

# Standard Terms and Conditions

## (Master Agreement)



### Pentana Solutions Pty Ltd

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ABN: 31 005 303 757

ACN: 005 303 757

Version: 010808

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**Parties**

1. Pentana Solutions Pty Ltd ACN 005 303 757 of 547 Blackburn Road, Mount Waverley (Pentana Solutions)

2. Customer:

Customer's Company Name.....

Address (Principal Place of Business).....

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.....

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and;

Address (Registered Office) .....

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**Introduction**

- A. The Customer wishes to use the products, services and systems of Pentana Solutions (the Licensed System).
- B. Pentana Solutions has offered to grant the Customer a non-transferable and non-exclusive licence to use the Licensed System, subject to the terms and conditions set out below.
- C. The Customer requires ongoing supply of products, services and access to systems from Pentana Solutions in respect of the Licensed System and simultaneously enters into a Service Level Agreement (SLA) with Pentana Solutions to govern the supply of products, support services and access for the Licensed System.

**Operative clauses**

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**Definitions**

In this Agreement, unless the contrary intention appears:

**AEST** means Australian Eastern Standard Time;

**Agreement** means this agreement and the SLAs which are attached to this agreement as an Appendix;

**Commencement Date** means the date the Customer signs the execution clause at the back of this Agreement;

**Confidential Information** means the confidential information of a Party which relates to the subject matter of this Agreement and includes information relating to:

the Licensed System;

the personnel, policies or business strategies of Pentana Solutions;

the terms upon which the Licensed System is being supplied, serviced and supported pursuant to this Agreement;

**Designated Equipment** means any equipment designated in the SLA, upon which the Licensed System may be used;

**Documentation** means operating manuals and other printed materials which assist the Customer to use the Licensed System;

**Escalation Request** is as set out in the SLA;

**Extra Charge** means a charge in accordance with Pentana Solutions' standard rates on a time and materials basis plus Travel Expenses, in cases where additional products or services have been requested over and above those specified in the SLA;

**Force Majeure** means a circumstance beyond the reasonable control of the Parties that results in a Party being unable to observe or perform on time an obligation under this Agreement. Such circumstances include, but are not limited to:

acts of God, lightning strikes, earthquakes, floods, storms, explosions, fires and any natural disaster;

acts of war, acts of public enemies, terrorism, riots, civil commotion, malicious damage, sabotage and revolution; and strikes;

**GST** means:

the same as in the GST Law;

any other goods and services tax, or any tax applying to this transaction in a similar way; and

any additional tax, penalty tax, fine, interest or other charge under a law of such a tax;

**GST Law** means the same as in *A New Tax System (Goods and Services Tax) Act 1999* (Cth);

**Intellectual Property Rights** means copyright, trade marks, designs, patents, confidential information, trade secrets or know-how;

**Licence Fee** means the fee specified in the SLA, payable by the Customer to Pentana Solutions, for the use of the Licensed System;

**Licensed System** means the products and/or services and/or systems designated in the SLA;

**Normal Business Hours** means between 0900am and 1700pm AEST on any day except Saturday, Sunday or any public holiday in Australia;

**Party** means either Pentana Solutions or the Customer as the context dictates and includes parties;

**Services** means the services provided by Pentana Solutions to the Customer pursuant to the SLA;

**Service Fees** means the charges specified in the SLA, which are payable by the Customer to Pentana Solutions in respect of the Services;

**Service Level Agreement** means a written or unwritten contract, arrangement or understanding entered into between the parties for specific products, services and systems provided by Pentana Solutions to the Customer and is also referred to as an SLA; and

in cases where the SLA is an unwritten contract, arrangement or understanding between Pentana Solutions and the Customer, this SLA will continue in force until superseded by a written contract between Pentana Solutions and the Customer;

in cases where the SLA is a written contract, the SLA will be copied and form an Appendix to this Agreement;

in cases where an SLA concerns a different Licensed System or Services provided by Pentana Solutions to the Customer, each SLA will be appended and form a part of this Agreement and each SLA is to be read together with the Master Agreement as the entire agreement pursuant to clause 26, concerning that subject matter; and

in cases where an SLA is an update of a previously written SLA for the same or substantially similar Licensed System or Services between Pentana Solutions and the Customer, the most up to date SLA is the entire agreement along with the Master Agreement pursuant to clause 26 confirming that subject matter.

