



NBN Regional Backbone Blackspots Program

Equivalence Undertaking to the Department of Broadband
Communications and the Digital Economy for Services
Provided on the Regional Backbone Blackspots Program
Network

Nextgen Networks Pty Limited ('Nextgen')

ABN: 32 094 147 403

Equivalence Undertaking in Relation to Services Provided on the Regional Backbone Blackspots Program Network

1. Statement of Purpose and Policy

- 1.1 As part of its role to manage, operate and maintain Regional Backbone Blackspots Program ('RBBP') assets on behalf of the Australian Government, Nextgen is required to develop an approach that ensures RBBP Services are offered to the market on open and equivalent terms and conditions.
- 1.2 This Equivalence Undertaking gives effect to that requirement by:
- (a) Establishing a framework under which Nextgen supplies RBBP Services on a wholesale open access basis;
 - (b) Establishing a framework to ensure equivalence that is transparent and practical to administer and monitor;
 - (c) Ensuring that Nextgen offers to supply RBBP Services to all RBBP Wholesale Customers on the basis of:
 - (i) open and equivalent terms and conditions;
 - (ii) equivalent access to a single Price Card; and
 - (iii) equivalence of access to information;
 - (d) Ensuring confidentiality of customer information;
 - (e) Establishing reporting, independent audit and complaint mechanisms to ensure compliance with this Equivalence Undertaking;
 - (f) Specifying the systems, processes, procedures and practices under which Nextgen commits to comply with in the provision of RBBP Services on open and equivalent terms; and
 - (g) Ensuring that Nextgen will not discriminate in favour of itself in relation the supply of the RBBP Services.
- 1.3 This Equivalence Undertaking recognises that Nextgen Retail Corporation currently provides or may in the future provide Retail Services that may use RBBP Services as inputs to those Retail Services. This Equivalence Undertaking prevents Nextgen from providing RBBP Services directly to Nextgen Retail Corporations and establishes a mechanism under which Nextgen may obtain RBBP Services from RBBP Wholesale Customers as an input to such Retail Services.
- 1.4 This Equivalence Undertaking applies to the provision of RBBP Services by Nextgen for all RBBP Locations and applies for the entire Operations Period for each RBBP Location.
- 1.5 This Equivalence Undertaking does not specify all the terms and conditions on which Nextgen will provide RBBP Services, including but not limited to any

obligations under s.152AR of the *Competition and Consumer Act 2010* ('CCA') or any replacement or amendment of that provision in respect of backbone transmission services.

- 1.6 Nothing in this Equivalence Undertaking replaces, limits, extends or affects the application of the CCA or affects any power of the Australian Competition and Consumer Commission ('Commission') under the CCA:
- (a) To declare a RBBP Service or any component of it as a declared service under Part XIC of the CCA; or
 - (b) To determine any Non-Price Terms for any component of a RBBP Service under Division 8 of Part XIC of the CCA.

2. **Definitions**

- (a) **Business Day** means a day that is not a Saturday, Sunday or public holiday in the Australian Capital Territory.
- (b) **Confidential Information** means information that is by its nature confidential and:
 - (i) is designated as being confidential; or
 - (ii) the receiving party knows or ought to know is confidential, and includes all business, financial and technical information of a party, but does not include information which:
 - (iii) is or becomes public knowledge other than by breach of this Equivalence Undertaking; or
 - (iv) has been independently developed or acquired by the receiving party.
- (c) **Nextgen Retail Corporation** means either Nextgen or a Related Body Corporate of Nextgen, or a unit within Nextgen or a Related Body Corporate, when it is in the business of using RBBP Services as inputs for the supply of a communications or carriage service to persons other than RBBP Wholesale Customers.
- (d) **Operations Period** means a five (5) year period commencing at the end of the construction phase for each RBBP Location.
- (e) **Price Card** means the maximum prices (including the application of defined discount structures) as approved by the Commonwealth that can be applied to RBBP Services.
- (f) **RBBP Information** means information provided in accordance with clause 9.1 of this Equivalence Undertaking.
- (g) **RBBP Funding Agreement** means the agreement between Nextgen and the Commonwealth dated 4 December 2009.
- (h) **RBBP Location** means each of the locations identified in Appendix 1.

