



Reference Offer

This Pro-forma Internet Service Provider Agreement, including Schedule 1(A) constitutes the 'Reference Offer' for the supply of the **TransACT VDSL Layer 3 Wholesale Interconnection Service** within the meaning of the Telecommunications (Network Exemption—TransACT Upgraded VDSL Networks) Instrument 2012

This Pro-forma Internet Service Provider Agreement, including Schedule 1(B) constitutes the 'Reference Offer' for the supply of the **TransACT FTTP Layer 3 Wholesale Interconnection Service** within the meaning of the Telecommunications (Network Exemption— Specified TransACT Networks) Instrument 2012

Date	Version	Changes
18 May 2012	1.0	First release



INTERNET SERVICE PROVIDER AGREEMENT

BETWEEN

**TRANSACT CAPITAL COMMUNICATIONS
PTY LTD**

AND

[Customer]

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- (e) independently developed or known by the other Party (including because it is in the public domain by reason other than a breach of this Agreement); or
- (f) required to be disclosed by law, but only to the extent of any such disclosure;

Core Network means TransACT Capital's electronic equipment housed in TransACT Capital facilities that is a core ATM, SDH or Ethernet switching element, or other elements as determined by TransACT Capital;

CPI means the Consumer Price Index (All Groups Index) for Canberra issued quarterly by the Australian Bureau of Statistics (or any successor to it);

Credit Review Event means:

- (a) any amount owed by the ISP under this Agreement becomes overdue;
- (b) TransACT Capital has reasonable grounds to believe that the credit risk posed by the ISP is materially increased, or will materially increase;
- (c) the ISP fails to comply with a notice by TransACT Capital to provide a Financial Security;
- (d) TransACT Capital has reasonable grounds to believe is likely to be subject to an Insolvency Event; or
- (e) there is, or is in TransACT Capital's reasonable opinion likely to be, a substantial increase in the amount of charges payable by the ISP under this Agreement.

Encumbrance means an interest or power:

- (a) created or otherwise arising in or over any interest in any asset under a bill of sale, mortgage, change, lien, pledge, trust or power; or
- (b) by way of security for the payment of a debt, any other monetary obligation or the performance of any other obligation,

and includes any agreement to grant or create any of the above;

End User means a person who has contracted with TransACT Capital to be connected to the TransACT Network;

End User Address means the physical location of End User premises that are connected to the TransACT Network for the provision of Services.

End User Data means any information relating to an End User including usage habits and traffic statistics;

End User Equipment means any set-top box, modem or other equipment owned by TransACT Capital and/or provided to the End User by TransACT Capital;

Exempt Network means that part of the TransACT Network which is:

- (a) a "Specified TransACT Network" within the meaning of the *Telecommunications (Network Exemption – Specified TransACT Networks) Instrument 2012*; or
- (b) a "TransACT Upgraded VDSL Network" within the meaning of the *Telecommunications (Network Exemption – TransACT Upgraded VDSL Networks) Instrument 2012*.

Force Majeure Event means anything outside the reasonable control of a Party, including:

- (a) acts of God, national disasters, national emergencies, radioactive contamination, insurrection, riot, hostile or warlike action or sabotage;
- (b) a transportation embargo;
- (c) industrial action (including a picket);

- (d) damage caused to any of TransACT Capital's equipment, sites, cabling or links including by any animal, bird, insect, termite, vandalism, car accidents or other causes beyond TransACT Capital's reasonable control where such damage impacts upon, or impairs the operation of, the TransACT Network or the provision of the Network Service; and
- (g) any legislation or regulation and any action or inaction of any government or Governmental Agency;

Governmental Agency means any government or governmental, semi-governmental, administrative, fiscal or judicial body, department, commission, authority, tribunal, agency or entity;

GST means goods and services tax; **GST Act** means *A New Tax System (Goods and Services Tax) Act 1999 (Cth)* and **GST Law** has the same meaning as in the GST Act;

Identification / Restoration means the three hour service window that is available to TransACT Capital to identify and restore a Network Fault following notification of the fault, in the approved form, to TransACT Capital by the ISP;

Insolvency Event in relation to a Party means:

- (a) there is a change in the direct or indirect beneficial ownership or control of the Party, which would affect its ability to comply with its obligations under this Agreement;
- (b) it disposes or enters into an agreement to dispose of the whole or any part of its assets, operations or business other than in the ordinary course of business;
- (c) it ceases to carry on business;
- (d) it ceases to be able to pay its debts as they become due;
- (e) where the Party is a company registered under the *Corporations Act 2001*, it is taken to have failed to comply with a statutory demand issued under s 459E of that Act; or
- (f) any step is taken to appoint a receiver, a receiver and manager, a trustee in bankruptcy, a liquidator, a provisional liquidator, an administrator or other like person of the whole or any part of its assets or business;

Intellectual Property means all industrial and intellectual property rights, both in Australia and throughout the world, and includes any copyright, trade or service marks, patents, registered and unregistered trademarks, registered designs, trade secrets, know-how, rights in relation to semiconductors and circuit layouts, trade, business or company name, indication or source or appellation of origin, or other proprietary right, or right to registration of such rights;

Interest means the interest rate per annum for pre-judgments as set by the Supreme Court of the Australian Capital Territory in accordance with the *Court Procedures Act 2004 (ACT)*, as amended or replaced from time to time;

ISP Contact Person means the person nominated in the Service Schedule;

ISP Customer means a person who has contracted with the ISP for the provision of the Services;

ISP Equipment means any hardware, cabling, devices, networks or other equipment used by the ISP to transmit, receive or provide the Services;

ISP Material means any Material:

- (a) owned by the ISP prior to the Commencement Date; or
- (b) provided by the ISP to TransACT Capital for the purposes of this Agreement;

Material means any software, firmware, documented methodology or process, documentation or other material in whatever form, including any reports, specifications, business rules or

requirements, user manuals, user guides, operations manuals, training materials and instructions;

National Privacy Principles means the principles specified in Schedule 3 of the *Privacy Act 1988 (Cth)*;

Network Fault means a fault, error or malfunction of the TransACT Network, which impairs or prevents the provision of the TransACT Services by TransACT Capital;

Network Service means:

(a) accepting Traffic from the ISP at the POI and delivering Traffic from the POI to the ISP Customer; and

