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# MAXCLOUD SERVICES TERMS & CONDITIONS

MAXWAN / MAXVPN REVISED APRIL 2016



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## MAXCLOUD SERVICES TERMS & CONDITIONS

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Maxon Australia provides maXwan - a managed IP wide area network (WAN) service within Telstra's network.  
Maxon Australia provides maXvpn - a managed IP virtual private network (VPN) service.

It is important to note that to use the maXvpn service a minimum of one (1) maXwan service is required. The Customer must initially have 2 maXwan service(s), unless a maXvpn service is purchased together with a maXwan, then only one (1) maXwan service is required.

Customers who wish to access either or both maXwan and/or maXvpn through the service(s) provided by Maxon Australia do so subject to the terms of this agreement which follow.

Before you can access maXwan and/or maXvpn through the service(s) provided by Maxon Australia, you must read, agree with and accept all of these terms:

### 1 Definitions

In this Agreement, unless the contrary intention appears:

"Charges"	means the money payable by the Customer to Maxon Australia pursuant to this Agreement;
"Commencement Date"	means the date which is five normal working days after the Customer pays Maxon Australia the Charges;
"Force Majeure"	means a circumstance beyond the reasonable control of the Parties which results in a Party being unable to observe or perform on time an obligation under this Agreement. Such circumstances shall include but shall not be limited to: acts of God, lightning strikes, earthquakes, floods, storms, explosions, fires and any natural disaster; acts of war, acts of public enemies, terrorism, riots, civil commotion, malicious damage, sabotage and revolution; and strikes; failure to perform by services and systems over which Maxon Australia has no control; damage to a facility of Telstra or any other carriage service provider used by Maxon Australia;
"Initial Term"	means twelve months from the Commencement Date;
"Service"	means maXwan - a managed IP wide area network (WAN) service within Telstra's Network or maXvpn - a managed IP virtual private network (VPN) service

### 2 Interpretation

In this Agreement, unless the contrary intention appears:

- the clause headings are for convenient reference only and have no effect in limiting or extending
- the language of the provisions to which they refer;
- a cross reference to a clause number is a reference to its sub clauses;
- words in the singular number include the plural and vice versa;
- words importing a gender include any other gender;
- a reference to a person includes a partnership and a body, whether corporate or otherwise;
- a reference to a clause is a reference to a clause or sub clause of this Agreement;
- a reference to a sub clause is a reference to a sub clause of the clause in which that reference is made;
- where a word or phrase is given a particular meaning, other parts of speech and grammatical forms of that word or phrase have corresponding meanings;
- the recitals to this Agreement do not form part of the Agreement;
- money references are references to Australian currency.

### 3 Term of agreement

- 3.1 The Service shall be provided by Maxon Australia to the Customer from the Commencement Date for the Initial Term.
- 3.2 Subject to sub clause 3, this Agreement may be renewed for subsequent terms of similar duration to the Initial Term.
- 3.3 Renewal of this Agreement pursuant to sub clause 2 is subject to the consent of Maxon Australia. Without limiting the foregoing, Maxon Australia may require an adjustment to the Charges as a condition of providing its consent to renewal.

### 4 Provision of service

- 4.1 Maxon Australia, in accordance with the terms and conditions of this Agreement, shall provide the Customer with the Service by such means as Maxon Australia determines. Maxon Australia shall use its best endeavour to provide the Service on a continuous basis during the term of this agreement. Maxon Australia will give the Customer notice if the Service is unavailable for access by the Customer due to maintenance.
- 4.2 Maxon Australia shall provide the Customer with all installation software, identification and log-in information (including a username and password) required for connection to the Service.
- 4.3 Any network address assignments (such as IP addresses) issued by Maxon Australia remain the property of Maxon. If the Customer ceases to access the Service for any reason or if this Agreement is terminated, such addresses must be reassigned to Maxon Australia.
- 4.4 Maxon Australia may, at its discretion, retain and assess any data or information concerning the Customer's use of the Service.

