

# CUSTOMER SERVICES AGREEMENT

## 1. Performance of Services

### 1.1 Provision of the Services

- (a) During the Term, DCS agrees to perform the Services as set out in a Proposal or other purchase order agreed by the parties in accordance with the terms of this Agreement. The Client acknowledges and agrees that the Services may be performed by DCS or any of its related bodies corporate.
- (b) DCS agrees to:
- (i) comply with all reasonable directions of the Client and all applicable laws in connection with the provision of the Services;
  - (ii) comply with all reasonable health and safety policies of the Client whilst on the Client's site as provided to DCS prior to commencing the work; and
  - (iii) use reasonable endeavours to have the personnel identified in the relevant Proposal available to perform the Services and will provide the Client reasonable written notice if it intends to replace or reassign such personnel.
- (c) The Client agrees to cooperate with DCS in supplying the Services or any Products, including:
- (i) providing DCS with safe and timely access to the Client's Systems, personnel, facilities, site and utilities;
  - (ii) providing DCS with any requested information relevant to the provision of the Services in a timely and accurate manner;
  - (iii) ensuring its Systems are virus free and backed-up prior to and at all times during the performance of the Services; and
  - (iv) comply with all reasonable requests or directions of DCS for the purpose of facilitating the supply of the Services and Products.
- (d) The Client authorises DCS Personnel to access and use the Client's Systems as reasonably required by DCS for the provision of the Services for all purposes, including in connection with the *Criminal Code Act 1995*(Cth).
- (e) To the maximum extent permitted by law, the Client will indemnify DCS from and against any Claim pursuant to the *Criminal Code Act 1995*(Cth) relating to, arising out of or in connection with the Services to be provided by DCS under this Agreement.
- (f) The Client acknowledges and agrees that DCS will not be in breach of the Agreement if the Services impact the information or operating Systems of the Client.

### 1.2 Use of subcontractors

- (a) DCS will be liable for:
- (i) the acts and omissions of its subcontractors; and
  - (ii) provision of the Services by its subcontractors, as if DCS had provided the Services or done the act or omissions itself.

### 1.3 Purchase of Products

- (a) At any time during the Term the Client may request to purchase any Products offered for sale by DCS by submitting a purchase order with DCS.
- (b) The purchase order must set out the type and quantity of the Product/s to be purchased and the desired date for delivery of the Products.
- (c) DCS will provide the Client written notification of acceptance or rejection of the purchase order and which will confirm the Purchase Price and the proposed delivery date for the Products. Failure by DCS to confirm receipt of the purchase order cannot be taken to be an acceptance of that purchase order.
- (d) All risk in any Products transfers to the Client upon delivery of the Product to the Client and title passes on payment in full of the Purchase Price.

## 2. Vulnerability or penetration testing

To the extent the Services include vulnerability testing, phishing and/or penetration testing, the terms of Attachment A apply.

## 3. Term

Unless otherwise terminated in accordance with clause 11, this Agreement commences on the day that DCS commences providing the Client with the Services and continues for the duration of the Services

## 4. Fees & Payments

- (a) The Client must pay DCS the Fees for the provision of the Services and the Purchase Price for the supply of any Products, as set out in a valid tax invoice issued by DCS. The parties agree the Fees may be in the form of a monthly retainer, hourly or daily Rates or a fixed fee as set out in the relevant Proposal.
- (b) DCS will issue invoices monthly at the end of the month in which the Services the subject of the invoice have been performed or the Product has been delivered. A final invoice for any outstanding amounts will be issued upon completion of the Services.
- (c) The Client must pay all invoices within 14 days of the invoice date by electronic funds transfer to an account as specified by DCS in the invoice.
- (d) All charges are exclusive of all applicable taxes, duties, goods and services tax (**GST**) and government charges. If GST is payable for any supply made by DCS under this Agreement, the amount payable shall be adjusted accordingly by DCS and the Client must pay any additional amount at the same time and in the same manner as the payment of other charges.
- (e) If DCS does not receive payment strictly in accordance with clause 4(c), DCS may charge the Client interest at the Late Payment Rate, compounding daily.
- (f) The Client may not set-off, counterclaim or deduct any amount from an amount owing by the Client to DCS.
- (g) The Client must notify DCS in writing of any disputed invoices within 5 business days of receipt detailing the amount and the reason for the dispute.

