

NetGain Master Subscription Terms

These NetGain Master Subscription Terms are between the Customer specified in the applicable Order Form and NetGain Pte Ltd, and are incorporated into, and form part of, the Order Form.

1. Definitions

In this Agreement, the following terms will have the meaning set out below:

Affiliates	means, in relation to a party, any entities that control, are controlled by, or are under common control with, that party (where “control” means the power to direct the management, policies or operations of an entity through the ownership of voting shares, by contract or otherwise), as well as the directors, officers, agents, employees, successors, assigns and contractors of a party.
Agreement	means these NetGain Master Subscription Terms and the Customer’s Order Form, together with any documents, schedules, annexures and attachments incorporated therein.
Claim	means any claim, demand, suit, action or proceeding.
Confidential Information	with respect to a party, means any information of or concerning that party’s technical, commercial, financial, marketing, strategy or business affairs or plans, its clients, customers, employees, contractors or business partners, and any of its trade secrets, know-how, intellectual property, personal information, and any other information of any kind which is by its nature confidential or disclosed in circumstances where it ought reasonably be understood that the disclosure is confidential (whether or not the information is marked as such), where disclosed or made available by that party to the other party in connection with this Agreement. The terms and pricing contained in this Agreement, and the SaaS, are the Confidential Information of NetGain.
Customer	means the customer specified on the Order Form.
Customer Data	means the data provided, submitted or made available or accessible by or on behalf of the Customer to NetGain or the SaaS.
Customer Environment	means the technology environment of the Customer or the Customer’s business to be used in connection with the SaaS, and includes the systems, devices, software, hardware, applications, storage, and technology infrastructure making up the Customer’s technology environment, whether or not the components of such environment are owned by the Customer or its Affiliates.
Documentation	means the documentation provided with or published in relation to the SaaS (which may include specifications, guides, manuals and system requirements) which are made available and updated from time to time by NetGain at the URL specified in the Order Form or such other location as may be notified by NetGain from time to time.
Fees	means the fees payable for the SaaS and Support Services under this Agreement as specified in or calculated in accordance with the Order

Form, and any other service-related fees which NetGain may charge in accordance with this Agreement.

GST	means goods and services tax as defined in the <i>A New Tax System (Goods and Services Tax) Act 1999</i> (Cth).
Initial Term	means the initial term of this Agreement as specified in the Order Form or if no period is specified, one (1) month.
Liability	means any loss, damages, cost or expense.
NetGain	means NetGain Pte Ltd.
Order Form	means the Customer's order for SaaS executed between the Customer and NetGain, or the online order form detailing the Customer's order of the SaaS which the Customer accepted or agreed to online.
Retention Period	means, in relation to any SaaS product, the retention period for Customer Data stated on or determined in accordance with the Order Form and Documentation for that SaaS product.
SaaS	means the NetGain software-as-a-service products and modules set out in the Order Form.
Service Credit	means thirty per cent (30%) of the Fees paid or payable for the SaaS in respect of the two (2) month period in which the relevant SLA Event occurred.
Service Credit Cap	means three (3) times the Fees paid or payable by the Customer for the first month of the Initial Term.
Service Levels	means the service level that the SaaS has an availability of 99.8%, excepting any periods of scheduled maintenance, subject to the exceptions set out in clause 12.d.
SLA Event	has the meaning given in clause 3.b.
Support Policy	means NetGain's current SaaS support policy available at the URL specified in the Order Form or such other location as may be notified by NetGain from time to time.
Support Services	means the support and maintenance services for the SaaS provided by NetGain in accordance with the Support Policy.
Term	means the term of this Agreement, being the Initial Term plus any renewal(s) in accordance with clause 2.
Third Party Hosting Provider	means any third party hosting services provider used from time to time by NetGain to host, support or facilitate the delivery of the SaaS.
Third Party Software	means software included in or provided with the SaaS, or to which a user has access through or from the SaaS, that is not proprietary to NetGain and identified in the Documentation as third party software. Third Party Software may include open source software.

2. Term

This Agreement commences on the date specified in the Order Form and continues for the Initial Term. At the end of the Initial Term, this Agreement will automatically renew for additional periods of the same duration as the Initial Term, unless the Customer provides at least thirty (30) days' written notice to NetGain prior to the expiry of the then-current Term, that the Agreement will not renew.

