

## Terms and Conditions of Usage

This Agreement and any documents referred to in it (this "**Agreement**") contain the terms and conditions that govern your access to and use of the Services (as defined below) and is an agreement between Sovereign Cloud Australia Pty Ltd (ACN 611181830) ("**AUCloud**", "we," "us," and "our") and you or the entity you represent ("**Customer**", "you" and "your").

### 1. Definitions

Unless the context otherwise requires, the definitions and rules of interpretation in this clause apply in this Agreement.

"**Acceptance**" means signification by you that, to the extent it can be reasonably determined at that time by the conduct of Acceptance testing, the specified Service(s) provided by us meet the applicable Acceptance criteria. "Accept" and "Accepted" have corresponding meanings.

"**Account**" means your AUCloud account set up through our portal, through which you can access the Services.

"**Aggregate Usage Data**" means Usage Data that is incapable, either independently or if combined with other data accessible by us or third parties, of personally identifying any particular Customer Personnel or Authorised User or a group of Customer Personnel or Authorised Users including metadata about use of our Services, such as monitoring data, analytics or derived data, resource names, service tag details and utilisation information.

"**Affiliates**" means any entity Controlling, Controlled by or under Control of, a party.

"**AUCloud Content**" means any Content we (or our subcontractors) make available to you in connection with the Services.

"**Authorised Users**" mean your employees, agents and independent contractors to whom you have granted permission to use the Services and for whose actions you accept responsibility.

"**Business Day**" means any day other than a Saturday or Sunday on which banks are open for general banking business in the Australian Capital Territory.

"**Commonwealth**" means the Commonwealth of Australia.

"**Community Rules Information Security Policy**" and "**CRISP**" means the formal top level security document produced by us that identifies which aspects of security are within the remit of our security officer, and which aspects of security are within the remit of your security officer.

"**Confidential Information**" means:

- a) information a party receives from another party to this Agreement in connection to this

- Agreement (whether in oral, written, or other tangible or intangible form);
- b) information about the terms of this Agreement, their negotiations, and the exercise of rights under this Agreement;
  - c) information that is by its nature confidential;
  - d) information that a party knows or ought to know is confidential;
  - e) information that is designated by a party as confidential; and
  - f) this Agreement, any trade secrets, knowhow, and other commercially valuable information of a party, but does not include information that:
    - i. is or becomes public knowledge other than by breach of this Agreement or by any other unlawful means;
    - ii. is in the possession of that person without restriction in relation to disclosure before the date of receipt; or
    - iii. has been independently developed or acquired by that person.

**"Conflict of Interest"** means any actual, potential or perceived conflict between our duty to you and either:

- a) our own interests; or
- b) our duty to another entity.

**"Content"** includes:

- a) literary, dramatic, musical, artistic works, sound recordings, cinematographic films, broadcasts, and published editions of works as defined by the *Copyright Act 1968* (Cth); and
- b) source code, object code, software (including third party software), test cases, tools, data stored by any means, documents, manuscripts, reports, equipment, technical information, text, studies, plans, procedures, methods, charts, drawings, diagrams, images, photographs, video, audio, calculations, tables, and schedules.

**"Control"** of an entity has the meaning given to it in Section 50AA of the *Corporations Act 2001* (Cth). Controlling or Controlled have corresponding meanings.

**"Customer Data"** means Your Content, Personal Information and Usage Data.

**"Data Breach"** means

- a) there is any unauthorised access to, or unauthorised disclosure of, any of your Personal Information held by us in connection with this Agreement; or
- b) any of your Personal Information held by us is lost in circumstances where unauthorised access to, or unauthorised disclosure of, your Personal Information is likely to occur.

**"Designated Person"** has the meaning ascribed in the Autonomous Sanctions Regulations 2011 (Cth), or any equivalent term or expression under comparable legislation applicable in respect of any Territory other than Australia.

**“Effective Date”** means the earliest of the day on which you:

- a) sign this document;
- b) submit an Order Form for Services; or
- c) Accept any Services.

**“Electronic Signature”** means an electronic method of signing that identifies the person and indicates their intention to sign the contract.

**“Exchange Rate Fluctuation”** means that in the event of a fluctuation in vendor pricing in exchange between currencies, customers will be charged or credited at the “spot rate” of the day.

**“Force Majeure Event”** means any occurrence or omission outside a party’s reasonable control, as a direct or indirect result of which the party relying on the event is prevented from or delayed in performing its obligations under this document (other than a payment obligation), and includes:

- a) a physical natural disaster including fire, flood, storm, lightning, atmospheric conditions, or earthquake;
- b) war or other state of armed hostilities (whether war is declared or not), insurrection, riot, civil commotion, act of public enemies, national emergency (whether in fact or in law) or declaration of martial law;
- c) breakdown of communication facilities including telecommunication networks, or generalised lack of availability of raw materials or energy;
- d) epidemic, pandemic, quarantine restriction, outbreaks of infectious disease or any other public health crisis;
- e) ionising radiation or contamination by radioactivity from any nuclear waste or from combustion of nuclear fuel;
- f) confiscation, nationalisation, requisition, expropriation, prohibition, embargo, restraint or damage to property by or under the order of any government agency;
- g) law taking effect after the date of this document, or other government agency acts or omissions;
- h) strike, lock-out, stoppage, labour dispute or shortage including industrial disputes that are specific to a party or the party’s subcontractors; and
- i) computer viruses or other similar occurrences, or any malicious or unlawful acts of any third party.

**“Head Terms”** means clauses 1 to 24 of this Agreement.

**“Information System”** means a collection of computing and/or communications components organised for the collection, processing, maintenance, use, sharing and dissemination of information. A “System” does not include industrial/process controls systems, telephone switching and private branch exchange systems and environmental control systems.

**"Intellectual Property Rights"** means all intellectual and industrial property rights, proprietary rights, and moral rights, whether registered or unregistered, existing under statute, common law, or equity, both in Australia and throughout the world and includes the following rights:

- a) all copyright (including rights in relation to phonograms and broadcasts), all rights in relation to inventions (including patent rights), plant varieties, registered and unregistered trade marks (including service marks), registered and unregistered designs, domain names, right in relation to semiconductors and circuit layouts, trade secrets, know how, trade or business or company name, and all other rights resulting from intellectual activity in the industrial, scientific, literary or artistic fields;
- b) any application or right to apply for registration of any of the rights referred to in paragraph (a); and
- c) all rights of a similar nature to any of the rights in paragraphs (a) and (b) which may subsist in Australia or elsewhere, whether or not such rights are registered or capable of being registered.

**"Interest Rate"** means the general interest charge rate determined under section 8AAD of the Taxation Administration Act 1953 on the day payment is due, expressed as a decimal rate per day.

**"Law"** means all applicable obligations under, and rules of, law, including common law, as well as any other applicable statute, regulation, by-law, rules, ordinance, subordinate legislation, court order, or legally binding directive or requirement of any regulatory authority, in force from time to time.

**"Material Breach"** means:

- a) any substantial violation or failure to comply with the terms and conditions of this Agreement by the party receiving notice of the breach, or a material impairment of the party's ability to perform its obligations under this Agreement, or
- b) if the other party becomes insolvent, makes an assignment for the benefit of creditors, or becomes subject to direct control of a trustee, receiver or similar authority.

**"Mediation Rules"** means the Resolution Institute Mediation Rules.

**"Order Form"** means the document or electronic form, produced by us and completed and submitted by you, which specifies your chosen Services. This may be produced automatically via our portal.

**"Personal Information"** has the meaning given to that term by the Privacy Act.

**"Personnel"** means the directors, employees, officers, partner, secondees, agents and subcontractors of a party who are individuals, and includes employees and subcontractors (who are individuals) of subcontractors.

**"Physical Host Core"** means the use specifically relates to the creation of VMs and cost associated with hosts to a cluster.

**"Privacy Act"** means the Privacy Act 1988 (Cth) and any ancillary rules, guidelines, orders, directions, directives, codes of conduct or other instruments made or issued under it, as amended from time to time.

**"Privacy Laws"** means:

- a) the Privacy Act 1988 (Cth);
- b) the Australian Privacy Principles (APPs) contained in Schedule 1 of the Privacy Act; and
- c) and any other applicable laws, regulations, registered privacy codes, privacy policies, and contractual terms in respect of the collection, processing, storage, transfer, use, and disclosure of Personal Information including, as applicable, the EU General Data Protection Regulation 2016/679, the Federal Data Protection Act of 19 June 1992 (Switzerland), the UK Data Protection Act 2018 (DPA 2018) and the UK General Data Protection Regulation, and any US state or federal laws or regulations relating to the collection, use, disclosure, security or protection of personal data, or to security breach notification.

**"Protective Security Policy Framework"** or **"PSPF"** means the Australian Government Protective Security Policy Framework.

**"Public Official"** 'Commonwealth Public Official' and/or 'Foreign Public Official' as defined in the Criminal Code Act 1995 (Cth).

**"Reseller"** means an AUCloud authorised reseller of Services that has executed a Reseller Agreement with AUCloud.

**"Reseller Agreement"** means the terms and conditions appointing and authorising an AUCloud Reseller to resell the Services to a you.

**"Resolution Institute"** means the Resolution Institute ACN 008 651 232, a company limited by guarantee, and any successor organisation.

**"Security Incident"** means security breach, violation, contact or approach from those seeking unauthorised access to Content relating to the Services, including:

- a) action taken through the use of computer networks that result in an actual or potentially adverse effect on our Information System and/or Your Content residing on that system; or
- b) any other unauthorised access or use by a third party or misuse, damage or destruction by any person.

**"Service Credits"** means the sums attributable to our failure to deliver any part of the Services in accordance with the service levels, as specified in the applicable Service Definition.

**"Service Definitions"** means the documents issued by us from time to time, which set out the

descriptions of the applicable Services, any terms and conditions specific to such Services, and the applicable service levels offered in respect of such Services, as may be updated or amended by us from time to time.

**"Services"** or **"Service"** means the services provided by us to you under an Order Form and in accordance with this Agreement.

**"Service Level Event"** means if AUCloud's monitoring detects that the service or component has failed based on the specific Service Level parameters procured by you. The total number of minutes that the Service is unavailable is measured from the time that AUCloud confirms the SLA event has occurred until the time that AUCloud resolves the issue and the service becomes available to the customer, excluding any periods of unavailability due to scheduled maintenance or a Force Majeure Event.

**"Specialist Services"** means support services associated with the Services identified in a Service Description and Order Form.

**"Spot Rate"** means the exchange rate, as determined by the market, that is applicable to the conversion of one currency into another currency.

**"Term"** has the meaning given in clause 14.1.

**"Third-Party"** means a legal entity, company, or person(s) that is not a party and not an Affiliate of a party.

**"Third-Party Products"** means any third-party products, applications, services, software, networks, systems, directories, websites, databases and/or information which may be linked to or integrate with the Services.

**"Usage Data"** means any and all information and/or data associated with or collected from Customer Personnel and Authorised Users, if any, which is received, stored, or processed by us in connection with the Services and includes aggregate information, usage and traffic data, technical support data (such as logs, monitoring alerts and error report information), IP addresses, transactional or financial information, account data or user names, passwords, registration and billing information, email addresses, mailing addresses, phone numbers or any other forms of personally identifiable information, provided that such information is used in accordance with the Privacy Laws and the terms of this Agreement.

