

National
Broadband
Network

Dispute Management

Approved Dispute Guidelines

NBN Co Limited

Approved Dispute Guidelines

The Approved Dispute Guidelines were approved by the ACCC on 10 October 2014.

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Environment

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DISPUTE GUIDELINES

Introduction

This document contains the Dispute Guidelines prepared by NBN Co for the purposes of clause 6 of the SAU Dispute Management Provisions.

These Dispute Guidelines:

- (a) are to be applied by a Panel when considering a Dispute under the WBA;
- (b) are to be applied by the Resolution Advisor in performing its obligations in relation to Panel Arbitrations; and
- (c) should be read in conjunction with the SAU Dispute Management Provisions, the Dispute Management Rules, and CAA.

Note: References to provisions of the WBA, the SAU and the approved Resolution Advisor or Panel terms of appointment are references to those provisions as they exist at the date of these Dispute Guidelines and are intended to provide contextual assistance only. Such cross-references are identified in grey italics.

Background

1. NBN Co is bound by the terms of a Special Access Undertaking (**SAU**) given by NBN Co to the ACCC under section 152CBA(2) of the *Competition and Consumer Act 2010* (Cth) and accepted by the ACCC on 13 December 2013.
2. Clause 1H.5 and Annexure 1 of Schedule 1H of the SAU require NBN Co to incorporate in each Standard Form Access Agreement a regime for resolving Disputes which arise between NBN Co and customer that satisfies the SAU Dispute Management Provisions.
3. These Dispute Guidelines include contextual references to the Wholesale Broadband Agreement (**WBA**), being the primary agreement under which NBN Co supplies Products to its customers over the NBN Co Network. The WBA is one SFAA. NBN Co has entered into Access Agreements based on the WBA with its customers that set out the terms on which customers may order products from NBN Co and NBN Co will supply products to customers.
4. The SAU Dispute Management Provisions require NBN Co to publish Dispute Guidelines, which are to be applied by a Panel when considering a Dispute. The Dispute Guidelines are subject to the approval by the ACCC.
5. The Resolution Advisor is required to have regard to these Dispute Guidelines under the Resolution Advisor Terms of Appointment.
6. A Panel Member appointed in respect of a Dispute under the Approved Panel Terms must have regard to these Dispute Guidelines.
7. These Dispute Guidelines are distinct from the guidance notes to be prepared and published by the Resolution Advisor in accordance with the Resolution Advisor Terms of Appointment (see section 8 below).

1 Objective

In exercising their decision-making functions in connection with a Panel Arbitration, the Resolution Advisor and Panel must endeavour to achieve (as far as practicable) the paramount object in section 1C of the *Commercial Arbitration Act 2010 (NSW) (CAA)*, being to facilitate the fair and final resolution of Disputes without unnecessary delay or expense.

2 Prior to Panel appointment

2.1 Referrals under the WBA

- (a) The WBA provides that Customer may refer a Dispute to Panel Arbitration by submitting a written Referral Notice to the Resolution Advisor: *clause G2.1(c)(iii) and G4.1*.
- (b) The WBA states that a Referral Notice must comply with any procedural requirements specified by the Resolution Advisor and published on NBN Co's Website: *clause G4.1(a)*.
- (c) Where the party providing the Referral Notice fails to comply with the relevant procedural requirements, the WBA gives the Resolution Advisor the power to require the referring party to submit such further information as the Resolution Advisor considers necessary for the Resolution Advisor to assess the nature of the Dispute: *clause G4.1(b)*.
- (d) The WBA contains a procedure by which:
 - (i) the Resolution Advisor will notify each party to the Dispute after receiving a Referral Notice: *clause G4.1(c)*;
 - (ii) following receipt of the Referral Notice, the parties provide the Resolution Advisor with a statement setting out the information relevant to the Dispute detailed in *clause G4.1(d)* which includes:
 - (A) a brief history of the Dispute and the circumstances giving rise to it;
 - (B) a brief statement of its position in relation to that Dispute;
 - (C) its submissions in respect to classification of the Dispute;
 - (D) any preference the party has for members of the Pool to be appointed to a Panel; and
 - (E) any other information or documentation requested by the Resolution Advisor.

