



## BLUE NET TERMS AND CONDITIONS

(effective from 1 March 2010)

### BLUE NET CONTACT DETAILS:

**Name:** Blue Net Pty Limited (ABN 53 097 236 470) (**Blue Net**)  
**Address:** 200/4 Young Street, Neutral Bay NSW 2089  
**Phone:** 1300 852 147  
**Fax:** 02 8569 2070  
**Email:** [info@blue.net.au](mailto:info@blue.net.au)  
**Web page:** <http://www.blue.net.au>

### 1. Structure of this Agreement

This document is known as the Blue Net **General Terms and Conditions**. It sets out the terms and conditions on which we (**Blue Net**) will supply our Products and Services to you, **the Customer**.

You need to read these General Terms and Conditions in conjunction with the following terms and documents:

- (a) the terms and conditions of the specific Products and Services you are purchasing, as set out in the relevant Schedules;
- (b) the Order Form for the Products and Services;
- (c) the Pricing Terms for the Products and Services; and
- (d) any other Special Conditions that may be agreed between us from time to time.

By signing the Order Form for the Products and Services, you agree to be bound by the terms and documents in (a) to (d) above, as well as the General Terms and Conditions. These terms and documents form **the Agreement** between you and Blue Net.

### Definitions

The following words used in these General Terms and Conditions have the following meanings. Words expressed in the singular include the plural, and vice versa:

**"Acceptable Use Policy"** means Blue Net's rules that may apply to your use of a particular Service.

**"Blue Net"**, **"us"**, **"we"**, or **"our"** means and refers to Blue Net Pty Limited, or any authorised entities acting on behalf of and/or under contract with Blue Net.

**"Business Day"** means a day on which banks are open for business excluding Saturdays, Sundays and public holidays in New South Wales.

**"Charges"** means the amounts payable by you for the Products and Services supplied by Blue Net, as set out in the Pricing Terms.

**"Charging Period"** means the timeframe over which Charges are measured for a Product or Service which may be specified in the Pricing Terms, the invoice, Special Conditions or Order Form.

**"Confidential Information"** means all information of a party which:

- (e) is by its nature confidential;
- (f) is designated by that party as confidential; or
- (g) the other party knows or ought to know is confidential,

but does not include any information that is required to be disclosed by law, or any information that is in the public domain (unless that information enters the public domain as a result of a breach of this Agreement).

**"Customer"**, **"User"**, or **"you"** is the individual, business, corporate or other organisation using or subscribing to any Blue Net Services or purchasing any Blue Net Products.

**"Due Date"** means the day specified in an invoice as the date by which the Charges must be paid.

**"Force Majeure Event"** means any cause which is not reasonably within the control of a party affected including, but not limited to, acts of God, industrial disputes of any kind, war, blockade, disturbance, lightning, fire, earthquake, storm, flood, explosion or meteor, government restraint, expropriation or prohibition, unavailability or delay in availability of software, equipment or transport, inability or delay in granting or obtaining governmental approvals (other than in respect of external financing), consents, permits, licences or authorities, where, in respect of all such events, the cause is not reasonably within the control of the party affected.

**"Order Form"** means any type of application that Blue Net accepts as a request for the supply of any Product or Service, containing your details and specifying the type, quantity and characteristics of the Product or Service. It includes any pro forma document that may be provided by Blue Net for completion by you, such as a document entitled "Application Form" or similar.

**"Personal Information"** means information about you from which your identity is apparent or can reasonably be ascertained including your name, address and other details, and your credit rating.

**"Pricing Terms"** means the document forming part of this Agreement that is supplied by Blue Net and contains the applicable Charges for the Blue Net Products and Services.

“**Product**” refers to any products, eg hardware (not services) that Blue Net supplies to you under this Agreement.

“**Product Schedule**” means any document forming part of this Agreement that sets out the specific terms of supply for a Blue Net Product.

“**Schedule**” means any terms or attachments to this Agreement which, by their nature, are intended to form part of this Agreement, including those documents listed at clause 1 of these General Terms and Conditions and any applicable Acceptable Use Policy.

“**Service**” refers to any services (not Products) that Blue Net supplies to you under this Agreement.

