

MASTER TERMS AND CONDITIONS

BLACKBIRD IT

STRICTLY PRIVATE AND CONFIDENTIAL
WWW.BLACKBIRDIT.COM.AU
ABN 25 123 690 997

MASTER TERMS AND CONDITIONS

Blackbird IT Pty. Ltd. (“Supplier”) provides a range of services including managed services and professional services and resells various cloud services including Microsoft cloud services, in accordance with these Master Terms and Conditions and the applicable ‘Associated Agreement’.

The Supplier may amend or replace these **Master Terms and Conditions** on one month’s written notice to the Customer at any time (for existing Contracts, the Master Terms and Conditions in place at the time that the Contract was made continue to apply for that Contract unless the Customer agrees otherwise in writing).

By ordering services such as managed services, professional services and/or cloud services from the Supplier, the Customer accepts the Master Terms and Conditions that apply at that time.

Any additional or different terms that the Customer includes in any communication with the Supplier will not be binding on the Supplier or included in any Contract unless expressly stated in the Associated Agreement.

1. DEFINITIONS AND INTERPRETATION

IN THE MASTER TERMS AND CONDITIONS:

"Acceptance" occurs when:

- a) the relevant Associated Agreement is signed by both parties within the period of time specified in the Associated Agreement (if any); or
- b) the Customer signs the relevant Associated Agreement within the period of time specified in the Associated Agreement (if any), if the Associated Agreement only requires the signature of the Customer; or
- c) an affirmative response is given by the Customer in whatever manner within the period of time specified in the Associated Agreement (if any), including communications to the Supplier to continue to proceed with the supply of the relevant goods or services, if no signature is required by the Associated Agreement.

"Accepted" means Acceptance has occurred.

"Associated Agreement" means:

- a) any document titled 'Statement of Work' or 'Statement of Supply' or similar that is entered into between the parties for the supply of certain goods or services which is made pursuant to, and references, the Master Terms and Conditions, and that has been accepted;
- b) any document titled 'Proposal', 'Quote', 'Purchase Order' or similar (in final form) for the supply of certain goods or services which is made pursuant to, and references, the Master Terms and Conditions, and that has been Accepted; or
- c) any request by an existing Customer for the supply of certain goods or services that the Supplier agrees to provide pursuant to, and references, the Master Terms and Conditions, and which is has been Accepted.

"Australian Consumer Law" means Schedule 2 of the Competition and Consumer Act 2010 (Cth).

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

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

“Consequential Loss” means any loss which does not arise naturally or in the ordinary course of things from a breach and any of the following, however arising and in any case, even if the loss is reasonably contemplated by the parties at the commencement of the applicable Associated Agreement as a likely result of breach of that Associated Agreement:

- a) incidental, special, remote or unforeseeable loss or damage;
- b) loss of revenue, profit, income, opportunity, use, business, contract, goodwill, or anticipated savings, loss caused by business interruption, but excluding loss of any amounts that would, but for the act or omission of a party, have otherwise been payable under the applicable Associated Agreement;
- c) costs or expenses incurred to prevent or reduce loss or damage which otherwise may be incurred or suffered by a third party; or
- d) loss or damage of the nature set out above in paragraphs (a) to (c) (inclusive) that is incurred or suffered by a third party.

“Contract” means these Master Terms and Conditions and the relevant Associated Agreement.

“Consumer Price Index” means the ‘All groups CPI’ Australian inflation price change calculated by the Australian Bureau of Statistics.

“Credit Application Form” means any document titled ‘Credit Application Form’ or similar (in final form) regarding credit terms for the Customer’s payment of products, deliverables or services to the Supplier made pursuant to, and references, the Master Terms and Conditions, and that has been Accepted.

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

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

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

“GST” has the meaning given to that expression in the A New Tax System (Goods and Services Tax) Act 1999 (Cth).

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

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

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

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

"PPSA" means the Personal Property Securities Act 2009 (Cth) and any statutory modification or re-enactment of that Act for the time being in force.

"Privacy Act" means the Privacy Act 1988 (Cth).

