

AGREEMENT FOR EQUIPMENT SUPPORT SERVICES

STANDARD TERMS AND CONDITIONS

1 INTERPRETATION

1.1 Definitions

In this Agreement:

"Additional Services" means maintenance support services, other than the Services, including, without limitation:

- a) the matters referred to in clause 5;
- b) services in respect of equipment other than the Equipment; and
- c) services not included within the scope of the Selected Plan;

"Adjustment Date" has the meaning given by clause 4.2(c)(i).

"Business Day" means a day (other than a Saturday or Sunday) on which banks are open for business generally in Melbourne.;

"Business Hour" means an hour on a Business Day between 9am and 5pm.

"Commencement Date" means the commencement date specified on the cover sheet;

"Current Terms" has the meaning given by clause 2.2(a).

"Customer" means the Customer specified on the cover sheet;

"Equipment" means:

- a) the equipment listed in the equipment schedule specified on the coversheet to this Agreement; and
- b) any additional equipment (including upgrades) specified in a notice given to and accepted by TBS, as referred to in clause 6, but does not include any equipment which is peripheral or incidental to the equipment so listed or specified;

"Further Term" has the meaning given by clauses 2.2(a) or (b) (as the case may be);

"GST" has the same meaning as in the A New Tax System (Goods and Services Tax) Act 1999 (C'th);

"Initial Term" has the meaning given by clause 2.1;

"Maintenance Plan" means TBS's service plans in respect of voice equipment and data and mobility equipment, each as attached to this Agreement and as amended by TBS from time to time;

"Party" or **"Parties"** means a Party or the Parties to this Agreement and their respective successors and permitted assigns;

"Selected Plan" means the Maintenance Plan selected by the Customer, as specified on the coversheet to this Agreement;

"Services" means:

- a) the maintenance support services in respect of the Equipment to be provided in accordance with the Selected Plan on the terms of this Agreement; and
- b) the supply and installation of replacement parts, as referred to in clause 3.3,

but does not include any Additional Services;

"Service Charges" means the charges payable in accordance with this Agreement by the Customer to TBS in respect of the Services and any Additional Services. The initial "Service Charges" in respect of the Services are as set out on the cover sheet.

"Tax Invoice" has the same meaning as in the A New Tax System (Goods and Services Tax) Act 1999 (C'th).

"TBS" means Telstra Business Systems Pty Ltd ABN 20 094 674 745, formerly called Damovo (Australia) Pty Ltd

"Term" means, subject to clause 11, the Initial Term and any Further Term.

1.2 General

In this Agreement, unless the context otherwise requires:

- a) the singular includes the plural and vice versa;
- b) a reference to an individual or person includes a corporation, firm, partnership, joint venture, association, authority, trust, state or government and vice versa;
- c) a reference to a cover sheet, clause or schedule is to a cover sheet, clause or schedule of this Agreement;
- d) a cover sheet or schedule forms part of this Agreement;
- e) a reference to any Agreement or document (including a Maintenance Plan) is to that Agreement or document (and, where applicable, any of its provisions) as amended, novated, supplemented or replaced from time to time;
- f) where an expression is defined, another part of speech or grammatical form of that expression has a corresponding meaning; and
- g) headings are for convenience of reference only and do not affect the interpretation of this Agreement.

If there is any inconsistency between the terms of this Agreement and the terms of a Maintenance Plan, the terms of this Agreement shall prevail to the extent of any inconsistency.

2 TERM OF AGREEMENT

2.1 Initial Term

The initial term of this Agreement is for the period stated on the cover sheet, commencing on the Commencement Date ("Initial Term").

2.2 Further Term

a) Annual Agreements

If the Initial Term is for a period of 12 months, then unless terminated in accordance with clause 11, upon expiration of the Initial Term this Agreement shall be extended for a further term equal in duration to the Initial Term ("Further Term") and during the Further Term this Agreement shall, subject to clause 2.2(d), be on the same terms and conditions (including pricing) as TBS's standard terms and conditions for equipment support services ("Current Terms") as at the expiration of the Initial Term .

b) Multi Year Agreements

If the Initial Term is for a period of greater than 12 months, then unless terminated in accordance with clause 11, upon expiration of the Initial Term this Agreement shall be extended for a further term equal in duration to a period of 12 months ("Further Term") and during the Further Term this Agreement shall, subject to clause 2.2(d), be on the same terms and conditions (including pricing) as the Current Terms as at the expiration of the Initial Term .

c) If the Current Terms referred to in clauses 2.2(a) or (b) (as the case may be) are:

- (i) subject to clause 2.2(c)(ii), different from the Current Terms as at the Commencement Date; or
- (ii) different from the Current Terms last provided to the Customer as referred to in clause 2.3(b),



then not less than 1 month prior to expiry of the Initial Term, TBS shall give the Customer a copy of the Current Terms which will be applicable as at the expiration of the Initial Term.

d) Any special discounts applicable in respect of Service Charges during the Initial Term or any part thereof shall not apply during any Further Term.

