

Master Services Agreement Terms & Conditions

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BACKGROUND

- A. The Supplier to establish the terms of an ongoing business relationship for the supply of services or products to the Customer.
- B. The Supplier and Customer wish to agree on a standard set of terms that can be referenced by subsequent agreements

TERMS AND CONDITIONS

1. Definitions and Interpretation

1.1 Definitions

In this Agreement the following words and phrases have the following meanings (unless the context otherwise requires):

Base Agreement means this agreement which will be used as a base for subsequent agreements for services or products from the Supplier to the Customer.

Business Days means any day other than a Saturday, Sunday or public holiday in the Jurisdiction.

Confidential Information means information that:

- a) is by its nature confidential;
 - b) is designated by the Discloser as confidential; or
 - c) the Recipient knows or ought to reasonably have known is confidential in nature;
- and includes all information which related to the Permitted Purpose, whether in a Document or provided orally but does not include information which:
- d) is or becomes public knowledge other than by breach of this Agreement or by any other unlawful means;
 - e) is in the possession of the Party without restriction in relation to disclosure before the date of receipt from the other Party;
 - f) is by law or the rules of any stock exchange required to be disclosed by the Recipient; or
 - g) has been independently developed, gained or acquired by the Recipient without any reference to the Confidential Information.

Consequential Loss means any loss recoverable at law other than arising in the usual course of things and includes any consequential or economic loss including:

- a) loss of anticipated or actual profits or revenue;
- b) loss of production or use;
- c) financial or holding costs;
- d) loss or failure to realise any anticipated savings;
- e) loss of business or business interruption;
- f) loss or denial of business or commercial opportunity;
- g) loss of or damage to goodwill, business reputation, future reputation or publicity;
- h) downtime costs or wasted overheads; and
- i) special, punitive or exemplary damages.

Deliverable means any materials that are required to be provided to the Customer as a result of the performance of the Services.

Document includes:

- a) any paper or other materials on which there is writing, marks, figures, symbols or perforations having a meaning for persons qualified to interpret them;
- b) any article or material from which sounds, images or writing are capable of being reproduced with or without the aid of any other article or device; and
- c) information in a form of data, text, or images stored or communicated by means of guided or unguided electromagnetic energy, or both.

Intellectual Property includes all copyright and neighbouring rights, all rights in relation to inventions and discoveries (including patent and utility model rights), plant varieties, registered and unregistered trademarks (including service marks), registered designs, Confidential Information (including trade secrets and know how) and circuit layouts, and all other rights resulting from intellectual activity in the industrial, scientific, literary or artistic fields including applications for grant of any of these rights or other rights of a similar nature arising (or capable of arising) anywhere in the world.

Jurisdiction means **Queensland**

Parties means both the Supplier and the Customer referred together.

Personal Information has the meaning given to it by the Privacy Act 1998.

Referenced Agreement means a transaction or agreement which is subject to the terms and conditions of this Agreement.

Services means the Services to be provided by the Supplier as referred to in a particular Referenced Agreement

1.2 Interpretation

- (a) In this Agreement unless specified to the contrary:
 - (i) the singular includes the plural and vice versa;
 - (ii) use of the word including and similar expressions are not, nor are they to be interpreted as, words of limitation;
 - (iii) a reference to a person includes a natural person, a company or other entities recognised by law;
 - (iv) a reference to writing includes any mode of reproducing words, figures or symbols in tangible and permanently visible form and includes electronic transmission; and
 - (v) a reference to a party includes the party's executors, administrators, successors and permitted assigns.
- (b) The language in all parts of this Agreement is to be in all cases construed in accordance with its fair and common meaning and not strictly for or against either of the parties.
- (c) This Agreement is to be interpreted so that it complies with all applicable laws of the Jurisdiction and if any provision does not comply then it must be read down so as to give it as much effect as possible. If it is not possible to give that provision any effect at all then it is to be severed from this Agreement and this Agreement is to be construed as if the severable portion did not exist. The remainder of this Agreement will continue to have full force and effect.
- (d) Any headings are for ease of reference only and do not affect the interpretation of this Agreement.

