

# **eServices Register Contract**

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## CONTENTS

1.	DEFINITIONS AND INTERPRETATION .....	1
2.	TERM .....	9
3.	NON EXCLUSIVE APPOINTMENT .....	9
4.	FORMATION OF CONTRACT .....	9
5.	TRANSITION IN .....	10
6.	PROVISION OF SERVICES .....	10
7.	THIRD PARTY ASSISTANCE .....	11
8.	PURCHASER'S RESPONSIBILITIES .....	11
9.	FAILURE TO PERFORM.....	12
10.	DELAYS.....	12
11.	ACCEPTANCE .....	13
12.	DOCUMENT APPROVAL PROCESS.....	15
13.	WARRANTY PERIOD .....	15
14.	SERVICE LEVELS .....	16
15.	PERSONNEL .....	17
16.	DOCUMENTATION .....	18
17.	TRAINING .....	18
18.	VARIATION OF SERVICES .....	18
19.	FEES AND INVOICING .....	19
20.	TAXES.....	20
21.	WARRANTIES .....	21
22.	CONTRACT MANAGEMENT, RECORDS AND REPORTS.....	21
23.	TERMINATION.....	22
24.	CONFLICT OF INTEREST .....	24
25.	INTELLECTUAL PROPERTY RIGHTS .....	25
26.	THIRD PARTY SOFTWARE.....	27
27.	OPEN SOURCE MATERIALS .....	27
28.	ESCROW.....	28
29.	LIABILITY .....	28
30.	INSURANCE.....	29
31.	PERFORMANCE GUARANTEE AND FINANCIAL UNDERTAKING .....	30
32.	CONFIDENTIALITY AND PRIVACY .....	30
33.	SECURITY MEASURES.....	31
34.	DISASTER RECOVERY .....	33
35.	COMPLIANCE WITH LAW AND POLICIES .....	33

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36.	AUDIT .....	36
37.	ACCESS TO THE SUPPLIER'S PREMISES AND RECORDS .....	37
38.	DISPUTE RESOLUTION .....	38
39.	SUB-CONTRACTING.....	38
40.	NOTICES.....	39
41.	GENERAL.....	39
	SCHEDULE 1: CLOUD SERVICES .....	41
	SCHEDULE 2: IMPLEMENTATION SERVICES .....	46
	SCHEDULE 3: DEVELOPMENT SERVICES .....	49
	SCHEDULE 4: HOSTING SERVICES .....	52
	SCHEDULE 5: MANAGED SERVICES .....	55
	SCHEDULE 6: MAINTENANCE AND SUPPORT SERVICES .....	58
	SCHEDULE 7: PROFESSIONAL SERVICES .....	62
	SCHEDULE 8: HARDWARE SERVICES.....	63
	SCHEDULE 9: TRANSITION IN .....	64
	SCHEDULE 10: PERFORMANCE GUARANTEE.....	65
	SCHEDULE 11: FINANCIAL UNDERTAKING .....	70
	SCHEDULE 12: TRANSITION OUT .....	73
	Part 1: Disengagement .....	73
	Part 2: Transition Out.....	76
	SCHEDULE 13: ESCROW AGREEMENT .....	79
	SCHEDULE 14: SAMPLE CHANGE ORDER.....	89

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## BACKGROUND:

- A The Purchaser requires the provision of certain information technology Services.
- B The Purchaser agrees to engage the Supplier to provide, and the Supplier agrees to provide, the Services on the terms and conditions of the Contract.

## IT IS AGREED:

### 1. DEFINITIONS AND INTERPRETATION

- 1.1 In the Contract, unless the context otherwise requires:

"**Acceptance Certificate**" has the meaning given to it in clause 11.3.1;

"**Adverse Event**" means in respect of the Supplier, means:

- (a) the Supplier, or any party having or exercising control (as that term is defined in section 50AA of the *Corporations Act 2001* (Cth)) over the Supplier, becomes an externally-administered body corporate for the purposes of the *Corporations Act 2001* (Cth) or an external insolvency administrator is appointed to any such party under the provisions of any companies or securities legislation of another jurisdiction;
- (b) a controller (as that term is defined in the *Corporations Act 2001* (Cth)) or mortgagee in possession is appointed to the assets of the Supplier, any party having or exercising control over the Supplier, or such appointment is reasonably likely;
- (c) the Supplier, or any party having or exercising control (as that term is defined in section 50AA of the *Corporations Act 2001* (Cth)) over the Supplier fails to comply with a statutory demand in the manner specified in section 459F of the *Corporations Act 2001* (Cth), and has not made an application to set aside such demand under section 459G of the *Corporations Act 2001* (Cth);
- (d) the Supplier, or any party having or exercising control (as that term is defined in section 50AA of the *Corporations Act 2001* (Cth)) over the Supplier enters into a composition or arrangement with its creditors, or any class of its creditors, with respect to the payment of amounts due to such creditors;
- (e) if the Supplier is an unincorporated entity or trust:
  - (i) an event of the kind referred to in paragraphs (a), (b), (c) or (d) above occurs in respect of any of the partners, joint venturers or proprietors of such entity; or
  - (ii) a trustee in bankruptcy (or comparable person) is appointed to the assets and affairs of any of the partners, joint venturers or proprietors of such entity, whether under the laws of the Commonwealth of Australia or another jurisdiction, or any of those partners, joint venturers or proprietors enter into an arrangement or composition with its or their creditors for the payment of their debts; or
- (f) the Supplier is unable to pay its debts as and when they fall due;

**"Applicable Industrial Instruments"** means an Award or Enterprise Contract that specifically applies to the employees of the Supplier and is binding on the Supplier;

**"Applicable Legislation"** means:

- (a) *Outworkers (Improved Protection) Act 2003* (Vic);
- (b) *Dangerous Goods Act 1985* (Vic);
- (c) *Equipment (Public Safety) Act 1994* (Vic);
- (d) *Occupational Health and Safety Act 2004* (Vic);
- (e) *Fair Work Act 2009* (Cth);
- (f) *Long Service Leave Act 1992* (Vic);
- (g) equivalent legislation in States and Territories other than Victoria; and
- (h) any other legislation designated by the Victorian Government as Applicable Legislation from time to time;

**"Application"** has the meaning given to it in clause 1.1 of Schedule 3;

**"Award"** means any award of Fair Work Australia or any tribunal empowered to make industrial awards for Victorian employees or employees in any other State or Territory;

**"Business Continuity Plan"** means the business continuity plan produced by the Supplier for approval by the Purchaser under clause 7.1 of Schedule 1, clause 4.1 of Schedule 4 and/or clause 3.1 of Schedule 5, as the context requires;

**"Cloud Services"** mean services provided by the Supplier to the Purchaser over the internet, which may include infrastructure as a service, software as a service, platform as a service or network as a service, as specified in the Contract;

**"Cloud Solution"** means the information technology and computing infrastructure to be made available by the Supplier to the Purchaser in accordance with the requirements in the Contract so that the Purchaser can receive Cloud Services;

**"Code of Conduct for Victorian Public Sector Employees"** means the Code of Conduct for Victorian Public Sector Employees published by or on behalf of the State of Victoria, as amended from time to time;

**"Code of Practice"** means a code of practice as defined in, and approved under, the *Privacy and Data Protection Act 2014* (Vic);

**"Commencement Date"** means the date specified in the Contract Variables for the commencement of the Services;

**"Completion Date"** means the date set out in the Contract Variables by which all of the Services must be provided by the Supplier;

**"Confidential Information"** means any technical, scientific, commercial, financial or other information of, about or in any way related to, the Purchaser which is by its nature

confidential or is designated by the Purchaser as confidential, and which is disclosed, made available, communicated or delivered to the Supplier, but excludes information:

- (a) which is in or which subsequently enters the public domain other than as a result of a breach of the Contract;
- (b) which the Supplier can demonstrate was in its possession prior to the date of the Contract;
- (c) which the Supplier can demonstrate was independently developed by the Supplier; or
- (d) which is lawfully obtained by the Supplier from another person entitled to disclose such information;

**"Contract"** means the contract formed pursuant to clause 4.1 which details the Services and Deliverables to be provided by the Supplier;

**"Contracts Publishing System"** means the system used to publish details of contracts entered into by Victorian Government departments and some agencies;

**"Contract Variables"** means the document issued by the Purchaser specifying the variables which apply to the Contract;

**"Control"** means, in relation to any body corporate, the ability of any person directly or indirectly to exercise effective control over the body corporate (including the ability to determine the outcome of decisions about the financial and operating and other policies of that body corporate) by virtue of the holding of voting shares, units or other interests in that body corporate or by any other means;

**"Defect"** means a failure of a Service or Deliverable to comply with the specifications and requirements for that Service or Deliverable set out in the Contract;

**"Deliverable"** means any item specified in the Contract to be delivered to the Purchaser;

**"Department"** means the Department of State Development, Business and Innovation or such other department of the Victorian Government as may be responsible for monitoring compliance with the VIPP from time to time;

**"Developed Software"** means software developed by the Supplier in accordance with the Contract and supplied by the Supplier to the Purchaser under the Contract;

**"Development Plan"** has the meaning given to it in clause 1.1 of Schedule 3;

**"Development Requirements"** has the meaning given to it in clause 2.1 of Schedule 3;

**"Development Services"** mean the software and/or system development services provided by the Supplier to the Purchaser, as specified in the Contract;

**"Disaster"** means a serious incident causing interruption of the Services, the severity of which is defined as a disaster by the Purchaser;

**"Disaster Recovery Plan"** means the business continuity plan produced by the Supplier for approval by the Purchaser under clause 8.1 of Schedule 1, clause 5.1 of Schedule 4 and/or clause 4.1 of Schedule 5, as the context requires;

**"Disengagement Plan"** means the plan produced by the Supplier and approved by the Purchaser pursuant to Part 1 of Schedule 12;

**"Disengagement Services"** mean the Services provided by the Supplier pursuant to the Disengagement Plan, or as otherwise requested by the Purchaser pursuant to Part 1 of Schedule 12;

**"Document"** has the meaning given to it in clause 12.1;

**"Downtime Aggregate Hours"** means the aggregate of downtime of the Cloud Solution or hosted application, as applicable, which includes where the Cloud Solution or hosted application cannot be accessed or is otherwise not functioning, during Standard Usage Hours;

**"Effective Date"** has the meaning given to it in clause 4.1;

**"Enterprise Contract"** means any certified contract of Fair Work Australia or a State industrial department;

**"Escrow Agreement"** means the escrow agreement, in the form set out in Schedule 13 or as otherwise approved by the Purchaser, to be executed by the Supplier, the Purchaser and the Purchaser's nominated escrow agent;

**"Escrow Software"** means the Software designated as escrow software in the Contract Variables;

**"Existing System"** has the meaning given to in in clause 4.1.2 of Schedule 12;

**"Existing Tools"** means tools, object libraries and methodologies existing at the commencement of the Contract:

- (a) owned by the Supplier; or
- (b) used by the Supplier to provide any of the Services;

**"Fees"** means the fees payable to the Supplier for the provision of the Services and the Deliverables, as set out in the Contract Variables;

**"Function"** has the meaning given to in in clause 2.3 of Schedule 6;

**"Functional Specifications"** has the meaning given to it in clause 2.4 of Schedule 3;

**"GST Act"** means the *A New Tax System (Goods and Services Tax) Act 1999* (Cth);

**"Hardware"** means the hardware to be maintained and supported by the Supplier to the Purchaser, as specified in the Contract;

**"Hardware Services"** mean the services to be provided by the Supplier to the Purchaser in relation to the Hardware, as specified in the Contract;

**"Hosting Services"** mean the hosting and related services to be provided by the Supplier to the Purchaser, as specified in the Contract;

**"Implementation"** has the meaning given to it in clause 1.1 of Schedule 2;

**"Implementation Period"** means the period specified in the Contract within which the Supplier must implement the Cloud Solution (if it is providing Cloud Services) or the Solution (if it is providing Implementation Services), as the context requires;

**"Implementation Plan"** has the meaning given to it in clause 2.1 of Schedule 2;

**"Implementation Services"** mean the services to be provided by the Supplier to implement, integrate and configure software for the Purchaser, as specified in the Contract;

**"Information Privacy Principles"** means the information privacy principles set out in the *Privacy and Data Protection Act 2014* (Vic);

**"Initial Product"** has the meaning given to in in clause 2.3 of Schedule 6;

**"Intellectual Property Rights"** includes all present and future copyright, all rights in relation to inventions (including patents), registered and unregistered trademarks, confidential information (including trade secrets and know how), registered designs, circuit layouts, and all other rights resulting from intellectual activity in the industrial, scientific, literary or artistic fields;

**"Key Personnel"** has the meaning given to it in clause 15.2;

**"Licensed Software"** means the software specified as such in the Contract, which is owned by the Supplier and to be supplied under the Contract by the Supplier to the Purchaser;

**"Liquidated Damages"** means the amount specified as such in the Contract Variables;

**"Maintenance and Support Services"** mean the maintenance and support services to be provided by the Supplier in respect of Software, as specified in the Contract;

**"Managed Services"** mean services whereby the Supplier agrees either to manage all or part of the Purchaser's information technology or infrastructure or otherwise, as specified in the Contract;

**"Milestone Date"** means each date specified as such in the Transition In Plan, Implementation Plan, Development Plan and/or any other delivery date agreed between the parties, as the case may be;

**"Moral Rights"** means moral rights under and in accordance with the *Copyright Act 1968* (Cth);

**"New Provider"** means the service provider(s) that the Purchaser may nominate to provide some or all of the New Services;

**"New Product"** has the meaning given to in in clause 2.3 of Schedule 6;

**"New Services"** mean the services which replace in whole or in part the Services provided by the Supplier and which may be provided by the Purchaser or a third party;



"**New System**" has the meaning given to it in clause 7.5.1 of Schedule 12;

"**Partial Termination**" has the meaning given to that term in clause 23.5;

"**Pre-Existing Intellectual Property**" means any and all Intellectual Property Rights owned by or licensed to a party which existed prior to the commencement of the provision of the Services;

"**Product Roadmap**" has the meaning given to in in clause 2.5 of Schedule 6;

"**Professional Services**" means any professional services to be supplied by the Supplier to the Purchaser, as specified in the Contract;

"**Proposed Plan**" has the meaning given to it in clause 7.1 of Schedule 12;

"**Protective Data Security Standards**" means the standards issued under Part 4 of the *Privacy and Data Protection Act 2014* (Vic);

"**Purchaser**" means a person or entity listed on the Register as a purchaser and, in respect of the Contract, the person or entity specified as such in the Contract Variables;

"**Purchaser Data**" means all data created, generated, placed in, stored in, accessed or retrieved by using the Deliverables or receiving the Services;

"**Register**" means the State's electronic register to facilitate the procurement of various information technology, communications and related services by Purchasers;

"**Request**" means a request from a Purchaser for the provision of services, which is submitted through the Register, in the form of a purchase order, request for quote, request for tender or any other form and specifies the type or types of services being requested;

"**Requirements**" has the meaning given to it in clause 3.1 of Schedule 2;

"**Response**" means a response to a Request, which is provided through the Register, in the form of a quote or such other form as may be required by that Request;

"**Restore**" has the meaning given to it in clause 1.7.1 of Schedule 6;

"**Resolve**" has the meaning given to it in clause 1.7.2 of Schedule 6;

"**Service Credit**" means the amount payable by the Supplier for failure to meet the Service Levels, as specified in the Contract;

"**Service Levels**" means the minimum standards of performance for one or more of the Services specified in the Contract;

"**Service Management Plan**" has the meaning given to it in clause 1.2 of Schedule 6;

"**Services**" mean the services (or any of them) specified in the Contract, which may include:

- (a) Cloud Services;
- (b) Implementation Services;

- (c) Development Services;
- (d) Hosting Services;
- (e) Managed Services;
- (f) Maintenance and Support Services;
- (g) Professional Services; and/or
- (h) Hardware Services;

**"Software"** means Developed Software, Licensed Software and/or Third Party Software, as the context requires;

**"Solution"** means the fully integrated and implemented Deliverables (including Licensed Software and Third Party Software), other software, interfaces and technology to be provided by the Supplier in accordance with the Contract;

**"Solution Design"** has the meaning given to it in clause 4.1 of Schedule 2;

**"Specifications"** has the meaning given to it in:

- (a) clause 3.3 of Schedule 2 in respect of the Implementation Services; and
- (b) clause 2.14 of Schedule 3 in respect of the Development Services;

**"Standard Usage Hours"** means the standard usage times specified in the Contract;

**"State"** means the State of Victoria;

**"Supplier"** means the person or entity supplying the Services under the Contract, as specified in the Contract Variables;

**"Supplier Code of Conduct"** means the Supplier Code of Conduct issued by the Victorian Government for suppliers providing goods or services to the Victorian Government (as amended from time to time);

**"Support Services"** has the meaning given to in in clause 1.3 of Schedule 6;

**"System Response Times"** means the time it takes for the Cloud Solution to respond to a user command in the manner specified in the Request;

**"Technical Architect"** means the Supplier's expert in the technical operation of the Solution;

**"Technical Specification"** has the meaning given to it in clause 2.7 of Schedule 3;

**"Term"** means the period from the Effective Date until the Completion Date (or such later date as may be specified in the Request);

**"Third Party Software"** means the software specified as such in the Contract, which is owned by a third party and procured under the Contract by the Supplier for the Purchaser or any other software licensed to the Purchaser by a third party;

**"Transition In Plan"** means a plan for Transition In Services developed by the Supplier in accordance with Schedule 9;

**"Transition In Services"** mean the Services to be provided by the Supplier pursuant to Schedule 9;

**"Transition Out Plan"** means a plan for Transition Out Services developed by the Supplier in accordance with Part 2 of Schedule 12;

**"Transition Out Services"** mean the Services to be provided pursuant to Part 2 of Schedule 12;

**"Uptime Percentage"** means the percentage of time for which the Cloud Solution or hosted application, as applicable, is actually available during Standard Usage Hours, as calculated in accordance with these terms and conditions;

**"Uptime Percentage Target"** means the percentage of time for which the Cloud Solution or hosted application, as applicable, must be available during Standard Usage Hours, as specified in the Contract;

**"Victorian Public Entity"** means:

- (a) each Victorian Government department (as defined in section 3 of the *Financial Management Act 1994* (Vic));
- (b) a "Government Owned Entity", meaning a statutory corporation, a State owned company, a State body or a State business corporation as those terms are defined in the *State Owned Enterprises Act 1992* (Vic);
- (c) a "Council" as defined in the *Local Government Act 1989* (Vic); or
- (d) an entity which receives any funding from any of the entities listed in paragraphs (a) to (c) or any entity under the control of any of the entities listed in paragraphs (a) to (c);

**"VIPP"** means the Victorian Industry Participation Policy issued by the Victorian Government, as amended from time to time;

**"VIPP Plan"** means a plan submitted by the Supplier to the Purchaser in connection with a tender evaluation process conducted prior to the entry into the Contract; and

**"Warranty Period"** means a period of 90 business days following acceptance of a Deliverable by the Purchaser, unless specified otherwise in the Contract Variables.

1.2 In the interpretation of the Contract, the following provisions apply unless the context otherwise requires:

1.2.1 headings are inserted for convenience only and do not affect the interpretation of the Contract;

1.2.2 a reference in the Contract to a "business day" is a reference to a day other than a Saturday or Sunday on which banks are open for business generally in Melbourne, Victoria;

- 1.2.3 if the day on which any act, matter or thing is to be done under the Contract is not a business day, the act, matter or thing must be done on the next business day;
- 1.2.4 a reference in the Contract to "dollars" or "\$" means Australian dollars and all amounts payable under this Contract are payable in Australian dollars;
- 1.2.5 a reference in the Contract to any law, legislation or legislative provision includes any statutory modification, amendment or re-enactment, and any subordinate legislation or regulations issued under that legislation or legislative provision;
- 1.2.6 a reference in the Contract to any document or agreement is to that document or agreement as amended, novated, supplemented or replaced;
- 1.2.7 a reference to a clause, part, schedule or attachment is a reference to a clause, part, schedule or attachment of or to the Contract;
- 1.2.8 an expression importing a natural person includes any company, trust, partnership, joint venture, association, body corporate or governmental agency;
- 1.2.9 where a word or phrase is given a defined meaning, another part of speech or other grammatical form in respect of that word or phrase has a corresponding meaning;
- 1.2.10 a word which indicates the singular also indicates the plural, a word which indicates the plural also indicates the singular, and a reference to any gender also indicates the other gender; and
- 1.2.11 a reference to the word "include" or "including" is to be interpreted without limitation.

## **2. TERM**

- 2.1 Subject to clause 2.2, the Contract commences on the Effective Date and remains in force for the Term, unless terminated earlier in accordance with its terms.
- 2.2 The Purchaser may, at any time during the one (1) month period before the expiry of the Term, notify the Supplier in writing that it wishes to extend the duration of the Contract by a further period as specified in the notice or the Contract Variables. Upon notification by the Purchaser, the Term will be extended by the specified period.

## **3. NON EXCLUSIVE APPOINTMENT**

- 3.1 Nothing in the Contract shall prevent the Purchaser from receiving services which are the same as or similar in nature to the Services from any other person.

