



TERMS AND CONDITIONS

version 2.2 April 2019

IT IS AGREED:

1. DEFINITIONS AND INTERPRETATION

Definitions

- 1.1 In these Terms and Conditions, unless the context otherwise requires, a word in a clause beginning with a capital letter has the meaning given in clause 22.

Interpretation

- 1.2 This Agreement must be interpreted in accordance with the rules of interpretation set out in clause 23.

2. AGREEMENT AND ORDERING PROCEDURE

- 2.1 Our Agreement with you will consist of the following documents:

- (a) Service Agreement for Hosting IT Support Services and any schedule and/or attachment to that document (**Service Agreement**); and
- (b) these general terms and conditions and any schedule and/or attachment to this document (**Terms and Conditions**).

3. TERM OF AGREEMENT

Subject to termination in accordance with clause 15:

- (a) The Initial Term shall be for the period identified at Item 7 of the Schedule and will begin on the Commencement Date.
- (b) The Agreement will remain in force after the end of the Initial Term until it is terminated pursuant to clause 15. The period for in which the Agreement remains in force after the end of the Initial Term is the Extended Term.

4. PROVISION OF SERVICE

Subject to the Customer's compliance with the Agreement, FocusNet will use its best endeavors to provide the Service in accordance with the Service Agreement.

5. CHARGES AND PAYMENT

- 5.1 The Customer will pay FocusNet the Service Fees by no later than each Due Date throughout the Term.
- 5.2 The Customer will pay FocusNet any Additional Charges by no later than each Due Date throughout the Term.
- 5.3 The Customer will pay any Set up Fees prior to the Commencement Date.
- 5.4 FocusNet may issue an invoice for any payment and the Customer must pay each invoice issued by FocusNet in accordance with the Agreement by the Due Date.
- 5.5 The Customer must pay any FNIS Invoice issued by FocusNet by direct debit in accordance with the Direct Debit Request. The terms of the Direct Debit Request are incorporated into this document and will prevail over the terms of this document to the extent of any inconsistency. All FNIS Invoices will be issued on the first business day of the month. FocusNet will debit your nominated bank account on the day the invoice is raised.

- 5.6 The Customer must pay any FNIT Invoice issued by FocusNet strictly within 7 days of issue. All FNIT invoices will be issued on the last day of each month, and will include an overview of any help desk support in accordance with clause 9 of the Service Agreement provided for the month prior. All FNIT Invoices must be paid directly by the Customer by one of the methods specified on the FNIT Invoice.
- 5.7 FocusNet reserves the right to charge, and the Customer agrees to pay, compound interest on any amount due and not paid by the Customer within the time specified on any invoice issued by FocusNet. Interest will be charged at the Default Rate per annum calculated daily from the date on which the amount became due for payment until the date that payment is received in full. FocusNet may also submit the Customer's account to a collection agency. The Customer agrees FocusNet may recover outstanding amounts plus interest, FocusNet's legal costs (on a solicitor-client basis), bank fees, and any charges or other expenses of any kind incurred in attempting to recover the amount outstanding from the Customer, including any fees, commissions or other amounts FocusNet pays to any collection agency to act on FocusNet's behalf.
- 5.8 FocusNet reserves the right to increase the Service Fee during the Initial Term and Extended Term. Any increase pursuant to this clause must not exceed an amount calculated by reference to the Consumer Price Index published by the Australian Bureau of Statistics quarterly.
- 5.9 The Customer acknowledges that FocusNet may pay commissions or referral fees to any person who introduced the Customer to FocusNet.

6. INSTALLATION AND EQUIPMENT

FocusNet Equipment

- 6.1 FocusNet may provide equipment at the Premises in connection with the provision of the Service.
- 6.2 Title in the FocusNet Equipment is not transferred to the Customer and at all times remains the property of FocusNet. The Customer holds the FocusNet Equipment as bailee for FocusNet.
- 6.3 Risk in the FocusNet Equipment shall pass to the Customer on delivery of the FocusNet Equipment to the Customer.
- 6.4 The Customer is responsible for any damage to, destruction or theft of the FocusNet Equipment, except to the extent it is directly caused by FocusNet. The Customer must keep the FocusNet Equipment in good repair and condition, excluding fair wear and tear, and shall not sell, assign or permit any charge, lien, mortgage or encumbrance to be created in relation to it.
- 6.5 Unless otherwise agreed, the Customer must:
- (a) allow FocusNet to service, modify, maintain, repair or replace the FocusNet Equipment; and
 - (b) do all things reasonably required by FocusNet to make clear that FocusNet is the owner of the FocusNet Equipment.

Purchased Equipment

- 6.6 The Customer may purchase equipment from FocusNet for use in connection with the Service.

- 6.7 Title to any Purchased Equipment passes to the Customer when the Customer pays for it in full in cleared funds.
- 6.8 Risk in any Purchased Equipment passes to the Customer on delivery to its nominated location.
- 6.9 FocusNet will use reasonable efforts to transfer to the Customer any manufacturer's warranty in any Purchased Equipment from the time title passes to the Customer.
- 6.10 The Customer must ensure that all Purchased Equipment and its use in connection with the Service complies with all laws, directions by a Government Agency and any reasonable directions by FocusNet, otherwise FocusNet may disconnect that Purchased Equipment on giving reasonable notice, or immediately in an emergency.

Scheduled Installation

- 6.11 FocusNet will advise the Customer of the Scheduled Delivery Date for the Service and shall use its best endeavours to meet this date, however FocusNet shall not be liable for any Liability incurred by the Customer due to a failure to install on or before the Scheduled Delivery Date.

FocusNet Network

- 6.12 FocusNet may grant the Customer access to the FocusNet Network.
- 6.13 The FocusNet Network is and shall remain the property of FocusNet irrespective of the manner in which any hardware or part of it is attached or secured to any land or buildings.

