

## **Master Terms**

(With effect from 1st November 2017)

### **Background**

- A Brennan provides a range of information technology services, including:
- managed services; outsourcing; (incl Ultimate Care product);
  - cloud services; (incl Infrastructure as a Service (IaaS) and Backup and Recovery as a Service (BRS) products);
  - infrastructure services; systems integration; project services; (incl Service Pack)
  - hardware and software procurement
  - intranet solutions; application management; application development;
  - telephony and unified communications
- B These Master Terms set out the terms and conditions under which Brennan supplies these services.

### **Agreement**

#### **1. Parties**

The parties are:

- 1.1. the Company named in a Brennan Order Form ('Brennan', 'us', 'we' or 'our'); and
- 1.2. the Client named in a Brennan Order Form ('you' or 'your').

#### **2. Master Terms**

These Master Terms apply to all IT services provided by us to you to the exclusion of any purchase order or other document submitted by you to us. For clarity any Voice or Data service that we supply to you are covered by a separate Standard Form of Agreement (SFOA).

#### **3. Product Terms**

- 3.1. The services that we are able to provide are described in the Product Terms.



- 3.2. Each of the Product Terms sets out:
  - 3.2.1. the scope of the service;
  - 3.2.2. the fees for the service; and
  - 3.2.3. any special conditions that apply to the service.

#### **4. Order Form**

- 4.1. You may request a service by submitting a Brennan Order Form to us.
- 4.2. Each Brennan Order Form:
  - 4.2.1. must be in our standard form, as current at the time;
  - 4.2.2. must clearly identify the service requested by reference to Product Terms;
  - 4.2.3. must set out the required commencement date and term of the service;
  - 4.2.4. must be completed by you accurately, with all required information; and
  - 4.2.5. is a request for service and not a contract unless and until accepted by us.

#### **5. Service Contracts**

- 5.1. If we accept a Brennan Order Form in writing, a binding contract is created ('Service Contract') comprising:
  - 5.1.1. the Product Terms, including any special conditions;
  - 5.1.2. the Brennan Order Form; and
  - 5.1.3. these Master Terms.
- 5.2. Each Service Contract is an independent contract.
- 5.3. If there is any inconsistency between the parts of a Service Contract, the order of priority, from highest to lowest, is:
  - 5.3.1. any special conditions in the Product Terms;
  - 5.3.2. the remainder of the Product Terms;
  - 5.3.3. the Brennan Order Form; and
  - 5.3.4. these Master Terms.



**6. Services**

- 6.1. For each Service Contract, we will provide you with the service specified in the relevant Product Terms ('the service').

**7. Fees**

- 7.1. The fees for a service are:
- 7.1.1. the fees specified in the Product Terms;
  - 7.1.2. if none are specified, our then current published fees for that service; or
  - 7.1.3. if there are no current published fees, at our time and materials rates for similar services.
- 7.2. Except where we have agreed fixed fees for services, we may adjust our fees at any time.
- 7.3. If we perform any work that is not covered by the Product Terms, we may charge for that work:
- 7.3.1. at our current published rates for that type of work; or
  - 7.3.2. if there are no current published rates, at our time and materials rates for similar work.
- 7.4. Unless we say otherwise in writing, when we use the term Monthly Base Fee this means the standard price contained in the Brennan Order Form, excluding variations, usage, consumption, Excluded Item fees or set up fees.

**8. Pre-paid fees**

- 8.1. If Product Terms require fees to be pre-paid:
- 8.1.1. services will not be provided until you pay the pre-paid fees;
  - 8.1.2. we may suspend providing a service if the balance of the pre-paid fees will not cover our fees for the service required; and
  - 8.1.3. we may apply amounts you owe us against the balance of your pre-paid fees in any manner we decide.
- 8.2. Pre-paid fees are non-refundable.



**9. Expenses**

- 9.1. You must reimburse our out of pocket expenses provided:
  - 9.1.1. the expenses have been approved in writing; and
  - 9.1.2. we supply reasonable evidence substantiating the expense.