## **4. FORMATION OF CONTRACT**

- 4.1 The Contract is formed between that Purchaser and the Supplier on the date that the Contract Variables is signed on behalf of both parties ("**Effective Date**").
- 4.2 The Contract will be comprised of the following documents (in descending order of precedence):
  - 4.2.1 these terms and conditions;

- 4.2.2 Schedules 9 to 14 to these terms and conditions;
  - 4.2.3 if the Contract Variables specify that:
    - (a) Cloud Services are being provided, Schedule 1;
    - (b) Implementation Services are being provided, Schedule 2;
    - (c) Development Services are being provided, Schedule 3;
    - (d) Hosting Services are being provided, Schedule 4;
    - (e) Managed Services are being provided, Schedule 5;
    - (f) Maintenance and Support Services are being provided, Schedule 6;
    - (g) Professional Services are being provided, Schedule 7; and/or
    - (h) Hardware Services are being provided, Schedule 8;
  - 4.2.4 the Contract Variables;
  - 4.2.5 the Request; and
  - 4.2.6 the Response (as it may be negotiated by the Purchaser and Supplier).
- 4.3 In the event and to the extent of any inconsistency between the documents listed in clause 4.2, the provisions of the earlier mentioned document will prevail to the extent of the inconsistency. If the inconsistency remains incapable of resolution by reading down, the inconsistent provisions will be severed from the document lower in the order of precedence without otherwise diminishing the enforceability of the remaining provisions of that document.
- 4.4 Neither a Request nor a Response will be binding on the Supplier or the Purchaser unless and until both parties sign the Contract Variables in accordance with clause 4.1.
- 5. TRANSITION IN**
- 5.1 If specified in the Contract Variables, the Supplier shall comply with the transition in requirements in Schedule 9.
- 6. PROVISION OF SERVICES**
- 6.1 The Supplier must provide the Services to the Purchaser from the Commencement Date in accordance with the terms of the Contract, and must:
- 6.1.1 complete the Services by the Completion Date and any other dates for delivery specified in the Contract;
  - 6.1.2 provide the Services in a proper, timely and efficient manner using that standard of care, skill, diligence, prudence and foresight that would reasonably be expected from a prudent, expert and experienced provider of services that are similar to the Services;

- 6.1.3 ensure the highest quality of work and the delivery of the Services with the utmost efficiency;
  - 6.1.4 act in good faith and without prejudice to the Purchaser's interests;
  - 6.1.5 provide the Services and Deliverables in accordance with any standards, policies and procedures specified in the Contract Variables; and
  - 6.1.6 provide any and all equipment and other resources necessary for the performance of the Services.
- 6.2 If any other services, functions or duties are identified by either party after the Commencement Date and those services, functions or duties are incidental to the Services and are necessary for the proper performance and provision of the Services and would in the normal course of business customarily be performed as part of the Services, then the Supplier will perform those services, functions or duties at no additional cost to the Purchaser.

## **7. THIRD PARTY ASSISTANCE**

- 7.1 Where a third party provides services to the Purchaser, the Supplier agrees to provide all reasonable assistance and co-operation as required by that third party to ensure the Purchaser receives those services in a seamless and efficient manner.
- 7.2 Where the Supplier requires assistance and co-operation from any third party supplier to the Purchaser in respect of the Services, the Purchaser will use its reasonable endeavours to obtain that assistance and co-operation.

## **8. PURCHASER'S RESPONSIBILITIES**

- 8.1 The Purchaser will provide any resources and/or facilities specified as being provided by it in the Contract in accordance with this clause 8.

### **Site Preparation**

- 8.2 To the extent specified in the Contract, the Purchaser will be responsible for site preparation to enable the performance of a Service.

### **Access to Purchaser's premises**

- 8.3 The Purchaser must provide the Supplier with access to the Purchaser's premises as specified in the Contract to enable the Supplier to fulfil its obligations under the Contract. The Supplier must, and must ensure that its employees, agents and contractors, use reasonable endeavours to protect people and property, prevent nuisance and act in a safe and lawful manner and comply with the safety standards and policies of the Purchaser (including those listed in the Contract Variables or as otherwise notified to the Supplier).
- 8.4 Access provided under clause 8.3 may be temporarily denied or suspended by the Purchaser, in its absolute discretion.
- 8.5 Where access is temporarily denied or suspended by the Purchaser in accordance with clause 8.4 (except in circumstances where access is temporarily denied or suspended due to an investigation into the conduct of the Supplier's employees, agents or contractors), the Supplier may request an extension of time to complete any obligations which are directly and adversely affected by the denial of access. For the avoidance of doubt, the Supplier is not

entitled to recover any costs incurred in connection with its inability to access to the Purchaser's premises, howsoever caused.

- 8.6 The Purchaser will not deny a request by the Supplier for an extension of time under clause 8.5 where the length of the extension requested is no longer than the period for which access was temporarily denied or suspended.
- 8.7 The Purchaser must use reasonable endeavours to permit a resumption of access as soon as practicable where access has been temporarily denied or suspended by the Purchaser in accordance with clause 8.4.

### **Provision of requirements**

- 8.8 To the extent specified in the Contract, the Supplier will provide the Purchaser with particulars of the implementation and environmental requirements of a Service and/or Deliverable in order to permit the Purchaser to prepare the site accordingly.

## **9. FAILURE TO PERFORM**

- 9.1 Without limiting any other available remedy, if the Supplier fails to provide any of the Services or Deliverables in accordance with the Contract, the Purchaser will not be required to pay for those Services or Deliverables until they are provided in accordance with the requirements set out in the Contract, and may require the Supplier to remedy any default or re-perform the Services within the time specified in a notice given by the Purchaser to the Supplier, which time must be reasonable having regard to the nature of the Services.
- 9.2 If the default referred to in clause 9.1 is not capable of being remedied or the Services are not capable of being re-performed, or the Supplier fails within the time specified to remedy the default or re-perform the Services, the Purchaser may either have the Services or Deliverables remedied or re-performed by a third party or do so itself. In either case, the Supplier must pay the reasonable costs incurred by the Purchaser in doing so.

## **10. DELAYS**

- 10.1 The Supplier must notify the Purchaser in writing as soon as it becomes aware that any date for performance, including a Milestone Date, will not be met. A notice under this clause 10.1 must include:
- 10.1.1 the cause of the (possible) delay;
  - 10.1.2 the steps the Supplier intends to take to overcome or minimise the (possible) delay; and
  - 10.1.3 the estimated length of the (possible) delay.
- 10.2 After the Purchaser has received a notice under clause 10.1, it may, but is not obliged to, grant the Supplier an extension of time for delivery of the Deliverables and Services affected by the delay and amend the affected dates for performance, including any Milestone Dates, accordingly. Where the delay is caused or contributed to by the Purchaser, the Purchaser shall act reasonably when considering whether to grant an extension of time under this clause.
- 10.3 If specified in the Contract Variables, the Purchaser may recover Liquidated Damages from the Supplier or deduct Liquidated Damages from money due to the Supplier if the Supplier

fails to provide the Services or the Purchaser does not accept any Deliverables by the relevant Milestone Dates.

- 10.4 Liquidated Damages will be payable at the rate specified in the Contract Variables for each day that the Supplier does not provide the Services or the Purchaser does not accept the Deliverables after the relevant Milestone Dates. The Supplier shall not be required to pay Liquidated Damages to the extent that a delay is caused or contributed to by the Purchaser.
- 10.5 The parties acknowledge that Liquidated Damages:
- 10.5.1 are based upon a reasonable and mutual pre-estimate of the loss likely to be suffered by the Purchaser in respect of the delays to which they relate;
  - 10.5.2 are not the Purchaser's sole remedy arising in relation to the circumstances giving rise to the Liquidated Damages;
  - 10.5.3 do not limit other remedies available to the Purchaser at law, in equity, pursuant to statute or otherwise, under or in connection with the Contract, provided that the amount of any damages awarded to the Purchaser shall take into account the Liquidated Damages received by the Purchaser; and
  - 10.5.4 are subject to the limitation on the Supplier's liability in clause 29.2.
- 10.6 The Supplier's payment of Liquidated Damages will not, in any way, relieve the Supplier from any other liability for performing or complying with its obligations under the Contract.

## 11. ACCEPTANCE

- 11.1 The Contract will specify the Services and/or Deliverables which are subject to acceptance by the Purchaser in accordance with this clause 11 (other than Documents, which are subject to clause 12). The Contract will also specify the acceptance criteria for those Services and/or Deliverables, or the method of determining the acceptance criteria. After delivery of a relevant Service or Deliverable to the Purchaser, the Purchaser will review the Service or Deliverable to confirm that it conforms with the acceptance criteria and any other requirements for that Service or Deliverable set out in the Contract. Where requested by the Purchaser, the Supplier must provide assistance and support to suitably qualified personnel of the Purchaser in respect of the testing of a Service or Deliverable under this clause 11.1 at no additional cost.
- 11.2 The Purchaser will promptly notify the Supplier in writing of any Defect discovered during its testing of a Service or Deliverable under clause 11.1 at any time prior to completion of its verification and testing activities. Upon receiving a notice under this clause 11.2, the Supplier must promptly rectify such Defects as soon as practicable, and in any event within five business days of receiving the notice from the Purchaser, or such other longer period determined by the Purchaser, acting reasonably.
- 11.3 After the Purchaser has completed its verification and testing activities, the Purchaser will give the Supplier one of the following within 7 days of completion of verification and testing:
- 11.3.1 if the Purchaser is satisfied that the Service or Deliverable, as the case may be, operates in accordance with and complies in all respects with the Contract, notice that it accepts ("**Acceptance Certificate**") the Service or Deliverable; or



11.3.2 if there is a Defect in the Services or Deliverable, as the case may be, notice of this fact with details of the Defect, in which case clause 11.4 will apply.

### **Defects**

11.4 If there is a Defect in a Service or Deliverable once the Purchaser has completed its verification and testing activities, the Purchaser may elect to do any of the following:

11.4.1 require the Supplier to rectify the Defect within the timeframe determined by the Purchaser and undertake further testing of the Service or Deliverable, as the case may be, to demonstrate that it complies in all respects with the Contract, after which the Purchaser will then re-conduct its testing of the Service or Deliverable and, if the Purchaser is satisfied that the Service or Deliverable operates in accordance with and complies in all respects with the Contract, it will accept the Service or Deliverable by issuing an Acceptance Certificate;

11.4.2 accept the Service or Deliverable, as the case may be, by issuing an Acceptance Certificate for the Service or Deliverable on the condition that the Supplier agree to deliver a work-around or otherwise rectify the Defect within a reasonable time-frame determined by the Purchaser;

11.4.3 partially accept the Service or Deliverable, as the case may be, by issuing an Acceptance Certificate for the Service or Deliverable and waive the requirement for the Purchaser's testing to be satisfactorily completed; or

11.4.4 subject to the Purchaser having provided the Supplier with at least two opportunities to rectify a Defect pursuant to clause 11.4.1, immediately terminate the Contract by notice in writing to the Supplier.

11.5 The Supplier will provide any reasonable assistance requested by the Purchaser to conduct its testing of the Service and/or Deliverable, at no additional cost to the Purchaser.

11.6 If the Purchaser terminates the Contract under clause 11.4.4 then, notwithstanding any other provision of the Contract, the Supplier must refund all amounts paid by the Purchaser for or in relation to the relevant Service or Deliverable and all other Services and Deliverables which are affected by the termination.

11.7 For the avoidance of doubt:

11.7.1 no act or omission on the part of the Purchaser in connection with this clause 11 constitutes deemed acceptance of a Service or Deliverable; and

11.7.2 acceptance of a Service or Deliverable does not occur until such time as the Purchaser issues an Acceptance Certificate in respect of that Service or Deliverable.

### **Use in Production**

11.8 The Purchaser may not use any Deliverable in production prior to its acceptance in accordance with this clause 11, unless specified in the Contract Variables.

## **12. DOCUMENT APPROVAL PROCESS**

- 12.1 Where the Contract requires the Supplier to submit any draft report, plan or other written document ("**Document**") for approval by the Purchaser, or otherwise specifies that this clause 12 will apply, the process in clauses 12.2 to 12.7 shall apply.
- 12.2 Within 10 business days (or such other period as is reasonable having regard to the nature of the Document) of the date on which the Purchaser receives a draft Document, the Purchaser shall notify the Supplier in writing whether it:
- 12.2.1 approves the draft Document; or
  - 12.2.2 rejects the draft Document, in which case the Purchaser may specify the reasons for its rejection and/or request amendments to the draft Document which must be made before the Purchaser will approve the draft Document.
- 12.3 If the Purchaser fails to notify the Supplier of its acceptance or rejection of a draft Document under clause 12.2 within the period specified in that clause, the Supplier may request the Purchaser in writing to notify the Supplier of its decision within the next 10 business days.
- 12.4 Within five business days of the Purchaser rejecting a draft Document under clause 12.2.2, the Supplier must submit a revised draft of the draft Document, incorporating the Purchaser's requested modifications (if any).
- 12.5 The Purchaser will respond to the revised draft Document submitted by the Supplier under clause 12.4 in accordance with clause 12.2 and the process will continue until the draft Document is approved by the Purchaser in accordance with clause 12.2.1.
- 12.6 If the Supplier is required to, or otherwise wishes to, update any Document following its approval by the Purchaser, the Supplier must submit its proposed amendments to the Document to the Purchaser and the process in clauses 12.2 to 12.5 will apply.
- 12.7 Until a proposed amendment to a Document is approved in writing by the Purchaser, the original Document will remain in effect.

## **13. WARRANTY PERIOD**

- 13.1 During the Warranty Period for a Deliverable, the Supplier must:
- 13.1.1 remedy all Defects in the relevant Deliverable by either repair, replacement or modification, whichever is required by the Purchaser;
  - 13.1.2 pay all costs in relation to performance of its obligations under the warranty, including any packing, freighting, repair, modification, disassembly and reassembly costs; and
  - 13.1.3 investigate and determine the root cause of each Defect and design and implement the solution to address and permanently rectify each Defect. To the extent the Purchaser incurs any costs in connection with this clause 13.1.3, the Supplier must reimburse the Purchaser for those costs.
- 13.2 If the Supplier is required to attend the Purchaser's premises to rectify a Defect pursuant to clause 13.1 and the Defect has been caused by:

13.2.1 misuse of the Deliverable by the Purchaser or its personnel; or

13.2.2 failure of the Purchaser's hardware,

such on-site support will be provided by the Supplier at the additional rates specified in the Contract Variables (if any).

13.3 Nothing in clause 13.1 limits the application of any indemnity provided under the Contract.

#### **Third Party Product Warranties**

13.4 Without limiting any obligation of the Supplier under the Contract, the Supplier must, unless specified otherwise in the Contract Variables, ensure the Purchaser receives:

13.4.1 all standard manufacturer and other relevant third party warranties for those Deliverables provided under the Contract that are sourced by the Supplier from third parties; and

13.4.2 a copy of, and is fully advised of and approves, all such warranties prior to any order or commitment being made in respect of the relevant Deliverable.

### **14. SERVICE LEVELS**

14.1 The Supplier must meet or exceed the Service Levels specified in the Contract.

14.2 The Supplier must:

14.2.1 use appropriate measurement and monitoring procedures to measure its performance of the Services against the Service Levels accurately and provide the Purchaser with details of (or access to) those measurement and monitoring procedures on request;

14.2.2 on a monthly basis, or otherwise as specified in the Contract Variables, provide the Purchaser with details of:

(a) the Supplier's performance against the Service Levels, both during that month and on a calendar year to date basis; and

(b) any matters which have impacted on the Supplier's performance of the Services during the relevant month.

14.3 If there is any failure by the Supplier to meet a Service Level:

14.3.1 the Purchaser may notify the Supplier in writing and request a remediation plan, whereupon the Supplier must provide a remediation plan for the Purchaser's approval in accordance with clause 12 within 10 business days from the Purchaser's request; and

14.3.2 the Service Credits specified in the Contract will be payable by the Supplier.

14.4 The Supplier acknowledges that Service Credits:

14.4.1 represent a reduction in the charges payable for the Services to reflect the provision by it of a lower level of service than is required of it under the Contract;

- 14.4.2 are a reasonable pre-estimate of the loss likely to be suffered by the Purchaser as a result of the Supplier's actions, including the diminution in value of services resulting from the failure; and
  - 14.4.3 constitute an agreed amount by which the Fees payable for the Services may be reduced according to the Contract.
- 14.5 If Service Credits are payable by the Supplier, the Purchaser may:
- 14.5.1 issue a written demand to the Supplier requiring the Supplier to identify the Service Credits corresponding to the failure to meet that Service Level in its next invoice and requiring the Supplier to pay those Service Credits to the Purchaser; or
  - 14.5.2 notify the Supplier in writing that the Service Credits corresponding to that failure to meet that Service Level have become a deduction, and deduct one or more amounts totalling, in aggregate, those Service Credits, at any time from any payment due by the Purchaser to the Supplier.
- 14.6 The Supplier shall not be required to pay Service Credits to the extent that the failure (or series of failures) to which the Service Credit relates is caused or contributed to by the Purchaser.
- 14.7 The parties agree that the Purchaser's right to receive Service Credits is without prejudice to any other rights or remedies the Purchaser may have in respect of the failure (or series of failures) to which the Service Credit relates, provided that the amount of any damages awarded to the Purchaser shall take into account the Service Credits received by the Purchaser.

## 15. PERSONNEL

- 15.1 The Supplier will utilise such personnel as are necessary to enable it to fulfil its obligations under the Contract and provide the Services. The Supplier will ensure that its personnel providing the Services:
- 15.1.1 are not, and will not be at any time whilst assigned to perform the Services, restricted by contract or otherwise in any way from performing the Services; and
  - 15.1.2 possess and will use the specific skills, qualifications and experience required to deliver the Services.
- 15.2 The Supplier will ensure that the Supplier's personnel listed in the Contract ("**Key Personnel**") will provide the Services for the period specified in the Contract (or, if no period is specified, for the Term). Except where the Contract Variables permit the replacement of Key Personnel, the Supplier may not remove or replace any Key Personnel without the Purchaser's written approval, which shall not be unreasonably withheld.
- 15.3 The Purchaser may reasonably request that the Supplier withdraw any of its personnel (including Key Personnel) from providing any part of the Services. If the Purchaser makes a request under this clause 15.3, the Supplier must:
- 15.3.1 promptly arrange for that person to cease being involved in providing the Services;

- 15.3.2 ensure that the person does not return to the Purchaser's premises except with the Purchaser's prior written consent, which may be withheld in its absolute discretion; and
- 15.3.3 replace that person with another person of suitable ability and qualifications, at no additional charge to the Purchaser and at the earliest opportunity.

## **16. DOCUMENTATION**

- 16.1 Any documentation, publications and aids provided with or relevant to the Deliverables must be:
  - 16.1.1 in English and of a high standard in terms of presentation, accuracy and scope with all key terms, words and symbols adequately defined or explained, with all monetary figures in Australian currency;
  - 16.1.2 the most current, accurate and up-to-date versions available at the date of supply of the Deliverables; and
  - 16.1.3 sufficient to ensure that the Purchaser and its appropriately trained personnel can utilise the full functionality and can obtain the full benefit of each Deliverable.

## **17. TRAINING**

- 17.1 The Supplier will provide the Purchaser and its nominated personnel with the training specified in the Contract in order for the Purchaser to access, use and utilise the full functionality of the Services and Deliverables.

## **18. VARIATION OF SERVICES**

- 18.1 Any variation to the Services, or addition of new services, proposed by either party must be submitted and approved in accordance with this clause 18. For the avoidance of doubt, the approval or amendment of a Document pursuant to clause 12 is not a variation for the purposes of this clause 18.
- 18.2 If the Purchaser wishes to vary the Services, it will submit a copy of the proposed variations to the Supplier.
- 18.3 If:
  - 18.3.1 the Purchaser proposes a variation under clause 18.2; or
  - 18.3.2 the Supplier wishes to vary the Services,the Supplier will submit to the Purchaser a detailed description of the changes proposed, including any resulting variations to any Fees, using a change order in substantially the form set out in Schedule 14 ("**Change Order**"). The draft Change Order must include, to the extent requested by the Purchaser:
  - 18.3.3 a detailed description of:
    - (a) the benefits to the Purchaser arising from the proposed change; and

- (b) the risks to the Purchaser should it decide against effecting the proposed change; and
- 18.3.4 any material impacts that the proposed change may have on:
  - (a) the functionality, interoperability or performance of existing software, hardware, systems, operations and processes used by, or on behalf of, the Purchaser;
  - (b) the specifications for the Services and Deliverables; and
  - (c) project scheduling, the achievement of Milestone Dates and Purchaser and Supplier resourcing.
- 18.4 If the Purchaser has proposed a variation under clause 18.2, the Supplier must provide a draft Change Order within 10 business days, or such other period as the parties agree, of receipt of the proposed variation.
- 18.5 Any resulting variation in the Fees must not exceed an amount that represents the reasonable additional cost (if any) associated with the relevant change (taking into account any reduction in cost that will result from implementing the change) and must be based on the rates set out in the Contract Variables, including using any agreed rates for particular types of Services or predefined tasks.
- 18.6 The Purchaser will accept or reject the draft Change Order, or withdraw the proposed variation (if applicable), within 20 business days of receipt of the draft Change Order or such other period agreed by the parties.
- 18.7 Any variations that are accepted pursuant to this clause 18 will be effective from the date on which the Change Order is signed on behalf of both parties. Neither party is obliged to commence work in connection with any variation until the relevant Change Order is signed on behalf of both parties.
- 18.8 If a proposed variation is not accepted by the Purchaser pursuant to this clause 18, each party must continue to perform its obligations under the Contract in accordance with its terms, which will continue to apply unchanged.
- 18.9 The Supplier agrees that it will not seek to impose any unreasonable terms and conditions in relation to any variation, including unreasonable timeframes or charges.

