

Structure of the Agreement: This agreement comprises these Terms and Conditions, the Details and Services Description.

1. Commencement and term

- 1.1 This agreement comes into force on the Commencement Date.
 - 1.2 This agreement continues for the Term unless terminated earlier in accordance with Clause 12.
 - 1.3 If you continue to receive the Services after the Term, this agreement will continue until terminated in accordance with Clause 12.
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2. What we will supply

We will, in accordance with the terms of this agreement supply the Services to you for the purpose of energy management of, and energy reporting relating to the Building.

3. Our standards

- 3.1 We will use our reasonable endeavours to:
 - 3.1.1 Supply the Services and perform our other obligations under this agreement, in a diligent and professional manner.
 - 3.1.2 ensure that, in providing the Services, we comply with all applicable laws, including any requirement to hold Authorisation;
 - 3.1.3 keep Our System secure and free of Viruses.
 - 3.2 However, we do not represent or guarantee that you will achieve any future energy, water or cost savings that we may forecast or predict as a result of you adopting a tactic or otherwise using the Services.
 - 3.3 Any period of time that we say in the Services Description we will take to provide a Service (such as implementation) is an estimate of the period of time we will take to provide that Service. The period of time we take to provide the Service may depend on many factors, including how quickly you are able to provide us with information or are able to connect to Our System.
 - 3.4 You acknowledge that the internet is sometimes unreliable and is difficult to secure and we do not guarantee;
 - 3.4.1 the security of our System, the interfaces you use to connect to our System or the information that passes through or is stored in Our System;
 - 3.4.2 access to Our System will be continuous, accessible at all times or fault free;
 - 3.4.3 that Our System is free of Viruses.
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4. Your obligations

- 4.1 You are solely responsible for:
 - 4.1.1 choosing, acquiring and maintaining your own equipment, facilities and systems necessary to enable you to receive the Services safely;
 - 4.1.2 ensuring that the Services are compatible with your networks and systems;
 - 4.1.3 the consequences of using the Services;
 - 4.1.4 the security of data or information that you send, receive or store using the Services.
 - 4.2 You must ensure that all equipment you use to receive the Services or to connect with Our System complies with the specifications for equipment that is "capable of receiving" the Services and connecting to Our System.
 - 4.3 You must not alter, tamper with or reverse engineer Our System or attempt to, or allow a third party, to do any of these things.
 - 4.4 You must use your reasonable endeavours to ensure that no Virus is introduced into Our System.
 - 4.5 You must:
 - 4.5.1 keep Our Equipment secure and safe;
 - 4.5.2 not damage Our Equipment;
 - 4.5.3 use Our Equipment only for the purpose for which it is provided to you;
 - 4.5.4 use Our Equipment in accordance with the manufacturer's instructions and guidelines.
 - 4.6 You must comply with:
 - 4.6.1 all applicable laws; and
 - 4.6.2 Our Policies to the extent that they relate to the Services.
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5. Payments of the Charges and invoices

- 5.1 You must pay us the Charges for Services.
 - 5.2 We will invoice you for the Charges. We may invoice you at any time for the Services. However, we normally invoice you monthly in arrears.
 - 5.3 We may include in a monthly invoice Charges that relate to a Service supplied in a period prior to the period to which the invoice relates.
 - 5.4 We may issue invoices by email.
 - 5.5 You must pay the amount of our invoice by the due date specified in the invoice or, if a due date is not specified, within 14 days of the date of our invoice.
 - 5.6 A payment to us must be made by direct transfer to Our Bank Account or, if you prefer, by providing us with a direct debit authority.
 - 5.7 We may charge you a fee for using a payment method other than a method referred to in clause 0 if the fee is specified in the Services Description.
 - 5.8 Any claim by you that that an invoice is incorrect must be made within 90 days of the date of the invoice.
 - 5.9 If you fail to make a payment on the due date, we may charge you interest at the interest rate our bank charges for a business overdraft on the due date. Interest accrues daily from the due date until the date you make payment in full. You must pay us interest when we invoice you for it.
 - 5.10 Our records are sufficient proof that a Charge is payable by you unless they are shown to be incorrect.
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6. GST

- 6.1 Words defined in the GST Law have the same meaning in this clause **Error! Reference source not found.**, unless the context makes it clear that a different meaning is intended.
 - 6.2 Unless indicated otherwise, the Charges and all other amounts referred to in this agreement are stated exclusive of GST. If GST is or will be imposed on a supply made under or in connection with this agreement, to the extent that the consideration otherwise provided for that supply under this agreement is not stated to include an amount in respect of GST on the supply;
 - 6.2.1 the consideration otherwise provided for that supply is increased by the amount of that GST; and
 - 6.2.2 the recipient must make payment of the increase at the same time as the consideration is provided subject to receipt of a tax invoice.
 - 6.3 The supplier of a taxable supply under this agreement will issue a tax invoice or adjustment note to the recipient in relation to the supply.
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7. Confidentiality

