



nbn™ Enterprise Ethernet Build Contract

NBN Co Limited ABN 86 136 533 741

nbn

[insert customer name], ABN [insert ABN]

Customer

The build activities described in this document are not a listed carriage service or a service that facilitates the supply of a listed carriage service for the purposes of section 152AL of the Competition and Consumer Act. The supply of build activities under this Agreement does not have the effect of making the build activities a declared service for the purposes of Part XIC of the Competition and Consumer Act. This document is not executable and is not a Standard Form of Access Agreement for the purposes of Part XIC of the Competition and Consumer Act.

nbn™ Enterprise Ethernet Build Contract

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Parties

NBN Co Limited ABN 86 136 533 741 of Level 40, 360 Elizabeth Street, Melbourne, Vic, 3000 (**nbn**)

[insert customer name] ABN **[insert ABN number]** of **[insert registered address]** (**Customer**)

Background

- A **nbn** and the Customer are parties to a WBA which sets out the terms on which the Customer may order Products from **nbn** and **nbn** will supply those Products to the Customer.
- B The parties are entering this build agreement governing the design and construction of infrastructure required for the supply of **nbn™** Enterprise Ethernet Ordered Products. This agreement does not govern the supply of Products to the Customer by **nbn**.
- C **nbn** and the Customer promise to carry out and complete their respective obligations in accordance with this Agreement.

Execution

Executed as an agreement.

Signed for **nbn co limited** by its authorised representatives:

Signature of authorised representative

Signature of authorised representative

Name of authorised representative

Name of authorised representative

Date of signature

Date of signature

Executed by **[insert customer name]** by its authorised representatives:

Signature of authorised representative

Signature of authorised representative

Name of authorised representative

Name of authorised representative

Date of signature

Date of signature

Section A: Master Agreement Framework

1. Build-only Agreement

This Agreement does not contain any terms under which the Customer may order Products from **nbn** or the terms on which **nbn** will supply Products to the Customer. Any such order or supply will occur on the terms of the WBA.

2. Term

This Agreement commences on the Commencement Date and continues until terminated in accordance with clause 3 (**Term**).

3. Termination

3.1 Termination for convenience

Either party may terminate this Agreement for any reason by providing at least 30 Business Days' notice in writing to the other party.

3.2 Termination for cause by **nbn**

nbn may terminate this Agreement upon notice to the Customer if:

- (a) the Customer commits a Material Default under this Agreement (including as specified in clause 15(c) in connection with payments) and:
 - (i) that Material Default is not capable of remedy; or
 - (ii) if the Material Default is able to be remedied, the Customer fails to remedy the Material Default within 30 days of a notice by **nbn** requiring the Customer to do so;
- (b) an Insolvency Event occurs in respect of the Customer;
- (c) a Regulatory Event has occurred which makes **nbn's** continued performance of this Agreement unlawful or potentially unlawful (as determined by **nbn**), or has a material adverse effect on **nbn's** expected commercial return in relation to this Agreement;
- (d) required by a Shareholder Minister; or
- (e) the Customer is no longer party to a WBA.

3.3 Termination for cause by the Customer

The Customer may terminate this Agreement upon notice to **nbn** if:

- (a) **nbn** commits a Material Default under this Agreement and:
 - (i) that Material Default is not capable of remedy; or
 - (ii) if the Material Default is able to be remedied, **nbn** fails to remedy the Material Default within 30 days of a notice by the Customer requiring **nbn** to do so; or
- (b) an Insolvency Event occurs in respect of **nbn**.

3.4 Effect of termination

- (a) If this Agreement is terminated under clause 3.1:
 - (i) that event does not terminate or cancel any Orders that have been Accepted as at the date of termination (in this clause 3.4, "**Incomplete Orders**"); and
 - (ii) all relevant clauses of this Agreement will continue to apply in respect of each Incomplete Order until it is cancelled or Completed in accordance with this Agreement.
- (b) If this Agreement is terminated under clause 3.2:
 - (i) any Incomplete Orders will be cancelled as at the date of termination; and
 - (ii) clause 6.2 sets out whether or not a Cancellation Charge will apply.
- (c) If this Agreement is terminated under clause 3.3:
 - (i) any Incomplete Orders will be cancelled as at the date of termination;
 - (ii) clause 5.1(c) sets out whether or not a Site Feasibility Study Rebate will apply; and
 - (iii) notwithstanding anything else in this Agreement, no Cancellation Charge or Fibre Build Contribution will apply in respect of those Incomplete Orders.

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- (d) If this Agreement is terminated under clause 4.3(c)(ii):
 - (i) subject to clause 3.4(d)(ii):
 - (A) that event does not terminate or cancel any Incomplete Orders; and
 - (B) all relevant clauses of this Agreement will continue to apply in respect of each Incomplete Order until it is cancelled or Completed in accordance with this Agreement; and
 - (ii) if the completion of any Incomplete Orders would be unlawful, then:
 - (A) any such Incomplete Orders will be cancelled as at the date of termination;
 - (B) clause 5.1(c) sets out whether or not a Site Feasibility Study Rebate will apply; and
 - (C) notwithstanding anything else in this Agreement, no Cancellation Charge or Fibre Build Contribution will apply in respect of those Incomplete Orders.
- (e) Termination of this Agreement by either party does not affect any accrued rights that either party may have under this Agreement.

4. Variation

4.1 Variation by agreement

Except as otherwise specified in this Agreement, this Agreement may only be varied, supplemented or replaced by agreement of the parties in writing.

4.2 Variation regarding Orders and Charges

- (a) Subject to clause 4.2(b), **nbn** may change any of clauses 5-8 or clause 12.1 by giving at least 30 Business Days' notice to the Customer of the variation.
- (b) **nbn** must:
 - (i) prior to issuing a variation notice under clause 4.2(a), consult with

Customer in relation to the proposed change; and

- (ii) not modify clause 12.1 under clause 4.2(a) to increase a Cancellation Charge to more than 120% of the amount of that Cancellation Charge at the Commencement Date.
- (c) Each change made by **nbn** under clause 4.2(a) will only apply in respect of any new Order placed on or after the effective date of the variation.

4.3 Variation for regulatory reasons

- (a) If **nbn** reasonably believes that a variation to this Agreement is required:
 - (i) as a result of a Regulatory Event; or
 - (ii) to comply with the requirements or consequences of its Non-Discrimination Obligations,

nbn will notify the Customer of the terms of the proposed variation (**Proposed Regulatory Variation Notice**).
- (b) The parties must meet and discuss in good faith the terms of any variation to this Agreement for a period of not less than 20 Business Days commencing on the Customer's receipt of the Proposed Regulatory Variation Notice.
- (c) If the parties are unable to agree a variation to this Agreement within 20 Business Days of the Customer's receipt of a Proposed Regulatory Variation Notice (or such other period agreed between the parties):
 - (i) **nbn** may, by not less than 10 Business Days' notice to the Customer, vary this Agreement on terms which it reasonably believes are required for the reasons in clause 4.3(a); and
 - (ii) the Customer may terminate this Agreement by notice in writing to **nbn** on or before the effective date of such variation as set out in that notice, in which case clause 3.4(a) will apply.

Section B: Orders

5. Ordering Process

5.1 Service Feasibility Assessment

- (a) The Customer may submit a request for a Service Feasibility Assessment in respect of a premises through:
 - (i) the **nbn**TM Enterprise Ethernet Portal by following the steps and providing the information required by the **nbn**TM Enterprise Ethernet Portal; or
 - (ii) B2B Access by following the steps and providing the information required by B2B Access.
- (b) If **nbn** determines that a Site Feasibility Study is required:
 - (i) **nbn** will notify the Customer through the **nbn**TM Enterprise Ethernet Portal or through B2B Access; and
 - (ii) the Customer may elect to either:
 - (A) proceed with the Site Feasibility Study, in which case the Customer will be liable to pay the Site Feasibility Study Charge of \$500; or
 - (B) discontinue the Service Feasibility Assessment process, in which case the request for the Site Feasibility Study will be cancelled.
- (c) **nbn** will apply a Site Feasibility Study Rebate of \$500 per Order if the Customer paid a Site Feasibility Study Charge in respect of that Order and:
 - (i) Delivery occurs at the Premises which was the subject of that Order; or
 - (ii) that Order is cancelled in accordance with clause 3.4(c)(i) or clause 3.4(d)(ii)(A); or
 - (iii) **nbn** notifies Customer under clause 5.1(e) that **nbn** has determined not to offer to perform a Fibre Build in respect of the relevant Premises.