## **19. FEES AND INVOICING**

- 19.1 The Fees payable by the Purchaser for the Services are set out in the Contract Variables. Expenses may only be charged in accordance with the Contract Variables.
- 19.2 The Supplier must submit to the Purchaser a tax invoice for the Fees due in respect of the Services once they are completed, or at such other time or times as specified in the Contract Variables or otherwise agreed by the parties. A tax invoice submitted for payment must contain the information necessary to be a tax invoice for the purposes of the GST Act, together with such other information as the Purchaser may reasonably require and be sent to the address specified in the Contract Variables.
- 19.3 The Purchaser will pay the invoiced amount within 30 days of receipt of an accurate invoice ("**Due Date**"). However, if the Purchaser disputes the invoiced amount it must pay the

undisputed amount (if any) and the parties will endeavour to resolve any such dispute using the dispute resolution procedure in clause 38. The Purchaser must pay any sums found or agreed to be due following resolution of a dispute, following submission of an invoice by the Supplier which complies with the requirements in clause 19.2.

- 19.4 Payment of an invoice is not to be taken as evidence that the Services have been supplied in accordance with the Contract but must be taken only as payment on account.
- 19.5 If the Purchaser fails to pay an undisputed invoice by the Due Date, the Supplier may claim penalty interest in accordance with clause 19.6 by delivering to the Purchaser, within thirty (30) days of the Due Date, a notice clearly headed "Fair Payments Policy – Penalty Interest Claim".
- 19.6 Subject to clause 19.7, the Supplier may claim and the Purchaser must pay simple interest calculated on a daily basis at the rate for the time being fixed under Section 2 of the *Penalty Interest Rates Act 1983* (Vic) on any amount outstanding, from the Due Date until the date of payment.
- 19.7 Clause 19.6 applies only if:
- 19.7.1 the Victorian Government Fair Payments Policy is applicable to the Contract; and
  - 19.7.2 the Fees payable in respect of this Contract do not exceed \$3,000,000; and
  - 19.7.3 the *Building and Construction Industry Security of Payment Act 2002* (Vic) is not applicable to the Contract.

## **20. TAXES**

- 20.1 Terms used in this clause 20 that are not otherwise defined in the Contract have the same meanings given to them in the GST Act.

### **Recovery of GST on supplies and adjustments under the Contract**

- 20.2 Unless otherwise expressly stated, all prices or other sums payable or consideration to be provided under or in accordance with the Contract are inclusive of GST.
- 20.3 If an adjustment event varies the amount of GST payable by a party making a taxable supply under the Contract ("**Provider**"), the Provider will adjust the amount payable by the other party ("**Recipient**") to take account of the adjustment event and notify the Recipient of the same. Any payment will be made by the Recipient to the Provider or by the Provider to the Recipient within 10 business days of the Provider becoming aware of the adjustment event. The Provider will issue an adjustment note to the Recipient within 10 business days of becoming aware of the adjustment event.

### **Other GST matters**

- 20.4 Subject to an express provision in the Contract to the contrary, any payment, amount, reimbursement or indemnity required to be made to a party (the "**Payee**") under the Contract that is calculated by reference to a cost, expense, liability or other amount paid or payable by the Payee to a third party ("**Expense**") will be calculated by reference to that Expense inclusive of GST, less the amount of any input tax credit which the Payee is entitled to claim on that Expense. The Payee is assumed to be entitled to a full input tax credit on an Expense

unless it demonstrates otherwise before the date the payment, amount, reimbursement or indemnity is required to be made.

- 20.5 Any reference in the Contract to sales, revenue, income, value or similar amount ("**Revenue**") is a reference to that Revenue exclusive of GST (unless that Revenue is expressed to be GST-inclusive).

#### **Other taxes**

- 20.6 Subject to other provisions of this clause 20, the Fees include all taxes, duties (including stamp duty), charges, fees and other imposts of whatever kind (including any fine or penalty imposed in connection with them) that may be levied, assessed, charged or collected in connection with the Contract.

### **21. WARRANTIES**

- 21.1 The Supplier warrants to the Purchaser that:

- 21.1.1 it has the right to enter into the Contract and perform the Services;
- 21.1.2 the execution, delivery and performance of the Contract by it does not contravene any contractual, legal or other obligation that applies to it;
- 21.1.3 it holds all licences, permits, consents and authorisations required under any law or this Contract in relation to the provision of the Deliverables and Services;
- 21.1.4 the Services will be fit for the purpose or purposes specified in the Request (either expressly or by implication);
- 21.1.5 it will comply with all applicable laws;
- 21.1.6 it will comply with all directions of the Purchaser in providing the Services and Deliverables and in performing its obligations under the Contract;
- 21.1.7 it will provide the Services and Deliverables:
  - (a) in a professional manner with due skill and care; and
  - (b) using appropriately skilled and qualified employees, agents and contractors; and
- 21.1.8 it is entitled to use and deal with any Intellectual Property Rights which may be used by it in connection with the Services and Deliverables and to grant to the Purchaser the licences contemplated by the Contract.

### **22. CONTRACT MANAGEMENT, RECORDS AND REPORTS**

#### **Contract Management**

- 22.1 The Supplier must:

- 22.1.1 supply to the Purchaser the reports specified in the Contract and attend the meetings specified in the Contract;



- 22.1.2 comply with all reasonable directions of the Purchaser; and
- 22.1.3 provide the Purchaser with such information as is reasonably required for the purpose of supervising or reviewing the provision of the Services.

### **Records**

- 22.2 Unless specified to the contrary in the Contract Variables, the Supplier must at all times maintain full, true and up-to-date accounts and records relating to the Contract. Such accounts and records must:
  - 22.2.1 include appropriate audit trails for transactions performed;
  - 22.2.2 record all receipts and expenses in relation to the Deliverables and Services provided to the Purchaser;
  - 22.2.3 be kept in a manner that permits them to be conveniently and properly audited;
  - 22.2.4 be drawn in accordance with any applicable Australian Accounting Standards; and
  - 22.2.5 in the case of any Service performed on a time and materials or cost plus basis, identify the time spent by the Supplier's personnel in performing that Service.

### **Archival Requirements**

- 22.3 The Supplier agrees to comply with any applicable State or Commonwealth legislation relating to archival requirements.
- 22.4 Without limiting the scope of clause 22.3, the Supplier shall cooperate with and assist the Purchaser to comply with any obligations imposed by the *Public Records Act 1973* (Vic).
- 22.5 Without prejudice to clause 36, the Purchaser may, on 10 business days' written notice to the Supplier, examine the Supplier's books and records relating to the Services at the Supplier's premises during reasonable business hours for the purpose of monitoring the Supplier's compliance with the Contract.

## **23. TERMINATION**

### **Termination by the Purchaser**

- 23.1 The Purchaser may terminate or sever part of the Contract at any time and for any reason by giving written notice to the Supplier who must, on receipt, immediately cease all work and take appropriate action to mitigate any loss and prevent further costs being incurred with respect to the Services. Where the Contract is terminated, wholly or in part, under this clause 23.1, the Purchaser must pay invoices in respect of:
  - 23.1.1 all reasonable amounts due in accordance with clause 19.1 for all work performed by the Supplier in accordance with the terms of the Contract up until the date of termination; and
  - 23.1.2 amounts equivalent to any liabilities or expenses of the Supplier relating to the terminated Services which are substantiated and which are properly incurred by

the Supplier, to the extent that those liabilities or expenses cannot be mitigated, but no other amount,

provided that in no event shall the Purchaser be required to pay any loss of prospective profits.

23.2 Without prejudice to any other rights the Purchaser may have under the Contract or at law, the Purchaser may terminate or sever part of the Contract:

23.2.1 immediately by notice in writing if the Supplier:

- (a) is subject to an Adverse Event;
- (b) breaches a material term of the Contract which is not capable of remedy; or
- (c) fails to remedy a breach capable of remedy within 10 business days of receiving notice from the Purchaser of the breach (or such longer period as the Purchaser considers is reasonable); or

23.2.2 pursuant to clause 11.4.4, 24.4 or 33.6, clause 1.2 or 5.3 of Schedule 1, clause 3.3 of Schedule 4 or clause 1.11 of Schedule 6.

#### **Termination for change in Control**

23.3 The Supplier must notify the Purchaser in writing of any proposed or impending change in Control of the Supplier (or of the ultimate holding company of the Supplier) of which it becomes aware.

23.4 If the Supplier:

23.4.1 fails to notify the Purchaser of a change in Control under clause 23.3; or

23.4.2 undergoes a change in Control; or

23.4.3 undergoes any other change in business structure or operations which creates a new legal entity (including a change in Australian Business Number),

and the Supplier or its ultimate holding company (as applicable) is not listed on a public stock exchange, the Purchaser may, acting reasonably, terminate the Contract on written notice to the Supplier. Termination under this clause 23.4 will take effect at any time nominated by the Purchaser within the immediately succeeding 12 months.

#### **Partial Termination**

23.5 For the purposes of clauses 23.1 and 23.2, the Purchaser may elect to sever part of the Contract ("**Partial Termination**") by notifying the Supplier that it no longer requires the Supplier to provide a particular Service or Deliverable, in which case:

23.5.1 the Supplier will cease to provide that Service or Deliverable; and

23.5.2 the Purchaser will no longer be obliged to pay any Fees in respect of that Service or Deliverable.

Following a Partial Termination, the Contract will be construed, and its provisions will be enforceable by and against the parties, as if references to the Services and/or Deliverables that are the subject of that Partial Termination, and Fees payable in respect of those Services and/or Deliverables, were severed from the Contract.

23.6 If notice is given to the Supplier to terminate the Contract under clause 23.2 or 23.4, the Purchaser may, in addition to terminating the Contract:

23.6.1 recover any sums paid to the Supplier on any account or for Services and Deliverables that have not been fulfilled or performed;

23.6.2 be regarded as discharged from any further obligations under the Contract; and

23.6.3 pursue any additional or alternative remedies provided by law.

#### **Termination by the Supplier**

23.7 If the Purchaser fails to pay amounts due under the Contract which are:

23.7.1 the subject of tax invoices complying with the Contract;

23.7.2 due and payable in accordance with the Contract;

23.7.3 not the subject of a dispute under clause 19.3; and

23.7.4 overdue for a period of at least 60 days,

then the Supplier may:

23.7.5 issue a demand to the Purchaser clearly stating that the amount has been overdue for a period of at least 60 days; and

23.7.6 if the amount due has not been paid within 5 business days of service of the Supplier's demand, terminate the Contract on 30 days' written notice to the Purchaser.

23.8 Clause 23.7 constitutes the Supplier's sole and exclusive right to terminate the Contract.

#### **24. CONFLICT OF INTEREST**

24.1 The Supplier warrants to the Purchaser that it does not, and will ensure that its employees, agents and contractors do not, hold any office or possess any property, are not engaged in any business, activity, trade or calling and do not have any obligations whereby, directly or indirectly, duties or interests are or might be created in conflict with or might appear to be created in conflict with its obligations under the Contract.

24.2 The Supplier agrees that, if specified in the Contract Variables, the Supplier and each of its employees, agents and contractors engaged in the provision of the Services or Deliverables will provide a declaration of compliance with clause 24.1, in the form required by the Purchaser.

24.3 The Supplier must promptly inform the Purchaser of any matter which may give rise to an actual or potential conflict of interest at any time during the Term, and comply with any reasonable directions given by the Purchaser in terms of dealing with that conflict.

24.4 The Purchaser may terminate the Contract immediately by notice in writing in the event that a conflict of interest occurs in respect of the Supplier which is not resolved to the Purchaser's satisfaction.

## **25. INTELLECTUAL PROPERTY RIGHTS**

25.1 If the Contract Variables state that the Intellectual Property Rights in the Deliverables created by or on behalf of the Supplier in the course of fulfilling its obligations under the Contract will be owned by:

25.1.1 the Supplier, then clauses 25.2 and 25.3 below shall apply to the Contract, and clauses 25.2A to 25.3A shall not apply; or

25.1.2 the Purchaser, then clauses 25.2A to 25.3A below shall apply to the Contract, and clauses 25.2 and 25.3 shall not apply.

25.2 All Intellectual Property Rights in any Deliverables created by or on behalf of the Supplier in the course of fulfilling its obligations under the Contract are, upon their creation, owned by the Supplier.

25.3 The Supplier grants to the Purchaser a worldwide, perpetual, irrevocable, transferable, royalty-free and non-exclusive licence to exercise all Intellectual Property Rights in the Deliverables (other than the Third Party Software) and all Supplier Pre-Existing Intellectual Property incorporated in or required to exercise the Purchaser's licence to the Deliverables. For the avoidance of doubt, such licence to the Deliverables that are not Third Party Software includes the right of the Purchaser to:

25.3.1 use those Deliverables for the purpose of providing services to any Victorian Public Entity;

25.3.2 permit any Victorian Public Entity to use those Deliverables; and

25.3.3 grant a sublicense of those Deliverables to any Victorian Public Entity to use those Deliverables or to any third party in order for that third party to exercise all Intellectual Property Rights in those Deliverables for the benefit of any Victorian Public Entity.

25.2A All Intellectual Property Rights in any Deliverables created by or on behalf of the Supplier in the course of fulfilling its obligations under the Contract are, upon their creation, owned by the Purchaser and the Supplier assigns, and agrees to assign, all right title and interest in the Deliverables to the Purchaser. The Purchaser grants to the Supplier a limited, revocable, non-exclusive licence to exercise the Intellectual Property Rights in the Deliverables for the specific purpose of fulfilling its obligations under the Contract.

25.3A The Supplier grants to the Purchaser a worldwide, perpetual, irrevocable, transferable, royalty-free and non-exclusive licence to exercise all Intellectual Property Rights in any Supplier Pre-Existing Intellectual Property incorporated in or required to use the Deliverables. For the avoidance of doubt, such licence to the Supplier Pre-Existing Intellectual Property includes the right of the Purchaser to:

25.3A.1 use the Supplier Pre-Existing Intellectual Property for the purpose of providing services to any Victorian Public Entity;

- 25.3A.2 permit any Victorian Public Entity to use the Supplier Pre-Existing Intellectual Property; and
- 25.3A.3 grant a sublicense of the Supplier Pre-Existing Intellectual Property to any Victorian Public Entity to use the Supplier Pre-Existing Intellectual Property or to any third party in order for that third party to exercise all Intellectual Property Rights in the Supplier Pre-Existing Intellectual Property for the benefit of any Victorian Public Entity.
- 25.4 The Purchaser will own the media in which the Deliverables are delivered to the Purchaser.
- 25.5 Nothing in the Contract:
- 25.5.1 transfers ownership of any Pre-Existing Intellectual Property of a party to the other party; or
- 25.5.2 allows the Purchaser or any other Victorian Public Entity to commercially exploit the Supplier's Pre-Existing Intellectual Property, unless specified otherwise in the Contract Variables.
- 25.6 Unless otherwise specified in the Contract Variables, where any Existing Tools are necessary for the proper functioning (including as to functionality and performance) of any Developed Software, the Supplier grants the Purchaser a licence to use those Existing Tools on the terms set out in clause 25.3 or 25.3A (as applicable). To the extent that the Existing Tools are owned by a third party, the Supplier must procure a licence for the Purchaser to use such Existing Tools in accordance with the terms of clause 26.
- 25.7 To the extent that the provision of Services by the Supplier necessitates use by the Supplier of the Purchaser's Pre-Existing Intellectual Property, the Purchaser grants the Supplier a non-exclusive, non-transferable licence to use such Pre-Existing Intellectual Property during the Term for purposes solely related to the provision of the Services.
- 25.8 Unless specified otherwise in the Contract Variables, where a Deliverable is comprised, in whole or in part, of Developed Software, the Supplier will deliver the source code in that Developed Software (including any subsequent modifications) to the Purchaser upon the Purchaser issuing an Acceptance Certificate for that Deliverable.
- 25.9 The Supplier will obtain, at the earliest opportunity, from any person (including the Supplier's employees) whose Moral Rights may be affected, written consent to the doing of such acts (with respect to the material to which the Moral Rights relate) as required for the provision of, and for the Purchaser to derive full benefit from, the Services and Deliverables. The obligation in this clause 25.9 shall not apply in respect of any Third Party Software.
- 25.10 The Supplier warrants that any Service or Deliverable may be used in any way by the Purchaser without infringing the Moral Rights of any person.

#### **Licence fee**

- 25.11 The parties acknowledge and agree that all licence fees and other amounts payable by the Purchaser for the licence granted under this clause 25 to the Licensed Software and Developed Software is included in the Fees and that no other amounts will be payable by the Purchaser to the Supplier or any other party for that licence or for any Services provided in respect of the Licensed Software.

## **Purchaser Data**

- 25.12 For the avoidance of doubt, all Purchaser Data is owned by the Purchaser.
- 25.13 The Purchaser grants the Supplier a limited licence to use the Purchaser Data solely to the extent required to provide the Services to the Purchaser in accordance with the terms of the Contract.

## **26. THIRD PARTY SOFTWARE**

- 26.1 Unless specified in the Contract Variables, the Supplier must arrange for all licences required in relation to any Third Party Software required for the provision of the Services and Deliverables. The Purchaser will contract directly with the Third Party Software licensor(s) in relation to those licences.
- 26.2 The Supplier must ensure that the licences for the Third Party Software include the relevant licence terms set out in the Contract Variables. The Supplier must ensure that the licences will not in any way inhibit or restrict the Purchaser's use or enjoyment of the Services or the Deliverables provided under the Contract. The Supplier must do all things necessary to manage the Third Party Software licences on behalf of the Purchaser. This includes:
- 26.2.1 liaising with the Third Party Software licensor(s) in relation to defects, upgrades and new versions;
  - 26.2.2 negotiating the best available terms and prices, including renewal of licences;
  - 26.2.3 acting as the Purchaser's single point of contact for all Third Party Software licence and performance related issues; and
  - 26.2.4 escalating issues with the Third Party Software provider(s).
- 26.3 Where the Supplier requires authorisation or assistance from the Purchaser to fulfil its obligations under clause 26.2, the Supplier must notify the Purchaser of the assistance or authorisation required, and prepare and provide to the Purchaser any documentation necessary to effect the assistance or authorisation.

## **27. OPEN SOURCE MATERIALS**

- 27.1 If the Supplier wishes to include any software or other material which is licensed under any form of open-source licence, including licences meeting the Open Source Initiative's Open Source Definition, in any Deliverable, it must first obtain the prior written consent of the Purchaser to do so.
- 27.2 To the extent that any Deliverable, or any part of a Deliverable, is licensed under an open source arrangement, the terms of the open source licence only apply to that Deliverable. The provisions of the open source licence will prevail over the terms of the Contract in the event and to the extent of any inconsistency.
- 27.3 Without limiting the provisions in clause 27.2, where an open source arrangement has been approved under clause 27.1, the following provisions shall apply in respect of the software or other material (**Open Source Code**) which is the subject of that arrangement:
- 27.3.1 the Open Source Code shall not be included within the definitions of Third Party Software or Existing Tools;

- 27.3.2 clauses 25.1 to 25.3A, 25.9, 25.10 and 28 do not apply to the Open Source Code; and
- 27.3.3 the Purchaser's rights of audit, access and inspection under this Contract do not extend to a right to audit, access or inspect any third party author (or the third party author's premises, data, records, accounts or other financial material or material related to the performance of the Contract) of any Open Source Code, except where the third party author is a sub-contractor of the Supplier.

## **28. ESCROW**

- 28.1 If specified in the Contract Variables, the parties agree to execute an Escrow Agreement, on the terms and conditions specified in Schedule 13 or such other terms as are approved by the Purchaser, and the Supplier agrees that it will, throughout the Term place into escrow (under the terms of that Escrow Agreement) the most up-to-date version of the source code for the Escrow Software. The Supplier must procure the execution of the Escrow Agreement by the escrow agent nominated by the Purchaser, and its delivery to the Purchaser, within 10 business days of a request by the Purchaser to have the Escrow Agreement executed.
- 28.2 If the Escrow Software is released to the Purchaser under the Escrow Agreement, the Supplier grants to the Purchaser (or in the case of Third Party Software, shall procure that the owner of that Third Party Software grants to the Purchaser) a worldwide, perpetual, irrevocable, transferable, royalty-free and non-exclusive licence to exercise all Intellectual Property Rights in the Escrow Software in connection with the Purchaser's use of any Deliverables. For the avoidance of doubt, such licence to the Escrow Software includes the right of the Purchaser to:
- 28.2.1 use the Escrow Software for the purpose of providing services to any Victorian Public Entity;
- 28.2.2 permit any Victorian Public Entity to use the Escrow Software; and
- 28.2.3 grant a sublicense of the Escrow Software to any Victorian Public Entity to use that Escrow Software or to any third party in order for that third party to exercise all Intellectual Property Rights in the Escrow Software for the benefit of any Victorian Public Entity, provided that the Escrow Software may not be commercially exploited by the Purchaser or any Victorian Public Entity, unless specified otherwise in the Contract Variables.

