

21 March 2024

Ultimate Data Centre

Master Services Agreement

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- A** The Supplier is the supplier of Co-Location Services and other Services provided by Ezisight Australia Pty Ltd, ACN: 661 879 938, ABN 63 661 879 938, registered address: Unit 2, Ground Floor, Building 4, Brandon Business Park, Glen Waverley, Victoria 3150 Ultimate Data Centre.
- B** The Customer wishes to order Co-Location Services and/or other Services from the Supplier from time to time.
- C** The parties wish to enter into a master agreement on the terms of this agreement to govern the terms and conditions under which the Customer may order, and the Supplier may provide, the Co-Location Services and other Services.

It is agreed

1 Definitions and interpretation

1.1 Definitions

In this Agreement:

- (1) **Act** means the *Telecommunications Act 1997* (Cth);
- (2) **Agreement** means this document, including any schedule or annexure to it;
- (3) **Authority** means any:
 - (a) government department;
 - (b) local government council;
 - (c) government or statutory authority; or
 - (d) other body (including semi governmental, administrative, fiscal or judicial body, department, commission, authority, tribunal, agency or entity whether federal, state, territorial or local, and includes the Australian Communications and Media Authority and Australian Competition and Consumer Commission),

which has a right to impose a requirement or whose approval is required with respect to or in connection with the Services;

- (4) **Authorised Personnel List** means the list of Representatives of the Customer who are authorised to access and enter into the Supplier's Premises;
- (5) **Background IP** of a party means any and all Intellectual Property:
- (a) belonging to or developed solely by that party, including its Representatives prior to the date of this Agreement; or
 - (b) developed by that party, including its Representatives independently of this Agreement or any Service Order,
- and includes any and all modifications or adaptations to any such Intellectual Property, whether or not such modifications or adaptations were made in relation to this Agreement, a Service Order or independently;
- (6) **Business Day** means any day which is not a Saturday, Sunday or a bank or public holiday in Melbourne, Victoria;
- (7) **Business Hours** means the hours between 9.00am and 5.00pm during a Business Day;
- (8) **Carriage Services** has the meaning given to it in the Act;
- (9) **Claims** means actions, suits, causes of action, proceedings, claims or demands;
- (10) **Co-Location Service** means the Service of providing an allocated area and/or facilities in the Supplier's Premises which are used by the Customer for the purpose of installing and operating its equipment, as more fully described in the Service Order;
- (11) **Co-Location Facilities Customer Manual** means the document as notified to the Customer from time to time by the Supplier in relation to:
- (a) the installation, replacement and removal of any Customer's Equipment at Supplier's Premises (including any procedures, standards and requirements relating to installation);
 - (b) gaining access to the Supplier's Premises;
 - (c) gaining access to the Space; and
 - (d) any other related issues;
- (12) **Commencement Date** means the date set out in Item 1 of Schedule 1;
- (13) **Confidential Information** means any information which is disclosed or observed in connection with this Agreement or any Service Order or the Supplier's Network and any information which is generated by or on behalf of one or both of the parties in relation to the Supplier's Network, and in each case includes the contents of this Agreement and each Service Order (including all Background IP and all information provided under it and the nature of any negotiations pursuant to it), the nature, extent and scope of the Services, information relating to technology, processes, products, samples, drawings, plans, specifications, inventions and designs used, developed or produced by or on behalf of one or both of the parties and trade secrets and know-how and information of a commercially sensitive nature (including, without limitation, financial information, business and marketing plans, information relating to clients, pricing, projections and formulae and any

geological, processing and engineering information, results, interpretations, reports and analyses);

- (14) **Content Services** has the meaning given to it in the Act;
- (15) **CPI** means the Weighted Average All Groups Eight Capital Cities Consumer Price Index published on a quarterly basis by the Australian Bureau of Statistics;
- (16) **Customer's Equipment** means any equipment (not including the Supplier's Equipment) provided and used by the Customer in connection with the Services;
- (17) **Customer's Equipment List** has the meaning given in clause 7.7(3);
- (18) **Default Rate** means the rate for the time being quoted by the National Australia Bank ("NAB") as its corporate overdraft reference rate monthly charging cycle ("**Published Rate**") plus 2% per annum. If the Published Rate ceases to exist, the rate will be as designated by the NAB as being an appropriate substitute plus 2% per annum. A letter signed by an authorised officer of the NAB stating the Published Rate or appropriate substitute for the time being shall be conclusive evidence of the rate;
- (19) **Emergency** means an emergency due to an actual or potential occurrence (such as fire, flood, storm, earthquake, explosion, accident, epidemic or war like action or other Force Majeure event) which endangers or threatens to endanger the environment, the Supplier's Premises, the integrity of the Supplier's Network or the safety or health of persons, or destroys or damages or threatens to destroy or damage property;
- (20) **End User** means any person:
 - (a) to whom the Customer supplies Carriage Services or Content Services (whether directly or indirectly) using the Services; and
 - (b) who provides or receives Carriage Services or Content Services delivered through or by the Services;
- (21) **Expiry Date** means the date set out in Item 2 of Schedule 1;
- (22) **Fault Management Procedure** means the procedure for reporting faults and claiming rebates as set out in the Service Level Agreement;
- (23) **Fees** means any fee payable under this Agreement, including fees for the provision of Services, Variation or Supplementary Work by the Supplier, as identified in a Service Order or this Agreement and as amended in accordance with the terms of this Agreement;
- (24) **Force Majeure** means:
 - (a) acts of God;
 - (b) war (whether declared or not), act of terrorism, revolution or act of public enemies;
 - (c) riot or civil commotion, strike, stoppage, ban, limitation on work or restraint of labour;
 - (d) fire, flood, storm, tempest, radioactive contamination or wash away or high sea inundation;

- (e) acts and mandatory directives of any government body; or
 - (f) any other event or circumstance which is beyond the reasonable control of either party and, without limitation, in the case of the Supplier, includes any third party interference or damage to the Supplier's Premises or Supplier's Network;
- (25) **Further Term** means the term set out in Item 3 of Schedule 1;
- (26) **Initial Request** has the meaning given in clause 5.1;
- (27) **Insolvency Event** means, in respect of a party, being insolvent under administration or insolvent, or having a controller appointed, or being in receivership or receivership and management, in liquidation, in provisional liquidation, under administration, wound up, subject to any arrangement, assignment, or composition, protected from creditors under any statute, dissolved, or otherwise unable to pay its debts when they fall due (with each of the expressions used in this paragraph having the meaning given under the *Corporations Act 2001* (Cth));
- (28) **Intellectual Property** means all statutory, civil and common law, and other proprietary rights (including rights to require information be kept confidential), whether registered or not or capable of registration or not, and including all applications and the right to apply for any registrations in respect of inventions, copyright, trade marks, designs, patents, circuit layouts, know-how, trade secrets and all other rights as defined by Article 2 of the Convention establishing the World Intellectual Property Organisation of July 1967;
- (29) **Intervening Event** means any change in a Legislative Requirement that materially adversely affects the Supplier's ability to provide a Service in accordance with this Agreement or a Service Order including:
- (a) amendments to or the repeal of any part of any statute, ordinance, code or law including the Act and the *Competition and Consumer Act 2010* (Cth), or the introduction of a new statute, ordinance, code or law;
 - (b) a directive of an Authority;
 - (c) any determination by an Authority;
 - (d) registration or determination of a new industry code or industry standard under the Act, or amendments to or the repeal of any existing code or industry standard;
 - (e) the issue by the ACCC of a Competition Notice (as defined in section 151AB of the *Competition and Consumer Act 2010* (Cth) which affects any Services or the subject matter of the Agreement or the Service Order, or if the Supplier reasonable considers that the ACCC is likely to issue a Competition Notice;
 - (f) the determination, addition, variation or removal of a Service Provider Rule (as defined by section 98 of the Act) applicable to the Supplier, any third party provider, or the Customer;
 - (g) the grant of an injunction against a party in relation to a breach or alleged contravention of any Legislative Requirement; and
 - (h) an amendment, declaration, addition, variation or removal of a condition to a party's carrier licence;

- (30) **Legislative Requirements** means:
- (a) acts, ordinances, rules, regulations, by-laws, orders, awards, codes (including the Ministerial Code of Practice (Clause 15 of Division 5 of Schedule 3 of the Act), any relevant codes registered with ACMA and the Telecommunications Code of Practice) and proclamations or any similar legislative or delegated legislative requirements of the Commonwealth or the State or Territory in which the Services or any part thereof are performed from time to time; and
 - (b) certificates, licences, consents, permits, approvals, mandatory directives, determinations and requirements of Authorities;
- (31) **Loss** means any damages, losses, costs, charges, interest, penalties, fees, fines, forfeitures, assessments, expenses and liabilities whether present, unascertained, immediate, future or contingent, and whether based in contract, tort, statute or otherwise;
- (32) **Minimum Capacity** means annualised data centre power consumption of 380kW at any one Bladeroom Site;
- (33) **Notification to Proceed** has the meaning given in clause 5.2;
- (34) **Related Body Corporate, Subsidiary** and **Holding Company** each has the meaning given in section 9 of the *Corporations Act 2001*;
- (35) **Representative** means, in relation to a party, an officer, employee, consultant, agent or sub-contractor of that party;
- (36) **Service Commencement Date**, in relation to each Service Order, has the meaning given in clause 2.2;
- (37) **Service Level** means the levels of service that the Supplier will endeavour to achieve in relation to an applicable Service (if any), as set out in the applicable Service Order;
- (38) **Service Level Rebate** means a rebate applicable to a Service Level as set out in the Service Order in the event that the Service Levels are not met;
- (39) **Service Notice** has the meaning given in clause 3.1;
- (40) **Service Order** means an order agreed between the parties in accordance with clause 3.3 for the provision of a Service from the Supplier to the Customer substantially in the form of Schedule 2;
- (41) **Service Term**, in respect of a Service Order, means the term of that Service Order, as set out in clause 2.2;
- (42) **Services** means the services to be provided by the Supplier to the Customer, including any Co-Location Services, as described in a Service Order and **Service** has a correspondence meaning;
- (43) **Site** means each separate site where the Supplier's Premises is located;
- (44) **Space** means an allocated part of the Supplier's Premises;
- (45) **Supplemental Work** means all work:

- (a) ancillary to a Service described in a Service Order that the parties agree that the Supplier shall provide; or
- (b) identified in this Agreement as Supplemental Work;
- (46) **Supplier's Equipment** means any equipment of the Supplier used for the provision of the Services under this Agreement including the Supplier's Network;
- (47) **Supplier's Network** means any telecommunications network, equipment, facilities or cabling controlled by the Supplier and its Related Bodies Corporate;
- (48) **Supplier's Premises** means premises owned, leased or licensed by the Supplier;
- (49) **Suspension Event** has the meaning given in clause 10.1;
- (50) **Term** means the term of this Agreement as set out in clause 2.1, and as extended in accordance with clause 2.3;
- (51) **Unauthorised Item** means any item of Customer's Equipment that:
 - (a) is not installed in accordance with clause 7.6;
 - (b) is not listed on the Customer's Equipment List;
 - (c) does not comply with all Legislative Requirements regarding its installation and operation; or
 - (d) is unsafe, or which affects or interferes with the Supplier's Premises, the Supplier's Equipment or the property, equipment, services or network of any other person;
- (52) **Variation** has the meaning given in clause 5.1; and
- (53) **Work Order** has the meaning given in clause 5.1.

