

# **5GN GENERAL TERMS AND CONDITIONS**

**5G NETWORK OPERATIONS PTY LTD**

**APPROVED 1 MAY 2023**

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# 5GN GENERAL TERMS AND CONDITIONS

## BACKGROUND

- A 5G Networks Pty Ltd and companies in the 5GN Group supply a range of Services and Hardware to Customers.
- B These General Terms apply to the supply of Goods and/or Services to a Customer and, along with the applicable Service Schedules and Specifications constitute the Supply Agreement that governs the supply of Goods and/or Services to the Customer.

## 1. DEFINITIONS AND INTERPRETATION

### 1.1 Definitions

In this document, unless the contrary intention appears:

- (a) **5G** means 5G Network Operations Pty Ltd ABN 80 620 305 393 and where relevant another entity in the 5GN Group.
- (b) **5G Data** means data of 5G or any customer of 5G (other than the Customer) which 5G accesses, stores or handles in the course of supplying Services.
- (c) **5G Networks Pty Ltd** means 5G Networks Pty Ltd ACN 163 312 025.
- (d) **5G Systems** means Systems owned and operated by 5G.
- (e) **5GN Group** means 5G Networks Pty Ltd and each Subsidiary of 5G Networks Pty Ltd from time to time including 5G Network Operations Pty Ltd ABN 80 620 305 393, 5G Networks Finance Pty Ltd ACN 605 721 024, Enspire Australia Pty Ltd ACN 105 883 887, Intergrid Group Pty Ltd ACN 613 707 690, Asian Pacific Telecommunications Pty Ltd ACN 091 353 374, Anittel Pty Ltd ACN 123 808 677, Hostworks Pty Ltd ACN 087 307 695, Hostworks Group Pty Ltd ACN 008 010 820, Logic Communications Pty Ltd ACN 168 914 127, Modular IT Pty Ltd ACN 147 267 383 and Australian Pacific Data Centres Pty Ltd ACN 605 265 218.
- (f) **Acceptable Use Policy** means the 5G Acceptable Use Policy which is available at [www.5gnetworks.com.au/terms-conditions/](http://www.5gnetworks.com.au/terms-conditions/).
- (g) **Associated Entity** means, in relation to an entity, a second entity that is an associate of the first entity by application of section 50AAA of the Corporations Act.
- (h) **Background IP** means Intellectual Property Rights that are in existence at the date of the Supply Agreement or are subsequently brought into existence other than as a result of the performance of the Supply Agreement.
- (i) **Burst Data Rate** means the excess usage of the Customer's IP Transit service in addition to Customer's IP as calculated using 95th percentile and stipulated in detail in the Specifications.

- (j) **Business Day** means a day that is not a Saturday, Sunday or any other day which is a public holiday or a bank holiday in the place where an act is to be performed or a payment is to be made.
- (k) **Business Hours** means 8.00 am to 6.00 pm on a Business Day unless otherwise stated.
- (l) **Co-Location Service Schedule** means the 5G Co-Location Service Schedule which is available at [www.5gnetworks.com.au/terms-conditions/](http://www.5gnetworks.com.au/terms-conditions/).
- (m) **Commencement Date** has the meaning given to it in clause 2.4.
- (n) **Committed Data Rate** means the minimum committed IP Transit bandwidth described in the Specifications that is being purchased by the Customer from 5G pursuant to the Supply Agreement.
- (o) **Confidential Information** means information relating to the parties to the Supply Agreement, the Supply Agreement, the negotiations relating to the Supply Agreement and any information disclosed by a party to the Supply Agreement to another party that is confidential in nature, but does not include information that:
  - (i) at the date of the Supply Agreement, was generally and publicly available, or subsequently becomes so available other than by breach of any duty or obligation;
  - (ii) at the time it was disclosed to a party, was in the possession of that party lawfully and without breach of any duty or obligation; or
  - (iii) has been disclosed to a party and was not generally and publicly available at that date of disclosure, but subsequently, through no act or omission of that party (or any person to whom it disclosed that information), becomes available from another source and is not subject to any duty or obligation as to confidence.

Without limiting the foregoing, Confidential Information includes (except where it is not confidential in nature):

- (iv) pricing and services offered under the Supply Agreement, including service levels;
- (v) financial information, projections and forecasts, valuations and financial models;
- (vi) intellectual property (including trade secrets); and
- (vii) information about business plans, market positioning, customers and suppliers.

- (p) **Corporations Act** means the *Corporations Act 2001* (Cth).
- (q) **CPI** means the Consumer Price Index as published by the Australian Bureau of Statistics or if the Australian Bureau of Statistics ceases to publish the Consumer Price Index means another measure of inflation selected by 5G as a reasonable alternative to the Consumer Price Index.

- (r) **Customer** means a person or entity to which 5G supplies Goods and/or Services, and where relevant includes entities in the Customer Group.
- (s) **Customer Application** means any script, software, website or application developed or used by the Customer including all modifications and enhancements to them which are hosted or supported by 5G as part of the Services.
- (t) **Customer Content** means custom code, text, images, audio, video, data, media content, features, databases, information, programs, files and other content created, generated, uploaded, stored, transmitted or otherwise used by the Customer or an End User in or through the Customer Applications or in connection with the Services.
- (u) **Customer Data** means data of the Customer that 5G accesses, stores or handles in the course of supplying Services.
- (v) **Customer Equipment** means equipment and Systems owned or operated by the Customer which are necessary for the supply to the Customer of the Goods and/or Services.
- (w) **Customer Group** means the Customer and all Associated Entities of the Customer.
- (x) **Customer Materials** means Customer Content and other materials uploaded, stored, transmitted or otherwise used by the Customer or an End User in connection with the Services.
- (y) **Customer Systems** means Systems owned or operated by the Customer.
- (z) **Data Security Breach** means unauthorised access to:
  - (i) 5G Systems or 5G Data;
  - (ii) Customer Systems or Customer Data while the Customer Systems or Customer Data are hosted on 5G Systems; or
  - (iii) Customer Applications while the Customer Applications are managed by 5G.
- (aa) **Default Rate** means the BBSW Rate plus 4% per annum where BBSW Rate means the mid-point Bank Bill Swap Rate published by ASX for \$1m on the date for which the rate is to be calculated. If ASX ceases to publish BBSW it means an alternative and substitute rate selected by 5G acting reasonably.
- (bb) **Dark Fibre Service Schedule** means the 5G Dark Fibre Service Schedule which is available at [www.5gnetworks.com.au/terms-conditions/](http://www.5gnetworks.com.au/terms-conditions/).
- (cc) **Discloser** means a party to the Supply Agreement who discloses Confidential Information to another party, or whose Confidential Information is disclosed to another party.
- (dd) **Dispute** means a dispute arising under or in connection with the Supply Agreement.

(ee) **End User** means an end user of the Customer Applications or the Services, and includes any of the Customer's customers or Personnel who access or use the Customer Applications or the Services.

(ff) **Ethernet Service Schedule** means the 5G Ethernet Service Schedule which is available at [www.5gnetworks.com.au/terms-conditions/](http://www.5gnetworks.com.au/terms-conditions/).

(gg) **Expenses** means any out-of-pocket expenses reasonably incurred by 5G in performing its obligations under the Supply Agreement, including those specified in the Supply Agreement and includes the expenses referred to in these General Terms.

(hh) **Expiry Date** means the day which is the last day of the Term of the Supply Agreement, as set out in the Specifications or as otherwise agreed between 5G and the Customer.

(ii) **Fees** means the fees and charges specified, set out or referred to in, or calculated in accordance with, the Supply Agreement, any other fees that 5G may apply ad-hoc, or any ancillary charges including remote hands fees, out-of-hours or incorrect call out fees, administration charges for moves, adds or changes, or other charges notified by 5G from time to time.

(jj) **Force Majeure Event** has the meaning given to it in clause 17.1.

(kk) **Foreground IP** means Intellectual Property Rights which are created in the course of performing the Supply Agreement.

(ll) **General Terms** means these General Terms and Conditions.

(mm) **Goods** means Hardware and other goods supplied or to be supplied by 5G to the Customer, where "goods" has its ordinary meaning but includes those things included in the definition of "goods" in section 4 of the *Competition and Consumer Act 2010* (Cth).

(nn) **Government Authority** means any governmental, semi-governmental, administrative, fiscal, judicial or quasi-judicial body, department, council (municipal or otherwise), commission, authority, tribunal, agency or entity.

(oo) **Hardware** means devices and physical components required for information and communications technology systems to operate.

(pp) **Indemnified Persons** means 5G, each Related Body Corporate of 5G and the Personnel of 5G and each Related Body Corporate of 5G.

