

## General Terms and Conditions

All orders or requests for the supply, manufacture or hire of goods, equipment or services by Avcatech Pty Ltd (ABN 80 633 111 056) and its related entities ("Seller") are subject to the Seller's general terms and conditions of sale ("**Terms and Conditions**") as printed below and as varied from time to time by the Seller in its sole discretion.

### 1. DEFINITIONS AND INTERPRETATION

1.1 **Definitions.** In these Terms and Conditions, unless the context requires otherwise:

- (a) **Application** means the software applications and platforms which the Seller makes available online via websites specified by the Seller from time to time, via mobile app versions that may be downloaded to devices such as smartphones or tablets (including any accompanying documentation supplied to the Buyer), or via other telecommunications or multimedia systems made available by the Seller.
- (b) **Buyer** means the person who requests to purchase or who orders Goods or Hire Equipment from the Seller or who is named in an Order or a Quotation for Goods or Hire Equipment or in an application for a commercial credit account application form with the Seller.
- (c) **Business Day** means any day which is not a Saturday, Sunday or public holiday in Victoria, Australia.
- (d) **Content** means all content, text, data, information, recordings, measurements, photos, illustrations, images results, outputs or other material that is displayed in, recorded by, stored in, transmitted by, retrievable from or otherwise communicated via the Application or the Goods or Hire Equipment.
- (e) **Contract** has the meaning given in clause 2(b).
- (f) **Credit Terms** means the terms and conditions of credit contained in the application for a commercial credit account application with the Seller completed by the Buyer and approved by the Seller.
- (g) **Goods** means any articles, products, materials or similar objects, or any services which are supplied, or to be supplied, for sale by the Seller to the Buyer under a Contract.
- (h) **GST** means the tax created by A New Tax System (Goods and Services Tax) Act 1999 (Commonwealth) and its associated legislation.
- (i) **Hire Charges** means the rates and charges for the Hire Equipment for the Hire Period.
- (j) **Hire Equipment** means any articles, products, devices or other equipment which are supplied, or to be supplied, for hire by the Seller to the Buyer under a Contract.
- (k) **Hire Period** means the period commencing from the date the Hire Equipment departs the premises of the Seller or its appointed agents and ending on the date the Hire Equipment is returned to the Seller or its appointed agents.
- (l) **Intellectual Property Rights** means all registered and unregistered intellectual property rights and industrial property rights in respect of copyright, patents, inventions, discoveries, designs, drawings, circuit layouts, trademarks and service marks and applications for any of the same, together with all trade secrets, know-how, moral rights, rights to confidentiality and other analogous rights, whether conferred by statute, common law or equity.
- (m) **Order** means an order placed, or a request or other offer made, by the Buyer to use the Application or Content, to purchase Goods or to hire Hire Equipment from the Seller.
- (n) **PPSA** means the Personal Property Securities Act 2009 (Commonwealth).
- (o) **Quotation** means the Seller's quotation specifying the Application or Content, Goods or Hire Equipment requested by the Buyer from the Seller and which may include pricing and payment information, delivery and/or return information, and any other terms applicable to the provision of the Application or Content, Goods or Hire Equipment to the Buyer.

1.2 **Interpretation.** In these Terms and Conditions, the following rules of interpretation apply:

- (a) **Headings** The headings are for convenience only and should not affect the construction of these Terms and Conditions and any Contract.
- (b) **Trade Terms** A reference to a trade term specified in any Contract is a reference to the definition given to that trade term in the Incoterms 2010 as published by the International Chamber of Commerce.
- (c) **Vienna Convention** Part IV of the Goods Act 1958 (Victoria) (and any similar legislation relating to the Vienna Convention in other States or Territories) does not apply to any Contract.

### 2. ACCEPTANCE AND FORMATION OF CONTRACT

- (a) Any Quotation for the supply of the Application, Content, Goods or Hire Equipment given by the Seller is indicative only and acceptance of a Quotation by the Buyer does not form a binding agreement until such acceptance is confirmed in writing by the Seller.
- (b) On acceptance in writing by the Seller of a Buyer's Order or the Buyer's acceptance of a Quotation for the Application, Content, Goods or Hire Equipment, a binding agreement is formed between the Seller and the Buyer in respect of the Application, Content, Goods and/or Hire Equipment on and subject to these Terms and Conditions, ("**Contract**"). All Orders and any variation of, addition to or cancellation of an Order, by the Buyer must be accepted in writing by the Seller to be binding on the Seller.
- (c) A Contract for the Application, Content, Goods and/or Hire Equipment is deemed to include these Terms and Conditions, the Seller's current price list for Goods, the Seller's current Hire Charges for Hire Equipment (as applicable), or fees for the Application, Content (as applicable) and any other information on the face of a Quotation or any invoice issued by the Seller to the Buyer for the relevant Application, Content, Goods and/or Hire Equipment.
- (d) By making a request for, accepting a Quotation or placing an Order for the Application, Content, Goods or to hire Hire Equipment from the Seller, the Buyer acknowledges that it is aware of the contents of, and agrees to be bound by, these Terms and Conditions (as varied from time to time) in respect of the Seller's supply of the Application, Content, or any particular Goods or hire of any particular Hire Equipment to the Buyer.
- (e) Unless expressly accepted in writing by the Seller, any qualification of these Terms and Conditions in a Buyer's purchaser order or anything contrary to or inconsistent with any of these Terms and Conditions proposed by the Buyer, is deemed to be and will be treated as inapplicable and will be of no effect.