**"User"** has the meaning given to it in clause 8.1.

**"Vendor Pricing"** refers to the pricing structure agreed upon between a vendor and a buyer "AUCloud".

**"Virus"** means anything or device (including any software, code, file or programme) which may: prevent, impair or otherwise adversely affect the operation of any computer software, hardware or network, any telecommunications service, equipment or network or any other service or device; prevent, impair or otherwise adversely affect access to or the operation of any programme or data, including the reliability of any programme or data (whether by re-arranging, altering or erasing the programme or data in whole or part or otherwise); steal or redirect data in bad faith or attempt to do the same; or adversely affect the User experience, including worms, malware, ransomware, Trojan Horses, viruses and other similar things or devices.

**"Vulnerability"** means a weakness in an Information System, system security procedures, internal controls, or implementation that could be exploited or triggered by a threat source.

**"Your Content"** means Content that is provided to or made accessible to us by you in connection with this Agreement or the Services.

## 2. Interpretation

In this Agreement:

- 1.1. headings and subheadings in this Agreement are for convenience only and shall not affect the interpretation of any provision;
- 1.2. words importing the singular include the plural and vice versa, and words importing a gender include all genders;
- 1.3. a reference to a party includes that party's executors, administrators, successors and permitted assigns, including by way of novation;
- 1.4. a reference to any document (including this Agreement) is to that document as varied, novated or replaced from time to time;
- 1.5. a reference to any statute or to any statutory provision includes any statutory modification or re-enactment of it or any statutory provision substituted for it, and all ordinances, by-laws, regulations, rules and statutory instruments (however described) issued under it;
- 1.6. the word **includes** in any form is not a word of limitation;
- 1.7. a reference to time is to local time in Canberra, Australia;
- 1.8. a reference to **\$** or **dollar** is to Australian currency;
- 1.9. if any day appointed or specified in this Agreement for the payment of money or doing any act falls on a day which is not a Business Day, that day is deemed to be the next Business Day; and
- 1.10. no provision of this Agreement is to be interpreted to the disadvantage of a party because that party (or its Personnel) drafted that provision.

### 3. Order of Precedence

This Agreement is comprised of:

- 3.1. the Order Form (and any document or URL incorporated into the Order Form);
- 3.2. the applicable Service Definitions (and any document or URL incorporated into the Order Form);
- 3.3. the Annexures to the Head Terms; and
- 3.4. the Head Terms.

If there is any ambiguity, conflict or inconsistency between the documents comprising the Agreement, the higher ranked document in clause 3 shall prevail to the extent of the inconsistency.

### 4. Use of the Services

- 4.1. From time to time you may order Services from us by completing and submitting an Order Form. Any subsequent supply of those Services from us to you is governed by these terms and conditions.
- 4.2. We grant you a non-exclusive, non-sub-licensable, non-transferrable, revocable licence during the Term to, subject to your compliance with the terms of this Agreement:
  - 4.2.1. access and use the Services solely in accordance with this Agreement; and
  - 4.2.2. copy and use the AUCloud Content solely to the extent reasonably required for your permitted use of the Services.
- 4.3. We will provide the Services in accordance with the applicable Service Definitions.
- 4.4. The Customer acknowledges that under the use of Physical Host Core "reasonable use" applies to 10 VMs that are created and powered off. Any additional VMs that are created and "powered off" will incur the costs of any additional hosts required to support that workload in the event they are required to "powered on".
- 4.5. We will obtain sufficient rights to third party Intellectual Property Rights necessary to perform the Services and to grant you a non-exclusive, revocable licence to use those third party Intellectual Property Rights as necessary to receive and use the Services during the Term.
- 4.6. You will be responsible for any third-party licenses and license costs which are not included in the relevant Service Definition, including any rights or licences to Your Content or information that is processed by our Information Systems unless otherwise agreed in writing by us.
- 4.7. You will comply with all Laws applicable to your use of the Services, including those specified in the Service Definitions and in the Community Rules Information Security Policy.



- 4.8. You understand that the Services may be designed to access, integrate with, or be interoperable with certain Third Party Products. Any such access and use of Third Party Products is governed solely by the terms and conditions of the third party provider, and AUCloud does not endorse, is not responsible or liable for, and makes no representations as to any aspect of such Third Party Products, including, without limitation, the technology itself, the availability of, or any content or material made available by the third party provider. Additionally, you understand that Third Party Products may be updated or changed overtime, and therefore, AUCloud makes no representations regarding the manner in which the Services accesses, integrates or interfaces with or fails to access, integrate or interface with such Third-Party Products. You agree to and irrevocably waive any claim against AUCloud with respect to such Third-Party Products or the access, availability, integration, or interoperability of the Third-Party Products with Services. The parties agree that AUCloud shall not be liable for any damage or loss caused or alleged to be caused by or in connection with your failure to enable access or use of any such Third-Party Products. In addition, you understand and agree that in connection with any access or use of the Third-Party Products, you are relying on the privacy practices, the data security processes and/or other policies of such Third-Party Providers. You may be required to register for or log into such Third-Party Products on their respective websites and by enabling any Third Party Products you are expressly permitting AUCloud to use and disclose relevant login information as well as information required by such login, strictly as necessary to facilitate the use or enablement of such Third Party Products enabled by you.

## 5. Acceptance of the Service

- 5.1. Where specified in a Service Description, the Services, Specialist Services and any hardware or software provided with the Services, are subject to Acceptance by you.
- 5.2. We must promptly notify you when the Services are ready for Acceptance by you.
- 5.3. If, at Acceptance, the delivered Services do not substantially conform to the Service Definition, or do not operate correctly in accordance with the applicable specifications in the Service Definition you must notify us within 5 Business Days that some or all of the Services are not Accepted (along with the reasons for its rejection); and
- 5.3.1. if the non-Accepted Services can be remedied to meet the requirements of the Service Definition (determined at our discretion), we must, at our own cost, remedy the non-Accepted Services to meet the requirements of the Service Definition and redeliver the Services for your Acceptance; or
- 5.3.2. if the non-Accepted Services cannot be remedied to meet the requirements of the Service Definition (determined at our discretion) we will notify you within 5 Business Days and you may terminate this Agreement immediately by giving us written notice.
- 5.4. The remedies described in clause 5.3 are not available to you if:
- 5.4.1. the Services are not used in compliance with the Service Definition;

- 5.4.2. unauthorised modifications are made to the Services by you or any other third party;
- 5.4.3. you are using early releases of the Services or non-current versions of the Services;
- 5.4.4. you are undertaking evaluations or a trial of the Services; or
- 5.4.5. where the Services incur defects due to accident, abuse or improper use by you.

## 6. Your Content

- 6.1. You grant to us a world-wide, royalty-free, non-exclusive, non-transferable licence to use, store and communicate Your Content solely for the purpose of exercising our rights and performing our obligations under this Agreement.
- 6.2. You own all rights, title and interest in and to all of Your Content and have sole responsibility for the legality, reliability, integrity, accuracy and quality of Your Content and its storage or transmission through our Information Systems.
- 6.3. If you provide us with Your Content, we must not without your prior written approval:
  - 6.3.1. modify Your Content; or
  - 6.3.2. destroy, or cause to be destroyed, any of Your Content, other than in accordance with this Agreement.
- 6.4. Except where we provide you with Backup as a Service under this Agreement, we are not responsible for backing up Your Content.

## 7. Privacy and Data Security

- 7.1. We will:
  - 7.1.1. take reasonable steps which align with industry standards to safeguard physical and electronic access and prevent unauthorised access, disclosure, destruction, loss, damage, alteration, and use of Your Content;
  - 7.1.2. comply with the Protective Security Policy Framework and any other reasonable security requirements set out in this Agreement in relation to Your Content; and
  - 7.1.3. notify you immediately (or as soon as practicable in the circumstances) in the event of any requests from foreign governments or agencies for access to any of Your Content (unless such notification is prohibited by Law) and attempt to redirect any foreign government or agency requesting access to Your Content to request the access directly from you.
- 7.2. Each party must process all Personal Information in connection with this Agreement in accordance with applicable Privacy Laws (regardless of whether or not it is otherwise obliged to comply with the Privacy Laws) and only for the purposes of performing its obligations under this Agreement.
- 7.3. If Your Content contains Personal Information, we may from time to time have access to

that Personal Information in the regular course of providing the Services to you. If you provide or make available to us any Personal Information in connection with this Agreement (**your Personal Information**), you must make all disclosures and obtain all consents necessary to allow us to collect, store, use, disclose and otherwise deal with your Personal Information lawfully in accordance with the Privacy Laws for the purposes of this Agreement.

7.4. We must take all reasonable steps to ensure that:

7.4.1. only authorised personnel have access to your Personal Information; and

7.4.2. we do not engage in any act or omission which would cause you to be in breach of the Privacy Laws.

7.5. AUCloud is a service provider and/or processor with respect to Customer Data and Customer is an owner and/or controller or processor, as applicable, of the Customer Data.

7.6. Unless otherwise expressly agreed, the:

7.6.1. the subject matter and duration of the processing;

7.6.2. the nature and purpose of the processing; and

7.6.3. the type of Customer Data involved shall be as set forth in the applicable Service Description.

7.7. We must not disclose your Personal Information overseas without your prior written consent and if that consent is given, we must take reasonable steps to ensure the recipient complies with the Privacy Laws and is required to comply with our and your directions about Personal Information, unless otherwise required by law or court order.

7.8. We must immediately notify you if we become aware that a disclosure of Personal Information may be required by law.

7.9. Without limiting your obligations under clause 6 of Appendix A, if we become aware of any actual or suspected Data Breach or Security Incident, we will:

7.9.1. inform you by telephone as soon as possible, and as soon as practicable (and at least within 5 Business Days) confirm the details in writing.

7.9.2. comply with all of your reasonable directions in relation to the Data Breach or Security Incident, including in relation to, provided such directions are in compliance with applicable laws and regulations:

a) notifying the Australian Cyber Security Centre, or any other relevant body, as required by you;

b) obtaining evidence about how, when and by whom our Information System, your Personal Information and/or Your Content has or may have been compromised, providing it to you on request, and preserving and protecting that evidence for a period of up to 12 months;

- c) undertaking an investigation to determine the extent to which the Data Breach or Security Incident concerns any of your Personal Information and providing the results of the investigation to you;
- d) implementing any reasonable mitigation strategies to reduce the impact of the Data Breach or Security Incident or the likelihood or impact of any future similar incident; and
- e) preserving and protecting your Personal Information and Your Content (including as necessary reverting to any backup or alternative site or taking other action to recover Your Content).

- 7.10. We will promptly notify you if we determine, in our reasonable business judgement, that the continued use or provision of the Services will cause you, the controller of Customer Data or AUCloud to be in violation of the applicable Privacy Laws. In such event, the parties will work together in good faith to resolve such issue in a timely manner. In no event will either party be required to perform any activity that violates the applicable Privacy Laws.
- 7.11. We will collect and store Usage Data which we may use only for the purposes of complying with our obligations under this Agreement and in compiling Aggregate Usage Data.
- 7.12. We may use, copy and distribute the Aggregate Usage Data for the purposes of improving the operation of our Services, performing statistical analysis, and marketing and promoting our Services.
- 7.13. You represent and warrant that you have obtained, and will maintain during the Term, all necessary authorisations and permissions from your Personnel and Authorised Users to enable us to use Customer Data in accordance with the terms of this Agreement. You agree to provide us with any documentation or evidence of such authorisations and permissions upon our written request. **Sub-processors.**
- 7.13.1. **"Sub-processors"** means the AUCloud Affiliates, other than the AUCloud contracting entity set out in the Order Form, and the third parties authorised under the terms of the Agreement to have access to and process Customer Data in order to provide a portion of the Service(s).
- 7.14. Customer generally authorises the engagement of AUCloud's Affiliates as Sub-processors and specifically authorises the engagement of Third-Parties as Sub-processors, including AUCloud's third party cloud provider(s) as set forth in the applicable Service Description. AUCloud shall remain fully liable for the performance of the Sub-processors in accordance with the terms of the Agreement and shall contractually require (including via standard contractual clauses, sub-processing agreements) any such Sub-processors to comply with data protection obligations that are at least as restrictive as those AUCloud is required to comply with under the Agreement. In the event AUCloud makes any changes or additions to the list of Sub-

processors, AUCloud shall provide notice of any changes or additions as set forth in the applicable Service Description.

