

# Terms & Conditions

Version 3, dated 2 December 2020

## 1. Definitions and interpretation

### 1.1 Meaning of “this agreement”

- (a) Subject to clause 1.1(b), “this agreement” means these Terms & Conditions and the HosPortal SaaS Schedule, which together constitute the agreement of the parties.
- (b) If the parties enter into more than one HosPortal SaaS Schedule, “this agreement” means, severally, each HosPortal SaaS Schedule and these Terms & Conditions, which together constitute separate agreements between the parties.

### 1.2 Other definitions

In this agreement:

**Additional Services** means services provided by HosPortal to the Customer in accordance with clause 4.2. **Error! Reference source not found.**

**Agreement Start Date** means the “Agreement Start Date” specified in the Commercial Schedule.

**Aggregate Profile Fee** means the “Aggregate Profile Fee (per Payment Period)” specified in the Commercial Schedule, if any, as adjusted in accordance with clauses 3.4 and 2.2.

**Business Day** means a day on which banks are open for business in Sydney, New South Wales other than a Saturday, Sunday or public holiday in New South Wales.

**Commercial Schedule** means that part of the HosPortal SaaS Schedule entitled “Commercial Schedule”.

**Confidential Information** of a party means any information or material, in any form, that is provided by or on behalf of that party to the other party under or in connection with this agreement and that is by its nature confidential or that otherwise the other party knows or ought reasonably to know is confidential. For the avoidance of doubt, the Confidential Information of the Customer includes the Customer Data.

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

**Customer** means the person identified as such in the HosPortal SaaS Schedule.

**Customer Data** means any information of any nature, including any Personal Information, which any User enters in the Software during the Term.

**Employees** means employees, contractors and other persons engaged in relation to a business.

**Excess Hours Fee** means, for any Payment Period, the number of hours spent on Additional Services during the Payment Period multiplied by the “Excess Hours Charge” specified in the Commercial Schedule.

**Excess SMS Fees** means, for any Payment Period, the number of SMS messages sent by the Customer or any User, or otherwise generated from the Customer’s use of the Software, during that Payment Period in excess of the Included SMS, rounded up to the nearest 1,000, multiplied by the SMS Charge.

**Fees** means, for each Payment Period, the aggregate of the following:

- (a) the Fixed Fee; and
- (b) the Excess Hours Fee; and
- (c) the Aggregate Profile Fee.

**Fixed Fee** means the “Fixed Fee (per Payment Period)” specified in the Commercial Schedule, if any, as adjusted in accordance with clause 2.2.

**Force Majeure** means an event outside the reasonable control of HosPortal including adverse weather conditions, flood, fire, earthquake, war, terrorism, sabotage, riot, revolution, civil disturbances, any act or omission of a government or a government agency or strike.

**GST** has the same meaning as in the GST Law.

**GST Law** means the A New Tax System (Goods and Services Tax) Act 1999 (Cth).

**HosPortal** means HosPortal Pty Ltd ACN 152 359 843.

**HosPortal SaaS Schedule** means any agreement entitled “HosPortal SaaS Schedule” entered into between HosPortal and the Customer.

**Included Setup Hours** means the amount specified as the “Included Setup Hours” in the Commercial Schedule.

**Included SMS** means the amount specified as the “Included SMS (per Payment Period)” in the Commercial Schedule.

**Initial Term** means the period of 12 months commencing on the Agreement Start Date.

**Insolvency Event** in relation to a party means:

- (d) the party becomes an externally-administered body corporate for the purposes of the Corporations Act;
- (e) a controller (as that term is defined in the Corporations Act) is appointed to the assets of the party;
- (f) 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 the party (except pursuant to a solvent amalgamation or reconstruction); or
- (g) the party is unable to pay its debts as and when they fall due.

**Intellectual Property Rights** means all intellectual property or intellectual property rights protected by statute or law, including but not limited to:

- (a) patents, copyright, rights in circuit layouts, registered designs and trademarks; and
- (b) any application or right to apply for registration of any of the rights referred to in paragraph (a) of this definition.

**Maximum Number** means the “Maximum Number of Profiles” specified in the Commercial Schedule, as adjusted in accordance with clause 3.4.

**Payment Period** means the “Payment Period” specified in the Commercial Schedule.

**Payment Terms** means the “Payment Terms” specified in the Commercial Schedule.

**Per-Profile Fee** means the “Per-Profile Fee (per Payment Period)” specified in the Commercial Schedule, as adjusted in accordance with clause 2.2.

