

## Head Agreement

(For ICT Solutions, Hardware Procurement, Third Party Software Procurement, Third Party Maintenance Contract Procurement, ICT Consultancy and Project Services, IAAS and SAAS, Contract and Permanent Recruitment Services)

**Between**

**Data#3 Limited**

**And**

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**Head Agreement Number: D3HA-\_\_\_\_\_**

This agreement ("**Head Agreement**") is made the \_\_\_ day of \_\_\_\_\_, 2012 or if blank the date of the last signature of an executing party (the "**Head Agreement Effective Date**").

**PARTIES**

**Data#3 Limited**  
**ABN 31 010 545 267**  
**of 67 High Street, Toowong, Qld, 4066**  
**PO Box 551 Indooroopilly, Qld, 4068**  
**("Data#3")**

**AND**

\_\_\_\_\_ **[Customer]**  
 \_\_\_\_\_ **[ABN]**  
 \_\_\_\_\_ **[Address]**  
**("Customer")**

**Introduction**

Data#3 has, at the request of the Customer, agreed to supply certain Goods and Services from time to time in accordance with the mutually agreed terms of this Head Agreement.

Agreement pertain to the supply of certain Goods and Services by Data#3 to the Customer by reference to the type and nature of such Goods and Services. The parties may agree in a Commercial Engagement Document which Annex(s) apply to the specific supply of Goods and Services detailed therein.

**GENERAL TERMS**

**1 Head Agreement Structure and forming Individual Contracts**

- 1.1 No Goods and Services are deliverable under this Head Agreement or each Annex to this Head Agreement. This Head Agreement, incorporating each relevant Annex to it, sets out the terms and conditions on which the parties agree to the supply, by Data#3, of certain Goods and Services to the Customer, for a Price.
- 1.2 Each time the Customer wishes to engage Data#3 to supply certain Goods and Services to it under this Head Agreement, the parties will agree upon the specific commercial terms (for example, exact description of goods, quantity, scope of services and price etc) of such supply in the form of a written document, referred to in this Head Agreement as a **Commercial Engagement Document**. The type and nature of such Goods and Services will determine whether a Commercial Engagement Document takes the form of a purchase order, quotation, Data#3 proposal, statement of work, Customer specification or a combination of these documents as agreed by the parties on a case by case basis.
- 1.3 Upon the parties agreement to a Commercial Engagement Document, a separate and distinct contract incorporating that document(s) and this Head Agreement (including each relevant Annex) is formed between the Customer and Data#3 for the supply of the relevant Goods and Services (an "**Individual Contract**"). Each Individual Contract formed pursuant to this process may be assigned a unique individual reference number and may note this Head Agreement's individual reference number.
 

**Head Agreement**  
 + **Commercial Engagement Document**  
 = **Individual Contract**
- 1.4 Notwithstanding the above provisions, unless expressly agreed by the parties in writing, the supply of all Goods and Services to the Customer by or on behalf of Data#3 will be governed by the terms of this Head Agreement (including each relevant Annex). This Head Agreement may be incorporated into several Individual Contracts concurrently.
- 1.5 Save in respect of clause 1.6, to the extent of any inconsistency between the terms of this Head Agreement and a Commercial Engagement Document, as both combine to form an Individual Contract, the terms of an Individual Contract will prevail over and supersede the conflicting provisions in this Head Agreement.
- 1.6 No purchase order, confirmation, receipt, shipment or delivery docket, quote, invoice or other document issued by or on behalf of the Customer (including the terms on any pre-printed purchase order form, or the Customer's standard retainer document) will vary or form part of this Head Agreement or an Individual Contract.
- 1.7 Terms contained in the General Terms section of this Head Agreement pertain to the supply of all Goods and Services by Data#3 to the Customer pursuant to this Head Agreement.
- 1.8 In addition to the terms contained in the General Terms section, terms contained in each relevant Annex to this Head

**2 Interpretation**

- In this Head Agreement, except where the context otherwise requires:
  - 2.1 a reference to a clause, paragraph, schedule or annexure is to a clause or paragraph of, or schedule or annex to, this Head Agreement, and a reference to this Head Agreement includes any schedule or annexure;
  - 2.2 a reference to a document or instrument includes the document or instrument as novated, altered, supplemented or replaced from time to time;
  - 2.3 a reference to A\$, \$A, AUD, dollar or \$ is to Australian currency;
  - 2.4 a reference to time is to Australian Eastern Standard time unless expressly set out to the contrary in an Individual Contract;
  - 2.5 a reference to a statute, ordinance, code or other law includes regulations and other instruments under it and consolidations, amendments, re enactments or replacements of any of them;
  - 2.6 the meaning of general words is not limited by specific examples introduced by 'including', 'for example' or similar expressions;
  - 2.7 a rule of construction does not apply to the disadvantage of a party because the party was responsible for the preparation of this Head Agreement or any part of it;
  - 2.8 if a day on or by which an obligation must be performed or an event must occur is not a Business Day, the obligation must be performed or the event must occur on or by the next Business Day;
  - 2.9 words beginning with a capital letter may be a defined term;
  - 2.10 definitions appear in clause 3 ;
  - 2.11 reference to:
    - (1) one gender includes each other gender;
    - (2) the singular includes the plural and the plural includes the singular;
    - (3) a person includes a body corporate; and
    - (4) a party includes the party's executors, administrators, successors and permitted assigns;
  - 2.12 if a party consists of more than one person, this Head Agreement binds them jointly and each of them severally;
  - 2.13 headings are for convenience only and do not form part of this Head Agreement or affect its interpretation;
  - 2.14 a party that is a trustee is bound both personally and in its capacity as a trustee; and
  - 2.15 where a word or expression is given a particular meaning, other parts of speech and grammatical forms of that word or expression have a corresponding meaning.

**3 Definitions**

- 3.1 "**Acceptance Tests**" or "**Acceptance Testing**" means the test methodology or criteria for determining acceptance by the Customer of the Goods and Services as described in the Commercial Engagement Document, subject to any change thereto effected by Change Order.

- 3.2 **"Annex"** means each annex to this Head Agreement and any additional annexes inserted by agreement of the parties. For information purposes only, it is the intention that each annex will set out the specific terms applicable to the supply of the type and nature of Goods and Services as are described in such annex.
- 3.3 **"Assumptions"** means the assumptions made by Data#3 and circumstances contemplated by the parties in respect of each engagement as at each Individual Contract's Effective Date and as set out in each Commercial Engagement Document.
- 3.4 **"Business Day"** means a day that is not a Saturday, Sunday or any other day that is a gazetted public holiday or a bank holiday in the place where an act is to be performed or a payment is to be made, as the context admits.
- 3.5 **"Business Hours"** means 8:30 am to 5:00 pm of each Business Day.
- 3.6 **"Change Order"** means a document signed by both parties recording any mutually agreeable changes to an Individual Contract from time to time.
- 3.7 **"Change Order Request"** has the meaning set out in clause 9.2.
- 3.8 **"Confidential Information"** means (i) any trade secrets embodied in any information relating to, but not limited to, the commercial activities, product pricing, technologies, business processes, client relationships, strategic information, Candidate personal information, Price, and any other information related to the conduct of each parties businesses; (ii) any information designated in writing by either party, by appropriate legend, as confidential; (iii) any information which if first disclosed orally is identified as confidential at the time of disclosure and is thereafter reduced to writing for confirmation and sent to the other party within thirty (30) days after its oral disclosure and designated, by appropriate legend, as confidential; and (iv) the terms and conditions of this Head Agreement and each Individual Contract.
- 3.9 **"Commercial Engagement Document"** means a written document agreed to by the parties that sets out the specific details pertaining to the supply of certain Hardware, Third Party Maintenance Contracts, Software and Services, in particular, quantities, price, product descriptions, due dates, acceptance testing requirements, IPR matters, project scope documents and any associated functional specifications. For information purposes only, it is expected that a Commercial Engagement Document may take the form of an accepted Data#3 quotation or sales proposal, Customer purchase order expressly accepted by Data#3, Data#3 tender response accepted by Customer or an agreed statement of work or scope of services setting out the nature, scope and parameters of work to be performed.
- 3.10 **"Consultancy Services"** means any consulting services supplied by Data#3 to the Customer pursuant to an Individual Contract.
- 3.11 **"Customer"** means (i) with respect to each Individual Contract formed pursuant to this Head Agreement, the specific Customer Group Company that enters into such Individual Contract; and (ii) where used in this Head Agreement, the company referred to on the header page of this Head Agreement.
- 3.12 **"Customer Group Company"** means each Customer and each Related Body Corporate of the Customer, as the context admits.
- 3.13 **"Data#3"** means Data#3 Limited and any Related Bodies Corporate of Data#3 Limited.
- 3.14 **"Developed Software"** means Software created by or on behalf of Data#3 for the Customer pursuant to this Head Agreement, as further particularised in the Commercial Engagement Document.
- 3.15 **"EULA" or "End User Licence Agreement"** means the licence agreement governing the use of certain Software as negotiated and agreed directly between the Customer and the owner of that Software.
- 3.16 **"Existing Intellectual Property"** means any Intellectual Property Rights owned by or licensed to Data#3 which exists prior to the date of this Head Agreement or is developed or acquired by Data#3 independently of this Head Agreement which is used by Data#3 or otherwise made available to the Customer under or in connection with this Head Agreement or an Individual Contract.
- 3.17 **"Foreground Intellectual Property"** means any Intellectual Property Rights created or developed by Data#3 in the performance of the Services for the Customer and which is embodied in the Materials. Foreground Intellectual Property expressly excludes any Existing Intellectual Property.
- 3.18 **"GST"** is defined in the A New Tax System (Goods and Services Tax) Act 1999.
- 3.19 **"Goods"** means either Hardware, Third Party Maintenance Contracts or Software procured or supplied pursuant to this Head Agreement as the context admits.
- 3.20 **"Hardware"** means any physical product manufactured by a third party, including any associated third party maintenance service contracts, as specified in a Commercial Engagement Document and includes each individual item, unit or component of such product.
- 3.21 **"IAAS"** means infrastructure as a service, as described in the Infrastructure as a Service and Software as a Service Annex.
- 3.22 **"Incidental Costs"** means delivery costs, Tax, installation, support or maintenance of Goods (after the expiry of any applicable manufacturer's or licensor's warranty period), any preparation of the site, or any audit of or work on the Customer's physical environments, any overtime rates, any miscellaneous costs or expenses including associated travel or accommodation.
- 3.23 **"Individual Contract"** means a separate and distinct legally binding contract formed between the Parties in accordance with the provisions of clause 1.3.
- 3.24 **"Individual Contract's Effective Date"** means the commencement date of an Individual Contract.
- 3.25 **"Intellectual Property Rights" or "IPR"** includes copyright, trade mark, design, patent, semiconductor or circuit layout rights, trade, business or company names, any right to have confidential information kept confidential or other proprietary rights or any rights to registration of those rights whether created before or after the date of this Head Agreement or the relevant Individual Contract as the context admits and whether existing in Australia or otherwise.
- 3.26 **"Key Personnel"** means the key personnel of Data#3 nominated in a Commercial Engagement Document as the personnel initially required to undertake the Services or part of the work constituting the Services.
- 3.27 **"Material" or "Materials"** means literary works or other works of authorship (such as programs, program listings, programming tools, documentation, reports, drawings and similar works) that Data#3 may deliver to the Customer as part of a Service. The term **"Material" or "Materials"** does not include licensed software products which are provided in accordance with their EULA.
- 3.28 **"Parties"** means Data#3 and the Customer.
- 3.29 **"Personal Information"** has the same meaning as in the Privacy Act 1988 (Cth) (as amended).
- 3.30 **"Price"** in relation to Goods and Services means the price payable for those Goods and Services as detailed in a Commercial Engagement Document.
- 3.31 **"Project Services"** means services supplied by Data#3 to the Customer for a particular Customer project, pursuant to an Individual Contract.
- 3.32 **"Related Body Corporate"** has the meaning given to that term as in the Corporations Act 2001.
- 3.33 **"Restraint Period"** means from an Individual Contract's Effective Date until 6 months after expiration or sooner termination of that Individual Contract.
- 3.34 **"Services"** means the services supplied by Data#3 to the Customer pursuant to an Individual Contract, including any pre-contractual advice provided relating to the Customer's choice to purchase certain Goods, Consultancy Services, IAAS and/or SAAS.
- 3.35 **"Software"** means any licensed, packaged, developed or supported software, such as Third Party Software or Developed Software as the context admits, as specified in a Commercial Engagement Document, ownership of which does not pass to the Customer unless agreed and which use is subject to its applicable EULA. For the purposes of this Head Agreement, Software expressly excludes SAAS.
- 3.36 **"SAAS"** means "software as a service", as described in the Infrastructure as a Service and Software as a Service Annex.

