

## 1. INTRODUCTION

These terms and conditions (**Terms**) set out the basis on which Modra Technology Pty Ltd (ACN 060 766 547) (**Modra**) will supply the Goods and/or Services to the Customer from time to time. By ordering or purchasing, or continuing to order or purchase, Goods and/or Services from Modra, the Customer agrees that it is bound by these Terms. Unless otherwise agreed by Modra in writing, any Order placed by the Customer incorporates these Terms.

## 2. DEFINITIONS

In these Terms, unless the context otherwise requires, the words below have the following meanings:

- 2.1. **Account** has the meaning given in clause 8.3.1.
- 2.2. **Australian Consumer Law** means Schedule 2 of the *Competition and Consumer Act 2010* (Cth) and any equivalent State or Territory legislation.
- 2.3. **Business Day** means a day that is not a Saturday, Sunday or public holiday in Victoria, Australia.
- 2.4. **Confidential Information** means all confidential information and other content disclosed between the parties and includes the prices of the Goods and/or Services but excludes information that:
  - 2.4.1. is public knowledge or becomes available to a party from a source other than the other party (otherwise than as a result of a breach of confidentiality); or
  - 2.4.2. is rightfully known to, or in the possession or control of a party and not subject to an obligation of confidentiality in accordance with the terms of a Contract.
- 2.5. **Collateral Contract** has the meaning given in clause 3.5.
- 2.6. **Contract** means each Offer which is accepted by Modra under clause 3.2.
- 2.7. **Customer** means the person or persons, company or business entity named in an Order who requested the Goods and/or Services be supplied or to whom Modra otherwise agrees to supply Goods and/or Services from time to time.
- 2.8. **Delayed Delivery** has the meaning given in clause 6.8.
- 2.9. **Delivery Fee** means:
  - 2.9.1. the delivery or freight fee set out in a Quote or agreed in writing between the parties; or
  - 2.9.2. if no delivery or freight fee is set out in a Quote or agreed in writing between the parties, the costs incurred by Modra in delivering the Goods to the Customer.
- 2.10. **Dispute** has the meaning given in clause 20.1.
- 2.11. **Dispute Notice** has the meaning given in clause 20.2.
- 2.12. **Force Majeure Event** means any event arising from, or attributable to, acts, events, omissions or accidents which are beyond the reasonable control of a party including any fire, failure or shortage of power supplies or raw ingredients, abnormally inclement climate or weather conditions, flood, lightning, storm, explosion, earthquake, subsidence, structural damage, epidemic or other natural physical disaster, riot, disease, civil commotion, insurrection, political instability, armed conflict, war, terrorist action, strike or other labour difficulty or shortage, unavailability of transport providers, failure or inability to obtain any licence or the threat of any of the foregoing.
- 2.13. **Goods** means the goods or product(s) supplied by Modra to the Customer under a Contract.
- 2.14. **Government Agency** means any governmental, semi-governmental, municipal, statutory, judicial or quasi-judicial authority, department, agency, body, entity, organisation, commission or tribunal in any part of the world.
- 2.15. **Incoterms** means the terms of trade known as Incoterms published by the International Chamber of Commerce, version 2020, or such other version as updated by the International Chamber of Commerce from time to time.
- 2.16. **Insolvency Event** means, in relation to a body corporate, a liquidation or winding up or the appointment of a voluntary administrator, receiver, manager or similar insolvency administrator to that body corporate or any substantial part of its assets; in relation to an individual or partnership, the act of bankruptcy, or entering into a scheme or arrangement with creditors; in relation to a trust, the

making of an application or order in any court for accounts to be taken in respect of the trust or for any property of the trust to be brought into court or administered by the court under its control; or the occurrence of any event that has substantially the same effect to any of the preceding events.

