

# **Rules for the Broadband Shared Property Access Disputes Scheme (the “Scheme Rules”)**

**July 2017**

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## **1 INTRODUCTION**

- 1.1 These Scheme Rules set out the rules that apply to the Approved Scheme for Broadband Shared Property Access Disputes under the Telecommunications (Property Access and Other Matters) Amendment Act 2017 (“the Amendment Act”) operated by Utilities Disputes Limited (the “Scheme Provider”). The principal Act is the Telecommunications Act 2001 (“the Act”).
- 1.2 Scheme Users and Scheme Members are bound by these Scheme Rules.

## **2 PURPOSE**

- 2.1 The purpose of the Broadband Shared Property Access Disputes (BSPAD) Scheme is to ensure any Disputes which arise as a result of the exercising of statutory rights of access under subpart 3, part 4 of the Act for broadband fibre-to-the-premises installations, or the installation of any prescribed other technology, are dealt with fairly and efficiently to help achieve the desired outcomes of the Amendment Act.

## **3 APPROACH**

- 3.1 The approach the Scheme will take to resolve Disputes will include a range of Dispute resolution processes, including facilitative, evaluative and determinative processes, so that:
  - 3.1.1 each Dispute can be resolved through the process assessed to be the most appropriate to the particular Dispute, having regard to the nature and circumstances of that Dispute; and
  - 3.1.2 if the Dispute cannot be resolved by agreement between the Parties, the Dispute is determined by the Decision-maker whose decision is legally binding on the Scheme Member; and
  - 3.1.3 the Scheme combines both formality and flexibility in a manner most likely to identify the process most appropriate for resolving the Dispute and ensures the Dispute is resolved within the time provided in these Rules, whether by agreement between the parties or by Determination by the Decision-maker.
- 3.2 The Scheme will operate in accordance with the principles of:
  - 3.2.1 **Accessibility** – the office makes itself readily available to potential users of the Scheme by promoting knowledge of its services, being easy to use and having no cost barriers
  - 3.2.2 **Independence** – the decision-making process and administration of the Scheme are independent from participating organisations

- 3.2.3 **Fairness** – the procedures and decisions of the Scheme Provider are fair and seen to be fair
- 3.2.4 **Accountability** - the Scheme Provider publicly accounts for its operations by publishing its final Determinations and information about Disputes and reporting any systemic issues to its participating organisations, policy agencies and regulators
- 3.2.5 **Efficiency** – the Scheme Provider operates efficiently by keeping track of Disputes, ensuring Disputes are dealt with by the appropriate process or forum, and regularly reviewing its performance
- 3.2.6 **Effectiveness** – the Scheme Provider is effective by having appropriate and comprehensive rules and periodic independent reviews of its performance.

## **4 PERSONS REQUIRED TO BELONG TO THE SCHEME**

- 4.1 A service provider or network operator that seeks to exercise a statutory right of access under subpart 3, part 4 of the Act is eligible to be a member of this Scheme unless otherwise exempt.
- 4.2 An application to become a Scheme Member must be accepted by the Board where the applicant:
  - 4.2.1 Supplies the Board sufficient information to enable it to determine any fees or levies payable by the Scheme Member.
  - 4.2.2 Signs a Scheme Membership Agreement.
  - 4.2.3 Meets the criteria at 4.1.
- 4.3 Scheme Members must continue their membership of the Scheme until at least 1 January 2026 (unless an appropriate exemption is granted or the Scheme is otherwise extended).
- 4.4 The Scheme Provider will have a full list of Scheme Members available on its website and keep that information up to date.

## **5 GOVERNANCE**

- 5.1 The governance of the Scheme Provider is established by and set out in the Constitution and Governance Charter for Utilities Disputes Limited available on the Utilities Disputes website.<sup>1</sup>

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<sup>1</sup> [www.utilitiesdisputes.co.nz](http://www.utilitiesdisputes.co.nz)

- 5.2 The terms of appointment for the Scheme Provider are set out in a Deed for Services between the Scheme Provider and the Ministry of Business, Innovation & Employment. These terms include the requirement to comply with the Scheme Rules.
- 5.3 The Board is responsible for overseeing the effectiveness and independence of the Scheme.
- 5.4 The Board will form an Advisory Committee for the BSPAD Scheme. The role of the Advisory Committee is to provide the Board with advice and recommendations, and a forum for consultation, on matters relating to the Board's operation of the Scheme.
- 5.5 The Advisory Committee for the Scheme will include Scheme Member representatives selected by the Board and nominated by the Scheme Members and an equal number of persons representing non-industry users of the Scheme.
- 5.6 The Board will determine the total number of representatives on the Advisory Committee, and will seek nominations for representation from appropriate persons. Nominations for representatives of Scheme Members will be sought from Scheme Members.
- 5.7 The Advisory Committee will include:
- 5.7.1 If there is only one Scheme Member, a representative of the Scheme Member
  - 5.7.2 If there are at least two Scheme Members, representatives of at least two Scheme Members
  - 5.7.3 At least one representative of retail service providers
  - 5.7.4 At least one representative of end users
  - 5.7.5 At least one representative of property owners or investors
- 5.8 The Advisory Committee may include representatives of industry that are not Scheme Members but whom have an interest in the Scheme. Non-Member industry representatives may include retail service providers.
- 5.9 The Decision-maker will chair the Advisory Committee meetings unless the Advisory Committee agrees another arrangement, such as rotation, for chairing of meetings.

