

## 1. Definitions

“**Account Holder**” means the Metrocom Ltd customer who is liable for all of the Charges under this Agreement.

“**Agents**” means any contractors, providers, dealers or agents appointed by Metrocom Ltd to perform any of Metrocom Ltd obligations under this Agreement.

“**Agreement**” means these terms and conditions between us and you.

“**Bar**” means suspending access to services and may be either an Out-bar, restricting use of Account for making calls, using data and accessing the Services, or an In-bar, restricting use of the Account for receiving calls and accessing the Services, or both.

“**Bill**” means a paper statement of your Charges or an Online Bill.

“**Charges**” means all monthly access charges, services costs, and airtime call charges payable in accordance with the Pricing Plan and any additional charges payable by you. All Charges, unless otherwise stated, exclude GST.

“**Client**” means the person/s, entities or any person acting on behalf of and with the authority of the Client requesting the Supplier to provide the Services as specified in any proposal, quotation, order, invoice, or other documentation, and:

if there is more than one Client, is a reference to each Client jointly and severally; and

if the Client is a partnership, it shall bind each partner jointly and severally; and

if the Client is a part of a Trust, shall be bound in their capacity as a trustee; and

includes the Client's executors, administrators, successors and permitted assigns.

“**Contract**” means the terms and conditions contained herein, together with any quotation, order, invoice or other document or amendments expressed to be supplemental to this Contract.

“**Cookies**” means small files which are stored on a user's computer. They are designed to hold a modest amount of data (including Personal Information) specific to a particular client and website and can be accessed either by the web server or the client's computer. **If the Client does not wish to allow Cookies to operate in the background when using the Supplier's website, then the Client shall have the right to enable / disable the Cookies first by selecting the option to enable / disable provided on the website, prior to making enquiries via the website.**

“**Customer Services**” means the Metrocom Ltd customer services team, which is contactable on 09 302 2202.

“**Default rate**” is the rate of 2.5% per month or any other rate notified to you on your account. It applies from the date payment by you is due to the date we receive your payment in full.

“**Equipment**” means all Equipment including any accessories supplied on hire by the Supplier to the Client (and where the context so permits shall include any supply of Services). The Equipment shall be as described on the invoices, quotation, authority to hire, or any other work authorisation form provided by the Supplier to the Client.

“**Fair Use Policy**” has the meaning set out at paragraph 3(i) of this Agreement and is published on our Website and updated from time to time;

“**Goods**” means all Goods (which includes any hardware or software, whether supplied from a third party or where custom developed or programmed for the Client, accessories, or parts, etc.) or Services (which includes any advice or recommendations, installation of Equipment, goods, cloud-based telecommunication, networking services and/or support, etc.) supplied by the Supplier to the Client at the Client's request from time to time (where the context so permits the terms 'Goods' or 'Services' shall be interchangeable for the other).

“**GST**” means Goods and Services tax as defined in the Goods and Services Tax Act 1985.

“**Network Operator**” is any entity with whom we have entered into:

(a) an interconnection agreement or arrangement (directly or indirectly) providing for the passing of customer generated or customer destined communications between us and that entity; or

(b) an arrangement to resell wholesale services, including Chorus New Zealand Limited.

“**Online Bill**” means an electronic statement of your Charges.

“**Payment**” means payment to your Metrocom Ltd account by any means made available by us from time to time.

“**Phone Number**” means the landline phone number which is either allocated to you by us or which you Ported or seek to Port.

“**Price**” means the Price payable for the Services/Goods/Equipment hire (plus any Goods and Services Tax (“GST”) where applicable) as agreed between the Supplier and the Client in accordance with clause 26 below.

“**Port**” means to transfer the Phone Number from one Telecommunications Service Provider to another, according to the approved industry process (and words such as Porting, Ported and Porting process will be construed accordingly).

“**Pricing Plan(s)**” are your chosen voice, data and access rates, and form part of this Agreement. Pricing Plans are published on our website.

“**Service(s)**” means the fixed line and broadband services, and related products and services that are made available to you by us or our agents from time to time.

“**Supplier**” means Metrocom Limited, its successors and assigns.

“**Telecommunications Service Provider**” means a provider of telecommunications services to the public in New Zealand.

“**Term**” means, subject to any early termination under this Agreement, the period specified in your Pricing Plan or in any extension to or replacement for this Agreement.

“**User**” means any individual who uses the Services.

“**Website**” means our websites at <https://metrocom.nz> and <https://metrocloud.nz>.

“we” or “us” means Metrocom Ltd and “our” has a corresponding meaning.

“you” means the customer under this Agreement and “your” has a corresponding meaning.

## **2. Commencement and Term**

This Agreement begins when we set up your connection to our Services to be available for your use. All Services, unless explicitly stated otherwise, are for a fixed term of one year. Following that year, Services will continue on a month-to-month basis unless otherwise agreed.

(a) If your connection to our network or a service is for a fixed Term:

- This Agreement will continue for the duration of that fixed Term, including the period of any suspension in accordance with this Agreement, in which case the period of any such suspension will be added onto the fixed Term.
- If you terminate this Agreement before the end of that fixed Term you may have to pay early termination charges. You may obtain details of any early termination charges by referring to our Website or by contacting Customer Services.
- If you re-sign to a new term before the end of that fixed Term, you may have to pay early re-sign charges. You may obtain details of any early re-sign charges by contacting Customer Services.
- On expiry of that fixed Term, your connection may be terminated by you or us on one month's notice or any lesser notice period agreed between us.

(b) If your connection to our network or Service does not have a fixed Term, this Agreement continues on a month-by-month basis until it is terminated in accordance with these terms and conditions. Unless we have agreed otherwise, no early termination charges are payable by you if you wish to discontinue a connection to our network or a Service which is not a fixed Term connection.

## **3. Coverage and Services**

- (a) While we will do our best to provide quality services, because of the nature of telecommunications, it is impossible to guarantee a fault-free Service, as the quality and coverage of the Services depends partly on our network, and partly on other Telecommunications Service Providers to which our Services are connected.
- (b) We reserve the right to temporarily suspend the Services or restrict access to our network for planned and unplanned maintenance or repair.
- (c) We will be available to fix any Service interruption in accordance with the Service Levels and will use reasonable endeavours to minimise their duration. There is no charge for this except where you (or anyone for whom you are responsible) cause the interruption.
- (d) We agree to:
- provide the Services to you with due care and skill to a standard meeting or exceeding that which can reasonably be expected from a telecommunications or internet service provider providing the same or similar Services.
  - commence providing the Services in a timely manner.
  - ensure our Service Specifications are adhered to.
  - use reasonable endeavours to achieve or better our Service Levels
  - credit your account where we do not meet our Service Levels; at the amount detailed by those Service Levels (if any)
  - be available to fix any interruption that occurs to any of the Services.
  - use reasonable endeavours to minimize the duration of any interruptions to the Services.
  - ensure that any scheduled maintenance is scheduled at a time so as to minimise inconvenience to the majority of affected customers and use reasonable endeavours to give you the advance notice as specified in our Service Levels
  - have all work that we perform carried out by competent and suitably qualified personnel.
  - use reasonable endeavours to answer any question or resolve any complaint which you may have about our Service. in a timely manner
  - supply the Services to you as if they have been supplied directly by us (notwithstanding that there may be third party inputs to such Services) except where the provision of third-party inputs is expressly excluded from such commitment.
- (e) You agree to:
- Keep any password, PIN number or security code that relates to the Services confidential, and to change any of the same if we request that you do so.
  - Notify us immediately if you believe that someone else has discovered your password, PIN number or security code, or has made fraudulent use of the Services.
- (f) You agree that you will not use the Services:
- in a way which breaks any law or infringes anyone's legal rights.
  - to obtain unauthorised access to anyone's computer or communications equipment.
  - to annoy anyone or to interfere with anyone else's use of our Services.
- (g) We reserve the right to remove any material from our servers which we consider, in our reasonable opinion, to breach the terms of this Agreement or any law.
- (h) The Services may be changed, modified, advanced, suspended or removed by us. We will notify you before doing this or introduce substitute or new services in accordance with paragraphs 16 and 19 below. If any of our new Services require new or upgraded equipment, you will be responsible for obtaining that equipment.
- (i) You agree to follow our instructions about the use of the Services and ensure that all Users meet your responsibilities when using your Service. You agree to keep us protected against any legal action taken against us and to cover any losses we may incur as a result of such use of the Services. You are responsible for any User's use or misuse of the Services.
- (j) You agree not to use the Services for any abusive, illegal, or fraudulent purpose.
- (k) Using or agreeing to use the Services does not give you any rights in any part of the Services. You must not resell, in any way whatsoever, the whole or any part of the Services.
- (l) You agree that if you do not use the Services in accordance with these conditions and, with our Fair Use Policy, we may restrict or suspend your use of the Services.
- (m) You acknowledge that our control of data speeds is limited to our own network. We may use traffic prioritisation policies at any time to improve the overall performance among our customers. Connections to servers outside the Metrocom Ltd network are on a "best endeavours" basis, and it may not be possible for you to achieve your desired or expected speed or latency.

