

Cutting Edge Software

HYBRID SOFTWARE PTY LTD 114 591 310

TERMS OF SERVICE

PARTICULARS

A PARTIES

- A.1** These Terms of Service form an agreement (**Agreement**) between Hybrid Software Pty Ltd trading as Cutting Edge Software ABN 22 114 591 310 (**CES**) and the Customer (referred to as **Customer** or **You**).

B PRIVACY POLICY

- B.1** In accepting these Terms you also confirm that you have read and accept our Privacy Policy. You can read our Privacy Policy at #link

C SOLUTION

C.1 Definitions.

Definitions relevant to the Agreement:

- (a) **BPAY** means the bill payment service provided by BPAY Pty Ltd and commonly known as “BPAY”.
- (b) **Claims** means all claims, proceedings, actions, liabilities, damages, losses, costs (both direct and indirect) and expenses (including full legal costs).
- (c) **Concierge Service** means the service described in item D.1.
- (d) **Concierge Service Fees** means the fees notified to the Customer from time to time in writing by CES.
- (e) **Customer** means You, being an Australian medical or allied health professional, or an individual engaged by such professional, that is a registered user of the Solution and, if applicable, the DoctorBill Service and/or Concierge Service.
- (f) **DoctorBill Service** means the service described in item E.1.
- (g) **DoctorBill Service Fee** means the fees equal to a percentage of the amount payable by a Payer in respect of an invoice issued and paid through the DoctorBill Service or under a subscription billing model, at the rates and adopting the payment arrangements notified to the Customer from time to time in writing by CES.
- (h) **DVA** means the Australian Government Department of Veterans’ Affairs.
- (i) **ECLIPSE** means the *Electronic Claim Lodgement and Information Processing Service Environment* gateway from Medicare.
- (j) **Eligible Invoice** means, at the time of clicking the ‘Send to Concierge’ button an invoice in respect of a patient in connection with which the service provided to the patient was provided less than two years ago.

- (k) **Health Fund** means a health fund registered under the *Private Health Insurance Act 2007* (Cth).
- (l) **MBS** means the Medical Benefits Schedule from the Australian Government Department of Health and Ageing.
- (m) **Medical Authorities** means Australian health & medical organisations including (without limitation) DVA, Medicare, Health Funds, Transport Accident Authorities and Workers' Compensation Authorities.
- (n) **Medicare** means the government authority Medicare Australia administered by the Australian Government Department of Human Services.
- (o) **Payers** means patients and other clients of Customers that have activated the DoctorBill Service and who have paid or need to pay the Customer.
- (p) **Solution** means the solution described in item C.2 and the Concierge Service and DoctorBill Service (if applicable).
- (q) **Transport Accident Authority** means any of the state-based compulsory third party motor vehicle insurance schemes in Australia.
- (r) **Workers' Compensation Authority** means any of the state-based compulsory workplace health, safety & insurance schemes in Australia.

C.2 Solution.

- (a) Cutting Edge Software is an online medical billing solution for Customers (**Solution**) with specific configurations for:
 - i anaesthetics;
 - ii surgery;
 - iii physicians;
 - iv allied health; and
 - v mobile applications.
- (b) The configuration of the Solution can be customised by CES.
- (c) The Solution has features which enable Customers to:
 - i access up-to-date schedules from the MBS, Health Funds, Workers' Compensation Authorities, Transport Accident Authorities and DVA;
 - ii create unique pricing for other services and products;
 - iii calculate fees for medical services;
 - iv create quotes and invoices;
 - v make electronic claim submissions to Medical Authorities;
 - vi track payments and unpaid invoices; and

- vii collect payments from patients and customers.

Some or features may or may not be available as per the specific configuration required or selected by the Customer.

C.3 Support.

- (a) The Solution is supported by CES for paid-up Customers as follows:
 - i unlimited phone support in the first month of purchase;
 - ii up to 12 support requests per year;
 - iii email support;
 - iv telephone support; and
 - v remote login support.
- (b) Additional support shall incur the Support Fees (as set out in the Fees & Payments below).

D CONCIERGE SERVICE

D.1 Concierge Service.

The Concierge Service is an optional service provided by CES under which CES offers additional support to You for new, rejected, unpaid, part-paid and overdue accounts, in exchange for You paying the Concierge Service Fees.

D.2 Activating the Concierge Service functionality.

- (a) The Customer may elect to use the Concierge Service by making a request to CES in writing.
- (b) Upon approval of a request under item D.2(a), CES will update the configuration of the Solution so that it includes Concierge Service functionality within the Solution and a 'Send to Concierge' button which appears in the patient invoice module of the Solution.
- (c) The Customer may request to have the Concierge Service functionality removed from the Solution by making a request to CES in writing, and CES will remove the Concierge Service functionality from the Solution within 14 days.

