



EMERGE TECHNOLOGIES PTY LTD

GENERAL CONDITIONS FOR COMMERCIAL SERVICE CONTRACT

1. It is a condition precedent to the formation of this agreement that the Supplier receives a credit report on the Customer (and if there is a Guarantor, the Guarantor) from a credit reporting agency and otherwise satisfies itself as to the credit worthiness of the Customer and the Guarantor. Until this condition is fulfilled or until the Supplier waives the condition by substantially commencing work under this agreement, this agreement is and is to be treated by the parties as an application for credit by the Customer. The Customer and the Guarantor agree and consent to the Supplier obtaining a credit report on the Customer and the Guarantor from a credit reporting agency for the purpose of assessing the Customer's application for credit. If the said condition is not satisfied or waived as aforesaid within 10 days after the execution of this agreement the Supplier will notify the Customer accordingly in writing and if necessary comply with section 18M of the *Privacy Act 1988*. If the said condition is not satisfied the Guarantor authorises and directs the Supplier to disclose all or any part of the credit report it obtains on the Guarantor to the Customer for the purpose of explaining why the condition has not been satisfied.
2. We will use reasonable endeavours to carry out scheduled Services (ie Services arranged by appointment or at regular intervals) during normal working hours (8am to 5pm) on a Business Day. We will use reasonable endeavours to supply scheduled Services on the maintenance dates and maintenance times specified in the schedule (if any).
3. You acknowledge and agree that:
 - (a) the Contract Rates vary depending upon the seniority of our technician who supplies the Services and the time at which the Services are supplied;
 - (b) there are three levels of seniority as set out in and forming part of the Contract Rates. Where possible the name of the technician is published under a level of seniority;
 - (c) if you request a specific technician to perform services you will be charged at the hourly rate applicable for that technician's seniority level even though the Services could have been supplied by a more junior technician;
 - (d) before any Service is supplied you must back up all data on all of your computers;
 - (e) we are not responsible for an any loss of data even if we backup any of your data.
4. If the value of Services supplied in a given Period exceeds the Instalment you will pay the excess within 7 days of service on you of a tax invoice therefor.
5. For any goods supplied by us to you either at your request or in the course of providing Services you will pay to us either the agreed price therefor or if no price is agreed the cost price of the goods to us plus a margin thereon of 30% within 30 days of service on you of a tax invoice therefor.
6. The minimum charge for any given attendance to supply Services outside our workshop is one hour.
7. Time spent shall be calculated in intervals of 6 minutes. That is, time spent in supplying Services will be rounded up in units of 6 minutes (eg 25 minutes will be charged as 30 minutes). If travel is required the time spent in supplying Services starts from the time our servant or agent commences travel to carry out the Services from wherever that servant or agent may be located in or about Kalgoorlie to and until the servant or agent returns to our office.
8. You hereby acknowledge that you are indebted to us in the sum of the Minimum Fee.
9. You promise to us that:
 - (a) you will pay the Minimum Fee by paying the Instalment every Period for the Term the first payment to be made on the Date of Commencement;
 - (b) you will pay each Instalment and all other money payable by you under or pursuant to this agreement on the due date in full and without deduction or set off of any kind for any reason whatsoever including without limitation a breach or repudiation of this agreement by us or any negligent act or omission by us or any of our servants or agents;
 - (c) you are responsible for the accounts for the email address and the mobile telephone specified in the schedule as your email address and mobile telephone number, that email address and telephone number exist and are functioning and you will inform us of any change thereto or if they or any of them are cancelled or cease to exist.
 - (d) in entering into this agreement you do so on your own account and as agent for the Customer's Associates.
10. The Minimum Fee includes GST. All other taxable supplies are exclusive of GST and you agree to pay us on demand an amount equal to the consideration payable for that supply multiplied by the prevailing GST rate.
11. Upon the expiration of the Term this agreement shall be automatically renewed unless either you notify us in writing within the Election Period that you wish to terminate this agreement upon the expiration of the Term or we elect for any reason not to renew this agreement in which event this agreement will terminate in accordance with its terms.
12. In addition to the Minimum Fee you promise to pay to us:

