

FINANCIAL SIMPLICITY AUSTRALIA PTY LTD

TERMS AND CONDITIONS

Meanings

Words used in this Agreement and the rules of interpretation that apply to this Agreement are set out in clause 20 of these Terms and Conditions.

1. Provision of Services

- 1.1 Subject to the Customer complying with this Agreement, FSA agrees to provide the Customer with the agreed Services as set out in the Order Schedule, in accordance with and subject to the terms and conditions of this Agreement, for the duration of the Term.
- 1.2 FSA agrees to provide the Services in a diligent, competent and workmanlike manner to make available the functionality listed in the Hosted Service Specifications for the Term.
- 1.3 To the extent that the Customer requests upgrades and/or new features of the Services, the provision by FSA of any such upgrades and/or new features is subject to the parties agreeing applicable terms to vary this Agreement.
- 1.4 FSA shall be entitled, at its own discretion, from time to time during the Term, to enhance, upgrade, update, patch and/or improve the Services (and references in this Agreement to the Services includes the Services as so enhanced, upgraded, updated, patched or improved). FSA shall not charge additional fees for enhancements, upgrades, updates, patches and/or improvements except to the extent that they are provided by FSA pursuant to clause 1.3 above.
- 1.5 The Customer must:
 - (a) only authorise individuals to use or access the Services who are registered as Users and in respect of whom the Customer is paying the applicable Fees;
 - (b) require that each User maintains the secrecy of their username and password for accessing the Services and do not disclose such username and password to any other person (including any other User);
 - (c) take all reasonable security precautions to prevent unauthorised access to or copying, use or disclosure of the FSA Systems by any third party;
 - (d) use the Services in accordance with any and all directions, guidelines and policies provided by FSA to the Customer (as varied by a reasonable amount of notice in writing from time to time);
 - (e) use the Services only as intended by FSA to provide access to the Customer's own Data (it being acknowledged that FSA is not responsible for providing or sourcing Data for use by the Customer);
 - (f) apply its own judgment, experience and expertise when using the Services, including using any outputs or results produced or generated by the Services or otherwise provided by FSA, and not rely on them in circumstances where it would be unreasonable to so rely;
 - (g) not use the Services to provide outsourcing or bureau services;
 - (h) not authorise, permit or enable any person who is not a User (or other person expressly permitted under this Agreement) to use or access all or any part of the Services
 - (i) not provide or enable access to the Services or any FSA Materials by any person who, directly or indirectly, works for or who has an interest in an entity that provides similar or competitive products or services to FSA
 - (j) not assign, license or transfer any of the rights granted to it under this Agreement to any third party;
 - (k) take all reasonable security precautions (including any notified by FSA from time to time) to prevent unauthorised access to or copying, use or disclosure of any FSA Materials, the Services or any parts of them by any third party;

- (l) not, and ensure that the Customer's Personnel and Users do not, copy, modify, decompile, reverse engineer, replicate the function or similar function of, or disassemble the FSA Systems (or attempt to do any of the foregoing);
- (m) ensure that any references by the Customer to FSA or any of its related entities (or any of their respective Personnel) in any material submitted to third parties shall be subject to the prior written approval of FSA (which may be withheld in FSA's sole discretion);
- (n) be responsible for the accuracy, quality and legality of the Data and of the means by which the Customer acquired the Data and remain responsible for any and all data verification processes that are appropriate to ensure the quality of the information and services it provides to its clients, including information and services based upon or supported by output from the Services supplied by FSA;
- (o) be responsible for maintaining knowledge and documentation associated with any system integration and data architecture in relation to the use of FSA Systems (such documentation to be reasonably made available to FSA staff on request unless doing so would be contrary to any law or regulation);
- (p) on FSA's request for the purposes of calculating Fees, within 7 (seven) business days of receiving a written request from FSA, provide to FSA details of relevant information requested by FSA in order to support the accurate calculation of the Fees;
- (q) at all times provide an employee with appropriate skills, knowledge, training and experience (together with one backup contact) as FSA's primary contact for provision of Services to the Customer;
- (r) ensure that all Users are trained to use the applicable Services and the applicable Permitted User Modules (as the case may be) in accordance with the requirements of FSA;
- (s) only request Services using the contact details provided by FSA for that purpose from time to time; and
- (t) independently obtain and pay for the necessary communications links, communications and computer hardware and software necessary for the Customer and each User (as relevant) to utilise the Services.

2. Hosted Service

2.1 Subject to any terms in an Order Schedule, FSA grants to the Customer a personal, non-transferable and non-exclusive right in the Territory during the Term to allow:

- (a) Users to access the Hosted Service in accordance with, and subject to the terms and conditions of this Agreement; and
- (b) Permitted Users to access the Permitted User Modules identified in the Order Schedule on the Hosted Service in conjunction with portfolios assigned to them by the Customer, subject to each Permitted User agreeing to the terms of an End User Agreement prior to such access; and
- (c) access to any permissioned web services or APIs (as relevant) as part of the Hosted Service in accordance with the Order Schedule as required by FSA.

2.2 The Customer must:

- (a) only access the Hosted Service through the web-based interface provided to the Hosted Service by FSA;
- (b) ensure that all the Customer's Personnel promoting the Customer's services by reference to the Services shall (i) undergo relevant sales training courses operated by FSA (and which will be charged at the rate stipulated by FSA), and (ii) not misrepresent the features, functions, capabilities of the Hosted Service or any other elements of the Services
- (c) ensure that the Customer, the Customer's Personnel and Users do not use the Hosted Service for the purposes of testing, exploring or monitoring the availability, performance or functionality of the Hosted Service, or for any other benchmarking or competitive purpose; and
- (d) not use the Hosted Service to provide Permitted Users with access to elements of the Hosted Service and/or any other Services that is not listed as available to them in the Specifications for the Services.

