

Agreement for Services Acquired from an IBM Business Partner

Customer Name, Address & ABN:

Agreement Number: SCD7058

Customer Name

Customer Number: Customer Number

Customer Address Line1

Customer Address Line2

Customer Address Line3

ABN: Customer ABN

Thank you for your business. IBM strives to provide you with high quality Services. If, at any time, you have any questions or problems, or are not completely satisfied, please let IBM know. IBM's goal is to do its best for you.

IBM has signed agreements with certain organisations (called "IBM Business Partners") to promote, market, and support certain Services. Some IBM Business Partners also fulfil these functions through other remarketers who are not IBM Business Partners. However, for purposes of brevity in this Agreement, when IBM uses the term IBM Business Partners it means IBM Business Partners and their remarketers.

When Customer Name ("you") orders IBM Services under this Agreement from an IBM Business Partner, IBM is responsible for providing the Services to you under the warranties and other terms of this Agreement. IBM is not responsible for 1) the actions of IBM Business Partners, 2) any additional obligations they have to you, or 3) any products or services that they supply to you under their agreements. IBM Business Partners establish the price and terms at which they market IBM Services.

In the event that your IBM Business Partner is no longer able to offer IBM's Services, for any reason, IBM will so notify you in writing. You may continue to receive IBM's Services by instructing IBM to transfer administration of your Service to either (1) another IBM Business Partner of your choice (who may require you to first execute one of their agreements) who is approved to offer you IBM's Services, or (2) IBM and signing a separate IBM agreement for services.

This IBM Agreement for Services Acquired from IBM Business Partner (called the "Agreement") governs the Services you acquire from an IBM Business Partner and IBM performs.

PART 1 – GENERAL

1.1 DEFINITIONS

Enterprise is any legal entity (such as a corporation) and the subsidiaries it owns by more than 50 percent. An Enterprise also includes other entities which are mutually agreed to in writing.

Machine is a machine, its features, conversions, upgrades, elements, or accessories, or any combination of them. The term "Machine" includes an IBM Machine and any non-IBM Machine (including other equipment) for which IBM may provide maintenance Services.

Materials are literary works or other works of authorship (such as programs, program listings, programming tools, documentation, reports, drawings, and similar works) that IBM may deliver to you as part of a Service. The term "Materials" does not include licensed program products available under their own license agreement.

Service is performance of a task, provision of advice and counsel, assistance, or access to a resource (such as access to an information data base) IBM makes available to you.

1.2 AGREEMENT STRUCTURE

Attachments

Some Services have terms in addition to those IBM specifies in this Agreement. IBM provides the additional terms in documents called "Attachments," which are also part of this Agreement. Attachments will be signed by both of us if requested by either of us. Your IBM Business Partner makes the Attachments available to you for signature.

Transaction Documents

For each business transaction, your IBM Business Partner will provide you with the appropriate "Transaction Documents" that confirm the specific details of the transaction. Transaction Documents will be signed by both of us if requested by either of us. The following are examples of Transaction Documents, with examples of the information they may contain:

- a. statements of work (scope of Services, responsibilities, deliverables, completion criteria and estimated schedule or contract period); and
- b. supplements and order forms (Service type ordered, and contract period).

Conflicting Terms

If there is a conflict among the terms in the various documents, those of an Attachment prevail over those of this Agreement. The terms of a Transaction Document prevail over those of both of these documents.

IBM's Acceptance of Your Request for Service

A Service becomes subject to this Agreement when IBM accepts your request for Service from your IBM Business Partner by:

- a. providing you a transaction document; or
- b. providing the Service.

Your Acceptance of Additional Terms

You accept the additional terms in an Attachment or Transaction Document by doing any of the following:

- a. signing the Attachment or Transaction Document;
- b. using the Service, or allowing others to do so; or
- c. making any payment to your IBM Business Partner for the Service.

1.3 CHARGES AND PAYMENT

Your IBM Business Partner sets the charges and terms governing charges. You will make payment directly to your IBM Business Partner. However, IBM may charge you directly for expenses incurred to perform your Service request, e.g., actual travel and living expenses, out-of-pocket expenses. IBM will not incur these expenses without your prior approval.