3. Access to and use of Services

- a. NetGain will provide access to the SaaS during the Term subject to this Agreement and the details, limits, authorisations and restrictions specified on the Order Form.
- b. NetGain will use commercially reasonable efforts to meet the Service Levels during the Term. Failure to achieve the Service Levels will not constitute a breach of this Agreement. If the Service Levels are not achieved in any two (2) consecutive months during the Term ("**SLA Event**"), then the Customer may notify NetGain in writing within thirty (30) days of such SLA Event and request a Service Credit. NetGain will investigate the SLA Event, and if able to verify the SLA Event, will provide the Customer a Service Credit to be applied to the Customer's next invoice under this Agreement, provided that any Service Credits will not, in the aggregate, exceed the Service Credit Cap. This clause represents the sole and exclusive remedy of the Customer and liability of NetGain in connection with any failure(s) to meet the Service Levels.

4. Support Services

- a. NetGain will provide the Support Services in accordance with the Support Policy. The Customer must provide all information, access (including remote access) and assistance required by NetGain to enable NetGain to assess, diagnose, recreate or investigate any Support Services request.
- b. NetGain has the right to use any reports, requests or other feedback received in connection with the Support Services for its business purposes including in product planning and to improve its Services, provided that NetGain will not identify the Customer in such use.

5. Customer responsibilities

- a. The Customer must promptly provide all reasonable information and assistance requested by NetGain to enable it to provide the SaaS and Support Services in accordance with this Agreement.
- b. The Customer will ensure the Customer Environment meets the requirements set out in, and is configured in the manner set out in, the Documentation. The Customer will provide all hardware, software and connectivity required to access the SaaS, other than as specified in the Documentation. Any software or application provided to the Customer by NetGain to enable the Customer to use the SaaS, is provided on and subject to the licence terms notified to the Customer at the time such software or application is made available.
- c. The Customer may use the SaaS, Documentation and Support Services only for its own internal business purposes and the Customer Environment. The Customer must, unless otherwise authorised in writing by NetGain, not resell the SaaS or use it to operate as a service bureau, subscription service or service provider to other persons, or in any other way share, sublicense, transfer, distribute or provide third party access to, the SaaS (or permit the same to occur).
- d. The Customer must comply with all applicable laws in its use of the SaaS and Support Services.

- e. The Customer must not, and must not permit or suffer any person to:
 - i. disassemble, decompile, reverse engineer, tamper with, modify, alter, enhance, adapt or translate the SaaS, the concepts behind them or attempt to do so;
 - ii. use the SaaS or Documentation to develop other software, application or services;
 - iii. avoid, circumvent or disable any security device, procedure, protocol or mechanism that NetGain may include, require or establish with respect to, or within, the SaaS;
 - iv. disclose any benchmarking, testing or comparison of the SaaS with other products, without NetGain's prior written consent;
 - v. remove or attempt to remove any copyright or other proprietary notices from the SaaS or any instance of it;
 - vi. combine the SaaS with any application, software, system, environment or service other than as permitted by the Documentation;
 - vii. use the SaaS for any obscene, offensive or fraudulent activity or content or in any manner that violates any applicable law or regulation;
 - viii. use the SaaS in a manner that results in gaining unauthorised access to any data, or which breaches, defeats or circumvents any system or network security measures;
 - ix. use the SaaS in connection with any systems, devices, applications, software, hardware, environment or equipment, or to monitor any of the same, where it is not properly and fully authorised to do so; or
 - x. use the SaaS in a manner that infringes any third party rights or where NetGain determines it may harass, harm, or cause nuisance or disruption to any person, or transmit unsolicited or abusive messages, viruses or other harmful code or matter.
- f. The Customer must comply with this Agreement at all times in its use of the SaaS.

