

PLEASE NOTE: ALL MEMBER SERVICES ARE SUPPLIED BY NEW ZEALAND INTERNET EXCHANGE (“NZIX”) ON THE TERMS AND CONDITIONS SET OUT IN THIS MASTER SERVICES AGREEMENT UNLESS NZIX OTHERWISE AGREES IN WRITING. YOU MAY ONLY ORDER MEMBER SERVICES THROUGH THE MEMBER PORTAL AND USE MEMBER SERVICES, IF YOU ARE AN 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 currently found 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.

Customer Data means data (other than Member Records) that is transmitted by You or Your customers using the Member Services.

Data Centre means a data centre at or from which We provide Member Services.

Disconnect Policy means the NZIX Disconnect Policy currently found 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, pandemic, earthquake, riots, explosions, wars, hostilities, acts of government, acts of God and industrial action.

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

Identifiers means as set out in clause 16.1.

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;
- (c) the party enters into an arrangement with its creditors;
- (d) where the party is a partnership, the partnership is dissolved or an application is made for its dissolution;
- (e) 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
- (f) 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 of NZIX and “**Members**” has a corresponding meaning.

Member Records includes technical configuration data You provide to enable Us to configure the Member Services for You or provide the Member Services to You, contact details for You and Your Representatives and any other information you provide to Us in relation to Your Membership, when placing any order for or communicating with Us about Member Services, and any other information that You enter into the Member Portal.

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*.

Privacy Act means the Privacy Act 1993 and from 1 December 2020, means the Privacy Act 2020.

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 means the fees and charges for Member Services as set out in the Services Schedule and/or on the Member Portal (or as otherwise agreed between You and Us in writing).

Services Schedule means information accessible on the Website and/or the Member Portal under the heading “Services Schedule” which describes the functionality provided by the 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, a society incorporated in New Zealand under 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 purchasing Member Services from NZIX from time to time on the terms of this Agreement.

1.2. Interpretation

In the terms and conditions of this Agreement:

- (a) Headings 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.
- (c) Currency refers to New Zealand dollars.
- (d) A reference to a statute or regulation includes amendments thereto.
- (e) In this Agreement, a reference to a clause, subclause or paragraph is a reference to a clause, subclause or paragraph of this Agreement.
- (f) The warning at the top of this Agreement forms part of the binding terms and conditions of this Agreement.
- (g) A reference to a person includes a reference to an individual, a partnership, a company, a government body, government department, and any other form of legal entity.
- (h) The words “includes”, “including” and similar expressions are not words of limitation.
- (i) A reference to the singular includes the plural and vice versa.

2. Member Portal

- 2.1. Only Members and their authorised Representatives may access the Member Portal through which Member Services may be ordered, configured, altered and cancelled.
- 2.2. Where you authorise a Representative to order, configure, alter and cancel Member Services on Your behalf (whether through the Member Portal or otherwise), We are entitled to act and rely on the instructions given by those Representatives.
- 2.3. You will use your best endeavours to ensure that Your logon, passwords and other authentication details that allow access to Your account on the Member Portal are kept secure and are only available for use by You and Your authorised Representatives. You will promptly notify Us of any actual or suspected security breach or unauthorised disclosure of such information.

3. Member Services offered by NZIX through the Member Portal

- 3.1. Member Services available are as described in the Member Portal and Services Schedules.
- 3.2. 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.
- 3.3. Notwithstanding clause 3.2, 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 Centre 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.
- 3.4. If We consider it necessary, We may modify the way that We deliver Member Services.
- 3.5. 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, including Customer Data. Except only to the extent that We are required to intercept any data or communications by law, We will not review the content of any Customer Data passing through the Member Services.
- 3.6. 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.
- 3.7. You are responsible for the conduct of Your customers and end users.

4. Orders and payment terms for Member Services

- 4.1. You may order Member Services from Us via the Member Portal.
- 4.2. Each time You or Your Representative 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 specified when You place Your order, are 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 is outside of Our reasonable control and adversely 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 will promptly notify you and attempt to agree with You on a change to the Member Services or the relevant Service Charges. If We cannot reach agreement with You on any such change, We reserve the right to cancel Your order.