1.4 CHANGES TO THE AGREEMENT TERMS

In order to maintain flexibility in IBM's Services, IBM may change the terms of this Agreement by giving you three (3) months' written notice. However, these changes are not retroactive. They apply, as of the effective date IBM specifies in the notice, only to new requests for Service and on-going transactions. Part 3 of this Agreement contains additional provisions for changes to the terms of individual Service transactions.

Otherwise, for a change to be valid, both of us must sign it. Additional or different terms in any written communication from you are void.

1.5 LIMITATION OF LIABILITY

Circumstances may arise where, because of a default on IBM's part or other liability, you are entitled to terminate an order in whole (or in part) or to recover damages from IBM or do both. In each such instance, regardless of the basis on which you are entitled to claim damages from IBM (including fundamental breach, negligence, or other contract or tort claim), IBM is liable for no more than:

- a. damages for bodily injury (including death) and damage to real property and tangible personal property; and
- b. the amount of any other actual direct damages up to the greater of US\$100,000 (or equivalent in local currency) or the charges (if recurring, 12 months' charges apply) you paid to your IBM Business Partner for the Service that is the subject of the claim. This limit also applies to any of IBM's sub-contractors. It is the maximum for which IBM and its sub-contractors are collectively responsible.

Items for Which IBM is Not Liable

Under no circumstances is IBM or its sub-contractors liable for any of the following:

- a. third-party claims against you for damages (other than those under the first item listed above);
- b. loss of, or damage to, your records or data; or
- c. special, incidental, or indirect damages or for any economic consequential damages (including lost profits or savings actual or anticipated), even if IBM is informed of their possibility.

Where IBM is in breach of a condition or warranty implied by the Trade Practices Act 1974 IBM's liability is limited to:

- a. where IBM supplied services – the cost of having the services supplied again; or
- b. where IBM supplied goods – the repair or replacement of the goods, or the supply of equivalent goods; and

where this condition or warranty relates to right to sell, quiet possession or clear title, or the goods are of a kind ordinarily acquired for personal, domestic or household use or consumption, then none of the limitations in this clause apply.

1.6 MUTUAL RESPONSIBILITIES

Both of us agree that under this Agreement:

- a. neither of us grants the other the right to use its (or any of its Enterprise's) trademarks, trade names, or other designations in any promotion or publication without prior written consent;
- b. all information exchanged is nonconfidential. If either of us requires the exchange of confidential information, it will be made under a signed confidentiality agreement;
- c. each is free to enter into similar agreements with others;
- d. each grants the other only the licenses and rights specified. No other licenses or rights (including licenses or rights under patents) are granted;
- e. each may communicate with the other by electronic means and such communication is acceptable as a signed writing to the extent permissible under applicable law. An identification code (called a "user ID") contained in an electronic document is sufficient to verify the sender's identity and the document's authenticity;

- f. each will allow the other reasonable opportunity to comply before it claims that the other has not met its obligations;
- g. neither of us will bring a legal action more than two (2) years after the cause of action arose unless otherwise provided by local law without the possibility of contractual waiver or limitation; and
- h. neither of us is responsible for failure to fulfil any obligations due to causes beyond its control.

1.7 YOUR OTHER RESPONSIBILITIES

You agree:

- a. not to assign, or otherwise transfer, this Agreement or your rights under this Agreement, delegate your obligations, or resell any Service, without IBM's prior written consent. Any attempt to do so is void;
- b. that you are responsible for the results obtained from use of the Services; and
- c. to provide IBM with sufficient, free, and safe access to your facilities for IBM to fulfil its obligations.

1.8 AGREEMENT TERMINATION

You may terminate this Agreement on written notice to your IBM Business Partner and to IBM following the expiration or termination of your obligations.

Either of us may terminate this Agreement on written notice to the other and to your IBM Business Partner if the other does not comply with any of its terms.

Any terms of this Agreement which by their nature extend beyond the Agreement termination remain in effect until fulfilled, and apply to both of our respective successors and assignees.

1.9 GEOGRAPHIC SCOPE

All your rights and all IBM's obligations are valid only in the Commonwealth of Australia except that all licenses to Materials are valid as specifically granted.

