



xpanse

STANDARD TERMS AND CONDITIONS

Xpanse Pty Ltd ATF Xpanse Unit Trust

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1 DEFINITIONS AND INTERPRETATION

1.1 Definitions.

In these Standard Terms and Conditions, unless the contrary intention appears from the context:

Business Day means any day (not being a Saturday or Sunday) on which banks are open for general banking business in Western Australia;

Change Request means a written request to vary the terms of the Contract issued by a Party in accordance with clause 28.5;

Client Data means, without limitation, all information, documents, records, passwords, usernames and Client IP provided to Xpanse by the client;

Client IP means all Intellectual Property Rights held by the Client at the date of the Contract or developed by the Client subsequently through activities unrelated to the subject matter of the Contract;

Client's Personnel means the officers, employees, agents, representatives, Sub-Contractors and consultants of the Client;

Client's Representative means the representative of the Client identified in the Service Agreement who is appointed as its agent to carry out the functions allotted to the Client's Representative under the Contract;

Confidential Information means the Contract and the Intellectual Property Rights, and any information, documentation, trade secrets, know-how, scientific, technical, product, market, pricing and the Client information relating to the Services and the current or future business interests, methodology or affairs of a Party (or any Related Body Corporate of a Party) that:

- (a) is reasonably regarded as confidential or which is identified as being confidential, but excluding information that is in the public domain otherwise than by breach of obligations owed by the recipient Party or third parties to the disclosing Party; and
- (b) which is disclosed to the recipient Party or third parties by the disclosing Party;

Contract IP means all Intellectual Property Rights and Improvements created, discovered or coming into existence, for the purposes of, or in connection with, the Services under the Contract;

Contract Price means the total fees which are payable by the Client to Xpanse for the Services as set out in the Service Agreement and such other fees for services as the Parties agree from time to time;

Data means, without limitation, any passwords, usernames, information, records, files, codes and other software provided to Xpanse by the Client;

End Date means the date which Xpanse completes the supply of Products or Services;

Facilities means all office equipment, internet access, access to telephone with outside line, security passes and such other facilities Xpanse may reasonably require in order to perform the Services;

Improvements means an improvement, modification, enhancement, adaption or the like arising from a Party's use of the Intellectual Property Rights;

Insolvent means, in respect of a Party to the Contract, that:

- (a) it stops or suspends, or threatens to stop or suspend, payment of all or a class of its debts or is otherwise unable to pay its debts when they fall due;
- (b) it is insolvent within the meaning of section 95A of the Corporations Act;
- (c) it fails to comply with a statutory demand (within the meaning of section 459F(1) of the Corporations Act);
- (d) a receiver, manager, administrator, trustee or similar official is appointed over all or substantially all of its assets or undertakings;
- (e) an application (not being withdrawn or dismissed within 21 days) or order is made for its winding up or dissolution;
- (f) a resolution is passed by it or any steps are taken by it to pass a resolution for the winding up or dissolution of that Party; or
- (g) except for the purpose of solvent reconstruction or amalgamation, it enters a scheme of arrangement or composition with creditors;

Intellectual Property Rights means all present and future rights to intellectual property of every kind, including any Improvements, trademarks (whether registered or common law trade marks), licenses, branding, business names, domain names, designs, copyright, Inventions, discoveries, trade secrets, secret processes, know-how, concepts, ideas, information, processes, data, formulae, any corresponding intellectual property rights at Law and any rights in respect of them;

Law means:

- (a) Commonwealth and Western Australian legislation including regulations, by-laws and other subordinate legislation;
- (b) guidelines of the Commonwealth, Western Australia and local governments with which the Client is legally required to comply;
- (c) common law and equity;

License Agreement means the license(s) relating to the Software and or Products supplied by Xpanse to the Client;

OSH Legislation means the Occupational Safety and Health Act 1984 (WA), the Occupational Safety and Health Regulations 1996 (WA), other legislation of any State, codes of practice, other compliance codes, directions of safety or notices issued by any relevant authority and standard where any part of the Services is being performed;

Parties means the Client and Xpanse and **Party** means either one of them;

Plant and Equipment is all plant, equipment, tools, machinery, appliances and other things used by Xpanse in connection with the provision of the Services and includes:

- (a) all the plant and equipment of Xpanse or the Client (as the case may be) proposed to be used to carry out the Services, whether owned, leased or hired, as at the Commencement Date; and
- (b) any additional plant and equipment obtained by Xpanse after the Commencement Date with the prior written approval of the Client's Representative for the purposes of performing the Services;

Products means products supplied by Xpanse to the Client including but not limited to the Software, documentation, manuals, computer hardware, intangible products, components owned or licensed by Xpanse, peripherals, accessories, and other goods supplied by Xpanse to the Client from time to time;

Release means an upgrade of licensed Software (or any part of it) provided for the principal purpose of substantially correcting errors or defects in the licensed Software but which is not a new Version;

Services means the services specified in the Service Agreement or Scope of Works and includes the Products where the context requires;

Service Agreement means the agreement between Xpanse and the Client detailing the Key Terms;

Site has the meaning given in the Service Agreement;

Software means the Products that are software and all Releases and Versions of those software products;

Special Conditions means any conditions mentioned in the Service Agreement;

Start Date means the date which Xpanse commences the supply of Products or Services;

Sub-Contractor means any person engaged by Xpanse to perform all or any part of Xpanse's obligations under the Contract on behalf of Xpanse as permitted under the Contract;

Substantial Breach means a breach by the Client of the Client's obligations under clauses 5, 11, 13, 15, 23, 28.2, 29, 30 and 34 inclusive;

Term means from the Start Date until the Completion Date, unless terminated earlier in accordance with Contract, or until the completion by the Client of all its obligations under the Contract;

Third Party IP means all Intellectual Property Rights of any third party;

