

# TERMS AND CONDITIONS

**Click This! Computer Consulting Pty Ltd Terms and Conditions of supply, installation and consulting services.**

**Click This! Computer Consulting Pty Ltd (ABN 92 105 396 174)**

## **1. Interpretation**

**1.1** In this agreement, unless the contrary intention appears:

- a) the clause headings are for ease of reference only and shall not be relevant to interpretation;
- b) a reference to a clause number is a reference to its subclauses;
- c) words in the singular number include the plural and vice versa;
- d) words importing a gender include any other gender;
- e) a reference to a person includes bodies corporate and unincorporated associations and partnerships;
- f) a reference to a clause is a reference to a clause or subclause of this agreement;
- g) a reference to a subclause is a reference to a subclause of the clause in which that reference is made
- h) where a word or phrase is given a particular meaning, other parts of speech and grammatical forms of that word or phrase have corresponding meanings;
- i) the recitals to this agreement do not form part of the agreement;
- j) monetary references are references to Australian currency.

## **2. Site Preparation**

**2.1** The customer shall at its own expense prepare the site, and access to the site, prior to the consultation and/or delivery. In so doing, the customer shall comply with any directions or specifications issued by the supplier.

**2.2** Without limiting the foregoing, the customer shall ensure the supply at the site of:

- a) adequate electrical current;
- b) adequate electrical and mechanical fittings; and
- c) appropriate environmental conditions.

**2.3** The supplier shall, upon request from the customer, supply such information and assistance as the supplier considers reasonable and necessary to enable the customer to prepare the site.

**2.4** If the supplier delays delivery of installation of the equipment and/or program/s due to inadequate preparation of the site or access to the site, the customer shall be liable to the supplier for all reasonable costs and expenses incurred by the supplier directly or indirectly as a result of such delay.

### **3. Delivery**

**3.1** The supplier will use reasonable endeavours to deliver the equipment and/or program/s to the customer on the delivery date at the site during the customer's normal business hours.

**3.2** If the equipment and/or program/s includes products in respect to which the law prescribes a minimum age of purchase, you must be over the age of 18 years (or such other minimum age as is prescribed by the law) and you must ensure that a person over that age is available to accept delivery of the equipment and/or program/s. The supplier may refuse to deliver the goods if the person receiving the goods is unable or unwilling to provide evidence of proof of age.

**3.3** Any charges relating to the delivery of equipment and/or program/s will be charged to the customer and these charges will be included in the total costs of the equipment and/or program/s.

### **4. Installation**

**4.1** The supplier shall install the equipment and/or program/s at the site on the installation date. In the absence of agreement to the contrary, the installation shall be effected during the supplier's normal business hours.

**4.3** If the customer requests installation in advance of the installation date, the supplier shall use its reasonable endeavours to re-schedule installation accordingly but shall be under no obligation to comply with the customer's request.

### **5. Training**

**5.1** The price does not include a training fee.

**5.2** The supplier will provide training in the use of the equipment and/or program/s, if requested by the customer, subject to payment of an additional charge.

### **6. Prices and Payment**

**6.1** The customer shall pay the price to the supplier in accordance with the order/invoice form, unless a discount or advertised rate has been previously arranged with the supplier.

**6.2** The customer shall pay the supplier interest on any amount due and not paid by the customer within the time required by the agreement at the rate of interest specified by the supplier.

**6.3** The price is exclusive of taxes, duties and charges imposed or levied in Australia or overseas in connection with the supply of the equipment or program/s. Without limiting the foregoing, the customer shall be liable for any taxes, duties or charges imposed subsequent to the date of this agreement in respect of the equipment and/or program/s.

**6.4** Unless a prior arrangement has been made with the supplier, all payments must be made in full at the end of the day of the installation or consultation.

**6.5** Any fees charged to the supplier by financial institutions due to failed payments (such as dishonoured cheques) will be on-charged to the respective customer.

## **7 Title**

**7.1** Subject to any other express provision of this agreement to the contrary, title in the equipment will pass to the customer upon full payment of the price, any additional charges and any interest due under this agreement.

## **8 . Risk**

**8.1** Risk of loss or damage to the equipment and/or program/s passes to the customer upon delivery of the equipment to the site.

## **9. Confidentiality**

**9.1** A party shall not, without the prior written approval of the other party, disclose the other party's confidential information.

**9.2** A party shall not in breach of subclause 1 in circumstances where it is legally compelled to disclose the other party's confidential information.