## **29. LIABILITY**

- 29.1 The Supplier indemnifies the Purchaser and each of its employees and agents against any loss, damage or expense (including legal costs on a full indemnity basis) which any of them may sustain or incur as a result of or in connection with:
- 29.1.1 a third party claim in respect of any infringement of, or an allegation that the Purchaser's receipt or use of any of the Services or Deliverables infringe upon, the Intellectual Property Rights or any other proprietary right of any third party;
- 29.1.2 any breach of the Supplier's warranties under the Contract resulting in a loss suffered by a third party;
- 29.1.3 any breach of clause 32 by the Supplier or its personnel;

- 29.1.4 any personal injury, death or damage to tangible property caused or contributed by the Supplier or its personnel;
  - 29.1.5 a third party claim in respect of negligence by the Supplier or its personnel; or
  - 29.1.6 any fraud or deliberate or wilful misconduct of the Supplier or its personnel.
- 29.2 Subject to clause 29.3, the aggregate liability of each party to the other party in respect of all losses, damages, liability, costs, expenses, suits and claims (whether direct, indirect or consequential) arising from breach of contract, tort (including negligence) or otherwise, in for all claims arising under or in connection with the Contract is limited (to the extent permitted by law) to the amount specified in the Contract Variables.
- 29.3 The limitation of liability in clause 29.2 does not apply in respect of:
- 29.3.1 personal injury, death or damage to tangible property;
  - 29.3.2 a breach of an obligation of confidence or privacy;
  - 29.3.3 fraud;
  - 29.3.4 infringement of a third party's Intellectual Property Rights; or
  - 29.3.5 liability of the Supplier under the indemnity in clause 29.1.
- 29.4 The liability of a party for loss or damage sustained by the other party will be reduced proportionately to the extent that such loss or damage has been caused by the other party's failure to comply with its obligations and responsibilities under the Contract and/or to the extent that the negligence of the other party has contributed to such loss or damage, regardless of whether a claim is made by the other party for breach of contract or for negligence.
- 29.5 Without prejudice to any other rights the Purchaser may have under the Contract or at law, if a mandatory term is implied by law or a mandatory consumer guarantee applies to goods or services provided in connection with the Contract, and the Supplier breaches such term or guarantee, the Supplier must, at the Purchaser's option:
- 29.5.1 in the case of goods not of a kind ordinarily acquired for personal, domestic or household use or consumption, either replace or repair the goods or pay the cost of replacing or repairing the goods; and
  - 29.5.2 in the case of services not of a kind ordinarily acquired for personal, domestic or household use or consumption, either resupply the services or pay the cost of the resupply of the services.

## **30. INSURANCE**

### **Obligation to insure**

- 30.1 The Supplier must take out and maintain during the Term and, in respect of clause 30.1.2, for seven years after the Term the following types of insurance policies with an insurance company approved by the Purchaser:



- 30.1.1 public liability insurance for an insured amount of not less than \$10 million per occurrence or as otherwise specified in the Contract Variables, whichever is the higher;
- 30.1.2 professional liability or ‘errors and omissions’ insurance for an insured amount of not less than \$5 million in aggregate or as otherwise specified in the Contract Variables, whichever is the higher, to cover any claim against the Supplier for any reason for any loss, damage, costs or expense due to the errors or any negligent or wrongful act or omission by the Supplier (or any of its employees, agents or contractors) in rendering or failing to render professional services;
- 30.1.3 workers compensation insurance as required by law; and
- 30.1.4 any other insurance specified in the Contract Variables.

#### **Confirmation of compliance**

- 30.2 The Supplier must, on request by the Purchaser, provide confirmation from its insurance brokers certifying that it has insurance as required by this clause 30.
- 30.3 The Supplier must immediately advise the Purchaser if it no longer has the benefit of any of the insurance policies required under this clause 30 for any reason.

### **31. PERFORMANCE GUARANTEE AND FINANCIAL UNDERTAKING**

- 31.1 The Supplier will, to the extent specified in the Contract Variables, provide or procure a performance guarantee, financial undertaking or other similar arrangement substantially in the form specified in Schedule 10 and/or Schedule 11, as applicable.
- 31.2 The Purchaser will consent to the discharge of a performance guarantee, financial undertaking or similar arrangement made pursuant to clause 31.1 one (1) year after termination or expiry of the Contract, or such earlier time as may be agreed between the parties.

### **32. CONFIDENTIALITY AND PRIVACY**

- 32.1 The Supplier and its employees, agents, directors, partners, shareholders, contractors and consultants must not disclose or otherwise make available any Confidential Information to any other person.
- 32.2 If specified in the Contract Variables, the Supplier must procure that each of its employees, agents and contractors engaged in the provision of the Services or Deliverables executes a deed of confidentiality in a form acceptable to the Purchaser.
- 32.3 The Supplier hereby consents to the Purchaser publishing or otherwise making available information in relation to the Supplier (and the provision of the Services) as may be required:
  - 32.3.1 on the Contracts Publishing System in order to comply with Victorian Government policy requiring publication of details of contracts entered into by Victorian Government departments, as amended from time to time;
  - 32.3.2 by the Auditor-General; or
  - 32.3.3 to comply with the *Freedom of Information Act 1982* (Vic).

32.4 On termination or expiration of the Contract, the Supplier shall immediately cease using all materials (whether in written or electronic form) that contain or encapsulate any Purchaser Data or Confidential Information and, at the election of the Purchaser:

32.4.1 delete or destroy the materials, as applicable; or

32.4.2 return the materials to the Purchaser in the format in which they were first provided by the Purchaser and, in addition, if required by the Purchaser, in a non-proprietary and open access file format (such as .txt, .cvs, .rft, etc) as specified by the Purchaser,

at no additional cost to the Purchaser, provided that the Supplier may retain one (1) copy of any materials that contain or encapsulate any Purchaser Data or Confidential Information to the extent required to comply with law, subject always to the requirements in this clause 32.

32.5 On termination or expiration of the Contract, the Supplier shall certify that it has complied with clause 32.4 and provide the Purchaser with a copy of the certification, including, if required, a statement that none of the Purchaser Data or Confidential Information is retained by the Supplier.

32.6 The Supplier agrees that it will:

32.6.1 be bound by the Information Privacy Principles, any applicable Codes of Practice and the *Health Records Act 2001* (Vic) ("**Privacy Obligations**") with respect to any act done in connection with the provision of the Services in the same way as the Purchaser would have been bound had the relevant act been done by the Purchaser;

32.6.2 assist the Purchaser to comply with its obligations under the Privacy Obligations, to the extent possible; and

32.6.3 immediately notify the Purchaser upon becoming aware of any breach of the Privacy Obligations and comply with all directions of the Purchaser.

### **33. SECURITY MEASURES**

#### **Policies and procedures**

33.1 The Supplier must:

33.1.1 as appropriate, inform its employees, agents and contractors of the provisions of any legislation, policies and procedures relating to secrecy and security which are listed in the Contract. Prior to being granted access to documents, materials or information pursuant to the Contract, any such employee, agent or contractor may first be required to provide the Purchaser with an acknowledgment that he or she is aware of any applicable legislation or security instructions. Nothing in this clause 33.1 excuses compliance by the Supplier or its employees, agents or contractors with any applicable legislation;

33.1.2 comply with such other State or Commonwealth legislation, policies or procedures relating to matters of security as may be specified in the Contract or advised by the Purchaser from time to time; and

- 33.1.3 comply with any specific security requirements specified in the Contract or as advised by the Purchaser (including undergoing any police checks, finger printing checks or other checks) prior to obtaining access to the Purchaser's premises, or providing any Services or fulfilling its obligations under the Contract, including any specific security clearance requirements.

#### **Back Up and Data security**

- 33.2 The Supplier must back up the Purchaser Data in the manner and at the frequency set out in the Contract. The backup must not interfere with the Purchaser's or any end user's use of the Services.
- 33.3 The Supplier must:
  - 33.3.1 comply with, and ensure that its employees, agents and contractors comply with, all Purchaser data security requirements in respect of access to and use of Purchaser Data as specified by the Purchaser from time to time, in addition to any statutory obligations relevant to data security;
  - 33.3.2 prohibit and prevent any person who does not have the appropriate level of security clearance from gaining access to Purchaser Data; and
  - 33.3.3 notify the Purchaser immediately and comply with all directions of the Purchaser if the Supplier becomes aware of any contravention of the Purchaser's data security requirements.

#### **Removal of Purchaser Data**

- 33.4 The Supplier must not, and must ensure that its employees, agents and contractors do not, without the Purchaser's prior written consent:
  - 33.4.1 remove the Purchaser Data or allow the Purchaser Data to be removed from the Purchaser's premises; or
  - 33.4.2 take, disclose or make available the Purchaser Data or allow the Purchaser Data to be taken, disclosed or made available outside of Australia.

#### **Security acknowledgment by Supplier**

- 33.5 The Supplier acknowledges and agrees that:
  - 33.5.1 the Purchaser holds and deals with highly sensitive data and information; and
  - 33.5.2 the Purchaser is concerned to ensure that such data and information is not improperly transferred, used or disclosed contrary to the Contract or any laws,and the Supplier must at all times use its best endeavours to prevent the unauthorised transfer, use or disclosure of the Purchaser Data and information.
- 33.6 The Purchaser may terminate the Contract immediately by notice in writing if the Supplier breaches clause 33.5.

### **Protective Data Security Standards**

- 33.7 The Supplier acknowledges that the Purchaser is bound by the Protective Data Security Standards. The Supplier will not do any act or engage in any practice that contravenes a Protective Data Security Standard in respect of any Purchaser Data collected, held, used, managed, disclosed or transferred by the Supplier, on behalf of the Purchaser, under or in connection with the Contract.

### **Access to Purchaser Data and Virus protection**

- 33.8 The Supplier shall at all times:
- 33.8.1 comply with any applicable security policies specified in the Contract Variables;
  - 33.8.2 take all care in utilising the Purchaser's information technology systems and the Purchaser Data, including all hardware, software and applications;
  - 33.8.3 not interfere with, disrupt or cause damage to such systems or Purchaser Data;
  - 33.8.4 ensure that such systems and Purchaser Data are protected from unauthorised access or use, or misuse, damage or destruction; and
  - 33.8.5 in addition to any requirements specified in the Contract, use its best endeavours to ensure that no Virus is introduced in the Purchaser's information technology systems or Purchaser Data.
- 33.9 In this clause, "**Virus**" is programming or files that have been developed for the purpose of doing harm and includes, without limitation, computer viruses, worms, Trojan horses, spyware, malware and adware.

### **Certification**

- 33.10 The Supplier must maintain any security or other accreditations and/or certifications specified in the Contract Variables throughout the Term and provide proof of its compliance with this clause to the Purchaser on request.

## **34. DISASTER RECOVERY**

- 34.1 The Supplier shall ensure that it has in place, at all times throughout the Term, a disaster recovery plan which is sufficient to ensure the continued provision of the Services by the Supplier following a Disaster.
- 34.2 If a Disaster continues to prevent, hinder or delay performance of the Services for more than 10 business days or such other period specified in the Contract Variables, the Purchaser may terminate the Contract for cause, wholly or in part, by notice in writing to the Supplier.

## **35. COMPLIANCE WITH LAW AND POLICIES**

- 35.1 In performing its obligations under the Contract, the Supplier must comply with the provisions set out in this clause 35 (without limiting any of its other obligations under the Contract), unless specified otherwise in the Contract.

### **Employment practices**

- 35.2 The Supplier agrees, during the Term:
- 35.2.1 to comply with its obligations, if any, under the *Equal Opportunity Act 2010* (Vic) or the *Disability Discrimination Act 1992* (Cth);
  - 35.2.2 to comply with its obligations, if any, under the *Workplace Gender Equality Act 2012* (Cth);
  - 35.2.3 not to enter into a sub-contract with an entity named in a report tabled in Commonwealth Parliament by the Director of Workplace Gender Equality as a supplier that has not complied with the *Workplace Gender Equality Act 2012* (Cth);
  - 35.2.4 to comply with such other State and Commonwealth legislation relevant to anti-discrimination as may be relevant to the Contract; and
  - 35.2.5 to use its reasonable endeavours to provide employment opportunities to Aboriginal and Torres Strait Islander people where there are positions available and there are Aboriginal or Torres Strait Islander people available with suitable qualifications and expertise.

### **Occupational Health and Safety**

- 35.3 The Supplier agrees, when using the Purchaser's premises, to comply with all reasonable directions of the Purchaser, including, but not limited to, documented procedures relating to occupational health, safety and security in effect at those premises. This obligation extends to all procedures which are notified to the Supplier by the Purchaser or which might reasonably be inferred by the Supplier in all the circumstances.
- 35.4 In addition to the requirements of clause 35.3, the Supplier agrees that, when working on the Purchaser's premises, it will comply, and will ensure that its personnel comply, with all applicable Commonwealth, State and local government laws, regulations and procedures relating to occupational health and safety, including any policies and procedures specified in the Contract Variables.

### **Code of Conduct for Victorian Public Sector Employees**

- 35.5 If the Supplier:
- 35.5.1 is required to supervise any employees, contractors, subcontractors or agents of the Purchaser;
  - 35.5.2 is performing functions and duties on behalf of the Purchaser at the Purchaser's premises; and
  - 35.5.3 has access to resources and/or information which are not usually accessible by or available to the general public,

then the Supplier and its employees, contractors, subcontractors and agents must, throughout the Term, observe the Code of Conduct for Victorian Public Sector Employees and such other relevant State Government policies as may be specified in the Contract Variables or notified by the Purchaser to the Supplier.

### **Applicable Industrial Instruments and Applicable Legislation**

- 35.6 The Supplier must not engage in any practice that is contrary to any Applicable Industrial Instrument or Applicable Legislation, insofar as it applies to the Supplier.
- 35.7 In addition to any other rights under the Contract, if the Supplier is in breach of clause 35.6, the Purchaser may suspend the operation of the Contract, or the performance of the Purchaser's obligations under it, immediately by notice to the Supplier for so long as the breach continues.

### **VIPP compliance**

- 35.8 Unless otherwise specified in the Contract Variables, the Supplier must, in performing its obligations under the Contract, comply with the VIPP Plan.
- 35.9 The Supplier acknowledges and agrees that its obligations as set out in the VIPP Plan apply during the Term.
- 35.10 The Supplier must:
- 35.10.1 permit the Department, or its duly authorised representative, from time to time to undertake a review of the Supplier's performance in accordance with the VIPP Plan; and
  - 35.10.2 ensure that its employees, agents and contractors give all reasonable assistance to any person authorised by the Department to undertake such audit or inspection.
- 35.11 The Supplier acknowledges and agrees that the Department, the Department's duly authorised representative and Industry Capability Network (ICN) Victoria ("**ICN**") of Level 11, 10 Queens Road, Melbourne, Vic, 3004 (ACN 007 058 120) are authorised to obtain information from any relevant persons, firms or corporations, including third parties, regarding the Supplier's compliance with the VIPP Plan.
- 35.12 The Supplier acknowledges and agrees that:
- 35.12.1 ICN will assess the Supplier's performance against the Supplier's VIPP Plan;
  - 35.12.2 the statistical information contained in the Supplier's VIPP Plan and the measures of the Supplier's compliance with the VIPP Plan will be:
    - (a) included in the Department's report of operations under Part 7 of the *Financial Management Act 1994* (Vic) in respect of the Supplier's compliance with the VIPP in the financial year to which the report of operations relates; and
    - (b) provided to the Responsible Minister for inclusion in the Responsible Minister's report to the Parliament of Victoria for each financial year on the implementation of the VIPP during that year.
- 35.13 The Supplier must:
- 35.13.1 prepare and maintain records demonstrating its compliance with the VIPP Plan; and

35.13.2 provide an annual report to the Purchaser demonstrating its progress towards implementing the VIPP Plan,

in the format requested by the Purchaser from time to time.

35.14 On request from the Purchaser, the Supplier must provide further information or explanation regarding the VIPP Plan, or any departures from the VIPP Plan.

### **Supplier Code of Conduct**

35.15 The Supplier acknowledges that:

35.15.1 the Supplier Code of Conduct is an important part of the State's approach to procurement and describes the State's minimum expectations regarding the conduct of its suppliers;

35.15.2 it has read the Supplier Code of Conduct; and

35.15.3 the expectations set out in the Supplier Code of Conduct are not intended to reduce, alter or supersede any other obligations which may be imposed on the Supplier, whether under the Contract or at law.

## **36. AUDIT**

36.1 The Purchaser or its nominee may, at any time during the Term, conduct an audit under this clause 36 in respect of:

36.1.1 the Supplier's compliance with its obligations under the Contract; and/or

36.1.2 any other matters reasonably determined by the Purchaser to be relevant to the performance of the Supplier's obligations under the Contract.

36.2 The Purchaser may conduct a maximum of one audit in every 12 month period unless an audit discloses any error, non-compliance or inaccuracy in respect of the Supplier's obligations under the Contract.

36.3 The Purchaser shall ensure that any third party engaged by it to conduct an audit under this clause 36 is subject to reasonable confidentiality requirements and complies with any reasonable security requirements of the Supplier.

36.4 The Supplier must promptly participate in and co-operate with the Purchaser or its nominee in any audits conducted by the Purchaser or its nominee.

36.5 Except in those circumstances in which notice is not practicable or appropriate, the Purchaser must give the Supplier reasonable notice of an audit and, where reasonably practicable, an indication of which documents and/or class(es) of documents the auditor may require.

36.6 The requirement for, and participation in, audits does not in any way reduce the Supplier's responsibility to perform its obligations in accordance with the Contract.

36.7 The Supplier must promptly take, at no additional cost to the Purchaser, corrective action to rectify any error, non-compliance or inaccuracy identified in any audit in the way the Supplier has, under the Contract:

- 36.7.1 supplied any of the Services or Deliverables; or
  - 36.7.2 calculated the Fees, or any other amounts or charges billed to the Purchaser.
- 36.8 Each party must bear its own costs associated with any audits.

**37. ACCESS TO THE SUPPLIER'S PREMISES AND RECORDS**

- 37.1 For the purposes of clause 36, the Supplier must grant, and where relevant must ensure that its sub-contractors grant, the Purchaser and its nominees access as required by the Purchaser to the Supplier's premises and data, records, accounts and other financial material or material relevant to the performance of the Contract.
- 37.2 In the case of documents or records stored on a medium other than in writing, the Supplier must make available, on request and at no additional cost to the Purchaser, such reasonable facilities as may be necessary to enable a legible reproduction to be created.
- 37.3 The Supplier must ensure that any sub-contract entered into for the purpose of the Contract contains an equivalent clause granting the rights specified in this clause 37 with respect to the sub-contractor's premises, data, records, accounts, financial material and information of its personnel.
- 37.4 Without limiting any of its other obligations under the Contract, the Supplier must, at its own cost, ensure that it keeps full and complete records relating to the Deliverables and Services supplied under the Contract in accordance with all applicable Australian Accounting Standards for 7 years and that those records are maintained in such a form and manner as to facilitate access and inspection under this clause 37.
- 37.5 Nothing in the Contract reduces, limits or restricts in any way any function, power, right or entitlement of the Auditor-General or a delegate of the Auditor-General or the Commissioners or a delegate of a Commissioner or the Ombudsman or a delegate of the Ombudsman. The rights of the Purchaser under the Contract are in addition to any other power, right or entitlement of the Auditor-General or a delegate of the Auditor-General or the Commissioners or a delegate of a Commissioner or the Ombudsman or a delegate of the Ombudsman.

**Interpretation of this clause**

- 37.6 In this clause 37:
  - 37.6.1 a reference to the 'Auditor-General' is a reference to the Auditor-General or equivalent office holder with jurisdiction over the Purchaser;
  - 37.6.2 a reference to the 'Commissioners' is a reference to the Privacy and Data Protection Deputy Privacy Commissioner appointed under the *Privacy and Data Protection Act 2014* (Vic) and the Information Commissioner and the Public Access Deputy Commissioner appointed under the *Freedom of Information Act 1982* (Vic); and
  - 37.6.3 a reference to the 'Ombudsman' is a reference to the Ombudsman or equivalent office holder with jurisdiction over the Purchaser.



### **38. DISPUTE RESOLUTION**

- 38.1 Subject to clause 38.9, if a dispute arises under the Contract or concerning its subject matter, a party must not commence or maintain a court action or proceeding until the parties have exhausted the dispute resolution procedure outlined in this clause 38.
- 38.2 A notice of dispute ("**Notice**") must be given in writing by the party claiming that a dispute has arisen to the other party to the Contract specifying the nature of the dispute.
- 38.3 If a Notice is given under clause 38.2, upon receipt of that Notice:
- 38.3.1 appropriate representatives of the parties must meet within five business days of the Notice to try to resolve the dispute in good faith; and
  - 38.3.2 if the meeting referred to in clause 38.3.1 does not take place or if, after five business days of that meeting, the dispute remains unresolved, either party may refer the dispute to appropriately senior executives of each party.
- 38.4 If a dispute is referred to the parties' senior executives, such persons must meet within five business days of the dispute being referred to them and endeavour to resolve the dispute.
- 38.5 If, within 15 business days of receipt of the Notice, the dispute is not resolved or an appropriate dispute resolution process is not agreed, then the parties agree to endeavour in good faith to settle the dispute by mediation administered by the Australian Disputes Centre ("**ADC**") before having recourse to litigation.
- 38.6 The mediation will be conducted in accordance with the mediation guidelines of ACDC ("**Guidelines**"), which set out the procedures to be adopted, the process of selection of the mediator and the costs involved and the terms of those Guidelines are incorporated into the Contract.
- 38.7 If the dispute is not resolved at mediation or in any event within 40 business days of service of a Notice, either party may pursue its rights at law.
- 38.8 Despite the existence of a dispute, each party must continue to perform its obligations under the Contract.
- 38.9 Nothing in this clause 38 restricts or limits the right of either party to obtain urgent interlocutory or injunctive relief, or to immediately terminate the Contract where the Contract provides such a right.

### **39. SUB-CONTRACTING**

- 39.1 The Supplier must not sub-contract to any third person any of its obligations in relation to the Contract without the prior written consent of the Purchaser (which may be given or withheld in its absolute discretion). The Purchaser is deemed to have given its consent to any sub-contractors listed in the Contract Variables.
- 39.2 The Supplier will not, as a result of any sub-contracting arrangement, be relieved from the performance of any obligation under the Contract and will be liable for all acts and omissions of a sub-contractor as though they were the actions of the Supplier itself.