Xpanse IP means all Intellectual Property Rights held by Xpanse at the date of the Contract or developed by Xpanse subsequently through activities unrelated to the subject matter of the Contract;

Xpanse Personnel means Xpanse and its Sub-Contractors and the directors, officers, employees, consultants and agents of each of them, and where the context requires includes any one or more of them;

Xpanse Remedies means, as the context requires, all or any of the following remedies:

- (i) suspend the provision of credit to the Client until all amounts owing by the Client are paid for in full;
- (ii) withhold any Client Data or Client IP;
- (iii) vary or cancel any credit facilities it makes available to the Client;
- (iv) charge the Client interest (on a compounding basis) on any overdue amount at the annual rate of 5% above the prevailing base lending rate quote by the Australia and New Zealand Banking Group Limited (ANZ). Such Interest will accrue daily from the date payment became overdue until Xpanse has received payment of the overdue amount, together with any interest accrued;

- (v) terminate the Contract immediately without notice;
- (vi) recover any Products supplied by Xpanse in performance of the Services;
- (vii) sue the Client for specific performance of the Contract;
- (viii) sue the Client for damages for default in addition to or instead of specific performance.

Xpanse's Representative means the representative of Xpanse identified in the Service Agreement who is appointed as its agent to carry out the functions allotted to Xpanse's Representative under the Contract;

1.2

Interpretation

In these Standard Terms and Conditions, headings are for convenience only and do not affect the interpretation, unless the context otherwise requires:

- (a) words importing the singular include the plural and vice versa;
- (b) an expression importing a natural person includes any company, partnership, joint venture, association, corporation or other body corporate and any Authority;
- (c) a reference to a statute includes all statutes, regulations, proclamations, ordinances or by laws amending, consolidating or replacing it, and a reference to a statute includes all regulations, proclamations, ordinances and by laws issued under that statute;
- (d) a reference to the word "including" and similar expressions are not words of limitation;
- (e) a reference to a document includes all amendments or supplements to, or replacements or novations of, that document;
- (f) a reference to a Party to a document includes that Party's successors and permitted assignees;
- (g) a reference to an amount of money is a reference to the amount in the lawful currency of Australia unless otherwise stated;
- (h) a reference to an obligation includes a liability and a duty and a reference to performance includes observance;
- (i) a reference to a clause or schedule or annexure is a reference to a clause or schedule or annexure to these Standard Terms and Conditions;
- (j) where any word or phrase is defined, any part of speech or other grammatical form of that word or phrase has a corresponding meaning;
- (k) if an act must be done on a specified day which is not a Business Day, that act must be done instead on the next Business Day; and
- (l) no rule of construction applies to the disadvantage of a party merely because that party was responsible for the preparation of the Standard Terms and Conditions or any part of it.

2 CONTRACT

2.1 Contract

The Contract comprises the following documents:

- (a) For the supply of products:
 - (i) the Quote;
 - (ii) Annexure A of this document – Product Terms & Conditions;
 - (iii) these Standard Terms and Conditions; and
 - (iv) any other document which is incorporated by written agreement between the Parties.
- (b) For the supply of services:
 - (i) the Service Agreement or Scope of Works including any special conditions mentioned in the Service Agreement or Scope of Works;
 - (ii) the Quote;
 - (iii) Annexure B of this document – Service Terms & Conditions;
 - (iv) these Standard Terms and Conditions; and
 - (v) any other document which is incorporated by written agreement between the Parties.

2.2 Contract documents

- (a) If there is any conflict or inconsistency between the documents comprising the Contract then the documents will rank in order of precedence in accordance with the order in which they are listed in clause 2.1.
- (b) If the Client discovers any discrepancy, inconsistency or ambiguity within or between the documents comprising the Contract, the Client must give Xpanse written notice of it.
- (c) Xpanse must (upon receiving a notice under clause 2.2(b) or otherwise becoming aware of a discrepancy, inconsistency or ambiguity) direct the Client as to the interpretation and construction of the clause.
- (d) The Client is not entitled to an adjustment to the Contract Price, or any other compensation in relation to a direction under clause 2.2(c).

2.3 Entire agreement

- (a) The Contract comprises the entire agreement between the Parties and supersedes all prior representations, proposals and agreements in connection with the subject matter of the Contract.
- (b) No reliance will be placed by any of the Parties on any representation, promise or other inducement made or given prior to the date of execution of the Contract.

2.4 Amendments to the Contract

- (a) Xpanse may change the Contract from time to time upon notice in writing to the Client.

3 QUOTES

All Quotes are subject to the following, unless otherwise confirmed in writing by Xpanse's Representative:

- (a) Quotes are valid for seven (7) days from the date of issue unless expressly stated otherwise on the Quote.
- (b) Errors and omissions in the Quote may not be relied on and no other discounts apply.
- (c) The Client must provide an Xpanse Quote number with an order if the Quote is accepted and relied on.
- (d) Configuration charges are not included unless otherwise stated on the Quote.
- (e) Xpanse reserves the right to re-quote the Client should the United States Dollar (USD) exchange rate vary by +/- 2 (two) cents, or for any other reason Xpanse sees fit. If this occurs, the Client will be informed within a reasonable period of time upon the Client's acceptance of the initial Quote.
- (f) Unless stated otherwise in these Standard Terms and Conditions, or in writing by Xpanse, all prices quoted are exclusive of all taxes, handling, delivery, agents' charges, and any other charge, duty, or import.

- (g) The Client is liable for all taxes, handling, delivery, agents' charges, and any other charge, duty or import.
- (h) The Client will pay to Xpanse on request any amount arising under 3(g).

4 CLIENT'S CANCELLATION

- (a) Unless otherwise agreed in writing by Xpanse, the Client may not cancel an order that has been accepted by Xpanse.
- (b) Xpanse retains discretion to accept or refuse a Client request to cancel an order.
- (c) Xpanse will not exercise this discretion unless a request for cancellation is:
 - (i) made in writing;
 - (ii) received by Xpanse no later than 14 days before the estimated date of:
 - (A) shipment of a Product by the manufacturer; or
 - (B) provision of a Service.

