



# MASTER TERMS AND CONDITIONS

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## MASTER TERMS AND CONDITIONS

Effective as of : 1<sup>st</sup> July 2024

By engaging Ethertech Computer Services for IT support and consulting, the Customer acknowledges and accepts these terms and conditions.

**EtherTech Pty Ltd T/As EtherTech Computer Services (“Supplier”) provides a range of services including managed services and professional services and resells various cloud services including Microsoft cloud services, in accordance with these terms and conditions and the applicable ‘Associated Agreement’. The Supplier may amend or replace these terms and conditions on one month’s written notice to the Customer at any time (for existing Contracts the terms and conditions in place at the time that the Contract was made continue to apply for that Contract, unless the Customer agrees otherwise in writing). By ordering services such as managed services, professional services and/or cloud services from the Supplier, the Customer accepts the terms and conditions that apply at that time. Any additional or different terms that the Customer includes in any communication with the Supplier will not be binding on the Supplier or included in any Contract unless expressly agreed upon in writing by the Supplier.**

In these terms and conditions, and in any Accepted Proposal or Statement of Work, capitalized words have the meanings given to them in clause 1.

## 1 Definitions and interpretation

### 1.1 In these terms and conditions:

**“Accepted Proposal”** has the meaning given to that term under clause 5.3(b), with the relevant accepted proposal being as varied by any Confirmed Changes;

**“Associated Agreement”** means:

- (a) any agreement or statement of work or statement of supply that is entered into between the parties which is made pursuant to these terms and conditions (for example by referencing that it is made under these Master Terms and Conditions) and may include by way of example only a ‘Managed Services Agreement’ or ‘Statement of Work - Managed Services’, and/or ‘Cloud Supply Agreement’ or ‘Statement of Supply - Cloud Supply’; and
- (b) any additional terms and conditions that are accepted and agreed by the Customer and which are expressed as being made pursuant to these Master Terms and Conditions (and may include by way of example only the ‘Statement of Supply - Cloud Supply’).

**“Australian Consumer Law”** means Schedule 2 of the *Competition and Consumer Act 2010* (Cth);

**“Confidential Information”** means any information disclosed in confidence to one party by the other party including without limitation the Customer Data, whether of a business, financial, technical or non-technical nature or otherwise and whether existing in hard copy form, electronically or otherwise but does not include any information which is:

- (a) on receipt by the recipient party, in the public domain or which subsequently enters the public domain without any breach of the Contract;
- (b) on receipt by the recipient party, already known by that party (otherwise than as a result of disclosure by the other party);
- (c) at any time after the date of receipt by the recipient party, received in good faith by the recipient party from a third party;
- (d) required by law to be disclosed by the recipient party;

**“Confirmed Change”** means a change that is carried out under clause 6.2(a) or a Change Request that is approved by the Customer under clause 6.5;

**“Contract”** means these terms and conditions and the relevant Associated Agreement;

**“Customer”** means the organisation identified as the customer in the Accepted Proposal or Statement of Work or the organisation on whose behalf a Small Task is requested;

**“Customer Data”** means the Customer’s data including all text, sound, video or image files and the Customer’s software and includes Personal Information;

**“Customer Materials”** has the meaning given to that term in clause 7.3;

**“Data Protection Laws”** means the Privacy Act and includes any and all other applicable laws relating to Personal Information (including data security, protection, privacy or the processing of Personal Information);

**“Deliverables”** means deliverables to be provided by the Supplier to the Customer under an Accepted Proposal or Statement of Work which includes the results of provision of the Services, as varied by any Confirmed Changes (and excludes SaaS subscriptions and licensed software which is supplied, where applicable, subject to the applicable SaaS agreement or software licence agreement (by whatever name called), and is not supplied under these terms and conditions);

**“Estimate”** has the meaning given to that term in clause 6.4;

**“Force Majeure Event”** means any war, riot, third party strike, pandemic, civil emergency, natural disaster or other circumstance of a similar nature that is outside of the control of the affected party;

**“Intellectual Property”** means copyright, patents, designs, trademarks, trade names, goodwill rights, trade secrets, confidential information and any other intellectual proprietary right or form of intellectual property;

**“Personal Information”** means information or an opinion about an identified individual, or an individual who is reasonably identifiable:

- (a) whether the information or opinion is true or not; and
- (b) whether the information or opinion is recorded in a material form or not,

and includes any other information that is ‘personal information’, ‘personal data’, or similar terms under applicable Data Protection Laws;

