



ASCENTION
THE NEXT LEVEL

**Master Services
Agreement
Terms**

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Master Services Agreement

Background

Ascention Services Pty Ltd (**Ascention**) provides a range of Consulting and Technical Services and Products in the information technology area.

This Master Services Agreement (**MSA**) sets out the terms and conditions under which Ascention supplies these Consulting and Technical Services and Products.

The parties to these terms are defined in the completed Ascention Service Terms and Order Form.

Agreement Structure

The Agreement consists of the following documents, which shall have effect as if expressly set out in the body of this Agreement. Any reference to this Agreement shall include:

- (a) this MSA;
- (b) the Service Terms and Order Form;
- (c) any other attachment or documents incorporated by reference.

The MSA provides the framework that governs the relationship between Ascention and Client with respect to the provision of the Services and provides a common set of terms and conditions to be adopted by the Parties through the execution of a single or multiple Service Terms and Order Forms.

1. Definitions & Interpretation

1.1 Definitions

In this Agreement, unless the context or subject matter otherwise requires:

Agreement means this service agreement between the Parties including this MSA, the Service Terms and Order Form and any other attachment or documents incorporated by reference;

Business means the business conducted by the Client at the Premises at the Commencement Date;

Commencement Date means the date set out in Ascention Service Terms and Order Form;

Client means the entity specified as such in the Ascention Service Terms and Order Form and where the context requires includes its officers, employees, agents and its successors, administrators and assigns;

Client Data means all data and information relating to the Client and its operations, facilities, Clients, clients, personnel, assets and programs in whatever form that information may exist and whether entered into, stored in, generated by or processed as part of the Services and any other data relating to the Services;

Confidential Information means the information, concepts, ideas, methodologies, systems, designs, data, formulae, forms, specifications, algorithms, processes, statements, charts, graphs, trade secrets, drawings, manuals, software (including source and object code versions) and data

(and copies and extracts made of or from that information and data) disclosed to either Party pursuant to this Agreement and includes:

- (a) confidential information relating to either Party's clientele;
- (b) information relating to the personnel, policies or business strategies of either Party; or
- (c) information relating to the terms of this Agreement;

The Confidential Information does not include any information that:

- (a) is or becomes generally known within the territory without breach of the terms of this Agreement or any other non-disclosure agreement; or
- (b) is required to be disclosed pursuant to the order or court or agency or government entity authorised under law to require disclosure;

Consulting and Technical Services means any work involving the following:

- (a) Data Governance, Data Quality, Master Data Management, Data Exploration / Science, Data Warehousing, Streaming / Predictive Analytics, Executive Dashboarding, Self-Service Analytics;
- (b) data systems design;
- (c) implementing and supporting solutions for data, analytics and tactical planning consultancy;
- (d) technology / product research and introduction;
- (e) Infrastructure Hosting, Software as a Service (SaaS)
- (f) Other services as described in the Service Terms and Order Forms.

CPI means the Consumer Price Index (All Groups Index for the Weighted Average Eight Capital Cities) as published from time to time by the Australian Bureau of Statistics for any Quarter and if that Index is discontinued or modified, an alternative equivalent index provided by the Australian Bureau of Statistics. If no equivalent alternative index is available, then either the Service Provider or the Client may request the Institute of Actuaries of Australia to provide an alternative index which is equivalent to the CPI and that alternative index shall be deemed to be the CPI for the purposes of this Agreement.

Disclosure means information provided by the Client regarding its needs and requirements in respect of Information, Communications and Technology requirements of its Business used by the Service Provider shown in Schedule 2;

Event of Force Majeure means the occurrence of an event or circumstances beyond the reasonable control of the party affected by it including (without limitation):

- (a) a war (declared or undeclared), insurrection, civil commotion, military action, or an act of sabotage;
- (b) a strike, lockout or industrial action, dispute or disturbance of any kind;
- (c) an act of a government or a Governmental Agency;
- (d) an act of God; or

- (e) a storm, tempest, fire, flood, earthquake or other natural calamity, and **Force Majeure** shall have a similar meaning;

Fees means the charges payable by the Client to the Service Provider pursuant to this Agreement, as specified in Ascention Service Terms and Order Form;

Future Rights means jointly and severally all those Rights (statutory or otherwise) comprised in Confidential Information and the Intellectual Property Rights which are created, developed or arise directly or indirectly from the provision of the Services;

Information, Communications and Technology (ICT) means all current software, programs, systems, electronic document retention, storage and retrieval processes, telephony systems and all other ICT of whatsoever kind or nature reasonably required by the Client in order to efficiently conduct the Business and includes any additional ICT which the Client may acquire, develop or create during the Term which the Service Provider agrees in writing to maintain and support under this Agreement;

Intellectual Property Rights means:

- (a) jointly and severally any Rights as they relate to the Confidential Information, copyright, the design rights, the patent rights, trademark rights, the eligible layout rights, the improvements and the Future Rights;
- (b) all other Rights resulting from intellectual activity in the industrial, scientific, literary or artistic fields; and
- (c) any application or Right to apply for registration of any of the Rights referred to in the subclause (a) or (b);

Materials means any documents, code, programs or other material forms of expression or any other object, process or thing comprising Intellectual Property Rights which is provided or brought into existence through the provision of the Services;

Minimum Specification means the specifications set out in the Ascention Service Terms and Order Form;

Nominated Person/Roles means the person or persons/roles, Client or entity nominated by the Service Provider/Client to perform the Services on behalf of the Service Provider/Client. The Nominated Person at the Commencement Date is specified in the Ascention Service Terms and Order Form;

Notice means a written notice, consent, approval, direction, order or other communication;

Notice Address means in respect of a Party:

- (a) the address or facsimile number specified as such in the Ascention Service Terms and Order Form; or
- (b) where a party gives Notice to all other parties of another address or number, the last address, email address or facsimile number so notified;

Obligation means any legal, equitable, contractual, statutory or other obligation, agreement, covenant, commitment, duty, undertaking or liability;

Party means either the Service Provider or the Client as the context dictates and Parties shall mean both or either of them as the context requires;

Premises means the location of the Client's Business at the Commencement Date specified as such in the Ascention Service Terms and Order Form;

Products means products and any work involving the following:

- (a) Supply of Software licensing;
- (b) Supply of Hardware and other products;
- (c) Other products as described in the Service Terms and Order Forms.

