

JCurve Business Software Pty Ltd

# JCurve Master Services Agreement

## DEFINITIONS AND INTERPRETATION

### 1.1 Definitions

In this document, unless the context requires otherwise:

**“Agreement”** means this agreement as amended from time to time and, includes the Quotation and each Schedule (where applicable).

**“Business Day”** means a weekday other than national public holidays in Australia.

**“Business Hours”** means the hours of 9:00am to 5:00pm Australian Eastern Standard time on a Business Day.

**“Claim”** means any claim, notice, demand, action, proceeding, litigation, investigation or judgment, however it arises and whether it is present or future, fixed or unascertained, actual or contingent.

**“Contract Date”** means the date the Customer signs the Quotation.

**“Customer”** means the person or organisation specified in the Quotation also referred to in this Agreement as “you”.

**“Customer Data”** means any data, documents or other materials provided by you to us.

**“Documentation”** means all training manuals, configuration documents, service levels and user guides supplied with the Software.

**“Effective Date”** means the date specified in the Quotation or otherwise agreed between us in writing by which you will have access to the Software.

**“Expenses”** means any out of pocket expenses specified in the Quotation or notified to you in writing.

**“Fees”** means the software licence, maintenance and support and service fees specified in the Quotation or Renewal Invoice, as adjusted from time to time in accordance with clause 6.4.

**“Hosted Solution”** means a version of the Software to which you are granted access that is installed on or accessed from a JCurve owned or controlled computer system via the Internet.

**“GST”** has the meaning given in section 195-1 of the A New Tax System (Software and Services Tax) Act 1999.

**“Installation”** means the process to be undertaken to enable you to have access to the Software.

**“Installation Date”** means the date specified in the Quotation or such other date as is agreed between us, when we will commence installation of the Software.

**“Intellectual Property”** means patents, copyright, registered and unregistered design rights, registered and unregistered trade marks, rights in know-how and confidential information and all other intellectual and industrial property rights (without limitation) and similar or analogous rights existing under the laws of any country and all rights to apply for or register such rights and includes any rights exercised under licence.

**“JCurve”** means JCurve Business Software Pty Ltd (ABN 84 094 525 587), a wholly owned subsidiary of JCurve Solutions Limited of Level 8, 9 Help Street, Chatswood, NSW, 2067 Australia and “us” or “we” has a corresponding meaning.

**“JCurve Intellectual Property”** means all Intellectual Property rights in or associated with the Software and the Documentation.

**“Login Information”** means the security or authentication credentials that are used to access the Website and/or the Software (where applicable) that may include a username, password and related account information.

**“Loss”** means any Claims, demands, costs, charges, loss or expenses and includes legal fees on a solicitor-client basis.

**“Minimum Specifications”** means the minimum hardware, software and operating system requirements in relation to use of the Software specified by us on the Website or in writing to you during the Term.

**“NetSuite”** means NetSuite Inc., a Delaware corporation having its offices at 2955 Campus Drive, Suite 100, San Mateo, CA 94403-2511, U.S.A.

**“NetSuite Agreement”** means the International Reseller Agreement between NetSuite and Gramell Investments dated 31 March 2009.

**“Quotation”** means the Quotation signed by you in addition to any Proposals or subsequent Quotations signed by you specifying the Software and/or Services provided pursuant to the terms of this Agreement and the relevant Fees and/or Expenses to be charged in relation to such Software and/or Services.

**“Personal Information”** means Personal Information as defined in the Privacy Act 1988 (Cth).

**“Renewal Invoice”** means any invoice pertaining to Software Maintenance and Support Services issued by us after the Initial Term.

**“Related Body Corporate”** has the meaning given to it in s50 of the Corporations Act 2001.

**“Services”** means any services provided to you in accordance with the terms and conditions of this Agreement and includes Software Maintenance and Support Services unless specified otherwise.

**“Software”** means the software specified in the Quotation and all enhancements and updates to it licensed to you for the duration of the Term including any data or documents accessed via the Software.

