

OptiComm Ltd
ACN 117 414 776

Master Services Agreement

with

XXXXXXXXXXXXXXXXXX
ACN XXX XXX XXX

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This agreement is made on the date last signed by the parties

between **OptiComm Ltd** ACN 117 414 776 of Level 1, 22 Salmon St, Port Melbourne VIC 3207 (**OptiComm**)

and **XXXXXXXXXXXXXXXX** ACN **XXX XXX XXX** of **XXXXXXXXXXXXXXXX** (**Customer**)

Purpose of Agreement

- A OptiComm is a Carrier and is the owner of the Network or has the right to use or provide Services on the Network for the purposes of this agreement.
- B The Customer is a carriage service provider and wishes to acquire Services from OptiComm, delivered over the Network, in order for the Customer to provide carriage services to End-users.

Now it is agreed as follows:

1 Preliminary

1.1 Service Requests and Service Orders

- (a) The Customer will submit Service Requests specifying the matters set out in clause 4.1.
- (b) When accepted by OptiComm under clause 5.4, a Service Request becomes a Service Order.
- (c) Service Requests will be submitted by the Customer and accepted by OptiComm using the methods and processes specified by OptiComm from time to time.

1.2 Agreement

Each Service Order forms a contract between OptiComm and the Customer for the provision of the Services consisting of:

- (a) the Master Services Agreement Signature Form (where applicable);
- (b) this Master Services Agreement;
- (c) the terms set out in Annexure A – Service Level Agreement;
- (d) the terms set out in the Wholesale Price List, available on the Customer Portal;
- (e) the terms set out in Annexure B – Acceptable Use Policy
- (f) the terms set out in the Service Schedules available on the Customer Portal; and
- (g) the terms set out in the Service Order.

Together, the documents set out in clauses 1.2(a) to (g) constitute the Agreement.

1.3 Precedence of Documents

Unless expressly stated otherwise, if any of the documents set out in clause 1.2 is inconsistent with the others, then, to the extent only of such conflict or inconsistency, the documents will prevail in the order set out in clause 1.2.

2 Cooperation of Parties

2.1 Resource Cooperation

Each party will:

- (a) provide sufficient Personnel as are necessary to perform its obligations under this Agreement and ensure that its Personnel have the requisite skills and experience;
- (b) provide the other party with information and assistance reasonably necessary to enable that party to comply with this Agreement; and
- (c) promptly do all things (including executing all documents) reasonably necessary to give full effect to this Agreement.

2.2 Joint Marketing

The parties will consult about undertaking joint marketing of the Customer's Services and the Network.

3 Term

3.1 Service Term

OptiComm will provide each Service to the Customer for the applicable Service Term.

3.2 Continuation after Service Term

- (a) When the Service Term of a Service expires, OptiComm may, at its sole discretion, continue to provide the Service and:
 - (i) if the Customer wishes OptiComm to cease providing the Service, it must give OptiComm at least 30 days written notice in accordance with clause 4.3.
 - (ii) Fees for that Service will continue to be charged at the prevailing rate in accordance with this Agreement until supply of the Service ceases.
- (b) If OptiComm continues to provide a Service after the Service Term has expired, OptiComm may terminate the Service in accordance with clause 19.1.
- (c) If OptiComm decides not to continue providing a Service when the Service Term expires, it will notify the Customer in writing no less than 30 days before the Service Term expires.

4 Services

4.1 Provision of Services

If the Customer wishes OptiComm to provide a Service under this Agreement, it will submit to OptiComm a Service Request setting out:

- (a) the type of Service requested;
- (b) the address of the proposed Service and its point of interconnect;
- (c) the contact details of the property owner(s) and/or occupier(s) for the purpose of arranging access;
- (d) the date by which the proposed Service is required;
- (e) the Customer's reference number;

- (f) any Supplemental Work that may be required; and
- (g) any other relevant information.

4.2 **Variation of Services**

If the Customer wishes OptiComm to vary an existing Service under this Agreement, it will submit to OptiComm a Service Request setting out:

- (a) the Service to be varied;
- (b) the address of the existing Service;
- (c) the existing Service identification number;
- (d) the date by which the variation is to take effect; and
- (e) any other relevant information.

4.3 **Cancellation of Services**

- (a) If the Customer wishes OptiComm to cancel an existing Service under this Agreement, it will submit to OptiComm a Service Request setting out:
 - (i) the address of the Service being cancelled;
 - (ii) the Service identification number;
 - (iii) the date by which the cancellation is to take effect; and
 - (iv) any other relevant information.
- (b) Subject to clause 4.1(c) if the Customer cancels a Service during the Service Term, it must pay any applicable Service Cancellation Fees in accordance with clause 7.3.
- (c) The Customer may cancel a Service immediately, and without incurring any additional charges if:
 - (i) OptiComm breaches an essential clause of this Agreement which is not resolved within 14 days of the Customer requesting OptiComm to do so in writing or which is unable to be resolved;
 - (ii) OptiComm become insolvent, bankrupt or unable to pay its debts when due; or
 - (iii) The Service has been suspended for 14 days, where there is no fault on the Customer's or an End-user's part.

4.4 **OptiComm's rights to cancel a Service**

- (a) OptiComm can cancel a Service immediately if:
 - (i) OptiComm reasonably suspects fraud by the Customer, an End-user or anyone using the Service;
 - (ii) OptiComm is required to cancel the Service to comply with a direction from a law enforcement agency or a Regulator;
 - (iii) the Customer has failed to make a payment by the due date and fails to make such payment within 5 business days of receipt of a notice requiring the Customer to do so, except where an amount is permitted to be withheld pursuant to a billing dispute;
 - (iv) the Customer has failed to provide the security deposit requested;

- (v) the Customer fails to comply with a statutory demand issued by OptiComm under the *Corporations Act 2001* (Cth);
 - (vi) OptiComm determines that the Customer is in breach of the confidentiality provisions of this Agreement;
 - (vii) the Customer become insolvent, bankrupt or unable to pay its debts when due;
 - (viii) the Customer breaches an essential clause of this or any Agreement with OptiComm which isn't resolved within 14 days of OptiComm requesting the Customer to do so in writing or which is unable to be resolved;
 - (ix) the Customer, an End-user of anybody using the Service is in breach of the Acceptable Use Policy; or
 - (x) OptiComm become aware that delivery of the Service is uncommercial or impractical.
- (b) OptiComm can cancel a Service on 30 days' notice if:
- (i) OptiComm is unable to supply the Service because a supplier has terminated its agreement with OptiComm and OptiComm cannot reasonably provide the Service by using an alternative supplier; or
 - (ii) OptiComm is unable to supply the Service because of a Force Majeure event.

4.5 **Consequences of cancellation**

Where a Service is cancelled:

- (a) The Customer will not be able to use the Service after the cancellation date;
- (b) The Customer agrees to pay for any charges incurred on the Service until the cancellation date;
- (c) any credits on the Customer's account will be applied against any outstanding charges at the cancellation date;
- (d) unless the Customer has other Services or acting reasonably OptiComm considers that the Customer owes or will owe OptiComm money, OptiComm will refund to the Customer any unused portion of any security deposits that it holds;
- (e) OptiComm will refund to the Customer any money paid in advance for that part of the Service that is being cancelled on a pro-rata basis;
- (f) The Customer will return any OptiComm equipment that it holds to OptiComm within 30 days;
- (g) The Customer may have to pay any applicable cancellation fee;
- (h) if OptiComm cancels the Service before the end of the Service Term pursuant to clause 4.4(a), the Customer will have to pay the applicable cancellation fee.

4.6 **Additional Service types**

Additional types of Services can be added to this Agreement by the Customer providing a Service Request to OptiComm and OptiComm accepting it as a Service Order.

5 Suspending a Service

5.1 OptiComm's rights to suspend a Service

OptiComm may suspend a Service by giving the Customer reasonable prior notice if possible in the circumstances if:

- (a) OptiComm would be entitled to terminate the Service under clause 4.4(a);
- (b) it is necessary to do so to maintain or restore any part of the Network;
- (c) OptiComm is required to suspend the Service to comply with a direction from a law enforcement, security or intelligence agency, or a regulatory authority such as the Australian Communication and Media Authority (ACMA);
- (d) OptiComm is temporarily unable to supply the Service to the Customer because a Supplier has temporarily withdrawn its services from OptiComm;
- (e) OptiComm is temporarily unable to supply the Service to the Customer because of an continuing event that is reasonably out of OptiComm's control; for example, earthquake, explosion, natural disaster, sabotage or war;
- (f) the Customer breaches an essential clause of the Agreement;
- (g) the Customer, an End-user, or anybody using the Service breaches the Acceptable Use Policy.

OptiComm will only suspend the Customer Service for a period that is reasonable in the circumstances.

5.2 Planned maintenance

OptiComm will give the Customer notification before all planned maintenance which OptiComm anticipates will interfere with the Customer's Services. Generally, at least 10 business days' notice will be given, however, the notice period may be less when the maintenance is being performed on a Supplier's network.

5.3 What happens when a Service is suspended?

When the Service is suspended:

- (a) the Customer and End-users will not be able to use the service;
- (b) the Customer may be liable to OptiComm for any charges for access to or use of the Service during the period of suspension; except where the suspension was a result of an event that was reasonably out of the Customer's control.

5.4 Acceptance of Orders

A Service Request will become a Service Order on the date that OptiComm notifies the Customer that OptiComm accepts the Service Request. If OptiComm requires changes to a Service Request in order for it to be acceptable, OptiComm may require the Customer to submit a new Service Request.

5.5 Supplemental Work

- (a) The Customer agrees that OptiComm or a Supplier may be required to contact End-users to arrange installation of Equipment to provide the Services. During this installation OptiComm, a Supplier, or their nominated agents may be required to perform Supplemental Work in the form of:
 - (i) installation of End-user premises wiring or equipment;

- (ii) installation of the lead-in wiring or conduit;
- (iii) trenching, ducting or cabling between the boundary of an End-user's property and the Service Delivery Point;
- (iv) any other work that may be required to be undertaken by OptiComm to connect OptiComm's Equipment to a point at any location beyond the Service Delivery Point;
- (v) any work required at the End-user's Premises to enable connection of the Service;
- (vi) any work required for connecting the Network to the Customer's point of interconnect; or
- (vii) other work which is the responsibility of the End-user.

(b) OptiComm's charges for performing Supplemental Work will be paid by the Customer.

5.6 Performance

- (a) OptiComm will deliver each Service in accordance with the terms of this Agreement.
- (b) OptiComm is not obliged to provide any service without a Service Order.

