

PART A: DEFINITIONS, INTERPRETATION

1. DEFINITIONS AND INTERPRETATION

1.1 Definitions

The following definitions apply in these Terms

"ACDC" means the Australian Commercial Disputes Centre Limited ACN 003 042 840.

"Agreed Software Defect Resolution Period" for a particular Severity Level has the meaning set out in the Order Form.

"Agreement" means this agreement for the supply of the Licensed Program and Documentation, and provision of the Support Services, by Oban to the Customer, as comprised by the Order Form, Attachments and these Standard Terms and Conditions.

"APRA" means the Australian Prudential Regulation Authority.

"ASIC" means the Australian Securities and Investments Commission.

"Attachment" means an attachment to the Order Form.

"Business Day" means a day that is not a Saturday or Sunday or public holiday in the city or State specified in the Order Form.

"Cloud Services" means the provision of gateway software and linkage, together with associated services, more particularly as set out in the Order Form

"Commencement Date" means the date specified in the Order Form.

"Confidential Information" in relation to a party, means information or data in any form or media given by or acquired from the party, directly or indirectly, under or in relation to this Agreement that:

- (a) is by its nature confidential;
- (b) is designated by the disclosing party as confidential; or
- (c) the receiving party knows or reasonably ought to know is confidential,

but does not include information that:

- (d) is published or has otherwise entered the public domain other than through a breach of this Agreement;
- (e) is obtained from a third party who has no obligation of confidentiality to the disclosing party; or
- (f) is independently developed or obtained other than through a breach of this Agreement.

"Configuration Services" means any installation, implementation, configuration, customisation or integration services performed by Oban in connection with or related to the Licensed Program or any of its components for the Customer, more particularly as set out in the Order Form.

"Delivery Date" means the date specified in the Order Form.

"Documentation" means the technical, user and other manuals prepared and distributed by Oban which describe and explain the functionality of the Licensed Program and includes any modified versions, any supplements, and any part of these materials and all copies.

"Employer" means an organisation that provides employee and superannuation contribution data which is sent to, processed by and/or delivered through the Licensed Program to Customer.

"Fees" means the fees specified in the Order Form for the supply of the Licenced Program and the provision of the Support Services.

"Functional Specifications" means the technical and functional specifications of the Licensed Program as specified in Order Form.

"Hardware and Software Specifications" means the specifications specified in the Order Form for the hardware, software and operating systems with which the Licensed Program will operate.

"Implementation Date" means the date on which the Licensed Program is installed and implemented in the Customer's production environment and becomes fully live and operational.

"Intellectual Property" means all present and future rights conferred by statute, common law or equity in or in relation to copyright, trade marks, designs, patents, circuit layouts, plant varieties, business and domain names, inventions and Confidential Information, and other results in the industrial, commercial, scientific, literary or artistic fields.

"IP Claim" means a claim or proceeding alleging that the Licensed Program infringes (or would infringe) another person's Intellectual Property.

"Licensed Program" means the computer or software program specified in the Order Form, and more particularly described in the Order Form, and each component thereof, together with any Updates, New Releases or authorised enhancements or modifications thereof.

"Media" means the tangible property on or in which the Licensed Program and the Documentation is delivered to the Customer.

"Moral Rights" means any of the rights described in Article 6b of the *Berne Convention for the Protection of Literary and Artistic Works* 1886, being *droit moral*, and other analogous rights arising under statute, including the *Copyright Act 1968* (Cth), that exist, or that may come to exist, in Australia.

"New Releases" means software produced primarily to extend, alter or improve the Licensed Program by providing additional functionality or performance enhancement (whether or not defects in the Licensed Program are also corrected) while still retaining its original designated purpose.

"Normal Business Hours" has the meaning given in the Order Form.

"Order Form" means the document, including Attachments, setting out the Customer's precise requirement under the Agreement.

"Performance Rebates" means, if stipulated in the Order Form, the rebate of the Fees by Oban to Customer if it fails to reach the Service Levels which apply to the provision of the Support Services.

"Permitted Purpose", for a party, means to exercise its rights, and to comply with its obligations, under this Agreement.

"Personal Information" has the meaning given to it by the *Privacy Act 1988* (Cth).

"PPSA" means the *Personal Property Securities Act 2009* (Cth).

"PPS Security Interest" means a security interest that is subject to the PPSA.

"Records" means documents and other records (including all copies) in any form or media (whether or not visible) that contain, refer to, or are based on, any Confidential Information or any analysis of it.