- 7.1 You must take all reasonable steps to ensure that you do not disclose Our Confidential Information or use it except for the purposes of this agreement.
 - 7.2 We will take all reasonable steps to ensure that we do not disclose Your Confidential Information or use it except for the purposes of this agreement.
 - 7.3 Clause 0 does not prevent you or us from disclosing information;
 - 7.3.1 to your or our agents, auditors, building managers or professional advisers, so long as the agent, auditor, building manager or professional adviser concerned is under a duty not to disclose or use the information except for the purpose of performing its duties;
 - 7.3.2 to a Government Agency.
 - 7.4 Your and our obligations under this clause 0 are not breached merely because Our Confidential Information or Your Confidential Information;
 - 7.4.1 is in the public domain otherwise than as a result of a breach of an obligation of confidentiality; or
 - 7.4.2 is disclosed as required by law - so long as the party:
 - (a) notifies the other party of the matter, including the identity of the person to whom the information is to be or has been disclosed, before or (if that is not possible) as soon as practicable after the disclosure is made;
 - (b) only discloses Our Confidential Information or Your Confidential Information to the extent legally required; and
 - (c) follows any reasonable direction given by the other party concerning the disclosure.
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8. **Your indemnity**

8.1 You indemnify us against all Loss we suffer or incur as a result of or relating to:

- 8.1.1 loss of or damage to our property or the property of a third party;
- 8.1.2 an infringement or alleged infringement of a third party's IP or Moral Rights;
- 8.1.3 your use of the Services,

where the Loss arises out of or as a consequence of your Default.

8.2 The amount payable under the indemnity in clause 0 is reduced **to the extent that the Loss is caused or contributed to by our Default.**

9. **Limits on our liability**

9.1 We accept liability arising from our Default in supplying the Services if it results in:

- 9.1.1 damage to your tangible property, but our liability is limited to repairing or replacing the property or paying the cost of repairing or replacing it.

9.2 You are not entitled to recover damages from us for any Default or otherwise under this agreement for indirect or consequential loss, including loss of use, loss of profits, loss of opportunity, damage to reputation or special, exemplary or punitive damages.

9.3 Subject to clause 0, to the fullest extent permitted by law, all terms which might be implied by statute are excluded and our total liability for all Claims relating to the Services, whether pursuant to contract, tort, statute law or otherwise, is limited to the total amount of Charges we receive for supplying the Services in the first year of the Term.

9.4 We do not give or make any warranty or representation about, or guarantee, any forecast, estimate, projection or any other statement that relates to the future or any statement of opinion honestly held.

9.5 Subject to clause 0, we do not give or make any warranty or representation about, or guarantee, Our Equipment.

9.6 If you are a consumer within the meaning of section 3 of the Australian Consumer Law, the Australian Consumer Law provides certain guarantees in relation to the services or goods we supply you that cannot be excluded. Where the services or goods we supply you are not of a kind ordinarily acquired for personal, domestic or household use or consumption, our liability for breach of any guarantee implied by the Australian Consumer Law is, to the extent permitted by the Australian Consumer Law, limited to the resupply of those services or goods or payment of the cost of having those services or goods resupplied.

10. **If you have a Complaint**

10.1 If you have a Complaint you must notify us of the Complaint by email or by calling us.

10.2 We will make good faith efforts to resolve your Complaint by negotiation.

10.3 If the Complaint is not resolved within 14 days after you first notify us of the Complaint, the Complaint must be referred to:

- 10.3.1 a senior manager nominated by us; and
- 10.3.2 a senior manager nominated by you,

who must make good faith efforts to resolve the Complaint by negotiation.

10.4 If the Complaint is not resolved within 21 days after being referred to the senior managers, either party may refer the Complaint for mediation by a mediator appointed by the Institute of Arbitrators and Mediators Australia or another mediator agreed by the parties.

10.5 Each party must continue to perform its obligations under this agreement despite the continuation of an unresolved Complaint, but this clause 0 does not prevent a party from exercising a right to terminate this agreement.

10.6 You must not commence litigation in respect of a Complaint unless clauses 0 to 0 have been complied with and the Complaint has not been resolved.