“**Service Schedule**” means any document forming part of this Agreement that sets out the specific terms of supply for a Blue Net Service.

“**Service Commencement Date**” means the date specified in the Order Form, or as otherwise agreed between you and Blue Net, as the date on which Blue Net will commence supplying a Service to you.

“**Special Conditions**” means any particular terms and conditions for the supply of a Product or Service specific to your purchase of those Products or Services which, by their nature, are intended to form part of this Agreement. The Special Conditions may be contained in a Schedule such as the Order Form or the Pricing Terms, or in any other format agreed between you and Blue Net from time to time.

## **2. Term of this Agreement**

This Agreement commences either on the Service Commencement Date, or the date on which we first supply a Product or Service to you (whichever occurs first). This Agreement will continue for the period set out in the Order Form or Special Conditions, unless it expires or is terminated in accordance with these General Terms and Conditions.

## **3. Access to premises**

In addition to any other obligations set out in these General Terms and Conditions, any Product Schedule, Service Schedule, Order Form or Special Conditions, you must provide reasonable and safe access to the premises at which the Products or Services are supplied as requested by Blue Net, for the purposes of enabling Blue Net to supply those Products or Services.

## **4. Charges and Payment**

From the relevant Service Commencement Date or the date on which we first supply a Product or Service to you (whichever occurs first), you must pay the Charges.

### **4.1 Variation to Charges**

The Charges may be varied in accordance with any price review mechanism set out in the Schedules, including the Pricing Terms or Special Conditions.

### **4.2 Invoicing**

Blue Net will invoice you for the Charges incurred during a Charging Period. We may invoice you the Charges:

- (a) in advance of use, in respect of monthly recurring access Charges;
- (b) in arrears in respect of excess usage Charges, as set out in the relevant Schedule;
- (c) in arrears in respect of variable Charges; or
- (d) at any other frequency as notified to you from time to time.

### **4.3 Back-billing**

Blue Net may invoice you for any Charges accrued that have been previously unbilled or understated, provided that no more than 190 days has passed since the date on which the Charges were incurred.

### **4.4 Payment**

- (a) Each invoice must be paid by you in full by the Due Date. You may pay by any method specified in the Invoice or as nominated from time to time by Blue Net.
- (b) Payment of an amount of Charges is deemed as being received by Blue Net when the amount is shown as having been deposited in Blue Net's bank account, and in the case of cheque payment, the funds have been cleared.

### **4.5 Disputed invoices**

This clause sets out the specific dispute resolution procedures that apply to billing disputes. If you reasonably believe that there is an error in an invoice, you must follow these steps:

- (a) notify Blue Net in writing no later than 5 Business Days of receiving the invoice, including providing details of the reason for the dispute;
- (b) co-operate with Blue Net to try and resolve the dispute; and
- (c) pay any undisputed Charges in any invoice by the Due Date.

Promptly after being notified of a billing dispute under this clause, Blue Net will investigate the dispute in good faith. If the investigation determines that:

- (i) the dispute is valid (including because there is an error in the invoice), Blue Net will notify you and you will not be required to pay the disputed amount. Blue Net will adjust its records accordingly; or
- (ii) the dispute is not valid (including because there is no error in the invoice), Blue Net will notify you and you must pay the disputed amount in full within 5 Business Days of receiving Blue Net's notice.

Any disputes in relation to the investigation of a billing dispute under this clause shall be dealt with in accordance with clause 8 of the General Terms and Conditions.

### **4.6 Set-off**

Unless otherwise agreed, you are not entitled to set-off any amounts payable under this Agreement against any payment obligation of Blue Net, whether or not Blue Net's payment obligation arises under this Agreement.

#### **4.7 Failure to pay**

Unless an invoice is the subject of a bona fide billing dispute, and you fail to pay an invoice by the Due Date, Blue Net may:

- (a) charge interest on the overdue amounts at a rate of 2% above the current "ANZ Reference Interest Rate" from the Due Date until the date you make payment; and
- (b) suspend the provision of the Products and Services until you have paid the outstanding amounts ; and
- (c) charge a late fee of \$50.00 per occasion when an invoice becomes overdue; and
- (d) in case of professional debt collection recover from you the costs and fees for the debt collection process incurred by Blue Net.

