

Ausenco Cloud Terms of Service

Last updated: 24 July 2024

1 These Terms

1.1 Legally Binding Agreement

These terms together with our Order Form constitute a legally binding agreement (**Agreement**) between **Ausenco Services Pty Ltd ABN 82 011 057 837 (Ausenco)** and the Customer whose details are set out in the Order Form, and if there is no Order Form or no Customer set out in the Order Form, the Customer is the person who clicks “I Agree” acknowledging these terms (**Customer**).

Separately, this Agreement also constitutes a legally binding agreement between Ausenco and the person who clicks “I Agree” acknowledging these terms (**User**).

1.2 Commencement Date

Unless an Order Form specifies otherwise, this Agreement commences on the earlier of the Commencement Date set out in the Order Form (if any) and the date the User clicks “I Agree” acknowledging these terms (**Commencement Date**).

2 Definitions and Interpretation

2.1 Definitions

In this Agreement, unless the context requires otherwise:

ACICA means the Australian Centre for International Commercial Arbitration.

Additional Services means the Additional Services (if any) specified in the Order Form, but for the avoidance of doubt do not include Support Services.

Administrators means the Customer’s personnel who administer the System to End Users on the Customer’s behalf.

Agreement has the meaning given under heading 1 above.

Ausenco has the meaning given under heading 1 above.

Ausenco Deliverables means any Materials, deliverables, modifications, derivative works or developments that Ausenco provides in connection with any Additional Services.

Ausenco Policies means the Privacy Policy and any other policies of Ausenco of which Ausenco notifies You in writing from time to time.

Ausenco Technology means the System (whether or not provided or accessed on a No-Charge Basis), Ausenco Deliverables, all modifications, improvements or derivative works of any of them (including as they may incorporate Feedback), and all Intellectual Property Rights in or arising out of any of the foregoing.

Australian Consumer Law means the Australian Consumer Law set out in Schedule 2 of the *Competition and Consumer Act 2010* (Cth).

Beta Features means pre-release and beta products or features that Ausenco makes available in the System from time to time.

Business Day means a day, not being a Saturday, Sunday or public holiday, on which banks are generally open for business in Brisbane, Queensland, Australia.

Commencement Date has the meaning given under heading 1 above.

Commercial Terms means written terms (including any schedules) agreed between the Customer and Ausenco in relation to access to the System where such access is not on a No-Charge Basis.

Confidential Information of a party means and includes all code, inventions, know-how and business, technical and financial information of the party and any other information that the party designates as being confidential or which pursuant to these terms is deemed confidential, provided that it is identified as confidential at the time of disclosure or should be reasonably known by the Recipient to be confidential or proprietary due to the nature of the information disclosed and the circumstances surrounding the disclosure, but in any event does not include Feedback. Where Ausenco is the Discloser, for the avoidance of doubt Ausenco's Confidential Information includes any performance information relating to the System whether or not it is specifically designated at the time of communication as being confidential.

Customer has the meaning given under heading 1 above where this Agreement is between Ausenco and the Customer. Where this Agreement is between Ausenco and the User, the Customer is the party (if any) who has entered into an agreement with Ausenco enabling the Customer to provide the User with access to System as an End User.

Customer Data means all and any Materials that the Customer or its End Users enter into the System, including by submitting, uploading, transmitting or otherwise making available to or through the System.

Customer Materials means any Materials or systems owned by the Customer or the User.

Discloser means the party disclosing Confidential Information to the Recipient.

Documentation means the details and specifications set out in the user guide located at <https://orien.zendesk.com/hc/en-us/sections/900000455103-User-Guide>.

End User means an individual who is the Customer or who is permitted by the Customer or anyone else on its behalf to access the System and includes the User.

End User Account means an account established by the Customer or an End User to enable the End User to use or access the System.

Feedback means comments, questions, ideas, suggestions or other feedback, provided by End Users via, or relating to, the System, Support or Additional Services.

HIPAA means the Health Insurance Portability and Accountability Act (US), as amended and supplemented.

Intellectual Property Rights means all industrial and intellectual property rights throughout the world protected by statute or common law including all current and future registered and unregistered rights (whether or not registrable) relating to:

- (a) trade marks, business names and domain names, copyright works, circuit layouts, designs, patents, know-how, inventions and discoveries, and all other intellectual property as defined in article 2 of the *Convention Establishing the World Intellectual Property Organisation 1967*; and

- (b) any application or right to apply for the registration of any of the rights referred to in paragraph (a) above.

Laws means common law, principles of equity, and laws made by parliament (laws made by parliament include State, Territory and Commonwealth laws and regulations and other instruments under them, and consolidations, amendments, re-enactments or replacements of any of them).

Materials means any data, content, code, video, text, writings, images or other materials of any type.

No-Charge Basis means where the Customer is given access (or is permitted to enable its End Users to access) to the System at no charge to the Customer, such as with a free account or for trial use and Beta Features.