**“Software Maintenance and Support Services”** means the Services specified in clause 4.2 of this Agreement.

**“Tax”** means a tax, levy, duty, charge or deduction together with any related additional tax, interest, penalty, fine or other charge calculated by reference to the value of anything supplied other than one imposed on net income and includes without limitation any goods and services tax (GST).

**“Term”** means the period commencing on the Contract Date and continuing for the period(s) more particularly described in Quotation.

**“Third Party Software”** means (where applicable), third party proprietary software supplied by us to be used in conjunction with the Software.

**“Training”** training sessions provided by us to facilitate your use of the Software.

**“User”** means any employee or contractor engaged by you that uses the Software.

**“Website”** means the JCurve website used by you to access updates and other information relevant to your use of the Software, details of which will be provided to you as part of Installation.

## **1.2 Words and expressions**

In this document, unless the context requires otherwise:

- (a) the singular includes the plural and vice versa;
- (b) headings are for convenience and do not affect interpretation;
- (c) a reference to a party includes its executors, administrators, successors, substitutes (including persons taking by novation) and permitted assigns;
- (d) no rule of construction applies to the disadvantage of a party because that party was responsible for the preparation of this document or any part of it.

## **APPLICABILITY OF THESE TERMS**

**2.1** The terms and conditions of this Agreement apply to your use of the Software which is supplied in conjunction with the JCurve Subscription Agreement located at [www.jcurvesolutions.com/terms/jcurve-subscription-agreement/](http://www.jcurvesolutions.com/terms/jcurve-subscription-agreement/). We may make changes to these terms and conditions from time to time. If we do, we will notify you in writing before they take effect. Your continued use of the Software and/or payment of further Fees and Expenses due after the date we notify you of a change is deemed acceptance of those changes. If you do not want to accept the changes, you are entitled to terminate this Agreement by written notice to us within 30 days of receiving notice of the relevant changes.

**2.2** Third Party Software supplied in conjunction with the Software may be subject to separate terms and conditions specified by those manufacturers. Such terms will be provided to you in conjunction with your licence of the relevant software.

## **TERM AND LICENCE**

**3.1** This Agreement will remain in force for the duration of the Term, unless terminated earlier in accordance with clause 15.

### **Software Licence**

**3.2** In consideration of payment of the Fees, we grant to you, with effect from the Effective Date, a non-exclusive, non-transferable limited licence for the number of Users specified in the Quotation to use the Software, subject to the further terms and conditions set out in this Agreement.

### **Software Maintenance and Support**

**3.3** In consideration of the payment of the Software Maintenance and Support Fees specified in the Quotation, we undertake to provide Software Maintenance and Support Services associated with the updating and maintenance of the Software with effect from the Effective Date for the initial period specified in the Quotation ("Initial Term").

**3.4** Subject to clause 3.5, at the end of the Initial Term, we will automatically continue to provide the Software Maintenance and Support Services for a further twelve months and thereafter for successive twelve month periods (each a "Renewal Period") unless terminated in accordance with the terms of this Agreement.

**3.5** Renewal of the Software Maintenance and Support Services may, at our discretion, be subject to an adjustment in the relevant Fees in accordance with clause 6.4.

**3.6** If you have not paid any amount which has fallen due for payment or you are otherwise in breach of the terms of this Agreement, we may (at our discretion) decline to provide ongoing Software Maintenance and Support Services.

## **OUR OBLIGATIONS**

### **4.1 Installation**

(a) We will commence installation of the Software specified in the Quotation on the Installation Date.

(b) We will make all reasonable efforts to provide the Software by the Effective Date and with all reasonable care, competence and diligence, and assign sufficient personnel to provide the Software and the Services.

(c) We may choose and substitute personnel assigned by us to provide the Services at any time during the Term.

(d) We shall supply such information and guidance as is reasonably required to prepare the site for the Installation of the Software.

(e) We will make such adjustments as are reasonable and necessary to address any issues that you raise in relation to the Installation, provided that you do so within 30 days of the Effective Date.