D.3 Using the Concierge Service.

- (a) The Customer may use the Concierge Service in respect of any Eligible Invoice by clicking the 'Send to Concierge' button in the relevant 'Account Handling' window of the Solution.
- (b) Once the Customer has clicked the 'Send to Concierge' button in respect of a particular invoice, that invoice is a **Concierge Managed Invoice** and is then managed by CES (to the exclusion of the Customer), until the earlier of:
 - i recovery of the full invoice amount by CES on behalf of the Customer; or

from any webpage or re-directed from within the Customer's own website.

- iii BPAY Payments.** A Customer-specific "BPAY reference number" so Payers can make BPAY payments from their financial institutions. The Customer can publish the BPAY reference number and logo on their invoices.
- iv Telephone Payments.** A dedicated "1300 number" and Customer-specific reference number for Payers to make credit card payments over the phone. The Customer can publish the 1300 number and the reference number on their invoices and/or website.

The DoctorBill Service provides for Customers to:

- i** offer to Payers some or all of the payment methods as the Customer sees fit for its business;
- ii** identify & reconcile payments made by Payers;
- iii** receive daily payment of funds received from Payers through DoctorBill; and
- iv** integrate the DoctorBill with other software from CES (including the Solution and Concierge Service).

E.2 Activating the DoctorBill Service functionality.

- (a)** The Customer may elect to use the DoctorBill Service by activating the DoctorBill Service via the Solution or by making a request to CES in writing.
- (b)** Where a Customer elects to use the DoctorBill Service, the Customer will be directed to activate an account with the payment gateway used by the DoctorBill Service from time to time (for example, Stripe and Westpac for BPay), and the Customer will have an opportunity to review and accept the terms of the relevant payment gateway(s) at the time of activating their account.
- (c)** In addition to restrictions in items F.1 and H.2, CES may limit or restrict access to the DoctorBill Service from time to time as it sees fit, including but not limited to:
 - i** requiring Customers to have an associated ABN;
 - ii** requiring a Customer's authorised users to be 18 years of age or older; and
 - iii** only providing the DoctorBill Service in certain jurisdictions.

E.3 Authorisation and warranties.

- (a)** The Customer acknowledges that payments received from its Payers through the DoctorBill Service will be received through the payment gateway into the Customer's nominated account.
- (b)** CES authorises the Customer to use the DoctorBill Service and to promote the available payment methods to its Payers.

- (c) The Customer warrants that it shall only request payments through the DoctorBill Service for which it is rightfully entitled to charge.

E.4 Fees and payment.

By activating the DoctorBill Service in accordance with item E.2:

- (a) the Customer agrees to pay CES, the DoctorBill Service Fee in respect of the DoctorBill Service; and
- (b) the Customer agrees to and authorises payment to CES from the relevant gateway for the DoctorBill Service Fee from the monies collected in the payment gateway by and on behalf of the Customer from a Payer processed through the DoctorBill Service.

E.5 Payment handling.

- (a) The Customer acknowledges that:
 - i the DoctorBill Service is a payment solution only and CES does not, and is not required to, handle queries from Payers, nor does it support billing disputes;
 - ii all queries made by Payers will be referred back to the Customer; and
 - iii CES cannot refund money or correct errors with payments made by Payers.
- (b) The Customer agrees to handle all billing disputes, errors, refunds and queries with Payers promptly.
- (c) The Customer indemnifies CES, and its suppliers, directors, employees, contractors and agents, against any Claims by Payers or any other person for any and all erroneous or improper charging, billing or invoicing by the Customer to the Payer.

F REGISTRATION

- F.1 The Customer must be registered in the Solution and pay any applicable fees described in item G. CES may set any registration requirements in respect of the Customer's use of the Solution (including as applicable the Concierge Service or DoctorBill Service) in its absolute discretion.

G FEES & PAYMENTS

G.1 Fees.

- (a) CES shall charge the Customer the following fees for the Solution (and, to the extent applicable for the Concierge Service and the DoctorBill Service) (the rates of which shall be notified to the Customer prior to purchase, or otherwise as published on CES website from time-to-time):
 - i Setup Fees;
 - ii Monthly, Quarterly or Annual Subscription Fees;

- iii Concierge Service Fees;
- iv DoctorBill Service Fees; and
- v Support Fees (where necessary/requested).

- (b) CES may charge additional fees for other services that it provides. Fees shall be as quoted by CES.
- (c) CES may waive or vary fees for as it sees fit in its absolute discretion, for any period of time it wishes.

G.2 Payment of Fees.

- (a) All fees (other than Concierge Service Fees) must be paid in advance by the Customer using one of the many payment options made available by CES.
- (b) The Concierge Service Fees must be paid by the Customer within 15 days of issue of an invoice, with invoices being issued at the end of each month by CES.
- (c) The DoctorBill Service Fees must be paid by the Customer in advance in accordance with the relevant billing arrangements (including, without limitation, monthly, quarterly or annually) in place by CES, from time to time.

