

## DIRECT PURCHASING AGREEMENT - AUSTRALIA

Agreement No.: \_\_\_\_\_

Effective Date: \_\_\_\_\_

This Direct Purchasing Agreement (“DPA”) governs Your purchase of Products and/or Services from HDS. The online terms and conditions at <http://www.hds.com/corporate/legal/index.html> (“Online Terms”) contain information about HDS’ warranty and maintenance terms and software license terms form part of this DPA and are incorporated by reference.

### TERMS AND CONDITIONS:

#### 1. ORDERING DELIVERY AND INSTALLATION

##### 1.1 Ordering Process

When You send HDS an Order, HDS may accept it by sending You an Order Confirmation, shipping the Product or starting the Services. Each Order, the Order Confirmation (if any) and this DPA form a separate agreement between HDS and You. For an Order to be valid, it must refer to this DPA. Terms and conditions in or on the back of Your Order or any other documents that You give to HDS will not form part of the agreement. Any changes to Your Order are subject to HDS’ acceptance and Your payment of an additional processing fee. You may not cancel any Orders.

##### 1.2 Product Delivery

HDS will use reasonable efforts to meet agreed estimated delivery dates, however estimated delivery dates are communicated for information purposes only and HDS will not be liable for any late delivery. You agree that, where possible, HDS may make partial deliveries and send You a partial invoice. Delivery will be EX WORKS (as defined in Incoterms 2000) HDS’ Product distribution center or other HDS designated address. You are responsible for loss or damage to the Products, once delivered, and must pay all subsequent shipping and insurance charges. HDS will retain all title to the Equipment ordered until You have paid HDS in full. HDS always retains ownership to any Software and tangible media in which it is contained. You must not do anything that affects HDS’ ownership.

##### 1.3 Product Installation

Unless agreed otherwise, the Products will be installed by HDS or HDS’ authorised service provider at the installation site specified in the Order. You will prepare the installation environment at Your cost according to HDS’ requirements.

#### 2. WARRANTIES

##### 2.1 Product Warranty

Subject to section 2.3, HDS warrants to You that, during the Warranty Period, Products will function in accordance with the Published Specifications. To make a valid warranty claim, You must submit a claim to HDS under the procedures set out in the Online Terms.

##### 2.2 Service Warranty

HDS warrants to You that the Services will be provided in a workmanlike manner in accordance with generally accepted industry standards.

##### 2.3 Warranty Exclusions

The provision of any Warranty and Maintenance Services are subject to HDS’ standard warranty and maintenance conditions and exclusions set out in the Online Terms. **EXCEPT AS SPECIFIED IN THE DPA, INCLUDING THE ONLINE TERMS, ALL EXPRESS OR IMPLIED CONDITIONS, REPRESENTATIONS AND WARRANTIES, INCLUDING ANY IMPLIED WARRANTIES OR CONDITION OF MERCHANTABILITY, SATISFACTORY QUALITY, OR FITNESS FOR A PARTICULAR PURPOSE AND NON-INFRINGEMENT ARE EXCLUDED TO THE MAXIMUM EXTENT PERMITTED BY LAW. HDS DOES NOT WARRANT THAT ANY PRODUCT OR SERVICE WILL OPERATE UNINTERRUPTED OR ERROR FREE.**

Where legislation, including the Australian *Trade Practices Act 1974* (Cth) implies warranties or conditions or imposes obligations which cannot be excluded, restricted or modified except to a limited extent, this DPA must be read subject to those provisions. If those provisions

#### CUSTOMER (“You”):

Name:

Address:

Contact Person (for Notices):

#### Hitachi Data Systems [ ] (“HDS”):

Address:

Contact Person (for Notices):

apply, notwithstanding any other term of this DPA, and to the extent HDS is entitled to do so, HDS limits its liability in respect those provisions to: (i) in the case of goods, at HDS’ option: (a) the replacement of the goods or the supply of equivalent goods (or payment of equivalent cost); or (b) the repair of the goods (or payment of equivalent cost); and (ii) in the case of services, at HDS’ option the supply of the services again or payment of equivalent cost.