### 3. DELIVERY

- (a) The Buyer acknowledges and agrees that time is not of the essence in relation to delivery of Goods or Hire Equipment and that the Seller will not in any circumstances be liable to the Buyer for any loss or damage (including any consequential loss or damage) arising from any delay in delivery, however caused.
- (b) The Buyer must accept and pay for the delivered Goods or Hire Equipment (as applicable) even if the Goods or Hire Equipment are delivered late or if the Seller makes partial delivery. The Seller may deliver the Goods or Hire Equipment in instalments and the Buyer must pay the applicable amount for that instalment as notified by the Seller in its invoice. If the Seller fails to deliver any instalment the Buyer must still accept and pay for the remaining instalments. If the Buyer fails to pay for any instalment the Seller may, in its absolute discretion, treat such failure as an Event of Default in accordance with clause 17.

### 4. RISK

- (a) Risk in the Hire Equipment will transfer from the Seller to the Buyer when the Hire Equipment departs the premises of the Seller or its appointed agents and will remain with the Buyer until the Hire Equipment is returned to the Seller or its appointed agents.
- (b) Risk in the Goods will transfer from the Seller to the Buyer when title to the Goods passes to the Buyer or when delivery is taken to occur, whichever is first.

### 5. TITLE

- (a) The Buyer acknowledges and agrees that the Hire Equipment remains the property of the Seller at all times and the Buyer has no right, title or interest in or to the Hire Equipment other than the rights granted to it under these Terms and Conditions.
- (b) The Buyer acknowledges and agrees that title to the Goods does not pass from the Seller to the Buyer until the Buyer pays in full the price and all other monies payable or owing but not paid to the Seller by the Buyer on any account. This is so even if the Buyer enhances or changes any Goods or performs work on any Goods.

### 6. USE AND RETURN OF HIRE EQUIPMENT

- (a) The Buyer acknowledges and agrees that:
  - (i) the Buyer's rights to use the Hire Equipment are as a hire only and that in no circumstances will the Hire Equipment be deemed to be a fixture; and
  - (ii) the Buyer must not sell, offer, assign, sub-let, charge, mortgage, pledge or create any form of security interest over, or otherwise deal with the Hire Equipment in any way except as provided in these Terms and Conditions.
- (b) The Buyer must at its own cost keep the Hire Equipment in good repair, condition and working order and in a suitable operating environment for the duration of the Hire Period.
- (c) The Buyer must not alter, make additions to, tamper with or repair the Hire Equipment or the identification or serial numbers on the Hire Equipment, or allow any other person to do so.
- (d) The Buyer must use and operate the Hire Equipment safely, in compliance with all applicable laws, regulations, standards, local, state and federal requirements, and only for its intended use.
- (e) Unless the Seller (in its absolute discretion) agrees otherwise in writing, at the end of the Hire Period, the Hire Equipment may only be removed or returned in accordance with the directions specified in the Quotation. Where the Quotation specifies that:
  - (i) the Seller or its appointed agents will collect and retrieve the Hire Equipment, the Buyer must not remove the Hire Equipment or attempt to return the Hire Equipment to the Seller;
  - (ii) the Buyer is to return the Hire Equipment to the Seller or its appointed agents, the Buyer must remove and return the Hire Equipment to the Seller or its appointed agents in working order and in the same condition as when it was delivered to the Buyer.
- (f) The Hire Equipment will be considered returned to the Seller only if, and on the day that, the Seller or its appointed agents actually receives it.
- (g) The Buyer acknowledges and agrees that, except for normal wear and tear, the Buyer must pay the Seller the amount of the replacement cost of the Hire Equipment for any damage to, loss, theft or destruction of, the Hire Equipment that occurs at any time during the Hire Period and before the Hire Equipment is returned to the Seller or its appointed agents.
- (h) The Buyer must promptly notify the Seller if during the Hire Period the Hire Equipment is lost, stolen, destroyed or damaged beyond reasonable repair, and the Buyer agrees to pay the Seller the replacement value of the Hire Equipment as specified by the Seller.
- (i) On return of the Hire Equipment, the Seller will inspect and assess the Hire Equipment and give a written notice to the Buyer of any costs for repairs required to the Hire Equipment, including the replacement cost (if applicable). Any such costs are payable by the Buyer within 14 days of the Seller's notice.
- (j) The Buyer acknowledges and agrees that the Seller may enter any premises where the Hire Equipment is located to exercise its rights under these Terms and Conditions, including if the need arises, the right to remove and retake possession of the Hire Equipment.