## 8. Users of Services

- 8.1. In relation to Customer Personnel and Authorised Users (the “**Users**”), you must ensure that:
  - 8.1.1. each User maintains a strong and secure password (as defined in the Australian Signals Directorate Information Security Manual) in connection with access to and use of the Services, and keeps such password confidential;
  - 8.1.2. all Users comply with your obligations under this Agreement and the relevant AUCloud Community Rules Information Security Policy;
  - 8.1.3. you use all reasonable endeavours to prevent any unauthorised access to, or use of, the Services; and
  - 8.1.4. you notify us immediately by email to [assurance@aucloud.com.au](mailto:assurance@aucloud.com.au) if you suspect or become aware of:
    - a) any unauthorised access to or use of the Services; or
    - b) any violation of your obligations under this Agreement by a User. You must immediately terminate access to the Services by any User who breaches the obligations under this Agreement.
- 8.2. You are responsible for all activities that occur under your Account, regardless of whether the activities are undertaken by you, your employees, or a third party (including your contractors or agents) and, except to the extent caused by our breach of this Agreement, we are not responsible for unauthorised access to your Account or Information Systems.

## 9. Our Obligations

- 9.1. We must:
  - 9.1.1. perform the Services to a high professional standard; and
  - 9.1.2. comply with all Laws relevant to the performance of the Services.
- 9.2. We represent that:
  - 9.2.1. the use of any Content provided under this Agreement by us to you will not infringe any third party’s Intellectual Property Rights or other third-party restrictions on use; and
  - 9.2.2. none of our Personnel:
    - a) have unlawfully entered or remain in Australia; or
    - b) are working in Australia in breach of their visa conditions.

- 9.3. If, during the duration of this Agreement a representation made under clause 9.2 is

breached, we must promptly:

- 9.3.1. notify you in writing; and
- 9.3.2. remedy the defect at our cost, or take any other action as reasonably directed by you, subject to our obligations at law.

## **10. Your Obligations**

### **10.1. You must:**

- 10.1.1. not access, store, distribute or transmit any Viruses, or any Content that is unlawful, harmful, threatening, defamatory, obscene, infringing, harassing or racially or ethnically offensive; facilitates illegal activity; depicts sexually explicit images; promotes unlawful violence; or is discriminatory based on race, gender, colour, religious belief, sexual orientation, disability; or any otherwise illegal, and we reserve the right, without liability to you, to disable your access to any Content that breaches the provisions of this clause 10.1.1;
- 10.1.2. not access all or any part of the Services in order to build a product or service which competes with the Services (or any part of them) or attempt to obtain, or assist third parties in obtaining, access to the Services, other than as provided under this Agreement;
- 10.1.3. comply with your responsibilities as set out at Appendix A, Section 6 of this Agreement ("Your Responsibilities") and the Protective Security Policy Framework (as that Framework applies to you or the Services);
- 10.1.4. provide us with all necessary co-operation in relation to this Agreement and all necessary access to such information as we may require in order to provide you with the Services, including but not limited to, security access information and configuration services.

### **10.2. You are solely responsible for procuring and maintaining your network connections and telecommunications links from your Information Systems to our data centres, and for all problems, conditions, delays, delivery failures and all other loss or damage arising from or relating to your network connections or telecommunications links or caused by the internet.**

### **10.3. You:**

- 10.3.1. are responsible for securing all necessary approvals, consents, and permissions required under law, from regulatory authorities, any agreements you have with third parties, employee representative bodies, or other applicable third parties, as may be required for AUCloud to perform the Services. You shall ensure that any required authorisation for accessing and processing data from your Information Systems, including, but not limited to, connecting to your network, installing software/hardware, collecting and analysing host and network based data captured or obtained as part of Services. You are solely responsible for providing instructions or obtaining any necessary consents for AUCloud to provide the

Services in compliance with laws, including without limitation, any laws relating to network integrity or security or to data privacy or data protection. If you fail to secure these consents, you accept full responsibility for any resulting claims or liabilities (notwithstanding any contrary terms in the Agreement);

- 10.3.2. hereby agree to indemnify and hold harmless AU Cloud, its directors, officers, employees, and agents (collectively referred to as the **"Indemnified Parties"**), from and against any and all claims, liabilities, damages, losses, costs, and expenses (including reasonable legal fees and expenses) incurred by the Indemnified Parties arising out of or in connection with any failure by you to obtain necessary approvals, consents, and permissions required for the provision of the Services under this Agreement. This indemnity shall survive the termination or expiration of this Agreement and shall continue to be binding upon the parties and their respective successors and assigns; and
- 10.3.3. acknowledge and agree that the indemnity in this clause is a material term of this Agreement and is necessary to protect the interests of AUCloud in the event of any failure by you to fulfill its obligations regarding necessary approvals, consents, and permissions.

## **11. Ethical Behaviour**

- 11.1. The parties must not, and each party must ensure that its respective Affiliates and personnel do not, induce or do or agree to do any other act, failure to act or thing in connection with the provision of the Services or any other agreement between any member of AUCloud or its subcontractors or partners (to the extent engaged by us in providing the Services to you) and any of your subcontractors or partners including the performance or award of any such agreement, that contravenes any applicable law or requirement of a regulatory authority relating to anti-bribery and corruption or anti-money laundering, including:
- 11.1.1. the Criminal Code Act 1995 (Cth), the Proceeds of Crime Act 2002, the Commonwealth Fraud Control Framework and the Australian Securities and Investments Commission Act 2001;
- 11.1.2. in the case of a Public Official, any applicable law applicable to the Public Official in his capacity as such; and
- 11.1.3. the principles described in the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, signed in Paris on 17 December 1997, which entered into force on 15 February 1999, and the commentaries to it (as amended and/or added to from time to time).
- 11.2. Each party agrees to notify the other party and confirm the same promptly in writing immediately upon discovering any instance where it has, or any of its Affiliates or personnel have, failed to comply with any provisions of this clause.
- 11.3. Each party undertakes, warrants and represents that it will maintain policies, procedures



and guidelines that are applicable to all members of the group and personnel (including subcontractors to the extent engaged by the party in relation to this Agreement) and are intended and designed to prevent them doing or failing to do any act or thing that contravenes any applicable law or requirement of a regulatory authority relating to anti-bribery and corruption or anti-money laundering, including a gifts and entertainment policy requiring such persons not to undertake, offer, promise, give, authorise, request, accept or agree any inducement (or to agree to do any of the foregoing).

- 11.4. Each party agrees to notify the other as soon as reasonably practicable upon becoming aware of any extortive solicitation, demand or other request for anything of value, by or on behalf of any person (including any Public Official) relating to this Agreement or its subject matter.
- 11.5. Each party holds harmless, indemnifies and keeps indemnified the other party and its successors assigns, officers, employees and representatives against losses which it suffers or incurs in connection with a breach of clause 9 and/or, in the case of AUCloud, a breach of clause 10. This clause 11.5 does not require a party to indemnify the party for the amount of any fine constituting a criminal penalty, to the extent that such indemnity would not be permitted by applicable law.
- 11.6. Upon a party's reasonable request from time to time the parties will meet to discuss and agree any additions or amendments to the requirements of this Agreement that a party considers necessary or appropriate to comply with the requirements of, and implement appropriate checks, controls, processes and procedures in relation to, the Criminal Code Act 1995 (Cth), or any other applicable law relating to anti-bribery and corruption or anti-money laundering.
- 11.7. Without prejudice to the parties' respective obligations to comply with applicable law, if we or our personnel receive a request to audit or for information, data, access and/or any other requirement, from any regulatory authority as contemplated by this Agreement:
  - 11.7.1. we must promptly notify you in writing of such request;
  - 11.7.2. if you consider that the relevant regulatory authority may be acting outside the scope of its lawful authority in making such request, you must notify us of the same and the parties must promptly discuss and agree (acting reasonably) the relevant response to that regulatory authority, provided that if you wish us to cooperate with the request notwithstanding any considerations as to the scope of the regulatory authority's lawful authority, we must comply with all of your instructions in relation to such request (subject always to the provisions of this Agreement).
- 11.8. Without prejudice to any of our other obligations with regard to its personnel pursuant to this Agreement, we confirm that we will undertake (or procure that our subcontractors and agents undertake) reasonable checks (not less than annually and otherwise in accordance with good industry practice) to ensure in so far as reasonably possible that no Designated Person is engaged to act for or on behalf of any supplier in connection



with this Agreement.

- 11.9. We warrant that we will not knowingly (having carried out the checks pursuant to clause 11.8) directly or indirectly engage any Designated Person to act on behalf of any supplier in connection with this Agreement.
- 11.10. We must notify you immediately in the event that we suspect we have been approached by, or are dealing with, a Designated Person in connection with this Agreement, or if any circumstances arise whereby there is a risk that the warranty given in clause 11.9 has been or may be breached. Such notification will be accompanied by full particulars of the events giving rise to the notification and we must fully co-operate with you in relation to any reasonable requests you may make arising from such notification.

## **12. Payment**

- 12.1. You must pay us the fees and charges described in the applicable Service Definition and Order Form without setoff or counterclaim, and without any deduction or withholding.
- 12.2. All fees and charges are payable in Australian Dollars within 30 days of the date of the invoice, are non-cancellable and non-refundable, and are exclusive of GST.
- 12.3. We calculate and bill our fees for the Services on a monthly basis (as agreed pursuant to an Order Form), unless otherwise described in the applicable Service Definition.
- 12.4. On the review date, the Fees provided under this Agreement and any Order Form will increase by the greater of three (3) per cent or CPI for the Services provided under this Agreement and any Order Form. Any such increase will be effective on the anniversary of the Effective Date of the relevant Order Form and each anniversary of the relevant Order Form thereafter.
- 12.5. Fee increases due to vendor changes or increases are subject to periodic review and adjustment. In the event that our costs associated with vendors, suppliers or service providers increase, we reserve the right to adjust our fees accordingly. We will notify you of any such increase in writing at least 30 days prior to the effective date of the increase. Your continued use of the Services following the effective date of the fee increase will be deemed as acceptance of the new fees. If you do not agree to the fee increase, you may terminate this Agreement and any impacted Order Form in accordance with the termination provisions in clause 14 before the new fees come into effect.
- 12.6. Customer is responsible for: (a) any international transaction and foreign exchange fees it incurs in paying the Fees; and (b) ensuring that the net amount received by AUCloud is equal to the amount due in the currency set out in the applicable tax invoice.
- 12.7. We must provide a Tax Invoice to you for the fees and charges that include the following details:
  - 12.7.1. your name;
  - 12.7.2. the relevant Order Form number;
  - 12.7.3. a description of the Services provided for the relevant period or the achievement of

the event to which the invoice relates; and

12.7.4. any further information required by the relevant Order Form or reasonably requested by you. If you wish to dispute a Tax Invoice, you must do so prior to the due date for payment. If you do not dispute a Tax Invoice by its due date, you are deemed to have accepted the Tax Invoice.

