

## DIGITALHUB SUBSCRIPTION AGREEMENT

### 1. Definitions and interpretation

#### 1.1 Definitions

In this document, unless the context otherwise requires, the following words have the following meanings:

**Application** means the software solution of the Company known as 'Digital Hub' that is designed to be used in connection with the Product.

**Business Day** means any day except Saturdays, Sundays and declared public holidays in Victoria, Australia.

**Claim** means any action, claim, proceeding or demand made by any third party whether referable to events or circumstances which have already occurred or which may occur in the future.

**Application Data** means:

- (a) data, information and other materials generated by the Application or the Product (**Unprocessed Data**); and
- (b) data, information and other materials in any format whatsoever generated, retrieved, printed or produced by the Licensee using the Unprocessed Data.

**Commencement Date** means the date specified in Item 2 of the Reference Schedule.

**Confidential Information** means any information in any form disclosed by one party to the other party or acquired by one party from the other party (including but not limited to information the subject of Intellectual Property Rights), whether deliberately or inadvertently and regardless of whether or not marked confidential, including:

- (a) any information passing from the personnel or representatives of the disclosing party;
- (b) any information relating to this document, its subject matter, any negotiations or transactions contemplated or provided for in this document; and
- (c) any information regarding the previous, current or future business interests, operations or affairs of any party or any of its related entities or of any person or entity with which that party may deal or be concerned including but not limited to customers of a party;

but excluding any information that the receiving party can establish:

- (d) is in the public domain other than through disclosure in breach of this document or any obligation of confidence;
- (e) is independently developed by the receiving party; or

is received by the receiving party from a third party who is not bound by obligations of confidence in relation to the information.

**Force Majeure** means a circumstance beyond the reasonable control of the Company which results in the Company being unable to observe or perform on time or at all an obligation under this document. Such circumstances shall include but shall not be limited to:

- (a) any faults, defects, incorrect operation of or other circumstance affecting or relating to the Licensee or its Personnel, sites or systems; and
- (b) acts of God, lightning strikes, earthquakes, floods, storms, explosions, fires and any natural disaster, acts of war, acts of public enemies, terrorism, riots, civil commotion, malicious damage, sabotage and revolution and strikes.

**Government Agency** means any government or any governmental, semi-governmental, administrative or fiscal body, court or other judicial body, department, commission, authority, agency or entity.

**Implementation Fees** means the amounts specified in Item 7 of the Reference Schedule for the Implementation Services.

**Implementation Services** means services provided by the Company to the Licensee in respect of the implementation of, or education regarding, the Application, as described in Item 11 of the Reference Schedule.

**Fees** means the Licence Fees, Implementation Fees (if any) and other amounts payable by the Licensee to the Company in exchange for the Application licence and services provided under this document.

**Initial Term** means the period beginning on the Commencement Date and continuing for the duration set out in Item 3 of the Reference Schedule.

**Insolvency Event** means:

- (a) a party becoming an 'externally-administered body corporate' within the meaning of the *Corporations Act 2001* (Cth);
- (b) any step being taken for the winding up or dissolution of a party;
- (c) a meeting of directors of a party considers a resolution that an administrator of that party should be appointed;
- (d) a party being insolvent within the meaning of the *Corporations Act 2001* (Cth), or being taken or presumed to be insolvent;
- (e) a party commits an 'act of bankruptcy' within the meaning of section 40 of the *Bankruptcy Act 1966* (Cth);
- (f) distress, attachment or other execution being levied or enforced over any of a party's property; or
- (g) anything analogous to or of a similar effect to anything described in paragraphs (a) - (f) above under the law of any relevant jurisdiction occurring in respect of a party.

**Intellectual Property Rights** means any and all intellectual and industrial property rights anywhere in the world (including present and future intellectual property rights) including rights in respect of or in connection with:

- (a) any related confidential information, know-how or any right to have information kept confidential;
- (b) copyright (including future copyright and rights in the nature of or analogous to copyright);
- (c) inventions (including patents);
- (d) trade marks, service marks and other related marks;
- (e) designs;
- (f) business names, domain names and company names; and
- (g) software, software programs and source code; whether or not existing at the date of this document and whether or not registered or registrable and includes any and all variations, modifications or enhancements to each of them together with any application or right to apply for registration of those rights and includes all renewals and extensions.

**Licence Fee** means the amounts specified in Item 4 of the Reference Schedule for the licence to the Application.

**Licensee Representative** means the person nominated by the Licensee to be its representative for this document, as specified in Item 6 of the Reference Schedule and which may be varied by written notice to the Company from time to time

**Loss** means all losses, costs, expenses and damages (including legal costs and disbursements) sustained or incurred, whether directly or indirectly or consequentially or in any other way.

**Maximum User Limit** means the number of Users specified in Item 5 of the Reference Schedule.

**Moral Rights** means:

- (a) the right of attribution of authorship;
  - (b) the right not to have authorship falsely attributed;
  - (c) the right of integrity of authorship; and
- any other rights of an analogous nature which now exist or which may exist in the future, including, without limitation, moral rights under Part IX of the *Copyright Act 1968* (Cth) and any other so-called 'droit moral'.