2.3 New Terms

- a) Notwithstanding any other clause of this Agreement, TBS reserves the right to amend, vary, change and replace the terms of this Agreement at any time and from time to time to ensure that the terms of this Agreement are consistent with the Current Terms.
- b) TBS will notify the Customer of, and provide the Customer with copies of, any proposed amendments, variations, changes or replacements pursuant to clause 2.3(a), and also provide the Customer with a copy of the then Current Terms.
- c) Unless the Customer gives written notice to TBS within 14 days of receiving a notice from TBS pursuant to clause 2.3(b), notifying TBS that the Customer does not accept the proposed amendments, variations, changes or replacements, then the proposed amendments, variations, changes or replacements will take effect on and from the date specified in the notice from TBS pursuant to clause 2.3(b), provided that the specified date is not less than 21 days after the date on which the relevant notice under clause 2.3(b) is received by the Customer.

3 COVERAGE

3.1 Services to be Provided and Service Charges

- a) TBS shall provide the Services in relation to the Equipment in accordance with the Selected Plan.
- b) In consideration of TBS agreeing to provide the Services, the Customer shall pay the Service Charges to TBS in accordance with clause 4.

3.2 Additional Services

TBS may, if requested by the Customer, provide Additional Services to the Customer. Such Additional Services will be chargeable in accordance with clause 4.4.

3.3 Replacement of Parts

In providing the Services, TBS shall replace any component parts, assemblies and sub-assemblies comprising the Equipment which, in TBS's opinion, require replacement due to normal wear and tear, such replacement to be made with new or as new component parts, assemblies and sub-assemblies (as the case may be). Any parts removed from the Equipment shall become the property of TBS and any replacement parts shall, upon installation, become the property of the Customer.

3.4 No Guarantee

The Customer acknowledges that TBS, in providing the Services, cannot and does not warrant or guarantee:

- a) uninterrupted or error free operation of the Equipment while the Services are in progress; or
- b) that the provision of the Services will achieve or result in a solution to any problem affecting the Equipment.

4 Payment

4.1 Charges for Services

The Service Charges:

- a) shall be invoiced in advance according to the payment terms indicated on the cover sheet;
- b) are due and payable within 30 days from the date of invoicing. Interest on accounts not paid within 14 days from the date of invoicing will be charged interest from the day the Service Charges (or part thereof) become overdue and remain overpaid at the rate applicable at the time by the Westpac Banking Corporation on overdrafts in excess of \$100,000 plus two (2) percent; and
- c) are, subject to clause 11.3, not affected by any decrease in the use of the Equipment, whether that decrease is due to the provision of the Services or to any other cause.

4.2 Review of Charges

a) Annual Agreements

If the Initial Term is for a period of 12 months, then during the Initial Term TBS may, by notice in writing to the Customer, increase the Service Charges provided that the increase does not result in the Service Charges being greater than TBS's commercial rates current at the relevant time. The increased Service Charges shall take effect on the date specified in the notice, provided that the relevant date is not less than 21 days after the date on which notice of the increased Service Charges is given to the Customer. TBS may increase the Service Charges pursuant to this clause 4.2(a) only once during the Initial Term.

b) Multiple Year Agreements

If the Initial Term is for a period of greater than 12 months, then, subject to review in accordance with clause 4.2(c), the Service Charges are fixed for the Initial Term.

c) Exceptions

(i) If this clause 4.2(c) applies, then the Service Charges shall, subject to clause 4.2(c)(iv), be reviewed on and adjusted with effect from each anniversary of the Commencement Date ("Adjustment Date") in accordance with the following formula:

$$X = \frac{SC \times C2}{C1}$$

where:

X = the revised Service Charge;

SC = the Service Charge payable during the year immediately preceding the relevant Adjustment Date;

C1 = the Index Number for the quarter ending immediately prior to the Commencement Date or, where a Service Charge review has taken

place, the Adjustment Date immediately preceding the relevant Adjustment Date; and

C2 = the Index Number for the quarter ending immediately prior to the Adjustment Date.

