

# Logicalis Terms and Conditions

Effective 1 December 2013  
Version 3.1



# LOGICALIS TERMS AND CONDITIONS

*These terms and conditions are effective for transactions on or after 1 September 2013. Terms and conditions applicable to transactions prior to this date are available from Logicalis on request.*

## 1. Introduction

1.1. These terms and conditions are divided into sections for convenience.

**Section 1 (General)** applies to all orders.

**Section 2** applies where Logicalis supplies Equipment.

**Section 3** applies where Logicalis provides any of the following Services, namely Professional Services, Telecommunications Services, Cloud Services, Managed Services, or Maintenance Services.

Where it is appropriate two or more of Sections 1 to 3 may apply.

## 2. SECTION ONE: GENERAL

2.1. In these terms and conditions unless the context otherwise requires, the following words and expressions shall have the following meanings:

"Agreement" means the agreement for supply of Equipment, Services and/or Deliverables between Logicalis and the Customer consisting of (i) these Terms and Conditions; (ii) the Schedules identified in the Proposal; (iii) the Proposal; (iv) the Statements of Work (if any) incorporated or identified in the Proposal; and (v) any other document that Logicalis and the Customer agree in writing forms part of the Agreement.

"Assumption" means any assumption (by whatever name called) which Logicalis has made in calculating the Charges and which is stated in the Proposal or elsewhere in the Agreement.

'Carrier' means, where the Services comprise or include Telecommunications Services, the provider of those Telecommunications Services as identified in the Telecommunications Schedule.

"Charges" or "Fees" or "Price" means the amounts payable by the Customer for the Equipment, Services and/or Deliverables as stated in the Proposal, together with any other amounts which are payable by Customer to Logicalis under the Agreement.

"Claims" means all claims, demands, suits, actions and other proceedings of any kind, whether arising under contract (including under any warranty or indemnity), in equity, in restitution, in negligence or any other tort, under strict liability, under statute, or otherwise at all.

"Cloud Services" means any cloud computing services that Logicalis is to supply to the Customer in accordance with the Cloud Services Schedule for the time being in force, a link to which will be found at <http://www.au.logicalis.com/terms.aspx>

"Customer" means the person, firm, company, Government body or other entity who purchases Equipment, Services and/or Deliverables from Logicalis.

"Customer Obligation" means any obligation of the Customer stated in the Proposal, a Schedule or elsewhere in the Agreement. .

"Deliverables" means all materials created by Logicalis specifically for the Customer, including, without limitation, data, diagrams, reports and specifications.

"Equipment" or "Products" means any equipment and/or Software that Logicalis is to supply to the Customer in accordance with the Equipment Schedule for the time being in force, a link to which will be found at <http://www.au.logicalis.com/terms.aspx>

"Exclusion" means any item identified in the Proposal, a Schedule, or elsewhere in the Agreement as (i) not available from Logicalis; or (ii) available from Logicalis for an additional Charge under clause 5.3.

"Fixed Term Services" means Services which are purchased for a fixed term including, without limitation, Managed Services and Maintenance Services.

"GST" means any goods and services tax imposed by A New Tax System (Goods and Services Tax) Act 1999 (Cth) as amended, renamed or replaced from time to time.

"Intellectual Property Rights" means patents, rights to inventions, copyright and related rights, trademarks, trade names, domain names, rights in get-up, rights in goodwill or to sue for passing off, unfair competition rights, rights in designs, rights in computer software, database rights, topography rights, moral rights, rights in confidential information (including know-how and trade secrets) and any other intellectual property rights, in each case whether registered or unregistered, and including all applications for, and renewals or extensions of, such rights, and all similar or equivalent rights or forms of protection in any part of the world.

"Logicalis" means Logicalis Australia Pty Limited; registered in Australia , ABN:67 089 914 581 Registered Office: Level 3, Tower B, 112-118 Talavera Road North Ryde NSW 2113.

"Logicalis Group" means Logicalis and all related bodies corporate as defined in section 9 of the Corporations Act 2001 .

"Maintenance Services" means any maintenance services that Logicalis is to procure for or supply to the Customer in accordance with the Maintenance Services Schedule for the time being in force, a link to which will be found at <http://www.au.logicalis.com/terms.aspx>

"Managed Services" means any managed services that Logicalis is to supply to the Customer in accordance with the Managed Services Schedule for the time being in force, a link to which will be found at <http://www.au.logicalis.com/terms.aspx>

"Manufacturer" means the manufacturer of the Equipment.

"Manufacturer's Maintenance Services" means any maintenance services which, although ordered from Logicalis, are purchased from and supplied by the Manufacturer in respect of Equipment.

"Manufacturer's Terms" means the Manufacturer's standard warranty, Software licensing and/or service terms applicable to the Equipment and/or Manufacturer's Maintenance Services, as may be packaged with the Equipment, set out on the Manufacturer's website, or otherwise provided by the Manufacturer.

"Pre-existing Materials" means materials which existed before the commencement of the Services.

"Pre-paid Services", means Fixed Term Services which are payable in advance for the full term of the Service, including, without limitation, Maintenance Services.

"Premises" or "Site" means the premises to which the Equipment is to be delivered and/or at which Services are to be performed, as specified in the Proposal.