- (a) any stamp duty payable on this agreement or on any renewal of this agreement and on any security on demand;
- (b) for every debit made by us to Credit Card that is dishonoured, \$35.00 payable on the day of dishonour;
- (c) the Credit Card Transaction Fee payable on the date of the payment to which it relates;
- (d) if any default notice is issued by us under this agreement, \$50.00 or the reasonable legal fees and disbursements incurred by us in issuing the default notice whichever is the greater amount payable, in the case of the fixed fee upon the issue of the default notice and otherwise within 7 days of being notified of the amount;
- (e) if you request a copy of any document we are not obliged to supply and we are prepared to supply it, \$10.00 or \$1.10 per page whichever is the greater payable at the time the document is supplied or in exchange therefor at our election;
- (f) \$30.00 plus cash disbursement for any credit report we obtain on you payable at the time the report is obtained;
- (g) if there is any security over land and for any reason we decide to lodge a caveat over that land to protect our interest therein, all reasonable legal costs and disbursements incurred by us in so doing payable within 7 days of being notified of the amount;
- (h) all costs and expenses incurred by us or for which we become liable (including without limitation all legal costs and disbursements) of, concerning, arising out of or in any way relating to:
 - (i) the exercise by us of our rights under this agreement;
 - (ii) any default by you; and
 - (iii) any enforcement of this agreement or any security given by or pursuant to this agreement (including without limitation the costs of any court action), payable within 2 days of being notified thereof, such costs and expenses to include all costs and expenses except so far as they are of an unreasonable amount or have been unreasonably incurred so that subject to the above exceptions we will be completely indemnified by you for our said costs and expenses.

12.2 We may assign all of our obligations under this agreement (save for any obligation that arises from a breach by us of this agreement) to a third party (herein called the *new supplier*) by notice from the new supplier and us to this effect. Upon service of the said notices on you there will be a new agreement between you and the new supplier on exactly the same terms as this agreement.

12.3 It is an Event of Default, whether or not it is within the control of the Customer, if:

- (a) the Customer fails to pay any money payable under this agreement when due and payable by it;
- (b) the Customer fails to perform any other undertaking or obligation of it under this agreement and that failure is in the opinion of the Supplier not remediable;
- (c) the failure described in preceding clause is in the opinion of the Supplier remediable, and the Customer does not remedy the failure within 10 Business Days of the earlier of the Supplier giving notice to the Customer or the Customer becoming aware of the failure;
- (d) any representation or warranty or statement of the Customer is incorrect or misleading when made or repeated;
- (e) a judgment in an amount exceeding \$5,000 is obtained against the Customer and is not set aside or satisfied within 10 Business Days;
- (f) a distress, attachment, execution or other process of a government agency is issued against, levied or entered upon an asset of the Customer in an amount exceeding \$5,000 and is not set aside or satisfied within 10 Business Days;
- (g) any of the following occur:
 - (i) a Controller (as defined in section 9 of the *Corporations Act 2001*) is appointed, or any steps are taken to appoint a Controller; or
 - (ii) a resolution is passed to appoint a Controller, or any steps are taken to pass a resolution to appoint a Controller, to the Customer or over an asset of the Customer;
- (h) any of the following occur:
 - (i) an application is made;
 - (i) an order is made; or
 - (ii) a resolution is passed or any steps are taken to pass a resolution, for the winding up of the Customer;

