



Terms and Conditions
For Delivery of Service

APEX Networks
www.apexn.com.au



These Terms and Conditions for Delivery of Service (the "Terms and Conditions") shall be applicable to Customer Orders executed by Customer for Services delivered by APEXn Pty Ltd, trading as APEX Networks, and shall be incorporated into each Customer Order. These Terms and Conditions are applicable to sales of Services originating or terminating in Australia.

DEFINITIONS

CONFIDENTIAL INFORMATION: Licensed Software, and all source code, source documentation, inventions, know-how, and ideas, updates and any documentation and information related to the Licensed Software, and any non-public information regarding the business of a party provided to either party by the other party where such information is marked or otherwise communicated as being "proprietary" or "confidential" or the like, or where such information is, by its nature, confidential.

CUSTOMER: The person, firm or corporation so named on the Customer Order.

CUSTOMER ORDER: A request for APEX NETWORKS Service submitted by the Customer in the format devised by APEX NETWORKS and accepted by APEX NETWORKS.

LICENSED SOFTWARE: Computer software, in object code format only, the use of which is required for use of Service ordered by Customer hereunder.

PREMISES: The location(s) occupied by Customer or its end users specified in the Customer Order to (or from) which Service will be delivered.

REVENUE COMMITMENT: A commitment which, if made by Customer in a Customer Order or in any other form specified and accepted by APEX NETWORKS, obligates Customer to order and pay for a minimum volume of Services during an agreed term.

RESTRICTED SERVICE: A service sold to a Customer that has a contractual restriction placed on it as noted in the Customer Order. Restrictions may apply to speed or mode of use or the ability to re-sell on that Service.

SERVICE: Any communications (or related) service offered by APEX NETWORKS pursuant to a Customer Order.

CUSTOMER ORDERS

1.1 SUBMISSION OF CUSTOMER ORDERS.

Customer may submit to APEX NETWORKS Customer Order forms requesting the provision of Service. Each Customer Order form shall be submitted on a form designated by APEX NETWORKS. APEX NETWORKS shall confirm the accuracy of information on the Customer Order form and the availability of the Services requested. The Customer Order form and attachments shall set forth the Service, the locations for delivery of same, the prices to be charged for same and any applicable term and/or Revenue Commitment.

1.2 UNDERTAKING OF APEX NETWORKS.

Upon signed and validated Customer Orders, APEX NETWORKS will furnish such Services in accordance with these Terms and Conditions and any Customer Orders executed by Customer. All title to equipment or materials used to deliver the Services (except as otherwise expressly agreed) shall be and remain with APEX NETWORKS.



BILLING AND PAYMENT

2.1 PAYMENT AND RENDERING OF BILLS.

APEX NETWORKS shall bill all charges incurred by and credits due to Customer on a monthly basis (unless otherwise agreed in writing by APEX NETWORKS and Customer). APEX NETWORKS shall bill in advance charges for all Services to be provided during the ensuing month except for charges which are dependent upon usage of Service (which charges shall be billed in arrears). Adjustments for the quantities of Service established or discontinued in any billing period will be prorated to the number of days based on a 30-day month. APEX NETWORKS will, upon request and if available, furnish such detailed information as may reasonably be required for verification of the bill.

2.2 PAYMENT OF BILLS.

All bills are due upon receipt thereof by Customer, and become past due seven (7) days or the term length as specified on the ORDER thereafter. The unpaid balance of any past due bills may bear interest at a rate of 1.5% per month (prorated on a daily basis), or the highest rate allowed by law, whichever is less. Interest will be applied for the number of days from the date the bill became past due to and including the date that payment is received by APEX NETWORKS.

2.3 TAXES AND FEES.

Except for taxes based on APEX NETWORKS net income and except with respect to ad valorem personal and real property taxes imposed on APEX NETWORKS property, Customer shall be responsible for payment of all sales, use, gross receipts, excise, access, bypass, franchise or other local, state and federal taxes, fees, charges, or surcharges, however designated, imposed on or based upon the provision, sale or use of the Services delivered by APEX NETWORKS (including, but not limited to, taxes and fees lawfully assessed by nations outside of the Australia). Any taxes shall be separately stated on Customer's bill. Any state or local tax, fee, charge, or surcharge shall be payable only for Services that are subject to such imposition.