### **4.2 Software Maintenance and Support Services**

(a) The following ongoing support shall be provided during the Term in consideration of your timely payment of the Fees set out in the Quotation:

(i) any solutions become known and published by us;

(ii) corrections to material problems that we are able to reproduce and/or diagnose;

(iii) enhancements and updates to the Software that we elect to incorporate into and make a part of the Software and that we do not separately market; and

(iv) support reasonably required for the use and maintenance of the Software.

(b) Support will be provided during Business Hours and in the form of an online knowledgebase, consultation, and advice.

(c) Where you request support to be provided outside of Business Hours, we shall be entitled to charge an additional Fee for those Services.

### **4.3 Exclusions**

Support to be provided by us does not include support of or for:

(a) use of Software in an operating environment not designated to satisfy the Minimum Specifications; or

(b) support required because of a failure to undertake the Training provided by us.

### **4.4 Platform or System Upgrades and Discontinuance**

We reserve the right to modify the Website or any component of the Software at any time in the sole exercise of our discretion to the extent reasonably required due to changes in law, security policy or to modify or upgrade the Software in order to address changes in technical requirements;

provided however that we ensure that the basic functionality of the Software is still accessible to you.

## **YOUR OBLIGATIONS**

### **5.1 Installation**

- (a) You agree to comply with the timeline to be agreed between us.
- (b) You will arrange for specified personnel to attend the Training that you agree to undertake.
- (c) You will provide all assistance reasonably required by us to complete the Installation including any assistance required with the transfer of Customer Data from any legacy software or system previously used by you.
- (d) You agree to notify us of the names and contact details of the personnel designated by you to manage the Installation and to be your principal point of contact with us during the Term.
- (e) You acknowledge that any adjustments requested more than 30 days after the Effective Date that constitute customisation may attract additional Fees. We will notify you in writing of any such additional Fees prior to undertaking the relevant work.
- (f) You agree that Installation will be completed by the Effective Date or such other timeline as is agreed between us.
- (g) You agree to install all updates made available by us within three months of delivery or of being given notice of the availability of that update either directly or via our Website (where applicable).
- (h) You also agree that if we have to undertake further work to complete the Installation solely because of your delay, we will be entitled to charge you additional Fees for that work.

### **5.2 Equipment**

- (a) You agree that for the duration of the Term you will comply with the Minimum Specifications.
- (b) You acknowledge that we are in no way responsible for any deficiencies in the hardware or software used by you to access the Software.

### **5.3 Regulatory Requirements**

You acknowledge that it is your responsibility to ensure at all times that you use of the Software complies with any relevant standards, regulations, laws or industry codes of practice.

### **5.4 Prohibited conduct**

You acknowledge and agree that you will not and you will procure that each User will not:

- (a) use the Software and Documentation other than as provided in this Agreement;
- (b) use the Software other than within the parameters specified in the Quotation or this Agreement;
- (c) access or attempt to access the source code of the Software;
- (d) copy (other than in the normal operation of the Software), reverse engineer, adapt, decompile, vary or modify the Software or attempt to do so;
- (e) supply, provide, sub-license, rent or otherwise make the Software available in whole or in part, in any form, to a person who is not a User;
- (f) use the Software in any unlawful manner to contravene any statute or other law, infringe the rights of any person or in any way likely to expose us to liability;
- (g) knowingly transmit any virus or other disabling feature or use another person's name, access codes or other confidential information;
- (h) disclose the Login Information to any unauthorised third party; or
- (i) permit another person to do any of the above acts.

### **5.5 Audit**

You agree that we may, on reasonable notice, audit or have your use of the Software audited by our authorised representative to assess your compliance with the terms of the licence set out in this Agreement.

## **PAYMENT**

**6.1** You agree to pay the Fees and Expenses (plus any relevant Taxes) as specified in the Quotation(s) or Invoice.

**6.2** Fees must be paid within the time period specified in the Quotation or where no time period is specified, within 30 days of the invoice date.

**6.3** Payments made by credit card may be subject to a surcharge. We reserve the right to make changes to this surcharge from time to time or to extend the surcharge to other methods of payment. If we do make any changes, we will notify you in writing before the changes take effect.

