Master MSP Terms and Conditions

1. Agreement

These Terms and Conditions together with the attached Schedules and the Order (collectively, the **Agreement**) set out the terms and conditions which govern the provision of the Services by Supplier to Customer. If there is an inconsistency between various parts of the Agreement, the following order of precedence will apply to the extent of the inconsistency:

(a) these Terms and Conditions; and

(b) the Schedules; and

(c) the Order.

2. Orders

(a) The purchase of Services will be evidenced by an Order executed by the Parties.

(b) All Orders executed by the Parties will form part of this Agreement.

(c) Customer acknowledges and agrees that Supplier is under no obligation to provide Services unless and until an Order is executed by the Parties in respect of such Services.

(d) Further Services may be purchased by Customer during the Term through the execution of further Orders.

3. Term of Agreement

(a) This Agreement commences on the Commencement Date and continues until terminated by either Party in accordance with clause 21 (the **Term**).

(b) On termination of this Agreement in accordance with clause 21 no further Orders may be entered into under this Agreement but existing Orders will continue for the Order Term and the terms of this Agreement will continue to apply until such Orders are also terminated.

4. Term of Order

(a) An Order commences on its Order Commencement Date and continues for the Initial Term.

(b) An Order will automatically extend on a month-to-month basis unless either party provides at least thirty (30) days' written notice prior to the end of the Initial Term, unless stated otherwise in the Order (the **Renewal Term**).

(c) If no Initial Term is specified in the Order, the Agreement will proceed on a month-to-month basis unless terminated on at least thirty (30) days' notice.

5. Exclusivity

(a) Customer must not engage, or enter into an agreement to engage, another supplier of services which are the same as or similar to the Services during the Term without Supplier's prior written approval.

(b) Supplier provides the Services to Customer on a non-exclusive basis. Nothing in this Agreement prevents the Supplier from providing, or entering into an agreement to provide, services which are the same as or similar to the Services to any third party.

6. Provision of Services

6.1 General

(a) Supplier will use the reasonable care and skill that can be expected from a competent service provider in providing the Services to Customer in accordance with this Agreement and will retain sufficient and appropriately qualified and experienced Personnel to provide the Services.

(b) Customer acknowledges and agrees that the Services or components of the Services may be performed via third parties including telecommunications and internet service providers and delivery providers and that outages, performance degradations, delays or unavailability attributable to such third parties are beyond the control of

Supplier and may impact Supplier's ability to provide the Services in accordance with this Agreement. Supplier will however take all reasonable steps to ensure that such service providers comply with the availability requirements of this Agreement.

6.2 Scheduled maintenance

If scheduled maintenance is to be carried out, such maintenance will be performed during the times specified in the Order (**Maintenance Window**). If the scheduled maintenance is unable to be completed within the Maintenance Window, Supplier will promptly notify Customer. If emergency maintenance is required, subject to Supplier providing Customer with prior notice, it may be performed at alternative times to the Maintenance Window.

6.3 On-boarding and Off-boarding assistance

(a) If specified in the Order and prior to the provision of the Services, Supplier will provide the On-boarding Assistance.

(b) If specified in the Order and prior to the end of the Term, Supplier will provide Customer with Off-boarding Assistance.

(c) Customer acknowledges that Supplier's timeframe to on-board/off-board Customer is dependent on a range of factors including the number of End Users and the complexity of the Customer Environment. Supplier will advise Customer on the on-boarding timeframe applicable to Customer.

6.4 Material Changes

(a) Customer acknowledges and agrees that Supplier may vary the terms of this Agreement and/or the Fees if the number of End Users increases or decreases and/or the Customer Environment changes materially (**Material Change**).

(b) Customer will advise Supplier in writing if it wishes to make a Material Change. Unless otherwise agreed by the Parties, a change in End User numbers will be effective from the beginning of the next calendar month following acceptance of the change in number of End Users by Supplier.

(c) If Supplier does not agree to the proposed change in the End User numbers, it will notify Customer in writing within a reasonable time of the request being made, not exceeding fourteen (14) days.

(d) If Customer does not agree with a variation to the terms of the Agreement and/or the Fees made under clause 6.4(a):

(i) Customer must provide notice to Supplier within two (2) Business Days that it does not agree to the variation; and

(ii) the Parties will discuss the variation in good faith within three (3) Business Days of the date on which Supplier receives the notice from Customer with a view to reaching an agreement as to the variation and, if an agreement cannot be reached on the date of the discussion, either Party may terminate the Agreement in accordance with clause 21 and no variation will be made to this Agreement.

6.5 Additional Services

(a) This clause applies to the extent that Customer requests additional services, including IT consulting, business continuity, new hardware installation, data migrations and company relocations, in the Order (**Additional Services**).

(b) Where specified in the Order or otherwise agreed between the parties, Supplier will provide the Additional Services to Customer.

(c) Additional Services will be charged on either a time and materials basis in accordance with Schedule 2 – Rate Card or on a fixed fee basis, as advised by Supplier to Customer.