Notification Email Address means the email address(es) You used to register for use of the System or otherwise notifies Ausenco is Your email address for notification.

Order Form means the Commercial Terms (if any), but if none, means the Order Form (if any) signed by the Customer in respect of access to the System.

PCI DSS means the Payment Card Industry Data Security Standards.

Privacy Policy means Ausenco's privacy policy located at <https://orien.app/privacy-policy>.

Recipient means the party receiving Confidential Information from the Discloser.

Sensitive Data means:

- (a) "sensitive information" as defined in the *Privacy Act 1988* (Cth);
- (b) categories of data enumerated in *European Union Regulation 2016/679*, Article 9(1) or any successor legislation;
- (c) patient, medical or other protected health information regulated by HIPAA;
- (d) credit, debit or other payment card data subject to PCI DSS;
- (e) social security numbers, driver's licence numbers or other government identifiers or ID numbers; or
- (f) any data similar to the foregoing that is protected under any foreign or domestic Laws.

Subscription Term means the Customer's permitted period for subscription to the System as set out in the Order Form (and if none, the period during which Ausenco allows the Customer (and its End Users) to access the System).

Support means support for the System as agreed in the Order Form (if any).

System means the Ausenco solution to which You are gaining access by clicking "I Agree" acknowledging these terms, and will include the cloud products set out in the Order Form if any (including any client software Ausenco provides as part of those cloud products).

Training means any training or certification services provided by Ausenco.

User has the meaning given under heading 1 above.

You means the Customer where this Agreement is between the Customer and Ausenco, and means the User where this Agreement is between Ausenco and the User, and **Your** will have a similar meaning.

2.2 Inconsistency with Commercial Terms

If there is any inconsistency between these terms and the Commercial Terms where You are Customer, the Commercial Terms will prevail to the extent of any such inconsistency.

2.3 Interpretation

In this Agreement, unless the context otherwise requires:

- (a) a reference to a Party includes a reference to that Party's executor, administrator, heirs, successors, permitted assigns, guardian, and trustee in bankruptcy, all of whom, respectively, are bound by the provisions of this Agreement;
- (b) headings shall not affect the meaning and interpretation;
- (c) words importing the singular or plural shall include the plural and singular respectively;
- (d) words importing persons include all persons, entities and associations, including companies, trusts, bodies corporate, statutory bodies, partnerships, and joint venturers;
- (e) where a word or phrase is given a particular meaning, other parts of speech and grammatical forms of that word or phrase have corresponding meanings;
- (f) the words *includes*, *including* or similar expressions are not to be read as words of limitation;
- (g) if something must be done on a day that is not a Business Day, it may be done on the next day that is a Business Day;
- (h) a reference to any statute is a reference to that statute as amended and in force from time to time;
- (i) a reference to an amount of money is a reference to that amount in Australian dollars; and
- (j) all amounts payable pursuant to this Agreement shall be paid in Australian dollars.

3 Overview

3.1 Provision of Access

From the Commencement Date, Ausenco will provide the Customer with access to the System in accordance with these terms. End Users are given access from the respective dates they are enabled as End Users.

3.2 Not Contingent

You agree that your access to the System (whether purchased or on a No-Charge Basis) is neither contingent upon the delivery of any future functionality or features of the System nor dependent upon any oral or written public comments made by Ausenco with respect to future functionality or features.

4 Cloud Administration

4.1 Administrators and End Users

You acknowledge and agree that:

- (a) via the System, You may be able to specify certain End Users as Administrators, who will have important rights and controls over End Users' use of the System, which may include entering into further transactions that may incur fees, modifying End User accounts, setting End User usage permissions, and managing access to Customer Data by End Users or others;
- (b) the Customer is and will remain (and Ausenco will not be) responsible for any and all actions taken by Administrators and End Users in relation to or during their access to the System, including as described above;
- (c) You are and will remain (and Ausenco will not be) responsible for any and all actions taken by You in relation to or during Your access to the System, including as described above; and
- (d) Ausenco's responsibilities do not extend to the internal management or administration of the System for Customer.

4.2 End User Consent

The Customer must provide:

- (a) all required disclosures to and will obtain and maintain all required consents from End Users to allow:
 - (i) Administrators to have the access described in these terms and the Privacy Policy; and
 - (ii) Ausenco's provision of access to the System to Administrators and End Users; and
- (b) evidence of such consents upon reasonable request from Ausenco.

4.3 Credentials

The Customer must ensure that all End Users:

- (a) keep their (and You must ensure that You keep Your) user IDs and passwords or other access credentials for the System strictly confidential; and
- (b) do not (and You must not) share such information with any unauthorized person.

4.4 Unauthorized Use or Access

You agree to notify Ausenco immediately on becoming aware of any unauthorized use of access credentials or unauthorized use of or access to the System.

4.5 Age Requirement

The System is not intended for, and should not be used by, anyone under the age of 16. The Customer is responsible for ensuring that all End Users are at least 16 years old.