5 PAYMENT AND CONSEQUENCES OF NON-PAYMENT

- (a) The price of the Products and/or Services will be identified in the Contract (**Contract Price**).
- (b) Payment of the Contract Price is required within 30 days of the date an invoice is issued.
- (c) If the Client fails to make payment in accordance with clause 5(b):
 - (i) all amounts owing by the Client to Xpanse on any account will immediately become due and payable;
 - (ii) the Client indemnifies Xpanse for any costs, including interest or legal costs, incurred by Xpanse in recovering overdue payments; and
 - (iii) Xpanse may in its absolute discretion exercise any of the Xpanse Remedies.

6 SET OFF AND DEDUCTIONS

The Client is not entitled to deduct, or set off any amount, from any monies due or becoming due to Xpanse under the Contract.

7 LIABILITY

To the extent permitted by law, Xpanse will not be liable to the Client or any other person under any circumstances for any loss of use, profit, revenue, interest, goodwill or data, or any injury or death to any person, or for any indirect, incidental or consequential damages sustained or incurred by the Client, whether such liability arises directly or indirectly as a result of:

- (a) any negligent act, omission or willful misconduct of the Client, the Client's Personnel or agents;
- (b) the supply, performance or use of any Products; or
- (c) any breach by the Client of its obligations under these Terms and Conditions.

8 TRADE PRACTICES AMENDMENT (AUSTRALIAN CONSUMER LAW) ACT 2010 AND FAIR TRADING ACTS

Nothing in the Contract is intended to have the effect of contracting out of any applicable provisions of the *Trade Practices Amendment (Australian Consumer Law) Act 2010* and the *Fair Trading Acts* (as amended) in each of the States and Territories of Australia, except to the extent permitted by those Acts where applicable.

9 DEFAULT OF THE CLIENT

Without prejudice to any of Xpanse's rights under these Standard Terms and Conditions, if the Client:

- (a) breaches any term of the Contract;
- (b) fails to make any payment due to Xpanse under the Contracts; or
- (c) causes a Substantial Breach and such breach is not remedied within ten (10) Business Days or is incapable of being remedied,

then Xpanse may in its absolute discretion and without further liability or notice to the Client, exercise any of Xpanse's Remedies.

10 PRIVACY

The Client agrees and consents to:

- (a) Xpanse obtaining a credit report from a credit-reporting agency containing personal credit information about the Client, including taking all necessary steps to obtain this report.
- (b) Xpanse exchanging information about the Client with those credit providers named in the Application for Credit account or consumer credit report issued by a reporting agency to:
 - (i) assess an application by the Client;
 - (ii) notify other credit providers of a default by the Client;
 - (iii) exchange information with other credit providers as to the status of this credit account, where the Client is in default with other credit providers; and
 - (iv) assess the credit worthiness of the Client.
- (c) Xpanse being given a consumer credit report to collect overdue payment on commercial credit (Section 18K(1)(h) Privacy Act 1988).
- (d) Personal data provided being used and retained by Xpanse for the following purposes:
 - (i) provision of the Products and/or Services;
 - (ii) marketing of the Products and/or Services provided by Xpanse, its agents or distributors;
 - (iii) analysing, verifying and/or checking the Client's credit, payment and or status in relation to provision of the Products and/or Services;
 - (iv) processing of any payment instructions, direct debit facilities and or credit facilities requested by the Client;
 - (v) enabling the daily operation of the Client's account and or the collection of amounts outstanding in the Client's account in relation to the Services; and
 - (vi) for other purposes as shall be agreed between the Client and Xpanse or required by law from time to time.

11 CONFIDENTIALITY

11.1 Confidential information to be kept confidential

- (a) Except as otherwise permitted under the Contract:
 - (i) each Party must treat as confidential all Confidential Information;
 - (ii) a Party may only reproduce or use Confidential Information for the sole reason of performing its obligations under the Contract, and not to the commercial, financial or competitive disadvantage of the other Party; and
 - (iii) each Party must take all reasonable precautions to ensure that its Personnel maintain the confidentiality of all Confidential Information in accordance with this clause.
- (b) A Party must not:
 - (i) disclose Confidential Information to third parties; or
 - (ii) permit third parties to reproduce or use Confidential Information, without the prior written consent of the other Party.

11.2 Disclosure required by Law

The Parties may make such disclosures as are required by law, or the rules of a recognized securities exchange (including public announcements), but only to that extent, and provided the disclosing Party first informs the other Party that such disclosure is required.

11.3 Permitted disclosures

The Parties may disclose Confidential Information to any of the under mentioned persons who reasonably require disclosure and who have first agreed in writing to be bound by the confidentiality obligations under this clause:

- (a) a related body corporate (as defined under s 50 of the *Corporations Act 2001* (Cth));
- (b) any financier or prospective financier;
- (c) any professional adviser; or
- (d) any assignee or prospective assignee.

12 TERMINATION

- (a) Subject to the termination provisions under this clause, the Contract will begin on the Start Date and will continue for the Term.
- (b) Xpanse may terminate the Contract by written notice, with immediate effect if the Client:
 - (i) breaches any provision of the Contract and fails to remedy the breach within 30 days after receiving notice require it to do so;
 - (ii) becomes unable to pay its debts when they become due;
 - (iii) enters into any arrangement between itself and it (or any class of its) creditors;
 - (iv) ceases to carry on business;
 - (v) has a mortgagee enter into possession or dispose of the whole or any part of its assets or business;
 - (vi) becomes Insolvent; or
 - (vii) has a receiver, receiver and manger, a trustee in bankruptcy, an administrator, a liquidator, a provisional liquidator or other like person appointed to the whole or any part of its assets or business.
- (c) The expiration or termination of the Contract will not affect any right or cause of action which has accrued to the Party which terminates the Contract at or prior to the date of termination.
- (d) Xpanse may terminate the Contract at any time without cause by giving the Client 10 days' written notice.
- (e) Without limiting any other clauses intended to survive termination, clauses 6, 7, 9, 11, 25.2, 30 and 31 survive the expiration or termination of the Contract.

