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# Vocus

## Standard Terms & Conditions

Effective 16 August 2022

### Important

**Application:** These Standard Terms & Conditions apply to any new Services that are acquired, or existing Services that are renewed, by the Customer from 16 August 2022. The Standard Terms & Conditions that apply to existing Services acquired prior to 16 August 2022 are available at [vocus.co.nz/legal-contracts](https://vocus.co.nz/legal-contracts) under “Historical Terms and Conditions”.

**Fixed Term Charges:** If you acquire Services from Vocus for a minimum contract period as set out on the relevant Service Order (**Initial Term**) then you agree to pay the Charges for those Services for that Initial Term. If the Services are terminated before the end of the Initial Term, then you may be required to pay the Fixed Term Charges for those Services under clause 4.2 of these Standard Terms & Conditions.

**Changes to the Charges:** Vocus can change the Charges under clauses 3.7 (Supplier Charges) and 4.7 (Changes to the Charges) of these Standard Terms & Conditions. If Vocus increases the Charges during the Initial Term for a Service, you may have the right to terminate that Service with any outstanding Fixed Term Charges being waived. However, if you terminate that Service because you have rejected increased Supplier Charges under clause 3.7(c) after the RFS Date, you will need to pay any third party costs incurred by Vocus in relation to that termination, including any early termination charges payable to Vocus’ Suppliers.

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## 1. Definitions and Interpretation

### 1.1 Definitions

In these terms and conditions, unless the context otherwise requires:

**Agreement** means these terms and conditions, and its schedules and annexures and any Service Schedules and Service Orders.

**Business Day** means:

- (a) in relation to a service provided at a data centre, a day that is not a Saturday, Sunday or public holiday in the Country (if New Zealand) or State (if in Australia) in which that data centre is located; and
- (b) in all other cases, a day that is not a Saturday, Sunday or public holiday in New Zealand.

**Charges** means the fees payable by the Customer to Vocus for Services or Supplied Equipment provided by Vocus under this Agreement, including any Fixed Term Charge, Equipment Fee or Equipment Rental Fees.

**Companies Act** means the *Companies Act 1993*.

**Confidential Information** of a party means any information marked as confidential or which by its nature the other party knows or ought to know is confidential (regardless of the form of the information and when it was acquired) and includes trade secrets, technical knowledge, concepts, designs, plans, precedents, processes, methods, techniques, know-how, innovations, ideas, procedures, research data, financial data, databases, personnel data, computer software and programs, customer and supplier information, correspondence and letters and papers of every description including all copies or extracts of same relating to the affairs or business of the party.

**Change in Control** means in relation to the Customer, a change in any of the following:

- (a) control of the composition of the board of directors of the corporation;
- (b) control of more than one half of the voting rights attaching to shares in the corporation; or
- (c) control of more than one half of the issued share capital of the corporation, excluding any part of the issued share capital which carries no right to participate beyond a specified amount in the distribution of either profit or capital,

except where that change is as a result of trading of securities listed on any securities exchange.

**Consequential Loss** means:

- (a) loss of revenue, loss of profits, loss of anticipated profits or loss of (or failure to achieve) anticipated savings;
- (b) loss of actual or potential opportunities or loss of contracts;
- (c) loss of or damage to goodwill or reputation;
- (d) loss arising from damage to credit rating or increased financing costs;
- (e) loss of data or corruption of data;
- (f) loss arising from business interruption or loss or damage resulting from wasted managed time; or
- (g) any indirect, special, economic, incidental or consequential loss or damage,

howsoever arising, whether based in contract (including under any indemnity), in tort (including negligence), in equity, under the provisions of any law or otherwise.

**Customer** means the Customer described in the Service Order and any of its employees, subcontractors, agents and representatives.

**Customer Content** means any other content, materials or data the Customer uses, installs, uploads or hosts on Vocus Equipment in the course of using the Service.

**Customer Equipment** means any hardware, software, equipment, systems and cabling provided by the Customer or which the Customer uses to access the Service that is not provided by Vocus.

**Customer's Premises** means locations at which Vocus provides the Services, where Vocus needs to have access in order to supply the Services, or locations for the delivery and installation of the Supplied Equipment or Vocus Equipment as specified in the Service Order.

**Customer Software Applications** means any software used by the Customer other than software owned or operated by Vocus.

**Customer Users** mean officers, employees, agents, contractors or representatives of the Customer.

**Documentation** means the user guides and any other documentation Vocus provides to the Customer relating to the use of the Service, as updated by Vocus from time to time.

**Equipment Fee** means the fee set out in the Service Order for the purchase of the Supplied Equipment (where applicable).

**End User** means a person who acquires a service that is a resupplied version or a derived version of the Service supplied to the Customer by Vocus.

**End User Details** means all information about the End Users in the Customer's possession or control including, but not limited to, full name, billing address, street address and, if applicable, details of ordered and supplied Services.

**Equipment Rental Fee** means the monthly fee set out in the Service Order for the rental of the Supplied Equipment by the Customer from Vocus (where applicable).

**Fault** means any fault relating to the Service.

**Fixed Term Service** means any Service supplied by Vocus in a fixed or minimum amount per month for a fixed Initial Term, (for example, 10Mbps of IP Transit per month for 24 months), where the number of months in the Initial Term is specified in the relevant Service Order for that Service.

**Fixed Term Charge** means the charge payable in accordance with clause 4.2 for a Fixed Term Service for the total duration of the Initial Term.

**Force Majeure Event** means any event which prevents a party from performing, or delays the performance of, any of its obligations under this Agreement including (without limitation):

- (a) forces of nature, any act of God, fire, storm or explosion;
- (b) any strike, lockout, industrial action, war, sabotage, riot, act of terrorism, any denial of service attack, insurrection, civil commotion, national emergency (whether in fact or in law), power shortage, epidemic, quarantine, radiation or radioactive contamination;
- (c) any action or inaction by any organ of government or government agency;
- (d) a change in any law including any new law; or
- (e) a breakdown of plant, machinery or equipment, telecommunications failure or shortages of labour, transportation, fuel, power or plant, machinery, equipment or material (including short supply from the regular source or regular Supplier),

to the extent that act, event or cause is beyond the reasonable control of the affected party.

**Government Agencies** means any government or any public, statutory, governmental (including a local government), semi-governmental or judicial body,

entity, department or authority and includes any self-regulatory organisation established under statute.

**GST** has the same meaning as in *Goods and Services Tax Act 1985*.

**Initial Term** means, in respect of a Service, the minimum contract period specified in a Service Order applicable to that Service, the term of which shall be deemed to commence on the RFS Date.

**Insolvency Event** means in relation to a party:

- (a) a receiver, receiver and manager, trustee, administrator, other controller (as defined in the Companies Act or similar official is appointed over any of the assets or undertaking of the party;
- (b) the party suspends payment of its debts generally;
- (c) the party is or becomes unable to pay its debts when they are due or is or becomes unable to pay its debts or is presumed to be insolvent within the meaning of the Companies Act;
- (d) the party enters into or resolves to enter into any arrangement, composition or compromise with, or assignment for the benefit of, its creditors or any class of them;
- (e) the party ceases to carry on business or threatens to cease to carry on business;
- (f) a resolution is passed or any steps are taken to appoint, or to pass a resolution to appoint, an administrator;
- (g) an application or order is made for the winding up or dissolution of the other party, or a resolution is passed, or any steps are taken to pass a resolution, for the winding up or dissolution of the other party, otherwise than for the purpose of an amalgamation or reconstruction that has the prior written consent of the first party; or
- (h) a party threatens to do any of (a) – (g).

**Intellectual Property Rights** means all intellectual property rights, including the following rights:

- (a) patents, copyright, rights in circuit layouts, registered and unregistered designs, trade marks, domain names, business names and any right to have confidential information kept confidential; and

- (b) any application or right to apply for registration of any of the rights referred to in paragraph (a).