1.2 Interpretation

In this Agreement, unless the contrary intention appears:

- (1) a reference to a day, week, month or a year is a reference to a calendar day, week, month or a year;
- (2) a reference to:
 - (a) the singular includes plural and vice versa;
 - (b) a person includes a partnership and a body, whether corporate or otherwise;
 - (c) writing, or written, refers to any representation of words, figures or symbols capable of being rendered in a visible form;
 - (d) any statute or other legislation (whether primary or subordinate) is a statute or other legislation of the Commonwealth, State or Territory as amended or replaced from time to time; and
 - (e) a party means a party to this Agreement;

- (3) words importing a gender include any other gender;
- (4) where a word or phrase is given a particular meaning, other parts of speech and grammatical forms of that word or phrase have corresponding meanings;
- (5) the headings are for convenience and are not to be used in the interpretation of this Agreement;
- (6) “including” and similar expressions are not words of limitation and words appearing after such expressions are not limited by such expressions;
- (7) a party includes the party’s executors, administrators, successors and permitted assigns;
- (8) if the Customer comprises more than one party, each of those parties shall be jointly and severally liable for the performance of the Customer’s obligations under this Agreement;
- (9) where a party is required under this Agreement to perform an obligation, matter or thing, or discharge a liability that party shall do so at its own expense, unless expressly provided otherwise;
- (10) a provision of this Agreement must not be construed to the disadvantage of a party merely because that party was responsible for the preparation of the Agreement or the inclusion of the relevant provision in the Agreement;
- (11) if an act must be done on a specified day, which is not a Business Day, it must be done instead on the next Business Day;
- (12) where time is to be calculated by reference to a day or event, that day or the day of that event is excluded;
- (13) money is in Australian dollars; and
- (14) all lump sums and rates stated in this Agreement (including each Service Order) shall be deemed not to include GST, unless expressly stated otherwise.

2 Term

2.1 Term of Agreement

This Agreement is effective from the date it is executed and continues in force until the Expiry Date unless extended in accordance with clause 2.3 or terminated earlier in accordance with clause 18.

2.2 Term of each Service

- (1) The date of commencement of each Service will be as set out in the relevant Service Order and, where applicable, subject to the successful completion of any pre-delivery testing or other validation procedure identified in the applicable Service Order (“**Service Commencement Date**”).
- (2) The date of expiry of each Service will be as set out in the relevant Service Order, unless extended in accordance with clause 2.3 or terminated earlier in accordance with clause 18.

- (3) The Supplier will ensure that any pre-delivery testing or other validation procedure required will be completed within any timeframe that may be identified in the Service Order or, if no timeframe is specified, within a reasonable timeframe.

2.3 Extensions

- (1) If this Agreement has not otherwise been terminated, either party may by written notice to the other party at least 30 days prior to the Expiry Date extend this Agreement for the Further Term. Extension of this Agreement does not affect the Service Term of any Service Order.
- (2) Either party may at any time prior to 30 days before the date of expiry of the Service Term of any Service Order notify the other that it does not wish to extend that Service Order.
- (3) If neither party has given notice under clause 2.3(2) and this Agreement has not been terminated on the expiry of the Service Term of the Service Order, the Service Term of that Service Order automatically extends for successive periods of one month, on the existing terms and conditions (including price) or on any amended terms (as agreed in writing) ("**Extended Service Term**").
- (4) During the Extended Service Term of a Service Order, either party may terminate that Service Order by giving no less than 30 days prior notice of termination to the other party.

3 Services

3.1 Services

In consideration of the Customer paying the Fees, the Supplier will provide the Services in accordance with the requirements set out in the Service Order and the other terms and conditions of this Agreement.

3.2 Service Notice

The Customer may from time to time request the Supplier to provide a Service under this Agreement by submitting to the Supplier a request for that Service ("**Service Notice**") that contains relevant details of:

- (1) the type of Service;
- (2) the date by which the proposed Service is required to commence;
- (3) the proposed date of expiry of the Service; and
- (4) any other relevant information required to provide the requested Service.

3.3 Service Order

- (1) The Supplier will consider each Service Notice received in accordance with clause 3.1.
- (2) If the Supplier agrees to provide the requested Service in accordance with the relevant proposed Service Notice, the Supplier will promptly complete and submit to the Customer a draft Service Order with the following details:
 - (a) proposed Service Order number;

- (b) the proposed date by which the proposed Service is scheduled to commence;
 - (c) proposed date of expiry of the Service;
 - (d) proposed Fees to apply to provide the requested Service;
 - (e) in relation to Co-Location Services, the location of the Supplier's Premises, the allocated Space and power consumption; and
 - (f) any other relevant details particular to the requested Service including any special conditions or variation of the terms of this Agreement to apply to the Service Order.
- (3) If the Supplier does not wish to provide the requested Service in accordance with the relevant proposed Service Notice, the Supplier will notify the Customer and provide reasons.
 - (4) The Customer will consider each draft Service Order submitted in accordance with clause 3.3(2) and may accept or reject it. If the Customer accepts the draft Service Order, the Customer must execute the Service Order without amendments within 5 Business Days of its receipt (or such other time as the Supplier may agree) and provide the Supplier with two signed copies. If the Customer does not execute the draft Service Order within the above timeframe, then the Customer is deemed to have rejected the draft Service Order.
 - (5) On receipt of a Service Order signed by the Customer under clause 3.3(4), the Supplier will review the Service Order, and if the Supplier accepts the Service Order, the Supplier will sign and provide a copy of the fully executed Service Order to the Customer. If the Supplier does not sign and provide a copy of the fully executed Service Order or, alternatively, notify the Customer in writing that it rejects the Service Order within 5 Business Days of receipt by it of a Service Order the Service Order shall be deemed to have been accepted by the Supplier.
 - (6) For the avoidance of doubt, the Supplier is under no obligation to provide any Service under a Service Order until and unless the Service Order has been executed by both parties in accordance with this clause 3.3 or deemed to have been accepted in accordance with clause 3.3(5).

3.4 Performance

In relation to each Service Order executed by both parties, the Supplier will provide the Services:

- (1) in accordance with the requirements and specifications set out in the Service Order and this Agreement;
- (2) using reasonable skill and care of a standard reasonably expected of a similar service provider providing similar services; and
- (3) so as to meet or exceed all Service Levels.

3.5 Maintenance and faults

- (1) The Supplier (or any of its Related Bodies Corporate) may conduct maintenance on the Supplier's Equipment at any time. The Supplier will use reasonable endeavours to schedule such maintenance, where it may adversely affect delivery of the Services, with reasonable notice and outside Business Hours.

- (2) The Supplier does not warrant that the Services will be free of blockages, interruptions, delays or faults, but shall remedy any fault or problem in accordance with this Agreement and the Fault Management Procedure.
- (3) If the Customer becomes aware or reasonably suspects the existence of a fault in a Service or any event or circumstance that is causing or likely to cause an interruption or degradation to a Service or otherwise detects a degradation in a Service that could lead to a fault occurring, it must notify the Supplier as soon as reasonably practicable.
- (4) Except where provided otherwise by the Fault Management Procedure, following receipt of a notice under clause 3.5(3), if the Supplier (acting reasonably) determines that:
 - (a) a fault reported by the Customer arose:
 - (i) in or in connection with the Customer's Equipment; or
 - (ii) in or in connection with the Customer's facilities, networks or systems; or
 - (iii) as a result of any wrongful or negligent act or omission by the Customer or its Representatives; or
 - (iv) in or in connection with any third party equipment, facilities, networks or systems; or
 - (b) there was no fault,

then the Supplier may charge the Customer a Fee for investigating or remedying the fault, or investigating or attempting to remedy the non-existent fault, at the Supplier's then current time and materials rates, together with any out of pocket expenses reasonably incurred by the Supplier for investigating or remedying the fault.

3.6 Monitoring

- (1) The Customer acknowledges that the Supplier may (but is not required to) intercept the Services or data being transmitted to or from the Customer over the Services or within the Supplier's Premises from time to time to enable the Supplier to comply with Legislative Requirements or to investigate the use or misuse of any Services by the Customer or End Users (where applicable, in conjunction with law enforcement agencies), provided that the Supplier does not conduct any interception in breach of its obligations under the Legislative Requirements.
- (2) Subject to clause 3.6(1), the parties acknowledge and agree that the Customer (and not the Supplier) has sole control over the content stored on the Customer's Equipment and any content and information stored or transmitted using the Services.

4 Service Levels

4.1 General

The Customer acknowledges and agrees that a Service Level will only apply to the Services as specified in the Service Order, and not to other Services provided under this Agreement.

4.2 Compliance with Service Levels

- (1) The Supplier will use reasonable endeavours to comply with the Service Levels.
- (2) Each party will follow the Fault Management Procedure set out in the Service Level Agreement in relation to the monitoring, reporting of Service Levels and claims for service credits or rebates.
- (3) Subject to any exclusions in, and the Customer's compliance with, the Fault Management Procedure, if the Supplier fails to provide a Service in accordance with the relevant Service Levels for that Service, then the consequences (if any) set out in the Service Order in relation to that failure will apply. To the maximum extent permitted by law, the consequences and remedies set out in the Service Order will be the sole and exclusive remedy of the Customer (including for any resulting breach of warranty) in connection with the Supplier's failure to comply with the Service Levels.