**Site** means the location designated in the SLA for delivery, installation and performance of the Licensed System or Services, or the Principal Place of Business;

**Trade Marks** means the registered and/or unregistered trade marks owned and/or used by Pentana Solutions;

**Travel Expenses** means any out of pocket expenses reasonably incurred including travel, accommodation, meals, tolls and visas;

**Warranty Period** is the period specified in the SLA.

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## Interpretation

In this Agreement, unless the contrary intention appears:

the clause headings are for ease of reference only and are not relevant to interpretation;

a reference to a clause number is a reference to its subclauses;

words in the singular number include the plural and vice versa;

words importing a gender include any other gender;

a reference to a person includes bodies corporate and unincorporated associations and partnerships;

a reference to a clause is a reference to a clause or subclause;

a reference to a subclause is a reference to a subclause within the clause in which that reference is made;

where a word or phrase is given a particular meaning, other parts of speech and grammatical forms of that word or phrase have corresponding meanings;

a reference to an Appendix includes a reference to any part of that Appendix which is incorporated by reference;

the recitals to this Agreement do not form part of the Agreement;

monetary references are references to Australian currency.

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#### Access, Assistance and Performance

Pentana Solutions will use its best endeavours to deliver the Licensed System to the Customer, and where relevant install the Licensed System and perform the Services, in accordance with the timeframe specified in the SLA.

The Customer must give Pentana Solutions such reasonable assistance, including the provision of personnel and facilities, as Pentana Solutions considers necessary to ensure satisfactory delivery, installation and performance of the Licensed System. The Customer must ensure Pentana Solutions is granted all reasonable access, including necessary security clearances, for the purposes of complying with subclause 0.

If, in the opinion of Pentana Solutions, the costs associated with the delivery, installation and performance of the Licensed System are greater than Pentana Solutions could have reasonably contemplated on execution of this Agreement and are greater than the costs that would normally be associated with a similar installation project, Pentana Solutions may make an Extra Charge.

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#### Grant of Licence

Pentana Solutions hereby grants to the Customer a non-exclusive, non-transferable licence for the Licence Fee.

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#### Documentation

The Documentation is licensed to the Customer for the duration of the Agreement.

Pentana Solutions must provide the Customer with such number of copies of the Documentation as the SLA specifies.

The Customer acknowledges that the Documentation contains sufficient information for the adequate use of the Licensed System, except to the extent Pentana Solutions has notified the Customer of any omission or deficiency, or of any variation which it considers necessary for the proper use of the Licensed System.

The Customer shall not copy or reproduce the Documentation except to the extent otherwise authorised by this Agreement.

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#### Licence Conditions

The Customer may only use the Licensed System as advised and notified by Pentana Solutions.

The Licensed System may only be used pursuant to this Agreement:

by the Customer; and

at the Site;

in the case of software, to make one copy for back-up purposes pursuant to clause 7.2;

if the number of Customers, or the number of Sites increases, or if the size, description or location of the Site changes in the case of software or support, only after paying an additional Licence Fee, and only with the consent of Pentana Solutions;

in the case of services, or access to systems, only after paying an Extra Charge.

Unless specified to the contrary in the SLA, the Licensed System may not be used on equipment other than Designated Equipment save

that at the sole risk of the Customer it may be used on alternative equipment if:

the Designated Equipment is temporarily inoperable due to malfunction, maintenance or change of installation site; or

Pentana Solutions has otherwise given its consent in writing to such alternate use.

The Customer must not copy, alter, modify or reproduce the Licensed System except to the extent authorised by this Agreement or as expressly authorised under Part III Div 4A of the *Copyright Act 1968* (Cth).

The Customer must not allow use of, or data extracted from, the Licensed System by any 3<sup>rd</sup> party except with written consent from Pentana Solutions.

Pentana Solutions reserves the right to collect and utilise data from the Licensed System for the purposes of aggregated analysis and reporting and guarantee anonymity of the source.

In addition to any other remedies available to Pentana Solutions under this Agreement or otherwise, any unauthorised use, alteration, modification, reproduction, publication, disclosure or transfer of the Licensed System will entitle Pentana Solutions to any available equitable remedy against the Customer.

The Customer acknowledges that there is no transfer of title or ownership to the Customer of the Licensed System or the Documentation or any modifications, updates or new releases of the Licensed System.

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#### Copying of Software

Subject to subclause 0, the Customer must not copy or reproduce the software in the Licensed System or the Documentation supporting the software by any means or in any form without Pentana Solutions' prior written consent.

The Customer may make one copy of the software in the Licensed System for the purpose of backup and security. The Customer acknowledges this copy as the property of Pentana Solutions. The terms of this Agreement, with the necessary modifications, apply to this copy.

