



Standard Terms and Conditions

Version 3.11

1 Definitions and interpretation

1.1 In this Agreement, unless the context otherwise requires:

(a) capitalised words have the meanings given in the dictionary in **clause 44** or as per below:

(1) "We", "Us", "Our" means Andor Systems (Aust) Pty Ltd; and

(2) "You", "Your" means any customer of We, Us or Our, or the customer's authorised point of contact

(b) this Agreement must be interpreted in accordance with **clause 45**.

2 Works

We will carry out the Works in accordance with this Agreement or any other agreement entered into between You and Us, including but not limited to any Specification.

3 Payment

3.1 In consideration for Us carrying out the Works, You must pay Us all Fees in accordance with this Agreement or any other agreement entered into between You and Us, including but not limited to any Specification.

3.2 Any services provided by Us to You, whether at Your request, or in necessity to the functionality of the Works provided to You, will be charged to You in accordance with the hourly Service Fee.

3.3 When the payment of Fees is due in accordance with the Agreement, We will issue You with an invoice for the relevant amount.

3.4 Unless We agree otherwise in writing by way of approved credit application or otherwise, You must pay all Our invoices immediately upon receipt of the relevant invoice of goods.

3.5 Unless We agree otherwise in writing by way of approved credit application or otherwise, You must

pay all Our invoices before delivery of the provision of services.

3.6 For services, You will be invoiced:

(a) Monthly in advance for recurring Fees;

(b) Monthly in arrears for other Fees We charge You; and

(c) As required in advance for pre-paid support hours.

3.7 If any of Your payments are overdue for 7 days or more, We may choose to:

(a) charge You interest on those outstanding payments at the rate equivalent to the prime rate of interest charged on overdrafts by the Commonwealth Bank of Australia plus 3 percentage points for the period during which the relevant payment is overdue; or

(b) charge You a late fee of 1.5% on any overdue balances beyond 30 days from the date an invoice is due for payment.

3.8 Without limiting Our other rights under this Agreement, if any invoice is not paid by You by the due date for payment:

(a) We may, in Our sole discretion, cease carrying out the Works; and

(b) We will be entitled to list Your payment default/s with the Credit Reference Association of Australia or other relevant credit reference organisations, which You acknowledge may affect Your credit rating.

3.9 If at any time, We propose to amend the Fees for Works We will provide You with not less than 30 days written notice.

3.10 If the amended Fee is as a result of an increase in the amount payable by Us to a third party:

(a) We will notify You of the amended Fees as soon as reasonably practicable; and

(b) We may amend the Fees will effect from the date of increase of the amount payable by Us to the third party.

4 GST

4.1 If GST becomes payable by a party (the **Supplier**) in relation to any supply that it makes to the other party (the **Recipient**) under or in connection with this Agreement, the parties agree that:

- (a) any consideration provided for that supply under this Agreement other than under this clause or any value deemed for GST purposes in relation to that supply (**Agreed Amount**) is exclusive of GST;
- (b) an additional amount will be payable by the Recipient equal to the amount of GST payable by the Supplier in relation to that supply and the additional amount is, subject to having received a correctly rendered tax invoice from the Supplier, payable at the same time as any part of the Agreed Amount is to be provided for that supply; and
- (c) the Supplier must provide the Recipient with a tax invoice in accordance with the GST Act.

4.2 Where, under the terms of this Agreement, one Party is required to indemnify another, the amount by which the indemnifying party indemnifies the other does not include any amount for which the indemnified party (or an entity grouped with the indemnified party for GST purposes) has claimed, or is entitled to claim an input tax credit under the GST Act.

5 Your acknowledgements

You acknowledge that You have relied solely on Your own skill and judgement in entering into this Agreement and have not relied on any representation by Us which is not expressly stated in this Agreement.

6 Site Access

6.1 On and from the Commencement Date until Completion, You agree to provide Us and Our Associates (including but not limited to Our engineers and technicians) with uninterrupted access to the Site to carry out activities relating to the Works.

6.2 Until Completion has occurred, You must not, and must procure Your Associates do not:

- (a) prevent or limit access to the Site; or
- (b) interfere with the Works.

6.3 You will be liable for any damage caused by You or any other third party to Our (or Our Associate's) equipment left at the Site.

6.4 In the case of Equipment failure or urgent repairs requiring unscheduled access by You to a location

where Your equipment is located (**Location**), You must notify Us to make arrangement for access to that Location.

6.5 You and any other person accessing the Location on Your behalf may only do so:

- (a) when accompanied by Our representative (unless We exercise Our discretion otherwise or in the case of emergency access under **clause 6.4**); and
- (b) subject to You paying the Access Charges.

6.6 You must comply with Our security regulations and other local site operating policies and procedures.

6.7 You, when granted access to the Location, must not interfere with or modify equipment other than the Equipment.

6.8 You will be liable for any damage to any equipment caused by You, Approved Employees or any other person accessing the Location on Your behalf (whether caused directly or indirectly).