2.2 Panel selection and appointment

- (a) The WBA provides that the Resolution Advisor will, in consultation with the parties, select from the Pool the Panel that will determine the Dispute. The WBA states that subject to the provisions of the CAA, the decision of the Resolution Advisor as to the selection of the Panel is final and binding upon all parties to the Dispute: *clauses G4.2(a) and G4.2(e)*.
- (b) The WBA contemplates that the Resolution Advisor will take into account the following factors in selecting the Panel *clause G4.2(b)*:
 - (i) the preferences of the parties to the Dispute in respect to Pool Members;

- (ii) any circumstances likely to give rise to a real danger of bias on the part of any Pool Member in the performance of his or her duties as a Panel Member for the Dispute, if appointed;
 - (iii) the expertise required to assess the nature of the Dispute; and
 - (iv) the need for the Panel to include a legal Practitioner or Dispute Resolution Practitioner as its Chair.
- (c) Where the Dispute Management Rules provide for selection of the Panel by the Resolution Advisor, the Resolution Advisor will:
- (i) confirm the availability of Pool Members with the relevant expertise to arbitrate the Dispute;
 - (ii) have regard to the objective in section 1 of these Dispute Guidelines, including the cost of the appointment of the potential Pool Members and the efficiency with which the Dispute may be determined;
 - (iii) consider, in consultation with the relevant Pool Members and the parties to the Dispute, whether any specific procedural steps will need to be inserted into the Approved Panel Terms to aid the efficient resolution of the Dispute, including provisions governing:
 - (A) the periodic payment of costs, or payment in instalments;
 - (B) the provision of security for costs of the Panel and/or Resolution Advisor in respect of the Dispute;
 - (iv) consider whether parties to the Dispute and relevant Pool Members agree to any other variations to the Approved Panel Terms, including deeming certain costs or expenses of the Panel Member as reasonable.
- (d) The WBA requires the parties to appoint the Panel Members on the Approved Panel Terms (subject to any permitted variation by the Resolution Advisor) after the Resolution Advisor has selected the Panel Members: *clause G4.2(g)*.
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3 Panel classification of a Dispute

3.1 Application

This section 3 will apply where the Dispute Management Rules provide for classification by a Panel of a Dispute as a Bilateral Dispute or an IRD.

3.2 Classification

The Panel will classify each Dispute on a case-by-case basis.

3.3 WBA classification requirements

- (a) Once the Panel is appointed, the Resolution Advisor will provide the Panel with information on the Dispute: *clause G4.2(h)*.
- (b) Before determining a Dispute, the Panel must first classify that Dispute as a Bilateral Dispute or an IRD: *clause G4.3*.

- (c) The WBA provides that:
- (i) The Panel must classify the Dispute prior to the expiry of 7 Business Days from the date on which the Panel is provided with information on the Dispute from the Resolution Advisor: *clause G4.3(a)*.
 - (ii) In classifying a Dispute, the Panel must determine the real questions in controversy between the parties (and is not bound by the parties' formulation of the questions) and have regard to these Dispute Guidelines: *clause G4.3(b)*.
 - (iii) The Panel may invite further submissions on classification from the parties to the Dispute prior to making its classification decision: *clause G4.3(c)*.
 - (iv) The Panel must classify a Dispute as an **IRD** only if the Panel considers, based on the materials before it and the facts, matters and circumstances of the Dispute in question, that the resolution of the Dispute will, or is likely to, materially affect Other NBN Co Customers, including by reason of the Non-Discrimination Obligations: *clause G4.3(d)*.
 - (v) A classification decision is made by a majority of the Panel Members: *clause G4.3(e)*.
 - (vi) Any Dispute not classified as an IRD must be classified as a **Bilateral Dispute**: *clause G4.3(g)*.
 - (vii) The Resolution Advisor will notify NBN Co and Customer in writing of the Panel's classification decision: *clause G4.3(h)*.