**Interest Rate** means the business banking rate charged from time to time by ASB bank plus 2%.

**Personal Information** means has the meaning given to that term in the Privacy Act.

**Privacy Act** means the *Privacy Act 2020*.

**Related Company** has the meaning given to that expression in the Companies Act 1993.

**RFS Date** in relation to a particular Service, means:

- (a) the date notified to the Customer as the RFS Date by email from Vocus; or
- (b) where Vocus has not notified the Customer of the RFS Date, the date on which the Service is first made available to the Customer by Vocus or the date the Customer begins using the Services which is earlier.

**Security Deposit** means an amount up to one month's Charges payable by the Customer under clause 28.1 as security for payment of all sums due under this Agreement.

**Service** means a product or service supplied by Vocus to the Customer under this Agreement, more particularly specified in a Service Schedule or Service Order and includes any equipment, wires, cables, ports, switches, routers, cabinets, racks and other hardware or telecommunications equipment supplied with that product or service.

**Service Level Agreement** means Vocus' service level agreement which can be found at <http://www.vocus.co.nz/legal-contracts> as amended from time to time.

**Service Schedule** means a schedule available on <http://www.vocus.co.nz/legal-contracts> setting out the specifications, system requirements and performance capabilities of a Service.

**Service Order** means an order in Vocus' standard written format for the provision of a Service, which includes details of the Initial Term and Charges for the Services provided, which has been agreed by Vocus.

**Special Offers** means the special offers Vocus may advertise and offer to the Customer from time to time where Vocus offers discounted Charges for the Services or other promotional incentives;

**Supplied Equipment** means the equipment which Vocus will be supplying to the Customer as requested

in the Service Order and otherwise in a format directed by Vocus.

**Supplier** means a Carrier, service, telecommunications service provider, a wholesale supplier of telecommunications services, software licensor or provider, equipment supplier, lessor or other supplier who Vocus uses from time to time in order to supply the Service to the Customer;

**Supplier Failure** means a failure of any equipment, product or service supplied to Vocus by a third party which is required by Vocus to enable it perform its obligations under this Agreement.

**Third Party EULA** means in respect of any Third Party Software made available by Vocus to the Customer, the licence terms which the Customer must comply with when using that Third Party Software.

**Third Party Software** means any software that Vocus uses or makes available to the Customer in connection with the Service.

**Third Party Software Licensors** means the licensor of Third Party Software.

**Training** means the training which Vocus will conduct for the Customer as nominated by the Customer in the Service Order or otherwise in writing.

**Vocus** means Vocus (New Zealand) Limited (NZCN 1371006).

**Vocus Equipment** means any items, equipment owned or used by Vocus in the provision of a Service that is:

- (a) provided by Vocus to the Customer for use as part of or in connection with the Services; or
- (b) to which Vocus permits the Customer to access as part of, or in connection with, any Services.

**Vocus Infrastructure** means any items, equipment owned or used by Vocus including computer hardware and software and any telecommunication network, equipment, facilities or cabling owned, controlled or utilised by Vocus including, without limitation, Vocus Equipment.

## 1.2 Interpretation

**Headings** are for convenience only and do not affect interpretation.

The following rules of interpretation apply unless the context requires otherwise:

- (a) the singular includes the plural and conversely;
- (b) a gender includes all genders;
- (c) a reference to a person includes a body corporate, an unincorporated body,

enterprise, firm, trust, joint venture, syndicate or other entity and conversely;

- (d) a reference to a clause or schedule is to a clause of or schedule to this agreement;
- (e) a reference to any party to this agreement or any other agreement or document includes the party's successors and permitted assigns;
- (f) a reference to any legislation or to any provision of any legislation includes any amendment, consolidation or replacement of it, and all regulations and statutory instruments issued under it;
- (g) a reference to conduct includes, without limitation, any omission, statement or undertaking, whether or not in writing;
- (h) a reference to a party is a party to this agreement or any person who executes a deed of accession to this agreement;
- (i) terms defined in the Companies Act have the same meaning in this agreement, unless the context expresses otherwise;
- (j) if any payment by a party under this agreement is due on a day which is not a Business Day, the due date will be the next Business Day in the same calendar month or, if none, the preceding Business Day; and
- (k) if an obligation must be performed by 2 or more persons it binds them jointly and individually.

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## 2. Service Schedules and Service Orders

### 2.1 Service Schedule

- (a) The Customer may obtain a Service Schedule in respect of each Service supplied to the Customer from the Vocus website: [www.vocus.co.nz](http://www.vocus.co.nz).
- (b) A Service Schedule will be binding in respect of all supplies of the Services to which it relates and will continue in force for as long as Vocus continues to supply the relevant Service.

### 2.2 Service Order

- (a) Vocus must provide the Customer with a Service Order in respect of each individual supply of a Service.
- (b) Vocus reserves the right to conduct feasibility studies, surveys or other service qualifications following execution of the Service Order. In the event Vocus discovers that the provision of the

Services will, in Vocus' reasonable opinion, be unfeasible, Vocus may terminate a Service Order or any part of it by giving to the Customer prior written notice before the RFS Date.

- (c) Termination of a Service Order does not automatically terminate these terms and conditions or any applicable Service Schedule, which will each continue in force until terminated in accordance with these terms and conditions.

### 2.3 Interaction between these terms and conditions, Service Schedule and Service Order

- (a) In the event of any inconsistency between the terms of these terms and conditions, a Service Schedule and a Service Order in relation to a particular supply of a Service, the following order of priority applies:
  - (i) first the Service Order; then
  - (ii) the Service Schedule; then
  - (iii) the Third Party EULAs (if any); then
  - (iv) the Service Level Agreement; and lastly
  - (v) these terms and conditions.

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## 3. Supply of Services

### 3.1 Supply by Vocus

Vocus must supply Services specified in a Service Order in a professional and workmanlike manner in accordance with industry standards and the applicable Service Schedule.

### 3.2 Service Levels

Vocus must provide the Services in accordance with the relevant service levels specified in the Service Level Agreement. The Customer's sole remedy for Vocus' failure to meet a service level is the service level rebates specified in the Service Level Agreement, and the Customer waives any right to any additional remedy.

### 3.3 Use of Services

The Customer must only use the Services in accordance with the terms specified in the Agreement and any applicable law.

### 3.4 Additional Services

If the Customer requires any additional Services a new Service Order (and, if required, Service Schedule) must be completed and signed by the parties.

### 3.5 Scheduled Installation

- (a) Vocus will advise the Customer of the scheduled delivery date which Vocus plans to install and deliver the Services, having regard to the service delivery targets in the Service Level Agreement (if any), and shall use reasonable efforts to commence installation as close as practicable to the service delivery targets.
- (b) Notwithstanding the above paragraph, the service delivery targets and the scheduled delivery date are estimates only and Vocus is not liable for any failure to commence installation by the scheduled delivery date.

### 3.6 Functionality of Services

The Customer acknowledges that Vocus does not warrant or represent the performance, accuracy, reliability or continued availability of the Vocus Infrastructure or the Service beyond the Service Level Agreement or that the Service will be compatible with or will inter-operate with any particular computer system or item of equipment, software applications (including Customer Software Applications), operating systems or required data formats except where provided by Vocus, except where otherwise expressly set out in this Agreement.

### 3.7 Supplier Charges

- (a) Vocus may require services from a Supplier (including a local fibre company) to provide the Services. Any charges payable in respect of those services from a Supplier (**Supplier Charges**) that are known when the parties enter a Service Order will be included in the Charges or otherwise specified on the Service Order. Any Supplier Charges that can only be estimated when the parties enter a Service Order will be separately identified and described as being an estimate only.
- (b) If a local fibre company (e.g. Chorus), or any other Supplier identified in a Service Order (or a necessary replacement Supplier), has a right to increase or introduce new Supplier Charges under its arrangements with Vocus and does so, Vocus will provide the increased or new Supplier Charges (with any supporting information) to the Customer for approval. Vocus can place any non-provisioned Services that are dependent on the Supplier's services on hold pending the Customer's approval. Examples of a Supplier increasing Supplier Charges include where: (i) final Supplier Charges exceed the estimate in a Service

Order; and (ii) the Supplier imposes an increase to reflect an increase in the consumers price index.

