

**DIRECT PURCHASING AGREEMENT**

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

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

This Direct Purchasing Agreement (“DPA”) governs the supply of Products and/or Services by HDS to You. The Software License Terms and the Warranty Maintenance & Support Terms respectively located at the following link, <http://www.hds.com/corporate/legal/index.html> (the “Online Terms”) contain HDS’ warranty and maintenance terms and software licence terms that form part of this DPA and are incorporated by reference.

**TERMS AND CONDITIONS:**

**1. PRODUCT ORDERING DELIVERY AND INSTALLATION**

**1.1 Quotation and Ordering Process**

At Your request, HDS will send You a Quote or Statement of Work for the supply of Products and/or Services. When You send HDS an Order (whether or not it is in response to a Quote), HDS may accept it by sending You an Order Confirmation, or otherwise by shipping the Products and/or starting the Services. Each Quote (if any), Order, Order Confirmation (if any), together with this DPA, form a separate agreement between HDS and You for that supply. 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 that You make to an Order are subject to HDS’ acceptance and if HDS requires, the payment of an additional processing fee to HDS. You may not cancel any Orders any later than five (5) business days prior to the scheduled date of shipment of the Products and/or commencement of the Services that are the subject of the Order. Notwithstanding, if Products have been delivered to You by HDS, the Services subject to the same Order may not be cancelled and will be performed as agreed.

**1.2 Product Delivery**

HDS will do everything that is reasonably possible to meet its estimated Delivery dates. Where necessary, HDS may make partial Deliveries of Products and send You a corresponding partial invoice. Delivery of Products will be EX WORKS (as defined in Incoterms 2010) to HDS’ nominated Delivery Point. HDS will arrange shipping of Products on Your behalf and at Your risk, and charge You accordingly, unless You instruct HDS in writing not to do so.

**1.3 Risk and Title in Products and Work Product**

Subject to Section 1.2, risk of loss of and damage to the Products and Work Product passes to You upon Delivery of the relevant Products and Work Product. Subject to Section 1.6, title in the Products will pass to You on payment in full for those Products. Ownership of any Software and Work Product and the tangible media in which they are contained will remain at all times with HDS and its licensors. Without limiting Section 5, You must not do anything that affects such ownership.

**1.4 Product Installation**

Unless You and HDS agree otherwise, the Products will be Installed at the location set out in the Order. You will prepare the installation environment at such location at Your cost and in accordance with HDS’ requirements and directions.

**1.5 Product Acceptance**

You are deemed to have accepted the Products on Delivery. At HDS’ request, You will sign and provide a written acceptance certificate to HDS.

**CUSTOMER (“You”):**

Name:

ABN:

Address:

Contact Person (for Notices):

**Hitachi Data Systems (“HDS”):**

Name: Hitachi Data Systems Australia Pty Limited

ABN: 65 005 610 079

Address: Level 3, 82 Waterloo Road North Ryde NSW 2113

Contact Person (for Notices):

**1.6 Product Loans**

(a) If HDS agrees to loan Products to You, such loan will be conditional on the Parties signing a Loan Schedule that refers to this DPA, in a form that is acceptable to HDS. HDS reserves the right to require You to execute a separate Loan Agreement, which is mandatory for pre-release Products. HDS will deliver and Install the Products at the Location set out in the Loan Schedule in accordance with this DPA. Risk in the Products will pass to You pursuant to Section 1.3 and HDS will provide Maintenance and Support Services on the Products at the Weekday Basic Support level (or its closest equivalent in place at the time of the Product Loan), as referred in, and subject to the Online Terms. Either Party may terminate a Product Loan, in whole or in part at any time, by written notice to the other Party.

(b) Notwithstanding any other provision in this DPA and to the extent permitted by applicable law and in respect of Product loans: (i) You accept the Products and any Services performed on the loan Products on an “as-is” basis, without warranty of any kind, including any warranty relating to performance or function; and (ii) except for death and personal injury caused directly by HDS’ act or omission and subject to section 9.3, HDS will not be liable to You for any actual or anticipated, direct, indirect, special, incidental, consequential or other damages arising from the Product Loan and any Services performed on the loan Products, howsoever caused, whether under contract, in equity, common law, statute or otherwise, including breach of contract, breach of warranty or in tort (including negligence), anticipatory breach or repudiation, and even if HDS has previously been advised of the possibility of such damages. This Section 1.6(b) prevails to the extent of any inconsistency with the terms of Section 9, in respect of Product Loans and Products and Services provided under such loans.