Proposal means the details provided to the Client for the provision of maintenance and support services for the Client's Information, Communications and Technology prepared after an inspection of the ICT hardware, software and information services/systems used by the Client in the ordinary course of its business included in Ascention Service Terms and Order Form;

Right includes a legal, equitable, contractual, statutory or other right, power, authority, benefit, privilege, remedy, discretion or cause of action;

Services means the Service/Product to be provided by the Service Provider as specified in the Ascention Service Terms and Order Form;

Service Levels means the service levels contained in Ascention Service Terms and Order Form;

Service Provider means the Party specified as such in the Ascention Service Terms and Order Form;

Term means the period of time (including any provision for extension) as specified in the Ascention Service Terms and Order Form.

1.2 Interpretation

In the interpretation of this Agreement, unless the context or subject matter otherwise require:

- (a) singular includes plural and vice versa;
- (b) any gender includes every gender;
- (c) a reference to a person includes corporations, trusts, associations, partnerships, a Government Authority, and other legal entities, and where necessary, include successor bodies;
- (d) references to writing include printing, typing, facsimile and other means of representing or reproducing words, figures, drawings or symbols in a visible and tangible form, in English;
- (e) references to signature and signing include due execution of a document by a corporation or other relevant entity;
- (f) references to months mean calendar months;
- (g) references to statutes include statutes amending, consolidating or replacing the statutes referred to and all regulations, orders-in-council, rules, by-laws and ordinances made under those statutes;

- (h) references to sections of statutes or terms defined in statutes refer to corresponding sections or defined terms in amended, consolidated or replacement statutes;
- (i) headings and the table of contents are used for convenience only and are to be disregarded in the interpretation of this Agreement;
- (j) where any word or phrase is given a defined meaning, another grammatical form of that word or phrase has a corresponding meaning;
- (k) each paragraph or sub-paragraph in a list is to be read independently from the others in the list;
- (l) a reference to an agreement or document is to that agreement or document as amended, novated, supplemented or replaced from time to time; and
- (m) a reference to a party includes that Party's executors, administrators, substitutes, successors and permitted assigns.

2. Services

2.1 Provision of Services

- (a) The Service Provider and Nominated Person agree to provide the Services to the Client for the Term in return for the Fees.
- (b) The Client acknowledges that the Service Provider has relied upon the Disclosure made by the Client in entering into this Agreement and warrants that the Disclosure to the best of its knowledge, fully and comprehensively sets out all of the needs and requirements of the Client in respect of the Information, Communications and Technology.
- (c) The Client agrees that the Services will be solely and exclusively provided by the Service Provider for the Term.

2.2 Ascention Service Terms and Order Form Term

In the event of any inconsistency between a term contained in the Ascention Service Terms and Order Form and any other term of this Agreement, the term contained in the Ascention Service Terms and Order Form will prevail to the extent of any inconsistency.

2.3 Term Commencement

The Service Provider will provide the Services for the Term commencing on the Commencement Date.

2.4 Renewed Term

- (a) Immediately following the expiration of the current Term and without further notice, the Term of this Agreement shall be automatically renewed for a further 12 months unless the Service Provider receives written notice terminating this Agreement from the Client at least 60 days prior to the expiration of the current Term.
- (b) Where the Term of this Agreement is renewed for a further 12 months pursuant to clause 2.4(a), the Service Provider may review the Fees and if the Service Provider wishes to vary the Fees for the renewed term:
 - (i) the Service Provider must give the Client 30 days' written notice of the variation;

- (ii) before the expiry of the 30 day notice period provided pursuant to clause 4.4(a), the Client may give written notice to the Service Provider that it does not accept the variation and notifying that it terminates the Agreement with 90 days' notice, or payment of Fees equivalent to the amount which would be charged over 90 days;
- (iii) if the Client does not provide notice to the Service Provider before the expiry of the 30 day notice period provided pursuant to clause 2.4(b)(ii), the Client will be deemed to have accepted the variation and it will take effect on the later of:
 - (A) the first day of the renewed term; and
 - (B) the expiry of the 30 day notice period.

2.5 General Duties

Unless otherwise provided in the Proposal the Service Provider will:

- (a) ensure that its Nominated Person and its personnel provide the Services in a thorough, competent and workmanlike manner, to a high professional standard and in the manner, frequency, quantity and time as reasonably required by the Client in accordance with this Agreement;
- (b) cause each Nominated Person to comply with clause 2.5(a) in the performance of the Service Provider's duties;
- (c) attend the Premises during ordinary office hours when required to perform the Services, including but not limited to any pre-emptive maintenance of the Information, Communications and Technology;
- (d) where necessary, ensure that the Nominated Person and its personnel hold and keep current appropriate approvals under the *Commission for Children and Young People and Child Guardian Act 2000* and, where appropriate, a blue card

2.6 System Upgrades

If the Client acquires, varies and/or installs software systems, hardware, services, telephony or any other Information, Communications and Technology componentry or services without consultation or recommendation by the Service Provider, the Service Provider may:

- (a) refuse to maintain or provide Services with regards to such new systems, componentry and hardware; or
- (b) provide notice to the Client that the Fees will increase to cover the additional service requirements associated with the upgrade.

