEL's digital Subscription Television Service;
- (e) FOXTEL will have no liability to the Access Seeker if FOXTEL exercises the rights referred to in Clause 9.1(d);
- (f) Subscribers to the Access Seeker's digital Subscription Television Service and Related Services must only use the FOXTEL supplied remote control in relation to the Digital Set Top Units and Digital Set Top Unit Services;
- (g) the Access Seeker must not provide Subscribers with any other remote control in connection with its digital Subscription Television Service and Related Services;
- (h) the Access Seeker must not allow Subscribers to use or connect any device to the Digital Subscriber Equipment;
- (i) the Access Seeker must use the Digital Subscriber Equipment only in the manner contemplated by this Agreement; and
- (j) the Access Seeker must not use or allow the use by Subscribers to the Access Seeker's digital Subscription Television Services and Related Services of the Digital Subscriber Equipment in a manner which is or may be prejudicial to any rights or interests which a third party lessor of the Digital Subscriber Equipment may have to or in respect of the Digital Subscriber Equipment.

9.2 Modifications

- (a) Subject to Clause 9.2(b), FOXTEL may, at any time,
 - (i) modify, vary, relocate, remove or replace the technology and/or functionality underlying any part or parts of the FOXTEL Equipment (including the Digital Subscriber Equipment or the Interface Points); or

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(ii) modify, vary, remove or replace any part or parts of:

- (A) the Interface Specifications; or
- (B) the Operational Procedures,

in each case a **Modification**.

- (b) To the extent that a Modification is likely, in the opinion of FOXTEL acting reasonably, to:
 - (i) have a material adverse impact on the functionality or performance of the Digital Set Top Unit Services supplied to the Access Seeker; or
 - (ii) result in additional costs to the Access Seeker under this Agreement,and the Modification is not required due to a Fault or an Emergency, then FOXTEL will give the Access Seeker reasonable prior notice of the proposed Modification.
- (c) If, within 5 Business Days of the date of a notice from FOXTEL under Clause 9.2(b), the Access Seeker has notified FOXTEL in writing of its concerns in relation to the proposed Modification, then FOXTEL will use reasonable endeavours to take into account any reasonable material technical concerns so notified by the Access Seeker, when considering how it will implement the proposed Modification.
- (d) Notwithstanding the foregoing, FOXTEL may implement any Modification in any manner it deems appropriate.
- (e) Where the implementation of any Modification necessitates an amendment to this Agreement (other than Schedule 3), then this Agreement will be amended accordingly and Clause 28.2 will not apply.
- (f) If a Modification is necessitated or caused by the act or omission of the Access Seeker then the Access Seeker shall reimburse FOXTEL, on demand, for all costs incurred by FOXTEL in the implementation of that Modification, in accordance with the payment terms in Clause 13.2.
- (g) Nothing in this Agreement may be construed as preventing FOXTEL from using, modifying or substituting such of its equipment for other equipment to provide the Digital Set Top Unit Services.

9.3 Non-interference

- (a) The Access Seeker must not, and must ensure that its People and its Subscribers do not, remove, repair, maintain, interfere with or make connections or disconnections to any Digital Subscriber Equipment or components thereof including Smartcards.
- (b) The Access Seeker must ensure that its provision of its digital Subscription Television Services and Related Services to Subscribers does not damage, interfere with or cause any deterioration in the operation of the Digital Subscriber Equipment or the provision by FOXTEL of Subscription Television Services to its Subscribers.

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9.4 Network Integrity

- (a) The Access Seeker must, at the Access Seeker's cost, comply with all signal fraud and theft countermeasures (including any security measures which are reasonably necessary to safeguard the FOXTEL Equipment and prevent use of the FOXTEL Equipment by any unauthorised person), as required by FOXTEL from time to time.
- (b) FOXTEL may decline to continue to provide the Digital Set Top Unit Services to the Access Seeker if it has reasonable grounds to believe that the Access Seeker has failed, or is likely to fail, to:
 - (i) comply with all signal fraud and theft countermeasures as required by FOXTEL from time to time; or
 - (ii) protect network integrity or the safety of individuals (including as required by Clause 9.3).
- (c) FOXTEL may, at any time, disable or replace any Smartcard (without liability to the Access Seeker or any third party) where it is necessary to prevent signal fraud and theft or to protect the security of the FOXTEL Equipment. If such action is required due to the Access Seeker's breach of Clause 9.4(a), then the Access Seeker shall reimburse FOXTEL for all costs and expenses incurred by FOXTEL in undertaking such action, in accordance with the payment terms in Clause 13.2.

9.5 Limitation

- (a) FOXTEL must not remove any Digital Subscriber Equipment from Subscriber Premises by reason solely of the fact that the Subscriber is receiving digital Subscription Television Services from the Access Seeker.
- (b) FOXTEL must give to the Access Seeker such notice as is reasonably practicable having regard to FOXTEL's usual business practices of FOXTEL's intention to remove a Digital Set Top Unit from a Subscriber Premises.

10. Access Seeker Equipment

- (a) The Access Seeker is solely responsible, at its own cost, for selecting, supplying and maintaining the Access Seeker Equipment in compliance with this Agreement.
- (b) The Access Seeker must, at its own cost:
 - (i) ensure that any:
 - (A) Access Seeker Equipment connected directly or indirectly to the FOXTEL Equipment (to the extent permitted under this Agreement);
 - (B) signal delivered to the FOXTEL Equipment by the Access Seeker; and
 - (C) interface between the Access Seeker Equipment and the FOXTEL Equipment,complies at all times with this Agreement;

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- (ii) upon reasonable notice by FOXTEL, permit FOXTEL (acting reasonably) to inspect any Access Seeker Equipment, and the Access Seeker must co-operate with FOXTEL in good faith in relation to any technical tests conducted by FOXTEL on the Access Seeker Equipment to ensure that it complies, at all times, with this Agreement.
- (c) In addition to any other remedy available to FOXTEL, if the Access Seeker Equipment connected directly or indirectly to the FOXTEL Equipment (as permitted under this Agreement) does not comply with this Agreement, FOXTEL may immediately and without notice disconnect such equipment from the relevant FOXTEL Equipment and the Access Seeker will be liable for FOXTEL's costs of effecting such disconnection. Any reconnection may only be made once compliance with this Agreement is achieved and shall be the Access Seeker's sole responsibility and at the Access Seeker's sole expense.
- (d) The Access Seeker is responsible for the safe operation of the Access Seeker Equipment and must take all reasonable and necessary steps to ensure that the Access Seeker Equipment and the implementation of this Agreement:
 - (i) does not endanger the safety or health of the People or customers of FOXTEL or any other person; and
 - (ii) does not damage, interfere or cause any deterioration in the operation of the FOXTEL Equipment (including the Digital Subscriber Equipment).
- (e) The Access Seeker must comply with the Operational Procedures.

11. Access to premises

For the avoidance of doubt, this Agreement does not:

- (a) grant a party any rights to access premises which are owned or operated by, or under the control of, the other party; or
- (b) oblige a party to make available to the other party any premises which are owned or operated by it or under its control.

12. Subscribers

12.1 Subscribers which acquire the Access Seeker's Subscription Television Services

- (a) The Access Seeker is solely responsible, at its cost, for:
 - (i) the acquisition, activation and customer management of the Access Seeker's Subscribers via a subscriber management system or equivalent system provided by the Access Seeker;
 - (ii) billing Subscribers which acquire the Access Seeker's digital Subscription Television Services and Related Services and any credit risks associated with Subscribers which acquire the Access Seeker's digital Subscription Television Services and Related Services;

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- (iii) Carriage Services and Content Services it supplies to Subscribers;
 - (iv) compression, multiplex, wide area networks, installation and consultancy services it supplies to Subscribers; and
 - (v) handling all other arrangements with Subscribers in relation to the Access Seeker's digital Subscription Television Services and Related Services, including inquiries or complaints regarding the digital Subscription Television Services and Related Services it provides to Subscribers and consents, approvals or agreements necessary for FOXTEL to have access to the Subscriber Premises to do all acts in relation to the installation, maintenance, use or removal of any equipment in connection with the supply or cessation of supply of Digital Set Top Unit Services.
- (b) The Access Seeker must ensure that Subscribers which acquire the Access Seeker's digital Subscription Television Service and Related Services use the Digital Set Top Unit Services solely for their own use and do not engage in any form of resupply of the Digital Set Top Unit Services.

12.2 Non-payment by Subscribers which acquire the Access Seeker's Subscription Television Services

The Access Seeker acknowledges and agrees that the Access Seeker is liable to FOXTEL in respect of the relevant Access Charges for Digital Set Top Unit Services provided to it by FOXTEL notwithstanding any failure by a Subscriber to pay it in respect of the provision of a Subscription Television Service, Related Service, Carriage Service, Content Service or other services by the Access Seeker.

12.3 Subscriber communications

- (a) If the Access Seeker is required to communicate with a Subscriber in relation to a Fault, the need for maintenance of any Digital Subscriber Equipment or the suspension of the Digital Set Top Unit Services, it must ensure that any such communications are consistent with information provided by FOXTEL in relation to the subject matter of the communication.
- (b) Except for communications under Clause 12.3(a), the Access Seeker must not, when dealing with Subscribers, attribute to FOXTEL:
- (i) blame for fault or other circumstances;
 - (ii) the need for maintenance of any Digital Subscriber Equipment; or
 - (iii) the suspension (or partial suspension) of the Digital Set Top Unit Services, unless not doing so would require the Access Seeker to engage in unethical, misleading or deceptive conduct.

12.4 No affiliation

The Access Seeker must not represent expressly or by omission or implication that:

- (a) it is approved by, an agent of, or affiliated with any member of the FOXTEL Group;
- (b) it is FOXTEL or any member of the FOXTEL Group;

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- (c) it has a special relationship or special pricing arrangements with any member of the FOXTEL Group; or
- (d) the services provided by the Access Seeker to Subscribers are FOXTEL's or any member of the FOXTEL Group's services.

12.5 Subscriber contracts

The Access Seeker must ensure that each agreement with a Subscriber for the provision of a digital Subscription Television Service and Related Service by the Access Seeker contains the following provisions, which provisions cannot be varied or waived without the prior written consent of FOXTEL or other entities in the FOXTEL Group and which provisions must be enforced by the Access Seeker if required by FOXTEL or other entities in the FOXTEL Group:

- (a) consent, approval or agreement in favour of FOXTEL or other entities in the FOXTEL Group from each of:
 - (i) Subscribers; and
 - (ii) owners and occupiers of Subscriber Premises,for FOXTEL or other entities in the FOXTEL Group having access to the Subscriber Premises to do, and doing, all things and acts in relation to the installation, maintenance, use or removal by FOXTEL or other entities in the FOXTEL Group of any equipment in connection with the supply or cessation of supply of Digital Set Top Unit Services;
- (b) consent, in a form which complies with the Privacy Law, to the use and disclosure by FOXTEL and other entities in the FOXTEL Group of information relating to Subscribers to the Access Seeker's digital Subscription Television Services and Related Services necessary for both parties to perform this Agreement;
- (c) an acknowledgment that, although the Access Seeker's digital Subscription Television Service and Related Services are supplied via Digital Subscriber Equipment owned by, or leased to FOXTEL or other entities in the FOXTEL Group, the Access Seeker's digital Subscription Television Service and Related Services are not Content Services supplied by FOXTEL or other entities in the FOXTEL Group and that FOXTEL, other entities in the FOXTEL Group and their People will not be liable for any loss or damage suffered by Subscribers resulting from the Access Seeker's digital Subscription Television Service and Related Services;
- (d) a provision which states that the Subscriber must not damage, abuse, remove, repair, maintain, interfere with, or make connections or disconnections to any Digital Subscriber Equipment or related wiring, Digital Subscriber Equipment location, Digital Subscriber Equipment set up parameters or Set Top Unit channel number frequency parameters;
- (e) an indemnity in favour of the Access Seeker that is back to back with the indemnities given by the Access Seeker in favour of FOXTEL and other entities in the FOXTEL Group under this Agreement (to the extent that these relate to the Subscriber);

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- (f) unless otherwise directed by FOXTEL or other entities in the FOXTEL Group, provisions which state that:
 - (i) if any Digital Subscriber Equipment becomes defective at any time by reason of mistreatment, improper use or breach of the agreement between the Access Seeker and Subscriber, FOXTEL or other entities in the FOXTEL Group may arrange to repair or replace such defective Digital Subscriber Equipment;
 - (ii) in no circumstances will FOXTEL and other entities in the FOXTEL Group and their People be liable (in contract, tort or otherwise) for any loss (including Consequential Loss) or damage suffered or incurred by any Subscriber resulting directly or indirectly from strikes or labour disputes, a shortage of suitable parts or components, Subscriber's operation and use of any Digital Subscriber Equipment, any damage caused to Subscriber's equipment arising from the misuse of any Digital Subscriber Equipment, any burn-in suffered to Subscriber's television monitor, any failure to operate Subscriber's equipment in accordance with the owner's manuals, any damage caused directly or indirectly by weather or any other "acts of God" or any other cause beyond the reasonable control of FOXTEL or other entities in the FOXTEL Group and that for the purpose of this Clause only, FOXTEL and other entities in the FOXTEL Group will be deemed to be a party to the agreement between the Access Seeker and Subscriber with the Access Seeker entering into the agreement as an agent of FOXTEL and other entities in the FOXTEL Group for the purpose of this Clause;
 - (iii) to the maximum extent permitted by law, the liability of FOXTEL and other entities in the FOXTEL Group in connection with provision of the Digital Set Top Unit Services and Subscriber's use of any Digital Subscriber Equipment (including liability for negligence) is limited at the option of FOXTEL to:
 - (A) in the case of goods supplied by FOXTEL and other entities in the FOXTEL Group, the replacement or repair cost of the goods (whichever is the lesser); and
 - (B) in the case of services provided by FOXTEL and other entities in the FOXTEL Group, the cost of supplying the services again,
- (g) any other conditions which FOXTEL or other entities in the FOXTEL Group may reasonably require to be included by the Access Seeker in its agreements with Subscribers from time to time, provided that those conditions are also included in FOXTEL's or other entities in the FOXTEL Group's agreements with Subscribers.

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13. Payment

13.1 Payment for supply of Digital Set Top Unit Services

It is a condition of supply of the Digital Set Top Unit Services that the Access Seeker pay to FOXTEL the Access Charges and Other Payments (and any GST payable) in accordance with the provisions of this Clause 13.

