

your IT department
MSP BLUESHIFT



I.T. Managed Services & Backup Disaster Recovery (BUDR) Terms & Conditions

ABOUT THIS DOCUMENT AND OUR SERVICE LEVEL AGREEMENTS

- A. This document sets out the terms and conditions on which MSP Blueshift Managed Services provides IT Support to Clients. These are known as our Standard terms and conditions.
- B. These Standard terms and conditions apply to MSP Blueshift Support Service Level Agreements or IT Services provided to you.
- C. A reference herein to 'the Agreement' is a reference to MSP Blueshift Service Level Agreements or services provided to you.
- D. MSP Blueshift advises Clients that its terms and conditions are published at www.mspblueshift.com.au by stating that in the services agreement.

BACKGROUND:

- A. MSP Blueshift is in the business of providing Information Technology (IT) service and technical support.
- B. The operations of the Client involve the use of an IT network which requires ongoing service and support.
- C. The Parties have agreed to enter into the Agreement whereby MSP Blueshift will provide IT service and support to the Client on the terms and conditions hereinafter provided.

1. DEFINITIONS AND INTERPRETATION

1.1 In these terms and conditions:

"Agreement" means the Services Agreement **"Business Day"** means a day in the State of Victoria that is not a Saturday, a Sunday or a gazetted public holiday in that State. **"Client"** means the party that has entered into the agreement with MSP Blueshift. **"Commencement Date"** means the date the parties enter into the Agreement.

"Confidential Information" means:

- (i) all pricing information, business and financial information, sales and supply details, marketing strategies, customer and supplier listings, staff information, business listings, information concerning the business or customers relating to the Client or the Services;
- (ii) all information related to people who are currently or have previously wished to find employment with the Client and or any third party introduced by the Client;
- (iii) all processes, procedures, techniques, concepts, systems, manuals, licence agreements, disclosure documents, documents, agreements, contracts, notes, file and data base structures and software relating to the Services;
- (iv) any information which, by its nature, places or potentially places the Client at an advantage over its present or future business competitors;
- (v) any pricing information which, by its nature, places or potentially places the Client at a disadvantage with its present or future clients;
- (vi) any information that would otherwise at law be considered secret or confidential information; whether or not marked "Confidential" BUT does not include information which:
- (vii) at the time of first disclosure by a party is or is reasonably known to be or to have been a part of the public domain;
- (viii) after disclosure by a party is or becomes part of the public domain otherwise than by disclosure in breach of the terms of the Agreement;

- (ix) was in the possession, knowledge, custody, power or control of MSP Blueshift prior to disclosure.

"Corporations Act 2001" means the Corporations Law and may be used interchangeably in the agreement. **"Contract"** means the Agreement and may be used interchangeably herein. **"Due Date"** means the date payment is due and payable by the Client to MSP Blueshift for the supply of the Services or other matters or things of and incidental to the Agreement. **"Emergency"** means anything that is considered to be of an extreme or catastrophic nature touching or impinging upon human life, property, goods, anything material or intangible deemed necessary to give effect to the Agreement. **"Fees"** means those monthly fee described within the "costing Matrix" Section of your MSP Blueshift Services Agreement.

"GST" means

- (i) the same as in the GST Law;
- (ii) any other goods and services tax, or any tax applying to the agreement in a similar way; and
- (iii) any additional tax, penalty tax, fine, interest or other charge under a law of such a tax.

"GST Law" means the same as 'GST law' in *A New Tax System (Goods and Services Tax) Act 1999* (Cth).

"Insolvency Event" in respect of the Client means:

- (a) An externally-administered body corporate for the purposes of the Corporations Act 2001 (Cth) or an external insolvency administrator is appointed to any such party under the provisions of any companies or securities legislation of another jurisdiction;
- (b) a controller (as that term is defined in the Corporations Act 2001 (Cth)) or mortgagee in possession is appointed to the assets of the Client, or any such appointment is reasonably likely;
- (c) The Client fails to comply with a statutory demand in the manner specified in section 459F of the Corporations Act 2001 (Cth), and has not made an application to set aside such demand under section 459G of the Corporations Act 2001 (Cth);
- (d) The Client is unable to pay its debts as and when they fall due.