(qq) **Insolvency Event** in relation to a person means:

- (i) a receiver, receiver and manager, trustee, administrator, controller (as defined in the Corporations Act), liquidator, provisional liquidator or similar official is appointed in respect of the person;
- (ii) an application is presented against it (that is not discharged or withdrawn within 14 days of its presentation), or an order

made, or a resolution is passed by its members or creditors for its winding up;

(iii) any execution or other process of any court or authority for an amount in excess of \$50,000 is issued against or levied upon any of its assets and that execution or process is not discharged or withdrawn within 60 days of the date of issue;

(iv) the person suspends payment of its debts generally or enters into or resolves to enter into any arrangement, composition or compromise with, or assignment for the benefit of, its creditors or any class of them;

(v) the person is or becomes unable to pay its debts when they are due or is or becomes unable to pay its debts or is presumed to be insolvent within the meaning of the Corporations Act;

(vi) the person ceases to carry on business or threatens to cease to carry on business;

(vii) an application made against it for a sequestration order, or a controlling trustee is appointed to it under the *Bankruptcy Act 1966* (Cth), or a meeting of its creditors approves a composition, compromise or arrangement under Part 10 of the *Bankruptcy Act 1966* (Cth), or is bankrupt, as defined under the *Bankruptcy Act 1966* (Cth); or

(viii) an event happens analogous to an event specified above to which the law of another jurisdiction applies and the event has an effect in that jurisdiction similar to the effect which the event would have had under any one or more of the clauses above if the laws of Australia had applied.

(rr) **Intellectual Property Rights** includes all rights, whether registered or unregistered, in respect of copyright, trade marks, domain names, patents, designs, circuit layouts, plant varieties, trade secrets and confidential information and such other rights that generally fall with this definition, whether arising under statute or otherwise.

(ss) **IP Transit Service Schedule** means the 5G IP Transit Service Schedule which is available at [www.5gnetworks.com.au/terms-conditions/](http://www.5gnetworks.com.au/terms-conditions/).

(tt) **Internet** means the global system of interconnected computer networks that use the Internet protocol suite (TCP/IP) to link devices.

(uu) **Law** means law or legal requirement, including at common law, in equity, under any statute, regulation or by-law, any condition of any Authorisation, and any decision, directive, guidance, guideline or requirements of any Government Authority.

(vv) **Layer2 Transport** means an unmanaged Layer 2 tunnelling service, connecting 2 point-to-point nodes enabling the Customer transparent connectivity to transmit IP traffic between the 2 designated points in accordance with the terms and conditions of the Supply Agreement.

(ww) **Loss** means any and all loss or damage of any kind whatsoever arising out of contract, tort (including negligence), under statute or any other basis at law, in equity or otherwise arising from or related in any way to the Supply Agreement or its subject matter.

(xx) **Network** means the telecommunications network that 5G uses to provide the Services to the Customer and to other customers (including any network to which 5G interconnects).

(yy) **Network Operator** means any entity with whom 5G has entered into a peering or transit agreement (directly or indirectly) providing for the passing of customer generated or customer-destined communications between 5G and that entity.

(zz) **Non-Excludable Term** has the meaning given to it in clause 15.2(b).

(aaa) **Notes** means notes relating to, summaries and copies of and extracts from, and advice or analysis based upon or incorporating, any Confidential Information whether in documentary, visual, machine readable or other form.

(bbb) **Personal Information** has the meaning given to it in the *Privacy Act 1988* (Cth).

(ccc) **Personnel** means in relation to a person or entity, the person or entity's officers, employees, contractors and agents.

(ddd) **Proposal** means a proposal or quote given to a Customer by 5G.

(eee) **Quote** means a quote or proposal given to a Customer by 5G.

(fff) **Recipient** means a party to the Supply Agreement to whom Confidential Information is disclosed by another party.

(ggg) **Related Body Corporate** has the meaning given in section 9 of the Corporations Act.

(hhh) **Required Service Change** has the meaning given to in in clause 6.3(a).

(iii) **Scope of Services** means the scope of services specified in the Supply Agreement.

(jjj) **SDP** means a specified service delivery point for the Services, located at the network terminating unit or equivalent 5G demarcation point at the Customer's site, as described in the Specifications.

(kkk) **Service Schedule** means the Co-Location Service Schedule, the Wavelength Service Schedule, the Ethernet Service Schedule, the Dark Fibre Service Schedule, the IP Transit Service Schedule and other Service Schedules made available at [www.5gnetworks.com.au/terms-conditions/](http://www.5gnetworks.com.au/terms-conditions/). **Services** means services supplied or to be supplied by 5G to the Customer, where "services" has its ordinary meaning but includes those things included in the definition of "services" in section 4 of the *Competition and Consumer Act 2010* (Cth).

- (III) **Services IP** means all Intellectual Property Rights subsisting in, relating to or arising out of the Services.
- (mmm) **Service Levels and SLAs** means the service levels (if any) specified in the Supply Agreement.
- (nnn) **Service Order Form** means a form completed or otherwise authorised by the Customer describing the Services, the site at which the Services are to be provided, the Fees and any additional terms or special conditions applying to the Services (including any terms contained in any marketing materials provided to the Customer which relate to the Services).
- (ooo) **Software** means the computer information technology programs, applications and functions required for information and communications technology systems to operate.
- (ppp) **Specifications** means the specifications of the Goods and / or Services to be supplied by 5G to the Customer under the Supply Agreement including quantities, pricing and the Term of the Supply Agreement, and any special conditions applicable to the supply of Goods or Services that are contained in a Quote, Proposal or Service Order Form.
- (qqq) **Subsidiary** has the meaning given in section 9 of the Corporations Act.
- (rrr) **Supply Agreement** means an agreement between 5G and a Customer for the supply of Goods and/or Services, as further described in clause 2.2.
- (sss) **Systems** means telecommunications systems, computer systems, networks, computer programs and databases, and the tangible media on which they are recorded and their supporting documentation.
- (ttt) **Telecommunications Service Provider** means a provider of telecommunications services to the public.
- (uuu) **Term and Contract Term** means the term of the Supply Agreement and includes any extension of that term.
- (vvv) **Third Party** means a person other than 5G, its Associated Entities and their respective Personnel.
- (www) **Third Party Tools** has the meaning given to it in clause 6.3.
- (xxx) **Wavelength Service Schedule** means the 5G Wavelength Service Schedule which is available at [www.5gnetworks.com.au/terms-conditions/](http://www.5gnetworks.com.au/terms-conditions/).

## 1.2 Interpretation

In this document, unless the contrary intention appears:

- (a) headings to clauses are for convenience only and do not affect interpretation;

- (b) any reference to a clause, background recital, schedule or annexure is a reference to a clause of, recital in, schedule to or annexure to, this document or the Supply Agreement;
- (c) if a word or phrase is defined, its other grammatical forms have a corresponding meaning;
- (d) the words "include", "including", "for example", "such as" or cognate expressions are to be construed without limitation;
- (e) a reference to a document (including this document) or to a statute, ordinance, code or other law includes a regulation, rule or other statutory instrument issued under it and consolidations, amendments, re-enactments or replacements of any of them;
- (f) an agreement, representation or warranty by two or more persons, binds them jointly and each of them individually;
- (g) an agreement, representation or warranty in favour of two or more persons is for the benefit of them jointly and each of them individually;
- (h) the singular includes the plural and vice versa;
- (i) a reference to a gender includes all genders;
- (j) a reference to a party to the Supply Agreement includes where relevant Personnel of the party; and
- (k) where any obligation under the Supply Agreement is to be performed on a day other than a Business Day, that obligation is to be performed on the next Business Day.

### **1.3 Rights**

Any indemnity or other right granted to 5G under the Supply Agreement is also granted to each other Indemnified Person, and 5G holds those rights for them and may enforce them on their behalf.

### **1.4 Customer Personnel**

The Customer must take all reasonable steps to ensure that its Personnel comply with the Supply Agreement as if they were the Customer.

### **1.5 Changes to these Terms**

5G may change or modify these General Terms, the Service Schedules or the Acceptable Use Policy at any time and the changes will be effective when posted on 5G's web site. The Customer will be deemed to have accepted any changed or additional terms if the Customer continues to use the Services after such changes are posted on 5G's website. The Customer should review these General Terms, the Service Schedules and the Acceptable Use Policy from time to time to ensure that they are aware of changes.

## **2. SUPPLY AGREEMENT**

### **2.1 Precedence of Supply Agreement**

The terms and conditions under which 5G will supply, and the Customer will acquire, Goods and/or Services are set out in the Supply Agreement, to the exclusion of all other contracts arrangements or understandings.

### **2.2 Structure and overview**

The terms and conditions of the Supply Agreement are set out in the following documents:

- (a) the Specifications;
- (b) the applicable Service Schedules; and
- (c) this document (these General Terms).

### **2.3 Order of precedence**

The order of precedence of the documents making up the Supply Agreement is as set out in clause 2.2. Unless the contrary intention appears from the relevant document then, in the event of any inconsistency or conflict, the provisions of the document higher in the list will prevail and a conflicting provision in the document lower in the list will be read down or severed, to the extent necessary to resolve the conflict.

### **2.4 Commencement Date**

In this document **Commencement Date** means:

- (a) if the Specifications include a date as the Commencement Date, that date;
- (b) if the Specifications do not include a date as the Commencement Date, but provide for acceptance testing, acceptance or a similar process, the date at which that process is completed; and
- (c) if the Specifications do not include a date as the Commencement Date, and do not provide for acceptance testing, acceptance or a similar process, the date on which 5G commences the supply of Services or, if 5G is required to install Goods or Services prior to the commencement of the supply of Services, the day on which 5G has completed installation and is ready to supply the Services.