**10. Invoicing and payment**

- 10.1. We will invoice you:
  - 10.1.1. in accordance with any payment schedule specified in the Product Terms;
  - 10.1.2. otherwise:
    - 10.1.2.1. monthly in advance for pre-paid fees; or
    - 10.1.2.2. monthly in arrears.
- 10.2. You must pay each invoice in full:
  - 10.2.1. by the due date specified in the invoice; or
  - 10.2.2. if no due date is specified, within 14 days of the invoice date.
- 10.3. Late invoicing does not affect our right to payment or your obligation to pay.
- 10.4. If a payment is overdue, in addition to our other rights:
  - 10.4.1. we may charge interest on the overdue amount at the Default Rate, calculated daily;
  - 10.4.2. we may withhold providing services under any Service Contract; and
  - 10.4.3. you must indemnify us against all costs and expenses (including legal expenses on a solicitor / client basis) incurred by us in attempting to recover the overdue amount. 'Default Rate' means the overdraft reference rate quoted by our principal banker on the first day of the applicable month plus 2%.
- 10.5. If:
  - 10.5.1. you fail to pay any amount (whether in whole or part) payable in respect of any hardware and/or Loan Equipment by the time required for payment;
  - 10.5.2. you become insolvent (as that term is defined in the *Corporations Act 2001*);or



10.5.3. the Service Contract between us is terminated, or becomes terminable at our option,

we may, without notice to you, enter at any reasonable time any premises where hardware and/or Loan Equipment is located (or believed by us to be located) and take possession of that hardware and/or Loan Equipment not paid for and any other hardware and/or Loan Equipment to the value of the amount owing. Our permission to enter your premises for that purpose is irrevocable. We are not liable to you in contract, tort or otherwise, for any costs, damages, expenses or losses incurred by you as a result of any action taken by us under this clause.

## **11. Third party charges**

- 11.1. You are responsible for all third party charges incurred as a result of your use of the service (for example, telecommunications carriage fees) unless we specify otherwise in writing.
- 11.2. Where we specify that our fees include third party charges, we may increase our fees by written notice to you if there is an increase in third party charges.

## **12. GST**

- 12.1. Terms in italics in this clause have the same meaning as in the *A New Tax System (Goods and Services Tax) Act 1999*.
- 12.2. Unless stated otherwise, fees stated under this agreement exclude GST.
- 12.3. The *consideration* payable by you under this agreement is the *value* of any *taxable supply* for which payment is to be made.
- 12.4. Subject to us supplying you with a valid *tax invoice*, if we make a *taxable supply* in connection with a Service Contract for a *consideration*, which represents its *value*, then you must pay, at the same time and in the same manner as the *value* is otherwise payable, the amount of any GST payable in respect of the *taxable supply*.
- 12.5. Subject to us supplying you with a valid *tax invoice*, if a Service Contract requires you to pay, reimburse or contribute to an amount paid or payable by us in respect of an *acquisition* of a *taxable supply* from a third party, the amount required to be paid, reimbursed or contributed by you will be the *value* of the *acquisition* by us less any *input tax credit* to which we are entitled plus, if our recovery from you is a *taxable*



*supply*, any GST payable under clause 12.4.

**13. Service delivery**

13.1. We will provide the service:

13.1.1. during Business Hours, unless otherwise specified in writing;

13.1.2. at the location(s) specified in the Product Terms or, if no location is specified, at the location we determine to be most appropriate; and

13.1.3. with professional skill and care, using appropriately qualified personnel.

'Business Hours' means between 8:00 am and 6:00 pm, Monday to Friday excluding public holidays at the place in which the service is to be provided.

**14. Access**

14.1. You must provide us with reasonable and timely access to your facilities, premises, information, equipment, personnel, network and data to enable to fulfill our obligations under the Product Terms.

14.2. We will not be responsible for any delay in providing a service where the delay results from your failure to provide timely access in accordance with clause 14.1.

**15. Your obligations**

15.1. You must:

15.1.1. comply with our reasonable and lawful directions in relation to the service;

15.1.2. provide a safe working environment for our personnel;

15.1.3. comply with all laws, regulations, policies and guidelines (including any acceptable use policy that we inform you of) applicable to the service;

15.1.4. ensure that any incumbent provider who is transitioning the service to us makes available the information, resources and facilities required by us to provide the service; and

15.1.5. maintain regular and complete backups of all of your data.

