

1. Definitions

- 1.1 "Upserve" shall mean Upserve Pty Ltd, its successors and assigns, or any person acting on behalf of and with the authority of Upserve Pty Ltd.
- 1.2 "Client" shall mean the Client (or any person acting on behalf of and with the authority of the Client) as described on any quotation, sales order or other form as provided by Upserve to the Client.
- 1.3 "Guarantor" means that person, or persons, or entity, who agrees to be liable for the debts of the Client on a principal debtor basis.
- 1.4 "Goods and/or Services" shall mean all Goods and/or Services supplied by Upserve to the Client and includes any goods, labour, accommodation expenses, travel expenses, disbursements, materials, reports, professional advice or recommendations.
- 1.5 "Price" shall mean the price payable for the Goods and Services as agreed between Upserve and the Client in accordance with clause 3 of this contract.

2. Acceptance

- 2.1 Any instructions received by Upserve from the Client for the supply of Goods and/or Services and/or the Client's acceptance of Goods and/or Services supplied by Upserve shall constitute acceptance of the terms and conditions contained herein.
- 2.2 Where more than one Client has entered into this agreement, the Clients shall be jointly and severally liable for all payments of the Price.
- 2.3 Upon acceptance of these terms and conditions by the Client the terms and conditions are binding and can only be amended with the written consent of Upserve.
- 2.4 The Client shall give Upserve not less than fourteen (14) days prior written notice of any proposed change of ownership of the Client or any change in the Client's name and/or any other change in the Client's details (including but not limited to, changes in the Client's address, facsimile number or business practice). The Client shall be liable for any loss incurred by Upserve as a result of the Client's failure to comply with this clause.
- 2.5 Goods and/or Services are supplied by Upserve only on the terms and conditions of trade herein to the exclusion of anything to the contrary in the terms of the Client's order notwithstanding that any such order is placed on terms that purport to override these terms and conditions of trade.
- 2.6 If the Purchaser terminates the Contract for convenience and not due to any breach of the Supplier, then the Purchaser shall be liable to pay to the Supplier all costs incurred by the Supplier in connection with the supply of the Equipment up to the date of termination including any costs incurred by the Supplier in relation to the termination and any materials, parts etc reasonably ordered by the Supplier that the Supplier is liable to accept. Supplier's costs shall include a reasonable amount for overhead and profit.

3. Price and Payment

- 3.1 At Upserve's sole discretion the Price shall be either:
 - a. as indicated on invoices provided by Upserve to the Client in respect of Goods and/or Services supplied; or
 - b. as indicated in the quotation
 - c. as indicated in Upserve's current pricelist.
- 3.2 Upserve reserves the right to change the Price in the event of a variation to Upserve's quotation. Variations to the labour cost will be charged at the advertised standard and/or casual hourly rate (whichever applies). Variations to the standard hourly rate will be calculated in increments of 4 hours.
- 3.3 At Upserve's sole discretion a deposit not exceeding 50% of the quoted price may be required for specially procured Goods and/or Services and associated work.
- 3.4 At Upserve's sole discretion:
 - a. payment for custom manufactured Goods shall be due before delivery of the Goods; or
 - b. payment for approved Clients shall be made by instalments in accordance with Upserve's payment schedule; or
 - c. payment may be based on a performance partnership agreement and will be agreed upon by the two parties at the time the Client engages Upserve to provide Goods and/or Services quoted.
- 3.5 Time for payment for the Services shall be of the essence and will be stated on the invoice or any other forms. If no time is stated then payment shall be due seven (7) days following the date of the invoice.
- 3.6 Payment will be made by
 - a. cash, cheque, bank cheque, electronic funds transfer (EFT) or
 - b. by any other method as agreed to between the Client and Upserve.
- 3.7 GST and other taxes and duties that may be applicable shall be added to the Price except when they are expressly included in the Price.