2.7 Recommendations

- (a) The Service Provider may, from time to time, give reasonable advice or recommendations to the Client as to the use, storage and maintenance of the Information, Communications and Technology and the acquisition of software and new operating systems.
- (b) If the Client does not follow the recommendations or advice provided pursuant to clause (a) within 30 days of such being provided by the Service Provider, the Service Provider may, at its absolute discretion and sole option:
 - (i) suspend the Services until the Client follows the recommendations or advice provided pursuant to clause (a); or

- (ii) terminate this Agreement by written notice to the Client; or
 - (iii) increase the Fees for the Service by written notice to the Client setting out the new Fees; or
 - (iv) continue to provide the Services for the same Fees.
- (c) The Client may request specific advice or recommendations from the Service Provider as to any aspect of the Information, Communications and Technology and the Service Provider may, at its discretion, respond to such a request.
- (d) The Client agrees and accepts that the Service Provider will not in any circumstance be liable to the Client for any damage or loss associated with any advice and recommendation provided by the Service Provider except to the extent that the damage or loss is caused by the Service Provider's wilful or negligent act or omission.

2.8 Location of Services

If the Client ceases to carry on the Business at the Premises detailed in Ascention Service Terms and Order Form and moves the Business to another address (New Premises) which is located more than 25 km from the Premises the Service Provider may, at its option:

- (a) terminate this Agreement by giving the Client six months' written notice to that effect; or
- (b) agree to provide the Services at the New Premises with such amendment to the terms of the Service Level Agreement as the Service Provider considers necessary as a result of the change in geographical location, including but not limited to delays associated with travel arrangements and time.

2.9 Client's Obligations

(a) The Client must:

- (i) ensure that all its employees and any other persons permitted to access the Information Technology are appropriately trained, competent and do not misuse or recklessly or negligently damage the Information, Communications and Technology;
- (ii) give the Service Provider, the Nominated Person, its employees and consultants reasonable access required to the Premises and the Information, Communications and Technology during ordinary business hours on work days to enable the Service Provider to carry out and provide the Services. The Client acknowledges and accepts that such access may interrupt or disrupt the Business while such maintenance is being conducted;
- (iii) where requested by the Service Provider acting reasonably, shut down or cease using the whole or part of its Information, Communications and Technology so as to allow the Service Provider to provide the Services until permitted by the Service Provider to resume use;
- (iv) ensure that all its employees, agents and contractors co-operate with the Service Provider, the Nominated Person, its employees and consultants at all times and provide the Service Provider with support and assistance as reasonably required; and
- (v) ensure that the Service Provider, the Nominated Person, its employees and consultants are provided with an appropriately furnished area with work and desk space as reasonably required.

- (b) Notwithstanding clause 2.9(a)(iii), if it is impractical for the Client to shut down or cease use of the Information, Communications and Technology at the time requested by the Service Provider the Client must notify the Service Provider as such and the Parties must reschedule such work to occur at a time appropriate for both Parties. Where the Client wishes to reschedule work under this clause, the Service Provider will not in any circumstances be liable for any loss, damage or delay which occurs in connection with this clause.
- (c) The Client warrants to the Service Provider that it has not withheld any material information about the Information, Communications and Technology or its Business.

2.10 Minimum System Requirements

- (a) The Client accepts and acknowledges that the Service Provider will not be required to provide the Services unless the Client ensures that the Information, Communications and Technology meets the Minimum Specifications.
- (b) The Service Provider may, at its sole discretion, agree to provide services where the Information, Communications and Technology does not meet the Minimum Specification, including but not limited to where Macintosh operating systems are used, upon request from the Client.
- (c) If the Service Provider agrees to provide services pursuant to clause 2.10(b), the extent of the services to be provided and the fees which will be required will be agreed between the Parties prior to any work being undertaken by the Service Provider.

2.11 Authorisation Processes

Unless otherwise provided in the Proposal the following must be requested by the Client Representative:

- (a) changes to the Information, Communications and Technology;
- (b) ordering Information, Communications and Technology equipment or systems;
- (c) escalating incident reports; and
- (d) requesting consulting and support time.

2.12 General Exclusions

Unless otherwise provided in the Ascention Service Terms and Order Form or agreed between the Parties, the following items are expressly excluded from the Services:

- (a) work required to recover or repair the Information, Communications Technology where a critical machine, number of machines or services are unavailable due to circumstances beyond the control of the Client or Service Provider;
- (b) the repair of any parts, equipment or software not covered by vendor/manufacturer warranty or support;
- (c) the cost of any:
 - (i) parts, equipment, or shipping charges;
 - (ii) software, licensing, or renewals or upgrades;
 - (iii) third party vendor or manufacturer support or incident fees;

- (d) work required to make the Client's Information, Communications and Technology meet the Minimum Specifications;
- (e) work or repairs made necessary by the alteration or modification of the Information, Communications and Technology other than that authorised by Service Provider, including alterations, software installations or modifications of equipment made by Client's employees or anyone other than Service Provider.
- (f) maintaining applications or software packages;
- (g) programming (modification of software code) and program (software) maintenance;
- (h) installing or upgrading equipment or hardware;
- (i) changing, upgrading or altering a network environment; and
- (j) supporting virtual machine management consoles (HyperV, VMware, etc) and associated clustered environments.