G.3 Currency.

All fees are in Australian dollars.

G.4 GST.

GST is applicable to any Fees charged by CES to the Customer. Unless expressed otherwise, all Fees shall be deemed exclusive of GST.

G.5 Refunds.

No refunds of Fees are offered other than as required by law.

G.6 Changes to Fees.

CES may change any of its Fees by giving you no less than 14 days' notice before the expiry of your current billing period. Any changes will come into effect from your next billing period.

H TERM & LIMITATIONS

H.1 Term.

- (a) Unless otherwise terminated, your licence to access the Solution shall be for the period for which you have paid the Fees.
- (b) CES may set minimum subscription terms for which you shall be required to pay the Fees whether or not you use the Solution.
- (c) To the extent that any Concierge Managed Invoices remain outstanding at termination of this Agreement or any amounts in Concierge Service Fees remain outstanding and unpaid at termination of this agreement, the term of the

Concierge Service will extend beyond the term of this Agreement until the date that no Concierge Managed Invoices remain outstanding and all monies due to be paid for the Concierge Service are paid in full.

- (d) To the extent that any Payer uses the DoctorBill Service after the termination of this Agreement, the term of the DoctorBill Service will extend beyond the term of this Agreement until the date that no invoices payable by Payers remain outstanding and all monies due to be paid for the DoctorBill Service are paid in full.

H.2 Limitations on Use.

CES may limit or restrict access to the Solution from time-to-time as it sees fit.

I CONFIDENTIAL INFORMATION

I.1 CES will keep confidential all information that it becomes aware of regarding the Customer's:

- (a) business, employees and contractors;
- (b) customers, patients and prospects (whether Payers or not); and
- (c) financial matters.

J TERMINATION

J.1 Either party may end this Agreement at any time by 14 days' written notice to the other party.

J.2 Either party may terminate the Concierge Service or the DoctorBill Service at any time by 14 days' written notice to the other party without terminating the provision of the remainder of the Solution.

K DISCLAIMER – THIRD PARTY SERVICES

K.1 The Customer acknowledges that the Solution is dependent on third-party services and providers, including but not limited to Medicare Online, ECLIPSE, Medical Authorities, banks, credit card providers, BPAY and telecommunications services.

K.2 The Customer agrees that CES shall not be responsible or liable in any way for interruptions to the availability, incorrect information or other interference with the efficacy of the Solution caused by or contributed to by, or in any way in connection with, third-party services.

L GENERAL

L.1 **Governing Law.** Victoria, Australia

L.2 **Reference City.** Melbourne

SPECIAL CONDITIONS

1 EFFECT OF SPECIAL CONDITIONS

- 1.1 The parties may agree to any Special Conditions to this Agreement in writing. Where the parties make such Special Conditions those Special Conditions shall prevail over any inconsistency with any other provisions of this Agreement.

GENERAL CONDITIONS

1 BACKGROUND

- 1.1 The Customer wishes to access the Solution provided by CES.
- 1.2 The terms and conditions in this Agreement govern the provision of the Solution to the Customer by CES.

2 INTERPRETATION

- 2.1 The following definitions apply in this document:

- (a) **ABN** means Australian Business Number.
- (b) **ACN** means Australian Company Number.
- (c) **Business Day** means a day (other than a Saturday, Sunday or public holiday) on which banks are open for general banking business in the Reference City set out in item L of the Particulars.
- (d) **Confidential Information** means all information (whether or not it is described as confidential) in any form or medium concerning any past, present or future business, operations or affairs of either party, including, without limitation:
 - i all technical or non-technical data, formulae, patterns, programs, devices, methods, techniques, plans, drawings, models and processes, source and object code, software and computer records;
 - ii all business and marketing plans and projections, details of agreements and arrangements with third parties, and customer and supplier information and lists;
 - iii all financial information, pricing schedules and structures, product margins, remuneration details and investment outlays;
 - iv all information concerning any employee, customer, contractor, supplier or agent of the relevant party;
 - v the party's policies and procedures; and
 - vi all information contained in this document,

but excludes information that the other party can establish:

vii is known by or is in the other party's possession or control other than through a breach of this document and is not subject to any obligation of confidence; or

viii is in the public domain other than by a breach of this document or any obligations of confidence.

