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# PROFESSIONAL IT SUPPORT

DELIVERED TO SMALL TO MEDIUM BUSINESSES

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## Managed Services Standard Terms and Conditions

Version 1.0

28/01/2015



## About this document

- A. This document sets out the terms and conditions on which KBIT Consultants provides managed IT support Services to clients. These are known as our Managed Services Standard Terms and Conditions.
- B. These Standard terms and conditions apply to KBIT Consultants Managed Services Agreements.
- C. A reference herein to “the Agreement” is a reference to KBIT Consultants Managed Services Agreements.
- D. KBIT Consultants advises Clients that its Standard and Managed services terms and conditions are published at <http://www.kbitcon.com.au/legal> by stating that in its Managed Services Agreements.
- E. Managed Services Agreements identify the type and level of IT Support that KBIT Consultants agrees to provide our clients.

## Background

- A. KBIT Consultants is in the business of providing Information Technology (IT) service and technical support.
- B. The operations of the Client involve the use of an IT network which requires ongoing service and support.
- C. The Parties have agreed to enter into the Agreement whereby KBIT Consultants will provide IT service and support to the Client on the terms and conditions hereinafter provided in the agreement.

## Contract

### 1. DEFINITIONS AND INTERPRETATION

- 1.1. In these terms and conditions:

**“Additional Charge”** means a charge levied to your account in relation to the supply of a service or product or goods of and incidental to the Agreement that is not included in the Agreement that is deemed by KBIT Consultants to be reasonably necessary to give effect to the performance of the Term of the Agreement.

**“Agreement”** means the Managed Services Agreement or IT Support SLA which may be used interchangeably herein.

**“Agreed Increase”** means the amount expressed as a percentage of the fixed annual fee by which the fee will rise at the anniversary of the commencement date of the Term of the Agreement to any extent applicable.

**“Business Day”** means a day in the State of Queensland that is not a Saturday, a Sunday or a gazetted public holiday in that State.

**“Client”** means the party that has entered into the agreement with KBIT Consultants.

**“Commencement Date”** means the date for the commencement of the services as specified in the Agreement.

**“Confidential Information”** means:

- I. all pricing information, business and financial information, sales and supply details, marketing strategies, customer and supplier listings, staff information, business listings, information concerning the business or customers relating to the Client or the Services;
- II. all information related to people who are currently or have previously wished to find employment with the Client and or any third party introduced by the Client;
- III. all processes, procedures, techniques, concepts, systems, manuals, licence agreements, disclosure documents, documents, agreements, contracts, notes, file and data base structures and software relating to the Services;
- IV. any information which, by its nature, places or potentially places the Client at an advantage over its present or future business competitors;
- V. any pricing information which, by its nature, places or potentially places the Client at a disadvantage with its present or future clients;
- VI. any information that would otherwise at law be considered secret or confidential information; whether or not marked "Confidential" BUT does not include information which:
  - a at the time of first disclosure by a party is or is reasonably known to be or to have been a part of the public domain;
  - b after disclosure by a party is or becomes part of the public domain otherwise than by disclosure in breach of the terms of the Agreement;
  - c was in the possession, knowledge, custody, power or control of KBIT Consultants prior to disclosure.
- VII. Any information relating to the Client, its members, customers, contributors or suppliers.

**“Contract”** means the Agreement and may be used interchangeably herein.

**“Corporations Act 2001”** means the Corporations Law and may be used interchangeably in the agreement.

**“Due Date”** means the date payment is due and payable by the Client to KBIT Consultants for the supply of the Services

or other matters or things of and incidental to the Agreement.

**“Emergency”** means anything that is considered to be of an extreme or catastrophic nature touching or impinging upon human life, property, goods, anything material or intangible deemed necessary to give effect to the Agreement.

**“Fees”** means the Time and Materials hourly rate or those costs prescribed in the schedule of Fees or Price List comprising the Agreement and may be used interchangeably to the extent applicable.

**“GST”** means

- I. the same as in the GST Law;
- II. any other goods and services tax, or any tax applying to the agreement in a similar way; and
- III. any additional tax, penalty tax, fine, interest or other charge under a law of such a tax.