- (d) If, following completion of the Service Feasibility Assessment, **nbn** determines to offer to perform a Fibre Build in respect of the relevant Premises, **nbn** will notify the Customer of:
 - (i) details of any Fibre Build Contribution; and
 - (ii) the Enterprise Ethernet Quote ID required to submit an order for **nbn**TM Enterprise Ethernet under the WBA at the relevant Premises.
- (e) Following a Service Feasibility Assessment, **nbn** may determine not to offer to perform a Fibre Build in respect of the relevant Premises, in which case **nbn** will:
 - (i) notify the Customer of the reason(s) why **nbn** does not intend to offer a Fibre Build; and
 - (ii) provide the Customer with an opportunity to discuss the reasons described in clause 5.1(e)(i).

5.2 Placement and acceptance of Orders

If:

- (a) **nbn** has offered to perform a Fibre Build in respect of a Premises under clause 5.1(d); and
- (b) **nbn** accepts an order for **nbn**TM Enterprise Ethernet placed by the Customer under the WBA using the Enterprise Ethernet Quote ID provided for that Premises,

the Customer will be deemed to have placed an Order for a Fibre Build in respect of that Premises and **nbn** will be deemed to have accepted that Order.

5.3 Amending Fibre Build Contribution

If, at any time prior to the commencement of the Build Phase, **nbn** determines that **nbn**'s costs of performing the Fibre Build are, or are likely to be:

- (a) 20% or more; or
- (b) \$20,000 or more,

than **nbn** had estimated at the time of completing the Service Feasibility Assessment, **nbn** may amend or introduce the Fibre Build Contribution and notify the Customer of the amended or new Fibre Build Contribution.

6. Cancellation of Fibre Build

6.1 Customer Cancellation of Order

- (a) The Customer may cancel an Order for a Fibre Build by cancelling an order placed by the Customer under the WBA for **nbn**TM Enterprise Ethernet to be supplied at a Premises.
- (b) If the Customer:
 - (i) receives a notice from **nbn** under clause 5.3; and
 - (ii) does not confirm to **nbn** that it accepts the amended or new Fibre Build Contribution within 10 Business Days of such notice,the Customer will be deemed to have cancelled the Order for the Fibre Build to which the amended or new Fibre Build Contribution relates.
- (c) If the Customer cancels an Order for a Fibre Build, the Customer must pay a Cancellation Charge calculated in accordance with clause 12.1(b) unless:
 - (i) the Customer cancels the Order within 5 Business Days of being notified that the Committed Delivery Date for the corresponding Ordered Product:
 - (A) exceeds the Customer Required Date; and
 - (B) is more than 65 Business Days after the date on which the Order was submitted; or
 - (ii) the Customer cancels the Order within 10 Business Days of receiving a notice from **nbn** in accordance with clause 5.3; or
 - (iii) the Customer cancels the Order in accordance with clause 6.1(b).
- (d) Except in respect of a cancellation described in clause 6.1(c)(i), 6.1(c)(ii) or 6.1(c)(iii), the Customer must pay the Fibre Build Contribution determined under clause 5.1(d) and amended (if applicable) under clause 5.3 if the Customer cancels an Order during the Build Phase or Pre-Delivery Phase.

- (e) This clause 6.1 does not apply to any Incomplete Orders that are cancelled in accordance with clause 3.4(c).

6.2 nbn Cancellation of Fibre Build

- (a) **nbn** may cancel an Order for a Fibre Build at a Premises by cancelling the order placed by the Customer under the WBA for **nbn**TM Enterprise Ethernet to be supplied at that Premises.
- (b) **nbn** must notify the Customer of its intention to cancel an Order, and reasons for doing so, at least 10 Business Days prior to cancelling the Order in accordance with clause 6.2(a)
- (c) The Customer must pay a Cancellation Charge to **nbn** in respect of an Order in accordance with clause 12.1(b) if one or more of the following occurs (irrespective of whether it is continuing to occur at the time **nbn** cancels the Order):
 - (i) **nbn** terminates the Agreement and cancels the Order under any of clause 3.2(a), clause 3.2(b) or clause 3.2(e);
 - (ii) **nbn** cancels the Order under this clause 6.2 and there have been at least 20 Business Days of delay to the Fibre Build which are fully or partly caused or contributed to by a Customer Event; or
 - (iii) **nbn** cancels the Order under this clause 6.2 because **nbn** was unable to secure access to a site in good faith after 3 attempts.
- (d) The Customer must pay the Fibre Build Contribution determined under clause 5.1(d) as amended (if applicable) under clause 5.3 if **nbn** cancels an Order during the Build Phase or Pre-Delivery Phase in any of the circumstances in clauses 6.2(c)(i) - 6.2(c)(iii).

7. Other consequences of Order Cancellation

If an Order is cancelled for any reason:

- (a) on and from the time of such cancellation, **nbn** does not have any obligation to perform the Fibre Build or Complete the Order; and
- (b) to the extent permitted by law, **nbn** will not have any liability to the Customer in

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connection with the Order not being Completed.

8. Credits, rebates and penalties

No credits, rebates or penalties will apply under this Agreement for a failure to meet the Committed Delivery Date, other than any Site Feasibility Study Rebate provided by **nbn** in accordance with this Agreement.

Section C: Build Activities

9. Performing the Build

9.1 Fibre Build

If **nbm** has accepted an Order, **nbm** will plan, design and construct a fibre optic link connecting a fibre aggregation node to a single location at the Premises, such location being determined by **nbm**, acting reasonably in consultation with the Customer (**Fibre Build**). The fibre optic link constructed by **nbm** as part of the Fibre Build will include a dedicated point-to-point fibre link between the Premises and the relevant fibre aggregation node.

9.2 Time

nbm may, from time to time, provide an indicative timetable showing the anticipated time for Completion in respect of each Premises. Any such timetable is indicative only. It does not constitute or amend the Committed Delivery Date for any corresponding Ordered Product and must not be relied upon by the Customer, including for the purpose of making representations to Downstream Customers.

10. Ownership of infrastructure

10.1 nbm owns the infrastructure and equipment

The Customer (and any Downstream Customer) does not obtain any right, title or interest (whether legal, equitable or statutory) in any part of the infrastructure, cable or associated equipment built, installed or used by **nbm** in connection with this Agreement.

10.2 Customer's obligations in relation to nbm infrastructure and equipment

The Customer must not (and must use reasonable endeavours to ensure that each Downstream Customer does not) damage or interfere with, or remove, any cable, infrastructure or associated equipment that is built, installed or used in connection with the Fibre Build.

11. Access

11.1 Access to premises

(a) The Customer must provide to **nbm** all End User information and other site owner, occupier or manager information requested by **nbm** that is reasonably necessary to enable **nbm** and its Personnel to directly organise access to the Premises and related sites in relation to the Fibre Build.

- (b) The Customer must obtain, on behalf of **nbm**, all consents required for **nbm** to access the Premises for the purposes of each Site Feasibility Study and each Fibre Build.
- (c) Where access is required by **nbm** or its Personnel for a purpose described in clause 11.1(d), the Customer must:
- (i) provide **nbm** and its Personnel with safe and timely access to any premises owned, controlled or occupied by the Customer or any of its Related Bodies Corporate; and
 - (ii) ensure that **nbm** and its Personnel are provided with safe and timely access to the premises of Downstream Customers for so long as:
 - (A) the relevant premises are owned, controlled or occupied by Downstream Customers, or any of their Related Bodies Corporate; and
 - (B) those persons remain Downstream Customers.
- (d) The purposes for which **nbm** may require access to a premises under clause 11.1(c) are:
- (i) to perform the Fibre Build;
 - (ii) to undertake a Service Feasibility Assessment (including a Site Feasibility Study); and
 - (iii) to exercise any of its rights or perform any of its obligations under this Agreement, provided that **nbm** exercises those rights and performs those obligations acting reasonably.
- (e) Each party will procure access for itself and its Personnel to Common Property.
- (f) The Customer must notify **nbm** as promptly as feasible in the circumstances where the Customer elects to procure or procures access to Common Property for **nbm** and Personnel of **nbm** either by obtaining the consent of the relevant person or body authorised to give such consent or pursuant to Schedule 3 of the Telecommunications Act.
- (g) Each party will provide reasonable assistance to the other in relation to access

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to premises for the purposes described in this clause 11.1.