**Personal Information** has the same meaning as in the Privacy Act.

**Personnel** of a party means the officers, Employees and agents of that party.

**Privacy Act** means the Privacy Act 1988 (Cth).

**Profile** means a profile created by or on behalf of the Customer in the Software and whether or not that profile is linked to a User Account or may be used to access the Software.

**SMS Charge** means the amount specified as the "Excess SMS Charge" in the Commercial Schedule.

**Software** means:

- (a) the cloud based software owned by HosPortal, or which HosPortal has a valid licence to use, which is capable of being used by businesses for the purposes of online rostering of Employees and associated communications and human resources management functionality; and
- (b) any Updates implemented by HosPortal as contemplated by clause 3.5.

**Term** means the term of this agreement, as determined in accordance with clause 2.

**Terms & Conditions** means this document.

**Update** means any modification of the Software by HosPortal that corrects faults, adds functionality or otherwise amends or upgrades the Software but excludes any new version of the Software which is at any time publicly marketed and offered for purchase by HosPortal in the course of its normal business, being a version which contains such significant differences from the previous versions as to be determined by HosPortal, acting reasonably, as constituting a new product.

**User** means any person who accesses the Software using a Profile linked by or on behalf of the Customer to a User Account.

**User Account** means an account (whether or not that account is created by or on behalf of the Customer) which enables persons to access the Software, which account will include a username and password combination for one or more persons to use the Software.

**Year** means each consecutive 12 month period commencing immediately after the expiry of the Initial Term.

### 1.3 Interpretation

In this agreement, except where the context otherwise requires:

- (a) the singular includes the plural and vice versa;
- (b) another grammatical form of a defined word or expression has a corresponding meaning;
- (c) a reference to a clause is to a clause of these Terms & Conditions;
- (d) a reference to a month is to a calendar month;
- (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 \$ is to Australian currency;
- (g) a reference to a person includes a natural person, partnership, body corporate, association, governmental or local authority or agency or other entity;
- (h) 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; and

- (i) 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.

#### **1.4 Agreement Start Date**

The parties agree that they are bound by this agreement on and from the Agreement Start Date notwithstanding that the Agreement Start Date may be a date that is prior to the date that the HosPortal SaaS Schedule has been executed by both parties.

### **2. Term**

- (a) Subject to this clause 2, this agreement commences on and from the Agreement Start Date and expires on the last day of the Initial Term.
- (b) On expiry of the Initial Term (or any subsequent Year), this agreement automatically extends for a further Year, unless either party gives the other at least 30 days' notice prior to the first day of the relevant Year stating that it wishes to terminate this agreement with effect from the expiry of the then current Year, in which case this agreement will expire on that date.
- (c) The parties agree that this agreement may be terminated in accordance with clause 7 prior to the expiry of the term of this agreement otherwise determined in accordance with this clause 2.

### **3. Licence of the Software**

#### **3.1 Grant of non-exclusive licence**

- (a) HosPortal grants to the Customer a non-exclusive and non-transferable licence to use, and to permit the Users to use, strictly on the terms set out in this agreement, the Software during the Term.
- (b) For the purpose of the grant of the licence in accordance with clause 3.1(a), the Customer and each User will be able to access the Software during the Term through HosPortal's website (available here: <https://hosportal.com/>).
- (c) For the avoidance of doubt:
  - (i) not all Profiles will be linked to a User Account; and
  - (ii) each User will require a User Account to access the Software through HosPortal's website and multiple Users may, if determined by the Customer, use the same User Account.

#### **3.2 Permitted uses**

- (a) The Customer acknowledges that the Software provides functionality in relation to human resources management, including but not limited to the following:
  - (i) developing, maintaining and communicating rosters for the Customer's Employees; and
  - (ii) contacting and communicating with the Customer's Employees.
- (b) The Customer agrees that it will use the Software, and ensure that Users use the Software, only for human resources management, as provided for by the functionality of the Software. The Customer will not, and must ensure that the Users do not, use the Software for any other purposes.