11. **What happens if a Force Majeure Event occurs?**

11.1 If a Force Majeure Event occurs, the obligations under this agreement of the party affected by the Force Majeure Event (affected party), being obligations that the effect of the Force Majeure Event prevents the party from performing (affected obligations), are suspended so long as the effects of the Force Majeure Event have that effect.

- 11.3 The affected party must give the other party notice of the Force Majeure Event as soon as practicable after becoming aware that the Force Majeure Event has occurred or may occur.
The affected party must use its reasonable endeavours to remove, overcome or minimise the effects of the Force Majeure Event as quickly as possible. This does not require a party to settle any industrial dispute in any way that it considers inappropriate.
- 11.4 An obligation to make a payment to a party cannot be an affected obligation.
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12. How this agreement may be terminated

- 12.1 If:
- 12.1.1 (being a corporation) you are or become insolvent or any order is made or resolution passed for your winding up or a controller is appointed over all or any part of your assets;
 - 12.1.2 you fail to make any payment to us when due under this agreement; or
 - 12.1.3 you breach any other material terms of this agreement,
- we may, by written notice to you, terminate this agreement immediately or with effect from a date specified in the notice.
- 12.2 If:
- 12.2.1 we breach any material terms of this agreement; and
 - 12.2.2 if the breach is curable, you give us notice of the breach requesting us to cure it and we do not cure the breach within 14 days of receiving your notice; or
 - 12.2.3 the breach is not curable,
- you may, by written notice to us, terminate this agreement immediately or with effect from a date specified in the notice.
- 12.3 If a Force Majeure Event occurs and affected obligations under clause 0 are suspended under that clause for more than 21 days, either party may, by written notice to the other, terminate this agreement.
- 12.4 If you continue to receive the Services after the Term, you may, by written notice to us, terminate this agreement for convenience with effect from a date specified in the notice (being a date after the expiry of the Term and not less than 30 days after the date of the notice).
- 12.5 Our rights to payment of the Charges accrued up to the date of termination are not affected by the termination.
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13. What happens on termination

- 13.1 On termination of this agreement:
- 13.1.1 you must return Our Equipment to us;
 - 13.1.2 you must pay the Charges accrued up to the date of termination; and
 - 13.1.3 we will as soon as reasonably practicable, transfer to you your data on Our System.
- We may charge you a fee for transferring to you your data on Our System if the Services Description specifies a data transfer fee.
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14. How this agreement may be changed

This agreement may only be changed if both parties agree to the change in writing.

15. Communications

- 15.1 You may communicate with us by:
- 15.1.1 calling us on the number specified in the Details, the number specified on the 'Support' page of Our Website or on another number we give you;
 - 15.1.2 emailing us at the email address specified in the Details, the email address specified on the 'Support' page of Our Website or another email address we give you;
 - 15.1.3 delivering a written communication to our physical address specified in the Details or another address we give you.
- 15.2 Our record of any request, instruction or other communication you give us will be sufficient proof of your request, instruction or other communication unless you can show it is incorrect.
- 15.3 We may communicate with you by:
- 15.3.1 calling you on the number specified in the Details or on another number you give us;
 - 15.3.2 emailing you at the email address specified on the Details or another email address you give us;
- 15.3.3 delivering a written communication to your physical address specified on the Details or another address you give us.

- 15.4 We may rely and act on any request, instruction or other communication received by us from any person who we, acting in good faith, believe to be your representative, whether or not that person has actual or apparent authority to make or give that request, instruction or other communication.
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16. Intellectual Property

- 16.1 You acknowledge and agree that you do not own or acquire any rights in Our IP.
- 16.2 You must not contest our title to Our IP or take action that may have a detrimental effect on our title to Our IP.
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17. Interpretation