**Payment Period** means the period specified in Item 8 of the Reference Schedule.

**Payment Terms** means the payment requirements specified in Item 9 of the Reference Schedule.

**Personal Information** means 'personal information' as defined in the *Privacy Act 1988* (Cth).

**Personnel** means, in relation to a person, the officers, employees, agents and contractors (including subcontractors) of that person, but in the case of the Company excludes the Licensee and its Personnel.

**Product** means the Company's conveyor belt(s) and related monitoring system product known as 'BeltGauge', or any other product provided by the Company.

**Service Level Default** means a failure to meet a Service Level.

**Service Level Exceptions** mean:

- (a) Force Majeure;
- (b) outage periods agreed with the Licensee;
- (c) connectivity issues beyond the Company's control including but not limited to those caused by an internet service provider or the Licensee's own network;
- (d) scheduled downtime;
- (e) periods resulting from Users, the Licensee or its Personnel, breaching this document or the Terms of Use, acting in an unauthorised manner or failing to act where the Company reasonably requires it; and
- (f) access or use of the Application other than in accordance with the reasonable instructions or directions of the Company, as updated from time to time.

**Special Conditions** means the terms and conditions set out in Item 13 of the Reference Schedule, if any.

**Support Services** means basic desktop support as advised by the Company in writing from time to time, such as:

- (a) adding and removing Users;
- (b) bug logs;
- (c) actions to restore and maintain continuity of Service Level; or
- (d) as agreed by the parties in writing

**Term** means the Initial Term plus any Renewal Terms.

**Terms of Use** mean the terms of use applicable to access and use of the Application, as revised, updated and replaced by the Company from time to time during the Term.

**User** means an individual who is authorised by the Licensee and/or the Company to access or use the Application as one of its respective Users in accordance with this document.

## 1.2 Interpretation

In this document, unless the contrary intention appears:

- (a) words denoting the singular include the plural and vice versa;
- (b) a reference to any gender includes all genders;
- (c) a reference to a person includes any individual, firm, company, partnership, joint venture, an unincorporated body or association, trust, corporation or other body corporate and any Government Agency (whether or not having a separate legal personality);
- (d) headings and the table of contents (if any) are for convenience only and do not affect interpretation;
- (e) where a word or phrase is defined, its other grammatical forms have a corresponding meaning;
- (f) a reference to any document is a reference to that document (and, where applicable, any of its provisions) as amended, novated, supplemented or replaced from time to time;
- (g) a reference to a party to this document includes that party's executors, administrators, successors and permitted assigns;
- (h) a reference to \$, A\$, AUD, dollars or Dollars is a reference to the lawful currency of the

- (i) Commonwealth of Australia;
- (i) a reference to a clause, party, annexure, exhibit or schedule is a reference to a clause of, and a party, annexure, exhibit and schedule to, this agreement and a reference to this agreement includes any clause, annexure, exhibit and schedule;
- (j) a reference to any books or records or writing includes a reference to such documents or writing in all formats including electronic, disk, magnetic or written format;
- (k) a reference to any legislation or legislative provision includes any regulations or other delegated legislation or instruments made or issued under it and any consolidations, amendments, re-enactments or replacements of it and them and any of them;
- (l) the words include, including, for example, such as or any form of those words or similar expressions in this agreement do not limit what else is included and must be construed as if they are followed by the words 'without limitation', unless there is express wording to the contrary;
- (m) a reference to time is to Victoria, Australia time;
- (n) if the time prescribed or allowed by this document for doing any act or thing falls or expires on a day which is not a Business Day, such time is extended so as to fall or expire on the next succeeding Business Day after that day; and
- (o) no rule of construction applies to the disadvantage of a party because that party was responsible for the preparation of this document.

## **2. Implementation Services**

### **2.1 Agreement to provide**

- (a) The Company may supply the Licensee with Implementation Services as agreed by the parties in writing from time to time.
- (b) The Company will supply Implementation Services in accordance with the terms of such separate agreement except that appropriate provisions of this document (including this clause 2 and provisions that protect the Company) will apply unless they are expressly excluded or altered.

### **2.2 Performance of Implementation Services**

- (a) The Company will supply agreed Implementation Services to the Licensee for the payment of the Implementation Fees.
- (b) The Company will supply the Implementation Services to the Licensee, from the agreed start date for those services until such time as the Implementation Services have been completed in full, or the parties have otherwise agreed.

### **2.3 Assistance by Licensee**

The Licensee will supply the Company with access to such sites and systems, and such personnel and resources as may reasonably be requested by the Company to enable it to perform the Implementation

Services.

### **2.4 Completion of Implementation Services**

The Implementation Services will be deemed to be complete when the Company notifies the Licensee that it has successfully completed performance of the Implementation Services.

