**SOFTWARE LICENCE AGREEMENT**

between Supplier and Customer

|  |
| --- |
| **Details Table** |
| **Supplier** | **Customer** |
| Name: | [Insert, e.g. CSSP Pty Ltd] | Name: | [Insert] |
| ACN/ABN: | [Insert] | ABN: | [Insert] |
| Address: | [Insert] | Address: | [Insert] |
| Contact Person: | [Insert] | Contact Person: | [Insert] |
| Telephone No: | [Insert] | Telephone No: | [Insert] |
| Email Address: | [Insert] | Email Address: | [Insert] |
| **Software**  |
| Product:Modules: | 󠄀 Cheops | 󠄀  | 󠄀  |
| 󠄀  | 󠄀 | 󠄀 |
| Special Conditions: | [Insert] |
| **Will the Software be provided on a "software as a service" basis?** |
| 󠄀 Yes | 󠄀 No |  |  |
| Customer Data storage included: | [Insert, e.g. 500GB] |  |  |
| **Region** |
| 󠄀 Australia | 󠄀 New Zealand | 󠄀  | 󠄀  |
| **Location** |
| [Insert] |
| **Time Zone Location** |
| [Insert – e.g. Melbourne, Australia] |
| **Installation Date** |
| [Insert] |
| **Term** |
| Is this a Fixed Term Agreement? | 󠄀 Yes | 󠄀 No |
| Commencement Date: | [Insert] |
| Initial Term: | [Insert] months/years |
| **Fees and Charges**  |
| Currency: | 󠄀 Australian dollars 󠄀 New Zealand dollars |
| Set-up Charge: | $[Insert if applicable] |
| Licence Fee: | $[Insert]  |
| Licence Fee Schedule: | [Insert – e.g. the Licence Fee is payable quarterly in advance] |
| Service Fee: | $[Insert]  |
| Training Fee: | $[Insert if applicable] |
| Test Environment Fee: | $[Insert if applicable] |
| Test Environment Fee Schedule: | [Insert – e.g. the Test Environment Fee is payable quarterly in advance] |
| Payment Terms: | [Insert – e.g. each invoice must be paid within 7 days of receipt by Customer] |
| **Permitted Number of Users** |
| [Insert] |
| **Will Supplier provide Support and Maintenance Services?** |
| 󠄀 Yes | 󠄀 No |  |  |
| **Training** |
| [Insert details of Training, including how it will be provided e.g. by webinar] |
| **Training Location** |
| [Insert] |

Executed as an agreement

|  |
| --- |
| **Signed** for and on behalf of Supplier by its authorised representative: |
| Signature: |  |  |
| Position (print): | Name (print): |  | Date: |
| **Signed** for and on behalf of Customer by its authorised representative: |
| Signature: |  |  |
| Position (print): | Name (print): |  | Date: |

|  |  |  |
| --- | --- | --- |
| Signature of witness: |  |  |
| Name (print): | Address: |  | Date: |

Operative Provisions

# Purpose of This Document

### This Software Licence Agreement sets out the terms applicable between Supplier and Customer in relation to Customer's access to and use of the Software and the Services selected in this document.

### The agreement between the parties includes:

#### this document; and

#### any document incorporated by reference in this document,

#### (collectively referred to as the **Agreement**).

### The documents specified in clause 1(b) constitute the entire agreement between the parties in relation to the subject matter of this Agreement. If there are any inconsistencies between those documents, the document appearing higher in the list set out in clause 1(b) will prevail to the extent of the inconsistency. This Agreement replaces and supplants any previous agreement between Supplier and Customer with respect to Customer's access to and use of the Software, the Documentation and the Services.

# Scope of Software and Services

Customer acknowledges and agrees that its access to and use of the Software and the Services will be limited to the selections stated in the Details Table, as amended by any subsequent written agreement between the parties.

# Term

### This Agreement commences on the Commencement Date and subject to the early termination of this Agreement:

### if this Agreement is a Fixed Term Agreement, will expire at the end of the Initial Term (or the then-current Term if the Term has already been extended under this clause 3(a)) unless Customer and Supplier agree in writing to extend the Term. For the avoidance of doubt:

#### neither party has any obligation to agree to an extension; and

#### Supplier may require, as a condition of its agreement to an extension, that Customer pre-pays some or all amounts that would become due under this Agreement in relation to the extension period; or

### if this Agreement is not a Fixed Term Agreement, remains in force until termination by either party in accordance with this Agreement.

# Licence

## Grant of Licence

### Subject to Customer complying with this Agreement and only upon Customer paying the Licence Fee in accordance with this Agreement, Supplier grants to Customer, and Customer accepts, a non-transferable, non-exclusive licence during the Term to access and use the Software and the Documentation in the Region for the purposes set out in this Agreement.

## Software provided "as a service"

If the Software is provided on a "software as a service" basis (as indicated in the Details Table):

### Customer acknowledges and agrees that the Software and any Customer Data may be hosted, managed and supported by Supplier or by a third party cloud-based provider;

### Supplier may from time to time update or provide a new release of the Software. The Software may be unavailable for a short period for the purpose of Supplier implementing an update or new release of the Software. If Customer does not wish to use the update or new release because the update or new release omits any material functionality or features of the Software on which Customer relies, Customer may terminate this Agreement on written notice to Supplier within 60 days of being notified about the new release;

### for operational reasons, the Supplier may, with no less than 48 hours’ notice to Customer, shut the Software down from 6pm on any Friday to 4am on the following Monday (in the Time Zone Location)to facilitate maintenance or management of the Software;

### Customer must not use the same user logins for the Software in multiple time zones;

### Supplier will provide the amount of Customer Data storage stated in the Details Table; and

### although Supplier will use commercially reasonable efforts to ensure the Software is available 24 hours a day, 7 days per week (subject to unavailability as expressly permitted by this Agreement), the Software may become unavailable from time to time for scheduled Changes, emergency maintenance, urgent measures to manage network performance, or as a result of events beyond Supplier's reasonable control including:

#### failure or default by any of Supplier's third party service providers;

#### abnormal usage volumes;

#### any breach of this Agreement by Customer or the negligence of Customer or its Personnel; or

#### failure of Internet communications.

### In the case of downtime for emergency maintenance or for reasons outside of Supplier's reasonable control, Supplier will use commercially reasonable efforts to notify Customer promptly and to overcome such circumstances or mitigate their effects and resume full operation as soon as reasonably practical.