### 5 Access to the service

- 5.1 The Customer agrees to provide the modems and all other hardware and equipment required to access the Service and to pay for and do all things necessary to set up the Customer's site or sites for the use of the Service.
- 5.2 The Customer agrees to use modems and other hardware that comply with the technical standards and specifications determined by Maxon Australia.
- 5.3 The rights and obligations of the Customer under this Agreement shall not be assigned, sold, delegated, alienated, transferred or otherwise disposed of in any way by the Customer.
- 5.4 The Customer is responsible for maintaining the secrecy and confidentiality of all identification and log-in information required by the Customer to access the Service and for ensuring all file protections are set correctly.
- 5.5 The Customer agrees not to disclose to any other person, corporation, entity or organisation any identification or log-in information, whether in use or not, nor any other confidential information relating to the Service or Maxon Australia.
- 5.6 The Customer is liable for all fees resulting from use of the Service accessed through the Customer's identification or log-in information, whether authorised by the Customer or not. Disclosure or loss of identification or log-in information that results in the incurring of fees or misuse of the Service is the Customer's responsibility and any such occurrences should be immediately communicated to Maxon Australia. An invoice presented by Maxon Australia shall be deemed to be correct and prima facie evidence of all connection, access, usage and other fees contained in that invoice.

- 5.7 The Customer must notify Maxon Australia if any identification and log-in information required by the Customer to access the Service is lost, stolen or otherwise compromised. If this happens, Maxon Australia may suspend or alter the Customer's access to the Service.
- 5.8 Maxon Australia will erase the Customer's identification or log-in information within 7 days of the termination of this agreement or after a written request to do so from the Customer.

## 6 Use of the service

- 6.1 The Customer agrees to comply with all directions pertaining to the access and use of the Service granted to the Customer by Maxon Australia.
- 6.2 The Customer agrees to carry out any maintenance or repairs to its hardware or other equipment used to access the Service and, where relevant, in accordance with directions given by Maxon Australia.
- 6.3 The Customer acknowledges that Maxon Australia does not and cannot in any way supervise, edit or control the content and form of any communication made using the Service and Maxon Australia shall not be held responsible in any way for any content or information communicated via the Service.
- 6.4 The Customer will not use, nor permit any other party to use, the Service for any purpose or activity of an illegal, fraudulent or defamatory nature.
- 6.5 Maxon Australia has no responsibility to provide training in the use of the Service pursuant to this Agreement.

## 7 Withdrawal of access

- 7.1 Maxon Australia reserves the right to immediately, and without notice to the Customer, withdraw the Customer's access to the Service if:
- the Customer fails to comply with any provision of this Agreement concerning the payment of any fees including without limitation, any fees relevant to the connection, administration or usage of the Service by the Customer; this Agreement is terminated for any reason;
  - the Customer misuses the Service or fails to comply with the Customer's obligations as to the use and access of the Service as specified in this Agreement.

## 8 Charges

- 8.1 The Customer shall pay the Charges as per agreed trading terms.
- 8.2 Maxon Australia retains the right to vary or change the Charges or other fees from time to time and shall give the Customer written notice of any such variations or changes.
- 8.3 If payment is to be made by credit card, the Customer agrees to pay the fees via its credit card, which shall be debited automatically. If the credit card number expires or Maxon Australia is otherwise not able to debit valid Charges or fees to this credit card number, Maxon Australia may immediately and without notice withdraw the Customer's access to the Service.
- 8.4 The Charges are exclusive of taxes (including GST), duties and charges imposed or levied in Australia or overseas in connection with the supply of the Service. The Customer must pay all taxes (including GST), duties and charges imposed or levied in Australia or overseas in connection with the supply of the Service. Without limiting the foregoing, the Customer shall be liable for any new or varied taxes, duties or charges imposed subsequent to the date of this Agreement in respect of the Service.

## 9 Indemnity

- 9.1 The Customer releases and indemnifies Maxon Australia, its servants and agents against all actions, claims and demands (including the cost of defending or settling any action, claim or demand) which may be instituted against Maxon Australia arising out of a breach of this Agreement by the Customer or the negligence of the Customer, its agents, employees or sub-contractors or of any other person for whose acts or omissions the Customer is vicariously liable.
- 9.2 The Customer releases and indemnifies Maxon Australia against any action, claim or demand by the Customer's servants, employees or agents or their personal representatives or dependants arising out of the use of the service.