**“Privacy Act”** means the Australian Privacy Act (1988) Cth;

**“Products, Deliverables and Services”** means the products, deliverables and/or services provided under an Associated Agreement, as described in the relevant Associated Agreement;

**“Proposal”** means a document issued by the Supplier to the Customer which defines Services and/or Deliverables to be provided to the Customer (if the Proposal becomes an Accepted Proposal) and includes an estimate or quote for provision of those Services and/or Deliverables, a work order, a proposal, a work order or other form of document (noting that ‘Statement of Work is separately defined);

**“Services”** means services to be provided by the Supplier to the Customer under an Accepted Proposal or a Statement of Work, as varied by any Confirmed Changes (and excludes SaaS subscriptions which are supplied, where applicable, subject to the applicable SaaS agreement (by whatever name called) and is not supplied under these terms and conditions);

**“Small Task”** means any request for Services made by the Customer to the Supplier (whether by telephone, email or otherwise) where:

- (c) the Customer does not request a Proposal or Statement of Work and the Supplier anticipates that the Services will take the Supplier four hours or less to complete; or
- (d) the parties agree that a Proposal or Statement of Work is otherwise not required;

**“Statement of Work”** means a document, email or Service Ticket which is prepared using the Supplier’s usual form of statement of work, as varied by any Confirmed Changes;

**“Working Day”** means a day other than a Saturday, Sunday or public holiday in Melbourne, Australia.

## 1.2 Interpretation

- (a) In these terms and conditions, reference to the plural includes reference to the singular, and vice versa.
- (b) Headings inserted in these terms and conditions are for convenience of reference only and do not affect the interpretation of these terms and conditions.
- (c) Reference to any legislation includes any statutory modification or re-enactment of that Act for the time being in force.

## 2 Order of precedence

2.1 If there is any conflict or inconsistency between these terms and conditions and an Associated Agreement, the following order of precedence applies to the extent of that conflict or inconsistency (listed below in order of high to low priority):

- (a) each Associated Agreement (with the order of priority of the parts of each Associated Agreement being as described in the relevant Associated Agreement);
- (b) these terms and conditions.

## 3 Term

3.1 Each Contract will commence on the date specified in the relevant Associated Agreement or if not specified will commence on the date that the Associated Agreement is signed by both parties, or in the case of Associated Agreements that require the signature of the Customer only on the date of signing by the Customer, or in the case of terms and conditions which are accepted and not signed by the Customer on the date of that acceptance.

3.2 Each Contract will continue for the term specified in the relevant Associated Agreement or if no term is specified will continue until terminated in accordance with the relevant Associated Agreement or under the termination provisions in these terms and conditions.

#### 4 **Products, Deliverables and Services**

4.1 The Supplier will provide Products, Deliverables and Services (as applicable) to the Customer:

- (a) in accordance with each Associated Agreement entered into between the parties;
- (b) using reasonable care and skill;
- (c) using people who have the necessary skills and experience; and
- (d) in accordance with:
  - i. the Contract;
  - ii. currently accepted principles and practices applicable to the provision of the Services;
  - iii. all applicable laws; and
  - iv. the reasonable instructions of the Customer.

4.2 Where Services and Deliverables are provided in the areas described in clause 4.2(d), and (e) below, the Customer acknowledges and accepts that the Services and Deliverables are intended to:

- (a) provide guidance to the Customer;
- (b) reduce risk for the Customer;
- (c) align IT strategy with business requirements;

and while the Supplier draws on the Supplier's relevant experience and skills and information available to the Supplier, the Supplier provides no assurance to the Customer that the Services and Deliverables will meet the Customer's requirements or provide a full solution.

For the purposes of this clause 4.2, the relevant areas are:

- (d) cyber security guidance;
- (e) deliverables to address cyber risks;

4.3 If the Customer requests services which are not covered by an existing Associated Agreement, the Supplier will issue a draft of the relevant Associated Agreement to the Customer for review and signing. Nothing in this Agreement commits the Supplier to providing services unless an Associated Agreement is agreed and signed by both parties, or approved and signed by the Customer (as applicable).