## Software not provided "as a service"

### If the Software is not provided on a "software as a service" basis:

### Supplier must during Supplier's normal business hours deliver and install the Software in machine readable form at the Location on or before the Installation Date;

### Customer must provide remote access to the required system with appropriate security and support to enable Supplier to install, maintain and support the Software;

### Supplier may from time to time provide an update or new release of the Software. Supplier may charge Customer a fee for a major update or new release of the Software. The Software may need to be unavailable for a short period for the purpose of implementing an update or new release of the Software. If Customer does not wish to use the update or new release because the update or new release omits any material functionality or features of the Software on which Customer relies, or because Customer does not agree to the fee Supplier proposes to charge for a major update or new release of the Software, Customer may terminate this Agreement on written notice to Supplier within 60 days of being notified about the update or new release. If Customer terminates the Agreement on this basis, Supplier will refund to Customer that proportion of any prepaid fees that relates to the period that remains unexpired as of the effective date of the termination. Otherwise, if required by Supplier, Customer must install the update or new release or (upon agreement with Supplier) have Supplier do so; and

### Customer must provide two logical database and executable environments for the Software within the Environment, if it wishes to have both a ‘live’ production environment and an environment for Customer testing of new releases and training support. Supplier may charge the Test Environment Fee to Customer in relation to any such testing environment. Supplier will invoice Customer for the Test Environment Fee in accordance with the Test Environment Fee Schedule.

## Authorised Users

### Supplier acknowledges that Customer may authorise its Authorised Users to access and use the Software and the Documentation. Customer:

### is responsible for the access to and use of the Software and the Documentation by its Authorised Users, including their compliance with this Agreement; and

### will be liable for all acts and omissions of its Authorised Users as if they were Customer's own acts and omissions.

# Customer Data

### The Software will allow Customer to enter and manage Customer Data. Customer is solely responsible for the content of the Customer Data.

# Supplier Obligations and Exclusions

## Supplier Obligations

Supplier will:

### provide the Training at the times reasonably agreed between the parties and at the Training Location;

### if it accesses Customer's system directly, perform all Services on Customer's system taking reasonable care to ensure that there is no malicious or unintentional data loss or corruption as a result of that access; and

### ensure that, whenever it or its Personnel are on Customer's premises or using Customer's equipment or facilities, it and its Personnel comply with:

#### Customer's policies, procedures and rules (including policies in relation to such matters as occupational health and safety, smoking in the workplace, IT security and premises security), as if they were Customer staff, but only to the extent that the policies, procedures and rules have been notified to Supplier; and

#### all reasonable directions given to them by Customer in relation to occupational health and safety, smoking in the workplace, IT and premises security.

## Exclusions from Supplier Obligations

Supplier is not required to provide Customer with any hardware or third party software licences.

# Customer Obligations

## General Obligations

Customer must (and must ensure that each of its Authorised Users will):

### ensure the Environment is technically compatible with the Software;

### maintain the Environment in order to obtain full access and use of the Software;

### maintain adequate security of the Environment to minimise the risk of viruses, malicious computer code or other forms of interference with the Environment or the Software;

### keep and maintain a separate back up copy of all Customer Data uploaded or entered by it into the Software;

### co-operate with Supplier in relation to, and take all reasonable steps to facilitate, the provision of the Services by Supplier;

### comply with all reasonable directions in relation to the Software and the Documentation (including in relation to their use) issued by Supplier;

### ensure its relevant personnel attend and fully participate in the Training at the times reasonably agreed between the parties and at the Training Location;

### notify Supplier promptly if it becomes aware of, or forms a reasonable belief that there has been an occurrence of, any unauthorised access to or use of the Software or the Documentation;

### provide to Supplier information relating to this Agreement or the Services as Supplier may reasonably request from time to time; and

### permit Supplier and its representatives on reasonable notice to audit Customer's compliance with this Agreement, including entering Customer's premises and inspecting Customer's systems and records. Customer must provide all reasonable co-operation in any such audit.

## Acceptable Use

Customer must (and must ensure that each of its Authorised Users will):

* + 1. only use the Software and Documentation in the Region;
		2. only access or use the Software and the Documentation for its own internal business use;
		3. not use the Software or Documentation except as expressly permitted by this Agreement;
		4. comply with all Relevant Laws and Legal Requirements in relation to its access to and use of the Software and the Documentation;
		5. if the Software is provided on a "software as a service" basis, not access or use the Software or use the Services in a manner which could interfere with the Software or the provision of the Software or the Services by Supplier to other customers;
		6. not engage in conduct or activities which attempt to manipulate or bypass any limitations or security measures on the Software;
		7. not use the Software in a manner, nor permit the transmission, inputting or storage of any data in a manner, that infringes any third party rights;
		8. not use the Software to input, store, or transmit any objectionable, defamatory, obscene, harassing, threatening, misleading or unlawful data or material;
		9. take all reasonable precautions to keep access to the Software (including login information and passwords) secure and protected at all times from misuse or any form of unauthorised access or use;
		10. promptly notify Supplier in writing of any known or suspected security issue in relation to the Software, including unauthorised access by any person to the Software or to any login information or password;
		11. not do (or omit to do) anything that may jeopardise the security of the Software or the Services, or access to the Software or the Services;
		12. not transfer, assign, grant a security interest in, or otherwise deal with its rights in relation to the Software contrary to the terms of this Agreement;
		13. promptly notify Supplier in writing of any allegation or claim of which Customer becomes aware that the Software or Documentation, or the use of the Software or Documentation, infringes the Intellectual Property Rights of any person and make no admission in relation to the allegation or claim without Supplier's prior written consent;
		14. promptly notify Supplier in writing of any known or suspected infringement of the Intellectual Property Rights in the Software or Documentation by any third party;
		15. not allow more than the Permitted Number of Users to use the Software simultaneously;
		16. not resell, sub-license, resupply, provide a bureau service using, communicate or otherwise make available to a third party the Software or the Documentation (except as may be expressly permitted by this Agreement);
		17. not (and not authorise, encourage or assist any other person to) copy, reproduce, translate, decompile, reverse-engineer, reverse assemble, reverse compile, modify, vary or otherwise deal with the whole or any part of the Software or the Documentation except as may be expressly permitted by this Agreement or with the prior written consent of Supplier and in accordance with such conditions as Supplier may in its absolute discretion impose;
		18. not merge all or any part of the Software with software not provided by Supplier without the prior written consent of Supplier and in accordance with such conditions as Supplier may in its absolute discretion impose; and
		19. not challenge the validity or ownership of the Intellectual Property Rights in the Software or the Documentation by Supplier or its licensors.

