

# New Zealand Internet Exchange Master Services Agreement

**WARNING: YOU MAY ONLY ORDER MEMBER SERVICES THROUGH THE MEMBER PORTAL AND USE MEMBER SERVICES, IF YOU ARE A NEW ZEALAND INTERNET EXCHANGE (“NZIX”) MEMBER AND ACCEPT THE TERMS AND CONDITIONS OF THIS AGREEMENT. BY ACCESSING, BROWSING AND/OR USING THE MEMBER SERVICES AND/OR THE MEMBER PORTAL, YOU CONFIRM THAT YOU HAVE READ AND UNDERSTAND AND WHOLLY AND UNCONDITIONALLY AGREE TO BE LEGALLY BOUND BY AND ACCEPT THE TERMS AND CONDITIONS OF THIS AGREEMENT (INCLUDING THE RELEVANT SERVICES SCHEDULES).**

## TERMS AND CONDITIONS:

### 1. Definitions and Interpretation

#### 1.1. Definitions

In this Agreement:

**Acceptable Use Policy** means the NZIX Acceptable Use Policy at <https://ix.nz/resources/>.

**Agreement** means this Master Services Agreement, any order for Member Services (whether created through the Member Portal or otherwise), each of the Services Schedules the Acceptable Use Policy and the Privacy Policy.

**Business Day** means Monday – Friday excluding national public holidays in New Zealand.

**Business Hours** means 9:00am – 5:00pm on Business Days.

**Commencement Date** means the date the relevant Member Services ordered on behalf of a Member are first made available by Us for use by the Member.

**Data Centre** means a data centre You select in Your order at the time of making an order through the Member Portal for relevant Member Services.

**Disconnect Policy** means the NZIX Disconnect Policy at <https://ix.nz/resources/>.

**Equipment** and **“Member Equipment”** means

Your equipment that You install in rack space that We allocate to You in a peering exchange or data centre we operate in order to connect to the Member Services.

**Force Majeure Event** means any event, act or circumstance beyond the reasonable control of a party which results in a party being unable to observe or perform (either on time or at all) an obligation under the terms and conditions of this Agreement (excluding any obligation to pay money), including fire, flood, storm, strikes, accidents, plague, earthquake, riots, explosions, wars, hostilities, acts of government, acts of God, labour disputes, and industrial action.

**GST** has the meaning given by the Goods and Services Tax Act 1985.

**Identifiers** means as set out in clause 17.1.

**Insolvency Event** means, in respect of a party:

- (a) the party ceases to carry on business, is unable to pay its debts as and when they fall due, or is deemed to be insolvent or bankrupt;
- (b) a receiver or a liquidator or provisional liquidator or an administrator is appointed to the party, or an application (including voluntary application filed by that party) is lodged or an order is made or a resolution is passed for the winding up (whether voluntary or compulsory) or reduction of capital of that party;
- (a) the party enters into an arrangement with its creditors;
- (b) where the party is a partnership, the partnership is dissolved or an application is made for its dissolution;
- (c) the party suspends payment of its debts to the other party or a third party, or the party takes the benefit of any law for the relief of insolvent debtors; or
- (d) anything analogous or having a substantially similar effect to any of the events described in (a) through (e) above occurs under the law of any applicable jurisdiction.

**Intellectual Property Rights** means all copyright, trademark rights, patent rights, and design rights, whether registered or unregistered, and all other rights to intellectual property as defined under article 2 of the convention establishing the World Intellectual Property Organization, and all rights to enforce any of the foregoing rights.

**Member** means a person who has obtained Membership as a NZIX Member.

**Member Data** means as set out in clause 7.1.

**Member Portal** means Our Member Portal accessible via <https://portal.ix.nz/> through which Members may order, configure and view information about the Member Services.

**Member Services** means the services provided by NZIX and available for Members to order through the Member Portal.

**Membership** means a Member's registration with NZIX.

**Membership Fees** means fees (if any) payable to NZIX for Membership.

**Minimum Term** has the meaning set out in clause 4.7.

**Moral Rights** means the rights described in section 94 of the *Copyright Act 1994*.

**Peering Services** means as defined in the Services Schedule for Peering Services.

**Personal Property Securities Register** means the Personal Property Securities Register established under the *Personal Property Securities Act 1999*.

**Representative** means officers, employees, agents, suppliers and other persons within a party's control.

**Renewed Term** means as set out in clause 4.8.

**Service Charges** has the meaning set out in clause 4.1.

**Services Schedule** means information accessible on the Website and/or the Member Portal under the heading "Services Schedule" which describes the functionality provided by Our Member Services, the applicable Service Charges, any other information We may provide that describe the Member Services, and any special conditions that apply to Your use of the relevant Member Services.

**Term** means any Minimum Term plus all Renewed Terms.

**We", "Our", "Us" and "NZIX"** means New Zealand Internet Exchange Incorporated, incorporation number 2636857.

**"Website"** means the website at <https://ix.nz/> and also includes the Member Portal and any content, images, text and other information appearing on any page of the Website and Member Portal and any source code and object code in the Website and Member Portal, plus any database which forms part of or which the Website or Member Portal interact with.

**"You"** means the Member who itself or through a duly authorised Representative, is ordering, upgrading, downgrading or configuring Member Services, whether via the Member Portal or as otherwise permitted by NZIX.

