

**Clause Bank for Mini-ICT Agreement**

(Mini-ICTA)

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| Information | **Guidance note:** The clauses in this clause bank may be added to the Agreement as Additional Conditions under the Mini-ICTA.If Additional Conditions are included, ensure that this is indicated in Item 6 of the Order Form and the attachment is clearly labelled 'Additional Conditions'. Ensure that all cross-references are updated prior to extracting specific clauses into the Additional Conditions. |

PART A - GENERAL TERMS

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| Information | **Guidance note:** The provisions in this Part A should be included if any Additional Conditions are added to the Agreement. |

# General

## Additional Conditions

1. These Additional Conditions are entered into pursuant to clause 1.8 of the Core Terms and form part of the Agreement.

## Definitions

1. Except where the context otherwise requires, all capitalised terms in these Additional Conditions have the meaning given to those terms under the Agreement or as defined in these Additional Conditions.

**PART B - ADDITIONAL CONDITIONS TO MINI-ICTA**

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| Information | **Guidance note:** The provisions in this Part B bolster, vary and/or supplement the Core Terms under the Mini-ICTA. |

# Additional Orders

### In this clause:

### **Additional Order** means an Additional Order for Services and/or Deliverables that is placed in accordance with this clause.

### If, at any time during the Term, the Customer wishes to increase the volume or quantum of Services and/or Deliverables, the Customer may, in its sole discretion, do so by submitting a written notice to the Supplier for those increased Services and/or Deliverables. The written notice will be in the form required by the Customer and will include information relating to the Additional Order, including the number of additional Services and/or Deliverables required.

### Except to the extent agreed by the parties in writing, any increased Deliverables and/or Services will be supplied for the same rates and charges specified in the Order Documents.

### The parties agree that each time the Customer submits an Additional Order to the Supplier:

#### that Additional Order forms part of this Agreement, and will not constitute a separate contractual relationship between the parties; and

#### the Supplier must increase the supply of the Deliverables and/or Services in accordance with that Additional Order, subject to any reasonable qualifications specified in the Statement of Work.

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| Information | **Guidance note:** If this clause is utilised, it will be important to ensure that the Statement of Work includes the relevant qualifications. The parties may also elect to include those qualifications in the Additional Conditions, in which case, the wording in this sub-clause should be revised to specify those qualifications. |

# Deed of Confidentiality and Privacy

### Without limiting the Module Terms, the Supplier's Personnel involved in the provision of the Supplier's Activities (or who may receive or have access to the Customer's Confidential Information or Personal Information in connection with this Agreement), must sign a deed in substantially the same form as the document in Attachment 1 of these Additional Conditions or such other deed as required by the Customer (**Deed of Confidentiality and Privacy**).

### Where the Customer requires an alternate Deed of Confidentiality and Privacy to that specified in Attachment 1 of these Additional Conditions, it must include obligations that are consistent with the privacy and confidentiality obligations under this Agreement.

### Unless otherwise agreed by the Customer in writing, the Deed of Confidentiality and Privacy must be signed and returned to the Customer's Representative prior to the Supplier's Personnel commencing the Supplier's Activities or being provided with access to the Customer's Confidential Information or Personal Information.

# Additional Supplier Personnel requirements

### The Supplier must monitor and assess its Personnel throughout their involvement in the Supplier's Activities to ensure that they remain fit and proper to provide the Supplier's Activities.

### Where requested by the Customer, the Supplier must provide the results of Supplier Personnel background checks carried out under the Agreement in accordance with the requirements under the Agreement and within at least five Business Days of the Customer’s request.

### Where the outcome of a background check reveals that any of the Supplier's Personnel are not fit and proper persons to be involved in the provision of the Supplier's Activities, the Supplier must not use those Personnel with respect to such activities.

### The Supplier acknowledges and agrees that:

#### the Customer may provide the results of any background checks to the Contract Authority or any other Government Agency; and

#### the Supplier is solely responsible for obtaining all necessary consents, in accordance with the Privacy Laws, in connection with the conduct of any background checks and the sharing and use of those background checks as contemplated under the Agreement, including this clause 4.

### For clarity, all background checks under the Agreement are to be conducted at the Supplier’s sole cost.

# Additional requirements in relation to Customer Data

## Acknowledgement

1. The parties acknowledge and agree that the requirements in this clause are in addition to the other requirements under the Agreement in relation to Customer Data.

## Backup of Customer Data

### If specified in the Order Documents that the Supplier is required to make and store backup copies of Customer Data as part of the Services, the Supplier must make and store backup copies of the Customer Data in accordance with all requirements (including as to frequency, maturity of backup and approved locations) set out or referenced in this Agreement (including the Module Terms and Statement of Work) or as otherwise reasonably required by the Customer by notice to the Supplier.

### Where clause 5.2(a) applies, the Supplier must check the integrity of all backup Customer Data annually (or at such other time required by the Statement of Work).

## Restoration of lost Customer Data

1. Notwithstanding any other rights the Customer may have under this Agreement, if as a result of any act or omission of the Supplier or its Personnel in the carrying out of the Supplier’s Activities or in discharging their obligations under this Agreement:

### any Customer Data is lost; or

### there is any unauthorised destruction or alteration of Customer Data,

### the Supplier must, at its sole cost, immediately restore the Customer Data to the last available backup and in accordance with any requirements and measures specified in the Statement of Work or agreed between the parties in writing..

## Rights to access, use, extract and retrieve Customer Data

### Without limiting the other requirements under the Agreement, where Customer Data is in the Supplier’s possession or control, the Supplier must enable the Customer to:

### access, use and interact with the Customer Data (which may be through access controls identified in the Order Documents); and

### extract, retrieve and/or permanently and irreversibly delete those copies of the Customer Data which are in the Supplier’s possession or control (which may be performed by self-service tools), or otherwise provide the Customer Data to the Customer:

#### in accordance with all applicable timeframes and requirements under this Agreement;

#### at no additional charge to the Customer;

#### in a human readable, commonly accepted format which does not require the Customer to purchase additional licences it does not already hold, or in the same format as the Customer Data was uploaded (for example, a semi-structured format); and

#### in order to maintain the relationships and integrity of those copies of the Customer Data.

## Use of Customer Data for testing purposes

1. Unless otherwise approved by the Customer in writing, the Supplier must not use any Customer Data for any testing conducted as part of the Supplier’s Activities unless that data has first been fully de-identified such that it no longer comprises any Personal Information. Nothing in this clause limits the Supplier’s obligations under the Agreement in relation to the management and protection of Personal Information.

# Liquidated Damages

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| Information | **Guidance note:** If this clause is used, the Statement of Work will need to be adapted to align with this clause; for example, by specifying the Key Milestones, the amount of Liquidated Damages (or the manner of calculation of such Liquidated Damages) and the maximum number of days (if any) for which Liquidated Damages are payable. |

### In this clause:

### **Critical CSI** means any:

#### CSI that is critical to the Supplier's ability to carry out the Supplier's Activities and without which the Supplier would be materially restricted in its ability to carry out the Supplier's Activities in accordance with the requirements of this Agreement; or

#### any CSI specified as "Critical CSI" in the Statement of Work.

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| Information | **Guidance note:** Where the parties would like to designate specific CSI as “Critical CSI”, the Statement of Work should clearly identify which specific CSI is Critical CSI. |

### **Key Milestone** means a date for delivery of a Deliverable, or for the completion of a particular Service or other Supplier's Activity, that is specified as such in the Statement of Work.

### **Liquidated Damages** means any damages specified as such in the Statement of Work which will be applied in accordance with this clause 6.

### If the Supplier fails to meet a Key Milestone, the Supplier must pay the Customer the amount of Liquidated Damages set out in, or otherwise calculated in accordance with, the Statement of Work in relation to the period between the relevant Key Milestone and the date on which the:

#### Supplier achieves the relevant Key Milestone; or

#### Customer terminates this Agreement

* 1. but subject always to the maximum number of days (if any) for which Liquidated Damages are payable, or maximum percentage of the value of applicable prices, as may be specified in the Statement of Work.

### The Supplier acknowledges that the Liquidated Damages payable under this clause are a reasonable and genuine pre-estimate of the Loss likely to be suffered by the Customer in respect of a failure by the Supplier to meet the relevant Key Milestone. However, they do not limit the rights or remedies of the Customer to claim Loss from the Supplier in the event that the amount of Loss actually incurred by the Customer exceeds such genuine pre-estimate, in the amount of the difference between such Loss actually incurred and the Liquidated Damages payable under this clause.

### The Supplier will not be liable to pay Liquidated Damages to the extent that the Supplier's failure to achieve a Key Milestone was caused or contributed to by the:

#### breach or negligence of the Customer;

#### unavailability or failure of any Critical CSI; or

#### acts or omissions of an Other Supplier.

# Open Source Software

### In this clause:

### **Open Source Software** means software available under a licence which:

#### meets the criteria of the “open source definition” published by the Open Source Initiative at http://www.opensource.org, and includes the forms of creative commons licences published as the Creative Commons Legal Code for Australia at http://www.creativecommons.org; or

#### contains any term or condition which mandates the re-licensing or redistribution to the public (whether free of charge or for a fee) of any software code, in any circumstance.