6.9 If it is necessary or desirable for Us to enter the Site, and You require any special certifications or clearances to enter the Site, You will bear the cost for granting Us or Our Associates entry.

7 Delays

7.1 You agree We will not be liable for delays to Completion of the Works by the Completion Date where:

- (a) You instruct Us to delay the Works, whether in writing or verbally;
- (b) You vary the Works in accordance with **clause 24**;
- (c) You do not provide access to the Site as required under **clause 6.1**;
- (d) You do not pay any invoice issued by Us to You by the due date;
- (e) the delay arises from an inability to secure any product from a third party supplier; or
- (f) the delay is due to Force Majeure.

7.2 Without in any way limited **clause 7.1**, We may defer commencement of the Works by notice to You if We or Our Associates are unable to provide the Works to You at the scheduled date.

7.3 You have no Claim arising from Our or Our Associates failure to commence providing the Works by the scheduled date, other than termination of the Agreement in accordance with **clause 25**.

8 Completion of Works

- 8.1 Unless You notify Us of a Dispute, Completion of the Works will be deemed to have occurred when We complete the Works to the Specification. If no Specification exists, Completion is deemed to occur on provision of the Works to You.
- 8.2 Despite any rights You may have under **clause 23**, You agree You must pay all Fees in accordance with **clause 3** without right of setoff.

9 Reporting Faults

You must promptly notify the Service Desk of any fault You or Your Associates identify or experience during the Warranty Term, whether or not You require Support Services as a result.

10 Support and Warranty

- 10.1 We will provide You with the Support Services for the Warranty Period.
- 10.2 Where You, on reasonable grounds, believe the Works are not satisfactorily completed to the Specification You may contact the Service Desk with details of the fault.
- 10.3 If the fault is:
- Notified to Us within the Warranty Period; and
 - We do not dispute the fault; and
 - not of the nature referred to in **clause 10.4**,
- We agree to repair those faults at no cost to You.
- 10.4 If the fault:
- arises where it is apparent You have or are using the Works other than for the purpose intended;
 - is notified to Us after expiry of the Warranty Period;
 - arises as a result of Viruses;
 - is covered by a Manufacturer's Warranty set out in **clause 11**; or
 - relates directly or indirectly to repairs arising because of a Manufacturer's Failure,

We will provide You with an estimate of the costs of those repairs and the terms and conditions on which those repairs will be carried out. On receipt of that estimate and the terms and conditions, You may elect whether or not to proceed with the repairs.

11 Manufacturer's Warranty

- 11.1 We will provide You with the details of the manufacturer of any product or goods installed as part of the Works.

- 11.2 Any claim involving products or goods which are subject to a Manufacturer's Warranty must be made only against the manufacturer, not Us.

- 11.3 We do not warrant and will not be liable where, in carrying out the Works, We have installed a product which fails or requires repair or replacement and the failure, repair or replacement is covered under the Manufacturer's Warranty.

12 Viruses

- 12.1 You must ensure that neither You nor Your Associates introduces any Virus into the Network.
- 12.2 If You or Your Associates believe that a Virus has entered the Network as a direct result of any act or omission of Us or Our Associates:
- You must immediately notify Us in writing; and
 - if Our investigations confirm that the cause of the Virus entering the Network was the act or omission of Us or Our associates, We agree (at Our cost) to use Our reasonable endeavours to remedy the effect of the Virus on the Network as soon as practicable.

13 Warranties

- 13.1 We warrant the Works will be carried out with due care and skill in a competent and workmanlike manner and according to generally applicable industry standards.
- 13.2 To the extent permitted by Law, all other express or implied warranties, representations or terms other than those expressly contained in this Agreement are expressly excluded.

14 Implied warranties

- 14.1 Where Law implies into this Agreement any condition or warranty which cannot be excluded, then Our liability for any breach of such implied condition or warranty is limited, at Our absolute discretion, to one or more of the following:
- in the case of goods, any one or more of the following:
 - the replacement of the goods or the supply of the equivalent goods;
 - the repair of the goods;
 - the payment of the cost of replacing the goods or of acquiring equivalent goods;
 - the payment of the cost of having the goods repaired; or
 - in the case of services:

- (1) the supplying of the services again; or
- (2) the payment of the cost of having the services supplied again.

15 Limitation of Liability

- 15.1 Despite any other provision in this Agreement, and to the extent permitted by Law, Our total liability to You or any third party for any Claims made by You or any third party (including Claims in negligence) relating to the Works, will not exceed the Fees actually paid by You.
- 15.2 We will not be liable for any loss of profit, savings or revenue or interest or any other consequential, indirect, incidental, special or punitive loss, damage or expenses even if We have been advised of their possible existence and even if such loss, damage or expense is caused by Our negligence or the negligence of Our Associates.
- 15.3 Nothing in this Agreement will operate to exclude, restrict or modify the application of any provision of the *Trade Practices Act 1974* or any equivalent State or Territory legislation, the exercise of a right conferred by such a provision, or any liability of Ours for a breach of a condition or warranty implied by such a provision, where it is unlawful to do so.