(c) Subject to Section 1.6(d), ownership of, and all right, title and interest in all Products loaned to You by HDS will remain with HDS at all times and You gain no rights in the Products, other than the right to use the Products at the Location, for the Designated Use specified on the Loan Schedule and in accordance with the applicable licensing provisions contained in the Online Terms. Without limiting Section 11.4, You must not do anything that affects HDS’ ownership of, or other rights in the Products, nor use the Products for any reason other than the Designated Use.

(d) If You have agreed in a Loan Schedule to purchase the Products at the end of the Loan Period, You must provide HDS with an Order for such Products no later than five (5) days after the end of the

Loan Period. Title in the Equipment will pass to You upon the date that HDS receives payment in full for the Products. Your use of the Products will be subject to the terms of this DPA (except for this Section 1.6) and the Loan Schedule will be deemed terminated. Otherwise, if You do not purchase the Products, then Your rights in the Products will cease at the end of the applicable Loan Period or, if the Product Loan is terminated earlier, on the effective date of termination; in which case, You will return the Products to HDS in the same condition (normal wear and tear excepted) and if You fail to do so, You grant to HDS the right to enter the premises where the Products are located, in order to recover them.

### **1.7 Affiliate Transactions**

(a) Your Affiliates are able to order Products and/or Services from HDS or a HDS Affiliate (as the case may be), by executing a Participation Agreement to this DPA. Orders and Order Confirmations (if any) will be issued, and the delivery of, and payment for Products and/or Services will be made between the relevant parties to the Participation Agreement.

(b) Each Participation Agreement will be a separate agreement, incorporating the terms of this DPA (except to the extent that changes are required by applicable local law or as otherwise agreed by the relevant parties to the Participation Agreement to reflect local conditions). Unless stated otherwise in the Participation Agreement, the Participation Agreement will be governed by the local law of the place of incorporation of the relevant HDS entity that is the party to such Participation Agreement.

(c) Each Party will use all reasonable endeavors to ensure that the relevant members of its company group comply with their respective obligations under the Participation Agreement. Notwithstanding this, each Party will not be liable to the other Party for the acts or omissions of their Affiliates or other members of their respective groups and does not guarantee, and assumes no liability for, the performance or default of the duties and obligations of any Affiliate under such Affiliate's Participation Agreement.

(d) When construing a Participation Agreement, the respective references in the DPA to "HDS" and "You" will be read as references to the relevant entities which are parties to the Participation Agreement.

## **2. ADDENDA FOR ADDITIONAL RIGHTS**

Terms granting rights beyond those contained in this DPA will be agreed to by both Parties in writing, before HDS agrees to consumption storage, software-as-a service, service provider hosted service rights and other permissions.

## **3. SERVICES**

### **3.1 Maintenance and Support Services**

(a) Subject to Section 11.1, HDS will provide You with Maintenance and Support Services on the Products during the Initial Service Period, provided that You have paid HDS the Fees for such Services in full. Such Fees are non-cancellable and non-refundable during the Initial Service Period. The Maintenance and Support Services will be performed in accordance with the maintenance sections of the Online Terms.

(b) Subject to Your payment of the applicable renewal Fees to HDS in full, the Maintenance and Support Services will be automatically renewed for successive Renewal Service Periods, unless You provide to HDS written notice of non-renewal at least thirty (30) days before the expiry date of the then current Service Period. As a courtesy, HDS may provide You with a prior written notification, in the form of a Quote, for the renewal prior to the end of the then-current Service Period. HDS' notification of the renewal or quotation of renewal Fees does not obligate You to renew Maintenance and Support Services.

DPA\_V6\_MAY2016\_AUSTRALIA

## **3.2 Professional Services**

(a) HDS will provide You with Professional Services under a separate SOW that incorporates the terms of the DPA and You are deemed to have accepted the Work Product arising from the Professional Services on Delivery. Without limiting the operation of the DPA on the SOW, the SOW will set out any other terms that relate to the Professional Services. Unless the SOW expressly states otherwise, if there is a conflict between the terms of a SOW and this DPA, the terms of the DPA will prevail to the full extent of the conflict.

(b) HDS will not be obligated to provide You with any Professional Services until a SOW has been agreed and signed by the relevant parties.