## 7. SUB-HIRE OF HIRE EQUIPMENT

- (a) Unless the Seller (in its absolute discretion) first consents in writing, the Buyer must not lease, hire, bail or give possession of the Hire Equipment ("**sub-hire**") to any third party or anyone else other than in accordance with and subject to any conditions of sub-hire specified in the Quotation. Where the Quotation specifies that the Hire Equipment:
- may not be sub-hired, the Buyer is not permitted to sub-hire the Hire Equipment under any circumstances;
  - may be sub-hired, the Buyer must only sub-hire the Hire Equipment in accordance with the terms and conditions of this clause 7 and any other conditions specified in the Quotation.
- (b) Any sub-hire must be in writing, in a form acceptable to the Seller and must be expressed to be subject to the rights of the Seller under these Terms and Conditions. The Buyer must not vary a sub-hire without the prior written consent of the Seller (which may be withheld in its absolute discretion). The terms of any sub-hire must include an express acknowledgement from the sub-hirer:
- that the Buyer is a hirer only and that the Seller is the legal owner of the Hire Equipment;
  - that if the Buyer's agreement with the Seller terminates: (A) the Seller may by notice to the sub-hirer terminate the sub-hire and the sub-hirer must return the Hire Equipment to the Seller, even if the sub-hirer may not be in breach or default of its obligations under the sub-hire; and (B) the Seller may enter any premises where the Hire Equipment is located to exercise its rights or the Buyer's rights under the sub-hire including, if the need arises, the right to remove and retake possession of the Hire Equipment.
- (c) The Buyer must ensure that the Seller is provided with information and kept up-to-date at all times about the sub-hire, including the sub-hirer's identity, the terms of the sub-hire, the status of any accounts and payment under the sub-hire and the location and condition of the Hire Equipment.
- (d) The Buyer must take all steps, including registration under PPSA (as may be required):
- to ensure that any security interest arising under or in respect of the sub-hire is enforceable, perfected and otherwise effective, including under the PPSA (as applicable);
  - to enable the Buyer (subject always to the rights of the Seller) to gain first priority (or any other priority agreed to by the Seller in writing) for the security interest; and
  - to enable the Seller and the Buyer to exercise their respective rights in connection with the security interest.

## 8. USE OF GOODS

- (a) **Looking after the Goods.** Until title to the Goods passes to the Buyer, the Buyer must:
- hold the Goods as fiduciary and bailee for the Seller;
  - store the Goods properly and separately and mark the Goods to identify them as the Seller's property; and
  - fully insure the Goods against loss or damage, ensuring the Seller's interest as owner is noted on the policy and promptly gives the Seller, at the Seller's request, a copy of the policy and evidence of its currency.
- (b) **Dealing with the Goods.** Until the Buyer pays in full the price and all other monies payable or owing but not paid to the Seller by the Buyer on any account, the Buyer may only sell, or otherwise deal with the Goods (whether in their original state or as part of another product):
- as a fiduciary (but not agent) of the Seller; and
  - in the ordinary course of the Buyer's business.
- For that purpose, the Seller gives the Buyer the right to pass title to the Goods to any person who buys the Goods from the Buyer.
- (c) The Buyer will receive all proceeds whether tangible or intangible, direct or indirect of any dealing with the Goods in trust for the Seller. The Buyer must keep those proceeds in a separate account until the Buyer's liability to the Seller has been discharged.
- (d) The Buyer must account to the Seller for any proceeds related to the Goods.
- (e) The Seller has the power to appropriate payments to any goods and accounts as it thinks fit, despite any appropriation by the Buyer to the contrary.
- (f) If the Buyer uses the Goods in some manufacturing or construction process of its own or some third party, the Buyer must hold that part of the proceeds of that manufacturing or construction process as it relates to the Goods in trust for the Seller. That part is taken to be equal in dollar terms to the amount owing by the Buyer to the Seller at the time of the receipt of those proceeds.
- (g) Proceeds delivered from a forward sale of the Goods are held on trust by the Buyer for the Seller.
- (h) In order to protect the Seller's proprietary interests in the Goods prior to full settlement of amounts owing to the Seller, the Buyer covenants with the Seller that it will not factor any of its book debts without obtaining the prior written consent of the Seller.
- (i) The Seller has the power to appropriate any book debts in relation to the Goods as it sees fit.
- (j) **Repossession.** The Seller may repossess the Goods, and for that purpose may enter any premises occupied by the Buyer and remove the Goods, if:
- the Buyer does not pay for the Goods or pay an invoice by the due date; or
  - an Event of Default occurs in relation to the Buyer.
- (k) **Mixed goods.** If the Buyer mixes the Goods with other goods of the same kind so that the Goods can no longer be separately identified:
- the Seller and the Buyer own all the mixed goods as tenants in common in shares proportional to the number of separately owned items each contributes to the mixed goods (or if the goods are bulk measured by weight or volume, in shares proportional to the weight or volume each contributes); and
  - the provisions of this clause 8 apply to the mixed goods as if they were Goods.
- (l) **Non-payment for manufactured products of mixed goods.** If the Buyer sells the Goods under sub-clause (b) or any manufactured product or any mixed goods to which sub-clause (k) applies, the Buyer must credit the Seller with a proportion of the sale proceeds which is the same as the Seller's proportion of the ownership of the manufactured product or mixed goods.
- (m) **Survival on termination.** This clause 8 survives the termination of any Contract into which the Terms and Conditions are incorporated.