### The Supplier must not, without the prior written consent of the Customer:

#### develop or enhance any Deliverable using Open Source Software; or

#### incorporate any Open Source Software into any Deliverable.

### In requesting any consent from the Customer under clause 7(b), the Supplier must provide the Customer with:

#### complete and accurate copies of any licence agreement, the terms and conditions of which would apply to the proposed use or incorporation of the Open Source Software into a relevant Deliverable; and

#### a description of how such use or incorporation may affect the provision of the Supplier's Activities, the Customer's licence rights under this Agreement and the Customer’s and Customer Users' uses or other dealings with the relevant Deliverable,

#### for the Customer’s review and consideration.

### Where the Customer provides its consent in relation to the use or incorporation of any Open Source Software under clause 7(b) the:

#### Customer must comply with the terms and conditions notified to it in clause 7(c)(i) in relation to the use of that Open Source Software: and

#### Supplier must ensure that the use of that Open Source Software will not:

##### result in an obligation to disclose, licence or otherwise make available any part of the Customer Environment, software of the Customer, Customer Data or Confidential Information to any third party; or

##### diminish the Supplier’s obligations or the Customer's rights under this Agreement.

# Prohibited activities

### The licences granted to the Customer under the Agreement do not permit the Customer to disassemble, decompile or reverse engineer any software-based elements of the materials licensed under the Agreement, provided that this restriction shall not apply to the extent it would not be permissible under the *Copyright Act 1968* (Cth) in relation to particular acts conducted for certain purposes, as specified in that legislation.

# Escrow

### In this clause:

### **Escrow Materials** means the software code and programming Materials specified in the Statement of Work or otherwise specified as constituting "Escrow Materials" in Attachment 2 of these Additional Conditions.

### If specified in the Statement of Work (or if otherwise agreed between the parties in writing) that any Escrow Materials are to be held in escrow, the Supplier must arrange for:

#### itself, the Customer and an escrow agent approved by the Customer to enter into an escrow agreement in substantially the same form as Attachment 2 of these Additional Conditions (or such other form as may be prescribed by the relevant escrow agent and agreed by the parties in writing); or

#### the Customer to become a party to an escrow arrangement which already covers the Escrow Materials which the Customer regards as a satisfactory arrangement.

### Any escrow arrangement to which the Customer becomes a party under clause 9(b) must continue in effect for the duration of the Supplier’s Activities or such other period stated in the Statement of Work.

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| Information | **Guidance note**: If the default position does not apply, ensure that the Statement of Work specifies the period that the escrow arrangement must continue for. |

### The Supplier must consult with, and comply with the reasonable directions of, the Customer in any negotiations with the escrow agent arising under clause 9(b).

### Any escrow arrangement must be entered into by the timeframe specified in the Statement of Work, or if no timeframe is specified, as otherwise reasonably required by the Customer.

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| Information | **Guidance note**: Ensure that the Statement of Work specifies when the escrow arrangement must be entered into (for example, within one Business Day following the Commencement Date). |

### This clause survives the termination or expiry of the Agreement.

# Benchmarking

## Benchmarking

### No more than once per annum during the Term and commencing on the first anniversary of the Commencement Date, the Customer may, in its sole discretion, notify the Supplier in writing (**Benchmarking Notice**) that the Customer is seeking to implement a formal independent benchmarking of the cost of the Supplier's Activities in order to consider whether the rates and prices under this Agreement are competitive with the current Australian market for like deliverables and services (**Benchmarking Activities**).

### An independent benchmarker may be agreed between the parties. If the parties cannot agree upon an independent benchmarker within 10 Business Days of the Benchmarking Notice, the Customer may appoint an independent third party benchmarker which the Customer reasonably considers to possess the adequate expertise to carry out the Benchmarking Activities, subject to such third party not being a direct competitor of the Supplier.

### The parties will work together in good faith to expeditiously develop terms of reference which will form the basis of joint instructions for the benchmarker to follow in conducting the Benchmarking Activities. Those terms of reference must, unless otherwise agreed by the parties, be based on the following principles:

#### a "like-for-like" comparison in respect of the Supplier’s Activities, conducted by reference to one or both of:

##### a "whole of offering" basis in relation to all Services and Deliverables; and

##### a product and service category basis; and

#### appropriate normalisation, including with respect to volumes, method of delivery, quality of service and, in respect of clause 10.1(c)(i)B, taking into account any cross-subsidies offered between different product and service categories.

### The parties will instruct the benchmarker to:

#### conduct the Benchmarking Activities on an objective and independent basis; and

#### use reasonable efforts to access and rely on recent, accurate and verifiable data in respect of its Benchmarking Activities.

### The parties must ensure that the benchmarker signs a confidentiality deed in favour of the Supplier and the Customer (in a form acceptable to the Customer) prior to undertaking any Benchmarking Activities pursuant to this Agreement.

### Unless otherwise agreed by the parties in writing, the Customer will bear the cost of engaging a benchmarker to undertake the Benchmarking Activities under this clause.

### The parties must each appoint a reasonable number of Personnel to work under the direction of the benchmarker in collecting data necessary for the purposes of the benchmarking exercise.

### The parties agree that the benchmarker may, in its own discretion, determine the information required to carry out the Benchmarking Activities and may carry out the benchmark as he or she sees fit (including by determining the benchmarking methodology).

### The parties must reasonably co-operate with the benchmarker in connection with the Benchmarking Activities carried out under this clause 10.1.

## Outcome of benchmarking

### The benchmarker will be required to deliver a benchmarking report (**Benchmarking Report**) to the parties within 60 days of the benchmarker's appointment, or within such other period as agreed by the parties in writing.

### If the Benchmarking Report concludes that the rates and prices (or certain rates and prices) under this Agreement exceed the rates and prices offered by the current Australian market for comparable goods, services and activities, then the parties must use all reasonable endeavours to agree on an adjustment to the rates and prices under this Agreement to reduce the relevant rates and/or prices to align with the conclusions of the Benchmarking Report.

### If the parties are unable to agree on adjustments to the rates and prices under this Agreement in accordance with clause 10.2(b) within 20 Business Days of the issue of the Benchmarking Report, then, subject to the Supplier’s rights under clause 10.2(g), the Customer may, acting reasonably, determine the adjustments required to reduce the rates and prices under this Agreement to reflect the conclusions contained in the Benchmarking Report.

### If the Customer determines that an adjustment to the rates and prices under this Agreement is required in accordance with clause 10.2(c), the Customer may issue a notice to the Supplier notifying it of the adjustment (**Adjustment Notice**).

### The parties acknowledge and agree that if an adjustment to the rates and prices under this Agreement is determined under clauses 10.2(b) or 10.2(c), those rates and prices will be deemed to have been amended to reflect the relevant adjustment, on and from the date:

#### on which the parties reach an agreement in respect of the adjustment to the rates and prices under clause 10.2(b); or

#### specified in an Adjustment Notice issued by the Customer under clause 10.2(d), provided that the Customer will not specify a retrospective date in the Adjustment Notice.

### A party may dispute the results of the Benchmarking Report if it reasonably considers that the findings in, and/or the conclusions of, the Benchmarking Report are based on incorrect facts, assumptions or comparisons. Any such dispute must be notified within 20 Business Days of the issue of the Benchmarking Report and must be resolved in accordance with clause 22 of the Agreement (Dispute resolution).

### The Supplier may dispute an Adjustment Notice if it reasonably considers that the adjustment to the rates and prices proposed in that notice are materially inconsistent with the conclusions contained in the Benchmarking Report. Any such dispute must be notified within 20 Business Days of the issue of the relevant Adjustment Notice and must be resolved in accordance with clause 22 of the Agreement (Dispute resolution).

# Disasters

### In this clause:

* 1. **Disaster** means any disaster, accident, emergency, degradation, damage, interruption or other event which impacts on the continuity of the Supplier's Activities (including any Force Majeure Event impacting the Supplier).

### On the occurrence of a Disaster, the Supplier must immediately:

#### notify the Customer's Representative that a Disaster has occurred; and

#### implement any measures set out in any business contingency or business contingency Plan specified in the Statement of Work, or such other measures as reasonably required by the Customer to mitigate and respond to the Disaster.

# Third party IP Claims

### In this clause:

* 1. **Licensed Software** means the software set out in the Order Documents that the Supplier is to provide to the Customer, or provide the Customer access to (as applicable) under this Agreement and includes any Updates or New Releases of that software that may be provided to the Customer from time to time in accordance with the Agreement.
	2. **New Releases** means software (including the latest current version) which has been produced primarily to extend, alter or improve the Licensed Software by providing additional functionality or performance enhancement (whether or not Defects in that Licensed Software are also corrected) while still retaining the original designation of the Licensed Software. A New Release does not include any software that is generally licensed by the Supplier to its customers as a different product.
	3. **Updates** means software which has been produced primarily to overcome Defects in, or to improve the operation of, the relevant part of the Licensed Software without significantly altering the Specifications whether or not that Licensed Software has also been extended, altered or improved by providing additional functionality or performance enhancement.

