



## **General Terms and Conditions**

**BGP GROUP &  
VOIPSMART**

**ABN 82 083 664 224**

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## General Terms and Conditions

### I Agreed Terms and Interpretation

- 1.1 These General Terms and Conditions include capitalised terms and phrases which are defined in one of the documents that form part of the Service Agreement with Customer for a particular transaction (i.e. the Service Agreement comprises these General Terms and Conditions, the Service Order, the Acceptable Use Policy, the relevant Schedules that apply to the Services ordered on the Service Order and any applicable Variation drawn up pursuant to any agreed amendments to the Service Agreements).
- 1.2 Unless the context requires otherwise each capitalised term or phrase shall have the same meaning in each of the documents that form the Service Agreement. Where there is a capitalised term or phrase in a Schedule then, unless the context requires otherwise, each such capitalised term or phrase shall have the same meaning in that Schedule for the purpose of that Schedule only.
- Agreed Terms**
- 1.3 **Acceptable Use Policy (AUP)** means BGP Group & VoIPSmart's policy that is posted on the BGP Group & VoIPSmart website at the time the Service Agreement is entered into by the Parties, titled Acceptable Use Policy that relates to the proper use of the BGP Group & VoIPSmart Environments, Customer Managed Equipment and Customer Data, and which applies to all BGP Group & VoIPSmart's clients to whom BGP Group & VoIPSmart is providing managed services.
- 1.4 **Affiliate** means any entity that is under the effective control of the entity that ultimately has effective control of the first-mentioned entity.
- 1.5 **APRA** means the Australian Prudential Regulation Authority.
- 1.6 **BGP Group & VoIPSmart Environment** means hardware, operating system software, Service Software and Network that is provided and used by BGP Group & VoIPSmart to perform the relevant Services. BGP Group & VoIPSmart Environment excludes any Customer Managed Equipment.
- 1.7 **BGP Group & VoIPSmart Disaster Recovery Environment** means the BGP Group & VoIPSmart Environment that is used to perform any BGP Group & VoIPSmart IT Continuity Services (DRaaS).
- 1.8 **BGP Group & VoIPSmart Marks** means all trade marks, service marks, logos or other words or symbols identifying the Services or BGP Group & VoIPSmart's business.
- 1.9 **Business Hours** means 0800 to 1800 AEST/AEDT on any Business Day.
- 1.10 **Business Day** means any day excluding: (a) Saturday; (b) Sunday; and (c) a public holiday recognised nationally in Australia.
- 1.11 **Confidential Information** means any information however recorded, preserved, disclosed or communicated (whether directly, indirectly, orally or by writing), disclosed by either Party or its Representatives to the other Party or its Representatives in connection with the Service Agreement that, if disclosed in writing is marked as "Confidential" or "Proprietary" or, if disclosed orally, is identified as "Confidential" or "Proprietary" at the time of disclosure and is specifically identified as confidential in a written document provided by Discloser to Recipient within thirty (30) days after the oral disclosure, or which is, or ought to have been, understood by the Parties, using reasonable business judgment to be confidential. For clarity, BGP Group & VoIPSmart's Confidential Information includes the Service Agreement, including the Fees, the Services and Deliverables, the Performance Tools, Service Software, the Operations Manual, any methodology and any of BGP Group & VoIPSmart's other Intellectual Property Rights. For clarity, Customer Software, Customer Records and Customer Data is Customer's Confidential Information.
- 1.12 **Core Service** means applications and enabling technologies that support Customer's critical business functions. Examples include payroll/personnel, accounting/budgeting and purchasing applications.
- 1.13 **Customer Data** means any data, information or other material in any form that is loaded, stored or processed by the BGP Group & VoIPSmart Environments, Customer Managed Equipment or any device that is used to transfer data, which is loaded into, stored in or processed by any of the BGP Group & VoIPSmart Environments, Customer Managed Equipment or any device that is used to transfer data, by any person other than BGP Group & VoIPSmart or its Personnel.
- 1.14 **Customer Managed Equipment** means hardware, operating system software, Customer Software and Customer Network Equipment that is being managed by BGP Group & VoIPSmart under the BGP Group & VoIPSmart Managed Services and is set out in the Service Order.

- 1.15 **Customer Network Equipment** means networking hardware and enabling technologies owned and operated by Customer up to Customer's router, that are used by Customer to connect to BGP Group & VoIPSmart's Network or other network provided by BGP Group & VoIPSmart.
- 1.16 **Customer Operating Hours** means the hours that Customer considers to be the core operating hours in respect of the Services, which are deemed to be 08:00 to 18:00 AEST on Business Days unless stated otherwise on the Service Order.
- 1.17 **Customer Records** means any data, information and records owned or supplied by Customer to which BGP Group & VoIPSmart is provided access under the Service Agreement, but excludes Customer Data. Customer Records excludes any record created or maintained by BGP Group & VoIPSmart in connection with its performance of the Services.
- 1.18 **Customer Software** means any software that is owned by Customer, or licensed to Customer from any person other than BGP Group & VoIPSmart that is run on the BGP Group & VoIPSmart Environment or a Customer Managed Equipment.
- 1.19 **Deliverable** means any materials that are created during the performance of the Professional Services and which are required to be provided to Customer as a result of the performance of the Professional Services. The term Deliverable does not include any Pre-Existing IP.
- 1.20 **Discloser** means the Party that makes a disclosure of Confidential Information.
- 1.21 **Disengagement Services** means the services that are performed by BGP Group & VoIPSmart at the end of the Service Period as set out in clause 9 and a Schedule (if any).
- 1.22 **Early Termination Payment** means a payment that Customer must make to BGP Group & VoIPSmart if:
- (a) the Customer exercises a right terminate a particular Service prior to the end of the relevant Service Period, where the right to terminate the Service prior to the end of the Service Period is set out in the relevant Schedule for that Service; or
  - (b) the Service Agreement is terminated under the force majeure provisions in clause 23.
- The amount of the Early Termination Payment will be calculated in accordance with provisions in the relevant Schedule.
- 1.23 **Emergency** means any event or circumstance which, in BGP Group & VoIPSmart's reasonable opinion, threatens or causes a major disruption or degradation to any Services which requires immediate remedial or avoidance action.
- 1.24 **Emergency Change** means a change or action that BGP Group & VoIPSmart deems necessary to respond to an Emergency.
- 1.25 **Fee** means the amounts payable for each of the Services, exclusive of all Taxes, as set out in a Service Order.
- 1.26 **Force Majeure Event** includes:
- (a) earthquake, fire, flood or other inclement weather conditions;
  - (b) national emergency, pandemic, terrorist act, war;
  - (c) a malfunction or failure of telecommunications equipment or services, including the internet (other than where such equipment or services forms part of the BGP Group & VoIPSmart Environment);
  - (d) any consequence of a virus, Trojan horse or any malicious code or action that could not have been prevented by the use of the then current version of commercially available anti-virus software;
  - (e) industrial action or inaction, government action or inaction, insolvency of a material subcontractor of the relevant Party; or
  - (f) a circumstance beyond the reasonable control of the relevant Party.
- 1.27 **General Terms and Conditions** means the document posted on the BGP Group & VoIPSmart website at the time the Service Agreement is entered into by the Parties, titled General Terms and Conditions.
- 1.28 **GST** means the Goods and Services Tax as defined in *A New Tax System (Goods and Services Tax) Act 1999* (Cth).
- 1.29 **Incident Support Request** means a request made by Customer via email, telephone or web portal to the BGP Group & VoIPSmart customer service centre to request a repair, to notify a defect or service failure or to make a request for service.
- 1.30 **Insolvent** means insolvent or insolvent under administration (including as defined under the *Corporations Act 2001* (Cth)), in receivership, in receivership and management, in liquidation or provisional liquidation, wound up, administration, subject to any form of arrangement, assignment or composition or protected against creditors under any statute or dissolved (other than to carry out a reconstruction while solvent) or otherwise unable to pay its debts when they fall due.
- 1.31 **Intellectual Property Rights** includes copyright, trade mark, service mark, patent, design, semiconductor, circuit layout right, or other proprietary right, any right to registration of such

rights, or any similar rights protected by statute, from time to time existing in Australia or elsewhere.

1.32 **Minimum Service Period** means the minimum period for which a particular Service must be acquired, which will be 24 months unless stated otherwise on the Service Order.

1.33 **Minimum Spend** means the minimum volume/quantity of any particular Service that must be acquired in a prescribed period, usually monthly, which will be determined in accordance with the relevant Schedule or on the Service Order.

1.34 **Network** means the telecommunications network comprised of equipment, wiring and circuits within and between the network backbone nodes (points of presence) and the servers in the BGP Group & VoIPSmart Environment. The term **Network** does not include any:

- (a) circuits to a backbone node, customer premises or any network or equipment not owned or controlled by BGP Group & VoIPSmart; or
- (b) third party networks or equipment not owned or maintained by BGP Group & VoIPSmart, including connections to peer networks and the internet.

1.35 **Operations Manual** means BGP Group & VoIPSmart's manual that sets out the processes and procedures for performing the Services and working with Customer. The Operations Manual is BGP Group & VoIPSmart's Intellectual Property Rights and Confidential Information.

1.36 **Party** means each of BGP Group & VoIPSmart and Customer.

1.37 **Performance Tools** means scripts or programs that BGP Group & VoIPSmart uses in the performance of the Services that may be operated remotely or may be installed and operated on Customer Managed Equipment in order to facilitate the performance of the BGP Group & VoIPSmart Managed Services, including facilitating remote access and monitoring, job scheduling, build and deployment scripts.

1.38 **Personal Information** has the meaning given to it in the *Privacy Act 1988* (Cth).

1.39 **Personnel** means a Party's (and its Affiliates') directors, officers, employees, agents, contractors and suppliers.

1.40 **Premises** means the data centre facility that is used to provide the relevant Service.

1.41 **Pre-existing IP** means the Intellectual Property Rights that are required to be provided to Customer in the performance of the Services (including as part of a Deliverable) and include:

- (a) the Operations Manual, Performance Tools, Service Software and any software and documentation used to perform the Services;
- (b) any other Intellectual Property Rights that are owned by BGP Group & VoIPSmart at the Service Commencement Date or which are created independently of the Services provided under the Service Agreement (**BGP Group & VoIPSmart Owned IP**); and
- (c) any adaptations, translations or derivatives of any of them.

Pre-existing IP does not include Customer's Intellectual Property Rights in Customer Data or Customer Records.

1.42 **Professional Services** means the services to be provided under Schedule I.

1.43 **RACI** means the four key responsibilities namely: responsible, accountable, consulted, and informed;

1.44 **Reasonable Excuse** means:

- (a) a failure or degradation of performance or malfunction resulting from scripts, data, applications, equipment, infrastructure, software, penetration testing, performance testing, or monitoring agents provided or performed by Customer;
- (b) outages initiated by BGP Group & VoIPSmart at the request or direction of Customer for maintenance, activation of configurations, backups or other purposes that require the service to be temporarily taken offline;
- (c) outages or degradation of services occurring as a result of any actions or omissions taken by BGP Group & VoIPSmart at the request or direction of Customer;
- (d) outages or degradations in service occurring as a result of any actions or omissions of any of Customer's Personnel;
- (e) outages or degradations in service occurring as a result of any third party software that is used by BGP Group & VoIPSmart to perform the Services;
- (f) events resulting from an interruption or shut down of the Services due to an Emergency;
- (g) outages due to system administration, commands, or file transfers performed by Customer's users or Personnel;
- (h) inability to access the services or outages caused by Customer's conduct, including failing to follow BGP Group & VoIPSmart's reasonable advice;