- (c) Without limiting clause 3.2(b), the Customer must not, and must ensure that the Users do not, alter, modify, copy or, in any way, reverse engineer, decompile, disassemble, adapt or make corrections to the Software (in whole or part) or design or make derivative works based upon the Software or use the Software to develop any other software or products. The Customer must not, and must ensure that the Users do not, publish the Software, or take any other action, to copy or rent, lease, lend or resell the Software.
- (d) The Customer agrees that it is responsible for all Customer Data and that HosPortal has no responsibility, of any nature, in respect of the accuracy or completeness of the Customer Data, including, for the avoidance of doubt, any alteration made to the Customer Data by HosPortal at the request of the Customer.
- (e) HosPortal does not impose any limits on data storage in relation to the Customer's use of the Software. However, if HosPortal acting reasonably determines that the data storage of the Customer (including the Users) on the Software exceeds reasonable limits, HosPortal may require the Customer to remove some part or all of the Customer Data from the Software. If the Customer fails to comply with any such request, HosPortal may remove some part or all of the Customer Data from the Software. The Customer agrees it will not have any rights to make any claim of any nature against HosPortal if it removes any Customer Data from the Software on the terms contemplated by this clause 3.2(e).
- (f) The Customer will promptly notify HosPortal if it becomes aware of any use of the Software not permitted by this clause 3.2.

### **3.3 Customer responsible for Users**

- (a) The Customer will ensure that each User is aware of the terms of this agreement and uses the Software only for the purposes permitted in accordance with clause 3.2. The Customer will immediately terminate the authorisation of a User if that User uses the Software for any purpose not permitted in accordance with clause 3.2. If the Customer does not comply with its obligation under this clause 3.3(a) to terminate the authorisation of a User, HosPortal may terminate the User Account under which that User accesses the Software. The Customer agrees it will not have any rights to make any claim of any nature against HosPortal if it terminates any User Account on the terms contemplated by this clause 3.3(a). The Customer will ensure that, if the authorisation of a User, or a User Account, is terminated under this clause 3.3(a), the relevant User who has used the Software for any purpose not permitted in accordance with clause 3.2 is not subsequently authorised by the Customer to use any other User Account.
- (b) The Customer will ensure that:
  - (i) each User is required to keep the password for the User Account used by him or her confidential; and
  - (ii) acknowledging that multiple Users may use the one User Account, no User will allow any person not authorised by the Customer to use the relevant User Account to access, or use, that password.
- (c) The Customer will ensure that no patient information (including without limitation any Personal Information of any patient) or "sensitive information", as defined in the Privacy Act, of any person is entered into the Software by any User. HosPortal may require the Customer to remove any information entered into the Software in breach of this clause 3.3(c). If the Customer fails to comply with any such request, HosPortal may remove that information from the Software. The Customer agrees it will not have any rights to

make any claim of any nature against HosPortal if it removes any information from the Software on the terms contemplated by this clause 3.3(c).

- (d) The Customer agrees that HosPortal has no contractual or other relationship with any User and that no User may make any claim, of any nature, against HosPortal in relation to this agreement or the use or non-use of the Software. The Customer indemnifies HosPortal against any loss, damage or expense (including lawyers' fees on a full indemnity basis) suffered or incurred by HosPortal arising out of or in connection with any such claim being made by a User.

### 3.4 Increase and decrease in number of Profiles

- (a) If the number of Profiles at any time exceeds the Maximum Number, then the Maximum Number is immediately increased to this number and the Aggregate Profile Fee will be recalculated in accordance with the Commercial Schedule with effect on and from the earlier of:
  - (i) the first day of the next Payment Period; and
  - (ii) the date HosPortal notifies the Customer that the Maximum Number is increased.
- (b) If any increase in the Fees occurs in accordance with clause 3.4(a), HosPortal will invoice the Customer for the additional amount of the Fees payable by the Customer for the then current Payment Period on the date determined by HosPortal, in its discretion, which may be the date the next payment is due and payable by the Customer in accordance with clause 2.1. Each such invoice must be paid by the Customer within the Payment Terms.
- (c) The Customer may request a decrease in the Maximum Number at any time after the expiry of the Initial Term, providing that the Maximum Number is not below the number of Profiles at that time.
- (d) If the Maximum Number is decreased in accordance with clause 3.4(c), the Aggregate Profile Fee will be decreased with effect on and from the first day of the next Payment Period to be that Maximum Number multiplied by the Per-Profile Fee.

### 3.5 Updates

HosPortal will implement Updates during the Term, at such times as it determines in its absolute discretion.