**“GST Law”** means the same as “GST law” in A New Tax System (Goods and Services Tax) Act 1999 (Cth).

**“Initial Term”** means the committed period of engagement by the Client of KBIT Consultants starting on the Commencement date.

**“Insolvency Event”** in respect of the Client means:

- a. The client becomes an externally-administered body corporate for the purposes of the *Corporations Act 2001* (Cth) or an external insolvency administrator is appointed to any such party under the provisions of any companies or securities legislation of another jurisdiction;
- b. a controller (as that term is defined in the *Corporations Act 2001* (Cth)) or mortgagee in possession is appointed to the assets of the Client, or any such appointment is reasonably likely;
- c. The Client fails to comply with a statutory demand in the manner specified in section 459F of the *Corporations Act 2001* (Cth), and has not made an application to set aside such demand under section 459G of the *Corporations Act 2001* (Cth);
- d. The Client is unable to pay its debts as and when they fall due.

**“KBIT Consultants”** means KBIT Consultants Pty Ltd trading as KBIT Consultants which may be used interchangeably in the Agreement or herein.

**“Out of Scope”** means services provided that do not form a part of the support inclusions or base costing of the Agreement to any extent applicable.

**“Parties”** means the parties to the Agreement, namely the Client and KBIT Consultants and may be used interchangeably in the Agreement or herein.

**“Penalty Rate”** means those amounts prescribed in the Agreement to any extent applicable.

**“Personal Information”** to the extent applicable to this contract has the same meaning as it has in sub-section 6(1) of the Privacy Act 1988 (Cth).

**“Related Bodies Corporate”** has the meaning given to that term in the Corporations Act 2001.

**“Response Time”** means the maximum delay prior to KBIT Consultants responding to a request for Services of an incidental to the Agreement.

**“Services”** means those services described in the Agreement.

**“Service Level Agreement (SLA)”** means a formal, negotiated document that defines in quantitative or qualitative terms the service being offered to a Customer.

**“Service Level Guarantees”** means those Service Support Levels set out in the Agreement.

**“Subsequent term”** means the period of time the Client engages KBIT Consultants following the conclusion of the Initial Term.

**“Tax Invoice”** means a tax invoice within the meaning of the GST Law.

**“Term”** means the Initial Term and any Subsequent Term as set out in the Agreement.

**“We” or “Us” or “Our”** means KBIT Consultants and may be used interchangeably in the Agreement or herein.

**“You” or “Your” or “It”** means the Client and may be used interchangeably in the Agreement or herein.

1.2. In these terms and conditions, except where the context otherwise requires:

- A. the singular includes the plural and vice versa, and a gender includes other genders;
- B. a reference to a definition that is capitalised may also be a reference to such definition in lower case;
- C. another grammatical form of a defined word or expression has a corresponding meaning;
- D. a reference to a clause, paragraph, schedule or annexure is to a clause or paragraph of, or schedule or annexure to, the agreement, and a reference to the agreement includes any schedule or annexure;
- E. a reference to a document or instrument includes the document or instrument as novated, altered,

supplemented or replaced from time to time;

- F. a reference to **A\$, \$A, dollar** or **\$** is to Australian currency;
- G. a reference to time is to the time in Queensland, Australia;
- H. a reference to a party is to a party to the agreement;
- I. a reference to a person includes a natural person, partnership, body corporate, association, governmental or local authority or agency or other entity;
- J. a reference to a statute, ordinance, code or other law includes regulations and other instruments under it and consolidations, amendments, re-enactments or replacements of any of them;
- K. the meaning of general words is not limited by specific examples introduced by including, for example or similar expressions;
- L. headings are for ease of reference only and do not affect interpretation;
- M. any agreement, representation, warranty or indemnity in favour of two or more parties (including where two or more persons are included in the same defined term) is for the benefit of them jointly and severally;
- N. a rule of construction does not apply to the disadvantage of a party because the party was responsible for the preparation of the agreement or these terms and conditions or any part of them; and
- O. if a day on or by which an obligation must be performed or an event must occur is not a Business Day, the obligation must be performed or the event must occur on or by the next Business Day.