7. Customer obligations and warranties

7.1 General obligations and warranties

(a) Customer agrees and undertakes to:

(i) do all things necessary to enable Supplier to perform its obligations under this

Agreement including performing any works, providing any equipment or connecting any services as required by Supplier from time to time;

(ii) provide Supplier with access to the Site and Customer Personnel as and where requested by Supplier;

(iii) provide Supplier with all information and documentation as requested by, or as otherwise necessary for Supplier;

(iv) comply with all Laws applicable to the Site including occupational health and safety laws;

(v) comply with all data retention Laws applicable to Customer;

(vi) use reasonable security precautions in light of its use of the Services;

(vii) co-operate with Supplier's reasonable investigations of outages, security problems and any suspected breach of this Agreement;

(viii) keep the contact and other account information that Supplier holds about it up-to-date;

(ix) not use or attempt to use the Services for any activity which breaches any Law, order, regulation or industry code of practice;

(x) not distribute, store or publish any content or material that is restricted, illegal or otherwise unlawful under any applicable Law, or which is likely to be offensive or obscene to a reasonable person; and

(xi) not interfere or attempt to interfere in any manner with the functionality or proper operation of the Services.

(b) Customer acknowledges and agrees that the effective and timely provision of the Services requires Customer to implement and incorporate any recommended changes Supplier makes in respect of the Customer Environment (**Recommendations**).

7.2 Site and access requirements

(a) Customer must:

(i) at its own expense and in accordance with the reasonable directions and specifications of Supplier and its suppliers, prepare and provide access to the Site prior to the supply of the Services;

(ii) ensure that the Site is maintained in good working repair and condition;

(iii) ensure the supply of adequate electric current and electrical and mechanical fittings at the Site;

(iv) ensure existing building connection frames, cables and sockets are in good working order; and

(v) allow Supplier Personnel to access its Site, facilities and specified equipment to perform its obligations under this Agreement. If Customer fails to provide Supplier Personnel with access to its Site, facilities and specified equipment, Customer acknowledges and agrees that Supplier may be unable to provide the Services adequately and in such circumstances, Supplier is not liable to Customer for a failure to perform the Services under this Agreement.

8. Fees

(a) The Fees for the Services, Hardware, Third Party Software, Third Party Services and Additional Services will be specified, invoiced and paid in accordance with the Order.

(b) Upon agreement by Customer and signature of the form in Schedule 3, Customer agrees that Supplier may direct debit payment for the Fees directly from Customer's account.

(c) Supplier may vary the Fees in accordance with clause 6.4.

(d) Without limiting clauses clause 6.4 and clause 8(b), the Customer acknowledges and agrees that each year Supplier may increase the Fees by the greater of:

(i) the CPI rate, or

(ii) 5%,

each year on 1st July upon written notice to the Customer.

(e) During the Term and in addition to its rights under clause 8(d), Supplier may increase the Fees on written notice to Customer as follows:

(i) following any increase in the costs of providing the Services as result of any change or increase in costs passed on by any third party suppliers. Any increase in Fees under this clause must be done on a cost pass through basis and must not exceed the increase applied by the third party suppliers. Where able to do so, on request, Supplier will provide Customer with reasonable written evidence verifying the third party supplier's increase; and

(ii) following any material increase in the costs of providing the Services as a result of any change or increase in the costs of labour, insurance or such other internal cost to Supplier. Any increase in Fees under this clause must be done on a cost pass through basis where possible having regard to the actual increase in the costs of providing the Services.

(f) If Customer does not agree with the proposed variation to the Fees as notified by Supplier, Customer may terminate the relevant Order related to the increased Fees on 30 days' written notice to Supplier.

9. Invoicing and payment

(a) Supplier will issue invoices for the Fees in accordance with the Order and the Customer must pay all undisputed invoices within fourteen (14) days from the date of invoice unless otherwise specified in the Order.

(b) If Customer disputes in good faith any amount of the invoice submitted by Supplier, then Customer is not obligated to pay the disputed amount until the dispute is resolved, but must pay all other undisputed amounts. Any disputed invoice will be managed in accordance with clause 22.

(c) Subject to clause 9(b), if Customer fails to pay any Fees by the due date, Supplier may charge interest at the Interest Rate on the outstanding Fees or any other monies due and unpaid by Customer, until such time as the Customer has paid in full, the outstanding amount and any interest accrued on the outstanding amount, and Customer will pay to Supplier any reasonable costs (including legal costs) incurred by Supplier in relation to collection of any amounts owning.

10. Taxes

The Fees are exclusive of GST, and where applicable, GST and other taxes, duties or levies will be added to the Fees payable at the then prevailing rate.

11. Software and Equipment

11.1 General obligations, access and rights

(a) Customer acknowledges that all title in and to any Software or Equipment, for example anti-virus licences, backup licences, managed firewalls or Supplier servers, used by Supplier in connection with the provision of the Services remain at all times with Supplier.

(b) Customer acknowledges and agrees that its access to and use of Software may be governed by third party licence terms and Customer is solely responsible for its compliance with such third party licence terms.

(c) The Equipment will only be affixed to the Site if it is reasonably necessary for its ordinary use. If the Equipment

is attached to the Site, the Equipment does not become a fixture and Supplier can still remove the Equipment in accordance with this Agreement.

(d) Customer must not part with possession of the Equipment without the prior written consent of Supplier.

