



## APPLICATION FORM

### FUJITSU Cloud Service S5 Service Usage Agreement

**Parties:**

1. Fujitsu Australia Limited (ABN 10 001 011 427) of 118 Talavera Road, Macquarie Park NSW 2113 (**Fujitsu**); and
2. Customer: \_\_\_\_\_ ABN: \_\_\_\_\_  
Registered Office Address: \_\_\_\_\_

The parties agree that this Application Form, the FUJITSU Cloud Service S5 Service Usage Agreement and its schedules form the agreement between the parties once the Customer has completed the required details on this Application Form and the parties have executed the Application Form as indicated in the Execution section below.

**Application Details**

Item	Service Name	Quantity
1	On-demand Virtual System FUJITSU Cloud Service S5	1

<b>Usage fee</b>	The usage fee for this service is as described in this service's published website. The Customer's gross total usage fee will be published on this service's website. The Customer shall pay Fujitsu the usage fee on a monthly basis.
<b>Remarks</b>	The Customer agrees to be bound by the terms of the FUJITSU Cloud Service S5 Service Usage Agreement.
<b>Helpdesk Service</b>	Yes / No (Circle as required) Details of Service Desk services to be provided

**Responsible Person for Service Usage**

<b>Business Unit Name</b>		
<b>Name of Responsible Person (person with authority)</b>		<b>Position</b>
<b>Contact details</b>	<b>Address</b>	
	<b>Telephone</b>	<b>Fax</b>
	<b>Email</b>	

**Portal Usage**

<b>Customer Organisation Number</b>	
<b>Portal Usage ID</b>	
<b>Desired start date of Service usage</b>	

**Billing Address (if different from the Person Responsible for Service usage)**

<b>Billing address</b>		
<b>Department</b>		<b>Name</b>
<b>Contact details</b>	<b>Email</b>	
	<b>Telephone</b>	<b>Fax</b>

**Use of the personal information of the Customer**

The personal information obtained from the Customer shall be handled within the scope of this Service. This may include using the information:

- (1) For the purpose of service provision including internet connection, communication, information service, insurance, advertisement, retail (including used commodities) and settlement.
- (2) For the purpose of conducting questionnaires and/or analysis in order to raise and maintain service level.
- (3) To provide information such as other company's products, services and prize competitions online such as e-mail/ website screen, telephone and post.

**Executed as an agreement**

**Date:**

Signed for and on behalf of Fujitsu Australia Limited in the presence of:

.....  
Signature of witness

.....  
Signature of authorised person

.....  
Name of witness (print)

.....  
Name of authorised person (print)

Signed for and on behalf of the Customer in the presence of:

.....  
Signature of witness

.....  
Signature of authorised person

.....  
Name of witness (print)

.....  
Name of authorised person (print)

# FUJITSU Cloud Service S5 Service Usage Agreement

## Background

- A. The Customer requires the use of certain cloud services on an 'as required' basis.
- B. Fujitsu has offered to make its On-demand Virtual System Service (hereafter “the Service”), one of the cloud services provided by Fujitsu, available to the Customer subject to the terms and conditions of this FUJITSU Cloud Service S5 Service Usage Agreement (hereafter “Agreement”).
- C. In using the Service, the Customer agrees to abide by the terms of this Agreement.

## Operative Provisions

### Clause 1: Definitions

The definitions of the terms in this Agreement shall be as follows:

**Agreement** means this agreement for the provision of Services to the Customer and includes the Application Form and the schedules, as they may be amended from time to time in accordance with the terms of this agreement.

**API** means an Application Program Interface that enables operation instructions, such as deploying or erasing Virtual Machines, to be issued without having to pass through the Service Website.

**Application Form** means the application form that is attached to this Agreement, a copy of which appears on the Public Service Website.

**Billing Month** means the period starting from a fixed start date of every calendar month and ending on the day before that date in the following calendar month.

**Community** means an online community, established by Fujitsu, which the Customer participates in as part of the Service. The Community is a forum where the Customer can exchange information about the Service and share technical information other Service users.

**Customer Content** means the data, information and material that the Customer provides or transmits using the Service.

**Customer-Specific Information** means the information specific to the Customer that the Customer has personally registered or entered on Virtual Systems and for which an access control function has been implemented.

