

## HEALTH METRICS LICENCE AND SUPPORT AGREEMENT

### 1. DEFINITIONS AND INTERPRETATION

1.1 In this agreement, unless the context otherwise requires:

**Agreement Details** means the section of this agreement named as such appearing at the beginning of it;

**Australian Consumer Law** means schedule 2 of the *Competition and Consumer Act 2010* (Cth);

**Bug Fix** means software released by Health Metrics after the Commencement Date primarily to overcome defects in the Software which are not Errors;

**Business Day** means a day which is not a Saturday, Sunday, bank holiday or public holiday:

- (a) for the purpose of sending or receiving a notice in the city where the notice is received; and
- (b) for all other purposes in Melbourne;

**Commencement Date** means the date set out in item 1 of the Agreement Details or, if no date is specified there, the date on which the last party signs this agreement.

**Customer** means the person or entity whose details are set out in item 2 of the Agreement Details;

**Customer Data** means data owned or supplied by the Customer which is processed or managed using the Software or otherwise provided to, or obtained or generated by, Health Metrics relating to the Customer, its business or any of its operations, administration, facilities, suppliers, customers, personnel, strategic or marketing plans, assets and programs (including any Personal Information and/or customer data) (**Raw Data**), and any other data (in whatever format) generated, stored, processed, retrieved, printed or produced by or on behalf of Health Metrics or the Software utilising the Raw Data;

**Delivery Date** means the earliest date on which the Software is Ready to Use by the Customer under this Agreement;

**Documentation** means any operating manual provided by Health Metrics to the Customer;

**Error** means, subject to clause 7.3, any failure of the Software in a material respect to provide the functionality contained in the Specifications;

**Fee Period** means, in relation to the Licence Fee, Support Fee, Hosting Fee or any other fee or charge payable or which may become payable to Health Metrics under this agreement, the time period described as the Fee Period for the Licence Fee, Support Fee or other fee or charge set out in item 13 of the Agreement Details;

**Fees** means the Licence Fee, Support Fee, Implementation Fees, other fees and charges payable or which may become payable to Health Metrics under this agreement or under any Work Order, and other fees and charges for consulting or other professional services provided by Health Metrics to the Customer from time to time as agreed between the parties;

**Force Majeure Event** means fire, earthquake, unusually severe weather, industrial action, strikes, government sanctioned embargo, flood, an act of God, war, act of a government agency, the non-availability of any relevant telecommunication and internet service providers used in relation to the provision of the services by Health Metrics or civil disorder and any other similar event which is beyond Health Metrics' control;

**Health Metrics** means Health Metrics Pty Ltd (ABN 50 132 624 956) of suite 202, 12 Corporate Drive Heatherton, Victoria, 3202 (telephone: 1800 810 081);

**Hosting Fee** means the fee (if applicable) payable by the Customer for the Hosting Services supplied by Health Metrics under this agreement, as those fees are set out in item 10 of the Agreement Details;

**Hosting Services** means the services provided by Health Metrics to host the Software and its data (including the Customer Data) in the Cloud based Solution Type in accordance with the terms of this agreement, provided as standard by Health Metrics in relation to the hosting of its Software for all licenses of the Product.

**Implementation Fees** means the fees payable by the Customer for the Implementation Services performed by Health Metrics, as those fees are set out or calculated in accordance with item 11 of the Agreement Details;

**Implementation Services** means the services other than Support Services provided by Health Metrics, including:

- (a) installation of the Software and Product implementation;
- (b) initial Product training; and

provided as standard by Health Metrics to all licensees of the Product, to the level necessary to assist with the implementation and use of the Product (as reasonably determined by Health Metrics having regard to the Customer's business requirements and the number of Users and Objects);

**Indirect Loss** means any Loss which does not arise naturally and according to the usual course of things as a result of a breach of this agreement or any Work Order or other event giving rise to the Loss, whether or not such Loss may reasonably be supposed to have been in the contemplation of both parties at the time they made this agreement or any Work Order, as the probable result of the relevant breach or other event, and includes to the maximum extent permitted by the law:

- (a) costs associated with the Customer's personnel or payable to third parties as a result of a delay in the delivery of the Product by Health Metrics, any Error or defect in the Product; and
- (b) any wasted expenditure, loss of revenue or loss of profit in relation to any Error or other defect in the Product.
- (c) any other incidental, punitive, special or economic loss, including loss of reputation, loss of actual or anticipated savings, loss of production, loss of opportunities, including opportunities to enter into arrangement with third parties.

**Insolvency Event** means with respect to a person:

- (a) the person is dissolved, wound up or placed into bankruptcy or an order is made by a court or a resolution is passed or the person gives notice of its intention that the person be dissolved, wound up or placed into bankruptcy;
- (b) a liquidator, provisional liquidator or trustee in bankruptcy is appointed in respect of the person or any property of the person;
- (c) a controller is appointed in respect of the person or any property of the person or takes possession or gains control of any property of the person;
- (d) except to reconstruct or amalgamate while solvent, the person enters into, or resolves to enter into, a scheme of arrangement, administration, deed of company arrangement or composition with, or assignment for the benefit of, all or any class of its creditors, or it proposes a reorganisation, moratorium or other administration involving any of them;
- (e) the person is (or states that it is) insolvent or an insolvent under administration (each as defined in the *Corporations Act 2001*(Cth));
- (f) as a result of the operation of section 459F(1) of the *Corporations Act 2001*(Cth), the person is taken to have failed to comply with a statutory demand;
- (g) execution or other process issued on a judgment, decree or order of a court (whether an Australian court or not) in favour of a creditor against the person, or another person authorised to be sued as nominal defendant on behalf of the person, is returned wholly or partly unsatisfied, or the person makes a statement from which it may be reasonably deduced that such an event has occurred;
- (h) the person takes any step to obtain protection or is granted protection from its creditors under any applicable legislation; or
- (i) anything analogous or having a substantially similar effect to any of the events specified above happens under the law of any applicable jurisdiction;

**Intellectual Property Rights** means all intellectual property and proprietary rights (whether registered or unregistered), including:

- (a) business names;
- (b) trade or service marks;
- (c) any right to have information kept confidential; and
- (d) includes (without limitation) any present and future right to and future interest in patents, patent applications, drawings, discoveries, inventions,

improvements, trade secrets, technical data, formulae, computer programs (including in source and object codes), data bases, know-how, logos, designs, design rights, copyright and similar industrial or intellectual property rights;

**Loss** means any loss, damage, liability, charge, expense, fine, outgoing, fee or cost of any kind;

**Licence Fee** means the fee payable by the Customer for the Product supplied by Health Metrics under this agreement, as those fees are set out in item 6 of the Agreement Details:

- (a) increased from time to time in accordance with clause 12.5 (if applicable); and
- (b) adjusted as may be agreed between Health Metrics and the Customer from time to time;

**Month** means calendar month, and **Monthly** has a corresponding meaning;

**New Releases** means enhancements and new versions of the Software released by Health Metrics after the Commencement Date, excluding modules or software which provide new or additional functionality (unless they are enhancements to existing modules or software or are replacement modules designed to operate with new technology). New Releases may, at Health Metrics' discretion, also include Third Party Software;

**Object** means:

- (a) a bed or other place (as defined in the *Aged Care Act 1997* (Cth)) in respect of which the Customer provides aged care or other services to an individual;
- (b) an hour of service or contact between the Customer and its client, for the purposes of providing home care, primary care or disability support; or
- (c) each individual occupant of retirement village unit or an independent living unit (ILU) managed or operated by the Customer,

and **Objects** means all of them;

**Personnel** means any employee (temporary or permanent) or contractor of the Customer or its related bodies corporate, or any person working on secondment with the Customer or its related bodies corporate, but excluding Health Metrics and any person who (or which at the relevant time) is acting as an officer, employee, contractor or agent of Health Metrics;

**Other Fee** means the fee (if applicable) payable by the Customer for Health Metrics as set out in item 8 of the Agreement Details:

**Product** means the eCase clinical care management system, comprising the Software and the Documentation;

**Ready to Use** means the Software installed, commissioned and acceptance tested in accordance with the Implementation Services.

**Service Levels** means the maintenance and support services provided by Health Metrics in respect of the Product, as set out in Schedule 1.

**Site** means a location where the Product is to be installed and/or used, as agreed between Health Metrics and the Customer;

**Software** means the eCase software, any New Releases, any optional software modules provided by Health Metrics to the Customer and, unless stated to the contrary, includes Third Party Software;

**Solution Type** means the way in which the Software is used by the Customer, as set out in item 9 of the Agreement Details:

- (a) **Cloud** – where the Customer accesses the Software via a secure internet connection and in turn uses the servers and other hardware and software resources of Health Metrics.

**Specifications** means any specifications relating to the Software set out in this agreement or the Documentation;

**Support Fee** means the fee payable by the Customer for the Support Services performed by Health Metrics under this agreement, as those fees are set out or calculated in accordance with item 7 of the Agreement Details;

**Support Services** means the maintenance and support services provided by Health Metrics in respect of the Product, as set out in Schedule 1;

**Term** means the period set out in item 3 of the Agreement Details, or such other period as the parties may agree in writing;

**Third Party Software** means any software comprised in the Product provided by Health Metrics which is owned or licensed by a third party;

**User** means any employee (temporary or permanent) or contractor of the Customer, or any person working on secondment with the Customer, who can access, or has at any time accessed, the Product or any part of it (but excluding Health Metrics and any person who (or which at the relevant time) is acting as an officer, employee, contractor or agent of Health Metrics);

**Work Order** means any other agreement entered into between Health Metrics and the Customer at the same time as, before or after this agreement under which Health Metrics provides additional professional services, Implementation Services, Product or Software to the Customer; and

**Year** means a period of 12 months commencing on the Commencement Date or on an anniversary of the Commencement Date, and **Yearly** has a corresponding meaning.

1.2 In this agreement headings and bold typing are included for convenience only and do not affect interpretation and, unless the context otherwise requires:

- (a) a reference to a word includes the singular and the plural of the word and vice versa;
- (b) a reference to a gender includes any gender;
- (c) if a word or phrase is defined, then other parts of speech and grammatical forms of that word or phrase have a corresponding meaning;

- (d) a term which refers to a person includes a company, a partnership, an association, a corporation, a body corporate, a joint venture, a sovereign state, a government or a government department or agency;
- (e) a reference to a document includes a reference to that document as amended, novated, supplemented, varied or replaced;
- (f) a reference to a recital, clause, paragraph, schedule, annexure or other part is a reference to an item of that type in this agreement;
- (g) a reference to a party is a reference to a party to this agreement and includes a reference to that party's successors, permitted assigns and permitted substitutes (including persons taking by novation);
- (h) a reference to a statute or regulation or a provision of a statute or regulation is a reference to that statute, regulation or provision as amended or a statute, regulation or provision replacing it, and a reference to a statute includes all regulations, proclamations, ordinances and by-laws made or issued under that statute;
- (i) an agreement, obligation or indemnity on the part of 2 or more persons binds them jointly and severally;
- (j) a reference to a document is a reference to a document of any kind including but not limited to an agreement in writing, a certificate, a notice, or an instrument;
- (k) no provision of this agreement will be construed adversely to a party solely on the ground that the party was responsible for the preparation of this agreement or that provision;
- (l) a reference to a time is a reference to Melbourne time;
- (m) a monetary reference is a reference to Australian currency;
- (n) the meaning of general words is not limited by specific examples introduced by "including", "for example" or similar expressions;
- (o) a reference to an entity, other than a party to this agreement, which ceases to exist or whose powers or functions are transferred to another entity, is a reference to the entity which replaces it or which substantially succeeds to its powers or functions;
- (p) a word or term defined in the *Corporations Act 2001* (Cth) has the same meaning in this agreement; and
- (q) a word or term defined in *A New Tax System (Goods and Services Tax) Act 1999* (Cth) has the same meaning in this agreement where used in connection with the GST imposed under that Act.