2. Agreement

1.3 Base Agreement

The Parties agree that the terms and conditions in this Agreement create a master set of terms and conditions that apply to subsequent transactions and agreements between the Parties where:

- a) the transaction or agreement explicitly references this Agreement and states that it is subject to this Agreement; and
- b) the transaction or agreement has been signed and executed

1.4 Conflict Between Agreements

If there is any conflict between this Agreement and a Referenced Agreement, the Referenced Agreement will prevail to the extent of that conflict.

3. Services

1.5 Services Provided

The Supplier shall provide the Services agreed in the Referenced Agreement

1.6 Customer Control

The Supplier shall provide the Services under the direction and control of the Customer

1.7 Cost Estimates

If the payment structure of a Referenced Agreement is based on a time and materials model, any estimates of task duration provided by the Supplier are estimates only and are not a binding commitment to complete a task in the estimated time. Notwithstanding this provision, the Supplier agrees to communicate to the Customer in a reasonable and timely manner regarding a task that is likely to or has overrun its estimate.

1.8 Included Chargeable Work

If the payment structure of a Referenced Agreement is based on a time and materials model, the Supplier reserves the right to charge the Customer in full for time spent on:

- a) activities that were abandoned;
- b) activities that were partially completed;
- c) activities that were unsuccessful; or
- d) activities that took longer than estimated to complete

If a payment structure of a Referenced Agreement is based on a fixed price model, the supplier reserves the right to charge the Customer for changes where they are caused:

- a) as a result of information that the Customer has not made the Supplier aware of or the Customer has changed since the Supplier commenced the delivery of the Services; or
- b) by a request for more detail or work not originally specified by the Customer;

1.9 Customer Access and Facilities

The Customer must, at its own expense:

- a) provide access to any third-party software, operating environment or system as required in the delivery of the Services;
- b) provide the Supplier with the necessary access to staff and associated resources to perform the Services;
- c) provide the Supplier with complete and accurate information in a timely manner as may be needed to facilitate the Supplier performing the Services;

- d) ensure that where there are multiple stakeholders within the Customer who have an interest in the Services, the person that is dealing with the Supplier is authorised to represent the views of all of the Customer's stakeholders, has obtained those views prior to providing information or instructions to the Supplier and provides information and instructions in a clear, concise and consistent manner; and
- e) promptly make any decisions needed by the Supplier to perform the Services

1.10 Delays Caused By Customer

The Customer acknowledges that a failure to meet the obligations of clause 3.5 may result in delays to the provision of the Services. The Supplier will not be responsible for any such delays. The Supplier is entitled to charge the Customer for any time or expense incurred as a result of the failure of the Customer to comply with its obligations under this Agreement.

1.11 Customer's Office

If the Services are performed by the Supplier at the Customer's offices, the Customer must provide office space and facilities to the Supplier's personnel that is commensurate with those provided to the Customer's own employees of similar standing. Additionally, the office space and facilities must be a safe working environment and comply with applicable OH&S legislation of the Jurisdiction.

1.12 Customer Authority

The Customer warrants that it has the authority to allow the Supplier or its contractors to use any facilities, equipment, resources and/or Intellectual Property that the Customer provides to the Supplier or its contractors for use in conjunction with performing the Services.

4. Review

1.13 Customer Review

If the Parties agree that it is practical and reasonable for the Supplier to provide Services so as to meet a particular purpose or achieve a particular outcome, then the Customer must ensure that the purpose or particular outcome is specified in the Referenced Agreement. In all other circumstances, it is acknowledged and agreed by both Parties that given the nature of the services:

- a) it is not possible for the Supplier to guarantee that any Service is fit for a particular purpose or that any particular outcome will be achieved as a result of any Service, or any product that results from the Service;
- b) it is not reasonable for the Customer to rely on the Supplier's skill and judgment to guarantee that any Service is fit for a particular purpose or that any particular outcome will be achieved as a result of any Service, or any product that results from the Service.