## 10 Implied terms

- 10.1 Subject to sub clause 2, any condition or warranty which would otherwise be implied in this Agreement is hereby excluded. Where legislation implies in this Agreement any condition or warranty, and that legislation avoids or prohibits provisions in a contract excluding or modifying the application of or exercise of or liability under such condition or warranty, the condition or warranty shall be deemed to be included in this Agreement. However, the liability of Maxon Australia for any breach of such condition or warranty shall be limited, at the option of Maxon Australia, to one or more of the following:
- if the breach relates to goods:
  - the replacement of the goods or the supply of equivalent goods;
  - the repair of such goods;
  - the payment of the cost of replacing the goods or of acquiring equivalent goods; or
  - the payment of the cost of having the goods repaired; and
  - if the breach relates to services:
  - the supplying of the services again; or
  - the payment of the cost of having the services supplied again.

## 11 Liability of Maxon Australia

- 11.1 Except in relation to liability for personal injury (including sickness and death), Maxon Australia shall be under no liability to the Customer in respect of any loss or damage (including consequential loss or damage) which may be suffered or incurred or which may arise directly or indirectly in respect of goods or services supplied pursuant to this Agreement, in respect of a failure or omission on the part of Maxon Australia to comply with its obligations under this Agreement, or in respect of the loss, theft or compromise in some other way of the identification and log-in information required for connection to the Service.
- 11.2 Subject to sub clause 3, the Customer warrants that it has not relied on any representation made by Maxon Australia which has not been stated expressly in this Agreement or upon any descriptions, illustrations or specifications contained in any document including catalogues or publicity material produced by Maxon Australia.
- 11.3 The Customer acknowledges that to the extent Maxon Australia has made any representation which is not otherwise expressly stated in this Agreement, the Customer has been provided with an opportunity to independently verify the accuracy of that representation.
- 11.4 The Customer shall at all times indemnify and hold harmless Maxon Australia and its officers, employees and agents ("those indemnified") from and against any loss (including reasonable legal costs and expenses) or liability reasonably incurred or suffered by any of those indemnified arising from any proceedings against those indemnified where such loss or liability was caused by:
- a breach by the Customer of its obligations under this Agreement; or
  - any willful, unlawful or negligent act or omission of the Customer.

## 12 Termination

- 12.1 Without limiting the generality of any other clause in this Agreement, Maxon Australia may terminate this Agreement immediately by notice in writing if:
- the Initial Term or a subsequent term ends without the Customer renewing and paying the Charges;
  - the Customer is in breach of any term of this Agreement and such breach is not remedied within 30 days of Maxon Australia notifying the Customer;
  - the Customer becomes, threatens or resolves to become or is in jeopardy of becoming subject to any form of insolvency administration;
  - the Customer, being a natural person, dies;
  - the Customer ceases or threatens to cease conducting its business in the normal manner;
  - required by law;
  - provision of the Service is reasonable likely to cause death or personal injury or damage to property; or
  - provision of the Service becomes illegal or Maxon Australia believes on reasonable grounds that provision of the Service is likely to become illegal within six months.
- 12.2 If notice is given to the Customer pursuant to sub clause 1, Maxon Australia may, in addition to terminating the Agreement:
- retain any money paid;
  - charge a reasonable sum for work performed in respect of which work no sum has been previously charged;
  - be regarded as discharged from any further obligations under this Agreement; and
  - pursue any additional or alternative remedies provided by law.

## 13 Force Majeure

- 13.1 Neither Party shall be liable for any delay or failure to perform its obligations pursuant to this Agreement if such delay is due to Force Majeure.
- 13.2 If a delay or failure of a Party to perform its obligations is caused or anticipated due to Force Majeure, the
- 13.3 performance of that Party's obligations will be suspended.
- 13.4 If a delay or failure by a Party to perform its obligations due to Force Majeure exceeds 60 days, either
- 13.5 Party may immediately terminate the Agreement on providing notice in writing to the other Party.
- 13.6 If this Agreement is terminated pursuant to sub clause 3, Maxon Australia is not required to refund money previously paid by the Customer pursuant to this Agreement.