3. Permitted Users

- 3.1 Where the Customer makes available the Hosted Services to Permitted Users in accordance with this Agreement:
- (a) for any Permitted User Modules listed in an Order Schedule as requiring activation by FSA:
 - (i) the Customer must request FSA in writing to activate such modules for the nominated Permitted Users; and
 - (ii) FSA may, at its sole and reasonable discretion, approve the activation of such modules for the nominated Permitted Users;
 - (b) FSA may charge professional services fees to the nominated Permitted Users for training, support and other services in relation to the activation and use of such modules, such fees to be paid by the Customer unless otherwise agreed in writing in advance by FSA. Notwithstanding this clause 3.1(b) or any other provision in this Agreement, FSA must not provide training, support or other services, or activate modules or do anything else which may cause the Customer to become liable for fees in respect of Permitted Users without obtaining prior written consent directly from the Customer;
 - (c) in relation to the use of the Permitted User Modules by the Permitted Users, the Customer is responsible at all times for all support and interaction with Permitted Users in relation to such use (any issues experienced by Permitted Users may only be raised with FSA via the Customer); and
 - (d) FSA is not under any obligation to provide Customer Support Services to Permitted Users.
- 3.2 The Customer agrees that if FSA provides Services to a Permitted User, FSA's obligations to the Customer are discharged by providing the Services to that Permitted User as if it were the Customer and the Customer remains liable for:
- (a) all Fees payable with respect to those Services; and
 - (b) any acts or omissions of that Permitted User in connection with the provision of the Services that would create a liability to FSA under this Agreement if that Permitted User was the Customer.

4. Customer Support Services

- 4.1 All customer support requests are to be lodged in the Customer Support Portal via the Customer's nominated representative.
- 4.2 Subject to any charges defined in the Order Schedule, FSA will provide telephone and portal support in respect of support requests logged via the Customer Support Portal during Business Hours to the Customer's nominated representative (as notified to FSA from time to time) for the reporting, discussion, identification, diagnosis and isolation of Faults in or unexpected results produced by the Hosted Service and to clarify procedures for using the Hosted Service.
- 4.3 Outside Business Hours, telephone calls for support will be diverted to a designated phone answering service for resolution by FSA as soon as practicable (subject to any charges defined in the Order Schedule).
- 4.4 All requests for telephone and e-mail support must be made using the telephone number/s or e-mail address notified by FSA from time to time.

5. Fault Correction Service and Excluded Support Services

- 5.1 The Customer must notify FSA in writing of any Faults through the Customer Support Portal upon becoming aware of any Faults.
- 5.2 FSA will use commercially reasonable efforts, at its own expense to determine if there is a Fault, and to correct or remedy Faults within 30 days of such notice.
- 5.3 The Customer will, in consultation with FSA, make reasonable appropriate adjustment to mitigate adverse effects of any Fault until FSA corrects or remedies such Fault.
- 5.4 Without limiting the other provisions of this Agreement, the Customer Support Services specifically exclude provision of services to cover support and maintenance requirements arising from:

- (a) errors resulting from use of the Hosted Service other than in accordance with FSA Materials and/or any directions, guidelines or policies provided by FSA to the Customer from time to time;
 - (b) operating (user) errors; and
 - (c) any faults in software, telecommunications links or equipment not supplied by FSA, including the software and equipment used by the Users to access the Services.
- 5.5 FSA may charge the Customer at FSA's then current time and materials rates for:
- (a) any maintenance or support required which in FSA's reasonable opinion results from the abnormal behavior or operation of the Hosted Service caused by the Customer (or its Users), including abnormalities with the Hosted Service due to the Customer's fault or misuse of the Hosted Service, or the Customer's failure to provide the necessary facilities or training or to observe the requirements or obligations contained in this Agreement;
 - (b) when applicable, support is requested from Users who have not received training by FSA;
 - (c) additional services are provided at the request of the Customer; or
 - (d) support requested from Users (including Permitted Users) other than the Customer's nominated representatives.

6. Marks

- 6.1 If set out in the Order Schedule, FSA hereby grants to the Customer a non-exclusive, non-transferable licence to use the name "FINANCIAL SIMPLICITY" (and associated registered or unregistered trademarks, logos and any associated copyright or other intellectual property rights agreed in writing by FSA) ("**Marks**") solely in connection with the use of the Services by the Customer in accordance with the terms of this Agreement.
- 6.2 Any use of Marks shall be:
- (a) used only on materials and/or in media approved in advance by FSA in writing;
 - (b) in accordance with FSA's reasonable usage policies as advised in writing from time to time by FSA ("**Mark Policies**"); and
 - (c) subject to FSA being entitled to withdraw any approval of any use of its Marks at any time in its sole discretion.
- 6.3 During the period of use under or in relation to this Agreement, the Customer shall reasonably cooperate with FSA in facilitating FSA's monitoring and control of the nature and quality of products and services bearing FSA's Marks, and shall supply FSA with specimens of the use of the Marks upon request.
- 6.4 If FSA notifies the Customer that the Customer's use of FSA's Marks is not in compliance with Mark Policies or is otherwise in FSA's opinion non-compliant, then the Customer shall promptly comply with such Mark Policies or otherwise as directed by FSA.
- 6.5 The Customer shall not make any express or implied statement or suggestion, or use the Marks in any manner, that dilutes, tarnishes, degrades, disparages or otherwise reflects adversely on FSA or its related bodies corporate (or their respective Personnel) or their business, products or services.
- 6.6 The Customer acknowledges that FSA's Marks are and shall remain the property of FSA or its related bodies corporate.
- 6.7 The Customer shall not gain any right, title or interest with respect to the Marks by the Customer's use thereof, and all rights or goodwill associated with the Marks shall inure to the benefit of FSA or its related bodies corporate.

7. Privacy

- 7.1 The parties must comply with all applicable laws (including the Privacy Act, regulations and industry codes ("**Privacy Laws**") in connection with the Services.
- 7.2 Notwithstanding any other provision of this Agreement, FSA must also comply with Privacy Laws at all times during the Term, including to the extent Privacy Laws apply to any Confidential Information FSA receives pursuant to this Agreement.