"Security Interest" means:

- (a) a PPS Security Interest;
- (b) any other mortgage, pledge, lien or charge; or
- (c) any other interest or arrangement of any kind that in substance secures the payment of money or the performance of an obligation, or that gives a creditor priority over unsecured creditors in relation to any property.

"Service Level Agreement" means the service performance guarantees contained in the Order Form.

"Service Levels" means the minimum level at which the Support Services must be provided by Oban, as specified in the Service Level Agreement.

"Services" means the Configuration Services, the Support Services, the Cloud Services and any other services to be provided pursuant to this Agreement or a Statement of Work, more specifically as set out in the Order Form.

"Severity Level" means Severity Level 1, Severity Level 2, Severity Level 3 or Severity Level 4 as the context requires.

"Severity Level 1" has the meaning given to that term in the Order Form.

"Severity Level 2" has the meaning given to that term in the Order Form.

"Severity Level 3" has the meaning given to that term in the Order Form.

"Severity Level 4" has the meaning given to that term in the Order Form.

"Software Defect" means any defect in the Licensed Program identified by the Customer and assessed by Oban in accordance with this Agreement.

"Software Defect Manager" means the individual specified in the Order Form, or as otherwise notified by Oban to the Customer from time to time.

"Software Defect Rectification Request" means the Customer's logging of an incident in accordance with the requirements of the Order Form.

"Special Conditions" means additional contractual requirements set out in the Order Form which take priority over any other provision of the Agreement.

"Support Services" means the support services for the Licensed Program provided by Oban to the Customer, more particularly as set out in the Order Form.

"Tax" means a tax, duty, charge, deduction or withholding, however it is described, that is imposed by law or by a Government Agency, together with any related interest, penalty, fine or other charge.

"Term" means, at any time, the Initial Term and any renewal of it under clause 2.1 effective at that time.

"Updates" means software which has been produced primarily to overcome defects in, or to improve the operation of, the Licensed Program without significantly altering the Licensed Program specifications whether or not the Licensed Program has also been extended, altered or improved by providing additional functionality or performance enhancement.

1.2 **Rules for interpreting this Agreement**

- (a) Headings are for convenience only, and do not affect interpretation. The following rules also apply in interpreting this Agreement, except where the context makes it clear that a rule is not intended to apply.
- (b) A word which suggests one gender includes the other genders.
- (c) If a word is defined, another part of speech has a corresponding meaning.
- (d) If an example is given of anything (including a right, obligation or concept), such as by saying it includes something else, the example does not limit the scope of that thing.
- (e) The word **"agreement"** includes an undertaking or other binding arrangement or understanding, whether or not in writing.

1.3 **Business Days**

If the day on or by which a person must do something under this Agreement is not a Business Day:

- (a) if the act involves a payment that is due on demand, the person must do it on or by the next Business Day; and
- (b) in any other case, the person must do it on or by the previous Business Day.

1.4 **Precedence for this Agreement**

- (a) The provisions of this Agreement are to be read in the following order of precedence:
 - (i) the Special Conditions;
 - (ii) the Attachments to the Order Form;
 - (iii) these Terms and Conditions; and
 - (iv) any document incorporated by reference.
- (b) If a conflict occurs between any of these provisions then the document lower in the order of precedence will be read down, where possible, to resolve the conflict.

2. **TERM**

2.1 **Term and renewal**

The rights and obligations under this Agreement begin on the Commencement Date and will continue unless and until the Agreement is terminated or otherwise expires.

PART B: ROLE OF ORDER FORM

3. **ORDERING PROCEDURE FOR SERVICES**

The Customer's precise requirements for goods and services are as set out in the applicable Order Form. An Order Form is not binding until signed by both Parties. These terms and conditions apply to the Order Form and form part of a single contract between the Parties but, for the avoidance of doubt, the terms of the Order Form, including the Special Conditions, take priority over these terms and conditions.

PART C: SUPPLY OF SOFTWARE

4. **DELIVERY AND INSTALLATION**

4.1 **Overview**

The Customer acknowledges and agrees that the Licensed Program, Documentation and Services are provided by Oban subject to the terms of this Agreement, more particularly as set out in the Order Form.

4.2 **Delivery**

Oban will deliver to the Customer by the Delivery Date:

- (a) the number of copies of the Licensed Program in object code format; and
- (b) the number of copies of the Documentation,
specified in the Order Form.

4.3 **Installation**

The Customer may either:

- (a) install the Licensed Program; or

5. **LICENCE**

Where stipulated in the Order Form, Oban grants the Customer a non-exclusive, non-transferable right to use the Licensed Program and Documentation on the terms set out in this Agreement.

