



# **POWERNET GROUP PTY LTD**

## **STANDARD FORM OF AGREEMENT (SFOA)**

### **Terms & Conditions of Trade**

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## General Terms and Conditions

This document is dated

between:

**POWERNET GROUP PTY LTD** trading as Powernet IT Solutions, ABN 91 614 215 495 of 4 Gipps Street, Collingwood, Victoria, 3066 (**Powernet**)

and:

### BACKGROUND

- A. Powernet is in the business of providing information technology products and services.
- B. The Client may have entered into a Previous Agreement with the Previous Provider. Powernet and the Client have agreed that Powernet shall provide the Client with products and services as set out in the Client Agreement.
- C. If the Client is party to a Previous Agreement, the Parties agree that Powernet shall replace the Previous Provider and the terms of this document will replace those in the Previous Standard Form of Agreement.
- D. The Parties agree that the Client Agreement shall be subject to the terms and conditions set out in this document.

### OPERATIVE PROVISIONS

## 1 Definitions and interpretation

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### 1.1 Definitions

**Additional Charge** means a charge levied to the Client's account in relation to the supply of a service or goods of and incidental to the Agreement that is:

- (a) not included in the Client Agreement; and
- (b) deemed by Powernet to be reasonably necessary to give effect to the performance of the Agreement.

**Agreement** means the agreement comprised by the provisions of the Client Agreement and this document and includes any schedules or annexures to this document.

**Billing Period** means the billing period specified in the Client Agreement and if such a period is not so specified, means a month.

**Business Day** means a day in the Client State that is not a Saturday, a Sunday or a gazetted public holiday in that place.

**Client Agreement** means:

- (a) if the Client is party to a Previous Agreement - the agreement between the Previous Provider and the Client setting out the products and/or services provided or to be provided by the Previous Provider to the Client and other terms applying to such provision including fees and prices payable by the Client;
- (b) otherwise - the agreement between Powernet and the Client setting out the products and services provided or to be provided by Powernet to the Client and other terms applying to such provision including fees and prices payable by the Client,

which Client Agreement may consist of a quotation or proposal or Service Description that has been accepted by the Client and confirmed in writing by Powernet or the Previous Provider as the case may be, Standard Services and/or the Standard Prices. Where the Client and Powernet or the Previous Provider have entered a Service Level Agreement, such Service Level Agreement shall be deemed part of the Client Agreement, even if constituted by a separate document.

**Client State** means the state or territory where the Client has its head office or principal place of business

**Commencement Date** means the date for the commencement of the services as specified in the Client Agreement.

**Confidential Information** means:

- (a) all pricing information, business and financial information, sales and supply details, marketing strategies, customer and supplier listings, staff information, business listings, information concerning the business or customers relating to the Client, Powernet or the Services;
- (b) all Personal Information related to people who are currently employed or have previously applied to be employed by the Client or Powernet;
- (c) all processes, procedures, techniques, concepts, systems, manuals, licence agreements, disclosure documents, documents, agreements, contracts, notes, file and data base structures and software relating to the Services;
- (d) information relating to the occurrence and details pertaining to an Eligible Data Breach;
- (e) any information that would otherwise at law be considered secret or confidential information; whether or not marked "Confidential" and
- (f) any information relating to the Client, its members, customers, contributors or suppliers

but does not include information which:

- (i) at the time of first disclosure by a Party is or is reasonably known to be or to have been in the public domain;
- (ii) after disclosure by a Party is or becomes part of the public domain otherwise than by disclosure in breach of the terms of the Agreement; or
- (iii) at the time of first disclosure by a Party was already known to the other Party.

**Corporations Act** means the *Corporations Act 2001* (Cth).

**Due Date** means the date payment is due and payable by the Client to Powernet for the supply of the Services or other matters or things under or incidental to the Agreement.

**Eligible Data Breach** has the same meaning given to it in s 26WE(2) of the *Privacy Act 1988* (Cth).

**Emergency** means any event, situation or circumstance actually or potentially threatening or adversely affecting human life, property, goods, or the businesses of the Parties or any material or intangible thing urgently required to give effect to a material aspect of the Agreement.

**Fees** means those fees at the hourly rate for hours worked, and/or those fixed fees, charges and costs as are prescribed in or that apply under the Client Agreement or are otherwise payable under the Agreement.

**GST** means:

- (a) the same as in the GST Law;
- (b) any other goods and services tax, or any tax applying to the Agreement in a similar way; and
- (c) any additional tax, penalty tax, fine, interest or other charge under a law of such a tax.

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

**Insolvency Event** in relation to a Party occurs where:

- (a) the Party becomes an externally-administered body corporate for the purposes of the Corporations Act or an external insolvency administrator is appointed to any such party under the provisions of any companies or securities legislation of another jurisdiction;
- (b) a controller (as that term is defined in the Corporations Act) or mortgagee in possession is appointed to the assets of the Party, or any such appointment is reasonably likely;
- (c) the Party fails to comply with a statutory demand in the manner specified in section 459F of the Corporations Act, and has not made an application to set aside such demand under section 459G of the Corporations Act within the period of 21 days after service of the statutory demand; or
- (d) a resolution is passed or an application is made to, or an order is made by, a court of competent jurisdiction for the winding up of a Party (except pursuant to internal amalgamation or reconstruction);
- (e) Party makes an arrangement for the benefit of or enters into an arrangement or composition with its creditors; or
- (f) the Party is unable to pay its debts as and when they fall due.

**Minimum Term** means the minimum period of engagement by the Client of Powernet pursuant to the Client Agreement, starting on the Commencement Date, and if no such period is specified, a month.

**Novation Date** means 1 May 2017

**Out of Scope** means services provided outside the Support Hours or products, goods and/or services that are not included the Service Description or are in addition to those which were taken into account in determining Fees or otherwise costing the provision of the subject matter of the Agreement.

**Parties** means the Client and Powernet, and **Party** means either one of them.

**Personal Information** to the extent applicable to the Agreement has the same meaning as it has in sub-section 6(1) of the *Privacy Act 1988* (Cth).

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

**PPS Register** means the register of security interests kept under the PPSA

**Previous Agreement** means the agreement the Client and the Previous Provider consisting of the Client Agreement together with the provisions of the Previous Standard Form of Agreement, and, if applicable, the Service Level Agreement.

**Previous Standard Form of Agreement** means the terms applying to the provision of products and/or services by the Previous Provider to the Client prior to the commencement of this document.

**Related Bodies Corporate** has the meaning given to that term in the Corporations Act.

**Response Time** means the maximum period following notification of a request for a Service within which Powernet must respond to that request pursuant to a Service Level Agreement or a Client Agreement.

**Service** means each of the services set out in the Client Agreement including any product goods or service delivered in connection with the delivery of those services.