"Parties" means the parties to the Agreement, namely the Client and MSP Blueshift and may be used interchangeably in the Agreement or herein. **"Personal Information"** to the extent applicable to this contract has the same meaning as it has in sub-section 6(1) of the *Privacy Act 1988* (Cth). **"Related Bodies Corporate"** has the meaning given to that term in the *Corporations Act 2001*. **"Response Time"** means the maximum delay prior to MSP Blueshift responding to a request for Services of and incidental to the Agreement. **"Services"** means those services described in the Agreement. **"Services Guarantees"** means those Service response times as out in the services agreement. **"Tax Invoice"** means a tax invoice within the meaning of the GST Law. **"Term"** means the Initial Term and any Subsequent Term as set out in the services agreement. **"MSP Blueshift"** means MSP Blueshift Pty Ltd or MSP Blueshift which may be used interchangeably in the Agreement or herein.

"We" or "Us" or "Our" means MSP Blueshift and may be used interchangeably in the Agreement or herein. **"You" or "Your" or "It"** means the Client and may be used interchangeably in the Agreement or herein.

1.2 In these terms and conditions, except where the context otherwise requires:

- (a) the singular includes the plural and vice versa, and a gender includes other genders;
- (b) a reference to a definition that is capitalised may also be a reference to such definition in lower case;
- (c) another grammatical form of a defined word or expression has a corresponding meaning;
- (d) a reference to a clause, paragraph, schedule or annexure is to a clause or paragraph of, or schedule or annexure to, the agreement, and a reference to the agreement includes any schedule or annexure;
- (e) a reference to a document or instrument includes the document or instrument as novated, altered, supplemented or replaced from time to time;
- (f) a reference to A\$, \$A, dollar or \$ is to Australian currency;
- (g) a reference to time is to the time in Victoria, Australia;
- (h) a reference to a party is to a party to the agreement, and a reference to a party to a document includes the party's executors, administrators, successors and permitted assigns and substitutes;
- (i) a reference to a person includes a natural person, partnership, body corporate, association, governmental or local authority or agency or other entity;
- (j) 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;
- (k) the meaning of general words is not limited by specific examples introduced by including, for example or similar expressions;
- (l) headings are for ease of reference only and do not affect interpretation;
- (m) any agreement, representation, warranty or indemnity in favour of two or more parties (including where two or more persons are included in the same defined term) is for the benefit of them jointly and severally;
- (n) a rule of construction does not apply to the disadvantage of a party because the party was responsible for the preparation of the agreement or these terms and conditions or any part of them; and
- (o) 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. DURATION

- 2.1 The Agreement continues for its term unless otherwise stipulated or terminated in accordance with the terms and conditions herein.
- 2.2 Month to month term agreements will automatically continue until you provide in writing a notice of termination. Termination of month by month agreements will take effect at the end of the following month from which the termination notification is provided. for the avoidance of doubt: as an example: notifications received in January, agreement ends last day of February, notification received in February, agreement ends last of March.
- 2.3 At the conclusion of the six month introductory pricing unless otherwise informed by the client all six month introduction pricing agreements automatically default to a thirty six month term, calculated from the original date of the agreement.
- 2.4 MSP Blueshift will provide two calendar months grace from the end of any introductory period for agreement term and pricing negotiation purposes however at the end of those two months clause 2.3 will take effect if no other a arrangements have be agreed to in writing by both parties.

3. ACKNOWLEDGMENTS AND NOTICE

- 3.1 MSP Blueshift acknowledges:
 - (a) the Client enters into the Agreement and receives the benefit of the Services on behalf of itself;
 - (b) that, if not for the Client entering into the Agreement, the Client would not have allowed MSP Blueshift to provide the Services to it;
 - (c) the Agreement and the confidentiality obligations hereby created shall not merge or be released upon cessation of any discussions between the Parties but will continue thereafter;