## 5. Intellectual Property

### 5.1 Intellectual Property in Deliverables and provision of Services

- (a) Subject to clauses 5.2 and 5.3, all intellectual property rights in the Deliverables, the Services and any other material created by DCS in delivering the Services remain the property of DCS.
- (b) Subject to clause 5.3, DCS grants the Client a non-exclusive, non-transferable, non-sub licensable, royalty free license to use in Australia the intellectual property rights in the Deliverables, the Services and any other material created by DCS in delivering the Services for the sole and limited purpose of enjoying the benefit of the Services.

### 5.2 Background IP

Each party at all times retains all title and ownership in its own Background IP.

### 5.3 Third party intellectual property

- (a) In providing the Services, DCS may provide the Client with software or Deliverables that are, or include, software or other material which is owned by or is proprietary to a third party (**Third Party Material**). The Client agrees that:
- (i) its use of Third Party Material will be subject to the third party licensor's licence agreement (**Third Party Licence**) between the Client and the third party licensor; and
  - (ii) title in any Third Party Material remains at all times with the third party.
- (b) Subject to clause 5.3(a), DCS warrants that to the best of its knowledge and belief, all materials and Deliverables created by DCS in delivering the Services do not infringe any intellectual property rights of any third party.

## 6. Confidentiality

- (a) Each party agrees that where it, its Personnel, or its Related Bodies Corporate, are the recipient of Confidential Information (**Recipient**) of the other party (**Disclosing Party**), the Recipient must:
- (i) subject to clause 6(b), treat all Confidential Information as confidential and not use it except as reasonably necessary for the purposes of this Agreement;

- (ii) ensure that the Confidential Information is held in strict confidence and is not disclosed to any third party (subject to any legal requirement on the Recipient to disclose the Confidential Information);
  - (iii) immediately notify the Disclosing Party in writing if the Recipient suspects that any Confidential Information may have been accessed by any unauthorised party;
  - (iv) use, at a minimum, the same degree of care with respect to its obligations under this Agreement as it employs with respect to its own confidential or proprietary information, but in no event less than reasonable care; and
  - (v) upon request by the Disclosing Party or termination of this Agreement, promptly deliver to the Disclosing Party all written documents or other physical embodiments containing the Confidential Information then in its custody, control or possession and must deliver within 10 days after such termination or request a written statement to the Disclosing Party certifying to such action.
- (b) Unless otherwise agreed in writing by the Disclosing Party, the obligations of confidentiality in clause 6(a)(i) do not apply to the extent the Confidential Information:
- (i) has been lawfully disclosed to the Recipient by a third party free from obligations of confidentiality; or
  - (ii) is in the public domain (other than through a breach of this Agreement).

## 7. Privacy

- (a) Both parties agree to comply with the Privacy Laws in relation to the provision and use of the Services.
- (b) Without limiting clause 7(a), the Client may only disclose Personal Information in its control to DCS, or allow DCS to access such Personal Information, if:
- (i) the Client is authorised to do so by applicable Privacy Laws and any privacy policy or code of the Client; and
  - (ii) the Client has informed the individual to whom the Personal Information relates that the Client may disclose their Personal Information to a third party such as DCS and of the purposes of that disclosure, and (if necessary under the Privacy Laws) has obtained the individual's consent to such disclosure.
- (c) The Client will be liable for all actions, claims, proceedings, demands, liabilities, losses, damages, expenses and costs (including legal costs on a full indemnity basis) that may be brought against DCS or its Related Bodies Corporate or which DCS may pay, sustain or incur as a direct or indirect result of any breach or non-performance of the Client's obligations under this clause 7, except that the Client's liability will be proportionally reduced to the extent caused or contributed to by the negligent or wilful acts or omissions of DCS.
- (d) The Client acknowledges and agrees that:
- (i) it may be necessary for DCS to access Personal Information held by the Client in order to provide the Services;
  - (ii) it will do all things necessary to prevent DCS being in breach of its obligations under the Privacy Laws and its Privacy Policy.