"Professional Services" means any professional services that Logicalis is to supply to the Customer in accordance with the Professional Services Schedule for the time being in force, a link to which will be found at <http://www.au.logicalis.com/terms.aspx>

"Proposal" means the written proposal issued by Logicalis to the Customer to supply the Equipment, Services and/or Deliverables for the Charges. The Proposal may be in the form of a written quotation, or, for complex projects or Services, may contain or incorporate one or more Statements of Work.

"Schedule" means the Equipment Schedule, the Cloud Services Schedule, the Maintenance Services Schedule, the Managed Services Schedule, the Professional Services Schedule and the Telecommunications Schedule.

"Services" means any services that Logicalis is to provide to the Customer in accordance with the Agreement, including the Services in section 3.

"Software" means any operating system or other software, including Third Party Software, installed on the Equipment or otherwise supplied by Logicalis.

"Statement of Work" or "SOW" means a service description, service level agreement, statement of work or other specification incorporated or identified in a Proposal, containing details of (i) the Equipment, Services and/or Deliverables; (ii) the Charges; (iii) any applicable project plan, milestones, acceptance test procedures and/or performance criteria; (iii) any Assumptions, Exclusions and Customer Obligations and/or (iv) any other details applicable to the performance of the Agreement.

"Telecommunications Services" means any telecommunications services that Logicalis is to supply to the Customer in accordance with the Telecommunications Schedule for the time being in force, a link to which will be found at <http://www.au.logicalis.com/terms.aspx>

"Termination Charges" or "Cancellation Charges" means:

- a) the full Charges for all delivered Equipment, Services and/or Deliverables;
- b) the full Charges for undelivered Equipment & Manufacturer's Maintenance Service orders which cannot be cancelled with the Manufacturer;
- c) the cancellation charges for undelivered Equipment & Manufacturer's Maintenance Service orders which can be cancelled with the Manufacturer;
- d) the full Charges, for the full term, of Fixed Term Services;
- e) an administration fee of \$500.00;
- f) any other termination or cancellation fees set out in the Proposal, a Schedule, a Statement of Work, or the Agreement; and
- g) all other costs, losses and expenses reasonably incurred by Logicalis as a consequence of such termination.

"Third Party Software" means Software that is not proprietary to Logicalis and which is installed on the Equipment or otherwise supplied by Logicalis.

2.2. The headings are for ease of reference only and shall not affect interpretation.

2.3. Reference to the singular includes the plural and vice versa, and reference to a gender includes the other gender.

- 2.4. References to a statutory provision include a reference to that statutory provision as from time to time amended, extended or re-enacted and any regulations made under it provided that in the event that the amendment, extension or re-enactment of any statutory provision or introduction of any new statutory provision has a material impact on the obligations of either party, the parties will negotiate in good faith to agree such amendments to these terms and conditions as may be appropriate in the circumstances.
- 2.5. Where the word "including" is used it shall be construed as meaning "including without limitation".

### 3. Proposals

- 3.1. All Proposals are valid for thirty (30) days from date of the Proposal, unless otherwise stated in the Proposal. All Proposals are subject to these Terms and Conditions.
- 3.2. Logicalis may, but is not obliged to, incorporate or identify in the Proposal, a SOW containing details of the Equipment, Services and/or Deliverables and any applicable Exclusions, activities, outputs and Assumptions.
- 3.3. Logicalis may at any time before both parties have signed the Proposal, withdraw and amend it to reflect any increase in the cost to Logicalis of any Equipment, Services and/or Deliverables which form part of the Proposal.

### 4. Conditions

- 4.1. **Exclusion:** These terms and conditions shall apply to the exclusion of any standard terms or conditions of the Customer, whether appearing in an order or in any other document, or published on any media issued by the Customer and notwithstanding any statement to the contrary appearing in such standard terms or conditions.
- 4.2. **Priority:** In the case of any conflict or inconsistency between the documents forming the Agreement, then the documents will take priority in the following order-(i) these Terms and Conditions; (ii) the Schedules identified in the Proposal; (iii) the Proposal; (iv) the Statements of Work (if any) incorporated or identified in the Proposal; and (v) any other documents that Logicalis and the Customer agree in writing forms part of the Agreement.

### 5. Formation and variation of Agreement

- 5.1. **Agreement and Term:** The Agreement is made on the date that (i) both parties sign, or confirm acceptance in writing of, the Proposal; or (ii) Logicalis delivers the Equipment or supplies the Services to the Customer; (whichever occurs earlier) and will continue for the initial period stated in the Proposal ("Initial Term") unless earlier terminated in accordance with the Agreement. If the Proposal provides for renewal terms then upon expiry of the Initial Term, the Agreement will automatically continue for successive renewal terms identified in the Proposal ("Renewal Terms") unless terminated by either party notifying the other in writing not less than 90 days before expiry of the then current Term. Any term of the Agreement, whether the Initial Term or a Renewal Term, is referred to as the "Term".
- 5.2. **Cancellation:** Unless otherwise provided in the Proposal, the Agreement may not be terminated for convenience and the supply of any Equipment, Services and/or Deliverables may not be cancelled by the Customer, except with the agreement in writing of Logicalis and payment by the Customer of the Termination Charges.



