



Master Services Agreement

Version 2.01

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Virtutel



Important notice

DISCLAIMER

Please note, this document may be subject to change from time to time as Virtutel Network infrastructure, Products and Partners change. Please ensure that you have the newest copy of this document from your Virtutel Account Manager, Sales Engineer or via Toolbox (Virtutel online portal).

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1. What is this Document

- 1.1 The purpose of this document is to set out the general terms and conditions that will govern the supply of Services by Virtutel to you. The terms and conditions specific to the supply of a Service to you are set out in the Service Schedule or Order Form.
- 1.2 We can provide you with a range of services. For each Order accepted by us, a separate Service Agreement exists. The terms of each Service Agreement are set out in the Service Schedule which incorporates the terms and conditions of this Master Services Agreement. A Service Agreement is binding and commences when an Order is accepted by Virtutel.

2. Meaning of Terms

- 2.1 If we have used terms in this document or in Schedules, their meanings are set out in the Glossary found at the end of this document.
- 2.2 If there is any inconsistency or ambiguity between this Master Services Agreement and the Service Schedule, the inconsistency will be resolved using the following priority:
 - (i) The Service Schedule;
 - (ii) this Master Services Agreement; and
 - (iii) any Attachments.

3. What Virtutel does for you

- 3.1 *Provide the Services:* The Service Schedule that you have signed or will sign, sets out the exact nature of the services that we have agreed to provide to you. Throughout the Term of a service, Virtutel will supply to you the Services and you agree to take them.
- 3.2 *Level of Service:* For some of the Services, we are able to specify Service Levels. The Service Schedule will set out Service Levels and any consequences of our failing to achieve the Service Levels.
- 3.3 *Privacy:* We will observe mandatory industry privacy and data handling requirements for your records and the records of End Users that are held by us.

4. What you must do

- 4.1 *Pay:* You must pay us the amount set out in the Order Form or Pricing Schedule for the service defined within the Service Schedule or as otherwise agreed by the parties in writing from time to time.
- 4.2 *Ensure Proper use of a Service* You must comply with all laws, regulations, standards and codes applicable to the telecommunications industry. You agree that you will not:
- a) use or permit the use of a Service in any manner which constitutes a violation or an infringement of any duty or obligation in contract, tort, or otherwise to any third person;
 - b) use or permit the use of a Service in connection with the commission of an offense against the laws of the Commonwealth or the States or Territories;
 - c) use or permit the use of a Service in any manner in contravention of the Acceptable Use Policy, including, but not limited to the transmission of any defamatory, offensive, abusive, indecent, spam or menacing material or the making of any hoax call;
 - d) knowingly, or by any negligent act or omission, use or permit the use of a Service in connection with the transmission of any computer virus that may adversely affect the Virtutel Equipment, the Virtutel Network, the equipment or network of any third-party provider to Virtutel or any network users;
 - e) use or permit the use of a Service to engage in any activities in a manner that may expose Virtutel or any third party provider to the risk of any legal or administrative action including prosecution under any law; or interfere or attempt to interfere with the operation of:

A Service, Service Number, or an IP address; any Virtutel Equipment; the Virtutel Network or the equipment, network, or IP Addresses of any other person.
- 4.3 *Regulatory Compliance Issues:* You must comply with all reasonable requests for assistance that we make of you to help us to comply with our regulatory obligations, including, in particular, requests relating to:
- a) providing information to the police and other law enforcement agencies;
 - b) providing information for directory purposes;
 - c) the provision of emergency services; and
 - d) the provision of information to telecommunications users from time to time regarding alterations in numbering plans, industry codes and other industry developments.
- 4.4 *Assistance:* You will co-operate with Virtutel and do everything reasonable to help Virtutel to provide to you a Service at a location. The kinds of assistance we may require from you include:
- a) ensuring that it is possible and safe for us to get necessary access to a location (including for any emergency);
 - b) ensuring that relevant people are available and give to us timely instructions;

- c) ensuring that Customer Equipment is ready for the commissioning of services;
- d) at your own expense and following our reasonable instructions, making any modifications to Customer Equipment reasonably necessary to enable us to provide the Service;
- e) obtaining and maintaining any authorisation, permission, licence, waiver, registration or consent from any person necessary for you to request to enable us to provide the Service;
- f) informing Virtutel of the location of Virtutel Equipment; and
- g) working together with Virtutel to establish procedures to reduce fraud or the opportunity for fraud in relation to the Service.