3. Projects

3.1 Project Work

The Service Provider may, on request from the Client, agree to undertake work or provide equipment outside of the scope of the Services (**Project Work**) in accordance with the following process:

- (a) The Client must provide a request to the Service Provider in writing (**Project Work Request**);
- (b) The Service Provider must respond to the Client within 14 days of receiving the Project Work Request either:
 - (i) refusing to undertake the Project Work; or
 - (ii) agreeing to undertake the Project Work and detailing:
 - (A) the equipment or services required to satisfy the Project Work Request;
 - (B) the estimated time frame for the Project Work to be completed;
 - (C) the costs and expenses involved in completing the Project Work (**Quote**);
- (c) Within 7 days of receipt of the Service Provider's response pursuant to clause 3.1(b)(ii), the Client may, by notice in writing to the Service Provider: (i) withdraw the Project Work Request; or
 - (ii) not accept the Quote and provide a counter-offer;
 - (iii) accept the Quote;
- (d) If the Client provides notice to the Service Provider in accordance with clause 3.1(c)(ii) the Parties agree to negotiate in good faith and co-operate in an effort to reach an agreement

within 14 days. If an agreement cannot be reached between the Parties within this time the Client will be deemed to have withdrawn the Project Work Request.

3.2 Project Work Recommended by the Service Provider

The Service Provider may recommend to the Client that work or equipment outside of the scope of the Services is required (**Suggested Project Work**) in accordance with the following process:

- (a) The Service Provider must give to the Client notice in writing detailing the Suggested Project Work specifying:
 - (i) the equipment or services required to satisfy the Project Work Request;
 - (ii) the estimated time frame for the Project Work to be completed;
 - (iii) the costs and expenses involved in completing the Project Work (**Suggested Project Work Quote**);
- (b) Within 7 days of receipt of the Suggested Project Work Quote pursuant to clause 3.2(a), the Client may, by notice in writing to the Service Provider:
 - (i) refuse the Suggested Project Work Quote; or
 - (ii) not accept the Suggested Project Work Quote and provide a counter-offer;
 - (iii) accept the Suggested Project Work Quote;
- (c) If the Client provides notice to the Service Provider in accordance with clause 3.2(b)(ii) the Parties agree to negotiate in good faith and co-operate in an effort to reach an agreement within 14 days. If an agreement cannot be reached between the Parties within this time the Client will be deemed to have refused the Suggested Project Work Quote.

3.3 Invoicing and Payment for Project Work

- (a) The Service Provider will, from time to time, render invoices to the Client for any Project Work undertaken in accordance with this clause 3.
- (b) The Client will make payment to the Service Provider within 10 business days of receipt of a rendered invoice.
- (c) If the Client disputes the amount of an invoice submitted by the Service Provider pursuant to this clause, then the Client is not obliged to pay the disputed portion of the invoice until the dispute is resolved, but must pay all other non-disputed amounts.
- (d) If the Client disputes an invoice, the Service Provider may suspend, cancel or withdraw the provision of the Project Work and the Services in whole or in part until such time as the dispute is resolved or the full amount of the invoice is paid.

4. Fees

4.1 Fees

In return for the Service Provider providing the Services, the Client must pay the Fees to the Service Provider as specified in the Ascention Service Terms and Order Form.

4.2 Payment of Fees

At the option of the Service Provider (at its sole discretion) the Client must pay the Fees to the Service Provider in accordance with either of the following procedures:

(a) Payment of invoices as follows:

- (i) The Client must pay a Site Establishment Fee and 1 month's fees in advance on the Commencement Date unless specified otherwise in Ascention Service Terms and Order Form.
- (ii) The Service Provider will, from time to time render invoices monthly in advance to the Client for work and Services to be performed in the following month.
- (iii) The Client will make payment to the Service Provider within 10 business days of receipt of a rendered invoice.
- (iv) The Service Provider must provide all invoices to the Client by facsimile or email to the number or address notified by the Client. All invoices provided to the Client by facsimile or email will be deemed to have been received by the Client on the date sent by the Service Provider.

(b) Payment by direct debit as follows:

- (i) The Client must pay a Site Establishment Fee and 1 month's fees in advance on the Commencement Date, unless otherwise specified in Ascention Service Terms and Order Form, and the payments for the balance of the Term will be debited from the Client's account in accordance with the following clauses.
- (ii) The Client must sign and supply a direct debit request form (DDRF) within 10 business days of a request by the Service Provider.
- (iii) The Fees will be debited from the Client's account in accordance with the authorisation in the DDRF in advance for work and Services to be performed in the following month.
- (iv) The Service Provider may vary the DDRF at any time by giving the Client at least 14 days written notice. If the variation detrimentally affects the Client, acting reasonably, the Client may provide notice that it wishes to make payment through another means within 7 days after receiving notice from the Service Provider under this clause.
- (v) If the Client wishes to stop or defer a direct debit payment, it must notify the Service Provider in writing at least 14 days before the next payment day.
- (vi) The Client may only cancel the direct debit arrangements if it gives the Service Provider at least 28 days' notice in writing before the next payment day and the Parties agree to an alternative method of payment.
- (vii) The Client accepts and acknowledges that it is the Client's responsibility to ensure that there are sufficient clear funds available in the account to allow the debit payment to be made in accordance with the DDRF.

4.3 Payments

- (a) Payments to the Service Provider will be made to the bank account nominated by the Service Provider in writing or otherwise on the invoice provided to the Client or any other bank account which may be notified in writing by the Service Provider to the Client from time to time.
- (b) Where the Client has failed to pay the Fees by the due date the Service Provider may charge interest on any money overdue during the period of until full payment is received at a rate of 14% per annum.