(b) accepting Traffic from the ISP Customer and delivering it to the POI,

in accordance with the applicable Service Schedule;

Organisation has the meaning given by the *Privacy Act 1988 (Cth)*, but does not include a small business or small business operator as defined in section 6D of that Act;

Party means a party to this Agreement, **Parties** means both of them;

POI means the point of interconnect located at the Site and described in the relevant Service Schedule, at which TransACT Capital accepts, and from which TransACT Capital delivers, Traffic;

Procedures Manual means TransACT Capital's standard procedures and operations manual, as amended from time to time;

Ready for Service Date means the date notified in writing by TransACT Capital to the ISP, which specifies when the Network Service shall be available;

Related Body Corporate has the meaning given to it in the *Corporations Act 2001 (Cth)*;

Service Fault means a fault, error or malfunction relating to the Services which:

(a) impairs the provision of Services by the ISP to an ISP Customer; or

(b) affects the operation of the Core Network;

Service Level Credits means the credit system described in the applicable Service Schedule;

Service Levels means the service levels set out in Service Schedules with which the Parties must comply in the provision of the Network Services and the Services;

Service Period means the term specified in the Service Schedule;

Service Request means a request in accordance with this Agreement from the ISP to TransACT Capital;

Service Schedule means a schedule to this Agreement formed in relation to each service setting out the Specifications and any other terms applicable to that Service;

Services means the services specified in a Service Schedule and provided by the ISP to the ISP Customers via the TransACT Network;

Site means the TransACT data centre at 470 Northbourne Avenue, Dickson in the Australian Capital Territory.

Specifications means TransACT or third party network specifications for a Service set out in the applicable Service Schedule;

Support Services means basic support services, which do not require any engineering, software or mechanical work as described in applicable Service Schedule;

Term has the meaning given in clause 3(a);

Traffic includes any voice, data, video, transmission, information or other non-tangible material delivered to ISP Customers or received from ISP Customers as part of the Services;

TransACT Contact Person means the person nominated in the applicable Service Schedule and appointed by TransACT Capital to perform functions on behalf of TransACT Capital as contemplated under this Agreement;

TransACT Material means any Material:

- (f) owned by TransACT Capital prior to the Commencement Date; or
- (g) provided by TransACT Capital to the ISP for the purposes of this Agreement (including the Procedures Manual);

TransACT Network means the telecommunications system comprising all links, cables, radio, microwave and other transmission media and equipment, switches, software and related items owned and operated by TransACT Capital to make available and provide the Network Service;

TransACT Service may include the Network Service and the Support Services, as defined in the applicable Service Schedule;

TransACT Site Operating Procedures means the manual which is provided by TransACT Capital to its customers that describes the administrative and physical procedures to be followed, and the use of the security controls that have been put in place, to regulate access to the secure telehousing facility at the Site.

Unauthorised Traffic means any Traffic delivered into the TransACT Network via an interconnection point or any other point of interface between ISP Equipment and TransACT's Equipment which:

- (a) is not of a nature permitted to be transmitted under the applicable Service Schedule;
- (b) non IP traffic and network scanning;
- (c) exceeds any volume restrictions specified in the applicable Service Schedule;
- (d) is illegal, or defamatory, or breaches any laws or relevant technical standards or industry codes; or
- (e) is otherwise prohibited by this Agreement;

Virus means a computer program file capable of attaching to disks or other files and replicating itself repeatedly without the knowledge or permission of the Parties or a non-replicating computer program file with a malicious function.

1.2 Interpretation

In this Agreement, unless the contrary intention appears:

- (a) headings are for ease of reference only and do not affect the meaning of this Agreement;
- (b) the singular includes the plural and vice versa and words importing a gender include other genders;
- (c) other grammatical forms of defined words or expressions have corresponding meanings;
- (d) 'including' means including but not limited to;
- (e) a reference to a clause, paragraph, schedule or annexure is a reference to a clause or paragraph of, or schedule or annexure to, this Agreement and a reference to this Agreement includes any schedules and annexures including as amended or replaced from time to time by the written agreement of the Parties; and

- (f) no provision of this Agreement will be construed adversely to a Party solely on the ground that this Party was responsible for the preparation of the Agreement or that provision.

1.3 Precedence

If there is any inconsistency between the terms of this Agreement, the schedules and any document referred to or incorporated into this Agreement, the following descending order of precedence applies:

- (a) this Agreement;
- (b) the Schedules and Annexures;
- (c) the Procedures Manual; and
- (d) any other document referred to or incorporated into this Agreement.

2. Non Exclusive Arrangement

- (a) The Parties acknowledge and agree that the arrangements set out in this Agreement are non-exclusive.
- (b) TransACT Capital may, at its absolute discretion, grant other internet service providers access to End Users through the TransACT Network.
- (c) The ISP may provide services to persons other than through the TransACT Network.

3. Term of the Agreement

- (a) This Agreement commences on the Commencement Date and expires two years later, unless terminated earlier in accordance with this Agreement (the **Term**).

4. Obligations of the Parties

4.1 TransACT Capital's Obligations

TransACT Capital shall in accordance with this Agreement:

- (a) provide the TransACT Services as requested by the ISP and agreed in a Service Schedule;
- (b) maintain and promptly repair the TransACT Network;
- (c) maintain and repair the Core Network in accordance with the Service Levels; and
- (d) promptly notify the ISP of any Service Faults of which it becomes aware.

4.2 ISP's Obligations

The ISP must in accordance with this Agreement:

- (a) provide the Services to the ISP Customers;
- (b) use its reasonable endeavours to successfully market, promote and advertise the Services;
- (c) promptly investigate and rectify any Service Faults;
- (d) promptly notify TransACT Capital of any Network Faults of which it becomes aware;
- (e) provide, install, make operational and maintain all of the ISP Equipment used in the provision of the Services;
- (f) manage the ISP Equipment to not cause disruption to the TransACT Network; and

- (g) maintain its own service back-up (including, without limitation, redundancy capabilities) sufficient to maintain the Services on a continuous basis.

4.3 Service Levels

- (a) The Service Levels are specified in the relevant Service Schedule.
- (b) Failure by a Party to meet their Service Levels may entitle the other Party to recover Service Level Credits.