13.2 Billing Procedure

- (a) On and from the Service Date (whether or not the Digital Set Top Unit Services are actually used by the Access Seeker in any month) and for the remainder of the Term, the Access Seeker must pay the Access Charges monthly in advance and Other Payments to FOXTEL, in accordance with this Agreement.
- (b) Within 10 Business Days before the Service Date and thereafter during the Term within 10 Business Days after the beginning of a month, FOXTEL will issue the Access Seeker with an invoice for the Access Charges due for the following month (which may include any adjustments to Access Charges required as a result of Clause 13.2(d) or an Audit) or, in the case of an invoice issued before the Service Date, the remainder of the month containing the Service Date and the following month (which may include any adjustments to Access Charges required as a result of Clause 13.2(d) or an Audit) and Other Payments (if any). The Access Seeker must pay all invoices within 10 Business Days of the date of the invoice.
- (c) The Access Seeker must, at least 15 Business Days before the Service Date and thereafter during the Term at least 20 Business Days before the end of each calendar quarter, deliver to FOXTEL a forecast of the revenue to be obtained by the Access Seeker from the supply of the Access Seeker's digital Subscription Television Services and Related Services to Subscribers during the following calendar quarter (or part thereof in respect of the calendar quarter containing the Service Date). If the Access Seeker fails to provide FOXTEL with a forecast of its revenue, then the Access Seeker's Rating will be deemed to be 5% for the purposes of calculating the Access Charges during that calendar quarter (or part thereof in respect of the calendar quarter containing the Service Date).
- (d) The Access Seeker must, within 5 Business Days after the end of each month during the Term, deliver to FOXTEL a written report, verified by the Access Seeker's Chief Financial Officer or other appropriate person, which includes the Access Seeker's actual revenue for that previous month (or part thereof in respect of the month containing the Service Date) which without limitation shall include:
 - (i) the amount of revenue invoiced to Subscribers in relation to the provision of digital Subscription Television Services and Related Services to Subscribers by the Access Seeker during that previous month;
 - (ii) the monthly Ratings for that previous month; and
 - (iii) such other information as FOXTEL may request by written notice to the Access Seeker that is necessary to verify the amount of Access Charges

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that should be payable by the Access Seeker for that previous month (or part thereof in respect of the month containing the Service Date).

The Access Seeker must pay to FOXTEL any additional payments in respect of Access Charges arising as a result of this Clause 13.2(d).

13.3 Other Payments

Other Payments will be either a pass through of payments made or payable by FOXTEL to third parties or, if they relate to work performed by FOXTEL, will be calculated on a time and materials basis not exceeding the then market rates (and may include a minimum time charge).

13.4 Invoices

Each invoice issued by FOXTEL must contain sufficient information to enable the Access Seeker to verify the Access Charges and Other Payments set out in the invoice and be in a form and substance that will satisfy the definition of a Tax Invoice.

13.5 Billing enquiries

- (a) If the Access Seeker requires any additional information regarding an invoice issued by FOXTEL, the Access Seeker must address its query to:

Chief Financial Officer
FOXTEL Management Pty Limited
Wharf 8
Pyrmont, Sydney, New South Wales
Phone: (02) 9200 1000
Fax: (02) 9200 1010

- (b) FOXTEL will respond to any billing enquiries from the Access Seeker which are addressed to the person noted in Clause 13.5(a) as soon as reasonably practicable.

13.6 Incorrect payment

- (a) If an invoice is found to have been rendered incorrectly after payment, any under payment will be promptly paid by the Access Seeker and any over payment will be promptly refunded by FOXTEL. If the parties are unable to agree on the amount of any such under or over payment, as the case be, the parties must follow the Dispute Resolution Procedure to determine the appropriate amount.
- (b) If a dispute arises in relation to an invoice that has already been paid, the Access Seeker must notify FOXTEL within 40 Business Days of the date of payment of the invoice. If the Access Seeker does not notify FOXTEL within the required period, it will be deemed to have accepted that the amount paid was correct.

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13.7 Dispute Resolution

If the Access Seeker reasonably disputes in good faith its obligation to pay part or all of an invoice submitted by FOXTEL under this Agreement, then the following provisions apply notwithstanding anything to the contrary in this Agreement:

- (a) the Access Seeker must notify FOXTEL within 10 Business Days of the date of the invoice of the amount on the invoice which it disputes being obliged to pay (the **Disputed Amount**) and the reasons why it considers it is not obliged to pay the Disputed Amount;
- (b) the Access Seeker must pay the entirety of the invoice to FOXTEL in accordance with this Agreement;
- (c) the parties must follow the Dispute Resolution Procedure to determine whether or how much of the Disputed Amount is payable to FOXTEL; and
- (d) upon the amount of the Disputed Amount which is payable by the Access Seeker being determined, any overpayment will be promptly refunded by FOXTEL and any underpayment will be promptly paid by the Access Seeker to FOXTEL.

13.8 Interest on late payments

The parties will pay, in respect of any underpayment or overpayment, interest on all money payable under this Agreement and unpaid at a rate equal to the Westpac Indicator Lending Rate from time to time or other equivalent rate nominated by FOXTEL from time to time plus 2% on a daily basis.

13.9 Retrospective charges

FOXTEL will be entitled to invoice the Access Seeker for Access Charges and Other Payments not previously invoiced or understated in a previous invoice, provided that the Access Charges and Other Payments to be retrospectively invoiced can be substantiated by FOXTEL to the Access Seeker and that:

- (a) in relation to Access Charges revealed following an Audit, these are invoiced within 20 Business Days of the date of completion of the relevant Audit; and
- (b) in relation to any Other Payments, these are invoiced within a reasonable period after such Other Payments are incurred or are payable by FOXTEL (or otherwise within such times as provided for in this Agreement).

13.10 Communication Charges

The Access Seeker must pay FOXTEL \$25.00 for each communication to FOXTEL's call centre (including email, faxes, letters, telephone calls) relating solely to the Access Seeker's digital Subscription Television Service and Related Services, in accordance with the payment terms in Clause 13.2.

13.11 Liability

- (a) The Access Seeker is obliged to pay the relevant Access Charges and Other Payments on and from the Service Date and for the remainder of the Term, regardless of whether or not:

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- (i) the Digital Set Top Unit Services are actually used by the Access Seeker; or
 - (ii) there is any interruption in the provision of the Digital Set Top Unit Services by FOXTEL.
- (b) The Access Seeker must reimburse FOXTEL for any costs or expenses incurred by FOXTEL in:
 - (i) suspending or terminating the Digital Set Top Unit Services as permitted by this Agreement;
 - (ii) reconnecting the Digital Set Top Unit Services after any such suspension or termination; and
 - (iii) investigating a fault which has been reported to FOXTEL which is not a FOXTEL Fault,such amounts being Other Payments which will be charged and calculated in accordance with Clause 13.3.
- (c) If there is any failure in the provision of Digital Set Top Unit Services by FOXTEL to the Access Seeker which:
 - (i) continues for more than 12 hours and occurs during the hours of 6 am and midnight; and
 - (ii) affects the provision of Digital Set Top Unit Services by FOXTEL to at least 25% of the Access Seeker's then current Subscribers who receive digital Subscription Television Services and Related Services from the Access Seeker under this Agreement; and
 - (iii) is due to a failure in the provision of CA Services by FOXTEL to the Access Seeker,("relevant failure") then, unless that relevant failure is due to Force Majeure, FOXTEL will reduce the Access Charges payable by the Access Seeker in the month following the relevant failure so as to credit any Access Charges paid or payable for the period of the relevant failure in the provision of Digital Set Top Unit Services by FOXTEL to the Access Seeker.

13.12 GST and CPI

The Access Charges and any Other Payments set out in this Agreement:

- (a) are exclusive of any applicable GST (unless otherwise expressly stated); and
- (b) the Other Payments may be increased on each anniversary of the Execution Date by an amount being the difference between the then latest CPI and the equivalent CPI published 12 months earlier, expressed as a percentage of the earlier CPI number.

13.13 Audit

- (a) The Access Seeker must establish and maintain accurate and up to date records of the actual revenues obtained by the Access Seeker from the supply of the Access

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Seeker's digital Subscription Television Service and Related Services to Subscribers.

- (b) Subject to Clause 13.13(h), once in each financial year during the Term (and in the event of termination or expiry of this Agreement, at any time within 6 months after the date of such termination or expiry), FOXTEL may, by giving at least 3 months notice, notify the Access Seeker that it wishes to undertake an audit of the actual revenues obtained by the Access Seeker from the supply of the Access Seeker's digital Subscription Television Services and Related Services to Subscribers (**Audit**) in the period since the Commencement Date (in the case of the first Audit) or since the last day of the last Audit period (in all other cases) (or in the event of termination or expiry of this Agreement, the period from the last day of the last Audit period to the date of such termination or expiry) (**Audit Period**).
- (c) Within 10 Business Days of receipt of such a notice, the Access Seeker must provide either FOXTEL or an independent third party auditor appointed by the Access Seeker (who must be briefed by FOXTEL as to the purpose of the Audit), with access to all necessary data, agreements, financial and operational records, computer records and other documentation relating to the supply of the Access Seeker's digital Subscription Television Services and Related Services to Subscribers during the relevant Audit Period, for the purpose of undertaking the Audit.
- (d) FOXTEL must keep any information obtained by it in the course of an Audit confidential in accordance with Clause 14.
- (e) The Access Seeker must cooperate in the performance of an Audit including by making appropriate People available to answer questions and otherwise providing reasonable assistance with and if required participating in the Audit.
- (f) If an Audit reveals that there is any difference between the actual Access Charges paid during the relevant Audit Period and the Access Charges which should have been payable during that same period, then the parties must make such payments as may be required having regard to the necessary adjustments resulting from the Audit, within 20 Business Days of the date of that Audit.
- (g) The Access Seeker must bear the full costs of an Audit in each financial year if it appoints an independent third party auditor to undertake the Audit. If FOXTEL undertakes an Audit itself, then each party will bear its own costs associated with undertaking such Audit(s) unless any such Audit discloses a material difference from the forecast revenues reported by the Access Seeker to FOXTEL which results in an increase in the Access Charges payable in the relevant Audit Period, in which case the Access Seeker must bear the full cost of the Audit.
- (h) If any Audit reveals a difference from the forecast revenues reported by the Access Seeker to FOXTEL which results in an increase in the Access Charges payable in that Audit period of 5% or more, then the Access Seeker acknowledges FOXTEL's right to undertake such number of additional Audits in any one financial year for the remainder of the Term, as FOXTEL may reasonably require, with the Access Seeker to bear the full costs of any such additional Audits.

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14. Confidential Information

14.1 Duty

- (a) Each party must hold the other party's Confidential Information in strict confidence and must not allow any persons to have unauthorised access to the other party's Confidential Information and must not disclose any of the other party's Confidential Information to any person, except:
 - (i) in accordance with Clause 14.3; or
 - (ii) on receiving the prior written consent of the other party.
- (b) Each party acknowledges that the obligations of confidence imposed on it, its employees, agents and contractors under this Agreement are in addition to any obligation of confidence imposed by statute.

14.2 Use of confidential information

A party must not make any use of the other party's Confidential Information or any part of it except for performing its obligations or exercising its rights under this Agreement and, without limitation, must not make any use of the other party's Confidential Information or any part of it to the competitive or business disadvantage of the other party.

14.3 Disclosure

- (a) A party may disclose the other party's Confidential Information to such of its employees, contractors and professional advisers who need to have access to the information in connection with that party exercising its duties under this Agreement including, in the case of FOXTEL, disclosure to its Shareholders and any person in the FOXTEL Group.
- (b) Each party must:
 - (i) ensure that any person to whom it discloses the other party's Confidential Information (including its employees and professional advisers) are aware of the confidential nature of the other party's Confidential Information; and
 - (ii) ensure that any person to whom it discloses the other party's Confidential Information holds the other party's Confidential Information in confidence on the terms of this Agreement.
- (c) Each party is liable to the other party for any breach of confidence by any person to whom it has disclosed the other party's Confidential Information.

14.4 Survival of obligation

The obligations and restrictions of confidentiality imposed on the parties under this Agreement survive termination of this Agreement for any reason whatsoever and only terminate with respect to a part of information when the condition in Clause 14.5 applies to that part.

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14.5 Exclusion

The provisions of Clauses 14.1 and 14.3 do not apply to the disclosure by a party of the minimum information necessary in order to comply with any applicable law or legally binding order of any Governmental Agency.

14.6 Notification prior to disclosure

Prior to any use or disclosure in reliance on Clause 14.5, a party must give notice to the other party with full details of the circumstances of the proposed use or disclosure and of the relevant information to be used or disclosed. Each party must give the other party a reasonable opportunity to:

- (a) challenge in a court of law or other appropriate body whether the proposed use or disclosure is in accordance with Clause 14.5;
- (b) minimise the amount of information which is disclosed; and
- (c) request that the information only be disclosed on confidential terms.

14.7 Destruction

- (a) On termination or expiration of this Agreement, each party must:
 - (i) supply to the other party:
 - (A) all documents, reports, notes, memoranda, computer media and other materials which:
 - (1) record, contain or relate in any way to the other party's Confidential Information (including all copies of them); and
 - (2) were provided by or on behalf of the other party or prepared or made by or for or on behalf of that party; and
 - (B) all property of the other party which is then in the other party's possession, custody or control;
 - (ii) delete entirely and permanently all of the other party's Confidential Information from every computer disk or electronic storage facility of any type owned or used by it; and
 - (iii) despite any other provision in this Agreement, cease to make use of the other party's Confidential Information or any part of it,and must confirm in writing promptly when it has complied with these obligations.
- (b) The provisions of Clauses 14.7(a)(ii) and 14.7(a)(iii) do not apply to:
 - (i) a part of the other party's Confidential Information after that part becomes generally available to the public free of charge other than because of a breach of confidence by a party or by any of its employees or professional advisers; and
 - (ii) to a part of the other party's Confidential Information after that part has been received by a party without restriction on use or disclosure by a third

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party legally entitled to possess such information and to provide it to that party.

14.8 Fraud and bad debt prevention

Notwithstanding the foregoing, to the extent permitted by law (including the Privacy Law) and in accordance with procedures established by those laws and any relevant guidelines or customer service standards, or as agreed between the parties, the parties will exchange information and otherwise co-operate in relation to:

- (a) the prevention and investigation of fraudulent use or misuse of the Digital Set Top Unit Services or the theft of equipment, including conditional-access customer equipment, provided by a party; and
- (b) the prevention and minimisation or incidents of telecommunications and network fraud and subscription television fraud and piracy.

14.9 Public announcements

A party must not, without the prior written consent of the other party, make media or other public statements relating specifically to the performance of and disputes under this Agreement. For the avoidance of doubt, each party may make general announcements concerning the existence of this Agreement and the provision of Digital Set Top Unit Services as a whole.

14.10 Databases

- (a) The parties acknowledge that when information required to be provided under this Agreement is held in a database, the Party entitled to receive the information will not be entitled to obtain direct access to the database. The precise method by which information is to be stored and made available will be determined by the Parties having regard to Privacy Law and the reasonable cost, convenience and security concerns of the Parties.
- (b) Any numbers or other identification of Smartcards which are stored in a database by the Access Seeker shall be the sole and exclusive property of FOXTEL. Such numbers or other identification are strictly confidential and shall not be used by the Access Seeker for any purpose other than to use the Digital Set Top Unit Services.

15. Privacy

15.1 Compliance

The Access Seeker must, in the course of receiving the benefit of the Digital Set Top Unit Services or otherwise in connection with its performance of this Agreement:

- (a) comply at all times with:
 - (i) the Privacy Law;
 - (ii) any privacy policy which has been adopted by FOXTEL; and

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- (iii) any direction of FOXTEL regarding how to comply with any such legislation or privacy policy, as the case may be, provided that such direction is consistent with FOXTEL's approach to its own internal privacy policies;
- (b) have procedures and systems reasonably acceptable to FOXTEL, including a privacy policy, to ensure that it complies with the standards and obligations of the Privacy Law;
- (c) only use or disclose Personal Information for the Purpose;
- (d) cooperate with FOXTEL in:
 - (i) the resolution of any complaint alleging a breach of the Privacy Law or a privacy policy; and
 - (ii) providing access to any record of Personal Information following a request from an individual,
- (e) allow FOXTEL an opportunity, on reasonable request, to review and audit the Access Seeker's information handling practices to ensure the Access Seeker is complying with its obligations under this Agreement; and
- (f) at FOXTEL's request, assist FOXTEL to discharge its obligations under the National Privacy Principles by providing notice which satisfies the requirements of National Privacy Principle 1.3 at the time of collecting the Personal Information.