1.3 This agreement consists of the Agreement Details, the terms and conditions set out in this document as amended from time to time and all schedules and annexures attached to this document. If there is any conflict or inconsistency between the following parts of this agreement, the order in which they will take priority is the order in which they are listed below:

- (a) **first**, these terms and conditions;

- (b) **secondly**, the Agreement Details;
- (c) **thirdly**, Schedule 1 (Support Services);
- (d) **fourthly**, any other schedules or annexures;
- (e) **fifthly**, any Work Order; and
- (f) **lastly**, any other documents incorporated by reference into this agreement.

- 1.4 All payments (including of Fees) under this agreement by the Customer to Health Metrics must be made by direct deposit of cleared funds to the credit of a bank account notified by Health Metrics to the Customer from time to time, or by any other method agreed to by Health Metrics.

## 2. **TERM**

This agreement will commence on the Commencement Date and continue for the Term, unless terminated earlier in accordance with its terms.

## 3. **LICENCE**

- 3.1 In return for the Licence Fee, Health Metrics:

- (a) must provide the Products; and
- (b) grants to the Customer a non-exclusive, irrevocable and non-transferable licence to:
  - (i) access, receive and use (with no right to resell) the Products for the Customer's business purposes (which may include integration, customisation or interface of the Software with third party systems or other software or systems); and
  - (ii) sublicense its Personnel to exercise any of the rights granted under paragraph (i) on its behalf,

during the Term and otherwise on the terms and conditions set out in this agreement. The licence granted under this clause is non-transferable, subject to paragraph (ii) above and clause 25.8.

- 3.2 Use of the Product is strictly limited to the initial number of Objects set out in item 6 of the Agreement Details, plus any increase in that number notified by the Customer to Health Metrics under clause 12.5(c).
- 3.3 The Customer must ensure that each person having access to the Software:
- (a) is an authorised User; and
  - (b) uses the Software and Documentation in accordance with the terms and conditions of this agreement.
- 3.4 The licence granted under clause 3.1 will apply to any workarounds and Bug Fixes, New Releases and any additional software which may be supplied to the Customer by Health Metrics from time to time under this agreement during the Term.
- 3.5 The title to, and copyright in, software developed by Health Metrics in the course of providing Implementation Services will remain the absolute property of Health Metrics,

and the licence to use that software will be governed by the terms of this agreement as if it were part of the Software (with the necessary changes).

**3.6 The Customer must not:**

- (a) resell, sub-license, rent, timeshare, host, outsource, decompile, disassemble, reverse engineer, copy, adapt or modify the Software or any part of it;
- (b) undertake system integration or introduce system modifications that will write to the Software, without Health Metrics' prior written consent; or
- (c) use the Software to operate a service bureau, subscription service or to process data for, or to be made available to, a third party.

**4. DOCUMENTATION**

- 4.1 Health Metrics must deliver any Documentation or information required as part of the Products and any other information required to enable the Customer to reasonably operate and make use of the Software. Health Metrics must provide the Customer with electronic copies of the Documentation. The Documentation will explain the functionality of the Software and the Product.
- 4.2 The Customer may make as many copies of the Documentation as it requires for its purposes.
- 4.3 The Customer must not, without Health Metrics' prior written consent provide any Documentation to anyone, other than its related bodies corporate, Personnel, for any purpose except as otherwise required by law or permitted by this agreement (including under clause 17.1(a))

**5. THIRD PARTY SOFTWARE**

- 5.1 The Customer acknowledges that the Software may utilise Third Party Software. Third Party Software is subject to the terms and conditions of this agreement and any applicable end user terms and conditions prescribed by the third party licensor of the Third Party Software and provided to the Customer by Health Metrics (in writing in advance) from time to time.
- 5.2 The Customer acknowledges that:
  - (a) the third party owner or licensor of any Third Party Software retains all ownership in, and intellectual property rights to, the Third Party Software;
  - (b) the Customer must not assign, give, or transfer any right or interest in or to any Third Party Software to any person or entity, or purport to do so; and
  - (c) this clause 5.2 takes effect as if it were included in a deed poll by the Customer in favour of each third party owner or licensor of any Third Party Software, and may be enforced by the third party as such, even though that third party is not a party to this agreement.

**6. DELIVERY**

- 6.1 Health Metrics will provide and make the Software and associated services available to the Customer in accordance with the Solution Type and Specifications .
- 6.2 Health Metrics may, from time to time, inform the Customer of a projected release or availability date for a New Release. However, Health Metrics will not be liable for any



delay in the release or availability of a New Release, or any failure to comply with those projected release or availability dates, regardless of the cause.

## 7. ERRORS

7.1 Subject to this clause 7, if at any time during the Term the Customer discovers any Error, then:

- (a) Local triage - the Customer's Personnel who have been trained in operating the Software should attempt to resolve the Error.
- (b) if the Error cannot be resolved by those Personnel, the Customer will as soon as reasonably practicable, notify Health Metrics of the Error.

7.2 Upon receipt of notification of the Error or if Health Metrics otherwise becomes aware of any actual or potential Error (the category of Error being reasonably determined by Health Metrics) during the Term, Health Metrics will promptly investigate, correct and aim to resolve the Error (at Health Metrics' cost) in accordance with the Service Levels (including required response and target timeframes).

7.3 Errors do not include any which are:

- (a) caused by alterations or modifications of the Software made by the Customer;
- (b) caused by use of the Software in an operating environment that Health Metrics has notified the Customer (prior to the Commencement Date) is not supported by the Software;
- (c) not reproducible by Health Metrics.

7.4 If the Customer acquires the Product as a "consumer" for the purposes of the Australian Consumer Law:

- (a) the following statements apply by force of that law:

*Our goods and services come with guarantees that cannot be excluded under the Australian Consumer Law. For major failures with the service, you are entitled to cancel your service contract with us and to a refund for the unused portion, or to compensation for its reduced value. You are also entitled to choose a refund or replacement for major failures with goods. If a failure with the goods or a service does not amount to a major failure, you are entitled to have the failure rectified in a reasonable time. If this is not done you are entitled to a refund for the goods and to cancel the contract for the service and obtain a refund of any unused portion. You are also entitled to be compensated for any other reasonably foreseeable loss or damage from a failure in the goods or service;*

- (b) the benefits to the Customer of clause 7.2 are in addition to other rights and remedies of the Customer under the Australian Consumer Law and any other applicable laws; and
- (c) the statement in clause 7.4(a):
  - (i) does not provide the Customer with any rights that are additional to any rights that the Customer may have under the Australian Consumer Law; and

- (ii) if there is any conflict or inconsistency between this statement and other provisions in this agreement, such other provisions will apply to the extent permitted under the Australian Consumer Law.

