



# Technology Services Agreement

## Terms and Conditions

### Document disclaimer

This document is issued as commercial in confidence and forms part of the Technology Services Agreement between Infoxchange and the Customer. This document is incorporated in and forms part of the Agreement and does not form a separate contractual arrangement between the parties on its own. Capitalised terms not otherwise defined in this document shall have the meaning (if any) given to them in the other documents comprising the Agreement.

### Document control

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# 1 Definitions

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**"Acceptance Test Period"** means 10 days following the Supplier indicating that the acceptance testing period has commenced.

**"Affiliate"** means any entity which directly or indirectly Controls, is Controlled by, or is under common Control with, the subject entity.

**"Agreement"** means the contract created between the Customer and Supplier on execution of the Technology Services Agreement, including its related documents, and any additional terms that expressly incorporate or are incorporated by reference in these documents. Each Agreement only comprises of one Quotation and associated documents. Each separate Quotation (including its related documents) forms a separate Agreement between the parties.

**"Australian Consumer Law"** means Schedule 2 of the Competition and Consumer Act 2010 (Cth).

**"Best-efforts Support"** means support/assistance that is provided outside of our Service Level Commitment (that is, not subject to the service level targets described in the Service Level Commitment). Support of this nature is provided in good faith however we cannot guarantee resolution will be reached.

**"Billing Contact"** means the billing contact identified in Part 1 - Customer details of the executed Technology Services Agreement.

**"Business Day"** means a day that is not a Saturday, Sunday, public holiday or bank holiday in Melbourne, Victoria.

**"Commencement Date"** means the "Start date" identified in Part 2 - Managed Services duration of the initial Infoxchange Quote.

**"Confidential Information"** means: (a) the terms of this Agreement and (b) any commercial, financial, marketing, business, technical or other data, security measures and procedures, know-how or other information disclosed by or on behalf of the disclosing party to the receiving party for purposes arising out of, in contemplation of, or in connection with this Agreement, that is designated as confidential or proprietary or which is by its nature confidential, but does not include:

- 1) information that was in the public domain at the time of its disclosure, or which becomes public domain property through no fault of the receiving party;
- 2) information that was rightfully in the receiving party's possession without restriction prior to disclosure;
- 3) information that was rightfully disclosed to the receiving party by a third party without restriction;
- 4) information that was independently developed by employees and/or contractors of the receiving party who did not have access to and without use of or reference to the disclosing party's Confidential Information; and
- 5) aggregate data collected or generated by Infoxchange or on behalf of Infoxchange regarding Infoxchange's products and services (for purposes of providing or improving Infoxchange's products and services, benchmarking system performance, preparing statistics and system metrics, marketing and other purposes) that does not contain any personal information and other Customer-specific information.



**"Control"** means direct or indirect ownership or control of more than 50% of the voting interests of the subject entity.

**"Customer"**, **"you"** and **"your"** means the purchaser of the Supplier's Services, named in "Part 1 - Customer details" of the executed Technology Services Agreement.

**"Deliverable(s)"** means the software, documentation and services to be delivered by the Supplier to the Customer in fulfilment of this Agreement as set out in the Technology Services Agreement and the related Proposal.

**"Developed Material"** means any software, documentation, reports or other material (whether in electronic or material form): (a) that are developed by or on behalf of the Supplier as a result of, or in the course of performing, this Agreement; or (b) that are otherwise specified as Developed Material in the Proposal, a Quote or a Project Plan.

**"Force Majeure Event"** has the meaning given in clause [20](#).

**"Hardware"** means any information technology hardware such as computers, tablets, phones, cables, etc.

**"Incident"** means an unplanned interruption to an IT service or reduction in the quality of an IT service.

**"Infoxchange Marks"** means Infoxchange's marks including Infoxchange, SRS, Service Seeker and Ask Izzy service marks, logos and product and service names.

**"Intellectual Property Rights"** and **"IP Rights"** means all industrial and intellectual property rights whether protectable by statute, at common law or in equity, including all copyright and similar rights which may subsist or may hereafter subsist in works or other subject matter, rights in relation to inventions (including all patents and patent applications), processes, trade secrets and know-how, rights in relation to designs (whether or not registrable), rights in relation to registered and unregistered trademarks, circuit layout designs and rights in relation to circuit layouts, but excludes non-assignable moral rights and similar non-assignable personal rights of authors and producers.

**"Managed Services"** means the Services set out in a Technology Services Agreement Quotation as "Managed Services" and that are expressed to be in scope of the Supplier's responsibilities under this Agreement.

**"Minor Works"** means a piece of work that is not covered by Infoxchange's Managed Services, because it is a change to the current supported environment, and it is too small to be a Project. In this case, Minor Works will be billed at Infoxchange's standard charge rates - as set out in the Quote (and as may have been updated under this Agreement) or at a fixed price as per a formal quote. Before Infoxchange commences work on a Minor Works activity, it will require the Customer to confirm, in writing, that the Customer has accepted the estimated time, costs, and or quote. Once a quote or estimate has been approved, the Customer is liable to pay the agreed amount.

**"Mobile Device"** means tablets and mobile phones.

**"Personal Computers"** means computers used by your organisation, including laptops desktops, and thin clients.

**"Personal Information"** has the meaning given in the Privacy Act.

**"Primary Contact"** means the primary contact identified in Part 1 - Customer details of the executed Technology Services Agreement.

**"Privacy Act"** means the *Privacy Act 1988 (Cth)*.

**"Privacy Law"** means the Privacy Act or such other Commonwealth or State privacy legislation with jurisdiction over Infoxchange as amended or replaced from time to time and "Privacy" has a corresponding meaning.

**"Project"** means an arrangement for the provision of additional Services by the Supplier with specified scope, timeframes and objectives defined as a Project in a relevant Project Plan.

**"Project Plan"** means a document developed by the Supplier setting out additional Services or Deliverables to be provided by the Supplier in accordance with the terms of this Agreement, at additional cost as set out in the relevant Project Plan.

**"Proposal"** means the document supplied together with an Infoxchange Quote that describes the boundaries and scope of the services to be provided as part of or in addition to the Technology Services Agreement

**"Quotation", "Quote" and "Infoxchange Quote"** means a document developed by the Supplier setting out prices for delivery of Services, Deliverables or Hardware under this Agreement.