16 Indemnities

- 16.1 You indemnify Us and Our Associates (**those indemnified**) from and against all loss, cost or damage suffered or incurred by those indemnified as a result of or in connection with:
 - (a) a breach of any term of this Agreement (including a warranty contained in this document) by You or Your Associates;
 - (b) the introduction of any Virus into the Server as a result of the act or omission of You or Your Associates;
 - (c) any negligent, wilful or unlawful act or omission by You or Your Associates;
 - (d) Your use of the Equipment;
 - (e) Your accessing the Location;
 - (f) Your interference with other equipment;
 - (g) the installation, operation, maintenance or removal of the Equipment;
 - (h) Your connection of the Equipment (or instruction to Us to connect) to any carrier or service provider network which results in loss or damage; or
 - (i) where You own the Equipment, any defects in the Equipment.

- 16.2 You are not obliged to indemnify Us for any claims to the extent that they arise out of Our negligence.

17 Confidential Information

- 17.1 A party must not without the prior written approval of the other party disclose the other party's Confidential Information or disclose or make public the terms of this Agreement.
- 17.2 Each party must take all reasonable steps to ensure its Associates do not make public or disclose another party's Confidential Information.
- 17.3 A party may at any time, on reasonable notice, request the other party to arrange for its Associates informed of the contents of this Agreement to execute a suitable confidentiality agreement and the other party must arrange for all such agreements to be executed within the time frame reasonably proposed by the requesting party.
- 17.4 A party must, immediately on demand, return to the other party, all copies of any documentation or Confidential Information in its possession or control which have supplied by the other party in connection with this Agreement.
- 17.5 We will take commercially reasonable steps to not disclose, reveal, copy, sell, transfer, assign, or distribute any part or parts of such information in any form, to any person or entity, or permit any of its Associates to do so for any purpose other than purposes which service You or as expressly and specifically permitted in writing by You or as required by applicable law.
- 17.6 You acknowledge that You have responsibility to keep records and information of Your business, customers, consumers, and employees, confidential.
- 17.7 You acknowledge that all information and services, consulting techniques, proposals, and documents disclosed by Us or which comes to its attention during the course of business and provided under this Agreement constitute valuable assets of, and confidential and/or proprietary to Us.

18 Intellectual Property

- 18.1 All intellectual property rights vest in Us.
- 18.2 If You need to use any of Our Intellectual Property, We may grant You a license to use the material.
- 18.3 Any such license to use Our Intellectual Property does not include a right to exploit the Intellectual Property for Your commercial purposes.

19 Title

- 19.1 For the avoidance of doubt, at no point in time will title in the Works or any part of the Works transfer to

You until such time as full payment of all Fees have been received by Us.

- 19.2 Where We are the “owner”, You must not grant any claim, lien or encumbrance over the Works.
- 19.3 You grant to Us, as security for any unpaid Fees owed by You to Us under this or any other agreement, a lien on the Equipment.
- 19.4 Until such time as full payment of all Fees have been received by Us:
 - (a) You and Your Associates are expressly prohibited from charging, encumbering or otherwise dealing with the Works or any part of the Works; and
 - (b) We may enter the Site (or any other premises owned by You where any part of the Works or goods are stored) without liability for the tort of trespass or any resulting damage and take possession of the goods.
- 19.5 If it is necessary or desirable for Us or Our Associates to install equipment on Your Site, We retain ownership of all Our or Our Associates equipment located on the Site even if part of all of that equipment becomes a fixture on the Site.

20 Risk

- 20.1 Risk in the Works will transfer to You completely on Completion.
- 20.2 Unless otherwise agreed, We will not arrange insurance cover for Equipment delivered to You.
- 20.3 You are solely liable for any loss or damage relating to the Equipment.
- 20.4 In no event will We be liable for loss, destruction or other damage of Your data files for any reason.

21 No property interest

The parties agree that this Agreement does not grant any property rights in, or licence to occupy, any part of the Location.

22 Insurance

- 22.1 You must, at Your own expense, have and maintain, for the duration of this Agreement, valid and enforceable insurance policies for public, property and products liability against all risks of loss or damage, including damage to third party equipment.
- 22.2 On Our request, You must provide written evidence certifying that You have insurance as required by this **clause 22**.

23 Dispute resolution

- 23.1 A party may not commence any court or arbitration proceedings relating to a Dispute unless it complies

with this **clause 23** except where the party seeks urgent interlocutory relief.