## **8. SUPPORT SERVICES**

- 8.1 In return for the Support Fee, subject to this clause 8, Health Metrics will provide the Customer with the Support Services in respect of the Product during the Term.
- 8.2 Health Metrics must supply the Support Services, including by:
  - (a) promptly responding to and resolving incidents, problems and service requests in accordance with the service levels;
  - (b) providing assistance, training and knowhow (including in the form of guidance documents) by those personnel to Users in relation to the appropriate use of relevant functionality;
  - (c) providing the Customer with any New Releases or Bug Fixes in relation to the Product that Health Metrics issues;
  - (d) doing all things necessary to ensure the Product continues to operate in accordance with the applicable Specifications and the requirements of this agreement;
  - (e) continuously maintaining, developing and enhancing the relevant functionality and features of the Products over the duration of the Term;
  - (f) otherwise providing the Support Services in a way that meets the applicable Service Levels;
  - (g) performing any other services, work, activities, functions and responsibilities reasonably required for the support of the Software in accordance with the applicable requirements, specifications and standards outlined in this agreement; and
  - (h) any other services, work, activities, functions and responsibilities reasonably related to or reasonably required for the proper performance and provision of those services described in paragraphs (a) to (g) above..
- 8.3 Health Metrics must maintain the capability to provide the Support Services and all other resources necessary to provide Support Services for the Term and any applicable warranty period.
- 8.4 If the Solution Type requires it, the Customer must provide Health Metrics and its authorised contractors with appropriate access to the Customer's systems as necessary for Health Metrics to perform the Support Services.
- 8.5 If the Customer requires Health Metrics to attend any Site after the Software goes live for any reason (including for the provision of Support Services, but excluding any such attendance which Health Metrics considers necessary in order to discharge its obligations under clause 7), the Customer acknowledges that Health Metrics will charge it for such attendances, and the Customer agrees to pay to Health Metrics, fees in accordance with Health Metrics' standard consulting time-based charge-out rates from time to time.
- 8.6 To the extent the Customer requires maintenance or support in relation to Third Party Software, Health Metrics will provide such maintenance and support in accordance with the third party's then standard terms (if permitted by the third party) and as supplied by the third party to Health Metrics.

## **9. IMPLEMENTATION SERVICES**

In return for the Implementation Fees, Health Metrics will provide the Customer with Implementation Services.

## **10. OTHER SERVICES**

Health Metrics will provide any additional services or facilities described in, and subject to the terms set out in, the Agreement Details in return for the payment of the applicable Fees set out in the Agreement Details, or otherwise agreed in writing between the parties. For example, where the Solution Type is Cloud, then the applicable Hosting Fee set out in item 10 of the Agreement Details will apply for Health Metrics' provision of the Hosting Services to the Customer.

## **11. SERVICE LEVELS**

- 11.1 Health Metrics must provide the Software and perform the associated services so as to meet the Service Levels.

## **12. FEES AND PAYMENT**

- 12.1 Subject to Health Metrics performing its obligations under this agreement, the Customer must pay Health Metrics the following applicable Fees within 7 days of the Customer's receipt of a valid tax invoice:

- (a) in the case of the Licence Fee, Support Fee, and Hosting Fee, in accordance with the payment terms set out in item 13, and other relevant parts, of the Agreement Details;
- (b) in the case of Implementation Fees, in accordance with the payment terms set out in the Agreement Details; and
- (c) in the case of any other Fee specified in this agreement, in accordance with the applicable payment terms set out in this agreement (including in the Agreement Details).

- 12.2 The Fees are inclusive of all taxes (other than any tax on the Customer's income and any GST) and all resources necessary to perform Health Metrics' obligations under the agreement, unless expressly agreed otherwise in writing.

- 12.3 If the Customer in good faith disputes the amount of any invoice, the Customer will notify Health Metrics accordingly and may withhold the disputed amount or portion of the invoice until the dispute is resolved. However, the Customer must pay all undisputed amounts or portion of the invoice by its due date for payment. Any dispute over an invoice will be resolved between the parties in good faith through its nominated representatives. Health Metrics must continue to perform its obligations under this agreement while that dispute is resolved.

- 12.4 Subject to clause 12.3, if

- (a) the Customer fails to make payment of any correctly rendered invoice by the date that is 30 days after its due date for payment,

then without limiting Health Metrics' other rights under this agreement or at law:

- (b) the Customer must pay to Health Metrics, on demand by Health Metrics, interest on the overdue amount during the period of default at the most recent

cash rate set by the Reserve Bank of Australia. Such interest accrues daily on a per annum basis and is capitalised (if not paid) every 30 days;

- (c) Health Metrics may suspend or cease any further work or services under this agreement, any Work Order or any other agreement between the parties until such time as the Customer has made payment in full of that overdue invoice;
- (d) Health Metrics may suspend and block the Customer's access and use of the Software (however it may not block the Customer's access to the Customer Data at any time or for any reason) until the Customer makes payment in full of that overdue invoice; and
- (e) if Health Metrics engages the services of a collection agency or lawyer to recover the overdue amount from the Customer, the Customer agrees that Health Metrics may seek recovery from the Customer the overdue amount plus interest, Health Metrics' legal costs, and any bank fees and charges and other expenses incurred by Health Metrics in attempting to recover the debt, and any fees, commissions or other amounts Health Metrics pays to any collection agency (all on an indemnity basis).