4.4 The Customer will:

- (a) only use the Products, Deliverables and Services, for lawful purposes and not for fraudulent, illegal or destructive purposes;

- (b) adhere to any specific requirements or restrictions in respect of the Products, Deliverables and Services included or referenced in an Associated Agreement;
- (c) not sell, re-sell, or otherwise provide the Products, Deliverables and Services to any third party unless such selling, re-selling, or provision is expressly permitted or anticipated in the relevant Associated Agreement;
- (d) not allow the Products, Deliverables or Services to be affected by any virus or destructive media, or use the Products, Deliverables or Services in any way which is intended to be, or is, detrimental to:
  - i. the use of those Products, Deliverables or Services by other customers of the Supplier or other users; or
  - ii. the systems utilised to provide the Products, Deliverables and Services.

## 5 **Requests for Services**

5.1 The Customer may at any time request the Supplier to provide services that are generally available from the Supplier. If the Supplier cannot provide the requested services for whatever reason, the Supplier will notify the Customer.

5.2 When the Supplier receives a request for services from the Customer:

- (a) in the case of Small Tasks (which are tasks estimated to take four hours or less), the Supplier will provide the Services at the Supplier's applicable standard rates without issuing any written proposal or description of the services to be provided);
- (b) in all other cases, the Customer can request the Supplier issue a draft Statement of Work.

When work is commenced as a 'Small Task' the Supplier is not confirming that the work will be completed within the maximum time for a Small Task and may issue a Statement of Work if it appears that a longer time period will be required.

5.3 A 'Contract' is made (which in each case include these terms and conditions):

- (a) in the case of Small Tasks, when the Supplier commences supply of the requested Services; or
- (b) in the case of Proposals, if and when a Proposal is accepted in writing by the Customer ('Accepted Proposal'); or
- (c) in the case of Statements of Work, if and when a Statement of Work is agreed on by both parties.

## 6 **Variations and change requests**

6.1 If the Customer requires any variation to the Deliverables or Services, or any other aspect of an Accepted Proposal or Statement of Work, the Customer will make a request to the Supplier, in writing, with relevant details.

- 6.2 On receipt of a request under clause 6.1, the Supplier will:
- (a) if the request involves four hours' work or less, that the Supplier will action the request. All work undertaken in carrying out the request will be charged to the Customer at the Supplier's then current standard hourly rates; or
  - (b) if the request involves more than four hours' work advise the Customer that the Customer must submit a change request in respect of the request under clause 6.3, in which case clauses 6.3 – 6.6 (inclusive) apply.
- 6.3 The Customer may request a change to or in respect of the Deliverables or Services or any other aspect of an Accepted Proposal or Statement of Work by issuing to the Supplier a written change request ("Change Request").
- 6.4 On receipt from the Customer of a Change Request, the Supplier will provide an estimate to the Customer for the Change Request ('Estimate') and notify the Customer of the likely impact on the timing of the work. All work carried out by the Supplier in preparing an Estimate will be charged to the Customer at the Supplier's then current standard rates, subject to a minimum charge of one hour which will apply to each Change Request received from the Customer.
- 6.5 The Customer has ten Working Days (unless stated otherwise in the Estimate) within which to accept the Estimate (and so confirm that the Customer wishes the Supplier to proceed with the Change Request) and acceptance must be in writing issued to the Supplier.
- 6.6 All communications under this clause 6 may be issued by email or via Service Ticket communications.

## **7 Customer's obligations**

- 7.1 Without limiting the Customer's obligations under any Associated Agreement, the Customer will:
- (a) where required to provide data to the Supplier, provide that data in a format suitable for import and otherwise as reasonably requested by the Supplier;
  - (b) where the Supplier's personnel will attend on site at the Customer's premises:
    - i. provide a suitable and safe work environment for the Supplier's personnel while on site in accordance with all applicable health and safety legislation;
    - ii. maintain suitable public liability insurance policies that include coverage for the Supplier's personnel while they are at the Customer's site; and
    - iii. indemnify the Supplier, to the extent permitted by law, against any and all claims, loss or damages, including legal costs on an indemnity basis, arising from or in connection with any illness, injury or death of any of the Supplier's personnel while at the Customer's site in connection with providing the Products, Deliverables and Services, except to the extent



that illness, injury or death was caused by the negligence or wilful act of that Supplier personnel;