- (i) any outage or failure caused by any negligent act or omission of Customer or its Personnel;
- (j) any outage or failure caused by Customer's breach of any of its obligations under the Service Agreement;
- (k) lack of availability or untimely response time of Customer to respond to incidents that require Customer's reasonable participation for source identification and/or resolution, including meeting Customer responsibilities for any Services;
- (l) outages or degradations caused by acts or omissions of third parties (other than BGP Group & VoIPSmart's Personnel), including damage to networks or infrastructure caused by third parties (other than BGP Group & VoIPSmart's Personnel);
- (m) any other circumstance or event set out as a "Reasonable Excuse" in the relevant Schedule or Service Order.
- 1.45 **Recipient** means the Party that receives a disclosure of Confidential Information.
- 1.46 **Recovery Point Objective** means the maximum period in which Customer Data might be lost as may be specified within the Service Agreement.
- 1.47 **Representatives** means the directors, officers, employees, agents, contractors of a Party, or those of any Affiliate, and the professional representatives of a Party providing advice in relation to the Service Agreement, including the lawyers, bankers, auditors, accountants and insurers of a Party.
- 1.48 **Resolution Target** means the target time it will take to resolve each call to the Support Centre depending on priority.
- 1.49 **Schedule** means each Schedule to these General Terms and Conditions which includes the Service Description and other rights and obligations for a particular Service.
- 1.50 **Scheduled Maintenance** means:
- (a) in respect of all Services other than BGP Group & VoIPSmart Managed Services: the routine maintenance for the BGP Group & VoIPSmart Environment and Premises that is recommended by its manufacturer or supplier to prevent failures or defects, and includes updates, new releases, engineering changes, replacement/substitutions or renovations to any part of the BGP Group & VoIPSmart Environment and Premises; or
- (b) in respect of BGP Group & VoIPSmart Managed Services: the routine maintenance for Customer Managed Equipment, that is recommended by its manufacturer or supplier to prevent failures or defects, and includes updates, new releases, engineering changes or replacement/substitutions to any part of Customer Managed Equipment.
- 1.51 **Service** means the:
- (a) Professional Services, as set out in Schedule 1;
- (b) BGP Group & VoIPSmart Managed Services, as set out in Schedule 2;
- (c) BGP Group & VoIPSmart Cloud Services (IaaS), as set out in Schedule 3;
- (d) BGP Group & VoIPSmart IT Continuity Services (DRaaS), as set out in Schedule 4;
- (e) BGP Group & VoIPSmart Network Services, as set out in Schedule 5;
- (f) BGP Group & VoIPSmart Voice Carriage Services, as set out in Schedule 6;
- (g) BGP Group & VoIPSmart Unified Communications, as set out in Schedule 7;
- (h) BGP Group & VoIPSmart Mobile Services, as set out in Schedule 8;
- (i) BGP Group & VoIPSmart Co-location Services, as set out in Schedule 9;
- (j) Software Licensing and Subscriptions, as set out in Schedule 10;
- (k) Hardware and Ancillary Service, as set out in Schedule 11;
- (l) related Transition In Services and Disengagement Services.
- 1.52 **Service Agreement** means:
- (a) the Service Order, when entered into by the Parties; and
- (b) the General Terms and Conditions, the Acceptable Use Policy, and the Schedules that BGP Group & VoIPSmart determines will apply to the particular Services that are set out on the Service Order,
- as may be updated or amended from time to time in accordance with the Service Agreement. Any such amendment will need to be documented and signed by both Parties in a separate Variation.
- 1.53 **Service Commencement Date** means the date when the Service(s) under the Service Agreement commences which is the earlier of:
- (a) the date that BGP Group & VoIPSmart notifies Customer that the Service is ready for use (which will





- be on or after any date set out in the Service Agreement);
- (b) the date that Customer first uses the Service; or
  - (c) such other date agreed by the Parties.
- 1.54 **Service Description** means the description of the Service which is included in the relevant Schedule.
- 1.55 **Service Level** means a specified level of Service delivery as set out in the Service Description under the heading "Service Level". Service delivery obligations that are not specifically described as "Service Levels" and which are not set out in the Service Description under the heading "Service Level" are not Service Levels.
- 1.56 **Service Order** means the document that is entered into by the Parties which sets out the details of a particular transaction, including the details of the Service that is to be provided, the Schedules that apply to the particular Services, the BGP Group & VoIPSmart Equipment (for BGP Group & VoIPSmart Cloud Services, BGP Group & VoIPSmart IT Continuity Services (DRaaS), BGP Group & VoIPSmart Network Services, BGP Group & VoIPSmart Voice Carriage Services, BGP Group & VoIPSmart Unified Communications, BGP Group & VoIPSmart Mobile Services, and BGP Group & VoIPSmart Co-location Services), Software Licensing and Subscriptions, Hardware and Ancillary Service, Customer Managed Equipment (for BGP Group & VoIPSmart Managed Services), the Fees, including any Minimum Spend, the Service Period (including any Minimum Service Period) and any other details of the transaction agreed by the Parties.
- 1.57 **Service Period** means the period during which a particular Service will be performed by BGP Group & VoIPSmart, and may be subject to a Minimum Service Period. The Service Period, including any Minimum Service Period, is determined in accordance with the relevant Service Description, unless otherwise stated on the Service Order.
- 1.58 **Service Software** means software that is owned or licensed by BGP Group & VoIPSmart that is used to help provide the Services which BGP Group & VoIPSmart gives Customer access and use of for the Service Period.
- 1.59 **Support Centre** means BGP Group & VoIPSmart's support service which provides the point of contact for Customer to report issues with the Services, which may be accessed by phone, fax, email or BGP Group & VoIPSmart's web portal, as determined by BGP Group & VoIPSmart from time to time.
- 1.60 **Taxes** includes any GST, sales taxes, duties, withholding taxes, levies, tariffs, imposts or other charges levied by any federal, state or local government in Australia or elsewhere, that arise out of or in connection with any Deliverable, the Services or the Service Agreement, and any interest, penalties or liabilities incurred on such amounts, but excludes taxes based on the net income of BGP Group & VoIPSmart.
- 1.61 **Term of the Service Agreement** means the period from the date both Parties have signed the Service Agreement, until it is terminated in accordance with the provisions of the Service Agreement.
- 1.62 **Time and Materials Rates** means the rates (exclusive of Taxes), as set out in the relevant section of the Service Order.
- 1.63 **Third Party Software** means any third party software (e.g. Microsoft) that is licensed to BGP Group & VoIPSmart for onward licensing to its clients, provided that the client enters into an agreement directly with the third party licensor in respect to the client's use of that Third Party Software.
- 1.64 **Transition Period** means the period during which the Transition In Services are provided, as set out in a Service Order.
- 1.65 **Transition In Services** means the services that are performed by BGP Group & VoIPSmart at the beginning of the Service Period as set out in clause 8 and a Schedule (if any).
- 1.66 **Variation** means a document that is signed by both Parties that varies the terms of the Service Agreement.
- Interpretation**
- 1.67 In the interpretation and application of this document the following rules apply unless the context otherwise requires:
- (a) words importing a gender include all other genders and vice versa;
  - (b) expressions importing a natural person include a corporation, a partnership, an association, a firm, a government and a government authority and agency and vice versa;
  - (c) if a word or phrase is defined, its other grammatical forms have a corresponding meaning;
  - (d) a covenant, agreement, warranty, obligation, liability or similar on the part of two or more persons binds each of them jointly and severally;
  - (e) no rule of construction applies to the disadvantage of a party because that party was responsible for the preparation of this document or part of it;
  - (f) this document binds and ensures for the benefit of successors and permitted transferees or assigns of the parties and,

accordingly, a reference to a party includes its executors, administrators, successors and persons acting by novation;

- (g) headings in this document are for ease of reference only and do not affect the remaining or interpretation of this document;
- (h) a reference to any statutory enactment or any law includes that statutory enactment or law as amended, modified or re-enacted from time to time and all rules regulations or other subordinate legislation made under that statute and where relevant corresponding legislation in any Australian state or territory;
- (i) a reference to an agreement or document (including a reference to this document) is to the agreement or document as amended, varied, supplemented, transferred or replaced except to the extent prohibited by the provisions in this document or that other agreement or document;
- (j) the words includes, including, for example, such as and similar expressions in any form are not intended to operate as words of limitation or imply any limitation;
- (k) if the day on or by which anything is to be done is not a Business Day then that thing must be done on or by the next Business Day;
- (l) it is not necessary for a party to this document to incur any expense or make any payment before enforcing a right of indemnity;
- (m) this document contains all agreements made between the parties in relation to the subject of this document;
- (n) unless otherwise specified on the Service Order, a reference to dollars and \$ and other monetary amounts is to Australian currency; and
- (o) a reference to bits or bytes (e.g. MB, GB etc.) in connection with Service will have the meanings set out in the International System of Units (or SI) (as defined by the National Institute of Standards and Technology, U.S. Department of Commerce).

## 2 Term and Formation of a Service Agreement

### Service Agreement

- 2.1 When the Parties enter into the Service Agreement for a particular transaction, the Service Agreement incorporates the Service Order, the General Terms and Conditions, the Acceptable Use Policy and the

relevant Schedule that relate to the Services that are set out on the Service Order, as are posted in the BGP Group & VoIPSmart website at the time the Service Agreement is entered into. The Service Agreement may be varied or amended in accordance with the terms and conditions of the Service Agreement. Any such amendment will need to be documented and signed by both Parties in a separate Variation.

- 2.2 If the Parties enter into a subsequent transaction that is not an amendment to a previous transaction under a previous Service Agreement, then that transaction will be subject to a separate and independent Service Agreement.
- 2.3 To the extent that there is any conflict between:
  - (a) the Service Order;
  - (b) the General Terms and Conditions;
  - (c) the Schedules;
  - (d) the Acceptable Use Policy,
 then the first listed shall prevail.
- 2.4 BGP Group & VoIPSmart may change the Acceptable Use Policy from time to time in its discretion, by posting an updated Acceptable Use Policy on its website.
- 2.5 Both Parties agree to act reasonably and in good faith in their dealings with each other under the Service Agreement. BGP Group & VoIPSmart reserves the right to act without reference to the first sentence in this clause where the phrase "in its discretion" or similar is used.

### Variations

- 2.6 Subject to clauses 2.4, 2.10, 3.22 or 5.1, the Service Agreement, or any part of it, may only be varied by the Parties agreeing to the Variation in writing (and the Variation will be binding when both Parties have signed the Variation).

### Service Period

- 2.7 Unless stated otherwise in a Service Description or on the Service Order, Services performed under the Service Agreement (other than Professional Services) are provided for an initial 36 month Minimum Service Period starting on the Service Commencement Date.
- 2.8 Customer may give BGP Group & VoIPSmart written notice prior to the end of the current Service Period to:
  - (a) renew the Services for the new Service Period (including any new Minimum Service Period), in which case the Fees, Taxes and any new terms and conditions that were previously advised to Customer will apply. If no new terms and conditions or Fees were advised, then the terms and conditions and Fees in



the existing Service Agreement will apply to the renewal Services shall be renewed in 36-month periods unless BGP Group & VoIPSmart advises otherwise; or

- (b) not to enter into a contract for the Services for the new Service Period.

2.9 If Customer does not give BGP Group & VoIPSmart written notice under clause 2.8, but continues to access or use any of the Services on the Service Agreement after the end of the Service Period then:

- (a) the Services Period for all the Services on that Service Agreement shall automatically be extended for a period of three months.
- (b) the Service Levels will not apply during that three-month period.
- (c) Customer must continue to pay the Fees for all the Services for the three-month period;
- (d) at the end of the three-month period the Service Period shall end, unless the Parties have agreed a Variation to extend the Service Period by the end of that three month period.

#### **Process**

2.10 A Variation which is a renewal under clause 2.6 may be agreed by exchange of emails or faxes, with or without a signature, or by continued use of the relevant Service. A Variation made under clause 3.9 may be made in accordance with that clause.

### **3 Service Delivery**

#### **Services**

3.1 BGP Group & VoIPSmart must perform the Services set out in the Service Agreement:

- (a) with due skill and care.
- (b) in accordance with any timescales set out in the Service Agreement, or if no time scales are set out, within a reasonable time.

3.2 BGP Group & VoIPSmart must ensure that its Personnel who carry out the work or perform duties under the Service Agreement are at all times properly qualified and experienced for the tasks that they are to perform. If Customer believes that any individual Personnel is not performing their tasks properly or is behaving in an unprofessional manner Customer must immediately bring this to the attention of the BGP Group & VoIPSmart project manager and they must attempt resolve the issue promptly. If Customer is not satisfied with the resolution of the issue then Customer may require the individual Personnel to be removed from working on the Services, and BGP Group & VoIPSmart must promptly replace that individual Personnel, at BGP Group & VoIPSmart's cost.

3.3 Unless stated otherwise on the Service Order:

- (a) the Services are provided to Customer for Customer benefit and for the benefit of Customer's Affiliates; and
- (b) Customer must ensure that only its (and those of its Affiliates) Personnel and their invitees are accessing the Service and Customer Data.

3.4 If the Service Order states that Customer may use the Services for the benefit of one or more third parties then Customer must ensure that it enters into an agreement with each third party which is consistent with the Service Agreement prior to giving the third-party access to the Service.