## **6 DISPUTES THE SCHEME WILL DEAL WITH**

- 6.1 A Dispute between the following persons about their rights and obligations under subpart 3, part 4 of the Act in relation to an installation may be referred to the Scheme by any of the Parties to the Dispute:
- 6.1.1 a Dispute between a Scheme Member and
- (a) A person who places an order with a retail provider for an FTTP service to be installed
  - (b) An Affected Person
  - (c) A person affected by a re-entry under section 155ZD(1)(b) of the Act
- 6.1.2 a Dispute between a person who places an order with a retail provider for an FTTP service to be installed and an Affected Person.
- 6.2 The Scheme will only accept Disputes if:
- 6.2.1 the Dispute has reached Deadlock;
- 6.2.2 none of the exclusions at 6.7 apply; and
- 6.2.3 the Dispute is about one or more of the following:
- (a) whether a statutory right of access under subpart 3, part 4 of the Act exists for a Scheme Member to enter a property and carry out a proposed installation; or
  - (b) the validity of a person's grounds for objecting to a Scheme Member exercising a statutory right of access under subpart 3, part 4 of the Act to carry out a Category 2 installation (or, in the case of a body corporate administered property, a Category 1 or Category 2 installation); or
  - (c) whether a Scheme Member has complied with requirements under subpart 3, part 4 of the Act while exercising or purporting to exercise a statutory right of access under the Act.
- 6.3 Where it appears to the Scheme Provider a Dispute that does not meet the criteria at 6.1 may be within the jurisdiction of the Telecommunications Dispute Resolution Service (TDRS) the Scheme Provider must refer users of the Scheme to the TDRS or an appropriate alternative.
- 6.4 The Decision-maker decides whether a Dispute falls within Jurisdiction. If Jurisdiction is disputed, the Scheme Provider will request and consider

representations from both parties and the Decision-maker will make a final decision.

- 6.5 Scheme Members may appeal against the Decision-maker's decision on Jurisdiction. A Scheme Member wishing to appeal against the Decision-maker's decision on Jurisdiction must appeal the matter to the Court within five working days.
- 6.6 If a Dispute is not accepted, the Scheme Provider will give reasons to the Parties. The Scheme Provider's reasons will be in writing if requested by a Party.
- 6.7 The Scheme will not deal further with Disputes where one or more of the following applies:
  - 6.7.1 The Decision-maker considers the Dispute is frivolous or vexatious after following the process in Appendix B
  - 6.7.2 The Dispute is subject to alternative legal action (including action initiated in the course of the Scheme's investigation of that Dispute)
  - 6.7.3 The Dispute has already been successfully resolved in an alternative forum or by agreement between the Parties to a Dispute
  - 6.7.4 The Dispute is about a Scheme Member's action or omission while accessing shared property without exercising the statutory right of access under subpart 3, part 4 of the Act, including with the express consent of Affected Persons.
  - 6.7.5 The Scheme Provider considers the Dispute is abandoned by a Scheme User
- 6.8 The Scheme Provider may consider a Dispute abandoned by a Scheme User under 6.7.5 if:
  - 6.8.1 the Scheme User has not responded to reasonable attempts to contact them regarding the Dispute; and
  - 6.8.2 the Scheme Provider has given the Scheme User notice the Dispute will be considered abandoned if no response is received within 3 working days; and
  - 6.8.3 the Scheme Provider has not received a response to a notice sent out under 6.8.2 within 3 working days.

## **7 REFERRING DISPUTES**

- 7.1 The following may refer Disputes to the Scheme:

- 7.1.1 The relevant Scheme Member
- 7.1.2 An Affected Person
- 7.1.3 A person who placed an order with a retail provider for a fibre-to-the-premises service to be installed
- 7.2 Scheme Members referring Disputes must provide the Scheme with the details of the affected parties to the Dispute.
- 7.3 A Dispute referred to the Scheme may be accepted for consideration by the Scheme once notice of the Dispute has been given to all relevant parties.
- 7.4 Disputes may be referred to the Scheme by a variety of methods, including:
  - 7.4.1 Telephone
  - 7.4.2 Email or other electronic means
  - 7.4.3 Website submission
  - 7.4.4 Fax
  - 7.4.5 Post
- 7.5 Scheme Users may, where necessary, be supported by another person at any stage in Scheme processes.
- 7.6 Notwithstanding clause 7.5 above, Scheme Users and Members of the Scheme may not bring legal counsel to a dispute case hearing without the written consent of the Scheme Provider.
- 7.7 Persons lodging disputes with the Scheme will be sent confirmation of receipt by the Scheme Provider.