2.4 REGULATORY AND LEGAL CHANGES

In the event of any change in applicable law or regulation that materially increases the cost of delivery of Service, APEX NETWORKS and Customer shall negotiate regarding the rates charged to Customer to reflect such increase in cost and, in the event that the parties are unable to reach agreement respecting new rates within 14 days after APEX NETWORKS delivery of written notice requesting renegotiation, then (a) APEX NETWORKS may pass such increased costs through to Customer, and (b) Customer may terminate the affected Customer Order upon no less than 14 days' prior written notice without payment of any applicable termination charge.

2.5 DISPUTED BILLS.

In the event that Customer disputes any portion of the charges contained in a bill, Customer must pay the undisputed portion of the invoice in full and submit a documented claim for the disputed amount. All claims must be submitted to APEX NETWORKS within 7 days of receipt of billing for those Services. If Customer does not submit a claim within such period and in the manner stated above, Customer waives all rights to dispute such charges.



2.6 CREDIT APPROVAL AND DEPOSITS.

Customer shall provide APEX NETWORKS with credit information as requested in advance of the commencement of delivery of Service under any Customer Order. Delivery of Service is subject to credit approval. APEX NETWORKS may require any Customer to make a deposit as a condition to APEX NETWORKS acceptance of any Customer Order submitted by Customer, or as a condition to APEX NETWORKS continuation of Service under any Customer Order (but only when Customer's consumption of Service materially exceeds Customer's anticipated use or when, in APEX NETWORKS reasonable discretion, such deposit is required in order to secure Customer's continued payment obligation), which deposit shall be held by APEX NETWORKS as security for payment of charges. A deposit may not exceed the actual or estimated rates and charges for the Service for a 3 month period. At such time as the provision of Service to Customer is terminated, the amount of the deposit will be credited to Customer's account and any credit balance which may remain will be refunded.

2.7 FRAUDULENT USE OF SERVICES

Customer shall be solely responsible for all charges incurred respecting the Services, even if such charges were incurred through or as a result of fraudulent or unauthorised use of the Services, unless APEX NETWORKS has actual knowledge of such fraudulent or unauthorised use and fails to inform Customer thereof or otherwise limit or preclude such use. Nothing in this Section 2.7, however, shall be construed to obligate APEX NETWORKS to detect or report unauthorised or fraudulent use of Services.

2.8 RESTRICTED SERVICE COMPLIANCE

Where a customer breaks any acceptable use clause or other network restriction on a Restricted Service the customer will be liable for full charges for entire length of contract as would be payable for a non restricted service:

- (a) these charges will be payable within 14 days to APEX NETWORKS unless the customer proves to the satisfaction of APEX NETWORKS that Service is once again operating as a Restricted Service; and
- (b) where the customer is sold a Restricted Service they will allow APEX NETWORKS access to the equipment configuration, billing information and any other paper or electronic version of records to the satisfaction of APEX Networks to ensure the Service is not being used outside its restriction.



CANCELLATION OF CUSTOMER ORDERS

3.1 CANCELLATION OF CUSTOMER ORDER BY APEX NETWORKS

A. For non-payment: APEX NETWORKS may, upon 7 days' written notice, discontinue Service without incurring any liability when there is an unpaid balance for Service that is past due.

B. For any violation of law or of any of the provisions governing the furnishing of Service: Any Customer Order shall be subject to cancellation, without notice, for any violation of any law, rule, regulation or policy of any government authority having jurisdiction over Service or by reason of any order or decision of a court or other government authority having jurisdiction which prohibits APEX NETWORKS from furnishing such Service.