"Products, Deliverables and Services" means (as the context requires) any, some or such of the products (including Tangible Products), deliverables and/or services provided under an Associated Agreement, as described in the relevant Associated Agreement.

"Tangible Products" has the meaning given to the term under clause 8.1.

"Working Day" means a day other than a Saturday, Sunday or public holiday in South Australia.

1.1. Interpretation

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

2. TERM

- 2.1. Each Contract will commence on the date specified in the relevant Associated Agreement.
- 2.2. If a commencement date is not specified in the relevant Associated Agreement, the Contract commences when the Associated Agreement is determined by the Supplier as Accepted.
- 2.3. Each Contract will, subject to the parties' rights of earlier termination, continue:
 - a) for the term specified in the relevant Associated Agreement, as may be renewed or extended in accordance with the terms of the relevant Associated Agreement; or
 - b) if no term is specified in the relevant Associated Agreement, until terminated in accordance with the relevant Associated Agreement or under the termination provisions in the Master Terms and Conditions.

3. ORDER OF PRECEDENCE

- 3.1. If there is any conflict or inconsistency between the Master Terms and Conditions and an Associated Agreement, the following order of precedence applies to the extent of that conflict or inconsistency as determined by the Supplier (listed below in order of high to low priority):
- a) each Associated Agreement (with the order of priority of the parts of each Associated Agreement being as described in the relevant Associated Agreement).
 - b) the Master Terms and Conditions.

4. PRODUCTS, DELIVERABLES AND SERVICES

- 4.1. The Supplier will provide Products, Deliverables and Services (as applicable) to the Customer:
- a) in accordance with each Associated Agreement.
 - b) using reasonable care and skill.
 - c) using people who have the necessary skills and experience; and
 - d) in accordance with all applicable laws.
- 4.2. If the Customer requests products or services which are not covered by an existing Associated Agreement, the Supplier will issue a draft of a proposed varied Associated Agreement to the Customer outlining the varied products, services, or deliverables and price, payment terms, and the timeframe (as relevant). The Customer has 7 days (or such longer period if agreed by the Supplier) to review and Accept the varied Associated Agreement. Nothing in the Master Terms and Conditions commits the Supplier to providing the requested products or services unless the applicable varied Associated Agreement is Accepted under this clause. Until the applicable varied Associated Agreement has been Accepted under this clause, the parties agree to continue to comply with the then-applicable Contract.
- 4.3. The Customer will:
- a) only use the Products, Deliverables and Services for lawful purposes and not for fraudulent, illegal or destructive purposes;
 - b) adhere to any specific requirements or restrictions in respect of the Products, Deliverables and Services included or referenced in an Associated Agreement;
 - c) not sell, re-sell, or otherwise provide the Products, Deliverables and Services to any third party unless such selling, re-selling, or provision is expressly permitted by the Supplier in the relevant Associated Agreement;
 - d) not allow the Products, Deliverables and Services to be affected by any virus or destructive media, or use the Products, Deliverables and Services in any way which is intended to be, or is, detrimental to:
 - 4.3.d.1. the use of those Products, Deliverables and Services by other customers of the Supplier or other users; or

- 4.3.d.2. the Supplier's ability to supply the Products, Deliverables and Services to the Customer or other customers; or
- 4.3.d.3. the systems utilised to provide the Products, Deliverables and Services.

5. CUSTOMER'S OBLIGATIONS

Without affecting the Customer's obligations under any Associated Agreement, the Customer will:

- 5.1. comply with all of the Customer's obligations as specified in the Master Terms and Conditions and in each Associated Agreement;
- 5.2. comply with all relevant laws, regulations, and industry-specific standards and communicate these requirements to the Supplier at the commencement of the Term, and during the Term if any of the requirements change or if the Customer becomes aware of such requirements;
- 5.3. maintain all required insurance policies under the relevant Contract;
- 5.4. where required to provide data to the Supplier, provide that data in a format suitable for import and otherwise as reasonably requested by the Supplier;
- 5.5. where the Supplier's personnel will attend on site at the Customer's premises:
 - a) provide a suitable and safe work environment for the Supplier's personnel while on site in accordance with all applicable health and safety legislation;
 - b) maintain suitable public liability insurance policies that include coverage for the Supplier's personnel while they are at the Customer's site; and
 - c) indemnify the Supplier, to the extent permitted by law, against any and all claims, loss or damages, including legal costs on an indemnity basis, arising from or in connection with any illness, injury or death of any of the Supplier's personnel while at the Customer's site in connection with providing the Products, Deliverables and Services, except to the extent that illness, injury or death was caused by the negligence or wilful act of that Supplier personnel;
- 5.6. except and to the extent that the Supplier is providing relevant backup services under an Associated Agreement or under another written agreement between the parties:
 - a) undertake frequent and adequate backups of the Customer's data; and
 - b) ensure that backups are always completed, as well as ensuring the backups are secure and checking that they can be successfully restored.
- 5.7. make available to the Supplier in a timely manner (and in accordance with any timeframes which the Customer has agreed to) all assistance (including availability of relevant personnel), permissions (including permissions from any relevant third parties), information, facilities and access to systems reasonably required by the Supplier;
- 5.8. follow the Supplier's reasonable directions;

- 5.9. negotiate in good faith with the Supplier to resolve any disputes or conflicts with the Supplier or any other third-party provider that may arise during the Term;
- 5.10. work collaboratively with the Supplier to provide timely feedback on the Products, Deliverables and Services, and engage in regular communication to address issues and make improvements on the Products, Deliverables and Services;
- 5.11. provide the Supplier with access to any resources and information the Supplier reasonably requires to deliver the Products, Deliverables and Services, which may include but is not limited to access to relevant information technology systems, data warehouses, and the Customer's personnel; and
- 5.12. periodically review the Contract, understanding its terms, and participate in the Contract renewal process in good faith if necessary.

6. PRICING AND PAYMENT

- 6.1. The Customer must pay to the Supplier the price, fees and other amounts specified in and on the terms outlined in the relevant Associated Agreement.
- 6.2. The Associated Agreement may specify the basis of the Supplier's charges for the relevant supply of Products, Deliverables and Services, and the Supplier will invoice the Customer accordingly. Where an Associated Agreement does not specify the basis of the Supplier's charges, the Supplier is entitled to charge its usual commercial amount or rate for the supply of the relevant Products, Deliverables and Services, and will invoice the Customer accordingly. All such amounts are exclusive of any taxes unless expressly specified otherwise.
- 6.3. If GST is payable in respect of a supply made under or in relation to an Associated Agreement, the Customer must pay to the Supplier, an amount equal to the GST payable on the supply ('GST Amount'). The GST Amount is payable by the Customer in addition to and at the same time as any consideration for the supply.
- 6.4. Unless otherwise specified in the relevant Associated Agreement or relevant Credit Application Form, all invoices issued by the Supplier in connection with the Associated Agreement are due for payment in full by the Customer 7 days from the date of the invoice.
- 6.5. All reasonable accommodation, travel and other expenses (**Expenses**) incurred in providing Products, Deliverables and Services to the Customer will be charged to the Customer provided that such Expenses are identified and agreed by the parties in advance. Expenses will be invoiced on a monthly basis by the Supplier during the Term. The Customer agrees to pay all accrued but not yet invoiced Expenses that may exist as at the end of the Term.
- 6.6. Subject to clause 6.7, the Customer must pay all invoices in full without set-off or deduction of any kind.
- 6.7. If the Customer wishes to dispute an invoice, it must notify the Supplier in writing before the due date of the invoice and provide full details and documentary evidence required by the Supplier supporting the Customer's dispute. Subject to the Customer complying with this clause, the Customer may withhold payment of the disputed part of an invoice only and must pay that part (or any amount subsequently agreed or determined to be the correct amount owing) within 7 days of the resolution of the dispute. Without limiting any other remedies available to the Supplier for late payment or failure to pay any amount due, if any amount due is not paid by the Customer by the due date, the Supplier may:

- a) charge the Customer interest calculated at 4% plus the Reserve Bank of Australia's current cash rate on the balance of the amount due by the Customer from the due date until payment is received in full by the Supplier; and/or
 - b) charge the Customer all collection costs reasonably incurred by the Supplier in collection of the amount outstanding (including solicitor and/or collection agency fees); and/or
 - c) on 7 days notice in writing, and without any liability or responsibility to the Customer whatsoever, suspend delivery of some or all further products, deliverables or services under any and all Contract(s) with the Customer until all outstanding amounts owing to the Supplier are paid in full.
- 6.8. The Customer agrees all pricing during the term of the Contract are subject to the following increases:
- a) once every 12-months on the anniversary of the Contract, with any price increase to be not more than 5% (of the total price of the Associated Agreement), as notified in writing to the Customer; and
 - b) as and when notified by the Supplier to the Customer to reflect increases in pricing by a vendor or supplier of Third-Party Products, or any exchange rate change impacting the price of Third-Party Products to the Supplier, upon the Supplier giving at least six weeks' written notice to the Customer.

7. TAXES

- 7.1. In addition to the amounts due under clause 6, the Customer will pay the Supplier amounts equal to any applicable government taxes or duties however designated, based on the relevant Contract (or the Products, Deliverables and/or Services provided under it), paid or payable by the Supplier in respect of the foregoing, exclusive however of taxes based on the Supplier's income.

8. OWNERSHIP AND RISK

- 8.1. Except as otherwise provided in the relevant Contract (and without limiting that Contract) and subject to the Intellectual Property provisions in that Contract, ownership of physical products, such as but not limited to computers and related equipment (**Tangible Products**) supplied to the Customer under an Associated Agreement for the sale and purchase of those Tangible Products will not pass to the Customer until the Customer has paid for the Tangible Products in full.
- 8.2. Unless and until ownership of Tangible Products passes to the Customer under clause 8.1, the Customer is obligated to hold the Tangible Products as bailee under clause 9 and not part with possession of the Tangible Products and only use the Tangible Products in accordance with law and in the ordinary course of business.
- 8.3. The risk of loss, or deterioration or damage of any degree, to the Tangible Products will pass to the Customer on delivery of the Tangible Products to the Customer. If the Customer discovers upon delivery that the Tangible Products are damaged, they will notify the Supplier within 24 hours of delivery. It is the Customer's responsibility to insure the Tangible Products from the date of delivery of the Tangible Products to the Customer for, at a minimum, the purchase price of the Tangible Goods under the relevant Associated Agreement.
- 8.4. If the Customer fails to pay for the Tangible Products by the due date(s) for payment, the Supplier may (without limiting any other rights or remedies it may have under the PPSA or any other relevant laws), and the Customer specifically authorises and consents the Supplier to, enter the Customer's premises at any time and with reasonable notice take possession of the Tangible Products without incurring any liability to the Customer or any other person with respect to the Tangible Products or Customer Data (see below). The Customer is not permitted to revoke the permission granted to the Supplier in this clause. In the event that the Supplier takes possession of the Tangible Products under this clause, the Supplier will:
- a) copy the Customer Data (if any) that is on the Tangible Product (in the format reasonably determined by the Supplier at its discretion) ('**Copy of Customer Data**'); and
 - b) make the Copy of Customer Data available to the Customer and notify the Customer accordingly, provided that the Supplier has no obligation to retain the Copy of Customer Data for more than 14 days after making it available to the Customer;
 - c) after creating the Copy of Customer Data, delete the Customer Data from the Tangible Product.
- 8.5. As per clause 10.5, nothing in any Contract operates to transfer ownership of Customer Data to the Supplier.

9. PERSONAL PROPERTY SECURITIES ACT

- 9.1. The Customer agrees that the retention of title in clause 8.1 creates a purchase money security interest (as defined by section 14 of PPSA) in the Tangible Products (and their proceeds) as security for the payment of the purchase price of the Tangible Goods under the relevant Associated Agreement, until the amount payable for those products is paid in full. The Customer grants to the Supplier a security interest in the Tangible Products ('Secured Property') as security for payment of all amounts payable for those products.
- 9.2. The Customer will promptly do all things, and execute all documents reasonably required by the Supplier to enable the Supplier to perfect and maintain the perfection of its security interest in respect of the Secured Property (as defined in clause 9.1). This includes but is not limited to the Supplier registering the security interest on the Personal Property Securities Register (PPSR).
- 9.3. The Customer waives its rights under section 157 of the PPSA to receive a copy of any verification statement, financing statement or financing change statement in relation to registration event (as those terms are defined in section 10 and section 155 of PPSA).