**"Remediation Plan"** means a remediation plan document that contains activities that must be undertaken before Infoxchange is able to provide support as per our Service Level Commitments (that is, before providing Managed Services that are subject to the service level targets described in the Service Level Commitment).

**"Security Breach"** means any unauthorised access to or loss or disclosure of Personal Information in the IT System.

**"Services" and "Service"** means any services requested by the Customer and agreed by the Supplier, including without limitation, supply of software, supply of hardware, implementation, maintenance and other professional support services to be supplied by the Supplier to the Customer, whether under a Project Plan, the Quotation, or as otherwise agreed between the Customer and Supplier.

**"Service Level Commitment"** means the document described and linked to in the applicable Infoxchange Quote.

**"Service Request"** means a formal request for something to be provided which has been agreed as a normal part of service delivery – for example, a request for information or advice.

**"Supplier", "Infoxchange", "we", "our", and "us"** means Infoxchange (ACN 098 019 544 & NZBN 9429030452435).

**"Technology Services Agreement" ("TSA")** means the applicable Infoxchange Quote and its related Proposal, Service Level Commitment and Terms & Conditions, and any further Project Plans executed by the parties from time to time during the Term.

**"Term"** means the duration of the services as specified in Section 2 Services & Deliverables for the period of 12 months if not specified, and includes any Renewal of the Term in accordance with this Agreement.

**"Terms and Conditions"** means these Technology Services Agreement - Terms and Conditions.

**"Third Party Product"** means any product supplied by the Supplier that is not manufactured by the Supplier or branded by the Supplier, other than such product which, although a third party holds the Intellectual Property Rights in such product, is provided as the Supplier's product, under the Supplier's brand.

**"Wilful Misconduct"** means an act undertaken with the intent to cause harm.



## 2 Services and Deliverables

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- 2.1 The Supplier warrants that it will perform the Services using all reasonable skill and care, to the standard reasonably expected of a competent professional in the business of providing services similar to the Services, to a customer like the Customer, under similar terms and conditions and for similar pricings as stipulated under this Agreement. To the extent permitted by applicable law and subject to clause [14.6](#), all other warranties that are implied by law are excluded.
- 2.2 The Customer engages the Supplier to provide the Services in accordance with the Agreement.
- 2.3 The Customer and the Supplier may agree for the Supplier to vary the Services or do additional work from time to time. Any additional work or variation to the Services must be agreed by the parties in writing, and Infoxchange shall be under no obligation to perform any additional work or varied Services until such variation has been executed by both the Customer and Infoxchange.
- 2.4 The Supplier will communicate with the Customer as follows:
  - a) with the Customer’s Primary Contact on matters concerning our Services with you
  - b) with the Customer’s Billing Contact on matters relating to accounts and financial management
  - c) with all the Customer’s staff from time to time to educate them on the services available and how to engage with the Supplier.
- 2.5 These Terms and Conditions will apply to any variation to the Services or additional work.
- 2.6 The Agreement commences on the Commencement Date and continues for the Term, unless terminated earlier in accordance with or clause [18](#).
- 2.7 Without limiting a party’s termination rights under or clause [18](#), the Term will automatically renew for further periods of 12 months (each a "**Renewal**") unless either party provides at least 30 days' notice in writing prior to the end of the Term or then current Renewal that it does not wish to renew.

## 3 Services

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### Support and advisory services

- 3.1 Subject to payment of all fees and charges when due under the Agreement, the Supplier agrees to deliver the Services in accordance with the provisions of the Agreement.
- 3.2 By entering into the Agreement, the Customer is expressly authorising the Supplier to manage the Customer’s IT System to the extent that it is in scope for the agreed Services as set out in this Agreement. Therefore, no changes to the IT System being managed by the Supplier within that agreed scope are permitted without the Supplier’s authorisation. If changes are made that affect the operation of the network this will be charged outside the Agreement.

## Monitoring

- 3.3 The Supplier will provide monitoring of Hardware, as detailed in the Technology Services Agreement, to identify potential hardware issues and provide maintenance for the Customer's IT System. The Customer expressly authorises the Supplier to install remote management agents, as required, to affect this.
- 3.4 The Customer understands that monitoring does not guarantee to prevent the occurrence of Incidents or failures within the Customer's IT System.
- 3.5 The Customer agrees to contact Infoxchange using an Approved Method for requests for support.
- 3.6 For the purpose of clause 3.5 "**Approved Method**" means the communications options included in the latest version of the Service Level Commitment document.
- 3.7 For the purpose of clause 3.5 "**Approved Method**" does not include:
  - a) contacting individual Infoxchange employees or technicians by telephone or email; or
  - b) any other form of communications not specified in the Service Level Commitment document.

## Service levels

- 3.8 Infoxchange will use reasonable endeavours to provide support for Incidents in accordance with the service levels set out in the Service Level Commitment.
- 3.9 If Infoxchange fails to meet the service levels set out in the Service Level Commitment in respect of any Incident or Service Request, then the Customer's only remedies in respect of such failure are to:
  - a) for Incidents, have the relevant Incident escalated in accordance with the escalation timers set out in the Service Level Commitment; and
  - b) for Incidents or Service Requests, terminate the Agreement as set out in clause [18.3](#), if the failures meet the thresholds set out in clause [18.3](#).

## Project deliverables

- 3.10 Acceptance of a Deliverable will be deemed to have been provided if by 5 Business Days after notification of the Deliverable being completed the Customer has not given notice to the Supplier of any identified material defect with the Deliverable.
- 3.11 The Customer must give the Supplier a reasonable written description of each material defect notified to the Supplier and must provide any further information relating to any material defect which is reasonably requested by the Supplier, and which is available to the Customer.
- 3.12 If the Customer gives notice of any material defect to the Supplier under clause 3.10, the Supplier must use reasonable efforts to promptly correct such a defect and will notify the Customer when the defect is corrected. The Customer will then have a further 5 Business Days to provide acceptance of the defective Deliverable in accordance with clauses 3.10 and 3.11.