## 9. APPLICATION OF THE PPSA

In these Terms and Conditions, **PPSR** means the register of personal property security interests established under the PPSA. Notwithstanding anything to the contrary contained in these Terms and Conditions, the PPSA applies to these Terms and Conditions. If a term used in this clause has a particular meaning in the PPSA, it has the same meaning in this clause.

- (a) For the purposes of the PPSA:
- these Terms and Conditions are a security agreement and the Buyer grants to the Seller a security interest and/or a purchase money security interest in all goods supplied by the Seller and their proceeds under or in connection with these Terms and Conditions now or in the future;
  - the security interest is a continuing interest irrespective of whether there are monies or obligations owing by the Buyer at any particular time; and
  - the Buyer must do whatever is necessary in order to give a valid security interest over the goods and their proceeds which is able to be registered by the Seller on the PPSR.
- (b) This clause applies to the extent that the Seller's interest in any Goods and/or Hire Equipment (as applicable) is a security interest.
- (c) The Buyer agrees that the security interest is over the Goods and/or Hire Equipment (as applicable), any proceeds of the Goods and/or Hire Equipment (as applicable), and any product or mass that the Goods and/or Hire Equipment (as applicable) may be or become part of. The Goods and/or Hire Equipment (as applicable), proceeds and product or mass are referred to in this clause 9 collectively as the Collateral.
- (d) The Buyer acknowledges that the Seller may register a financing statement in relation to its security interest. The Buyer waives its right under s 157 of the PPSA to receive notice of any verification statement relating to the registration of any such financing statement or any related financing change statement.
- (e) The Buyer undertakes, if it disposes of any Collateral, that it will receive proceeds at least equal to the market value of the Collateral, and that it will not allow any other security interest to exist over those proceeds if that security interest could rank ahead of the Seller's security interest. If such a security interest does arise despite the previous sentence, the Buyer must ensure that it receives cash proceeds for the security interest at least equal to the market value of the proceeds and must immediately pay those proceeds to the Seller in reduction of the amount owing.
- (f) The Seller can apply amounts it receives from the Buyer, including under sub-clause 9(e) towards amounts owing to it in such order as the Seller chooses.
- (g) The Buyer and the Seller agree not to disclose information of the kind mentioned in s 275(1) of the PPSA, except in the circumstances required by ss 275(7)(b) to (e) of the PPSA. The Buyer agrees that it will only authorise the disclosure of information under s 275(7)(c), or request information under s 275(7)(d), if the Seller approves.
- (h) If the Buyer defaults in the timely performance of any obligation owed to the Seller, the Seller may enforce its security interest in any Collateral by exercising all or any of its rights under clause 17. To the extent that Chapter 4 of the PPSA would otherwise apply to an enforcement by the Seller of its security interest in the Collateral, the Buyer and the Seller agree that the following provisions of the PPSA do not apply, to the extent that s 115(1) of the PPSA allows them to be excluded: ss 95, 118, 121(4), 125, 130, 132(3)(d), 132(4), 135, 138B(4), 142 and 143.
- (i) The Buyer must promptly do anything the Seller requires to ensure that its security interest is a perfected security interest and has priority over all other security interests.
- (j) Nothing in this clause is limited by any other provision of these Terms and Conditions or any other agreement between the Seller and the Buyer. Nothing in this clause limits the Seller's rights or the Buyer's obligations apart from under this clause.