- (e) **Corporations Act** means the *Corporations Act 2001* (Cth).
- (f) **Customer Content** means data that is entered into the Solution by the Customer that forms part of its Intellectual Property.
- (g) **Fees & Charges** means the fees and charges as set out in section G of the Particulars.
- (h) **Force Majeure** means an event or cause beyond the reasonable control of the party claiming force majeure. It includes each of the following, to the extent it is beyond the reasonable control of that party:
- i act of God, lightning, storm, flood, fire, earthquake or explosion cyclone, tidal wave, landslide, adverse weather conditions;
 - ii act of public enemy, war (declared or undeclared), terrorism, sabotage, blockade, revolution, riot, insurrection, civil commotion, epidemic or pandemic (declared or undeclared);
 - iii the effect of any change in applicable laws, orders, rules or regulations of any government or other competent authority; and
 - iv embargo, inability to obtain necessary materials, equipment or facilities, or power or water shortage.
- (i) **General Conditions** means the terms and conditions set out in the section of this Agreement entitled "General Conditions".
- (j) **GST** has the meaning given by the *A New Tax System (Goods and Services Tax) Act 1999* (Cth).
- (k) **Intellectual Property** means all copyright, patents, inventions, trade secrets, know-how, product formulations, designs, circuit layouts, databases, registered or unregistered trademarks, brand names, business names, domain names and other forms of intellectual property;
- (l) **Intellectual Property Rights** means, for the duration of the rights in any part of the world, any Moral Rights, industrial or intellectual property rights, whether registrable or not, including in respect of Intellectual Property, applications for the registration of any Intellectual Property and any improvements, enhancements or modifications to any Intellectual Property registrations.
- (m) **Moral Rights** means:
- i moral rights pursuant to the *Copyright Act 1968* (Cth);

- ii or any rights analogous to the rights set out in Article 6bis of the *Berne Convention for Protection of Literary and Artistic Works* 1886 (as amended from time to time).
- (n) **Particulars** means this Agreement's details and variables set out in the section of this Agreement entitled "Particulars".
- (o) **Pricing** means the pricing set out in this Agreement or as notified to the Customer in writing by CES from time-to-time.
- (p) **Privacy Act** means the *Privacy Act* 1989 (Cth).
- (q) **Privacy Policy** means the Privacy Policy of CES found at the address in item B of the Particulars.
- (r) **Solution** means the solution described in the Particulars.
- (s) **Special Conditions** means the terms and conditions set out in the section of this agreement entitled "Special Conditions".
- (t) **Tax Invoice** has the meaning given by the *A New Tax System (Goods and Services Tax) Act* 1999 (Cth).

2.2 Headings are only for convenience and do not affect interpretation. The following rules apply unless the context requires otherwise:

- (a) The singular includes the plural and the opposite also applies.
- (b) If a word or phrase is defined, any other grammatical form of that word or phrase has a corresponding meaning.
- (c) A reference to a clause refers to clauses in this Agreement.
- (d) A reference to legislation is to that legislation as amended, re-enacted or replaced, and includes any subordinate legislation issued under it.
- (e) Mentioning anything after *includes*, *including*, or similar expressions, does not limit anything else that might be included.
- (f) A reference to a *party* to this Agreement or another agreement or document includes that party's successors and permitted substitutes and assigns (and, where applicable, the party's legal personal representatives).
- (g) A reference to a *person, corporation, trust, partnership, unincorporated body* or other entity includes any of them.
- (h) A reference to *information* is to information of any kind in any form or medium, whether formal or informal, written or unwritten, for example, computer software or programs, concepts, data, drawings, ideas, knowledge, procedures, source codes or object codes, technology or trade secrets.
- (i) A reference to *dollars* or \$ is to an amount in Australian currency.
- (j) A reference to 'in writing' includes, without limitation, by email (unless expressly excluded).

3 APPLICATION

- 3.1 This Agreement applies to use of and access to the Solution.
- 3.2 Where the Customer does not accept the terms and conditions of this Agreement, the Customer must immediately cease using the Solution.
- 3.3 This Agreement may be updated by CES at its absolute discretion from time-to-time, and unless stated otherwise by CES in writing, such updates shall come into effect for use of the Solution at the Customer's next login after the Customer receives written notice of the update(s).

4 AGREEMENT

- 4.1 By using the Solution, the customer acknowledges and agrees to:
- (a) these Terms of Service; and
 - (b) the Privacy Policy.

5 SOLUTION

- 5.1 The Solution is the product described in the Particulars.
- 5.2 The Solution is only accessible to the Customer for the term set out in the Particulars.
- 5.3 The Customer agrees and accepts that the Solution is:
- (a) hosted by CES and shall only be installed, accessed and maintained by CES, accessed using the internet or other connection to CES servers and is not available 'locally' from the Customer's systems; and
 - (b) managed and supported exclusively by CES from CES servers and that no 'back-end' access to the Solution is available to the Customer unless expressly agreed in writing.
- 5.4 As a hosted and managed service, CES reserves the right to upgrade, maintain, tune, backup, amend, add or remove features, redesign, improve or otherwise alter the Solution.
- 5.5 CES shall not exercise its rights under clause 5.4 in a manner that would intentionally cause the Customer to lose access to Customer Content or fundamentally decrease the utility of the Solution to the Customer, other than in accordance with the terms of this Agreement.