5 Supplemental Work

5.1 General

During the Term, if the Customer desires the Supplier to perform any Supplemental Work, or vary the content or type of existing Services or the manner in which they will be provided ("**Variation**"), it must notify the Supplier of the relevant request ("**Initial Request**"). As soon as practicable after receipt of the Initial Request the Supplier will notify the Customer:

- (1) whether or not the Supplier is willing perform the Supplemental Work or Variation; and
- (2) if the Supplier is willing perform the Supplemental Work or Variation:
 - (a) the dates by which it anticipates it may be able to commence and complete the Supplemental Work or Variation;
 - (b) any amendments to this Agreement or a Service Order required to effect the Supplemental Work or Variation; and
 - (c) the Fees to perform the Supplemental Work or implement the Variation, in addition to any variation to the existing Fees for the ongoing provision of the Service as varied,

("Work Order").

5.2 Notification to Proceed

- (1) The Customer will consider the Work Order. If the Customer accepts the Work Order (without amendment), then it must notify the Supplier in writing within 7 days of receipt of the Work Order ("**Notification to Proceed**"), in which case:
 - (a) the Supplier must perform the Supplemental Work or Variation within the timeframes notified in accordance with its Work Order;
 - (b) the amendments to this Agreement or a Service Order as set out in the Work Order will apply (and this clause 5.2(1)(b) is an exception to clause 23.5); and
 - (c) the Customer must pay the Fees for the Supplemental Work or Variation as set out in the Notification to Proceed.

- (2) The Work Order is deemed to have been rejected by the Customer if the Supplier does not receive a Notification to Proceed within the 7 days set out in clause 5.2(1) (or such other time agreed between the parties). After this, if the Customer desires the Supplier to perform the Supplemental Work or carry out the Variation, the Customer must submit another Initial Request.

6 Customer's Equipment

6.1 Disconnection and Modifications

- (1) In the event that:
 - (a) the Customer does not fulfil its obligations under clause 6.2;
 - (b) this Agreement or the Service to which the Customer's Equipment relates is terminated; or
 - (c) the Supplier considers that the Customer's Equipment may:
 - (i) cause death or personal injury;
 - (ii) cause damage to the property of the Supplier (including the Supplier's Equipment) or another person; or
 - (iii) materially impair the operation of the Supplier's Equipment,

then the Supplier may disconnect, or direct the Customer to disconnect, the Customer's Equipment. The Supplier will give the Customer reasonable prior written notice of its intention to disconnect or require the disconnection of the Customer's Equipment except in the case of an Emergency or if the Supplier reasonably considers the circumstances necessitate urgent action, in which case the Supplier may disconnect or require disconnection without notice.

- (2) The Supplier will not be liable for any Losses incurred by the Customer arising from or in connection with:
 - (a) any disconnection or modification of the Customer's Equipment in accordance with clause 6.1(1); or
 - (b) any faults or interruptions to the Services or any inability of the Customer to access the Services which are due to the Customer's Equipment or any incompatibility between the Customer's Equipment and the Supplier's Equipment.

6.2 Responsibility for Customer's Equipment

- (1) Except where otherwise provided for by a Service Order, the Customer will be responsible for the network and logical security of the Customer's Equipment and its own network, including the implementation and maintenance of such security.
- (2) Except where otherwise provided for by a Service Order, the Customer will be liable for all Losses incurred by the Customer due to a breach in the security of the Customer's Equipment and its network including but not limited to where such Losses are incurred as a result of viral infection, hacking, spam, password misuse or misuse of the Services by the Customer or any of the Customer's Representatives and any other person.

7 Co-Location Services

7.1 Application of clause 7

This clause 7 applies in respect of Co-Location Services and any other Services which specifically grant the Customer a right of access the Supplier's Premises to install, maintain and operate the Customer's Equipment.

7.2 Access to Space

- (1) The Supplier grants the Customer a limited and personal licence to:
 - (a) use and occupy the allocated Space as specified in the Service Order for the purpose of for installing, operating and maintaining Customer's Equipment in accordance with this Agreement and the applicable Service Order;
 - (b) run cable within the Supplier's Premises along routes approved by the Supplier (and at the Customer's cost); and
 - (c) connect the Customer's Equipment to power supply and access ducts located at or outside the Space (as approved by the Supplier and at the Customer's cost).
- (2) The rights conferred by the Supplier under this clause 7:
 - (a) are subject to the compliance by the Customer of this Agreement and the Service Order;
 - (b) rest in contract only and will not create or confer any tenancy, estate or interest in the Supplier's Premises or the Space;
 - (c) do not confer upon the Customer any right or interest in:
 - (i) any other facilities used by the Supplier in providing the Services by way of occupation rights, easements, rights of way or otherwise; or
 - (ii) the Supplier's Equipment or any other equipment or facilities (including any equipment and facilities connected to the Customer's Equipment); and
 - (d) do not confer any right of exclusive occupation of the Supplier's Premises on the Customer and, subject to the terms of this Agreement and the Service Order, the Supplier may at any time exercise its rights as lessee or owner, to use, possess and enjoy the whole or any part of the Supplier's Premises.
- (3) The Customer will not provide, make available, sub-license or permit in any manner any other person to use all or any portion of the Space or the Supplier's Premises without the Supplier's approval.
- (4) The Supplier may enter the Space at any time for any of the following purposes:
 - (a) inspection and examining the state of condition of the Space; or
 - (b) maintaining or repairing the Space or any Supplier's Equipment located in the Space.

The Supplier will give reasonable notice to the Customer, except in the case of an Emergency, in which case the Supplier may enter the Space without notice.

- (5) This Agreement does not confer any rights on the Customer in relation to access, continued occupation or use of any network, premises or facilities pursuant to the Act.

7.3 **Supplier's Obligations**

- (1) The Supplier must ensure that the Supplier's Premises and the Space is available for access by the Customer 24 hours a day, 7 days a week, in accordance with this clause 7.
- (2) The Supplier must ensure that the Supplier's Premises and the Space meet the redundancy, security, temperature control and other environmental standards set out in the applicable Service Order.
- (3) The Supplier must:
 - (a) not interfere with the Customer's use of the Space (provided that this does not prevent the Supplier from exercising any rights to access and inspect the Space under this Agreement); and
 - (b) take care not to damage or interfere with the Customer's Equipment installed in the Space.

7.4 **Conditions relating to access**

- (1) The Customer may use the Space only for the purposes of installing, maintaining and operating the Customer's Equipment.
- (2) The Customer must comply with the Co-location Facilities Customer Manual.
- (3) In entering and accessing the Supplier's Premises and the Space, the Customer must ensure that its Representatives:
 - (a) are suitably training, qualified and experienced;
 - (b) comply with the Co-location Facilities Customer Manual;
 - (c) have identification available and display security passes at all times while in the Supplier's Premises;
 - (d) remain only in the Space or other common area designated by the Supplier;
 - (e) follow the Supplier's reasonable instructions concerning security, safety and other general Supplier's procedures (as reasonably amended by the Supplier and notified to the Customer from time to time) as they apply in the Supplier's Premises and the Space, including prohibition on smoking in the Supplier's Premises.
 - (f) do not interfere with any security arrangements in place in the Supplier's Premises; and
 - (g) participate in any site safety awareness induction training as required by the Supplier and any site safety training updates as may be required by the Supplier from time to time (both at the cost of the Supplier).

- (4) Access to the Supplier's Premises and Space is restricted to persons listed on the Authorised Personnel List. The Customer must provide the Supplier on or before the Service Commencement Date a list of its authorised Representatives containing their full name, title, signature and photo identification. The Customer is responsible for maintaining and updating the Authorised Personnel List by notifying the Supplier of any changes. The Supplier may refuse entry to the Supplier's Premises to any person whose name and other details do not appear on the Authorised Personnel List.
- (5) All persons listed on the Authorised Personnel List are deemed to be authorised by the Customer to access and enter into the Space. The Customer is responsible for all acts or omissions of any persons included on the Authorised Personnel List or otherwise authorised by the Customer to enter the Supplier's Premises and must indemnify and hold the Supplier harmless from any Losses and Claims arising from the wilful misconduct or negligent acts or omission of these individuals.
- (6) The Supplier will not be liable for any Losses incurred by the Customer as a result of:
 - (a) the Supplier granting access to any person on the Authorised Personnel List; or
 - (b) the Supplier refusing entry to any person whose name and other details do not appear on the Authorised Personnel List.
- (7) The Supplier may reasonably deny any person access to the Supplier's Premises or restrict the number of persons in the Supplier's Premises at any one time for safety or security reasons.

7.5 Delivery of Customer's Equipment

- (1) The Customer is solely responsible for delivering and accepting delivery of Customer's Equipment and any other facilities or materials delivered to the Supplier's Premises on behalf of the Customer.
- (2) At the Customer's request, the Supplier may, in its sole discretion and at the sole risk of the Customer, accept delivery of Customer's Equipment at the Supplier's Premises if the Supplier has the means to do so. Delivery must be pre-arranged and agreed with the Supplier.
- (3) The Customer will remain responsible for risk of loss of or damage to the Customer's Equipment unless such loss or damage is caused by the negligence or wilful misconduct of the Supplier.

7.6 Installation of Customer's Equipment

- (1) Unless otherwise authorised by the Supplier in writing, the Customer is only permitted to install its equipment and cabling within the Space. All other installation and cabling within the Supplier's Premises must be undertaken by the Supplier or approved contractors in accordance with Australian electrical and fire standards and any of the Supplier's standards and specifications.
- (2) Unless agreed to by the Supplier or in an Emergency, all installation and/or removal of Customer's Equipment must be undertaken during Business Hours and must be pre-scheduled with the Supplier in accordance with the procedures specified in the Co-location Facilities Customer Manual. The Supplier may charge a Fee associated with all installation works undertaken by the Customer outside Business Hours.

- (3) The Customer must ensure that:
 - (a) all installation of Customer's Equipment is conducted in accordance with the Co-location Facilities Customer Manual, including (where relevant) any requirements to unpack and conduct power-up testing at the staging area prior to installation of the Customer's Equipment in the Space.
 - (b) the Customer's Equipment and its installation complies with Legislative Requirements;
 - (c) the Customer's Equipment is safe and does not endanger the safety of any person;
 - (d) the Customer's Equipment does not interfere with the Supplier's Premises, Supplier's Equipment or other equipment and networks located in the Supplier's Premises;
 - (e) the Customer's Equipment is installed and fitted within the Space;
 - (f) the Customer's Equipment is appropriately labelled;
 - (g) no Customer's Equipment or wiring protrudes beyond the Space; and
 - (h) all cabinet doors (if applicable) must be fully and securely closed and remain in the closed position, except when performing maintenance.
- (4) The Supplier's Representatives may observe the work activities of the Customer's Representatives in the Supplier's Premises and may inspect at any time the Customer's Equipment brought into the Supplier's Premises.
- (5) The Customer must notify the Supplier on the completion of installation works of the Customer's Equipment. The Supplier may inspect the installation works and may either approve the installation works or require the Customer to remedy all defects or issues identified during this inspection. All defects and issues must be rectified and approved by the Customer before the Customer's Equipment is activated.
- (6) The inspection (or the failure to inspect) and approval of the installation works by the Supplier under clause 7.6(5) does not in any way:
 - (a) relieve the Customer from, or alter or affect, its liabilities, obligations or responsibilities whether under this Agreement or otherwise; or
 - (b) prejudice the Supplier's rights against the Customer whether under this Agreement or otherwise.

