

~~As amended on~~

~~[]~~

Version 001

EFTPOS ACCESS CODE

~~Commencing Date []~~

Commencement Date: 15 September 2006

Copyright © 2006 EFTPOS Access Australia Limited
ABN 99 119 811 344

EFTPOS Access Australia Limited
Level 24, 25 Bligh Street, SYDNEY NSW 2000
Telephone: (02) 9221-8944 Facsimile: (02) 9221 8057
www.eftposaccess.com.au

EFTPOS ACCESS CODE —EXPOSURE DRAFT

TABLE OF CONTENTS

1. INTRODUCTION	1
2. ACCESS RULES	5
3. NEW ENTRY PROCESS	8
4. ACCESS AGREEMENT	14
5. IMPLEMENTATION PROCESS	15
6. SERVICE REQUIREMENTS FOR MEMBERS	18
7. DISPUTE RESOLUTION	19
8. CONFIDENTIALITY	26
9. REPORTING	28
10. WARRANTIES AND LIABILITY	29
11. VARIATION OF THE ACCESS CODE	32
12. NOTICES	34
13. DEFINITIONS AND INTERPRETATION	36
SCHEDULE 1: CONFIDENTIALITY DEED	45
SCHEDULE 2: APPLICATION FORM	51
SCHEDULE 3: STANDARD ACCESS TERMS	53
SCHEDULE 4: FEES	64
SCHEDULE 5: STANDARD SERVICE	65

1. INTRODUCTION

1.1 BACKGROUND

- (a) On 6 September 2004, the RBA designated as a payment system pursuant to section 11 of the *Payment Systems (Regulation) Act 1998* the debit card payment system operated within Australia known as the EFTPOS system.
- (b) As defined by the RBA, the EFTPOS system is the electronic funds transfer at the point of sale payment system described in clause 1 of the CECS Regulations and Manual and governed by rules of that system set out in the CECS Manual, supplemented or modified by contracts, arrangements or understandings between individual Issuers, Acquirers and Self-Acquirers in the system.
- (c) The Members acknowledge and agree that the Access Code is a contract between Members in respect of access entitlements in the EFTPOS system designated by the RBA.

1.2 SCOPE

- (a) The Access Code, regulates access to the Standard Service.
- (b) Access to Indirect Connection and Indirect Clearing/Settlement services is not regulated under the Access Code.
- (c) Access in respect of EFTPOS Transactions provided pursuant to any contract, arrangement or understanding:
 - (i) entered into prior to the Commencement Date; or
 - (ii) with rights and obligations additional to, or which vary from, the rights and obligations provided for in this Access Code,

is not regulated under the Access Code.

1.3 ACCESS CODE OBJECTIVES

The objectives of the Access Code are to:

- (a) facilitate equitable and practicable access to the Standard Service and thereby promote competition;
- (b) take into account Access Providers' proprietary rights;
- (c) take into account the interests of current and future Members, including Access Seekers;
- (d) be objective and transparent;
- (e) be technology neutral, which in the context of the Access Code is intended to mean that the Access Code will regulate access without promoting, impeding, or endorsing a particular technology or technological solution; and
- (f) achieve all of the above in a self-regulatory regime without impinging on:
 - (i) the integrity, security, reliability and stability of EFTPOS Transactions; or
 - (ii) the universal acceptance of EFTPOS cards.

1.4 OPERATION OF THE ACCESS CODE

Members must provide the Standard Service to Access Seekers in accordance with:

- (a) the Access Code, as amended from time to time, which includes obligations to:
 - (i) pay the Annual Membership Fee as provided in clause 1.8;
 - (ii) comply with the requirements of the New Entry Process set out in clause 3;
 - (iii) participate, if and when required, in the Implementation process set out in clause 5;
 - (iv) comply with the service obligations set out in clause 6;
 - (v) resolve Disputes in accordance with the Dispute Resolution process set out in clause 7; and

- (vi) meet the confidentiality obligations set out in clause 8; and
- (b) any relevant terms and conditions of the CECS Manual, as amended from time to time.

1.5 EFFECT OF THE ACCESS CODE

- (a) The Access Code has been established for the benefit of current and future Members who, and in consideration of becoming Members, acknowledge that they are bound to:
 - (i) comply with the Constitution and the Access Code; and
 - (ii) fulfil and perform every obligation and duty imposed on them by or pursuant to the Constitution and the Access Code.
- (b) The Access Code has the effect of a contract under seal:
 - (i) between the Access Company and each Member; and
 - (ii) between the Members.
- (c) The contractual relationship between the Access Company and the Members, and between the Members, forms part of the ongoing business relationships between the parties in relation to the processing of EFTPOS Transactions.

1.6 INCONSISTENCIES

- (a) If a provision in the Access Code is inconsistent with a provision of the EFTPOS Access Regime, the provision of the EFTPOS Access Regime prevails.
- (b) If a provision in the Access Code is inconsistent with a provision of the Constitution, the provision of the Constitution prevails but only to the extent the provision of the Constitution is consistent with the EFTPOS Access Regime.
- (c) If a provision in the Access Code is inconsistent with a provision of the CECS Regulations or Manual, the provision of the Access Code prevails.

1.7 ADMINISTRATION

- (a) The Access Company must appoint a person to administer the Access Code (**Administrator**). The Administrator's obligations include to:
- (i) participate, as required, in the New Entry Process as described in clause 3;
 - (ii) participate, as required, in the resolution of Disputes in accordance with clause 7; and
 - (iii) make recommendations to the Access Company in relation to Minor Variations to the Access Code in accordance with clause 11.2.
- (b) In fulfilling its role, the Administrator is bound to act in accordance with the objectives of the Access Code as set out in clause 1.3 and is bound to comply with any duties and obligations imposed by:
- (i) the Access Code; and
 - (ii) the agreement between the Access Company and the Administrator (**Management Agreement**).
- (c) The Access Company must (directly or indirectly) procure from the Administrator, and Expert, as the case may be, the performance of those matters expressed in this code to be the obligations of the Administrator and Expert respectively.

1.8 MEMBERSHIP FEES

Members must pay the Annual Membership Fee to cover costs associated with the administration of the Access Code, including the costs of the Administrator (see Schedule 4).

1.9 COMMENCEMENT

The Access Code takes effect from the date when the Access Code has been prescribed by the Access Company, which will be no later than ~~1 January~~31 December 2006 (**Commencement Date**).

2. ACCESS RULES

2.1 ACCESS OBLIGATION

- (a) A Member must:
 - (i) provide, or be capable of providing, the Standard Service in accordance with the terms of the Access Code; and
 - (ii) comply, or be capable of complying, with any relevant obligations set out in the CECS Manual as amended from time to time.
- (b) A Member who is an Acquirer or an Issuer must engage in Clearing and Settlement with other Acquirer and Issuer Members directly. The Member may also agree to alternative arrangements for Clearing and Settlement with another Member who is an Acquirer or an Issuer. For the avoidance of doubt, a Member is not required to have an ESA to complete Settlement.
- (c) Access Seekers and Members must not do anything that could hinder or prevent access to the Standard Service.
- (d) Under the Access Code, Members have the right to:
 - (i) decide whether or not to act as a Switch. For the avoidance of doubt a Member is not obliged to provide Switching services to any person seeking to act as an Indirect Connector; and
 - (ii) decide whether or not to act as a Clearing/Settlement Agent. For the avoidance of doubt, a Member is not obliged to provide Clearing or Settlement services to any person seeking to act as an Indirect Clearer/Settler.
- (e) The access rights granted under the Access Code are non-exclusive contractual rights and do not give Access Seekers any right, title or interest of any proprietary nature in an Access Provider's EFTPOS infrastructure and systems.

2.2 ELIGIBILITY CRITERIA

(a) A Constitutional Corporation is eligible to seek access to the Standard Service under the Access Code if it:

(i) maintains, or within twelve (12) months of entering into an Access Agreement will maintain, a connection to at least two Direct Connectors in accordance with the requirements under the Access Code; and

(ii) maintains or will maintain:

A. connections to at least three Direct Connectors within thirty six (36) months of entering into its first Access Agreement under the Access Code; or

B. connections to four Direct Connectors within twelve (12) months of entering into its third Access Agreement under the Access Code; or

(iii) in the alternative to (i) and (ii) above, is a Direct Connector as at the Commencement Date; and

~~(iii)~~(iv) is solvent (within the meaning given to that term in the *Corporations Act* 2001); and

~~(iv)~~(v) is not, and has not been within the previous two years, in material default of any Access Agreement with a Member, or any other agreement for the provision of access in respect of EFTPOS Transactions; and

~~(v)~~(vi) complies, or within twelve (12) months of entering into an Access Agreement will be capable of complying, with all the relevant obligations applicable to Members under the Access Code and any relevant obligations set out in the CECS Manual, as amended from time to time; and

~~(vi)~~(vii) _____ is a prudentially supervised ADI, except that if the Constitutional Corporation:

A. is a Self-Acquirer ~~not otherwise expressly acting as an Issuer or an Acquirer~~; or

B. a Switch,

not otherwise expressly acting as an Issuer or an Acquirer the requirement to be an ADI does not apply.

