

MASTER SERVICES AGREEMENT (MSA)

1 Background

- (a) Downer and its Related Bodies Corporate own or have the right to provide the Services.
- (b) The Customer wishes to engage Downer to provide the Services
- (c) Downer agrees to provide the Services to the Customer on the terms and conditions set out in this Agreement.

2 Term of Agreement

This Agreement commences on the Commencement Date and continues:

- (a) in relation to Professional Services, for the duration of the Professional Services as set out in the Order Form; and
- (b) in relation to the Managed Service, for the Initial Term, and until all Application Subscriptions granted under this Agreement have expired or been terminated.

3 Term of Application Subscriptions

- (a) Each Application Subscription commences on the start date specified in the relevant Order Form (**Subscription Start Date**), and continues for the Subscription Term.
- (b) Except as otherwise specified in an Order Form, each Application Subscription will automatically renew for additional periods each of the same duration as the Subscription Term, unless either party gives the other notice of non-renewal at least 30 days before the end of the relevant Subscription Term. Except as otherwise provided in an Order Form or elsewhere in this Agreement, Fees applicable to the Subscription Term renewal will not be more than 10% greater than the then current Fees applicable to the Application Subscription.

4 Placing orders

- (a) The Customer must sign and return to Downer the Order Form for each Service.
- (b) Upon signature of an Order Form by both parties the Order Form will form part of this Agreement.
- (c) Order Forms must not derogate from the terms of this Agreement unless explicitly agreed to by Downer in the Order Form. Downer will not be bound by any terms other than those contained in this Agreement and an agreed Order Form. Any terms or conditions contained in, issued with or printed on any purchase order, letter of acceptance, notice of intention to proceed or similar document or communication issued by the Customer, or its agent, do not form part of the Agreement and are of no effect whatsoever.

5 Services

- (a) Subject to the payment of the Fees and the Customer's compliance with the terms of this Agreement, Downer will provide:
 - (i) the Professional Services to the Customer during the Term; and
 - (ii) each Application Subscription during the relevant Subscription Term.
- (b) Downer warrants that the Services will:
 - (i) be provided to the Customer during the Term with all reasonable care and skill; and
 - (ii) perform materially in accordance with the Specification.

6 Customer's obligations

- (a) In relation to the Services, Customer must:
 - (i) provide all necessary resources, information and work requirements for each engagement;
 - (ii) provide access to premises and systems (including remote access) as necessary for the performance of the Services;
 - (iii) in relation to Professional Services, acknowledge that there is no express or implied commitment from Downer that all tasks can be completed in the hours of Professional Services purchased by the Customer;
 - (iv) back-up and validate data from all systems that may be accessed during and in connection with the Services.
- (b) The Customer must ensure that all Customer Data uploaded and hosted in the System is in the format agreed by Downer, complies with this clause 6 and does not exceed the data limits as described in the Order Form.
- (c) The Customer is responsible for providing its own facilities, including terminals, software, hardware, modem, telecommunications facilities and all network and other connections and equipment (**Customer Facilities**) as required to access, use and receive the Services. The Customer acknowledges and agrees that Downer's ability to provide the Services is dependent on the Customer connecting to the System and the Customer Facilities meeting the requirements for the Services.
- (d) The Customer is solely responsible and liable for all Customer Data uploaded, installed, stored or accessed by it or its Permitted Users in connection with the Services.
- (e) The Customer must comply with Downer's reasonable instructions and guidelines relating to the input of the Customer Data and security

requirements from time to time. The Customer must not copy, disable, interfere with or make any unauthorised use of any security device or protocol provided by Downer or its Third Party Providers.

- (f) The Customer must:
- (i) only use the Managed Service for the Permitted Purpose and not for any other purpose;
 - (ii) not use the Managed Service directly or indirectly for any activity or upload, store or transmit any data, information or material unlawfully or which prevents any other user from accessing, using or enjoying the Managed Service;
 - (iii) not attempt to gain unauthorised access to the Managed Service or any part thereof, or use another person's name, registration account, token, log in identification or password;
 - (iv) ensure that there is one user account per Permitted User and that Permitted Users do not share tokens, log in identifications or passwords with other Permitted Users or other persons;
 - (v) not tamper with, hinder the operation of or make unauthorised modifications to the Managed Service;
 - (vi) not knowingly introduce or transmit any Malicious Code or other disabling feature to or from the Managed Service;
 - (vii) not remove, disable or modify any security, anti-Virus or other software connected with the Managed Service;
 - (viii) ensure that all Customer Facilities used to access the Managed Service have up to date anti-Virus software installed and operating;
 - (ix) not attempt to gain access to any data or information within or through the Managed Service, other than the Customer Data; and
 - (x) keep all passwords, account names, tokens or log in identifications required to access the Managed Service secure and confidential.