"Index Number" means:

(a)

Bureau of Census and Statistics; or

the Consumer Price Index (All Groups) for Melbourne published from time to time by the Australian

(b) if there is any suspension or discontinuance in the publication of the Consumer Price Index, then, until publication of the Consumer Price Index is resumed, such other index reflecting fluctuations in the cost of living in Melbourne agreed by the parties, or failing agreement, as determined by the President of the Institute of Chartered Accountants (Victorian Division) or his or her nominee as reflecting fluctuations in the cost of living in Melbourne, whose decision shall be final and binding upon the parties, who shall act as an expert and not as an arbitrator and whose costs shall be borne equally between the parties.

(ii) If the Service Charges payable from the relevant Adjustment Date have not been ascertained by that date, then, within 14 days after any adjustment in the Service Charges has been ascertained, the Customer shall pay to TBS the difference between the Service Charges payable immediately before the Adjustment Date and the Service Charges so adjusted for the period commencing on the Adjustment Date and ending on the last day of the period to which Service Charges are then payable by the Customer.

(iii) If this clause 4.2(c) applies, then the Service Charges applicable in respect of the period on and from the first Adjustment Date shall not include any special discounts specified on the cover sheet as being only applicable in respect of the 12 month period prior to the first Adjustment Date.

(iv) Notwithstanding anything to the contrary, this clause 4.2(c) shall not apply in so far as its application would result in a decrease to Service Charges.

d) This clause 4.2 does not apply to any Service Charges in respect of any Additional Services.

4.3 Travel and Living Expenses

TBS may charge the Customer, and the Customer agrees to pay, for travel and living expenses for Services provided at a site more than 40 kilometres from nearest TBS Customer service centre. Charges will be based on TBS's standard travel policy current at the relevant time.

4.4 Charges for Additional Services

Additional Services provided to the Customer under clause 3.2 of this Agreement shall be charged at TBS's commercial rate current at the time that such Additional Services are provided and shall be invoiced after the Additional Services have been provided. Service Charges in respect of Additional Services shall be due and payable as provided in clause 4.1(b).

4.5 Good and Services Tax

4.5.1 If GST is imposed on any supply made under this Agreement by TBS and GST has not been taken into account when determining the consideration payable for the supply, the customer must pay, in addition to and at the same time as that consideration is payable or to be provided for the supply, an additional amount calculated by multiplying that consideration (without deduction or set-off) by the prevailing GST rate;

4.5.2 The customer is not required to pay any amount of GST to TBS unless TBS has made demand for payment by means of a Tax Invoice.

4.5.3 If the amount of GST recovered by TBS from the Customer differs from the amount of GST payable at law by TBS in respect of the supply, the amount payable by the Customer to TBS will be adjusted accordingly.

5 Service Exclusions

5.1 Services and Parts

The Customer acknowledges that the following maintenance support services are not included as "Services" for the purposes of this Agreement:

- a) the repair of damage or malfunction caused by an act of God, lightning, flood, electrostatic interference or power surge;
- b) the replacement of backbone and external cabling other than interconnecting cables as required;
- c) the servicing of software that has been customised after initial installation, except where the customisation has been performed under a software maintenance agreement existing between TBS and the Customer;
- d) the servicing of Equipment that has been misused or neglected;
- e) the correction of errors resulting from system administration changes performed by persons other than TBS or its authorised agents or representatives;
- f) services and parts required where the Customer has allowed Services or works to be performed on the Equipment by any person other than TBS without the written approval of TBS for such work to be performed by that person;
- g) consumable and disposable items (for example telephone cords, floppy discs, tapes, standby batteries, etc);
- h) remedial software maintenance for software platform versions which are older than the current release minus 1. In addition TBS will not undertake fee for service work to provide customised enhancements to the software (at the Customer's request), for software versions which are not current release or current release minus 1;
- i) telephone support other than that which is directed at restoring communications service to normal working operation, except where Customer has subscribed to TBS customer telephone support Services;
- j) backup and storage of configuration data and program data except where the Customer has subscribed to this TBS service;
- k) relocation and installation of Equipment; and
- l) remedial maintenance of external power supply equipment which is not Equipment.

5.2 Special Requirements

The Customer acknowledges that the provision of specialised equipment and labour, including without limitation a cherry picker, or professional rigger, are not included as "Services" for the purposes of this Agreement. Where such equipment or labour is required to enable access to the Equipment or to perform of any of the Services, TBS will notify the Customer of the relevant charges, and subject to the Customer agreeing to pay the relevant charges, TBS will utilise the relevant specialised equipment or labour.

