

**STANDARD TERMS FOR THE CO-LOCATION ON
CELLULAR MOBILE TRANSMISSION SITES
SERVICE**

**CO-LOCATION ON CELLULAR MOBILE
TRANSMISSION SITES GENERAL TERMS
PUBLIC VERSION**

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GENERAL INFORMATION

This document:

- is part of the standard terms determination made by the Commission under section 30M of the Act in relation to the co-location on cellular mobile transmission sites service; and
- sets out the terms on which Access Providers must make their co-location on cellular mobile transmission sites service available to Access Seekers.

Structure of the Mobile Co-location Terms

These Mobile Co-location Terms are made up of:

- **Mobile Co-location General Terms**
Sets out the general rights and obligations of Access Providers and Access Seekers for the co-location on cellular mobile transmission sites service.
- **Schedules to the Mobile Co-location General Terms**

Schedule 1	Mobile Co-location Service Description <i>Describes the co-location service that Access Providers must make available to Access Seekers under the standard terms determination.</i>
Schedule 2	Mobile Co-location Service Level Terms <i>Specifies performance levels regarding some of the services that Access Providers will make available to Access Seekers under the standard terms determination.</i>
Schedule 3	Mobile Co-location Operations Manual <i>Sets out in detail the operational procedures for supplying all of the services that Access Providers will make available to Access Seekers under the standard terms determination.</i>
Schedule 4	Mobile Co-location Access Terms <i>Sets out the specific rights and obligations of Access Providers and Access Seekers for access to and co-location on or with an Access Provider's Relevant Facilities.</i>
Schedule 5	Mobile Co-location Interference Management and Design <i>Sets out the interference management and design principles that Access Seekers and Access Providers must follow in relation to the Mobile Co-location Service.</i>

These Mobile Co-location Terms, including up to date versions of those parts of the terms which may be changed, are available from the Commission (www.comcom.govt.nz).

MOBILE CO-LOCATION GENERAL TERMS

1 Definitions

1.1 Except where expressly provided otherwise, in the Mobile Co-location Terms:

Access Date	has the meaning given in clause 4.2.
Access Provider	means an access provider under the Act to whom an Access Seeker has made a Request.
Access Provider's Network	means the telecommunication system whether fixed, mobile or wireless from time to time of the Access Provider which the Access Provider uses to provide services including all transmission media, equipment and related support systems. For the purposes of this definition, Access Provider includes every Related Company of the Access Provider.
Access Provider Equipment	means any Cellular Mobile Telephone Network transmission and reception equipment (including any necessary supporting equipment) used by, or which is to be used by, the Access Provider. Access Provider Equipment includes the equipment of any person other than the Access Provider where such equipment is being, or is to be, used to support the Access Provider's Cellular Mobile Telephone Network.
Access Provider Owned Equipment	means any Access Provider owned, leased or licensed equipment provided to the Access Seeker by the Access Provider for use in relation to the Mobile Co-location Service.
Access Provider Systems	means any operational support system of the Access Provider and any functionalities of such system provided to the Access Seeker under the Mobile Co-location Terms.
Access Seeker	means an access seeker under the Act that has made a Request.
Access Seeker Equipment	means any Cellular Mobile Telephone Network transmission and reception equipment (including any necessary supporting equipment) used by, or which will be used by, the Access Seeker. Access Seeker Equipment includes the equipment of any person other than the Access Seeker where such equipment is being, or is to be, used to support the Access Seeker's Cellular Mobile Telephone Network.
Access Seeker Space	means the physical space on or with the Relevant Facilities that is occupied, or which is to be occupied, by the Access Seeker Equipment.
Access Seeker's Network	means the telecommunication system whether fixed, mobile or wireless from time to time of the Access Seeker which the Access Seeker uses to provide services including all transmission media, equipment and related support systems. For the purposes of this definition, Access Seeker includes every Related Company of the Access Seeker.
Act	means the Telecommunications Act 2001.

Antenna	means equipment that transmits or receives radiocommunications signals in a Cellular Mobile Telephone Network.
Bank	means any body registered as a registered bank under section 69 of the Reserve Bank of New Zealand Act 1989.
Bill Rate	means the average 90 day bank bill mid rate as quoted on Reuters Screen page BKBM or the equivalent page replacing page BKBM (known at the date of these terms as the FRA rate) at or about 10.45 am on the relevant date or, if at that time page BKBM or the equivalent replacement page is not available, the last rate quoted on that page before it became unavailable.
Building	means any building (or part thereof) on a Site, that is associated with a Mast and that is the subject of a Relevant Occupation by an Access Provider that is used to house equipment in connection with a Cellular Mobile Telephone Network, and includes, without limitation, a container, cabinet, pillar, pedestal, pit and Cable Housing. For the avoidance of doubt, a Building does not include a rack.
Cable Housing	means any duct, conduit or tray used by the Access Provider in the operation of its Cellular Mobile Telephone Network, and which is used for housing or running a cable.
Cellular Mobile Telephone Network	<p>means a telecommunications network:</p> <p>(a) that is designed to enable:</p> <ul style="list-style-type: none"> (i) two-way communications between End Users; and (ii) an End User of the service that uses that network to use the service while moving continuously between places or when standing still; and <p>(b) that has the following characteristics:</p> <ul style="list-style-type: none"> (i) the End User equipment used in relation to the network has a wireless connection to the network; (ii) the service area of the network is divided into a number of contiguous geographical radio coverage areas (known as cells) and each cell is served by an antenna and a base station, which transmits and receives signals to and from the End User equipment within that cell; (iii) the service that uses that network is capable of re-using the radio frequencies in different cells within the service area; and (iv) as the End User equipment travels between adjacent cells, the service that uses that network uses intercell hand-over functions to:

- a. determine in which cell the equipment is located; and
- b. allow the transmit and receive signal connection to transfer from one base station to an adjacent base station when the End User equipment moves out of that cell to an adjacent cell.

Charge or Charges means all or (as the context requires) any amounts payable by the Access Seeker to the Access Provider in respect of the Mobile Co-location Service.

Commission means the Commerce Commission in the course of performing its functions under the Act.

Customer means:

- (a) in relation to the Access Seeker, a person who has a contractual relationship with the Access Seeker for the supply of services, the provision of which relies in whole or in part on the Mobile Co-location Service; and
- (b) in relation to an Access Provider, means a person (other than the Access Seeker) who has a contractual relationship with the Access Provider for the supply of services or to whom the Access Provider is supplying services pursuant to any law or regulation.

Dispute has the meaning given in clause 39.1.

Dispute Notice has the meaning given in clause 39.2.

Deadlock has the meaning given in clause 39.4.

Default means any failure, refusal or inability by either the Access Seeker or the Access Provider to meet any of its obligations under the Mobile Co-location Terms.

Default Notice has the meaning given in clause 36.1.

End User means a person who is the ultimate recipient of the Mobile Co-location Service (or of another service the provision of which relies in whole or in part on the Mobile Co-location Service).

Exchange means:

- (a) where Telecom is the Access Provider, a Telecom owned or leased building with a floor area of at least 15 square metres and a main distribution frame terminating copper local loop of at least 200 pairs, the prime function of which is to provide fixed wire line telecommunications services, and includes all of the Telecom owned, leased or licensed property on which the building is situated; and
- (b) in the case of any Access Provider, a base station controller (or equivalent facility) or a mobile service

switching centre (or equivalent facility).

Force Majeure Event	has the meaning given in clause 22.1.1.
Indirect Damages	<p>means any liability resulting from or arising under or in connection with the Mobile Co-location Terms (whether based in contract, tort, statute or otherwise) for:</p> <p>(a) indirect, incidental or consequential economic loss or damage; or</p> <p>(b) loss of profit, loss of revenue, loss of production, loss of income, loss of business, loss of anticipated savings, loss of entitlement to special damages and loss of opportunity.</p>
Intellectual Property	means any patent, copyright, design, trade name, trademark, service mark or other intellectual property right (whether registered or not) including ideas, concepts, know-how, techniques, designs, specifications, drawings, blueprints, tracings, diagrams, models and other information relating to any such intellectual property.
Mast	means any tower, pole, mast or other similar structure that is used for the transmission or reception of Telecommunications via a Cellular Mobile Telephone Network and that is the subject of a Relevant Occupation by the Access Provider.
Mobile Co-location Access Terms	means the terms set out in schedule 4.
Mobile Co-location General Terms	means the terms set out in this document excluding its schedules.
Mobile Co-location Implementation Plan	means the implementation plan that forms part of the Mobile Co-location Standard Terms Determination.
Mobile Co-location Interference Management and Design	means the document set out in schedule 5.
Mobile Co-location Operations Manual	means the manual set out in schedule 3.
Mobile Co-location Service	means the co-location on cellular mobile transmission sites service as described in the Mobile Co-location Service Description or (as the context requires) any part of that Service.
Mobile Co-location Service Description	means the description set out in schedule 1.
Mobile Co-location Service Level Terms	means the terms as set out in schedule 2.
Mobile Co-location Standard Terms Determination	means the standard terms determination made by the Commission under section 30M of the Act in relation to the co-location on cellular mobile transmission sites service, including the Commission's decision report, the Implementation Plan, the Mobile Co-location General Terms and the schedules to the Mobile Co-location General Terms.

Mobile Co-location Terms	means, together, the Mobile Co-location General Terms, all of the schedules to the Mobile Co-location General Terms as described in the first page of these Mobile Co-location General Terms and the Mobile Co-location Implementation Plan.
Network	has the same meaning as given to that expression in the Telecommunications Act, 2001.
Notice	means a notice in writing provided in accordance with section 46.
Non-Payment Notice	has the meaning given in clause 16.1.
Other Service Provider	means a provider of telecommunications services other than the Access Seeker or the Access Provider.
Party	means (as the context requires) the Access Provider or the Access Seeker and Parties means both the Access Provider and the Access Seeker.
Performance Penalties	has the meaning given in the Mobile Co-location Service Level Terms.
Planned Outage	has the meaning given in clause 23.2.
Related Company	has the meaning given in section 2(3) of the Companies Act 1993.
Relevant Facilities	means: <ul style="list-style-type: none"> (a) any Mast; and (b) any Site, Building or Utility Service.
Relevant Occupation	means a lease, sub-lease, licence, sub-licence or other right to occupy or possess (which may arise, without limitation, as a result of ownership) by the Access Provider of any Relevant Facilities.
Request	means a request in writing pursuant to section 30S(1) of the Act which the Access Provider receives from an Access Seeker to make the Mobile Co-location Service available on the Mobile Co-location Terms.
Site	means the land on which the Mast and Building is located, that is the subject of a Relevant Occupation by the Access Provider.
Standard Site Types	has the meaning as defined and described in the Mobile Co-location Operations Manual.
Suspend and Suspension	includes: <ul style="list-style-type: none"> (a) to restrict or otherwise withdraw the right to use the Mobile Co-location Service or any part of the Mobile Co-location Service; and (b) to refuse any order for the Mobile Co-location Service.
Telecom	has the meaning given in section 5 of the Act.

Telecommunications	has the same meaning as given to that expression in the Telecommunications Act, 2001.
Telecommunications Carriers' Forum	means the New Zealand Telecommunications Carriers' Forum or its successor body.
Telecommunications Service	has the same meaning as given to that expression in the Telecommunications Act, 2001.
Unplanned Outage	has the meaning given in clause 23.4.
Utility Service	means any facility that is used primarily for the purpose of providing utility services to or on the Site, that is associated with a Mast, or a Mast and Building, on a Site.
Working Day	means any day other than a Saturday, Sunday or public holiday in any province relevant to the provision of the Mobile Co-location Service.

2 Guiding Principles

- 2.1 The Mobile Co-location Standard Terms Determination is designed to meet the purposes set out in the Act, and in particular, section 18 of the Act. The Mobile Co-location Terms are to be interpreted in light of the Commission's decision report and the purposes.
- 2.2 The Parties must:
- 2.2.1 carry out their obligations under the Mobile Co-location Terms in good faith and in furtherance of those purposes; and
 - 2.2.2 ensure that they and their employees, subcontractors and agents do all things reasonably necessary, including executing any additional documents or instruments, to give full effect to the Mobile Co-location Terms.
- 2.3 The standard access principles under clause 5 of schedule 1 to the Act apply to the Mobile Co-location Service and all of an Access Provider's obligations under the Mobile Co-location Terms subject to the limits on the application of those principles under the Act.