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- (i) **RBBP Services** means the services described in clause 3 of this Equivalence Undertaking.
 - (j) **RBBP Wholesale Customers** means any access seeker that falls within one or more of the following categories and which is not a Nextgen Retail Corporation:
 - (i) Carriers as defined in the *Telecommunications Act 1997* (Cth);
 - (ii) Carriage Service Providers as defined in the *Telecommunications Act 1997* (Cth);
 - (iii) Internet Service Providers as defined in the *Telecommunications Act 1997* (Cth);
 - (iv) Broadcast Transmission Providers as defined in the *Broadcasting Services Act 1992* (Cth);
 - (v) Systems Integrators, defined as an entity that transforms RBBP Services by integrating them with their own services to provide ICT solutions for a third party;
 - (vi) Utilities, defined as transport authorities, electricity supply bodies, gas supply bodies, water supply bodies, sewerage services supply bodies, stormwater drainage services bodies and State or territory road authorities; and
 - (vii) Any other category of access seeker approved in writing by the Commonwealth.
 - (k) **Related Body Corporate** has the meaning given in Section 9 of the *Corporations Act 2001* (Cth).
 - (l) **Retail Services** means the communications or carriage services that are supplied to a user who is not a RBBP Wholesale Customer.
3. **Services Addressed by this Equivalence Undertaking**
- 3.1 This Equivalence Undertaking applies to RBBP Services supplied by Nextgen.
- 3.2 Subject to clause 3.3, RBBP Services are defined as:
- (a) Any carriage or data communications service that terminates or originates at an RBBP Backbone Point of Interconnect ('BPoI') or a Carrier Point of Interconnect (CPoI) owned by the Commonwealth pursuant to the RBBP Funding Agreement; or
 - (b) Any co-location service provided at a BPoI or CPoI owned by the Commonwealth pursuant to the RBBP Funding Agreement.
- 3.3 A carriage or data transmission service provided by Nextgen that merely transits RBBP assets, as described in the following Figure 1, is not an RBBP Service.