#### 3.0 SERVICES

##### 3.1 Support Services

After the end of the Warranty Period, You will be entitled to receive Maintenance and Support Services during the Initial Services Period, provided that You have purchased and paid for those services in full. Provided that You pay HDS the applicable renewal fees in advance, HDS will automatically renew these Maintenance and Support Services for successive 12 month periods, unless You write to HDS at least 90 days before the then-current period expires and tell HDS that they will not be renewed any further. HDS will provide You with Maintenance and Support Services in accordance with the maintenance section of the Online Terms.

##### 3.2 Professional Services

HDS will provide You with Professional Services under a separate Statement of Work that incorporates the terms of the DPA. The Statement of Work sets out any other terms that relate to the Professional Services.

##### 3.3 Co-operation

To assist HDS to provide You Services, You must provide prompt access to Your premises, computer equipment (including remote access), adequate working space, facilities, personnel, information or materials that HDS may reasonably require.

#### 4. FINANCIAL TERMS

##### 4.1 Fees and Payment

You will pay HDS the fees and charges for the supply of Products and Services set out in HDS’ invoice within 30 days from the invoice date. HDS may charge You interest or suspend delivery of all or any Services if payments are overdue.

##### 4.2 Maintenance and Support Renewals

The fees for Maintenance and Support Services will be payable from the date set out in HDS’ invoice or if no such date is specified, from the expiration of the applicable Warranty Period for the Products. The quotation of renewal fees does not obligate You to renew Maintenance and Support Services.

##### 4.3 Taxes

You will pay any Taxes arising from the transaction under this DPA, whether or not these taxes are included in HDS’ invoices. Invoiced amounts payable under this DPA are expressed exclusive of GST. If GST is payable as a result of any supply made (or deemed to be made) by one party to the other in connection with this DPA, the party receiving the supply must pay to the party making the supply an amount equal to the GST payable in respect of the supply (“GST Amount”), in addition to the invoiced amounts or other consideration (if any) required to be paid under any other provision of this DPA.

##### (a) Reimbursement

Notwithstanding any other provision of this DPA, if either party is required to reimburse or indemnify the other party for any cost, expenses or other amounts, the amount to be reimbursed or

indemnified must be reduced by any part which is recoverable as an input tax credit by the party which incurred it (or representative member of that party's GST group).

*(b) Tax invoices*

Each party must ensure that each invoice it presents to the other party under this DPA in respect of any GST Amount is a valid tax invoice. A party to whom a GST Amount is owed must include that GST Amount on the same invoice as the consideration for the supply to which it relates. The party receiving that invoice must pay the GST Amount no later than the date on which the rest of the invoice is due to be paid.

*(c) Adjustments*

If at any time an adjustment is to be made with the relevant taxing authority in respect of an amount paid on account of GST as a result of any supply made (or deemed to be made) by a party in connection with this DPA: (i) a corresponding adjustment must be made between the parties; (ii) the party entitled or required to make the adjustment must deliver an adjustment note to the other party within 28 days of becoming aware of the entitlement or requirement to make an adjustment; and (iii) any payment required to give effect to the adjustment must be made within 30 days of the adjustment note being delivered to the recipient party.

*(d) Installments or no monetary consideration*

If a party making a supply is not entitled to invoice the other party for all or part of the monetary consideration in respect of that supply until after the liability to pay GST in respect of the supply arises (or if no monetary consideration is due in respect of that supply), the party making the supply may present its invoice for the GST Amount in respect of the supply at any time, provided it is no earlier than 40 days before the liability to pay the GST arises; and the party receiving the invoice must pay the GST Amount no later than 30 days after it receives the invoice.

*(e) Terms Used*

Terms defined in the GST Act have the same meaning when used in this section, including "supply", "consideration", "representative member", "tax invoice", "adjustment note", "supply", "taxable supply" and "GST group".