## **3. Licence**

### **3.1 Grant**

In consideration of the payment of the Licence Fees, the Company grants to the Licensee a non-exclusive, non-transferable, royalty-free, limited licence to access and use the Application, and to permit Users to access and use the Application, for the duration of the Term, subject to the terms and conditions set out in this document.

### **3.2 Acceptance**

The Licensee accepts the licence to the Application granted by the Company, and must access and use, and procure that Users access and use, the Application in accordance with the Terms of Use and the terms and conditions set out in this document.

### **3.3 Maximum User Limit**

- (a) Unless otherwise agreed by the Company in writing (which agreement may be subject to conditions imposed by the Company such as increased Licence Fees), the number of Users the Licensee permits to access and use the Application must at no time exceed the Maximum User Limit.
- (b) The Licensee agrees that the Company may audit the Licensee to determine whether the Maximum User Limit has been exceeded. If the Company finds that the Maximum User Limit has been exceeded the Licensee agrees to an increase in Licence Fees as set out in Item 4 of the Reference Schedule.

### **3.4 Licensee Representative**

The Licensee Representative will be responsible for the co-ordination and management between the parties of Users on behalf of the Licensee under this document, and must provide reasonable reports requested by the Company in connection with this document from time to time. The Company is entitled to rely on and deal with the Licensee Representative as its main point of contact with respect to changes to Users and Fees.

## **4. Support Services**

### **4.1 Agreement to provide**

- (a) The Company will supply Support Services as are reasonably required to ensure that errors in the Application which are notified by the Licensee or come to the attention of the Company are rectified during the Term.
- (b) The Company will provide an email address as set out in item 13 of the Reference Schedule for the Licensee to report faults in the Application which will operate between the hours of 8am and 4pm on Business Days during the Term.
- (c) The parties acknowledge and agree that the Licence Fees include the costs of the Company

providing the Support Services.

#### **4.2 Additional services**

- (a) The Company may for additional amounts supply additional technical or maintenance support services if requested by the Licensee to do so. The parties must agree the scope and cost of such services from time to time in writing in advance.
- (b) The Company will supply such additional technical or maintenance support services in accordance with the terms of such separate agreement except that appropriate provisions of this document (including provisions that protect the Company) will apply unless they are expressly excluded or altered.

#### **4.3 Assistance by Licensee**

The Licensee will supply the Company with access to such sites and systems, and such personnel and resources as may reasonably be requested by the Company to enable it to perform the Support Services and any agreed additional technical or maintenance support services.

### **5. Service Level**

#### **5.1 Service Level**

The Company must ensure that it meets the Service Level in providing the Application.

#### **5.2 Service Level Default**

If a Service Level Default occurs, the Company shall credit the Licensee a pro rata amount of the License Fee for every 24 hour period that the Service Level is not restored. The first 24 hour period shall be calculated as the time starting from the initial notification of the Service Level Default by the Licensee to the time the Company can confirm the Service Level will be restored.

### **6. Licensee obligations**

#### **6.1 Acknowledgements (including on Intellectual Property Rights)**

- (a) The Licensee acknowledges and agrees that:
  - (1) except as set out in this document, it does not have any right or entitlement to access or use the Application, or permit others to do so;
  - (2) as between the Company and the Licensee, the Company is the owner of all Intellectual Property Rights comprised in or associated with the Application and the Product, and nothing in this document transfers title or ownership of the Application or any component of it, or any Intellectual Property Rights comprised in or associated with the Application or the Product, to the Licensee;
  - (3) without limiting the Terms of Use:
    - (A) to the extent any Intellectual Property Rights comprised in or associated with the Application or the Product are created or developed by or for the Company or the Licensee during the course

of performing obligations under this document (including modifications, updates, new releases, enhancements and documentation) (New IP), ownership of all New IP automatically vests in the Company immediately on creation, without the need for any further formality or documentation. The New IP will be entirely the property of the Company in perpetuity, throughout the world, free of any claim whatsoever by the Licensee or any third party;

- (B) any New IP is or will be deemed on its creation automatically assigned and transferred to the Company by this document. The Licensee agrees to execute, and procure the execution of, any documents reasonably necessary to confirm this fact; and
  - (C) the Licensee irrevocably consents to all possible uses by the Company (including adaptation, reproduction, editing, alteration, addition to and/or deletion from, rearrangement, transposition, translation) and exploitation of the Application and New IP, and agrees not to enforce, and otherwise waives to the fullest extent legally possible, and agrees to procure all necessary consents and waivers to, any Moral Rights that may exist now or in the future in respect of such items; and
- (4) nothing in this document grants to it any right to use any trade marks, trade names or brands of the Company.
- (b) The Licensee further understands, acknowledges and agrees that:
    - (1) in addition to any other remedies available to the Company under this document or otherwise, any unauthorised use, installation, alteration, modification, reproductions or disclosure of the Application or any of its components will entitle the Company to any available equitable remedy against the Licensee;
    - (2) the Company may update or change the functionality and look and feel of the Application, and remotely deploy updates to it, from time to time;
    - (3) except to the extent specified to the contrary in this document, the Company will not be obliged to support the Application, whether by providing advice, training, error-correction, modifications, updates, new releases or enhancements or otherwise; and
    - (4) any technical documentation (if provided) in respect of the Application contains

sufficient information for the adequate use of the Application, except to the extent the Company has notified the Licensee of any omission or deficiency or of any variation which it considers necessary for the proper use of the Application.