7 Permitted Users and Usage Rights

- (a) The Customer may at any time during a Subscription Term appoint Permitted Users (up to the maximum number of persons included within the applicable Usage Rights), provided that such persons:
- (i) are authorised representatives of the Customer; and
 - (ii) agree to comply with the terms of this Agreement prior to accessing and using the Managed Service.
- (b) The Customer's right to access and use the Managed Service will be determined by the level of Usage Rights purchased by the Customer, as set out in the applicable Order Form. The Customer must not exceed, and must not

authorise its Permitted Users or any other person to exceed, the applicable Usage Rights.

- (c) Where a Customer has ordered a Managed Service, Downer will issue or cause to be issued to the Customer an administrator name and password which will enable the Customer to access and use the Managed Service and nominate its Permitted Users.
- (d) Downer agrees to provide access to the Services to each of the Permitted Users in accordance with this Agreement. The Customer agrees that it is responsible and liable for all acts or omissions of its Permitted Users (and its Personnel) as if those acts and omissions were its own.

8 Usage Monitoring and Reporting

- (a) Subject to this **clause 8**, the Customer acknowledges and agrees that Downer may at any time during the Term:
- (i) monitor and measure access to and use of the Services by the Customer and its Permitted Users for the purposes of ensuring compliance with the terms of this Agreement and technical efficiency of the Services; and
 - (ii) report to its Third Party Providers on usage levels and metrics, provided such reports are on an aggregated and de-identified basis.
- (b) The reporting of usage metrics by Downer pursuant to **clause 8(a)(ii)** will be limited to aggregated usage data and will not identify the Customer or disclose the Customer Data.
- (c) The Customer undertakes to notify each Permitted User that Downer may monitor their use of the Services or otherwise conduct computer surveillance of the Customer's (and the Permitted Users') use of the Services.

9 Support Services

The Services will incorporate the Support Services set out in the Order Form at the cost set out in the Order Form.

10 Service Level Agreement

- (a) Downer will use reasonable efforts to provide the Support Services during the Subscription Term in accordance with the Service Level Agreement.
- (b) Downer will use reasonable efforts to provide prior reasonable notice to the Customer in respect of any downtime in the provision of the Managed Service as a result of scheduled maintenance.
- (c) Downer will use all reasonable efforts to make the Managed Service available to the Customer, however, the Customer acknowledges and agrees that, except as expressly provided in the Service Level Agreement:
- (i) the Managed Service or any part of the Managed Service (including any Application) may be temporarily unavailable for maintenance and support purposes;

- (ii) Downer may discontinue or change the Managed Service or any part of the Managed Service at any time; and
- (iii) Downer may deny access to any Permitted User or the Customer to the Managed Service or any part of the Managed Service at any time and for any period of time.
- (d) Downer is not responsible for any failure to comply with its obligations under this Agreement, or any suspension of or interruption to the Services caused by a Force Majeure Event.
- (e) Downer is not responsible for any interruption or any fault or failure in the Services where the interruption, fault or failure arises as a result of:
 - (i) power outages or fluctuations;
 - (ii) outages or interruptions in relation to a carriage service used to supply the Services;
 - (iii) errors or defects in the Services as a result of Malicious Code in or transmitted by a Third Party Service;
 - (iv) defective equipment provided or used by the Customer or incorrect operation by the Customer of the Services; and/or
 - (v) errors or defects in the Services caused by operation or use of the Services in a manner other than in accordance with this Agreement or that are caused by a modification, revision or alteration of the Services not authorised by Downer.