15.2 Indemnity

The Access Seeker indemnifies each member of the FOXTEL Group against each claim, action, proceeding, judgment, damage, loss, cost, expense or liability brought, made or recovered against, or incurred or suffered by any member of the FOXTEL Group in connection with any breach by the Access Seeker of Clause 15.1.

16. Intellectual Property

16.1 General

- (a) The Access Seeker acknowledges that this Agreement does not grant it any licence, title, interest or other right in relation to FOXTEL's Intellectual Property Rights or the Intellectual Property Rights of any third party.
- (b) FOXTEL acknowledges that this Agreement does not grant it any licence, title, interest or other right in relation to the Access Seeker's Intellectual Property Rights except to the extent necessary to enable FOXTEL to perform its obligations under this Agreement.
- (c) For the purposes of definition only, a reference to FOXTEL's Intellectual Property Rights includes the Intellectual Property Rights of FOXTEL and its Related Bodies Corporate and of Twentieth Century Fox Film Corporation.
- (d) A reference to the Access Seeker's Intellectual Property Rights includes the Intellectual Property Rights of the Access Seeker's Related Bodies Corporate.

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16.2 Infringement

Except to the extent permitted by this Agreement, neither party may use, reproduce, adapt or modify in any advertisement, marketing materials, other publicity materials or otherwise, the other party's Intellectual Property Rights without the other party's prior written consent. Neither party will unreasonably withhold its consent where the other party proposes to do no more than make a factual statement to the effect that a FOXTEL subscriber can now receive the Access Seeker's service or that the Access Seeker's Service is now available on the Digital Set Top Unit.

16.3 Notification

Each party must promptly notify the other party if it becomes aware of any infringement or threatened or potential infringement of any of the other party's Intellectual Property Rights (including in relation to the provision of the Digital Set Top Unit Services under this Agreement). Such notice must identify (if possible) the infringer and the infringement or threatened or potential infringement, as the case may be.

16.4 Protection

Each party may take such steps and proceedings as it considers necessary or desirable to protect its Intellectual Property Rights, and the rights of any third party to which services are supplied using the intellectual property to which the Intellectual Property Rights relate, and the other party must render all reasonable assistance, at the expense of the first party, in connection with those steps or proceedings if requested in writing by that party, to do so.

16.5 Branding

- (a) Except to the extent permitted by this Agreement, neither party may remove the other party's name, logos, distinctive colours, get up, trade marks or other Intellectual Property Rights from anything without the other party's prior written consent.
- (b) The Access Seeker must not brand or hold out the Digital Set Top Unit Services, any Digital Subscriber Equipment, remote controls, Smartcards, magazines or manuals or other FOXTEL provided services or equipment as being the property of or otherwise connected with the Access Seeker (including by way of affixing anything to any Digital Subscriber Equipment) without FOXTEL's prior written consent. For the avoidance of doubt, the Access Seeker must not affix its logo, brand, name, distinctive colours, get up or trade marks on any Digital Subscriber Equipment or other FOXTEL equipment.
- (c) The Access Seeker must not name or otherwise identify any Access Seeker's digital Subscription Television Service and Related Services in a manner that could be confused with a FOXTEL Subscription Television Service or misrepresent a connection or association between any of the Access Seeker's digital Subscription Television Services and any of FOXTEL's Subscription Television Services or FOXTEL.

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17. Regulatory issues

17.1 Intervening Legislation

- (a) If, in a party's reasonable opinion, its rights or obligations under this Agreement are or may be affected by Intervening Legislation, the parties will (without prejudice to any other rights) meet as soon as practicable and negotiate in good faith such amendments to this Agreement to the extent necessary to address the first mentioned party's concerns regarding the Intervening Legislation.
- (b) Notwithstanding any other provision of this Agreement a party may in its absolute discretion:
 - (i) suspend all or part of the performance of its obligations (other than those under Clauses 13, 17.1(a) and this Clause 17.1(b)) under this Agreement with effect from such date as it may determine and notify the other party of such suspension as soon as reasonably practicable after such suspension; and/or
 - (ii) by giving notice to the other party, unilaterally amend this Agreement (including, in the case of FOXTEL, terminating the provision by it of the Digital Set Top Unit Services or any part of the Digital Set Top Unit Services),

to the extent necessary to comply with Intervening Legislation.
- (c) If, within a reasonable period after the exercise by a party of its rights under Clause 17.1(b), the other party does not agree with that exercise of such rights, the other party may:
 - (i) notify a Dispute which will be resolved in accordance with the Dispute Resolution Procedure; or
 - (ii) terminate the provision to it of any part of the Digital Set Top Unit Services, the supply of which has been or will be affected by the suspension or amendment under Clause 17.1(b) by the giving of not less than 10 Business Days notice.

17.2 Further Legislation

Any present or future Law or other binding requirement which varies a right, power or remedy of a person in connection with this Agreement is excluded to the extent lawfully permitted.

17.3 Supply of Digital Set Top Unit Services

If FOXTEL is:

- (a) no longer providing to itself; or
- (b) proposing no longer to provide to itself,

any part or all of the Digital Set Top Unit Services, then FOXTEL may terminate this Agreement or the provision of any part of the Digital Set Top Unit Services under this

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Agreement by giving the Access Seeker such period of written notice of termination as is reasonably practicable, provided that such notice is given at least 6 months before the date that FOXTEL is no longer providing such terminated Digital Set Top Unit Services to itself.

18. Broadcasting

18.1 Restrictions on content

The Access Seeker must ensure that the Digital Subscriber Equipment and the Digital Set Top Unit Services are not knowingly used in a manner which may:

- (a) menace or harass any person or cause damage or injury to any person or property;
- (b) be regarded by a reasonable person as offensive;
- (c) involve the publication of any material that is illegal, defamatory, or which may incite or perpetrate hatred against any person or group or have the likely effect of causing harm or offence;
- (d) infringe any person's Intellectual Property Rights or other rights;
- (e) constitute an infringement or the commission of an offence against any Law;
- (f) involve sending or receiving any instructions which, if implemented, might cause damage or injury to any person or property; or
- (g) expose a party to the risk of any legal or administrative action including prosecution under any Law.

18.2 Resale

- (a) The Access Seeker agrees that it will not confer any benefit of the Digital Set Top Unit Services (or any part thereof) on any person (including by resale, licensing or otherwise) without FOXTEL's prior written consent, except for the provision of digital Subscription Television Services and Related Services to a Subscriber.
- (b) FOXTEL agrees that it will not confer the benefit of the Access Seeker's digital Subscription Television Services and Related Services to any person (including by resale, licensing or otherwise) without Access Seeker's prior written consent.

18.3 Access Seeker warranties

- (a) The Access Seeker represents and warrants that each of the statements in this Clause 18.3(a) is accurate on the Service Date and will be accurate on each day during the term of this Agreement as if made on each of those dates:
 - (i) the Digital Set Top Unit Services will be used solely to deliver digital Subscription Television Services and Related Services by Access Seeker, those digital Subscription Television Services and Related Services are duly licensed by the Access Seeker under the BSA, and the Access Seeker is otherwise legally entitled to use the Digital Set Top Unit Services in the manner in which it does or proposes;

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- (ii) Access Seeker's use of the Digital Set Top Unit Services complies with, and does not offend, any applicable laws, regulations, orders, program standards or codes of practice including:
 - (A) the BSA;
 - (B) the conditions of any applicable subscription television broadcasting licence which applies;
 - (C) the requirements of the Australian Broadcasting Authority as to television program content, standards or origin; and
 - (D) laws as to defamation.
- (b) In addition to any other remedy available to FOXTEL, and without liability to Access Seeker, if any representation or warranty in Clause 18.3(a) is inaccurate or misleading, FOXTEL need not supply the part of the Digital Set Top Unit Services to which that representation or warranty relates until 5 Business Days after the representation or warranty is rendered accurate and not misleading by the Access Seeker.

19. Warranties

Each party represents and warrants to the other party that:

- (a) it has the power to enter into and observe its obligations under this Agreement;
- (b) it has in full force and effect the authorisations necessary to enter into this Agreement, observe its obligations under it and allow it to be enforced; and
- (c) its obligations under this Agreement are valid and binding.

20. Indemnities

20.1 Access Seeker indemnities

- (a) The Access Seeker indemnifies each member of the FOXTEL Group and holds each member of the FOXTEL Group harmless in respect of any claim, action, loss (including Consequential Loss), liability, damage, cost or expense (including legal fees on a full indemnity basis) incurred or suffered by any member of the FOXTEL Group arising out of or in connection with:
 - (i) a breach of Clause 9.3 or Clause 12.5;
 - (ii) any claim by the owners or lessors of any Digital Subscriber Equipment or the Smartcards that it has suffered loss as a result of the access to or use of any Digital Subscriber Equipment or the Smartcards by the Access Seeker or any Subscriber that acquires Access Seeker's digital Subscription Television Services and Related Services (whether such access or use is authorised or not);
 - (iii) the reproduction, broadcast, use, transmission, re-transmission, communication or making available of any material (including data and

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- information of any sort) by the Access Seeker or a Subscriber that acquires Access Seeker's digital Subscription Television Services and Related Services using the Digital Set Top Unit Services;
- (iv) any breach or alleged breach of a person's rights or defamation of a person in any way associated with the supply of the Digital Set Top Unit Services or provision of a digital Subscription Television Service and Related Services by Access Seeker;
 - (v) the death or personal injury of any person to the extent that death or personal injury was caused by the negligence or intentional act or omission of the Access Seeker or its People or any Subscriber that acquires Access Seeker's digital Subscription Television Services and Related Services using the Digital Set Top Unit Services;
 - (vi) any action, claim, suit or demand from a Subscriber that acquires Access Seeker's digital Subscription Television Services and Related Services using the Digital Set Top Unit Services;
 - (vii) any action, claim, suit or demand from any third party (except for a Subscriber that acquires Access Seeker's digital Subscription Television Services and Related Services using the Digital Set Top Unit Services) in respect of or arising out of any act or omission of the Access Seeker or its People;
 - (viii) any breach or alleged breach of any Law by the Access Seeker or its People;
 - (ix) any damage to, or loss of, any part of the FOXTEL Equipment (including the Digital Subscriber Equipment) or other FOXTEL provided equipment (including Smartcards) caused by any act or omission of the Access Seeker or its People.
- (b) The Access Seeker's liability to each member of the FOXTEL Group under this Clause 20.1 will be reduced to the extent that any member of the FOXTEL Group's loss, cost, expense or liability:
- (i) arises from, or is attributable to, any negligent act or wilful misconduct on the part of any member of the FOXTEL Group or breach of this Agreement by FOXTEL; or
 - (ii) in relation to the acts or omissions of the Subscribers, does not arise from any act or omission of the Access Seeker or is not otherwise in connection with the Access Seekers digital Subscription Television Service.

20.2 Exclusions and Limitations

- (a) Subject to Clauses 20.2(b) and 20.2(c), and to the maximum extent permitted by law, all terms, conditions and warranties expressed or implied by any legislation, the common law, equity, trade, custom or usage or otherwise in relation to the supply of Digital Set Top Unit Services under this Agreement or otherwise in connection with this Agreement, are expressly excluded.

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- (b) Clause 20.2(a) does not exclude a term, condition or warranty which is implied into this Agreement by any legislation if that legislation also prohibits provisions in a contract excluding or modifying the application of or exercise of, or liability under, that term, condition or warranty.
- (c) The liability of FOXTEL for a breach of a term, condition or warranty referred to in Clause 20.2(b) is limited, at the option of FOXTEL, to any one or more of the following:
 - (i) if the breach relates to goods:
 - (A) the replacement of the goods or the supply of equivalent goods;
 - (B) the repair of such goods;
 - (C) the payment of the cost of replacing the goods or of acquiring equivalent goods; or
 - (D) the payment of the cost of having the goods repaired; and
 - (ii) if the breach relates to services:
 - (A) the supplying of the services again; or
 - (B) the payment of the cost of having the services supplied again.

20.3 Continuing Indemnity

Each representation, warranty and indemnity in this Agreement is a continuing obligation, separate and independent from the other obligations of the Parties.

20.4 No payment

It is not necessary for FOXTEL to incur expense or make payment before enforcing a right of indemnity conferred by this Agreement.

21. Liability

21.1 Exclusion of Consequential Loss

Subject to Clause 21.3, neither party will be liable, whether in contract or tort (including negligence or otherwise), for any Consequential Loss.

21.2 Limitation of liability

To the extent permitted by law, the total aggregate liability of FOXTEL or any other member of the FOXTEL Group to the Access Seeker or any other person (whether in negligence or otherwise) in connection with this Agreement at any time:

- (a) in any 12 month period ending on the day before an anniversary of the Execution Date; or
- (b) in a period of less than 12 months from the Execution Date or an anniversary of the Execution Date to the date of termination or expiry of this Agreement,

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will not, in any circumstances, exceed the aggregate of the Access Charges and Other Payments actually paid by the Access Seeker to FOXTEL during that period.

21.3 Exclusions from limit

The exclusion of liability in Clause 21.1 does not apply to:

- (a) acts of negligence or of unlawful or wilful misconduct by the Access Seeker or its Related Bodies Corporate or their People;
- (b) loss of or damage to physical property and death or personal injury caused by or contributed to by the Access Seeker or its People;
- (c) liability arising as a result of a breach of Clause 14 or 15; and
- (d) the indemnity obligations under this Agreement.

21.4 Authorisation

The exclusions and limitations of liability in this Clause 21 apply to any action giving rise to an obligation, duty or liability even if the action was not authorised, or not capable of being authorised, by the relevant party.

22. Suspension and Termination

22.1 Immediate Suspension

- (a) FOXTEL may, without prior notice to Access Seeker, immediately suspend the supply of the Digital Set Top Unit Services to one or more Subscribers:
 - (i) during an Emergency; or
 - (ii) where FOXTEL reasonably considers that the supply of the relevant Digital Set Top Unit Services or access to any Digital Subscriber Equipment may pose a threat to safety of persons, hazard to equipment, threat to network security or is likely to impede the activities of authorised persons responding to an Emergency; or
 - (iii) where FOXTEL reasonably considers that Access Seeker's network or equipment adversely affects or threatens to affect the normal operation of the Digital Subscriber Equipment or other FOXTEL Equipment,and is entitled to continue such suspension until (as the case requires and FOXTEL reasonably determines) the relevant Emergency or threat has passed or until the normal operation of the Digital Subscriber Equipment or other FOXTEL Equipment is no longer adversely affected or threatened.
- (b) If FOXTEL suspends the supply of the Digital Set Top Unit Services under Clause 22.1(a), then:
 - (i) as soon as reasonably practicable after suspension due to an Emergency; and
 - (ii) at the time of suspension in all other cases

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FOXTEL will inform the Access Seeker of the relevant provisions in Clause 22.1(a) under which FOXTEL is exercising its rights to immediately suspend the supply of the Digital Set Top Unit Services.