4. CONFIDENTIALITY OBLIGATIONS

- 4.1 MSP Blueshift must not use the Confidential Information other than for the purpose of fulfilling the requirements of and incidental to give effect to the performance of the Agreement.
- 4.2 MSP Blueshift must maintain strict confidentiality in relation to the Confidential Information and must not divulge all or any aspect of the Confidential Information to any person not in its employ or engagement in relation to fulfilling its obligations under the Agreement.
- 4.3 If MSP Blueshift wishes to disclose any of the Confidential Information to its accountant, business, financial or legal adviser ("*Professional Advisors*"), it may do so upon advising the Client and obtaining the consent of the Client that shall not be unreasonably withheld.
- 4.4 If MSP Blueshift is uncertain whether any information comprises part of the Confidential Information then it may seek direction from the Client before divulging the information to a third party excluded by the Agreement.
- 4.5 MSP Blueshift must not grant or permit any person to have access to or possession of the Confidential Information.
- 4.6 The obligations on the Parties under this clause 4 shall not be taken to have been breached to the extent that the Confidential Information:
- (a) is disclosed by MSP Blueshift to its Professional Advisers, officers, employees, agents or subcontractors solely in order to comply with obligations or to exercise rights under the Agreement;
 - (b) is disclosed by MSP Blueshift to its internal management personnel, solely to enable effective management or auditing of related activities of and incidental to fulfilling its obligation to the Client under the Agreement;
 - (c) is authorised or required by law or by order of any regulatory authority, stock exchange, judicial or parliamentary body or governmental agency to be disclosed.
- 4.7 Where MSP Blueshift discloses Confidential Information to another person pursuant to sub-paragraphs 4.6(a) and 4.6(b), MSP Blueshift must:
- (a) notify the receiving person that the information is Confidential Information; and
 - (b) not provide the information unless the receiving person agrees to keep the information confidential.
- 4.8 If MSP Blueshift is required to make a disclosure as described in sub-paragraph 4.6(c) MSP Blueshift will disclose only the Confidential Information required to comply with the applicable law or order.
- 4.9 Notwithstanding this clause 4, the Client is not entitled to restrict the use by MSP Blueshift of any Intellectual Property in material which vests in the Client by claiming that the Intellectual Property is Confidential Information.
- 4.10 The Client agrees that it will:
- (a) treat as confidential information and keep secret during the term of this Agreement and at any time after the termination of it all information relating to the business practices or clientele of MSP Blueshift that is disclosed to it in confidence unless MSP Blueshift gives its prior written consent to such disclosure; and
- 4.11 MSP Blueshift's obligations of confidentiality shall not merge or be released upon the expiry or termination of the Agreement, and will continue thereafter.

5. IT SERVICE AND SUPPORT

- 5.1 MSP Blueshift must provide the Services to the Client:
- (a) in accordance with any Services Agreement; and
 - (b) otherwise on the terms and conditions of the Agreement, throughout the term.
- 5.2 The method of delivering the Services will be determined by MSP Blueshift in accordance with the services agreement.

5.3 MSP Blueshift must provide and carry out the Service in an efficient and professional manner and in accordance with standards generally observed in the IT industry or profession for similar services.

5.4 The Client shall:

- (a) provide all reasonable assistance requested by the personnel of MSP Blueshift in the diagnosis of any problem within the IT infrastructure and follow any reasonable direction of MSP Blueshift in the course of doing so;
- (b) make available free of charge and within a reasonable time all information, facilities and services reasonably required to enable MSP Blueshift to provide the Services;
- (c) provide reasonable access to its premises thereby granting a non-exclusive licence to MSP Blueshift to give effect to the matters described in sub-clauses 5.4(a) and (b) herein;
- (d) provide such telecommunication facilities as reasonably required by MSP Blueshift for testing and diagnostic purposes at the Client's expense.

5.5 MSP Blueshift will use best endeavours to supply the Services without warranting that supply will be interruption or error free. Despite anything else within the Agreement the Client acknowledges and accepts that the Services may not be available in all circumstances. The Client hereby agrees to indemnify and release MSP Blueshift against any claim for damages arising in contract and or tort (including negligence) for default or failure to perform our obligations under the Agreement (including Service Level Guarantees) resulting from circumstances reasonably beyond its control.. MSP Blueshift shall rely upon this clause 5.5 to the full extent permitted by law and to the extent of any inconsistency between this clause 5.5 and clause 9 herein, clause 9 shall prevail to the extent of such inconsistency.