6 LICENCE

- 6.1 By accepting the terms and conditions of this Agreement, the Customer is granted a limited, non-exclusive, non-sublicensable and revocable licence to access and use the Solution for the duration of this Agreement, in accordance with the terms and conditions of this Agreement.
- 6.2 CES may issue the licence to the Customer on the further terms or limitations (including the number of users or volume of use or transactions) as it sees fit.

- 6.3 CES may revoke or suspend the Customer's licence(s) in its absolute discretion for any reason that it sees fit, including for breach of the terms and conditions in this Agreement by the Customer or any of its users. CES will ordinarily advise the Customer of any suspension or revocation however it is under no obligation to do so.

7 USE

- 7.1 The Customer agrees that it shall only use the Solution for legal purposes and shall not use it to engage any conduct that is unlawful, immoral, threatening, abusive or in a way that is deemed unreasonable by CES in its discretion.

8 AUTHORISED USERS

- 8.1 The Customer shall authorise users to access the Solution in its absolute discretion (however, these are to be restricted to employees and/or contractors of the Customer). CES accepts no liability for access to Customer Content by users authorised by the Customer or any persons using login credentials of users authorised by the Customer.
- 8.2 The Customer is solely responsible for the security of its username and password for access to the Solution and must not share login credentials (including, without limitation, username(s) and password(s)) with any unauthorised person.
- 8.3 The Customer is responsible for ensuring that its users comply with this Agreement in full and accepts full responsibility and liability for any action that constitutes a breach of this Agreement by any user of the Customer (and the Customer agrees that any such action may be deemed to be an action of the Customer itself).

9 CUSTOMER DATA

- 9.1 CES obtains no right, title or interest in Customer Content including any Intellectual Property found within it. CES accepts no liability for the content of Customer Content.
- 9.2 The Customer is responsible for the accuracy, quality and legality of Customer Content and the Customer's acquisition of it, and the users that create, access and/or use Customer Content.
- 9.3 Despite clause 9.1 CES shall be authorised to permanently delete Customer Content where outstanding Fees & Charges remain unpaid in accordance with clauses 11 and 12.
- 9.4 CES shall not access, use, modify or otherwise deal with Customer Content except where required by compulsion of law or upon the Customer's authority (such as to provide support for the Solution).

10 PRIVACY

- 10.1 CES maintains the Privacy Policy in compliance with the provisions of the Privacy Act for data that it collects about the Customer and other customers. CES agrees to abide by the Privacy Act regardless of whether CES is legally bound by that act.
- 10.2 The Privacy Policy does not apply to how the Customer handles Customer Content. It is the Customer's responsibility to meet the obligations of the Privacy Act by implementing a privacy policy in accordance with law.

- 10.3 The Customer agrees to inform its patients from time to time, in accordance with its obligations to do so under the Privacy Act, in relation to and in respect of, any and all Customer Content which is shared with CES.
- 10.4 CES makes no warranty as to the suitability of the Solution in regard to the Customer's privacy obligations at law or contract, and it is the Customer's responsibility to determine whether the Solution is appropriate for the Customer's circumstances.
- 10.5 The Customer agrees to indemnify CES, and its suppliers, directors, employees, contractors and agents, against all Claims arising out of any breach by the Customer of the Privacy Policy, Privacy Act or any other law or regulation, or anything else that the Customer does or does not do in relation to the Customer Content.

11 FEES & CHARGES

- 11.1 The Customer agrees to pay all Fees & Charges as and when they fall due.
- 11.2 Fees & Charges are non-cancellable and/or non-refundable once ordered or paid.
- 11.3 CES may introduce new services and/or Fees & Charges by giving the Customer written notice of their availability and applicability.
- 11.4 CES shall notify the Customer of any changes to existing Fees & Charges no less than the time period for notice in item G.6 of the Particulars. CES reserves the right to change the Fees & Charges in item G of the Particulars at any time at its absolute discretion.
- 11.5 If the Customer does not accept a change to Fees & Charges, the Customer must notify CES before the expiry of the time period for notice the Fees & Charges and must stop using the Solution before the new Fees & Charges come into effect.
- 11.6 CES may revoke or suspend the Customer's licence to access the Solution for unpaid Fees & Charges without liability.
- 11.7 Where CES:
- (a) is required to perform any services for the Customer outside of what is set out in this Agreement or otherwise in writing; or
 - (b) is subject to delays caused by any changes or complexities outside of its control (and not caused by its breach of this Agreement); then

the Customer agrees that CES shall be entitled to charge the Customer an additional amount that is reasonable for the service performed.