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- (n) The integrity or quality of the data or information you send or receive via the Services may be affected or compromised due to the configuration of our network, the use of the internet, or the configuration or limitations of your, or your intended recipient's, hardware, or other device. In such events you may not be able to make emergency services calls from your VoIP phones and you and your staff would need to use alternative means to contact emergency services.
- (o) From time-to-time scheduled outages will be required for maintenance and upgrade purposes.
- (p) Because of the nature of these services, we cannot guarantee the confidentiality of any calls or transmissions you make using the service. Maintaining and protecting how and when your service is used is solely your responsibility. You must pay all charges on your account regardless of whether you or someone else uses those services.

### Performance Guarantees

The four guaranteed Service performance metrics (to the other end of the Link) are:

- Availability: 99.9% or greater network availability, determined on a monthly basis.
- Latency: 20ms or less average round trip delay, determined on an hourly basis.
- Packet Loss: 0.5% or less average packet loss, determined on an hourly basis.
- Throughput: 95% or greater average of purchased speed (including packet headers and overhead), on an hourly basis.

If Service to the End customer's site does not meet the performance guarantees, then the End customer may be eligible for a Service degradation credit as outlined below.

### Service Degradation Credits

If the customer believes that Metrocom Ltd is not meeting its performance guarantees for the Service, then the customer must notify Metrocom Ltd. For every hour beyond four hours since the notification to Metrocom Ltd that Service remains below the agreed Performance Guarantees, Metrocom Ltd will give the customer a 1-day credit for Service up to a maximum of 1 months' worth of Service.

If Metrocom Ltd is unable to fix the performance issues after a 1-month credit has been issued, then the Wholesale customer has the option of continuing to pay normal rates for the degraded Service or terminating early from the Service without penalty.

We may define specific Service Levels for any Service from time to time. If Service Levels apply, these will be detailed to you at the time the Service is requested. When providing the Services, we will use reasonable endeavours to achieve or better those Service Levels.

If we fail to achieve the Service Level, then we will credit your account the amount specified by that Service Level provided that the failure is not a direct consequence of:

- any event beyond our reasonable control (including but not limited to loss of power to our network equipment and not being able to access any site we do not control)
- any act or omission by you or any third party for whom you are responsible.
- any failure of any Service or equipment provided by you or any third party for whom you are responsible.

## 4. Charges and Billing

- (a) We will send you a Bill for your Charges on a regular basis, starting from on or about when you enter into an Agreement with us for the provision of the Services. You must pay the total amount on this Bill by the date specified on the Bill. You will pay the Charges no matter who incurs them or how they are incurred. We may charge for some Services in arrears depending on when charges come through from other Network Operators and providers. If you do not pay on the due date, you will be charged a late payment fee. You will also have to pay any reasonable expenses (including solicitor and own client costs) we incur in collecting any money that you owe to us or in exercising any of our other legal rights. If you receive Bills in paper format, we may charge you for this.
- (b) You must advise us when you change your address.
- (c) We will not be responsible if a Bill is not received by you for any reason.
- (d) If there is a mistake on your Bill, please let us know as soon as possible. You may only withhold payment of the disputed part of a Bill. If we agree there has been a mistake, we will correct it. Otherwise, you must pay your Bill by the due date without set-off or deduction.
- (e) We can use any credit balance or security deposit in any of your accounts or use any money we owe you to cover your outstanding Charges. We may charge a reasonable account administration fee in relation to accounts we regard as being dormant or for providing statements or for dealing with unused credit balances. Subject to those rights, we will refund any unused credit or security deposits at the end of this Agreement. We will hold any security deposit in a non-interest-bearing account.
- (f) At our discretion, if you terminate your Agreement prior to the expiry of the Term for any reason other than our default:
  - you will repay to us any credit we have given against your account, pro-rated to the length of the Term remaining; and
  - any credit remaining on the account will not be used to set off any Charges or early termination charges.
- (g) We can, at our discretion, impose credit limits for your use of the Services and we will try to notify you as soon as we impose such limits. You must observe any credit limits we set from time to time. We may restrict your use of the Services without further notice to you if you exceed the credit limits we have set. However, you will continue to be liable for all Charges incurred in excess of any credit limit in place.
- (h) We may impose a credit limit on your use of the Services without further notice to you. You will continue to be liable for all Charges incurred in excess of any credit limit in place.
- (i) Each call is charged at the rate which is applicable when the call commences. We will not be responsible for any loss you suffer as the result of an assumption that a particular number is on a particular network (for example that an 021 number is held by a Metrocom Ltd customer).
- (j) Data is charged at the rate which is applicable at the time that the data is used.
- (k) You are responsible for all Charges, and for all calls made and data used under your Account.

- (l) If you require us to provide you with technical support, or administration services (including, as applicable, call barring, call redirection), we may charge you for the costs we incur in carrying out these services. If you require prior notification of our current charges, please call Customer Services.

## **5. Pricing Plans**

- (a) You may choose to change from one Pricing Plan to another. If you change your Pricing Plan it is up to you to check what, if any, special terms and conditions there may be for the different Pricing Plans or if there is any fee for changing your Pricing Plan. You may contact Customer Services or visit our Website to obtain information about Pricing Plans.
- (b) There is a one-minute minimum charge for fixed line calls. Thereafter:
- If you are a business customer, your call will be charged by the second
- (c) The charges for data and other additional Services shall be as set by Metrocom Ltd from time to time. You can contact Customer Services or visit our Website for current details of such charges.

## **6. ID Check, Credit References and Provision of Related Services**

- (a) You authorise us to check your identity (by obtaining a Driver Check from NZTA), and your credit status with any credit reference agency as we see fit from time to time and to pass on credit information about you to any credit reference agency at any time. If you are not satisfied with the information about you which we receive from any credit reference agency, you must deal directly with the credit reference agency.
- (b) If you do not give us the names of any credit referees when we ask for them, or we are dissatisfied with the information regarding your credit status, we may decline your application or terminate your access to the Services.
- (c) We may ask for a security deposit and/or impose other conditions upon approving your application. These may include, but are not limited to, a mandatory payment method or credit limit.
- (d) If you ask for any additional services, we may ask for further credit referee(s) and/or a security deposit for that Service and may also impose a credit limit.
- (e) We may decline your application and/or any request for additional Services or provide a restricted service at our discretion. Subject to any applicable privacy laws, we do not have to disclose our credit criteria or the reasons for our decision.

## **7. Consumer Guarantees Act and Limitation of Liability**

- (a) You may have the benefit of statutory guarantees under the Consumer Guarantees Act 1993. Unless you use, or hold yourself out as using, the Services for the purposes of a business, nothing in this paragraph 7 will limit or exclude your rights under that Act.
- (b) Where you do use, or hold yourself out as using, our Services for the purposes of a business, then the Consumer Guarantees Act statutory guarantees do not apply to your connection or to our Services and we exclude any liability of any kind (whether in contract, tort, equity or otherwise) to you or anyone claiming through you, relating to any loss of profits or revenue, loss of data, lost business or missed opportunities, wasted expenditure or savings you might have had, or any form of indirect or consequential loss whatsoever, arising from:
- your connection to our network or the content or supply of any Services.
  - the failure, interruption or delay in the supply of, any services (including number transfer if applicable) or any part of them or any negligence in this regard.
  - the fitness of all or any of the Services for any particular purpose.
  - errors in or omissions from any directory assistance listing or published directory assistance.
  - the inaccurate or incomplete transmission of any call or any email.
  - any other matter which relates to this Agreement.
- (c) If you are a consumer customer, except where we cause direct damage to your property due to our negligence (and subject to paragraph 7(a) and the liability cap in paragraph 7 (d)), to the extent allowed by law we have no other liability to you or any other person in respect of this Agreement.
- (d) If for any reason the exclusions in paragraph 7(b) and (c) do not apply, then our liability to you, or anyone claiming through you, will be limited at all times to \$10,000 or the total amount of all Payments made by you in the 6-month period immediately prior to the date of your claim, whichever is the lesser sum. This limitation applies to each claim or series of related claims made by you. For the purposes of paragraphs 7 (b), (c) and (d), “we” and “our” include our officers, employees, and agents, as well as all Network Operators.

We will compensate you for any physical damage that we cause to your property through our negligence. Our maximum liability to you for this will be \$10,000 for any event or series of related events and \$50,000 for all events occurring in any 12-month period.

Apart from where specified in this Agreement we will not be liable to you (or any person that you authorise to use our Services) in tort (including negligence), contract or otherwise for any indirect loss or damage (including loss of profits or anticipated savings, economic loss, or any consequential damage).