## **3.3 Your Responsibilities**

To assist in the supply of the Services, You must provide HDS, its subcontractors or agents (if applicable) and their respective Personnel with prompt access to Your premises, computer equipment (including remote access), adequate working space, facilities, Personnel, technology, data, information or other materials that are reasonably required from time to time. Without limiting the previous sentence or the terms of any applicable SOW, You will, at HDS' request, assign an appropriately qualified person(s) to be Your representative(s) for the receipt of the Services and to communicate with HDS on all Service-related matters, and HDS will be entitled to assume that the acts, conduct and decisions of such person(s) are authorised by, and are binding on, You.

## **3.4 Liability for Service Delays and Failures**

If HDS fails to perform, or delays in the performance of, any Service or other obligation required of HDS under this DPA, HDS will not be liable to You for the failure or non-performance, to the extent that such failure or non-performance is caused by Your act or omission, or the act or omission of Your Personnel or any other person acting on Your behalf. In any event, You agree to take all steps and measures available to You in order to mitigate and minimize the losses, costs and damages arising from such failure or non-performance, irrespective of the nature and extent of Your contribution.

## **4. FINANCIAL TERMS**

### **4.1 Fees and Payment**

HDS will invoice You the Fees for the supply of Products and/or Services (as applicable): (i) upon shipment of the Products, with respect to Order(s) pursuant to a Quote for Products only, or for combined Products and Services; and (ii) in accordance with the applicable terms set out in the Quote and/or SOW for Services only, or where no invoicing terms are set out, prior to commencement of the Services by HDS. You will pay the Fees for the supply of Products and/or Services set out in HDS' invoice within 30 days from the invoice date. You will make payment without any deduction by way of set-off, counterclaim, discount or otherwise. HDS may charge You interest on late payments in accordance with applicable law and/or, in the case of Services, suspend delivery of any Services, where payments for such Services are overdue.

### **4.2 Processing Fees**

HDS will not incur the burden of any fees or charges associated with Your processing or payment of Fees, including but not limited to any portal service fees, unless those fees or charges have been agreed to by HDS in advance and in writing. HDS reserves the right to pass through to You any processing fees that HDS incurs from a third party service provider that You engage to process vendor invoices.

### **4.3 Taxes**

All prices for Products and Services are quoted by HDS to be exclusive of applicable Taxes. You must also pay for all Taxes arising

from the transaction under this DPA, irrespective of whether or not these taxes are included in HDS' invoices. If You are required under any applicable law to withhold or deduct any amount from the payments due to HDS, You will increase the sum You pay to HDS by the amount necessary to leave HDS with an amount equal to the sum HDS would have received if no such withholdings or deductions had been made.

#### **4.4 GST**

Without limiting Section 4.3, 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 costs, expenses or other amounts, the amount to be reimbursed or indemnified must be reduced by any part that 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 Licences**

(a) You agree and acknowledge that HDS and its licensors own all copyright, trademarks, designs, patents, circuit layout rights, know-  
DPA\_V6\_MAY2016\_AUSTRALIA

how, trade secrets, trade, business and/or company names, domain names and related registration rights and all other intellectual property rights in all Hitachi IP.

(b) You gain no right, title or interest in the Hitachi IP, other than the licence rights in Software, Work Product and any other Hitachi IP, as expressly stated in this DPA and the Online Terms.

(c) Without limiting the operation of the Online Terms, You must not do anything to jeopardize the rights of HDS and HDS' licensors in the Hitachi IP, including to: (i) copy, modify, reverse engineer (except to the extent such restrictions are prohibited by applicable law), transfer or sub-license any Hitachi IP (except as allowed by Your licence or as HDS agrees in writing); (ii) register or attempt to register any competing intellectual property rights in or to the Hitachi IP; (iii) delete or tamper with any proprietary notices on or in the Hitachi IP; (iv) take or allow any action that diminishes the value of any trademarks included in the Hitachi IP; or (v) use the Products or any Work Product in violation of applicable law.

### **5.2 Software Licence Grant**

Subject to the terms of this DPA and the Online Terms, HDS grants to You a personal, non-exclusive, non-transferable (except in connection with the transfer of Equipment as permitted by this DPA and the Online Terms) licence to use the Software in order to operate the Equipment in accordance with its Published Specifications solely for Your internal business purposes. Any additional or alternative purposes must be agreed between the Parties in accordance with Section 2.