## 10. WARRANTY AND LIMITATION OF LIABILITY

- (a) Nothing in these Terms and Conditions excludes, restricts, modifies or limits any right or remedy or any guarantees which cannot lawfully be excluded, restricted, modified or limited by agreement, including any consumer guarantees set out in the Australian Consumer Law in Schedule 2 of the *Competition and Consumer Act 2010* (Cth) ("**ACL**").
- (b) Subject to clause 12, and to the extent permitted by law, any Contract into which these Terms and Conditions are incorporated expressly excludes every warranty, condition, liability or representation with respect to the Application, Content, Goods or Hire Equipment (as applicable), whether implied at law, by course of dealing or otherwise, including but without limitation any warranty as to the fitness or suitability of the Application, Content, Goods or Hire Equipment for any particular purpose or special circumstance or the correctness or quality or fitness of information, advice or services concerning the Application, Content, Goods or Hire Equipment.
- (c) To the maximum extent permitted by law, and except as otherwise expressly set out in these Terms and Conditions, all express or implied guarantees, warranties or representations relating to these Terms and Conditions or their subject matter are excluded.
- (d) Subject to clause 10(g), to the maximum extent permitted by law, and except as otherwise expressly set out in these Terms and Conditions, the Seller's maximum aggregate liability for all claims under or relating to any Contract incorporating these Terms and Conditions or their subject matter, whether in contract, tort (including negligence) in equity, under statute or otherwise, is limited to an amount equal to the price paid for the Goods or the Hire Charges paid for the Hire Equipment or the fees paid in respect of the Application or Content by the Buyer under the relevant Contract.
- (e) To the extent that any statute, including the ACL, may imply warranties or impose obligations on the Seller which cannot be excluded, restricted or modified, the Seller's liability is limited, at the Seller's sole discretion and at its option to:

- (i) in the case of goods, any one or more of:
  - A. the repair or replacement (from any source) of the goods or the supply of equivalent goods; or
  - B. the payment of the costs of repairing or replacing the goods or of acquiring equivalent goods, by credit to the Buyer's account, in cash or by cheque; or
  - C. the repayment of any part of the price of those goods which has been paid by the Buyer, by credit to the Buyer's account, in cash or by cheque.
- (ii) in the case of services:
  - A. the supplying of the services again; or
  - B. the payment of the cost of having the services supplied again.
- (f) Where Goods are subject to a claim under clause 12, and the Seller elects an option under sub-clause 10(c), the Buyer is required to return the Goods in accordance with the Seller's directions and at the Seller's cost, unless the Seller indicates otherwise.
- (g) To the maximum extent permitted by law, the Seller (including its employees or agents) will, under no circumstances, be liable to the Buyer for any consequential, indirect, economic or special loss or damages of any nature, including, without limitation, any loss of business or revenue, loss of profits, loss of opportunity, loss of goodwill, anticipated savings or expenses, arising under or in connection with these Terms and Conditions, or for any liability to any third parties incurred by the Buyer in connection with its use of the Application, Content, Goods or Hire Equipment, or the use of any information, results or outputs generated by the Application, Content, Goods or Hire Equipment.
- (h) The Buyer indemnifies, and keeps the Seller indemnified, against all claims, costs, liabilities, losses and expenses suffered or incurred by the Seller arising from or in connection with:
  - (i) the use of the Application or Content, or the possession, hire, operation, control, use, storage, delivery or return of the Goods or Hire Equipment by the Buyer (or any of its officers, employees, agents, representatives or subcontractors), including any claims for personal injury or death, or for loss of or damage to person or property;
  - (ii) any breach of these Terms and Conditions by the Buyer; and
  - (iii) any forfeiture, seizure, or impounding of, or claim of charge, lien or encumbrance on the Goods or Hire Equipment; but only to the extent that the Seller did not cause or contribute to the loss and the loss was not outside the Buyer's control.
- (i) The indemnity in clause 10(h) survives the termination or expiry of these Terms and Conditions.

## 11. INTELLECTUAL PROPERTY AND LICENCE

- (a) The Seller owns, or has the right to sublicense, all Intellectual Property Rights in and attributable to the Application, the Content, the Goods and the Hire Equipment.
- (b) The Seller hereby grants the Buyer a revocable, non-exclusive, royalty free and non-transferrable licence (without the right to sub-licence) to use the Application and/or Content as modified or updated from time to time by any patches or maintenance releases.
- (c) The Buyer must not download, install or use the Application in any way other than as expressly permitted under these Terms and Conditions and/or in the applicable end-user terms and conditions set out in the relevant website or mobile app (as applicable).
- (d) Unless authorised by the Seller in writing or expressly permitted by these Terms and Conditions or by applicable law, the Buyer must not copy, distribute, transfer, sell, sublicense, rent, lease or loan the whole or any part of the Application or the Content.
- (e) The Buyer may only use the Application and/or Content in accordance with the licence granted in this clause 11 and subject to these Terms and Conditions.
- (f) Except as otherwise provided in these Terms and Conditions, the Buyer acknowledges and agrees that these Terms and Conditions do not confer on the Buyer any Intellectual Property Rights in the Application, the Content, the Goods or Hire Equipment.
- (g) The Seller will not be responsible to the Buyer, and the Buyer waives any claim against the Seller, for any alleged infringement of patent, utility model, design, trademark or any other industrial property right or copyright in connection with the Goods or Hire Equipment.