10. CUSTOMER DATA

- 10.1. The Customer will:
 - a) provide and make Customer Data available to the Supplier only to the extent required for the purposes of the relevant Contract;
 - b) where practical, and particularly in the case of Personal Information, obfuscate Customer Data prior to providing or making the Customer Data available to the Supplier.
- 10.2. Subject to clause 10.3, the Supplier will access the Customer Data only as required in the performance of the relevant Contract.
- 10.3. Without limiting clause 11 or clause 12.2, the Supplier will only access Customer Data and disclose the Customer Data to law enforcement or government authorities to the extent required by law. If a request for Customer Data is made by a law enforcement agency or government authority (whether directly to the Supplier or through Microsoft or a third party vendor), the Supplier will redirect the request to the Customer or if redirection is not permitted or feasible in the available time frame and unless legally prohibited from doing so, the Supplier will notify the Customer of the request as soon as practically possible.
- 10.4. The Customer warrants that the Customer has the right and authority to deal with the Customer Data in the manner contemplated by the relevant Contract.
- 10.5. Nothing in a Contract transfers ownership of the Customer Data to the Supplier.

11. PERSONAL INFORMATION

- 11.1. Before providing Personal Information to the Supplier, the Customer will obtain all required consents from third parties (including the Customer's contacts, partners, distributors, administrators, and employees) to that Personal Information being made available to the Supplier and used as anticipated by the relevant Contract.
- 11.2. Each party will comply with the applicable Data Protection Laws in respect of any breach of privacy.

12. CONFIDENTIAL INFORMATION

- 12.1. Each party agrees to:
 - a) hold in confidence all Confidential Information disclosed to it by the other party and disclose that information to its directors, employees and contractors only to the extent required in the performance of the Contract;
 - b) ensure that all Confidential Information is protected at all times from unauthorised access or use by, or disclosure to, any third party or misuse, damage or destruction by any person.
- 12.2. A party may disclose the other party's Confidential Information if and to the extent required by law if it first notifies the other party of the obligation to disclose the Confidential Information, provided that a party is not required to notify the other party under this clause if it is not legally permitted to do so or if the timing within which the party is required by law to disclose the Confidential Information does not permit notification to the other party.

13. INTELLECTUAL PROPERTY

- 13.1. The Supplier or its licensors (as applicable) own:
 - a) the Intellectual Property in the means, methods, processes and know-how used by the Supplier to create or provide the Products, Deliverables or Services and to otherwise perform the Supplier's obligations under the Associated Agreements; and
 - b) the Intellectual Property in any of the Supplier's pre-existing library code that may be used to create the Products, Deliverables and Services, or that has been incorporated into the Products, Deliverables and Services.
- 13.2. The Supplier grants the Customer a non-exclusive, revokable, limited licence to use the Intellectual Property referred to in clause 13.1 above, to the extent required for the Customer to make use of the relevant Products, Services and Deliverables that are supplied under the Contract, and otherwise give effect to the Contract. This licence will survive the termination of the relevant Contract.
- 13.3. Without limiting any third-party Intellectual Property rights, the Associated Agreement may outline any Intellectual Property relating the relevant products, deliverables and services supplied under the Associated Agreement that may be owned by the Customer. If the Associated Agreement is silent on

Intellectual Property rights owned by the Customer, the Customer agrees that the Supplier owns all such Intellectual Property.

- 13.4. All Intellectual Property in any proposal, pitch, or quote (or similar document) that has been provided to the Customer by the Supplier that describes or explains solutions or the supply of products, services or deliverables remains owned by the Supplier unless specifically stated otherwise in the relevant Associated Agreement. The Customer must not share or provide a copy of any such proposal, pitch or quote (or similar document) to any third party (including any alternate service providers), or use such proposal, pitch or quote (or similar document) in any manner not specifically authorised by the Supplier.