## **6.2 Use of Application**

The Licensee must:

- (a) ensure that only its Personnel that meet any eligibility criteria advised by the Company (if any) from time to time and are Users are permitted to access and use the Application;
- (b) and must ensure that Users:
  - (1) only use the Application in accordance with the normal operating procedures and instructions as notified by the Company from time to time (including as specified in any accompanying technical documentation (if any));
  - (2) comply with all applicable laws and regulations in connection with the use of the Application;
  - (3) not grant, or purport to grant, sub-licences in respect of entitlement to access and use the Application;
  - (4) not reverse engineer, copy, alter, modify or reproduce the Application or any of its content by any means, or create derivative works based on the Application or the Product;
  - (5) not alter, change, remove or obscure any notices or other indications regarding the ownership of the Application or the Product;
  - (6) not access or use the Application after the Term or their entitlement to do so has ended; and
  - (7) provide all cooperation requested by the Company from time to time reasonably required to enforce the terms of this document or perform its obligations under it.

## **6.3 Reverse engineering and modifications**

Without limiting or affecting clause 6.2(b)(4), the Licensee will not, and must ensure that Users do not:

- (a) copy or reproduce the Application or any part of it by any means or in any form;
- (b) modify or alter the Application or any part of it; or
- (c) reverse assemble or reverse compile or directly or indirectly allow or cause a third party to reverse assemble or reverse compile the whole or any part of the Application.

## **6.4 Intellectual Property Rights management**

If the Licensee is or becomes aware of:

- (a) any infringement or likely or possible infringement of any Intellectual Property Rights comprised in or associated with the Application; or
- (b) any assertion or Claim that the Application infringes the Intellectual Property Rights of any third party; or

- (c) any opposition or challenge to the validity of any registrations in relation to the Application acquired by the Company or an entity related to or otherwise affiliated with the Company, it must notify this to the Company as soon as practicable, and must use its best efforts to provide any assistance that the Company may reasonably request to investigate or respond to such claims.

## **6.5 Users and Security**

- (a) The Licensee is responsible for its access and use of the Application, and for supervising, managing and controlling access and use of the Application by Users.
- (b) The Licensee must ensure that all Users are aware of, understand, accept and comply with the Terms of Use. Any breach of the Terms of Use by any Users of the Application will constitute a breach of this document by the Licensee.
- (c) The Licensee must comply, and must ensure that Users comply with any:
  - (1) requirements and procedures for adding, removing and otherwise managing Users; and
  - (2) security regulations, procedures or directions,which may be notified by the Company from time to time in respect of the access and use of the Application.
- (d) The Company reserves the right, in its sole discretion, to restrict, suspend or terminate a User's access to part or all of the Application.

## **6.6 Records**

The Licensee must keep accurate records of access and use of the Application including information relating to Users (including email address, first and last name, contracting company (if appropriate) and phone number). The Licensee must permit the Company to inspect such records at any time during the Licensee's normal business hours.

## **7. Privacy and Data**

### **7.1 Privacy**

- (a) The Company will comply with its privacy policy in force from time to time in respect of any Personal Information it receives from the Licensee in the course of performing this document over the Term. The Company's privacy policy is subject to change from time to time, provided that such change will not materially reduce the level of privacy protection for Personal Information.
- (b) The Licensee acknowledges and agrees that the Company may provide the Application from any locations, and/or through the use of contractors, worldwide.
- (c) The Licensee is responsible for maintaining its own privacy protections and security measures in respect of all content and information it provides to the Company in performing this document, and for ensuring that all access and use of the Application is conducted in

accordance with its obligations under privacy laws.

- (d) The Licensee agrees that it has, or will have, and must procure as appropriate and provide to the Company on request, all consents and authorisations relevant to access and use of the Application by individuals in connection with this document, including in relation to the collection, use, disclosure and storage of Personal Information of any User whose Personal Information is provided by the Licensee to the Company.

## **7.2 Application Data**

- (a) Subject to the terms of this document, the Company acknowledges that the Licensee own the rights, title and interest in the Application Data.
- (b) The Licensee grants the Company a non-exclusive, irrevocable, royalty-free perpetual right to use the Application Data for whatever purpose throughout the world.
- (c) The Licensee acknowledges that the Company is not required to disclose the source of the Application Data, or attribute any ownership rights to the Application Data by the Licensee.
- (d) The Licensee acknowledges that the Company may sub-licence rights in the Application Data at its sole discretion for whatever purpose throughout the world.
- (e) The Licensee acknowledges that the Company is under no obligation to retain, store, remove, or amend the Application Data at any time.