- (c) The Customer must approve or reject the increased or new Supplier Charges within 10 Business Days of receipt from Vocus. If the Customer approves (or does not reject in writing) the increased or new Supplier Charges within 10 Business Days (and any validity period imposed by the Supplier), those Supplier Charges will be invoiced to the Customer and any Services that were placed on hold will recommence. If the Customer rejects the increased or new Supplier Charges, then either party can terminate the relevant Service that is dependent on the Supplier's services under clause 16.2(a) (if termination occurs before the RFS Date) or clause 16.2(f) (if termination occurs after the RFS Date).

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## 4. Payment terms

### 4.1 Payment of Charges

- (a) Unless otherwise specified in a Service Schedule or Service Order, Vocus must invoice the Customer monthly in advance for the Services to be provided to the Customer for the following month.
- (b) The Customer must pay the invoiced Charges by the 20<sup>th</sup> day in the month following the invoice date in cleared funds and without set-off, counterclaim or deduction and free and clear of and without deduction for or on account of any taxes, levies, imports, duties, charges (including intermediary bank charges), fees and withholdings of any nature.
- (c) Vocus may start to invoice a Customer for a Service from the RFS Date whether or not the Customer has used the Service since that date.

### 4.2 Fixed Term Charges

- (a) Subject to clause 4.2(b) as to instalment payment terms, where the Customer purchases a Fixed Term Service, the Fixed Term Charge is payable on the RFS Date and constitutes a debt due to Vocus as from that date.
- (b) The Customer may pay the Fixed Term Charge in equal monthly instalments over the Initial Term for as long as the Customer complies with the terms of this Agreement, the Service Order and any Service Schedule.

(c) Vocus must issue invoices to the Customer in respect of each monthly instalment of the Fixed Term Charge in advance.

(d) If either:

(i) the Customer terminates one or more Services prior to expiry of their Initial Term (other than pursuant to clause 16.2); or

(ii) Vocus terminates one or more Services prior to the expiry of their Initial Term pursuant to clauses 16.3(a), 16.3(b), 16.3(c) and 16.3(f) (where caused by Customer), then

any unpaid part of the Fixed Term Charge outstanding in respect of those Services becomes immediately due and payable.

#### 4.3 Disputed invoices

(a) If the Customer disputes any part of an invoice submitted by Vocus, the Customer must:

(i) notify Vocus in writing within 14 days of receipt of the invoice of the reasons for disputing the invoice; and

(ii) pay the undisputed amount on or before the due date for payment.

(b) The parties must endeavour to resolve the disputed amount between themselves within 10 days of the notification being given by the Customer. If the parties do not resolve the dispute within 10 days of notification in writing by the Customer, the dispute resolution procedure set out in clause 22 applies.

#### 4.4 Vocus Group invoicing

Invoices in respect of any of the Services provided under this Agreement by any member of the Vocus group of companies may be rendered by any other member of the Vocus group, and will be deemed issued in respect of the Services so provided.

#### 4.5 Additional charges for regulatory changes

Vocus reserves the right to vary any Charges where Vocus' cost of supply increases as a result of any additional regulatory costs, imposts, penalties or taxes imposed by any governmental or regulatory body, including without limitation, any costs, imposts, penalties or taxes arising as a result of any carbon tax or power levy.

#### 4.6 Commission and referral fees payable

The Customer acknowledges and accepts that Vocus may pay commissions to any dealer or referral fees to any person who introduced the Customer to Vocus.

#### 4.7 Changes to the Charges

Vocus can change the Charges by giving the Customer at least 30 days' prior written notice. If Vocus increases the Charges during the Initial Term for a Service, the Customer can terminate that Service under clause 16.2(e).

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### 5. Customer's Obligations

#### 5.1 General obligations

The Customer must:

(a) if relevant, provide and maintain its own network and network security;

(b) comply with any operational procedures and technical specifications specified in any Service Schedule, Documentation or otherwise provided by Vocus, or other reasonable directions given by Vocus from time to time;

(c) comply with any applicable law and the requirements or directions of Government Agencies;

(d) provide Vocus with all information, assistance and co-operation reasonably requested by Vocus in order to enable Vocus to meet its obligations under this Agreement;

(e) not do, or omit to do, anything which the Customer is aware or ought reasonably be aware, could have an adverse effect on the operation or maintenance of the Vocus Infrastructure;

(f) provide Vocus and its suppliers, contractors, agents and employees with prompt and safe access to the Customer's Premises and to the Customer's personnel, equipment, data and information as is reasonably required for the purpose of delivering the Services;

(g) provide all reasonable assistance and take all safety precautions as may be reasonably necessary or otherwise requested by Vocus to ensure safe and proper performance by Vocus of all work at the Customer's Premises;

(h) provide all necessary space and utility services (including electricity, earthing and air-conditioning) as reasonably required by Vocus for the installation, provision and proper

operation of the Vocus Equipment and for the provision of the Service;

- (i) ensure that, prior to the connection of any cabling to the Customer's Premises:
  - (i) cabling at the Premises has been installed by a registered cabling service provider;
  - (ii) the Customer's Premises cabling meets minimum technical requirements as determined by the New Zealand Telecommunications Forum; and
  - (iii) the Customer has obtained all necessary consents from the owner of the Premises.
- (j) obtain and maintain all permits, licences, approvals or authorisations required for the installation and operation of any equipment or Vocus Equipment at the Customer's Premises; and
- (k) provide all necessary assistance to obtain all permits, licences, approvals or authorisations required for Vocus to provide the Services.

## 5.2 Access

Where Vocus employees are given access to the Customer's premises in order to provide a Service Vocus must ensure that its employees comply with any reasonable direction given by the Customer or its employees in relation to maintenance of health and safety at the Customer's premises.

## 5.3 Customer acknowledgments

The Customer acknowledges that:

- (a) where the Service is a carriage service, Vocus may be required to intercept communications over or using the Service as directed by an authorised Government Agency; and
- (b) Vocus may monitor the Customer's usage and communications sent over the Service for the purposes of billing, network monitoring and management, or otherwise required by any applicable law or as directed by an authorised Government Agency.

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## 6. Customer use of the Service

### 6.1 Use of Service

- (a) The Customer accepts full risk and responsibility for all use of the Service and is responsible for all Charges due in relation to

use of the Service, whether or not such use was authorised by the Customer.

- (b) The Customer must not use the Service:
  - (i) for any improper or unlawful purpose or allow others to do so;
  - (ii) to create, for the purpose of or in a manner that transmits, publishes or communicates material which is defamatory, offensive, abusive, indecent, discriminatory, menacing, unwanted, in breach of confidence, illegal or which brings Vocus or any of Vocus' agents into disrepute;
  - (iii) in any way which damages or interferes with Vocus Infrastructure or the supply of the Service to other Vocus customers; or
  - (iv) to host or transmit information which contains viruses or other harmful code or data designed to interrupt, damage, destroy or limit the functionality of any software, hardware or equipment.

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## 7. Personal Information and Privacy

### 7.1 Use and disclosure of Personal Information

By providing the Customer's, Customer Users' and End Users' Personal Information to Vocus and obtaining the Services, the Customer acknowledges and consents to the collection, use, storage and disclosure of the Customer's, Customer Users' and End Users' Personal Information:

- (a) for purposes relating to the supply of the Service to the Customer. This includes:
  - (i) for billing and account management purposes, product and service development, managing the Customer's relationship with Vocus and marketing Vocus' Services to the Customer;
  - (ii) disclosure to a Government Agency to assist in the investigation of crime or the enforcement of any laws;
  - (iii) disclosure to Vocus' Suppliers or any Related Companies of Vocus or Vocus' Suppliers, and any dealer, agent or contractor for purposes relating to the supply of Services to the Customer;



- (iv) disclosure to any third party as required by law; or
- (b) otherwise in accordance with Vocus' privacy policy (see <http://www.vocus.co.nz/privacy-policy>).