**Sub-contracting**

- 3.13 Supplier may sub-contract any of its rights and obligations under this Agreement, but no subcontract will relieve Supplier from liability for the performance of any of its obligations under this Agreement.
- 3.14 Supplier is responsible for ensuring the suitability of a sub-contractor for any subcontracted work and that the sub-contractor is capable of complying with Supplier’s obligations under the Agreement at the date of the subcontracting until the conclusion of this Agreement.

**4 Warranties, Fleet Management and Variation of the Agreement**

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- 4.1 The Supplier will arrange for repair on any Hardware covered by an active manufacturer’s parts and labour warranty.
- 4.2 For Hardware not covered by an active manufacturer’s parts and labour warranty, the Supplier will generally require replacement at the Customer’s expense rather than repair of non-functional equipment. However, you may have rights by law that arise under this Agreement, and this Agreement is subject to those rights.
- 4.3 The Supplier expects that the Customer will adhere to a fleet management plan that keeps 90% of the Customer’s Personal Computer fleet less than 4 years old.
- 4.4 The Supplier expects that the Customer will manage their fleet of devices by ensuring all devices listed in the Asset register are in use or required to support the business. All devices, other than those with status = “disposed” will be considered as in support.
- 4.5 The Customer is responsible for notifying the Supplier if assets are to be disposed and removed from the support contract.
- 4.6 The Supplier expects that the Customer will fulfil a technology refresh plan to:
  - a) renew on-premises backup Systems, Servers and Storage approximately every 3-5 years OR
  - b) maintain under manufacturer warranty at all times any on-premise backup Systems, Servers and Storage OR
  - c) move on-premise services to the Cloud
- 4.7 The Supplier may at its discretion agree to support Hardware, Personal Computer fleets and on-premises backup Systems, Servers and Storage that are not compliant with clauses 4.2 to 4.4, but the Supplier will not be liable to the extent any issues are caused or contributed to by such non-compliance and, to avoid doubt, will not be responsible for a failure to meet service levels set out in the Service Level Commitment document as a result of such issues.
- 4.8 Without limiting its rights under this Agreement, the Supplier reserves the right to vary this Agreement by providing notice in writing to the Customer at least 45 days before the end of the then-current Term. Such variations will take effect for any Renewal period unless the Customer opts not to renew the Term by providing notice in accordance with clause [2.7](#). If the Customer does not exercise its right not to renew in accordance with clause [2.7](#), such variations to this Agreement (including any changes to the Service) will apply for the further Term.



## 5 Supply of Hardware and Software

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The Supplier can provide Hardware and Software that are consistent with the Technology Services Agreement. Hardware quoted by the Supplier will meet or exceed the minimum standards set by the Supplier and use the Supplier's preferred vendors.

- 5.1 If the Supplier agrees to supply the Customer with hardware or software then it will be subject to the acceptance of a separate Quotation.
- 5.2 The Customer must ensure that all software licensing requirements as stated by the Supplier are maintained to meet the Customer's legal requirements of usage.
- 5.3 The Customer may be charged for provision of cables and/or replacement of minor Hardware items required to restore operation of the IT System following a Hardware failure.
- 5.4 The Supplier, at its absolute discretion, may refuse to work on Hardware not using licensed software.
- 5.5 The Supplier is not liable for damages to Hardware purchased from the Supplier and is delivered directly to the Customer ("drop shipped") from the designated third-party supplier.

## 6 Payment

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- 6.1 Any Quotation issued by the Supplier will only be binding if accepted in writing by the Customer before the expiry date shown on the quote.
- 6.2 Fees set out in a Quotation will be invoiced as set out in the Quotation. Ongoing Services fees will be invoiced as set out in clause [6.8](#). The Supplier's default position for payment (unless modified by the terms of this Agreement) is as follows:
  - a) 100% of hardware, software and licence fees prior to shipment, unless covered under 6.2
  - b) 50% of labour and services fees up-front
  - c) Remaining 50% of labour and services fees upon Project completion
- 6.3 Software and other third-party items supplied by Infoxchange on a reseller basis as set out in the Quotation will be paid in arrears as set out in the Quotation
- 6.4 All amounts payable by the Customer must be received by the Supplier in full within 14 days of receipt of a valid tax invoice from the Supplier, unless otherwise specified in the Quotation.
- 6.5 In return for the Supplier providing the Managed Services, the Customer must pay the fees specified under the Agreement.
- 6.6 The fees must be paid without deduction for the duration of the Term, irrespective of the Customer usage.
- 6.7 The Customer may request a change to the service parameters specified in Part 3 - Managed Services or Part 4 - Software subscriptions of the executed Quotation. If agreed, any agreed changes to the regular fee will take effect from the next billing month unless specifically quoted otherwise.



## Variation of fees and charges

- 6.8 The Supplier reserves the right to:
- a) vary its fees and to introduce new fees, in each case to take effect after the end of the initial Term of the Agreement (or after the end of the then-current Renewal) by providing notice in writing to the Customer at least 45 days before the end of the then-current Term
  - b) vary its labour rates and fees annually (including for ad hoc services, Projects and Minor Works), with any changes taking effect from 1 July each year, provided the Supplier has notified the Customer of any such changes at least 45 days before the change takes effect;
  - c) vary prices for subscriptions billed in arrears (such as Microsoft Office 365 subscriptions) as the published vendor rates change to account for the changes in the published vendor rates;
  - d) vary fees at any time as reasonably required to account for increases to the Supplier's cost of providing the Services, including without limitation to pass through any additional or increased third party costs; and
  - e) increase the then-current fees by 3.5% or CPI (whichever is the greater) on any Renewal of the Term. "CPI" is the Consumer Price Index All Groups for Australia published by the Australian Bureau of Statistics. The increase applied will be rounded up to the nearest dollar. Infoxchange will provide details of its revised pricing prior to the end of the Term or then current Renewal.

## Invoicing

- 6.9 The Supplier will issue a tax invoice as set out in the Quotation for specific Services where set out in the Quotation, and otherwise in respect of Services not set out in the Quotation then the Supplier will issue a tax invoice at the beginning of each calendar month for the Services to be provided in that month.
- 6.10 Further tax invoices may be issued from time to time for Services provided under the Agreement, that are additional to your selected Services or usage metrics as set out in the relevant Proposal, Project Plan, or Quotation.
- 6.11 You must notify the Supplier of any inaccuracies or errors in any tax invoices within 30 days of the date of issue to receive an adjustment or credit.