2.3 ASSESSING COMPLIANCE WITH ACCESS OBLIGATIONS AND ELIGIBILITY CRITERIA

If there is disagreement between an Access Seeker and a Member, or between Members, in respect of:

- (a) a Member's compliance with the access obligations set out in clause 2.1; or
- (b) the actual or prospective ability of an Access Seeker or Member to meet, or continue meeting, the eligibility criteria set out in clause 2.2,

any of the parties to the disagreement may trigger the Dispute Resolution process set out in clause 7.

3. NEW ENTRY PROCESS

3.1 INTRODUCTORY GUIDE

- (a) The Administrator must prepare and periodically update an introductory guide to EFTPOS access dealing with matters such as:
- (i) an introduction to the Access Code and the CECS Manual;
 - (ii) an outline of eligibility criteria for Access Seekers;
 - (iii) an outline of the process and steps required to become a Member;
 - (iv) to the extent they are ascertainable, a list of fees and charges payable, or likely to be payable, as part of the processes of applying for access and becoming a Member;
 - (v) a copy of the Application Form (prepared in accordance with the requirements set out in Schedule 2);
 - (vi) a copy of the Confidentiality Deed (substantially in the form of Schedule 1); and
 - (vii) any other matters that the Administrator considers relevant.
- (b) The Administrator must prepare and periodically update a list of all Members.
- (c) The Administrator must make the guide referred to in paragraph (a) and the list referred to in paragraph (b) available upon the request of any person.

3.2 ASSISTANCE BY THE ADMINISTRATOR

- (a) If a person who has obtained the guide referred to in clause 3.1 requires information not covered in the guide, the person may approach the Administrator for assistance.
- (b) If a request for assistance is made, the Administrator must provide any information reasonably required by the person making the request.

- (c) For the purposes of paragraph (b), it is not reasonable to:
 - (i) require information that is Confidential Information of the Administrator or a Member; or
 - (ii) to require information that is not related to the operation of the Access Code.
- (d) The Administrator may charge its reasonable costs of providing assistance under this clause 3.2.

3.3 INFORMATION TO BE PROVIDED TO THE ADMINISTRATOR

Members must provide the Administrator with the name and contact details of a person who will receive and process all Application Forms addressed to the Member.

3.4 APPLICATION PROCESS

- (a) An Access Seeker must:
 - (i) request from the Administrator, and the Administrator must provide, a copy of the Access Code and the CECS Manual;
 - (ii) lodge with the Administrator a completed Application Form;
 - (iii) provide to the Administrator an executed counterpart of the Confidentiality Deed for each Access Provider from whom the Access Seeker is requesting access;
 - (iv) agree to comply with the Access Code from the time of lodgement of the Application Form until the negotiation period is deemed to end (as determined in accordance with the Negotiation Timetable provided in clause 3.5.4); and
 - (v) pay the Application Fee (see Schedule 4).
- (b) Upon receiving an Application Form and having the Application Fee paid, the Administrator must forward the executed counterpart of the Confidentiality Deed to each Access Provider from which access is to be requested.

- (c) An Access Provider that has received an executed counterpart of a Confidentiality Deed under paragraph (b) must within fifteen (15) Business Days of receiving it:
 - (i) execute its counterpart of the Confidentiality Deed; and
 - (ii) return the executed counterpart of the Confidentiality Deed to the Administrator.
- (d) Upon receipt of an executed counterpart of a Confidentiality Deed from an Access Provider, the Administrator must:
 - (i) forward the executed counterpart of the Confidentiality Deed to the Access Seeker; and
 - (ii) forward the Access Provider a copy of the Application Form from the Access Seeker.
- (e) Information provided by the Access Seeker in the Application Form and as part of the application process is Confidential Information and must be treated in accordance with clause 8.

3.5 NEGOTIATION PROCESS

3.5.1 Access Seeker Information Package

Within thirty five (35) Business Days of receiving an Application Form, an Access Provider must either:

- (a) notify the Access Seeker that in the Access Provider's opinion, the Access Seeker does not meet the eligibility requirements set out in clause 2.2; or
- (b) give the Access Seeker an information package (**Access Seeker Information Package**) containing:
 - (i) an offer for the provision of the Standard Service in compliance with clause 3.5.2 (**Access Offer**); and

- (ii) any further information that in the Access Provider's opinion is relevant to the negotiation process.

3.5.2 Access Offer

The Access Offer referred to in clause 3.5.1(b)(i) must:

- (a) include the Access Provider's Standard Access Terms (prepared in accordance with Schedule 3);
- (b) include as part of the Access Provider's Standard Access Terms an Access Charge that ~~does not exceed any RBA Benchmark~~complies with the relevant obligations set out in the EFTPOS Access Regime; and
- (c) be an offer capable of being accepted by the Access Seeker.

3.5.3 Acceptance of Access Offer without negotiation

- (a) The Access Seeker may accept the Access Offer provided under clause 3.5.1(b)(i) without undertaking any negotiations with the Access Provider.
- (b) If the Access Seeker accepts the Access Offer in accordance with paragraph (a), the Access Seeker and the Access Provider must enter into an Access Agreement substantially in the form of the Access Offer.

3.5.4 Negotiation Timetable

If an Access Provider and Access Seeker enter into negotiations in respect of access, negotiations must be conducted in accordance with the following timetable (**Negotiation Timetable**):

- (a) the negotiation period is deemed to commence the earlier of:
 - (i) the day when the Access Seeker gives the Access Provider notice that it is ready to commence negotiations; or
 - (ii) after twenty (20) Business Days have lapsed since the Access Seeker received the Access Seeker Information Package; and

- (b) the negotiation period is deemed to end on the earlier of:
 - (i) the day when the Access Seeker and the Access Provider agree to the terms and conditions of a binding Access Agreement between them;
 - (ii) the day when the Access Seeker and the Access Provider agree to end all negotiations in respect of access;
 - (iii) when the number of days elapsed since the negotiation period commenced is equal to forty (40) Business Days; or
 - (iv) when three (3) months have elapsed since the Access Seeker lodged the Application Form in accordance with clause 3.4(d).

3.5.5 Dispute resolution

If the Access Seeker and Access Provider have not agreed on the terms of an Access Agreement by the date on which the negotiation period ends (as determined in accordance with the Negotiation Timetable provided in clause 3.5.4(b)(iii)), either the Access Seeker or the Access Provider may refer the matter to the Dispute Resolution process set out in clause 7.

3.5.6 Conduct of the negotiations

In conducting the process set out in this clause 3.5, Access Providers and Access Seekers must:

- (a) use reasonable endeavours to provide appropriate information requested by the other party as part of the negotiation process; and
- (b) negotiate in good faith.

3.5.7 Confidentiality

Access Providers are not obliged to engage in the negotiation process with Access Seekers who have not entered into a Confidentiality Deed substantially in the form of the Confidentiality Deed set out in Schedule 1.

3.5.8 Costs

The Access Seeker and the Access Provider must each bear its own costs and expenses of negotiating, preparing and executing the Access Agreement and any other instrument executed under the Access Code.

4. ACCESS AGREEMENT

4.1 ENTERING INTO A NEW ACCESS AGREEMENT

- (a) The Access Seeker and the Access Provider must enter into an access agreement for the provision of the Standard Service prepared in accordance with the process provided for in clause 3 (**Access Agreement**).
- (b) Access Agreements executed under the Access Code:
- (i) must contain Standard Access Terms prepared in compliance with Schedule 3; and
 - (ii) may contain any terms agreed by the Access Seeker and the Access Provider in addition to the Standard Access Terms (**Additional Terms**), including terms in relation to the provision of services other than the Standard Service, provided that the Additional Terms are not inconsistent with, and do not derogate from, the rights given to the Access Seeker under the Standard Access Terms. For the avoidance of doubt, the Access Code does not regulate the rights of the Access Seeker and Access Provider in relation to Additional Terms and any disputes arising between the parties in relation to the Additional Terms must ~~be resolved commercially between the parties and must~~ not be referred to the Dispute Resolution process in clause 7.

4.2 ACCESS SEEKER'S OBLIGATION TO BECOME A MEMBER

On or about the time of signing of an Access Agreement under clause 4.1 in respect of access to the Standard Service, the Access Seeker must become a Member thereby agreeing to be bound by the Constitution and the Access Code as provided for in clause 1.5.

4.3 VARYING AN EXISTING ACCESS AGREEMENT

The parties to an existing Access Agreement may agree to vary the terms of an Access Agreement, provided that the agreement, as varied, meets the requirements set out in clause 4.1(b).

5. IMPLEMENTATION PROCESS

5.1 APPLICATION

- (a) Access Seekers who are party to an Access Agreement must complete the relevant obligations in Step 1 (Planning), Step 2 (Certification), Step 3 (Test Planning) and Step 4 (Testing) of the Implementation process (as set out in clauses 5.2, 5.3, 5.4 and 5.5, respectively).
- (b) Access Providers who are party to an Access Agreement must complete the relevant obligations in Step 1 (Planning), Step 3 (Test Planning) and Step 4 (Testing) of the Implementation process (as set out in clauses 5.2, 5.4 and 5.5, respectively).

5.2 STEP 1: PLANNING

- (a) The Access Seeker and Access Provider must meet to discuss and agree on an implementation project plan (**Project Plan**).
- (b) The Access Provider and the Access Seeker must provide all information reasonably required for the preparation of the Project Plan.
- (c) The Access Provider or Access Seeker may request from the Administrator, and if requested the Administrator must provide, any assistance reasonably required for the preparation of the Project Plan.