### **5.3 Intellectual Property Claims**

Subject to Sections 5.1, 5.4 and 9.1, if a third party makes a claim against You that any Product or Work Product that HDS has supplied to You under this DPA infringes that third party's patent rights or copyright ("**IP Claim**"), HDS will provide You with the following recourse (which comprises, to the extent permitted by applicable law, Your sole and exclusive remedy against HDS, and HDS' sole and exclusive liability to You for, the IP Claim):

(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 against You or settled by You (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 (and HDS will pay Your costs of doing so); and (iv) You are not in breach of this DPA or the Online Terms.

(b) HDS will, at HDS' option and cost, do any of the following in relation to a Product or Work Product which is, or which HDS considers is likely to be, the subject of an IP Claim ("**Infringing Item**"): (i) secure the rights for You to continue to use the Infringing Item without infringement; or (ii) modify the Infringing Item so that it is not infringing, or (iii) replace it with something that has similar functionality to the Infringing Item. If HDS considers that none of these options are reasonably possible, HDS will provide You with a Refund, provided that You promptly return the Infringing Item to HDS.

### **5.4 Exceptions**

HDS will not be liable to provide any of the remedies in Section 5.3 with respect to: (a) any Third Party Products which are not included on HDS' standard price list at the time of the IP Claim; (b) any Third Party Related OSS; or (c) to any Product or Work Product that You have, or any person on Your behalf has: (i) modified or combined with any product not authorised or approved by HDS; (ii) used outside HDS' stated standard operating environment for the Product or Work Product, or for a purpose not authorised by HDS; (iii) failed to use a more recent version of the Product or Work

Product that was available to You and that 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 must keep any Confidential Information that is disclosed to it by the other Party as confidential, by using the same degree of care that it would use to protect its own Confidential Information. Each Party must not disclose the other Party's Confidential Information to any third party, without the other Party's prior written consent. A Party can, however, disclose the other Party's Confidential Information to those of its Personnel who need to know the information in order to perform that Party's obligations under this DPA, provided that it takes all necessary steps to ensure its Personnel's compliance with this Section.

## **7. PERSONAL DATA**

### **7.1 Your Obligations**

You must ensure that when You collect, use, disclose or transfer Personal Data in connection with this DPA, you comply with the *Privacy Act 1988* (Cth). You will provide adequate safeguards to, routinely back up, and ensure the integrity and security of Your data, including all Personal Data. You are responsible for any unauthorised access, acquisition, use, disclosure, modification or destruction to any such data that is caused by the acts or omissions of You, Your Personnel, Affiliates, agents, vendors, and contractors. You will only provide HDS with Personal Data in relation to which You have the legal right to collect, process, use, transfer, and disclose to HDS for the purpose of HDS, its subcontractors and agents performing HDS' obligations under this DPA to the extent that is necessary or required under any transaction agreed to by the Parties pursuant to this DPA. You will not disclose or use any Personal Data about HDS Personnel without the prior written consent of HDS.

### **7.2 Our Obligations**

HDS will ensure that when it collects, uses, discloses or transfers Personal Data in connection with this DPA, it complies with the *Privacy Act 1988* (Cth). To the extent that HDS collects or has access to Your Personal Data as part of a transaction agreed to by the Parties pursuant to this DPA, HDS agrees to not disclose or use such Personal Data unless HDS has your prior written consent, or otherwise as is allowed under this DPA. HDS is entitled to disclose Your Personal Data: (i) to HDS' Personnel with a need to know the information in order to perform obligations under this DPA; (ii) to Affiliates, subcontractors, vendors, and agents of HDS who help HDS perform its obligations under this DPA, to the extent required to perform the obligations under this DPA and who are contractually obligated to protect Your Personal Data in the same manner as HDS; or (iii) as required by law. HDS will comply with applicable law with respect to your Personal Data.

### **7.3 Reporting**

Each Party will promptly report any Security Breach to the other Party. The Party experiencing the Security Breach will first provide oral notice as soon as reasonably practicable and no later than ten (10) days after discovery. That Party will provide follow-up, written notice as soon as reasonably practicable and no later than fifteen (15) days after discovery. The written notice will include, to the extent the information is currently available: (i) an identification of affected individuals, and (ii) any other information that must be included in a legally required notice of Security Breach under applicable law.

### **7.4 Cooperation And Mitigation**

Each Party agrees to cooperate in any Security Breach investigation undertaken by, or otherwise involving the other Party and to take reasonable measures to mitigate the harmful effects of any Security Breach, of which that Party becomes aware.