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## 8. Supplied Equipment

### 8.1 Supply of Supplied Equipment

- (a) This clause 8 only applies if the Customer purchases or rents Supplied Equipment from Vocus.
- (b) Vocus will supply to the Customer the Supplied Equipment as described in the Service Order. The Customer agrees and acknowledges that Supplied Equipment provided on a rental basis may not be new and is only required to be in operational condition at the time of delivery.
- (c) The Service Order indicates whether the Supplied Equipment will be supplied on an outright purchase basis or on a rental basis.

### 8.2 Risk and Title

- (a) Where the Supplied Equipment is to be purchased by the Customer, title in the Supplied Equipment will only pass to the Customer upon full payment in cleared funds of the Equipment Fee.
- (b) Where the Service Order does not expressly indicate the Supplied Equipment will be purchased by the Customer, then the Supplied Equipment will be rented by the Customer from Vocus, and title will remain with Vocus at all times.
- (c) Vocus retains title to any Supplied Equipment until title in the Supplied Equipment passes to the Customer under clause 8.2(a) and while Vocus retains title to the Supplied Equipment, the Customer agrees to hold the Supplied Equipment in a fiduciary capacity as bailee for Vocus.
- (d) Risk of loss or damage to the Supplied Equipment passes to the Customer upon delivery of the Supplied Equipment to the Customer Premises.

### 8.3 Renting Equipment from Vocus

- (a) This clause 8.3 only applies if the Customer rents Supplied Equipment from Vocus.
- (b) The Customer must pay the Equipment Rental Fee set out in the Service Order.

### (c) The Customer:

- (i) agrees and acknowledges that the Customer must use the Supplied Equipment in accordance with all applicable safety standards or industry codes applicable to the Supplied Equipment and those notified by Vocus from time to time; and
- (ii) must keep the Supplied Equipment in good repair and condition (excluding fair wear and tear) and shall not sell, assign or permit any charge, lien, mortgage or encumbrance to be created in relation to the Supplied Equipment.
- (d) At Vocus' election, Vocus will repair or replace the Supplied Equipment, where the Supplied Equipment is defective except that Vocus is not responsible to repair or replace the Supplied Equipment if it becomes faulty due to:
  - (i) any misuse by the Customer or unauthorised modification of the Supplied Equipment by the Customer; or
  - (ii) Force Majeure Event.

### 8.4 Equipment warranties for purchase

- (a) This clause 8.4 only applies if the Customer purchases Supplied Equipment from Vocus.
- (b) Any Supplied Equipment purchased by the Customer from Vocus is subject to the warranties given by the manufacturer in respect of the Supplied Equipment (if any apply at the time).
- (c) To the extent that Vocus is lawfully able to do so, Vocus will assign to the Customer the benefit of any warranties given to Vocus by the manufacturer of the Supplied Equipment purchased by the Customer from Vocus under the Service Order.
- (d) To the fullest extent permitted by Law, Vocus does not provide any warranties to the Customer in respect of the Supplied Equipment in addition to those set out in clauses 8.4(b) and 8.4(c).

### 8.5 Insurance

- (a) If the Supplied Equipment is delivered to the Customer Premises before title passes to the Customer pursuant to clause 8.2(a), then until title passes to the Customer, or at all times

while the Supplied Equipment is rented by the Customer, the Customer must insure and keep the Supplied Equipment insured with an insurer of recognised standing for their full replacement value against loss or damage by fire, theft, accident and such other risks as are insured against by prudent persons engaged in a similar business to the Customer.

- (b) The Customer must promptly provide Vocus with evidence of the currency of the insurance described in this clause 8.4 upon Vocus' request.

#### **8.6 Personal Properties Securities Interest**

Where any bailment of Supplied Equipment constitutes a security interests for the purposes of the Personal Property Securities Act 1999 then:

- (a) Vocus may perfect its security interest by registering a finance statement in the PPS Register; and
- (b) This clause will constitute a security agreement for the purposes of the PPSA.

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### **9. Vocus Equipment**

#### **9.1 Risk and Title**

- (a) The Customer is responsible for any damage to, or destruction or theft of the Vocus Equipment. The Customer must keep the Vocus Equipment in good repair and condition, excluding fair wear and tear and shall not sell, assign or permit any charge, lien, mortgage or encumbrance to be created in relation to it.
- (b) Unless otherwise agreed, the Customer must:
  - (i) allow Vocus to service, modify, maintain, repair or replace the Vocus Equipment; and
  - (ii) do all things reasonably required by Vocus to make clear the identity of the owner of the Vocus Equipment.

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### **10. Training**

#### **10.1 Provision of Training**

- (a) If expressly stated in the Service Order, Vocus will provide to the Customer the Training.

#### **10.2 Intellectual Property Rights in Training**

- (a) For the avoidance of doubt, the Customer agrees and acknowledges that all Intellectual Property Rights in any materials provided by Vocus to the Customer in connection with, or

for the purposes of, the Training will be retained by Vocus or Vocus' Suppliers in accordance with clause 13.

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### **11. Fault reporting and recovery**

#### **11.1 Fault reporting and restoration**

- (a) The Customer must report any faults in relation to the Services to the Vocus network operations centre as soon as reasonably practicable after it becomes aware of them.
- (b) Before reporting a Fault, the Customer should take all reasonable steps to ensure that the Fault is with the Service and not caused by any Customer Equipment, Customer Software Applications, Customer Content or communications services not supplied or provided by Vocus.
- (c) If no timeframe for resolution of a particular Fault is specified in the Service Level Agreement for the Service, then Vocus will use reasonable efforts to rectify that Fault within a reasonable time.
- (d) Vocus is not responsible for rectifying Faults where the Fault arises in or is caused by its Third Party Software Licensors or Third Party Software outside of Vocus' reasonable control, but Vocus will request that Third Party Software Licensors rectify such Faults.

- (e) The Customer is responsible for repairing faults relating to any Customer Equipment, Customer Software Applications and communications services not supplied by Vocus.

#### **11.2 Charges for restoration**

The Customer is liable for all costs incurred by Vocus in restoring a service where the fault arises as a result of:

- (a) any fault in any equipment, software or any network unit which does not form part of the Vocus Equipment;
- (b) defects in Customer Equipment or its installation, arising out of Customer Software Applications, Customer Content or communications services not supplied or provided by Vocus; or
- (c) any act or omission of the Customer or any of its employees, consultants, contractors, agents or representatives.

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## 12. Confidentiality

### 12.1 Confidentiality Obligation

Each party (**Recipient**) which receives Confidential Information of the other party (**Disclosing Party**) under this Agreement acknowledges that all Confidential Information provided to it or to which it is exposed is confidential to the Disclosing Party.

### 12.2 Loss suffered

The Recipient acknowledges and agrees that the Confidential Information is, by virtue of its special nature, valuable property of the Disclosing Party and that the Disclosing Party may suffer damage or loss by any disclosure by the Recipient of the Confidential Information.

### 12.3 Non-Disclosure

The Recipient must:

- (a) treat all Confidential Information as confidential and not make public or disclose to any other person that Confidential Information unless it has first obtained the written consent of Disclosing Party to do so;
- (b) prevent third parties from gaining access to the Confidential Information; and
- (c) deliver and surrender to Disclosing Party upon request all records of Confidential Information held by it.

### 12.4 Disclosure Required

The Recipient may disclose Confidential Information if required to do so by a Government Agency or any law or court order, or the rules of any applicable securities exchange after first giving notice to Disclosing Party and after taking all practicable steps to cooperate with Disclosing Party to prevent the disclosure to the maximum extent permitted by law.

### 12.5 Reference to Customer

Vocus may acknowledge that the Customer is a customer of Vocus and use the Customer's logo (in accordance with Customer's reasonable guidelines provided by the Customer to Vocus) in any press release, marketing, sales, or stock exchange reporting materials. Any other reference to the Customer by Vocus requires the Customer's prior written consent.

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## 13. Intellectual Property Rights

### 13.1 Ownership of Intellectual Property Rights

- (a) All Intellectual Property Rights which are owned by either party as at the date of this

Agreement will at all times remain owned by that party exclusively.