3 Interpretation

- 3.1 In interpreting the Mobile Co-location Terms:
- 3.1.1 clause and section headings are for convenience only and do not affect the interpretation;
 - 3.1.2 a word which denotes the singular also denotes the plural and vice versa;
 - 3.1.3 words denoting natural persons include any legal entity or association of entities and vice versa;
 - 3.1.4 all currency references are to New Zealand dollars and all amounts payable are payable in New Zealand dollars;
 - 3.1.5 the words 'include' and 'including' are to be construed without limitation;
 - 3.1.6 except where the Mobile Co-location Terms expressly provide otherwise, reference to a statute or regulation means that statute or regulation as amended or re-enacted and includes sub-ordinate legislation;
 - 3.1.7 except where the Mobile Co-location Terms expressly provide otherwise, references to months are to calendar months; and

3.1.8 except where the Mobile Co-location Terms expressly provide otherwise, reference to a document (including in any procedure or technical specification) means that document as amended from time to time.

3.2 In interpreting the Mobile Co-location Terms references to clauses or sections are references to clauses or sections in the applicable Mobile Co-location Terms unless expressly provided otherwise. Sections are identified by a single number (for instance 'this section 2') and clauses by a composite number (for instance 'this clause 2.2').

4 Request to access the Mobile Co-location Service

4.1 The Access Provider must comply with a Request by making the Mobile Co-location Service available to the Access Seeker in accordance with the Mobile Co-location Terms unless section 30S(2) of the Act applies.

4.2 From the date the Access Provider receives the Access Seeker's Request (**Access Date**), the Access Seeker and the Access Provider must comply with the Mobile Co-location Terms.

4.3 For the avoidance of doubt, if section 30S(3) of the Act applies, the Access Provider must also comply with the applicable residual terms determination.

5 Application of the Mobile Co-location Terms

5.1 The Mobile Co-location Terms are all of the terms on which the Access Provider will make the Mobile Co-location Service available to the Access Seeker.

5.2 The Access Seeker's rights under the Mobile Co-location Terms cannot be duplicated by making a subsequent Request. If the Access Provider becomes entitled to Suspend or terminate supply of the Mobile Co-location Service to the Access Seeker, any further supply of the Mobile Co-location Service under the Mobile Co-location Terms is limited to the existing rights and obligations of the Access Seeker and the Access Provider under the Mobile Co-location Terms at that time.

5.3 Termination of supply of the Mobile Co-location Service or the Mobile Co-location Terms coming to an end does not relieve the Access Seeker or the Access Provider of any rights or obligations under the Mobile Co-location Terms which have accrued beforehand.

6 Not used

7 Prerequisites to the Mobile Co-location Service being made available

7.1 Despite section 4, the Access Provider has no obligation to make the Mobile Co-location Service available to the Access Seeker unless the prerequisites in this section 7 are satisfied at all times. For the avoidance of doubt, if the pre-requisites in this section 7 are not satisfied and if provision of the Mobile Co-location Service to the Access Seeker has already commenced, then the Access Provider's sole remedy shall be to exercise any rights to Suspend in accordance with clause 37.7.2.

Agreement on Charges

7.2 The Access Provider and the Access Seeker must agree all Charges payable by the Access Seeker. If any Charges have not been agreed prior to the Access Date, the Access Provider and the Access Seeker must comply with clause 14.5.

Security requirements

7.3 The Access Seeker must provide to the Access Provider:

7.3.1 evidence reasonably satisfactory to the Access Provider that the Access Seeker has a long term credit rating for its senior unsecured indebtedness of at least A3 (Moody's Investor Services), A- (Standard and Poor's Ratings Group) or B+ (AM Best); or

7.3.2 if such evidence cannot be provided, the Access Seeker must provide to the Access Provider the Access Seeker's choice of an unconditional:

- (a) Bank guarantee;
- (b) letter of credit;
- (c) cash prepayment;
- (d) guarantee from the parent company of the Access Seeker if:
 - (i) that parent company has a credit rating which is in accordance with clause 7.3.1; and
 - (ii) where the parent company is not a “company” registered under Part II of the Companies Act 1993, the Access Provider has approved that company as a guarantor (such approval not to be unreasonably withheld or delayed); or
- (e) other security agreed by the Access Provider in writing,

(Security).

7.4 The Security must be in a form reasonably acceptable to the Access Provider and, in the case of a Bank guarantee or a letter of credit, from a Bank which has a credit rating acceptable to the Access Provider, acting reasonably. The Security must be for:

- 7.4.1 \$100,000; or
- 7.4.2 an amount equal to the Access Provider's reasonable estimate of the total value of Charges for the Mobile Co-location Service the Access Provider is likely to supply to the Access Seeker under the Mobile Co-location Terms during any two consecutive month period,

whichever is the greater.

7.5 Every six months after the Access Date, if either the Access Seeker or the Access Provider requests, the amount of the Security must be adjusted. The adjusted Security must meet the same requirements as any Security under clause 7.4 and be for:

- 7.5.1 \$100,000; or
- 7.5.2 an amount equal to the total value of Charges under the Mobile Co-location Terms over the two month period immediately preceding the date any request under clause 7.5 is made,

whichever is the greater.

7.6 If the adjusted Security amount is an increase, the Access Seeker must, within 20 Working Days after that adjustment date, provide replacement or additional Security that is equal to the new Security amount. If the adjusted Security amount is a decrease, the Access Seeker may cause the Security to be reduced accordingly.

Insurance requirements

7.7 The Access Seeker must maintain a policy or policies of insurance. Such insurance must:

- 7.7.1 cover the Access Seeker in respect of any liability arising out of or in connection with the performance of the Access Seeker's obligations under the Mobile Co-location Terms;
- 7.7.2 be for a sum insured of not less than:
 - (a) where the Access Provider is to provide the Mobile Co-location Service to the Access Seeker at an Exchange, \$50,000,000 for any one claim; or
 - (b) if clause 7.7.2(a) does not apply, \$10,000,000 for any one claim;
- 7.7.3 have a deductible payable by the Access Seeker of no more than:
 - (a) in the case of insurance under clause 7.7.2(a), \$1,000,000; or
 - (b) in the case of insurance under clause 7.7.2(b), \$200,000;
- 7.7.4 be provided by an insurer or insurers reasonably acceptable to the Access Provider; and
- 7.7.5 be governed by New Zealand law and subject to New Zealand jurisdiction.

Operational requirements

- 7.8 The Access Seeker must comply with every applicable prerequisite under the Mobile Co-location Operations Manual.

GENERAL RIGHTS AND OBLIGATIONS**8 General****Supply of the Mobile Co-location Service**

- 8.1 Upon the Mobile Co-location Service being made available under section 4, the Access Provider will, subject to the Mobile Co-location Terms, supply the Mobile Co-location Service to the Access Seeker and the Access Seeker may order the Mobile Co-location Service in accordance with the process and procedures under the Mobile Co-location Operations Manual.

The Access Provider's relationship with Customers and End Users of the Access Seeker

- 8.2 No obligation or other legal relationship is created between the Access Provider and any Customer or End User of the Access Seeker by the Mobile Co-location Terms. The Mobile Co-location Terms do not provide, grant or confer any right, benefit or privilege on any Customer or End User of the Access Seeker.

Rights not excluded

- 8.3 Nothing in the Mobile Co-location Terms excludes or limits the Commission's, an Access Seeker's or an Access Provider's right to:
- 8.3.1 unless expressly stated otherwise, enforce the Mobile Co-location Terms; or
 - 8.3.2 exercise any other rights under the Act.

Amendment

- 8.4 The Mobile Co-location Terms may be amended by the Commission under the Act including by:
- 8.4.1 a review under section 30R;
 - 8.4.2 a residual terms determination under section 30ZB;
 - 8.4.3 a pricing review determination under section 51;
 - 8.4.4 a clarification under section 58; and
 - 8.4.5 a reconsideration under section 59.

9 The schedules to the Mobile Co-location General Terms**Compliance**

- 9.1 The Access Seeker and the Access Provider must comply with each of the schedules to the Mobile Co-location General Terms.
- 9.2 If there is a conflict between the Mobile Co-location General Terms and the schedules to the Mobile Co-location General Terms, the Mobile Co-location General Terms will prevail except where expressly provided otherwise.

Procedures and technical specifications

- 9.3 The Mobile Co-location Operations Manual refers to the various procedures and technical specifications which are listed in Appendix X of the Mobile Co-location Operations Manual. They contain technical and procedural detail. Where changes are made to the procedures and technical specifications that consequently alter the Mobile Co-location Terms, these changes will be made under the relevant change mechanisms set out in section 10. Such reference to the procedures and technical specifications is necessary for both the Access Seeker and the Access Provider so that:
- 9.3.1 uniform standards of best practice are set;

- 9.3.2 the performance of the Relevant Facilities can be maintained;
 - 9.3.3 the health and safety of the Access Seeker's and the Access Provider's employees, contractors and other agents can be protected;
 - 9.3.4 systems are in place for the management of outages, faults and any work the Access Seeker or the Access Provider needs to undertake on or around the Relevant Facilities; and
 - 9.3.5 the Access Seeker's and the Access Provider's employees, contractors and other agents have access to uniform technical instructions.
- 9.4 The Access Seeker and the Access Provider are required to comply with any technical and procedural detail contained in a procedure or technical specification referred to in the Mobile Co-location Operations Manual to the extent that the Mobile Co-location Operations Manual creates an obligation to do so.
- 9.5 The procedures and technical specifications referred to in the Mobile Co-location Operations Manual may have other unrelated uses and contain terms irrelevant to the Mobile Co-location Terms.
- 9.6 To the extent that the Mobile Co-location Operations Manual creates any obligation to comply with a procedure or technical specification, the Access Seeker and the Access Provider must:
- 9.6.1 apply the procedure or technical specification under the Mobile Co-location Terms in good faith;
 - 9.6.2 interpret the procedure or technical specification consistently with the Mobile Co-location Terms; and
 - 9.6.3 comply with the technical and/or procedural detail the procedure and technical specification contains.

10 Change mechanism for Mobile Co-location Operations Manual and Mobile Co-location Service Level Terms

- 10.1 Any proposed change to the Mobile Co-location Operations Manual and Mobile Co-location Service Level Terms must be approved by the Commission under this section 10.

Notice of change

- 10.2 Any Access Seeker or any Access Provider may propose a change to the Mobile Co-location Operations Manual and Mobile Co-location Service Level Terms by:
- 10.2.1 giving Notice to the Telecommunications Carriers' Forum and the Commission; and
 - 10.2.2 from the date of that Notice, publishing the proposed change on its website accessible by all Access Seekers, all Access Providers, the Telecommunications Carriers' Forum and the Commission.
- 10.3 On receiving Notice under clause 10.2.1, the Telecommunications Carriers' Forum shall give Notice to all interested parties, which must include all Access Providers and all Access Seekers (who are not otherwise an Access Provider), of the details of the proposed change.
- 10.4 All Access Providers and all Access Seekers have 10 Working Days to object to any proposed change from the date such change is notified under clause 10.3. If no written objection is received by the Telecommunications Carriers' Forum within the 10 Working Days, the Telecommunications Carriers' Forum must submit the proposed change to the Commission for approval under clause 10.12.

Objections to change

- 10.5 If any Access Seeker or any Access Provider objects to a proposed change under clause 10.4, all Access Providers and all Access Seekers have 20 Working Days from the date the proposed change was notified under clause 10.3 to negotiate and agree the proposed change. Negotiation will take place through the Telecommunications Carriers' Forum and will be administered by a Telecommunications Carriers' Forum administrator. The administrator will administer the voting

process and will confirm in writing the outcome to all Access Providers and all Access Seekers (who are not otherwise an Access Provider). If, despite any objection, the proposed change is agreed by 75% or more of a vote of all Access Providers and all Access Seekers (who are not otherwise an Access Provider) (where the 75% must include all Access Providers), the Telecommunication Carriers' Forum must submit the proposed change to the Commission for approval under clause 10.12.