13 INTELLECTUAL PROPERTY

- (a) The Client acknowledges:
 - (i) all Xpanse IP embodied, or provided in connection with the Products and/or Services and any related documentation, parts or Software are the sole property of Xpanse or its suppliers; and
 - (ii) all Xpanse IP may only be used by the Client with Xpanse's express written consent, during the continuance of any relevant sale, and such consent extends only to use essential for the purposes stated in it.
- (b) The Client must not register or use any trademarks, trade name, domain name, trading style or commercial designation or design used by Xpanse or its suppliers in connection with the Products or Services.
- (c) The Client indemnifies Xpanse against all liabilities, damages, costs and expenses which Xpanse suffers or incurs as a result of:
 - (i) any work performed or Services provided by Xpanse in accordance with the Client's specifications; or
 - (ii) the combination or use of the Products with other equipment, parts or software not supplied by Xpanse which results in the infringement of any Intellectual Property Rights of any person.
- (d) The Client:
 - (i) warrants that any Client Data or the Client IP provided to or used by Xpanse will not infringe any Intellectual Property Rights; and
 - (ii) indemnifies Xpanse against any infringement of this clause 13(d).
- (e) The Client shall not cause or permit anything which may interfere with, damage or endanger Xpanse IP, Improvements or any Third Party IP, or assist or allow others to do so.

- (f) The Client shall immediately advise Xpanse when the Client becomes aware of any unauthorized use or attempted use by any person of Xpanse IP or Third Party IP.
- (g) Immediately following termination of the Contract, the Client shall discontinue the use of all Xpanse IP and Third Party IP.
- (h) The Client acknowledges Xpanse at all times remains the owner of Xpanse IP and that the Contract does not prevent, limit or restrict Xpanse from using or exploiting Xpanse IP at any time.
- (i) All Contract IP automatically vests with Xpanse and will be the property of Xpanse as and when created.
- (j) Xpanse does not transfer any right, title or interest in the Contract IP to the Client.

14 LICENCE

If required, and only to the extent required, to perform its obligations under the Contract, Xpanse will have transferable, irrevocable and royalty free licence to use the Client IP.

15 THIRD PARTY INTELLECTUAL PROPERTY RIGHTS

- (a) The Client warrants that in respect of all Third Party IP which Xpanse will or may use:
 - (i) it has disclosed the Third Party IP to Xpanse;
 - (ii) it has obtained, or will obtain from the third party, at no cost to Xpanse, the necessary licences and consents to use the Third Party IP; and
 - (iii) the provision of the Third Party IP to Xpanse is not in breach of any licence arrangements.
- (b) If the Client fails to comply with this clause for any reason whatsoever, the Client acknowledges and agrees that Xpanse is, in addition to any other rights or remedies it may have under the Contract, entitled to:
 - (i) obtain the grant of a licence to use the Third Party IP itself at the expense of the Client; or
 - (ii) terminate the Contract.

16 FORCE MAJEURE

If a Party is prevented from or delayed in complying with an obligation (other than to pay money) by a Force Majeure Event, performance by it of that obligation is suspended during the time, but only to the extent that, compliance is prevented or delayed.

For the purposes of this clause, a **Force Majeure Event** means an event which:

- (a) is beyond the reasonable control of the Party claiming force majeure;
- (b) is not reasonably foreseeable by Law;
- (c) causes or results in prevention of the performance by the affected Party of any of its obligations under the Contract;
- (d) does not result from the fault or negligence of the Party claiming force majeure; and
- (e) which through the exercise of reasonable endeavours cannot be avoided, overcome or remedied by the affected Party; and
- (f) includes (without limitation) subject to the satisfaction of the foregoing:
 - (i) any act of God, including without limitation, cyclone, earthquake, or other natural physical disaster;
 - (ii) fire, flood, ground subsidence;
 - (iii) strike, lockout, labour dispute or other industrial action by workers or employees which is industry-wide and not confined to the Site;
 - (iv) an act of a public enemy including terrorism, war or hostilities whether declared or undeclared; or
 - (v) revolution or any other unlawful act against public order or authority.

17 DISPUTE RESOLUTION

17.1 Dispute

In the event of any dispute, question or difference of opinion between the Client and Xpanse arising out of or under the Contract (**Dispute**), a party may give to the other party a notice (**Dispute Notice**) specifying the dispute and requiring its resolution under this clause 17.

17.2 Dispute Representatives to seek resolution

- (a) If the Dispute is not resolved within 7 days after a Dispute Notice is given to the other Party, each Party must nominate one representative from its senior management to resolve the Dispute (**Dispute Representative**).
- (b) If the Dispute is not resolved within 30 days of the Dispute being referred to the Dispute Representatives, then either Party may commence legal proceedings in an appropriate court to resolve the matter.

17.3 Performance of Obligations during Dispute

- (a) During the existence of any Dispute, the Parties must continue to perform all of their obligations under the Contract without prejudice to their position in respect of such Dispute, unless the Parties otherwise agree.

17.4 Urgent Interlocutory Relief

- (a) Nothing in this clause 17 prevents a Party from seeking any urgent interlocutory relief which may be required in relation to the Contract.

18 GST

For the purposes of this clause a word or expression used in this clause which is defined in the GST Law has the same meaning in this clause 18.