6. Fees

- a. The Customer must pay the Fees specified in or calculation in accordance with the Order Form or as otherwise determined in accordance with this Agreement. Fees are non-refundable other than as expressly provided in this Agreement or required by law.
- b. Fees will be payable at the times and in the manner stated on the Order Form. If not specified in the Order Form, Fees are:
 - i. quoted, charged and payable in Australian Dollars;
 - ii. payable in advance of the Initial Term and each subsequent renewal period (other than Fees which are calculated on a "pay-as-you-go" basis);
 - iii. payable monthly in arrears if calculated on a "pay-as-you-go" basis.
- c. NetGain will issue a tax invoice for Fees when due. Unless otherwise specified in the Order Form, the Customer will pay such Fees immediately on the invoice date (via automatic debit authorised by

the Customer) without deduction or withholding of any kind. The Customer must raise any dispute as to the amount payable under an invoice prior to the applicable due date for payment, in order to be eligible for an adjustment or credit. The existence of such a dispute does not limit the Customer's obligation to make full payment prior to the invoice due date unless otherwise agreed in writing by NetGain.

- d. If the Customer does not pay the Fees by the applicable last date for payment, NetGain may, without limiting its other rights:
 - i. suspend the Customer's access to the SaaS; and/or
 - ii. terminate this Agreement; and/or
 - iii. charge the Customer interest on the outstanding Fees at the rate of 2% above the rate prescribed under section 2 of the *Penalty Interest Rates Act 1983* (Vic), accruing on a daily basis from the date the Fees were due for payment (or if such rate is not permitted by law, the highest rate permitted by law); and/or
 - iv. recover on demand as a debt due from the Customer, any debt collection and other costs and expenses incurred in recovering or attempting to recover the Fees, including any reasonable legal fees and expenses, on a full indemnity basis.
- e. Following the Initial Term, NetGain may increase the Fees from time to time by providing one (1) months' notice to the Customer.
- f. NetGain reserves the right to charge the Customer, in arrears, at its then-current applicable Fees, for any actual usage by the Customer in excess of the applicable usage measures, inclusions or restrictions specified in the Order Form.

7. Taxes

- a. The Fees are quoted exclusive of GST. The Customer must pay any GST applicable to the SaaS at the same time and in the same manner as the relevant Fees for the SaaS. NetGain must issue a tax invoice for such GST amounts.
- b. The Customer is responsible for all withholding and any other taxes, duties, tariffs, value-added taxes, or any sales, service, use, consumption and excise taxes, or similar taxes or charges of any kind imposed by any federal, state or local governmental or regulatory authority in connection with the SaaS or any amounts payable under this Agreement (other than taxes imposed on NetGain's income) ("**Taxes**"). All Fees are quoted exclusively of any Taxes. If Customer is required by law to pay on NetGain's behalf or withhold from NetGain any amount in respect of such Taxes, or if NetGain is required to pay any such Taxes, the Customer indemnifies NetGain against all liability for those amounts so that the total amount received from the Customer and retained by NetGain is equal to the amount invoiced by NetGain (as if there had been no payment or withholding of Taxes).

8. Intellectual Property

- a. The Customer acknowledges that it has, receives, acquires and derives no Intellectual Property or other rights in the SaaS, Documentation or any other material or document provided by NetGain. Other than rights expressly granted in this Agreement, NetGain reserves all rights in the SaaS, Documentation and any other material provided by NetGain.

- b. NetGain acknowledges that other than the rights expressly granted in this Agreement, rights in and to the Customer Data, including any enhancements, modifications, derivations or other material or data developed therefrom, are owned retained by the Customer (as between the parties).

