

## TERMS AND CONDITIONS FOR PROVISION OF SERVICES

### 1. Agreement

This Agreement, together with the relevant Service Level Agreement(s), states the terms and conditions by which ICO, a division of Avnet Technology Solutions (Aust) Limited ("ICO"), will deliver and the Customer will receive the Services. For the avoidance of doubt, any terms or conditions contained in, issued with or printed on any purchase order, letter of acceptance, notice of intention to proceed or the like issued by the Customer do not form part of this Agreement and are of no effect whatsoever.

### 2. Definitions

**"AUP"** means the Acceptable Use Policy.

**"Commencement Date"** means the date of the Service Level Agreement(s).

**"Data Centre"** refers to the Fujitsu Australia Limited Data Centre located in Macquarie Park NSW or any other data centre that may be used by ICO for the Services;

**"Force Majeure"** means a circumstance beyond the reasonable control of ICO which results in ICO being unable to observe or perform on time an obligation under this Agreement. Such circumstances include but are not limited to:

- (a) acts of God, lightning strikes, earthquakes, floods, storms, explosions, fires and any natural disaster;
- (b) terrorism, riots, civil commotion, malicious damage, sabotage; and
- (c) strikes and other industrial action.

**"ICO Technology"** means ICO's proprietary technology, including the Services, software tools, hardware designs, algorithms, software (in source and object forms), user interface designs, architecture, class libraries, objects and documentation (both printed and electronic), network designs, know-how, trade secrets and any related intellectual property rights throughout the world (whether owned by ICO or licensed to ICO from a third party) and also including any derivatives, improvements, enhancements or extensions of ICO Technology conceived, reduced to practice, or developed during the term of this Agreement by either party that are not uniquely applicable to Customer or that have general applicability in the art.

**"Initial Term"** means the minimum term for which ICO will provide the Service(s) to the Customer, as indicated in the Service Level Agreement.

**"Intellectual Property Rights"** means any copyright, trade mark, design, patents, know-how and the like relevant to ICO Technology.

**"Party"** means ICO or the Customer as the context dictates.

**"Professional Services"** means any professional, consulting or support services which are not part of the Services provided by ICO to the Customer.

**"Renewal Term"** means each consecutive 30 day period following the Initial Term.

**"Service(s)"** means the specific service(s) provided by ICO as detailed in the Service Level Agreement.

**"Service Level Agreement"** means the agreement between the Parties which sets out the service(s) to be provided by ICO and the fees for the services to be paid by the Customer.

**"Supplemental Services"** means certain limited services and equipment needed by the Customer on a "one-off" or emergency basis.

**"Third Party Product"** means third party software and/or products supplied or leased by ICO to the Customer.

### 3. Credit approval

If the Customer does not have a current credit account with Avnet Technology Solutions (Aust) Limited, the Customer must submit an application to open a credit account on an approved company credit application form. ICO may refuse credit at its absolute discretion or may allow credit on terms that ICO considers appropriate. If no application to open a credit account from the Customer is received or credit to the Customer is refused by ICO, ICO may in addition to any of its rights, at its option, terminate this Agreement immediately or require the Customer to pay all the fees as defined in clause 4 in advance or by an irrevocable letter of credit confirmed by an Australian bank as a pre-condition to the provision of any Services and ICO will not be liable to the Customer for any loss, damage, cost or expense arising directly or indirectly from ICO taking these actions.

### 4. Fees and Payment Terms

4.1 The Customer shall pay all fees for the Services as specified in the Service Level Agreement.

4.2 The Customer shall pay all fees for the Supplemental Services, Professional Services and fees for switching or upgrading servers as agreed with ICO. ICO will provide the Customer with a quotation for any additional services prior to ICO obtaining the Customer's authorisation to undertake such services.