The Customer must ensure any copy of the software in the Licensed System made pursuant to this Agreement bears notice of Pentana Solutions' ownership of copyright and a notice stipulating that the Licensed System contains information confidential to Pentana Solutions. The Customer must comply with any directions of Pentana Solutions as to the form or content of such notices.

If requested by Pentana Solutions, the Customer must issue a notice in a form approved by Pentana Solutions to all employees and other authorised users of the software in the Licensed System under its direction or control, advising such persons of the Customer's obligations under this clause and also advising of the possible civil and criminal consequences of a breach of this clause.

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#### Modification of Software

The Customer must not modify or alter the software in the Licensed System or merge all or any part of the Licensed System with any other software without Pentana Solutions' written permission.

If the software in the Licensed System is modified or altered by Customer with the permission of Pentana Solutions pursuant to subclause 0:

the costs associated with the modifications or alterations or the costs arising out of the investigation of the effects of proposed modifications or alterations will be borne solely by the Customer; and

the Customer will fully indemnify against all liability which may be incurred by Pentana Solutions if such modifications or alterations infringe any Intellectual Property Rights of a third person or otherwise cause Pentana Solutions to suffer loss, damages or expense.

The Licensed System as modified or altered remains the property of Pentana Solutions in all respects, whether modified by the Customer, Pentana Solutions or a third party and whether or not authorised pursuant to this Agreement. Specifically, the Customer must if necessary assign to Pentana Solutions all Intellectual Property Rights arising out of any modifications to the Licensed System.

This Agreement applies to the Licensed System as modified or altered.

The Licensee must execute such documents and perform such other acts as are necessary in order to give effect to subclause 0.

Pentana Solutions is not required to provide support services in respect of Licensed System which has been modified by the Customer, but may at its sole discretion elect to do so for an Extra Charge.

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## Reverse Engineering

The Customer must not reverse assemble or reverse compile or directly or indirectly allow or cause a third party to reverse assemble or reverse compile the whole or any part of the software or any products supplied as a part of the Licensed System.

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## Security of the Licensed System

The Customer is solely responsible for the use, supervision, management and control of the Licensed System at the Site.

The Customer must ensure that the Licensed System is protected at all times from misuse, damage, destruction or any form of unauthorised use at the Site.

The Customer must keep accurate records of use, copying, any modification permitted pursuant to clause 0 and disclosure of the Licensed System. The Customer permits Pentana Solutions to inspect such records at any time during the Customer's normal business hours. If Pentana Solutions requests, the Customer must furnish to Pentana Solutions a copy of all or any part of such records.

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## Nature of Services

Pentana Solutions must perform such services as it considers reasonable to ensure the Licensed System remains in substantial conformity with the SLA. Such support will, at the sole option of Pentana Solutions, take the form of:

telephone advice;

remote connection to customer site;

on-site attendance followed by such advice, programming or re-configuration as Pentana Solutions considers necessary; and

such services as Pentana Solutions considers are more effectively provided off-site.

Pentana Solutions must provide the Services in response to a report by the Customer of a suspected defect or error in the Licensed System, which defect or error allegedly causes the Licensed System to deviate from the Licensed System's normal operating conditions.

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## Services Availability

Pentana Solutions must provide the Services between 0900 hours and 1700 hours AEST, Monday to Friday.

If the Customer requests Pentana Solutions to provide on-site support, Pentana Solutions will do so as soon as reasonably practicable and an Extra Charge will apply.

Pentana Solutions does not warrant that it will be capable of promptly receiving, processing or otherwise acting upon a request for support which is made outside Pentana Solutions' Normal Business Hours or that it can provide on-site Services outside Pentana Solutions' Normal Business Hours.

Immediately after making a request for Services which may involve error correction or program modification, the Customer must provide to Pentana Solutions a documented example of the defect or error which it alleges prevents conformity of the Licensed System's normal operating conditions.

The Customer must, if so requested by Pentana Solutions, give Pentana Solutions a listing of output and any other data which Pentana Solutions requires in order to reproduce operating conditions similar to those present when any alleged defect or error in the Licensed System was discovered.