12.5 If the number of Objects increases during the Term from:

- (a) the initial number of Objects specified in the Agreement Details; plus
- (b) any previous increase in the number of Objects,

then:

- (c) the Customer must notify Health Metrics of that increase within 10 Business Days after the end of the relevant Fee Period.
- (d) if item 5 of the Agreement Details specifies that the licence of the Products granted under this agreement is a "Per Object licence", the Licence Fee, Support Fee, Hosting Fee and any other non Implementation Fee calculated on a per object basis, will on and from the first day of the Fee Period after the Fee Period in which the increase in Objects occurs, be adjusted so that it equals the total number of Objects (as increased) multiplied by the "fee per Object per Fee Period" set out in item 6 of the Agreement Details.
- (e) if item 5 of the Agreement Details specifies that the licence of the Products granted under this agreement is an "Up front licence":
  - (i) on the first day of the Fee Period after the Fee Period in which the increase in Objects occurs (**Effective Date**), the Licence Fee, Hosting Fee, Support Fee and any other non Implementation Fee calculated on a per object basis, will be adjusted by, and the Customer must pay to Health Metrics, an amount equal to the number by which the Objects has increased multiplied by the "fee per Object" set out in the Agreement Details;
  - (ii) if the Effective Date is not the first day of a Fee Period, and the Fee Period is a Year, the Customer must pay to Health Metrics, on the Effective Date, an amount representing the pro rata increase in the License Fee, Hosting Fee, Support Fee and any other non Implementation Fee calculated on a per object basis in respect of the balance of the Fee Period in which the Effective Date falls, worked out as follows:

$$(A - B) \times \frac{n}{365}$$

where:

- A* is the License Fee, Hosting Fee, Support Fee and any other non Implementation Fee calculated on a per object basis (exclusive of GST) for a whole Fee Period (Year), as increased on that Effective Date under clause 12;
- B* is the License Fee, Hosting Fee, Support Fee and any other non Implementation Fee calculated on a per object basis (exclusive of GST) that was paid or is payable in respect of the Fee Period (Year) in which the Effective Date falls, before the increase; and
- n* is the number of days left in the Fee Period (Year) in which the Effective Date falls, commencing on (and inclusive of) the Effective Date.

- 12.6 The Customer acknowledges that it will not be entitled to a refund of, or reduction in, any fees if the number of objects is reduced by the Customer below the initial number of objects in the agreement details.
- 12.7 All Fees and any other supply made under this agreement by a party to another party are exclusive of GST. If GST is imposed on any supply under this agreement, the recipient must pay to the supplier, in addition to and at the same time as the related Fees or other consideration is payable or to be provided for the supply, an additional amount calculated by multiplying the value of that Fee or consideration by the prevailing GST rate (**GST Amount**). The GST Amount must be paid to the supplier by the recipient (without set-off, deduction or requirement for demand) at the same time as the GST exclusive consideration is payable or to be provided. The supplier must issue a valid tax invoice to the recipient before any payment for a supply made by the supplier under this agreement is due, and the recipient need not pay a GST Amount until the supplier has given the recipient a tax invoice for the supply to which that payment relates. If a payment to a party is a reimbursement or indemnification, calculated by reference to a Loss incurred by that party, then the payment will be reduced by the amount of any input tax credit to which that party is entitled for that Loss.
- 12.8 The Customer must pay Health Metrics all applicable Fees and any other amounts owing to Health Metrics without set-off, deduction or withholding. For the avoidance of doubt, any finance arrangement the Customer may enter into is the Customer's responsibility and will not affect the enforceability of this agreement, nor the rights and obligations of the parties, including the Customer's obligation to pay Health Metrics the Fees.
- 12.9 Any Fees the Customer pays Health Metrics under this agreement are non-refundable, except as otherwise provided in this agreement, even if the Customer's circumstances change. However, if any part of an invoice is found to have been rendered incorrectly after payment has been made by the Customer, the relevant underpayment or overpayment will be recoverable by or from Health Metrics.

- 12.10 Hardware manufacturers or their authorised agents or distributors may provide discounts and/or commissions to Health Metrics for testing, approving or marketing their hardware. Health Metrics may (but is not obliged to) pass on such discounts or commissions to the Customer.
- 12.11 Health Metrics is entitled to withhold supply and performance of services, and to retake possession of hardware, software or goods supplied by Health Metrics if the Customer is in material breach of this clause 12.
- 12.12 Health Metrics reserves the right to revise the Fees during the Term, including expenses related fees. This change will be effective immediately upon notification to the Customer. Continued use of Health Metrics' Products, Software or services following such notification will constitute the Customer's acceptance of the revised Fees.

### **13. HEALTH METRICS OBLIGATIONS**

- 13.1 Without limiting Health Metrics' obligations arising elsewhere under this agreement or otherwise, Health Metrics must supply the Products, Support Services and Consulting Services (where applicable):
- (a) for the Term;
  - (b) in a proper, timely and efficient manner using that standard of care, skill, diligence, prudence, good faith and foresight that would reasonably be expected of an expert and experienced provider of goods and services similar to the goods and services provided under this agreement;
  - (c) in accordance with all relevant laws, industry standards and codes (which are applicable to Health Metrics' business, products and services) and its obligations under its Third Party Licences and in a manner which will not cause the Customer to contravene any applicable laws;
  - (d) in accordance with the requirements of the agreement; and
  - (e) to comply with, and conform to, all applicable Health Metrics policies, procedures, processes and requirements.

### **14. CUSTOMER'S OBLIGATIONS**

- 14.1 Without limiting the Customer's obligations arising elsewhere under this agreement or otherwise, the Customer:
- (a) is responsible for arranging its own computing equipment and electricity and telecommunication services to enable the Customer to access and use the Software;
  - (b) must report any Error in the Product to Health Metrics as soon as practicable; and
  - (c) must notify Health Metrics in writing prior to any change to the Customer's system configuration that may have the potential to adversely affect the efficient operation of the Product on the Customer's systems.
- 14.2 The Customer indemnifies Health Metrics against any Loss which Health Metrics pays, suffers, incurs or is liable for in connection with any breach of this agreement by the Customer.