3.4 Relevant considerations

In classifying a Dispute and determining whether the resolution of that Dispute will, or is likely to, materially affect Other NBN Co Customers, the Panel may have regard to any matter the Panel considers relevant, including (but not limited to):

- (a) whether the objective in section 1 of these Dispute Guidelines is best achieved by classifying the Dispute as a Bilateral Dispute or IRD;
- (b) whether any Other NBN Co Customer is likely to have a "sufficient interest" in the subject matter of the Dispute. See section 5.3 below for guidance on what might constitute a "sufficient interest";
- (c) whether the issues in Dispute are likely to arise in other Panel Arbitrations, or are common to one or more other Referral Notices or Panel Arbitrations (where that other Panel has not classified or determined the parties for that other Dispute);
- (d) whether the issues in Dispute are in respect of, or arise out of, facts or circumstances which are the same, similar or related to those affecting Other NBN Co Customers;
- (e) whether the Dispute relates to facts and circumstances specific to a particular Customer or that Customer's Downstream Customers;
- (f) the time which has elapsed since the events or circumstances giving rise to the Dispute;
- (g) any submissions from NBN Co and the Customer who is a party to the Dispute made in accordance with the Dispute Management Rules; and

- (h) any submissions from Other NBN Co Customers provided that, in seeking those views, the Panel complies with the provisions relating to the disclosure of confidential information in the Dispute Management Rules and/or CAA.

4 Invitations for IRDs

4.1 Application

This section 4 will apply where the:

- (a) Dispute Management Rules provide for:
 - (i) classification of a Dispute by a Panel;
 - (ii) the Resolution Advisor to issue an Invitation to Other NBN Co Customers to apply to join as a party to an IRD; and
- (b) Dispute is classified as an IRD.

4.2 Invitations to potentially affected Other NBN Co Customers

Under the WBA, if the Panel classifies a Dispute as an IRD, the Resolution Advisor must identify the potentially affected Other NBN Co Customers in accordance with section 4.3 of these Dispute Guidelines and issue an Invitation to those Other NBN Co Customers in accordance with the WBA, *clause G6.2(b)*, which informs them of:

- (a) the commencement of the IRD; and
- (b) their right to make an application to become a party to the Panel Arbitration for that IRD.

4.3 Identifying potentially affected Other NBN Co Customers

- (a) In identifying potentially affected Other NBN Co Customers, the Resolution Advisor will have regard to the following factors:
 - (i) the objective in section 1 of the Dispute Guidelines;
 - (ii) whether any Other NBN Co Customers may have a "sufficient interest" in the subject matter of the Dispute. See section 5.3 below for guidance on what might constitute a "sufficient interest";
 - (iii) whether there are Other NBN Co Customers supplied with the specific product and/or services which are the subject of the Dispute;
 - (iv) the effect of any applicable Non-Discrimination Obligations;
 - (v) any submissions from NBN Co and the Customer who is a party to the Dispute made in accordance with the WBA; and
 - (vi) any submissions from Other NBN Co Customers provided that, in seeking those views, the Resolution Advisor does not disclose the confidential information of a party without that party's consent in writing.
- (b) The Resolution Advisor may request that NBN Co provide to the Resolution Advisor details of the Customers whom the Resolution Advisor reasonably considers are affected or potentially affected by the Dispute.

4.4 Form of Invitation

- (a) The Resolution Advisor will, from time to time, publish on the Resolution Advisor's website a pro-forma Invitation which will be used when notifying Other NBN Co Customers potentially affected by an IRD.
- (b) Invitations must contain the information set out in *clause G6.2(c)* of the WBA, being:
 - (i) a brief history of the IRD (subject to the preservation of confidentiality of the disputing parties' confidential information);
 - (ii) the process which the Invitee must comply with in order to make a valid application to become a party to the Panel Arbitration for the IRD;
 - (iii) the conditions and/or criteria that the Invitee must meet, to the Panel's satisfaction, to become a party to the Panel Arbitration for the IRD;
 - (iv) the terms on which the Panel Arbitration will be conducted;
 - (v) the deadline for responses to the Invitation; and
 - (vi) any other information the Resolution Advisor considers relevant to the Invitation.
- (c) The form of the Invitation issued by the Resolution Advisor must:
 - (i) disclose any special terms which have been inserted in the Schedule to the Approved Panel Terms governing the appointment of the Panel Members in respect of the relevant Dispute;
 - (ii) include terms which govern the use, disclosure, and security of confidential information in connection with the IRD, such terms not being inconsistent with the relevant Access Agreement and the CAA; and
 - (iii) include terms that protect ownership of, or right, title or interest in, the intellectual property rights of a disputing party, any other party to the IRD or any third party.
- (d) The form of the Invitation issued by the Resolution Advisor may include special considerations that the Panel considers desirable to assist the achievement of the objective in section 1 of these Dispute Guidelines, including by way of example:
 - (i) the potential for joint legal representation of any Accepted Invitees; and
 - (ii) limiting participation of Invitees to the resolution of particular issues in the IRD, where appropriate.