(e) Customer must:

(i) properly operate and maintain any Equipment in accordance with the reasonable requirements and instructions of Supplier;

(ii) ensure the Equipment is maintained in substantially good repair and condition during the Term; and

(iii) ensure the Equipment does not damage, hinder or unduly interfere with any other third party or their equipment.

(f) Subject to any negligent act or omission of Supplier and to the extent permitted by any applicable Laws, Customer remains solely responsible and liable for its access and use of its own equipment and software (**Customer Equipment**) and indemnifies Supplier against all Claims, losses, liabilities, damage and injury incurred by Customer, Supplier or any third party by or as a result of use of such Customer Equipment.

(g) Customer acknowledges that unless otherwise specified in the Order, Customer is responsible for ensuring any Customer Equipment is properly licensed, covered by an appropriate warranty and for managing any claims made under that warranty.

11.2 Procurement and sale of Hardware

(a) This clause applies to the extent Supplier supplies Hardware to Customer under the Order. The supply of Hardware is independent of the provision of Services and must be specified in the Order.

(b) Risk in the Hardware passes to Customer immediately on delivery of Hardware to the Site, and title to the Hardware passes to Customer when the Fees have been paid in full to Supplier. The Customer must pay the Fees in respect of the Hardware in advance and prior to delivery, unless otherwise agreed in the Order.

(c) Customer must not do anything to affect ownership of the Hardware unless or until title has passed to Customer.

(d) Subject to the payment of the applicable Fees, where Customer requests installation of the Hardware, Supplier agrees to ensure the Hardware is installed and operational, in accordance with the Operating Manuals, at the Site and to install the Hardware on or before the installation date agreed between the Parties during Customer's normal business hours.

(e) The Hardware will be deemed to have been accepted by Customer within five (5) Business Days of delivery of the Hardware to the Site. Upon installation of the Hardware, Customer will accept installation, either verbally or by signing a Customer Acceptance Form, which will be evidence Customer has accepted installation of the Hardware. Installation of the Hardware will be deemed to have been accepted by Customer within five (5) Business Days of installation.

(f) Customer must obtain and maintain all necessary consents, permits, licences, registrations and approvals from any Government, body corporate, landlord or entity for the Hardware to be installed, used, hired, maintained, upgraded, inspected and/or accessed at the Site by Supplier or its Personnel.

(g) Subject to clause 19.1, Customer acknowledges and agrees that Supplier makes no representations and gives no warranties in respect of Hardware, including that the Hardware is fit for any particular purpose.

12. Third Party Software

(a) This clause applies to the extent that Customer purchases Third Party Software in connection with this Agreement. The supply of Third Party Software is independent of the provision of Services and must be specified in the Order.

(b) Where Supplier supplies Third Party Software to Customer, Customer acknowledges and agrees that its access to and use of such Third Party Software is governed by the third party licence terms between Customer and the licensor (**Third Party Licence Terms**) and Customer is solely responsible for its compliance with the Third Party Licence Terms.

(c) Subject to clause 19.1, Customer acknowledges and agrees that Supplier makes no representations and gives no warranties in respect of the Third Party Software, including that the Third Party Software is fit for any particular purpose.

13. Third Party Services

(a) This clause applies to the extent Supplier supplies Third Party Services to Customer under the Order. The supply of Third Party Services is independent of the provision of Services and must be specified in the Order.

(b) Third Party Services may be subject to additional terms and conditions as specified from time to time (**Third Party Service Terms**) and Customer acknowledges and agrees that its access to and use of any Third Party Services may be governed by such Third Party Service Terms.

(c) If Customer requests Supplier to provide services outside the scope of the Third Party Services, Supplier may provide it in accordance with the rates applicable at the time of Customer's request.

14. PPSA

(a) Customer acknowledges that Supplier's interest under this Agreement is a Security Interest for the purposes of the PPSA and:

(i) that Security Interest relates to the Equipment and all proceeds of any kind; and

(ii) this Agreement is a security agreement for the purposes of the PPSA.

(b) Customer consents to Supplier effecting a registration on the PPSA (in any manner Supplier considers appropriate) in relation to any Security Interest arising under or in connection with this Agreement.

(c) If required by Supplier, Customer must pay all costs associated with the registration, maintenance and withdrawal of any Security Interest on the PPSR which secures Customer's obligations under any agreement with Supplier.

(d) Customer waives its right to receive any notice under the PPSA (including notice of a verification statement) unless the notice is required by the PPSA and cannot be excluded.

(e) Customer must do all things (including signing any document) and provide all information necessary to enable Supplier to perfect and maintain the perfection of any and each Security Interest granted to Supplier by Customer.

(f) For the purposes of this clause 14, Customer irrevocably appoints Supplier to be its attorney with power to do all things necessary or expedient including entering into any documents deemed necessary by it to give effect to Customer's obligations under this Agreement.

(g) If Chapter 4 of the PPSA applies to the enforcement of a Security Interest arising under or in connection with this Agreement, Customer agrees the following provisions of the PPSA will not apply to the enforcement of that Security Interest:

(i) section 95 (Secured party must give notice of removal of accession), to the extent that it requires Supplier to give the Customer a notice;

(ii) section 96 (When a person with an interest in the whole may retain accession);

(iii) subsection 121(4) (Enforcement of security interests in liquid assets – notice to higher priority parties and grantor);

(iv) section 125 (Obligation to dispose of or retain collateral);

(v) section 130 (Notice of disposal of collateral), to the extent that it requires Supplier to give the Customer a notice;

(vi) paragraph 132(3)(d) (Secured party to give statement of account – statement of account following disposal);

(vii) subsection 132(4) (Secured party to give statement of account – statement of account if no disposal);

(viii) section 142 (Entitled persons may redeem collateral); and

(ix) section 143 (Entitled persons may reinstate security agreement).