- 3.37 **"System"** means (i) any combination of Hardware or Software intended to be integrated or installed as a system as specified in a Commercial Engagement Document; or (ii) any existing Customer combination of Hardware or Software defined as a system, which is the subject of this Head Agreement, as the context admits.
- 3.38 **"Tax Invoice"** has the meaning as defined in the A New Tax System (Goods and Services Tax) Act 1999.
- 3.39 **"Tax"** includes any tax, GST, withholding tax, charge, rate, duty or impost imposed by any authority, but does not include any income or capital gains tax.
- 3.40 **"Third Party Maintenance Contract"** means a contract for the supply of maintenance services, typically over hardware of software, that is procured by Data#3 on behalf of the Customer, the terms of which form a contract directly between the Customer and the relevant maintenance service provider.
- 3.41 **"Third Party Software"** means software that is manufactured, licensed or owned by a third party (other than Data#3 or the Customer) (**"Third Party"**) and procured on behalf of Data#3 for the Customer, the use of which is subject to that Third Party's EULA, and where applicable, includes its associated third party support and maintenance contract.

#### 4 Customer's General Obligations

- 4.1 The Customer will cooperate fully and act reasonably and in good faith to assist in the timely progress and fulfillment of Data#3's obligations pursuant to this Head Agreement and under each Individual Contract including, but not limited to:
- (1) not unreasonably withholding or delaying the provision of any agreement, acceptance, information, assistance or other resource required by Data#3;
  - (2) providing Data#3, in a timely manner, with all Customer information, data, documentation and co-operation by its personnel reasonably required by Data#3 to deliver the Goods and Services;
  - (3) operating and performing these obligations in accordance with any applicable laws;
  - (4) providing Data#3 with all necessary access to the Customer's premises and Systems; and
  - (5) assigning specific managerial, technical and user personnel as reasonably requested by Data#3 to participate in essential activities. The Customer will ensure that all such personnel have the appropriate skills and experience to perform their functions.
- 4.2 Where required, Customer will perform its own obligations and responsibilities in accordance with an Individual Contract.
- 4.3 The Customer will be responsible for all site preparation as required to enable efficient delivery and implementation of the Goods and Services, as the context admits.
- 4.4 The Customer agrees to ensure that all Data#3's personnel, agents or sub-contractors are sufficiently trained in and aware of the Customer's specific policies and procedures (including workplace health and safety requirements) to the extent necessary and applicable prior to them commencing work at a Customer site. The Customer shall promptly advise Data#3 where such personnel have not been provided with such training.

#### 5 Data#3's General Obligations

- 5.1 Data#3 will cooperate fully and act reasonably and in good faith to ensure the timely progress and fulfillment of Data#3's obligations pursuant to an Individual Contract.
- 5.2 Data#3 will ensure that it maintains insurance policies for public and product liability for not less than \$20,000,000 per claim and in the annual aggregate and professional indemnity insurance in the amount of \$10 million for each claim and \$10,000,000 in the annual aggregate, and workers compensation insurance in the amounts required by law.
- 5.3 Data#3 agrees to comply with any mandatory obligations arising out of any relevant Federal or State legislation as applicable to the performance of each Individual Contract.
- 5.4 Data#3 agrees to operate and perform its obligations in accordance with any applicable laws.
- 5.5 Data#3 will ensure that its personnel comply with the Customer's specific policies and procedures that they are trained in and made aware of in accordance with clause 4.4 above.

#### 6 Delay

- 6.1 If Data#3 is delayed in the performance of its obligations specified in an Individual Contract, Data#3 must:
- (1) promptly notify the Customer of that delay;
  - (2) cooperate with the Customer to establish and implement (to the extent commercially possible) a work-around plan to overcome or minimise the effect of the delay; and
  - (3) if necessary, submit a Change Order Request.
- 6.2 To the extent that any delay is caused or contributed to by an act or omission of the Customer; or a Customer related event that is not within the sole control of Data#3; or a force majeure event as described in clause 18, the Customer must grant an appropriate extension of time to Data#3 to perform its obligations under an Individual Contract.
- 6.3 If the Customer does not comply with clause 6.2, it acknowledges that Data#3 may terminate the relevant Individual Contract upon giving ten (10) Business Days prior written notice to the Customer.
- 6.4 To the extent that a delay is caused solely by factors other than those set out in clause 6.2 above, the Customer must either:
- (1) grant an appropriate extension of time to Data#3 to perform those obligations; or
  - (2) provided such delay is a material delay, exercise its rights to terminate the relevant Individual Contract in accordance with the provisions of clause 15.
- 6.5 Data#3 will have no liability to the Customer in respect of a delay or series of related delays to the extent it is caused by the factors set out in clause 6.2 above.

#### 7 Change Control

- 7.1 Either party may request an amendment to an Individual Contract by Change Order.
- 7.2 The Customer may request a Change Order by submitting a request for a Change Order (**"Change Order Request"**) to Data#3. A Change Order Request must be submitted in writing to Data#3. Data#3 shall review any Change Order Request in good faith and report to Customer in writing in the form of a draft Change Order: (i) whether such change is technically feasible and if technically feasible; (ii) the reasonable impact on any Data#3 or Customer milestones contained in such Individual Contract; and (iii) any necessary revision to the Services, Acceptance Tests and Price, as appropriate. Data#3 shall be under no obligation to accept the terms of any Change Order Request and the Customer shall be under no obligation to accept the terms of any draft Change Order. If the terms of a Change Order Request are agreed by Data#3 and the terms of a respective draft Change Order are agreed by the Customer the draft Change Order shall be signed by both parties. The Customer shall bear all costs and expenses associated with any variation requested by the Customer to an Individual Contract including the cost of any feasibility study connected with the analysis of such variation. Data#3 shall be entitled to suspend the delivery of the Goods and Services, without liability, to the Customer, until such time as the issues raised by such Change Order Request have been settled by mutual agreement of the parties.
- 7.3 Data#3 may request a Change Order by submitting a draft Change Order to the Customer. Within ten (10) Business Days of receiving a draft Change Order from Data#3, Customer shall review the draft Change Order in good faith and report to Data#3 in writing whether the terms of such draft Change Order are acceptable. Customer shall be under no obligation to accept the terms of any draft Change Order. If the terms of a draft Change Order are accepted by Customer the draft Change Order shall be signed by both parties. Data#3 shall be entitled to suspend the delivery of the Goods and Services, without liability, to the Customer, until such time as the issues raised by such Change Order Request have been settled by mutual agreement of the parties.
- 7.4 Any Change Order shall be attached to the relevant Individual Contract. After execution of a Change Order by both parties the amendments detailed therein shall be incorporated into the relevant Individual Contract and Price as appropriate and shall form part of the Individual Contract to which it relates.

## 8 Prices and Payment

- 8.1 Prices for Goods and Services will be set out in each Commercial Engagement Document. Unless otherwise set out in a Commercial Engagement Document, Prices are exclusive of GST and Incidental Costs.
- 8.2 Unless otherwise set out in the Commercial Engagement Document, prior to Customer's acceptance of a Commercial Engagement Document or issue of its valid Purchase Order, quoted Prices may be modified by Data#3 without notice and are in Australian dollars. Data#3 will use reasonable endeavours to provide notice of any changes to quoted Prices to Customer.
- 8.3 The Customer must pay the Price due to Data#3 in accordance with Commercial Engagement Document or as otherwise agreed pursuant to an approved Credit Application. If a Commercial Engagement Document is silent with respect to payment terms and in the absence of an approved Credit Application, the default payment terms shall be fourteen (14) days from the date of Data#3's invoice ("**Due Date**").
- 8.4 If any sum due under an Individual Contract is not paid by the Due Date, then (without prejudice to Data#3's other rights and remedies in addition to the invoice amount), Data#3 reserves the right to charge interest on such sum on a day to day basis (as well as before any judgment) from the Due Date to the date of payment at the rate of 2% per annum above the prime lending rate of Data#3's principal banker.
- 8.5 Data#3 will provide the Customer with a correctly rendered Tax Invoice that clearly identifies the Goods and Services.
- 8.6 All sums properly due to Data#3 under an Individual Contract shall be paid in full and the Customer shall not be entitled to assert against Data#3 any credit, set-off or counterclaim in order to justify withholding payment of any sum properly due. Obligations under an Individual Contract shall be construed as divisible from obligations under any other Individual Contract for the purposes of interpreting this clause.