1.10 GOVERNING LAW

The laws of the State or Territory in which the transaction is performed govern this Agreement.

Nothing in this Agreement affects any statutory rights of consumers that cannot be waived or limited by contract.

PART 2 – WARRANTY TERMS

2.1 WARRANTY FOR IBM SERVICES

The warranties specified this part are in addition to any rights you may have under the Trade Practices Act 1974 or other applicable legislation and are only limited to the extent permitted by the applicable legislation.

Unless IBM specifies otherwise, the following warranties apply only in the Commonwealth of Australia.

For each IBM Service, IBM warrants that it performs it:

- a. using reasonable care and skill; and
- b. according to its current description (including any completion criteria) contained in this Agreement, an Attachment, or a Transaction Document.

2.2 EXTENT OF WARRANTY

THESE WARRANTIES ARE YOUR EXCLUSIVE WARRANTIES AND REPLACE ALL OTHER WARRANTIES OR CONDITIONS, EXPRESS OR IMPLIED, INCLUDING, BUT NOT LIMITED TO, THE IMPLIED WARRANTIES OR CONDITIONS OF MERCHANTABILITY AND FITNESS FOR A PARTICULAR PURPOSE.

2.3 ITEMS NOT COVERED BY WARRANTY

IBM does not warrant uninterrupted or error-free operation of any deliverable or Service.

Unless IBM specifies otherwise, IBM provides Materials and non-IBM Services WITHOUT WARRANTIES OF ANY KIND.

PART 3 – SERVICES

3.1 IBM SERVICES

Services may be either standard offerings or customised to your specific requirements. Each Service transaction may include one or more Services that:

- a. expire at task completion or an agreed upon date;
- b. automatically renew as another transaction with a specified contract period. Renewals will continue until either of us terminates the Service; or
- c. do not expire and are available for your use until either of us terminate the Service.

3.2 PERSONNEL

Each of us will be responsible for the supervision, direction, and control of our respective personnel.

IBM reserves the right to determine the assignment of its personnel.

IBM may sub-contract a Service, or any part of it, to sub-contractors selected by IBM.

3.3 MATERIALS OWNERSHIP AND LICENSE

IBM will specify Materials to be delivered to you. IBM or third parties have all right, title, and interest (including ownership of copyright) in Materials created during the Service performance period or otherwise (such as those that pre-exist the Service). IBM will deliver one copy of the specified Materials to you. IBM grants you an irrevocable, nonexclusive, worldwide, paid-up license to use, execute, reproduce, display, perform, and distribute, within your Enterprise only, copies of these Materials.

You agree to reproduce the copyright notice and any other legend of ownership on any copies made under the license granted in this Section.

Any idea, concept, know-how, or technique which relates to the subject matter of a Service and is developed or provided by either of us, or jointly by both of us, in the performance of a Service may (subject to applicable patents and copyrights) be freely used by either of us.

3.4 CHANGES TO SERVICE TERMS

IBM may change the terms of Services that are renewable or non-expiring by giving you three (3) months' written notice. However, these changes are not retroactive. They apply immediately to renewal transactions and as of the effective date IBM specifies in the notice to all existing transactions. If IBM makes a change to the terms of a renewable Service that 1) affects your current contract period and 2) you consider unfavourable, at the request of your IBM Business Partner, IBM will defer it until the end of that contract period.

When both of us agree to change any Services statement of work other than as described above, IBM will prepare a written description of the agreed change (called a "Change Authorisation"), which both of us must sign. The terms of a Change Authorisation prevail over those of the statement of work and any of its previous Change Authorisations.

3.5 RENEWAL

Renewable Services renew automatically for a same length contract period unless either of us provides written notification (at least one (1) month prior to the end of the current contract period) to the other and to your IBM Business Partner of their intent not to renew.

3.6 TERMINATION AND WITHDRAWAL

Either of us may terminate a Service if the other does not meet its obligations concerning the Service.

You may terminate a Service transaction on one (1) month's written notice to IBM and to your IBM Business Partner. You should check with your IBM Business Partner to determine if you will incur an additional charge for this.