- 23.2 A party claiming that a Dispute has arisen under or in relation to this Agreement must give written notice to the other party specifying the nature of the Dispute (**Dispute Notice**).
- 23.3 On receipt of a Dispute Notice from the other party, the parties must endeavour in good faith to resolve the Dispute expeditiously using informal dispute resolution techniques such as mediation, expert evaluation or determination or other techniques agreed by them.
- 23.4 If the parties do not agree within 14 days of receipt of the Dispute Notice (or any further period agreed in writing by them) as to:
 - (a) the dispute resolution technique and procedures to be adopted;
 - (b) the timetable for all steps in those procedures; and
 - (c) the selection and compensation of the independent person required for such technique,

then the parties must mediate the Dispute in accordance with the Mediation Rules of the Law Society of New South Wales. The parties must request the President of the Law Society of New South Wales or the President's nominee to select the mediator and determine the mediator's remuneration.

- 23.5 If the Dispute is not resolved within 60 days of the date of a Dispute Notice, then any party which has complied with the provisions of this **clause 23** may in writing terminate any dispute resolution process undertaken pursuant to this **clause 23** and may then commence Court proceedings in relation to the Dispute.

24 Variation

- 24.1 By notice received by Us not less than 21 days prior to the commencement of Works, You may cancel the Works on the condition that We may charge You a cancellation fee equal to the deposit paid to Us and charge You additional Fees for work done which will include any other costs We have incurred in anticipation of carrying out of the Works.
- 24.2 You may request a variation of the Works, in writing, at any time prior to or after the commencement of Works which We may, in Our sole discretion, refuse or grant subject to payment of any Additional Fees and reasonable costs as We in Our discretion may determine.
- 24.3 If We are unable to comply with the request for variation made under **clause 24.2** (and without

limiting **clause 25.2**) You may terminate this Agreement but You agree We are entitled to charge You a cancellation fee equal to the Deposit and charge You additional fees for work done which will include any other costs We have incurred in anticipation of carrying out of the Works.

24.4 Without in any way limiting **clause 36**, if We are required to vary the Works:

- (a) We will write to You noting the impact of any such variations on Services and any agreement with You;
- (b) You must provide a written response accepting or rejecting the variation;
- (c) If You do not provide a written response, Your silence will be interpreted as acceptance of the variations to Works;
- (d) The effective date of variation will be 14 days from the date that We provided You with details of the variations (set out in this **clause 3.3**).

25 Initial Term and Termination

25.1 This Agreement will commence on the date You sign Your acceptance of Our terms and conditions, whether by way of acceptance of any Specification, the commencement of Us providing goods or services to You, or otherwise, and will continue until the termination of Our services, subject to earlier termination in accordance with this **clause 24**.

25.2 This Agreement cannot be terminated before the expiry of the Initial Term, unless agreed to by Us in writing. If agreed to by Us, You will be required to pay out any agreement for the remaining Initial Term, within 14 days of termination of Our services.

25.3 Without limiting **clause 25.2**, this Agreement will continue in effect until terminated by either party by not less than 60 days' written notice.

25.4 Subject to **clauses 28.2, 28.3** and **19.3**, You must remove the Equipment from the Location within [7] Business Days of termination of this Agreement.

25.5 We reserve the right to terminate this Agreement on not less than 3 days notice if:

- (a) the operation of the Equipment at the Location is for purposes substantially other than the purposes for which this Agreement contemplated; or
- (b) You fail to comply with any material obligation or responsibility under this Agreement.

25.6 Despite any other provision in this Agreement, if We, for any reason, are required to vacate the Location We can terminate this Agreement by providing You with not less than 3 days notice in writing.

25.7 Without limiting the generality of any other clause in this Agreement, a Party (the **Terminating Party**) may terminate this Agreement immediately by notice in writing if:

- (a) the other Party is in breach of this Agreement and the breach is not remedied within 30 days of notice by the Terminating Party to rectify that breach;
- (b) the other Party commits an Act of Insolvency;
- (c) the other party ceases or threatens to cease conducting its business in the normal manner.

25.8 In the event of termination under **clause 25.7** or otherwise, You must pay Us for all Work carried out up to the date of termination.

26 Delivery of the Equipment

26.1 Where You are providing the Equipment, You must arrange for the delivery of the Equipment to the Location in accordance with this **clause 26**.

26.2 You must advise Us in writing of the Equipment You are delivering and any change to the Equipment List at least [4] Business Days prior to delivery.

26.3 You will be responsible for all costs of delivering the Equipment to the Location, including delivery from the Location goods receiving area to the area allocated for Your Rack Space.

27 Installation and use of Equipment

27.1 If You install the Equipment, You must install the Equipment in Rack Spaces provided to You at Your cost during times notified to You and in accordance with **Schedule 1**.

27.2 If You ask Us to install the Equipment, You will only need to deliver the Equipment to the Location at a time agreed with Us and We will install the Equipment in accordance with **Schedule 1**.