4.5 *Reporting and Inspections:* You agree to supply to us, or our nominated agent any information reasonably requested by us relating to you and your business of providing communications services:

- a) for credit management purposes (see also clause 11);
- b) to enable Virtutel to monitor and help reduce the incidence of fraud;
- c) to assist Virtutel in complying with its regulatory obligations and its obligations to report on compliance with those obligations;
- d) to assess whether or not you have complied, are complying and will be able to continue to comply with all obligations imposed on you under this Master Services Agreement; and
- e) for other purposes reasonably required by Virtutel from time to time and agreed by you.

5. Equipment

5.1 Each of us will be using equipment to facilitate the supply of the Services. We may be locating equipment in each other's premises. It is important that the terms governing the use of that equipment are clear. They are as follows.

Virtutel Equipment and or third-party Equipment. If required for the provision of the Service, we will supply to you Virtutel Equipment. You should understand that you are responsible for the Virtutel Equipment and must compensate us for any loss or damage to it (unless we cause such loss or damage). If you become aware of any loss of, damage to, claim over, or malfunction of the Virtutel Equipment, you must notify us immediately. We may, at any time and at our cost, modify or replace Virtutel Equipment provided there is no material adverse impact on our provision to you of the Service.

In respect of Virtutel Equipment, you must:

- a) provide an adequate power supply and a suitable physical environment in accordance with Virtutel's reasonable directions;
- b) only permit Virtutel Equipment to be repaired, serviced, moved or disconnected by Virtutel unless otherwise permitted by Virtutel in writing;
- c) not remove or obscure any identification marks on Virtutel Equipment;

- d) make Virtutel's title (or the title of a person nominated by Virtutel) to Virtutel Equipment clear to all persons;
 - e) comply with all reasonable instructions given by Virtutel to protect the proper ownership of the Virtutel Equipment; and
 - f) not do anything or allow anything to be done which might affect the ownership of the Virtutel Equipment.
 - g) Pack and return any Virtutel Equipment to Virtutel on the termination of a service.
- 5.2 *Customer Owned Equipment:* You are responsible for the installation of Customer Equipment and connections to the Virtutel Network necessary for us to provide the Service unless otherwise agreed in writing. You must ensure that Customer Equipment does not have a detrimental effect, as determined by Virtutel, on the Virtutel Network and accords with all relevant laws.
- 5.3 We may, without liability, immediately disconnect any or all of the Customer Equipment and you will provide Virtutel with access to the location where Customer Equipment is located to permit Virtutel to disconnect Customer Equipment if:
- a) you do not fulfil any of your obligations under the Services Agreement; or
 - b) Virtutel reasonably considers that Customer Equipment:
 - (iv) is not ACMA/A-Tick/C-Tick approved;
 - (v) may cause death or personal injury;
 - (vi) may cause damage to the property of Virtutel or another person; or
 - (vii) may materially impair the operation of the Virtutel Network,
- 5.4 *Purchased Equipment:* We will supply any Purchased Equipment at the location set out in the Service Schedule, Pricing Schedule, Order or as otherwise agreed by the parties in writing. You must, on delivery or, on any other date agreed by the Parties in writing pay the price set out in the Service Schedule or Pricing Schedule or Order for the equipment and the installation of the equipment.
- (i) Title to and legal and beneficial interest in the Purchased Equipment remains with Virtutel until Virtutel has received in full and cleared funds the purchase price and the installation charges for that Purchased Equipment.
 - (ii) Regardless of ownership, risk for damage to or loss of the Purchased Equipment passes to the Customer on delivery of the Purchased Equipment to the location set out in the Service Schedule or as otherwise agreed. Virtutel will use reasonable commercial efforts to assign to you all supplier warranties provided in respect of the Purchased Equipment but otherwise gives no warranties regarding it.
- 5.5 *Change of Location of POP:* Upon giving no less than one calendar months' prior written notice, or notice as soon as practicable in the event of an emergency, we reserve the right to change the location of a POP, or the access device by which you obtain access to the Virtutel Network. You agree to work with us in good faith to minimise any disruption of the Service.

6. End Users

Where you re-supply any of the Services to an End User you must ensure that all contracts or the terms and conditions on which you or your distributors resupplies any Service to End Users (**End User T&Cs**) contain:

- (i) a statement of obligation on the part of an End User that is no less onerous than the terms and conditions set out in clause 4.2 above;
- (ii) a statement that Virtutel or its suppliers are not liable to the End User (in contract, tort including negligence or otherwise) in relation to any service supplied to the End User by you, or any delay or failure to supply services to the End User;
- (iii) a reference to an acceptable use policy applicable to the provision of the Service is no less onerous than the Acceptable Use Policy given by us to you; and
- (iv) a provision requiring the End User to contact only your help desk for End User provisioning, service enquiry, faults and information requests.

