

Test Agreement Standard Test Terms



This Agreement is a Standard Form of Access Agreement for the purposes of Part XIC of the *Competition and Consumer Act 2010 (Cth)* where one is required for NBN Co to supply a Test Product.



NBN Co Limited

Test Agreement: Standard Test Terms

Version	Description	Effective Date
2.0	Issued on 9 December 2013	Execution Date
2.1	Issued on 24 September 2015	Execution Date
2.2	Issued on 22 December 2015	Execution Date
2.3	Issued on 2 August 2017	Execution Date
2.4	Issued on 17 November 2017	15 December 2017

Copyright

This document is subject to copyright and must not be used except as permitted below or under the *Copyright Act 1968* (Cth). You must not reproduce or publish this document in whole or in part for commercial gain without the prior written consent of **nbn**. You may reproduce and publish this document in whole or in part for educational or non-commercial purposes as approved by **nbn** in writing.

Copyright © 2017 NBN Co Limited. All rights reserved. Not for general distribution.

Disclaimer

This document is provided for information purposes only. The recipient must not use this document other than with the consent of **nbn** and must make their own inquiries as to the currency, accuracy and completeness of this document and the information contained in it. The contents of this document should not be relied upon as representing **nbn**'s final position on the subject matter of this document, except where stated otherwise. Any requirements of **nbn** or views expressed by **nbn** in this document may change as a consequence of **nbn** finalising formal technical specifications, or legislative and regulatory developments.

Environment

nbn asks that you consider the environment before printing this document.



Contents

1. Application of this Agreement	5
2. Supply of Test Products	5
3. Performance of Tests	5
4. End of Tests	6
5. Participation of third parties	6
6. Use of networks, facilities, systems and equipment	7
6.1 Lawful use	7
6.2 Network protection and safety	7
6.3 Test Participant and End User equipment	7
6.4 nbn™ Equipment	8
6.5 Property rights and beneficial interest	8
7. Access to premises	8
8. Visiting sites and premises	9
9. Confidentiality	9
10. Liability	9
10.1 Liabilities of each party	9
10.2 Limitation of liability	9
10.3 Uncapped liability	9
10.4 No liability for Indirect Loss	10
10.5 General exclusions of liability	10
10.6 Force majeure	10
11. Indemnities	10
11.1 Confidentiality	10
11.2 Intellectual property	10
11.3 Death and personal injury	10
11.4 Damage to property, etc.	11
11.5 Claims by End Users and other third parties	11
11.6 Operational indemnities	12
11.7 General rules for all indemnities	12
11.8 No claims against certain persons	13
11.9 Downstream liabilities	13



12. Title and Intellectual Property	13
13. Insurance	14
14. Term and termination	14
15. Effect of expiry or termination	14
16. Dispute Management	15
17. General	15
17.1 Compliance with applicable laws	15
17.2 Relationship between the parties	15
17.3 Relationships with third parties	15
17.4 Subcontractors and agents	15
17.5 No variation of existing WBAs	16
17.6 Entire agreement	16
17.7 Changes	16
17.8 Assignment, novation and other dealings	16
17.9 Waiver	16
17.10 Notices	16
17.11 Other general clauses	16
18. Interpretation	16
19. Dictionary	16



Test Agreement

Standard Test Terms

Parties

This Agreement is entered into between:

- nbn co limited (ABN 86 136 533 741) of Level 11, 100 Arthur Street, North Sydney NSW 2060 (**nbn**)
- **[Insert full legal name of Test Participant]** (ABN **[insert ABN]**) of **[insert registered address of Test Participant]** (**Test Participant**)

Background

- A. This Agreement sets out the terms that apply to the supply of products and services by **nbn** on a non-commercial basis for the purposes of Tests.
- B. In addition to these Standard Test Terms, specific terms applying to particular Tests will be set out in Test Descriptions which are issued under this Agreement and form part of this Agreement.
- C. Commercial supply of products and services, and testing related to products and services supplied commercially, are subject to the terms of **nbn**'s WBA.

1. Application of this Agreement

- (a) **nbn** and Test Participant agree to conduct each Test on the terms set out in these Standard Test Terms and each applicable Test Description during the Term (together, this **Agreement**).
- (b) To the extent of any inconsistency between these Standard Test Terms and a Test Description, the terms set out in the Test Description will prevail.

2. Supply of Test Products

- (a) **nbn** will supply Test Products to Test Participant on the terms of this Agreement.
- (b) Test Participant acknowledges and agrees that the Test Products are provided in a test environment for limited test purposes only (including, where applicable, for the supply to a limited number of End Users) and for a limited time only.
- (c) **nbn** may interrupt or suspend the performance of a Test or the supply of Test Products for any reason, by giving Test

Participant as much notice as reasonably practicable in the circumstances.

- (d) Test Participant must not use any Test Product for any purpose other than the performance of the Test for which it is supplied.
- (e) Test Participant agrees that the Test Products have not been designed by **nbn** as (and are not suitable as) inputs into the supply of Downstream Products on a commercial basis, including Downstream Products that are Priority Services or standard telephone services for the purposes of the TCPSS Act and Test Participant must not use the Test Products for such purposes.