27.3 Unless You have previously agreed with Us, additional Rack Spaces will be subject to availability at the time of Your request.

27.4 You agree You will only use the Equipment as authorised by Us in this Agreement and must not use the Equipment in connection with any third party content or to provide services to any third party.

28 Spare parts and removal of Equipment

28.1 Any spare parts stored for maintenance of the Equipment must be confined to the Rack Spaces.

28.2 You must notify Us in writing at least 7 days prior to removal of any Equipment from the Location.

28.3 You must provide a receipt to Us detailing any Equipment removed from the Location no later than

7 days after that Equipment is removed from the Location and an updated Equipment List.

29 Returned Goods

- 29.1 Goods returned will only be credited to the You if returned in the same condition as delivered by Us to You and if returned and received by Us in accordance with Our Returns Policy, as amended from time to time.
- 29.2 A restocking fee will be passed on to You if this is charged to Us in returning any goods to Our supplier.

30 Refunds

- 30.1 It is Our policy that no refund will be issued to You for goods and/or services. This includes refunding any pre-paid support hours to You on termination of Our services.
- 30.2 If You dispute a portion of any charge, You must pay Us the portion of the amount stated in the invoice which is not in dispute and notify Us in writing (within 14 days of receipt of the invoice) of the reason for disputing the remainder of the invoice.
- 30.3 If it is resolved that some or all of the amount in dispute should have been paid at the time it was invoiced, then You must pay the amount finally resolved together with interest on that amount as set out in **clause 3.7**.

31 Co-operation

- 31.1 You must in the performance of services under this Agreement:
- (a) fully co-operate with Us by providing access to Your premises and facilities as reasonably necessary to enable Us to provide the Works; and
 - (b) use Your best efforts to coordinate Your activities so as to support and facilitate, in Your best interests, the timely and efficient completion of all work and other activities to be performed for You by any person.

32 Non-Poaching

- 32.1 Because employees are Our most valuable assets, and are instrumental in developing and implementing critical aspects of Our strategic business plan, policy and professional ethics require that Our employees not seek employment with, or be offered employment by You during the course of business engagement and for a period of one (1) year thereafter.
- 32.2 You acknowledge that We are involved in a highly strategic and competitive business. You further acknowledge that You would gain substantial benefit

and that We would be deprived of such benefit, if You were to directly hire any personnel employed by Us.

- 32.3 Except as otherwise provided by law, You specifically agree that You shall not, without Our prior written consent, directly or indirectly, whether on Your own account, or for any other person, firm or company, either directly or indirectly, jointly or severally, counsel, solicit, procure or otherwise attempt to entice away from or discourage from being employed by Us any employee or contractor of Ours, during the course of business engagement and for a period of one (1) year thereafter.

- 32.4 You agree that damages resulting from breach by You of this provision would be impracticable and that it would be extremely difficult to ascertain the actual amount of damages.

- 32.5 In the event that You violate the provisions of this **clause 32**, You shall immediately pay Us an amount equal to 50% of the employee's total annual remuneration package, as liquidated damages and We shall have the option to terminate this Agreement without further notice or liability to You.

- 32.6 The amount of the liquidated damages set out in **clause 32.5** is not intended as a penalty and is reasonably calculated based upon the projected costs We would incur to identify, recruit, hire and train suitable replacements for such personnel.

33 Notices

- 33.1 Notices given under this Agreement must be signed by or on behalf of the party giving the notice and given to the recipient at the address specified in the quote by being:

- (a) hand delivered;
- (b) sent by email;
- (c) sent by facsimile transmission; or
- (d) sent by pre-paid ordinary mail.

- 33.2 A notice given under **clause 33.1** is deemed to have been given:

- (a) if hand-delivered, on the date of delivery;
- (b) If sent by email before 5pm. on any Business Day, on receipt of the receiving party's read receipt;
- (c) if sent by facsimile transmission before 4 pm. on any Business Day, on the date that the sending party's facsimile machine records the facsimile was successfully transmitted; and
- (d) if sent by pre-paid ordinary mail within Australia, on the date that is two Business Days after the date of posting.

34 Force Majeure

- 34.1 Neither party will be liable for any delay or for failure to perform its obligations under this Agreement, resulting from or as a consequence of Force Majeure.
- 34.2 If a delay or failure of a party to perform its obligations is caused or anticipated due to Force Majeure, the performance of that party's obligations is suspended.
- 34.3 If a delay or failure by a party to perform its obligations due to Force Majeure exceeds 60 days, either party may immediately terminate this Agreement by given written notice of termination to the other party.

35 Entire agreement

The contents of this Agreement constitute the entire agreement between the parties regarding the matters contemplated by this document and supersede any prior negotiations, representations, understandings or arrangements made between the parties, whether orally or in writing.