## **8 DECISION-MAKER'S POWERS AND OBLIGATIONS**

- 8.1 The Decision-maker exercises all powers and discretions conferred on the Scheme Provider by these Scheme Rules for the duration of the Scheme. The Decision-maker must act independently when dealing with Disputes and not:
  - 8.1.1 be selected directly by Scheme Members;
  - 8.1.2 be subject to the direction or control of any other person; or
  - 8.1.3 have relationships which could give rise to a perceived, potential, or actual conflict of interest.
- 8.2 The Decision-maker may delegate:



- 8.2.1 All or any powers (except the power to make final decisions on Jurisdiction, Preliminary Determinations and Determinations) to any employee or contractor engaged by the Scheme Provider.
- 8.2.2 With the agreement of the Board, the power to make final decisions on Jurisdiction, preliminary Determinations and Determinations, to one or more deputies.
- 8.3 In dealing with Disputes, the Scheme Provider must:
  - 8.3.1 follow the requirements of the Act, including any legal rules or judicial authority that applies;
  - 8.3.2 do what it considers appropriate to resolve Disputes in a cooperative, fair, efficient, and timely way;
  - 8.3.3 keep all Parties to a Dispute informed of progress;
  - 8.3.4 encourage settlements over Determinations and an informal Dispute resolution approach to resolving Disputes and discourage legalistic and adversarial approaches;
  - 8.3.5 advise Scheme Users of their right to access other redress mechanisms at any stage if they are dissatisfied with any of the Scheme's decisions;
  - 8.3.6 be as transparent as possible, while also acting in accordance with confidentiality and privacy obligations;
  - 8.3.7 conduct hearings on the papers in a way that is consistent with the rules of natural justice including ensuring that both parties have the opportunity to put their case to the Decision-maker and rebut the arguments of and information provided by the other Party; and
  - 8.3.8 accept and investigate a Dispute referred by or against multiple parties in accordance with these Scheme Rules; and where applicable, treat multiple complaints as a single Dispute, and give reasons for doing so.
  - 8.3.9 report material or persistent breaches of the Scheme Rules to the Board.
- 8.4 In dealing with Disputes, the Scheme Provider may:
  - 8.4.1 Consider any information relevant to a Dispute, and make any inquiry, that is fair and reasonable in the circumstances and consistent with the rules of natural justice
  - 8.4.2 Seek independent external advice after consulting with the relevant Scheme Member

- 8.4.3 Refer Disputes to other forums where, in the opinion of the Decision-maker, the case is outside Jurisdiction and such referral would be in the best interests of the parties involved in the Dispute
- 8.4.4 Issue infringement notices to Scheme Members for breaches of these Scheme Rules, a list of which will be published in the Scheme Provider's annual report and reported to the Minister

## **9 SCHEME USERS' RIGHTS AND OBLIGATIONS**

- 9.1 Scheme Users who use the Scheme agree to be bound by these Scheme Rules.
- 9.2 A Scheme User is not liable for any charges associated with making use of the Scheme, other than a Scheme User's own costs under 14.5.
- 9.3 A Scheme User must consent to information obtained by the Scheme Provider being disclosed to Scheme Members, the Ministry of Business, Innovation & Employment, and any other person the Scheme Provider considers reasonably appropriate to perform its role while complying with contractual and legislative obligations.
- 9.4 The Scheme Provider is not liable to a Scheme User.
- 9.5 A Scheme User may appeal any Determination made by the Scheme Provider to the Court, but must do so within 5 working days after receiving notification.
- 9.6 Except as set out at 9.5, a Scheme User does not forfeit rights to take alternative legal action against a Scheme Member or any other Party by referring a dispute to the Scheme or otherwise using the Scheme, however any such alternative legal action must not be contemporaneous with a Scheme User's access of the Scheme under 6.7.2.

## **10 TIMEFRAMES**

- 10.1 The Scheme Provider will make available, including on its website, guidelines and policies about its processes, including a reasonable time limit for each process.
- 10.2 The Scheme Provider's target service level for decisions about Jurisdiction is 5 working days from the date the Dispute is referred to the Scheme.
- 10.3 The Scheme Provider's target service level for facilitating resolution of the Dispute is 10 working days from the date the Dispute becomes an Accepted Dispute.
- 10.4 The Scheme Provider's target service level for issuing a Determination is 32 working days from the date the Dispute becomes an Accepted Dispute.

## **11 DECISIONS AND DETERMINATIONS**

- 11.1 The Decision-maker makes all decisions on the outcome of Disputes referred to the Scheme (Determinations) based on what the Decision-maker considers is fair and reasonable, having regard to any information made available, including good industry practice, previous Determinations, relevant codes of practice, practice statements developed under 17.5.13, and the law.
- 11.2 Before issuing a Determination, the Decision-maker will issue a Preliminary Determination and provide the Parties 3 working days to respond.
- 11.3 A Preliminary Determination and Determination will be made on the papers unless the Decision-maker considers an oral hearing is required in extraordinary circumstances.
- 11.4 Determinations must:
- 11.4.1 be reasonably detailed;
  - 11.4.2 be non-confidential;
  - 11.4.3 be made in a way that is consistent with the rules of natural justice;
  - 11.4.4 be in writing;
  - 11.4.5 set out the reasons for the Determination, including, where appropriate, the reasons for making a Determination without first attempting to facilitate settlement of the Dispute; and
  - 11.4.6 be made available to all Parties.
- 11.5 The Decision-maker will seek to achieve consistency of Determinations. However, the precedent value of Determinations is limited to interpretation of the Scheme and not factors external to the Scheme.
- 11.6 The Scheme Provider will establish a process to review Determinations for consistency and compliance.
- 11.7 A Decision-maker's Determination may include any of the following:
- 11.7.1 No award or action
  - 11.7.2 A requirement a Scheme Member pay compensation to a Party or Parties to a Dispute up to a total maximum of \$50,000
  - 11.7.3 A requirement a Scheme Member take certain reasonable actions to make redress to a Dispute, including a requirement to carry out reinstatement work