- 17.1 The following provisions apply to this agreement.
- 17.2 This agreement comprises:
- 17.2.1 these Terms and Conditions; and
 - 17.2.2 the Services Description.
- 17.3 If there is an inconsistency between provisions of this agreement, a descending order of precedence is to be accorded to:
- 17.3.1 these Terms and Conditions;
 - 17.3.2 the Services Description,
- so that the higher ranked provision prevails to the extent of the inconsistency.
- 17.4 A reference to:
- 17.4.1 a legislative provision or legislation (including subordinate legislation) is a reference to that provision or legislation as amended, re-enacted or replaced, and includes a reference to any subordinate legislation issued under it;
 - 17.4.2 a document or agreement (including this agreement), or a provision of a document or agreement (including this agreement), is a reference to that document, agreement or provision as amended, supplemented, replaced or novated;
 - 17.4.3 a specified standard, code, guideline, or other similar document is a reference to the version or edition of the standard, code, guideline, or document as in force for the time being;
 - 17.4.4 a party to this agreement or to any other document or agreement includes a successor in title, permitted substitute or a permitted assign of that party;
 - 17.4.5 a person includes a reference to any type of entity or body of persons, whether or not it is incorporated or has a separate legal identity, and any executor, administrator or successor in law of the person; and
 - 17.4.6 anything (including a right, obligation or concept) includes a reference to each part of it.
- 17.5 A singular word includes the plural, and vice versa.
- 17.6 A word that suggests one gender also suggests the other genders.
- 17.7 If a word or phrase is defined, another part of speech of that word or another grammatical form of that phrase has a corresponding meaning.
- 17.8 If an example is given of anything (for example, a right, obligation or concept), such as by saying it includes something else, the example does not limit the scope of the thing.
- 17.9 A reference to information is a reference to information of any kind in any form or medium, whether formal or informal, written or unwritten, for example, computer software or programs, concepts, data, drawings, ideas, knowledge, procedures, source codes or object codes, technology and trade secrets.
- 17.10 A reference to a breach by a party to an agreement or other document:
- of the agreement or document; or
 - 17.10.1 of an obligation in an agreement or other document;
 - 17.10.2 includes a reference to a representation made by the party in or in connection with the agreement or document being inaccurate or misleading, including by omission.
- 17.11 Headings in this agreement are not provisions of this agreement and do not affect the interpretation of this agreement.
- 17.12 A reference in this agreement to a numbered or otherwise identified provision is a reference to the provision so numbered or identified in these Terms and Conditions.
- 17.13 If the day on or by which a person must do something under this agreement is not a Business Day, the person must do it on or by the next Business Day.
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18. Other terms

- 18.1 The parties agree that, except as may be required by law, the express provisions of this agreement are intended to constitute the exhaustive statement of their rights and obligations in relation to the Services and the other matters to which it relates.
- 18.2 An indemnity granted to a person under this agreement is in addition to and does not replace or limit any other right the person may have under this agreement or otherwise at law.
- 18.3 You:
- 18.3.1 are not for any purpose, and are not to be taken to be for any purpose, merely because of this agreement, our partner or agent;
 - 18.3.2 do not, merely because of this agreement, have any power or authority to bind or represent us; and
 - 18.3.2 must not represent yourself as being our agent or as otherwise able to bind or represent us.
- 18.4 You must not, without our written consent, assign your rights under this agreement.
- 18.5 A right under or in relation to this agreement may only be waived in writing and:
- 18.5.1 no other conduct of a party (including a failure to exercise, or delay in exercising, the right) operates as a waiver of the right or otherwise prevents the exercise of the right;
 - 18.5.2 a waiver of a right on one or more occasions does not operate as a waiver of that right or as an estoppel precluding enforcement of the right if it arises again; and
 - 18.5.3 the exercise of a right does not prevent any further exercise of that right or of any other right.
- 18.6 Any provision of this agreement that is unenforceable or partly unenforceable is, where possible, to be severed to the extent necessary to make this agreement enforceable, unless this would materially change the intended effect of this agreement.
- 18.7 The following provisions of this agreement survive the expiry or termination of this agreement:
- 18.7.1 any provision to do with an indemnity;
 - 18.7.2 any provision expressed to survive the expiry or termination of this agreement;
 - 18.7.3 any provision which by implication from its nature is intended to survive the termination or expiration of the agreement including provisions relating to confidential information, a right to recover money and privacy.
- 18.8 This agreement is governed by the laws in force in Victoria. Each party:
- 18.8.1 submits to the jurisdiction of the courts of Victoria and of any court that may hear appeals from any of those courts, for any proceedings in connection with this agreement; and
 - 18.8.2 irrevocably waives any objection to the venue of any proceedings brought in those courts in connection with this agreement on the ground that they have been brought in an inconvenient forum.