### In relation to Claims of the kind referred to in clause 21.1(c) of the Agreement (Indemnities), the parties agree that the Supplier’s liability under the indemnity under that sub-clause is reduced to the extent that Loss arising under that indemnity is caused or contributed to by:

#### the Customer’s combination, operation or use of a Deliverable or Service with any other product, equipment, software or document of the Customer or a third party, except where:

##### such combination, operation or use is authorised under this Agreement;

##### the Supplier supplied the Deliverable or Service on the basis that it can be combined, operated or used with the Customer's or the relevant third party's products; or

##### such combination, operation or use should have been reasonably anticipated by the Supplier having regard to the nature and purpose of the Deliverable or Service;

#### the Customer’s unauthorised modification of a Deliverable without the knowledge of the Supplier, except where such modification was contemplated in the Order Documents or reasonably anticipated having regard to the nature and purpose of the Deliverable; or

#### in relation to Licensed Software:

##### the Supplier following the Customer’s written technical directions in relation to the coding and configuration of the Licensed Software, to the extent that verifying or validating such directions is not within the scope of the Supplier’s Activities; or

##### the Customer’s continued use of old versions of the Licensed Software after the Supplier has notified the Customer in writing of the relevant infringement and provided the Customer (at no additional cost) a remedial software version, patch or correction, or a replacement part or other correction, that would have overcome the relevant infringement without affecting the performance or availability of the Licensed Software.

PART C - ADDITIONAL CONDITIONS TO SERVICES MODULE

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| Information | **Guidance note:** The clauses in this Part C bolster, vary or provide further detail in relation to the terms and conditions under the Mini-ICTA Services Module. Where Part C references details specified in the Statement of Work, ensure that the Statement of Work includes such details. |

# Support Services

## Application

1. This clause applies where it is specified in the Order Form (including the Statement of Work) that the Supplier will provide support and maintenance Services (**Support Services**).

## Support Period

1. All Support Services must be provided for the period specified in the Statement of Work.

## General

### The Supplier must carry out the Support Services specified in the Order Form (including the Statement of Work).

### The Supplier must carry out all Support Services:

#### in accordance with the requirements in these Additional Conditions and any additional requirements specified in the Statement of Work;

#### to meet any applicable Service Levels;

#### in a manner that is consistent with the Customer's operating requirements (if any) and the Specifications; and

#### in a manner that causes minimal disruption to Customer Users and the Customer's operations.

## Help desk

### If the Statement of Work specifies that the Supplier will provide help desk Services, the Supplier must provide help desk Services during the times of operation and in accordance with the Specifications and any other requirements of the Agreement.

### The Supplier must:

#### respond to, and investigate, requests to the help desk in a timely and efficient manner and in accordance with any requirements and Service Levels specified in the Order Documents; and

#### ensure the help desk is provided by Personnel who are sufficiently qualified and experienced to resolve and escalate issues.

# Software Support Services

## Application

### This clause applies where it is specified in the Order Form (including the Statement of Work) that the Supplier will provide either or both software support or maintenance Services (**Software Support Services**).

### Unless otherwise agreed between the parties in writing, Software Support Services will be provided in respect of the software specified in the Statement of Work.

## Updates and New Releases

### This clause applies where the Supplier provides Software Support Services and Updates and/or New Releases form part of those Software Support Services.

### The Supplier must offer and provide the Customer all:

#### Updates applicable to the software; and/or

#### New Releases applicable to the software,

### at no additional cost and when the Update and/or New Release becomes available, except where otherwise specified in the Statement of Work (in relation to either Updates or New Releases, or both).

### All Updates and New Releases that the Supplier provides must conform to the security and other requirements of the Agreement and must not reduce or diminish the functionality, performance or availability of the software.

### To the extent reasonably practicable, the Supplier must:

#### provide the Customer with written notice of all Updates and New Releases prior to installation; and

#### if requested to do so by the Customer, at the Supplier's sole cost (unless otherwise specified in the Order Form), demonstrate the extent to which the relevant Update and New Release is capable of providing the functionality and performance specified in the Specifications and Order Documents (including, where available, through the provision of release notes pertaining to the Update and New Release).

### Subject to clauses 14.2(f) and 14.2(g), the Customer is under no obligation to accept, approve or permit the installation (whether manually or automatically applied) of any Update or New Release offered by the Supplier pursuant to this clause 14.2 and a refusal by the Customer to implement an Update or New Release will not affect the Customer's entitlement to the Deliverables and Services.

### Notwithstanding the above, the Customer must accept any Update that is designed to correct or redress a security vulnerability that is affecting the software (**Security Correction**) but only to the extent that the Update complies with clause 14.2(c) and such other conditions specified in the Statement of Work.

### If the Customer rejects the offer by the Supplier of an Update or New Release (other than any Security Correction), the Supplier must (unless otherwise agreed between the parties in writing) continue to maintain the version of the software that the Customer is using for 18 months (or such other period as agreed between the parties in writing) from the date that the Customer provides written notice to the Supplier of the rejection of the Update or New Release. After this period, the parties acknowledge and agree that:

#### the relevant software may have its usefulness reduced over time;

#### the Supplier may not be able to remedy any Defects in that software; and

#### the Supplier is not responsible for any Defect in any such software, nor any incident, outage or breach of any Service Level, which would not have occurred had the Update or New Release been installed.

### If the Customer accepts an Update or New Release the:

#### Specifications with respect to the software will be deemed to be amended to the extent that the Specifications for the Update and New Release supersede the existing Specifications;

#### Supplier must promptly update any user documentation being provided under the Agreement to the extent required to reflect the Update and New Release and, once updated, promptly provide a copy to the Customer;

#### Supplier must deliver the Update and New Release in a timely manner and in accordance with any timeframes agreed between the parties in writing; and

#### Agreement will continue to apply in all respects to the Update and New Release.

## No restriction

Nothing in clause 14 is intended to reduce or restrict the Supplier's obligations to respond to and redress Defects and Security Incidents (including through the provision of appropriate patches for security vulnerabilities). Such matters must be completed in accordance with any applicable Service Levels and all other requirements of the Agreement.

## Definitions

1. For the purposes of this clause:

### **New Release** means software (including the latest current version) which has been produced primarily to extend, alter or improve the licensed software (or software being provided under the Agreement) by providing additional functionality or performance enhancement (whether or not Defects in that software are also corrected) while still retaining the original designation of that software. A New Release does not include any software that is generally licensed by the Supplier to its customers as a different product.

### **Update** means software which has been produced primarily to overcome Defects in, or to improve the operation of, the relevant part of the licensed software (or software being provided under the Agreement) without significantly altering the Specifications or performance requirements for such software under the Agreement, whether or not that software has also been extended, altered or improved by providing additional functionality or performance enhancement.

# Support Services for Hardware and Other ICT Deliverables

## Application

1. This clause applies where it is specified in the Order Form (including the Statement of Work) that the Supplier will supply Support Services with respect to the Hardware and/or Other ICT Deliverables.

## Provision of Support Services

1. The Supplier must carry out the Support Services with respect to the Hardware and/or Other ICT Deliverables specified in the Order Form (including the Statement of Work). These Support Services may include either Preventative Maintenance or Remedial Maintenance (or both), as well as such other Support Services specified in the Statement of Work.

## Preventative Maintenance

### Where specified in the Statement of Work, the Supplier must carry out Preventative Maintenance to ensure that the Deliverables remain in good working order and comply with the Specifications and other requirements of the Agreement.

### Preventative Maintenance will be carried out at the times specified in the Statement of Work or agreed by the Customer in writing.

### Except to the extent specified in the Statement of Work, as part of Preventative Maintenance the Supplier must:

#### maintain the Deliverable and any Machine Code to a standard that ensures continued performance in accordance with the Specifications and other requirements of the Agreement;

#### make available all necessary fixes, patches, upgrades and new releases and enhancements for the Machine Code and other software components incorporated within the Deliverable; and

#### detect problems in relation to the Deliverables and minimise their occurrence,

* 1. including undertaking system checks, replacing any unserviceable parts (excluding consumable items), cleaning and, where necessary, lubricating and adjusting mechanical and electro-mechanical devices in accordance with any manufacturer's instructions.

### The Customer may, acting reasonably, postpone Preventative Maintenance with at least five Business Days' notice in writing to the Supplier's Representative. Where this occurs, the parties will co-operate with each other to reschedule the Preventative Maintenance on a date and time mutually agreed between the parties.

## Engineering changes

### Unless otherwise agreed between the parties in writing, the Supplier must make available to the Customer all engineering changes to any Hardware and Other ICT Deliverables that:

#### are designed to improve the safety, performance and reliability of the Deliverables; and

#### the Supplier generally makes available to its other customers.

### The Supplier must give the Customer at least 7 Business Days advance written notice of all proposed engineering changes or such other notice period as agreed between the parties in writing. This notice should include sufficient particulars about the proposed engineering changes to enable the Customer to determine whether to implement the proposed engineering changes.

### Except where any engineering changes are classified by the Supplier or the manufacturer as being mandatory to ensure product security or safety in accordance with the Agreement (**Mandatory Engineering Changes**), the Customer may, at its sole discretion, elect not to proceed with any engineering changes.