- 11.7.4 A requirement an Affected Person take certain reasonable actions to make redress to a Dispute, including a requirement to comply with a Determination that an installation proceed
- 11.8 For the avoidance of doubt, the \$50,000 maximum compensation is applicable per Dispute and covers compensation payable to all relevant Parties (property owners and other affected parties) in relation to any installation works (whether as a single event or a series of events) that are performed within the accessed land while exercising a statutory right of access under subpart 3, part 4 of the Act.
- 11.9 Compensation payable under 11.7.2 is limited to awards for damage to land and improvements thereon and does not include:
- 11.9.1 Awards for indirect or economic loss
- 11.9.2 Awards for inconvenience or stress
- 11.10 Compensation payable under 11.7.2 is payable to all owners of the damaged land and improvements in proportion to their ownership share.
- 11.11 The Decision-maker cannot award monetary penalties or punitive damages.
- 11.12 Determinations, subject to clause 11, are binding on all Parties to the Dispute.

## **12 APPEALS AGAINST DETERMINATIONS**

- 12.1 A Scheme User can appeal a Determination.
- 12.2 The Scheme Provider will advise Scheme Users of the Scheme of their right to access other redress mechanisms at any stage if they are dissatisfied with a Determination. This information will include:
- 12.2.1 that referral of the Dispute elsewhere will:
- (a) end the Scheme Provider's involvement in resolution of the Dispute; and
- (b) leave all Parties with their remaining rights and obligations;
- 12.2.2 that appeals may be made to the Court within 5 working days after the Determination is notified to the Party appealing;
- 12.2.3 that the Scheme is not entitled to be represented at the appeal hearing;
- 12.2.4 that the Court may confirm, modify or reverse the Determination;
- 12.2.5 that the Court may not refer the Determination back to the Scheme for any purpose; and

12.2.6 that the Court may hear any evidence or representations it considers relevant.

### **13 AUTHORISATION, INFORMATION AND CONFIDENTIALITY**

- 13.1 The Scheme Provider will ensure its Dispute handling process includes a clear and prominent acknowledgement and agreement by the Affected Person, body corporate and a person who placed an order with a retail service provider for FTTP, as appropriate, that they:
- 13.1.1 authorise the Scheme Member to disclose any information the Scheme Provider may request from the Scheme Member about the Dispute, and
  - 13.1.2 undertake to provide any more information the Scheme Provider may reasonably request.
- 13.2 Other than from Scheme Members, the Scheme Provider cannot compel a Party to provide information.
- 13.3 If a Party, other than a Scheme Member, unreasonably refuses to provide information requested by the Scheme Provider or unreasonably refuses to authorise other persons to release information requested by the Scheme Provider, the Decision-maker may decide to discontinue the investigation and advise the Parties of this in writing.
- 13.4 Information requested by the Scheme Provider from Scheme Members must be provided within no more than 5 working days of the request unless otherwise agreed with the Scheme Provider.
- 13.5 Scheme Members may elect not to provide information that is legally privileged, confidential to a third party, or commercially sensitive under 13.4, but must give reasons for any refusal to provide information to the Scheme Provider.
- 13.6 Information provided by a Party for the purpose of resolving Disputes will be treated as confidential to the Parties unless disclosure is required by law.
- 13.7 Where a Scheme Member gives information to the Scheme Provider which identifies a third party, the information may be given to the other Parties with deletions, where appropriate, at the discretion of the Decision-maker.
- 13.8 The Scheme Provider will ensure any summaries of Determinations do not name Scheme Members, other users of the Scheme or third parties.
- 13.9 Any Party may ask for copies of any information on the Scheme Provider's file on the Dispute and the Scheme Provider provide that information subject to legal requirements and any procedural standard the Scheme Provider develops.

## **14 COSTS OF PROVIDING THE SERVICES**

- 14.1 The Scheme is available to all potential Scheme Users at no charge.
- 14.2 The Board is responsible for setting the Scheme's annual budget.
- 14.3 Each Scheme Member will pay fees as set out in Appendix C.
- 14.4 All Parties are responsible for any fees or charges they incur in relation to a Dispute (for example legal fees) unless otherwise explicitly provided for in these Rules.

## **15 SCHEME MEMBER OBLIGATIONS**

- 15.1 If there is any inconsistency between a Scheme Member's obligations under the BSPAD Scheme and a Scheme Member's rights and/or obligations under any other agreement or contractual arrangement, the Scheme Member's obligations under the Scheme Rules prevail.
- 15.2 A Scheme Member must:
  - 15.2.1 Maintain effective internal mechanisms and processes for dealing with Disputes referred to them, and for referring Disputes to the Scheme where required
  - 15.2.2 Make reasonable efforts to resolve Disputes referred to them before referring the Dispute to the Scheme
  - 15.2.3 Promote the Scheme on any relevant information (for example factsheets and pamphlets) to ensure those in the community who may require its services are aware of its existence
  - 15.2.4 Advise potential users of the Scheme in writing about the existence and nature of the Scheme if a Dispute is referred to that Scheme Member which it is unable to resolve through its own internal mechanisms and processes
  - 15.2.5 Provide the Scheme with up-to-date information about its staff member(s) responsible for Dispute resolution
  - 15.2.6 Provide to potential users of the Scheme who have a Dispute that may fall within Jurisdiction, in plain and accessible language, information about the existence and nature of and the contact details for, the Scheme
  - 15.2.7 Promptly provide information that the Scheme Provider requests:
    - (a) for administrative, operational, business planning or performance review purposes; or