6. **CUSTOMER OBLIGATIONS**

6.1 **Use of Licensed Program and Documentation**

The Customer:

- (a) must not copy, reproduce, translate, adapt, vary or modify the Licensed Program or Documentation except as expressly authorised by this Agreement;
- (b) may copy or reproduce the Licenced Program or Documentation for its own internal business purposes only;

- (c) must ensure that all reproductions, adaptations and copies of the Licensed Program or Documentation made by or for it bear notice of Oban's ownership of copyright;
- (d) must not reverse assemble or reverse compile the whole or any part of the Licensed Program;
- (e) must use reasonable endeavours to supervise and control the use of the Licensed Program and Documentation in accordance with the terms of this Agreement and to ensure that the Licensed Program and Documentation is protected from misuse, damage, destruction or any form of unauthorised use;
- (f) must limit the use of the Licensed Program to the number of users and subject to any restrictions set out in this Agreement;
- (g) may only use the Documentation in connection with the operation of the Licensed Program;
- (h) must not create or permit to exist a Security Interest over any of its rights under the licence granted under clause 5, or over any of the Licensed Program or the Documentation, or any modifications to, or enhancements of, the Licensed Program or the Documentation (including Updates and New Releases);
- (i) acknowledges that the Licensed Program and Documentation is valuable Confidential Information of Oban and the Customer must not disclose such information to any third party, except to an Authorised Person in accordance with clause 19.2;
- (j) must ensure its employees, sub-contractors and other agents who have authorised access to the Licensed Program or Documentation are made aware of and comply with the terms of this Agreement;
- (k) must not provide or otherwise make available the Licensed Program or Documentation in any form to any person other than those referred to in paragraph (j) without the written consent of Oban; and

6.2 **Additional acknowledgements and obligations**

- (a) Except to the extent that Oban notifies the Customer otherwise, the Customer acknowledges that the Documentation contains sufficient information for its use of the Licensed Program on the terms set out in this Agreement.
- (b) The Customer must maintain accurate records of its use of the Licensed Program and Documentation and shall provide these records to Oban upon fourteen (14) days prior written notice. Oban may only request these records once in any 12-month period. If Oban has reasonable grounds to question their accuracy, Oban may request that Customer, at Customer's expense, provide an independent audited report of its use of the Licensed Program and compliance with the applicable provisions of this Agreement

6.3 **Copyright Act provisions preserved**

No restrictions on the Customer's right to copy, modify or reverse engineer the Licensed Program are intended to exclude or limit the operation of section 47B(3), 47C, 47D, 47E or 47F of the Copyright Act 1968 (Cth) and the restrictions set out in this Agreement will be read down to the extent necessary to give effect to those sections.

PART D: SUPPORT SERVICES AND MAINTENANCE

7. **SUPPORT SERVICES**

7.1 **Provision of Support Services**

Where stipulated in the Order Form, Oban will provide the following support services to the Customer:

- (a) Telephone, email and other technical or interactive support 24 hours a day, seven days a week to the Customer in the form of consultation, assistance and advice on any aspect of the Licensed Program;
- (b) defect logging software for the purpose of:
 - (i) providing a mechanism for the Customer to record, review, monitor and report on any Licensed Program defects; and
 - (ii) generating automated e-mails to advise the Customer of actions which can be taken to address or counter specific Licensed Program defects;
- (c) promptly reviewing any Software Defect Rectification Request logged by the Customer and assigning it an appropriate Severity Level;
- (d) responding to any Software Defect Rectification Request by promptly diagnosing and rectifying such Software Defect; and
- (e) where any Severity Level 1 Software Defect and/or Severity Level 2 Software Defect has not been resolved, or where Oban has assessed that the Severity Level 1 Software Defect and/or Severity Level 2 Software Defect is incapable of being resolved within the Agreed Software Defect Resolution Period, arranging for a suitably skilled representative of Oban to promptly attend the Customer's premises to rectify the relevant Software Defect.

7.2 **Service Levels**

Oban will provide the Support Services at or above a level which meets the Service Levels. If Oban fails to provide the Support Services at a level which at least meets the Service Levels, and such failure is not attributable to an act or omission of Customer in any material respect, it will be liable to pay to Customer the Performance Rebates.

8. **UPDATES AND NEW RELEASES**

8.1 **Supply of Updates and New Releases**

Where stipulated in the Order Form, Oban will provide Updates and New Releases to the Customer, free of charge, if:

- (a) the Updates or New Releases provide functions at least equal to the latest version of the Licensed Program then supplied to the Customer under this Agreement; and
- (b) Oban makes the Updates and New Releases commercially available.