## 2. DURATION

- 2.1. The Agreement continues for its term unless otherwise stipulated or terminated in accordance with the terms and conditions herein.
- 2.2. Following expiry of the Initial Term the Agreement will automatically renew for subsequent periods equal to the length of the Initial Term of the Agreement (each a Subsequent Term) unless you notify KBIT Consultants in writing at least 30 days prior to the expiry of the Initial Term or, where relevant, a Subsequent Term, of your intention to allow the Agreement to expire.

## 3. ACKNOWLEDGMENTS AND NOTICE

- 3.1. KBIT Consultants acknowledges:
  - A. the Client enters into the Agreement and receives the benefit of the Services on behalf of itself;
  - B. that, if not for the Client entering into the Agreement, the Client would not have allowed KBIT Consultants to provide the Managed Services to it;
  - C. the confidentiality obligations hereby created shall not merge or be released upon cessation of any discussions between the Parties but will continue thereafter;
- 3.2. KBIT Consultants hereby notifies the Client:
  - A. that these terms and conditions take effect from signing of the Managed Services contract; and
  - B. if an existing contract is on foot to supply IT services at the time these terms and conditions take effect:
    - i. the existing contract is enforceable until its expiration; and
    - ii. at the expiration of the existing contract these terms and conditions apply.

## 4. CONFIDENTIALITY OBLIGATIONS

- 4.1. KBIT Consultants must not use the Confidential Information other than for the purpose of fulfilling the requirements of and to give effect to the performance of the Agreement.
- 4.2. KBIT Consultants must maintain strict confidentiality in relation to the Confidential Information and must not divulge all or any aspect of the Confidential Information to any person not in its employ or engagement in relation to fulfilling its obligations under the Agreement.
- 4.3. If KBIT Consultants wishes to disclose any of the Confidential Information to its accountant, business, financial or legal adviser ("Professional Advisors"), it may do so upon advising the Client and obtaining the prior written consent of the Client that shall not be unreasonably withheld.
- 4.4. If KBIT Consultants is uncertain whether any information comprises part of the Confidential Information then it may seek direction from the Client before divulging the information to any third party.
- 4.5. KBIT Consultants must not grant or permit any person to have access to or possession of the Confidential Information.
- 4.6. The obligations on the Parties under this clause 4 shall not be taken to have been breached to the extent that the



Confidential Information:

- A. is disclosed by KBIT Consultants to its Professional Advisers, officers, employees, agents or subcontractors solely and to the extent necessary in order to comply with obligations or to exercise rights under the Agreement;
  - B. is disclosed by KBIT Consultants to its internal management personnel, solely to enable effective management or auditing of related activities of and incidental to fulfilling its obligation to the Client under the Agreement;
  - C. is authorised or required by law or by order of any regulatory authority, stock exchange, judicial or parliamentary body or governmental agency to be disclosed.
- 4.7. Where KBIT Consultants discloses Confidential Information to another person pursuant to sub-paragraphs 4.6(a) and 4.6(b), KBIT Consultants must:
- A. notify the receiving person that the information is Confidential Information; and
  - B. not provide the information unless the receiving person agrees in writing to keep the information confidential.
- 4.8. If KBIT Consultants is required to make a disclosure as described in sub-paragraph 4.6(c) KBIT Consultants will disclose only the Confidential Information required to comply with the applicable law or order.
- 4.9. Notwithstanding this clause 4, the Client is not entitled to restrict the use by KBIT Consultants of any Intellectual Property in material which vests in the Client by claiming that the Intellectual Property is Confidential Information which would restrict the delivery of the Managed Service or impinge or unduly impact upon the Service Levels provided.
- 4.10. The Client agrees that it will:
- A. treat as confidential information and keep secret during the term of this Agreement and for three full years after the termination of it all information relating to the business practices or clientele of KBIT Consultants that is disclosed to it in confidence unless KBIT Consultants gives its prior written consent to such disclosure unless such disclosure is required by law or relevant regulatory body; and
  - B. not reproduce in whole or in part any report prepared by KBIT Consultants for use by any other party without KBIT Consultants' prior written approval.
- 4.11. KBIT Consultants' obligations of confidentiality shall not merge or be released upon the expiry or termination of the Agreement, and will continue thereafter.