- (b) Vocus or Vocus' Suppliers will retain all Intellectual Property Rights:
  - (i) in any manuals or user Documentation supplied with the Service, rented Supplied Equipment and Vocus Equipment; and
  - (ii) in all material provided by Vocus to the Customer including, but not limited to, software used by Vocus to provide the Service.
- (c) Except as expressly provided, nothing in this Agreement confers on the Customer any right or interest in, or licence to use, any of Vocus' or any third party's Intellectual Property Rights.

### 13.2 Domain Names and Internet Protocols

- (a) Any Vocus network space assigned by Vocus to the Customer is not portable and must be returned to Vocus immediately if Vocus suspends or discontinues supply of data Services.
- (b) Where Vocus allots any internet protocol numbers to the Customer in connection with a Service, the Customer may only use such internet protocol numbers in connection with that Service. If the Customer or Vocus suspends or discontinues the use or supply of a Service for whatever reason, the Customer's right to use such internet protocol numbers will cease and Vocus may reallocate such numbers as it see fit.

### 13.3 Licensed Intellectual Property Rights

- (a) The Customer is granted a limited, non-exclusive, non-transferable, non-sublicenseable licence to use Vocus' Intellectual Property or Intellectual Property licensed to Vocus by Vocus' Suppliers, to the extent required to enjoy the Service, subject to any conditions which Vocus may impose from time to time.
- (b) The conditions that Vocus imposes under clause 13.3(a) include, subject to any alteration or addition by Vocus:
  - (i) treating Vocus' Intellectual Property as Confidential Information under clause 12;
  - (ii) using any software or any portions or aspects thereof (including any

- methods or concepts utilized therein) solely on the authorised equipment;
  - (iii) returning to Vocus all memory media, Documentation and/or other material that has been modified, updated or replaced;
  - (iv) not modifying, disassembling or decompiling the Intellectual Property, or reverse engineering any part of the Intellectual Property or permitting others to do so; and
  - (v) not reproducing or copying the Intellectual Property in whole or in part except for backup and archive purposes, and in relation to any materials or Intellectual Property provided by Vocus during the provision of the Training under clause 10, not reproducing or copying the Intellectual Property in whole or in part except that the Customer may make copies of such material if the copies include a statement preserving Vocus' Intellectual Property Rights in such copies.
- (c) The Customer's discretion to use the Intellectual Property Rights in accordance with clause 13.3(a) will cease when the applicable Service is terminated or expires.

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## 14. Third Party Software

### 14.1 Third Party EULAs

- (a) By executing the Agreement or by otherwise accessing and using the Third Party Software, the Customer acknowledges and agrees that it has read and agrees to be bound by the terms of each Third Party EULA which contain the terms and conditions which apply to the use by the Customer of the Third Party Software. The Customer acknowledges and agrees that if the EULA is terminated, Vocus may terminate the relevant Service pursuant to clause 16.3(a)(ii).

### 14.2 Customer Obligations

Without limiting clause 14.1(a), the Customer acknowledges and agrees that:

- (a) Vocus' licensor retains all rights, title and interest (including Intellectual Property Rights) in and to any Third Party Software;
- (b) the Third Party Software is Confidential Information of Vocus' licensor and the Customer must not use or disclose any

Confidential Information without Vocus' or its licensor's prior written consent;

- (c) it will not assign, transfer, lease or rent the Third Party Software to any third party;
- (d) it will not attempt to modify or create any derivative work of the Third Party Software;
- (e) it will not remove, modify or obscure any copyright, trademark or other proprietary rights notices that are contained in or on the Third Party Software;
- (f) reverse assemble, disassemble, reverse engineer or otherwise attempt to derive source code, the underlying ideas, algorithms, structure or organisation of the Third Party Software; and
- (g) it will indemnify and hold Vocus harmless from all claims made by any Third Party Software Licensor arising from:
  - (i) any breach of this Agreement or any agreement or licence entered between the Customer and the Third Party Software Licensor or between the End Users and the Third Party Software Licensor; or
  - (ii) any improper, unlawful or unauthorised use or dealing by the Customer or the End Users with the Third Party Software.

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## 15. Maintenance and Suspension

### 15.1 Maintenance

- (a) Vocus, Vocus Suppliers or the Third Party Software Licensors may perform scheduled and unscheduled maintenance or perform updates in relation to the Vocus Infrastructure, the Service or the Third Party Software from time to time.
- (b) Vocus will use its reasonable efforts to give the Customer notice in accordance with the Service Level Agreement before undertaking any scheduled maintenance and will use reasonable endeavours to perform all scheduled maintenance at times likely to minimise interference to the Customer. If Vocus is required to perform unscheduled or urgent maintenance, then Vocus will use reasonable efforts to provide prior notice to the Customer however the Customer accepts that such prior notice may not always be possible.

## 15.2 Suspension by Vocus

Vocus may, upon reasonable notice, without liability and with immediate effect suspend the Service for as long as Vocus, acting reasonably, considers necessary to comply with any law, protect any person, equipment or Vocus' Equipment, or enable authorised persons to attend to any emergency.

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## 16. Term and Termination

### 16.1 Term

- (a) This Agreement continues until terminated in accordance with this clause 16.
- (b) Other than where terminated by the Customer or Vocus in accordance with the Agreement, a Service Order remains in force for the specified Initial Term.
- (c) After the Initial Term expires, the Service Order remains in force on a month to month basis (**Extended Term**) until terminated by either party giving the other not less than 30 days written notice of termination. Any Special Offers do not apply to the Extended Term unless otherwise agreed in writing.
- (d) These terms and conditions and any relevant Service Schedule or Service Order remains in force in respect of any Service supplied to a Customer for as long as Vocus continues to supply that Service to the Customer.

### 16.2 Customer termination

The Customer may terminate these terms and conditions, or an individual Service, Service Schedule or Service Order (as applicable) by notice in writing to Vocus, if:

- (a) In respect of termination of a Service Order, the Customer gives to Vocus prior written notice before the RFS Date to terminate that Service Order and pays to Vocus all infrastructure, equipment and installation costs incurred by Vocus in connection with preparation for the provision of the Service, including costs payable to Vocus' Suppliers;
- (b) Vocus has committed a material breach of these terms and conditions, the Service Schedule or Service Order (as the case may be) and either:
  - (i) the breach is not remedied within 14 days of the date written notice of the breach is given to Vocus; or

- (ii) the breach is not capable of remedy;

- (c) Vocus suffers an Insolvency Event;
- (d) In respect of termination of a Service only, the Customer has validly claimed service level rebates for that Service under the Service Level Agreement for three consecutive months (provided that notice of termination must be given within 10 Working Days of the third consecutive claim for service level rebates);
- (e) In respect of termination of a Service only, Vocus increases the Charges during the Initial Term for that Service under clause 4.7 (provided that notice of termination must be given before the increased Charges for that Service come into effect); or
- (f) In respect of termination of a Service only, the Customer has given notice rejecting increased Supplier Charges for that Service under clause 3.7(c) after the RFS Date and pays to Vocus any third party costs incurred by Vocus in relation to that termination, including any early termination charges payable to Vocus' Suppliers.

### 16.3 Vocus termination

Vocus may terminate these terms and conditions, or an individual Service, Service Schedule or Service Order (as applicable) by notice in writing to the Customer if:

- (a) the Customer has committed a material breach of these terms and conditions, the Service Schedule or Service Order (as the case may be), and:
  - (i) the breach is not remedied within 14 days of the date written notice of the breach is given to the party; or
  - (ii) the breach is not capable of remedy; or
- (b) the Customer fails to pay any amount due under this Agreement within 14 days of written notice from Vocus requiring payment;
- (c) the Customer suffers an Insolvency Event;
- (d) a Supplier Failure occurs which impairs or prevents Vocus from delivering the Services in accordance with these terms and conditions, a Service Schedule or a Service Order (as the case may be);
- (e) any permit, licence, lease or consent required for the provision of the Services cannot reasonably be obtained or retained by Vocus; or

- (f) Vocus is required to do so to comply with any law or direction of any Government Agency.