## 14 Entire agreement

- 14.1 This Agreement constitutes the entire agreement between the Parties and supersedes all prior representations, agreements, statements and understandings, whether verbal or in writing.

## 15 Assignment and novation

- 15.1 The benefit of this Agreement shall not be assigned by the Customer without Maxon Australia's written consent.

- 15.2 Maxon Australia may consent to the assignment or novation of this Agreement by the Customer subject to such conditions as it chooses to impose.

## 16 Waiver

- 16.1 No term of this Agreement shall be deemed to be waived except by notice in writing signed by each Party. A waiver made by Maxon Australia pursuant by sub clause 1 will not prejudice its rights in respect of any subsequent breach of the Agreement by the Customer.
- 16.2 Subject to sub clause 1, any failure by Maxon Australia to enforce any clause of this Agreement, or any forbearance, delay or indulgence granted by Maxon Australia to the Customer, will not be construed as a waiver of Maxon Australia's rights under this Agreement.

## 17 Variation

- 17.1 The provisions of the Agreement shall not be varied, except by agreement in writing signed by the Parties.
- 17.2 If either Party wishes to vary the Agreement, the proposing Party shall submit a copy of the proposed variations to the other Party. The receiving Party shall advise the proposing Party within four normal working days, or such other period as is agreed by the other Party ( "the receiving Party" ), of receipt of the variations either:
- that the receiving Party accepts the variations; or
  - that the receiving Party rejects the variations.
- 17.3 If the receiving Party accepts the variations, the Agreement shall be deemed to incorporate the accepted variations from the date upon which the receiving Party notifies the proposing Party that it accepts the variations.

If the receiving Party rejects the proposed variations, each Party shall perform the Agreement in accordance with the unvaried Agreement.

A variation shall not be effective unless the Parties agree in writing as to:

- the effect of the variation, if any, upon the Charges; and
- the impact of the variation on the obligations of either Party under this Agreement.

## 18 Disputes

- 18.1 Any dispute arising in connection with this Agreement which cannot be settled by negotiation between the Parties or their representatives shall be submitted to arbitration in accordance with the Rules for the Conduct of Commercial Arbitrations for the time being of the Institute of Arbitrators Australia. During such arbitration, both Parties may be legally represented. Prior to referring a matter to arbitration pursuant to sub clause 1, the Parties shall:
- formally refer the dispute to their respective contract managers for consideration;
  - if the respective contract managers are unable to resolve the dispute after five days (or such other period as is agreed between the Parties) from the date of referral, refer the dispute to the respective chief executive officers of each Party; and
  - in good faith explore the prospect of mediation.

Nothing in this clause shall prevent a Party from seeking urgent equitable relief before an appropriate court.

## 19 Severability

- 19.1 If any provision of this Agreement is held invalid, unenforceable or illegal for any reason, the Agreement shall



remain otherwise in full force apart from such provisions which shall be deemed deleted.

## 20 Maxon Australia's rights

20.1 Any express statement of the right of Maxon Australia under this Agreement is without prejudice to any other right of Maxon Australia expressly stated in this Agreement or existing at law.

## 21 Survival of agreement

21.1 Subject to any provision to the contrary, this Agreement shall ensure to the benefit of and be binding upon the Parties and their successors, trustees, permitted assigns or receivers but shall not ensure to the benefit of any other persons.

21.2 The covenants, conditions and provisions of this Agreement which are capable of having effect after the expiration of the Agreement shall remain in full force and effect following the expiration of the Agreement.

## 22 Governing law

22.1 This Agreement will be governed by and construed according to the law of New South Wales, Australia.

## 23 Notices

23.1 Notices under this agreement may be delivered by hand, by mail, by facsimile or by email to the following

Maxon Australia Australia:

36A Gibson Avenue, Padstow  
Facsimile: 02 8707 3001  
Email: [support@maxon.com.au](mailto:support@maxon.com.au)

Customer:

The address, facsimile number and email address provided to Maxon Australia.

Notice will be deemed given:

- in the case of hand delivery, upon written acknowledgment of receipt by an officer or other duly authorised employee, agent or representative of the receiving Party;
- in the case of posting, three days after dispatch;
- in the case of facsimile or email, when the transmission is sent.