- (c) meet all of the Customer's obligations as specified in these terms and conditions, in each Associated Agreement and in any applicable Accepted Proposal or Statement of Work;
- (d) where applicable in light of the services provided under an Associated Agreement, undertake frequent and adequate backups of the Customer's data provided always that except where expressly included under an Associated Agreement it is not the Supplier's responsibility to advise the Customer to undertake backups. The Customer should ensure that backups are always completed, as well as ensuring the backups are secure and checking that they can be successfully restored;
- (e) make available to the Supplier in a timely manner (and in accordance with any timeframes which the Customer has agreed to) all assistance (including availability of relevant personnel), permissions (including permissions from any relevant third parties), information, facilities and access to systems reasonably required by the Supplier; and
- (f) follow the Supplier's reasonable directions.
- (g) in all matters in relation to each Contract act reasonably and make reasonable decisions bearing in mind any time constraints specified in the applicable Accepted Proposal or Statement of Work;
- (h) perform each Contract, make all decisions and provide all sign-offs required of the Customer, and where applicable run acceptance testing, in accordance with the timing in the applicable Accepted Proposal or Statement of Work, subject to performance by the Supplier;

7.2 The Supplier has no liability for deficiencies in Services or Deliverables provided to the Customer that result from the acts or omissions of the Customer or which result from provision of the Services or Deliverables in accordance with Customer's instructions.

7.3 The Supplier may require access to and/or the use of certain software, information and other things owned by the Customer or owned or licensed to the Customer by the Customer's suppliers ("Customer Materials") in performing the Services and certain Customer Materials may be provided to the Supplier to be incorporated into or used in the development of the Deliverables. The Customer represents and warrants to the Supplier that the Customer has all requisite authority to permit the Supplier to access and use the Customer Materials as required and that such access and use will not infringe any third party's intellectual property rights.

## **8 Pricing and payment**

8.1 Each Associated Agreement will specify the basis of the Supplier's charges for the relevant supply of Products, Deliverables and Services and the Supplier will invoice the

Customer accordingly. All amounts specified in an Associated Agreement are exclusive of any taxes unless expressly specified otherwise.

- 8.2 If GST is payable in respect of a supply made under or in relation to an Associated Agreement, the Customer must pay to the Supplier, an amount equal to the GST payable on the supply ('GST Amount'). The GST Amount is payable by the Customer in addition to and at the same time as any consideration for the supply.
- 8.3 Unless otherwise specified in an Associated Agreement or Statement Of Work, all invoices issued by the Supplier are due for payment by the Customer within 14 days from the date of the invoice.
- 8.4 All reasonable accommodation, travel and other expenses incurred in providing Products, Deliverables and Services to the Customer will be charged to the Customer provided that such expenses are identified and agreed in advance. Expenses will be invoiced on a monthly basis by the Supplier.
- 8.5 Subject to clause 8.6, the Customer must pay all invoices in full without set-off or deduction of any kind.
- 8.6 If the Customer wishes to dispute an invoice, it must notify the Supplier in writing within 14 days of the date of the invoice and provide details of the dispute. The Customer may withhold payment of the disputed part of an invoice only and must pay that part (or any amount subsequently agreed or determined to be the correct amount owing) promptly on resolution of the dispute.
- 8.7 Without limiting any other remedies available to the Supplier for late payment or failure to pay any amount due, if any amount due is not paid by the Customer by the due date, the Supplier may:
- (a) charge the Customer interest calculated at 1.5% on the balance of the amount due by the Customer from the due date until payment is received in full by the Supplier; and/or
  - (b) charge the Customer all collection costs reasonably incurred by the Supplier in collection of the amount outstanding (including solicitor and/or collection agency fees); and/or
  - (c) on 5 Working Days' notice in writing, suspend delivery of further Products, Deliverables and Services until the outstanding amount is paid in full.
- 8.8 Unless otherwise specified in the relevant Associated Agreement, the Supplier may increase its pricing for Products, Deliverables and Services from time to time but not more than once every 6 months. One month's notice in writing will be given.
- 8.9 Unless otherwise agreed in an Accepted Proposal or Statement of Work:
- (a) all Services are provided on a time and materials basis and the Supplier's standard rates apply;
  - (b) the Supplier will invoice the Customer on a weekly basis; and

The Supplier's standard rates apply as set out in the Accepted Proposal or Statement of Work or if not set out there are available on request from the Supplier.

- 8.10 If required, the Customer will provide its credit card details to the Supplier to be held by an independent third party that is PCI compliant and authorizes the Supplier to use the credit card held in this way to pay each invoice issued to the Customer when payment is due. If the credit card payment is not successfully processed for any reason, the amount will remain owing by the Customer. Credit card surcharges will apply dependant on card issuer

## 9 **Delay and cost impacts**

- 9.1 Unless expressly agreed otherwise in writing, where specific timing applies for performance of Services or supply of Deliverables, that timing is extended if:

- (a) a delay by the Customer causes the Supplier to be delayed in performance of Services or supply of Deliverables; and
- (b) the Supplier notifies the Customer of the delay or likelihood of delay as soon as this becomes apparent and provides updated timing details (with such evidence as may be reasonably required by the Customer).