## 8. Data Security

- (a) DCS will take reasonable precautions within its own control to prevent any unauthorised access to or alteration of the Client Data (**Security Breach**).
- (b) The Client agrees that DCS will not be responsible for any Loss or damage to the Client Data or property resulting from a Security Breach, provided the Security Breach is not a result of DCS's negligent or wilful acts or omissions.

## 9. Warranties

- (a) DCS warrants:
- (i) it has the power, capacity and authority to enter into and observe its obligations under this Agreement;
  - (ii) the Services will be provided by exercising the same degree and skill, care and diligence that would be

- exercised by a professional services provider in the same industry in similar circumstances;
  - (iii) it and its personnel are appropriately trained and experienced to provide the Services; and
  - (iv) any Products sold to the Client or supplied in the performance of the Services are reasonably fit for purpose and of good merchantable quality.
- (b) Any representation, warranty, condition or undertaking that would be implied in this Agreement by legislation, common law, equity, trade, custom or usage is excluded to the maximum extent permitted by law.
- (c) Nothing in this Agreement excludes, restricts or modifies any condition, guarantee, warranty, right or remedy conferred on the parties by the *Competition and Consumer Act 2010* (Cth) or any other applicable law that cannot be excluded, restricted or modified by agreement.
- (d) To the fullest extent permitted by law, the liability of DCS for a breach of a non-excludable condition, guarantee, warranty right or remedy referred to in clause 9(c) is limited, at DCS's option, to:
- (i) the replacement, resupply or repair of the relevant Products;
  - (ii) the resupply of the relevant Services; or
  - (iii) the payment of the cost of having the relevant Services or Products resupplied or repaired.

## 10. Liability

- (a) To the maximum extent permitted by law, DCS is not responsible and excludes all liability for any Loss or damage to the Client's Systems or any data or information of the Client arising from or in connection with the supply of the Services or the Products by DCS except to the extent DCS acted negligently in the performance of the Services or the loss or damage arose from a material breach by DCS of the terms of this Agreement.
- (b) DCS indemnifies the Client for any Loss suffered by the Client arising from or related to:
- (i) any personal injury or death to the Client's personnel resulting from the negligent or wilful acts or omissions of DCS; and
  - (ii) any damage to Client's real or tangible property resulting from any negligent or wilful acts or omissions of DCS,
- except to the extent caused or contributed to by the Client's or its Personnel's acts or omissions and subject to:
- (iii) the Client promptly notifying DCS of the relevant injury, death, damage or loss;
  - (iv) the Client taking all reasonable steps (and ensuring its employees, agents, officers and contractors take all reasonable steps) to mitigate their loss; and
  - (v) the Client (and its employees, agents, officers and contractors where relevant) permitting DCS to manage any relevant claim or action in the name of the Client (or any relevant employee, agent, officer or contractor of the Client).
- (c) Subject to clause 10(d), DCS's total aggregate liability to the Client in respect of any and all Losses incurred by the Client (whether for breach of contract, in tort (including negligence) or otherwise) arising out of or in connection with the carrying out of the Services or supply of the Products is limited to twice the amount paid by the Client to DCS under this Agreement in the 12 months preceding the event giving rise to the Loss, to a maximum amount of \$1m.
- (d) DCS's limit on liability in clause 10(c) does not apply to the following Losses:
- (i) third party Intellectual Property claims against the Client caused or contributed to by DCS; or
  - (ii) personal injury or death of a party or person as a result of DCS's acts or omissions.
- (e) Notwithstanding anything to the contrary in this Agreement, under no circumstances will either party be liable to the other party for any indirect or Consequential Loss.

## 11. Termination

- (a) Either party may terminate the Agreement with immediate effect if the other party is:

- (i) in material breach of the Agreement and where the breach is remediable that defaulting party fails to remedy the breach within 14 days of receiving notice of the breach;
  - (ii) subject to an Insolvency Event; or
  - (iii) subject to an Event of Force Majeure continues for a period of 90 days.
- (b) Upon termination of this Agreement for any reason:
- (i) DCS will cease providing the Services and Products; and
  - (ii) the Client must pay to DCS all outstanding Fees for Services actually performed or Products for which a purchase order has been accepted.
- (c) Termination of this Agreement does not affect a liability or any obligation of a party arising prior to termination nor affect any damages or other remedies which a party may be entitled under this Agreement.
- (d) On expiry or termination of this Agreement:
- (i) Clauses 6 (Confidentiality), 7 (Privacy), 8 (Data Security), 9 (Warranties), 10 (Liability), 11(b) (termination) and 12 (Non-solicitation) continue in full force and effect; and
  - (ii) all rights, obligations and liabilities a party has accrued before expiry or termination continue.