#### **40. NOTICES**

- 40.1 Any notice given to a party under the Contract is only given if it is in writing and sent in one of the following ways:
- 40.1.1 delivered or posted to that party at its address and marked for the attention of the relevant department or officer (if any) set out in the Contract Variables; or
  - 40.1.2 faxed to that party at its fax number and marked for the attention of the relevant department or officer (if any) set out in the Contract Variables.
- 40.2 If a party gives the other party three business days' notice of a change of its address or fax number, any notice is only given by that other party if it is delivered, posted or faxed to the latest address or fax number.
- 40.3 Subject to clause 40.4, any notice is to be treated as given at the following time:
- 40.3.1 if it is delivered, when it is left at the relevant address;
  - 40.3.2 if it is sent by post, two (or, in the case of a notice or communication posted to another country, nine) business days after it is posted; or
  - 40.3.3 if it is sent by fax, as soon as the sender receives from the sender's fax machine a report of an error free transmission to the correct fax number.
- 40.4 If any notice is given at the place of the party to whom it is sent, on a day that is not a business day or after 5.00pm on a business day, it is to be treated as having been given at the beginning of the next business day.
- 40.5 Nothing in this clause 40 prevents day to day communications between the parties being made electronically.

#### **41. GENERAL**

- 41.1 The Contract is governed by and is to be construed in accordance with the laws applicable in Victoria. Each party irrevocably and unconditionally submits to the non-exclusive jurisdiction of the courts of the State of Victoria and any courts which have jurisdiction to hear appeals from any of those courts and waives any right to object to any proceedings being brought in those courts.
- 41.2 Unless otherwise specified in the Contract Variables, time will not be of the essence in relation to the provision of the Services and Deliverables.
- 41.3 Unless the Contract expressly provides otherwise, a party may give or withhold an approval or consent in that party's absolute discretion and subject to any conditions determined by the party. A party is not obliged to give its reasons for giving or withholding a consent or approval or for giving a consent or approval subject to conditions.
- 41.4 Where the Contract refers to a matter being to the 'satisfaction' of a party, this means to the satisfaction of that party in its absolute discretion.
- 41.5 The Supplier shall not be released from any of its obligations under the Contract as a result of or due to the Purchaser's exercise of any of its rights under the Contract or otherwise at law.

- 41.6 The Supplier must not assign or transfer any of its rights or obligations under the Contract without the prior written consent of the Purchaser.
- 41.7 The following provisions will survive termination or expiry of the Contract: clauses 9 (Failure to Perform), 13 (Warranty Period), 20 (Taxes), 23 (Termination), 25 (Intellectual Property Rights), 28 (Escrow), 29 (Liability), 30 (Insurance), 31 (Performance Guarantee and Financial Undertaking), 32 (Confidentiality and Privacy), 37 (Access to the Supplier's Premises and Records), 40 (Notices) and 41 (General) of these terms and conditions and Schedule 12.
- 41.8 Each provision of the Contract is individually severable. If any provision is or becomes illegal, unenforceable or invalid in any jurisdiction it is to be treated as being severed from the Contract in the relevant jurisdiction, but the rest of the Contract will not be affected. The legality, validity and enforceability of the provision in any other jurisdiction will not be affected.
- 41.9 No variation of the Contract will be of any force or effect unless it is in writing and signed by both parties to the Contract.
- 41.10 Each party must at its own expense promptly execute all agreements and do or use reasonable endeavours to cause a third party to do all things that the other party from time to time may reasonably request in order to give effect to, perfect or complete the Contract and all transactions incidental to it.
- 41.11 A waiver of any right, power or remedy under the Contract must be in writing signed by the party granting it. A waiver only affects the particular obligation or breach for which it is given. It is not an implied waiver of any other obligation or breach or an implied waiver of that obligation or breach on any other occasion. The fact that a party fails to do, or delays in doing, something the party is entitled to do under the Contract does not amount to a waiver.
- 41.12 Except as expressly provided in the Contract, no party is an agent, representative, trustee, employee or partner of any other party by virtue of the Contract and no party may represent itself as such in any circumstances.
- 41.13 Except where expressly stated to the contrary in the Contract, the rights of a party under the Contract are cumulative and are in addition to any other rights available to that party whether those rights are provided for under this the Contract, any other document or by law.

## **SCHEDULE 1: CLOUD SERVICES**

### **1. IMPLEMENTATION OF THE CLOUD SOLUTION**

- 1.1 From the Commencement Date, the Supplier must implement the Cloud Solution during the Implementation Period and ensure that it:
  - 1.1.1 operates in accordance with the Contract and its documentation;
  - 1.1.2 is verified for performance reasonably expected in the context of the requirements of the Contract; and
  - 1.1.3 interoperates with the Purchaser's systems as required by the Contract.
- 1.2 If the Cloud Solution is not implemented within the Implementation Period, then the Purchaser may terminate the Contract immediately by notice in writing to the Supplier.

### **2. TESTING**

- 2.1 Following the completion of implementation, the Supplier must test and verify that the Cloud Solution operates in accordance with and complies in all respects with the Contract.
- 2.2 The Supplier will remedy any Defects discovered during its testing and verification activities under clause 2.1 until it is satisfied that the Cloud Solution operates in accordance with and complies in all respects with the requirements in the Contract.
- 2.3 The Purchaser may have an observer present during the Supplier's testing and verification under clause 2.1, which person may participate in the testing and require the Supplier to conduct additional tests, at the Supplier's cost, if he or she is not satisfied with the testing carried out.
- 2.4 When the Supplier is satisfied that the Cloud Solution operates in accordance with and complies in all respects with the requirements in the Contract, it will promptly notify Purchaser.

#### **Acceptance Testing by Purchaser**

- 2.5 After receiving notification from the Supplier under clause 2.4, the Purchaser will evaluate and conduct acceptance testing in accordance with clause 11 of the terms and conditions to determine whether the Cloud Solution operates in accordance with and complies in all respects with the Contract.

### **3. CLOUD SERVICES**

#### **Access to the Cloud Services**

- 3.1 Within the time specified in the Contract, the Purchaser must be issued with the quantity of user names and passwords as set out in the Contract, which must enable the Purchaser to access and use the Cloud Services.
- 3.2 The Purchaser is responsible for maintaining the confidentiality of the passwords associated with any account the Purchaser or its personnel may use to access the Cloud Services.

## Using the Cloud Services

- 3.3 The Supplier must supply Cloud Services during the Term that conform to, and enable the Purchaser to perform the functions described, in the Contract.

## 4. AVAILABILITY

- 4.1 The Supplier must ensure that the Cloud Services meet the Uptime Percentage Target during the Standard Usage Hours every month. The Uptime Percentage will be calculated in accordance with the following formula:

$$U\% = \frac{S-D}{S} \times 100$$

Where:

S = Standard Usage Hours (excluding any permitted or scheduled unavailability which is permitted in the Request)

D = Downtime Aggregate Hours

U% = Uptime Percentage

- 4.2 If the Uptime Percentage Target in clause 4.1 is not achieved in any one calendar month period, the Supplier agrees that a percentage of the Fees for that month may be deducted from the Fees payable for that month, depending on the actual Uptime Percentage achieved, as set out in the Contract. Any deduction from the Fees payable for a particular month pursuant to this clause 4.2 is not the Purchaser's sole remedy for a failure by the Supplier to achieve the Uptime Percentage Target.

## 5. SYSTEM RESPONSE TIMES

- 5.1 The Supplier must ensure that the Cloud Services enable the Purchaser to undertake the transactions set out in the Contract within the System Response Times specified for those transactions in the Contract.

- 5.2 If the System Response Time Service Level specified in the Contract is not achieved in any one calendar month period, the Supplier agrees that a percentage of the Fees for that month may be deducted from the Fees payable for that month, depending on System Response Time, as set out in the Contract. Any deduction from the Fees payable for a particular month pursuant to this clause is not the Purchaser's sole remedy for a failure by the Supplier to achieve a System Response Time requirement.

- 5.3 Without prejudice to clause 4.2 or 5.2 above, if:

5.3.1 the Uptime Percentage Target referred to in clause 4.1; or

5.3.2 the System Response Time requirement in clause 5.1,

is not achieved over two or more consecutive months and the Purchaser, acting in its own discretion, considers this pattern of conduct unacceptable, the Purchaser may terminate the Contract immediately by notice in writing to the Supplier. This clause does not affect the operation of any of the Purchaser's other rights or remedies under the Contract or at law.

## **6. SYSTEM SECURITY**

- 6.1 The Supplier must, when requested by the Purchaser, permit the Purchaser or its authorised representative to undertake technical security compliance and penetration testing of the Cloud Solution.
- 6.2 In addition to the requirements in clause 33 of the terms and conditions, the Supplier will ensure that the following security measures are in place at all times to ensure the physical and logical security of all information, intellectual property, application code, data and personal information:
- 6.2.1 the location at which the Cloud Solution is hosted has appropriate physical security measures in place to prevent unauthorised access to the Purchaser Data; and
  - 6.2.2 if specified in the Contract Variables, all employees, agents and contractors of the Supplier who have physical and/or logical access to the Cloud Solution have undergone a police check.
- 6.3 The Supplier will immediately notify the Purchaser upon becoming aware of any breach of physical or logical security in relation to the Cloud Solution and take such action as is required and/or directed by the Purchaser to rectify the cause of the breach and ensure no further breaches of that nature occur.

### **Onsite Audit**

- 6.4 Without limiting the Purchaser's rights under clause 36 of the terms and conditions, the Purchaser, either itself or through a third party independent contractor selected by the Purchaser, may conduct, with reasonable prior written notice, under reasonable time, place and manner conditions and pursuant to reasonable confidentiality and technical restrictions, an onsite audit of the Supplier's systems, policies and procedures relevant to the security and integrity of the Cloud Solution and/or the Cloud Services (including any Purchaser Data).
- 6.5 Additionally, upon the Purchaser's reasonable belief that the Supplier is not acting in compliance with its security policies and procedures under the Contract regarding the Cloud Solution or the Cloud Services (including any Purchaser Data), the Purchaser may conduct, either itself or through a third party contractor selected by the Purchaser, an on-site audit of the Supplier's architecture, systems and procedures used in connection with the Cloud Services.

## **7. BUSINESS CONTINUITY**

- 7.1 Where specified in the Request, the Supplier must provide to the Purchaser for approval a draft Business Continuity Plan to minimise the impact of a failure, disruption or unavailability of the Services.
- 7.2 The procedure in clause 12 of the terms and conditions will apply until such time as the Supplier's Business Continuity Plan is approved by the Purchaser.

## **8. DISASTER RECOVERY PLAN**

- 8.1 Without prejudice to clause 34 of the terms and conditions, if required by the Request, the Supplier must provide to the Purchaser for approval a draft Disaster Recovery Plan that is

specifically tailored for the Purchaser, complies with the Purchaser's Disaster recovery policy and specifies:

- 8.1.1 when the Disaster Recovery Plan is to be activated;
- 8.1.2 the steps to be taken to recover the Services;
- 8.1.3 the Supplier personnel, the Purchaser personnel and any other persons to be involved;
- 8.1.4 the communications to be implemented during a Disaster;
- 8.1.5 the training and testing required for the Disaster Recovery Plan; and
- 8.1.6 procedures to reduce the impact of a Disaster on the Services,

and addresses all other matters that may be requested the Purchaser.

8.2 The procedure in clause 12 of the terms and conditions will apply until such time as the Disaster Recovery Plan is approved by the Purchaser.

8.3 The Supplier must also:

8.3.1 provide such other information in relation to the Business Continuity Plan and/or the Disaster Recovery Plan as the Purchaser may reasonably request from time to time;

8.3.2 review and update the Business Continuity Plan and the Disaster Recovery Plan:

8.3.2.1 on an annual basis; or

8.3.2.2 as otherwise reasonably requested by the Purchaser,

to ensure that the Business Continuity Plan and the Disaster Recovery Plan meet the requirements set out in this Schedule and submit the reviewed and updated Business Continuity Plan and Disaster Recovery Plan to the Purchaser for review and approval in accordance with clause 12 of the terms and conditions; and

8.3.3 implement the activities set out in the Business Continuity Plan and/or the Disaster Recovery Plan at the times and in accordance with the procedures set out in the Business Continuity Plan or the Disaster Recovery Plan (as applicable).

### **Testing**

8.4 The Supplier must conduct tests of the Business Continuity Plan and the Disaster Recovery Plan at the frequency set out in the Business Continuity Plan or the Disaster Recovery Plan (as applicable) to ensure that it will enable the complete recovery of the provision and supply of the Services and Deliverables after a Disaster or other business continuity event.

8.5 If, as a result of testing conducted in accordance with clause 8.4, the Supplier identifies problems with the Business Continuity Plan and/or the Disaster Recovery Plan, the Supplier must:

8.5.1 notify the Purchaser of the problems identified by the testing; and

- 8.5.2 make any changes to the Business Continuity Plan and/or the Disaster Recovery Plan necessary to rectify the issues identified during the testing or that are otherwise recommended by the Purchaser, at no cost to the Purchaser.
- 8.6 The Purchaser may, at any time during the Term, and in addition to the testing conducted by the Supplier in accordance with clause 8.4, conduct tests in accordance with the Business Continuity Plan or the Disaster Recovery Plan to ensure that the relevant plan will enable the complete recovery of the provision and supply of the Services and Deliverables after a Disaster or other business continuity event. The Supplier must do all things reasonably requested by the Purchaser to assist with such tests, at no cost to the Purchaser.
- 8.7 If, as a result of testing conducted in accordance with clause 8.6, the Purchaser identifies problems with the Business Continuity Plan and/or the Disaster Recovery Plan, the Supplier must make any changes to the Business Continuity Plan and/or the Disaster Recovery Plan recommended by the Purchaser, at no cost to the Purchaser.

#### **Service Levels and Service Credits**

- 8.8 During a Disaster:
  - 8.8.1 the Service Levels apply; and
  - 8.8.2 the Supplier must pay Service Credits for failures to meet the Service Levels.



## **SCHEDULE 2: IMPLEMENTATION SERVICES**

### **1. IMPLEMENTATION WITHIN THE PURCHASER'S ENVIRONMENT**

- 1.1 From the Commencement Date, the Supplier must implement the Solution in accordance with this Schedule 2 and the agreed Implementation Plan (the "**Implementation**") within the Implementation Period to ensure that the Solution:
  - 1.1.1 operates according to the Specifications;
  - 1.1.2 is verified for expected performance in accordance with the Specifications; and
  - 1.1.3 interoperates with any necessary software and hardware in accordance with the Specifications.

### **2. IMPLEMENTATION PLAN**

- 2.1 Within 10 business days of the Commencement Date, or such other period specified in the Contract Variables (if any), the Supplier will provide a detailed and complete plan for the Implementation showing all activities, timeframes and resources required to undertake the Implementation in accordance with the requirements of the Contract ("**Implementation Plan**").
- 2.2 Without limiting clause 1.1, the Supplier will undertake the Implementation by the dates, including the Milestone Dates, set out in the Implementation Plan.

### **3. DEVELOPMENT OF SPECIFICATIONS**

- 3.1 At the time specified in the Implementation Plan, the Supplier will review the Purchaser's requirements specified in the Contract ("**Requirements**") and the Purchaser and the Supplier may agree to make amendments to the Requirements to clarify the functions required by the Purchaser of the Solution.
- 3.2 If the Purchaser and the Supplier cannot agree on a change to the Requirements, the Supplier may submit to the Purchaser reasons why the Requirements ought to be changed.
- 3.3 The Purchaser may consider any advice received from the Supplier under clause 3.2 and, as a result, may approve amendments to the Requirements. Once any amendments to the Requirements are approved under this clause 3.3, the Requirements will become the specifications for the Deliverables ("**Specifications**") and shall be part of the Contract.
- 3.4 If the Purchaser and the Supplier cannot agree following the Purchaser's consideration of any advice received from the Supplier under clause 3.2, then the issue may be submitted to dispute resolution under clause 38 of the terms and conditions.

### **4. DEVELOPMENT OF SOLUTION DESIGN**

#### **Preparation of Solution Design**

- 4.1 At the time specified in the Implementation Plan, the Supplier will prepare a detailed technical explanation of how the Specifications will be met and the technical architecture for the Solution ("**Solution Design**") and submit it to the Purchaser for approval. To the extent reasonably required, the Purchaser will assist the Supplier in the preparation of the Solution Design.

- 4.2 Prior to submission to the Purchaser, the Solution Design must be reviewed by the Supplier's Technical Architect to ensure that it fulfils all of the Specifications and that it performs in accordance with the functional and other requirements set out in the Specifications and the Requirements. The results of this review must be presented to the Purchaser upon submission of the Solution Design.

### **Approval of Solution Design**

- 4.3 The Purchaser will use its reasonable endeavours to approve the Solution Design by the date specified in the Implementation Plan or, if applicable, before the expiry of any extended period which is permitted in the Implementation Plan or which is otherwise agreed between the parties.
- 4.4 The Supplier will accommodate any requests for alteration of the Solution Design reasonably made by the Purchaser in order to satisfy the Specifications.
- 4.5 Notwithstanding any such requests or comments made by the Purchaser, the Supplier is responsible for verifying information provided by the Purchaser in relation to the Services and ensuring that the Solution Design fulfils all of the Specifications.
- 4.6 The Purchaser will approve the Solution Design if it is satisfied that it will deliver the requirements set out in the Specifications, or that any departures from the Specifications are reasonable in the circumstances.
- 4.7 The Purchaser is not required to approve the Solution Design if it is inconsistent with the requirements of the Contract. The Purchaser will provide the Supplier with details as to why it considers the Solution Design is inconsistent with the requirements of the Contract and provide the Supplier with an opportunity to rectify that inconsistency prior to the date upon which approval of the Solution Design is due.
- 4.8 Upon approval from the Purchaser, the Solution Design will become part of the Specifications.

## **5. IMPLEMENTATION AND INTEGRATION**

- 5.1 Upon receiving the Purchaser's approval and sign-off of the Solution Design under clause 4, the Supplier will provide all Services required, including those specified in the Contract, to implement the Solution such that it complies with the Specifications.

## **6. TESTING**

- 6.1 Following completion of the Implementation, the Supplier must test and verify that the Solution operates in accordance with and complies in all respects with the Specifications.
- 6.2 The Supplier will remedy any Defects discovered during its testing and verification activities under clause 6.1 until it is satisfied that the Solution operates in accordance with and complies in all respects with the Specifications.
- 6.3 The Purchaser may have an observer present during the Supplier's testing and verification under clause 6.1, which person may participate in the testing and require the Supplier to conduct additional tests, at the Supplier's cost, if he or she is not satisfied with the testing carried out.

- 6.4 When the Supplier is satisfied that the Solution operates in accordance with and complies in all respects with the Specifications, it will promptly notify Purchaser.

**Acceptance Testing by Purchaser**

- 6.5 After receiving notification from the Supplier under clause 6.4, the Purchaser will evaluate and conduct acceptance testing in accordance with clause 11 of the terms and conditions to determine whether the Solution operates in accordance with and complies in all respects with the Specifications.

**7. CHANGE MANAGEMENT**

- 7.1 The Purchaser will be responsible for the implementation of the Purchaser's change management responsibilities specified in the Request.

## **SCHEDULE 3: DEVELOPMENT SERVICES**

### **1. DEVELOPMENT PLAN**

- 1.1 Within 10 business days of the Commencement Date, or such other period specified in the Contract Variables (if any), the Supplier will provide a detailed and complete plan showing all activities, timeframes and resources required to develop the software application to be developed by the Supplier, either by the creation of Developed Software or the configuration of Licensed Software ("**Application**") in accordance with the requirements of the Contract ("**Development Plan**").
- 1.2 Without limiting clause 1.1, the Supplier will develop the Application by the dates, including the Milestone Dates, set out in the Development Plan.

### **2. APPLICATION DEVELOPMENT**

#### **Specifications**

- 2.1 By the time specified in the Development Plan, the Supplier will review the Purchaser's requirements for the Application set out in the Contract (the "**Development Requirements**").
- 2.2 The Supplier may request the Purchaser clarify the Development Requirements. Following such clarification, the Supplier will either confirm that:
  - 2.2.1 the Licensed Software will deliver the requirements set out in the Development Requirements; or
  - 2.2.2 modifications or configurations to the Licensed Software are required; and/or
  - 2.2.3 Developed Software must be created to meet the Development Requirements.
- 2.3 The Supplier may submit to the Purchaser reasons why the Purchaser ought to change the Development Requirements.
- 2.4 The Purchaser may approve amendments to the Development Requirements and consider any advice received from the Supplier under clause 2.2.2. Once any amendments to the Development Requirements are approved under this clause, the Development Requirements, as amended, will become the functional specifications for the Application (the "**Functional Specifications**"). The Functional Specifications must be confirmed and approved by Purchaser by the date specified in the Development Plan.
- 2.5 Upon the Purchaser's approval of the Functional Specifications (as they may be amended in accordance with clauses 2.1 to 2.4), the Functional Specifications will become part of the Contract.
- 2.6 Notwithstanding anything in clauses 2.1 to 2.5, the confirmation process of the Development Requirements as set out in clauses 2.1 to 2.5 does not constitute a variation pursuant to clause 18 of the terms and conditions and will not vary any Fees payable under the Contract.

#### **Preparation of Technical Specification**

- 2.7 The Supplier will prepare a detailed technical specification for the Application ("**Technical Specification**") and submit it to the Purchaser for review by the date specified in the Development Plan. The Technical Specification will:

- 2.7.1 set out a technical explanation of how the Functional Specifications (as approved under clauses 2.1 to 2.5) will be met; and
  - 2.7.2 be consistent with the technical solution specified in the Development Requirements.
- 2.8 To the extent reasonably required, the Purchaser will assist the Supplier in the preparation of the Technical Specification.