No third-party supplier (including their officers, employees, contractors and agents) of any part of the Services will be liable to you for loss or damage of any kind arising from your use of the Services.

You will indemnify us from and against all expenses, claims, costs (including but not limited to legal fees and commissions) and damages suffered or incurred by us that are caused by any failure by you to comply with your obligations under this Agreement or that arise from any claim relating to the Services by any person that you authorise to use the Services.

The Supplier agrees to abide by the provisions of the Fair Trading Act (“FTA”).

## **8. Access to Premises**

You will allow us or our Agents access to your property to perform our obligations under this Agreement. We will always try to give you reasonable prior notice if we require access to your premises and we will ensure that we or our Agents carry sufficient proof of identity. If you do not allow us to access your premises your ability to use the Services may be adversely affected.

## **9. Provision of Hardware and Additional Services**

- (a) If you have acquired any hardware from us, or from one of our dealers or Agents, all claims in relation to those products are covered by the warranty, if any, offered by the relevant manufacturer. This paragraph does not limit any rights you may have under the Consumer Guarantees Act 1993. Please see paragraph 40 with respect to warranty.
- (b) If you have acquired hardware from some other source, for example from overseas or second-hand, and it does not support all the services offered by us, we are not under any obligation to take any action so that you can access any such Services.
- (c) We do not make any warranty as to the accuracy, completeness or currency of any content or material which you may access or have provided to you, using our Services. Where Services are provided by a third party, we accept no responsibility or liability for their quality or the nature of their content.

## **10. Phone Numbers and Number Portability**

- (a) Phone Numbers allocated to you by us or another Telecommunications Provider and do not belong to you.
- (b) You may Port the Phone Number to another Telecommunications Service Provider. If you wish to do so, you must contact the Telecommunications Service Provider to whom you wish to Port. You will be responsible for completing the Porting requirements of that Telecommunications Service Provider. We will comply with our obligations under the Terms for Local and Mobile Number Portability in relation to the Porting of the Phone Number to the other Telecommunications Service Provider. You will be responsible for all costs associated with Porting the Phone Number (including any applicable early termination charges).
- (c) We may be required by law, under contracts with other Network Operators or for other reasons, to change your Phone Number(s). We will do our best to give you notice of any change required. We will not be liable for any costs which you, or anyone else, may incur as a result of such a change.
- (d) If you or we disconnect your connection to the Services, we may allocate your Phone Number to another customer.

## **11. Directory Assistance and Listing**

- (a) We may include your personal information in any telephone or similar directory, or directory enquiry service provided or operated by us or by a third party subject to any objection or preference you may have indicated to us. We will give you an opportunity to express any objection or preference. If you indicate that you wish to be listed in the white/yellow pages and/or for directory assistance, your name(s), telephone number(s) and address details will be given to the directory assistance service provider for listing at your cost.
- (b) Any arrangement you make to be listed will be a matter between you and that directory listing service only.

## **12. Disconnection of Services**

- (a) You may discontinue your connection to our network or give up any Service at any time by emailing Customer Services and giving us at least one calendar month's notice. Your connection to our network or the particular Service will be disconnected one calendar month after receiving your notice and this shall be the date of disconnection. Some Services may be able to be terminated sooner than this.
- (b) If you request us to, or we elect to, disconnect your connection to the Services, you must pay us in respect of each connection you have:
  - any early termination charges (if they apply); and
  - all Charges incurred until the date of disconnection; and
  - any outstanding Charges and other monies payable by you for the Services.
- (c) We can suspend, Bar, Re-direct or restrict your use of any or all of the Services or disconnect your connection without telling you if:
  - you do not pay any Charges by the due date.
  - you exceed any credit limit in place, or your usage of the services is unusual or excessive.
  - you become (or are likely to become) insolvent, bankrupt or where you are or might be a poor credit risk.
  - a receiver, manager and receiver, or statutory manager is appointed over any or all of your assets.
  - a resolution for liquidation is proposed or passed or proceedings to liquidate you are filed or presented.
  - you die or, in the case of a partnership, it is or is intended to be dissolved; or
  - you do not remain connected to the Services.
  - you do not abide by the terms and conditions in this Agreement.
  - you make abusive, offensive, malicious or nuisance calls or communications, or use any of our Services in an offensive way.
  - you are abusive or offensive to us, our dealers or agents, or any other person.
  - we suspect you of using the services for any illegal or fraudulent activity; or
  - all of the services are permanently or temporarily (for any reason) unavailable to you.

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Any and all charges for any Services, including any costs incurred in the suspension or restriction of the Services, will be payable by you in accordance with this Agreement.

- (d) If we suspend your use of our Services, we will try to contact you before doing so. We may not suspend Services before disconnecting your connection.
- (e) Where we suspend, Bar, re-direct or restrict the Services all Charges will continue to apply.

### 13. Transferring Responsibilities

- (a) We may transfer to someone else the whole of this Agreement and/or any interest in our network.
- (b) Your interests in this Agreement are personal to you and you may not transfer or on-sell the Agreement or any benefit or obligation under it to another person without our consent. If you are a company and your effective management or control is changed in any way, we may treat this as a transfer of this Agreement entitling us to end it.
- (c) You must pay any costs in respect of recording any transfer to which we consent (including our costs in checking the creditworthiness of the transferee). Metrocom Ltd normal credit criteria will apply to any proposed transferee.
- (d) Metrocom Ltd retains the right to alter its Services and/or terms and conditions for the proposed transferee

### 14. The rights of Metrocom Ltd to end this Agreement

Notwithstanding any other clause in this Agreement, we may disconnect your connection or terminate particular Services:

- if any of our licences to operate our network is ended or suspended or any interconnection Agreement with any other Network Operator expires or is ended; or
- for any other reason we believe that it is appropriate to do so, and in either case you will only have to pay any outstanding Charges incurred up to and including the time of disconnection.

### 15. Termination

We require 30 days' written notice for the termination of any Service. If that Service is being provided to you for a specific term and you cancel within that term, then you must also pay us a penalty fee of 100% of the total monthly Charges remaining in your term, unless explicitly stated otherwise in the Service Agreement.

Either party may terminate any or all Services immediately and without penalty if the other party:

- materially breaches these Terms; or
- any of its directors/principals goes into liquidation, bankruptcy, or receivership; or
- has a receiver or statutory manager appointed over any or all of its assets; or
- is removed from the Companies Register, is dissolved, or dies; or
- commits an act of fraud, theft, or dishonesty that impacts the other party.

If we require consent from owners of any site for access in order to supply you with a particular Service and the owners of that site withdraw such consent or request us to remove our equipment, then we may terminate the Service provided to you by written notice with effect of the date on which access to the site will be unavailable to us. You acknowledge and accept that we will not be liable to you in any way for failure to supply any Service where we terminate such Service under this provision.

Termination due to breach of these Terms will not affect other rights and remedies. If Services are terminated due to breach, then you agree to pay us any monies owing (including any applicable penalty fee of 100% of the total monthly Charges remaining in your term, unless explicitly stated otherwise in the Service Agreement) and immediately return any equipment owned by us or provide us access to retrieve our equipment.

### 16. Contacting each other

- (a) If you need to contact us for any reason you can do so by:
  - calling Customer Services; or
  - contacting us via our Website.
- (b) If we need to notify you of anything we may do so by
  - e-mail if you are an internet customer, or a customer for any other Services who has supplied us with an email address;
  - post.
  - phone.
  - short message service (SMS).
  - a notice on our Website.
- (c) If your contact details change you must tell us. You will be deemed to have received any notice which was sent to your last known email or postal address.

### 17. Rights and Responsibilities that Continue

Ending this Agreement does not affect any of the rights or responsibilities which are intended to continue or to come into existence after this Agreement ends including (without limitation) any obligation you may have to:

- pay any outstanding charges;
- pay any applicable early termination charges;

- and return any Metrocom Ltd hardware you may have on loan from us or any of our dealers or agents or pay any outstanding amounts in respects of such hardware.

## **18. Network Operators and Other Suppliers**

- (a) We have certain obligations towards other Network Operators and our dealers, Agents, and suppliers. Those persons (and their officers, employees, contractors, and agents) will not be liable to you or anyone else for any claims, costs, damages, losses or other liabilities of any kind arising in any way from the services we provide or from your use of those services and our network, including (without limitation) your access to and use of any Telecommunications Service Provider's site or Network Operator's networks. This paragraph creates an obligation that other Network Operators and/or our dealers, Agents and suppliers can enforce, whether as a defence or otherwise.
- (b) You acknowledge that certain equipment and lines installed on your property and used to provide the Services are ours, another Network Operator's, or a third party's, and you waive any rights, title, or interest in them. Such equipment and lines are not fixtures and may be removed without recourse to legal proceedings. You agree to obtain any building or landowner authorisation necessary for us or another Network Operator to install, inspect, maintain, replace, or remove that equipment and lines, and will supply us with any contact or other information we reasonably require to assess what authorisations, licences or consents are necessary for that purpose. You acknowledge that other Network Operators may require access to your premises in order to provide the Services, and that, if such access is denied, there may be interruptions to, or disconnection of, the Services.