Where there is a change in the Customer personnel involved in a Contract, and such change in personnel results in delays for the Supplier in performing its obligations under that Contract, the Supplier may on notice to the Customer amend the timing for supply of the Services and Deliverables to take account of that change.

## 10 **Taxes**

- 10.1 In addition to the amounts due under clause 8, the Customer will pay the Supplier amounts equal to any applicable government taxes or duties however designated, based on this Agreement (or the Products and Services provided under it), paid or payable by the Supplier in respect of the foregoing, exclusive however of taxes based on the Supplier's income.

## 11 **Customer Data**

- 11.1 The Customer will:

- (a) provide and make Customer Data available to the Supplier only to the extent required for the purposes of the relevant Contract;
- (b) where practical, and particularly in the case of Personal Information, obfuscate Customer Data prior to providing or making the Customer Data available to the Supplier.

- 11.2 Subject to clause 11.3, the Supplier will access the Customer Data only as required in the performance of the relevant Contract.

- 11.3 Without limiting clause 12, the Supplier will only access the Customer Data and disclose the Customer Data to law enforcement, government and/or related authorities (eg

insolvency) to the extent required by law. If a request for Customer Data is made by a law enforcement agency or government authority (whether directly to the Supplier or through Microsoft or a third party vendor), the Supplier will redirect the request to the Customer or if redirection is not permitted or feasible in the available time frame and unless legally prohibited from doing so, the Supplier will notify the Customer of the request as soon as practically possible.

11.4 The Customer warrants that the Supplier has the right and authority to deal with the Customer Data in the manner contemplated by the relevant Contract.

11.5 Nothing in this Agreement transfers ownership of the Customer Data to the Supplier.

## 12 **Personal Information**

12.1 Before providing Personal Information to the Supplier, the Customer will obtain all required consents from third parties (including the Customer's contacts, partners, distributors, administrators, and employees) to that Personal Information being made available to the Supplier and used as anticipated by the relevant Contract.

12.2 Each party will comply with the applicable Data Protection Laws, including in respect of any breach of Personal Information.

## 13 **Confidential Information**

13.1 Each party agrees to:

- (a) hold in confidence all Confidential Information disclosed to it by the other party and disclose that information to its directors, employees and contractors only to the extent required in the performance of the Contract;
- (b) ensure that all Confidential Information is protected at all times from unauthorised access or use by, or disclosure to, any third party or misuse, damage or destruction by any person.

13.2 A party may disclose the other party's Confidential Information if and to the extent required by law if it first notifies the other party of the obligation to disclose the Confidential Information, provided that a party is not required to notify the other party under this clause if it is not legally permitted to do so or if the timing within which the party is required by law to disclose the Confidential Information does not permit notification to the other party.

## 14 **Intellectual property**

14.1 The Supplier or its licensors owns the Intellectual Property in the means, methods, processes and know-how that the Supplier employs to create the Deliverables or to otherwise perform the Supplier's obligations under each Contract, and in any of the Supplier's pre-existing library code used to create or incorporated into the Deliverables. The Supplier grants the Customer a non-exclusive licence to use the Intellectual Property referred to in this clause to the extent required for the Customer to make use of the Services and Deliverables, and otherwise give effect to a Contract. This licence will survive the termination of a Contract.

14.2 Any additional provisions relating to Intellectual Property ownership in relation to particular products, deliverables and services need to be specified and included in the relevant Associated Agreement.

14.3 Unless agreed otherwise in an Accepted Proposal or a Statement of Work or otherwise agreed in writing and subject to clause 14.1 and the rights of any third parties, the Customer will own the Intellectual Property in the Deliverables on payment in full for those Deliverables.

14.4 The Customer or its licensors (as applicable) will retain any Intellectual Property rights that the Customer or its licensors (respectively) own in Customer Materials.

14.5 Documentation Deliverables: Where the Supplier prepares documentation under a scoping or discovery Proposal or Statement of Work which describe the design or manner in which a solution will be implemented for the Customer, the Customer is not permitted to provide a copy of the documentation Deliverables to any alternative supplier unless the relevant work has been paid for in full and after giving the Supplier the first opportunity to submit a Proposal for the implementation work or other relevant next stages.