**5. INTELLECTUAL PROPERTY**

**5.1 Ownership and Licenses**

HDS and its licensors own all copyright, trade marks, designs, patents, circuit layout rights, know-how, trade secrets, trade, business or company names, domain names and related registration rights and all other intellectual property rights in all items and materials that HDS provides to You or otherwise creates pursuant to this DPA, and their modifications ("**Hitachi IP**"). You only get license rights in Software, Work Product and any other Hitachi IP as expressly stated in this DPA, including the Online Terms. You must not do anything to jeopardise HDS' or its licensors' rights in the Hitachi IP including to (i) copy, modify, reverse engineer (except to the extent such restrictions are prohibited by applicable law), transfer or sublicense any Hitachi IP (except as allowed by Your license or as HDS agrees in writing); (ii) register or attempt to register any competing intellectual property rights to the Hitachi IP; (iii) delete or tamper with any proprietary notices on or in the Hitachi IP, (iv) take or use any action that diminishes the value of any trademarks included in the Hitachi IP, or (v) use the Products in violation of applicable law.

**5.2 Software License Grant**

Subject to the terms of this DPA and the applicable licensing provisions contained in the Online Terms, HDS grants You a personal, non-exclusive, non-transferable (except in connection with the transfer of Equipment as permitted by this DPA including the Online Terms) license to Use the Software to operate the Equipment in accordance with its Published Specifications solely for Your internal business purposes.

**5.3 Intellectual Property Claims**

Subject to section 5.1, if a third party makes a claim against You that any Product or Service infringes that party's patent rights or copyright ("**IP Claim**"), HDS provides You with the following recourse (which, to the extent permitted by applicable law, comprises Your sole and exclusive remedy against HDS for IP Claims):

- (a) HDS will defend or settle the IP Claim at HDS' option and cost, and pay to You the amount of damages, losses and costs finally awarded (or settled with HDS' written consent), provided that You (i) promptly notify HDS of the IP Claim (ii) allow HDS to solely manage the defense and settlement of the IP Claim; (iii) co-operate with and assist HDS as HDS requires (HDS will pay Your reasonable costs of doing so); and (iv) are not in breach of this DPA, including the Online terms .
- (b) HDS will, at HDS' option and cost, do any of the following in relation to a Product which is, or HDS considers is likely to be, the subject of an IP Claim: (i) secure the rights for You to continue to use the Product without infringement or (ii) modify the Product so that it is not infringing or replace it with something that has similar functionality to the Product. If neither option is reasonably possible, HDS will provide You with a refund, provided that You promptly return the Product to HDS.

The above remedies will not apply to any Third Party Products or otherwise to any Product that You have, or any person on Your behalf has: (i) modified or combined with any third party product not authorised or approved by HDS (ii) used outside HDS' stated standard operating environment for the Product or for a purpose not authorised by HDS (iii) failed to use a more recent version of the Product that was available to You and would have avoided the infringement or (iv) where the IP Claim arises due to any material or item that You own or have sourced from a third party Yourself.

**6. CONFIDENTIAL INFORMATION**

Each party respectively must keep any Confidential Information that they receive from the other party confidential, by using the same degree of care that each party would use to protect their own Confidential Information. HDS won't disclose Your Confidential Information to anyone else, unless You allow HDS to, and You must do the same with HDS' Confidential Information. HDS can, however, disclose Your Confidential Information to HDS' employees and contractors who need to know the information in order to perform obligations under this DPA.

**7. LIMITATIONS OF LIABILITY**

**7.1 Uncapped Liability**

Each party respectively acknowledges the full extent of liability to the other party arising from: death or personal injury resulting from negligent acts or omissions; claims for non-payment; the non-excludable statutory rights of consumers (for example, under laws providing for strict product liability); breaches of any Software license; breach of any obligation of confidence; and any infringement of Hitachi IP.

**7.2 Cap on Liability**

Except for section 7.1 and the exceptions identified in the Online Terms and to the extent not prohibited by applicable law:

- (a) each party's respective maximum aggregate liability for all claims, whether for breach of contract, breach of warranty or in tort, including negligence, will be limited to the amount paid for the Product(s), Third Party Product(s), Third Party Software or Service(s) which is the subject matter of the claim up to a maximum of one million Australian dollars (AUD\$1,000,000) per agreement; and (b) neither party will be respectively liable for any indirect, punitive, special, incidental or consequential damages in connection with or arising out of this DPA including the Online Terms (including, without limitation, loss of business, revenue, profits, goodwill, use, data, electronically transmitted orders, or other economic advantage), however they arise, whether in breach of contract, breach of warranty or in tort, including negligence, and even if the liable party has previously been advised of the possibility of such damages. Liability for damages will be limited

and excluded, even if an exclusive remedy provided for in this DPA fails of its essential purpose.