**Service Description** means a description of services offered by Powernet to the Client and which may reference or incorporate Standard Services.

**Service Guarantee** means the guarantee that Powernet will meet a Service Level or a Response Time as is expressly set out in a Service Level Agreement.

**Service Level** means the percentage of time during a calendar month that a Service is available to the Client

**Service Level Agreement** means a written agreement between Powernet or the Previous Provider and the Client that specifies one or more Service Guarantees

**Set up charge** means a charge payable in respect of the set up or establishment of a Service

**Standard General Terms** means the version of this document excluding provisions relating to the Previous Agreement, which is published on the Website.

**Standard Services** means those services that Powernet offers to provide generally, a description of which is published on the Website.

**Standard Prices** means the prices for Standard Services and other goods and services as published on the Website.

**Support Hours** - means 06.30HRS to 17.30HRS AEST on a Business Day

**Subsequent Term** means the period of operation of the Agreement following the conclusion of the Minimum Term as set out in the Client Agreement or that the Parties otherwise agree or if no such period is so agreed, then equal to the Billing Period.

**Suspension Event** means any of the events described in clause 7.1(b).

**Systems Maintenance** means scheduled maintenance carried out by Powernet to its systems, that prevents a Service from being provided to the Client where notice has been provided to the Client either by email or by posting a notice on the Website prior to the scheduled maintenance occurring.

**Tax Invoice** means a tax invoice within the meaning of the GST Law.

**Term** means the Minimum Term and all Subsequent Terms.

**Unauthorised Purpose** has the meaning given to it in clause 5.4(b) of this document.

**Website** means Powernet's website, the address of which is currently [www.power-net.com.au](http://www.power-net.com.au).

**Wholesaler** means a provider of goods and/or services used in supplying the Services;

## 1.2 Interpretation

In these terms and conditions, except where the context otherwise requires:

- (a) the singular includes the plural and vice versa, and a gender includes other genders;
- (b) a reference to a definition that is capitalised may also be a reference to such definition in lower case;
- (c) another grammatical form of a defined word or expression has a corresponding meaning;
- (d) a reference to a clause, paragraph, schedule or annexure is to a clause or paragraph of, or schedule or annexure to, the Agreement, and a reference to the Agreement includes any schedule or annexure;
- (e) a reference to a document or instrument includes the document or instrument as novated, altered, supplemented or replaced from time to time;
- (f) a reference to A\$, \$A, dollar or \$ is to Australian currency;
- (g) a reference to time is to the time in New South Wales, Australia;
- (h) a reference to a party is to a party to the Agreement;
- (i) a reference to a person includes a natural person, partnership, body corporate, association, governmental or local authority or agency or other entity;
- (j) a reference to a statute, ordinance, code or other law includes regulations and other instruments under it and consolidations, amendments, re-enactments or replacements of any of them;
- (k) the meaning of general words is not limited by specific examples introduced by including, for example or similar expressions;
- (l) headings are for ease of reference only and do not affect interpretation;
- (m) any agreement, representation, warranty or indemnity in favour of two or more parties (including where two or more persons are included in the same defined term) is for the benefit of them jointly and severally;



- (n) a rule of construction does not apply to the disadvantage of a party because the party was responsible for the preparation of the agreement or these terms and conditions or any part of them; and
- (o) if a day on or by which an obligation must be performed or an event must occur is not a Business Day, the obligation must be performed or the event must occur on or by the next Business Day.

### 1.3 Previous Agreement and Novation.

- (a) This clause 1.3 applies only if the Client is party to a Previous Agreement. Powernet, the Client and the Previous Provider enter the novation agreement provided in this clause in consideration of the mutual undertakings and promises given by each to the other.
- (b) Effective on and from the Novation Date Powernet shall be substituted for the Previous Provider in the Client Agreement as if it had originally been a party to the Client Agreement instead of the Previous Provider, and all references in the Client Agreement to the Previous Provider in any capacity shall be read and construed as if they were references to Powernet.
- (c) The Parties agree that the terms of the Agreement shall comprise the terms of the Client Agreement and the terms of this document in lieu of the Previous Standard Form of Agreement, as if the terms of this document had applied to the Client Agreement from the time the Parties entered the Client Agreement.
- (d) Powernet undertakes to perform all the obligations of the Previous Provider under the Client Agreement, but in accordance with this document in lieu of Previous Standard Form of Agreement and agrees to indemnify the Client against any loss or damage suffered by the Client as a result of the breach by the Previous Provider of its obligations under the Previous Agreement.
- (e) The Client undertakes to perform all the obligations of the Client under the Client Agreement, but in accordance with this document in lieu of Previous Standard Form of Agreement.
- (f) In consideration of the undertaking and indemnity provided under clause **Error! Reference source not found.1.3(d)** the Client agrees to release the Previous Provider from any liability under the Previous Agreement and the Previous Provider assigns all its rights under the Previous Agreement to Powernet.

## 2 Duration, cancellation and acknowledgments

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- (a) The Agreement shall operate for the term of the Client Agreement unless otherwise stipulated or terminated in accordance with the terms and conditions of this document or the Client Agreement.
- (b) Subject to clause 2(c), following expiry of the Minimum Term, the Client Agreement will be renewed automatically for successive Subsequent Terms.
- (c) The renewal will occur unless either Party notifies the other Party in writing at least 30 days prior to the expiry of the Minimum Term (or relevant Subsequent Term) of the Party's intention to terminate the Agreement, thereby cancelling the Services.
- (d) The Parties acknowledge and agree:
  - (i) the Client enters into the Agreement and receives the benefit of the Services on behalf of itself;

- (ii) that, if not for the Client entering into the Agreement, Powernet would not have provided the Client with the Services.

### **3 Services**

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#### **3.1 Quotation for Services**

- (a) A quote or proposal provided by Powernet to the Client does not constitute a legally binding offer to provide the Services and an acceptance of that quote or proposal will not bind Powernet unless Powernet subsequently agrees in writing to provide those Services in accordance with the accepted quote or proposal.
- (b) Powernet may provide an informal proposal or quote to the Client after the commencement of the Client Agreement, in respect of additional Services requested by the Client or recommended by Powernet, and upon the written acceptance of that proposal or quotation the Client Agreement shall be deemed varied in accordance with the terms of that proposal or quote and the provisions of clause 6.2 shall apply subject to the express terms of that accepted proposal or quote.