## 12. Non-solicitation

During the Term and for a period of 12 months after completion of the Term, the Client must not, and must procure its affiliates do not, offer work to, solicit or induce for employment, employ, or contract with, DCS's Personnel who are involved with the provision of the Services, without first obtaining the written consent of DCS (which may be withheld by DCS at its absolute discretion).

## 13. Miscellaneous

- (a) If any provision set out in this Agreement is invalid under the operation of any applicable law that clause will be considered to be invalid and unenforceable in the relevant jurisdiction without affecting the validity of the remaining clauses.
- (b) Neither party may assign its rights under this Agreement without the other party's prior written consent, provided however DCS can assign its rights under this Agreement to a Related Body Corporate if it wants for so long as it requires to do so.
- (c) The Client acknowledges and agrees that some or all of the Services may be provided by CyberCX Pty Ltd and /or its group companies, which may include the storage, or accessing of client data by CyberCX Pty Ltd personnel from locations outside of Australia.
- (d) All notices and consents must be sent by email to the email addresses on the front page of this Agreement.
- (e) This Agreement is governed by the laws in force in Western Australia, Australia.
- (f) DCS will not be liable for any delay or failure to supply the Services or Products if such a delay or failure was due to an Event of Force Majeure.
- (g) Any dispute relating to the subject matter of this Agreement shall be submitted to mediation prior to any other dispute resolution process being invoked. The parties will agree a mediator within 21 days of either party giving the other written notice of intention to invoke mediation. If the parties cannot agree on a mediator then the dispute will be referred to the Australian Disputes Centre (ADC). All mediation proceedings will be conducted in accordance with the ADC's ADR Guidelines.
- (h) No party is authorised to bind another party and nothing in this Agreement is construed as creating a relationship of principal and agent, partners, trustee and beneficiary, or employer and employee.
- (i) This Agreement may only be amended or replaced with the written agreement of all parties.
- (j) This Agreement constitutes the entire agreement between the parties and supersedes any prior conduct, arrangement, agreement or understanding in relation to its subject matter.
- (k) This Agreement can be signed in counterparts. If an electronic signature is used, it shall have the same effect as a handwritten signature.

## 14. Definitions and interpretation

### 14.1 Definitions

All capitalised terms have either the meanings given to that term in the Contract Details, the definitions in this clause 14.1 or where otherwise set out in the Agreement:

**Agreement** means these general terms and conditions and any Proposal or purchase order;

**Background IP** means a party's intellectual property rights in any materials developed independently of, or prior to, the provision of the Services and the Deliverables;

**Business Day** means a day that is not a Saturday, Sunday, public holiday or bank holiday in Melbourne, Victoria;

**Client** means the customer who has requested the Services to be performed by DCS.

**Client Data** means the data owned or supplied by the Client which is accessed by DCS or its subcontractors in the course of performing the Services;

**Confidential Information** means all and any information (in any form or media) of a confidential nature that is made available directly or indirectly, and before, on or after the date of this Agreement including financial, client, employee and supplier information, product specifications, policies and procedures, processes, statements, formulae, trade secrets, Client Data, drawings and data which is not in the public domain (except by virtue of a breach of the confidentiality obligations arising under this Agreement);

**Consequential Loss** means any:

- (a) loss that does not arise naturally (that is, according to the usual course of things) from the event giving rise to the loss; or
- (b) any loss of profits, loss of production, loss of revenue, loss of business, loss of goodwill, damage to reputation, loss of opportunity, loss or corruption of data or wasted overheads;