## **15. EXCLUSION AND LIMITATION OF HEALTH METRICS' LIABILITY**

- 15.1 Except as expressly provided to the contrary in this Agreement and any rights that the Customer may have under the consumer guarantee provisions in the Australian Consumer Law or other applicable legislation, Health Metrics excludes all warranties, guarantees and conditions in connection with the Product and all other goods and services (or advice regarding the Product or those other goods or services) supplied to the Customer. For the avoidance of doubt, this exclusion includes an exclusion of all warranties, guarantees and conditions implied by custom, the general law or statute, other than those which may not be excluded under the Australian Consumer Law or other applicable legislation.
- 15.2 Health Metrics' liability arising out of or in connection with this Agreement and under any warranty, guarantee or condition implied or stipulated by the Australian Consumer Law or similar legislative provision which may not be excluded but may be limited in any of the following ways, is limited at Health Metrics' election to:
- (a) in the case of goods supplied by Health Metrics:
    - (i) the replacement of the goods or the supply of equivalent goods;
    - (ii) the repair of the goods;
    - (iii) the payment of the cost of replacing the goods or of acquiring equivalent goods; or
    - (iv) the payment of the cost of having the goods repaired; or
  - (b) in the case of services supplied by Health Metrics:
    - (i) the supplying of the services again; or
    - (ii) the payment of the cost of having the services supplied again.
- 15.3 Other than in relation to any rights that the Customer may have under the consumer guarantee provisions of the Australian Consumer Law, to the extent permitted by law, Health Metrics' total liability is limited to:
- (a) in the case of goods supplied by Health Metrics, the amount paid by the Customer for the goods in the previous 12 months; or
  - (b) in the case of services supplied by Health Metrics, the amount paid by the Customer for the services in the previous 12 months (excluding Implementation Fees).
- 15.4 Notwithstanding anything to the contrary contained in this agreement or any Work Order, neither party is liable for any Indirect Loss, except for any such liability which may not be excluded by force of the Australian Consumer Law or similar legislative provision
- 15.5 For the avoidance of doubt, except as provided otherwise in the Australian Consumer Law or similar legislative provision, Health Metrics is not liable (whether in contract, negligence, tort or otherwise) for:
- (a) any Loss arising from the use of the Product for any purpose for which it was not designed (the purpose for which it was designed being set out in, or apparent from, the Specifications);
  - (b) any defects or failures which arise in whole or in part from accident, neglect or misuse of the Product;

- (c) any defects caused by products, equipment or computer programs not provided by Health Metrics;
  - (d) any failure of electrical power or circuitry or network outside the Product.
- 15.6 The Customer acknowledges that the Fees are determined on the basis of, and reflect, the limitation and exclusions of liability in this agreement.
- 15.7 If a party suffers any Loss in connection with this agreement or any Work Order for which the other party is liable (including under an indemnity), the party suffering the Loss must use its reasonable efforts to mitigate its loss.
- 15.8 If a party does not comply with clause 15.7 and compliance with clause 15.7 would have mitigated the Loss, the other party is not liable for the amount by which the Loss would have been reduced.
- 15.9 Each party's liability to pay compensation for any Loss of the other party is reduced proportionally to the extent that the liability was caused or contributed to by the other party or its personnel.

## **16. TERMINATION OR EXPIRY**

- 16.1 This agreement may be terminated by notice in writing with immediate effect:
- (a) by Health Metrics, if Health Metrics exercises its suspension rights under clause 12.4 and the Customer fails to pay the relevant overdue invoice in full within 10 Business Days of the commencement of that suspension; or
  - (b) by either party if the other commits a material breach of this agreement which cannot be remedied or which, in the case of a breach capable of being remedied, has not been remedied within 30 days of a written request from the non-defaulting party to the party in breach to remedy the breach; or
  - (c) subject to any applicable statutory stay on the exercise of this right, by either party if an Insolvency Event occurs in relation to the other party.
- 16.2 Termination or expiry of this agreement will not prejudice or otherwise affect any rights and obligations of the parties expressed in this agreement to survive termination or expiry of this agreement, nor will it prejudice or otherwise affect any right or remedy one party has against another party in respect of any breach of this agreement before termination or expiry, but will terminate all other rights and obligations of the parties under this agreement, subject to clause 16.5.
- 16.3 On termination or expiry of this agreement:
- (a) Health Metrics will immediately cease providing Support Services and all other services to the Customer from the date that termination or expiry takes effect;
  - (b) the Customer must immediately cease all use of the Product, except as necessary to download and migrate the Customer Data to its new target software;
  - (c) if relevant, the Customer must immediately delete all copies of the Product; and
  - (d) if requested by Health Metrics, the Customer must provide written confirmation to Health Metrics that no copies of the Product have been retained by the Customer.



- 16.4 Health Metrics must provide the Customer with written confirmation that no Customer Data, or any part thereof, has been retained or destroyed by Health Metrics without the express consent of the Customer. If requested by the Customer, Health Metrics must provide proof of secure destruction of Customer Data pursuant to this clause 16.
- 16.5 This clause 16, and clauses 3.6, 5.2, 12.1, 15, 17, 20.1, 20.2 and 25 (other than clause 25.13) survive termination or expiry of this agreement.

## 17. CONFIDENTIALITY AND PRIVACY

- 17.1 Each of Health Metrics and the Customer will keep confidential all confidential information communicated by, acquired from or disclosed by the other of them, whether before or during the term of this agreement, and will not, without the prior written consent of the other:
- (a) disclose the other's confidential information to any third party, save to those of its:
    - (i) officers, employees and contractors who need to know for the purposes of giving effect to this agreement, any Work Order or any other agreement between the parties and provided that such persons comply with the provisions of this clause 17.1 (as if those persons were the party receiving the other's confidential information); or
    - (ii) professional advisers, lawyers, auditors and bankers in confidence or where those professional advisers, lawyers, auditors and bankers are otherwise bound by a duty of confidence in relation to the other's confidential information; or
  - (b) use the other party's confidential information for any purpose other than to perform its obligations, or exercise its rights, under this agreement, any Work Order or any other agreement between the parties.
- 17.2 In addition, a party (**Party A**) may disclose confidential information of the other party (**Party B**), where it is required to be disclosed by order of a court of competent jurisdiction or pursuant to a statutory or regulatory obligation or the rules of any stock exchange upon which Party A's securities are listed, provided that Party A:
- (a) discloses only the minimum amount of confidential information required to satisfy the relevant court or legal requirement or stock exchange rules;
  - (b) before disclosing any information, provides a reasonable amount of notice to Party B (where practicable) and exhausts all reasonable steps to maintain such confidential information in confidence; and
  - (c) notifies the third person that the information is confidential information of Party B.
- 17.3 The Customer acknowledges that the Documentation and computer code included in the Product or otherwise provided by Health Metrics to the Customer in relation to the Product form part of Health Metrics' confidential information.
- 17.4 Health Metrics acknowledges that the Customer Data forms part of the Customer's confidential information and belongs to the Customer.