**6.4** You acknowledge that we revise our fee scale periodically and the continued provision of Software Maintenance and Support Services is subject to payment of the Fees on the basis of the fee scale current at the commencement of each Renewal Period.

**6.5** We reserve the right to charge you an additional charge for any additional Services which include, without limitation:

- (a) additional work undertaken by us because of delay on your part;
- (b) an increase in the number of Users;
- (c) any query from you that does not relate to the basic functionality of the Software;
- (d) any services required to better utilise, customise or modify, adapt, develop or expand the Software or change its functionality;
- (e) on-site attendance at your premises at your request;
- (f) issues that are already covered in the Documentation;
- (g) issues that reveal that the Minimum Specifications are not satisfied;
- (h) issues requiring a response due to the relevant User not having undertaken Training;
- (i) requests for additional Training; and
- (j) Services that are required outside of the Business Day.

Where Services referred to in clause 6.5 are requested by you and agreed to by us, an Quotation will be issued by us and will apply to the provision of those services. Such Services will only commence once you have agreed to and signed the relevant Quotation issued by us in relation to the additional Services. You also agree that we will be entitled to charge you for any Expenses we incur in connection with the provision of those services provided that the details of such Expenses are notified to you in advance and we have obtained your prior written approval to incur that Expense.

**6.6** If any payment owing to us is not made by the due date for that payment, we may, without prejudice to our rights under clause 15, suspend the Software Maintenance and Support Services or any of our other obligations to you under this Agreement, until we receive such payment from you.

## **TAXES**

**7.1** Any amount payable by you in terms of this Agreement is inclusive of GST.

**7.2** If the amount of GST paid or payable by us on a supply made to you differs from the amount of GST you have paid to us for the products or services sold, then the amount of GST paid by you will be adjusted either by further payment by you to us or repayment to you by us of the amount of the adjustment.

**7.3** In relation to any GST paid by a party under this Agreement, including any adjustment, the payee will provide the pay or with a tax invoice.

## **INTELLECTUAL PROPERTY**

**8.1** You acknowledge that:

- (a) we own or are licensed to use all JCurve's and NetSuite's Intellectual Property; and
- (b) you must not, during or after the Term, whether directly or indirectly, dispute our ownership of such Intellectual Property.

**8.2** You warrant that our use of, or access to, the Customer Data to the extent required to deliver the Services to you will not infringe any third party Intellectual Property rights.

**8.3** You agree to notify us as soon as possible if you become aware of any infringement of our Intellectual Property or if you become aware of any Claim made or threatened against you arising from your use of the Software.

**8.4** You also agree that we will (at our discretion) have the sole right to defend any infringement claim and to agree any settlements in relation to such a claim and you agree to provide all

assistance reasonably required by us in relation to any infringement proceedings brought by or against us, subject to the payment of your reasonable out of pocket expenses.

**8.5** We may, if we desire to minimise our liability for any third party Claim, at our option and expense:

- (a) substitute in whole or in part, non-infringing software that is substantially similar to that of the allegedly infringing Software;
- (b) modify the Software to remove the component the subject of the Claim, provided that the utility remains substantially equivalent; or
- (c) obtain for you the right to continue use of the Software.

**8.6** If, in our discretion, none of the options set out in 8.5 are commercially reasonable, we may terminate this Agreement with respect to the allegedly infringing Software or component part and refund to you on a pro-rated basis any pre-paid Fees attributable to the allegedly infringing Software or component.

## **REPRESENTATIONS AND WARRANTIES**

### **9.1 Joint warranties**

Each party represents and warrants to the other party as at the Contract Date that:

- (a) it has the power and has taken all corporate and other action required to enter into this Agreement and to authorise the execution and delivery of this Agreement and the performance of its obligations;
- (b) this Agreement constitutes a valid and legally binding obligation that is enforceable against it; and
- (c) the execution, delivery and performance of this Agreement does not violate any existing law or any document or agreement to which it is a party or which is binding on it or any of its assets.