7. APPLICATION OF THE PPSA

- 7.1 The Customer acknowledges and accepts that FocusNet may register under the PPSA any Security Interest it has in any FocusNet Equipment or Purchased Equipment.
- 7.2 The Customer waives its right under section 157 of the PPSA to receive notice of any verification of the registration.
- 7.3 The Customer must not:
- (a) create any form of Security Interest over the FocusNet Equipment in favour of any third party;
 - (b) register, or permit to be registered, a financing statement or financing change statement in respect of a Security Interest contemplated or constituted by this Agreement without FocusNet's prior written consent; or
 - (c) register, or permit to be registered, a financing statement or financing change statement in relation to the FocusNet Equipment in favour of any third party without FocusNet's prior written consent.

8. MAINTENANCE AND REPLACEMENT

- 8.1 FocusNet may in its discretion and for so long as it determines, replace any part of the provision of the Service, including any FocusNet Equipment, with similar equipment or services as may for the time be available.
- 8.2 Any replacement provided under this clause shall be subject to the Agreement as if it had always formed part of the Service or FocusNet Equipment.
- 8.3 FocusNet may interrupt the Service for a Planned Outage Period and will give reasonable advance notice to the Customer wherever possible.

9. PROVISIONS APPLICABLE TO THE SERVICE

Cooperation

- 9.1 The Customer must cooperate with FocusNet and any Supplier and comply with any reasonable request to allow FocusNet or a Supplier access to the Premises, install equipment and establish and supply the Service to the Customer safely and efficiently. This includes meeting FocusNet's reasonable requests, at no further cost to FocusNet, to:
- (a) provide any reasonably necessary forecasts and information to FocusNet, on which FocusNet will rely in establishing and supplying the Service to the Customer;
 - (b) provide safe and prompt access to the Premises and the Customer's personnel, equipment, data and information for the purpose of inspection, repair, maintenance or adjustment of the Service and to inspect and audit all equipment and devices connected to the Service;
 - (c) provide all necessary space and utility services (such as electricity, earthing and air conditioning) as reasonably required by FocusNet for the installation, provision and proper operation of any FocusNet Equipment and Purchased Equipment and for the provision of the Service;
 - (d) provide all reasonably necessary assistance to obtain all licenses, permits and other approvals required for the provision by FocusNet of the Service; and
 - (e) provide all assistance and take all safety precautions as may be reasonably necessary or otherwise requested by FocusNet to ensure safe and proper performance by FocusNet of all work at the Premises.

Customer's Use

- 9.2 Unless otherwise expressly agreed in writing, the Customer shall not resell, hire, allow access to, let or make available any aspect of the Service or any FocusNet Equipment for use in any way to any other person other than a person at the Premises exclusively for purposes directly related to the Customer's business.
- 9.3 Subject to the terms of the Agreement and unless otherwise expressly agreed in writing, the Customer must only use the Service and any FocusNet Equipment for the communication of data for purposes directly related to its business.
- 9.4 The Customer must not use, attempt to use, or allow others to use or attempt to use, the Service or any FocusNet Equipment or any Purchased Equipment:
- (a) to breach any term of the Agreement;
 - (b) for any improper or unlawful purpose;
 - (c) in breach of any applicable Government Agency requirements, legislation and laws including but not limited to any privacy laws; copyright laws and telecommunications laws;
 - (d) to expose FocusNet to any liability;
 - (e) in any way which damages, interferes with or interrupts the Service, the FocusNet Network or a Supplier Network;

- (f) in any way which may damage any property or injure or kill any person; or
- (g) to transmit, publish or communicate material which is defamatory, offensive, abusive, indecent, menacing or unwanted.

Customer to comply with FocusNet's directions

9.5 The Customer acknowledges that:

- (a) where the Service is a carriage service, FocusNet may be required to intercept communications over the Service as directed by any Government Agency; and
- (b) FocusNet may monitor the Customer's usage of the Service and communications sent over it for the purposes of billing and network monitoring and management or as otherwise required by any law, legislation, or direction of any Government Agency.

9.6 FocusNet may ask the Customer to stop doing something which FocusNet reasonably believes is contrary to clause 9.4. The Customer must immediately comply with any such request.

9.7 If the Customer does not comply with clause 9.6, then FocusNet may:

- (a) terminate or suspend the Agreement in accordance with clause 15.4; or
- (b) take any steps reasonably necessary to ensure compliance with clause 9.4.

10. BILLING & BILLING DISPUTES

10.1 On and from the Commencement Date FocusNet will provide the Customer with an invoice or invoices which include a breakdown of the Charges payable pursuant to the Agreement in each Invoice Period.

10.2 FocusNet's records and/or any other relevant records will be conclusive evidence of usage of the Service and any Charges payable by the Customer.

10.3 Unless otherwise agreed expressly in writing by FocusNet and the Customer, FocusNet may bill the Customer for any Charges in advance of the Invoice Period.

10.4 FocusNet reserves the right to:

- (a) include any Charges in a future invoice if those Charges are not included in a past invoice and are owing by the Customer to FocusNet; and
- (b) re-issue any invoice if any error is subsequently discovered.

10.5 The Customer is liable for all Charges whether or not the Customer authorised the particular use of the Service by another person and the Customer will continue to be liable for the Charges if the Customer allows another person to occupy the Premises or use the Service.

10.6 The Customer may dispute an invoice if the Customer reasonably believes that the Customer is not liable to pay the Charges because of an inaccuracy, omission or error in the invoice. Any dispute relating to the payment or accuracy of any invoice must be resolved pursuant to the procedure specified in clause 13. The parties must continue to comply with their obligations under this Agreement notwithstanding the existence of a dispute with respect to an invoice

11. COMPLIANCE WITH POLICY AND LEGAL REQUIREMENTS

- 11.1 The Customer acknowledges that the provision of the Services and FocusNet Equipment by FocusNet shall be subject to:
- (a) FocusNet's privacy policy;
 - (b) the *Privacy Act 1988* (Cth);
 - (c) the *Telecommunications Act 1997* (Cth);
 - (d) the *Telecommunications (Interception and Access) Act 1979* (Cth); the
 - (e) the *Spam Act 2003* (Cth); and
 - (f) any other applicable laws, codes and regulations as passed or amended from time to time.
- 11.2 In the event that FocusNet is unable to provide the Service substantially in the form and of the type contemplated under the Agreement due to any direction of a Government Agency, law, rule, regulation, statute or ordinance, then FocusNet shall provide notice to the Customer of that fact as expeditiously as possible and shall not be liable for any Liability incurred by the Customer as a result of FocusNet's failure to provide the Service.
- 11.3 Upon receipt by the Customer of a notice under clause 11.2, the Customer may terminate the Service without penalty by Notice to FocusNet within 14 days of receipt of the notice. If the Customer provides this notice to FocusNet within the said 14 days then the Service shall be deemed to be terminated by the Customer.