(h) Where a person is a controller in relation to the Equipment, the Parties agree that Part 4.3 of the PPSA will not apply to the enforcement of any Security Interest in the Equipment by that controller.

(i) Notices or documents required or permitted to be given to Customer for the purposes of the PPSA must be given in accordance with the PPSA.

15. Intellectual Property Rights

(a) Customer acknowledges that Supplier and its licensors own or are entitled to all right, title to and interest including all Intellectual Property Rights in the Services and any documentation supplied by Supplier to Customer in connection with the Services.

(b) Nothing in this Agreement transfers ownership of the Intellectual Property Rights subsisting in the Services and related documentation except as expressly permitted by the terms of this Agreement.

16. Privacy

16.1 Personal Information

If the performance of rights and obligations under this Agreement involves the handling of any Personal Information, then each Party must:

(a) comply with all applicable provisions of the Privacy Act;

(b) comply with all reasonable requests or directions of the other Party in connection with an obligation of the other Party under the Privacy Act;

(c) use the Personal Information only for the purposes of performing its obligations under this Agreement;

(d) not transfer that Personal Information outside of Australia or allow persons outside of Australia to have access to that Personal Information, unless the other Party has consented in writing to such transfer or access;

(e) take all necessary steps to ensure that such Personal Information is protected against misuse, loss and unauthorised access; and

(f) without undue delay, notify the other Party if it becomes aware of a breach of any applicable privacy laws in connection with this Agreement.

16.2 Eligible Data Breach

(a) Promptly, and no later than 7 days upon becoming aware of an actual or suspected Cyber Breach, in relation to the Customer Environment, Customer will:

(i) immediately investigate, or procure the investigation of, the Cyber Breach;

(ii) assess if the Cyber Breach constitutes an Eligible Data Breach and notify Supplier of the following:

(A) the reasons why Customer considers that a reasonable person would or would not conclude that the Cyber Breach is an Eligible Data Breach;

(B) whether Customer will make any statements to the affected individuals and the Office of the Australian Information Commissioner; and

(C) where there are reasonable grounds to conclude that the Cyber Breach constitutes an Eligible Data Breach, prepare statements in accordance with section 26WK of Part IIIC of the Privacy Act and make statements

to the affected individuals and the Office of the Australian Information Commissioner to notify them of the Cyber Breach.

(b) On receipt of a notification under clause 16.2(a)(ii) that Customer will not be issuing any statements to the affected individuals and the Office of the Australian Information Commissioner, Supplier may:

(i) immediately investigate, or procure the investigation of, the Cyber Breach;

(ii) assess if the Cyber Breach constitutes an Eligible Data Breach; and

(iii) if Supplier considers that there are reasonable grounds to conclude that the Cyber Breach constitutes an Eligible Data Breach, Supplier will:

(A) notify Customer of the reasons why Supplier considers that a reasonable person would conclude that the Cyber Breach is an Eligible Data Breach; and

(B) prepare statements in accordance with section 26WK of Part IIIC of the Privacy Act and issue the statements to the affected individuals and the Office of the Australian Information Commissioner of the Cyber Breach on behalf of itself and Customer.

(c) Customer will reimburse Supplier on demand for all reasonable costs incurred by Supplier under this clause 16.2.

17. Confidentiality

17.1 Treatment of Confidential Information

Each Party acknowledges that the Confidential Information of the other Party is valuable to the other Party. Each Party undertakes to keep the Confidential Information of the other Party secret and to protect and preserve the confidential nature and secrecy of the Confidential Information of the other Party.

17.2 Use of Confidential Information

A Recipient may only use the Confidential Information of the Discloser for the purposes of performing the Recipient's obligations or exercising the Recipient's rights under this Agreement.

17.3 Disclosure of Confidential Information

A Recipient may not disclose Confidential Information of the Discloser to any person except:

(a) representatives, legal advisers, auditors and other consultants of the Recipient who require it for the purposes of performing its obligations or exercising its rights under this Agreement and then only on a need to know basis; or

(b) if required to do so by Law or a stock exchange.

17.4 Return of Confidential Information

Upon expiry or termination of this Agreement, the Recipient must promptly deliver to the Discloser all documents or other materials containing or referring to the Discloser's Confidential Information which are in the Recipient's possession, power or control or in the possession power or control of persons who have received the Confidential Information from the Recipient under this clause 17.

18. Non-solicitation

Each Party agrees not to directly or indirectly solicit, recruit or make an offer of employment to the Personnel of the other Party during the Term and for a period of:

(a) twelve (12) months;

(b) six (6) months; or

(c) three (3) months,

following expiration or termination of the Agreement.

19. Warranties

19.1 Supplier warranties

(a) Supplier's goods and services come with guarantees that cannot be excluded under the Australian Consumer Law. For major failures with the service, Customer is entitled:

(i) to cancel its service contract with Supplier; and

(ii) to a refund for the unused portion, or to compensation for its reduced value.