Notifiable Data Breaches Scheme (Australia)

- 7.3 The parties acknowledge and agree that:

- (a) the Customer must comply with the obligations set out in Part IIIC (Notification of Eligible Data Breaches) of the Privacy Act in relation to Personal Information relating to the provision of the Services by FSA, including the obligations to prepare a statement about an eligible data breach under Section 26WK of the Privacy Act and the notification requirements under Section 26WL of the Privacy Act, and provide timely reports to FSA in that respect;
- (b) to the extent FSA is aware that there are reasonable grounds to suspect that there may have been an eligible data breach (as that term is defined in Section 26WE of the Privacy Act) in relation to Personal Information or is otherwise aware that there are reasonable grounds to believe that the relevant circumstances amount to an eligible data breach in relation to Personal Information (an “**Incident**”), FSA may notify the Customer of the Incident, including by providing any relevant details relating to the Incident, and the Customer must comply with its obligation under clause 7.3(a) above in relation to the Incident and provide timely reports to FSA in that respect;
- (c) the Customer will assume all obligations in relation to an eligible data breach concerning Personal Information relating to the provision of the Services by FSA for the purposes of Part IIIC of the Privacy Act and any other obligations that may arise under the Privacy Act and the general law concerning Personal Information, and that the Customer’s obligations under clauses 7.3(a) and 7.3(b) above apply regardless of whether the FSA may have any similar or equivalent obligations under the Privacy Act;
- (d) FSA will provide the Customer with reasonable assistance and cooperation to assist the Customer’s compliance with clauses 7.3(a) to 7.3(c) above;
- (e) the Customer is taken to hold, and is treated as holding, Personal Information relating to the provision of the Services by FSA for the purposes of the Privacy Act;
- (f) FSA agrees to use all reasonable endeavours to assist and co-operate with the Customer in the discharge of the Customer’s obligations under this clause 7.3 including providing information, taking steps or undertaking acts that may be reasonably required by the Customer to meet these obligations; and
- (g) the Customer agrees to professional services fees and expenses reasonably incurred by FSA in connection with assisting and co-operating with the Customer under this clause 7.3.

8. Publicity

- 8.1 FSA may, with the prior approval from the Customer, such approval not to be unreasonably withheld:
 - (a) issue a press release about the Customer being a customer of FSA; and
 - (b) work with the Customer to create a case study around the Customer’s use of FSA technology in their business operations.
- 8.2 FSA may promote its relationship with the Customer under this Agreement to its existing and potential customers, including by making reference to any projects undertaken under this Agreement.
- 8.3 The parties shall mutually agree on the form, content and timing of any publicity or promotional communications referencing both parties.

9. Service Level Agreement

- 9.1 FSA will use its best endeavours to make the Hosted Service available no less than 95% of the time so long as such availability is not less than 98% of the time during Business Hours each calendar month during the Term. For the purposes of this clause 9, “available” means Users will be able to access the Hosted Service in accordance with this Agreement.
- 9.2 Subject to clauses 9.1 and 9.4, if the Hosted Service is available:
 - (a) less than 98% of Business Hours in a calendar month, but not less than 95% of Business Hours in that calendar month, FSA will provide the Customer a rebate of 5% of the Hosted Service Fee payable for that calendar month;
 - (b) less than 95% of Business Hours in a calendar month, but not less than 90% of Business Hours in that calendar month, FSA will provide the Customer a rebate of 10% of the Hosted Service Fee payable for that month;

- (c) less than 90% of Business Hours in a calendar month, but not less than 75% of Business Hours in that calendar month, FSA will provide the Customer a rebate of 25% of the Hosted Service Fee payable for that month;
- (d) less than 75% of Business Hours in a calendar month, but not less than 50% of Business Hours in that calendar month, FSA will provide the Customer a rebate of 50% of the Hosted Service Fee payable for that month; or
- (e) less than 50% of Business Hours in a calendar month, FSA will provide the Customer a rebate of 100% of the Hosted Service Fee payable for that month.

For the avoidance of doubt, the rebates in clauses 9.2(a) to 9.2(b) above are mutually exclusive (and will not be aggregated).

9.3 Any rebate FSA is required to give under clause 9.2 will be credited to the FSA's next invoice for the payment of Fees to the Customer.

9.4 In reconciling the time which the Hosted Service has not been available in a calendar month, FSA shall be entitled to exclude any period where the unavailability is caused by any of the following matters:

- (a) due to routine maintenance for a duration of no more than 6 hours between 8:00PM and 6:00AM that is notified to the Customer in advance;
- (b) due to a breach of this Agreement by the Customer or a User;
- (c) due to an act or omission of the Customer or a User (including a failure or a delay by the Customer to notify FSA of a Fault in accordance with clause 5.1);
- (d) due to an act or omission of a supplier of FSA, the Customer or a supplier of a Permitted User including Internet service providers, provided FSA uses all reasonably commercial efforts to promptly overcome or work-around a problem caused by its suppliers;
- (e) where FSA is entitled to suspend or terminate the Customer's access to the Hosted Service in accordance with the terms of this Agreement; or
- (f) otherwise due to an event beyond the reasonable control of FSA (including Force Majeure).

9.5 The Customer acknowledges that the rebates referred to in clause 9.2 are the Customer's sole remedy against FSA for the unavailability of the Hosted Service in breach of clause 9.1.

10. Intellectual Property

10.1 The Customer:

- (a) acknowledges and agrees that all Intellectual Property owned or developed by FSA, or licensed from third parties, to provide the Services remains the sole property of FSA and its licensors (as the case may be), regardless of whether that Intellectual Property was created in accordance with this Agreement.
- (b) agrees that except for the limited right to use the Hosted Service provided under this Agreement, all other rights in the FSA System remain the property of and vest in FSA and its licensors;
- (c) where relevant, must obtain, at the request and for the benefit of FSA, a written assignment of any Intellectual Property relating to the Services from any of the Customer's Personnel who may otherwise claim an interest in that Intellectual Property, together with a written consent waiving any moral rights that person may have in connection with the Intellectual Property; and
- (d) where relevant, must, on the termination of this Agreement or at the earlier request of FSA (so long as such request is reasonable in the circumstances), deliver up to FSA any of FSA's Intellectual Property, including any copies thereof, in the Customer's possession or control.

10.2 FSA does not grant the Customer any ownership rights in relation to any Intellectual Property in relation to the FSA Systems under this Agreement.

10.3 Subject to clause 10.1, the Customer retains all rights in Intellectual Property that it provides to FSA in the course of the Customer using the Services.

10.4 FSA may suspend the performance of its obligations under this Agreement and vary any element of the Services if any third party reasonably alleges that any use of the Service by the Customer or Users infringes the rights of that third party.

11. Fees and Payments

11.1 To the extent that the Order Schedule does not specify how fees are to be paid, the Customer must pay FSA the Fees in accordance with this clause 11 or as otherwise provided in the Order Schedule, time being of the essence with respect to all payments due to FSA under this Agreement.