7.7 Operation and maintenance of Space and Customer's Equipment

- (1) The Customer must not do anything which may invalidate or breach the Supplier's lease or occupation agreement in respect of the Supplier's Premises or make void or voidable, or cause an increase in, the insurance premium of any policy for the Supplier's Premises.
- (2) The Customer:
 - (a) must not, and must not attempt to, alter, tamper with, adjust, or repair any equipment or property not belonging to the Customer; and

- (b) must not erect signs or devices on the exterior of any cabinet; and
 - (c) must not make any construction changes or material alterations to the Space or the interior or exterior portions of the Supplier's Premises.
- (3) The Customer must maintain a list of all of the Customer's Equipment to be installed in the Space ("**Customer's Equipment List**") and provide the list to the Supplier. If the Customer intends during the Service Term to install additional Customer's Equipment and/or to remove any Customer's Equipment, the Customer must notify the Supplier by submitting a revised Customer's Equipment List. This Customer's Equipment List will be signed by the Customer and the Supplier at the time the Customer's Equipment is installed or removed as evidence of the Customer's Equipment installed in the Space. The Customer and the Supplier agree that the most recent signed copy of the signed Customer's Equipment List sets out the only Customer's Equipment permitted in the Supplier's Premises.
- (4) The Customer will operate and maintain the Customer's Equipment in a safe manner, and keep the Space in good order and condition.
- (5) The Customer will be responsible for the prompt removal of all rubbish, packing materials, cartons and other items or materials that the Customer brings into or delivers to the Supplier's Premises.
- (6) The Customer will be responsible for obtaining and complying with all necessary Legislative Requirements regarding the installation and operation of the Customer's Equipment (including compliance with industry standards) as well as any licence regarding the operation of that equipment.
- (7) The Customer will notify the Supplier immediately of any failure of any of the Customer's Equipment (including switches, access lines and/or apparatus) which may affect the Supplier's Premises, the Supplier's Equipment or the property, equipment, services or network of any other person.
- (8) The Customer must at its own cost effect and maintain:
- (a) public liability insurance in an amount not less than \$20 million in relation to the liability of the Customer under this Agreement; and
 - (b) property insurance for an amount of not less than the reinstatement cost of the Customer's Equipment,
- and at the Supplier's request, produce evidence of currency of such insurance.

7.8 **Removal of Customer's Equipment during Service Term**

- (1) Without limiting the rights of the Supplier under clauses 6 and 7.8(2), the Supplier will give at least 10 Business Days days written notice to the Customer to disconnect and remove any Unauthorised Items from the Supplier's Premises. If the Customer does not disconnect and remove the Unauthorised Items from the Supplier's Premises by the expiry of the notice period, the Supplier may disconnect and remove the Unauthorised Items from the Supplier's Premises.
- (2) Notwithstanding the foregoing, if the Supplier determines in its reasonable discretion that any Unauthorised Item poses an immediate and significant risk to the Supplier's Premises, the Supplier's Equipment or other customers co-located at the Supplier's Premises, the Supplier may immediately disconnect or remove such Unauthorised Item from the Supplier's Premises without prior notice to the Customer.

- (3) The Supplier will not be liable for any Losses incurred by the Customer as a result of any disconnection or removal of the Unauthorised Items in accordance with clauses 7.8(1) or 7.8(2).
- (4) The Customer may remove Customer's Equipment from the Supplier's Premises if:
 - (a) the Customer's Equipment is clearly labelled as the property of the Customer;
 - (b) the Customer's Equipment was located at the Space assigned to the Customer; or
 - (c) the Customer is otherwise able to show proof of ownership or right of possession to the reasonable satisfaction of the Supplier.

7.9 Location of Space and additional Space

- (1) The Customer acknowledges that the location of the Space is at the sole discretion of the Supplier. The Supplier does not warrant or guarantee that the location of the Space:
 - (a) will be at the Customer's preferred location; or
 - (b) will be contiguous or adjacent to other Space allocated to the Customer.
- (2) The Customer may from time to time request additional Space by submitting Service Notice in accordance with clause 3.1. The Supplier will make reasonable attempts at the time it receives the Service Notice to provide the Customer with adjacently located Spaces.
- (3) The Customer may from time to time request reservation of adjacent Space for future use by submitting a written request to the Supplier ("**Reservation Request**"). If it agrees to reserve the relevant Space for the Customer, the Supplier will provide the Customer with a proposed Fee for the reservation of that Space. If that price is acceptable to the Customer:
 - (a) the Customer will notify the Supplier in writing;
 - (b) the Customer will pay the Supplier the Fee ("**Reservation Fee**"); and
 - (c) the Supplier will reserve the relevant Space for future use by the Customer ("**Reserved Space**").
- (4) To avoid doubt, the Customer does not have any right to enter and use the Reserved Space unless and until the parties enter into a Service Order for the Supplier to supply Co-Location Services in respect of the Reserved Space.
- (5) The Supplier may withdraw the Reserved Space at any time by giving the Customer at least 20 Business Days notice. If the Customer does not submit a Service Notice to request the Supplier to supply Co-Location Services in respect of the Reserved Space by the expiry of the notice, then:
 - (a) the Reserved Space is withdrawn and the Supplier may allocate it to any other customer at its discretion; and
 - (b) the Supplier will credit the Customer (in the next invoice) with the prorated amount of any paid annual Reservation Fee.

7.10 Heat and Power Management

- (1) Upon request by the Supplier, the Customer must provide accurate power consumption information for all of the Customer's Equipment installed at the Supplier's Premises.
- (2) The Customer must comply with all the Supplier's specifications, rules, procedures and policies in relation to heat and power management. This includes (without limitation) installation of Customer's Equipment in the Space to allow sufficient cool air flow to reach all items of Customer's Equipment located in the area, installation of the Customer's Equipment in accordance with the Supplier hot/cold aisle design and installation of required blanking panels at the direction of the Supplier.
- (3) The Customer must ensure that the maximum power consumption for the Space does not exceed the specified rating as defined in the Service Order. All variations of the maximum power ratings from the Service Order must be agreed in writing with the Supplier, and the Supplier reserves the right to charge the Customer increased Fees associated with the higher power consumption. If the Customer exceeds the maximum power consumption allocated to the Space, the Supplier may, at its discretion, after giving the Customer at least 10 Business Days written notice:
 - (a) limit the power supply to the Space;
 - (b) increase the Fees to reflect the higher power consumption; or
 - (c) carry out any other action reasonably required to ensure the Customer does not continue to exceed the maximum power consumption for the Space.
- (4) To the extent that the Service Description Order includes any requirements on maintaining the temperature of the Supplier's Premises:
 - (a) the Customer acknowledges that the temperature requirements only apply in relation to the Supplier's Premises, and not in respect of temperatures within cabinets or cages; and
 - (b) the temperature measured by the Supplier's operated sensors are deemed to be accurate in the absence of manifest errors.
- (5) The Supplier may limit the excess power usage by the Customer to keep the temperature of the Customer occupied area within what the Supplier considers in its sole discretion as the safe limit.

7.11 Floor Loading and Weight Management

The Supplier may:

- (1) limit the weight of any Customer's Equipment installed in the Supplier's Premises; and
- (2) require the Customer to distribute load of the Customer's Equipment if the loading exceeds the weight limit identified in the Service Order. If additional Space is required as a result of the distribution, the Supplier reserves the right to charge the Customer additional Fees associated with the provision of the additional Space.

7.12 Security

- (1) The Customer must not circumvent, attempt to circumvent, or do anything which is likely to jeopardise, the security of the Supplier's Premises, the Supplier's Equipment or any systems, network and equipment located or connected to the Supplier's Premises.
- (2) If the Supplier determines in its sole discretion that the Customer poses an immediate and significant risk to the Supplier's Premises, the Supplier's Equipment or any property of the Supplier, its landlord (if applicable) or other persons located at the Supplier's Premises, the Supplier will immediately notify the Customer, and may take any reasonable action to prevent or correct such risk. The Customer indemnifies the Supplier from and against all Losses incurred by the Supplier pursuant to this clause 7.12(2), to the extent that the action is reasonable and that the risk is caused by the breach of this Agreement by the Customer or the wilful misconduct or negligent act or omission of the Customer.

7.13 Third party connections

- (1) Subject to this clause 7.13, the Supplier will permit access by third party providers ("**Third Party Providers**") to the Supplier's Premises for the purposes of the Third Party Providers providing services and network connectivity to the Customer ("**Third Party Services**"), but will not arrange for or resupply any Carriage Services or connections between the Third Party Providers and the Customer. To avoid doubt:
 - (a) the Customer is solely responsible for negotiating and entering into arrangements with the Third Party Providers for the provision of the Third Party Services; and
 - (b) the Customer is solely responsible for the Third Party Services obtained from the Third Party Providers, including obligations to pay for such services.
- (2) Access to the Supplier's Premises by a Third Party Provider is subject to the Third Party Provider having an enforceable agreement with the Supplier in connection with the access to the Supplier's Premises, on terms reasonably required by the Supplier. The Supplier will not unreasonably refuse to enter into such agreement with Third Party Providers.
- (3) In order for the Supplier to ensure that all contractual and infrastructure requirements are in place to support delivery of the Third Party Services by the Third Party Providers to the Customer, the Customer must provide the Supplier with written notice of the requirements, including:
 - (a) the identity of the Third Party Provider;
 - (b) the Third Party Services to be provided by the Third Party Provider;
 - (c) access and other provisioning requirements;
 - (d) the proposed commencement date of the Third Party Services; and
 - (e) such other information as may be reasonably requested by the Supplier.
- (4) Any cabling and cross connections between the Third Party Provider's point of presence in the Supplier's Premises to the Space must be carried out:
 - (a) only after consent of the Supplier has been granted;

- (b) in accordance with the Supplier's standards, procedures and practices; and
- (c) for the fee notified by the Supplier.