IBM may withdraw a renewable or non-expiring Service or support for an eligible product on three (3) months' written notice to you. If IBM withdraws a Service for which you have prepaid and IBM has not yet fully provided it to you, your IBM Business Partner will give you a prorated refund.

Any terms which by their nature extend beyond termination or withdrawal remain in effect until fulfilled and apply to respective successors and assignees.

3.7 SERVICE FOR MACHINES

IBM provides certain types of repair and exchange Service either at your location or at a service centre to keep Machines in, or restore them to, conformance with their official published specifications. IBM may repair the failing Machine or exchange it at IBM's discretion.

When the type of Service requires that you deliver the failing Machine to IBM, you agree to ship it suitably packaged (prepaid unless IBM specifies otherwise) to a location IBM designates. After IBM has repaired or exchanged the Machine, IBM will return it to you at IBM's expense unless IBM specifies otherwise. IBM is responsible for loss of, or damage to, your Machine while it is 1) in IBM's possession or 2) in transit in those cases where IBM is responsible for the transportation charges.

You agree to:

- a. obtain authorisation from the owner to have IBM service a Machine that you do not own; and
- b. where applicable, before IBM provides service:
 - 1) follow the problem determination, problem analysis, and service request procedures that IBM provides,
 - 2) secure all programs, data, and funds contained in a Machine, and
 - 3) inform your of changes in a Machine's location.

When Service involves the exchange of a Machine or part, the item IBM replaces becomes IBM's property and the replacement becomes yours. You represent that all removed items are genuine and unaltered. The replacement may not be new, but will be in good working order and at least functionally equivalent to the item replaced. The replacement assumes the warranty or Service status of the replaced item. Before IBM exchange a Machine or part, you agree to remove all features, parts, options, alterations, and attachments not under IBM's service. You also agree to ensure that the item is free of any legal obligations or restrictions that prevent its exchange.

Any feature, conversion, or upgrade IBM service must be installed on a Machine which is 1) for certain Machines, the designated, serial numbered Machine and 2) at an engineering-change level compatible with the feature, conversion, or upgrade.

Repair and exchange Services do not cover:

- a. accessories, supply items, and certain parts, such as batteries, frames, and covers;

- b. Machines damaged by misuse, accident, modification, unsuitable physical or operating environment, or improper maintenance by you;
- c. Machines with removed or altered Machine or parts identification labels;
- d. failures caused by a product for which IBM is not responsible; or
- e. service of Machine alterations.

IBM manage and install engineering changes that apply to IBM Machines and may also perform preventive maintenance.

IBM provides maintenance Services for selected non-IBM Machines.

When you request maintenance Services under this Agreement, your IBM Business Partner will inform you of the date on which maintenance Services will begin. IBM may inspect the Machine within one (1) month following that date. If the Machine is not in an acceptable condition for service, you may have IBM restore it. You should check with your IBM Business Partner to determine if you will incur an additional charge for this. Alternatively, you may withdraw your request for maintenance Services, for which you should check with your IBM Business Partner to determine if you will incur an additional charge for this.

This Agreement and its applicable Attachments and Transaction Documents are the complete agreement between us regarding these Services, and replace any prior oral or written communications. No machines or licensed program products are acquired under this Agreement. Such items are available only under the terms of 1) the IBM Customer Agreement (or any equivalent agreement between us) or 2) the applicable third-party agreement. By signing below for our respective Enterprises, each of us agrees to the terms of this Agreement. Once signed, 1) unless prohibited by local law or specified otherwise, any reproduction of this Agreement, an Attachment, or Transaction Document made by reliable means (for example, photocopy or facsimile) is considered an original and 2) all Services ordered under this Agreement are subject to it.

Agreed to by:

Customer Name

A.B.N. Customer ABN

Accepted by:

IBM Australia Limited

A.B.N. 79 000 024 733

By: _____

Authorised Signatory

By: _____

Authorised Signatory

Name (print or type):

Name (print or type):

Title (print or type):

Title (print or type):

Date: _____

Date: _____

State/Territory: _____

Business Partner Name, Address & ABN:

BP Number: Business Partner No.

BP Address1
BP Address2