5 Customer Responsibility

The Customer and the User must, and the Customer must procure that its End Users:

- (a) have sole responsibility for the accuracy, quality, integrity, reliability and appropriateness of all Customer Data that is entered into the System;
- (b) use commercially reasonable efforts to prevent unauthorized access to or use of the System and notify Ausenco promptly of any such unauthorized access or use;
- (c) comply with all applicable Laws in accessing and using the System; and
- (d) provide and maintain their own equipment, software, networks and communications lines, including any public lines required to properly access the System and any relevant content or data.

6 Rules of Access

6.1 Access

Subject to these terms, during the Subscription Term, You may access and use the System for and only for the Customer's own business purposes or Your own personal use, as applicable, all in accordance with the terms of the Agreement and the Commercial Terms as applicable. The rights granted to You in this clause are non-exclusive, non-sublicensable and non-transferable.

6.2 Support

During the Subscription Term, Ausenco will provide Support (if any) agreed in the Order Form.

6.3 Restrictions

Except as otherwise expressly permitted in these terms, You must not:

- (a) reproduce, modify, adapt or create derivative works of all or any part of the System;
- (b) rent, lease, distribute, sell, sublicense, transfer or provide access to the System to a third party;
- (c) provide to any third party (without first obtaining written permission from Ausenco to do so) copies of any Materials produced by Ausenco or by or via the System;
- (d) use the System for the benefit of any third party;
- (e) incorporate any part of the System into a product or service You provide to a third party;
- (f) interfere with or otherwise circumvent mechanisms in the System intended to limit Your (or anyone's) use;
- (g) reverse engineer, disassemble, decompile, translate or otherwise seek to obtain or derive the source code, underlying ideas, algorithms, file formats or non-public APIs to any part of the System, except to the extent expressly permitted by applicable Law (and then only upon advance notice to Ausenco in writing);

- (h) remove or obscure any proprietary or other notices contained in any part of the System;
- (i) use the System for competitive analysis or to build competitive products;
- (j) publicly disseminate information regarding the performance of the System; or
- (k) encourage or assist any third party to do any of the foregoing.

7 GDPR Processing

If the Customer is in the EU or Switzerland or is otherwise subject to the territorial scope of *Regulation (EU) 2016/679 (General Data Protection Regulation)* or any successor legislation, the Customer can request and complete the Ausenco Data Processing Addendum.

8 Customer Data

8.1 Title to Customer Data

The Customer, or the User as applicable, retains all right, title and interest in and to Customer Data in the form submitted to the System.

8.2 Access to Customer Data

- (a) Subject to these terms, and solely to the extent necessary to provide access to the System to You, You grant Ausenco a worldwide, limited term licence to access, use, process, copy, distribute, perform, export, and display Customer Data You submit to the System.
- (b) Solely to the extent that reformatting Customer Data for display in the System constitutes a modification or derivative work, the foregoing licence also includes the right to make modifications and derivative works.
- (c) Ausenco may also access the Customer's and End Users' accounts in order to respond to support requests (but is not obliged to provide any support unless a specific agreement for that has been entered into).

8.3 Customer Data Compliance

- (a) You must ensure that Your and Your End Users' use of the System complies at all times with these terms and all Laws.
- (b) You represent and warrant that:
 - (i) You have obtained all necessary rights, releases and permissions to submit all Customer Data to the System and to grant the rights granted to Ausenco in these terms; and
 - (ii) Customer Data and its submission and use as You authorize in these terms will not violate:
 - (A) any Laws;
 - (B) any third-party rights (including Intellectual Property Rights); or
 - (C) any of Your or third-party policies or terms governing any of the Customer Data.

- (c) Other than Ausenco's express obligations set out in these terms, Ausenco assumes and will have no responsibility or liability for Customer Data, and You acknowledge and agrees that You are solely responsible for Customer Data and the consequences of submitting and using it with the System.

8.4 No Sensitive Data

You agree that:

- (a) You will not (and will ensure that Your End Users do not) submit to the System (or use the System to collect) any Sensitive Data;
- (b) Ausenco is not acting as the User's or Customer's *Business Associate* or *subcontractor* (as such terms are defined and used in HIPAA);
- (c) the System is neither HIPAA nor PCI DSS compliant; and
- (d) notwithstanding any other provision of these terms or HIPAA to the contrary, Ausenco has no liability under these terms for Sensitive Data.

8.5 Indemnity

You agree to defend, indemnify and hold harmless Ausenco, its officers, directors, agents and employees, from and against any and all claims, costs, damages, losses, liabilities and expenses (including reasonable legal fees and costs) resulting from any claim arising from or related to:

- (a) Your breach of any of these terms;
- (b) any claims or disputes brought by Your End Users arising out of their use of the System; or
- (c) Customer Materials You or Your End Users submit to the System.