## **8. WARRANTIES**

### **8.1 Product Warranty**

Subject to Sections 8.3 and 9.1, HDS warrants to You that, during the Warranty Period, the Products will function in accordance with their applicable Published Specifications. To make a valid warranty claim, You must submit a claim to HDS in accordance with the procedures referred to in the Online Terms.

### **8.2 Service Warranty**

Without limiting any of the warranties in the Online Terms, HDS warrants to You that HDS will provide the Services to You in a professional and workmanlike manner and in accordance with Good Industry Practice.

### **8.3 Warranty Exclusions**

The provision of any Warranty and Maintenance Services are subject to HDS' standard warranty and maintenance terms conditions set out in the Online Terms. **EXCEPT AS SPECIFIED IN THE DPA AND 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 AND WILL NOT BE LIABLE FOR COSTS OF PROCUREMENT OF SUBSTITUTE GOODS OR SERVICES.**

## **9. LIMITATIONS OF LIABILITY**

### **9.1 Uncapped Liability**

Each Party acknowledges the full extent of its own 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 licence; any infringement of Hitachi IP or breach of the confidentiality obligations pursuant to Section 6. For the avoidance of doubt, to the full extent permitted by law, this Section 9.1 does not apply a Party's liability for Security Breaches under this DPA or under applicable law or for a breach of Section 7.

### **9.2 Limits and Exclusions of Liability**

Subject to Sections 3.4 and 9.1, the exceptions identified in the Online Terms, and except for HDS' indemnity obligations in Section 5.3, and to the extent not prohibited by applicable law:

(a) each Party's maximum aggregate liability for all claims made against it will be limited to the Fees paid by You to HDS under the Order for the relevant Products and/or Service(s) that is or are the subject matter of the claim, up to a maximum of: (i) the Fees paid by You to HDS over the twelve (12) month period immediately prior to the first event giving rise to the claim, where the Order contains only Software and/or Services; and (ii) the lesser of the total Fees paid by You under the Order and one million Australian Dollars (\$A1,000,000), in all other cases; and

(b) under no circumstances will either Party be liable for: (i) any loss of business, revenue, profits, goodwill, use, data, electronically transmitted orders, anticipated savings whether arising directly or indirectly, or (ii) for any indirect, punitive, special, incidental or consequential damages.

The limitations and exclusions of liability in Sub-sections (a) and (b) above, apply whether such liabilities or claims arise under contract, in equity, common law, statute or otherwise, including breach of contract, breach of warranty or in tort (including negligence), anticipatory breach or repudiation, 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.

### **9.3 Implied Terms**

Where legislation, including the Australian *Competition and Consumer Act 2010* (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 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.

## **10. 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 Party, if the other Party: (i) breaches the confidentiality, intellectual property or export compliance and anti-bribery sections of the DPA; (ii) commits a material breach of any other terms and does not remedy that breach within thirty (30) days of written notice to do so; or (iii) becomes or threatens to become Insolvent. If the DPA is terminated, Your rights, licences and privileges under it will terminate and You must comply with HDS' directions to either remove and destroy all Hitachi IP and Confidential Information in Your possession or control or return such material and items to HDS, at Your cost. HDS reserves the right to cancel any Order(s) which have not yet been delivered. You will not be relieved from Your payment obligations and any money due to HDS will become immediately payable. Neither Party is deemed to have waived any of its existing rights as a result of termination.

## **11. GENERAL**

### **11.1 Third Party Products**

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

### **11.2 Export Compliance and Anti-Bribery**

(a) 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.

(b) Each Party will comply with all applicable laws and regulations relating to anti-corruption and bribery, including the U.S. Foreign Corrupt Practices Act, and not engage in any activity, practice or conduct that would constitute an offence under such laws and regulations. You must read, understand and comply with the HDS Code of Ethics and Business Conduct located at: <https://www.hds.com/en-us/pdf/brochure/code-of-ethics-and-business-conduct.pdf>.

### **11.3 Dispute Resolution**

In the event of a dispute between the Parties arising out of this DPA, the Parties will use reasonable efforts to get an appropriate person from their respective management teams to meet and attempt to resolve the dispute in good faith. If such persons are unable to resolve the dispute within thirty (30) days, the Parties may resort to alternate dispute resolution such as arbitration (if both Parties agree) or otherwise either Party may seek recourse from the courts. Either Party may seek injunctive or other urgent equitable relief at any time.