## **19. Notices and Variations of Charges, Terms and Pricing Plans**

- (a) We may change this Agreement and any free Services at any time.
- (b) Pricing Plan(s) are subject to change at any time during the term of the contract.
- (c) If we materially increase a Pricing Plan, or materially reduce elements of a Service you are using or change the terms and conditions of this Agreement so that it has a materially detrimental effect on you we will give you at least 10 business days' prior notice, and where possible one month's notice of these changes.

## **20. Disputes**

If you have any dispute with us or our services, please refer that dispute, initially, to Customer Services. If Customer Services are unable to resolve your concerns the matter will be escalated to the Customer Operations Support Manager.

If any dispute arises out of this or other Agreements, neither party is to commence proceedings, other than urgent equitable relief, unless that party has first complied with this clause 20.

A party claiming a dispute has arisen is to give written notice to the other party specifying the nature of the dispute. On receipt of that notice the parties will use all reasonable endeavours to resolve the dispute by discussion or negotiation.

If the parties do not resolve the dispute within 10 Business Days of the receipt of the notice, then either party can, by writing to the other, require that the dispute be mediated in accordance with the standard mediation Agreement of LEADR New Zealand Incorporated, and the Chair of LEADR will select the mediator and determine the mediator's fee.

## **21. Agents of Metrocom Ltd**

- (a) We shall be entitled to subcontract or delegate the performance of any of our rights or obligations under this Agreement, but any such subcontracting or delegation will not relieve us from liability for performance of any such obligation. Without limiting this, we may appoint an Agent to provide billing services (including credit checking and control) and customer services.
- (b) Invoices issued by our Agent will be binding on you and payment of those invoices in full to our Agent will be a valid discharge of your liability to pay those invoices under this Agreement.

## **22. Acceptance**

- (a) The parties acknowledge and agree that:
  - they have read and understood the terms and conditions contained in this Contract; and
  - the parties are taken to have exclusively accepted and are immediately bound, jointly and severally, by these terms and conditions if the Client places an order for or accepts delivery of the Goods/Equipment.
- (b) In the event of any inconsistency between the terms and conditions of this Contract and any other prior document or schedule that the parties have entered into, the terms of this Contract shall prevail.
- (c) Any amendment to the terms and conditions contained in this Contract may only be amended in writing by the consent of both parties.
- (d) The Client acknowledges that the supply of Services/Goods/Equipment on credit shall not take effect until the Client has completed a credit application with the Supplier and it has been approved with a credit limit established for the account.
- (e) In the event that the supply of Services/Goods/Equipment requested exceeds the Client's credit limit and/or the account exceeds the payment terms, the Supplier reserves the right to refuse delivery.
- (f) Any advice, recommendation, information, assistance, or service provided by the Supplier in relation to Equipment, Goods or Services supplied is given in good faith to the Client, or the Client's agent and is based on the Supplier's own knowledge and experience and shall be accepted without liability on the part of the Supplier. Where such advice or recommendations are not acted upon then the Supplier shall

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require the Client or their agent to authorise commencement of the Services in writing. The Supplier shall not be liable in any way whatsoever for any damages or losses that occur after any subsequent commencement of the Services.

The Client acknowledges and accepts that the supply of Goods for accepted orders may be subject to availability and if, for any reason, Goods are not or cease to be available, the Supplier reserves the right to vary the Price with alternative Goods as per clause (b). The Supplier also reserves the right to halt all Services until such time as the Supplier and the Client agree to such changes.

Electronic signatures shall be deemed to be accepted by either party providing that the parties have complied with Section 226 of the Contract and Commercial Law Act 2017 or any other applicable provisions of that Act or any Regulations referred to in that Act.

### 23. Authorised Representatives

- (a) Unless otherwise limited as per clause (b) the Client agrees that should the Client introduce any third party to the Supplier as the Client's duly authorised representative, that once introduced that person shall have the full authority of the Client to order any Equipment, Goods or Services on the Client's behalf and/or to request any variation to the Services on the Client's behalf (such authority to continue until all requested Services have been completed or the Client otherwise notifies the Supplier in writing that said person is no longer the Client's duly authorised representative).
- (b) In the event that the Client's duly authorised representative as per clause 0 is to have only limited authority to act on the Client's behalf, then the Client must specifically and clearly advise the Supplier in writing of the parameters of the limited authority granted to their representative.
- (c) The Client specifically acknowledges and accepts that they will be solely liable to the Supplier for all additional costs incurred by the Supplier (including the Supplier's profit margin) in providing any Services, Goods, Equipment or variation/s requested by the Client's duly authorised representative (subject always to the limitations imposed under clause 23(b) (if any)).

### 24. Errors and Omissions

- (a) The Client acknowledges and accepts that the Supplier shall, without prejudice, accept no liability in respect of any alleged or actual error(s) and/or omission(s):
  - resulting from an inadvertent mistake made by the Supplier in the formation and/or administration of this Contract; and/or
  - contained in/omitted from any literature (hard copy and/or electronic) supplied by the Supplier in respect of the Services.
- (b) In the event such an error and/or omission occurs in accordance with clause (a)(a), and is not attributable to the negligence and/or wilful misconduct of the Supplier, the Client:
  - shall not be entitled to treat this Contract as repudiated nor render it invalid; but
  - shall not be responsible for any additional costs incurred by the Supplier arising from the error or omission.

### 25. Change in Control

The Client shall give the Supplier not less than fourteen (14) days prior written notice of any proposed change of ownership of the Client and/or any other change in the Client's details (including but not limited to, changes in the Client's name, address, contact phone or fax number/s, change of trustees, or business practice). The Client shall be liable for any loss incurred by the Supplier as a result of the Client's failure to comply with this clause.

### 26. Price and Payment

- (a) At the Supplier's sole discretion, the Price shall be either:
  - as indicated on any invoice provided by the Supplier to the Client; or
  - the Supplier's quoted Price (subject to clause 26(b)) which will be valid for the period stated in the quotation or otherwise for a period of thirty (30) days.
- (b) The Supplier reserves the right to change the Price:
  - if a variation to the Goods or Equipment which are to be supplied is requested; or
  - if a variation to the plan of scheduled Services, or the Client's specifications is requested (including, but not limited to, limitations to accessing the site, additional work required due to hidden or unidentifiable difficulties not evident prior to commencement of the Services such as additional defects/software or hardware incompatibilities which are found on closer inspection, safety considerations, prerequisite work by any third party not being completed, or any request to investigate and/or repair any faults or defects outside the Supplier's normal business hours, etc) which are only discovered on commencement of the Services; or
  - in the event of increases beyond the Supplier's reasonable control in the cost of Goods or labour (including, but not limited to, third-party network operator or supplier costs, or overseas transactions that may increase as a consequence of variations in foreign currency rates of exchange and/or international freight and insurance charges etc.).
- (c) Variations will be charged for on the basis of the Supplier's quotation, and will be detailed in writing, and shown as variations on the Supplier's invoice. The Client shall be required to respond to any variation submitted by the Supplier within ten (10) working days. Failure to do so will entitle the Supplier to add the cost of the variation to the Price. Payment for all variations must be made in full at the time of their completion.
- (d) At the Supplier's sole discretion, a reasonable non-refundable deposit may be required.
- (e) Time for payment for the Services/Goods/Equipment being of the essence, the Price will be payable by the Client on the date/s determined by the Supplier, which may be:
  - on or before delivery of the Goods/Equipment.
  - by way of instalments/progress payments in accordance with the Supplier's payment schedule.
  - for certain approved Clients, due twenty (20) days following the end of the month in which a statement is posted to the Client's address or address for notices.
  - the date specified on any invoice or other form as being the date for payment; or
  - failing any notice to the contrary, the date which is seven (7) days following the date of any invoice given to the Client by the Supplier.



- (f) The Supplier may in its discretion allocate any payment received from the Client towards any invoice that the Supplier determines and may do so at the time of receipt or at any time afterwards. On any default by the Client the Supplier may re-allocate any payments previously received and allocated. In the absence of any payment allocation by the Supplier, payment will be deemed to be allocated in such manner as preserves the maximum value of the Supplier's Purchase Money Security Interest (as defined in the PPSA) in the Goods/Equipment.
- (g) Payment may be made by electronic/on-line banking, or by any other method as agreed to between the Client and the Supplier.
- (h) The Client shall not be entitled to set off against, or deduct from the Price, any sums owed or claimed to be owed to the Client by the Supplier nor to withhold payment of any invoice because part of that invoice is in dispute, unless the request for payment by the Supplier is a claim made under the Construction Contracts Act 2002. Nothing in this clause (h) prevents the Client from the ability to dispute any invoice.
- (i) Unless otherwise stated the Price does not include GST. In addition to the Price, the Client must pay to the Supplier an amount equal to any GST the Supplier must pay for any supply by the Supplier under this or any other Agreement for the sale of the Goods. The Client must pay GST, without deduction or set off of any other amounts, at the same time and on the same basis as the Client pays the Price. In addition, the Client must pay any other taxes and duties that may be applicable in addition to the Price except where they are expressly included in the Price.