## 9 Confidentiality

- 9.1 Except as expressly provided elsewhere under this Head Agreement, each party shall maintain in confidence the Confidential Information disclosed by the other party and apply security measures no less stringent than the measures which that party applies to protect its own like information (but in any event not less than a reasonable degree of care) to prevent unauthorised disclosure and use of the Confidential Information.
- 9.2 The parties agree that information shall not be regarded as Confidential Information and that the recipient shall have no obligation with respect to any information which the recipient can demonstrate: (i) is already known to or in the possession of the recipient without obligations of confidentiality prior to its receipt from the disclosing party or which is publicly available at the time of disclosure; or (ii) is or becomes known to the public through no wrongful act of the recipient; or (iii) is received from a third party who is not in breach of any obligation of confidentiality in respect thereof; or (iv) is disclosed to a third party by the disclosing party without a restriction of confidentiality; or (v) is disclosed with the prior written permission of the owner; or (vi) is disclosed by the recipient in compliance with a legal requirement of a governmental agency or court of law; or (vii) is independently conceived of by the recipient without reference to the Confidential Information.

## 10 Intellectual Property Ownership and Licensing

- 10.1 The ownership and licensing of any Intellectual Property Rights in the Goods and Services, as the context admits, shall be regulated by the terms set out in each relevant Annex to this Head Agreement.

## 11 Changes to Assumptions

- 11.1 The Customer acknowledges that changes to any of the Assumptions agreed to by the parties in the relevant Commercial Engagement Document may affect the ability of Data#3 to deliver the Goods and Services in accordance with any agreed milestones and in such event the parties shall work together in good faith to minimise the impact of the change. Any change to a Commercial Engagement Document resulting from any changes to any of the Assumptions shall be managed by Change Order in accordance with the provisions of Clause 7. Data#3 shall have no liability for any delays or

increased costs in the delivery of the Goods and Services which result directly from changes to any of the Assumptions.

## 12 Risk Apportionment

- 12.1 NOTWITHSTANDING ANYTHING TO THE CONTRARY CONTAINED IN THIS HEAD AGREEMENT OR AN INDIVIDUAL CONTRACT OR OTHERWISE, NEITHER PARTY WILL BE LIABLE TO THE OTHER OR A THIRD PARTY FOR ANY INDIRECT, SPECIAL, INCIDENTAL, PUNITIVE, EXEMPLARY OR CONSEQUENTIAL LOSS OR DAMAGES WHETHER SUCH DAMAGES ARE ALLEGED AS A RESULT OF TORTIOUS CONDUCT (INCLUDING NEGLIGENCE) OR BREACH OF CONTRACT OR A LIABILITY ARISING UNDER AN INDEMNITY OR OTHERWISE EVEN IF THE OTHER PARTY HAS BEEN ADVISED OF THE POSSIBILITY OF SUCH DAMAGES AND REGARDLESS OF WHETHER ANY REMEDY HEREIN SHALL HAVE PROVEN INEFFECTIVE. SUCH LOSS OR DAMAGES SHALL INCLUDE BUT NOT BE LIMITED TO COST OF REMOVAL AND REINSTALLATION OF THE GOODS, CLAIMS BY THIRD PARTIES, LOSS OF GOODWILL, LOSS OF PROFITS, LOSS OF USE OF DATA OR SOFTWARE, INTERRUPTION OF BUSINESS OR OTHER ECONOMIC LOSS BUT NOTHING IN THIS CLAUSE SHALL OPERATE TO EXCLUDE LIABILITY FOR DEATH OR PERSONAL INJURY RESULTING FROM EITHER PARTY'S NEGLIGENCE.
- 12.2 Subject to the provisions of clause 12.1, the maximum liability of Data#3 to the Customer in aggregate for all claims, damages, costs, losses and expenses, made against Data#3 in contract, tort, pursuant to an indemnity or for any other common law or statutory cause of action or any wilful, unlawful or negligent act or omission of Data#3 or its employees, agents or subcontractors, under or in connection with:
- (1) any loss of or damage to the Customers or a third party's tangible property, real or personal, (but excluding loss of software or data), shall be limited to the sum of \$10,000,000 per occurrence and in the aggregate;
  - (2) any breach or misappropriation of Intellectual Property Rights or intangible property or breach of Confidentiality, shall be limited to the sum of \$1,000,000 per occurrence and in the aggregate;
  - (3) other than loss or damage covered by (1), (2) or (4), any loss, damage, cost or expense the subject matter of an Individual Contract shall be limited to
    - (1) In respect of Goods and/or Services (excluding IAAS and/or SAAS) the Price paid by the Customer to Data#3 for such Goods and/or Services under the relevant Individual Contract;
    - (2) In respect of IAAS and/or SAAS, the Price paid by the Customer to Data#3 for the IAAS and/or SAAS for the 12 months preceding the date the cause of action arose;
  - (4) other than loss or damage covered by (1), (2) or (3), any loss, damage cost or expense the subject matter of the Recruitment Annex shall be limited to:
    - (1) For failing to perform Project Services to the reasonable satisfaction of the Customer or with a reasonable level of due care and skill, Data#3 shall employ commercially reasonable efforts to find a replacement Candidate in accordance with the Recruitment Annex;
    - (2) For all other claims, the Service Fee paid by the Customer for the Recruitment Services under the specific Schedule to which the claim relates.
  - (5) For all other claims not covered by (1), (2), (3) or (4), Data#3's liability shall be limited to the Price paid by the Customer to Data#3 for all Goods and Services supplied by Data#3 in the 12 months prior to the date the cause of action arose.
- 12.3 Any Price paid shall be applied in priority of the longest outstanding invoices first. Where an Individual Contract does not clearly differentiate its Price between the relevant Goods and Services supplied, Data#3 shall determine such differentiation in its sole discretion (acting reasonably and in good faith) having regard to the nature of the Goods and Services supplied under such Individual Contract and the respective market values of similar offerings of Goods and Services.

- 12.4 In respect of any Goods and Services provided for the benefit of any Customer Group Company, Data#3 will have the benefit of the limitations and exclusions of liability available to it under this Head Agreement as if Data#3 was supplying those Goods and Services to the Customer and the Customer agrees to indemnify Data#3 in respect of any liability to each Customer Group Company to the extent the liability would not have arisen had those Goods and Services been provided to the Customer.
- 12.5 The Customer's exclusive remedy for any and all damages under this Head Agreement or an Individual Contract is against Data#3 and not any of its subcontractors. Data#3 remains fully responsible for the performance of all work in accordance with this Head Agreement notwithstanding the engagement of a subcontractor.
- 12.6 Subject to the limitations and exclusions of liability in this clause, if a party ('Claimant') makes a claim or commences proceedings against the other party ('Recipient') seeking indemnification against, compensation for or recovery of any liabilities, losses, damages, costs or expenses suffered or incurred by the Claimant in connection with this Head Agreement or an Individual Contract, the Recipient's liability for that claim or those proceedings will be reduced proportionately to the extent that any act or omission of the Claimant or any of its officers, agents, employees or contractors causes or contributed to those liabilities, losses, damages, cost or expenses.
- ### 13 Term
- 13.1 This Head Agreement commences on the Head Agreement Effective Date and subject to earlier termination in accordance with clause 14, continues in force for a period of three (3) years (the "Initial Term"). On expiry of the Initial Term, this Head Agreement will automatically renew for successive periods of one (1) year, unless either party gives written notice of its intention not to renew at least thirty (30) days prior to the expiry of the then current renewed annual term.
- 13.2 Each Individual Contract is an independent contract that will commence on the Individual Contract Effective Date and continue in force for the term set out therein or until each party has fulfilled its obligations under that Individual Contract (or it is terminated in accordance with its terms). Accordingly, various Individual Contracts and this Head Agreement may run concurrently and Individual Contracts may continue after termination or expiry of this Head Agreement.
- ### 14 Termination
- 14.1 Either party may terminate this Head Agreement for convenience on sixty (60) days written notice to the other party. In no event shall a party be entitled to any compensation as a result of the other party's election to terminate this Head Agreement pursuant to this clause. Termination of this Head Agreement pursuant to this clause does not have the effect of terminating any Individual Contracts. Individual Contracts will remain in force in accordance with its terms.
- 14.2 Either party may terminate this Head Agreement or each Individual Contract immediately where the other party:
- (1) commits a material breach of this Head Agreement or an Individual Contract which is not capable of being remedied;
  - (2) fails to remedy a material breach of this Head Agreement or an Individual Contract which is capable of remedy within 60 days of receipt of a written notice specifying such breach; or
  - (3) commits an act of insolvency, comes under any form of insolvency administration or assigns its rights otherwise than in accordance with this Head Agreement.
- 14.3 On termination of this Head Agreement or an Individual Contract:
- (1) the accrued rights and remedies of each Party remain unaffected.
  - (2) Data#3 will deliver a Tax Invoice to the Customer in respect of any delivered Goods that Data#3 has not invoiced the Customer at the date of termination of the relevant Individual Contract.
  - (3) Data#3 will deliver a Tax Invoice to the Customer in respect of any delivered Services that Data#3 has not invoiced the Customer at the date of termination of the relevant Individual Contract. Unless set out in an Individual Contract, such Services will be calculated by Data#3 in accordance with its then prevailing consulting rate.
- (4) Each party shall at the other party's option, either destroy or return to the other party any of its Confidential Information, including any copies thereof in its possession or control.
- (5) In respect of a termination effected by Data#3 pursuant to clause 14.2, any licenses in respect of any Developed Software granted under an Individual Contract to the Customer shall cease and the Customer shall, at Data#3's option, either destroy or return to Data#3 any copies of such Developed Software in the Customer's possession or control.
- 14.4 The following provisions will survive termination of this Head Agreement or an Individual Contract: clause 1 Head Agreement Structure and forming Individual Contracts, clause 2 Interpretation, clause 3 Definitions, clause 8 Prices and Payment (to the extent that any obligation under this clause remains outstanding), clause 9 Confidentiality, clause 12 Risk apportionment, clause 14.3, clause 15 Restraint, clause 20 General, clauses 5, 6 and 11 of the Hardware and Third Party Software Annex, clauses 17 to 19 (inclusive) of the Services Annex.
- ### 15 Solicitation of Data#3's Employees / Recruitment
- 15.1 During the Restraint Period, neither party, its employees, sub-contractors or agents may solicit for employment to or accept any approach for employment from, either directly or indirectly, any person who is employed or contracted by the other party.
- 15.2 Either party must immediately advise the other party if a person who is employed or contracted by the other party seeks to be employed or contracted by the first mentioned party before the end of the Restraint Period.
- 15.3 In the event that a situation arises where both parties agree that it is in the interests of a Data#3 employee to transfer their employment to the Customer, the parties may agree a fee to be paid by the Customer to Data#3 in consideration of the transfer. This fee shall be based on Data#3 Recruitment Solution's (Data#3's internal recruitment business) standard schedule of recruitment fees.
- ### 16 Subcontracting
- 16.1 Unless set out to the contrary in a Commercial Engagement Document, Data#3 may sub-contract the performance of an Individual Contract or any part of an Individual Contract.
- ### 17 Force Majeure
- 17.1 Data#3 is excused from performing its obligations to the extent it is prevented by circumstances beyond its reasonable control (other than lack of funds for any reason), including but not limited to acts of God, natural disasters, acts of war, riots and strikes.
- ### 18 Privacy
- 18.1 Each party must ensure that any collection, use, disclosure or transfer of Personal Information complies with all applicable laws, rules and regulations in Australia, including without limitation the Privacy Act 1988 (Cth) and the National Privacy Principles contained in Schedule 3 to that Act.
- ### 19 Disputes
- 19.1 In the event of a dispute arising, the parties will establish a dispute committee consisting of representatives from both parties and any approved sub-contractors within five (5) Business Days of the date of the dispute arising.
- 19.2 A party shall raise a dispute by giving written notice to the other party and stating therein that it requires a dispute committee to be established in accordance with clause 19.1 and also stating the nature and substance of the dispute.
- 19.3 If the dispute is not settled by agreement within ten (10) Business Days after the notice referred to in clause 19.2 is given, the parties may agree appoint a mediator and seek in good faith to settle the dispute through mediation. If the parties are unable to agree on a mediator within ten (10) Business Days after the expiration of the ten (10) Business Days referred to in this clause 19.3, the mediator must be a person nominated by the Australian Commercial Disputes Centre. Either party may request such nomination referred to

in this clause 19.3 at any time after the expiration of the second ten (10) Business Day period.