### **11.4 Responsibility for HDS Property**

(a) You are responsible for loss of or damage to the HDS Property, once delivered to Your custody or control, except for loss or damage arising due to the actions of HDS, or normal wear and tear in the course of proper use, storage and maintenance. HDS will retain title to the HDS Property at all times. You must not: (i) assign, transfer, sell, deal with, or create any mortgages, security, liens, or interests in or over the HDS Property; or (ii) move, repair or modify or interfere in anyway with the HDS Property without HDS' prior consent. You will provide to HDS (or HDS' authorised representatives) reasonable access to the premises on which HDS Property is located on receipt of reasonable notice by HDS, in order for HDS to inspect the HDS Property and to verify Your compliance with this Section 11.4.

(b) Upon the delivery of HDS Property to Your custody or control, and until such HDS Property is either delivered back to HDS or otherwise removed by HDS from Your custody or control, You will maintain insurance policies with reputable insurers covering loss of, and damage to the Products at least equal to the replacement cost of the HDS Property. Where requested by HDS or required under the applicable SOW, You will also maintain insurance policies with reputable insurers to cover Service arrangements requiring the on-site presence of any Personnel of HDS or its subcontractors. The insurance policies referred to in this Section will note HDS as an additional insured party and all insurance coverage will be primary and non-contributory. You will provide HDS with evidence of such insurance that is acceptable to HDS, upon HDS' request.

(c) You agree and acknowledge that, where the provision of HDS Property to You creates a PPS Security Interest for HDS: (i) that PPS Security Interest is registrable in the Personal Property Securities Registry and HDS may take all such steps as it considers appropriate to register, protect, perfect, record, or better secure its position in respect of this DPA under the PPS Law; and (ii) HDS is not obliged to give any notice or provide copies of any documents required under the PPS Law (including notice of a verification statement), unless the obligation to give that notice or provide that document cannot be excluded. You must sign and deliver any documents, provide all information and do anything else that HDS requires to ensure that it has a perfected first-ranking PPS Security Interest under the PPSA.

### **11.5 Non-Solicitation**

You undertake that You will not, directly or indirectly, while this Agreement is in force and for a period of one (1) year after termination of this Agreement for any reason whatsoever, engage, employ or otherwise solicit for employment any person who during the term of the Agreement was an employee of HDS and was directly engaged in the provision of the Services.

### **11.6 Miscellaneous**

(a) Unless the Parties agree 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

applicable 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 of its obligations under the DPA (except payment obligations), due to matters beyond its reasonable control, provided all 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 engage or retain subcontractors to perform any of its obligations, and 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 Personnel 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) Both Parties are independent contractors 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 company and brand name and/or logo in promotional materials, including press releases, presentations and customer references regarding the sale of Products, Third Party Products and Services. These permissions are free of charge and for worldwide use in any medium. The foregoing notwithstanding, HDS agrees to 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 effective date of the change.

(k) The DPA (including the Online Terms and all Quotes, Orders and Order Confirmations) 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 at law).

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

(m) This DPA may be signed by the Parties in counterparts, which together will form the entire agreement, and each of which may be transmitted electronically, to be effective on the other Party's receipt of the signed copy.

(n) There are no third party beneficiaries to this DPA.

(o) References to "business days" means a day which is not a Saturday, Sunday or public holiday in the Australian State or Territory where Products and/or Services are delivered to You.

(p) Unless the Parties agree otherwise, all transactions under this DPA will be in Australian Dollars.

## **12. DEFINITIONS AND INTERPRETATION**

**Affiliate:** in relation to a Party, means a business entity controlled by, controlling or under common control of such Party, where "control" means owning or controlling the majority (more than 50%) of the voting rights, either directly or indirectly, or, if no voting stock exists, possessing, directly or indirectly, the power to direct or cause the direction of the management and policies of the concerned entity. In the case of HDS, Affiliate also means Hitachi Limited and any business entity controlled by Hitachi Limited. However, Affiliate does not include HDS distributors, resellers, independent service providers or HDS authorised service providers.

**Confidential Information:** all information of a confidential or proprietary nature concerning the disclosing Party's business, including, but not limited to, any non-public information relating to a Party's business operations, financials, products, services, pricing, or trade secrets, which at the time of disclosure, is clearly marked as confidential or under the circumstances such information would be considered to be confidential by a reasonable person. Confidential Information does not include any Personal Data or other information that is: (i) already in the public domain prior to disclosure; (ii) becomes publicly known and made generally available after disclosure through no breach of the receiving Party; or (iii) is independently developed by the receiving Party, without use of or reference to the disclosing Party's Confidential Information.