## Overdue money

- 6.12 If all or part of any payment is overdue, the Supplier may upon 7 days' written notice:
- a) terminate the Agreement;
  - b) suspend provision of any Service or supply of any Deliverable or Hardware to be provided to the Customer under the Agreement until all monies owed by the Customer to the Supplier are paid in full (and to avoid doubt the Supplier will not be liable for any delay caused by the Supplier's suspension under this clause 6.12); or
  - c) Take any other action which it is legally entitled to take.
- 6.13 Overdue and unpaid invoices are subject to interest of 1.0% per month on debt owed, or the maximum permitted by law.



- 6.14 During the suspension of any Service, the Customer will continue to be charged for the Service.
- 6.15 The Customer must reimburse the Supplier for its costs and expenses in relation to the exercise or attempted exercise of any right power or remedy under the Agreement and the charges, and fees for all consultants (including lawyers and debt recovery agents) properly incurred by the Supplier as a result of your failure to pay monies due under the Agreement.

## 7 GST

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- 7.1 In this clause 7:
- a) terms or expressions which have a defined meaning in the *A New Tax System (Goods and Services Tax) Act 1999 (Cth)* ("**GST Act**") have the same meaning as in the GST Act; and
  - b) any reference to a party includes the representative member of a GST group of which that party is a member.
- 7.2 Unless otherwise expressly stated, all consideration to be paid or provided under this Agreement is expressed exclusive of GST.
- 7.3 If GST is payable on any supply made under this Agreement, the recipient must pay to the supplier an additional amount ("**GST Amount**") equal to the GST payable on that supply at the same time as the consideration for the supply is to be paid or provided.
- 7.4 Clause 7.3 does not apply to the extent that:
- a) the consideration for the supply is stated to include GST; or
  - b) GST on the supply is reverse charged and payable by the recipient.
- 7.5 The recipient need not pay the GST Amount until it has received a tax invoice or adjustment note, as the case may be.
- 7.6 If an adjustment event arises in relation to a supply made under this Agreement, the GST Amount must be adjusted to reflect that adjustment event. A corresponding payment must be made by the supplier to the recipient or by the recipient to the supplier, as the case may be.
- 7.7 If this Agreement requires an amount to be calculated by reference to another amount ("**Reference Amount**") that will be:
- a) received for a taxable supply; or
  - b) paid for a creditable acquisition,
  - c) then the Reference Amount must be reduced so as to exclude any part of the Reference Amount paid or received on account of GST, as the case may be.
- 7.8 If this Agreement requires a party to reimburse or indemnify another party for a cost or expense, the amount of the cost or expense must be reduced by an amount equal to any input tax credit to which the party being reimbursed or indemnified is entitled for that cost or expense.
- 7.9 This clause 7 will survive and continue to apply following the termination or completion of this Agreement.



## 8 Access

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- 8.1 The Customer must provide the Supplier's personnel with such access to the Customer's premises (or third party's premises), as Supplier may reasonably request in order to provide the Services.
- 8.2 The Supplier must ensure that Supplier's personnel, when on the Customer's or third party's premises, comply with all applicable health and safety policies and requirements and all reasonable directions which the Customer or the applicable third party may reasonably give to the Supplier and do not interfere with the operation of the Customer's business to the extent possible.

## 9 Intellectual Property Rights

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- 9.1 Unless otherwise agreed in writing between the parties, all rights, title and interest in and to the Services and the Deliverables (including without limitation all Intellectual Property Rights therein and all modifications, extensions, customizations, scripts or other derivative works of the Deliverables or Services provided or developed by Infoxchange) are owned exclusively by Infoxchange or its licensors, and the Supplier does not assign any Intellectual Property Rights to the Customer. The Customer must not represent that it owns those rights.
- 9.2 Unless otherwise agreed in writing between the parties, Infoxchange owns all rights, title and interest (including any Intellectual Property Rights) in and to any Developed Material on and from the date of creation.
- 9.3 Upon receipt of payment by Supplier, Supplier grants to the Customer a personal, non-exclusive, non-transferable licence to use the Intellectual Property Rights in the Deliverables solely for its internal business purposes.
- 9.4 The Customer may not grant any third party the right to use the Intellectual Property Rights in the Deliverables without the prior written consent of the Supplier.
- 9.5 Except as provided in this Agreement, the rights granted to Customer do not convey any rights in the Services or Deliverables, express or implied, or ownership in the Services or Deliverables or any Intellectual Property Rights thereto.
- 9.6 Customer grants Infoxchange a royalty free, worldwide, perpetual, irrevocable, transferable right to use, modify, distribute and incorporate into the Services and Deliverables (without attribution of any kind) any suggestions, enhancement request, recommendations, proposals, correction or other feedback or information provided by Customer or any of its personnel related to the operation or functionality of the Services or Deliverables.
- 9.7 Any rights in the Services or Deliverables or any other material of Infoxchange not expressly granted herein by Infoxchange are reserved by Infoxchange.
- 9.8 Customer agrees not to display or use the Infoxchange Marks in any manner without Infoxchange's express prior written permission.
- 9.9 The trademarks, logos and service marks of Third-Party Product providers ("**Marks**") are the property of such third parties. Customer is not permitted to use these Marks without the prior written consent of the owner of the Mark.

## 10 Intellectual Property Claims (IP Claims)

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If a third party makes a claim against the Customer that any Services or Deliverables infringe that party's patent rights or copyright ("**IP Claim**"), the Supplier provides the Customer with the following recourse:

**10.1** The Supplier will defend or settle the IP Claim at the Supplier's option and cost, and pay to the Customer the amount of damages, losses and costs finally awarded against the Customer (or settled with the Supplier's written consent), provided that the Customer:

- a) as soon as possible taking into consideration the urgency of the matter notifies the Supplier of the IP Claim;
- b) allows the Supplier to solely manage the defence and settlement of the IP Claim;
- c) cooperates with and assists the Supplier as the Supplier requires (the Supplier will pay the Customer's reasonable costs of doing so); and
- d) is not in breach of this Agreement.