- 19.4 In the event that a mediator is appointed, all parties to this agreement agree to accept the determination of the mediator without question and to take whatever actions or pay whatever charges the mediator decides are reasonable.

## 20 General

- 20.1 *Notices:* A notice, consent, approval, request or demand in connection with this Head Agreement:
- (1) must be in writing and in English;
  - (2) must be signed by the party giving it or that party's authorised representative, officer, attorney, or solicitor;
  - (3) must be either:
    - (1) sent by facsimile to the facsimile number of the address specified by the parties, or if the addressee notifies another facsimile number for receipt of documents under this clause, then to that address; and
    - (2) left at or posted by prepaid post (airmail, if posted outside Australia) to the address of the addressee specified by the parties, or if the addressee notifies another address for receipt of documents under this clause, then at or to that address;
  - (3) sent by electronic mail to an authorised representative;
  - (4) is taken to be received:
    - (1) if hand delivered, on delivery;
    - (2) if posted in Australia, on the third Business Day after posting;
    - (3) if posted outside Australia, on the seventh Business Day after posting; and
    - (4) if sent by facsimile, when the sender's fax machine produces a report that the facsimile was sent in full to the addressee;
    - (5) if sent by electronic mail, on the next Business Day after sending the electronic mail, provided that no undeliverable notice or out of office notification was received by the sender.
  - (5) unless a later date is specified in it, takes effect on the date it is taken to be received.
- 20.2 *Assignment:* Either party may with the prior written consent of the other party (which will not be unreasonably withheld or delayed) at any time transfer, assign or novate any or all of its rights, obligations, benefit or interest under this Head Agreement or an Individual Contract.
- 20.3 *Public Statements:* Subject to clause 20, neither party shall make any public statement about this Head Agreement or the terms of an Individual Contract unless it has first obtained the written consent from the other party.
- 20.4 *Severability:* The provisions contained in each clause and sub-clause of this Head Agreement shall be enforceable independently of each of the others and if a provision of this Head Agreement is, or becomes, illegal, invalid, void or deemed unenforceable by any court or administrative body of competent jurisdiction it shall not affect the legality, validity or enforceability of any other provisions of this Head Agreement. If any of these provisions is so held to be illegal, void, invalid or unenforceable but would be legal, valid or enforceable if some part of the provision were deleted, the provision in question will apply with such modification as may be necessary to make it legal, valid or enforceable.
- 20.5 *Independent Parties:* Data#3 and the Customer are independent parties. Neither company nor their employees, consultants, contractors or agents are agents, employees or joint venturers of the other party, nor do they have the authority to bind the other party by contract or otherwise to any obligation. Neither party will represent to the contrary, either expressly, implicitly, by appearance or otherwise.
- 20.6 *Variations:* This Head Agreement may be varied from time to time providing that both parties agree to the variations in writing. Any such variations must take into account any variations in costs and delivery timeframes that may result.
- 20.7 *Waiver:* Failure or delay by either party to enforce any provision of this Head Agreement shall not be deemed a waiver of future enforcement of that or any other provision. No amendment or waiver of any provision of this Head

Agreement shall take place unless so agreed in writing by Data#3.

- 20.8 *Entire Head Agreement:* This Head Agreement, including all Annexes, constitutes the entire agreement between the parties with respect to the subject matter hereof and supersedes and replaces any prior condition, warranty, representation, statement, agreement, undertaking, indemnity (whether negligently or innocently) imposed, given or made by a party, whether written, oral or implied and may only be amended in writing and signed by both parties. Where an Individual Contract is formed pursuant to and incorporating this Head Agreement, such Individual Contract will constitute the entire agreement between the parties with respect to the subject matter contained in that Individual Contract and supersedes and replaces any prior condition, warranty, representation, statement, agreement, undertaking, indemnity (whether negligently or innocently) imposed, given or made by a party, whether written, oral or implied and may only be amended in writing and signed by both parties.
- 20.9 *Governing Law and Jurisdiction:* Unless set out the contrary in a Commercial Engagement Document, this Head Agreement shall be governed by and construed with reference to the laws of the State of Queensland and each party submits to the non-exclusive jurisdiction of the courts of Queensland and the Federal Court of Australia.
- 20.10 The Customer confirms its acceptance of the following Annexes contained in this Head Agreement:

- Hardware and Third Party Software Supply Annex
- Consultancy Services and Project Services Annex
- Recruitment Annex
- IAAS and SAAS Annex

**EXECUTED** as an agreement for and on behalf of **Data#3 Limited** and the **Customer** by their duly authorised representative(s):

**DATA#3 Limited**

**Customer**

Authorised Representative
Name:
Title:
Signature:
Date:

Authorised Representative 1
Name:
Title:
Signature:
Date:
Authorised Representative 2 or witness (if necessary)
Name:
Title:
Signature:
Date:



## HARDWARE AND THIRD PARTY SOFTWARE SUPPLY ANNEX

### 1 Definitions

- 1.1 "Delivery Date" means Data#3's estimated or indicative delivery date of the Hardware, Third Party Maintenance Contract and Third Party Software as specified in a Commercial Engagement Document.
- 1.2 "Integration" means the integration and installation, as the case may be, of each separate piece of Hardware and each item of Third Party Software, to comply with the requirements of a System as specified in a Commercial Engagement Document.

### 2 Procurement of Hardware and Third Party Software

- 2.1 Data#3 agrees to procure for and supply to the Customer the Hardware, Third Party Maintenance Contract and Third Party Software in accordance with the terms of each Individual Contract.

### 3 Integration

- 3.1 If specified in the Commercial Engagement Document, Data#3 agrees to integrate the Hardware and Third Party Software.

### 4 Delivery

- 4.1 Estimated Delivery Dates are based on information available to Data#3 from suppliers and are subject to change at any time, without prior notice. Data#3 is not responsible for delays in delivery caused by a supplier or for other reasons beyond the reasonable control of Data#3. The Customer acknowledges that Data#3 is not responsible for an inability to supply certain products as a result of changes related to the supply of certain third party products by the manufacturer.

### 5 Risk and Title

- 5.1 Risk of loss or damage to Goods will pass to the Customer when the Goods are delivered to the Customer or to the Customer's authorised representative.
- 5.2 Notwithstanding the passing of risk:
  - (1) All Goods delivered by Data#3 to the Customer remain the property of Data#3 until all monies owing to Data#3 have been paid in full. The Customer acknowledges that the sale of Goods constitutes a registered security interest under the Personal Property Securities Act (2009) (Cth) ("PPSA"). Data#3 reserves the right to register its interest in the Goods under the PPSA. Data#3 may not provide notification of registration of its interest in the Goods.
  - (2) Prior to any sale by the Customer, the Customer shall hold the Goods as bailee for Data#3 and shall return the Goods to Data#3 on demand.
  - (3) Until payment has been received in full, Data#3 will be entitled to enter the premises of the Customer (or any receiver and manager, administrator, liquidator or trustee in bankruptcy of the Customer) at any reasonable time to inspect all records in relation to all Goods supplied by Data#3 and all records in respect of the sale of those Goods by the Customer.
  - (4) Data#3 will be entitled to enter the premises of the Customer (or any receiver and manager, administrator, liquidator or trustee in bankruptcy of the Customer) at any reasonable time to recover possession of those Goods for which payment in full has not been made.
  - (5) It is agreed between Data#3 and the Customer that where Data#3 enters the premises of the Customer (or any receiver and manager, administrator, liquidator or trustee in bankruptcy of the Customer) to take possession of the Goods and it is not possible to otherwise identify the ownership of the Goods in the possession of the Customer, the Goods will be treated as though they were sold by the Customer in the same sequence as the Customer has taken delivery of the Goods. If the quantity of Goods exceeds the amount owing, Data#3 will be entitled to determine the Goods in which it claims ownership.
  - (6) The Customer must insure the Goods against loss or damage of any kind for their full value until full payment of the purchase price has been made.

### 6 Acceptance Testing

- 6.1 If specified in the Commercial Engagement Document, Data#3 agrees to perform Acceptance Testing on the Hardware and Third Party Software.

### 7 Customer Obligations

- 7.1 The Customer warrants that all information pertaining to its Hardware, Third Party Maintenance Contract, Software or Service requirements, its site and specifications is complete, accurate and has been provided to Data#3 prior to formal agreement on an Individual Contract and that all such information is specified in writing in a Commercial Engagement Document and in sufficient detail to satisfy the Customer's and Data#3's requirements of interpretation to enable the successful supply of the relevant Goods and Services to the Customer.
- 7.2 The Customer is solely responsible for the accuracy of the terms of any purchase order, the evaluation of its own requirements, the selection of the Third Party Software, Third Party Maintenance Contract and Hardware necessary to satisfy those requirements and the results obtained from the use of such Hardware or Third Party Software.
- 7.3 If compliance by Data#3 with the Customer's designs, specifications or instructions, or use by Data#3 of Intellectual Property Rights received from the Customer or the Customer's agent, results in Data#3 being subject to a claim for infringement of any Intellectual Property Right of a third party, the Customer agrees to indemnify Data#3 against any claims, demands, damages, costs and expenses made against or suffered by Data#3 as a result of any such claim or action.