7. Charges and Payment

- 7.1 The Charges for a Service are set out in the Order Form and or Pricing Schedule. The Pricing Schedule sets out the usual pricing for a Service that will apply during the Validity Period of the Pricing Schedule. The pricing set out in the Pricing Schedule can only apply for approved Orders received by Virtutel during the Validity Period for that Pricing Schedule. Nothing in this clause shall limit Virtutel's right not to accept an Order.
- 7.2 Your obligation to pay for the Service will accrue on and from the Service Commencement Date for the Service. You will be sent an Invoice each calendar month and you must pay each Invoice in Australian dollars (or in a currency as agreed to from time to time) within 14 days of the Invoice Date or as otherwise advised on Service Schedules or Order Forms (**Due Date**).
- 7.3 You must pay all Invoices as they fall due, regardless of whether the End User has paid you or not.
- 7.4 If we have omitted Charges from an Invoice for any reason, they will be included in a later Invoice.
- 7.5 Unless you establish otherwise, there is a presumption that records held and call logging procedures adopted by Virtutel or any other third-party provider Virtutel uses to deliver services are correct and that the Charges have been incurred and are payable by you.
- 7.6 You are responsible for payment of all Charges arising from the use of a Service, whether that use was specifically authorised by you or not. In addition, since there sometimes is a delay in the processing or the termination of a Service, you must pay:
 - a) any charges in respect of the provision of Service to a Service Number until Virtutel, or any third-party provider of Virtutel, gives notice that the Service has ceased to be provisioned to that Service Number; and

- b) any and all Charges that continue to be invoiced to Virtutel by any third-party provider during the transfer process of any relevant Service Number or Service away from Virtutel.

7.7 If you dispute the validity of any Charges in an Invoice:

- a) you must notify us in writing of the reasons for the dispute before the due date of that Invoice;
- b) you must pay the full amount of the undisputed portion of the Charges in the Invoice by the Due Date of that Invoice;
- c) we will endeavour to have your dispute resolved within 30 days of receiving your notice of dispute but, if that is not possible as a result of the complexity or circumstances of your dispute it may take longer.
- d) where a resolution is that the disputed amount is payable to us, you shall pay such amounts within 5 Business Days or invoice is due of receiving notice of our resolution; and
- e) if you disagree with the determination, you will be entitled to engage the dispute resolution mechanisms set out in clause 19 below.

7.8 If you fail to pay when due any amount, we will be entitled to:

- a) Immediately and without notice suspend provision of the Service to you in accordance with clause 13 below; and
- b) charge interest on the overdue amount (both before and after judgment), at the rate of 2% above the corporate reference rate of the Westpac Banking Corporation in Australia. This interest will be calculated daily and compounded every 30 days; and
- c) impose a charge to cover our reasonable expenses and costs incurred in enforcing any failure or delay in your payment (including the cost of engaging a debt recovery agent).

7.9 Virtutel may apportion non-traffic sensitive Charges on a daily basis for the balance of any partial billing cycle due to the Service Commencement Date or the termination date falling part way through a billing period.

8. Variation of Charges & Terms

- 8.1 Virtutel may, at any time after the Minimum Service Period for the Service, increase or decrease the Charges or change the terms applicable for the supply of the Services. Virtutel will do this by giving to you thirty days (30) prior written notice of the variation (a **Variation Notice**).
- 8.2 If Virtutel gives you a Variation Notice and you do not accept the variation, you must notify Virtutel in writing within 5 Business Days from the date of the Variation Notice and the services will be terminated at the end of the notice period. If you fail to do so, you will be deemed to have accepted the Variation Notice and the varied terms will take effect at the conclusion of the notice period.
- 8.3 Any Variation of Charges & Terms specified in a Service Schedule will take precedence over, without limiting paragraphs 8.1 & 8.2, if specified.

9. GST and Other Taxes

- 9.1 The Charges do not include any GST. Where a supply of Services constitutes a taxable supply, Virtutel will include on each invoice a separate amount for the GST payable in respect of the Charges in the invoice.
- 9.2 You must pay all taxes (including any goods or services tax or any equivalent thereof), duties, stamp duties, impost, levies or government charges relating to the Service Agreement, the supplied Services, provision of the Virtutel Equipment and, where relevant, the sale of the Purchased Equipment. Should there be an introduction of any new tax, duty, levy or government charge relating to any charges (including Charges) under the Service Agreement, you must pay Virtutel for such taxes, duty, levy or government charges imposed under such relevant legislation.