- (h) **nbn** must ensure that any Personnel of **nbn** visiting any premises owned, controlled or operated or used by the Customer or Downstream Customer:
 - (i) comply with any policies that are notified by Customer or Downstream Customer (as applicable) to **nbn** from time to time (provided that as much notice as feasible in the circumstances is given to **nbn** by Customer or Downstream Customer), and any reasonable directions that may be given by Customer or Downstream Customer (as applicable) to **nbn** from time to time, and all OH&S Laws; and
 - (ii) do not at any time cause Customer to be in contravention of an OH&S Law.

Section D: Charges and Payment Terms

12. Charges, Invoicing and Payment

12.1 Charges

- (a) The Customer must pay the Site Feasibility Study Charges, the Fibre Build Contribution (if applicable) and the Cancellation Charge (if applicable) once the relevant Invoice Event for each charge occurs.
- (b) If the Customer must pay a Cancellation Charge under clause 6, the amount of that Cancellation Charge will be calculated as follows (depending on the phase of the relevant Fibre Build during which the Customer cancelled the Order):
 - (i) \$750 for cancellation during the Planning Phase;
 - (ii) \$2,050 for cancellation during the Design Phase; and
 - (iii) \$8,000 for cancellation during the Build Phase or Pre-Delivery Phase.
- (c) The Customer acknowledges that the Customer and not the Downstream Customer is responsible for all payments required to be made under this Agreement to **nbn** (including any Fibre Build Contribution and Cancellation Charges) even if a Downstream Customer:
 - (i) ceases to own or occupy the relevant Premises after the Customer places an Order for the relevant Fibre Build;
 - (ii) decides that it no longer wishes to proceed with the acquisition of products or services which require the Fibre Build in respect of its Premises; or
 - (iii) terminates or breaches any contract, arrangement or understanding it may have with the Customer.

12.2 Invoices

- (a) Following an Invoice Event, **nbn** will invoice the Customer for the relevant Charges.
- (b) **nbn** will use reasonable endeavours to include the relevant Charges in the first Customer invoice following the Invoice Event.
- (c) The Customer must pay **nbn** the full amount set out in an invoice on the later of the due date specified in an invoice and

the date which is 30 calendar days after the date of the invoice (**Due Date**).

- (d) Each invoice issued by **nbn** will:
 - (i) set out the amount payable by the Customer in Australian dollars; and
 - (ii) comply with all of the requirements of a Tax Invoice under the GST Law.

12.3 Method of payment

- (a) Each payment of an invoice by the Customer must be:
 - (i) paid by electronic funds transfer directly to **nbn's** nominated bank account or by such other means as stipulated by **nbn** in the invoice;
 - (ii) paid without any set-off, counterclaim, withholding or deduction, including on account of any amounts owed to the Customer by **nbn** or any third party; and
 - (iii) accompanied by sufficient information for **nbn** to identify, process and properly allocate those payments.
- (b) Each payment made by the Customer will be treated as being received by **nbn** when that payment is credited to **nbn's** nominated bank account in cleared funds. If a payment made by the Customer is dishonoured, then that payment will be treated as not having been received by **nbn** until it is credited to **nbn's** nominated account in cleared funds, together with a reimbursement of any dishonour fees and charges that have been paid, or may be payable, by **nbn** in respect of that dishonoured payment.

13. GST and Tax

- (a) The Fibre Build Contribution and any other amounts payable under this Agreement exclude GST (where applicable).
- (b) If GST is or becomes payable on a Supply made in connection with this Agreement, the party providing consideration for the Supply (in this clause 13, the **recipient**) is responsible for paying an additional amount (in this clause 13, the **additional amount**) to the party making that Supply (in this clause 13, the **supplier**).

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- (c) The payment of the additional amount is conditional on receipt of a valid Tax Invoice by the recipient.
- (d) The additional amount is equal to the amount of GST payable on that Supply, as calculated by the supplier in accordance with the GST Law.
- (e) The additional amount is payable by the recipient without set off, demand or deduction at the same time and in the same manner as the consideration for the Supply.
- (f) If an amount payable in connection with this Agreement is calculated by reference to an amount incurred by a party (in this clause 13, **the amount incurred**), the amount payable will be reduced by the amount of any Input Tax Credit to which that party is entitled in respect of that amount incurred.
- (g) If an Adjustment Event occurs, the parties must do all things necessary to make sure that the Adjustment Event is appropriately recognised.
- (i) accept that Billing Dispute Resolution Notice; or
- (ii) reject that Billing Dispute Resolution Notice and escalate the Billing Dispute under clause 14(d).
- (d) If a Billing Dispute Resolution Notice was not provided by **nbn** within the timeframe specified in clause 14(c), or the Billing Dispute Resolution Notice is rejected, either party may escalate a Billing Dispute by having its Relationship Point of Contact give a copy of the Billing Dispute Form to the other party's Relationship Point of Contact.
- (e) The parties' respective Relationship Points of Contact must attempt to resolve the Billing Dispute within 10 Business Days after a party's Relationship Point of Contact receives a copy of the Billing Dispute Form.
- (f) If the Billing Dispute remains unresolved after the conclusion of the timeframe in clause 14(e), either party may escalate an unresolved Billing Dispute for determination by a Billing Expert in accordance with, and subject to, the Resolution Institute Expert Determination Rules, by giving notice to the other party.

14. Billing errors and Billing Disputes

- (a) If an invoice omits or miscalculates any amounts payable under this Agreement, **nbn** may issue an additional invoice to the Customer, adjust an invoice submitted to the Customer or issue a credit to the Customer to recover or refund the omitted or miscalculated amounts if **nbn** does so no later than 6 months after the date of the original invoice.
- (b) If the Customer, acting reasonably, considers there is an error in the amount set out in an invoice payable by the Customer under this Agreement (**Billing Dispute**), the Customer must notify **nbn** by submitting a Billing Dispute Form within 6 months after the date of the invoice to which the Billing Dispute relates.
- (c) **nbn** will give to Customer a Billing Dispute Resolution Notice within 30 Business Days after receiving a Billing Dispute Form from Customer, or such longer period as may be agreed between the parties. Customer must, within 30 Business Days after receiving a Billing Dispute Resolution Notice:
 - (i) If none of the firms specified in clause 14(h) can provide a Billing Expert, the Chair of the Resolution Institute (or their nominee) may appoint a different Billing Expert.
 - (j) **nbn** and the Customer must, within 10 Business Days of the Billing Expert being agreed or determined, appoint the Billing
- (g) The parties must use reasonable endeavours to agree on a Billing Expert within 10 Business Days after a party receiving notice under clause 14(f).
- (h) If the parties cannot agree on a Billing Expert under clause 14(g) within the timeframe specified, either party may request that the Chair of the Resolution Institute (or their nominee) appoint a Billing Expert from one of the following firms:
 - (i) PricewaterhouseCoopers Australia;
 - (ii) Ernst & Young Australia;
 - (iii) KPMG Australia; or
 - (iv) Deloitte Touche Tohmatsu Australia.

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Expert on the terms of the Resolution Institute Expert Determination Rules (subject to the terms of this Agreement or as otherwise agreed by the parties and the Billing Expert).

- (k) The costs of the Billing Expert will be borne equally by **nbn** and the Customer.
- (l) Without limiting clause 15(c)(i), both parties must continue to perform their respective obligations in accordance with this Agreement in the event of a Billing Dispute.