18.1 GST

- (a) Unless stated otherwise, all amounts payable under the Contract are exclusive of GST.
- (b) Xpanse shall, when making a claim for payment, render a Tax Invoice to the Client.
- (c) Notwithstanding any contrary provision in the Contract, the Client is not obliged to make any payment under the Contract unless Xpanse has provided a Tax Invoice in respect of the Taxable Supply attributable to that payment.

18.2 Reimbursements

If any payment to be made to a Party under or in accordance with the Contract is a reimbursement or indemnification of an expense or other liability incurred or to be incurred by that Party (**Reimbursement**), then the amount of the payment must be reduced by the amount of any input tax credit to which that Party is entitled for that Reimbursement, such reduction to be effected before any increase in accordance with clause 18.3.

18.3 Adjustment for GST

- (a) If a Supply under or in connection with the Contract constitutes a Taxable Supply, the Xpanse may recover from the Recipient an amount on account of GST in addition to any payment or other consideration for the Supply.
- (b) The additional amount is equal to the Value for the Supply multiplied by the prevailing GST Rate.
- (c) The Recipient must pay that additional amount at the same time and in the same manner as the GST exclusive consideration is payable or to be provided for that Supply.

19 GENERAL

19.1 Further assurances

Each Party must do or cause to be done all things necessary to give effect to the Contract and refrain from doing anything which might hinder performance of the Contract.

19.2 Severance

If the whole or any part of a provision of the Contract is invalid, illegal or unenforceable, then that provision will be severed from the Contract and will not affect the validity or enforceability of the remaining provisions of the Contract.

19.3 Waiver

The failure or delay by a Party to exercise any of its rights conferred by the Contract will not operate as a waiver of its rights and will not prevent that Party from subsequently enforcing any right or treating any breach by the other Party as a repudiation of the Contract.

19.4 Successors and assigns

The Contract will bind and endure to the benefit of the Parties and their respective successors and permitted assignees.

19.5 Governing law

The Contract will be governed by and construed according to the laws of Western Australia. The Parties submit themselves exclusively to the courts of competent jurisdiction in that State and the courts of appeal in relation to any Disputes arising from or relating to the Contract.

19.6 Relationship of Parties

Xpanse is an independent contractor, provider and supplier. The Contract does not:

- (a) constitute a partnership or a joint venture between the Parties;
- (b) authorise a Party to assume or create any obligations on behalf of another Party except as specifically permitted under the Contract; or
- (c) create an employment relationship between the Client and Xpanse Personnel of employer..

ANNEXURE A – PRODUCT TERMS & CONDITIONS

20 PRODUCT ORDERS

- (a) A Client wishing to place an order for Product shall submit a Purchase Order to Xpanse referencing the Xpanse Quote number.
- (b) The price payable for the Products shall be that specified in the Quote unless such price is subject to alteration in accordance with a formula agreed in writing by the Parties.
- (c) All orders for Products are subject to acceptance by Xpanse.
- (d) Xpanse may reject any order placed by the Client if there is an insufficient supply of Products, or other circumstances which prevents Xpanse being able to fulfil the Client's order.
- (e) Xpanse will not be bound by any terms attaching to the Client's order and, unless those terms are expressly agreed to in writing by Xpanse, the Client agrees that those terms are excluded.

21 DELIVERY

- (a) Delivery times advised to the Client are estimates only and Xpanse will not be liable for any loss, damage, or delay suffered or incurred by the Client or its customers arising from early, late or non-delivery of the Products.

21.2 Delivery of Products

- (a) Delivery of the Products shall be made to the Client's site address or nominated address at time of order.
- (b) Xpanse will provide a minimum of 24 hours' notice of the date of delivery (**Delivery Date**).
- (c) The Client shall make all arrangements necessary to take delivery of the on the Delivery Date.
- (d) Clients must inspect all goods upon delivery and notify Xpanse immediately of any damage or discrepancy with the delivered Products.
- (e) Xpanse may deliver the Products by separate installments.
- (f) Each separate installment may be invoiced and paid for in accordance with the provisions of the Contract.
- (g) The failure of Xpanse to deliver shall not entitle either Party to repudiate the Contract.
- (h) The Client may not request a change of delivery address once an order has been placed without consent from Xpanse.
- (i) Xpanse reserves the right to charge an additional storage fee should the Client not accept delivery of the Products within 3 days of the Xpanse proposed Delivery Date.

21.3 Returns

- (a) Returns under any circumstances, including identification of defect upon delivery, shall be subject to the particular terms and conditions of the manufacturer of those Products.
- (b) The provisions of this clause 21 do not extend to any Products which have been added to, varied, or otherwise modified by, any person other than Xpanse.
- (c) Products cannot be returned due to a change of mind or as a result of incorrect ordering by the Client.

22 SOFTWARE

- (a) To the extent that a Product supplied under the Contracts is a software product then, in addition to these Standard Terms and Conditions, that Product will be supplied subject to the License Agreement applicable to it.
- (b) The License Agreements may be packaged with the software, may be separately provided to the Client for execution or may require on-screen acceptance by the Client. The Client agrees to use the software in accordance with the License Agreement.
- (c) Where the term "supply" is used in these Standard Terms and Conditions to refer to a software Product, such term means the sale and purchase of the license to use that software Product.
- (d) Xpanse will not be liable for any loss or damage resulting from spam, viruses or other malicious software that may become present.
- (e) The Client must use any Software in accordance with:

- (i) the end user License Agreement or other license agreement governing the product for which the Software is provided; or
 - (ii) the end user License Agreement packaged with the Software or any terms expressly set out in writing by Xpanse.
- (f) The following restrictions apply if no License Agreement is packaged with the Software:
- (i) the Software may not be reverse engineered, de-compiled or disassembled to the extent this restriction is permitted by law;
 - (ii) the Software may not be loaned, leased, sold, sublicensed or otherwise distributed to another user;
 - (iii) to the maximum extent permitted by law the Software is provided “as is” without warranty of any kind; and,
 - (iv) The Software owner (or Xpanse if instructed by the Software owner) may terminate the Client’s use of the Software if the Client does not comply with these restrictions.