22.2 Immediate Termination by FOXTEL

Notwithstanding any other provision of this Agreement and in addition to its other rights under this Clause 22 or at Law, FOXTEL may at any time immediately terminate all or any part of this Agreement (including terminating the supply of the Digital Set Top Unit Services to one or more Subscribers) by giving notice of termination to the Access Seeker:

- (a) in accordance with Clause 17.3;
- (b) if the Access Seeker has failed to pay any monies owing to FOXTEL under this Agreement when due (including the payment of any Access Charges and Other Payments by the date on which they are due) and FOXTEL has given notice of such non payment to the Access Seeker and the Access Seeker fails to remedy the non payment specified in the notice within 10 Business Days (or longer period as agreed in writing by the parties) after receiving the notice; or
- (c) if the Access Seeker breaches or is deemed to have breached any term or condition of this Agreement and FOXTEL has given notice of such breach (**Breach Notice**) to the Access Seeker and:
 - (i) the Access Seeker fails to remedy the breach specified in the Breach Notice within 10 Business Days (or such longer period as may be agreed by the parties) after receiving the Breach Notice; or
 - (ii) if the breach is not a material breach, the Breach Notice is the third Breach Notice issued by FOXTEL to the Access Seeker in any period of 3 consecutive months and the Access Seeker has failed to remedy the breach specified in each previous Breach Notice within 10 Business Days after it received the Breach Notice from FOXTEL in each case;
- (d) if the Digital Subscriber Equipment to which the Digital Set Top Unit Services are to be supplied is not actually in use by a Subscriber for reception of FOXTEL's Commercial retail digital cable Subscription Television Service;
- (e) if all of the requirements in Clause 4.3(a) have not been satisfied within 6 months after the date which is the later of the date on which:
 - (i) the Access Seeker notifies FOXTEL that the enhancements and extensions that are required by Telstra, to enable Telstra's digital service to be supplied to the Access Seeker, have been completed; and
 - (ii) the requirement in Clause 4.3(a)(i) has been satisfied.
- (f) if the Access Seeker ceases to be a party to an arrangement with a Carriage Service Provider for the supply of a Subscription Television Digital Carriage Service and there are constraints on the capacity available to FOXTEL to supply Digital Set Top Unit Services to itself or other access seekers;

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- (g) if the Access Seeker ceases to hold a subscription television licence as required under the BSA;
- (h) if the Access Seeker ceases to supply any digital Subscription Television Services;
- (i) if the Access Seeker stops or suspends or threatens to stop or suspend payment of all or a class of its debts;
- (j) if the Access Seeker is insolvent within the meaning of section 95A of the Corporations Act;
- (k) if the Access Seeker is presumed by a court to be insolvent by reason of section 459C(2) of the Corporations Act;
- (l) if the Access Seeker fails to comply with a statutory demand (within the meaning of section 459F(1) of the Corporations Act);
- (m) if the Access Seeker has an administrator appointed over all or any of its assets or undertaking or any step preliminary to the appointment of an administrator is taken;
- (n) if the Access Seeker has a controller within the meaning of section 9 of the Corporations Act or similar officer appointed to all or any of its assets or undertaking;
- (o) if the Access Seeker has an application or order made, proceedings commenced, a resolution passed or proposed in a notice of meeting, an application to a court made or other steps taken against or in respect of it for its winding up or dissolution or for it to enter an arrangement, compromise or composition with or assignment for the benefit of its creditors, a class of them or any of them; or
- (p) subject to Clause 23(b), a Force Majeure Event substantially and adversely affecting the ability of a party to perform its obligations under this Agreement continues for more than 3 months.

22.3 Immediate Termination by Access Seeker

Notwithstanding any other provision of this Agreement and in addition to its other rights under this Clause 22 or at Law, the Access Seeker may at any time immediately terminate this Agreement or terminate the supply of the Digital Set Top Unit Services to one or more Subscribers by giving notice of termination to FOXTEL, if:

- (a) FOXTEL breaches a material obligation or deemed material obligation under this Agreement and:
 - (i) the Access Seeker has given FOXTEL notice of such breach (**Breach Notice**); and
 - (ii) FOXTEL has failed to remedy the breach specified in the Breach Notice within 10 Business Days (or such longer period as may be agreed between the parties) after receiving the Breach Notice.
- (b) FOXTEL stops or suspends or threatens to stop or suspend payment of all or a class of its debts;
- (c) FOXTEL is insolvent within the meaning of section 95A of the Corporations Act;

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- (d) FOXTEL is presumed by a court to be insolvent by reason of section 459C(2) of the Corporations Act;
- (e) FOXTEL fails to comply with a statutory demand (within the meaning of section 459F(1) of the Corporations Act);
- (f) FOXTEL has an administrator appointed over all or any of its assets or undertaking or any step preliminary to the appointment of an administrator is taken;
- (g) FOXTEL has a controller within the meaning of section 9 of the Corporations Act or similar officer appointed to all or any of its assets or undertaking;
- (h) FOXTEL has an application or order made, proceedings commenced, a resolution passed or proposed in a notice of meeting, an application to a court made or other steps taken against or in respect of it for its winding up or dissolution or for it to enter an arrangement, compromise or composition with or assignment for the benefit of its creditors, a class of them or any of them;
- (i) FOXTEL gives the Access Seeker notice of a Modification under Clause 9.2(b);
- (j) FOXTEL gives the Access Seeker notice of a Change under Clause 4.4(b); or
- (k) subject to Clause 23(b), a Force Majeure Event substantially and adversely affecting the ability of a party to perform its obligations under this Agreement continues for more than three months.

22.4 Termination or suspension with notice

- (a) FOXTEL may, on notice, terminate or suspend the Digital Set Top Unit Services to one or more Subscribers, if any of the lessors of the Digital Subscriber Equipment used by that Subscriber withdraws its consent, which withdrawal has the effect of terminating or suspending:
 - (i) FOXTEL's rights to locate any Digital Subscriber Equipment at any Subscriber Premises; or
 - (ii) any rights which FOXTEL has relied on in order to grant the Access Seeker the rights granted to it under this Agreement.
- (b) Either party may terminate this Agreement by serving a notice on the other party in the event that the Digital Set Top Unit Services are not available for the Access Seekers use within 6 months after the Commencement Date, other than due to a default by the party serving such termination notice in the performance of its obligations under this Agreement.
- (c) In addition to FOXTEL's rights under this Clause 22 or at Law, if:
 - (i) the Access Seeker fails to pay any Access Charge (or part thereof) by the date on which it is due in accordance with the terms of this Agreement;
 - (ii) the Access Seeker fails to pay any Other Payment (or part thereof) payable by the Access Seeker to FOXTEL under this Agreement when due;

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- (iii) the Access Seeker's use of the Digital Set Top Unit Services is in contravention of any Law or the Access Seeker fails to comply with any of its obligations under Law;
- (iv) the Access Seeker breaches a material obligation or deemed material obligation under this Agreement;
- (v) at any time, any of the requirements in Clause 4.1(c)(iii) - 4.1(c)(v) are not satisfied; or
- (vi) any of the events described in Clauses 22.2(d) to 22.2(p) (inclusive) occurs,
(any of which is a ***Suspension Event***), and:
 - (vii) FOXTEL gives notice (***Suspension Notice***) to Access Seeker:
 - (A) pursuant to this Clause;
 - (B) specifying the Suspension Event in respect of which the event has occurred;
 - (C) requiring the Access Seeker to institute remedial action (if any) in respect of that event;
 - (D) stating that FOXTEL may suspend the provision of part of, or all of, the Digital Set Top Unit Services if the Suspension Event is not remedied; and
 - (viii) the Access Seeker fails to remedy the Suspension Event specified in the Suspension Notice within 20 Business Days (or such longer period as may be agreed by the parties) after receiving the Suspension Notice (***Suspension Remedy Period***),then FOXTEL may at its discretion, by giving notice to the Access Seeker at any time after the expiry of the Suspension Remedy Period either:
 - (ix) without further notice and without liability suspend the provision of, or refuse to provide, any or all of the Digital Set Top Unit Services until the Suspension Event specified in the Suspension Notice is remedied (including, for the avoidance of doubt, suspending any activities being undertaken by FOXTEL in relation to ordering and provisioning of Digital Set Top Unit Services, if any); or
 - (x) terminate this Agreement on 5 Business Days written notice; or
 - (xi) take action under both Clauses 22.4(c)(ix) and 22.4(c)(x).
- (d) For the avoidance of doubt, for the purposes of this Agreement, payment of the Access Charge, or any other monies owing, by a cheque which is dishonoured will be taken to be non-payment.

22.5 Reconnection

FOXTEL will recommence the supply of any suspended services as soon as practicable after a Suspension Event if, after the expiry of the Suspension Remedy Period, there no

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longer exists a reason for suspension and FOXTEL shall do so subject to payment by the Access Seeker of FOXTEL's reasonable costs of suspension and reconnection.

22.6 Single event rights

For the avoidance of doubt:

- (a) FOXTEL may give the Access Seeker both a Suspension Notice under Clause 22.4 and, during the relevant Suspension Remedy Period, a Breach Notice under Clause 22.2 in respect of:
 - (i) the same breach; or
 - (ii) different breaches that relate to or arise from the same act, omission or event or related acts, omissions or events; and
- (b) FOXTEL will not be required to provide a Suspension Notice in accordance with Clause 22.4 in respect of a breach before giving a Breach Notice in respect of that breach under Clause 22.2.

22.7 Obligations on termination

- (a) On termination or expiration of this Agreement, FOXTEL may:
 - (i) render an invoice in respect of goods and services which have been provided but not invoiced as at the date of termination or expiry;
 - (ii) charge a reasonable sum for work done in respect of which no sum has been previously charged; and
 - (iii) pursue any other remedies provided by Law or this Agreement.
- (b) The Access Seeker must pay all moneys owed by it to FOXTEL as follows:
 - (i) where it has received an invoice on or prior to the date of termination or expiration, on the earliest of the date on which it is due in accordance with the terms of this Agreement or within 20 Business Days of termination or expiration; or
 - (ii) where it receives an invoice after the date of termination or expiration, within 20 Business Days of receipt of the invoice.

22.8 Accrued Rights

The termination of this Agreement does not affect any accrued rights or remedies of either party.

23. Force Majeure

- (a) If a party is unable to perform an obligation (other than an obligation to pay money) under this Agreement by reason of Force Majeure, that obligation is suspended for the minimum extent and duration of the Force Majeure, provided that the party:

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- (i) gives the other party prompt notice of and reasonable details of the Force Majeure and an estimate of the extent and duration of its inability to perform; and
 - (ii) uses reasonable commercial endeavours to remove that Force Majeure as quickly as possible.
- (b) Without prejudice to Clause 22.2(p), if the Force Majeure continues more than 10 Business Days after the notice given under Clause 23(a), the parties must meet to discuss in good faith a mutually satisfactory resolution to the problem.
- (c) The requirement that a Force Majeure be removed with all possible diligence does not require the settlement of strikes, lockouts or other labour disputes or claims or demands on unreasonable terms in the reasonable opinion of the party affected by such events. If a strike, lockout or other labour dispute or claim or demand principally concerns any matter the subject of this Agreement, the affected party must advise the other party.

24. Access Technical Implementation Group

24.1 Establishment

On the Commencement Date the parties must establish an Access Technical Implementation Group (**ATIG**), which will be responsible for coordinating the implementation and performance of this Agreement and for co-ordinating on-going technical and operational issues with respect to the Digital Set Top Unit Services.

24.2 Representation

- (a) The ATIG should consist of 2 representatives from each party and a representative from the relevant Carriage Service Provider.
- (b) The representatives from each party and the relevant Carriage Service Provider may change from time to time depending on the issues being discussed by the ATIG.
- (c) The relevant Carriage Service Provider's representative on the ATIG will be approved by FOXTEL and shall not have any decision-making power in relation to issues discussed by the ATIG.

24.3 Meetings

The ATIG will meet in Sydney (or by phone or video conference) at least once each month during the initial 6 months of this Agreement after the Commencement Date and during the Transitional Period, and after that period at such other times as agreed by the parties, to discuss, amongst other things:

- (a) day to day operational issues;
- (b) the performance of the parties under the Agreement;
- (c) without in any way limiting the operation of Clause 25, any disputes or escalated technical or operational issues; and

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- (d) relevant technical issues.

24.4 Minutes of meeting

Minutes may be agreed and kept of meetings of the ATIG. Any draft minutes relating to a meeting must be given by the party responsible for keeping such minutes (as agreed between the parties) to the other party for its comments, which minutes may then be revised by agreement between the parties.

24.5 Decisions not a variation to Agreement

Any decision of the ATIG does not constitute a variation or amendment of the Agreement, unless such amendments are executed in writing by both parties in accordance with Clause 28.2.

24.6 Appointment of case manager

The parties may appoint an independent third party to act as a case manager, to guide discussions between the parties in relation to the technical implementation of the provision of the Digital Set Top Unit Services, in the event that such discussions are not progressing to the satisfaction of both parties. The terms of engagement, including the period of engagement, of such a third party case manager will be as agreed between the parties, acting reasonably. The costs of a case manager will be shared equally between the parties.

25. Dispute resolution

25.1 Application of Clause

- (a) A party must not start arbitration or court proceedings (except proceedings seeking interlocutory relief) about a dispute or failure to agree under or in connection with this Agreement (**Dispute**), unless it has followed the procedure set out in this Clause 25 (**Dispute Resolution Procedure**).
- (b) If a party to a Dispute does not comply with any provision of this Clause 25, the other party to the Dispute will not be bound by this clause.

25.2 Technical Dispute

In the event of a Technical Dispute affecting the Digital Set Top Unit Services, any action, decision or determination made by FOXTEL acting reasonably will stand and be accepted by the Access Seeker until the determination of the Dispute.

25.3 Notification

- (a) If a party notifies the other party that it considers there to be a Dispute, the parties must meet within 2 Business Days of the notice being given and use reasonable endeavours acting in good faith to resolve the Dispute by joint discussions.
- (b) If the parties are unable to resolve the Dispute within 10 Business Days (or longer period agreed in writing by the parties) of commencing discussions under Clause 25.3(a), the Chief Executive Officer of the Access Seeker and the Chief Executive

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Officer of FOXTEL or their nominees must meet and use reasonable endeavours acting in good faith to resolve the Dispute by joint discussions.

- (c) If the parties are unable to resolve the Dispute within 10 Business Days (or longer period agreed in writing by the parties) of commencing discussions under Clause 25.3(b), the parties must attempt to resolve the Dispute by mediation pursuant to Clause 25.4.

25.4 Mediation

If the parties are unable to resolve a Dispute by negotiation under Clause 25.3(a) or 25.3(b) and,:

- (a) it is a Technical Dispute and the parties have agreed to refer the Dispute to mediation pursuant to this Clause 25.4; or
- (b) if the Dispute does not relate to a Technical Dispute,

then the Dispute is to be referred to an independent mediator acceptable to both parties or, if the parties cannot agree on an appropriate person within 5 Business Days of the Dispute not being resolved under Clause 25.3(a), an independent mediator appointed by the President for the time being of the Australian Commercial Disputes Centre (**ACDC**) on the application of either the Access Seeker or FOXTEL, which mediator will conduct the mediation in accordance with the ACDC Mediation Guidelines in force at the time of the Dispute and Schedule 7. To the extent that there is any inconsistency between the ACDC Mediation Guidelines and Schedule 7, Schedule 7 will prevail.