- 2.17. **Intellectual Property Rights** means any and all intellectual and industrial property rights anywhere in the world including but not limited to the rights comprised in any patent, copyright, design, trade mark, eligible layout or similar right whether at common law or conferred by statute, rights to apply for registration under a statute in respect of those or like rights and the right to protect trade secrets and know how, throughout the world for the full period of the rights and renewals and extensions.
- 2.18. **Interest Rate** means the average bid rate (rounded up to the nearest two decimal places) for 90 day bank bills as published in the Australian Financial Review as the "Bank Bill Swap Reference Rate: Average Bid" on the date of calculation or if no such rate is published such other rate as approximates that rate as determined by an independent chartered accountant nominated by the Institute of Chartered Accountants Australia.
- 2.19. **Invoice** has the meaning provided to it in clause 5.3.
- 2.20. **Loss** means any loss, liability, cost, expense, damage, charge, penalty, outgoing or payment however arising, whether present, unascertained, immediate, future or contingent loss.
- 2.21. **Non-excludable guarantee** has the meaning provided to it in clause 11.2.
- 2.22. **Offer** has the meaning provided to it in clause 3.1.
- 2.23. **Order** means any order or other request by or for the Customer to Modra to supply to the Customer any Goods and/or Services whether such order or request is written, verbal or implied in the circumstances and which may have been given in response to a Quote.
- 2.24. **Purchase Price** has the meaning given in clause 5.1.
- 2.25. **PPSA** means *Personal Properties Securities Act 2009* (Cth).
- 2.26. **Quotation or Quote** means a quote, if any, provided by Modra to the Customer in respect of the Goods and/or Services.
- 2.27. **Services** means any services provided by Modra to the Customer under a Contract.
- 2.28. **Specifications** means any physical, qualitative, technical or descriptive specifications, weight or other particulars of the Goods which are supplied by Modra.
- 2.29. **Tax** means any tax, levy, charge, impost, tariff, fee, deduction, compulsory loan or withholding (including excise and import duties, consumption tax, value added tax or any other taxes, levies or charges), which is assessed, levied, imposed or collected by any Government Agency, and includes any interest, fine, penalty, charge, fee or any other amount imposed on or in respect of any such amounts.
- 2.30. **Variation Date** has the meaning given in clause 22.4.
- 2.31. **Warranties** has the meaning given in clause 11.3.
- 2.32. **Warranty Periods** has the meaning given in clause 11.4.

## 3. FORMATION OF CONTRACT

- 3.1. The Customer acknowledges and agrees that by submitting an Order the Customer makes an irrevocable offer to Modra for Modra to supply it with the Goods and/or Services on the terms of:
  - 3.1.1. these Terms;
  - 3.1.2. the Order; and
  - 3.1.3. the Quote (if any),(**Offer**).
- 3.2. A contract (**Contract**) will be formed between Modra and the Customer in respect of each Offer upon:
  - 3.2.1. Modra notifying the Customer, either in writing or verbally, that it accepts the Customer's Offer; and
  - 3.2.2. Modra receiving from the Customer payment of the deposit for the Goods and/or Services the subject of the Offer.
- 3.3. A Contract formed under clause 3.2 will comprise of these Terms, the Order (only to the extent that any additional terms in the Order are accepted by Modra in writing), the Quote (if any) and the Invoice.

- 3.4. Unless otherwise specified in these Terms, in the event of an inconsistency between any of the documents listed in clause 3.1, the following order of precedence shall apply to the extent of the inconsistency:
- 3.4.1. the prices and quantity of Goods and / or Services set out in the Quote (if any);
  - 3.4.2. any other terms of the Quote (if any);
  - 3.4.3. these Terms; and
  - 3.4.4. any other terms of the Order which are accepted by Modra in writing.
- 3.5. Notwithstanding clause 3.3 and 3.4, if the Goods and/or Services set out in the Quote are subject to another written contract issued by Modra (**Collateral Contract**), then the terms and conditions set out in the Collateral Contract are supplemental to these Terms and to the extent of any inconsistency the terms of the Collateral Contract prevail.
- 3.6. These Terms will prevail over any terms and conditions of the Customer, except to the extent specifically agreed by Modra in writing and any terms or conditions included in an Order or other document provided or issued by the Customer will only be binding on Modra if expressly agreed by Modra in writing.
- 3.7. Modra is not bound to accept any Offer and may decide not to accept any Offer for any reason and in the absolute discretion of Modra.
- 3.8. Modra may, in its absolute discretion, accept or reject any request by the Customer to vary any Order after the Contract is formed. Modra will notify the Customer in writing of any additional costs associated with the variation of the Order,
- 3.9. To the maximum extent permitted by law, any Order cannot be cancelled by the Customer when accepted by Modra under clause 3.2 unless expressly agreed to by Modra in writing.
- 3.10. If the Customer cancels delivery of the Goods, the Customer shall be liable for any Loss incurred by Modra (including but not limited to any loss of profits) and any costs incurred by Modra under clause 3.11 up to the time of cancellation.
- 3.11. If the Customer places an Order with Modra and Modra places an order with a third party supplier to meet the Customer's request, the Customer shall be liable for the price of the Goods ordered if the Customer cancels the Order.

#### **4. SUPPLY OF GOODS AND/OR SERVICES**

- 4.1. The supply of Goods and/or Services by Modra to the Customer is on a non-exclusive basis, and nothing in these Terms limits Modra's ability to supply the Goods, or products similar to the Goods, or Services, to any third party.
- 4.2. Modra may make changes to the Specifications or other particulars of the Goods as may be required from time to time by law or any safety or manufacturing requirements, and such changes will be promptly notified to the Customer.