## 12. INSPECTION OF GOODS AND CLAIMS

- (a) The Buyer will inspect the Goods immediately after delivery.
- (b) In the event that the Buyer discovers in the course of any such inspection that all or any portion of the Goods delivered is not in conformity with the Contract for those Goods, the Buyer must make a claim against the Seller within thirty (30) days after delivery or within such other period of time which the Buyer and the Seller may have agreed in writing. In the event that the Buyer does not assert a claim in accordance with this clause 12, the Goods will be deemed to be in conformity with the Contract.
- (c) The Buyer will assert all claims against the Seller in connection with any latent defect of the Goods within six (6) months after delivery, except to the extent that this requirement is inconsistent with rights which are granted to the Buyer under statute, and which are incapable of being limited by contract. All claims by the Buyer against the Seller in connection with any latent defect of the Goods must be made in writing.

## 13. FORCE MAJEURE

- (a) The Seller is not liable for failure to comply with these Terms and Conditions or any Contract if the failure (directly or indirectly) arises out of any circumstances which are not within the Seller's reasonable control. If such circumstances occur, the Seller may delay or cancel delivery of the relevant Goods or Hire Equipment (as applicable) or reduce the quantity to be delivered.
- (b) The following circumstances are taken to be beyond the Seller's reasonable control: strikes, lock-outs, accidents, war, fire, flood, explosion, shortage of power, breakdown of plant or machinery, shortage of raw materials from normal source of supply, acts of God, pandemics, epidemics, lockdowns or any order or direction of any local, State or Federal Government, Government authority or instrumentality. These are only examples. The Seller is not obliged to remedy any such circumstances. The Seller is especially not obliged to settle any strike, lock-out or any other kind of labour dispute.
- (c) The Seller may offer to modify a Contract in whole or in part when a force majeure event occurs. If the Buyer objects to such offer or if the Seller does not receive a response from the Buyer within thirty (30) days after the date of such offer, the Seller may terminate the Contract by written notice to the Buyer.

## 14. PAYMENT AND CREDIT

- (a) **Cash on delivery.** Subject to sub-clause 14(b), the Buyer must pay the price for the Goods in advance or cash on delivery and must pay the Hire Charges for the Hire Equipment and/or fees for the Application, Content, at the times and in the manner specified in the Contract or applicable invoice.
- (b) **Credit Period.** If the Buyer has the continuing credit approval of the Seller, the Buyer must pay for the Application, Content, Goods and/or Hire Equipment (as applicable) within the approved credit period from the date of delivery of the Goods and/or Hire Equipment or use of the Application, Content, (as applicable). Unless otherwise agreed by the Seller, payment must be by electronic funds transfer into a bank account nominated by the Seller.
- (c) **Disputes.** If there is a dispute in relation to price of Goods or Hire Charges, the Buyer must provide the Seller with written detailed reasons for the dispute within fourteen (14) days of the date of the invoice and must pay the undisputed amount of the price for the Goods or Hire Charges for Hire Equipment (as applicable).
- (d) **Resolution of Disputes.** The Buyer and the Seller must make a bona fide attempt to resolve the dispute by negotiation within fourteen (14) days of the date that the Buyer provides its reasons for the dispute before pursuing other remedies, but the Seller may during this period refuse to supply Goods or Hire Equipment to the Buyer. If the price stated on the invoice is found to be correct, the Seller may, at its discretion, charge the late charge set out in clause 15 on the disputed amount from the date the disputed amount was due to the date it is paid.
- (e) **Discounts – Credit to Invoice.** Agreed discounts, rebates and allowances to which the Buyer is entitled will be credited to the Buyer in the invoice. In no circumstances is the Buyer permitted to deduct any discount, rebate or allowance from moneys owing by it to the Seller.
- (f) **Seller's right to set-off.** The Seller may set off any amount owed by the Seller to the Buyer from any amount due by the Buyer to the Seller.

## 15. LATE CHARGE

If payment is not made in full when due, the Seller may treat the non-payment as an Event of Default in accordance with clause 17 and, in addition, may charge interest, on all amounts owing by the Buyer to the Seller, equal to the 3 month Australian bank bill swap (BBSW) reference rates as published by Reuters from time to time plus 5% per annum, provided that nothing in this clause will require the payment of any amount in excess of the maximum amount permitted by law. Any late charge will be payable on demand and the Buyer must also pay to the Seller upon demand an amount equal to any additional GST that may become payable by the Seller as a result of the Buyer's non-payment.

## 16. INCREASED COSTS

Any new additional or increased freight rates, surcharges (banker, currency, congestion or other surcharges), taxes, customs, duties, export or import surcharges or other governmental charges, or insurance premiums, including those of pandemic, epidemic, lockout, war, strikes, riots and civil commotion risks, which may be incurred by the Seller with respect to the Goods or Hire Equipment (as applicable) will be for the account of the Buyer and will be reimbursed to the Seller by the Buyer, unless such amounts were incurred after the conclusion of the relevant Contract and do not relate to the Buyer's obligations under the Contract.