- 10.6 If the proposed change is not agreed by a vote under clause 10.5, the proposed change may be referred to an independent recommendation maker at the request of the party that proposed the change. The independent recommendation maker must be agreed by every Access Provider and every Access Seeker that indicates it wishes to be a party to the decision **(the parties to the decision)**. If the parties to the decision cannot agree, an independent recommendation maker will be appointed by the Chair of the Telecommunications Carrier's Forum .
- 10.7 To be eligible for appointment, the independent recommendation maker must be impartial, experienced in the relevant area of telecommunications and will preferably be experienced in dispute resolution. Unless the parties to the decision agree, the independent recommendation maker must not have performed any duties, whether as an employee, consultant or contractor, for any of the parties to the decision or any related person during a six month period prior to the date the proposed change was voted on.
- 10.8 The independent recommendation maker must act as an expert and not as an Arbitrator under the Arbitration Act 1996. The independent recommendation maker will be entitled to rely on their own judgement and opinion.
- 10.9 The independent recommendation maker may seek independent legal advice regarding the appropriate procedures for reaching a decision.
- 10.10 The independent recommendation maker should seek to make decisions that are timely, practical, efficient, and take into account the Act, in particular the relevant standard access principles under the Act. The independent recommendation maker must inform all Access Providers and all Access Seekers (who are not otherwise an Access Provider) of his or her recommendation as to the proposed change and the Telecommunication Carriers' Forum must submit the proposed change to the Commission for approval under clause 10.12.
- 10.11 If the proposed change is accepted by the independent recommendation maker, the independent recommendation maker's costs are to be met by the parties to the decision that opposed the change. If the proposed change is rejected by the independent recommendation maker, the independent recommendation maker's costs are to be met by the party to the decision that proposed the change.

Referral to the Commission

- 10.12 The Telecommunication Carriers' Forum must submit any proposed change in accordance with clause 10.4, 10.5 and 10.10 to the Commission with:
- 10.12.1 an updated version of the Mobile Co-location Operations Manual or Mobile Co-location Service Level Agreement (as the case may be) containing the proposed changes;
 - 10.12.2 the reasons for the proposed change; and
 - 10.12.3 information on which the Parties agree or disagree with the proposed change:
- and the Telecommunication Carriers' Forum will request the Commission to endeavour to advise whether a proposed change is approved or not within 10 Working Days of receipt of that proposed change.

Notice of approval process

- 10.13 If the proposed change is approved by the Commission, the Telecommunication Carriers' Forum must give Notice to all Access Providers and all Access Seekers (who are not otherwise an Access Provider) of when the change takes effect together with providing an updated version of the Mobile Co-location Operations Manual or the Mobile Co-location Service Level Agreement (as the case may be) containing the change.
- 10.14 For the avoidance of doubt, nothing in this section 10 prevents any Access Seeker or any Access Provider from seeking any remedies or exercising any other rights available to it under the Act.

THE ACCESS SEEKER'S RIGHTS AND OBLIGATIONS

11 General

- 11.1 Whenever an Access Provider supplies the Mobile Co-location Service to the Access Seeker, the Access Seeker will:
- 11.1.1 follow the Access Provider's reasonable directions about the use of the Mobile Co-location Service which the Access Provider reasonably believes are:
 - (a) in the interests of health and safety;
 - (b) the quality of service to the Access Provider's Customers, the Access Seeker's Customers or any Other Service Provider's customers; or
 - (c) necessary to prevent a risk to persons and property;
 - 11.1.2 use all reasonable endeavours to provide such information as the Access Provider may reasonably require in order for the Access Provider to perform its obligations under the Mobile Co-location Terms;
 - 11.1.3 use all reasonable endeavours to ensure that information disclosed is correct and complete to the best of the Access Seeker's knowledge at the time of provision of the information;
 - 11.1.4 use the Mobile Co-location Service for lawful purposes, in accordance with all applicable laws and without being a nuisance to anyone;
 - 11.1.5 never interfere with the reasonable use of any service by any Customer of the Access Provider or any customer of an Other Service Provider;
 - 11.1.6 where required under the Mobile Co-location Terms, obtain any third party authorisation, licence or consent necessary or prudent for the Access Provider to supply the Mobile Co-location Service to the Access Seeker (other than authorisations, licences or consents required generally by the Access Provider to operate the Access Provider's Network);
 - 11.1.7 where reasonably requested by the Access Provider, provide reasonable assistance to the Access Provider in obtaining any third party authorisation, licence or consent necessary or prudent for the Access Provider to supply the Mobile Co-location Service to the Access Seeker (other than authorisations, licences or consents required generally by the Access Provider to operate the Access Provider's Network);
 - 11.1.8 where reasonably requested by the Access Provider, provide reasonable assistance and information to the Access Provider in order for the Access Provider to provide access to the Relevant Facilities to another Access Seeker or other third party; and
 - 11.1.9 except where the law requires otherwise, only use the Mobile Co-location Service in ways that are contemplated by the Mobile Co-location Terms.
- 11.2 The Access Seeker must use all reasonable endeavours to ensure that there is included in:
- 11.2.1 each contract it has with a Customer for the provision of services which rely, in whole or in part, on the Mobile Co-location Service; and
 - 11.2.2 where the Customer in clause 11.2.1 is an Other Service Provider, each contract that the Other Service Provider has with a customer for the provision of services which rely, in whole or in part, on the Mobile Co-location Service;
- a provision which excludes (to the maximum extent permitted by law) all liability of the Access Provider arising from or in connection with the services which rely, in whole or in part, on the Mobile Co-location Service.

12 The Access Seeker's responsibility for Customers and End Users

- 12.1 The Access Seeker will, independently of the Access Provider, manage all aspects of its relationship with its Customers and End Users, including being responsible for:
- 12.1.1 customer service and enquiries;
 - 12.1.2 product information, service, fault reporting and technical issues;
 - 12.1.3 contact with the police and other government authorities; and
 - 12.1.4 invoicing and settlement.

13 Not used

CHARGES, PAYMENT, NON-PAYMENT AND INVOICE ERROR DISPUTES

14 Charging principles

- 14.1 The Access Seeker must pay all Charges for supply of the Mobile Co-location Service to the Access Seeker under the Mobile Co-location Terms, regardless of who uses the Mobile Co-location Service.
- 14.2 The Access Seeker must pay GST in accordance with the Goods and Services Tax Act 1985 on all Charges. All Charges are expressed before the addition of GST, except any Charge expressly stated in writing by the Access Provider to be GST inclusive.
- 14.3 Except as expressly provided under the Mobile Co-location Terms:
- 14.3.1 Charges for the Mobile Co-location Service are payable for the period beginning on the date the Mobile Co-location Service (or the relevant part of it) is capable of being used unless the Access Seeker and the Access Provider have agreed a scheduled operational date for the Mobile Co-location Service (or the relevant part of it), in which case Charges will not be payable for any period before that date unless the Mobile Co-location Service is actually being used before that date; and
 - 14.3.2 where the Mobile Co-location Service is supplied for a part period, a pro rata adjustment to the Charges will be made by the Access Provider and, where necessary, a refund will be made to the Access Seeker.
- 14.4 The Access Seeker must not rely on any information from the Access Provider concerning the tax treatment of any payments under the Mobile Co-location Terms, or any other matter relating to tax in relation to the Mobile Co-location Terms and the Access Seeker is responsible for determining the correct tax treatment of such matters.
- 14.5 To the extent that the Access Seeker and the Access Provider have not already agreed all Charges prior to the Access Date, upon a written request from either the Access Provider or the Access Seeker, the Access Provider and the Access Seeker must meet within 10 Working Days to endeavour to agree the amount of any Charges payable under the Mobile Co-location Terms.

15 Invoicing and payment of Charges

Invoices

- 15.1 The Access Provider will invoice the Access Seeker for all Charges.
- 15.2 The Access Provider's invoices must include reasonable information to enable the Access Seeker to check the accuracy of all Charges.
- 15.3 The due date of each invoice will be specified in the invoice and will be not less than 20 Working Days following the date of invoice.

Payment

- 15.4 Except as expressly provided under the Mobile Co-location Terms:

- 15.4.1 all Charges invoiced by the Access Provider must be paid by the Access Seeker on or before the due date;
- 15.4.2 all Charges invoiced by the Access Provider must be paid by the Access Seeker by electronic funds transfer in cleared funds to a place or bank account nominated by the Access Provider free of any deduction, set off or withholding (the only exceptions to the prohibition on deduction, set off and withholding are clause 17 and any set off in accordance with the Mobile Co-location Service Level Agreement); and
- 15.4.3 payments must not be made by credit card.
- 15.5 The Access Seeker must provide the Access Provider with sufficient information to allow the Access Provider to allocate any payment to a particular invoice or invoices and provide any information reasonably requested by the Access Provider for this purpose.
- 15.6 If the Access Seeker does not pay an invoice by the due date for payment, the Access Seeker will be in Default and the Access Provider may charge the Access Seeker default interest on the unpaid amount on a daily basis from the due date until payment is made. The default interest rate is the Bill Rate plus 2%.
- 15.7 Under no circumstances does payment of any amount unpaid under the Mobile Co-location General Terms release the Access Seeker from liability for any interest payable on that amount.
- 15.8 Neither the Access Seeker's obligation to pay interest under the Mobile Co-location General Terms, nor the performance of that obligation, prejudices the Access Provider's rights in respect of the Access Seeker's non-payment of an amount on its due date.

Electronic invoicing and billing reports

- 15.9 The Access Provider must provide billing information to the Access Seeker in an electronic format, as set out in the Mobile Co-location Operations Manual.
- 15.10 The Access Provider must provide a hard copy of monthly billing information when requested by the Access Seeker, in which case the Access Provider will charge the Access Seeker in accordance with the Charges.
- 15.11 The Access Provider must, where practicable, provide billing reports and information additional to the information required by this section 15 when requested by the Access Seeker, in which case the Access Provider will charge the Access Seeker in accordance with the Charges.

Time limit for invoicing

- 15.12 Nothing under the Mobile Co-location Terms or in any invoice prejudices the Access Provider's right to invoice the Access Seeker for any Charges except that no Charge may be invoiced 100 days or more after the date the Mobile Co-location Service to which that Charge relates was supplied.

16 Non-payment

- 16.1 Where the Access Seeker fails to pay any amount due under the Mobile Co-location Terms (other than an amount withheld in accordance with section 17 or set off in accordance with the Mobile Co-location Service Level Agreement), the Access Provider may give Notice to the Access Seeker to pay that amount within 20 Working Days of the Notice being given (**Non-Payment Notice**). A Non-Payment Notice must state the amount due and may be given to the Access Seeker at any time from the date on which the Mobile Co-location Terms provides for interest to begin to accrue on the amount due (regardless of whether interest is charged).
- 16.2 A Non-Payment Notice will not be affected by the Access Seeker giving a Dispute Notice to the Access Provider unless the Non-Payment Notice purports to require payment of an amount withheld in accordance with section 17 or set off in accordance with the Mobile Co-location Service Level Terms. In this case the status quo will prevail and the Non-Payment Notice will not give rise to any rights under clause 16.3 or section 38 until the Dispute is resolved.

Suspension following Non-Payment Notice

- 16.3 The Access Provider may Suspend supply of the Mobile Co-location Service if the Access Provider gives the Access Seeker a Non-Payment Notice and the amount due (including any interest charged) is not paid within 20 Working Days of the Non-Payment Notice being given.
- 16.4 Suspension of the Mobile Co-location Service under clause 16.3 must cease as soon as it is reasonably practicable for the Access Provider to complete restoration of the Mobile Co-location Service after the Access Seeker's non-payment is remedied, and in any event must cease no later than four Working Days after the Access Seeker's non-payment is remedied.

17 Invoice Disputes**Dealing with Invoice Error Disputes**

- 17.1 If the Access Seeker reasonably and in good faith believes there is a manifest error in the either the Charges in an invoice or in the calculation of the amount of the invoice (**Invoice Error**), the Access Seeker may give Notice to the Access Provider before the due date setting out in full details of:
- 17.1.1 the invoice;
 - 17.1.2 the Invoice Error;
 - 17.1.3 the grounds for the Access Seeker's belief that the Invoice Error exists; and
 - 17.1.4 the amount by which the Access Seeker believes that the Access Provider has overcharged or undercharged it by reason of the Invoice Error.
- 17.2 Where the Access Seeker believes the Access Provider has overcharged it by reason of an Invoice Error, the Access Seeker may withhold payment of the amount it believes it has been overcharged until the issue has been resolved in accordance with this section 17. Whenever payment is withheld under this clause 17.2 the Access Seeker must, within 10 Working Days after the due date, give the Access Provider a full extract detailing each withheld Charge.
- 17.3 If the Access Seeker fails to follow the Notice requirements set out in clause 17.1, then any right under this section 17 to withhold payment of the amount it believes it has been overcharged does not apply.
- 17.4 Following the giving of any Notice of an Invoice Error, the Access Seeker and the Access Provider must treat that Notice as a Dispute Notice and resolve the Dispute in accordance with section 39. If the Dispute reaches a Deadlock, the Access Seeker and the Access Provider must refer the Dispute to expert decision as set out in section 39.
- 17.5 If it is agreed by the Access Seeker and the Access Provider or decided under clause 39.7 that an Invoice Error exists in an invoice, depending on whether the amount properly payable by the Access Seeker is more than the amount paid (an underpayment) or less than the amount paid (an overpayment), then:
- 17.5.1 in the case of an underpayment, the Access Seeker must forthwith pay to the Access Provider the amount of the difference between the amount paid and the amount properly payable;
 - 17.5.2 in the case of an overpayment, the Access Provider must forthwith pay to the Access Seeker the amount of the difference between the amount paid and the amount properly payable, plus interest on that amount at the Bill Rate (as at the date the Access Seeker made the overpayment) plus 2% for the period from the date the Access Seeker made the overpayment to the date of payment, or the date clause 17.7 becomes applicable, whichever is earlier; or
 - 17.5.3 in the case of an Invoice Error that affects three or more of any five consecutive invoices and constitutes an overpayment by the Access Seeker that is more than 5% of the amount properly payable by the Access Seeker under such invoices, the Access Provider must forthwith pay to the Access Seeker the amount of the difference between the amount paid and the amount properly payable, plus interest on that amount at the Bill Rate (as at the date the Access Seeker made the first overpayment) plus 4% for the

period from the date the Access Seeker made the first overpayment to the date of payment, or the date clause 17.7 becomes applicable, whichever is earlier.