6 ADDITIONAL EQUIPMENT

a) Additional equipment (including any upgrades) will be "Equipment" for the purposes of this Agreement if:

(i) TBS has received (from the Customer or a dealer, agent or sub-contractor of TBS) a maintenance contract variation form specifying the additional equipment; and

(ii) TBS has not, in its absolute discretion, given written notice to the Customer within a reasonable period of time after TBS has received the maintenance contract variation form, that such additional equipment shall not constitute "Equipment" for the purposes of this Agreement.

(b) If during the course of performing the Services or undertaking an equipment audit or otherwise, it becomes apparent to TBS that equipment (not being Equipment) ("New Equipment") is or has been located with the Equipment such that TBS acting reasonably, has performed or is likely to perform maintenance services in respect of such New Equipment, then:

(i) the New Equipment is to be regarded as "Equipment" for the purposes of this Agreement if TBS, in its absolute discretion, gives written notice to the Customer to that effect; and

(ii) irrespective of whether a notice is given pursuant to clause 6(b)(i), the Customer shall pay service charges to TBS in respect of the maintenance services performed in respect of the New Equipment as if the New Equipment was "Equipment" for the purposes of this Agreement.

The Service Charges in respect of any such additional Equipment and New Equipment shall be TBS's commercial rates current at the time that the additional Equipment or New Equipment (as the case may be) becomes "Equipment" for the purposes of this Agreement, or if clause 6(b)(ii) applies, TBS's commercial rates current at the time the relevant maintenance services are performed.

7 RELOCATION OF EQUIPMENT

If the Customer re-locates any of the Equipment, the Customer must give written notice to TBS. If TBS, at the request of the Customer, relocates existing Equipment, the rates charged in respect of the relocation and installation shall be TBS's commercial rates current at the time of relocation and installation. The Customer agrees to pay those charges.

If any Equipment is relocated, the Service Charges applicable to the provision of Services in respect of that Equipment shall be increased to the extent that the re-location results in any cost increases to TBS.

8 CUSTOMER RESPONSIBILITIES

The Customer shall:

- a) ensure the proper use of the Equipment at all times in accordance with operating manuals and/or CD-ROMs previously provided to the Customer;
- b) ensure that TBS service staff have prompt and free access to the Equipment as required;
- c) provide a suitable environment for the effective servicing of the Equipment;
- d) provide conditions that are consistent with the Equipment specifications;
- e) ensure that the necessary auxiliary Services for the correct operation of the Equipment are available;
- f) provide adequate air conditioned and dust free storage for spare parts (including consumable parts) packaged in electrostatic (ESD) packaging and held on site;
- g) protect the Equipment from electrostatic interference and power surges; and
- h) provide sufficient stocks of consumable items to ensure that a satisfactory level of service can be maintained.

9 WARRANTIES

9.1 Customer

The Customer warrants that:

- a) it owns or leases the Equipment;
- b) it has obtained and will maintain all necessary licences (including those relating to software), permits, consents, authorisations and approvals necessary to operate the Equipment and to permit TBS to perform the Services in respect of the Equipment; and
- c) it has the legal authority to enter into this Agreement and all resolutions, authorities and consents required to enable the Customer to enter into this Agreement have been passed or obtained.

9.2 TBS

TBS warrants that:

- a) the Services (other than materials and replacement parts) will, for a period of 90 days from the date on which Services are provided, meet TBS's published performance specifications applicable as at the date on which such Services are provided; and
- b) any materials and replacement parts provided in connection with the Services will be new or in as new condition.

For the avoidance of doubt, this warranty does not extend to any services on Equipment other than Services, nor does it extend to Equipment maintained otherwise than by a properly trained person or interfaced otherwise than in accordance with the conditions specified by TBS. Materials and replacement parts are supplied on the basis of the warranty (if any) provided by the manufacturer of such materials and replacement parts, in respect of such warranty TBS will use its reasonable endeavours to ensure that the Customer receives the benefit thereof. Subject to the foregoing, to the extent permissible by law, TBS excludes all liability for materials and replacement parts and any such manufacturers' warranties.

The Customer shall not have any rights under this clause until payment in full for the contract has been received.

The warranties contained in this Agreement are to the extent permissible by law exclusive and in lieu of all other warranties whether expressed or implied including without limitation any warranty of merchantability or of fitness for a particular purpose.

10 LIMITATION OF LIABILITY

The liability of TBS under this Agreement (including breach of a warranty contained in clause 9.2) or in tort will be actual direct damages, incurred as a result of the negligence of TBS in performing this Agreement, up to the amount paid by the Customer in the last twelve (12) months for Services that are the subject of the claim, and for damages for bodily injury or death or third party property to the extent that all such damages are determined by a court of final jurisdiction to have directly been caused by TBS. Without limiting the generality of the foregoing, TBS and its suppliers shall not be liable to the Customer for any special, incidental, indirect or consequential loss or damage which the Customer or any person may sustain. TBS shall not be liable for any claim caused in whole or in part by a public carrier or statutory authority.