C. For other causes: Any Customer Order shall be subject to cancellation, upon 7 days' prior written notice, in the event of a breach of a Customer Order, fraudulent use of the Service, or fraud or misrepresentation in any submission of information required in a Customer Order or any other information submitted to APEX NETWORKS.

D. For any Customer filing of bankruptcy or reorganisation, entering voluntary or otherwise administration, having an administrator appointed or failing to discharge an involuntary petition therefor within 21 days after filing APEX NETWORKS may immediately discontinue or suspend delivery of Service without incurring any liability.

E. For consumption of Services that materially exceeds Customer's credit limit: APEX NETWORKS may, upon 7 days prior written notice and provided Customer has not provided additional security for payment which is sufficient in APEX NETWORKS reasonable discretion, discontinue or suspend delivery of Service without incurring any liability.

3.2 EFFECT OF CANCELLATION

Upon APEX NETWORKS discontinuance of Service to Customer under any of the foregoing subparagraphs, APEX NETWORKS may, in addition to all other remedies that may be available to APEX NETWORKS at law or in equity or under any other provision of a Customer Order, assess and collect from Customer any termination charge set forth herein (to the extent applicable).

3.3 RESUMPTION OF SERVICE.

If Service has been discontinued by APEX NETWORKS, and Customer requests that Service be restored, APEX NETWORKS shall have the sole and absolute discretion to restore such Service only after satisfaction of such conditions as APEX NETWORKS determines to be required for its protection. Nonrecurring charges apply to restoration of Service.



DELIVERY OF SERVICES

4.1 APEX NETWORKS ACCESS TO PREMISES

Customer shall allow APEX NETWORKS continuous and reasonable access to the Premises to the extent reasonably determined by APEX NETWORKS to be appropriate to the installation, inspection and maintenance of equipment, facilities and systems relating to the Service. APEX NETWORKS shall notify Customer 2 business days in advance of any regularly scheduled maintenance that will require access to the Premises.

4.2 APEX NETWORKS FACILITIES.

APEX NETWORKS will use reasonable efforts to maintain the facilities and equipment required to deliver Service. Customers shall not and shall not permit others to rearrange, disconnect, remove, attempt to repair, or otherwise tamper with any of the facilities or equipment installed by APEX NETWORKS, except upon the written consent of APEX NETWORKS. Equipment provided or installed at the Premises by APEX NETWORKS for use in connection with the Service shall not be used for any purpose other than that for which APEX NETWORKS provided it. In the event that Customer or a third party attempts to operate or maintain any APEX NETWORKS-owned equipment without first obtaining APEX NETWORKS written approval, in addition to any other remedies of APEX NETWORKS for a breach by Customer of Customer's obligations hereunder, Customer shall pay APEX NETWORKS for any damage to APEX NETWORKS-owned equipment caused thereby. Customer shall be responsible for the payment of service charges in the event that maintenance or inspection of the equipment is required as a result of Customer's breach of this Section. APEX NETWORKS shall, in the event that such expenses are incurred, deliver to Customer a written invoice therefore. In no event shall APEX NETWORKS be liable to Customer or any other person for interruption of Service or for any other loss, cost or damage caused or related to improper use or maintenance of APEX NETWORKS-owned equipment.

4.3 TITLE AND POWER.

Title to all facilities (except as otherwise agreed), including terminal equipment, shall remain with APEX NETWORKS and/or its Suppliers.

4.4 CUSTOMER-PROVIDED EQUIPMENT

APEX NETWORKS shall not be responsible for the operation or maintenance of any Customer-provided communications equipment. APEX NETWORKS may install certain Customer provided communications equipment upon installation of Service; unless otherwise agreed by APEX NETWORKS in writing, APEX NETWORKS shall not thereafter be responsible for the operation or maintenance of such equipment. APEX NETWORKS shall not be responsible for the transmission or reception of signals by Customer-provided equipment or for the quality of, or defects in, such transmission.