## **8. Fees**

The Licensee will pay the Fees to the Company in accordance with the relevant Payment Terms. The Company will issue the Licensee with an invoice for each Fee amount, and may elect to restrict, suspend or terminate access to part or all of the Application or applicable services if invoiced Fees remain unpaid for a period of more than 10 days past their due date.

## **9. GST**

### **9.1 Construction**

In this clause 9:

- (a) words and expressions which are not defined in this document but which have a defined meaning in GST Law have the same meaning as in the GST Law; and
- (b) GST Law has the same meaning given to that expression in *A New Tax System (Goods and Services Tax) Act 1999* (Cth).

### **9.2 Consideration GST exclusive**

Unless otherwise expressly stated, all Fees or other sums payable or consideration to be provided under this document are exclusive of GST.

### **9.3 Payment of GST**

If GST is payable by a supplier or by the representative member for a GST group of which the supplier is a member, on any supply made under this document, the recipient will pay to the supplier an amount equal to the

GST payable on the supply.

### **9.4 Timing of GST payment**

The recipient will pay the amount referred to in clause 9.3 in addition to and at the same time that the consideration for the supply is to be provided under this document.

### **9.5 Tax invoice**

The supplier must deliver a tax invoice or an adjustment note to the recipient before the supplier is entitled to payment of an amount under clause 9.3. The recipient can withhold payment of the amount until the supplier provides a tax invoice or an adjustment note, as appropriate.

### **9.6 Adjustment event**

If an adjustment event arises in respect of a taxable supply made by a supplier under this document, the amount payable by the recipient under clause 9.3 will be recalculated to reflect the adjustment event and a payment will be made by the recipient to the supplier or by the supplier to the recipient as the case requires.

### **9.7 Reimbursements**

Where a party is required under this document to pay or reimburse an expense or outgoing of another party, the amount to be paid or reimbursed by the first party will be the sum of:

- (a) the amount of the expense or outgoing less any input tax credits in respect of the expense or outgoing to which the other party, or to which the representative member for a GST group of which the other party is a member, is entitled; and
- (b) if the payment or reimbursement is subject to GST, an amount equal to that GST.

## **10. Term and termination**

### **10.1 Initial Term**

This document will commence on the Commencement Date and continue for the Initial Term, subject to clause 10.3.

### **10.2 Renewal Term**

- (a) Upon expiry of the Initial Term, and any subsequent Renewal Term, this document will automatically renew and continue for a period equivalent in duration to the Initial Term (Renewal Term), on the same terms and conditions (subject to clause 10.2(b)), unless the Licensee gives the Company notice of its intention not to renew this document not less than 60 calendar days prior to the expiry of the Initial Term or Renewal Term then in force.
- (b) The Company will give not less than 90 calendar days' notification to the Licensee of any changes to the Fees that will apply to the forthcoming Renewal Term. The Licensee can, in response to such notice, advise the Company of its intention not to renew this document, provided such notice is issued within the timeframe set out in clause 10.2(a).
- (c) If the Licensee does not advise the Company of its intention not to renew this document for the Renewal Term, including in response to a notice issued by the Company under clause

10.2(b), within the applicable timeframe, then this document will automatically continue for the Renewal Term in full force and effect, on the same terms and conditions in place as at the date of expiry of the Initial Term or Renewal Term then in force and subject to any Fee variations notified by the Company as contemplated above).

### 10.3 Termination by Company

- (a) The Company can terminate this document with immediate effect by notice in writing to the Licensee where:
- (1) the Licensee ceases business, or threatens to do so;
  - (2) the Licensee breaches a term of this document which is capable of remedy, but does not remedy the breach within 14 calendar days of notice in writing issued by the Licensee, identifying the breach and requesting remedy;
  - (3) the Licensee breaches a term of this document and that breach is incapable of remedy; or
  - (4) an Insolvency Event occurs in respect of the Licensee.
- (b) The Company may terminate this document at any time by giving the Licensee not less than 90 calendar days notice in writing.

### 10.4 Termination by Licensee

The Licensee can terminate this document with immediate effect by notice in writing to the Company where:

- (a) the Company ceases business, or threatens to do so;
- (b) the Company materially breaches a term of this document but does not remedy the breach within 14 calendar days of notice in writing issued by the Licensee, identifying the breach and requesting remedy; or
- (c) an Insolvency Event occurs in respect of the Company.

### 10.5 End of Term obligations

Upon expiry or termination of this document:

- (a) the Licensee must stop, and must ensure that Users stop, accessing and using the Application; and
- (b) each party must return or destroy (as directed) to the other party any material or documentation or property of the other party in that party's control or possession (including but not limited to any relevant Confidential Information).
- (c) For the avoidance of doubt Confidential Information does not include the Application Data.