- (i) any of the following occur:
 - (i) an administrator is appointed, or any steps are taken to appoint an administrator; or
 - (i) a resolution is passed to appoint an administrator, or any steps are taken to pass a resolution to appoint an administrator, to the Customer;
 - (j) the Customer is deregistered, or any steps are taken to deregister the Customer under the *Corporations Act*;
 - (k) the Customer suspends payment of its debts generally;
 - (l) the Customer is:
 - (i) unable to pay its debts when they are due; or
 - (i) presumed to be insolvent under the *Corporations Act*;
 - (m) the Customer enters into or resolves to enter into any arrangement, composition or compromise with, or assignment for the benefit of, any of its creditors;
 - (n) the Customer implements a merger, de-merger or scheme of arrangement with any person;
 - (o) the Customer ceases to carry on business.
13. If an Event of Default occurs then whether or not any formal demand therefor has been made the whole of the Minimum Fee then outstanding shall become due and owing by you to us. Without prejudice to our other rights and remedies our obligations under this agreement are suspended until 7 days after the payment of all money owing under this agreement.
14. If you default in the payment of any money under this agreement interest will be charged on the amount owing and unpaid from time to time at the Rate as from and including the due date for payment until it has been repaid. At the end of every calendar month any unpaid interest shall be capitalised for the purpose of calculating interest, namely it will be added to and increase the amount due and owing and thereafter interest shall be charged on the sum of the amount then due and owing and the unpaid interest at the said rate. Unless otherwise advised by us payments shall be applied first in payment of interest. The provisions of this paragraph are without prejudice to any of our other rights and remedies.
15. Except as herein provided, to the fullest extent permitted by law all express and implied warranties, guarantees and conditions under statute or general law as to merchantability, description, quality, suitability or fitness for any purpose of goods or services supplied by us to the Customer pursuant to this agreement are expressly excluded.
- 15.1 To the maximum extent permitted by law, under no circumstances will we be liable to the Customer for any indirect, incidental, special or consequential damages of any kind, including without limitation damages for loss of business or other profits, arising out of or referable to this agreement or any act done or omitted to be done under or by reason of this agreement, whether caused by the negligence of or breach of statutory duty by us or otherwise.
- 15.2 Our liability to you for a breach of a condition or warranty implied by law and which cannot be excluded, is limited, to the extent possible, at our option, to:
- (a) the supply of the goods or services again; or
 - (b) the repair of the goods; or
 - (c) the payment of the cost of having the goods or services supplied again or repaired.
- 15.3 Every exemption from liability, defence and immunity of whatsoever nature applicable to the Supplier or to which Supplier is entitled hereunder shall also be available and shall extend to protect the Supplier and every one of the Supplier's servants or agents acting hereunder or making or giving statements information or advice and for the purposes of this clause 15 shall be or shall be deemed to be acting as agent or trustee on behalf of and for the benefit of the Supplier and all persons who are or might be its servants or agents from time to time as well as on its own behalf and all such persons shall to this extent be or be deemed to be parties to this agreement.
- 15.4 In this clause 'Customer' includes the Customer's Associates.
16. You indemnify us from and against all actions, suits, claims and demand whatsoever which may be brought against us and also all costs damages and expenses which we may in any way pay or incur in defending or settling the same or in any way relating thereto in consequence of or by reason of or arising out of or in respect of anything done by us or any of our servants or agents in compliance or attempted compliance with our obligations under this agreement and any demand or claim brought by or on behalf of the Customer's Associates or any of them arising out of, related to, or connected with this agreement.
17. You hereby charge all of your right, title and interest in all real estate which you (or if there is more than one Customer any of you) now has or at any time hereafter may have to secure your obligations under this agreement. If we lodge a caveat over all or any of the said real estate we are under no obligation to withdraw that caveat but must execute a withdrawal of that caveat presented to us by you for that purpose once you have satisfied all of your obligations under this agreement.

Proprietary rights

18. We will retain exclusive ownership in all deliverables created by us hereunder and will own all intellectual property rights, title and interest in any ideas, concepts, know how, documentation or techniques developed by us under, pursuant to or arising out of this agreement. We will also retain all intellectual property rights with respect to the tools and/or software that we use to deliver the Services.
19. Use the Credit Card is a sufficient communication by us to you that we have signed this agreement. If we have not communicated to you that we have signed this agreement for a period of 30 days after you signed this agreement you may withdraw from this agreement by notice in writing to us.
20. If there is a Reversal the parties agree that for the purposes of this agreement and determining their respective rights and obligations the payment the subject of the Reversal was never paid. By way of example only, if there is a Reversal you will be in breach of this agreement as from the due date for payment of the Reversal.

Data and systems

21. It is solely your responsibility to complete a backup of all existing data, software, and programs on affected systems before receiving Services (including telephone support). We will have no liability for loss of or damage to data or for recovery of data, programs, or loss of use of any computer or network.
22. You understand and agree that under no circumstances will we be responsible for any loss of software, programs, or data - even if technicians have attempted to assist you with your backup, recovery, or similar services. Any such assistance is beyond the scope of any service we can supply. The assistance is provided in our sole discretion and without any guarantee or warranty of any kind. Neither do we provide any guarantee or warranty of any kind with respect to any third party product that a technician may use in assisting you.
23. You acknowledge that our performance and delivery of the Services are contingent upon:
 - (a) where Services require onsite performance, you providing safe and hazard-free access to your personnel, facilities, equipment, hardware, software, network and information. Without limitation this includes ample, hazard-free working space, electricity, local telephone line, access to parking facility (at no charge), and security escorts as necessary during the performance of the Service. An adult (over age 18) must also be present at all times during the technician's visit;
 - (a) your timely decision-making, notification of relevant issues or information and granting of approvals and/or permission.
24. You will promptly obtain and provide to us any required licenses, approvals or consents necessary for our performance of the Services.