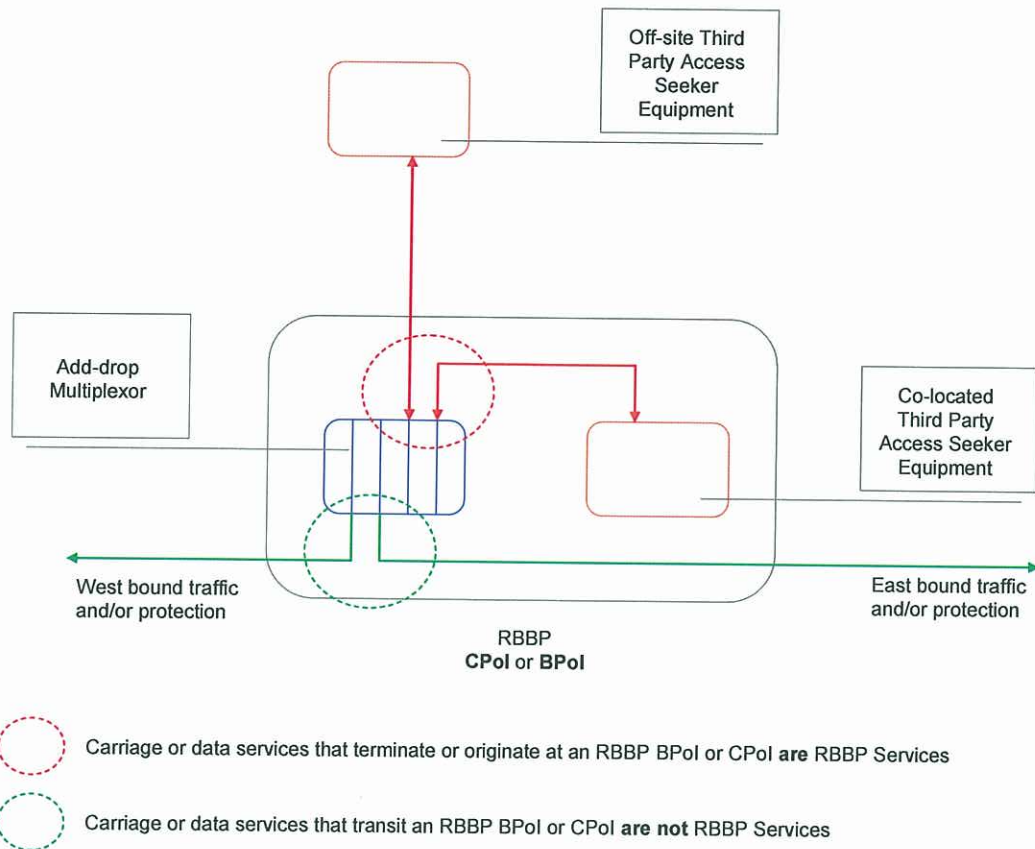


Figure 1: A definition of services that are in-scope and out of scope for this Equivalence Undertaking

4. **Undertaking as to compliance**
 - 4.1 Nextgen undertakes to the Commonwealth that for the Operations Period it will be bound by and comply with this Equivalence Undertaking.
 - 4.2 This Undertaking does not create any legal or equitable rights or obligations as between Nextgen and any person who is not a party to this Undertaking.
5. **Undertaking as to supply of RBBP Services**
 - 5.1 Nextgen will only supply RBBP Services to RBBP Wholesale Customers.
 - 5.2 Nextgen will not supply RBBP Services to a Nextgen Retail Corporation or to any person who is not a RBBP Wholesale Customer.
 - 5.3 Subject to any legal obligation to the contrary, Nextgen will not provide RBBP Information that is not publicly available to Nextgen Retail Corporation or to any person who is not a RBBP Wholesale Customer.

6. Undertaking as to equivalence of RBBP Services

6.1 Nextgen will offer to supply all RBBP Services to all RBBP Wholesale Customers on open and equivalent terms and conditions in accordance with this clause 6.

6.2 Nextgen will provide all RBBP Wholesale Customers with equivalence of inputs when supplying RBBP Services.

6.3 For the purposes of this Equivalence Undertaking, 'equivalence of inputs' in terms of RBBP Services means:

- (a) In responding to the same request from different RBBP Wholesale Customers Nextgen will offer to supply the same RBBP Service;
- (b) In the same timeframe; and
- (c) On the same non discriminatory terms and conditions (including price, quality of service and quality of business systems and processes),

where 'the same' means identical, subject only to:

- (d) trivial differences; and
- (e) differences relating to:
 - (i) credit-worthiness;
 - (ii) matters of national security and law enforcement, or any other security requirements;
 - (iii) occupational health and safety requirements; or
 - (iv) differences specified by the Commonwealth.

7. Undertaking as to Pricing

7.1 Nextgen will offer to supply RBBP Services to all RBBP Wholesale Customers in accordance with the Price Card. This approach acknowledges that RBBP Services will be offered in a competitive market context and may require a response to competing offers.

7.2 Where Nextgen responds to a competing offer, Nextgen will respond in the same manner to an equivalent competing offer in relation to the provision of the same RBBP Service.

8. Undertaking as to terms and conditions of supply

8.1 Nextgen will offer to supply RBBP Services to all RBBP Wholesale Customers on the terms and conditions in:

- (a) Nextgen's Master Services Agreement ('MSA') or Standard Form of Agreement ('SFoA'); or
- (b) A Third Party Services Contract ('TPSC') that has been approved by the Commonwealth.