## 17. EVENT OF DEFAULT

17.1 The Buyer will be in default if any one or more of the following events occur:

- (a) the Buyer is: in liquidation or provisional liquidation or under administration; has a controller as defined in the *Corporations Act 2001* (Cth) (**Corporations Act**) or an analogous person appointed to it or to any of its property; is taken under section 459F(1) of the *Corporations Act* to have failed to comply with a statutory demand; is unable to pay its debts or is insolvent; takes any step that could result in the Buyer becoming an insolvent under administration as defined in section 9 of the *Corporations Act*; enters into a compromise or arrangement with, or assignment for the benefit of, any of its members or creditors; or is affected by an analogous event (each an **Insolvency Event**);
- (b) any permit or governmental authorisation or license required to carry on the Buyer's business is either cancelled or revoked;
- (c) the Seller reasonably determines that an adverse change in the financial situation of the Buyer has occurred and that in the Seller's reasonable determination such change will adversely affect the Buyer's ability to fulfil its obligations to its creditors generally or its obligations to the Seller under any Contract;
- (d) there is a change in any law (including taxation law) or requirement of any governmental agency which renders the performance of any obligation under a Contract unlawful or incapable of being performed;
- (e) the Buyer fails to perform in whole or in part any of its obligations under, or breaches in whole or in part any term contained in these Terms and Conditions, a Contract or any other contract between the Buyer and the Seller; or

(f) the Buyer breaches in whole or in part any of the Credit Terms.

17.2 If the Buyer defaults, in addition to any other rights the Seller may have under these Terms and Conditions or the Contract, the Seller may:

- (a) treat the whole of the Contract and any other contract with the Buyer as repudiated and sue for breach of contract; and/or
- (b) refuse to supply any Goods or Hire Equipment, the Application or Content, (as applicable) to the Buyer; and/or
- (c) repossess any Hire Equipment in the Buyer's possession or, in accordance with sub-clause 8(j), any Goods in the Buyer's possession for which title has not yet passed; and/or
- (d) without notice to the Buyer, withdraw or vary any credit the Seller has provided to the Buyer; and/or
- (e) without notice to the Buyer, make all monies owing by the Buyer to the Seller on any account immediately due and payable.

#### 18. REFUSAL TO TAKE DELIVERY

- (a) If the Buyer fails or refuses to take delivery of all or part of the Goods or Hire Equipment (as applicable) in accordance with clause 3 or it seems that the Buyer will fail or refuse to take delivery of all or part of the Goods in accordance with clause 3 on the reasonable judgement of the Seller, the Seller may, in its sole discretion, either extend the time for delivery of the Goods or Hire Equipment (as applicable) or terminate the relevant Contract in whole or in part without prejudice to any other remedies it may have.
- (b) In the event that the time of delivery of the Goods or Hire Equipment (as applicable) is extended, the Buyer will indemnify the Seller for the damages, costs and/or expenses incurred by the Seller due to the delay and the costs for storage required for the Goods or Hire Equipment (as applicable) which have been returned by or not delivered to the Buyer.
- (c) In the event that the relevant Contract for Goods or Hire Equipment is wholly terminated, the Seller may repossess any Hire Equipment in the Buyer's possession in accordance with sub-clause 66(j), or in accordance with sub-clause 88(j), repossess any Goods which have been delivered to the Buyer but not paid for in full.
- (d) The provisions of this clause 18 will be applied mutatis mutandis to the termination of any portions of a Contract.

#### 19. ALL TAXES

- (a) Unless otherwise stated, the price is GST exclusive.
- (b) In addition to the price for the Goods or the Hire Charges for the Hire Equipment (as applicable), the Buyer must pay to the Seller an amount equal to any GST the Seller is liable to pay for any taxable supply by the Seller under these Terms and Conditions or any Contract.
- (c) Subject to sub-clause (d), the Buyer must pay any GST amount, without deduction or set-off of any other amounts, at the same time and on the same basis as the price for the Goods or the Hire Charges for the Hire Equipment is paid.
- (d) Where the price for Goods is payable in instalments, the Buyer must pay any GST amount payable on the full price paid for the Goods, at the same time, and on the same basis as the first instalment.
- (e) Where the price for the Goods or Hire Charges are expressed in a currency other than Australian dollars, the Buyer must pay the amount of GST as calculated by the Seller with reference to the GST Ruling 2001/2 (Foreign Exchange Conversions) or any replacement or substitute of that Ruling.

#### 20. INFORMATION

The Buyer must provide whatever information may reasonably be required by the Seller or any governmental or quasi-governmental organisation. Information may be required with respect to the intended use or on-sale of the Goods or Hire Equipment or in respect of any party interested in the Goods or Hire Equipment including but not limited to information of a type referred to in any anti-money laundering or counter-terrorism legislation. The Buyer acknowledges that shipments of Goods or use of Hire Equipment may be subject to security controls by carriers and government entities, and the Seller will submit (and will require the Buyer to submit) to all required security controls and the Buyer consents to a search of any shipment of Goods or Hire Equipment as required by any carrier or government entity.