(b) Customer is also entitled to choose a refund or replacement for major failures with goods. If a failure with the goods or a service does not amount to a major failure, Customer is entitled to have the failure rectified in a reasonable time. If this is not done Customer is entitled to a refund for the goods and to cancel the contract for the service and obtain a refund of any unused portion. Customer is also entitled to be compensated for any other reasonably foreseeable loss or damage from a failure in the goods or service.

(c) To the extent permitted by Law and subject to this clause 18, Supplier excludes all conditions, warranties and terms not expressly set out in this Agreement. Where applicable Law provides any consumer guarantee, condition or warranty which cannot be excluded, Supplier's liability for any breach of such consumer guarantee, condition or warranty will be limited to the extent permitted by applicable Law to, at its option to the provision of the entitlements set out in clauses 19.1(a) and 19.1(b).

19.2 Customer warranties

The Customer warrants that:

(a) it owns the rights or has the right to use any software, hardware, systems, IP addresses, domain names and all other items in the Customer Environment;

(b) its Customer Environment is in good working order and it has sole responsibility for the availability and integrity of the Customer Environment;

(c) it will:

(i) take all reasonable precautions to safeguard its business and specifically its Customer Environment, the Software and Equipment and all applicable software, hardware and data to minimise any loss or disruption, including (as applicable) implementing effective audit control, firewalls, virus checking controls, data security measures and appropriate data and software back-ups; and

(ii) comply with Supplier's or the applicable vendor's written instructions for the access and use of all Software and Equipment used within the Customer Environment.

20. Liability

20.1 Limitation on liability

(a) To the extent permitted by Law, Supplier's total aggregate liability whether in tort (including negligence), contract, breach of statutory duty, misrepresentation, restitution or otherwise, is limited for this Agreement and each Order to the Fees paid under this Agreement or the applicable Order in the twelve (12) month period preceding the date on which the event giving rise to liability occurred.

(b) To the extent permitted by Law, Supplier is not responsible for any loss or damage incurred by Customer or any third party and Customer releases Supplier and its Personnel from all Claims in connection with:

(i) a Cyber Breach, including but not limited to, any statutory fines or penalties;

(ii) Customer's failure to comply with its obligations or warranties under clause 7.1 (including Customer's failure to implement any Recommendation); or

(iii) a third party's failure to comply with its obligations to Customer, including under any Third Party Licence Terms, Third Party Service Terms or any other terms entered into by a Customer and the relevant third party.

(c) Unless otherwise specified in an Order, Supplier's only obligation arising from a Cyber Breach is to

attempt the restoration of such Customer Data to the last available backup. .

(d) To the extent permitted by Law, Supplier is not responsible for any loss or damage incurred by Customer or any third party arising from Customer's failure to implement a Recommendation.

20.2 No consequential loss

Neither Party is liable whether in tort (including for negligence), contract, breach of statutory duty, misrepresentation, restitution or otherwise for indirect loss of profits, loss of business, depletion of goodwill, loss or corruption of data or information, or pure economic loss, or for any other special, indirect or consequential loss, costs, damages, charges or expenses however arising under this Agreement.

20.3 Proportionate liability

A Party's liability under this Agreement will be reduced to the extent that the other Party caused or contributed to the relevant liability or the act giving rise to the liability.

20.4 Avoiding or minimising loss

A Party which incurs a loss under this Agreement must take reasonable steps to avoid or minimise the loss.

20.5 Indemnity

(a) Supplier agrees to indemnify the Customer against any and all Claims arising out of:

(i) a Claim by a third party that the Services infringe the Intellectual Property Rights of that third party;

(ii) death or personal injury; and

(iii) damage to tangible or real property.

(b) Clause 20.5(a) will not apply to the extent the infringement is caused by:

(i) Customer failing to promptly provide Supplier with written notice of such a Claim against Customer;

(ii) Customer failing to give Supplier sole control of the defence and settlement of such a Claim against Customer; or

(iii) Customer failing to provide Supplier with all reasonable assistance in relation to the defence and settlement of such a Claim.

(c) Customer indemnifies Supplier, and will keep Supplier indemnified, from and against any Claims that Supplier suffers, incurs or is liable for, whether or not contemplated by the Parties, as a result of any:

(i) material breach of this Agreement by Customer;

(ii) loss of, or damage to, any property caused by any act or omission of Customer or Customer's Personnel, including through negligence;

(iii) personal injury (including sickness or death) caused by an act or omission of Customer or Customer's Personnel, including through negligence;

(iv) all Claims, arising from or in connection with a Cyber Breach caused or contributed to by Customer or its Personnel;

(v) fraud, criminal offence or wilful misconduct by Customer or Customer's Personnel; and

(vi) Claims by Customer or a third party against Supplier arising because of any act or omission of Customer in connection with this Agreement, except to the extent that the Claim arises because of Supplier's negligence or breach of this Agreement.

(d) If a Claim is made by a party alleging Customer's access or use of the Services infringes that party's Intellectual Property Rights, Supplier will, at its option either:

(i) modify or replace the Services so that they become non-infringing; or

(ii) procure for Customer the right to continue using the Services.