Resolution of claim against the Supplier

25. The parties will attempt to resolve any claim, or dispute or controversy (whether in contract, tort or otherwise) against the Supplier, its agents, employees, successors, assigns, or affiliates (collectively for purposes of this paragraph, "Supplier") arising out of or relating to this agreement, the Supplier's advertising, or any related purchase (**Dispute**) through face to face negotiation with persons fully authorised to resolve the Dispute or through mediation utilising a mutually agreeable mediator, rather than through litigation.
- 25.1 The existence or results of any negotiation or mediation will be treated as confidential. Notwithstanding the foregoing, either party will have the right to obtain from a court of competent jurisdiction a temporary restraining order, preliminary injunction or other equitable relief to preserve the status quo, prevent irreparable harm, avoid the expiration of any applicable limitations period, or preserve a superior position with respect to other creditors, although the merits of the underlying Dispute will be resolved in accordance with this clause.
- 25.2 In the event the parties are unable to resolve the Dispute within thirty (30) days of notice of the Dispute to the other party, the parties shall be free to pursue all remedies available at law or equity. Specifically, if the Supplier is then in breach of this agreement the Customer may by notice in writing to the Supplier terminate this agreement as from the date the said notice is served on the Supplier.
- 25.3 For the avoidance of doubt this clause does not apply to any claim the Supplier may have against the Customer.

Servants or agents of the Supplier

26. In this clause:
 - (a) during a Term **relevant person** means any person who is a servant or agent of ours or a related body corporate or had been a servant or agent of ours or a related body corporate at any time during the twelve months immediately preceding the commencement of that Term and who has supplied services pursuant to this agreement; or
 - (b) after termination of this agreement for any reason **relevant person** means any person who is or was at any time during the twelve months immediately preceding the termination of this agreement a servant or agent of ours or a related body corporate and who has supplied services pursuant to this agreement.
- 26.2 During the Term you will not:
 - (a) entice away or attempt to entice away from us or a related body corporate a relevant person;

- (b) employ or engage the services of a relevant person either directly or indirectly.
- 26.3 You will not for a period of 12 months after the termination of this agreement for any reason whatsoever:
 - (a) entice away or attempt to entice away from us or a related body corporate a relevant person;
 - (b) employ or engage the services of a relevant person either directly or indirectly.
- 26.4 Further, and without prejudice to any other right or remedy we may have, if you procure the services of a relevant person (whether as an employee or independent contractor or otherwise) either during a Term or in the period of 12 months after the termination of this agreement for any reason whatsoever you will account to us for all remuneration paid to the relevant person and pay to us an amount equal to 50% of that remuneration.
- 26.5 You acknowledge and agree that:
 - (a) we and our related bodies corporate have goodwill arising from servants and agents of ours and related bodies corporate due to factors including but not limited to good employee morale, good employee relations and good customer relations;
 - (b) breach of clauses 21.5; 21.6 or 21.7 would diminish that goodwill;
 - (c) the provisions of clauses 21.4 to 21.7 both inclusive are reasonable and necessary to protect that goodwill and must be given full effect;
 - (d) monetary damages would not be adequate compensation for breach of clauses 21.5; 21.6 or 21.7 and that we and our related bodies corporate are entitled to seek an injunction if you breach any of clauses 21.5; 21.6 or 21.7 or we have reason to believe that you will breach any of those clauses.

Guarantee and indemnity

- 27. In consideration of the Supplier having agreed at the request of the Guarantor to enter into this agreement with the Customer the Guarantor does (and if more than one jointly and severally) HEREBY GUARANTEE to the Supplier the due and punctual performance by the Customer of its obligations under this agreement and the Guarantor HEREBY ACKNOWLEDGES and declares that this Guarantee shall be a continuing guarantee for the whole of the moneys hereby secured and shall not be avoided released or affected in any way by:
 - (a) any agreement or arrangement made between the Supplier and the Customer whether with or without the consent of the Guarantor or by any alterations or variations to the rights or obligations of either of them;
 - (b) the granting of any time or other indulgence or forbearance by the Supplier to the Customer whether or not the granting of such further time or other indulgence imposes further liabilities on the Guarantor;
 - (c) the fact of or notice of the death mental incapacity bankruptcy or liquidation of the Customer or the Guarantor or any of them;
 - (d) any composition or arrangement with or release of the Customer or any composition or arrangement with or release of any one or more of the Guarantor or any other surety or person by the Supplier whether the consent of the Guarantor or any of them to any of the foregoing shall have been obtained or notice thereof given to him or not or any omission or delay on the part of the Supplier;
 - (e) the fact that any money payable by the Customer is not or may cease to be or any part thereof cease to be recoverable from him or from any of the Guarantor or other person or that the Customer be discharged from all or any of Customer's obligations to pay such money or any part thereof for any reason other than that the same have been paid;
 - (f) any change in membership of the Customer or any partnership or firm of which the Customer is a member or the death liquidation or bankruptcy of the Customer or any member of the Customer or the assent of the Supplier to any composition arrangement or scheme in respect of the Customer or the acceptance by the Supplier of any dividend or sum of money thereunder,and the Supplier shall be at liberty to regard the Guarantor in all respects as principal debtor and shall not be obliged to take action first against the Customer.
- 27.1 The Guarantor further acknowledges and declares that the obligations of the Guarantor hereunder shall not merge or be deemed to have merged in any judgement obtained by the Supplier against the Customer and the Guarantor shall remain liable to the Supplier in the terms of this Guarantee notwithstanding that the Supplier may in the meantime obtain a judgement against the Customer.
- 27.2 Any payment made to the Supplier and later avoided by the application of any statutory provision shall be deemed not to discharge the Guarantor's liability and in any such event the parties are to be restored to the rights which each respectively would have had if the payment had not been made.
- 27.3 Further in consideration of the Supplier having agreed to enter into this agreement with the Customer on the terms and conditions herein contained at the request of the Guarantor the Guarantor further covenants with the Supplier to save harmless and indemnify the Supplier from and against all losses damages costs and expenses which the Supplier may suffer as a result of the Supplier entering into this agreement including but without limitation all costs incurred by the Supplier as a result of or arising out of enforcing its rights under this agreement or any other security held by the Supplier in respect of the obligations of the Customer hereunder