## 1.2. Interpretation

In the terms and conditions of this Agreement:

- (a) Headings and underlinings are for convenience only and do not affect the construction of this Agreement.
- (b) A provision of this Agreement will not be interpreted against a party because the party prepared or was responsible for the preparation of the provision, or because the party's legal representative prepared the provision.
- (c) Currency refers to New Zealand dollars.
- (d) A reference to a statute or regulation includes amendments thereto.
- (e) In the body of this Agreement, a reference to a clause, subclause or paragraph is a reference to a clause, subclause or paragraph of this Agreement.
- (f) In a Services Schedule, a reference to a clause, subclause or paragraph is a reference to a clause, subclause or paragraph of the Service Schedule unless specified otherwise.
- (g) A reference to a subclause or paragraph is a reference to the subclause or paragraph in the clause in which the reference is made.
- (h) The warning at the top of this Agreement forms part of the binding terms and conditions of this Agreement.
- (i) A reference to a person includes a reference to an individual, a partnership, a company, a joint venture, government body, government department, and any other legal entity.
- (j) The words "includes", "including" and similar expressions are not words of limitation.
- (k) A reference to the singular includes the plural and vice versa.

## **2. Member Portal**

- 2.1. Only Our Members may access the Member Portal.
- 2.2. You agree and acknowledge that:
  - (a) if You are a Member You and Your representatives will have access to the Member Portal, through which Member Services may be ordered, configured, altered and cancelled by You and Your Representatives on Your behalf; and
  - (b) Those of Your Representatives who are granted authority to order, configure, alter and cancel Member Services on Your behalf, are duly authorised to do so and We may act and rely on instructions given by those persons on Your behalf, whether through the Member Portal or otherwise.

## **3. Member Services offered by NZIX through the Member Portal**

- 3.1. Members may order Member Services from Us via the Member Portal.
- 3.2. The Member Services We offer to Members are as follows:
  - (a) Data Centre Colocation Services;
  - (b) Remote Hands Services;
  - (c) Cross Connect Services;
  - (d) Peering Services;
  - (e) Transit Services; and
  - (f) Point to Point Link Services.
- 3.3. We will use Our best endeavours to provide the Member Services with skill and care and substantially in accordance with any specifications for the Member Services set out in the relevant Services Schedules.
- 3.4. Notwithstanding clause 3.3, We will provide the Member Services to Members ordered through the Member Portal by such means as We determine in Our discretion is appropriate. This includes:
  - (a) the Member Services may be provided from a location such as a data room owned and operated by Us, or from a location owned and operated by any third party, as We see fit;
  - (b) We may supply the Member Services Ourselves or outsource the whole or part of any Member Services to third parties. Where We subcontract Our obligations under this Agreement to any third party however, We will still remain responsible to You for the performance of Our obligations under this Agreement;
  - (c) Where We use third party suppliers to provide services that We use to supply the Member Services, or where We resell or resupply third party services in connection with Our supply of the Member Services, We may choose the suppliers that We use to supply those Member Services;
  - (d) We may determine the type and level of maintenance that We conduct in relation to the Member Services.
- 3.5. If We consider it necessary, We may modify the way that We deliver Member Services.
- 3.6. You acknowledge that We do not supervise, edit or control and are not responsible for any data or the content or form of any data accessed or made available through the use of the Member Services and do not (unless and to the extent that We are required to intercept any communications by law or that We deem it necessary in order to investigate any breach or suspected breach of Your obligations or any misuse or suspected misuse of the Member Services) review the content of any data passing through the Member Services.
- 3.7. We do not generally provide training in the use of the Member Services. At Our discretion, training may be provided or procured from Us for an additional charge.
- 3.8. You are responsible for the conduct of Your customers and end users.

## **4. Orders and payment terms for Member Services**

- 4.1. If You are a Member then You may order Member Services from Us via the Member Portal. You must pay the fees and charges, without set off or deduction of any kind, set out in the Services Schedule and/or on the Member Portal (or as otherwise agreed between You and Us in writing) in consideration for the Member Services ordered on Your behalf from Us ("**Service Charges**").
- 4.2. Each time You or a person on Your behalf orders Member Services from Us, You will be deemed to have warranted that You have obtained all necessary consents, authorities and permissions to