36 Variation to agreement

- 36.1 A provision of this Agreement may be varied by Us at any time on the giving of 14 days notice to You. Your continued trade with Us will be indicative of Your acceptance of any such variation.
- 36.2 This Agreement may also be varied in writing, signed by You and Us.

37 Waiver

A right or remedy created by this Agreement cannot be waived except in writing signed by the party entitled to that right. Delay by a party in exercising a right or remedy does not constitute a waiver of that right or remedy, nor does a waiver (either wholly or in part) by a party of a right operate as a subsequent waiver of the same right or of any other right of the party.

38 Further assurances

Each party must promptly execute all documents and do all things necessary or desirable to give full effect to the arrangements contained in this Agreement.

39 Assignment

You must not assign this Agreement or otherwise transfer the benefit of this Agreement or a right, benefit or remedy under it, without Our prior written consent.

40 Subcontracting

- 40.1 You acknowledge and agree that We may subcontract any of Our obligations under this Agreement to any third party.

Unless otherwise set out in this Agreement, Works sourced by Us from a third party will be provided on the terms and conditions set out in this Agreement, or any other agreement entered into between You and Us, including but not limited to any Specification.

- 40.2 If the Specification provides that a third party's terms and conditions apply to part or all of the Works, or if the third party's terms and conditions are expressed as an agreement between You and the third party:

- (a) Your rights in relation to that part of the Works are limited to those set out in those third party terms and conditions, unless otherwise agreed in the Specification.
- (b) any rights You have under the third party's terms and conditions are rights exercisable in respect of the third party only and not against Us;
- (c) We are not liable for any failure of the third party to provide that part of the Works in accordance with the third party terms and conditions; and
- (d) Your obligations under this Agreement, including Your obligation to pay Us, are not suspended or reduced by a failure of the third party supplier to provide that part of the Works in accordance with the third party's terms and conditions.

41 Severance

If any clause or part of any clause in this Agreement is in any way unenforceable, invalid or illegal, it is to be read down so as to be enforceable, valid and legal. If this is not possible, the clause (or where possible, the offending part) is to be severed from this Agreement without affecting the enforceability, validity or legality of the remaining clauses (or parts of those clauses) which will continue in full force and effect.

42 Governing Law and Jurisdiction

- 42.1 The laws applicable in New South Wales govern this Agreement.
- 42.2 The parties submit to the non-exclusive jurisdiction of the courts of New South Wales and any courts competent to hear appeals from those courts.

43 Survival

The following clauses survive the termination of this Agreement: 1, 3, 4, 5, 13, 14, 15, 17, 18, 19, 20, 22, 23, 24, 42, 43, 44 and, 43.

44 Dictionary

Access Charges means the charges for access to the Location as set from time to time.

Act of Insolvency means:

- (a) in the case of a corporation:
 - (1) a party becomes subject to external administration within the meaning of Chapter 5 of the Corporations Act;
 - (2) a party is liquidated, whether compulsorily or voluntarily;
 - (3) a party enters into any arrangement with creditors; or
 - (4) anything analogous or having a substantially similar effect to the events specified in (1) to (3) above occurs in relation to a party; or
- (b) in the case of an individual:
 - (1) a party commits an act of bankruptcy within the meaning of the Bankruptcy Act 1966;
 - (2) a party enters into any arrangement with creditors; or
 - (3) anything analogous or having a substantially similar effect to the events specified in (1) and (2) above occurs in relation to a party.

Agreement means these terms and conditions and Schedule 1.

Associates means a party's officers, employees, agents, contractors, and subcontractors.

Business Day means a week day on which banks are open in Newcastle, NSW.

Business Hours are the hours between 8:30am and 5pm Monday to Friday.

Claim means, in relation to a party, a demand, claim, action, proceeding, judgment, damage loss, cost, expense or liability incurred by or recovered by or against the party, however arising and whether present, unascertained, immediate, future or contingent and whether or not arising in relation to matters which occurred in the past.

Completion means the date completion occurs in accordance with clause 8.1.

Completion Date means the date (if any) specified in the Specification.

Confidential Information means all confidential information, non-public or proprietary information exchanged between the parties or known to the

parties before, on or after the parties entering into this Agreement relating to the business, technology or other affairs of the other party but excludes information which:

- (a) is in or becomes part of the public domain other than through breach of this Agreement or an obligation of confidence owed by one party to the other party;
- (b) is acquired by either party from a third party entitled to disclose it; or
- (c) is independently developed by a party.

For the sake of avoiding doubt, Confidential Information shall include (but is not limited to) any trade secrets, confidential or secret designs, processes, formulae, plan, manual devices, machines, know-how, methods compositions, ideas, improvements, financial and marketing information, costs, pricing, sales, sales volume, methods and proposals, customer and prospective customer lists, identity of key personnel in the employ of customers and prospective customers, amount or kind of customer's purchases, computer programs, source and object codes (whether or not patented, patentable, copyrighted or copyrightable), related software development information, inventions, or other confidential or proprietary information belonging to Us or directly or indirectly relating to Our business and affairs.