12 INVOICING & PAYMENTS

- 12.1 CES shall issue the Customer a Tax Invoice for all Fees & Charges for which GST applies.
- 12.2 The terms of payment set out in the Fees & Charges shall apply.
- 12.3 Where Fees & Charges are payable:
- (a) *in advance*, no services shall be commenced or provided unless a Tax Invoice has been issued and paid in full;

(b) *in arrears*, CES reserves the right to cease work and not perform any further services until the Tax Invoice for those Fees & Charges have been paid.

12.4 Should the Customer dispute a Tax Invoice, the Customer must notify CES of the disputed item within 5 Business Days of the date of the Tax Invoice. The Customer must pay the amount of the Tax Invoice not in dispute within the prescribed payment period.

12.5 Overdue Tax Invoices shall accrue interest at the rate of 1.5% per month, or in default, the maximum rate of penalty interest prescribed under law.

12.6 The Customer authorises CES to use the Customer's information for the purposes of obtaining a credit assessment or to otherwise make investigations as to the Customer's payment history.

12.7 Refunds are provided for in accordance with the Particulars or as required by law.

13 DATA

13.1 **Security.** CES takes the security of the Solution and the privacy of its users very seriously. The Customer agrees that the Customer shall not do anything to prejudice the security or privacy of CES's systems or the information on them.

13.2 **Transmission.** CES shall do all things reasonable to ensure that the transmission of data occurs according to accepted industry standards. It is up to the Customer to ensure that any transmission standards meet the Customer's operating and legal requirements.

13.3 **Storage.** CES may limit the amount of data that the Customer stores in the Solution, and shall advise the Customer of such. Data that is stored with CES shall be stored according to accepted industry standards.

13.4 **Backup.** CES shall perform backups of its entire systems in as reasonable manner at such times and intervals as is reasonable for its business purposes. CES does not warrant that it is able to backup or recover specific Customer Content from any period of time unless so stated in writing by CES.

14 ACCESS

14.1 **Solution.** By accepting the terms of this Agreement the Customer agrees that CES shall provide access to the solution to the best of its abilities, however it accepts no responsibility for ongoing access to the Solution.

15 INTELLECTUAL PROPERTY

15.1 **Trademarks.** CES has moral & registered rights in its trademarks and the Customer shall not copy, alter, use or otherwise deal in the marks without the prior written consent of CES.

15.2 **Proprietary Information.** The Solution may use software and other proprietary systems and Intellectual Property for which CES has appropriate authority to use, and the Customer agrees that such is protected by copyright, trademarks, patents, proprietary rights and other laws, both domestically and internationally. The Customer warrants that it shall not infringe on any third-party rights through the use of the Solution.

15.3 **Solution.** The Customer agrees and accept that the Solution is the Intellectual Property of CES and the Customer further warrants that by using the Solution the Customer will not:

- (a) copy the Solution or the services that it provides for the Customer's own commercial purposes; and
- (b) directly or indirectly copy, recreate, decompile, reverse engineer or otherwise obtain, modify or use any source or object code, architecture, algorithms contained in the Solution or any documentation associated with it.

15.4 **Content.** All content (with the exception of Customer Content) remains the Intellectual Property of CES, including (without limitation) any source code, ideas, enhancements, feature requests, suggestions or other information provided by the Customer or any other party with respect to the Solution.

16 CONFIDENTIALITY

16.1 The information and classes of information set out in the Particulars are Confidential Information for the purposes of this Agreement. In default, information relating to the business operations, personal information and other information that should be confidential is Confidential Information.

16.2 Each party acknowledges and agrees that:

- (a) the Confidential Information is secret, confidential and valuable to the disclosing party (**Discloser**);
- (b) it owes an obligation of confidence to the Discloser concerning the Confidential Information;
- (c) it must not disclose the Confidential Information to a third party except as permitted in this Agreement;
- (d) all Intellectual Property rights remain vested in the Discloser but disclosure of Confidential Information does not in any way transfer or assign any rights or interests in the Intellectual Property to the receiving party; and
- (e) any breach or threatened breach by the receiving party of an obligation under this Agreement may cause the Discloser immediate and irreparable harm for which damages alone may not be an adequate remedy. Consequently the Discloser has the right, in addition to other remedies available at law or in equity, to seek injunctive relief against the receiving party (and its agents, assigns, employees, officers and directors, personally) or to compel specific performance of this clause.

16.3 A party must notify the Discloser in writing, giving full details known to it immediately, when it becomes aware of:

- (a) any actual, suspected, likely or threatened breach by it of clause 16.1;
- (b) any actual, suspected, likely or threatened breach by any person of any obligation in relation to the Confidential Information; or
- (c) any actual, suspected, likely or threatened theft, loss, damage, or unauthorised access, use or disclosure of or to any Confidential Information.