12.8. We may charge Interest on the late payment of any undisputed amounts in a Tax Invoice, commencing on the due date of the invoice and continuing until fully paid, whether before or after judgment.

12.9. Interest payable under clause 12.88 is calculated as simple interest on the unpaid amount at the Interest Rate, calculated in respect of each day from the day after the amount was due and payable, up to and including the day that you effect payment, as represented by the following formula:

$$\text{Interest Amount} = UA * IR * D$$

Where:

*UA = the unpaid*

*amount; IR = Interest*

*Rate; and*

*D = the number of days from the day after payment was due up to and including the day that payment is made*

### **13. GST**

13.1. In this clause 13.1, a word or expression defined in the A New Tax System (Goods and Services Tax) Act 1999 (Cth) ("GST Act") has the meaning given to it in the GST Act.

13.2. If we make a delivery of Services under or in connection with this Agreement in respect of which GST is payable, you must pay to the us, an additional amount equal to the GST payable on the Services ("GST Amount").

13.3. If you must reimburse or indemnify us for a loss, cost or expense, the amount to be reimbursed or indemnified is first reduced by any input tax credit we are entitled to for the loss, cost or expense, and then increased in accordance with clause 13.5.

13.4. If a payment is calculated by reference to or as a specified percentage of another amount or revenue stream, that payment will be calculated by reference to or as a specified percentage of the amount or revenue stream exclusive of GST.

13.5. If the GST payable by us on any supply made under or in connection with this Agreement varies from the GST Amount paid or payable by you under clause 13.2, such that a further amount of GST is payable in relation to the supply or a refund or credit of GST is obtained in relation to the Services, then we must provide a corresponding refund or credit to, or will be entitled to receive the amount of that variation from, you.

13.6. Any payment, credit or refund under this clause 13 is deemed to be a payment, credit or refund of the GST Amount payable under clause 13.2.

- 13.7. If an adjustment event occurs in relation to the Services, we will issue an adjustment note to you in relation to that supply within 10 Business Days after becoming aware of the adjustment.
- 13.8. You need not make a payment for a taxable supply made under or in connection with this Agreement:
- 13.8.1. until you receive a tax invoice for the Services to which the payment relates; and
  - 13.8.2. the tax invoice complies with clause 12.7, unless any requirement of that clause is inconsistent with the GST Act.

## **14. Suspension**

- 14.1. We may suspend your or any of your Personnel or Authorised User's right to access or use all or any part of the Services immediately (unless otherwise specified) upon notice to you if:
- 14.1.1. we determine that you have committed a Material Breach of this Agreement;
  - 14.1.2. we determine that any undisputed payments are overdue; or
  - 14.1.3. we determine that your or your Personnel or Authorised User's access to or use of the Services:
    - a) creates a security risk to the Services or any third party; or
    - b) breaches the obligations contained within the relevant Community Rules Information Security Policy; or,
    - c) may adversely impact the Services or the Information Systems or Content of any other of our customers,
  - 14.1.4. AUCloud or any of AUCloud's suppliers may perform any emergency or maintenance or other service work in connection with the Services, provided that AUCloud has provided you with reasonable prior written notice of the suspension; or
  - 14.1.5. AUCloud is required to do so by law or by any authority.
- 14.2. If we suspend your right to use or access all or part of the Services in accordance with clause 14.1:
- 14.2.1. you remain responsible for any applicable fees and charges for any Services to which you continue to have access, as well as applicable data storage fees and charges, and fees and charges for in-process tasks completed after the date of suspension; and
  - 14.2.2. you will not be entitled to any Service Credits under the Service Definitions for any period of suspension.

## **15. Terms and Termination**

- 15.1. This Agreement commences on the Effective Date and continues until terminated by you or us in accordance with this clause 15.
- 15.2. You may terminate this Agreement for convenience by providing us with:
- 15.2.1. written advance notice as set out in the applicable Service Definition; or
  - 15.2.2. where the Service Definition is silent on notice periods, 30 days' written notice.
- 15.3. Either party may terminate this Agreement by written notice to the other party if the other party commits a Material Breach of this Agreement (which, in your case, includes a failure to comply with our Community Rules Information Security Policy (CRISP)) and fails to remedy the breach within 14 days of receiving a written notice by the notifying party requiring it to do so. A notice by the notifying party must contain sufficient details of the breach to provide the breaching party a meaningful opportunity to remedy the breach.
- 15.4. This Agreement may be terminated immediately for cause:
- 15.4.1. by AUCloud providing written notice to you if AUCloud believes that you are using the Services in any unauthorised manner likely to cause harm to AUCloud, the Services or a third party; or
  - 15.4.2. if the other party becomes the subject of a voluntary or involuntary petition in bankruptcy, or any involuntary proceeding relating to insolvency, receivership, liquidation, or similar action for the benefit of creditors as a consequence of debt, or if the other party otherwise ceases or threatens to cease business.
- 15.5. On termination of this Agreement for any reason:
- 15.5.1. all sums payable to us under this Agreement are immediately due and payable;
  - 15.5.2. accrued rights of a party are not affected;
  - 15.5.3. all rights granted to you under this Agreement immediately terminate;
  - 15.5.4. you must immediately return or (at our request) destroy all AUCloud Content in your possession;
  - 15.5.5. the off-boarding provisions in Appendix A will apply.
- 15.6. Where you terminate for convenience in accordance with clause 15.2, you are required to pay a the termination fee specified in the Order Form for the relevant Services, or in the absence of a specified termination fee in the Order Form, an amount equal to 50% of the remaining fees for the Services under the Order Form that would have been payable by you for the 12 months immediately following the date of termination. Such termination fee shall be due and payable within 30 days of the date of termination. This fee is intended to compensate us for our anticipated lost profits and unrecouped investment in connection with the provision of the Services, and is not a penalty.
- 15.7. Termination of this Agreement will not affect clauses 1 (Definitions), 7 (Privacy and Data Security), 12 (Payment), 15.5 and 15.6 (consequences of termination), 16 (Intellectual

Property Rights), 17 (Warranties), 18 (Indemnities), 19 (Limitation of Liability), 20 (Confidentiality), 22 (Dispute Resolution), 22 (General) or any provision of this Agreement which is expressly or by implication intended to come into force or continue on or after termination or expiry.

## **16. Intellectual Property Rights**

- 16.1. We retain all ownership, title and interest in, and do not assign to you any, Intellectual Property Rights (including future Intellectual Property Rights) in:
  - 16.1.1. the Services and Specialist Services;
  - 16.1.2. the AUCloud Content;
  - 16.1.3. in any developments or enhancement to anything set out above resulting from this Agreement or otherwise created by us in the performance of the Services; and
  - 16.1.4. Vulnerabilities found, identified or discovered during the performance of the Services ("**AUCloud IP**")
- 16.2. We grant you a non-exclusive licence for the Term to use the Intellectual Property Rights in the AUCloud IP to the extent incorporated as part of the Services and Specialist Services and strictly as necessary to obtain the benefit of those Services.
- 16.3. You retain and do not assign to us any Intellectual Property Rights (including future Intellectual Property Rights) in Your Content or other Intellectual Property Rights of yours.
- 16.4. You grant to us a non-exclusive licence for the Term to use the Intellectual Property Rights in any of Your Content to the extent required for us to exercise our rights and perform our obligations under this Agreement.
- 16.5. The licence granted under clause 16.4 includes the right to sublicense to the extent necessary to exercise our rights and perform our obligations under this Agreement. You agree not to:
  - 16.5.1. use the AUCloud IP other than as permitted under this Agreement;
  - 16.5.2. copy, translate, or create a derivative work of the AUCloud IP;
  - 16.5.3. reverse engineer, reverse assemble, disassemble, or decompile the AUCloud IP or any part thereof or otherwise attempt to discover any source code;
  - 16.5.4. modify, improve, amend, or vary the AUCloud IP in any manner or form; or
  - 16.5.5. merge all or any part of the AUCloud IP with any other software or application without our consent.
- 16.6. If notwithstanding clause 16.7 you make any modifications, improvements, amendments, or variations (**Modifications**) to the AUCloud IP, you:
  - 16.6.1. assigns all Intellectual Property Rights (including future Intellectual Property Rights) in those Modifications to AUCloud IP; and

16.6.2. must provide us with an electronic copy of all Modifications as soon as practicable after it is created in a format acceptable to us.

- 16.7. You must sign all documents and do all things necessary to give effect to clause 16.6.1. Each party must not, and must ensure that its officers, employees and agents do not, use the names, trademarks or logos of the other party except with the prior consent of the other party, or as otherwise permitted under this Agreement.

## **17. Warranties**

- 17.1. To the fullest extent permitted by law, and except as expressly provided in this Agreement, all warranties, conditions, representations, and guarantees, whether express, implied, statutory, or otherwise arising under or in connection with this Agreement, including any warranties, conditions, representations, or guarantees as to merchantability, fitness for a particular purpose, or non-infringement, are hereby excluded.
- 17.2. AUCloud warrants that its Services will be performed in a good and workmanlike manner, in accordance with the Agreement
- 17.3. AUCloud does not warrant or guarantee that the Services and Specialist Services will:
- 17.3.1. be error-free, uninterrupted, or free of viruses or other harmful components;
  - 17.3.2. operate in combination with other software or any particular equipment or system, that it will provide any functionality other than set out in the Service Description; or
  - 17.3.3. detect all security risks or threats, or that false positives will not be found.
- 17.4. AUCloud makes no representations or warranties about the accuracy, reliability, completeness, or timeliness of the content, information, or materials provided through the Services.
- 17.5. You acknowledge and agree that the Services are provided on an “as is” and “as available” basis, and your use of the Services is at your sole risk. AUCloud does not warrant or guarantee the suitability, reliability, or availability of the Services for your specific requirements or purposes.
- 17.6. Except as expressly stated in this Agreement, AUCloud does not make any warranties, conditions, representations, or guarantees regarding the performance, quality, or results that may be obtained from the use of the Services.
- 17.7. To the extent that any warranties, conditions, representations, or guarantees cannot be excluded or limited under applicable law (including the Competition and Consumer Act 2010 (Cth) or any other legislation that states that there is a guarantee in relation to any good or service supplied by us in connection with this Agreement), AUCloud’s liability for breach of such warranties, conditions, representations, or guarantees shall be limited to the maximum extent permitted by law.

17.8. You acknowledge that you have not relied on any warranties, conditions, representations, or guarantees not expressly set forth in this Agreement.

17.9. This clause 17 (Warranties) shall survive the termination or expiration of this Agreement.

## **18. Indemnities**

18.1. You indemnify us (including our directors, officers, employees, contractors, agents and other authorized representatives (**AUCloud Indemnitees**)) from and against all claims, liabilities, losses, damages, fines, judgements, settlements, costs or expenses (including legal fees, costs, penalties, interest and disbursements) suffered or incurred by us however caused in connection with:

18.1.1. your or any User's breach of clause 7, 8, 10, 16, or 20 this Agreement;

18.1.2. your or any User's breach of any third party licence terms;

18.1.3. any negligent, unlawful, illegal, fraudulent or dishonest act, error or omission of you or any User;

18.1.4. a violation of any applicable Law by you or any User;

18.1.5. your or any Users' use of the Services (including any activities under your Account and use by your personnel);

18.1.6. any claim by a third party, including Customer Personnel and Authorised Users, resulting from or connected to a Data Breach or Security Incident; and

18.1.7. Your Content or the combination of Your Content with other applications or content, including any claim involving alleged infringement of third-party rights by Your Content or use thereof.