CPI means the Consumer Price Index (All Groups – Sydney) published by the Australian Bureau of Statistics from time to time.

Dispute means a dispute arising out of, or relating to, this Agreement including without limitation a dispute as to interpretation, breach or termination of this Agreement or as to any claim in tort, in equity or pursuant to any Law.

Equipment means the equipment to be supplied to You, including Equipment required to carry out the Works.

Fault Management Services means diagnostic or remedial work to the Works that may be required from time to time to deal with any faults identified excluding faults caused or contributed to by You.

Fees means the fees, charges or prices charged by Us and agreed to by You and as otherwise varied in accordance with this Agreement.

Force Majeure means any act of God, war, terrorism, fire, flood or any other extreme weather conditions, loss of power, industrial disputes, slow-downs or other strike activities, riots or civil disturbances, acts of government, semi-government or other Authorities, inability to obtain any necessary licence or consent and delays caused by

subcontractors and suppliers (including telecommunication carriers) or material shortages.

GST has the meaning given to it in the GST Act.

GST Act means *A New Tax System (Goods and Services Tax) Act 1999* (Cth).

Initial Term means the term agreed to by You for the provision of Works, including but not limited to recurring services.

Intellectual Property Rights means all intellectual property rights, including but not limited to, the following rights:

- (c) Patents, copyrights, rights in circuit layouts, designs, trade marks (including goodwill in those marks) and domain names;
- (d) Any application or right to apply for registration of any of the rights referred to in paragraph (a); and
- (e) All rights of a similar nature to any of the rights in paragraphs (a) and (b) which may subsist in Australia or elsewhere,

whether or not such rights are registered or capable of being registered.

Law means any applicable statute, regulation, by-law, ordinance or subordinate legislation in force from time to time in Australia, whether made by a State, Territory, Commonwealth, or a local government, and includes the common law as applicable from time to time.

Manufacturer's Warranty means the warranty that is provided to Us by Our supplier.

Manufacturer's Failure means any instance where the device fails to perform in accordance with its functional specifications or any other documentation.

Network means Your interconnected network of computers operated either locally as a local area network (LAN) or a Wide Area Network (WAN) which can access the Server either directly or via a connection to the internet.

Rack Cabinet means the space at the Location occupied by a computer rack.

Rack Space means the space within a Rack Cabinet occupied by the Equipment.

Server means the server forming part of the Network.

Service Desk means Our call centre which You can call to report faults.

Service Fee means the hourly rate for service, and may vary depending on whether You have PSP or do and charge rates.

Site means the building or premises where any part of the Works or goods are stored.

Specification means the written information We have provided to You which sets out the features and functionality of the Works. This may be in the form of a quote, purchase order, or other forms of documentation provided by Us to You.

Support Call means a request (via telephone) made by You or a Nominated User to the Service Desk for Support Services.

Support Call Procedure means the procedure which the parties must follow when making or receiving a Support Call.

Support Services means support, maintenance and rectification services.

Virus means a computer program, code, device, product or component that is maliciously designed to prevent, inhibit or impair the performance of any software (including firmware in the hardware) in accordance with its functional specifications or any other documentation.

Warranty Term and/or **Warranty Period** means 30 days from Completion.

Works means the provision of the equipment and services by Us to You.

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Interpretation

In this Agreement:

(documents) a reference to this Agreement or another document includes any document which varies, supplements, replaces, assigns or novates this Agreement or that other document;

(references) a reference to the background, a party, clause, paragraph, schedule or annexure is a reference to the background, a party, clause, paragraph, schedule or annexure to or of this Agreement;

(headings) clause headings and the table of contents are inserted for convenience only and must not be used when interpreting this Agreement;

(person) a reference to a person includes a natural person, corporation, statutory corporation, partnership, the Crown and any other organisation or legal entity;

(natural person) a reference to a natural person includes their personal representatives, successors and permitted assigns;

(rights and obligations) a reference to a right or obligation of a party is a reference to a right or obligation of that party under this Agreement;

(including) 'including' and 'includes' are not words of limitation;

(rules of construction) neither this Agreement nor any part of it is to be construed against a party on the basis that the party or its lawyers were responsible for its drafting;

(legislation) a reference to any legislation or provision of legislation includes all amendments, consolidations or replacements and all regulations or instruments issued under it;

(writing) a reference to a notice, consent, request, approval or other communication under this Agreement means a written notice, request, consent, approval or agreement;

(replacement bodies) a reference to a body (including an institute, association or authority) which ceases to exist or whose powers or functions are transferred to another body is a reference to the body which replaces it or which substantially succeeds to its power or functions; and

(corresponding meanings) where a word or phrase is defined, its other grammatical forms have a corresponding meaning.