15. **nbn's remedies for non-payment**

- (a) **nbn's** rights under this clause 15 are in addition to, and do not exclude or limit, its other rights under this Agreement or at law. Any exercise or waiver of **nbn's** rights under this clause will not waive or prevent the exercise of **nbn's** other rights or remedies under this Agreement or at law.
- (b) Any undisputed amount set out in an invoice that is not paid in full by the Due Date, or any disputed amount withheld in accordance with clause 14(b) agreed or determined to be due and payable, will be an **Overdue Amount** with effect from (but excluding) the Due Date.
- (c) If the Customer does not pay an Overdue Amount and that amount remains unpaid for 15 calendar days the Customer will be in Material Default and **nbn** may do one or more of the following:
 - (i) suspend any Service Feasibility Assessment and Fibre Build until the Overdue Amount is paid;
 - (ii) recover any Overdue Amount, plus the reasonable costs of recovery, as a debt due and payable immediately to **nbn**;
 - (iii) notify and exchange information regarding the Customer with **nbn's** debt collection and credit reporting bodies concerning overdue amounts;
 - (iv) charge the Customer interest on any Overdue Amount of an invoice applied for each day from (but excluding) the Due Date until (and including) the date that **nbn** receives payment in full at an annual percentage rate equal to the aggregate of the 90 Day Bank Bill

Swap Rate plus 2.5 per cent. The payment of any Overdue Amount under this Agreement does not relieve the Customer from the obligation to pay the interest accrued on that Overdue Amount under this clause 15;

- (v) enforce, call on, use or otherwise take action to exercise or obtain the benefit of any Financial Security to recover any Overdue Amount in accordance with the Credit Policy;
- (vi) review and assess the Credit Risk posed by the Customer in accordance with the Credit Policy;
- (vii) require the Customer to provide a new, or adjust the amount of an existing, Financial Security in accordance with the Credit Policy; and
- (viii) terminate this Agreement and any Order in accordance with clause 3 and invoice the Customer for any Cancellation Charge and Fibre Build Contribution in accordance with clause 6.2.

16. **Credit Policy**

- (a) The Customer warrants to **nbn** that throughout the Term it complies and will continue to comply with the Credit Policy, including providing a Financial Security where required under the Credit Policy.
- (b) Without limiting **nbn's** rights under clause 3.2, **nbn** is not obliged to perform or continue to perform any Fibre Build unless the Customer complies with the Credit Policy.
- (c) The Customer must notify **nbn** within 2 Business Days after the time the Customer no longer fully complies with the Credit Policy.

Section E: Liability, confidentiality, intellectual property, data security and Disputes (excluding Billing Disputes)

17. Liability

- (a) To the maximum extent permitted by law:
- (i) **nbn** is not liable to the Customer, and the Customer is not liable to **nbn**, in respect of any Consequential Loss which may be suffered or incurred arising out of or in connection with the Fibre Build or this Agreement; and
 - (ii) each of:
 - (A) **nbn's** liability to the Customer; and
 - (B) the Customer's liability to **nbn**,

whether under this Agreement, in tort (including negligence or otherwise), under any statute (to the extent that it is possible to exclude such liability) or otherwise at law or in equity, arising out of or in connection with the performance of **nbn's** or the Customer's obligations under this Agreement (as the case may be) is limited to the Liability Cap, other than in relation to:
 - (C) liability for personal injury including death;
 - (D) liability for damage to Tangible Property;
 - (E) the Customer's liability for any fees or charges payable under this Agreement, including any Fibre Build Contribution or Cancellation Charge; and
 - (F) **nbn's** liability for any Site Feasibility Study Rebates under this Agreement
- (b) Nothing in this Agreement excludes, restricts or modifies any right or remedy, or any guarantee, warranty or other term or condition implied or imposed by the Competition and Consumer Act which cannot be lawfully excluded or restricted.
- (c) Any Claims (including Downstream Claims) against **nbn** by third parties to which **Appendix A** applies must be managed by

the Customer and **nbn** as set out in **Appendix A**.

18. Confidentiality

18.1 Disclosure of Confidential Information

Each party (**Recipient**) acknowledges and agrees that:

- (a) The Confidential Information of the other party (**Discloser**) is confidential, and that the Recipient will not, except as set out in this Agreement:
 - (i) use or copy Confidential Information of the Discloser; or
 - (i) disclose or communicate, cause to be disclosed or communicated, or otherwise make available such Confidential Information to any person.
- (b) Confidential Information of the Customer may be used by **nbn**:
 - (i) for the purposes of undertaking planning, maintenance, construction, provisioning, testing, operations or reconfiguration of **nbn** infrastructure and equipment;
 - (ii) for the purposes of undertaking the Fibre Build;
 - (iii) for the purpose of billing the Customer;
 - (iv) to exercise its rights or perform its obligations under this Agreement or the WBA; or
 - (v) for any other purpose agreed to by the Customer.
- (c) Confidential Information of **nbn** may be used by the Customer:
 - (i) where it has been received in relation to this Agreement, to prepare for supplying Customer Products to Downstream Customers at a relevant Premises;
 - (ii) to enable the use of Customer Products by Downstream Customers;
 - (iii) to exercise its rights or perform its obligations under this Agreement or the WBA; or
 - (iv) for any other purpose agreed to by **nbn**.

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- (d) Confidential Information of the Discloser may be used and or disclosed (as the case may be) by the Recipient:
- (i) to those of its Related Bodies Corporate and its and their Personnel to whom the Confidential Information is reasonably required to be disclosed for the purposes of this Agreement provided the person to whom the disclosure is made is subject to an obligation to keep the information confidential;
 - (ii) to Downstream Customers to whom the Confidential Information is reasonably required to be disclosed for the purposes of this Agreement provided the person to whom the disclosure is made is subject to an obligation to keep the information confidential;
 - (iii) to any professional person for the purpose of obtaining advice in relation to matters arising out of or in connection with this Agreement, provided the person to whom the disclosure is made is subject to an obligation to keep the information confidential;
 - (iv) to an auditor acting for the Recipient to the extent necessary to permit that auditor to perform its audit functions, provided the person to whom the disclosure is made is subject to an obligation to keep the information confidential;
 - (v) in connection with legal proceedings, arbitration, expert determination and other dispute resolution mechanisms set out in this Agreement, provided that the Recipient has first given as much notice (in writing) as is reasonably practicable to the Discloser so that the Discloser has an opportunity to protect the confidentiality of its Confidential Information;
 - (vi) as required by law provided that the Recipient has first given as much notice as is reasonably practicable to the Discloser, that the Recipient is required to disclose the Confidential Information so that the Discloser has an opportunity to protect the confidentiality of its Confidential Information;
- (vii) with the written consent of the Discloser provided that prior to disclosing the Confidential Information of the Discloser:
- (A) the Recipient informs the relevant person or persons to whom disclosure is to be made that the information is the Confidential Information of the Discloser; and
 - (B) if required by the Discloser as a condition of giving its consent, the Recipient must provide the Discloser with a confidentiality undertaking (which is in a form approved by the Discloser) signed by the person or persons to whom disclosure is to be made;
- (viii) in accordance with a lawful and binding directive issued by, or where otherwise required by law to, a Regulator or Government Agency, provided that any Confidential Information originally marked by the Discloser as commercial-in-confidence is also marked commercial-in-confidence by the Recipient when making a disclosure under this clause;
- (ix) if reasonably required to protect the safety of persons or property or the integrity of a telecommunications network or in connection with an emergency;
- (x) as required by the listing rules of any stock exchange where the Recipient's securities are listed or quoted;
- (xi) where **nbn** is the Recipient, where required by law, to any Shareholder Minister and their respective government departments; and
- (xii) where **nbn** is the Recipient and the Confidential Information is provided pursuant to the Credit Policy, to any third party provided that the Customer may require a confidentiality undertaking to be given by that third party (on terms

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to be approved by the Customer, such approval not to be unreasonably withheld) prior to such Confidential Information being provided to that third party.

- (e) On demand by the Discloser, the Recipient must return, destroy or delete the Discloser's Confidential Information except to the extent it is impracticable to do so, or necessary to comply with the Recipient's internal governance processes, or any applicable law.
- (f) Notwithstanding the above, Confidential Information that is also "Confidential Information" as defined in the WBA may be used and disclosed by the Recipient in accordance with the terms of the WBA.

18.2 Co-operation

Subject to clause 18.1, each party must co-operate in any action taken by the other party to:

- (a) protect the confidentiality of the other party's Confidential Information; or
- (b) enforce its rights in relation to its Confidential Information.

18.3 No disclosure to Other Customers

Except where expressly contemplated by this Agreement, **nbn** may not disclose Confidential Information of the Customer to an Other Customer.

18.4 No warranty

Confidential Information provided by one party to the other party is provided for the benefit of that other party only. Each party acknowledges that no warranty is given by the Discloser that the Confidential Information is or will be correct.