## **3. SUPPLY AND STANDARDS OF SUPPLY**

### **3.1 Supply to the Customer**

5G agrees to supply Goods and/or Services to the Customer in accordance with the Supply Agreement and:

- (a) in a timely, efficient, proper and workmanlike manner, using reasonable care, skill and diligence;
- (b) using suitably skilled and experienced Personnel; and
- (c) in compliance with any Laws applicable to the supply of the Goods and/or Services.

### **3.2 Resupply**

Unless otherwise agreed by 5G, the Customer may not resell or resupply Goods or Services without first obtaining the written consent of 5G (which is not to be unreasonably withheld).

### **3.3 Service Levels / SLAs**

Without limiting clause 3.1, 5G agrees to supply Services so as to meet or exceed the Service Levels. 5G and the Customer agree that any rebates or service credits paid or payable in respect of a failure to meet a Service Level are a genuine and reasonable pre-estimate of the reduction in value of the Services that would arise from 5G's failure to meet the Service Level, and are the Customer's sole and exclusive remedy, and 5G's sole and exclusive liability, in relation to that failure to meet the Service Level.

### **3.4 Provisioning**

5G will commence the supply of Goods and/or Services on the later of the date specified for activation in the Supply Agreement and the date 5G is able to commence supply. 5G is not liable for any loss arising from delays in provisioning. The Customer must take all reasonable steps to assist with provisioning including those steps referred to in clause 5.

## **4. EQUIPMENT**

### **4.1 5G Equipment**

If required for the supply of Services, 5G will supply to the Customer or locate on the Customer's premises 5G Systems and equipment (**5G Equipment**). The Customer is responsible for safeguarding 5G Equipment and must compensate 5G for any loss or damage to 5G Equipment (fair wear and tear excepted), except to the extent 5G or its Personnel cause or contribute to such loss or damage.

If the Customer becomes aware of any loss of, damage to, claim over, or malfunction of the 5G Equipment, the Customer must promptly notify 5G. 5G may, at any time and at 5G's cost, modify or replace 5G Equipment provided there is no material adverse impact on the supply of the Services.

The Customer must:

- (a) provide an adequate power supply and a suitable physical environment in accordance with 5G's reasonable directions;
- (b) only permit 5G Equipment to be repaired, serviced, moved or disconnected by 5G Personnel unless otherwise permitted by 5G in writing;
- (c) not remove or obscure any identification marks on 5G Equipment;
- (d) take reasonable steps to make title to 5G Equipment clear to all persons including by not removing labels identifying 5G Equipment as 5G Equipment;
- (e) comply with all reasonable instructions given by 5G;
- (f) protect 5G ownership of the 5G Equipment;

- (g) not do anything or allow anything to be done which might affect 5G's ownership of the 5G Equipment; and
- (h) permit and take all steps required to enable 5G to remove 5G Equipment and 5G Systems from the Customer's premises on termination of the Supply Agreement.

#### **4.2 Customer Equipment**

The Customer is responsible for the installation of any Customer Equipment and connections to 5G Systems necessary for 5G to supply the Services. The Customer must ensure that Customer Equipment does not have a detrimental effect on 5G Systems and complies with all applicable Laws.

5G may, without liability, immediately disconnect all or any of the Customer Equipment if 5G reasonably considers that Customer Equipment may:

- (a) cause death or personal injury;
- (b) cause damage to the property of 5G or another person; or
- (c) materially impair the operation of 5G Systems,

provided that, where and to the extent that it is reasonable for 5G to do so, 5G will notify the Customer before disconnection and ensure that the Customer has sufficient time to make alternative arrangements.

Where Customer Equipment is located at a place under the control of the Customer, the Customer must promptly comply with a written request from 5G to disconnect Customer Equipment in accordance with this clause.

### **5. CUSTOMER OBLIGATIONS**

#### **5.1 Assistance with provisioning**

The Customer must take all reasonable steps to assist with provisioning including:

- (a) ensuring that it is possible and safe for 5G Personnel to obtain necessary access to a site;
- (b) ensuring that relevant and appropriately authorised Customer Personnel are available to give 5G Personnel timely guidance and instructions;
- (c) ensuring that Customer Equipment is ready at the appropriate times; and
- (d) following 5G's reasonable instructions in connection with making any modifications to Customer Equipment reasonably necessary to enable 5G to supply the Goods and/or Services.

#### **5.2 Safeguards and security**

The Customer must maintain adequate operational and technical safeguards and security procedures in relation to the Customer's and End Users' use of the Services, Customer Applications and Customer Content, and must comply with any technical documentation, user manuals or other documentation provided by 5G in relation to the Services.

### **5.3 Insurance**

The Customer must at all times obtain and maintain in force insurance to a prudent level of cover and with a reputable insurer for public liability as well as insurance against loss or damage to 5G Equipment, while it is under the Customer's control or on the Customer's premises.

### **5.4 5G instructions**

The Customer must comply with all reasonable instructions given by 5G with respect to the use of the Services, and must ensure that each person that uses the Services in connection with the provision of 5G's Services to the Customer also meets the Customer's responsibilities when using the Services.

### **5.5 Compliance**

The Customer must comply with all applicable Laws and must obtain and maintain any authorisation, permission, licence, waiver, registration or consent from any person including any Government Authority necessary or desirable for the legal and efficient supply of the Goods and/or Services by 5G.

### **5.6 Acceptable Use Policy**

- (a) The Customer must comply with the Acceptable Use Policy and ensure that Customer Personnel comply with the Acceptable Use Policy.
- (b) The Customer take reasonable steps to ensure that End Users comply with the Acceptable Use Policy.

### **5.7 Access and passwords**

The Customer must control access to and use of logins and passwords by the Customer's Personnel and End Users to ensure their compliance with the Supply Agreement.

### **5.8 Information and reporting**

The Customer must supply 5G with any information it reasonably requests

- (a) for credit management purposes;
- (b) to enable 5G to monitor and help reduce the incidence of fraud;
- (c) to assist 5G in complying with its regulatory obligations and its obligations to report on compliance with those obligations;
- (d) to assess whether or not the Customer has complied, is complying and will be able to continue to comply with all obligations of the Customer under the Supply Agreement;
- (e) to assist 5G in preventing and responding to a Data Security Breach; and
- (f) for other purposes reasonably required by 5G from time to time in connection with the Supply Agreement.

### **5.9      Remote access by 5G**

The Customer must:

- (a)      permit and facilitate remote access by 5G's engineers which may be required as part of the Services; and
- (b)      provide reasonable assistance in relation to 5G's investigation of Service interruptions, outages, and security issues.

### **5.10     Site access**

The Customer grants to 5G and 5G Personnel a right to enter sites and premises owned or occupied by the Customer and Associated Entities of the Customer in order to comply with 5G's obligations or enforce 5G's rights under the Supply Agreement. 5G agrees to endeavour wherever practicable to exercise its right of entry during business hours and in cooperation with the Customer but is not obliged to do so if it considers it impracticable or contrary to its interests to do so.

### **5.11     Network operation and other suppliers**

5G has certain obligations towards other Network Operators, agents and suppliers. The Customer acknowledges that those persons (and their officers, employees, contractors and agents) will not be liable to the Customer or anyone else for any claims, costs, damages, losses or other liabilities of any kind arising in any way from the Services that 5G provide or from the Customer's use of those Services and 5G's network, including (without limitation) the Customer's access to and use of any provider's site or Network Operator's networks. For the purposes of this clause 5.12, and for the avoidance of doubt, 5G is not an agent, supplier or contractor of 5G's Network Operators, agents and suppliers.

### **5.12     Pass through of additional costs**

If non-compliance with this clause 5 by the Customer results in 5G incurring additional costs 5G may pass those costs through to the Customer. 5G may only do so if and to the extent the costs were necessarily incurred and were reasonable in the circumstances.

## **6.        SERVICE CHANGES**

### **6.1       Customer Representative**

The Customer warrants to 5G that the person specified in the Order Form or otherwise in the Supply Agreement as 'Customer Representative' has the authority of the Customer to negotiate and agree with 5G any changes to the Supply Agreement.

### **6.2       Changes generally**

If 5G notifies the Customer or the Customer notifies 5G that it wishes to make a change to the Services (other than a change of the kind contemplated by clause 6.3), or add to them, then:

- (a)      5G will prepare a proposal, setting out how it would implement the change, the costs and timing of implementation and any impact on other aspects of the Services and the Supply Agreement;

- (b) the parties will negotiate, in good faith, the terms of 5G's proposal;
- (c) if the parties are unable to agree on the terms of 5G's proposal then either party may refer the matter as a Dispute and the procedures set out in clause 24 will apply; and
- (d) upon the parties reaching agreement on, and executing a document outlining the details of the change, 5G will implement the change.