4.4 Variations

Where the Client's Business or Information, Communications and Technology varies during the Term, the Service Provider may, at its discretion, vary the Fees to reasonably reflect the change in the Service which will be provided. Should the Service Provider choose to vary the Fees pursuant to this clause:

- (a) the Service Provider must give the Client 30 days' written notice of the variation;
- (b) before the expiry of the 30 day notice period provided pursuant to clause 4.4(a), the Client may terminate this Agreement by written notice to the Service Provider that it does not accept the variation and clause 11.6 will apply;
- (c) if the Client does not provide notice to the Service Provider before the expiry of the 30 day notice period provided pursuant to clause 4.4(a), the Client will be deemed to have accepted the variation and it will take effect immediately upon the expiry of the 30 day notice period.

4.5 Relationship

The Service Provider is an independent contractor of the Client and is not a partner, agent, employee or joint venturer of the Client in the conduct of the Client's business nor does it have the authority to bind the Client by contract or otherwise.

4.6 Statutory Requirements

The Service Provider acknowledges it has sole responsibility in relation to payment of superannuation, workers' compensation and taxes incidental to employment in respect of its own personnel. The Service Provider further acknowledges that neither it nor its personnel have, pursuant to this Agreement, any entitlement from the Client in relation to any form of employment or related benefits.

4.7 CPI Increases

The Fees will be reviewed on or around each anniversary of the Commencement Date by the Service Provider by reference to any increase in the CPI over the 12 months preceding the last published data. Any such increases will be applied from the 1st day of each anniversary of the Commencement Date.

5. GST

5.1 Definitions

For the purpose of this clause:

GST means the goods and services tax under the GST Act;

GST Act has the same meaning as in *A New Tax System (Goods and Services Tax) Act 1999* (Cth); and

Expressions used in this clause have the same meaning as those expressions in the GST Act.

5.2 Consideration exclusive of GST

Any consideration or payment Obligation under this Agreement is exclusive of GST unless stated otherwise.

5.3 Consideration

(a) The consideration (including any non-monetary consideration) for a Supply made under or in connection with this agreement which is a Taxable Supply is increased by an additional amount or value equal to the amount of that consideration multiplied by the relevant GST rate.

(b) The additional amount under paragraph (a) is payable at the same time and in the same manner as the consideration for the Supply to which the additional amount relates.

5.4 Tax Invoice

A Party who receives consideration, whether monetary or otherwise, must give the other party a Tax Invoice in a form which complies with the GST Act within 10 Business Days after the end of the month in which any consideration is paid, or an invoice issued, in relation to the Supply, whichever occurs first.

5.5 Payments

Unless otherwise stated in this Agreement, the following principles apply when determining the amount of a payment under this Agreement:

(a) if a party is entitled under this Agreement to be reimbursed or indemnified by another party in respect of any loss, damage or outgoing, paid, suffered or incurred by or any action, proceeding, claim or demand against the first mentioned party in connection with this Agreement, the reimbursement or indemnity payment must not include any GST component of the claim, loss or outgoing for which an Input Tax Credit may be claimed; and

(b) if a party sets off an amount under this Agreement, the same principles apply to calculate the amount to be set-off, as if the amount had been paid in accordance with paragraph (a).

5.6 Adjustment Event

If an Adjustment Event occurs, the parties must do all things necessary to make sure that the Adjustment Event may be properly accounted for, including the issue of an Adjustment Note.

6. Security

- (a) The Service Provider will ensure all information and Materials of the Client in the custody of the Service Provider shall be protected at all times from unauthorised access or use by a third party or misuse, damage or destruction by any person.
- (b) All passwords and access codes to any of the Information, Communications and Technology remain the sole and exclusive property of the Client at all times and must not be used or disclosed by the Service Provider except where proper and reasonably necessary in providing the Services

7. Data Security

7.1 Client Data

The Client Data is and will remain the property of the Client at all times. Except as required by Law or where a 'Data Usage' agreement is in place, the Service Provider must not:

- (a) use Client Data for any purpose other than directly in relation to the performance of its obligations under this Agreement;
- (b) allow its representatives sell, commercially exploit, let for hire, assign rights in or otherwise dispose of any Client Data;
- (c) make any Client Data available to a third party other than an approved subcontractor and then only the extent necessary to enable the approved subcontractor to perform its part of the Service Provider's obligations under this Agreement; and
- (d) remove or transfer the Client Data to any non-Client premises or systems without obtaining the prior approval of the Client.

7.2 Safeguards

The Service Provider must make all attempts, where possible and commercially reasonable, to establish and maintain safeguards against the destruction, loss or alteration of the Client Data in its possession or control that:

- (a) are consistent with the data security requirements notified by the Client from time to time;
- (b) comply with all applicable Laws concerning data security;
- (c) prohibit and prevent any person who does not have the appropriate level of security clearance from gaining access to Client Data; and

notify the Client immediately and comply with all reasonable directions of the Client if the Service Provider becomes aware of the contravention of any data security requirement.

7.3 Backup Requirements

The Service Provider will, where agreed as part of the managed service agreement services, backup the Client Data to the location and extent requested by the Client as a safeguard against the destruction or loss of the Client Data, including:

- (a) scheduling backups in accordance with the reasonable requests of the Client;

- (b) monitoring the success or failure of backups; and
- (c) testing successful reinstatement on random backup images

Notwithstanding the above, the Service Provider is not, in any circumstances, liable to the Client for any costs, expenses, loss, liability or damage of any kind, including but not limited the loss of profits associated to or in connection with the validity, success or otherwise of any backup of the Client Data.

8. Intellectual Property

8.1 Title

The Service Provider, Nominated Person and the Client acknowledge that the benefit, Right, title and interest in all Intellectual Property Rights in the Materials of the:

- (a) Client shall remain with the Client, unless otherwise agreed in writing signed by the Client and the Service Provider; and
- (b) Service Provider or as otherwise created by or arising out of the Services performed by the Service Provider relating to the Software, shall immediately be assigned to and vest absolutely in the Service Provider.