### 3.6 Ownership of Software

- (a) The Customer agrees that the Software, and all Intellectual Property Rights in the Software, belong and will belong to HosPortal or a third party or parties from whom HosPortal has a licence to use the relevant Intellectual Property Rights, and neither the Customer nor any User will have any rights in or to the Software or the Intellectual Property Rights in the Software, of any nature, other than the right to use the Software strictly in accordance with the terms of this agreement.
- (b) The Customer will, as soon as practicable, notify HosPortal if any third party makes a claim against the Customer that the Customer's use of the Software in accordance with this agreement constitutes an infringement of the Intellectual Property Rights of that third party (each such notice, for the purposes of this clause 3.6, a **notice**).
- (c) If the Customer issues a notice, the Customer:
  - (i) agrees HosPortal may, at its option, conduct the defence of the claim made by the third party (each such claim, for the purposes of this clause 3.6, a **Claim**),

including negotiations for settlement or compromise prior to the institution of legal proceedings and the conduct of the defence of any legal proceedings;

- (ii) agrees to provide to HosPortal, at HosPortal's cost, all co-operation, information and assistance in conducting the defence of the Claim as requested by HosPortal, acting reasonably;
  - (iii) agrees that HosPortal may modify, alter or substitute the infringing part of the Software, at its own expense, to render the Software non-infringing; and
  - (iv) authorises HosPortal to procure for the Customer the authority to continue the use of the Software in accordance with this agreement.
- (d) The Customer will, as soon as practicable, notify HosPortal if it becomes aware of any infringement of the Intellectual Property Rights of HosPortal.

### **3.7 Exclusion of warranties etc**

- (a) The Software is provided "as is". Except as expressly provided in this agreement, HosPortal excludes all representations and warranties, of any nature, in relation to the Software to the maximum extent permitted by law. HosPortal specifically disclaims all implied warranties, including warranties of merchantability, non-infringement and fitness for a particular purpose.
- (b) Without limiting clause 3.7(a), HosPortal does not warrant that the use of the Software will be uninterrupted or error free.
- (c) Without limiting clause 3.7(a):
  - (i) HosPortal does not warrant that any Customer Data will not be lost or destroyed. The Customer acknowledges that HosPortal has advised it to ensure that it keeps a copy of the Customer Data;
  - (ii) the Customer acknowledges that the Software relies on a network of other cloud based software, including cloud based software provided by third parties and that, during any period of failure of any of that other software, the Software will not be available for use by the Customer or the Users; and
  - (iii) the Customer agrees that HosPortal may undertake maintenance of its systems, network and infrastructure which prevents the use of the Software by the Customer and the Users during the Term. Where practicable, HosPortal will undertake this maintenance during periods identified to be of low activity (for example, outside of normal business hours on a Business Day or on days other than Business Days).

## **4. Time-based Services**

### **4.1 Included services**

- (a) Except for the Additional Services described in clause 4.2, HosPortal provides reasonable support and training for the use of the Software included in the Fees.
- (b) During the Initial Term, there is no charge for hours up to the Included Setup Hours spent to configure and set up the Software, understand the Customer's business, conduct training, and undertake any other activities required make the Software available for use by the Customer.

### **4.2 Additional Services**

Additional Services include the following:

- (a) Setup and configuration, including any revised setup and configuration, except as described in clause 4.1(b).
- (b) Preparation or delivery of tailored or customer-specific training except as described in clause 4.1(b).
- (c) Professional services, labour or advice that the Customer requests, and HosPortal agrees to provide, that is not related to the operation of the Software.
- (d) Auditing, reconciling or checking of Users, User numbers and User profiles other than in the event of a dispute over the Aggregate Profile Fee.
- (e) Building roster templates.
- (f) Undertaking bulk changes to rosters and Users on behalf of the Customer, such as amending roster configuration options or changing User permissions, unless the changes are not able to be conducted by the Customer.
- (g) Calculating self-roster quotas.
- (h) Assisting the Customer fill any roster vacancies other than by use of the functions available in the Software.
- (i) Responding to repeated and unreasonable requests for assistance, assessed at HosPortal's discretion, for which there has been satisfactory training or online help.
- (j) Pursuing Customers for repeated or unreasonable delays in payment of undisputed invoices.