#### **5. PRICE AND PAYMENT**

- 5.1. Unless otherwise agreed by the Customer and Modra in writing, the price the Customer must pay for the Goods and/or Services under each Contract will be:
- 5.1.1. the price for the Goods and/or Services specified in the Quote or, if there is no Quote, in the Order; and
  - 5.1.2. the Delivery Fee (if applicable), (**Purchase Price**).
- 5.2. Unless otherwise expressly specified by Modra in the Quote or in these Terms, all prices stated are stated exclusive of Taxes and the Customer is solely responsible for the payment of all Taxes levied or payable in respect of the Goods and/or Services and must immediately upon request by Modra provide Modra with evidence of payment of any Taxes.
- 5.3. Modra may invoice the Customer for the Purchase Price at any time following formation of the relevant Contract (**Invoice**).
- 5.4. All contingency charges such as currency exchange rate fluctuation, sales tax or other taxes, raw material price increases, increases in freight or insurance costs, shipping company financial collapse, surcharges due to war, threat of war, warlike conditions, port congestion, unavailability of transport providers or any other

emergencies unforeseen or non-existent at the time of a Quote is not included in the Purchase Price, and shall be payable by the Customer.

- 5.5. Modra reserves the right to vary the Purchase Price in the event of a variation to the Order requested by the Customer and notice of the relevant price change will be provided in writing by Modra to the Customer within a reasonable time in accordance with clause 3.8 and the parties shall agree in writing any pricing adjustments.
- 5.6. Unless otherwise agreed in writing between the Customer and Modra, the due date for payment by the Customer to Modra for the Goods and/or Services supplied pursuant to a Contract (**Due Date**) is prior to the scheduled date of delivery for the Goods or performance of the Services.
- 5.7. If the Customer fails to make any payment by the Due Date or is the subject of an Insolvency Event then, without prejudice to any other right or remedy available to Modra, Modra may, in its sole discretion, elect to do any one or more of the following:
- 5.7.1. suspend any further deliveries of Goods or Services to the Customer arising from any Contract;
  - 5.7.2. cancel any Contract in respect of any Goods or Services not yet supplied to the Customer in whole or in part by Modra;
  - 5.7.3. charge the Customer interest on all sums owing to Modra at the Interest Rate plus 2% per annum, which interest will accrue and be chargeable from the first day on which such amounts become overdue until Modra receives payment of all such amounts (including all interest) by way of cleared funds;
  - 5.7.4. enter the property of the Customer in order to repossess the Goods and recover from the Customer the cost of repossessing any of the Goods; and
  - 5.7.5. exercise any rights which Modra may have under law, including the PPSA.
- 5.8. A certificate of debt signed by a representative of Modra shall be prima facie evidence and proof of money owing by the Customer to Modra at the time the certificate is signed.
- 5.9. The Customer may not set off or combine any amount owing by Modra to the Customer, whether or not due for payment, against any money due for payment by the Customer to Modra under a Contract and the Customer must pay any amount due to Modra under a Contract notwithstanding the Customer may be in dispute with Modra regarding the Goods or Services supplied by Modra to the Customer.
- 5.10. The Customer is liable for all costs reasonably incurred by Modra relating to the collection of overdue accounts, including debt collection and its legal costs on a full indemnity basis.
- 5.11. All payments made by the Customer to Modra under a Contract shall be applied in the following order:
- 5.11.1. any costs incurred by Modra under clause 5.10;
  - 5.11.2. any interest owing to Modra under clause 5.7.3; and
  - 5.11.3. the Purchase Price owing to Modra under the Contract.

#### **6. DELIVERY OF GOODS AND SERVICES**

- 6.1. Modra will deliver the Goods to the Customer:
- 6.1.1. under any relevant Incoterms as set out in the Quote; or
  - 6.1.2. as otherwise agreed between Modra and the Customer (including collection by the Customer).
- 6.2. Modra will provide the Services to the Customer in the manner:
- 6.2.1. determined by Modra; or
  - 6.2.2. as otherwise agreed between the Customer and Modra.
- 6.3. Where Modra agrees to supply Goods to the Customer at a location nominated by the Customer which is not controlled by Modra, the Customer will be responsible, at its own cost and risk, for the unloading of all Goods at the delivery location and there must be a representative of the Customer present at the delivery location at the scheduled delivery time who is authorized to accept delivery of the Goods. If no such representative is present, a redelivery fee may be charged by Modra.
- 6.4. Without limiting any other rights Modra may have, Modra will be entitled to store, at the risk and cost of the Customer, any Goods which the Customer refuses or fails to take delivery of.