**9.3** Each party shall take all reasonable steps to ensure that its employees and agents, and any sub-contractors engaged for the purposes of this agreement, do not make public or disclose the other party's confidential information.

**9.4** Notwithstanding any other provision of this clause, the supplier may disclose the terms of this agreement (other than confidential information of a technical nature) to its related companies, solicitors, auditors, insurers and accountants.

**9.5** This clause shall survive the termination of this agreement.

## **10. Intellectual Property Rights**

**10.1** Subject to subclauses 2, 3 and 4, the supplier shall indemnify the customer against liability under any final judgment in proceedings brought by a third party against the customer which determine that the customer's use of equipment and/or program/s constitutes an infringement in Australia of any intellectual property rights in the equipment and/or program/s.

**10.2** The supplier shall not be required to indemnify the customer as provided in subclauses 1 unless the customer:

- a) notifies the supplier in writing as soon as practicable of any infringement, suspected infringement or alleged infringement;
- b) gives the supplier the option to conduct the defence of such claim, including negotiations for settlement or compromise prior to the institution of legal proceedings;
- c) provides the supplier with reasonable assistance in conducting the defence of such claim;
- d) permits the supplier to modify, alter or substitute the infringing part of the equipment at its own expense in order to avoid continuing infringement, or authorises the supplier to procure for the customer the authority to continue the use and possession of the infringing equipment and/or program/s;

**10.3** The supplier shall not indemnify the customer to the extent that an infringement, suspected infringement or alleged infringement arises from:

- a) use of the equipment and/or program/s in combination by any means and in any form with other goods not specifically approved by the supplier;
- b) use of the equipment and/or program/s in a manner or for a purpose not reasonably contemplated or not authorised by the supplier;
- c) modification or alteration of the equipment and/or program/s without the prior written consent of the supplier; or
- d) any transaction entered into by the customer relating to the equipment and/or program/s without the supplier's prior consent in writing.

**10.4** In the event that proceedings are brought or threatened by a third party against the customer alleging that the customer's use of the equipment and/or program/s constitutes an infringement of intellectual property rights, the supplier may at its option and at its own expense conduct the defence of such proceedings. The customer shall provide all necessary co-operation, information and assistance to the supplier in the conduct of the defence of such proceedings.

**10.5** The customer shall indemnify the supplier against any loss, costs, expenses, demands or liability, whether direct or indirect, arising out of a claim by a third party alleging such infringement if:

- a) the claim arises from an event specified in subclause 3; or
- b) the ability of the supplier to defend the claim has been prejudiced by the failure of the customer to comply with any requirement of subclauses 2 or 4

## **11. Warranties**

**11.1** The supplier warrants that the equipment is newly manufactured.

**11.2** The supplier warrants that at the date of this agreement it believes the equipment to be free from defects in materials and workmanship.

**11.3** Any problems arising from the consultation service must be reported within seven (7) working days of the original consultation. Any reported incidences after this may be deemed not directly resulting from the original consultation.

**11.4** Any refunds resulting from faulty workmanship will be fixed under warranty. This will expressly include only work completed in the original consultation.

**11.5** Customers may only receive a full refund on faulty equipment within seven (7) days of purchase providing that the equipment has been tested by the customer and supplier and found to be faulty by both.

**11.6** Faulty equipment may be returned under warranty which is deemed by the manufacturer. If the supplier is required to remove and return the equipment it may be subject to payment of an additional charge.

**11.7** Software cannot be returned if it has been opened and/or damaged by the customer. If the software has been found to be damaged and/or faulty by the customer and the supplier within seven (7) days of purchase it may be returned to the supplier who will undertake to return it to the manufacturer and provide a replacement product to the customer.

## 12. Implied terms

**12.1** Subject to subclause 2, any condition or warranty which would otherwise be implied in this agreement is hereby excluded.

**12.2** Where legislation implies in this agreement any condition or warranty, and that legislation avoids or prohibits provisions in a contract excluding or modifying the application of or exercise of or liability under such condition or warranty shall be limited, at the option of the supplier to one or more of the following;

- a) if the breach relates to goods;
  - i) the replacement of the goods or the supply of equivalent goods;
  - ii) the repair of such goods;
  - iii) the payment of the cost of replacing the goods or acquiring equivalent goods; or
- b) if the breach relates to services;
  - i) the supplying of the services again: or
  - ii) the payment of the cost of having the services supplied again.