**Delivery:** delivery of Product to the Delivery Point in accordance with the delivery terms set out in Section 1.2 or in the case of Work Product, delivery of the Work Product in accordance with the terms of the applicable SOW.

**Delivery Point:** HDS' Product distribution center or other location for delivery, as nominated by HDS.

**Designated Use:** Your internal business evaluation of the performance of the Product in a non-production environment.

**Equipment:** hardware and spare parts.

**Fees:** the fees payable by You to HDS for the supply of Products and/or Services, as set out in HDS' invoice to You.

**Good Industry Practice:** at any time, the exercise of the degree of care and skill that would reasonably and ordinarily be expected at that time from a skilled and experienced provider or supplier to a customer like You for products and services similar to the Products Services and under similar terms and conditions for similar pricings, whilst seeking to comply with its contractual obligations and complying with applicable laws within Australia.

**HDS Property:** all Products provided to You by HDS prior to the passing of title pursuant to Section 1.3, all products loaned to You pursuant to Section 1.6, any consumption or other services contemplated by Section 2, and all other HDS materials and property that HDS retains on Your premises pursuant to the performance of Services.

**Hitachi IP:** all items and materials that HDS provides to You or otherwise creates pursuant to this DPA, and their changes, improvements, additions, enhancements, new versions, updates and derivatives.

**Initial Service Period:** the non-cancellable Service Period of the duration referred to in, and commencing on the date referred to in, HDS' Quote (or if there is no Quote, then the Order).

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

**Install:** has the meaning set out in the maintenance and support provisions of the Online Terms.

**Loan Period:** the period for the loan of Products under Section 1.6 as set out in the applicable Loan Schedule.

**Loan Agreement:** A separate agreement to this DPA, under which the Parties agree to the terms of a Product Loan.

**Loan Schedule:** a Schedule to this DPA, under which the Parties agree to terms of a Product Loan.

**Location:** the location for the delivery of Products that are the subject of a Product Loan, as set out in the applicable Loan Schedule.

**Maintenance and Support Services:** the Equipment maintenance and Software support services described in more detail in the Online Terms (including the Service Descriptions as referred to in the Online Terms);

**Order:** a written or electronic order for the purchase of Products, Third Party Products and/or Services from HDS, or a document detailing the same, including, but not limited to, description and price which is submitted to, and accepted by HDS in accordance with this DPA and HDS' then-current ordering requirements.

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

**Participation Agreement:** an agreement for Affiliates of the Parties to participate in this DPA, which agreement will be in the form set out in Exhibit A to this DPA.

**Party:** HDS and You when referred individually.

**Parties:** HDS and You when referred jointly.

**Personal Data:** personal information about an identifiable person.

**Personnel:** of a Party means that Party's employees, contractors or workforce members.

**Personnel:** of a Party means that Party's employees, contractors or workforce members.

**PPSA:** the means the *Personal Property Securities Act 2009* (Cth).

**PPS Law:** means (i) the PPSA and the PPS Regulations as amended from time to time; and (ii) any amendment made to any other legislation as a consequence of any law or regulation referred to in sub-section (i), including without limitation, amendments to the *Corporations Act* (Cth).

**PPS Security Interest:** a security interest under the PPSA.

**PPS Regulations:** the *Personal Property Securities Regulations 2010* (Cth).

**Product(s):** any Equipment or Software (including Third Party Products) listed in HDS' standard product price lists published from time to time.

**Product Loan:** HDS' loan of Products in accordance with Section 1.6 and the applicable Loan Schedule or Loan Agreement (as applicable).

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

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

**Quote:** a written quotation or proposal issued by HDS for the proposed supply of Products and/or Services.

**Refund:** a refund of the price that You have paid for the Product will be less a straight-line depreciation, based on a 3 year useful life. A refund of Service fees will be the pro-rated portion of the Fees paid by You, for the Services actually delivered and which are in conformity with the HDS Services warranty.

**Renewal Service Period:** the automatically renewable Service Period commencing at the end of the Initial Service Period and any subsequent renewal period thereafter.

**Security Breach:** the unauthorised access, acquisition, use, disclosure, modification or destruction of Personal Data associated with the supply of Products or Services under this DPA.

**Services:** Billable Services (as defined in the Online Terms), Maintenance and Support Services, Professional Services and any other services listed in HDS' published price lists or similar offerings from time to time.

**Service Period:** term during which Maintenance and Support Services are provided. The term of a particular Service Period and the applicable charges shall be as specified in an Order.