4. Delivery, Title and Personal Property Securities Act 2009 (PPSA)

- 4.1 The Customer assumes the risk for Goods at the time of delivery, whether the Goods are delivered to the Customer's premises or other site nominated by the Customer and whether the Customer (or the Customer's representative) is at the delivery site to acknowledge receipt of delivery. The Customer agrees to pay standard delivery charges as billed.
- 4.2 Ownership of the Goods will only pass to the Customer when all monies owed to us by the Customer are paid in full.
- 4.3 Until we have received payment in full for all monies owed by the Customer, we reserve the following rights:
 - a. legal and equitable ownership of the Goods;
 - b. the right to enter the delivery site and retake possession of the Goods ;
 - c. the right to keep or resell any Goods repossessed under sub-clause 4.3.b and
 - d. any other rights it may have at law or under the PPSA;
- 4.4 Until we receive payment for all monies owed to us, the Customer acknowledges that we have a Purchase Money Security Interest (PMSI) which attaches over the Goods and their proceeds and a Security Interest in relation to other amounts owed by the Customer to us.
- 4.5 The Customer acknowledges that the Contract constitutes a Security Agreement for the purposes of the PPSA.
- 4.6 The Customer undertakes to do anything (such as obtaining consents, producing documents or getting documents completed or signed) which we consider reasonably necessary for the purposes of ensuring that a PMSI and/or Security Interest is enforceable, perfected and effective.
- 4.7 To the extent permitted by law, the Customer waives its rights to:
 - a. receive notices or statements under sections 95, 121(4), 125, 130, 132(3)(d) and 135 of the PPSA;
 - b. redeem the Goods under section 142 of the PPSA;
 - c. reinstate the Security Agreement under section 143 of the PPSA;
 - d. receive a Verification Statement.
- 4.8 Nothing in this clause prevents us from taking collection or legal action to recover any monies owed to it from time to time.

5. Delivery of Goods and/or Services

- 5.1 Delivery of the Goods and/or Services is deemed to have taken place when
 - a. the Client signs off as to accept the satisfactory completion of Services and/or supply of Goods as quoted and provided by Upserve
 - b. the Client instructs Upserve to put into Service any Goods as quoted and provided by Upserve.
- 5.2 The failure of Upserve to deliver shall not entitle either party to treat this contract as repudiated.
- 5.3 Upserve shall not be liable for any loss or damage whatever due to failure by Upserve to deliver the Goods and/or Services (or any part thereof) promptly or at all where failure to deliver is due to circumstances beyond the control of Upserve.

6. **Risk**
 - 6.1 All risk for the Goods and/or Services passes to the Client on delivery.
 - 6.2 All third-party software is provided at the Client's own risk and is not in any way warranted by Upserve.
 - 6.3 The Client accepts that Goods may require periodic servicing and takes responsibility for the arrangement of the required Service with the relevant Service provider. Upserve takes no responsibility for the loss of data, production or consequential damages that result from failure of Goods that have not received periodic servicing.
 - 6.4 The Client accepts full responsibility for all costs associated with the repair and/or replacement of failed Goods that have not received the relevant servicing and accepts that Upserve is entitled to charge the Client the current market rate for the repair or replacement of the Goods if so engaged to do so by the Client.
 - 6.5 Where the Goods and/or Services provided to the Client by the Contractor allow for the switching, servicing and or testing of Uninterruptible Power Supply Systems and their related equipment in any form, the Client takes full responsibility for such switching, servicing and or testing and indemnifies Upserve against any action whatsoever arising from such switching, servicing and or testing.
 - 6.6 Where the Goods and/or Services provided to the Client by the Contractor allow for the provision of reports, professional advice or recommendations in any form, the Client takes full responsibility for the use of such reports, professional advice or recommendations and indemnifies Upserve against any action whatsoever in arising from errors and/or omissions in the reports, professional advice or recommendations provided.
7. **Client's Responsibilities**
 - 7.1 The Client warrants that all material supplied to Upserve to be used in relation to Upserve providing Goods and/or Services:
 - a. be true and correct in every particular; and
 - b. comply with Clause 7.2; and
 - c. not breach any industry standards or guidelines; and
 - d. not contain nor constitute a statement that is misleading or deceptive or likely to deceive or to mislead or which is otherwise in breach of a provision of the Trade Practices Act of 1974.
 - 7.2 The Client will provide Upserve with a safe work environment for the provision of the Goods and/or Services to a minimum standard as described in the Occupational Health, Safety and Welfare Regulations 2010 as published in the South Australian Government Gazette on 22 July 2010 (No.173 of 2010, at page 3627).
8. **Intellectual Property**
 - 8.1 Copyright in any software, designs, drawings, or written documents supplied to the Client by Upserve, shall remain vested in Upserve, and shall only be used by the Client at Upserve's discretion.
 - 8.2 The Client warrants that all designs or instructions to Upserve will not cause Upserve to infringe any patent, registered design or trademark in the execution of the Client's order and the Client agrees to indemnify the Upserve against any action taken by a third party against Upserve in respect of any such infringement.
 - 8.3 The Client will use any third-party software supplied by Upserve, and identified as such, strictly in terms of the license under which it is supplied.
 - 8.4 The Client hereby authorises Upserve to utilise images (including but not limited to photographs and/or text) for advertising, marketing, or competition material whilst the Client is under contract to Upserve.
9. **Retention of Title**
 - 9.1 Upserve and the Client agree that ownership of the Services shall not pass until:
 - a. the Client has paid Upserve all amounts owing for the particular Goods and/or Services; and
 - b. the Client has met all other obligations due by the Client to Upserve in respect of all contracts between Upserve and the Client.
 - 9.2 Receipt by Upserve of any form of payment other than cash shall not be deemed to be payment until that form of payment has been honoured, cleared or recognised and until Upserve's ownership or rights in respect of the Services shall continue.
10. **The Commonwealth Trade Practices Act 1974 and Fair Trading Acts**
 - 10.1 Nothing in this agreement is intended to have the effect of contracting out of any applicable provisions of the Commonwealth Trade Practices Act 1974 or the Fair Trading Acts in each of the States and Territories of Australia, except to the extent permitted by those Acts where applicable.
11. **Default & Consequences of Default**
 - 11.1 Interest on overdue invoices shall accrue daily from the date when payment becomes due, until the date of payment, at a rate of two and one half percent (2.5%) per calendar month and such interest shall compound monthly at such a rate after as well as before any judgment.
 - 11.2 If the Client defaults in payment of any invoice when due, the Client shall indemnify Upserve from and against all costs and disbursements incurred by Upserve in pursuing the debt including legal costs on a solicitor and own client basis and Upserve's collection agency costs.
 - 11.3 Without prejudice to any other remedies Upserve may have, if at any time the Client is in breach of any obligation (including those relating to payment), Upserve may suspend or terminate the supply of Services to the Client and any of its other obligations under the terms and conditions. Upserve will not be liable to the Client for any loss or damage the Client suffers because Upserve has exercised its rights under this clause.
 - 11.4 If any account remains overdue after thirty (30) days then an amount of the greater of twenty dollars (\$20.00) or ten percent (10%) of the amount overdue (up to a maximum of two hundred dollars (\$200.00)) shall be levied for administration fees which sum shall become immediately due and payable.
 - 11.5 Without prejudice to Upserve's other remedies at law Upserve shall be entitled to cancel all or any part of any order of the Client which remains unfulfilled and all amounts owing to Upserve shall, whether or not due for payment, become immediately payable in the event that:
 - a. any money payable to Upserve becomes overdue, or in Upserve's opinion the Client will be unable to meet its payments as they fall due; or
 - b. the Client becomes insolvent, convenes a meeting with its creditors or proposes or enters into an arrangement with creditors, or makes an assignment for the benefit of its creditors; or
 - c. a receiver, manager, liquidator (provisional or otherwise) or similar person is appointed in respect of the Client or any asset of the Client.
12. **Cancellation**
 - 12.1 Upserve may cancel any contract to which these terms and conditions apply or cancel delivery of Goods and/or Services at any time before the Goods and/or Services are delivered by giving written notice to the Client. On giving such notice Upserve shall repay to the Client any sums paid in respect of the Price. Upserve shall not be liable for any loss or damage whatever arising from such cancellation.
 - 12.2 In the event that the Client cancels delivery of Goods and/or Services the Client shall be liable for any loss incurred by Upserve (including, but not limited to, any loss of profits) up to the time of cancellation.