7.14 Alterations to the Space and/or Facility

- (1) The Supplier may from time to time make any alterations to the Space or other parts of the Supplier's Premises for any reason at the Supplier's expense, provided that the Supplier gives reasonable notice to the Customer and that such alteration will not have any adverse affect on the delivery of the Services or result in any Service not meeting the requirements of the Service Order.
- (2) The Customer may not make any alterations to the Space or other parts of the Supplier's Premises without the Supplier's written approval. All such alterations must be undertaken by the Supplier or Supplier-approved contractors and all costs are to be paid by the Customer.

7.15 Damage to Space or Supplier's Premises

- (1) The Customer must not damage any property, equipment, facilities or network located at the Supplier's Premises. The Customer is liable to the Supplier for the all Losses incurred by the Supplier in repairing any damage to the Space or any part of the Supplier's Premises to the extent that such damage is caused by the breach of this Agreement by the Customer or the wilful misconduct or negligent act or omission of the Customer.
- (2) If the Space or the Supplier's Premises is damaged due to a Force Majeure event, the Supplier will give prompt notice to the Customer of such damage, and may temporarily relocate Customer's Equipment to another area within the Supplier's Premises or another Supplier's Premises, if practicable.
- (3) If the Supplier's landlord or the Supplier exercises an option to terminate a particular lease or occupation agreement in respect of the Supplier's Premises due to damage or destruction of the Space or the Supplier's Premises, or if the Supplier decides not to repair the damage, then the Supplier will notify the Customer and the relevant Service will be terminated as of the date of notification. The periodic Fees for the terminated Service will proportionately abate for the period from the date of such notification.
- (4) If clause 7.15(3) does not apply, then the Supplier will repair the Space or the Supplier's Premises to the same condition it was in prior to the damage, completing the same within a reasonable time period having regard to all the circumstances. In the event that the Supplier fails to complete the repair in a reasonable time period, the Customer may terminate the affected Service. If the Supplier's Premises or the Space is rendered unusable by reason of such damage, the periodic Fees for the Service will proportionately abate for the period from the date of such damage to the date when such damage has been repaired.

7.16 Prohibited Materials

- (1) The Customer must not, and must ensure that its Representatives do not, bring any harmful or dangerous materials (as determined by the Supplier in its sole discretion) into the Supplier's Premises. Such materials include, but are not limited to, batteries, explosives, flammable liquids or gases, alcohol, controlled substances, weapons, cameras, tape recorders and similar equipment and materials.
- (2) The Customer must not install in the Supplier's Premises any equipment which may cause or have the potential to cause any adverse effects to the performance

or damage any of the equipment or facilities of the Supplier or other person. This includes the installation of rectifiers connected to the Supplier's uninterruptable power supply units.

7.17 Security interests in Customer's Equipment

- (1) The Customer must notify the Supplier immediately of any liens on or security interests in respect of the Customer's Equipment.
- (2) The Customer indemnifies the Supplier against all Losses incurred by the Supplier arising from or in connection with any Claims by any person claiming an ownership or possessory interest, lien, trust, pledge, or security interest in respect of any Customer's Equipment, including without limitation any attempt by such third party to take possession of the Customer's Equipment.

8 Warranties

8.1 General

Each party represents and warrants to the other party that:

- (1) if it is a body corporate, it is duly incorporated under the *Corporations Act 2001* (Cth) and has full power to enter into and perform its obligations under this Agreement;
- (2) it does not enter into this Agreement in its capacity as trustee of any trust;
- (3) its obligations under the Agreement are binding and enforceable in accordance with the terms of this Agreement;
- (4) by entering into and undertaking proper performance of its obligations under this Agreement, it will not infringe any Intellectual Property rights;
- (5) it is not immune from suit and its assets are not exempt from execution; and
- (6) on the date of execution of this Agreement:
 - (a) it is not an externally administered body corporate under the *Corporations Act 2001* (Cth) and steps have not been taken by any person towards making it an externally administered body corporate;
 - (b) a controller (as defined in section 9 of the *Corporations Act 2001* (Cth)) has not been appointed in respect of any of its property nor have any steps been taken for the appointment of such a person;
 - (c) it has not been served with a demand under section 459E of the *Corporations Act 2001* (Cth) which it is taken, under section 459F of the *Corporations Act 2001* (Cth), to have failed to comply with; and
 - (d) no other Insolvency Event has occurred in respect of it.

8.2 Customer Warranties

- (1) The Customer represents and warrants that its equipment used or work performed by it in connection with this Agreement:
 - (a) complies with all applicable standards and regulatory requirements;

- (b) is licensed for operation at each place where installed in compliance with all applicable Legislative Requirements;
 - (c) is suitable for connection to and able to be made interoperable with the Supplier's Equipment (to the extent that such equipment connects to the Supplier's Equipment); and
 - (d) is free from any defect or fault which may in any way cause damage or disruption to the Supplier's Equipment or the Supplier's Premises.
- (2) The Customer represents and warrants to the Supplier that:
- (a) it has made its own independent enquiries and has informed itself of the adequacy of the Services and its rights and obligations under the Agreement;
 - (b) it has not entered into this Agreement on reliance on any representation, warranty, promise or statement made by the Supplier or any person on the Supplier's behalf; and
 - (c) the execution and the performance of this Agreement and each Service Order by the Customer will not breach any contract or obligation by which the Customer is bound.

9 Customer's obligations

9.1 The Customer must:

- (1) provide reasonable assistance and co-operation to the Supplier to enable the Supplier to comply with the directions and orders of Authorities (including in compliance with the *Telecommunications (Interception and Access) Act 1979* (Cth));
- (2) in using the Services:
 - (a) exercise due care, skill and judgement;
 - (b) act in an efficient and timely manner;
 - (c) comply with all Legislative Requirements applicable to its; and
 - (d) comply with all relevant technical standards and determinations made by the Australian Communications and Media Authority or other relevant Authority (including Standards Australia);
- (3) not perform any activity that will alter, interfere, weaken and/or damage the Supplier's Equipment;
- (4) not do or permit or suffer to be done or omit to do any act or thing that would or could cause the Supplier to be in breach of any relevant Legislative Requirements;
- (5) not make any use of or attempt to use the Services or allow others (including its customers) to use the Services in a manner:
 - (a) that contravenes any Legislative Requirements or infringes any third party's rights;
 - (b) that exposes the Supplier to liability;

- (c) that damages, interferes with or interrupts the Supplier's Equipment, the Supplier's Premises or any network, equipment, property or facilities of any person;
 - (d) which transmits, publishes or communicates material which is fraudulent, defamatory, offensive, abusive, indecent, menacing, unwanted or unlawful; or
 - (e) that interferes with the use or protection of the Supplier's or any third party's Carriage Services;
- (6) not undertake in any way in connection with the Services, without being properly authorised to do so, any alterations to the drainage, transport, access or security installations of a third party;
 - (7) not install in any way in connection with the Services any electrical equipment which overloads or could reasonably be expected to overload the cables, switchboards or sub-boards through which electricity is conveyed to a third party;
 - (8) not interfere with or obstruct in any way in connection with the Services access to any utility's services, power poles, communication cables or systems or any other installation of a third party;
 - (9) comply with the reasonable directions of the Supplier necessary for the Supplier to comply with any access arrangements it may have with third parties for the provision of a Service; and
 - (10) provide and allow the Supplier access when reasonably required to collect, record or generate data in relation to the Services.

10 Suspension

10.1 The Supplier's right to suspend

The Supplier may, without liability to the Customer, immediately suspend providing a Service if:

- (1) there is an Emergency or event of Force Majeure;
- (2) the Customer fails to comply with any of its obligations under clause 9;
- (3) the Customer commits a breach of this Agreement (including failure to make payment) and the Supplier serves a default notice under clause 18.1, or the Customer suffers an Insolvency Event;
- (4) doing so is, in the Supplier's reasonable opinion, necessary to allow the Supplier to protect, repair, maintain or service any part of the Supplier's Equipment or Supplier's Premises;
- (5) doing so is, in the Supplier's reasonable opinion, necessary to prevent damage to property or injury to persons at the Supplier's Premises;
- (6) the Supplier is required to do so to comply with a Legislative Requirement, or an order, standard, determination, direction, instruction or request of an emergency services organisation or an Authority;

- (7) the Supplier is issued with a competition notice under Part XIB of the *Competition and Consumer Act 2010* (Cth) in respect of the Service, or the Service is declared under Part XIC of the *Competition and Consumer Act 2010* (Cth);
- (8) a supplier of facilities and services to the Supplier which are necessary for the provision of the Services ceases or suspends supplying those facilities or services to the Supplier;
- (9) the Customer ceases to hold any licence, registration or other authorisation or permit required in order for the Services to be provided; or
- (10) in the Supplier's reasonable opinion an act or omission (or threatened act or omission) by the Customer, its Representatives or customers may adversely affect the provision of Services,

(each "**Suspension Event**"), and the Supplier will recommence providing the Service as soon as reasonably practicable after the Suspension Event has ceased or been rectified.

10.2 Consequences of Suspension

- (1) If a Service is suspended by reason of a Suspension Event, during the period of such suspension the Customer shall not be liable to pay usage based charges for that portion of the Fees which relates to that Service, and the Supplier shall not be liable to pay any applicable Service Level Rebates. The Customer remains liable for any outstanding and ongoing Fees.
- (2) Where the Suspension Event arises out of or is connected to the acts or omissions of the Customer, its Representatives or customers, the Supplier may take any reasonable action to prevent or correct the Suspension Event at the Customer's expense.
- (3) If the Supplier suspends any Service by reason of a Suspension Event for a period exceeding 30 days, either party may terminate that Service by written notice to the other party (provided that the Customer may not terminate where the Suspension Event is one of clauses 10.1(2), 10.1(3), 10.1(9) and 10.1(10)).
- (4) The Supplier is not liable for any Loss suffered or incurred by the Customer or End Users in relation to the Supplier suspending a Service by reason of a Suspension Event and the Customer must indemnify the Supplier from and against any Claim brought by the any person (including End Users) arising out of or in connection with the suspension of Services during a Suspension Event.

11 Force majeure

- 11.1 Despite any other provision of this Agreement or any Service Orders, neither party is liable for not performing an obligation (other than an obligation to make payment) in whole or in part, or for not performing it on time, if it is prevented from so performing due to a Force Majeure event.
- 11.2 The non-performing party agrees to take all reasonable efforts to avoid or remove the cause of non-performance of its obligations.
- 11.3 If a Force Majeure event occurs, the affected party must:
 - (1) give the other party notice of the event promptly and an estimate of the non-performance and delay;

- (2) take all reasonable steps to overcome the effects of the event (but this does not require the settlement of industrial disputes or other claims on unreasonable terms); and
- (3) resume compliance as soon as practicable after the event no longer affects the party from performing its obligations in whole or in part under this Agreement or a Service Order.