**Execution Date** means the date that the Application Form is signed by the last party to sign it.

**Confidential Information** means:

- (1) Information specific to the other party’s business activities, technology or sales that has been disclosed in writing (including electronic formats) that indicates that the information is confidential,
- (2) Information specific to the other party’s business activities, technology or sales that has been indicated as being confidential while being disclosed verbally or by demonstration and that has been presented in writing (including electronic formats) within 10 days of disclosure, and
- (3) The content of this Agreement (excluding content that has been published on the Public Service Website),  
but Confidential Information does not include:
  - (1) Information that was already public knowledge at the time of disclosure, or which becomes public knowledge after the disclosure through no fault of the party receiving the confidential information (hereafter “the Recipient”),
  - (2) Information that the Recipient has rightfully obtained from a third party without obligations of confidentiality,
  - (3) Information that the Recipient already held at the time of disclosure, and
  - (4) Information that the Recipient has developed independently without reliance on Confidential Information that has been disclosed.

**Confidential Materials** means materials received from the other party that contain Confidential Information including Confidential Information received via a network, such as email, that have been fixed in a tangible form.

**Customer Data** means data owned or supplied by the Customer and which is stored or accessed using the Services.

**Customer Organisation Number** means the customer number allocated by Fujitsu to the Customer.

**Force Majeure** means a circumstance beyond the reasonable control of the party claiming the event of force majeure which results in that party being unable to observe or perform on time an obligation under this Agreement. Such circumstances include but are not limited to acts of God, lightning strikes, earthquakes, floods, storms, explosions, fires and any natural disaster, acts of war, acts of public enemies, terrorism, riots, civil commotion, malicious damage, sabotage, revolution and strikes.

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

**Initial Term** means a period of 3 years from the Execution Date.

**Insolvency Event** means any of the following circumstances have occurred:

- (1) There has been a seizure, provisional seizure, provisional demand or petition for auction or a tax delinquency demand has been received;
- (2) There has been a petition to start insolvency proceedings, civil rehabilitation proceedings, or any similar bankruptcy proceedings, or liquidation has commenced;
- (3) A party, who is a corporation, has been dissolved, or an attempt has been made to transfer all or a major part of the business to a third party;
- (4) A party reasonably believes that the other party will not be able to fulfill its obligations under this Agreement because the other party has received a demand to cease or suspend business from a regulatory authority, or the party is changing its business or going out of business.

**Intellectual Property** means all copyright (including future copyright), patents, patent applications, trade marks (registrable or not), designs (registrable or not), eligible circuit layout rights, trade secrets, know-how and other intellectual property rights.

**Inquiry Contact Point** means an email address established by Fujitsu as a point of contact for inquiries from the Customer for cases such as when the Service does not appear to behave “normally”.

**Moral Rights** means the right of integrity of authorship (that is, not to have a work subjected to derogatory treatment), the right of attribution of authorship of a work, and the right not to have authorship of a work falsely attributed, which rights are created by the Copyright Act 1968 (Cth).

**Operation Stoppage Time** means the time, rounded up to the nearest minute, during which the Service has stopped operating and all responses to attempts to connect to the Virtual Systems managed by Fujitsu from the outside have been unsuccessful.

**Portal Usage ID** means the user name and password issued by Fujitsu to the Customer for use of the Service Website.

**Public Service Website** means the website that Fujitsu publishes on the Internet that provides details of the Service to the general public.

**SDK** means a Software Development Kit, which is a collection of software, sample programs and documents relating to the API specification, in order to enable the Customer to use the APIs easily.

**Service Website** means the website only available to Fujitsu customers receiving the Service.

**Subsequent Term** has the meaning given to that term in clause 1.2.

**Term** means the Initial Term and all Subsequent Terms.

**Virtual Machine** refers to the computers that Fujitsu uses to provide the Service. Virtualisation technology splits a physical computer into multiple logical computers, each of which is operated under an independent operating system.

**Virtual System** means a collection of Virtual Machines and virtual infrastructure (including, but not limited to, virtual memory disks and virtual communications facilities), with a single virtual firewall and independent networks for each virtual subnet on the inside of the firewall.

**Virtual System Set** means the collection of all of the virtual systems used by the Customer in accordance with the Agreement.

For terms that appear in the Schedules to this Agreement, the definitions shall be the same as the definitions in this clause 1, unless expressly stated otherwise in the Schedule.