3.5 Customer must ensure that each person who is accessing the Service (other than BGP Group & VoIPSmart or its Personnel) uses the Service in accordance with the Service Agreement. Customer is responsible for the acts and omissions of all persons (other than BGP Group & VoIPSmart or its Personnel) who access and/or use the Service and any Customer Data.

3.6 BGP Group & VoIPSmart is not in breach of the Service Agreement to the extent that the failure, delay, or other breach arises from, or is contributed to by, a Reasonable Excuse.

#### **Service Levels**

3.7 BGP Group & VoIPSmart must meet or exceed any Service Level that is applicable to the Services acquired under the Service Agreement, except to the extent that the failure, delay, or other breach arises from, or is contributed to by, a Reasonable Excuse.

3.8 All Service Levels will be measured using BGP Group & VoIPSmart's measurement tools, the results of which will be final and binding on Customer.

#### **Moves, adds, changes**

3.9 Customer may request that BGP Group & VoIPSmart makes additions, moves, or changes to the Services Customer is receiving under the Service Agreement for an additional Fee. To do this, Customer may agree a new Service Agreement, send BGP Group & VoIPSmart an email or use the BGP Group & VoIPSmart Cloud Services portal. If BGP Group & VoIPSmart agrees to make the addition, move, or change BGP Group & VoIPSmart will charge Customer an additional Fee which BGP Group & VoIPSmart will notify Customer of the additional Fees for the addition, move or change at the time of Customer's request.

#### **Scheduled Maintenance and Emergencies**

3.10 BGP Group & VoIPSmart will use its best efforts to carry out Scheduled Maintenance:

- (a) within the times set out in the relevant Schedule.



- (b) at other times with at least 3 Business Days prior notice from BGP Group & VoIPSmart.
- (c) with a minimum disruption to Customer's business.

3.11 Where BGP Group & VoIPSmart needs to respond to an Emergency BGP Group & VoIPSmart will provide Customer with as much notice as is practical in the circumstances. The Service may not be available during an Emergency. BGP Group & VoIPSmart will use its best efforts to restore Services as soon as possible after an Emergency.

#### **Disaster Recovery and Backup**

3.12 Where the Schedule expressly states that the Service includes the provision of backups of Customer Data:

- (a) Customer acknowledges and agrees that the backup and restoration of Customer Data only restores the version of Customer Data that existed at the time of the relevant backup, and that if this data is corrupted or damaged, only the same corrupted or damaged data can be restored; and
- (b) the obligation to take a backup is limited to an obligation to run backup software at the agreed intervals and ensuring that if the backup software provides a record that advises that the backup has failed BGP Group & VoIPSmart must re-run the backup after addressing the root cause of the failure until the backup software provides a record that the backup has been successfully completed.

3.13 Where the Services do not include the provision of backups of Customer Data:

- (a) Customer must take regular and complete backups of Customer Data in accordance with industry best practice; and
- (b) Customer must ensure that it has duplicate copies of all data that is provided to BGP Group & VoIPSmart.

3.14 Where the Schedule expressly states that the Service includes the provision of disaster recovery services (known as BGP Group & VoIPSmart IT Continuity Services (DRaaS)) the obligation to provide disaster recovery services is limited to the restoration of Customer Data and Software that is the subject of the agreed Restore Time Objective and Recovery Point Objective as set out in the relevant Schedule.

#### **Virus and Malware Protection**

3.15 Except to the extent that a Service Description states that BGP Group & VoIPSmart is responsible for installing, configuring and operating anti-virus software of a particular item of equipment, Customer must install, configure and operate anti-virus software on all

Customer Network Equipment, Customer Managed Equipment and other equipment that interfaces with any of the Services or BGP Group & VoIPSmart technology in accordance with industry best practice.

#### **Third Party Software**

3.16 Where the Services include technology and services provided by BGP Group & VoIPSmart's third party contractors or licensors, BGP Group & VoIPSmart may not have control over certain terms and conditions which the third-party contractors or licensors requires Customer to click to accept or otherwise enter into when Customer first uses the Service.

3.17 BGP Group & VoIPSmart will use its best efforts to provide Customer with a copy of these third-party contractor's or licensor's terms and conditions at the time that the Parties enter into the Service Agreement.

3.18 If Customer does not agree to the third-party contractor or licensor's terms and conditions, BGP Group & VoIPSmart may not be able to provide Customer with certain Services.

3.19 Customer must comply (and ensure that Customer's users comply) with the third-party contractor's or licensor's terms and conditions, whether or not they have been brought to the attention of Customer at the time the Service Agreement is entered into, or when the software is first used.

3.20 If Customer fails to comply with the third-party contractor's or licensor's terms and conditions, BGP Group & VoIPSmart may be required by the relevant third party to terminate that part of the Service. BGP Group & VoIPSmart will not be liable for any loss, damage or expense incurred by Customer as a result of such termination.

#### **Security Policies**

3.21 Customer must:

- (a) comply with BGP Group & VoIPSmart's security policies and directions as may be reasonably requested by BGP Group & VoIPSmart's security manager.
- (b) inform BGP Group & VoIPSmart promptly if Customer believes there has been any suspected security compromise (including any significant virus or malicious attack) in relation to the BGP Group & VoIPSmart Environment, Customer Managed Equipment, Network or any Customer Data.

#### **Updating the Service Description**

3.22 BGP Group & VoIPSmart may update the Service Description for a Service from time to time in its discretion, and such update will apply 30 days after the date when Customer has been given notice of the update

(including by posting it on BGP Group & VoIPSmart's website). If the updated Service Description will deprive Customer of more than an insubstantial benefit of the Service, then Customer may give BGP Group & VoIPSmart notice of that fact within 7 days of BGP Group & VoIPSmart's notice of updated Service Description. If BGP Group & VoIPSmart receives such a notice and is unable to agree with Customer an acceptable alternative within 14 days of the date that BGP Group & VoIPSmart issued the notice of the updated Service Description then:

- (a) BGP Group & VoIPSmart may give Customer notice that it elects not to make the update; or
- (b) if BGP Group & VoIPSmart does not issue Customer with notice that it elects not to make the update within 21 days of the date when BGP Group & VoIPSmart issued the notice of the update, Customer may:
  - (i) continue to use the Service and the update will be effective 30 days after BGP Group & VoIPSmart issued the notice of the update or
  - (ii) Customer may terminate the Service Agreement only in so far as it relates to the effected Service immediately by giving BGP Group & VoIPSmart written notice prior to the date which is 30 days from the date of issue of the update. In this case BGP Group & VoIPSmart will provide Customer with a pro-rate refund of any Fees that have been paid in advance for the relevant Services that will not be provided, and such payment will be BGP Group & VoIPSmart's entire liability and Customer's sole remedy in connection with such updated Service Description and/or termination of the Service.

3.23 Customer must cooperate with BGP Group & VoIPSmart so that any changes to the Services can be made.

**Consent**

3.24 If the Service Agreement states that Customer requires any form of consent or agreement from BGP Group & VoIPSmart prior to doing something, such consent or agreement must be in writing from an authorised representative of BGP Group & VoIPSmart.

**Exclusions on Services**

3.25 BGP Group & VoIPSmart may not carry out all requests or rectify all incidents as part of the Services. BGP Group & VoIPSmart may charge Customer any of BGP Group & VoIPSmart's costs incurred in identifying, examining, and rectifying any of the following:

- (a) faults or other issues that cause BGP Group & VoIPSmart additional work which would have been avoided had Customer followed BGP

Group & VoIPSmart's written advice, instruction or recommendation, including in respect of the configuration, capacity, design or operational procedures in connection with Customer Managed Equipment;

- (b) faults resulting from any act or omission of Customer, its Personnel or any person accessing the Services using Customer's password or access key or by Customer's invitation.
- (c) faults caused by Customer's breach of the Service Agreement;
- (d) faults as a result of Customer Data being incompatible with a Service.

**Suspension or Cancellation of Service**

3.26 BGP Group & VoIPSmart may also suspend or cancel the Service under the Service Agreement (but without Customer incurring any Fees relating to such Services during the period of suspension) due to any of the following:

- (a) the provision of the Services Customer is receiving under the Service Agreement being suspended or cancelled for whatever reason by BGP Group & VoIPSmart or its contractors which provides BGP Group & VoIPSmart with the relevant Services, including where:
  - (i) the relevant Service or feature is replaced by a newer technology which allows for increased functionality; or
  - (ii) the relevant Service or feature has reached the end of its natural life cycle.
- (b) a determination by BGP Group & VoIPSmart, in BGP Group & VoIPSmart's discretion, that BGP Group & VoIPSmart's provision of any of the Services Customer is receiving under the Service Agreement is no longer practical due to any legal or regulatory reason; or
- (c) a reasonable suspicion on BGP Group & VoIPSmart's behalf that the continued provision of a Service compromises or will compromise the security of the BGP Group & VoIPSmart Environment, for example due to hacking attempts or denial of service attacks or a vulnerability discovered in relation to a particular item of technology which BGP Group & VoIPSmart uses to deliver the Services provided under the Service Agreement.

3.27 Where BGP Group & VoIPSmart suspends or cancels

possible in the circumstances prior to suspending or cancelling that Service, and the Parties must use best efforts to identify and implement any reasonable solution that will prevent or limit the duration or effect of the suspension.

#### 4 Ancillary Services

##### Customer Portal

- 4.1 As part of BGP Group & VoIPSmart's Service, BGP Group & VoIPSmart may provide Customer with a user account enabling Customer to access BGP Group & VoIPSmart's online customer portal(s) so that Customer can review information about the Services.
- 4.2 Where Customer registers for online customer portal(s) access, Customer must read and accept the relevant terms of use for the portal(s).
- 4.3 Customer must take all necessary steps to prevent unauthorised access to the Service, the customer portals and all BGP Group & VoIPSmart Environments.

##### Service Software and Performance Tools

- 4.4 BGP Group & VoIPSmart uses Service Software to provide many of the Services provided under the Schedules and BGP Group & VoIPSmart does not guarantee that such Service Software is error-free.
- 4.5 As part of the Service, BGP Group & VoIPSmart may provide Customer with access to Service Software for the sole purpose of Customer accessing and using the Service.
- 4.6 Customer must comply (and ensure that Customer's users comply) with all licence terms applicable to the Service Software as set out in the Schedule, Service Order or any click wrap or browser wrap licence that is applicable.
- 4.7 Customer must use and/or install Service Software and Performance Tools, and upgrades and patches to that Service Software or Performance Tools as directed by BGP Group & VoIPSmart (including allowing BGP Group & VoIPSmart to install certain Performance Tools on Customer Managed Equipment where BGP Group & VoIPSmart Managed Services are being provided). If Customer fails to do so, BGP Group & VoIPSmart may suspend or refuse to support that Service.

##### Network Connection

- 4.8 Unless stated otherwise in a Schedule all Services (other than Professional Services) require Customer to acquire a network connection from BGP Group & VoIPSmart in order to enable the transfer of data between BGP Group & VoIPSmart Environments or Customer Managed Equipment, BGP Group & VoIPSmart and Customer Network Equipment. The details of this network connection and the Fees for that connection will be set out on the Service Order.

##### Reporting and Review

- 4.9 Within 5 Business Days of the end of each month during the Service Period BGP Group & VoIPSmart will provide Customer with its standard reports on BGP Group & VoIPSmart's performance against certain key metrics of the Service delivery requirements for each Service, including reporting on Service Levels. Samples of BGP Group & VoIPSmart's standard reports are available upon request. The Parties may agree that BGP Group & VoIPSmart will provide additional reports at additional Fees.
- 4.10 During the Term of the Service Agreement the Parties will each appoint a representative (**Account Representative**) who:
- will be the primary contact for the other's Account Representative in dealing with all matters under the Service Agreement;
  - will have overall responsibility for managing and coordinating that Party's performance of its obligations in relation to the Services;
  - has authority to make binding decisions on all day-to-day matters in the course of the Services;
  - will meet regularly with each other, at times agreed or promptly after a request from the other Party's Account Representative
- 4.11 The Parties will meet each 6 months to review the Services and agree to act in good faith to discuss any proposed changes to the Services.

##### Audit and Monitoring

- 4.12 BGP Group & VoIPSmart must keep full and proper books of accounts and records relating to the performance of BGP Group & VoIPSmart's obligations under the Service Agreement (**Records**) during the Term and for 7 years after the termination or expiry of the Service Agreement.
- 4.13 Customer may give BGP Group & VoIPSmart no less than 5 Business Days' notice that it or persons nominated by it (**Auditors**) are to conduct an audit of any of the Records. If Customer is required by any regulatory body or legislation to initiate an audit, then BGP Group & VoIPSmart will facilitate access to its Records upon Customer providing at least 1 Business Days written notice.
- 4.14 If Customer provides notice under clause 4.13, BGP Group & VoIPSmart must provide Customer or its Auditor with:
- the Service under clause 3.26 BGP Group & VoIPSmart will provide Customer with as much notice as is reasonably access to any premises occupied by it and access to any of its Records; and



- (b) the opportunity to interview relevant personnel relating to the provision of the Services upon request.