## 5. IT SERVICE AND SUPPORT

- 5.1. KBIT Consultants must provide the Services to the Client:
- A. in accordance with any Service Levels Guarantees; and
  - B. otherwise on the terms and conditions of the Agreement, throughout the Term.
- 5.2. The method of delivering the Services will be determined at the sole discretion of KBIT Consultants and can be delivered via telephone, remotely or by onsite attendance. KBIT Consultants must act reasonably in exercising such discretion.
- 5.3. KBIT Consultants must provide and carry out the Service in an efficient and professional manner and in accordance with standards generally observed in the IT industry or profession for similar services.
- 5.4. The Client shall:
- A. provide all reasonable assistance requested by the personnel of KBIT Consultants in the diagnosis of any problem within the IT infrastructure and follow any reasonable direction of KBIT Consultants in the course of doing so;
  - B. make available free of charge and within a reasonable time all information, facilities and services reasonably required to enable KBIT Consultants to provide the Services;
  - C. provide reasonable access to its premises thereby granting a non-exclusive licence to KBIT Consultants to give effect to the matters described in sub-clauses 5.4(A) and (B) herein;
  - D. provide such telecommunication facilities as reasonably required by KBIT Consultants for testing and diagnostic purposes.
- 5.5. KBIT Consultants will use best endeavours to supply the Services without warranting that supply will be interruption or error free. Despite anything else within the Agreement the Client acknowledges and accepts that the Services may not be available in all circumstances. The Client hereby agrees to indemnify and release KBIT Consultants against any claim for damages arising in contract and or tort (including negligence) for default or failure to perform our obligations under the Agreement (including Service Level Guarantees) resulting from circumstances reasonably beyond its control including, but not limited to, weather conditions, power failure, telecommunications failure, technical failure, maintenance requirements, our inability to access your premises, your acts or omissions or those of any third parties. KBIT Consultants shall rely upon this clause 5.5 to the full extent permitted by law and to the extent of any inconsistency between this clause 5.5 and clause 9 herein, clause 9 shall prevail to the extent of such inconsistency.
- 5.6. Where a serious issue or potential issue or problem matter or thing of any type whatsoever or howsoever arises relating

to the age, configuration or implementation of any supported equipment that has been identified and brought to the attention of the Client by KBIT Consultants in writing and in the opinion of KBIT Consultants that said equipment is requiring additional support or support beyond the scope of the obligations of KBIT Consultants under the Agreement due to its age, configuration or implementation, KBIT Consultants reserves the right in its sole discretion to cease support of that item of equipment under the Managed Services Agreement or provide support on the time and material basis within the scope of the Agreement until such times as the said equipment is brought up to a standard in the opinion of KBIT Consultants is acceptable to agreed IT standards in the Australian IT profession. KBIT Consultants will work with the Client to proactively identify appropriate replacement solution options and to assist the Client to procure such solution. The Client hereby expressly agrees to indemnify, release and hold harmless and blameless KBIT Consultants for any consequential, economic, business or opportunity, direct or indirect loss or damage or harm of any type whatsoever (including negligence and in contract or tort) arising out of or incidental to any interruption to service, support or maintenance of the Clients operating network howsoever arising by KBIT Consultants having ceased support of the said equipment. KBIT Consultants shall rely upon this clause 5.6 to the full extent permitted by law and to the extent of any inconsistency between this clause 5.6 and clause 9 herein, clause 9 shall prevail to the extent of such inconsistency.

5.6.1. To any extent necessary, clause 5.5 and 5.6 hereof may be read together to interpret the application or operation of them individually or collectively in part or in whole and in the event there is found to be any inconsistency between the clauses such inconsistency shall be severed without affecting the remaining provision that shall be enforced and interpreted as if the severed provision had never existed.