## Changes to Permitted Number of Users

The parties may agree in writing to:

* + 1. increase the Permitted Number of Users, which may be conditional upon payment of additional charges; or
		2. decrease the Permitted Number of Users, in which case they will also use reasonable endeavours in good faith to agree a corresponding decrease in any fees payable under this Agreement that are related to the Permitted Number of Users. Any decrease will take effect 90 days after such agreement in writing is reached, unless a different period is agreed in writing.

# Support and Maintenance Services

## Application of this clause

This clause 8 will only apply if the Details Table indicates that the Supplier is to provide Support and Maintenance Services.

## Service Fee

### Customer will pay the Service Fee monthly in advance unless otherwise agreed in writing by the parties.

### The Service Fee will be charged from the Installation Date and for every subsequent calendar month. Supplier will invoice Customer for the Service Fee on or before the Installation Date and no more than 7 days before the start of each subsequent calendar month. Customer must pay such invoices into Supplier's Bank Account in accordance with the Payment Terms.

### Supplier will increase the Service Fee once per year after the expiration of 12 months from the Installation Date, by written notice to Customer. The annual increase of the Service Fee shall not be greater than the increase in the CPI plus 2%, plus any additional increase that is reasonable to take into account additional costs incurred by Supplier that cannot reasonably be avoided (for example compliance costs in relation to a new Legal Requirement).

## Support and Maintenance Services

### Supplier will provide Support and Maintenance Services as set out in the Support and Maintenance Services Schedule.

### Unless specified in the Support and Maintenance Services Schedule, Supplier is not required to provide Support and Maintenance Services outside Business Hours. Supplier may offer to provide Support and Maintenance Services outside Business Hours on specific occasions for an additional charge. Supplier does not warrant that it will be capable of receiving, processing or otherwise complying with a request for Support and Maintenance Services which is made or to be performed outside Business Hours unless otherwise specified in the Support and Maintenance Services Schedule.

### Supplier is not required to provide Support and Maintenance Services to the extent that the relevant errors or defects are caused by:

#### the operation of the Software in a manner other than that specified by Supplier;

#### the use of computer programs not licensed by Supplier to Customer; or

#### unauthorised modification or alteration of the Software.

### Unless otherwise agreed in writing by the parties, the Support and Maintenance Services do not include:

#### equipment maintenance;

#### operating system support;

#### support for or maintenance of third party software;

#### modifications or customisations designed to extend the Software to provide facilities not described in the Documentation or otherwise not contemplated by the parties at the date of this Agreement; or

#### furnishing or maintaining hardware, accessories, attachments, consumables, supplies or associated items, whether or not manufactured or distributed by Supplier.

## Access to Environment and facilities

### The Software may provide an auto email facility out of the Software to Supplier's support team. This feature allows the support team to analyse issues using technical logs when issues are raised by Customer. Customer must set up this email facility in order for Supplier to provide the Support and Maintenance Services.

### Customer must ensure that Supplier's support personnel have full, safe and easy access to the Environment and Customer's facilities, including the Software as used by the Customer, at all reasonable times for the purpose of providing the Support and Maintenance Services.

# Privacy

## Compliance with Privacy Laws

The parties will, in performing their respective obligations under this Agreement, comply with all applicable Privacy Laws, and neither party will put the other in breach of any such Privacy Laws. Customer will ensure that it is entitled to transfer the relevant Personal Information to Supplier so that Supplier may lawfully use, process and transfer the Personal Information as necessary to provide the Services in accordance with this Agreement.

## Supplier's Use and Disclosure Obligations

Supplier will (except where otherwise required or authorised by law):

### only access or use the relevant Personal Information provided by Customer for the purposes of performing its obligations under this Agreement; and

### not otherwise access, use, process, modify or disclose the relevant Personal Information except with Customer's or the relevant individual's prior written consent,

### however Supplier is under no obligation to:

### withhold any Customer Data or related data, documentation or records from any law enforcement officer or government representative, officer or agency with apparent authority to seek delivery of or access to such data; or

### refuse to provide any such person or instrumentality with access to Customer Data or related data, documentation or records,

### if Supplier receives a request or demand for such information which on its face appears to be valid and lawful.

## Transfer of Customer Data Outside of Australia

If the Software is provided on a "software as a service" basis, Supplier may store Customer Data (including any Personal Information) in servers located in Australia and overseas and may access that Customer Data (including any Personal Information) from both within and outside Australia from time to time, for the purposes of performing its obligations under or in connection with this Agreement.

## Customer Data Security

Supplier will take commercially reasonable steps to protect Customer Data (including Personal Information) to which Supplier has access in connection with this Agreement against unauthorised access, use, modification or disclosure.

## Deletion of Personal Information

Customer must take reasonable steps to promptly delete from the Software any Personal Information contained in Customer Data once it is no longer required for Customer's business purposes.

## Survival

## The provisions of this clause 9 will survive the termination or expiry of this Agreement.

# Payments

## Set-up Charge

## Supplier will upon or before commencement of this Agreement provide Customer with an invoice setting out any Set-up Charge applicable for the Services.