- 17.6 If it is agreed by the Access Seeker and the Access Provider or decided under clause 39.7 that an Invoice Error does not exist, the Access Seeker must forthwith pay any amount withheld plus interest on the amount withheld at the Bill Rate (as at the date of the invoice) plus 2% for the period from the day after the due date to the date of payment of the amount withheld, or the date clause 17.7 becomes applicable, whichever is earlier.

Interest on unpaid amounts

- 17.7 Where an amount due from the Access Provider or the Access Seeker under clauses 17.5, 17.6, or section 18 remains unpaid on the 20th Working Day after the date the Dispute is resolved, that Party must pay interest on that amount at the Bill Rate (as at that 20th Working Day) plus 5% for the period from that 20th Working Day to the date of payment of that amount, in addition to the amount due under clause 17.5, 17.6 or section 18.

18 Other invoice Disputes

- 18.1 Regardless of whether or not the Access Seeker has previously given Notice of an Invoice Error in relation to any invoice, either the Access Seeker may give the Access Provider a Dispute Notice in respect of that invoice, provided that a Dispute Notice cannot be given later than 100 days after the date of the invoice. Any Dispute Notice under this clause 18.1 must comply with clause 39.2 and set out details of the invoice, the disputed amount and the grounds for the Dispute together with any available supporting evidence. The Access Seeker and the Access Provider must resolve the Dispute in accordance with section 39.
- 18.2 If a Dispute under clause 18.1 is resolved in favour of the Access Seeker, the Access Provider must forthwith pay the amount agreed or found to have been overpaid plus interest at the Bill Rate (as at the date of the overpayment) plus 2% on the overpaid amount for the period from the date the overpayment was made to the date of refund of the overpayment or the date clause 17.7 becomes applicable, whichever is earlier.
- 18.3 If a Dispute under clause 18.1 is resolved in favour of the Access Provider, the Access Seeker must forthwith pay the amount agreed or found to have been underpaid plus interest at the Bill Rate (as at the date the underpayment became due) plus 2% on the underpaid amount for the period from the date the underpayment was paid to the date of payment of the balance or the date clause 17.7 becomes applicable, whichever is earlier.

LIABILITY

19 Access Seeker's liability

Limitation of the Access Seeker's liability

- 19.1 The Access Seeker's total liability in respect of any and all Defaults, negligent acts or omissions or breaches of statutory duty is limited to:
- 19.1.1 where the event which gave rise to the liability relates to the Mobile Co-location Service provided by the Access Provider to the Access Seeker at an Exchange, \$50,000,000 in aggregate for all events (connected or unconnected) occurring in any 12 month period; and
 - 19.1.2 where the event that gave rise to the liability does not relate to the Mobile Co-location Service provided by the Access Provider to the Access Seeker at an Exchange, \$1,000,000 for a single event and \$10,000,000 in aggregate for all events (connected or unconnected) occurring in any 12 month period,
- save that these limitations do not apply to the exceptions under clause 19.4.

Exclusion of the Access Seeker's liability

- 19.2 The Access Seeker's liability for Indirect Damages in respect of any and all Defaults, negligent acts or omissions or breaches of statutory duty is excluded, save that this exclusion does not apply to the exceptions under clause 19.4.

Time bar

- 19.3 The Access Seeker has no liability to the Access Provider in respect of any Default, negligent act or omission or breach of statutory duty unless the Access Provider notifies the Access Seeker of its claim within 12 months after that Default, negligent act or omission or breach of statutory duty became reasonably discoverable.

Exceptions to the limitation and exclusion of the Access Seeker's liability

- 19.4 The limitation under clause 19.1 and the exclusion under clause 19.2 do not apply to:
- 19.4.1 any liability resulting from the Access Seeker's fraud or wilful Default;
 - 19.4.2 any obligation arising under the Mobile Co-location Terms to pay money in the ordinary course of business;
 - 19.4.3 any liability described in clause 21.1;
 - 19.4.4 any liability resulting from the Access Seeker's Default under section 32; or
 - 19.4.5 any liability resulting from the Access Seeker's Default under section 34.

Costs of recovering Charges

- 19.5 The Access Seeker must pay on demand all of the Access Provider's reasonable expenses (including legal costs on a full indemnity basis) incurred by the Access Provider in exercising its rights to recover any Charge the Access Seeker is liable to pay the Access Provider under the Mobile Co-location Terms.

Access Seeker's indemnity

- 19.6 The Access Seeker is responsible for and indemnifies the Access Provider against cost, liability, loss, damage or expense (including legal and other professional costs) that the Access Provider incurs or suffers as a direct result of any action, proceeding, claim or demand (**Claim**) that is made, threatened or commenced by:
- 19.6.1 any Other Service Provider where that claim or proceeding is a direct result of the Access Seeker's Default, save that this indemnity does not apply to the extent that an Other Service Provider's claim or proceeding is for Indirect Damages;
 - 19.6.2 any person as a result of a breach by the Access Seeker of:
 - (a) section 40;
 - (b) clause 6.1.6(a) or (b) of the Mobile Co-location Access Terms;
 - (c) clause 6.2 or 6.3 of the Mobile Co-location Access Terms; or
 - (d) clause 8.2 or 8.3 of the Mobile Co-location Access Terms.
- 19.7 The Access Seeker may elect at its own expense to defend any such Claim, and if so the Access Provider must render all reasonable assistance to, and co-operate with, the Access Seeker for that purpose at the Access Seeker's expense.
- 19.8 The Access Provider shall not admit liability or settle any Claim without the Access Seeker's prior written consent, that consent not to be unreasonably withheld or delayed. The Access Provider must notify the Access Seeker as soon as practicably possible after the date on which any such claims or proceeding becomes known to it.
- 19.9 The Access Seeker will not indemnify the Access Provider pursuant to clause 19.6 to the extent that the relevant cost, liability, loss, damage or expense (including legal and other professional costs) is the direct result of the Access Provider's Default or a negligent act or omission of the Access Provider.

20 Access Provider's liability

Limitation of the Access Provider's liability

20.1 The Access Provider's total liability in respect of any and all Defaults, negligent acts or omissions or breaches of statutory duty is limited to \$1,000,000 for a single event and \$10,000,000 in aggregate for all events (connected or unconnected) occurring in any 12 month period, save that this limitation does not apply to the exceptions under clause 20.4.

Exclusion of the Access Provider's liability

20.2 The Access Provider's liability for Indirect Damages in respect of any and all Defaults, negligent acts or omissions or breaches of statutory duty is excluded, save that this exclusion does not apply to the exceptions under clause 20.4.

Time bar

20.3 The Access Provider has no liability to the Access Seeker in respect of any Default, negligent act or omission or breach of statutory duty unless the Access Seeker notifies the Access Provider of its claim within 12 months after that Default, negligent act or omission or breach of statutory duty became reasonably discoverable.

Exceptions to the limitation and exclusions of the Access Provider's liability

- 20.4 The limitation under clause 20.1 and the exclusions under clause 20.2 do not apply to:
- 20.4.1 any liability resulting from the Access Provider's fraud or wilful Default;
 - 20.4.2 any obligation arising under the Mobile Co-location Terms to pay money in the ordinary course of business;
 - 20.4.3 any liability described in clause 21.1;
 - 20.4.4 any liability resulting from the Access Provider's Default under section 32;
 - 20.4.5 any liability arising under clause 33.3;
 - 20.4.6 any liability resulting from the Access Provider's Default under section 34; or
 - 20.4.7 any Performance Penalty which may be payable by the Access Provider.

Costs of recovering Performance Penalties

20.5 The Access Provider must pay on demand all of the Access Seeker's reasonable expenses (including legal costs on a full indemnity basis) properly incurred by the Access Seeker in exercising its rights to recover any Performance Penalty the Access Provider is liable to pay the Access Seeker under the Mobile Co-location Terms.

Access Provider's indemnity

- 20.6 The Access Provider is responsible for and indemnifies the Access Seeker against cost, liability, loss, damage or expense (including legal and other professional costs) that the Access Seeker incurs or suffers as a direct or indirect result of any action, proceeding, claim or demand (**Claim**) that is made, threatened or commenced by an Other Service Provider where that claim or proceeding is a direct or indirect result of the Access Provider's Default, save that this indemnity does not apply to the extent that an Other Service Provider's claim or proceeding is for Indirect Damages.
- 20.7 The Access Provider may elect at its own expense to defend any such Claim, and if so, the Access Seeker will render all reasonable assistance to, and shall co-operate with, the Access Provider for that purpose at the Access Provider's expense.
- 20.8 The Access Seeker shall not admit liability or settle any Claim without the Access Provider's prior written consent. The Access Seeker shall notify the Access Provider as soon as practicably possible after the date on which any such claim or proceeding becomes known to it.
- 20.9 The Access Provider will not indemnify the Access Seeker pursuant to clause 20.6 to the extent that the relevant cost, liability, loss, damage or expense (including legal and other professional costs) is the direct result of the Access Seeker's Default or a negligent act or omission of the Access Seeker.

21 General

- 21.1 Nothing under the Mobile Co-location Terms excludes or limits:
- 21.1.1 any statutory liability of the Access Seeker or the Access Provider (to the extent that the law prohibits excluding or limiting such liability); or
 - 21.1.2 the Access Seeker's or the Access Provider's liability to pay any costs of, or awarded in, any proceeding, expert decision, arbitration or mediation.
- 21.2 Each term of sections 19 and 20:
- 21.2.1 is a separate limitation, exclusion or indemnity (as the case may be) applying and surviving even if one or more of such terms is inapplicable or held unreasonable in any circumstances; and
 - 21.2.2 takes effect so that every limitation, exclusion and indemnity (as the case may be) is not affected by the Mobile Co-location Terms coming to an end.

22 Force Majeure

- 22.1 In this section 22:
- 22.1.1 **Force Majeure Event** means any event beyond the reasonable control of a Party, including:
- (a) act of God or force of nature (including fire, earthquake, flood, landslide and weather of exceptional severity);
 - (b) public mains electrical supply failure;
 - (c) serious accident the cause of which is unconnected to the Party relying on the Force Majeure Event (including explosion and radioactive contamination);
 - (d) requirement or restriction of or failure to act by any government, regulatory or judicial entity (including any requirement to comply with a statutory or regulatory obligation) other than any exercise of power under the Act in relation to the Mobile Co-location Terms itself;
 - (e) epidemic, or national or local emergency (whether in fact or law);
 - (f) sabotage, riot, insurrection, terrorism or civil disorder;
 - (g) military operations or war (whether declared or not);
 - (h) industrial dispute of any kind (provided that, in circumstances where the industrial dispute involves its own employees, the Party relying on the Force Majeure Event must have taken reasonable actions to prevent such industrial dispute from arising); or
 - (i) acts, omissions or delays of third parties for whom the Party relying on the Force Majeure Event is not responsible (for the avoidance of doubt, the Access Seeker and the Access Provider are responsible for all of their respective contractors, employees, servants and agents),
- but does not include:
- (j) any event which the Party relying on the Force Majeure Event could have avoided or overcome by exercising a standard of reasonable care at a reasonable cost; or
 - (k) a lack of funds for any reason or any other inability to pay.
- 22.2 Notwithstanding anything in the Mobile Co-location Terms, neither the Access Seeker nor the Access Provider is liable for any cost, liability, loss, damage or expense (including legal and other

professional costs) for not meeting or for any delay in meeting any obligation under the Mobile Co-location Terms (other than any obligation arising under the Mobile Co-location Terms to pay money in the ordinary course of business) caused by a Force Majeure Event.