### **6.3 Required Service Changes**

- (a) The Customer acknowledges that 5G relies on a range of third-party systems, applications, tools, technologies and services (**Third Party Tools**) in order to deliver the Services and that from time to time there may be changes to the Third Party Tools, or certain Third Party Tools may cease to be provided or supported by the relevant third-party owners. If that occurs 5G may consider it necessary to make a change to the manner in which the Services are supplied to the Customer or via the Customer to End Users (**Required Service Change**).
- (b) If 5G considers it necessary to do so it may give the Customer notice of the Required Service Change and the change will take effect from the date specified in the notice. If 5G makes a Required Service Change it must give the Customer as much prior notice as is reasonably practicable in the circumstances, use all reasonable endeavours to maintain the same features, functionality and performance of the Services following the Required Service Change and provide reasonable assistance to enable the Customer to modify the Customer Applications and/or Customer Content as necessary to accommodate the Required Service Change.

## **7. FEES AND INVOICING**

### **7.1 Fees and Expenses**

The Customer must pay:

- (a) the applicable Fees for Services supplied by 5G; and
- (b) the Expenses incurred by 5G in supplying the Services to the Customer except those expenses which have been taken into account in calculating the Fees payable by the Customer.

### **7.2 Periodic invoicing**

Unless otherwise stated in the Specifications (for example where it is agreed that 5G will invoice on a project basis), 5G will invoice the Customer for the supply of Goods and Services on a periodic basis. Periodic invoices will be issued monthly commencing on the Commencement Date unless otherwise stated in the Specifications.

### **7.3 Invoices and payment**

- (a) 5G will from time to time issue invoices to the Customer in respect of the Fees and Expenses. Each invoice must be a valid tax invoice. Unless specified otherwise in the Supply Agreement, the Customer must pay each invoice within 14 days of its date.

- (b) The Customer must pay money owed or payable to 5G in cleared funds without any set-off, abatement, counterclaim or deduction.

#### **7.4 Records and logging**

There is a presumption that records held and logging procedures adopted by 5G or any third party provider with which 5G is interconnected are correct and that the Fees and Expenses have been incurred and are payable by the Customer in the absence of manifest error.

#### **7.5 Account access**

5G may require the Customer to provide a Personal Identification Number (**PIN**) to 5G which will enable 5G to verify the identity of those who are authorised to have access to the Customer's account details and to make changes to Customer's account. The Customer is entirely responsible for maintaining the security of its PIN. 5G is entitled to rely on the provision the Customer's PIN without further enquiry, as evidence of authority to access the Customer's account details and to make changes to the Customer's account.

#### **7.6 Billing disputes**

If the Customer disputes the validity of an invoice:

- (a) the Customer must notify 5G in writing of the reasons for the dispute as soon as practicable and in any event within 10 Business Days of the date of the invoice;
- (b) the Customer must pay the full amount of the Fees and Expenses specified in the disputed Invoice unless the Customer has notified 5G in writing of the reasons for the dispute by the due date of the Invoice and must pay the undisputed portion of the Fees and Expenses in the invoice by the due date of the invoice;
- (c) 5G will endeavour to give the Customer a determination on the dispute within a reasonable time of receiving the Customer's notice of dispute and 5G shall keep the Customer informed as to the expected timeframe for finalisation;
- (d) where the determination is that a disputed amount is payable, the Customer must pay the amounts within 10 Business Days of receiving notice of the determination; and
- (e) if the Customer disagrees with the determination, the Customer will be entitled to engage the dispute resolution mechanisms set out in clause 24.

#### **7.7 Goods and Services Tax (GST)**

For the purposes of this clause 7.6 "GST" has the meaning given to it in the *A New Tax System (Goods and Services Tax) Act 1999* (Cth) (**GST Act**) and the related imposition Acts of the Commonwealth. Expressions set out in italics bear the same meaning as those expressions in the GST Act. To the extent that a party makes a taxable supply under or in connection with the Supply Agreement, except where express provision is made to the contrary, the consideration payable by a party under or in connection with the Supply Agreement represents the value of the taxable supply for which payment is to be made and on which GST is to be calculated. If a party makes a taxable

supply under or in connection with the Supply Agreement for a consideration, which, under this clause represents its value, then the party liable to pay for the taxable supply must also pay at the same time and in the same manner as the value is otherwise payable, the amount of any GST payable in respect of the taxable supply.

**7.8 Interest on overdue amounts**

5G may at its discretion charge interest on overdue amounts. The rate of interest charged by 5G must not exceed the Default Rate.

**7.9 Collection costs**

5G may charge the Customer for reasonable costs incurred by 5G in recovering money owed to it by the Customer (including collection agents' fees).

**7.10 Suspension or termination for non-payment**

5G may at its option, and without prejudice to any other remedy, at any time after payment of any Fees or Expenses has become due, temporarily suspend or terminate the supply of the Goods or Services. If 5G becomes entitled to terminate the supply of Goods or Services or this Agreement for any reason, any sums then due to 5G by the Customer will immediately become payable in full.

5G's normal process in relation to overdue amounts (excluding Customers who have previously not paid invoices on time) is as follows:

- (a) On becoming aware that an amount is overdue – 5G will contact the Customer and request payment.
- (b) If payment is not received within 7 days - 5G will contact the Customer and request payment and advise that the supply of Goods and/or Services may be suspended if payment is not received within a specified period.
- (c) If payment is not received within 14 days after the due date, and 5G has previously contacted the Customer and requested payment 5G may send a suspension notice and suspend supply of the Goods and/or Services.

5G is not obliged to follow the procedure set out in above and will normally not do so in the case of Customers who have previously not paid invoices on time.

**7.11 Reconnection charges**

The Customer must pay any reconnection charge reasonably imposed by 5G for lifting a suspension of the supply of Goods or Services under clause 7.10.

**7.12 Increase in Fees**

5G may at any time increase the Fees:

- (a) to reflect increases in the CPI since the date of the Service Agreement or the previous increase in the Fees; or

- (b) if the cost of it supplying Goods and/or Services increases for any reason during the Term, including as a result of an increase in fees charged in relation to Third Party Tools, or to reflect increases in market price of equivalent goods or services.

## **8. CREDIT**

### **8.1 Provision of credit**

5G may in its absolute discretion agree to supply Goods and/or Services on credit terms. 5G may at any time without liability undertake an assessment of the financial capability of a Customer and following that assessment may withdraw the provision of credit to the Customer and / or cease the supply of Goods and/or Services to the Customer. The Customer must provide such information regarding its financial capability as 5G reasonably requests.

### **8.2 Review of credit**

5G may, from time to time, review a Customer's creditworthiness. In doing so, 5G may seek from the Customer or an independent person such as a credit reporting agency or credit provider information or advice to assist in the creditworthiness review.

The Customer must cooperate with the review by:

- (a) providing to 5G any information (including a completed 5G credit application form) 5G reasonably requires to conduct the review; and
- (b) giving to 5G permission to communicate with credit reference associations about the Customer's creditworthiness (which the customer does by entering into the Supply Agreement).

The information sought in a credit review can include any information reasonably required by 5G about the Customer's creditworthiness, credit standing, credit history or credit capacity that credit providers are allowed to give or receive under law.

The Customer warrants that all material information that it provides to 5G in any creditworthiness review will provide a true and fair view of the Customer's financial position at the time it is provided, and that all other information is accurate and complete.

The Customer is entitled to see and to correct any credit information that 5G holds about the Customer.

### **8.3 Actions following review**

Following a creditworthiness review of the Customer which may occur at any time before or during the Term of a Supply Agreement 5G may give to the Customer a written notice specifying a credit limit and/or the security that the Customer is required to give to 5G, which shall be in a form and amount that is no more than reasonably required. If the Customer fails to provide the security required by 5G within a reasonable time or exceeds the nominated Credit Limit, 5G may suspend the supply of Goods and/or Services.

### **8.4 Title to goods sold**

If 5G agrees to sell equipment or other Goods to the Customer the Goods remain the property of 5G until the Customer has paid for them in full. Until

the Customer has paid for the Goods in full the Customer may not transfer title to the Goods or grant a security interest in them to any other person. If the Customer does not pay for the Goods when required to do so under its agreement with 5G then 5G or its agents may enter premises owned or occupied by the Customer to recover possession of the Goods. The Customer agrees that 5G may register its interest in the Goods on the Personal Property Securities Register.

## **9. TERM OF THE SUPPLY AGREEMENT**

### **9.1 Commencement and Term**

The Term of the Supply Agreement commences on the Commencement Date and continues until the earlier of the Expiry Date and the date that the Supply Agreement is terminated.

### **9.2 Extension of the Term by agreement**

5G and the Customer may vary or extend the Term of the Supply Agreement at any time by agreement in writing.

### **9.3 Extension of Term for the supply of Services**

Unless specified otherwise in the Supply Agreement or agreed in writing not less than 30 days before the Expiry Date of the Term or any extension of the Term (**Further Term**) either party may give notice to the other party stating it will not renew the Term or that the Term will be extended on a monthly basis. If the Customer gives notice stating that the Term is to be extended on a monthly basis, the Fees will automatically be increased by 15% unless otherwise agreed. If neither party gives such a notice the Term will automatically be renewed for a Further Term of 12 months, and 5G will continue to supply the Services during this period. The Customer may terminate the Further Term of the Supply Agreement, as so extended, at any time by giving 5G not less than 3 months' notice of termination.