## **27. Provision of the Services**

- (a) Subject to clause (b)7(b) it is the Supplier's responsibility to ensure that the Services start as soon as it is reasonably possible.
- (b) The Services' commencement date will be put back and the completion date extended by whatever time is reasonable in the event that the Supplier claims an extension of time (by giving the Client written notice) where completion is delayed by an event beyond the Supplier's control, including but not limited to any failure by the Client to:
  - make a selection; or
  - have the site ready for the Services; or
  - notify the Supplier that the site is ready.
- (c) Delivery ("**Delivery**") of the Services/Goods/Equipment is taken to occur at the time that the Supplier (or the Supplier's nominated carrier) delivers the Services/Goods/Equipment to the Client's nominated address even if the Client is not present at the address.
- (d) The cost of Delivery is either included in the Price or is in addition to the Price as agreed between the parties.
- (e) Any time specified by the Supplier for Delivery of the Services/Goods/Equipment is an estimate only and the Supplier will not be liable for any loss or damage incurred by the Client as a result of Delivery being late. However, both parties agree that they shall make every endeavour to enable the Services/Goods/Equipment to be delivered at the time and place as was arranged between both parties. In the event that the Supplier is unable to supply the Services/Goods/Equipment as agreed solely due to any action or inaction of the Client, then the Supplier shall be entitled to charge a reasonable fee for redelivery and/or storage.

## **28. Product Specifications**

- (a) The Client acknowledges that:
  - all descriptive specifications, illustrations, drawings, data, dimensions, ratings and weights stated in the Supplier's or manufacturer's fact sheets, price lists or advertising material are indicative only and that they have not relied on such information.
  - while the Supplier may have provided information or figures to the Client regarding the performance of the Goods, the Client acknowledges that the Supplier has given these in good faith and are estimates based on optimal operating conditions.

## **29. Risk**

- (a) Risk of damage to or loss of the Goods passes to the Client on Delivery and the Client must insure the Goods on or before Delivery.
- (b) If any of the Goods are damaged or destroyed following Delivery but prior to ownership passing to the Client, the Supplier is entitled to receive all insurance proceeds payable for the Goods. The production of these terms and conditions by the Supplier is sufficient evidence of the Supplier's rights to receive the insurance proceeds without the need for any person dealing with the Supplier to make further enquiries.
- (c) If the Client requests the Supplier to leave Goods outside the Supplier's premises for collection or to deliver the Goods to an unattended location, then such Goods shall be left at the Client's sole risk.
- (d) The Supplier shall:
  - be entitled to rely on the accuracy of any plans, specifications and other information provided by the Client. The Client acknowledges and agrees that in the event that any of this information provided by the Client is inaccurate, the Supplier accepts no responsibility for any loss, damages, or costs however resulting from these inaccurate plans, specifications or other information; and
  - not be held responsible for any damage to the Goods or delays to delivery caused by outside agents. Where the Client requests the Supplier to repair such damage then the Supplier reserves the right to charge the Client for any costs incurred in rectifying such damage.
- (e) In the event that the data cabling is required to be re-positioned at the request of any third party contracted by the Client then the Client agrees to notify the Supplier immediately upon any proposed changes. The Client agrees to indemnify the Supplier against any additional costs incurred with such a relocation of data cabling. All such variances shall be invoiced in accordance with clause 26(b).
- (f) The Client acknowledges and accepts that:
  - where the Supplier has performed temporary repairs that:
    - (i) the Supplier offers no guarantee against the reoccurrence of the initial fault, or any further damage caused; and
    - (ii) the Supplier will immediately advise the Client of the fault and shall provide the Client with an estimate for the full repair required.
  - the Supplier:
    - (i) is only responsible for components that are replaced by the Supplier and does not at any stage accept any liability in respect of previous goods and/or services supplied by any other third party that subsequently fail and found to be the source of the failure.
    - (ii) shall not be responsible or liable for any defect in other appliances or power points as a coincidence of the Supplier installing the Goods,

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- any defects in the Goods or appearing in the Services after completion due to the Client or any third party using any items that overloads the structure or system to which the Supplier's Goods are installed or connected to, or by workmanship not performed by the Supplier, shall not be covered by any applicable warranty pertaining to the Goods.
- (g) The Client acknowledges and agrees that:
  - The Supplier does not guarantee the performance or transmission speed or quality of any data.
  - transmission of data may be unavailable from time to time due to scheduled maintenance and/or upgrades to websites, servers or networks by third parties; and
  - there are inherent hazards in electronic distribution (including, but not limited to electrical interference, surges or spikes, high traffic volume affecting speed, etc.) and as such the Supplier cannot warrant against delays or errors in transmitting data between the Client and any person or entity the Client conducts communications with including orders, and the Client agrees that the Supplier will not be liable for any losses which the Client suffers as a result of delays or errors in transmitting orders or other communications and/or documents.
- (h) The Client will use any third-party software supplied by the Supplier, and identified as such, strictly in terms of the licence under which it is supplied.
- (i) All third-party software and/or hosting services is provided at the Client's own risk and is not in any way warranted by the Supplier, nor shall the Supplier be in any way responsible for the implementation or effects of any "patches", "updates", or "fixes" offered by the manufacturer of the software. Further, the Client agrees to indemnify the Supplier against all consequential loss arising out of any defect or failure in products (including delivery time-lags), hosting services or software supplied by any third party.
- (j) The Supplier shall not be held liable for any loss, corruption, or deletion of files or data (including, but not limited to software programmes) resulting from the Services provided by the Supplier. It is the sole responsibility of the Client to back-up any data which they believe to be important, valuable, or irreplaceable prior to the Supplier providing the Services. The Client accepts full responsibility for the Client's software and data and the Supplier is not required to advise or remind the Client of appropriate backup procedures.
- (k) The Client acknowledges that it is the policy of the Supplier to report all findings of illegal material (including, but not limited to, images and software) to the relevant authorities.

### 30. Installation

- (a) The Client warrants that any structures to which the Goods are to be affixed are able to withstand the installation of the Goods and that any electrical connections (including, but not limited to, meter boxes, main switches, circuit breakers, and electrical cable) are of suitable capacity to handle the Goods once installed. If for any reason (including the discovery of asbestos, defective or unsafe wiring or dangerous access to roofing) that the Supplier, its employees or the Supplier's reasonably form the opinion that the Client's premises is not safe for the installation of Goods to proceed then the Supplier shall be entitled to delay installation of the Goods (in accordance with the provisions of clause (b) above) until the Supplier is satisfied that it is safe for the installation to proceed.

### 31. Access

- (a) The Client shall ensure that the Supplier has clear and free access to the work site at all times to enable them to undertake the Services. The Supplier shall not be liable for any loss or damage to the site (including, without limitation, damage to pathways, driveways and concreted or paved or grassed areas) unless due to the negligence of the Supplier.
- (b) The Supplier reserves the right to refuse to enter the site to undertake the Services in the event that the Supplier believes the site to be unsafe. In this event, the Client agrees that it is their responsibility to ensure the site is made safe before the Supplier will enter the site, the Supplier shall not be liable for any delays caused, loss, damages, or costs however resulting from an unsafe site.

### 32. Underground Locations

- (a) Prior to the Supplier commencing any work the Client must advise the Supplier of the precise location of all underground services on the site and clearly mark the same. The underground mains and services the Client must identify include, but are not limited to, electrical services, gas services, sewer services, pumping services, sewer connections, sewer sludge mains, water mains, irrigation pipes, telephone cables, fibre optic cables, oil pumping mains, and any other services that may be on site.
- (b) Whilst the Supplier will take all care to avoid damage to any underground services the Client agrees to indemnify the Supplier in respect of all and any liability claims, loss, damage, costs and fines as a result of damage to services not precisely located and notified as per clause (a).

### 33. Compliance with Laws

- (a) The Client and the Supplier shall comply with the provisions of all statutes, regulations and bylaws of government, local and other public authorities that may be applicable to the Services, including any WorkSafe health and safety laws relating or any other relevant safety standards or legislation pertaining to the Services.
- (b) Both parties acknowledge and agree:
  - to comply with the Building Act 2004 (including any subsequent Amendments) and Code of Ethics, in respect of all workmanship and building products to be supplied during the course of the Services; and
  - that Services will be provided in accordance with any current relevant Australian/New Zealand Standards applicable.
- (c) Where the Client has supplied products for the Supplier to complete the Services, the Client acknowledges that it accepts responsibility for the suitability of purpose and use for their products and the intended use and any faults inherent in those products. However, if in the Supplier's opinion, it is believed that the materials supplied are non-conforming products and will not conform with New Zealand regulations, then the Supplier shall be entitled, without prejudice, to halt the Services until the appropriate conforming products are sourced and all costs associated with such a change to the plans and design will be invoiced in accordance with clause (b).
- (d) The Client shall obtain (at the expense of the Client) all licenses and approvals that may be required for the Services.