### **9.2 JCurve's warranties**

We warrant that:

- (a) as at the Contract Date:
  - (i) we are entitled to grant a licence to you in accordance with the terms of this Agreement; and
  - (ii) to the best of our knowledge, the use of the Software by you in accordance with the terms and conditions of this Agreement will not infringe the copyright of any third party;
- (b) at the Effective Date the Software:
  - (i) is free from material defects or errors; and
  - (ii) will operate in substantial conformity with its published specifications;
- (c) when providing support, we shall at all times:
  - (i) employ appropriate techniques and standards;
  - (ii) engage personnel of suitable training and experience; and
  - (iii) exercise due care, skill and attention.

### **9.3 No warranty**

We do not warrant that:

- (a) the operation of the Software will be uninterrupted, virus free or error free or conform to any reliability or performance standards beyond those specified in the Documentation;
- (b) the Software or any component thereof will operate and function effectively and accurately if you do not employ the Minimum Specifications;
- (c) the Software is fit for any purpose other than the purposes specified in this Agreement;
- (d) that information will continue to be available to us to enable us to keep the Software; or
- (e) that the Software can be integrated with any other software or any network or server.

### **9.4 When warranties do not apply**

The warranties provided in clause 9 will not apply if failure of the Software results from a breach by you of any of your obligations under this Agreement.

### **9.5 Status of warranties**

All representations and warranties in this Agreement remain in full force and effect during the Term.

## **LIABILITY OF JCURVE**

**10.1** To the fullest extent permitted by law, we expressly exclude all terms, representations and warranties that otherwise would be implied by law into this Agreement.

**10.2** Where any term or condition imposing liability is implied through the operation of any law, and that term or condition cannot be excluded, our liability for a breach of such a term or warranty will be limited, at our option, to any one or more of the following:

(a) if the breach relates to Software:

(i) the replacement of the Software or the supply of equivalent Software ;

(ii) the repair of such Software;

(iii) the payment of the cost of replacing the Software or of acquiring equivalent Software; or

(iv) the payment of the cost of having the Software repaired; and

(b) if the breach relates to Services:

(i) the supplying of the Services again; or

(ii) the payment of the cost of having the Services supplied again.

**10.3** If we are held or found to be liable to you for any matter relating to or arising in connection with this Agreement, whether based on an action or claim in contract, negligence, tort or otherwise, our maximum aggregate liability will be an amount equal to the licence fees paid by you to us in the 12 months immediately preceding the date on which that claim arose.

**10.4** Notwithstanding anything else in this Agreement, we expressly exclude liability for:

(a) indirect, special, incidental, or consequential loss or damage which may arise in respect of this Agreement or use of the Software or other equipment or property;

(b) loss of profit, business, revenue, goodwill or anticipated savings;

(c) any Claim made against you by any third party arising from your use of the Software (other than a Claim that the Software infringes their Intellectual Property); and

(d) the outcomes of any use of the Software.

**10.5** Except to the extent required by any applicable law or regulation, including but not limited to the Competition and Consumer Act 2010 (Cth) (or any legislation which amends or repeals that law), the remedies set forth in this paragraph are your sole and exclusive remedies, and our sole and exclusive liability for the failure of the Software to conform to the Documentation.

## **SUSPENSION OF ACCESS TO THE WEBSITE AND/OR HOSTED SOLUTIONS**

**11.1** We may, without notice, suspend access to the Website or (where applicable) a Hosted Solution, in whole or in part, until further notice and with immediate effect:

(a) if we believe that the Software or Documentation may be used in such a way as may constitute a breach of this Agreement; or

(b) if you fail to pay all or any part of the Fees or Expenses by the due date.

**11.2** Whilst we will use our best endeavours to minimise disruption to the Website and/or Hosted Solution, unscheduled outages may occur from time to time.