15.2. We will not be responsible for any failure, default or delay to the extent caused by your failure to perform your obligations under this clause.



**16. Hardware supply**

16.1. To the extent that the service is for the sale and supply of hardware:

- 16.1.1. the risk of loss of or damage to the hardware passes to you on delivery. Your obligation to insure hardware commences when risk passes to you. You must insure the hardware for its full value and ensure that our interest is noted on the policy. We may require you to demonstrate compliance with this clause including by producing a copy of the insurance policy;
- 16.1.2. we remain the legal and beneficial owner of all hardware sold by us to you under these Master Terms until all amounts due in respect of all hardware and any other amounts you owe us, actually or contingently presently or in future, have been paid to us in cleared funds. This applies even if you install the hardware or commingle it with other goods.
- 16.1.3. you must not sell, dispose of, assign or encumber the hardware unless and until you have paid for it in full;
- 16.1.4. where the hardware manufacturer's warranty is capable of being assigned to you, it is the only warranty given in relation to the hardware, to the extent permitted by law;
- 16.1.5. where hardware is subject to export control laws or regulations (including US export laws and regulations), you must not directly or indirectly export, re-export, distribute or otherwise act in violation of such laws and regulations; and
- 16.1.6. the United Nations Convention on Contracts for the International Sale of Goods does not apply.

**17. Loan equipment**

- 17.1. We may install on your premises, loan or otherwise provide you with equipment ("Loan Equipment"). All Loan Equipment:
  - 17.1.1. remains our property;
  - 17.1.2. must only be used by you for the purposes of receiving services from us; and
  - 17.1.3. must be kept secured from loss or damage.



17.2. If Loan Equipment in your possession or control is lost, stolen or damaged:

17.2.1. you must notify us without unreasonably delay; and

17.2.2. you must pay us the replacement cost of the Loan Equipment calculated as the recommended retail price at the date the Loan Equipment was lost, stolen or damaged minus any amount we recover under an insurance policy.

## **18. Software**

18.1. To the extent that a service involves the creation or licensing of software that we own:

18.1.1. we warrant that our software will operate substantially in accordance with its accompanying documentation during the warranty period;

18.1.2. we will use our reasonable efforts to correct any defect provided:

18.1.2.1. you notify us of the defect during the warranty period;

18.1.2.2. you have used the software in accordance with its accompanying documentation and our recommendations;

18.1.2.3. the software has not been used on or in conjunction with equipment or software not approved by us;

18.1.2.4. the software has not been modified by anyone other than us;

18.1.2.5. the defect is not due to a change in your IT or physical environment after delivery of the software; and

18.1.2.6. you are not in breach of this agreement or any Service Contract.

18.2. 'Warranty period' means 90 days from the date of delivery, unless we specify a different period.

18.3. 'Defect' means a reproducible failure of the software to work substantially as described in the documentation that accompanies it.





**19. PPS Law**

- 19.1. This clause applies to the extent that the agreement we have with you provides for or contains a 'security interest' for the purposes of the *Personal Property Securities Act 2009* (Cth) ("PPS Law") (or part of it). The security interest granted to us is a 'purchase money security interest' ("PMSI") to the extent that it can be under section 14 of the PPS Law.
- 19.2. We may register our security interest. You must do anything (such as obtaining consents and signing documents) which we require for the purposes of:
  - 19.2.1. ensuring that our security interest is enforceable, perfected and otherwise effective under the PPS Law;
  - 19.2.2. enabling us to gain first priority (or any other priority agreed to us in writing) for our security interest; and
  - 19.2.3. enabling us to exercise rights in connection with the security interest.
- 19.3. Our rights under our agreement with you are in addition to and not in substitution for our rights under other law (including the PPS Law) and we may choose whether to exercise rights under our agreement and/or under such other law, as we see fit.
- 19.4. The following provisions of the PPS Law do not apply and, for the purposes of section 115 of the PPS Law are "contracted out" of our agreement with you in respect of goods that are not used predominantly for personal, domestic or household purposes:
  - 19.4.1. sections 95 (notice of removal of accession to the extent it requires us to give a notice to you), 96 (retention of accession), 125 (obligations to dispose of or retain collateral); section 130 (notice of disposal to the extent it requires us to give a notice to you); section 132(3)(d) (contents of statement of account after disposal); section 132(4) (statement of account if no disposal); section 135 (notice of retention); section 142 (redemption of collateral); and section 143 (re-instatement of security agreement).