12. DISCLOSURE TO CREDIT REPORTING AGENCY

- 12.1 For the purposes of processing the application for Service, establishing the Customer's account and the ongoing credit management of the Customer's account, FocusNet may need to disclose to a credit reporting agency personal information relating to the Customer which is in FocusNet's possession and the Customer hereby consents to such disclosure or use.
- 12.2 Pursuant to clause 12.1, the following represents a list of customer information relating to the Customer which may be disclosed to a credit reporting agency:
- (a) customer name and address, ACN, ABN, business names, partnership details;
 - (b) details of the Customer's application for FocusNet Services and/or services supplied to the Customer;
 - (c) credit limits on the Customer's accounts;
 - (d) the amount of any payments which are overdue for at least 45 days;
 - (e) where an overdue payment has been previously reported, advice that the payment is no longer overdue;
 - (f) court judgments or bankruptcy orders made against the Customer;
 - (g) that, in the reasonable opinion of FocusNet, the Customer has committed a serious credit infringement;
 - (h) that FocusNet has ceased to provide Services to the Customer in accordance with the terms of this Agreement as a result of Customer default relating to payment/credit; and
 - (i) any additional and relevant information which FocusNet may wish to use or believes should be disclosed.

- 12.3 The Customer agrees that FocusNet may obtain from any person or body carrying on the business or undertaking involving the provision of information about the commercial creditworthiness of persons, any information concerning the Customer that concerns the Customer's commercial activities or commercial creditworthiness for the purposes of assessing the Customer's application for Services and the ongoing credit management (including collection of overdue amounts) of the Customer's account. FocusNet may, at its sole discretion, refuse to supply the Service to the Customer on the basis of FocusNet's credit assessment of the Customer, after consultation with the Customer to confirm the accuracy of the assessment.
- 12.4 The Customer agrees that FocusNet may disclose a credit report to any credit provider, debt collection agency or any Supplier for the purposes of:
- (a) assessment of the Customer's creditworthiness; or
 - (b) the collection of payments that are overdue.
- 12.5 The Customer agrees to provide to FocusNet any information (including the Customer's Financial Accounts) which FocusNet considers in its discretion is reasonably necessary to assess the creditworthiness of the Customer, and the Customer will do so within 10 Business Days of FocusNet's request.

13. DISPUTES PROCEDURE

- 13.1 The Parties agree to negotiate in good faith with each other to resolve any dispute which arises between the Parties under or connected with the Service or this Agreement.
- 13.2 The Parties shall co-operate to investigate promptly and resolve any dispute concerning the accuracy of any billing data, any amount payable and any other issue arising pursuant to the Agreement.
- 13.3 In the event of a dispute as to fees and charges arising pursuant to clause 10.6, the Customer shall notify FocusNet of any dispute in writing no later than 21 days from the date of the relevant invoice, providing sufficient information to identify the invoice in question and the grounds of the dispute. Failure to make such a notification within the time frame shall be deemed to be a waiver of the Customer's rights to dispute the relevant invoice.
- 13.4 If a dispute of any kind cannot be resolved by negotiation between the Parties within 10 days or such further period as the Parties agree is appropriate, then within the following 10 days the Parties must seek to agree a timetable for resolving the dispute through mediation by a mediator agreed upon by the parties, or if the Parties cannot agree, a mediator appointed by the Australian Commercial Disputes Centre or any body which replaces it. Each Party will bear their own costs of mediation and pay one half of the mediator's costs.
- 13.5 During the existence of any dispute, the Parties must continue to perform all of their obligations under the Agreement, without prejudice to their position in respect of any dispute unless the Parties agree otherwise in writing. The Customer must continue to make payment of all Fees or part thereof which are not the subject of a dispute.
- 13.6 A Party may not commence court proceedings or arbitration relating to any dispute arising from or connected with this Agreement unless that Party has complied with the preceding sub-clauses of this clause 13.

13.7 Nothing in this clause prevents either Party from applying to a court for urgent injunctive or other interlocutory relief.

14. LIABILITY, INDEMNITY AND WARRANTIES

14.1 The Customer absolutely and unconditionally releases and indemnifies FocusNet, its servants, agents and contractors against all actions, claims and demands of any kind which are in any way connected with any breach of this Agreement by the Customer, or any other person for whose acts or omissions the Customer is vicariously liable.

14.2 The Customer agrees to indemnify FocusNet from and against any Claim made or brought against FocusNet by reason of any loss, injury or damage suffered or incurred, or alleged to have been suffered or incurred, by any person from or in connection with the Customer's use of any of the Services, any FocusNet Equipment or any Purchased Equipment. The indemnity given by the Customer extends to include payment of:

- (a) any damages or other amounts paid by FocusNet in settlement or satisfaction (including pursuant to a judgment or order of a court) of the Claim; and
- (b) FocusNet's legal fees on an indemnity basis incurred in connection with the Claim,

provided that FocusNet promptly gives the Customer Notice of the Claim.

14.3 FocusNet's liability for breach of any term, condition, warranty or under any remedy implied by law, which cannot be lawfully excluded will be:

- (a) limited (if permitted by law) at FocusNet's option to repair or resupply the Service or goods; and
- (b) reduced to the extent that any such liability is caused, directly or indirectly, by the Customer's negligent acts/omissions and/or any breach by the Customer of the Agreement.

14.4 Except as required by law or regulation or as otherwise expressly set out in this Agreement, FocusNet expressly excludes all liability for all:

- (a) warranties;
- (b) conditions; and
- (c) non-fraudulent representations, concerning the Service or the FocusNet Equipment, including but not limited to those relating to the availability, performance, quality or fitness for purpose of the Service or FocusNet Equipment.

14.5 The Customer acknowledges it has not relied on:

- (a) any representation or warranty made by FocusNet which has not been stated expressly in this Agreement; or
- (b) any descriptions or illustrations or specifications contained in any document including any catalogues or material published by FocusNet.