8.2 Future Rights

The Parties hereby assign absolutely any benefit, Right, title and interest the Parties may have in any Future Rights in the Intellectual Property Rights or the Materials relating to the Software to the Service Provider.

8.3 Further Assurances

The Client shall at the request of the Service Provider and within a reasonable time execute all documents and do all things as required by the Service Provider to give effect to this clause.

8.4 Pre-Existing Rights

The Client acknowledges that, notwithstanding clauses 8.1 and 8.2, such vesting of title does not affect the Intellectual Property Rights in any pre-existing material (including but not limited to software, documentation and data) which is incorporated into the Materials. In such circumstances, the Service Provider has granted the Client an exclusive, non-transferable licence to use such pre-existing materials as set out in the Intellectual Property License Agreement.

8.5 Indemnity

- (a) The Service Provider warrants that the Materials and any other documents or information delivered under this Agreement do not and will not infringe the Intellectual Property Rights of any person.
- (b) The Service Provider will fully indemnify the Client from and against any loss, expenses, demands or liability whether directly or indirectly arising out of a Claim by a third party against the Client alleging that the Materials, documents or other information infringes that person's Intellectual Property Rights.

9. Confidential Information

9.1 Assurance

- (a) The Service Provider must ensure that it and its personnel comply with the terms of this clause 9 and the Client may at any time require the Service Provider to arrange for its employees, agents or sub-contractors engaged in the performance of this Agreement to execute a suitable confidentiality deed (if required by the Client).
- (b) The Service Provider shall arrange for all such deeds to be executed within the timeframe reasonably proposed by the Client.

9.2 No Disclosure

The Service Provider and Nominated Person must not:

- (a) disclose, directly or indirectly, any Confidential Information of the Client to any person without the prior written approval of the Client; or
- (b) use or make a copy of any of the Client's Confidential Information otherwise than for the purposes of this Agreement,

and the Service Provider must immediately notify the Client if the Service Provider becomes aware of any unauthorised access to, or use or disclosure of, any of the Client's Confidential Information.

9.3 Delivery

The Service Provider, at the written request of the Client, is required to immediately deliver to the Client all records and documents, including, without limitation, all copies or records containing or referring to Confidential Information which are in its possession, power or control, or (at the Client's request) delete all copies of such documents in its possession, power or control, including electronic copies provided that the Client makes payment of the Service Provider's reasonable costs in delivering or deleting these records and documents.

9.4 Survival

This clause 9 survives the expiration or termination (for any reason) of this Agreement and is in addition to and not in derogation of Obligations at law or under any law or trade or professional custom or use.

10. Limitation of Warranties and Liability

- (a) To the fullest extent permitted by law, the Service Provider makes no representation or warranty in respect of the provision of the Services except that it will carry out the Services competently, professionally and to the best of its ability within the scope of the Proposal, Disclosure and the terms of this Agreement.
- (b) The Service Providers warranties with respect to the state, quality or condition of the Services are limited to those imposed upon the Service Provider by statute, including those contained in Schedule 2 of the *Competition and Consumer Act 2010* (Cth) and the Service Provider expressly disclaims all other implied warranties and conditions except where the infringement is known by the Service Provider beforehand.
- (c) The Client expressly accepts and acknowledges that the Service Provider is not liable to the Client for any costs, expenses, loss, liability or damage of any kind, including but not limited to loss of profits, however arising from or in connection with:

- (i) any delay in the Service Provider attending the Premises to repair any breakdown;
- (ii) any failure or inability to repair any breakdown;
- (iii) any inability of the Client to access the Information, Communications and Technology;
- (iv) any disruption or interference with the Business in connection with the Services being carried out or provided;
- (v) any Information, Communications and Technology being properly in the possession of the Service Provider;
- (vi) the Information, Communications and Technology failing to operate at any time or times during the Term;
- (vii) any delay, failure or error in the provision of the Service due to any circumstance outside the Service Provider's reasonable control, including without limitations, failure of any communications network or system, electronic power surges, overloads, failures or blackouts, including but not limited to any failure in internet, telephone or data connectivity,

except to the extent that such costs, expenses, loss, liability or damage is caused by the Service Provider's wilful or negligent act or omission.

- (d) The Service Provider will make reasonable endeavours to resolve internet or other communications network or system connectivity issues which may impact their ability to perform the Services but will not in any circumstance be liable to the Client for any costs, expenses, loss, liability or damage of any kind, including but not limited to loss of profits, arising from or in connection with such issues and the Service Level Agreement will not apply to any work done pursuant to this clause 10(d).
- (e) The Service Provider will not be liable for any costs, expenses, loss, liability or damage of any kind suffered by the Client in connection with any non-deliberate inaccuracy, error or omission on the part of the Service Provider in carrying out the Service notwithstanding any negligence on the part of the Service Provider.
- (f) To the fullest extent permitted by law, the Service Provider excludes all liability for direct, indirect and consequential loss including without limitation the loss or corruption of the Information, Communications and Technology or Client's data, loss of revenue, loss of profits, failure to realise expected profits or savings and any other commercial or economic loss of any kind arising from this Agreement or the provision of any of the Services by the Service Provider except to the extent that such liability is a result of the Service Provider's wilful or negligent acts or omissions.
- (g) The Client acknowledges that:
 - (i) it does not rely upon any prior statement, undertaking or representation made or given by or behalf of the Service Provider which is not set out in this Agreement;
 - (ii) it is fully aware of the contents of this Agreement and all documents referred to herein and has had the opportunity to obtain independent legal advice on its terms and the terms of all other related documents prior to entering into the Agreement; and

(iii) where the Service Provider is liable for any costs, expenses, loss, liability or damage suffered by the Client the Service Provider's liability is limited to either:

(A) re-supply of the Services by the Service Provider;

(B) payment of the cost of having another provider re-supply the Services.