4.15 On request, BGP Group & VoIPSmart must give Customer all reasonable assistance in any activities conducted under clause 4.14.

4.16 Without limiting clause 4.13, the purposes of which Customer or its Auditor may require access include reviewing, inspecting and auditing compliance or to otherwise observe the quality of BGP Group & VoIPSmart's work practices and procedures to determine BGP Group & VoIPSmart's performance of its obligations under the Service Agreement.

## 5 Operational Issues

### Shared Services

5.1 Where BGP Group & VoIPSmart is providing a shared BGP Group & VoIPSmart Environment as part of the Service, Customer acknowledges and agrees that the Service is provided on a shared service basis to Customer and other clients and BGP Group & VoIPSmart may from time to time in its discretion, without the prior consent of Customer:

- (a) implement updates and/or new releases to software that change, add or delete the functions, features, performance or other characteristics of BGP Group & VoIPSmart's software, and when such update or new release is installed on the BGP Group & VoIPSmart Environment, the Service Description of the Service shall be amended accordingly;
- (b) change and/or replace any component of the BGP Group & VoIPSmart Environment, Network, infrastructure or other component of the environment with components that are similar or superior in features and functionality.

BGP Group & VoIPSmart will not be liable for any loss, damage, cost or expense which Customer may incur as the result of any action taken by BGP Group & VoIPSmart in accordance with this clause.

### Browser Compatibility

5.2 In order to access and use the Service each user must have its own device with a web browser of the type that is supported by BGP Group & VoIPSmart. Customer acknowledges and agrees that it is Customer's and its users' responsibility to acquire, maintain and properly use any device, communications link and software and to update any device, communications link or software if BGP Group & VoIPSmart updates the browsers that it supports, and that all capital and on-going cost for such items are the responsibility of Customer and its users.

### Control over Infrastructure

5.3 BGP Group & VoIPSmart retains the sole right and control over all aspects of the selection of, programming, composition, management, content, support and operation of the BGP Group & VoIPSmart Environment and the Premises. Customer is not entitled to gain physical access to our Premises or any BGP Group & VoIPSmart Environment.

### On Premises

5.4 BGP Group & VoIPSmart agrees to comply with all rules and regulations relating to the access and use of the Customer's sites (including any work, health and safety rules) of which Customer has provided BGP Group & VoIPSmart with prior written notice, when visiting Customer's sites.

## 6 Prohibited Actions

6.1 Nothing in the Service Agreement permits Customer (nor permits Customer to permit any other person) to:

- (a) copy, adapt, translate, publish, communicate to the public, or create any derivative work or translation of any software used to provide any part of the Services, unless expressly permitted by law or the Service Agreement.
- (b) sub-licence, lease, rent, loan, assign, novate or otherwise transfer any part of the Service to any third party.
- (c) disclose any part of the software that is used to provide any part of the Service to any third party, except as permitted under the Service Agreement.
- (d) reverse engineer, reverse compile, de-compile or disassemble the object code of any of the software that is used to provide any part of the Services, or otherwise attempt to derive the source code of that software, except to the extent permitted by law.
- (e) breach the Acceptable Use Policy.
- (f) access, monitor or copy any content of the Service using any robot, spider, scraper or automated process, or deep link to any part of the Service.
- (g) bypass or circumvent, or attempt to bypass or circumvent any measure that is designed to limit access to any part of the Service.
- (h) frame, mirror or otherwise include any part of the Service in any other website or application.



- (i) remove, alter or obscure any BGP Group & VoIPSmart Marks, or any proprietary or restricted use notice on the Service.
- (j) allow any part of the Service to become the subject of any charge, lien, encumbrance, or security interest; or
- (k) deal in any other manner with any or all of Customer's rights and obligations under the Service Agreement.

## 7 Customer's Obligations

7.1 In addition to any obligations set out in the Schedule, Customer must:

- (a) provide BGP Group & VoIPSmart with remote access, on a 24 x 7 basis, to all relevant components in Customer Managed Environments and Customer Software in the BGP Group & VoIPSmart Environments, the Service Software and the Performance Tools to enable BGP Group & VoIPSmart to perform the Services (including error correction and installation of patches) remotely, including any passwords or access rights or requirements.
- (b) ensure that all Customer Software in Customer Managed Environments and in the BGP Group & VoIPSmart Environments is maintained at the then current or previous release level. If Customer is responsible for implementing new updates or new releases Customer must obtain BGP Group & VoIPSmart's prior agreement to the implementation of the update or new release.
- (c) ensure that Customer Software installed on Customer Managed Environments or BGP Group & VoIPSmart Environments is fully, and properly licensed, and such licences permit BGP Group & VoIPSmart and its Personnel to access and use that Customer Software to perform the Services and meet their obligations under the Service Agreement;
- (d) ensure that BGP Group & VoIPSmart has direct telephone access to the providers of support and maintenance to any component of Customer Managed Environments and Customer Software installed on BGP Group & VoIPSmart Environments, including the manufacturers of the hardware and operating systems, databases and applications, such access to be available during Business Hours, and any other times reasonably required by BGP Group & VoIPSmart (e.g. when major new releases are being implemented out of hours or other critical activities are planned);

(e) ensure it uses the BGP Group & VoIPSmart Environment in accordance with recommended operating procedures, Operations Manual or otherwise in accordance with the directions or recommendations of BGP Group & VoIPSmart.

(f) ensure it uses Customer Managed Equipment in accordance with recommended operating procedures, Operations Manual and in accordance with the directions or recommendations of the original manufacturer of Customer Managed Equipment, its authorised distributor or BGP Group & VoIPSmart;

(g) maintain registration of its domain names; (h)

provide BGP Group & VoIPSmart with complete and accurate information in a timely manner as may be needed to facilitate BGP Group & VoIPSmart performing the Services.

(i) make available appropriately knowledgeable Personnel in a timely manner who are capable of answering BGP Group & VoIPSmart's questions.

(j) promptly make any decisions needed by BGP Group & VoIPSmart to perform the Services; and

(k) ensure that where there are multiple stakeholders within Customer who have an interest in the Services, (including stakeholders in other Affiliates), the person that is dealing with BGP Group & VoIPSmart is authorised to represent the views of all Customer's stakeholders, has obtained those views prior to providing information or instructions to BGP Group & VoIPSmart, and provides information or instructions that are the single authorised position of Customer.

7.2 If the Services are performed at Customer's offices, Customer must:

(a) provide office space and facilities to BGP Group & VoIPSmart's Personnel commensurate with those provided to Customer's own employees of similar standing.

(b) provide a safe place to work for any of BGP Group & VoIPSmart's Personnel that are working at Customer's site.

7.3 Customer warrants that it has the authority to allow BGP Group & VoIPSmart and its Personnel to use any facilities, equipment, Customer Software, resources and/or Intellectual Property Rights with performing the Services and meeting its obligations under the Service Agreement and the law.



Where:

- (a) there is a change in the scope of the Services or other Customer requirements for the Services.
- (b) Customer fails to perform any obligation under the Service Agreement.
- (c) there is a negligent act or omission of Customer or its Personnel.
- (d) there is a change of law that affects the supply of the Services.
- (e) Customer issues any direction, instruction or changes a policy.
- (f) any assumption set out in the Service Order is not true or becomes untrue.
- (g) an act or omission of a third-party provider to Customer causes a change in the supply of the Services;
- (h) there is a Force Majeure Event,

and such event causes BGP Group & VoIPSmart to incur a non-trivial (i.e. more than \$500 per event or series of connected events) increase in its costs of providing the Service or performing its obligations under the Service Agreement, then, in addition to any other right or remedy, BGP Group & VoIPSmart is entitled to charge Customer all its increased costs that result from such event. BGP Group & VoIPSmart shall use the Time and Materials Rates and expenses (or if no Time and Materials Rates are set out on the Service Order, BGP Group & VoIPSmart will use its then current rates) as the basis of any such charge. In this case BGP Group & VoIPSmart will draft a Variation to the Service Agreement and submit it to Customer. Customer must not unreasonably withhold or delay its approval to such Variation. BGP Group & VoIPSmart must use reasonable efforts to mitigate any costs that it may incur due to the occurrence of any of the events in this clause.

## 8 Transition In Services

8.1 Immediately following the Service Commencement Date BGP Group & VoIPSmart will perform the following Transition in Services:

- (a) providing Customer with the date upon which the Services will commence.
- (b) commencing a due diligence process to collect all required information on the systems and services to be supported.
- (c) where applicable, configuring BGP Group & VoIPSmart's system monitoring platforms to monitor and report on the availability and performance of the systems BGP Group & VoIPSmart is managing.

- (d) providing Customer with documentation on how to interact with and utilise BGP Group & VoIPSmart's support services.
- (e) agreeing a regular meeting and reporting schedule.
- (f) any other Transition in Services set out in the Schedule;
- (g) once the Services are ready for use, advise Customer that the Services are ready to use.

8.2 To assist BGP Group & VoIPSmart perform the Transition in Services Customer must promptly:

- (a) provide any details reasonably requested by BGP Group & VoIPSmart to allow BGP Group & VoIPSmart to initiate the support services (for example details of Customer's firewall and network connectivity, passwords and access codes, details of Customer's procedures etc.); and
- (b) review and approve in a timely manner all such documentation provided by BGP Group & VoIPSmart during the Transition In Services.

## 9 Disengagement

9.1 At the expiry or termination of a Service Period under the Service Agreement BGP Group & VoIPSmart must, at no cost to Customer:

- (a) return to Customer any Customer provided equipment held by BGP Group & VoIPSmart (e.g. Building access passes, spare computer equipment or remote access tokens etc.);
- (b) remove its own equipment, from Customers site(s); and
- (c) remove or delete any copies of any Customer Software or Customer Data loaded on BGP Group & VoIPSmart Environment. Customer is solely responsible for ensuring it has taken a copy of all Customer Data prior to the expiry or termination of the Service Agreement.

9.2 If Customer requires additional Disengagement Services BGP Group & VoIPSmart will provide Customer with a quotation for those Services, which will form a separate agreement between the Parties.

## 10 APRA Compliance

10.1 Where Customer is an APRA regulated entity and the provision of the Services constitutes a material business activity in accordance with the Prudential Standard CPS 231 then the provisions of this clause 10 also apply.

### Customer Representations

10.2 Customer represents and warrants to BGP Group & VoIPSmart that:

- (a) it has complied with all the requirements of APRA in choosing and appointing BGP Group & VoIPSmart to provide the Services and entering into the Service Agreement.
- (b) it will comply with all its on-going obligations in respect of the review, monitoring, renewal, change management, risk management (including appropriate contingency plans), resourcing and governance of the Services and any other requirements that APRA may determine from time to time, in connection with the Services;
- (c) it will notify BGP Group & VoIPSmart if APRA varies the Prudential Standard CPS 231 or introduces any additional standard that is applicable to the Services, and the Parties will endeavour to agree to an appropriate adjustment to the Service Agreement to enable Customer to comply with the new APRA requirement. BGP Group & VoIPSmart will be entitled to charge for any additional costs incurred in varying the Service Agreement and the Services to meet the new APRA requirement.

#### **BGP Group & VoIPSmart Obligations**

10.3 Where BGP Group & VoIPSmart receives a request from APRA in connection with the Service Agreement for information, access to documents or records, to conduct an on-site visit or other request which an applicable APRA prudential standard relating to outsourcing or business continuity contemplates occurring by direct contact between APRA and BGP Group & VoIPSmart (**APRA Request**), BGP Group & VoIPSmart will:

- (a) promptly notify Customer with details of the APRA Request.
- (b) comply with the APRA Request or procure compliance with the APRA Request by its Personnel (in so far as that request is within APRA's statutory authority).
- (c) not disclose or advertise that APRA is conducting or has conducted any audit of BGP Group & VoIPSmart or the Services except as may be required to coordinate with other institutions that are also regulated by APRA who are also customers of the Services.

#### **Business Continuity**

10.4 Where Customer requires BGP Group & VoIPSmart to create a business continuity plan (**BCP**) under clause 15:

- (a) that BCP must include be in a form reasonably required by Customer and must include, at a minimum:
  - (i) a detailed description of all activities needed to minimise any interruption to the Services by reason of a

disruption to the business operations of Customer or BGP Group & VoIPSmart.