### 8 Hardware Warranty

- 8.1 The Customer accepts the Hardware manufacturer's warranty in relation to the Hardware. Data#3 cannot provide any additional warranty in relation to the Hardware. Data#3 will pass on to the Customer any warranty provided to Data#3 by the relevant manufacturer of the Hardware. Data#3 will provide information to the Customer relating to the applicable Hardware manufacturer's warranty.
- 8.2 For purchases of Hardware under \$40,000,
  - (1) Data#3's Goods come with guarantees that cannot be excluded under Australian Consumer Law. Customer is entitled to a replacement or refund for a major failure and for compensation for any other reasonably foreseeable loss or damage. Customer is also entitled to have the goods repaired or replaced if the goods fail to be of acceptable quality and the failure does not amount to a major failure;
  - (2) to claim this warranty, the Customer must inform Data#3 (by providing notice to the address set out in this contract of a warranty issue within the warranty time period specified by the Hardware manufacturer. Data#3 will assist the Customer with claiming the warranty from the Hardware Manufacturer.
  - (3) The Hardware manufacturer's warranty will provide details as to who will bear the expense of claiming the warranty and (if applicable) how the Customer can claim expenses incurred in making the claim.
  - (4) the benefits to the consumer given by the warranty are in addition to other rights and remedies of the consumer under a law in relation to the goods or services to which the warranty relates.

**9 Third Party Software EULA and Warranty**

- 9.1 The Customer's use, rights and obligations in respect of Third Party Software is governed by its applicable EULA, unless it is varied by agreement between the parties to that EULA.
- 9.2 The Customer agrees to execute and be bound by the terms of the Third Party Software owner's EULA. Data#3 is able to provide the Customer with a copy of the relevant EULA for its review prior to submitting a purchase order to Data#3.
- 9.3 The Customer accepts the Third Party Software owner's warranty in relation to the Third Party Software. Data#3 cannot provide any warranty in relation to the Third Party Software.
- 9.4 For purchases of Software under \$40,000,
- (1) our goods come with guarantees that cannot be excluded under Australian Consumer Law. Customer is entitled to a replacement or refund for a major failure and for compensation for any other reasonably foreseeable loss or damage. Customer is also entitled to have the goods repaired or replaced if the goods fail to be of acceptable quality and the failure does not amount to a major failure.
  - (2) to claim this warranty, the Customer must inform Data#3 (by providing notice to the address set out in this contract) of a warranty issue within the warranty time period specified by the Third Party Software owner. Data#3 will assist the Customer with claiming the warranty from the Third Party Software owner.
  - (3) The Third Party Software owner's warranty will provide details as to who will bear the expense of claiming the warranty and (if applicable) how the Customer can claim expenses incurred in making the claim.
  - (4) the benefits to the consumer given by the warranty are in addition to other rights and remedies of the consumer under a law in relation to the goods or services to which the warranty relates.

**10 Integration Warranty**

- 10.1 The Customer accepts the relevant Hardware manufacturer's or Software owner's warranties in relation to the integration, compatibility or interoperability of those products with other Hardware and Software. Data#3 does not provide any warranty in relation to the integration, compatibility or interoperability of Hardware from different third parties, or the integration, compatibility or interoperability of Software from different owners with any such Hardware.

**11 Data#3 Assistance with Hardware, Third Party Maintenance Contract and Third Party Software Functionality Issues**

- 11.1 Any issues or problems with any Hardware, Third Party Maintenance Contract or Third Party Software functionality including, but not limited to, warranty claims, are to be resolved between the Customer and the relevant owner or manufacturer directly, subject to the terms of the Hardware manufacturer's warranty, maintenance provider or Third Party Software manufacturer's warranty and its EULA, as the case may be. Data#3 will, where possible, provide incidental and reasonable assistance to the Customer during this process. Where the Customer requests assistance by Data#3 in the resolution of such issues or problems, Data#3 reserves the right (and the Customer agrees to accept this reservation) to charge the Customer directly for such intervention on a time and materials basis. The Customer agrees that its right to pursue recovery of such charges is a matter to be pursued directly with the Third Party Software owner. A Commercial Engagement Document may otherwise contemplate Data#3 assuming a first-line warranty claims assistance support role for the Price set out therein.

**12 Exclusion of all other warranties**

- 12.1 To the extent permitted by law, and except as set out in these Annexes or otherwise specifically agreed in an Individual Contract, Data#3:
- (1) provides the Goods to the Customer on an "AS IS" basis;
  - (2) excludes all warranties and conditions, express, implied or statutory (including all implied warranties of merchantability, fitness for a particular purpose, lack of viruses, uninterrupted or error free operation, accuracy or completeness of responses or results, lack of workmanlike effort or non-infringement) regarding the Goods provided to the Customer; and
  - (3) limits the remedies available for a breach of any warranty given to the Customer to the lesser of and to the extent that such breach of warranty is capable of remedy by employing commercially reasonable efforts (as determined by Data#3 acting reasonably and in good faith, the cost of repairing or replacing those Goods; or paying the cost of having those Goods repaired or replaced.
- 12.2 Data#3 accepts no liability whatsoever for any resultant loss or damage arising directly or indirectly from any connectivity or integration with any existing Customer process, product, materials, environment or System that is not adequately accounted for in a Commercial Engagement Document, or inaccurate or incomplete Customer information.

**13 Order Cancellation Requests**

- 13.1 Each request by the Customer for cancellation of an Individual Contract relating to the return of Goods shall be dealt with pursuant to Data#3's Goods returns procedure. Pursuant to this procedure, Data#3 may not be able to accept request for cancellation or return of Goods. If Data#3 is able to accept a request for cancellation or return of Goods, then, such acceptance may be subject to specific conditions, including but not limited to, period within which it must complete the return, condition of the Goods (and its packaging), the imposition or applicable administration or restocking fees, transportation costs and arrangements.

**14 Third Party Maintenance Contracts**

- 14.1 The procurement of Third Party Maintenance Contracts establishes a maintenance contract directly between Customer and the relevant maintenance provider (usually the Goods manufacturer or owner (in the case of Third Party Software)). Data#3's responsibility in respect of the procurement of Third Party Maintenance Contracts will be fully set out in the relevant Commercial Engagement Document.

## CONSULTANCY SERVICES AND PROJECT SERVICES ANNEX

### 1 Performance of Consultancy Services and/or Project Services

- 1.1 Unless otherwise agreed, the Consultancy Services and/or Project Services will be performed by Data#3 during Business Hours of each Business Day. If work outside of Australia is performed by Data#3, then it will be conducted within the normal working hours applicable to that location, excluding the public holidays in that location, unless otherwise agreed.
- 1.2 Where the Customer provides Data#3 with at least two (2) Business Day's notice, the Consultancy Services and/or Project Services may be provided by Data#3 at times other than those set out in clause 1.1 of this Consultancy Services and Project Services Annex at a rate agreed between the parties. Where the Customer is unable to provide two (2) Business Day's notice, Data#3 will use commercially reasonable endeavours to meet the Customer's requirements, however will not accept any liability whatsoever if unable to do so.
- 1.3 Data#3 agrees to perform the Consultancy Services and/or Project Services in accordance with the terms of each Individual Contract.
- 1.4 Data#3 will perform the Consultancy Services and/or Project Services utilising such resources, employees and subcontractors as Data#3 in its sole discretion deems appropriate.
- 1.5 If an Individual Contract specifies certain Key Personnel, then Data#3 must directly engage such Key Personnel in the performance of the Consultancy Services and/or Project Services in the roles nominated. If required, Data#3 may substitute alternative personnel for the Key Personnel with the prior written consent of the Customer, which shall not be unreasonably withheld.
- 1.6 Out-of-pocket expenses will be charged as an additional cost to the Customer provided the Customer has approved the expenses in writing in advance. The Customer will not unreasonably withhold such approval.
- 1.7 Data#3 will maintain a record of all Consultancy Services and/or Project Services provided and the Customer will be given a copy of that record on request.

### 2 Acceptance Testing

- 2.1 A Commercial Engagement Document may set out a requirement for Acceptance Testing and its associated criteria in respect of the Goods, Services or System. If so, it will set out which party is to undertake the Acceptance Testing.
- 2.2 To ensure that Data#3 has a fair opportunity to substantiate the adherence or otherwise of the Goods, Services or System to the Acceptance Testing criteria, the Customer acknowledges that Data#3 is relying upon the following assumptions:
  - (1) the Customer will cooperate fully and act reasonably and in good faith to assist Data#3 in the timely progress and fulfilment of its obligations as required by the Acceptance Testing procedures;
  - (2) the Customer will continue to observe the requirements of clause 4 of the Head Agreement and any requirements set out in the Commercial Engagement Document; and
  - (3) it may be necessary to mutually agree, in good faith, on amendments to the Acceptance Testing criteria or the relevant specifications set out in the Commercial Engagement Document if either of the parties have not foreseen certain factors that are or may have a material impact on the ability for the Goods, Services or System to strictly meet the original Acceptance Testing criteria.
- 2.3 The Goods, Services or System or part of it will be accepted or deemed to be accepted by the Customer (as the context admits):
  - (1) if at any time the Customer issues an 'Acceptance Certificate' or by its conduct either explicitly or implicitly; or
  - (2) if at any time Data#3 or the Customer can reasonably demonstrate that the Goods, Services or System pass the Acceptance Testing criteria; or
  - (3) by operation of the provisions of clause 2.8 of this Consultancy Services and Project Services Annex.
- 2.4 Any dispute relating to the Acceptance Testing shall be determined in accordance with the dispute resolution procedure set out in clause 20 of the Head Agreement.
- 2.5 Unless a Commercial Engagement Document sets out to the contrary, the Acceptance Testing will be performed at the earliest opportunity after the Goods, Services or System have been delivered to the Customer. Unless otherwise agreed, the period of time to undertake the Acceptance Testing shall not exceed thirty (30) days from the date of delivery mentioned above.
- 2.6 Where the Customer is undertaking the Acceptance Tests, it will on the earlier of completion of the testing or expiry of the period mentioned in clause 2.5 of this Consultancy Services and Project Services Annex, report to Data#3, in writing, whether or not the Goods, Services or System pass the Acceptance Test criteria (and if not will provide sufficient details of the reasons for the failure). If any Goods, Services or System do not pass the Acceptance Test criteria and subject to Data#3's opinion whether such Goods, Services or System are capable of passing the Acceptance Test criteria using commercially reasonable efforts, Data#3 may apply no more than commercially reasonable efforts to modify the Goods, Services or System so that they may pass the Acceptance Test criteria and re-deliver same to the Customer for testing and determination of its acceptance. The parties may agree to repeat the above process until the Goods, Services or System pass the Acceptance Test criteria or the Customer provides written notification to Data#3 in the form of either sub-clause (1) or (3) of clause 2.8 of this Consultancy Services and Project Services Annex.
- 2.7 Where Data#3 is undertaking the Acceptance Tests and Data#3 is of the opinion (reasonably held) that the Goods, Services or System cannot pass the Acceptance Testing criteria within the period stipulated in clause 2.5 of this Consultancy Services and Project Services Annex, by employing commercially reasonable efforts (irrespective of whether the Customer or Data#3 or both parties are at fault), Data#3 will provide written evidence (in the form of a report) to the Customer outlining the reasons for its opinion and any options or recommendations available to the Customer, no later than the expiry of the period stipulated in clause 2.5 of this Consultancy Services and Project Services Annex.
- 2.8 Upon receipt of Data#3's report, the Customer will be deemed to have accepted the Goods, Services or System if it fails to respond to such report in any of the manners (or their time periods) set out as below. The Customer may provide written notification to Data#3 within seven (7) days of its receipt of the report that it:
  - (1) Accepts the Goods, Services or System "AS IS". The Customer affirms that Data#3 shall not be liable to the Customer as a result of and to the extent that the Goods, Services or System fail to meet the Acceptance Testing criteria.
  - (2) Approves of any options, recommendations or plans of action contained in Data#3's report (including any proposals associated with additional fees and changes to the Acceptance Testing criteria or as negotiated by agreement of the parties during such seven (7) day period), in which case, Data#3 will commence fresh Acceptance Testing procedures. The Customer affirms that Data#3 shall not be liable to the Customer as a result of and to the extent that the Goods, Services or System fail to meet the Acceptance Testing criteria.
  - (3) Rejects the Goods, Services or System, in which case the Customer shall permit Data#3's personnel, on seven (7) days prior written notice, to arrange to de-install the System and remove/return any or all Goods not accepted. The Customer and Data#3 shall bear their own costs in relation to a failed Acceptance Testing procedure and Data#3 shall not be liable to the Customer in any way whatsoever as a result of the Goods, Services or System failing to meet the Acceptance Testing criteria. Data#3 will refund to the Customer any Price paid to it in respect of Goods, Services or System that are rejected.