11. Termination

11.1 By either Party

Without limiting the generality of any other clause in this Agreement, either Party may terminate this Agreement immediately by notice in writing if the other Party:

- (a) is in breach of any term of this Agreement and any such breach is not remedied within 30 days of the Party notifying the other Party of the need to remedy, including but not limited to the obligation to pay the Fees;
- (b) becomes, threatens or resolves to become subject to any form of insolvency administration;
- (c) being a partnership, dissolves, threatens or resolves to dissolve or is in jeopardy of dissolving;
- (d) being a natural person, dies; or
- (e) ceases conducting its business in the normal manner.

11.2 Effect of Notice of Breach

- (a) Where the Party provided notice of a breach of this Agreement is the Client, the Service Provider may, at its option, suspend the provision of the Services until the breach has been remedied.
- (b) Where the Party provided notice of a breach of this Agreement is the Service Provider, the Client may, at its option, suspend the payment of the Fees until the breach has been remedied.

11.3 Termination by the Service Provider for Breach

Where the Service Provider terminates this Agreement pursuant to clause 11.1, the Client must pay to the Service Provider a sum equal to the amount calculated as "A" below where: $A = (B \div 12) \times C$

Where

A = payment to the Service Provider;

B = the aggregate of the Fees paid by the Client for the 12 month period preceding the month in which the termination notice is given, or if a 12 month period has not yet elapsed since the Commencement Date, the aggregate of the Fees that the Service Provider reasonably believes would have been received over a 12 month period from the Commencement Date; and

C = the number of months or part thereof from the date of termination, to the end of the Term current at the time termination occurs;

11.4 Pre-Estimate of Loss

The Client acknowledges and agrees that the amounts payable under clause 11.3 is a genuine pre-estimate of the loss that the Service Provider will suffer if this Agreement is terminated before the expiry date of the relevant Term.

11.5 Consequences of Termination

If this Agreement is terminated for any reason then, in addition to any payment required pursuant to clause 11.3:

- (a) both Parties will return all property in its possession belonging to the other party, including all Confidential Information and in the case of the Service Provider, all Client Data unless agreed as part of a 'Data Usage' agreement.;
- (b) the Service Provider must reimburse the Client for any amounts paid by the Client for Services which have not been supplied in accordance with this Agreement;
- (c) the Client must pay to the Service Provider any amounts owing for the Services to the Service Provider within 30 days of the date of termination; and
- (d) where the Service Provider has undertaken any Project Work the Client must, at the direction of the Service Provider (in its sole discretion):
 - (i) pay to the Service Provider all amounts owing for any Project Work or equipment supplied as at the date of termination;
 - (ii) return to the Service Provider any and all equipment provided as part of the Project Work that has not been paid for by the Client at the date of termination and the Client will be responsible for all costs associated with the removal of equipment or systems; and
 - (iii) any combination of the above considered reasonably appropriate by the Service Provider and notified to the Client.

11.6 Transition

- (a) The Client may request the Service Provider to provide transitional assistance for a period of up to 90 days or a longer period if agreed between the parties at any time after receiving or issuing a notice of termination under this Agreement which will be invoiced to the Client and paid at the standard rate applicable to the Services requested and the time spent by the Service Provider.
- (b) Upon receipt of the request under this clause the Service Provider will provide transitional assistance to the Client, necessary to:
 - (i) allow the Client to source and appoint a replacement service provider;
 - (ii) minimise any business disruption arising from the handover of services to any incoming service provider or back to the Client; and
 - (iii) facilitate the orderly transfer of responsibility for and conduct of any services to any in-coming service provider or back to the Client.

12. Sub-contractors

12.1 Personal Performance

The Service Provider may sub-contract or otherwise arrange for another person to perform any part of this Agreement or to discharge any of its Obligations under any part of this Agreement without the prior written consent of the Client.

12.2 Responsibility

In the event the Service Provider sub-contracts pursuant to subclause 12.1, the Service Provider shall not be relieved of any of its liabilities or Obligations under this Agreement and the Service Provider shall be liable to the Client for the acts, defaults and neglects of any sub-contractor or any employee or agent of the sub-contractor as if they were the acts, defaults or neglects of the Service Provider or the employees or agents of the Service Provider.

12.3 Suitability

The Service Provider shall be responsible for ensuring the suitability of all sub-contractors and for ensuring that the work performed by the sub-contractors meets the requirements of this Agreement.

13. Conflict of Interest

13.1 No Conflict

The Service Provider warrants that to the best of its knowledge, no conflict of interest exists or is likely to arise in the performance of its Obligations under the Agreement.

13.2 Ability to perform

The Service Provider must not, during the course of this Agreement, engage in any activity likely to compromise the ability of the Service Provider to perform its Obligations fairly and independently.

14. Force Majeure

14.1 No liability

Neither Party shall be liable for any delay or failure to perform its Obligations pursuant to this Agreement if such delay is due to Force Majeure.

14.2 Suspension

If a delay or failure of a Party to perform its Obligations is caused or anticipated due to Force Majeure, the performance of that Party's Obligations will be suspended.

14.3 Termination

If a delay or failure by a Party to perform its Obligations due to Force Majeure exceeds 60 days, either Party may immediately terminate the Agreement on providing notice in writing to the other Party.

14.4 Refund

If this Agreement is terminated pursuant to subclause 14.3, the Service Provider shall refund moneys previously paid by the Client pursuant to this Agreement for goods or services not provided by the Service Provider to the Client.