#### **Review of Technical Specification**

- 2.9 The Purchaser will use its reasonable endeavours to review the Technical Specification by the time specified in the Development Plan. The Supplier will accommodate any requests for alteration to the Technical Specification reasonably made by the Purchaser in order to satisfy the Functional Specifications.
- 2.10 Notwithstanding any requests or comments made by the Purchaser under clause 2.9, the Supplier is responsible for verifying any information provided by the Purchaser and ensuring that the Technical Specification will deliver all of the Functional Specifications. The Technical Specification must be completed by the date specified in the Development Plan.
- 2.11 The Technical Specification must be reviewed by the Supplier's Technical Architect to ensure that the Technical Specification will deliver all the Functional Specifications and that it performs in accordance with the functional and other requirements set out in the Functional Specifications. The results of this review must be presented to the Purchaser.
- 2.12 The Purchaser will notify the Supplier if it has no further requests or comments in relation to the Technical Specification when it is satisfied that the Technical Specification will deliver the requirements set out in the Functional Specifications or that any departures from the Functional Specifications are reasonable in the circumstances. The Purchaser will use its reasonable endeavours to notify the Supplier by the date specified in the Development Plan or, if applicable, before the expiry of any extended period which is permitted in the Development Plan or which is otherwise agreed between the parties. The Purchaser will notify the Supplier when it can proceed with the 'build' of the Application in accordance with the Technical Specification.
- 2.13 The Purchaser may notify the Supplier if the Technical Specification is inconsistent with the requirements of the Contract and provide the Supplier with details as to why it considers the Technical Specification is inconsistent with the requirements of the Contract. The Supplier will have an opportunity to rectify that inconsistency prior to the date upon which notification by the Purchaser is due under the Development Plan or, if applicable, before the expiry of any extended period which is permitted in the Development Plan or which is otherwise agreed between the parties.

#### **Development**

- 2.14 Upon receipt of the Purchaser's notice that it can proceed with the 'build' of the Application under clause 2.12, the Supplier will undertake development of the Application such that it complies with the Technical Specification and Functional Specification (together, the "**Specifications**").

### **3. TESTING**

- 3.1 The Supplier must test and verify that the Application operates in accordance with and complies in all respects with the Specifications.
- 3.2 The Supplier will remedy any Defects discovered during its testing and verification activities under clause 3.1 until it is satisfied that the Application operates in accordance with and complies in all respects with the Specifications.
- 3.3 The Purchaser may have an observer present during the Supplier's testing and verification under clause 3.1, which person may participate in the testing and require the Supplier to conduct additional tests, at the Supplier's cost, if he or she is not satisfied with the testing carried out.
- 3.4 When the Supplier is satisfied that the Application operates in accordance with and complies in all respects with the Specifications, it will promptly notify Purchaser.

#### **Acceptance Testing by Purchaser**

- 3.5 After receiving notification from the Supplier under clause 3.4, the Purchaser will evaluate and conduct acceptance testing in accordance with clause 11 of the terms and conditions to determine whether the Application operates in accordance with and complies in all respects with the Specifications.

### **4. METHODOLOGY**

- 4.1 The Supplier will fully document the development and implementation process for the Application as integrated with Purchaser's systems and will:
  - 4.1.1 manage the Development Services;
  - 4.1.2 take timely corrective action prior to acceptance to ensure that all tests for acceptance (as specified in the Contract) can be met;
  - 4.1.3 take timely corrective action prior to acceptance where any Deliverable is not performing in accordance with the Specifications;
  - 4.1.4 ensure concurrent development and supply of user documentation to fully explain all functionality of the Application; and
  - 4.1.5 ensure that the Developed Software component of the Application is written and documented in a way which would enable future modification by a competent developer without further reference to the Supplier.

### **5. DEVELOPED SOFTWARE**

- 5.1 The Supplier agrees to give the Purchaser written notice identifying Developed Software upon its creation.

## **SCHEDULE 4: HOSTING SERVICES**

### **1. HOSTING SERVICES**

- 1.1 The Supplier agrees to host the Purchaser's application, website or other content specified in the Contract in accordance with this Schedule 4 and the Contract.
- 1.2 The Supplier must ensure the Hosting Services comply with the Service Levels and other requirements set out in the Contract at all times during the Term.

### **2. MONITORING**

- 2.1 The Supplier must ensure that the performance of the hosting environment is monitored in accordance with the monitoring requirements set out in the Contract.

### **3. AVAILABILITY**

- 3.1 The Supplier warrants that the Hosting Services will meet the Uptime Percentage Target during the Standard Usage Hours every month. The Uptime Percentage will be calculated in accordance with the following formula:

$$U\% = \frac{S-D}{S} \times 100$$

Where:

S = Standard Usage Hours

D = Downtime Aggregate Hours

U% = Uptime Percentage

- 3.2 If the Uptime Percentage Target in clause 3.1 is not achieved in any one calendar month period, the Supplier agrees that a percentage of the Fees for that month may be deducted from the Fees payable for that month, depending on the actual Uptime Percentage achieved, as set out in the Contract. Any deduction from the Fees payable for a particular month pursuant to this clause 3.2 is not the Purchaser's sole remedy for a failure by the Supplier to achieve the Uptime Percentage Target.
- 3.3 Without prejudice to clause 3.2 above, if the Uptime Percentage Target referred to in clause 3.1 is not achieved over two or more consecutive months and the Purchaser, acting in its own discretion, considers this pattern of conduct unacceptable, the Purchaser may terminate the Contract immediately by notice in writing to the Supplier. This clause does not affect the operation of any of the Purchaser's other rights or remedies under the Contract or at law.

### **4. BUSINESS CONTINUITY**

- 4.1 Where specified in the Request, the Supplier must provide to the Purchaser for approval a draft Business Continuity Plan to minimise the impact of a failure, disruption or unavailability of the Services.
- 4.2 The procedure in clause 12 of the terms and conditions will apply until such time as the Supplier's Business Continuity Plan is approved by the Purchaser.

## **5. DISASTER RECOVERY PLAN**

- 5.1 Without prejudice to clause 34 of the terms and conditions, if required by the Request, the Supplier must provide to the Purchaser for approval a draft Disaster Recovery Plan that is specifically tailored for the Purchaser, complies with the Purchaser's Disaster recovery policy and specifies:
- 5.1.1 when the Disaster Recovery Plan is to be activated;
  - 5.1.2 the steps to be taken to recover the Services;
  - 5.1.3 the Supplier personnel, the Purchaser personnel and any other persons to be involved;
  - 5.1.4 the communications to be implemented during a Disaster;
  - 5.1.5 the training and testing required for the Disaster Recovery Plan; and
  - 5.1.6 procedures to reduce the impact of a Disaster on the Services,
- and addresses all other matters that may be requested the Purchaser.
- 5.2 The procedure in clause 12 of the terms and conditions will apply until such time as the Disaster Recovery Plan is approved by the Purchaser.
- 5.3 The Supplier must also:
- 5.3.1 provide such other information in relation to the Business Continuity Plan and/or the Disaster Recovery Plan as the Purchaser may reasonably request from time to time;
  - 5.3.2 review and update the Business Continuity Plan and the Disaster Recovery Plan:
    - 5.3.2.1 on an annual basis; or
    - 5.3.2.2 as otherwise reasonably requested by the Purchaser,to ensure that the Business Continuity Plan and the Disaster Recovery Plan meet the requirements set out in this Schedule and submit the reviewed and updated Business Continuity Plan and Disaster Recovery Plan to the Purchaser for review and approval in accordance with clause 12 of the terms and conditions; and
  - 5.3.3 implement the activities set out in the Business Continuity Plan and/or the Disaster Recovery Plan at the times and in accordance with the procedures set out in the Business Continuity Plan or the Disaster Recovery Plan (as applicable).

### **Testing**

- 5.4 The Supplier must conduct tests of the Business Continuity Plan and the Disaster Recovery Plan at the frequency set out in the Business Continuity Plan or the Disaster Recovery Plan (as applicable) to ensure that it will enable the complete recovery of the provision and supply of the Services and Deliverables after a Disaster or other business continuity event.



- 5.5 If, as a result of testing conducted in accordance with clause 5.4, the Supplier identifies problems with the Business Continuity Plan and/or the Disaster Recovery Plan, the Supplier must:
- 5.5.1 notify the Purchaser of the problems identified by the testing; and
  - 5.5.2 make any changes to the Business Continuity Plan and/or the Disaster Recovery Plan necessary to rectify the issues identified during the testing or that are otherwise recommended by the Purchaser, at no cost to the Purchaser.
- 5.6 The Purchaser may, at any time during the Term, and in addition to the testing conducted by the Supplier in accordance with clause 5.4, conduct tests in accordance with the Business Continuity Plan and/or the Disaster Recovery Plan to ensure that the relevant plan will enable the complete recovery of the provision and supply of the Services and Deliverables after a Disaster or other business continuity event. The Supplier must do all things reasonably requested by the Purchaser to assist with such tests, at no cost to the Purchaser.
- 5.7 If, as a result of testing conducted in accordance with clause 5.6, the Purchaser identifies problems with the Business Continuity Plan and/or the Disaster Recovery Plan, the Supplier must make any changes to the Business Continuity Plan and/or the Disaster Recovery Plan recommended by the Purchaser, at no cost to the Purchaser.

#### **Service Levels and Service Credits**

- 5.8 During a Disaster:
- 5.8.1 the Service Levels apply; and
  - 5.8.2 the Supplier must pay Service Credits for failures to meet the Service Levels.

## **SCHEDULE 5: MANAGED SERVICES**

### **1. MANAGED SERVICES**

- 1.1 The Supplier will provide the Managed Services to the Purchaser as specified in the Contract from the date specified in the Contract or the Transition In Plan (as applicable).

### **2. SERVICE STANDARDS AND WARRANTIES**

- 2.1 The Supplier must perform, supply or make available the Managed Services in accordance with:

2.1.1 relevant industry standards;

2.1.2 the Purchaser's policies and procedures as specified in the Contract Variables or otherwise notified to the Supplier in writing from time to time; and

2.1.3 any reasonable directions in relation to the Managed Services given by the Purchaser from time to time.

- 2.2 The Supplier warrants that:

2.2.1 the Managed Services will be performed with due care and skill in a proper, workmanlike and professional manner, by the dates specified in the Contract, or within a reasonable time if no date is specified, and will not cause any disruption to the operation of the Purchaser;

2.2.2 its employees, agents and contractors who provide the Managed Services have the appropriate experience, skill, knowledge, competence and resources to provide the Managed Services; and

2.2.3 any Deliverables, goods, equipment or materials provided by it in connection with the Managed Services will be of acceptable quality and fit for the purpose or purposes specified in the Request (either expressly or by implication).

### **3. BUSINESS CONTINUITY**

- 3.1 Where specified in the Request, the Supplier must provide to the Purchaser for approval a draft Business Continuity Plan to minimise the impact of a failure, disruption or unavailability of the Services.

- 3.2 The procedure in clause 12 of the terms and conditions will apply until such time as the Supplier's Business Continuity Plan is approved by the Purchaser.

### **4. DISASTER RECOVERY PLAN**

- 4.1 Without prejudice to clause 34 of the terms and conditions, if required by the Request, the Supplier must provide to the Purchaser for approval a draft Disaster Recovery Plan that is specifically tailored for the Purchaser, complies with the Purchaser's Disaster recovery policy and specifies:

4.1.1 when the Disaster Recovery Plan is to be activated;

4.1.2 the steps to be taken to recover the Services;

- 4.1.3 the Supplier personnel, the Purchaser personnel and any other persons to be involved;
  - 4.1.4 the communications to be implemented during a Disaster;
  - 4.1.5 the training and testing required for the Disaster Recovery Plan; and
  - 4.1.6 procedures to reduce the impact of a Disaster on the Services,  
and addresses all other matters that may be requested the Purchaser.
- 4.2 The procedure in clause 12 of the terms and conditions will apply until such time as the Disaster Recovery Plan is approved by the Purchaser.
- 4.3 The Supplier must also:
- 4.3.1 provide such other information in relation to the Business Continuity Plan and/or the Disaster Recovery Plan as the Purchaser may reasonably request from time to time;
  - 4.3.2 review and update the Business Continuity Plan and the Disaster Recovery Plan:
    - 4.3.2.1 on an annual basis; or
    - 4.3.2.2 as otherwise reasonably requested by the Purchaser,
 to ensure that the Business Continuity Plan and the Disaster Recovery Plan meet the requirements set out in this Schedule and submit the reviewed and updated Business Continuity Plan and Disaster Recovery Plan to the Purchaser for review and approval in accordance with clause 12 of the terms and conditions; and
  - 4.3.3 implement the activities set out in the Business Continuity Plan and/or the Disaster Recovery Plan at the times and in accordance with the procedures set out in the Business Continuity Plan or the Disaster Recovery Plan (as applicable).

### **Testing**

- 4.4 The Supplier must conduct tests of the Business Continuity Plan and the Disaster Recovery Plan at the frequency set out in the Business Continuity Plan or the Disaster Recovery Plan (as applicable) to ensure that it will enable the complete recovery of the provision and supply of the Services and Deliverables after a Disaster or other business continuity event.
- 4.5 If, as a result of testing conducted in accordance with clause 4.4, the Supplier identifies problems with the Business Continuity Plan and/or the Disaster Recovery Plan, the Supplier must:
- 4.5.1 notify the Purchaser of the problems identified by the testing; and
  - 4.5.2 make any changes to the Business Continuity Plan and/or the Disaster Recovery Plan necessary to rectify the issues identified during the testing or that are otherwise recommended by the Purchaser, at no cost to the Purchaser.
- 4.6 The Purchaser may, at any time during the Term, and in addition to the testing conducted by the Supplier in accordance with clause 4.4, conduct tests in accordance with the Business

Continuity Plan and/or the Disaster Recovery Plan to ensure that the relevant plan will enable the complete recovery of the provision and supply of the Services and Deliverables after a Disaster or other business continuity event. The Supplier must do all things reasonably requested by the Purchaser to assist with such tests, at no cost to the Purchaser.

- 4.7 If, as a result of testing conducted in accordance with clause 4.6, the Purchaser identifies problems with the Business Continuity Plan and/or the Disaster Recovery Plan, the Supplier must make any changes to the Business Continuity Plan and/or the Disaster Recovery Plan recommended by the Purchaser, at no cost to the Purchaser.

#### **Service Levels and Service Credits**

- 4.8 During a Disaster:

4.8.1 the Service Levels apply; and

4.8.2 the Supplier must pay Service Credits for failures to meet the Service Levels.

## **SCHEDULE 6: MAINTENANCE AND SUPPORT SERVICES**

### **1. SUPPORT SERVICES**

#### **Commencement of Maintenance and Support Services**

- 1.1 The Maintenance and Support Services will commence on the date specified in the Transition In Plan or, if no date is specified, the Commencement Date.

#### **Service Management Plan**

- 1.2 The Supplier will, by the date specified in the Contract or the Transition In Plan (as applicable), develop and implement a plan for the delivery of the Maintenance and Support Services (the "**Service Management Plan**"). The Service Management Plan will specify the Software which is the subject of the Maintenance and Support Services and also include the following service management processes at a minimum:

- 1.2.1 managing achievement of the Service Levels, including monitoring, recording and reporting of Service Levels and Service Level impacts;
- 1.2.2 managing service requests;
- 1.2.3 notifying and managing incidents;
- 1.2.4 managing problems;
- 1.2.5 managing systems releases;
- 1.2.6 managing configuration;
- 1.2.7 managing achievement of customer satisfaction;
- 1.2.8 managing the security of the services;
- 1.2.9 ensuring business continuity;
- 1.2.10 managing archiving and record management;
- 1.2.11 managing system administration access;
- 1.2.12 managing the solution's infrastructure;
- 1.2.13 integration with the Purchaser's service management processes; and
- 1.2.14 the creation and maintenance of an issues register and risks register by the Supplier.

#### **Support Services**

- 1.3 The Supplier agrees to provide such services to the Purchaser as are necessary to ensure the Developed Software, Licensed Software and/or Third Party Software conforms to, and enables the Purchaser to perform the functions and obtain the level of performance described in, the Contract ("**Support Services**").

### **Time to Answer**

- 1.4 All contact by the Purchaser directed to the Supplier's help desk will be by the methods set out in the Service Management Plan, using the details set out in the Contract.
- 1.5 The Supplier must respond to all Defects reported the Purchaser within the response times detailed in the Contract. The Defect must be logged immediately and transferred to a support consultant.
- 1.6 A severity level will be assigned to the logged Defect by the Purchaser and actioned according to the severity level by the Supplier in accordance with the severity level table detailed in the Contract.

### **Restoration and Resolution**

- 1.7 For each Defect logged by the Purchaser, the Supplier must use its best endeavours to:
  - 1.7.1 provide a work-around to or otherwise remedy the Defect (temporarily or permanently) so that the relevant Service or Deliverable continues to operate normally ("**Restore**");
  - 1.7.2 provide a permanent work-around or code re-write to ensure the Defect will not re-occur ("**Resolve**"); or
  - 1.7.3 propose a suitable workaround to the Purchaser's representative,at the time the Defect is logged. The Supplier must ensure that the Service or Deliverables are Restored and all Defects are Resolved, or suitable workarounds agreed to by the Purchaser's representative are implemented, within the time frames set out in the Contract.
- 1.8 The Supplier must comply with the Purchaser's change management policy when implementing any Resolution of or workaround for a Defect.
- 1.9 By the times specified by the Purchaser, acting reasonably, the Supplier must provide the Purchaser with details of all Defects that are Resolved, including a summary of the cause of the Defect and how it was Resolved.

### **Failure to Resolve Defects**

- 1.10 If the Supplier fails to Resolve a Defect notified in accordance with this clause 1 within the time referred to in the Contract, Service Credits will apply.
- 1.11 In addition to clause 1.10, if the Supplier fails to resolve a Defect in accordance with this clause 1 and such Defect has a material adverse impact on the Purchaser's ability to access and use the Services and/or the Deliverables, the Purchaser may terminate the Contract immediately by notice in writing to the Supplier. This clause 1.11 does not affect the operation of any of the Purchaser's other rights or remedies under the Contract or at law.

## 2. MAINTENANCE SERVICES

### Maintenance

- 2.1 The Supplier must perform scheduled maintenance of the Developed Software, Licensed Software and/or Third Party Software at times which have been agreed with the Purchaser. If scheduled maintenance requires the Services to be offline for more than the time specified in the Contract, the Supplier must give the Purchaser reasonable prior written notice.

### Update and New Releases

- 2.2 Updates to, and new releases of:

2.2.1 any Developed Software in respect of which Intellectual Property Rights are owned by the Supplier; and

2.2.2 Licensed Software,

will be made available by the Supplier to the Purchaser. The Supplier will provide any update or new release at no cost where the Supplier makes such updates or new releases generally available to other customers under similar circumstances at no cost. Where there is a cost, the charges and level of support applicable to the update or new release will be as specified in the Contract.

### New Products

- 2.3 Where the Supplier removes a material function ("**Function**") in a subsequent version of Developed Software or Licensed Software provided under the Contract ("**Initial Product**") and the Supplier makes such Function(s) available in a new software product ("**New Product**") with similar features and functionality, the Supplier must notify the Purchaser of the changes to the Initial Product and the features of the New Product. The Supplier must provide to the Purchaser an equal quantity of the New Product as Purchaser has of the Initial Product at no additional cost.

- 2.4 The Purchaser is not obliged to accept an update or new release offered by the Supplier pursuant to this clause. If the Purchaser rejects the offer of an update or new release, the Supplier must continue to support and maintain the version of the Licensed Software which the Purchaser is using until the expiry of three years from the date upon which the rejected update or new release was formally offered by the Supplier to the Purchaser, or until the expiry of the Contract, whichever is the later. If the Purchaser at a later date accepts the update or new release (or any subsequent update or new release), then the three year period referred to in this clause shall recommence from the date of such acceptance.

### Product Lifecycle

- 2.5 If requested by the Purchaser, the Supplier must provide a roadmap of the updates and new releases planned for the Licensed Software ("**Product Roadmap**"). The Product Roadmap must detail:

2.5.1 the nature of the update or new release;

2.5.2 the additional functionality that will be provided with the update or new release;

- 2.5.3 any functionality that will be changed or removed by the update or new release;  
and
- 2.5.4 the expected date of release of the update or new release.
- 2.6 If the Supplier wishes to update the Product Roadmap following submission to the Purchaser, the Supplier must promptly notify the Purchaser and provide a copy of its updated Product Roadmap.
- 2.7 Where the Supplier provides a Product Roadmap in accordance with clause 2.5, the Supplier must deliver the updates and new releases to the Purchaser in accordance with the then current version of the Product Roadmap.



## **SCHEDULE 7: PROFESSIONAL SERVICES**

### **1. SUPPLIER TO PROVIDE THE SERVICES**

- 1.1 The Supplier must commence providing Professional Services on the date(s) specified in the Contract.

### **2. SERVICE STANDARDS AND WARRANTIES**

#### **General Service obligations**

- 2.1 The Supplier must perform, supply or make available the Professional Services in accordance with:
- 2.1.1 relevant industry standards;
  - 2.1.2 the Purchaser's policies and procedures as specified in the Contract Variables or otherwise notified to the Supplier in writing from time to time; and
  - 2.1.3 any reasonable directions in relation to the Professional Services given by the Purchaser from time to time;
  - 2.1.4 in a professional manner with due skill and care.