20.6 Exclusions from liability

To the extent permitted by Law, Supplier will not be liable for loss (including under a warranty or indemnity) suffered by Customer, or failure to provide the Services, to the extent caused or contributed to by any of the following:

(a) a use of the Services in combination with materials or services not supplied to Customer by Supplier;

(b) a use of the Services in breach of this Agreement;

(c) operation or use of any Software, Hardware or Equipment supplied under the Agreement other than in accordance with the recommended operating procedures and relevant user documentation or in accordance with normal business use and requirements;

(d) faults, malfunction or defect in any Third Party Software or Third Party Services; or

(e) telecommunications or power failure or fault or defective network or internet connection affecting Customer, or affecting Supplier provided that Supplier is unable to reasonably mitigate through its business continuity and disaster plan.

21. Termination

21.1 Termination for convenience

Either Party may terminate this Agreement or any Order for convenience by giving the other Party not less than thirty (30) days written notice.

21.2 Termination for cause

(a) This Agreement including any Orders may be terminated at any time during the Term immediately by a Party if the other Party:

(i) is in material breach of any of its obligations under this Agreement and it has not rectified the breach within thirty (30) Business Days from receiving written notice requiring it to do so;

(ii) is no longer able to perform its obligations under this Agreement due to a change in Law which prevents a Party from performing its obligations under this Agreement; or

(iii) suffers an Insolvency Event and is in material breach of its obligations under this Agreement.

(b) Without limiting clause 21.1, Supplier may terminate this Agreement including any Orders or suspend the Services if Customer fails to make payment and has not rectified the non-payment within seven (7) Business Days from receiving written notice requiring it to do so.

21.3 Consequences of termination

(a) Upon termination of this Agreement or any Orders in accordance with this clause 21:

(i) where Customer terminates this Agreement or an Order under clause 21.1, Customer agrees to pay for any costs or expenses (including any pre-paid subscriptions, Hardware purchases and licences) incurred directly under the Agreement and applicable Order by Supplier as a result of such early termination;

(ii) all amounts due and payable to Supplier, whether or not invoiced, including any Fees for Services provided up to the date of termination, as at the date of termination become a debt due and payable on the effective date of termination; and

(iii) each Party must promptly return or destroy the other Party's Confidential Information, as directed by the other Party.

(b) Unless otherwise provided, termination of an Order will not necessarily affect this Agreement and any other Orders which are in effect between Supplier and Customer at the time of the termination and such other Orders

will continue in accordance with their respective terms.

21.4 Survival of rights

Termination of this Agreement does not affect the rights of a Party which have accrued up to the date of such termination.

22. Dispute resolution

22.1 Dispute Notice

If any dispute or difference arises between the Parties with respect to the construction, effect or operation of this Agreement, or with respect to any matter connected with this Agreement or arising out of it (a **Dispute**), the Parties must take the following steps to attempt to resolve the Dispute:

(a) either Party may serve a written notice on the other Party stating the nature of the Dispute and invoking the dispute resolution process set out in this clause 22 (a **Dispute Notice**); and

(b) the Parties must meet within ten (10) Business Days after the date of the receipt of the Dispute Notice, or such other period as the Parties agree in writing, and negotiate in good faith to resolve the Dispute.

22.2 Mediation

If the Dispute is not resolved in accordance with this clause 22 within twenty (20) Business Days of the date of the Dispute Notice, or such other period as the Parties agree in writing, the Dispute will be referred to mediation with the Parties to agree on a mediator who possesses the requisite skills and qualifications to assist the Parties in resolving the Dispute. The Parties will equally share all the costs of the mediation, including without limitation any fees charged by mediator.

22.3 Commencing proceedings

Other than proceedings for urgent interlocutory relief, a Party may not commence or maintain any proceedings in any court with respect to a Dispute unless and until that Party has complied with the procedures in this clause 22.

23. Insurance

23.1 Insurance Requirements

Each Party must procure and maintain adequate insurance with respect to the nature of their business, including the following insurance policies at its own expense:

(a) workers compensation insurance, as required by Law;

(b) public and product liability insurance;

(c) professional indemnity insurance; and

(d) cyber insurance.

23.2 Certificates of Insurance

Either Party may reasonably request certificates of insurance as evidence that the other Party is in compliance with clause 23.1 and the other Party must provide the relevant certificates within thirty (30) days of receiving such a request.

24. General

24.1 Force Majeure

(a) Neither Party will be liable to the other for any delay or failure to perform its obligations under this Agreement as a result of a Force Majeure Event.

(b) If a Force Majeure Event arises:

(i) the affected Party must notify the other Party of the extent to which the affected Party is unable to perform its obligations;

(ii) the affected Party will use its reasonable endeavours to mitigate the effect of the Force Majeure Event; and

(iii) the affected Party will not be liable to the other Party for any Claim the other Party suffers or incurs as a result of that Force Majeure Event.

(c) A Force Majeure Event does not relieve a Party from liability for an obligation which arose before the occurrence of that event, nor does that event affect the obligation to pay money in a timely manner.

(d) If the Force Majeure Event continues for a period of more than thirty (30) days, either Party may terminate this Agreement by written notice to the other Party.