- 16.4 The receiving party must promptly take all steps that the Discloser may reasonably require and must co-operate with any investigation, litigation or other action of the Discloser or of a related body corporate if there is:
- (a) any actual, suspected, likely or threatened breach of a term of this Agreement;
or
 - (b) any theft, loss, damage or unauthorised access, use or disclosure of or to any Confidential Information that is or was in its possession or control.

17 LIABILITY & INDEMNITY

- 17.1 The Customer agrees that it uses the Solution at its own risk.
- 17.2 The Customer acknowledges that CES is not responsible for the conduct or activities of any user and that CES is not liable for such under any circumstances.
- 17.3 The Customer agrees to indemnify CES, and its suppliers, directors, employees, contractors and agents, for any loss, damage, cost or expense that CES may suffer or incur as a result of or in connection with the Customer's use of or conduct in connection with the Solution, including any breach by the Customer of this Agreement.
- 17.4 In no circumstances will CES be liable for any direct, incidental, consequential or indirect damages, loss or corruption of data, loss of profits, goodwill, bargain or opportunity, loss of anticipated savings or any other similar or analogous loss resulting from the Customer's access to, or use of, or inability to use the Solution or any content, or in any way relating to an experience itself (or the provision or non-provision of an experience), whether based on warranty, contract, tort, negligence, in equity or any other legal theory, and whether or not CES knew or should have known of the possibility of such damage, to business interruption of any type, whether in tort, contract or otherwise.
- 17.5 Certain rights and remedies may be available under the *Competition and Consumer Act 2010* (Cth) or similar legislation of other States or Territories and may not be permitted to be excluded, restricted or modified. Apart from those that cannot be excluded, CES and CES's related entities exclude all conditions and warranties that may be implied by law. To the extent permitted by law, CES's liability for breach of any implied warranty or condition that cannot be excluded is restricted, at CES's option to:
- (a) the re-supply of services or payment of the cost of re-supply of services; or
 - (b) the replacement or repair of goods or payment of the cost of replacement or repair.

18 BREACH

- 18.1 Where a party is in breach of this Agreement, the other party may issue a written notice (**Breach Notice**) requiring the party in breach that must set out:
- (a) the nature of the breach;
 - (b) the provisions of the Agreement that are alleged to have been breached;
 - (c) a reasonable timeframe to remedy the breach in not less than 10 Business Days;
and

- (d) the action required to remedy the breach.
- 18.2 Where a party issues a compliant Breach Notice in accordance with clause 18.1, the receiving party shall be required to respond and/or remedy the breach as so set out in the Breach Notice. Failure to respond in writing setting out:
- (a) the steps taken to remedy the breach; or
 - (b) why the party believes it is not in breach as put forward in the Breach Notice,
 - (c) shall not in itself confirm the alleged breach but shall be in itself a breach of this Agreement.
- 18.3 Failure to remedy a breach set out in a Breach Notice shall be a material breach of this Agreement (**Material Breach**).

19 TERMINATION

- 19.1 **Breach.** Where a party is in Material Breach of this Agreement, the other party may terminate this Agreement by giving written notice of termination, which shall become effective 5 Business Days after the date of the notice.
- 19.2 **Insolvency.** Either party may terminate this Agreement immediately by notice, if either party:
- (a) stops or suspends or threatens to stop or suspend payment of all or a class of its debts;
 - (b) is insolvent within the meaning of section 95A of the Corporations Act;
 - (c) fails to comply with a statutory demand (within the meaning of section 459F(1) of the Corporations Act) unless:
 - (d) the debt to which the statutory demand relates is discharged within 15 Business Days of the date of the failure; or
 - (e) the party demonstrates to the satisfaction of the other party (acting reasonably) that it is able to pay all its debts as and when they become due and payable;
 - (f) has an administrator appointed in respect of it;
 - (g) has a controller within the meaning of section 9 of the Corporations Act or similar officer appointed to the whole or a substantial part of its assets or undertaking and that controller or similar officer is not removed within 15 Business Days of the appointment;
 - (h) has an order made or a resolution passed for its winding up or dissolution or it enters into an arrangement, compromise or composition with or assignment for the benefit of its creditors or a class of them;
 - (i) has any security enforced over, or a distress, execution or other similar process levied or served against, the whole or a substantial part of its assets or undertaking; or
 - (j) is subject to any event which, under the law of any relevant jurisdiction, has an analogous or equivalent effect to any of the events listed above.

- 19.3 Expiry or termination of this Agreement is without prejudice to and does not affect the accrued rights or remedies of any of the parties arising in any way out of this Agreement up to the date of expiry or termination.
- 19.4 The rights and obligations under the relevant provisions of clauses 8, 9, 10, 11, 12, 15, 16, 17, 18, 19, 20, 21, 22 and 23 survive termination of this Agreement.