6. Monthly Service Fees

6.1 The monthly Fees for the Services as detailed in the Agreement will be payable calendar monthly and shall be due and payable 14 days from date of invoice in the event of an account being granted or billed directly via direct debit or credit card facility.

6.2 Where payment is facilitated via standing credit card or direct debit account we will debit your credit card or nominated direct debit account for the amount of the Tax Invoice on the due date each month.

6.5 In the event a credit card or direct debit payment is rejected as and when it is due and payable under this agreement you will reimburse MSP Blueshift any fees or charges imposed by our bank for the declined payment.

6.6 Our records are prima facie evidence of the Fees payable by you under the Agreement except to the extent they are proved to be substantially incorrect.

6.7 We may pay a commission to retailers/dealers who introduced you to us (or any other person).

6.8 Accounts remaining in debit 14 days past Due Date may be placed on credit hold without notice.

6.9 We will increase or decreased on a monthly basis fixed cost based the number of servers and workstations that form and comprise your IT operating network. These changes increases or decreases will be calculated using the costing matrix that forms your current service level agreement.

7.0 SUSPENSION or TERMINATION

7.1 Without limiting our rights under the Agreement we may suspend the supply of Services with notice (which may be written or verbal) to you if:

- (a) it is an Emergency;
- (b) directed/required to do under the law; or
- (c) you fail to pay an amount due and payable that is 14 days past the Due Date for which a valid Tax Invoice has been issued.

7.2 Without limiting clause 7.1, we may suspend Services by providing 14 days written notice if:

- (a) a resolution is passed or an application is made to, or an order is made by, a court of competent jurisdiction

- (b) for the winding up of the other party (except pursuant to internal amalgamation or reconstruction);
- (b) an administrator or a receiver or a receiver and manager or an external controller is appointed to any of the assets or undertaking;
- (c) you or your guarantors (if applicable) makes an arrangement for the benefit of or enters into a arrangement or composition with its creditors;
- (d) you have an official manager or inspector appointed pursuant to the provisions of the *Corporations Act*; or
- (e) if you or your guarantors (if applicable) commit an act of insolvent trading and or are likely to be unable to pay debts as and when they fall due and payable within the meaning of the *Corporations Act 2001*.
- (f) a director is convicted of a criminal offence or is subject to regulatory action resulting in a civil penalty declaration or administrative banning order or adverse finding, including Enforceable Undertaking.

7.3 MSP Blueshift may terminate the agreement immediately if:

- (a) the Client breaches any provision of this agreement; and
- (b) MSP Blueshift gives the Client 14 days written notice specifying the nature of the Client's breach or default telling the Client what is required to be done to remedy the breach or default and advising the Client that MSP Blueshift intends to terminate this agreement if the Client fails to remedy the breach or the default within the given notice period.

7.4 Without limiting clause 2.2, the Client may immediately terminate the Agreement, by sending MSP Blueshift a written notice of that fact if:

- (a) Subject to sub-clause 7.4(c) herein MSP Blueshift repudiates a material or fundamental term of the Agreement;
- (b) an Insolvency Event occurs or MSP Blueshift cease, or threaten to cease, to conduct business; or
- (c) MSP Blueshift fails to remedy, within 30 days of written notice, to the satisfaction of the parties, a fundamental breach of service delivery incidental to the Agreement.

7.5 Any termination or expiry of the Agreement will not prejudice any equitable or legal right of action or remedy which may have accrued or manifest to either party prior to or after termination of the Agreement.

7.6 MSP Blueshift may in its absolute discretion release the Client from its obligations under the Agreement before expiration of the Term and shall be entitled to claim liquidated damages in accordance with clause 10 herein.

7.7 MSP Blueshift may at its sole discretion, with or without notification cease all or any project related services during the final month of the termination notice period. For the avoidance of doubt this includes but is not necessary limited to, any new or commenced installations or upgrades of hardware or software, the installation of any non MSP Blueshift automated software patching services or any service that is not directly related to the rectification of a reported issue.