## **8. TERM AND TERMINATION**

The DPA will start on the Effective Date and continue until it is terminated by either party by written notice to the other, if the other party (i) breaches the confidentiality, intellectual property or export compliance sections of the DPA; (ii) commits a material breach of any other terms and does not remedy that breach within 30 days of written notice to do so (iii) becomes or threatens to become Insolvent. If the DPA is terminated, Your rights, licenses and privileges under it will terminate and You must comply with HDS' requests to either remove and destroy all Hitachi IP in Your possession or control or return such material and items to HDS at Your cost. Furthermore, You will not be relieved from Your payment obligations and any money due to HDS will become immediately payable. Neither of us is deemed to have waived any existing rights.

## **9. GENERAL**

### **9.1 Third Party Products**

Except as expressly stated otherwise in this DPA, the Online Terms or a SOW: (i) HDS provides Third Party Products to You without warranties or maintenance of any kind, and (ii) licenses, warranties and support for Third Party Products will be given by the relevant suppliers in their license agreements that HDS passes to You.

### **9.2 Export Compliance**

You acknowledge that in various countries, laws and regulations governing the export of computer products and technology may prohibit use, sale or re-export of such products or technology if You know or have reason to know that such products and technology are for use in connection with the design, development, production, stock piling or use of nuclear, chemical or biological weapons or missiles, and in some countries (e.g. China) for certain conventional military end-uses. If You sell or transfer to another person or entity title in or right to use any part of products or other materials supplied by HDS, You will ensure that all applicable export restrictions of the nature described in this section are observed.

### **9.3 Dispute Resolution**

In the event of a dispute, each party will use reasonable efforts to get an appropriate person from its respective management teams to meet and attempt to resolve the dispute in good faith. If they are unable to resolve the dispute within 30 days, each party may resort to alternate dispute resolution such as conciliation, or otherwise seek recourse from the courts. Either of us may seek injunctive or other urgent equitable relief at any time.

### **9.4 Miscellaneous**

(a) Unless it is agreed in writing that the laws of another jurisdiction will apply, this DPA will be governed by and construed in accordance with the laws of New South Wales, Australia or where the Products and/or Services are delivered in a State or Territory of Australia other than New South Wales, by the laws of such state or territory. To the extent allowed in the applicable jurisdiction, the United Nations Convention on Contracts for the International Sale of Goods and its implementing legislation will not apply to this DPA.

(b) Neither party will be responsible for any failure to meet any obligations (except payment obligations) due to matters beyond its reasonable control provided reasonable efforts have been made to perform them.

(c) You must not assign, or otherwise transfer any of Your rights under this DPA without HDS' prior written agreement.

(d) HDS may use subcontractors to perform any of HDS' obligations, but HDS will remain responsible for their performance.

(e) Notices made under the DPA must be in writing to the appropriate representative of the recipient, as identified in the DPA or otherwise to a senior executive. Notices will be deemed given: where they are hand delivered, when a duly authorised employee or representative of the recipient gives written acknowledgement of receipt; for email communication, at the time the communication enters into the information system of the recipient; for posting, three days after dispatch and for fax, on receipted transmission of the fax.

(f) Each party is an independent contractor of the other and there is no actual or deemed partnership, franchise, joint venture, agency, employment or other fiduciary relationship between the parties.

(g) Rights and obligations under the DPA, which by their nature should survive the termination or expiration, will remain in effect after termination.

(h) You grant to HDS the limited right to use Your name in promotional materials, including press releases, presentations and customer references regarding the sale of Products and Services. These permissions are free of charge and for worldwide use in any medium. The foregoing notwithstanding, HDS will obtain Your prior written approval for publicity that contains claims, quotes, endorsements or attributions by You, such approval not to be unreasonably withheld.