5.3 STEP 2: CERTIFICATION

Before the Access Seeker may proceed to conduct testing with the Access Provider as set out in Step 4, the Access Seeker must provide to the Access Provider a current certificate from APCA confirming that the systems the Access Seeker intends to use for connecting to the systems of the Access Provider have been certified in accordance with the requirements set out in Part 2 of the CECS Manual (as relevantly required depending on whether the Access Seeker will act as an Issuer, Acquirer and/or Switch). APCA may charge its reasonable costs of providing such certification.

5.4 STEP 3: TEST PLANNING

- (a) Before beginning Step 4 of the Implementation process, the Access Seeker must, in consultation with the Access Provider, update the Project Plan.
- (b) The updated Project Plan must:
 - (i) include a timetable (**Testing Timetable**) for testing the operation of the Access Seeker's system with the Access Provider's systems;
 - (ii) include a testing protocol, describing the duration and scope of the testing process and the standards that must be met in order to complete testing successfully (**Testing Protocol**); and
 - (iii) be approved by the Access Provider, which approval will not be unreasonably withheld.
- (c) The Testing Protocol must have regard to:
 - (i) any relevant obligations set out in the CECS Manual; as amended from time to time; and
 - (ii) reasonable requests of the Access Provider.
- (d) The Testing Timetable must provide that testing will be undertaken during a Testing Window, or at another time agreed between the Access Seeker and Access Provider.

5.5 STEP 4: TESTING

- (a) The Access Seeker and the Access Provider must conduct tests in accordance with the Testing Timetable and Testing Protocol developed in clause 5.4.
- (b) Testing will be deemed to be successful if and when all tests in the Testing Protocol are successfully completed in accordance with the criteria set out in the Testing Protocol.

5.6 PROJECT PLANS AND OTHER ACCESS AGREEMENTS

For the avoidance of doubt, when agreeing, proposing or approving a Project Plan or updated Project Plan pursuant to Step 1 (Planning) or Step 3 (Test Planning) of the Implementation process the Access Seeker and the Access Provider must have regard to any other Access Agreement(s) that may require the Access Provider to engage in a concurrent or overlapping Implementation process.

5.65.7 COSTS

- (a) The Access Seeker must bear all of its costs of compliance with the Implementation process.
- (b) The Access Seeker must pay any Access Charges specified in the Access Agreement as they relate to the Implementation process.

6. SERVICE REQUIREMENTS FOR MEMBERS

6.1 QUALITY OF SERVICE

Each Member must meet the relevant service levels and operational requirements set out in the CECS Manual as amended from time to time.

6.2 SYSTEMS' PROTECTION AND SAFETY

Each Member is responsible for ensuring that they maintain a current valid certification as provided by APCA in Part 2 of the CECS Manual.

6.3 SUSPENSION

- (a) Subject to paragraph (b), any Member (**Suspending Member**) may suspend the provision of the Standard Service to another Member (**Suspended Member**) as provided for in the provisions of clause 2.2.2 of the CECS Manual, as amended from time to time.
- (b) A Suspending Member must not suspend the provision of the Standard Service other than and only to the extent reasonably necessary to address the event that caused the suspension.

7. DISPUTE RESOLUTION

7.1 APPLICATION OF THIS CLAUSE

- (a) This clause applies to a dispute:
- (i) between Members, or between an Access Seeker and a Member, in respect of the actual or prospective ability of the Access Seeker or Member to meet or continue meeting the eligibility criteria set out in clause 2.2;
 - (ii) between Members, or between an Access Seeker and a Member, arising in connection with the rights and obligations under the Access Code; or
 - (iii) between parties to an Access Agreement in relation to the rights and obligations of the parties under that Access Agreement but only if those rights and obligations are regulated under the Access Code,
- (Dispute).
- (b) This clause and the definition of Dispute do not apply to any dispute between Members, or involving Members, in connection with rights and obligations under agreements that have been entered into other than pursuant to and regulated by the Access Code.

7.2 COURT PROCEEDINGS

A Member or an Access Seeker must not start court proceedings (except proceedings seeking interlocutory relief) in relation to a Dispute unless it has followed the procedure set out in this clause 7.

7.3 PANEL OF EXPERTS

- (a) The Access Company must, from time to time, appoint persons to act as experts for determining Disputes under the Access Code (**Panel of Experts**), provided that the persons so appointed are, in the Access Company's reasonable opinion, suitably qualified to act as experts.

- (b) The Administrator must maintain a register of persons who have been appointed by the Access Company to the Panel of Experts.
- (c) A person may be considered suitably qualified to act as an Expert for the purposes of paragraph (a), if the person has:
 - (i) no less than ~~2~~ years experience acting as an independent expert resolving disputes; or
 - (ii) knowledge and/or experience in the payments industry, including but not limited to knowledge or experience of:
 - A. the CECS Manual;
 - B. payments processing (for debit and credit transactions); or
 - C. clearing and settlement processes (for debit and credit transactions).

7.4 NOTIFICATION OF A DISPUTE

- (a) Any Access Seeker or Member can notify a Dispute by issuing a written notice to the other party to the Dispute stating that a Dispute has arisen, setting out the nature of the Dispute and the grounds for the Dispute (**Dispute Notice**).
- (b) Within ten (10) Business Days of the receipt of a Dispute Notice the parties to the Dispute must meet and use reasonable endeavours acting in good faith to resolve the Dispute by joint discussions.
- (c) Unless otherwise agreed by the parties in writing, if the parties to the Dispute are unable to resolve the Dispute within fifteen (15) Business Days of commencing discussions under paragraph (b), the CEO of each party to the Dispute or a senior representative of each party suitably authorised to make decisions in relation to the Dispute must meet and use reasonable endeavours acting in good faith to resolve the Dispute by joint discussions.
- (d) Unless otherwise agreed by the parties in writing, if the parties to the Dispute are unable to resolve the Dispute within fifteen (15) Business Days of commencing

discussion under paragraph (c), the parties to the Dispute must refer the Dispute to an independent expert for determination pursuant to clause 7.6.

7.5 WITHDRAWAL OF DISPUTE NOTICE

The party to a Dispute that issued the Dispute Notice may withdraw the Dispute Notice at any time before the expert makes a decision in relation to the Dispute.

7.6 EXPERT DETERMINATION PROCESS

7.6.1 Appointment of Expert

- (a) A person must be appointed to act as expert to resolve particular Disputes (**Expert**).
- (b) The parties to the Dispute may agree to appoint:
 - (i) the Administrator (if the Administrator informs the parties it accepts the appointment);
 - (ii) an expert from the Panel of Experts; or
 - (iii) an expert from outside the Panel of Experts,to act as the Expert for their Dispute.
- (c) If the parties to the Dispute fail to agree to appoint a person to act as Expert within ten (10) Business Days of the Dispute being referred under clause 7.4(d) to expert determination, then the Administrator must appoint a person from the Panel of Experts to act as Expert. In making such appointment, the Administrator should have regard to the desirability of appointing persons who:
 - (i) are suitably qualified (as defined in clause 7.3(c)); and
 - (ii) do not have conflicts of interest in relation to the Dispute or the parties to it.

7.6.2 Process

- (a) Within ten (10) Business Days after the appointment of the Expert, each party must give the Expert and the other party a copy of:
 - (i) the Dispute Notice;
 - (ii) a statement of the facts upon which the party relies in relation to the Dispute;
 - (iii) a statement of the party's contentions in relation to each matter in Dispute; and
 - (iv) a document stating the names and the titles or positions of the persons whom that party intends will appear before or meet with the Expert.
- (b) Each party has the right to reply to the submissions made by the other in paragraph (a), to be made within five (5) Business Days of receiving these submissions.
- (c) Each party has the right to respond to the written reply made by the other in paragraph (b), to be made within five (5) Business Days of receiving the other's written reply.
- (d) In resolving the Dispute, the Expert:
 - (i) must act in a fair and unbiased manner;
 - (ii) must act as an expert and not as an arbitrator, and the provisions of the *Commercial Arbitration Act 1984* (NSW) have no application to the Expert's determination;
 - (iii) may not be bound by the rules of evidence;
 - (iv) may receive evidence and submissions from the parties in a form and at times as the Expert determines, and make copies of them available to the other party;

- (v) may permit the parties to meet with or appear before the Expert personally or be represented by any person at any meeting or hearing conducted by the Expert;
 - (vi) must determine the times and places at which any meeting or hearing will be held;
 - (vii) must take into account any statements, evidence, submissions or other material received from any party, and any other material from other sources as the Expert considers desirable for the purpose of resolving the Dispute;
 - (viii) may require any party to produce to the Expert documents in the party's possession or control as the Expert considers desirable for the purpose of resolving the Dispute; and
 - (ix) may take steps the Expert considers necessary to protect the confidentiality of any documents or other material received by him or her.
- (e) The Expert must at any time terminate the determination process without making a final determination if he or she thinks that:
- (i) the Dispute Notice was vexatious;
 - (ii) the subject matter of the Dispute is trivial, misconceived or lacking in substance; or
 - (iii) the party who initiated or continues to press the Dispute has not engaged in discussions under clauses 7.4(b) and 7.4(c) in good faith.