#### **3.2 Delivery of Services**

- (a) The Parties agree that Powernet must provide to the Client and the Client must receive from Powernet the Services:
  - (i) as provided in the Client Agreement; and
  - (ii) on the terms and conditions of the Agreement, throughout the Term.
- (b) Powernet will, in its sole discretion, decide the delivery method and technical means by which the Services are provided, whether by telephone, remotely, by onsite attendance or any other means Powernet deems fit, unless otherwise specified in the Client Agreement.
- (c) Powernet must provide and carry out the Services in an efficient and professional manner and in accordance with standards generally observed in the information technology industry.
- (d) Should Powernet not be able to provide the Services to the Client, the Client will not be liable to Powernet for any costs incurred by Powernet in preparing to provide the Services.
- (e) The Client acknowledges that Powernet may take all reasonable steps and undertake all measures it considers necessary to efficiently deliver the Services.
- (f) The Client does not have any rights to any particular user identification, password, customer number, IP address, or any other thing which Powernet may provide as part of a Service.

#### **3.3 Assistance**

The Client must:

- (a) provide all reasonable assistance requested by the personnel of Powernet in the diagnosis of any problem within the Client's information technology infrastructure and follow any reasonable direction of Powernet in the course of doing so;
- (b) make available free of charge and within a reasonable time all information, facilities and services reasonably required to enable Powernet to provide the Services;

- (c) provide reasonable access to its premises thereby granting a non-exclusive licence to Powernet to give effect to the matters described in clauses 3.3(a) and 3.3(b);
- (d) provide such facilities as reasonably required by Powernet for performance of the Services; and
- (e) nominate a person as the Client's representative who will be authorised to bind the Client in all matters relating to the Services, until notice to the contrary is given to Powernet. The Client must ensure its representative is contactable at all reasonable times.

### **3.4 Delays and interruptions**

- (a) Powernet will use best endeavours to supply the Services but does not warrant that such supply will be interruption or error free.
- (b) Despite anything else within the Agreement, the Client acknowledges and accepts that:
  - (i) a delay may occur between execution of the Agreement and the commencement of the Services;
  - (ii) the Services may not be available in all circumstances; and
  - (iii) Powernet is not responsible nor liable for any delay or unavailability.
- (c) The Client agrees to indemnify and release Powernet against any claim for damages arising in contract and or tort (including negligence) for default or failure to perform its obligations under the Agreement (including any Service Guarantees) resulting from circumstances reasonably beyond its control. This includes but is not limited to, weather conditions, power failure, telecommunications failure, technical failure, maintenance requirements, our inability to access the Client's premises, the Client's acts or omissions or those of any third parties.
- (d) Powernet will rely upon this clause 3.4 to the full extent permitted by law. To the extent of any inconsistency between this clause 3.4 and clause 8, clause 8 will prevail to the extent of inconsistency.

### **3.5 Support**

- (a) Powernet is not obliged to provide any maintenance or support except as is:
  - (i) expressly provided in the Client Agreement including any Service Level Agreement, or
  - (ii) required by law that cannot be contracted out of including consumer guarantees under the Australian Consumer Law.
- (b) Without limiting clause 3.5(a), Powernet is not obliged to provide, in the absence of an express provision to the contrary in the Client Agreement:
  - (i) computer monitoring,
  - (ii) data backup,
  - (iii) historical data or meta data,
  - (iv) on-site support,

- (v) software or hardware support,
  - (vi) updates, upgrades or patches,
  - (vii) notifications or reminders, or
  - (viii) any service outside Support Hours.
- (c) Powernet will provide maintenance and/or support services as is required by the Client Agreement and will use its best endeavours to comply with any applicable Service Guarantee.

### **3.6 Issues with equipment**

- (a) Any serious, potential or any other issue which relates to the age, configuration or implementation of any supported equipment may be brought to the attention of the Client by Powernet in writing.
- (b) Where, in opinion of Powernet, that equipment requires additional support or support beyond the scope of the obligations of Powernet under the Agreement due to its age, configuration or implementation, Powernet reserves the right in its sole discretion to cease support of that item of equipment under the Client Agreement until the equipment is brought up to agreed industry standards.
- (c) Powernet will work with the Client to proactively identify appropriate replacement solution options and to assist the Client to procure such solutions. The Client expressly agrees to indemnify, release and hold harmless and blameless Powernet for any consequential, economic, business or opportunity, direct or indirect loss or damage or harm of any type whatsoever (including negligence and in contract or tort) arising out of or incidental to any interruption to service, support or maintenance of the Clients operating network howsoever arising by Powernet having ceased support of the said equipment. Powernet will rely upon this clause 3.6(c) to the full extent permitted by law. To the extent of any inconsistency between this clause and clause 8, clause 8 will prevail to the extent of such inconsistency.]

### **3.7 Software**

- (a) If Powernet provides any third party software to the Client, then:
  - (i) it does so subject to the licence terms and conditions that apply to that software; and
  - (ii) the Client is solely responsible for ensuring the suitability and compatibility of the software.
- (b) If the Client's software is not distributed or approved by Powernet, the Client acknowledges that it may result in interference to the Services or it may result in loss, for which Powernet is not responsible.

### **3.8 Out of Scope**

- (a) Out of Scope services will be charged in accordance with the time and materials "Out of Scope" hourly rate specified in the Client Agreement or if not so specified at the applicable standard Out of Scope hourly rate charged by Powernet from time to time.
- (b) The services that are Out of Scope include but are not limited to:
  - (i) travel time to and from and support of equipment at locations outside the Client's usual premises such as staff homes;

- (ii) installation of new or additional devices or provision of service which is not specifically mentioned in the Client Agreement or covered by its scope; and
- (iii) the relocation of equipment if the Client changes the location of its premises.

### **3.9 Errors**

- (a) If the Client provides incorrect information to Powernet which is relied upon by Powernet or a third party to its detriment, the Client will be liable for all costs incurred by Powernet in connection with the error.

## **4 Fees**

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### **4.1 Fees payable**

- (a) The Client must pay to Powernet the Fees in accordance with the terms stipulated in the Client Agreement.
- (b) Powernet may charge Fees in respect of work required to set up the Client's system, infrastructure or equipment, preparatory to the provision of Services, and may do so in advance or in arrears of such work being done.
- (c) Fees are adjustable in accordance with clause 6.1 or 6.2.
- (d) Powernet will issue a Tax Invoice in respect of Fees payable from time to time.

### **4.2 Due Date for payment**

- (a) Fees are due and payable as follows:
  - (i) in respect of regularly recurring or periodic Services, within 14 days after the date of the relevant Tax Invoice;
  - (ii) in respect of goods (including computer hardware and/or software and/or other licensed materials) as follows:
    - (A) if such Fees as quoted or estimated exceed \$1500 plus GST, 50% of the Fees on placement of the order, with the balance payable within 7 days after the date of the relevant Tax Invoice,
    - (B) in all other cases, within 7 days after the date of the relevant Tax Invoiceprovided always that Powernet shall not be obliged to deliver goods until payment in full has been received for those goods,
  - (iii) in all other cases, within 14 days after the date of the relevant Tax Invoice,(each such date being referred to as the **Due Date**).
- (b) Despite clause 4.2(a), Powernet may require the Client to pay Fees in advance of the relevant Service being provided, by giving the Client notice to that effect.
- (c) Fees which do not appear on a Tax Invoice for a particular period may appear on future Tax Invoices.