- enable Us to provide the Member Services to You.
- 4.3. The Service Charges that apply to Your order for the Member Services that are specified when You place Your order, are calculated based on the information that You provide to Us at the time You place the order. If:
- (a) the information that You provide when You place Your order is incorrect, false or misleading; or
  - (b) an unforeseen event occurs that affects Our ability to supply the Member Services that You ordered, or requires more work on Our part to supply those Member Services than We previously envisaged, We reserve the right to cancel the order if You and Us cannot agree on the amount of the additional costs that You must pay Us for those Member Services.
- 4.4. Each order placed for Member Services through the Member Portal will be deemed to constitute a subscription by the Member on behalf of which the order was placed for the Member Services. The Member Services You order must be paid for whether or not You use them and whether or not You authorise their use. You will not be liable however, for unauthorised ordering or use of the Member Services, to the extent caused by a security flaw in the Member Portal.
- 4.5. If the Services Schedule for Member Services specifies that charges will be payable for any specific amount of use of the Member Services, You must also pay all and any usage charges that apply to those Member Services, at the time and in the manner set out in the Services Schedule and/or on the Member Portal when the Member Services are ordered. Where We charge You Service Charges for services that We provide that are to be calculated on a usage basis, if such costs and charges are not separately metered or assessed, You must pay the amount determined by Us for which We, acting reasonably, estimate You are liable.
- 4.6. Unless We have agreed otherwise in writing, the Service Charges must be paid at the time and in the manner set out in each invoice We provide to You. Generally, Service Charges for Member Services are invoiced monthly in advance and any Service Charges for usage are invoiced monthly in arrears. You must also pay any GST that is applicable in respect of the Service Charges.
- 4.7. Some Member Services may be available for order for an agreed term ("**Minimum Term**"). Member Services that are purchased for a Minimum Term may have Service Charges that are lower than the equivalent Member Services purchased with no Minimum Term. This is in recognition of your commitment to purchase those services for an agreed period. If You place an order for Member Services for a Minimum Term, that Member Service cannot be cancelled or terminated prior to the expiry of the Minimum Term, unless expressly permitted under the terms and conditions of this Agreement. If you cancel or terminate the Member Services prior to the expiry of any applicable Minimum Term (unless pursuant to Your rights under this Agreement) You will be required to immediately pay to Us any monies that would have been payable to Us for the balance of the Minimum Term had the Member Services not been cancelled or terminated (plus any other monies that You owe to Us under this Agreement).
- 4.8. Upon expiry of any applicable Minimum Term, We may agree with You to provide the relevant Member Services for a further minimum term ("**Renewed Term**"). If You and We do not agree to a Renewed Term, the relevant Member Services shall continue on a monthly basis and otherwise on the same terms and conditions, unless:
- (a) either We or the Member who subscribed to the Member Services provides at least 30 days written notice prior to the expiry of the Minimum Term, in which case the Member's subscription to the Member Services shall terminate at the end of the Minimum Term; or
  - (b) either party gives a notice of termination under clause 4.11.
- 4.9. We will use reasonable endeavours to ensure that Member Services ordered through the Member Portal are provided promptly, but to the extent possible by law, We will not be liable for any delay (whether caused by Us, any third party or otherwise) in the provision of the Member Services.
- 4.10. You acknowledge that We may need to wait for part or whole of Member Services ordered to be provisioned by Our Suppliers. We will keep You informed of Our progress in provisioning Member Services that You order from Us.
- 4.11. If a Member Service does not have a Minimum Term or if the Minimum Term has expired, either party may terminate the Member Service at any time on 30 days written notice to the other party.
- 4.12. You must pay all costs associated with accessing the Member Portal and those associated with Your use of the Member Services, including internet access costs, web browser and computer and smartphone equipment costs, telecommunications costs, data costs, roaming charges, charges

relating to utilities, such as gas, water and electricity costs, cleaning costs, Membership Fees and Service Charges.

- 4.13. Without limiting Our rights and any other provision of this Agreement, if You fail to pay the Membership Fee and/or Service Charges in accordance with the requirements of this Agreement and/or any other agreement between You and Us, We may suspend and/or terminate Your Membership and/or the supply of any Member Services to You by notice to You.
- 4.14. For the avoidance of doubt, if any services required by a Member are not expressly specified in the Services Schedule for the relevant Member Services when ordered by the Member, the Member shall be solely responsible for the procurement and/or provision of such services and payment therefore and where the Member wishes to obtain such services from third parties at a peering exchange or data centre, the provision of such services by those third parties will be subject to Our written consent in each case (such consent not to be unreasonably withheld).

## 5. Invoicing

- 5.1. An invoice raised by Us will be deemed to be correct and prima facie evidence of all applicable and relevant Service Charges contained therein.
- 5.2. If You dispute the whole or any part of the amount claimed in an invoice issued by Us under this Agreement, You must, by the due date specified in the invoice (time being of the essence), pay the undisputed portion and notify Us of the reasons for the dispute.
- 5.3. Other than where it is found that You are not liable to pay the disputed amount, You must pay Us on demand interest on any money payable by You to Us which is not paid by the due date for payment, calculated from the due date for payment until payment is made, at the rate of 4% per annum above the Westpac Bank interest rate for unarranged business overdrafts published most recently prior to the first day of the month of the original due date.
- 5.4. Without limiting clause 5.3, if You fail to make any payment that is not disputed in accordance with clause 5.2 to Us by the due date for payment, We reserve the right to:
  - (a) suspend or terminate the supply of the Member Services to You, Your Membership and this Agreement; and
  - (b) as a condition of continuing to supply You with any Member Services, require that You:
    - (i) prepay amounts for the Member Services (in addition to any amounts which are otherwise payable in advance);
    - (ii) lodge a bond as security against payment in an amount that We consider to be reasonable in the circumstances;
    - (iii) provide a personal guarantee in a form acceptable to Us from a principal/director of Your organisation; or
    - (iv) comply with any other reasonable arrangement that We agree to with respect to payment of Service Charges approved by Us in writing.
- 5.5. You agree to replenish the amount of any prepayment, bond or personal guarantee to the original amount, if We draw down on any amounts the subject of those prepayments, bonds or personal guarantees to pay Service Charges, within 5 days of demand by Us at any time.