## **Clause 2: Term**

1. This Agreement will commence on the Execution Date and continue for the Initial Term.
2. Subject to clause 2.3, this Agreement will be automatically renewed for subsequent terms of the same duration to the Initial Term (each a “Subsequent Term”).
3. If either party does not wish to renew the Agreement for a Subsequent Term, it may end this Agreement by providing the other party with at least thirty (30) days’ written notice that it does not wish to renew the Agreement, in which case this the Agreement will expire at the end of the Initial Term or the Subsequent Term, as the case may be.

## **Clause 3: Entire Agreement**

1. The Agreement sets forth the entire understanding between the Customer and Fujitsu regarding the subject matter of this Agreement.
2. The content of this Agreement shall take precedence over any other agreements, materials, statements, understandings or offers that were exchanged between the parties.

3. Neither party shall be responsible for or have obligations for any matters in relation to the Service other than those specified in this Agreement.

#### **Clause 4: Termination**

1. The Customer may, terminate this Agreement by providing 90 days' written notice to Fujitsu.
2. On expiry or termination of this Agreement for any reason, the Customer must immediately remove or delete any Customer Data registered and stored in the Virtual System Set, at the Customer's own responsibility and cost. If the Customer fails to remove or delete any of the Customer Data from the Virtual System Set within 30 days of the expiration or termination of this Agreement, Fujitsu shall be entitled to take such action as it considers necessary to remove the Customer Data and shall have no liability to the Customer or any other person if it does so.
3. Either party may immediately terminate this Agreement, without notice to the other party, if:
  - (1) A debt is unpaid;
  - (2) There an Insolvency Event occurs; or
  - (3) A party is in breach of its obligations under clause 13.
4. Without limiting the generality of any other clause in this Agreement, Fujitsu may terminate this Agreement immediately by notice in writing if the Customer is in breach of any term of this Agreement and such breach is not remedied within 7 days of it being notified of the breach by Fujitsu.
5. On expiry of this Agreement for any reason, all Services provided will immediately terminate and the Customer's right to use software and content licensed by this Agreement immediately ceases.

#### **Clause 5: Provision of this Service**

1. Unless stated otherwise in this Agreement, Fujitsu shall provide the Service with the due care and skill and in accordance with the terms of this Agreement.
2. The Service shall be provided in accordance with **Schedule 1 - Service Specification**.
3. To the extent permitted by law, Fujitsu disclaims all implied warranties without limitation, including warranties of fitness for purpose. Where legislation implies into this Agreement any condition or warranty, and that legislation voids or prohibits the exclusion of that condition or warranty, the liability of Fujitsu for any breach of that condition or warranty is limited at Fujitsu's option to the re-supply or the cost of re-supplying the Services.

#### **Clause 6: Virtual Machines**

1. The Customer may deploy (generating), start (virtually turning on the power to) and return (erasing) Virtual Machines by using its Portal Usage ID to perform prescribed operations via the Service Website.
2. The Customer acknowledges and agrees not to enter Fujitsu data centers in order to use the Service, unless expressly granted permission to do so by Fujitsu.
3. The conditions for use of the Service Website are provided in **Schedule 2 – Service Website Conditions of Use**. The Customer agrees to comply with the Service Website Conditions of Use when using the Service Website.
4. In using the Service, the Customer shall participate in the Community. Community participation conditions of use are provided in **Schedule 3 – Community Participation Rules**. The Customer agrees to comply with the Community Participation Rules when participating in the Service.

#### **Clause 7: The Time Period for Providing this Service**

1. Subject to clauses 7.1 and 7.2, the time period for the provision of the Service shall be 24 hours a day, 365 days a year.
2. The Customer acknowledges that Fujitsu shall conduct regular maintenance, from time to time, in order to ensure the smooth operation of the Service, and may temporarily interrupt the provision of the Service in order to conduct such regular maintenance. Fujitsu shall provide the Customer with at least 14 days advance notice that regular maintenance is to be conducted, via email and the Service Website.
3. The Customer acknowledges that Fujitsu may temporarily interrupt the provision of the Service in order to conduct urgent maintenance. In such cases, Fujitsu shall report to the Customer that urgent maintenance has been conducted promptly after the event.