24.2 Notices

Any notice given in connection with this Agreement must be in legible writing and must be addressed to a Party and either hand delivered to, or sent by post to the relevant address or emailed to the relevant contact's email address. A notice is taken to have been given:

(a) in the case of being hand delivered, on the date on which it is delivered;

(b) in the case of being sent by post, on the fifth (ninth if sent to an address in another country) day after the date of posting; or

(c) in the case of delivery by email, at the time sent, unless the sender is notified, by a system or person involved in the delivery of the email, that the email was not successfully sent.

24.3 Governing Law

This Agreement is governed by the law of Victoria. Each Party submits to the non-exclusive jurisdiction of the courts of Victoria and its appellate courts.

24.4 Counterparts

This Agreement may be executed in any number of counterparts, all of which taken together are deemed to constitute the same Agreement.

24.5 Waiver

A provision of this Agreement or a right created under it, may not be waived or varied except in writing, signed by the Party or Parties to be bound.

24.6 Costs

Each Party musty bear its own costs arising out of the negotiation, preparation and execution of this Agreement.

24.7 Severability

If any part or provision of this Agreement is judged invalid or unenforceable in a jurisdiction, it is severed for that jurisdiction, and the remainder of this Agreement will continue to operate in full force.

24.8 Assignment and novation

Customer may not assign or transfer its rights and obligations under this Agreement without the prior written consent of Supplier. Supplier may assign, transfer or novate its rights under this Agreement upon notice to Customer.

24.9 Remedies

The rights of a Party under this Agreement are cumulative and not exclusive of any rights provided by law.

24.10 Amendments

Any amendment to this Agreement has no force or effect, unless effected by a document executed by the Parties.

24.11 Survival

Clauses 8, 9, 10, 11.1(f), 14, 15, 16, 17, 18, 19, 20, 21.3, 21.4, 22, 23 and 25 survive termination of this Agreement.

24.12 Entire Agreement

This Agreement constitutes the entire agreement between the Parties about its subject-matter and supersedes any previous understandings or agreements on that subject- matter.

24.13 Relationship of the Parties

Nothing in this Agreement is intended to create a partnership, joint venture, or agency relationship between the Parties, and each of the Parties agree that they are entering into this Agreement only as independent contractors.

25. Definitions and interpretation

25.1 Definitions

In this Agreement, unless the context requires otherwise:

Additional Services is defined in clause 6.5;

Agreement is defined in clause 1;

Agreement Details means the section of this Agreement entitled 'Agreement Details';

Business Day means a day that is not a Saturday, Sunday or public holiday in Victoria;

Claim means any claim, notice, demand, action, proceeding, litigation, investigation,

judgment, damage, loss, cost, expense or liability however arising, whether present, unascertained, immediate, future or contingent, whether based in contract, tort or statute and whether involving a third party or a Party to this Agreement;

Commencement Date means the commencement date of this Agreement, as specified in a Schedule or Order;

Confidential Information means all confidential, non-public or proprietary information, regardless of how the information is stored or delivered, exchanged between the Parties, before, on or after the date of this Agreement, relating to the business, products, services, customers or other affairs of the Discloser of the information but does not include information which is in or becomes part of the public domain other than through breach of this Agreement;

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

Customer Acceptance Form means the form Customer or its agent signs upon installation of the Hardware;

Customer Data means all data and information relating to Customer, and its operations, facilitates, customers, Personnel, assets and Customer Environment (including Personal Information) in whatever form that information may exist and which:

(a) is supplied or made available by Customer to Supplier;

(b) is created or accessed by or on behalf of Supplier in the course of performing the Services; or

(c) Supplier has access to under this Agreement;

Customer Environment means Customer's information technology, telecommunications, internet and other relevant infrastructure that interfaces with the Services;

Customer Equipment is defined in clause 11.1(f);

Cyber Breach means any incident in respect of the Customer Environment or Customer Data (including in respect of Personal Information held or stored by Supplier on behalf of Customer) (**Data**) that results in:

(a) an Eligible Data Breach;

(b) the Data having been misused, interfered with, corrupted or subject to unauthorised access, modification or disclosure;

(c) unauthorised access to the Data, storage device or computer network in which such information is stored;

(d) that Data or the storage device or computer system on which such information is stored being lost or misplaced; or

(e) any part of the Data becoming corrupted, not accessible, incorrectly modified or deleted as a result of loss, unauthorised disclosure or unauthorised access;

Discloser means a discloser of Confidential Information;

Dispute is defined in clause 22.1;

Dispute Notice is defined in clause 22.1;

Eligible Data Breach has the meaning set out in the Privacy Act;

End User means an employee, contractor, business partner or customer of Customer who interacts with or uses the Customer Environment;

Equipment means any equipment, hardware or tools forming part of the Services which are provided by Supplier to Customer;

Fees means the fees payable by Customer for the Services, Hardware, Third Party Software, Third Party Services or Additional Services, On-boarding Assistance or Off-boarding Assistance as specified in the Order;