13. Privacy Act 1988

- 13.1 The Client and/or the Guarantor/s agree for Upserve to obtain from a credit reporting agency a credit report containing personal credit information about the Client and Guarantor/s in relation to credit provided by Upserve.
- 13.2 The Client and/or the Guarantor/s agree that Upserve may exchange information about the Client and the Guarantor/s with those credit providers either named as trade referees by the Client or named in a consumer credit report issued by a credit reporting agency for the following purposes:
 - a. to assess an application by the Client; and/or
 - b. to notify other credit providers of a default by the Client; and/or
 - c. to exchange information with other credit providers as to the status of this credit account, where the Client is in default with other credit providers; and/or
 - d. to assess the credit worthiness of Client and/or Guarantor/s.
- 13.3 The Client consents to Upserve being given a consumer credit report to collect overdue payment on commercial credit (Section 18K(1)(h) Privacy Act 1988).
- 13.4 The Client agrees that personal credit information provided may be used and retained by Upserve for the following purposes and for other purposes as shall be agreed between the Client and Upserve or required by law from time to time:
 - a. provision of Goods and/or Services; and/or
 - b. marketing of Goods and/or Services by Upserve, its agents or distributors in relation to the Goods and/or Services; and/or
 - c. analysing, verifying and/or checking the Client's credit, payment and/or status in relation to provision of Goods and/or Services; and/or
 - d. processing of any payment instructions, direct debit facilities and/or credit facilities requested by the Client; and/or
 - e. enabling the daily operation of Client's account and/or the collection of amounts outstanding in the Client's account in relation to the Goods and/or Services.
- 13.5 Upserve may give information about the Client to a credit reporting agency for the following purposes:
 - a. to obtain a consumer credit report about the Client; and/or
 - b. allow the credit reporting agency to create or maintain a credit information file containing information about the Client

14. Delays

- 14.1 The Client acknowledges that any delivery date stated by Upserve is an estimation only. Upserve shall not be liable for any loss or damages suffered by the Client caused by the delay or postponement in delivering the Goods and/or Services.
- 14.2 Should Upserve seek instruction from the Client in relation to the provision and/or delivery of the Goods and/or Services and such instruction is not forthcoming for a period of 90 days, resulting in the stalling of the project ordered by the Client, delivery of the Goods and/or Services shall be deemed to have been completed and the Upserve shall be entitled to full payment of all moneys owing to Upserve by the Client.