8.2 **Update and New Release obligations**

If an Update or New Release is provided to the Customer under this clause:

- (a) the Customer is responsible for installing the Update or New Release;
- (b) this Agreement will apply to the Update or New Release as if it is the Licensed Program from the date it is made available to the Customer; and

- (c) the Customer must, at its cost, deliver all copies of its previous version of the Licensed Program to Oban, or deal with these copies according to Oban's directions.

PART E: CLOUD SERVICES

9. PROVISION OF CLOUD SERVICES

9.1 Services to be specified in Order Form

Where specified in the Order Form, Oban will:

- (a) deploy, configure and support the cloud hosted generic gateways services environment (multi-tenanted);
- (b) deploy, configure and support the cloud hosted specific registry services environments (single-tenanted); and/or
- (c) provide the on-premises Oban.Key which facilitates the secure premises to cloud linkage, and will assist with Customer deployment, configuration and support for this link software.

9.2 Security Standards to be specified in Order Form

In providing the Services, Oban will adhere to such information security standards as are specified in the Order Form.

10. CLOUD SUPPORT

Oban will provide such support for the ongoing Cloud Services as is specified in the Order Form.

11. OUT OF SCOPE

For the avoidance of doubt, the Order Form may specify certain activities which are out of scope.

PART F: GENERAL

12. FEES

12.1 Fees

- (a) The Customer must pay Oban the Fees within thirty (30) days of receiving a correctly rendered invoice from Oban.
- (b) Notwithstanding any clause to the contrary, the Customer is not entitled to use the Licensed Program or Documentation, or to receive the Configuration or Support Services, unless the Customer is current in its obligation to pay the Fees, provided that Oban first gives the Customer written notice of any late payment and Customer has failed to pay the Fees within ten (10) days of receiving such notice.

12.2 Payment Disputes

If the Customer disputes any of Oban's claims for payment:

- (a) the Customer must give Oban written notice of the disputed amount (with its reasons for the dispute);

- (b) the Customer may withhold the disputed amount but must pay Oban any undisputed amount; and
- (c) the parties must first use the procedures specified in clause 21 to attempt to resolve the dispute.

12.3 **No set-off**

The Customer may not set-off any amount that is or may become owing by Oban to the Customer against any amount owing by the Customer to Oban under this Agreement.

12.4 **Payment default**

- (a) The Customer must pay interest to Oban on each undisputed amount that is not paid when due, and on any disputed amount which is subsequently determined to be payable by the Customer if Customer fails to pay the undisputed amount within 7 days of such determination, from (and including) the day on which it falls due to (but excluding) the day on which it is paid in full, at the rate of 6% per annum. This interest must be paid on demand.
- (b) Interest on an unpaid (undisputed) amount:
 - (i) accrues daily;
 - (ii) is capitalised (if not paid) every 7 days; and
 - (iii) is calculated on the basis of the actual number of days on which interest has accrued and of a 365 day year.

This clause does not affect the Customer's obligation to pay each amount under this Agreement when it is due.

13. **GST**

13.1 **Payment of GST**

- (a) If a party (Supplier) makes a supply under or in connection with this Agreement in respect of which GST is payable, the recipient of the supply (Recipient) must pay to the Supplier, an additional amount equal to the GST payable on the supply (GST Amount).
- (b) If a party must reimburse or indemnify another party for a loss, cost or expense, the amount to be reimbursed or indemnified is first reduced by any input tax credit the other party is entitled to for the loss, cost or expense, and then increased in accordance with paragraph (a).
- (c) 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.
- (d) If the GST payable by a Supplier on any supply made under or in connection with this Agreement varies from the GST Amount paid or payable by the Recipient under paragraph (a) above 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 supply, then the Supplier will provide a corresponding refund or credit to, or will be entitled to receive the amount of that variation from, the Recipient.
- (e) Any payment, credit or refund under this clause is deemed to be a payment, credit or refund of the GST Amount payable under paragraph (a) above.

- (f) If an adjustment event occurs in relation to a supply, the Supplier must issue an adjustment note to the Recipient in relation to that supply within 14 days after becoming aware of the adjustment.

13.2 **Tax invoice within 28 Days**

Oban must, within 28 Business Days of request from the Customer, issue a tax invoice (or an adjustment note) to the Customer for any supply by Oban for which GST is payable under or in connection with this Agreement and must include in the tax invoice (or adjustment note) the particulars required by the GST Law.

14. **RISK TO MEDIA**

Risk of loss of, or damage to, the Media passes to the Customer on its delivery to the Customer.