19.5. The following provisions of the PPS Law:

19.5.1. section 123 (seizing collateral); section 126 (apparent possession); section 128 (secured party may dispose of collateral); section 129 (disposal by purchase); and section 134(1) (retention of collateral),

confer rights on us. You agree that in addition to those rights, we shall, if there is default by you, have the right to seize, purchase, take possession or apparent possession, retain, deal with or dispose of any hardware and/or Loan Equipment, not only under those sections but also, as additional and independent rights, under our agreement with you and you agree that we may do so in any manner we see fit including (in respect of dealing and disposal) by private or public sale, lease or licence.

19.6. You waive your rights to receive a verification statement in relation to registration events in respect of commercial property under section 157 of the PPS Law.

19.7. We and you agree not to disclose information of the kind that can be requested under section 275(1) of the PPS Law. You must do everything necessary on your part to ensure that section 275(6)(a) of the PPS Law continues to apply. The agreement in this sub-clause is made solely for the purpose of allowing to us the benefit of section 275(6)(a) and we shall not be liable to pay damages or any other compensation or be subject to injunction if we breach this sub-clause.

19.8. You must not create, purport to create or permit to be created any 'security interest' (as defined in PPS Law) in the hardware and/or Loan Equipment other than with our express written consent.

19.9. You must not lease, hire, bail or give possession of ('sub-hire') the equipment to anyone else unless we (in our absolute discretion) first consent in writing. Any such sub-hire must be in writing in a form acceptable to us and must be expressed to be subject to our rights under our agreement with you.

19.10. You must take all steps including registration under PPS Law as may be required to:

19.10.1. ensure that any security interest arising under or in respect of the sub-hire is enforceable, perfected and otherwise effective under the PPS Law;



19.10.2. enabling us to gain (subject always to our rights) first priority (or any other priority we agree to in writing) for the security interest; and

19.10.3. enabling each of us to exercise our respective rights in connection with the security interest.

19.11. We may recover from you the cost of doing anything under this clause, including registration fees and the costs of notification.

**20. Third party materials**

20.1. In providing a service we may supply you with materials (including software) licensed by third parties.

20.2. You must comply with the terms of the third party license and you indemnify us against any loss, damage, claim, liability or demand we incur due to your breach of a third party license.

**21. Delay**

21.1. We will use our reasonable efforts to meet any deadlines or milestones that we promise to meet but will not be liable for any delay or failure to meet these.

21.2. To the extent that our provision of a service is impaired by:

21.2.1. you;

21.2.2. a third party;

21.2.3. a failure or defect (not caused by us) in hardware or software (not supplied by us); or

21.2.4. an event beyond our reasonable control – then:

21.2.5. our obligation to provide the service is suspended;

21.2.6. we will not be liable to you in respect of any delay or failure to provide the service.

21.3. Where our personnel are delayed from performing a service due to a delay you cause, we may invoice you those personnel's hourly rate for the duration of the delay subject



only to us making reasonable efforts to reallocate our personnel to other chargeable duties.

**22. Confidentiality**

- 22.1. A party must not use or disclose the other party's confidential information without prior written approval.
- 22.2. Each party must take all reasonable steps to ensure that its employees and agents do not use or disclose the other party's confidential information.
- 22.3. A party may disclose confidential information where required by law or the rules of a stock exchange.
- 22.4. This clause survives termination of this agreement.
- 22.5. 'Confidential information' means all information treated by the owning party ('discloser') as confidential and:
  - 22.5.1. provided to the other party ('recipient'); or
  - 22.5.2. of which the recipient becomes aware –  
except information that:
    - 22.5.3. the recipient creates or lawfully obtains independently of the discloser; or
    - 22.5.4. is public knowledge (otherwise than as a result of a breach of confidentiality by the recipient).