10. Rebates

- 10.1 A Service Schedule may stipulate the circumstances in which you may become entitled to a rebate (also called a Credit). Notwithstanding the specific terms of a Service Schedule the maximum amount of any rebate for any calendar month for a service cannot exceed 30% of the total of the Charges payable for that month by you for the Service which is unavailable.
- 10.2 Unless otherwise set out in a relevant Service Schedule, for the purpose of calculation of any Service Level rebate, a Service is not eligible for a rebate if there is:
- a) a Planned Outage
 - b) a failure or malfunction in relation to the Customer Equipment, any computer software or power supply at your premises;
 - c) an act or an omission by you or a person under your direction or control (other than if the act or omission is at the direction of Virtutel);
 - d) the occurrence of a Force Majeure Event; or

- e) a requirement, direction, or any other order, issued by a government, statutory or other relevant authority with jurisdiction over the Services.

11. Creditworthiness

- 11.1 It is important for us to assess the creditworthiness of our customers and perhaps obtain security. We also may, from time to time, review your creditworthiness. In doing so, we may seek from you or an independent person such as a credit reporting agency or credit provider information or advice to assist us in a creditworthiness review.
- 11.2 You agree promptly to cooperate with a review by providing to Virtutel any information (including a completed Virtutel Commercial Credit Application form) Virtutel reasonably requires conducting any such review.
- 11.3 You grant us permission to communicate with credit reference associations about your credit history, creditworthiness, credit standing, credit history or credit capacity that credit providers are allowed to give or receive under the *Privacy Act 1988* (Cth).
- 11.4 You warrant that all material information that you provide to Virtutel prior to the signing of this Master Services Agreement or in any subsequent creditworthiness review will provide a true and fair view of your financial position at the time it is provided to us, and that all other information is accurate and complete.
- 11.5 You authorise us to share information obtained in connection with the supply of a Service to any Related Body Corporate for any internal credit review purposes, including ongoing account management.

12. Security

- 12.1 You acknowledge that Virtutel is not obliged to perform its obligations under this Master Services Agreement until it has:
 - a) received a favourable report in response to any initial credit review conducted by Virtutel under clause to assess your creditworthiness; and
 - b) where required by Virtutel, received, in the form and amount specified by Virtutel, security in respect of amounts owing by you to Virtutel under this Master Services Agreement from time to time (whether or not those amounts are due).
- 12.2 We may require you to vary any Security (including increasing the amount of an existing Security) if:
 - a) there is a material adverse change in your creditworthiness identified in a creditworthiness review; or
 - b) you fail to pay any Charges when due.

- 12.3 The amount of any Security required under this clause will be no more than the amount Virtutel reasonably believes is necessary to secure Virtutel's credit exposure to you. You must on terms reasonably acceptable to Virtutel continue at your cost to provide and maintain the value of any Security and comply with its terms.

13. Service Suspension

- 13.1 We will be entitled to suspend the provision of a Service to you:
- a) immediately and, because of the urgency of the need, without prior notice, where:
 - (i) we are required to undertake the repair, maintenance or service of any part of the Virtutel Network (or an interconnected third-party provider is required to undertake such work on its network) to attend to any emergency;
 - (ii) it is reasonably required to reduce or prevent fraud or interference within the Virtutel Network;
 - (iii) we believe it is necessary to do so to comply with any law or an order, instruction or request of government, the ACMA, emergency services or other competent authority;
 - (iv) a Force Majeure Event occurs which materially affects our ability to provide the Service; or
 - b) upon giving 3 Business Days' notice where you are in breach of clause 4.2, clause 4.3, clause 4.5, clause 5, clause 11.2, clause 6, or you refuse to provide Security requested under clause 12, such suspension to continue for so long as the breach subsists or until termination of this Master Services Agreement; or
 - c) immediately after 7 days' notice if you fail to pay an Invoice's Due Date, such suspension to continue for so long as the breach subsists or until termination of this Master Services Agreement.

14. Term and Termination

- 14.1 This Master Services Agreement will commence on the Effective Date and will continue for the Initial Period. Upon expiration of the Initial Period, this Master Services Agreement shall continue in force until either party notifies the other party in writing as specified in this Agreement of its intention to terminate this agreement in which case shall terminate 30 days from the date of the notice.
- 14.2 In relation to each Service that has a current Service Term (each Existing Services) will continue until the end of the Service Term for each Existing Service term and is subject to earlier termination of Existing Services in accordance to early termination provisions as set out in this Agreement.
- 14.3 Should either party terminate this Agreement in accordance to 14.1 and 14.2, unless Virtutel agrees you may not acquire and new or additional services under this Agreement.
- 14.4 At or after the expiry of the Initial Period, this Master Services Agreement may be terminated by either Party giving to the other not less than 30 days written notice.