8.6 Content Monitoring

Ausenco has no obligation to monitor any content uploaded to the System. However, if Ausenco deems such action necessary based on Your or an End User's violation of these terms, including any Ausenco Policies, or in response to lawful takedown requests that Ausenco receives, Ausenco may:

- (a) remove the relevant Customer Data from the System; or
- (b) suspend Your (and/or any End Users') access to the System.

8.7 Notification

Ausenco will use reasonable efforts to provide the Customer with advance notice of any removals and suspensions when practicable, but if Ausenco determines that the Customer's (or any End User's) actions are in breach of any Laws or endanger the operation of the System or other users, Ausenco may suspend the Customer's (or any End Users') access or remove any Customer Data immediately without notice.

8.8 Liability

You agree that Ausenco will have no liability to You for removing or deleting Customer Data from or suspending the Customer's or any End Users' access to any part of the System as described in this clause 8.

9 Third-Party Products

Ausenco does not warrant that the System will function correctly or as intended when used in combination with any particular third party products. You agree that Your use of any third party products in conjunction with the System is entirely at Your sole risk and Ausenco will not have any responsibility or liability to You or any End Users in any way for any outcome arising out of use of third party products in conjunction with the System.

10 Additional Services

10.1 Applicability

This clause 10 only applies if the Order Form specifies that Ausenco will provide Additional Services to the Customer.

10.2 Ausenco's Deliverables

Ausenco will retain all right, title and interest in and to all Ausenco Deliverables and all Intellectual Property Rights in or arising out of any of them.

10.3 Customer Materials

The Customer:

- (a) agrees to provide Ausenco with reasonable access to Customer Materials as reasonably necessary for the provision of Additional Services, failing which performance of Additional Services will not be required until such access is provided;
- (b) retains all rights in all and any Customer Materials, subject to Ausenco's ownership of all parts of the System, Ausenco Deliverables and of Ausenco Technology; and
- (c) licenses Ausenco to use the Customer Materials for the purpose of performing the Additional Services, and represents and warrants that the Customer has all necessary rights in all Customer Materials to provide access to Ausenco for such purposes.

10.4 Training Not Included

For the avoidance of doubt, unless Training is specifically included as an Additional Service in the Order Form (if any), Ausenco's provision of Training is not included with provision of access to the System and will only be provided if agreed under a separate agreement.

11 Billing, Payment and Renewals

All terms relating to billing, payment for and renewal of access to the System are set out in and governed by the Commercial Terms.

12 Evaluation and Trial Products & Beta Features

12.1 No-Charge Basis

Where access to the System or Beta Features is offered on a No-Charge Basis, use of the System or Beta Features is subject to any additional terms that Ausenco specifies and is only permitted during the Subscription Term Ausenco designates (or, if not designated, until terminated in accordance with these terms). Ausenco

may modify or terminate access to the System or any Beta Features provided on a No-Charge Basis at any time in its sole discretion, without liability to You.

12.2 Beta Features

- (a) You understand that any Beta Features are still under development, may be inoperable or incomplete and are likely to contain more errors and bugs than the System as generally available.
- (b) In some circumstances, a fee may be charged in order to allow access to Beta Features, but the Beta Features will remain subject to this clause.
- (c) All information regarding the characteristics, features or performance of any part of the System or Beta Features provided on a No-Charge Basis constitutes Ausenco's Confidential Information.

12.3 Liability Limitation

To the maximum extent permitted by applicable law, Ausenco disclaims all obligations or liabilities with respect to any part of the System or Beta Features offered or provided on a No-Charge Basis, including any support, warranty and indemnity obligations. NOTWITHSTANDING ANYTHING ELSE IN THESE TERMS, AUSENCO'S MAXIMUM AGGREGATE LIABILITY TO YOU IN RESPECT OF ANY PART OF THE SYSTEM OR BETA FEATURES OFFERED OR PROVIDED ON A NO-CHARGE BASIS WILL BE AUD \$100.

13 Intellectual Property Rights

13.1 Ausenco Technology

The System and its components (including all Ausenco Technology) are provided under a limited licence only on these terms and all right, title and interest in and to the System and Ausenco Technology and all Intellectual Property Rights in or arising out of all or any of those remains solely with Ausenco and its licensors.

13.2 Feedback

Ausenco may use, copy, disclose, license, distribute and exploit any Feedback in any manner without restriction and any obligation, royalty or restriction based on Intellectual Property Rights or otherwise.

14 Confidentiality

14.1 Confidential Information

Except as otherwise set out in these terms, each party agrees that all Confidential Information disclosed to that party as a Recipient by the other party as Discloser constitutes the Confidential Information of the Discloser.

14.2 Must be Kept Confidential

Except as expressly authorized in these terms, the Recipient:

- (a) must hold in confidence and not disclose any Confidential Information to third parties;
- (b) must not use Confidential Information for any purpose other than fulfilling its obligations and exercising its rights under these terms; and
- (c) may disclose Confidential Information to its employees, agents, contractors and other representatives having a legitimate need to know, provided that

they are bound to confidentiality obligations no less protective of the Discloser than (and that the Recipient remains responsible for compliance by them with the terms of) this clause 14.