23 TITLE, RISK AND INSURANCE

- (a) Products supplied by Xpanse to the Client will be at the Client’s risk immediately upon:
 - (i) delivery of the Products to the Client, the Client’s agent, or into the Client’s custody or control; or
 - (ii) collection of the Products by the Client’s nominated carrier or agent.
- (b) Risk in the Products will remain with the Client at all times unless Xpanse retakes possession of the Products in accordance with clause 23(f).
- (c) Title in the Products (other than Software) supplied by Xpanse will remain with Xpanse and will not pass to the Client until Xpanse has been paid all monies due and owing to it by the Client in relation to any account.
- (d) Title to products which are Software remains with Xpanse and/or the applicable third party licensor(s) at all times.
- (e) Until the Products have been paid for:
 - (i) the Client must (where practicable) properly segregate and store the Products in such manner as to clearly indicate that they are the property of Xpanse; and
 - (ii) in the event that the Client incorporates the Products into any other property used, owned or leased by the Client, then such property of the Client shall be referred to as finished goods;
 - (iii) If any monies owing by the Client to Xpanse are overdue then Xpanse may by its agents or employees enter upon the Client’s premises and recover and resell the finished goods;
 - (iv) The Client shall not be entitled to sell, transfer or otherwise dispose of the Products without the consent of Xpanse until payment of the Contract Price is made in full by the Client to Xpanse.
- (f) If the Client has breached these Standard Terms and Conditions, the Client authorises Xpanse, at any time, to enter onto any premises upon which Xpanse’s Products are stored to enable Xpanse to:
 - (i) inspect the Products; and/or
 - (ii) reclaim the Products.
- (g) The Client acknowledges that in the case of Software, any refusal or failure to pay may result in cancellation of the license to use the Software.
- (h) The Client agrees that the provisions of this clause 23 apply despite any arrangement under which Xpanse grants credit to the Client.

24 WARRANTY IN RELATION TO PRODUCTS

- (a) Products are covered by the manufacturer’s warranty. To the extent permitted by law, Xpanse’s entire responsibility with respect to warranties for the Products is to pass on to the Client the benefit of any such warranties.
- (b) Subject to clause 24(d) Software is not warranted by Xpanse under these Standard Terms and Conditions. Such Software is warranted in accordance with the relevant License Agreements governing their use.
- (c) To the extent permitted by law, the manufacturer’s warranties referred to in clause 24(a) are in substitution for all other terms, conditions and warranties, whether implied by statute or otherwise (including implied warranties with

respect to merchantability and fitness for purpose) and all such terms, conditions and warranties are expressly excluded.

- (d) Certain legislation may imply warranties or conditions or impose obligations upon Xpanse which cannot be excluded, restricted or modified except to a limited extent. These Standard Terms and Conditions must be read subject to those statutory provisions. If those statutory provisions apply, to the extent to which Xpanse is able to do so, its liability will be limited, at its option to:
- (i) the replacement of the products; or
 - (ii) resupply of equivalent products;
 - (iii) repair of the products;
 - (iv) payment of the cost of replacing the Products or acquiring equivalent Products; or
 - (v) the payment of the cost of having the Products repaired, and
 - (vi) Xpanse does not warrant that repair facilities or parts will be available in respect of any of the Products.

25 INDEMNITY

25.1 Exclusion of Liability

- (a) The Client agrees that, to the full extent permitted by law, Xpanse, nor any person purporting to act with the authority of Xpanse has given, any express or implied condition, warranty or representation whatsoever in favour of the Client:
- (i) as to the condition or quality of the Products including, without limitation, latent and other defects and whether or not discoverable by Xpanse or the Client;
 - (ii) as to the suitability or fitness for ordinary or any special use or purpose of the Products,
- and Xpanse's liability for any breach of implied conditions, warranties or rights not excluded will be limited to the extent identified in 24(d).

25.2 Indemnity

- (a) The Client shall indemnify Xpanse and Xpanse's Personnel against any Claims of any nature whatsoever, and whether direct, indirect or consequential, in connection with or arising out of any or all of the following:
- (i) breach by the Client or the Client's directors, employees, subcontractors and agents, of any warranties, terms or conditions of Contract;
 - (ii) incorrect application of Products by the Client or information given by the Client to anyone in relation to the Products;
 - (iii) any loss or damage to the Products or to property of any person (including the Client's property) or for any injury to, or death, illness or incapacitation of any person, arising from, contributed to or caused by or in relation to the Client's use, maintenance, possession or storage of the Products and whether occasioned by Xpanse's negligence or otherwise;
 - (iv) delivery, selection, purchase, acceptance or rejection, ownership, possession, use, repair, maintenance, storage, or operation of the Products, and by whomsoever used or operated (except where used by Xpanse or any person on behalf of Xpanse);
 - (v) any reasonable action taken by Xpanse to remedy a default of Contract by the Client or the Client's directors, employees, subcontractors and agents and invitees; or
 - (vi) all costs and legal expenses, stamp duties, debt collectors fees and any other expenses, taxes or costs (on a full indemnity basis) reasonably incurred by Xpanse in order to recover monies owing by the Client or Products for which payment has not been received,
- (b) This indemnity survives termination of Contract by either party for any reason.
- (c) It is not necessary for Xpanse to incur expense or make payment before enforcing a right of indemnity conferred by the Contract.

26 LIEN AND STOPPAGE IN TRANSIT

- (a) Where Xpanse has not received or been tendered the whole of the Contract Price, or the payment has been dishonored, then Xpanse shall have:

- (i) a lien on the Products;
- (ii) the right to retain the Products;
- (iii) a right of stopping the Products in transit whether or not delivery has been made or ownership has passed;
- (iv) a right of resale; and
- (v) the foregoing right of disposal,

provided that the lien of Xpanse shall continue despite the commencement of proceeding or judgment for the price having been obtained.