18.5 Injunctive relief

Each party acknowledges that a breach of this clause 18 by one party may cause another party irreparable damage for which monetary damages would not be an adequate remedy. Accordingly, in addition to other remedies that may be available, a party may seek injunctive relief against such a breach or threatened breach of clause 18.

18.6 Disclosure by nbn for debt collection

- (a) If:
 - (i) **nbn** has the right to suspend any Fibre Build in respect of the

Customer failing to pay an amount due or owing to **nbn** under this Agreement by the due date for payment; or

- (ii) after suspension of supply of any Fibre Build under this Agreement, Customer fails to pay amounts due or owing to **nbn** by the due date for payment,

then, notwithstanding clause 18.1 **nbn** may do one or both of the following:

- (iii) notify and exchange information about the Customer (including the Customer's Confidential Information) with any credit reporting agency or **nbn's** collection agent to the extent necessary for the credit reporting agency or **nbn's** collection agent to carry out their respective functions; and
- (iv) without limiting clause 18.6(a)(iii), disclose to a credit reporting agency:
 - (A) the defaults made by the Customer to **nbn**; and
 - (B) the exercise by **nbn** of any right to suspend any Fibre Build under this Agreement.

18.7 Confidentiality under the PDF Terms

Each party agrees that their rights and obligations in relation to use and disclosure of confidential information under the PDF Terms are subject to separate confidentiality provisions set out in the PDF Terms.

19. Intellectual Property

- (a) Nothing in this Agreement operates to transfer or assign ownership of Intellectual Property Rights and, except as expressly provided under this clause 19, nothing in this Agreement confers on either party any right, title or interest in or to, any of the other party's Intellectual Property Rights or Third Party IPR.
- (b) Except as otherwise agreed, each party grants to the other an irrevocable, non-exclusive, royalty-free, non-transferable, worldwide licence for the Term to use, reproduce and communicate its Intellectual Property Rights embodied in any of its Material, to the extent required by the other party (directly or through its

Personnel) to perform its obligations and exercise its rights under this Agreement.

20. Data Security

- (a) Each party must apply reasonable security standards in respect of any data or information (including Confidential Information) of the other party (having regard to the nature of the data or information and the party's obligations under applicable law) that the party collects, stores, uses or discloses to third parties by any means inside or outside Australia and must not allow any person inside or outside of Australia to access any such data or information except in compliance with those data security standards.
- (b) Each party (the first party) must promptly notify the other party if the first party becomes aware that:
 - (i) the first party's security standards, as referred to in clause 20(a), have been compromised; and
 - (ii) the compromise of the first party's security standards results, in the reasonable opinion of the first party, in a risk that there has been, or will imminently be, unauthorised access by any person to:
 - (A) Personal Information disclosed or transferred to the first party by the other party in connection with this Agreement; or
 - (B) the information systems or interfaces of the other party that contain such Personal Information.

21. Disputes

21.1 Notice of Dispute

- (a) Any dispute or difference, other than a Billing Dispute, which arises between **nbn** and the Customer in respect of any fact, matter or thing arising out of, or in any way in connection with this Agreement (**Dispute**) must be resolved in accordance with this clause 21.
- (b) Where such Dispute arises, either party may give a notice in writing to the other party specifying the Dispute and the

position which the party believes is correct (**Notice of Dispute**).

- (c) If a Notice of Dispute is served, persons authorised by the Chief Customer Officer, Business (or equivalent) of each party must meet and negotiate with a view to resolving the Dispute.

21.2 Arbitration

- (a) If the Dispute is not resolved within 15 Business Days of service of the Notice of Dispute (or such other period agreed by the parties in writing), then, subject to the parties' right to seek injunctive or urgent declaratory relief, either party may refer the Dispute to arbitration conducted in accordance with the Resolution Institute Arbitration Rules by notice to the other party.
- (b) Any Dispute which is referred to arbitration will be conducted before a person to be:
 - (i) agreed between the parties; or
 - (ii) failing agreement within 10 Business Days after the referral of the Dispute to arbitration, a person nominated by the Resolution Institute.
- (c) Each party must continue to perform its obligations under this Agreement, notwithstanding the existence of a Dispute.

21.3 Court Proceedings

Neither **nbn** nor the Customer may commence any court proceedings in relation to a Dispute or Billing Dispute, except where:

- (a) expressly permitted under this Agreement;
- (b) an Insolvency Event affects, or is reasonably likely to affect imminently, either **nbn** or the Customer, and the other party reasonably considers it necessary to commence court proceedings in relation to a Dispute or Billing Dispute to preserve its position with respect to creditors of the other party;
- (c) **nbn** or the Customer is seeking to enforce unpaid debts;
- (d) **nbn** or the Customer is seeking urgent interlocutory relief; or
- (e) the relevant Dispute or Billing Dispute relates to a failure by **nbn** or the Customer to comply with clause 14 in relation to the

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Billing Dispute or this clause 21, which is not trivial or immaterial.

Section F: General Terms

22. Notices and contacts

22.1 Contacting the Customer

- (a) **nbn** may give notices to the Customer by sending a letter to the Customer's address (by post or email) in Schedule A to this Agreement, or as otherwise notified to **nbn**.
- (b) The contact person nominated in Schedule A to this Agreement (or as otherwise notified in writing to **nbn**) must be authorised to send and receive notices on behalf of each Downstream Customer.

22.2 Contacting nbn

- (a) The Customer may give notices to **nbn** by sending a letter to **nbn's** address (by post or email).
- (b) Any notice sent to **nbn** by the Customer under clause 21.1(b) must be given to **nbn's** Chief Legal Counsel as specified below (or such other person notified by **nbn** to the Customer from time to time):

Name: Jane Van Beelen
Chief Legal and Regulatory Officer

Address: Level 13, 100 Mount Street,
North Sydney NSW 2060

Email: janevanbeelen@nbnco.com.au

22.3 When a Notice is received

- (a) Each notice in connection with this Agreement is taken to be received by the addressee:
 - (i) (in the case of delivery by hand) on delivery;
 - (ii) (in the case of prepaid post) on the fifth Business Day after the day of posting; and
 - (iii) (in the case of email) unless the party sending the email knows or reasonably ought to suspect that the email and the attached communication were not delivered to the addressee's domain specified in the email address in the contact details, when the email was sent, but if the communication would otherwise be taken to be received on a day that is not a Business Day or after 5:00pm, it is

deemed to be received at 9:00am on the next Business Day.

22.4 Contact details

- (a) Each party must ensure that its contact details are up-to-date details of the name, postal address and email address for that party's:
 - (i) contact person for the purposes of notices under this Agreement;
 - (ii) nominated point of contact within its organisation whose role requires them to use reasonable endeavours to facilitate the resolution of relationship issues (the **Relationship Point of Contact**); and
 - (iii) other relevant contacts, as may be agreed.

23. Relationships

23.1 Relationship between the parties

- (a) This Agreement does not create a fiduciary relationship between the parties or any agency, partnership or trust.
- (b) The only relationship created under this Agreement between the parties is of supplier and customer. Neither party has the power to bind the other party.

23.2 Relationships with third parties

- (a) This Agreement does not create any obligation or legal relationship between **nbn** and any Downstream Customer or any other third party (in this clause 23.2, **Third Parties**).
- (b) The parties have entered into this Agreement in their own legal capacity and not as agent or trustee for, or a partner of, any other person and this Agreement does not grant any right or benefit to Third Parties.
- (c) If either party subcontracts any of its obligations under this Agreement, that party is responsible for all acts and omissions of its subcontractors as if they were those of the party and that party remains liable to the other party for all of its obligations under this Agreement and all acts, defaults, and negligence of any subcontractors as if the acts, defaults and negligence were the party's own.

24. Warranties

- (a) Each party represents and warrants that, as at the Commencement Date and on each day of the Term:
 - (i) it is a corporation duly incorporated and validly existing under the laws of the state or territory in which it is incorporated;
 - (ii) it has all necessary corporate power and authority to enter into this Agreement and to perform its obligations under this Agreement;
 - (iii) it has taken all necessary action to authorise the execution and performance of this Agreement;
 - (iv) this Agreement constitutes a legal, valid and binding obligation on it, and is enforceable against it, in accordance with its terms; and
 - (v) it is not suffering an Insolvency Event.