1.14 Statutory Guarantees

Where the Customer is not entitled to the statutory guarantees under sections 54 to 59 or sections 60 to 62 of the Australian Consumer Law, then clauses 4.3 to 4.5 apply.

1.15 Supplier Obligations

The Supplier warrants that:

- a) it will provide the Services with due skill and care; and
- b) if no time for the supply of the Service is set out in the Referenced Agreement, the Services will be provided in a reasonable time.

1.16 Customer Notification of Issue

Subject to clause 3.4, if any Service is not performed in accordance with the Reference Agreement, the Customer must notify the Supplier of the issue in writing within 14 days and the Supplier, at its option and cost, rectify the deficiency, re-perform the Service or refund the amount paid for the deficient Service.

1.17 Limit on Liability and Warranty

The remedy specified in clause 4.4 is for the entire liability and the exclusive remedy for breach of the warranty in clause 4.3

5. Compensation, Invoicing and Payment

1.18 Compensation

The Supplier shall receive the compensation agreed to in the Referenced Agreement

1.19 Invoicing

The Supplier shall invoice the Customer at the dates or frequency agreed in the Reference Agreement. If the Referenced Agreement does not include this information, the Supplier shall issue an invoice as soon as possible after a billable task has been completed. All invoices:

- a) must be in accordance with the applicable terms of the Referenced Agreement;
- b) refer to the applicable Referenced Agreement; and
- c) shall include sufficient detail to reasonably verify the basis of the charges

1.20 Payment

Payment terms are net 14 days from the date the invoice is issued.

1.21 Late Payment Fee

At the Supplier's sole discretion, the Supplier may charge the Customer a late payment fee for a payment that is not paid by the required date. The late payment fee will be calculated daily using a rate that is 4% over the Reserve Bank of Australia's Cash Rate, from the date that the payment first becomes overdue to the date that the payment is received by the Supplier in full, both dates inclusive. At the Supplier's sole discretion, the Supplier may elect to reduce the late payment fee to a value lower than that calculated via the formula described in this clause.

1.22 Dispute

In the event of a dispute or question regarding any invoice submitted by the Supplier:

- a) all amounts not disputed or in question shall be promptly paid as and when required by this section;
- b) the Customer shall promptly transmit to the Supplier an explanation of the dispute or question within 30 days of receiving an invoice;
- c) the Supplier and Customer shall immediately seek to resolve the dispute or question; and
- d) payment of any remaining amount shall be made within 14 days of when the dispute or question is resolved.

1.23 Suspension of Service

If any fee, expense or tax is not received by the required date, the Supplier may suspend or cease providing Services until the outstanding amounts (including applicable late charges, damages, costs and expenses) are paid.

1.24 Waiver of Breach of Contract

The Customer does not have any claim for breach of contract or otherwise for any action taken by the Supplier under clause 5.6.

6. Intellectual Property Rights

1.25 Licensing of Supplier Information

If the Supplier provides the Customer with a copy of its methodology, business processes or other internal business collateral, the Customer is licensed to use that information solely for the purposes of assisting in the Services and such license will terminate at the end of the Services

1.26 Licensing of Deliverables

Subject to the payment of all fees, expenses and taxes, the Supplier grants the Customer a non-exclusive, non-transferable right to use any Deliverable for its own internal business purposes at no additional cost.

1.27 Third Party Licensing

Where the Services include the installation, development, implementation or customisation of any third party software programs, then the Customer is responsible for acquiring a license for those third party software programs directly from the third party owner or its authorised distributor. If the Customer wishes the Supplier to acquire such third party software programs and the Supplier agrees to do so, such acquisition will be the subject of a separate agreement. The Customer grants the Supplier a license to copy, modify, adopt and otherwise use any third party software programs provided to the Supplier in connection with the performance of the Services.