11.2 FSA may issue Tax Invoices for the Fees:

- (a) in the case of amounts payable for the provision of a Service over a specified recurring period of time, immediately before the commencement of the time period to which the Fee relates;
- (b) otherwise where the Fees are calculated based on an hourly rate at the end of the relevant period; and
- (c) in any other case, before FSA provides the Customer with the relevant service.

11.3 The Customer must pay the Fees and any amount stated in FSA's Tax Invoice without set-off, deduction, withholding or counterclaim. Unless otherwise expressly stated in an Order Schedule, the Customer must pay the Fees within 14 days of receipt of the applicable Tax Invoice or on such later due date specified in the Tax Invoice.

11.4 Without limiting clause 11.3, if the Customer disputes an amount set-out in FSA's Tax Invoice, it must notify FSA within 14 days of the date of receipt of the Tax Invoice and provide written reasons for the dispute. Resolution of the dispute is then subject to the Dispute Resolution clause of this Agreement. Undisputed amounts are to be paid within 14 days of receipt of the Tax Invoice.

11.5 The Customer will nominate one (1) person whom FSA will deal with in relation to all invoices and payment matters.

11.6 The Customer must pay FSA interest on any amount due and not paid by the Customer within the time required by this Agreement at the rate which is 2% per annum above the Commonwealth Bank of Australia Corporate Overdraft Reference Rate (and if that rate ceases to be quoted, any similar rate quoted by an Australian licenced bank nominated by FSA) as quoted on the date on which payment was due (or if that date is not a Business Day, the next Business Day when the rate is quoted).

11.7 To the maximum extent permitted by law, the Fees are non-refundable.

11.8 At the conclusion of the Minimum Term and on each anniversary thereafter (where applicable by reason of an extension of this Agreement; see clause 15.2 below), and unless specified otherwise in this Agreement, FSA may vary the level of Fees, on no less than 30 days' prior written notice.

11.9 The Customer may terminate this Agreement on no less than 30 days' prior written notice if the Customer is unwilling to pay any increase in Fees notified under clause 11.8, unless FSA agrees to waive the increase within 14 days of receipt of the Customer's notice. Any such termination will not affect the rights or obligations of either party under this Agreement to which the Fee increase does not apply.

12. FSA Warranties

12.1 FSA warrants and represents that:

- (a) the Services will materially conform with Hosted Service Specifications; and
- (b) it has all necessary rights, consents and licences to authorise the Customer to access the Services in accordance with this Agreement.

12.2 FSA does not warrant, represent or guarantee that:

- (a) the Customer's use of the Services will render the Customer compliant with the requirements of any particular laws, regulations, codes or industry standards, including laws relating to the provision of financial products or services;
- (b) the Customer's use of the Service will create any commercial or financial advantages for the Customer or any Permitted Users or any of their respective clients, including the generation of a financial gain or avoidance of a financial loss; or
- (c) the Services will be secure, error free or uninterrupted.

- 12.3 In the event of a defect with the Services (whether or not a breach of clause 12.1) which affects conformity with the Hosted Service Specifications or any failure to provide the Services in accordance with the Hosted Service Specifications or the Managed Service Specifications, FSA will use all commercially reasonable efforts to:
- (a) investigate and identify the cause of any such defect or failure to supply the Services; and
 - (b) at its option, either rectify the defect within a reasonable timeframe, supply the Services again, or refund the Fees for the period during which the Services were affected by the defect or the failure to supply the Services. The remedies referred to in this clause 12 shall be the sole and exclusive remedies for the breach of the warranties in clause 12.1.
- 12.4 FSA does not make any other representations or warranties (express or implied) and, to the extent permitted by law, excludes all warranties or guarantees implied by law regarding its Services including but not limited to any implied warranty of merchantability or fitness for a particular purpose.
- 12.5 FSA hereby indemnifies and undertakes to keep indemnified the Customer and its related bodies corporate, and their respective Personnel, from and against all Losses arising from:
- (a) FSA's breach of this Agreement; or
 - (b) FSA's infringement of any third party's rights, including any Intellectual Property.

13. Customer Warranties and Indemnity

- 13.1 The Customer hereby warrants and represents that:
- (a) it will comply with all legal and regulatory requirements in relation to its use of the Services, including any laws relating to the provision of financial products or services and any other applicable laws, regulations, codes or industry standards;
 - (b) it will be responsible for all compliance requirements in relation to its use of the Services; and
 - (c) it will obtain all necessary rights, consents and licences in any and all Data used by the Customer in relation to the Services.
- 13.2 The Customer hereby indemnifies and undertakes to keep indemnified FSA and its related bodies corporate, and their respective Personnel, from and against all Losses arising from:
- (a) any use of the Services by the Customer or any Users;
 - (b) the Customer's breach of this Agreement; or
 - (c) the Customer's infringement of any third party's rights, including any Intellectual Property.

14. Confidentiality

- 14.1 The Customer acknowledges that the FSA System is the Confidential Information of FSA and constitutes proprietary information and trade secrets of FSA.
- 14.2 Without limiting this clause 14, the Customer must not disclose to any other person any details of FSA's fees or charges or the terms and conditions of this Agreement.
- 14.3 The receiving party of any Confidential Information must:
- (a) treat Confidential Information as secret and confidential and as the property solely of the disclosing party;
 - (b) not use Confidential Information for any purpose other than the performance of this Agreement;
 - (c) ensure the Confidential Information is secured with the same level of security as it uses to protect its own Confidential Information;
 - (d) only disclose Confidential Information to those of its employees and other professional consultants who require Confidential Information to enable the receiving party to perform its obligations pursuant to this Agreement or otherwise exercise its rights under this Agreement; and
 - (e) ensure that each person to whom Confidential Information has been disclosed complies, and is obliged to comply, with the obligations of the receiving party under this Agreement

and, if reasonably required by the disclosing party, executes a confidentiality agreement in the form reasonably required by the disclosing party.

- 14.4 Clauses 14.2 and 14.3 do not apply to Confidential Information that the recipient is required to disclose by any applicable law or legally binding order of any Court, or by a lawful requirement of any government or regulatory department, body, instrumentality, Minister, agency, recognised stock exchange or other authority which has jurisdiction over the recipient. Before such disclosure the receiving party must:
- (a) use its best endeavours to give the disclosing party details of the information to be disclosed and the law or order requiring disclosure; and
 - (b) notify the entity requiring the information that it is the Confidential Information of the disclosing party and request the entity to whom the disclosure is to be made to treat the information as confidential.