3. Performance of Tests

- (a) Subject to the rights and obligations of each party under this Agreement, the parties will cooperate with each other and work collaboratively in connection with:
 - (i) the performance of each Test; and
 - (ii) the supply and acquisition of Test Products under this Agreement,



so as to enable **nbn** to develop and enhance its network, systems, facilities, products, services and processes through the learnings gained by **nbn** and Test Participant from the Tests.

- (b) Test Participant must participate in Tests in accordance with:
 - (i) each Test Description;
 - (ii) any Test Plan for the Test as provided by **nbn** to Test Participant;
 - (iii) any operational procedures agreed between the parties from time to time; and
 - (iv) **nbn**'s reasonable instructions, policies and procedures regarding the Test that are notified by **nbn** to Test Participant from time to time.
- (c) On request by **nbn**, Test Participant must provide to **nbn** any Test Information within any reasonable timeframe specified by **nbn**.

4. End of Tests

- (a) Each Test will end on the earlier of:
 - (i) completion of the Test in accordance with any Test Plan provided by **nbn**; and
 - (ii) the date that **nbn** gives notice to Test Participant cancelling the Test, or the Test Description (**Cancellation Notice**).
- (b) **nbn** may issue a Cancellation Notice at any time, but will give Test Participant as much notice as is reasonably practicable in the circumstances.
- (c) The issuing of a Cancellation Notice only terminates the performance of the specific Test to which the notice relates, and does not affect the continued operation of this Agreement.
- (d) A Cancellation Notice may terminate:
 - (i) a specific Test or part of a Test; or
 - (ii) all Tests being performed under a Test Description.

5. Participation of third parties

- (a) Subject to clause 5(d), Test Participant must not supply any Downstream Products to any third parties (including End Users) unless **nbn** has expressly authorised that supply in a Test Description or otherwise in writing.
- (b) Test Participant must not charge any End User any amount in connection with the supply of a Downstream Product.
- (c) Test Participant must manage all aspects of its relationship with any End Users who assist in any Test, including:
 - (i) arranging for the participation of each End User in the Test and termination of such Test in a manner consistent with this Agreement;
 - (ii) managing all interactions with End Users, including handling service, technical and maintenance enquiries and requests, disputes, provision of information as reasonably directed by **nbn**; and
 - (iii) ensuring that it enters into an agreement with End Users which allows Test Participant to comply with this Agreement (including with regard to the basis on which any Downstream Product is supplied and its limitations, including drawing to the End User's specific attention the nature of the testing environment and that the supply of products or services are for testing purposes and will not necessarily perform in accordance with their descriptions, be fit for the purposes for which such goods or services are commonly supplied; be free from defects; durable; fit for a particular purpose or supplied within a particular time; or at all).
- (d) Test Participant may fulfil its obligations under this Agreement (including the provision of Downstream Products to End Users where relevant) through a downstream service provider or third party supplier provided that Test Participant:
 - (i) must notify **nbn** of any such third party involvement before agreeing to participate in a Test; and



- (ii) remains liable to **nbn** for all its obligations under this Agreement and for all acts or omissions of any such third party to the same extent that Test Participant would be liable to **nbn** under this Agreement as if they were the acts or omissions of Test Participant.

6. Use of networks, facilities, systems and equipment

6.1 Lawful use

- (a) Test Participant must:
 - (i) ensure that use by Test Participant of the **nbn**TM Infrastructure or any Test Product is lawful and in accordance with this Agreement;
 - (ii) use reasonable endeavours to ensure that use by any End Users of any Downstream Product is lawful, is consistent with this Agreement and does not give rise to a breach of any provision of this Agreement by **nbn** or by Test Participant.

6.2 Network protection and safety

- (a) Each party is responsible for the safe operation of its network, systems, equipment and facilities and must take all necessary steps, so far as is reasonably practicable, to ensure that it and its networks, systems, equipment and facilities do not, in connection with this Agreement or the exercise of rights or the performance of obligations under this Agreement:
 - (i) endanger the health or safety of any person;
 - (ii) damage, threaten, interfere with, degrade or result in the deterioration of the operation or performance of the other party's network, systems, equipment or facilities; or
 - (iii) in the case of Test Participant, damage, threaten, interfere with, degrade or cause the deterioration of the operation or performance of any **nbn** customer's network, systems, equipment or facilities used in connection with the **nbn**TM Network.

- (b) Test Participant must use reasonable endeavours to ensure that End Users do not damage, threaten, interfere with or degrade or cause the deterioration of the operation or performance of the **nbn**TM Infrastructure, or any **nbn** customer's network, systems, equipment or facilities used in connection with the **nbn**TM Network.

- (c) Test Participant must:

- (i) ensure that any connection made and maintained by or on behalf of Test Participant or from its networks, systems, equipment or facilities to the **nbn**TM Network; and
- (ii) use reasonable endeavours to ensure any connection made and maintained by or on behalf of any End Users to the **nbn**TM Network,

is made and maintained in accordance with this Agreement and all applicable laws.

- (d) If Test Participant becomes aware that any network, system, equipment or facility is causing an event that Test Participant has an obligation under this clause 6 to ensure, or use reasonable endeavours to ensure, does not occur (e.g. it is degrading the operation of any product being supplied by **nbn** to its customers), Test Participant must immediately disconnect or deactivate the network, system, equipment or facility and use reasonable endeavours to minimise the breach.