## Licence Fee

* + 1. Supplier will invoice Customer for the Licence Fee in accordance with the Licence Fee Schedule.
		2. Supplier may increase the Licence Fee once per year after the expiration of 12 months from the Installation Date on giving 90 days notice to Customer. Any annual increase of the Licence Fee shall not be greater than the increase in the CPI plus 2%, plus any additional increase that is reasonable to take into account additional costs incurred by Supplier that cannot reasonably be avoided (for example compliance costs in relation to a new Legal Requirement).

## Expenses

Supplier may invoice Customer for all travelling expenses (including travel, accommodation and meals) reasonably incurred by Supplier's Personnel providing installation, Training or consulting Services under this Agreement. Supplier will invoice these charges to Customer at cost.

## Training Fee

### Supplier will invoice Customer for the Training Fee promptly after delivering each relevant Training session.

### If Customer cancels a Training session within 48 hours before the scheduled session, Customer must pay Supplier the full Training Fee for that session. If Customer cancels a Training session between 7 days and 48 hours before the scheduled session, Customer must pay Supplier half of the Training Fee for that session. The parties agree that these payments are genuine pre-estimates of the loss Supplier will suffer if a Training session is cancelled at short notice. Supplier will invoice Customer for the relevant amount promptly after receiving notice from Customer cancelling the relevant Training session. Supplier may also charge Customer, and Customer must pay, for all committed travelling expenses (including travel, accommodation and meals) reasonably incurred by Supplier's Personnel in relation to the cancelled Training session that cannot be recovered by Supplier and all cancellation fees (and the like) in connection with cancelling any such expenses where Supplier is reasonably able to cancel them.

## Means and timing of payment

Customer must pay the amount of any invoice properly rendered under this Agreement by electronic funds transfer into Supplier's Bank Account in accordance with the Payment Terms or any other terms specifically stated in this Agreement.

## Interest on overdue amounts

Supplier may charge default interest at the Interest Rate (compounding daily) on any overdue amounts from the date the payment was due until the date of payment in full.

## Recovery costs

Customer must reimburse Supplier for any expenses, costs or disbursements incurred by Supplier in recovering any unpaid amounts from Customer, including debt collection agency fees and legal costs (on a full indemnity basis). Supplier may invoice Customer for such amounts as they are incurred.

## Supplier's Bank Account

Supplier will notify Customer from time to time in writing of the details of Supplier's Bank Account and Customer must take reasonable steps to confirm the authenticity of any such communication before acting on it.

## GST

### Terms defined in the GST Act have the same meaning when used in this clause unless expressly stated otherwise.

### Except where this Agreement specifies otherwise, an amount payable by a party under this Agreement in respect of a taxable supply by the other party represents the value of the supply (**Supply Amount**). The recipient of the supply must, in addition to the Supply Amount and at the same time, pay to the supplier the amount of GST imposed by the GST Act payable in respect of the supply. For the avoidance of doubt, the GST amount payable under this clause will be calculated by multiplying the Supply Amount by the prevailing GST rate.

### If at any time an adjustment is made between the supplier or any other payer of GST and the relevant taxing authority on account of GST on any supply made or other matter or thing done under or in connection with this Agreement by the supplier, a corresponding adjustment must be made as between the supplier and the recipient and any payment required to give effect to the adjustment must be made. The supplier must provide to the recipient an adjustment note relating to the adjustment within 7 days.

### Each party warrants to the other party that if legally required, it is registered for GST at the time of entering this Agreement and will promptly notify the other party if it ceases to be so registered.

# Intellectual Property Rights

## Ownership

As between the parties:

### all Intellectual Property Rights in the Software and the Documentation including any modifications to them are owned by Supplier; and

### all Intellectual Property Rights in Customer Data including any modifications to it made by or on behalf of Customer are owned by Customer.

## Customer's rights and obligations

Customer:

### must follow all reasonable instructions given by Supplier from time to time with regard to the use of trade marks owned by Supplier and any indications of ownership of Intellectual Property Rights in the Software and Documentation;

### may copy the Software and Documentation for the purpose of back-up, if it is not provided on a "software as a service" basis; and

### must not copy, alter, modify or reproduce the Software or Documentation by any means or in any form without Supplier's prior written approval, unless specifically permitted by this Agreement or by statute.

## Customer's Licence to Supplier

### Customer grants to Supplier:

#### a non-exclusive, royalty-free, worldwide licence to use (and allow Supplier's Personnel to use) Customer Data for the purposes of performing its obligations under this Agreement and to further develop the Services; and

#### a non-exclusive, royalty-free, worldwide licence to use the Customer Trade Marks during the Term for the purposes of providing and promoting Supplier and the Software.

### Customer warrants that the use of Customer Data and Customer Trade Marks by Supplier in accordance with clause 11.3(a) will not infringe any third party's rights (including Intellectual Property Rights) or any Privacy Laws.

### Supplier agrees that:

#### it will use Customer Trade Marks in such manner and form (if any) as Customer may reasonably specify in writing from time to time;

#### the Customer Trade Marks are and will remain the property of Customer or its successors or assigns; and

#### its use of Customer Trade Marks under this Agreement, and any goodwill resulting from that use, will accrue solely for Customer's benefit.

## Feedback

In the event that Customer or any of its Authorised Users provides Supplier with any feedback, suggestion or comment regarding the Software or the Documentation, Customer grants (and must ensure any of its relevant Authorised Users grants) to Supplier a worldwide, irrevocable, perpetual, sub-licensable, transferable, royalty-free licence to use any such feedback, suggestion or comment (including any Intellectual Property Rights in it) for any purpose without any obligation or compensation to Customer or any of its Authorised Users.

# Confidentiality

## Confidential Information

The parties acknowledge that one may provide the other with Confidential Information for the purposes of this Agreement. Each party agrees to take reasonable steps to keep the other's Confidential Information secure from unauthorised disclosure.