## 6. Payment Gateway

- 6.1. We utilise third party payment gateways provided by Westpac New Zealand, Merchant Warrior, Braintree and Paypal (each a, "**Payment Gateway**") to process payments made to Us via the Member Portal.
- 6.2. If You are a Member, and if You make credit card payments on the Website You acknowledge and understand that:
  - (a) the Payment Gateway may be affected by delays, defects, faults and/or other matters which render the Payment Gateway unusable. These matters may be caused by factors including technical difficulties with the performance or operation of Our or the Payment Gateway's software or hardware or due to problems or malfunctions with the Internet or other telecommunications networks;
  - (b) We do not warrant, guarantee or represent that unauthorised access to information and data cannot occur;
  - (c) You have relied on Your own independent assessment and judgment in determining whether the Payment Gateway We use on the Member Portal meets Your requirements; and

- (d) You have read, understand and agree to comply with the applicable terms and conditions of, and have read, understood and agree with the privacy policy of, the Payment Gateway providers (collectively, the "**Payment Gateway Agreement**"), copies of which are available from Us on request.
- 6.3. You indemnify Us in respect of all and any loss or damage We incur as a result of any breach by You of the Payment Gateway Agreement.

## 7. Responsibility for and ownership of Member Data

- 7.1. For Member Services ordered by a Member, We agree that as between Us and the Member, the Member owns all data that it and any other person (such as a customer of the Member) transmits in the course of using and/or accessing the Member Services, or any services that use the Member Services ("**Member Data**").
- 7.2. You agree and acknowledge that:
  - (a) the Member Portal, Member Services and/or Member Data may be hosted by Us or Our suppliers on hardware or infrastructure located in or outside New Zealand; and
  - (b) We may not own or operate the infrastructure upon which the Member Portal, Member Services and/or the Member Data is hosted.
- 7.3. Each time a Member uses the Member Portal and/or Member Services it shall be deemed to have warranted, agreed and represented that:
  - (a) it will only upload, input and transfer Member Data into and/or via the Member Portal and/or Member Services or disclose Member Data, which the Member is fully entitled and authorised to upload, input, transfer and disclose, and will not permit any data to be uploaded, input, transferred or disclosed through the Member Services which the Member is not fully entitled and authorised to upload, input, transfer and disclose;
  - (b) the Member Data and Our collection, use, storage and/or disclosure thereof in the course of facilitating access to the Member Portal and/or performing the Member Services ordered by a Member, will not breach any applicable law or right of any person; and
  - (c) all software, data, materials and information that is stored on or transmitted by any of the Member's Equipment will not infringe the rights of any person or breach any applicable law.
- 7.4. Each Member is solely responsible for the accuracy, legality and quality of all its Member Data and for obtaining any permissions, licences, rights and authorisations necessary for Us and Our suppliers to use, host, transmit, store and disclose the Member Data in connection with the provision of the Member Services.
- 7.5. If We become aware of content that breaches our Acceptable Use Policy, We will disconnect the Member Equipment that the relevant content is hosted on from the relevant Member Service. We will endeavor to provide You with notice prior to disconnection. If You become aware of any content that You think breaches Our Acceptable Use Policy, please notify Us immediately.
- 7.6. You agree that You, not Us, are solely responsible for backing up and archiving all Member Data.
- 7.7. You agree that We are not responsible for any loss, corruption or hacking of any Member Data.
- 7.8. You indemnify Us and Our suppliers in respect of any loss and damage We or any of Our suppliers incur in respect of any claim that:
  - (a) any of the Member Data is lost, unavailable or corrupted (other than to the extent such loss, unavailability or corruption is caused by our willful misconduct); or
  - (b) the transmission, storage, disclosure, access or use of any Member Data by Us or Our suppliers in the course of providing the Member Services infringes the Intellectual Property Rights or other rights of any person or breaches any law, regulation, code or standard.
- 7.9. During the term of this Agreement (and any renewal thereof):
  - (a) Subject to clauses 7.4 and 7.9(e), We must ensure that Our collection, use, storage and/or disclosure practices in performing the Services complies with Our obligations under the Privacy Act 1993;
  - (b) We will not process, collect, use, store, host, disclose or access any Customer Data, except as strictly (and only to the extent) required to comply with applicable law. We acknowledge that We are neither authorised nor have We been instructed to act as "Data Processor" or "subprocessor" (as defined under European privacy laws and regulations) with respect to such Customer Data. We will promptly notify You of any unauthorised access to Your Customer Data by any of Our Representatives once we become aware of such unauthorised access. For the avoidance of doubt, We shall not be deemed to have breached this clause or any other provision

of this Agreement merely by providing the Member Services through which Customer Data is transferred by You and/or any third party;

- (c) We will not process, collect, use, store, host, disclose or access any Member Data, except as required to perform the Member Services or to strictly (and only to the extent) required to comply with applicable law;
  - (d) Except as permitted by clause 7.9(b), We will not process, collect, use, store, host, disclose or access any Customer Data unless and until the parties have entered into a mutually acceptable data processing and security agreement, which at a minimum meets the requirements of the Privacy Act 1993 and any other applicable privacy and data protection laws. We will otherwise only transmit and route Customer Data in accordance with your instructions and to the limited extent required to provide the Member Services; and
  - (e) You must ensure that Your collection, use, storage and/or disclosure practices in using the Member Services will comply with Your obligations under the Privacy Act 1993 and any other privacy and data protection laws applicable to You.
- 7.10. We will not issue any express request to any of Our Representatives to read the content of any Customer Data.