### **Clause 8: Intellectual Property**

1. Intellectual Property in the software and content on the Service shall be held by Fujitsu or third parties.
2. Unless expressly stipulated otherwise, the Customer shall not duplicate, adapt or make public broadcasts (including converting the software or content into a transmittable form), modify, decompile, disassemble, or reverse engineer such software or content.
3. As part of the Service, the Customer may be provided with access to or use of third party software. The Customer acknowledges that Fujitsu has certain obligations to third party licensors of software that may be accessed or used by the Customer in the course of accessing the Service Website or receiving the Services.
4. In using the third party software, the Customer agrees to abide by any third party software conditions of use (**Schedule 4 – End User License Agreements**).
5. The responsibility borne by Fujitsu in respect of such software shall be limited in accordance with the terms of the applicable End User License Agreement.
6. The Customer agrees that Fujitsu may provide those third party licensors with information regarding the Customer's use of their software, including information on the number of licences required for the Customer's use or access of the software, the country in which the Customer's is located and the Customer's name and address.
7. The Customer releases Fujitsu from any and all liability Fujitsu may have to the Customer in relation to any use or other dealing with that information by Fujitsu's third party licensors.
8. If the software is listed as open source software in Schedule 1 - Service Specification, the Customer shall only use such software having agreed to the conditions indicated by the licensor as the license conditions for the software.
9. If the Customer personally prepares software for use on a Virtual Machine, the Customer shall acquire permission to use the software on the Virtual Machine from the person with the rights to the software.

### **Clause 9: Backups**

1. The Customer acknowledges that it is solely responsible for backups of the data and material that the Customer has registered and stored on the Virtual System Set.

### **Clause 10: Application Program Interfaces**

1. Fujitsu shall provide the Customer with an API.
2. The Customer acknowledges that all operating instructions issued via the API shall be regarded as having been issued by the Customer as if the instruction was made via the Service Website using the Portal Usage ID.
3. If requested by the Customer, Fujitsu shall provide the Customer with a SDK.
4. The Customer agrees to comply with Fujitsu's conditions of use of the SDK.

### **Clause 11: Helpdesk Service**

1. Fujitsu shall provide the Customer with a Helpdesk Service.
2. The Helpdesk Service includes:
  - (1) an Inquiry Contact Point;
  - (2) a helpdesk to reply to questions regarding the details of the Service Specification, how to set up or use Virtual Machines or Virtual Systems (refer to Schedule 1 – Service Specification); and
  - (3) a support service contact point for the software that is provided together with Virtual Machines (refer to **Schedule 5 – Software Support Specification**).
3. The Customer may email the Inquiry Contact Point when the Customer suspects that the Service is not behaving “normally”.
4. The Customer acknowledges that the Inquiry Contact Point will not respond to questions regarding Service Specifications, how to set up or use Virtual Machines or Virtual Systems or Software Defects.
5. The time period for telephone replies from the Helpdesk is 9:00 AM to 9:00 PM from Monday to Friday Australian Eastern Standard time (except for New South Wales public holidays).

### **Clause 12: Service Level**

1. If the cumulative value for Operation Stoppage Time over a twelve month period exceeds the value listed in the table below, the amount that the Customer is required to pay for the usage fees for the Billing Month following the Billing Month when this

threshold was exceeded shall be reduced by an amount (rounded up to the nearest dollar) equivalent to the rate in the table below.

Cumulative value for the Operation Stoppage Time	Rate for calculating the usage fees that do not need to be paid
4.38 hours (equivalent to an annual availability rate of 99.95%)	10%

2. The Customer acknowledges that Operation Stoppage Time does not include time during which the Service cannot be used as a result of any of the following reasons:
  - (1) Regular maintenance;
  - (2) Force Majeure events including, but not limited to war, civil unrest, insurgency, outbreaks of infectious diseases, and natural disasters such as earthquakes, typhoons, and floods;
  - (3) Orders from government or judicial institutions to halt business activities;
  - (4) Defects with the Customer's facilities;
  - (5) Defects with the access line for connecting to the Service;
  - (6) Defects with the software running on virtual machines (whether prepared by Fujitsu or the Customer);
  - (7) Defects with the settings that the Customer has implemented for virtual systems;
  - (8) Illegal operations by the Customer; and
  - (9) Attacks or illegal acts by third parties.
3. In no circumstances shall Fujitsu pay the Customer the amount in clause 12.1, in cash or by any other means.