4.3 On the Commencement Date for each Service, the Customer will be billed (the "Initial Bill") an amount equal to:

- (i) all non-recurring charges indicated in the Service Level Agreement; and
  - (ii) the monthly recurring charges for the first month of the Initial Term in advance.
- 4.4 Subsequent monthly billing will occur on the same day of each calendar month of the Initial Term and any Renewal Term(s). Standard monthly charges will be billed (the "Recurring Bill") one month in advance of the provision of the Services. All other charges and expenses incurred for Supplemental Services or Professional Services during a month will either be billed immediately or at the end of the month in which such services were provided.
- 4.5 Notwithstanding anything to the contrary in this Agreement, ICO expressly reserves the right to alter, change or amend its billing practices in its sole discretion, including, but not limited to, the date on which such billing will occur. Where possible, ICO will provide the Customer with fourteen (14) days written notice of such changes.
- 4.6 Any payment not received within fourteen (14) days of the invoice date of the Initial Bill and thirty (30) days of the invoice date of a Recurring Bill (respectively, a "Payment Default") will accrue interest of 10% per annum compounded daily. The Customer shall also pay to ICO all reasonable expenses incurred by ICO in exercising any of its rights under this Agreement or the law with respect to a Payment Default or other breach by the Customer, including, but not limited to, reasonable legal fees and the fees of any collection agency retained by ICO.
- 4.7 Where a genuine dispute arises between the Parties in relation to a bill, and the Customer has provided ICO with written notice of the dispute, normal billing will continue on a monthly basis for subsequent months. If the dispute is the result of ICO's error, no interest will apply to the disputed bill once remedied.
- 4.8 The Customer will be responsible for and will pay in full, except for taxes on ICO's net income, all taxes, including GST, and similar fees now in force or enacted in the future imposed on the transaction and/or the delivery of Services. All ICO charges are exclusive of GST. All charges payable by the Customer to ICO under this Agreement will attract GST at the prevailing rate.

## 5. Intellectual Property Rights

- 5.1 This Agreement does not transfer from ICO to the Customer the ownership of any ICO Technology and all such ownership and Intellectual Property Rights will remain solely with ICO.
- 5.2 ICO and the Customer each agree that they will not, directly or indirectly, reverse engineer, decompile, disassemble or otherwise attempt to derive source code or other trade secrets from the other party and/or its third party vendors.
- 5.3 The Customer shall not:
  - (i) remove, modify or obscure any copyright, trademark or other proprietary rights notices that appear on any Third Party Product or that appear during use of any Third Party Product; or
  - (ii) reverse engineer, decompile, or disassemble any Third Party Product.
- 5.4 The Customer shall maintain registration of its domain name.

## 6. Compliance with Law and AUP

- 6.1 The Customer agrees that it will use the Service(s) only for lawful purposes and in accordance with this Agreement. The Customer will comply at all times with all applicable laws and regulations and with the AUP, and will indemnify ICO against any claims brought by any third party arising out of any violation of failure of the Customer to comply with such laws and regulations and/or the AUP.
- 6.2 ICO may change the AUP upon thirty (30) days notice to the Customer, which notice may be provided by sending an e-mail alert to the Customer and posting such new AUP at the ICO website [www.ico.com.au](http://www.ico.com.au)
- 6.3 Without limiting the foregoing, the Customer undertakes to ensure that any material included on the Customer's website:
  - (a) does not infringe the Intellectual Property Rights, the Privacy Act 1988 or the privacy of any person;
  - (b) is not obscene, offensive, upsetting, defamatory or discriminatory;
  - (c) is not prohibited content or potentially prohibited content as defined in the relevant legislation.
- 6.4 The Customer further agrees to indemnify ICO and its affiliates against any losses which arise out of, or relate to, any content provided by the Customer or the customers of the Customer, and the Customer will reimburse ICO and its affiliates for all legal expenses, including reasonable legal fees, incurred by ICO and its affiliates in connection with any such losses.
- 6.6 Without accepting responsibility to monitor the content of its Customer's web sites, ICO reserves the right to prohibit any conduct or to remove any materials or content in violation of the AUP or which ICO believes in its sole discretion to be illegal or potentially harmful to others, or which may expose ICO to harm or liability.
- 6.7 For an up to date copy of ICO's AUP please see [www.ico.com.au](http://www.ico.com.au)

## 7. Limitations of Liability

- 7.1 With the exception of liquidated damages specified in the Service Level Agreement and notwithstanding anything to the contrary in this Agreement, in no event will ICO be liable to the Customer for any loss of revenue, profit,

data, contract, use of service or equipment or any other economic loss or any consequential or indirect loss, whether arising under contract, tort (including negligence), statute (to the maximum extent permissible) or otherwise.

- 7.2 The liquidated damages specified in the Service Level Agreement are a genuine pre-estimate of the Customer's losses in the event of any network downtime, server unavailability or hardware failure and are in final satisfaction of ICO's liability in respect thereof.
- 7.3 Notwithstanding anything else to the contrary contained in this Agreement, ICO's maximum aggregate liability to the Customer (including for any liquidated damages), whether in contract, tort or otherwise, shall be limited to twelve times the monthly fee payable by the Customer to ICO in respect of the Service giving rise to such liability.
- 7.4 To the maximum extent permitted by applicable law, ICO will not be liable for any damages whatsoever, whether direct, economic, indirect, or consequential, arising from the use of or inability to use any Third Party Product.