### For any engineering changes that the Customer proceeds with, the Customer may (at its sole discretion) elect to either:

#### procure the Supplier to, at its own cost, provide a "user installable part" which the Customer must promptly install in accordance with the Supplier's, and any manufacturer's, instructions; or

#### allow the Supplier to install the engineering change, at the Supplier's own cost.

### The Supplier must:

#### perform relevant tests to demonstrate that the engineering change has been successfully implemented and, if requested by the Customer, provide written confirmation of such tests;

#### if requested by the Customer, explain to the Customer the reason for, and demonstrate to the Customer the effect of, the engineering change; and

#### promptly following performance of the engineering change, make any necessary updates to any user documentation being provided under the Agreement.

### Except for Mandatory Engineering Changes, a refusal of the Customer to implement an engineering change will not affect the Customer's entitlement to the Deliverables and Services under the Agreement.

## Remedial Maintenance

### Where specified in the Statement of Work, the Supplier must provide Remedial Maintenance as specified in the Statement of Work and in accordance with the requirements of this clause.

### The Supplier must promptly, after being notified of a Defect or problem in relation to a Deliverable (including any Machine Code):

#### repair or restore the Deliverable to enable it to operate in accordance with the Agreement;

#### comply with any applicable Service Levels and response times specified in the Order Documents;

#### to the extent that it is practical to do so, implement appropriate measures to minimise disruption to Customer Users and the Customer's operations during the provision of Remedial Maintenance; and

#### comply with any other requirements specified in the Statement of Work.

### The Supplier must:

#### perform relevant tests to demonstrate that the Remedial Maintenance has been successfully implemented and, if requested by the Customer, provide written confirmation of such tests;

#### if requested by the Customer, explain to the Customer the reason for, and demonstrate to the Customer the effect of, the Remedial Maintenance; and

#### promptly following performance of the Remedial Maintenance make any necessary updates to any user documentation being provided under the Agreement.

## Definitions

1. In this clause:

### **Hardware** means the physical ICT equipment, including all components and parts, specified in the Statement of Work which is to be acquired or maintained under the Agreement (as the case may be) and any substituted equipment, components or parts.

### **Machine Code** means any microcode, basic input/output system code (called "BIOS"), utility programs, device drivers, diagnostics, firmware and any other code, delivered with the Hardware for the purpose of enabling the Hardware to function as specified in the Statement of Work.

### **Other ICT Deliverables** means Deliverables other than Hardware or any software provided pursuant to this Agreement.

### **Preventative Maintenance** means scheduled maintenance Services required to be performed by the Supplier in accordance with the Agreement to ensure that the Hardware and Other ICT Deliverables remain in working order in accordance with the Specifications and other requirements of the Agreement.

### **Remedial Maintenance** means unscheduled maintenance Services required to be performed by the Supplier pursuant to the Agreement to restore the Hardware and Other ICT Deliverables to a condition allowing performance in accordance with the Specifications and other requirements of the Agreement.

### **Support Services** means the support and maintenance Services to be provided by the Supplier as specified in the Statement of Work or other Order Documents.

# Exceptions

|  |  |
| --- | --- |
| Information | **Guidance note:** As they operate to relieve the Supplier from liability for any failure of the Services or associated Deliverables to comply with the Agreement, the below exceptions should be carefully reviewed. Not all exceptions will be relevant to all engagements and, if so, those exceptions should not be added as Additional Conditions. |

### The Supplier is not liable for any failure of the Services or associated Deliverables to comply with the Agreement to the extent arising as a result of:

#### any misuse of the Services or associated Deliverables by the Customer;

#### in relation to any Support Services for Hardware or Other ICT Deliverables, the Customer not implementing any Mandatory Engineering Changes as defined in clause 15.4(c); and

#### in relation to Development Services for Software as defined in the Services Module, the Customer's combination, operation or use of the relevant Software with any other product, equipment, software or document of the Customer or a third party except where:

##### such combination, operation or use is authorised under the Agreement;

##### the Supplier supplied the Software on the basis that it can be combined, operated or used with the Customer's or relevant third party products; or

##### such combination, operation or use should have been reasonably anticipated by the Supplier having regard to the nature and purpose of the Development Services and the associated Software;

#### damage caused by the operation of any Deliverables other than in accordance with any recommended and reasonable operating procedures specified in the Statement of Work; or

#### any virus, Denial of Service Attack or other malicious act that adversely affects the Services or associated Deliverables (or any software installed on the Deliverables or connected to them), except to the extent that the virus, Denial of Service Attack or other malicious act was:

##### introduced or carried out by the Supplier or its Personnel;

##### caused or contributed to by any wrongful act or omission of the Supplier or its Personnel; or

##### due to the Supplier or its Personnel breaching the Agreement, including any failure to comply with the security obligations under the Agreement.

### The Customer may, at its sole discretion, request the Supplier to provide Services in respect of correcting or resolving any of the issues set out in clause 16(a) and, if so, the Supplier must provide such Services on a time and materials basis, based on the rates and charges specified in the Order Documents or as otherwise agreed between the parties in writing. However, any issue that results from one or more of the circumstances specified in paragraphs (iii) A to C or paragraphs (v) A to C of clause 16(a) must be rectified at the Supplier's sole cost and in accordance with the Agreement.

1. - Deed of Confidentiality and Privacy

**Given by: [*Insert full name of Recipient (insert ABN, if applicable)*]** of **[*Insert address of Recipient*]** (**Recipient**)

**In favour of: [*Insert full name of Customer (insert ABN)*]** (**Customer**)

**Made:** on the date the Recipient executes this Deed (**Date of this Deed**).

Background

A The [***Insert name of the Supplier***] and the Customer have entered into an ICT Agreement dated on or about the Date of this Deed (**Agreement**)pursuant to which the Supplier must carry out certain activities (**Supplier's Activities**).

B The Recipient has been engaged, contracted or may provide works or services in connection with the Agreement.

C The Customer has agreed that the Recipient may access or receive certain Confidential Information and/or Personal Information on the terms and conditions of this Deed and for the Permitted Use.