#### **5. Restrictions on use**

You must not use the Services (and you must ensure that no-one else uses the Services):

- (a) to distribute material that is defamatory, offensive, abusive, obscene, menacing, threatening, harassing, or illegal under any law at any place where transmissions using the Services are sent from, viewed or received;
- (b) to copy or distribute material where there is no right to do so;
- (c) to commit a crime or for an unlawful purpose;
- (d) to do anything that may damage the network or systems (or the quality of those networks or systems) used in connection with delivery of the Service;
- (e) to engage in any activity that may expose Blue Net to liability; or
- (f) against the reasonable instructions of Blue Net, where such instructions are given in order to ensure that the Services are supplied by Blue Net in accordance with any laws and regulations that apply to Blue Net.

#### **6. Confidentiality**

- (a) Blue Net or the Customer, may from time to time when carrying out its obligations under this Agreement, obtain access to one another's Confidential Information. Both Blue Net and the Customer must keep such information confidential, unless disclosure is required by law.
- (b) The Customer agrees to keep this Agreement and all information connected with it (including the Charges, special pricing under the Pricing Terms or Order Form, any Special Conditions and offers) confidential unless disclosure is required by law or Blue Net expressly consents to the disclosure.
- (c) This confidentiality clause survives the expiry or termination Agreement.

#### **7. Privacy**

Blue Net may collect, use and disclose your Personal Information (and you consent to such collection, use or disclosure):

- (a) in connection with supplying a Product or Service to you;
- (b) to assess whether or not to supply you with a Product or Service; or
- (c) as required or in accordance with any applicable laws.

#### **8. Dispute resolution**

This clause sets out the process for resolving disputes that may arise between you and Blue Net. Neither you nor Blue Net may start court proceedings (except proceedings seeking urgent interlocutory relief) unless you or Blue Net has complied with the following dispute resolution procedures.

##### **8.1 Notice**

A party claiming that a dispute, difference or question arising out of this Agreement has arisen must notify the other party in writing giving details of the dispute.

##### **8.2 Escalation procedure**

The parties will first attempt to resolve all disputes by good faith negotiations, using any escalation procedures set out in the relevant Product or Service Schedules, or Special Conditions. If after following that escalation procedure the dispute remains unresolved within 10 Business Days of a notice being given under clause 8.1, the dispute will be referred to the Managing Director of Blue Net and his or her counterpart within the Customer's organisation, and they (or their duly authorised representatives) will promptly meet to discuss and attempt to resolve the issue in a manner that best preserves the ongoing relationship between the parties.

##### **8.3 Failure to resolve**

If the parties are unable to resolve a dispute in accordance with the escalation procedure set out in clause 8.2, including the 10 Business Days timeframe for resolution of the dispute, then either party may commence court proceedings or refer the dispute for resolution in an alternative dispute resolution forum. Such alternative forum may include resolution by expert determination, mediation or arbitration.

##### **8.4 Release if other party breaches**

If, in relation to a dispute, a party breaches any provision of these dispute resolution procedures, the other party is not obliged to comply with its obligations under this clause in relation to the dispute.

##### **8.5 Obligations continue**

Each party must continue to perform their respective obligations under this Agreement pending the resolution of a dispute.

##### **8.6 Costs**

Each party must bear its own costs of complying with the dispute resolution procedures under this clause.

#### **9. Force Majeure events**

- (a) Notwithstanding anything else in this Agreement, a party (the **Affected Party**) will not be liable for any failure to perform, or delay in the performance of its obligations, under this Agreement if the failure or delay is caused, whether directly or indirectly by a Force Majeure Event.
- (b) The Affected Party must notify the other party immediately of the Force Majeure Event, including describing the impact or anticipated impact of the Force Majeure Event on the Affected Party's performance and use its reasonable endeavours to continue or resume its performance in accordance with this Agreement as soon as possible, including:

- (i) using its reasonable endeavours to remedy or cause to be remedied any impact of the Force Majeure Event that is capable of remedy;
  - (ii) making alternative arrangements with a third party to enable it to fulfil its obligations, provided those alternative arrangements are satisfactory to the other party and do not involve any additional cost to the other party (unless the other party agrees otherwise in writing); and
  - (iii) keep the other party informed in relation to any change in its ability to continue or resume its performance.
- (c) Either party may terminate this Agreement on notice to the other party if a Force Majeure Event continues for a period of 14 continuous days.