14.6 Under no circumstances will FocusNet be liable to the Customer for loss of profits, loss of contracts, loss of use of the Service or any interruption or for any indirect economic or consequential loss whatsoever, whether arising from negligence, breach of contract, failure of the Service at law, in equity or howsoever otherwise.

- 14.7 Save for in respect of the obligation to pay money, neither Party shall be liable to the other for any delay or failure to perform its obligations under this Agreement if such delay or failure is due to a cause or matter beyond the reasonable control of that Party, including a Force Majeure Event.

15. TERMINATION AND SUSPENSION

Termination on the expiration of the Initial Term

- 15.1 The Agreement will terminate upon the expiration of the Initial Term if either Party gives the other Party Notice to that effect no later than 30 days prior to the expiration of the Initial Term.

Termination during the Extended Term

- 15.2 During the Extended Term either Party may terminate the Agreement on 30 days' Notice.

Termination by FocusNet before and during the Initial Term

- 15.3 FocusNet may terminate the Agreement at any time prior to the Commencement Date without Liability to FocusNet or the Customer if FocusNet reasonably determines that it is not technically or operationally feasible or commercially viable to supply the Service to the Customer.

- 15.4 FocusNet may in its absolute discretion immediately terminate or suspend supply under the Agreement if:

- (a) the Customer breaches clause 9.6;
- (b) FocusNet reasonably suspects the Customer is a residential or small business customer in accordance with clause 16;
- (c) the Customer breaches any obligation under the Agreement and such breach is not capable of remedy or the Customer does not remedy that breach within 30 days after FocusNet gives it Notice requiring it to do so;
- (d) if the Customer does not obtain the consent of the owner of the Premises to the supply of the Service;
- (e) the Customer fails to make payment for the Service by the Due Date and such amount remain unpaid for 10 Business Days after receiving Notice from FocusNet of such non-payment;
- (f) FocusNet reasonably suspects fraud or other misuse by the Customer or any person in connection with the Customer with the Service and the Customer has not responded to FocusNet's Notice to the Customer of any such event within 10 Business Days;
- (g) the Customer suffers an Insolvency Event;
- (h) FocusNet or a FocusNet Group Company is entitled to terminate or cancel any other service, including any Service, supplied to the Customer, or is entitled to (or does) terminate any other agreement with the Customer;
- (i) FocusNet is required to do so under any law or to comply with an order, instruction or request of a Government Agency, an emergency services organisation or any other competent authority; or

- (j) a Supplier terminates its agreement with FocusNet, or ceases to supply services to FocusNet, and FocusNet is not able to provide the Service or any aspect of the Service using services supplied to FocusNet by an alternate supplier on terms reasonably acceptable to FocusNet.
- 15.5 If the Agreement is terminated by FocusNet before the end of the Term for any of the reasons in clause 15.4(a)-(h), the Customer must forthwith pay to Focus Net:
- (a) the Termination Fee; and
 - (b) any amount that FocusNet is obligated or required to pay to any Supplier for the remainder of the Initial Term; and
 - (c) any reasonable costs associated with the extraction and delivery of data pursuant to clause 15.20.
- 15.6 The Customer warrants and represents to FocusNet that:
- (a) the Customer understands the nature and intended effect of clause 15.5, and the stated obligations of the Customer under clause 15.5;
 - (b) the Customer has had the opportunity to obtain independent legal advice on this agreement, and this clause 15 in particular, prior to entering into this Agreement;
 - (c) it has entered into this Agreement of its own volition, intending fully to observe its obligations, including those stated in clause 15.5;
 - (d) it unconditionally waives, alternatively is estopped from asserting, any right or entitlement that it has or might at any time have to challenge or dispute its obligations under clause 15.5; and
 - (e) if the Customer challenges or in any way disputes its obligations under clause 15.5, FocusNet may plead the matters stated in clause 15.6(c) and or clause 15.6(d) as a full and final defence and complete answer to the challenge or dispute that has been raised by the Customer.
- 15.7 The Customer further acknowledges and agrees that:
- (a) the amounts payable by it pursuant to clause 15.5 are a genuine pre-estimate of the loss and damage that FocusNet will suffer in the event that FocusNet terminates the Agreement before the end of the Term for any of the reasons in clause 15.4;
 - (b) in determining to enter into this agreement with the Customer, FocusNet has relied on the warranties and representations given by the Customer pursuant to clause 15.6; and
 - (c) it will indemnify FocusNet for any loss, damage, expense or liability suffered or incurred, including without limitation legal costs on an indemnity basis, in the event that the Customer fails, refuses or neglects to pay any of the amounts specified in clause 15.5 if the Agreement is terminated before the end of the Term for any of the reasons in clause 15.4.

Termination by Customer before and during the Initial Term

- 15.8 The Customer may terminate the Agreement before the Commencement Date, in which case the Customer must pay to FocusNet all costs incurred by FocusNet in connection with preparation for the provision of the Service.

- 15.9 After the Commencement Date the Customer may terminate the Agreement without Liability to FocusNet if:
- (a) it does so pursuant to clause 11.3;
 - (b) if the Service has been suspended for more than 30 consecutive days through no fault of the Customer unless the suspension is due to a Force Majeure Event;
 - (c) FocusNet commits a serious breach of the Agreement, and has not remedied that breach within 30 days of being given Notice of that breach; or
 - (d) the Initial Term has ended, and the Customer gives 30 days Notice of the termination to FocusNet.
- 15.10 Subject to clause 15.9, after the Commencement Date the Customer may terminate the Agreement by giving 30 days Notice to FocusNet and, in that event, the Customer must forthwith pay to FocusNet:
- (a) the Termination Fee; and
 - (b) any outstanding charges including but not limited to the Set up Fees and Additional Charges, or part thereof; and
 - (c) any reasonable costs associated with the extraction and delivery of data pursuant to clause 15.20.
- 15.11 The Customer warrants and represents to FocusNet that:
- (a) the Customer understands the nature and intended effect of clause 15.10, and the stated obligations of the Customer under clause 15.10;
 - (b) the Customer has had the opportunity to obtain independent legal advice on this agreement, and this clause 15 in particular, prior to entering into this agreement;
 - (c) it has entered into this agreement of its own volition, intending fully to observe its obligation, including those stated in clause 15.10;
 - (d) it unconditionally waives, alternatively is estopped from asserting, any right or entitlement that it has or might have to challenge or dispute its obligations under clause 15.10; and
 - (e) if the Customer challenges or in any way disputes its obligations under clause 15.10, FocusNet may plead the matters stated in clause 15.11(c) and or clause 15.11(d) as a full and final defence and complete answer to the challenge or dispute that has been raised by the Customer.
- 15.12 The Customer further acknowledges and agrees that:
- (a) the amounts payable by it pursuant to clause 15.10 are a genuine pre-estimate of the loss and damage that FocusNet will suffer in the event that the Customer terminates the Agreement pursuant to clause 15.10;
 - (b) in determining to enter into this agreement with the Customer, FocusNet has relied on the warranties and representations given by the Customer pursuant to clause 15.11; and
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- (c) it will indemnify FocusNet for any loss, damage, expense or liability suffered or incurred, including without limitation legal costs on an indemnity basis, in the event that the Customer fails refuses or neglects to pay any of the amounts specified in clause 15.10 if the Agreement is terminated pursuant to clause 15.10.