Schedule 1 Managed Online Services

Our Responsibilities	
Installation of Equipment	<p>Where You request Us to install the Equipment, We will use Our reasonable endeavours to:</p> <ol style="list-style-type: none"> 1 provide You with a 19" rack with cage nuts and a tray for non-standard Equipment (if required); 2 ensure all Equipment is installed in compliance with acknowledged industry standards, including Australian Communications Authority (ACA) regulations; 3 ensure all Equipment is separately fused; 4 properly configure all Equipment; 5 install and test the Equipment in accordance with acknowledged industry standards and the Equipment supplier's or manufacturer's instructions, so as to meet safe technical and environmental operation; 6 label all the Equipment using a common labelling system; 7 maintain a list of all circuits installed, citing pairs, carrier and where they are terminated in the equipment cabinet. <p>Note: Major installation work and power connection is to be done during off-peak hours in Our discretion.</p>
Connection of the Equipment to Network	<p>We must use Our reasonable endeavours to:</p> <ol style="list-style-type: none"> 1 procure the supply and installation of cables from Our Network to the Equipment for access to the Managed Online Services; 2 procure testing, as We consider appropriate, to verify operation of Our Network and the Equipment; 3 liaise with any telecommunications carrier regarding the physical placement of carrier equipment directly with the Equipment; and 4 procure installation of power to the Rack Space housing the Equipment.
Approved Staff Register	<p>We must use Our reasonable endeavours to maintain a contact list for Approved Staff with the details of those staff whom You notify Us of.</p>
Operation	<ol style="list-style-type: none"> 1 We will provide a maximum of 1200 Watts per Rack Space. 2 If, in Our opinion, the Equipment is likely to cause service degradation to Our other customers due to overheating, excessive power load or non-standard installation practices, We reserve the right to turn the Equipment off. 3 If We determine the noise or interference caused by the Equipment is causing service degradation to Our other customers, We reserve the right to turn off the Equipment. 4 Where practicable, We will give You 24 hours notice to remedy the noise or interference prior to turning the Equipment off. 5 If We or You detect any noise or interference caused by the Equipment above the thresholds or limits for EMR/RFI established by the ACA, You must correct that interference to Our satisfaction as soon as reasonably practicable. If You fail to do so, We will correct the interference and charge You the Service Fee.
Maintenance	<p>We will use Our reasonable endeavours to:</p> <ol style="list-style-type: none"> 1 maintain cabling between the Equipment and the Network; 2 maintain power supply to the Equipment; 3 provide routine and emergency maintenance of the Equipment for the Service Fee.
Trouble Shooting	<ol style="list-style-type: none"> 1 We will provide You with trouble shooting services to assist in the localisation of faults, including those related to carrier provided services for the Service Fee. 2 We reserve the right to prioritise Your trouble-shooting requests in relation to other Network faults.

Your Responsibilities	
Installation of Equipment	<p>Where You elect to install the Equipment, You must:</p> <ol style="list-style-type: none"> 1 ensure all Equipment is installed in compliance with acknowledged industry standards, including Australian Communications Authority (ACA) regulations; 2 ensure all Equipment is separately fused; 3 properly configure all Equipment; 4 install and test the Equipment in accordance with acknowledged industry standards and the Equipment supplier's or manufacturer's instructions, so as to meet safe technical and environmental operation; 5 label all the Equipment using a common labelling system; 6 maintain a list of all circuits installed, citing pairs, carrier and where they are terminated in the equipment cabinet. <p>Note: Major installation work and power connection must be done during off-peak hours unless We consent otherwise.</p>
Connection of the Equipment to Network	You may only prepare the Equipment for connection to the Network. Connection may only be done by Us.
Approved Staff Register	<p>You must:</p> <ol style="list-style-type: none"> 1 provide Us with a list of all staff You desire to be Approved Staff; 2 provide Us with details (as We require) for all staff You desire to be Approved Staff; 3 pay for any costs associated with inducting the Approved Staff to the Location; and 4 notify Us of any change in particulars to the Approve Staff Register.
Maintenance	<p>Where You choose to carry out Your own maintenance, You must:</p> <ol style="list-style-type: none"> 1 maintain cabling between the Equipment and the Network; 2 maintain power supply to the Equipment; 3 provide routine and emergency maintenance of the Equipment; and 4 provide Us with a monthly report of all maintenance operations carried out by You.
Site Appearance	<p>You must:</p> <ol style="list-style-type: none"> 1 ensure the Equipment, Rack Spaces and surrounding areas are left neat and tidy at all times; and 2 remove any packaging materials You brought to or used at the Location at Your expense, or store them wholly within the Rack Spaces.
Notification	You must notify Us immediately of any failure of any Equipment which may affect the Location or Rack Spaces.