5.7 Intervening Event and changes to the Service

If there is an Intervening Event, then OptiComm will inform the Customer as soon as reasonably practicable of any change to any or all of the Services or this Agreement arising from the Intervening Event. If the actual direct costs to OptiComm of providing any Service to the Customer increase as a result of the Intervening Event (**Affected Service(s)**), then OptiComm may pass on the additional cost to the Customer subject to the following procedure:

- (a) OptiComm must give no less than 14 days' written notice of the increase and must provide details of the Intervening Event and the Affected Service(s) in that notice (**Cost Increase Notice**);
- (b) if OptiComm gives a Cost Increase Notice during the Service Term, the Customer may, by written notice to OptiComm given within 14 days after the date of the Cost Increase Notice, terminate the Affected Service(s) specified in the Cost Increase Notice with effect from the date of the Customer's notice in which case the Customer will not be required to pay a Service Cancellation Fee; and
- (c) OptiComm must take reasonable steps to mitigate the effect of an Intervening Event on OptiComm's cost of providing the Affected Services.

OptiComm can change the Agreement or Service when there is no Intervening Event by providing a written notice of the change to the Customer. However, OptiComm cannot make any changes to the Agreement or Services that are of more than a minor detriment to the Customer unless OptiComm provides the Customer with written notice detailing the change proposed and a period of at least 30 days in which the Customer can cancel the affected Service without incurring any additional termination costs or charges.

5.8 Permitted uses of the Service

In using the Service, the Customer must comply with and make all reasonable endeavours to ensure that End-users comply with all laws, regulations, standards, industry codes, applicable codes of conduct and directions by a Regulator and any reasonable directions by OptiComm. The Customer must not use, attempt to use, or permit an End-user or a Third Party to use the Service:

- (a) to break any law or to infringe another person's rights;

- (b) in a way which may expose OptiComm to liability or legal threats by Third Parties;
- (c) in any way which damages, interferes with or interrupts the Service, or any telecommunications network, equipment, or facilities, or cabling controlled by OptiComm, its Suppliers, or another carrier;
- (d) in any way which may damage any property or injure or kill any person;
- (e) to transmit, publish or communicate material which is defamatory, offensive, abusive, indecent, menacing or unwanted; or
- (f) in any other way which contravenes OptiComm's Acceptable Use Policy.

OptiComm may ask the Customer to stop or to make End-users stop doing something that OptiComm reasonably believe is contrary to this clause. If the Customer does not immediately comply with such a request or the infringement continues, OptiComm may take any steps reasonably necessary to ensure compliance with this clause or the request.

6 Maintenance and Faults

The parties acknowledge and agree that:

- (a) OptiComm will conduct maintenance on the Network in accordance with the Service Level Agreement;
- (b) OptiComm does not warrant that the Services will be free of blockages, interruptions, delays or Faults, but will remedy any Fault or problem in accordance with this Agreement;
- (c) if the Customer becomes aware or reasonably suspects the existence of a Fault or any event or circumstance that is causing or likely to cause an interruption or degradation to a Service or otherwise detects a degradation in a Service that could lead to a Fault occurring, it will notify OptiComm as soon as reasonably possible using the process specified in the Service Level Agreement; and
- (d) unless caused by OptiComm's negligence or fair wear and tear, the Customer is responsible for the reasonable cost of repairing damage to OptiComm facilities that are installed on End-user premises.

6.1 Monitoring and data retention

OptiComm may monitor the Network for the purposes of:

- (a) maintaining the Network at an optimum performance;
- (b) diagnosing problems associated with the Network,

and may intercept and retain data transmitted on the Network or relevant to communications for the purpose of complying with its obligations under Law or the requests of Regulators or government agencies.

6.2 Suspension of Services

- (a) OptiComm may, without liability, immediately suspend a Service if:
 - (i) there is an Emergency;
 - (ii) the Customer breaches this Agreement and OptiComm serves a Default Notice;
 - (iii) an Insolvency Event occurs in relation to the Customer;

- (iv) doing so is necessary to allow OptiComm to protect, repair, maintain or service any part of the Network;
 - (v) OptiComm reasonably suspects fraud by the Customer or any other person in connection with the Service;
 - (vi) OptiComm is required to do so to comply with a Law, industry code, or an order, instruction or request of an emergency services organisation or other government agency, or a Regulator;
 - (vii) OptiComm is issued with a competition notice under Part XIB of the *Competition and Consumer Act 2010* (Cth) in respect of the Service, or the Service is declared under Part XIC of the *Competition and Consumer Act 2010* (Cth); or
 - (viii) a Supplier of services to OptiComm which are necessary for the provision of the Services ceases or suspends provision of those services to OptiComm.
- (b) OptiComm will provide the Customer with as much prior notice of the suspension as reasonably possible in the circumstances. OptiComm will recommence providing the Service as soon as reasonably possible after the reason for the suspension has ceased.

6.3 Consequences of Suspension

If a Service is suspended in accordance with clause 6.2, the Customer will not be liable to pay any usage based portion of the Fees for that Service for the period of the suspension and OptiComm will not be liable to pay any rebates under the Service Level Agreement for the period of the suspension.

7 Fees and Payment

7.1 Wholesale Price List

- (a) OptiComm's Service Fees are set out in the Wholesale Price List which is available on the Customer Portal.
- (b) Subject to clause 5.7, OptiComm will provide the Customer with 90 days' written notice of variations to existing Service Fees. Price variations will not occur during the Service Term of a Service other than as set out in clause 5.7.
- (c) The Customer must pay OptiComm all applicable Fees for the Services as set out in the Wholesale Price List. The Customer must pay the Fees monthly in arrears.

7.2 Support Fees

- (a) Fees for support services over and above the Fee for a Service set out in the Wholesale Price List may be levied on the Customer if:
 - (i) more than 5% of the Customer's reported Faults are found to be outside the domain of the Network;
 - (ii) the Customer requests OptiComm to contact an End-user directly to resolve a problem; or
 - (iii) OptiComm visits End-user premises to test a reported Fault and there is no Fault found or the fault is outside the Network.
- (b) Fees for support services are set out in the Wholesale Price List.

7.3 Cancellation Fees

- (a) Subject to subclauses 7.3(c) and (d), if the Customer cancels a Service Order before the Service Date but after OptiComm has performed work in relation to the Service, the Customer must, within 30 days of receipt of an invoice, pay OptiComm for the work performed and reimburse OptiComm for any verifiable third party costs incurred by OptiComm in performing that work.
- (b) Subject to subclauses 7.3(c) and (d), if the Customer terminates a Service during the Service Term, the Customer must pay OptiComm the applicable Service Cancellation Fee within 30 days of receipt of an invoice.
- (c) The Customer is not obliged to pay the charges under subclauses 7.3(a) and (b) if the Customer has cancelled the Service as a result of an unresolved breach of this Agreement by OptiComm.
- (d) The Customer may cancel a Service to migrate to another OptiComm Service, in which case no Service Cancellation Fee will be payable but the Customer will, within 30 days of receipt of an invoice, reimburse OptiComm for any verifiable third party costs incurred by OptiComm in relation to the Service.

7.4 Supplemental Work

- (a) Unless otherwise specified in the applicable Service Order, the Fees set out in the Wholesale Price List do not cover Supplemental Work.
- (b) OptiComm or its nominated contractor will invoice the Customer for Supplemental Work on a time and materials basis at OptiComm's standard rates and the Customer will be required to pay such invoices within 7 days of the date of invoice. OptiComm is not obliged under this Agreement to supply a Service to an End-user until the invoice is paid.

7.5 Invoices

- (a) Unless otherwise agreed, OptiComm will issue a monthly invoice to the Customer for payment of the sum of:
 - (i) the GST exclusive amount of the Fees for each Service relevant to that month;
 - (ii) the GST exclusive amount of any underpayment or overpayment of the Fees paid to OptiComm up until that time;
 - (iii) the GST exclusive amount of any other payment to be made by the Customer to OptiComm (such as any interest payable) or by OptiComm to the Customer in accordance with the Agreement;
 - (iv) subject to clause 8, the amount of GST payable on the sum of clauses 7.5(a)(i), 7.5(a)(ii) and 7.5(a)(iii) above and 7.5(b)(i) and 7.5(b)(ii) below; and
 - (v) the amount of any damages payable by a party to the other party.
- (b) The parties acknowledge and agree that in respect of clause 7.5(a)(i) above:
 - (i) if the invoice is the first invoice for Fees and OptiComm has provided Services in the previous month then in addition to the amount described in clause 7.5(a)(i) above, the invoice will include a GST exclusive amount for the Services provided in that previous month (which amount will represent a prorated adjustment of the GST exclusive amount of the Fees based on the number of days in that month for which the Services are or will be provided); and

- (ii) if the invoice is the last invoice for Fees, the amount of the Fee relevant to the month will represent a prorated adjustment of the GST exclusive amount of the Fees based on the number of days in the month for which the Services will be provided.

7.6 **Payments**

- (a) Subject to clause 7.7, the Customer will pay the amount(s) invoiced by OptiComm in accordance with clause 7.5, no later than 7 days from the invoice date. The Customer will pay any amount due under this Agreement electronically to a bank account nominated by OptiComm, unless otherwise agreed between the parties.
- (b) If the Customer does not pay a bill by its due date, OptiComm reserves the right to charge the Customer, and the Customer agrees to pay:
 - (i) interest at the rate of 3% above the prevailing base rate charged by OptiComm's current bank on overdue charges from the due date until paid;
 - (ii) all reasonable expenses incurred by OptiComm (including reasonable legal costs and expenses and the fees of OptiComm's debt recovery agents) in relation to recovering payments due;
 - (iii) an equal amount to recoup any bank or financial institution fees incurred because the Customer's cheque, credit card payment or direct debit is not honoured.

7.7 **Disputed Amounts**

To dispute an invoice in good faith, the Customer must notify OptiComm in writing. This notice must include detailed reasons for the dispute, and must be issued within 60 days of the invoice date. If the Customer has notified OptiComm of the dispute by the due date for payment, the Customer may withhold only the disputed amounts of the invoice. If the Customer fails to notify OptiComm by the due date the Customer must pay all sums due in full including the disputed amount. OptiComm will use reasonable endeavours to resolve any such dispute quickly and efficiently. Where a dispute is determined to be unfounded, the Customer must pay OptiComm the amount withheld within 7 days of such determination; or where a dispute is determined to be founded and the Customer has already paid the disputed amount, OptiComm will refund the relevant amount within 7 days of such determination.