4.5 REMOVAL OF EQUIPMENT

Customer agrees to allow APEX NETWORKS to remove all APEX NETWORKS-owned equipment from the Premises:

- (a) after termination, interruption or suspension of the Service in connection with which the equipment was used; and
- (b) for repair, replacement or otherwise as APEX NETWORKS may determine is necessary or desirable. At the time of such removal, such equipment shall be in the same condition as when delivered to Customer or installed in the Premises, normal wear and tear only excepted. Customer shall reimburse APEX NETWORKS for the depreciated cost of any equipment which is not in such condition.

4.6 SERVICE SUBJECT TO AVAILABILITY

The furnishing of Service under these Terms and Conditions is subject to the availability on a continuing basis of all the necessary facilities and is limited to the capacity of APEX Networks facilities, as well as facilities APEX NETWORKS may obtain from other carriers to furnish Service from time to time as required at the sole discretion of APEX NETWORKS. Nothing in these Terms and Conditions shall be construed to obligate Customer to submit, or APEX NETWORKS to accept, Customer Orders.

4.7 NO LIABILITY FOR FAILURE TO TRANSMIT MESSAGES

APEX NETWORKS does not undertake to transmit messages, but offers the use of its Service when available, and, as more fully set forth elsewhere in these Terms and Conditions and any applicable Customer Orders, shall not be liable for errors in transmission or for failure to establish connections.

4.8 SERVICE LEVEL AGREEMENTS

All warranties respecting the Service, and the remedies applicable to a failure of APEX NETWORKS to meet such warranties, shall be set forth in Service Level Agreements applicable to the particular Service, which Service Level Agreements (when and if issued by APEX NETWORKS) shall be deemed attached hereto and by this reference incorporated herein.

OBLIGATIONS AND LIABILITY LIMITATION

5.1 OBLIGATIONS OF THE CUSTOMER

Customer shall be responsible for:

- A. The payment of all charges applicable to the Service (including charges incurred as a result of fraud or unauthorised use of the Service).
- B. Damage or loss of APEX Networks facilities or equipment installed on the Premises (unless caused by the negligence or willful misconduct of the employees or agents of APEX NETWORKS);
- C. Providing the level of power, heating and air conditioning necessary to maintain the proper environment on the Premises for the provision of Service;
- D. Providing a safe place to work and complying with all laws and regulations regarding the working conditions on the Premises;
- E. Granting APEX NETWORKS or its employees access to the Premise for the purpose of maintaining APEX Networks facilities in accordance herewith;
- F. Keeping APEX NETWORKS equipment and facilities located on Premises free and clear of any lines or encumbrances.



5.2 LIABILITY

The liability of APEX NETWORKS for damages arising out of the furnishing of Service, including but not limited to mistakes, omissions, interruptions, delays, tortious conduct or errors, or other defects, representations, use of Service or arising out of the failure to furnish Service, whether caused by acts of commission or omission, shall be limited to the extension of credit allowances due under any Service Level Agreement. The extension of such credit allowances or refunds shall be the sole remedy of Customer and the sole liability of APEX NETWORKS. Neither party shall be liable for any indirect, incidental, special, consequential, exemplary or punitive damages (including but not limited to damages for lost profits or lost revenues), whether or not caused by the acts or omissions or negligence of its employees or agents, and regardless of whether such party has been informed of the possibility or likelihood of such damages.

5.3 DISCLAIMER OF WARRANTIES

APEX Networks makes no warranties or representations, express or implied either in fact or by operation of law, statutory or otherwise, including warranties of merchantability and fitness for a particular use, except those expressly set forth herein or in any applicable Service Level Agreement.

SOFTWARE TERMS

6.1 LICENSE

If and to the extent that Customer requires the use of Licensed Software in order to use the Service supplied under any Customer Order, then Customer shall have a nonexclusive, nontransferable license to use such Licensed Software only and solely to the extent required to permit delivery of the Service. Customer shall in no event be entitled to claim title to or any ownership interest in any Licensed Software (or any derivations or improvements thereto), and Customer shall execute any documentation reasonably required by APEX NETWORKS to memorialize APEX NETWORKS existing and continued ownership of Licensed Software.