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- (e) All work will be tested to ensure that it is electrically safe and is in accordance with the wiring rules and other standards applying to the electrical installation under the Electrical Safety Regulations. All of the cabling work will comply with all relevant Australian and New Zealand Wiring standards.
- (f) If during the course of installation when the Services are being conducted within and around switchboards that if the same is found defective or deemed to be unsafe by the Supplier, then the Supplier shall notify the Client immediately. The power if isolated will not be re-energised until such time as the existing condition has been rectified and made safe in accordance with the Electrical Safety Regulations. The Client accepts and agrees that any costs associated with the rectification Services including any Goods and labour shall be to the Client's account.
- (g) Any live Services or Services undertaken near live conductors where it is safe to do so shall be dealt with in accordance with New Zealand and Australian Wiring standards being "Safe working on Low Voltage Electrical Installations, relevant Statutory Acts and Workplace Regulations". The Supplier's live Services procedures are designed to eliminate risk of injury to the Supplier's employees, damage to the Client's installations and unexpected power disconnections. It may in some cases require disconnection and isolation of the installation to undertake such Services for which additional charges may be applicable. This shall be invoiced in accordance with clause (b).
- (h) Notwithstanding clause (a) and pursuant to the Health & Safety at Work Act 2015 (the "HSW Act"), the Supplier agrees at all times to comply with sections 28 and 34 of the "HSW Act" with meeting their obligations for health and safety laws in the workplace regardless of whether they may be the party in control of the site or where they may be acting as a sub-contractor for the Client who has engaged a third party head contractor.

### 34. Title to Goods

- (a) The Supplier and the Client agree that ownership of the Goods shall not pass until:
  - the Client has paid the Supplier all amounts owing to the Supplier; and
  - the Client has met all of its other obligations to the Supplier.
- (b) Receipt by the Supplier of any form of payment other than cash shall not be deemed to be payment until that form of payment has been honoured, cleared or recognised.
- (c) It is further agreed that:
  - until ownership of the Goods passes to the Client in accordance with clause (a) that the Client is only a bailee of the Goods and must return the Goods to the Supplier on request;
  - the Client holds the benefit of the Client's insurance of the Goods on trust for the Supplier and must pay to the Supplier the proceeds of any insurance in the event of the Goods being lost, damaged or destroyed;
  - the Client must not sell, dispose, or otherwise part with possession of the Goods other than in the ordinary course of business and for market value. If the Client sells, disposes or parts with possession of the Goods then the Client must hold the proceeds of any such act on trust for the Supplier and must pay or deliver the proceeds to the Supplier on demand;
  - the Client should not convert or process the Goods or intermix them with other goods but if the Client does so then the Client holds the resulting product on trust for the benefit of the Supplier and must sell, dispose of or return the resulting product to the Supplier as it so directs;
  - the Client irrevocably authorises the Supplier to enter any premises where the Supplier believes the Goods are kept and recover possession of the Goods;
  - the Supplier may recover possession of any Goods in transit whether or not Delivery has occurred;
  - the Client shall not charge or grant an encumbrance over the Goods nor grant nor otherwise give away any interest in the Goods while they remain the property of the Supplier; and
  - the Supplier may commence proceedings to recover the Price of the Goods sold notwithstanding that ownership of the Goods has not passed to the Client.

### 35. Personal Property Securities Act 1999 ("PPSA")

- (a) Upon assenting to these terms and conditions in writing the Client acknowledges and agrees that:
  - these terms and conditions constitute a security Agreement for the purposes of the PPSA; and
  - a security interest is taken in all Goods/Equipment that have previously been supplied and that will be supplied in the future by the Supplier to the Client, and the proceeds from such Goods/Equipment as listed by the Supplier to the Client in invoices rendered from time to time.
- (b) The Client undertakes to:
  - sign any further documents and/or provide any further information (such information to be complete, accurate and up-to-date in all respects) which the Supplier may reasonably require to register a financing statement or financing change statement on the Personal Property Securities Register;
  - indemnify, and upon demand reimburse, the Supplier for all expenses incurred in registering a financing statement or financing change statement on the Personal Property Securities Register or releasing any Goods/Equipment charged thereby;
  - not register, or permit to be registered, a financing statement or a financing change statement in relation to the Goods/Equipment or the proceeds of such Goods/Equipment in favour of a third party without the prior written consent of the Supplier; and
  - immediately advise the Supplier of any material change in its business practices of selling Goods which would result in a change in the nature of proceeds derived from such sales.
- (c) Unless otherwise agreed to in writing by the Supplier, the Client waives its right to receive a verification statement in accordance with section 148 of the PPSA.
- (d) The Client shall unconditionally ratify any actions taken by the Supplier under clauses 35(a) to 35(c).
- (e) Subject to any express provisions to the contrary (including those contained in this clause 35), nothing in these terms and conditions is intended to have the effect of contracting out of any of the provisions of the PPSA.
- (f) Only to the extent that the hire of the Equipment exceeds a six (6) month hire period with the right of renewal shall clause 35 apply as a security Agreement in the form of a PPS Lease in respect of Section 36 of the PPSA, in all other matters this clause 35 will apply generally for the purposes of the PPSA.

**36. Security and Charge**

- (a) In consideration of the Supplier agreeing to supply the Goods/Equipment, the Client charges all of its rights, title and interest (whether joint or several) in any land, realty or other assets capable of being charged, owned by the Client either now or in the future, and the Client grants a security interest in all of its present and after-acquired property, to secure the performance by the Client of its obligations under these terms and conditions (including, but not limited to, the payment of any money). The terms of the charge and security interest are the terms of Memorandum 2018/4344 registered pursuant to s.209 of the Land Transfer Act 2017.
- (b) The Client indemnifies the Supplier from and against all the Supplier's costs and disbursements including legal costs on a solicitor and own client basis incurred in exercising the Supplier's rights under this clause.
- (c) The Client irrevocably appoints the Supplier and each director of the Supplier as the Client's true and lawful attorney/s to perform all necessary acts to give effect to the provisions of this clause 36 including, but not limited to, signing any document on the Client's behalf.

**37. Defects**

- (a) The Client shall inspect the Goods/Equipment on Delivery and shall within seven (7) days of Delivery (time being of the essence) notify the Supplier of any alleged defect, shortage in quantity, damage or failure to comply with the description or quote. The Client shall afford the Supplier an opportunity to inspect the Goods/Equipment within a reasonable time following Delivery if the Client believes the Goods are defective in any way. If the Client shall fail to comply with these provisions the Goods/Equipment shall be presumed to be free from any defect or damage. For defective Goods/Equipment, which the Supplier has agreed in writing that the Client is entitled to reject, the Supplier's liability is limited to either (at the Supplier's discretion) replacing the Goods/Equipment or repairing the Goods/Equipment.
- (b) Goods/Equipment will not be accepted for return for any reason other than those specified in clause (a) above (or in the case of Equipment hire, normal termination of Equipment hire in accordance with the full terms and conditions herein).

**38. Return of Goods**

- (a) Returns of Goods will only be accepted provided that:
  - the Client has complied with the provisions of clause 37(a); and
  - the Supplier has agreed in writing to accept the return of the Goods; and
  - the Goods are returned at the Client's cost within ten (10) days of the Delivery date; and
  - the Supplier will not be liable for Goods which have not been stored or used in a proper manner; and
  - the Goods are returned in the condition in which they were delivered and with all packaging material, brochures and instruction material in as new condition as is reasonably possible in the circumstances.
- (b) If the Supplier accepts that the Client is entitled to reject the Goods following their return pursuant to clause 38(a) the Supplier will reimburse the Client's actual and reasonable costs of return Delivery.
- (c) The Supplier may (in its discretion) accept the return of Goods for credit but this may incur a handling fee of twenty-five percent (25%) of the value of the returned Goods plus any freight.
- (d) Subject to clause 37(a), non-stocklist items or Goods made to the Client's specifications are under no circumstances acceptable for credit or return.