15. Term, Termination and Suspension

- 15.1 The Agreement will operate for the Minimum Term which the parties acknowledge is a fixed term. The Customer shall not be entitled to terminate this Agreement except as expressly provided in this Agreement.
- 15.2 At the end of the Minimum Term or an Extension Term (if this Agreement is extended under this clause), this Agreement shall be automatically extended for a period equal to the Extension Term commencing immediately following the last day of the Minimum Term or the applicable Extension Term. However, if a party does not want this Agreement to be automatically extended pursuant to this clause, that party must give the other party prior written notice of at least the Notice Period before the end of the Minimum Term or the applicable Extension Term, in which event, this Agreement shall be terminated at the end of the Minimum Term or the applicable Extension Term in which such notice is properly served.
- 15.3 Without limiting FSA's other rights, FSA may suspend the performance of its obligations under this Agreement if:
- (a) the Customer fails to pay any Fees to FSA when due, unless the subject of a bona fide dispute in accordance with clause 11.4;
 - (b) the Customer breaches any other provision of this Agreement which is not capable of remedy;
 - (c) the Customer breaches any other provision of this Agreement which is capable of remedy but is not remedied within 14 days after receipt of notice requiring it to do so; or
 - (d) FSA is also entitled to terminate this Agreement according to an express provision of this Agreement.
- 15.4 FSA shall be entitled to suspend provision of all or part of the Services if:
- (a) required for urgent maintenance of the FSA System; or
 - (b) to prevent damage to the FSA System; or
 - (c) where FSA reasonably suspects that the FSA Systems are being used, accessed or attacked in an unauthorised or illegal manner.
- 15.5 FSA may terminate this Agreement by written notice to the Customer:
- (a) with immediate effect if any amount payable by the Customer under this Agreement that is not subject to a bona fide payment dispute in accordance with clause 11.4, remains outstanding for 30 days after the due date for payment;
 - (b) with immediate effect if the Customer commits a material breach of this Agreement or a breach of a material or essential term or condition of this Agreement;
 - (c) with immediate effect if the Customer commits a breach of or fails to perform any or all of its other obligations under this Agreement and does not remedy that breach or non-performance (if capable of remedy) within 21 days after receipt of notice requiring it to do so;
 - (d) with immediate effect if the Customer suffers an Insolvency Event or a Change in Control.
- 15.6 The Customer may terminate this Agreement with immediate effect (or some other longer period of the Customer's discretion) by written notice to FSA if FSA commits a breach of a material term of

this Agreement and does not remedy that material breach within 30 days after receipt of notice of breach.

15.7 Upon the termination or expiration of this Agreement:

- (a) each party must promptly return to the other party or destroy (at the other party's election) all Confidential Information, data, materials and other property of the other party (including all copies), held by it, its Personnel or otherwise under its control;
- (b) FSA may issue a Tax Invoice for all Fees and any other amounts payable to FSA but not included in a previous Tax Invoice. The Customer must pay those amounts within 14 days of the date of the Tax Invoice;
- (c) each party will have no further obligations to the other unless expressly stated otherwise in this Agreement;
- (d) the Customer must, and ensure that all Users also, stop using the Services;
- (e) FSA is entitled to take any and all action as will result in the Customer no longer being able to access or use the Services and the Customer must provide reasonable assistance to FSA to achieve such, including giving FSA reasonable access to the Customer's computer systems and network to remove or disconnect any of the Services;
- (f) neither party will retain any of the other party's Confidential Information unless, and only to the minimum extent, they are required to do so by any applicable law. In the event that a party (**First Party**) is required to retain the Confidential Information of the other party (**Second Party**) by law, the First Party must immediately notify the Second Party of the requirement (and provide any particulars reasonably requested by the Second Party) unless such notification would be a contravention of the law; and
- (g) does not affect the rights and obligations of either party arising or accruing prior to termination, and the rights and obligations in clauses 7, 10, 13, 14, 15, 16, 17, 19, 20 and 21 in these Terms and Conditions shall survive the termination of this Agreement.

15.8 For the avoidance of doubt, the rights under this clause 15 are in addition to any other rights and remedies the parties may have under the general law. Further, a party's exercise of a right to terminate or suspend this Agreement in accordance with the provisions of this clause 15 does not in and of itself affect any other rights or remedies that the party may otherwise have under this Agreement (for example, the exercise of a right to suspend the provision of the Services does not itself result in the waiver of a right to terminate this Agreement even if the same event gives rise to the exercise of both rights).

16. Limitation of liability

16.1 Limitations

- (a) In no event shall either party be liable for any Consequential Loss that the other party may incur by reason of its having entered into or relied upon this Agreement, regardless of the form of action in which such loss or damages are asserted, whether in contract, tort (including negligence) or otherwise.
- (b) Subject to clause 16.2, a party's liability for the loss or damage directly caused by the other party under or in relation to this Agreement shall be limited to all fees paid by the Customer in accordance with this agreement in the twelve (12) months preceding the date in which the event or last event in a series of connected events given rise to liability occurred. In the event that the loss or damage occurs during the first twelve month period of the Agreement the limit defined above shall be the fees paid by the Customer up to the event or last event in a series of connected events given rise to liability.

16.2 Exceptions to Limitations

The limitations in clause 16.1(b) shall not apply with respect to:

- (a) personal injury or death caused by negligence of either party or their respective employees, agents or contractors;
- (b) fraud or fraudulent misrepresentation of either party or their respective employees, agents or contractors;
- (c) the wilful acts or omissions of either party, its employees, agents or contractors;
- (d) any breach of clause 6 above by the Customer;
- (e) a failure by the Customer to pay any Fees or other charges payable to FSA;

- (f) any infringement of a party's Intellectual Property;
- (g) a breach, by either party, of its obligations under clause 14 above; or
- (h) a breach by the Customer and Permitted Users (including their Personnel) of clause 9 (Intellectual Property) or clause 1.5.

16.3 To the maximum extent permitted by law and subject to FSA's obligation to comply with this Agreement, the Services are provided "as is" and all express or implied representations, conditions, statutory guarantees, warranties and provisions (whether based on statute, common law or otherwise) that are not expressly contained in this Agreement are excluded.