- 22.3 Where the Access Seeker or the Access Provider rely on a Force Majeure Event in respect of any failure or delay in meeting its obligations under the Mobile Co-location Terms, it must forthwith give Notice to the other Party of the estimated extent and duration of its inability to perform or delay in performing its obligations.
- 22.4 Upon cessation of the effects of a Force Majeure Event any Party relying on it must forthwith give Notice to the other Party of such cessation.
- 22.5 A Force Majeure Event does not discharge any Party relying on it from any obligation accrued beforehand. Any Party relying on a Force Majeure Event must continue to perform those of its obligations not affected by the Force Majeure Event.
- 22.6 Any Party affected by a Force Majeure Event will use its reasonable endeavours to mitigate as soon as practicable those consequences of that Force Majeure Event which have affected its obligations under the Mobile Co-location Terms, and will keep the other Party fully informed about the status of the Force Majeure Event and the extent to which it is preventing the first Party from performing those obligations.
- 22.7 To the extent that the Access Provider is prevented as a result of a Force Majeure Event from providing all or part of the Mobile Co-location Service, the Access Seeker is not required to pay the Charges that apply to that part of the Mobile Co-location Service that is not provided by the Access Provider during the Force Majeure Event.

SERVICE DISRUPTION

23 Outages

- 23.1 The Access Provider must, where practicable, give the Access Seeker reasonable advice of any thing that the Access Provider is aware of which is likely to adversely affect the Mobile Co-location Service to the same extent that it provides advice and notification to any Customers or other part of the Access Provider responsible for selling services to Customers of the Access Provider.

Planned Outages

- 23.2 The Access Provider may Suspend supply of the Mobile Co-location Service for the purpose of conducting works, routine maintenance, remedial work or upgrades to the Access Provider's Network (**Planned Outage**).
- 23.3 The Access Provider must:
- 23.3.1 use all reasonable endeavours to conduct any Planned Outage between the hours of 12.00 am to 7.00 am inclusive where the Access Provider believes that is practicable and in such manner as to minimise, to the extent practicable, any impact on the provision of the Mobile Co-location Service to the Access Seeker;
- 23.3.2 advise the Access Seeker in advance of any Planned Outage to the same extent that the Access Provider provides advice and notification to any Customer or other part of the Access Provider responsible for selling services to Customers of the Access Provider; and
- 23.3.3 in respect of any advice of a Planned Outage, provide the following information:
- (a) a brief explanation of the reason for the Planned Outage;
 - (b) the intended date, time and duration of the Planned Outage;
 - (c) a description of the Mobile Co-location Service (or the relevant part of it) which will be affected by the Planned Outage; and
 - (d) the name and contact details of the Access Provider's representative(s) who gave the advice.

Unplanned Outages

- 23.4 The Access Provider may Suspend supply of the Mobile Co-location Service:
- 23.4.1 due to any unplanned unavailability of or interruption to the Access Provider's Network or the Mobile Co-location Service; or
 - 23.4.2 in order to provide or safeguard service to the emergency or other essential services, **(Unplanned Outage)**.
- 23.5 The Access Provider must:
- 23.5.1 use all reasonable endeavours to give the Access Seeker as much advice as possible of the existence of any Unplanned Outage;
 - 23.5.2 advise the Access Seeker of any Unplanned Outage within the timeframe set out in the Mobile Co-location Service Level Terms; and
 - 23.5.3 use all reasonable endeavours to answer any reasonable questions from the Access Seeker about the extent and duration of any Unplanned Outage.
- 23.6 The Access Provider must act reasonably and in good faith in:
- 23.6.1 planning and implementing any Planned Outage; and
 - 23.6.2 managing any Unplanned Outage,
- with a view to minimising the impact on the Access Seeker and Customers and End Users of the Access Seeker.
- 23.7 If the Access Seeker becomes aware of any Unplanned Outage before it receives advice from the Access Provider under clause 23.5, the Access Seeker must make reasonable efforts to notify the Access Provider as soon as reasonably practical.
- 23.8 If, for the purpose of the Access Provider undertaking emergency work on or around the Relevant Facilities:
- 23.8.1 the Access Seeker Equipment (or a relevant part of it) has to be turned off or disabled; or
 - 23.8.2 the Access Provider requires assistance in relation to the Access Seeker Equipment (or a relevant part of it),
- then the Access Provider must:
- 23.8.3 use all reasonable endeavours to notify the Access Seeker of the Access Provider's need to undertake the emergency work on or around the Relevant Facilities;
 - 23.8.4 advise the Access Seeker of the need to perform either of the actions in clauses 23.8.1 or 23.8.2; and
 - 23.8.5 use all reasonable endeavours to answer any reasonable questions from the Access Seeker about the extent and duration of any Unplanned Outage,
- in accordance with the same procedures and timeframes as the Access Provider would respond to undertake emergency work relating to Access Provider Equipment.

FAULTS**24 Responsibility for faults**

- 24.1 The Access Provider is responsible for fixing any faults which affect the Mobile Co-location Service and are in the Access Provider's Network, Access Provider Equipment or Access Provider Owned Equipment, except where a fault is the Access Seeker's responsibility under clause 24.2.
- 24.2 The Access Seeker is responsible for:

- 24.2.1 any faults which affect the Mobile Co-location Service and are in the Access Provider's Network, Access Provider Equipment or Access Provider Owned Equipment but are due to any act or omission of the Access Seeker or of a Customer of the Access Seeker or an End User of the Access Seeker;
- 24.2.2 any faults in Access Seeker Equipment; and
- 24.2.3 any faults in the Access Seeker's Network.
- 24.3 Despite the Access Seeker's responsibilities under clause 24.2, this section 24 does not create any right for the Access Seeker to access any property controlled by the Access Provider or fix any cable or equipment or other thing unless expressly provided otherwise in the Mobile Co-location Terms.
- 24.4 Where the Access Seeker is responsible for a fault under clause 24.2, and the Access Provider is to fix that fault on its behalf in accordance with the Mobile Co-location Operations Manual, the Access Seeker shall pay to the Access Provider the relevant Charge.

25 Diagnosing faults

- 25.1 The Access Seeker must operate a competent and sufficiently resourced faults reporting service for Customers and End Users of the Access Seeker.
- 25.2 Before asking the Access Provider to investigate any fault, the Access Seeker must:
 - 25.2.1 confirm the presence of a fault;
 - 25.2.2 perform an initial fault diagnosis to identify where the fault has arisen;
 - 25.2.3 use all reasonable endeavours to investigate the fault and find out all relevant information from its Customer or End User; and
 - 25.2.4 confirm the fault is one that the Access Provider is responsible for fixing under clause 24.1.

26 Reporting faults to the Access Provider

- 26.1 Once the Access Seeker has complied with clause 25.2 it must report any fault that the Access Provider is responsible for fixing under clause 24.1 to the Access Provider and provide details of it (**Reported Fault**). The procedures for making and acknowledging a Reported Fault are set out in the Mobile Co-location Operations Manual.
- 26.2 Where the Reported Fault is outside the Access Provider's responsibility under clause 24.1 or the Access Provider cannot confirm the presence of a fault, then the Access Provider may charge the Access Seeker the relevant Charge.
- 26.3 The Access Provider must not accept any report of a fault from a Customer or End User of the Access Seeker. Any Customer or End User of the Access Seeker mistakenly contacting the Access Provider will be advised to contact the Access Seeker. The Access Seeker must ensure that all of its Customers and End Users are informed that all faults must be reported to the Access Seeker.

27 Fixing faults

- 27.1 A Reported Fault that is the Access Provider's responsibility under clause 24.1 will be responded to by the Access Provider between the hours of 7.00 am and 11.00 pm seven days a week. Procedures for fixing emergency faults are set out in the Mobile Co-location Operations Manual.
- 27.2 The Access Seeker will facilitate contact with any relevant Customer or End User of the Access Seeker and/or arrange a site visit whenever this is reasonably required by the Access Provider to clarify the nature of, or undertake work to fix, any Reported Fault. The Access Provider may communicate with a Customer or End User of the Access Seeker directly so long as such communications are confined to technical matters directly concerning the Reported Fault. The Access Provider must comply with the customer contact procedures set out in the Mobile Co-location Operations Manual.

- 27.3 Upon the Access Provider's acknowledgement of a Reported Fault that is the Access Provider's responsibility under clause 24.1, the Access Provider must:
- 27.3.1 comply with the Mobile Co-location Operations Manual;
 - 27.3.2 diagnose and fix the Reported Fault;
 - 27.3.3 following the initial diagnosis, provide an indication to the Access Seeker of the likely time to fix the Reported Fault, provided that the Access Provider has no obligation to provide such indication if the Reported Fault is fixed at the time of initial diagnosis; and
 - 27.3.4 if requested by the Access Seeker, provide progress reports after expiry of the indicated fault restoration timeframe (such progress reports must include the steps taken by the Access Provider to resolve the Reported Fault and the expected time remaining until the Reported Fault will be resolved, if known),
- in each case using all reasonable endeavours to meet the timeframes set out in the Mobile Co-location Service Level Terms or, if there are none, the fault restoration timeframe indicated when the Reported Fault was made or as advised in the most recent progress report provided under clause 27.3.4.

THE ACCESS PROVIDER'S NETWORK, EQUIPMENT AND PROPERTY

28 Safeguarding the Access Provider's Network and Access Provider Equipment

- 28.1 For the Access Seeker's own safety, and so that services supplied to Customers and End Users of the Access Provider are not disrupted, the Access Seeker must help safeguard the Access Provider's Network and Access Provider Equipment. The Access Seeker must:
- 28.1.1 follow the Access Provider's reasonable directions when connecting anything to the Access Provider's Network or any Access Provider Equipment and make sure it complies with the Mobile Co-location Operations Manual;
 - 28.1.2 only allow people authorised by the Access Provider to work on or around the Access Provider's Network or Access Provider Equipment; and
 - 28.1.3 make sure everyone the Access Seeker is responsible for also meets these obligations .
- 28.2 The Access Provider is responsible for the safe operation and upgrading of the Access Provider's Network in a manner that does not:
- 28.2.1 endanger the safety or health of any of the Access Seeker's employees, contractors, agents or Customers; or
 - 28.2.2 damage, interfere with or cause any deterioration in the operation of the Access Seeker's Network. However the Access Provider will not be responsible for any damage to, interference with or deterioration of the Access Seeker's Network that is caused by the Access Seeker's failure to ensure that the Access Seeker's Network is compatible with the Access Provider's Network.
- 28.3 The Access Provider must not unreasonably withhold or delay granting authorisation under clause 28.1.2.

29 Network Performance

- 29.1 A Party's Network may affect the performance of the second Party's Network. If there is an issue affecting the performance of a Party's Network then, without prejudice to the other terms of the Mobile Co-location Terms, that Party (**Affected Party**) may require the other Party to meet with it within a reasonable timeframe. At that meeting, the Parties must discuss in good faith and endeavour to agree the steps the other Party will take, and the timeframes for taking those steps, to mitigate the effects on the Affected Party's Network.

30 Responsibilities for Access Provider Owned Equipment

- 30.1 At the time any Access Provider Owned Equipment is used by the Access Seeker, the Access Provider will use all reasonable endeavours to make sure it is safe, durable and approved for connection to the rest of the Access Provider's Network (where applicable).
- 30.2 Where the Access Seeker uses any Access Provider Owned Equipment, the Access Seeker will, where applicable:
 - 30.2.1 leave the Access Provider Owned Equipment installed and not use it otherwise than in accordance with the Mobile Co-location Operations Manual;
 - 30.2.2 protect the Access Provider Owned Equipment from radio or electrical interference, power fluctuations, abnormal environmental conditions, theft and any other risks of loss or damage, except where such risks of loss or damage are caused by the Access Provider;
 - 30.2.3 meet any requirements set out in the Mobile Co-location Operations Manual relating to the Access Provider Owned Equipment;
 - 30.2.4 if the Access Provider Owned Equipment is lost, stolen or damaged, notify the Access Provider directly and pay for repairing or replacing it, except where the loss, theft or damage was caused by the Access Provider;
 - 30.2.5 follow the Access Provider's reasonable directions when using the Access Provider Owned Equipment and never use the Access Provider Owned Equipment for purposes for which it is not designed; and
 - 30.2.6 not encumber the Access Provider's title to the Access Provider Owned Equipment or expose such title to third party claims and notify the Access Provider if it becomes aware of any third party claim.
- 30.3 When any Access Provider Owned Equipment is no longer required the Access Seeker:
 - 30.3.1 must return the Access Provider Owned Equipment to the Access Provider;
 - 30.3.2 will take reasonable care to avoid causing damage when returning the Access Provider Owned Equipment to the Access Provider and be responsible for any damage to the Access Provider Owned Equipment; and
 - 30.3.3 must pay all Charges (if any) for the Access Provider Owned Equipment until such time as it is returned to the Access Provider.
- 30.4 The Access Provider must:
 - 30.4.1 maintain the Access Provider Owned Equipment to the same specifications that the Access Provider maintains equivalent equipment used to supply the Mobile Co-location Service to itself; and
 - 30.4.2 where necessary to ensure the Access Seeker is able to meet its obligations under clause 30.2, provide the Access Seeker with adequate and timely information regarding these specifications.