or in any way incidental to this agreement or any other such security or in defending any action, claim or demand made against it by the Customer and insofar as it may be necessary so to do in order to give full effect to this indemnity the Guarantor shall waive any rights of recourse they might otherwise have or have had against the Customer arising out of this indemnity.

- 27.4 In the event that the Customer is wound up and a liquidator of the Customer shall lawfully disclaim these presents at any time, no such disclaimer shall operate so as to relieve the obligations of the Guarantor to the Supplier pursuant to this indemnity AND IT IS EXPRESSLY AGREED THAT the provisions of this indemnity shall survive any termination of this agreement arising out of any such disclaimer.
- 27.5 It is expressly agreed that this indemnity shall continue notwithstanding any agreement or arrangement or variation of any agreement between the Supplier and the Customer and the provisions of the Guarantee hereinbefore given shall with the necessary changes apply to this indemnity.
- 27.6 In the event that there is more than one person or corporation constituting the Guarantor or there is any other co-surety then it is expressly agreed between each Guarantor who executes this agreement and the Supplier that the failure of any one or more Guarantor or any other co-surety to execute this agreement or any document as the case may be or the fact that this guarantee is not binding on any one or more Guarantor who executes the same for any reason whatsoever or that any one or more Guarantor is for any reason whatsoever discharged from their obligations hereunder shall not in any way relieve them or the others of them as the case may be from liability under this guarantee and indemnity.
- 27.7 In the event that the consideration specified herein is found to be past consideration the Guarantor agrees that the Supplier may adduce evidence of other consideration to support the Guarantee.
- 27.8 For the said consideration the Guarantor hereby charges their respective right, title and interest in all real estate which they or any of them now have or at any time hereafter may have to secure their obligations under this agreement. If the Supplier lodges a caveat over all or any of the said real estate it is under no obligation to withdraw that caveat but must execute a withdrawal of that caveat presented to it by the Guarantor for that purpose once the Guarantor has satisfied all of its obligations under this agreement.

Interpretation

28. Each party means and includes itself its successors and permitted assigns, the word **person** shall include a corporation; words importing the singular number or plural number shall include the plural number and the singular number respectively; and words importing the masculine or neuter genders shall include every gender. References to statutes shall include all statutes amending, consolidating or replacing the statutes referred to; references to any statutory body shall include any statutory body exercising the same or similar powers to the relevant statutory body either in conjunction therewith or in lieu thereof. When two or more parties enter into covenants, obligations and or agreements together, those covenants, obligations and or agreements on their part contained refer to and shall bind them and any two or greater number of them jointly and each of them severally; and the words **in writing** whenever contained in this agreement shall be deemed to include any communication sent by letter, telegram, cablegram, wireless telegraphy, facsimile, email or electronic media. The captions, headings, labels for defined terms, and clause numbers appearing in this agreement are inserted only as a matter of convenience and in no way define, limit, construe or describe the scope or intent of the clauses of this agreement nor in any way affect this agreement. Ambiguities shall not be construed for or against a party who drafted or whose solicitor drafted this agreement.
- 28.1 Where under this instrument:
- (a) any requirement, calculation or payment of money might otherwise fall to be performed or paid on the 29th, 30th, or 31st day of a month which does not contain such a date, then references thereto shall be construed as references to the last day of that month;
 - (b) the day or last day for doing an act or for the payment of any money or on which any entitlement is due to arise or a notice is deemed served is a day that is not a Business Day the day or last day for doing that act or payment of that money or on which that entitlement arises or notice is deemed served shall be deemed to be the next Business Day.