## Use of Confidential Information

A party will not, without the prior written approval of the other party, disclose, copy or use the other party’s Confidential Information, other than to:

### the extent required to exercise its rights or perform its obligations under this Agreement;

### its Personnel as necessary for the purposes of the party exercising its rights or performing its obligations under this Agreement;

### comply with any Legal Requirements; or

### obtain professional advice in relation to matters arising under or in connection with this Agreement.

## Compliance by Personnel

Each party must procure compliance by each of its Personnel to whom the other party's Confidential Information is disclosed, with the obligations under this clause 12 as if this clause 12 applied directly to them.

## Return of Confidential Information

Upon termination or expiry of this Agreement, each party must (at that party's option) promptly either return or to the extent practical, destroy or otherwise make permanently unavailable the other party's Confidential Information in its possession or control, however to the extent Supplier holds any Customer Data, Supplier will continue to hold it for up to 90 days during which period Supplier will provide a copy of it, or otherwise make it available, to Customer upon request and may charge a reasonable fee for doing so. Each party must upon request by the other party promptly certify in writing to that other party that it has complied with its obligations under this clause 12.4.

## Survival

The provisions of this clause 12 will survive the termination or expiry of this Agreement.

# Warranties

## General

## Each party warrants that:

### it has full power and authority to enter into and perform its obligations under this Agreement which, when executed, will constitute binding obligations on that party; and

### all information it provides to the other party is true and correct to the best of its knowledge, information and belief.

## Disclaimer

Supplier does not warrant that the operation of the Software will be uninterrupted, always accessible, free from harmful components, accurate or error-free or that Supplier will correct all errors in the Software or the Documentation.

# Indemnities

## Supplier’s Indemnity

### Supplier will indemnify, defend, and hold Customer and its Personnel harmless from and against any Claim by any third party that the Software or the permitted use of the Software infringes or violates any third party's valid trade mark, patent, copyright or trade secret (**IP Claim**). If in Supplier’s reasonable judgment any such IP Claim, or threat of an IP Claim, materially interferes with Customer’s use of the Software, Supplier will consult with Customer, and Supplier will have the option in its sole discretion to:

#### substitute functionally equivalent non-infringing software;

#### modify the Software to make it non-infringing; or

#### obtain for Customer at Supplier’s expense the right to continue using the infringing Software.

### If Supplier cannot achieve any of the remedies in the preceding clause on a reasonable commercial basis, it may, by written notice, require Customer to cease using the Software (or the relevant functionality) and refund a pro-rata portion of the Licence Fee for the Software for any period of time in which Customer was unable to use the Software (or the relevant functionality).

### Supplier will have no indemnity obligation for claims of infringement resulting or alleged to result from:

#### any combination, operation, or use of the Software with any program or equipment not supplied by Supplier or not specified in this Agreement for such purpose if in Supplier’s reasonable judgment such infringement is caused by such use;

#### inclusion or use of Customer Data; or

#### the use of the Software in a manner other than for its intended purposes or contrary to this Agreement or Supplier’s lawful directions.

### To the extent permitted by law, the provisions in this clause 14.1 state Customer's sole and exclusive remedy in relation to any IP Claim.

## Customer's Indemnity

Customer agrees to defend, indemnify and hold harmless Supplier, its Personnel and its Related Bodies Corporate from and against any and all Claims or Loss arising from:

### Customer's use or misuse of the Software or the Documentation;

### Customer's breach of any third party right (including Intellectual Property Rights) or any law; or

### any claim arising in relation to any content of Customer Data,

### except to the extent any such Claim or Loss arises from a breach of this Agreement by Supplier, the negligence of Supplier or a Claim or Loss for which Supplier indemnifies Customer under this Agreement.

## General

The defence and indemnification obligations provided for in this clause 14 are conditional upon:

### the indemnified party providing the indemnifying party timely notice of any claim or cause of action upon which the indemnified party intends to base a claim of indemnification;

### the indemnified party providing reasonable assistance and cooperation to enable the indemnifying party to defend the action or claim; and

### the indemnified party allowing the indemnifying party to control the defence and all related settlement negotiations, provided that the indemnifying party may not settle any claim that results in the indemnified party's liability and the indemnifying party will be required to consult in good faith with the indemnified party during any settlement discussions.

## Survival

## The provisions of this clause 14 will survive the termination or expiry of this Agreement.

# Limit on liability

## Rights under statute

### Nothing in this Agreement restricts, excludes or modifies any consumer rights under any statute including the *Competition and Consumer Act 2010* (Cth), the *Consumer Guarantees Act 1993* (NZ) or the *Fair Trading Act 1986* (NZ) where to do so would breach that statute.

## Exclusion of liability

### Supplier will not have any liability to any party (including Customer) because of any act or omission of Supplier or its Personnel, where such act or omission is specifically required by a direction to Supplier or its Personnel from a Regulatory Body purporting to exercise its functions or powers.

## Consequential Loss

### To the full extent permitted by law, neither party is liable to the other party for any Consequential Loss arising out of or in relation to this Agreement.

## Conditions, warranties and representations excluded

### Except for conditions, warranties and representations expressly stated in this Agreement, to the extent permitted by law each party excludes all conditions, warranties and representations under or in connection with this Agreement and agrees that it does not rely on any representation by the other party that is not expressly stated in this Agreement.

## Limitation of liability

### Each party's total aggregate liability in respect of all Claims or Losses arising under or in connection with this Agreement (including in negligence but not including Customer's liability to pay any fee or charge to Supplier under this Agreement) will not exceed the total fees paid by Customer to Supplier under this Agreement in the 12 months preceding the events giving rise to the relevant Claim(s) or Loss(es).

### Each party's liability under or in connection with this Agreement (including in negligence) will be reduced by the extent, if any, to which the other party or its Personnel contributed to the relevant Loss.

### Each party must take reasonable steps to mitigate any Loss it suffers as a result of a breach by the other party of this Agreement or the negligence of the other party or the other party's Personnel.