31 Property rights

Access Provider's property rights

- 31.1 Acquiring the Mobile Co-location Service from the Access Provider does not give the Access Seeker any property rights or beneficial interest in any part of the Access Provider's Network, including in any Relevant Facilities. The supply of any Access Provider Equipment or software to the Access Seeker, or the Access Seeker's use of Access Provider Equipment or software, does not give the Access Seeker any beneficial interest in that Access Provider Equipment or software.

Personal Property Securities Act 1999

- 31.2 Where any lease or bailment of:
 - 31.2.1 Access Provider Equipment to the Access Seeker; or

- 31.2.2 any property of the Access Seeker to the Access Provider, constitutes a security interest for the purposes of the Personal Property Securities Act 1999 (**PPSA**), then:
- 31.2.3 the Access Provider or the Access Seeker (as the case may be) may perfect its security interest by registering a finance statement in the Personal Property Securities Register; and
- 31.2.4 this clause shall constitute a security agreement for the purposes of the PPSA.

32 Intellectual Property

- 32.1 Except as expressly provided under the Mobile Co-location Terms, any Intellectual Property created or owned by the Access Provider shall remain the property of the Access Provider, and any Intellectual Property created or owned by the Access Seeker shall remain the property of the Access Seeker. Nothing under the Mobile Co-location Terms:
 - 32.1.1 confers any assignment, right, title or licence of one Party's Intellectual Property to the other; or
 - 32.1.2 restricts the rights of the Access Provider or the Access Seeker to own, use, enjoy, licence, assign or transfer its own Intellectual Property.
- 32.2 All Intellectual Property in any improvements or changes to the Mobile Co-location Service devised or made by anyone during the time the Access Provider is supplying the Mobile Co-location Service to the Access Seeker, belong to the Access Provider.

33 Software and Access Provider Systems

- 33.1 Where the Access Provider provides the Access Seeker with any software to use or grants the Access Seeker access to an Access Provider System:
 - 33.1.1 the Access Provider shall advise the Access Seeker of the purpose of the software or access to the Access Provider System;
 - 33.1.2 the Access Provider remains the owner or licensee of the software or Access Provider System and has the right to allow the Access Seeker to use it for the purposes for which it is provided;
 - 33.1.3 the Access Seeker may use the software or Access Provider System only for the purposes for which it is provided;
 - 33.1.4 the Access Seeker's right to use the software or Access Provider System is personal to the Access Seeker and may not be transferred to anyone else;
 - 33.1.5 the Access Seeker will not change or interfere with the software or Access Provider System in any way;
 - 33.1.6 the Access Seeker must protect and secure its usernames and passwords from unauthorised use;
 - 33.1.7 the Access Seeker will not use the software or Access Provider System to recreate any source code;
 - 33.1.8 the Access Seeker will not copy any part of the software or Access Provider System except for the purposes of Access Provider-approved backup or testing procedures; and
 - 33.1.9 the Access Seeker's right to use the software or Access Provider System will continue until either:
 - (a) supply of the Mobile Co-location Service has been terminated or is suspended; or
 - (b) the Access Provider reasonably believes that the Access Seeker has breached any obligation under this clause 33.1, in which case the Access Provider may Suspend or terminate the Access Seeker's right to use the

software or Access Provider System immediately, with the Access Provider having no liability to the Access Seeker.

- 33.2 The Access Provider may at any time provide upgrades or new versions of any software. Provided that an upgrade or new version does not adversely affect supply of the Mobile Co-location Service, or the Access Seeker's use of the Mobile Co-location Service, the Access Seeker will install the upgrade or new version at its own cost:
- 33.2.1 as soon as it reasonably can and no later than six months after the Access Provider provides it; or
 - 33.2.2 immediately, if the Access Provider notifies the Access Seeker that the Mobile Co-location Service may be adversely affected if the upgrade or new version is not installed immediately.
- 33.3 The Access Provider indemnifies the Access Seeker against cost, liability, loss, damage or expense (including legal and other professional costs) that the Access Seeker incurs or suffers as a result of any claim or proceeding that is made, threatened or commenced by any third party where that claim or proceeding is a result of the Access Seeker's proper and lawful use of the Access Provider Systems or software under the Mobile Co-location Terms.

INFORMATION

34 Confidential Information

34.1 In this section 34:

34.1.1 **Disclosing Party** means (as the context requires):

- (a) the Access Seeker when information is disclosed to the Access Provider; and
- (b) the Access Provider when information is disclosed to the Access Seeker.

34.1.2 **Receiving Party** means (as the context requires):

- (a) the Access Seeker when receiving information from the Access Provider and
- (b) the Access Provider when receiving information from the Access Seeker.

34.1.3 **Access Seeker** includes any Related Company of the Access Seeker.

34.1.4 **Access Provider** includes any Related Company of the Access Provider.

34.1.5 **Confidential Information** means all information which is confidential or proprietary to the Disclosing Party and is used or disclosed in connection with the Mobile Co-location Terms, including information which is confidential or proprietary to a third party and is used or disclosed in connection with the Mobile Co-location Terms by the Disclosing Party under licence from that third party and including information derived from Confidential Information, but excludes:

- (a) information which is independently developed by the Receiving Party outside the scope of the Mobile Co-location Terms, provided that such development did not rely on any Confidential Information;
- (b) information obtained from a source independent of the Disclosing Party;
- (c) information which was publicly available at the time it was received;
- (d) information which was known to the Receiving Party at the time it was received or becomes publicly available after the time it was received other than by a breach of an obligation of confidence;
- (e) information required to be released under any applicable law or the regulations of a stock exchange on which the Receiving Party's shares are listed;

- (f) information expressly stated under the Mobile Co-location Terms to be disclosed to the public or telecommunications industry;
- (g) information expressly stated under the Mobile Co-location Terms not to be Confidential Information; or
- (h) any press release or other public statement that is agreed by the Access Seeker and the Access Provider.

34.1.6 **Confidential Customer Information** means all information which a Party ("the first Party") provides to the other Party on a confidential basis, or which the other Party holds or obtains, in connection with the Mobile Co-location Terms concerning a particular person who is or intends to become a Customer of the first Party. It includes the fact that the person intends to subscribe for or has subscribed for any of the first Party's services and includes information about the Customer which is generated from usage records made by that Customer or by End Users of any service provided to that Customer that relies (in whole or in part) on the Mobile Co-location Service but excludes the contents of these Mobile Co-location terms itself and any information (including information which was formerly Confidential Customer Information):

- (a) obtained from the person or from any other source independent of either Party;
- (b) which is publicly available and is obtained from a public source;
- (c) which is both contained in and generated from a Party's own billing records relating to its Customers other than billing records relating to its services to the other Party;
- (d) resulting from the fact that a Customer has commenced receiving a service from the Access Seeker that relies (in whole or in part) on the Mobile Co-location Service, the identity of that Customer, and all information associated with the commencement of that service; or
- (e) expressly stated in these Mobile Co-location Terms not to be Confidential Customer Information.

34.2 Subject to the following clauses of this section 34, a Receiving Party shall keep Confidential Information in confidence and will not (and will ensure that its directors, employees, and professional advisors do not) disclose Confidential Information to any third party or use any of the Confidential Information other than as necessary for performance of the Mobile Co-location Terms.

34.3 A Receiving Party shall exercise the greater of:

- 34.3.1 the degree of care of Confidential Information that a reasonable person with knowledge of the confidential nature of the Confidential Information would apply; and
- 34.3.2 the security or degree of care that it applies to its own Confidential Information of an equivalent nature.

34.4 A Receiving Party shall restrict disclosure of Confidential Information within itself to those persons who have a reasonable need to know.

34.5 A Receiving Party may disclose Confidential Information to a contractor, agent or professional advisor where that person has a need to know, provided that the Receiving Party will be responsible for any disclosure of the Confidential Information by that person where such disclosure would be a breach of this section 34 if made by the Receiving Party.

34.6 A disclosure of Confidential Information will not constitute a breach of this section 34 where it is:

- 34.6.1 authorised in writing by the Disclosing Party to the extent of that authority;
- 34.6.2 to an emergency organisation;
- 34.6.3 properly made pursuant to a relevant statutory or regulatory obligation;
- 34.6.4 disclosed to the Commission;

34.6.5 properly and reasonably made to the Court or any person appointed by the Access Seeker and the Access Provider under section 39 to resolve a Dispute; or

34.6.6 to obtain or maintain any listing on any recognised stock exchange,

subject (in the case of any disclosure specified in clauses 34.6.3 to 34.6.6) to the Receiving Party informing the Disclosing Party as soon as reasonably practicable, after such disclosure.

34.7 Each Party must use reasonable care to ensure that it does not use Confidential Customer Information for sales or marketing purposes, which means using the information in a manner designed to prevent or encourage the transfer of a Customer from one Party to the other or the subscription to a service (that relies in whole or in part on the Mobile Co-location Service) offered by a Party (whether or not that service is offered by the other Party), except that:

34.7.1 this clause is not intended to prevent a Party using any information about one of its Customers (who may also be a Customer of the other Party) which is generated solely within the first Party's own Network from its own records relating to its own services provided that any such information a Party generates through transferring one of its Customers to a service provided by the other Party must not be used for sales and marketing purposes before completion of the transfer process. For example, billing information of one Party indicating that a person who is a Customer of that Party is dialling and/or receiving calls from numbers allocated to the other Party is not Confidential Customer Information of the other Party; and

34.7.2 each Party acknowledges that the other Party's personnel (or those of the other Party's Related Companies) may engage in multiple roles or functions and a Party does not breach this clause merely because Confidential Customer Information is provided other than for sales and marketing purposes to a person who has multiple roles or functions (one of which is sales or marketing). Each Party must ensure that its personnel directly involved in the supply of the Mobile Co-location Service may not, at the same time, be involved in marketing or sales to that Customer. To avoid doubt, nothing in this clause 34.7.2 prevents either Party restructuring the operational aspects of its business.

34.8 Each Party acknowledges that damages may not be an adequate remedy in the case of a breach of clauses 34 or 35, and that either Party may seek an injunction or interlocutory relief in these circumstances.

35 Access Seeker Information

35.1 Subject to the requirements of confidentiality imposed under section 34, the Access Provider may collect information about the Access Seeker and Customers and End Users of the Access Seeker where and to the extent that such information is reasonably required for the purpose of providing the Mobile Co-location Service (**Access Seeker Information**). Access Seeker Information may be obtained from the Access Seeker or generated within the Access Provider's Network when the Access Seeker or anyone else uses the Mobile Co-location Service.

35.2 For the avoidance of doubt, nothing in this section 35 shall require the Access Seeker, or entitle the Access Provider, to do anything in breach of any statutory or regulatory obligation or in breach of any confidentiality obligation to a third party.

35.3 The Access Provider may:

35.3.1 hold Access Seeker Information and share it with its employees, contractors and other agents who are directly involved in the provision of the Mobile Co-location Service, but only where and to the extent that this is necessary to enable the Access Provider to provide the Access Seeker with the Mobile Co-location Service, send the Access Seeker invoices, check that the Access Seeker's obligations are being met, or otherwise to administer and enforce the Mobile Co-location Terms;

35.3.2 share Access Seeker Information with Other Service Providers, but only where and to the extent that this is necessary to enable the Access Seeker to send or receive messages of any kind through any telecommunications network;

- 35.3.3 disclose Access Seeker Information in accordance with and to the extent required by a reporting obligation under any applicable law;
- 35.3.4 use Access Seeker Information in order to ensure compliance with non-discrimination or similar clauses in contracts between the Access Provider and Customers of the Access Provider provided that the Access Seeker and any Customers or End Users of the Access Seeker are not identified; and
- 35.3.5 use Access Seeker Information for statistical purposes in fulfilment of legal or regulatory requirements, provided that the Access Seeker and any Customers or End Users of the Access Seeker are not identified.