25. Assignment, novation and other dealings

- (a) If either party proposes to assign, novate or otherwise transfer or deal in any of its rights or benefits under this Agreement, then it must provide the other party at least 20 Business Days' prior written notice. For the purposes of this clause 25(a), a Change in Control of a party is deemed to be a transfer of that party's rights under this Agreement and that party must notify the other party to that deemed transfer in accordance with this clause 25.
- (b) Any assignment or novation of this Agreement, or any transfer or dealing in any of the rights or benefits under this Agreement (including any deemed transfer of rights):
 - (i) by **nbn**:
 - (A) to effect, or as a result of, any sale of the Commonwealth's ownership of **nbn** (in whole or in part);
 - (B) to effect, or as a result of, any corporate restructure of **nbn** or any Related Body Corporate of **nbn**; or
 - (C) to charge or otherwise encumber any of **nbn**'s assets in the ordinary course of

business, including any securitisation of **nbn**'s receivables; or

- (ii) by the Customer:
 - (A) to effect, or as a result of, any corporate restructure of the Customer or any Related Body Corporate of the Customer that does not change the "ultimate holding company" (as that term is defined in section 9 of the Corporations Act) of the Customer;
 - (B) as a result of a transfer or issue of any securities listed on any recognised stock or securities exchange; or
 - (C) to charge or otherwise encumber any of the Customer's assets in the ordinary course of business, including any securitisation of the Customer's receivables (provided the Customer gives prior notice to **nbn** in writing of the relevant proposed encumbrance),

will not be an assignment, novation, transfer or dealing (or deemed transfer) to which clause 25(a) applies.

26. Waiver

- (a) A party will only be deemed to have waived a right or remedy under this Agreement if that waiver is in writing and signed by that party.
- (b) Any failure or delay in exercising or a single or partial exercise of a right or remedy under this Agreement will not operate as a waiver and will not prevent further exercise of that, or of any other, right or remedy.

27. Costs, expenses and duties

- (a) Except where this Agreement provides otherwise, each party is responsible for its own costs and expenses of negotiating, preparing and executing this Agreement and any other instrument executed under this Agreement and complying with its obligations under this Agreement.
- (b) The Customer must pay all stamp duty (including interest, fines and penalties)

assessed to be payable on this Agreement, the performance of this Agreement (including the transfer of any property) and any transaction contemplated by it.

28. Electronic execution and counterparts

- (a) This Agreement is entered into on the date that the last party executes this Agreement.
- (b) This Agreement may be executed in any number of counterparts and by the parties on separate counterparts. Each counterpart constitutes an original of this Agreement and all together constitute one agreement.
- (c) Any document which must, under this Agreement, be executed or signed by a party may be:
 - (i) executed electronically; and
 - (ii) communicated electronically in any manner permitted under clause 22.

29. Interpretation

- (a) This Agreement is to be construed in accordance with the laws applicable in New South Wales.
- (b) If part of this Agreement is void or is not legally enforceable, that part will be severed from this Agreement. All other parts of the Agreement will continue.
- (c) A reference to:
 - (i) **nbn** includes its successors, permitted substitutes and permitted assignees;
 - (ii) a law or to a provision of a law includes a change to it or a re-enactment of it, a provision substituted for it and a regulation or statutory instrument issued under it;
 - (iii) "includes" or "including" means without limitation;
 - (iv) a Site Feasibility Study Charge or Site Feasibility Study Rebate being in respect of an Order is a reference to each such charge or rebate being in respect of a Premises to which the Customer places an order under the WBA for **nbn**[™] Enterprise Ethernet to be supplied; and
 - (v) a Contracted End User or End User includes a reference to a prospective Contracted End User or prospective

End User (respectively), where the context so requires.

30. Definitions

90 Day Bank Bill Swap Rate for any period means:

- (a) the rate which is the average of the bid rates shown at or about 10.30 am (Sydney time) on page "BBSY" on the Reuters Monitor System on the first day of that period for a term equal to 90 days;
- (b) if:
 - (i) the rate referred to in paragraph (a) of this definition is replaced or the service referred to in paragraph (a) of this definition ceases to be available; or
 - (ii) the basis on which the rate referred to in paragraph (a) of this definition is calculated or displayed changes after the date of this Agreement and **nbn** determines that the rate ceases to reflect **nbn**'s cost of funding to the same extent as at the date of this Agreement,

the rate determined by **nbn** acting reasonably, to be the appropriate equivalent rate having regard to prevailing market conditions.

Rates will be expressed as a yield percent per annum to maturity and if necessary will be rounded up to the nearest fourth decimal place.

Acceptance means the acceptance of an Order in accordance with clause 5.2.

ACMA means the Australian Communications and Media Authority.

Adjustment Event has the meaning given to that term in the GST Law.

Advisory Notice has the meaning given to that term in section 151AQB of the Competition and Consumer Act.

Agreement means this agreement, including any annexures, schedules or attachments to it, as amended from time to time in accordance with its terms.

B2B Access has the meaning given in the WBA.

Billing Dispute has the meaning given to that term in clause 14(b).

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Billing Dispute Form means the document by that name which is published by **nbn** from time to time.

Billing Dispute Resolution Notice means a notice given by **nbn** to Customer which sets out:

- (a) **nbn's** proposed resolution of a Billing Dispute; and
- (b) the proposed actions to be taken by **nbn** and Customer to settle a Billing Dispute.

Billing Expert means a person who is an auditor qualified under Australian law and appointed under clause 14.

Build Phase means, for each Order, the period:

- (a) starting from the date on which **nbn** commences the construction portion of the Fibre Build; and
- (b) ending on the date of Completion.

Business Day means a day which is not a Saturday, Sunday, bank holiday or public holiday in the States or Territories where the relevant works or tasks are being carried out.

Cancellation Charge means an amount calculated in accordance with clause 12.1(b).

Carriage Service Provider has the meaning given to that term in Section 87 of the Telecommunications Act.

Carrier has the meaning given to that term in section 7 of the Telecommunications Act.

Change in Control has the meaning given in the WBA.

Claim means any claim, allegation, cause of action, proceeding, suit or demand made however it arises and whether it is present or future, fixed or unascertained, actual or contingent.

Commencement Date means the date on which this Agreement is executed by the last party to execute this Agreement.

Committed Delivery Date has the meaning given to that term in the WBA.

CommsAlliance means Communications Alliance Ltd.

Common Property means any real property or part thereof which is owned or managed by a third party strata body, managing corporation or other similar entity, or which is otherwise common to, accessible by, or shared between,

two or more separately owned or occupied Premises to which **nbn** may require access.

Commonwealth means the Commonwealth of Australia.

Competition and Consumer Act means the *Competition and Consumer Act 2010* (Cth).

Competition Notice has the meaning given to that term in section 151AB of the Competition and Consumer Act.

Completion means, in respect of an Order, when the Fibre Build is complete.

Confidential Information means this Agreement and all:

- (a) information of a party or any of its Related Bodies Corporate relating to or arising from this Agreement;
- (b) information, which, either orally or in writing, is designated or indicated as being proprietary or confidential information, or is by its nature confidential, or that the party receiving the information knows, or ought to know, is confidential;
- (c) trade secrets or other types of information of a party or any of its Related Bodies Corporate which are capable of protection at law or equity as confidential information;
- (d) information from a third party, where a party is advised by the other party that such information is confidential; and
- (e) information derived or produced, partly or wholly, from the information referred to above,

whether the information was disclosed:

- (f) orally, in writing or in electronic or machine readable form;
- (g) before on or after the Commencement Date; or
- (h) in the course of discussions between the parties,

in each case which is not in the public domain.

Consequential Loss means Loss which:

- (a) does not arise directly, or naturally in the usual course of things, from the breach, action or inaction in question; or
- (b) constitutes loss of profit, loss of anticipated profit, loss of opportunity or anticipated

savings, loss of revenue, loss or impairment of credit rating, loss of data, loss of business opportunities and loss of or damage to reputation or goodwill even if such loss arises directly or naturally in the usual course of things from that breach, action or inaction,

but does not include the following Losses to the extent that they arise directly, or naturally in the usual course of things, from the breach, action or inaction in question:

- (c) reasonable costs incurred in remedying the impact of the breach, action or inaction in question;
- (d) reasonable overtime and related expenses (including travel, lodging and wages); and
- (e) payments or penalties imposed by any Government Agency.