25.5 Expert Determination

If a Dispute relates to a billing dispute over payments or charges in accordance with Clause 13.7, a dispute in relation to EPG Services in accordance with clause 4.2(d) or a Technical Dispute and the parties:

- (a) are unable to agree to refer a Dispute to mediation pursuant to Clause 25.4 within 5 Business Days; or
- (b) are unable to resolve a Dispute by mediation pursuant to Clause 25.4,

then the parties must promptly refer the Dispute for binding expert determination in accordance with the rules of the ACDC in Sydney to an expert agreed and appointed by the parties, who is independent of the parties or, failing agreement, to an independent expert appointed by the President for the time being of the ACDC in Sydney.

The parties agree that in reaching any decision in relation to a dispute in relation to EPG Services, the independent expert must take into account the interests of FOXTEL, the Access Seeker and other access seekers. The parties also agree that the independent expert will only consider the following issues: positioning in the EPG, the price for access to the EPG and the terms of access to the EPG functionality. The parties also agree that the independent expert must not make a decision which would:

- (a) result in a price payable by the Access Seeker which does not allow FOXTEL to recover a reasonable proportion of its reasonably incurred costs in connection with

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the provision of EPG Services together with a reasonable rate of return having regard to FOXTEL and the Access Seeker's respective use of the EPG;

- (b) affect FOXTEL's or another person's rights in relation to the EPG Services at the time the dispute arose;
- (c) require FOXTEL to make an enhancement or modification to the Digital STU or the software contained in the EPG; or
- (d) discriminate between Access Seekers.

25.6 Performance Pending Decision

Pending completion of the Dispute Resolution Procedure, the parties must continue performing their respective obligations under this Agreement to the maximum extent possible.

25.7 Costs

The parties must bear their own costs of the Dispute Resolution Procedure, including the costs of any representatives, and will each bear half the costs of the mediator appointed under Clause 25.4 or any expert appointed under Clause 25.5.

26. Taxes

26.1 GST to be added to amounts payable

If GST is payable on a Taxable Supply made under, by reference to or in connection with this Agreement, the party providing the Consideration for that Taxable Supply must also pay the GST Amount as additional Consideration. This clause does not apply to the extent that the Consideration for the Taxable Supply is expressly stated to be GST inclusive.

26.2 Liability net of GST

Any reference in the calculation of Consideration or of any indemnity, reimbursement or similar amount to a cost, expense or other liability incurred by a party, must exclude the amount of any Input Tax Credit entitlement of that party in relation to the relevant cost, expense or other liability.

26.3 Timing of the payment of the GST Amount

The GST Amount is payable, subject to prior receipt of a Tax Invoice, on the date on which all or any part of the Consideration for the Taxable Supply is provided.

26.4 Revenue exclusive of GST

Any reference in this Agreement to price, value, sales, revenue or a similar amount (**Revenue**), is a reference to that Revenue exclusive of GST.

26.5 Cost exclusive of GST

Any reference in this Agreement (other than in the calculation of Consideration) to cost, expense or other similar amount (**Cost**), is a reference to that Cost exclusive of GST.

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26.6 Impact of GST on CPI Adjustment

If an amount payable under this Agreement is adjusted by reference to a change to the CPI, then the impact of GST must be excluded from the change to the CPI.

26.7 GST obligations to survive termination

This clause will continue to apply after expiration or termination of this Agreement.

26.8 Stamp duty and taxes

- (a) All stamp duty (including fines, penalties and interest) that may be payable on or in connection with this Agreement and any instrument executed under this Agreement must be borne by Access Seeker. The Access Seeker must indemnify FOXTEL on demand against any liability for that stamp duty.
- (b) All taxes, duties and charges imposed or levied in Australia or overseas in connection with the performance of this Agreement will be borne by Access Seeker.

27. Assignment

27.1 No Assignment by Access Seeker

The Access Seeker must not, without FOXTEL's prior written consent, assign any of its rights or purport to transfer any of its obligations under this Agreement.

27.2 Assignment by FOXTEL

FOXTEL may novate or assign any or all of its rights and obligations under this Agreement by notice to the Access Seeker and without the consent of the Access Seeker.

28. General

28.1 Entire Agreement

This Agreement contains the entire agreement between FOXTEL and the Access Seeker as at the date of this Agreement with respect to its subject matter and supersedes all prior agreements and understandings between the parties in connection with that subject matter.

28.2 Amendment

Subject to FOXTEL's rights in clauses 4.4 and 9.2, no amendment or variation of this Agreement is valid or binding on a party unless made in writing executed by all parties.

28.3 Severability

If the whole or any part of a provision of this Agreement is prohibited or unenforceable in any jurisdiction, it is severed for that jurisdiction. The remainder of this Agreement has full force and effect and the validity or enforceability of that provision in any other jurisdiction is not affected. This Clause has no effect if the severance alters the basic nature of this Agreement or is contrary to public policy.

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28.4 Independent Contractor not employment

This Agreement does not set up or create an employer/employee relationship, partnership of any kind, an association or trust between the parties, each party being individually responsible only for its obligations as set out in this Agreement and in addition the parties agree that their relationship is one of independent contractors. Save to the extent to which a party is specifically authorised in writing in advance by the other party, neither party is authorised or empowered to act as agent for the other for any purpose and neither party must on behalf of the other enter into any contract, warranty or representation as to any matter. Neither party will be bound by the acts or conduct of the other, save for acts or conduct which the first party specifically authorises in writing in advance.

28.5 Non-solicitation

During the Term and for a period of 6 months after the expiry or termination of this Agreement, the Access Seeker undertakes that neither it, nor any entity which it owns, controls or manages, shall in any capacity or by any means, do any of the following, be interested, involved or engaged in any of the following, or attempt or seek to do or be interested, involved or engaged in any of the following:

- (a) solicit;
- (b) entice;
- (c) encourage; or
- (d) induce,

any of FOXTEL's People who were involved with the provision of the Digital Set Top Unit Services to cease their employment or engagement with FOXTEL and to commence employment or engagement with, or provide services on any basis to, the Access Seeker or any entity which it owns, controls or manages.

28.6 Responsibility for Employees

Nothing in this Agreement has the effect of making the personnel of a party become the employees of the other party. Each party is, and must ensure that its permitted sub-contractors will be, responsible for all liability whatsoever, whether arising at common law or by virtue of any statute, relating to worker's compensation or employer's liability in respect of its employees.

28.7 Sub-contracting

FOXTEL may subcontract any of its obligations under this Agreement to a third party without notice to the Access Seeker and without the Access Seeker's consent.

28.8 Health, Safety and Environment

Each party must take all reasonable precautions to protect its employees, agents, contractors, customers (including its Subscribers), members of the general public and the environment and, without limitation, will comply and ensure compliance by their employees, agents and contractors, with all applicable legislation, regulations, orders and laws relating to health, safety and the environment. Each party must use its best endeavours to ensure

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that its contractors, agents and licensees also comply with such legislation, regulations, orders and laws relating to health, safety and the environment.

28.9 No waiver

No failure to exercise nor any delay in exercising any right, power or remedy by a party operates as a waiver. A single or partial exercise of any right, power or remedy does not preclude any other or further exercise of that or any other right, power or remedy. A waiver is not valid or binding on the party granting that waiver unless made in writing.

28.10 Remedies cumulative

Except where this Agreement provides otherwise, the rights, powers and remedies provided to the parties in this Agreement are in addition to, and do not exclude or limit, any right, power or remedy provided by law or equity or by any agreement between the parties.

28.11 Counterparts

This Agreement may be executed in any number of counterparts. All counterparts will be taken to constitute one instrument.

28.12 Notices

Any notice, demand, consent or other communication (a **Notice**) given or made under this Agreement:

- (a) must be in writing or by electronic mail;
- (b) must be signed by a person duly authorised by the sender, which signature may be digital if the digital signature complies with any guidelines for the use of digital signature which may be agreed by the parties;
- (c) must refer to this Agreement and state the Clause under which the notice is given;
- (d) must be delivered to the intended recipient by prepaid post, by hand or fax or by email to the address, fax number or email address below or the address, fax number or email address last notified by the intended recipient to the sender:

- (i) to FOXTEL: FOXTEL Management Pty Ltd
Wharf 8
Pyrmont NSW 2000
Attention: Director of Legal Affairs
Fax No: 9200 1010
Email: [#],
with a copy being given to [insert name] at the time
notice is given under this Clause; and
- (ii) to Access Seeker: [insert name and address]
Attention: [#]
Fax No: [#]
Email: [#],

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with a copy being sent to [insert name] at the time notice is given under this Clause.

- (e) will be taken to be duly given or made:
- (i) in the case of delivery in person, when delivered;
 - (ii) in the case of delivery by post, two Business Days after the date of posting (if posted to an address in the same country) or seven Business Days after the date of posting (if posted to an address in another country);
 - (iii) in the case of fax, on receipt by the sender of a transmission control report from the despatching machine showing the relevant number of pages and the correct destination fax machine number or name of recipient and indicating that the transmission has been made without error; and
 - (iv) in the case of electronic mail, on receipt by the sender of an electronic acknowledgement that the electronic mail has been read by the intended recipient,

but if the result is that a Notice would be taken to be given or made on a day that is not a Business Day in the place to which the Notice is sent or is later than 4.00pm (local time) it will be taken to have been duly given or made at the commencement of business on the next Business Day in that place.

28.13 Further assurances

Each party agrees to do all things and execute all deeds, instruments, transfers or other documents as may be necessary or desirable to give full effect to the provisions of this Agreement and the transactions contemplated by it.

28.14 Costs

Each party will bear its own costs arising out of the negotiation, preparation and execution of this Agreement.

28.15 Governing law and jurisdiction

This Agreement is governed by the laws of the State of New South Wales. Each party submits to the non-exclusive jurisdiction of courts exercising jurisdiction there in connection with all matters concerning this Agreement.

28.16 Survival

All rights, obligations and indemnities in Clauses 3, 13, 14, 15, 16, 20, 21, 22.7, 22.8, 25, 26, 28 and Schedule 8 (or such other provisions that by their context are required) survive the termination or expiry of this Agreement.

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Schedule 1

Digital Set Top Unit Services

This Schedule contains:

1. Part A – Set Top Unit Services
2. Part B – CA Services

Parts A & B together are the ***Digital Set Top Unit Services***.

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Part A – Set Top Unit Services

The delivery of a digital Subscription Television Service which complies with the Interface Specifications from the Network Termination Point to the Subscriber's television or VCR using the Digital Subscriber Equipment for the purpose of provision by the Access Seeker of digital Subscription Television Services and Related Services to its Subscribers.

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Part B - Conditional Access Services

This service consists of:

1. CA Services

The services and Operational Procedures that allow a service provider to determine whether a Subscriber is entitled to receive a particular service through a Digital Set Top Unit using a Smartcard.

2. Service Information Service

The processing of information necessary to be received by a Digital Set Top Unit which, in addition to CA information, permits the reception of a digital Subscription Television Service but does not include the content which forms the digital Subscription Television Service.

3. Smartcard Authorisation Verification Information Services

- (a) The provision of information to allow the Access Seeker to verify the Access Seeker's digital Subscription Television Service enabled on the Smartcard but only that information which can reasonably be produced by the FOXTEL Equipment to provide CA Services.
- (b) FOXTEL to provide this information on a monthly basis.
- (c) For the avoidance of doubt, the Access Seeker is not entitled to use or access the subscriber management system.

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Schedule 2

Faults

1. Access Seeker – Fault Management Obligations

The Access Seeker must:

- (a) establish an Access Seeker Fault Management Help Desk;
- (b) establish and maintain a telephone number;
- (c) establish and maintain a fax number; and
- (d) establish and maintain an email address.

2. FOXTEL Obligations – Fault Management Obligations

FOXTEL will:

- (a) establish a FOXTEL Fault Management Help Desk operating between 9am and 5pm on Business Days;
- (b) appoint a fault management officer;
- (c) establish and maintain a telephone number;
- (d) establish and maintain a fax number;
- (e) correct Faults of which it is aware in accordance with its standard fault rectification procedures from time to time; and
- (f) provide a schedule of FOXTEL fault codes, updated by FOXTEL from time to time.

3. Fault Reporting Procedure

- (a) If the Access Seeker is notified of a Fault by a Subscriber to its digital Subscription Television Services and Related Services, the Access Seeker must, within 1 Business Day of being notified of the Fault:
 - (i) identify, as far as possible the nature and source of the Fault;
 - (ii) complete a Fault Report detailing:
 - (A) Name of Subscriber;
 - (B) Address of Subscriber;
 - (C) Telephone number of Subscriber;
 - (D) Time and date that Fault occurred;

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- (E) Smartcard Number;
 - (F) Set Top Unit serial number, model, type;
 - (G) Location of Digital Subscriber Equipment;
 - (H) channel/channels affected;
 - (I) Description of the Fault, for example:
 - (1) no picture and or sound;
 - (2) poor quality picture and/or sound;
 - (3) status of the Set Top Unit front panel indicators;
 - (4) remote control; and
 - (J) Number of incidence of the Fault/s.
 - (K) Use fault codes from FOXTEL's schedule of fault codes.
- (b) The Fault Report should be sent by fax to the FOXTEL Fault Management Help Desk.

4. FOXTEL Fault Management Procedure

- (a) On receipt of a Fault Report, FOXTEL Fault Management Help Desk will, within 1 Business Day of receipt of the Fault Report:
 - (i) confirm receipt of the Fault Report by fax to Access Seeker; and
 - (ii) assign a job number to the Fault Report for tracking purposes.
- (b) FOXTEL Fault Management Help Desk may elect to contact the Subscriber for the purpose of troubleshooting via telephone.
- (c) If the Fault cannot be rectified via telephone and remote access, FOXTEL Fault Management Help Desk may elect to dispatch a service call to the Subscriber. FOXTEL is under no obligation to dispatch a service call unless in FOXTEL's opinion the service call is required to remedy the fault.
- (d) FOXTEL will not dispatch service calls outside FOXTEL's normal operating hours as notified to the Access Seeker from time to time.
- (e) Once the Fault has been rectified, FOXTEL Access Fault Management Help Desk will advise the Access Seeker via fax of the status of the Fault and notify the Access Seeker of the relevant charges (which are to be calculated in accordance with Section 1.6 of this Schedule 1).
- (f) FOXTEL, at its discretion, may choose to automate the Fault reporting procedure at any time via technologies such as email, IVR or other technologies relevant.

5. Priority

As a general principle, each party must give priority to Faults that have the highest service loss impact in terms of the number of Subscribers affected.

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6. Fault Charges

- (a) If the Access Seeker notifies FOXTEL of a Fault and the Fault is a FOXTEL Fault, then there will be no charge to the Access Seeker.
- (b) If the Access Seeker notifies FOXTEL of a Fault which is not a FOXTEL Fault, then the Access Seeker must pay to FOXTEL:
 - (i) a fee of \$200; and
 - (ii) a charge of \$30 for each 15 minutes (or part thereof) of time spent (including travelling time to and from the relevant location) for each person investigating the Fault, in excess of 1 person per hour,in accordance with the payment terms in Clause 13.2
- (c) The Access Seeker acknowledges that any charges incurred by it under this paragraph 6 reflect FOXTEL's costs and expenses in investigating the relevant Fault.