#### 16.4 Failure to pay

In addition to the right to terminate this Agreement under clause 16.3(b), if the Customer fails to make a payment due under this Agreement within 10 Business Days of written notice from Vocus requiring such payment o, Vocus may do any one or more of the following:

- (a) suspend the provision of the Services;
- (b) charge the Customer interest on the overdue amount from the due date for payment up to the date of actual payment at the Interest Rate;
- (c) where services include rack rentals in a data centre, suspend all Customer access to the data centre;
- (d) use or disclose any Personal Information collected and recorded in relation to the Customer to a third party to assist Vocus in the process of debt recovery; or
- (e) enter the Customer Premises, or any premises where the rented Supplied Equipment or Vocus Equipment is located, to recover possession of the rented Supplied Equipment or Vocus Equipment.

#### 16.5 Suspended Services

If Vocus suspends the provision of any Services under clause 16.4, Vocus may reinstate those Services if all amounts due (including interest) are subsequently paid. In that event, Vocus may charge a reconnection fee equal to Vocus' reasonable costs incurred in suspending and reconnecting the Services and reconnection will not occur until those costs have been paid.

#### 16.6 Actions on termination

On termination of these terms and conditions, a Service Schedule or Service Order:

- (a) all unpaid sums owing by each party will immediately become due and payable to the other party;
- (b) in addition to any other rights it may have, Vocus may:
  - (i) retain any moneys paid to it in respect of services provided;
  - (ii) invoice the Customer in respect of any Services provided prior to the date of termination which have not been invoiced;

- (c) the Customer must:

- (i) immediately return to Vocus all Confidential Information of Vocus, all access codes and keys of any type and any other materials in the Customer's possession relating to Vocus;
- (ii) where the Customer has equipment in a Vocus data centre, at Vocus' request remove all such equipment. If the Customer fails to remove the equipment within 10 Business Days of written request from Vocus to do so, the Customer waives any proprietary rights it may have in that equipment, and Vocus may remove that equipment and do anything (including sell, dispose of or dump) that equipment at its absolute discretion.

- (d) the Customer authorises Vocus to recover any outstanding sums from any over payment the Customer has made at the time of termination;

- (e) Vocus shall have reasonable access upon notice to the Customer Premises for the purpose of disconnecting, dismantling and removing the Service (as the case may be) and any Vocus Equipment in a reasonable manner (without any obligation to repaint, redecorate or repair) and the Customer will provide to Vocus all reasonable assistance; and

- (f) Vocus will continue to provide the Customer with any Service which have not been terminated (unless that termination makes it technically unviable to do so).

#### 16.7 Return of Supplied Equipment

- (a) At the expiry or termination of the relevant Service, the Customer must return to Vocus, at Vocus' depot which is located closest to the Customer as nominated by Vocus, all Supplied Equipment which the Customer rented from Vocus from the Customer Premises at the Customer's cost within 30 days of the effective date of termination or expiry.

- (b) Vocus will inspect the rented Supplied Equipment returned by the Customer and in the event any rented Supplied Equipment is not in good repair and condition in accordance with clause 8.3(c)(ii), Vocus may issue a purchase notice to the Customer requiring the Customer to purchase the Supplied Equipment at the market value of the relevant rented Supplied Equipment as advised by the vendor of that equipment. On receipt of the notice the

Customer must pay as a debt immediately due to Vocus.

- (c) If the Customer fails to return the rented Supplied Equipment within 30 days of the effective date of termination or expiry, the Customer must provide Vocus full access at the Customer's costs, as required by Vocus, to the Customer Premises or any premises where the rented Supplied Equipment is located, in order to enable Vocus to recover the rented Supplied Equipment. The Customer is liable for costs incurred by Vocus in recovering the rented Supplied Equipment and in addition, clause 16.7(b) applies in the event the rented Supplied Equipment is not in good repair and condition in accordance with clause 8.3(c)(ii).

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## 17. Force Majeure

### 17.1 No liability

Where any failure or delay by a party (**Affected Party**) in the performance of its obligations (except payment obligations) under a Service Order is caused, directly or indirectly, by a Force Majeure Event:

- (a) the Affected Party must as soon as practicable give the other party written notice of that fact;
- (b) the Affected Party is not liable for that failure or delay; and
- (c) the Affected Party's obligations under this Agreement is suspended, to the extent to which they are affected by the relevant Force Majeure Event, for the duration of the Force Majeure Event.

### 17.2 Termination for Force Majeure Event

If the Force Majeure Event continues for more than 30 consecutive days and while it continues, the non-Affected Party may, at its sole discretion, terminate the relevant Service Order by giving written notice to the Affected Party and all other parties (if any) and clause 16.6 applies.

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## 18. Kiwirail Holdings Limited Provisions

- (a) A portion of the Services to be provided under this Agreement will traverse cable infrastructure owned by KiwiRail Holdings Limited ("**KiwiRail Holdings**"). The agreement between Vocus and KiwiRail Holdings for use of its infrastructure requires that Vocus network customers acknowledge that:

- (i) KiwiRail Holdings will at all times retain ownership, power, possession and control of the fibre, cables, break-

outs, ducts and all associated equipment located on rail land and owned or controlled by KiwiRail Holdings ("**KiwiRail Holdings infrastructure**");

- (ii) KiwiRail Holdings will not be responsible or liable for:

(A) any lack of continuity in, or loss of supply or quality of, any data services;

(B) any action taken or proceedings brought by any third party in relation to the "KiwiRail Holdings - Vocus Agreement"; and

(C) any degradation to the KiwiRail Holdings infrastructure or to the quality of the KiwiRail Holdings infrastructure however caused;

- (iii) KiwiRail Holdings accepts no liability for any damage caused as a result of any rail activities, power operations, public utility related activities and other ancillary activities undertaken on the rail corridor or for any damage caused to the KiwiRail Holdings infrastructure as a result of any other activities, operations or circumstances which occur or are being carried out along or on the rail corridor;

- (iv) the Customer has no right of physical access to the KiwiRail Holdings infrastructure and that any moves, adds, or changes to the KiwiRail Holdings infrastructure can only be carried out by Vocus with the express approval of KiwiRail Holdings; and

- (v) KiwiRail Holdings will not be providing the Customer with any service level guarantees in relation to any of the services it receives via the KiwiRail Holdings infrastructure;

- (b) If Vocus breaches the terms of its agreement with KiwiRail Holdings and KiwiRail Holdings terminates that agreement in accordance with its terms KiwiRail Holdings has the option (exercisable only upon agreement between the Customer and KiwiRail Holdings), to assume by way of novation the agreement between Vocus

and the Customer (to the extent that such agreement requires use of capacity on the Infrastructure).

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## 19. Limitation of liability

### 19.1 No indirect loss

Unless expressly stated to the contrary in this Agreement, neither party is liable to the other for any Consequential Loss however caused in connection with or related to this Agreement or the otherwise in respect of the Services.

### 19.2 Resupply of Services

Where legislation implies in this Agreement any condition or warranty, and that legislation avoids or prohibits provisions in a contract excluding or modifying the application of or exercise of or liability under such condition or warranty, the condition or warranty is deemed to be included. The liability of Vocus for any breach of such condition or warranty is limited, at the option of Vocus, to one or more of the following:

- (a) if the breach relates to goods:
  - (i) the replacement of the goods or the supply of equivalent goods;
  - (ii) the repair of such goods;
  - (iii) the payment of the cost of replacing the goods or of acquiring equivalent goods; or
  - (iv) the payment of the cost of having the goods repaired; and
- (b) if the breach relates to services:
  - (i) the supplying of the services again; or
  - (ii) the payment of the cost of having the services supplied again.

### 19.3 Limitation of liability

- (a) The total aggregate liability of either party in respect of all claims made under this Agreement (including under any Service Schedule, Service Level Agreement or Service Order) or otherwise in respect of the provision of Services (including in respect of any claims in tort or negligence) is limited as follows:
  - (i) for Vocus, where the claim is in respect of or in connection with a failure to meet any service level specified in the Service Level Agreement, the service level rebate specified in the Service Level Agreement;

- (ii) in every other case, an amount equal to:

- (A) where this Agreement has been in force for more than 24 months, the total Charges paid by the Customer in the 24 month period prior to the date of the relevant claim; or

- (B) where this Agreement has not been in force for 24 months or more, the amount calculated by multiplying the monthly recurring Charges payable in respect of all services the Customer has with Vocus at the date of the breach by 24.