4.5 Conflicts of Interest

- (a) The Resolution Advisor must disclose to the Panel the identity of the Invitees for a Dispute, following which the Panel must disclose to the:
 - (i) Resolution Advisor (in accordance with the Pool/Panel Terms); and
 - (ii) parties (in accordance with the CAA),if the involvement of any Invitee in the IRD is likely to give rise to any conflict of interest if the Invitee becomes an Accepted Invitee.

- (b) An actual or potential conflict of interest between a Panel Member and Invitee is not relevant to the Panel's application of the sufficient interest test described in section 5.3 below.

5 Acceptance of Invitees to IRDs

5.1 Application

This section 5 will apply where the Dispute Management Rules provide for classification of a Dispute by a Panel and the Dispute is classified as an IRD.

5.2 WBA requirements

- (a) The Panel is responsible for determining whether to accept an application from an Invitee to become a party to the Panel Arbitration for the IRD, and must conclusively determine the parties to the Panel Arbitration within 10 Business Days following the deadline for responses detailed in the Invitation and notify the Resolution Advisor of that decision: *clause G6.2(f)*.
- (b) In considering any application made by an Invitee to become a party to the Panel Arbitration for the IRD, the Panel must consider the factors in *clause G6.2(d)*, being:
 - (i) if the Invitee has, or is likely to have, a "sufficient interest" in the subject matter of that IRD that is likely to be materially affected by the resolution of that IRD (see section 5.3 below);
 - (ii) whether the Invitee becoming a party to the Panel Arbitration might unreasonably interfere with the ability of the original Dispute parties to conduct the Panel Arbitration as they wish; and
 - (iii) the effect of any applicable Non-Discrimination Obligations.
- (c) An Invitee is not entitled to make, and the Panel must disregard, any submissions made by an Invitee in response to applications or submissions made by other Invitees: *clause G6.3(c)*.
- (d) The WBA provides that where an Invitee to an IRD does not apply to be a party to that IRD in accordance with the requirements set out in the Invitation prior to the deadline for responses to the Invitation, the Invitee is deemed to have waived its right to apply to become a party to that IRD: *clause G6.3(b)*.

5.3 "Sufficient interest" test

- (a) One of the factors the Panel must consider in determining whether to accept an Invitee's application to become a party to the Panel Arbitration is whether that Invitee has, or is likely to have, a "sufficient interest" in the subject matter of that IRD that is likely to be materially affected by the resolution of that IRD.
- (b) A case-by-case assessment of each Invitee's application is required having regard to the facts and circumstances of each Dispute and the nature and extent of the Invitee's interest.
- (c) By way of general guidance:
 - (i) The requirement of a "sufficient interest" is concerned primarily with the interest of the Invitee in the subject matter of the Dispute rather than with the merits of the contentions which the Invitee seeks to raise in the Panel Arbitration.

- (ii) The Panel should consider whether the Invitee has a direct and immediate interest in the subject matter of the Dispute or whether the Invitee's interest is remote, indirect or fanciful. In general, an Invitee with an indirect interest would not be regarded as having a sufficient interest to become a party to the Panel Arbitration for an IRD.
- (iii) An Invitee with a sufficient interest may include an Invitee who establishes that its business interests or prospects could be adversely affected by the outcome of the Dispute.
- (iv) The precedent effect of a determination, in itself, generally is not enough to provide a sufficient interest - something more is required.
- (v) An Invitee's interest should be one that is sufficient to warrant putting those who will be involved in the Dispute to the time, effort and expense of an IRD rather than a Bilateral Dispute.

5.4 WBA reclassification

Where a Dispute has originally been classified by a Panel as an IRD, but subsequent to issuing an Invitation and considering any responses from an Other NBN Co Customer to the Invitation, the Panel considers in its reasonable opinion, having regard to clause G6.2(d) and section 5 of these Dispute Guidelines, that no Other NBN Co Customer should be joined to the Panel Arbitration on the Dispute, then the WBA provides that the Dispute will be reclassified, managed and resolved as a Bilateral Dispute: *clause G6.2(e)*.