7.6.3 Determination

- (a) The Expert must resolve the Dispute within fifty (50) Business Days after his or her appointment by issuing a written determination.
- (b) In undertaking determination of a Dispute, the Expert must have regard to all matters considered relevant, including:

- (i) the Access Code;
 - (ii) in respect of a dispute concerning the quantum of Access Charges to be paid by an Access Seeker to an Access Provider pursuant to an Access Agreement, the Expert's determination of the quantum of Access Charges ~~must not exceed:~~
 - A. must take into account the ~~RBA Benchmark~~ relevant obligations set out in the EFTPOS Access Regime; or
 - B. if there is no ~~RBA Benchmark~~, EFTPOS Access Regime in force, must not exceed the Expert's assessment of the efficient incremental cost of providing the Standard Service.
- (c) The Expert's written determination:
- (i) must set out the reasons for the determination; and
 - (ii) may include, as part of the Expert's resolution of the Dispute, directions requiring:
 - A. a party to pay a sum of money to the other party;
 - B. a party to pay interest on any such sum;
 - C. a party to pay the other party's costs of complying with the Dispute resolution procedure in this clause; and
 - D. a party to do any other act or thing, or to refrain from doing any act or thing, as the expert considers desirable to resolve the Dispute.
- (d) Subject to any order of a court to the contrary, a party must comply with the Expert's determination, including any directions made in the determination.
- (e) The Expert's determination is final and binding upon the parties.

7.7 COSTS

Each party must pay an equal share of the total costs and expenses of the Expert in resolving the Dispute, unless the Expert orders otherwise.

7.8 SECURITY

While a Dispute is being dealt with in accordance with this clause 7, either party to the Dispute may request a reasonable form of security to secure payment of any amounts payable, or likely to be payable, to that party upon resolution of the Dispute.

8. CONFIDENTIALITY

- (a) All Confidential Information ~~is~~must be treated as confidential ~~to~~by the recipient of that information, its employees, legal advisers, auditors and, on a need to know basis, any other of its contractors, prospective contractors, or other consultants or prospective consultants.
- (b) Subject to paragraph (c), each Access Seeker, Member, Expert and the Administrator must keep confidential all Confidential Information and must not:
 - (i) use or copy such Confidential Information except for the purposes of the Access Code; or
 - (ii) disclose or communicate, cause to be disclosed or communicated or make available, such Confidential Information to any third person.
- (c) A party (**Disclosing Party**) may to the extent necessary disclose the Confidential Information of another party:
 - (i) with the consent of the provider of that information (which consent is not to be unreasonably withheld);
 - (ii) in accordance with the requirements of the Access Code;
 - (iii) if required by the Administrator for ~~statistical purposes~~reporting requirements, on ~~an~~an aggregate basis which does not identify the provider of that information;
 - (iv) to the extent required by law or required by any stock exchange or supervisory or regulatory authority having jurisdiction over the Disclosing Party;
 - (v) in connection with legal proceedings relating to the Access Code or an Access Agreement made under the Access Code; or
 - (vi) if the information is generally and publicly available.
- (d) If required by law or by any stock exchange or supervisory or regulatory authority to disclose Confidential Information:

- (i) the Disclosing Party must, prior to that disclosure, notify the provider of that information;
 - (ii) the Disclosing Party and the person who provided the Confidential Information must, acting reasonably, agree the form of the disclosure (unless they are restrained from doing so by the law or requirement); and
 - (iii) the Disclosing Party must seek reasonable confidentiality arrangements to protect the confidentiality of the Confidential Information and to prevent further disclosure.
- (e) Each Access Seeker, Member, Expert and the Administrator acknowledge that a breach of this clause may cause another party irreparable damage for which monetary damages would not be an adequate remedy. Accordingly, in addition to other remedies that may be available, a party may seek injunctive relief against such a breach or threatened breach of this clause 8.

9. REPORTING

9.1 REPORTING

- (a) The Administrator may:
 - (i) establish reporting requirements for Members as required to ensure compliance with, and the effectiveness of, the Access Code; and
 - (ii) notify all Members of the application of those requirements.
- (b) In establishing reporting requirements, the Administrator must consult with all Members.
- (c) Each Member must comply with all reporting requirements set out by the Administrator under the Access Code. In complying with this obligation, a Member must not recklessly or knowingly provide, or permit any other person to provide on behalf of that Member, misleading or deceptive data or information to any other Member or to the Administrator.
- (d) A Member may request, and the Administrator may agree to impose, reasonable additional reporting requirements on another Member in order to monitor or assess compliance with the Access Code by that Member. Unless it would frustrate the reasonable purpose of the reporting, the results of that additional reporting must be kept confidential by the Administrator.
- (e) Each Member must bear its own costs of complying with the reporting requirements under the Access Code.

9.2 TRANSPARENCY

The Administrator may publish, from time to time, a report providing information on compliance with the Access Code.

10. WARRANTIES AND LIABILITY

10.1 MEMBER WARRANTIES

At all times, each Member represents and warrants to each other Member, the Access Company and/or the Administrator that:

- (a) it has the power to observe its obligations under this Access Code;
- (b) it performs its obligations under the Access Code in good faith;
- (c) it will not seek to prevent any other Member, the Access Company and/or the Administrator from obtaining specific performance of its obligations under the Access Code;
- (d) it has not relied on any representation made by any other Member, the Access Company and/or the Administrator to induce it to become a Member or otherwise act in accordance with the Access Code;
- (e) it has made (without reliance on any other Member, the Access Company and/or the Administrator) its own independent investigation of the financial condition and affairs of each other Member;
- (f) it has made (without reliance on any other Member, the Access Company and/or the Administrator) its own independent assessment and approval of the Access Code as being appropriate with respect to access to the Standard Service; and
- (g) its obligations under the Access Code are valid and binding.

10.2 ACCESS COMPANY AND/OR ADMINISTRATOR NOT LIABLE

To the extent permitted by law and with the exception of obligations with respect to specific performance, the Access Company and/or Administrator will not be liable for any loss to any persons or damage to persons or property, whether such loss or damage is direct or consequential (including economic loss and loss of profits), howsoever arising out of the performance of the Access Company's and/or Administrator's obligations under the Access Code including:

- (a) any decision made by the Access Company or the Administrator in connection with the procedure for variation of the code set out in clause 11 of the Access Code;
- (b) any act or omission by any Member or any other person other than the Access Company and/or Administrator, their officers, employees or agents (including without limitation any errors or delays, any breach of warranty or undertaking or representation, any breach of the Access Code or the terms of any other document relating to the Access Code, any Insolvency Event, any fraud or any forgery);
- (c) any act or omission done by, or any refusal to do any act by, the Access Company and/or Administrator, their officers, employees or agents in good faith and without negligence or in reliance on any act, conduct or consent of any other person or on any instructions, information or document provided by any other person;
- (d) any fraud or forgery on the part of any officer, employee or agent of the Access Company and/or the Administrator outside the scope of their employment;
- (e) the failure of the Access Company and/or the Administrator, their officers, employees or agents to receive any instructions, information or document from any other person, unless the failure has resulted from a negligent act or omission of the Access Company and/or Administrator;
- (f) the terms of any instructions, information or document given to the Access Company and/or Administrator, their officers, employees or agents by any other person;
- (g) any error or omission in any document issued by the Access Company and/or Administrator, other than an error or omission resulting from a negligent act or omission of the Access Company and/or Administrator;
- (h) any technological failure of any sort (including without limitation any telephone, computer or electrical failure);
- (i) any contractual arrangements between any Member and any other person; or

- (j) any change in the status, financial condition, affairs or creditworthiness of a Member or another person, including without limitation in its capacity as a Direct Connector, Switch, Direct Clearer/Settler or Clearing/Settlement Agent.

10.3 LIMITATION OF LIABILITY

If, notwithstanding paragraph 10.2, any liability is incurred by the Access Company and/or the Administrator in relation to the Access Code, to the extent permitted by law, the aggregate amount of that liability in respect of all claims made by Members in respect of, or arising out of, any one event will not exceed the highest aggregate amount of Annual Membership Fees paid by Members during the twelve (12) months preceding the month in which the liability is incurred.

11. VARIATION OF THE ACCESS CODE

11.1 VARIATION OF THE CODE

The Access Company may vary the Access Code if:

- (a) the Access Company:
 - (i) has received a recommendation from the Administrator to make a Minor Variation; or
 - (ii) has notified Members and the Administrator of the proposed variation to the Access Code, inviting them to provide comments or make submissions, and has given due consideration to those comments or submissions;
- (b) the variation is consistent with the objectives of the Access Code as set out in clause 1.3;
- (c) the variation is consistent with the terms of the EFTPOS Access Regime; and
- (d) the variation has been approved in accordance with clause 11.3.

11.2 RECOMMENDATIONS BY THE ADMINISTRATOR

If the Administrator considers that it is necessary or desirable to make a variation to the Code which is of a procedural or technical matter, or required to correct a manifest error in relation to any part of the Access Code (**Minor Variation**), the Administrator may make a recommendation to the Access Company with respect to a variation of the Access Code.