### 3 Services Warranty

- 3.1 Except where the Commercial Engagement document stipulates that Consultancy Services and/or Project Services are provided on an "as is" basis or except where otherwise required by law, Data#3 warrants that:
- (1) it will use commercially reasonable efforts to perform the Consultancy Services and/or Project Services (including the provision of any associated Materials) in accordance with a Commercial Engagement Document and any milestones set out therein; and
  - (2) all Consultancy Services and/or Project Services will be provided with due care and skill.
- 3.2 The Customer acknowledges that changes to any of the Assumptions may affect the ability of Data#3 to perform the Consultancy Services and/or Project Services in accordance with a Commercial Engagement Document and in such an event the parties shall work together in good faith to minimise the impact of the change. Any change to a Commercial Engagement Document resulting from any changes to any of the Assumptions shall be managed by Change Order in accordance with the provisions of the General Terms section of this Head Agreement. Data#3 shall have no liability for any delays or increased costs in the provision of the Consultancy Services and/or Project Services which result directly from changes to any of the Assumptions.
- 3.3 Data#3's Consultancy Services and/or Project Services warranty is valid for a period of 30 days following delivery of the Services.

### 4 Alterations to Services

- 4.1 The Customer may request alterations to the scope of the Consultancy Services and/or Project Services in accordance with the Change Control provisions contained in the General Terms section of this Head Agreement.

### 5 Materials Ownership and Licence

- 5.1 Data#3 retains all right, title and interest (including ownership of copyright) in or is entitled to use, its Existing Intellectual Property. Data#3 will deliver one (1) copy of the specified Materials to the Customer. Data#3 grants the Customer a perpetual, non-exclusive, worldwide, paid-up licence (including the right to sublicense to its Related Bodies Corporate) to use, execute, reproduce, modify, adapt, display and perform and otherwise exercise all of Data#3's Existing Intellectual Property in the Material to the extent necessary to obtain the benefit of the Services for the Customer's internal business purposes only. The Customer agrees to reproduce the copyright notice and any other legend of ownership on any copies made under this licence.
- 5.2 Data#3 acknowledges that all right, title and interest in the Foreground Intellectual Property in the Material automatically vests in the Customer on its creation, subject to receipt of full payment for the Material. To the extent that any rights in the Foreground Intellectual Property do not vest in the Customer on creation, subject to receipt of full payment for the Material, Data#3 assigns all right, title and interest in the Foreground Intellectual Property in the Material to the Customer. Data#3 must sign all documents and do anything else reasonably necessary to give effect to this clause when asked.
- 5.3 Data#3 shall use reasonable endeavours to obtain all third party assignments, licences, consents and waivers, including waivers of moral rights, to enable the Customer to use the Foreground Intellectual Property in the Material.
- 5.4 Subject to the confidentiality obligations set out in clause 10 of the Head Agreement, any idea, concept, know-how or technique which relates to the subject matter of a Service and is developed or provided by either of the Parties, or jointly by both, in the performance of a Service may (subject to applicable patents and copyrights) be freely used by either of the Parties.

### 6 Customer Obligations

- 6.1 The Customer warrants that all information pertaining to its hardware, software or service requirements, its site and specifications is complete, accurate and has been provided to Data#3 prior to formal agreement on an Individual Contract and that all such information is specified in writing in a Commercial Engagement Document and in sufficient detail to satisfy the Customer's and Data#3's requirements of interpretation to enable the successful supply of the relevant Goods and Services to the Customer.
- 6.2 If compliance by Data#3 with the Customer's designs, specifications or instructions, or use by Data#3 of Intellectual Property Rights received from the Customer or the Customer's agent, results in Data#3 being subject to a claim for infringement of any Intellectual Property Right of a third party, the Customer agrees to indemnify Data#3 against any claims, demands, damages, costs and expenses made against or suffered by Data#3 as a result of any such claim or action.

### 7 Exclusion of all other warranties

- 7.1 To the extent permitted by law, and except as otherwise set out in these Annexes or otherwise specifically agreed in an Individual Contract, Data#3:
- (1) provides Consultancy Services and/or Project Services to the Customer on an "AS IS" basis;
  - (2) excludes all warranties and conditions, express, implied or statutory (including all implied warranties of merchantability, fitness for a particular purpose, lack of viruses, uninterrupted or error free operation, accuracy or completeness of responses or results, lack of workmanlike effort or non-infringement) regarding the Goods and Services provided to the Customer; and
  - (3) limits the remedies available for a breach of any warranty for Consultancy Services and/or Project Services given to the Customer to the lesser of and to the extent that such breach of warranty is capable of remedy by employing commercially reasonable efforts (as determined by Data#3 acting reasonably and in good faith), the cost of resupplying the Consultancy Services and/or Project Services; or paying the cost of having the Consultancy Services and/or Project Services resupplied.
- 7.2 Data#3 accepts no liability whatsoever for any resultant loss or damage arising directly or indirectly from any connectivity or integration with any existing Customer process, product, materials, environment or System that is not adequately accounted for in a Commercial Engagement Document, or inaccurate or incomplete Customer information

## RECRUITMENT ANNEX

### 1 Recitals

- 1.1 Data#3's People Solutions division carries on the business of personnel recruitment within the Information, Communication and Technology Industry and offers the services of recruiting IT personnel for Customers on either a permanent or contract placement basis.
- 1.2 The Customer agrees to engage Data#3 to provide the service of personnel recruitment in accordance with the terms, and conditions of this Annex, including each attached Schedule and specifically referenced documentation.

### 2 Definitions

- 2.1 **"Candidate"** means any person or entity introduced by Data#3 as potentially suitable for the position that the Customer requires to be filled.
- 2.2 **"Commencement Date"** means the date specified in a Schedule.
- 2.3 **"Completion Date"** means the date specified in a Schedule.
- 2.4 **"Guarantee Period"** means the period of 3 months commencing on the commencement date of a Key Personnel with the Customer and, during which the Customer is entitled to enforce the guarantee.
- 2.5 **"Location"** means the address at which the Candidate, on behalf of Data#3, will perform the Project Services for the Customer, as further particularised in a Schedule.
- 2.6 **"Notice Period"** means the period(s) specified in a Schedule, as may be relevant to the Customer or to Data#3.
- 2.7 **"Parties"** means Data#3 and Customer.
- 2.8 **"Payment Term Period"** means the payment term details for payment of the Services Fee by the Customer, as further particularised in a Schedule.
- 2.9 **"Permanent Recruitment Fee"** means the fee payable by the Client to Data#3 for the Services, as further particularised in the Schedule.
- 2.10 **"Project"** means the Customer project to which the Project Services will be delivered in respect of, as further particularised in a Schedule.
- 2.11 **"Project Services"** means the specific services (eg. skill-set, position description, outline of responsibilities, generic description of deliverables) to be provided by the Candidate for the Project, as further particularised in a Schedule.
- 2.12 **"Schedule"** means any schedule to this Agreement as agreed in writing between the Parties.
- 2.13 **"Recruitment Services"** is as defined in clause 3.1 of this Recruitment Annex.
- 2.14 **"Service Fee"** means the fee payable by the Customer to Data#3 for the Recruitment Services, as further particularised in a Schedule.