5.5 Resolution Advisor to notify Accepted Invitees

The WBA provides that the Resolution Advisor will notify each: *clauses G6.2(f) and G6.2(g)*:

- (a) Invitee who applied to become a party to the Panel Arbitration for the IRD of the Panel's determination; and
- (b) party to the Panel Arbitration for the IRD of the identity of each of the other parties to the Panel Arbitration.

5.6 Arbitration Agreement

The WBA states that the terms on which the IRD will be conducted will be those terms that are set out in the Invitation. Those terms will constitute an arbitration agreement between NBN Co, Customer and any Accepted Invitees: *clause G6.3(a)*.

5.7 Conflicts of Interest

The procedure for challenging the appointment of an arbitrator in the CAA applies where a conflict of interest arises between a Panel Member and a party to the Dispute (including an Accepted Invitee).

6 Panel Arbitration

6.1 WBA requirements – Panel Arbitration

- (a) The Panel must comply with the Dispute Management Provisions in respect to Panel Arbitrations: *clause 3.1 Approved Panel Member Terms of Appointment*.
- (b) The WBA provides that:

- (i) the Panel Arbitration of a Dispute will be governed by the CAA, except where (in accordance with the CAA) the parties have agreed otherwise in Module G of the WBA: *clause G7.1(a)*;
 - (ii) the Panel Arbitration will be conducted in English in Sydney under the law of New South Wales. Hearings may be conducted elsewhere with the agreement of all parties to the Dispute: *clause G7.1(c)*; and
 - (iii) the proceedings in respect of a Panel Arbitration commence on the date specified in *clause G7.1(b)* unless otherwise agreed between the parties to the Dispute and the Panel; and
 - (iv) NBN Co and Customer must do all things that are reasonably necessary for the proper and expeditious conduct of the processes set out in the Dispute Management Rules and to give full effect to the matters contemplated by them: *clause G9.2*.
- (c) The CAA provides that the:
- (i) Panel must exercise its functions to facilitate the fair and final resolution of Disputes without unnecessary delay or expense: *section 1C CAA*;
 - (ii) disputing parties must do all things necessary for the proper and expeditious conduct of the arbitral proceedings, including complying without undue delay with any order or direction of the Panel: *section 24B CAA*; and
 - (iii) Panel may exercise certain powers where a party fails to take steps required for the proper and expeditious conduct of the arbitration: *sections 25 and 33B CAA*.
- (d) The parties to the Dispute have agreed to the publication of the Panel Award in accordance with *clause G7.3* of the WBA.

6.2 WBA requirements - decisions

In making any orders, decisions, determinations or Awards, the WBA requires the Panel to have regard to the factors in *clause G7.2* as part of its decision-making process, being:

- (a) whether the order, decision, determination, or Award itself, or its implementation by the parties, will or is likely to require NBN Co to treat Customer, any other NBN Co Customer or any Customer in a manner that does not comply with the Non-Discrimination Obligations: *clause G7.2(a)*; and
- (b) any award previously made by an arbitration panel in respect to a dispute under an Other Wholesale Broadband Agreement, to the extent relevant to the Dispute, except that the Panel is not bound to follow the prior award. Where the Panel has regard to a prior award, the Panel must ensure the confidentiality of any commercially sensitive information of a party to which prior award applied: *clauses G7.2(b) and G7.2(c)*.

6.3 WBA requirements – Awards

- (a) The WBA requires the Panel to provide the parties to the Dispute with a signed copy of its Award in accordance with the time detailed in *clause G7.2(d)*.

- (b) The WBA confirms that a party may, in accordance with the CAA, apply to the Panel for a correction or interpretation of the Award or for an additional award within 20 Business Days from receipt of the notice of the Panel's Award: *clause G7.2(e)*.
- (c) The WBA states that the Panel must, in accordance with *clause G7.3*:
 - (i) invite the parties to the Dispute to make written submissions to the Panel identifying and justifying any part of the Confirmed Award that the party considers is confidential to them and should not be published on NBN Co's Website for access by Other NBN Co Customers and Access Seekers; and
 - (ii) having regard to any written submissions, determine which parts (if any) of the Confirmed Award (if any) NBN Co must redact prior to publication to protect confidentiality.