## **10. SUSPENSION OF SERVICES**

### **10.1 Suspension or restriction**

Without limiting any of 5G's other rights or remedies, whether under the Supply Agreement or otherwise, 5G may suspend or restrict any or all of the Services at any time, without liability to 5G if:

- (a) 5G considers it necessary to undertake emergency maintenance of 5G's Systems or scheduled maintenance of which the Customer has been provided reasonable advance notice;
- (b) 5G is required to do so by Law;
- (c) 5G or the Customer is affected by a Force Majeure Event;
- (d) an Insolvency Event occurs in relation to the Customer;
- (e) a Data Security Breach occurs or may occur if 5G does not suspend or restore the supply of Services;
- (f) the Customer or an End User has breached the terms of the Supply Agreement, including any provision of the Acceptable Use Policy, and that breach is incapable of remedy or has not been promptly

remedied by the Customer or any End User after receiving a notice from 5G requiring it to do so; or

- (g) 5G reasonably believes that:
  - (i) the use of the Services by the Customer or an End User poses a security risk to, or may adversely affect, the Services, either party's Systems, or any of 5G's other customers;
  - (ii) the Customer, or an End User, is using the Services in a fraudulent, unlawful, threatening or harassing manner; or
  - (iii) the Customer's, or an End User's, continued use of the Services may expose the Customer, 5G or any third party to liability.

## **10.2 Advance notice of suspension**

Where practicable, 5G will endeavour to give the Customer reasonable advance notice of any suspension of the Services under clause 10.1. However, 5G is not obliged to give advance warning if it reasonably believes that the circumstances require otherwise (including, for example, in the event of an emergency or serious breach or misconduct by the Customer or an End User) and 5G may suspend the Services for as long as reasonably necessary to implement the correction or to ensure compliance.

## **11. TERMINATION FOR DEFAULT**

### **11.1 Termination for default**

Either of 5G or the Customer may terminate the Supply Agreement if:

- (a) the other party has committed a material breach of the Supply Agreement that is not capable of remedy;
- (b) the other party has committed a material breach of the Supply Agreement that is capable of remedy, and has failed to remedy that breach within 30 days after the first party gives a notice in writing specifying the breach and requiring the breach to be remedied; or
- (c) the other party becomes subject to an Insolvency Event.

### **11.2 Termination by 5G for non-payment**

In addition to and without limiting its rights under clause 11.1, 5G may terminate the Supply Agreement in accordance with clause 7.10.

## **12. EFFECT OF TERMINATION**

### **12.1 Procedures following termination**

Upon termination of the Supply Agreement:

- (a) subject to clause 12.3, 5G will provide reasonable assistance and information requested by the Customer in relation to the transition of the Services to a successor supplier;
- (b) unless expressly stated otherwise in the Supply Agreement, all the Customer's rights under the Supply Agreement immediately

terminate and the Customer must cease and ensure that any End User ceases using the Services other than in consultation with 5G for transition-related activities;

- (c) if requested by 5G, the Customer must promptly return to 5G or (if directed by 5G) destroy, any of 5G's Confidential Information, and any documents or other materials that record any of the Services IP, which are in the possession, custody or control of the Customer; and
- (d) the Customer remains responsible for any unpaid Fees, Expenses or other charges and must immediately pay these in full (without any set-off or deduction to 5G).

## **12.2 Charges and expenses in the case of early termination**

If the Customer cancels or terminates the Supply Agreement or the supply of Services, or 5G terminates the Supply Agreement or the supply of Services for default, in either case before the end of the Term, or for any other reason the Supply Agreement or the supply of Services is terminated before the end of the Term other than by the Customer under clause 11.1, on the basis of 5G default then 5G may do any one or more of the following:

- (a) 5G may charge the Customer any applicable early termination charges;
- (b) 5G may charge the Customer the recurring monthly Fee for the terminated Services multiplied by the number of months or part months remaining in the Term;
- (c) if 5G has entered into an agreement to acquire services from a third party in order to supply the terminated Services to a Customer, 5G may require the Customer to pay 5G the costs and expenses incurred by 5G in terminating the supply to 5G of those services (including any break fee);
- (d) if 5G has leased equipment in order to supply the terminated Service to the Customer and the supply of the Service is terminated prior to the expiry of the lease, 5G may require the Customer to pay to 5G an amount equal to the sum of the remaining payments on the lease (or a lease payout amount if that is available).

A statement by 5G as to the applicable early termination charges, the costs and expenses incurred in terminating the supply to 5G of services, the remaining payments on a lease or a lease payout amount or any calculations of the relevant amounts is conclusive in the absence of manifest error.

### **12.3 Supply after termination**

Any supply of Services or assistance by 5G after termination of the Supply Agreement will be by mutual agreement between 5G and the Customer. 5G may charge and the Customer must pay 5G a fee reasonably determined by 5G for the supply of such Services or assistance.

## **13. HOSTING, VIRUS, DATA SECURITY AND BACK UP**

### **13.1 Customer Materials**

The Customer warrants and represents that:

- (a) it has the right to use and to permit 5G to use, store, copy, transmit, secure, transcode, encode, analyse and otherwise handle the Customer Materials for the purposes contemplated by the Supply Agreement; and
- (b) the Customer Materials do not contain any misleading, deceptive, defamatory, offensive, obscene or otherwise unlawful data or information.

### **13.2 Take Down**

In circumstances where 5G hosts Customer Materials, 5G reserves the right to routinely monitor the Customer Materials and may at any time, and without liability to 5G, take down, remove, delete or cease hosting (**Take Down**) any Customer Materials that it reasonably believes may breach the Acceptable Use Policy. The Customer acknowledges that, in order for 5G to take such action, it may need to wholly or partially suspend or restrict the Services. Where practicable, 5G will endeavour to give the Customer reasonable advance notice of any Take Down of Customer Materials, unless it reasonably believes that the circumstances require otherwise (including, for example, in the event of an emergency or serious breach or misconduct by the Customer or an End User).

### **13.3 Virus and malware**

The Customer must take all reasonable steps to ensure that it does not upload (either intentionally or negligently) any malicious content including but not limited to virus, malware which could infect any Systems of 5G, the Customer or an End User. The Customer agrees that it will not knowingly allow a virus to enter the Internet community by allowing Internet users to download files containing viruses from any of the Customer's Materials and will take all necessary and appropriate steps to ensure that each of the Systems of 5G, the Customer and each End User remains virus free. The Customer agrees to indemnify 5G and hold it harmless from and against all and any Loss incurred by 5G from any breach by the Customer of this clause.

### **13.4 Data Security**

The Customer must take all reasonable steps to prevent a Data Security Breach including:

- (a) implementing two factor authentication for access to 5G Systems or 5G Data, Customer Systems or Customer Data while the Customer

Systems or Customer Data are hosted on 5G Systems, or Customer Applications while the Customer Applications are managed by 5G;

- (b) ensuring Customer Personnel and other who access Customer Systems use appropriate passwords; and
- (c) without limiting the above or clause 14.2, providing all necessary security and privacy features and procedures to protect the Customer Data, Customer Systems and the Systems and Data of End Users.

### **13.5 Backup of data**

Except as expressly provided in the Supply Agreement:

- (a) 5G does not have any responsibility for the back up of Customer Data;
- (b) the Customer is solely responsible for the backup of all Customer Data contained in the Customer Materials or elsewhere; and
- (c) 5G shall not be liable for any Loss arising out of or in connection with any loss of Customer Data by the Customer or an End User which is due to a failure to back up such data.

## **14. SERVICE LIMITATIONS AND DISCLAIMERS**

### **14.1 Management Tools**

- (a) The Customer acknowledges that tools made available by 5G from time to time (**Management Tools**) provide the Customer with a high degree of control over the configuration and management of the Services.
- (b) The Customer agrees that it is solely responsible and liable for any and all consequences that result from the Customer's or any End User's use of the Management Tools, including any disruption to, or failure or degradation of, the Services or any Customer Applications, any corruption or loss of Customer Content, and any other Loss suffered or incurred as a result of any acts or omissions of the Customer or any End User in the course of using the Management Tools.
- (c) The Customer agrees that it is liable for and will pay to 5G any additional fees or charges levied by 5G for any steps taken to remedy any faults or damage caused by the Customer's or any End User's use of the Management Tools.

### **14.2 Internet, security and Data Security Breaches**

- (a) The Customer acknowledges and agrees that the Internet and activities conducted online are, by their nature, not secure. Except as provided otherwise in the Supply Agreement, the Customer is responsible for providing all necessary security and privacy features and procedures to protect the Customer Data, Customer Systems and the Systems and Data of End Users.
- (b) 5G will implement reasonable measures consistent with industry standards to prevent Data Security Breaches.