* 1. Definitions and Interpretation
		1. Definitions
1. In this Deed:
2. **Confidential Information** means information that:
	1. is by its nature confidential;
	2. is communicated by the Customer as being confidential;
	3. the Recipient knows or ought to know is confidential; or
	4. relates to or comprises the:
		1. financial, corporate and commercial information of the Customer;
		2. affairs of a third party; or
		3. strategies, practices and procedures of the State of New South Wales and any information in the Recipient's possession relating to a Government Agency,
3. but excludes information:
	1. in the public domain, unless it came into the public domain due to a breach of confidentiality;
	2. independently developed by the Recipient; or
	3. in the possession of the Recipient without breach of confidentiality by the Recipient or other person.
4. **Customer Data** means all data (including metadata) and information relating to the Customer or any Government Agency and the operations, facilities, customers, clients, personnel, assets and programs of the Customer and any Government Agency, including Personal Information, in whatever form that information may exist and whether created, captured, collected, entered into, stored in, generated by, controlled, managed, retrieved, transferred, transmitted, printed, processed or produced as part of carrying out the Supplier's Activities, but excluding any Performance Data.
5. **Deed** means this deed poll.
6. **Government Agency** means any of the following:
	1. a government sector agency (within the meaning of the *Government Sector Employment Act 2013* (NSW));
	2. a New South Wales Government agency;
	3. any other public authority that is constituted by or under an Act or that exercises public functions for or on behalf of the State of New South Wales (other than a State owned corporation); or
	4. any State owned corporation prescribed by regulations under the *Public Works and Procurement Act 1912* (NSW).
7. **Performance Data** means automatically generated metadata, not including any Personal Information or Confidential Information of the Customer or a Government Agency that:
	1. is incidentally generated by a computer system in the course of its normal operation;
	2. relates to the performance or operation of that computer system; and
	3. arises in the course of the performance of the Supplier's Activities.
8. **Permitted Use** has the meaning given to that term in clause 3(a) of this Deed.
9. **Personal Information** means information or an opinion about an identified individual (that is, a natural person) or an individual who is reasonably identifiable whether the information or opinion is:
	1. true or not; and
	2. recorded in a material form or not.
10. **Privacy Laws** means:
	1. the *Privacy Act 1988* (Cth);
	2. the *Privacy and Personal Information Protection Act 1998* (NSW);
	3. the *Health Records and Information Privacy Act 2002* (NSW);
	4. any legislation (to the extent that such legislation applies to the Customer, the Recipient or the Supplier) from time to time in force in:
		1. any Australian jurisdiction (which includes the Commonwealth of Australia and any State or Territory of Australia); and
		2. any other jurisdiction (to the extent that the Customer or any Personal Information or the Supplier or the Recipient is subject to the laws of that jurisdiction),
	5. affecting privacy or Personal Information, provided that the Recipient ensures that it complies at all times with the Privacy Laws applicable in New South Wales to the extent relevant to the Recipient's activities; and
	6. any ancillary rules, guidelines, orders, directions, directives, codes of conduct or other instruments made or issued under any of the legislation referred to in paragraphs (a), (b), (c) and (d), as amended from time to time.
		1. Interpretation
11. In this Deed:
	* + 1. headings are for convenience only and do not affect interpretation;
			2. an obligation or liability assumed by, or a right conferred on, two or more persons binds or benefits them jointly and severally;
			3. a reference to a "person" includes an individual, the estate of an individual, a corporation, an authority, an association or a joint venture (whether incorporated or unincorporated), a partnership and a trust;
			4. a reference to a party includes that party's executors, administrators, successors and permitted assigns, including persons taking by way of novation and, in the case of a trustee, includes a substituted or an additional trustee;
			5. a reference to a document (including this Deed) is to that document as varied, novated, ratified or replaced from time to time;
			6. a reference to a statute or statutory provision includes a statutory modification or re-enactment of it or a statutory provision substituted for it, and each ordinance, by-law, regulation, rule and statutory instrument (however described) issued under it;
			7. a word importing the singular includes the plural (and vice versa), and a word indicating a gender includes every other gender;
			8. a reference to a clause is a reference to a clause of this Deed;
			9. if a word or phrase is given a defined meaning, any other part of speech or grammatical form of that word or phrase has a corresponding meaning; and
			10. "including", "in particular" and words of equivalent expression are not words of limitation.
	1. Access and non-disclosure
		* 1. The Recipient acknowledges and agrees that:
				1. in the course of performing duties under the Agreement, it may receive or have access to Confidential Information and/or Personal Information;
				2. compliance with this Deed and the protection of Confidential Information and Personal Information are of paramount importance to the Customer; and
				3. the obligations in this Deed are for the benefit of the Customer and the Customer may enforce the obligations under this Deed.
			2. The Recipient must not disclose any Confidential Information or Personal Information that it receives or obtains in connection with the Agreement or the Supplier's Activities except with the consent of the Customer or as otherwise authorised under the Agreement or this Deed.
			3. If the Customer grants its consent for the Recipient to disclose Confidential Information or Personal Information, it may impose conditions on that consent. In particular, the Customer may require that the Recipient obtain the execution of a deed in these terms by the person to whom the Recipient proposes to disclose the Personal Information or Confidential Information.
			4. The Recipient's obligations under this Deed will not be taken to have been breached to the extent it is required by law to disclose the Confidential Information or Personal Information. However, if the Recipient is required by law to disclose any Confidential Information or Personal Information, the Recipient must, before doing so, immediately notifythe Customer and comply with any reasonable directions or requirements given by the Customer*.*
	2. Recipient's obligations
		* 1. The Recipient must only use Confidential Information and Personal Information that it receives or obtains in connection with the Agreement or the Supplier's Activities for the sole purpose of carrying out duties under the Agreement (**Permitted Use**).
			2. The Recipient must:
				1. safeguard and protect all Confidential Information and Personal Information;
				2. not copy or reproduce Confidential Information or Personal Information for purposes other than the Permitted Use;
				3. not sell, let for hire, assign rights in or otherwise commercially dispose of any Confidential Information or Personal Information;
				4. not commercialise or otherwise exploit any Confidential Information or Personal Information; and
				5. take all necessary precautions to prevent the loss; unauthorised use, disclosure or other misuse of Confidential Information and Personal Information in its possession or control.
		1. Comply with Privacy Laws
12. Where the Recipient receives or obtains access to any Personal Information in connection with the Agreement or the Supplier's Activities, the Recipient must comply with all applicable Privacy Laws, including the *Privacy and Personal Information Protection Act 1998* (NSW) in respect of that Personal Information, regardless of whether the Recipient is legally bound to comply with those Privacy Laws.
	* 1. Security measures
13. Without limiting any other obligation under this Deed or at law, the Recipient must ensure that any Confidential Information or Personal Information in its possession or control is kept secure at all times, including by:
	* + 1. where the Recipient has access to Confidential Information or Personal Information by password or other secure means, not disclosing that password or means of access to any other person unless it has been authorised in writing to do so by the Customer; and
			2. complying with the security requirements under the Agreement or as notified by the Customer to the Recipient.
		1. Breach of obligations
14. If the Recipient becomes aware of any actual, threatened or suspected breach of this Deed, including by any of the Recipient's personnel, the Recipient must:
	* + 1. immediately notify the Customer in writing and take all steps necessary to remedy, prevent or stop the actual, threatened or suspected breach of this Deed and comply with any reasonable directions issued by the Customer regarding any unauthorised use or disclosure of the Confidential Information or Personal Information; and
			2. provide such other assistance as may be reasonably required by the Customer, including in relation to any claim or proceedings that the Customermay bring against any third party for unauthorised use or disclosure of the Confidential Information or Personal Information.
		1. Return of Confidential Information and Personal Information

If requested by the Customer, the Recipient must:

* + - 1. promptly and securely return to the Customer all documents and other physical records of Confidential Information or Personal Information in its or its personnel's possession, custody or control;
			2. securely delete the Confidential Information and Personal Information from any computer system or other device operated or controlled by, or which may be accessed by, the Recipient;
			3. where applicable, comply with any Customer policies and procedures in respect of the destruction or return of any Confidential Information and Personal Information; and
			4. comply with any reasonable directions issued by the Customer in respect of the Confidential Information and Personal Information.
	1. Remedies
1. The Recipient acknowledges that:
	* + 1. damages may not be an adequate remedy for the Customer for any breach of this Deed by the Recipient; and
			2. the Customer is entitled to seek injunctive relief as a remedy for any breach or threatened breach of this Deed by the Recipient, in addition to any other remedies available at law or in equity under, or independently of, this Deed.
	1. General
		1. No exclusion of law or equity
2. This Deed must not be construed to exclude the operation of any principle of law or equity, including in relation to the protection and preservation of the confidentiality of Confidential Information.
	* 1. Waiver
3. The Recipient acknowledges and agrees that:
	* + 1. no waiver by the Customer of one breach of any obligation or provision under this Deed will operate as a waiver of another breach of the same or of any other obligation or provision; and
			2. none of the provisions under this Deed will be taken either at law or in equity to have been varied, waived, discharged or released by the Customer unless by its express consent in writing.
		1. Governing Law
4. This Deed will be governed by, and construed in accordance with, the laws in force in the State of New South Wales, Australia. The Recipient submits to the exclusive jurisdiction of the courts of New South Wales, Australia and the courts competent to determine appeals from those courts.
	* 1. Continuing obligations
5. The obligations of the Recipient under this Deed continue after the completion or termination of any employment, engagement or assignment in respect of the Permitted Use.
	* 1. Revocation or amendment
6. This Deed may not be revoked or otherwise modified or amended without the prior written consent of the Customer.

**Executed** as a deed poll:

**[Note: Delete the execution block that is not applicable.]**

**[If the Recipient is an individual]**

|  |  |  |  |
| --- | --- | --- | --- |
| Signed, sealed and deliveredby **[*insert full legal* *name of Recipient*]** in the presence of: |  |  |  |
|  |  |  |  |
| Signature of witness |  |  | Signature of Recipient |
|  |  |  |  |
| Full name and position of witness |  |  | Full name and position of Recipient |
|  |  |  |  |
|  |  |  | Date |

**[If the Recipient is a company]**

|  |  |  |
| --- | --- | --- |
| Executed by **[*Insert*] ABN [*Insert ABN*]** in accordance with section 127 of the *Corporations Act 2001* (Cth): |  |  |
| Signature of director |  | Signature of director/company secretary |
| Full name of director |  | Full name of director/company secretary |
| Date |  | Date |

|  |  |
| --- | --- |
| Information | **Guidance note:** The execution clause may need to be revised to correctly reflect the legal entity entering into the deed and the capacity in which the legal entity is signing the deed. The above execution clause is suitable where the deed is being executed by two directors or a director and a company secretary pursuant to section 127 of the *Corporations Act 2001* (Cth). |

1. - Escrow Deed

**Between: [*Insert full name of escrow holder (Insert ABN)*]** of **[*Insert registered address of the escrow holder***] (**Escrow Holder**)

**And:** [***Insert full name of Customer (insert ABN)*]** of [***insert address of the Customer*]** (the **Customer**)

**And:** [***Insert full name of Supplier (insert ABN)*]** of [***Insert registered address of the Supplier*]** (the **Supplier**)

**Made:** on the date of last execution of this deed (**Date of this Deed**).

**RECITALS**

A. The Supplier has agreed to deposit with the Escrow Holder a copy of the Escrow Material and to allow the Customer to access and use the Escrow Material under certain circumstances.