## **2. Payment of Fees and GST**

### **2.1 Fees, Excess SMS Fees and Excess Hours Fees**

- (a) The Customer will pay HosPortal the Fees in advance on the first day of every Payment Period.
- (b) The first payment is due by the Customer on the Agreement Start Date provided that, if the Agreement Start Date is a date prior to the date on which both of the parties have executed the HosPortal SaaS Schedule, the first payment is due by the Customer on the date the HosPortal SaaS Schedule is signed by it.
- (c) In addition to the Fees, the Customer will pay HosPortal the Excess SMS Fees and Excess Hours Fees in arrears on the last day of each Payment Period.
- (d) Each invoice issued by HosPortal for any amount payable in accordance with this agreement must, unless otherwise specified, be paid within the Payment Terms.

### **2.2 Adjustments to Fees**

- (a) HosPortal may not increase the Fixed Fee, the Per-Profile Fee or the SMS Charge during the Initial Term.
- (b) Subject to clause 2.2(a) and without limiting clause 3.4, HosPortal may during the Term change the Fixed Fee, the Per-Profile Fee, the Excess SMS Charge or the Excess Hours Charge (or any of them) by providing not less than 30 days' prior notice to the Customer. HosPortal may make multiple changes under this clause during the Term.
- (c) Unless the Customer exercises its rights under clause 2.2(d), each change in the Fixed Fee, the Per-Profile Fee, Excess SMS Charge and Excess Hours Charge (or any of them) notified by HosPortal in accordance with clause 2.2(b) will take effect on the expiry of that notice period and, in the case of any change in the Per-Profile Fee, the Aggregate



Profile Fee will be changed to be the Maximum Number multiplied by the changed Per-Profile Fee with effect on the expiry of that notice period.

- (d) If the Customer does not agree to any change in the Fixed Fee, the Per-Profile Fee, the Excess SMS Charge or the Excess Hours Charge (or any of them) notified in accordance with clause 2.2(b), it must notify HosPortal not later than 14 days after the date of receipt of the notice in accordance with clause 2.2(b). This agreement will then terminate on the date that is 14 days after the date of the Customer's notification in accordance with this clause 2.2(d).
- (e) If any increase in the Fixed Fee or the Per-Profile Fee occurs in accordance with this clause 2.2 at any time other than the first day of a Payment Period, HosPortal will invoice the Customer for the additional amount of the Fees payable by the Customer for the then current Payment Period on the date determined by HosPortal, in its discretion, which may be the date the next payment is due and payable by the Customer in accordance with clause 2.1. Each such invoice must be paid by the Customer within the Payment Terms.

### **2.3 GST**

- (a) All amounts payable under this agreement are exclusive of GST.
- (b) If GST is or becomes payable on a supply made by HosPortal under or in connection with this agreement, the Customer will pay to HosPortal an additional amount equal to the amount of GST payable on that supply, as determined by HosPortal in accordance with the GST Law.
- (c) Each invoice issued by HosPortal in accordance with this agreement will be a valid tax invoice and will include the amount payable by the Customer in accordance with clause 2.3(b) for the relevant supply.
- (d) Notwithstanding any other provision in this agreement, if an amount payable under or in connection with this agreement (whether by way of reimbursement, indemnity or otherwise) is calculated by reference to an amount incurred by a party, whether by way of cost, expense, outlay, disbursement or otherwise (**Amount Incurred**), the amount payable must be reduced by the amount of any input tax credit to which that party is entitled in respect of that Amount Incurred.
- (e) Terms which are used in this clause 2.3 which are defined in the GST Law have this same meaning in this clause 2.3.

### **2.4 No refunds or set-off**

- (a) No amount paid by the Customer under this agreement is refundable in any circumstances.
- (b) The Customer must make all payments due under this agreement without set-off or deduction of any kind.

### **2.5 Interest on overdue amounts**

If the Customer does not make any payment of the Fees to HosPortal on the due date under this agreement then, without limiting any other rights that HosPortal may have, the Customer will pay interest on the overdue amount at the rate \$250 per month, or part of a month, during which the Fees remain unpaid. The Customer will pay this interest on demand.

### **3. Confidential Information**

#### **3.1 Obligation of confidentiality**

Each party must maintain strict confidentiality in relation to the Confidential Information of the other party, must keep that Confidential Information secure and must not use or disclose that Confidential Information except as permitted in accordance with this clause 3.

#### **3.2 Permitted use and disclosure**

- (a) Each party must only use the Confidential Information of the other party for the purpose of exercising its rights, or performing its obligations, under this agreement.
- (b) Either party may disclose the Confidential Information of the other party to:
  - (i) its Personnel, solely for the purpose of exercising its rights, or performing its obligations, under this agreement and provided that the recipient agrees to keep the Confidential Information confidential;
  - (ii) if authorised or required by law to be disclosed;
  - (iii) to any person approved by the other party prior to the disclosure; or
  - (iv) if that Confidential Information is in the public domain otherwise than due to a breach by any person of any duty of confidentiality.

