



ESP Terms and Conditions

Parties

Energy Solution Providers Limited, registered number NZBN 9429036879274 (referred to in this Agreement as “**ESP**”, “**we**”, “**us**” or “**our**”)

and

The person or entity named or identified as the “client” or “customer” in the Order Form, Schedule and/or Proposal (referred to this Agreement as “**Client**”, “**you**” or “**your**”)

Overview

These Terms and Conditions comprise the General Terms and any applicable Schedules. Other terms and conditions may appear in the Order Form.

General Terms

1.0 APPLICATION OF TERMS AND CONDITIONS

- 1.1 These Terms and Conditions apply to your purchase, use and receipt, and our supply, of the Services, Deliverables and Equipment. By purchasing, accessing, using and/or receiving the Services, Deliverables and/or Equipment, you agree to these Terms and Conditions.
- 1.2 If you do not agree to these Terms and Conditions, you are not authorised to access, use or receive the Services, Deliverables or Equipment, and you must immediately stop doing so and (where applicable) return any Deliverables and Equipment previously received.

2.0 CHANGE

- 2.1 We may change these Terms and Conditions from time to time by notifying you of the change by email (a “**Change Notice**”). A change may take the form of an updated version of these Terms and Conditions. Unless stated otherwise and subject to clause 2.2, any change takes effect from the date set out in the Change Notice, which will be at least 30 days after the date of the Change Notice (the period from the date of the Change Notice to the date on which the Change Notice specifies the change will take effect being the “**Change Notice Period**”). You are responsible for ensuring you are familiar with the latest version of these Terms and Conditions.
- 2.2 If you object to the change, you may, at any time during the Change Notice Period, give us notice specifying the particular aspects of the change you object to and requesting that this Agreement be terminated (“**Change Objection Notice**”). Within 30 days following receipt of the Change Objection Notice, unless we have already agreed with you (in writing) the full extent to which the change will or will not apply, we will (by email notification) either:
 - 2.2.1 confirm your request, in which case this Agreement will terminate effective from the later of the end of the Change Notice Period and the date of our notice to you under this clause 2.2. In this case you may be entitled to a pro rata refund under clause 21.4.2; or
 - 2.2.2 agree that the particular aspects of the change you objected to (as specified in the Change Objection Notice) are withdrawn and will not take effect, in which case this



Agreement will remain in effect and (if applicable) be changed only to the extent that the Change Notice specified aspects of the change which you did not object to.

Pending the parties having reached such an agreement referred to in this clause 2.2 or us having given you notice under this clause 2.2, the particular aspects of the change you objected to (as specified in the Change Objection Notice) will not take effect.

2.3 Subject to clause 2.2, by continuing to access, use and/or receive the Services, Deliverables and/or the Equipment following the expiry of the Change Notice Period, you agree to be bound by the changed Terms and Conditions.

2.4 These Terms and Conditions were last updated on 20 February 2024.

3.0 DEFINITIONS AND INTERPRETATION

Definitions

In this Agreement, unless the context indicates otherwise:

“Agreement” means the agreement between the parties comprising an Order Form, and these Terms and Conditions (including any applicable Schedules), each as may be varied, changed or updated from time to time in accordance with these Terms and Conditions. If the parties have entered into multiple Order Forms, there will be a separate agreement relating to each such Order Form (and comprising the Order Form and these Terms and Conditions).

“Agreement Date” means the date the applicable Order Form was signed by the last of the parties to sign the Order Form.

“Analytical Data” has the meaning given to that term in clause 10.6.

“Confidential Information” means all information relating to a party and its business, including a party’s suppliers and their business, which is disclosed or made available to a party (**“receiving party”**) under or in relation to this Agreement. Our Confidential Information shall include information relating to ESP’s know how, its technology (including the SaaS Services), its Intellectual Property Rights and the Fees. Your Confidential Information includes the Client Data. Notwithstanding the previous sentences, Confidential Information does not include information that:

- (a) is or becomes publicly known other than through any act or omission of the receiving party;
- (b) was in the receiving party’s lawful possession before the disclosure;
- (c) is lawfully disclosed to the receiving party by a third party without restriction on disclosure;
- (d) is independently developed by the receiving party, which independent development can be shown by written evidence.

“Client Data” means all data, content, and information (including personal information) owned, held, used or created by you or on your behalf that is inputted into the SaaS Services.

“Client Specific Materials” means any user guide or other documentation prepared by ESP, specifically for the Client’s use of the Services (and not for use by ESP’s clients or customers (or any segment of them) generally).

“Consulting Services” means implementation, consulting, data management, and other professional services to be supplied by ESP, excluding the SaaS Services, as set out in the relevant Order Form.

“Deliverables” means any reports and deliverables to be provided by ESP as listed in the relevant Order Form and/or (if applicable) the Proposal (if any) and relevant Schedules, plus any other items and outputs that ESP is required to produce, supply or deliver pursuant to this Agreement.