#### 21. PRIVACY

- (a) In these Terms and Conditions, **Privacy Act** means the *Privacy Act 1988* (Cth) and 'personal information' has the same meaning given in the Privacy Act.
- (b) The Seller's privacy policy applies to these Terms and Conditions. The Seller's privacy policy can be accessed at [<https://data.maxtend.com.au/privacy.php>] and it contains more information about how the Seller collects, uses, handles and shares personal information in connection with these Terms and Conditions and how the Buyer can access, correct or complain about the handling of that information.
- (c) The Buyer acknowledges and agrees that it has read and understood the Seller's privacy policy, and if the Buyer provides personal information about any individuals to the Seller in connection with these Terms and Conditions, the Buyer will ensure that it has informed those individuals that it is providing their personal information to the Seller, has advised those individuals of how to access the Seller's privacy policy and, if required, it has obtained the individual's consent to provide their personal information to the Seller unless the individual provided their personal information directly to the Seller.

#### 22. GENERAL

- (a) **Waiver** No claim or right of the Seller under any Contract will be deemed to be waived or renounced in whole or in part unless the waiver or renunciation or such claim or right is acknowledged and confirmed in writing by the Seller. A waiver of a right by the Seller on one or more occasions does not operate as a waiver of that right if it arises again. The exercise of a right by the Seller does not prevent any further exercise of that right or of any other right.
- (b) **Severability** Any provision of these Terms and Conditions which is unenforceable or partly unenforceable is, where possible, to be severed to the extent necessary to make a Contract incorporating these Terms and Conditions enforceable, unless this would materially change the intended effect of the Contract.
- (c) **Governing Law** These Terms and Conditions and any Contract incorporating these Terms and Conditions is governed by the law of the State of Victoria. The Buyer submits to the jurisdiction of any Court of competent jurisdiction in which the Seller institutes proceedings for the settlement of disputes arising under or in connection with these Terms and Conditions or any Contract. Any legal action taken by the Buyer against the Seller will be brought in a Court having competent jurisdiction in the State of Victoria. The Buyer hereby irrevocably waives for itself and all of its assets any immunity from suit, execution or other legal process to the full extent permitted by the laws of any jurisdiction in which proceedings may be brought.
- (d) **Confidentiality** The Buyer must keep confidential all Confidential Information it receives from the Seller and must return such information to the Seller immediately upon request. For the purpose of this clause 22(d), "**Confidential Information**" means information (whenever it was obtained) in relation to the Seller's business, pricing, operations or strategies or property that is confidential but excludes information that is in the public domain.
- (e) **Assignment** The Buyer cannot assign, transfer or otherwise dispose of any of the benefits or burdens of any Contract with the Seller without the Seller's prior written consent.
- (f) **Costs** The Buyer must pay the Seller all costs and expenses incurred by the Seller in connection with any Contract including any legal expenses (on a solicitor-client basis), stamp duty and costs incurred in the recovery of monies owing by the Buyer to the Seller or in otherwise enforcing the Seller's rights against the Buyer under the Contract.
- (g) **Entire Agreement** The Contract incorporating these Terms and Conditions relating to the Application, Content, Goods and/or Hire Equipment constitutes the entire agreement of the parties, and no other terms and conditions (including the Buyer's terms and conditions of purchase (if any)) are binding on the Seller. If the Buyer places an order, accepts delivery of the Application, Content, Goods or Hire Equipment (as applicable), makes any payment under an invoice issued by the Seller or performs any of these terms, the Buyer is taken to have accepted these Terms and Conditions.
- (h) **Notices** All notices given under a Contract or under these Terms and Conditions must be in writing, in English and, in the case of a notice to the Buyer, must be given to the Buyer's address shown in the Order or Quotation for Goods or Hire Equipment or to such other address otherwise notified by the Buyer to the Seller in writing, or in the case of a notice to the Seller, must be given to the Seller's address shown in the Seller's Quotation, or acceptance of an Order, or to such other address notified by the Seller to the Buyer in writing. A notice given under this clause 22(h) takes effect when taken to be received (unless a later time is specified in the notice) and a notice is taken to be received:
  - (i) if hand delivered, on delivery;
  - (ii) if sent by pre-paid post, on the fifth Business Day after the date of posting (or on the tenth Business Day after the date of posting if posted to or from a place overseas); or
  - (iii) if sent by email, one hour after it is sent by the sender unless the sender receives a report of an error or delay in delivery,but if the delivery or receipt is on a day which is not a Business Day or is after 4.00 pm (addressee's time) it is regarded as received at 9.00 am on the following Business Day.

[July 2021]