- (d) The Client must pay all Tax Invoices by the Due Date or, if the Client elects to pay by credit card or by direct debit, Powernet will debit the credit card or nominated direct debit account for the amount of the Tax Invoice and any other Fees due and payable by the Due Date.

#### **4.3 Overdue payments**

- (a) If the Client does not pay an invoice by the Due Date, Powernet may charge daily interest on outstanding balances from the Due Date until the date on which payment in full is received, such interest to be 10% p.a. above the Reserve Bank of Australia cash target rate applying as at the date of the relevant Tax Invoice.
- (b) The Client will be liable for all reasonable costs and expenses incurred by Powernet in collecting an amount outstanding (including legal fees charged on a solicitor/client basis) and will indemnify Powernet in respect thereof.
- (c) Accounts remaining in debit 21 days past Due Date will be placed on credit hold without notice.

#### **4.4 Genuine Dispute**

- (a) This clause takes precedence over clause 11
- (b) If the Client in good faith disputes an amount in an invoice, the Client must notify Powernet in writing within 14 days of the date of invoice (**Invoice Dispute Notice**). The Invoice Dispute Notice must set out the number of the invoice being disputed, the amount in dispute (**Disputed Amount**), and the reasons why the Client disputes the Disputed Amount.
- (c) If the Client serves an Invoice Dispute Notice in accordance with clause 4.4(a), the Client may withhold payment of the Disputed Amount in accordance with clause 4.4(d), but is not entitled to withhold payment of any undisputed amount owing to Powernet.
- (d) Powernet will within 14 days of receipt of the Invoice Dispute Notice, review the relevant invoice, the content of the Invoice Dispute Notice and other facts and circumstances it considers relevant, for the purpose of resolving the dispute. Powernet shall notify the Client of the result of its review, the amount it determines is payable by the Client (if any), and the reasons for its determination. The Client must pay to Powernet the amount determined by Powernet to be due and payable, without deduction or set-off, within 7 days of notification of the determination, failing which Powernet may treat the amount payable under the determination as an overdue payment and invoke the provisions of the Agreement relating to overdue payments including clauses 4.3, 7.1 and 7.2.
- (e) If the Client disputes Powernet's determination it must nevertheless pay the amount determined by Powernet to be payable, but may do so under protest and without admission of liability and invoke the dispute resolution procedure under clause 11.

#### **4.5 Credit Check**

- (a) The Client authorises Powernet to do the things set out in this clause 4.5 and acknowledges and agrees that Powernet may do so for as long as the Agreement continues or the Client owes Powernet any money.
- (b) Powernet may obtain a credit report (within the meaning of the *Privacy Act 1988* (Cth)) of the Client to assess the Client's creditworthiness or for debt recovery purposes.

- (c) Powernet may give to a credit reporting agency any information Powernet has about the Client to enable Powernet to obtain a credit report.
- (d) Powernet is authorized to disclose financial, credit and other information (including Personal Information) about the Client to other credit providers or a credit reporting agency or to other persons for the purpose of debt recovery.
- (e) The Client must cooperate with any enquiries that Powernet make about the Client's creditworthiness and provide any further information, consent or authority Powernet reasonably require.

## **5 Client's obligations**

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### **5.1 General**

The Client must:

- (a) comply promptly with Powernet's reasonable directions in relation to the provision of the Services;
- (b) provide promptly all information, decisions, facilities and assistance Powernet reasonably requires to supply the Services;
- (c) promptly notify Powernet of any change of circumstances or in previously supplied information, that is likely to materially affect the Services or the provision of them.
- (d) comply with all laws, agreements, guidelines, rules and regulations concerning the Client's use of the Services and the services rendered by third parties including acceptable use policies and terms of service;
- (e) provide Powernet safe access to and egress from the premises to which the Services are supplied and, where required, obtain any consent, licence or permit of the owner of the premises or any other person including governmental authority, for Powernet to provide the Services and/or install, inspect, repair, maintain or remove equipment connected with the provision of the Services; and
- (f) notify Powernet of the Client's inability to comply with reasonable requests pursuant to this clause, outlining why the Client cannot comply and providing alternate options so that Powernet may continue to meet its obligations under the Agreement.

### **5.2 Security and third party access**

- (a) The Client is responsible for maintaining the security of the accounts details used in or in connection with the Services including all usernames and passwords.
- (b) Where a third party uses any of the Client's accounts, as between the Client and Powernet, the Client will be liable for costs incurred as a result of that third party's access regardless of whether such use was authorised by or otherwise with the knowledge or consent of Powernet.
- (c) If Powernet suspects that the security of the Client's account details have been compromised, Powernet may suspend the Services in accordance with clause 7 of this document.

### **5.3 Eligible Data Breach**

- (a) If either Party:

- (i) becomes aware that there are reasonable grounds to suspect that there may have been an Eligible Data Breach; or
- (ii) becomes aware that there are reasonable grounds to believe that there has been an Eligible Data Breach,

it will notify the other party of this fact as soon as practicable.

- (b) Where either of Powernet or the Client are required to comply with any obligations arising under the *Privacy Act 1998* (Cth) in relation to an Eligible Data Breach of the Client's data, the Client must ensure compliance with all those obligations.
- (c) If the Client believes it is unable for any reason to comply with its obligations without the assistance of Powernet, the Client must notify Powernet as soon as practicable and in any event within 7 days, that it requires such assistance from Powernet, specifying the nature of that assistance.
- (d) If Powernet provides any services to the Client to assist it to comply with the obligations under clause 5.3(a), those services may be provided as an Out of Scope service.

#### **5.4 Unauthorised Purpose**

- (a) The Client must not use or permit any other person to use the Services for any Unauthorised Purpose.
- (b) An Unauthorised Purpose includes:
  - (i) attempts (whether or not successful) to access, modify or otherwise disrupt:
    - (A) any of the Services which the Client is not expressly authorised to access or modify;
    - (B) Powernet's network or infrastructure; or
    - (C) any other client of Powernet or any computer system other than the Client's;
  - (ii) distributing unsolicited advertising or spamming, monopolisation of services, propagation or transmission of code or software containing computer worms, viruses, trojan horses, key loggers, or any other harmful code or software;
  - (iii) any conduct that may endanger the Powernet network or infrastructure;
  - (iv) publishing, distributing or disseminating defamatory material;
  - (v) making threats, harassing, abusing, stalking;
  - (vi) infringing on any third party's copyright, patent, trademark, trade secret or other proprietary right;
  - (vii) allowing a minor to be exposed to unsuitable material;
  - (viii) storing or transmitting material that violates State or Commonwealth legislation;
  - (ix) any conduct of a fraudulent or obscene nature;
  - (x) any conduct that violates State or Commonwealth legislation; or



- (xi) any conduct that may violate the legal rights of any other person.
- (c) If Powernet reasonably suspects a breach of clause 5.4(a)5.4(b), Powernet may suspend or terminate the Client Agreement in accordance with clause 7 of this document.