7.8 **Payment Default**

If the Customer fails to pay any amount due under this Agreement by the due date for payment or withholds an amount from payment in accordance with clause 7.7, which is subsequently agreed or determined to be payable, OptiComm will notify the customer via a Default Notice. If the customer fails to remedy that default within 14 days of receiving the Default Notice, OptiComm will be entitled, in its sole discretion, to:

- (a) reduce the speed of Service(s);
- (b) apply interest at the rate of 3% above the prevailing base rate charged by OptiComm's current bank on overdue charges from the due date until paid;
- (c) be reimbursed for any debt collection expenses incurred by OptiComm in respect of the failure to pay when due; and/or
- (d) take any additional actions as provided under this Agreement, including but not limited to the suspension or termination of Service(s).

8 GST and Other Taxes

8.1 Definitions

Except for defined terms in this Agreement, capitalised expressions set out in this clause 8 have the meaning given to those expressions in the GST Act.

8.2 Payment of GST

If a party makes a Taxable Supply in connection with this Agreement for a Consideration which represents its Value, then the party liable to pay for the Taxable Supply will 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. A party's right to payment under this clause is subject to a valid Tax Invoice being delivered to the party liable to pay for the Taxable Supply.

8.3 Warranty

Each party warrants to the other party that:

- (a) it is registered under the GST Act; and
- (b) it will set out on each Tax Invoice issued by it the total amount of GST payable by it on making the Taxable Supply.

8.4 Adjustment Note

A party will issue an Adjustment Note for or in respect of any Adjustment Event to the other party 5 Business Days prior to the due date for payment (if any) or otherwise, within 10 Business Days of when the party became aware or should have become aware of the Adjustment Event, if there is no payment to be made by the other party.

8.5 Identification of GST

Each party will identify the amount of GST relevant to all pricing and payments.

8.6 Taxes Generally

The cost of any stamp duty or transaction duty in relation to this Agreement will be shared equally by the parties

9 Access and Security

9.1 Access to Residential End-user Premises

- (a) If OptiComm or a Supplier must perform work in an End-user's Premises in order to provide or maintain the Services, OptiComm or the Supplier will:
 - (i) obtain any necessary approvals and permits (including occupant, home owner or landlord consent as applicable) prior to accessing the Premises; and
 - (ii) make and keep to an appointed time with the home owner or builder in accordance with the CSG (if applicable).
- (b) Work referred to in clause 9.1(a) will be performed by OptiComm or the Supplier or their appointed contractor, at the request of the Customer and, unless the work is required because of a fault in OptiComm or the Supplier's Equipment, at the Customer's cost.
- (c) The Customer will provide all necessary assistance to enable OptiComm or the Supplier to meet its obligations in clause 9.1(a).

9.2 Access to Business End-user Premises

- (a) If OptiComm or a Supplier must perform work in a Business End-user's Premises in order to provide the Services, the Customer must procure for OptiComm or the Supplier the following for access to those Premises:
 - (i) the contact details of the relevant site representative;
 - (ii) ensure that access and work is not impeded; and
 - (iii) ensure that OptiComm's or the Supplier's Equipment is protected.
- (b) Prior to accessing the Premises, OptiComm or the Supplier will:
 - (i) obtain any necessary approvals and permits (including occupant or landlord consent as applicable); and
 - (ii) give all necessary notices.
- (c) Work referred to in clauses 9.2(a) and 9.2(b) will be performed by OptiComm, the Supplier or their appointed contractor, at the Customer's request and, unless the work is required because of a fault in OptiComm or the Supplier Equipment, at the Customer's cost.

9.3 Access to Customer's Facilities

In entering, using or accessing any of Customer's Equipment, facilities, premises or personnel, OptiComm must observe all of the Customer's reasonable security, administrative and other requirements and directions, including any training or other requirements relating to occupational health and safety.

9.4 Site Specification

Where it is necessary for OptiComm to install Equipment in the Customer's premises in order to provide a Service, OptiComm will provide the Customer with specifications of the Equipment. The Customer, at its cost, must arrange for all necessary preparatory work to be performed and provide all necessary utility services in order for OptiComm to be able to access, operate and maintain that Equipment.

9.5 Access to the Network

Except where specifically stated in this Agreement, the Customer or its End-user has no right to and will not access or interfere with the Network. The Customer will make all reasonable attempts to prevent the End-user from attempting to access OptiComm or a Supplier's Equipment located on the End-user premises.

9.6 Rights

The rights conferred by OptiComm under this Agreement rest in contract only and nothing in this Agreement creates a tenancy between OptiComm or a Supplier and the Customer or the Customer's End-user, nor does it confer upon the Customer or its End-user any right or interest in:

- (a) the facilities used by OptiComm or a Supplier in providing the Services by way of occupation rights, easements, rights of way or otherwise; or
- (b) OptiComm's, a Supplier's, or any Third Party's Equipment.

10 Credit approval

OptiComm may require credit approval of the Customer:

- (a) if the Customer is a new customer;
- (b) to meet a Supplier's requirements;
- (c) for material increases in monthly billing; and
- (d) from time to time to ensure that OptiComm is satisfied with the Customer's credit rating.

To assess the Customer's credit rating, the Customer consents to OptiComm or a Supplier disclosing to a credit reporting agency personal information relating to the Customer in OptiComm's possession. If OptiComm requires additional information from the Customer to properly assess the Customer's credit rating the Customer must promptly supply this requested information.

11 Security Deposit

11.1 Requirement for security deposits

OptiComm may require a security deposit, or an addition to the Customer's existing security deposit to limit OptiComm's financial risk under this Agreement. If OptiComm requires a security deposit the Customer must provide the security deposit within 14 days of the date of OptiComm's request and in a form acceptable to OptiComm. The value of the security deposit must be equivalent to the amount OptiComm reasonably believe is necessary to secure its exposure under this Agreement, for example 2.5 times the Customer's average monthly billings.

11.2 Application of security deposits

OptiComm may utilise the Customer's security deposit to recover any amounts payable by the Customer to OptiComm or OptiComm may compensate itself for any loss, liability or expense suffered or incurred by OptiComm as a result of any breach of this Agreement by the Customer.

12 Rebates

12.1 Entitlement to rebates

Where the Service is subject to a Service Level Agreement and OptiComm fails to achieve the relevant Service Levels in any one month, the Customer will be entitled to a rebate calculated in accordance with the relevant Service Level Agreement.

12.2 How to claim a rebate

In order to claim a rebate, the Customer must lodge a written claim detailing the incident that gives rise to the claim. OptiComm must receive the written claim within the time frame specified in the Service Level Agreement.

12.3 When rebates do not apply

The Customer is not entitled to a rebate when:

- (a) The Service is not subject to a Service Level Agreement;
- (b) OptiComm achieves the applicable Service Levels in any one month;
- (c) The Customer has any undisputed overdue payments outstanding with OptiComm; or

- (d) failure to achieve the Service Levels is caused directly or indirectly by, or arises from or in connection with:
 - (i) a Force Majeure event;
 - (ii) any act or omission by the Customer or the Customer's agents, employees, contractors, or End-users;
 - (iii) the Customer's or End-user's equipment; or
 - (iv) a suspension or reduction of the Service, allowed under this Agreement.

13 Communications with End-users

13.1 General

OptiComm or a Supplier may communicate and deal with End-users as expressly provided in this Agreement and as otherwise permitted by Law.

13.2 OptiComm or a Supplier communicating with End-users

Subject to clause 13.3, OptiComm or a Supplier may communicate and deal with End-users:

- (i) in relation to goods and services which OptiComm currently supplies or previously supplied to the End-user;
- (ii) as members of the general public or a part of the general public or members of a particular class of recipients of carriage or other services;
- (iii) where OptiComm or the Supplier performs wholesale operations which require communications or dealings with the End-users, to the extent necessary to carry out such operations;
- (iv) in a manner or in circumstances agreed by the parties; or
- (v) in an Emergency, to the extent it reasonably believes necessary to protect the safety of persons or property.

13.3 End-user Initiated Communication

If an End-user initiates a communication with OptiComm:

- (a) in relation to goods and/or services supplied to that End-user by the Customer, OptiComm must advise the End-user that they should discuss any matter concerning the Customer's goods and/or services with the Customer and must not engage in any form of marketing or discussion of OptiComm's goods and/or services;
- (b) in relation to goods and/or services supplied to that End-user by OptiComm, OptiComm may engage in any form of marketing or discussion of OptiComm's goods and/or services; and
- (c) in relation to goods and/or services supplied to that End-user by OptiComm and the Customer, OptiComm must advise the End-user that they should discuss any matter concerning the Customer's goods and/or services with the Customer, but OptiComm may otherwise engage in any form of marketing or discussion of the OptiComm's goods and/or services.

13.4 Records of Communication

- (a) OptiComm will make and maintain records of any communication that OptiComm has with an End-user concerning the Customer's goods or services. OptiComm is not

obliged to provide these records to the Customer except as required in the course of resolving a dispute with the Customer concerning Services to the relevant End-user.

- (b) For the purposes of clauses 13.2 to 13.4, inclusive, a 'communication' includes any form of written or verbal communication.

13.5 Representation

Neither party may represent that:

- (a) it has any special relationship with or special arrangements with the other party;
- (b) a Service has any characteristics or functionality other than as specified in the Agreement or in any specifications or marketing material published in relation to the Service; or
- (c) the other party participates in the provision of the first mentioned party's services, provided that a party may, upon enquiry by an End-user, inform the End-user of the nature of its relationship with the other party.

13.6 Attribution

- (a) Where a party communicates with an End-user of either party, the first mentioned party will not attribute to the other party:
 - (i) blame for a Fault or other circumstance; or
 - (ii) the need for maintenance of a Network; or
 - (iii) the suspension of a Service.
- (b) A party must not engage in any unlawful conduct in observing its obligations under clause 13.6(a).

- 13.7 Any applicable industry standard made by the ACMA pursuant to Part 6 of the Act and any applicable industry code registered pursuant to Part 6 of the Act in relation to communications or dealings with End-users will prevail over the requirements of this clause 13 to the extent of any inconsistency.

14 Force Majeure

14.1 General

- (a) With the exception of payment obligations under the Agreement, a party is excused from performing its obligations under the Agreement to the extent it is prevented from doing so by a Force Majeure event or circumstances.
- (b) A party which is affected by an event of Force Majeure, must promptly and diligently act to mitigate or remove that event and its effect, except that neither party is obliged to settle any strike, lockout, embargo and labour dispute.

14.2 Notice of Force Majeure Event

If a party is prevented from performing an obligation due to a Force Majeure event or circumstances, that party will give notice of the relevant event or circumstances to the other party as soon as reasonably possible, identifying the Force Majeure event or circumstances, the effect it is having and the steps it is taking to minimise that effect.