- 8.2 A TPSC must not be inconsistent with this Equivalence Undertaking except to the extent that any differences appropriately reflect issues arising as a result of the remoteness of any fibre termination point or other genuine accessibility constraints or requests by RBBP Wholesale Customers for variations due to technical requirements.
- 8.3 Nextgen may also enter into an agreement for the supply of RBBP Services with RBBP Wholesale Customers on terms and conditions different to the terms and conditions in the MSA, or SFoA or TPSC, on a commercially negotiated basis, provided that Nextgen has first offered the RBBP Wholesale Customers the opportunity to obtain a supply of RBBP Services on the terms in the MSA or SFoA, or TPSC.
- 8.4 Where there is an inconsistency between the RBBP Service supply agreement and this Equivalence Undertaking, this Equivalence Undertaking has priority.
9. **Undertaking as to equivalence of access to RBBP Information**
- 9.1 Nextgen will make available to all RBBP Wholesale Customers equivalent information, being the information that, in Nextgen's reasonable opinion, may be required for these customers to make informed decisions about the use of RBBP Services, including in relation to:
- (a) The technical and operational parameters of the RBBP network;
 - (b) The deployment and related commissioning schedule for the RBBP network;
 - (c) The RBBP Services that are being offered and pricing in relation to individual network requirements;
 - (d) Any new RBBP Services that have been developed;
 - (e) The dispute resolution procedure (as outlined in clause 14 of this Equivalence Undertaking);
 - (f) Any new RBBP Service that Nextgen intends to offer; and
 - (g) Information relating to planned Service outages and upgrade.
- 9.2 Nextgen will provide all RBBP Wholesale Customers with access to information in an equivalent timeframe.
- 9.3 Nextgen will make available to all RBBP Wholesale Customers equivalent access to applicable network information that is not in the public domain.
- 9.4 Nextgen may require a RBBP Wholesale Customer to enter into a Non Disclosure Agreement prior to providing access to RBBP Services information, which if used will:
- (a) be required of all RBBP Wholesale Customers receiving such information; and
 - (b) apply the same or equivalent terms and conditions to each RBBP Wholesale Customer.

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- 9.5 Nothing within clause 9 requires the provision to RBBP Wholesale Customers of Confidential Information of any other RBBP Wholesale Customer, or information which is commercially sensitive to Nextgen's wider network activities.
10. **Undertaking as to Confidentiality**
- 10.1 Subject to any disclosures required by law, government, a judicial or statutory authority or the rules of any stock exchange, Nextgen will keep the Confidential Information of all RBBP Wholesale Customers secret and will protect and preserve the confidential nature and secrecy of such Confidential Information.
- 10.2 Without limiting this Equivalence Undertaking, Nextgen will maintain protocols to ensure that Confidential Information is kept secret from any Nextgen Retail Corporation and cannot be obtained either deliberately or inadvertently by a Nextgen Retail Corporation consistent with the requirements set out in clause 10.1.
- 10.3 So long as it is consistent with clause 10.2, nothing in this Equivalence Undertaking will be taken to prevent Nextgen from disclosing the Confidential Information of a RBBP Wholesale Customer to its officers, employees, agents, contractors and professional advisors of its Related Bodies Corporate who need to know that information for the purposes of the supply of RBBP Services to RBBP Wholesale Customers or to comply with statutory reporting obligations.
11. **Undertaking as to use of RBBP Services by a Nextgen Retail Corporation.**
- 11.1 Nextgen will not provide RBBP Services directly to a Nextgen Retail Corporation.
- 11.2 A Nextgen Retail Corporation may purchase an RBBP Service as an input for the purposes of supplying a Retail Service only if:
- (a) the Nextgen Retail Corporation acquires the RBBP Service from a third party who is a RBBP Wholesale Customer;
 - (b) the Nextgen Retail Corporation acquires the RBBP Service from the third party on arms length commercial terms in accordance with clause 11.3 of this Equivalence Undertaking; and
 - (c) the RBBP Service is not obtained at a price which is less than the price of the identical RBBP Service that is available to RBBP Wholesale Customers had the RBBP Service been purchased on a standalone basis and based on the lesser of the following pricing:
 - (i) the maximum price indicated under Price Card (including the application of defined discount mechanisms); or
 - (ii) the price at which Nextgen supplies the same service to RBBP Wholesale Customers following a response to a competing offer.
- 11.3 To acquire an RBBP Service on arms length commercial terms as required by clause 11.2(b), the Nextgen Retail Corporation must:
- (a) request quotations from at least three RBBP Wholesale Customers as potential third party providers;

- (b) manage these quotes through a Sales System Work Queue ('SSWQ') (or equivalent) that is separate to any SSWQ used for sale of RBBP Services to RBBP Wholesale Customers;
- (c) make a selection of the best price or value offer from the RFQ process; and
- (d) support all transactions between a Nextgen Retail Corporation and RBBP Wholesale Customers conducted for the purpose of this clause 11.3 by valid taxation invoices and or records sufficient to substantiate compliance with clause 11.1 of this Equivalence Undertaking. These records will be made available to the Commonwealth upon request.