### Clause 13: Prohibitions

In using the Service, the Customer agrees not to perform any of the following acts:

- (1) Infringing, or risking the infringement of, the Intellectual Property rights or Moral Rights of Fujitsu or third parties.
- (2) Infringing, or risking the infringement of, the property, privacy or confidentiality rights of Fujitsu or third parties.
- (3) Discriminating against, defaming or slandering Fujitsu or third parties, or facilitating discrimination against third parties, or undermining the reputation or good name of Fujitsu or third parties.
- (4) Actions connected to, or with a high risk of connection to, criminal activities, such as fraud, abuse of controlled substances, the child-sex trade, or the illegal sale of bank accounts or mobile phone numbers.
- (5) Transmitting or publishing images or text related to obscenity, child pornography or child abuse, selling media where such materials have been recorded, or displaying or transmitting advertisements that suggest the transmission, publication or sale of such media.
- (6) Establishing endless money chains (illegal pyramid schemes) or soliciting the establishment of such activities.
- (7) Gambling illegally or soliciting illegal gambling.
- (8) Directly and explicitly outsourcing, mediating or inducing (including making requests to other persons) illegal actions (such as the transfer of weapons, the provision of child pornography, forgery of official documents, murder or intimidation).
- (9) Publishing or transmitting to an indeterminate large number of persons information about atrocities, such as information about places where people have been killed, or information or images about cruelty to animals, or any other information that would, under normal social conventions, clearly cause third parties to have a feeling of revulsion.
- (10) Soliciting or inducing suicide.
- (11) Violating prohibitions on improper solicitations via online dating services or the regulations applicable to the providers of such services.
- (12) Sending emails containing unsolicited advertising, promotions, or solicitations to Fujitsu or third parties, sending emails that harbor ill will or that may harbor ill will (hate emails), hindering the reception of emails by Fujitsu or third parties, making requests to forward chain emails or forwarding chain emails in response to such requests.
- (13) Repeatedly making numerous connections to a computer held by a third party, thereby making it difficult to use that computer.
- (14) Collecting personal information about a third party by fraudulent means, or without obtaining the consent of the person in question.
- (15) Erasing or falsifying the information that can be used with the Service.
- (16) Using the Service by masquerading as Fujitsu or a third party.
- (17) Obstructing, or risking the obstruction of, the use or management of facilities owned by Fujitsu or third parties (including actions that destroy the functions of Virtual Machines, such as erasing the operating systems stored on Virtual Machines).
- (18) Transmitting or publishing malicious computer programs or creating a situation where such programs can be downloaded by third parties.
- (19) In cases where the Customer is obliged to perform procedures in accordance with laws and regulations, such as making submissions

to regulatory authorities or obtaining permits or licenses, failing to implement such procedures or violating these laws and regulations in other ways.

- (20) Violating laws or regulations or public order and good morals (such as violence or abuse), undermining the reputation of Fujitsu or infringing on Fujitsu's assets, or actions to the detriment of third parties.
- (21) Posting links to data and material where actions applicable to any of the items above can be found (including actions performed by third parties).
- (22) Compelling a third party to perform actions applicable to any of the preceding items, or failing to take appropriate measures to prevent such actions or omissions despite being aware of such actions or omissions by a third party.

#### **Clause 14: Addressing Problems**

1. If Fujitsu deems that the Customer's behaviour breaches any of the conditions in the Clause 13, Fujitsu may, at its absolute discretion, adopt any measures that it deems appropriate, including, but not limited to:
  - (1) deleting or hiding all or part of the information that the Customer sends or displays, without any prior notice to the Customer; and
  - (2) immediately terminating this Agreement in accordance with clause 4.3.

#### **Clause 15: Self-responsibility**

1. If the Customer, through use of the Service, inflicts damages on a third party for reasons attributable to the Customer, or receives demands (such as claims for damages) from a third party, the Customer shall address and resolve such issues at the Customer's own cost and responsibility. The same shall apply in cases where a Customer suffers damages from a third party through the use of the Service, or makes demands (such as claims for damages) to a third party.
2. The Customer acknowledges that Customer Content is provided or transmitted at the Customer's own risk and Fujitsu makes no guarantees whatsoever regarding the Customer Content.
3. Fujitsu shall not be liable to the Customer or anyone else for any loss or damage (including, without limitation, any direct, indirect, special or consequential loss) arising from the Customer Content.

#### **Clause 16: Security**

1. The Customer acknowledges that software, such as the operating systems running on the Virtual Machines (and including the software that is provided as part of this Service) may contain known or unknown security vulnerabilities.
2. The Customer acknowledges that it can apply updates to the software, and take other necessary measures at the Customer's discretion, to reduce software security vulnerabilities.
3. Fujitsu shall not be liable to the Customer or anyone else for any loss or damage (including, without limitation, any direct, indirect, special or consequential loss) arising from known or unknown security vulnerabilities with software, such as the operating systems running on the Virtual Machines.