9. Warranties and exclusions

- a. NetGain warrants for a period of thirty (30) days from the commencement of the Initial Term that the SaaS will operate substantially in conformance with the Documentation when used, installed, configured and operated in accordance with the Documentation and this Agreement.
- b. In the event of a breach of the warranty in clause 9.a, the Customer must promptly notify NetGain and provide all details reasonably requested by NetGain to enable it to assess and take steps to rectify the breach, by repairing, modifying or re-performing the SaaS. NetGain will use commercially reasonable efforts to rectify the breach by repairing, modifying or re-performing the SaaS. If NetGain determines that such rectification is not commercially reasonable, the Customer may terminate this Agreement and NetGain will provide a refund, pro-rata, of any Fees pre-paid by the Customer in respect of the unexpired portion of the then-current Term. This clause sets out the Customer's sole and exclusive remedy for a breach of the warranty in clause 9.a.
- c. NetGain provides the SaaS, Documentation and Support Services "as is" and does not warrant that they will be error-free, defect-free, without interruption, or that all identified defects will be corrected.
- d. Other than as expressly set out in this Agreement, to the extent permitted by law, NetGain makes no representations, warranties or guarantees, whether express, implied, statutory or otherwise, oral or written, with respect to the SaaS, Documentation or Support Services, and expressly disclaims and excludes all such representations, warranties or guarantees, including without limitation, as to (i) merchantability, (ii) satisfactory quality, (iii) fitness for a particular purpose, (iv) title or non-infringement, (v) suitability for the Customer, Customer Environment or Customer's intended use, (vi) integration or interoperability, (vii) freedom from viruses any other harmful code, third party attack, disruption or unauthorised access; (viii) availability; or (vix) any matter arising from the course of performance, course of dealing, or usage or trade.
- e. NetGain makes no warranty or representation as to, and accepts no liability to Customer in connection with, the outcome(s) or result(s) to be achieved from the use of the SaaS, or the accuracy, completeness, suitability or fitness for any purpose of any information, data, insights, monitoring or other outputs of the SaaS, which the Customer uses solely at its own risk (and is responsible for independently verifying prior to use, disclosure to any third party or relying thereon).
- f. Nothing in this Agreement has the effect of modifying, displacing or excluding any statutory provision, warranty, condition or guarantee (including any provision of the *Competition and Consumer Act 2010* (Cth)) which cannot by law be excluded. In the event that such statutory provision operates to imply or impose a guarantee, warranty or liability, then to the extent permitted by law, NetGain's liability under such provision will be limited at NetGain's discretion to:
 - i. in the case of goods: the replacement of the goods or the supply of equivalent goods, the repair of the goods, payment of the cost of replacing the goods or of acquiring equivalent goods, or payment of the cost of having the goods repaired; and
 - ii. in the case of services: the supply of the services again or payment of the cost of having the services supplied again.

10. Third party services

- a. NetGain may offer or provide access to Third Party Software in the course of providing the SaaS or in order for the Customer to access certain modules of the SaaS. Where Customer elects to access, download or use Third Party Software or purchases any SaaS requiring the use of Third Party Software, Customer agrees that the Third Party Software is provided according to the licence terms specified in the Documentation, and the Customer must comply with such terms in its use of Third Party Software, such terms applying as between the Customer and the relevant third party provider.
- b. Despite any other term of this Agreement, NetGain is not liable for any Claim or Liability arising in connection with the provision or use of Third Party Software. If the relevant third party provider ceases to provide or withdraws the Third Party Software (whether from NetGain or the market generally), NetGain may sever that Third Party Software from the SaaS.
- c. The Customer acknowledges that NetGain uses Third Party Hosting Providers and has no actual control over the availability, quality or other features of hosting services. NetGain reserves the right, from time to time and without notice, to change and substitute Third Party Hosting Providers.

11. Data, security and privacy

- a. The Customer hereby authorises, non-exclusively licences, permits and expressly requests NetGain, its subcontractors and subprocessors (including Third Party Hosting Providers) to use, access, provide, store, reproduce, modify and disclose Customer Data for the purpose of performing the SaaS, providing the Support Services and administering and performing this Agreement.
- b. The Customer warrants that it has all necessary authorisations, consents, approvals and licences required under applicable laws and contractual obligations to:
 - i. use the SaaS in connection with the Customer Environment;
 - ii. provide NetGain with access to the Customer Environment to the extent reasonably necessary for NetGain to provide the SaaS, Support Services and perform any other service, assistance or obligation under this Agreement;
 - iii. provide NetGain with the Customer Data, and permit NetGain to use such Customer Data in accordance with this Agreement and to the extent reasonably necessary for NetGain to provide the SaaS, Support Services and perform any other service, assistance or obligation under this Agreement; and
 - iv. provide NetGain with any personal information which is provided by the Customer in connection with the Customer's account or access credentials, Customer Data or otherwise (including that all required consents have been obtained from affected individuals), and permit NetGain to use such personal information in accordance with this Agreement.
- c. The Customer acknowledges that the SaaS monitors devices in the Customer Environment to which it is connected, and will collect data concerning the Customer Environment such as CPU usage, device temperatures, system logs, network traffic data (including IP addresses). The Services do not collect email contents or packet data.
- d. The Customer authorises and permits NetGain to monitor and investigate its use of the SaaS and collect data on such usage in order to provide the SaaS, Support Services, administer and perform this Agreement, calculate the Fees and monitor the Customer's compliance.
- e. The Customer acknowledges that NetGain does not require or wish to receive any personal information or other regulated information, or any information considered confidential or sensitive to