- 14.5 Each Service Agreement will commence on the date that it is accepted by Virtutel and will continue until the termination of that Service Agreement by either party giving to the other 30 days notice in writing.
- 14.6 If the Master Service Agreement is terminated under clause 14.1 during the term of a Service Agreement, the terms of the Master Services Agreement will continue to apply until all the Service Agreements have expired or been terminated.
- 14.7 A Service Schedule or Order Form may stipulate a Minimum Service Period. If a Service is terminated by you during its Minimum Service Period or is terminated by Virtutel by reason of a breach by you then, subject to any right of termination set out in a Service Agreement, you will be liable to pay, by way of liquidated damages, the total of the amount of Charges that would have applied from the date of the termination up to the expiry of the Minimum Service Period in addition to any accrued charges.
- 14.8 A party may, at its election, terminate this Master Services Agreement or one or more of the Service Agreements:
- a) immediately by written notice to the other party if a receiver, liquidator, provisional liquidator or administrator is appointed over any of that other party's undertakings or assets and that appointment continues for a period of 5 Business Days, or if that other party enters into any arrangement with any of its creditors or any class of such creditors or if that other party ceases to carry on business;
 - b) immediately by written notice to the other party if that other party breaches any other provision of this Master Services Agreement which is capable of remedy and does not rectify that breach within 30 days of receiving written notice from the other party requesting it to do so.
- 14.9 Each party must notify the other party immediately if any event referred to in clause 14.8(a) occurs or any step towards the occurrence of such event occurs.
- 14.10 Virtutel may immediately, by giving written notice to you, terminate this Master Services Agreement or one or more of the Service Agreements if:
- a) following a suspension of the Service under clause 13.1(b) or 13.1(c), you fail within 14 days of the commencement of the suspension to rectify the breach giving rise to the suspension; or
 - b) If we issue a Services Suspension Notice on 3 separate occasions for the same or substantially similar breaches of the Master Service Agreement;
 - c) there is, in respect of your company, a Change in Control which occurs without the prior written consent of Virtutel (which shall not be unreasonably withheld) and:
 - (i) which in Virtutel's reasonable opinion, has or may have a material adverse effect on your creditworthiness; or
 - (ii) if the third party acquiring the relevant interest or control is reasonably deemed by Virtutel to be a competitor of Virtutel;

- d) you are in breach of a licence, permit or authorisation relating to the use of or connection of equipment to the relevant access line, or the use of Services;
- e) Virtutel reasonably suspects that you have suspended payment of your debts generally;
- f) Virtutel reasonably suspects fraud in respect of, or misuse of, the Service by you or an End User;
- g) a licence, permit or authorisation required by you to conduct the business of providing telecommunications services are terminated, revoked or expires; or
- h) a force majeure event which continues for more than 20 Business Days.

15. Effects of Termination

- 15.1 On termination of this Master Services Agreement (other than a termination under clause 14.1), or one or more Service Agreements:
- a) your right to use the relevant Service ceases and, if applicable, you must cease to resupply such Service to End Users or to any related Service Numbers or IP Addresses;
 - b) you must immediately cease using and return to Virtutel, or third-party Equipment used in relation to that Service;
 - c) if you have not paid to Virtutel the full purchase price for any Purchased Equipment used in relation to that Service, Virtutel will refund to you the amount of the purchase price that you have paid when Virtutel receives that Purchased Equipment after it has set off any outstanding amount of Charges referred to in 15.1(d) below;
 - d) you must immediately pay to Virtutel, without deduction or set off, all outstanding Charges and any other amounts payable to Virtutel under the Service Agreement at the date of termination; and
 - e) Virtutel will refund to you the balance (if any) of any Charges or other money paid in advance to Virtutel under the Services Agreement after deducting all amounts payable to Virtutel under sub-clauses 15.1(d) and 7.8(b) above.
- 15.2 Termination of a Service Agreement or this Master Services Agreement does not affect the accrued rights or liabilities of either party nor does it affect the provisions which expressly or by implication are intended to operate after termination, including, without limitation clause 5.2 (Virtutel Equipment); clause 17 (Liability and Insurance); and clause 18 (Confidentiality).
- 15.3 Any term of this Master Services Agreement or a Service Agreement which expressly or by implication is intended to survive termination, shall survive termination.

16. Force Majeure

- 16.1 Neither party will be liable to the other party for any failure to perform or delay in performance of any obligation under a Service Agreement caused by a Force Majeure Event (other than an obligation to pay money). Each party will provide notice of the date of commencement of a Force Majeure Event and the date of cessation of a Force Majeure Event.