#### **Clause 17: Customer-specific Information**

1. Fujitsu shall not access the Virtual Systems deployed by the Customer without the Customer's consent.
2. Fujitsu will not access or view Customer-Specific Information without the Customer's consent unless:
  - (1) a disclosure is required by law or for the purpose of criminal investigation;
  - (2) Fujitsu deems that the information is required to protect life, limb or property; or
  - (3) Fujitsu needs to access management information so that it can operate the Service (eg calculating usage fees or maintaining the facilities).

#### **Clause 18: Confidential Information**

1. Subject to clause 18.3, each party shall maintain the confidentiality of Confidential Information disclosed by the other party, and neither party shall disclose or leak such information to any person other than those employees or directors of their own organisations who need to know the information in order to use the Service (or, in the case of Fujitsu, in order to operate and develop the Service).
2. Subject to clause 18.3, each party shall store and manage Confidential Materials with due care and skill, and neither party shall transfer or provide Confidential Materials to third parties nor allow persons other than employees or directors of their own organisation to view or otherwise access such Confidential Materials.

3. Each party may disclose or provide the other party's Confidential Information or Confidential Material to relevant third parties in the following circumstances:
  - (1) When compelled to by law;
  - (2) Where information is provided to a person with a legal obligation of confidentiality; and
  - (3) When either party commissions work relating to the Service to a third party and that third party has an obligation of confidentiality equivalent to the obligation of confidentiality in this clause 18.
4. Each party shall only use Confidential Information disclosed by the other party for purposes related to the Service, and shall not use such information for any other purpose.
5. Each party may duplicate Confidential Materials to the extent necessary in order to use the Service.
6. Each party must, without delay, destroy, erase or return to the other party all Confidential Materials (including any duplicates) if requested to do so by the other party, or upon termination of the Agreement.
7. Each party must ensure that any employees or directors in their own organisation who come to know the other party's Confidential Information to comply with the content of this clause 18.
8. Personal information (by which is meant the information so stipulated by the Privacy Act 1988) held by the Customer and clearly disclosed as such, as well as the materials received from the Customer for the purpose of disclosing such personal information shall be handled in the same manner as the Confidential Information and Confidential Materials in this clause 18.
9. The conditions in this clause 18 shall continue to remain in effect even after the termination of this Agreement.

#### **Clause 19: Liability**

1. In the event that the Customer is entitled to damages as a result of an inability to use the Service for reasons attributable to Fujitsu, Fujitsu shall accept liability for damages not exceeding the amounts itemised in this clause 19, but only in cases where the inability to use the Service persists for more than 24 hours from the time when Fujitsu becomes aware that the Customer is no longer able to use the Service.
2. Fujitsu shall not be liable to the Customer or anyone else for any loss or damage (including, without limitation, any direct, indirect, special or consequential loss) arising from reasons that cannot be directly attributed to Fujitsu.
3. Fujitsu's liability shall be limited to the following amounts:
  - (1) If the Customer has been using the Service for more than 12 months, the maximum amount shall be the average amount for one month's usage fees, calculated backwards according to the amount of use over the past 12 months, starting from the Billing Month prior to the Billing Month when the inability to use the Service occurred.
  - (2) If the period between the date when the Customer started using the Service and the Billing Month prior to the Billing Month when the inability to use the Service occurred is less than 12 months, the maximum amount shall be the average amount for one month's usage fees, calculated according to the amount of use over this period.
  - (3) If the period in clause 19.3 (2) is less than one month, the maximum amount shall be the average amount for one day's usage fees (calculated according to the amount of use up until the day before the inability to use the Service occurred) multiplied by 30.
4. In no event is Fujitsu, its affiliates, agents or subcontractors, and each of their partners, principals, members, employees and other personnel liable for any lost profits, opportunity costs or lost data, loss of management time or failure to realise anticipated savings or for any special, indirect, incidental, consequential or punitive damages, costs, expenses or losses of any nature.
5. Fujitsu's legal responsibility in relation to inability to use the Service shall be limited to the extent prescribed in this clause 19 and clause 12.
6. Without limiting the foregoing, Fujitsu shall not be held legally responsible for damages to the Customer caused by any of the following reasons:
  - (1) Regular maintenance;
  - (2) Force Majeure events, including, but not limited to, war, civil unrest, insurgency, outbreaks of infectious diseases, and natural disasters such as earthquakes, typhoons, and floods;
  - (3) Orders from government or judicial institutions to halt business activities;
  - (4) Defects with the Customer's facilities;
  - (5) Defects with the software running on virtual machines (whether prepared by Fujitsu or the Customer);
  - (6) Defects with the access line for connecting to the Service;
  - (7) Defects with the settings that the Customer has implemented for Virtual Systems;