- 5.7. Unless specified in the Agreement all other services and or requirements that the Client may require in connection with or of and incidental to its IT infrastructure other than the services listed in the Agreement will be deemed not to be covered by the Agreement and if provided by KBIT Consultants shall be charged in accordance with the time and materials "Out of Scope" hourly rate included in the Agreement. This includes but is not limited to:
- A. Travel time to and from and support of equipment at remote locations such as staff homes not listed in the "Supported Site Location" list;
  - B. Installation of new or additional devices or provision of service which is not specifically mentioned in the Agreement or covered by its scope; and
  - C. The relocation of equipment in the event you move location.

## 6. SERVICE FEE

- 6.1. The Fees for the Services as detailed in the Agreement will be payable calendar monthly and shall be due and payable within 14 days of the date of a Tax Invoice supplied (Due Date). Fees which do not appear on a Tax Invoice for a particular period may appear on future Tax Invoices.
- 6.2. You will pay all Tax Invoices by the Due Date or, if you elect to pay by credit card or by direct debit, we will debit your credit card or nominated direct debit account for the amount of the Tax Invoice and any other Fees by the Due Date.
- 6.3. Unless a credit application has been completed by the Client and approved by KBIT Consultants, we may require the Client to pay a negotiated security deposit on Fees before entering into the Agreement with You. The security deposit shall be held in escrow and You are deemed hereby to have provided your express consent for Us to deduct any amounts you owe under the Agreement from the security deposit.
- 6.4. If you do not pay an invoice by the Due Date you agree:
- A. we may charge you daily interest from the Due Date until the date on which payment is received; and
  - B. interest will be capitalised monthly and will be payable at the rate which is 2.5% per annum above the overdraft reference rate quoted by our principal bankers on the first day of the applicable month.
- 6.5. You will be liable for all reasonable and necessary collection costs (including legal fees charged on a solicitor/client basis and indemnify KBIT Consultants for such costs) we incur to collect an amount outstanding.
- 6.6. If you in good faith dispute an amount in an invoice, you must notify us in writing within 7 days of the date of invoice setting out reasons for the dispute and the amount in dispute (Disputed Amount). We will within 7 days of the date of receipt of your notice in writing in good faith review the invoice for the purposes of resolving such dispute. In the event a Fee is disputed, you are not entitled to withhold payment of the undisputed amount of the invoice.
- 6.7. Our records are prima facie evidence of the Fees payable by you under the Agreement except to the extent they are proved to be substantially incorrect.
- 6.8. Subject to due performance by KBIT Consultants of its obligations under this Agreement and to the terms of this Agreement, except where an interruption, unavailability or impaired quality of the Service has been caused or contributed to by us, you remain liable for all Fees.
- 6.9. We may pay a commission to retailers/dealers who introduced you to us (or any other person).



- 6.10. Accounts remaining in debit 14 days past Due Date will be placed on credit hold without notice.
- 6.11. Fees will each be adjusted at the discretion of KBIT Consultants by the agreed increase (measured as a percentage).