B. The Escrow Holder agrees to deal with the Escrow Material on the terms and conditions of this deed.

* 1. Interpretation
		1. Definitions
1. Unless otherwise specified below, words and phrases used in this deed have the same meaning as that which is given to them under the ICT Agreement.
2. In this deed:
3. **Annual Fee** means the annual fees set out in section 1 of the Information Attachment.
4. **Corporations Act** means the *Corporations Act 2001* (Cth).
5. **CPI** means the Consumer Price Index (all groups – weighted average of eight capital cities) published by the Australian Bureau of Statistics.
6. **Escrow Deposit Specification Form** means the form set out in Attachment 2 to this deed.
7. **Escrow Materials** means the Source Code and/or object code of the Licensed Software and all other software programs owned by the Supplier, documentation, drawings and plans, as well as a list of any third party software programs that would enable a competent programmer skilled in the use of the Deliverables and any necessary development tools to keep the Deliverables in good order and repair that are stated in section 2 of the Information Attachment.
8. **Establishment Fee** means the establishment fee set out in section 1 of the Information Attachment.
9. **ICT Agreement** means the agreement between the Customer and the Supplier dated **[*Insert*]**.
10. **Information Attachment** means Attachment 1A to this deed.
11. **Insolvency Event** means in relation to a party to the ICT Agreement, any of the following:
	1. the party informs the other party in writing, or its creditors generally, that the party is insolvent or is unable to proceed with the ICT Agreement for financial reasons;
	2. a trustee, receiver, receiver and manager, interim receiver, controller, administrator, custodian, sequestrator, provisional liquidator, liquidator or any foreign law equivalent or other person with similar power is appointed to the party;
	3. the party:
		1. becomes bankrupt or insolvent within the meaning of section 95A of the Corporations Act or under any bankruptcy, insolvency or analogous law;
		2. would be presumed by a court to be insolvent under section 459C(2) of the Corporations Act;
		3. fails to comply with a statutory demand (within the meaning of section 459F(1) of the Corporations Act) and fails to remedy that failure within seven days after being required in writing to do so by the party issuing the statutory demand;
		4. makes any assignment in bankruptcy or makes any other assignment for the benefit of creditors;
		5. seeks relief from its obligations to creditors under any bankruptcy, insolvency or analogous law;
		6. commences any proceeding, files a petition or proposal to take advantage of any act of bankruptcy or insolvency;
		7. resolves to, consents to or acquiesces in the appointment of a trustee, receiver, receiver and manager, interim receiver, controller, administrator, custodian, sequestrator, provisional liquidator, liquidator or other person with similar power of itself or of all or a portion of its assets; or
		8. files a petition or otherwise commences any proceeding seeking to enter into any compromise, reorganisation, arrangement, composition or readjustment under any applicable bankruptcy, insolvency or analogous law affecting creditors’ rights or consents to, or acquiesces in, the filing of such a petition, or commencement of such proceedings; or
	4. any act is done or event occurs which, under applicable law, has a similar effect to anything mentioned in paragraphs (b) or (c).
12. **Intellectual Property Rights** means all intellectual property rights including:
	1. copyright, patent, trade mark, design, semi-conductor or circuit layout rights, registered design, trade marks or trade names and other protected rights, or related rights, existing worldwide; and
	2. any licence, consent, application or right to use or grant the use of, or apply for the registration of, any of the rights referred to in paragraph (a).
13. **Licensed Software** means the software to be licensed by the Supplier to the Customer and other permitted users under the ICT Agreement.
14. **Software Application** means the software application(s) specified in section 2 of the Escrow Deposit Specification Form.
15. **Source Code** means, in respect of any software, firmware, computer code or configuration files (**Computer Programs**), the human readable code of such Computer Programs, and includes associated software including scripts and applets (collectively comprised in a complete copy of all of the foregoing in executable code) and all compliers, tools, language, documentation necessary to operate, maintain and modify the executable code copy of that Computer Program including all technical documentation and specifications in respect of that Computer Program, including any other information necessary for a reasonably skilled computer programmer to understand the program logic of the software, firmware, computer code or configuration files and to perform any of those acts in relation to it.
16. **Tax Invoice** has the same meaning as in the GST Law.
17. **Taxable Supply** has the same meaning as in the GST Law.
18. **Update** means any material update, new release, modification or new version of the computer programs or computer interfaces provided by the Supplier.
	* 1. References to certain general terms
19. In the deed:
	* + 1. headings are for convenience only and do not affect interpretation;
20. and unless the context indicates a contrary intention:
	* + 1. an obligation or liability assumed by, or a right conferred on, two or more persons binds or benefits them jointly and severally;
			2. "person" includes an individual, the estate of an individual, a corporation, an authority, an association or a joint venture (whether incorporated or unincorporated), a partnership and a trust;
			3. a reference to a party includes a party's executors, administrators, successors and permitted assigns, including persons taking by way of novation and, in the case of a trustee, includes a substituted or additional trustee;
			4. a reference to a document (including the deed) is to that document as varied, novated, ratified or replaced from time to time;
			5. a reference to a statute includes its delegated legislation and a reference to a statute or delegated legislation or a provision of either includes consolidations, amendments, re-enactments and replacements;
			6. a word importing the singular includes the plural (and vice versa), and a word indicating a gender includes every other gender;
			7. a reference to a party, clause or attachment is a reference to a party, clause or attachment to or of the deed, and a reference to the deed includes all attachments to it;
			8. if the time for giving any notice, issuing any certificate, making any payment or doing any other act required or permitted by the deed, falls on a day which is not a Business Day, then the time for giving the notice, issuing the certificate, making the payment or doing the other act will be taken to be on the next Business Day;
			9. if a word or phrase is given a defined meaning, any other part of speech or grammatical form of that word or phrase has a corresponding meaning;
			10. the word "includes" and similar expressions are not used as, nor intended to be, interpreted as words of limitation;
			11. for all purposes (other than where designated as a Business Day), "day" means calendar day;
			12. a reference to "$" or "dollar" is to Australian currency or such other currency specified in the Order Documents; and
			13. a reference to any authority, institute, association or body is:
				1. if that authority, institute, association or body is reconstituted, renamed or replaced or if the powers or functions of that authority, institute, association or body are transferred to another organisation, deemed to refer to the reconstituted, renamed or replaced organisation or the organisation to which the powers or functions are transferred, as the case may be; and
				2. if that authority, institute, association or body ceases to exist, deemed to refer to the organisation which serves substantially the same purposes or object as that authority, institute, association or body.
	1. Supplier's deposit obligations
		1. Supplier to make deposits
21. The Supplier must deposit the then currently implemented version of the Escrow Material, accompanied by a completed Escrow Deposit Specification Form, with the Escrow Holder:
	* + 1. within 14 days of the Date of this Deed; and
			2. within 14 days after any update or material change is made to the implemented version of any Source Code then held by the Escrow Holder.
		1. The Customer may test deposits
22. The Customer may, after providing the Supplier with at least seven days' notice, conduct tests on the Escrow Material to determine whether the Supplier has met its obligations under clause 2.1.
	* 1. Escrow Holder to provide access
23. The Escrow Holder will provide the Customer with access to the Escrow Material to enable testing under clause 2.2 to be carried out and will, in the presence and with the oversight of the Supplier, allow the Customer to:
	* + 1. remove the Escrow Material from the custody of the Escrow Holder;
			2. install, download or copy the Escrow Material onto such computer system or hardware as the Customer may reasonably specify; and
			3. analyse and conduct reasonable tests in relation to the Escrow Material as provided for under clause 2.2.
24. Following the testing, the Customer will (in the presence of, and with the oversight of, the Supplier) ensure that all copies of the Escrow Material are deleted from the computer system or hardware referred to in clause 2.3(b), and the material referred to in clause 2.3(a) is promptly returned to the Escrow Holder.
	* 1. Support to provide assistance with testing
25. The Supplier must, at the Customer's request and at no charge, give the Customer all reasonable assistance to enable the Customer to carry out the tests referred to in clause 2.2.
	* 1. Failure to deposit correct version in escrow
26. If testing by the Customer reveals that the Escrow Material does not contain the correct version of the computer programs or computer interfaces, the Supplier must, at no charge, deliver a copy of the correct version of the Escrow Material to the Escrow Holder within two Business Days of the completion of testing.
	1. Escrow Holder's obligations
		1. Obligations
27. The Escrow Holder must:
	* + 1. accept each deposit of the Escrow Material and, subject to the terms and conditions of this deed, hold it on behalf of the Supplier and the Customer;
			2. take all reasonably necessary steps to ensure the preservation, care, safe custody and security of the Escrow Material whilst it is in the possession, custody or control of the Escrow Holder;
			3. only use, access, copy and release the Escrow Material to the extent necessary to enable the Escrow Holder to comply with its obligations under this deed;