15. **INTELLECTUAL PROPERTY**

15.1 **Acknowledgments and obligations**

The Customer acknowledges and agrees that:

- (a) Oban is, and will remain, the owner of all Intellectual Property in the Licensed Program and the Documentation and in any modifications to, or enhancements, of, the Licensed Program or the Documentation (including Updates and New Releases);
- (b) the Customer has no rights or interests in the Licensed Program or the Documentation or in any modifications to, or enhancements of, the Licensed Program or the Documentation (including Updates and New Releases), other than those expressly granted to it by this Agreement;
- (c) the Customer must not sub-license, resell or otherwise distribute the Licensed Program or the Documentation; and
- (d) the Customer must not use the Licensed Program as part of a business network or in connection with a service bureau operation, save that Oban acknowledges and agrees that the Licensed Program forms part of a network for the benefit of Employers which involves the transfer of SuperStream compliant member and contributions data from the Employers' payroll systems to Customers' internal systems for processing. For the avoidance of doubt, the foregoing restriction does not apply to use of the Licensed Program by the Customer as part of any type of information technology or computer network.

15.2 **Warranty and Indemnity for Infringement**

Oban warrants that the Licensed Program and any Updates or New Releases, and any use thereof by the Customer in accordance with the terms of this Agreement, will not infringe the Intellectual Property of any person. Oban will fully indemnify the Customer and each of its employees, agents and contractors against any loss (including without limitation loss of profit and other consequential loss) arising out of any IP Claim.

15.3 **Indemnity Offered Regardless of Institution of Proceedings**

The indemnity referred to above will be granted whether or not legal proceedings are instituted and, if such proceedings are instituted, irrespective of the means, manner or nature of any settlement, compromise or determination.

15.4 **Management of IP Claims**

- (a) Customer will notify Oban as soon as practicable of any IP Claim.
- (b) Oban must do anything (including execute any document), and must ensure that its employees and agents do anything (including execute any document) that Customer may request to assist Customer in the defence, settlement or compromise of any IP Claim against Customer or its personnel, agents or contractors.
- (c) Without prejudice to Customer's right to defend an IP Claim, Oban must, if requested by the Customer, and at Oban's expense, conduct the defence of an IP Claim. Oban must follow the Customer's directions relating in any way to that defence or to negotiations for settlement of the claim.
- (d) Customer will, if requested by Oban and at Oban's expense, provide Oban with reasonable assistance in conducting the defence of a claim pursuant to paragraph (c) above. Oban will reimburse Customer for all verified expenses incurred pursuant to this subclause within 10 Business Days of receipt of Customer's written demand.

15.5 **Oban's Obligations**

If it is determined by any independent tribunal of fact or law or if it is agreed between the parties to the dispute that an infringement of Intellectual Property has occurred in relation to the Licensed Program, and without limiting the generality of the foregoing subclauses and without limiting any other right or remedy of Customer arising out of the infringement, Oban will at its sole expense:

- (a) modify the Licensed Program or the relevant components of the Licensed Program in order to avoid continuing infringement;
- (b) procure for Customer the right to continue the use or possession of the infringing Licensed Program or the relevant components of the Licensed Program; or
- (c) if the solutions in either of the preceding paragraphs cannot be achieved, remove the Licensed Program or the relevant components of the Licensed Program.

16. **REPRESENTATIONS, WARRANTIES AND OBLIGATIONS**

16.1 **Licensed Program Limited Warranty**

In addition to and notwithstanding warranties otherwise provided by Oban to Customer under this Agreement, and notwithstanding any warranties provided by third parties direct to the Customer, Oban warrants that, for a period of ninety (90) days following the Implementation Date (Limited Warranty Period), the Licensed Program:

- (a) will be free from Severity Level 1 and Severity Level 2 defects;
- (b) will conform to and work in accordance with the Documentation; and
- (c) is suitable for the ordinary use contemplated by the Company.

If the Licensed Program does not operate in accordance with this clause 16.1 during the Limited Warranty Period, Oban must repair or replace the Licensed Program as appropriate.

16.2 **Licensed Program Ongoing Warranties & Indemnity**

- (a) Oban warrants that the Licensed Program, including any Updates and New Releases, will at all times conform to and be compatible with the Functional Specifications and Hardware and Software Specifications, as may be updated in writing from time to time by Oban.
- (b) Oban warrants that the Licensed Program supplied to Customer will at all times hold and maintain all necessary authorisations, accreditations or certifications and the Licensed Program and Documentation will at all times comply with all applicable superannuation and data payment standards and regulations, including but not limited to the *Superannuation Industry (Supervision) Act 1993* (Cth) and *Superannuation Industry (Supervision) Regulations 1994* (Cth) (as amended) (Data Payment Standards). Oban will fully indemnify the Customer and each of its employees, agents and contractors against any loss (including without limitation loss of profit and other consequential loss) arising out of any allegation or claim that the Licensed Program or Documentation, or any use thereof, breaches or contravenes the Data Payment Standards.