“Emission Reduction Projects” means any projects required to reduce emissions including equipment upgrades, retrofits, maintenance intended to reduce carbon emissions or improve energy efficiency.



“Equipment” means the meters (devices producing recordable usage data), remote terminal units (or loggers) which log consumption data from multiple meters or hardware to present display infographics and data, and other equipment to be supplied or to be supplied by ESP, as set out in the relevant Order Form and (if applicable) the Proposal (if any) and relevant Schedules.

“Fees” means the applicable fees, prices or charges payable in relation to the Services, Deliverables and/or Equipment, as set out in the Order Form and/or (if applicable) the Proposal (if any) and the relevant Schedules, or as agreed otherwise in writing between you and us, as may be updated from time to time in accordance with clause 12.6.

“Force Majeure” means an event that is beyond the reasonable control of a party, excluding:

- (a) an event to the extent that it could have been avoided by a party taking reasonable steps or reasonable care; or
- (b) a lack of funds for any reason.

“GST” means goods and services tax chargeable under the Goods and Services Tax Act 1985.

“Initial Subscription Term” means the initial subscription term during which SaaS Services are to be provided as specified in the Order Form or, if not so specified, the Initial Subscription Term will be deemed to be 36 months commencing from the Subscription Start Date.

“Intellectual Property Rights” or **“Intellectual Property”** includes copyright and all rights existing anywhere in the world conferred under statute, common law or equity relating to inventions (including patents), registered and unregistered trade marks and designs, data and databases, software and computer code, confidential information, know-how, and all other rights resulting from intellectual activity.

“New IP” means all Intellectual Property Rights in Client Specific Materials that are developed, commissioned or created by ESP in performance or provision of any Services under this Agreement.

“Objectionable” includes being objectionable, defamatory, obscene, harassing, threatening, harmful, or unlawful in any way.

“Order Form” means an order form, statement of work or other document (however described) which:

- (a) describes (among other things) the scope of Deliverables, Services and/or Equipment to be supplied by ESP to the Client;
- (b) sets out the price or fees payable for such Deliverables, Services and/or Equipment;
- (c) was signed by both parties, or accepted by the Client electronically and confirmed or approved by ESP in writing; and
- (d) incorporates, specifies that it is subject to or governed by, or attaches these Terms and Conditions (or any earlier version of them).

“Personal Information” has the meaning set out in the Privacy Act 2020.

“Pre-existing IP” means any Intellectual Property Rights of a Party which:

- (a) exist at the Agreement Date; or
- (b) are developed or acquired independently of this Agreement.

“Proposal” means the proposal document (if any) provided by ESP proposing a solution that includes the Services, Deliverables and/or Equipment, and is accepted and signed by the Client and/or is attached to or referenced in the Order Form.

“Renewal Term” means a subscription term, following the Initial Subscription Term, during which a subscription for the SaaS Services will continue, as specified in the Order Form or, if not so specified, each Renewal Term will be deemed to be 12 months commencing from the end of the Initial Subscription Term or any anniversary of the end of the Initial Subscription Term.



“SaaS Services” means the web applications owned and hosted by us (and/or our licensors and/or hosting providers) as set out in the Order Form and (if applicable) as further described in the Proposal (if any), which are made available via <https://app.bravegen.com>, <https://hub.esphq.com>, and/or <https://dashboard.espnz.co.nz> (as applicable) or such other sites notified to you by us, as those web applications may be changed or updated by ESP from time to time.

“Schedule” means a Schedule to and/or forming part of these Terms and Conditions, which (among other things) contains additional terms and conditions applicable to Equipment and/or certain Services and/or Deliverables to be supplied to the Client. Relevant Schedules may include the Schedules entitled 'Schedule – Equipment' and 'Schedule – Vector Connect'.

“Services” includes the Consulting Services and/or SaaS Services supplied or to be supplied by ESP, as set out in the Order Form and (if applicable) as further described in the Proposal (if any) and/or the applicable Schedules.

“Subscription Fee” means the annual Fee, paid annually or in monthly instalments, for the SaaS Services, as agreed in an Order Form and as may be updated from time to time in accordance with clause 12.6.

“Subscription Start Date” means start date for a subscription for the SaaS Services as specified in the relevant Order Form or, if not so specified, the Subscription Start Date will be deemed to be the Agreement Date.

“Subscription Term” means the term during which you have a subscription to use the SaaS Services, being (subject to any earlier termination in accordance with clause 6.2.1 or 20.0) the Initial Subscription Term together with all applicable Renewal Terms).

“Subscription Year” means a 12-month period starting on the Subscription Start Date of an Order Form or the anniversary of that date.

“Term” means the term of this Agreement as set out in clause 6.0.

“Terms and Conditions” means these terms and conditions, comprising the General Terms and any applicable Schedules.