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## Exclusions

Services to be provided by Pentana Solutions under this Agreement do not include:

correction of errors or defects caused by operation of the Licensed System in a manner other than that currently recommended by Pentana Solutions in its Documentation;

correction of errors or defects caused by modification, revision, variation, translation or alteration of the Licensed System not authorised by Pentana Solutions;

correction of errors or defects caused by the use of the Licensed System by a person not authorised by Pentana Solutions or the Customer;

correction of errors or defects caused by customer error, fault, negligence or abuse;

correction of errors or defects caused by causes external to the Licensed System or Designated Equipment, such as, but not limited to, transportation or the fluctuation of power;

correction of errors or defects caused by transportation of the Licensed System or Designated Equipment by personnel other than from Pentana Solutions;

correction of errors caused in whole or in part by the use of software other than the Licensed System;

correction of errors caused by entities other than Pentana Solutions including third party internet service providers, networks or operating environments;

correction of errors caused, by the failure of the Customer to provide suitably qualified and adequately trained operating staff for the operation of the Licensed System;

rectification of operator errors, or errors caused by incorrect use of the Licensed System;

rectification of errors caused by an equipment fault, or by a failure to maintain equipment adequately;

diagnosis or rectification of faults not associated with the Licensed System;

furnishing or maintenance of accessories, attachments, supplies, consumables or associated items, whether or not manufactured or distributed by Pentana Solutions or the Customer;

correction of errors arising directly or indirectly out of the Customer's failure to comply with this Agreement or any other agreement with Pentana Solutions; or

correction of errors or defects which are the subject of a warranty under another agreement;

but each of these services may be provided by Pentana Solutions subject to an Extra Charge.

If so specified in this Agreement, the Services must include the provision of any updates and new releases of the Licensed System.

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#### Access

The Customer must, where relevant, ensure Pentana Solutions' support personnel have full and safe access, physical and/or electronic as appropriate, to the Licensed System and the relevant equipment at all reasonable times for the purpose of providing the Services. The Customer must also ensure that Pentana Solutions' support personnel are provided with all information, facilities, assistance and accessories reasonably required by Pentana Solutions to enable Pentana Solutions to comply with its obligations under this Agreement.

If reasonably requested by Pentana Solutions, the Customer must provide a suitably qualified or informed representative to accompany Pentana Solutions' personnel and to provide such advice or assistance to those personnel as may be necessary in order to enable Pentana Solutions to access the Licensed System and any Designated Equipment or other equipment and to otherwise effectively perform the Services.

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#### Updates and New Releases

If so specified in the SLA, the Services include the provision of updates and new releases of the Licensed System.

Unless stated in the SLA to the contrary, updates and new releases of the Licensed System must be provided by Pentana Solutions as they become available and the Customer must accept them. If Customer does not upgrade, Pentana Solutions may request an Extra Charge for its Services.

When reasonably required to do so by the Customer, Pentana Solutions must demonstrate the extent to which an update or new release is capable of providing functions and performance specified in the SLA. Pentana Solutions may make an Extra Charge in respect of any such demonstration.

Where the Customer accepts an update or new release this Agreement applies in all respects to that update or new release to the extent that it is incorporated or replaces the Licensed System.

Customers are required to remain on the current version of the Licensed System and an Extra Charge may apply if not.

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## Licence and Service Fees

The Customer must pay the Licence Fees and the Service Fees at the rate and in the manner specified in the SLA.

Irrespective of the any payment terms specified in any SLA, the Customer must pay to Pentana Solutions;

A deposit of 10% upon signing of this Agreement;

Amounts invoiced for any hardware, 3<sup>rd</sup> party software, licences or services purchased by Pentana Solutions pursuant to this Agreement, when the said hardware, 3<sup>rd</sup> party software, licences or services arrive at Pentana Solutions;

All amounts relating to hardware and/or software maintenance, Licence Fees and any other recurring fee, seven (7) days from receipt of invoice;

An annual price increase applied to all recurring fees.

Unless specifically excluded in an attached Appendix or SLA, Travel Expenses will be payable in addition to this Agreement;

Pentana Solutions reserves the right to vary the Licence Fee with 30 days written notice.

If the Customer disputes the whole or any portion of the amount claimed in an invoice submitted by Pentana Solutions, the Customer must still pay the entire invoice when due, but the amount disputed will be treated as a dispute and escalated in accordance with the Escalation Request provisions set out in the SLA or the dispute resolution provisions in clause 31.

The Customer must pay Pentana Solutions interest on any amount due and not paid by the Customer within the timeframe required by this Agreement at the prevailing base market interest rate plus 5%.

In the event that an amount remains outstanding beyond 45 days, after reasonable notice, Pentana Solutions may at its discretion remove access via any means at its disposal (including activating Software Expiry) to any Pentana Solutions product or service, whether part of this Agreement or not.