## **8. Responsibility for Equipment and Your connections to the Member Services**

- 8.1. Your Equipment is Your responsibility. We are not responsible for securing or maintaining Your Equipment except to the extent specified otherwise in a Services Schedule for Member Services that You order from Us. Without limiting the foregoing provisions, You are solely responsible for any viruses, hacking, denial of service attacks and other problems associated with Your Equipment.
- 8.2. You must provide and maintain all cabling from the service demarcation point that We specify to Your Equipment and ensure that Your Equipment complies with any requirements specified in the Services Schedule or requirements that We otherwise notify You of from time to time including requirements that relate to space, power and other environmental conditions for the Equipment and Our or Our suppliers' equipment at the service demarcation point.
- 8.3. It is Your responsibility to connect Your Equipment to the service demarcation point. We will provide You with details of any relevant Network Termination Unit Specifications which specify the technical requirements for connecting Your Equipment to the service demarcation point. We may make amendments to the Network Termination Unit Specifications from time to time if required in order to maintain connectivity to any services that Our suppliers provide that are related to the Member Services and You must also comply with those amendments.
- 8.4. You agree:
  - (i) and acknowledge that the Member Services may not necessarily be secure;
  - (ii) that We and Our suppliers do not have any responsibility for loss of data, delays, non-deliveries, or mis-deliveries of data; and
  - (iii) that We and Our suppliers do not have any responsibility for any content accessed through the Member Services (including inaccurate, incomplete or out of date information).
- 8.5. You must implement and maintain network security and take reasonable precautions to ensure that no viruses, Trojans or other malicious code is transferred in the course of You using the Member Services.

## **9. Availability of Member Services and Member Portal**

- 9.1. We are not responsible for ensuring that any data sent or received over the Member Services is sent or received correctly.
- 9.2. We may be unable to supply Member Services as soon as You order them from Us. In some cases there may be a delay between the date of Your Order for the Member Services and the date that We can first supply them. We will use all reasonable endeavours to supply the Member Services:
  - (a) within any timeframe specified in the Services Schedule; or
  - (b) within a reasonable time from the date that You place Your order.
- 9.3. The Member Services will not be supplied uninterrupted or error free.
- 9.4. To the full extent possible by law, We will have no liability for any failure, downtime, interruption or error in the Member Services, irrespective of whether the failure, downtime, interruption or error is caused by a Force Majeure Event, a scheduled outage, Your conduct or otherwise.
- 9.5. You agree and acknowledge that the accessibility and use of the Member Portal and Member

Services is highly dependent on the proper function of the Internet and any other computer and telecommunications networks and infrastructure upon which the Member Portal and Member Services operate, interface with or connect to.

- 9.6. We will use Our best endeavours to notify You in advance of any scheduled outage of the Member Portal and/or Member Services.
- 9.7. If You become aware of any fault in the Member Services You must notify Us immediately. You must ensure that faults are not caused by Your Equipment or Your failure to comply with this Agreement or Your failure to comply with any of Our policies or requirements that We notify You of from time to time ("**Member Equipment Failure**"). We reserve the right to charge an additional fee for investigating any fault which is caused by a Member Equipment Failure.

#### **10. Transfer of Services to NZIX**

- 10.1. If You transition from any services provided by another telecommunications supplier to services provided by Us via our supply of the Member Services, You agree and acknowledge that You remain liable for all amounts owing to the other telecommunications supplier if payable by You as a result of Your transition from any services and/or termination of any agreement with the other supplier.

#### **11. Service Upgrades and Downgrades**

- 11.1. Some of Our Member Services can be upgraded and/or downgraded via the Member Portal.
- 11.2. If You wish to upgrade and/or downgrade Member Services that You have ordered, You may be required to enter into a new Minimum Term for the relevant Member Services, if specified in the Services Schedule.
- 11.3. Rules governing upgrading and downgrading of Member Services are specified in the Services Schedules for the Member Services.

#### **12. Acceptable Use Policy**

- 12.1. You must comply with Our Acceptable Use Policy.
- 12.2. We may suspend Your Membership and/or Your access to the Member Portal and/or the supply of Membership Services to You if You infringe Our Acceptable use Policy.
- 12.3. We may terminate Your Membership and/or Your access to the Member Portal and/or the supply of Member Services to You in accordance with our Disconnect Policy if you:
  - (a) repeatedly infringe Our Acceptable Use Policy; or
  - (b) commit a material breach of Our Acceptable Use Policy.
- 12.4. You indemnify Us, our suppliers and each other Member in respect of any loss, costs or damage We or they incur as a result of a breach by You or Your Representatives of our Acceptable Use Policy.