- (ii) a detailed description of how BGP Group & VoIPSmart's plan will integrate with Customer's own business continuity plan.
- (iii) the types of events that will trigger the BCP
- (iv) the roles and responsibilities of the Parties to mitigate the impact of the disruption.
- (v) a detailed description of the activities, processes and procedures that must occur in the event of disaster to prevent any loss or damage to the Customer Data or any property, assets or resources of Customer and to restore the Services to meeting the obligations under the Service Agreement.
- (vi) Customer's and BGP Group & VoIPSmart's communication plan if the BCP is invoked.
- (vii) the timeframes for the Service to be restored if the BCP is invoked.
- (viii) BGP Group & VoIPSmart's alternative site (if applicable);
- (ix) the process to test the BCP (including the format of the test results); and
- (x) the process for review and updating of the BCP.

(b) whenever Customer notifies BGP Group & VoIPSmart that Customer has updated its own business continuity plan, BGP Group & VoIPSmart must review and update the BCP to ensure that it is consistent with Customer's business continuity plan.

(c) BGP Group & VoIPSmart must in conjunction with Customer, test the BCP every 6 months or when reasonably requested by Customer to ensure that the BCP complies with the requirements of the Service Agreement, and is consistent with Customer's business continuity plan. BGP Group & VoIPSmart must provide the results of the BCP testing to Customer within 7 days of the end of the test.

10.5 Any costs that BGP Group & VoIPSmart incurs under clause 10.4 must be borne by Customer, and Customer must pay BGP Group & VoIPSmart for such services at the Time and Materials Rates set out in the Service Order, and if no Time and Materials Rates are set out in the

Service Order, at BGP Group & VoIPSmart's then current rates. Any such services will be provided as a Professional Service.

#### Technical Review

- 10.6 Customer may require that Customer and BGP Group & VoIPSmart undertake a joint review of the technical and organisational measures that are being used to ensure the security of Customer Data. Customer shall determine the scope of such review, but such review may include:
- (a) the adequacy of the performance, capacity, security, availability and recoverability of the in-scope environment, software or other resources that are being managed.
  - (b) a comprehensive risk assessment of the provision of the Services to Customer's business.
  - (c) the adequacy of the change management process, including contract change and changing the underlying IT infrastructure that is being used to provide the Services.
  - (d) the adequacy of the RACI and the allocation of tasks, roles and responsibilities of the Parties.
  - (e) the adequacy of the incident management process, including root cause analysis.
  - (f) the adequacy of the business continuity arrangements, back up and recoverability of Customer Data.
  - (g) the information that is available and the documentation that is being kept recording and demonstrate compliance with the data security requirements under the Service Agreement, including the adequacy of the Operations Manual;
  - (h) BGP Group & VoIPSmart's ability to assist Customer meet its obligations to meet APRA's prudential requirements.

Nothing in this clause requires BGP Group & VoIPSmart to disclose to Customer any information that BGP Group & VoIPSmart holds under an obligation of confidence or non-disclosure to any third party, nor to disclose any data from which a person could identify BGP Group & VoIPSmart's of margins or profitability.

- 10.7 Any costs that BGP Group & VoIPSmart incurs under clause 10.6 must be borne by Customer, and Customer must pay BGP Group & VoIPSmart for such services at the Time and Materials Rates set out in the Service Order, and if no Time and Materials Rates are set out in the Service Order, at BGP Group & VoIPSmart's then current rates. Any such services will be provided as a Professional Service.

## II Consumer Rights and Warranties

- 11.1 Where Customer is entitled to a statutory guarantee under sections 54-59 or 60-62 of the Australian Consumer Law then those statutory guarantees apply.
- 11.2 Where Customer is entitled to the benefits of the statutory guarantees under sections 60 to 62 of the Australian Consumer Law, then Regulation 90 (issued under that Act) applies.

Accordingly, BGP Group & VoIPSmart provides Customer with the following information as is required by Regulation 90:

The work that is provided to remedy any defect in the services are a "Warranty Against Defects" as defined in Regulation 90. This work is provided by BGP Group & VoIPSmart Pty Ltd ABN of 083 664 224, telephone number 1300 13 55 48, email address [accounts@BGPGroup.com.au](mailto:accounts@BGPGroup.com.au) & [accounts@VoIPSmart.com.au](mailto:accounts@VoIPSmart.com.au)

Email address: [support@BGPGroup.com.au](mailto:support@BGPGroup.com.au) & [VoIPSmart.net.au](mailto:VoIPSmart.net.au)

The costs for the work that BGP Group & VoIPSmart provides as a Warranty Against Defects are included within the Fee that are set out in the Services Agreement. No additional fees are payable by Customer for this service. Customer is responsible for any expenses it incurs in using this service.

In accordance with Regulation 90 BGP Group & VoIPSmart includes the following notice.

*"Our goods and services come with guarantees that cannot be excluded under the Australian Consumer Law. For major failures with the service, you are entitled:*

- *to cancel your service contract with us; and*
- *to a refund for the unused portion, or to compensation for its reduced value.*

*You are also entitled to choose a refund or replacement for major failures with goods. If a failure with the goods or a service does not amount to a major failure, you are entitled to have the failure rectified in a reasonable time. If this is not done you are entitled to a refund for the goods and to cancel the contract for the service and obtain a refund of any unused portion. You are also entitled to be compensated for any other reasonably foreseeable loss or damage from a failure in the goods or service"*

- 11.3 The benefits that BGP Group & VoIPSmart provides to consumers under the Warranty Against Defects are in addition to any other rights or remedies a consumer may have in respect of these goods or services under the Australian Consumer Law.

11.4 If you believe there is a defect in any good or service provided by us, then you should follow the relevant procedure for the type of good or service that we supplied to you and contact BGP Group & VoIPSmart's support desk by email during the Service Period. You must also provide us with any help that we may reasonably request to help us remedy and defect or provide any replacement, at no cost to us.

**Where your claim is in relation to the Hardware**

11.5 You must give us written notice to the address above (including by email) within 30 of the date of purchase of the hardware setting out details of the issue, and at our request:

- you must, at your cost, provide us with remote access to the hardware in order for use to diagnose and remedy the defective hardware; and/or
- if it is possible to repair defective hardware with user installable parts, we will send you the user installable parts and you must install them in accordance with our instructions; and/or
- you must promptly package and send the defective hardware to us in packaging provided and paid for by us, using a courier nominated and paid for by us.

11.6 Wherever technically possible, you must take a copy of, and then remove, all data from the hardware prior to de-installing any user installable parts on which the data is stored or from the hardware that you are sending to us.

11.7 If we request that you send the Hardware to us, we will use our best efforts to diagnose the issue, and if the issue is found to be defect in the Hardware, we will, at our option and cost, remedy the defect, repair the hardware or provide a replacement (which may be a different model with substantially similar or better features), and return the repaired/replaced item to you at our cost, within 30 days.

11.8 If your issue is not covered by our warranty against defects service, then we will diagnose the issue at our cost, and if we are able to provide a repair or a replacement, we will provide you with an estimate for the repair or replacement (and any shipment, insurance, and delivery costs). If you agree to the estimate, we will provide the repair or replacement and ship the repaired/replacement item to you, within 10 days of the date you approved us to undertake the repair/replacement. If you do not agree to the estimate then you must either authorise us to keep and/or destroy the hardware or return it to you at your cost (and pay us the cost of returning the hardware to you prior to us returning it to you).

11.9 If we are unable to repair or replace the defective hardware, we will provide a refund of the price paid for the hardware, and to keep and/or destroy the original defective hardware, as we see fit.

11.10 We may use a refurbished part for any replacement part.

**Where your claim is in relation to a Managed Service**

11.11 You must give us written notice to the address above (including by email), within the Service Period setting out details of the issue, including wherever possible, a screen shot of the issue or any error message.

11.12 Once you have done these things:

- you must, at your cost, provide us with remote access to the relevant technology in order for use to diagnose and remedy the defect; and
- we will use our best efforts to re-perform the service or remedy the defect in a timely manner.

11.13 If we cannot re-perform the service or remedy the defect in a timely manner we will provide you with a refund of the fees paid for the defective managed service for the month in which the defect occurred, or if the defect is a major defect, we may also terminate the defective managed service and provide you with an additional refund of any fees that you may have paid in advance for the period of the managed service that is no longer going to be provided.

11.14 Where your claim is in relation to Professional Services

11.15 You must give us written notice to the address above (including by email) within [30] days of the date when the service was provided setting out details of the issue.

11.16 We will then use our best efforts to re-perform the service or remedy the defect in a timely manner, and if we cannot, we will provide you with a refund of the fees paid for the defective service.

**Exclusions**

11.17 Our warranty against defects does not cover any defects that are caused by any of the following (whether it is for hardware, software, subscription services, managed services, or professional services):

- fair wear and tear.
- misuse, incorrect use of or damage to the good or service from whatever cause (other than any act or omission by us).

- failure to maintain the necessary environmental conditions for use of the good or service.
- any failure of any technology that is connected to any of the technology that is the subject of the service.
- data that is entered into the technology that that is the subject of the service.
- any breach of your obligations under the agreement.
- having any good or service purchased from us being maintained by a third party.
- any item that is subject to our service being maintained by you or any third party; or
- any use that is contrary to the instructions provided by the manufacturer or us.

#### **Your costs**

- 11.18 You are responsible for any expenses you incur in using any of our warranty against defects service, except where it is stated that we are paying the relevant costs. If you submit a claim for these expenses to us (including the original receipts or other acceptable proof of payment), and we have failed to meet any statutory guarantees under the Australian Consumer Law and as a result you are entitled to reimbursement of these costs, we will reimburse you for those costs.
- 11.19 In accordance with Regulation 91 under the Australian Consumer Law, BGP Group & VoIPSmart gives Customer notice that if BGP Group & VoIPSmart repairs goods that are capable of retaining user-generated data (e.g. computer hard drives, mobile phones, portable media players, games consoles, USB memory sticks), then BGP Group & VoIPSmart provides notice that the repair of the goods may result in the loss of the data.
- 11.20 BGP Group & VoIPSmart warrants to Customer that its use of the Services and any Deliverable in accordance with the Service Agreement will not infringe the Intellectual Property Rights of any third party.
- 11.21 Customer agrees to comply with all laws which are relevant to Customer performing its obligations under the Service Agreement. Customer is solely responsible for ensuring it uses the Services, Customer Software, Customer Data, Third Party Software, the BGP Group & VoIPSmart Environment, Customer Managed Equipment, and any Deliverable in accordance with all applicable laws.
- 11.22 To the extent permitted by law, all implied conditions, warranties, and rights, together with any implied by custom or other circumstances, are excluded.

## **12 Payment and Invoicing**

### **Payment**

- 12.1 Unless stated otherwise on the Service Order and subject to any Minimum Spend, the Fees, and Taxes are due as follows:
- for any fixed Fee Services: monthly in advance for every month in the Service Period from the Service Commencement Date. BGP Group & VoIPSmart will use reasonable endeavours to notify Customer of the activation date via email, SMS or telephone.
  - where a Service Order states that payment for a Service is based on the maximum amount of a component of the Service that was actually used in the prior month, payment is due for the relevant usage (subject to a Minimum Spend) monthly in arrears for every month of the Service Period.
  - for any renewed period of the Service Period: at the Fees and for the Service Period determined in accordance with clauses 2.7 to 2.9; and
  - for Professional Services: in accordance with Schedule 1, unless stated otherwise on the Service Order.

### **Use Base Fees**

- 12.2 Where the Fees are based on usage, BGP Group & VoIPSmart may round up usage in the billing period to the nearest whole unit (for example, 1.4GB is rounded up to 2GB).
- 12.3 For certain Services, BGP Group & VoIPSmart's pricing may be based on usage bands. Where BGP Group & VoIPSmart's pricing is based on usage bands, Customer may request that BGP Group & VoIPSmart reduces or increases BGP Group & VoIPSmart's usage band in accordance with the Service Agreement. If BGP Group & VoIPSmart agrees to reduce the usage band, Customer may have to pay a Fee.
- 12.4 Unless stated otherwise on the Service Order, any expenses incurred in providing any Service will be invoiced after they have been incurred. Expenses will be invoiced in accordance with BGP Group & VoIPSmart's then current expense policy, a copy of which is available upon request.
- 12.5 For certain Services the Schedule or the Service Order may specify a Minimum Spend as a percentage of the total monthly spend specified for such Service. Where a Minimum Spend is specified, Customer may reduce Customer's spend to the amount of the Minimum Spend through reducing Customer's utilisation of the Services without incurring a further Fee. If Customer reduces Customer's utilisation of Services such that the amount payable would otherwise be an amount





below the Minimum Spend, Customer is still required to pay the Minimum Spend for that Service.