Service

29. Any notice or other document or writing required to be served on any party hereto may be served by prepaid ordinary post and any such notice or other document in writing shall be deemed to be served two days after it was so posted. You nominate your address in the schedule as the address for service of notices by us on you by post. Any notice or other document or writing required to be served on you by us may be served by email at your email address herein (if any and if more than one the first mentioned email address) or at such other email address as you may have notified to us in writing from time to time as an email address for the service of notices or by fax to your facsimile number herein (if any and if more than one the first mentioned facsimile number) or to such other facsimile number as you may have notified to us in writing from time to time as your facsimile number for the service of notices.
30. In the event of any legal proceeding in respect of this agreement being begun by us the process by which it is begun may be served by post on you at the same address and in the same manner prescribed for the service of any notice in writing by post.

Publication

31. Any notice or other information that the Supplier is entitled to publish under this agreement may be published by displaying the notice or information on the Web Site. Publication of any notice or information in this way is deemed to effect service thereof on the Customer from but not including the date of publication.

Force majeure

32. A party is not liable for any delay in performing an obligation (other than to pay money) under this agreement to the extent that the delay or failure to perform is caused by:
- (c) act of God;
 - (d) war, riot, insurrection, vandalism or sabotage;
 - (e) strike, lockout, ban, limitation of work or other industrial disturbance; and/or
 - (f) the operation of a law, rule or regulation of any government or governmental agency or executive or administrative order or act of general or particular application;
 - (g) any fact matter or thing that is outside the control of the party.

Jurisdiction

33. This agreement shall be deemed to have been made in the State of Western Australia and the construction, validity and performance of this agreement shall be governed in all respects by the laws of that State and the parties submit to the exclusive jurisdiction of the courts within Perth Western Australia.

No partnership

34. The parties are independent contractors. Neither party will have any rights, power or authority to act or create an obligation, express or implied, on behalf of another party except as specified in this agreement.

Severance

35. The parties hereby agree that in the event that any provision of this agreement is contrary to any statutory enactment in force in the Commonwealth of Australia then that provision shall, if capable of being severed, be severed from this agreement and the balance of this agreement shall remain in full force and effect.

Entire agreement

36. This agreement sets forth the entire agreement and understanding between the parties as to the subject matters hereof and merges and supersedes all prior discussions, agreements and understandings of every kind and every nature between them and no party hereto shall be bound by any condition, definition, warranty or representation other than as expressly provided for in this agreement, or any subsequent agreement in writing between the parties.

Variation

37. We may vary any provision of this agreement (including the Contract Rates, Hourly Rates and the Minimum Fee) by notice in writing to you or by publishing the variation on the Web Site at any time not less than 30 days prior to the expiration of a Term. The variation takes effect 60 days after service or publication on the Web Site as the case may be or upon the commencement of a Term, whichever occurs first.

Personal information

38. You acknowledge that we have collected personal information about you for the following purposes and **consent** to us collecting personal information about you and using it to: (a) obtain a credit report from a credit reporting agency about you; (b) allow a credit reporting agency to create or maintain a credit information file containing information about you; (c) obtain information about your commercial activities and commercial credit worthiness; (d) give and obtain from other credit providers information about your credit worthiness, credit standing, credit history or credit capacity; (e) market goods and services to you and authorise others (for its sole benefit) to market goods and services to you. If you do not consent to us obtaining a credit report we may not be able to enter into this agreement. You can gain access to the personal information we hold about you. We usually disclose the information to credit reporting agencies, companies related to us, and third parties who sell goods and/or services.

Waiver

39. A party's failure or delay to exercise a power or right does not operate as a waiver of that power or right.
- 39.1 The exercise of a power or right does not preclude either its exercise in the future or the exercise of any other power or right.
- 39.2 A waiver is not effective unless it is in writing.
- 39.3 Waiver of a power or right is effective only in respect of the specific instance to which it relates and for the specific purpose for which it is given.

Release after 2 years

40. If a party to this agreement has or may have a cause of action against the other party arising out of or as a consequence of this agreement (whether in tort, equity or contract) and has not commenced legal proceedings to enforce that cause of action within two (2) years after that cause of action first arose, that party hereby

releases and forever discharges the other party from that cause of action and this release may be pleaded in bar to any action suit or proceeding commenced or taken by that party or their privy against the other party or their privy in relation to that cause of action.

No assignment

41. You cannot assign this agreement or any interest therein to any party without our express written consent first had and obtained.