Termination on Force Majeure Event

- 15.13 FocusNet shall not have any liability under or be deemed to be in breach of this Agreement for any delays or failures in performance of this Agreement which result from a Force Majeure Event.
- 15.14 Either Party may, without liability, terminate the Agreement with immediate effect on the giving of Notice if any Force Majeure Event prevents the supply of the Service for more than 60 consecutive days. Nothing in this clause affects any Liability either Party has accrued to the other prior to termination pursuant to this clause.

Suspension by FocusNet

- 15.15 In addition to FocusNet's rights to terminate the Agreement under this clause 15, FocusNet may, upon reasonable Notice, without Liability and with immediate effect, suspend the Service for as long as FocusNet, acting reasonably, considers necessary:
 - (a) to allow FocusNet or a Supplier to repair, maintain or service any part of the FocusNet Network, FocusNet Equipment or Supplier Network used to supply the Service;
 - (b) if FocusNet reasonably believes it is necessary to do so to comply with any law, to protect any person, equipment or the FocusNet Network, or to enable authorised persons to attend to any emergency; or
 - (c) if the Customer breaches the Agreement.
- 15.16 If the Service is suspended as a result of the Customer's breach of the Agreement, the Customer must pay to FocusNet:
 - (a) the Service Fees arising during the suspension; and
 - (b) any applicable Additional Charges,
 that would have been payable but for the Customer's breach of the Agreement.

Following termination

- 15.17 Termination of the Agreement for whatever reason shall be without prejudice to the right of FocusNet to be paid any amounts which may have become due for payment prior to such termination but which have not been paid, and to be paid any reasonable costs associated with the extraction and delivery of data pursuant to clause 15.20.
- 15.18 Upon termination of the Service for any reason, FocusNet, its agents or employees shall have reasonable access to the Premises for the purpose of disconnecting, dismantling and removing the Service and FocusNet Equipment, and the Customer shall render all reasonable assistance to FocusNet to enable it to do so.
- 15.19 Except in cases where the removal of the Service occurs as a result of the breach of the terms of this Agreement, upon removal of the Service and any FocusNet Equipment, FocusNet shall make good to a reasonable standard, fair wear and tear excepted, any damage caused during the removal of the Service or FocusNet Equipment, but without any obligation to repaint or redecorate.
- 15.20 On termination of the Agreement for any reason:

- (a) FocusNet will, if requested by the Customer, provide the Customer with any reasonably necessary assistance required by the Customer for transferring responsibility for providing the Service either to an alternative service provider or to the Customer, and such assistance will include the provision by FocusNet to an alternative service provider or to the Customer of a copy of all of the Customer's documentation, records and data held by FocusNet relating to the Software Platform Service in a reasonable format suitable for transfer of such data to an alternative service, provided that:
 - (i) there is no requirement pursuant to this paragraph for FocusNet to provide any materials for which the Intellectual Property Rights are owned by FocusNet or its licensors;
 - (ii) such assistance will be provided during the period commencing on the termination of this Agreement and ending no later than 30 days after the effective date of such termination;
 - (iii) the Customer will pay FocusNet for any such assistance on a time and materials basis in accordance with the then-current rates, which amounts will be payable in accordance with clauses 5 and 10; and
 - (iv) the Customer must agree to comply with any reasonable security and confidentiality requirements stipulated by us in respect of such assistance.
- (b) each Party must, on request by the other Party, immediately return or destroy the other Party's Confidential Information, except to the extent that it is required by law to retain the other party's Confidential Information;
- (c) FocusNet may immediately stop supplying to the Customer the Service;
- (d) unless otherwise expressly agreed in writing by FocusNet the Customer must immediately stop using the Service and the FocusNet Equipment; and
- (e) the accrued rights and obligations of each Party are not affected.

16. CUSTOMER'S ACKNOWLEDGMENT

The Customer:

- (a) acknowledges and warrants that it is not a residential or small business customer as defined in the *Telecommunications Act 1997* (Cth);
- (b) agrees that FocusNet may suspend or terminate the Service immediately in accordance with clause 15.4, without notice and without Liability to the Customer if it reasonably believes the Customer is a residential or small business customer;
- (c) agrees to inform FocusNet immediately if its situation may or does change and it becomes or may become a residential or small business customer; and
- (d) indemnifies FocusNet for any Liability that FocusNet suffers or incurs in connection with a breach by the Customer of this clause, regardless of any fault or negligence on the part of FocusNet.

17. CONFIDENTIALITY

17.1 The Parties agree:

- (a) to keep each other's Confidential Information confidential;
- (b) to limit access to each other's Confidential Information to those of its employees, agents or contractors reasonably requiring it on a need to know basis; and
- (c) to take all reasonable steps to ensure that their employees, agents and contractors do not make public or disclose the other Party's Confidential Information or any part of it.

17.2 Nothing in the Agreement shall impose an obligation on a Party to keep the other Party's Confidential Information confidential where that information:

- (a) is or becomes available in the public domain (otherwise than through a breach of this Agreement);
- (b) was already known by the Parties at the time of disclosure; or
- (c) is required to be disclosed by compulsion of law.