11.4 Any Service Levels and Service Level Rebates which would otherwise apply to the affected Services will not apply for the relevant reporting period in which any Force Majeure event occurred.

12 Fees and Payment

12.1 Fees and Commencement of billing

The Customer must pay the Supplier all the Fees in accordance with this clause 12 and each Service Order.

12.2 Invoices

- (1) The Supplier shall issue an invoice to the Customer which must include:
 - (a) the amount of the Fees;
 - (b) the amount of any other payment to be made by the Customer to the Supplier (such as any interest payable) or credited by the Supplier to the Customer in accordance with this Agreement; and
 - (c) the amount of GST payable on the sum of the above sub-paragraphs.
- (2) Each invoice submitted by the Customer will be adjusted, as applicable, for any Service Level Rebates that the Customer is entitled to in accordance with the Service Order. Where the Service Level Rebates exceed the amount of the invoice, the Supplier will pay the balance owing to the Customer within 30 days.

12.3 Payment

- (1) All Fees will be invoiced in AUD dollars, and the Customer must pay all amounts in AUD dollars.
- (2) The Customer must make all payments by means of electronic funds transfer to the account and in accordance with the instructions set out in the, or as notified by the Supplier from time to time.
- (3) The Customer must pay each invoice within 30 days of receipt of invoice by the Customer without set-off, counterclaim and free of withholding.

12.4 Variation to Fees

- (1) The parties acknowledge that certain Fees invoiced to the Customer may be based upon information provided by the Customer to the Supplier. In the event that such information is inaccurate, or an event occurs which results in such information becoming inaccurate, the Supplier may reasonably increase the Fees to account for the change of circumstances.

- (2) In each of the circumstances set out in clauses 12.2 (2) and 12.4(1) the Supplier will use give reasonable notice (and in any event a minimum of 40 Business Days' notice) prior to the increase.
- (3) For the avoidance of doubt, any amendment to the Fees under this clause 12.4 is an exception to clause 23.5.

12.5 **Disputed Amounts**

- (1) If the Customer acting in good faith disputes an invoice, it must:
 - (a) before due date for payment of that invoice, notify the Supplier of the details of its dispute; and
 - (b) pay the Supplier in full the undisputed amount(s) invoiced by the Supplier in accordance with clause 12.3.
- (2) The Customer acknowledges that it is able, and that it is reasonable to require the Customer, to raise disputes regarding invoices before the due date for payment, and to the maximum extent permitted by law, the Customer waives its right to dispute any invoices that are not disputed before the due date for payment.
- (3) If resolution of the dispute determines that the Customer is to pay an amount to the Supplier, the Customer will pay that amount, together with interest at the Default Rate calculated from the date the payment would otherwise have been due for payment following the issue of the invoice in accordance with clause 12.2 to the date of resolution, within 30 Business Days of the date of resolution.
- (4) The Supplier will use commercial endeavors to resolve a dispute under this clause within 10 Business Days of receipt of notification, unless otherwise agreed in writing. In the event a dispute is not resolved within 10 Business Days (or other period as agreed), the parties must refer the dispute to the dispute resolution process set out in clause 21.

12.6 **Set-Off**

The Supplier is entitled to set-off against any money owing to the Customer, amounts owed to the Supplier by the Customer on any account whatsoever.

12.7 **Payment Default**

If the Customer fails to pay any amount due under this Agreement by the due date for payment, the Supplier shall be entitled, in addition to any other rights it has under the Agreement:

- (1) to be paid interest on that amount at the Default Rate from the time the amount should have been paid, compounded daily until it is paid;
- (2) to be reimbursed for any debt collection expenses incurred by the Supplier in respect of the failure to pay when due; and
- (3) to retain possession of all Customer's Equipment located at the Supplier's Premises until such time as all outstanding amounts are paid in full.

12.8 **Repayment**

Unless otherwise expressly provided by this Agreement or as required by law, no part of the Fees is repayable to the Customer if either party defaults or this Agreement or a Service Order is terminated for any reason whatsoever.

13 Relationship

13.1 Representatives and authorisation

- (1) The Customer will appoint an authorised representative and will provide the Supplier with written notification of the identity and contact details of the authorised representative.
- (2) The Customer will use its best endeavours to ensure that all communications by the Customer to the Supplier regarding the Services are made by the authorised representative of the Customer.
- (3) If the Customer fails to appoint an authorised representative or uses persons other than the authorised representative to communicate with the Supplier, the Supplier will not be liable for any unauthorised requests made by such persons in relation to the Services.

13.2 Resources and Cooperation

Each party will:

- (1) provide such personnel as are necessary to perform its obligations under this Agreement and ensure that such personnel have the requisite skills and experience;
- (2) provide to the other party all information and assistance reasonably necessary in order for the parties to comply with this Agreement; and
- (3) promptly do all things (including executing all documents) reasonably necessary to give full effect to this Agreement.

13.3 Relationship of the parties

- (1) The relationship of the parties is one of independent contractors.
- (2) Except as may be otherwise expressly provided, nothing in this Agreement will constitute a party as the employee, partner, agent, representative, trustee or joint venturer of the other party.

14 Intellectual Property

14.1 Background IP

Each party's Background IP will remain the sole and exclusive property of that party and will not be transferred to the other party unless by written agreement.

14.2 Licence

Each party ("**the Licensor**") grants to the other party and its Representatives ("**the Licensee**") a non-exclusive licence for the Term to use the Intellectual Property of the Licensor solely for and to the extent necessary for the purpose of supplying or receiving the Services (as the case may be) in accordance with this Agreement and applicable Service

Orders. The Licensee is not authorised to use the Licensor's Intellectual Property for any other purpose outside the scope of this Agreement or the Service Orders.

14.3 **Developed IP**

- (1) Subject to clause 14.3(2), any rights in respect of Intellectual Property created in the course of this Agreement (including under a Service Order) will be owned by the party who created it ("**Developed IP**"), and will be licensed to the other party on the terms of clause 14.2.
- (2) Any rights in respect of an adaptation based on, or modification to one party's Intellectual Property by another party shall be assigned, on creation, to the first-mentioned party and licensed for use to the other party.

14.4 **IP Addresses**

If a Service includes or requires use of one or more IP addresses allocated by the Supplier, the Supplier grants the Customer a limited, revocable, non-transferable licence to use such IP addresses as the Supplier allocates to the Customer, as determined by the Supplier from time to time, for the sole purpose of receiving that Service. Such licence terminates on the cessation or termination of that Service.

14.5 **Return of Intellectual Property**

The Customer must return all materials containing Intellectual Property rights of the Supplier in its possession upon the expiration or termination of the Service Orders to which materials relate, and in any case upon the expiration or termination of the Agreement.

14.6 **Transmitted Data**

Nothing in this clause 14 is intended to affect the Intellectual Property rights of the Customer or any third party with respect to any data transmitted via the Services.

14.7 **Infringing Equipment**

The Customer must immediately remove or render non-infringing, at the Customer's expense, any Customer's Equipment that infringes any Intellectual Property rights.

15 **Confidential Information**

15.1 **General**

- (1) Each party acknowledges that Confidential Information is valuable and undertakes to keep the Confidential Information of the other party secret and to protect and preserve the confidential nature and secrecy of such Confidential Information.
- (2) Each party agrees that this clause 18 does not apply to information that at the Execution Date is already in the public domain or information which subsequently enters the public domain, through no fault of either party and without either party breaching this Agreement.

15.2 **Use of Confidential Information**

Each party may only use or reproduce the Confidential Information of the other party for the purposes of providing or enjoying the benefit of the Services under this Agreement or the Service Orders (as the case may be).

15.3 Disclosure of Confidential Information

Each party:

- (1) must not disclose Confidential Information of the other party to any person except for the reasonable purposes of fulfilling the party's obligations under this Agreement or the Service Orders or as otherwise permitted by this Agreement or the applicable Service Order;
- (2) must not make, assist or permit any person (including its Representatives) to make any unauthorised use, disclosure or reproduction of the Confidential Information of the other party;
- (3) must take:
 - (a) reasonable steps to ensure that any person who has access to Confidential Information of the other party does not make any unauthorised use, reproduction or disclosure of that information; and
 - (b) reasonable steps to enforce the confidentiality obligations imposed or required to be imposed by this Agreement or any applicable Service Order, including acting appropriately in response to any breach or threatened breach of such confidentiality obligations by a person to whom it has disclosed Confidential Information of the other party and, where appropriate, commencing legal proceedings and making applications for interim or interlocutory relief; and
 - (c) must co-operate with the other party in any action taken to protect the Confidential Information of that party.

15.4 Permitted Disclosures

A party may disclose Confidential Information of the other party:

- (1) to its Related Bodies Corporate and their Representatives to the extent necessary for the purposes of fulfilling that party's obligations under this Agreement or any Service Order;
- (2) to its legal, accounting or financial advisers and bankers for the purpose of giving effect to this Agreement or any Service Order or obtaining advice in relation to this Agreement or any Service Order;
- (3) to the extent required by law, the rules or regulations of a recognised securities exchange or by a lawful requirement of any Authority having authority over the party; or
- (4) if required in connection with legal proceedings relating to this Agreement or any Service Order,

but in the case of clauses 15.4(3) and 15.4(4), subject to the party giving the other party sufficient notice of any proposed disclosure to enable the party to seek a protective order or other remedy to prevent the disclosure.

15.5 Public announcements

- (1) Subject to this clause 15, unless required by a Legislative Requirement or by the rules of any securities exchange, no announcement, communication or other disclosure relating to the subject matter of this Agreement or any Service Order

shall be made by any party to any person who is not a party without the prior written consent of the other party.

- (2) If an announcement, communication or other disclosure referred to in this clause 15.5 is required by a Legislative Requirement or the rules of any securities exchange, the party making it shall use reasonable endeavours to agree upon the terms of the announcement, communication or other disclosure with the other party prior to it being made.

16 Goods and services tax

16.1 In this clause 16:

- (1) **GST** means GST as defined in *A New Tax System (Goods and Services Tax) Act 1999* as amended (**GST Act**) or any replacement or other relevant legislation and regulations;
- (2) words or expressions used in this clause which have a particular meaning in the **GST law** (as defined in the GST Act, and also including any applicable legislative determinations and Australian Taxation Office public rulings) have the same meaning, unless the context otherwise requires;
- (3) any reference to GST payable by a party includes any corresponding GST payable by the representative member of any GST group of which that party is a member;
- (4) any reference to an input tax credit entitlement by a party includes any corresponding input tax credit entitlement by the representative member of any GST group of which that party is a member; and
- (5) if the GST law treats part of a supply as a separate supply for the purpose of determining whether GST is payable on that part of the supply or for the purpose of determining the tax period to which that part of the supply is attributable, such part of the supply is to be treated as a separate supply.