16.3 **Disclaimer of Warranties**

Except as expressly set out in this Agreement, and to the extent permitted by law, the Licensed Program and Documentation, and any Updates or New Releases, are provided without any other warranty of any kind, either express or implied, from Oban.

13.4 **Support Services Warranty**

Oban warrants that it will provide the Support Services with the degree of professional skill, care and diligence that may reasonably be expected of a skilled professional person suitably qualified and experienced in the performance of services similar to the Support Services.

16.5 **Configuration Services Warranty**

Oban warrants that it will provide the Configuration Services with the degree of professional skill, care and diligence that may reasonably be expected of a skilled professional person suitably qualified and experienced in the performance of services similar to the Configuration Services.

16.6 **Third Party Warranties**

The Customer may be eligible for third party warranties, indemnities or other commitments with respect to the Licensed Program, Documentation and Support Services, and any Updates or New Releases, and Oban will procure for Customer the benefit of any such licensors' and proprietors' warranties, indemnities or other commitments and provide commercially reasonable assistance to the Customer in enforcement thereof. Oban accepts no liability for any claims arising out of any act or omission, including negligence, by any third party supplier.

16.7 **No reliance upon representations**

The Customer acknowledges that it has exercised its independent judgment in acquiring the Licensed Program and Documentation and has not relied on any representation made by Oban which has not been stated expressly in this Agreement.

17. **EXCLUSION AND LIMITATION OF LIABILITY**

17.1 **Exclusions**

Except as required of Oban under Division 1 of Part 3-2 of the Australian Consumer Law (as embodied in Schedule 2 to the *Competition and Consumer Act 2010* (Cth)) ("**ACL**"), or as expressly set out in this Agreement, Oban provides no other warranty, guarantee or assurance, express or implied, to the Customer in relation to the goods or services supplied to the Customer, and the Customer agrees and acknowledges that it is fair and reasonable, in all the circumstances, for Oban to do so.

17.2 **Liability**

Except for a party's liability:

- (a) under an indemnity in this Agreement and
- (b) in respect of a breach of confidentiality rights or Intellectual Property Rights,

and to the extent permitted by applicable law, each party's liability to the other party under or in connection with this Agreement, however caused, and whether arising under contract, tort (including negligence) or otherwise, will not exceed in total twice the total amount paid by the Customer to Oban under this Agreement.

17.3 **Excluded liability**

Except as provided otherwise in this Agreement, and to the extent permitted by applicable law, each party is not liable to the other party for:

- (a) loss, damage or corruption of data or records; or loss of anticipated savings, opportunity, revenue, profit or goodwill, or other economic loss; or
- (b) any indirect, incidental, punitive or exemplary damages,

however caused, and whether arising under contract, tort (including negligence) or otherwise, even if the other party has advised the first mentioned party of their possibility.

17.4 **Limitation of liability**

If the goods or services supplied by Oban to the Customer are not of a kind ordinarily acquired for personal, domestic or household use or consumption, except in the case of a failure by Oban to comply with a consumer guarantee under any of sections 51, 52 or 53 of the ACL, Oban's liability for failure to comply with a Consumer Guarantee under the ACL to the Customer is limited to:

- (a) in the case of goods supplied to the Customer, the replacement of the goods or the supply of equivalent goods (or the payment of the cost to the Customer of the replacement or supply), or the repair of the goods (or the payment of the cost to the Customer of the repair); and
- (b) in the case of services supplied to the Customer, the supply of the services again or the payment of the cost to the Customer of having the services supplied again.

18. **TERMINATION**

18.1 **Termination for breach**

Either party may terminate this Agreement immediately by giving written notice to the other party if:

- (a) The other party is in breach of a fundamental term of this Agreement and such breach is not remedied within 20 Business Days of written notice from the aggrieved party;
- (b) The other party becomes, threatens or resolves to become or is in jeopardy of becoming subject to any form of insolvency administration; or

18.2 **The parties' obligations**

On expiry or termination of this Agreement:

- (a) the Customer must promptly deliver to Oban in good order (ordinary wear and tear excepted) all copies of the Licensed Program, the Documentation, the Media and all Records in its possession, custody or control, or, at Oban's written direction, destroy or erase those copies (including the Media) and all Records;
- (b) at Oban's request, the Customer must promptly certify in writing to Oban that it has complied with paragraph (a) above;
- (c) Oban must promptly return or destroy (at Customer's election) any of Customer's Confidential Information, property and all related data, documentation and records in the possession, custody or control of Oban; and
- (d) the Customer must pay to Oban any amounts properly due to Oban under this Agreement (but not paid). Oban must refund to the Customer any sums paid by Customer on any account or for services which have not been fulfilled or performed.