**DCS** means Diamond Cyber Security Pty, CyberCX Pty Ltd and any of CyberCX Pty Ltd's wholly owned subsidiaries;

**Deliverables** means the materials, reports and other deliverables to be provided by DCS in performing the Services, as set out in the relevant Proposal;

**Deliverables Date** means the date upon which the final Deliverables are to be provided to the Client, if any;

**Event of Force Majeure** means any event or circumstance, or a combination of events or circumstances, which is beyond the reasonable control of a party, which by the exercise of due diligence that party is not reasonably able to prevent or overcome and which has the effect of preventing the party from performing an obligation under this Agreement;

**Fees** means the fees payable by the Client for the provision of the Services, as set out in the relevant Proposal or purchase order agreed by the parties;

**Insolvency Event** means:

- (a) bankruptcy proceedings are commenced against the relevant party, or the relevant party is declared bankrupt;
- (b) any step is taken to enter into any scheme of arrangement between the relevant party and its creditors;
- (c) any step is taken by a mortgagee to enter into possession or dispose of the whole or any part of the relevant party's assets or business;
- (d) any step is taken to appoint a receiver, a receiver and manager, a trustee in bankruptcy, a liquidator, a provisional liquidator, an administrator or other like person to the relevant party or to the whole or any part of the relevant party's assets or business;
- (e) if the relevant party is in a partnership, the partnership is dissolved or an application is made to dissolve the partnership;
- (f) the relevant party suspends payment of its debts generally; or
- (g) the relevant party is or becomes unable to pay its debts when they are due or either party is or is presumed to be insolvent for the purposes of any provision of the *Corporations Act 2001*(Cth);

**Late Payment Rate** means a fixed interest rate of 2% above the base lending rate of the Reserve Bank of Australia at the date of this Agreement;

**Loss** means any loss, cost, liability or damage, including reasonable legal costs on a solicitor/client basis;

**Personal Information** has the meaning given to that term in the Privacy Act;

**Personnel** means, in relation to a party, its employees, advisers and contractors;

**Privacy Act** means the *Privacy Act 1988*(Cth);

**Privacy Laws** means the Privacy Act and all other applicable privacy and data protection laws as may be in force from time to time which regulate the collection, use, disclosure, storage of and granting of access rights to Personal Information;

**Privacy Policy** means the documented policy of DCS, as amended from time to time, located at :

[www.cybercx.com.au/resources/PrivacyPolicy.pdf](http://www.cybercx.com.au/resources/PrivacyPolicy.pdf).

**Product** means any products or goods supplied in the performance of the Services or purchased in accordance with

**Proposal** means the proposal for Services to be provided to the Client by DCS;

**Purchase Price** means the price payable for the purchase of Products supplied by DCS in accordance with clause 1.3;

**Rates** means the hourly or daily rates payable by the Client for the provision of Services by DCS, as set out in Schedule 3;

**Regulator** means a relevant government authority or statutory body with authority to enforce the law or regulations;

**Related Body Corporate** of an entity means a body corporate that is related to that entity in any of the ways specified in section 50 of the *Corporations Act 2001*(Cth);

**Security Breach** has the meaning given to that term in clause 8(a);

**Services** means the services to be provided to the Client by DCS, as set out in a relevant Proposal , or other purchase order document agreed by the parties;

**Systems** includes networks, software, applications, computers, servers, mobile devices, cloud services (including storage, software, platforms and infrastructure as a service), industrial control systems, and any other IT systems or equipment.

**Third Party Licence** has the meaning given to that term in clause 5.3(a)(i); and

**Third Party Material** has the meaning given to that term in clause 5.3(a).

#### 14.2 Interpretation

In this Agreement, unless the context requires otherwise:

- (a) clause and subclause headings are for reference purposes only;
- (b) the singular includes the plural and vice versa;
- (c) words denoting any gender include all genders;
- (d) a reference to a person includes any other entity recognised by law and vice versa;
- (e) where a word or phrase is defined, its other grammatical forms have a corresponding meaning;
- (f) any reference to a party to this Agreement includes its successors and permitted assigns;
- (g) any reference to any agreement or document includes that agreement or document as amended at any time;
- (h) the use of the word includes or including is not to be taken as limiting the meaning of the words preceding it;
- (i) the expression at any time includes reference to past, present and future time and performing any action from time to time; and
- (j) an agreement, representation or warranty by two or more persons binds them jointly and severally and is for the benefit of them jointly and severally.