15 Intellectual Property

15.1 Ownership

As between the parties and unless otherwise specified in this Agreement, the title to all Intellectual Property rights in the Services and Material provided by OptiComm vests with OptiComm.

15.2 Licence

OptiComm hereby grants to the Customer a non-exclusive, non-transferrable licence for the Term to use the Intellectual Property of OptiComm solely for, and to the extent necessary to:

- (a) deliver the Customer's value added services over the Network to End-users; and
- (b) promote the Services in accordance with this Agreement.

15.3 Background IP

Any Intellectual Property rights of a party that came into effect prior to the signing of this Agreement will remain the sole and exclusive property of that party and will not be transferred to the other party unless by written agreement.

15.4 Developed IP

Subject to sub-clause 15.5:

- (a) any Intellectual Property created in the course of this Agreement will be owned by the party who created it ('Developed IP');
- (b) OptiComm hereby grants the Customer a non-exclusive, non-transferrable licence for the Term to use any Developed IP of OptiComm solely for the purpose of receiving the Services; and
- (c) the Customer hereby grants OptiComm and Suppliers a non-exclusive, non-transferrable licence for the Term to use any Developed IP of the Customer solely for the purpose of supplying the Services.

15.5 Modified IP

Any rights in respect of an adaptation based on, or modification of, one party's Intellectual Property by the other party is hereby assigned, on creation, to the first-mentioned party and licensed for use to the other party on the applicable terms set out in clause 15.4.

15.6 Return of Material

Each party must return all materials containing Intellectual Property of the other party in its possession or control to the other party upon the expiration or termination of the Agreement.

15.7 Transmitted Data

Nothing in this clause 15 will affect the rights of the Customer or any Third Party with respect to any data transmitted via the Services.

16 Confidentiality

16.1 Definitions

In this clause 16:

- (a) 'Confidant' means the party to whom the Confidential Information is provided by the Discloser and includes that party's Personnel to whom Confidential Information is provided by the party or by the Discloser.
- (b) 'Discloser' means the party providing the Confidential Information to the Confidant.
- (c) 'Permitted Purpose' means the performance of this Agreement.

16.2 Confidential Information

The Confidant hereby undertakes:

- (a) to keep secret and confidential Confidential Information of the Discloser which has been made available, or which has become known by any means, to the Confidant and to treat the Confidential Information solely as the property of the Discloser;
- (b) to strictly limit disclosure of the Confidential Information of the Discloser to those of its Personnel who require the Confidential Information for the Permitted Purpose;
- (c) that it will make sure that those of its Personnel who receive Confidential Information of the Discloser will be under a duty of confidentiality no less onerous than the obligations imposed by this clause 16.2;
- (d) not to use any of the Confidential Information of the Discloser, or permit it to be used, for any purpose other than the Permitted Purpose;
- (e) not at any time to disclose any of the Confidential Information of the Discloser to any person except as permitted by clause 16.2(b) without the prior written consent of the Discloser;

16.3 Disclosure of Information

The Confidant agrees:

- (a) from time to time as requested by the Discloser to promptly supply the Discloser with a list of any of the Confidant's Personnel to whom any Confidential Information of the Discloser has been disclosed;
- (b) to ensure that each person to whom the Confidential Information of the Discloser has been disclosed complies with the obligations of the Confidant under this Agreement, as if that person were the Confidant; and
- (c) to immediately notify the Discloser in writing if any person discloses or is suspected by the Confidant of disclosing or intending to disclose any of the Confidential Information of the Discloser otherwise than in accordance with this Agreement.

16.4 Disclosure to other Carriers or Carrier Service Providers

- (a) Subject to clause 16.4(b), no Confidant will disclose the Confidential Information of the Discloser to any body corporate (other than the parties involved in this agreement) or that body corporate's Personnel if that body corporate holds, or has applied for, a carrier licence or operates or plans to operate as a carriage service provider under the Act (whether or not that body corporate is providing professional advice to the Confidant) without the Discloser's prior written consent.
- (b) Clause 16.4(a) does not prevent the disclosure of Confidential Information to a Supplier.

16.5 Breach of Confidentiality

The Confidant acknowledges that damages may not be an adequate remedy for any breach by the Confidant of its obligations under this Agreement and that the Discloser will be entitled to seek an injunction or other equitable relief in respect of any actual or threatened breach by

the Confidant of this Agreement without the need for the Discloser to prove any special damage.

16.6 Disclosure required by Law

- (a) The obligations contained in this Agreement will not prevent the disclosure of information:
 - (i) which is required to be disclosed by an order of any court of competent jurisdiction;
 - (ii) which is required to be disclosed pursuant to any Law or regulation or by any Regulator with whose requirements the Confidant is bound to comply; or
 - (iii) which is required to be disclosed in compliance with the requirement of any stock exchange upon which the share of any party or its related corporations are or may be listed.
- (b) If the Confidant is required by Law to disclose all or any part of the Confidential Information of the Discloser and it anticipates or has cause to anticipate that it will or may make such a disclosure, the Confidant must (subject to any overriding contrary legal or stock exchange requirement) immediately notify the Discloser of the actual or anticipated requirement and will use reasonable endeavours to:
 - (i) delay and withhold such disclosure until the Discloser has had a reasonable opportunity to oppose the disclosure by lawful means; and
 - (ii) restrict distribution of the Confidential Information of the Discloser so disclosed to the fullest extent permitted by the relevant Law or order or stock exchange requirement.

16.7 Return of Confidential Information

The Confidant will return to the Discloser the Confidential Information of the Discloser, in whatever medium it is held, which is in its possession or control (including all copies, reproductions, records, extracts and notes) immediately upon request by the Discloser, save that a copy of Confidential Information necessary to be kept to satisfy good corporate practice may be kept for so long as is necessary and to the extent necessary for that purpose.

17 Warranties

17.1 General

Each party represents and warrants to the other party that:

- (a) it has the power to execute this Agreement and all necessary corporate and other action has been taken to authorise that execution;
- (b) this Agreement will be executed on the party's behalf by an authorised signatory and the party's obligations under this Agreement constitute its valid and binding obligations enforceable in accordance with their terms;
- (c) it is duly incorporated under the jurisdiction of its incorporation, with all requisite corporate power and authority to own, lease and operate its assets and to carry on its business as currently owned, leased, operated and conducted; and
- (d) it has not suffered an Insolvency Event.

17.2 Customer Equipment

The Customer warrants that the Customer's Equipment is, where required, approved for use in Australia by the relevant authority (e.g. ACMA) and that it complies with all applicable Laws.

18 Liability and Indemnity

18.1 Customer's Indemnities

The Customer indemnifies OptiComm, and will keep OptiComm fully indemnified, from and against any Loss suffered or incurred by OptiComm in connection with:

- (a) an action or claim brought by the Customer or a Third Party against OptiComm which relates to or arises out of the Customer's (or any of Customer's End-users') use of the Services (including as a result of the transmission of any illegal, misleading or offensive material by the Customer or any of the Customer's End-users);
- (b) if OptiComm uses another supplier in providing the Services, the Customer will indemnify OptiComm for all loss suffered by OptiComm as a result of a claim by the Customer, End-user or a Third Party against the other supplier (excluding claims for death, personal injury or physical damage to tangible property) arising from or in connection with the supply or cessation of supply of the Services; or
- (c) a claim made by any End-user (including a claim based in negligence) in any way related to the Services or this Agreement.

18.2 Mutual Indemnities

Each party indemnifies the other Party for all Loss suffered or incurred by that other party arising from:

- (a) personal injury (including illness and disability) or death; and
- (b) damage to that other party's physical property (up to the value of the damage to the damaged property);

to the extent it is caused directly by the negligence of the indemnifying party in connection with this Agreement.

18.3 Implied Terms

Subject to any applicable Consumer Guarantee, and to the fullest extent permitted by law, all terms, conditions and/or warranties that may otherwise be implied into this Agreement, statutory and otherwise, are excluded.

18.4 Indirect & Consequential Costs

Subject to clause 18.7 and notwithstanding any other provision of this Agreement, neither party will be liable to the other party (whether in contract, tort (including negligence) under statute or an indemnity or otherwise) for any Consequential Loss suffered or incurred under or in connection with the Services or this Agreement.

18.5 Limitation of liability

- (a) Subject to clause 18.7, and except to the extent that the Customer is entitled to any greater remedy for any breach by OptiComm of an applicable Consumer Guarantee, the aggregate liability of each party to the other party in each calendar year for all Loss (including, in OptiComm's case, any rebate payable under the Service Level Agreement) suffered or incurred under or in connection with this Agreement is limited to the amount of the Fees paid or payable to OptiComm by the Customer in that calendar year.
- (b) Except to the extent that the Customer is entitled to any greater remedy for any breach by OptiComm of an applicable Consumer Guarantee, the liability of OptiComm for breach of an applicable Consumer Guarantee is limited, at the option of OptiComm, to any one or more of the following:
 - (i) if the breach of Consumer Guarantee relates to Goods:

- (A) repair of the Goods or the payment of the costs of having the Goods repaired; or
- (B) the replacement of the Goods, the provision of new Goods or the payment of the cost of replacing or acquiring equivalent Goods; and
- (ii) if the breach of Consumer Guarantee relates to Services:
 - (A) provision of the Services again; or
 - (B) the payment of the costs of having those Services supplied again.

18.6 **Duty to mitigate Loss**

Each party must use reasonable endeavours to mitigate any Loss suffered by it under or in connection with this Agreement and a claim for Loss will be reduced to the extent that this is not done.

18.7 **Exceptions**

The limitations of liability in clauses 18.4 and 18.5(a) do not extend to any liability of a party:

- (a) which it cannot lawfully limit or exclude by contract;
- (b) for loss or damage to Third Party property;
- (c) for infringement of Intellectual Property rights or unauthorised disclosure of Confidential Information;
- (d) for repudiation of its obligations under this Agreement;
- (e) for personal injury or death; or
- (f) for the party's breach of any Law.

18.8 **Service Levels**

Where a Service Level Agreement applies to a Service, to the extent permitted by law, OptiComm's total liability to the Customer in relation a failure of the Service is limited to any applicable rebates under the Service Level Agreement.

19 **Termination of Agreement**

19.1 **General**

- (a) A party may terminate this Agreement in whole:
 - (i) by giving the other party no less than 6 months' written notice;
 - (ii) if the other party breaches any material provision of this Agreement and fails to remedy the breach within 30 days of receiving written notice requesting it to do so;
 - (iii) if required to do so pursuant to the Act, any other Law, or by a Regulator;
 - (iv) if an Insolvency Event occurs in relation to the other party;
 - (v) under clause 19.2;
 - (vi) if OptiComm has exercised a right under and in accordance with this Agreement to suspend all of the Services and the grounds for suspension have not been rectified within 30 days of the date of suspension; or

- (vii) in the case of termination by OptiComm, if a supplier ceases supply of a services or good including but not limited to network access that is necessary for OptiComm's supply of Services.
- (b) This Agreement will automatically terminate when all Services under the Agreement have expired or been terminated.
- (c) For the purposes of clause 19.1(a)(ii), a provision of this Agreement requiring a party to pay money is a material provision.