#### **13. Intellectual Property Rights**

- 13.1. The parties each agree and acknowledge that this Agreement does not transfer or assign any Intellectual Property Rights to the other party.
- 13.2. As between You and Us, except in respect of Your Member Data, We own all Intellectual Property Rights in the Website, Member Portal, Member Services and in all of our equipment, networks and in all of Our other property.
- 13.3. You have no rights in the Website, Member Portal or Member Services or in any part of them or in any modification or enhancement thereof, other than the rights temporarily granted to You pursuant to this Agreement.
- 13.4. You must not take any step to invalidate or prejudice Our (or Our licensors' or suppliers') Intellectual Property Rights in the Website, the Member Portal, the Member Services or otherwise. Without limiting the foregoing provisions, You must not register any security interest or purchase money security interest on the Personal Property Securities Register, or otherwise encumber or charge Your rights under or in connection with Our or any of Our suppliers' property.
- 13.5. Where We license any software from any third party to enable or assist Our provision of the Member Portal or Member Services ("Software"), We agree to indemnify You against any loss and damage that may be incurred by You directly as a result of a claim that Your use of the Member Portal or Member Services in accordance with this Agreement breaches the Intellectual Property Rights of the Software vendor ("IP Claim"), provided that:



- (a) You notify Us immediately upon receipt by You of any notice of any IP Claim or upon You suspecting or having reasonable cause to suspect that such an IP Claim may be made;
- (b) You do not make any admission or settlement of such IP Claim without Our prior written consent;
- (c) You give Us sole control of the defense and any negotiations for compromise; and
- (d) You provide such assistance as We reasonably require in connection with the IP Claim.

#### **14. Responsibility for other users**

- 14.1.** We do not accept responsibility for the conduct of any users of the Website, Member Portal and/or Member Services or for any Members.
- 14.2.** If You believe that another user of the Website, Member Portal and/or Member Services, or any Member, has breached this Agreement, or if You are aware of or suspect unauthorised use of the Website, Member Portal or any Member Services, You must immediately notify Us.
- 14.3.** We are not a party to any transaction for the supply of goods or services advertised by any user of the Website, Member Portal and/or Member Services, or by any Member.
- 14.4.** Any dispute You have with another user of the Website, Member Portal and/or Member Services, or any Member is between You and them. You release Us from any claims that You may otherwise have against Us in relation to any conduct of any user of the Website, Member Portal and/or Member Services, or any Member.

#### **15. Responsibility for third party claims**

- 15.1.** You agree and acknowledge that You are solely responsible for and You indemnify Us in respect of any loss and damage We may incur in connection with any claims and/or complaints made by any third party where the claim is caused directly or indirectly by:
  - (a) A breach of this Agreement by You or Your Representatives;
  - (b) Your use of or inability to use the Member Portal and/or Member Services; and/or
  - (c) Software, data, Member Data, materials and information that is stored on or transmitted by any of Your Equipment.

#### **16. Responsibility for network security**

- 16.1.** We do not make any representations or warranties as to the effectiveness or fitness for purpose of Our network security or the security of Your networks, equipment and data that You connect to any Member Services.
- 16.2.** We will maintain appropriate technical, organizational and physical safeguards to secure the Member Services that meet or exceed industry standards.
- 16.3.** You agree and acknowledge that:
  - (a) Your use of the Member Portal and/or Member Services; and/or
  - (b) software, data, Member Data, materials and information that is stored on or transmitted by any of Your Equipment,is at Your sole risk and You will not make any claim concerning Our network security and You indemnify Us and Our suppliers who provide us with services in connection with the Member Services, against any claims concerning Our, their or Your network security, except with respect to any claim that is caused directly by Our breach of clause 7.

#### **17. Identifiers**

- 17.1.** You agree and acknowledge that in order for us to supply Member Services, We may need to allocate to You one or more identifiers such as an IP address ("**Identifiers**").
- 17.2.** You agree and acknowledge that the Identifiers are not owned by You and remain Our property and You agree and acknowledge that We may be required to forego, reallocate or reassign the Identifiers to comply with rules and other requirements (as applicable) of any relevant government entities or authorities in respect of the Identifiers.
- 17.3.** We grant to You a non-transferable licence to use such Identifiers as are allocated to You by Us during the Term and only for the purpose of receiving the Member Services.
- 17.4.** We will notify You in writing as early as reasonably practicable if We are required to forego, reallocate or reassign any Identifier allocated to You by Us, and You must cooperate in respect of all such matters.
- 17.5.** Member Services do not include the provision of any Identifiers unless expressly specified in the

Services Schedule for the Member Services.