### 3 Contract or Temporary Personnel Recruitment

- 3.1 Subject to the terms of this Annex, the Customer wishes to engage Data#3 to source and remotely administer a Candidate to perform the Project Services under the direction, supervision and control of the Customer, as set out in each specific Schedule (the **"Recruitment Services"**) in consideration of the Services Fee. The Customer will initiate a request to Data#3 to perform the Recruitment Services in respect of a prospective Candidate. Data#3 may decide whether to respond to such request or not in its sole discretion.
- 3.2 The Candidate, will commence providing the Project Services on the Commencement Date and will, subject to early termination, cease providing the Project Services on the Completion Date. In the event that the Project Services extend after the expiry of the Completion Date, the supply of such Project Services will continue on foot in accordance with the terms and conditions of this Annex.
- 3.3 Where a Customer desires to engage a Candidate, the parties shall promptly complete and sign a Schedule.
- 3.4 To the extent permitted by law, and except as expressly set out in this Annex or a Schedule, Data#3:
- (1) provides the Recruitment Services and the Project Services (as performed by the Candidate) to the Customer on an "AS IS" basis;
  - (2) excludes all warranties and conditions, express, implied or statutory (including all implied warranties of merchantability, fitness for a particular purpose, lack of viruses, uninterrupted or error free operation, accuracy or completeness of responses or results, lack of workmanlike effort or non-infringement) regarding the Recruitment Services and Project Services provided to the Customer; and
  - (3) limits the remedies available for a breach of any warranty given to the Customer to the lesser of and to the extent that such breach of warranty is capable of remedy by employing commercially reasonable efforts (as determined by Data#3 acting reasonably and in good faith) to the cost of re-supplying the Recruitment Services and Project Services (as the case may be); or paying the cost of having the Recruitment Services and Project Services (as the case may be) re-supplied.
- 3.5 The Customer warrants that the information provided by it to complete each Schedule will be accurate and of sufficient detail to enable Data#3 to successfully source a Candidate to provide the Project Services to the Customer.
- 3.6 The Customer acknowledges that the Candidate is not required, obliged or otherwise permitted to perform services outside the scope of the Project Services. In the event that the Customer requests the Candidate to perform services that fall outside the scope of the Project Services, then, Data#3 reserves the right to renegotiate the Services Fee to a level that is consistent with the market rate incorporating the proposed change to the Project Services.
- 3.7 The Candidate will perform the Project Services exclusively under the management, supervision and direction of the Customer.
- 3.8 The Customer will be responsible for the health and safety of the Candidate while the Candidate is providing the Project Services to the Customer and must satisfy all obligations under the applicable occupational health and safety legislation and anti-discrimination legislation. These obligations include, but are not limited to, the following:
- (1) Providing applicable induction and training to the Candidate;
  - (2) Notifying Data#3 of any applicable occupational health and safety risks or discrimination or harassment issues;
  - (3) Requiring the Candidate to perform only tasks that the Candidate is skilled to perform within the scope of the Project Services;
  - (4) Immediately notifying Data#3 of any changes in the tasks that the Candidate is assigned to outside the scope of the Project Services;
  - (5) Fully informing the Candidate of all relevant Customer organisational or site-specific policy and procedures prior to commencement of the Project Services, and promptly upon any change to such policies and procedures.
- 3.9 The Candidate will perform the Project Services during normal working hours; 8:30 a.m. to 5:00 p.m. Monday to Friday, public holidays excluded, at the Location, unless otherwise agreed in writing on a case-by-case basis.
- 3.10 Data#3, to the extent that it is reasonably possible to exert control over the Candidate, agrees to employ commercially reasonable efforts to ensure that the Candidate performs the Project Services in a professional and timely manner.
- 3.11 The Customer must sign off on all correctly rendered weekly time sheets presented to it within 24 hours.

**4 Termination: Contract or Temporary Personnel Recruitment**

- 4.1 Data#3 may terminate this Agreement or a contract formed under it by giving the Customer not less than the Notice Period in the event that a Candidate has resigned or otherwise is unfit or unable to continue supplying the Project Services to the Customer, on behalf of Data#3.
- 4.2 The Customer may terminate a Candidate assignment before the Completion Date for convenience by giving Data#3 not less than the Notice Period.
- 4.3 Where the Customer (acting reasonably and in good faith) determines that the Candidate is failing to perform the Project Services to its satisfaction, the Customer may request Data#3 in writing, to source and provide a suitable replacement Candidate within a reasonable period of time. Data#3 will employ commercially reasonable efforts to source a suitable replacement Candidate. However, Data#3 will not be liable to the Customer for failing to source a replacement Candidate within a reasonable period of time or at all.

**5 Restraint: Contract or Temporary Personnel Recruitment**

- 5.1 The Customer must not, during the term of the Agreement or a contract formed under it and for 6 months after termination engage, employ or induce any of Data#3's personnel or the Candidate, either directly or through an agency, to enter into a contract for services or employment with the Customer or any other third party to provide services comparable to those required to perform the Project Services (specifically required under each Schedule), without Data#3's written consent. If the Customer breaches the obligation set out above, it agrees to pay Data#3 a separate recruitment fee equal to:
- (1) 20% of the gross salary offered by the Customer to any of Data#3's personnel or the Candidate (where such personnel is subsequently employed by the Customer); or
  - (2) 200 hours of work (or the reasonable equivalent) performed under a Schedule to this Agreement (where the Customer is engaging such Data#3 personnel or the Candidate as an independent contractor).
- 5.2 Where the Candidate is employed by the Customer, no guarantee or guarantee period on tenure will apply.

**6 Risk: Contract or Temporary Personnel Recruitment**

- 6.1 Data#3 will employ commercially reasonable efforts to obtain accurate information from Candidates and their referees including, but not limited to, details of his/her qualifications and experience, however, the Customer acknowledges that Data#3 is not liable for any inaccuracies and that the Customer is responsible for the final recruitment decision and must satisfy itself as to the suitability of the Candidate to perform the Project Services for the Project.
- 6.2 Where Candidate, on behalf of Data#3, fails to perform the Project Services to the Customer's satisfaction or with a reasonable level of due care and skill, the Customer's sole and exclusive remedy is to request Data#3 to provide a replacement Candidate in accordance with clause 3.3 of this Recruitment Annex.

**7 Payment for Contract or Temporary Personnel Recruitment**

- 7.1 The Customer must pay the Services Fee and any agreed out of pocket expenses to Data#3 within the Payment Term Period, unless otherwise agreed in writing.
- 7.2 Data#3 may charge an administration fee of 10% on all agreed out of pocket expenses.

**8 Permanent Placement Recruitment Services**

- 8.1 Subject to the terms of this Agreement, the Customer may provide Data#3 with a 'position requirements statement' (either written or verbal) with instructions to source and introduce a suitable Candidate that may match such position requirements (the "Permanent Placement Recruitment Services").
- 8.2 The Customer undertakes to ensure that each 'position requirements statement' contains all necessary information and sufficient detail required by Data#3 to source a suitable Candidate.
- 8.3 The Customer agrees not to deal directly with any Candidate introduced by Data#3 without the prior written consent of Data#3.
- 8.4 Whilst reasonable efforts are made to maintain an acceptable standard of integrity and an efficient permanent recruitment service, introductions are only effected on the basis that Data#3 shall be under no liability for any loss or damage howsoever caused arising from or consequent upon the introduction of any Candidate (to the extent permitted by law) and that no reliance is placed by the Customer on any statement or representation concerning the Candidate made or given by either Data#3 or the Candidate. The selection of a Candidate is the Customer's exclusive responsibility and Data#3 recommends that the Customer make all offers subject to satisfactory references which it should take up directly, and to verify to their own satisfaction that all statements made by or on behalf of a Candidate as may relate to the Candidate's skills, work permits or visas, general integrity or qualifications or medical requirements which may be required by law or otherwise, are satisfied.
- 8.5 The Customer shall notify Data#3 immediately that a Candidate is engaged by it.
- 8.6 Where a Candidate that was permanently placed with the Customer resigns or is released for any reason, other than retrenchment or redundancy, during the Guarantee Period, Data#3 undertakes to employ commercially reasonable efforts to source a suitable replacement Candidate, at no additional charge, provided that Data#3 has been informed in writing of the Candidate's termination within 48 hours of their ceasing employment and provided that any Permanent Recruitment Fees outstanding to Data#3 have been paid in full within the applicable payment terms period. Under no circumstances will a refund of a Permanent Recruitment Fee (in respect of a Key Personnel) be due to the Customer. This offer of guarantee does not apply if the Candidate is retrenched or made redundant as a result of a downturn in business, closure of business, company takeover, or is released due to a change in the original position requirements statement. Only one replacement per position requirements statement is available.
- 8.7 The guarantee set out above does not apply where the Candidate has transitioned from a contractor placement with the Customer (through Data#3) to a permanent placement with the Customer.
- 8.8 If within 6 months of the date that Data#3 first introduced a Candidate to the Customer, the Customer or any third party engages such Candidate to provide services that directly or indirectly benefit the Customer, the Customer shall be deemed to have obtained the services (directly or indirectly as the case may be) as a result of the introduction by Data#3 and the Customer shall be liable to pay Data#3 a recruitment fee calculated in accordance with Data#3's then prevailing fee structure for permanent recruitment placements.
- 8.9 In the event that a dedicated press advertisement is requested to assist in the sourcing of a suitable permanent Key Personnel for the Customer's requirements, the Customer agrees to pay all agreed costs, incurred by Data#3, associated with the advertisement.

**9 Payment for Permanent Placement Recruitment Services**

- 9.1 Data#3's permanent recruitment fee (the "Permanent Recruitment Fee") for the provision of the Services is detailed in the Schedule and is payable in respect of each Candidate in accordance with clause 9.4.
- 9.2 Such Permanent Recruitment Fee will be calculated on a percentage (%) of the anticipated aggregate remuneration of any kind including, but not limited to, the value of 1 or more of the remuneration package structure components during the first year of the Candidate's engagement.
- 9.3 The remuneration package structure components are as detailed below and in the Schedule, or as otherwise agreed between the Parties.

- 
- (1) 1st Year Base salary;
  - (2) Superannuation;
  - (3) Guaranteed Bonuses (including sign-on bonuses) and / or Commissions; and
  - (4) Vehicle Allowance (or agreed amount).
- 9.4 The Permanent Recruitment Fee will become due and payable to Data#3 upon the Candidate being engaged either directly or indirectly by the Customer (whether on a full time, part time or any other basis whatsoever, and whether through the medium of a company arrangement or third party intermediary).
- 9.5 Data#3 will submit a tax invoice to the Customer for each Permanent Recruitment Fee due and the Customer agrees to pay such invoice within the Payment Term Period.
- 9.6 All fees and costs quoted are ex GST.
- 9.7 The Customer must pay any GST payable in relation to the permanent recruitment services provided by Data#3 under this Agreement.
- 9.8 If any sum due under this Agreement is not paid by the Due Date, then (without prejudice to Data#3's other rights and remedies in addition to the invoice amount), Data#3 reserves the right to charge interest on such sum on a day to day basis (as well as before any judgment) from the Due Date to the date of payment at the rate of 2% per annum above the prime lending rate of Data#3's principal banker.

#### **10 Advertising and Other Costs**

- 10.1 In the event that a dedicated press advertisement is requested to assist in the sourcing of a suitable Candidate for the Customer's requirements, the Customer agrees to pay all agreed costs, incurred by Data#3, associated with the advertisement.
- 10.2 Any agreed additional costs that may be incurred in carrying out the assignment (including advertising, travel, and courier costs) may be invoiced to the Customer as separate from the Permanent Recruitment Fee.

## Infrastructure as a Service (“IAAS”) and Software as a Service (“SAAS”) Annex

### 1 Performance of Infrastructure as a Service and Software as a Service

- 1.1 Data#3 agrees to perform the IAAS and/or SAAS in accordance with the terms of each Individual Contract.
- 1.2 Data#3 will perform the IAAS and/or SAAS utilising such infrastructure, software, resources, employees and subcontractors as Data#3 as stipulated in each Individual Contract, and otherwise as it deems appropriate.
- 1.3 If an Individual Contract specifies certain Key Personnel, then Data#3 must directly engage such Key Personnel in the performance of the IAAS and/or SAAS in the roles nominated. If required, Data#3 may substitute alternative personnel for the Key Personnel with the prior written consent of the Customer, which shall not be unreasonably withheld.
- 1.4 Data#3 will maintain a record of all IAAS and/or SAAS provided and the Customer will be given a copy of that record on request.
- 1.5 All facilities used to store and process Customer data will adhere to reasonable security standards. Data#3 has implemented industry standard systems and processes to ensure the security of Customer data. By using IAAS and/or SAAS, the Customer consents to this processing and storage of Customer data.
- 1.6 Data#3 may make commercially reasonable updates and modifications to the IAAS and/or SAAS from time to time. If Data#3 makes a material change to the IAAS and/or SAAS, Data#3 shall inform the Customer. If the Customer does not agree to the revised modifications to the IAAS and/or SAAS, the Customer is entitled to terminate the agreement upon 90 days written notice.