- (b) to prepare reports and recommendations for the Minister or other significant stakeholder
- 15.2.8 Scheme Members may elect not to provide information that is legally privileged, confidential to a third party, or commercially sensitive under 15.2.7, but must give reasons for any refusal to provide information to the Scheme Provider.
- 15.2.9 Include on their primary website information about the existence, nature of, and contact information for, the Scheme
- 15.2.10 Ensure employees or contractors who frequently deal with the public are trained in recognising Disputes and actively referring them to the Scheme where required
- 15.2.11 Include the contact details of the Scheme on any notice of an installation required by the Act

## **16 CHANGES TO THESE RULES**

- 16.1 The Act requires the Minister to approve any amendment to the rules of the Approved Scheme. The Minister's approval will be treated as given if the Minister does not decline approval within 45 days after being notified of the proposed amendment.
- 16.2 For clarity, these Rules, including the arrangements for fees and charges set out in Appendix C, must not be changed without Ministerial approval.
- 16.3 Scheme Members do not have a power or right to veto a proposed change to the Jurisdiction or to its Rules and procedures.
- 16.4 If the Advisory Committee proposes a change to these Rules, the Board is required to consider the proposal and decide whether to accept the proposal and recommend to the Minister that the Scheme Rules be amended.
- 16.5 A proposed amendment must:
  - 16.5.1 be consistent with the Act;
  - 16.5.2 be reasonable; and
  - 16.5.3 meet the purpose of the Scheme
- 16.6 The Scheme Provider must consult with the Advisory Committee, and relevant stakeholders, including telecommunications service providers generally, on any proposed amendments, including changes to Scheme Fee arrangements set out in appendix C, and proposed changes to the Scheme Provider's appointment.

- 16.7 Any proposal for amendments to the Scheme can be approved by:
- 16.7.1 a resolution at a meeting of the Board by a vote in favour of at least four Board members; or
  - 16.7.2 all Board members agreeing in writing to the proposed amendment.
- 16.8 If the proposed amendments are approved, the Scheme Provider must notify and provide a copy of the Scheme Rules incorporating the proposed amendments to:
- 16.8.1 the Minister; and
  - 16.8.2 Scheme Members.
- 16.9 The Board must give at least 25 working days' notice of a change of any fee to Scheme Members.

## **17 OTHER SCHEME PROVIDER RESPONSIBILITIES AND ACTIVITIES**

- 17.1 As well as resolving Disputes, the Scheme Provider will carry out activities it considers appropriate to support its services, with the aim of promoting good practice in relation to handling of Disputes under this Scheme and public confidence in dealing with Scheme Members.
- 17.2 The Scheme Provider will ensure its website contains the Scheme Rules and information relevant to the Scheme, including:
- 17.2.1 the nature of the Scheme, including that it is funded by Scheme Members;
  - 17.2.2 how to access the Scheme;
  - 17.2.3 what can and cannot be referred to the Scheme;
  - 17.2.4 the process for resolving Disputes;
  - 17.2.5 the restrictions on the Scheme's scope and powers;
  - 17.2.6 step-by-step guidelines; and
  - 17.2.7 case studies that do not name Scheme Members, Scheme Users or third parties.
- 17.3 The Scheme Provider will comply with any reasonable request for information listed in clause 17.2 at no charge.
- 17.4 The Scheme Provider will arrange services to assist potential users of the Scheme to access the Scheme at no cost to the potential users of the Scheme, including:
- 17.4.1 Appropriate services to meet the needs of potential users of the Scheme with disabilities and from non-English speaking backgrounds



- 17.4.2 If a user or potential user of the scheme is unable to provide information relevant to a Dispute in writing, recording the Dispute in writing and sending it to the relevant Party requiring assistance for confirmation and then forwarding the Dispute to the other Parties to the Dispute
- 17.5 The Board will ensure that the Scheme Provider undertakes the following activities:
  - 17.5.1 Promoting the Scheme to ensure public awareness of the Dispute resolution services it makes available and how these can benefit Scheme Users
  - 17.5.2 Setting Performance Standards sufficient to allow external parties, including the Minister, to readily determine if the Scheme is providing an effective Dispute resolution service
  - 17.5.3 Conducting an annual in-house review of the Scheme (including feedback from stakeholders) and reporting to the Minister on the performance of the Scheme against Performance Standards and any particular issues raised by the Minister
  - 17.5.4 Preparing quarterly reports for the Board on the Performance Standards, including reasons for any failure to meet them and recommendations to avoid future occurrences
  - 17.5.5 Using comments received from users of the Scheme to inform the improvement of internal processes and procedures, and to inform public reporting
  - 17.5.6 Reviewing these Scheme Rules from time to time, to assess whether the Scheme Provider considers any amendments are appropriate
  - 17.5.7 Hiring employees and ensuring employees are independent of Scheme Members
  - 17.5.8 Monitoring Scheme Member's compliance with Scheme Rules and providing reports and recommendations to Scheme Members based on the outcome of the monitoring
  - 17.5.9 Reporting annually to the Minister on all material or persistent breaches of the Scheme Rules
  - 17.5.10 Collecting and analysing information and data about Disputes and their handling, and using those to monitor, prepare and publish reports about trends, practices and systemic industry issues in relation to the Scheme
  - 17.5.11 Receiving information about and taking appropriate action in relation to systemic industry issues relevant to the Scheme and having a mechanism