**18. Liability and indemnity**

- 18.1.** If You are acquiring the Member Services supplied pursuant to this Agreement other than for the purposes of a business, nothing in this Agreement limits or excludes any rights you have under the Consumer Guarantees Act 1993, the Fair Trading Act 1986 or any other legislation or law which cannot be lawfully excluded.
- 18.2.** If You use any Member Services supplied pursuant to this Agreement for the purposes of a business, or if you indicate to us that You are doing so:
- (a) the guarantees under the Consumer Guarantees Act 1993 will not apply and sections 9, 12A, 13 and 14(i) of the Fair Trading Act 1986 do not apply; and
  - (b) all conditions, warranties and guarantees implied in the terms and conditions of this Agreement are excluded, to the full extent permitted by law.
- 18.3.** Neither party will be liable to the other for any indirect, special or consequential loss or damage incurred by the other party, including liability for loss of profits, loss of business opportunity, loss of savings, loss of revenue or any other economic loss, or loss or corruption of data or loss of goodwill, regardless of the cause of such loss or damage or whether We or You have been advised of the possibility of such loss or damage.
- 18.4.** Subject to clause 18.1 and except for any willful breach by Us of clauses 7.9(b) or 7.10 and except for Our liability to indemnify you under clause 13.5, to the maximum extent permitted by law, We will not have any liability to You for:
- (a) any loss or damage howsoever incurred in relation to Your use of or inability to use the Member Portal and/or Member Services;
  - (b) any and all claims brought against You by a third party to whom You provide products or services;
  - (c) the acts or omissions of any third party, including the suppliers which have been engaged by Us for the purpose of supplying or maintaining any Member Services; or
  - (d) any matter for which You are responsible under this Agreement.
- 18.5.** Subject to clause 18.1, , Our total liability to You or anyone claiming through You, under or in relation to this Agreement and howsoever arising is limited, in the aggregate, for all claims, at an amount equivalent to the Service Charges paid by You for any relevant Member Services in the 12-month period preceding the date of the event that gave rise to the last claim, and which cap is reduced to the extent a Force Majeure Event was, or You were, responsible for such loss.
- 18.6.** You release and indemnify Us and Our Representatives (those indemnified) from and against all third-party actions, claims and demands which may be instituted against those indemnified, and all loss (including reasonable legal costs) for liability incurred or suffered by any of those indemnified, where such action, claim, demand, loss or liability was caused by or arises out of:
- (a) Your use of the Member Portal or any of the Member Services;
  - (b) a breach of this Agreement or any negligent act or omission by You or Your Representatives;
  - (c) Your Equipment or data generated by Your Equipment or your networks, systems or facilities
  - (d) damage or loss to Our property or the property of any third party caused by You or Your Representatives;
  - (e) disruption to, interference with or deterioration or degradation of Our network caused by You or Your Representatives;
  - (f) the installation, repair, operation or removal of Your Equipment;
  - (g) any use by You or Your Representatives of any software, data and other materials and information stored on or transmitted by any of Your Equipment.
- 18.7.** You acknowledge that Our suppliers do not by virtue of this Agreement have any contractual relationship with You and are not directly providing You with any services under this Agreement.
- 18.8.** To the maximum extent permitted by law, all liability of Our suppliers in connection with the supply of services to Us that We use to supply Member Services to You is excluded and You agree not to bring any claim against them, their related companies (as that term is defined in the Companies Act 1993) or personnel arising out of or in connection with any Member Services.

**19. Termination and suspension**

- 19.1.** If you are not a Member, We may terminate this Agreement or any part of it at any time without

- notice.
- 19.2.** We may temporarily suspend or restrict any Member Services if:
- (a) We are required to do so by law;
  - (b) if any of Our suppliers who supply goods or services to Us in connection with Our supply of the Member Services to You suspend or restrict their supply of goods or services to Us;
  - (c) if You are in material breach of this Agreement;
  - (d) where reasonably necessary for the protection of life, health or property;
  - (e) during any scheduled maintenance.
- 19.3.** If You are a Member, We may terminate this Agreement and Your access and/or subscription to the Member Portal and Member Services by notice to You if:
- (a) You breach any material term of this Agreement (including a failure to pay any fees or charges) and fail to remedy the breach within the time required by Us (if the breach is capable of remedy), which time period shall be no less than 15 Business Days;
  - (b) if any of Our suppliers withdraw or terminate the delivery of services to Us that We use to supply all or part of the Member Services to You.
- 19.4.** If You are in breach of this Agreement, We may give You notice:
- (a) specifying the breach; and
  - (b) requiring You to rectify the breach within a time period specified in the notice (which shall be no less than 15 Business Days), and in those circumstances We may temporarily suspend the supply of Member Services ordered by You, including access to any peering exchange or data centre, while You remain in breach of Your obligations.
- 19.5.** We may elect at Our discretion to either:
- (a) terminate this Agreement, Your access to the Member Portal and any Member Services that You have ordered from Us; or
  - (b) disconnect You from any Member Services that We supply to You in accordance with Our Disconnect Policy,
- if after the expiry of the period specified in the notice referred to in clause 19.4, You have not rectified the breach specified in the notice.
- 19.6.** Where We have suspended You from any Member Services, the suspended Member Services may only be re-established following payment of Our standard reconnection fee (as specified in the Services Schedules from time to time) where We unsuspend the Member Services.
- 19.7.** In addition to Our rights under clause 19.5, we may terminate this Agreement:
- (a) for convenience at any time on thirty (30) days' written notice to You; or
  - (b) effective immediately, by giving notice in writing to You in the event that:
    - (i) You cease to be one of Our Members;
    - (ii) You become subject to any form of Insolvency Event,
    - (iii) any representation made by You to Us proves to have been false, incorrect or misleading when made; or
    - (iv) a Force Majeure Event continues for more than thirty (30) days.
- 19.8.** You may only terminate this Agreement and Member Services that You order from Us:
- (a) following the expiry of any Minimum Term that is applicable to the Member Services, on thirty (30) days' notice to Us;
  - (b) if We become subject to any form of Insolvency Event;
  - (c) if We breach any material term of this Agreement and fail to remedy the breach within fifteen (15) Business Days of receiving a notice in writing from You requiring us to remedy;
  - (d) if We have been unable to perform Our obligations under this Agreement as a result of a Force Majeure Event that has continued for more than thirty (30) days.