## 7. SUSPENSION or TERMINATION

- 7.1. Without limiting our rights under the Agreement we may suspend the supply of Services with notice (which may be written or verbal) to you if:
  - A. it is an Emergency;
  - B. directed/required to do under the law; or
  - C. you fail to pay an amount due and payable that is 14 days past the Due Date which is not the subject of a good faith dispute, and for which a valid Tax Invoice has been issued.
- 7.2. Without limiting clause 7.1, we may suspend Services by providing 14 days written notice if:
  - A. a resolution is passed or an application is made to, or an order is made by, a court of competent jurisdiction for the winding up of the Client (except pursuant to internal amalgamation or reconstruction);
  - B. an administrator or a receiver or a receiver and manager or an external controller is appointed to any of the assets or undertaking;
  - C. you or your guarantors (if applicable) makes an arrangement for the benefit of or enters into an arrangement or composition with its creditors; you have an official manager or inspector appointed pursuant to the provisions of the Corporations Act; or
  - D. if you or your guarantors (if applicable ) commit an act of insolvent trading and or are likely to be unable to pay debts as and when they fall due and payable within the meaning of the Corporations Act 2001.
  - E. a director is convicted of a criminal offence or is subject to regulatory action resulting in a civil penalty declaration or administrative banning order or adverse finding, including Enforceable Undertaking.
- 7.3. After the expiration of the Initial Term of the Agreement, KBIT Consultants may terminate at its sole discretion the supply of a particular Service at any time by providing the Client 30 days prior written notice.
- 7.4. KBIT Consultants may terminate the agreement immediately if:
  - A. the Client breaches a material provision of this agreement; and
  - B. KBIT Consultants gives the Client 30 day's written notice:
    - i. specifying the nature of the Client's breach or default;
    - ii. telling the Client what is required to be done to remedy the breach or default; and
    - iii. advising the Client that KBIT Consultants intends to terminate this agreement if the Client fails to remedy the breach or the default within the given notice period; and
  - C. the Client fails to remedy the breach or default within the given notice period.
- 7.5. Without limiting clause 2.2, the Client may immediately terminate the Agreement, by sending KBIT Consultants a written notice of that fact if:
  - A. KBIT Consultants repudiates a material or fundamental term of the Agreement;
  - B. KBIT Consultants fails to remedy, to the satisfaction of the parties, a fundamental breach of service delivery incidental to the Agreement on three separate occasions within 30 days after the date on which the Client issued KBIT Consultants a written notice requiring KBIT Consultants to remedy those breaches.
- 7.6. Any termination or expiry of the Agreement will not prejudice any equitable or legal right of action or remedy which may have accrued or manifest to either party prior to or after termination of the Agreement.
- 7.7. KBIT Consultants may in its absolute discretion release the Client from its obligations under the Agreement before expiration of the Term and shall be entitled to claim damages in accordance with clause 9 herein.
- 7.8. Termination of the Services in accordance with the Agreement does not affect the application of the provisions of these terms and conditions relating to limitation of liability or indemnity.

## 8. YOUR RESPONSIBILITIES

- 8.1. You must:
  - A. comply promptly with our reasonable directions in relation to the provision of the Services to the Agreement;
  - B. provide promptly all information, decisions, facilities and assistance we reasonably require to supply the Services;
  - C. comply with all laws and guidelines concerning your use of the Services; and
  - D. provide us safe access to and egress from the premises to which the Services are supplied and obtain the consent of the owner (where required) for us to install, inspect, repair, maintain or remove equipment



connected with the provision of the Services.

- E. notify KBIT Consultants of your inability to comply with our reasonable requests in line with points A, B, C & D outlining why you cannot comply and providing alternate options so that KBIT Consultants may continue to meet its obligations under the contract.
- 8.2. Unless otherwise permitted under the Agreement, you must not use or permit any other person to use any of the Services for any unauthorised purpose.

## 9. LIMITATION AND EXCLUSION OF LIABILITY

- 9.1. Subject to clause 9.4, KBIT Consultants shall not be liable to the Client for any loss or damage whatsoever or howsoever caused arising directly or indirectly in connection with the agreement, except to the extent that such liability may not lawfully be limited or excluded. For the avoidance of doubt this extends to any employees, contractors, agents, representatives, licensees or permitted assigns of KBIT Consultants.
- 9.2. Notwithstanding the generality of clause 9.1, KBIT Consultants expressly excludes liability for consequential loss or damage which may arise in respect of the Services or for loss of data, loss of, or claim for, revenue, profits, actual or potential business opportunities or anticipated savings or profit, whether direct, indirect, economic, consequential howsoever arising by way of act or omission in contract or in tort. You hereby agree to release and indemnify KBIT Consultants to that extent.
- 9.3. Where we cannot by law exclude such liability, our liability to you will be limited, at our choice, to, if the breach relates to goods, the replacement or repair the goods or, if the breach relates to services, the supply of those services or the payment of the cost of those services supplied again. This clause applies despite anything else contained herein or incidental to the Agreement and to the fullest extent permitted by law.
- 9.4. Notwithstanding clause 9.1, the limitation of liability set out in clause 9.1 will not apply to any liability arising as a result of, or in connection with:
  - A. fraud or wilful misconduct by KBIT Consultants;
  - B. breach of confidentiality by KBIT Consultants;
  - C. breach of privacy by KBIT Consultants; or
  - D. infringement of a third party's Intellectual Property Rights by KBIT Consultants. For the purposes of this clause 9.4, the term "KBIT Consultants" shall mean KBIT Consultants, its officers, employees, sub-contractors, suppliers and agents, whether individually or collectively.
- 9.5. To the fullest extent permitted by law, we exclude all warranties implied by law except as expressly set out in the Agreement.
- 9.6. Any unreasonable and material interference by the Client or its agents, servants, employees, sub-contractors or other third party with the consent of the Client with equipment, network or configuration relevant to or of and incidental to the Agreement will void any guaranteed response time or quality of service commitments, remove any liability to the Client for the quality of the Service the subject of such interference and may also incur fees to cover costs of rectification as the rectification will be considered as an excluded item of the Agreement.