## **FORCE MAJEURE**

**12.1** No failure or omission by either party to carry out or observe any of the terms and conditions of this Agreement shall give rise to any claim against it or be deemed a breach of this Agreement if such failure or omission arises from any cause reasonably beyond its control including but not limited to act of God, war (whether declared or not), sabotage, riot, insurrection, terrorist action, civil commotion, labour disturbance, acts or omissions of telecommunications operators, national emergency (whether in fact or in law), martial law, fire, flood, cyclone, earthquake, landslide or explosion affecting or referable to a party's obligations under this Agreement ("Force Majeure Event").

## **CONFIDENTIALITY**

**13.1** For the purposes of this Agreement, "Confidential Information" means all non- public information or documents which either party receives or produces in connection with this Agreement and includes without limitation, the Software, the Documentation and any working

papers, proposal or tender document, information and methodologies prepared by us prior to the conclusion of this Agreement and JCurve's Intellectual Property in relation to any of those materials, but does not include any information which:

- (a) is or becomes generally available to the public other than as a result of a breach of this clause;
- (b) is known to either party prior to entering into discussions regarding this Agreement; or
- (c) either party acquires on a non-confidential basis from a third party entitled to disclose it.

**13.2** Neither party may disclose Confidential Information about or belonging to the other without the other's prior written consent.

**13.3** Notwithstanding the above, either party may disclose Confidential Information:

- (a) to a Related Body Corporate in relation to the provision of the Software;
- (b) to their insurers or legal advisors provided that the Confidential Information remains confidential;
- (c) if required to do so by law, rule or regulation; or
- (d) if required for the proper performance of its obligations under this Agreement.
- (e) Notwithstanding any other provision of this clause 13, you agree that we may reference your use of the Software in our advertising and promotional materials.

## **PRIVACY AND CUSTOMER DATA**

**14.1** Where access to the Software is provided via a Hosted Solution, we undertake to take reasonable measures to provide a secure environment for receipt and transmission of information. However, since use of the Software depends in part on third parties such as telecommunications carriers whose performance is outside of our control, we disclaim all liability for damages arising from the failure of the Software due to such third parties' performance. We also disclaim all liability for damages arising from the disclosure or dissemination of information during transmission to or from the Software, although such information shall be encrypted while in transmission. Notwithstanding anything to the contrary express or implied, we will have no responsibility for delays or errors related to the Software caused by systems or components outside of our network, including but not limited to your hardware, software and/or networking systems, telecommunications systems, Internet access, telephone access lines and telephone and communications equipment.

**14.2** As soon as is reasonably possible, we will notify you of any actual, attempted or threatened breaches in security, or unauthorised or suspicious access to the Software indicating that an individual may have damaged, or intends to damage the Software or gain unauthorised access to the Software in a way that would adversely affect your information, including any corruption, loss or mis-transmission of data, or any breach of data security during transmission and storage. In the event of any such security breach, we will perform a root cause analysis to identify the cause of such security breach and shall, on an expedited basis, provide you with a report detailing the cause of such a security breach.

**14.3** Disclosure and use of any Personal Information by the parties is subject to the Privacy Act 1988 (Cth) ("Privacy Act").

**14.4** Each party will comply with the privacy laws applicable to that party's performance of its obligations under this Agreement.

**14.5** You warrant that use and disclosure of Personal Information by us in accordance with the terms of this Agreement will not result in a breach of the Privacy Act by either of us.

**14.6** You are responsible for ensuring that if a third party is required to disclose Personal Information to us for the purposes of this Agreement on your behalf or at your request, such disclosure by the third party complies with the Privacy Act.

**14.7** If we are required to retain any Personal Information by law:

- (a) you have taken all steps to ensure that we are permitted to do so; and
- (b) on reasonable notice, and the payment of a reasonable charge, we will make such information available for inspection by you and your auditors.

**14.8** You expressly acknowledge and consent to:

- (a) us transferring and disclosing Personal Information provided by you to us to third party service providers located outside of Australia to the extent required in providing access to, maintaining and servicing the Software as part of our information technology arrangements; and
- (b) such third party service providers storing and processing such Personal Information provided by you on servers outside of Australia.