Force Majeure Event means an event which is beyond the reasonable control of the party affected, whether foreseeable or otherwise, and which could not have been prevented by the party affected exercising reasonable diligence and includes an act of God, earthquake, cyclone, fire, explosion, flood, landslide, lightning strike, storm, tempest, drought, war or pandemic (declared or undeclared), invasion, act of a foreign enemy, hostilities between nations, civil insurrection, explosion, government intervention, act of public enemy, sabotage, malicious damage, terrorism, civil unrest; contamination by radioactivity from any nuclear waste or from combustion of nuclear fuel, confiscation, requisition, expropriation, prohibition, embargo, damage to property by or under the order of any government

authority, strikes at a national level or industrial disputes at a national level, or any failure of the internet or telecommunications services, any failure of public service, absence of transport facilities, absence of raw material supplies, plant breakdown or failure of plant to perform to expected specifications;

GST has the meaning given in the GST Law;

GST Law has the meaning given in the *A New Tax System (Goods and Services Tax) Act 1999* (Cth), and terms used which are not defined in this Agreement, but which are defined in the GST Law, have the meanings given in the GST Law;

Hardware means any hardware which Customer independently procures from Supplier;

Intellectual Property Rights means all intellectual property rights including current and future registered and unregistered rights in respect of copyright, deigns, circuit layouts, trade marks, trade secrets, know-how, confidential information, patents, invention and discoveries and all other intellectual property as defined in article 2 of the convention establishing the World Intellectual Property Organisation 1967;

Insolvency Event means in respect of a Party, the occurrence of one or more of the following events:

(a) an application or order is made for the winding up or dissolution or a resolution is passed or any steps are taken to pass a resolution for the winding up or dissolution of the company;

(b) a provisional liquidator, liquidator or person having a similar function under the laws of any relevant jurisdiction is appointed in respect of the company or any action is taken to appoint such a person and the action is not stayed, dismissed or withdrawn within ten (10) Business Days;

(c) the company is deregistered under the Corporations Act or other legislation or notice of its proposed deregistration is given to it; or

(d) anything analogous to or of a similar effect to anything described above under the Laws of any relevant jurisdiction;

Interest Rate means the interest rate of two (2) % higher than the penalty interest rate under section 2 of the *Penalty Interest Rates Act 1983* (VIC), per annum;

Law means any:

(a) law including Commonwealth, State, Territory, local government legislation or any regulations, by-laws, declarations, ministerial directions and other subordinate legislation;

(b) common law;

(c) government or any governmental, semi-governmental, administrative, fiscal or judicial body, department, commission, authority, tribunal, agency or entity requirement or authorisation (including conditions in respect of any authorisation); and

(d) code of conduct, writ, order, injunction or judgment;

Maintenance Window is defined in clause 6.2;

Material Change is defined in clause 6.4;

Off-boarding Assistance means the off-boarding assistance specified in the Order;

On-boarding Assistance means the on-boarding assistance specified in the Order;

Operating Manual means the documentation that provides instructions on the installation and use of Hardware;

Order means an order form document, physical or electronic, which is executed by the Parties under clause 2;

Order Commencement Date means the order commencement date specified in the Order;

Party means a party to this Agreement and **Parties** means both of them;

Personal Information has the meaning given in the Privacy Act;

Personnel means in respect of a Party, that Party's employees, officers, contractors and agents;

PPSR means the Personal Properties Securities Register established pursuant to the PPSA;

PPSA means the *Personal Property Securities Act 2009* (Cth) and any regulations made pursuant to it;

Privacy Act means the *Privacy Act 1988* (Cth);

Recommendations is defined in clause 7.1(b);

Recipient means a recipient of Confidential Information;

Related Body Corporate has the meaning it is given in the Corporations Act;

Renewal Period means the renewal period specified in the Order;

Renewal Period is defined in clause 4(b);

Services means the managed services to be provided by Supplier to Customer, as described in the Order;

Security Interest has the same meaning given in the PPSA;

Site means the location for the provision of the Services, as specified in the relevant Order;

Software means any software forming part of the Services which is provided by Supplier to Customer;

Term has the meaning given in clause 3(a);

Third Party Licence Terms has the meaning given in clause 12(b);

Third Party Software means any software independently procured by Customer from Supplier;

Third Party Services means any services which Supplier resells on behalf of a third party to Customer; and

Third Party Service Terms is defined in clause 13(b).

25.2 Interpretation

The following apply in the interpretation of this Agreement, unless the context requires otherwise:

(a) a reference to any Act, regulation, rule or similar instrument includes any consolidations, amendments or re-enactments of it, any replacements of it, and any regulation or other statutory instrument issued under it;

(b) a reference to the singular includes the plural number and vice versa;

(c) a reference to a gender includes a reference to each gender;

(d) person includes a firm, corporation, body corporate, unincorporated association and a governmental authority;

(e) a reference to a party or a person includes that party's or person's executors, legal personal representatives, successors, liquidators, administrators, trustees in bankruptcy and similar officers and, where permitted under this agreement, their substitutes and assigns;

(f) an agreement on the part of, or in favour of, two or more persons binds or is for the benefit of them jointly and severally;

(g) includes means includes but without limitation;

(h) where a word or expression has a defined meaning, its other grammatical forms have a corresponding meaning;

(i) a reference to doing something includes an omission, statement or undertaking (whether or not in writing) and includes executing a document;

(j) a reference to a clause, schedule or annexure is a reference to a clause of, or a schedule or an annexure to this Agreement; and

(k) a heading is for reference only. It does not affect the meaning or interpretation of this Agreement.