In the event that the supply, installation or performance of the Licensed System is delayed and:

Pentana Solutions is required to deliver and install the Licensed System or perform services in circumstances other than those expressly or reasonably anticipated to be associated with the delivery or installation or supply of services of a similar nature; or

there is a change in the timing or complexity of the delivery, installation of the Licensed System or the supply of Services;

for reasons other than a breach of this Agreement by Pentana Solutions, then Pentana Solutions is entitled to immediate payment for hardware purchases and any third party costs and an Extra Charge on a time and materials basis in respect of additional resources reasonably utilised in order for Pentana Solutions to fulfil its obligations under this Agreement.

The Licence Fees and Service Fees are exclusive of taxes, duties and charges imposed or levied in Australia or overseas (including withholding tax) in connection with the supply, installation and support of the Licensed System. Without limiting the foregoing, the Customer is liable for any new taxes, duties or charges imposed subsequent to the Commencement Date in respect of the goods and services which are the subject of this Agreement.

Words defined in the GST Law have the same meaning in this clause, unless the context makes it clear that a different meaning is intended.

In addition to paying the Licence Fee and Service Fees and any other amount payable under or in connection with this Agreement (which is exclusive of GST), the Customer must:

pay to Pentana Solutions an amount equal to any GST payable for any supply by Pentana Solutions in respect of which the Licence Fee and Service Fees or other amount is payable under this Agreement; and

make such payment either on the date when the Licence Fee and Service Fees or other amounts to which it relates is due or within seven (7) days after the Customer is issued with a tax invoice, whichever is the later.

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## Warranty

Pentana Solutions shall not be liable for failure of the Licensed System due to causes or conditions beyond Pentana Solutions' reasonable control;

For the duration of the Warranty Period, Pentana Solutions warrants that the Licensed System will operate in conformity with the Documentation in all material respects, but the Customer acknowledges that the Licensed System is of such complexity that it may have inherent defects.

If at any time during the Warranty Period the Customer believes there is a defect in the Licensed System such that the Licensed System does not comply with or cannot be used in conformity with the Documentation in all material respects, the Customer must notify Pentana Solutions of such perceived defect.

Pentana Solutions will investigate the perceived defect notified pursuant to subclause 17.3 and will, upon the verification of the existence of the defect, rectify such defect without additional charge to the Customer.

If due investigation by Pentana Solutions of a defect reported pursuant to subclause 17.3 reveals that no such defect in fact exists, Pentana Solutions may make an Extra Charge in respect of such investigation.

Pentana Solutions will not be liable under this clause to the extent that a defect is caused by the Customer or a third party, including the failure of the Customer or a third party to maintain the operating environment or any part thereof, designated in the Documentation, the failure of a Customer or a third party to maintain the hardware or network, or to otherwise use the Licensed System in accordance with recommendations made by Pentana Solutions from time to time, whether in the Documentation or otherwise.

When any hardware or network product is no longer supported, or serviced by its supplier and has effectively reached its end of life, the cost of replacement is the responsibility of the Customer. The Customer and Pentana Solutions may jointly agree to either:

the purchase of a replacement from Pentana Solutions by the Customer; or

continued support by Pentana Solutions at an agreed Extra Charge.

Pentana Solutions' warranty applies only to the functioning of the Licensed System and is entirely independent of, and Pentana Solutions is not responsible for, any warranty provided by a third party supplier of hardware or networks that allow the Customer to use the Licensed System.

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#### Confidentiality

A Party must not, without the prior written approval of the other Party, disclose the other Party's Confidential Information.

A Party will not be in breach of subclause 18.1 in circumstances where it is legally compelled to disclose the other Party's Confidential Information.

Each Party must take all reasonable steps to ensure that its employees and agents, and any sub-contractors engaged for the purposes of this Agreement, do not make public or disclose the other Party's Confidential Information.

Notwithstanding any other provision of this clause, Pentana Solutions may disclose the terms of this Agreement to its related companies, solicitors, auditors, insurers and accountants.

This clause survives the termination of this Agreement.

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#### Intellectual Property Rights

Subject to subclauses 19.2, 19.3, 19.4, Pentana Solutions indemnifies the Customer against liability under any final judgment in proceedings brought by a third party against the Customer which determine that the Customer's use of the Licensed System constitutes an infringement in Australia of any Intellectual Property Rights in the Licensed System.

Pentana Solutions is not required to indemnify the Customer as provided in subclause 19.1 unless the Customer:

notifies Pentana Solutions in writing as soon as practicable of any infringement, suspected infringement or alleged infringement;

gives Pentana Solutions the option to conduct the defence of such a claim, including negotiations for settlement or compromise prior to the institution of legal proceedings;

provides Pentana Solutions with reasonable assistance in conducting the defence of such a claim;

permits Pentana Solutions to modify, alter or substitute the infringing part of the Licensed System at its own expense in order to avoid continuing infringement, or authorises Pentana Solutions to procure for the Customer the authority to continue the use and possession of the infringing Licensed System.