DEFAULTS OTHER THAN FOR NON-PAYMENT AND SUSPENSION OF SUPPLY

36 Default Notice

- 36.1 Where on reasonable grounds a Party considers there has been a Default (other than a failure to pay any amount due under the Mobile Co-location Terms), it may give Notice to the Party in Default setting out details of the Default and giving a reasonable period to remedy the Default, which must be at least 15 Working Days (**Default Notice**).
- 36.2 If a Dispute Notice is given in relation to the same subject matter as a Default Notice before the period to remedy the Default expires then:
 - 36.2.1 the status quo will prevail until the Dispute is resolved;
 - 36.2.2 if the Default Notice was given by the Access Provider, it will not give rise to any rights under clauses 37.5, 37.6, 38.5.4, or 38.5.5 unless and until the Dispute is resolved in the Access Provider's favour; and
 - 36.2.3 if the Default Notice was given by the Access Seeker, it will not give rise to any rights under clause 38.4 unless and until the Dispute is resolved in the Access Seeker's favour.
- 36.3 If a Dispute Notice is given in relation to the same subject matter as a Default Notice after the period to remedy the Default expires, then:
 - 36.3.1 if the Default Notice was given by the Access Provider, it will give rise to rights under clauses 37.5, 37.6, 38.5.4, or 38.5.5 unless and until the Dispute is resolved in the Access Seeker's favour; and
 - 36.3.2 if the Default Notice was given by the Access Seeker, it will give rise to rights under clause 38.4 unless and until the Dispute is resolved in the Access Provider's favour.

37 Suspension of supply

- 37.1 The Access Seeker remains liable to pay all Charges for the Mobile Co-location Service (or part of the Mobile Co-location Service) until the Mobile Co-location Service is Suspended. The Access Seeker must pay all Charges for any part of the Mobile Co-location Service the supply of which has not been Suspended, except to the extent that the Access Seeker is unable to use that part of the Mobile Co-location Service as a result of the Suspension of another part of the Mobile Co-location Service.
- 37.2 Acceptance of part payment or the continued supply of the Mobile Co-location Service by the Access Provider, either before or after its powers to Suspend have become exercisable, does not constitute a waiver of the Access Providers rights under this section 37.
- 37.3 Suspension of the Mobile Co-location Service under this section 37 as a result of the Access Seeker's Default will cease as soon as it is reasonably practicable for the Access Provider to complete restoration of the Mobile Co-location Service after the Default is remedied, and in any event must cease no later than four Working Days after the Access Seeker's Default is remedied.

Suspension of supply following consultation and Default Notice

- 37.4 Except in a case of an exceptional event making prior consultation impractical, before the Access Provider may exercise any right under clause 37.5:
- 37.4.1 the Access Provider must give a Default Notice to the Access Seeker setting out the specific event giving rise to the Default Notice, any provisions of the Privacy Act 1993 or any telecommunications privacy codes of practice and any practicable process or outcome which would remove the necessity for Suspension;
 - 37.4.2 the Access Seeker and the Access Provider must promptly make themselves available for consultation and must promptly consult with each other with a view to establishing a better understanding of the event and agreeing on a practical process or outcome which would remove the necessity for Suspension; and
 - 37.4.3 five Working Days must have expired since the Access Provider made itself available for consultation with the Access Seeker, and the event which gave rise to the Default Notice must have continued throughout this period.
- 37.5 The Access Provider may Suspend supply of the Mobile Co-location Service, but only to the minimum extent practicable so as to limit disruption to services the Access Seeker provides to its Customers and End Users, if the Access Provider reasonably believes:
- 37.5.1 the Access Seeker does not hold a licence, permit or other official authorisation it must hold to provide its services lawfully;
 - 37.5.2 the Access Seeker, in providing services that depend on the Mobile Co-location Service, is breaching the Privacy Act 1993 or any relevant telecommunications privacy codes of practice in force under Part VI of the Privacy Act 1993;
 - 37.5.3 any person to whom the Access Seeker is providing, or from whom the Access Seeker is receiving, a service in connection with the Mobile Co-location Service is breaching the Privacy Act 1993 or any relevant telecommunications privacy codes of practice in force under the Privacy Act 1993; or
 - 37.5.4 the Privacy Commissioner has performed a statutory function or exercised a statutory power which has or could have the effect of either making the operation of all or any part of the Co-location Service impractical or detrimental to the Access Providers reputation, or rendering the Access Provider incapable of performing an obligation relating to supply of the Mobile Co-location Service.

Suspension or restriction following Default Notice

- 37.6 Where the Access Provider gives a Default Notice in respect of a material Default by the Access Seeker, the Access Provider may Suspend supply of the Mobile Co-location Service or (where that Default affects only a part of the Mobile Co-location Service) the relevant part of the Mobile Co-location Service, after the period to remedy the material Default has expired if such Default has not been remedied.

Immediate Suspension or restriction

- 37.7 The Access Provider may Suspend supply of the Mobile Co-location Service or (if the relevant event affects only part of the Mobile Co-location Service) the relevant part of the Mobile Co-location Service, either immediately or within a reasonable period of time following the date on which the right to Suspend arises if:
- 37.7.1 the Access Seeker, in meeting its obligations, exercising its rights or using the Mobile Co-location Service, endangers the health or safety of any person;
 - 37.7.2 the prerequisites under section 7 have not been, or are no longer, satisfied by the Access Seeker;
 - 37.7.3 any condition specified by the Access Provider under clause 38.6.3 has not been, or is no longer, satisfied by the Access Seeker;

- 37.7.4 any person to whom the Access Seeker is providing a service that relies (in whole or in part) on the Mobile Co-location Service is, in the Access Provider's reasonable opinion, using that service fraudulently or in breach of the Mobile Co-location Terms, provided that the Access Provider will only Suspend the Mobile Co-location Service to the minimum extent practicable to protect the Access Provider from the effects of that fraud or use in breach of the Mobile Co-location Terms;
- 37.7.5 the Access Seeker's operation or conduct, in the Access Provider's reasonable opinion, , interferes with, damages or threatens in any material way the operation of the Access Providers Network;
- 37.7.6 the primary, or all, of the business activities of the Access Seeker are suspended or cease for more than five consecutive Working Days;
- 37.7.7 the Access Seeker is unable to pay its debts as they fall due, or is presumed to be unable to pay its debts as they fall due, in terms of section 287 of the Companies Act 1993 (whether the Access Seeker is incorporated under that Act or not);
- 37.7.8 the Access Seeker goes into receivership or administration or has a receiver, trustee, administrator or statutory manager appointed in respect of all or any of its business or property;
- 37.7.9 the Access Seeker makes an assignment for the benefit of, or enters into or makes any arrangement or composition with, its creditors; or
- 37.7.10 any resolution is passed or any proceeding is commenced for the winding up or liquidation of the Access Seeker (whether on a voluntary or involuntary basis) without the Access Provider's prior written consent (which is not to be unreasonably withheld or delayed), and providing that if such a proceeding is commenced on an involuntary basis it has remained ongoing for 20 or more Working Days ,

and the Access Provider must give Notice of such Suspension to the Access Seeker as soon as reasonably practicable.

Obligation to inform the Commission

- 37.8 If the supply of the Mobile Co-location Service is Suspended under this section, the Access Provider must inform the Commission immediately of the suspension and the reason for the suspension.

TERMINATION OF SUPPLY

38 Termination of supply

- 38.1 The Access Seeker remains liable to pay all Charges for the Mobile Co-location Service (or part of the Mobile Co-location Service) until termination. The Access Seeker must pay all Charges for any part of the Mobile Co-location Service the supply of which has not been terminated, except to the extent that the Access Seeker is unable to use that part of the Mobile Co-location Service as a result of the termination of another part of the Mobile Co-location Service.
- 38.2 Acceptance of part payment or the continued supply of the Mobile Co-location Service by the Access Provider, either before or after its powers to terminate have become exercisable, does not constitute a waiver of the Access Provider's rights under this section 38.

Termination of supply by the Access Seeker

- 38.3 The Access Seeker may terminate the Mobile Co-location Service (or any part of the Mobile Co-location Service) after giving Notice to the Access Provider of two months or more. If the Access Seeker gives the Access Provider any Notice under this clause 38.3, the Access Provider must terminate supply of the Mobile Co-location Service in accordance with that Notice upon expiry of the Notice period.
- 38.4 Where the Access Seeker gives a Default Notice to the Access Provider, the Access Seeker may, after the period to remedy the Default has expired and provided that the Default has not been

remedied, terminate supply of the Mobile Co-location Service (or any part of the Mobile Co-location Service) either:

- 38.4.1 immediately; or
- 38.4.2 within a reasonable period of time following the date on which the Access Seeker becomes aware of the right to terminate.

Termination of supply by the Access Provider

38.5 The Access Provider may on giving Notice to the Access Seeker, terminate supply of the Mobile Co-location Service either immediately or within a reasonable period of time following the date on which the right to terminate arises if:

- 38.5.1 the Access Seeker goes into receivership or administration or has a receiver, trustee, administrator or statutory manager appointed in respect of all or any of its business or property;
- 38.5.2 the Access Seeker makes an assignment for the benefit of, or enters into or makes any arrangement or composition with, its creditors;
- 38.5.3 any resolution is passed or any proceeding is commenced for the winding up or liquidation of the Access Seeker (whether on a voluntary or involuntary basis) without the Access Provider's prior written consent (which is not to be unreasonably withheld or delayed), and providing that if such a proceeding is commenced on an involuntary basis it has remained ongoing for 20 or more Working Days;
- 38.5.4 the Access Provider has given a total of five or more Default Notices and/or Non-Payment Notices in any period of 12 months, provided that each Notice included in the total under this clause:
 - (a) may have been in respect of the same or any different Default;
 - (b) must not have been subject to a Dispute that was resolved in the Access Seeker's favour; and
 - (c) must not have been subject to a determination by the Commission under the Act in the Access Seeker's favour.

38.5.5 Where the Access Provider gives a Default Notice to the Access Seeker, the Access Provider may, after the later of:

- (a) the period to remedy the Default has expired; and
- (b) three months from the date the Default Notice was given,

terminate supply of the Mobile Co-location Service (or any part of the Mobile Co-location Service) either immediately or within a reasonable period of time following the date on which the Access Seeker becomes aware of the right to terminate, provided that:

- (c) the Default has not been remedied; and
- (d) the Default is material.

38.6 If supply of the Mobile Co-location Service is terminated under clause 38.5, at its discretion, the Access Provider may:

- 38.6.1 refuse to recommence supply of the Mobile Co-location Service to the Access Seeker;
- 38.6.2 agree to recommence supply of the Mobile Co-location Service to the Access Seeker; or
- 38.6.3 agree to recommence supply of the Mobile Co-location Service to the Access Seeker subject to any conditions, provided those conditions must not be inconsistent with the Mobile Co-location Terms.

38.7 Upon termination of supply of the Mobile Co-location Service, the Access Provider shall refund to the Access Seeker a pro rata proportion of all periodic Charges which have been paid in advance by the Access Seeker for the period starting on the date of termination.

Obligation to inform the Commission

38.8 If the supply of the Mobile Co-location Service is terminated under this section, the Access Provider must inform the Commission immediately of the termination and the reason for the termination.

DISPUTES

39 Dispute resolution

General

39.1 Except as expressly provided under the Mobile Co-location Terms or the Act, any dispute, disagreement, question or difference that arises between the Parties in relation to the Mobile Co-location Terms (**Dispute**), must be resolved in accordance with this section 39.

Notice of Dispute

39.2 If a Dispute arises, either Party may give Notice to the other requiring that the Dispute be resolved in accordance with this section 39 (**Dispute Notice**). A Party's Dispute Notice must specify:

- 39.2.1 the nature of the Dispute;
- 39.2.2 its representative for negotiations under clause 39.4; and
- 39.2.3 its suggestion for settling the Dispute.

Response to Dispute Notice

39.3 A Party receiving a Dispute Notice must, within five Working Days of receipt, reply to the other Party by Notice in writing specifying:

- 39.3.1 its representative for negotiations under clause 39.4; and
- 39.3.2 its suggestion for settling the Dispute.