## **TERMINATION**

**15.1** We may terminate this Agreement immediately by written notice:

- (a) if you commit a breach of a material provision of this Agreement that:
  - (i) if capable of being remedied, is not remedied within 90 days of the date of notice from us specifying the breach and requiring it to be remedied; or
  - (ii) is not capable of remedy;
- (b) if we are required to do so to comply with any law, order, instruction or direction issued to us by any governmental, legal, judicial, regulatory or other like body; or
- (c) at any time during the Term, if we have given you 120 days prior written notice that we can no longer (for whatever reason) support or maintain the Software.

**15.2** You may terminate this Agreement:

- (a) on 90 days prior written notice at any time during the Term, to take effect after the expiry of the Initial Term, or the anniversary of the expiry of the initial term; or
- (b) at any time during the Term, immediately by written notice if we commit a breach of a material provision of this Agreement which:
  - (i) if capable of remedy has not been remedied within 90 days of notice from you specifying the breach and requiring it to be remedied; or
  - (ii) is not capable of remedy.

**15.3** Either party may terminate this Agreement by notice in writing immediately:

- (a) if the other party is subject to bankruptcy or insolvency proceedings or, becomes insolvent, makes any composition or arrangement with or assignment for the benefit of its creditors, or goes into either voluntary (otherwise than for reconstruction or amalgamation) or compulsory liquidation, or a receiver or administrator is appointed over its assets, or anything analogous to the foregoing occurs in respect of that party; or
- (b) if either party is unable to perform for a period of 60 days or more due to the occurrence of a Force Majeure Event.

## **CONSEQUENCES OF TERMINATION**

**16.1** If this Agreement is terminated, you will:

- (a) immediately pay to us the amount of all Fees and Expenses due for payment; and
- (b) no longer receive the Software Maintenance and Support Service.

**16.2** If this Agreement is terminated for any of the reasons specified in clauses 15.1(a) or 15.3(a), you agree to pay to us the reasonable costs (including legal costs) incurred by us as a result of termination within 7 days of written demand by us.

**16.3** Following termination, we:

- (a) may charge a reasonable sum for work performed which has been authorised by you in respect of which no sum has been previously charged;
- (b) will be regarded as discharged from any further obligations under this Agreement; and
- (c) may pursue any additional or alternative remedies provided by law.

**16.4** If we cancel this Agreement other than for cause, we will issue you with a credit or refund the Fees paid by you in respect of any unexpired portion of the Term relating to Services not yet supplied.

**16.5** In the event that this Agreement is terminated and there are no outstanding Fees and Expenses, we will give all reasonable assistance to enable you to transition to another provider (where applicable) at your request and subject to payment of an agreed Fee for providing that Service.

**16.6** Termination of this Agreement does not affect any accrued rights or remedies of either party.

**16.7** Clauses 8, 9, 13 and 16 survive termination of this Agreement.

### **ELECTRONIC MAIL**

**17.1** We may send documents and information to you electronically. You acknowledge that we are not liable in respect of:

- (a) any error, omission or loss of confidentiality arising from an electronic communication;
- (b) any unauthorised copying, recording or interference with a document;
- (c) any delay or non-delivery of a document; or
- (d) any damage caused to your system or files by such electronic transmission (including by any computer virus).

### **DISPUTES**

**18.1** Except where a Claim relates to a debt or injunctive relief is sought, the parties must use all reasonable efforts in good faith to resolve any dispute which arises between them in connection with this Agreement.

**18.2** Any dispute or difference which arises between the parties and which cannot be resolved under clause 18.1 shall, by notice by either party to the other, be referred to compulsory mediation under the following provisions:

- (a) such dispute shall be settled by a mediator appointed by agreement of the parties, or, in the absence of agreement by a suitably qualified independent mediator appointed by the President of the New South Wales Law Society as requested by either of the parties, the costs of which will be borne equally between the parties; and
- (b) the mediation shall be conducted in Sydney, Australia.

**18.3** Except where a Claim relates to a debt or injunctive relief neither party may commence proceedings in any Court to enforce its rights under this Agreement, without first conducting a mediation in accordance with clause 18.2.