27 PASS-THROUGH TERMS & CONDITIONS

Hardware, software and support purchases may be subject to additional warranty, licensing and support Terms & Conditions as set out by the relevant manufacturer. These Terms & Conditions shall be passed through Xpanse, from the manufacturer to the Client.

27.1 NetApp

For NetApp hardware, software and support purchases, the Client will also be subject to, where relevant:

- (a) NetApp Channel End User Terms - <http://media.netapp.com/documents/channel-end-user-terms-australia.pdf>
- (b) NetApp Support Services Terms - <http://media.netapp.com/documents/support-services-terms.pdf>

ANNEXURE B – SERVICE TERMS & CONDITIONS

28 SERVICES

28.1 Services

The Client appoints Xpanse to supply the Services to the Client for the Term and Xpanse agrees to perform the Services, for the Contract Price in accordance with the Contract.

28.2 Plant and Equipment

- (a) The Parties shall supply and maintain all such Client Plant and Equipment and Xpanse Plant and Equipment as detailed in the Services Agreement which is necessary to enable Xpanse to perform the Services and carry out their respective obligations under the Contract and must each arrange transportation to the Site for all such plant and equipment.

28.3 Personnel

- (a) Xpanse shall provide such Xpanse Personnel as required to perform the Services in accordance with its obligations under the Contract.
- (b) If for whatever reason, Xpanse is unable to perform all or part of the Services, then Xpanse may in its sole discretion engage a third party to perform those Services.
- (c) The Client shall provide, subject to clause 29.1 such Client Personnel required by Xpanse to enable Xpanse to perform the Services.

28.4 Access to Site and Client Information

- (a) The Client shall grant to Xpanse and Xpanse's Personnel access to the Site, Facilities, Client IP and the Data on and from the Commencement Date to enable Xpanse to carry out the Services.
- (b) Access to the Site will confer upon Xpanse the right to use any Facilities connected with Services.

28.5 Change Requests

- (a) Either Party may request revisions (including deletions or additions) to any aspect of the Contract by giving a written Change Request to the other Party.
- (b) If a change request is issued by a party under clause 28.5(a), the receiving Party must notify the issuing Party whether it accepts or rejects the Change Request within five working days of receipt of the Change Request.
- (c) If a Change Request:
- (i) is rejected, each Party must continue to perform its obligations under the Contract; or
 - (ii) is accepted, the change takes effect from the date the Change Request is signed by both Parties (or any other agreed date specified in the Change Request).
- (d) The Client may, by issuing a Change Request, request Xpanse provide additional services in relation to the Contract. Subject to Xpanse accepting the Change Request and, availability of its Personnel, Xpanse must provide the additional services in accordance with the terms of the Contract. Xpanse will advise the Client of the charges, costs, expenses, fees and the like, if any, that will apply in respect of the additional services and the methodology of calculation.

29 CLIENT OBLIGATIONS AND WARRANTIES

29.1 Client's Obligations

- (a) The Client shall ensure that all Client Personnel:
- (i) are appropriately qualified and experienced for the duties that they are to perform;
 - (ii) comply with all Site policies, procedures and terms of access;
 - (iii) comply with all Laws and OSH Legislation; and
 - (iv) do not interfere with or disrupt Xpanse in the provision of Services.

29.2 Client's Warranties

The Client warrants that:

- (a) if it is not the Client, it has the power and authority to enter into the Contract on behalf of the Client and will indemnify Xpanse for any breach of the Contract by the Client or the Client's Personnel;
- (b) at the time of entering into the Contract the Client is not relying on any representation made by Xpanse which has not been stated expressly in the Contract, or any descriptions of specifications contained in any other document, including catalogues or publicity material which Xpanse has produced;
- (c) the Client will conduct such tests and computer virus scanning as may be necessary to ensure that data uploaded by the Client onto or downloaded by the Client does not contain any malicious software and will not in any way interrupt the performance of the Services;
- (d) it will keep secure any passwords used with the Services;
- (e) all information, documentation, records and Data supplied to Xpanse is at all times accurate, complete, sufficient and suitable to enable Xpanse to perform the Services; and
- (f) all Plant and Equipment supplied by it is of merchantable quality, properly maintained and fit for its intended purpose.

30 INSURANCE

30.1 Client insurances

The Client is required, at its own expense, to effect and maintain the insurances set out in the Service Agreement for the duration of the Term and any additional period specified in this clause **30** in respect of risk or occurrences arising, or which may arise, out of the performance of the Client's obligations under the Contract.

30.2 Plant and equipment

- (a) The Client must maintain insurance for all Client Plant and Equipment and all additional Plant and Equipment which Xpanse may use in the performance of the Services.
- (b) The insurance policy must:
 - (i) cover all loss and damage to the Plant and Equipment for an amount not less than the market value of the Plant and Equipment;
 - (ii) be endorsed to indemnify Xpanse and its employees, agents, consultants and contractors for their respective rights and interests arising out of the performance of the Contract;
 - (iii) include a cross liability clause in which the insurer agrees to consider each of the parties comprising the insured as a separate entity and that the insurance applies as if a separate policy has been issued to each of the insured parties; and
 - (iv) waive all express or implied rights of subrogation or action against any of the persons insured under the policy arising out of the performance of the Contract.

30.3 Other insurances

The Client must, at its expense, effect and maintain any other insurance which is required by law as applicable to the Client and its operations.

30.4 Proof of insurance

If required by Xpanse at any time, the Client must lodge with Xpanse certificates of currency to evidence the existence of the insurance policies required to be obtained by the Client and under the Contract.