## **8. Third Party Products**

- 8.1 ICO may provide the Customer access to Third Party Products through reseller relationships ICO has established with certain commercial vendors.
- 8.2 The Customer expressly acknowledges and agrees that use of Third Party Products is at the Customer's sole risk. Third Party Products are provided without representation or warranty of any kind from ICO, including without limitation, any implied warranty of merchantability, fitness for a particular purpose, lack of viruses, accuracy or completeness of responses or results, correspondence to description, or non-infringement of third party rights.
- 8.3 The Customer agrees to observe the terms of any license and/or applicable end user subscriber agreement for Third Party Products and shall indemnify ICO with respect to any improper use of such Third Party Products or violation of license agreements with them and/or applicable end user subscriber agreements.

## **9. Termination**

- 9.1 Unless otherwise provided elsewhere in this Agreement, this Agreement cannot be terminated by either party during the Initial Term. This Agreement may be terminated by either party at the end of any Renewal Term for any or no reason upon either party giving to the other no less than ninety (90) days prior written notice of termination. If the Customer, nevertheless, terminates or repudiates this Agreement in the Initial Term, all fees that would have been payable during the Initial Term will become immediately due and payable.
- 9.2 Either party may terminate this Agreement in the event of a material breach of this Agreement (which includes a Payment Default) if such breach remains unremedied after 7 days from the non-defaulting party's notice. If this Agreement is terminated pursuant to this clause, the parties' remedies, rights and liabilities shall be the same as they would have been under the law governing this Agreement had the defaulting party repudiated this Agreement and the notifying party elected to treat this Agreement at an end and recover damages.
- 9.3 The following provisions will survive any expiration or termination of the Agreement: clauses 2, 4.6, 5, 6.4, 7, 8.3, 11 and 12.
- 9.4 Upon termination of this Agreement, the Customer shall relinquish any Internet Protocol ("IP") numbers, addresses or address blocks assigned to the Customer by ICO or its network services supplier (but not the URL or top level domain connected therewith). ICO reserves, in its sole discretion, the right to change or remove any and all such IP numbers, addresses or address blocks.
- 9.5 If the Customer, being an individual, is subject to an application for bankruptcy (which is not dismissed or withdrawn within 5 days), is declared bankrupt, files for bankruptcy, suspends payment of any debt or is or states that it is unable to pay debts; or either party, being a corporation, is or states that it is unable to pay its debts when they fall due, stops or suspends or threatens to stop or to suspend payment of any debt, is subject to an application or an order for the appointment of a liquidator or provisional liquidator or for its winding up (which is not dismissed or withdrawn within 5 days), or if an administrator or a controller is appointed in respect of any of its property, enters into or resolves to enter into any composition, scheme of arrangement, deed of company arrangement with all or any of -its creditors or proposes a reorganisation, moratorium or other administration involving any creditors or seeks to obtain any protection or is granted any protection from any creditors, passes a resolution to wind up itself, or otherwise dissolves itself or gives notice of its intention to do so or is otherwise dissolved, ICO may at any time by written notice terminate this Agreement immediately.

## **10. Force Majeure**

If performance by a party of any obligation under this Agreement (other than an obligation of the Customer to make payment) is prevented, restricted or delayed by Force Majeure then that party shall be excused from and shall not be liable for non-performance to the extent of that prevention, restriction or delay.

## **11. Governing Law**

This Agreement shall be governed by the law of New South Wales, Australia and the parties agree to submit to the jurisdiction of the courts of that State and any courts having appellate jurisdiction from them.

## **12. Other Provisions**

- 12.1 In the event that any provision of this Agreement is held by a court or tribunal of competent jurisdiction to be contrary to the law, the remaining provisions of this Agreement will remain in full force and effect. The waiver of any breach or default of this Agreement will not constitute a waiver of any subsequent breach or default, and will not act to amend or negate the rights of the waiving party.
- 12.2 The Customer may not assign or transfer its rights or delegate its duties under this Agreement either in whole or in part without the prior written consent of ICO, and any attempted assignment or delegation without such consent will be void. ICO shall not unreasonably withhold such consent. ICO may assign this Agreement in whole or part. ICO also may delegate the performance of certain Services to third parties. ICO will endeavour to provide the Customer with fourteen (14) days written notice of such changes.
- 12.3 ICO and the Customer are independent contractors and this Agreement does not establish any relationship of partnership, joint venture, employment, franchise or agency between ICO and the Customer.
- 12.4 This Agreement, including the Service Level Agreement and all documents incorporated herein by reference, constitutes the complete and exclusive agreement between the parties with respect to the subject matter hereof, and supersedes and replaces any and all prior or contemporaneous discussions, negotiations, understandings and agreements, written and oral, regarding such subject matter.