- (b) The limitation of liability set out in clause 19.3(a) does not limit liability for:

- (i) death or personal injury caused by any negligent act or omission or wilful misconduct of that party or any of its officers, agents, employees or contractors;

- (ii) loss or damage to tangible property caused by any negligent act or omission or wilful misconduct of that party or any of its officers, agents, employees or contractors; and

- (iii) fraud.

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## 20. Indemnity

### 20.1 Mutual Indemnity

- (a) Subject to the limitations on liability set out in clause 19, each party (the **Indemnifying Party**) indemnifies the other and its Related Companies, directors, officers, employees and agents from and against all losses, damages, liabilities, claims and expenses incurred (including but not limited to reasonable legal costs and defence or settlement costs) arising as a result of:

- (i) any breach by the Indemnifying Company of this Agreement or any Service Schedule or Service Order; or

- (ii) any grossly negligent act or omission of the Indemnifying Company or any of its employees, consultants, contractors, agents or representatives relating to this Agreement or any



Services provided under this Agreement.

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**21. GST**

**21.1 GST**

- (a) All prices quoted for supplies made and/or to be made under this Agreement or any Service Schedule or Service Order are in New Zealand dollars and are exclusive of GST, unless expressed to the contrary in writing.
- (b) If GST is applicable to any supply made by Vocus under this Agreement, a Service Schedule or Service Order, Vocus is entitled to add to the amount otherwise payable an additional amount for the applicable GST.
- (c) The Customer agrees to pay Vocus such GST charge in the same manner and at the same time as the payment for the relevant supply.
- (d) Vocus will issue tax invoices to the Customer for the purposes of GST.
- (e) If required by applicable law, Vocus will give the Customer an adjustment note arising from the adjustment event relating to a taxable supply made under, or in connection with, this Service Schedule within 30 days after the date Vocus becomes aware of the adjustment event.

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**22. Disputes**

**22.1 Dispute resolution prior to litigation**

The parties must exhaust the provisions of this clause 22 before initiating any legal proceedings in court.

**22.2 Senior representative resolution**

The parties must use their best endeavours and act in good faith to resolve any dispute arising in connection with this Agreement by negotiation between a senior manager of each of them.

**22.3 CEO Resolution**

If senior managers of the parties have not resolved any dispute within 20 Business Days of notification of the dispute, the dispute must be escalated to the CEO of each party for resolution.

**22.4 Litigation**

If the CEOs of the parties fail to resolve the dispute within a further 20 Business Days of notification of the dispute, either party may take such additional action as it deems necessary to resolve the dispute, including initiating legal proceedings.

**22.5 Interlocutory relief**

Nothing in this clause 22 prevents any party from seeking urgent interlocutory relief from a court at any time.

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**23. Related Companies**

- (a) Vocus may provide the Services to the Customer through the use of any of Vocus' Related Companies.
- (b) The Customer acknowledges and agrees that any debt owed under this Agreement is a debt owed to Vocus and that Vocus may take any necessary action in relation to any such debt notwithstanding that the right or obligation giving rise to the debt was satisfied by a Related Company of Vocus.

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**24. Assignment and Change in Control**

**24.1 No assignment by Customer without consent**

Subject to clause 24.2, the Customer and Vocus may not assign, charge or deal with any its rights and obligations under these terms and conditions or any Service Schedule or Service Order, or attempt or purport to do so, without the prior written consent of the other party, which must not be unreasonably withheld or delayed.

**24.2 Subcontracting by Vocus**

Notwithstanding anything to the contrary in this Agreement, Vocus may subcontract the whole or any of Vocus' obligations under the Service Order without the Customer's consent.

**24.3 Change in Control**

If a Change in Control occurs in respect of the Customer Vocus may terminate the Agreement, or the provision of any Service, at any time without notice and clause 16.3 will apply as if the Agreement or the Service was terminated pursuant to clause 16.3

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**25. Party as trustee**

- (a) If the Customer enters into this Agreement in the capacity as trustee of any trust (**Trust**) under any trust deed, deed of settlement or other instrument (**Trust Deed**), then this clause 25 applies and the Customer also enters into this Agreement in its personal capacity.
- (b) The Customer represents and warrants that:
  - (i) it is the only trustee of the Trust and no action has been taken or is proposed to remove it as trustee of the Trust;

- (ii) it has power under the Trust Deed and under its constitution to enter into and execute this Agreement and to perform the obligations imposed under this Agreement as trustee;
  - (iii) all necessary resolutions have been passed as required by the Trust Deed and by its constitution in order to make this Agreement fully binding on the Customer;
  - (iv) the execution of this Agreement is for the benefit of the Trust;
  - (v) the Customer is not, and has never been, in default under the Trust Deed;
  - (vi) it has a right to be fully indemnified out of the Trust assets in respect of obligations incurred by it under this Agreement and the assets of the Trust are sufficient to satisfy that right of indemnity;
  - (vii) there is not now, and the Customer will not do anything by virtue of which there will be in the future, any restriction or limitation on the Customer's right to be indemnified out of the assets of the Trust; and
  - (viii) there is no material fact or circumstance relating to the assets, matters or affairs of the Trust that might, if disclosed, be expected to affect the decision of Vocus, acting reasonably, to enter into this Agreement.
- (c) No change of trustee of the Trust (including any appointment of an additional trustee) can occur without the prior written consent of Vocus, which consent must not be unreasonably withheld or delayed.

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**26. General**

**26.1 Notices**

- (a) A notice or other communication required or permitted to be given by one party to another must be in writing and:
  - (i) delivered personally;
  - (ii) sent by pre-paid mail to the address of the addressee specified in this Agreement;

- (iii) sent by facsimile transmission to the facsimile number of the addressee with acknowledgment of receipt from the facsimile machine of the addressee; or
  - (iv) sent by email to an email address previously used or advised by the other party.
- (b) A notice or other communication is taken to have been given:
- (i) If delivered personally, immediately upon delivery;
  - (ii) if mailed, on the second Business Day after posting;
  - (iii) 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; or
  - (iv) if emailed, on the date sent, unless the recipient is able to demonstrate that the email failed to be delivered.
- (c) A party may change its address for service by giving notice of that change in writing to the other parties.
- (d) The parties' respective contact details for notification under this Agreement are as set out in the Parties section above.

**26.2 Governing law and jurisdiction**

This Agreement is governed by the laws of New Zealand. Each party irrevocably submits to the non-exclusive jurisdiction of the courts of New Zealand.

**26.3 Further assurance**

Each party will from time to time do all things (including executing all documents) necessary or desirable to give full effect to this Agreement. Each party acknowledges that it has obtained legal advice, or had the opportunity to obtain legal advice, in connection with this Agreement.

**26.4 Variation**

Except to the extent expressly provided in this Agreement, this Agreement may not be amended or varied except in writing signed by both parties.

**26.5 Counterparts and facsimile signatures**

- (a) This Agreement may be executed in one or more counterparts, each of which when so executed shall be deemed to be an original and

all of which taken together shall constitute one and the same agreement.

- (b) The transmission by a party by email, fax or other electronic means of an executed copy of this Agreement (or any Service Schedule or Service Order) will be deemed proof of signature of the original for the purposes of constituting a binding agreement between the parties, and the signed copy so transmitted will be deemed the original for the purposes of this Agreement.

#### **26.6 Attorneys**

Each attorney and any other individual executing this Agreement on behalf of a party warrants that he or she has full and proper authority to do so and is not aware of any revocation or suspension of the relevant power of attorney or other authorisation.

#### **26.7 Joint and Several liability**

If this Agreement is executed on behalf of the Customer by more than one party, each party shall be jointly and severally liable for the obligations of the Customer.