## 5.5 Indemnity

The Client must indemnify Powernet against, and hold it harmless from all liability, claims, actions, loss, damage, cost and expense (including legal costs on a solicitor client basis) suffered by or threatened against Powernet resulting from or arising in connection with any breach by the Client of any obligation under clauses, 5.1, 5.2, 5.3 and/or 5.4(a) and any action taken in good faith by Powernet in response to such breach.

## 6 Variation

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### 6.1 Variation of Fees

- (a) Subject to clauses 6.1(b) and 6.4, Powernet may amend Fees at any time with effect after 30 days in respect of Services not then delivered or performed, by giving notice to the Client or by Powernet changing its Standard Prices published on the Website.
- (b) Powernet may not increase Fees applying in respect of the Minimum Term or fixed price contracts until the Minimum Term or period of the fixed price contract has expired, except in accordance with clause 6.1(c).
- (c) Powernet may pass on price increases during the Minimum Term or a fixed price contract:
  - (i) which third party suppliers impose on Powernet; or
  - (ii) which are imposed on Powernet by law such as an increase in GST;

but in either of those events Powernet will provide the Client with notice at least 30 days prior to the date on which the variation is intended to take effect.

### 6.2 Variation of Services

- (a) The Parties may agree to vary the Services and if applicable the Fees payable in respect of the varied Services, at any time by varying the Client Agreement in writing. Unless otherwise agreed, such changes will take effect at the start of the next Billing Period.
- (b) Subject always to clauses 6.2(c) 6.2(d) and 6.4, either Party may vary the Services after the end of the Minimum Period or fixed price contract by giving to the other 30 days' notice of such change (**Service Change Notice**). Where Powernet gives such notice it must include any applicable change in Fees in the Service Change Notice. Where the Client gives the Service Change Notice Powernet must advise the Client of any change in Fees consequent upon the change in Services within 14 days of receiving the Client's Service Change Notice. Unless otherwise agreed, such changes will take effect at the start of the next Billing Period after the expiry of the Service Change Notice.
- (c) The other Party may decline to accept the change of Services or the change in Fees notified under clause 6.2(b), by giving notice to that effect prior to the start of the next Billing Period after the expiry of the Service Change Notice, whereupon the Agreement will terminate in respect of the Services the subject of the Service Change Notice.

- (d) Powernet may amend the scope and/or particulars of Services that are Standard Services by amending the description of the Standard Services published on the Website.

### **6.3 Variation of other terms**

- (a) Powernet may vary the terms of the Agreement other than Fees and Services (**Other Terms**), subject to and in accordance with this clause 6.3 and clause 6.5
- (b) Powernet may vary any Other Terms by amending the Standard General Terms and publishing the new version on the Website. The change takes effect from the time of publication of the change

### **6.4 Correction of errors**

Powernet may vary any term in the Agreement to correct any error or account for changed circumstances including in the description or specifications of Services, the calculation of Fees, the identity of personnel or scheduling.

### **6.5 Requirements of Law.**

Notwithstanding any other provision of this clause 6, if a statute or regulation or an order of a court or tribunal having jurisdiction or a valid directive from a governmental authority imposes upon Powernet the obligation to take steps or comply with other requirements before effecting a variation of a term of the Agreement, the variation does not take effect until those steps are taken or other requirements are complied with.

## **7 Service suspension and termination**

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### **7.1 Suspension**

- (a) Without limiting Powernet's rights under the Agreement, Powernet may suspend the supply of Services to the Client without notice and without any liability for loss where a Suspension Event occurs.
- (b) A Suspension Event will occur if:
  - (i) the Client breaches any of its obligations under clause 5.1;
  - (ii) Powernet reasonably suspects use of the Services for an Unauthorised Purpose in breach of clause 5.4(a);
  - (iii) Powernet reasonably suspects that the Client's account details have been compromised;
  - (iv) Powernet considers it necessary to suspend the Services to protect its infrastructure or otherwise because of an Emergency or because of Systems Maintenance;
  - (v) Powernet reasonably suspects that a failure to suspend the Services will create an unacceptable risk that there will be a breach of a law or a bona fide agreement between Powernet and a third party including a Wholesaler
  - (vi) Powernet is directed/required to suspend the Services under the law or by a court, tribunal, governmental or enforcement agency;
  - (vii) a Wholesaler requires Powernet to suspend the Services;

- (viii) the Client or any of its guarantors (if applicable) experiences an Insolvency Event;
  - (ix) Powernet believes on reasonable grounds that the Client is likely to be unable to pay its debts as and when they fall due and payable;
  - (x) a director of the Client is convicted of a criminal offence or is subject to regulatory action resulting in a civil penalty declaration or administrative banning order or adverse finding, including an enforceable undertaking;
  - (xi) the Client fails to pay an amount due and payable that is 21 days past the Due Date which is not the subject of a good faith dispute, and for which a valid Tax Invoice has been issued; or
  - (xii) the Client changes its contact details without informing Powernet.
- (c) The Client will be liable for all charges for the Services during a Suspension Event where the Suspension Event was caused by the Client's breach of the Agreement.

## 7.2 Termination

- (a) Powernet may terminate the Agreement immediately if:
- (i) a Suspension Event occurs which is not resolved to Powernet's satisfaction within seven (7) days of its occurrence;
  - (ii) the Client fails to pay Fees by the Due Date or otherwise in accordance with Powernet's terms of payment or a payment by or on behalf of the Client is dishonoured, on more than two (2) occasions;
  - (iii) the Client has provided Powernet with false or misleading information, or fails to provide Powernet with any information that Powernet has reasonably requested for the purposes of the Agreement;
  - (iv) the Client being a sole trader dies or being a partnership and a partner in the partnership dies;
  - (v) Powernet reasonably believes that the Client is a minor or does not have the authority to enter into the Agreement; or
  - (vi) the Client breaches a material provision of the Agreement and such breach is incapable of remedy or if capable of remedy the Client fails to rectify the breach within 7 days of being given notice by Powernet to do so;
- (b) Without limiting clause , the Client may immediately terminate the Agreement, if:
- (i) Powernet experiences an Insolvency Event;
  - (ii) Powernet repudiates a fundamental term of the Agreement; or
  - (iii) Powernet fails to remedy a material breach of the Agreement relating to the delivery of a Service on 3 separate occasions, within 14 days after the Client issues Powernet a written notice requiring Powernet to remedy those breaches.
- (c) Where the Client has more than one Client Agreement:
- (i) a breach of one Client Agreement will place the Client in breach of all of them; and