### 10.6 Effect of expiry or termination

- (a) Any expiry or termination of this document does not relieve the other party of any obligation remaining to be or performed by it or capable of having effect after such termination and is without prejudice to any right or cause of action already accrued to either party in respect of any

breach of this document by the other party.

- (b) After expiry or termination of this document, the Company will be under no obligation to retain or dispose of any data supplied by or associated with the Licensee (including the Application Data), and such data can be irrevocably deleted by the Company.
- (c) In no circumstances will any prepaid Licence Fees be refunded to the Licensee in the event of early termination of the Term, unless clause 13.1(e) applies or the Licensee terminates the agreement pursuant to clause 10.4].

### 10.7 Survival

The rights and obligations under clauses 6.1, 6.2(b)(4), 6.2(b)(5), 6.2(b)(6), 6.3, 7, 9, 10.5, 10.6, 12, 13, 14, 17 and this clause 10.7 survive the expiry or termination of this document and continue in full force and effect, together with any other rights and obligations which are by their nature or effect intended to survive.

### 11. Force Majeure

- (a) The Company will not be liable for any delay or failure to perform its obligations under this document if such delay is due to Force Majeure. If a delay or failure is caused or anticipated due to Force Majeure, the Company's obligations will be suspended. If a delay or failure by the Company to perform its obligations due to Force Majeure exceeds 60 days, the Company may immediately terminate this document on providing notice in writing to the Licensee.
- (b) If this document is terminated pursuant to clause 11(a), the Company is not liable to refund any moneys paid by the Licensee pursuant to this document.

### 12. Confidentiality

#### 12.1 Obligation

Each party must keep the Confidential Information of the other party secret and confidential. No party may use or disclose the Confidential Information of any other party for any purpose other than that which the information was disclosed.

#### 12.2 Exclusions

The obligations of confidence under this document do not apply to any Confidential Information that:

- (a) is in the public domain (other than through any breach of this document or any obligation of confidence);
- (b) the receiving party can prove was known to it at the time of disclosure by the disclosing party, free from any obligation of confidence;
- (c) a party is required by law to disclose;
- (d) a party is required to disclose in order to obtain the approval or consent of any government body, authority or agency in connection with the purpose for which that information was disclosed; or
- (e) a party is required to disclose by the rules of any stock exchange.

#### 12.3 Survival of obligations

The obligations of confidentiality under this document

survive the expiration or termination of this document.

#### **12.4 Permitted disclosure**

Each party may disclose another party's Confidential Information to those of its Personnel, representatives or professional advisers who need to know the information and who are aware of the confidential nature of the information and agree to keep it confidential.

#### **12.5 Destruction of documents**

Except as otherwise agreed in writing, on written notice from the owner of any Confidential Information, the recipient of that information will immediately destroy or deliver to the owner all Confidential Information in a recorded form (including any copies of that information) which is in the recipient's possession or control.

#### **12.6 Ownership**

Except as otherwise agreed in writing, no party will acquire any title to any Confidential Information of the other party.

### **13. Exclusions and limitation on liability**

#### **13.1 Exclusions**

- (a) To the fullest extent permitted by law the Company:
  - (1) does not warrant that the Application will be error free, or that the Licensee's or User's access or use of the Application will be uninterrupted, or that the Application will meet the requirements of the Licensee; and
  - (2) does not make any warranty or representation (whether express or implied) that the Application will operate in conformity with any technical documentation supplied to the Licensee.
- (b) The Licensee expressly acknowledges and agrees that access and use of the Application is at its sole risk, and further acknowledges and agrees that to the extent permitted by law, the Application is provided "as is", with all faults and without warranty of any kind. Accordingly, the Company is not responsible for any problems, failures or technical malfunctions of any telephone lines or networks, online computer systems, servers or providers, computer equipment, software, or any other object or material, related to the Licensee's or User's access or use of the Application.
- (c) To the fullest extent permitted by law, the Company makes no warranties or representations regarding the security of any material, data and information uploaded or submitted by the Licensee or any Users in their respective use of the Application, as relevant.
- (d) To the fullest extent permitted by law, the Company expressly disclaims any express or implied term, condition, guarantee, statutory or other warranty relating to the Application, the Implementation Services, the Support Services and any other goods or services supplied to the Licensee from time to time, including but

not limited to warranties and guarantees of acceptability, compliance with description, correspondence with sample, merchantability, fitness for purpose, rendering with due care and skill, achievement of result or provided within a reasonable time, and makes no representations to the Licensee regarding any of these matters.