**39. Warranty**

- (a) Subject to the conditions of warranty set out in Clause 39(b) the Supplier warrants that if any defect in any workmanship provided by the Supplier becomes apparent and is reported to the Supplier within twelve (12) months of the date of Delivery (time being of the essence) then the Supplier will either (at the Supplier's sole discretion) replace or remedy the defect.
- (b) The conditions applicable to the warranty given by Clause (a) are:
  - the warranty shall not cover any defect or damage which may be caused or partly caused by or arise through:
    - (i) failure on the part of the Client to properly maintain any Goods or serviced item; or
    - (ii) failure on the part of the Client to follow any instructions or guidelines provided by the Supplier; or
    - (iii) any use of any Goods or serviced item otherwise than for any application specified on a quote or order form; or
    - (iv) the continued use of any Goods or serviced item after any defect becomes apparent or would have become apparent to a reasonably prudent operator or user; or
    - (v) fair wear and tear, any accident or act of God.
  - the warranty shall cease and the Supplier shall thereafter in no circumstances be liable under the terms of the warranty if the workmanship is repaired, altered or overhauled without the Supplier's consent.
  - in respect of all claims the Supplier shall not be liable to compensate the Client for any delay in either replacing or remedying the defective Goods or serviced item or in properly assessing the Client's claim.
- (c) For Goods not manufactured by the Supplier, the warranty shall be the current warranty provided by the manufacturer of the Goods. The Supplier shall not be bound by nor be responsible for any term, condition, representation or warranty other than that which is given by the manufacturer of the Goods.

**40. Intellectual Property**

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- (a) Where the Supplier has designed, drawn or developed Goods for the Client, then the copyright in any designs and drawings and documents shall remain the property of the Supplier. Under no circumstances may such designs, drawings and documents be used without the express written approval of the Supplier.
- (b) The Client warrants that all designs, specifications or instructions given to the Supplier will not cause the Supplier to infringe any patent, registered design or trademark in the execution of the Client's order and the Client agrees to indemnify the Supplier against any action taken by a third party against the Supplier in respect of any such infringement.
- (c) The Client agrees that the Supplier may (at no cost) use for the purposes of marketing or entry into any competition, any documents, designs, drawings or Goods which the Supplier has created for the Client.

### 41. Default and Consequences of Default

- (a) Interest on overdue invoices shall accrue daily from the date when payment becomes due, until the date of payment, at a rate of two and a half percent (2.5%) per calendar month (and at the Supplier's sole discretion such interest shall compound monthly at such a rate) after as well as before any judgment.
- (b) If the Client owes the Supplier any money the Client shall indemnify the Supplier from and against all costs and disbursements incurred by the Supplier in recovering the debt (including but not limited to internal administration fees, legal costs on a solicitor and own client basis, the Supplier's collection agency costs, and bank dishonour fees).
- (c) Further to any other rights or remedies the Supplier may have under this Contract, if a Client has made payment to the Supplier, and the transaction is subsequently reversed, the Client shall be liable for the amount of the reversed transaction, in addition to any further costs incurred by the Supplier under this clause 41, where it can be proven that such reversal is found to be illegal, fraudulent or in contravention to the Client's obligations under this Contract.
- (d) Without prejudice to the Supplier's other remedies at law the Supplier shall be entitled to cancel all or any part of any order of the Client which remains unfulfilled and all amounts owing to the Supplier shall, whether or not due for payment, become immediately payable if:
  - any money payable to the Supplier becomes overdue, or in the Supplier's opinion the Client will be unable to make a payment when it falls due;
  - the Client has exceeded any applicable credit limit provided by the Supplier;
  - the Client becomes insolvent, convenes a meeting with its creditors or proposes or enters into an arrangement with creditors, or makes an assignment for the benefit of its creditors; or
  - a receiver, manager, liquidator (provisional or otherwise) or similar person is appointed in respect of the Client or any asset of the Client.

### 42. Cancellation

- (a) Without prejudice to any other remedies the parties may have, if at any time either party is in breach of any obligation (including those relating to payment) under these terms and conditions the other party may suspend or terminate the supply or purchase of Goods or Equipment on hire to the other party. Neither party will be liable for any loss or damage the other party suffers because one of the parties has exercised its rights under this clause.
- (b) If the Supplier, due to reasons beyond the Supplier's reasonable control, is unable to deliver any Services/Goods/Equipment to the Client, the Supplier may cancel any Contract to which these terms and conditions apply or cancel Delivery of Services/Goods/Equipment at any time before the Services/Goods/Equipment are due to be delivered by giving written notice to the Client. On giving such notice the Supplier shall repay to the Client any money paid by the Client for the Services/Goods/Equipment. The Supplier shall not be liable for any loss or damage whatsoever arising from such cancellation.
- (c) The Client may cancel Delivery of the Services/Goods/Equipment by written notice served within twenty-four (24) hours of placement of the order. Failure by the Client to otherwise accept Delivery of the Services/Goods/Equipment shall place the Client in breach of this Contract.
- (d) Cancellation of orders for Goods made to the Client's specifications, or for non-stocklist items, will definitely not be accepted once production has commenced, or an order has been placed.
- (e) Fixed Term Contracts
  - where this Contract relates to a fixed term contract, all payments shall fall due as per the payment schedule. To terminate the fixed term contract on, or after, the current annual term, the Client must give the Supplier not less than thirty (30) days' notice prior to the current anniversary date of this Contract. The Services will then terminate at the end of the month, or at an earlier agreed date. If the Client does not terminate the Services on expiry of the current annual term, the Services shall revert to a month-by-month basis charge until otherwise agreed by both parties. Any additional Services shall become due and payable until notice (as herein) is received;
  - upon termination of any fixed term contract, the Supplier will immediately delete all files and content relating to the Client and the Services provided thereto; and
  - it is the Client responsibility to make arrangements for the transfer of their data prior to the termination date. The Supplier accepts no liability for any loss or damage incurred by the Client as a result of the deletion of such data or any cyber security breaches.

### 43. Privacy Policy

- (a) All emails, documents, images, or other recorded information held or used by the Supplier is "**Personal Information**" as defined and referred to in clause (c) and therefore considered confidential. The Supplier acknowledges its obligation in relation to the handling, use, disclosure and processing of Personal Information pursuant to the Privacy Act 2020 ("the Act") including Part II of the OECD Guidelines and as set out in the Act. The Supplier acknowledges that in the event it becomes aware of any data breaches and/or disclosure of the Client's Personal Information, held by the Supplier that may result in serious harm to the Client, the Supplier will notify the Client in accordance with the Act. Any release of such Personal Information must be in accordance with the Act and must be approved by the Client by written consent, unless subject to an operation of law.

- (b) Notwithstanding clause (c), privacy limitations will extend to the Supplier in respect of Cookies where the Client utilises the Supplier's website to make enquiries. The Supplier agrees to display reference to such Cookies and/or similar tracking technologies, such as pixels and web beacons (if applicable), such technology allows the collection of Personal Information such as the Client's:
- IP address, browser, email client type and other similar details;
  - tracking website usage and traffic; and
  - reports are available to the Supplier when the Supplier sends an email to the Client, so the Supplier may collect and review that information ("collectively Personal Information")
- If the Client consents to the Supplier's use of Cookies on the Supplier's website and later wishes to withdraw that consent, the Client may manage and control the Supplier's privacy controls via the Client's web browser, including removing Cookies by deleting them from the browser history when exiting the site.
- (c) The Client authorises the Supplier or the Supplier's agent to:
- access, collect, retain and use any information about the Client;
    - (i) (including, name, address, D.O.B, occupation, driver's license details, electronic contact (email, Facebook or Twitter details), medical insurance details or next of kin and other contact information (where applicable), previous credit applications, credit history or any overdue fines balance information held by the Ministry of Justice) for the purpose of assessing the Client's creditworthiness; or
    - (ii) for the purpose of marketing products and services to the Client.
  - disclose information about the Client, whether collected by the Supplier from the Client directly or obtained by the Supplier from any other source to any other credit provider or any credit reporting agency for the purposes of providing or obtaining a credit reference, debt collection or notifying a default by the Client.
- (d) Where the Client is an individual the authorities under clause (c) are authorities or consents for the purposes of the Privacy Act 2020.
- (e) The Client shall have the right to request (by e-mail) from the Seller, a copy of the Personal Information about the Client retained by the Supplier and the right to request that the Supplier correct any incorrect Personal Information.
- (f) The Supplier will destroy Personal Information upon the Client's request (by e-mail) or if it is no longer required unless it is required in order to fulfil the obligations of this Contract or is required to be maintained and/or stored in accordance with the law.
- (g) The Client can make a privacy complaint by contacting the Supplier via e-mail. The Supplier will respond to that complaint within seven (7) days of receipt and will take all reasonable steps to make a decision as to the complaint within twenty (20) days of receipt of the complaint. In the event that the Client is not satisfied with the resolution provided, the Client can make a complaint to the Privacy Commissioner at <http://www.privacy.org.nz>.