## 10. Liability and Indemnity

- (a) You agree to defend, indemnify and hold Blue Net, its affiliates, officers, employees, agents and related bodies corporate harmless against all liabilities, actions, claims, suits, demands, damages, costs or expenses (including reasonable legal expenses) related to any breach by you of this Agreement, or arising out of or in any way connected to the use of Blue Net's Products and Services by any other person.
- (b) You indemnify Blue Net in respect of any loss, liability or expense arising out of the reproduction, broadcast, use, transmission, communication or making available of any material (including data and information of any sort) by anyone using the Products or Services.
- (c) You acknowledge that the Blue Net's Services are provided without warranty that they are continuous or fault-free. To the extent permitted by law, we are not liable for any loss or disappointment you or any user may suffer as a result of any faults or interruptions in the Service.
- (d) We are not liable for any losses you may incur in connection with the use of the Products or Services, where those losses are not directly caused by an act or omission of Blue Net.
- (e) We are not liable in tort (including negligence), contract or otherwise for any damages, including loss of profits, business or anticipated savings or any indirect or consequential damages.
- (f) Where any laws imply certain conditions and warranties into this Agreement that Blue Net cannot exclude, and any goods or services supplied under this Agreement are not of a kind ordinarily acquired for personal, domestic or household use or consumption, our liability to you is limited to (at our election) to:
- (i) in the case of goods:
    - A. replacing those goods or supplying similar goods, or paying for the cost of having them replaced; or
    - B. repairing those goods or paying for the cost of having them repaired; and
  - (ii) in the case of services:
    - A. supplying those services again, or paying for the cost of having them supplied again.
- (g) Other than in respect of the remedies for conditions and warranties set out in paragraph f above, Blue Net accepts liability to you in relation to:
- (i) all breaches of this Agreement by us in a 12 month period, up to a maximum aggregate amount each year equivalent to the total Charges paid or payable by you in the 12 month period in which the cause of action arises; or
  - (ii) damage to your property caused by our negligence.

## 11. Suspension and Termination

- (a) You may terminate this Agreement in accordance with the terms set out in the Order Form or any Special Conditions. Upon termination of this Agreement:
- (i) any Charges owing to Blue Net at termination shall become immediately due and payable;
  - (ii) Blue Net will cease to supply any Product or Service to you; and
  - (iii) any other obligations upon termination as set out in the Order Form or Special Conditions shall apply.
- (b) Blue Net may terminate this Agreement, or suspend the supply of a Product or Service for a reasonable period, in accordance with the terms set out in the Order Form or any Special Conditions or if:
- (i) you fail to pay the Charges in accordance with clause 4;
  - (ii) you breach this Agreement and do not rectify that breach within 10 Business Days of receiving a notice from us directing you to rectify that breach;
  - (iii) any supplier to Blue Net suspends the supply of a service (including as a result of a regulatory requirement) used as an input to supply the Service to you;
  - (iv) you become insolvent or otherwise unable to pay the Charges by the Due Date;
  - (v) you die (in the case of a natural person);
  - (vi) we are required to do so under law; or
  - (vii) we reasonably believe that the Service is being used fraudulently, or to commit unlawful activities, or otherwise contrary to the terms of this Agreement.

## 12. Variation

- (a) Subject to paragraphs b and c, Blue Net can vary this Agreement at any time, provided that we notify you of the change at least 14 days in advance. Your continued use of the Blue Net Services beyond the date of the change will be deemed acceptance of this Agreement as so varied.
- (b) Paragraph c only applies if you acquire the Products or Services under this Agreement where:
- (i) those Products or Services are acquired for the primary purpose of personal or domestic use, or if we reasonably consider the Charges paid or payable by you under this Agreement are unlikely to exceed \$20,000 annually; and
  - (ii) the Agreement has a fixed term, as specified in the Order Form.
- (c) Blue Net can vary this Agreement at any time, provided that we notify you of the change at least 21 days in advance. You may terminate this Agreement within 42 days of the date of such notice, however your continued use of the Blue Net Services beyond such time will be deemed acceptance of this Agreement as so varied.
- (d) If an emergency has arisen, Blue Net may vary this Agreement without notice to the extent reasonably necessary to protect Blue Net, its customers, suppliers and affiliates, or if so required under law.