7. Information

1.28 Confidential Information

Each Party agrees that it will not permit the use of the other Party's Confidential Information by, nor disclose the other Party's Confidential Information to, any third person, other than:

- (a) for any use or disclosure that is permitted by this Agreement or a Reference Agreement;
- (b) the Supplier may disclose the Customer's Confidential Information to any contractors or employees of the Supplier;
- (c) either Party may disclose the other Party's Confidential Information to its professional advisors;
- (d) any other use or disclosure that is specifically authorised in writing by the other Party or by the law.

1.29 Use of Confidential Information

Each Party must only use the other Party's Confidential Information for the purpose of performing the obligations under the Referenced Agreement, or if the recipient is a professional adviser, the professional adviser may use the Confidential Information for purposes connected with advising on or reporting on this Agreement of the Referenced Agreement.

1.30 Use of Personal Information

Each Party must use any Personal Information of which it becomes aware in connection with this Agreement in accordance with the law.

8. Liability

- (a) To the extent that the Supplier fails to comply with a guarantee under sections 54 to 59 of the Australian Consumer Law in respect of goods which are not goods of a kind that are ordinarily acquired for personal, domestic or household use or consumption, then the Supplier's liability is limited to one or more of the following, at the Supplier's option:
- (i) the replacement of the goods or the supply of equivalent goods;
 - (ii) the repair of the goods;
 - (iii) the payment of the cost of replacing the goods or of acquiring equivalent goods;
 - (iv) the payment of the cost of having the goods repaired,
- unless it is not fair or reasonable for the Supplier to rely on this term of the agreement.
- (b) To the extent that the Supplier fails to comply with a statutory guarantee under sections 60 to 62 of the Australian Consumer Law in respect of services which are not services of a kind that are ordinarily acquired for personal, domestic or household use or consumption, then the Supplier's liability for such a failure is limited to, at the Supplier's option:
- (i) supplying the services again; or
 - (ii) payment of the cost of having the services supplied again,
- unless it is not fair or reasonable for ITOC to rely on this term of the agreement.
- (c) The Supplier's liability for any loss, damage or expense that is not subject to clauses 8a or 8b but which arises out of, or in connection with the Agreement arising under a Referenced Agreement, whether in contract (including under an indemnity), tort (including negligence), breach of statutory duty or otherwise, shall, to the extent permitted by law:
- (i) exclude any indirect, consequential, special or exemplary loss, damage or expense, even if ITOC has been advised of, knows of, or should have known of the possibility of such loss, damage or expense;
 - (ii) not exceed \$10,000 in any event.

9. Restraint

- (a) The Customer must not, without the prior written consent of the Supplier, for a period of 12 months after the last day of the performance of Services of the most recent Referenced Agreement, either on his own account (or for any person, company or entity) cause, facilitate or procure any other person, company or entity to employ, contract or enter into any other arrangement directly or indirectly:
- (i) to receive services of any of the Supplier's employees; or
 - (ii) with any of the Supplier's contractors (or any individuals employed by, or contracted to, the contractor)
- (b) The Parties agree that the:
- (i) remedy of damages may be inadequate to protect the Supplier's interests from the Customer's breach of clause 9a and, if clause 9a is breached, the Supplier is entitled to obtain injunctive relief, or any other remedy, in any court; and
 - (ii) restrictions in clause 9 are necessary to protect the legitimate interests of the Supplier.

10. Duration of Obligations

The obligations imposed by this Agreement continue until terminated by either Party or until a period of 12 months elapses between during which time the Supplier does not supply any services or products to the Customer.