12. Undertaking as to Record Keeping, Performance Reporting and Auditing

Record Keeping

- 12.1 Nextgen and, where applicable, Nextgen Retail Corporations, will keep full and accurate data records with respect to RBBP Services in a manner that is transparent, auditable and supports its compliance with this Equivalence Undertaking.
- 12.2 Nextgen will maintain these data records referred to in clause 12.1 throughout the term of this Equivalence Undertaking.

Audit

- 12.3 Nextgen will establish and maintain a process for independent audit of its compliance with this Equivalence Undertaking.
- 12.4 Nextgen will obtain an independent auditor's report of its activities for each 12 month period to verify Nextgen's compliance with this Equivalence Undertaking. The auditor's final report will be provided to the Commonwealth.
- 12.5 The Commonwealth may also retain an independent auditor to conduct a compliance audit and Nextgen will fully co-operate with any such Commonwealth audit.
- 12.6 The Commonwealth may at any time request such records and information from Nextgen with respect to the RBBP Services as it reasonably requires to be satisfied that Nextgen is meeting its obligations in accordance with this Equivalence Undertaking. Nextgen will comply with any reasonable request under this clause as soon as is reasonably practicable.

Reporting

- 12.7 From the commencement date of each Operations Period, Nextgen will provide a quarterly report for each RBBP Location to the Commonwealth that reports Nextgen's performance against this Equivalence Undertaking.
- 12.8 Figure 2 provides a schematic outline of the reporting framework.