11.3 APPROVAL OF VARIATIONS

- (a) If the variation is a Minor Variation, the variation must be approved by the Board of the Access Company by a simple majority of the Board.
- (b) If the variation is not a Minor Variation, it must be approved by the Access Company in a general meeting by a Special Resolution.

11.4 REGULATORY APPROVALS

The Access Company must obtain any regulatory approvals necessary prior to the implementation of any variation to the Access Code.

12. NOTICES

- (a) A notice, consent or other communication under the Access Code is only effective if it is:
 - (i) in writing and in legible English, signed by or on behalf of the person giving it;
 - (ii) addressed to the person to whom it is to be given; and
 - (iii) either:
 - A. sent by pre-paid mail (by airmail, if the addressee is overseas) or delivered to that person's address; or
 - B. sent by fax to that person's fax number.
- (b) Subject to paragraph (a) a notice, consent or other communication under the Access Code is, in the absence of earlier receipt, regarded as given and received:
 - (i) if it is delivered, on delivery at the address of the relevant person;
 - (ii) if it is sent by fax at the time and on the day it was successfully sent; or
 - (iii) if it is sent by mail, on the third Business Day after the day of posting, or if to or from a place outside Australia, on the seventh Business Day after the day of posting.
- (c) If a notice, consent or other communication under the Access Code is given and received on a day that is not a Business Day or after 5.00 pm (local time in the place of receipt) on a Business Day, it is regarded as being given and received at 9.00 am on the next Business Day.
- (d) For the purposes of this clause, a person's address and fax number are:
 - (i) if the addressee is the Administrator, the registered office of the Administrator; and

- (ii) if the addressee is a Member, an address shown for that person in the register of Members maintained by the Administrator; and
- (iii) in all other cases, the address and fax number (if any) supplied by that person to the sender of the notice.

13. DEFINITIONS AND INTERPRETATION

13.1 DEFINITIONS

- (a) Terms used in the Access Code not defined in this clause have the meaning given to that term in the CECS Regulations or Manual.
- (b) The following definitions apply to the Access Code.

Acquirer has the meaning given to the term EFTPOS Acquirer in the CECS Manual.

Access Agreement means an agreement for the provision of the Standard Service by an Access Provider to Access Seeker made in accordance with the terms of this Access Code.

Access Charges means charges payable by an Access Seeker to an Access Provider under an Access Agreement.

Access Code means the EFTPOS Access Code.

Access Company means ~~the~~ EFTPOS Access ~~Company~~ Australia Limited (ABN 99 119 811 344), a company limited by guarantee.

Access Offer has the meaning given to that term in clause 3.5.1(b)(i).

Access Provider means a:

- Member that has agreed to provide the Standard Service pursuant to an Access Agreement in accordance with the terms of the Access Code; and/or
- Member that has received an Application Form from an Access Seeker requesting access to the Standard Service.

Access Seeker means a person seeking access to the Standard Service from Access Providers in accordance with the terms of the Access Code.

Access Seeker Information has the meaning given to that term in clause 3.5.1(b).

Package

Additional Terms	has the meaning given to that term in clause 4.1(b)(ii).
Administrator	has the meaning given to that term in clause 1.7(a).
Annual Membership Fees	has the meaning given to that term in Schedule 4.
APCA	means the Australian Payments Clearing Association Limited (ABN 12 055 136 519).
ADI	means a body corporate authorised to carry on banking business in Australia under the <i>Banking Act</i> .
Application Fee	has the meaning given to that term in Schedule 4.
Application Form	means the application form set out in Schedule 2.
Available Party	has the meaning given to that term in clause 10.3 of Schedule 3.
Board	means the Board of the Access Company.
Business Day	means a day on which banks are open for business excluding Saturdays, Sundays and public holidays in New South Wales.
CECS Manual	means the Manual adopted by APCA for the purposes of the Consumer Electronic Clearing System, as amended from time to time.
CECS Regulations	means the Regulations adopted by APCA for the purposes of the Consumer Electronic Clearing System, as amended from time to time.
Clearing	has the meaning given to that term in the CECS Regulations.
Clearing/Settlement Agent	is a Direct Clearer/Settler that Clears and Settles on behalf of Indirect Clearers/Settlers.
Commencement Date	has the meaning given to that term in clause 1.9.
Confidential Information	of a party means all information of that party or any of its Related Bodies Corporate (regardless of form) which: <ul style="list-style-type: none"> (a) is regarded by the party as confidential to it or can reasonably be inferred to be confidential from the circumstances in which

it is disclosed;

- (b) is disclosed to or observed by another person; and
- (c) is not in or has not come into the public domain otherwise than by disclosure in breach of an obligation of confidence owed to the party,

and all notes, compilations, analyses, extracts, summaries and other records prepared by or for the benefit of the person receiving the information or any of its Related Bodies Corporate based on or incorporating that information.

Confidentiality Deed	means the Confidentiality Deed set out in Schedule 1.
Constitution	means the constitution of the Access Company, as amended from time to time.
Constitutional Corporation	has the meaning given to that term in the <i>Payment Systems and Netting Act</i> 1998.
Costs	includes costs, charges and expenses, including those incurred in connection with advisers.
Delayed Party	has the meaning given to that term in clause 10.3 of Schedule 3.
Direct Clearer/Settler	has the meaning given to that term in the CECS Regulations.
Direct Connector	means a Member that has established a direct communications link with at least two other Direct Connectors for the purposes of: <ul style="list-style-type: none">- exchanging Transaction Messages in respect of its own activities as an Issuer or Acquirer; and/or- exchanging Transaction Messages on behalf of other Issuers or Acquirers.
Disclosing Party	has the meaning given to that term in clause 8(c).
Dispute	has the meaning given to that term in clause 7.1.

Dispute Notice	has the meaning given to that term in clause 7.4(a).
Dispute Resolution Process	means the Dispute Resolution Process set out in clause 7.
EFTPOS	has the meaning given to that term in the CECS Manual.
EFTPOS Access Regime	means the access regime imposed by the RBA under section 12 of the <i>Payment Systems (Regulation) Act 1998</i> headed “Access Regime for the EFTPOS system” dated [...], as varied from time to time.
EFTPOS Transactions	has the meaning given to that term in the CECS Manual.
ESA	means an Exchange Settlement Account held with the RBA.
Expert	has the meaning given to that term in clause 7.6.1(a).
GST	means the goods and services tax as imposed by the GST Law together with any related interest, penalties, fines or other charges.
GST Amount	means, in relation to a Payment, an amount arrived at by multiplying the Payment (or the relevant part of the Payment if only part of a Payment is consideration for a Taxable Supply) by the appropriate rate of GST (being 10% when the GST Law commenced) or any lower rate notified from time to time by the person making the relevant Taxable Supply.
GST Law	has the meaning given to that term in <i>A New Tax System (Goods and Services Tax) Act 1999</i> , or, if that Act is not valid or does not exist for any reason, means any Act imposing or relating to the imposition or administration of a goods and services tax in Australia and any regulation made under that Act.
Implementation	means the process set out in clause 5.
Indirect Clearer/Settler	means a person that has appointed a Direct Clearer/Settler for the purposes of Clearing and Settling in respect of that person’s activities as an Issuer and/or Acquirer.
Indirect Clearing/Settlement	means Clearing and Settlement undertaken by a Clearing/Settlement

Agent for an Indirect Clearer/Settler.

Indirect Connection means a communications link between an Indirect Connector and a Switch.

Indirect Connector is an Issuer/Acquirer who maintains a communications link with a Switch for the purposes of exchanging Transaction Messages with that Switch in respect of the Indirect Connector's activities as an Issuer and/or Acquirer.

Insolvency Event means the happening of any of these events to a person:

- (a) an application is made to a court for an order or an order is made that the person be wound up;
- (b) an application is made to a court for an order appointing a liquidator or provisional liquidator in respect of the person, or one of them is appointed, whether or not under an order;
- (c) the person enters into, or resolves to enter into, a scheme of arrangement or composition with, or assignment for the benefit of, all or any class of its creditors, or it proposes a reorganisation, moratorium or other administration involving any of them;
- (d) the person resolves to wind itself up, or otherwise dissolve itself, or gives notice of intention to do so;
- (e) the person is or states that it is unable to pay its debts when they fall due;
- (f) as a result of the operation of section 459F(1) of the *Corporations Act* or any corresponding legislation, the person is taken to have failed to comply with a statutory demand;
- (g) the person is, or makes a statement from which it may be reasonably deduced that the person is, the subject of an event described in section 459C(2)(b) or section 585 of the *Corporations Act* or any corresponding legislation;

- (h) the person takes any step to obtain protection or is granted protection from its creditors, under any applicable legislation or an administrator is appointed to the person;
- (i) a body responsible for the prudential supervision of the person assumes management and control of that person;
- (j) to the extent not otherwise provided for above, the person goes into external administration within the meaning of the *Payment Systems and Netting Act 1998*; or
- (k) anything analogous or having a substantially similar effect to any of the events specified above happens under the law of any applicable jurisdiction.

Issuer has the meaning given to the term EFTPOS Issuer in the CECS Manual.

Law includes any requirement of any statute, rule, regulation, proclamation, ordinance, designation instrument, standard, access regime or by-law, present or future, and whether state, federal or otherwise.

Management Agreement has the meaning given to that term in clause 1.7(b)(ii).