the Customer, as part of the Customer Data to be received or processed by the SaaS (**Sensitive Data**). The Customer agrees that it has the right, the ability and the sole responsibility to omit, remove, mask or scrub such data from any potential Customer Data, prior to submitting or making it available to NetGain or the SaaS. NetGain may provide the Customer access to filtering technology to assist Customer to do so. Unless otherwise agreed by NetGain, the Customer must not submit or provide access to any Sensitive Data or use the SaaS to process Sensitive Data, other than the minimum reasonably required to enable NetGain to create user accounts and provision access to the SaaS, and for the Customer to receive the Support Services.

- f. The Customer acknowledges that the Customer Data are stored in a public cloud environment (provided by a Third Party Hosting Provider) determined from time to time by NetGain.
- g. The Customer has reviewed the Documentation and determined the suitability of the SaaS for the Customer's intended purposes and the Customer Data, and its consistency with the Customer's applicable policies and processing instructions.
- h. NetGain is responsible for maintaining industry standard virus protection and cybersecurity measures intended to protect against unauthorised access, modification and destruction of the SaaS and any Customer Data contained therein. NetGain does not guarantee that no viruses or other harmful code will be introduced into the SaaS or Customer Data, or that the SaaS or Customer Data will be free from cyber security threats, attacks, unauthorised access, disruptions or incidents.
- i. The Customer is responsible for maintaining industry standard virus protection and cybersecurity technology in the Customer Environment, as well as any additional measures required by the Documentation.
- j. The Customer is responsible for the security of the Customer's passwords and access credentials in connection with the SaaS, and is solely responsible and liable for all activities, transactions and actions in connection with the SaaS carried out using the Customer's password(s) and/or access credentials (even if not authorised by the Customer).
- k. NetGain accepts no liability for any loss of or corruption to Customer Data. The Customer is solely responsible for ensuring the adequate backup of Customer Data and any other measures it considers appropriate to protect against, or recover from, its loss or corruption. The Customer may export Customer Data from the SaaS in order to maintain its own backups from the Service, or NetGain may, on request, assist the Customer to do so for a Fee specified by NetGain.

12. Liability

- a. The limitations set out in this clause 12 apply to the fullest extent permitted by law and to all Claims and Liabilities arising in connection with this Agreement, irrespective of whether a Claim or Liability arises under contract or indemnity, statute, strict liability, tort (including negligence), equity or otherwise, and irrespective of whether the Claim or Liability was foreseeable, notified to or within the contemplation of NetGain (or its Affiliates).
- b. The aggregate liability of NetGain and its Affiliates in respect of all Claims and Liabilities under or in connection with this Agreement, cumulatively, is limited to any actual direct damages up to a maximum of the total Fees paid by the Customer under the Agreement for the relevant Services during the twelve (12) months immediately preceding the date of the first event giving rise to a Claim or Liability.
- c. Despite any other term of this Agreement, in no event will NetGain or its Affiliates be responsible for any indirect, incidental, consequential, exemplary or special loss, damage or Liability of any kind, or

for any economic loss, loss of profits, revenue, use, savings, or any anticipated savings or profits, for loss of reputation, business, business opportunity, contract, goodwill, or for any business interruption, loss of use, any loss or corruption of data (including Customer Data), or for the acts and omissions of Third Party Software providers or Third Party Hosting Providers.