### To the extent permitted by law, a party's liability for breach of any condition, warranty or guarantee imposed by statute that cannot be excluded and the other party's sole and exclusive remedy in relation to such breach will be limited to (at the first party's election):

#### in the case of goods:

##### replacement or repair of the goods or supplying the equivalent goods again; or

##### paying the cost of replacing or repairing the goods or of acquiring equivalent goods; and

#### in the case of services:

##### supplying the services again; or

##### paying the cost of having the services supplied again.

## Survival

## The provisions of this clause 15 will survive the termination or expiry of this Agreement.

# Insurance

### Each party must effect and maintain at its own expense the following insurance policies until the termination or expiry of this Agreement and for at least 3 years after that:

#### in the case of Supplier: professional indemnity insurance with a policy value of not less than $10,000,000; and

#### in the case of each party: public liability insurance with a policy value of not less than $10,000,000.

### Upon request, each party will promptly provide to the other party a copy of the certificate of currency for each of its insurance policies specified in clause 16(a).

### This clause 16 will survive the termination or expiry of this Agreement.

# Suspension and Termination

## Suspension and Termination

### Without limiting Supplier's rights in respect of any breach of this Agreement, if Customer breaches any material obligation in this Agreement and (if the breach is capable of rectification) does not remedy that breach to Supplier's reasonable satisfaction within 5 Business Days of receiving written notice of the breach from Supplier, Supplier may suspend Customer's or any of its Personnel's access to or use of any or all of the Software and the Documentation and may suspend provision of any Services until the breach is remedied to Supplier's reasonable satisfaction.

### Without limiting the generality of any other clause in this Agreement, a party may terminate this Agreement by written notice to the other party if the other party:

#### breaches a material term of this Agreement and does not remedy the breach within 14 days of receiving a notice of the breach, or

#### breaches a material term of this Agreement that is not capable of remedy; or

#### becomes, threatens or resolves to become or is in jeopardy of becoming insolvent or subject to any bankruptcy, receivership, external administration or other form of insolvency administration, or makes a composition or arrangement with its creditors, and fails to make any payment when due under this Agreement;

#### being a partnership, dissolves, threatens or resolves to dissolve or is in jeopardy of dissolving; or

#### ceases or threatens to cease conducting its business in the normal manner.

### At any time after the Initial Term, unless this Agreement is a Fixed Term Agreement, either party may terminate this Agreement without cause by 90 days prior written notice to the other party.

### Neither party is entitled to terminate this Agreement except as expressly stated in this Agreement.

## Consequences of termination

### Upon termination or expiry of this Agreement, Customer must promptly at Supplier's option either return or destroy the Software and Documentation in Customer's possession or control, and all copies thereof. Customer must promptly certify in writing to Supplier that it has complied with its obligations under this clause 17.2.

### Termination or expiry of this Agreement will not prejudice any rights of either party which have arisen on or before the date of termination or expiry, including any right of Customer to receive a refund from Supplier stated in this Agreement.

# Dispute Resolution

## First Step

A party must use its best efforts and enter into good faith negotiations with the other party to resolve any dispute under or in connection with this Agreement before taking any further action.

## Escalation

If the parties have been unable to resolve the dispute through the negotiations specified in clause 18.1 within 20 Business Days, then the parties' representatives will meet with a view to resolving the dispute.

## Mediation

If the process in clause 18.2 fails to resolve the dispute to each of the parties’ reasonable satisfaction, the parties will appoint a mutually agreed third party mediator to mediate the dispute, the costs of which will be shared equally between the parties.

## Expert Determination

### If the parties cannot agree on the identity of a mediator within 7 days after either party notifies the other party that the dispute is to be referred for mediation, an Expert will be nominated at the request of either party, by the President for the time being (or their nominee) of the Law Institute of Victoria (or if that organisation ceases to exist or fails to nominate an Expert within a reasonable period, a similar and independent organisation nominated by the party).

### The determination of the Expert will be final and binding on the parties except in the case of manifest error.

### The Expert will be free to decide the determination procedure to be adopted and the parties will execute all documents that the Expert reasonably requests that they execute in order to implement that procedure.

### The Expert will act as an expert and not as an arbitrator.

## Confidential and Without Prejudice

All negotiations connected with dispute resolution under this clause 18 must be conducted in strict confidence, and are without prejudice to the rights of the parties in any further legal proceedings.

## Costs

Each party must pay its own costs in relation to complying with this clause 18 except for the costs and expenses of any Expert which will be borne by the parties equally.

## Interlocutory Relief

Nothing in this clause 18 restricts or prevents a party from applying for urgent interlocutory relief.

# Relationship

The parties are independent contractors. Nothing in this Agreement will create the relationship of partnership, joint venturers, principal and agent, trustee and beneficiary or employer and employee between the parties, and it is the express intention of the parties that any such relationships are denied.

# General provisions

## Special Conditions

The Special Conditions (if any) form part of this Agreement. If there are any inconsistencies between the terms of this Agreement and the Special Conditions, the Special Conditions will prevail to the extent of the inconsistency.

## Force Majeure

### Neither party will be responsible for a failure to perform any obligation under this Agreement (except an obligation to pay money) to the extent that it is caused by a Force Majeure Event, provided that such party has:

#### taken all reasonable steps to prevent and avoid the effects of the Force Majeure Event;

#### taken all reasonable steps to overcome and mitigate the effects of the Force Majeure Event as soon as reasonably practicable; and

#### on becoming aware of the Force Majeure Event, promptly informed the other party of the Force Majeure Event.

### In the event that the Force Majeure Event continues for more than 30 days starting on the day the impact of the Force Majeure Event starts, the unaffected party may terminate this Agreement by not less than 10 days' notice in writing to the affected party.

## Assignment

Customer must not assign any right or liability under this Agreement without the prior written consent of Supplier. Supplier may assign its rights or liabilities under this Agreement, or novate this Agreement, to a Related Body Corporate that has the resources and expertise to fully perform this Agreement and Customer must take all steps, including executing all documents, reasonably requested by Supplier for this purpose.

## Sub-contracting

Supplier may sub-contract the performance of this Agreement or any part of this Agreement upon obtaining Customer's prior written consent which consent must not be unreasonably withheld.