18.2. We must take all reasonable steps to mitigate our losses which may be subject to a claim for payment under clause 18.1.

18.3. We will notify you of any third-party claim, allow you to conduct all negotiations and proceedings and provide you with such reasonable assistance as is required by you (at your cost), and not, without prior consultation with you, make any admission relating to such claim or attempt to settle it, provided that you consider and defend the claim diligently, using competent counsel and in such a way as not to bring our reputation into disrepute.

18.4. We indemnify you from and against all liabilities, losses, damages, costs or expenses (including reasonable legal costs) suffered or incurred by you however caused in connection with:

18.4.1. any breach of clause 7, 16, or 20 of this Agreement by us;

18.4.2. any infringement by us of the Intellectual Property Rights of, or usage restrictions imposed by, a third party; and

18.4.3. any negligent, unlawful, illegal, fraudulent or dishonest act, error, or omission of us and our personnel in the provision of the Services.



- 18.5. The indemnity in clause 18.4 will be reduced proportionally to the extent that the liabilities, losses, damages, costs or expenses is caused or contributed to by you or your Authorised Users.
- 18.6. You must take all reasonable steps to mitigate your losses which may be subject to a claim for payment under clause 18.4.
- 18.7. If we are permitted to handle negotiations or conduct litigation on your behalf, we must comply at all times with government policy and obligations relevant to the conduct of the litigation as notified by you.

## **19. Limitation of Liability**

- 19.1. The following provisions set out our entire financial liability (including any liability for the acts or omissions of our employees, agents, sub-contractors and licensors) to you in respect of:
  - 19.1.1. any breach of this Agreement howsoever arising;
  - 19.1.2. any use made by you of the Services or any part of them; and
  - 19.1.3. any representation, misrepresentation (whether innocent or negligent), statement or tortious act or omission (including negligence) arising under or in connection with this Agreement.
- 19.2. Subject to clause 19.4 and 19.5, our total liability for any loss or damage, however caused (including by our negligence), suffered by you in connection with this Agreement is limited to an amount equal to the total fees paid by you for the Service which gave rise to the claim during the 12 months immediately preceding the event giving rise to the claim.
- 19.3. Subject to clause 19.4 and 19.5, we are not liable for consequential or indirect loss however caused (including by our negligence) suffered or incurred by you in connection with this Agreement, including (whether considered direct or indirect, the following heads of loss):
  - 19.3.1. loss of revenue or profits of business; or
  - 19.3.2. any business interruption or loss of business information (including loss of data); or
  - 19.3.3. claims arising out of the use of, or not being able to use, or any defect in the Services; or
  - 19.3.4. depletion of goodwill or reputation or similar losses; or
  - 19.3.5. loss of anticipated savings; or
  - 19.3.6. any special, or pure economic loss, costs, damages, charges or expenses.



- 19.4. The limitations and exclusions in clauses 19.2 and 19.3 do not apply to a liability for any loss, damage or claim in respect of:
- 19.4.1. death or personal injury; or
  - 19.4.2. loss, or damage to tangible property;
  - 19.4.3. an infringement of third party Intellectual Property Rights;
  - 19.4.4. a breach of clauses 7 (Privacy and Data Security) or 20 (Confidentiality), for which our total liability for any breach of our obligations in relation to confidentiality, breach of security, or data breach, however caused (including by our negligence), suffered by you in connection with this Agreement is limited to an amount equal to the greater of \$1m or 2 times the total fees paid by you for the Service which gave rise to the breach, calculated based on the fees paid during the 12 months immediately preceding the event giving rise to the breach;
  - 19.4.5. malicious, unlawful or illegal acts or conduct;
  - 19.4.6. liabilities arising from indemnification obligations under this Agreement; or
  - 19.4.7. any conduct that would amount to repudiation of this Agreement.
- 19.5. AUCloud's liability for any claim arising from a breach of warranty under this Agreement, and, if the *Competition and Consumer Act 2010* (Cth) or any other legislation states that there is a guarantee in relation to any good or service supplied by us in connection with this Agreement, and our liability for failing to comply with that guarantee cannot be excluded but may be limited, clauses 17.2 and 17.3 and do not apply to that liability and instead our liability for such failure is limited to (at our election), in the case of a supply of goods, us replacing the goods or supplying equivalent goods or repairing the goods, or in the case of a supply of services, us supplying the services again or paying the cost of having the services supplied again.
- 19.6. Our liability under this Agreement (however it arises) will be reduced proportionately to the extent that any act, omission, or negligence of you or your Authorised Users contributed to the loss or damage.

## **20. Confidentiality**

- 20.1. A party must not, without the prior written consent of the other party, disclose any Confidential Information of the other party or its Affiliates to a third party, unless the Confidential Information:
- 20.1.1. is disclosed to its Personnel only to the extent strictly necessary in order for it to manage and perform its obligations or to exercise or enforce its rights under this Agreement;
  - 20.1.2. is disclosed to a party's internal management personnel, solely to enable effective management or auditing of activities related to this Agreement;
  - 20.1.3. is disclosed within a government agency (or another government agency), if this serves the your or the government agency's legitimate interests;

- 20.1.4. is disclosed by a government agency to the responsible minister and his or her advisers;
  - 20.1.5. is disclosed by a government agency in response to a request from a House or a Committee of the Parliament of the Commonwealth, or from a State or Territory Parliament or Assembly if the Agency is a State or Territory government agency, or otherwise to meet public accountability obligations;
  - 20.1.6. disclosure is authorised or required by Law, including under this Agreement, under a licence or otherwise, to be disclosed; or,
  - 20.1.7. is in the public domain other than as a result of a breach of this clause 20.
- 20.2. Except as expressly authorised in this Agreement, recipients of Confidential Information agree to:
- 20.2.1. use the Confidential Information only to perform that party's obligations or exercise rights granted to it under this Agreement; and
  - 20.2.2. treat all Confidential Information in the same manner as it treats its own similar proprietary information, but in no case will the degree of care be less than reasonable care.
- 20.3. Where a party discloses Confidential Information to another person:
- 20.3.1. if the disclosure is under clause 20.1.1 or 20.1.2, the party making the disclosure must, if required by the other party, obtain from the recipient a properly executed Confidentiality Undertaking (subject to clause 20.5); and
  - 20.3.2. if the disclosure is under clauses 20.1.3, 20.1.4, 20.1.5 or 20.1.6, the party making the disclosure must inform the recipient of the confidential nature of the information.
- 20.4. A Confidentiality Undertaking will not be required under clause 20.3.1 if the party making the disclosure confirms to the other party in writing that the recipient is an individual who is bound by obligations in their employment or services contract not to disclose the Confidential Information. The party making the disclosure must use all reasonable endeavours to enforce those obligations.
- 20.5. We must not make a public announcement about this Agreement, or any transaction contemplated by this Agreement, unless it has your written agreement, except if the public announcement is required by Law or a regulatory body (including a relevant stock exchange).
- 20.6. If we are required by Law or a regulatory body to make a public announcement in connection with:
- 20.6.1. this Agreement; or
  - 20.6.2. any transaction contemplated by this Agreement,
- 20.7. We must:
- 20.7.1. limit the public announcement to the extent required by the relevant Law or

regulatory body;

20.7.2. to the extent practicable, first consult with and take into account your reasonable requirements(as applicable); and

20.7.3. not include or disclose your name, logo or identify any information, including in any list of your customers, online or informational materials unless otherwise authorised in writing by you.

20.8. Nothing in clauses 20.6 and 20.7 prohibits you from disclosing your personnel, or us from disclosing to our personnel, the fact of this Agreement and the subject matter of this Agreement, provided that the confidentiality obligations set out in this clause 20 are complied with.

20.9. The party receiving Confidential Information acknowledged that any unauthorised disclosure of Confidential Information will result in irreparable injury to the disclosing party, which injury could not be adequately compensated by the payment of money damages. In addition to any other legal and equitable remedies that may be available, the disclosing party will be entitled to seek and obtain injunctive relief against any breach or threatened breach by the receiving party of the confidentiality obligations in this Agreement, from any court of competent jurisdiction, without being required to show any actual damage or irreparable harm, prove the inadequacy of its legal remedies, or post any bond or other security.

## **21. Insurance**

21.1. We must at all times have and maintain valid and enforceable insurance policies in any one or more of the following categories, and for the amounts per occurrence, as specified in the Service Definition:

21.1.1. property and public liability insurance;

21.1.2. professional indemnity; and

21.1.3. workers' compensation as required by law

21.2. The insurance in clause 21.1.2 must either:

21.2.1. be held for one (1) year following the expiry or termination of the Services; or

21.2.2. be held for the term of the Services, but only if the insurance policy also covers any claim made up to one (1) year after the expiry or termination of the Services which arises from or relates to events that occurred during the Service term (even if the insurance policy has expired or been terminated when the claim is made).

21.3. We must, on request by you, provide you, within 5 Business Days, proof of the currency of the required insurances including:

21.3.1. an insurance certificate certifying that the insurance required by this clause 21 is in force; and

21.3.2. copies of the policies of insurance or at a minimum, details of any exclusions and

other information about the required insurances as reasonably requested by you.

## **22. Dispute Resolution**

- 22.1. Clause 22 applies to any a dispute which arises between the parties in connection with this Agreement ("Dispute").
- 22.2. Subject to clause 22.9, neither party may commence legal or arbitration proceedings in relation to any Dispute unless the party has complied with the procedures set out in this clause 22 , and the parties have been unable to resolve the Dispute within 90 days of the date that the applicable Dispute Notice was received.
- 22.3. A party claiming a Dispute has arisen must give the other parties a notice setting out details of the Dispute ("Dispute Notice").
- 22.4. During the 10 Business Days after a Notice is given under clause 22.3 (or longer period if the parties to the Dispute agree in writing), each party to the Dispute must use its reasonable efforts to resolve the Dispute ("First Level Discussions").
- 22.5. If the parties cannot resolve the Dispute within 10 Business Days or such longer period that they may agree to, the parties must endeavour to settle any Dispute by mediation. The mediation is to be conducted in Canberra, Australia, by a mediator who is independent of the parties and appointed by agreement between the parties, or failing agreement within 7 days of the failure of First Level Discussions, by a person appointed by the Chair of Resolution Institute or the Chair's designated representative. The Mediation Rules apply to the mediation. It is a condition precedent to the right of either party to commence arbitration or litigation, other than for interlocutory relief, that they have first offered to submit the dispute to mediation.
- 22.6. Despite the existence of a Dispute, both parties must (unless requested in writing by the other party not to do so) continue to perform their obligations under this Agreement.
- 22.7. Any information or documents disclosed by a party under this clause 22:
  - 22.7.1. must be kept confidential in accordance with clause 20; and
  - 22.7.2. may only be used to attempt to resolve the Dispute.
- 22.8. Each party to a Dispute must pay its own costs of complying with this clause 22. The parties to the Dispute must equally pay the costs of any mediator.
- 22.9. Notwithstanding anything in this clause 22, a party may at any time commence court proceedings in relation to a Dispute or claim arising in connection with this Agreement where that party seeks urgent interlocutory relief.
- 22.10. If a party to a Dispute does not comply with this clause 22, the other party is released from its obligation under clause 20.2.
- 22.11. This clause 22 does not apply to any action undertaken by either party under, or purportedly under clause 15.