16.2 Unless GST is expressly included, the consideration to be paid or provided under any other clause of this Agreement for any supply made under or in connection with this Agreement or any Service Order does not include GST.

16.3 To the extent that any supply made under or in connection with this Agreement or a Service Order is a taxable supply, the GST exclusive consideration otherwise to be paid or provided for that taxable supply is increased by the amount of any GST payable in respect of that taxable supply and that amount must be paid at the same time and in the same manner as the GST exclusive consideration is otherwise to be paid or provided. A party's right to payment under this clause is subject to a valid tax invoice being delivered to the recipient of the taxable supply.

16.4 To the extent that a party is required to reimburse or indemnify another party for a loss, cost or expense incurred by that other party, that loss, cost or expense does not include any amount in respect of GST for which that other party is entitled to claim an input tax credit.

16.5 To the extent that any consideration payable to a party under this Agreement or a Service Order is determined by reference to a cost incurred by a party, or is determined by reference to a price, value, sales, revenue or similar amount, the GST exclusive amount of that cost, price, value, sales, revenue or similar amount must be used.

17 Liability

17.1 General limitation of liability

Without limiting clauses 17.2 and 17.3, to the maximum extent permitted by law, the Supplier's aggregate liability to the Customer under or in connection with this Agreement (including any liability arising under or in connection with any Service Order) in any calendar year of the Term will in any event not the amount of Fees paid or payable to the Supplier in that calendar year.

17.2 Exclusion of certain liability

To the maximum extent permitted by law, a party will not be liable to the other party under or in connection with this Agreement or any Service Order in any circumstances for any indirect, economic, special or consequential loss or damage, or in any event for any loss of revenue, loss of production, loss of operating time, loss of use, business interruption, loss of profit or loss of data.

17.3 Specific releases

To the maximum extent permitted by law, the Supplier will not be liable and the Customer releases the Supplier from all Loss arising from:

- (1) suspension of the Services under this Agreement;
- (2) any defect or fault of the Services which is caused by the act or omission of any person outside the reasonable control of the Supplier; or
- (3) faults or defects that arise in Carriage Services not provided by the Supplier under this Agreement.

17.4 The Supplier's indemnities

Subject to the limitations and exclusions in clauses 17.1, 17.2, 17.3 and 17.7, the Supplier indemnifies the Customer from and against any and Losses suffered or incurred by the Customer which arise as a result of or in connection with any injury to or death to any person, or damage to real or personal property, caused or contributed to by the Supplier's wilful misconduct or negligent act or omission, or the wilful misconduct or negligent acts or omissions of any of its Representatives in connection with this Agreement or any Service Order, except to the extent that the Losses were caused by the Customer's wilful misconduct or negligent act or omission, or the wilful misconduct or negligent acts or omissions of any of its Representatives.

17.5 The Customer's indemnities

- (1) The Customer indemnifies the Supplier and its Representatives from and against any and all Losses suffered or incurred by the Supplier which arise as a result of or in connection with:
 - (a) a breach of this Agreement or any Service Order by the Customer;
 - (b) any injury to or death to any person caused or contributed to by the Customer's breach of this Agreement or any Service Order, or the wilful misconduct or negligent act or omission of the Customer or any of its Representatives or End Users;
 - (c) any damage to or loss of any real or personal property, including but not limited to, the Supplier's Premises, the Supplier's Equipment or the

equipment, facilities or network of any other person caused or contributed to by the Customer's breach of this Agreement or any Service Order, or the wilful misconduct or negligent act or omission of the Customer or any of its Representatives or End Users;

- (d) the recovery of the Supplier's Equipment following the expiry or termination of this Agreement;
- (e) the Customer's contravention of any Legislative Requirement;
- (f) the Customer's or End User's misuse of the Services or the Supplier's Equipment; and
- (g) an infringement or an alleged infringement of the Supplier's Intellectual Property or Confidential Information,

except to the extent that the Losses were caused by the Supplier's wilful misconduct or negligent act or omission, or the wilful misconduct or negligent acts or omissions of any of the Supplier's Representatives.

- (2) The Customer indemnifies the Supplier and keeps the Supplier indemnified from and against all Loss suffered or incurred by the Supplier in connection with:
 - (a) any Claim brought by any person (including any Authority) against the Supplier arising from or in connection with the content stored in the Customer's Equipment or transmitted using the Services; and
 - (b) any Claim brought by an End User against the Supplier arising from or in connection with the Services (including failure or interruption of the Services).

17.6 Exclusion of implied terms

- (1) To the maximum extent permitted by law, and subject to clause 17.6(2), the Supplier excludes all representations, warranties, terms, conditions and undertakings in respect of Services and any other goods or services provided in connection with this Agreement or any Service Order, including to the extent permitted by law any warranties regarding the merchantability or fitness for purpose of the Services or those goods and services.
- (2) In relation to:
 - (a) all express warranties, representations and limitations provided under or in relation to this Agreement or any Service Order; and
 - (b) any condition, warranty or representation implied by law referred to in clause 17.6(1) that cannot be lawfully excluded,

where permitted by law, the Supplier's liability is limited, at the sole discretion and option of Supplier, to the minimum obligations or liabilities permitted by law, such as by resupplying the relevant goods or services or payment of the cost of resupplying the relevant goods or services.

17.7 Resupply arrangements

If the Supplier resupplies the goods or services of another supplier as part of the Services provided to the Customer pursuant to this Agreement or any Service Order and the

Customer suffers any Loss for which the Supplier would (but for this clause 17.6) be liable then, to the maximum extent permitted by law:

- (1) the Supplier's liability to the Customer will, without limiting clauses 17.1, 17.2 and 17.3, be limited to the amount received by the Supplier from the other supplier in respect of the Customer's Loss;
- (2) the Supplier will hold for the benefit of the Customer and use reasonable endeavours to pursue the rights of recovery (in respect of the Customer's Loss) against the other supplier pursuant to the Supplier's contractual rights against the supplier; and
- (3) the Customer's rights to recover Loss is subject to the Customer's compliance with the terms of use of the supplier, provided those terms of use are notified in writing by the Supplier to the Customer.

18 Termination

18.1 Termination by Supplier

The Supplier may immediately terminate this Agreement in whole or, to the extent that any of the following events relate to a specific Service, the relevant Service Order, by written notice to the Customer if:

- (1) the Customer breaches a material provision of this Agreement or a Service Order (including an obligation to pay the Fees) and does not rectify that breach within 10 Business Days of receiving written notice from the Supplier;
- (2) the Customer breaches a material provision of this Agreement or a Service Order and that breach is incapable of being remedied;
- (3) an Insolvency Event occurs to the Customer;
- (4) the Supplier is required to take such action because of a Legislative Requirement, in compliance with a mandatory direction or order of an Authority, or otherwise by law;
- (5) the Customer or its Representatives misuses the Services or the Supplier reasonably suspects the Customer or its Representatives of misusing the Services;
- (6) the Customer ceases to hold any licence, registration or other authorisation or permit required in order for the Services to be provided or used; or
- (7) the Supplier is otherwise entitled to terminate this Agreement or the Service Order as provided in this Agreement or the relevant Service Order.

18.2 Suspension

If the Supplier is entitled to terminate a Service Order or this Agreement in accordance with clause 18.1, then without prejudice to its right to issue a notice of termination, the Supplier may elect at its sole discretion to suspend the provision of the Service(s) to which the relevant termination event relates until the relevant termination event is rectified.

18.3 Termination by Customer

The Customer may immediately terminate this Agreement in whole or, to the extent that any of the following events relate to a specific Service, the relevant Service Order, by written notice to the Supplier if:

- (1) the Supplier breaches a material provision of this Agreement or a Service Order and does not rectify that breach within 30 Business Days of receiving written notice from the Customer;
- (2) the Supplier breaches a material provision of this Agreement or a Service Order and that breach is incapable of being remedied;
- (3) an Insolvency Event occurs to the Supplier; or
- (4) the Customer is otherwise entitled to terminate this Agreement or the Service Order as provided in this Agreement or the relevant Service Order.

18.4 Force Majeure

Either party may terminate this Agreement and all Service Orders with immediate effect from the date of service of a notice, or a later date specified in the notice, if a Force Majeure event substantially affects the ability of that party to perform its obligations (other than an obligation to pay money) under the Agreement or any Service Order continuously for a period exceeding 6 months.

18.5 Consequences of Termination

- (1) Termination of this Agreement or a Service Order will not:
 - (a) affect and is without prejudice to any accrued rights or remedies a party may have under this Agreement or the Service Order or otherwise that have accrued prior to or as a result of termination of this Agreement or the Service Order;
 - (b) operate as a waiver of any breach of this Agreement or the Service Order by a party;
 - (c) affect any indemnity given by a party under this Agreement or the Service Order, each of which will survive the expiry or termination of this Agreement or the Service Order or any other clause of this Agreement or the Service Order that is expressed to survive the termination or expiry of this Agreement or the Service Order (as applicable); or
 - (d) affect clauses 1, 8.1, 8.2, 11, 12, 14, 15, 16, 17, 18.5, 20, 21, 22 and 23, each of which will survive the expiry or termination of this Agreement and the Service Order.
- (2) On termination of this Agreement, except where the Service Orders are also terminated, the Service Orders in force as at the date of termination of this Agreement will survive termination, and this Agreement will survive and remain in force, but only in relation to the surviving Service Orders until expiry or termination of the Service Orders. To avoid doubt, clauses 3.1 and 3.3 will **not** survive termination of this Agreement.
- (3) Termination of a Service Order will not affect this Agreement or other Service Orders.
- (4) On termination or expiry of each Service Order each party shall promptly return to the other party the other party's Confidential Information and Intellectual Property in its possession or under its control and the Customer must:
 - (a) pay to the Supplier any amounts due which remain unpaid, in addition to any Fees incurred by the Customer and subsequently owed to the Supplier for the period up to termination of the Service Order;