14.3 Exceptions

Clause 14.2 will not apply to information which the Recipient can document:

- (a) was lawfully in its possession or known to it prior to receipt of the Confidential Information;
- (b) is or has become public knowledge through no fault of the Recipient;
- (c) is lawfully obtained by the Recipient from a third party without breach of any confidentiality obligation; or
- (d) is independently developed by employees of the Recipient who had no access to such information.

14.4 Disclosure by Legal Obligation

The Recipient may disclose Confidential Information if so required pursuant to a Law but only to the minimum extent required to comply with such Law and with advance written notice to the Discloser.

14.5 Equitable Relief

The Recipient acknowledges that disclosure of the Discloser's Confidential Information could cause substantial harm to the Discloser for which damages alone would not be a sufficient remedy, and therefore that upon any such disclosure or threat of disclosure by the Recipient, the Discloser will be entitled to appropriate equitable relief in addition to whatever other remedies it might have at law.

14.6 Publicity

Notwithstanding any other provision of these terms, Ausenco may identify the Customer as an Ausenco customer in Ausenco's promotional materials, unless and until the Customer requests that Ausenco refrain from doing so, such request to be sent by email to support@orien.zendesk.com.

15 Termination

15.1 Termination for Cause

The Customer or Ausenco may terminate this Agreement (where this Agreement is between the Customer and Ausenco) by written notice with immediate effect if the other party:

- (a) fails to cure any material breach of this Agreement within ten (10) Business Days after receiving from the party not in breach written notice of such breach;
- (b) ceases operation without a successor; or
- (c) seeks protection under any bankruptcy, receivership, trust deed, creditors' arrangement, composition or comparable proceeding, or if any such proceeding is instituted against that party (and not dismissed within sixty (60) days).

15.2 Termination for Convenience

- (a) The Customer may choose to stop using the System and terminate this Agreement at any time for any or no reason upon written notice to Ausenco, but, unless such early termination is pursuant to clause 15.1, upon any such termination:
 - (i) the Customer will not be entitled to a refund of any pre-paid fees; and
 - (ii) all outstanding applicable fees for the then-current Subscription Term or related services period (as applicable) will become immediately due and payable.
- (b) Ausenco may terminate this Agreement for convenience (where this Agreement is between the Customer and Ausenco) by giving written notice of five (5) Business Days to the Customer. If Ausenco terminates this Agreement in this way then Ausenco will refund to the Customer any pre-paid fees (on a pro rata basis as applicable) covering periods after the end of that notice period.

15.3 Effect of Termination

Upon any expiration or termination of this Agreement (where this Agreement is between the Customer and Ausenco):

- (a) all use of the System must cease and all copies of Ausenco's Confidential Information or other materials must be deleted upon Ausenco's request, including from any third-party systems;
- (b) no access will be provided to Customer Data (which Ausenco may delete irretrievably unless legally prohibited from doing so) after such expiration or termination;
- (c) the Customer is solely responsible for ensuring that all Customer Data is exported using the functionality of the System during the applicable Subscription Term;
- (d) if termination was by the Customer pursuant to clause 15.1, any prepaid fees covering the remainder of the then-current Subscription Term will be reimbursed after the effective date of termination;
- (e) if termination was by Ausenco pursuant to clause 15.1, any unpaid fees covering the remainder of the then-current Subscription Term after the effective date of termination will become immediately due and payable;
- (f) in no event will termination relieve the Customer of its obligation to pay any fees payable for the period prior to the effective date of termination.

15.4 Other Remedies

Except where an exclusive remedy may be specified in these terms, the exercise by either party of any remedy, including termination, will be without prejudice to any other remedies it may have under these terms, whether by law or otherwise.

15.5 Surviving Terms

The following provisions will survive any termination or expiration of this Agreement, namely clauses 6.3 (Restrictions), 8.5 (Customer Indemnity), 9 (Third-Party Products), 12 (Evaluation and Trial Products & Beta Features), 13 (Intellectual Property Rights), 14 (Confidentiality), 15 (Termination), 17.4 (Warranty Disclaimer),

18 (Limitations of Liability), 19 (IP Indemnification) (but solely with respect to claims arising from Customer's use of Cloud Products during the Subscription Term), 21 (Dispute Resolution) and 25 (General Provisions).

16 Warranties & Disclaimer

16.1 Power

Each party represents and warrants that it has the legal power and authority to enter into this Agreement.

16.2 Ausenco Warranties

Ausenco will use commercially reasonable efforts to:

- (a) prevent introduction of viruses, Trojan horses or similar harmful materials into the System (but Ausenco will not have any liability for harmful materials submitted by the Customer or End Users); and
- (b) ensure the System functions in accordance with the Documentation.