11. Notices

- (a) Any notice to be given to one Party by another under this Agreement:

- (i) must be in legible writing, in English and addressed to the intended recipient; and
 - (ii) must be delivered to the recipient in person or by courier hand delivery, by prepaid ordinary post, by facsimile or by email; and
 - (iii) must be signed by an authorised officer of the Party giving or making it, or (on its behalf) by any solicitor, director, secretary or authorised agent of that Party.
- (b) A notice is regarded as being given by the sender and received by the recipient:
 - (i) if by delivery in person, when delivered to the recipient;
 - (ii) if by post, three Business Days from and including the date of postage;
 - (iii) if by facsimile transmission, whether or not legibly received, when the machine from which the facsimile is sent generates a transmission report confirming that all pages of the notice have been sent to the recipient's facsimile number; or
 - (iv) if by email, immediately unless sender receives an automated reply that the email was not delivered by reason of the address being invalid or otherwise.
- (c) If a notice is received on a day which is not a Business Day or after 5:00pm on a Business Day, that notice is regarded as received 9:00am on the following Business Day.

12. Termination

- (a) Either Party may immediately terminate this Agreement in relation to a Referenced Agreement by giving the other written notice if the other Party breaches any other provision of this Agreement in relation to a Referenced Agreement and the breach has not been remedied within 14 days of written notice from the non-defaulting Party specifying the breach.
- (b) Where this Agreement is subject to Australian Consumer Law, the Customer may also terminate this Agreement in accordance with the Australian Consumer Law

13. General Conditions

- (a) The terms and conditions of the Agreement can only be varied by written document signed by both Parties.
- (b) The Customer must not transfer, assign or novate the whole or any part of the Agreement in relation to a Proposal without the prior written consent of the Supplier.
- (c) The Supplier may transfer, assign or novate the whole or any part of the Agreement in relation to a Referenced Agreement, including the right to receive any amount payable under that Referenced Agreement without the prior written consent of the Customer. Notwithstanding any other provision in this Agreement, the Supplier may disclose any of Customer's Confidential Information that is reasonably necessary to affect any transfer, assignment or novation. The Customer must promptly sign any documents reasonably requested by the Supplier to affect such transfer, assignment or novation.
- (d) No provision of this Agreement shall be deemed waived, amended or modified by either Party, unless the waiver, amendment or modification is in writing and signed by both Parties.
- (e) If any part of this Agreement is for any reason declared invalid or unenforceable the validity of the remaining portion of this Agreement will not be affected and the remaining portion will remain in force.
- (f) Except as expressly provided otherwise in this Agreement, the Parties' rights and remedies under this Agreement are cumulative and there is no obligation to exercise a particular remedy. If a Party is in breach of this Agreement, the non-breaching Party may avail itself of all other rights, remedies and causes of action available at law, in equity or otherwise.
- (g) To the extent permitted by law:

- a. the Agreement in relation to a Referenced Agreement records the entire agreement between the Parties in relation to its subject matter. The Agreement in relation to a Referenced Agreement supersedes all previous negotiations, understandings or agreements in relation to the subject matter and expressly excludes the pre-printed terms and conditions of the Customer's purchase order (if any);
 - b. all conditions, warranties, guarantees or rights, including any implied by custom or other circumstance, that are not expressly specified in the Agreement in relation to a Referenced Agreement, are excluded.
- (h) The Agreement may be signed in any number of counterparts, each of which shall be original, and any one of which shall be deemed to be validly executed if evidenced by a facsimile or email copy of the executing Party's signature or electronic signature with the same effect as if the signatures were on the same document.
- (i) Nothing in this Agreement is to constitute or be deemed to constitute a partnership among the Parties, joint venture, fiduciary relationship or franchise arrangement.
- (j) Except as specifically set out in this Agreement, neither Party is authorised to act as agent for the other.
- (k) The Agreement is governed by the laws of Queensland, Australia. The Parties submit to the exclusive jurisdiction of the courts of Queensland, Australia and any courts competent to hear appeals from those courts.