11 Third Party Services

- (a) The Customer acknowledges that the Managed Service may include Third Party Services and agrees to accept and be bound by the additional terms that may apply to an Application, as notified in the Order Form (if applicable) and any notices included in the Application or any Documentation. Except as provided in this clause, in the event of any inconsistency between any of these additional terms and any other provision of this Agreement, the additional terms will prevail.
- (b) In the event that, for any reason, a Third Party Provider terminates or suspends supply, materially changes or ceases to support a Third Party Service which impacts on Downer's ability to provide any of the Services to the Customer, Downer will notify the Customer as soon as reasonably practicable. Downer may terminate all or part of the Services on notice to the Customer where a Third Party Provider suspends or terminates all or part of a Third Party Service. Downer will provide as much prior notice to the Customer as is practicable in the circumstances.

12 Fees and Payment

- (a) Customer must pay to Downer the fees and charges for the Services as detailed in each Order Form (the **Fees**).
- (b) Customer must reimburse Downer for the cost of travel and other expenses where those costs were the subject of prior approval by Customer,

in which case such expenses shall form part of the Fees.

- (c) Downer will invoice the Customer for the Fees and the Customer must pay each invoice within 30 days of the date of the invoice.
- (d) If the Customer fails to pay any correctly rendered undisputed invoice by the payment due date and such failure continues for a period of 21 days after the payment due date, then without prejudice to Downer's other rights and remedies, Downer may suspend the Services and charge interest of 12% per annum compounding daily until payment is made in full. The Customer is liable for all amounts payable under this clause and Downer's costs of debt collection and enforcement, including reasonable legal fees on a solicitor and client basis.
- (e) With effect from the first anniversary of the Commencement Date, the Fees relating to multiyear Application Subscription Terms may be adjusted annually on each anniversary of the Commencement Date (**Adjustment Date**) by the CPI Adjustment.
- (f) The Customer acknowledges and agrees that Downer may notify the Customer of any increases to the Fees at any time, where a fee increase is imposed on Downer by a Third Party Provider, in so far as such increase relates to a part of the Services and/or an Application supplied to the Customer and the increase represents a cost increase borne by Downer in providing the applicable Services and/or Application(s). Downer will provide reasonable notice of any such increase. If the Customer does not accept the notified increase to the Fees, the Customer may terminate the applicable Application Subscription by giving 14 days' notice in writing to Downer.

13 GST

- (a) Unless otherwise expressly stated, all prices or other sums payable or consideration to be provided under this Agreement are exclusive of GST.
- (b) If GST is payable on any supply made by a party (or any entity through which that party acts) (**Supplier**) under or in connection with this Agreement, the recipient will pay to the Supplier an amount equal to the GST payable on the supply. The recipient will pay the amount referred to in this **clause 13(b)** in addition to and at the same time that the consideration for the supply is to be provided under this Agreement.
- (c) The Supplier must deliver a tax invoice or an adjustment note to the recipient before the Supplier is entitled to payment of an amount under **clause 13(b)**. The recipient can withhold payment of the amount until the Supplier provides a tax invoice or an adjustment note, as appropriate.
- (d) If an adjustment event arises in respect of a taxable supply made by a Supplier under this Agreement, the amount payable by the recipient under **clause 13(b)** will be recalculated to reflect the adjustment event and a payment will be made by the recipient to the Supplier or by the Supplier to the recipient as the case requires.

- (e) Where a party is required under this Agreement to pay or reimburse an expense or outgoing of another party, the amount to be paid or reimbursed by the first party will be the sum of:
 - (i) the amount of the expense or outgoing less any input tax credits in respect of the expense or outgoing to which the other party is entitled; and
 - (ii) if the payment or reimbursement is subject to GST, an amount equal to that GST.

14 Intellectual Property Rights

Downer IPR

- (a) The Customer acknowledges and agrees that, as between the parties, Downer owns and retains all right, title and interest, including all Intellectual Property Rights, in and to the Services (including each Application). The Customer has no right, title or interest in, or licence to use, such Intellectual Property Rights, except as expressly set out in this **clause 14**.
- (b) Downer warrants to the Customer that it has all necessary rights, licences and permissions required to supply the Services to the Customer for access and use by the Customer in accordance with the terms of this Agreement.