#### **Invoicing**

- 12.6 Customer must pay BGP Group & VoIPSmart the Fees, expenses, and related Taxes by direct debit on the due date. If BGP Group & VoIPSmart agrees in writing (and subject to meeting BGP Group & VoIPSmart's credit approval policy) to allow Customer to pay by electronic funds transfer or cheque, then Customer must pay BGP Group & VoIPSmart within 14 days of date of the Tax Invoice. Tax Invoices will be sent on or after the due date for payment as set out in clause 12.1 To the extent permitted by law, all amounts that are payable under the Service Agreement by Customer are non- cancellable and non-refundable and must be paid without set off or deduction.

#### **Taxes**

- 12.7 In addition to the Fees and expenses payable in accordance with the Service Agreement, Customer must pay to BGP Group & VoIPSmart an additional amount equal to the GST that is payable on the supply (**GST Amount**), such GST amount must be stated in the relevant Tax Invoice and paid at the same time as the relevant Fees and expenses.
- 12.8 If a Party has to reimburse or indemnify another Party for a loss, cost or expense, the amount to be reimbursed or indemnified is reduced by any input tax credit the other Party is entitled to for the loss, cost, or expense, and then increased in accordance with clause 12.7.
- 12.9 If the GST payable by Customer on any supply arising out of or in connection with the Service Agreement varies from the GST Amount paid or payable by Customer under clause 12.7 such that the further amount of GST is payable in relation to the supply or a refund or credit of GST is obtained in relation to the supply, then BGP Group & VoIPSmart will provide a corresponding refund or credit to, or will be entitled to receive the amount of that variation from, Customer.
- 12.10 Any payment, credit, or refund under clause 12.9 is deemed to be a payment, credit or refund of the GST Amount payable under clause 12.7.

#### **Late Payment**

- 12.11 Customer may be charged a late charge for any failure to make any payment by the date required under the Service Agreement, calculated daily using a rate that is 4% over the Reserve Bank of Australia's Cash Rate, from the date that the payment first becomes overdue, to the date that the payment is received by BGP Group & VoIPSmart, both dates inclusive.

### **13 Intellectual Property Rights**

#### **Pre-existing IP**

- 13.1 Each Party owns its Pre-existing IP and nothing in the Service Agreement transfers to the other Party any right, title, or interest in that Party's Pre-existing IP.

#### **Customer's Property**

- 13.2 As between BGP Group & VoIPSmart and Customer, Customer owns all right, title and interest in all Customer Data and Customer Records and nothing in the Service Agreement conveys to BGP Group & VoIPSmart any right, title or interest in Customer Data or Customer Records.
- 13.3 Customer grants BGP Group & VoIPSmart and its Personnel a non-exclusive limited licence to use, copy, adapt and translate Customer Data, Customer Records, Customer Software, and any other Intellectual Property Rights in material it provides to BGP Group & VoIPSmart solely for the purpose of performing its obligations and exercising its rights under the Service Agreement for the period of the Service Period.

#### **Third Party Software Licensed as part of the Service**

- 13.4 Where Customer acquires a licence for Third Party Software as part of a Service then that Third Party Software is licensed to Customer on the terms and conditions set out, or referred to, on the Service Order, and Customer must comply with those terms and conditions.
- 13.5 If Customer (or Customer permits or requests any third party to) installs, imports, downloads or otherwise copies, including temporarily, any software (including Third Party Software) onto any computer or device that is operated, controlled, or managed by BGP Group & VoIPSmart, including onto any Customer Managed Equipment, Customer must:
- ensure that it has right to possess, use and copy the software in the manner that it is possessing, using or copying that software.
  - strictly comply with (and ensure that Customer's users strictly comply) any agreement that it has with any third-party licensor of that software;
  - within 5 Business Days of written request from BGP Group & VoIPSmart, provide to BGP Group & VoIPSmart a copy of that agreement with the third party (and any other documentation that BGP Group & VoIPSmart may reasonably require relating to Customer's possession, use or copying of that software), to demonstrate to BGP Group & VoIPSmart (and/or the owner/distributor of that third party software), that Customer's possession, use or copying of that software is properly licenced and paid for.





- 13.6 Where the third-party contractor or licensor varies its charges for the use of the software (including Third Party Software) to BGP Group & VoIPSmart, BGP Group & VoIPSmart may vary the Fees that it charges Customer for the use of the software by giving Customer 30 days' notice of the new Fees.

#### **BGP Group & VoIPSmart IP**

- 13.7 Subject to clause 13.8, BGP Group & VoIPSmart does not grant, nor does Customer obtain, any right in any item, including any Pre-existing IP that is used by BGP Group & VoIPSmart to perform any of the Services. Customer is not granted any right of ownership in any such item, nor is Customer granted any right to transfer, sub-license or provide access to, or disclose any such item to any third party, nor is Customer permitted to copy, adapt, translate, commercialise, communicate to the public or otherwise deal with that item. All such items are the Confidential Information and incorporate Intellectual Property Rights of BGP Group & VoIPSmart or its licensors and must be returned to BGP Group & VoIPSmart at the end of the Service Period, or on demand, if sooner.
- 13.8 BGP Group & VoIPSmart grants Customer a non-exclusive, non- transferrable, royalty-free licence for Customer (and any Personnel acting on behalf of Customer) to run any Performance Tools that are installed on Customer Managed Equipment for BGP Group & VoIPSmart's use in connection with the Services during the Service Period.
- 13.9 BGP Group & VoIPSmart grants Customer a non-exclusive, non- transferrable, royalty-free licence for Customer (and any Personnel acting on behalf of Customer) to access and use the Service Software in connection with the Services during the Service Period.
- 13.10 Upon receipt of full payment of the Fees, expenses, and Taxes for the relevant Deliverable under a Service Agreement, BGP Group & VoIPSmart grants Customer a worldwide, royalty free, non-exclusive licence for the Customer and its Affiliates to use, copy and adapt, for Customer's internal use during the Service Period:
- (a) all Intellectual Property Rights that have been newly created through the performance of the Professional Services in that Deliverable; and
  - (b) any BGP Group & VoIPSmart Owned IP that is incorporated in the Deliverable.
- 13.11 Customer is not granted any right of ownership in any Deliverable, nor is Customer granted any right to transfer, sublicense or provide access to the Deliverable to any third party (other than any Affiliate or any Personnel acting on behalf of Customer or an Affiliate). Customer must not use

BGP Group & VoIPSmart Owned IP in any manner other than as an integral part of the Deliverable.

#### **Marketing and Trademarks**

- 13.12 Each Party agrees to allow reference to the other and the relationship under the Service Agreement in its marketing presentations, marketing materials, lists of customers or suppliers (as applicable), and websites as well as in discussion with prospective resellers and customers, and industry/financial analysts.
- 13.13 Neither Party may use the other Party's trademarks, logos, get up or other branding without the other Party's prior written consent, such consent not to be unreasonably withheld.
- 13.14 Customer acknowledges and agrees that BGP Group & VoIPSmart is the owner and/or licensee of the BGP Group & VoIPSmart Marks and that all goodwill arising out of Customer's use of the BGP Group & VoIPSmart Marks under the Service Agreement shall inure to BGP Group & VoIPSmart. Customer will not acquire any right to, or interest in, any of the BGP Group & VoIPSmart Marks. Customer must not at any time or in any way indicate Customer's ownership of, or any right in, the BGP Group & VoIPSmart Marks and Customer must not contest the right of BGP Group & VoIPSmart or any BGP Group & VoIPSmart Affiliate to the use of any of the BGP Group & VoIPSmart Marks.

#### **14 Take Down Notices**

- 14.1 Customer acknowledges and agrees that BGP Group & VoIPSmart is not responsible for the content or accuracy of any Customer Data. BGP Group & VoIPSmart will not access, delete, edit or vary any Customer Data except:
- (a) as specified in the Service Order;
  - (b) as is necessary to comply with any applicable laws, including the Telecommunications Act 1997 and the Telecommunications (Interception and Access) Act 1979 or other legislation.
- 14.2 Customer must promptly notify BGP Group & VoIPSmart if Customer receives any take-down, service cessation or link deletion notices from the Australian Communication and Media Authority (or other regulatory authority), or any direction from the Telecommunications Industry Ombudsman which relates to Customer Data. Customer must promptly comply with any such notices and directions.
- 14.3 BGP Group & VoIPSmart may intercept, remove, alter or prevent access to any Customer Data or to any person that BGP Group & VoIPSmart believes:
- (a) to be breaching or attempting to breach the Service Agreement, including the Acceptable Use Policy;

- (b) is necessary or prudent following receipt of any take-down, service cessation or link deletion notices from the Australian Communication and Media Authority (or other regulatory authority), or any direction from the Telecommunications Industry Ombudsman which relates to Customer Data.

- 14.4 Without accepting responsibility to monitor Customer Data, BGP Group & VoIPSmart reserves the right to prohibit any conduct or remove (without prior notice or liability to Customer) any Customer Data that BGP Group & VoIPSmart believes in its absolute discretion, breaches, or may breach, the Service Agreement, (including the Acceptable Use Policy) or which may expose BGP Group & VoIPSmart or its Personnel to harm or liability.
- 14.5 Provided BGP Group & VoIPSmart acts in good faith Customer may not dispute any action taken by BGP Group & VoIPSmart under clauses 14.3 or 14.4 even if Customer has been paid the applicable Fees and Taxes.

## 15 Business Continuity Management

- 15.1 If Customer has a business continuity plan for its own business that provides for Customer to take certain actions to alleviate the effects of a disaster that effects Customer's business (**BCP**), and Customer wishes that the BCP incorporates the management of the Services in the event of a disaster then Customer may request that BGP Group & VoIPSmart perform some of these actions. BGP Group & VoIPSmart will not unreasonably refuse such request.
- 15.2 Customer will pay the costs associated with:
- (a) the work associated with creating, maintaining or updating an action plan (**Action Plan**) that integrates with Customer's BCP;
  - (b) any costs that are incurred if Customer activates the BCP and BGP Group & VoIPSmart is required to perform the services in the Action Plan,

in accordance with the provisions set out in the Action Plan, or if no costs are set out in the Action Plan at the Time and Materials Rates set out in the Service Order, and if no Time and Materials Rates are set out in the Service Order, at BGP Group & VoIPSmart's then current rates. Any such services will be provided as a Professional Service.

## 16 Confidentiality

- 16.1 The Recipient must not use any of the Discloser's Confidential Information except in connection with the performance of its obligations and the exercise of its rights in the Service Agreement.

- 16.2 The Recipient must not disclose the Discloser's Confidential Information to any third party without obtaining the Discloser's prior written consent, provided that the Recipient may disclose the Discloser's Confidential Information to:

- (a) its Personnel, and those of any of its Affiliates, who have entered into a written agreement with the Recipient that is no less protective of the Discloser's Confidential Information than the Service Agreement provided those persons have a need to know such information for the purposes of the Service Agreement;
- (b) its lawyers, bankers, auditors, accountants and insurers, who have a need to know the information in order to provide professional advice to the Recipient relating to the Service Agreement.

- 16.3 The Recipient must use, and must ensure that any person to whom it is permitted by the Service Agreement to disclose the Discloser's Confidential Information to uses, the same measures to protect the Discloser's Confidential Information as it uses to protect its own confidential information, but in no event less than reasonable measures.

- 16.4 The restrictions of this clause 16 shall not apply to information that:

- (a) is independently developed by the Recipient without any access to the Confidential Information of the Discloser;
- (b) becomes known to the Recipient without restriction, from a third party who, to the Recipient's knowledge, was not bound by a confidentiality agreement with the Discloser, or otherwise prohibited from disclosing the information to the Recipient, or had the right to disclose it;
- (c) was available to the Recipient on a non-confidential basis prior to disclosure by the Discloser;
- (d) was lawfully in the possession of the Recipient before the information was disclosed to it by the Discloser;
- (e) is or becomes in the public domain through no act or omission of the Recipient;
- (f) the Parties agree in writing is not confidential or may be disclosed; or
- (g) is required to be disclosed under an order or requirement of a court, administrative agency, or other governmental body (but only to the minimum extent required to comply), provided however, that Recipient shall provide prompt notice to Discloser of

any potential disclosure and shall use its reasonable efforts to prevent disclosure of such information.