- 4.4. Each order for Member Services placed through Your account on the Member Portal will be deemed to constitute a subscription by You for the relevant Member Services. The Member Services so ordered 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 usage or metered charges are payable, You must pay all such applicable usage charges for 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. If usage charges are payable but We have been unable to separately meter or determine such charges during a particular period, You must pay the amount We estimate You are liable for. We must act reasonably and in good faith in applying any such estimates.
- 4.6. You must pay the Service Charges in consideration for the Member Services ordered by You or on Your behalf. The Service Charges must be paid at the time and in the manner set out in each invoice We provide to You. Unless We have otherwise agreed in writing, the 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, the relevant 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.
- 4.8. Upon expiry of any applicable Minimum Term, We may agree to provide the relevant Member Services for a further minimum term ("**Renewed Term**"). If a Renewed Term is not agreed, the relevant Member Services shall continue on a monthly basis and otherwise on the same terms and conditions, unless terminated in accordance with clause 4.11.
- 4.9. We will use reasonable endeavours to ensure that Member Services ordered through the Member Portal are provisioned and available for Your use by any agreed dates. We will not be liable for any delays to the extent caused or contributed to by You or Your suppliers and, to the full extent permitted by law, any other reasonable delays (whether caused by Us, any third party or otherwise) in the provision of the Member Services.
- 4.10. We may need to wait for all or part of the 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. For the avoidance of doubt, the services and any equipment and facilities provided by Us as part of the Member Services are as expressly specified in the Services Schedule for the relevant Member Services when ordered by the Member. The Member shall be solely responsible for the provision of all other services, equipment and facilities required by the Member to access and utilise the Member Services. and for payment thereof. 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 prior written consent in each case (such consent not to be unreasonably withheld or delayed).
- 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.

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 disputed amount and the reasons for the dispute. You must not otherwise set off or make deduction of any kind from any amount owed by You to Us under the Agreement.
- 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. Such interest is to be calculated from the due date for payment until payment is actually 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 do any or all of the following:
 - (a) suspend or terminate the supply of the Member Services to You;
 - (b) terminate Your Membership in accordance with the rules of NZIX; and
 - (c) 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; or
 - (iii) comply with any other reasonable payment arrangement as We may determine.
- 5.5. If We draw down on any prepayment or bond required under clause 5.4 to pay Service Charges, You agree to replenish the amount of any prepayment or bond to the original amount, within 5 days of demand by Us.

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 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. Records and Data

- 7.1. You and We will each comply with Our respective obligations under the Privacy Act and any other applicable privacy and data protection laws in relation to Member Records and Customer Data.
- 7.2. Your customers retain all rights in their Customer Data. Unless otherwise agreed, We may only transmit and route Customer Data in accordance with this Agreement and to the extent required to provide the Member Services to You. In particular, We will:

- (a) not issue any express request to any of Our Representatives or suppliers to access any Customer Data; and
 - (b) promptly notify You of any unauthorised access to Customer Data by any of Our Representatives or suppliers promptly after becoming 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;
- 7.3. We will not process, collect, use, store, host, disclose or access any Member Records, except in accordance with Our privacy policy and as required to perform the Member Services or to strictly (and only to the extent) required to comply with applicable law.
 - 7.4. You accept that the Member Portal, Member Services and/or Member Records may be hosted by Us or Our suppliers on hardware or infrastructure located in or outside New Zealand and We may not own or operate that infrastructure Ourselves.
 - 7.5. You warrant and agree that:
 - (a) You will only upload or input Member Records into the Member Portal, which You are legally entitled and authorised to upload or input;
 - (b) You are responsible for the accuracy of Your Member Records except where We have assigned or allocated such records for You;
 - (c) Our collection, use, storage and disclosure of the Member Records in accordance with this Agreement will not breach any applicable law or the rights of any other person; and
 - (d) all Member Records, Customer Data and other materials and information that is transmitted by You or Your customers using the Member Services will not infringe the rights of any person or breach any applicable law.
 - 7.6. If We become aware of the transmission or storage of any Customer Data or other content that breaches this Agreement, We may disconnect the Member Equipment that the relevant content is hosted on or transmitted by. Unless immediate action is required by law or for protection of persons or property, we will use reasonable endeavors to provide You with prior notice of any proposed disconnection and an opportunity to remove or cease transmission of the offending content. If You become aware of any Customer Data or other content that You think breaches the Agreement, You will notify Us immediately.
 - 7.7. You will take reasonable precautions to back up and archive Your Member Records and, where You have agreed with Your customers to do so, the Customer Data. You agree that We have no responsibility for any loss or corruption of any Member Records or Customer Data unless caused by Our wilful misconduct.
 - 7.8. You indemnify Us in respect of any loss or damage We incur in respect of any third-party claim that:
 - (a) any of the Member Records or Customer Data is lost, unavailable or corrupted (other than to the extent such loss, unavailability or corruption is caused by our wilful misconduct); or
 - (b) the transmission of any Member Records or Customer Data by Us or Our suppliers in the course of providing the Member Services in accordance with the Agreement infringes the Intellectual Property Rights or other rights of any person or breaches any law, regulation, code or standard.
 - 7.9. 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 Customer Data. We will not process, collect, use, store, host, disclose or access any Customer Data:
 - (a) except as strictly (and only to the extent) required to comply with applicable laws; or
 - (b) unless and until We have entered into a mutually acceptable data processing and security agreement with You, which at a minimum meets the requirements of the Privacy Act 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 extent required to provide the Member Services;

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 technical requirements for connecting Your Equipment to the service demarcation point ("Network Termination Unit Specifications"). 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 all reasonable precautions to ensure that no viruses 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. However, we will use all reasonable endeavours to supply the Member Services:
 - (a) within any timeframe specified in the Services Schedule or otherwise agreed in writing by Us; or
 - (b) otherwise, within a reasonable time of Us accepting Your order for those Member Services.
- 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 all reasonable endeavours to:
 - (a) Provide You with prior notice of any scheduled maintenance or outage of the Member Portal and/or Member Services; and
 - (b) Minimise the impact of scheduled maintenance and outages on Members, including by undertaking such scheduled maintenance or scheduling necessary outages during non-Business Hours where practical to do so.
- 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 peering exchange or 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 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 access to the Member Portal and/or the supply of Member 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 and:
 - (a) Except for Your Member Records and Customer 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; and
 - (b) 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.
- 13.2. 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.
- 13.3. Where We license any software from a 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:
 - (a) any users of the Website, Member Portal and/or Member Services; or

- (b) 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.** Other than the Member Services We provide, 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 network security**
- 15.1.** 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.
- 15.2.** We will maintain appropriate technical, organizational and physical safeguards to secure the Member Services that meet or exceed industry standards.
- 15.3.** You agree and acknowledge that:
- (a) Your use of the Member Portal and/or Member Services; and/or
- (b) software, Customer Data, Member Records and other 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.
- 16. Identifiers**
- 16.1.** 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**”). Member Services will only include the provision of Identifiers where expressly specified in the Services Schedule for those Member Services.
- 16.2.** 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.
- 16.3.** We grant to You a non-transferable licence to use such Identifiers as are allocated to You by Us for the purpose of receiving the Member Services and for the period. We supply those services to You.
- 16.4.** 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. Liability and indemnity**
- 17.1.** 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.
- 17.2.** 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 and 13 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.

- 17.3.** 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.
- 17.4.** Subject to clause 17.1 and except for any willful breach by Us of clauses 7.9 and except for Our liability to indemnify you under clause 13.3, 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;
 - (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; or
 - (d) any matter for which You are responsible under this Agreement.
- 17.5.** Subject to clause 17.1, , 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.
- 17.6.** 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 or transmitted 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 except where that is performed by Us;
 - (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.
- 17.7.** 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.
- 17.8.** 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.