Restrictions on use of IP

- (c) Downer grants the Customer a non-exclusive, non-sublicensable and non-transferable license to use the materials developed and provided to Customer by Downer in performing the Professional Services solely for Customer's internal business purposes.
- (d) The Customer is permitted to access and use the Services solely for its own internal business purposes (subject to the applicable Usage Rights) and must not provide any type of bureau, rental, facilities management or similar type of service to, or use the Services on behalf of or for the benefit of, any third party (including any subsidiary, holding company or associate of the Customer) by way of trade or otherwise in any similar such manner.
- (e) The Customer must only permit and authorise the specified number of Permitted Users to access and use the Managed Service and each Application in accordance with the Usage Rights. The Customer shall not be entitled to permit or authorise any other of its Personnel to access or use the Managed Service, including any Application, without the prior consent of Downer and payment of all additional fees.
- (f) The Customer agrees that it will not, and will not authorise its Permitted Users or other Personnel to, infringe Downer's, its Related Bodies Corporate's or Third Party Providers' Intellectual Property Rights in the Services, each Application or any part thereof and will not modify, copy, republish, frame, distribute or communicate any part of the Services, any Application or any information contained therein or otherwise use the Services in a way which will infringe Downer's, its Related Bodies Corporate's or Third Party Providers' Intellectual Property Rights or other rights in the Services, each Application or any part thereof.

- (g) Nothing contained on the System, in the Services or in this Agreement shall be construed as granting any licence or right to use any of the Downer Marks. Any unauthorised use of the Downer Marks by the Customer is strictly prohibited.

15 Customer Data

Ownership and licence

- (a) Except as expressly set out in this **clause 15**, Downer does not acquire any right, title or interest in or to any Customer Data.
- (b) The Customer warrants and represents to Downer that at all times during the Term it owns all rights, title and interest in and to all Customer Data, or has obtained all necessary licences, rights, permissions, consents and clearances on a fully paid-up basis for the inclusion of such Customer Data in the Services.
- (c) To the extent necessary by law, the Customer grants to Downer and its Related Bodies Corporate a non-exclusive, worldwide, royalty-free licence to:
 - (i) collect, host, copy, transmit, display and store; and
 - (ii) disclose, and provide access, to each Permitted User,
 the Customer Data as necessary for Downer to provide the Services in accordance with this Agreement.

Storage and security

- (d) Except to the extent required in performing its obligations under this Agreement or at Law, or as otherwise agreed in writing with the Customer, Downer will not itself access or use, or permit third parties to access or use, the Customer Data.
- (e) Customer Data will be stored by Downer and its Third Party Providers, as further described in the Order Form. Unless otherwise agreed in writing by the parties, Downer will not transfer or store the Customer Data in a location not specified in the Order Form.
- (f) Downer will take reasonable steps to ensure that the Customer Data remains logically separate from any data of a third person.
- (g) Notwithstanding Downer's obligations under this Agreement, the Customer is responsible for maintaining the security of the Customer Data, including any required encryption or encoding whilst being stored or transferred by the Customer. Without limiting the generality of the foregoing, the Customer must ensure that it has appropriate anti-Virus software at all times on the Customer Facilities and will use reasonable endeavours to ensure that no Virus or similar program existing within the Customer Facilities have any direct or indirect impact upon the Services or Downer's business operations.
- (h) The Customer agrees that, if any Malicious Code is found to have been introduced into the Managed Service, whether or not in contravention of **clause 15(g)**, the Customer will take such action as Downer reasonably directs to

assist Downer in minimising the effects of the Malicious Code. To the extent that the introduction of the Malicious Code is the result of a contravention by the Customer of its obligations under **clause 15(g)**, the remedial efforts undertaken by Downer and the Customer to minimise the effect of the Malicious Code will be at the Customer's cost.

16 Confidentiality

- (a) Each party (**receiving party**) must keep confidential, and not disclose, any Confidential Information of the other party (**disclosing party**) except:
- (i) as permitted under this Agreement;
 - (ii) where the receiving party has obtained the prior written permission of the disclosing party;
 - (iii) to the receiving party's officers, agents, professional advisers, employees, contractors, subcontractors and insurers;
 - (iv) to the receiving party's Related Bodies Corporate;
 - (v) to the receiving party's auditors; or
 - (vi) where the receiving party is compelled to do so by Law, provided that it gives the disclosing party written notice prior to disclosure.
- (b) Each party must only use Confidential Information of the other party for the purpose for which it was disclosed in connection with this Agreement.
- (c) Downer may disclose Confidential Information of the Customer to its Third Party Providers, to the extent such disclosure is required in order to perform its obligations under this Agreement.
- (i) All press releases and other publicity relating to this Agreement or the Services are subject to the prior written approval of Downer.