4.4 Dependency – TransACT Capital

TransACT Capital will not be liable for any failure to provide access to the TransACT Network or of the Network Service to the extent that the failure is directly attributable to:

- (a) a failure by the ISP to comply with the Service Levels or material non-compliance with a provision of this Agreement;
- (b) a failure by the ISP to make or give a decision or approval in a timely manner which:
 - (i) is requested by TransACT Capital; and
 - (ii) TransACT Capital needs to obtain to provide access to the TransACT Network or the Network Service in the manner contemplated by this Agreement; or
- (c) a change to the systems, hardware or software owned, controlled or maintained by the ISP or any of its Related Bodies Corporate which materially affects TransACT Capital's ability to provide access to the TransACT Network or the Network Service.

5. Charges

- (a) The ISP must pay TransACT Capital the Charges as set out in the relevant Service Schedule.
- (b) TransACT Capital reserves the right to increase the Charges during the Term of the Agreement, with effect from the anniversary of the Commencement Date. Such increases shall not exceed the value of the CPI for the preceding year.
- (c) Any dispute that may arise in relation to the Charges must be resolved in accordance with clause 23.
- (d) TransACT Capital may, at its sole discretion and without notice to the ISP, pass through to the ISP any increase in taxes or other fees or charges imposed by any government or Governmental Agency.

6. Payment

- (a) Charges are payable from the Commencement Date or such date that the TransACT Services are available for use by the ISP.
- (b) TransACT Capital will provide monthly invoices to the ISP, in which:
 - (i) Fixed charges (including but not limited to charges for Network services) will be charged monthly in advance; and
 - (ii) Variable and ad-hoc charges (including but not limited to data user charges, installation charges, fault charges and after hour access charges) will be invoiced monthly in arrears
- (c) The ISP must pay the Charges set out in an invoice by the due date for payment set out in that invoice.

- (d) The ISP must pay TransACT Capital Interest on all amounts due and payable under this Agreement but unpaid as at the due date.

7. Connecting to and Interfacing with the POI

7.1 Connecting to the POI

- (a) The ISP must provide, install and maintain its own equipment for the purpose of connecting to and interfacing with the POI in accordance with the applicable Service Schedule.
- (b) The ISP's equipment can be located, at the election of the ISP:
 - (i) at the POI; or
 - (ii) at an alternative location proposed by the ISP and agreed to by TransACT Capital.
- (c) If the ISP's equipment is located at the POI, the ISP must:
 - (i) enter into a separate telehousing agreement with TransACT Capital in respect of that equipment; or
 - (ii) procure telehousing from another customer of TransACT which is authorised to sub-license or re-supply telehousing services at the Siteand in either case must comply with the TransACT Site Operating Procedures.
- (d) If the ISP's equipment is located at an alternative location under clause 7.1(b)(ii), the ISP is responsible for:
 - (i) procuring and maintaining a link between the POI and the ISP's location (the **Link**); and
 - (ii) paying for all costs associated with the Link.

7.2 Access to the POI for Installation and Planned Maintenance

- (a) TransACT Capital must provide the ISP with reasonable access to the POI to enable the ISP to install, restore faults in and maintain the ISP's equipment.
- (b) Where the ISP requires access to the POI in connection with the provision of Services, the ISP must comply with the TransACT Site Operating Procedures.

8. Delivering Traffic to and Accepting Traffic from ISP Customers

8.1 Delivering Traffic to and Accepting Traffic from the POI

The ISP must:

- (a) deliver to the POI the Traffic to be transmitted on the TransACT Network to the ISP Customers; and
 - (b) accept from the POI Traffic from ISP Customers that is addressed to the ISP;
- in accordance with the Specifications.

8.2 Specification of the Services

- (a) If the ISP wishes to be provided with any additional TransACT Services, the ISP must submit a Service Request to the TransACT Contact Person.

- (b) TransACT may, in its absolute discretion, decline a Service Request, unless the Service Request relates to additional TransACT Services supplied in relation to an Exempt Network.
- (c) If TransACT accepts the ISP's Service Request, the ISP must execute a Service Schedule for the TransACT Service requested.
- (d) Each Service Schedule constitutes a separate and binding contract between TransACT Capital and the ISP in relation to the supply of TransACT Services.
- (e) These General Terms and Conditions are incorporated into each Service Schedule.
- (f) Multiple Service Schedules may operate concurrently.
- (g) The Service Schedule will specify:
 - (i) the TransACT Service to be supplied to the ISP by TransACT Capital;
 - (ii) the Specifications;
 - (iii) the Service Period;
 - (iv) the renewal mechanism for the Service Period (if applicable);
 - (v) the Charges applicable to the TransACT Service;
 - (vi) Service Levels and Service Level Credits (if applicable); and
 - (vii) any other relevant matters agreed by TransACT Capital and the ISP.

8.3 Availability of Network Service

TransACT Capital may interrupt, suspend or cancel the provision of all or part of the Network Service in respect of a End User Address in accordance with clause 14.

8.4 Transmission of Traffic

- (a) TransACT Capital must use its best endeavours to make the Network Service available in respect of the ISP specified in the Service Request in a timely manner.
- (b) Except to the extent required by law and subject to clause 13.2, TransACT Capital must accept and distribute Traffic without deletion or modification of its content.

9. Billing Services

- (a) The Parties acknowledge and agree:
 - (i) that TransACT Capital is responsible for billing End Users for the services provided by TransACT Capital to that End User; and
 - (ii) the ISP is responsible for billing its ISP Customers for the Services provided by the ISP to that ISP Customer.
- (b) The ISP acknowledges and agrees that notwithstanding any failure by one of its ISP Customers to pay the ISP in respect of the supply of Services, the ISP is liable to TransACT Capital in respect of the relevant Charges payable by the ISP to TransACT Capital under this Agreement that relate to the provision of Services by the ISP to that ISP Customer.

10. Fault Restoration

10.1 Network Fault reported to TransACT Capital

Where a Network Fault is reported to TransACT Capital by the ISP, TransACT Capital must promptly investigate and rectify the Network Fault in accordance with the procedures and within the time periods specified in the Procedures Manual, taking into account the nature and severity of the fault.