5.3. **Contract Changes:** The Agreement shall not be amended or modified except (i) where Logicalis is authorised by the Agreement to make a change, such as a change to the Charges, or a change to the Acceptable Use Policy or the Fair Usage Policy referenced in the Cloud Services Schedule or the Telecommunications Schedule; or (ii) in accordance with the Contract Change Mechanism set out below:

- a) At any time during the term of the Agreement, Customer or Logicalis may request any reasonable alteration to the Agreement ("Change Request").
- b) Any Change Request shall be in writing and served on the other party in accordance with clause 13 (Notices).
- c) For each Change Request, Logicalis will, within a reasonable period, provide Customer with written details of the effect the Change Request will have on the Agreement, including (i) the provision of the Equipment, Services and/or Deliverables; and (ii) the Charges.
- d) If agreement is reached between the parties on the Change Request, then the parties shall prepare and sign a written record of the alteration to the Agreement (a "Contract Change").
- e) No proposed Change Request will be binding on the parties unless a Contract Change is signed by both parties. Until a Contract Change is signed by the Customer and Logicalis, each party shall continue to perform its obligations under the Agreement without taking account of the proposed Change Request.
- f) Once a Contract Change has been signed by both parties, such Contract Change shall constitute an amendment to the Agreement in accordance with the content thereof with effect from the date of signature.
- g) The costs of preparing a Change Request initiated by Logicalis will be borne by Logicalis. The cost of responding to a Change Request initiated by Customer shall be (i) borne by Logicalis if a Contract Change is agreed which produces increased revenue for Logicalis; and (ii) otherwise will be charged by Logicalis to Customer using the rates specified in the Proposal, or if no rates are specified, then using Logicalis' then current standard commercial charges.

## 6. Charges

6.1. **Charges:** Logicalis shall charge and the Customer shall pay the Charges set out in the Proposal in AUD\$, without deduction, set off or counterclaim.

6.2. **Additional Charges:** The Customer shall also reimburse Logicalis for all reasonable costs, expenses and charges in connection with the supply of Equipment, Services and/or Deliverables. Without limiting the foregoing and unless specifically excluded in the Proposal, Logicalis may make an additional Charge at its then current standard commercial charges for (i) all GST, which shall be payable by Customer on receipt of a valid tax invoice; (ii) all Equipment and Service related taxes, duties and imposts, and all Equipment related delivery costs and installation charges; (iii) any increase in costs to Logicalis resulting from Force Majeure, changes in laws, changes in exchange rates, changes in the prices and fees charged by its suppliers and/or changes, errors or omissions in Customer's instructions, data or requirements; (iv) any Assumptions

proving to be incorrect; (v) any delays caused by Customer, or Customer's failure to fulfill any Customer Obligations; (vi) any Contract Change agreed under clause 5.3; (vii) Service related travel and accommodation expenses; and (viii) any other amounts which Logicalis is entitled to receive from the Customer under the Agreement.

Where an expenses policy is included or referred to in the Proposal, then expenses will be charged by Logicalis as set out in that policy.

- 6.3. **Invoicing and Payment** : Unless otherwise stated in the Proposal, or in the Agreement: (i) all Charges must be paid by the Customer within 30 days after the date of Logicalis' invoice for the same; and (ii) Logicalis will be entitled to invoice the Customer as follows:
- a) Charges for Equipment and the initial term of Maintenance Services for the Equipment will be invoiced on delivery of the Equipment to the Premises;
  - b) Charges for other Pre-paid Services, including Maintenance Service renewals, will be invoiced, in advance, on the commencement date of the Service, or the commencement date of the Service renewal, as the case may be; and
  - c) Charges for all other Services, Deliverables and any other amounts due under the Agreement will be invoiced monthly in arrears.
- 6.4. **Calculation of Charges:** If the means of calculating the Charges is not specifically stated in the Proposal, then the Charges will be calculated using Logicalis' then current standard commercial charges.
- 6.5. **Revision of Charges:** Except where the Proposal specifies that a Charge is fixed, the Charges may be revised by Logicalis from time to time, consistent with Logicalis' then current standard commercial charges. Charges for Pre-paid Services will not be revised during the pre-paid term, but will be revised to Logicalis' then current standard commercial charges on renewal of the pre-paid term.
- 6.6. **Acceptance:** The Customer's obligation to pay the Charges is not dependent on the Equipment, Services, and/or Deliverables meeting any acceptance criteria, unless stated in the Proposal.
- 6.7. **Failure to pay:** If the Customer fails to pay the Charges in full by the due date, then Logicalis may, without prejudice to any other right or remedy available to Logicalis:
- a) suspend its obligations to provide Equipment, Services and/or Deliverables and recover any Equipment storage costs incurred;
  - b) require payment in advance of delivery of Equipment, Services and/or Deliverables;
  - c) charge interest on overdue amounts at the Commonwealth Bank of Australia's Published Base Rate plus two (2%) percent per annum; and/or
  - d) recover all costs and expenses (including any legal costs and expenses on a full indemnity basis) incurred or sustained by Logicalis in recovering sums due.
- 6.8. **Termination Charges:** Unless otherwise provided in the Proposal, the Agreement may not be terminated for convenience and the supply of any Equipment, Services and/or Deliverables may not be cancelled by the Customer, except with the agreement in writing of Logicalis and payment by the Customer of the Termination Charges. The Customer acknowledges that termination or cancellation of Fixed Term Services will require payment of the full Charges for the full term. Charges for Pre-paid Services including, without limitation, Maintenance Services, are not refundable.