## 10. ENDING CONTRACT PREMATURELY

- 10.1. Without prejudice to any other rights under the Agreement or at law, if we terminate the Agreement in accordance with clause 7 or the Agreement prematurely ends because you are in breach of your obligations under the Agreement:
  - A. our rights in respect of your breaches and unfulfilled obligations under the Agreement at that time continue;
  - B. you must pay us all outstanding Fees at that time together with an amount equal to the Fees which would have been payable if the Agreement had continued for the full Term.
- 10.2. Notwithstanding anything else, the liability of KBIT Consultants under the Agreement of and incidental to any breach thereof shall be limited to the total cost of the contract per single event or occurrence. This clause 10.2 shall apply to the fullest extent permitted by law despite anything else incidental to the Agreement.

## 11. NOTICE PROVISIONS

- 11.1. Any notice, consent or other communications given or made to a party under the Agreement must be in writing and delivered or sent by email, pre-paid ordinary post or facsimile transmission to the address or facsimile number of the party as last or reasonably known to either party or to such other address or facsimile number as the party may from time to time notify for the purpose of this clause.
- 11.2. Proof of posting by pre-paid or ordinary post shall be deemed receipt within 2 Business Days after posting.
- 11.3. Proof of dispatch by facsimile is proof of receipt upon production of a facsimile report by the machine from which the facsimile is sent except where the sender machine indicates a malfunction in transmission or the recipient immediately notifies the sender of an incomplete transmission, in which case the transmission shall be deemed not to have been





given or served.

- 11.4. Proof of delivery by email is proof of receipt upon production of a delivery confirmation report appearing on the sender's computer except where the sender's computer indicates delivery has not been effected in which case delivery shall be deemed not to have been effected.

## 12. ASSIGNMENT AND SUBCONTRACTING

- 12.1. You must not assign or otherwise transfer your rights or obligations under the Agreement without the prior written consent of KBIT Consultants, which shall not be unreasonably withheld. For the avoidance of doubt, a change in the control of a party is a deemed assignment.
- 12.2. We may subcontract our Service obligations under the Agreement provided that by subcontracting we are:
  - A. not relieved from any of our obligations under the Agreement; and
  - B. liable for any breach of the Agreement committed, caused or contributed to by our subcontractors.