## 13. Liability of Supplier

**13.1** Except in relation to liability for personal injury including sickness and death, the supplier shall be under no liability to the customer in respect of any loss or damage (including consequential loss or damage) which may be suffered or incurred or which may arise directly or indirectly in respect of goods or services supplied pursuant to this agreement or in respect of a failure or omission on the part of the supplier to comply with its obligations under this agreement.

**13.2** Subject to subclause 3, the customer warrants that it has not relied on any representation made by the supplier which has not been stated expressly in this agreement, or upon any descriptions, illustrations or specifications contained in any document including catalogues or publicity material produced by the supplier.

**13.3** The customer acknowledges that to the extent the supplier has made any representation which is not otherwise expressly stated in this agreement, the customer has been provided with an opportunity to independently verify the accuracy of that representation.

**13.4** The customer at all times indemnify and hold harmless the supplier and its officers, employees and agents ("those indemnified") from and against any loss (including reasonable legal costs and expenses) or liability reasonable incurred or suffered by any of those indemnified arising from any proceedings against those indemnified where such loss or liability was caused by:

- a) a breach by the customer of its obligations under this agreement; or
- b) any wilful, unlawful or negligent act or omission of the customer.

## 14. Data Integrity

**14.1** The supplier is not responsible for any data lost during the course of a consultation service.

**14.2** The customer is solely responsible for backing up all data before the consultation.

**14.3** Any backups required to be executed by the supplier will be done as instructed by the customer at a price set by the supplier and as disclosed in the order/invoice form.

## **15. Termination**

**15.1** Without limiting the generality of any other clauses in this agreement, the supplier may terminate this agreement immediately by notice in writing if:

- a) the customer is in breach of any term of this agreement and such breach is not remedied within (30) days of written notice by the supplier;
- b) the customer becomes, threatens or resolves to become or is in jeopardy of becoming subject to any form of insolvency administration;
- c) the customer, being a partnership dissolves, threatens or resolves to dissolve or is in jeopardy of dissolving;
- d) the customer, being a natural person, dies; or
- e) the customer ceases or threatens to cease conducting its business in the normal manner.

**15.2** If notice is given to the customer pursuant to subclause 1. The supplier may, in addition to terminating the agreement:

- a) repossess the equipment and/or program/s if payment is not complete;
- b) retain any monies paid;
- c) charge a reasonable sum for work performed in respect of which work no sum has been previously charged;
- d) be regarded as discharged from any further obligations under this agreement; and
- e) pursue any additional or alternative remedies provided by law.

## **16. Force Majeure**

**16.1** Neither party shall be liable for any delay or failure to perform its obligations pursuant to this agreement if such delay is due to force majeure.

**16.2** If a delay or failure of a party to perform its obligations is caused or anticipated due to force majeure, the performance of that party's obligations will be suspended.

**16.3** If a delay or failure by a party to perform its obligations due to force majeure exceeds sixty (60) days, either party may immediately terminate the agreement on providing notice in writing to the other party.

**16.4** If this agreement is terminated pursuant to subclause 3, the supplier shall refund moneys previously paid by the customer pursuant to this agreement for goods or services not provided by the supplier to the customer.

## **17. Entire Agreement**

**17.1** This agreement constitutes the entire agreement between the parties and supercedes prior representations, agreements, statements and understandings, whether verbal or in writing.

## **18. Assignment and Novation**

**18.1** The benefit of this agreement shall not be assigned by the customer without the supplier's written consent.

**18.2** The supplier may consent to the assignment or novation of this agreement by the customer subject to such conditions as it chooses to impose.

## **19. Waiver**

**19.1** No right under this agreement, shall not be varied, except by agreement in writing signed by the parties.

**19.2** A waiver by the supplier pursuant by subclause 1 will not prejudice its rights in respect of any subsequent breach of the agreement by the customer.

**19.3** Subject to subclause 1, any failure by the supplier to enforce any clause of this agreement, or any forbearance, delay or indulgence granted by the supplier to the customer, will not be construed as a waiver of the supplier's rights under this agreement.

## **20. Variation**

**20.1** The provisions of this agreement, shall not be varied, except by agreement in writing signed by the parties.

**20.2** If either party wishes to vary the agreement, the proposing party shall submit a copy of the proposed variations to the other party ("the receiving party"), specifying a reasonable period in which the receiving party is to provide written notice of acceptance or rejections of the proposal.

**20.3** If the receiving party accepts the variations, the agreement shall be deemed to be so amended from the date of acceptance.

**20.4** If the receiving party rejects the proposed variations, each party shall perform the agreement in accordance with the unvaried terms.