## **23. Force majeure**

- 23.1. Neither party will be in breach of this Agreement as a result of, or liable for, any failure or delay in the performance of its obligations under this Agreement to the extent that the failure or delay is wholly or partially caused, directly or indirectly, by a Force Majeure Event or any act or omission of the other party.
- 23.2. If a party is affected in performing its obligations under this Agreement by a Force Majeure event, it must promptly notify the other party.
- 23.3. If a Force Majeure Event prevents a party from performing any of its obligations under this Agreement for 30 days or more, the other party may terminate this Agreement immediately by written notice.

## **24. General**

- 24.1. This Agreement is governed by and construed in accordance with the Laws of the Australian Capital Territory, Australia, and the parties submit to the non-exclusive jurisdiction of the courts of the Australian Capital Territory and courts competent to hear appeals from those courts.
- 24.2. This Agreement does not create a relationship of employment, agency or partnership between the Parties or their respective personnel.
- 24.3. The parties must not represent themselves, and must ensure that their personnel do not represent themselves, as being an officer, employee, partner or agent of the other party, or as otherwise able to bind or represent the other party.
- 24.4. No party may novate or assign its interest in this Agreement without the prior written consent of the other party, such consent not to be unreasonably withheld or delayed.
- 24.5. A clause or part of a clause of this Agreement that is illegal or unenforceable may be severed from this Agreement and the remaining clauses or parts of the clause of this Agreement continue in force.
- 24.6. If any provision is or becomes illegal, unenforceable or invalid in any jurisdiction, it is to be treated as being severed from this Agreement in the relevant jurisdiction, but the rest of this Agreement will not be affected.
- 24.7. This Agreement is the entire agreement concerning its subject matter and supersedes any prior or concurrent communications or representations.
- 24.8. A right under this Agreement may only be waived in writing signed by the party granting the waiver, and is effective only to the extent specifically set out in the waiver.
- 24.9. This Agreement may be signed in any number of counterparts. All counterparts together make one instrument.
- 24.10. If any document in this Agreement is signed by a person using an Electronic Signature, the parties:

- 24.10.1. agree to enter into this Agreement in electronic form; and
- 24.10.2. consent to either or both parties signing the Agreement using an Electronic Signature.
- 24.11. If, during the performance of this Agreement a Conflict of Interest arises, or appears likely to arise, we must:
  - 24.11.1. notify you immediately in writing;
  - 24.11.2. make full disclosure of all relevant information relating to the Conflict of Interest; and
  - 24.11.3. take all steps that you reasonably require us to take in order to resolve or otherwise deal with the Conflict of Interest.
- 24.12. We must, in performing our obligations under this Agreement, comply with all Laws and Commonwealth policy applicable to our performance of the Services, including but not limited to those set out in Appendix C, and as notified to us by you from time to time.
- 24.13. We may modify this Agreement from time to time. Any modifications made by us will be notified to you in writing, including by providing a notice on our website or sending out a notice by email, and will become effective on the date specified in the notice. Notwithstanding the above, any modifications made by us will not materially reduce your rights under this Agreement. If any modification materially reduces your rights, you will have the right to terminate this Agreement for convenience in accordance with the termination provisions in clause 14. Your continued usage of the Services following the effective date of any modification will be deemed as acceptance of such modification. Any other amendments to the Agreement or an Order Form must be in writing and signed by both parties. No course of conduct or failure or delay in exercising any right, power, or privilege under this Agreement shall operate as a waiver thereof, nor shall any single or partial exercise of any right, power, or privilege preclude any other or further exercise thereof or the exercise of any other right, power, or privilege under this Agreement.

## Appendix A Using Our Services

Unless otherwise specified in the applicable Service Definition, this Appendix describes how our Services will be used:

### 1. Onboarding

- 1.1. Following the sales process, you will be on-boarded onto the AUCloud service by a single contact within our Concierge team. You will be contacted by your Concierge (support@aucloud.com.au) who will assist you with the on-boarding process by providing guidance and sources of information on our Knowledge Base. Further, they will co-ordinate AUCloud on-boarding activity.
- 1.2. If you are a trial customer, the sales team will further manage the Concierge assisting you.

### 2. Data Migration

- 2.1. In many circumstances, we can help facilitate a bulk migration to the platform using local data import. This is priced on a time-and-materials basis, and a separate Order Form will be completed if this work is required.
- 2.2. We can also help facilitate a bulk migration to the platform using offline data ingest and extraction
  - please ask us for details.

### 3. Service Management

- 3.1. A comprehensive secure online portal will provide the most common service management functionality and address most requirements.
- 3.2. We will allocate a Technical Account Manager (TAM) to provide you with an assigned point of contact. The TAM will provide additional assistance with reporting and incident escalation.
- 3.3. We will provide, through our portal or ticketing system, the following information:
  - 3.3.1. date of provision of access to Services, including any delays;
  - 3.3.2. status of outstanding issues for any Service, including expected time to resolve.
- 3.4. We will promptly provide additional information in respect of this Agreement as you reasonably request from time to time at no additional cost.
- 3.5. For organisations that require a managed service, we have a partner ecosystem that can provide value-added services such as consultancy and ongoing custom managed services. We will make an introduction on request.

## 4. Service Constraints

- 4.1. We will adhere to the following in terms of maintenance windows:
- 4.2. “Planned Maintenance” means any pre-planned disruptive maintenance to any of the infrastructure relating to the service. Planned Maintenance activity may result in periods of degradation or loss of availability depending on the nature of the activity required. In such cases, we will endeavour to provide affected customers with at least fourteen (14) days’ advance notice of the Planned Maintenance.
- 4.3. If during Planned Maintenance there is a loss of availability outside the scope described in the planned maintenance notification to the Service, an SLA event will be triggered.
- 4.4. Service-level agreements (SLA) applied may differ depending on the service used and the security environment in which it operates; for definitions of AUCloud SLAs, please review the Service Definitions for the services used.
- 4.5. “Emergency Maintenance” means any urgent maintenance required to prevent or mitigate against any event compromising the infrastructure relating to the Service. Whenever possible, AUCloud will:
- 4.5.1. provide affected customers with at least six (6) hours’ advance notice and
  - 4.5.2. carry out the emergency maintenance between the hours of 00:00 and 06:00 (ACT local time) Monday to Friday or between the hours of Saturday 00:00 to 06:00 (ACT local time) on Monday unless there is an identified and demonstrable immediate risk to your operations.
- 4.6. Emergency Maintenance may result in periods of degradation or loss of availability depending on the nature of the activity required.
- 4.7. If during Emergency Maintenance there is a loss of availability to the Service, an SLA event will be triggered. This time will be excluded from the availability calculation but will be included in Portal reporting related to the Service.

## 5. Technical Requirements

- 5.1. You will require appropriate network connectivity such as DDoS-protected internet access or accredited connectivity such as a government secure network to our cloud platforms. Connectivity via the DDoS-protected internet, a government secure network (ICON or FedLink) or private leased line is available but may incur additional charges.
- 5.2. Where they are required, you are responsible for procuring and managing appropriate devices or software to meet the requirement for data security over the various forms of connectivity.



## 6. Your Responsibilities

6.1. You are responsible for the following in relation to the Service:

- 6.1.1. the control and management of access and responsibilities for Customer Personnel and Authorised Users;
- 6.1.2. advanced OS security hardening specific to application requirements;
- 6.1.3. deployment and management of non-core OS components such as IIS, Apache and Active Directory;
- 6.1.4. User Account creation, administration and assignment of permissions;
- 6.1.5. deployment of patches facilitated by our patch repository, and sourcing and deployment of all non-core OS and non-critical patches;
- 6.1.6. timely testing of application and data following any changes to the managed VM;
- 6.1.7. management of AV policies, exclusions and quarantine;
- 6.1.8. clean-up of virus infestations;
- 6.1.9. system administration tasks;
- 6.1.10. creation of systems documentation;
- 6.1.11. configuration management of OS and application components;
- 6.1.12. disaster recovery and business continuity;
- 6.1.13. security management and protective monitoring of OS and applications; and
- 6.1.14. optimisation of VM resources.

6.2. You are also responsible for ensuring only lawful data that supports the Australian public sector and critical infrastructure sectors (as that term is defined in the Security Legislation Amendment (Critical Infrastructure) Bill 2020) is stored and processed by applications on this environment, and that they fully comply with our Security Operating Procedures and other information assurance requirements as specified in our Community Rules Information Security Policy (CRISP) and associated accreditation documentation sets. Any failure to comply with these requirements may result in the immediate suspension or termination of your access to the Services.

6.3. You are also responsible for accrediting the OS and application environment.

## 7. Off-Boarding

7.1. We must take all actions that are reasonably necessary to ensure there is an efficient and effective disengagement from the Services and/or transfer to you or your nominee when the provision of Services ends under this Agreement, so as to cause minimum disruption and inconvenience to you. Without prejudice to the generality of that obligation, we must:

- 7.1.1. liaise with you to plan and implement all necessary actions;
- 7.1.2. comply with our security and data protection obligations in this Agreement; and
- 7.1.3. make available for transfer to you or your nominee all of Your Content in a non-proprietary format or at your request, delete your Content.

7.2. If required, we must provide to you such verification that you or your nominee reasonably require, verifying our performance of our obligations under clause 7.1.

7.3. You are responsible for removing all of Your Content on the date the Services under this Agreement are terminated. If Your Content is not removed by this time, we may charge for any of Your Content that is not removed, or for retrieving and returning Your Content, and may destroy or otherwise securely dispose of any of Your Content in our possession.

7.4. An example outline off-boarding process is listed below for illustrative purposes only.

#	Step	Narrative
1	Request for Removal	The customer or their partner requests in writing the removal of a customer, service, partner or part thereof.
2	Wait for Termination Date	AUCloud takes no action to remove customer services until the termination date (typically 30 days from cancellation) has passed
3	Provide Data	If requested, AUCloud provides you or your nominee all of Your Content in a non-proprietary format
4	Remove Service(s) / Container(s)	(If applicable) AUCloud removes the services, containers and any associated data for the services that the customer has requested to be removed
5	Remove Partner / Customer	(If applicable) AUCloud removes complete Partner or Customer from the AUCloud platforms
6	Verification of Obligations	(If applicable) AUCloud provide verification Your Content been removed from the AUCloud platform
7	Final Bill	Where a customer or partner is cancelling completely, AUCloud issue a final bill taking account for any outstanding debits or credits

## Appendix B – Microsoft Licensing

This Appendix B applies only where you obtain Microsoft software services directly from us.