**10.2** The Supplier may, at the Supplier's option and cost, do any of the following in relation to Services or Deliverables which are, or which both parties consider likely to be, the subject of an IP Claim:

- a) secure the rights for the Customer to continue to use the Services or Deliverables without infringement; or
- b) modify the Services or Deliverables so that they are not infringing, with such modified Services or Deliverables having substantially equivalent functionality; or
- c) if neither of the above options is reasonably possible as determined by the Supplier, terminate the affected Services or Deliverables upon notice to the Customer and the Supplier will have no further liability to the Customer in respect of such terminated Services or Deliverables under this Agreement.

**10.3** The above remedies will not apply to any third-party products owned or used by the Customer or otherwise to any Services or Deliverables provided by the Supplier that the Customer has, or any person on behalf of the Customer has:

- a) used in violation of this Agreement or applicable law;
- b) used after Infoxchange has notified Customer to discontinue use because of an infringement claim;
- c) modified or combined with any third-party product not authorised or approved by the Supplier;
- d) used outside the Supplier's stated standard operating environment for the Customer in the case of Software or otherwise for a purpose not authorised by the Supplier;
- e) used to offer services by the Customer or in respect of revenue earned by the Customer for such services;
- f) failed to use a more recent version of the Services or Deliverables that was available to the Customer and would have avoided the infringement; or
- g) where the IP Claim arises due to any material or item that the Customer owns or has sourced from a third party itself.

**10.4** In the event of a potential indemnity obligation under this clause 10, the Customer shall:



- a) promptly notify the Supplier in writing of such IP Claim;
- b) allow the Supplier to have sole control of its defence and settlement; and
- c) upon request of the Supplier, cooperate in all reasonable respects, at the Supplier's cost and expense, with the Supplier in the investigation, trial, and defence of such IP Claim and any appeal arising therefrom.

The indemnification obligations under this clause 10 are expressly conditional upon the Customer's compliance with this clause 10.4 except that failure to notify the Supplier of such IP Claim shall not relieve the Supplier of its obligations under this clause 10 but such obligations shall be reduced to the extent of any damages attributable to such failure.

- 10.5 To the extent permitted by applicable law, and subject to clause 14.6, the rights and remedies granted to Customer under this clause 10 state Infoxchange's entire liability, and Customer's sole and exclusive remedy, with respect to any claim of infringement of any third-party Intellectual Property Rights.
- 10.6 The indemnification obligations contained in this clause 10 shall survive termination of this Agreement.

## 11 Licences and Third-Party Products

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Services or Deliverables offered by the Supplier under this Agreement may be offered under licence from third parties, except as expressly stated otherwise in this Agreement:

- 11.1 Where third party providers require acceptance of separate agreements, you will be expected to accept the terms and conditions as part of the overall Agreement, and any receipt or use of affected Services or Deliverables by you after we have notified you of such requirement by a third-party provider will, as between the Customer and Infoxchange, be deemed acceptance of such separate agreements; and
- 11.2 The Supplier provides Third Party Products to the Customer without warranties, licences or maintenance of any kind; however, you may have rights by law that arise under this Agreement, and this Agreement is subject to those rights; and
- 11.3 Licences, warranties and support for Third Party Products will be given by the relevant product manufacturers in their licence agreements that the Supplier either passes through to the Customer or which are contained in a licence agreement directly between the Customer and the licensor of the Third-Party Products.

## 12 Privacy and Confidentiality

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- 12.1 Infoxchange agrees to, and agrees to procure all of its personnel and any third party which holds or access Personal Information on behalf of the Customer to, in respect of such Personal Information held or obtained during the course of the provision of Services or otherwise in connection with this Agreement, at alltimes:
  - a) comply with Privacy Law;
  - b) use and store such Personal Information only for the purposes of and as otherwise contemplated by this Agreement;



- c) notify the Customer as soon as reasonably practicable if Infoxchange becomes aware of any Security Breach or other breach of this clause 12.1, and act in accordance with the reasonable and lawful directions given to it by the Customer.
- 12.2 The Customer warrants that it has provided the appropriate notifications and procured any necessary consents to allow Infoxchange to collect Personal Information about the Customer, its users and staff, and anyone else whose Personal Information is stored by the Customer in the Customer's IT System in relation to which Infoxchange is providing the Services, and to use such Personal Information to provide the Services as contemplated by this Agreement and in accordance with the Privacy Laws.
- 12.3 Infoxchange shall:
  - a) provide the Customer with the name and contact information for an employee of Infoxchange who shall serve as the Customer's primary security contact and shall be available to assist the Customer as a contact in resolving obligations associated with a Security Breach; and
  - b) notify the Customer of a Security Breach as soon as reasonably practicable after Infoxchange becomes aware of it.
- 12.4 Following Infoxchange's notification to the Customer of a Security Breach, the parties shall coordinate with each other to investigate the Security Breach in accordance with Infoxchange's standard policies and procedures, a copy of which will be provided to the Customer.
- 12.5 Infoxchange shall use reasonable commercial efforts to remedy any Security Breach and prevent any further Security Breach in accordance with applicable Privacy rights, laws, regulations and standards.
- 12.6 Infoxchange agrees that except to the extent Infoxchange is required by law to notify affected individuals or an applicable regulator, it shall not inform any third party of any Security Breach without first obtaining the Customer's prior written consent, other than to inform a complainant that the matter has been forwarded to the Customer's legal counsel. Further, Infoxchange agrees that except to the extent Infoxchange is required by law to notify affected individuals or an applicable regulator, the Customer shall have the sole right to determine:
  - a) whether notice of the Security Breach is to be provided to any individuals, regulators, law enforcement agencies, consumer reporting agencies or others as required by law or regulation, or otherwise in the Customer's discretion; and
  - b) the contents of such notice, whether any type of remediation may be offered to affected persons, and the nature and extent of any such remediation.
- 12.7 Each party agrees to use the same degree of care to protect the Confidential Information of the other party that it uses to protect the confidentiality of its own confidential information of like kind (at all times exercising at least a commercially reasonable degree of care in the protection of such Confidential Information). Each party agrees not to use or disclose Confidential Information of the other party except to the extent necessary to perform its obligations or exercise rights under this Agreement or as directed in writing by the other party. Either party may disclose Confidential Information to the extent that such disclosure is required by law or order of a court or other governmental authority or regulation.
- 12.8 Where the Services include Infoxchange responding to Service Requests, the Customer may submit a Service Request for the investigation of actual or suspected misuse of the Customer's IT System or accounts. This may include without limitation a request to investigate an incident, unusual activity, or an individual's activity either on the Customer's