- 6.5. In the event of the Customer returning or refusing to accept any delivery of the Goods, Modra shall be entitled to payment for those Goods and to treat the obligation to supply the remainder of the Goods (if any) as cancelled by the Customer.
- 6.6. Modra will use its reasonable endeavours to deliver the Goods and/or Services on any date specified or estimated by Modra, however the Customer acknowledges that any availability or lead times nominated for the supply of the Goods and/or Services are estimates only. Modra will keep the Customer reasonably informed of any anticipated delay in delivery and alternative shipping arrangements. Unless otherwise agreed by Modra in writing, Modra does not represent or warrant that it is capable of providing the Goods and/or Services at specific times requested by the Customer.
- 6.7. To the maximum extent permitted by law:
- 6.7.1. Modra reserves the right to deliver the Goods or provide the Services by instalments and will not be liable for failure to deliver, or for delay in delivery, arising from any cause whatsoever;
- 6.7.2. the Customer shall not be relieved of any obligation to accept or pay for the Goods and/or Services by reason of any delay in delivery,
- 6.7.3. any delay in delivery shall not give the Customer a right to rescind or repudiate the Contract;
- 6.7.4. the Customer may not refuse to accept delivery of the Goods because Modra has delivered only a portion of the quantity of the Goods ordered or because delivery was late; and
- 6.7.5. the Customer may not refuse to accept the provision of Services from Modra because Modra has provided only a portion of the Services or because the Services were or will be provided late.
- 6.8. Where Modra agrees to deliver the Goods and/or Services at a later time at the request of the Customer (**Delayed Delivery**), the Customer:
- 6.8.1. must continue to pay the Purchase Price on or before the Due Date notwithstanding the Delayed Delivery; and
- 6.8.2. is responsible for any additional costs incurred by Modra associated with the delayed delivery including storage fees and delivery rescheduling fee.

## 7. RISK AND TITLE OF GOODS

- 7.1. Risks in the Goods (or any portion of them) passes from Modra to the Buyer upon supply of the Goods (or any portion of them) in accordance with clause 6.1.
- 7.2. Title to and property in, the Goods (or any portion of them) delivered to the Customer pursuant to a Contract remains with Modra and will only pass to the Customer once the money owed to Modra under the relevant Contract has been paid for in full.
- 7.3. From the date the risk in the Goods (or any portion of them) passes to the Customer and until the title of the Goods (or any portion of them) passes to the Customer, the Customer must:
- 7.3.1. insure the Goods (or any portion of them) for their full replacement value;
- 7.3.2. hold the Goods (or any portion of them) as bailee for Modra (and will return such Goods to Modra on request);
- 7.3.3. separately store the Goods in such a way that makes it clear that the Goods are the property of Modra; and
- 7.3.4. allow Modra to enter the premises at which the Goods (or any portion of them) are stored to inspect the Goods during the hours between [9.00am] to [5.30pm].
- 7.4. If the Customer defaults under a Contract (including any default on the payment of any monies due to Modra), Modra reserves the right to:
- 7.4.1. without giving notice to the Customer, retake possession of the Goods supplied to the Customer by Modra, and the Customer hereby authorises and allows Modra or its representatives to enter the premises upon which the Goods are kept or stored for the purposes of retaking possession of the Goods. Modra is not liable for any costs, losses, damages, expenses or any other monies or losses suffered

by the Customer as a result of Modra retaking possession of the Goods; and

- 7.4.2. initial legal proceedings against the Customer as a liquidated sum for monies outstanding under the relevant Contract.

- 7.5. All costs, including but not limited to, transportation costs, storage costs and costs of resale incurred by Modra as a result of it exercising any of its rights under clause 7.4 in the event of default of payment by the Customer, shall be borne by the Customer.