## 13. General

### 13.1 Governing Law

This Agreement is governed by and construed in accordance with the laws of New South Wales and each party submits to the non-exclusive jurisdiction of the courts of New South Wales.

### **13.2 Entire Agreement**

- (a) This Agreement is the entire agreement between the parties about its subject matter and replaces all previous agreements, understandings, representations and warranties about that subject matter.
- (b) Each party represents and warrants that it has not relied on any representations or warranties about the subject matter of this Agreement except as expressly provided in this Agreement.

### **13.3 Third Party Rights**

Except as expressly provided in this Agreement:

- (a) each person who executes this Agreement does so solely in its own legal capacity and not as customer or trustee for or a partner of any other person; and
- (b) only those persons who execute this Agreement have a right or benefit under it.

### **13.4 Relationship of the Parties**

Except as expressly provided in this Agreement:

- (a) nothing in this Agreement is intended to constitute a fiduciary relationship or an agency, partnership or trust; and
- (b) no party has authority to bind any other party.

### **13.5 Further Assurances**

Except as expressly provided in this Agreement, each party must, at its own expense, do all things reasonably necessary to give full effect to this Agreement and the matters contemplated by it.

### **13.6 Consents and Approvals**

Except as expressly provided in this Agreement, a party may conditionally or unconditionally in its absolute discretion give or withhold any consent or approval under this Agreement.

### **13.7 Survival and Merger**

- (a) No term of this Agreement merges on completion of any transaction contemplated by this Agreement.
- (b) Those clauses which by their nature are intended to survive termination or expiry of this Agreement shall survive such termination or expiry.

### **13.8 Severability**

Any term of this Agreement which is wholly or partially void or unenforceable is severed to the extent that it is void or unenforceable. The validity or enforceability of the remainder of this Agreement is not affected.

### **13.9 Waiver**

- (a) No waiver of a right or remedy under this Agreement is effective unless it is in writing and signed by the party granting it. It is only effective in the specific instance and for the specific purpose for which it is granted.
- (b) A single or partial exercise of a right or remedy under this Agreement does not prevent a further exercise of that or of any other right or remedy. Failure to exercise or delay in exercising a right or remedy under this Agreement does not operate as a waiver or prevent further exercise of that or of any other right or remedy.

### **13.10 Cumulative Rights**

Except as expressly provided in this Agreement, the rights of a party under this Agreement are in addition to and do not exclude or limit any other rights or remedies provided by law.

### **13.11 Assignment, Novation and Other Dealings**

Blue Net may assign or novate this Agreement on notice to you. You must not assign or novate this Agreement or otherwise deal with the benefit of it or a right under it, or purport to do so, without the prior written consent of Blue Net, such consent not to be unreasonably withheld.

### **13.12 Costs, Expenses and Duties**

Except as expressly provided in this Agreement, each party must pay its own costs and expenses of negotiating, preparing and executing this Agreement and any other instrument executed under this Agreement.

### **13.13 Notices**

- (a) A notice, consent or other communication under this Agreement is only effective if:
  - (i) it is in writing, signed by or on behalf of the party giving it and it is received in full and legible form at the addressee's address or fax number; or
  - (ii) it is sent to and is received by the email address of the other party, as set out in this clause.
- (b) A notice is regarded as received at the time and on the day it is actually received, but if it is received on a day that is not a Business Day or after 5.00 pm on a Business Day it is regarded as received at 9.00 am on the following Business Day.
- (c) For the purposes of this clause, a party's address, fax number and email address are:
  - (i) for Blue Net, as set out on the front page of these General Terms and Conditions; and
  - (ii) for the Customer, as set out in the Order Form.