18. INTELLECTUAL PROPERTY

18.1 FocusNet owns or is otherwise authorised to use all material (including the Intellectual Property Rights) developed by it, or its personnel.

18.2 FocusNet may permit the Customer to use the material referred to in clause 18.1, or other material licensed by FocusNet, as part of the Service. This permission is subject to any conditions which FocusNet may impose from time to time and will cease when the Service is terminated, unless otherwise expressly agreed in writing.

18.3 The Customer will not challenge directly or indirectly, or do anything to assist any other person to challenge directly or indirectly, FocusNet's rights, including Intellectual Property Rights, in or to the Services.

18.4 Without limiting the generality of this clause, the Customer acknowledges and agrees that any attempt to tamper with or Reverse Engineer any of the Service will constitute a challenge by the Customer of FocusNet's Intellectual Property Rights and is a breach of this Agreement.

19. AUSTRALIAN FINANCIAL SERVICES LICENCE HOLDERS

19.1 This clause 19 applies only where the Customer:

- (a) operates a Financial Services Business; and
- (b) holds an Australian financial services licence (**AFSL**) or is an Authorised Representative of such a Customer.

19.2 In the event of any conflict or inconsistency, this clause 19 takes precedence over any other clause of these Terms and Conditions.

19.3 FocusNet acknowledges that the Services provided under this Agreement may affect the Customer's conditions of its AFSL.

19.4 For the avoidance of doubt, FocusNet will comply with any special conditions attached to these Terms and Conditions.

19.5 FocusNet will not subcontract the performance of the Service to any person without the prior written consent of the Customer.

20. GOODS & SERVICES TAX

- 20.1 In this clause the expressions “consideration”, “GST”, “input tax credit”, “recipient”, “supplier”, “supply” and “tax invoice” have the meanings given to those expressions in the *A New Tax System (Goods and Services Tax) Act 1999* (Cth).
- 20.2 All prices or other sums payable or consideration to be provided and which are expressly stated in this Agreement are exclusive of GST unless otherwise indicated.
- 20.3 If GST is payable by FocusNet on any supply made under this Agreement the Customer will pay to FocusNet an amount equal to the GST payable on the supply. Subject to the supply of a tax invoice, that amount will be paid at the same time the consideration for the supply is payable under the Agreement and will be paid in addition to the consideration. FocusNet shall provide the Customer with a tax invoice in respect of the supply and any applicable GST.
- 20.4 Where the Customer is required to pay for or reimburse an expense or outgoing of FocusNet, the amount to be paid by the Customer is the amount of the expense or outgoing less any input tax credit in respect of such expense or outgoing that the supplier is entitled to.
- 20.5 Any invoice or claim provided by FocusNet under the Agreement will be accompanied by a tax invoice or other approved document providing the recipient with the ability to claim an input tax credit.

21. GENERAL

Survival

- 21.1 The rights and obligations in clauses 5, 6, 7, 14, 17 and 18 survive termination or expiration of this Agreement, whichever occurs first.

No Assignment

- 21.2 The Customer may not assign, delegate, subcontract, mortgage, charge or otherwise transfer any or all of its rights and obligations under this Agreement without the prior written agreement of FocusNet.
- 21.3 FocusNet shall be entitled to novate, assign or sub-contract its interest in and obligations under the Agreement or any part thereof to any third party on Notice to the Customer. FocusNet shall have no further obligations to the Customer in respect of any matter relating to such novation or assignment on and from the date of the Notice provided to the Customer pursuant to this clause. This clause 21.3 does not apply to a Customer that holds an AFSL.

Related Bodies Corporate

- 21.4 FocusNet may provide the Service through the use of any of FocusNet’s Related Bodies Corporate.
- 21.5 The Customer acknowledges and agrees that any debt owed under this Agreement is a debt owed to FocusNet and that FocusNet may take any necessary action in relation to any such debt notwithstanding that the right or obligation giving rise to the debt was satisfied by FocusNet’s Related Bodies Corporate.

Variation

- 21.6 FocusNet may change these Terms and Conditions from time to time during the Term.

- 21.7 It is the Customer's responsibility to access FocusNet's Website to view the Terms and Conditions.
- 21.8 The Customer may request a copy of these Terms and Conditions as may be amended from time to time, at any time during the Term from FocusNet and FocusNet must provide a copy within 10 Business Days.
- 21.9 If the Customer wishes to reject any change to these Terms and Conditions, including any amendment to the Terms and Conditions, the Customer must give Notice of that rejection to FocusNet within 20 Business Days of publication of the Terms and Conditions as amended on FocusNet's Website. When such Notice is given, the Customer continues to be bound by the Terms and Conditions immediately in force before such Notice was given and must strictly comply with its obligations under that Agreement.
- 21.10 If the Customer does not give Notice as referred to in this clause, the Customer is deemed to have accepted the varied terms and those terms will take effect at the end of the period of 20 Business Days after publication of the varied Terms and Conditions on FocusNet's website.

Notices

- 21.11 A Notice connected with this Agreement (**Notice**) has no legal effect unless it is in writing and:
- (a) delivered;
 - (b) sent by post, postage prepaid; or
 - (c) emailed;
- to any address or email address of the addressee set out at Item 1 or Item 2 of the Schedule to the Service Agreement as appropriate, or subsequently notified from time to time.
- 21.12 A Notice is deemed given and received:
- (a) if delivered or emailed, upon delivery; or
 - (b) if mailed, on the expiration of 2 Business Days (at the address to which it is mailed) after mailing.
- 21.13 A Notice by the Party may be given by any officer or agent of the Party.

Waiver

- 21.14 No waiver or indulgence by any Party is binding on the Parties unless it is in writing. No waiver of one breach of any term or condition of this Agreement will operate as a waiver of another breach of the same or any other term or condition of this Agreement.

Severability

- 21.15 Any provision of this Agreement which is illegal, void or unenforceable is only ineffective to the extent of that illegality, voidness or unenforceability, without invalidating the remaining provisions.