18.3 **Transition Period**

Upon termination of this Agreement, all rights and licenses granted by Oban to Customer under this Agreement, including but not limited to the use of the Licensed Program and Documentation, will continue for a period of up to one hundred and twenty (120) days to enable Customer to find an alternative supplier without interruption to its business (the Transition Period). Oban must provide all reasonable assistance which Customer considers necessary during the Transition Period to enable Customer to obtain supply of software which provides the same or similar functionality to the Licensed Program from an alternative third party proprietor or licensor. To the extent that Oban's assistance pursuant to this clause 18.3 involves the provision of services over and above its support and maintenance obligations arising under the Order Form, Oban may by prior notice to Customer charge fees on a time and materials basis at its standard rates. For the avoidance of doubt, Customer will continue to pay the Fees for this Transition Period.

19. **CONFIDENTIALITY AND SECURITY**

19.1 **Use and disclosure of Confidential Information**

A party must not, directly or indirectly:

- (a) use any Confidential Information of the other party except to the extent necessary for the Permitted Purpose; or

- (b) disclose any Confidential Information of the other party except in accordance with sub-clause 2 below,

without first obtaining the other party's written consent.

19.2 **Permitted disclosures**

Subject to sub-clause 3 below, a party may disclose Confidential Information:

- (a) to an Authorised Person who needs to know that Confidential Information for the Permitted Purpose; or
- (b) to comply with:
 - (i) a legally enforceable requirement to do so, including an order of a court or tribunal of competent jurisdiction; or
- (c) a requirement of a Government Agency, stock exchange or other regulatory body.

19.3 **Security, control, and other obligations**

Each party must, at its cost:

- (i) use reasonable endeavours to ensure that the other party's Confidential Information and all of the other party's information, data, materials and tangible property in the first mentioned party's possession, custody or control are kept under its effective control and are secure from theft, loss, damage and unauthorised access, use and disclosure; and
- (ii) notify the other party in writing immediately if it becomes aware of any actual, suspected, likely or threatened theft, loss, damage or unauthorised access, use or disclosure of or to any Confidential Information or any of the other party's tangible property in the first mentioned party's possession, custody or control.

20. **PRIVACY**

Oban will comply with all obligations arising under the *Privacy Act 1988* (Cth) which apply to the collection, use and handling of Personal Information which it may access in connection with this Agreement, whether or not the Company is an organisation bound by the Privacy Act.

21. **AUDIT**

21.1 **Oban to permit audit**

Subject to clauses 21.2 and 21.3, Oban will permit the Customer's internal or external auditors and other professional representatives, together with representatives of ASIC, APRA and other regulatory and revenue authorities of any relevant Australian jurisdiction, to access its premises, computer systems, books, records, documents, data, equipment and other property relevant to the performance of this Agreement.

21.2 **Scope of audit**

Oban's obligations under clause 21.1 do not extend beyond providing access to any of the premises, systems or items as is reasonably required to:

- (a) comply with audit, risk management or regulatory requirements;
- (b) comply with the request of a regulator; or

(c) determine Oban's compliance with its obligations under this Agreement.

21.3 Customer's obligations:

The Customer will:

- (a) provide Oban with as much advance notice as is reasonably possible in the circumstances. Where appropriate, the Customer will consult with Oban on an ongoing basis to formulate access timetables to ensure that access is provided in a convenient, non-duplicative, non-frequent, efficient and effective manner for all parties involved; and
- (b) to the extent that information referred to in clause 21.1 comprises Confidential Information or Personal Information, the Customer agrees, and will procure the agreement of any third party to whom access is granted, to treat the information as confidential information and restrict the use and disclosure of such information to the purpose for which it was obtained.

21.4 Oban to co-operate with auditor

Oban will provide all reasonable assistance to a party requiring access to any of the premises, systems or items referred to in clause 21.1, including making all such materials available for such inspection and copying as the auditing entity reasonably directs.

21.5 Oban to ensure sub-contractor co-operation

Oban will ensure that it obtains equivalent rights of access to those contained in this clause 21 from any person or entity to which it subcontracts the performance of any aspect of the Services, unless the Customer otherwise consents in writing.