(i) If either party fails to promptly exercise any contractual right, this does not of itself mean that the right has been waived. For a waiver of a right to be valid, it must be written and it will not give rise to an ongoing waiver or any expectation that the right will not be enforced, unless it is expressly stated to do so.

(j) Except for the Online Terms, this DPA may not be modified except in writing signed by an authorised representative of each party. Any changes to the Online Terms will not apply retrospectively to Orders for Products or Services made prior to the date of the change. Changes to the Online Terms may apply prospectively to new Orders received by HDS prior to the change only if You agree.

(k) The DPA (including the Online Terms, all Orders and Order Confirmations and SOWs) is the entire agreement relating to its subject matter. All other written communications, understandings, proposals, representations and warranties are by agreement, excluded and are of no force or effect (to the extent permitted by law).

(l) If there is a conflict amongst the elements the DPA, the following order of precedence will apply (in descending order): (i) this DPA; (ii) the Online Terms; (iii) an Order Confirmation; (iv) an Order; and (v) a Statement of Work.

(m) This DPA and any Attachments may be signed in counterparts, each of which may be transmitted electronically, to be effective on the other party's receipt of the signed copy.

## **10. DEFINITIONS AND INTERPRETATION**

**Attachment:** any of the signed documents attached to this DPA that supplements or amends it.

**Confidential Information:** information that, at the time of disclosure, is clearly marked as confidential or in the circumstances would be considered to be confidential.

**Equipment:** hardware and spare parts.

**Initial Services Period:** the initial, renewable service period for the supply of Maintenance and Support Services (which is either 12, 24 or 36 months).

**Insolvent:** the inability of a party to pay its debts as they fall due; or the appointment of a receiver or administrator, liquidator or similar person to the party's affairs under the laws of any jurisdiction; or the calling of a meeting of creditors or for any reason ceasing to carry on business.

**Maintenance and Support Services:** the equipment maintenance and software support services described in more detail in the Online Terms.

**Order:** a written or electronic order from You for the purchase of Products and/or Services from HDS, or a document detailing the Product, Product description and price which is submitted in accordance with HDS' then-current ordering requirements.

**Order Confirmation:** a written or electronic acknowledgement or invoice issued by HDS in response to an Order.

**Product(s):** any Equipment and/or Software listed in HDS standard product price lists published from time to time.

**Professional Services:** software enablement, data migration and other services.

**Published Specifications:** are the specifications for Products listed valid at the time of acceptance of the Order.

**Services:** Maintenance and Support Services, Professional Services and any other services listed in HDS published offerings from time to time.

**Software:** the object code format of (i) programming firmware embedded in the Equipment to enable it to perform its basic functions (**Operating Software**) and (ii) software programs supplied by HDS (**Programs**) and (iii) and any Updates, related documentation and specifications.

**Statement of Work or SOW:** is a document which fully describes the Professional Services being provided by HDS and sets out the services

being provided, estimated delivery dates, acceptance procedures and roles and responsibilities of the parties.

**Tax:** a tax, duty, fee or impost (including withholding tax and VAT).

**Third Party Products:** any Products supplied by HDS that are not listed in HDS' standard product price lists published from time to time.

**Third Party Software:** any software contained in or comprising Third Party Products.

**Updates:** subsequent releases and error corrections for Software previously licensed by HDS, as listed in HDS' standard product price lists published from time to time.

**Use:** to use Software in live production for processing data either in operation of Products or in use of Programs.

**Warranty Period:** means the period listed on the Online Terms for a particular Product.

**Work Product:** works of authorship, program listings, tools, documentation, reports, drawings and similar works created by or on behalf of HDS pursuant to the supply of Services.

**EXECUTED AS AN AGREEMENT:**

IN WITNESS WHEREOF, the parties have executed this DPA by its authorised officers as of the Effective Date.

<p><b>FOR HITACHI DATA SYSTEMS [entity]</b></p> <p>Signature:</p> <p>Name:</p> <p>Title:</p>	<p><b>FOR CUSTOMER:</b></p> <p>Signature:</p> <p>Name:</p> <p>Title:</p>
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