20 DISPUTES

- 20.1 All disputes shall be handled in accordance with CES's dispute resolution policy.
- 20.2 Where CES does not have a relevant dispute resolution policy for a type of dispute, the following process shall apply:
- (a) **Negotiation.** If there is a dispute between the parties relating to or arising out of this Agreement, then within 5 Business Days of a party notifying the other party of a dispute, senior representatives from each party must meet (or if discuss directly via the telephone or internet) and use all reasonable endeavours acting in good faith to resolve the dispute by joint discussions;
 - (b) **Mediation.** If the dispute between the parties relating to or arising out of this Agreement is not resolved within five Business Days of notification of the dispute under Clause 20.1, the parties must agree to submit the dispute to mediation, administered by lawyers engaged in alternative dispute resolution;
 - (c) **Arbitration.** If the dispute between the parties relating to or arising out of this Agreement is not settled by mediation under Clause (b), either party may by written notice to the other refer the dispute to arbitration administered by the Institute of Arbitrators Australia. The arbitrator will be agreed between the parties from a panel suggested by the President of the Institute of Arbitrators Australia or failing Agreement, an arbitrator will be appointed by the President of the Institute of Arbitrators Australia; and
 - (d) **Court proceedings.** A party may not commence court proceedings in relation to a dispute relating to or arising out of this Agreement until it has exhausted the procedures in this clause (d) unless the party seeks appropriate injunctive or other interlocutory relief to preserve property or rights or to avoid losses that are not compensable in damages.

21 FORCE MAJEURE

- 21.1 If a party is prevented in whole or in part from carrying out its obligations under this Agreement as a result of Force Majeure, it will promptly notify the other party accordingly. The notice must:
- (a) specify the obligations and the extent to which it cannot perform those obligations;
 - (b) fully describe the event of Force Majeure;
 - (c) estimate the time during which the Force Majeure will continue; and
 - (d) specify the measures proposed to be adopted to remedy or abate the Force Majeure.

- 21.2 Following a notice of Force Majeure in accordance with clause 21.1 and while the Force Majeure continues, the obligations which cannot be performed because of the Force Majeure will be suspended, other than obligations to pay money that is due and payable.
- 21.3 The party that is prevented from carrying out its obligations under this Agreement as a result of Force Majeure must remedy the Force Majeure to the extent reasonably practicable and resume performance of its obligations as soon as reasonably possible.
- 21.4 The party that is prevented from carrying out its obligations under this Agreement as a result of Force Majeure must take all action reasonably practicable to mitigate any loss suffered by the other party as a result of the party's failure to carry out its obligations under this Agreement.
- 21.5 The term of this Agreement will not be extended by the period of Force Majeure.

22 ELECTRONIC COMMUNICATION, AMENDMENT AND ASSIGNMENT

- 22.1 The words in this clause that are defined in the *Electronic Transactions Act 1999 (Cth)* have the same meaning.
- 22.2 Each party to this Agreement agrees to the clauses in the Particulars and the Special Conditions. The Particulars, Special Conditions and the General Conditions form a single legal agreement. To the extent that the Particulars or the Special Conditions are inconsistent with the General Conditions, the terms of the Particulars will prevail. To the extent that the Special Conditions are inconsistent with the Particulars, the Special Conditions will prevail.
- 22.3 The Customer can direct notices, enquiries, complaints and so forth to CES as set out in this Agreement. CES will notify the Customer of a change of details from time-to-time.
- 22.4 CES will send the Customer notices and other correspondence to the details that the Customer submits to CES, or that the Customer notifies CES of from time-to-time. It is the Customer's responsibility to update its contact details as they change.
- 22.5 A consent, notice or communication under this Agreement is effective if it is sent as an electronic communication unless required to be physically delivered under law.
- 22.6 Notices must be sent to the parties' contact details as specified in item A of the Particulars.
- 22.7 The parties to this Agreement may only assign or otherwise create an interest in their rights under this document with the written consent of each other party.

23 GENERAL

- 23.1 **Disclaimer.** Each party acknowledges that it has not relied on any representation, warranty or statement made by any other party, other than as set out in this Agreement.
- 23.2 **Relationship.** The relationship of the parties to this Agreement does not form a joint venture or partnership.
- 23.3 **Waiver.** No clause of this Agreement will be deemed waived and no breach excused unless such waiver or consent is provided in writing.

- 23.4 **Further Assurances.** Each party must do anything necessary (including executing agreements and documents) to give full effect to this Agreement and the transaction facilitated by it.
- 23.5 **Governing Law.** This Agreement is governed by the laws of the state set out in item L of the Particulars. Each of the parties hereby submits to the non-exclusive jurisdiction of courts with jurisdiction there.
- 23.6 **Severability.** Any clause of this Agreement, which is invalid or unenforceable is ineffective to the extent of the invalidity or unenforceability without affecting the remaining clauses of this Agreement.

END GENERAL CONDITIONS