**23. Intellectual property rights**

- 23.1. Unless otherwise specified in writing, we own exclusively all intellectual property rights in material, including software, that we design, create, modify, supply or licence, even if it was created or modified for or suggested by you.
- 23.2. To the extent necessary for you to receive the benefit of a service, we grant you a non-exclusive, non-transferable, licence to use our materials.
- 23.3. If any of your materials become combined with our materials with your knowledge and without your objection, then we have a perpetual, royalty-free, irrevocable, non-



exclusive licence to copy, use, adapt and distribute and sub-license those materials in the course of our ongoing business.

- 23.4. 'Intellectual property rights' includes all patents, copyright, rights in circuit layouts, registered designs, trademarks, trade, business or company names and the right to have confidential information kept confidential.

**24. Limitation of liability**

- 24.1. Our maximum aggregate liability under a Service Contract or Claim, whether for breach of these terms or in negligence or in any other tort or for any other common law or statutory cause of action or otherwise is the amount equal to the fees you have paid to us under the Service Contract.

- 24.2. We will not be liable to you for data loss under any circumstances.

**25. Warranty and Indemnity**

- 25.1. You must indemnify us, our employees and agents against any loss (including reasonable legal costs and expenses) or liability any of us reasonably incurs or suffers arising from any proceedings where such loss or liability was caused by:

25.1.1. your breach of these Master Terms or a Service Contract; or

25.1.2. your wilful, unlawful or negligent act or omission.

**26. Termination and suspension of Service Contracts**

- 26.1. We may terminate or suspend performance of a Service Contract immediately if:

26.1.1. you breach the Service Contract and fail to remedy the breach within 14 days after receiving a notice detailing the breach and requiring that it be cured;

26.1.2. you become insolvent;

26.1.3. you fail to pay money owed to us within 30 days of it being due;

26.1.4. you cease, or threaten to cease, carrying on your business;

26.1.5. you exceed your credit limit or there is an adverse change in our credit assessment of you;

26.1.6. we reasonably believe that you have used a service for unauthorised,



criminal or unlawful activity; or

26.1.7. an administrator or controller (as those terms are defined in the *Corporations Act 2001*) is appointed in respect of any of your assets.

26.2. Your breach of a Service Contract is deemed to be a breach of these Master Terms and all other Service Contracts.

26.3. Termination of a Service Contract does not affect our rights of action based on any breach by you before the termination.

26.4. On termination we may:

26.4.1. repossess any of our property in your possession, custody or control;

26.4.2. retain all moneys paid to us under the Service Contract;

26.4.3. provide you with an invoice for all unpaid fees and expenses and any costs incurred by us as a result of termination; and

26.4.4. pursue any additional or alternative remedies provided by law.

26.5. If you terminate a Service Contract prior to its expiry, then you must pay us within 14 days of invoice, the equivalent of the Monthly Service Fee multiplied by the number of months remaining in the Service Contract<sup>1</sup>.

26.6. The termination fee in clause 26.5:

26.6.1. is a reasonable pre-estimate of our loss and damage arising from an early termination of a Service Contract; and

26.6.2. is without prejudice to any other rights we may have to recover other sums from you.

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<sup>1</sup> e.g. if the Monthly Service Fee is \$200 (inc GST), and there are 3 months remaining in the Service Contract, you must pay us \$600.



- 26.7. Should the Service Contract expire and not be expressly terminated by you it will continue indefinitely on a quarter by quarter basis and you must provide us with 90 days notice to cancel the service.
- 26.8. Upon expiry or termination of a Service Contract each party must return any property belonging to the other party within 7 days.
  - 26.8.1. Where you have a right to terminate a Service Contract, or any individual service, under these terms, you may only do so by providing us with written notice through our cancellation form available at <http://www.brennanit.com.au/terms-and-agreements>.
- 26.9. Should the Service Contract expire and not be expressly terminated by you it will continue indefinitely on a quarter by quarter basis and you must provide us with 90 days' notice to cancel the service.
- 26.10. Any discount provided to you in relation to the Service Contracts Fixed Term (Generally 25%) shall be revoked and your pricing will revert to the Uncontracted Price.