19.2 Force Majeure

A party may terminate this Agreement with immediate effect from the date of service of a notice, or a later date specified in the notice, if a Force Majeure event significantly affects the other party's ability to perform its obligations (other than an obligation to pay money) under this Agreement for a continuous period of more than 6 months.

19.3 Consequences of Termination

- (a) Termination of this Agreement will not:
 - (i) affect, and is without prejudice to, any rights or remedies of a party that have accrued prior to or as a result of termination of this Agreement;
 - (ii) operate as a waiver of any breach of this Agreement by a party;
 - (iii) affect any indemnity given by a party under this Agreement, each of which will survive the expiry or termination of this Agreement, or any other clause of this Agreement that is expressed to survive the termination or expiry of this Agreement; or
 - (iv) affect clauses 7, 15, 16, 17 and 18 each of which will survive the expiry or termination of this Agreement.
- (b) On termination of this Agreement the Customer will:
 - (i) in respect of any Equipment supplied by OptiComm, other than by sale:
 - (A) immediately cease, or as applicable procure its End-users to cease, using that Equipment; and
 - (B) permit, or procure permission for, OptiComm to access the premises where that Equipment is located for the purpose of removing that Equipment and not hinder OptiComm in carrying out that purpose; and
 - (ii) in respect of any other Equipment used by the Customer in order to utilise a Service, disconnect that Equipment from the Network and promptly do all things reasonably required by OptiComm to enable OptiComm to disconnect that Equipment from the Network and, where applicable, remove it from the vicinity of the Network.

20 Notices

20.1 Notices to be in writing

Any notice given under this agreement must be in writing and must be signed by the Party giving the notice or any Authorised Officer of that Party. Communications sent by email are taken to be signed by the named sender.

20.2 Address for notices

- (a) OptiComm's address and facsimile number for notices are:

Name: OptiComm Ltd
 Attention: RSP Manager
 Address: Level 1, 22 Salmon Street, Port Melbourne VIC 3207
 Email: RSP@opticomm.net.au

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

Name: _____
 Attention: _____
 Address: _____
 Email: _____

- (b) A party may change its address, facsimile number or email address by giving notice of that change to the other party.

20.3 Effective time for notices

- (a) Unless a later time is specified in a notice, the notice takes effect from the time it is received.
- (b) A notice is taken to be received:
- (i) if delivered by hand, when so delivered;
 - (ii) if sent by pre-paid post, on the second clear Business Day after the date of posting;
 - (iii) if sent by email:
 - (A) when the sender receives an automated message confirming delivery; or
 - (B) four hours after the time sent (as recorded on the device from which the sender sent the email) unless the sender receives an automated message that:
 - (I) the email has not been delivered; or
 - (II) that the recipient is "out of the office" or equivalent; or
 - (iv) if sent by facsimile, upon the receipt by the sender of a transmission report from the despatching facsimile machine which confirms that all of the pages comprised in the notice have been successfully sent to the receiving Party's facsimile number.

21 Dispute Resolution

21.1 General

If there is a dispute, difference, controversy or claim (other than a failure by the Customer to pay an invoice in accordance with clause 7) arising out of or in connection with this Agreement or the breach, rectification, termination, frustration or invalidity thereof, ('dispute') the parties will use their reasonable endeavours to resolve the dispute in accordance with this clause 21. Neither party will resort to legal proceedings, except for urgent interlocutory relief, until the process outlined in this clause 21 has been complied with.

21.2 Notice of Dispute

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

- (a) state that it is a notice given pursuant to this clause 21;
- (b) adequately describe the particulars of the alleged dispute including if relevant the amount of the dispute; and
- (c) be signed by a director, executive or equivalent of the party.

21.3 Minor Disputes

If the amount in dispute is less than or equal to \$100,000 and the dispute cannot be resolved by negotiation, the dispute will be settled by the final and binding decision of an expert appointed by agreement between the parties, or failing agreement appointed by the Chairperson of the Institute of Arbitrators and Mediators, Australia. The cost of the expert will be shared equally by the parties.

21.4 Major Disputes

If the amount in dispute is \$100,000 or more, the parties will attend at least one meeting to discuss the dispute within 5 Business Days of the notification of the dispute. If the dispute cannot be solved by negotiation within that period, the parties will confer within a further 5 Business Days in order to ascertain whether they agree that the dispute will be referred to the process set out in clause 21.3.

21.5 Litigation

If a dispute to which clause 21.4 applies cannot be resolved in accordance with the procedure set out in that clause 21.4, then either party may commence legal proceedings in relation to the dispute.

21.6 Expert Determination

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

21.7 Conduct of Disputes

Unless agreed otherwise, all dispute resolution proceedings will be conducted in Melbourne, Victoria.

21.8 Continuing Performance

Despite the existence of a dispute, the parties will continue to perform their respective obligations under the Agreement, other than to the extent prevented by the nature of the dispute.

22 General

22.1 Governing Law

This Agreement is governed by the Laws of Victoria. The parties submit to the non-exclusive jurisdiction of the courts of Victoria and the Federal Court of Australia. The rights of a party under the Agreement are cumulative and not exclusive of any rights provided by Law.

22.2 Severance

If any provision of this Agreement is illegal or unenforceable the, to the extent possible, it will be severed from this Agreement and the remaining provisions of this Agreement will continue in force.

22.3 Entire Agreement

This Agreement:

- (a) contains the entire agreement between the parties on its subject matter; and
- (b) supersedes any prior agreement, representations or understanding on the subject matter of this Agreement.

22.4 Assignment and Waiver

- (a) A party will not assign, novate or otherwise transfer this Agreement or any right or obligation under this Agreement without the prior written approval of the other party, which will not be unreasonably withheld.
- (b) A party's failure or delay to exercise a power or right does not operate as a waiver of that power or right. Waiver of a power or right is effective only:
 - (i) in respect of the specific instance to which it relates;
 - (ii) for the specific purpose for which it is given; and
 - (iii) if it is given in writing.
- (c) The exercise of a power or right does not preclude either its exercise in the future or the exercise of any other power or right.

22.5 Variation

No variation of this Agreement will be valid unless it is in writing and signed by each of the parties to this Agreement.

22.6 Public Announcements

- (a) Unless permitted under this Agreement or required by Law or by the rules of any stock exchange, no announcement, communication or other disclosure relating to the Network or the subject matter of this Agreement will be made by either party to any person who is not a party to this Agreement without the prior written consent of the other party.
- (b) If an announcement, communication or other disclosure referred to in this clause 22.6 is required by Law or the rules of any stock exchange, the party making it will use reasonable endeavours to agree upon the terms of the announcement, communication or other disclosure with the other party prior to it being made.

22.7 Costs

Each party must pay its own costs in relation to:

- (a) the negotiation, preparation, execution, performance, amendment or registration of the Agreement, or any consent given or made under the Agreement; and
- (b) the performance of any action by that party in compliance with any obligation or liability arising under the Agreement,

or other document executed or effected under the Agreement, unless expressly provided otherwise by the terms of this Agreement.

22.8 Further Assurance

Each party must execute any document and perform any action necessary to give full effect to the Agreement, whether before or after performance of the Agreement.

22.9 Relationship

The relationship of the parties is one of independent contractors and nothing in this Agreement will constitute a party as the employee, partner, agent, representative, trustee or joint venturer of the other party.

22.10 Counterparts

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

23 Definitions and Interpretations

23.1 Definitions

In this Agreement:

ACCC means the Australian Competition and Consumer Commission.

Acceptable Use Policy means the document in Annexure C.

ACMA means the Australian Communications Media Authority.

Act means the *Telecommunications Act 1997* (Cth).

Agreement means the documents listed in clause 1.2 as amended from time to time.

Approval means any approval, permit, license, registration, consent or authorisation of any other kind required by Law, by a Regulator or by the owner and/or lessor.

Business Day means any day except Saturdays, Sundays and gazetted public holidays observed in the place where an act is to be performed or a payment is to be made.

Business End-user means an End-user that is acquiring a Service for business use.

Business Hours means the hours between 9.00am to 5.00pm on a Business Day at the place where the Services are to be provided, unless specified otherwise.

Carrier has the meaning given to that term under the Act.

Confidential Information means any information which is disclosed to a party (**Recipient**) by the other party (**Discloser**), or which is acquired or observed by the Recipient, in connection with this Agreement or the Network and includes the contents of this Agreement, the nature, extent and scope of the Services, information relating to technology, processes, products, samples, drawings, plans, specifications, inventions and designs used, developed or produced by or on behalf of one or both of the parties and trade secrets and know-how and information of a commercially sensitive nature (including, financial information, business and marketing plans, projections and formulae and any geological, processing and engineering information, results, interpretations, reports and analyses), but does not include any information which is in, or comes into, the public domain otherwise than by disclosure in breach of the terms of this Agreement.

Consequential Loss means:

- (a) loss of revenue, loss of profits, loss of anticipated savings or business, pure economic loss, loss of data, loss of value of equipment (other than cost of repair), loss of opportunity or expectation loss and any form of consequential, special, indirect, punitive or exemplary loss or damages; and
- (b) any penalties or fines imposed by a Regulator.

Consumer Guarantees means the consumer guarantees set out in Division 1 of Part 3-2 of the Australian Consumer Law.

Consumer Protection Act means the *Telecommunications (Consumer Protection and Service Standards) Act 1999* (Cth).

Critical Fault is defined in the Service Level Agreement.

CSG means the *Telecommunications (Customer Service Guarantee) Standard 2011* made under the Consumer Protection Act.

Customer Portal means a secure site on OptiComm's website that the Customer may access.

Default Notice means a Notice that provides details of the other party's breach of or default under the Agreement.

Emergency means an emergency due to an actual or potential occurrence (such as fire, flood, storm, earthquake, explosion, accident, epidemic or war like action or other Force Majeure event) which endangers or threatens to endanger the environment, the integrity of the Network, the safety or health of persons, or destroys or damages or threatens to destroy or damage property.

End-user means a person to whom the Customer on-sells one or more Services.

Equipment means any device, electronic or otherwise, which is used in the delivery or consumption of the Service.

Fault has the meaning given to it in respect of a particular Service, as set out in the Service Level Agreement.