## 15 Personnel

- 15.1 The Supplier will not change or re-assign personnel that are known by the Customer to be working on a Contract or which have been identified by name to the Customer, without notifying the Customer.
- 15.2 A situation may arise where one of the Supplier's staff members does not work well with one of the Customer's staff members or contractors. If this arises, the party first aware of the issue will raise this with the other party and the Supplier will promptly discuss ways to resolve the issue and restore a favourable working relationship.
- 15.3 Solicitation of Staff. Refer to the 'Non-Solicitation' provisions in the Master Terms and Conditions.

## 16 Warranties

- 16.1 Each party warrants that it has all requisite right, power and authority to enter into this Agreement.
- 16.2 Except as provided under clause 16.1 and in any express warranties contained in an Associated Agreement, to the extent permitted by law, all warranties, terms and conditions (including without limitation, warranties and conditions as to fitness for purpose and merchantability) implied by legislation or otherwise, are excluded by the Supplier.
- 16.3 The Supplier provides no warranty or guarantee:
- (a) that any result or objective not specified in an Associated Agreement can or will be achieved or attained through the provision of the Products, Deliverables and Services; or
  - (b) as to the suitability of the Products, Deliverables and Services for any purpose other than that specified in an Associated Agreement, which the Supplier may interpret, and apply using its experience, skill and judgment, to provide the Services.
- 16.4 Nothing in these terms and conditions is intended to exclude, restrict or modify an applicable consumer guarantee under the Australian Consumer Law.

## 17 Warranty by Supplier

- 17.1 The Supplier warrants that they have the ability to perform the agreed Services and that all Services will be performed with due care and skill by people that have the requisite skills, expertise and competency.
- 17.2 The Supplier will perform the Services to the generally accepted standards of professionalism within the Supplier's industry. The Supplier will assign personnel to perform the Services that have the requisite skills, expertise and competency for the project or task.

17.3 If a Deliverable includes the production of a document, the Supplier will produce that document from the information available. However, the Supplier cannot warrant the contents, accuracy or use of such information as the Supplier relies on information provided by the Customer and third parties.

17.4 Except as expressly provided in a Contract, all warranties, terms and conditions (including without limitation, warranties and conditions as to fitness for purpose and merchantability), whether express or implied by statute, common law or otherwise are excluded to the extent permitted by law.

## 18 **Warranty by the Customer**

18.1 The Customer warrants that it has all requisite right, power and authority to enter into each Contract and to obtain and use the Services and Deliverables supplied under it.

## 19 **Termination of Contracts**

19.1 Except where a Contract has a fixed term, either party may terminate a Contract at any time without cause on giving thirty days' notice in writing to the other party. Provided that if any work is outstanding under the Contract, such termination will only take effect on completion and payment in full by the Customer of all such work. The Customer may waive the requirement that the Supplier complete all work but must pay all amounts under the Contract as if that waiver had not been given.

19.2 Each Contract will commence on the date that the relevant Proposal becomes an Accepted Proposal or the date that the Statement of Work is signed by both parties (as applicable), unless the Accepted Proposal or Statement of Work specifies an alternative commencement date. Contracts for Small Tasks will commence when the Supplier commences supply of the Services.

19.3 Each Contract will continue until the Contract is terminated under this clause 19 or in accordance with these terms and conditions.

19.4 Either party may terminate a Contract immediately (or with effect from any later date that it may nominate) by written notice to the other party if:

(a) one or more Insolvency Events occurs in relation to that other party but only if permitted by and/or in accordance with the *Corporations Act 2001* (Cth). For the purposes of this clause, 'Insolvency Event' means, in respect of a party (other than for the purpose of solvent reconstruction or amalgamation):

- i. a receiver, manager or liquidator is appointed over the party's undertaking or assets or the party enters into any assignment, composition or arrangement with its creditors; or
- ii. the party is unable to pay its debts when due or is deemed unable to pay its debts under any law or suspends payment to its creditors.

(b) the other party commits a material breach of any of its obligations under the Contract and fails to remedy that breach within 30 days of prior written notice of such breach. For the purposes of this clause 19.4 (b), non-payment by the

Customer for a period of 30 days or more after due date of any undisputed invoice constitutes a material breach by the Customer.

19.5 Additional rights of termination that apply to individual Associated Agreements may be included in each of those agreements.