## **20. Termination consequences**

- 20.1.** You acknowledge and agree that in the case of termination by either party, any fees and charges paid by You in advance will not be refunded, whether or not the Member Services have been provided or used.
- 20.2.** On termination or expiration of this Agreement:
- (a) We may at any time terminate the supply of Member Services to You;
  - (b) You shall immediately pay to Us all moneys due and owing as at the date of termination of this Agreement including in relation to the Member Services.

- 20.3. Termination of this Agreement and access to the Website, Member Portal and/or Member Services does not affect any accrued rights of either party.

## 21. Force Majeure

- 21.1. Neither party is liable for any delay or failure to perform its obligations pursuant to this Agreement (except an obligation to pay money) if such delay or failure is due to a Force Majeure Event. If a delay or failure of a party to perform its obligations is caused or anticipated due to a Force Majeure Event:
- (a) that party must promptly notify the other party in writing stating the cause of the delay and the effect upon the party's performance;
  - (b) the performance of that party's obligations will be suspended; and
  - (c) that party must use reasonable endeavours to overcome or resolve the Force Majeure Event as promptly as possible.

## 22. Dispute Resolution

- 22.1. If a dispute arises out of, or in any way in connection with, or otherwise relates to this Agreement that the parties are unable to resolve themselves after 10 Business Days and no alternative disputes resolution process has been agreed, the parties agree to refer their dispute to Mediation administered by the Resolution Institute ("RI") before having recourse to arbitration or litigation, except where the dispute relates to non-payment of any fees and charges to Us in which case We may take whatever legal action We deem necessary to recover the fees and charges.
- 22.2. The Mediation shall be conducted in Auckland, New Zealand and shall be conducted in accordance with the Resolution Institute Mediation Rules which are operating at the time the dispute is referred to the RI and which terms are hereby deemed incorporated into this Agreement.
- 22.3. The costs of the mediator shall be shared equally between the parties.
- 22.4. Nothing in this clause shall limit either party's right to seek urgent interlocutory relief from any court of competent jurisdiction at any time.

## 23. Notices

- 23.1. A notice or other communication under the terms and conditions of this Agreement shall be in writing, sent by hand delivery, post or email.
- 23.2. Any notice issued by hand shall be deemed delivered upon delivery.
- 23.3. Any notice issued by post shall be deemed delivered 3 Business Days after posting if posted domestically, or 10 Business Days after posting if posted internationally.
- 23.4. Any notice issued via email shall be deemed to be delivered upon the email being sent, provided that if an email is sent out of Business Hours, it shall be deemed to be delivered at gam on the next Business Day.

## 24. General

- 24.1. Other rights: All rights not expressly granted to Us in this Agreement are expressly reserved by Us.
- 24.2. Publicity: Neither party may make or send public announcements, press releases, or other communications concerning this Agreement or the Member Services without the prior written consent of the other party provided that We may include You in any public list of Members and publish Your company name and autonomous system number to its peering database and the Website. Neither party may use the logo or marks of the other party without the written permission of the party for which such permission may be withdrawn at any time. You have the right to publish Your relevant details for Member Services to internet peering databases.
- 24.3. Amendment: You may upgrade or downgrade the Member Services You purchase as permitted through the Member Portal. We may amend the terms and conditions of this Agreement or the Member Services at any time by giving You at least 30 days' written notice ("Amendment Notice") provided that We will not change the Service Charges or the functionality and features of Member Services during any applicable minimum term for those services. .
- 24.4. Assignment: You may not assign, transfer, license or novate Your rights or obligations under this Agreement without Our prior written consent. We may assign, transfer, license or novate Our rights or obligations under this Agreement at any time. This Agreement will be binding upon and inure to the benefit of all permitted successors and assigns, who will be bound by all obligations of the assignor.

- 24.5.** Severability: If any part of this Agreement is deemed invalid by a court of competent jurisdiction, the remainder of this Agreement shall remain enforceable.
- 24.6.** Relationship: You and We are independent contractors and this Agreement does not create any relationship of partnership, joint venture, or employer and employee or otherwise.
- 24.7.** Entire Agreement: This Agreement constitute the entire agreement between You and Us and to the extent possible by law, supersedes all prior understandings, representations, arrangements and agreements between You and Us regarding its subject matter.
- 24.8.** Jurisdiction: This Agreement will be interpreted in accordance with the laws of New Zealand. You and We irrevocably submit to the non-exclusive jurisdiction of the courts of New Zealand.
- 24.9.** Waiver: Waiver of any right arising from a breach of the terms and conditions of this Agreement must be in writing and signed by the party granting the waiver. A failure or delay in exercise, or partial exercise, of a right arising from a breach of this Agreement does not result in a waiver of that right. A party is not entitled to rely on a delay in the exercise or non-exercise of a right arising from a breach of this Agreement or from a default under this Agreement as constituting a waiver of that right. This clause may not itself be waived except by writing.
- 24.10.** Counterparts and Delivery: This Agreement may be executed in counterparts. Without limiting any other method of delivery, delivery by the transmission, in electronic form by any means of electronic communication (including the e-mail of a scanned copy) of this Agreement or a counterpart executed by a party to the other party or its solicitor is permitted.
- 24.11.** Survival: The indemnities contained in this Agreement survive termination of this Agreement, regardless of the reason for termination. In addition, any other provisions of this Agreement that, by their nature are intended to survive termination, including (without limitation), clauses 18, 20, 22, 23 and this clause 24 shall also survive termination, regardless of the reason for termination.