7.7 Termination of the Services in accordance with the Agreement does not affect the application of the provisions of these terms and conditions relating to limitation of liability or indemnity.

8.0 YOUR RESPONSIBILITIES

8.1 You must:

- (a) comply promptly with our reasonable directions in relation to the provision of the Services to the Agreement;
- (b) provide promptly all information, decisions, facilities and assistance we reasonably require to supply the Services;
- (c) comply with all laws and guidelines concerning your use of the Services; and
- (d) provide us safe access to and egress from the premises to which the Services are supplied and obtain the consent of the owner (where required) for us to install, inspect, repair, maintain or remove equipment connected with the provision of the Services.

9.0 LIMITATION AND EXCLUSION OF LIABILITY

- 9.1 Subject to clause 9.4, MSP Blueshift shall not be liable to the Client for any loss or damage whatsoever or howsoever caused arising directly or indirectly in connection with the agreement, except to the extent that such liability may not lawfully be limited or excluded. For the avoidance of doubt this extends to any employees, contractors, agents, representatives, licensees or permitted assigns of MSP Blueshift.
- 9.2 Notwithstanding the generality of clause 9.1, MSP Blueshift expressly excludes liability for consequential loss or damage which may arise in respect of the Services or for loss of data, loss of, or claim for, revenue, profits, actual or potential business opportunities or anticipated savings or profit, whether direct, indirect, economic, consequential howsoever arising by way of act or omission in contract or in tort, including where our negligence is involved or we are vicariously liable. You hereby agree to release and indemnify MSP Blueshift to that extent.
- 9.3 Where we cannot by law exclude such liability, our liability to you will be limited, at our choice, to, if the breach relates to goods, the replacement or repair the goods or, if the breach relates to services, the supply of those services or the payment of the cost of those services supplied again. This clause applies despite anything else contained herein or incidental to the Agreement and to the fullest extent permitted by law.
- 9.4 Notwithstanding clause 9.1, the limitation of liability set out in clause 9.1 will not apply to any liability arising as a result of, or in connection with:
- (a) fraud or wilful misconduct by MSP Blueshift;
 - (b) breach of confidence by MSP Blueshift;
 - (c) breach of privacy by MSP Blueshift; or
 - (d) infringement of a third party's Intellectual Property Rights by MSP Blueshift.

For the purposes of this clause 9.4, the term "MSP Blueshift" shall mean MSP Blueshift, its officers, employees, sub-contractors, suppliers and agents, whether individually or collectively.

- 9.5 To the fullest extent permitted by law, we exclude all warranties implied by law except as expressly set out in the Agreement.

10.0 ENDING CONTRACT PREMATURELY RESULTS IN ENFORCEABLE LIQUIDATED DAMAGES NOT BEING A PENALTY CLAUSE

- 10.1 Without prejudice to any other rights under the Agreement or at law, if we terminate the Agreement in accordance with clause 7.4 or the Agreement prematurely ends because you are in breach of your obligations under the Agreement, it is a condition precedent that:
- (a) our rights in respect of your breaches and unfulfilled obligations under the Agreement at that time continue;
 - (b) you must pay us all outstanding Fees at that time together with an amount equal to the Fees which would have been payable if the Agreement had continued for the full Term. The parties hereby expressly covenant and agree that MSP Blueshift has the exclusive right to claim any such Fees as liquidated damages (and not as a penalty) in relation to the cost of non-performed work or goods supplied incidental to the Agreement due to the breach of the Client. The amount as liquidated damages shall be calculated on the basis of the Fee divided by 365 days multiplied by the number of days remaining had the Agreement continued for the full Term.