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Schedule 3

Access Charges and Pricing Methodology for Digital Set Top Unit Services

1. APPLICATION OF METHODOLOGY

From time to time, but at least annually, FOXTEL will calculate and produce an access seeker rate card (**Rate Card**) which specifies the Access Charges payable by Access Seekers based on the Access Seeker's revenue or Rating. The Access Charges will be calculated in accordance with the methodology set out in this document.

2. SUMMARY

In summary, the Access Charges will be the sum of the allocated Annual Attributable Costs and allocated Annual Shared Costs. The Access Charges will be payable for each Subscription Television Service delivered by an Access Seeker using the Digital Set Top Unit Services.

The Access Charges are based on the following principles.

FOXTEL may recover all costs it incurs in relation to supplying Digital Set Top Unit Services, including a return on its investment in the digital subscription television system commensurate with the risk being borne. Costs incurred in relation to supplying the Digital Set Top Unit Services are the costs forecast to be incurred by the Access Provider, adjusted to what is actually incurred.

FOXTEL will use a "building block" methodology based on forecasts of costs over a period of time to establish appropriate cost pools.

FOXTEL will establish four cost pools for each of the Cable service and the Satellite service:

- (a) a pool of capital costs forecast to be incurred in each one year period commencing in T1 (**Capex Pool**);
- (b) a pool of Installed Base Acquisition Costs (**IBAC Pool**);
- (c) a pool of operations and maintenance costs (**Opex Pool**) forecast to be incurred in each one year period; and
- (d) a pool of overhead contribution costs (**Overhead Pool**) forecast to be incurred in each one year period.

The Capex Pool costs and the IBAC Pool costs will be annualised and will include an amount representing a return of capital and a return on capital which will be calculated using a straight line depreciation methodology and the Capital Asset Pricing Methodology (**CAPM**) to produce a nominal post-tax ("vanilla") Return on Capital, where tax is modelled in cash flows. This return on capital is applied to the average asset base in each year.

FOXTEL will specify that the cumulative value of the cable and satellite IBAC in the years T1 to T4. The relevant amounts are set out in clause 4 below.

The recovery of the IBAC Pool will be smoothed over a 10 year period.

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The Opex Pool and the Overhead Pool will be recovered in the year in which they are forecast to be incurred.

For each Pool (other than the IBAC Pool) at the end of each one year period (for example T1) the deviance from the amount forecast to be incurred for that period from the amount actually incurred in that period will be calculated and the opening balance for each such Pool for the succeeding one year period (for example T2) will be adjusted accordingly.

The Total Annual Cost is the sum of the Annual Capex Cost, the Annual IBAC Cost, the Annual Opex Cost and the Annual Overhead Cost. The principles set out in this methodology apply separately to Satellite Set Top Unit Services and Cable Set Top Unit Services. The Total Annual Cost is the sum of the costs of each of Satellite Set Top Unit Services and Cable Set Top Unit Services respectively.

The Total Annual Costs will be allocated between Shared Costs and Attributable Costs. Shared costs are costs that are incurred as a result of both FOXTEL and Access Seeker activity.

Shared Costs will be allocated on the basis of the greater of the imputed or the actual revenue of FOXTEL and Access Seekers. Attributable Costs will be allocated to Access Seekers in equal portions.

3. THE COST POOLS – CAPEX

3.1 Capital costs

The only Capital Expenditure, which will be included in the Capex Pool is Defined Capital Expenditure. At the Commencement Date forecast Defined Capital Expenditure for the period T1 will be specified. At the beginning of each subsequent period, the Defined Capital Expenditure for that period will be specified. The Defined Capital Expenditure forecasts for each year will be assigned to periods for recovery by annualising these costs over the Economic Life of the asset. (For example, for the period T2 the annualised costs will be the sum of annualised capital costs incurred in T1 that were assigned for recovery in T2 and the annualised capital costs incurred in T2 that were assigned for recovery in T2).

FOXTEL Asset Base (**APAB**) is equal to the sum of the Defined Capital Expenditure that has occurred between T1 and the period for which prices are being determined less accumulated Depreciation. (For example, the APAB in T3 is equal to the sum of Capital Expenditure in T1, T2 and T3 less Depreciation allocated to T1, T2 and T3.)

3.2 Review

At the end of each one year period (for example T1) the deviance from the amount of Defined Capital Expenditure forecast to be incurred for that period from the amount actually incurred in that period will be calculated and the opening balance for the Capex Pool for the succeeding one year period (for example T2) will be adjusted accordingly.

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3.3 Annualisation

The annualised Defined Capital Expenditure will be determined as follows.

$$\text{annualised capex} = (W \times \text{WDV}) + D$$

Where:

W = is the Return on Capital;

WDV = is the written down (depreciated) value of the APAB; and

D = is the Depreciation.

It will be assumed that Capital Expenditure occurs evenly during any year. Therefore, only half of the depreciation costs for assets acquired in any given year may be included in that year.

Return on Capital will be applied to the value of the APAB mid-way through the year, rather than at the beginning of the year. The APAB mid-way through the year will be calculated as the opening balance of the APAB at the beginning of the year plus the closing balance of the APAB at the end of the year divided by two (2).

3.4 Return on Capital

The Return on Capital is the nominal post-tax ("vanilla") Return on Capital and is calculated as:

$$W = R_e \frac{E}{V} + R_d \frac{D}{V}$$

Where:

W = is the nominal post-tax ("vanilla") Return on Capital;

R_e = is the cost of equity;

E/V = is the proportion of equity capital in total capital;

D/V = is the proportion of debt capital in total capital; and

R_d = is the actual cost of debt to the Access Provider.

The post-tax cost of equity, R_e, is determined using a capital asset pricing model (**CAPM**) method. That is:

$$R_e = r_f + \beta_e(r_m - r_f)$$

Where:

r_f = is the risk-free cost of debt (based on 10 year Government bond rates);

r_m = is the market rate of return;

(r_m - r_f) = is the market risk premium — the return of the market as a whole less the risk free return; and

β_e = is the equity beta, that is, the systematic risk of FOXTEL's equity determined by the Access Provider.

The re-levering formula that will be used to calculate the equity beta is:

$$\beta_e = \beta_a + (\beta_a - \beta_d) * \{1 - [R_d / (1 + R_d)] * (1 - \gamma) * T\} * ((1 / (E/V)) - 1)$$

Where

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β_e is the equity beta

β_a is the asset beta

β_d is the debt beta

T is the current Corporate Tax Rate

γ is the value of imputation credits;

and all other terms have the meaning set out in this clause 3.4.

The cost of debt is calculated as follows:

$$R_d = r_f + r_d$$

Where

r_d is the margin for debt finance above the risk free rate;

and all other terms have the meaning set out in this clause 3.4.

Return on Capital is expressed as a percentage. The value of W will be calculated by FOXTEL from time to time but at least every three (3) years.

The post-tax ("vanilla") Return on Capital in T1 will be 13.99%, based on the following variables:

$(r_m - r_f)$	=	6%
r_f	=	5.5%
r_d	=	2.5%
β_a	=	1.4
β_d	=	0.33
E/V	=	80%
D/V	=	20%
T	=	30%
γ	=	0.5

The value attributed to these variables in subsequent years will be selected by FOXTEL on a basis that is consistent with the values stated above.

The beta will be determined as an asset beta and then converted to an equity beta. The asset beta will remain at 1.4 unless the following events occur:

- On average, in the course of a year, more than 50 per cent of Australian television households subscribe to the service, in which event the asset beta will be redetermined. That redetermination will be conducted on a basis consistent with best practice as used by expert financial advisers. However, the redetermined value cannot be set below 1.0.
- On average, in the course of a year, more than 75 per cent of Australian television households subscribe to the service, in which event the asset beta will be redetermined. That redetermination will be done on a basis consistent with best practice as used by expert financial advisers. However, the redetermined value cannot be set below 0.7.

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3.5 Depreciation

Depreciation is the return of capital. The total annual cost of Depreciation is the depreciation expense incurred in each period from T1 calculated by applying a straight-line depreciation schedule to each category of capex items in the APAB.

For the avoidance of doubt Digital Set Top Units and the Conditional Access System are to be depreciated over five (5) years and:

- (a) Smartcards;
- (b) the system for the generation of Service Information;
- (c) marketing other than Retention Marketing and marketing solely devoted to a single Subscription Television Service in the basic package of FOXTEL or its nominated Associate;
- (d) replacing analogue set top units with Digital Set Top Units;
- (e) the installation and commissioning of Digital Set Top Units and Smartcards;
- (f) warehousing and transportation of Digital Set Top Units and Smartcards; and
- (g) the refurbishment of Digital Set Top Units to enable them to be redeployed.
- (h) are to be depreciated over three (3) years.

4. THE COST POOLS – IBAC

4.1 Cable Installed Base Acquisition Costs

The Cable Installed Base Acquisition Costs (**Cable IBAC**) will be assumed to be \$280 million over the period T1 through T4.

Satellite Installed Base Acquisition Costs

The Satellite Installed Base Acquisition Costs (**Satellite IBAC**) will be assumed to be \$115 million in T1.

4.2 Annualisation

The period over which the Cable IBAC and the Satellite IBAC are annualised will be ten (10) years. The Cable IBAC and the Satellite IBAC will be annualised by calculating the return of capital and the return on capital as set out in clauses 3.3 to 3.5 above to provide a separate annual cost for Cable IBAC and Satellite IBAC (each an **Annual IBAC Cost**).

4.3 Smoothing of IBAC

Recovery of the Cable IBAC and the Satellite IBAC will be smoothed over a ten (10) year period to produce an smoothed Annual IBAC cost (**Smoothed Annual IBAC Cost**) for both the Cable IBAC and the Satellite IBAC for each year from T1 to T10.

The Smoothed Annual IBAC for Cable cost will be calculated by:

- (a) summing the 10 years of the relevant Annual IBAC Costs;
- (b) calculating the NPV of paragraph (a) above using the formula:

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$$\sum_{t=1}^{10} [1/(1+W)^{(t-1)}]$$

where W is the post-tax Return on Capital defined in clause 3.4; and

- (c) allocating the result of paragraph (b) to each of the 10 years from T1 to T10 in proportion to the NPV distribution of forecast demand Digital Set Top Units, where the NPV distribution of forecast demand Digital Set Top Units from T1 to T10 will be assumed to be as set out in Table 1 for cable Digital Set Top Units and satellite Digital Set Top Units, respectively.

Table 1: NPV distribution of forecast demand for Digital Set Top Units

	T1	T2	T3	T4	T5	T6	T7	T8	T9	T10
Cable STUs	3.5%	10.6%	15.5%	15.8%	13.5%	11.3%	9.5%	8.0%	6.7%	5.6%
Satellite STUs	14.6%	14.6%	14.2%	12.7%	10.8%	9.1%	7.6%	6.4%	5.4%	4.6%

5. THE COST POOLS – OPEX

For each year from T1 the Annual Opex Cost will be calculated. The Opex Pool is the forecast Defined Operational Expenditure incurred in relation to the supply of the Digital Set Top Unit Services in the year that they are forecast to be incurred (**Annual Opex Cost**).

6. THE COST POOLS – OVERHEAD

For each year from T1, the annual overhead cost will be calculated. The Overhead Pool is calculated by multiplying the Annual Opex Cost by the historic proportion of Corporate Overhead Cost to Opex costs but, in any case, will be no less than 10.89% of Annual Opex Cost (**Annual Overhead Cost**).

7. TRANSLATION OF COSTS INTO CHARGES

7.1 Total Annual Costs

The Total Annual Costs in each year are the sum of the Annual Capex Costs; the Annual IBAC Costs; the Annual Opex Costs and the Annual Overhead Costs.

In each year, FOXTEL may recover from Access Seekers a proportion of the Total Annual Costs.

7.2 Shared Costs and Attributable Costs

The Total Annual Costs will be divided between two [2] cost categories:

- (a) Annual Shared Costs; and
- (b) Annual Attributable Costs.

Annual Shared Costs are the sum of Annual Capex Costs (less annual Attributable Capex Costs), Annual IBAC Costs, Annual Opex Costs (less annual Attributable Opex Costs) and Annual Overhead Costs.

Annual Attributable Costs are the sum of the annual Attributable Capex Costs and the annual Attributable Opex Costs.

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7.3 Allocation of Annual Shared Costs

Annual Shared Costs will be allocated in each Quarter between FOXTEL and each Access Seeker in proportion to:

- (a) their forecast Subscription Television Revenues for their first Quarter of operation; and
- (b) for each Quarter thereafter, their actual Subscription Television Revenue from the immediately preceding Quarter.

The actual Subscription Television Revenues for each Access Seeker for a Quarter will be determined by FOXTEL and will be the greater of:

- (a) the Access Seeker's actual revenue; and
- (b) the Access Seeker's Imputed Revenues.

New Access Seekers will be required to provide FOXTEL with a forecast of their revenue for their first Quarter of Access prior to the commencement of their service.

FOXTEL or its nominated Associate will appoint an independent organisation experienced in the practice of providing audience share information to broadcasters. This independent organisation will measure the audience for all Subscription Television Services delivered to Digital Set Top Units owned or operated by the Access Provider. The independent organisation will determine a Rating for Access Seeker and FOXTEL services.

In the case of a new Access Seeker service, the Access Seeker's Rating will be deemed to be five percent [5%] if the Access Seeker fails to provide a forecast of its revenue.

The Access Seeker will, within two weeks of the end of the Quarter, provide to FOXTEL the Access Seeker actual revenue for that Quarter.

The Imputed Revenue is based on the Access Seeker's Ratings and involves imputing a revenue amount to each Rating percentage point. The Imputed Revenue amount per Rating percentage point is based on the subscription revenues and Ratings of FOXTEL or its nominated Associate for the prior Quarter.

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The Access Seeker's Imputed Revenue will be calculated according to the following formula:

$$R_I = V_{AS} \times (R_{AP}/V_{AP})$$

Where:

R_I is Imputed Revenue;

V_{AS} is Access Seeker's Rating;

R_{AP} is FOXTEL's or its nominated Associate's total subscription revenue; and

V_{AP} is the sum of the Ratings of FOXTEL or its nominated Associate.

Where the actual revenue is higher than the Imputed Revenue, the Subscription Television Revenue is the actual revenue.

The proportion of Annual Shared Costs payable by an Access Seeker for a given service A is given by:

$$C_A = \frac{ASC \times R_{ASA}}{\left(\sum_1^n R_{ASm} \right) + R_{AP}}$$

Where:

C_A is the allocated Quarterly Shared Costs charge payable by the Access Seeker for service A;

ASC is the Annual Shared Costs divided by 4;

R_{ASA} for the relevant Quarter, is the greater of the Subscription Television Revenue for service A and the Imputed Revenue for service A;

n is the number of Access Seeker services;

R_{ASm} m for the relevant Quarter, is the greater of the Subscription Television Revenue for service A and the Imputed Revenue for service number m; and

R_{AP} is the actual revenue of FOXTEL or its nominated Associate for the relevant Quarter.

There will be a minimum Rating per Subscription Television Service which will be determined by FOXTEL to be the minimum level of statistical significance. The initial minimum Rating will be 0.25% of the share of the total subscription television Ratings and this may be changed by FOXTEL from time to time on the written recommendation of the provider of Rating data.

7.4 Attributable Costs

Annual Attributable Costs will be allocated equally across all Access Seekers independently of the number of channels used, revenue share or Ratings.

7.5 Access Charge

The Access Charge will be the sum of allocated Annual Attributable Cost and allocated Annual Shared Costs and will be payable for each Subscription Television Service delivered by an Access Seeker using the Digital Set Top Unit Services.