#### **26.8 Whole agreement**

In relation to the subject matter of this Agreement:

- (a) these terms and conditions, and any relevant Service Schedule and Service Order, is taken to be the whole agreement between the parties; and
- (b) supersedes all oral and written communications by or on behalf of any of the parties in relation to the subject matter of the Agreement, Service Schedule or Service Order, as the case may be.

#### **26.9 No reliance on warranties and representations**

In entering into this Agreement, each party:

- (a) has not relied on any warranty or representation (whether oral or written) in relation to the subject matter of this Agreement made by any person other than as expressly stated in this Agreement; and
- (b) has relied entirely on its own enquiries in relation to the subject matter of this Agreement.

#### **26.10 Survivability**

- (a) Subject to any provision to the contrary, this Agreement will enure to the benefit of and be binding upon the Parties and their successors,

trustees, permitted assigns or receivers but will not enure to the benefit of any other persons.

- (b) The covenants, conditions and provisions of this Agreement which are capable of having effect after the expiration of this Agreement will remain in full force and effect following the expiration of this Agreement.
- (c) Each indemnity in this Agreement survives the expiry or termination of this document.

#### **26.11 Severance**

If any part of this Agreement is legally unenforceable, this Agreement does not include it. The remainder of this Agreement continues in full force.

#### **26.12 No merger**

Nothing in this Agreement merges, extinguishes, postpones, lessens or otherwise prejudicially affects any right, power or remedy that Vocus may have against the Customer or any other person at any time.

#### **26.13 Consents and approvals**

- (a) Where this Agreement gives Vocus a right or power to consent or approve in relation to a matter under this Agreement, Vocus may withhold any consent or approval or give consent or approval conditionally or unconditionally and in its absolute discretion. The party seeking consent or approval must comply with any conditions Vocus imposes on its consent or approval.
- (b) The Customer warrants it has and will maintain the power and authority and has obtained and will comply with all necessary licenses and consents, necessary for it to enter into this Agreement and obtain and utilise the Services.

#### **26.14 Relationship**

The parties agree that this Agreement does not create any relationship of partnership or employment, franchise, joint venture or agency and that Vocus is an independent contractor.

#### **Consumer Guarantees Act and Fair Trading Act 1986**

Vocus and the Customer each acknowledge and agree that:

- (a) the Services and Equipment are supplied and acquired in trade and for a business purpose;
- (b) to the extent permitted by law, the parties are contracting out of the Consumer Guarantees Act 1993 and sections 9, 12A, 13 and 14(1) of the Fair Trading Act 1986, and it is fair and reasonable to do so.

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## Additional Resupply Terms

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### 27. Resupply

#### 27.1 Customer who resupplies

In addition to the clauses above, clauses 28 to 30 apply to Customers who resupply the Services. For avoiding doubt, clauses 28 to 30 do not apply to Customers who do not resupply the Services.

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### 28. Security Deposit and Credit Checks

#### 28.1 Payment of Deposit

If the Customer fails to pay any amount due under this Agreement by the due date for payment, Vocus may by notice in writing require the Customer to pay a Security Deposit.

#### 28.2 Payment of Security Deposit

If required under clause 28.1, the Customer must pay the Security Deposit to Vocus within 5 Business Days of the date of the notice. In addition to any other rights available to it under this Agreement, Vocus may terminate or suspend a Service if the Customer fails to pay the Security Deposit within the time required under this clause.

#### 28.3 Use of Security Deposit

Vocus must hold the Security Deposit as security for the payment of any sums due under this Agreement. If the Customer fails to pay any amount due on the due date for payment, Vocus may immediately deduct that amount from the Security Deposit in set-off of the Customer's payment obligation.

#### 28.4 Reinstatement of Security Deposit

If Vocus deducts any monies from the Security Deposit under clause 28.3 the Customer must pay Vocus on demand by way of additional security that amount to replace the amount of the Security Deposit used in accordance with clause 28.2.

#### 28.5 Return of Security Deposit

Vocus must return any part of the Security Deposit which is unused to the Customer on termination of this Master Services Agreement.

#### 28.6 Credit reference check

Vocus may conduct a credit check on the Customer prior to entering into any Service Schedule or Service Order with the Customer. The Customer authorises Vocus to make all enquiries reasonably necessary to determine the Customer's creditworthiness including by

conducting requests for information from banks, credit agencies and other financial institutions.

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### 29. End Users

#### 29.1 Customer obligations

- (a) The Customer warrants and represents that it has the experience, capacity and resources to carry out its obligations under this Agreement, including providing support to End Users with a high level of professionalism and in a timely and efficient manner.
- (b) The Customer must:
  - (i) only use the Services for its own internal business use or to supply services to End Users using in whole or in part, the Services;
  - (ii) ensure that it has obtained consent from the End User:
    - (A) to disclose the End User Details to Vocus and the relevant Supplier; and
    - (B) for Vocus and the relevant Supplier to use the End User Details to the extent necessary or desirable in connection with the supply of the Services;
  - (iii) provide and manage all services provided to an End User including billing and collection of payments;
  - (iv) manage the relationship between the Customer and its End Users including (without limitation) providing technical support to the End Users and ensure that End Users do not contact Vocus;
  - (v) use its best endeavours to;
    - (A) maintain facilities and staff sufficient to provide the support services to the End Users; and
    - (B) immediately notify Vocus of any defect in any of the Services of which it become aware;
  - (vi) comply and take reasonable steps to ensure that all of its personnel comply at all times with any current operations manual issued by Vocus

and any other reasonable directions given by Vocus from time to time in relation to the promotion, sale and use of the Services;

- (vii) not:
  - (A) bring Vocus' reputation or brand into disrepute; or
  - (B) compromise the integrity or security of the Vocus Infrastructure or any of Vocus' customers; and
- (viii) cease using any of Vocus' branding including its name and logo on termination of this Master Services Agreement, a Service Schedule or Service Order whichever is applicable.

### **29.2 Customer Acknowledgment**

The Customer acknowledges that:

- (a) it must not make any representation or give any warranty in relation to any Service that is inconsistent with written materials supplied by Vocus for that purpose other than as expressly authorised in writing by Vocus.
- (b) the supply of Services to the Customer pursuant to the terms of this Agreement is non-exclusive. Vocus is free to supply the Services or procure the supply of the Services to other parties on terms and conditions as Vocus sees fit; and Vocus may promote and sell, or appoint other resellers to promote and sell, the Services from time to time.

### **29.3 End User liability**

- (a) The Customer is solely liable for any dispute raised by any End Users in relation to the provision of any Services by the Customer to those End Users. Other than as expressly provided in this Agreement, Vocus disclaims any liability which may arise either on the part of the Customer or an End User as a result of the use of a Service by an End User or any related or ancillary claim, and the Customer indemnifies Vocus in respect of any liability so incurred.
- (b) The Customer also indemnifies Vocus in respect of all losses, damages, liability, claims and expenses incurred (including but not limited to reasonable legal costs and defence or settlement costs) arising as a result of any claim or demand by any persons relating to the

resupply of the Services to End Users, including a claim or demand by an End User.

### **29.4 Branding and use of Name**

The Customer must not use Vocus' logo or refer to Vocus except:

- (a) with Vocus' prior written consent; and
- (b) in accordance with any directions or guidelines provided by Vocus.

### **29.5 Third Party Software**

The Customer acknowledges and agrees on its own behalf and on behalf of its End Users that it will comply with clause 14 except that the Customer may rent the Software to its End Users.

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## **30. Insurance**

### **30.1 Customer to obtain and maintain insurance**

- (a) The Customer must take out and maintain valid and enforceable insurance policies with reputable insurers relating to:
  - (i) Public liability insurance for not less than \$10 million per event and unlimited in aggregate; and
  - (ii) Professional indemnity insurance for not less than \$10 million per event and in aggregate.
- (b) The Customer must provide to Vocus upon Vocus' request, certificates of currency from its insurers certifying that the Customer complies with the requirements of clause 30.1(a).
- (c) If the Customer fails to effect or maintain the insurances specified in clause 30.1(a), Vocus may effect and keep in force the insurance policies and the cost of the insurance will be immediately due and payable by the Customer to Vocus.