Fees mean the fees and charges that are set out in the Wholesale Price List or as otherwise advised to the Customer by OptiComm.

Force Majeure means an event or circumstance beyond the reasonable control of the party claiming force majeure, including act of God, fire, flood, storm, tempest or wash away or high sea inundation, radioactive contamination, act of war (whether declared or not), terrorism, revolution or act of public enemies, riot or civil commotion, strike, stoppage, ban, limitation on work or restraint of labour and, in the case of OptiComm, includes any Third Party damage to the Network and any suspension or failure by a Third Party to supply goods or services.

GST Act means the *Tax System (Goods and Services Tax) Act 1999* (Cth)

Insolvency Event means in respect of a party, being insolvent under administration or insolvent, or having a controller appointed, or being in receivership or receivership and management, in liquidation, in provisional liquidation, under administration, wound up, subject to any arrangement, assignment, or composition, protected from creditors under any statute, dissolved, or otherwise unable to pay its debts when they fall due (with each of the expressions used in the clause having the meaning given under the *Corporations Act 2001* (Cth)).

Intellectual Property means all statutory, civil and common law, and other proprietary rights (including rights to require information be kept confidential), whether registered or not or capable of registration or not, and including all applications and the right to apply for any registrations in respect of inventions, copyright, trade marks, designs, patents, circuit layouts, know-how, trade secrets and all other rights as defined by Article 2 of the Convention establishing the World Intellectual Property Organisation of July 1967;

Intervening Event means any of the following that materially adversely affects the supply of a Service by OptiComm:

- (a) any change in a Law, including:
 - (i) amendments to or repeals of any part of any statute, ordinance, code or Law including the Act, the *Competition and Consumer Act 2010* (Cth) or the introduction of a new statute, ordinance, code, standard or law;
 - (ii) a directive of, or determination by, a Regulator; registration or determination of a new industry code or industry standard under the Act, or amendments to or repeals of any existing code or industry standard;
 - (iii) the issue by the ACCC of a Competition Notice (as defined in section 151AB of the *Competition and Consumer Act 2010* (Cth) which affects any Services or the subject matter of the Agreement, (or where OptiComm reasonably considers that the ACCC is likely to issue a Competition Notice);

- (iv) the determination, addition, variation or removal of a Service Provider Rule (as defined by section 98 of the Act) applicable to OptiComm or any Third Party provider;
 - (v) the grant of an injunction against OptiComm in relation to a breach or alleged contravention of any Law; and
 - (vi) an amendment, declaration, addition, variation or removal of a condition to OptiComm's carrier licence; or
- (b) any material increase in fees or charges of a Third Party supplying goods or services to OptiComm.

Law means any applicable statute, regulation, by-law, ordinance or subordinate legislation in force from time to time in Australia, whether made by a State, Territory, the Commonwealth, or a local government, and includes the common law and rules of equity as applicable from time to time.

Loss means any loss, damage, cost, interest, tax, expense, debt, fee, penalty, fine, forfeiture, assessment, liability or damages suffered or incurred by a person;

Major Fault is defined in the Service Level Agreement.

Master Services Agreement Signature Form means the 'Master Services Agreement Signature Form' signed by each of OptiComm to the Customer to formalise execution of this Agreement.

Material any software, firmware, documented methodology or process, documentation or other material in whatever form, including any reports, specifications, business rules or requirements, user manuals, user guides, operations manuals, training materials and instructions, and the subject matter of any category of Intellectual Property rights.

Network has the same meaning as 'telecommunications network' as defined in the Act and, for the purposes of this Agreement specifically means the telecommunication facilities used by OptiComm to provide Services including facilities and networks owned by Suppliers.

Notice means a notice, demand, consent, Approval or communication issued under this Agreement.

Personnel of a party or person means that party or person's employees, officers, agents, contractors, professional advisers or other representatives.

Premises means any land together with its building(s) used as a place of business or residence.

Regulator means ACMA, ACCC, Communications Alliance Ltd, Communications Compliance Ltd, the Telecommunications Industry Ombudsman or any other government or statutory body or authority.

Residential End-user means an End-user to whom the Customer is on-selling a Service for personal, domestic or household use by the End-user.

Service(s) means the services to be provided by OptiComm to the Customer as described in a Service Order.

Service Cancellation Fee means the Fee which may be payable if the Service is cancelled prior to the end of the Service Term and is to be calculated as 70% of the monthly Fees for the remaining period of the Service Term which the parties agree is a genuine estimate of the loss that OptiComm incurs as a result of the early cancellation.

Service Date means the date that OptiComm commences providing the relevant Service to the Customer, or is deemed to do so.

Service Delivery Point means the point at which a Service is made available for connection to the Customer's Equipment or cabling.

Service Level Agreement means the relevant agreement nominated for a particular Service as set out in Annexure A that details the service levels in respect of that Service and the consequences if those service levels are not met.

Service Order means a written order established between the parties in accordance with clause 5.4.

Service Request means a request from the Customer for the provision, variation or cancellation of a Service provided by OptiComm, made in accordance with clause 4.

Service Schedule means the schedule of terms applicable to a particular type of Service set out in the Customer Portal.

Service Term means the period that commences on the Service Date and specified in a Service Order for which OptiComm agrees to supply a Service to the Customer. If no Service Term is specified then it is 12 months.

Supplemental Work is defined in clause 5.5(a).

Supplier means a carrier that provides wholesale services to OptiComm that are used in the provision of Services to the Customer.

Tax Invoice has the meaning given to that term in the GST Act.

Term means the period commencing on the Execution Date and continuing until such time as the Agreement is terminated in accordance with clause 19.

Third Party means a person who is not a party to this Agreement.

we, us, or our means OptiComm.

Wholesale Price List means the list of OptiComm's Fees and charges under this Agreement set out in the Customer Portal.

you or your means the Customer.

23.2 Interpretation

In this Agreement:

- (a) headings are for convenience only and do not affect interpretation, and, unless the contrary intention appears:
- (b) undefined words and expressions if defined in the Act have the same meaning as in the Act;
- (c) a reference to any legislation or any provision of any legislation includes a reference to any modification or re-enactment of, or any provisions substituted for, such legislation or provisions;
- (d) if a corporation, authority, institute or association or other body referred to in this Agreement (other than a party to this Agreement) is reconstituted, renamed or replaced or if its powers or functions are transferred to another entity, this Agreement is deemed to refer to that new entity;
- (e) if a corporation, institute or association or other body referred to in this Agreement (other than a party to this Agreement) ceases to exist, the Agreement is deemed to refer to that entity which serves substantially the same purpose or objects as the former entity;

- (f) a reference to a clause, schedule or annexure is a reference to a clause, schedule or annexure to this Agreement and a reference to this Agreement includes any schedule or annexure;
- (g) a reference to any document or instrument includes the document or instrument as amended, novated, supplemented or replaced from time to time;
- (h) the singular includes the plural and vice versa;
- (i) a word denoting a gender includes all genders;
- (j) a reference to a person includes a corporation, firm association, joint venture, unincorporated body, partnership, authority, government or governmental authority or other entity;
- (k) examples are illustrations only and do not limit general words;
- (l) the words 'includes', 'including' and similar expressions are not words of limitation;
- (m) where an expression is defined, another part of speech or grammatical form of that expression has a corresponding meaning;
- (n) a provision of this Agreement must not be construed to the disadvantage of a party merely because that party was responsible for the preparation of the Agreement or the inclusion of the relevant provision in the Agreement;
- (o) if an act must be done on a specified day, which is not a Business Day, it must be done instead on the next Business Day;
- (p) money is in Australian dollars; and
- (q) all lump sums and rates stated in this Agreement (including each Service Order) will be deemed not to include GST, unless expressly stated otherwise.

Executed as an agreement

Signed for and on behalf of **OptiComm Ltd**
ACN 117 414 776 by its duly authorised
representative:

Authorised Representative

Name
(BLOCK LETTERS)

Date

Signed for and on behalf of **XXXXXXXXXXXX**
ACN XXX XXX XXX by its duly authorised
representative:

Authorised Representative

Name
(BLOCK LETTERS)

Date

Annexure A – Service Level Agreement

1 Definitions

This Service Level Agreement forms part of the Master Services Agreement between OptiComm and the Customer. In this Service Level Agreement, the following terms have the following meanings. All other capitalised terms are defined in the Master Services Agreement.

Connection Fee: All applicable Connection Fees are set out in the Wholesale Price List.

Consumer Protection Act means the *Telecommunications (Consumer Protection and Service Standards) Act 1999* (Cth).

Critical Fault is defined in paragraph 4.3.

CSG means the *Telecommunications (Customer Service Guarantee) Standard 2011* (Cth) made under the Consumer Protection Act.

CSG Service means a standard telephone service supplied by the Customer to an End-user over the Network, as defined in the *Consumer Protection Act* and referred to in paragraph 8 of this Annexure.

External Plant Facility means a facility that is not located in a telephone exchange and is accessible by a carriage service provider for the purpose of connecting an End-user customer to a telecommunications service, where 'facility' means:

- (a) any part of the infrastructure of a telecommunications network; or
- (b) any line, equipment, apparatus, tower, mast, antenna, tunnel, duct, hole, pit, pole or other structure or thing used, or for use, in or in connection with a telecommunications network.

In Close Proximity: The site at which the Customer requests a specified Service to be connected is In Close Proximity when:

- (a) the site is in close proximity to an External Plant Facility used to supply the Service; and
- (b) the External Plant Facility has sufficient capacity available to supply the Service when the request is made.

This would tend to mean the external cable plant is installed in a communications pit at or near the property boundary.

In Place Connection: The site at which the Customer requests a specified Service to be connected has an In Place Connection when:

- (a) all External Plant Facility and the network termination device are installed at the site; and
- (b) the External Plant Facility has sufficient capacity available to supply the Service when the request is made.

Major Fault is defined in paragraph 4.3

Minor Fault is defined in paragraph 4.3.

Non-CSG Service means any OptiComm Service other than a CSG Service.

Not Readily Accessible: The site at which the Customer requests a specified Service to be connected is Not Readily Accessible when the site is not In Close Proximity to available

External Plant Facility and infrastructure, or the External Plant Facility or infrastructure has no spare capacity.

Primary Damages has the meaning given to this term in section 118A of the Consumer Protection Act.

Service Levels means the service levels for the Services set out in the Wholesale Price List.

2 Applicable Services

This Service Level Agreement applies to the provision of the Non-CSG Services set out in the Wholesale Price List.

3 Fault Management

3.1 Network Monitoring

OptiComm will monitor the Network and seek to identify any Fault as early as reasonably possible.