Costs

42. If you breach this agreement you shall pay all costs incurred by us in respect of or arising out of the breach and notices relating thereto. Without limitation you will pay to us all costs charges and expenses for which we shall become liable in consequence of, in connection with, or arising out of any default by you in performing or observing any of the promises herein contained or implied on your part to be performed or observed, including without limitation:

- (a) all legal costs, including the cost of and in preparation for any litigation commenced by us against you (or any of your servant or agents) or any Guarantor to recover money owing, and/or damages and/or for an injunction pursuant to or arising out of or by reason of this agreement;
- (b) all costs, charges and expenses (including solicitors' costs) incurred by us for the purpose of and incidental to the preparation and service of a notice requiring you to remedy a breach of any provision of this agreement herein contained or implied notwithstanding termination for such breach,

on an indemnity basis and further such costs are to include all costs except so far as they are of an unreasonable amount or have been unreasonably incurred so that subject to the above exceptions we will be completely indemnified by you for our costs.

Definitions

43. In this agreement including the recitals unless contrary to or inconsistent with the context:

Business Day means a day on which banks are open for business in Perth excluding in any event a Saturday, Sunday, public holiday or the day of the Kalgoorlie Boulder Race Round;

Contract Rates means the onsite contract rates per hour published by the Supplier on the Web Site or otherwise served on the Customer from time to time;

Credit Card means the credit card specified in the schedule and any credit card given in addition thereto or in substitution therefor;

Credit Card Transaction Fee means a fee calculated by multiplying the amount of a payment made under this agreement by the Credit Card by the appropriate credit card rate notified to the Customer by the Supplier from time to time or published at the Web Site for each brand of credit card and until notification or publication aforesaid at the rate of 1% for Visa and Mastercard and 4% for American Express and Dinners;

credit report and **credit reporting agency** have the meaning given to them by the *Privacy Act 1988*;

Customer, you, your means the person or persons specified in the schedule as the Customer;

Customer's Associates means:

- (a) the owner, sender or receiver of the goods;
- (b) a person having an interest in the goods;
- (c) the Customer's principal; and
- (d) any agent, representative, employee or sub-contractor of the Customer or those persons.

Date of Commencement means the date this agreement is signed by the Customer and thereafter each day on which this agreement is automatically renewed as herein provided;

Election Period means the period of 90 days before the expiration of a Term or if notice of a proposed variation to this agreement is served or published at the Web Site within that period, the period of 21 days after the said notice is served or published as the case may be.

General Conditions means these general conditions for a commercial service contract.

Guarantor means the person or persons specified in the schedule as a guarantor and every director of the Customer who signs this agreement;

Hourly Rates means:

- (e) during normal working hours (namely between 8am to 5pm on a Business Day) the Contract Rates;
- (f) during the hours of 6am to 8am and 5pm to 8pm on a Business Day the Contract Rates plus 50% of the Contract Rates;
- (g) at any other time the Contract Rates plus 100% of the Contract Rates;

Instalment means the dollar amount derived by dividing the Minimum Fee by the number of Periods in the Term;

Period means the period of a quarter, month, or week as specified in the schedule and if none is specified a month;

Rate means 15% per annum;

related body corporate means a body corporate that is related to the Supplier by virtue of section 50 of the *Corporations Act 2001*;

Reversal means a reversal or partial reversal of a transaction effected by the Supplier using the Credit Card;

schedule means the schedule to this agreement;

Minimum Fee means the sum specified in the schedule as the Minimum Fee;

Services means any work done by the Supplier for or at the direction or request of the Customer in relation to computer systems but excluding any chattel supplied as an incident thereof;

Supplier means **Emerge Technologies Pty Ltd** ACN 087 855 221 of 3/72 Brookman Street KALGOORLIE WA 6430

taxable supply, tax invoice consideration, GST and supply have the meanings given to those expressions in the *A New Tax System (Goods and Services Tax) Act 1999*;

Term means the period of time described in the schedule as the Term and if no period is specified, 12 calendar months from and including the Date of Commencement;

this agreement means this agreement and every renewal thereof as herein provided;

we, us, our means the Supplier.

Web Site means the web site of the Supplier set out in the schedule or if none is specified then <http://www.emerge.net.au/>

Privacy consent

44. The Customer has applied for credit from the Supplier and the Guarantor (if any) has applied to the Supplier to guarantee the obligations of the Customer to the Supplier. In this Privacy Consent *the Supplier* includes all companies related to the Supplier, *you* and *your* mean the Customer and if there is a Guarantor, both the Customer and the Guarantor, and *we, our* or *us* mean the Supplier.

44.1 The *Privacy Act 1988* (Cth) regulates the way in which personal information about customers can be used by credit providers. Certain personal information is required to enable the Supplier to:

- assess your application for personal or commercial credit and/or credit worthiness and/or to become a guarantor;
- administer any credit facility which is subsequently provided by the Supplier including managing any account in connection with the credit facility, administering insurance claims, recovering any money owed to the Supplier, maintaining the value and protecting any assets provided as security for any obligations under the credit facility and for use in connection with the out sourcing of any of the Supplier's functions;
- notifying other credit providers of any default by you; and
- identifying and sending you any information about the Supplier's other related products or services that may be of interest to you.