16.4 To the maximum extent permitted by law, FSA shall not be liable for any damage or loss suffered by the Customer as a result of any of the following matters:

- (a) any temporary interruption, downtime or error in the Services, including interruption or downtime caused by scheduled maintenance or the enhancement, update, upgrade, patching or improvement of the Services (where applicable);
- (b) FSA's performance of this Agreement in accordance with this Agreement;
- (c) FSA's inability to provide the Services due to the Customer's (or User's) breach of this Agreement;
- (d) the use and/or reliance on the Services by the Customer (including any Users) in contravention of this Agreement, including use of the Services in a manner that is to be regarded as unreasonable or excessive having regard to the ordinary operation of the Services;
- (e) use of inaccurate, erroneous, incomplete or unreliable Data in conjunction with the Services;
- (f) the use of the Services or the Customer's Data by an unauthorised third party not due to a breach by FSA of this Agreement; or
- (g) orders from government or judicial institutions to halt provision of the Services not due to a breach by FSA of this Agreement.

16.5 Both parties shall use their reasonable endeavours to mitigate any loss, damage, liability, expenses and costs suffered by them under or arising out of this Agreement.

16.6 Remedies

To the maximum extent permitted by law, if any applicable law or statute implies any terms, conditions or guarantees, or imposes any liability on FSA, which cannot lawfully be excluded under this Agreement:

- (a) those matters shall apply to this Agreement notwithstanding any other provision in this Agreement; and
- (b) if FSA is able to limit its liability for a breach of such terms, conditions or guarantees, as the case may be, then FSA's liability is limited, at FSA's discretion, as follows:
 - (i) if the breach relates to goods:
 - A. the replacement of the goods or the supply of equivalent goods;
 - B. the repair of the goods;
 - C. the payment of the cost of replacing the goods or of acquiring equivalent goods; or
 - D. the payment of the cost of having the goods repaired; or
 - (ii) if the breach relates to services:
 - A. the supplying of the services again; or
 - B. the payment of the cost of having the services supplied again.

17. Dispute resolution

17.1 Dispute Procedures

- (a) If a Dispute under this agreement arises the party claiming that a Dispute has arisen must give notice to the other party indicating the nature of the Dispute (Dispute Notice) and the

parties must negotiate in good faith to resolve the Dispute within 10 Business Days after the issue of a Dispute Notice or any longer period agreed in writing by the parties.

- (b) If the parties have been unable to resolve the Dispute in accordance with clause 17.1(a), then the parties must, within 5 Business Days of expiry of the period referred to in clause 17.1(a), submit the Dispute to mediation administered by the Australian Commercial Disputes Centre (ACDC) in accordance with the ACDC Guidelines for Commercial Mediation, which Rules are taken to be incorporated into this agreement. Any mediation must commence within 5 Business Days of the submission of the Dispute to the ACDC.
- (c) Despite any of the Rules of the ACDC, the parties agree if they have been unable to resolve the Dispute within 5 Business Days of the first mediation meeting, they must, within 2 Business Days of expiry of such 5 Business Day period, terminate the mediation process and appoint an Independent Expert to determine the Dispute in accordance with clause 17.2.

17.2 Independent Expert

- (a) The Independent Expert must be an appropriately qualified expert agreed in writing by the parties, or, failing agreement in accordance with the period set out in clause 17.1(b), will be selected by the then current chief executive officer of the Australian International Disputes Centre.
- (b) FSA and the Customer are entitled to make written submissions to the Independent Expert and must:
 - (i) provide the Independent Expert with all information and documentation the Independent Expert reasonably requires; and
 - (ii) provide the other party with a copy of all information provided and submissions made to the Independent Expert.
- (c) The Independent Expert must be directed by the parties to settle the matter referred to it within 30 days after its appointment by:
 - (i) having regard to any written submissions made to the Independent Expert by either party within the time requested by the Independent Expert;
 - (ii) making such enquiries or inspections as the Independent Expert considers in its absolute discretion to be necessary; and
 - (iii) providing a written report of its determination to the parties.
- (d) In making its determination the Independent Expert:
 - (i) is entitled (to the extent he or she considers it appropriate) to base his or her opinion on the information provided and submissions made by the parties;
 - (ii) will act as an expert and not as an arbitrator; and
 - (iii) may seek the advice of another expert at his or her discretion.
- (e) The costs of the Independent Expert shall be borne equally between the parties unless otherwise determined by the Independent Expert.

17.3 Communications without prejudice

Communications between the parties during the process set out in clauses 17.1(a) and 17.1(c), whether oral or in writing, will not be admissible as evidence in any legal process unless in writing and signed by both parties.

17.4 Continued performance of the agreement

Despite the existence of a Dispute, the parties must continue to perform their respective obligations under the agreement.

17.5 Urgent relief

Nothing in this clause 17 prevents a party issuing proceedings where the only relief sought is urgent injunctive or urgent declaratory relief.

18. Force Majeure

- 18.1 Each obligation of a party will be suspended during the time and to the extent that the party is prevented from or delayed in complying with that obligation by Force Majeure.

- 18.2 A party affected by Force Majeure must:
- (a) as soon as reasonably possible after being affected give to the other party full particulars of the Force Majeure (including why it is a circumstance beyond its reasonable control), the manner in which its performance is prevented or delayed and its calculation of the estimated period of prevention or delay due to Force Majeure; and
 - (b) promptly and diligently take appropriate reasonable action to enable it to perform the obligations compliance with which is prevented or delayed by Force Majeure except that the party is not obliged to settle a strike, lockout, boycott or other industrial dispute.
- 18.3 If a party is relieved from performing an obligation under clause 17.1 for a period of at least 60 days, either party may terminate this Agreement without penalty by written notice to the other.

19. Notices

- 19.1 Any notice to or by a party under this Agreement must be in writing and signed by the sender or, if a corporate party, an authorised officer of the sender.
- 19.2 Any notice may be served by delivery in person or by post or transmission by facsimile to the address or number of the recipient specified in this Agreement or most recently notified by the recipient to the sender.
- 19.3 Any notice is effective for the purposes of this Agreement upon delivery to the recipient, or production to the sender of a facsimile transmittal confirmation report, between Business Hours in the place in or to which the written notice is delivered or sent or otherwise at 9.00am on the next Business Day thereafter.