10.2 Service Fault reported to TransACT Capital

- (a) Where a Service Fault is reported to the Network Operations Centre, TransACT Capital must promptly notify the ISP Contact Person.
- (b) If TransACT Capital determines the Service Fault to be within the ISP Equipment the ISP must promptly investigate and rectify the Service Fault in accordance with the Procedures Manual.

10.3 Investigation and Rectification of Network Faults and Service Faults

Where a fault is incorrectly identified by the ISP as a Network Fault and TransACT Capital acts to remedy such fault, TransACT Capital may charge the ISP, and the ISP must pay, the Charges set out in applicable Service Schedule.

11. Customer Service

11.1 Customer Relations

- (a) Where the ISP communicates with an ISP Customer, the ISP must not attribute to TransACT Capital blame for:
 - (i) a fault where the source of the fault has not been isolated; or
 - (ii) the interruption or suspension of a Service,provided that this requirement does not require the ISP to engage in unethical, misleading or deceptive conduct.
- (b) The ISP may inform an ISP Customer of any specific service interruption that the ISP Customer may experience as a result of a Network Fault of which TransACT Capital has notified the ISP.
- (c) The ISP acknowledges and agrees that:
 - (i) the speed and other characteristics of the Services depends on a number of factors including the equipment used by the ISP Customer; and
 - (ii) the ISP must address any issues regarding speed or performance of the Services directly with the ISP Customer.

11.2 Marketing

Each Party may promote or advertise the other Party's services, including:

- (a) verbal promotion of the other Party and its services; and
- (b) distributing the other Party's promotional or advertising material where such material has been approved by the other Party.

11.3 Use of Names

- (a) TransACT Capital may use the ISP's name, trademark or logo to promote the TransACT Network and associated services provided that TransACT Capital does not deface or alter the ISP's name, trade mark or logo.
- (b) The ISP may use TransACT Capital's name, trademark or logo to promote the Services provided that the ISP does not deface or alter TransACT Capital's name, trademark or logo.
- (c) To the extent required under clause 11.3(a) or (b), the owner of the name, trademark, trade or product name and logo grants, and the other Party accepts, a licence to use the owner's name, trademark, trade or product name and logo for the sole purpose referred to in clauses 11.3(a) and (b).
- (d) Neither Party may use the other Party's name, trademark, trade or product name or logo in any way which may bring the first Party into disrepute. This includes, without limitation, either Party making false or defamatory statements in any public forum, or knowingly allowing that Party's employees or agents to make such statements. The failure of a Party to strictly comply with this clause is a material breach of this Agreement.
- (e) Each Party may only use the other Party's name, trademark, trade or product name or logo in accordance with the reasonable guidelines or requirements of the other Party.

12. Network Protection

12.1 ISP's Actions

The ISP must use its best endeavours to ensure that it does not do or permit to be done or omit or permit the omission of anything which:

- (a) causes or may cause damage to the TransACT Network or any other network connected to the TransACT Network;
- (b) results in, or may result in, interference with or modification of the operation of the TransACT Network or any other network connected to the TransACT Network; or
- (c) would breach any law.

12.2 TransACT Capital's Actions

TransACT Capital must use its best endeavours to ensure that it does not do or permit to be done or permit the omission of anything which:

- (a) causes or may cause damage to the ISP Equipment or any other equipment required to provide the Services;
- (b) results in, or may result in interference or modification of the Services; or
- (c) would breach any law.

12.3 ISP Customer's Actions

The ISP must use commercialist best endeavours to ensure that the ISP Customers using the Services do not do, or permit to be done, or do not omit or permit the omission of anything which:

- (a) causes damage to the TransACT Network, or any other network connected to the TransACT Network; or

- (b) results in interference with or modification of the operation of the TransACT Network, or any other network connected to the TransACT Network; or
- (c) would breach any law.

13. Use of TransACT Network and Network Service

13.1 Permitted Use

- (a) The ISP must only use the TransACT Network and the Network Service for the sole purpose of facilitating the provision of the Services to ISP Customers.
- (b) The ISP must not transmit anything to, or accept anything from, the POI other than Traffic.

13.2 Unauthorised Traffic

- (a) The Parties must use their best endeavours to ensure that Unauthorised Traffic is prevented from entering the TransACT Network.
- (b) The Parties will not, and will not knowingly authorise others, to receive, transmit or exhibit by any means any part of the Services except as specifically authorised in this Agreement.
- (c) If TransACT Capital becomes aware that any unauthorised third party is receiving, transmitting or exhibiting any or part of the Services, TransACT Capital must immediately notify the ISP in writing and take all reasonable steps to prevent such unauthorised use.
- (d) If the Unauthorised Traffic emanates from the ISP's side of the POI, TransACT Capital may charge the ISP any costs, expenses and charges reasonably incurred by TransACT Capital in taking such preventative action. The ISP may, after TransACT Capital has exhausted all reasonable efforts, take steps it considers necessary to prevent such unauthorised use and TransACT Capital agrees to co-operate with any efforts undertaken to prevent the unauthorised use.
- (e) If TransACT deems it has suffered financial loss due to Unauthorised Traffic entering the TransACT Network the ISP must pay all reasonable charges as determined by TransACT Capital.
- (f) Preventative action by TransACT Capital referred to in clause 13.2(c) may include, without limitation:
 - (i) immediate suspension of the supply of a Service; and
 - (ii) giving instructions to the ISP in relation to preventing Unauthorised Traffic from entering the TransACT Network.
- (g) The ISP must comply with any reasonable instruction given by TransACT Capital under clause 13.2(f)(ii).

14. Interruptions, Suspensions and Cancellations by TransACT Capital

14.1 Interruptions

The ISP acknowledges and agrees:

- (a) that from time to time TransACT Capital may carry out works for the purpose of:
 - (i) maintaining and repairing the TransACT Network; and

- (ii) modifying, expanding or improving the TransACT Network or the Network Service,
(collectively the **Works**); and
- (b) due to the Works, TransACT Capital may temporarily interrupt the operation of the TransACT Network or the provision of the Network Service (**Interruption**).

14.2 Minimise Disruption

TransACT Capital must use reasonable endeavours to minimise the impact on the ISP arising from any Interruption.