7 Resolution Advisor delegation of functions

7.1 More than one Resolution Advisor appointed

Where more than one Resolution Advisor is appointed, a Resolution Advisor may only delegate the performance of its functions to an Alternate Advisor, in accordance with the terms of its appointment and the Dispute Management Rules.

7.2 Single Resolution Advisor appointed

- (a) Where the Resolution Advisor is temporarily unavailable after a Dispute has arisen:
 - (i) the parties to that Dispute may agree to the temporary performance of the Resolution Advisor's administrative functions in respect to that Dispute by a delegate who has been approved by the Resolution Advisor (where practicable); or
 - (ii) in the absence of agreement, the Panel will undertake the administrative functions of the Resolution Advisor in relation to the Dispute.
- (b) The Resolution Advisor may from time to time identify in writing one or more persons who the Resolution Advisor has approved to act as the Resolution Advisor's delegate for the purposes of clause 7.2(a).

8 Practice Notes

- (a) In accordance with the Resolution Advisor Terms of Appointment, the Resolution Advisor may, from time to time, prepare, vary, and withdraw guidance notes – to be referred to as Practice Notes, in distinction to these Dispute Guidelines.
- (b) The Resolution Advisor will consult NBN Co, Customers, Access Seekers, Pool Members and any persons on the Expert List in respect to the issue and variation of Practice Notes: *Resolution Advisor terms of appointment Scope of Work paragraphs 1.2(f), 1.3(e), 1.3(f)*.
- (c) Practice Notes will:
 - (i) be published on the Resolution Advisor's website and made available to the ACCC, Customers and Pool Members and Panel Members: *Resolution Advisor terms of appointment Scope of Work paragraphs 1.2(f) and 1.3(e)*; and

- (ii) be effective on the date specified in the Practice Note.
- (d) In accordance with the Approved Panel Terms, Panel Members must have regard to Practice Notes: *Approved Panel terms of appointment, clause 3.1(d)*.
- (e) In accordance with the Resolution Advisor's terms of appointment, the Resolution Advisor is obliged to comply with the Practice Notes: *Resolution Advisor terms of appointment Scope of Work paragraphs 1.1(b)(xii) and 1.3(f)(i)*.
- (f) Practice Notes must be consistent with the WBA, SAU Dispute Management Provisions and these Dispute Guidelines, and must not, in accordance with the *Resolution Advisor's terms of appointment Scope of Work paragraph 1.3(e)*:
 - (i) create rules, processes or procedures that are different from those established by the Dispute Management Provisions or the Dispute Guidelines; and
 - (ii) ascribe any functions or responsibilities to the Resolution Advisor that are not otherwise ascribed to the Resolution Advisor by the Dispute Management Provisions.

9 Provision of reports to the ACCC

- (a) If directed to do so by the ACCC, the Resolution Advisor will provide the ACCC with any report that it has prepared and delivered to NBN Co in accordance with the Resolution Advisor Terms of Appointment: *Resolution Advisor terms of appointment clause 3.2(a)(i) and clause 1.3(h) of the scope of work in the Terms of Appointment*.
- (b) If directed to do so by the ACCC, and in accordance with the requirements of the direction, the Resolution Advisor must in the course of performing functions in accordance with the Resolution Advisor Terms of Appointment, report to the ACCC on any dispute or disputes, including an Industry Relevant Dispute, that the Resolution Advisor acting reasonably considers indicates a serious issue regarding the operation or interpretation of the Dispute Management Rules: *Resolution Advisor terms of appointment clause 3.2(a)(i) and clause 1.3(h) of the scope of work in the Terms of Appointment*.

10 Variation

10.1 Panel Terms

The SAU Dispute Management Provisions provide that the Panel (and the Resolution Advisor prior to the composition of the Panel) may specify in the Panel Terms: *clause 3.1(e) of the SAU Dispute Management Provisions and clause 7 of the Approved Panel Terms*:

- (a) the details of the Dispute;
- (b) any special procedural steps considered by the Panel in its reasonable belief to aid the efficient resolution of the Dispute; and/or
- (c) any other variation to the Panel Terms, where the parties to the Dispute and Panel Members agree to the variation.