17. Liability & Insurance

- 17.1 You must take out and maintain all insurance policies relevant to Your business.
- 17.2 Despite any other provision of this Master Services Agreement, Virtutel will not be liable to you, or any person claiming through you, in contract, tort, or otherwise (including negligence) for any loss or damage arising from suspension or termination of the Service in accordance with, as the case may be, clause 13 or 14 or any failure to perform or delay in the performance of any obligation due to an event described in clause 13.1(a).
- 17.3 You agree that no supplier of telecommunications services to Virtutel is liable to you or your End Users in respect of Virtutel's supply to you of the Services.
- 17.4 You acknowledge that:
- a) Virtutel does not warrant that Virtutel will be able to supply the Service uninterrupted or fault free;
 - b) except for any rebate that must be paid as a result of a failure by Virtutel to achieve a Service Level, Virtutel is not liable to you or any End User or potential End User or any other person for any:
 - (i) failure for any reason to provide the Service;
 - (ii) failure to provide part or all of any of the Service, including where such failure is due to any network failure, any network congestion or any call drop out; and
- 17.5 Virtutel:
- a) excludes all conditions and warranties implied into this Master Services Agreement and Service Agreements to the extent permitted by law; and
 - b) limits its liability for any breach of any such condition or warranty that cannot be excluded at law to the greater (at Virtutel's option) of:
 - (i) if the breach relates to goods, repairing or replacing those goods;
 - (ii) if the breach relates to services, resupplying those or equivalent services.

- 17.6 To the maximum extent permitted by law and subject to clauses 17.4, 17.5, 17.7 and 17.8, Virtutel is only liable for:
- a) personal injury (including sickness, death or disability) of you or your employees directly resulting from Virtutel's negligent acts or omissions arising under or in connection with this Master Services Agreement;
 - b) if the loss or damage arises out of or is related to a failure by Virtutel to meet Service Levels set out in a Service Schedule, the compensation or other remedy specified in the Service Schedule; and
 - c) in respect of any other liability which may arise out of or in connection with a Service Agreement, (whether based in contract, tort (including negligence) statutory duty or otherwise) an amount which is:
 - (i) 30% of the Charges received by Virtutel for the Service for the 12 months preceding the event giving rise to the liability for each event or series of connected events; and
 - (ii) in the aggregate, the amount of Charges received by Virtutel under the Service Agreement.
- 17.7 Virtutel's liability under the Service Agreement or the Master Services Agreement is diminished to the extent that your acts or omissions (or those of a third party) contribute to or cause the loss or liability.
- 17.8 Virtutel excludes any liability to you for any indirect, special or consequential loss, costs, or damage (including, but not limited to, loss of profits, loss of revenue, loss of data, loss of bargain, damage to reputation and expectation loss) arising out of the Service Agreement, including, but not limited to, Virtutel's supply of, delay in supply or failure to supply a Service, whether arising as a result of any act, omission or negligence of Virtutel or otherwise.
- 17.9 You indemnify Virtutel on demand against any:
- a) claim or liability arising from your acts or omissions, or the acts or omissions of a third party acting on your behalf or engaged by you in any capacity, relating to the use of the Services; and
 - b) claims by End Users in connection with the provision or use of a Service.
- 17.10 In this clause 17.7, a reference to Virtutel includes each of its Related Bodies Corporate, and Virtutel's employees, agents and contractors.

18. Confidentiality

- 18.1 Each party acknowledges that the Confidential Information of the other party is confidential and secret, and each party must preserve the confidential and secret nature of the other party's Confidential Information.

18.2 A party must not:

- a) disclose or copy the other party's Confidential Information (including the terms and conditions of this Master Services Agreement) for any purpose other than as contemplated by the Service Agreement and this Master Services Agreement, including without limitation, a disclosure to a competitor or potential competitor of Virtutel;
- b) make the other party's Confidential Information available to any third party, other than to its employees with a need to know the information to enable a Service to be used in the manner contemplated by the Service Agreement or this Master Services Agreement (but only to the extent that the employee needs to know), or
- c) use the other party's Confidential Information for any purpose other than as contemplated by the Service Agreement and this Master Services Agreement.

18.3 Neither party may use in any way the name, logo, trademark, registered design, or copyright material of the other party without having first obtained the written consent of the owner of the property to such use. Neither party will issue a press release, or make any public announcement, concerning the existence of, or any fact arising out of, or connected to, this Master Services Agreement or the other party without first having obtained the prior written consent of the other party to the terms of such press release or announcement.