6.3 Test Participant and End User equipment

- (a) Test Participant must ensure that its equipment has all necessary regulatory approvals, the uses to which the Test Participant equipment is put are not prohibited by any Regulator and comply with this Agreement and all applicable laws, and the Test Participant equipment is maintained in good repair and working condition.
- (b) Test Participant must use reasonable endeavours to ensure that End User equipment has all necessary regulatory approvals, the uses to which End User equipment are put are not prohibited by any Regulator and comply with this Agreement and all applicable laws, and End User



equipment is maintained in good repair and working condition.

6.4 nbn™ equipment

- (a) **nbn** must ensure that **nbn™** equipment has all necessary regulatory approvals, the uses to which the **nbn™** equipment is put are not prohibited by any Regulator and comply with this Agreement and all applicable laws, and the **nbn™** equipment is maintained in good repair and working condition.

6.5 Property rights and beneficial interest

- (a) Nothing in this Agreement gives Test Participant (or any End User) any right, title or interest (whether legal, equitable or statutory) in any part of the **nbn™** Infrastructure made available by **nbn** to Test Participant or used by **nbn** to supply products or services under this Agreement.

7. Access to premises

- (a) Test Participant must provide, or procure the provision of, safe and timely access to any premises owned, controlled or occupied by Test Participant and all valid and enforceable consents, approvals and rights of access required by **nbn** from Test Participant, the End User and/or any third party in a form approved by **nbn** that enables **nbn** and any Personnel of **nbn** to enter and do anything necessary in respect of that site or premises to:
 - (i) conduct the relevant Test and supply the Test Products;
 - (ii) disconnect or remove any part of the **nbn™** Network or equipment following expiry or termination of this Agreement; and
 - (iii) exercise any of its rights or perform any of its obligations under and in accordance with this Agreement.
- (b) Test Participant must:
 - (i) hold all consents, approvals and rights of access provided or obtained by Test Participant under clause 7(a) on trust for the benefit of **nbn**; and
 - (ii) on request by **nbn**, provide to **nbn** documentary evidence of having obtained all of the consents, approvals and rights of access referred to in clause 7(a).
- (c) Test Participant must use reasonable endeavours to ensure that:
 - (i) no End User creates, or allows creation of, any security interest, encumbrance, lien, charge or mortgage over any part of the **nbn™** Network;
 - (ii) End Users take all reasonable care of any part of the **nbn™** Network to which they have access;
 - (iii) End Users provide true and complete answers to any reasonable installation questions asked by any **nbn** Personnel or Test Participant and informs such **nbn** Personnel or Test Participant of any issue which may affect or prevent the conduct of a Test on the first visit to the relevant End User premises (including anything which may prevent access to the relevant site or premises); and
 - (iv) End Users are available at the site or premises where each Test is to be conducted (and able to give any access required) on the date and at the times agreed with the relevant **nbn** Personnel or Test Participant.
- (d) If Test Participant fails to comply with this clause 7, then:
 - (i) **nbn** will not be liable for any Claims or Losses that may be suffered or incurred by Test Participant or any End User, arising from or in connection with **nbn**'s failure to perform its obligations under this Agreement as a result of Test Participant's failure to comply with this clause 7; and
 - (ii) Test Participant must pay to **nbn** on demand the amount of any and all Losses suffered or incurred by **nbn**, any of its Related Bodies Corporate or any of their Personnel arising from or in relation to Test Participant's failure to comply with this clause 7, including



as a result of Claims from **nbn** Personnel.

8. Visiting sites and premises

- (a) Each party must, and must ensure that any Personnel of the party visiting any premises which are owned, controlled or operated by or on behalf of the other party and used in connection with a Test:
 - (i) comply with any policies that are notified by the other party from time to time, any reasonable directions that may be given by the other party from time to time and all HSE Laws; and
 - (ii) do not at any time cause the other party to be in contravention of an HSE Law.

9. Confidentiality

- (a) Each party must comply with the confidential information regime set out in clause D1 of the WBA as if a reference in that clause to the WBA is a reference to this Agreement but with the following changes:
 - (i) references to "this Agreement and an SAU" are to be read as "this Agreement" as defined in clause 19;
 - (ii) references to "Products" are to be read as "Test Products";
 - (iii) references to "Downstream Service Provider" are to be read as "downstream service provider or third party supplier"; and
 - (iv) clauses D1.2(a)(ii), D1.4, D1.5 and D1.6 are deleted.

10. Liability

10.1 Liabilities of each party

- (a) To the extent permitted by law, each party excludes all liability that it would otherwise have to the other party in connection with this Agreement and its subject matter (including for negligence), except to the extent that the first party has accepted liability under this Agreement.

- (b) Every exclusion, restriction, limitation and indemnity in this Agreement separately applies on its own terms and survives expiry or termination of this Agreement.