#### **3.3 Cessation of use of Confidential Information**

Each party must, on the expiry or earlier termination of the Term, cease to use the Confidential Information of the other party for any purpose.

#### **3.4 Publicity regarding agreement**

Notwithstanding the terms of this clause 3, the Customer agrees that HosPortal may publish on HosPortal's website, and in any marketing materials of HosPortal, the fact that the Customer has entered into this agreement and is a customer of HosPortal in respect of the Software. The Customer also agrees that HosPortal may, strictly for this purpose, use the Customer's trade marks or logos.

#### **3.5 Survival**

This clause 3 will survive the expiry or earlier termination of this agreement.

### **4. Privacy**

Each party agrees to comply with the Privacy Act (including for the avoidance of doubt Part IIIIC of the Privacy Act) and any applicable Australian State or Territory privacy legislation in relation to the Personal Information that is included in the Customer Data.

### **5. Limitation of liability of HosPortal**

- (a) Subject to this clause 5, HosPortal is not liable to the Customer or any User for any loss, damage or expense, of any nature, whatsoever or howsoever caused, arising directly or indirectly from or in connection with this agreement or the use or non-use of the Software, except to the extent that such liability may not lawfully be limited or excluded.
- (b) Without affecting the generality of clause 5(a) and notwithstanding any other provision of this agreement, HosPortal expressly excludes liability for consequential loss or damage howsoever caused, whether arising from or in connection with the Software or the use of the Software, including any loss of Customer Data or other 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 HosPortal was aware that such loss may be incurred by the Customer. The Customer releases HosPortal from any such liability for consequential loss or damage suffered by the Customer.

- (c) Where HosPortal cannot by law exclude liability, then to the extent permitted by law, its liability to the Customer will be limited to:
  - (i) if HosPortal has failed to provide the Software in accordance with this agreement – the resupply of the Software for the period it was not so provided or, if determined by HosPortal, an amount equal to the Fees paid or payable for the period the Software was not so provided; and
  - (ii) otherwise – the costs or expense the Customer reasonably incurs that is a direct result of and flows naturally from HosPortal's breach of this agreement or other relevant matter, provided that the aggregate liability of HosPortal under this clause 5(c)(ii) is limited to the Fees paid by the Customer for the Initial Term.

This clause 5(c) applies despite anything else in this agreement other than clause 5(d) and to the fullest extent permitted by law.

- (d) The limitations of liability set out in clauses 5(a) and 5(c) will not apply to any liability arising as a result of, or in connection with:
  - (i) fraud or wilful misconduct by HosPortal; or
  - (ii) death or personal injury to any User caused by HosPortal's breach of this agreement or HosPortal's negligence.
- (e) Notwithstanding any other provision of this agreement, HosPortal's liability to the Customer will be reduced to the extent that any loss or damage incurred or suffered by the Customer or any User is caused or contributed to by the Customer, any User or any of the Customer's Personnel.
- (f) The benefit of this clause 5 extends to all Personnel of HosPortal as if each reference in this clause 5 to HosPortal included a reference to its Personnel. HosPortal holds the benefit of this clause 5 on behalf of all of its Personnel and may enforce this clause 5 for its Personnel or any of them.
- (g) This clause 5 will survive the expiry or earlier termination of this agreement.

## **6. Customer's indemnity**

- (a) The Customer indemnifies HosPortal against any loss, damage or expense (including lawyers' fees on a full indemnity basis) suffered or incurred by HosPortal arising out of or in connection with any breach by the Customer of this agreement, except to the extent that the loss, damage or expense was directly caused by HosPortal's breach of this agreement or negligence.
- (b) If the Customer does not make any payment required under clause 6(a) on demand from HosPortal then, without limiting any other rights that HosPortal may have, the Customer will pay interest on that amount at the rate of 5.00% per annum. This interest will accrue on a daily basis from the date of demand up to and including the date of actual payment and will be compounded on the last day of each month. The Customer will pay this interest on demand.
- (c) This clause 6 will survive the expiry or earlier termination of this agreement.