- (c) If 5G becomes aware of a Data Security Breach or if the Customer notifies 5G of a Data Security Breach, 5G will immediately investigate the cause of the Data Security Breach and take reasonable steps to (i) determine the nature and extent of the Data Security Breach, (ii) determine what steps can be taken to prevent future Data Security Breach and (iii) to the extent that it is practicable to do so, implement processes and procedures in its systems that will prevent the Data Security Breach from occurring in the future.
- (d) The Customer may request 5G to take further action in relation to a Data Security Breach. If such action is for the Customer's benefit only (and for avoidance of doubt, this excludes actions that 5G would otherwise reasonably have to take as a result of the Data Security Breach to upgrade its own systems in accordance with clause 14.2(c) above), this will be performed by 5G at the cost of the Customer. If requested, 5G will provide the Customer with an estimate of the cost of taking such further action before proceeding.

#### **14.3 High risk situations**

The Customer must not use the Services in any high risk situations or for high risk purposes, such as situations where failure or fault of the Services could harm or threaten the life, health or safety of any individual, or public health or safety.

#### **14.4 Services changes**

The Customer acknowledges and agrees that the Services may change as a result of network expansion, reconfiguration or other changes, in which case 5G will provide the Customer with reasonable notice of the change if such change is likely to have a material or detrimental impact on the Services.

### **15. WARRANTIES**

#### **15.1 Statutory warranties**

The Customer may have rights under statutory consumer protection laws, including the *Competition and Consumer Act 2010* (Cth), which cannot be excluded, restricted, limited or modified. The following exclusions of warranties, and the limitations of liability in clauses 16 and 17 below, apply subject to any rights the Customer may have under such laws.

#### **15.2 Exclusion of warranties**

- (a) Without limiting the foregoing, and to the extent permitted by law, all express or implied representations, conditions, warranties, guarantees or other provisions that are not contained in the Supply Agreement (whether based in legislation, the common law or otherwise) are excluded, including any representations, conditions, warranties or guarantees as to acceptable quality, fitness for purpose, timeliness, or non-infringement of third party rights, and in particular any representations or warranties made in relation to Third Party Tools are specifically excluded by 5G.
- (b) If any condition, warranty, guarantee or other provision is implied or imposed in relation to the Supply Agreement (whether based in legislation, the common law or otherwise) and cannot be excluded (**Non-Excludable Term**), and 5G is able to limit the Customer's

remedy for a breach of such a Non-Excludable Term, then 5G's liability for such a breach of the Non-Excludable Term is limited to one or more of the following, at 5G's option:

- (i) in relation to Goods, the replacement of the Goods or the supply of equivalent Goods, the repair of the Goods, the payment of the cost of replacing the Goods or of acquiring equivalent Goods, or the payment of the cost of having the Goods repaired;
- (ii) in relation to Services, the supplying of the Services again or the payment of the cost of having the Services supplied again; or
- (iii) in relation to the Hardware and Software, the replacement of the Hardware and Software or the supply of equivalent Hardware and Software, the repair of the Hardware and Software, the payment of the cost of replacing the Hardware and Software or of acquiring equivalent Hardware and Software, or the payment of the costs of having the Hardware and Software repaired (and in any case 5G's liability is subject to the manufacturer's warranty for the Hardware and Software and is not the responsibility of 5G).

### **15.3 Limitations on 5G representations and warranties**

Except as specified otherwise in the Supply Agreement 5G will supply Goods and/or Services on an "as is" basis and 5G does not represent or warrant that they will be error, defect or "bug" free, free from interruption or intrusion, continuously available, accurate or secure, or suitable for the Customer's business objectives or other purposes.

### **15.4 Limitation of 5G responsibility**

Except as specified otherwise in the Supply Agreement, 5G will not be responsible or liable for:

- (a) the development, functionality or performance of the Customer Applications, or the compatibility and interoperability of the Services with the Customer Applications or the Customer Systems;
- (b) without limiting the generality of clause (a), any Customer Application-related issues of which 5G was not aware, or could not reasonably have been expected to be aware, at the time 5G and the Customer entered into the Supply Agreement;
- (c) the content, operation, maintenance, backing-up, security and use of the Customer Applications or the Customer Content, except as specified otherwise in the Supply Agreement;
- (d) monitoring any Customer or End User activity;
- (e) exercising editorial control over the Customer Content and/or Customer Applications;
- (f) any claims or legal issues related to or arising out of the Customer Applications or Customer Content;

- (g) defects or errors resulting from any modifications or enhancements to the Customer Applications or Customer Content not made by 5G or made without 5G's prior written consent, or resulting from incorrect use of the Customer Applications or Customer Content by the Customer;
- (h) malfunctions that are due to incorrect use of the Customer Applications or Customer Content, or for any reason external to the Services supplied by 5G including, but not limited to, failure or fluctuation of electrical supplies, hardware failures, accidents, or natural disasters;
- (i) the acts and omissions of the Customer and/or End Users including any failure by the Customer or End Users to comply with clause 5;
- (j) any Loss incurred by the Customer and/or an End User by using the Customer Applications or Customer Content inappropriately or outside the Scope of Services;
- (k) maintaining the currency of, and ensuring the Customer's ongoing compliance with, any third-party software licences, maintenance contracts and other agreements;
- (l) any interrupted availability or degraded performance of Customer Applications or Customer Content attributable to the Customer:
  - (i) failing to adopt 5G's recommendations for changes or upgrades reasonably required to the Services due to material changes in the Customer's requirements (for example because of increased traffic, usage or capacity requirements); or
  - (ii) using unsupported or out-of-date software;
- (m) loss incurred by the Customer as a result of a virus or manipulating program affecting the Customer's Equipment or Customer's Systems, whether it was transmitted by the Services supplied by 5G or otherwise.
- (n) providing support to End Users, except as specified otherwise in the Scope of Services;
- (o) the Customer's compliance with applicable Laws, including the Privacy Act 1988 (Cth) and the Spam Act 2003 (Cth);
- (p) any Loss arising from a Data Security Breach unless 5G fails to comply with its obligations in clauses 14.2(b) to 14.2(d).

## 15.5 Customer responsibility

The Customer must take and accepts full responsibility for the items or matters referred to in clause 15.4.

## 15.6 Manufacturer responsibility

Subject to 5G's obligations under clause 15.7, if there is any:

- (a) defect, problem or deficiency with Hardware provided by 5G (**Defective Hardware**), to the extent that the Defective Hardware is

the fault of the respective manufacturer, 5G is not responsible or liable for the Defective Hardware and the Customer should address any claim in relation to the Defective Hardware to the manufacturer or distributor of the Hardware; or

- (b) defect, problem or deficiency with Software provided by 5G (**Defective Software**), to the extent that the Defective Software is the fault of the respective manufacturer, 5G is not responsible or liable for the Defective Software and the Customer should address any claim in relation to the Defective Software to the manufacturer or distributor of the Software.

### **15.7 5G assistance with Defective Hardware and Software.**

5G agrees to provide reasonable assistance to the Customer in relation to any claims the Customer may have against the manufacturer or distributor of Defective Hardware or Defective Software. Where practicable 5G will pass through to the Customer its rights against the manufacturer or distributor.

## **16. LIABILITY**

### **16.1 Unlimited liability**

The exclusions and limitations on a party's liability in the Supply Agreement, including this clause 16, do not apply to:

- (a) the Customer's liability for breach of clause 19 or 20;
- (b) the Customer's liability under the indemnity in clause 16.5;
- (c) the Customer's obligation to pay any Fees or Expenses due and payable under the Supply Agreement; or
- (d) any liability under a Non-Excludable Term, or any other liability to the extent that it may not be excluded or limited as a matter of applicable Law.

### **16.2 Exclusions of 5G liability**

To the fullest extent permitted by law, except to the extent caused by or contributed to by 5G or its personnel, 5G has no liability in respect of any Loss arising out of::

- (a) the Customer or any Customer Personnel failing to comply with any relevant data protection or privacy laws (including the *Privacy Act 1988*);
- (b) a Data Security Breach;
- (c) the use of the Services by the Customer or an End User otherwise than in accordance with the Supply Agreement;
- (d) the Customer's breach of the Supply Agreement;
- (e) any Customer or third party content or software that the Customer or an End User may upload, transmit, place, add or otherwise use in relation to the Services;
- (f) the use by the Customer or an End User of Third Party Tools; and

- (g) use of the Internet by the Customer or an End user including all liability for any disclosure of Confidential Information when transmitted over the Internet.

### **16.3 Exclusion of consequential loss**

Subject to clause 16.1, neither 5G nor the Customer party will be liable, under or in connection with the Supply Agreement, whether in contract, tort (including negligence), equity, breach of statutory duty, or otherwise, for any indirect, consequential, incidental or special loss or damage, or for any loss of profits, loss of sales, loss of business or agreements, loss of goodwill, loss of or wasted management of staff time, loss of use or corruption of software, loss of or corruption to data, or loss of anticipated savings, even if such party has been advised of the possibility of such loss or damage.