**18.4** The parties shall continue to perform their obligations under this Agreement in all respects as if no dispute had arisen pending the final resolution of any dispute or difference.

### **EMPLOYEES**

**19.1** Neither party shall during the Term or for the 12 month period following the date of termination of this Agreement, solicit for employment, whether directly or indirectly through an associated or subsidiary company or otherwise, any person who is employed by the other party.

### **NOTICES**

#### **20.1 Method**

All notices, requests, demands, consents, approvals, offers, agreements or other communications ("Notices") given by a party under or in connection with this Agreement must be:

- (a) in writing;
- (b) signed by a person duly authorised by the sender or, where transmitted by email, sent by a person duly authorised by the sender;
- (c) directed to the intended recipient's address; and
- (d) hand delivered, sent by prepaid post or transmitted by email or facsimile to that address.

#### **20.2 Receipt**

A Notice given in accordance with this clause is taken as having been given and received:

- (a) if hand delivered, on delivery;
- (b) if sent by prepaid post:
  - (i) within Australia, on the fourth Business Day after the date of posting;
  - (ii) to or from a place outside Australia, on the seventh Business Day after the date of posting;
- (c) if transmitted by email, on transmission; or
- (d) if transmitted by facsimile, at the time recorded on the transmission report indicating successful transmission of the entire notice,

but if the delivery or transmission is not on a Business Day or is after 5.00pm (recipient's time) on a Business Day, the Notice is taken to be received at 9.00am (recipient's time) on the next Business Day.

### **20.3 Address of parties**

Unless varied by notice in accordance with this clause 20.3, the parties' addresses are as stated in the Quotation. All communications from you to us should be marked for the attention of the relevant account manager.

## **GENERAL**

### **21.1 Entire agreement**

This Agreement constitutes the entire agreement between the parties in relation to its subject matter. All prior discussions, undertakings, agreements, representations, warranties and indemnities are replaced by this Agreement and have no further effect (except for the purposes specified in clause 13).

### **21.2 Priority**

If this Agreement conflicts with any other document, agreement or arrangement, this document prevails to the extent of the inconsistency.

### **21.3 Attorneys**

Each person who executes this Agreement on behalf of a party under a power of attorney warrants that he or she has no notice of the revocation of that power or of any fact or circumstance that might affect his or her authority to execute this document under that power.

### **21.4 Severability**

If any part or all of any provision of this Agreement is, or becomes, illegal or unenforceable it will be severed from this Agreement and will not affect the continued operation of the remaining provisions of this Agreement.

### **21.5 Amendment and Variation**

This Agreement may only be validly varied, modified, amended or added to if the variation is in writing, and is authorised and signed by an authorised signatory of each party.

### **21.6 Assignment**

Neither party may assign its rights and remedies nor transfer its obligations under this Agreement without the prior written consent of the other party, which consent shall not be unreasonably withheld. However, upon written notice to the other party, either party may assign this Agreement to any present or future Related Body Corporate or as part of the sale of its business pertaining to the Software provided hereunder, or pursuant to any merger, consolidation, or other reorganisation, without the other party's consent PROVIDED THAT the assignee is solvent and capable of performing the assignor's obligations contemplated in this Agreement. An assignee of either party, as authorised hereunder, shall assume all of the rights and obligations of the assigning party set forth in this Agreement.

### **21.7 Waiver**

Waiver of any power or right under this Agreement:

- (a) must be in writing signed by the party entitled to the benefit of that power or right; and
- (b) is effective only to the extent set out in that written waiver.

### **21.8 Rights, remedies additional**

Any rights and remedies that a person may have under this document are in addition to and do not replace or limit any other rights or remedies that the person may have.

### **21.9 Counterparts**

This Agreement may be executed in one or more counterpart copies, including facsimile copies, which, taken together, shall constitute one and the same document (provided that this Agreement shall not bind any of the parties until each of the parties have executed this Agreement).

### **21.10 Governing law and jurisdiction**

This Agreement will be governed by and construed in accordance with the laws in force in the State of New South Wales and each party submits to the exclusive jurisdiction of the courts of that State.