TBS shall not be under any liability for any Services on Equipment that has been maintained or tampered with by a person who is not properly trained.

The Customer's exclusive remedy and TBS's sole obligation and liability for any breach of warranty contained in this Agreement will be the re-supply of the relevant Services.

11 TERMINATION

11.1 Termination by Non-Renewal

This Agreement shall terminate upon expiry of the Initial Term if:

- a) either Party has given the other Party notice of termination not less than 1 month prior to the expiry of the Initial Term; or
- b) the Customer, having received a notice of increases to Service Charges in accordance with clause 4.2, has given TBS a notice of termination not less than 7 days after the date on which the Customer receives notice from TBS in accordance with clause 4.2(a).

11.2 Termination Upon Breach

- a) If at any time either Party fails to perform any of its material obligations under this Agreement for a period of 30 days after receipt of written notice of such failure, the non-defaulting Party will have the right to terminate this Agreement immediately upon delivery of written notice to the defaulting Party of its election to do so. The foregoing rights of termination are in addition to and without derogation from any other rights and remedies that the non-defaulting Party may have.
- b) Either party may terminate this Agreement, immediately by notice in writing to the other Party if:
- (i) a controller (as defined in the Corporations Act (C'th)), liquidator, provisional liquidator, administrator or other like person is appointed in respect of the other Party or to the whole or any part of the business or assets of the other Party;
 - (ii) the other Party becomes bankrupt or insolvent or makes an assignment, arrangement or composition for the benefit of creditors or ceases to carry on business;
 - (iii) the other Party is issued with a bankruptcy notice under section 41(1) of the Bankruptcy Act (C'th) or is presented with a creditors' petition or a debtors' petition, or signs an authority for the purposes of section 188 of the Bankruptcy Act or a sequestration order or similar order is made against the property, estate or affairs of the other Party;
 - (iv) an official trustee, registered trustee, controlling trustee or official receiver is appointed in respect of the property, estate or affairs of the other Party;
 - (v) an order, petition, application, meeting or resolution is made, presented, brought, called, threatened or passed for the purposes of appointing a person referred to in paragraphs 11.2(b)(ii) or (v), bankrupting, winding up or deregistering the other Party or proposing a scheme of arrangement in respect of the other Party; or
 - (vi) a director, secretary, chief executive or senior manager of the other party is convicted of an offence, in respect of which a custodial sentence is imposed (whether or not actually served).

11.3 Termination where Equipment cannot be Maintained

- a) TBS may give the Customer a termination notice if:
- (i) in TBS's opinion, the whole or part of the Equipment cannot be maintained in accordance with the Selected Plan due to, in TBS's opinion, works having been carried out on the whole or part of the Equipment by persons not accredited by TBS to perform such works. If TBS gives the Customer a termination notice pursuant to this clause 11.3(a), this Agreement will, on the date which is 30 days after the date on which the Customer receives the termination notice, cease to apply to the whole or part of the relevant Equipment referred to in the relevant termination notice and this Agreement shall continue to apply in relation to the whole or part of that Equipment not referred to in the relevant termination notice;
 - (ii) parts necessary to maintain the whole or part of the Equipment in accordance with the Selected Plan are, in TBS's opinion, no longer readily available or manufactured. If TBS gives the Customer a termination notice pursuant to this clause 11.3(b), this Agreement will, on the date which is 30 days after the date on which the Customer receives the termination notice, cease to apply to the whole or part of the relevant Equipment referred to in the relevant termination notice and this Agreement shall continue to apply in relation to the whole or part of that Equipment not referred to in the relevant termination notice; or
 - (iii) support software in respect of the software necessary to operate the whole or part of the Equipment is, in TBS's opinion, no longer readily available. If TBS gives the Customer a termination notice pursuant to this clause 11.3(c), this Agreement will, on the date which is 30 days after the date on which the Customer receives the termination notice, cease to apply to the whole or part of the relevant Equipment referred to in the relevant termination notice and this Agreement shall continue to apply in relation to the whole or part of that Equipment not referred to in the relevant termination notice.
- b) The Customer may give TBS a termination notice if the whole or part of the Equipment is damaged or destroyed to the extent that the Customer is unable to use the whole or part of the Equipment and it is not economically viable for the Equipment to be repaired or restored. If the Customer gives TBS a termination notice pursuant to this clause 11.3, this Agreement will, on the date which is 14 days after the date on which TBS receives the termination notice, cease to apply to the whole or part of the relevant Equipment referred to in the relevant termination notice and this Agreement shall continue to apply in relation to the whole or part of that Equipment not referred to in the relevant termination notice.