30.5 Obligations of Client

The Client must:

- (a) not do or cause to be done anything which would in any way void any insurance policy, or reduce the effectiveness of any insurance policy mentioned in this clause **30**; and
- (b) immediately advise Xpanse of any change or cancellation of an insurance policy referred to in this clause **30**.

30.6 Failure to maintain insurance

If the Client fails to, or fails to ensure its sub-contractors, effect or keep in force any of the insurances which it is required by clause 30 to effect, Xpanse may, but is not obliged to:

- (a) effect and keep in force any such insurance and pay such premiums as may be necessary for that purpose and recover the costs of such insurances as a debt due and payable from the Client; or
- (b) terminate the Contract.

31 INDEMNITY BY THE CLIENT

- (a) The Client will indemnify and keep indemnified Xpanse and Xpanse's Personnel against any liability, loss, damage, claim, suit, action, demand, expense or proceedings of any nature whether arising under statute or at common law in respect of any:
 - (i) Intellectual Property Rights Claim;
 - (ii) personal injury, including illness or disability, or death of any and all persons;
 - (iii) loss or destruction of or damage to or loss of use of all property, real or personal, including but not limited to the property of the Client;
 - (iv) breach by the Client or the Client's Personnel of any of the Client's obligations (including any warranty) under the Contract;
 - (v) unlawful, reckless, negligent act or omission or wilful misconduct by the Client or the Client's Personnel; or
 - (vi) a claim demand, suit, action or proceeding by a third party arising from any act of omission of the Client or the Client's Personnel;
 - (vii) the Client's obligations under the Contract; and
 - (viii) other Client obligations directly or indirectly associated with the Contract.
- (b) Each indemnity in the Contract is a continuing obligation separate and independent from the Client's other obligations and survives termination of the Contract.
- (c) It is not necessary for Xpanse to incur expense or make payment before enforcing a right of indemnity conferred by the Contract.

32 STAFF

- (a) The Client undertakes that it will not:
 - (i) employ; or
 - (ii) attempt to employ; or
 - (iii) purchase any Products or Services directly from any staff member of Xpanse for the following periods:
 - (iv) during the entire time the Client receives the Services from Xpanse;
 - (v) 6 months following the provision of the Services by Xpanse; and
 - (vi) 6 months following the cessation of the staff member's employment with Xpanse.
- (b) The restriction in clause 32(a) applies to the Client acting:
 - (i) either alone or in partnership or association with another person or business;
 - (ii) as principal, agent, representative, director, officer or employee;
 - (iii) as member, shareholder, debenture holder, note holder or holder of any other security;
 - (iv) as trustee of or as a consultant or adviser to any person (other than the Client); or
 - (v) in any other capacity.
- (c) Geographical Restraint

The agreement by the Client in clause 32(a) applies to the Client in any of:

- (i) any State of Australia;
 - (ii) within Western Australia; or
 - (iii) any capital city in Australia.
- (d) The Client and Xpanse each acknowledge that the restriction in this clause 32 is a fair and reasonable restriction on the trade of the Client.

33 ACCESS AND BACK UP OF DATA

- (a) The Client shall provide Xpanse with sufficient, free and safe access to the Client Data, the Client's computer systems, networks and facilities in the event that Xpanse provides the Services onsite or remotely.
- (b) The Client must keep adequate backup copies of Data, databases and application programs and agrees that the Client is solely responsible for any and all restoration and reconstruction of lost or altered files, data or programs.

34 OCCUPATIONAL SAFETY AND HEALTH

- (a) Occupational safety and health is recognised and accepted by Xpanse as of primary importance.
- (b) Xpanse warrants that it is familiar with and has the capability and resources to comply with the OSH Legislation applicable or relevant to the Services.
- (c) Xpanse will:
 - (i) co-operate with any other contractors or other persons engaged in or associated with the business of the Client in order to maintain uniform safety and industrial practices; and
 - (ii) co-operate with the Client to enable the Client to comply with its obligations under all relevant OSH Legislation.
- (d) The Client shall ensure that it and the Client's Personnel comply with:
 - (i) OHS Legislation;
 - (ii) Xpanse's OHS requirements;
 - (iii) the general safety health and environmental conditions notified to the Client by Xpanse from time to time;
 - (iv) the specific safety health and environmental conditions notified to the Client by Xpanse from time to time; and
 - (v) any other directions to the Client regarding health, safety or the environment issued by Xpanse from time to time.
- (e) The Client must ensure that the Client's Personnel undertake any training:
 - (i) required by the Client from time to time; or
 - (ii) required by Law.
- (f) The Client must ensure that the Client's Personnel are adequately supervised to ensure their health and safety and that of other persons on the Site at all times while Xpanse is involved in the provision of Services.
- (g) If, at any time, Xpanse is of the opinion that the Client is in breach of OHS Legislation, Xpanse will notify the Client in writing of the alleged breach and Xpanse may suspend the Services in whole or in part.

35 SUBCONTRACTING

- (a) The Client acknowledges that Xpanse may, without the prior written approval of the Client, subcontract any of the Services.
- (b) In the event that Xpanse sub-contract the Services, Xpanse shall give to the Client:
 - (i) written particulars of the Services to be subcontracted;
 - (ii) the name and address of the proposed sub-contractor; and

- (iii) any other information which the Client may reasonably request, including the proposed subcontract documents without prices.

36 SUSPENSION

Suspension by Xpanse:-

- (a) Xpanse may, by providing prior notice in writing to the Client, suspend all or any part of the Services:
 - (i) for the protection or safety of any person or property; or
 - (ii) for any other reason that Xpanse, in its absolute discretion, considers appropriate.
- (b) If Xpanse provides notice under clause 36, then:
 - (i) the Services will be suspended with effect on and from the date of that notice;
 - (ii) the Client must comply with the directions stated in the notice and take all reasonable actions to minimise the effects and costs of any such suspension; and
 - (iii) the suspension of the Services by Xpanse will not constitute a breach of the Contract.