17 Privacy

- (a) Both parties must comply with the Privacy Act, including the Australian Privacy Principles (**APPs**), in so far as it relates to their respective obligations and rights under this Agreement.
- (b) As between the parties, the Customer acknowledges and agrees that it is solely responsible for dealing with any individual's request for access to or correction of their Personal Information comprised in the Customer Data, complying with the APPs with respect to the Customer Data, and for dealing with any privacy complaint under the Privacy Act.

18 Indemnity

- (a) The Customer indemnifies and holds harmless Downer and its Related Bodies Corporate, and their respective officers, employees, agents and contractors (the those indemnified) from and against any Claim or Loss which those indemnified pays, suffers, incurs or is liable for arising out of or in connection with:
- (i) any breach of this Agreement;
 - (ii) the death or personal injury of any person;

- (iii) the loss of, or damage to, any property;
 - (iv) any breach of Law or infringement of a third party's rights;
 - (v) Claim by a third party (including a Third Party Provider) that the use of the Services infringes the Intellectual Property Rights of any person;
 - (vi) any act or omission of fraud, dishonesty, reckless or wilful misconduct or misrepresentation,
- to the extent caused or contributed to by any act or omission of the Customer or its Personnel.

19 Exclusions

- (a) The Customer agrees that the Services are supplied and made available by Downer to the Customer under this Agreement on an "as is" basis. The Services are not intended to be used as the sole basis for any decision by the Customer.
- (b) The Customer agrees that Downer will not be, and is not responsible or liable for, and releases Downer from any Claim in relation to:
- (i) retaining any copy of the Customer Data, except as expressly provided in the Specification, if at all;
 - (ii) restoring or repairing any lost, damaged or corrupted Customer Data;
 - (iii) monitoring, analysing or otherwise ensuring the integrity, completeness, correctness or accuracy of any of the Customer Data;
 - (iv) any business, operational, safety or other decision, act or omission by the Customer or its personnel based on the Services, or any output from the Services; or
 - (v) any failure of the Services to achieve any particular result for the Customer.
- (c) Subject to clause **20(a)**, the warranties expressly set out in this Agreement are the only warranties that each party gives to the other in respect of the subject matter of this Agreement. All other conditions, warranties, representations or terms of equivalent effect that might be implied by Law, circumstances, industry practice or otherwise are excluded, to the fullest extent permitted by Law.
- (d) The application of the United Nations Convention on Contracts for the International Sale of Goods (the Vienna Convention) to this Agreement is excluded.

20 Limitation of liability

- (a) Nothing in this Agreement excludes, restricts or modifies any condition, guarantee or warranty that is implied in respect of this Agreement by the *Competition and Consumer Act 2010* (Cth) or any other consumer protection legislation and which cannot be lawfully excluded, restricted or modified. Where such condition, guarantee or warranty is implied (and is breached by Downer), Downer's sole liability will be limited to supplying the Services to the Customer again or the payment of the cost of having the Services supplied again, to the extent permitted by any non-excludable provision.

- (b) Except as provided in **clause 20(a)**, the liability of each party to the other (whether in contract, negligence, breach of statutory duty or under any indemnity or otherwise) in respect of any Claims brought under or in connection with this Agreement in any Year is limited to an amount equal to the Fees paid by the Customer under this Agreement during that Year.
- (c) Subject to **clause 20(a)**, neither party shall be liable to the other (whether arising under contract, in tort (including negligence), for breach of statutory duty or otherwise) for:
 - (i) any special, indirect or consequential loss or damage;
 - (ii) loss of profit, loss of revenue, loss of earnings, loss of business or goodwill, loss of use, loss of production, loss or corruption of data, loss of contract or for any financial or similar economic loss, even if that party had notice of the possibility of the other party incurring such losses; or
 - (iii) anticipated or incidental losses, including loss of anticipated savings or anticipated profits, even if that party had notice of the possibility of the other party incurring such losses.
- (d) The limitations in **clauses 20(b)** and **20(c)** do not apply to any Loss arising out of or in connection with any:
 - (i) repudiation or intentional breach of this Agreement;
 - (ii) personal injury or death resulting from a party's negligence or that of its personnel;
 - (iii) fraud or fraudulent misrepresentation by a party; or
 - (iv) indemnities given by the Customer under clause 18.
- (e) In respect of any Claim between the parties under or in connection with this Agreement, the parties agree that to the maximum extent permitted by Law, the operations of the *Civil Liability Act 2003* (Qld) and of any Laws having a similar effect in the Commonwealth and other States and Territories of Australia are excluded and have no application or effect insofar as any of them would apportion liability to Downer which would not have been so apportioned but for such Laws.