Materials has the meaning given to that term in clause 10.3 of Schedule 3.

Member means a member of the Access Company.

Minor Variation has the meaning given to that term in clause 11.2.

Negotiation Timetable has the meaning given to that term in clause 3.5.4.

New Entry Process means the process set out in clause 3.

Outsourced Testing Expenses has the meaning given to that term in clause 10.3 of Schedule 3.

Original Access Agreement has the meaning given to that term in clause 3.1(c)(i) of Schedule 3.

Panel of Experts has the meaning given to that term in clause 7.3(a).

Payment	means a fee or an amount of any monetary consideration (other than a GST Amount).
Project Plan	has the meaning given to that term in clause 5.2(a).
RBA	means the Reserve Bank of Australia.
RBA Benchmark	means the benchmark calculated in accordance with paragraphs 9 to 16 of the EFTPOS Access Regime applying on the date the Access Agreement is entered into. <u>applicable from time to time.</u>
Related Body Corporate	has the meaning given to that clause in the <i>Corporations Act 2001</i> .
Settlement	means the process of discharging payment obligations between Issuers and Acquirers arising from EFTPOS Transactions.
Special Resolution	has the meaning given to that term in the Constitution.
Standard Access Terms	means the Standard Access Terms set out in Schedule 3.
Standard Service	is defined as set out in Schedule 5.
Suspended Member	has the meaning given to that term in clause 6.3(a).
Suspending Member	has the meaning given to that term in clause 6.3(a).
Switch	is a Direct Connector that exchanges Transaction Messages of Indirect Connectors.
Tax Invoice	has the meaning given to that term in the GST Law.
Taxable Supply	has the meaning given to that term in the GST Law.
Testing Protocol	has the meaning given to that term in clause 5.4(b)(ii).
Testing Timetable	has the meaning given to that term in clause 5.4(b)(i).
Testing Windows	means, for any given year, any of the following two periods: <ul style="list-style-type: none"> - from the first day of March to the last day of May (inclusive) of that year; or

- from the first day of September to the last day of November (inclusive) of that year,

or other times determined by the Administrator from time to time.

Transaction Messages means messages containing payment instructions and any other instructions needed to effect an EFTPOS Transaction.

Wages has the meaning given to that term in clause 10.3 of Schedule 3.

13.2 INTERPRETATION

Unless expressed to the contrary:

- (a) the singular includes the plural and vice versa;
- (b) where a word or phrase is defined, its other grammatical forms have a corresponding meaning;
- (c) a reference to:
 - (i) a clause is a reference to a clause in the Access Code, and a reference to a Schedule is a reference to a Schedule in the Access Code;
 - (ii) a person includes a firm, unincorporated association, body corporate and a government or statutory body or authority and where the person is a body corporate includes a Related Body Corporate;
 - (iii) a person includes its legal personal representatives, successors and assigns;
 - (iv) a statute, ordinance, or other law includes regulations and other statutory instruments under it and consolidations, amendments, re-enactments or replacements of any of them;
 - (v) a right includes a benefit, remedy, discretion, authority or power;
 - (vi) the words include, includes or including must be read as if they are followed by the words without limitation;

- (vii) time is a reference to local time in New South Wales;
 - (viii) \$ or dollars is a reference to the lawful currency of Australia;
 - (ix) the Access Code includes the Schedules;
 - (x) a document (including the Access Code) includes the document as varied or replaced from time to time and notwithstanding any change in the identity of any relevant parties to such document;
 - (xi) writing includes any mode of representing or reproducing words in tangible and permanently visible form, and includes facsimile transmission;
 - (xii) any thing (including any amount) is a reference to the whole or any part of it and a reference to a group of things or persons is a reference to any one or more of them; and
 - (xiii) conduct includes any omission and any representation, statement or undertaking, whether or not in writing;
- (d) where time is to be reckoned by reference to a day or event, that day or the day of that event will be excluded;
 - (e) headings and outline clauses are provided for convenience only and do not form part of the Access Code;
 - (f) the relevant definitions for any words that are capitalised in the Access Code can be found in this Clause 12 and if they are not included in clause 12, they can be found in the CECS Regulations or Manual; and
 - (g) in the case of any inconsistency between the definitions in this Clause 12 and the definitions in the Schedules to the Access Code:
 - (i) the definitions in this Clause 12 will apply in interpreting the clauses in the Access Code; and
 - (ii) the definitions contained in each respective Schedule must apply in interpreting that particular Schedule.

SCHEDULE 1: CONFIDENTIALITY DEED

CONFIDENTIALITY DEED

DATE

PARTIES

1. _____ (ACCESS PROVIDER)

2. _____ (ACCESS SEEKER)

THE PARTIES AGREE

1. DICTIONARY

(a) The terms used in this agreement are defined below:

Approved Purpose means the sole and exclusive purpose of the parties acting in accordance with the rights and obligations imposed on Access Seekers and Access Providers under the Access Code.

Confidential Information means all information of the Discloser or any of its Related Bodies Corporate disclosed to the Recipient or any of its Related Bodies Corporate including, without limitation information relating to the Discloser or any of its Related Bodies Corporate including without limitation information:

- (i) comprised in or relating to any intellectual property rights of the Discloser;
- (ii) relating to the business, financial position, assets or liabilities of the Discloser and any matter that does or may affect the financial position or reputation of the Discloser;
- (iii) relating to future business plans of the Discloser; and
- (iv) relating to the internal management and structure of the Discloser, or the personnel, policies and strategies of the Discloser.

Discloser means a party disclosing the Confidential Information.

Recipient means a party receiving the Confidential Information.

Recipient Representative means in respect of a party an officer, employee or professional adviser of that party.

- (b) Words capitalised in this Deed that are not defined in clause 1(a) above have the meaning given to them in clause 12 of the EFTPOS Access Code.

2. BACKGROUND

- (a) The Access Seeker is requesting access from the Access Provider [under the Access Code](#).
- (b) As part of the process of negotiation for access, the Access Provider and Access Seeker may disclose to each other Confidential Information.
- (c) The Access Provider and Access Seeker have agreed to deal with the Confidential Information disclosed as part of the negotiation process in accordance with the terms of this agreement.

3. RECIPIENT'S OBLIGATIONS

3.1 Recipient must keep information confidential

The Recipient must:

- (a) keep confidential all Confidential Information;
- (b) use all Confidential Information solely for the Approved Purpose and, for the avoidance of doubt, must not use the Confidential Information to compete against the Discloser; and
- (c) not copy or record in any other form any part of the Confidential Information except as is strictly necessary for the Approved Purpose [and in accordance with this Deed](#).

3.2 Disclosure to Recipient Representatives

The Recipient must:

- (a) only disclose Confidential Information to a Recipient Representative to the extent necessary for the Recipient Representative to perform their duties for the Approved Purpose; and
- (b) ensure that each Recipient Representative to whom Confidential Information has been disclosed keeps that information confidential and does not do anything which would be a breach of this agreement if done by the Recipient.

3.3 Disclosure required by law

- (a) The Recipient is not bound to keep confidential any Confidential Information if and to the extent that the Confidential Information is required by law to be disclosed.
- (b) If required by law to disclose Confidential Information, the Recipient must prior to that disclosure:
 - (i) notify the Discloser; and
 - (ii) seek reasonable confidentiality arrangements to protect the confidentiality of the Confidential Information and to prevent further disclosure.

3.4 Information in the public domain

- (a) The Recipient is not bound to keep confidential any information if and to the extent that the information is in the public domain other than because of a breach of this agreement.
- (b) If the Recipient is uncertain whether any information is Confidential Information, the Recipient must treat the information as if it were Confidential Information ~~and as not being in the public domain~~ unless and until the Discloser agrees in writing that the information is ~~in the public domain~~ not Confidential Information.

4. RECIPIENT DOES NOT OWN THE INFORMATION

The Recipient acknowledges that this agreement does not:

- (a) transfer to it any interest in any intellectual property; and
- (b) oblige the Discloser to disclose any Confidential Information to the Recipient.

5. RETURN OF INFORMATION

5.1 Recipient's rights may cease

The Discloser may at any time notify the Recipient in writing that its right to use the Confidential Information ceases and the Recipient must immediately, at the Discloser's option:

- (a) return to the Discloser all of the Disclosers' Confidential Information in its possession or control;
- (b) destroy it and permit the Discloser to witness the destruction; or
- (c) delete it in the case of machine readable records.

5.2 Obligations continue

The obligations of confidentiality under this agreement continue to apply for a period of 5 years after the date of this agreement to the Recipient even if:

- (a) the Approved Purpose is completed or terminated; and
- (b) the Recipient has returned, destroyed or deleted the Confidential Information in accordance with clause 5.1 (**Return of information**),

unless the parties have entered into an Access Agreement, in which case the obligations of confidentiality under this agreement are replaced by the obligations of confidentiality under the Access Agreement.

6. INDEMNITY

6.1 Breach of agreement will damage Discloser

The Recipient acknowledges that any breach of this agreement may cause damage to the Discloser and its Related Bodies Corporate. In the event of a breach the Discloser is

permitted to institute proceedings to exercise all rights and remedies available under all relevant jurisdictions including equity.