19. Glossary

In this document, unless a contrary intention appears:

- Authorisation** means:
- (a) an authorisation, consent, exemption or licence, however it is described, required to do something that would otherwise be prohibited or restricted by law; or
 - (b) in relation to something that could be prohibited or restricted by law if a Government Agency acts in any way within a specified period, the expiry of that period without that action being taken.
- Building** means the building described in Item 5 of the Details.
- Business Day** means a day other than a day that is a Saturday, Sunday or national public holiday.
- Claim** means a cause of action, claim, demand, suit or proceeding of any kind, including by way of court proceedings, proceedings in the nature of arbitration, mediation or other methods of dispute resolution and administrative claims and proceedings (whether or not before a tribunal).
- Commencement Date** means the date stated in Item 2 of the Details.
- Charges** means the prices, charges and fees that you must pay for the Services as specified in the Services Description or these Terms and Conditions, including the Monthly Service Charge.
- Complaint** means a complaint you have about the supply of the Services or a dispute or difference between you and us arising out of or in connection with this agreement.
- Corporations Act** means the Corporations Act 2001 (Cth).
- Default** means an act or omission that:

- (a) is a contravention of a written law; or
- (b) amounts to negligence or a breach of a duty (including a duty arising under an agreement) or a breach of an agreement or other document.

Details means the details set out on the page of this document entitled 'Details'.

Force Majeure Event means an event that prevents a party (affected party) from performing its obligations under this agreement (affected obligations), being an event that is beyond the reasonable control of the party, but not an event that is, or is caused wholly or partly by a Default of the affected party.

Government Agency means a person or body performing governmental functions, including any of the following:

- (a) a body politic;
- (b) a government or government department or other similar body;
- (c) a governmental, semi-governmental or judicial person;
- (d) a person (whether autonomous or not) charged with the administration of a law.

GST Act means the A New Tax System (Products and Services Tax) Act 1999 (Cth).

GST Law has the meaning given to that term in the GST Act.

IP or Intellectual Property means all copyright and all rights in relation to inventions (including patent rights), registered and unregistered trademarks (including service marks), registered and unregistered designs, and circuit layouts, and any other rights resulting from intellectual activity in the industrial, scientific, literary and artistic fields recognized in domestic law anywhere in the world.

Loss means any liability, loss, damage, compensation and costs and expenses (including the costs of the investigation, defense and settlement of any Claim or demand) and any legal costs and expenses in relation thereto on a solicitor and own client basis.

Material includes documents, goods, equipment, reports, software, specifications, reports, information and data.

Monthly Service Charge means the charge described in Item 4 of the Details.

Moral Right means a right conferred by Part IX of the Copyright Act 1968 (Cth) and a right of a similar nature conferred by statute that exists, or may come to exist, anywhere in the world.

Our Confidential Information means information relating to us or any of our Related Bodies Corporates that:

- (a) is by its nature confidential;
- (b) is designated by us as confidential;
- (c) you know or ought to know is confidential,

but not information that:

- (d) is or becomes public knowledge otherwise than by a breach of this agreement or another confidentiality obligation; or
- (e) you establish has been independently developed or acquired by you.

Our Equipment means any site data controller or other equipment that we supply to you to enable you to use the Services and which you do not purchase from us.

Our IP means all IP in any Material provided to you by us or on our behalf under or in connection with this agreement and all IP in Our System and Our Portal.

Our Policies means our policies that are described on Our Portal, including our access and acceptable use policy.

Our Portal means our customer portal into which you can login at Our Website.

Our System means the system of computer equipment, software, processes and interfaces that comprises the infrastructure used by us to provide the Services, including Our Portal.

Our Website means our website at setmetrics.com.

Related Body Corporate has the meaning given to that term in the Corporations Act.

Service Level means the standards of service we try to attain in supplying Support Services as specified in the Services Description, including availability times and response times.

Services means the services that we will supply to you under this agreement specified in the Services Description, the name of which is set out in Item 3 of the Details.

Services Description means the description of the services we supply you set out in the part of this document entitled 'Services Description'.

- Support Services** means the technical support services we make available to you described in the Services Description.
- Tactic** means an action we recommend you take to optimise your building operations or save energy, water or costs.
- Term** means the term set out in Item 6 of the Details.
- Virus** means:
- (a) any program code, programming instruction or set of instructions intentionally constructed to damage, interfere with or otherwise adversely affect computer programs, data files or operations;
 - (b) any device that would, if introduced into a system or software used to provide the Products or the Services, prevent that system or software from performing the functions it is designed to perform, or interfere with or otherwise adversely affect that performance; or
 - (c) any other code or device which a person in the IT industry would reasonably consider to be a virus.
- we or us** means Set Metrics Pty Ltd ABN 16 141 049 112.
- you** means the customer named in the Details.
- Your Confidential Information** means information relating to you or any of your Related Bodies Corporate that:
- (a) is by nature confidential;
 - (b) is designated by you as confidential;
 - (c) we know or ought to know is confidential,
- including your data that is in Our System, but not information that:
- (d) is or becomes public knowledge otherwise than by a breach of this agreement or another confidentiality obligation; or
 - (e) we establish has been independently developed