- 17.5 The obligations of a party under clause 17.1 do not apply to any information which:
- (a) is generally known to the public in Australia, other than as a result of a breach by that party or any of its officers, employees or contractors of clause 17.1 or of any other obligation of confidentiality owed to the other party;
  - (b) is lawfully obtained by a party free of any duty of confidentiality otherwise than directly or indirectly from the other party; or
- 17.6 If, as a result of this agreement, Health Metrics is able to access any information about identifiable individuals within the Customer Data, Health Metrics agrees to:
- (a) comply with the *Privacy Act 1988* (Cth) and all other applicable privacy laws and such other data protection laws as may be in force from time to time which regulate the collection, storage, use and disclosure of information, as if it were regulated by those laws; and
  - (b) collect, store, use and disclose such information in accordance with Health Metrics' privacy policy and collection statement, as notified by Health Metrics to the Customer from time to time, to the extent that policy and statement comply with the laws referred to in clause 17.6(a).
- 17.7 The Customer also agrees to comply with the *Privacy Act 1988* (Cth) and all other applicable privacy laws and such other data protection laws as may be in force from time to time which regulate the collection, storage, use and disclosure of any information about identifiable individuals within the Customer Data, including, without limitation, Australian Privacy Principle 5.
- 17.8 Health Metrics may use the confidential information in an anonymised format for the purposes of developing and testing software releases including enhanced reporting capabilities.

## **18. CUSTOMER DATA**

- 18.1 Health Metrics must not, and must ensure that its Personnel do not:
- (a) use or alter Customer Data for any purpose other than in connection with its supply of the Products;
  - (b) purport to sell, let for hire, assign rights in or otherwise dispose of any Customer Data; or
  - (c) store or access Customer Data at or from (or permit Customer Data to be accessed from), locations outside of Australia, without the prior written consent of the Customer.
- 18.2 Health Metrics must:
- (a) ensure that all Customer Data is signified as the property of the Customer and must not cause or have caused any pledge, lien, charge, mortgage, encumbrance of a third party or any other security interest to be placed on the

Customer Data or any database (whether electronic or otherwise) in which such Customer Data is stored.

- (b) establish and maintain safeguards against the destruction, loss or alteration of Customer Data in the possession, custody or control of Health Metrics that comply with all Laws.
  - (c) maintain and back-up Customer data and perform any data restoration services forming part of the Services in a way that meets or exceeds the applicable Service Levels.
- 18.3 Health Metrics must ensure that any subcontract entered into for the purpose of fulfilling its obligations under the Agreement imposes on the approved subcontractor the same obligations that Health Metrics has under this clause 18.
- 18.4 Upon request from the Customer, Health Metrics must return all Customer Data to the Customer, in the manner and format reasonably required by the Customer. The Customer will be required to pay for this work to be completed at Health Metrics then hourly rates.
- 18.5 Unless otherwise specified in the agreement, the Customer owns all rights (including Intellectual Property Rights) in the Customer Data. The agreement does not assign or transfer ownership, and Health Metrics must not assert ownership, of all or any part of the Customer Data.

## **19. Security**

- 19.1 Health Metrics must, and must ensure that each of its Personnel:
- (a) implement, maintain and enforce security procedures and safeguards (both physical and logical) to protect the Customer Data and integrity of the Software;
  - (b) ensure that only the authorised personnel have access to the Customer Data or any other information assets of the Customer; and
  - (c) only access Customer Data in accordance with the Customer's reasonable directions and for the purposes of the Agreement.
- 19.2 If Health Metrics becomes aware of a breach of any of the requirements of clauses 19.1, any loss or unauthorised disclosure of Customer Data or the Customer's Confidential Information, or an actual circumvention of either party's security measures or procedures (including any introduction of Harmful Code), (each, a **Data Security Breach**), then Health Metrics must to the extent permitted by applicable law:
- (a) promptly notify the Customer;
  - (b) assist the Customer to implement any remedial activities; and
  - (c) provide to the Customer known details of the Data Security Breach and the remedial steps taken by Health Metrics.

## **20. HEALTH METRICS' INTELLECTUAL PROPERTY RIGHTS**

- 20.1 All right, title, and interest in, and all Intellectual Property Rights consisting of or subsisting in, the Product or any part of it including any modifications (in both print and

machine-readable forms) belong to Health Metrics or Health Metrics' third party suppliers. The Customer acquires no ownership of copyright or other Intellectual Property Rights, or any proprietary interest in the Product or any part of it or any modifications, or in any materials provided as part of any Implementation Services, Support Services or other services provided by Health Metrics, including any copies thereof.

- 20.2 Any new features, functionality or performance of the Product suggested by the Customer that Health Metrics subsequently incorporates into any New Release or in the Product (including the Intellectual Property Rights therein) will be the sole and exclusive property of Health Metrics.

## **21. NO SOLICITATION OF HEALTH METRICS STAFF**

During the Term and for a period of 12 months after its termination or expiry, the Customer must not, directly or indirectly, take any action to hire or solicit for employment or engagement any person who is an employee of Health Metrics or its related entities (**Restricted Personnel**) who has knowledge of the Product, without Health Metrics' prior written consent other than where a Restricted Personnel responds to a public advertisement.

## **22. AUDIT**

- 22.1 The Customer agrees to allow Health Metrics and its authorised representatives to inspect the Customer's records once annually on at least 10 Business Days' notice from Health Metrics solely for the purpose of enabling Health Metrics to verify that the Customer is complying with the terms of its licence granted under clause 3.
- 22.2 Health Metrics has the right to audit the Customer's use of the Product in accordance with clause 22.1. The Customer agrees to provide reasonable assistance and access to information in the course of such audit and permit Health Metrics to:
- (a) report the audit results to any owner or licensor of Third Party Software; and
- 22.3 Each party will be responsible for its own costs in relation to the audit under this clause 22.