Pentana Solutions does not indemnify the Customer to the extent that an infringement, suspected infringement or alleged infringement arises from:

use of the Licensed System in combination by any means and in any form with other goods not specifically approved by Pentana Solutions;

use of the Licensed System in a manner or for a purpose not reasonably contemplated or not authorised by Pentana Solutions;

modification or alteration of the Licensed System without the prior written consent of Pentana Solutions; or

any transaction entered into by the Customer relating to the Licensed System without Pentana Solutions' prior consent in writing.

In the event that proceedings are brought or threatened by a third party against the Customer alleging that the Customer's use of the Licensed System constitutes an infringement of Intellectual Property Rights, Pentana Solutions may at its option and at its own expense conduct the defence of such proceedings. The Customer must provide all necessary co-operation, information and assistance to Pentana Solutions in the conduct of the defence of such proceedings.

The Customer must indemnify Pentana Solutions against any loss, costs, expenses, demands or liability, whether direct or indirect, arising out of a claim by a third party alleging such infringement if:

the claim arises from an event specified in subclause 19.3; or

the ability of Pentana Solutions to defend the claim has been prejudiced by the failure of the Customer to comply with any requirements of subclauses 19.2 or 19.4.

The Customer has a limited licence only to use Pentana Solutions' Trade Marks in the manner that Pentana Solutions has approved on the signing of this licence, or in a manner subsequently approved by Pentana Solutions in writing and there is no transfer of ownership or general right of use of the Pentana Solutions Trade Marks as a result of this licence.

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#### Implied Terms

Subject to subclause 20.2, any condition or warranty which would otherwise be implied in this Agreement is hereby excluded.

Where legislation implies in this Agreement any condition or warranty, and that legislation avoids or prohibits provisions in a contract excluding or modifying the application of or exercise of or liability under such condition or warranty, the condition or warranty is deemed to be included in this Agreement. However, the liability of Pentana Solutions for any breach of such condition or warranty is limited, at the option of Pentana Solutions, to one or more of the following:

if the breach relates to goods:

the replacement of the goods or the supply of equivalent goods;

the repair of such goods;

the payment of the cost of replacing the goods or of acquiring equivalent goods; or

the payment of the cost of having the goods repaired; and

if the breach relates to services:

the supplying of the services again; or

the payment of the cost of having the services supplied again.

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#### Liability of Pentana Solutions

Except in relation to liability for personal injury (including sickness and death), Pentana Solutions is under no liability to the Customer in respect of any loss or damage (including consequential loss or damage) which may be suffered or incurred or which may arise directly or indirectly in respect of the Licensed System supplied pursuant to this Agreement or in respect of a failure or omission on the part of Pentana Solutions to comply with its obligations under this Agreement.

Subject to subclause 21.3, the Customer warrants that it has not relied on any representation made by Pentana Solutions which has not been, stated expressly in this Agreement, or upon any descriptions, representations, illustrations or specifications contained in any document including catalogues or publicity material produced by Pentana Solutions.

The Customer acknowledges that to the extent Pentana Solutions has made any representation which is not otherwise expressly stated in this Agreement, the Customer has been provided with an opportunity to independently verify the accuracy of that representation.

The Customer at all times indemnifies and holds harmless Pentana Solutions and its officers, employees and agents (those indemnified) from and against any loss (including reasonable legal costs and expenses) or liability reasonably incurred or suffered by any of those indemnified arising from any proceedings against those indemnified where such loss or liability was caused by:

- a breach by the Customer of its obligations under this Agreement;
  - any wilful, unlawful or negligent act or omission of the Customer.
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#### Termination

Without limiting the generality of any other clause in this Agreement, Pentana Solutions may terminate this Agreement immediately by notice in writing if:

- the Customer is in breach of any term of this Agreement;
- the Customer for any reason destroys or disposes of or loses custody of the Licensed System;
- the Customer becomes, threatens or resolves to become or is in jeopardy of becoming subject to any form of insolvency administration;
- the Customer, being a partnership, dissolves, threatens or resolves to dissolve or is in jeopardy of dissolving;
- the Customer, being a natural person, dies; or
- the Customer ceases or threatens to cease conducting its business in the normal manner,

If notice is given to the Customer pursuant to subclause 22.1, Pentana Solutions may, in addition to terminating the Agreement:

- repossess any copies of the Licensed System in the possession, custody or control of the Customer;
- retain any moneys paid;
- charge a reasonable sum for work performed in respect of which work no sum has been previously charged;
- be regarded as discharged from any further obligations under this Agreement; and
- pursue any additional or alternative remedies provided by law.