- d. Notwithstanding any express warranty, indemnity or other term of this Agreement, NetGain will have no Liability, responsibility or obligation whatsoever with respect to the SaaS, Documentation or Support Services arising in connection with: (i) modifications made to the SaaS (other than by NetGain); (ii) combination of the SaaS with anything outside the Customer Environment; (iii) use of the SaaS in connection with any system, environment or device that does not meet the requirements set out in the Documentation; (iv) the Customer's use of the SaaS in a manner not permitted by, or prohibited by, this Agreement, or any misuse of the SaaS; (v) any technical factor outside the actual control of NetGain, including, without limitation, the Customer's Environment (or any changes to such environment), Customer Data, network connectivity or internet, or third parties; (vi) any Third Party Software or Third Party Hosting Providers; (vii) a breach of any law or third party rights caused by the Customer or Customer Data; (viii) any SaaS which the Customer has failed to cease using after being notified by NetGain that it must do so; (ix) any SaaS for which the Customer is in breach of this Agreement (including where Customer has failed to pay the applicable Fees when due for the affected SaaS); or (ix) unavailability of the SaaS during scheduled or emergency maintenance.

13. Indemnities

- a. Subject to clauses 13.b–13.d, NetGain indemnifies the Customer against any judgment or award by a court of competent jurisdiction, or any amount agreed to in settlement by NetGain or with its written approval, in a third party Claim against the Customer to the extent such Claim is based on an allegation that the SaaS or Documentation, when used in accordance with this Agreement, infringe a third party's copyright or patent rights, or misappropriates a third party trade secret.
- b. NetGain provides the indemnity in paragraph 13.a subject to the Customer providing NetGain with prompt notice of the Claim, the sole right to control and defend the Claim and any negotiations for settlement or compromise (at NetGain's own cost), and all cooperation, information and assistance reasonably requested by NetGain in connection with the Claim. The Customer may participate in any Claim (including with legal representation) at its own discretion and cost.
- c. If the SaaS becomes or NetGain determines that it may become the subject of a Claim of or similar to the kind referred to in paragraph 13.a, NetGain will use commercially reasonable efforts to arrange or procure (at its own cost) the right for the Customer to continue using the SaaS, or modify the SaaS so as to remove the infringement or potential infringement. If NetGain determines that neither option is practicable, NetGain may terminate any affected Order and issue a refund of any pre-paid Fees on a pro-rata basis having regard to the unexpired Term of the relevant SaaS.
- d. This clause 13 sets out the sole and exclusive remedy of the Customer in connection with any actual or alleged intellectual property rights infringement in connection with the SaaS and Documentation.
- e. The Customer indemnifies NetGain and its Affiliates from and against all Claims and Liabilities arising out of or in connection with:
 - i. the Customer's breach of this Agreement and any warranty given hereunder;
 - ii. NetGain's use of Customer Data in accordance with this Agreement; and
 - iii. any allegation by a third party that the Customer Data breaches the intellectual property, privacy or personal data, confidentiality or other rights of any person.

14. Termination and suspension

- a. NetGain may immediately suspend or cease providing any SaaS and Support Services, or terminate this Agreement in whole or in part by written notice to the Customer if the Customer:
 - i. has committed any material breach of this Agreement and, where in the opinion of NetGain such breach could be remedied, has failed to remedy that breach within the reasonable time frame specified in a notice from NetGain;
 - ii. enters or threatens to enter into any form of bankruptcy, insolvency, liquidation or administration, whether voluntary or involuntary, or is wound up or undergoes a similar event or ceases (or threatens to cease) to conduct its business in the ordinary way.
- b. For the purposes of paragraph 14.a.i, without limitation, any breach (without regard to materiality) of the Customer's obligations in clause 5 or clause 11, and any failure to pay Fees when due, constitutes a "material breach".
- c. NetGain may suspend or terminate the SaaS and/or this Agreement immediately in writing if:
 - i. NetGain's right to provide the SaaS, or ability to provide the SaaS or any part of the SaaS, ceases or is suspended for any reason (including without limitation where a Third Party Hosting Provider ceases to provide services for any reason) or is or is reasonably anticipated to be the subject of a Claim;
 - ii. required by applicable law;
 - iii. reasonably necessary to preserve, protect, maintain or rectify the security, integrity, operation, viability or stability of the SaaS; or
 - iv. NetGain withdraws or discontinues the SaaS generally, in which case NetGain will provide no less than thirty (30) days' notice.
- d. The Customer may terminate this Agreement on written notice to NetGain if NetGain:
 - i. enters or threatens to enter into any form of bankruptcy, insolvency, liquidation or administration, whether voluntary or involuntary, or is wound up or undergoes a similar event or ceases (or threatens to cease) to conduct its business in the ordinary way; or
 - ii. commits a material breach of this Agreement which is not remedied within the reasonable period (not less than thirty (30) days) specified in a notice from the Customer requiring the breach to be remedied.
- e. On the expiry of the Term or on termination of this Agreement for any reason:
 - i. the Customer must cease using the SaaS and its rights to use the SaaS, Documentation and Support Services will immediately cease and be withdrawn;
 - ii. the Customer must pay all Fees and other amounts due under this Agreement;
 - iii. if the Agreement was terminated under clause 14.a, all Fees remaining to be invoiced and paid in respect of the remaining Term will become immediately due and payable;