Content Service Provider has the meaning given to that term in section 97 of the Telecommunications Act.

Contracted End User means an End User acquiring a Customer Product or Downstream Product under a contract with Customer, a Downstream Service Provider or another Contracted End User (as the case may be).

Corporations Act means the *Corporations Act 2001* (Cth).

Credit Policy means the **nbn**[™] Technology Extension Contract Credit Policy which forms part of this Agreement, a copy of which was provided to the Customer prior to entry into this Agreement.

Credit Risk has the meaning given in the Credit Policy.

Customer Event has the meaning given in the WBA.

Customer Product has the meaning given in the WBA.

Customer Required Date means the date by which the Customer requires the Ordered Product to be available, as indicated by the Customer on placement of the Order.

Default means a failure, inability or refusal by a party to comply with the terms of this Agreement.

Delivery has the meaning given to that term in the WBA.

Design Phase means, for each Order, the period:

- (a) starting on the day immediately after the end of the Planning Phase; and
- (b) ending on the day immediately before the start of the Build Phase.

Dispute has the meaning given in clause 21.1(a).

Downstream Claim means a Claim against **nbn**, any of its Related Bodies Corporate or any of their respective Personnel by a Downstream Customer or any of their respective Related Bodies Corporate in connection with this Agreement.

Downstream Claimant means a person who makes a Downstream Claim.

Downstream Contract means an agreement pursuant to which a Downstream Service Provider or Contracted End User acquires or has agreed to acquire (or another End User is the ultimate recipient of) a Customer Product or Downstream Product.

Downstream Customer means any actual or prospective Downstream Service Provider or End User of the Customer.

Downstream Product has the meaning given in the WBA.

Downstream Service Provider has the meaning given in the WBA.

Due Date has the meaning in clause 12.2(c).

End User has the meaning given in the WBA.

Enterprise Ethernet Quote ID has the meaning given in the WBA.

Fibre Build has the meaning given to that term in clause 9.1.

Fibre Build Contribution means, in respect of each Order, the amount notified by **nbn** in accordance with clause 5.

Financial Security has the meaning given in the Credit Policy.

Government Agency means any court or tribunal of competent jurisdiction or any agency, authority, board, department, government, instrumentality, ministry, official or public or statutory person of the Commonwealth or of any State or Territory of Australia, and any local or municipal government or governmental bodies.

GST has the meaning given in the GST Law.

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GST Law means the *A New Tax System (Goods and Services Tax) Act 1999* (Cth), as amended from time to time.

Industry Code means an industry code developed and registered with the ACMA under Part 6 of the Telecommunications Act.

Industry Standard means an industry standard determined by the ACMA under Part 6 of the Telecommunications Act.

Input Tax Credit has the meaning given to that term in the GST Law.

Insolvency Event means any of the following events occurring:

- (a) a receiver, manager, receiver and manager, trustee, administrator, Controller (as defined in section 9 of the *Corporations Act 2001* (Cth)) or similar officer is appointed in respect of that party or any asset of that party;
- (b) a liquidator or provisional liquidator is appointed in respect of that party or the party is wound up;
- (c) an application is made to court for an order, or an order is made, or a meeting is convened, or a resolution is passed, for the purpose of appointing a person referred to in paragraphs (a) or (b);
- (d) a scheme of arrangement is entered into (and that application is not withdrawn or dismissed within 10 Business Days);
- (e) a moratorium of any debts of the party, or an official assignment or a composition of or an arrangement (formal or informal) with any creditors of that party (or similar proceedings or arrangements by which the assets of the party are subjected to the control of the party's creditors), is ordered, declared or agreed to, or is applied for and the application is not withdrawn or dismissed within 10 Business Days;
- (f) the party becomes, admits in writing that it is, is declared to be or is deemed under any applicable law to be, insolvent or unable to pay its debts;
- (g) any writ of execution, garnishee order, mareva injunction or similar order is made, levied or issued against, or in relation to, any asset of the party; or
- (h) any act is done or event occurs which under the Laws of any country other than

Australia has an analogous or similar effect to any of the events in paragraphs (a) to (g).

Intellectual Property Rights has the meaning given to it in the WBA.

Invoice Event means for:

- (a) the Site Feasibility Study Charge, the Customer becoming liable to pay that Charge in accordance with clause 5.1(b)(ii)(A);
- (b) the Site Feasibility Study Rebate, first invoice after Delivery;
- (c) the Fibre Build Contribution, any of the following:
 - (i) Delivery;
 - (ii) the Customer becoming liable to pay the Fibre Build Contribution under clause 6.1(d); and
 - (iii) the Customer becoming liable to pay the Fibre Build Contribution under clause 6.2(d); or
- (d) a Cancellation Charge, the Customer becoming liable to pay the Cancellation Charge under clause 6.

Liability Cap means:

- (a) in the case of **nbn**, \$5,000,000; and
- (b) in the case of the Customer, \$5,000,000.

Loss means losses, damages, liabilities, charges, expenses, compensation, fine, penalty, payment outgoings or costs and all related costs and expenses (including reasonable legal fees and reasonable costs of investigation, litigation, settlement, judgment, appeal, interest and penalties) of any nature or kind, however it arises and whether it is present or future, fixed or unascertained, actual or contingent.

Material means any material (including technical and marketing material) provided or otherwise made available by or on behalf of a party under this Agreement.

Material Default means a Default which:

- (a) itself, or when combined with other Defaults, is a material breach of this Agreement; or
- (b) is expressly specified to be a Material Default in this Agreement.

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NBN Companies Act means the *National Broadband Network Companies Act 2011* (Cth).

Non-Discrimination Obligations means the obligations applying to an NBN corporation (as that term is defined in section 5 of the NBN Companies Act) under section 152AXC and section 152AXD of the Competition and Consumer Act.

Notice of Dispute has the meaning given to that term in clause 21.1(b).

OH&S Law means all laws and legislative requirements relating to occupational health & safety.

Order means an order for a Fibre Build submitted in accordance with clause 5.2.

Ordered Product has the meaning given in the WBA.

Other Customer has the meaning given in the WBA.

Overdue Amount has the meaning given to that term in clause 15(b).

PDF Terms means the document entitled "Product Development Forum Terms" as entered into by the parties.

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

Personnel means, in relation to a party or third party, that party's officers, employees, agents, contractors, subcontractors and consultants.

Planning Phase means, for each Order, the period:

- (a) starting on the day the Order is placed; and
- (b) ending on the day **nbn** advises Customer that Order has progressed to Design Phase.

Pre-Delivery Phase means, for each Order, the period:

- (a) starting on the day immediately after the end of the Build Phase; and
- (b) ending on the day of Delivery.

Premises has the meaning given to that term in the WBA.

Product has the meaning given in the WBA.

Regulator means, as the context requires:

- (a) the Commonwealth government minister responsible for administering Part XIB and/or Part XIC of the Competition and Consumer Act;
- (b) the Commonwealth government minister responsible for administering the Telecommunications Act;
- (c) the Australian Competition and Consumer Commission;
- (d) the Australian Communications and Media Authority;
- (e) the Telecommunications Industry Ombudsman;
- (f) any other Commonwealth government minister, Government Agency or parliamentary committee or parliamentary body whose activities impact on **nbn**'s business.

Regulatory Event means:

- (a) any enactment, amendment, replacement or repeal of any law;
- (b) the lawful making, amendment or withdrawal of any determination, order, directive, consent or finding by a Regulator, Commonwealth government minister, Government Agency or a court of competent jurisdiction;
- (c) any investigation, action or proceeding by a Regulator;
- (d) the making of any code by CommsAlliance (or any replacement or successor to CommsAlliance) to which **nbn** is a code signatory, the registration of any Industry Code, the determination of an Industry Standard or the making of any Technical Standard (or any amendment or withdrawal of such codes or standards);
- (e) any declaration, amendment, or removal of a condition applying to a party's carrier licence (if applicable), including **nbn** being required to comply with section 152CJB of the Competition and Consumer Act in relation to a specific eligible service and **nbn** being prohibited from supplying a specified carriage service to Carriers, Carriage Service Providers or Content Service Providers under section 41(3) of the NBN Companies Act;

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- (f) any determination, amendment or removal of a Service Provider Rule applicable to a party;
- (g) any amendment to the WBA necessary to comply with any applicable law or required by a "Regulatory Event" (as defined in the WBA);
- (h) the issuing of an Advisory Notice or Competition Notice by the ACCC in respect of **nbn**; or
- (i) the issuing of an injunction against a party in relation to a breach or contravention (alleged or otherwise) of the Competition and Consumer Act.