## 17 Information Security

- 17.1 Customer is solely responsible for the content of all Customer Data including its lawfulness, adaptation, modification, publication, handling and use, subject only to BGP Group & VoIPSmart's limited rights to copy, adapt, modify or suspend access to Customer Data as set out in the Service Agreement. For clarity, Customer is solely responsible for ensuring that it complies with any statute, regulation or other requirement (as amended, updated, supplemented or replaced from time to time) in respect of record keeping, including obligations under laws relating to record keeping under taxation law, State Record Acts or Archives Acts or similar legislation (as may be applicable to Customer). If Customer requires any assistance from BGP Group & VoIPSmart in respect of Customer's obligation to comply with any of its record keeping obligations this may be acquired from BGP Group & VoIPSmart as a Professional Service at BGP Group & VoIPSmart's then current Time and Materials Rates, or if no Time and Material Rates are set out in the Service Agreement, at BGP Group & VoIPSmart's then current rates.
- 17.2 During the course of providing the Services, BGP Group & VoIPSmart must:
- (a) take all reasonable steps to ensure that no unauthorised party is allowed physical or electronic access to the Customer Records or Customer Data; and
  - (b) implement practices and process to sufficiently identify and protect against the following events occurring in relation to the Customer Records:
    - (i) complete or partial loss;
    - (ii) complete or partial corruption;
    - (iii) malicious deletion; and
    - (iv) accidental deletion.
  - (c) implement the security features set out in the relevant Schedule in relation to the Customer Data and Customer Records.
- 17.3 BGP Group & VoIPSmart must:
- (a) provide Customer with access to the Customer Records (including the provision of accurate and complete copies of the Customer Records) as and when required by Customer from time to time;
  - (b) provide the Customer Records to Customer (or its nominee) within 10 Business Days after a request by Customer in a form,

through a method (such as a direct link or portal) and/or on media reasonably requested by Customer;

- (c) to the extent set out in the Service Order (and if not set out in the Service Order, BGP Group & VoIPSmart has no obligation in this respect) backup the Customer Data in accordance with the requirements of the Service Agreement, including in accordance with any applicable any Service Levels; and
- (d) not access, use, disclose or modify the Customer Data for marketing or profiling purposes, whether Customer or any individual is identifiable from that data or not;
- (e) not create any lien, security interest or other encumbrance over the Customer Data or Customer Records.

## 18 Privacy

- 18.1 Each Party must, when it collects, receives, uses, discloses, transfers or otherwise handles Personal Information in the course of performing its obligations under the Service Agreement:
- (a) comply with the *Privacy Act 1988* (Cth)) (**Privacy Act**) as though it were a bound by the Privacy Act and any subordinate legislative instruments or regulations;
  - (b) comply with any the other Party's policies in relation to any Personal Information or any reasonable directions of the other Party of which it has been given written notice.
- 18.2 Each Party must:
- (a) collect, use and disclose the Personal Information only as authorised or for the purposes of:
    - (i) the performance of the rights and obligations under the Service Agreement;
    - (ii) the administrative tasks associated with the performance of the Service Agreement, including invoicing, payment, contract management, risk management, insurance, renewals, delivery, maintenance and support;
  - (b) not disclose the Personal Information except:
    - (i) to its personnel to the minimum extent necessary for the purposes of performing its obligations under the Service Agreement;
    - (ii) subject to clause 18.4(c), as required by law; or

(iii) with the prior written consent of the other Party; and

- (c) ensure that any person to whom Personal Information is disclosed under sub-clause (b), uses, discloses, transfers, retains and otherwise manages such Personal Information consistently with that Party's obligations under the Service Agreement.

18.3 Neither Party may transfer or disclose any Personal Information to any recipient located outside of Australia, or any other country in which the Personal Information was first collected (the **Relevant Countries**), or allow or permit any person located outside the Relevant Countries to access or receive any Personal Information, without the prior written consent of the other Party, except that Customer gives BGP Group & VoIPSmart consent to transfer Customer's Personal Information to:

- (a) the US;
- (b) any EU Member State;
- (c) the UK;
- (d) any country where BGP Group & VoIPSmart or its contractors are currently providing the Services from;
- (e) any other country set out in BGP Group & VoIPSmart's privacy policy,

where it is necessary or convenient to do so for BGP Group & VoIPSmart to meet its obligations to provide the Services under the Service Agreement.

18.4 Where there is an eligible data breach (as defined in the Privacy Act) involving the Personal Information that has been provided by the other Party, then the Party that has suffered the eligible data breach must:

- (a) immediately, and in any event within 24 hours of the discovery of the eligible data breach, notify the other Party of the eligible data breach, to the other Party with all information that is required to be provided to the Office of the Australian Information Commission and/or the affected individual, as required under the Privacy Act;
- (b) co-operate with the other Party in any investigation or audit (including by providing access to the breaching Party's premises, personnel, processes and systems) in respect of the eligible data breach;
- (c) not disclose to any third party (including the Information Commissioner as defined in the *Australian Information Commissioner Act 2010* (Cth)) the existence or circumstances surrounding any eligible data breach, without the non-breaching Party's prior

written approval, unless the non-breaching Party does not make any notification that it is lawfully required to do and the breaching Party is required by law to make the notification.

18.5 Customer warrants that:

- (a) Customer has obtained the express informed consent from each individual about whom BGP Group & VoIPSmart will obtain Personal Information from Customer as a result of the Service Agreement, for BGP Group & VoIPSmart, its Representatives and their permitted successors, assignees and sub-licensees to use that individual's Personal Information in any manner that may be reasonably contemplated by the Service Agreement and/or is stated in BGP Group & VoIPSmart's privacy policy (as available on the BGP Group & VoIPSmart website), including a transfer overseas to the countries stated in the privacy policy;
- (b) it will not provide BGP Group & VoIPSmart with, nor request that BGP Group & VoIPSmart processes any, personal data that is subject to the General Data Protection Regulation (EU) 2016/679.

## 19 Liability and Indemnity

### Liability for Breach of Statutory Guarantee

19.1 Where Customer is entitled to the benefit of a statutory guarantee under sections 54 to 59 of the Australian Consumer Law, then unless Customer can prove that it is not fair or reasonable for BGP Group & VoIPSmart to rely on this limitation, then BGP Group & VoIPSmart's liability for breach of such statutory guarantee is limited to one of the following, at BGP Group & VoIPSmart's option:

- (a) the replacement of the goods or the supply of equivalent goods;
- (b) the repair of the goods;
- (c) the payment of the cost of replacing the goods or of acquiring equivalent goods;
- (d) the payment of the cost of having the goods repaired.

19.2 Where Customer is entitled to the benefit of a statutory guarantee under sections 60 to 62 of the Australian Consumer Law, then unless Customer can prove that it is not fair or reasonable for BGP Group & VoIPSmart to rely on this limitation, then BGP Group & VoIPSmart liability for breach of such statutory guarantee is limited to one of the following, at BGP Group & VoIPSmart's option:

- (a) supplying the services again; or



- (b) payment of the cost of having the services supplied again.

**Other Liability**

19.3 Subject to clauses 19.1, 19.2 and 19.4 to the extent permitted by law, BGP Group & VoIPSmart is not liable to Customer in contract, tort (including negligence), breach of statutory duty or otherwise in respect of any loss, damage or expense arising out of or in connection with the Service Agreement that:

- (a) is an indirect, consequential, special, punitive or exemplary loss, damage, cost or expense, even if BGP Group & VoIPSmart has been advised of, knows of, or should have known of the possibility of such loss, damage, cost or expense;
- (b) is for loss of profits, loss of revenue, failure to realise expected savings, loss of or damage to data (except to the extent described in clause 19.4(a)), business interruption or loss of goodwill;
- (c) is, for any single claim, for an amount that exceeds the amounts paid under the Service Agreement in the three months prior to the date the claim first arose, or \$25,000, whichever is the greater.

19.4 BGP Group & VoIPSmart's liability:

- (a) for loss of or damage to Customer Data is:
  - (i) excluded, unless BGP Group & VoIPSmart has an obligation under the Service Agreement to take backups or provide Disaster Recovery Services in respect of that Customer Data when sub-clause (ii) applies;
  - (ii) where BGP Group & VoIPSmart has an obligation under the Service Agreement to take backups or provide Disaster Recovery Services in respect of that Customer Data and BGP Group & VoIPSmart is in breach of those obligations, then BGP Group & VoIPSmart's liability is limited to the cost of restoring the Customer Data to version of the Customer Data that should have existed at the time of the latest Recovery Point Objective to which BGP Group & VoIPSmart was obliged to restore the Customer Data under the Service Agreement;
- (b) for loss or damage arising from death or bodily injury, including sickness, that is caused by the negligent act or omission of BGP Group & VoIPSmart, its agents or contractors is limited to \$5 million dollars per event or

series of connected events, and \$10 million dollars in the aggregate for any and all claims under the Service Agreement;

- (c) for loss or damage to tangible property (which excludes data), that is caused by the negligent act or omission of BGP Group & VoIPSmart, its agents or contractors is limited to \$5 million dollars per event or series of connected events and \$10 million dollars in the aggregate for any and all claims under the Service Agreement;
- (d) for breach of clauses 16 (Confidential Information), 17 (Information Security), 18 (Privacy) or 20 (BGP Group & VoIPSmart Intellectual Property Right Indemnity), is limited to \$1 million dollars per event or series of connected events and \$2 million dollars in the aggregate for any and all claims under the Service Agreement.

**Customer Indemnity**

19.5 Customer will indemnify and hold harmless BGP Group & VoIPSmart and its Personnel against any liability, loss, damage or expense (including lawyer's fees on an indemnity basis) arising out of, or in connection with:

- (a) any breach of clauses 3.19, 4.6, 13.4 or 13.5;
- (b) any other possession, use or copying of any Service Software, Third Party Software or other software owned by any person other than BGP Group & VoIPSmart, by or on behalf of Customer that is unauthorised, exceeds or is otherwise contrary to the permitted usage of that software (such amounts may include retrospectively applied licence and/or support fees);
- (c) any claim or allegation relating to any content, modification, adaptation, modification, publication, handling or other use of Customer Data;
- (d) any willful, negligent or unlawful act or omission of Customer or its Personnel;
- (e) personal injury or death, or loss of or damage to BGP Group & VoIPSmart's (or its Personnel's) property, caused or contributed to by Customer, its agents and contractors,

except the extent that the loss, damage or expense has been caused solely by a breach of the Service Agreement by BGP Group & VoIPSmart or the negligence of BGP Group & VoIPSmart or its Personnel.



## 20 BGP Group & VoIPSmart Intellectual Property Right Indemnity

20.1 BGP Group & VoIPSmart will indemnify and hold harmless Customer or, at BGP Group & VoIPSmart's option, settle any claim or action brought against Customer alleging that the use or possession of any Deliverable or the use of the Services in accordance with the Service Agreement infringes any Intellectual Property Right that is enforceable in Australia (an **Infringement Claim**) and shall be responsible for any losses, damages, expenses or costs (including lawyer's fees on an indemnity basis) incurred by, or awarded against Customer arising out of, or in connection with, any such Infringement Claim, provided that:

- (a) Customer promptly notifies BGP Group & VoIPSmart of the Infringement Claim in writing, specifying the nature of the claim in reasonable detail and providing access to, and copies of, documents, software any other material, that are relevant to the Infringement Claim, as well as providing prompt access to any Representative who may be relevant to BGP Group & VoIPSmart's defence of the Infringement Claim;
- (b) Customer does not make any admission of liability, agreement or compromise in relation to the Infringement Claim without the prior written consent of BGP Group & VoIPSmart;
- (c) Customer grants BGP Group & VoIPSmart the sole right to defend, negotiate and settle the Infringement Claim, at BGP Group & VoIPSmart's expense;
- (d) Customer provides BGP Group & VoIPSmart with reasonable assistance, at BGP Group & VoIPSmart's expense, to defend, negotiate and settle the Infringement Claim.