21 Termination

- (a) Either Party may terminate this Agreement and any or all Services immediately by notice in writing to the other party if the other party:
 - (i) commits any material breach and does not remedy the same (if capable of remedy) within 30 calendar days of being notified of such breach; or
 - (ii) is affected by an Insolvency Event.
- (b) Downer may terminate this Agreement immediately on notice to the Customer where its invoices for Fees remain unpaid for more than 60 days from the date of the invoice.

- (c) On termination or expiry of this Agreement, the Customer must pay any outstanding invoices within 5 Business Days.
- (d) After a period of 10 Business Days following the termination or expiry of this Agreement, Downer shall be entitled to take such action as it considers necessary to delete Customer Data from the System and will have no liability to the Customer in relation to such deletion.
- (e) **Clauses 6(c), 7(d), 11, 14, 15(h), 16, 17, 18, 20, 21, 23, and 25** survive termination or expiry of this Agreement.

22 Resale and exports

- (a) Customer acknowledges that the Services (including the Applications), Documentation and other materials provided by Downer ("**Covered Products**") may be subject to export control laws and regulations of the United States and other countries. Upon delivery of Covered Products to the Customer (where applicable), the Customer is responsible for compliance with all applicable export control laws and regulations.
- (b) The Customer must not export, re export, sell or re-sell or transfer directly or indirectly any Covered Products in contravention of such export control laws and regulations.

23 Dispute resolution

- (a) If a difference or dispute between the Parties arises relating to the subject matter of this Agreement (Dispute), then either party shall give the other party a notice of dispute adequately identifying and providing details of the Dispute.
- (b) Notwithstanding the existence of a Dispute, the Parties shall continue to perform this Agreement.
- (c) Within 10 days after receiving a notice of dispute, the parties shall confer at least once to attempt to resolve the Dispute or to agree on methods of doing so. At every such conference, each party shall be represented by a person having authority to agree to such resolution or methods. All aspects of every such conference except the fact of occurrence shall be privileged.
- (d) In the event that the parties are unable to resolve the Dispute or reach agreement on a method to do so within 28 days (or such longer period as agreed by the Parties) after the notice of dispute is served, then the Dispute shall be and is hereby submitted to arbitration in accordance with either clause 23(e) or 23(f) as applicable. The arbitrator's decision or majority decision of the arbitrators (as applicable) shall be final and binding on the parties.
- (e) Where the Customer is a company incorporated in Australia or another type of entity resident in Australia: The parties agree that such arbitration will be administered by the Resolution Institute and will be finally resolved under the Resolution Institute Arbitration Rules. There will be one arbitrator, appointed in accordance with the Resolution Institute Arbitration Rules. The decision of the arbitrator shall be final and binding on the Parties. The arbitrator must give written reasons for their award. The seat of the arbitration will be Sydney, Australia, and the arbitration proceedings (including all hearings)

will take place in Sydney, Australia. The arbitration will be conducted in English.

- (f) Where the Customer is a company not incorporated in Australia, or is another entity resident outside of Australia: The parties agree that such arbitration will be finally resolved under the Rules of Arbitration of the International Chamber of Commerce. The arbitral tribunal will comprise three arbitrators, appointed in accordance with the Rules. The arbitrators must give written reasons for their award. The seat of the arbitration will be Sydney, Australia and the arbitration proceedings (including all hearings) will take place in Sydney. The arbitration will be conducted in English.
- (g) Except to enforce this clause 23, to recover an amount due and payable by the Customer under this Agreement, or to seek an urgent interim determination, a party must not commence or maintain an action by way of proceedings until it has been dealt with in accordance with this clause 23.