## 8. PPSA

- 8.1. This provision only applies in the event the Goods (or any portion of them) are supplied to Customer in Australia.
- 8.2. Unless otherwise defined in these Terms, capitalised terms and expressions used in this clause have the meanings given to them in the PPSA.
- 8.3. Unless the Customer has paid for the Goods in respect of a Contract in full before they are supplied to the Customer, the Customer acknowledges that:
- 8.3.1. the Contract for the supply of Goods created under these Terms is a security agreement for the purposes of the PPSA, under which the Customer grants Modra a security interest in the Goods and over any amount owed to the Customer in respect of the Goods (**Account**) to secure all monies owing by the Customer to Modra from time to time;
- 8.3.2. where Modra has other enforcement rights in addition to the enforcement rights provided for in the PPSA, those other enforcement rights will continue to apply; and
- 8.3.3. Modra is not obliged to act in any way to dispose of or to retain any Goods which have been seized by Modra or any person nominated by Modra under its rights under the PPSA.
- 8.4. Without limiting anything else in these Terms, the Customer consents to Modra effecting a registration on the register in relation to any security interest created by or arising in connection with, or contemplated by a Contract or these Terms, including in relation to the Goods and any Account.
- 8.5. The Customer must promptly take all reasonable steps to perfect the security interest(s) in respect of the Goods or the Account (as applicable) in accordance with the PPSA, including promptly responding to reasonable requests made by Modra in connection with the security interest.
- 8.6. The Customer must indemnify, and on demand reimburse, Modra for all expenses incurred in registering a financing statement or financing change statement on the register, and for the enforcement of any rights arising out of any of Modra's security interests.
- 8.7. If the provisions of Chapter 4 of the PPSA would otherwise apply, to the maximum extent permitted by law, the Customer agrees that sections 129(3), 132(1), 132(3)(d), 132(4), 135, 142 and 143 of the PPSA will not apply.
- 8.8. To the maximum extent permitted by law, the Customer contracts out of and waives any rights it may have pursuant to sections 95 and 96 of the PPSA, and if the provisions of Chapter 4 of the PPSA would otherwise apply, sections 121(4), 123, 129(2) and 130 of the PPSA.
- ## 9. INSPECTION OF GOODS AND NOTIFICATION OF CLAIMS
- 9.1. The Customer must inspect all Goods (or any portion of them) and notify Modra of any damage to, or any issues with, the Goods (or any portion of them) within 5 Business Days after delivery or collection (as applicable) and must provide Modra details of the damage or issues identified by the Customer.
- 9.2. Where the Customer makes a claim for non-delivery of Goods (or any portion of them), such claims must be made to Modra within 20 Business Days of the shipping date as notified by Modra in writing (which is generally provided in a form of an e-mail including the tracking number of the Goods upon dispatch).
- ## 10. RETURN OF GOODS
- 10.1. Subject to any applicable provision of the Australian Consumer Law, and these Terms, the Customer must not return any Goods (or any portion of them) unless:

- 10.1.1. Modra has first given its prior written approval for their return;
- 10.1.2. the Goods are accompanied by a delivery docket showing Modra's return authorisation reference number; and
- 10.1.3. the Customer pays to Modra a handling charge notified by Modra at its discretion (which will be no less than an amount equal to 10% of the invoice value of the returned goods or AUD100.00, whichever is greater).
- 10.2. If Modra has given its written approval to the return of Goods which were deemed to have been accepted in accordance with these Terms, Modra will only give credit for the Goods returned if they are in a resalable condition with its original packing and with all product documentation included (unless there is a supply error).
- 10.3. Subject to any applicable provisions of the Australian Consumer Law, and these Terms, unless otherwise agreed in writing by Modra, Modra reserves the right to not accept the Customer's request for return of Goods (or any portion of them) which are specifically manufactured for the Customer, except due to defect in the Goods (or any portion of them).
- 10.4. If Modra gives its written approval to the return of Goods which:
  - 10.4.1. have been rejected by the Customer under clause 9 and those Goods are found by Modra to have been validly rejected; or
  - 10.4.2. are found not to comply with the warranties set out or referred to in these Terms,Modra will refund the handling charge paid by the Customer under clause 10.1.3 and where remedial action is required to be taken under these Terms, Modra will pay for freight expenses to deliver the repaired or replacement Goods.
- 10.5. Subject to any applicable provisions of the Australian Consumer Law, and these Terms, if Goods are not returned in accordance with clause 10.1, Modra may require the Customer to take back the Goods and pay any associated delivery, storage and handling charge.

## 11. WARRANTY AND EXCLUSION OF LIABILITY

- 11.1. Modra represents and warrants to the Customer that:
    - 11.1.1. the Customer will have the full benefit of any manufacturer's warranties that may be applicable to the Goods or any part of the Goods; and
    - 11.1.2. in addition to the warranties expressed and implied by law or as otherwise agreed by Modra in writing, subject to clause 12.1.5, the Goods will conform to their description and the Specifications, are of merchantable quality and fit for the known purpose for which they are supplied.
  - 11.2. Modra excludes all statutory guarantees, implied conditions and warranties except any statutory guarantee, implied condition or warranty the exclusion of which would contravene any statute or cause any part of this paragraph to be void (**Non-excludable Guarantee**).
  - 11.3. To the maximum extent permitted by law, the maximum aggregate liability of Modra for any Loss suffered by the Customer in connection with any Order or any Contract (including any Non-excludable Guarantee) is limited, at Modra's sole option and discretion:
    - 11.3.1. in relation to Goods (or any portion of them):
      - 11.3.1.1. the replacement of the Goods or the supply of equivalent Goods;
      - 11.3.1.2. the repair of the Goods;
      - 11.3.1.3. the payment of the cost of replacing the Goods or of acquiring equivalent Goods; or
      - 11.3.1.4. the payment of having the Goods repaired.
    - 11.3.2. in relation to Services:
      - 11.3.2.1. the re-supply of the Services; or
      - 11.3.2.2. the payment of the cost of having the Services resupplied,
- (Warranties).
- 11.4. Where the Goods (or any portion of them) are defective in workmanship, design or materials, Modra will repair or replace the Goods in accordance with clause 11.3.1.1 and 11.3.1.2 provided that the Customer notifies Modra in writing of the defects of the Goods:

- 11.4.1. with respect to Goods which have been previously reconditioned and repaired by Modra – within 60 days of delivery or collection (as applicable) of the Goods.
- 11.4.2. with respect to the spare parts of the Goods – within 6 months of delivery or collection (as applicable) of the Goods.
- 11.4.3. with respect to Goods which is a machinery – the warranty period is set out in the Contract,

### (Warranty Periods).

- 11.5. During the Warranty Periods, Modra will correct any defects in components or workmanship, or any failure of the hardware of the Goods which does not conform to the Specifications and Modra shall bear the labour costs and costs of replacing or providing new parts for the Goods. The Customer is responsible for:
  - 11.5.1. paying the cost of shipping the defective parts or defective Goods to Modra for service under the Warranty;
  - 11.5.2. insuring the shipment; and
  - 11.5.3. any Taxes that are payable to the relevant Government Agency even if the delivery is refused.
- 11.6. Any replacement parts or replaced Goods provided by Modra under the Warranties will be new or serviceably used and Modra will provide Warranties with respect to the replacement parts or replaced Goods for the following period:
  - 11.6.1. for the remainder of the original warranty of the defective parts of defective Goods; or
  - 11.6.2. for a period of thirty (30) days from the date of shipment of such parts or Goods, whichever is longer.
- 11.7. The Warranty Period which applies to the Goods will not be extended as a result of the Customer purchasing any additional parts of the Goods from Modra to improve the Goods.
- 11.8. Subject to the preceding provisions of this clause 11, Modra's liability to the Customer arising under or in connection with a Contract, whether in contract, tort (including negligence) or otherwise, is limited to an amount equal to 100% of the Purchase Price paid or payable by the Customer to Modra in respect of that Contract.
- 11.9. Each Warranty made by Modra under these Terms is made solely to the Customer in its own right. For the avoidance of doubt, to the maximum extent permitted by law, each Warranty explicitly excludes any liability of Modra to any third party, including but not limited to:
  - 11.9.1. any person to whom the Customer on-sells the Goods;
  - 11.9.2. any person for whom:
    - 11.9.2.1. the Customer installs (or has installed, as the case may be) the Goods; or
    - 11.9.2.2. any purchaser, occupant or licensee of a premises at which Goods are installed or located or at which Modra has rendered Services.
- 11.10. For the avoidance of doubt, the Warranties given with respect to Goods exclude any claims for or damage to the Goods caused by:
  - 11.10.1. inclement weather;
  - 11.10.2. fire, explosion, act of God or other like cause;
  - 11.10.3. unauthorised alterations, additions or tampering of the Goods, loose plugs or leads not hardwired.
  - 11.10.4. any other events beyond the control of Modra;
  - 11.10.5. the Customer's use of the Goods which does not comply with the reasonable directions provided by Modra from time to time; and
  - 11.10.6. the Customer's failure to store the Goods at a dry, safe and secure place away from any hazards as directed by Modra from time to time.
- 11.11. To the extent permitted by law, Modra expressly excludes all liability to the Customer for any loss of revenue or profits, goodwill or reputation, loss of or interruption to business, loss of production or any other indirect or consequential loss arising out of or in connection with these Terms, any Contract or the supply of Goods and/or Services to the Customer, howsoever arising including for breach of contract, negligence or otherwise, regardless whether Modra knew

or ought to have known that it was possible or foreseeable that the Customer would incur such loss.

## **12. CUSTOMER'S WARRANTY**

- 12.1. The Customer represents and warrants that:
- 12.1.1. it is duly authorised and has capacity to enter into and carry out the transactions contemplated by these Terms;
  - 12.1.2. it will comply with all applicable laws in the performance of these Terms;
  - 12.1.3. it will comply with any other reasonable directions in relation to the Goods provided by Modra from time to time;
  - 12.1.4. it will store the Goods at a dry, safe and secure place away from any hazards as directed by Modra from time to time; and
  - 12.1.5. when placing the Order, it will provide Modra with sufficient information, accurate Specifications and any special requirements pertaining to the Order to enable Modra to execute the Order.
- 12.2. The Customer acknowledges and agrees that Modra's liability will be reduced or extinguished to the extent that the Customer fails to comply with clause 12.1.3, 12.1.4 and 12.1.5.