18. Suspension and Termination

- 18.1.** 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; and
 - (e) during any scheduled maintenance or scheduled outage.
- 18.2.** We may terminate Your access and/or subscription to the Member Portal and Member Services by written 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.
- 18.3.** 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 to You, including access to any peering exchange or Data Centre, while You remain in breach of Your obligations.
- 18.4.** If, after the expiry of the period specified in the notice referred to in clause 18.3, You have not rectified the breach, We may at Our discretion either :
- (a) terminate Your access to the Member Portal and the supply of any Member Services that You have ordered from Us; or
 - (b) disconnect any Member Services that We supply to You in accordance with Our Disconnect Policy.
- 18.5.** Where We have suspended or disconnected 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 or Our Disconnect Policy from time to time.
- 18.6.** In addition to Our rights under clause 18.4, 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 affecting either You or Us continues for more than thirty (30) days.
- 18.7.** You may only terminate Member Services that You have ordered 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; or
 - (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.

19. Termination consequences

- 19.1.** Where Member Services are terminated:
- (a) You shall immediately pay all moneys due and owing by You in relation to the Member Services as at the date of termination; and
 - (b) any fees and charges paid by You in advance for Member Services will not be refunded, whether or not the Member Services have been provided or used.
- 19.2.** Termination of Member Services or access to the Website or Member Portal does not affect any accrued rights of either party.

20. Force Majeure

- 20.1.** 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.

21. Dispute Resolution

- 21.1. No party to this Agreement shall commence any court or arbitration proceedings relating to a dispute arising out of or related to this Agreement (“Dispute”), unless that party has first complied with this clause.
- 21.2. A party who claims that a Dispute has arisen must give written notice to the other party specifying the nature of the Dispute.
- 21.3. On receipt of such notice by the other party, the parties must:
 - (a) co-operate and use their best endeavours to resolve any Dispute expeditiously; and
 - (b) if they do not, within 10 Business Days of the receipt of the notice (or such further period as they may agree in writing) resolve the Dispute, refer the Dispute to mediation.
- 21.4. The mediation will be conducted in Auckland, New Zealand on the terms of the Resolution Institute standard mediation agreement (NZ version). The mediation shall be conducted by a mediator and at a fee agreed by the parties. Failing agreement between the parties, the mediator shall be selected, by the Chair for the time being of Resolution Institute.
- 21.5. Nothing in this clause 21 shall limit either party’s right to seek urgent interlocutory relief from any court of competent jurisdiction at any time.

22. Notices

- 22.1. A notice or other communication under the terms and conditions of this Agreement shall be in writing and sent by hand delivery, post or email.
- 22.2. Any notice issued by hand shall be deemed delivered upon actual delivery.
- 22.3. 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.
- 22.4. Any notice issued via email shall be deemed to be delivered:
 - (a) When the sender receives an automated message confirming delivery; or
 - (b) 30 minutes after the time sent (as recorded on the device from which the sender sent the email) unless the sender receives an automated message that the email has not been delivered, whichever happens first and provided that if an email is delivered outside of Business Hours, it shall be deemed to be delivered at 9am on the next Business Day.

23. General

- 23.1. **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 Our 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.
- 23.2. **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.
- 23.3. **Assignment:** You may not assign, transfer, license or novate Your rights or obligations under this Agreement without Our prior written consent except in connection with a sale, merger, or solvent reorganisation. 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.
- 23.4. **Severability:** If any part of this Agreement is deemed invalid by a court of competent jurisdiction, the remainder of this Agreement shall remain enforceable.

- 23.5. 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.
- 23.6. 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.
- 23.7. Counterparts and Delivery: The 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 the Agreement or a counterpart executed by a party to the other party or its solicitor is permitted.
- 23.8. 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 17, 19, 21, 22 and this clause 23 shall also survive termination, regardless of the reason for termination.
- 23.9. 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.
- 23.10. 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.