to report these to the Minister, and where appropriate, Scheme Members

- 17.5.12 Making recommendations and reports in light of trends, practices and issues in relation to the Scheme
- 17.5.13 Preparing practice statements
- 17.5.14 Establishing a process for dealing with complaints about the Scheme Provider's operation of the Scheme (other than complaints about a Decision-maker's decision) and referring to the Board for appropriate action
- 17.5.15 Responding in a timely and appropriate manner to any recommendations of the Board in response to complaints about the operation of the Scheme
- 17.5.16 Preparing reports on Scheme Provider activities for stakeholders including the Board and the Minister
- 17.5.17 Providing anything required by legislation as the Approved Scheme
- 17.5.18 Taking actions to improve the performance of the Scheme where the Minister deems it necessary
- 17.5.19 Keeping detailed records of all Disputes, their progress and outcomes

## **18 ANNUAL REPORT**

- 18.1 The Scheme Provider will include the following information about the BSPAD Scheme in its annual report:
  - 18.1.1 information about how the Scheme works;
  - 18.1.2 the number of queries the Scheme receives;
  - 18.1.3 the number and types of Disputes it receives and the outcomes;
  - 18.1.4 the time taken to resolve Disputes;
  - 18.1.5 any systemic issues arising from Disputes;
  - 18.1.6 examples of representative case studies;
  - 18.1.7 information about how the Scheme ensures it meets its purpose;
  - 18.1.8 a list of Scheme Members, together with any changes to the list during the year;
  - 18.1.9 information about new developments or key areas in which policy or education initiatives are required;

- 18.1.10 a report on compliance with the approval criteria set out in this document;
  - 18.1.11 a report against the Performance Standards;
  - 18.1.12 the findings of in-house reviews;
  - 18.1.13 the findings of the '5-yearly' review (if relevant for that year); and
  - 18.1.14 a financial report containing sufficient information to allow members and other stakeholders to understand how the Scheme funding is being utilised, including details of the actual costs of operating the Scheme and details and amounts of funding sources; and
  - 18.1.15 a list of any Scheme Members who materially or persistently breached the Scheme rules that year along with what the breach was and the severity of the breach, unless the Decision-maker considers to do so would unfairly disadvantage or harm the Scheme Member without just cause, and the Board agrees
- 18.2 The Scheme Provider will make the annual report available to relevant stakeholders on its website and via other appropriate means, including internet link and electronic copies.

## **19 REVIEWS OF THE SCHEME**

- 19.1 Within two years of approval, and subsequently at no more than five yearly intervals, the Scheme will organise a review (a '5-yearly' review). This will be either an independent review or an in-house review by the Scheme (as required under the Act), whichever the Minister thinks appropriate, of the Scheme to assess:
- 19.1.1 whether the Scheme is meeting its purpose;
  - 19.1.2 whether the Performance Standards set by the Board are adequate; and
  - 19.1.3 the quality and results of the annual in-house reviews.
- 19.2 The Board will appoint an independent reviewer for the '5-yearly' review and will consult with the Minister over the terms of reference for the review.
- 19.3 The results of the '5-yearly' review will be made available on the Scheme's website.
- 19.4 The Minister may require a special review of any or all aspects of the Scheme at any time. The Minister will appoint the reviewer for any special review.

## **20 OTHER MATTERS**

### **Liability**

- 20.1 The Scheme Provider (including the Board, Decision-maker and, staff) are not liable for any loss, damage or liability that arises from anything done or omitted in the course of their duties, unless the person has acted in bad faith.

## A APPENDIX A: DEFINITIONS

In these rules, the following words are used with these meanings:

**Act** means the Telecommunications Act as amended by the Telecommunications (Property Access and Other Matters) Amendment Act and includes further amendments or replacements

**Accepted Dispute** means a Dispute referred to the Scheme that is not ruled out of Jurisdiction or otherwise excluded from the Scheme and is accepted by the Scheme for consideration

**Scheme Membership Agreement** or **Membership Agreement** is the agreement in Appendix D or any document with similar intent that is approved by the Board

**Advisory Committee** has the meaning given to it in the Constitution

**Affected Person**, in relation to property and a Category 1 or Category 2 Installation,

- (a) Means a person whose consent a Scheme Member would, but for subpart 3, part 4 of the Act, have to obtain before entering the property or carrying out the installation; and
- (b) Does not include the person who placed the order with a Retail Provider for the FTTP service to be installed
- (c) For the avoidance of doubt includes, if the property is administered by a body-corporate, a body corporate

**Approved Scheme** means a Scheme approved by a Minister as a Dispute resolution Scheme for the purposes of legislation

**Australian Benchmarks** means the Benchmarks and Key Practices for Industry-based Customer Dispute Resolution issued by the Treasury of the Australian Government