## 7. Liability and dispute resolution

- 7.1. **Death or bodily injury:** Neither party excludes or limits liability to the other party for (i) death or bodily injury due to its negligence; or (ii) any other liability which may not be excluded by law.
- 7.2. **Exclusion of warranties:** Other than those expressly contained in the Agreement and to the fullest extent allowed under law, Logicalis excludes all warranties and conditions relating to the Equipment, the Services, the Deliverables, the Proposal and the Agreement. To the extent that warranties and conditions implied by law cannot be excluded, the liability of Logicalis for breach of any such warranty or condition is limited, at Logicalis' option, to the replacement or repair of the Equipment or, in the case of Services or Deliverables, to the supply of those Services or Deliverables again.
- 7.3. **Limitation of liability for claims arising in connection with a Schedule:** Subject to clause 7.1, clause 7.4, and clause 7.5, the total liability of Logicalis for all Claims arising out of, or in connection with, a Schedule, will not exceed:
- any limitation of liability stated in that Schedule, or if no limitation of liability is stated then;
  - the Charges paid by the Customer to Logicalis, under that Schedule, during the 12 months preceding the last act, omission, event or circumstance giving rise to such liability.
- 7.4. **Limitation of liability for all claims:** Subject to clause 7.1, and clause 7.5, the cumulative liability of Logicalis for all Claims arising out of or in connection with the Agreement or its subject matter, in respect of any and all acts, omissions, events and circumstances giving rise to any loss or damage from any cause or causes whatsoever, shall not exceed in aggregate:
- In the case of loss or damage to any tangible property, A\$5,000,000 (five million dollars); and
  - In the case of all other loss or damage, a sum equal to the Charges paid by the Customer to Logicalis, under the Agreement, during the 12 months preceding the last act, omission, event or circumstance giving rise to such liability, or A\$1,000,000 (one million dollars), whichever is the lesser.
- 7.5. **Exclusion of losses and damages:** Subject to clause 7.1, Logicalis will not be liable for:
- any loss of profits, revenues, business, goodwill, opportunity, anticipated savings, or data; or
  - any exemplary, punitive or special damages; or
  - any indirect, consequential or economic losses; or
  - any loss or damage specifically excluded in the Proposal, or in a Schedule, howsoever arising (in negligence or otherwise), in relation to any Claim, or otherwise in connection with the Equipment, the Services, the Deliverables, the Proposal, or the Agreement, or any act or omission by Logicalis.
- 7.6. If for any reason the exclusion of liability in clause 7.5 above is void or unenforceable, then Logicalis' total liability for all loss or damage under the Agreement shall be as provided in clause 7.4.
- 7.7. **Time limitation:** No Claim may be brought under the Agreement more than two years



after the circumstances giving rise to the Claim have come, or with reasonable diligence should have come, to the notice of the party bringing the Claim.

- 7.8. **Customer's business and operations:** The parties agree that Logicalis will not be exposed to the business and operational risks associated with Customer's business and operations. Customer therefore agrees that (i) any use of the Equipment, Services and/or Deliverables in the conduct of the Customer's business and operations will be entirely at its own risk, and (ii) it will indemnify, defend and hold harmless Logicalis, from and against any third party claim, suit, action or proceeding arising out of the use or attempted use by the Customer of the Equipment, Services and/or Deliverables in the conduct of the Customer's business and operations, except for a third party claim for which Logicalis is liable under clause 10 (Intellectual Property Rights indemnity).

Logicalis does not warrant uninterrupted or error free operation of any Equipment, Service or Deliverable.

7.9. **Dispute resolution:**

Save where expressly stipulated to the contrary in the Agreement, all and any disputes or differences arising out of or in connection with the Agreement (including any question as to its validity or termination) (the 'Dispute') shall be resolved in accordance with the provisions of this clause 7.9.

- a) Either party may serve a notice of dispute upon the other party. All disputes notified under the Agreement will be escalated to each party's Chief Executive (or a delegate specifically authorised by the Chief Executive) for resolution by negotiation.
- b) If the dispute is not resolved by negotiation within 14 days, then it will be referred for non binding mediation conducted in accordance with mediation process of the Australian Commercial Disputes Centre. The parties may be legally represented and will share equally the cost of the mediation.
- c) Subject to paragraph (d) following, all disputes which are not resolved by mediation will be referred to arbitration conducted in accordance with the Rules for the Conduct of Commercial Arbitrations, of the Institute of Arbitrators and Mediators Australia. The parties may be legally represented and the arbitrator will determine an appropriate allocation of costs.
- d) All disputes for more than \$1,000,000 or which require urgent injunctive relief may be referred by either party directly to the Court for determination.
- e) In the event of a dispute, Logicalis will only be obliged to continue to provide the Equipment, Services and/or Deliverables if the Customer pays and continues to pay (i) any undisputed amount to Logicalis without deduction; and (ii) any disputed amount into an escrow account administered by the auditors of each party, pending the outcome of dispute resolution as outlined above.