## **27. Termination for Non-Performance**

- 27.1. You may terminate the Service Contract immediately if we breach a Service Level Agreement and fail to remedy the breach within 14 days after receiving a notice detailing the breach and requiring that it be cured;
- 27.2. Termination of a Service Contract does not affect our rights of action based on any breach by you before the termination and is without prejudice to any other rights we may have to recover other sums from you.
- 27.3. On termination we may retain all moneys paid to us under the Service Contract;
- 27.4. If you terminate a Service Contract prior to its expiry as per clause 30.1, then no termination fee will be payable.

## **28. Notices**

- 28.1. All notices must be:
  - 28.1.1. in writing;
  - 28.1.2. signed by the party giving it (or its authorised representative); and
  - 28.1.3. sent to a party's service address.



28.2. A party's service address is any of:

- 28.2.1. in the case of a corporation, its current registered office;
- 28.2.2. the parties' business addresses set out in a Brennan Order Form; or
- 28.2.3. any other address a party nominates, by written notice to the other party, as a service address.

**29. Restraints**

- 29.1. Neither party may approach the Employees, Agents or Contractors of the other party to this Agreement, with an offer of employment during the term of this Agreement or for each of the following periods, 2 months, 3 months, 6 months and 12 months after its expiry or termination.
- 29.2. For the avoidance of doubt, nothing in this clause 32 prevents either party from employing an employee of the other party as a result of the employee responding to a public notice, in the absence of any solicitation however if this occurs then the employing party will pay a replacement recruitment fee to the other party of \$15,000 ex GST.

**30. General matters**

- 30.1. We are an independent contractor and have no authority to bind you by contract or otherwise.
- 30.2. We may sub-contract the performance of this agreement if we obtain your prior written consent (which you must not unreasonably withhold).
- 30.3. We may assign or novate our rights and obligations under this Agreement at any time without your consent.
- 30.4. You may not assign your rights and obligations under this agreement without our prior written consent (which we will not unreasonably withhold).
- 30.5. If a party overlooks a breach of a Service Contract by the other party on one or more occasions, it is not taken to have agreed to any future breach.
- 30.6. These Master Terms, the Product Terms and the Brennan Order Form are the entire agreement between the parties with respect to the services specified in the Product Terms and all prior agreements regarding those services are superseded. No





amendment or modification of a Service Contract is binding unless in writing and executed by the parties.

- 30.7. Anything that is unenforceable must be read down, to the point of severance if necessary.
- 30.8. Anything a party can do, it may do through an appropriately authorised representative.
- 30.9. Any matter in our discretion is in our absolute and unfettered discretion.

### **31. Applicable law and disputes**

- 31.1. This agreement is subject to the laws that apply in New South Wales, Australia.
- 31.2. Any dispute or difference arising in connection with this agreement will be submitted to arbitration in accordance with and subject to the Institute of Arbitrators and Mediators Australia Expedited Commercial Arbitration Rules.
- 31.3. Otherwise, legal proceedings relating to this agreement or any dispute about it must be brought in the courts of New South Wales, Australia.

### **32. Interpretation**

- 32.1. Headings are for navigational assistance only and do not affect the meaning of this agreement.
- 32.2. Where a term is said to 'include' one or more things, the list is not exhaustive and does not limit the natural meaning of the term in anyway.
- 32.3. A schedule or attachment to a document (including a schedule or attachment to this agreement) is part of that document, as is any document incorporated by reference.
- 32.4. A reference to the singular includes the plural and viceversa.
- 32.5. There is no significance in the use of gender-specific language.
- 32.6. A 'person' includes any entity which can sue and be sued and any legal successor to or representative of that person.
- 32.7. A reference to 'hardware' or 'Loan Equipment' includes all IT and communication products and equipment including hardware, software and related parts, accessories and other goods.
- 32.8. A reference to a law includes any amendment or replacement of that law.



- 32.9. A provision must not be construed to the disadvantage of a party because that party prepared or required it.