16.3 Warranty Remedy

If Ausenco determines (within its sole discretion) that corrections or costs required to comply with clause 16.2 have become or are likely to become uncommercial or impracticable, Ausenco may terminate this Agreement (where this Agreement is between the Customer and Ausenco) with immediate effect by giving written notice to the Customer, in which case any fees that have been pre-paid for use of the System will be reimbursed for the terminated portion of the applicable Subscription Term.

16.4 Claim Under Warranty

Clause 16.2 will not apply:

- (a) unless the Customer notifies Ausenco in writing of a claim under that clause within thirty (30) days of the date on which the non-conformity was first noticed;
- (b) if the non-conformity was caused by misuse, unauthorized modifications or third-party products, software, services or equipment; or
- (c) to any access, products or services provided on a No-Charge Basis.

16.5 Australian Consumer Law

- (a) Nothing in this Agreement is intended to limit any liability that Ausenco may have that may not by Law be limited.
- (b) For the purposes of section 64A of the Australian Consumer Law, if Ausenco is liable to the Customer for breach of any consumer warranties under the Australian Consumer Law in respect of its supply or proposed supply of products or services under this Agreement, Ausenco's liability is limited, at its option, to:
 - (i) in respect of the supply of any goods, and one or more of:
 - (A) the replacement of the goods or the supply of equivalent goods;
 - (B) the repair of the goods;

- (C) the payment of the cost of replacing the goods or of acquiring equivalent goods; or
- (D) the payment of the cost of having the goods repaired; and
- (ii) in respect of the supply of any services:
 - (A) the supplying of the services again; or
 - (B) the payment of the cost of having the services supplied again.

16.6 Disclaimers

- (a) Except as otherwise provided in this clause 16, all products and services provided or to be provided by Ausenco to You are provided “as is,” and to the maximum extent permitted by Law, Ausenco expressly disclaims any and all warranties and representations of any kind, including any warranty of non-infringement, title, fitness for a particular purpose, functionality or merchantability, whether express, implied or statutory.
- (b) Ausenco does not warrant that Your use of the System will be uninterrupted or error-free, that Ausenco will review Customer Data for accuracy or that Ausenco will preserve or maintain Customer Data without loss.
- (c) You agree and understand that:
 - (i) use of the System necessarily involves transmission of Customer Data over networks that Ausenco does not own, operate or control;
 - (ii) Ausenco is not responsible for any of the Customer Data lost, altered, intercepted or stored across such networks;
 - (iii) Ausenco cannot guarantee that its security procedures will be error-free, that transmissions of Customer Data will always be secure or that unauthorized third parties will never be able to defeat Ausenco’s security measures or those of its third party service providers;
 - (iv) Ausenco will not be liable for delays, interruptions, service failures or other problems inherent in use of the internet and electronic communications or other systems outside Ausenco’s reasonable control; and
 - (v) You may have other statutory rights, but the duration of statutorily required warranties, if any, will be limited to the shortest period permitted by Law.
- (d) Without limiting any of the foregoing paragraphs, You acknowledge and agree that if You or anyone else use the Asset Library function in the System:
 - (i) The results presented or output to You or anyone else via that function:
 - (A) represent only a generic implementation of a given asset type;

- (B) show an example in specific conditions of how such an asset has been or may be maintained;
 - (C) are not in any way tailored to suit Your or anyone else's circumstances or assets;
 - (D) do not necessarily reflect what You or anyone else will experience if You or anyone else maintain an asset in a similar way; and
 - (E) do not constitute (and You agree that You must not rely upon the same as being) professional advice; and
- (ii) Ausenco will not be liable in any way to You or anyone else for, and You agree not to make any claim against Ausenco arising out of, any adverse consequences to You or anyone else as a result of You or anyone else relying upon any results presented or output to You or anyone else via that function.

17 Limitation of Liability

17.1 Consequential Damages

Subject to clauses 16.5 and 17.3, neither party will have any liability arising out of or related to these terms for any loss of use, lost or inaccurate data, lost profits, failure of security mechanisms, interruption of business, costs of delay, or any indirect, special, incidental, reliance or consequential damages of any kind, even if informed of the possibility of such damages in advance.

17.2 Liability Cap

Subject to clauses 16.5 and 17.3, Ausenco's aggregate liability to You arising out of or related to these terms will not exceed the amount actually paid or payable by the Customer to Ausenco under these terms in the twelve (12) months immediately preceding the claim.

17.3 Excluded Claims

Clauses 17.1 and 17.2 do not apply to:

- (a) the Customer's liability to pay fees owed to Ausenco under this Agreement;
- (b) either party's express indemnification obligations in these terms; and
- (c) Your liabilities under clauses 4 (Cloud Administration) or 5 (Customer Responsibility) or for breach of clause 6.3 (Restrictions).

17.4 Application

The parties agree that the waivers and limitations specified in this clause 17 apply regardless of the form of action, whether in contract, tort including negligence), strict liability or otherwise.