- iv. if the Agreement was terminated under clause 14.d or 14.c.iv, NetGain will refund to the Customer any pre-paid Fees in respect of any unexpired portion of the Term; and
- v. the Customer may request disengagement assistance, including assistance to retrieve or download Customer Data from the SaaS. NetGain may agree to provide the requested assistance subject to the Customer's agreement to the applicable Fees for such assistance specified by NetGain, and payment of all other Fees and amounts then owing under this Agreement. NetGain may destroy or delete Customer Data, and will have no obligation to retain or archive any Customer Data, following the applicable Retention Period.

15. Confidentiality

- a. A party ("the disclosing party") may disclose Confidential Information to the other party ("the receiving party") in connection with this Agreement. Each party must:
 - i. not copy, publish or disclose the Confidential Information of the other party to others without the written consent of the other party unless expressly permitted by this Agreement;
 - ii. use the Confidential Information of the other party solely for the performance of the receiving party's obligations under this Agreement;
 - iii. protect the Confidential Information of the other party against unauthorised access and disclosure to at least the same standard as its own Confidential Information, and in any event, to no less than a reasonable standard;
 - iv. return or if directed by the other party, destroy, the Confidential Information of the other party within thirty (30) days of the termination or expiry of this Agreement or at any other time on request by that other party, save that each party may retain its ordinary business records (which may contain the Confidential Information of the other party) in accordance with requirements of law or ordinary internal record-keeping, archival or business records policies, provided always that the party retaining such records continues to observe its obligations under this clause 15 with respect to such Confidential Information.
- b. The Confidential Information of a party remains the exclusive property of the disclosing party (as between the parties).
- c. Neither party will be taken to have breached the requirements of this clause 15 if it discloses Confidential Information of the other party:
 - i. to its professional legal and financial advisers which are subject to confidentiality obligations no less protective than those set out in this Agreement, who have a need to know the Confidential Information in the context of providing professional advice to the party;
 - ii. to its employees, subcontractors, contractors, service providers and consultants to the extent such parties have a need to know the Confidential Information in order for the party to perform its obligations under this Agreement;
 - iii. where the disclosure is required by law, and the party so compelled has provided as much notice of the required disclosure as is reasonably possible to the other party, and provides all reasonable assistance to the other party (if requested) in that other party's efforts to minimise, dispute, object to or otherwise resist the obligation to disclose by lawful means; or
 - iv. if the information in question was:

- I. already in the public domain (other than as the result of a breach of this clause 15); or
- II. obtained (without any condition or obligation of confidentiality) or derived independently of the information provided by the disclosing party.