10.2 Limitation of liability

- (a) To the full extent permitted by law, **nbn** excludes all liability to Test Participant in respect of any Loss arising by reason of any failure of a product or service supplied by **nbn** or its Personnel to Test Participant or End User to perform in accordance with their descriptions, be fit for the purposes for which such goods or services are commonly supplied; free from defects; durable; fit for a particular purpose or supplied within a particular time; or at all.
- (b) To the extent permitted by law, each party's aggregate liability to the other party in relation to any and all events that arise in connection with this Agreement or its subject matter (whether that liability arises in contract, tort (including negligence), at common law, in equity, under statute, under an indemnity or otherwise) is limited to \$1 million.
- (c) The amount of one party's liability to the other party for the purposes of clause 10.2(b) will be reduced to the extent that the other party otherwise recovers in respect of any event or cause giving rise to the liability, including from the relevant insurer if that other party has a right to recover under any contract of insurance with any third party in respect of any event or cause giving rise to the liability.

10.3 Uncapped liability

- (a) The limitations of liability imposed by clause 10.2(b) do not apply to either party's liability:
 - (i) for any negligent or wilful acts or omissions of the party that cause death, personal injury or damage to Tangible Property;
 - (ii) for any acts or omissions of the party constituting fraud;
 - (iii) under the indemnities given by the party under clause 11 (other than clauses 11.4(a) or 11.4(b) as applicable); or



- (iv) under the indemnity given by the party under clauses 11.4(a) or 11.4(b) (as applicable) where the liability giving rise to that indemnity was caused by a negligent or wilful act or omission of the party.

10.4 No liability for Indirect Loss

- (a) No party is liable to make any payment to the other party for any and all Losses of that other party arising from or in connection with this Agreement or its subject matter (regardless of whether that liability arises in contract, tort (including negligence), at common law, in equity, under statute, under an indemnity or otherwise) to the extent such liability constitutes Indirect Loss.
- (b) The exclusion of liability in clause 10.4(a) does not apply in respect of the indemnity set out in clause 11.5(a).

10.5 General exclusions of liability

- (a) To the extent permitted by law, **nbn** excludes all liability for any and all Losses suffered or incurred by the Test Participant to the extent such Losses are caused or contributed to by:
 - (i) any and all:
 - (A) Claims brought against the Test Participant by a third party to whom the Test Participant provides products or services under a contract, to the extent that that liability could have been lawfully excluded, restricted or limited under that contract; or
 - (B) End User Losses, except to the extent that such Claims or Losses fall within clauses 10.3(a)(i), 10.3(a)(ii) or 11.4(b)(i); or
 - (ii) any Test Participant Event.

10.6 Force majeure

- (a) If an Affected Party is unable to perform an obligation under this Agreement (other than, an obligation to pay money in the ordinary course of business) because of a Force

Majeure Event, then to the extent the Force Majeure Event prevents that party from performing that obligation, the Affected Party:

- (i) will be excused from performing that obligation for the duration of the Force Majeure Event; and
- (ii) will not be liable for any costs, expenses, losses, damages or liabilities arising from or in connection with the non-performance of that obligation for the duration of the Force Majeure Event.

11. Indemnities

11.1 Confidentiality

Each party must pay to the other party on demand an amount equal to all Losses suffered or incurred by the Indemnified Party arising from or in connection with any breach of clause 9 by the Indemnifying Party.

11.2 Intellectual property

Each party must pay to the other party on demand an amount equal to all Losses suffered or incurred by the Indemnified Party arising from or in connection with any Claim brought by any third party alleging that the exercise by the Indemnified Party of any rights assigned, transferred or granted, or purportedly assigned, transferred or granted, by or on behalf of the Indemnifying Party in connection with this Agreement infringes any Intellectual Property Rights of that third party.

11.3 Death and personal injury

Each party must pay to the other party on demand an amount equal to all Losses suffered or incurred by the Indemnified Party arising from or in connection with the death or personal injury of any person to the extent that:

- (i) an act or omission of the Indemnifying Party, its Related Bodies Corporate, their respective Personnel or suppliers in connection with this Agreement:



- (A) is negligent and causes or contributes to that death or personal injury; or
 - (B) intentionally causes or contributes to that death or personal injury; or
- (ii) the network, systems, equipment or facilities of the Indemnifying Party causes or contributes to that death or personal injury in connection with this Agreement.

11.4 Damage to property, etc.

- (a) The Test Participant must pay to **nbn** on demand an amount equal to all Losses suffered or incurred by **nbn**, any Related Body Corporate of **nbn**, or their respective Personnel arising from or in connection with any:
- (i) damage to, or loss of, the Tangible Property of **nbn** and/or any third party, including damage to sites at which facilities access services are supplied to the Test Participant;
 - (ii) damage to, or loss of, the whole or any part of the **nbn**TM Network and/or the **nbn**TM Platform;
 - (iii) disruption of, interference with or deterioration or degradation of the normal operation or performance of the whole or any part of the **nbn**TM Network, the **nbn**TM Platform or any other third party equipment sites at which **nbn** provides interconnection to its customers and sites at which facilities access services are supplied to the Test Participant; or
 - (iv) interruption of access to and use of any product or service supplied by **nbn** to any person that is a "Test Participant" under another agreement or is otherwise a customer of **nbn**,

to the extent that such Losses are caused, or contributed to, by the Test Participant, its Related Bodies Corporate or any of their respective Personnel or third party supplier to the Test Participant in connection with this Agreement or its subject matter.