A customer can terminate this Agreement by giving Pentana Solutions 30 days notice in writing after a period of six (6) months from the date of commencement of this Agreement has passed.

If a customer terminates this Agreement pursuant to clause 22.3, the customer is responsible for the payment of all 3<sup>rd</sup> party costs, including fixed term contracts, incurred by Pentana Solutions as part of this Agreement.

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#### GST and Claims

If a payment to satisfy a claim or a right to claim under or in connection with this Agreement (for example, for misleading or deceptive conduct or for misrepresentation or for a breach of any warranty or for an indemnity or for reimbursement of any expense) gives rise to a liability to pay GST, the payer must also pay, and indemnify the payee against, the amount of that GST.

If a Party has a claim under, or in connection with this Agreement for a cost on which that Party must pay GST, the claim is for the cost plus all GST (except any GST for which that Party is entitled to an input tax credit).

If a Party has a claim under or in connection with this Agreement and the amount of the claim depends on actual or estimated revenue or lost revenue, revenue must be calculated without including any amount received or receivable as reimbursement for GST (whether that amount is separate or included as part of a larger amount).

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#### Force Majeure

Neither Party is liable for any delay or failure to perform its obligations pursuant to this Agreement if such delay is due to Force Majeure.

If a delay or failure of a Party to perform its obligations is caused or anticipated due to Force Majeure, the performance of that Party's obligations will be suspended.

If a delay or failure by a Party to perform its obligations due to Force Majeure exceeds sixty (60) days, either Party may immediately terminate the Agreement on providing notice in writing to the other Party.

If this Agreement is terminated pursuant to subclause 24.3, Pentana Solutions refunds moneys previously paid by the Customer pursuant to this Agreement for goods or services not provided by Pentana Solutions to the Customer.

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#### Sub-Contracts

Pentana Solutions may sub-contract for the performance of this Agreement or any part of this Agreement to the extent specified in the SLA or upon obtaining (subject to subclause 25.3) the Customer's prior written consent.

The Customer must not unreasonably withhold consent for the engagement of a sub-contractor in accordance with subclause 25.1.

Pentana Solutions may, without the consent of the Customer, engage individuals on a sub-contract or consultancy basis, whether or not operating under a corporate structure, to assist in the provision of Services pursuant to this Agreement.

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#### Entire Agreement

This Agreement constitutes the entire agreement between the Parties concerning this subject matter and supersedes all prior representations, agreements, statements and understandings, whether verbal or in writing.

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#### Precedence

The documents comprising this Agreement are to be read in the following order of precedence:

the clauses of this Agreement;

any SLA

Where any conflict occurs between the provisions contained in two or more of the documents forming this Agreement, the document lower in the order of precedence shall where possible be read down to resolve such conflict. If the conflict remains incapable of resolution by reading down, the conflicting provisions shall be severed from the document lower in the order of precedence without otherwise diminishing the enforceability of the remaining provisions of that document.

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#### Assignment and Novation

The benefit of this Agreement must not be assigned by the Customer without Pentana Solutions' written consent.

Pentana Solutions may consent to the assignment or novation of this Agreement by the Customer subject to such conditions as it chooses to impose.

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#### Waiver

No right under this Agreement is deemed to be waived except by notice in writing signed by each Party.

A waiver made by Pentana Solutions pursuant by subclause 29.1 will not prejudice its rights in respect of any subsequent breach of the Agreement by the Customer.

Subject to subclause 29.1, any failure by Pentana Solutions to enforce any clause of this Agreement, or any forbearance, delay or indulgence granted by Pentana Solutions to the Customer, will not be construed as a waiver of Pentana Solutions' rights under this Agreement.

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#### Variation

The provisions of this Agreement must not be varied, except by agreement in writing signed by the Parties.

If either Party wishes to vary the Agreement, the proposing Party must submit a copy of the proposed variations to the other Party (the receiving Party), specifying a reasonable period in which the receiving Party is to provide written notice of acceptance or rejection of the proposal.

If the receiving Party accepts the variations, the Agreement between those parties is deemed to be amended from the date of acceptance.

If the receiving Party rejects the proposed variations, each Party must perform the Agreement in accordance with the unvaried terms.