## 8. Termination

- 8.1. **Termination for breach:** Either party may terminate the Agreement forthwith by notice in writing to the other party where the other party has committed a material breach and (i) such breach is not capable of remedy, or (ii) such breach is capable of remedy within 30 days and the other party has failed to remedy such breach within thirty (30) days of receiving notice specifying the breach and requiring its remedy; or (iii) such breach is not capable of remedy within 30 days and the other party has failed to commence and diligently progress the remedy of such breach within thirty (30) days of receiving notice

specifying the breach and requiring its remedy.

- 8.2. **Termination for insolvency:** Either party may terminate the Agreement forthwith by notice in writing to the other party if the other party is unable to pay its debts as they fall due, or is the subject of any action, application or proceeding for the appointment of (i) a receiver, or receiver and manager, of its property; (ii) an administrator, including an administrator of a deed of company arrangement; (iii) a liquidator; or (iv) a trustee or similar officer, in respect of that party's affairs.
- 8.3. **Termination Charges:** Without prejudice to any rights or remedies arising as a result of such termination, if Logicalis terminates the Agreement under clause 8.1 or 8.2 or if the Customer terminates the Agreement under clause 14.3 (Force Majeure) then Customer will be liable for payment of the Termination Charges.
- 8.4. **Return of property:** On the termination of the Agreement each party shall return to the other party any equipment, documents or other materials ( including Confidential Information) belonging to the other party which it has no legal right to retain. To the extent that Confidential Information of the other party has been incorporated into a party's own material and cannot be separated and returned, then that party must destroy that Confidential Information and certify destruction to the other party.
- 8.5. **Survival:** Except for Clauses which are expressed to, or which by their nature, survive the termination or expiration of the Agreement, including, without limitation, clauses 6 to 13 inclusive and clauses 16, 17, and 18, the termination of the Agreement shall relieve both parties from further performance of their respective obligations hereunder but shall not affect the accrued rights of either party in respect of the Agreement or any breach.

## 9. Intellectual Property Rights

- 9.1. **Retention of rights:** Each party retains all Intellectual Property Rights in its own Pre-existing Materials, software, development tools, know how, methodologies, processes, technologies and algorithms used or disclosed pursuant to the Agreement. The parties acknowledge that the Manufacturer retains all Intellectual Property Rights in the Equipment (including Third Party Software).
- 9.2. **Ownership of rights:** Except where stated otherwise in the Proposal, all Intellectual Property Rights in the Deliverables and the Services shall be owned by Logicalis. Logicalis hereby licenses such rights to the Customer free of charge and on a non-exclusive, worldwide basis to such extent as is necessary to enable the Customer to make reasonable internal use of the Deliverables and the Services as described in the Proposal. Such license will terminate on expiry or termination of the Agreement, except where the Proposal provides otherwise.
- 9.3. **Third Party Software:** The Customer acknowledges that the licences for all Third Party Software will be between the Customer and the Manufacturer and the Customer must comply with the Manufacturer's Terms.
- 9.4. **Pre-existing Materials:** To the extent that the Customer's license to use the Deliverables and the Services in clause 9.2 is dependent upon use of Pre-existing Materials, then the license in clause 9.2 will include such Pre-existing Materials, provided that Logicalis is the owner of the same. The Customer's use of rights in Pre-existing Materials (other than Third Party Software) owned by third parties is conditional on Logicalis obtaining a written end-user licence (or sub-licence) of such rights from the relevant licensor or licensors to such extent as is necessary to enable the Customer to make reasonable internal use of the Deliverables and the Services as described in the Proposal. Such license will terminate on expiry or termination of the Agreement, except

where the Proposal provides otherwise.

- 9.5. **Infringement:** Customer agrees not to directly or indirectly infringe the Intellectual Property Rights of the Manufacturer, or Logicalis, or its suppliers and to ensure that such rights are not infringed by its employees or contractors.
- 9.6. **Confidentiality:** Any Confidential Information which a party ('Disclosing Party') supplies or discloses to, or which is otherwise obtained by, the other party ('Receiving Party') in connection with the Agreement shall be treated as confidential by the Receiving Party, using the same standard of care that it uses to protect its own Confidential Information of like importance, but in any event not less than reasonable care.

The Confidential Information (i) shall not be disclosed by the Receiving Party to any third party without the Disclosing Party's prior written consent; and (ii) shall not be used by the Receiving Party and its employees, agents and contractors except as necessary to perform its obligations and exercise its rights under the Agreement. The Receiving Party shall have an appropriate agreement with each of its employees, agents and contractors having access to Confidential Information, with terms no less restrictive than the terms of this clause 9.6.