- (ii) Powernet may exercise any of its rights under any of the Client Agreements accordingly.
- (d) If Powernet terminates the Agreement during the Minimum Term, because of the Client's breach, the Client must pay Powernet the following amount:
  - (i) the Fees payable for Services completed as at the date of effective termination, in addition to all other outstanding Fees;
  - (ii) all expenses incurred or paid by Powernet in anticipation of providing the Services for the Minimum Term, as at the date of effective termination, that Powernet is not able to legally avoid paying or obtain refund; and
  - (iii) 25% of the Fees that would have been payable by the Client during the unexpired period of the Minimum Term as a pre-estimate of the profit that Powernet would have made in respect of those Fees.
- (e) Any termination or expiry of the Agreement will not prejudice any equitable or legal right of action or remedy which may have accrued to either party prior to or after termination of the Agreement.
- (f) Termination of the Agreement does not affect any term relating to limitation of liability or indemnity.
- (g) After the expiration of the Minimum Term of the Agreement, either Party may terminate the Services in accordance with clause 2.

## **8 Limitation and exclusion of liability**

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- (a) Subject to clause 8(d), Powernet is not liable to the Client for any loss or damage whatsoever or howsoever caused arising directly or indirectly from or in connection with the Agreement or the provision or non-provision of Services, except to the extent that such liability may not lawfully be limited or excluded. For the avoidance of doubt this extends to any employees, contractors, agents, representatives, licensees or permitted assigns of Powernet.
- (b) Without affecting the generality of clause 8(a), Powernet expressly excludes liability for consequential loss or damage howsoever caused, whether arising from or in connection with the Services or their provision, including any loss of data, any loss of, or claim for, revenue, profits, actual or potential business opportunities or anticipated savings or profit, whether arising in contract, in tort, in equity or via breach of statute, even if Powernet was aware that such loss may be incurred by the Client. The Client hereby agrees to release and indemnify Powernet from any such liability for consequential loss suffered by the Client.
- (c) Where Powernet cannot by law exclude liability, its liability to the Client will be limited, at Powernet's choice, to:
  - (i) if the breach relates to goods — the replacement or repair or the payment for the replacement or the repair of the goods; or
  - (ii) if the breach relates to services — the supply of those services or the payment of the cost of those services supplied again.

This clause applies despite anything else in the Agreement and to the fullest extent permitted by law.

- (d) The limitation of liability set out in clause 8(a) will not apply to any liability arising as a result of, or in connection with:
  - (i) fraud or wilful misconduct by Powernet;
  - (ii) breach of confidentiality by Powernet;
  - (iii) breach of privacy by Powernet; or
  - (iv) infringement of a third party's Intellectual Property Rights by Powernet.
- (e) Powernet does not warrant or represent the performance of any goods or services provided by it except as may be expressly set out in the Client Agreement. To the fullest extent permitted by law, Powernet excludes all warranties implied by law except as expressly set out in the Client Agreement.
- (f) Any unreasonable and material interference by the Client or its agents, servants, employees, subcontractors or other third party acting with the consent of the Client, with equipment, network or configuration relevant to or of and incidental to the Agreement will void any Service Guarantee, remove any liability to the Client for the quality of the Service the subject of such interference and may also incur Fees in respect of the costs of rectification as the rectification will be considered as an excluded item of the Agreement.

## **9 Confidentiality obligations**

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- (a) The Parties must not use the Confidential Information other than for the purpose of fulfilling the requirements of, and to give effect to, the performance of the Agreement.
- (b) The Parties must maintain strict confidentiality in relation to the Confidential Information and must not divulge all or any aspect of the Confidential Information to any person not in its employ or engagement in relation to fulfilling its obligations under the Agreement.
- (c) If a Party wishes to disclose any of the Confidential Information to its accountant, business, financial or legal adviser (**Professional Advisors**), it may do so upon advising the other Party and obtaining the prior written consent of the other Party. That consent must not be unreasonably withheld.
- (d) If a Party is uncertain whether any information is Confidential Information, it may seek direction from the other Party before divulging the information to any third party.
- (e) The Parties must not grant or permit any person to have access to or possession of the Confidential Information.
- (f) The obligations on the Parties under this clause 9 must not be taken to have been breached to the extent that the Confidential Information:
  - (i) is disclosed by the Parties to its Professional Advisers, officers, employees, agents or subcontractors solely and to the extent necessary in order to comply with obligations or to exercise rights under the Agreement or the Client Agreement;
  - (ii) is disclosed by Parties to its internal management personnel, solely to enable effective management or auditing of related activities of and incidental to fulfilling its obligations under the Agreement or the Client Agreement; or

- (iii) is authorised or required by law or by order of any regulatory authority, stock exchange, judicial or parliamentary body or governmental agency to be disclosed.
- (g) Where a Party discloses Confidential Information to another person under clauses 9(f)(i) or 9(f)(ii), that Party must:
  - (i) notify the receiving person that the information is Confidential Information; and
  - (ii) not provide the information unless the receiving person agrees in writing to keep the information confidential.
- (h) If a Party is required to make a disclosure as described in clause 9(f)(iii) that Party will disclose only the Confidential Information required to comply with the applicable law or order.
- (i) The Client agrees that it will:
  - (i) treat as confidential information and keep secret during the term of the Agreement and for 2 years after the termination of it all information relating to the business practices or clientele of Powernet that is disclosed to it in confidence unless Powernet gives its prior written consent to such disclosure unless such disclosure is required by law or relevant regulatory body; and
  - (ii) not reproduce in whole or in part any report prepared by Powernet for use by any other party without Powernet's prior written approval.
- (j) Powernet's obligations of confidentiality will not merge or be released upon the expiry or termination of the Agreement, and will continue thereafter.