18 Indemnity for Third Party IP Claims

18.1 Defence of Claims

Ausenco will defend You against any claim brought by a third party alleging that the System, when used as authorized under these terms, infringes that party's copyright, or a patent right granted in the United States, Australia or a member

nation of the European Union (**Claim**), and Ausenco will indemnify and hold You harmless against any damages and costs finally awarded on the Claim by a court of competent jurisdiction or agreed to via settlement executed by Ausenco (including reasonable legal fees), provided that Ausenco has received from You:

- (a) prompt written notice of the Claim (but in any event notice in sufficient time for Ausenco to respond without prejudice);
- (b) reasonable assistance in the defence and investigation of the Claim, including providing Ausenco a copy of the Claim, all relevant evidence in Your possession, custody, or control, and cooperation with evidentiary discovery, litigation, and trial, including making witnesses within Your employ or control available for testimony; and
- (c) the exclusive right to control and direct the investigation, defence, and settlement (if applicable) of the Claim.

18.2 Injunctions

If Your use of the System is (or is likely to be) enjoined, whether by court order or by settlement, or if Ausenco determines such actions are reasonably necessary to avoid material liability, Ausenco may, at its option and discretion:

- (a) procure the right for Your continued use of the System in accordance with these terms;
- (b) substitute a substantially functionally similar product or service; or
- (c) terminate Your right to continue using the System and (where You are the Customer) refund any prepaid amounts for the terminated portion of the Subscription Term.

18.3 Exceptions

Ausenco's obligations under clause 18.1 do not apply:

- (a) if the total aggregate fees Ausenco receives with respect to the Customer's subscription to the System in the twelve (12) month period immediately preceding the Claim is less than AUD\$50,000;
- (b) if the System is modified by any party other than Ausenco (or contractors at its request), but solely to the extent the alleged infringement is caused by such modification;
- (c) if the System is used in combination with any non-Ausenco product, software, service or equipment, but solely to the extent the alleged infringement is caused by such combination;
- (d) to unauthorized use of the System;
- (e) to any Claim arising as a result of:
 - (i) Customer Data or circumstances covered by Your indemnification obligations under these terms; or
 - (ii) any third-party deliverables or components contained with the System; or
- (f) if You settle or make any admissions with respect to a Claim without Ausenco's prior written consent.

18.4 Sole Remedy

This clause 18 states Ausenco's sole liability and Your exclusive remedy for any infringement of Intellectual Property Rights in connection with the System or any product or service provided under these terms.

19 Dispute resolution

19.1 Proceedings

If any dispute arises in relation to this Agreement (**Dispute**), including in relation to its interpretation or any aspect of its performance, no party may commence any form of legal proceedings, unless and until the parties have complied with the procedures set out in this clause 19, except where a party seeks urgent interlocutory relief or the dispute relates to compliance with this clause 19.

19.2 Notice of Dispute

If any Dispute arises, either party may give written notice (**Notice of Dispute**) to the other party claiming that a Dispute has arisen, specifying the nature of the Dispute, and request that a meeting be held between one duly authorised representative of each party within ten (10) Business Days.

19.3 Meetings between authorised representatives

If a party receives a Notice of Dispute from the other party in accordance with clause 19.2, that party, and the party that gave the Notice of Dispute, must cause an authorised representative to attend at the meeting referred to in that notice, which may be held by contemporaneous linking by telephone or live audio visual transmission (or similar).

19.4 Dispute resolution and mediation

If the parties have not resolved the Dispute within twenty (20) Business Days of the meeting referred to in clause 19.3 (or such further period as agreed in writing by them), the parties must attempt to resolve the Dispute by participating in a mediation (**Mediation**), which must be conducted in Brisbane (or as agreed in writing between the parties), in accordance with the ACICA Mediation Rules (in operation from time to time) by the ACICA, except where they conflict with this clause 19 in which case this clause 19 will prevail.

19.5 Appointment of mediator

If the parties are required by clause 19.4 to mediate the dispute, the parties agree that:

- (a) ACICA will appoint the mediator unless the parties agree on a mediator (**Mediator**);
- (b) the role of the Mediator is to assist in negotiating a resolution of the dispute via the Mediation;
- (c) the Mediator may not make a decision that is binding on the parties unless the disputing parties otherwise agree in writing;
- (d) the costs of the Mediator (and of the venue for the Mediation, if there are any such costs) must be paid equally by the disputing parties but otherwise each disputing party must pay their own costs of the Mediation; and

- (e) if the Dispute is not resolved within twenty (20) Business Days after referral to the Mediator, any disputing party may take legal proceedings to resolve the Dispute.