**Board** means the Utilities Disputes Board of Directors

**Board chair** means the person appointed in accordance with the Constitution

**Category 1 installation** means a method of installation prescribed in legislation or regulations as a Category 1 installation

**Category 2 installation** means a method of installation prescribed in legislation or regulations as a Category 2 installation

**Commissioner** means Utilities Disputes' Chief Executive Officer and when used in relation to dealing with Disputes, includes the Deputy Commissioner, as delegated by the Commissioner or the Board

**Constitution** means the company constitution for Utilities Disputes Limited

**Court** means a District Court

**Deadlock** means either:

- (a) The Dispute has not been resolved between the parties to the dispute after more than 20 working days from the date the Scheme Member became aware of the Dispute or, if there is disagreement about the date on which the Scheme Member was made aware of the Dispute, the date on which the Scheme Member should reasonably have been aware of the Dispute in the view of the Decision-maker
- (b) The Decision-maker considers:
  - The Member has made it clear that they do not intend to do anything further about the Dispute
  - A user of the Scheme would suffer unreasonable harm from waiting longer
- (c) A Member has referred the Dispute to the Scheme for consideration

**Decision-maker** means the person or group of persons delegated by the Board of the Scheme Provider to be responsible for making decisions on Disputes. Unless otherwise decided by the Board, the Decision-maker is the Commissioner.

**Determination** means a written determination by the Decision-maker including a brief statement of reasons for the determination. **Preliminary Determination** has a consistent meaning

**Dispute** means a disagreement between two or more parties

**Financial Year** means the period commencing on 1 April and ending on 31 March of the following year

**FTTP service** means a telecommunications service delivered over fibre optic media to an end-user's premises

**FTTP Service Provider** has the same definition as in the Act and includes a provider of a prescribed other technology which is also defined in the Act

**Governance Charter** means the Governance Charter for Utilities Disputes Limited

**High-Level Design Plan** means a plan that must describe or illustrate-

- (a) Where the installation method (or, if more than 1, where each installation method) is to be used on the property; and
- (b) Where the network equipment (if any) associated with that installation method is proposed to be put

**Jurisdiction** means the basis for the Scheme Provider's involvement in a Dispute, generally referred to as 'in' or 'out' of jurisdiction

**Minister** means the relevant Minister

**Non-prescribed Installation** means a method of installation that is not prescribed as a Category 1 or Category 2 installation

**Party** means a party to a Dispute and **Parties** has a consistent meaning

**Performance Standards** means the standards adopted by the Board to measure the Scheme's performance and includes the Australian Benchmarks.

**Scheme** means the approved BSPAD Scheme, as prescribed by the Act

**Scheme Member** means an FTTP Service Provider or Network Operator that relies on a statutory right of access under subpart 3, part 4 of the Act and has elected to be a member of the Scheme.

**Scheme Rules** or **Rules** means the set of rules for the Approved Scheme for broadband property access Disputes

**Scheme User** means a person who accesses the Scheme for the resolution of a Dispute, and does not include a Scheme Member.

**B APPENDIX B: FRIVOLOUS OR VEXATIOUS DISPUTES**

- B.1. This appendix sets out the process the Scheme Provider will follow to determine whether a Dispute is frivolous or vexatious and therefore out of Jurisdiction.
- B.2. Where the Scheme Provider considers a Dispute is frivolous or vexatious, it must advise all parties and give a reasonable opportunity for them to respond.
- B.3. The Decision-maker will review all responses reasonably received and make a final decision.
- B.4. The Decision-maker's decision will be made within 2 working days, in writing, and include reasons



## **C APPENDIX C: SCHEME FEES**

### **Setting and publishing of Fees**

- C.1. The Scheme fees payable by a Scheme Member provided for in this Appendix represent all the compensation owed by the Scheme Member to the Scheme Provider.
- C.2. The Board shall set Scheme fees applicable to Scheme Members in accordance with the Scheme Rules.
- C.3. The Scheme Provider shall compile Scheme fees into a Fees Document, to be published by the Scheme Provider separately to these Rules.

### **Members to pay Annual Membership Fee**

- C.4. Each Scheme Member must pay an annual membership fee determined by the size of its market share in relation to fee tiers applicable according to market share.
- C.5. The market share of each Scheme Member for this purpose shall be measured (as at 1 April each year) as a proportion of the total broadband market of all Scheme Members in aggregate for the fixed line connection of premises at network level. It includes every fixed line connection of a Scheme Member irrespective of whether the Scheme Member wholesales and/or retails the connection as a service. A connection must be operational (active for an end user) and can be comprised of any mix of fixed line technologies which have been deployed exercising statutory rights of access under subpart 3 of part 4 of the Act.
- C.6. Annual Membership Fee amounts payable by Scheme Members shall be set out in the Fees Document.
- C.7. The first Annual Membership Fee paid by a Scheme Member shall be a pro rata amount based on the number of working days remaining in the Financial Year from when the Scheme Member executes a Membership Agreement.

### **Members to pay Sign Up Fee**

- C.8. A person that becomes a Scheme Member must pay a one-time sign up fee.
- C.9. The sign up fee paid shall be 25 percent of the Member's first annual membership fee amount.

### **Members to pay Case Fees**

- C.10. Case fees, including their amounts and how they are triggered, are to be set out in the Fees Document.
- C.11. Members must pay case fees for all Disputes that meet the criteria set out in the Fees Document under C.7.