14. WARRANTIES

- 14.1. Each party warrants that it has all requisite right, power and authority to enter into each Contract.
- 14.2. Except as provided under clause 14.1 and in any express warranties contained in an Associated Agreement, to the extent permitted by law, all warranties, terms and conditions (including without limitation, warranties and conditions as to fitness for purpose and merchantability) implied by legislation or otherwise, are excluded by the Supplier.
- 14.3. To extent permitted by law, the Supplier provides no warranty or guarantee:
- a) that any result or objective not specified in an Associated Agreement can or will be achieved or attained through the provision of the Products, Deliverables or Services; or
 - b) as to the suitability of the Products, Deliverables or Services for any purpose other than that specified in an Associated Agreement, which the Supplier may interpret, and apply using its experience, skill and judgment, to provide the Services.
- 14.4. Nothing in the Master Terms and Conditions is intended to exclude, restrict or modify an applicable consumer guarantee under the Australian Consumer Law.

15. TERMINATION OF CONTRACTS

- 15.1. Except where an Associated Agreement has a fixed term or where early termination is otherwise provided under an Associated Agreement (in which case those terms apply), either party may terminate a Contract at any time without cause on giving thirty days' notice in writing to the other party.
- 15.2. Either party may terminate a Contract immediately (or with effect from any later date that it may nominate) by written notice to the other party if:
- a) an Insolvency Event occurs in relation to that other party but only if permitted by and/or in accordance with the Corporations Act 2001 (Cth). For the purposes of this clause, 'Insolvency Event' means, in respect of a party (other than for the purpose of solvent reconstruction or amalgamation):
 - 15.2.a.1. a receiver, manager or liquidator is appointed over the party's undertaking or assets or the party enters into any assignment, composition or arrangement with its creditors; or

15.2.a.2. the party is unable to pay its debts when due or is deemed unable to pay its debts under any law or suspends payment to its creditors.

- b) the other party commits a material breach of any of its obligations under the Contract and fails to remedy that breach within 30 days of prior written notice of such breach. For the purposes of this clause 15.2(b), non-payment by the Customer for a period of 30 days or more after due date of any undisputed invoice constitutes a material breach by the Customer.

15.3. Additional rights of termination that apply to individual Associated Agreements may be included in each of those agreements. Such rights will apply in addition to rights under these Master Terms and Conditions.

16. CONSEQUENCES OF TERMINATION

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

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

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

17. LIABILITY AND INDEMNITY

17.1. To the extent permitted by law and notwithstanding any other provision in these Master Terms and Conditions, the Supplier's liability under a Contract is limited to direct loss only, and limited to the *lesser* of the following:

- a) the amount the Supplier has received by the Customer under the relevant Associated Agreement in the three-month period preceding the event giving rise to the claim;
- b) an amount equal to 20% of the amount received by the Supplier from the Customer under the relevant Associated Agreement.

17.2. Neither party will be liable to the other for any consequential loss, which may include, but is not limited to any loss of profits or savings, loss of controlled funds, loss of data, any loss attributable to a cyber security event (including but not limited to a phishing attack, cyber-criminal hack and/or ransomware), business interruption, or incidental or special damages.