## **7. Expiry or termination of agreement**

### **7.1 Termination by HosPortal**

HosPortal may terminate this agreement on 30 days' notice to the Customer if:

- (a) the Customer does not pay on or before the due date any amount payable under this agreement and does not remedy that default within 2 Business Days of its occurrence;
- (b) the Customer breaches any provision of this agreement (other than a provision requiring the payment of any amount as contemplated by clause 7.1(a)) and does not remedy that default within 14 days of its occurrence;
- (c) an Insolvency Event occurs in respect of the Customer, provided HosPortal is permitted by law to terminate this agreement.

### **7.2 Termination by Customer**

The Customer may terminate this agreement on 30 days' notice to HosPortal if:

- (a) HosPortal breaches any provision of this agreement and does not remedy that default within 14 days of being advised in writing by the Customer of its occurrence;
- (b) an Insolvency Event occurs in respect of the HosPortal, provided the Customer is permitted by law to terminate this agreement.

### **7.3 Consequences of expiry or termination**

- (a) On the expiry or earlier termination of this agreement, the Customer and all Users will immediately cease to have any rights to use the Software.
- (b) The expiry or earlier termination of this agreement will not prejudice, limit or restrict any other rights or remedies either party may have arising prior to such expiry or earlier termination.

## **8. Dispute Resolution**

### **8.1 Mediation**

If any dispute arises under or in connection with this agreement (**Dispute**), including any question regarding its existence, validity or termination, the parties agree they will seek to resolve that dispute by mediation in accordance with the Australian Centre for International Commercial Arbitration (**ACICA**) Mediation Rules. The mediation shall take place in Sydney, Australia and will be administered by ACICA.

### **8.2 Arbitration**

In the event that:

- (a) any Dispute referred to in clause 8.1 is not resolved in accordance with the ACICA Mediation Rules within 60 days of that Dispute being referred to ACICA; or
- (b) either party refuses to mediate any Dispute in accordance with the ACICA Mediation Rules,

the Dispute will be resolved by arbitration in accordance with the ACICA Expedited Arbitration Rules. The arbitration will take place in Sydney, Australia.

### **8.3 No litigation**

No party may commence any court or arbitration proceedings in relation to any Dispute unless and until the parties have complied with the procedures set out in this clause 8, except where a party seeks urgent interlocutory or similar relief.

#### **8.4 Survival**

This clause 8 will survive the expiry or earlier termination of this agreement.

### **9. General**

#### **9.1 Notices**

- (a) All notices, of any nature, under or in connection with this agreement must be sent by email to:
  - (i) in the case of HosPortal, info@hosportal.com; and
  - (ii) in the case of the Customer, the email address specified as the "Contact email for notices" in Part A of the Commercial Schedule.
- (b) An email sent in accordance with clause 9.1(a) will be deemed to have been received by the recipient on the email leaving the sender's system.

#### **9.2 Relationship of Parties**

Nothing in this agreement is intended to create any partnership, fiduciary or joint venture relationship between the parties. Neither party has any authority to bind the other party.

#### **9.3 Assignment**

- (a) Neither party may assign, novate or otherwise transfer any of its rights or obligations under this agreement except with the prior consent of the other party, such consent not to be unreasonably withheld or delayed.
- (b) HosPortal may subcontract the performance of its obligations under this agreement (or any of them) to any person determined by HosPortal in its absolute discretion, provided that HosPortal is:
  - (i) not relieved of any obligations under this agreement as a result of any such subcontract; and
  - (ii) liable for any breach of its obligations under this agreement caused or contributed to by any subcontractor appointed as permitted by this clause 9.3(b), subject always to the provisions of this agreement relating to exclusion and limitation of liability.

#### **9.4 Waiver**

No waiver of a right or remedy under this agreement is effective unless it is in writing and signed by the party granting it. It is only effective in the specific instance and for the specific purpose for which it was granted.

#### **9.5 Severability**

If any part of this agreement is determined to be invalid, illegal or unenforceable by any court or competent authority, such part will be severed from the remainder of this agreement and the remaining provisions will continue in force.

#### **9.6 Force Majeure**

HosPortal is not liable for any delay or failure to perform its obligations under this agreement to the extent that the delay or failure is caused by Force Majeure or a breach of this agreement by the Customer.

**9.7 Agreement**

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

**9.8 Execution**

This agreement may be executed in any number of counterparts, each of which, when executed, is an original. Those counterparts together make one instrument.

**9.9 Governing Law**

This agreement will be governed by the laws of New South Wales.