## Notices

### Any notice may be served by delivery in person, by email or by post to the address of the recipient specified in the Details Table or most recently notified by the recipient to the sender.

### Any notice is effective for the purposes of this Agreement upon delivery to the recipient before 4.00pm local time on a day in the place in or to which the notice is delivered or sent or otherwise at 9.00am on the next day following delivery or receipt.

## Governing law and jurisdiction

This Agreement is governed by the laws of Victoria, Australia. The parties irrevocably submit to the non-exclusive jurisdiction of the courts having jurisdiction in that state.

## Amendments

Any amendment to this Agreement has no force or effect, unless effected by an agreement executed by the parties.

## Third parties

This Agreement confers rights only upon a person expressed to be a party, and not upon any other person.

## Further assurances

Each party must execute any document and perform any action necessary to give full effect to this Agreement, whether before or after performance of this Agreement.

## Counterparts

This Agreement may be executed in any number of counterparts, all of which taken together are deemed to constitute one and the same document.

## Continuing performance

### The provisions of this Agreement do not merge with any action performed or document executed by any party for the purposes of performance of this Agreement.

### Any indemnity under this Agreement:

#### constitutes a liability separate and independent from any other liability under this Agreement or any other agreement; and

#### survives and continues after performance of this Agreement.

## Waiver

### No right under this Agreement shall be deemed to be waived except by notice in writing signed by the waiving party.

### Any failure by any party to exercise any right under this Agreement does not operate as a waiver and the single or partial exercise of any right by a party does not preclude any other or further exercise of that or any other right by that party.

## Remedies

The rights of a party under this Agreement are cumulative and not exclusive of any rights provided by law.

## Severability

Any provision of this Agreement which is invalid in any jurisdiction is invalid in that jurisdiction to that extent, without invalidating or affecting the remaining provisions of this Agreement or the validity of that provision in any other jurisdiction.

## Survival

Any term of this Agreement that is expressed to survive, or by its nature survives, the termination or expiry of this Agreement will survive and continue in effect following termination or expiry of this Agreement.

## Publicity

Notwithstanding clause 12, Supplier may announce the relationship set forth in this Agreement in a list of clients, press release, or similar public announcement without approval by Customer.

## Party acting as trustee

If a party enters into this Agreement as trustee of a trust, that party and its successors as trustee of the trust will be liable under this Agreement in its own right and as trustee of the trust. Nothing releases the party from any liability in its personal capacity. The party warrants that at the date of this Agreement:

### all the powers and discretions conferred by the deed establishing the trust are capable of being validly exercised by the party as trustee and have not been varied or revoked and the trust is a valid and subsisting trust;

### the party is the sole trustee of the trust and has full and unfettered power under the terms of the deed establishing the trust to enter into and be bound by this Agreement on behalf of the trust and that this Agreement is being executed and entered into as part of the due and proper administration of the trust and for the benefit of the beneficiaries of the trust; and

### no restriction on the party’s right of indemnity out of or lien over the trust's assets exists or will be created or permitted to exist and that right will have priority over the right of the beneficiaries to the trust's assets.

# Definitions and interpretation

## Definitions

In this Agreement unless the context otherwise requires:

**Authorised User** means Personnel of Customer whom Customer invites and/or permits to access and use the Software or the Documentation.

**Business Day** means a day that is not a Saturday, Sunday, public holiday or bank holiday in the Time Zone Location.

**Business Hours** means 8.30am to 5.30pm (in the Time Zone Location) on a Business Day.

**Changes** means any upgrades, maintenance, additions or removals of any features and functionality, redesign, improvements, or any other alterations to the Software.

**Claim** means any claim, action, proceeding or investigation of any nature or kind and includes the allegation of a claim.

**Commencement Date** means the date specified in the Details Table.

**Confidential Information** means, in relation to a party (for the purposes of this definition, the **Discloser**):

### information relating to or used by the Discloser, including know-how, trade secrets, ideas, marketing strategies and operational information;

### information concerning the current or proposed business affairs (including financial information, products, services, pricing, Intellectual Property Rights, customers and suppliers) or property of the Discloser; and

### other information which is disclosed, communicated or imparted by or on behalf of the Discloser in circumstances importing an obligation of confidence or which a reasonable person would have realised was of a confidential nature,

and the Confidential Information of Supplier includes the Documentation and the source code, object code, and details of the functionality of the Software, but Confidential Information excludes information which is:

### or becomes publicly known other than by breach of this Agreement or any other obligation of confidentiality; or

### developed or known independently by the receiving party without reliance on any of the Discloser’s Confidential Information.

**Consequential Loss** includes special, incidental, punitive, exemplary, indirect or consequential Losses, as well as business interruption losses, loss of revenue, anticipated savings, profits, goodwill, reputation, interest or business opportunity, costs of procurement or substitution of goods, technology or services, and loss of information or data (including the costs of recovering or reconstructing any lost or corrupted data).

**CPI** means:

### if the Supplier's address specified in the Details Table is in Australia – the all groups CPI weighted average of eight capital cities as published by the Australian Bureau of Statistics (or similar figure if that figure is not published); or

### if the Supplier's address specified in the Details Table is in New Zealand – the consumers price index as published by Stats NZ (or similar figure if that figure is not published).

**Customer Data** means any data inputted into the Software by Customer or Customer's Personnel.

**Customer Trade Marks** means the brands, logos and trademarks used by Customer to brand and promote itself and its products and services.

**Details Table** means the schedule on the first page of this Agreement.

**Documentation** means the manuals, documentation, instructions and training material associated with, or contained in, the Software and includes any update or amendment of such material provided by Supplier to Customer from time to time or made by Customer as may be permitted by this Agreement and any copy of the Documentation that Customer is permitted to make under this Agreement.

**Environment** means Customer's hosting and processing environment, including all hardware, software, storage space, power, Internet connectivity and other components to be used in conjunction with the Software.

**Expert** means a person who is duly qualified or generally recognised as an expert in the substance of the dispute to be resolved by the Expert.