## **13. LANGUAGE**

All documentation issued by Modra with respect to the Goods will be in English. Training sessions (where applicable) provided by Modra to the Customer will be carried out in English. Editable versions of documents will be made available to the Customer upon the Customer's request and if the Customer requires any translation with respect to the documentation provided by Modra, the costs will be borne by the Customer and provided at the risk of the Customer.

## **14. CONFIDENTIALITY**

- 14.1. The parties:
- 14.1.1. may use Confidential Information solely for the purposes of the relevant Contract;
  - 14.1.2. must keep confidential all Confidential Information; and
  - 14.1.3. may disclose Confidential Information only to:
    - 14.1.3.1. employees and contractors who:
      - 14.1.3.1.1. are aware and agree that the Confidential Information must be kept confidential; and
      - 14.1.3.1.2. either have a need to know the Confidential Information (and only to the extent that each has a need to know), or have been specifically approved by the party to which the Confidential Information belongs
    - 14.1.3.2. as required by law; or
    - 14.1.3.3. with the prior written consent of the party to which the Confidential Information belongs.
- 14.2. A party must notify the other party immediately once it becomes aware of any breach of confidentiality in respect of the Confidential Information and must take all reasonable steps necessary to prevent further unauthorised use or disclosure of the Confidential Information.

## **15. INTELLECTUAL PROPERTY RIGHTS**

The Customer acknowledges that:

- 15.1. any Intellectual Property Rights in the Goods, material created as part of the Services or any other Intellectual Property Rights owned by Modra are and remain property of Modra; and
- 15.2. these Terms do not grant any licence in, transfer of ownership in, or creation of any right or interest in any Intellectual Property Rights to the Customer.

## **16. PRIVACY**

The Customer acknowledges and agrees that personal information (as that term is defined in the *Privacy Act 1988* (Cth)) regarding the Customer if the Customer is an individual, or the employees, contractors, officers and agents of the Customer if the Customer is an organisation, may be collected, held or used by Modra for the purposes set out in Modra's privacy policy (which privacy policy is available on [insert Modra's website link to privacy policy](#)) or on request from Modra). The Customer consents, and

where applicable will make all reasonable endeavours to have its employees, contractors, officers and agent consent, to Modra collecting, holding and using any such personal information for all purposes specified in Modra's privacy policy.

## **17. TERMINATION**

- 17.1. Without limiting Modra's other rights under these Terms, to the maximum extent permitted by law, Modra may terminate any and all Contracts with immediate effect by written notice to the Customer if:
- 17.1.1. the Customer is the subject of an Insolvency Event; or
  - 17.1.2. the Customer has breached any term of the relevant Contract (including these Terms).
- 17.2. On termination of a Contract, the Customer must, at its cost and within 10 Business Days of the date of termination, return to Modra all Goods (or any portion of them) the subject of the Contract (other than any Goods which have been paid for).
- 17.3. Each party retains any rights, entitlements or remedies it has accrued before termination, including the right to pursue all remedies available to either party at law or in equity.

## **18. SUSPENSION AND CANCELLATION**

- 18.1. Without limiting clause 5.7.1, 5.7.2 and 17.1, Modra may cancel or suspend any Contract effective immediately upon providing the Customer with written notice of cancellation or suspension where Modra believes (for any reason) that it will be unable to supply the relevant Goods and/or provide the Services to the Customer, provided that if Modra cancels a Contract under this clause 18.1 it will refund to the Customer any amounts already paid by the Customer for the Goods and/or Services subject to the cancellation and which are not provided to the Customer. The refund of any such amounts will be the Customer's sole remedy against Modra in respect of any cancellation pursuant to this clause 18.1.
- 18.2. Neither any Contract nor any Offer that has been submitted can be cancelled by the Customer except with the prior written consent of Modra and without prejudice to any other rights Modra may have, the Customer indemnifies Modra for any Loss incurred by Modra in connection with such cancellation.

## **19. SMALL BUSINESS CONTRACT**

- 19.1. If the Contract is a "small business contract" (within the meaning of the Part 2-3 of the Australian Consumer Law), the Customer acknowledges having been given a reasonable opportunity to both negotiate the terms of the Contract and to seek independent legal advice in relation to the Contract before it was entered into.
- 19.2. Notwithstanding clause 19.1, and without limiting any other remedies available to the Customer, if the Contract is or may be a "small business contract" and the Customer considers a term contained in the Contract to be "unfair" (within the meaning of the Australian Consumer Law), the Customer agrees that any dispute in relation to the term will be addressed in the first instance by the process set out in clause 20.