#### **Service warranties**

- 2.2 The Supplier warrants that:
- 2.2.1 the Professional Services will be performed with due care and skill in a proper, workmanlike and professional manner, by the dates specified in the Contract, or within a reasonable time if no date is specified, and will not cause any disruption to the operation of the Purchaser;
  - 2.2.2 its employees, agents and contractors who provide the Professional Services have the appropriate experience, skill, knowledge, competence and resources to provide the Professional Services;
  - 2.2.3 any Deliverables, goods, equipment or materials provided by it in connection with the Professional Services will be of acceptable quality and fit for the purpose or purposes specified in the Request (either expressly or by implication); and
  - 2.2.4 all Deliverables provided by it will be free from Defects in design, materials and workmanship.

## **SCHEDULE 8: HARDWARE SERVICES**

### **1. HARDWARE SERVICES**

- 1.1 If and to the extent specified in the Contract, the Supplier will provide the Purchaser with Hardware Services, which may include the installation and integration of the Hardware.
- 1.2 The Supplier must commence providing Hardware Services on the date(s) specified in the Contract or the Transition In Plan (as applicable) for the period specified in the Contract.

#### **Preventative Maintenance**

- 1.3 If specified in the Contract, the Supplier will provide preventative maintenance and will ensure that such preventative maintenance is carried out:
  - 1.3.1 in accordance with the requirements of the Contract; and
  - 1.3.2 at the times specified in the Contract or otherwise at times when the Hardware is either not operational or else at times likely to cause the least possible disruption to the Purchaser's business and in all cases only by prior arrangement with the Purchaser.

#### **Remedial Maintenance**

- 1.4 If specified in the Contract, the Supplier will provide remedial maintenance. Where the Supplier is required to provide remedial maintenance, it will, after being notified of a fault condition or possible fault condition in the Hardware, promptly restore the Hardware to good working order and will, as necessary:
  - 1.4.1 replace or repair parts in accordance with the Contract;
  - 1.4.2 comply with the response times and any other time frames specified in the Contract relating to the replacement or repair of the Hardware and any other requirements specified in the Contract; and
  - 1.4.3 to the extent practical, implement measures to minimise disruption to the Purchaser's operations during maintenance work as specified in the Contract.
- 1.5 If the Supplier fails to meet a response time or any other time frame specified in the Contract relating to the replacement or repair of the Hardware, Service Credits will apply.
- 1.6 Unless provided to the contrary in the Contract, the Supplier may store manuals, tools and test equipment on site as required for the purposes of providing the Hardware Services. The Purchaser agrees not to use any such manuals, tools or test equipment without the Supplier's consent.

## **SCHEDULE 9: TRANSITION IN**

### **1. PREPARATION OF TRANSITION IN PLAN**

- 1.1 The Supplier must prepare a Transition In Plan (including relevant Milestone Dates) and submit it to the Purchaser for approval by the date specified in the Contract Variables.
- 1.2 The procedure in clause 12 of the terms and conditions will apply until such time as the Transition In Plan is approved by the Purchaser.
- 1.3 The Purchaser:
  - 1.3.1 must approve the Transition In Plan when the Purchaser is satisfied that it is consistent with the requirements of the Contract; and
  - 1.3.2 is not required to approve the Transition In Plan if the Purchaser, acting reasonably, considers that it is inconsistent with the requirements of the Contract.

### **2. TRANSITION IN SERVICES**

- 2.1 The Supplier shall:
  - 2.1.1 provide the Transition In Services and any required Deliverables in accordance with the Transition In Plan and, in any event, so as to achieve the milestones by the Milestone Dates;
  - 2.1.2 perform such other tasks and provide such other outputs as are required to achieve the milestones by the Milestone Dates; and
  - 2.1.3 perform the activities described in clauses 2.1.1 and 2.1.2 causing only minimal and non-adverse impact to the Purchaser and its end users.

## SCHEDULE 10: PERFORMANCE GUARANTEE

**Deed of Agreement** dated [            ] 20[   ]

### Between

Name                            *[insert name and address of Purchaser]*  
ABN                                *[insert]*  
Short Form Name            **Purchaser**  
Notice details                *[insert]*  
   *[insert]*  
Fax:                                *[insert]*  
Attention:                      *[insert]*

### And

Name                            *[insert name and address of Guarantor]*  
ABN                                *[insert]*  
Short form name            **Guarantor**  
Notice details                *[insert]*  
   *[insert]*  
Fax:                                *[insert]*  
Attention:                      *[insert]*

### Purpose

Name                            *[insert name and address of Supplier]*  
ABN                                *[insert]*  
Short form name            **Supplier**  
Notice details                *[insert]*  
   *[insert]*  
Fax:                                *[insert]*  
Email:                            *[insert]*

The Supplier has agreed to supply certain services and deliverables to the Purchaser pursuant to a contract dated *[insert]* (**Contract**).

The Guarantor agrees to provide the guarantees and indemnities stated below in respect of the Contract.

### What is agreed:

The Guarantor unconditionally and irrevocably guarantees to the Purchaser the due performance and observance of the obligations undertaken by the Supplier under the Contract (the **Obligations**) and the due and punctual payment by the Supplier of all moneys which the Supplier is or at any time becomes actually or contingently liable to pay to or for the account of the Purchaser under the Contract (the **Guaranteed Money**) on the following terms and conditions:

1. If the Supplier (unless relieved from the performance of the Contract by the Purchaser or by statute or by a decision of a tribunal of competent jurisdiction) fails to execute and perform its Obligations, the Guarantor will, if required to do so by the Purchaser, cause to be completed the Obligations in the same manner as the Supplier is required to complete or perform the Obligations.

2. If the Supplier (unless relieved from the performance of the Contract by the Purchaser or by statute or by a decision of a tribunal of competent jurisdiction) fails to make a payment of any of the Guaranteed Money, the Guarantor will, if required to do so by the Purchaser, pay an amount equal to the Guaranteed Money then due and payable within seven business days of receipt of such demand in the in the same manner and currency as the Supplier is required to pay the Guaranteed Money under the Contract.
3. If the Supplier commits any breach of its obligations, and the breach is not remedied by the Guarantor as required by this clause, and the Contract is then terminated for default, the Guarantor unconditionally and irrevocably indemnifies the Purchaser against costs and expenses directly incurred by the Purchaser by reason of such default.
4. The Guarantor will not be discharged, released or excused from this Deed of Guarantee by an arrangement made between the Supplier and the Purchaser with or without the consent of the Guarantor, or by any other inference arising out of the conduct between the parties, in the absence of a formal release in accordance with the procedures stipulated in the Contract.
5. This Deed of Guarantee shall not be considered as wholly or partially discharged by the performance of any of the Obligations or the payment at any time of any of the Guaranteed Money or by any settlement of account or by any matter or thing whatsoever and shall apply to all the Obligations and the present and any future balance of the Guaranteed Money.
6. Unless required under the Contract, the Purchaser will not be required to make any claim or demand upon the Supplier or to enforce any right, power or remedy against the Supplier in respect of its Obligations or liability to pay the Guaranteed Money before making any claim or demand on the Guarantor under this Deed of Guarantee.
7. The Guarantor shall, in respect of any rights of any kind that may accrue to it against the Supplier, rank and be entitled to enforce the same only after satisfaction in full, either by the Supplier or the Guarantor or partly by the Supplier and partly by the Guarantor, of all claims, present or contingent, that the Purchaser may then have against the Supplier by reason of or arising out of the Contract.
8. In the event of the liquidation of the Supplier:
  - a. the Guarantor shall not prove in competition with the Purchaser in any way that may diminish any dividend or other payment which, but for such proof, the Purchaser may be entitled to receive; and
  - b. the Purchaser may prove for all money outstanding to the Purchaser and not paid until the Purchaser has received one hundred (100) cents in the dollar in respect of all such money.
9. The obligations of the Guarantor under this Deed of Guarantee are principal obligations and will not be discharged, released, excused or otherwise affected by reason of anything which but for this provision might have that effect, including but not limited to:
  - a. the Purchaser granting any time, waiver or indulgence to the Supplier or another person under the Contract or this Deed of Guarantee;
  - b. the Purchaser compounding or compromising with or wholly or partially releasing the Supplier or another person;
  - c. laches, acquiescence, delay, acts, omissions or mistakes by the Supplier;

- d. the Purchaser taking, varying, wholly or partially discharging or otherwise dealing with or losing or impairing any security for the Supplier's obligations under the Contract or the Guarantor's obligations under this Deed of Guarantee or a security of that kind being or becoming void, voidable or unenforceable;
  - e. a person who is intended to assume liability as a Guarantor under this Deed of Guarantee not doing so effectively or being discharged;
  - f. a novation, assignment, termination or variation of this Deed of Guarantee or the Contract;
  - g. the death, mental illness or bankruptcy of the Supplier or the Guarantor if an individual, or the insolvency or deregistration of the Supplier or the Guarantor if a corporation;
  - h. anything else which might have a similar effect at law or in equity to any of the above actions or events; and
  - i. any other act, omission or thing whatsoever in relation to the Supplier which might directly or indirectly prejudice or affect the rights or interest of the Guarantor.
10. The obligations of the Supplier or its permitted assign will continue in force and effect until completion of the undertakings of this Deed of Guarantee by the Guarantor.
11. The obligations and liabilities of the Guarantor under this Deed of Guarantee will not exceed the obligations and liabilities of the Supplier under the Contract.
12. This Deed of Guarantee will be subject to and construed in accordance with the laws in force in the State of Victoria.
13. Where the Supplier has failed to perform under the Contract the obligations of the Guarantor will continue even though the Supplier has been dissolved or has been made subject to external administration procedures under Chapter 5 of the *Corporations Act 2001* (Cth) or any other law.
14. The rights and obligations under this Guarantee remain in full force and effect until all Obligations of the Supplier under the Contract have been performed and the Guaranteed Money has been paid in full.
15. A notice or other communication is properly given or served if the party delivers it by hand, posts it or transmits a copy by facsimile to the address last advised by one of them to the other. Where the notice is given or served by facsimile, the sending party can confirm receipt by any other means. The address for services of notices is set out above. The parties may notify the other parties of a new address in writing at any time.
16. A notice or other communication is deemed to be received if:
- a. delivered by hand, when the party who sent the notice holds a receipt for the notice signed by a person employed at the physical address for service;
  - b. sent by post from and to an address within Australia, after three (3) business days;
  - c. sent by post from or to an address outside Australia, after ten (10) business days;
  - d. sent by facsimile, at the time which the facsimile machine to which it has been sent records that the communication has been transmitted satisfactorily (or, if such time is outside normal business hours, at the time of resumption of normal business hours); or

e. sent by any other electronic means, only in the event that the other party acknowledges receipt by any means.

17. The Guarantor may merge with another entity, enter into a scheme of arrangement, amalgamation, consolidation or other combination, or directly or indirectly through its subsidiaries sell or transfer all or substantially all of its assets or those of its subsidiaries to another entity or entities and, in connection with such transaction or transactions, assign all of its rights and obligations under this Deed of Guarantee to the successor entity to the Guarantor. Such transactions and assignment shall not require the prior consent of the Purchaser, provided the Guarantor takes necessary steps to confirm that, upon completion of such a transaction or transactions, the successor entity to the Guarantor shall own and control total consolidated assets greater than or equal to those owned and controlled by the Guarantor immediately prior to such transaction or transactions. In consideration of its right to undertake such a transaction or transactions, the Guarantor shall be further obligated to provide the Purchaser with an instrument executed by the successor entity to the Guarantor unconditionally assuming and agreeing to perform all of the Guarantor's obligations under this Deed of Guarantee; and provided further that, should the Guarantor continue in legal existence after the transaction or transactions, the Purchaser shall also be required, upon delivery of such deed of guarantee form the successor guarantor to deliver to the Guarantor an instrument releasing the original Guarantor from any further obligation or liability under this Deed of Guarantee.

In witness whereof the parties to this Deed of Guarantee have executed the Deed as at the date first written.

**EXECUTED** as a deed

**Signed for and on behalf of the Purchaser**

by .....  
[insert name of representative of the Purchaser] [signature of Purchaser representative]

in the presence of

.....  
[insert name of witness] [signature of witness]

**Signed for and on behalf of the Guarantor**

by .....  
[insert name of representative of the Guarantor] [signature of Guarantor representative]

in the presence of

.....  
[insert name of witness] [signature of witness]

Note: Evidence of Authority must be provided



## SCHEDULE 11: FINANCIAL UNDERTAKING

**Deed of Agreement** dated [            ] 20[   ]

### **Between**

Name                                    *[insert name and address of Purchaser]*  
ABN                                        *[insert]*  
Short Form Name                    **Purchaser**  
Notice details                        *[insert]*  
    *[insert]*  
Fax:                                        *[insert]*  
Attention:                                *[insert]*

### **And**

Name                                    *[insert name and address of Guarantor]*  
ABN                                        *[insert]*  
Short form name                    **Guarantor**  
Notice details                        *[insert]*  
    *[insert]*  
Fax:                                        *[insert]*  
Attention:                                *[insert]*

### **Purpose**

Name                                    *[insert name and address of Supplier]*  
ABN                                        *[insert]*  
Short form name                    **Supplier**  
Notice details                        *[insert]*  
    *[insert]*  
Fax:                                        *[insert]*  
Email:                                      *[insert]*

The Supplier has agreed to supply certain services and deliverables to the Purchaser pursuant to a contract dated *[insert]* (**Contract**). The following undertakings are given in respect of the Contract:

1. In consideration of the Purchaser accepting this undertaking, the Guarantor undertakes unconditionally to pay the Purchaser on written demand from time to time any sum or sums to an aggregate amount not exceeding \$*[insert]*.
2. The Guarantor will pay this amount or any parts of it to the Purchaser on demand without reference to the Supplier and even if the Supplier has given the Guarantor notice not to pay the money, and without regard to the performance or non-performance of the Supplier or Purchaser under the terms of the Contract.
3. Any alterations to the terms of the Contract or any extensions of time or any other forbearance by the Purchaser or Supplier will not impair or discharge the Guarantor's liability under this undertaking.
4. This undertaking remains in force until one of the following events occurs:
  - a. the Purchaser notifies the Guarantor in writing that the undertaking is no longer required; and

- b. the Guarantor has paid the said aggregate amount or the balance outstanding to the Purchaser.
5. This undertaking shall be governed by and construed in accordance with the laws in force in Victoria.
  6. A notice or other communication is properly given or served if the party delivers it by hand, posts it or transmits a by facsimile to the address last advised by one of them to the other. Where the notice is given or served by facsimile, the sending party can confirm receipt by any other means. The address for services of notices is set out above. The parties may notify the other parties of a new address in writing at any time.
  7. A notice or other communication is deemed to be received if:
    - a. delivered by hand, when the party who sent the notice holds a receipt for the notice signed by a person employed at the physical address for service;
    - b. sent by post from and to an address within Australia, after three (3) business days;
    - c. sent by post from or to an address outside Australia, after ten (10) business days;
    - d. sent by facsimile, at the time which the facsimile machine to which it has been sent records that the communication has been transmitted satisfactorily (or, if such time is outside normal business hours, at the time of resumption of normal business hours); or
    - e. sent by any other electronic means, only in the event that the other party acknowledges receipt by any means.

In witness whereof the parties to this Deed of Agreement have executed the Deed as at the date first written.

**EXECUTED** as a deed

**Signed for and on behalf of the Purchaser**

by ..... [insert name of representative of the Purchaser] ..... [signature of Purchaser representative]

in the presence of

..... [insert name of witness] ..... [signature of witness]

**Signed for and on behalf of the Guarantor**

by .....  
[insert name of representative of the Guarantor] [signature of Guarantor representative]

in the presence of

.....  
[insert name of witness] [signature of witness]

Note: Evidence of Authority must be provided

## **SCHEDULE 12: TRANSITION OUT**

### **Part 1: Disengagement**

#### **1. DISENGAGEMENT**

- 1.1 For a reasonable period after the expiry or termination of the Contract, and for no less than the period specified in the Contract Variables (if any), the Supplier will assist the Purchaser in the orderly transfer of the Services to the Purchaser and/or the New Provider(s) (as applicable).

#### **2. DISENGAGEMENT PLAN**

- 2.1 Within 30 days of the Commencement Date, or such other period as is agreed between the parties (acting reasonably), the Supplier must provide to the Purchaser for approval a draft Disengagement Plan which addresses the issues set out in this Part 1 of Schedule 12. The Purchaser will review the draft Disengagement Plan once it is submitted by the Purchaser and the procedure in clause 12 of the terms and conditions will apply until such time as the Disengagement Plan is approved by the Purchaser.
- 2.2 The Supplier must provide an updated draft of the Disengagement Plan, incorporating such additional details as are appropriate given the Supplier's knowledge of the Services, to the Purchaser for approval as soon as practicable following the service of a notice to terminate the Contract by the Purchaser or no less than six months prior to the expiry of the Term. The Purchaser will review the updated Disengagement Plan once it is submitted by the Purchaser and the procedure in clause 12 of the terms and conditions will apply until such time as the updated Disengagement Plan is approved by the Purchaser.
- 2.3 The Purchaser may, at any time, review the Disengagement Plan and request amendments to it as may be reasonably required to address any changes to the Purchaser's requirements from time to time. The Supplier must promptly amend the Disengagement Plan to incorporate all such amendments requested by the Purchaser and provide the amended Disengagement Plan to the Purchaser for approval. The procedure in clause 12 of the terms and conditions will apply until such time as the amended Disengagement Plan is approved by the Purchaser.
- 2.4 In addition, the Supplier must:
- 2.4.1 maintain and update the Disengagement Plan regularly (meaning no less than annually) throughout the Term; and
- 2.4.2 provide all information and assistance reasonably necessary to effect disengagement in accordance with the Disengagement Plan.
- 2.5 No separate payment will be made for the Disengagement Plan.

#### **3. DOCUMENTATION**

- 3.1 The Supplier must provide to the Purchaser and/or the New Provider(s), a copy of all documentation required to be created or maintained by the Supplier under the Contract, including procedures manuals, schedules, usage reports, service issue logs, change information reports, product and service specifications, architecture and system mapping documents and other reference materials and related information. Such documentation must be provided promptly upon request by the Purchaser, and in any event, unless otherwise agreed, within 10 business days of a request from the Purchaser.

- 3.2 The Supplier acknowledges that the Disengagement Plan must list all documentation referred to in clause 3.1 of this Schedule 12 and must provide the following details for such documentation:
- 3.2.1 the form and format of each item of documentation;
  - 3.2.2 the location of such documentation (physical or electronic); and
  - 3.2.3 the date on which the documentation was last revised.

#### **4. PROVISION OF ADVICE AND INFORMATION**

- 4.1 The Supplier must provide to the Purchaser advice and information regarding the Services, and related topics as are required to facilitate the provision of the New Services. This will include:
- 4.1.1 responding to all requests for information and advice by the Purchaser and providing the information and advice to the Purchaser within five business days (or such other period as is agreed) of receiving a request from the Purchaser;
  - 4.1.2 providing the Purchaser and/or the New Provider(s) with all information regarding the Services that is reasonably necessary to implement the Disengagement Plan (including, where necessary, the provision of access to system or systems used by the Supplier to provide the Services ("**Existing System**")), subject to the Supplier's reasonable security and confidentiality requirements);
  - 4.1.3 providing such information regarding the Services as reasonably necessary for the Purchaser and/or the New Provider to assume responsibility for continued performance of the Services in an orderly manner so as to minimise disruption to the Services, including:
    - 4.1.3.1 information regarding the manner in which the Existing System provides business functionality to end users including application functionality, networks, interfaces, data structures, processes, outcomes and service functionality of the Existing System; and
    - 4.1.3.2 access to and transfer of any archived data files;
  - 4.1.4 permitting the Purchaser to assign its employees, agents or contractors or personnel of the New Provider(s) to work with the Supplier's employees, agents and contractors to facilitate knowledge transfer from the Supplier to the Purchaser and/or the New Provider(s);
  - 4.1.5 explaining the documented procedures and other standards and procedures specific to the Purchaser and the Services to personnel of the Purchaser and/or the New Provider(s);
  - 4.1.6 providing full details of any interfaces between the Existing System and any other system or environment;
  - 4.1.7 providing details of the status of all Services as at the commencement of the disengagement period;

- 4.1.8 if known, providing a contact list of current potential alternate sources of resources, including skilled labour and spare equipment parts;
  - 4.1.9 surrendering to the Purchaser, the Purchaser-owned reports and documentation still in the Supplier's possession, custody or control;
  - 4.1.10 answering questions and providing such other information and advice as may be reasonably sought by the Purchaser and/or the New Provider with regard to any aspect of the disengagement;
  - 4.1.11 such other similar or related information and advice as the Purchaser may reasonably request;
  - 4.1.12 providing information to the Purchaser to use in the tendering process;
  - 4.1.13 co-operating with the Purchaser during the tendering process;
  - 4.1.14 co-operating with the incoming New Provider(s) as required by their engagement plan (subject to the Supplier's approval of any applicable requirements under that plan, acting reasonably);
  - 4.1.15 finalising the Supplier's obligations under the Contract;
  - 4.1.16 assistance in the transfer of the Purchaser Data; and
  - 4.1.17 deletion or handover of the Purchaser Data after the Services are transferred.
- 4.2 Except as otherwise specified in the Contract Variables, the Disengagement Services are within the scope of the Services and no separate payment will be made.
- 4.3 The Parties may agree from time to time agree any additional services that the Supplier will be required to undertake under this Part 1 of Schedule 12.

## **5. TRANSFER OF ASSETS**

- 5.1 In accordance with the agreed Disengagement Plan, or otherwise on the effective date of termination or expiration of the Contract, the Supplier will, if requested by the Purchaser, offer to transfer the assets and infrastructure associated with the Services to the Purchaser or to the New Provider(s), in accordance with any timescales and other arrangements in the Disengagement Plan.
- 5.2 This obligation applies solely to assets and infrastructure owned by the Supplier and dedicated to the delivery of the Services.
- 5.3 The Supplier will facilitate the transfer of assets in accordance with the conditions of sale agreed with the Purchaser.