- (e) Despite clause 13.1(d), the Company acknowledges that certain State, Territory and Commonwealth legislation, including the Australian Consumer Law set out as Schedule 2 to the *Competition and Consumer Act 2010* (Cth) implies particular non-excludable guarantees, warranties and conditions into particular agreements for the supply of goods and services, which cannot be excluded, restricted or modified (Non-Excludable Terms). It is agreed by the parties that:
    - (A) the Company does not exclude, restrict or modify any of the Non-Excludable Terms;
    - (B) nothing in this clause or this document is intended to exclude, or is to be interpreted as excluding, any Non-Excludable Term that cannot lawfully be excluded or disclaimed by the Company; and
    - (C) nothing in this document limits any remedies which may be available to the Licensee at law and which cannot lawfully be excluded by the Company, including in respect of any breach of a Non-Excludable Term which may be applicable.
  - (f) To the fullest extent permitted by law, and unless otherwise expressly stated in this document, the Company excludes all liability towards the Licensee in respect of all claims made by the Licensee under or in connection with this document (whether arising out of breach of contract, negligence or any other tort, under statute or otherwise) for any loss of profit, revenue, data, contracts, goodwill or business, or any interruption to the business of the Licensee, or any consequential, indirect, special, punitive or incidental damages.
- #### **13.2 Limitation of liability**
- (a) Despite clause 13.1, to the fullest extent permitted by law, the total liability of the Company to the Licensee:
    - (1) subject always to the overall cap in clause 13.2(a)(2), in respect of any Claim made by the Licensee under or in connection with this document (whether arising out of breach of contract, negligence or any other tort, under statute or otherwise) will not exceed the amount of the Fees paid by the Licensee to the Company under this document at the date the Licensee makes its Claim; and
    - (2) in respect of all Claims made by the Licensee under or in connection with this document (whether arising out of breach of contract, negligence or any other tort, under statute or otherwise) will not exceed



the total aggregate amount of the Fees paid by the Licensee to the Company under this document across the first two Payment Periods.

- (b) Despite clauses 13.1 and 13.2(a), and notwithstanding anything else to the contrary in this document, to the extent the Company is unable to fully exclude its liability pursuant to applicable law in relation to Non-Excludable Terms, and to the extent that it is entitled to do so, the Company's liability to the Licensee for a breach of any of the Non-Excludable Terms is limited to any one of the following, at the option of the Company:
- (1) in the case of goods (including the Application) - replacement of the goods or the supply of equivalent goods; repair of the goods; payment of the cost of replacing the goods or acquiring equivalent goods or payment of the costs of having the goods repaired; and
  - (2) in the case of services (including the Implementation Services and Support Services) - the supply of the services again or payment of the cost of having the services supplied again.

## **14. Licensee warranties and indemnity**

### **14.1 Warranties by Licensee**

The Licensee acknowledges, understands and agrees that it assumes sole and full responsibility for its access and use of the Application, and warrants and represents to the Company that:

- (a) it has the authority and ability to enter into and perform its obligations under this document;
- (b) it will perform its obligations under this document;
- (c) no additional authorisation, consent, approval, filing or registration with any court or government department, commission, agency or instrumentality is or will be necessary or required for the Licensee to enter into and give effect to this document; and
- (d) the information and representations provided to the Company in relation to the subject matter of this document prior to its entry into this document is true and correct.

### **14.2 Indemnity**

- (a) The Licensee will at all times indemnify and keep indemnified the Company, and each of its Personnel (those indemnified) from and against any Claims made against, or Loss incurred by, any of those indemnified where such Claim or Loss arises out of, in connection with, or in respect of:
- (1) any breach by the Licensee or any of its Personnel, Users or any other person for whose acts or omissions the Licensee is vicariously liable (Representatives) of any obligation, warranty or representation (whether express or implied) under this document;

- (2) any of the warranties given by the Licensee under this document being false, misleading or inaccurate; or
- (3) any unauthorised acts, fraud, wilful default, dishonesty or negligence of the Licensee or any of its Representatives.

- (b) The Licensee releases and indemnifies the Company against any Claim by the Licensee's Representatives arising out of the performance of this document.
- (c) For the avoidance of doubt, the indemnities set out in this clause 14.2 require the Licensee to reimburse those indemnified for all legal and other expenses, including reasonable solicitor's fees (on a solicitor-own client basis) incurred by those indemnified in connection with defending or settling any Loss or Claim.

### **14.3 Continuing indemnity**

The indemnities referred to in clause 14.2 will be granted whether or not legal proceedings are instituted and, if such proceedings are instituted, irrespective of the means, manner or nature of any settlement, compromise or determination.

## **15. Dispute resolution**

### **15.1 Disputes**

If any dispute or difference arises in connection with this document the parties will use their best endeavours to resolve the dispute or difference in accordance with this clause 15 before initiating any court proceedings.

### **15.2 Resolution by negotiation**

Any dispute or difference arising in connection with this document will be referred in writing to a senior representative appointed by each party who will attempt to resolve the dispute by negotiation in good faith within 14 calendar days of one party notifying the other of the existence of the dispute.