6.2 Recipient indemnifies Discloser

The Recipient indemnifies the Discloser and its Related Bodies Corporate and their respective officers, employees, and agents against any claim, liability, action, damage, loss, cost or expense sustained by any of them arising directly or indirectly from:

- (a) any breach by the Recipient of its obligations under this agreement; and
- (b) any act or omission of the Recipient's officers, employees, advisers, agents or contractors which, if done or omitted to be done by the Recipient, would be a breach of the Recipient's obligations under this agreement.

7. DISCLAIMER

7.1 No representations

The Recipient acknowledges that none of the Discloser, its Related Bodies Corporate, their respective officers, employees, advisers or agents has made or makes any representation or warranty, express or implied, as to the accuracy or completeness of the Confidential Information.

7.2 Recipient releases Discloser

The Discloser, its Related Bodies Corporate and their respective officers, employees, advisers and agents disclaim liability for any loss or damage suffered or incurred by any person acting on any Confidential Information.

7.3 Discloser contracts as trustee

For the purposes of clause 7.1 (**No representations**) and 7.2 (**Recipient releases Discloser**), the Discloser contracts on its own behalf and as trustee of the benefit of the acknowledgment and release, for its Related Bodies Corporate and their respective officers, employees, advisers and agents.

8. MISCELLANEOUS

The rights and obligations set out in this Deed are in addition to, and do not derogate from, the rights or obligations of confidence expressed in the EFTPOS Access Code.

SIGNED as a Deed.

SIGNED by [] as authorised signatory for [*the Access Seeker*] in the presence of:

Signature of witness

Signature of

Name of witness (print)

SIGNED by [] as authorised signatory for [*the Access Provider*] in the presence of:

Signature of witness

Signature of

Name of witness (print)

SCHEDULE 2: APPLICATION FORM

The Application Form must include the following:

- (a) Name of the Access Seeker.
- (b) Financial information about the Access Seeker that shows the Access Seeker is solvent.
- (c) Information about the proposed EFTPOS operations of the Access Seeker, including information as to scale of operations, area of operations (eg, state based, national), time when the Access Seeker will test its systems with the systems of the Access Provider, timing of implementation, roll out plan, growth plan, details of any contracts already negotiated, etc.
- (d) For the purposes of paragraph (c), unless the Access Seeker and Access Provider agree otherwise, the time when the Access Seeker tests its systems with the systems of the Access Provider must:
 - (i) coincide with a Testing Window; and
 - (ii) allow for at least six (6) months to pass between the time when Access Seeker lodges the Application Form and the time when testing begins.
- (e) A capability statement (how the Access Seeker will be able to meet the eligibility requirements under the Access Code, what resources they will have available, the Access Seeker capability to become an Access Provider, etc).
- (f) The names of Members from whom access is sought.
- (g) An acknowledgement that the Access Seeker agrees to seek access in accordance and in compliance with the terms of the Access Code and agrees to become a Member upon entry into an Access Agreement.
- (h) An acknowledgement that by lodging the Application Form, the Access Seeker has agreed to enter into a contract with the Access Company and with each of the Members from whom access is sought. Under this contract, in consideration for obtaining the benefit of the rights given to Access Seekers under the Access

Code, the Access Seeker agrees to comply with the relevant obligations of Access Seekers under the Access Code.

SCHEDULE 3: STANDARD ACCESS TERMS

HOW TO USE THIS SCHEDULE

The terms in this Schedule must be included in any Access Offer prepared by an Access Provider under clause 3.5 of the Access Code.

Other than including the terms in this Schedule, the Access Offer may contain any other terms the Access Provider considers appropriate (having regard to its commercial interests and the requirements of the Access Code). In particular, we note that the Access Provider must include any additional terms that are necessary to make the Access Offer into an offer capable of being accepted by the Access Seeker. Examples of terms that may need to be added by the Access Provider include: term, intellectual property rights, force majeure, relationship of the parties, notices, insolvency, governing law and insurance. A reference should also be included that terms capitalised in the Access Offer but not defined have the same meaning given to that term in the Access Code.

1 ACKNOWLEDGMENTS

Insert:

[1] Acknowledgements

The ~~Access Provider~~ Administrator has provided and the Access Seeker has received copies of the Access Code and the CECS Manual (effective as at the date of this agreement).

2 ACCESS RIGHTS

Insert:

[2] Grant of access rights

- (a) *The Access Provider must provide to the Access Seeker the Service as defined in the Attachment to this agreement, at Access Charges set out in clause 3.1 of this agreement.*
- (b) *The access rights granted pursuant to clause [2(a)] of this agreement:*

- (i) *are non-exclusive contractual rights and do not give the Access Seeker any right, title or interest of any proprietary nature in the Access Provider's EFTPOS infrastructure and systems; and*
- (ii) *are otherwise granted on the terms and conditions set out in this agreement.*

3 ACCESS CHARGES

Insert:

[3] Access Charges

[3.1] Payment of Access Charges

- (a) *Subject to paragraph [(c)], the Access Seeker must pay to the Access Provider the Access Charges set out in the Attachment to this agreement.*
- (b) *The Access Charges payable under this agreement:*
 - (i) *must be paid prior to or at the time of execution of the agreement;*
 - (ii) *must be paid as a single payment; and*
 - (iii) *are non-refundable.*
- (c) *The Access Seeker is not obliged to pay the Access Charges to the Access Provider if:*
 - (i) *the Access Seeker and the Access Provider had entered into an Access Agreement within the previous [14] months (**Original Access Agreement**);*
 - (ii) *the Original Access Agreement was terminated pursuant to clause [6(a)(i) or clause 6(a)(ii)] of that agreement; and*
 - (iii) *the acts or omissions that triggered the application of [clause 6(a)(i) or clause 6(a)(ii)] were not the responsibility or fault of the Access Seeker.*

-[3.2] Charges for variation to Service

- (a) *The parties may agree to vary the Service defined in the Attachment to this agreement after the date of commencement of this agreement.*
- (b) *Any variation of the Service under paragraph [(a)] may result in a variation of the Access Charges. For the avoidance of doubt, any such variation to the Access Charges:*
 - (i) *does not take effect unless it has been agreed between the Access Seeker and the Access Provider; and*
 - ~~(ii) *must not allow a charge for the Standard Service that exceeds the RBA Benchmark.*~~
 - (ii) *must comply with the relevant obligations set out in the EFTPOS Access Regime.*

[3.3] GST

- (a) *The parties agree that:*
 - (i) *all Payments have been set or determined without regard to the impact of GST;*
 - (ii) *if the whole or any part of a Payment is the consideration for a Taxable Supply in respect of which GST is payable, the GST Amount in respect of the Payment must be paid to the payee as an additional amount, either concurrently with the Payment or as otherwise agreed in writing; and*
 - (iii) *the payee must provide to the payer a Tax Invoice at the same time at which any GST Amount is payable.*
- (b) *Despite any other provision of this agreement, if a payment due under this agreement is a reimbursement or indemnification by one party of an expense, loss or liability incurred or to be incurred by the other party, the payment excludes any GST forming part of the amount to be reimbursed or indemnified.*

4 IMPLEMENTATION

Insert:

[4] Implementation

[4.1] Implementation according to Access Code

Implementation of the Service between the Access Seeker and the Access Provider must be completed in accordance with the relevant provisions in clause 5 of the Access Code, including provisions in relation to planning, certification and testing of the Service.

[4.2] Obligation to make systems available for testing

The Access Provider and Access Seeker must use ~~its~~their best endeavours to make ~~its~~their systems available for testing during the Testing Timetable as agreed ~~with the Access Seeker~~ (in accordance with clause 5.4 of the Access Code).

[4.3] Failure to make systems available for testing

- (a) *If an Access Provider fails to make its systems available for testing at the times set out in the Testing Timetable agreed under clause 5.4 of the Access Code:*
- (i) *the Access Seeker may request, and if so requested the Access Provider must agree, to complete all testing at a different time (including at a time other than the periods defined as Testing Window under the Access Code); and*
 - (ii) *within 30 days of receiving written notice from the Access Seeker, the Access Provider must pay to the Access Seeker an amount as liquidated damages calculated in accordance with clause [10.3].*
- (b) *If an Access Seeker fails to make its systems available for testing at the times set out in the Testing Timetable agreed under clause 5.4 of the Access Code:*
- (i) *all testing must be completed at the next available Testing Window; and*
 - (ii) *within 30 days of receiving written notice from the Access Provider, the Access Seeker must pay to the Access Provider an amount as liquidated damages calculated in accordance with clause [10.3].*

5 MAINTENANCE AND SERVICE LEVELS

Insert:

[5] Service levels

The Access Provider and the Access Seeker must meet the requirements set out in clause 6 of the Access Code.