## **10 Security interest in equipment**

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### **10.1 Equipment Supply**

- (a) If Powernet or a third party at Powernet's request sells any goods or equipment to the Client **(Equipment)**:
  - (i) Powernet retains title to and ownership of all the Equipment until all amounts due in respect of all Equipment sold by or on behalf of Powernet to the Client or at its request have been paid by the Client in full;
  - (ii) risk of loss or damage of the Equipment passes to the Client when it is delivered to the Client's premises;
  - (iii) the Client must fully insure the Equipment from the time of delivery and maintain the insurance until the Client obtains title, and failing that until the equipment is delivered up to Powernet . The Client must insure the equipment for its full value and ensure that Powernet's interest is noted on the policy. Powernet may require the Client to demonstrate compliance with this clause by producing a copy of the insurance policy;
- (b) The Client must not:
  - (i) mortgage, charge or encumber the equipment without Powernet's written consent; and

- (ii) loan, rent, licence, transfer or assign or part with possession of the equipment without Powernet's written consent.
- (c) The Client must allow Powernet to enter upon the Client's premises to inspect the equipment in the Client's possession upon reasonable notice from time to time;
- (d) If:
  - (i) the Client fails to pay any amount (whether in whole or part) payable in respect of any equipment by the time required for payment;
  - (ii) the Client become insolvent (as that term is defined in the *Corporations Act 2001*); or
  - (iii) the Agreement is terminated, or becomes terminable at Powernet's option, Powernet may, without notice to the Client, enter at any reasonable time any premises where equipment is located (or believed by Powernet to be located) and take possession of that equipment not paid for to the value of the amount owing. Powernet's permission to enter the Client's premises for that purpose is irrevocable. Powernet is not liable to the Client in contract, tort or otherwise, for any costs, damages, expenses or losses incurred by the Client as a result of any action taken by Powernet under this clause.
- (e) If any equipment belonging to Powernet is sold or otherwise disposed of by the Client or if any insurance claim is made in respect of them, Powernet is entitled to trace and receive the sale or insurance proceeds. The Client must notify Powernet of all insurance claims made by the Client in respect of the equipment. The Client must keep the proceeds of sale or insurance in a separate bank account on trust for Powernet.
- (f) The Client must reimburse to Powernet all costs incurred by Powernet in exercising Powernet's rights under this clause .

## 10.2 PPSA

- (a) The Client hereby grants to Powernet a security interest over the Equipment to secure the payment of any unpaid balance of the price of, and any other Fees relating to, the Equipment (**Equipment Fees**). Such security is a 'purchase money security interest' (PMSI) to the extent that it can be under section 14 of the PPSA.
- (b) The Client consents to Powernet registering a financing statement in the PPS Register in respect of the Security Interest so granted.
- (c) The Client must do anything (such as obtaining consents and signing documents) which Powernet require for the purposes of:
  - (i) ensuring that Powernet's security interest is enforceable, perfected and otherwise effective under the PPS Law;
  - (ii) enabling Powernet to gain first priority (or any other priority agreed to Powernet in writing) for Powernet's security interest; and
  - (iii) enabling Powernet to exercise rights in connection with the security interest.
- (d) The Client must not deal with (including dispose or create another security interest in) any Equipment without first obtaining the written consent of Powernet, until the Equipment Fees are paid in full.

- (e) Unless required by an applicable law that cannot be excluded Powernet may exercise any right under the Agreement or conferred by law without giving notice to the Client or allowing for the elapse of any period of time.
- (f) Where the law requires that a period of time be fixed or stipulated for any notice or lapse of time, then 1 day is the period is fixed and stipulated.
- (g) The Client waives the requirement for Powernet to give notice under the PPSA where notice can be waived, including under sections 95, 118, 121(4), 130 and 157 of the PPSA.
- (h) To the extent that Chapter 4 of the PPSA would otherwise apply to enforcement by the secured party of any security interest in the Equipment, the parties agree that the following provisions of the PPSA are excluded:
  - (i) to the extent permitted by section 115(1) of the PPSA: sections 125, 132(3)(d), 132(4), 142 and 143 of the PPSA; and
  - (ii) to the extent permitted by section 115(7) of the PPSA: sections 132 and 137.
- (i) Powernet's rights under the Agreement are in addition to and not in substitution for Powernet's rights under law (including the PPSA) and Powernet may choose whether to exercise rights under the Agreement, and/or under such law, as Powernet sees fit.
- (j) The parties agree not to disclose information of the kind that can be requested under section 275(1) of the PPSA. The Client must do everything necessary on the Client's part to ensure that section 275(6)(a) of the PPSA continues to apply. The agreement in this sub-clause is made solely for the purpose of allowing Powernet the benefit of section 275(6)(a) and Powernet shall not be liable to pay damages or any other compensation or be subject to injunction if Powernet breaches this clause.
- (k) Powernet may recover from the Client the cost of doing anything under this clause, including the registration fees and the costs notification.

## **11 Dispute resolution**

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### **11.1 Reasonable endeavours to settle**

- (a) If a dispute arises in relation to either party's obligations under the Agreement (**Dispute**) the parties undertake in good faith to use all reasonable endeavours to settle the Dispute expeditiously.

### **11.2 Dispute Notice**

- (a) Any party claiming that a Dispute has arisen may give a written notice to the other party (**Dispute Notice**). The Dispute Notice must:
  - (i) identify the party's representative for negotiations relating to the Dispute, being a person with authority to settle the Dispute on behalf of that party; and
  - (ii) set out succinctly the issues the subject of the Dispute and, with all relevant particulars, a description of the circumstances giving rise to the Dispute and the relief sought including, to the extent possible, any amount claimed.



### 11.3 Reply

- (a) The recipient of the Dispute Notice must within 10 Business Days of receipt of the Dispute Notice reply in writing to the other party (**Reply**). The Reply must:
  - (i) identify the recipient's representative for negotiations relating to the Dispute, being a person with authority to settle the Dispute on behalf of the recipient; and
  - (ii) set out succinctly the recipient's response to the matters set out in the Dispute Notice and any additional matters the recipient considers relevant.

### 11.4 Negotiation

- (a) The representatives designated under clauses 11.2(a)(i) and 11.3(a)(i) above will make whatever investigations each considers appropriate and, within 10 Business Days of receipt of the Reply by the party which issued the Dispute Notice, use their reasonable endeavours to resolve the Dispute on a "*without prejudice*" basis and taking such steps as are considered appropriate.

### 11.5 Escalation of Dispute

- (a) If the Parties do not resolve the Dispute after following the procedure in clauses 11.1 to 11.4, then either Party may request that the Dispute be considered by a member of senior management or each Party.
- (b) On a request being made under paragraph (a), those relevant personnel must:
  - (i) promptly commence discussions to attempt in good faith to resolve the Dispute; and
  - (ii) negotiate in good faith to try to resolve the Dispute without resorting to any formal proceeding.

### 11.6 Independent Expert

- (a) At any stage, if agreed in writing by the parties, the parties may appoint an independent expert acceptable to both parties to resolve the Dispute.
- (b) If the Dispute remains unresolved after 10 Business Days after a request made under clause 11.5(a) the Dispute must be referred for determination to an independent expert of requisite experience appointed by the parties.
- (c) If the parties are unable to agree as to the identity of the independent expert, the independent expert will be chosen by the managing director of **Australian Commercial Disputes Centre Limited** or his or her delegate.
- (d) The independent expert will sit as an expert and not as an arbitrator and (except for cases of Intellectual Property Rights, manifest error or fraud) the decision will be final and binding and not subject to appeal to any court or tribunal on any basis whatever.

### 11.7 Resolution of dispute

- (a) Any resolution reached that is satisfactory to all parties to the Dispute will be implemented as soon as possible.