### **15.3 Mediation**

- (a) If the senior representatives fail to resolve the dispute, the parties agree to refer the dispute to a mediator to be mutually agreed, or in default of agreement within 5 calendar days of either party requesting the other to agree a mediator, to be appointed by the Australian Disputes Centre of Sydney, NSW, 2000, Australia (ADC) or its nominee.
- (b) The mediation is to be held within 21 calendar days of the appointment of the mediator, in accordance with the Commercial Mediation Guidelines issued by the ADC, in Victoria (or such other location as the parties mutually agree) and the parties will pay equal shares of the mediator's fees, unless otherwise agreed. The parties will otherwise each bear their own costs of mediation.
- (c) If the mediation does not proceed within the agreed timetable or is not successful in resolving the dispute, each party is free to commence legal proceedings to resolve the dispute.

### **15.4 Interlocutory relief**

Nothing in this clause prevents a party from seeking urgent interlocutory relief.

## **16. Special Conditions**

### **16.1 Special Conditions**

The parties agree to comply with the Special Conditions set out in Item 13 of the Reference Schedule, if any.

### **16.2 Interpretation**

In the event of an inconsistency between a Special Condition and any other provision of this document, the Special Condition will prevail to the extent necessary.

## **17. General**

### **17.1 Notices**

- (a) Any notice given under this document must be in writing and signed by or for the sender and delivered by regular post if posted within Australia to a place within Australia, by airmail if posted to or from a place outside Australia, by hand or by email to the address specified in Item 12 of the Reference Schedule or such other address as may be notified by a party in writing from time to time.
- (b) A notice or other communication delivered under this document will be deemed to be given if:
- (1) personally delivered, upon delivery;
  - (2) sent from and to a place within Australia by regular post, at 9:00 am on the sixth Business Day after the date of posting;
  - (3) sent from a place within Australia to a place outside Australia by airmail, at 9.00 am on the tenth Business Day after the date of posting;
  - (4) sent from a place outside Australia by airmail, at 9.00 am on the twelfth Business Day after the date of posting; and
  - (5) sent by email, at the time of transmission unless the sending party receives a notification of delivery failure within 24 hours of the email being sent.

### **17.2 Costs**

Each party will pay its own costs in connection with the negotiation, preparation and execution of this document.

### **17.3 Amendment**

This document may only be amended in writing signed by the parties and may not be amended in any other manner.

### **17.4 Entire agreement**

Except as provided otherwise, this document contains the entire agreement between the parties about its subject matter. Any previous understanding, agreement, representation or warranty by the Company relating to its subject matter is replaced by this document and has no further effect.

### **17.5 Relationship**

The relationship between the parties is and will remain that of independent contractors, and nothing in this document constitutes the parties as partners or joint venturers or constitutes any party as the agent of

another party or gives rise to any other form of fiduciary relationship between the parties.

### **17.6 Assignment and novation**

The Licensee cannot assign or transfer any of its rights or obligations under this document without the prior written consent of the Company, which will be granted or withheld by the Company in its discretion, acting reasonably.

### **17.7 Waiver**

No waiver by a party of any breach or default by any other party is effective unless reduced to writing and signed by that party, and any such waiver does not constitute a waiver of any other continuing breach or default under this document.

### **17.8 Remedies**

- (a) Except as provided in this document, the rights and remedies provided under this document are cumulative and not exclusive of any rights or remedies provided by law or of any other such right or remedy. Any single or partial exercise of any power or right does not preclude any other or further exercise of it or the exercise of any other power or right under this document.
- (b) The rights and obligations of the parties pursuant to this document are in addition to and not in derogation of any other right or obligation between the parties under any other deed or agreement to which they are parties.

### **17.9 Apportionment of liability**

Where either party (**Aggrieved Party**) sustains any liability howsoever arising to a third party arising out of or connected with this document which is caused or contributed to partly by the negligence, breach of this document or breach of any statutory duty on the part of the other party (**Defaulting Party**) and partly by the negligence, breach of this document or breach of any statutory duty by the Aggrieved Party, the damages recoverable by the Aggrieved Party pursuant to this document must be reduced to such extent as is just and equitable, having regard to the extent to which such liability was caused or contributed to by the negligence, breach of this document or breach of any statutory duty by the Aggrieved Party.

### **17.10 Severance**

If any provision of this document is prohibited, invalid or unenforceable in any jurisdiction, that provision will, as to that jurisdiction, be ineffective to the extent of the prohibition, invalidity or unenforceability without invalidating the remaining provisions of this document or affecting the validity or enforceability of that provision in any other jurisdiction.

### **17.11 Governing law**

This document is governed by the law in force in the State of Victoria in Australia. The parties submit to the exclusive jurisdiction of the courts of the State of Victoria in respect of all proceedings arising in connection with this document.

### **17.12 Further assurances**

Each party will promptly do all things required by law

or reasonably requested by the other party to give effect to this document.

**17.13 No merger**

No right or obligation of any party will merge on completion of any transaction under this document. All rights and obligations under this document survive the execution and delivery of any transfer or other document which implements any transaction under this document.

**17.14 Counterparts and multiple originals**

This document may be executed in any number of counterparts and all of those counterparts taken together will be deemed to constitute the same document.