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## Disputes

The Parties acknowledge that before a dispute arises in connection with this Agreement, the Parties will have first tried to resolve the matter as between the respective company representatives and failing that a disputant may give the other disputant a notice specifying the dispute.

Within fifteen (15) Business Days after the notice is given, the disputants (each represented by its Chief Executive Officer or other person authorised by the disputant to bind it in connection with the dispute) must confer to resolve the dispute or to decide the method of resolving the dispute.

Unless the disputants otherwise agree, the dispute must be referred to mediation if not resolved within thirty (30) Business Days after the notice is given.

The disputants must appoint a mediator within forty-five (45) Business Days after the notice is given. If they fail to agree, the mediator must be nominated by the then current President of the Law Institute of Victoria or nominee. The mediation must be conducted in Victoria, Australia in accordance with the mediation rules of the Law Institute of Victoria.

The mediator assists in negotiating a resolution of the dispute. The mediator may not make a decision binding on the disputants, unless the disputants have agreed to it in writing.

The mediation ends if the dispute is not resolved within thirty (30) Business Days after the mediator's appointment.

Each disputant must keep confidential:

any information or documents disclosed in the course of the mediation;

any discussions between the disputants in the course of the mediation.

These may be used only to resolve the dispute.

Unless disclosure is required by law:

each disputant must keep confidential all information about the existence, conduct, status or outcomes of the mediation and the terms of any mediation settlement agreement;

this information and these terms may be published or announced only with the consent of the disputants and in terms agreed by them in writing.

The dispute resolution process does not affect any party's obligations under this Agreement

Neither disputant may commence Court proceedings in respect of the dispute until the mediation period ends. This does not affect a disputant's right to seek injunctive or urgent declaratory relief.

Each disputant must pay its own costs in respect of the dispute resolution process. The disputants must pay the mediator's costs in equal shares and the cost of third party reports and enquiries requested by the mediator.

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## Survival of Agreement

Subject to any provision to the contrary, the benefit and the obligations of this Agreement shall be only for the Parties and their successors, trustees, permitted assigns or receivers, but shall not enure to the benefit of any other persons.

The covenants, conditions and provisions of this Agreement which are capable of having effect after the expiration of the Agreement shall remain in full force and effect following the expiration of the Agreement.

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## Severability

If any provision of this Agreement is held invalid, unenforceable or illegal for any reason, the Agreement shall remain otherwise in full force apart from such provision which shall be deemed deleted.

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## Governing Law

This Agreement will be governed by the law of Victoria.

The parties irrevocably submit to the exclusive jurisdiction of the Courts of Victoria and the Federal Court of Australia in that jurisdiction, and the Courts of appeal from them.

No party may object to the jurisdiction of any of those Courts on the ground that it is an inconvenient forum or that it does not have jurisdiction.

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#### Notices

Notices under this Agreement may be delivered by hand, by mail or by facsimile to the addresses specified in the Registered Office at the front of this Agreement.

Notices are deemed to be given:

in the case of hand delivery, upon written acknowledgment of receipt by an officer or other duly authorised employee, agent or representative of the receiving Party;

in the case of posting, three (3) days after despatch;

in the case of facsimile, upon receipt of transmission if received on a business day or otherwise at the commencement of the first business day following transmission.

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**Execution**

This Agreement may be executed in counterparts by the respective Parties, each of which when so executed is deemed to be an original and all of which taken together constitute one and the same agreement, provided that this Agreement is of no force and effect until the counterparts are exchanged.

Executed as an agreement on \_\_\_\_\_ / \_\_\_\_\_ / \_\_\_\_\_ (AGREEMENT DATE – PLEASE FILL IN)

Executed by Pentana Solutions

**PENTANA SOLUTIONS - SIGN HERE**

.....

Pentana Solutions Director/Company Secretary - Signature

.....

Pentana Solutions Director/Company Secretary - Name (please print)

Date \_\_\_\_\_ / \_\_\_\_\_ / \_\_\_\_\_

Executed by Pentana Solutions

**PENTANA SOLUTIONS ACCOUNT MANAGER - SIGN HERE**

Pentana Solutions Account Manager - Signature

.....

Pentana Solutions Account Manager - Name (please print)

.....

Date \_\_\_\_\_ / \_\_\_\_\_ / \_\_\_\_\_

Executed by the Customer

**CUSTOMER - SIGN HERE**

.....

Customer's Director/Company Secretary – Signature

.....

Customer's Director/Company Secretary - Name (please print)

Date \_\_\_\_\_ / \_\_\_\_\_ / \_\_\_\_\_