20. General

- 20.1 Each party must pay its own costs in relation to:
- (a) the negotiation, preparation, execution, performance, amendment or registration of, or any consent given or made; and
 - (b) the performance of any action by that party in compliance with any obligation or liability arising, under this Agreement, or any agreement executed or effected under this Agreement, unless this Agreement provides otherwise.
- 20.2 Except in accordance with this Agreement, either party must not contract, employ or otherwise engage the services of any Personnel of the other party, either directly or indirectly, during the term or for a period of twelve months after the expiry or termination of this Agreement.
- 20.3 The parties must not solicit the clients of the other party, either directly or indirectly, during the term or for a period of twelve months after the expiry or termination of this Agreement.
- 20.4 FSA may novate, assign or sub-contract its rights and obligations under this Agreement to a Related Body Corporate, a third party that FSA reasonably believes is in a position to fulfill the obligations of FSA under this Agreement or otherwise.
- 20.5 The Customer may not novate, assign, licence or sublicense or sub-contract its rights or obligations under this Agreement without the prior written consent of FSA
- 20.6 This Agreement is governed by and construed under the law in the State of New South Wales.
- 20.7 Any legal action in relation to this Agreement against any party or its property may be brought in any court of competent jurisdiction in the State of New South Wales.
- 20.8 Each party by execution of this Agreement irrevocably, generally and unconditionally submits to the non-exclusive jurisdiction of the courts of New South Wales in relation to both itself and its property.
- 20.9 Unless otherwise specified in this Agreement, any variation or amendment to this Agreement has no force or effect, unless effected by an agreement in writing and executed by the parties.
- 20.10 This Agreement:
- (a) expresses and incorporates the entire agreement between the parties in relation to its subject matter, and all the terms of that agreement; and
 - (b) supersedes and excludes any prior or collateral negotiation, understanding, communication or agreement by or between the parties in relation to that subject matter or any term of that agreement, except as contained in any document which expressly excludes the operation of this clause.

- 20.11 Each party must execute any agreement and perform any action necessary to give full effect to this Agreement, whether before or after performance of this Agreement.
- 20.12 The provisions of this Agreement do not merge with any action performed or agreement executed by any party for the purposes of performance of this Agreement.
- 20.13 Any representation in this Agreement survives the execution of any agreement for the purposes of, and continues after, performance of this Agreement.
- 20.14 Any indemnity agreed by any party under this Agreement:
- (a) constitutes a liability of that party separate and independent from any other liability of that party under this Agreement or any other agreement; and
 - (b) survives and continues after performance of this Agreement.
- 20.15 Any failure by any party to exercise any right under this Agreement does not operate as a waiver and the single or partial exercise of any right by that party does not preclude any other or further exercise of that or any other right by that party.
- 20.16 The rights of a party under this Agreement are cumulative and not exclusive of any rights provided by law.
- 20.17 Any provision of this Agreement that is invalid in any jurisdiction is invalid in that jurisdiction only to that extent, without invalidating or affecting the remaining provisions of this Agreement or the validity of that provision in any other jurisdiction.
- 20.18 This Agreement may be executed in any number of counterparts, all of which taken together are deemed to constitute one and the same Agreement.

21. Definitions and interpretation

In this Agreement, unless the context otherwise requires:

Agreement means, in connection with each Order Schedule, these Terms and Conditions together with the applicable Order Schedule and all attachments, exhibits, schedules, policies and any other document executed by the parties which incorporates these Terms and Conditions;

Business Day means any day on which banks are open and conduct normal trading operations in Sydney other than a Saturday or Sunday;

Business Hours means the hours between 9am and 5pm on a Business Day in Sydney, NSW, Australia;

Change in Control means:

- (a) where any third party gains direct or indirect control over the majority of the shares, or beneficial interest in the shares, of the Customer;
- (b) where any third party gains direct or indirect control over the composition of the Customer's Board of Directors;
- (c) where any third party gains direct or indirect control over the casting of the majority of votes for the Customer's voting shares;
- (d) where any third party gains direct or indirect control over the management of the Customer as applicable; or
- (e) where there is a material change in ownership or control of the Customer as applicable which in the reasonable opinion of the other party adversely affects the other party's rights under this Agreement or is otherwise contrary to the other party's interests;

Commencement Date means the date specified in an Order Schedule;

Confidential Information means the terms of this Agreement and any material or information of a confidential nature, whether received before or after the date of this Agreement, including details of suppliers, customers, business practices and plans and Intellectual Property provided by or emanating from a party (**the disclosing party**) to the other party (**the receiving party**) in connection with this Agreement, including material incorporating or derived from any such material or information, but excludes material or information which:

- (a) is at the time of disclosure, or subsequently becomes, material or information in the public domain otherwise than by a breach by the receiving party of this Agreement;

- (b) was or becomes known by a party independently of the other party, otherwise than by any breach of a confidentiality obligation owed by a third party to the disclosing party;
- (c) is independently developed by the receiving party, as evidenced by written record; or
- (d) is assigned by the disclosing party to the receiving party in accordance with the terms of this or any other agreement;

Consequential Loss means any indirect, incidental, special, economic or consequential loss, cost or damage, loss of business profits, revenue or opportunities, business interruption, loss of business information (including computer data), loss of business, loss of anticipated savings, loss of goodwill, loss or reputation or loss due to delay;

Customer means the person identified as such in an Order Schedule;

Customer Support Portal means a web based service provided by FSA for the lodgment and tracking of support requests made by the Customer to FSA;

Customer Support Service means the services specified in clauses 4 and 5 (Fault Correction Service), being part of the Support Services identified in an Order Schedule;

Data means electronic information, data and documentation provided or used by the Customer, the Users, the Permitted Users (as the case may be), or by any third party vendor or service provider to the Customer, the Users or the Permitted Users, in relation to the Services, including any information, data and documentation provided to, or collected by, FSA for the purposes of providing the Services to the Customer or performing this Agreement and any data loaded or downloaded onto any equipment to be used in conjunction with the Hosted Services. In relation to investment holdings data, this can only be loaded for investment portfolios for direct retail clients of the Customer;

End of Period Adjustment Fee means a fee adjustment paid at the end of each Period to reflect changes to the usage of the Hosted Service or Managed Service over the Period, as may be provided for in an Order Schedule;