6.2 RESTRICTIONS

Customer agrees that it shall not:

- (a) copy the Licensed Software except as allowed and permitted by the express written consent of APEX NETWORKS;
- (b) reverse engineer, decompile or disassemble the Licensed Software;
- (c) sell, lease, license or sublicense the Licensed Software; or
- (d) create, write or develop any derivative software or any other software program based on the Licensed Software or any Confidential Information of APEX NETWORKS.

6.3 IP ADDRESSES.

APEX NETWORKS may assign on a temporary basis a reasonable number of Internet Protocol Addresses for a fee or as part of another bundled service. All IP addresses are subject to approval from the relevant regional Internet registry. The customer acknowledges that the addresses are the sole property of APEX NETWORKS and are not portable. APEX NETWORKS reserves the right to change or modify allocations to the Customer. The Customer agrees that it will have no rights to the IP addresses upon termination and that all costs associated with any renumbering the Customer may have to do will be the sole responsibility of the Customer.



CONFIDENTIAL INFORMATION

7.1 DISCLOSURE AND USE.

The Confidential Information disclosed by either party constitutes the confidential and proprietary information of the disclosing party and the receiving party shall retain same in strict confidence and not disclose to any third party (except as authorised by these Terms and Conditions) without the disclosing party's express written consent. Each party agrees to treat all Confidential Information of the other in the same manner as it treats its own proprietary information, but in no case will the degree of care be less than reasonable care.

7.2 RESTRICTED USE.

Each party agrees:

- (a) to use Confidential Information only for the purposes of performance of any Customer Order or as otherwise expressly permitted by these Terms and Conditions;
- (b) not to make copies of Confidential Information or any part thereof except for purposes consistent with these Terms and Conditions; and
- (c) to reproduce and maintain any copies of any Confidential Information such proprietary legends or notices (whether of disclosing party or a third party) as are contained in or on the original or as the disclosing party may otherwise reasonably request.
- (d) that pricing and service delivery information that is not made public by the APEX NETWORKS via its public, non password protected website or other public means is confidential and should not be disclosed.
- (e) Access to any APEX NETWORKS online databases and the information in those databases is confidential.
- (f) APEX NETWORKS access to information regarding Customer use of RESTRICTED SERVICES is confidential and APEX NETWORKS will not retain any of this information past making a determination on the use of the RESTRICTED SERVICE.

7.3 EXCEPTIONS.

Notwithstanding the foregoing, each party's confidentiality obligations hereunder shall not apply to information which:

- (a) is already known to the receiving party;
- (b) becomes publicly available without fault of the receiving party;
- (c) is rightfully obtained by the receiving party from a third party without restriction as to disclosure, or is approved for release by written authorisation of the disclosing party;
- (d) is developed independently by the receiving party without use of the disclosing party's Confidential Information;
- (e) is used for the purpose of publicly promoting Customer use of the Service. For the avoidance of doubt any such information is limited to the name and/or logo of either party.
- (f) is required to be disclosed by law.

7.4 REMEDIES.

Notwithstanding any other section of these Terms and Conditions, the non-breaching party shall be entitled to seek equitable relief to protect its interests, including but not limited to preliminary and permanent injunctive relief. Nothing stated herein shall be construed to limit any other remedies available to the parties.



7.5 SURVIVAL.

The obligations of confidentiality and limitation of use shall survive the termination of any applicable Customer Order.

GENERAL TERMS

8.1 FORCE MAJEURE

Except with respect to payment obligations, neither party shall be liable, nor shall any credit allowance or other remedy be extended, for any failure of performance or equipment due to causes beyond such party's reasonable control, including but not limited to: acts of God, fire, train derailment, flood or other catastrophes; any law, order, regulation, direction, action, or request of any governmental entity or agency, or any civil or military authority; national emergencies, insurrections, riots, wars; unavailability of rights-of-way or materials; or strikes, lock-outs, work stoppages, or other labour difficulties.