14.3 Suspension or Cancellation

- (a) In addition to the circumstances in which an Interruption under clause 14.1 may occur, and notwithstanding anything else in this Agreement, TransACT Capital may at any time:
 - (i) immediately suspend the TransACT Network or Network Service or any part of them:
 - (1) if TransACT Capital is required or instructed to do so by a Governmental Agency; or
 - (2) in an emergency; or
 - (3) it is reasonably likely that an act or omission of the ISP shall impair or adversely affect the quality or the operation of the TransACT Network or the provision of TransACT Services;
 - (ii) in relation to an End User or an ISP Customer, suspend or cancel the End User's or ISP Customer's access to the TransACT Network or the Network Service if:
 - (1) it is reasonably likely that an act or omission of that End User or ISP Customer shall impair or adversely effect the quality or the operation of the TransACT Network or the Network Service;
 - (2) that End User or ISP Customer is using equipment which infringes or is claimed to infringe the Intellectual Property rights of any person; or
 - (3) if the End User is in default of its agreement with TransACT Capital; or
 - (iii) in relation to the ISP, following 10 Business Days prior notice, suspend or cancel access to the TransACT Network or the provision of the TransACT Services to the ISP if:
 - (1) the ISP is using equipment which infringes or is claimed to infringe the Intellectual Property rights of any person; or
 - (2) the ISP is in material default of this Agreement.
- (b) For the purposes of clauses 14.3(a)(ii)(3) and 14.3(a)(iii)(3), non-payment of an undisputed account or an undisputed TransACT Capital invoice by the due date is a material default.
- (c) A suspension pursuant to clause 14.3 may be for such a period or periods as TransACT Capital considers reasonably necessary in the circumstances. TransACT Capital may only suspend those TransACT Services which are affected by the matters set out in clause 14.

14.4 Notice of Suspension or Cancellation

TransACT Capital must, before (or in the case of an emergency as soon as practical following) taking action in relation to a suspension or cancellation pursuant to clause 14.3(a)(iii), provide the ISP with written notice of the suspension or cancellation.

14.5 Liability

- (a) Each Party acknowledges and agrees that:
 - (i) an ISP Customer may suffer loss as a result of an Interruption, suspension or cancellation;
 - (ii) the ISP may suffer loss or damage as a result of an Interruption, suspension or cancellation; and
 - (iii) the ISP accepts the risk of, and must not make any claim against TransACT Capital in relation to, any loss or damage arising out of an Interruption, suspension or cancellation in accordance with this Agreement.

15. Relationship Management

15.1 TransACT Capital Representative

The TransACT Contact Person will represent TransACT Capital for the day-to-day purposes of this Agreement.

15.2 ISP Representative

- (a) The ISP Contact Person will represent the ISP for the day-to-day purposes of this Agreement.
- (b) The ISP must comply with the reasonable directions of the TransACT Contact Person made within the scope of the administration of this Agreement.
- (c) A direction of the TransACT Contact Person includes any instruction, order, request, requirement or authorisation of TransACT Capital and may be given orally. If given orally, a direction must be promptly confirmed in writing.

15.3 Meetings

The Parties must meet as agreed to discuss:

- (a) agreement management and operational issues; and
- (b) any other matter, of which a Party gives notice in writing to the other Party 10 Business Days prior to the relevant scheduled meeting.

15.4 Access

- (a) Where TransACT Capital deems, in its sole discretion, that such access is necessary, the ISP must provide TransACT Capital with reasonable access to ISP's hardware, technical, system and programming aids and procedures to enable TransACT Capital to provide the Services, and perform its obligations, in accordance with this Agreement.
- (b) Any access under clause 15.4(a) is subject to:
 - (i) clause 20; and
 - (ii) the ISP's reasonable security requirements.

15.5 Compliance with Policies and Procedures

The ISP must comply with, and use its best endeavours to ensure that its officers, employees, agents and subcontractors comply with:

- (a) all laws and industry codes in relation to:
 - (i) the ISP Equipment; and
 - (ii) the provision of the Services to ISP Customers;
- (b) the Procedures Manual;
- (c) all laws relating to occupational health and safety; and
- (d) when on TransACT Capital's premises, including the Site, TransACT Capital's policies and reasonable directions and procedures relating to occupational health and safety, security, confidentiality and work standards.

15.6 Security

The ISP agrees to:

- (a) comply with all TransACT Capital's reasonable security requirements as set out in the Procedures Manual;
- (b) prohibit and prevent any person who does not:
 - (i) have the appropriate level of security; or
 - (ii) comply with TransACT Capital's reasonable security requirements,from engaging in any activity relating to this Agreement; and
- (c) notify TransACT Capital immediately, and comply with all directions of TransACT Capital, if the ISP becomes aware of any contravention of TransACT Capital's security requirements.

16. Procedures Manual

- (a) The Procedures Manual shall specify relevant procedures, processes and methodologies to enable the Parties to fulfil their respective obligations under this Agreement.
- (b) TransACT Capital may vary the Procedures Manual in its reasonable discretion and must inform the ISP of the nature and content of any such variation. Such variation may be for the improved effectiveness, security, operability or efficiency of the TransACT Network.
- (c) The ISP agrees to act in accordance with, and be bound by, the Procedures Manual.

17. Representations and Warranties

17.1 General Warranties

The ISP represents and warrants:

- (a) incorporation: it is a corporation as that expression is defined in the *Corporations Act 2001 (Cth)* having limited liability, incorporated (or taken to be incorporated) or registered and validly existing under the *Corporations Act 2001 (Cth)*;
- (b) corporate power: it has the corporate power to own its assets and to carry on its business as it is now being conducted;

- (c) authority: it has full power and authority to enter into and perform its obligations under this Agreement;
- (d) authorisations: it has taken all necessary action to authorise the execution, delivery and performance of this Agreement in accordance with its terms;
- (e) binding obligations: this Agreement constitutes its legal, valid and binding obligations, and subject to any necessary stamping and registration, is enforceable in accordance with its terms;
- (f) transaction permitted: the execution, delivery and performance by it of this Agreement does not and shall not violate:
 - (i) any law, regulation, authorisation, ruling, consent, judgment, order or decree of any Governmental Agency;
 - (ii) its memorandum and articles of association or other constituent documents; or
 - (iii) any Encumbrance or document which is binding upon it or any Related Body Corporate or any assets of it or any assets of a Related Body Corporate,
 - (iv) and does not and shall not result in:
 - (1) the creation or imposition of any Encumbrance or restriction of any nature on any of its assets or any assets of a Related Body Corporate; or
 - (2) the acceleration of the date of payment of any obligation existing under any Encumbrance or document which is binding upon it or any of a Related Body Corporate any of its assets or any assets of a Related Body Corporate; and
- (d) no litigation: no litigation, arbitration, dispute or administrative proceeding has been commenced, is pending or to its knowledge threatened, by or before any Governmental Agency, and no judgment or award has been given, made or is pending, by or before any Governmental Agency, which:
 - (i) in any way questions its power or authority to enter into or perform its obligations under this Agreement; or
 - (ii) may have a material adverse effect.