- (8) Illegal operations by the Customer; and
  - (9) Attacks or invalid actions by third parties.
7. To the extent permitted by law, the liability of Fujitsu for loss or damage sustained by the Customer will be reduced proportionately to the extent that such loss or damage has been directly caused by the other party's failure to comply with its obligations under this agreement or the negligence of the other party has directly contributed to such loss or damage, regardless of whether a claim is made by the other party in contract, tort (including negligence) or any other basis.

**Clause 20: Billing Month**

1. The Billing Month for the Service shall start on the first day of the calendar month and end on the last day of the calendar month.

**Clause 21: Service Usage Fees**

2. The unit prices for the usage fees for the Service shall be as listed on the Public Service Website.
3. Fujitsu shall calculate usage fees from the first day of each Billing Month (unless the Agreement started midway through the Billing Month in question, in which case the calculation will start from the day that the Agreement started) until the last day of the Billing Month (unless the Agreement ended midway through the Billing Month in question, in which case the calculation will end on the day that the Agreement ended), by measuring one or more of the following elements:
- (1) the usage time for Virtual Machines;
  - (2) the usage time and allocated capacity for virtual memory disks,
  - (3) the volume of Internet communications, and
  - (4) the number of licenses for using software,
- which are the preconditions for calculating the service usage fees.
4. Fujitsu shall display the usage fee on the Service Website, calculated as the total usage fee for each Customer Organisation Number.
5. All usage fees are exclusive of GST, unless expressed to be GST inclusive. Where Fujitsu makes a taxable supply to the Customer under or in connect with this Agreement, the Customer must pay Fujitsu an additional amount equal to the supply (unless consideration for that supply is expressed to include GST).
6. With respect to the calculations for the usage fees for the Service and the GST amounts, any fractional amounts less than one cent shall be rounded down.

**Clause 22: Obligation to Pay Usage Fees**

1. The Customer shall pay Fujitsu the usage fees for the Service and an amount equivalent to GST, as calculated in accordance with clause 21 and the payment conditions in the Application Form.
2. If the payment date falls on a non-business day for financial institutions, the payment date shall be moved forward to the preceding business day.

**Clause 23: Conditions for Paying Usage Fees**

1. The Customer shall be responsible for paying any transfer fees payable to a financial institution at the time when the payments in accordance with clause 22 are made.
2. If the Customer neglects to discharge financial liabilities arising from the Agreement (including any debts due and payable), the Customer shall pay Fujitsu interest on any amount due from the due date of payment until the date of actual payment at the standard bank bill rate of Westpac Bank plus 2%. Interest is to be calculated on a daily basis.
3. If the Customer does not pay usage fees by the payment date, Fujitsu shall reserve the right to cease providing the Service after making a formal demand for payment.

**Clause 24: Prohibition of Transfer of Rights and Obligations**

1. The Customer shall not lend or in any other way transfer its rights or obligations under the Agreement to a third party.

**Clause 25: High Safety Required Use**

1. The Customer acknowledges that the Service is designed, developed and manufactured for general use (including general office use,

personal use, household use, and ordinary industrial use) and is not designed, developed or manufactured for use accompanying fatal risks or dangers that, unless extremely high safety is secured, could lead directly to death, personal injury, severe physical damage or other loss, including without limitation, nuclear reaction control in nuclear facility, aircraft flight control, air traffic control, mass transport control, medical life support system, missile launch control in weapon system (hereinafter referred to as "High Safety Required Use").

2. In the event that the Customer wishes to use the Service for High Safety Required Use, the Customer agrees not use the Service without securing the sufficient safety required for the High Safety Required Use.
3. The Customer acknowledges that any use of the Service for High Safety Required Use is at its own risk. Fujitsu shall not be liable to the Customer and/or any third party for any claims or damages arising in connection with the High Safety Required Use of the Service by the Customer.

#### **Clause 26: Agreement Jurisdiction**

1. The Courts of New South Wales, Australia shall have the exclusive jurisdiction of the first instance over all disputes arising in connection with the Agreement.