			4. establish and maintain a register of deposits of the Escrow Material (**Register**) showing deposit and release dates and to whom each deposit was released;
			5. allow the Supplier or the Customer to examine the Register at any time during regular business hours; and
			6. provide the Supplier or the Customer with a copy of the Register within seven days of receiving a request to do so.
		1. Limit on obligations
28. The Escrow Holder has no obligation to and is not responsible for:
	* + 1. verifying the nature, completeness or accuracy of Escrow Material; or
			2. any transaction between the parties, other than the performance of the Escrow Holder's obligations under this deed.
	1. Confidentiality
29. The Escrow Holder must not disclose to any person:
	* + 1. any part of the Escrow Material;
			2. any information about the Escrow Material; or
			3. any information about this deed,
30. other than as permitted by this deed or as required by law.
	1. Release to the Customer
		1. The Customer may request release
31. If one of the following circumstances occurs:
	* + 1. an Insolvency Event occurs to the Supplier that would entitle the Customer to terminate the ICT Agreement;
			2. the Supplier ceases to carry on business;
			3. the Supplier has ceased for any reason to maintain or support a Software Application;
			4. the Supplier breaches the terms of this deed;
			5. the ICT Agreement is terminated for the Supplier's breach; or
			6. the Supplier assigns copyright in a Software Application to a third party,
32. then the Customer may notify the Escrow Holder and the Supplier of this event and request that the Escrow Holder release the Escrow Material to the Customer (**Customer Notice**).
	* 1. Supplier may dispute release
33. If the Supplier disputes the Customer Notice, then it may notify the Escrow Holder and the Customer that it objects to release of the Escrow Material on the basis that the event relied on by the Customer does not exist and the Supplier has provided substantial evidence to support its objection (**Supplier Objection**).
	* 1. Release of Escrow Material to the Customer
34. Unless otherwise ordered by a court, the Escrow Holder must release the Escrow Material to the Customer:
	* + 1. if no Supplier Objection is received, within two Business Days after the Escrow Holder receives a Customer Notice; or
			2. if a Supplier Objection is received, within seven days after the Supplier Objection is received.
		1. Grant of licence
35. If the Escrow Material is released to the Customer under this clause 5, then the Supplier grants the Customer a licence to use the Escrow Material on terms consistent with the ICT Agreement.
	1. Release to Supplier
		1. Release of Escrow Material to Supplier
36. If the Customer has given the Escrow Holder written notice of its consent to the release of the Escrow Material to the Supplier, then the Supplier may request that the Escrow Holder release the Escrow Material to the Supplier, and the Escrow Holder must immediately release the Escrow Material to the Supplier.
	* 1. No other release to Supplier is permitted
37. Other than as provided for in clause 6.1 and clause 7, the Escrow Holder must not release any Escrow Material to the Supplier.
	1. Release by agreement or by court order
		1. Release by agreement
38. Within five days after receipt of a joint notice from the Supplier and the Customer requesting release of the Escrow Material, the Escrow Holder must release the Escrow Material in accordance with that notice.
	* 1. Release by court order
39. Each party acknowledges that the Escrow Holder must release the Escrow Material in accordance with any court order requiring the Escrow Holder to do so.
	* 1. Notice to the Customer
40. The Escrow Holder must immediately notify the Customer if it receives a court order (or any document that refers to a court order being sought) in relation to the Escrow Material.
	1. Fees and charges
		1. Payment of fees
41. The Customer must pay the Establishment Fee and Annual Fee to the Escrow Holder within 30 days of the Customer's receipt of the invoices referred to in clause 8.3.
	* 1. Annual Fee subject to change
42. The Escrow Holder may increase the Annual Fee for any year by giving 30 days' notice to the Customer. An increase must not exceed the increase in the CPI for the previous year.
	* 1. Invoices
43. The Escrow Holder may issue invoices as follows:
	* + 1. for the Establishment Fee, on or after the Date of this Deed, to the Customer;
			2. for the Annual Fee, on or after each anniversary of the Date of this Deed, to the Customer; and
			3. for reasonable delivery costs incurred by the Escrow Holder in releasing the Escrow Material, to the party that requested the release.
44. All invoices issued by the Escrow Holder must state the basis on which fees are charged and, in respect of amounts invoiced pursuant to sub-clause (c), must attach evidence justifying the amounts claimed.
	* 1. GST inclusive prices
45. Unless otherwise stated, the fees include GST.
	1. GST
		1. GST gross up
46. Subject to clauses 9.2, 9.3 and 9.4, if GST is imposed on any Taxable Supply made by a party under this deed (**Supplying Party**), then the party receiving the Taxable Supply (**Receiving Party**) must pay, in addition to any consideration payable or to be provided under this deed for the supply, an additional amount calculated by multiplying the prevailing GST rate by the consideration for the relevant Taxable Supply payable, or to be provided, by the Receiving Party under any other clause in this deed.
	* 1. Tax Invoice
47. Payment for Taxable Supplies is conditional upon the issue of a Tax Invoice. Each Tax Invoice must provide full details of the Taxable Supply, the subject of the Tax Invoice, including any details the payer of the fee may specifically require and such other details required to ensure that it is a Tax Invoice.
	* 1. Adjustment
48. If the amount of GST recovered by the Supplying Party from the Receiving Party differs from the amount of GST payable at law by the Supplying Party (or an entity grouped with the Supplying Party for GST purposes) in respect of the supply, the amount payable by the Receiving Party to the Supplying Party will be adjusted accordingly.
	* 1. Reimbursements
49. Where one party (**Payer**) is liable to reimburse another party (**Payee**) for any expenditure incurred by the Payer (**Expenditure**), the amount reimbursed by the Payer shall be the GST exclusive Expenditure plus any GST payable to the Payee by the Payer pursuant to clause 9.1.
	1. Ownership and risk
		1. Acknowledgements
50. Each party acknowledges that:
	* + 1. nothing in this deed assigns any Intellectual Property Rights in the Escrow Material;
			2. title in the physical media on which the Escrow Material is stored passes from the Supplier to the Customer on release of the Escrow Material to the Customer under clause 5 or clause 7; and
			3. risk of loss of, or damage to, the Escrow Material and associated media remains with the Supplier.
		1. Loss or damage to Escrow Material
51. Without limiting any rights or remedies that any of the parties may have, if any of the Escrow Material or associated media is lost, damaged or destroyed while in the Escrow Holder's control:
	* + 1. the Escrow Holder must promptly notify each other party; and
			2. the Supplier must provide the Escrow Holder with replacement Escrow Material within two Business Days of receiving such notice from the Escrow Holder.
		1. Warranty
52. The Supplier warrants and represents that it has the necessary authority to comply with its obligations under this deed (including the right to grant the licence in clause 5.4).
	* 1. Act or omission of Escrow Holder
53. Notwithstanding any other provision of this deed, if any of the Escrow Material or associated media is lost, damaged or destroyed while in the Escrow Holder's control, and that loss, damage or destruction is caused by:
	* + 1. the Escrow Holder's breach of this deed; or
			2. the negligent, wilful or unlawful act or omission of the Escrow Holder,
54. then the Escrow Holder must, at its own expense, reimburse the Supplier for the reasonable cost of replacing the relevant part or parts of the Escrow Material.
	1. Termination
		1. Upon insolvency
55. This deed terminates immediately if an Insolvency Event occurs to the Escrow Holder to the extent there is no prohibition at Law in respect of such termination.
	* 1. Upon release of Escrow Material
56. This deed terminates immediately if the Escrow Material is released to the Customer or the Supplier under this deed, except such termination will not affect those parts of this deed referenced in clause 14.14 (**Survival**).
	* 1. Upon provision of notice
57. This deed may be terminated by:
	* + 1. the Escrow Holder giving 90 days' written notice to the Supplier and the Customer, subject to a pro-rata refund by the Escrow Holder to the Customer of any advance payment of the Annual Fee; or
			2. the Customer giving 90 days' written notice to the Supplier and the Escrow Holder.
		1. By the Customer or the Supplier
58. Either the Supplier or the Customer may, by giving notice to the Escrow Holder (with a copy to the Customer or the Supplier, as applicable), terminate this deed with immediate effect if:
	* + 1. the Escrow Holder commits a breach of this deed; and
			2. the breach is not remedied within 14 days of the Escrow Holder receiving a notice detailing the breach and requiring that it be rectified.
		1. Consequences of an Escrow Holder termination event
59. Within 14 days after the termination of this deed under clauses 11.1 to 11.4, the Supplier must, at the direction of the Customer (and the Customer must, if the Supplier so requests), enter into another agreement between the Supplier, the Customer and a new escrow Supplier in a form substantially similar to this deed.
	* 1. Return of Escrow Material on termination
			1. If this deed terminates for any reason other than under clauses 11.2 and 11.3(b), then, unless a new escrow deed is entered into within 14 days in accordance with clause 11.5, the Escrow Holder must, within a further 20 days, deliver the Escrow Material to the Customer.
			2. If this deed terminates under clause 11.3(b), then the Escrow Holder must within seven days deliver the Escrow Material to the Supplier.
	1. Notices
		* 1. Any notices contemplated by this deed must be in writing and delivered to the relevant email or postal address as set out below (or to any new address that a party notifies to the others):
				1. to the Customer: **[*Insert*]**
				2. to the Escrow Holder: **[*Insert*]**
				3. to the Supplier: **[*Insert*]**.
			2. Unless there is evidence to the contrary:
				1. a letter sent by post will be taken to be received on the fifth Business Day after posting (or seventh, if posted to or from a place outside of Australia); and
				2. in the case of email:

production of a delivery notification statement from the computer from which the email was sent which indicates that the email was sent in its entirety to the email address of the recipient will be prima facie evidence that the email has been received;

where there is no delivery notification statement from the computer from which the email was sent, the date and the time of dispatch of the email will be prima facie evidence of the date and time that the email was received; and

where a delivery error or similar response is returned in response to that email, the email will not be taken to be received and the sender must use an alternative method of giving that notice in accordance with this clause.

* 1. No assignment
1. The Supplier and the Escrow Holder must not assign or otherwise deal with all or any of its rights or obligations under this deed without the written consent of the other parties.
	1. General
		1. Discretion in exercising rights
2. A party may exercise a right or remedy or give or refuse its consent in any way it considers appropriate (including by imposing conditions), unless this deed expressly states otherwise.
	* 1. Partial exercise of rights
3. If a party does not exercise a right or remedy at a given time, the party may still exercise it later.
	* 1. Approvals and consents
4. By giving its approval or consent a party does not make or give any warranty or representation as to any circumstance relating to the subject matter of the consent or approval.
	* 1. Remedies cumulative
5. The rights and remedies provided in this deed are in addition to other rights and remedies given by law independently of this deed.
	* 1. Operation of law
6. Rights given to the parties under this deed and the parties' liabilities under it are not affected by anything which might otherwise affect them by law.
	* 1. Indemnities
			1. Each indemnity in this deed is a continuing obligation, separate and independent from the other obligations of the parties, and survives termination, completion or expiration of this deed.
			2. Nothing in this clause 14.6 prevents any other provision of this deed, as a matter of interpretation, also surviving the termination of this deed.
			3. It is not necessary for a party to incur expense or make any payment before enforcing a right of indemnity conferred by this deed.
		2. No partnership, joint venture or other fiduciary relationship
7. Nothing in this deed will be construed or interpreted as constituting the relationship between the Customer, the Supplier and the Escrow Holder as that of partners, joint venturers or any other fiduciary relationship.
	* 1. Entire agreement
8. This deed constitutes the entire agreement and understanding between the parties and will take effect according to its tenor and supersedes:
	* + 1. any prior agreement (whether in writing or not), negotiations and discussions between the parties in relation to the subject matter of this deed; or
			2. any correspondence or other documents relating to the subject matter of this deed that may have passed between the parties prior to the Date of this Deed and that are not expressly included in this deed.
		1. Joint and several liability
			1. The obligations of the Escrow Holder, if more than one person, under this deed, are joint and several. Each person constituting the Escrow Holder acknowledges and agrees that it will be causally responsible for the acts and omissions (including breaches of this deed) of the others as if those acts or omissions were its own and the Customer may proceed against any or all of them.
			2. The obligations of the Supplier, if more than one person, under this deed, are joint and several. Each person constituting the Supplier acknowledges and agrees that it will be causally responsible for the acts and omissions (including breaches of this deed) of the others as if those acts or omissions were its own and the Customer may proceed against any or all of them.
		2. Severance
9. If at any time any provision of this deed is or becomes illegal, invalid or unenforceable in any respect under the law of any jurisdiction, that will not affect or impair:
	* + 1. the legality, validity or enforceability in that jurisdiction of any other provision of this deed; or
			2. the legality, validity or enforceability under the law of any other jurisdiction of that or any other provision of this deed.
		1. Provisions limiting or excluding liability
10. Any provision of this deed which seeks to limit or exclude a liability of the Customer, the Supplier or the Escrow Holder is to be construed as doing so only to the extent permitted by law.
	* 1. Variations
11. This deed may only be varied by a document signed by or on behalf of the Customer, the Supplier and the Escrow Holder.
	* 1. Waiver
			1. Failure to exercise or enforce, or a delay in exercising or enforcing, or the partial exercise or enforcement of any right, power or remedy provided by law or under this deed by the Customer will not in any way preclude, or operate as a waiver of, any exercise or enforcement, or further exercise or enforcement of that or any other right, power or remedy provided by law or under this deed.
			2. Any waiver or consent given by the Customer under this deed will only be effective and binding on the Customer if it is given or confirmed in writing by the Customer.
			3. No waiver by the Customer of:
				1. a breach of any term of this deed; or
				2. any other failure by the Escrow Holder to comply with a requirement of this deed,
	1. will operate as a waiver of another breach of that term or failure to comply with that requirement or of a breach of any other term of this deed or failure to comply with any other requirement of this deed.
		1. Survival
12. Clauses 3.1(e) and 3.1(f) ("Obligations"), 4 ("Confidentiality"), 5.4 ("Grant of licence"), 8.4 ("GST inclusive prices"), 9 ("GST"), 10.3 ("Warranty"), 11.5 ("Consequences of an Escrow Holder termination event"), 11.6 ("Return of Escrow Material on termination"), 14 ("General"), 14.15 ("Governing Law and jurisdiction") and 1 ("Interpretation") survive the termination (for any reason) of this deed.
	* 1. Governing Law and jurisdiction
13. This deed is governed by the laws applicable in the State of New South Wales, Australia. Each party irrevocably and unconditionally submits to the sole and exclusive jurisdiction of the courts of New South Wales, Australia and the courts entitled to hear appeals from those courts.

**Attachment 1A to Escrow Deed - Information Attachment**

**1. Fees and charges**

|  |  |
| --- | --- |
| Establishment Fee: (first year) | $***[Insert]*** plus GST |
| Annual Fee: (first year and subsequent years) (subject to increases under clause 8.2) | $***[Insert]*** plus GST |

**2. Escrow Material**

1. (a) the Source Code which incorporates computer programs or computer interfaces;
2. (b) all documentation relating to the material referred to in paragraph (a) which a reasonably qualified programmer would require for understanding, maintaining and modifying such material; and
3. (c) media on which that Source Code is stored or deposited:
4. **[*Insert description of media, e.g. CD ROM*]**

**Attachment 2 to Escrow Deed - Escrow Deposit Specification Form**

**1. Depositor information**

|  |  |
| --- | --- |
| Company Name: |  |
| Technical Contact: |  |
| Email: |  |
| Telephone: |  |

**2. Software Application information**

|  |  |
| --- | --- |
| Product Name(s)/Version(s) |  |
|  |  |
|  |  |
| Software modules: |  |
|  |  |
|  |  |
| Product Name(s)/Version(s) |  |
|  |  |
|  |  |
| Software modules: |  |
|  |  |
|  |  |

**3. Media information**

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
| Medium |  | Quantity |  | Label |
|  |  |  |  |  |
|  |  |  |  |  |
|  |  |  |  |  |
|  |  |  |  |  |

**4. Escrow deposit details**

**4.1 Compilation**

1. (a) What hardware is required to compile the Software Application?

|  |
| --- |
|  |
|  |

1. (b) What operating system and version is used in the compilation process?

|  |
| --- |
|  |
|  |

1. (c) What development environment (compilers/linkers/other tools) is necessary to compile the Software Application?

|  |
| --- |
|  |
|  |

1. (d) List all third party libraries/components that are required to compile the software (brand name, version and Supplier) and indicate which (if any) are not included in the deposit?

|  |
| --- |
|  |
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1. (e) List all non-third party libraries/components that are required to compile the software.

|  |
| --- |
|  |
|  |

1. (f) Detail the steps to follow to compile the Source Code and produce a version of the Software Application that runs.

|  |
| --- |
|  |
|  |

1. (g) List all of the files that are created by the compilation process and are needed to successfully run the Software Application.

|  |
| --- |
|  |
|  |

**4.2 Running the application**

1. (a) What hardware is required to successfully run the Software Application? If identical to item 4.1(a) please leave blank.

|  |
| --- |
|  |
|  |

1. (b) What software (in addition to the operating system) is required to successfully run the Software Application?

|  |
| --- |
|  |
|  |

**4.3 Documentation**

1. (a) Please provide an overview of the technical documentation.

|  |
| --- |
|  |
|  |

1. (b) Please provide an overview of the user documentation.

|  |
| --- |
|  |
|  |

1. (c) Please include a short description on the layout of the deposit.

|  |
| --- |
|  |
|  |

1. (d) Please include a full directory listing of the contents of the deposit media.

|  |
| --- |
|  |
|  |

**4.4 General information**

1. (a) What are the main functions performed by the Software Application?

|  |
| --- |
|  |
|  |

1. (b) List the additional material (reports, databases, etc.) included with the deposit.

|  |
| --- |
|  |
|  |

1. (c) Is a copy of the development environment (compilers and third party software) included with the deposit?

|  |
| --- |
|  |
|  |

1. (d) Does your company use a formal coding convention? Please provide a brief description of the convention used.

|  |
| --- |
|  |
|  |

**5. Remarks**

|  |
| --- |
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**6. Signature**

1. Date: \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_Signature: \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_
2. Name (please print):\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_
3. For and on behalf of the Supplier
	1. The Supplier warrants that the details set out above are correct and complete.

Executed as a deed:

|  |  |  |  |
| --- | --- | --- | --- |
| **Executed** for and on behalf of **[*Insert name of Customer*]** **ABN** **[*Insert ABN*]** by its authorised delegate in the presence of: |  |  |  |
|  |  |  |  |
| Signature of witness |  |  | Signature of authorised delegate |
|  |  |  |  |
| Full name of witness |  |  | Full name of authorised delegate |
|  |  |  |  |
|  |  |  | Date |
| Information | **Guidance note:** The below execution clauses for the Supplier and the Escrow Holder may need to be revised to correctly reflect the legal entity entering into the deed and the capacity in which the legal entity is signing the deed. The below execution clauses are suitable where the deed is being executed by two directors or a director and a company secretary pursuant to section 127 of the *Corporations Act 2001* (Cth). |

|  |  |  |  |
| --- | --- | --- | --- |
| **Executed** by **[*Insert name of Supplier*] ABN [*Insert ABN*]** in accordance with section 127 of the *Corporations Act 2001* (Cth): |  |  |  |
|  |  |  |  |
| Signature of director |  |  | Signature of company secretary/director |
|  |  |  |  |
| Full name of director |  |  | Full name of company secretary/director |
|  |  |  |  |
| Date |  |  | Date |

|  |  |  |  |
| --- | --- | --- | --- |
| **Executed** by **[*Insert name of Escrow Holder*] ABN [*Insert ABN*]** in accordance with section 127 of the *Corporations Act 2001* (Cth): |  |  |  |
|  |  |  |  |
| Signature of director |  |  | Signature of company secretary/director |
|  |  |  |  |
| Full name of director |  |  | Full name of company secretary/director |
|  |  |  |  |
| Date |  |  | Date |