Negotiations

39.4 The Parties must enter into negotiations to resolve the Dispute within 10 Working Days of receiving the Dispute Notice. Negotiations must be held between a senior representative of each Party who must have authority to settle the Dispute. The senior representatives must endeavour to resolve the Dispute within 20 Working Days of receiving the Dispute Notice. If the senior representatives are not able to resolve the Dispute within 20 Working Days of receiving the Dispute Notice then the Dispute will be considered to have reached a deadlock (**Deadlock**).

Dispute resolution options where negotiations fail

39.5 If the Dispute reaches a Deadlock then:

- 39.5.1 the Parties must advise the Commission of the Dispute and the Deadlock;
- 39.5.2 the Parties may agree in writing to refer the Dispute to mediation in accordance with clause 39.6;
- 39.5.3 the Parties may agree in writing to refer the Dispute to expert decision in accordance with clause 39.7; or
- 39.5.4 either Party may refer the Dispute to arbitration in accordance with clause 39.8 (in the circumstances permitted under clause 39.8),

save that the Parties must refer any Invoice Error or Dispute of a technical, operational or implementation nature to expert decision in accordance with clause 39.7.

Mediation

39.6 Where the Parties have agreed in writing to refer a Dispute that has reached a Deadlock to mediation (**Mediation Referral Agreement**), the following provisions will apply:

- 39.6.1 the mediator will be appointed by agreement between the Parties. However, if the Parties can not agree on a mediator within five Working Days of the Mediation Referral Agreement, then the mediator will be appointed at the written request of either Party by the president for the time being of LEADR NZ – Leading Edge Alternative Dispute Resolvers, New Zealand (or the president's nominee) or its successor body. The Party making this request must copy the request to the other Party;
- 39.6.2 unless the Parties agree otherwise in writing, the terms of reference for the mediation will be the model mediation terms suggested by LEADR;
- 39.6.3 either Party may, by Notice to the other, revoke the Mediation Referral Agreement at any time; and
- 39.6.4 the Parties must advise the Commission if the mediation has led to an agreement or if the Parties have ceased mediation without an agreement. If an agreement has been reached, the Parties must advise the Commission of the terms of the agreement.

Expert Decision

- 39.7 Where the Parties must, or have agreed in writing to, refer a Dispute that has reached a Deadlock to expert decision (**Expert Referral Agreement**), the following provisions will apply:
 - 39.7.1 the expert will be appointed by agreement between the Parties. However, if the Parties can not agree on the expert within five Working Days of the Expert Referral Agreement, then an appropriately qualified and experienced expert will be appointed at the written request of either Party by the Chair of the Telecommunications Carriers' Forum. The Party making this request will use, and where possible ensure that the Chair of the Telecommunications Carriers' Forum uses, best endeavours to ensure that the appointment of the expert occurs no later than 15 Working Days from the date of the Expert Referral Agreement. The Party making this request must copy the request to the other Party;
 - 39.7.2 to be eligible for appointment, the expert must be independent and impartial, experienced in the relevant area of telecommunications and will preferably be experienced in dispute resolution procedures. Unless the Parties agree otherwise, he or she must not have performed any duties, whether as an employee, consultant or contractor, for any of the Parties or any Related Company during a 12 month period prior to the date the Dispute Notice was given;
 - 39.7.3 the expert may seek independent legal advice regarding the appropriate procedures for resolution of the Dispute;
 - 39.7.4 the expert must adopt a procedure which, in the expert's opinion, is the most simple and expeditious procedure practicable in the circumstances;
 - 39.7.5 the Parties will provide the expert with any information that the expert reasonably requires in a timely manner. The expert is entitled to make his or her decision in the absence of the information requested being provided, but subject to a reasonable time being given to the relevant Party to provide that information;
 - 39.7.6 the expert will act as an expert and not as an Arbitrator under the Arbitration Act 1996. The expert will be entitled to rely on the expert's own judgement and opinion;
 - 39.7.7 the expert should seek to make decisions that are timely, practical, efficient, and will take into account the Act, in particular the relevant standard access principles under the Act;
 - 39.7.8 the expert will provide the Parties with a draft decision for comment prior to finalising it. The expert must provide the Parties with a reasonable period in which to comment on the draft decision and must take any comments received during that period into account in finalising a decision;
 - 39.7.9 the expert must provide a final decision (which must include reasons for that decision) to the Parties in writing as soon as reasonably practicable and, in the absence of manifest error or bad faith, that decision will be final and binding upon the Parties. Either Party

- has 10 Working Days from the date the final decision is provided to assert that the expert's decision contains a manifest error or the expert has acted in bad faith;
- 39.7.10 the expert must use all reasonable endeavours to reach a final decision within 40 Working Days after appointment, and the Parties must co-operate reasonably with the expert to achieve that timetable;
- 39.7.11 except as set out in clause 39.7.12, the costs of the expert will be borne equally by the Parties. Each Party will bear its own costs in relation to the expert's decision;
- 39.7.12 where a Party has asserted that the expert's decision contains a manifest error or the expert has acted in bad faith, and such assertion is not upheld in that Party's favour by the relevant court or other authority (including the Commission), then the Party making the assertion will bear the costs (that is all court or other authority costs) of both Parties; and
- 39.7.13 the Parties must advise the Commission if the expert has made a final decision and if so the terms and reasons for that final decision.

Arbitration

- 39.8 If the Dispute reaches a Deadlock and the Parties:
- 39.8.1 have agreed to refer the Dispute to mediation and have not resolved the Dispute by the earlier of the conclusion of the mediation or the revoking of the Mediation Referral Agreement; or
- 39.8.2 have not agreed to refer the Dispute to mediation or expert decision,
- then either Party may refer the Dispute to arbitration by a sole arbitrator (being a New Zealand resident) under the Arbitration Act 1996, by giving Notice to the other Party (**Arbitration Referral Notice**) and the following provisions will apply:
- 39.8.3 The arbitrator will be appointed by agreement between the Parties. However, if the Parties can not agree on an arbitrator within five Working Days of receipt of the Arbitration Referral Notice, the arbitrator will be appointed at the written request of either Party by the president for the time being of the New Zealand Law Society (or his/her nominee) or its successor body. The Party making this request must copy the request to the other Party.
- 39.8.4 The arbitration will take place in Auckland or Wellington (at the arbitrator's discretion).
- 39.8.5 The arbitrator must adopt a procedure which, in the arbitrator's opinion, is the most simple and expeditious procedure practicable in the circumstances.
- 39.8.6 The arbitrator may determine the Dispute without a hearing unless either Party gives Notice requiring one, in which case the arbitrator must treat that as a material consideration in assessing costs.
- 39.8.7 The Second Schedule of the Arbitration Act 1996 will apply.
- 39.8.8 The costs of the arbitrator will be borne equally by the Parties unless the arbitrator determines otherwise.
- 39.8.9 The Parties will co-operate to ensure the expeditious conduct of the arbitration. In particular, each Party will comply with any reasonable time limits sought by the other for settling the terms of reference, interlocutory matters and all other steps preliminary and incidental to the hearing and decision of the Dispute.
- 39.8.10 The arbitrator must use all reasonable endeavours to reach a decision within 40 Working Days after appointment, and the Parties must co-operate reasonably with the expert to achieve that timetable. In any event, the Dispute must be finally settled by the arbitrator within 60 Working Days after appointment, unless the Parties agree in writing to extend this period.
- 39.8.11 The Parties must advise the Commission if the arbitrator has made a decision and if so the terms and reasons for that decision.

Interlocutory or injunctive relief

39.9 Nothing in this section 39 will prevent either Party from seeking urgent interlocutory or injunctive relief from the Court.

Good faith and continuity

- 39.10 Pending resolution of any Dispute, the Access Seeker and the Access Provider will each:
- 39.10.1 make all reasonable efforts in good faith to resolve the Dispute promptly and in a manner which minimises any impact on the performance of the Mobile Co-location Terms; and
 - 39.10.2 continue to perform its other obligations under the Mobile Co-location Terms.

Remedies under the Act

- 39.11 A copy of any decision arising from a Dispute must be provided by the Parties to the Commission immediately following that decision. The Parties will indicate if any part of the decision is confidential. A copy of the decision will be published on the Commission's website as soon as practicable, subject to any restriction made by the Commission.
- 39.12 No Disputes as to the Charges may be resolved by the Disputes Resolution procedures in this section 39.
- 39.13 For the avoidance of doubt, nothing in this section 39 prevents the Access Seeker or the Access Provider from seeking any remedies available to it under the Act.

GENERAL

40 Health and safety

- 40.1 The Access Seeker and the Access Provider will comply with each other's reasonable requirements for security, health and safety when working at each other's premises and Relevant Facilities. Where practicable, these requirements will be communicated to each other in writing.
- 40.2 The Access Seeker warrants that it has complied with and will continue to comply with all approved codes of practice under the Health and Safety in Employment Act 1992 and all other regulatory provisions (safety or otherwise) connected with any obligations under the Mobile Co-location Terms.
- 40.3 The Access Seeker acknowledges that all of the Access Seeker's employees, agents and invitees that enter on to or into any Relevant Facilities do so at the sole risk of the Access Seeker and that the Access Seeker shall have the sole responsibility for identifying and advising to such persons all existing and potential hazards on or around any Relevant Facilities which such persons may or could encounter on or around any Relevant Facilities .
- 40.4 The Access Provider and the Access Seeker is responsible for the maintenance of their own respective equipment, including the safe operation of their own respective equipment, and must take all reasonable and necessary steps to ensure that its own equipment does not endanger the health or safety of the officers, employees, contractors or agents of another Access Provider or Access Seeker.
- 40.5 Where the Access Seeker seeks to eplace Access Seeker Equipment currently on or with the Relevant Facilities with similar or new equipment, the Access Seeker must not perform such replacement unless such replacement:
- 40.5.1 will not cause or result in a significant threat to the health or safety of persons who operate or work on or around the Relevant Facilities ; and
 - 40.5.2 is in accordance with the processes and procedures detailed in the Mobile Co-location Operations Manual and the Mobile Co-location Access Terms.

41 Consumer Guarantees Act 1993

41.1 The Mobile Co-location Service is supplied to the Access Seeker for the purposes of a business as defined in the Consumer Guarantees Act 1993. The provisions of that Act do not apply to the Mobile Co-location Service supplied to the Access Seeker under the Mobile Co-location Terms.

42 Assignment

42.1 An Access Seeker may transfer all of its rights and obligations (but not less than all) under the Mobile Co-location Terms, provided that the assignee has satisfied the prerequisites set out in section 7.

42.2 Where the Access Seeker transfers its rights or obligations under the Mobile Co-location Terms in accordance with clause 42.1, it must give prior Notice to the Access Provider of when that assignment will take effect.

43 Representations

43.1 The Access Seeker may not represent, and will use reasonable endeavours to ensure that its employees, contractors or agents do not represent, that there will be a continuing relationship between the Access Provider and any Customer or End User of the Access Seeker.

44 Subcontracting

44.1 A Party may have subcontractors or other agents meet any of its obligations under the Mobile Co-location Terms, but it will remain liable to the other Party for meeting all those obligations.

45 No waiver

45.1 A waiver of any right, power or remedy under the Mobile Co-location Terms must be in writing signed by the Party granting it. A waiver is only effective in relation to the particular obligation or Default in respect of which it is given. It is not to be taken as an implied waiver of any other obligation or Default or as an implied waiver of that obligation or Default in relation to any other occasion.

45.2 The fact that a Party fails to do, or delays in doing, something the Party is entitled to do under the Mobile Co-location Terms does not amount to a waiver.

46 Notices

46.1 Notices to the Access Provider or the Access Seeker must be in writing and must be sent to the relevant contact details advised in accordance with the Mobile Co-location Operations Manual.

46.2 Any Notice given by:

46.2.1 post to a contact address will be assumed to have been delivered three days after it is posted;

46.2.2 fax to a contact fax number will be assumed to have been delivered once a correct transmission confirmation slip is received, but any fax sent after 5.00 pm on a Working Day will be deemed to have been delivered at 9.00 am on the next Working Day;

46.2.3 email to an email address will be assumed to have been delivered on the earlier of:

(a) the sender's receipt of confirmation of successful delivery; or

(b) one Working Day after dispatch, provided the sender does not receive any indication of the failure of, or delay in, delivery within one Working Day after dispatch. For the purpose of this clause 46.2.3, 'dispatch' occurs when the relevant email first leaves the sender's network for delivery to the recipient's address.