Entire Agreement

21.16 The Agreement represents the entire agreement between the Parties in relation to its subject matter and all prior or contemporaneous representations, statements and agreements (if any) made by the Party or the Party's representatives are superseded by this Agreement.

Agency, partnership

21.17 This Agreement shall not constitute or imply any partnership, joint venture, agency, fiduciary or other relationship between the Parties other than the contractual relationship expressly provided for in this Agreement.

21.18 Neither Party shall have, not represent that it has, any authority to make any commitments on the other Party's behalf.

Governing Law

21.19 Each Party irrevocably and unconditionally submits to the exclusive jurisdiction of the courts and appellate courts of Western Australia with respect to any legal action or proceedings which may be brought at any time relating in any way to this Agreement.

21.20 Each Party irrevocably waives any objection it may now or in the future have to the venue of any action or proceedings, and any claim it may now or in the future have that the action or proceeding has been brought in an inconvenient forum.

Counterparts

21.21 This Agreement may be executed in any number of counterparts, including counterparts delivered by facsimile or email transmission, all of which taken together shall constitute one and the same document.

22. DEFINITIONS

In this Agreement:

Additional Charges means:

- (a) FocusNet's reasonable costs and expenses incurred in providing the Service as a direct or indirect consequence of:
 - (i) providing the Service at a different site to the Premises, if requested by the Customer;
 - (ii) any variation of the Agreement requested by the Customer;
 - (iii) any inaccurate or incomplete information provided to FocusNet by or on behalf of the Customer;
 - (iv) a suspension and subsequent reactivation of the Service;
 - (v) the occurrence of an Excluded Event; or
 - (vi) FocusNet investigating or remedying a potential or actual fault in connection with the Customer's Equipment; and
- (b) any other amounts agreed between the Customer and FocusNet.

Agreement means these Terms and Conditions and the Service Agreement, including and any documents attached to either of those documents.

Australian Financial Services Licence and **AFSL** have the meaning given in the *Corporations Act 2001* (Cth).

Authority includes any governmental or public authority of any kind.

Authorised Representative has the meaning given in the *Corporations Act 2001* (Cth).

Business Day means a day that is not a Saturday, Sunday or any other day which is a gazetted public holiday in Western Australia.

Claim means any claim, demand, action, suit or proceeding of any kind anywhere in the world.

Charges means any amount that FocusNet is entitled to charge the Customer pursuant to this Agreement, including but not limited to Service Fees, Set up Fees and Additional Charges, as may be amended from time to time.

Commencement Date means the date that FocusNet commences providing the Service to the Customer.

Confidential Information means any information or document of any kind of the other Party that a reasonable person would consider to be confidential information or which the other Party expressly identifies in writing at or the time of its disclosure to the other Party as confidential.

Customer means the person or persons named at Item 2.

Customer's Equipment means any equipment in the Premises used in connection with the Service other than FocusNet's Equipment and includes any Purchased Equipment once it is paid for in full.

Default Rate means a rate 5% above the Commonwealth Bank Corporate Overdraft Reference Rate or, if that rate is no longer published, the interest rate quoted from time to time by FocusNet's bank for loans exceeding \$100,000.

Direct Debit Request means the Direct Debit Request form attached to the Service Agreement.

Due Date means the date for payment specified in an invoice or, if no date is specified, the date that is 7 days after the date of the invoice.

Excluded Event means

- (c) a breach of the Agreement by the Customer; or
- (d) a Force Majeure Event; or
- (e) a negligent or fraudulent act or omission of the Customer or any the Customer's contractors, employees or agents; or
- (f) a failure of any of the Customer's Equipment.

Extended Term means the period, if any, in which the Agreement remains in force after the end of the Initial Term.

Facilities includes premises, utilities (including electricity, internet access and air-conditioning), equipment, computer networks, and telecommunications networks or systems.

Fees means the fees specified in the Schedule and any other Additional Charges.

Financial Services Business has the meaning given in the *Corporations Act 2001* (Cth).

Financial Services Legislation means all acts, regulations, codes of practice and any relevant circular, directive, policy statement and similar issued by any government authority or industry body which apply to the provision of financial services.

FNIS Invoice means any invoice issued by FocusNet in respect of the Service.

FNIT Invoice means any invoice issued by FocusNet in respect of Help Desk Support charges, Purchased Equipment, FocusNet Equipment or other charges not included on an FNIS Invoice.

FocusNet means FocusNet Pty Ltd ABN 30 606 250 006.

FocusNet Equipment means any equipment in the Premises owned or provided by FocusNet or its Related Bodies Corporate, excluding Purchased Equipment.

FocusNet Group Company means any company that is a Related Body Corporate of FocusNet.

FocusNet Network means any telecommunications network, equipment, or facilities, or cabling controlled or utilised by FocusNet.

FocusNet Website means any website hosted by or on behalf of FocusNet and which is currently www.focusnet.com.au

Force Majeure Event means any event or circumstance (or combination of events or circumstances) that is beyond the control of the Party affected by it and that causes delay or failure in the performance of that Party's obligations under the Agreement, including:

- (g) an act of God; or
- (h) an act of war (whether declared or not), terrorism, riot, civil commotion, sabotage or insurrection; or
- (i) any strike, lockout, work stoppage or other industrial dispute of any kind; or
- (j) any requirement or restriction of an Authority; or
- (k) a delay in the provision of, or the refusal of, an approval, consent, permit or licence by an Authority; or
- (l) any act or omission of a third party that affects the provision of the Services, including a failure to provide goods or services or access to premises.

Government Agency means any government or governmental, semi-governmental, administrative, municipal, fiscal or judicial body, department, commission, authority, tribunal, agency or other statutory entity including but not limited to the Australian Communications and Media Authority, the Australian Competition and Consumer Commission, the Australian Communications Industry Forum Limited, the Telecommunication Industry Ombudsman and any other governmental or statutory body or authority.

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

Initial Term means the period specified at Item 7 of the Schedule.