## **23. FORCE MAJEURE**

- 23.1 Subject to clause 23.2, where a Force Majeure Event prevents Health Metrics from, or delays it in, performing any obligation under this agreement, that obligation is suspended for as long as the Force Majeure Event continues.
- 23.2 If the Force Majeure Event referred to in clause 23.1 continues for a period of 3 months or more, either party may (without affecting the accrued rights and obligations of the parties as at the date of termination) terminate the relevant part of this agreement that is directly affected by the relevant Force Majeure Event immediately by notice to the other party. If all or part of the agreement is terminated in accordance with this clause, neither party will be liable for any Loss of the other party caused by that termination.

## **24. DISPUTES**

Where either party disputes any matter with the other which cannot be agreed, before any legal action is taken, the parties must, through their respective chief executive officers (or equivalent officer holders) use reasonable endeavours to seek to resolve the dispute within 21 days of it arising. If, the dispute is not able to be resolved through

that process, either party may take such action (including legal action) as is available to it in relation to the dispute.

## **25. GENERAL**

- 25.1 This agreement is governed by the laws of Victoria. The parties submit to the non-exclusive jurisdiction of the courts exercising jurisdiction there.
- 25.2 The parties may only amend this agreement if each party signs the written amendment.
- 25.3 A provision of this agreement or a right created under it may not be waived except in writing signed by the party granting the waiver.
- 25.4 A party may exercise a right at its discretion and separately or together with another right. If a party exercises a single right or only partially exercises a right, then that party may still exercise that right or any other right later. If a party fails to exercise a right or delays in exercising a right, then that party may still exercise that right later.
- 25.5 The rights and remedies provided in this agreement are cumulative with, and not exclusive of, the rights and remedies provided by law independently of this agreement.
- 25.6 Each indemnity in this agreement is:
  - (a) a continuing obligation despite any settlement of account or the occurrence of any other thing, and remains in full force and effect until all money owing, contingently or otherwise, under the indemnity has been paid in full;
  - (b) is additional, separate and independent from the other obligations of the parties; and
  - (c) survives termination or expiry of this agreement.

It is not necessary for a party to incur expense or make payment before enforcing a right of indemnity conferred by this agreement.

- 25.7 The rights and obligations of the parties will not merge on completion of any transaction under this agreement. They will survive the execution and delivery of any assignment or other document entered into for the purpose of implementing any transaction.
- 25.8 This agreement is for the benefit of the parties and their successors and assigns. The parties and their successors and assigns are bound by this agreement. The Customer may only assign its rights under this agreement after it obtains the written consent of Health Metrics. Health Metrics may assign its rights under this agreement without the Customer's consent.
- 25.9 If any provision of this agreement is void, voidable, unenforceable, illegal, prohibited or otherwise invalid in a jurisdiction, in that jurisdiction the provision must be read down to the extent it can be to save it but if it cannot be saved by reading it down, words must be severed from the provision to the extent they can be to save it but if that also fails to save it the whole provision must be severed. That will not invalidate the remaining provisions of this agreement nor affect the validity or enforceability of that provision in any other jurisdiction where it is not invalid.
- 25.10 The parties may execute this agreement in 2 or more counterparts and all counterparts together constitute one instrument.

- 25.11 Subject to an express provision in this agreement, a party may in its absolute discretion give its consent or approval conditionally or unconditionally, or withhold its consent or approval.
- 25.12 This agreement and any Work Order constitute the entire agreement of the parties in respect of the subject matter of this agreement and any Work Order, and supersede all prior discussions, negotiations, representations, understandings, undertakings and agreements. To avoid doubt, each party warrants that it has not relied on any statement or representation by the other party not expressly included in this agreement or any Work Order.
- 25.13 Each party must, at its own expense, do everything reasonably necessary to give effect to this agreement and the transactions contemplated by it, including the execution of documents.
- 25.14 Each party warrants and represents to each other party that:
- (a) it has the power to enter into and perform this agreement;
  - (b) this agreement is valid and binding on it and enforceable against it in accordance with its terms subject to any necessary stamping, the availability of any equitable remedies and to laws affecting creditors' rights generally;
  - (c) it benefits by executing this agreement; and
  - (d) it is able to pay its debts as and when they fall due, and no action has been taken towards winding it up or placing it in bankruptcy.
- 25.15 In connection with the use of the Hosting Services, Software and Third Party Software, the Customer may not (a) attempt to probe, scan or test the vulnerability of the Hosting Services, Software and Third Party Software, or a system, account or network of Health Metrics; or (b) intentionally distribute worms, trojan horses, viruses, spyware, other malicious code, corrupted files or any similar items.
- 25.16 The Customer grants Health Metrics permission to use its name in Health Metrics marketing material and to publish its name, trademark and/or logo on the Health Metrics website, solely for the purpose of identifying the Customer as a client.
- 25.17 A party may send a notice or other communication in connection with this agreement by hand delivery, pre-paid post, facsimile transmission or by electronic mail to another party at the address details set out below or in such other way as the recipient party may have last notified each other party in writing:
- (a) **Health Metrics**
    - Address: Suite 202, 12 Corporate Drive, Heatherton Victoria, 3202
    - Facsimile: -
    - Telephone: 1800 810 081
    - E-mail: pbrindle@healthmetrics.com.au
    - Attention: Tyron Ball, Chief Executive Officer
  - (b) **Customer**
    - The address details set out in item 2 of the Agreement Details
- 25.18 A notice or other communication is deemed to be received:
- (a) if sent by pre-paid post, on the second Business Day after the date of posting;

- (b) if sent by facsimile transmission, on the next Business Day after the date the facsimile was sent in its entirety as shown by the transmission report produced by the sending machine; or
- (c) if sent by electronic mail, when the sender's information system from which the electronic mail was sent generates a confirmation of delivery report which indicates that the electronic mail has entered the information system of the recipient (but if that confirmation of delivery report indicates that the electronic mail entered the information system of the recipient on a day which is not a Business Day, or after 5.00 pm on a Business Day, the electronic mail will be deemed to be received at 9.00 am on the next Business Day).

**Schedule 1 - Support Services**

See *RE01-HM950-Customer Support Guide*

Note: the above customer support guide can change from time to time without notice.