11.4 Early Termination – Liquidated Damages.

- a) The Customer acknowledges and agrees that:
- i) TBS has entered into this Agreement on the basis that the Term of this Agreement will not be less than the Initial Term;
 - ii) the Service Charges have been calculated on the basis that the Term of this Agreement will not be less than the Initial Term;
 - iii) TBS would suffer loss and damage if the Term of this Agreement is less than the Initial Term;
 - iv) the amount specified in clause 11.4(b) is a reasonable estimate of TBS's likely loss and damage in the event that this Agreement is terminated prior to expiration of the Initial Term.
- b) If this Agreement is terminated for any reason (other than termination by the Customer by reason of a material breach of this Agreement by TBS or pursuant to clauses 11.2(b), 11.3(a)(ii), 11.3(a)(iii) or 11.3(b)) prior to the expiry of the Initial Term, then without prejudice to any other rights which TBS may have under this Agreement or otherwise, the Customer agrees to pay TBS an amount equal to:
- i) 25 percent of the aggregate Service Charges which would have been charged in respect of the period between the date of termination and the end of the Initial Term; plus
 - ii) if the Initial Term is for a period of time greater than 12 months, an amount equal to the difference between the aggregate amount of service charges which would have been charged in respect of the period before the date of termination (being service charges calculated on the basis of the prices and special discounts that would have been applicable as at the Commencement Date for the provision of Services for a term equal to the actual term, as opposed to the intended Initial Term) and the aggregate amount of the actual Service Charges paid or payable in respect of that period

12 NOTICES

12.1 Notice Details

To ensure that this Agreement operates efficiently during the Term, the parties agree that the following contacts will be deemed as the only people delegated responsibility for the Agreement. Any communication under or in connection with this Agreement:

- a) must be in writing (which for the avoidance of doubt, includes email);
- b) must state the Agreement number and the Customer's customer number (each as specified on the cover sheet);
- c) must be addressed as shown below:

TBS:

Name: Telstra Business Systems Pty Ltd

Address: 400 Queen St Melbourne VIC 3000
Fax no: +61 3 8617 6000

For the attention of: Service Contract Administration
(or as otherwise notified by TBS to the Customer from time to time);
Customer:
Details as specified on the cover sheet.

(or as otherwise notified by the Customer to TBS from time to time);
d) must be signed by the party making the communication or (on its behalf) by the solicitor for, or by any attorney, director, secretary, or authorised agent of, that party;
e) must be delivered, posted by prepaid post or emailed to the address, or sent by fax to the number, of the addressee, in accordance with clause 12.1(c); and
f) will be deemed to be received by that addressee:
i. (in the case of prepaid post) on the third business day after the date of posting to an address within Australia, and on the fifth business day after the date of posting to an address outside Australia;
ii. (in the case of fax) at the local time (in the place of receipt of that fax) which then equates to the time at which that fax is sent as shown on the transmission report which is produced by the machine from which that fax is sent and which confirms transmission of that fax in its entirety, unless that local time is a non-business day, or is after 5.00pm on a business day, in which case that communication will be deemed to be received at 9.00am on the next business day; and
iii. (in the case of delivery by hand) on delivery at the address of the addressee as provided in paragraph 12.1(c), unless that delivery is made on a non-business day, or after 5.00pm on a business day, when that communication will be deemed to be received at 9.00am on the next business day; and
iv. (in the case of email) on return of a receipt produced by the system from which the email was sent which indicates that the email was sent to the address specified in clause 12.1(c) or, where no return receipt is produced and provided no notice of delivery failure is received, by the end of the day on which the email was sent, unless that day is a non-business day, or is sent after 5.00pm on a business day, in which case the email will be deemed to be received at 9.00am on the next business day,
and where "business day" means a day (not being a Saturday or Sunday) on which banks are generally open for business in the place of receipt of that communication.

13 GENERAL PROVISIONS

13.1 Sub-Contracting and Assignment

TBS may sub-contract any or all of the Services to be performed, but shall retain prime responsibility for the Services under the terms of this Agreement. TBS may assign its rights under this Agreement without the consent of the Customer. The rights and obligations of the Customer under this Agreement cannot be assigned without the prior written consent of TBS.

13.2 Entire and Complete Terms

This Agreement constitutes the entire Agreement between the Parties in respect of the subject matter of this Agreement. No oral or written representation, inducement or promise made by, or on behalf of, either Party and not contained in this Agreement will be relied upon or binding upon the Parties.