17.2 Intellectual Property Warranty

The ISP represents and warrants that:

- (a) it owns or has the right to use to the extent necessary to comply with, and perform its obligations under, this Agreement, and shall at all relevant times own or have the right to use, all Intellectual Property in the ISP Material;
- (b) it will not infringe any persons Intellectual Property rights in complying with, and performing its obligations under, this Agreement; and
- (c) it has and will have at all relevant times the right to grant any licences that the ISP is required to grant under this Agreement.

17.3 Continuing Warranties

The representations and warranties given in clause 17:

- (a) survive the expiration or termination of this Agreement; and
- (b) are regarded as repeated during the term of this Agreement with respect to the facts and circumstances then subsisting.

18. Credit Management

- (a) The provision of services by TransACT Capital under this agreement is subject to TransACT Capital being satisfied at all times of the creditworthiness of the ISP.
- (b) TransACT Capital may assess the creditworthiness of the ISP once a year, on or around the anniversary of execution of this Agreement, and at any time if a Credit Review Event occurs.
- (c) If, following such an assessment, TransACT Capital believes there is an unacceptable risk that the ISP is or will become unable to pay all amounts payable to TransACT Capital in full and on or before their due date, TransACT Capital may by written notice require the ISP to provide (at the ISP's expense) a Financial Security within 20 business days.
- (d) **"Financial Security"** means, at the ISP's election:
 - (i) an unconditional and irrevocable guarantee, with no expiry date, in terms acceptable to TransACT Capital, from either an entity registered as an Authorised Deposit-taking Institution by the Australian Prudential Regulation Authority (a Bank), or an insurer regulated by the Australian Prudential Regulation Authority under the *Insurance Act 1973* (Cth), for an amount which is equal to the average charges payable by the ISP to TransACT Capital over a period of four months; or
 - (ii) a cash pre-payment of an amount which is equal to the average charges payable by the ISP to TransACT Capital over a period of four months.
- (e) If the ISP is unable to provide a Financial Security listed above, but is prepared to provide some other means of securing the payment obligations of the ISP (such as a director's guarantee or a security over the assets of the ISP), TransACT Capital may – but is not obliged to – accept it instead of a Financial Security. If TransACT does accept such an alternative means of security, it will be treated as a Financial Security for the purposes of this Agreement.
- (f) The purpose of the Financial Security is to ensure the due and proper performance of this Agreement by the ISP and TransACT Capital may demand any sum under a guarantee from the executing financial institution or draw on any amount from a prepayment in respect of amounts owed to TransACT Capital by the ISP under this Agreement.
- (g) Where this Agreement continues in force after the exercise by TransACT Capital of its rights under clause 18(f), the ISP shall within five Business Days of receipt of written notice by TransACT Capital restore to TransACT Capital in full amount of the Financial Security.
- (h) The exercise by TransACT Capital of its rights under clause 18(f) shall not preclude TransACT Capital from the further exercise of its rights under clause 18(f) at any future time.

19. Intellectual Property

The Parties agree that:

- (a) Intellectual Property in TransACT Capital Material remains vested at all times in TransACT Capital;
- (b) Intellectual Property in ISP Material remains vested at all times in the ISP;
- (c) any Intellectual Property developed by TransACT Capital during the Term will remain the property of TransACT Capital;

- (d) any Intellectual Property developed by the ISP during the Term will remain the property of the ISP;
- (e) any Intellectual Property jointly developed during the Term shall be the property of both Parties jointly and each Party shall grant to the other a perpetual, royalty-free, non-exclusive licence to use and exploit such Intellectual Property; and
- (f) upon expiration or termination of this Agreement, each Party must deliver to the other any of the other Party's Intellectual Property in its care, custody and control.

20. Confidential Information

- (a) Each Party (**Recipient**) must in relation to the Confidential Information of the other Party (**Discloser**):
 - (i) keep it confidential;
 - (ii) use it only as permitted under:
 - (1) the National Privacy Principles, as they apply to Organisations; and
 - (2) this Agreement or subject to any other conditions notified at the time of disclosure;
 - (iii) not disclose it to any person other than:
 - (1) to those of its employees who have a need to know (and only to the extent of their need to know) and who have first been directed and have undertaken to keep it confidential and use it only as permitted under this Agreement (Undertaking);
 - (2) to other people such as contractors, agents and visitors who have a need to know (and only to the extent of their need to know) and who have agreed in writing to keep it confidential and use it only as permitted under this Agreement (also an Undertaking);
 - (iv) not copy it or any part of it other than as strictly necessary and shall mark any such copy 'Confidential - [Discloser]'; and
 - (v) promptly comply with any request by the Discloser to return or destroy any or all copies of Confidential Information.
- (b) The Recipient must:
 - (i) implement security practices against unauthorised copying, use and disclosure (whether that disclosure is oral, in writing or in any other form);
 - (ii) enforce each Undertaking; and
 - (iii) immediately notify the Discloser if the Recipient becomes aware of any:
 - (1) unauthorised copying, use or disclosure in any form; or
 - (2) disclosure required by law.
- (c) Upon the expiration or termination of this Agreement, each Party must deliver to the other any of the other Party's Confidential Information in its care, custody and control.

21. Insurance

- (a) Each Party must itself, and must ensure that its subcontractors, arrange and maintain:
 - (i) public liability insurance;

- (ii) workers compensation insurance;
- (iii) professional indemnity insurance;
- (iv) property damage insurance; and
- (v) director's and officer's insurance;

in an amount sufficient to cover all liabilities arising under this Agreement.