## 20 **Consequences of termination**

20.1 On termination of a Contract, in addition to any other consequences of termination included in the relevant Associated Agreement and without limiting either party's rights or remedies:

- (a) each party will, on request, return the other's Confidential Information in its possession or control in respect of that Contract except for copies that it may be required to hold for compliance, audit or legal reasons;
- (b) all amounts owed to the Supplier under the Contract which accrued before termination will be due and payable in accordance with the payment terms in that Contract;
- (c) the Supplier will deliver to the Customer all Deliverables paid for by the Customer.

20.2 On any termination of a Contract, all clauses which by their nature survive termination, will survive the termination.

## 21 **Liability and indemnity**

21.1 To the extent permitted by law and subject to clause 21.3, the Supplier's liability under each contract is limited to direct loss only, to the amount paid by the customer under the relevant contract in the 3 month period preceding the event giving rise to the claim.

21.2 To the extent permitted by law and subject to clause 21.3, in no event is the Supplier liable for any indirect loss or for any loss of profits, lost savings, loss of data, business interruption, incidental or special damages, or for any consequential loss. In addition, the Supplier is not liable for any damages claimed by the Customer based on any third party claim, including, but not limited to, any claim in negligence. In no event is the Supplier liable for any damages caused (whether directly or indirectly) by the Customer's failure to perform its responsibilities under the relevant Contract.

21.3 If a consumer guarantee applies to a Contract or goods or services provided by the Supplier and the Supplier is liable for a breach of that guarantee, then to the extent permitted by law, the Supplier's liability is limited, at the Supplier's option:

- (a) in the case of goods, to the replacement or repair of the goods; or the supply of equivalent goods; or the cost of replacing or repair of the goods; or the cost of acquiring equivalent goods; and
- (b) in the case of services, to the resupply of those services or the cost of resupply,



and the Customer acknowledges and agrees that having regard to the commercial terms for the provisions of the goods and or services it is fair and reasonable for the Supplier to rely on the above limitations and that without the benefit of the limitations, among other things, the charges would be higher.

21.4 The Customer indemnifies the Supplier against any costs (including legal costs on an attorney and own client basis, all and any court costs and witness fees and related legal expenses), expenses, claims, demands or liability whether direct, indirect or otherwise, and whether arising in contract, tort (including negligence), equity or otherwise, arising out of, and must at the Supplier's request, and subject to clause 21.5 and any reasonable conditions imposed at the Supplier's discretion, at the Customer's own cost defend or settle, any claim, action or proceedings brought against the Supplier in connection with:

- (a) use of any Product, Deliverables and Services otherwise than in accordance with the relevant Contract; or
- (b) a breach by the Customer of any Contract.

21.5 If the Supplier wishes to rely on an indemnity under clause 21.4, the Supplier:

- (a) must ensure that the Customer is notified promptly in writing of the relevant claim, action or proceedings ("Claim") once it becomes aware of the Claim;
- (b) will make no admission of liability regarding the Claim nor any offers of settlement regarding the Claim without the Customer's written approval;
- (c) may, at its discretion, grant control of the defence or settlement to the Customer;
- (d) will, where the Supplier has granted control of the defence or settlement negotiations to the Customer:
  - i. co-operate reasonably with the Customer in defending or settling the Claim and make its employees available to give statements, advice and evidence, as the Customer may reasonably request, all at the expense of the Customer; and
  - ii. give the Customer sufficient authority and relevant information in its possession or control in order to assist the Customer to conduct the defence of the Claim and all negotiations for its settlement or compromise.

## 22 **Dispute Resolution**

22.1 In the event of any dispute arising between the parties in relation to a Contract, no party may commence any proceedings relating to the dispute (except where the party seeks urgent injunctive or interlocutory relief) unless that party has complied with the procedures in this clause 22.

22.2 The party initiating the dispute ("the first party") must provide written notice of the dispute to the other party ("the other party") and nominate in that notice the first party's representative for the negotiations. The other party must within fourteen days of receipt of the notice, give written notice to the first party naming its representative

for the negotiations ("Other Party's Notice"). Each nominated representative will have authority to settle or resolve the dispute. The parties will co-operate with each other and endeavour to resolve the dispute through discussion and negotiation.

22.3 If the parties are unable to resolve the dispute by discussion and negotiation within 14 days of receipt of the written notice from the first party, either party may refer the dispute to mediation.