In the Agreement, "Confidential Information" means:

- a) the terms of the Agreement, including information submitted or disclosed by either party during negotiations, discussions and meetings relating to the Agreement;
- b) information that at the time of disclosure by a Disclosing Party is identified to the Receiving Party as being confidential; and
- c) all other information belonging or relating to a Disclosing Party, which the Receiving Party knows, or ought reasonably to be expected to know, is confidential to that Disclosing Party or any related entity of that Disclosing Party;

Information shall not be considered to be Confidential Information if it (1) is already or otherwise becomes publicly known through no wrongful act of the Receiving Party; (2) is lawfully received from third parties subject to no restriction of confidentiality; (3) was in the Receiving Party's lawful possession prior to disclosure by the Disclosing Party; (4) can be shown by the Receiving Party to have been independently developed by it prior to disclosure by the Disclosing Party and without the benefit or use of the Confidential Information; or (5) is compelled to be disclosed by law.

- 9.7. **Privacy:** Each party must take such steps as are reasonable in the circumstances to implement practices, procedures and systems that will ensure that it complies with Australian Privacy laws in relation to any personal information disclosed by either party to the other. In particular, without limiting the foregoing, the Receiving Party must-
- a) not collect, disclose, store, transfer or handle the information except in accordance with Australian Privacy laws;
  - b) take all reasonable steps to ensure that the information is protected from misuse, interference, or loss, and from unauthorised access, modification or disclosure;
  - c) take all reasonable steps to destroy or permanently de-identify information that is no longer needed for the purposes of the Agreement;
  - d) co-operate with any reasonable request or direction the Disclosing Party makes which relates to the protection of the information or the exercise of the functions of the Privacy Commissioner under Australian Privacy laws;

- e) ensure that access to the information is limited to those of the Recipient's Personnel who are required to access that information for the purposes of the Agreement; and
- f) comply with any reasonable direction of the Disclosing Party in relation to a complaint concerning privacy received by either party.

**9.8. Protection of Customer's data:**

- a) Customer's data will remain at all times Customer's property. Logicalis is authorised to access and use Customer's data solely for the provision of the Services.
- b) Logicalis will observe any data safeguards and storage requirements detailed in the Proposal. Customer acknowledges that the data safeguards detailed in the Proposal provide adequate protection for its business and that any additional or enhanced safeguards must be processed as a Contract Change under clause 5.3.
- c) On termination of the Agreement for any reason, or when Customer's data is no longer required, and subject to payment in full of all Charges then due, Logicalis will destroy Customer's data or return Customer's data to Customer on magnetic or optical media strictly in accordance with Customer's directions.

9.9. **Audit:** Logicalis will provide Customer's auditors with reasonable access to Customer's data for the sole purpose of performing statutory audits of Customer. All requests to assist the Customer's auditors will be charged using Logicalis' then current standard commercial charges. Logicalis' auditors shall be provided reasonable access to Customer's data for the purpose of verifying or calculating Logicalis' costs and Charges pursuant to the Agreement.

## 10. Intellectual Property Rights Indemnity

10.1. **Indemnity:** Each party agrees to indemnify the other party from and against any third party claim, suit, action or proceeding (collectively called "Action") brought against the other party to the extent that such Action is based on a claim that any product, material, or service provided by the indemnifying party under the Agreement (other than Equipment and Third Party Software) infringes the third party's Intellectual Property Rights (an "Infringing Item"), provided that:

- a) The indemnified party fully co-operates with the indemnifying party in defending or settling the Action, does not at any time admit liability and makes its employees available to give such statements, advice, information and evidence as the indemnifying party may reasonably request;
- b) The indemnifying party is notified promptly in writing of any Action by the indemnified party and is given the sole control of and authority for the conduct of any Action and all negotiations for its settlement, compromise or resolution.

10.2. **Equipment:** Customer acknowledges that Logicalis is not the manufacturer of the Equipment (including Third Party Software) and does not provide any warranty or indemnity in respect of infringement of Intellectual Property Rights by Equipment (including Third Party Software). Logicalis shall pass to the Customer so far as it is permitted by the Manufacturer to do so, any warranty provision applicable to the Equipment which is provided by the Manufacturer of the Equipment, but otherwise excludes liability for infringement of Intellectual Property Rights by Equipment.

- 10.3. **Exclusion:** Neither party shall have any liability to indemnify the other against any Action to the extent that such Action is caused or contributed to by :
- a) any use by or on behalf of the indemnified party, of the Infringing Item in combination with products, materials, or services not supplied or approved by the indemnifying party in writing ; or
  - b) Any modification carried out by or on behalf of the indemnified party to the Infringing Item without the written approval of the indemnifying party; or
  - c) the indemnified party's unreasonable refusal to use modified products, materials, or services provided pursuant to Clause 10.4; or
  - d) any infringement or alleged infringement of any Intellectual Property Right arising only by reason of the indemnifying party's compliance with the express written instructions of the indemnified party.
- 10.4. **Remedies:** In the event of an Action, the indemnifying party may at its own expense:
- a) Procure the right for the indemnified party to continue to use the Infringing Item; or
  - b) Make such alterations modifications or adjustments to the Infringing Item that it becomes non-infringing without materially reducing performance or function; or
  - c) Replace the Infringing Item with non-infringing substitutes which are substantially their equal in performance and function; or
  - d) If none of the above is practicable refund the price of the Infringing Item.