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8. Dictionary

For the purposes of this Pricing Methodology, the following definitions apply:

ACCC means the Australian Competition and Consumer Commission.

Access means access to the Digital Set Top Unit Services.

Access Agreement means an access agreement entered into between FOXTEL and an Access Seeker pursuant to the terms of the Undertaking.

Access Charges means the charges for the Digital Set Top Unit Services calculated in accordance with this Schedule 3.

Access Seeker means a person seeking Access other than FOXTEL.

Act means the Trade Practices Act 1974 (Cth).

Annual Attributable Cost has the meaning set out in clause 7.2.

Annual Opex Cost has the meaning set out in clause 5.

Annual Overhead Cost has the meaning set out in clause 6.

Annual Shared Costs has the meaning set out in clause 7.2.

APAB means FOXTEL Asset Base and has the meaning set out in clause 3.1.

Associate means an entity over which FOXTEL is in a Position to Exercise Control.

Attributable Capex Costs means the Capital Expenditure incurred by FOXTEL as a result of the provision of Access to Access Seekers.

Attributable Cost means the cost incurred by FOXTEL as a result of the provision of Access to Access Seekers.

Attributable Opex Costs means the Operational Expenditure incurred by FOXTEL as a result of the provision of Access to Access Seekers.

Cable Installed Base Acquisition Cost has the meaning set out in clause 4.2.

Cable Set Top Unit Services means Digital Set Top Unit Services where the Subscription Television Service is delivered using the hybrid fibre-coaxial network provided by Telstra.

Capex Pool has the meaning set out in clause 3.1.

Capital Expenditure means the outlays made to obtain or control assets, where assets are probable economic benefits that will be obtained or controlled by FOXTEL in future periods as a result of past or current transactions or events but only to the extent that the outlays are necessary for the supply of Digital Set Top Unit Services.

CAPM means the capital asset pricing model set out in clause 3.4.

Commencement Date means the date by which FOXTEL has incurred expenditure on Defined Capital Expenditure items equal to 1% of the total capital expenditure forecast over the period T1 to T10.

Conditional Access (CA) means all of the services specified in Part B of Schedule 1.

Conditional Access System means the system used by FOXTEL to provide Conditional Access.

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Corporate Overhead Cost means the indirect costs incurred by FOXTEL in relation to the supply of the Digital Set Top Unit Services expressed as a percentage of the Annual Opex Cost.

Corporate Tax Rate means the rate set out in section 23 of the Income Tax Rates Act 1986.

Customer Cabling means a Line within a customer's premises.

Defined Capital Expenditure means Capital Expenditure that is incurred by FOXTEL in providing Digital Set Top Unit Services to itself and to Access Seekers and includes, but is not limited to, all expenditure on:

- Digital Set Top Units;
- Smartcards;
- Conditional Access System;
- the system for the generation of Service Information;
- replacing analogue set top units with Digital Set Top Units;
- marketing other than Retention Marketing and marketing solely devoted to a single Subscription Television Service in the basic package of FOXTEL or its nominated Associate;
- the installation and commissioning of Digital Set Top Units and Smartcards; and
- warehousing and transportation of Digital Set Top Units and Smartcards.

Defined Operational Expenditure means Operational Expenditure that is incurred by FOXTEL in providing Digital Set Top Unit Services to itself and to Access Seekers and includes, but is not limited to, all expenditure on:

- support for the delivery of Conditional Access;
- logistics management;
- Retention Marketing;
- the refurbishment of Digital Set Top Units to enable them to be redeployed;
- sales; and
- service calls (net of any revenue received for those service calls).

Depreciation means depreciation calculated using the straight-line methodology, which allocates an equal proportion of the actual cost of the asset to each year of the asset's Economic Life.

Digital Set Top Unit means conditional access customer equipment (as defined in Part XIC of the Act) owned by and / or leased to FOXTEL (including remote control) appropriate for receiving a digital Subscription Television Service or Related Services.

Digital Set Top Unit Services means all of the services specified in Part A (Set Top Unit Services) and Part B (CA Services) of Schedule 1, which will be supplied by FOXTEL on the terms and conditions set out in this Agreement, including any special terms and conditions set out in Schedule 1.

Economic Life means the period during which an asset is expected to provide a positive benefit to FOXTEL. It begins when the asset starts producing useful benefits for FOXTEL and ends when

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there is no longer a benefit. That is, the Economic Life is the shorter of the physical life of the asset or the period over which it becomes technically obsolete.

Installed Base Acquisition Cost (IBAC) means costs associated with the development of FOXTEL's subscriber base that were not recovered or will not to be recovered prior to the cessation of the analog subscription television business. These costs represent the minimum amount that a digital subscription television business would need to pay the analog business to purchase its subscriber base to make the analog subscription business willing to cease operations.

Interactive Service means a carriage service and services provided by the modem and associated software in the Subscriber's Digital Set Top Unit which carry or facilitate the carriage of digital signals from a Subscriber's Digital Set Top Unit to the subscription television provider or another person, the critical features of which are that:

- (i) the signals are sent from the Subscriber's premises; and
- (ii) the signals are being sent using the Digital Set Top Unit.

Imputed Revenue has the meaning set out in clause 7.3.

Line means a wire, cable or other physical medium used as a continuous artificial guide for carrying communications by means of guided electromagnetic energy.

NPV means net present value calculated by determining discounted cash flow over a number of periods at a specific rate of return.

Opex means Operational Expenditure.

Operational Expenditure means outlays other than Capital Expenditure.

Opex Pool has the meaning set out in clause 5.

Overhead Pool has the meaning set out in clause 6.

Position to Exercise Control has the meaning given to it in Schedule 1 of the *Broadcasting Services Act 1992*.

Quarter means a quarter of any calendar year/financial year.

Quarterly Shared Costs has the meaning set out in clause 7.3.

Rate Card has the meaning set out in clause 1.

Rating means the audience share obtained by the Access Seeker's Subscription Television Service as a percentage of the total subscription television viewing for all services to Digital Set Top Units owned or operated by FOXTEL over the period of the most recently completed Quarter (or such other period as FOXTEL determines from time to time) measured by an independent organisation experienced in the practice of providing audience share information to broadcasters who produces ratings information in a form acceptable to FOXTEL.

Related Service means a service that is related to a Subscription Television Service that delivers content where the sole purpose of the transmission of the content is to enhance a television program, but does not include Interactive Services.

Retention Marketing means marketing intended to retain existing customers.

Return on Capital has the meaning set out in clause 3.4.

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Satellite Installed Base Acquisition Cost has the meaning set out in clause 4.3.

Satellite Set Top Unit Services means Digital Set Top Unit Services where the Subscription Television Service is delivered by satellite.

Service Information (SI) means the information necessary to be received by a Digital Set Top Unit which, in addition to information provided as part of the Conditional Access System, permits the reception of a Subscription Television Service but does not include the content which forms the digital Subscription.

Shared Costs means the costs that are shared between Access Seeker and FOXTEL .

Smartcard means a plastic card with embedded electronic chip, or other similar device, owned by FOXTEL and issued to a Subscriber by FOXTEL which, when enabled and inserted into the Digital Set Top Unit located in the Subscriber Premises, has the functionality of enabling that Digital Set Top Unit to receive, in unscrambled form, the digital Subscription Television Service and Related Services to which that Subscriber is entitled.

Smoothed Annual IBAC Cost has the meaning set out in clause 4.4.

Subscriber means a person who receives FOXTEL's digital Subscription Television Services and Related Services and who may also receive digital Subscription Television Services and Related Services from the Access Seeker pursuant to the Digital Access Agreement.

Subscriber Premises means the premises of a Subscriber at which FOXTEL provides digital Subscription Television Services and Related Services.

Subscription Television Revenue means subscription revenue obtained in consideration for the provision of Subscription Television Services (and any Related Services that enhance the television programs in those Subscription Television Services) using the Digital Set Top Unit Services.

Subscription Television Service means a service that delivers television programs where the service is:

- (a) a subscription broadcasting service; or
- (b) a subscription narrowcasting service.

Subscription broadcasting service, subscription narrowcasting service and television programs have the meanings given by the BSA from time to time.

T1 means a one-year period which begins on the Commencement Date.

T2, T3 ...T10 means a one-year period subsequent to T1 where the number after the letter "T" indicates the order of the one-year periods. The periods follow each other immediately. That is, for example, there is no period between T2 and T3.

Total Annual Cost has the meaning set out in clause 7.1.

Undertaking means an undertaking given by FOXTEL to the ACCC under section 87B of the Act on 21 November 2002.

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Schedule 4

Interface Specifications

Part A – NTP Specifications

Part B- CAS Specifications

- Access Seeker provided subscriber management system interface
- Access Seeker program data interface
- Access Seeker CA/SI data interface

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Schedule 5

Interface Points [FOXTEL to attach diagram]

- NTP
- Access Seeker SMS interface
- Access Seeker program data interface
- Access Seeker CA/SI data interface

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Schedule 6

Required Network Enhancement

At a minimum, the Required Network Enhancement must include:

- (a) enhancements and extensions to the Interface Points to enable interconnection with the Carriage Service Provider's network;
- (b) the acquisition and installation of additional equipment at the Interface Points to enable FOXTEL to supply the Digital Set Top Unit Services to the Access Seeker;
and
- (c) any other equipment, software, system, facilities or other things as otherwise advised in writing by FOXTEL.

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Schedule 7

Mediation Guidelines

Any mediation conducted under Clause 25 must be conducted in accordance with the ACDC Mediation Guidelines in force at the time of the Dispute and the provisions of this Schedule 7. In the event of any inconsistency between the ACDC Mediation Guidelines and the provisions of this Schedule 7, the provisions of this Schedule 7 will prevail.

- (a) Any referral of a Dispute to mediation must be made by notice, including a statement of the matters in dispute.
- (b) Mediations are to be conducted in private.
- (c) In addition to the qualifications of the mediator contemplated by the ACDC Mediation Guidelines, the mediator should:
 - (i) have an understanding (or have the capacity to come to such an understanding quickly) of:
 - (A) the relevant aspects of the subscription television and/or telecommunications industry; and
 - (B) competition law and policy; and
 - (ii) not be an officer, director or employee of a telecommunications company or otherwise have a potential for conflict of interest.
- (d) 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 paragraph 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.
- (e) The terms of any mediation settlement agreements and any information relating to the existence, conduct, status or outcomes of the mediation is deemed to be Confidential Information of each party and may be published or announced only with the consent of both parties and in terms agreed by the parties.
- (f) The mediation will terminate in accordance with the ACDC Mediation Guidelines.
- (g) The parties will bear their own costs of the mediation, including the costs of any representatives, and will each bear half the costs of the mediator.
- (h) Any agreement resulting from mediation will bind the parties on its terms.

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Schedule 8

1. Definitions and Interpretation

The following definitions apply in this Agreement, the Recitals and the Schedules unless the context requires otherwise.

Access Charges means the charges for the Digital Set Top Unit Services calculated in accordance with Schedule 3.

Access Seeker Equipment means all software, hardware and other equipment (other than the Digital Subscriber Equipment) used or provided by the Access Seeker, its Related Bodies Corporate or a third party (other than FOXTEL) to receive the Digital Set Top Unit Services.

Access Seeker Fault means any failure of or fault with any services provided by the Access Seeker or its Related Bodies Corporate, or the Access Seeker Equipment.

ACDC Mediation Guidelines means the 'Guidelines for Commercial Mediation' (August 1997 Edition) issued by the Australian Commercial Disputes Centre Limited (**ACDC**) but if the ACDC issues an updated edition of those guidelines, the Parties may agree in writing to use the updated edition.

Act means the *Trade Practices Act 1974* (Cth).

Agreement means this agreement between FOXTEL and the Access Seeker for the supply of Digital Set Top Unit Services which is comprised of this agreement and its Schedules.

Analogue Access Agreement means an agreement in accordance with Schedule 1 to the undertakings provided by FOXTEL and accepted by the Commission on [date] under section 87B of the Act.

Analogue Subscriber means a person who receives FOXTEL's analogue Subscription Television Services and may also receive Subscription Television Services from the Access Seeker pursuant to the Analogue Access Agreement.

Bank Guarantee means an irrevocable and unconditional undertaking in favour of FOXTEL from a major bank and on such terms and conditions as approved by FOXTEL to pay amounts of money to FOXTEL upon demand.

Bouquet means a collection of digital Subscription Television Services and Related Services allocated to a group.

BSA means the *Broadcasting Services Act 1992* (Cth).

Business Day means a day on which banks are open for general banking business in Sydney and Melbourne (not being a Saturday, Sunday or public holiday in those places).

Carriage Service has the meaning given by section 7 of the Telecommunications Act and includes a Subscription Television Digital Carriage Service.

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Carriage Service Provider means Telstra in relation to the Telstra Network and Optus Networks Pty Limited (ABN 92 008 570 330) in relation to the Satellite Network.

Carrier Licence means a licence granted under section 56 of the Telecommunications Act.

Commencement Date means the date which is 10 Business Days after all of the conditions precedent in Clause 2 have been satisfied or waived in writing by FOXTEL.

Commercial retail digital cable Subscription Television Service means a retail digital Subscription Television Service using both the Telstra Network and the Satellite Network which is offered for sale and does not include a trial or test service.

Commission means the Australian Competition & Consumer Commission.

Conditional Access (CA) Services means all of the services specified in Part B of Schedule 1.

Confidential Information of a party means all information of a confidential nature relating to that party including know-how, ideas, concepts, technology, the terms of any mediation settlement made under this Agreement, manufacturing processes, industrial marketing and commercial knowledge which is disclosed, communicated or delivered by it to the other party under this Agreement or comes to the knowledge or into the possession of the other party in connection with this Agreement, but does not include information which:

- (a) is or becomes part of the public domain (other than through any breach of either this Agreement by the other party or of an obligation of confidence to a third party); or
- (b) is rightfully received by the other party from a third person (except where that party knew or should have reasonably known that the information was obtained in breach of an obligation of confidentiality or where the third person was under a duty of confidentiality to the first party in respect of the relevant information).

Consequential Loss means any form of consequential loss including loss of profits, loss of opportunity, loss of anticipated savings, pure economic loss and any increased operating costs suffered by or incurred by any person, whether arising in contract or tort (including negligence) or under any statute, arising out of or in connection with this Agreement.

Consideration has the meaning given by the GST Law.

Content Service has the meaning given by section 15 of the Telecommunications Act.

Corporations Act means the *Corporations Act 2001* (Cth).

CPI means the Weighted Average All Groups Eight Capital Cities Consumer Price Index published on a quarterly basis by the Australian Bureau of Statistics. The CPI base for the purposes of this Agreement is the calendar quarter ending prior to the Commencement Date.

Digital Set Top Unit means conditional-access customer equipment (as defined in Part XIC of the Act) owned by and/or leased to FOXTEL (including remote control) appropriate for receiving a digital Subscription Television Service or Related Service.

Digital Set Top Unit Services means all of the services specified in Part A (Set Top Unit Services) and Part B (CA Services) of Schedule 1, which will be supplied by FOXTEL on

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the terms and conditions set out in this Agreement, including any special terms and conditions set out in Schedule 1.

Digital Subscriber Equipment means the Digital Set Top Units, Fly Cables and, if relevant, the Satellite Equipment, but does not include the MDU/MRE Installations.