- (b) **nbn** must pay to the Test Participant on demand an amount equal to all Losses suffered or incurred by the Test Participant arising from or in connection with any damage to, or loss of:
- (i) the Tangible Property of the Test Participant and/or any third party; or
 - (ii) the whole or any part of the network, systems, equipment or facilities of the Test Participant,

to the extent that such Losses are caused, or contributed to, by **nbn**, its Related Bodies Corporate or any of their respective Personnel in connection with this Agreement or its subject matter.

11.5 Claims by End Users and other third parties

- (a) Subject to clause 11.5(b), the Test Participant must pay to **nbn** on demand an amount equal to all Losses suffered or incurred by **nbn**, any Related Body Corporate of **nbn**, or their respective Personnel arising from or in connection with any Claim:
- (i) against **nbn** for any End User Loss or by any downstream service provider or End User in connection with this Agreement, to the extent that Test Participant could lawfully have excluded or limited such Losses in its arrangements with downstream service providers, End Users or third parties; or
 - (ii) by a third party against **nbn** to the extent that the Claim arises from or in connection with any:



- (A) breach of this Agreement by the Test Participant (including any Claim arising by reason of any failure to include terms in contracts with End Users as required by clause 11.9(a)); or
 - (B) negligent act or omission of the Test Participant, any Related Bodies Corporate of the Test Participant, or their respective Personnel or suppliers arising directly from or in connection with this Agreement or its subject matter.
- (b) Clause 11.5(a) does not apply to the extent that the Loss suffered or incurred by **nbn**, any Related Body Corporate of **nbn**, or their respective Personnel:
- (i) is the direct result of a breach of this Agreement, or a negligent act or omission, by **nbn**;
 - (ii) was caused, or contributed to, by **nbn**, its Related Bodies Corporate or any of their respective Personnel or suppliers in connection with this Agreement or its subject matter; or
 - (iii) arose from a Claim in relation to which the Test Participant could not have lawfully excluded liability.

11.6 Operational indemnities

- (a) The Test Participant must pay to **nbn** on demand an amount equal to all Losses suffered or incurred by **nbn**, any Related Body Corporate of **nbn**, and their respective Personnel arising from or in connection with:
- (i) the reasonable exercise by **nbn** of its rights to disconnect or remove any network, systems, equipment or facilities in accordance with clause 15(b); or
 - (ii) the Test Participant's failure to comply with clause 7(a).

11.7 General rules for all indemnities

- (a) The liability of a party to pay on demand an amount under this clause 11 to the party being indemnified for an event set out in this clause 11 will be:
- (i) the sole and exclusive financial remedy in respect of the liability the subject of the indemnity; and
 - (ii) reduced to the extent that the liability the subject of the indemnity claim is caused or contributed to by any unlawful act or omission by any Indemnified Party.
- (b) It is not necessary for any party to incur expense or make payment before enforcing a right of indemnity conferred by this Agreement.
- (c) An Indemnified Party under clause 11.2 must:
- (i) notify the Indemnifying Party as soon as is reasonably practicable of a relevant Claim; and
 - (ii) where the Indemnifying Party can demonstrate to the reasonable satisfaction of Indemnified Party that the Indemnifying Party has the resources to pay all Losses which are reasonably likely to arise in the event the relevant Claim is successful:



- (A) give the Indemnifying Party the option to conduct the defence of the relevant Claim, including negotiations for settlement or compromise;
 - (B) promptly provide all assistance reasonably requested by the Indemnifying Party (at the cost of the Indemnifying Party) in conducting the defence of the relevant Claim; and
 - (C) not make any admissions in relation to the relevant Claim without the prior written consent of the Indemnifying Party.
- (d) If the Indemnifying Party exercises its option under clause 11.7(c)(ii), the Indemnifying Party must first obtain the consent of Indemnified Party (which must not be unreasonably withheld) to the terms of any settlement or compromise of the relevant Claim.
- (i) specifically draw to the End User's attention that the products or services supplied to them are for testing purposes and will not necessarily perform in accordance with purposes for which such goods or services are commonly supplied; be free from defects; durable; fit for a particular purpose or supplied within a particular time; or at all;
 - (ii) exclude (to the full extent permitted by law) all liability of **nbn**, its Related Bodies Corporate and each of their respective Personnel, arising from or in connection with such Downstream Products; and
 - (iii) state **nbn** is not providing, and does not have a contractual relationship with the End User for the supply of, any products or services to the End User.
- (b) The Test Participant must ensure that contracts with End Users for the supply of Downstream Products do not prevent or hinder **nbn** or the Test Participant from exercising rights or performing obligations under this Agreement.

11.8 No claims against certain persons

- (a) Each party agrees that it will not make any Claims arising from or in connection with the subject matter of this Agreement against:
 - (i) the Personnel of the other party; or
 - (ii) any Related Body Corporate of the other party which is not a party to this Agreement or any of their Personnel.
- (b) The Test Participant must not make any Claims against any Third Party Supplier arising from or in connection with any failure of a Third Party Supplier to supply goods, services or facilities to **nbn** under a contract between **nbn** and such a Third Party Supplier.