24 General

- (a) This Agreement constitutes the entire agreement between the parties in connection with the subject matter and supersedes all previous agreements or understandings between the parties in connection with the subject matter.
- (b) If there is any inconsistency between the following documents, the inconsistency is resolved by applying the following order or priority: the Order Form, these terms and conditions, the Specification and the Documentation.
- (c) The Customer may not assign any of its rights or obligations under this Agreement without the prior written consent of Downer.
- (d) The parties are independent contractors and nothing in this Agreement gives rise to any relationship of agency, partnership, employment or otherwise.
- (e) In the event that any part of this Agreement is void, voidable, illegal or otherwise unenforceable it may be severed and the remaining provisions of these terms and conditions shall remain in full force and effect.
- (f) No waiver of a right or remedy under this Agreement is effective unless it is in writing and signed by the party granting it.
- (g) This Agreement may be varied by Downer by giving 30 days' notice of the updated form of the Agreement, which may be given by referring to an updated form of the Agreement available online. Where the variation has a material detrimental impact on the Customer, the Customer may terminate this agreement by notice to Downer given within the 30 day period referred to in this clause.
- (h) All notices given under this Agreement must be given by a party to the other party's address for notice, as detailed on the Order Form or as notified to it by the other party from time to time.

- (i) This document may consist of a number of counterparts and, if so, the counterparts taken together constitute one document.

25 Governing law

This Agreement is governed by the laws of New South Wales and each Party submits to the exclusive jurisdiction of the courts of New South Wales.

26 Definitions

In this Agreement, capitalised terms have the meaning given to them in the Order Form and as follows:

Adjustment Date has the meaning given in **clause 12(e)**.

Agreement means each executed Order Form (including schedules and appendixes to the Order Form) and these terms and conditions.

Application means each software application (including automations) made available by way of the Services from time to time.

Application Subscription means a subscription to an Application purchased by the Customer under an Order Form in accordance with these terms and conditions.

Business Day means a day which is not a Saturday, Sunday or bank or public holiday across Australia.

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

Commencement Date means the date on which this document is executed by the last party, or the date on which Downer commences providing the Services, whichever is the earlier.

Confidential Information in relation to a party means information of a confidential nature including information about its business, operations, strategy, administration, technology, affairs, clients, customers, employees, contractors or suppliers, but does not include any information which is in the public domain other than through a breach of confidence.

Covered Products has the meaning given in **clause 22**.

CPI Adjustment means the percentage difference in the All Groups Consumer Price Index Weighted Average of Eight Australian Capital Cities (published by the Australian Bureau of Statistics) since the last Adjustment Date.

Customer Data means all data and information that is uploaded to or entered into the Applications by the Customer in connection with this Agreement.

Customer Facilities has the meaning given to it in **clause 6(c)**.

Documentation means Downer's user guides, training materials and other documentation relating to the use and operation of the Services, as may be updated and made available by Downer from time to time.

Downer Mark means a trade mark (whether registered or unregistered), logo, company name, business name or trading name, including all associated logos, get-up and goodwill, owned, licensed and/or used by Downer and any of its Related Bodies Corporate..

Fees has the meaning given to it in **clause 12**.

Force Majeure Event means an event:

- (a) which is outside of the reasonable control of the party claiming that the event has occurred; and
- (b) the adverse effects of which could not have been prevented or mitigated against by that party by reasonable diligence or reasonable precautionary measures,

and includes natural disasters, acts of terrorism, riots, revolutions, civil commotion, or epidemic.

GST means a goods and services tax, or a similar value added tax, levied or imposed under the GST Law.

GST Law has the meaning given to it in the *A New Tax System (Goods and Services Tax) Act 1999* (Cth).

Initial Term means the period specified in the first Order Form relating to an Application Subscription.

Insolvency Event means the occurrence of any event of insolvency, including a winding up application being made and not withdrawn within 21 days, a failure to comply with a statutory demand, the appointment of a provisional liquidator or administrator, the entering into of an arrangement with creditors, a voluntary winding up other than for the purpose of a bona fide corporate reconstruction, any inability to pay debts as and when they fall due, any admission of insolvency, any court order relating to any of the above or anything which occurs which has a similar effect to any of the foregoing.

Intellectual Property Rights means any and all intellectual property rights throughout the world, including:

- (c) any patent, copyright (including future copyright), trade mark (whether registered or unregistered), software, design, circuit layout right, trade, business or company name or other proprietary right, or any right to register such rights; and
- (d) all present and future rights in an invention, discovery, trade secret, know-how, concept, idea, data or formula and rights in information, including any serendipitous discoveries, granted by law or equity from time to time under the law of any jurisdiction.