Related Body Corporate has the meaning given in the Corporations Act.

Relationship Point of Contact has the meaning given to that term in clause 22.4(a)(ii).

Service Feasibility Assessment means an assessment by **nbn** regarding the availability of a Fibre Build at a particular Premises.

Service Provider Rule has the meaning given to that term in section 98 of the Telecommunications Act.

Serviceable has the meaning given in the WBA.

Shareholder Ministers means collectively the Communications Minister (which has the meaning given to that term in the NBN Companies Act) and the Finance Minister (which has the meaning given to that term in section 7 of the Telecommunications Act).

Site Feasibility Study means a detailed assessment, which is carried out by **nbn** as part of a Service Feasibility Assessment and which may involve a site visit.

Site Feasibility Study Charge means the charge described in clause 5.1(b)(ii)(A).

Site Feasibility Study Rebate means a rebate by **nbn** to Customer of the Site Feasibility Study Charge in relation to a completed Order.

Supply has the meaning given to that term in the GST Law.

Tangible Property means physical property, including real property, but does not include non-physical property such as incorporeal property or intellectual property rights.

Tax Invoice has the meaning given in the GST Law.

Technical Standard means any technical standard made by the ACMA under Part 21 of the Telecommunications Act.

Telecommunications Act means the *Telecommunications Act 1997* (Cth).

Term has the meaning given to that term in clause 2.

Third Party IPR has the meaning given in the WBA.

Wholesale Broadband Agreement or WBA means the Wholesale Broadband Agreement between the parties in force at the date of this Agreement or any new wholesale broadband agreement between the parties which supersedes it and which governs the supply of products and services from **nbn** to the Customer.

Schedule A – **Customer contact details**

Customer details

Postal address:

Email address:

Contact person:

Contact person telephone:

Contact person email:

Appendix A – nbn™ Enterprise Ethernet Build Contract

A1 Downstream Claims against nbn

- (a) If **nbn** notifies the Customer of a Downstream Claim, the Customer may, within 20 Business Days after such notice, deliver to **nbn** a duly executed, binding and unconditional offer of assignment (in the form set out in Schedule A to the WBA or as otherwise notified by **nbn** to the Customer from time to time) of the Customer's, Downstream Service Provider's or Contracted End User's rights (as applicable) against the Downstream Claimant(s) under a Model Undertaking (in this clause A1, an **Assignment**).
- (b) For the purposes of clause A1(a), a Model Undertaking is an undertaking in a Downstream Contract which is, subject to clause A1(d), binding on the relevant Downstream Claimant in accordance with the following terms, or on such other terms that **nbn** (acting reasonably) agrees in writing are no less effective in protecting **nbn**'s interests:

"X *Notwithstanding anything else in [this agreement]:*

- X.1 *to the extent permitted by law and without excluding, restricting or modifying any rights or remedies to which [the relevant Downstream Service Provider / Contracted End User] may be entitled to under the consumer guarantee provisions in Parts 3-2 and 5-4 of the Australian Consumer Law [the relevant Downstream Service Provider / End User] must not bring any claim (including any action, suit or proceedings of any nature or kind, whether in contract, tort (including negligence) at common law, in equity, under statute or otherwise however arising) against NBN Co Limited ACN 136 533 741 (**nbn**), its Related Bodies Corporate or any of their respective Personnel in connection with the design and installation of any infrastructure required for the **nbn** network to be made available to **nbn**'s customers*

at the premises which are the subject of [this agreement];

- X.2 *clause X.1 does not apply to a claim by [relevant Downstream Service Provider / End User] for loss or damage suffered or incurred by [relevant Downstream Service Provider / End User] arising from or in connection with:*

X.2.1 *any damage to, or loss of, tangible property to the extent that such losses are caused or contributed to by **nbn**, its Related Bodies Corporate or any of their respective Personnel or third party suppliers; or*

X.2.2 *the death or personal injury of any person to the extent caused or contributed to by:*

X2.2.1 *negligent or wilful acts or omissions of **nbn**, its Related Bodies Corporate or any of their respective Personnel or third party suppliers; or*

X2.2.2 *any equipment or network owned, operated or controlled by **nbn**.*

- X.3 *The supplier of the products and services which are the subject of this agreement may assign the benefit of this clause X to **nbn** or its nominee without consent or, to the extent that consent is required, [the relevant Downstream Service Provider / End User] hereby gives that consent.*

X.4 *This clause X survives expiry or termination of [this agreement].*

X.5 *In this clause X:*

Personnel means, in relation to a party or third party, that party's officers, employees, agents, contractors, subcontractors and consultants.

Related Body Corporate has the meaning given to that term in

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section 50 of the Corporations Act 2001 (Cth)."

- (c) The Customer must pay to **nbn** on demand an amount equal to all Losses suffered or incurred by **nbn**, any Related Body Corporate of **nbn**, or their respective Personnel (each an **nbn Indemnified Party**) arising from or in connection with any Downstream Claim if:
- (i) **nbn** has given notice to the Customer of the Downstream Claim and the Customer has not either:
 - (A) delivered to **nbn** an Assignment of a Model Undertaking that is, subject to clause A1(d), binding on the relevant Downstream Claimant in respect of the Downstream Claim in accordance with clauses A1(a) and A1(b); or
 - (B) taken any other steps which have the effect of placing **nbn**, any Related Body Corporate of **nbn**, and their respective Personnel in a position in respect of such Losses that is no worse than the position they would have been in had Customer delivered to **nbn** a binding Assignment in accordance with this clause A1; and
 - (ii) the Customer could lawfully have excluded or limited such Losses in its arrangements with Downstream Service Providers, Contracted End Users or third parties.
- (d) An undertaking does not cease to be a Model Undertaking for the purposes of this clause A1 solely by reason of it not being binding on the relevant Downstream Claimant by operation of Part 2-3 of the Australian Consumer Law.
- (e) If the Customer has delivered to **nbn** an Assignment pursuant to clause A1(a) or has otherwise excluded or limited Losses suffered or incurred by **nbn** in accordance with clause A1(c)(i)(B), the Customer must:
- (i) promptly provide, and, where applicable, ensure that any Downstream Service Provider or Contracted End User other than the Downstream Claimant promptly provides, all assistance reasonably requested by **nbn** in responding to and conducting the defence of a Downstream Claim to ensure that **nbn** obtains the full benefit of the Assignment or such other exclusion or limitation of liability (as applicable) (and **nbn** will pay the reasonable costs of such assistance); and
 - (ii) not do anything, and, where applicable, ensure that any Downstream Service Provider or Contracted End User other than the Downstream Claimant does not do anything, including during the course of any defence, settlement or compromise of a Claim which is related to a Downstream Claim, which prejudices **nbn**'s ability to obtain the full benefit of the Assignment or such other exclusion or limitation of liability (as applicable).
- (f) The Customer must pay to **nbn** on demand an amount equal to all Losses suffered or incurred by **nbn**, any Related Body Corporate of **nbn**, or their respective Personnel arising from or in connection with any Claim (including any Downstream Claim) by a third party against **nbn** to the extent that the Claim arises from or in connection with any:
- (i) breach of this Agreement by the Customer; or
 - (ii) negligent act or omission of the Customer, its Related Bodies Corporate, any of their respective Personnel or third party suppliers arising directly from or in connection with this Agreement, including the supply of any Customer Product by Customer to any Downstream Service Provider or Contracted End User.
- (g) Clause A1(c) and clause A1(f) do not apply to any Claim (including a Downstream Claim) arising from or in connection with:
- (i) the death or personal injury of any person;

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- (ii) damage to, or loss of any Tangible Property,
to the extent caused or contributed by:
 - (iii) the negligent or wilful acts or omissions of any **nbn** Indemnified Party; or
 - (iv) any network or equipment owned or controlled by **nbn**.
- (h) The liability exclusions in clause 17(a) of this Agreement do not apply to any liability of the Customer arising under clause A1(c) or clause A1(f).