IT System or otherwise using the Customer's accounts. Where Infoxchange agrees to provide those Services, the Customer shall provide further instructions to Infoxchange about the issue to be investigated. The Customer acknowledges that Infoxchange's ability to lawfully review and investigate the issue, and to disclose the outcome of its investigation to the Customer, is subject to the Customer's compliance with clause 12.2 of this Agreement. The Customer warrants that such a request, and any acts or omissions by Infoxchange undertaken at the instruction or direction of the Customer, are lawful and will not cause Infoxchange or the Customer to breach any law or infringe any person's rights.

**12.9** The obligations under this clause survive termination or expiry of this Agreement.

## **13 Warranties, Disclaimers and Exclusive Remedies**

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**13.1** Each party represents that it has validly entered into this Agreement and that it has the power and authority to do so.

**13.2** Infoxchange does not warrant that the Services will be performed free from minor errors or interruptions or that Infoxchange will correct all Service or Deliverable errors, or that the Services or Deliverables will meet Customer's expectations. Infoxchange is not responsible for any issues related to the performance, operation or security of the Services or Deliverables (including any integration) to the extent caused by the Customer or by products or services not supplied by Infoxchange.

**13.3** To the extent not prohibited by law, the warranties expressly set out in this Agreement are exclusive. However, you may have rights by law that arise under this Agreement, and this Agreement is subject to those rights.

**13.4** The Customer warrants that it has not relied on any representation made by Infoxchange which has not been stated expressly in this Agreement, or upon any descriptions, illustrations or specifications obtained in any document including catalogues or publicity material produced by Infoxchange.

**13.5** Any representation, warranty, condition, guarantee, indemnity or undertaking that would be implied in, or affect, this Agreement by legislation, common law, tort, equity, or by course of performance, dealing, trade, custom or usage is excluded to the maximum extent permitted by law.

**13.6** If and to the extent the Australian Consumer Law applies to the Services, Deliverables and/or Hardware under this Agreement:

Our goods and services come with guarantees that cannot be excluded under the Australian Consumer Law. For major failures with the service, you are entitled:

- a) to cancel your service contract with us; and
- b) to a refund for the unused portion, or to compensation for its reduced value.

You are also entitled to choose a refund or replacement for major failures with goods. If a failure with the goods or a service does not amount to a major failure, you are entitled to have the failure rectified in a reasonable time. If this is not done you are entitled to a refund for the goods and to cancel the contract for the service and obtain a refund of any unused portion. You are also entitled to be compensated for any other reasonably foreseeable loss or damage from a failure in the goods or service.

## 14 Liability

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- 14.1 Subject to clause [14.6](#), to the maximum extent permitted by law, in no event shall either party or its Affiliates have any liability to the other party or its Affiliates arising out of or in connection with this Agreement for any loss of profit (except for fees due under this Agreement), revenue, data, contracts, goodwill or business, any interruption to the Customer's business, any failure to realise savings, or for incidental, consequential (being loss which may not fairly and reasonably be considered to arise naturally, in the usual course of things, from the breach or other act or omission giving rise to the relevant liability), punitive, cover, special, reliance or exemplary loss, or indirect loss of any type or kind, however caused, whether from breach or repudiation of contract, breach of warranty, negligence or any other tort, under statute, under an indemnity or otherwise (and whether or not the party has been advised of the possibility of such damages).
- 14.2 Subject to this clause 14, to the maximum extent permitted by law, the maximum aggregate liability of either party and its Affiliates arising out of or in connection with this Agreement, whether such liability arises from any claim based on breach or repudiation of contract, breach of warranty, negligence or any other tort, under statute, under an indemnity or otherwise, shall not exceed in the aggregate the total amount of fees paid to the Supplier in connection with this Agreement during the twelve (12) month period immediately preceding the event out of which the liability arose.
- 14.3 Both parties acknowledge that the fees reflect the allocation of risk set forth in this Agreement and that the parties would not enter into this Agreement without these limitations on their liability.
- 14.4 The limitations of liability set forth in clause 14.2 shall not apply to:
- fees due under this Agreement;
  - Customer's breach of clause [9](#) or of any of the rights granted under clause [9](#);
  - either party's defence and indemnity obligations as set forth in clauses [10](#) and [15](#);
  - personal injury or death; or
  - Wilful Misconduct.
- 14.5 Notwithstanding anything to the contrary in this clause, neither party shall be liable to the other party to the extent such liability:
- would not have occurred but for the other party's failure to comply with the terms of this Agreement; or
  - is caused or contributed to by the negligence of the other party.
- 14.6 Nothing in this Agreement excludes, restricts or modifies any consumer guarantee, right or remedy conferred on a party by the Australian Consumer Law or any other applicable law that cannot be excluded, restricted or modified by agreement.
- 14.7 To the fullest extent permitted by Law, the liability of Infoxchange for a breach of a non-excludable guarantee referred to in clause 14.6 is limited, at Infoxchange's option, to:
- in the case of goods, any one or more of the following:
    - the replacement of the goods or the supply of equivalent goods;
    - the repair of the goods;
    - the payment of the cost of replacing the goods or of acquiring equivalent goods; or



- iv. the payment of the cost of having the goods repaired; or
    - b) in the case of services:
      - i. the supplying of the services again; or
      - ii. the payment of the cost of having the services supplied again.
- 14.8 Without limiting any other provision of this clause 14, the Supplier will not be liable for any loss or damage that may arise from errors, omissions or statements contained in written text in project documents which the Customer has been asked to review and has agreed to.
- 14.9 The Customer acknowledges that Hardware and software cannot be guaranteed completely free from defects or errors. The Supplier shall not be liable for the failure in operational functionality of Hardware or software (except to the extent caused or contributed to by the Supplier, or to which the Supplier is liable as the supplier of the relevant Hardware or software under the Australian Consumer Law), including any failure in operational functionality of Hardware or software that is otherwise caused by any Force Majeure Event. However, you may have rights by law that arise under this Agreement, and this Agreement is subject to those rights.
- 14.10 Except as specifically set out in the Agreement:
  - a) the Supplier makes no representation and gives no warranty in relation to any incorrect performance or functionality of any Hardware or software which results partly or wholly, from data, records or other information provided by the Customer or a third party.
  - b) The Supplier will not be liable for any direct, indirect, or consequential losses suffered by the Customer, the Customer's clients or users of any hardware or software or any third party as a result of defects or errors in the Hardware or software pursuant to the Agreement. However, you may have rights by law that arise under this Agreement, and this Agreement is subject to those rights.