### **Expert costs**

- C.12. In addition to the fees payable under the Scheme, if the Decision-maker requires input from an expert to assist with any investigation or resolution of a Dispute, the costs of any such expert shall be charged by the Scheme Provider to the Member that is (or are) the subject of the Dispute. The Decision-maker will notify a relevant Member or Members before an expert is engaged, and will not engage the expert until at least 5 working days after such notice unless the relevant Member or Members agrees to earlier engagement.

### **Amendments to Fees Document**

- C.13. The Board may only amend the Fees Document under the terms of the Scheme Rules.
- C.14. The Board will advise Members of any amendment to the Fees Document including the reason(s) for the amendment.
- C.15. To avoid doubt, the Board is entitled to amend the Fees Document without the Minister's approval. This is because the Fees Document does not constitute part of the Scheme Rules for the purposes of clauses 16.1 and 16.2.
- C.16. Unless one of the criteria in C.17 or C.18 are met and the Board elects to exercise its right to review annual membership fees, the Board may only review Annual Membership Fees as part of a Scheme review required under 19.1 of the Scheme Rules.
- C.17. The Board reserves the right to review and amend Annual Membership Fees prior to the first Scheme review required under 19.1 of the Scheme Rules if the Scheme Provider accepts more than 35 Disputes during a six month period prior to the review.
- C.18. In addition to the criteria at C.17, the Board may adjust annual membership fees (for years subsequent to the initial year of the Scheme) to reflect changes to the consumers price index as published by Statistics New Zealand.
- C.19. The Board may elect to review case fees in isolation prior to 1 April 2019. Any changes to case fees arising from the review will be effective only for cases arising from 1 April 2019.
- C.20. The Board may only amend the Fees Document following consultation with the Advisory Committee.

### **Invoicing and payment**

- C.21. Other than during a Member's first year of Membership, the Scheme Provider will invoice Members for annual membership fees on 1 April and 1 October of each year.

- C.22. During a Member's first year of Membership, the Scheme Provider will invoice the new Member for annual membership fees and the sign up fee at sign up.
- C.23. The Scheme Provider will invoice Members for case fees incurred before 28 February on 1 April of each year.
- C.24. The Board must give notice to each Member requesting payment of any fee to be paid by that Member. The notice must state the total amount to be paid.
- C.25. All fees are:
  - C.25.1. Plus GST payable (if any); and
  - C.25.2. Due and payable by each Member within 20 Working Days of the Board sending the notice requesting payment (unless otherwise agreed).

### **Disputing fees**

- C.26. Members may only dispute an invoice for fees payable under the Scheme in the 30 Working Days from the date of issue of the invoice. Members disputing an invoice must notify the Board in writing and provide details as to why the invoice or part of it is disputed. If the Board and the Member cannot resolve the dispute within 20 Working Days the matter will be referred to the Board Chair who will make a final determination. Any amount of the invoice found by the Board Chair to be payable will be paid by the Member within 5 Working Days of the final determination. Except as set out in this clause Members may not dispute or refuse to pay any invoice for fees payable under the Scheme.

**D APPENDIX D: SCHEME MEMBERSHIP AGREEMENT**

**New Scheme Member**

**Name of entity:** ..... (New Scheme Member)

**Physical address:** .....  
.....

**Postal address:** .....  
.....

**Scheme:** *The Broadband Property Access (BSPAD) Scheme operated by Utilities Disputes Limited (Scheme)*

**TERMS AND CONDITIONS**

- 1 The BSPAD Scheme Rules govern the legal relationship between Utilities Disputes Ltd (the Scheme Provider) and the New Scheme Member.
- 2 The New Scheme Member acknowledges that by accepting this agreement the New Member agrees to:
  - 2.1 become a Scheme Member under the Scheme;
  - 2.2 be bound by the Scheme Rules; and
  - 2.3 observe and perform all of the obligations of a Scheme Member under the Scheme Rules.
- 3 For the purposes of the Contracts (Privity) Act 1982, this agreement is given for the benefit of all Scheme Members , each Utilities Disputes Director (including committee members) and the Commissioner, and is enforceable by any of them.
- 4 This agreement becomes effective when it is executed by Utilities Disputes. Utilities Disputes will promptly notify you in writing once it has been executed.
- 5 All terms defined in the BSPAD Scheme Rules have the same meaning when used in this agreement.
- 6 By accepting this agreement, you warrant that you are fully and properly authorised to do so on behalf of the New Scheme Member.

**The New Scheme Member understands and accepts the terms and conditions of this agreement.**

**Date:** .....

**Signed for and on behalf of the Scheme Member in accordance with its constitutional documents by:**

.....  
Signature of witness

.....  
Signature of authorised person  
**(New Scheme Member)**

.....  
Name of witness (print)

.....  
Name of authorised person (print)

.....  
Occupation of witness

.....  
Address of witness

**Signed for and on behalf of Utilities Disputes Ltd in accordance with its constitutional documents by:**

.....  
Signature of witness

.....  
Signature of authorised person  
**(Utilities Disputes Board)**

.....  
Name of witness (print)

.....  
Name of authorised person (print)

.....  
Occupation of witness

.....  
Effective date

.....  
Address of witness