Insolvency Event means the happening of any of the following events in relation to a Party:

- (a) the Party is unable to pay all the Party's debts as and when they become due and payable or the Party has failed to comply with a statutory demand as provided in section 459F of the *Corporations Act 2001* (Cth), or the Party is deemed to be unable to pay the Party's debts under section 585 of the *Corporations Act 2001* or the Party is otherwise presumed by Law to be insolvent;
- (b) the Party has stopped or suspended or is threatening to stop or suspend payment of all or a class of its debts;
- (c) the Party becomes an externally-administered body corporate (within the meaning stated in the *Corporations Act 2001*) and remains so for a period of at least 30 days;
- (d) an application is filed for the winding up of a Party and that application is not dismissed or withdrawn within 30 days after the date on which it was filed;
- (e) an order is made by a court for the Party to be wound up or dissolved;
- (f) an appointment of a controller (as defined in section 9 of the *Corporations Act 2001*) is made in respect of any of the Party's assets and the appointment is not terminated within 30 days;
- (g) the Party enters into any form of arrangement (formal or informal) with the Party's creditors or any of them, including a deed of company arrangement; or
- (h) the Party becomes an insolvent under administration, as defined in section 9 of the *Corporations Act 2001*; or
- (i) anything analogous or having a similar effect to the events described happens to a Party, including a Party who is a natural person.

Intellectual Property Rights means any and all forms of intellectual property rights which may subsist anywhere in the world, whether protected at common law or under statute, including, without limitation, patents, designs (whether registered or unregistered), trade marks (whether registered or unregistered), trade and business names, copyrights (including rights in computer software), database rights, semiconductor topography rights and rights in circuit layout designs, whether or not registered and including applications for the registration of any such thing.

Invoice Period means the period for which payment is required as set out on any invoice issued by FocusNet.

Law includes the provisions of any statute, rule, regulation, proclamation, ordinance or by-law, present or future, whether state, federal or otherwise.

Liability means any direct or consequential liabilities, claims, losses, costs, charges, damages, injuries or expenses of any nature.

Notice means any notice given in accordance with clause 21.11 to 21.13.

Party means a party to the Agreement and **Parties** has a corresponding meaning.

Payment includes every amount (other than GST) payable by the Customer to FocusNet under the Agreement.

Planned Outage Period means a period during which the Service is or may become unusable or impaired due to FocusNet undertaking work on its facilities, networks or systems for any reason, including arising out of or in connection with:

- (a) installation of infrastructure;
- (b) maintenance requirements; and
- (c) software or infrastructure upgrades.

PPSA means the *Personal Property Securities Act 2009* (Cth).

Purchased Equipment means any equipment purchased by the Customer from FocusNet.

Premises means the location(s) specified at Item 2 of the Schedule at which FocusNet is to provide the Service for the Customer and any other location to which FocusNet requires access in order to provide the Service.

Related Bodies Corporate has the meaning given in section 50 of the *Corporations Act 2001* (Cth).

Reverse Engineer means a process of discovering the technological principles of a device, object, or system through analysis of its structure, function, and operation.

Schedule means the schedule to the Service Agreement.

Scheduled Delivery Date means any date FocusNet advises the Customer is the date on which FocusNet will commence installation of any FocusNet Equipment or Purchased Equipment.

Security Interest has the meaning given in section 12 of the *Personal Property Securities Act 2009* (Cth).

Service means the service(s) specified at Item 4 of the Schedule and any ancillary service that FocusNet agrees to provide to the Customer.

Service Agreement means the Service Agreement for Hosting IT Support Services between FocusNet and the Customer, including any attachment and/or schedule to that document.

Service Fees means the fees specified in Item 4 of the Schedule.

Set up Fees means the fees, if any, specified in Item 5 of the Schedule.

Special Conditions means the special conditions, if any, annexed to these Terms and Conditions and signed by the Parties.

Supplier means any third party that provides goods or services to FocusNet in connection with the provision of the Service or FocusNet Equipment.

Supplier Network means any telecommunications network, equipment, or facilities, or cabling controlled by a Supplier.

Term means the Initial Term and any Extended Term, if applicable.

Termination Fee means the calculation of remaining months under agreement multiplied by the total service fees and or a fee specified in Item 7 of the Schedule.

Terms and Conditions means these general terms and conditions.

23. **INTERPRETATION**

In this Agreement unless the context otherwise requires:

- (a) headings are for convenience only and are not to be taken into account in interpreting the provisions of this Agreement;

- (b) the singular includes the plural and vice versa and a reference to any gender or the neuter includes every other gender and the neuter;
- (c) “including” and similar expressions are not words of limitation;
- (d) if a word or phrase is defined, other grammatical forms of that word or phrase have a corresponding meaning;
- (e) unless otherwise specified, references to clauses are references to clauses in these Terms and Conditions;
- (f) all the provisions in any schedule, attachment or appendix to this Agreement are incorporated in and form part of this Agreement and bind the Parties;
- (g) reference to a statute, code or other law includes regulations and other instruments under it and consolidations, amendments, re-enactments or replacements of any of them occurring at any time before or after the Commencement Date;
- (h) reference to a person includes a firm, a body corporate, an unincorporated association, an Authority and the legal representatives, successors and assigns of that person;
- (i) a reference to currency, money or ‘\$’ is a reference to Australian currency;
- (j) a reference to this Agreement or another instrument includes any variation or replacement of either of them despite any change of Party or any change in the identity of a Party;
- (k) an agreement, representation or warranty on the part of or in favour of 2 or more persons binds or is for the benefit of them jointly and severally;
- (l) no rule of interpretation is to be applied to disadvantage a Party on the basis that the Party was responsible for preparing this Agreement or any part of it;
- (m) if an act must be done on a specified day which is not a Business Day, it must be done instead on the next Business Day;
- (n) a reference to a day is to be interpreted as the period of time commencing at midnight and ending 24 hours later; and
- (o) if something must be done with in a period of time after a certain day, that day is not included in the calculation of the relevant period of time.

THESE TERMS AND CONDITONS ARE

Signed for & on behalf of FocusNet Pty Ltd ABN 30 606 250 006 by its duly authorised representative who, by signing on behalf of FocusNet, warrant and represent to the Customer that he/she is duly authorised to do so:

Signed
By Name
Position Held
Date

Signed for & on behalf of **(Customer)** by its duly authorised representatives who, by signing on behalf of the Customer warrant and represent to FocusNet that they are duly authorised to do so:

Signed
By Name
Position Held
Date

Signed
By Name
Position Held
Date