6 TERMINATION

Insert:

[6] Termination

(a) *Subject to paragraph [(b)], either party to this agreement (**Terminating Party**) may terminate the entire agreement, by providing notice to the other party if:*

-(i)

A this agreement relates to an Access Seeker's first or second connection under the Access Code, and the Access Seeker ceases to meet or fails to meet within the time specified any of the eligibility criteria set out in clause 2.2(a)(i) or clause 2.2(a)(iii)-(vi) of the Access Code; or

B this agreement relates to an Access Seeker's third or subsequent connections under the Access Code, and the Access Seeker ceases to meet or fails to meet within the time specified any of the eligibility criteria set out in clause 2.2(a) of the Access Code;

-(ii) the other party is in material breach of its obligations under the Implementation process set out in clause 5 of the Access Code, the Terminating Party has given five (5) Business Days notice of such breach and the other party has failed to rectify such breach within that time;

(iii) the other party is in material breach of this agreement, the Terminating Party has given five (5) Business Days notice of such breach and the other party has failed to rectify such breach within that time;

(iv) *the other party is unable to pay its debts, becomes insolvent, or has ceased or threatens to cease business, or a petition for winding up or bankruptcy has been filed, a resolution for voluntary winding up has been passed, a receiver and manager or judicial manager has been appointed over the whole or substantial part of its assets or property, or the other party ceases to carry on business, or any action is taken by any creditor of the other party to recover, realise or enforce any security over any assets of the other party or to enforce any judgment against the other party;*

(v) *continued operation of this agreement would be unlawful or would pose an imminent threat to life or property;*

(vi) *if, in the Terminating Party's reasonable opinion, the other party attempted to use, is likely to use, or has used any Service (whether with or without the authorisation and/or permission of the Terminating Party) in contravention of any law; or*

(vii) *any material information provided or representation made by either party to the other party is untrue, misleading or inaccurate and has an adverse material impact on the other party in relation to its provision of the Service under this agreement.*

(b) *Prior to terminating this agreement, in full or to the extent necessary, the Terminating Party must notify the other party and the Administrator that it proposes to terminate this agreement.*

(c) *In the event that this agreement is terminated:*

(i) *all sums due or accrued or payable to each party under this agreement or up to the date of termination and all sums due or payable to each party ~~must upon termination~~ become immediately due and payable to that party;*

(ii) *each party must immediately return to the other party at its own expense all equipment, facilities, plant and other property of the other party used under this agreement in good working condition, fair wear and tear only excepted; and*

- (iii) *each party must immediately remove all of that party's equipment, facilities, plant and other property located on the other party's premises used under this agreement.*
- (d) *On termination of this agreement, each party must, at its own expense, deliver to the other party, or after notices from that other party, destroy or erase all documents or other forms of storage which comprise or contain the other party's Confidential Information or from which the other party's Confidential Information can be reproduced.*
- (e) *Termination or expiry of this agreement must not be deemed a waiver of a breach of any term or condition of this agreement and must be without prejudice to a party's rights, liabilities or obligations that have accrued prior to such termination or expiry.*

7 APPOINTMENT OF NOMINATED INTERMEDIARIES

Insert:

[7] Nominated Intermediaries

The Access Provider may retain a third party to perform one or more of the Access Provider's obligations under this agreement.

8 DISPUTE RESOLUTION

Insert:

[8] Dispute Resolution

If there is a matter of disagreement between the Access Seeker and Access Provider in relation to their rights and obligations under this agreement, either party may refer the matter to the Dispute Resolution process in clause 7 of the Access Code, provided that any matter so referred falls within the definition of a Dispute as provided in clause 7.1 of the Access Code.

9 CONFIDENTIALITY

Insert:

[9] Confidentiality

The Access Seeker and Access Provider must comply with the confidentiality obligations set out in clause 8 of the Access Code.

10 LIABILITY AND INDEMNITY

Insert:

[10] Liability and indemnity

[10.1] General principle

Save to the extent that another provision in this agreement expressly provides for (or expressly excludes or limits) a remedy, a liability or a form of compensation in relation to an act, omission or event, this clause 10 regulates the liability of the Access Seeker and Access Provider under this agreement and in relation to any act, omission or event relating to or arising out of this agreement.

[10.2] General exclusions

(a) *Neither party is liable for, and no measure of damages including without limitation damages under clause [10.3] will under any circumstances include:*

- (i) *special, indirect, incidental, consequential or punitive damages; or*
- (ii) *economic loss, loss of profits or loss of any of the following – revenue or clients, goodwill, bargain, anticipated savings, use of products or equipment, software, data or management time,*

whether the relevant claim is made for breach of contract, in tort (including negligence), under product liability legislation, under any other statute, under an indemnity or otherwise and whether or not the party was aware or should have been aware of the possibility of such loss or damage.

(b) *To the extent permitted by law, each party expressly disclaims all conditions and warranties, express or implied, in respect of the provision of the Service including any condition or warranty of merchantability or of fitness for a particular purpose. If any condition or warranty is implied in this agreement pursuant to any legislation (including, without limitation, the Trade Practices Act*

1974) and the legislation avoids or prohibits provisions in a contract excluding or modifying the application of, exercise of, or liability under such condition or warranty, the condition or warranty is deemed to be included in this agreement provided that each party's liability for breach of the condition or warranty, if the legislation so permits, is limited to:

- (i) the resupply of the Service; or
- (ii) the cost of resupplying the Service,

and otherwise is limited to the maximum extent permitted by law

[10.3] Specific remedies for delays in testing

- (a) For the purposes of clauses [4.3(a)(ii)] and [4.3(b)(ii)] of this agreement, the sole remedy available to the party that made its systems available for testing at the time agreed in the Testing Timetable (**Available Party**) when the other party did not (**Delayed Party**) will be the Liquidated Damages calculated in accordance with paragraph (b).
- (b) The Liquidated Damages payable by the Delayed Party to the Available Party will be the lesser of:
 - (i) the sum of Wages, Materials and Outsourced Testing Expenses; and
 - (ii) the Liquidated Damages Cap,

where:

- (iii) **Wages** means the wages paid to the staff of the Available Party for time spent or set aside in anticipation of testing (which testing, as a result of the failure, did not occur), but only for the period until the staff resumed other duties.
- (iv) **Materials** means the amount paid and which cannot be recouped by the Available Party (other than pursuant to this clause [10.3]) for consumables purchased in anticipation of testing which, as a result of the failure, did not occur.

- (v) **Outsourced Testing Expenses** means the cost paid and which cannot be recouped by the Available Party (other than pursuant to this clause [10.3]) to a third party provider to undertake or assist in testing which testing, as a result of the failure, did not occur.

- (vi) **Liquidated Damages Cap** means either:
 - A [seventy five per cent of any RBA Benchmark]; or

 - B if there is no RBA Benchmark, [seventy five per cent of the Access Charges payable under this agreement].

- (c) The parties agree that any amount of Liquidated Damages under this clause are a conservative and genuine pre-estimate of loss that the Available Party may suffer as a result of a delay in testing.

- (d) The amount payable to the Available Party under this clause [10.3] is reduced proportionally to the extent to which the liability is caused, or contributed to, by the Available Party.

- (e) The Available Party must not raise any claims relating to or under this clause 10.3 more than 12 months after the failure to make systems available for testing at the time agreed in the Testing Timetable first occurred.

[10.4] Indemnity

Each party agrees to indemnify the other and will hold the other harmless against any and all liability, losses, claims, demands, actions, suits or proceedings (including all Costs) which it suffers or incurs as a result of any failure or malfunction of the Service. Each party agrees to pay the other any amounts due under this indemnity on demand.

11 ATTACHMENT

Insert:

ATTACHMENT

SERVICE

[Insert definition of the Standard Service provided in Schedule 5, as amended from time to time.]

ACCESS CHARGES

[The Access Offer must include Access Charges.

If ~~the RBA has published~~ there is an ~~RBA Benchmark~~ EFTPOS Access Regime in force, the total Access Charges must ~~not exceed~~ comply with the relevant obligations set out in the ~~RBA Benchmark~~ EFTPOS Access Regime.

If the Access Provider and the Access Seeker agree to include additional services in the Access Agreement, the charges payable for these additional services must not be bundled with the Access Charges (ie, they must be itemised separately).]

SCHEDULE 4: FEES

Fees and charges payable

Fees and charges are payable in accordance with the following table:

Fee	Amount (or method of calculation)	To be paid	Recipient
Application Fee	1\$ For \$1,000.00 for each Access Provider from whom the Access Seeker is requesting access. To be calculated solely on the basis of the Administrator's administrative costs of processing applications for access.	At the time of lodging an Application Form (see clause 3.4)	Administrator
Annual Membership Fee	As determined by the Access Company from time to time	At the beginning of each financial year or another time determined by the Access Company from time to time	Administrator

Taxes

- All fees are exclusive of GST.
- If the whole or any part of a fee is the consideration for a Taxable Supply in respect of which GST is payable, the GST Amount in respect of that fee must be paid as an additional amount concurrently with the payment of the fee.
- The Administrator must provide to the person paying the fee a Tax Invoice at the same time at which any GST Amount is payable.

SCHEDULE 5: STANDARD SERVICE

The Standard Service means:

- (a) a service to establish a direct communications link between two Direct Connectors for EFTPOS Transactions that complies with the requirements set out in the CECS Manual (as amended from time to time) and is solely comprised of:
- establishing two production telecommunications links in accordance with the requirements of the CECS Manual; and
 - purchasing and installing two line encryptors; and
 - configuring hardware and software for switching; and
 - configuring hardware and software for back end processing (including development to support settlement); and
 - testing:
 - the links to ensure fault free continuous system availability;
 - transaction processing capability;
 - clearing and settlement capability;
 - to ensure that the new link has not corrupted other parts of the network; and
 - IT and operation project management; or
- (b) a service which the Access Company has defined as the Standard Service, as amended from time to time.