#### **Clause 27: Applicable Law**

1. This Agreement shall be governed by the laws of New South Wales, Australia.

#### **Clause 28: Indemnity**

1. The Customer continually indemnifies Fujitsu against any claim or proceeding that is made, threatened or commenced, and against any liability, loss, damage or expense (including legal costs on a full indemnity basis) any of them incurs or suffers, as a direct or indirect result of any of the following:
  - (1) a breach of this Agreement by the Customer;
  - (2) a wilful, unlawful or negligent act or omission by the Customer;
  - (3) any claim by a third party that the Customer's installation, storage or accessing of the material on the Service infringes the Intellectual Property or other rights of that third party.
  - (4) the Customer's use of software other than as permitted by this Agreement;
  - (5) damage to or loss of any of Fujitsu's property caused or contributed to by the Customer;
  - (6) a deficiency in the Customer's systems or facilities;
  - (7) corruption or loss of Fujitsu's or a third party's data caused or contributed to by the Customer; or
  - (8) damages caused to a third party caused by or in connection with the Customer's use of the Service.

#### **Clause 29: Dispute Resolution**

1. A party must not start court proceedings (except proceedings seeking interlocutory relief) unless it has complied with this clause 29.
2. A party claiming that a dispute, difference or question arising out of this Agreement ("Dispute") has arisen must notify the other party giving details of the Dispute ("Notification").
3. Within 7 days (or any longer period agreed between the parties) after a Notification is given, each party's Contract Managers or Legal representatives must personally or through a nominee use reasonable efforts to resolve the Dispute through negotiation.
4. If the Contract Managers or Legal representatives cannot resolve the Dispute within 14 days after the Notification is given (or any longer period agreed between the parties), the Contract Managers or Legal representatives must immediately refer the Dispute to an Executive General Manager of each party or their nominated representatives.

#### **Clause 30: Subcontract**

1. Fujitsu may subcontract for the performance of this Agreement or any part of this Agreement and may engage subcontractors, whether or not operating under a corporate structure, to assist in the provision of Services pursuant to this Agreement at any time without the Customer's consent.

#### **Clause 31: Variation**

1. The Customer acknowledges and agrees that Fujitsu may change the terms of this Agreement and its Schedules at any time during the Term, in which case the new (changed) Agreement shall apply to the Customer.

2. Fujitsu will provide the Customer with reasonable advance notice of any proposed change to the terms, but the Customer's consent is not a prerequisite.
3. If the Customer does not agree with the terms of the new (changed) Agreement, the Customer may terminate the Agreement without penalty by providing 30 days written notice to Fujitsu.

**Clause 32: Express rights**

1. Any express statement of a right of Fujitsu under this Agreement is without prejudice to any other right of Fujitsu expressly stated in this Agreement or existing at law.

**Clause 33: Publicity**

1. Except as (but only to the extent) required by applicable law, the requirements of any Governmental Authority or other regulatory body which restricts the undertaking of marketing and promotional activities or press releases and public announcements in respect to the Services provided under this Agreement, Fujitsu may, with notice to the Customer, undertake marketing and promotional activities and make press releases and other public announcements in respect to the Services provided under this Agreement.

**Clause 34: Waiver**

1. No right under this Agreement will be deemed to be waived except by notice in writing signed by each party. Any waiver by Fujitsu will not prejudice its rights in respect of any subsequent breach of the Agreement by the Customer.
2. Any failure by Fujitsu to enforce any clause of this Agreement, or any forbearance, delay or indulgence granted by Fujitsu to the Customer will not be construed as a waiver of Fujitsu's rights under this Agreement.

**Clause 35: Severability**

1. If any provision of this Agreement is held invalid, unenforceable or illegal for any reason, the Agreement will remain otherwise in full force apart from such provisions which will be deemed deleted.

**Clause 36: Notices by electronic communication**

1. Any notice or communication given to a party under this Agreement may be made by electronic mail or other electronic means via the Service Website.

**Clause 37: Interpretation**

1. In the interpretation of this Agreement, the following provisions apply unless the context otherwise requires:
  - (1) the clause headings are for ease of reference only and will not be relevant to interpretation;
  - (2) a reference to a clause number is a reference to its subclauses;
  - (3) words in the singular number include the plural and vice versa;
  - (4) words importing a gender include any other gender;
  - (5) a reference to a person includes bodies corporate and unincorporated associations and partnerships;
  - (6) a reference to a subclause is a reference to a subclause of the clause in which that reference is made;
  - (7) 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; and
  - (8) monetary references are references to Australian currency.