Disputed Amount has the meaning given to that term in Clause 13.7(a).

Dispute Resolution Procedure means the procedure set out in Clause 25.

Electronic Program Guide has the meaning given by paragraph 6(24) of Schedule 4 of the BSA.

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.

Enhancement Charges means all of the charges payable by the Access Seeker to FOXTEL for the costs, charges and expenses incurred by FOXTEL (including labour, licensing and materials costs) relating to the Required Network Enhancements and related works.

Execution Date means the date of execution of this Agreement.

Fault means a failure of any Digital Subscriber Equipment or any other FOXTEL Equipment to operate as required under this Agreement.

Flash Memory means electronic memory that forms part of a Digital Set Top Unit, the contents of which:

- (a) do not alter when the Digital Set Top Unit is de-powered; and
- (b) may be altered by a service provider using the transmission path used by a Subscription Television Digital Carriage Service or by other means.

Fly Cables means any cable located at a Subscriber Premises which connects the Network Termination Point to the Digital Set Top Unit and the Digital Set Top Unit to the Subscriber's television set, video cassette recorder, DVD player or other Subscriber equipment.

Force Majeure means an event or cause beyond the reasonable control of the party claiming force majeure including:

- (a) Emergencies;
- (b) an act of God;
- (c) acts or omissions by any Governmental Agency;
- (d) war, revolution or any other act against public order or authority;
- (e) industrial action or trade disputes of whatever nature;
- (f) the requirements of any Law; or

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(g) any act of a third person other than FOXTEL or a Related Party of FOXTEL.

FOXTEL means FOXTEL Management Pty Limited (ACN 068 671 938) for and on behalf of the FOXTEL Partnership (which is the partnership established between Telstra Media Pty Limited (ACN 069 279 072) and Sky Cable Pty Limited (ACN 069 799 640)).

FOXTEL Cable Television means FOXTEL Cable Television Pty Limited (ACN 069 008 797).

FOXTEL Equipment means all software, hardware and other equipment (including the Digital Subscriber Equipment) used by FOXTEL in the provision of the Digital Set Top Unit Services.

FOXTEL Fault means a Fault directly caused by the negligent act or omission of FOXTEL or breach of this Agreement by FOXTEL.

FOXTEL Group means FOXTEL, Sky Cable Pty Limited (ACN 069 799 640), Telstra Media Pty Limited (ACN 069 279 027), FOXTEL Cable Television Pty Limited (ACN 069 008 797) and Customer Services Pty Limited (ACN 069 272 117).

Governmental Agency means a government or a governmental, semi-governmental or judicial entity or authority. It also includes a self-regulatory organisation established under statute or a stock exchange and a Regulator.

GST has the meaning given by the GST Law.

GST Amount means in relation to a Taxable Supply the amount of GST payable in respect of that Taxable Supply.

GST Group has the meaning given by the GST Law.

GST Law has the meaning given by the *A New Tax System (Goods and Services Tax) Act 1999* (Cth), or, if that Act does not exist means any Act imposing or relating to the imposition or administration of a goods and services tax in Australia and any regulation made under that Act.

Input Tax Credit has the meaning given by the GST Law and a reference to an Input Tax Credit entitlement of a party includes an Input Tax Credit for an acquisition made by that party but to which another member of the same GST Group is entitled under the GST Law.

Intellectual Property Rights means any existing or future intellectual or industrial property rights, including:

- (a) the right to apply for (or an application for) patent, trade mark, service mark or design protection in any country or region, including the right to apply for such protection under any international treaty;
- (b) the right to have patent, trade mark, service mark or design protection in any country or region registered or granted upon application;
- (c) a registered or granted patent, trade mark, service mark or design in any country or region;
- (d) an unregistered trade mark, service mark or design in any country or region (including a brand, name, logo, distinctive colour or get up);

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- (e) a common law or statutory right to sue for passing off;
- (f) copyright in any country or region;
- (g) trade secrets, know-how and confidential information; and
- (h) a licence or other right to use or to grant the right to use any of the foregoing or to apply for registration or to be the registered proprietor or user of any of the foregoing.

Interactive Service means a carriage service and services provided by the modem and associated software in the Subscriber's Digital Set Top Unit which carry or facilitate the carriage of digital signals from a Subscriber's Digital Set Top Unit to the subscription television provider or another person, the critical features of which are that:

- (i) the signals are sent from the Subscriber's premises; and
- (ii) the signals are being sent using the Digital Set Top Unit.

Interface Points means the interface points set out in Schedule 5, which may be amended by FOXTEL from time to time in accordance with Clause 9.2, and in the case of the Interface Specifications at the Network Termination Point, which may also be amended by FOXTEL from time to time if required to ensure these Interface Specifications are the same as those specifications required by FOXTEL of its Carriage Service Providers in the provision of Digital Set Top Unit Services by FOXTEL to itself.

Interface Specifications means the specifications and procedures, which include the information set out in Schedule 4, which may be amended by FOXTEL from time to time in accordance with Clause 9.2.

Intervening Legislation means:

- (a) the enactment, promulgation, amendment, replacement or repeal of the Act, the BSA, the Telecommunications Act or any Law;
- (b) a directive of a Regulator;
- (c) the declaration, addition, variation or removal of a condition applying to that party's Carrier Licence;
- (d) a declaration, variation of a declaration or revocation of a declaration under Part XIC of the Act;
- (e) registration or determination of a new or varied industry standard or industry code under Part 6, Divisions 4 or 5 of the Telecommunications Act;
- (f) the Commission issuing, or FOXTEL reasonably believing that the Commission intends to issue, a competition notice under Part XIB of the Act;
- (g) the grant of an injunction against a party in relation to a breach or alleged contravention of a Law; or
- (h) a Regulator or FOXTEL reasonably believing that a part of this Agreement contravenes or may contravene a Law.

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Law means any law or regulation or any lawful authorisation, declaration, decision, authorisation, notification, determination, order, licence, licence condition or direction made by any Minister or any Governmental Agency.

MDU/MRE Installations means any installation at Subscriber Premises which are:

- (a) complexes or groups of private residential dwellings which are connected by or share common cabling for the distribution of Subscription Television Services to those private residential dwellings, including strata, stratum or company title apartments, blocks, condominiums and community title dwelling complexes; or
- (b) multiple residential estates;
- (c) public and commercial premises such as hotels or motels and office, industrial and similar commercial premises; or
- (d) or where such installation is a commercial satellite integration installation,

and which is used for the provision of digital Subscription Television Services and Related Services but which is not Digital Subscriber Equipment.

Minister means a minister of the Crown responsible for the administration of any Law.

Network Termination Point means the wall plate or satellite dish (or where there are MDU / MRE Installations, then the wall plates), as the case may be, in a Subscriber Premises to which FOXTEL's Subscription Television Services are transmitted and, for the avoidance of doubt, does not include any Digital Subscriber Equipment or any other point or thing on the Subscriber Premises' side of the wall plate or satellite dish (or where there are MDU / MRE Installations, then the wall plates), as the case may be.

Operational Procedures means FOXTEL's operating procedures manual as notified to the Access Seeker, which may be amended by FOXTEL from time to time.

Other Payments means any charges, fees, costs, reimbursements, expenses or other amounts (other than Access Charges) payable by the Access Seeker to FOXTEL under or in connection with this Agreement.

People means directors, officers, employees, agents, contractors, advisers and representatives of a person but, in relation to a party, does not include that party's Subscribers or the other party.

Personal Information has the meaning given to that term in the Privacy Act.

Privacy Act means the *Privacy Act 1988* (Cth) as amended by the *Privacy (Private Sector) Amendment Act 2000* (Cth) and any guidelines issued by the Federal Privacy Commissioner under that legislation.

Privacy Law means any laws, regulations, codes or policies applicable to or protecting the privacy of individuals and their Personal Information, including:

- (a) Parts 13 and 14 of the Telecommunications Act;
- (b) the Privacy Act;
- (c) any privacy codes registered under Division 4 of Part 6 of the Telecommunications Act;

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- (d) any industry or private sector privacy codes subscribed to by a party on a voluntary basis; and
- (e) any undertakings given by a party in participating in the Telecommunications Industry Ombudsman Scheme established by Part 10 of the Telecommunications Act.

Purpose means the purpose for which the Personal Information was originally provided to the Access Seeker or to FOXTEL and as otherwise advised by FOXTEL from time to time.

Ratings means the audience share obtained by the Access Seeker's Subscription Television Service as a percentage of the total subscription television viewing for all services to Digital Set Top Units owned or operated by FOXTEL over the period of the most recently completed quarter (or such other period as FOXTEL determines from time to time) measured by an independent organisation experienced in the practice of providing audience share information to broadcasters who produces ratings information in a form acceptable to FOXTEL.

Regulator means, as the case requires, a minister responsible for administering Part XIB or XIC of the Act or the Telecommunications Act or the BSA, the Australian Communications Authority, the Commission, the Australian Broadcasting Authority or any two or more of them.

Related Party has the meaning given to that term in the Corporations Act.

Related Service means a service that is related to a Subscription Television Service that delivers content where the sole purpose of the transmission of the content is to enhance a television program, but does not include Interactive Services.

Required Network Enhancement means the equipment, software, system, facilities or other things listed in Schedule 6, or as otherwise advised in writing by FOXTEL irrespective of whether the equipment, software, system, facilities or other things were acquired by FOXTEL on behalf of all Access Seekers prior to the commencement of this Agreement, reasonably required to enable the Digital Set Top Unit Services to be provided to the Access Seeker.

Resident Application/Processes means software and data within a Digital Set Top Unit which are not manipulated by a service provider as a necessary element of the reception of the supply of a digital Subscription Television Service.

Satellite Equipment means satellite dishes and associated downlink equipment owned by and/or leased to FOXTEL appropriate for receiving digital Subscription Television Services and Related Services via the Satellite Network.

Satellite Network means the satellite network operated by Optus Networks Pty Limited or such other company and used for the delivery of FOXTEL's digital Subscription Television Services via satellite.

Service Date has the meaning set out in Clause 4.3(b).

Smartcard means a plastic card with embedded electronic chip, or other similar device, owned by FOXTEL and issued to a Subscriber by FOXTEL which, when enabled and inserted into the Digital Set Top Unit located in the Subscriber Premises, has the

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functionality of enabling that Digital Set Top Unit to receive, in unscrambled form, the digital Subscription Television Service and Related Services to which that Subscriber is entitled.

Smartcard Number means a unique number associated with each Smartcard.

Set Top Unit Services means all of the services specified in Part A of Schedule 1.

Subscriber means a person who receives FOXTEL's digital Subscription Television Services and Related Services and who may also receive digital Subscription Television Services and Related Services from the Access Seeker pursuant to this Agreement.

Subscriber Premises means the premises of a Subscriber at which FOXTEL provides digital Subscription Television Services and Related Services.

Subscription Television Digital Carriage Service means a forward path Carriage Service for a digital Subscription Television Service or a Related Service using the Telstra Network and/or the Satellite Network to the Network Termination Point.

Subscription Television Service means a service that delivers television programs where the service is:

- (a) a subscription broadcasting service; or
- (b) a subscription narrowcasting service.

Subscription broadcasting service, subscription narrowcasting service and television programs have the meanings given by the BSA from time to time.

Tax Invoice has the meaning given to that term in the *A New Tax System (Goods and Services Tax) Act 1999* (Cth).

Taxable Supply has the meaning given by the GST Law excluding the reference to section 84-5 of the *A New Tax System (Goods and Services Tax) Act 1999* (Cth).

Technical Dispute means a dispute relating to the technical operation of the deployed technology used to provide or facilitate the provision of Digital Set Top Unit Services under this Agreement.

Telecommunications Act means the *Telecommunications Act 1997* (Cth).

Telstra means Telstra Multimedia Pty Ltd (ACN 069 279 072).

Telstra Network means the hybrid fibre co-axial (**HFC**) network operated by Telstra and used for the delivery of FOXTEL's digital Subscription Television Services.

Term has the meaning given to that term in Clause 1.2.

Transitional Digital Set Top Unit Services means the limited Digital Set Top Unit Services provided to the Access Seeker during the Transitional Period as described in and in accordance with Clause 5.

Transitional Period means the period from the date that FOXTEL commences supplying a Commercial retail digital cable Subscription Television Service to either the date that FOXTEL has deployed a minimum of 100,000 cable Digital Set Top Units to Subscribers for use in receiving the FOXTEL digital Subscription Television Service or the expiry of 6 months from that date, whichever is earlier.

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Undertaking means the undertaking given by FOXTEL to the ACCC under section 87B of the Act on 21 November 2002.

2. The following interpretation provisions apply in this Agreement, the Recitals and the Schedules unless the content requires otherwise.
- (a) The Recitals form part of this Agreement.
 - (b) Nothing in this Agreement is to be interpreted against a party solely on the ground that the party put forward this Agreement or any part of it.
 - (c) Headings are for convenience only and do not affect interpretation.
 - (d) The singular includes the plural and conversely.
 - (e) A gender includes all genders.
 - (f) If a word or phrase is defined, its other grammatical forms have a corresponding meaning.
 - (g) A reference to a person, corporation, trust, partnership, unincorporated body or other entity includes any of them.
 - (h) A reference to a Clause or Schedule is a reference to a clause or schedule to this Agreement.
 - (i) A reference to an agreement or document (including a reference to this Agreement) is to the agreement or document as amended, varied, supplemented, novated or replaced, except to the extent prohibited by this Agreement or that other agreement or document.
 - (j) A reference to a party to this Agreement or another agreement or document includes the party's successors, permitted substitutes and permitted assigns (and, where applicable, the party's legal personal representatives).
 - (k) A reference to legislation or to a provision of legislation includes a modification or re-enactment of it, a legislative provision substituted for it and a regulation or statutory instrument issued under it.
 - (l) A reference to conduct includes an omission, statement and undertaking, whether or not in writing.
 - (m) A reference to an **agreement** includes any undertaking, deed, agreement and legally enforceable arrangement, whether or not in writing, and a reference to a document includes an agreement (as so defined) in writing and any certificate, notice, instrument and document of any kind.
 - (n) A reference to **dollars** and **\$** is to Australian currency.
 - (o) A reference to a right includes a benefit, remedy, discretion, authority or power.
 - (p) A reference to an obligation includes a warranty or representation and a reference to a failure to observe or perform an obligation includes a breach of warranty or representation.

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- (q) A reference to any thing (including any amount) is a reference to the whole or any part of it and a reference to a group of things or persons is a reference to any one or more of them.
- (r) A reference to an **asset** includes any real or personal, present or future, tangible or intangible, property or asset (including Intellectual Property Rights) and any right, interest, revenue or benefit in, under or derived, from the property or asset (including Intellectual Property Rights).
- (s) The meaning of general words is not limited by specific examples introduced by **including** or **for example**, or similar expressions.
- (t) Subject to Clause 28.12, a reference to **writing** includes any mode of representing or reproducing words in tangible or permanently visible form, and includes facsimile transmissions and communications by electronic mail which are reduced to a tangible or permanently visible form.
- (u) A reference to 'reasonable endeavours' does not require the payment of money or the provision of any financial benefit.

Digital Access Agreement

Executed in Sydney.

Executed by FOXTEL Management Pty Ltd:

Director Signature

Director/Secretary Signature

Print Name

Print Name

Executed by [Access Seeker]:

Director Signature

Director/Secretary Signature

Print Name

Print Name