13.3 Amendments

Except where this Agreement expressly contemplates that this Agreement (including any cover sheet, schedule, attachment and other document referred to in this Agreement) may be amended, varied, changed or replaced, any amendments including changes to the term, modifications or supplements to this Agreement must be in writing and signed by the authorised representative of each Party.

13.4 Waiver

Failure to enforce or insist upon compliance with any of the terms of this Agreement will not constitute a waiver or relinquishment of the terms.

13.5 Force Majeure

In the event of any delay or prevention of performance by TBS due to any event beyond the reasonable control of TBS, including, but not limited to any act of God, delays in obtaining Australian Communication Authority approvals and other statutory approvals, strikes, lock-outs, civil disturbance or commotion, terrorism, war, fire, flood, explosions, storm, earthquake or other natural calamity, failure of plant, compliance with government authority, inability to obtain suitable materials, components, labour, power or transportation ("Force Majeure Event"), TBS shall be under no liability for loss or injury suffered by the Customer by reason of the Force Majeure Event and the obligations of TBS under this Agreement shall be suspended during the time that TBS is prevented or delayed in complying with such obligations by the Force Majeure Event and any date or dates for the provision of Services shall be postponed during the period of such delay or prevention.

13.6 Applicable Law

This Agreement shall be governed and construed in accordance with the laws in force in the State of Victoria.

13.7 Trained Personnel

All Services provided by TBS under this Agreement will be by qualified and experienced staff.

13.8 Severability

In the event that any part of these terms and conditions is void, voidable, illegal or otherwise unenforceable it may be severed therefrom and the remaining provisions of these terms and conditions shall remain in full force and effect.

13.9 Intellectual Property

- a) TBS, or the source manufacturer in the case of third party products, retains title to, ownership of and all proprietary rights (including patent rights, trade secrets, copyright and other intellectual property rights) in each item of Equipment, software (including documentation) and any confidential information, trade secrets and know-how developed, used or revealed in the sale or service of the Equipment or the provision of the Services, including products used in the course of providing the Services ("Spare Parts"). Use and reproduction of the proprietary rights of TBS is expressly forbidden unless TBS gives written permission. TBS does not and cannot grant any title to, ownership of or a licence to use the proprietary rights of any third party.
- b) TBS (in its absolute discretion) will defend or settle at its cost any claim against the Customer that Equipment manufactured, Spare Parts supplied or the provision of the Services by TBS under this Agreement infringes an Australian patent, industrial design, copyright or trademark, provided the Customer:
- (i) promptly notifies TBS in writing of the claim; and
 - (ii) co-operates with TBS in, and grants TBS the sole authority to control, the defence of the claim and any related settlement.
- c) In the event of a claim referred to in clause 13.9(b) being made, TBS (in its absolute discretion and to the extent permitted by law) may procure the right for the Customer to continue using Equipment or Spare Parts, may modify the Equipment or Spare Parts, may replace the Equipment or Spare Parts or may refund the depreciated value of the Equipment or Spare Parts.
- d) TBS is not liable for any claim of infringement arising from:
- (i) TBS's compliance with any designs, specifications or instructions of the Customer;
 - (ii) modification of the Equipment, Spare Parts or software by the Customer or a third party;
 - (iii) use of the Equipment, Spare Parts or software in any way not specified by TBS;
 - (iv) use of the Equipment, Spare Parts or software with products not supplied from TBS; or
 - (v) the operation of Equipment and/or software manufactured or supplied by a third party.
- e) These terms state the entire liability of TBS for claims of infringement in respect of the Equipment, Spare Parts and software supplied and the Services provided by TBS under this Agreement.