## 15 Indemnity

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- 15.1 The Supplier agrees to indemnify the Customer and keep the Customer indemnified against any loss, damage, costs, expenses, demands or liability:
  - a) which the Customer pays, suffers, incurs or is liable for; or
  - b) for any claim or claims by a third party or parties;

as a result of or arising from any Wilful Misconduct of the Supplier except to the extent that such loss, damage, costs, expenses, demands or liability are directly caused by the Customer.
- 15.2 The Customer agrees to indemnify the Supplier and keep the Supplier indemnified against any loss, damage, costs, expenses, demands or liability:
  - a) which the Supplier pays, suffers, incurs or is liable for; or
  - b) for any claim or claims by a third party or parties;
  - c) as a result of or arising from:
    - i. use of the Services or Deliverables other than in accordance with the Supplier's instructions; or

- ii. any Wilful Misconduct or negligent act or omission of the Customer;  
except to the extent that such loss, damage, costs, expenses, demands or liability are directly caused by the Supplier.
- 15.3 The Customer further indemnifies, keeps indemnified and holds harmless the Supplier and its officers, employees and agents from and against all claims, losses and liabilities consequent upon, occasioned by or arising from:
  - a) the undertaking of the Customer's projects and commercial activities; and / or
  - b) any Wilful Misconduct, negligent or illegal acts or omissions of the Customer or any person the Customer is responsible for.
- 15.4 In the event of a potential indemnity obligation under this clause 15, the indemnified party shall:
  - a) promptly notify the indemnifying party in writing of a claim;
  - b) allow the indemnifying party to have sole control of its defence and settlement; and
  - c) upon request of the indemnifying party, cooperate in all reasonable respects, at the indemnifying party's cost and expense, with the indemnifying party in the investigation, trial, and defence of such claim and any appeal arising therefrom.

The indemnification obligations under this clause 15 are expressly conditional upon the indemnified party's compliance with this clause 15.4 except that failure or delay in notifying the indemnifying party of a claim shall not relieve that party of its obligations under this clause 15 but such obligations shall be reduced to the extent of any damages attributable to such failure.
- 15.5 The indemnification obligations contained in this clause 15 shall survive termination of this Agreement.

## 16 Notices and Invoices

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### Delivery

- 16.1 Any invoice, notice, demand, consent, approval, request or other communication to be given under this Agreement must be in writing and must be given to the recipient at its address as specified in this Agreement (or as otherwise notified to the other party) by being:
  - a) hand delivered;
  - b) sent via email to support@infoxchange.org (for email notices sent to Infoxchange); or
  - c) sent by prepaid ordinary mail within Australia or New Zealand.

### Deemed receipt

- 16.2 A notice is deemed given if:
  - a) hand delivered, on the day of delivery;
  - b) sent via email, 2 hours after the time the email is sent to the recipient's email address, as recorded on the sender's email system, unless the sender receives, within that time period, an automatic notification (other than an out of office message) indicating that the email has not been delivered; or

- c) sent by prepared ordinary mail within Australia or New Zealand, on the date that is 5 Business Days after the date of posting.
- 16.3 If any delivery or receipt would be deemed by clause 16.2 to be on a day that is not a Business Day or after 4.00 pm (recipient's time), it is deemed to have been received at 9.00 am (recipient's time) on the next Business Day.

## 17 Dispute Resolution

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- 17.1 A party may give the other party notice of a dispute in connection with this Agreement ("**Dispute Notice**").
- 17.2 If the parties are unable to resolve the dispute within 20 Business Days from the issue of a Dispute Notice by either party under clause 17.1, the dispute will be referred to a duly qualified mediator who is agreed between the parties, or failing such agreement, who is appointed by the President of the Law Institute of Victoria, or his or her delegate.
- 17.3 A party may not commence legal proceedings (except proceedings seeking urgent interlocutory relief) in respect of a dispute unless the dispute has first been referred for resolution in accordance with the dispute resolution process described in clause 17.1 and 17.2 and such process has been followed by the party in good faith.

## 18 Termination

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### Termination for insolvency

- 18.1 Either party may immediately terminate this Agreement by notice in writing to the other party if the other party:
- a) has a liquidator or provisional liquidator appointed to it;
  - b) resolves to wind up or is subject to an order to wind up;
  - c) has an administrator appointed to it;
  - d) enters into a scheme of arrangement with its creditors;
  - e) has a petition brought to wind it up which petition is not dismissed, withdrawn or stayed within 20 Business Days; or
  - f) is otherwise insolvent, or enters into any other form of external or insolvency administration.

### Termination for breach

- 18.2 Either party may immediately terminate this Agreement by notice in writing to the other party, if the other party is in material breach of its obligations under the Agreement, and such breach is not remedied within 30 days of the other party receiving written notice of the breach and of the party's intention to terminate if it is not remedied within such time.
- 18.3 Without limiting clause 18.2, the Customer may immediately terminate this Agreement by notice in writing to the Supplier, if Infoxchange fails to meet the service levels set out in the Service Level Commitment:

- a) in respect of any Incident, at least 6 times in a calendar quarter, where each of those service level failures is either a Priority 1 or Priority 2 Incident; or
- b) in respect of any Service Request or any Incident that is either a Priority 3 or lower Incident, at least 12 times in a calendar quarter, and:
  - i. after the end of that calendar quarter, the Supplier has been directed by the Customer to create and implement a remediation plan to address and mitigate the continued occurrence of those service level failures; and
  - ii. in any of the subsequent two calendar quarters after the Supplier has been directed to create and implement a remediation plan (including the calendar quarter in which the direction under clause 18.3, b), i. is made), a further 12 or more such service level failures occur.