## 11. Publicity

- 11.1. Customer agrees that Logicalis may use the name of the Customer and details of Equipment, Services and/or Deliverables supplied by Logicalis to the Customer for marketing purposes including: using the Customer's name on lists of Logicalis' customers; announcing new Orders placed by or contracts awarded by the Customer and the preparation and publication of case studies both on Logicalis' web site and in printed format.
- 11.2. Save in respect of trademarks owned by the Customer or any third parties, Intellectual Property Rights in any documents, pictures, charts or other visual or audible material (whether in physical or electronic form) created by Logicalis for marketing purposes will vest in Logicalis.
- 11.3. Customer may withdraw its consent to the use of its name by Logicalis for marketing purposes by sending written notice to Logicalis. Such withdrawal of consent will not apply to material published by Logicalis before the notice of withdrawal of consent is received.
- 11.4. A party ("Disclosing Party") will not make or authorise any public announcement, advertisement or disclosure concerning the other party which the Disclosing Party knows, or ought reasonably to be expected to know, is detrimental to the other party or any related entity of the other party. This clause will not apply to information which is compelled to be disclosed by law.

## 12. Contract Management and Personnel

- 12.1. **Primary points of contact:** Logicalis will provide an Account Manager identified in the Proposal (or an agreed substitute) as the primary point of contact with Customer for the purposes of the Agreement.



Customer will provide a Designated Representative identified in the Proposal (or an agreed substitute) as the primary point of contact with Logicalis for the purposes of the Agreement.

**12.2. Committees:** For large projects, the Proposal may provide for

- a) a Joint Steering Committee to provide a forum for the discussion of opportunities and issues arising under the Agreement; and/or
- b) a Change Management Committee to monitor necessary changes to the Agreement.

The composition, functions and frequency of meetings of the Committees shall be as set out in the Proposal, or as otherwise agreed.

**12.3. Personnel**

- a) Where individuals are named in the Proposal, Logicalis will use reasonable commercial endeavours to ensure that those personnel are of good character, properly qualified and made available to perform the Services.
- b) Logicalis may replace any personnel who are temporarily or permanently unable to perform the Services due to ill health, holidays, termination of employment or leave of absence.
- c) Logicalis will consult with the Customer and if appropriate replace an employee or contractor if the Customer determines on reasonable grounds that the employee or contractor is a security risk or is not acting in a professional manner.
- d) The Logicalis personnel performing the Services will be and remain either employees or contractors of Logicalis and Customer will not be liable for salary, health, accident or workers' compensation benefits of such personnel, or for deduction of any personal taxes or superannuation contributions in respect of such personnel.

**12.4. Solicitation**

- a) Each party will not, without the prior written consent of the other party, at any time during the Term and for six months thereafter (i) solicit or encourage any employee of the other party who is or was directly involved in performing the Agreement, to leave the employ of the other party; or (ii) solicit or encourage any consultant or other contractor under contract with the other party who is or was directly involved in performing the Agreement, to cease work for the other party. In the event that a party breaches this clause, it will pay to the other party as liquidated damages an amount equal to the last 6 months remuneration paid by the other party to that employee, consultant, contractor or sub-contractor.

## 13. Notices

13.1. Any notice given in connection with the Agreement must be in writing and must be delivered by hand at or sent by facsimile or pre-paid registered or recorded delivery post addressed to a party at the party's registered office or principal place of business for the time being or at such other address as may be notified for the purpose of the service of notices. A notice is deemed to have been given on the date on which it is delivered by hand, or in the case of a notice being sent by facsimile is deemed to have been given at the time of dispatch and in the case of a notice being sent by post, it is deemed to have been given two business days after the date of posting provided that in each case a

notice received outside of normal business hours or on a day which is not a business day shall be deemed to have been received at the start of normal business hours on the next business day. A notice (other than a notice under clause 8 (Termination)) may also be given by email, provided that receipt is acknowledged by the recipient.

## 14. Force Majeure

- 14.1. Neither party will be liable for any act, omission, or failure to fulfil its obligations under the Agreement if such act, omission or failure arises from any cause reasonably beyond its control including (without limitation) acts of God, strikes, lockouts, riots, acts of war, epidemics, governmental action after the date of the Agreement, acts or omissions of the other party, acts or omissions of a Manufacturer or supplier of Equipment, acts or omissions of a Carrier, or fire, communication line failures, power failures, earthquakes or other disasters (each such cause is called "Force Majeure").
- 14.2. The party unable to fulfil its obligations due to Force Majeure will immediately:
  - a) Notify the other in writing of the reasons for its failure to fulfil its obligations and the effect of such failure; and
  - b) Use all reasonable endeavours to avoid or remove the cause and perform its obligations.
- 14.3. Where a Force Majeure event continues for more than 4 consecutive weeks, either party may immediately terminate the Agreement by written notice to the other. If the Customer elects to terminate the Agreement under this clause then it must pay the Termination Fees. If Logicalis elects to terminate the Agreement under this clause then it will be entitled to receive any amounts then due but will not be entitled to any other Termination Fees.