- 17.3. Neither party will be liable to the other for any third-party claims, including but not limited to any claim in negligence.
- 17.4. The Supplier is not liable for damages or any third-party claim for a data breach that may be experienced by the Customer, whether or not such data breach has originated from or connected with any software that the Supplier has installed or altered or supplied to the Customer under a Contract.
- 17.5. In no event is the Supplier liable for any damages caused (whether directly or indirectly) by the Customer not accepting or not acting on a recommendation made to the Customer in writing by the Supplier or by the Customer's failure to perform its responsibilities under the relevant Contract
- 17.6. If a consumer guarantee applies to a Contract or goods or services provided by the Supplier and the Supplier is liable for a breach of that guarantee, then to the extent permitted by law, the Supplier's liability is limited, at the Supplier's option:
- a) in the case of goods, to the replacement or repair of the goods; or the supply of equivalent goods; or the cost of replacing or repair of the goods; or the cost of acquiring equivalent goods; and
 - b) in the case of services, to the resupply of those services or the cost of resupply,
- 17.7. and the Customer acknowledges and agrees that having regard to the commercial terms for the provisions of the goods and or services it is fair and reasonable for the Supplier to rely on the above limitations and that without the benefit of the limitations, among other things, the charges would be higher. The Customer acknowledges that the Supplier does not guarantee there will be no disruptions or interruptions to any of the Customer's systems, and that such disruptions or interruptions are not unusual and may be due to any number of factors that may not be within the Supplier's control. The Customer specifically agrees that the occurrence of any such disruptions or interruptions do not entitle the Customer to claim against the Supplier for damages or losses in situations where the Supplier is otherwise not liable under these Master Terms and Conditions.
- 17.8. The Supplier indemnifies the Customer against all costs, claims, demands, expenses and liabilities of whatsoever nature, arising from a breach of the Contract by the Supplier, except to the extent where those costs, claims, demands, expenses or liabilities are directly attributable to the fraud, negligence or wilful default of the Customer or any of its employees, contractors or agents.
- 17.9. The Customer indemnifies the Supplier, its Related Bodies Corporate, employees, agents and customers against all costs, claims, demands, expenses, and liabilities of whatsoever nature, arising from:
- a) the use of any Product, Deliverables or Services otherwise than in accordance with the relevant Contract; or
 - b) a breach of any Contract by the Customer or any of its employees, contractors, or agents; or
 - c) the fraud, negligence or wilful default of the Customer or any of its employees, contractors or agents.
- 17.10. If a party wishes to rely on an indemnity under this clause 17 ('Relying Party'), the Relying Party:
- a) must ensure that the other party is notified promptly in writing of the relevant claim, action or proceedings ("Claim") once it becomes aware of the Claim;

- b) will make no admission of liability regarding the Claim nor any offers of settlement regarding the Claim without the other party's written approval;
- c) may, at its discretion, grant control of the defence or settlement;
- d) will, where the other party has granted control of the defence or settlement negotiations:
 - 17.10.d.1. co-operate reasonably with the other party in defending or settling the Claim and make its employees available to give statements, advice and evidence, as the other party may reasonably request, all at the expense of the other party; and
 - 17.10.d.2. give the other party sufficient authority and relevant information in its possession or control in order to assist the other party to conduct the defence of the Claim and all negotiations for its settlement or compromise.

18. DISPUTE RESOLUTION

- 18.1. In the event of any dispute arising between the parties in relation to a Contract, no party may commence any proceedings relating to the dispute (except where the party seeks urgent injunctive or interlocutory relief) unless that party has complied with the procedures in this clause 18.
- 18.2. The party initiating the dispute ("the first party") must provide written notice of the dispute to the other party ("the other party") and nominate in that notice the first party's representative for the negotiations. The other party must within fourteen days of receipt of the notice, give written notice to the first party naming its representative for the negotiations ("Other Party's Notice"). Each nominated representative will have authority to settle or resolve the dispute. The parties will co-operate with each other and endeavour to resolve the dispute through discussion and negotiation.
- 18.3. If the parties are unable to resolve the dispute by discussion and negotiation within 14 days of receipt of the written notice from the first party, either party may refer the dispute to mediation.
- 18.4. If the dispute is referred to mediation, the mediation must be conducted in terms of the Resolution Institute Australia Standard Mediation Agreement. The mediation must be conducted by a mediator and at a fee agreed by the parties. Failing agreement being reached between the parties as to the mediator and/or fee within three weeks of the dispute being referred to mediation, the mediator will be appointed by, and his/her fee determined by the Law Society of the state or territory in which the Supplier is domiciled.
- 18.5. If the dispute is not resolved within two months following the date of the Other Party's Notice (or such longer period as may be agreed in writing by the parties), either party may utilise any other legal remedies available to it in seeking to resolve the dispute.

19. NON-SOLICITATION

- 19.1. Neither party will solicit, employ, or otherwise engage the services of, the other party's personnel (including employees and contractors) who has been involved in providing or receiving (as applicable) the Products, Deliverables and Services (**Solicited Person**). This clause will apply from commencement of the first Contract between the parties and will continue until there has been no Contract between the parties for a continuous period of twelve months (and if there is subsequently a Contract between the parties the non-solicitation period will re-commence).