4 Fault Reporting

4.1 Prior to reporting a Fault

Prior to logging a Fault with OptiComm, the Customer must provide the End-user with the following 'level 1' helpdesk assistance for the problem or Fault in question:

- (a) if the Customer suspects that a Fault has occurred or is likely to occur or the Service is not available, the Customer will:
 - (i) assist the End-user in diagnosing any problem which may exist with the End-users' own equipment;
 - (ii) complete a diagnostic check of its own internal equipment to ensure that the Fault is not due to its own internal systems; and
 - (iii) conduct some preliminary investigation of the problem using tools provided by OptiComm.

After providing this 'level 1' support, the Customer may then report the Fault to OptiComm in accordance with the fault reporting methods in the following table or as set out in OptiComm's operational manual or website.

Method	Contact Details	Purpose
By Email	noc@opticomm.net.au	The preferred method for all Minor and Major Faults as defined in paragraph 4.3.
By Phone	1800 665 217	Only for Major or Critical Faults as defined in paragraph 4.3

When identifying the Fault, the Customer must provide OptiComm with the following information.

- (b) the Customer's name and contact;

- (c) the Service ID affected by the Fault; and
- (d) a description of the Fault.

Each time a Fault is reported by the Customer, OptiComm will issue the Fault a unique identifier (Trouble Ticket), which will be:

- (e) logged by OptiComm; and
- (f) quoted by the parties for all future references.

This is to assist with the management of the Fault and for future analysis and reporting.

OptiComm reserves the right to charge the Customer for costs incurred in the event that OptiComm is called to either the Customer's or its End-user's site regarding a Fault that is:

- (g) subsequently proven to be with the Customer's or End-user's equipment; or
- (h) caused by negligent use or misuse of the Service or equipment by the Customer, its employees agents, suppliers, End-users or other third parties.

4.2 Accepting and Managing Faults

OptiComm will operate a call centre for the logging of Faults and a network management centre for the monitoring and management of Faults, which will be contactable via the assigned number 24-hours a day. OptiComm's target is to answer all calls, by a person, within one minute.

If the Customer notices that its Service is being interrupted or degraded and the Customer lodges a Fault call, then OptiComm will communicate with the Customer as follows or as otherwise agreed with the Customer throughout the process:

Communications Type	Description	Timing
Receipt of Call	Upon receipt of the call, confirm with Customer if there is a Fault. Issue is to be logged for resolution by the call centre.	While Customer is on the phone.
Response	Initial notification to advise Customer of progress and the latest expectation of a resolution process or time frame.	Target within 30 minutes of the issue being logged, unless OptiComm has agreed with Customer otherwise.
Resolution	Advice to Customer that the issue has been resolved.	As soon as practical and with consideration of the Customer's requirements as advised to the call centre.

4.3 Fault Classification

The following table gives a description of the Fault classifications by OptiComm:

Fault Priority	Fault Description	Update Method
Critical Fault	There is a Fault which is affecting all of the Customer's Services for a particular state (e.g. Queensland) and there is a risk of recurrence. For example a complete outage of a point of interconnect would be deemed a Critical Fault, or where a significant	Phone or email

Fault Priority	Fault Description	Update Method
	number of end-users are impacted by the Fault	
Major Fault	There is a Fault which is affecting a significant number of the Customer's Services and there is a risk of recurrence. For example an outage of a broadband aggregation node supporting a number of buildings would be deemed a Major Fault.	Phone or email
Minor Fault	There is a Fault which is affecting service to a single or small number of the Customer's Services.	Phone or email

4.4 Escalation

Fault escalation will be activated by contacting the relevant party during the hours and on the contact details set out below.

OptiComm will assign a Fault priority in its sole discretion in accordance with paragraph 4.3 above.

As soon as it becomes apparent that the Response Time, Repair Time or Update Time may be exceeded, the Customer may at its own discretion escalate the Fault in accordance with the following table.

The aim of escalating the Fault is to ensure that adequate and appropriate resources are applied to the Fault.

Escalation	Time at which escalation can occur	Position of Action
Level 0	At the time when the Fault was initially logged	Network Management Centre (NMC)
Level 1	(a) Immediately when a Major Fault occurs; or (b) at the time when 100% of the Resolution Time for a Minor Fault has expired and the Fault is still outstanding.	Network Operations Manager
Level 2	(a) Immediately when a Critical Fault occurs; or (b) at the time when 200% of the Resolution Time for a Minor Fault and the Fault is still outstanding.	General Manager, Operations

5 Performance Reporting

Due to the nature of Services offered, OptiComm does not provide any regular reporting of the end-to-end performance of the Customer's Services.

6 Planned Outages

OptiComm may conduct maintenance on the Network at any time where in OptiComm's opinion it is necessary to carry out work on its facilities, network, or systems (including but not

limited to installation of infrastructure, maintenance and upgrade) to ensure optimum operation of the Network.

OptiComm will endeavour to schedule such maintenance, where it may adversely affect delivery of the Services, outside normal Business Hours. OptiComm will provide notice to the Customer of scheduled maintenance within the following time periods:

Classification	Description	Notice Period
Non Service Affecting	Work that is not intended to impact the Services, but may have a small risk to the Customer.	5 Business Days
Service Affecting	Work that will impact the Services.	10 Business Days
Urgent	Work that requires urgent attention, which if left unattended will have a Critical impact on the Services.	48 hours

7 Service Levels

7.1 Products and Service Levels

The Services and their respective service level categories and Service Levels are specified in the Wholesale Price List, which OptiComm may update and re-issue to the Customer from time to time.

7.2 Connection Guarantee

OptiComm will deliver all Services within the following timeframes based on the availability of telecommunication infrastructure:

- (a) where an In Place Connection exists, the Service will be made available to the Customer by the end of second Business Day from OptiComm's acceptance of the applicable Service Order;
- (b) where infrastructure is In Close Proximity, the Service will be made available to the Customer within five Business Days from OptiComm's acceptance of the applicable Service Order by or as otherwise agreed; and
- (c) where infrastructure is Not Readily Accessible, the Service will be made available to the Customer by a date which is mutually agreed between OptiComm and the Customer.

7.3 Compensation for a Non-CSG Service

Subject to paragraphs 7.4 and 7.5 and any target availability set out in the Wholesale Price List, if OptiComm fails to meet a specific area of performance within an applicable service level for a Non-CSG-Service the Customer will be entitled to the following rebates:

Service Category	Area of Performance	Compensation
Bronze	Target Availability	Nil
	Service Connection	100% of Connection Fee, if not delivered by agreed date in accordance with paragraph 7.2.
	Service Variation	100% of Connection Fee, if not delivered by agreed date in accordance with the applicable Service

Service Category	Area of Performance	Compensation		
		Levels.		
	Fault Restoration	Nil		
	Latency	Nil		
	Packet Loss	Nil		
Silver	Target Availability	Nil		
	Service Connection	100% of Connection Fee, if not delivered by agreed date in accordance with paragraph 7.2		
	Service Variation	100% of Connection Fee, if not delivered by agreed date in accordance with the applicable Service Levels.		
	Fault Restoration	5% of monthly service Fee if not restored by end of 2 nd Business Day	10% of monthly service Fee if not restored by end of 3 rd Business Day	25% of monthly service Fee if not restored by end of 5 th Business Day
	Latency	Nil		
	Packet Loss	2.5% of monthly service Fee if more than 0.01% but less than 0.1%	5% of monthly service Fee if more than 0.1% but less than 0.5%	7% of monthly service Fee if more than 0.5%
Gold	Target Availability	Nil		
	Service Connection	100% of Connection Fee, if not delivered by agreed date in accordance with paragraph 7.2		
	Service Variation	100% of Connection Fee, if not delivered by agreed date in accordance with the applicable Service Levels.		
	Fault Restoration	5% of monthly service Fee if less than 60 minutes past restoration target	10% of monthly service Fee if more than 60 min. but less than 240 min. past restoration target	25% of monthly service Fee if more than 240 minutes past restoration target
	Latency	Nil		
	Packet Loss	5% of monthly service Fee if more than 0.01% but less than 0.1%	7% of monthly service Fee if more than 0.1% but less than 0.5%	10% of monthly service Fee if more than 0.5%

7.4 Ineligible for Compensation

The Customer is not eligible for compensation under paragraph 7.3 if:

- (a) OptiComm is not in a position to avoid an event or occurrence which caused the non-compliance with the Service Level due to acts or omissions of a third party, the Customer, the End-user or a Force Majeure event;
- (b) the Customer has been notified by OptiComm of a planned outage which, in OptiComm's sole opinion, is required to maintain the Network at an optimum operating performance;
- (c) the End-user has not cooperated with OptiComm or its agents and denied access to the Customer's premises; or
- (d) delays are due to the need for OptiComm to comply with the Law.

7.5 Claiming Compensation

The payment of a rebate is conditional on the Customer notifying OptiComm of the non-compliance within 3 months of the relevant issue and the amount of rebate and whether a rebate is payable will be determined by OptiComm in its sole discretion, acting in good faith.

8 Customer Service Guarantee

8.1 Requirements by Law

Where a CSG Service is supplied by resale, the Customer (as the carriage service provider) is liable to the End-users with respect to the CSG, even though the liability may ultimately rest with OptiComm (as the underlying network provider). The Consumer Protection Act enables a carriage service provider that is liable to pay compensation under the CSG penalty to recover some or all of the compensation that it has paid to an End-user from another provider where the acts or omissions of the other provider were wholly or partly the cause of the failure to comply with the CSG.

8.2 Connection Guarantee

OptiComm will deliver a CSG Service within the following timeframes based on availability of telecommunication infrastructure:

- (a) where an In Place Connection exists, the Service will be made available to the Customer by the end of second Business Day from OptiComm's acceptance of the applicable Service Order;
- (b) where infrastructure is In Close Proximity, the Service will be made available to the Customer within five Business Days from OptiComm's acceptance of the applicable Service Order or as otherwise agreed; and
- (c) where infrastructure is Not Readily Accessible, the Service will be made available to the Customer by a date which is mutually agreed between OptiComm and the Customer.

8.3 Repair Guarantee

If the site for a Service is in an urban centre with a population equal to or greater than 10,000 people, OptiComm will repair a CSG Service by the end of the first full Business Day after it receives the report of a Fault from the Customer.

If the site for a Service is an urban centre with a population less than 10,000 people OptiComm will repair a CSG Service by the end of the second full Business Day after it receives the report of a Fault from the Customer.

For clarification, a Fault logged after 5:00pm will be deemed to be logged the following day.