## 15. Cost of Compliance with Law

- 15.1. If the direct cost to Logicalis of the performance of the Agreement shall be increased or reduced by reason of the making after the commencement of the Agreement of any relevant law or any relevant order, regulation or by law having the force of law that shall be applicable to the Agreement (other than any tax upon income), the amount of such increase or reduction shall be notified to Customer and shall take effect upon proof by Logicalis of the amount of any such increase or reduction, which increase or reduction shall be added to or deducted from the Charges stated in Clause 6.

## 16. Know-how

- 16.1. Nothing herein shall be so construed as to prevent Logicalis from using data processing techniques, ideas, know how and the like gained during the performance of the Services in the furtherance of its normal business, to the extent that this does not result in a disclosure of confidential information or infringement of any valid Intellectual Property Rights of Customer.

## 17. General

- 17.1. **Entire agreement:** The Agreement is complete and constitutes the entire agreement between the parties with respect to the subject matter hereof and any and all written or oral agreements, arrangements, representations, or understandings of any kind that may have been made prior to the date of the Agreement shall be deemed to have been superseded by the terms of the Agreement. No statement or representation (other than

as set out in the Agreement) made by either party has been relied upon by the other party in agreeing to enter into the Agreement.

- 17.2. **Implied terms:** All implied terms, conditions or warranties are excluded to the fullest extent permitted by law.
- 17.3. **Amendment:** The Agreement shall not be amended or modified except in accordance with the Contract Change process set out in clause 5.
- 17.4. **Assignment:** A party cannot assign any or all of its rights under the Agreement without the prior written consent of the other party, which will not be unreasonably withheld; provided that Logicalis may at any time assign all or any of its rights or obligations under the Agreement to another company in the Logicalis Group.
- 17.5. **Waiver:** Any failure or delay by either party to enforce or take action on any of its rights under the Agreement shall not be construed as a waiver of the same.
- 17.6. **Severability:**
- a) If any provision of the Agreement is held invalid, illegal or unenforceable for any reason by any court of competent jurisdiction, such provision shall be severed and the remainder of the provisions hereof shall continue in full force and effect as if the Agreement had been executed with the invalid, illegal or unenforceable provisions eliminated. In the event that a provision of the Agreement that is fundamental to the accomplishment of the purpose of the Agreement is held invalid, Logicalis and the Customer shall immediately commence good faith negotiations to remedy such invalidity.
  - b) The invalidity or unenforceability of any provision of the Agreement shall not affect the validity or enforceability of any other provision of the Agreement and the Agreement shall continue in full force and effect except for any such invalid and unenforceable provision.
- 17.7. **Third parties:** A person who is not a party to the Agreement has no right to enforce any term of the Agreement. Logicalis has no duty of care to any customer, supplier, contractor, or related body corporate or associated entity (as defined in section 9 of the Corporations Act 2001) of the Customer.
- 17.8. **Agency:** Logicalis and the Customer acknowledge and agree that the Agreement shall not constitute, create or give effect to a joint venture, pooling arrangement, principal/agency relationship, partnership or formal business organisation of any kind and neither Logicalis nor the Customer shall have the right to bind the other without the other's express prior written consent.
- 17.9. **Set off:** Logicalis may retain or set off any amount owed to it or to any other company in the Logicalis Group by Customer against any amount due to Customer under this or any other Agreement.
- 17.10. **Approvals:** Where agreement, approval, acceptance, consent or similar action by either party is required or permitted by any provision of the Agreement, such action shall not be unreasonably delayed or withheld.

## 18. Law

- 18.1. The Agreement shall be governed by and construed in accordance with the laws of the State of New South Wales. The United Nations Convention on the International Sale of Goods is hereby expressly excluded from application to the Agreement.

18.2. Customer and Logicalis hereby irrevocably submit to the jurisdiction of the Courts of the State of New South Wales. The submission to such jurisdiction shall not (and shall not be construed so as to) limit the right of Logicalis to take proceedings against Customer in any other court of competent jurisdiction, nor shall the taking of proceedings in any one or more jurisdictions preclude the taking of proceedings in any other jurisdiction, whether concurrently or not.

## 19. SECTION TWO: Equipment

- 19.1. The Equipment Schedule, a link to which will be found at <http://www.au.logicalis.com/terms.aspx> sets out additional terms applicable to the supply of Equipment.
- 19.2. If the Proposal includes the supply of Equipment, then the Equipment Schedule will form part of the Agreement.

## 20. SECTION THREE: SERVICES

- 20.1. The following Schedules set out additional terms applicable to the following Services-
  - a) For Professional Services, the Professional Services Schedule for the time being in force, a link to which will be found at <http://www.au.logicalis.com/terms.aspx>;
  - b) For Maintenance Services, the Maintenance Services Schedule for the time being in force, a link to which will be found at <http://www.au.logicalis.com/terms.aspx>;
  - c) For Managed Services, the Managed Services Schedule for the time being in force, a link to which will be found at <http://www.au.logicalis.com/terms.aspx>;
  - d) For Cloud Services, the Cloud Services Schedule for the time being in force, a link to which will be found at <http://www.au.logicalis.com/terms.aspx>;
  - e) For Telecommunications Services, the Telecommunications Schedule for the time being in force, a link to which will be found at <http://www.au.logicalis.com/terms.aspx>;
- 20.2. If the Proposal includes the supply of any of the above Services, then the applicable Schedules will form part of the Agreement.