- 19.2. If a party breaches clause 19.1 above, they must pay liquidated damages to the innocent party to compensate the innocent party for the reasonable expenses suffered, having regard to the recruitment fee to hire a new employee, and the downtime to train a new employee, which accords to either:
- a) the fees for 12 months of that Associated Agreement; or
 - b) where the Associated Agreement is a Statement of Work for Managed Services, a fee of 50 per cent of the Solicited Person's gross annual remuneration.
- 19.3. The innocent party under clause 19.2 above is entitled to invoice the liquidated damages under to the other party, which must be paid by the other party within 7 days of invoice, with such invoiced liquidated damages being a debt due and payable by the other party until paid in full.

20. NOTICES

- 20.1. Any notice or other communication in connection with a Contract must be:
- a) marked for the attention of the primary contact person and delivered or sent to the address of the other party by prepaid post or email, as set out in the relevant Associated Agreement.
- 20.2. Notices or other communications are deemed received:
- a) if delivered by hand, on delivery;
 - b) if delivered by post:
 - 20.2.b.1. on the fifth Working Day following posting if sent and received within Australia; and
 - 20.2.b.2. on the tenth day following posting if posted internationally; or
 - c) if sent by email, on sending the email,
 - 20.2.c.1. except if the sender receives any type of delivery notification failure.

21. FORCE MAJEURE

- 21.1. Either party may suspend its obligations to perform under a Contract if it is unable to perform as a direct result of a Force Majeure Event. Any such suspension of performance must be limited to the period during which the Force Majeure Event continues.
- 21.2. Where a party's obligations have been suspended pursuant to clause 21.1 for a period of 30 days or more, the other party may immediately terminate the Contract by giving notice in writing to the other party.

22. GENERAL PROVISIONS

22.1. Assignment:

- a) Subject to clause 22.1.b, neither the Customer nor the Supplier is permitted to assign its rights under a Contract without the prior written consent of the other party.
- b) The Supplier may, without the consent of the Customer, assign its rights under a Contract to an assignee that it reasonably considers has the personnel, skills, experience and resources to perform the Contract. The Supplier will notify the Customer of any assignment made pursuant to this clause 22.1.b prior to the assignment unless it is not permitted to do so in which case it will notify the Customer as soon as practical following the assignment.

22.2. **Contractors:** The Supplier may perform its obligations under a Contract by the use of the Supplier-selected independent contractors.

22.3. **Other agreements:** Subject to sections 12 and 13, nothing in any Contract prevents the Supplier from entering into similar agreements with others that are the same or similar to any Contract entered into with the Customer or from providing products, deliverables or services which are the same or similar to the Products, Deliverables and Services provided under a Contract.

22.4. **Entire agreement:** Each Contract constitutes the complete and exclusive statement of the agreement between the parties, superseding all proposals or prior agreements, oral or written, and all other communications between the parties relating to the subject matter of that Contract.

22.5. **Further assurances:** The parties must each do all such further acts (and sign any documents), as may be necessary or desirable for effecting the transactions contemplated by the Contract.

22.6. **Amendments:** Except as specifically provided in a Contract, no amendment to a Contract will be effective unless it is Accepted.

22.7. **Waiver:** No exercise or failure to exercise or delay in exercising any right or remedy by a party will constitute a waiver by that party of that or any other available right or remedy.

22.8. **Partial invalidity:** If any provision of a Contract or its application to any party or circumstance is or becomes invalid or unenforceable to any extent, the remainder of the Contract and its application will not be affected and will remain enforceable to the greatest extent permitted by law.

22.9. **Relationship of the Parties:** The parties agree that the Supplier is an independent contractor to the Customer and that nothing in the Master Terms and Conditions or any Contract constitutes a partnership, joint venture or relationship of employer and employee between the parties. Neither party may:

- a) act or hold itself out as an agent or representative of the other party; or
- b) assume or create any obligations on behalf of the other party.

23. GOVERNING LAW

23.1. Each Contract is governed by the laws of the State of South Australia, Australia. The parties hereby submit to the non-exclusive jurisdiction of the courts of South Australia, Australia.