8.2 ASSIGNMENT OR TRANSFER by the Customer

Customer may not transfer or assign the use of Service without the express prior written consent of APEX NETWORKS, and then only when such transfer or assignment can be accomplished without interruption of the use or location of Service. These Terms and Conditions shall apply to all such permitted transferees or assignees. Customer shall, unless otherwise expressly agreed by APEX NETWORKS in writing, remain liable for the payment of all charges due under each Customer Order.

8.3 ASSIGNMENT OR TRANSFER by APEX NETWORKS

Customer shall agree to allow APEX NETWORKS to assign this agreement and any other Agreement that reference this agreement to another party on 20 days notice.

8.4 NOTICES

Any notice APEX NETWORKS may give to Customer or Customer shall give to APEX NETWORKS shall be deemed properly given when delivered, if delivered in person, or when sent via facsimile, overnight courier, electronic mail or when sent via Australia Post, (a) with respect to Customer, the address listed on each Customer Order, or (b) with respect to APEX NETWORKS. Customer shall notify APEX NETWORKS of any changes to its addresses listed on any Customer Order.

8.5 INDEMNIFICATION BY CUSTOMER.

Customer shall indemnify, defend and hold APEX NETWORKS harmless from claims, loss, damage, expense (including solicitor's fees and court costs), or liability (including liability for patent infringement) arising from (1) any claims made against APEX NETWORKS by any end user in connection with the delivery or consumption of Service, (2) use of facilities furnished by APEX NETWORKS in a manner inconsistent with the terms hereof or in a manner that APEX NETWORKS did not contemplate and over which APEX NETWORKS exercises no control and (3) all other claims, loss, damage, expense (including solicitor's fees and court costs), or liability arising out of any commission or omission by Customer in connection with the Service.



8.6 INDEMNIFICATION BY APEX NETWORKS.

APEX NETWORKS shall indemnify, defend and hold Customer harmless from claims, loss, damage, expense (including attorney's fees and court costs), or liability (including liability for patent infringement) arising from all claims, loss, damage, expense (including solicitor's fees and court costs), or liability for property damage or personal injury to the extent that such claims arise out of or are caused by APEX NETWORKS negligence or willful misconduct.

8.7 APPLICATION OF TARIFFS.

APEX NETWORKS may elect or be required by law to file with the appropriate regulatory agency tariffs respecting the delivery of certain Service. In the event and to the extent that such tariffs have been or are filed respecting Service ordered by Customer, then (to the extent such provisions are not inconsistent with the terms of a Customer Order) the terms set forth in the applicable tariff shall govern APEX NETWORKS delivery of, and Customer's consumption or use of, such Service.

8.8 CONTENTS OF COMMUNICATIONS.

APEX NETWORKS shall have no liability or responsibility for the content of any communications transmitted via the Service by Customer or any other party, and Customer shall hold APEX NETWORKS harmless from any and all claims (including claims by governmental entities seeking to impose penal sanctions) related to such content.

8.9 ENTIRE UNDERSTANDING.

These Terms and Conditions, including any Agreement and Customer Orders executed hereunder (and any tariff applicable to the delivery of Service), constitutes the entire understanding of the parties related to the subject matter hereof. These Terms and Conditions may be amended by APEX NETWORKS at any time, and Customer agrees to be bound by the amended Terms and Conditions from and after the effective date of such amendment. In the event of a conflict between these Terms and Conditions and any Customer Order executed hereunder, the Customer Order shall control. These Terms and Conditions shall be governed and construed in accordance with the laws of the State of Queensland.

8.10 FUTURE CHANGES TO TERMS AND CONDITIONS

APEX NETWORKS reserves the right to change these Terms and Conditions by giving the Customer 20 days notice. The customer and APEX NETWORKS agree to negotiate in good faith regarding objections to changes to the Terms as notified by APEX NETWORKS. Failure to respond inside the 20 day period will be taken as acceptance of the new Terms. The latest version of these Terms may always be found on APEX NETWORKS web site.

8.11 NO WAIVER

No failure by either party to enforce a right hereunder shall constitute a waiver of such right.