### **11.8 Right to suspend and terminate**

- (a) This clause does not affect any rights to suspend or terminate Services or the Agreement under clause 7 or pursuant to any other rights of termination contained in the Agreement.

### **11.9 Parties to continue to perform**

- (a) Notwithstanding the existence of a Dispute (but subject to clause 11.8), each party must continue to perform its obligations under the Agreement.

## **12 Notice provisions**

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### **12.1 Notices given by Powernet**

- (a) Some laws regulate the way in which certain notices can be given. This clause is subject to any such laws.
- (b) Powernet may give the Client a notice:
  - (i) by emailing the notice (or a hyperlink to a webpage that contains the notice) to:
    - (A) the most recent email address of the Client supplied to Powernet ; or
    - (B) any power-net.com.au email address the Client has; or
    - (C) to any email address whose mail server Powernet host;
  - (ii) by fax to the most recent fax number the Client supplied to Powernet ;
  - (iii) by ordinary mail or hand delivery to the most recent postal address the Client supplied to Powernet or (if the Client is a company) to the Client's registered office;
  - (iv) by hand delivery to the Client;
  - (v) by sending the notice by SMS to the last mobile phone number the Client supplied to Powernet;
  - (vi) by publishing the notice on Powernet's website and sending the Client an alert about the notice (including its website address) by SMS to the last mobile phone number the Client supplied to Powernet; or
  - (vii) in any other way as permitted by law
- (c) Any notice that Powernet send the Client is deemed to have been received by the Client as follows:
  - (i) If it (or a hyperlink to it) is emailed: one hour after it leaves Powernet's mail server;
  - (ii) If it (or a hyperlink to it) is emailed to a power-net.com.au email address that the Client may have: one hour after Powernet send it;
  - (iii) If it is faxed: when Powernet's fax machine issues a successful delivery record;
  - (iv) If it is mailed: at 10am on the third business day after posting;

- (v) If it is hand delivered to the Client or the Client's postal address or (if the Client are a company) the Client's registered office – at the time of delivery
  - (vi) If it is delivered in another way – at the time when it would have been delivered in the normal course of that way of delivery
- (d) A notice from Powernet need not be signed.

## 12.2 Notices given by the Client

- (a) The Client may give Powernet notice
  - (i) By email to [support@power-net.com.au](mailto:support@power-net.com.au) and [cancellations@power-net.com.au](mailto:cancellations@power-net.com.au)
  - (ii) By ordinary mail or hand delivery to the current postal address indicated by Powernet's website contact details pageand in no other way
- (b) Any notice that the Client send Powernet has no effect until Powernet actually receive it. Even then it has no effect:
  - (i) If it is mailed: before noon on the third business day after posting;
  - (ii) If it is received outside of business hours: before 9:00 AM on the next business day
  - (iii) If it is received after 4:00 PM on any day: before 9:00 AM on the next business day
- (c) A notice from the Client must be signed. Powernet is not obliged to verify any mark that purports to be the Client's signature or the authority of anyone who purports to sign on the Client's behalf
- (d) Any notice that the Client send Powernet must be in the English Language

## 13 Assignment and subcontracting

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- (a) The Agreement may not be assigned without the consent of all the Parties.
- (b) Powernet may subcontract Service obligations under the Agreement provided that Powernet is:
  - (i) not relieved from any obligations under the Agreement; and
  - (ii) liable for any breach of the Agreement committed, caused or contributed to by the subcontractors, subject always to the provisions of the Agreement relating to exclusion and limitation of liability.

## 14 GST

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- (a) Any consideration to be paid or provided for a supply made under or in connection with the Agreement, unless specifically described in the Agreement as 'GST Inclusive', does not include an amount on account of GST (**GST Exclusive Consideration**).
- (b) If any supply made or to be made by a party (**Supplier**) under or in connection with the Agreement is a taxable supply, the Supplier may, in addition to the GST Exclusive Consideration, recover from the

recipient of that supply (**Recipient**) an amount on account of GST. This is to be calculated by multiplying the GST exclusive consideration for the supply by the GST rate prevailing at the time that the supply is made.

- (c) Any additional amount on account of GST recoverable from the Recipient under clause 14(b) is payable on provision by the Supplier of a Tax Invoice.
- (d) In this clause 14, words or expressions that are defined in the A New Tax System (Goods and Services Tax) Act 1999 (Cth) have the meaning given to them by that Act.

## **15 Miscellaneous**

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### **15.1 Waiver**

- (a) The waiver by either party of any breach of the Agreement does not licence the other party to repeat or continue any such breach. Such a waiver will not operate as a waiver of any subsequent breach.
- (b) The failure of either party to exercise any right is not be deemed to be an abandonment or waiver of any right for damages injunction or otherwise.

### **15.2 Entire Agreement**

The Agreement constitutes the entire agreement of the parties in respect of the matters dealt with in the Agreement and supersedes all prior agreements, understandings, undertakings and negotiations in respect of the matters dealt with in the Agreement.

### **15.3 Force Majeure**

- (a) The non-performance or delay in performance by a party of any obligation under the Agreement is excused during the time and to the extent that such performance is prevented by a circumstance or event beyond its reasonable control (Force Majeure Event), provided that the party affected by the Force Majeure Event uses its best endeavours to perform as soon as possible its obligations under the Agreement (including by the use of reasonable workarounds and interim measures).
- (b) If a Force Majeure Event continues for more than 90 days, either party may terminate the Agreement immediately by notice in writing to the other party.

### **15.4 Governing Law**

This Agreement is governed by, and is to be construed and take effect in accordance with, the laws of the state of Victoria.

### **15.5 Severability**

- (a) Powernet and the Client consider the covenants, obligations and restrictions contained within the Agreement to be reasonable in all the circumstances of the Agreement.
- (b) Unenforceability of a provision of the Agreement does not affect the enforceability of any other provision.
- (c) If any provision is void, voidable or unenforceable, it is taken to be severed from the Agreement.

#### **15.6 Non merger**

All obligations of the parties which expressly or by their nature survive the expiration or termination of the Agreement will continue in full force and effect notwithstanding such expiration or termination.

#### **15.7 Non solicitation**

- (a) The Client must not solicit or attempt directly or indirectly to solicit or engage any of Powernet's employees or contractors, with whom the Client had contact in the 12 months prior to expiry or termination of the Agreement, during the term of the Agreement and for 12 months after the date of expiration of the Agreement.
- (b) If the Client breaches this clause, the Client agrees to pay Powernet a fee equal to the solicited/engaged employee's last annual Powernet gross taxable remuneration package as compensation. The Client agrees this is a genuine estimate of the loss and damage that would be suffered by Powernet.

#### **15.8 Counterparts**

This agreement may consist of a number of counterparts and, if so, the counterparts taken together constitute one agreement.