11.9 Downstream liabilities

- (a) The Test Participant must include in the terms of each contract with an End User for the supply of Downstream Products provisions that:

12. Title and Intellectual Property

- (a) Each party (or its licensors) owns all right, title and interest (including Intellectual Property Rights) in its own network, platform and other systems, equipment, facilities and materials (including Test Information) which currently exist or may be acquired, created or developed by or on behalf of that party.
- (b) **nbn** (or its licensors) owns all Intellectual Property Rights in:
 - (i) the **nbn**[™] Network and the **nbn**[™] Platform;
 - (ii) this Agreement, including any changes made to this Agreement and the Test Description; and
 - (iii) the products and services supplied by **nbn** in connection with any Test, including any changes made to any products and services after the Execution Date.



- (c) Nothing in this Agreement transfers or assigns ownership of a party's Intellectual Property Rights (or those of a third party) or confers on any person a right, title or interest in such Intellectual Property Rights, except as expressly set out in this clause 10 or a Test Description.
- (d) To the extent Test Participant acquires any right, title or interest (including Intellectual Property Rights) in existing or future **nbn** products, services or materials in connection with Test activities, Test Participant, by this Agreement, hereby assigns to **nbn** absolutely and as beneficial owner the entire right, title and interest in and in relation to the relevant **nbn** products or services, for no additional consideration, and must do all other things reasonably necessary to ensure that such right, title or interest becomes owned by **nbn** (if any).
- (e) Test Participant grants to **nbn** a non-exclusive, transferable, sub-licensable, perpetual, irrevocable, fully paid and royalty free licence to use, copy, adapt and communicate the Test Information for the purpose of **nbn** developing and supplying products and services to its customers and complying with its legal obligations, including in relation to non-discrimination.

13. Insurance

- (a) Test Participant must maintain the insurances required by Module E of the WBA and Part E of the Service Terms for the Facilities Access Service and comply with the insurance requirements of that Module E and Part E as if a reference in that Module E and Part E to the WBA is a reference to this Agreement and a reference to "Customer" is a reference to "Test Participant".

14. Term and termination

- (a) This Agreement starts on the Execution Date.
- (b) Subject to clause 14(c), this Agreement expires on the earlier of:
 - (i) 31 August 2019; and
 - (ii) the date that is 10 Business Days after a party gives notice to the other party that it wishes to terminate this Agreement,

unless extended by agreement of the parties.

- (c) If a Test, as described in a Test Description, continues after the expiry of this Agreement, this Agreement continues to the extent relevant to the Test.
- (d) If a party suffers an Insolvency Event, the other party may terminate this Agreement with immediate effect by giving notice to the first party.

15. Effect of expiry or termination

- (a) From the effective date of expiry or termination of a Test or this Agreement (as applicable):
 - (i) Test Participant's right to use services and products supplied in connection with each Test immediately ceases;
 - (ii) **nbn** may take all steps necessary or desirable pursuant to clause 15(a)(i), including ceasing to supply products and services supplied in connection with any Test;
 - (iii) Test Participant must, to the extent relevant to any Test under this Agreement, disconnect Test Participant's and End Users' network, systems, equipment and facilities from any **nbn**TM Infrastructure and remove Test Participant's and End Users' network, systems, equipment and facilities from any sites owned or controlled by **nbn**; and
 - (iv) Test Participant must, to the extent relevant to any Test under this Agreement, assist **nbn** to remove any part of any **nbn**TM Infrastructure and the **nbn**TM Platform from sites owned or controlled by Test Participant or an End User.
- (b) If Test Participant does not comply with a request from **nbn** to perform its obligations under clause 15(a)(iii), **nbn** may perform the activities contemplated by that clause without further notice to Test Participant.
- (c) Within 20 Business Days after the effective date of expiry or termination, each party must return, destroy or delete any of the other



party's Confidential Information disclosed to it under or in connection with this Agreement, except to the extent it is impracticable to do so, or impermissible under applicable law.

- (d) Each party may retain one copy of, and use, the other party's Confidential Information after the effective date of expiry or termination for the purpose of enforcing its rights under this Agreement, discharging its obligations under applicable law or its own record-keeping purposes and no other purpose.
- (e) Expiry or termination of this Agreement by either party does not affect the right of either party to enforce its accrued rights against the other party.
- (f) Clauses 9 to 10 and 15 to 19 will survive the termination or expiry of this Agreement, as will any other term which is expressed or, by its nature is intended, to do so.
- (g) No provision of this Agreement merges on completion of any transaction contemplated by this Agreement.