44.2 The following tells you what information might be required and how the information might be used. **PLEASE READ THIS CAREFULLY.** If you do not provide the Supplier with the personal information requested, the Supplier will be unable to assess your application for personal or commercial credit or to become a guarantor.

Disclosure of personal information

44.3 The types of organisations to which the Supplier usually discloses personal information include Credit Reporting Agencies, government departments and authorities, insurers and underwriters, guarantors, agents, contractors, proposed assignees of the Supplier's assets and other third parties associated with the Supplier who enable or assist the Supplier to carry out its functions, for example, mailing houses, debt collection agencies, mercantile agents, archive companies, valuers, call centre operators, solicitors, accountants, other people who provide funding, introducers and brokers. the Supplier may also disclose your personal information to the Supplier for the marketing purposes of the Supplier.

44.4 You **consent** to the Supplier collecting your personal information and using it for the purposes outlined in this document including disclosing your personal information to the types of organisations set out above.

Disclosure of credit information to a Credit Reporting Agency

44.5 You authorise the Supplier to give a Credit Reporting Agency certain personal information about you for the purposes of enabling the Supplier to obtain a Credit Report about you and/or to allow the Credit Reporting Agency to create or maintain a credit information file containing information about you. The information which the Supplier may disclose to the Credit Reporting Agency is limited to:

- your identification (including your name, sex, address and the previous two addresses, date of birth, name of employer and driver's licence number);
- the fact that credit has been applied for and the amount;
- the fact that the Supplier is or may be a current credit provider to you;

- details of payments which become overdue for more than 60 days and for which collection action has commenced;
- the fact that payments are no longer overdue;
- details of cheques drawn by you which have been dishonoured more than once;
- the fact that in the Supplier's opinion you have committed a serious credit infringement; and
- the fact that credit provided to you by the Supplier has been paid or discharged.

Authority to obtain credit information

44.6 You authorise the Supplier to obtain from:

- (a) a Credit Reporting Agency a Credit Report containing information about you in relation to personal or commercial credit provided to you at any time and from time to time for any purpose related to this agreement; and
- (b) a business which provides information about the commercial credit worthiness of persons information about your commercial activities or commercial credit worthiness.

Authority to exchange credit information with another credit provider

44.7 You authorise the Supplier to give to and obtain from other credit providers information about your credit worthiness, credit standing, credit history or credit capacity.

Authority to disclose certain information to joint applicants

44.8 You understand that if the Supplier declines your credit application or application to become a guarantor due to adverse information on your personal credit file, then each applicant for the credit may be notified that the application has been declined wholly or partly on information derived from the personal Credit Report relating to you.

Authority to disclose certain information to guarantors

44.9 You consent to the Supplier providing information about you to any person who proposes to guarantee your obligations to the Supplier for the purpose of allowing that person to assess whether to act as your guarantor and/or indemnifier. After the guarantee is given, you consent to the Supplier providing information about you to the guarantor and/or indemnifier.

Authority to obtain information about a guarantor

44.10 You authorise the Supplier to obtain from a Credit Reporting Agency a Credit Report containing personal credit information about you to assess whether to accept you as a guarantor for the personal or commercial credit applied for by the applicant.

Authority to give opinions

44.11 You authorise the Supplier to give to or receive from another credit provider an opinion for purposes connected with your business trade or profession.

Other acknowledgments and consents

44.12 You consent to the Supplier exchanging information concerning your financial affairs with any person acting on your behalf including your agent, accountant, solicitor or broker.

44.13 You acknowledge that the Supplier may exchange information with government authorities as required or authorised by law including the Australian Taxation Office.

44.14 You agree that the Supplier may use your personal information either alone or in conjunction with third parties for marketing purposes to tell you about other related services and products which could suit your needs. *If you do not want this to happen please tell us.*

44.15 You acknowledge that the above authorities and consents will continue until the credit facility provided is repaid in full and the credit facility terminated.

Access and correction

44.16 If you would like to know more about:

- the personal information which we hold about you; or
- our personal information handling practices; or
- gaining access to the personal information which we hold about you; or
- our handling of personal information about you,

please contact the Supplier by writing to the Supplier's Privacy Officer at the Supplier's address in this agreement or such other address as the Supplier may have notified to you in writing from time to time.

44.17 the Supplier will provide you with a copy of this information for which a fee may be payable. You should let us know if you think any information we hold about you is inaccurate so that we may correct it.