- (b) Each Party must, on request by the other Party, provide certificates of currency for each insurance policy.

22. Indemnity

22.1 General Principal

Except to the extent expressly set out in this Agreement, this clause 22 will regulate the liability of one Party to the other Party in relation to this Agreement.

22.2 Remedies for warranties implied by law

If TransACT Capital breaches any condition, warranty or guarantee implied by law which cannot be lawfully excluded, to the extent permitted by law the liability of TransACT Capital is limited, at its option, to:

- (a) in the case of services, the resupply of, or payment of the cost of resupplying, the service; and
- (b) in the case of goods:
 - (i) the replacement of the goods or the supply of equivalent goods; or
 - (ii) the repair of the goods; or
 - (iii) the payment of the cost of replacing the goods or of acquiring equivalent goods; or
 - (iv) the payment of the cost of having the goods repaired.

22.3 The ISP's Indemnity

The ISP is liable for and indemnifies TransACT Capital and must keep it indemnified from and against any liability, cost, expense, loss or damage suffered or incurred by TransACT Capital (including legal fees on a solicitor and own client basis), as a result of or in connection with:

- (a) a breach by the ISP of any of its obligations or warranties under this Agreement; or
- (b) any negligent or wilful act or omission of the ISP, its employees, subcontractors, agents, ISP Customers or others for whom the ISP is legally responsible;
- (c) any damage to the TransACT Network or other damage to property or persons caused by the ISP, its employees, subcontractors, agents, ISP Customers or others for whom the ISP is legally responsible;
- (d) any damage to TransACT Capital's system or data or those of any person arising from any Virus contained in the system or hardware of the ISP its employees, subcontractors, agents, ISP Customers or others for whom the ISP is legally responsible;
- (e) any claims from ISP Customers, Governmental Agencies or other third parties relating to the Traffic, including claims relating to interruption, suspension, cancellation, or failure of a Service, privacy, infringement of Intellectual Property rights or defamation; or

- (f) any claims from music collecting societies, owners of copyright or other persons who claim rights to payment as a result of use of content provided to ISP Customers by or through the ISP.

22.4 TransACT Capital's Indemnity

TransACT Capital is liable for and indemnifies the ISP and must keep it indemnified from and against any liability, cost, expense, loss or damage suffered or incurred by the ISP (including legal fees on a solicitor and own client basis), as a result of or in connection with:

- (a) any negligent act or omission of TransACT Capital, its employees, subcontractors, agents or others for whom TransACT Capital is legally responsible.

22.5 General Exclusions

Except to the extent expressly set out in this Agreement, TransACT Capital has no liability to the ISP:

- (a) for or in respect of any consequential, special or indirect liability, loss, damage, cost, charge or expense, including without limitation any loss of profits or data; or
- (b) for or in relation to any act or omission of, or any matter arising from or consequential upon any act or omission of, any third person not under the direct control of TransACT Capital.

22.6 Limitation of Liability

Without otherwise limiting this clause and to the maximum extent permitted by law, the aggregate liability of TransACT Capital for all loss suffered or incurred by the ISP at any time is limited in the aggregate for all claims, to the amount of the Charges (excluding GST) paid under this Agreement in the preceding 12 month period.

22.7 Third Party Claims

- (a) TransACT Capital is not liable to the ISP for or in respect of a claim brought against the ISP by an ISP Customer, or any third party with whom the ISP has a contractual relationship to the extent that the liability, cost, expense, claim or damage could reasonably have been excluded or reduced (regardless of whether such liability actually was excluded or reduced) by the ISP in its contract with the ISP Customer or third party.
- (b) The ISP indemnifies TransACT Capital and must keep it indemnified from and against any liability, cost, expense, loss or damage suffered or incurred by TransACT Capital (including legal fees on a solicitor and own client basis) as a result of or in connection with any claim made against TransACT Capital by an ISP Customer, or any other third party with whom the ISP has a contractual relationship, in connection with the use or supply of the Services (including any claim alleging any negligent act or omission by TransACT Capital).

22.8 Contributory Negligence

Either Party's liability to the other in relation to any liability, cost, expense, claim or damage arising out of or in connection with this Agreement is reduced to the extent (if any) that the other Party causes or contributes to the liability, cost, expense claim or damage.

23. Dispute Resolution

23.1 Dispute Resolution

- (a) A Party claiming that a dispute has arisen must notify the other Party giving details of the dispute (**Notification**).
- (b) On receipt of a Notification, each Party must negotiate in good faith to resolve the dispute and, if necessary to resolve the dispute, involve the senior officers of the Parties directly in those negotiations.
- (c) If the dispute is not resolved under clause 23.1(b) within 20 Business Days after Notification (or longer period agreed between the Parties), the Parties must refer the dispute for mediation by a mediator selected by the President of the ACT Law Society for resolution in accordance with the Mediation Rules of the Australian Commercial Dispute Centre Limited.
- (d) If the dispute is not resolved under clause 23.1(c) within 20 Business Days after referral (or such longer period agreed by the Parties), either Party may initiate proceedings in a court.
- (e) A Party must not start court proceedings (except proceedings seeking interlocutory relief) about a dispute arising out of this Agreement unless it has complied with this clause.

23.2 Billing Disputes

- (a) In the event of a billing dispute, the ISP may, by written notice provided to TransACT Capital, invoke the dispute resolution mechanism in this clause 23.2.
- (b) The ISP must only initiate a billing dispute in good faith and must pay the invoice containing the Charge that is being disputed in full in accordance with this Agreement.
- (c) TransACT Capital is not obliged to accept a notice of a billing dispute in relation to an invoice unless the ISP has complied with clause 23.2(b).
- (d) TransACT Capital will promptly investigate a billing dispute and will provide the findings to the ISP as soon as possible after completing such investigation.
- (e) If the billing dispute cannot be resolved by agreement, the disputed amount shall be dealt in accordance with the agreed dispute mechanism under this Agreement.
- (f) Where TransACT Capital is required to refund a disputed Charge, TransACT Capital shall adjust a subsequent invoice or issue a credit note to the ISP, at its absolute discretion.