22.4 If the dispute is referred to mediation, the mediation must be conducted in terms of the Resolution Institute Australia Standard Mediation Agreement. The mediation must be conducted by a mediator and at a fee agreed by the parties. Failing agreement being reached between the parties as to the mediator and/or fee within three weeks of the dispute being referred to mediation, the mediator will be appointed by and his/her fee determined by the Law Society of the state or territory in which the Supplier is domiciled.

22.5 If the dispute is not resolved within two months following the date of the Other Party's Notice (or such longer period as may be agreed in writing by the parties), either party may utilise any other legal remedies available to it in seeking to resolve the dispute.

## 23 **Non-Solicitation**

23.1 Neither party will, without the written consent of the other party, solicit, employ, or otherwise engage the services of, the other party's personnel (including employees and contractors) who has been involved in providing or receiving (as applicable) the Product, Deliverables and Services. This clause will apply from commencement of the first Contract between the parties and will continue until there has been no Contract between the parties for a continuous period of six months (and if there is subsequently a Contract between the parties the non-solicitation period will re-commence).

23.2 A party may as a condition of granting its consent under clause 23.1 above, require the other party to pay to it a fee of 15% of the person's gross annual remuneration to cover the cost of replacing the employee or contractor.

## 24 **Notices**

24.1 Any notice or other communication in connection with a Contract must be:

(a) marked for the attention of the primary contact person and delivered or sent to the address of the other party by prepaid post or email, as set out in the relevant Associated Agreement.

24.2 Notices or other communications are deemed received:

(a) if delivered by hand, on delivery;

(b) if delivered by post:

i. on the fifth Working Day following posting if sent and received within Australia; and

ii. on the tenth day following posting if posted internationally; or

- (c) if sent by email, on sending the email provided that no email is successfully sent if the sender receives any type of delivery notification failure.

## 25 **Force majeure**

- 25.1 Either party may suspend its obligations to perform under a Contract if it is unable to perform as a direct result of a Force Majeure Event. Any such suspension of performance must be limited to the period during which the Force Majeure Event continues.
- 25.2 Where a party's obligations have been suspended pursuant to clause 25.1 for a period of 30 days or more, the other party may immediately terminate the Contract by giving notice in writing to the other party.

## 26 **General**

- 26.1 **Assignment:** The Customer is not permitted to assign its rights under a Contract without the prior written consent of the Supplier. Except as otherwise provided in an Associated Agreement and subject to compliance by the Supplier and/or the assignee with any applicable third party vendor requirements in respect of the assignment, there is no restriction on assignment by the Supplier of its rights or obligations under a Contract.
- 26.2 **Contractors:** The Supplier may perform its obligations under a Contract by the use of the Supplier-selected independent contractors.
- 26.3 **Other agreements:** Subject to clause 13, nothing in these terms and conditions prevents the Supplier from entering into similar agreements with others or from providing products, deliverables or services which are similar to the Products, Deliverables or Services provided under a Contract.
- 26.4 **Survival:** All clauses of these terms and conditions, which by their nature survive the termination of a Contract will do so.
- 26.5 **Entire agreement:** Each Contract constitutes the complete and exclusive statement of the agreement between the parties, superseding all proposals or prior agreements, oral or written, and all other communications between the parties relating to the subject matter of that Contract.
- 26.6 **Further assurances:** The parties must each do all such further acts (and sign any documents), as may be necessary or desirable for effecting the transactions contemplated by the Contract.
- 26.7 **Amendments:** Except as specifically provided, no amendment to a Contract will be effective unless it is in writing and signed by both parties.
- 26.8 **Waiver:** No exercise or failure to exercise or delay in exercising any right or remedy by a party will constitute a waiver by that party of that or any other available right or remedy.
- 26.9 **Partial invalidity:** If any provision of a Contract or its application to any party or circumstance is or becomes invalid or unenforceable to any extent, the remainder of

the Contract and its application will not be affected and will remain enforceable to the greatest extent permitted by law.

26.10 Relationship of the Parties: The parties agree that the Supplier is an independent contractor to the Customer and that nothing in these terms and conditions or any Contract constitutes a partnership, joint venture or relationship of employer and employee between the parties. Except as specified in an Associated Agreement or otherwise agreed in writing by the Customer (including by email) neither party may:

(a) act or hold itself out as an agent or representative of the other party; or

(b) assume or create any obligations on behalf of the other party.

## 27 **Governing Law**

27.1 The Contract is governed by the laws of the Victoria, Australia. The parties hereby submit to the non-exclusive jurisdiction of the courts of Victoria, Australia.