### 2 IAAS and SAAS Warranty

- 2.1 Except where the Commercial Engagement Document stipulates that IAAS and/or SAAS are provided on an “as is” basis, Data#3 warrants that:
  - (1) it will use commercially reasonable efforts to perform the IAAS and/or SAAS (including the provision of any associated Materials) in accordance with a Commercial Engagement Document; and
  - (2) all IAAS and/or SAAS will be provided with due care and skill.
- 2.2 The Customer acknowledges that changes to any of the Assumptions may affect the ability of Data#3 to perform the IAAS and/or SAAS in accordance with a Commercial Engagement Document and in such an event the parties shall work together in good faith to minimise the impact of the change. Any change to a Commercial Engagement Document resulting from any changes to any of the Assumptions shall be managed by Change Order in accordance with the provisions of the General Terms section of this Head Agreement. Data#3 shall have no liability for any delays or increased costs in the provision of the IAAS and/or SAAS which result directly from changes to any of the Assumptions.
- 2.3 Data#3’s IAAS and/or SAAS warranty is valid for a period of 30 days following delivery of the IAAS and/or SAAS.

### 3 Alterations to IAAS and SAAS

- 3.1 The Customer may request alterations to the scope of the IAAS and/or SAAS in accordance with the Change Control provisions contained in the General Terms section of this Head Agreement.

### 4 Materials Ownership and Licence

- 4.1 Data#3 retains all right, title and interest (including ownership of copyright) in or is entitled to use, its Existing Intellectual Property. Data#3 will deliver one (1) copy of the specified Materials to the Customer. Data#3 grants the Customer a perpetual, non-exclusive, worldwide, paid-up licence (including the right to sublicense to its Related Bodies Corporate) to use, execute, reproduce, modify, adapt, display and perform and otherwise exercise all of Data#3’s Existing Intellectual Property in the Material to the extent necessary to obtain the benefit of the Services for the Customer’s internal business purposes only. The Customer agrees to reproduce the copyright notice and any other legend of ownership on any copies made under this licence.
- 4.2 Data#3 acknowledges that all right, title and interest in the Foreground Intellectual Property in the Material automatically vests in the Customer on its creation, subject to receipt of full payment for the Material. To the extent that any rights in the Foreground Intellectual Property do not vest in the Customer on creation, subject to receipt of full payment for the Material, Data#3 assigns all right, title and interest in the Foreground Intellectual Property in the Material to the Customer. Data#3 must sign all documents and do anything else reasonably necessary to give effect to this clause when asked.
- 4.3 Data#3 shall use reasonable endeavours to obtain all third party assignments, licences, consents and waivers, including waivers of moral rights, to enable the Customer to use the Foreground Intellectual Property in the Material.
- 4.4 Subject to the confidentiality obligations set out in clause 10 of the Head Agreement, any idea, concept, know-how or technique which relates to the subject matter of a Service and is developed or provided by either of the Parties, or jointly by both, in the performance of a Service may (subject to applicable patents and copyrights) be freely used by either of the Parties.

### 5 Customer Obligations

- 5.1 The Customer warrants that all information pertaining to its hardware, software or service requirements, its site and specifications is complete, accurate and has been provided to Data#3 prior to formal agreement on an Individual Contract and that all such information is specified in writing in a Commercial Engagement Document and in sufficient detail to satisfy the Customer’s and Data#3’s requirements of interpretation to enable the successful supply of the relevant Goods and Services to the Customer.
- 5.2 If compliance by Data#3 with the Customer’s designs, specifications or instructions, or use by Data#3 of Intellectual Property Rights received from the Customer or the Customer’s agent, results in Data#3 being subject to a claim for infringement of any Intellectual Property Right of a third party, the Customer agrees to indemnify Data#3 against any claims, demands, damages, costs and expenses made against or suffered by Data#3 as a result of any such claim or action.
- 5.3 The Customer is responsible for security of its own passwords and accounts, unless otherwise set out in the Commercial Engagement Document.
- 5.4 The Customer is responsible for ensuring that it has adequate protection in place in the Customer’s systems to prevent circulation of computer programs or attacks from the Customer’s computer or network (such as viruses, worms, trojans and malicious programs (“Virus”)) and lower level denial of service (DOS) attacks. Data#3 shall use reasonable efforts to ensure the security of Data#3’s networks, but Data#3 does not guarantee that Viruses and other DOS attacks will not be distributed via Data#3’s network. Data#3 is not liable for any degradation in service, increased download or damage suffered by Customer’s as a result of any Virus or DOS.
- 5.5 The Customer is responsible for ensuring that the Customer Data complies with Acceptable Use Policy.
- 5.6 Customer will be responsible for protecting the privacy and rights of its end users under the applicable law and regulations, including the Privacy Act 1988 (Cth). The Customer shall obtain any required consents of its end users in order for Data#3 to provide the IAAS and/or SAAS.
- 5.7 For SAAS, the Customer will not, and will not allow third parties under its control to copy, modify, create a derivative work of, reverse engineer, decompile, translate, disassemble or otherwise attempt to extract the source code of the SAAS or any component of the SAAS.
- 5.8 For SAAS, The Customer will comply with the terms of any End User License Agreement relating to the Software, and will indemnify and hold harmless Data#3 against any loss, damage, cost, expense incurred by Data#3 arising from or in connection with a breach by the Customer of the terms of the End User License Agreement.



5.9 The Customer acknowledges and agrees that:

- (1) Data#3 is not the manufacturer of SaaS software or the applications that are developed as a SaaS; and
- (2) The manufacturer, developer, distributor or platform provider of SaaS software or applications may impose obligations on Data#3 in order to distribute such software or applications, in which case:
  - (a) Any obligations imposed on Data#3 will be an obligation that the Customer will owe to Data#3;
  - (b) Data#3 will hold the benefit of that obligation that the Customer owes, on trust, for the relevant manufacturer, developer, distributor or platform provider (as the case may be);
  - (c) Data#3 will provide notice to the Customer of any obligations imposed on us, from time to time.

## 6 Exclusion of all other warranties

- 6.1 To the extent permitted by law, and except as otherwise set out in these Annexes or otherwise specifically agreed in an Individual Contract, Data#3:
- (1) provides IAAS and/or SAAS to the Customer on an "AS IS" basis;
  - (2) excludes all warranties and conditions, express, implied or statutory (including all implied warranties of merchantability, fitness for a particular purpose, lack of viruses, uninterrupted or error free operation, accuracy or completeness of responses or results, lack of workmanlike effort or non-infringement) regarding the Goods and Services provided to the Customer; and
  - (3) limits the remedies available for a breach of any warranty for IAAS and/or SAAS given to the Customer to the lesser of and to the extent that such breach of warranty is capable of remedy by employing commercially reasonable efforts (as determined by Data#3 acting reasonably and in good faith), the cost of resupplying the IAAS and/or SAAS; or paying the cost of having the IAAS and/or SAAS resupplied.
- 6.2 Data#3 accepts no liability whatsoever for any resultant loss or damage arising directly or indirectly from any connectivity or integration with any existing Customer process, product, materials, environment or System that is not adequately accounted for in a Commercial Engagement Document, or inaccurate or incomplete Customer information.

## 7 No lease or transfer of title

- 7.1 IAAS is a services agreement and is not intended to, and will not constitute a lease of any real or personal property.
- 7.2 Title in any Data#3 equipment used in the provision of IAAS or SAAS shall remain at all times with Data#3.

## 8 Suspension of Service

- 8.1 Data#3 reserves the right to suspend the IAAS or SAAS without liability to the Customer:
- (1) upon seven days' notice, in the event of non-payment of any Data#3 invoice;
  - (2) immediately in the event of insolvency of the Customer, or appointment of any receiver and manager, administrator, liquidator or trustee in bankruptcy of the Customer;
  - (3) immediately upon Data#3 becoming aware of the Customer breaching the Acceptable Use Policy or the End User License Agreement;
  - (4) immediately, in the event of an emergency.

## 9 Acceptable Use Policy

- 9.1 It is prohibited to use SAAS to:
- (1) accept, transmit or distribute unsolicited bulk e-mail of advertising or promotional nature ("spam") unless the recipient of the e-mail has previously indicated their consent;
  - (2) send email or causing an email to be sent that hides or obscures the source of the email, contains invalid or forged headers or domain names or deceptive addressing;
  - (3) relay from a third party's mail server without permission, or employ techniques to hide or obscure the source of the email;
  - (4) collect or harvest screen names or email addresses of others for the purposes of sending spam or exchanging or disclosing such screen names or email addresses to third parties without consent;
  - (5) send email that may damage or affect the performance of the recipient's computer;
  - (6) send large amounts of emails that may disrupt another's computer or account; or
  - (7) persistently sent email for the purposes of causing annoyance, inconvenience or distress;
  - (8) for any prohibited activity, including containing any content that contains pornography, or otherwise defames, abuses, offends or harasses third parties or violates the copyright or intellectual property rights of others.
- 9.2 It is prohibited to use IAAS:
- (1) In a manner that causes Data#3 to breach its agreements with its third party telecommunications suppliers, or to breach a relevant law (including relevant foreign laws);
  - (2) In a manner that could result in Data#3 incurring a liability to any person, third party, government or statutory authority;
  - (3) in a manner which could interfere with or disrupt Data#3's service, or the third party networks or equipment or the provision of Data#3's service to third parties;
  - (4) in a manner which attempts to manipulate or bypass any limitations that Data#3 has placed on the Customer's service, by any means;
  - (5) monitor data or traffic on the network or system without permission;
  - (6) in a manner which infringes any third party's intellectual property rights.
- 9.3 Data#3 may take remedial action for a breach of the Acceptable Use Policy, which may include:
- (1) Suspending or terminating a Customer's Service;
  - (2) Disabling or removing material or content;
  - (3) Monitoring usage and investigating any suspected breach of the Acceptable Use Policy
  - (4) Providing written notice to the Customer of the breach and requiring the Customer to remedy the breach within 3 Business Days;
  - (5) Reporting the activity or conduct to relevant authorities or system administrators.