20.2 BGP Group & VoIPSmart will have no obligation under clause 20 or otherwise with respect to any Infringement Claim to the extent that it is based upon:

- (a) any use of the Deliverable or Service not in accordance with the Service Agreement or documentation provided by BGP Group & VoIPSmart;
- (b) the combination, operation or use of the Deliverable or Service with any other product, equipment, business method, software or data;
- (c) any modification of the Deliverable or Service by any person other than BGP Group & VoIPSmart or its authorised Personnel; or
- (d) any use of the Deliverable or Service after BGP Group & VoIPSmart has provided Customer a new version, patch or correction that would have overcome the infringement.  
If any Infringement Claim is made, or in BGP

Group & VoIPSmart's opinion is likely to be made, then BGP Group & VoIPSmart may (at its sole option and expense) either:

- (a) procure for Customer the right to continue using the affected Deliverable or Service, or substantially similar software that does not substantially affect the functionality of the Deliverable or Service, in accordance with the Service Agreement;
- (b) replace or modify the affected Deliverable or Service so that it becomes non-infringing but performs substantially the same functions; or
- (c) if neither (a) or (b) is commercially reasonable, as determined in BGP Group & VoIPSmart's discretion, then BGP Group & VoIPSmart may terminate Customer's rights to use the affected Deliverable or Service and pay damages of up to an amount equal to:
  - (i) the Fees paid for the infringing Deliverable; or
  - (ii) the amount paid for the infringing Service in the 12 months prior to the date that the Infringement Claim first arose, as applicable.

20.4 To the extent permitted by law, clauses 20 to 20.4 states BGP Group & VoIPSmart's entire liability and Customer's sole and exclusive remedy for any claims related to any infringement of the Intellectual Property Rights in respect of any Deliverable or Service.

## 21 Risk, Title, PPSR and Insurance

21.1 Customer acknowledges and agrees that nothing in the Service Agreement transfers title to any part of the BGP Group & VoIPSmart Environment or Premises to Customer at any time.

21.2 Customer retains all title and risk in any Customer Managed Equipment, Customer Software and Customer Data, and Customer must insure Customer Managed Equipment, Customer Software and Customer Data with a reputable insurer for its full replacement value against all risks, including fire, accidental loss or damage, attack from viruses, Trojan horses or other malicious code or acts.

21.3 Where BGP Group & VoIPSmart allocates any internet protocol numbers to Customer in connection with a Service, Customer may only use those internet protocol numbers in connection with that specific Service. Customer's right to use those internet protocol numbers ceases at the end of the Service Period under the Service Agreement.

20.3





- 21.4 Customer must not register any security interest (as defined under the *Personal Property Securities Act 2009*) against BGP Group & VoIPSmart or its Personnel in respect of any of the BGP Group & VoIPSmart Environment, Premises, Customer Software, Customer Records or Customer Data and/or in connection with the Service Agreement.
- 21.5 BGP Group & VoIPSmart must effect and/or maintain with a reputable APRA authorised insurer(s):
- public liability insurance, which provides coverage for at least \$10 million for each occurrence and in the annual aggregate;
  - professional indemnity insurance, which provides coverage for at least \$1 million for each occurrence and in the annual aggregate;
  - workers' compensation insurance as required by law; and
  - any other insurance set out on the Service Order.
- 21.6 BGP Group & VoIPSmart will, promptly following written request, produce to Customer satisfactory evidence that BGP Group & VoIPSmart has effected and/or renewed a particular insurance policy or that BGP Group & VoIPSmart continues to be a beneficiary under a particular insurance policy.

## 22 Restraint

- 22.1 Neither Party may, without the prior written consent of the other Party, for a period of 12 months after the last day of the performance of the Services under the Service Agreement, either on its own account (or for any person, company or entity) cause, facilitate or procure any other person, company or entity to employ, contract or enter into any other arrangement, directly or indirectly:
- to receive the services of any of the other Party's employees who provided Services under the Service Agreement, or who dealt with the other Party in connection with the Service Agreement, in the 12 months prior to the date that the relevant person contracted with or entered into the arrangement with the other Party; or
  - with any of the other Party's contractors (or any individuals employed by, or contracted to, the contractor) that provided services in connection with the Service Agreement in the 12 months prior to the date that the relevant person contracted with or entered into the arrangement with the other Party, where the services that are to be provided to the other Party relate to the same or similar

work to the work that was provided in connection with the Service Agreement.

## 23 Force Majeure

- 23.1 Neither Party will be liable for any delay nor failure to perform its obligations under the Service Agreement to the extent that such delay or failure is due to a Force Majeure Event.
- 23.2 To the extent that a delay or failure of a Party to perform its obligations is caused by a Force Majeure Event, the performance of that Party's obligations will be suspended.
- 23.3 If a delay or failure by a Party to perform its obligations due to a Force Majeure Event exceeds 20 Business Days, the other Party may, by written notice, immediately terminate the Service Agreement. In this event Customer must pay for the Services up to the date of termination of the Service Agreement and the Early Termination Payment as defined in the relevant Schedule.

## 24 Termination

### Customer's Right to Terminate

- 24.1 Customer may immediately terminate the Service Agreement by giving BGP Group & VoIPSmart written notice if BGP Group & VoIPSmart:
- breaches any provision of the Service Agreement and the breach has not been remedied within 20 Business Days of written notice from Customer specifying the breach;

(b) ceases to carry on business; (c)

becomes Insolvent. **BGP Group &**

### VoIPSmart's Right to Terminate

- 24.2 BGP Group & VoIPSmart may immediately terminate or suspend part or all of, the Service Agreement (including by suspending access to part or all of the Services) by giving Customer written notice if Customer:

(a) fails to make any payment when due and the failure has not remedied within 5 Business Days of written notice from BGP Group & VoIPSmart specifying the breach;

(b) breaches clauses 6, 13.7 to 13.14, 14.2, 16, 18, 21.4 or 27.4 of these General Terms and Conditions and the breach has not been remedied within 20 Business Days of written notice from BGP Group & VoIPSmart specifying the breach;

(c) ceases to carry on business;

(d) becomes Insolvent;

(e) merges with another entity, sells substantially all of Customer's assets or



Customer is subject to a change of control. A "change of control" is deemed to occur when an entity acquires fifty percent (50%) or more of Customer's voting shares or equity interest in Customer or fifty percent (50%) or more of Customer's assets, in the event of a change of a majority of Customer's Board of Directors (or majority of the partners if a partnership) or if there is any other effective change of control.

24.3 If BGP Group & VoIPSmart suspends the provision of any Services in accordance with the Service Agreement:

- (a) any such suspension does not relieve Customer from paying any Fees during the period of suspension;
- (b) BGP Group & VoIPSmart has no liability to Customer for any loss, damage or expense incurred as a result of such suspension;
- (c) BGP Group & VoIPSmart may reinstate the suspended Services when the breach, including failure to make payment, has been remedied and Customer has paid any re-instatement Fee that is applicable to the reinstatement and/or reconnection of the Services (including any charges imposed on BGP Group & VoIPSmart by its suppliers/contractors as a result of the suspension).

## 25 Consequences of Termination

25.1 Termination of the Service Agreement for any reason does not:

- (a) release Customer from the obligation to pay any monies to BGP Group & VoIPSmart whether due before or after termination of the Service Agreement;
- (b) excuse the payment of any instalment of the Fee, nor does it entitle Customer to any refund of any instalment of the Fee; or
- (c) discharge either Party from any liability which has been incurred by that Party prior to termination of the Service Agreement.

25.2 At the end of the Service Agreement:

- (a) Customer must immediately pay to BGP Group & VoIPSmart any Fees that have not been paid in respect of any Minimum Service Period or Minimum Spend that has not been met by the last day of the Service Agreement;
- (b) BGP Group & VoIPSmart shall have the right to enter Customer's site on reasonable notice and during a Business Day and take possession of its equipment, resources and Intellectual Property Rights;

(c) Customer must promptly return all of BGP Group & VoIPSmart's property (including devices or other equipment). BGP Group & VoIPSmart may charge Customer for any of its equipment that is not returned at its full replacement value;

(d) each Party must immediately return to the other Party or certify in writing to the other Party that it has destroyed, all copies and partial copies of the other Party's Confidential Information, Customer Records or any material that includes the other Party's Intellectual Property Rights or Personal Information (except for any copies that it must retain to meet a legal requirement);

(e) Customer must immediately delete and return to BGP Group & VoIPSmart (or certify in writing the destruction of) all copies of any item that includes any of BGP Group & VoIPSmart's Intellectual Property Rights (including the Performance Tools and Service Software), Deliverables or any other material provided under the Service Agreement and the licence for any of BGP Group & VoIPSmart's Intellectual Property Rights, the Deliverables or other material provided under the Service Agreement terminates immediately.

## 26 Dispute Resolution

26.1 Subject to clause 26.2, where the Parties find themselves in dispute under the Service Agreement, the following process must be followed prior to commencing court proceedings:

(a) a Party will issue a written notice to the representative of the other Party identifying the matter in dispute and setting out adequate detail to enable a clear understanding of the position taken by the issuing Party (**Dispute Notice**);

(b) the representative of both Parties, or their respective nominees in the event one or other should be unavailable within time, will meet within 3 Business Days of the date of issue of the Dispute Notice (or such longer period agreed by the Parties), and will cooperate in attempting, at that meeting, to expedite an amicable resolution of the dispute;

(c) where the dispute remains unresolved after 10 Business Days from the meeting (or such longer period agreed by the Parties), then each of the Parties will, within 3 Business Days, refer the dispute to a senior representative who does not devote substantially all of his or her time to the performance of the Service Agreement and



the senior representatives will meet within a further 10 Business Days after the time for such referral and use all reasonable commercial endeavours to resolve the dispute amicably;

- (d) where a dispute is unresolved after the meeting of senior representatives, within 10 Business Days from the meeting of senior representatives provided for in sub-clause (c) (or such longer period agreed by the Parties), then either Party may commence court proceedings.

26.2 Nothing in this clause 26 prevents either Party seeking urgent equitable relief. Clause 26.1 does not apply to any dispute concerning whether or not the Service Agreement has been validly terminated.

## 27 General

27.1 Any notice that is to be given under the Service Agreement must be in writing and signed by the person giving the notice. Any notice must be hand delivered to the address or sent by prepaid post to the address of the recipient as set out in the Service Agreement. BGP Group & VoIPSmart may send a notice by email to any email address that Customer has used to communicate with BGP Group & VoIPSmart.

27.2 Each Party must promptly notify the other of any change of address or contact details, and such details shall be incorporated into the Service Agreement from the date following the date of receipt.

27.3 Any notice sent in accordance with the Service Agreement is deemed to have been received if:

- (a) hand delivered; on the date of delivery;
- (b) posted; 3 Business Days after the date of posting; or
- (c) sent by BGP Group & VoIPSmart by email; within 1 Business Day of the time that the email was sent, provided no notice of failure has been received by the sender within that Business Day.

27.4 Customer must not transfer, assign or novate the whole or any part of the Service Agreement without the prior written consent of BGP Group & VoIPSmart. BGP Group & VoIPSmart may transfer, assign, novate or subcontract the whole or any part of the Service Agreement without the prior written consent of Customer.

27.5 Where BGP Group & VoIPSmart subcontracts any part of the Service Agreement, then BGP Group & VoIPSmart will be liable for the acts or omissions of those subcontractors, to the same extent as if they were its own employees.

27.6 No provision of the Service Agreement shall be deemed waived, amended or modified by either Party, unless the waiver, amendment or modification is in writing and signed by both Parties.

27.7 If any provision of the Service Agreement is for any reason declared invalid or unenforceable the validity of the remaining portion of the Service Agreement will not be affected and the remaining portion will remain in force.

27.8 Except as expressly provided otherwise in the Service Agreement, the Parties' rights and remedies under the Service Agreement are cumulative and there is no obligation to exercise a particular remedy. If a Party is in breach of the Service Agreement, the non-breaching Party may avail itself of all other rights, remedies and causes of action available at law, in equity or otherwise.

27.9 The Service Agreement records the entire agreement between the Parties in relation to its subject matter. To the extent permitted by law, the Service Agreement supersedes all previous negotiations, understandings or agreements in relation to the subject matter and expressly excludes the pre-printed terms and conditions of Customer's purchase order (if any).

27.10 The Service Agreement may be signed in any number of counterparts, each of which shall be original, and any one of which shall be deemed to be validly executed if evidenced by a copy of the executing Party's signature with the same effect as if the signatures were on the same document.

27.11 The Parties consent to dealing with each other using electronic means. Nothing in the Service Agreement is to constitute or be deemed to constitute a partnership among the Parties, joint venture, employment relationship, fiduciary relationship or franchise arrangement. Neither Party is authorised to act as agent for the other, except as expressly authorised by the Service Agreement.

The Service Agreement is governed by the laws in force in the State of Victoria. The Parties submit to the exclusive jurisdiction of the courts of the State of Victoria and any courts competent to hear appeals from those courts.