## **21. Disputes**

**21.1** Any dispute arising in connection with this agreement which cannot be settled by negotiation between the parties or their representatives shall be submitted to arbitration in accordance with the rules for the Conduct of Commercial Arbitrations for the time being of the Institute of Arbitrators Australia. During such arbitration, both Parties may be legally represented.

**21.2** Prior to referring the matter to arbitration pursuant to subclause 1, the Parties shall:

- a) formally refer the dispute to their respective contract managers for consideration;
- b) if the respective contract managers are unable to resolve the dispute after five (5) days (or such other period as is agreed between the parties) from the date of referral, reffer the dispute to the respective chief executive officers of each party; and
- c) in good faith explore the prospect of mediation

**21.3** Nothing in this clause shall prevent a party from seeking urgent equitable relief before an appropriate court.

## **22. Supplier's Rights**

**22.1** Any express statement of a right of the supplier under this agreement is without prejudice to any other right of the supplier expressly stated in this agreement or existing at law.

### **23. Survival of Agreement**

**23.1** Subject to any provision to the contrary, this agreement shall ensure to the benefit of and be binding upon the parties and their successors, trustees, permitted assigns or receivers but shall not ensure to the benefit of any other persons.

**23.2** The covenants, conditions and provisions of this agreement which are capable of having effect after the expiration of the agreement shall remain in full force and effect following the expiration of the agreement.

### **24. Severability**

**24.1** If any provision of this agreement is held invalid, unenforceable or illegal for any reason, the agreement shall remain otherwise in full force apart from such provisions which shall be deemed deleted.

### **25. Governing Law**

**25.1** This agreement will be governed by and construed according to the laws of Australia.

### **26. Notices**

**26.1** Notices under this agreement may be delivered in hand, by mail or by facsimile to the address of the Supplier.

**26.2** Notice will be deemed given:

- a) in the case of hand delivery, upon written acknowledgement of receipt by an officer or other duly authorised employee, agent or representative of the receiving party;
- b) in the case of posting, three days after despatch;
- c) in the case of facsimile, upon receipt of transmission if received on a business day or otherwise at the commencement of the first business day following transmission.

### **27. Sub-Contracts**

**27.1** The supplier may sub-contract for the performance of this agreement or any part of this agreement upon obtaining (subject to subclause 3) the customer's prior written consent.

**27.2** The customer shall not unreasonably withhold consent for the engagement of a sub-contractor in accordance with subclause 1.

**27.3** The supplier may, without the consent of the customer, engage individuals on a sub-contract or consultancy basis, whether or not operating under a corporate structure, to assist in the provision of services pursuant to this agreement.

## 28. Definitions

28.1 In this agreement unless the contrary intention appears:

"Additional Charge" means a charge in accordance with the suppliers standard rates in effect from time to time;

"Agreement" means the agreement for the supply and installation of the equipment and/or program/s or engaging in a consulting service;

"Confidential Information" means the confidential information of a party which relates to the subject matter of the agreement and includes information relating to:

- a) the technology and design of the equipment and/or program/s
- b) the personnel, policies or business strategies of the supplier;
- c) the terms upon which the equipment and/or program/s has been supplied or installed pursuant to this agreement;

"Consulting Services" means the work completed by the supplier's technician as will appear on the order/invoice form provided to the customer;

"Customer's Normal Business Hours" means the normal hours during which the customer is open for business;

"Delivery Date" means the date or the period for the delivery of the equipment and/or program/s;

"Equipment" means the equipment, which is to be supplied by the supplier to the customer, pursuant to this agreement;

"Force Majeure" means a circumstance beyond the reasonable control of the parties which results in a party being unable to observe or perform on time an obligation under the agreement. Such circumstance shall include but is not limited to:

- a) acts of God, lightening strikes, earthquakes, floods, storms, explosions, fires and any natural disaster;
- b) acts of war, acts of public enemies, terrorism, riots, civil commotion, malicious damage, sabotage and revolution; and
- c) strikes.

"Installation Date" means the date (if any) for the installation of the equipment and/or program/s;

"Intellectual Property Rights" means copyright, trademark, design, patent, semiconductor or circuit layouts;

"Party" means either the supplier or the customer as the context dictates;

"Price" means the price of the equipment and/or program/s and the charge of any services provided by the supplier, as will appear on the order/invoice form.

"Program/s" means the software, which is to be supplied by the supplier to the customer, pursuant to the agreement;

"Site" means the location for the delivery and installation of the equipment and/or program/s or where the consulting service is to take place.

"Supplier's Normal Business Hours" means the normal hours during which the supplier is open for business.