End User Agreement means a set of terms and conditions which are required by FSA to either be (i) provided to the Permitted Users by the Customer in a form approved by FSA in conjunction with the supply of the Hosted Service or (ii) provided to the Customer by FSA;

Establishment Period means the term specified in an Order Schedule (if any);

Extension Term means the extended term specified in an Order Schedule (if any), commencing from the end of the Minimum Term;

Fault means a failure by the Hosted Service to comply with its documentation as supplied to the Customer by FSA but excludes any faults or delays caused by any hardware, software or other services not provided by FSA under this Agreement and/or that are not otherwise within FSA's control, including issues with a User's Internet, data or telephone services;

Fault Correction Service means the services provided by FSA in accordance with clause 5;

Fees means the amounts payable to FSA by the Customer, as set out in an Order Schedule and this Agreement or as otherwise notified to the Customer by FSA in accordance with this Agreement. This may include the Managed Services Fee, the Hosted Service Fee, and the End of Period Adjustment Fee;

Force Majeure means a circumstance beyond the reasonable control of a party and includes labour disputes, fire, floods, explosions, riots, civil disturbances, war, terrorism, unforeseeable weather conditions, natural disasters, direct government action or regulation, or acts of God that renders impossible a party's ability to perform its obligations under this Agreement;

FSA means Financial Simplicity Australia Pty Ltd (ABN 29 109 935 542);

FSA Materials means any materials, manuals, guidelines and other documents provided in any format to the Customer in relation to the Services;

FSA Systems means the Services, the Customer Support Portal, the FSA Materials and any and all

Software, processes, support systems, tools and methodologies developed, provided or operated by FSA, and any technical information or data thereof, relating to the Services;

GST Law has the meaning given in the A New Tax System (Goods and Services Tax) Act 1999;

GST means any tax, levy, charge or impost implemented under the GST Law or an Act of the Parliament of the Commonwealth of Australia substantially in the form of, or which has a similar effect to, the GST Law;

Hosted Service means the hosted service accessible through a website, as specified in the Hosted Service Specifications;

Hosted Service Specifications means the specifications attached to an Order Schedule for Subscribed Modules;

Insolvency Event means the occurrence of any of the following events in relation to a party:

- (a) a liquidator, provisional liquidator, official manager, company administrator, administrator, receiver, manager, trustee in bankruptcy or receiver and manager or other form of insolvency or bankruptcy administrator is appointed to or over the whole or any part of its undertaking, property or assets or any step is validly taken for the appointment of such a person;
- (b) the party entering into, or resolving to enter into, a scheme of arrangement or composition with or assignment for the benefit of, or proposing a reorganisation, moratorium or other administration, involving its creditors or a class of its creditors;
- (c) the party entering into bankruptcy or a deed of company arrangement;
- (d) the party being ordered by a court, or otherwise resolving, to wind itself up or otherwise dissolve itself or enter into bankruptcy, or giving notice of an intention to so resolve, except by way of bona fide solvent reconstruction or amalgamation on terms approved by the other party;
- (e) the party suspending payments of its debts generally; or
- (f) the party becoming unable to pay its debts when they fall due or becoming unable to pay its debts within the meaning of the Corporations Act or being presumed to be insolvent under the Corporations Act;

Intellectual Property means:

- (a) any commercial information, industrial or intellectual property (whether in material form or not) or rights of a proprietary nature, including without limitation:
 - (i) any copyright, invention, patent, design, trade mark, service mark, domain name, semiconductor, software program, idea, confidential information, trade secret, know-how, database; or
 - (ii) (any rights protected or recognised under any laws anywhere in the world related to the above or any similar laws; and
- (b) anything (whether in material form or not) copied or derived from the above property or rights;

Loss(es) means claims, losses, costs, expenses and damages (including Consequential Loss and legal costs and disbursements on a solicitor and own Customer basis) sustained or incurred whether directly or indirectly or consequentially or in any other way;

Managed Portfolio Monitoring means the services specified in an Order Schedule or an Appendix to an Order Schedule;

Managed Service means the Managed Portfolio Monitoring and review services, if any, as specified in the Managed Services Specifications;

Managed Service Specifications means the specifications for managed services as set out in an Appendix to an Order Schedule (if any);

Minimum Term means the 'Minimum Term' as specified in an Order Schedule;

Notice Period means the Notice Period as defined in an Order Schedule or 60 days;

Number of Portfolios means the number of investor records recorded in the Software;

Order Schedule means an order for Services to be provided by FSA to Customer under the terms of the Agreement, including any Annexures, as such order is updated or amended from time to time;

Period means a period of a month or quarter (3 months) of a Calendar year defined by the periodicity of billing defined in an Order Schedule;

Periodic Hosting Fee means a fee payable each Period for the use of the Hosted Service, as set out in an Order Schedule;

Permitted Users means users that are authorised by the Customer to access the Permitted User Modules on the Hosted Service (as more specifically described in the applicable Order Schedule), the scope of which access may be defined in the Order Schedule;

Permitted User Modules means the modules listed in the Hosted Service Specifications for Permitted Users;

Personnel mean officers, employees, contractors and agents;

Portfolio means an individual record on the Hosted Service representing an investor account with associated investments;

Privacy Laws has the meaning given to it in clause 7.1;

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

Professional Services means the professional services specified in an Order Schedule (if any);

Related Body Corporate has the meaning given by Section 50 of the Corporations Act;

Software means the software contained within, and/or which is used to provide, the Hosted Service;

Service Establishment means the service establishment services specified in an Order Schedule (if any);

Services means the Service Establishment, Hosted Service, the Managed Service, Customer Support Service and Fault Correction Service, Professional Services and any other services specified in an Order Schedule;

Subscribed Modules means modules subscribed to by the Customer from time to time as agreed with FSA;

Sum of Portfolio Values is an amount calculated as the sum across all portfolio records of the number of units of an investment recorded multiplied by the recorded price of that investment;

Tax Invoice has the meaning given by the GST Law;

Term means the Minimum Term and any preceding Establishment Periods and subsequent extensions of the Minimum Term (as provided for in the Order Schedule) until the expiration or earlier termination of this Agreement;

Terms and Conditions means this document;

Territory means Australia or as otherwise specified in an Order Schedule; and

User means the Customer's Personnel and Permitted Users who use the Hosted Service or the Managed Service on behalf of the Customer.