13.10 Confidential Information

- a) "Confidential Information" means information of either Party ("Disclosing Party") (irrespective of whether or not it has been reduced to material form) that:
- (i) is by its nature confidential;
 - (ii) is designated by the Disclosing Party as confidential; or
 - (iii) the Party to whom it is disclosed or who otherwise obtains it ("Receiving Party") knows or ought to know it is confidential, relating generally to the business or commercial affairs of the Disclosing Party and includes:
 - information comprised in or relating to any intellectual property rights (whether registered or unregistered) of the Disclosing Party, including information relating to any trade secrets or know how of the Disclosing Party;
 - information relating to the financial position of the Disclosing Party and, in particular, information relating to the assets and liabilities of the Disclosing Party, its customers and its financial standing generally; and
 - information relating to any business or marketing plans, projections, arrangements or agreements with third parties, customer information, accounting records and other information relating to the Disclosing Party's business generally.
- Notwithstanding anything to the contrary in this Agreement, "Confidential Information" does not include:
- (iv) information in the public domain, at the time that it is provided to or obtained by the Receiving Party; or
 - (v) information which, after it is provided to or obtained by the Receiving Party, becomes a part of the public domain other than due to breach by the Receiving Party of this Agreement.
- b) The Parties acknowledge and accept that, in order to comply with their respective obligations under this Agreement, there may be a need for either Party to provide to or obtain from the other Party Confidential Information.
- c) When acting in the capacity of a Receiving Party, each Party covenants, agrees and undertakes in favour of the other, to:
- (i) hold the Confidential Information of the Disclosing Party in confidence; and
 - (ii) except with the prior written consent of the Disclosing Party, not (either directly or indirectly):
 - a) disclose any part of the Confidential Information of the Disclosing Party to any third party (other than the Receiving Party's officers, employees or sub-contractors who need to know that information for the purposes of this Agreement);
 - b) use all or any part of the Confidential Information for any purpose other than performing its obligations under this Agreement.
- d) The Parties further acknowledge and agree that any covenants and undertakings made by them under clause 13.10(c) shall be taken to have been automatically restated by each of them, respectively, at the time of each subsequent disclosure of the Confidential Information taking place.
- e) Each Party will protect the Confidential Information of the other Party which is provided to or obtained by the Party by using the same degree of care, but in any event no less than a reasonable degree of care, to prevent the unauthorised use, dissemination or publication of the Confidential Information as the Party uses to protect its own confidential information of a like nature (whether or not such information forms of the Party part of the Confidential Information).
- f) This obligation of confidentiality shall continue for a period of three (3) years from the date of the termination of this Agreement.
- g) If TBS wishes to disclose Confidential Information of the Customer to an officer, employee or sub-contractor in accordance with clause 13.10(c)(ii)(a), TBS must only disclose such Confidential Information to the sub-contractor once the sub-contractor has executed a confidentiality agreement with terms no less onerous than those imposed on TBS by this Agreement.
- h) The Disclosing Party will retain title to all forms of the Confidential Information, all copies provided to or obtained by the Receiving Party and any copies made pursuant to this Agreement. A Receiving Party must not copy or reproduce any Confidential Information of the Disclosing Party without written authorisation of the Disclosing Party.
- i) No disclosure or exchange of Confidential Information will be construed as granting to the Receiving Party (either expressly or by implication) any right or interest under any patent, copyright, trade secret, trademark or any other proprietary right except as provided by this Agreement.
- j) Upon termination of this Agreement or on written request by the Disclosing Party, a Receiving Party will promptly return or destroy all proprietary and Confidential Information of the Disclosing Party which was provided to or obtained by the Receiving Party.

13.11 Insurance

TBS will maintain appropriate public liability insurance, professional indemnity insurance, contract works insurance and workers compensation cover for the duration of this Agreement.

13.12 Disputes

- a) In the event of any dispute between the Parties concerning any provision of this Agreement, the issue resolution process set out in this clause 13.12 shall be used before any litigation may be commenced by either Party, except where a Party seeks urgent interlocutory relief in which case that Party, in relation to the relief sought, need not comply with this clause 13.12 prior to seeking such relief.
- b) Each Party agrees that any dispute between the Parties relating to this Agreement will first be submitted in writing to the senior executive, nominated by the managing director of TBS and the Customer, who will meet and confer in an effort to resolve such dispute. Any decision of the executives will be final and binding on both Parties. Where the dispute is not resolved within 14 days of submission to the executives the matter will be referred to arbitration.

- c) If the Parties cannot agree on an arbitrator within 7 days, then either Party may approach the President of the Institute of Commercial Arbitrators to appoint an arbitrator. Such arbitration will be conducted in accordance with the Commercial Arbitration Act of Victoria.
- d) The Parties acknowledge that any exchange of information or documents or offers to settle pursuant to this dispute resolution procedure is an attempt to settle the dispute between the Parties. Neither Party may use any information, documents or offer obtained solely by reason of this clause for any purpose other than in an attempt to settle the dispute in the context of negotiation, mediation and or arbitration.

13.13 Survival

The terms, conditions, exclusions and warranties contained in this Agreement that by their sense and context are intended to survive the performance thereof by either or both Parties hereunder shall so survive the termination of this Agreement.

13.14 Authorisation To Execute

An individual who signs this Agreement (or the cover sheet) on behalf of the Customer represents and warrants that:

- (i) he or she is authorised to execute this Agreement on behalf of the Customer; and
- (ii) all action necessary to authorise the execution of this Agreement has been taken by the Customer.