## ATTACHMENT A: SECURITY TESTING AND ASSESSMENT

### 1. Application of this Attachment A

The terms of this Attachment A apply if and to the extent DCS is providing Security Testing Services to the Client.

### 2. Security Testing Services

In this Agreement, "Security Testing Services" may include:

- (a) penetration testing and red teaming;
- (b) code reviews;
- (c) security advisory;
- (d) security threats and risks assessment; and
- (e) and any other security testing or security assessment activities contemplated in a Proposal.

### 3. Sensitive nature of the services

The Client warrants that it is aware of the nature of the Security Testing Services, and in particular that the Security Testing Services may include:

- (a) security testing activities, including:
  - i) simulating or performing controlled Cyberattacks on the Client's Systems;
  - ii) deliberate attempts to penetrate the security Systems of the Client, which may be provided by a third party;
  - iii) red teaming (including, but not limited to, deliberately masquerading as a hostile attacker with the intention of detecting vulnerabilities) activities in relation to the Client and its premises and Systems; or
  - iv) deliberately allowing unauthorised access to the Client's network or Systems for the purpose of analysing threat vectors and origination;
- (b) acts that may be considered unethical; or
- (c) acts that may put the Client in breach of its agreements including, but not limited to, its third party supplier's terms of supply,

and the Client further acknowledges that DCS cannot be compelled by the Client to explain or reveal its methods of undertaking the Services.

### 4. Authorisation

The Client expressly asks and authorises DCS to provide the Security Testing Services (including the activities of a nature contemplated in clause 3 of this Attachment A) in relation to the Client and its Systems.

### 5. Acknowledgment and liability

The Client acknowledges and agrees that:

- (a) Security Testing Services:
  - i) are sample testing activities only and cannot account for all possible ways a third party could breach the Client's security measures or Systems; and
  - ii) are not security services and do not implement any security measures, and are not designed to prevent security breaches or Cyberattacks;

- (d) DCS does not guarantee that the Security Testing Services will prevent the Client from being affected by any security breach or Cyberattack; and
- (e) subject to clause 10(c), DCS is not liable to the Client in the event that the Client is affected by any security breach or Cyberattack, except where and to the extent such security breach or Cyberattack is caused by DCS.

### 6. Publicity

If the Client is affected by any kind of security breach or Cyberattack, the Client (or its employees, officers or contractors) must not:

- (a) in any way link such security breach or Cyberattack to DCS's failure to provide the Security Testing Services in any announcement, publication, declaration or other communication; or
- (b) otherwise mention or refer to DCS in relation to such security breach or Cyberattack in any announcement, publication, declaration or other communication, without DCS's prior written consent.

### 7. Specific indemnity

- (a) The Client indemnifies DCS from and against any damage or loss (however caused) that DCS suffers or incurs in connection with:
  - i) any claim by a third party that DCS is not or has not been asked or authorised to:
    - (1) provide the Security Testing Services (including Security Testing Services of a nature contemplated in clause 3 of this Attachment A) in relation to the Client; or
    - (2) where applicable, access and interact with the Systems of the Client (including Systems provided to the Client by a third party), as contemplated in clause 3 of this Attachment A;
  - ii) any claim by a third party in relation to any act by DCS of the nature described in clause 3 of this Attachment A; or
  - iii) any breach of clause 6 of this Attachment A by the Client or its officers, employees, contractors or agents.
- (b) Clauses 9(c) and 10(e) do not apply in relation to the indemnification obligations set out in clause 7(a) of this Attachment A.
- (c) This clause 7 of this Attachment A survives termination or expiry of this Agreement.

### 8. Definitions

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

**Attachment A** means clauses 1 to 5 of this Attachment A.

**Cyberattacks** mean any breach of (or attempted or threatened breach of) or unauthorised access to the Customer's Systems, including identity or intellectual property theft, exploitation of ICT systems, phishing, spamming, denial-of-service (including distributed), stolen hardware, or website defacement.

**Security Testing Services** has the meaning given to it in clause 2 of this Attachment A.