### 1. Terms

- 1.1. All licensing relating to the operating system must be provided by us, unless you have a dedicated server. You may provide your own application licensing, but you must complete and provide a Microsoft Mobility Agreement to us.
- 1.2. You must not remove, alter, cover or obscure any trademarks, trade names, service marks, logos or brands, copyright notices, patent numbers or any other statements or symbols of ownership from software, or do so in respect of any media supplied to you by us on which any software is loaded.
- 1.3. You must not copy, alter, modify, adapt, translate, create derivative works of, distribute, rent, lease, sublicense, transmit, sell all or part of the software or do so in respect of any media on which the software is loaded.
- 1.4. To the extent permitted by applicable Law, we make no representations or express or implied warranties in relation to the software services, and disclaim all express or implied warranties, including without limitation:
  - 1.4.1. Any implied warranties of merchantability, and fitness of the software services for a particular purpose; and
  - 1.4.2. Any liability on the part of Microsoft, or its suppliers, for any direct, indirect or consequential damage arising from the software services, serious injury of any person, or to severe physical or environmental damage.
- 1.5. We, or a third party on our behalf, will provide technical support for the software services. Microsoft will not provide direct support to you.
- 1.6. You agree that we may be obliged to pass limited details about you to Microsoft in the event that your software service consumption exceeds the AUD equivalent of US\$1000 per month, or if Microsoft elects to undertake an audit of software service consumption.
- 1.7. In the event that you have failed to pay for the correct number of users, or other necessary software licences, you will promptly pay the correct amount, and hold us harmless against any consequential liabilities.
- 1.8. You agree that the software services are not fault tolerant and are not guaranteed to be error free or to operate uninterrupted. No rights are granted to you to use the software services in any application or situation where failure of the software services could lead to death or injury.
- 1.9. You agree that Microsoft is an intended third party beneficiary of this Appendix B and that Microsoft holds the right to enforce this Appendix B, and to verify your compliance with this Appendix B.

## Appendix C – Commonwealth Policy

Where identified in an Order Form, in performing our obligations under this Agreement, we must comply with all applicable Laws and Commonwealth policies including as set out in this Appendix C.

### 1. Archives Act Requirements

- 1.1. We acknowledge that:
  - 1.1.1. the Services may be used to store Commonwealth Records and that the requirements of the *Archives Act 1983* (Cth) apply to Commonwealth Records; and
  - 1.1.2. any disposal of any of Your Content which includes Commonwealth Records may occur in accordance with those requirements, your relevant policies and practices or if directed in writing to do so by you.
- 1.2. We must:
  - 1.2.1. comply with, and follow any reasonable directions by you which are relevant to, any applicable Commonwealth, State or Territory legislation relating to archival requirements; and
  - 1.2.2. ensure that we implement minimum metadata requirements in providing the Services that comply with the Australian Government Recordkeeping Metadata Standard available at: <https://www.naa.gov.au/information-management/information-management-standards/australian-government-recordkeeping-metadata-standard>
  - 1.2.3. For the purposes of this clause 1, 'Commonwealth Record' has the meaning given under clause 3 of the *Archives Act 1983*.(Cth).

## 2. Anti-Discrimination

- 2.1. We must comply with all Commonwealth, State or Territory Laws relevant to anti-discrimination as may be relevant to this Agreement, including but not limited to:
  - 2.1.1. the *Disability Discrimination Act 1992* (Cth);
  - 2.1.2. the *Racial Discrimination Act 1975* (Cth);
  - 2.1.3. the *Sex Discrimination Act 1984* (Cth); and
  - 2.1.4. the *Age Discrimination Act 2004* (Cth).
- 2.2. We must ensure that all of our personnel engaged in providing the Services comply with the APS Values and Code of Conduct while on your premises and while liaising with your personnel or members of the public in connection with the provision of the Services.
- 2.3. In this clause 2, 'APS Values' and 'Code of Conduct' have the same meaning as they have in the *Public Service Act 1999* (Cth).
- 2.4. We must provide all reasonable assistance to you with any investigation of a report of a breach of the APS Code of Conduct.

## 3. Freedom of Information

- 3.1. If an application is made to you under the *Freedom of Information Act 1982* (Cth) for access to documents concerning us, you:
  - 3.1.1. must, before making a decision, consult with us, without prejudice to any decision to release the information; and
  - 3.1.2. must determine the application in accordance with the requirements of the *Freedom of Information Act 1982* (Cth).

## 4. Fraud

- 4.1. We must comply with the Commonwealth Fraud Control Guidelines, as amended from time to time at:  
<http://www.ag.gov.au/CrimeAndCorruption/FraudControl/Pages/default.aspx>.
- 4.2. We must notify you, as relevant, immediately if we know or have reason to suspect that any fraud has occurred or is occurring or is likely to occur in relation to this Agreement (including by us or our personnel).

## 5. Illegal Workers

- 5.1. In clauses 5.2 to 5.4, 'Illegal Worker' means a person who:
  - 5.1.1. has unlawfully entered and remains in Australia;
  - 5.1.2. has lawfully entered Australia, but remains in Australia after their visa has expired; or
  - 5.1.3. is working in breach of their visa conditions.
- 5.2. We must not engage Illegal Workers in any capacity to carry out any work under or in connection with this Agreement.
- 5.3. Upon becoming aware of the involvement of an Illegal Worker, we must:
  - 5.3.1. promptly notify you; and
  - 5.3.2. immediately remove, or cause to be removed, the Illegal Worker and arrange for their replacement at no cost to you.
- 5.4. If requested in writing by you, we must provide evidence within 14 days that we have taken all reasonable steps to ensure that we have complied and are complying with our obligations in respect of Illegal Workers.

## 6. Indigenous Opportunities Policy

- 6.1. We must comply with the Australian Government's Indigenous Opportunities Policy to the extent that policy applies to this Agreement.
- 6.2. Without limiting clause 6.1, we must use our reasonable endeavours to provide employment opportunities to Aboriginal and Torres Strait Islander people where there are positions available and there are Aboriginal or Torres Strait Islander people available with suitable qualifications, experience and expertise.

## 7. Security

- 7.1. We will comply with all relevant requirements of the Commonwealth Protective Security Policy Framework at <http://www.protectivesecurity.gov.au>, as amended or replaced from time to time and its Protective Security Protocols, including the Protective Security Governance Guidelines – Security of outsourced services and functions and the Information Security Manual at <http://www.asd.gov.au/infosec/ism/index.htm>.

## 8. Work Health and Safety

- 8.1. In clauses 8.2 to 8.4 below:

- 8.1.1. **'Act'** means the *Work Health and Safety Act 2011* (Cth).
- 8.1.2. **'Person Conducting a Business or Undertaking (PCBU)'** as defined by the Act means a person conducting a business or undertaking:
- 8.1.3. whether the person conducts the business or undertaking alone or with others; and
- 8.1.4. whether or not the business or undertaking is conducted for profit or gain.
- 8.2. We must ensure that the Services are provided in a manner that does not pose any avoidable health or safety risk to your or our personnel, or to any other person.
- 8.3. Without limiting in any way the work health and safety obligations that we have under this Agreement or, including those that apply due to the operation of Commonwealth and State or Territory Laws, we must:
  - 8.3.1. ensure that a PCBU meets the primary duty of care requirements of section 19 of the Act or corresponding State or Territory legislation;
  - 8.3.2. ensure the regulator is notified immediately after a notifiable incident has occurred in accordance with section 38 of the Act or corresponding State or Territory legislation; and
  - 8.3.3. notify you, of:
    - a) any work related injury that causes death or serious personal injury;
    - b) any notifiable incident as defined at sections 35, 36 and 37 of the Act, or corresponding State or Territory legislation; and
    - c) each occasion it reports to, or notifies, a regulatory authority of a notifiable incident authority under the Act, or the relevant work health and safety legislation in that jurisdiction, within 1 Business Day after the incident has occurred or within 2 hours if the injury causes death.
- 8.4. At your request, we must provide reasonable assistance to you or Comcare (including giving you, Comcare and their agents reasonable access to the our premises, files, information technology systems and personnel) in connection with any monitoring, inspection, investigation or audit of work health and safety matters arising in relation to the provision of the Services.

## **9. Workplace Gender Equality ACT 2012 (Cth)**

- 9.1. This clause 9 applies only to the extent that we are a 'relevant employer' for the purposes of the Workplace Gender Equality Act 2012 (Cth) (the 'WGE Act').
- 9.2. We must comply with our obligations, if any, under the WGE Act.
- 9.3. If we become non-compliant with the WGE Act, we must notify you.

- 9.4. If the Term of this Agreement exceeds 18 months, we must provide a current letter of compliance within 18 months from the commencement of the Agreement and following this, annually, to you.
- 9.5. Compliance with the WGE Act does not relieve us from our responsibility to comply with our other obligations under this Agreement.



## Appendix D Red Hat Licensing

This Appendix D applies only where you obtain Red Hat software services directly from us.

### 1. Terms

- 1.1. All Red Hat licensing must be provided by us as the 'Authorised Red Hat Certified Cloud & Service Provider' (Authorised CCSP), unless you can justify and evidence otherwise.
- 1.2. If you purchase Red Hat Products from AUCloud you must agree to the terms of Red Hat's EULA<sup>1</sup> and provide evidence to AUCloud of your agreement.
- 1.3. You must not remove, alter, cover or obscure any trademarks, trade names, service marks, logos or brands, copyright notices, patent numbers or any other statements or symbols of ownership from software, or do so in respect of any media supplied to you by us on which any software is loaded.
- 1.4. You must not copy, alter, modify, adapt, translate, create derivative works of, distribute, rent, lease, sublicense, transmit, sell all or part of the software or do so in respect of any media on which the software is loaded.
- 1.5. To the extent permitted by applicable Law, we make no representations or express or implied warranties in relation to the software services, and disclaim all express or implied warranties, including without limitation:
  - 1.5.1. Any implied warranties of merchantability, and fitness of the software services for a particular purpose; and
  - 1.5.2. Any liability on the part of Red Hat, or its suppliers, for any direct, indirect or consequential damage arising from the software services, serious injury of any person, or to severe physical or environmental damage.
- 1.6. We, or a third party on our behalf, will provide technical support for the software services. Red Hat will not provide direct support to you.
- 1.7. You agree that we are obliged to pass limited details about you to our Reseller, and ultimately to Red Hat as part of the reporting process including: licence usage quantities, end user company name, end user company physical address, and end user company email address.
- 1.8. You will make available any required licence usage information to us by the 5th day of the following month or in the event of an audit by our Reseller or by Red Hat.
- 1.9. In the event that you have failed to pay for the correct number of necessary software licences, you will promptly pay the correct amount, and hold us harmless against any consequential liabilities.
- 1.10. You agree that the software services are not fault tolerant and are not guaranteed to be error free or to operate uninterrupted. No rights are granted to you to use the software services in any application or situation where failure of the software services could lead to death or injury.

- 1.11. You agree that our Reseller and Red Hat are intended third party beneficiaries of this Appendix D and that Red Hat holds the right to enforce this Appendix D, and to verify your compliance with this Appendix D.
- 1.12. We will retain maintain complete, clear, and accurate records related to all Red Hat Software Subscriptions and usage, as well as any other record necessary to demonstrate material compliance with our contract with our Reseller, Red Hat's Subscription Agreement, and the EULA for the term of our contract with our Reseller (minimum 1 year) and two (2) years thereafter. This may include data that identifies your company.
- 1.13. Pricing is set by Red Hat in USD and is therefore subject to monthly foreign exchange variances. In circumstances where We can no longer absorb these variances We will update our pricing from the subsequent month.
- 1.14. Red Hat has the right to adjust their pricing annually. We will adjust our pricing from the subsequent month.

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<sup>1</sup> <https://www.redhat.com/en/about/agreements#rhel>,  
[https://www.redhat.com/licenses/Red\\_Hat\\_GPLv2-Based\\_EULA\\_20191118.pdf](https://www.redhat.com/licenses/Red_Hat_GPLv2-Based_EULA_20191118.pdf)

## Appendix E Security Services

In addition to the Head Terms applicable to your purchase of AUCloud's Security Services, the Appendix E – Security Services shall apply to our provision, and your use of the Security Services.