## 13. MISCELLANEOUS

- 13.1. (Waiver) The waiver by either party of any breach of the Agreement shall not licence the other party to repeat or continue any such breach nor operate as a waiver of any subsequent breach whether of the nature or not. The failure of either party to exercise any right which it may have in the event of a breach of the Agreement shall not be deemed to be an abandonment or waiver of any right for damages injunction or otherwise.
- 13.2. (Entire Agreement) The terms and conditions herein and the Agreement set forth the entire Agreement and understanding for provision of Managed Services between the parties and merges all prior discussion between them and none shall be bound by any conditions, warranties or representations with respect to the subject of the Agreement other than as expressly provided therein or any instrument subsequent to the Commencement Date of the Agreement in writing and signed by the party to be bound thereby.
- 13.3. (Force Majeure) The non-performance or delay in performance by a party of any obligation under the Agreement is excused during the time and to the extent that such performance is prevented by a circumstance or event beyond its reasonable control (Force Majeure Event), provided that the party affected by the Force Majeure Event uses its best endeavours to perform as soon as possible its obligations under the Agreement (including by the use of reasonable workarounds and interim measures). If a Force Majeure Event continues for more than 30 days, either party may terminate the Agreement immediately by notice in writing to the other party.
- 13.4. (Governing Law) The Agreement shall be deemed to have been made in the State of Queensland and construction, validity and performance of the Agreement shall be governed by the laws (as amended) of that State. The parties unconditionally submit to the jurisdiction of the Courts of that State or any superior Court of the Commonwealth having relevant jurisdiction.
- 13.5. (Reading down and severance) Each clause of the Agreement and each part of each clause must be read as a separate and severable provision. If any provision is found to be void or unenforceable, that provision may be severed and the remainder of the agreement must be interpreted as if the severed provision had never existed.
- 13.6. (Non merger) All obligations of the parties which expressly or by their nature survive the expiration or termination of the Agreement shall continue in full force and effect notwithstanding such expiration or termination.
- 13.7. (Non solicitation) You must not solicit or attempt directly or indirectly to solicit any of our employees, either directly as an employee, as a contractor or as a subcontractor for employment or separate engagement as a contractor during the term of the Agreement and for 12 months after the date of expiration of the Agreement. Should you breach this clause you agree to pay KBIT Consultants a fee equal to the solicited/engaged employee's last annual KBIT Consultants gross taxable remuneration package as compensation.
- 13.8. (Testing) From time to time we may carry out various security checks on the Services, these checks may include, but are not limited to, port scans, simulated Denial Of Service ("DOS") attacks, simulated Distributed DOS attacks. KBIT Consultants will provide the Client with 7 days' notice of such test however under some circumstances this may not be possible such as when a suspected breach of security has been identified.
- 13.9. (Variation) KBIT Consultants reserves the right to vary, alter or amend the terms and conditions of the Agreement. Any such amendment shall be published by KBIT Consultants on its website.
- 13.10. (Counterparts) This agreement may consist of a number of counterparts and, if so, the counterparts taken together constitute one agreement.

## 14. GST

- 14.1. Any consideration to be paid or provided for a supply made under or in connection with the Agreement, unless specifically described in the Agreement as 'GST Inclusive', does not include an amount on account of GST ('GST Exclusive

Consideration').

- 14.2. If any supply made or to be made by a party ('Supplier') under or in connection with the Agreement is a taxable supply the Supplier may, in addition to the GST Exclusive Consideration, recover from the recipient of that supply ('Recipient') an amount on account of GST to be calculated by multiplying the GST exclusive consideration for the supply by the GST rate prevailing at the time that the supply is made.
- 14.3. Any additional amount on account of GST recoverable from the Recipient under clause 13.2, is payable on provision by the Supplier of a Tax Invoice.
- 14.4. In this clause 14 words or expressions that are defined in the A New Tax System (Goods and Services Tax) Act 1999 (Cth) have the meaning given to them by that Act.

## 15. PERMISSIONS

- 15.1. Permission will be sought in writing and not unreasonably withheld to provide us requested information relevant to our assessment of your credit rating before we enter into the Agreement with you.
- 15.2. Permission will be sought in writing prior to and not reasonably withheld for us to disclose information or documents about our mutual business particulars and affairs (including credit worthiness, credit history and credit capacity) from or to credit providers and credit reporting agencies and all purposes permitted by the Privacy Act 1988 (Cth); law enforcement agencies; debt collection agencies for purposes connected with supply of the Services, billing for the Services or collecting amounts invoiced for the Services.
- 15.3. You permit us to set a limit on the credit we extend to you in relation to your use of the Services ("credit limit") if applicable. We will advise you of any credit limit we set. We may revise the credit limit from time to time by notice to you if we consider there has been any change in your capacity to pay.