19. Disputes

19.1 Before resorting to external dispute resolution mechanisms, the parties must seek to resolve any dispute in relation to a Service Agreement by referring the matter to the respective chief executive officers of the parties or their nominees.

19.2 If the parties cannot resolve the dispute in accordance with clause 19 within 14 days, either party may refer the dispute to mediation by the Australian Commercial Disputes Centre (ACDC) for resolution in accordance with the Guidelines for Commercial Mediation of the ACDC.

19.3 Nothing in this clause prevents a party from seeking interlocutory relief from a court.

20. Notices

20.1 A notice given in accordance with clause 20.1 is received:

- a) if personally delivered to the recipient's address, on the date of delivery;
- b) if sent by registered post, three Business days after the date of posting; and
- c) if sent by fax, on the Business Day after the Day of transmission provided that the transmitting fax machine generates upon completion of the transmission report stating that the notice has been duly transmitted without error to the addressee's fax number; or
- d) if sent by electronic mail (email), on the Business Day after the electronic mail was sent.

21. General

- 21.1 You may not assign or attempt to assign or otherwise transfer any right or obligation arising out of the Service Agreement without the written consent of Virtutel (which consent may not be unreasonably withheld or delayed). Virtutel may, at its discretion, assign its rights and obligations under the Service Agreement.
- 21.2 Nothing in the Service Agreement or any circumstances associated with it or its performance give rise to any relationship of partnership, employer and employee or principal and agent between Virtutel and you.
- 21.3 Virtutel may set off or apply any credit balance in any of your accounts with Virtutel or any amounts owed by Virtutel to you against any amount due and payable by you to Virtutel.
- 21.4 Failure by either party to exercise or enforce any right conferred by the Service Agreement will not be deemed to be a waiver of any such right nor operate so as to bar the exercise or enforcement of the right or of any other right on any later occasion.
- 21.5 If part or all of any clause of this Master Services Agreement or a Service Agreement is illegal, invalid or unenforceable it will be read down to the extent necessary to ensure that it is not illegal, invalid or unenforceable or if this is not possible, the affected clause or part will be severed from the Agreement, the remaining provisions of the Agreement will continue to have full force and effect and the parties will attempt to replace that severed part with a legally acceptable alternative clause that meets the parties' original intention in relation to the subject matter severed.
- 21.6 A Service Agreement constitutes the entire agreement between the parties as to its subject matter and supersedes any prior understanding or agreement between the parties (including any Memorandum of Understanding) and any prior condition, warranty, indemnity or representation imposed, given or made by Virtutel.
- 21.7 This Master Services Agreement and each Service Agreement is governed by the laws applicable in the State of Victoria in the Commonwealth of Australia and each party irrevocably submits to the non-exclusive jurisdiction of the courts of that State.

A1. Glossary

ACMA means the Australian Communications & Media Authority.

Acceptance Tests means tests undertaken to determine if a Service complies with the specifications in the Service Schedule for that Service, such tests to be set out in, or agreed in accordance with, the customer care manual.

Acceptable Use Policy means the Virtutel Acceptable Use Policy available on the Virtutel website as reasonably modified by Virtutel from time to time.

Attachment means an attachment to a Service Schedule or this Master Services Agreement setting out matters relating to the supply of the Service as amended or attached from time to time.

Business Day means a day on which banks (as defined in the *Banking Act 1959* (Cth)) are open for general banking business in the location in which the Services are being provided, excluding Saturdays and Sundays.

Business Hours means the hours between 9.00am and 7.00pm Sydney time on any Business Day.

Change in Control of the Customer means, a third party:

- (a) becomes entitled after the Effective Date, to a relevant interest (as defined in the Corporations Act) in 20% or more of the shares or securities of the Customer that in normal circumstances entitle the holder to vote or participate at a meeting of the members of the Customer or to vote or participate in the election or appointment of directors of the Customer; or
- (b) obtains control (as defined in section 50AA of the Corporations Act) of the Customer after the Effective Date.

Charges means the charges for a Service (as set out in a relevant Order Form or Pricing Schedule), which are payable by the Customer in accordance with clause 7.

Confidential Information of a party means information (including this Master Services Agreement), know-how, ideas, concepts, pricing and industrial knowledge, in whatever format, of that party, other than information which:

- (a) is generally available in the public domain without a breach of confidence or unauthorised disclosure by either party.
- (b) is lawfully disclosed by a third party without restriction on disclosure; or
- (c) is required by law or the Australian Stock Exchange to be disclosed.