### **16.4 Cap on 5G liability**

Subject to clause 15 and this clause 16, 5G's total maximum liability to the Customer for all Loss sustained, incurred or suffered by the Customer and any End Users arising under or in connection with the Supply Agreement, whether in contract, tort (including negligence), equity, breach of statutory duty, or otherwise, shall be limited for all claims in aggregate to an amount equal to the charges paid by the Customer to 5G during the period of 12 months prior to the event that gave rise to the claim (or if the event occurs in the first 12 months of the Supply Agreement, the total of the amounts payable by the Customer during those first 12 months).

### **16.5 Indemnity**

The Customer must indemnify and hold harmless the Indemnified Persons from and against all Loss sustained, incurred or suffered by any of them, arising out of or in connection with but not limited to:

- (a) the use or attempted use of the Services by the Customer or an End User;
- (b) any breach of the terms or warranties in the Supply Agreement;
- (c) any breach by the Customer of its warranty in clause 13.1;
- (d) any Customer Application and/or any Customer Content (including where such Customer Application or Content is alleged to infringe any rights, including Intellectual Property Rights);
- (e) any claims brought or threatened by a third party against any of them, to the extent that such third party claim arises out of any breach by the Customer or End Users of the Supply Agreement;
- (f) any Loss arising from a Data Security Breach to the extent such loss is attributable to the Customer or an End User or Personnel of the Customer; and
- (g) the Customer, and End User or any of their Personnel fails to comply with any relevant data protection or privacy laws (including the *Privacy Act 1988*).

**16.6 Limitation where the Customer or End User contributes to loss or damage**

Any liability of 5G for any Loss sustained, incurred or suffered by the Customer, an End User or any of their Personnel arising under or in connection with the Supply Agreement, whether in contract, tort (including negligence), breach of statutory duty, or otherwise, is reduced to the extent that the Customer, the End User or their Personnel contributed to the Loss.

**16.7 Obligation to mitigate**

The Customer must promptly take all reasonable and practicable steps to mitigate any Loss likely to be or actually sustained, incurred or suffered by the Customer, and End User or their Personnel.

**17. FORCE MAJEURE EVENT**

**17.1 Reduction in liability or extension**

Notwithstanding any other provision of the Supply Agreement, neither 5G nor the Customer shall be deemed to be in breach of the Supply Agreement or otherwise liable to the other party as a result of any delay or other failure in the performance of its obligations under the Supply Agreement (other than an obligation to pay money, including the Fees) if and to the extent that such delay or other failure is caused by or arises from any event or circumstance not within the reasonable control of the party concerned (**Force Majeure Event**), and the time for performance of the relevant obligation(s) shall be extended accordingly.

**17.2 Steps**

A party whose performance of its obligations under the Supply Agreement is delayed or prevented by a Force Majeure Event must:

- (a) notify the other Party of the nature, extent, effect and likely duration of the circumstances constituting the Force Majeure Event as soon as reasonably practicable; and
- (b) after cessation of the Force Majeure Event, as soon as reasonably practicable notify the other Party thereof and resume full performance of its obligations under this Agreement.

**17.3 Termination**

5G may terminate the Supply Agreement in whole or in part by notice to the Customer if any Force Majeure Event has the result that 5G is unable to supply the goods or Services for more than 20 Business Days.

**18. ASSIGNMENT AND SUBCONTRACTING**

**18.1 No assignment or subcontracting**

Subject to clauses 18.2 and 18.3, neither 5G nor the Customer may assign, novate, transfer, sub-contract or otherwise dispose of any or all of its rights and/or obligations under the Supply Agreement without the prior written consent of the other party (which may be withheld in that party's absolute discretion).

## **18.2 Sub-contracting by 5G**

Notwithstanding clause 18.1, 5G may enter into sub-contract arrangements with third parties from time to time in relation to the supply of Goods and/or Services under the Supply Agreement. Any such sub-contract shall not excuse 5G from performing its obligations under the Supply Agreement.

## **18.3 Assignment or novation by 5G**

5G may assign, novate, transfer, or otherwise dispose of any or all of its rights or obligations under the Supply Agreement to:

- (a) an Associated Entity of 5G; or
- (b) a third party that has acquired a substantial part of 5G or any of its Associated Entities' business, assets or undertaking,

without the prior consent of the Customer and, in the case of a novation, the Customer, 5G and the relevant third party will execute a novation agreement in a form reasonably prescribed by 5G.

# **19. CONFIDENTIAL INFORMATION**

## **19.1 Maintenance of confidentiality**

Each Recipient must:

- (a) maintain and take all steps necessary to maintain all Confidential Information in strictest confidence;
- (b) ensure that proper and secure storage is provided for the Confidential Information while in the possession or under the control of the Recipient or the Recipient's Personnel;
- (c) take all precautions necessary to prevent accidental disclosure of any of the Confidential Information;
- (d) not disclose any of the Confidential Information to any person other than the Recipient's Personnel and then only to the extent that they are reasonably required to receive and consider the Confidential Information in the course of (and solely for the purpose of) their role in relation to the Supply Agreement; and
- (e) not expressly or impliedly disclose the existence of the Confidential Information.

## **19.2 Compliance by Personnel**

Each Recipient must ensure that its Personnel comply with clause 19.1 as if they were parties to the Supply Agreement.

## **19.3 Exceptions**

Clause 19.1 does not impose obligations on the Recipient or Personnel concerning Confidential Information which the Recipient proves to the reasonable satisfaction of the Discloser:

- (a) is publicly available at the date of the Supply Agreement;

- (b) becomes publicly available without breach of the Supply Agreement after the date of the Supply Agreement;
- (c) the Recipient obtained from a third party without breach by the third party of any obligation of confidence concerning that Confidential Information; or
- (d) was already in the Recipient's possession (as evidenced by written records) when provided by or on behalf of the Discloser.

#### **19.4 Legal obligations**

Clause 19.1 does not apply to the Disclosure of Confidential Information which the Recipient is obliged to disclose by:

- (a) law;
- (b) the rules of a recognised stock exchange on which the securities of the Recipient or a Related Body Corporate of the Recipient are quoted; or
- (c) court order;

to the person to whom it is Disclosed.

#### **19.5 Opportunity to restrict**

If at any time the Recipient is required to disclose any part of the Confidential Information under clause 19.4, the Recipient:

- (a) must immediately notify the Discloser of the requirement and the reasons;
- (b) must permit the Discloser to oppose or restrict the disclosure;
- (c) must not disclose the Confidential Information until the Discloser has a reasonable opportunity to consider those reasons and take such action as it considers appropriate in the circumstances.

#### **19.6 Damages insufficient remedy**

Each party acknowledges that:

- (a) the Confidential Information is confidential and at all times the property of the Discloser and that the Supply Agreement does not give any proprietary or other interest in the Confidential Information to the Recipient;
- (b) a breach of the Supply Agreement would be harmful to the Discloser;
- (c) monetary damages alone would not be a sufficient remedy for a breach of the Supply Agreement; and
- (d) in addition to any other remedy which may be available in law or equity, the Discloser is entitled to any injunctive relief to prevent breach of the Supply Agreement and to compel specific performance of it.

## **19.7 Challenge and use**

The Recipient:

- (a) must not challenge the ownership of the Confidential Information; and
- (b) must not, and must make sure that each of its Related Bodies Corporate and Personnel do not, make any use of the Confidential Information or any part of it to the competitive disadvantage of the Discloser.

## **20. PRIVACY**

### **20.1 Notifications and consents**

The Customer acknowledges and agrees that:

- (a) 5G may collect Personal Information about individuals in the course of performing the Services;
- (b) the Customer has made, or will make, all notifications, and obtain all consents, necessary or desirable for 5G to make or obtain under the Privacy Act 1988 (Cth) in order to collect and handle those individuals' Personal Information for the purpose of performing the Services; and
- (c) the Customer will, on request, provide 5G with details of the notifications and consents made and obtained by the Customer for 5G to collect and handle those individuals' Personal Information.

### **20.2 Security**

Each party to the Supply Agreement must, in connection with the Services and the performance of its obligations under the Supply Agreement comply with the *Privacy Act 1988* (Cth) and ensure that it has in place appropriate technical and organisational measures to protect Personal Information from misuse, interference and loss and from unauthorised access, modification or disclosure.

## **21. INTELLECTUAL PROPERTY**

### **21.1 Ownership of Services IP**

The Customer acknowledges and agrees that:

- (a) all Services IP, including all Background IP, is the property of 5G or a person who has licensed Intellectual Property rights to 5G and that all Foreground IP becomes the property of 5G and part of the Services IP upon its creation; and
- (b) none of the Supply Agreement or any act or transaction occurring under or in relation to it transfers any right, title or interest in any Services IP to the Customer or any third party.

### **21.2 Licence**

5G grants to the Customer a licence to use the Services IP to the extent required by the Customer to use the Services in accordance with the Supply

Agreement, such licence to be revocable only in accordance with the Supply Agreement.