**Force Majeure Event** means an event or circumstance whose occurrence and effects could not have been prevented or overcome, such as earthquakes, war, natural disasters, fire, flood, storm, riots, civil commotion, industrial disputes, malicious damage, failure of any utility service or transport network, viruses, denial of service attacks, other acts or omissions or service outages by third parties (including any Internet service provider) or breakdown of plant or equipment.

### **Further Term** means the further term stated in the Details Table.

**GST** means any tax, levy, charge or impost implemented under (as applicable) the *A New Tax System (Goods and Services Tax) Act 1999* (Cth) or the *Goods and Services Tax Act 1985* (NZ) (**GST Act**) or an Act of the Parliament of the Commonwealth of Australia or of the Parliament of New Zealand (as applicable) substantially in the form of, or which has a similar effect to, the GST Act.

**Initial Term** means the initial term stated in the Details Table.

**Installation Date** means the installation date stated in the Details Table.

**Intellectual Property Rights** means any intellectual property rights subsisting anywhere in the world, including:

### rights in relation to copyright (registered or unregistered), inventions (including patents, innovation patents and utility models), confidential information, technical information and know-how, registered and unregistered designs, registered and unregistered trade marks, and circuit layout rights, topography rights and rights in databases;

### any similar rights resulting from intellectual activity in the industrial, commercial, scientific, literary or artistic fields which subsist or may at any time subsist;

### any application and the right to apply for registration for any of the above; and

### any right of action against any party in connection with any of the above.

**Interest Rate** means:

### if the Customer's address specified in the Details Table is in Australia – the interest rate provided for by section 2 of the *Penalty Interest Rates Act 1983* (Vic), plus 2%; or

### if the Customer's address specified in the Details Table is in New Zealand – the Official Cash Rate as determined by the Reserve Bank of New Zealand, plus 10%.

**Legal Requirements** means any present and future obligation arising under laws, statutes, regulations, by-laws, codes, orders, ordinances, proclamations and decrees (provided such orders, ordinances, proclamations and decrees are legally binding).

**Licence Fee** means any fee or fees described as such in the Details Table.

**Licence Fee Schedule** means the schedule for invoicing of the Licence Fee, as specified in the Details Table.

**Location** means the location stated in the Details Table.

**Loss** means any loss, damage, liability, cost (including all legal and other professional costs), charge, expense, outgoing, fine or payment of any nature or kind.

**Payment Terms** means the timing of payments applicable to any Supplier invoices, as specified in the Details Table.

**Permitted Number of Users** means the permitted number of users stated in the Details Table.

**Personal Information** has the meaning given to that term in the Privacy Laws.

**Personnel** means the directors, officers, employees, contractors and subcontractors of the relevant party.

**Privacy Laws** means the *Privacy Act 1988* (Cth), the *Privacy Act 2020* (NZ) and any other laws or legally-binding codes of practice, guidelines or standards issued by regulators or authorities that apply to the collection, handling, disclosure and use of Personal Information by the parties.

**Regulatory Body** means any government or any governmental, semi-governmental, or judicial entity or authority, any self-regulatory organisation established or recognised under any statute or any stock exchange.

**Related Body Corporate** has the same meaning as in the *Corporations Act 2001* (Cth) and includes any relevant company wherever that company has been incorporated.

**Relevant Laws** means all laws and legally-binding codes of practice, guidelines or standards issued by relevant regulators or authorities or industry bodies including (as applicable) the Privacy Laws, the *Competition and Consumer Act 2010* (Cth), the *Consumer Guarantees Act 1993* (NZ) and the *Fair Trading Act 1986* (NZ).

**Service Fee** means any fee or fees as described as such in the Details Table.

**Services** means any services to be provided by Supplier under this Agreement, as may be varied from time to time by written agreement of the parties.

**Set-up Charge** means the charge stated as such in the Details Table.

**Software** means the software specified in the Details Table, including any specific software modules specified there, plus any other software agreed in writing by the parties to form part of the Software, and includes any replacement to, modification of, customisation of or addition to the Software supplied by Supplier under this Agreement or made by Customer as may be permitted by this Agreement and any copy of the Software that Customer is permitted to make under this Agreement.

**Special Conditions** means the additional terms set out in the Details Table.

**Supplier's Bank Account** means the bank account referred to in clause 10.8, as may be amended in accordance with that clause.

**Support and Maintenance Services** means any support and maintenance services to be provided by Supplier under this Agreement, as may be varied from time to time by written agreement of the parties.

**Term** means the term of this Agreement as described in clause 3.

**Test Environment Fee** means any fee or fees described as such in the Details Table.

**Time Zone Location** means the time zone location described as such in the Details Table.

**Training** means the training set out in the Details Table, and any other training agreed in writing by the parties.

**Training Fee** means any fee or fees described as such in the Details Table.

**Training** **Location** means the location for the delivery of Training set out in the Details Table or otherwise agreed in writing by the parties.

## Interpretation – Fixed Term Agreement

This Agreement is a Fixed Term Agreement if so stated in the Details Table.

## Interpretation – General

In this Agreement unless the context otherwise requires:

### clause and subclause headings are for reference purposes only;

### the singular includes the plural and vice versa;

### words denoting any gender include all genders;

### reference to a person includes any other entity recognised by law and vice versa;

### where a word or phrase is defined its other grammatical forms have a corresponding meaning;

### any reference to a party to this Agreement includes its successors and permitted assigns;

### any reference to any agreement or document includes that agreement or document as amended at any time;

### the use of the word "includes" or "including" is not to be taken as limiting the meaning of the words preceding it;

### the expression "at any time" includes reference to past, present and future time and the performance of any action from time to time;

### an agreement, representation or warranty on the part of two or more persons binds them jointly and severally;

### when a thing is required to be done or money required to be paid under this Agreement on a day which is not a Business Day, the thing must be done and the money paid on the immediately following Business Day;

### reference to "$" or "dollars" means Australian dollars or New Zealand dollars, as specified in the Details Table; and

### reference to a statute includes all regulations under and amendments to that statute and any statute passed in substitution for that statute or incorporating any of its provisions to the extent that they are incorporated.