CPI means the All Groups Consumer Price Index (weighted average for the Eight Capital Cities) published quarterly by the Australian Bureau of Statistics. If that index is discontinued or suspended, such other economic index or indicator which in Virtutel's reasonable opinion reflects the changes in the cost of living and inflation.

Customer means the customer named as a party to this Master Services Agreement.

Customer Care Manual means the manual provided by Virtutel to the Customer after entry into a Service Agreement for the purposes of informing the Customer of, amongst other matters, Virtutel's usual procedures in regard to provisioning of orders, Acceptance Tests, contact and escalation points and how to proceed to log service difficulties, the contents of which manual may be amended by Virtutel from time to time.

Customer Equipment means all equipment and facilities located on the Customer side of the Network Termination Point other than Virtutel Equipment used in connection with the Service.

Early Termination Charge means the charge calculated in accordance with clause 14.4.

Effective Date means the date of execution of this Master Services Agreement as set out on the first page of this Master Services Agreement.

End User means a person who contracts or agrees with the Customer to acquire a telecommunications service from the Customer.

Force Majeure Event means:

- (a) fire, flood, earthquake, elements of nature or act of God;
- (b) riot, civil disorder, rebellion or revolution; or
- (c) other matter outside of the reasonable control of the non-performing party, but in each case only if, and to the extent that, the non-performing party is without fault in respect of the default or delay and the default or delay could not have been prevented by taking steps specifically required under this Master Services Agreement or a Service Agreement.

GST has the same meaning as in *A New Tax System (Goods and Services Tax) Act 1999* (Cth).

Initial Period means a period of 2 years from the Effective Date.

Invoice means an invoice rendered by Virtutel to the Customer which records the Charges payable for the relevant Services.

Invoice Date means the date that an Invoice for the Charges is:

- (a) in the case of paper Invoices, printed by Virtutel;
- (b) in the case of electronic Invoices, sent by Virtutel to the customer by electronic means.

IP Address means an internet protocol address.

Minimum Service Period of a Service means the minimum supply period (if any) specified in the Service Schedule or Order Form from the Service Commencement Date.

Network Termination Point (or NTP)

means the point, designated by Virtutel, at which the Virtutel Network connects to:

- (a) equipment or cabling of the Customer; or
- (b) cabling of a third party where it is being used to convey the Service to Customer Equipment, or, if Virtutel fails to designate that point, the NTP as defined in the Telecommunications Act.

Order means a request for services to be provided by Virtutel from the customer.

Order Form means a Virtutel standard form or Order request by which Services may be ordered.

Planned Outage means a period of time that Virtutel may interrupt the supply of Services to the Customer other than an interruption which is less than 100 milliseconds in duration (a **Nominal Outage**) for routine maintenance or up-grading or other similar processes, after giving the Customer 5 days prior notice, which outage does not exceed the period of time specified in that notice.

POP means a point of presence on the Virtutel Network.

Pricing Schedule means a schedule which has been delivered to the Customer under clause 7.1 which sets out the pricing that will apply during the Validity Period described in that Pricing Schedule.

Purchased Equipment means the items of equipment (if any) purchased by the Customer from Virtutel.

Related Body Corporate has the meaning given to it by sections 9 and 50 of the *Corporations Law*.

Security means a form of security provided by the Customer to Virtutel to support the performance of the Customer's obligations under this Master Services Agreement, and includes any additional, replacement or alternative form of security.

Service means a telecommunications service identified in, and to be delivered pursuant to, an Order Form.

Service Commencement Date of a Service means the later of:

- (a) the date requested by the Customer in the Order Form; and
- (b) the date on which the Service is available for use by the Customer.

Service Level means, where applicable, the reliability and performance standard that applies to the delivery of a Service by Virtutel to the Customer, as set out in, or agreed in accordance with, a Service Schedule.

Service Number means any telephone, facsimile or other service number.

Service Schedule means a schedule to this Master Services Agreement which sets out, amongst other matters, the Service description, any Minimum Service Period, and the applicable Service Level.

Virtutel means Virtutel Pty Ltd (ABN 86 142 205 712)

Virtutel Equipment means equipment (if any) of Virtutel, or of a supplier to Virtutel, located on your premises (including premises leased by you or co-location spaces licensed by you) for the provision of a Service, other than Purchased Equipment.

Virtutel Network means a telecommunications network of Virtutel.

Telecommunications Act means the Telecommunications Act 1997 (Cth) as amended from time to time.

Term and **Service Term** means the period between the date on which an Order is accepted by Virtutel and the termination of the Service pursuant to clause 14.2 above.

We, us and **our** means and refers to Virtutel.

You and **your** means and refers to the Customer.