10.2 Timescales and procedures

- (a) The WBA states that, subject to the CAA, the Panel and the Resolution Advisor must comply with any dispute timeframes or procedural changes agreed by the parties: *clauses G9.3 and G9.4(a)*.
- (b) In accordance with the CAA and *clauses G9.3 and G9.4(b)* the Panel (or Resolution Advisor only where prior to the appointment of the Panel) may, where requested by a party to the Dispute, make a direction to vary any timeframes or procedures detailed in the WBA, if the Panel or Resolution Advisor, as the case may be, reasonably believes such a direction is fair in all the circumstances.

10.3 Dispute Guidelines

- (a) Variation of these Dispute Guidelines is subject to consultation and ACCC approval: *clause 6 SAU Dispute Management Provisions*.
- (b) A Customer, Access Seeker, or Pool Member may propose a change to these Dispute Guidelines by submitting a written proposal detailing the change proposed and the reasons for it to one or both of the following:

NBN Co:

Name: Ms Susan Huggett
General Manager Wholesale Supply
Address: Level 11, 100 Arthur Street, North Sydney NSW 2060
Fax: 02 9927 4132
Email: susanhuggett@nbnco.com.au

Resolution Advisor:

Name: Prof. Tania Sourdin
Address: 6 Rosemont Street, Woollahra NSW 2025
Email: tsourdin@endispute.com.au or Tania.Sourdin@monash.edu

- (c) NBN Co will have regard to the proposal and the opinion of Resolution Advisor in deciding whether or not to propose a variation to these Dispute Guidelines. Where, in response to a submission under this section 10, NBN Co decides to consult on a variation in accordance with the SAU Dispute Management Provisions, the variation may be on the same or different terms as the proposal.

11 General

11.1 Interpretation

- (a) Capitalised terms used but not defined in section 11.2 have the meaning given in the WBA or SAU Dispute Management Provisions.

- (b) Where relevant, *clause H5.4* of the WBA will apply to these Dispute Guidelines as if a reference in that clause to the WBA is a reference to these Dispute Guidelines.
- (c) The Dispute Management Rules and SAU Dispute Management Provisions apply to the extent of any inconsistency with these Dispute Guidelines.

11.2 Defined terms

Access Agreement means an agreement made between a Customer and NBN Co within the meaning of section 152BE of the *Competition and Consumer Act 2010* (Cth) which refers to these Dispute Guidelines.

Alternate Advisor means a person other than the Resolution Advisor to whom a Dispute is referred, who is appointed to perform the functions of the Resolution Advisor on the same or similar terms as the Resolution Advisor.

Customer means the counterparty that has entered into an Access Agreement with NBN Co.

Dispute Management Rules means the provisions governing the resolution of disputes contained in an Access Agreement.

Other NBN Co Customer means, in relation to an Access Agreement, a person (other than Customer) who has entered into an Access Agreement with NBN Co which deals with the subject matter of the first mentioned Access Agreement.

Practice Notes means the guidance notes prepared by the Resolution Advisor in accordance with the Resolution Advisor Terms of Appointment, in regard to the performance of the key functions and responsibilities of the Resolution Advisor and the procedural operation of the Dispute Management Rules.

SAU Dispute Management Provisions means clause 1H.5 and Annexure 1 of Schedule 1H of the SAU.

Standard Form Access Agreement or **SFAA** means a standard form of access agreement published on NBN Co's website for the purposes of section 152CJA of the CCA.

Wholesale Broadband Agreement or **WBA** means the Standard Form of Access Agreement of that name published on NBN Co's website as at the date of these Dispute Guidelines.

12 Annexure

WBA Panel Arbitration flowchart

NBN Co Dispute Management Process

Panel Arbitration

Summary: Disputes under the WBA can be resolved by mediation, expert determination or Panel Arbitration. The parties may agree to mediate for a period of 30 Business Days (or such other period as agreed), which may resolve the Dispute. If it does not, the parties may either agree to go to expert determination in accordance with the IAMA Expert Determination Rules, or one of the parties to the Dispute may make a referral to the Resolution Advisor (RA) for the RA to constitute a Panel for an arbitration in accordance with the *Commercial Arbitration Act 2010 (NSW) (CAA)*.

This flowchart summarises the process for Panel Arbitration as set out in Module G of the WBA.

Note: Court process available specific circumstances, e.g. interlocutory action, unpaid debt, material non compliance with dispute management process (see clause G8.2).

Note: All timeframes and procedures are subject to variation by agreement or extension where permitted by the RA or Panel (see clause G9.3).