23.3 Notification of Disputed Invoices

- (a) The ISP must notify TransACT Capital of any billing dispute within 10 Business Days of the date of receipt of the invoice to which the dispute relates (in relation to which time is of the essence) by submitting a completed Billing Dispute Notice to the email address and/or facsimile number specified on the Billing Dispute Notice.
- (b) The ISP may be requested to provide further details of the billing dispute to TransACT Capital in accordance with a notice in writing provided to the ISP by TransACT Capital.

23.4 Failure to notify TransACT Capital

In the event that the ISP does not:

- (a) notify TransACT Capital of a billing dispute within the time period specified in clause 23.3(a); or

- (b) provide the requested additional information to TransACT Capital within 10 Business Days of receipt of TransACT Capital's request for further information under clause 23.3(b), or
- (c) pay all amounts (including any disputed amounts) in the invoice to which the billing dispute relates by the due date;

then all amounts in the invoice to which the billing dispute relates will be deemed to be agreed and accepted by the ISP and acknowledged as a debt due and payable in accordance with the terms set out in this Agreement.

24. Force Majeure

- (a) A Party is not liable for any failure or delay in performing obligations under this Agreement due to a Force Majeure Event.
- (b) If a Force Majeure Event continues for more than 20 consecutive Business Days, or for an aggregate of 30 Business Days in any six month period, the Party not claiming the benefit of the Force Majeure Event may terminate this Agreement in accordance with clause 25 as if the Force Majeure Event were a Defaulting Event.
- (c) The non-performing Party must use its best endeavours to remedy the failure or delay in performing its obligations under this Agreement.

25. Termination for Default

25.1 Right to Terminate

- (a) A Party (**terminating party**) may terminate this Agreement (**defaulting party**) if:
 - (i) a Insolvency Event occurs in respect of the defaulting party;
 - (ii) the defaulting party breaches in any material way a provision of this Agreement and does not remedy the breach within 10 Business Days (or such longer period as may be specified in the notice) after receipt of written notice from the terminating party specifying the breach and requiring it to be rectified; or
 - (iii) the defaulting party fails to meet a particular Service Level for three consecutive months.
- (b) Any default in payment by the ISP is a material breach of this Agreement.

25.2 After Termination

On termination of this Agreement:

- (a) the ISP must remove its interface equipment from the POI without:
 - (i) causing any damage to the POI, the Site or any TransACT Capital or third party equipment located at the Site; or
 - (ii) interfering with the operation of the TransACT Network;
- (b) the accrued rights or remedies of a Party are not affected;
- (c) the ISP must immediately pay TransACT Capital any outstanding amounts; and
- (d) each Party must deliver to the other any of the other's Confidential Information or Intellectual Property in its care, custody and control.

26. Costs, Expenses and GST

26.1 Costs and Expenses

Each Party must pay its own legal costs and expenses in respect of the negotiation, preparation and completion of this Agreement.

26.2 GST

- (a) Unless expressly included, the consideration for any Supply under or in connection with this Agreement does not include GST.
- (b) To the extent that any supply made under or in connection with this Agreement is a taxable supply, the supplier may increase the consideration for that supply by an amount not exceeding the amount of the consideration multiplied by the rate at which GST is imposed in respect of the supply.
- (c) The supplier must issue a tax invoice to the recipient of a supply to which clause 26.2(b) applies no later than seven Business Days following payment of the GST inclusive consideration determined under that clause.
- (d) If either Party is entitled under this Agreement to be reimbursed or indemnified by the other Party for a cost or expense incurred in connection with this Agreement, the reimbursement or indemnity payment must not include any GST component of the cost or expense for which an input tax credit may be claimed by the Party entitled to be reimbursed or indemnified, or by its representative member.

27. General

27.1 Assignment

Either Party may assign its rights and obligations under this Agreement with the prior written consent of the other Party, which must not be unreasonably withheld or delayed.

27.2 Entire Agreement

This Agreement (including its schedules and annexures):

- (a) constitutes the entire agreement between the Parties as to the subject matter of this Agreement; and
- (b) in relation to that subject matter, supersedes any prior understanding or agreement between the Parties and any prior condition, warranty, indemnity or representation imposed, given or made by a Party.

27.3 Governing Law and Jurisdiction

- (a) The law applicable in the Australian Capital Territory governs this Agreement.
- (b) Each Party irrevocably and unconditionally submits to the non-exclusive jurisdiction of the courts of the Australian Capital Territory.

27.4 Counterparts

This Agreement may be executed in any number of counterparts.

27.5 Notice

- (a) A Party giving notice under this Agreement must do so in writing signed by the Party:

- (i) directed to the recipient's address specified in this clause, as varied by any notice and marked for the attention of the recipient's Representative; and
 - (ii) hand delivered, sent by prepaid post, facsimile or by email to that address.
- (b) The Parties agree that, in respect of email correspondence, a digital signature is sufficient to discharge the obligation under clause 27.5(a) that a Party must sign their written notice.
- (c) The Parties' addresses and facsimile numbers are:
- (i) ISP: ...
Address: ...
Facsimile: ...
 - (ii) TransACT Capital
Address: 470 Northbourne Ave Dickson ACT 2602
Facsimile: +612 6229 8164
- (d) A notice given in accordance with clause 27.5(a) is taken to be received:
- (i) if hand delivered, on delivery;
 - (ii) if sent by prepaid post, three Business Days after the date of posting;
 - (ii) if sent by facsimile, when the sender's facsimile system generates a message confirming successful transmission of the total number of pages of the notice unless, within eight business hours after that transmission, the recipient informs the sender that it has not received the entire notice; and
 - (iii) if sent by email, when the recipient sends a return email confirming transmission.

27.6 Severability

Part or all of any provision of this Agreement that is illegal or unenforceable may be severed from this Agreement and the remaining provisions of this Agreement continue in force.

27.7 No Waiver

The failure of a Party at any time to require performance of any obligation under this Agreement is not a waiver of that Party's right:

- (a) to claim damages for breach of that obligation; and
- (b) at any other time to require performance of that or any other obligation under this Agreement.

27.8 No Partnership

The Parties agree that for the purposes of this Agreement they are independent contractors and nothing in this Agreement enables either Party to bind the other as joint venturer, partner or employee.

27.9 Variation

No modification of this Agreement recorded in this document is binding unless it is in writing and signed by both Parties.