Law means all applicable laws, including rules of common law and equity, statutes, regulations, determinations, by-laws, ministerial directions, subordinate legislation, ordinances, mandatory codes, standards and guidelines, writs, orders, injunctions and judgements and any government or regulatory agency or authority requirement or authorisation (including conditions in respect of any authorisation).

Loss includes loss, damage, liability, charge, expense, outgoing or cost (including all legal and other professional costs on a full indemnity basis) of any nature or kind.

Malicious Code means code, files, scripts, agents or programs intended to do harm, including Viruses, worms, time bombs and Trojan horses.

Managed Service means the services provided by the System, including applicable Support Services, as specified in the Order Form.

Order Form means each document (in any form or format) made available by Downer for placing an order for Services that is entered into between Customer and Downer from time to time, including any schedules, appendixes and attachments.

Permitted Purpose means the management by the Customer of data relating to activities and operations of the Customer for the purposes of internal tracking and monitoring of performance and operations.

Permitted Users means those persons nominated by the Customer to access and use the Services in accordance with the terms of this Agreement, up to the maximum number set out in the relevant Order Form.

Personal Information means information or an opinion (including where forming part of a database), whether true or not, and whether recorded in a material form or not, about an identified individual or an individual who is reasonably identifiable.

Personnel means the employees, independent contractors, consultants and agents of a party.

Privacy Act means the *Privacy Act 1988* (Cth), as amended from time to time.

Professional Services means any consulting, training, implementation or technical services specified on the Order Form as Professional Services.

Related Bodies Corporate has the meaning given in the *Corporations Act 2001* (Cth).

Service Level Agreement or SLA means the service levels for the accessibility and operation of the Managed Service, as set out in the Order Form or as otherwise made available to all Downer customers from time to time.

Services means the Managed Services and/or the Professional Services specified in the applicable Order Form.

Specification means the detailed description and requirements for the Services as agreed between the Parties.

Subscription Start Date has the meaning given in **clause 3(a)**.

Subscription Term means the subscription period applicable to an Application Subscription as specified in the relevant Order Form or as subsequently renewed in accordance with this Agreement.

Support Services means support services for the System or a particular Application, as described in the relevant **Order Form** or as otherwise made available to all Downer Managed Service customers from time to time.

System means the electronic platform on which the Applications are hosted, and includes Applications, graphical user interfaces and application programming interfaces (APIs) and related databases, tools, materials, data storage and hosting services, including any Third Party Services incorporated into such System.

Term means, in relation to Professional Services, the period during which the Professional Services are being provided, and in relation to an Application Subscription, means the Initial Term and any further period during which any Application Subscription is in effect.

Third Party Providers means Downer's licensors and other third parties providing services, applications or systems that support the System.

Third Party Service means software, hardware and services manufactured, developed, owned, supplied or licensed by Third Party Providers, and not Downer, and made available to the Customer subject to additional

terms and conditions set out in the applicable Order Form.

Usage Rights means the number of Permitted Users and level of access and usage of the Managed Service and applicable Application(s), as further described in the applicable Order Form.

Virus means any files, program or program code designed to affix themselves to, bury themselves within or send instructions to, other files, computers, or other programmes or programme code in order to cause malfunctions, errors or destruction or corruption of data.

Year means each (rolling) 12 month period during the Term.

27 Construction

Unless expressed to the contrary, in this Agreement:

- (a) words in the singular include the plural and vice versa;
- (b) if a word or phrase is defined its other grammatical forms have corresponding meanings;
- (c) 'includes' means includes without limitation;
- (d) no rule of construction will apply to a clause to the disadvantage of a party merely because that party put forward the clause or would otherwise benefit from it; and
- (e) a reference to:
 - (i) a person includes a partnership, joint venture, unincorporated association, corporation and a government or statutory body or authority;
 - (ii) a person includes the person's legal personal representatives, successors, assigns and persons substituted by novation;
 - (iii) any legislation includes subordinate legislation under it and includes that legislation and subordinate legislation as modified or replaced; and
 - (iv) an obligation includes a warranty or representation and a reference to a failure to comply with an obligation includes a breach of warranty or representation.

27.2 Headings

Headings do not affect the interpretation of this Agreement