16. General

- a. **Notices:** Notices may be posted or delivered by hand to the address of a party, or emailed to the email address of a party, specified in the Order Form (unless the party has provided five (5) business days' written notice of a change of address). Notices sent by post within Australia will be deemed delivered three (3) days after posting and for email, four (4) hours after the email was sent unless prior to the expiry of such period, the sender receives an automated message that the email was not delivered or knows that the email was not delivered.
- b. **Disputes:** If a dispute arises between the parties with respect to this Agreement which cannot be settled by negotiation, the parties will attempt to resolve it by mediation prior to either party commencing proceedings. Such mediation will be conducted by the Australian Disputes Centre and according to the ADC Guidelines for Commercial Mediation then in effect, including with respect to selection and appointment of the mediator. Either party may initiate the mediation by serving notice on the other party. The costs of the mediation will be borne equally by the parties.
- c. **Force Majeure:** Neither party will be considered in breach or default of this Agreement for any failure or delay in performance (other than an obligation to pay Fees) which is, directly or indirectly, caused by an event beyond its actual or reasonable control including, without limitation, any act of God, flood, fire, storm, earthquake, war, epidemic, act of terrorism, insurrection, riot, labour disturbance (including strike and lockout), equipment malfunction, computer hacker or network intrusion, governmental regulation or any other events, whether similar or not. The affected party's obligations will, to the extent affected by the relevant event, be suspended for the duration of that event.
- d. **Entire agreement:** This Agreement is the entire agreement between the parties with respect to its subject matter and supersedes, merges and replaces all prior negotiations, representations, warranties, discussions and understandings, whether oral or written with respect to the same subject matter. NetGain objects to any terms and conditions which may appear on a Customer purchase order or similar document or communication and such terms will be of no force or effect unless expressly agreed in writing (and signed by an authorised representative of) NetGain.
- e. **Execution:** This Agreement may be executed in any number of counterparts, each of which will be deemed to be an original and which taken together shall constitute one and the same document. This Agreement may be executed by reliable electronic signatures and such execution will have the same effect as manual signatures and be deemed as originals.
- f. **No waiver:** No failure or delay by a party in exercising or enforcing a right under this Agreement will be deemed to constitute a waiver of such right or any future right. No waiver of any default by a party on any occasion will constitute a waiver of any subsequent default. No single or partial exercise of any right will preclude the further or full exercise of it.
- g. **Assignment:** The Customer may not assign or transfer any rights or obligations under this Agreement without the prior written consent of NetGain, except to an Affiliate or successor to substantially all of its business and assets on written notice. NetGain may assign, transfer or novate any or all rights or obligations under this Agreement where it does so generally in connection with any restructure, reorganisation, sale, transfer or merger of its business or operations.

- h. Severability: If any provision of this Agreement is held to be invalid, illegal or unenforceable, in whole or in part, by any court of competent jurisdiction, such provision will be severed and the remaining provisions of this Agreement will continue in full force and effect as if such invalid, illegal or unenforceable provision had not been contained herein, unless doing so would fundamentally undermine the commercial transaction contemplated by this Agreement.
- i. Variations and changes: NetGain may vary the terms of this Agreement on no less than thirty (30) days' notice in writing to the Customer, with such variation to take effect on the next renewal date (the day after the end of the then-current Term). Such changes will not apply retrospectively. If NetGain determines that any variation to this Agreement is required prior to the expiry of the then-current Term, it may make such variation on thirty (30) days' notice, provided that the Customer may terminate this Agreement at any time prior to the expiry of such notice period if such a change has a material adverse impact on the Customer.
- j. Governing law: This Agreement will be governed by the laws of Victoria, Australia and the parties irrevocably submit to the exclusive jurisdiction of the courts of Victoria, Australia and the appellate courts entitled to hear appeals therefrom.
- k. Relationship: The parties acknowledge and agree that no relationship of employment, joint venturer, partnership or agency is created by this Agreement and that the parties are independent contractors.
- l. Subcontracting: NetGain may from time to time and in its discretion subcontract any of the SaaS, Support Services and any other obligations, in whole or in part, without notice, and substitute any such subcontractors, providing that NetGain will remain at all times responsible to the Customer for the performance of its obligations under this Agreement.
- m. Publicity: NetGain may use the Customer's name and logo (subject to any marketing policies provided to NetGain in writing) in customer lists, marketing materials (including online materials) and any discussions with current or prospective customers and business partners for the sole reason of identifying the Customer as a customer of NetGain.
- n. Interpretation: (a) Headings used in this Agreement are for convenience only and do not affect its interpretation, and (b) the term "including" will be deemed to mean "including, without limitation".
- o. Survival: Terms which by their nature are intended to survive the Term of this Agreement, shall continue following its termination or expiry. Without limiting the foregoing, the following clauses will survive expiry or termination of this Agreement: 4.b, 5.e, 6.f, 7.b, 12, 13, 14.e, 15, and 16.b. The termination or expiry of this Agreement will not affect the accrued rights of either party.