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

**Statement of Work or SOW:** a document agreed and executed between the Parties, which fully describes the Professional Services being provided by HDS and sets out the scope of services being provided, the price, estimated delivery dates, service deliverable 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 Equipment or Software supplied to HDS by any entity other than Hitachi Ltd. for direct or indirect distribution to end users, which is listed in HDS' standard product price lists published from time to time.

**Third Party Related OSS:** any Open Source Software licensed to, provided with or otherwise contained in, the Third Party Software.

**Third Party Software:** any software contained in or comprising Third Party Products. For clarification purposes, if any Third Party Software not sub-licensed through the Online Terms contains Third Party Related OSS, You must refer back to that applicable licence for those terms.

**Update:** Subsequent releases and error corrections and/or minor functional enhancements for Software previously licensed by HDS.

**Use:** to use Software and Third Party Software in live production for processing data either in operation of Products, in use of Programs or in receipt of Services.

**Warranty Period:** means the applicable warranty period listed in the Online Terms for a particular Product or, in the case of Third Party Products, as may be provided in the applicable third party warranty terms.

**Work Product:** any works of authorship, program listings, tools, documentation, reports, drawings and similar works created by HDS 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.

<b>HITACHI DATA SYSTEMS CORPORATION</b>	<b>CUSTOMER</b>
By	By
Name	Name
Title	Title
Company	Company
Date	Date



EXHIBIT A

PARTICIPATION AGREEMENT

This Participation Agreement ("**Participation Agreement**") dated [insert date] ("**PA Effective Date**") has been entered into by and between [insert full title of local HDS entity] ("**HDS Affiliate**") and [insert full title of local CUSTOMER company] ("**Customer Affiliate**").

HDS Affiliate and Customer Affiliate will be jointly referred to as "Parties" and individually as "Party".

**Background**

- (A) Hitachi Data Systems Corporation ("**HDS**") and [insert full company name of CUSTOMER] ("**Customer**") have signed an Direct Purchasing Agreement dated [insert date] ("**Agreement**"), a copy of which is attached as an Annex to this Participation Agreement.
- (B) HDS Affiliate and Customer Affiliate wish to benefit from the terms of the Agreement.

**Now it is hereby agreed as follows:**

1. Both HDS Affiliate and Customer Affiliate have read the Agreement, and agree that it will govern the engagement between them, except that:
  - (i) this Participation Agreement will commence on the PA Effective Date shown above and will continue to operate until either the Agreement as a whole is terminated, or until this Participation Agreement is terminated by either party on the same grounds as set out in the Agreement, or is terminated on 30 days' prior written notice by: (i) HDS Affiliate where the Customer Affiliate ceases to be a member of the Customer corporate group; or (ii) Customer Affiliate where the HDS Affiliate ceases to be a member of the HDS corporate group. Termination of this Participation Agreement does not affect the Agreement.
  - (ii) the governing law of this Participation Agreement will be [insert governing law] (except that body of law controlling conflict of laws). All disputes arising out of this Participation Agreement will be resolved by the courts of [insert choice of jurisdiction], and the parties to this Participation Agreement submit to the exclusive jurisdiction of those courts;
  - (iii) the currency for transactions under this Participation Agreement will be [insert currency]; and
  - (iv) Except for the claims of intellectual property rights infringement, breach of confidentiality obligation and willful misconduct, HDS Affiliate's and Customer Affiliate's respective maximum aggregate liability for all claims relating to this Participation Agreement, whether for breach of contract, breach of warranty or in tort, including negligence, will be [insert local PA cap] in aggregate.
2. HDS Affiliate and Customer Affiliate agree to comply with the terms of the Agreement which are incorporated by reference herein. References in this Participation Agreement to the Agreement mean the Agreement and any future amendments to the Agreement from time to time (unless the Parties expressly agree in writing that any particular amendment will not apply). Neither HDS Affiliate nor Customer Affiliate will be liable to other for the acts or omissions of other members of their respective corporate groups.
3. Capitalized terms used throughout this Participation Agreement which are not defined herein will have the meaning given to them in the Agreement. In the event of conflict between the terms of the Agreement and those of this Participation Agreement, the terms of this Participation Agreement prevails to the extent of such conflict.

IN WITNESS WHEREOF, the parties have caused this Participation Agreement to be executed their duly authorised representatives.

HDS Affiliate	Customer Affiliate
By	By
Name	Name
Title	Title
Company	Company
Date	Date