### 1. Definitions

In addition to the definitions in clause 1 (Definitions) of the Head Agreement, the following capitalised terms will have the following meaning and will apply to this Appendix E:

**"Software"** means the software incorporated into the Security Services, including all available Updates.

**"Support and Maintenance"** means the support and maintenance services provided by AUCloud to you relating to installation and use of the Security Services in accordance with this Agreement.

**"Updates"** means any patches and modifications, enhancements, improvements and revisions of the Software, including new releases of the Software, made available by AUCloud or its third-party vendors, at their discretion, from time to time.

### 2. Provision of security services

2.1. The Security Services provided by us to you are those expressly set out in a Service Description and will be performed in accordance with this Agreement.

2.2. Any services, tasks, or deliverables not expressly included in a Service Description shall be deemed out of scope and shall require a separate agreement between the parties for provision and compensation. Any additional work requested by you that falls outside the scope of the Service Description shall be subject to AUCloud's approval and may result in additional fees or changes to service delivery.

2.3. AUCloud may modify the Security Services and/or the corresponding Service Description at any time:

- a. due to changes in applicable laws or industry standards; and
- b. for any other reason,

if the modification does not materially reduce the level of performance, functionality, security, or availability of the Security Services during the Term.

### 3. Licences and Restrictions

3.1. During the Term of this Agreement AUCloud grants you, on and from the Commencement

Date, a non-transferable, non-sublicensable, non-exclusive, revocable license to:

- a. install and use the Security Services;
- b. solely for your internal business purposes,

and otherwise in accordance with this Agreement.

3.2. Notwithstanding clause 3.1 AUCloud expressly retains all rights not expressly granted to you.

3.3. You may make the Security Services available to your Affiliates under the terms and conditions of this Agreement, provided that you remain liable for any breach of this Agreement by any of your Affiliates.

3.4. Except as expressly authorised by this Agreement, you may not (and shall not permit or cause any third party to) do any of the following:

- a) reproduce, modify, disclose, alter, enhance, translate, or create derivative works of the Services (or any components thereof) or any accompanying documentation, or merge the Security Services or documentation into another program;
- b) license, sublicense, resell, distribute, lease, rent, lend, transfer, assign or otherwise dispose of the Security Services (or any components thereof) or any documentation (or any access to the Security Services or documentation);
- c) use the Security Services other than as permitted under this Agreement and in conformity with the Service Description;
- d) use the Security Services in violation of any laws or regulations, including, without limitation to store or transmit infringing, libelous or otherwise unlawful or tortious material, or material in violation of third-party property, personal or privacy rights;
- e) use the Security Services to store, transmit or test for any viruses, software routines or other code designed to permit authorised access, disable, erase or otherwise harm software, hardware or data, or to perform any other harmful actions;
- f) probe, scan, or test the efficacy or vulnerability of the Security Services, or take any action in an effort to circumvent or undermine the Security Services, except for the legitimate testing of the Security Services in coordination with AUCloud in connection with considering a subscription to the Services as licensed herein;
- g) attempt or actually disassemble, decompile or reverse engineer, copy, frame or mirror any part or content of the Security Services;
- h) access, test, and/or use the Security Services in any way to build a competitive product or service, or copy any features or functions of the Security Services;
- i) interfere with or disrupt the integrity or performance of the Security Services;
- j) attempt to gain authorised access to the Security Services or their related systems or networks;
- k) disclose to any third party or publish in any media any performance information or

analysis relating to the Security Services (except that Customer may share such information with its Affiliates under obligations of confidentiality at least as strict as the confidentiality obligations as this Agreement);

- l) fail to maintain all copyright, trademark and proprietary notices on the Security Services, documentation and any permitted copy thereof;
- m) cause or permit Customer Personnel or Authorised Users or third party to do any of the foregoing;
  - i. make unauthorised, false or misleading or illegal statements concerning the subject matter of this Agreement, including the Security Services; or
  - ii. access or use the Security Services on behalf of any third party without obtaining valid authorisations from such third party.

3.5. All restrictions stated herein with respect to the Services apply to any components of the Security Services ordered by you.

3.6. There are no implied licenses granted by AUCloud under this Agreement.

#### **4. Third Party Tools and Terms**

4.1. Unless otherwise set out in the Service Description and Order Form, you shall be responsible for obtaining any necessary third-party licences for hosting or tools, and for registration and/or logging into third party websites, required to perform the Security Services.

4.2. You shall provide AUCloud with any credentials, access and permissions necessary to facilitate the use of, or enablement of, the Third-Party Products for the sole purpose of performing the Security Services.

4.3. You acknowledge and agree that any costs or fees associated with the third-party licences or access (other than those included in the Service Description) shall be borne solely by you.

4.4. To the extent permitted by law, all Third-Party Products features or services provided or contained in the Security Services are provided "as is" without warranty of any kind. AUCloud:

- a) shall not be liable for any delays, interruptions, or deficiencies in the provision of the Security Services arising from your failure to obtain the necessary third-party licences or provide the required access and permissions; and
- b) shall have no liability or responsibility for the operation or performance of the Third-Party Products and will not be liable for any damages, costs, or expenses, direct or indirect, arising out of the performance or failure to perform of the Third-Party products.

4.5. You shall be solely responsible for:

- a) maintaining its current maintenance and technical support contracts with relevant third-

party vendors for any hardware or device(s) receiving the Security Services;

- b) interacting with hardware or device(s) vendors to ensure that the hardware or device(s) are scoped and implemented in accordance with vendors' recommended standards;
- c) interacting with hardware or device(s) vendors regarding the resolution of any issues related to hardware or device(s) scoping, feature limitations or performance issues; and
- d) remediation and resolution of changes to hardware or device(s) which negatively impact the Security Services or the functionality, health, stability, or performance of the hardware or device(s).

4.6. In providing the Security Services AUCloud may utilise certain trusted Third-Party Products as described in the Service Description. Some Third-Party Products require you to expressly acknowledge certain terms and conditions. You acknowledge that:

- a) certain components of the Security Services identified in a Service Description have been rebranded by AUCloud using AUCloud's own name, business names, trademarks and logos, however, the Intellectual Property Rights in those components are owned by Leto Pty Ltd (ACN 34 626 165 580), trading as "Cyber Aware" and remain the Intellectual Property of Cyber Aware;

## 5. Warranties and Disclaimers

5.1. To the extent permitted by applicable law, AUCloud does not represent, warrant or covenant that the Security Services will:

- a) detect or identify all security or network threats to, or Vulnerabilities of your networks, devices or other facilities, assets, or operations;
- b) guarantee security of, or prevent all intrusions into or any damage to your networks, devices or other facilities, assets, or operations, or those of its customers, subcontractors and users; or
- c) correct all defects or return control of your or third-party systems where unauthorised access or control has occurred; or
- d) meet or help you meet any industry standard or other requirements.

## 6. Customer Acknowledgement and Responsibilities

### Your Responsibilities

6.1. You agree to:

- a) install all Updates to the Software to a minimum level of 3 minor point releases from current Software release to retain access to the Security Services unless agreed in writing

by AUCloud; and

- b) use reasonable endeavours to safeguard software associated with the Security Services and any licence key(s) to ensure that no unauthorised person has access to them and that there is no unauthorised copying or distribution of the software or the licence key(s).

6.2. You acknowledge and agrees that the Security Services may only be installed and used on equipment, including a server which meets or exceeds the minimum system requirements identified in a Service Description.

### **Your Responsibilities for Issue Remediation**

6.3. Unless otherwise set out in a Service Definition or an Order Form, you remain solely responsible for patching Vulnerabilities, making necessary configuration changes, and performing any other activities required to remediate issues identified through the provision of the Security Services. AUCloud shall provide recommendations and guidance regarding issue remediation, however the implementation and execution of such recommendations shall be your sole responsibility.

6.4. You acknowledge and understand that failure to promptly address identified issues may result in increased risks and potential harm to your Information Systems, assets, and operations, and hereby assume all liability for any damages or losses resulting from its failure to take appropriate remedial actions.

### **Providing Assistance and Information**

6.5. You shall provide all necessary assistance to AUCloud, including, but not limited to, providing access to adequate Customer Personnel and Authorised Users, technical and license information related to the Security Services as may be required by AUCloud, to enable AUCloud to perform the Security Services effectively. Where applicable to the Security Services, you shall provide AUCloud with remote access to the device(s) and necessary administrative credentials in a timely manner to enable AUCloud to perform the Security Services.

6.6. You acknowledge that AUCloud shall not be liable for any delays, interruptions, or deficiencies in the provision of the Security Services arising from your failure to provide, or failure to provide within a reasonable timeframe, the assistance and information referred to in clause 6.6.

### **Consent and Authorisation**

6.7. You acknowledge and agree that unauthorised access to your Information System or data or intrusion into hosts and network access points may be prohibited by law and contract unless expressly authorised.

6.8. You are, under this Agreement:

- a) explicitly confirming that you have obtained all applicable consents, permissions, licences and authority for AUCloud to deliver the Security Services;
- b) giving AUCloud explicit permission to perform the Security Services and to access and process any and all Customer Data related to the Security Services, including without limitation, if applicable, consent to analyse host forensics including memory, disk, logs, data, network traffic in real time to detect evidence of known malicious communication patterns and traffic containing unrecognised malicious code or malware, connect to your computer network, archive and retain all host forensics data including but not limited to, memory, disk, logs, data, network traffic captured as part of the Security Services (including to store any malware and metadata supplied by you, or anyone else working with or for you);
- c) representing that such access and processing by AUCloud does not violate any applicable law or any obligation you owe to a third party; and
- d) accepting sole responsibility and liability with respect to engagement of such Security Services.

6.9. You warrant and represent that you are the owner or licensee of the Customer's Information Systems, and that you are authorised to instruct AUCloud to perform the Security Services. You hereby fully indemnify and hold harmless AUCloud, its officers, employees, and agents from and against any and all claims, liabilities, damages, losses, costs, expenses, fees (including reasonable legal fees) that such parties may incur as a result of or arising from any Security Services provided by AUCloud or any breach of this Agreement by you.

### **Log Collection and Analysis**

6.10. You acknowledge and agree that AUCloud may retain, use and analyse information derived from its provision of the Security Services to you (in a de-identified manner), including indicators of compromise, malware, anomalies, or other information that may be found as part of, or related to the performance of the Security Services for the purposes of gathering and compiling security event log data to look at trends and real or potential security threats, improving and developing AUCloud's security products and services, preparing and distributing statistical reports related to security trends and data patterns, internal research, and for providing general security related services.

## **7. Feedback About Services**

- 7.1. You may independently provide, or AUCloud may request, verbal and/or written suggestions, comments or other feedback related to the Security Services ("**Feedback**").
- 7.2. You agree to make a reasonable effort to provide appropriate Feedback to AUCloud, and you assign to AUCloud all right, title and interest in and to Feedback.



- 7.3. All Feedback is provided “as is,” and you make no warranties whatsoever about any Feedback.
- 7.4. You represent and warrant that you have obtained all necessary authorisations and permissions from your Affiliates, Personnel, Authorised Users, and applicable third parties to enable us to use the Feedback in accordance with the terms of this Agreement. You agree to provide us with any documentation or evidence of such authorisations and permissions upon our written request.