#### **44. Equipment Hire**

- (a) The Equipment shall at all times remain the property of the Supplier and is returnable on demand by the Supplier. In the event that Equipment is not returned to the Supplier in the condition in which it was delivered the Supplier retains the right to charge the Client the full cost of repairing the Equipment. In the event that Equipment is not returned at all the Supplier shall have right to charge the Client the full cost of replacing the Equipment.
- (b) The Client shall:
- keep the Equipment in their own possession and control and shall not assign the benefit of the Equipment nor be entitled to a lien over the Equipment;
  - not alter or make any additions to the Equipment including but without limitation altering, make any additions to, defacing or erasing any identifying mark, plate or number on or in the Equipment or in any other manner interfere with the Equipment.
  - keep the Equipment, complete with all parts and accessories, clean and in good order as delivered, and shall comply with any maintenance schedule as advised by the Supplier to the Client.
- (c) The Client accepts full responsibility for the safekeeping of the Equipment and the Client agrees to insure, or self-insure, the Supplier's interest in the Equipment and agrees to indemnify the Supplier against physical loss or damage including, but not limited to, the perils of accident, fire, theft and burglary and all other usual risks and will effect adequate Public Liability Insurance covering any loss, damage or injury to property or persons arising out of the use of the Equipment. Further the Client will not use the Equipment nor permit it to be used in such a manner as would permit an insurer to decline any claim.
- (d) Notwithstanding the above clause, immediately on request by the Supplier the Client will pay:
- any lost hire charges the Supplier would have otherwise been entitled to for the Equipment, under this, or any other hire agreement.
  - any insurance excess payable in relation to a claim made by either the Client or the Supplier in relation to any damage caused by, or to, the hire Equipment whilst the same is hired by the Client and irrespective of whether charged by the Client's insurers or the Supplier's.
- (e) Return of the Equipment ("**Return**") will be completed when the:
- Equipment is returned by the Client to the Supplier's place of business; or
  - Supplier takes back possession of the Equipment once collection by the Supplier is affected.

#### **45. Suspension of Services**

- (a) Where the Contract is subject to section 24A of the Construction Contracts Act 2002, the Client hereby expressly acknowledges that:
- the Supplier has the right to suspend work within five (5) working days of written notice of its intent to do so if a payment claim is served on the Client, and:
    - (i) the payment is not paid in full by the due date for payment in accordance with clause (e) and/or any subsequent amendments or new legislation and no payment schedule has been given by the Client; or
    - (ii) a scheduled amount stated in a payment schedule issued by the Client in relation to the payment claim is not paid in full by the due date for its payment; or
    - (iii) the Client has not complied with an adjudicator's notice that the Client must pay an amount to the Supplier by a particular date; and
    - (iv) the Supplier has given written notice to the Client of its intention to suspend the carrying out of work under the construction Contract.

- if the Supplier suspends work, it:
    - (i) is not in breach of Contract; and
    - (ii) is not liable for any loss or damage whatsoever suffered, or alleged to be suffered, by the Client or by any person claiming through the Client; and
    - (iii) is entitled to an extension of time to complete the Contract; and
    - (iv) keeps its rights under the Contract including the right to terminate the Contract; and may at any time lift the suspension, even if the amount has not been paid or an adjudicator's determination has not been complied with.
  - if the Supplier exercises the right to suspend work, the exercise of that right does not:
    - (i) affect any rights that would otherwise have been available to the Supplier under the Contract and Commercial Law Act 2017; or
    - (ii) enable the Client to exercise any rights that may otherwise have been available to the Client under that Act as a direct consequence of the Supplier suspending work under this provision.
  - due to any act or omission by the Client, the Client effectively precludes the Supplier from continuing the Services or performing or complying with the Supplier's obligations under this Contract, then without prejudice to the Supplier's other rights and remedies, the Supplier may suspend the Services immediately after serving on the Client a written notice specifying the payment default or the act, omission or default upon which the suspension of the Services is based. All costs and expenses incurred by the Supplier as a result of such suspension and recommencement shall be payable by the Client as if they were a variation.
- (b) If pursuant to any right conferred by this Contract, the Supplier suspends the Services and the default that led to that suspension continues un-remedied subject to clause 42(a) for at least ten (10) working days, the Supplier shall be entitled to terminate the Contract, in accordance with clause 422.

#### **46. Service of Notices**

- (a) Any written notice given under this Contract shall be deemed to have been given and received:
- by handing the notice to the other party, in person.
  - by leaving it at the address of the other party as stated in this Contract.
  - by sending it by registered post to the address of the other party as stated in this Contract.
  - if sent by facsimile transmission to the fax number of the other party as stated in this Contract (if any), on receipt of confirmation of the transmission.
  - if sent by email to the other party's last known email address.
- (b) Any notice that is posted shall be deemed to have been served, unless the contrary is shown, at the time when by the ordinary course of post, the notice would have been delivered.

#### **47. Trusts**

- (a) If the Client at any time upon or subsequent to entering into the Contract is acting in the capacity of trustee of any trust or as an agent for a trust ("Trust") then whether or not the Supplier may have notice of the Trust, the Client covenants with the Supplier as follows:
- the Contract extends to all rights of indemnity which the Client now or subsequently may have against the Trust, the trustees and the trust fund;
  - the Client has full and complete power and authority under the Trust or from the Trustees of the Trust as the case maybe to enter into the Contract and the provisions of the Trust do not purport to exclude or take away the right of indemnity of the Client against the Trust, the trustees and the trust fund. The Client will not release the right of indemnity or commit any breach of trust or be a party to any other action which might prejudice that right of indemnity.
  - the Client will not during the term of the Contract without consent in writing of the Supplier (the Supplier will not unreasonably withhold consent), cause, permit, or suffer to happen any of the following events:
    - (i) the removal, replacement or retirement of the Client as trustee of the Trust.
    - (ii) any alteration to or variation of the terms of the Trust.
    - (iii) any advancement or distribution of capital of the Trust; or
    - (iv) any resettlement of the trust fund or trust property.

#### **48. General**

- (a) Any dispute or difference arising as to the interpretation of these terms and conditions or as to any matter arising hereunder, shall be submitted to, and settled by, either adjudication in accordance with section 26 the Construction Contracts Act 2002 and/or by arbitration in accordance with the Arbitration Act 1996 or its replacement(s).
- (b) The failure by either party to enforce any provision of these terms and conditions shall not be treated as a waiver of that provision, nor shall it affect that party's right to subsequently enforce that provision. If any provision or clause of these terms and conditions shall be invalid, void, illegal or unenforceable the validity, existence, legality and enforceability of the remaining provisions shall not be affected, prejudiced or impaired.
- (c) These terms and conditions and any Contract to which they apply shall be governed by the laws of New Zealand and are subject to the jurisdiction of the courts of North Shore, Auckland, New Zealand.
- (d) Subject to the CGA, the liability of the Supplier and the Client under this Contract shall be limited to the Price.
- (e) The Supplier may licence and/or assign all or any part of its rights and/or obligations under this Contract without the Client's consent provided the assignment does not cause detriment to the Client.
- (f) The Client cannot licence or assign without the written approval of the Supplier.
- (g) The Supplier may elect to subcontract out any part of the Services but shall not be relieved from any liability or obligation under this Contract by so doing. Furthermore, the Client agrees and understands that they have no authority to give any instruction to any of the Supplier's sub-contractors without the authority of the Supplier.

- (h) The Client agrees that the Supplier may amend their general terms and conditions for subsequent future Contracts with the Client by disclosing such to the Client in writing. These changes shall be deemed to take effect from the date on which the Client accepts such changes, or otherwise at such time as the Client makes a further request for the Supplier to provide Services/Goods/Equipment to the Client.
- (i) Neither party shall be liable for any default due to any act of God, war, terrorism, strike, lock-out, industrial action, fire, flood, storm, national or global pandemics and/or the implementation of regulation, directions, rules or measures being enforced by Governments or embargo, including but not limited to, any Government imposed border lockdowns (including, worldwide destination ports), etc, ("Force Majeure") or other event beyond the reasonable control of either party, provided that party uses its reasonable endeavours to perform despite the cause. This clause 48 does not apply to a failure by the Client to make a payment to the Supplier, following cessation of a Force Majeure. This provision does not apply to lack of financial resources or disputes with a party's own personnel. The party failing to perform will:
- promptly give written notice to the other party specifying the cause and extent of its failure to perform.
  - take all reasonable steps to remedy or abate the cause and extent of its failure to perform.
  - resume performance of its obligations under this Agreement as soon as possible
- (j) Both parties warrant that they have the power to enter into this Contract and have obtained all necessary authorisations to allow them to do so, they are not insolvent and that this Contract creates binding and valid legal obligations on them.

#### **49. Confidential Information**

You must, during and after this Agreement, keep confidential any information you receive from us that is confidential (i.e., not in the public domain) or commercially sensitive. Any pricing or network or equipment design information must be treated as confidential. You may only disclose confidential or commercially sensitive information if you are required to by law, or applicable stock exchange rules; but you must tell us when you are going to do this. The provisions of this clause 49 will survive the termination of this Agreement.

#### **50. Intellectual Property**

You acknowledge that you do not, as a result of any Agreement with us, acquire any intellectual property rights from us (including in relation to any confidential information). The provisions of this clause 50 will survive the termination of this Agreement.