- (b) in respect of any equipment provided by the Supplier in order to provide a Service immediately cease using that equipment; and
- (c) in respect of any Customer's Equipment installed or located on the Supplier's Premises in connection with that Service Order:
 - (i) the Customer must arrange with the Supplier a mutually convenient time ("**Removal Date**") to remove the Customer's Equipment from the Supplier's Premises. In the absence of agreement the Supplier may determine the Removal Date;
 - (ii) after removing the Customer's Equipment the Customer must return the Space to the Supplier in the same condition as it was originally delivered to the Customer (reasonable wear and tear excepted);
 - (iii) the Customer must remove from the Space and the Supplier's Premises all Customer's Equipment or trade fixtures, equipment, personal property of the Customer, whether or not Customer's Equipment or the property are fastened or attached to the area or the premises;
 - (iv) the Customer must fully repair any damage caused by the removal of the Customer's Equipment or any trade fixtures, equipment and personal property of the Customer;
 - (v) unless otherwise agreed between the Supplier and the Customer, all Customer's Equipment and any trade fixtures, equipment or personal property not removed within 30 calendar days after the Removal Date will, at the Supplier's election, conclusively be deemed to be abandoned by the Customer and may be disposed of by the Supplier without notice to the Customer or to any other person or entity and without any obligation to account for such property and without any liability to the Customer or any other person or entity; and
 - (vi) in respect of any other equipment used by the Customer in order to receive the terminated Service, disconnect that equipment from the Supplier's Network and promptly do all things reasonably required by the Supplier to enable the Supplier to disconnect that equipment from the Supplier's Network and remove it away from the locality of the Supplier's Network.
- (5) Unless termination is caused by the Supplier's default under this Agreement, the Customer must pay the Supplier its costs incurred in respect of clause 18.5(4).
- (6) This Agreement will automatically terminate upon the termination or expiry of all Service Orders under the Agreement, or if there is only one Service Order, termination or expiry of that Service Order.

19 Withdrawal of Services

Except as otherwise expressly provided by a Service Description, the Supplier may cease to supply a Service, or a part of a Service, to the Customer by giving the Customer not less than 6 months written notice and terminating the relevant Service Orders, without any liability to the Customer.

20 Intervening Event

- 20.1 If either party's rights or obligations under the Agreement or any Service Order are, or may be, affected by any Intervening Event, the parties will meet as soon as practicable and negotiate in good faith such necessary or appropriate amendments to the Agreement or the Service Order (as applicable) to ensure the Agreement and the Service Order do not and will not cause either party to contravene that Intervening Event.
- 20.2 If the parties cannot agree to any such amendments within 10 Business Days of the first meeting taking place or if a meeting does not take place within 10 Business Days of one party bringing notice of the Intervening Event to the other party's notice and requesting a meeting, either party may terminate the Agreement or the Service Order, in so far as it applies to any Service affected by the Intervening Event, by giving the other party 10 Business Days notice.
- 20.3 For the avoidance of doubt, a change in any relevant Legislative Requirement which impacts on the cost to the Supplier of providing the Services is not an Intervening Event. In these circumstances:
- (1) the Supplier shall take all reasonable steps to mitigate the impact on the cost to the Customer of providing the Services as a result of the change;
 - (2) the Supplier reserves the right to increase the Fee to reflect the extent of that cost from the date of the change; and
 - (3) an amendment to the Agreement or a Service Order which results from an increase under this clause 20.3 is an exception to clause 23.5.

21 Dispute Resolution

21.1 General

The parties agree that in the event of a dispute, difference, controversy or claim (other than a failure by the Customer to pay an invoice in accordance with clause 12) arising out of or in connection with this Agreement or any Service Order or the breach, rectification, termination, frustration or invalidity thereof, ("**Dispute**") they shall use their reasonable endeavours to resolve the Dispute on its merits by negotiation in accordance with this clause 21. Neither party shall resort to legal proceedings, except for urgent interlocutory relief, until the process outlined in this clause 21 has been exhausted.

21.2 Notice of Dispute

A party claiming that a Dispute has arisen shall notify the other party in writing. Such notice shall:

- (1) state that it is a notice given pursuant to this clause 21;
- (2) adequately describe the particulars of the alleged Dispute including if relevant the amount of the Dispute; and
- (3) be signed by a director or equivalent of the party.

21.3 Minor Disputes

If the amount in dispute is less than \$300,000 and the Dispute cannot be resolved by negotiation, the Dispute shall be settled by the final and binding decision of an expert appointed by agreement between the parties, or failing agreement appointed by the

Chairperson of the Victorian Chapter of the Institute of Arbitrators and Mediators, Australia.
The cost of the expert shall be shared equally by the parties.

21.4 Major Disputes

If the amount in Dispute is \$300,000 or more, the parties shall attend at least one meeting with Representatives (with the authority to resolve the Dispute) to discuss the Dispute within 5 Business Days of the notification of the Dispute as a condition precedent to commencing any other proceeding. If the Dispute cannot be solved by negotiation as aforesaid, the parties shall confer within 5 Business Days of the breakdown of negotiations in order to ascertain whether they agree that the Dispute shall first be subject to the process of conciliation, mediation, expert appraisal, mini-trial, or expert determination or such other alternative dispute resolution process as may be appropriate in the circumstances of the Dispute and, if they so agree, the Dispute shall be referred to such process.

21.5 Litigation

- (1) If a Dispute to which clause 21.4 applies cannot be resolved in accordance with the procedure set out in clause 21.4, or if at any time during the procedure either party reasonably considers that the other party is not making reasonable efforts to resolve a Dispute, either party may issue a notice to the other party within 5 Business Days of the failure of the procedure or the perceived failure of the procedure, as the case may be, requiring that the Dispute be referred to litigation.
- (2) Any conciliator, mediator, expert or neutral adviser appointed by the parties pursuant to clause 21.4, shall not be called by either party in litigation, unless both parties agree in writing.

21.6 Expert Determination

Expert determination of a Dispute in accordance with clauses 21.3 or 21.4 shall be carried out in accordance with Institute of Arbitrators and Mediators, Australia's Rules for Expert Determination of Commercial Disputes.

21.7 Conduct of Disputes

Unless agreed otherwise, all Dispute resolution proceedings shall be conducted in Melbourne, Victoria.

21.8 Continuing Performance during Dispute

Each party will continue to perform its obligations under the Agreement and the Service Orders (including as to payment) despite the existence of a Dispute, other than to the extent prevented by the nature of the Dispute.

22 Notices

22.1 Notices in Writing

A notice or other communication in connection with this Agreement or a Service Order ("a notice") has no legal effect unless it is in writing and sent or delivered in accordance with this clause 22. A notice shall be sent or delivered:

- (1) by prepaid post to the address of the addressee, if the address is in Australia and the notice is sent from within Australia;

- (2) by prepaid airmail to the address of the addressee, if the address is outside Australia or if the notice is sent from outside Australia;
- (3) by facsimile to the facsimile number of the addressee; or
- (4) delivered at the address of the addressee.

22.2 **Validity of Notices**

A notice sent or delivered in a manner provided by this clause 22 shall be treated as validly given to and received by the party to which it is addressed even if:

- (1) the addressee has been liquidated or deregistered or is absent from the place at which the notice is sent or delivered; or
- (2) the notice is returned unclaimed.

22.3 **Address for Notices**

The Supplier's address and facsimile number for notices are:

Name: Ultimate Datacentre

Attention: Anthony Ling, Director

Address: Unit2, Ground Floor, Building 4, Brandon

Business Park, 540 Springvale Rd, Glen Waverley, Victoria 3150

Email: info@ultimatedatacentre.com.au

A party may change its address or facsimile number by giving notice of that change to the other party.

22.4 **Deemed Receipt**

A notice in connection with this Agreement or a Service Order is deemed to have been given:

- (1) if it is delivered by hand, on the date upon which it is delivered;
- (2) if mailed from within Australia to an address in Australia, on the 2nd Business Day after mailing;
- (3) if mailed to an address outside Australia or mailed from outside Australia, on the 4th Business Day after mailing; or
- (4) if sent by facsimile before 4pm on a Business Day at the place of receipt, on the day it is sent and otherwise on the next Business Day at the place of receipt provided that at the end of the transmission the sender's facsimile machine issues a report confirming the successful transmission of the number of pages in the notice.

23 General

23.1 Further assurance

Each party must promptly at its own cost do all things (including executing and if necessary delivering all documents) necessary or desirable to give full effect to this Agreement and each Service Order.

23.2 Severance

Should any provision of this Agreement or any Service Order be illegal or unenforceable it shall be severed from this Agreement or the Service Order (as applicable) and the remaining provisions of this Agreement or the Service Order (as applicable) will continue in force.

23.3 Assignment

Except with the prior written consent of the Supplier (not to be unreasonably withheld), the Customer shall not assign, novate or otherwise transfer this Agreement or any Service Order or any right or obligation under this Agreement or any Service Order.

23.4 Entire understanding

This Agreement (together with the Service Orders) is the entire agreement and understanding between the parties on everything connected with the subject matter of this Agreement (and the Service Orders) and supersedes any prior agreement or understanding on anything connected with that subject matter.

23.5 Variation

Subject to clauses 5.2(1)(b), 12.4 and 20.3, an amendment or variation to this Agreement or any Service Order is not effective unless it is in writing and signed by the parties.

23.6 Waiver

A party's failure or delay to exercise a power or right does not operate as a waiver of that power or right. The exercise of a power or right does not preclude either its exercise in the future or the exercise of any other power or right. A waiver is not effective unless it is in writing. Waiver of a power or right is effective only in respect of the specific instance to which it relates and for the specific purpose for which it is given.

23.7 Continuing Performance

- (1) The provisions of the Agreement and the Service Orders document do not merge with any action performed or document executed by any party for the purposes of performance of the Agreement or the Service Orders.
- (2) Any representation in this document survives the execution of any document for the purposes of, and continues after, performance of this document.
- (3) Any indemnity agreed by any party under this document:
 - (a) constitutes a liability of that party separate and independent from any other liability of that party under this document or any other agreement; and
 - (b) survives and continues after performance of this Agreement or the Service Orders (as applicable).

23.8 Remedies

The rights of a party under the Agreement and the Service Orders are cumulative and not exclusive of any rights provided by law.

23.9 Costs and outlays

Each party must pay its own costs and outlays connected with the negotiation, preparation and execution of this Agreement and any Service Orders.

23.10 Governing law and jurisdiction

The law of Victoria governs this Agreement and each Service Order. The parties submit to the non-exclusive jurisdiction of the courts of Victoria and of the Commonwealth of Australia.

23.11 Counterparts

This Agreement may be executed in any number of counterparts. In such case, each counterpart shall constitute an original but the counterparts together shall constitute one and the same agreement.