15. Defects

- 15.1 The Client shall inspect the Goods and/or Services on delivery and shall within sixty (60) days of delivery, as defined in Clause 4.1, with time being of the essence, notify Upserve in writing of any alleged defect, shortage in quality, damage or failure to comply with the description or quote.
- 15.2 The Client shall afford Upserve an opportunity to inspect the Goods and/or Services within a reasonable time following delivery if the Client believes the Goods and/or Services are defective in any way. If the Client shall fail to comply with these provisions the Goods and/or Services shall be presumed to be free from any defect or damage.
- 15.3 For defective Goods and/or Services, which Upserve has agreed in writing that the Client is entitled to reject, Upserve's liability is limited to repairing and/or rectifying the Goods and/or Services except where the Client has acquired Goods and/or Services as a consumer within the meaning of the Commonwealth Trade Practices Act 1974 or the Fair Trading Acts of the relevant state or territories of Australia, and is therefore also entitled to, at the consumer's discretion either a refund of the purchase price of the Goods and/or Services, or repair and/or rectification of the Goods and/or Services, or replacement of the Goods and/or Services.

16. Warranties and Guarantees

- 16.1 To the extent permitted by statute, no warranty is given by Upserve as to the quality or suitability of the Goods and/or Services for any purpose and any implied warranty, is expressly excluded.
- 16.2 Upserve shall not be responsible for any loss or damage to the Goods and/or Services, or caused by the Goods and/or Services, or any part thereof however arising.
- 16.3 Upserve provides no warranty as to the commercial performance or otherwise of the Goods and/or Services provided to the Client.
- 16.4 If, at any stage during the development of Service arrangements, custom Goods design and prior to delivery as defined in Clause 4.1, the Client advises Upserve that the standard of Goods and/or Services being provided is not satisfactory in relation to fulfilling the design brief and instructions of the Client to Upserve, the Client may request to terminate the project and in doing so is entitled to a full or part refund (at Upserve's sole discretion) of all monies paid to Upserve in relation to the aborted provision of Goods and/or Services.
- 16.5 Upserve shall not be responsible for any 3rd party Goods and/or Services provided to the client. This includes but is not limited to 3rd party software which may be to provide the Goods and/or Services. No refund will be made once the Goods and/or Services are acquired and paid by the Client to Upserve.

17. Confidentiality

- 17.1 The Client acknowledges that Upserve may, from time to time, disclose certain confidential information and documentation of Upserve relating to the Goods and/or Services, their marketing, use, maintenance and software, including technical specifications.
- 17.2 The Client must use such confidential information solely for the purposes contemplated under any relevant sales contract and the Client must not at any time disclose, whether directly or indirectly to any third party this confidential information.
- 17.3 These obligations on the part of the Client do not apply to any information which is otherwise public knowledge within the public domain or which is required to be disclosed by law.

18. General

- 18.1 If any provision of these terms and conditions shall be invalid, void, illegal or unenforceable the validity, existence, legality and enforceability of the remaining provisions shall not be affected, prejudiced or impaired.
- 18.2 These terms and conditions and any contract to which they apply shall be governed by the laws of South Australia and are subject to the jurisdiction of the courts of South Australia.
- 18.3 Upserve shall be under no liability whatever to the Client for any indirect loss and/or expense (including loss of profit) suffered by the Client arising out of a breach by Upserve of these terms and conditions.
- 18.4 In the event of any breach of this contract by Upserve the remedies of the Client shall be limited to damages which under no circumstances shall exceed the Price of the Goods and/or Services.
- 18.5 The Client shall not be entitled to set off against or deduct from the Price any sums owed or claimed to be owed to the Client by Upserve.
- 18.6 Upserve may license or sub-contract all or any part of its rights and obligations without the Client's consent.
- 18.7 Upserve reserves the right to review these terms and conditions at any time. If, following any such review, there is to be any change to these terms and conditions, then that change will take effect from the date on which Upserve notifies the Client of such change.
- 18.8 Neither party shall be liable for any default due to any act of God, war, terrorism, strike, lock-out, industrial action, fire, flood, drought, storm or other event beyond the reasonable control of either party.
- 18.9 The failure by Upserve to enforce any provision of these terms and conditions shall not be treated as a waiver of that provision, nor shall it affect Upserve's right to subsequently enforce that provision.