### Termination for other reasons

- 18.4 The Customer may terminate the Agreement for any reason after the end of the initial Term, by providing at least three months' written notice of termination, or by providing immediate written notice of termination with three months' fees in lieu of notice.
- 18.5 The Agreement may be immediately terminated by the Supplier by notice in writing to the Customer if the Customer:
- a) breaches any term of the Agreement and fails to remedy the breach within 7 days of written notice;
  - b) uses technology or services provided by the Supplier for any unauthorised use;
  - c) causes any person with a security interest to take possession or appoint a receiver, administrator or other similar officer over any of the Customer's property or assets; or
  - d) is subject to any other similar event or proceedings.

### Consequences of termination

- 18.6 If the Agreement is terminated for any reason, the Customer will be liable for any accrued or unpaid fees under the Agreement up to the date of termination, including generally, all costs incurred or likely to be incurred by the Supplier in providing the Services as at the date of termination, including the cost of Proposal development.
- 18.7 Termination of the Agreement for any reason will not prejudice any other rights or remedies which may have accrued to either party prior to the date of termination.
- 18.8 Termination or expiry of the Agreement will not relieve the Customer of their liability in respect of the rights and remedies of the Supplier which have accrued prior to termination.
- 18.9 On the Supplier's termination of the Agreement for the Customer's breach under clauses 18.1, 18.2 or 18.5, the Customer's termination under clause 18.4, or either party's termination for a Force Majeure Event under clause [20](#), without prejudice to the Supplier's accrued rights or remedies:
- a) the Customer must pay to the Supplier its reasonable and unavoidable costs arising as a result of the termination, including without limitation:
    - i. fees incurred by cancelling or otherwise in respect of payments for the minimum remaining term of any commitments to third parties (such as third party Hardware, software, or services providers) that the Supplier cannot reasonably mitigate or recover from the third party;

- ii. costs for personnel which the Supplier has engaged to support the Customer's Services, to the extent such personnel cannot be redeployed to the Supplier's other customers within a reasonable period of time; and
  - iii. any other costs that the Supplier incurs as a result of the termination that it is unable to reasonably mitigate; and
- b) to the extent practicable, at Infoxchange's option, Infoxchange will hand over or assign to the Customer and the Customer will accept any remaining agreements with third parties which cannot be cancelled, so that Customer can pay for and continue to have the benefit of those agreements directly from the respective third parties.

**18.10** On termination or expiry of the Agreement, for whatever reason:

- a) all money which would become payable by the Customer to the Supplier at a later date on any account, becomes immediately due and payable;
- b) any payment made by the Customer to the Supplier prior to the termination will not be refundable, unless otherwise expressly set out in the Agreement, and subject to any rights you have by law that arise under this Agreement;
- c) except for termination as contemplated under clause 18.9, if there are ongoing commitments to third parties (such as telephony service providers) in respect of Services, Hardware or software the Supplier supplies to the Customer under this Agreement, where such commitments cannot be cancelled without incurring additional fees and involve a minimum term that has not yet expired, to the extent practicable and where requested by the Customer, Infoxchange will hand over or assign to Customer and the Customer will accept any remaining agreements with third parties which cannot be cancelled, so that Customer can pay for and continue to have the benefit of those agreements directly from the respective third parties;
- d) each party must immediately cease using the other party's Confidential Information and immediately return to that party all Confidential Information of that party or, if it is not capable of return, destroy it;
- e) the Supplier shall render its account for all Services provided up until the date of termination or expiry. The Customer must pay the account within 7 days of receipt of the tax invoice; and
- f) the Supplier will cancel your password, account and use of the Service.



## 19 General Provisions

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- 19.1 This Agreement is the entire agreement of the parties about the subject matter of this Agreement and supersedes all other representations, negotiations, arrangements, understandings or agreements and all other communications.
- 19.2 If a provision of this Agreement is invalid or unenforceable in a jurisdiction it is to be read down or severed in that jurisdiction to the extent of the invalidity or unenforceability and that fact does not affect the validity or enforceability of the remaining provisions.
- 19.3 A party's failure or delay to exercise a power or right does not operate as a waiver of that power or right. A waiver is not effective unless it is in writing, and only relates to the specific purpose for which it is given.
- 19.4 Except as otherwise expressly set out in this Agreement, this Agreement may be amended or varied only by a written document signed by both parties.
- 19.5 This Agreement will be interpreted and construed in accordance with the laws of Victoria, Australia, without regard to conflict of law principles. The parties submit to the exclusive jurisdiction of the courts of Victoria and the Commonwealth of Australia.
- 19.6 Neither party shall assign its rights or obligations under the Agreement without prior written consent to the other, which consent cannot unreasonably be withheld and is to be provided within 30 days of the request. However, consent is not required for an assignment by Infoxchange that occurs as part of a transfer of all or substantially all of the assets of Infoxchange.
- 19.7 Except with Infoxchange's written consent, the Customer will not, either directly or indirectly:
  - a) solicit or encourage any employee of Infoxchange who was directly involved in performing this Agreement, to leave the employ of Infoxchange; or
  - b) solicit or encourage any consultant or other contractor under contract with Infoxchange who was directly involved in performing this Agreement to cease work for Infoxchange,until at least 12 months after this Agreement has ended.
- 19.8 The Customer acknowledges that Infoxchange invests substantial time and resources in training its staff and accordingly agrees that in the event that it breaches clause 19.7 it will pay to Infoxchange as agreed damages its loss and damage which the parties estimate is 50% of one year's salary of that person when last engaged by Infoxchange as due consideration.

## 20 Force Majeure

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Neither party will be liable to the other for any delay or failure to perform its obligations under this Agreement (excluding any payment obligation or other obligation of a financial nature) as a result of a cause beyond its reasonable control (a "**Force Majeure Event**"). If the Force Majeure Event continues for a period of more than 60 days, the party not affected by the Force Majeure Event may terminate this Agreement by written notice to the affected party.