22. DISPUTE RESOLUTION

22.1 Application of clause

- (a) A party to a dispute must not commence or maintain any litigation or arbitration in relation to that dispute (except for interlocutory relief or a stay of proceedings because of this clause) until it has complied with this clause.
- (b) No party may oppose an application for a stay of legal proceedings in relation to a dispute until this clause has been complied with.

22.2 Notice of Dispute

A party that requires a dispute to be resolved must give the other party written notice of this requirement that includes details of the dispute.

22.3 Negotiations

- (a) Within 10 Business Days of receipt of the notice under clause 22.2, authorised representatives of the parties must meet at a place and time nominated by Oban and uses their best endeavours to attempt to resolve the dispute.
- (b) If a dispute is not resolved under sub-clause 3(a) above within 5 Business Days of its referral, the parties must refer the dispute to their respective chief executive officers (or to a person holding an equivalent position) (or to the delegate of either person), for resolution.

22.4 **Mediation**

If a dispute is not resolved using the processes in sub-clause 3 above, the parties must refer it to the ACDC for mediation in accordance with the ACDC's then current Mediation Guidelines in force at the date of this Agreement. These Guidelines are incorporated into this Agreement.

22.5 **Performance continues**

Despite the existence of a dispute, the parties will continue to perform their respective obligations under this Agreement.

23. **RELATIONSHIP OF THE PARTIES**

Oban and the Customer severally acknowledge and agree that:

- (a) each are independent contractors and are not partners, joint venturers or principal and agent;
- (b) a party does not have the authority to bind the other party by contract or otherwise and must not hold itself out as having authority to bind the other party to any contract or otherwise;
- (c) the Customer, if a natural person, is not an employee of Oban; and
- (d) any employee or subcontractor of the Customer is solely an employee or subcontractor of the Customer and will not be considered an employee or subcontractor of Oban.

24. **INSURANCE**

24.1 **Oban's insurance obligations**

Oban will, for the duration of this Agreement, be insured in respect of its performance of this Agreement as set out in the Order Form.

24.2 **Evidence of Insurance**

Oban will produce evidence on demand, to the satisfaction of the Customer, of the insurance effected and maintained in accordance with this clause.

25. **KEY PERSONNEL**

To the extent specified in the Order Form, each party will ensure that a nominated individual is at all times appointed to the roles nominated in the Order Form and that it has at all times kept the other party advised as to the name of the individual[s] occupying such role[s].

26. **NOTICES**

26.1 **How to give a notice**

A notice, consent or other communication under this Agreement is only effective if it is in writing, signed and either left at the addressee's address or sent to the addressee by post, fax or email. If it is sent by post, it is taken to have been received 3 working days after it is posted. If it is sent by fax, it is taken to have been received when the addressee actually receives it in full and in legible form. If sent by email, it is taken to have been received when the sender receives confirmation on its server that the message has been transmitted.

26.2 **Address for notices**

A person's postal address, fax number and email address for the purpose of giving notices are those specified in the Order Form or as the person notifies the sender in writing.

27. **GENERAL**

27.1 **Cooperation**

Each party will fully cooperate with the other to ensure timely progress and fulfilment of this Agreement. Without limiting the foregoing, Oban acknowledges that the progress of the Agreement and Oban's performance under the Agreement will be the subject of periodic internal review by Customer, and that Oban must participate in meetings and provide information as reasonably requested by Customer for this purpose.

27.2 **Governing law**

- (a) This Agreement, including these Terms and Conditions, is governed by the law in force in the State, Territory or country specified in the Order Form.
- (b) Each party submits to the non-exclusive jurisdiction of the courts exercising jurisdiction in the State, Territory or country specified in the Order Form, and any court that may hear appeals from any of those courts, for any proceedings in connection with this Agreement, and waives any right it might have to claim that those courts are an inconvenient forum.

27.3 **Liability for expenses**

Each party must pay its own expenses incurred in negotiating, executing, stamping and registering this Agreement.

27.4 **Operation of this Agreement**

- (a) This Agreement contains the entire agreement between the parties about its subject matter. Any previous understanding, agreement, representation or warranty relating to that subject matter is replaced by this Agreement and has no further effect.
- (b) Any right that a person may have under this Agreement is in addition to, and does not replace or limit, any other right that the person may have.
- (c) Any provision of this Agreement which is unenforceable or partly unenforceable is, where possible, to be severed to the extent necessary to make this Agreement enforceable, unless this would materially change the intended effect of this Agreement.

27.5 **Inconsistency with other documents**

If this Agreement is inconsistent with any other document or agreement between the parties, this Agreement prevails to the extent of the inconsistency.