## **20. DISPUTE RESOLUTION**

- 20.1. If a dispute arises out of or relating to a Contract or these Terms (including a dispute of the kind referred to in clause 19.2) (**Dispute**), except where the party seeks urgent interim or interlocutory relief (including an injunction), a party may not commence any court, tribunal or other similar proceedings relating to the Dispute unless it has complied with this clause.
- 20.2. If a party believes a Dispute has arisen, it must provide written notice to the other party setting out full details of the matters in dispute (**Dispute Notice**).
- 20.3. Senior representatives of the parties must meet within 10 Business Days of the date a Dispute Notice is given to discuss in good faith and seek to resolve the Dispute as quickly as possible.
- 20.4. If a Dispute is not resolved within 20 Business Days after the date the Dispute Notice is given, a party may commence proceedings or take such other action as it considers appropriate to resolve the Dispute. Failure by a party to comply with the preceding provisions may be pleaded in bar to the continuance of any proceeding initiated by that party until this clause has been complied with.

20.5. This clause does not prevent a party from seeking any interlocutory relief from a court.

## 21. FORCE MAJEURE

21.1. Neither party shall be liable for a delay in its performance of its obligations and responsibilities (other than any payment obligations which have accrued prior to the occurrence of the Force Majeure Event) under these Terms or under a Contract due to a Force Majeure Event provided that the party affected by the Force Majeure Event (**Affected Party**) has taken reasonable measures to notify the other party in writing of the delay.

21.2. Where the Affected Party has complied with the notice requirement set out in clause 21.1, the parties agree that the time for performance of obligations (other than any payment obligations which have accrued prior to the occurrence of the Force Majeure Event) under a Contract shall be extended for a period equal to the duration of the Force Majeure Event.

## 22. MISCELLANEOUS

22.1. In these Terms:

- 22.1.1. the singular includes the plural and vice versa;
- 22.1.2. the word person includes a firm, a body corporate, an unincorporated association, body or organisation or government authority and other official authority;
- 22.1.3. a reference to a document or legislation includes a reference to that document or legislation as varied, amended, novated or replaced from time to time;
- 22.1.4. a reference to a person includes a reference to the person's successors, substitutes (including, but not limited to, persons taking by novation) and permitted assigns;
- 22.1.5. headings are inserted for convenience and do not affect the interpretation of these Terms;
- 22.1.6. no provision will be construed to the disadvantage of a party merely because that party was responsible for the preparation of the Terms or the inclusion of the provision in the Terms; and
- 22.1.7. unless otherwise provided, all monetary amounts are in [United States] dollars and a reference to payment means payment in in [United States] dollars.

22.2. The relationship between the parties is and will remain that of independent contractors, and nothing in these Terms, or any Order, Offer or Contract constitutes the parties as partners or joint venturers or, except to the extent these Terms expressly provided to the contrary, constitutes any party as the agent of another party or gives rise to any other form of fiduciary relationship between the parties.

22.3. The Customer may not assign any rights or obligations under these Terms or any Contract without the prior written consent of Modra.

22.4. Modra may, to the extent permitted by law, vary these Terms from time to time (including by displaying the updated terms on its website) and the variation will become effective when Modra notifies the Customer of the variation (**Variation Date**). Any variation to these Terms will only apply to any Order made after the Variation Date and the parties acknowledge that nothing in these Terms requires the Customer to make any further Orders after the Variation Date.

22.5. No failure to exercise or delay in exercising any right under these Terms or any Contract constitutes a waiver and any right may be exercised in the future. Waiver of any of these Terms must be in writing and is only effective to the extent set out in that written waiver.

22.6. If any provision of these Terms is void, unenforceable or illegal and would not be so if words were omitted, then those words are to be severed and if this cannot be done, the entire provision is to be severed from these Terms without affecting the validity or enforceability of the remaining provisions.

22.7. The documents listed in clause 3.3 constitute the entire agreement between Modra and the Customer in respect of the supply of Goods and/or Services the subject of the relevant Contract and supersede all previous communications, representations, understandings or agreements.

## 23. GOVERNING LAW

23.1. These Terms are governed by and are construed in accordance with, the Law of Victoria, Australia and the parties agree to submit to the non-exclusive jurisdiction of the courts of Victoria, Australia and any court hearing appeals from those courts.

23.2. The United Nations Convention on Contracts for the International Sale of Goods (Vienna, 1980) do not apply to these Terms.

## 24. CONTACT DETAILS

Modra Technology Pty Ltd  
10 Neilson Court  
Warragul, Victoria, 3820  
AUSTRALIA  
Tel: +61 3 5622 3261  
Australian Business Number (ABN) 31 060 766 547