16. Dispute Management

- (a) Any dispute that arises between **nbn** and Test Participant under or in relation to this Agreement must be resolved in accordance, and the parties agree to comply, with Module G of the WBA.
- (b) The provisions of Module G and the definitions set out in the Dictionary of the WBA will be modified for the purposes of this Agreement as follows:
 - (i) "**Customer**" is to be read as a reference to "Test Participant";
 - (ii) "Other Customer" is to be read as a reference to "Other Test Participant";
 - (iii) "Relationship Point of Contact" is to be read as a reference to a person nominated by a party under clause 17.11(b) of this Agreement;
 - (iv) "Other Wholesale Broadband Agreement" is to be read as a reference to "any Other Test Participant Agreement";

- (v) "Wholesale Broadband Agreement" means the WBA;
- (vi) the words "other than a Billing Dispute" in clause G1(a) and clause G1(b) will be deleted;
- (vii) the words "of Module E (Risk Management)" in clause G9.1(a)(v) will be deleted and "E6" in clause G9.1(b)(v) is to be read as a reference to "10.6"; and
- (viii) "Other Customer Dispute" means a dispute between **nbn** and an Other Test Participant under or in relation to an Other Test Participant Agreement between **nbn** and that Other Test Participant that has been classified as an industry relevant dispute under that Other Test Participant Agreement".

17. General

17.1 Compliance with applicable laws

- (a) Each party must comply with all applicable laws in connection with the exercise of its rights and the performance of its obligations under this Agreement.

17.2 Relationship between the parties

- (a) The relationship between the parties under this Agreement is that of independent contractors only.

17.3 Relationships with third parties

- (a) This Agreement does not create any obligation or legal relationship between **nbn** and any End User or other third party, nor does it grant any right or benefit to any End User or other third party.

17.4 Subcontractors and agents

- (a) Except in respect of the performance of Test Participant's obligations in connection with the performance of Tests, which may not be subcontracted, each party may use subcontractors or other agents to meet any of its obligations under this Agreement.



17.5 No variation of existing WBAs

- (a) Except as expressly provided in this Agreement, nothing in this Agreement varies or otherwise limits the terms of any WBA between **nbn** and Test Participant.

17.6 Entire agreement

- (a) Subject to clause 17.5(a), this Agreement is the entire agreement between the parties about the matters dealt with in this Agreement. They replace all previous agreements, understandings, representations and warranties about those matters.

17.7 Changes

- (a) **nbn** may vary the Standard Test Terms by giving Test Participant 20 Business Days' notice of the variation.

17.8 Assignment, novation and other dealings

- (a) A party must not assign or novate this Agreement, or deal with the benefit of, or right under this Agreement, or attempt to do any of these things, unless that party has obtained the prior written consent of the other party (not to be unreasonably withheld or delayed).

17.9 Waiver

- (a) A party will only be deemed to have waived a right or remedy under this Agreement if that waiver is in writing and signed by that party. Any failure or delay in exercising or a single or partial exercise of a right or remedy under this Agreement will not operate as a waiver and will not prevent further exercise of that, or of any other, right or remedy.

17.10 Notices

- (a) The parties must comply with the notice provisions in clause H1 of the WBA to the extent applicable as if references in that clause to the WBA are references to this Agreement and references to "Customer" are references to "Test Participant". For the purposes of that clause a party's "Contact Details" are those notified under clause 17.10(b) and references to a "Dispute" are to any dispute under this Agreement.

- (b) Each party must ensure that they provide the other party with up-to-date details of the name, mail address, email address and fax number for each party's:
 - (i) contact person for the purposes of notices under this Agreement; and
 - (ii) other relevant contacts, as may be agreed.

17.11 Other general clauses

- (a) Clauses H3, H4.1, H4.4 to H4.6, H4.8 to H4.11 and H4.13 of the WBA will apply to this Agreement as if references in those clauses to the WBA are references to this Agreement, but with the following changes:
 - (i) references to "Customer" are to be read as "Test Participant"; and
 - (ii) references to "Downstream Service Provider" are deleted.

18. Interpretation

- (a) A capitalised term used but not defined in this Agreement has the meaning given to it in the WBA.
- (b) Clause H5.4 of the WBA will apply to this Agreement as if a reference in that clause to the WBA is a reference to this Agreement.

19. Dictionary

In this Agreement:

Agreement means this agreement as described in clause 1(a).

Business Day means any day other than a Saturday, Sunday or public holiday in New South Wales.

Cancellation Notice has the meaning given in clause 4(a)(ii).

Claim means any and all claims, alleged claims, actions, suits or proceedings by any person of any nature or kind, whether in contract, tort (including negligence) at common law, in equity, under statute or otherwise howsoever arising.

Confidential Information has the meaning given to that term in the WBA as if references to "this Agreement" are to this Agreement.



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

Downstream Product means a product or service supplied by Test Participant which relies on a Test Product as an input.

End User means a person who is the ultimate recipient or user of a product or service supplied by Test Participant which relies on a Test Product as an input.

End User Loss means:

- (a) any Loss suffered by a person who uses a product or service supplied directly or indirectly from Test Participant, a Related Body Corporate of Test Participant or any other entity controlled by Test Participant within the meaning of the Corporations Act where that Loss is in connection with any telecommunications network over which Test Participant is in a position to exercise control or which Test Participant uses; and
- (b) any Loss suffered by Test Participant as result of any loss referred to in paragraph (a) of this definition.

Execution Date means the date that this Agreement is executed by the last party to sign this Agreement.

HSE Laws means all laws and legislative requirements relating to health, safety and environment.

Indemnified Party means, in each of clauses 11.1 to 11.3, the party with a right of indemnity from the other party.

Indemnifying Party means, in each of clauses 11.1 to 11.3, the party obliged to indemnify the other party.