15. Dispute Resolution

15.1 No proceedings

A Party must not commence court proceedings, save for proceedings seeking interlocutory relief, in respect of a dispute arising out of this Agreement (**Dispute**) unless it has complied with the provisions of this clause.

15.2 Notification of Dispute

A Party claiming that a Dispute has arisen must notify each other Party to the Dispute by providing details of the Dispute.

15.3 Best efforts to resolve Dispute

During the 5 day period after a notice is given under clause 15.2, or such longer period as is unanimously agreed in writing by the parties to the Dispute (**Initial Period**), each Party to the Dispute (**Disputant**) must use its best efforts and negotiate in good faith to resolve the Dispute.

15.4 Referral to Mediator

If the Disputants are unable to resolve the Dispute within the Initial Period, each Disputant agrees that the Dispute must be referred, at the request of any Disputant, to an independent Mediator agreed between the Parties, or by the President for the time being of the Law Society of Queensland, in the absence of agreement no later than 2 business days after the end of the Initial Period, and:

- (a) the Disputants must act in the utmost good faith and co-operate with the Mediator and the other Disputants in a genuine attempt to resolve the Dispute within 10 business days after it is referred to the Mediator;
- (b) the cost of the Mediator will be borne equally by the parties to this Agreement; and
- (c) The Parties of the mediation will bear their own costs of attending.

15.5 Breach of this clause

If, in relation to a Dispute, a Disputant breaches any provision of clauses 15.1 to 15.4, each other Disputant need not comply with clauses 15.1 to 15.4 in relation to that Dispute.

15.6 General Obligation to Co-Operate

The parties agree that:

- (a) they have a general Obligation to co-operate to achieve the objectives of the Agreement; and
- (b) in the event of a breakdown of their relationship, they will use their best endeavours to resolve their differences and will proceed to mediation prior to having recourse to litigation or terminating the Agreement.

16. Proper law, Jurisdiction

16.1 Choice of law

This Agreement is governed by and construed in accordance with the laws of New South Wales.

16.2 Jurisdiction

Actions, suits or proceedings relating in any way to this Agreement or documents or dealings contemplated by it, may be instituted, heard and determined in a court of competent jurisdiction in Queensland.

16.3 Submission to jurisdiction

Each Party irrevocably submits to the non-exclusive jurisdiction of such court for the purpose of any such action, suit or proceeding.

17. General Provisions

17.1 Variations

No variation of this Agreement nor consent to a departure by a Party from a provision, shall be of effect unless it is in writing, signed by the parties or (in the case of a waiver) by the Party giving it. Any such variation or consent shall be effective only to the extent to or for which it may be made or given.

17.2 Waiver

The non-exercise of or delay in exercising a Right of a Party shall not operate as a waiver of that Right, nor does a single exercise of a Right preclude another exercise of it or the exercise of other Rights. A Right may only be waived by notice, signed by the Party to be bound by the waiver.

17.3 Assignment

The Rights and/or Obligations under the terms of this Agreement may not be assigned without the prior written consent of the other Party. Such consent will not be unreasonably withheld. For the avoidance of doubt a change in ownership or control of a Party shall be deemed to constitute an assignment

17.4 Notices

Any Notice or other communication in connection with this Agreement must be in writing addressed to:

The Notice Address of the other Party and the Notice or other communication will be deemed to be received:

- (a) in the case of a posted letter on the third day after posting;
- (b) in the case of delivery by generally recognised overnight courier, on the second day after dispatch with that courier;
- (c) in the case of personal delivery on the date of delivery; and
- (d) in the case of email or facsimile transmission at the time recorded on the transmission report from the machine from which the email or facsimile was sent.

17.5 Further assurances

Each Party to this Agreement shall do all things and sign, execute and deliver all deeds and other documents as may be legally necessary or reasonably required of it by notice from another Party to carry out and give effect to the terms and intentions of this Agreement and to perfect, protect and preserve the Rights of the other parties to this Agreement.

17.6 Liability of parties

If a Party consists of more than one person:

- (a) an Obligation of those parties is a joint Obligation of all of them and a several Obligation of each of them;
- (b) a Right given to those parties is a Right given jointly and severally to each of them, and if exercised by one of them, is deemed to be exercised jointly; and
- (c) a representation, warranty or undertaking made by those parties is made by each of them.

17.7 Counterparts

This Agreement may be signed or executed in a number of counterparts, with the same effect as if the signatures to or execution of each counterpart were on the same instrument.

17.8 Warranty of authority

Each person signing this Agreement:

- (a) as attorney, by so doing, warrants to the other parties that, as at the date of signing, the signatory has not received notice or information of the revocation of the power of attorney appointing that person; and
- (b) as an agent or trustee of a Party warrants to the other parties that, as at the date of signing, the signatory has full authority to execute this Agreement on behalf of that Party.

17.9 Severability

This Agreement shall, so far as possible, be interpreted and construed so as not to be invalid, illegal or unenforceable in any respect, but if a provision, on its true interpretation or construction is held to be illegal, invalid or unenforceable:

- (a) that provision shall, so far as possible, be read down to the extent that it may be necessary to ensure that it is not illegal, invalid or unenforceable and as may be reasonable in all the circumstances so as to give it a valid operation; or
- (b) if the provision or part of it cannot effectively be read down, that provision or part of it shall be deemed to be void and severable and the remaining provisions of this Agreement shall not in any way be affected or impaired and shall continue notwithstanding that illegality, invalidity or unenforceability.

17.10 Entire agreement

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

17.11 Client's Rights

Any express statement of the Right of the Client under this Agreement is without prejudice to any other Right of the Client expressly stated in this Agreement or existing at law.

17.12 Survival

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

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