## **6. SOFTWARE**

- 6.1 In accordance with the agreed Disengagement Plan, or otherwise on the effective date of termination or expiry, the Supplier will licence and/or procure access to any software (or assignment of an existing licence of software), which are not Deliverables to the Purchaser or the New Provider(s), on terms specified in the agreed Disengagement Plan.

## Part 2: Transition Out

### 7. TRANSITION OUT PLAN

- 7.1 Where the Contract is due to expire within 6 months or has been terminated, to the extent that the Purchaser requires any Services that are not Disengagement Services, the Purchaser may issue a request for Transition Out Services to the Supplier. The Supplier must prepare a response to that request which includes a proposal ("**Proposed Plan**") to transfer each Service when requested by the Purchaser. The Supplier must submit each Proposed Plan to the Purchaser for approval within 15 business days of the date of a request with the Purchaser's approved requirements under this clause 7.1 or such other period as is agreed.
- 7.2 Each Proposed Plan must address each of the matters referred to in clause 7.5, including the Supplier's and the Purchaser's responsibilities and resource commitments with regard to each phase of the transition of the Services.
- 7.3 The Purchaser will review the each Proposed Plan once it is submitted by the Purchaser and the procedure in clause 12 of the terms and conditions will apply until such time as the updated Proposed Plan is approved by the Purchaser.
- 7.4 Upon written approval by the Purchaser, the Proposed Plans will, as from the date of such approval, constitute a Transition Out Plan. The Supplier must provide the Transition Out Services in accordance with the Transition Out Plan.
- 7.5 Subject to clause 7.1 of this Schedule 12, each Proposed Plan will provide for Transition Out Services including, without limitation, making reasonable arrangements for:
- 7.5.1 designing, building, implementing and running changes to the Existing System to allow it to interface with any systems which the Purchaser or a New Provider uses to provide the New Services ("**New System**");
  - 7.5.2 increasing the Existing System's processing capacity to cope with increases in the workload placed on the Existing System during the transition;
  - 7.5.3 the provision of data, including for:
    - 7.5.3.1 development and testing, including sanitised data in accordance with any privacy requirements; and
    - 7.5.3.2 synchronisation across environments, including where identical data is required in the Existing System and the New Systems;
  - 7.5.4 changes to any reporting provided by the Supplier under the Contract;
  - 7.5.5 changes to documentation required under the Contract;
  - 7.5.6 providing development and test environments as may be required by the Purchaser on its infrastructure to enable the Purchaser and/or a New Provider to build and maintain new interfaces on the Supplier's infrastructure;
  - 7.5.7 changes to the governance arrangements in the Contract, including attendance at project meetings and contributing to project planning and provision of a single point of contact to coordinate delivery of the Transition Out Services;

- 7.5.8 provision of technology changes where necessary, including to allow network connections;
- 7.5.9 change and release management;
- 7.5.10 training of personnel as changes take place, including the provision of new operating instructions and new applications maintenance instructions;
- 7.5.11 the provision of all necessary information, documentation and instructions, including specifications, requirements, standards, protocols, policies, constraints and parameters for the Existing System and Services to enable migration of the Purchaser Data;
- 7.5.12 liaison with users of the Existing System;
- 7.5.13 the granting by the Supplier to the New Provider(s) and/or the Purchaser, access to all material (including any licence to use such material for the purpose of providing the New Services) held by the Supplier and produced in connection with and for the purposes of delivering the Services;
- 7.5.14 discontinuance of obsolete functionality of the Existing System;
- 7.5.15 the licensing or novation of Software;
- 7.5.16 the impact (if any) on configuration management; and
- 7.5.17 ensuring co-operation with the Purchaser at all times,

and do all such other things necessary to ensure that the Transition Out Services are successfully completed.

- 7.6 Nothing that is contained within the Disengagement Plan needs to be reiterated in the Transition Out Plan.
- 7.7 Where the Purchaser terminates the Contract under clause 23.1 of the terms and conditions, or the Supplier terminates the Contract under clause 23.7 of the terms and conditions, the parties will use best endeavours to agree the fees payable to the Supplier for the performance of the Services specified in this Part Two of Schedule 12 as part of each Proposed Plan, such fees to be no greater than the Fees specified in the Contract.
- 7.8 Where the Contract comes to an end for any reason other than as specified in clause 7.7 above, the Services specified in this Part Two of Schedule 12 must be provided to the Purchaser at no additional cost to the Purchaser.

## **8. TRANSITION OUT PERIOD**

- 8.1 The Supplier will provide the Transition Out Services in accordance with the Transition Out Plan.
- 8.2 The Supplier acknowledges and agrees that except as approved or required by the Purchaser, the Supplier:
  - 8.2.1 will complete each phase of the Transition Out Services set out in the Transition Out Plan within the period specified for that phase in the Transition Out Plan; and



8.2.2 must implement the entire Transition Out Plan within a period not exceeding the period set out in the Transition Out Plan.

## SCHEDULE 13: ESCROW AGREEMENT

### Parties

[name] ABN [ABN] of [address] (**Supplier**)

[name] ABN [ABN] of [address] (**Agent**)

[name] ABN [ABN, if applicable] of [address] (Purchaser)

### Operative provisions

#### 1 Agreement

##### Supplier to deposit copies

1.1 When this Agreement is signed by the parties, the Supplier must deposit with the Agent accurate copies of both:

- (a) the latest version of the Source Code of the Software; and
- (b) all Source Code Materials.

1.2 The Supplier must also deposit with the Agent copies of any modifications, updates or new versions of the Source Code, and Source Code Materials, as soon as they are created, or as otherwise agreed with the Purchaser.

##### Form in which material to be deposited

1.3 Material deposited under the previous clause must be in a widely accepted industry standard format, except where specified by the Purchaser.

##### Verification of material

1.4 The Purchaser may at any time nominate a person who is independent of the Purchaser to conduct a test to establish whether the Deposited Material is in accordance with the description that is contained in this Agreement or that was represented at the relevant stage by the Supplier. The Agent must allow the independent person access to the material on reasonable notice.

1.5 The Purchaser must pay for the cost of the test unless the test reveals an inconsistency between the Deposited Material and its description. In that case, the Supplier must pay for the cost of the test and for any rectification that is necessary.

##### Property in, and use of, Deposited Material

1.6 The Deposited Material remains the property of the Supplier. The Agent may only keep or release it in accordance with this Agreement.

##### Agent to keep register etc

1.7 The Agent must keep the Deposited Material in secure storage in an appropriate environment. The Agent must keep a register of them and of any release of them under this Agreement. The Agent must allow the Supplier or the Purchaser, on reasonable notice, to inspect and take a copy of the register. The Agent must also give the Supplier or the Purchaser, on request, full written details of the procedures it follows in relation to the secure storage of the Deposited Material.

**Sub-contracting by Agent**

- 1.8 The Agent must not engage a sub-contractor to perform any of its obligations under this Agreement without the Supplier's and the Purchaser's written consent. That consent does not release the Agent from any of its obligations.

**Insurance**

- 1.9 Throughout this Agreement, the Agent must be insured against liability, loss or damage that arises from a breach of the Agent's obligations under this Agreement or from the Agent's negligence. The insurance must meet the requirements in Item 2 of the Schedule.

**Indemnity by Agent**

- 1.10 The Agent must continually indemnify the Supplier and the Purchaser against any claim made against either or both of them, and against any liability, loss, damage or expense incurred by either or both of them, as a direct or indirect result of a breach of this Agreement by the Agent or the Agent's negligence.

**Loss etc of Deposited Material**

- 1.11 If any of the Deposited Material is lost or damaged, the Agent must immediately notify the Supplier and the Purchaser. The Supplier must immediately deposit again with the Agent a copy of the Deposited Material that has been lost or damaged. The Agent must continually indemnify the Supplier and the Purchaser against any costs incurred as a direct or indirect result of the loss or damage.

**Agent may release Deposited Material with written consent**

- 1.12 The Agent may release any of the Deposited Material with the written consent of both the Supplier and the Purchaser.

**Agent must release Deposited Material to Purchaser in certain circumstances**

- 1.13 At the Purchaser's written request, the Agent must release the Deposited Material to the Purchaser in any of the following circumstances:
- (a) the Supplier fails to provide maintenance and support services the Purchaser is entitled to, and that failure lasts for more than seven days after notification from the Purchaser to the Supplier;
  - (b) an Adverse Event happens in relation to the Supplier; or
  - (c) the Supplier ceases, or indicates that the Supplier is about to cease, carrying on business.

**Purchaser to pay Agent annual fee**

- 1.14 The Purchaser must pay the Agent in advance the annual fee stated in Item 3 of the Schedule to perform its obligations under this Agreement. The first annual fee is payable on the date of this Agreement.

**Confidentiality**

- 1.15 A party to this Agreement must not disclose any of the other party's Confidential Information except where:
- (a) the disclosure is required by law. If the party decides that disclosure is required by law, it must immediately notify the other party of the requirement for the information to be disclosed. If the other party objects to the disclosure on the basis that it is not required by law, the party must reconsider its decision;

- (b) the disclosure is to an officer or employee of the party, to the extent that he or she needs to know the Confidential Information;
- (c) the disclosure is reasonably made to a professional legal adviser; or
- (d) the other party consents in writing to the disclosure. The other party's consent may be subject to the condition that the person to whom the disclosure is to be made enter into a separate confidentiality agreement with the provider.

#### **Disputes and Mediation**

- 1.16 If a dispute (including a dispute in relation to the return or release of Deposited Material) arises in relation to this Agreement, the parties agree to the terms of clause 38 of the agreement between the Purchaser and the Supplier under which the Source Code Materials were deposited will apply as if references to the "Contract" therein are references to this Agreement, and references to the "parties" are references to the parties to this Agreement.

#### **Period of Agreement and termination**

- 1.17 This Agreement lasts until Deposited Materials are released to the Purchaser, the Purchaser's licence ends and is not renewed, or the Agreement is terminated. The Supplier and the Purchaser may terminate it by together giving the Agent seven days written notice. The Purchaser may terminate it immediately by giving written notice to the Agent and the Supplier if any of the following happens:

- (a) the Agent breaches this Agreement;
- (b) the Agent ceases, or indicates that it is about to cease, carrying on business as an escrow Agent; or
- (c) an Adverse Event happens in relation to the Agent.

#### **Effect of ending or termination of Agreement**

- 1.18 If this Agreement ends (except as a result of the Agent releasing the Deposited Materials to the Purchaser) or is terminated, the Agent must promptly return the Deposited Material to the Supplier.
- 1.19 If this Agreement is terminated as a result of a breach by the Agent, the Supplier must immediately enter into another agreement on the same terms with the Purchaser and a replacement escrow Agent acceptable to the Purchaser.
- 1.20 Each party must at its own expense promptly execute all agreements and do or use reasonable endeavours to cause a third party to do all things that the other party from time to time may reasonably request in order to give effect to, perfect or complete the Contract and all transactions incidental to it.

#### **Entire agreement**

- 1.21 This Agreement constitutes the entire agreement between the parties in relation to the subject matter of this Agreement and supersedes all prior representations, agreements, statements and understandings, whether verbal or in writing, which do not form part of, and may not be relied on by either party in construing, this Agreement.

#### **Severability**

- 1.22 Each provision of this Agreement is individually severable. If any provision is or becomes illegal, unenforceable or invalid in any jurisdiction it is to be treated as being severed from this Agreement in the relevant jurisdiction, but the rest of this Agreement will not be affected.

The legality, validity and enforceability of the provision in any other jurisdiction will not be affected.

**Assignment**

- 1.23 The Supplier must not assign or transfer any of its rights or obligations under this Agreement without the prior written consent of the Purchaser, such consent not to be unreasonably withheld.
- 1.24 Any purported dealing in breach of clause 1.23 is of no effect.

**Waiver**

- 1.25 A waiver under this Agreement must be in writing, executed by the Purchaser Representatives. A single or partial exercise or waiver by a party of a right relating to this Agreement does not prevent any other exercise of that right or the exercise of any other right.
- 1.26 A party is not liable for any loss, cost or expense of any other party caused or contributed to by the waiver, exercise, attempted exercise, failure to exercise or delay in the exercise of a right.

**Governing law**

- 1.27 This Agreement is governed by and is to be construed in accordance with the laws applicable in Victoria. Each party irrevocably and unconditionally submits to the non-exclusive jurisdiction of the courts of the State of Victoria and any courts which have jurisdiction to hear appeals from any of those courts and waives any right to object to any proceedings being brought in those courts.

**2 Notices**

**Giving notices**

- 2.1 Any notice or communication given to a party under this Agreement is only given if it is in writing and sent in one of the following ways:
  - (a) delivered or posted to that party at its address and marked for the attention of the relevant department or officer (if any) set out below; or
  - (b) faxed to that party at its fax number and marked for the attention of the relevant department or officer (if any) set out below.

Name: **[Insert]**

Address: **[Address]**

Fax number: **[Fax number]**

Attention: **[Attention]**

Name: *[Insert]*

Address: *[Address]*

Fax number: *[Fax number]*

Attention: *[Attention]*

Name: *[Insert]*

Address: *[Address]*

Fax number: *[Fax number]*

Attention: *[Attention]*

### **Change of address or fax number**

- 2.2 If a party gives the other party three business days' notice of a change of its address or fax number, any notice or communication is only given by that other party if it is delivered, posted or faxed to the latest address or fax number.

### **Time notice is given**

- 2.3 Any notice or communication is to be treated as given at the following time:
- (a) if it is delivered, when it is left at the relevant address;
  - (b) if it is sent by post, two (or, in the case of a notice or communication posted to another country, nine) business days after it is posted; and
  - (c) if it is sent by fax, as soon as the sender receives from the sender's fax machine a report of an error free transmission to the correct fax number.
- 2.4 However, if any notice or communication is given, on a day that is not a business day or after 5pm on a business day, in the place of the party to whom it is sent it is to be treated as having been given at the beginning of the next business day.

## **3 Definitions and interpretation**

### **Definitions**

- 3.1 In this Agreement the following definitions apply:

**"Adverse Event"** means in respect of the Supplier, means:

- (a) the Supplier, or any party having or exercising control (as that term is defined in section 50AA of the *Corporations Act 2001* (Cth)) over the Supplier, becomes an externally-administered body corporate for the purposes of the *Corporations Act 2001* (Cth) or an external insolvency administrator is appointed to any such party under the provisions of any companies or securities legislation of another jurisdiction;
- (b) a controller (as that term is defined in the *Corporations Act 2001* (Cth)) or mortgagee in possession is appointed to the assets of the Supplier, any party having or exercising control over the Supplier, or such appointment is reasonably likely;
- (c) the Supplier, or any party having or exercising control (as that term is defined in section 50AA of the *Corporations Act 2001* (Cth)) over the Supplier fails to comply

with a statutory demand in the manner specified in section 459F of the *Corporations Act 2001* (Cth), and has not made an application to set aside such demand under section 459G of the *Corporations Act 2001* (Cth);

- (d) the Supplier, or any party having or exercising control (as that term is defined in section 50AA of the *Corporations Act 2001* (Cth)) over the Supplier enters into a composition or arrangement with its creditors, or any class of its creditors, with respect to the payment of amounts due to such creditors;
- (e) if the Supplier is an unincorporated entity or trust:
  - (i) an event of the kind referred to in paragraphs (a), (b), (c) or (d) above occurs in respect of any of the partners, joint venturers or proprietors of such entity; or
  - (ii) a trustee in bankruptcy (or comparable person) is appointed to the assets and affairs of any of the partners, joint venturers or proprietors of such entity, whether under the laws of the Commonwealth of Australia or another jurisdiction, or any of those partners, joint venturers or proprietors enter into an arrangement or composition with its or their creditors for the payment of their debts; or
- (f) the Supplier is unable to pay its debts as and when they fall due;

**"Agreement"** means this Escrow Agreement;

**"Business Day"** means a day (except Saturday and Sunday) on which banks are open for general banking business in Melbourne;

**"Confidential Information"** means any of the following information (whenever it was obtained) in relation to the Person's, or a Related Entity's:

- (a) business, operations or strategies;
- (a) intellectual or other property;
- (b) actual or prospective customers, suppliers or competitors;

The information must be any one of the following:

- (c) confidential in fact;
- (d) reasonably regarded by the Person as confidential;
- (e) information that a written notice from the Person to the other Person states is confidential;

Information is not confidential if it is any of the following:

- (f) in the public domain, unless it came into the public domain by a breach of confidentiality;
- (g) already known by the other Person at the time this Agreement is entered into; or
- (h) obtained lawfully from a third party without any breach of confidentiality;

**"Deposited Material"** means Source Code and Source Code Materials;

**"Person"** includes a partnership, trust or other entity which is not a legal person;

**"Related Entity"** in relation to a company or Person, means a company or Person that would be regarded as related to the relevant party under the *Corporations Act 2001* (Cth), but also includes a company or Person that would be regarded as an associate or related company under generally accepted accounting principles;

**"Software"** means the software listed in Item 1 of the Schedule;

**"Source Code"** means the Source Code of the software, expressed in human-readable language, that is necessary for the understanding, maintaining, modifying, correction and enhancing of the software; and

**"Source Code Materials"** means in relation to any software the source code of that software in a human readable format in a recognised computer programming language and includes all programming aids and tools, documentation, reports, data, designs, concepts, know-how, documentation explaining the operation of the computer program and all other information created or used in the creation of the Software. The Source Code Materials also include such statements of principles of operation and schematics as well as any pertinent commentary, explanation, program (including compilers), tools, and any other material used for the development, maintenance, implementation or use of the Software so that a trained computer programmer could develop, maintain, enhance, modify, support, compile and use all releases or separate versions of the Software and other items listed in Item 1 of the Schedule.

### **Interpretation**

3.2 In this Agreement, except where the context otherwise requires:

- (a) the singular includes the plural and vice versa, and a gender includes other genders;
- (b) another grammatical form of a defined word or expression has a corresponding meaning;
- (c) a reference to a clause, paragraph, schedule or annexure is to a clause or paragraph of, or schedule or annexure to, this agreement, and a reference to this agreement includes any schedule or annexure;
- (d) a reference to a document or instrument includes the document or instrument as novated, altered, supplemented or replaced from time to time;
- (e) a reference to A\$, \$A, dollar or \$ is to Australian currency;
- (f) a reference to time is to the time in Victoria, Australia;
- (g) a reference to a party is to a party to this agreement, and a reference to a party to a document includes the party's executors, administrators, successors and permitted assigns and substitutes;
- (h) a reference to a person includes a natural person, partnership, body corporate, association, governmental or local authority or agency or other entity;
- (i) a reference to a statute, ordinance, code or other law includes regulations and other instruments under it and consolidations, amendments, re-enactments or replacements of any of them;
- (j) the meaning of general words is not limited by specific examples introduced by including, for example or similar expressions;



- (k) headings are for ease of reference only and do not affect interpretation;
- (l) any agreement, representation, warranty, indemnity or contractual right in favour of two or more parties (including where two or more persons are included in the same defined term) is for the benefit of them jointly and severally;
- (m) a rule of construction does not apply to the disadvantage of a party because the party was responsible for the preparation of this agreement or any part of it; and
- (n) if a day on or by which an obligation must be performed or an event must occur is not a Business Day, the obligation must be performed or the event must occur on or by the next Business Day.

Execution and date

Executed as *[insert]*

Date: *[insert]*

Executed by **[SUPPLIER]** in accordance with s127 of the *Corporations Act 2001*:

.....  
Signature of director

.....  
Signature of director/company secretary

.....  
Name of director (print)

.....  
Name of director/company secretary (print)

Executed by **[AGENT]** in accordance with s127 of the *Corporations Act 2001*:

.....  
Signature of director

.....  
Signature of director/company secretary

.....  
Name of director (print)

.....  
Name of director/company secretary (print)

***[Insert execution clause for Purchaser]***



## SCHEDULE 14: SAMPLE CHANGE ORDER

[Insert name and ABN of Supplier] (the "**Supplier**") entered into an agreement with [enter name of Purchaser] ("**Purchaser**"), for the supply of Services, effective [insert date of contract] ("**the Contract**").

The Contract is changed in accordance with the terms of this Change Order and its attachments.

Any terms not defined in this Change Order shall have the meaning given to them in the Contract.

1.	Change order number	
2.	Date proposed	
3.	Name of party instigating the change	
4.	Implementation date of change	
5.	Details of change 1	[to include, in draft version only, summary of benefits of change for Purchaser and risks of not implementing change]
6.	Clauses affected by the change are as follows	
7.	New charges payable to the Supplier or Purchaser affected by this change	
8.	Plan for implementing the change	
9.	The responsibilities of the parties for implementing the change	
10.	The new date for acceptance testing	
11.	Effect of change on performance	[to include impact on functionality, interoperability or performance of software, hardware, operations and processes used by or on behalf of Purchaser.]
12.	Effect on timescales	[include any required changes to milestone dates]
13.	Effect on resources	
14.	Effect on specifications and documentation	
15.	Effect on training	
16.	Effect on users	
17.	Any other matters on which the parties agree	

### Execution

Signed for and on behalf of the **Purchaser**

Name (print)  
Position  
Signature and date

\_\_\_\_\_ / \_\_\_\_\_ / \_\_\_\_\_

Signed for and on behalf of the **Supplier**

Name (print)  
Position  
Signature and date

\*By executing this Change Order, the above signatory personally represents that he or she has the authority to bind the Supplier to this Change Order

\_\_\_\_\_ / \_\_\_\_\_ / \_\_\_\_\_