Indirect Loss means any liability which:

- (a) does not arise directly, or naturally in the usual course of things, from the breach, action or inaction in question; or
- (b) constitutes or arises from or in connection with loss of profit, loss of anticipated profit, loss of opportunity or anticipated savings, loss of revenue, loss of income, loss of production, loss or impairment of credit rating, loss of data, loss of management time, loss of

business opportunities and loss of or damage to reputation or goodwill even if such loss arises naturally or in the usual course of things from that breach.

Insolvency Event has the meaning given to that term in the WBA.

Intellectual Property Rights means any patent, copyright, design, trade name, trade mark, service mark or other intellectual property right (whether registered or not) including ideas, concepts, know-how, techniques, designs, specifications, drawings, blueprints, tracings, diagrams and models.

Loss means losses, damages, liabilities, charges, expenses, compensation, fine, penalty, payment outgoings or costs and all related costs and expenses (including reasonable legal fees and reasonable costs of investigation, litigation, settlement, judgment, appeal, interest and penalties) of any nature or kind, howsoever it arises and whether it is present or future, fixed or unascertained, actual or contingent.

nbn™ Infrastructure means the **nbn™** Network, **nbn™** Platform and any other network, systems, equipment and facilities used by **nbn** in connection with Tests.

nbn™ Network means any of the telecommunications networks owned or controlled by, or operated by or on behalf of, **nbn** (or any Related Body Corporate of **nbn**) and any equipment owned, operated or controlled by **nbn** (or any Related Body Corporate of **nbn**) and used as part of, or in connection with Tests (whether part of the **nbn™** Network, any replica 'sandpit' environment, or otherwise).

nbn™ Platform means the operational support systems and billing support systems that are used by **nbn** from time to time for purposes that may include the ordering and tracking of products and services provided in connection with Tests, billing and payment, and fault reporting, detection and restoration, but excludes **nbn**'s core systems or any functionality of those core systems. For clarity, the **nbn™** Platform may comprise automated systems, semi-automated systems, manual systems (such as manually manipulated spreadsheets) or any combination thereof.

Other Test Participant means a person (other than Test Participant) who has entered into an Other Test Participant Agreement with **nbn**.



Other Test Participant Agreement means an agreement dealing with the subject matter of this Agreement entered into between **nbn** and a person other than Test Participant.

Personnel means, in relation to a party or third party, that party's or third party's officers, employees, agents, subcontractors and consultants.

Priority Services means priority assistance, emergency calling, critical medical or similar services.

Related Body Corporate has the meaning given to that term in section 50 of the Corporations Act.

Standard Test Terms means this document.

Tangible Property means physical property, including real property, but does not include non-physical property such as incorporeal property or Intellectual Property Rights.

TCPS Act means the *Telecommunications (Consumer Protection and Service Standards) Act 1999* (Cth).

Term means the term of this Agreement being the period commencing on the Execution Date and ending on the date specified in clause 14(b).

Test means the test activities conducted by **nbn** with the assistance of Test Participant under this Agreement, in relation to a specified or proposed product or service, or a feature, enhancement or component of a product or service, the details of which **nbn** specifies in the relevant Test Description.

Test Description means a set of terms specific to a particular Test, published by **nbn**, and issued to Test Participant prior to the Test, covering the content set out in Schedule 1.

Test Information in relation to each Test means any observations, findings or results in connection with the Test.

Test Participant Event means:

- (a) any act or omission of Test Participant or any End User other than in accordance with the terms of this Agreement or that is otherwise unlawful; or
- (b) any event or circumstance to the extent caused or contributed to by:
 - (i) the network, systems, equipment or facilities of Test Participant; or
 - (ii) the network, systems, equipment or facilities of any End Users.

Test Plan means the plan provided by **nbn** to Test Participant in relation to each Test including any definition or description document, which describes how Test Participant must perform the relevant Test and the assistance and direction which **nbn** intends to provide.

Test Product means a product or service supplied by **nbn** for the purpose of a Test.

WBA means the most recent agreement of that name entered into between the parties (as amended from time to time) including any replacement version of that agreement entered into between the parties.



Execution

Executed as an agreement

Signed for **NBN Co Limited** by its authorised representatives:

Signature of authorised representative

Signature of authorised representative

Name of authorised representative

Name of authorised representative

Date of signature

Date of signature

Signed for **[insert full legal name of Test Participant]** by its authorised representatives:

Signature of authorised representative

Signature of authorised representative

Name of authorised representative

Name of authorised representative

Date of signature

Date of signature



Schedule 1: Test Description Content

The Test Description will include the following content:

Test Product/Service	<i>[Insert the product, enhancement, feature or service which is the subject of the Test]</i>
General description and scope of required Test	<i>[Insert a general description of what test is to be done during the Test, including any requirements for end user participation and any specific terms which nbn requires Test Participant to pass on to end users.]</i>
Test period	<i>[Insert the date on which the Test is to commence and end and if any options to extend are available, what those options are.]</i>
Location of Test	<i>[Insert location(s) of Test]</i>
Special Terms	<i>[Insert any changes to the main Ts & Cs which form part of the Ts & Cs]</i>