8.4 Appointment Guarantee

If OptiComm requires access to End-user premises to install or repair a Service, OptiComm will offer to meet the End-user onsite as follows:

- (a) for Residential End-users, appointments will be set between two particular times of the day that are not more than five hours apart. Nominally this is either 8:00am to 12:00pm or 12:00pm to 4:00pm; or
- (b) for Business End-users, appointments will be set for a particular time of day with a 30 minute window, between the hours of 8:00am and 4:00pm.

OptiComm may change an appointment by giving reasonable notice of the change (typically no less than 24 hours) or by obtaining agreement to the change with the Customer or End-user.

8.5 Compensation Protection

Subject to paragraphs 8.7, 8.8 and 8.9, if the Customer has paid Primary Damages to an End-user in connection with a contravention of the CSG for that End-user's Service within the time frames prescribed by the CSG:

- (a) if the contravention is wholly attributable to OptiComm's acts or omissions, OptiComm will pay the Customer an amount equal to the Primary Damages; or
- (b) if the contravention is partly attributable to OptiComm's acts or omissions, OptiComm will pay the Customer an amount that is attributable to OptiComm's acts or omissions (but not exceeding the Primary Damages).

8.6 Special Offers under the CSG

The CSG provides that the Customer (or its End-user) may agree to accept an offer that specifies a connection date after the end of the guaranteed maximum connection period, provided that the special offer complies with certain consumer safeguards. The consumer safeguards that OptiComm must comply with when making a special offer to the Customer (or its End-user) are set out in section 9 of the CSG. The CSG is intended to ensure that, as far as possible, OptiComm is allowed to initiate service offerings that provide significant benefit to customers.

8.7 Ineligible for CSG Protection

The Customer is not eligible for CSG compensation protection from OptiComm under paragraph 8.5 if:

- (a) the payment of Primary Damages was in connection with a matter within the Customer's own control, including (but not limited to) call features such as call waiting, calling line identification, 3-way conference, call forwarding;
- (b) an exemption from compliance with a performance standard as set out in the CSG applies;
- (c) OptiComm has made a reasonable offer of an interim or alternative service that the Customer (on behalf of its End-user) did not accept;
- (d) the Customer (on behalf of its End-user) accepted an offer of an interim or alternative service;
- (e) the End-user has not cooperated with OptiComm or its agents and denied access to the End-user's premises;

- (f) the contravention of the CSG is due to the incompatibility or failure of the End-user's equipment or internal wiring;
- (g) non-compliance of the Standard is due to other circumstances beyond the control of OptiComm, such as to acts or omissions of a third party, the Customer, the End-user or a Force Majeure event;
- (h) delays are due to the need for OptiComm to comply with the Law; or
- (i) the End-user has agreed to waive their rights in respect of a failure to comply with the CSG.

8.8 Reduction of CSG protection

OptiComm's obligation to pay the Customer compensation protection under paragraph 8.5 is reduced to the extent that:

- (a) the Customer has not taken advantage of any available exemptions to compliance with the CSG; or
- (b) the Customer contributed to the failure to comply with the CSG.

8.9 Claiming CSG Protection

A claim by the Customer for compensation protection under paragraph 8.5 is conditional on the Customer:

- (a) notifying OptiComm immediately upon an event where a CSG breach has occurred;
- (b) making a claim to OptiComm within 6 months of the relevant breach; and
- (c) providing evidence to OptiComm of the claim for a CSG rebate by the End-user.

8.10 The Customer's obligation to mitigate CSG damages

- (a) The Customer must take all reasonable action to avoid or mitigate its liability to pay Primary Damages under the CSG Standard where OptiComm may be liable to pay CSG Compensation under this Service Level Agreement or secondary damages under section 118A of the Consumer Protection Act.
- (b) For the purpose of section 8.10(a), reasonable actions that the Customer may take include:
 - (i) offering to supply or supplying the relevant End-user with an alternative or interim service;
 - (ii) applying for and claiming the benefit of any applicable exemptions that may be available under Part 3 of the CSG Standard; and
 - (iii) requesting that an End-user provide a waiver under Part 5 of the CSG Standard, but not including a situation where the End-user is prohibited from providing that waiver under section 120(7) of the Consumer Protection Act.
- (c) For the avoidance of doubt, it is not a requirement that the Customer obtain CSG waivers from End-users pursuant to Part 5 of the CSG Standard in respect of fault rectification timeframes under Part 2 of Division 3 of the CSG Standard

8.11 OptiComm's audit rights

- (a) OptiComm may appoint a person as a CSG Auditor and the Customer must co-operate with and assist the CSG Auditor's assessment of any claims for CSG Compensation that the Customer makes or has made to OptiComm. For example, the Customer must give the CSG Auditor copies of all records, materials, invoices,

payment receipts, documents and correspondence that are relevant to the audit. If required by the Customer, the CSG Auditor must agree to abide by reasonable undertakings to protect the confidentiality of the information that the Customer provides during the audit.

- (b) If OptiComm has paid or credited any CSG Compensation to the Customer and it is subsequently determined (either as a result of the audit, or otherwise) that the Customer was not entitled to claim that CSG Compensation from OptiComm, then:
 - (i) OptiComm may, at its discretion, notify Customer that the CSG Compensation it has previously paid or credited to Customer was wrongly paid or credited; and
 - (ii) Customer must immediately repay the amount to OptiComm.

9 Billing

OptiComm's will use best endeavours to resolve any invoicing dispute within 14 days or agree with the Customer on a process and timetable to resolve the issue.

Annexure B – Acceptable Use Policy

Rules of interpretation and capitalised terms used in this Acceptable Use Policy are defined in the Master Services Agreement.

1 About our Acceptable Use Policy

- 1.1 To ensure the availability of our Services to customers and their End-users, OptiComm has an Acceptable Use Policy that is designed to protect our Network from abuse.
- 1.2 We may immediately suspend, cancel or restrict the supply of the Service to the Customer or an End-user under clause 4.4(a) or clause 5.1 of the Master Services Agreement if the Customer or an End-user use the Service, or if any person who accesses the Service uses the Service, in any way which breaches this Acceptable Use Policy.

2 Prohibited use

- 2.1 The Customer, an End-user, and any person who accesses the Service, must not use, or attempt to use, the Service:
- (a) for illegal purposes or practices;
 - (b) for any purpose if OptiComm has previously advised the Customer that such purpose is prohibited;
 - (c) in any way which damages or interferes (or threatens to damage or interfere) with the operation of a Service or with the efficiency of OptiComm's Network or a Supplier's Network (including as a result of attempts by the Customer to increase the capacity or performance of the Customer's system or Equipment);
 - (d) in any way which makes it unsafe or which may damage any property or injure or kill any person;
 - (e) to transmit, publish or communicate any material or engage in any conduct which is defamatory, abusive, menacing or harassing;
 - (f) to engage in abusive behaviour toward OptiComm's staff;
 - (g) to make inappropriate contact with children or minors;
 - (h) to access, store, reproduce, distribute, publish or commercially exploit any information or material of any kind that infringes any copyright, patent, trade mark, design or other intellectual property right;
 - (i) to send, relay or distribute any electronic data, the contents or properties of which have been manipulated for the purpose of maliciously or illegally impersonating or obscuring the original source of that data. This does not include the use of Virtual Private Networks or similar concepts in circumstances where this is legal and otherwise complies with this Policy;
 - (j) to access, monitor, use or control any other person's equipment, systems, networks or data (including usernames and passwords) or to otherwise probe, scan or test the vulnerability of any other person's equipment, networks, systems or data, without that person's consent;
 - (k) to access, or attempt to access, the accounts or private information of others, or to penetrate, or attempt to penetrate OptiComm's or a third party's security measures, computer software or hardware, electronic communications system or telecommunications system, whether or not the intrusion results in the corruption or

loss of data. This does not include conducting network security testing specifically requested by the owner of the targeted network or system;

- (l) to use or distribute software (such as password guessing programs, keyboard loggers, viruses or trojans) with the intent of compromising the security of any network or system;
 - (m) to make fraudulent offers to sell or buy products, items, or services or to advance any type of financial scam such as 'pyramid schemes', 'Ponzi schemes', and 'chain letters';
 - (n) to engage in any unreasonable activity which impairs the ability of other people or systems to use OptiComm's Services or the Internet. This includes any malicious activity resulting in an adverse effect such as denial of service attacks against another network host or individual user, flooding of a network, overloading a service, improper seizing or abuse of operator privileges, and attempts to harm a system or network. For the avoidance of doubt, this clause does not capture an activity solely because it unintentionally contributes to network congestion;
 - (o) to access, store, reproduce, distribute or publish any content which is prohibited or unlawful under any Commonwealth, State or Territory law or classification system, or to provide unrestricted access to material that is unsuitable for minors; or
 - (p) to support carrier or service provider data aggregation applications, such as backhaul for mobile base stations or other networks or facilities, the provision of services to another carrier or carriage service provider to enable that carrier or carriage service provider to use the Service to provide retail services to End-users, multiplexed access systems and/or networks, or the provision of services to End-users on networks or facilities other than networks or facilities owned or operated by OptiComm.
- 2.2 Due to Payment Card Industry (PCI) requirements, the Customer, and any person who accesses the Service, must not use, or attempt to use, OptiComm's web-hosting Services to store credit card data without OptiComm's express consent in writing.

3 Spam

- 3.1 In this clause 3, "Spam" includes one or more unsolicited commercial electronic messages with an "Australian link" as contemplated by the Spam Act 2003.
- 3.2 The Customer, an End-user, and any person who accesses the Service must not use the Service to:
- (a) send, allow to be sent, or assist in the sending of Spam;
 - (b) use or distribute any software designed to harvest email addresses; or
 - (c) otherwise breach the Spam Act 2003 or any regulations made under the *Spam Act 2003*.

4 General

- 4.1 The Customer and End-users must use reasonable endeavours to secure any device or network within the Customer's or End-user's control against being used in breach of this Acceptable Use Policy by third parties, including where appropriate:
- (a) the installation and maintenance of antivirus and firewall software;
 - (b) the application of operating system and application software patches and updates;

- (c) protecting account information and passwords and taking all reasonable care to prevent unauthorised access to the Service, including taking reasonable steps to secure any Wi-Fi network operated;
- (d) for residential End-users, requiring any persons (for example, other members of the End-user's household) that the End-user allows to use the Service from time to time to also comply with this Policy; and
- (e) for business and government End-users, maintaining and enforcing appropriate workplace and guest user policies that are consistent with the requirements of this Acceptable Use Policy.

4.2 Unless otherwise stated, OptiComm's rights to suspend, cancel or restrict the supply of the Service to the Customer or an End-user applies regardless of whether the breach or suspected breach was committed intentionally, or by means not authorised by the Customer or End-user (such as through Trojan horses, viruses or other security breaches).