11. NOTICE PROVISIONS

- 11.1 Any notice, consent or other communications given or made to a party under the Agreement must be in writing and delivered or sent by email, pre-paid ordinary post or facsimile transmission to the address or facsimile number of the party as last or reasonably known to either party or to such other address or facsimile number as the party may from time to time notify for the purpose of this clause.
- 11.2 Proof of posting by pre-paid or ordinary post shall be deemed receipt within 2 Business Days after posting.
- 11.3 Proof of dispatch by facsimile is proof of receipt upon production of a facsimile report by the machine from which the facsimile is sent except where the sender machine indicates a malfunction in transmission or the recipient immediately notifies the sender of an incomplete transmission, in which case the transmission shall be deemed not to have been given or served.
- 11.4 Proof of delivery by email is proof of receipt upon production of a delivery confirmation report appearing on the sender's computer except where the sender's computer indicates delivery has not been effected in which case delivery shall be deemed not to have been effected.

12. ASSIGNMENT AND SUBCONTRACTING

- 12.1 You must not assign or otherwise transfer your rights or obligations under the Agreement without the prior written consent of MSP Blueshift, which shall not be unreasonably withheld. For the avoidance of doubt, a change in the control of a party is a deemed assignment under this clause 12.
- 12.2 We may subcontract our Service obligations under the Agreement provided that by subcontracting we are:
- (a) not relieved from any of our obligations under the Agreement; and
 - (b) liable for any breach of the Agreement committed, caused or contributed to by our subcontractors.
- This clause 12 shall not be in abrogation of clause 9 that shall apply to the full extent permitted by law despite anything else incidental to the Agreement.

13. MISCELLANEOUS

- 13.1 (Waiver) The waiver by either party of any breach of the Agreement shall not licence the other party to repeat or continue any such breach nor operate as a waiver of any subsequent breach whether of the nature or not. The failure of either party to exercise any right which it may have in the event of a breach of the Agreement shall not be deemed to be an abandonment or waiver of any right for damages injunction or otherwise.
- 13.2 (Entire Agreement) The terms and conditions herein and the Agreement set forth the entire Agreement and understanding between the parties and merges all prior discussion between them and none shall be bound by any conditions, warranties or representations with respect to the subject of the Agreement other than as expressly provided therein or any instrument subsequent to the Commencement Date of the Agreement in writing and signed by the party to be bound thereby.
- 13.3 (Force Majeure) The non-performance or delay in performance by a party of any obligation under the Agreement is excused during the time and to the extent that such performance is prevented by a circumstance or event beyond its reasonable control (Force Majeure Event). If a Force Majeure Event continues for more than 30 days, either party may terminate the Agreement immediately by notice in writing to the other party.
- 13.4 (Governing Law) The Agreement shall be deemed to have been made in the State of Victoria and construction, validity and performance of the Agreement shall be governed by the laws (as amended) of that State. The parties unconditionally submit to the jurisdiction of the Courts of that State or any superior Court of the Commonwealth having relevant jurisdiction. This shall not be in abrogation of any relevant laws of the Commonwealth of Australia. MSP Blueshift reserves the right to elect the forum in which to institute proceedings.
- 13.5 (Reading down and severance) Each clause of the terms and conditions and each part of each clause must be read as a separate and severable provision. If any provision is found to be void or unenforceable, that provision may be severed and the remainder of the agreement must be interpreted as if the severed provision had never existed.
- 13.6 (Non merger) All obligations of the parties which expressly or by their nature survive the expiration or termination of the Agreement and the licence shall continue in full force and effect notwithstanding such expiration or termination.
- 13.7 (Variation) MSP Blueshift reserves the right to vary, alter or amend the terms and conditions of the Agreement.

14 GST

- 14.1 All pricing provided unless otherwise stated in writing "GST Inclusive" is exclusive of GST.

15 PERMISSIONS

- 15.1 Permission will be sought in writing prior to and not reasonably withheld for us to disclose information or documents about your personal particulars and affairs (including credit worthiness, credit history and credit capacity and any unlisted telephone number and address) from or to credit providers and credit reporting agencies and all purposes permitted by the *Privacy Act 1988* (Cth); law enforcement agencies; debt collection agencies; a Carrier or our dealers for purposes connected with supply of the Services, billing for the Services or collecting amounts invoiced for the Services.
- 15.2 You permit us to collect, store, use and disclose your Personal Information (as defined in the *Privacy Act 1988* (Cth) (including promotional or other services we offer).