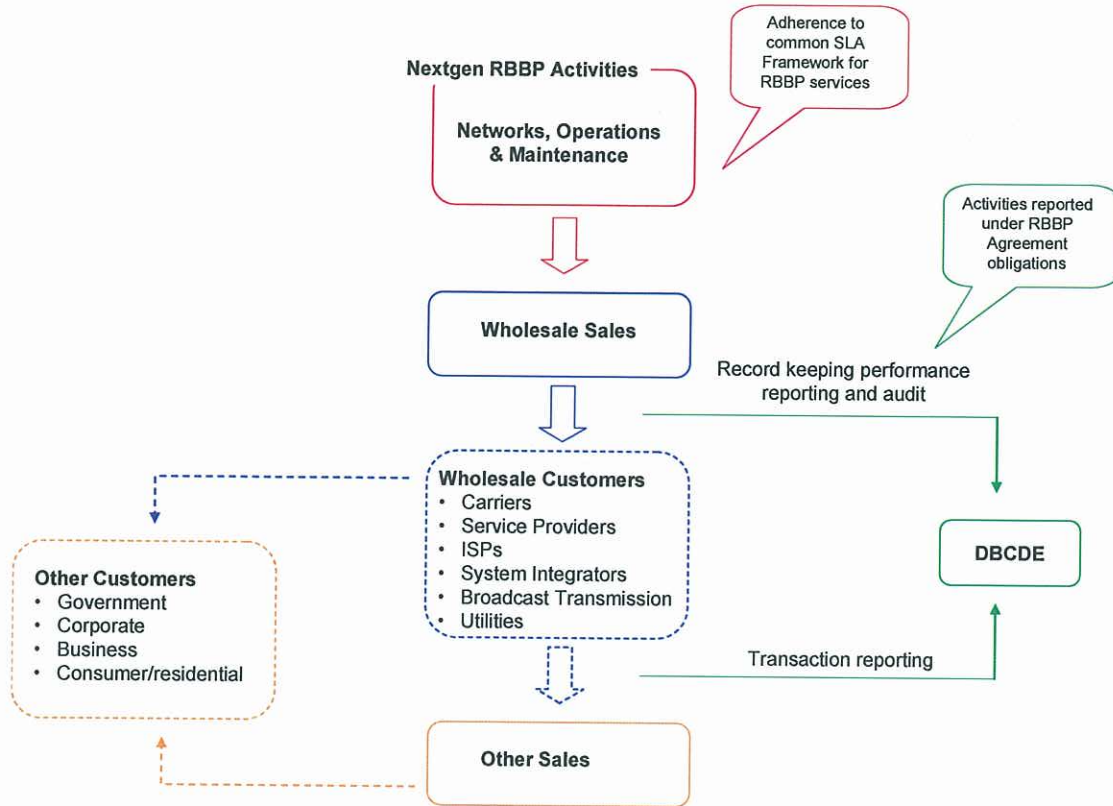


Figure 2: Integrity of this Equivalence Undertaking is ensured by transaction reporting on both sales to RBBP wholesale Customers and other sales activities

13. **Undertaking as to implementation of this Equivalence Undertaking**
 - 13.1 Nextgen will adopt and implement all provisions set out in this Equivalence Undertaking for RBBP Services as company policy and will modify any existing arrangements in order to be consistent with this Equivalence Undertaking.
 - 13.2 Nextgen will assign overall and day-to-day responsibility for ensuring compliance with the Equivalence Undertaking to the Nextgen Commercial and Contracts Manager.
 - 13.3 The Nextgen Commercial and Contracts Manager will report to the Nextgen Financial Controller in matters related to this Equivalence Undertaking.
 - 13.4 Nextgen will publish this Equivalence Undertaking on its website.
 - 13.5 Nextgen will disseminate the Equivalence Undertaking to its employees and take all appropriate steps to train and instruct its employees in its content and application.
 - 13.6 All employees engaged in the delivery of RBBP Services will be made aware of the obligations under this Equivalence Undertaking by way of:
 - (a) Direct briefings from the Nextgen Commercial and Contracts Manager or the employee's respective line managers;

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- (b) Written confirmation from each employee that the employee has been provided with a copy of this Equivalence Undertaking and has attended a briefing; and
- (c) Publishing and promoting the provisions of this Equivalence Undertaking on the Corporate Intranet.

14. **Dispute Resolution**

- 14.1 In this clause 14, 'Complainant' means the Commonwealth or a RBBP Wholesale Customer.
- 14.2 For the sake of clarity, this clause 14 applies only to compliance with this Equivalence Undertaking. Other disputes between Nextgen and a Complainant are not covered by this clause.
- 14.3 A Complainant who considers there has been any failure by Nextgen to comply with this Equivalence Undertaking may raise the issue with Nextgen via routine customer management processes or operational processes.
- 14.4 If the matter cannot be resolved within 10 Business Days from the date the Complainant has raised the issue with Nextgen, the Complainant may lodge a complaint in writing ('Notice of Complaint') with the Nextgen Financial Controller. The Notice of Complaint must adequately describe the particulars of the alleged failure. The contact details for such disputes within Nextgen are:

Nextgen Networks Pty Ltd
Attention: Financial Controller
PO Box 13071 Law Courts
Melbourne
VIC 8010
- 14.5 Nextgen will provide a written response to the Notice of Complaint within 10 Business Days from the date of the Notice of Complaint.
- 14.6 If the Complainant is not the Commonwealth, Nextgen will provide the Commonwealth with a copy of the Notice of Complaint within 5 Business Days of its receipt; and a copy of its written response to the Complainant within 5 Business Day of its dispatch.
- 14.7 If Nextgen's written response does not resolve the disputed matter, the Complainant may request a meeting with the Nextgen Financial Controller to resolve the matter. Such meeting will be held within 5 Business Days (or such other period as agreed) of the request.
- 14.8 Alternatively, or failing resolution at a meeting with Nextgen, the Complainant may request by notice in writing to the Nextgen Commercial and Contracts Manager that the matter be referred to an Independent Reviewer.
- 14.9 An Independent Reviewer will be appointed in accordance with the following procedures:

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- (a) Nextgen will propose a list of persons capable of fulfilling the role of an Independent Reviewer after reasonable consultation with the Complainant about appropriate selection criteria;
- (b) Nextgen will provide the Complainant with at least 15 Business Days notice in writing of the person proposed to be appointed and information supporting whether that person meets the criteria of an Independent Reviewer;
- (c) If the Complainant believes, on reasonable grounds, that the proposed person does not meet the criteria of an Independent Reviewer, the Complainant may provide Nextgen with a statement objecting to the proposed Independent Reviewer and setting out the reasons behind its objection;
- (d) If the Complainant objects to an Independent Reviewer in accordance with clause 14.9(c), Nextgen will propose another person to be the Independent Reviewer in accordance with clause 14.9(b);
- (e) If the Complainant approves the proposed Independent Reviewer that person will be appointed;
- (f) If the Complainant and Nextgen cannot agree on an Independent Reviewer, either Nextgen or the Complainant may request the current President of the Law Institute of Victoria or their delegate to appoint an Independent Reviewer.

14.10 Upon the appointment of an Independent Reviewer:

- (a) Nextgen and the Complainant will notify the Independent Reviewer, as applicable, in writing of the disputed matter;
- (b) Both parties will be entitled to make submissions to the Independent Reviewer regarding the disputed matter;
- (c) The Independent Reviewer will determine all other procedures for settling the disputed matter in a timely manner;
- (d) The Independent Reviewer will determine the disputed matter in a manner consistent with this Equivalence Undertaking and any reasonable criteria established for the determination of that matter.
- (e) If the Independent Reviewer makes a finding that Nextgen has not or is not acting in compliance with this Equivalence Undertaking, it may direct Nextgen to take steps or act in a manner to rectify that non-compliance. The Independent Reviewer has no power to order that compensation be paid to any Complainant.
- (f) The cost of the Independent Reviewer will be shared equally between the Nextgen and the Complainant, unless the Independent Reviewer determines that the actions of one party justify the Independent Reviewer's costs being paid entirely by that party. Other than the cost of the Independent Reviewer, each party will bear all of its own costs.

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- (g) The decision of the Independent Reviewer in relation to compliance with this Equivalence Undertaking will be final and binding on Nextgen and the Complainant.

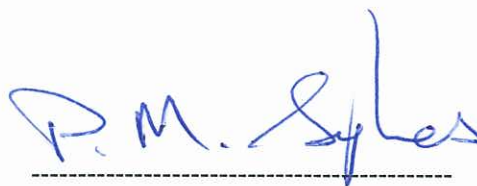
15. **Failure to comply with this Equivalence Undertaking**

- 15.1 If Nextgen is found to have failed to comply with this Equivalence Undertaking, including a failure to comply with a decision of an Independent Reviewer, the Commonwealth may issue a notice in writing setting out the nature of the non-compliance.
- 15.2 Nextgen undertakes to rectify such non-compliances within 20 Business Days of receiving a notice in writing from the Commonwealth specifying such non-compliances and requiring them to be rectified.
- 15.3 Failure by Nextgen to rectify a failure to comply with any of its Equivalence Obligations within 20 Business Days of receiving notice in writing from the Commonwealth to do so may constitute a default by Nextgen of the RBBP Funding Agreement and may entitle the Commonwealth to take such action as is provided for in the RBBP Funding Agreement.

16. **Commonwealth Approval of this Equivalence Undertaking**

- 16.1 This Equivalence Undertaking has been approved by the Commonwealth prior to the commencement of any Operations Period.
- 16.2 Commonwealth approval for this Equivalence Undertaking has been granted on the basis of Nextgen undertaking to:
 - (a) Provide RBBP Services in accordance with this Equivalence Undertaking;
 - (b) Publish the approved Equivalence Undertaking on its website; and
 - (c) Otherwise complying with the obligations set out in this Equivalence Undertaking, including any monitoring or reporting required.
- 16.3 Nextgen will be required to amend this Equivalence Undertaking if it intends to sell RBBP Services directly to entities other than RBBP Wholesale Customers. The Commonwealth may approve Nextgen amending this Equivalence Undertaking.
- 16.4 The Commonwealth may require Nextgen to provide a revised Equivalence Undertaking to the Commonwealth if there is a material change in Nextgen's business or ownership and control.

Signed by an authorised signatory of
Nextgen Networks Pty Limited



Signature



Name in full



Position

Signature of Witness



Signature



Name in full

Appendix 1: An Overview of RBBP Locations and Routes