### **21.3 Third party rights**

5G represents and warrants to the Customer that it has the right to supply the Services IP to the Customer and that the Customer's use of the Services IP in accordance with the Supply Agreement will not infringe the Intellectual Property Rights of any third party. If any third party makes a claim, or in 5G's reasonable opinion is likely to make a claim, that any aspect of the Services infringes the Intellectual Property Rights of the third party, 5G may, at its option:

- (a) modify or replace that aspect of the Services;
- (b) procure a licence for the Customer to continue using the Services free from any such claim; or
- (c) if neither of the above are reasonably practicable, terminate the Supply Agreement (in whole or in part) by providing written notice or termination to the Customer. Any such termination will be without liability to 5G, save for a pro-rata refund to the Customer of any fees paid in advance for any such terminated Services.

### **21.4 Customer IP**

5G acknowledges and agrees that the Customer Content and Customer Applications, and all Intellectual Property Rights subsisting in the Customer Content and Customer Applications are owned by and vest in the Customer or its licensors. 5G acknowledges and agrees that none of the Supply Agreement or any act or transaction occurring under or in relation to it transfers any right, title or interest in Customer Content and Customer Applications to 5G or any third party.

### **21.5 Licence of Customer IP and third party rights**

The Customer grants to 5G a licence to use the Customer Content and Customer Applications to the extent required by 5G to supply the Services in accordance with the Supply Agreement. The Customer represents and warrants to 5G that it has the right to licence the Customer Content and Customer Applications to 5G and that 5G's use of the Customer Content and Customer Applications in accordance with the Supply Agreement will not infringe the Intellectual Property Rights of any third party.

### **21.6 Software**

If 5G provides the Customer with any software in connection with the provision of the Services, the Customer must not copy, modify or reverse assemble the software. The Customer acknowledges and agrees that the Customer is licensed by 5G to use the software only for the purposes, and in accordance with the terms, of the Supply Agreement and any terms upon which the software is ordinarily licensed or which 5G notifies the Customer.

## **22. PUBLICITY**

The Customer agrees that 5G may publicly disclose that it is providing Services to the Customer and authorises 5G to use its name and logo to identify it in promotional materials, including press releases as 5G's customer.

## **23. NON-SOLICITATION**

The Customer must not and must procure that End Users and their Associated Entities do not during the Term and the period of 1 year after the termination or expiration of the Supply Agreement, directly or indirectly, solicit or attempt to solicit for employment any persons employed by 5G during such period.

## **24. DISPUTE RESOLUTION**

### **24.1 Notification of Disputes**

A party claiming that a Dispute has arisen must notify the other party in writing, giving details of the Dispute, and, subject to clause 24.5, must not commence any action or court proceeding in respect of the Dispute unless it has followed the procedure set out in this clause.

### **24.2 Attempts to resolve in good faith**

During the period of 1 month after a notice is given under clause 24.1 (or any longer period agreed in writing between the parties) the parties' chief executive officers (or their delegates) must work together in good faith to resolve the Dispute.

### **24.3 Legal proceedings**

If a Dispute is not resolved within 1 month from the date of the notice given under clause 24.1 (or longer agreed period), either party may then commence any action or court proceeding in relation to the Dispute.

### **24.4 Continuing performance**

The parties must continue performing their respective obligations under the Supply Agreement while a Dispute is being resolved in accordance with this clause, unless and until such obligations are terminated or expire in accordance with the Supply Agreement. This clause 24.4 does not apply at any time after payment of any Fees or Expenses have become due and the Fees or Expenses remain unpaid, and without limitation does not prevent 5G exercising its suspension or termination rights including under clause 7.10.

Without limiting the foregoing, the Customer must continue paying Fees for the supply of any Goods or Services that are not the subject of the Dispute.

### **24.5 Urgent interlocutory relief and suspension or termination**

Nothing in this clause:

- (a) prevents either party from commencing any action or proceeding at any time for urgent interlocutory relief in any court or tribunal having jurisdiction over such action or proceeding; or
- (b) derogates or limits the right of 5G to suspend or terminate the supply of Goods or Services for non-payment under clause 7.10.

## **25. NOTICES**

### **25.1 Notices to be in writing**

A communication in connection with the Supply Agreement (including a notice, consent, request, waiver or demand) (**Notice**) has no legal effect unless it is in writing.

### **25.2 Delivery**

In addition to any other method of service provided by law, a Notice may be:

- (a) sent by prepaid ordinary post to the address for notices of the addressee, if the address is in the country of posting;
- (b) sent by prepaid airmail to the address for notices of the addressee, if the address is overseas;
- (c) sent by email to the email address of the addressee; or
- (d) delivered at the address for service of the addressee.

### **25.3 Timing of delivery**

If the Notice is sent or delivered in a manner provided by clause 25.2, it must be treated as given to and received by the party to which it is addressed:

- (a) if sent by post to an address in the country of posting, on the fourth Business Day (at the address to which it is posted) after posting;
- (b) if sent by post to an address overseas, on the fifth Business Day (at the address to which it is posted) after posting;
- (c) if sent by email before 5.00pm on a Business Day at the place of receipt, on the day it is sent and otherwise on the next Business Day at the place of receipt; or
- (d) if otherwise delivered before 5.00pm on a Business Day at the place of delivery, upon delivery, and otherwise on the next Business Day at the place of delivery.

### **25.4 Emails**

Notwithstanding clause 25.3, an email is not treated as given or received if the sender's computer reports that the message has not been delivered.

### **25.5 Time and days**

If a Notice is served by a method which is provided by law and is not provided by clause 25.2, and the service takes place after 5.00pm on a Business Day, or on a day which is not a Business Day, it must be treated as having been received on the next Business Day.

### **25.6 Assumed delivery**

A Notice sent or delivered in a manner provided by clause 25.2 must be treated as validly given to and received by the party to which it is addressed even if:

- (a) the addressee has been liquidated or deregistered or is absent from the place at which the Notice is delivered or to which it is sent; or
- (b) the Notice is returned unclaimed.

## **25.7 Addresses**

Addresses for notices for 5G are:

Address: Level 7, 505 Little Collins Street, Melbourne Victoria 3000  
Attention: General Counsel  
Email: Chelsea McDonald, [cm@5gn.com.au](mailto:cm@5gn.com.au)

Addresses for notices for the Customer are as set out in the Supply Agreement.

Unless otherwise agreed the Customer address, Customer contact name, and Customer contact email address specified in a Quote or Proposal will be the addresses for notices for the Customer.

## **25.8 Change of address**

A party may change any one or more of its address for notices (including any email address and facsimile number) by giving Notice of that change to each other party.

# **26. GENERAL**

## **26.1 Waiver and exercise of rights**

In the Supply Agreement:

- (a) a single or partial exercise or waiver of a right relating to the Supply Agreement may be given subject to conditions and does not prevent any other exercise of that right or the exercise of any other right.
- (b) no party is liable for any loss or expense of another party caused or partly caused by the waiver, exercise or failure to exercise a right.
- (c) waiver of any right, power, authority, discretion or remedy arising upon a breach of or default under the Supply Agreement must be in writing and signed by the party granting the waiver.
- (d) this clause may not itself be waived except in writing.

## **26.2 Variation**

An amendment or variation of the Supply Agreement is not effective unless it is in writing and signed by the parties.

## **26.3 Prohibition or enforceability**

- (a) Any provision of, or the application of any provision of the Supply Agreement which is prohibited in any jurisdiction is, in that jurisdiction, ineffective only to the extent of that prohibition.
- (b) Any provision of, or the application of any provision of the Supply Agreement, which is void, illegal or unenforceable in any jurisdiction does not affect the validity, legality or enforceability of that provision

in any other jurisdiction or of the remaining provisions of the Supply Agreement in that or any other jurisdiction.

(c) The application of this clause 26.3 is not limited by any other provision of the Supply Agreement in relation to severability, prohibition or enforceability.

#### **26.4 Counterparts**

The Supply Agreement may consist of a number of counterparts and if so executed by hand or by electronic signature, the counterparts taken together constitute the one instrument. The parties agree that a fully executed and digitally scanned copy of the Supply Agreement, whether exchanged by facsimile or email (including in portable document format) will constitute evidence of due execution and any agreement so exchanged will serve as a legal and binding contract with the same force and effect as the original (where such facsimile or email address has been notified by a party to other party for these purposes).

#### **26.5 Electronic execution**

The Supply Agreement including each document comprising the Supply Agreement can be executed by using electronic signatures. Each party consents to the use of electronic signatures (in whole or in part). The parties acknowledge and agree that each electronic signature is to be treated as an original signature for all purposes and shall have the same force and effect as an original signature. If the signatory is a corporation, it, and each director or secretary (as applicable) that executes on behalf of the corporation, represents and warrants to the counterparty that the signing satisfies section 127(1) of the Corporations Act.

#### **26.6 Further assurance**

Each party must at all times and from time to time at its own expense do all further acts and execute and deliver all further deeds, documents and instruments necessary or reasonably desirable in order to fully perform and give effect to and carry out the terms of the Supply Agreement.

#### **26.7 Governing law and jurisdiction**

The Supply Agreement is governed by the laws in force in Victoria. Each party irrevocably and unconditionally submits to the non-exclusive jurisdiction of the courts of Victoria and any courts having jurisdiction to hear appeals from those courts.