20 Export Restrictions

You:

- (a) acknowledge that the System is or may be subject to export restrictions by the Australian government and may be subject to import restrictions by certain foreign governments, and You agree to comply with all applicable export and import Laws in relation to Your access to, use of, and download of the System (or any part of it);
- (b) agree that You will not (and will not allow any third-party to) remove or export from Australia or allow the export or re-export of any part of the System or any direct product of it:
 - (i) into (or to a national or resident of) any embargoed or terrorist-supporting country;
 - (ii) to anyone on the Australian Government Denied Persons, Entity, or Unverified Lists or other Australian law enforcement agency lists of Specially Designated Nationals and Consolidated Sanctions list (collectively, **Prohibited Persons**);
 - (iii) to any country to which such export or re-export is restricted or prohibited, or as to which the Australian government or any agency of it requires an export licence or other governmental approval at the time of export or re-export without first obtaining such licence or approval; or
 - (iv) otherwise in violation of any export or import restrictions or Laws of any Australian or foreign agency or authority;
- (c) represent and warrant that:
 - (i) You are not located in, under the control of, or a national or resident of any such prohibited country; and
 - (ii) none of the Customer Data is controlled under the U.S. International Traffic in Arms Regulations or similar Laws in other jurisdictions;
- (d) certify that You are not a Prohibited Person nor owned, controlled by, or acting on behalf of a Prohibited Person; and
- (e) agree not to use or provide access to all or any part of the System for any prohibited end use, including to support any nuclear, chemical, or biological weapons proliferation, or missile technology, without the prior permission of the Australian and United States governments.

21 Changes

21.1 Changes to Terms

Ausenco may modify these terms and any Ausenco Policies from time to time, with effect from the next time You or any End User logs in and accepts these terms (as amended) by clicking "I Agree".

21.2 Changes to the System

You acknowledge that the System is an online subscription-based product, and that in order to provide improved customer experience or to comply with changes to Laws (or for other reasons relevant to Ausenco's business), changes may be made to the System, and Ausenco may update the applicable Documentation accordingly.

21.3 Discontinuation

Subject to Ausenco's obligation to provide access to the System and Additional Services under relevant Order Forms, any or all of the System, Additional Services and any other product or service of Ausenco or any portion or feature of any of the same may be discontinued at any time without liability to You.

22 General Provisions

22.1 Notices

The parties agree that:

- (a) any notices under these terms must be given in writing;
- (b) Ausenco may notify You through the Notification Email Address, Your account or in-product notifications;
- (c) any electronic communication will satisfy any applicable legal communication requirements, including that such communications be in writing;
- (d) any notice from:
 - (i) Ausenco to You will be deemed given upon the first Business Day after it has been sent;
 - (ii) You to Ausenco will be deemed given upon receipt;
- (e) You must provide notices to Ausenco by post to Ausenco Services Pty Ltd, c/o Ausenco, Level 6, 189 Grey Street, South Brisbane, QLD 4101, Australia, Attn: General Counsel.

22.2 Exclusion of Conventions

The terms of the United Nations Convention on Contracts for the Sale of Goods do not apply to these terms. The *Uniform Computer Information Transactions Act* will also not apply to these terms regardless of when or where adopted.

22.3 Force Majeure

Neither party will be liable to the other for any delay or failure to perform any obligation under these terms (except for a failure to pay fees) if the delay or failure is due to events which are beyond the reasonable control of such party, such as a strike, blockade, war, act of terrorism, riot, natural disaster, failure or diminishment of power or telecommunications or data networks or services, or refusal of a licence by a government agency.

22.4 Assignment

Neither party may, or shall have the power to, assign this Agreement without the prior written consent of the other, except that Ausenco may assign its rights and obligations under this Agreement without Your approval to an entity which acquires all or substantially all of Ausenco's assets.

22.5 Entire Agreement

This Agreement represents the entire agreement between the parties relating to the System and any other subject matter covered by these terms, and supersedes all prior or contemporaneous oral or written communications, proposals and representations between the parties with respect to the System or any other subject matter covered by these terms. No provision of any purchase order or other business form employed by the Customer will supersede or supplement these terms, and any such document relating to these terms will be for administrative purposes only and will have no legal effect.

22.6 Waivers

No failure or delay by an injured party in exercising any right, power or privilege under these terms will operate as a waiver of any of those things, nor will any single or partial exercise of those things preclude any other or further exercise of them or the exercise of any right, power or privilege under these terms at law or equity.

22.7 Severance

If any clause or part of any clause is in any way unenforceable, invalid or illegal, it is to be read down so as to be enforceable, valid and legal. If this is not possible, the clause (or where possible, the offending part) is to be severed from this Agreement without affecting the enforceability, validity or legality of the remaining clauses (or parts of those clauses) which will continue in full force and effect.

22.8 No merger

Any right or obligation of any party that is expressed to operate or have effect on or after the completion, expiration or termination of this Agreement for any reason, will not merge on the occurrence of that event but will remain in full force and effect.

22.9 Relationship of parties

Unless otherwise stated:

- (a) nothing in this Agreement creates a joint venture, partnership, or the relationship of principal and agent, or employee and employer between the parties; and
- (b) no party has the authority to bind any other party by any representation, declaration or admission, or to make any contract or commitment on behalf of any other party or to pledge any other party's credit.