“Underlying Systems” means the information technology systems and networks (including software and hardware) used to provide the SaaS Services, including any third-party solutions, systems and networks.

“User” means any person or entity who you have authorised to access and use the SaaS Services in accordance with clause 8.2.

“Variation” means a variation to timetable or Fees in an Order Form provided by ESP and agreed with the Client, which agreement will not be unreasonably withheld.

Interpretation

In this Agreement, unless the context indicates otherwise:

- (a) section and clause headings are used as a matter of convenience only and shall not affect the interpretation;
- (b) a person includes an individual, a body corporate, an association of persons (whether corporate or not), a trust, a government department, or any other entity;
- (c) personnel includes officers, employees, contractors and agents, but a reference to your personnel does not include us;
- (d) the words “including”, “particularly”, “such as” and similar expressions are do not limit the general interpretation of the surrounding words;
- (e) words in the singular include the plural and vice versa;



- (f) reference to a statute includes references to regulations, orders or notices made under or in connection with the statute or regulations and all amendments, replacements or other changes to any of them;
- (g) references to "dollars" or "\$" are references to New Zealand dollars; and
- (h) a party includes that party's permitted assigns.

4.0 PRECEDENCE

- 4.1 If there is any inconsistency between these Terms and Conditions (including a Schedule) and an Order Form, the Order Form shall prevail.
- 4.2 If there is any inconsistency between the General Terms and a Schedule, the Schedule shall prevail.

5.0 PROVISION OF THE SERVICES

- 5.1 ESP agrees to supply, and the Client agrees to pay ESP for, the Services, Deliverables and Equipment as described in the Order Form and in accordance with this Agreement.
- 5.2 Subject to payment of the Subscription Fees, ESP grants to the Client for the Subscription Term a non-exclusive, non-transferable right to permit Users to use the SaaS Services for Client's internal business operations.

6.0 TERM

- 6.1 Unless agreed otherwise in the Order Form this Agreement will start on the Agreement Date.
- 6.2 Unless this Agreement is terminated earlier in accordance with clause 20.0:
 - 6.2.1 the supply of and subscription for the SaaS Services starts on the Subscription Start Date and initially is for the Initial Subscription Term. At the end of the Initial Subscription Term, the supply of and subscription for the SaaS Services shall automatically renew for an unlimited number of successive Renewal Terms, until either party gives the other written notice of termination at least 90 days prior to the expiration of the Initial Subscription Term or the then-current Renewal Term, as the case may be; and
 - 6.2.2 all other Services will be supplied for the term as set out in the Order Form or, if no term has been specified, until all such Services (including associated Deliverables and Equipment (as applicable)) have been supplied by ESP in accordance with this Agreement.
- 6.3 Unless this Agreement is terminated earlier in accordance with clause 20.0, this Agreement will end once all Subscription Terms, the term for all other Services has ended in accordance with clause 6.2, and all other Equipment and Deliverables have been supplied by ESP in accordance with this Agreement.

7.0 ESP OBLIGATIONS

- 7.1 ESP must use reasonable efforts to provide the Services:
 - 7.1.1 in accordance with this Agreement and New Zealand law;
 - 7.1.2 exercising reasonable care, skill and diligence; and
 - 7.1.3 using suitably skilled, experienced and qualified personnel.



- 7.2 Our provision of the Services, Deliverables and Equipment to you is non-exclusive. Nothing in this Agreement prevents us from providing the Services, Deliverables or Equipment to any other person.
- 7.3 We must use reasonable efforts to ensure the SaaS Services remain available. However, it is possible that on occasion the SaaS Services may be unavailable to permit maintenance or other development activity to take place, or in the event of Force Majeure. We must use reasonable efforts to publish on the relevant site at which the SaaS Services are accessed or notify you by email advance details of any unavailability.
- 7.4 Through the use of web services and APIs, the SaaS Services may interoperate with features of third-party services. We do not make any warranty or representation on the availability, performance or security of those third-party services. Without limiting the previous sentence, if a third-party service provider ceases to provide that feature or ceases to make that feature available on reasonable terms, we may cease to make available that feature to you. We will endeavour to replace that feature with one that is similar, however, if we exercise our right to cease the availability of a third party feature, you are not entitled to any refund, discount or other compensation.

8.0 YOUR OBLIGATIONS

- 8.1 You are responsible for assessing the suitability of the Services, the Deliverables and the Equipment for your purposes and for any decisions made or actions taken or not taken based on information or data provided through the Services, the Deliverables and/or the Equipment.
- 8.2 Through the SaaS Services, you may manage Users. You must procure each User's compliance with clause 8.4 and any other reasonable condition notified by us to you.
- 8.3 You are responsible for ensuring all Users have appropriate computing and telecommunications hardware, software, and services necessary to access and use the SaaS Services.
- 8.4 You and your Users must:
 - 8.4.1 use the SaaS Services in accordance with this Agreement solely for the Client's internal business purposes; and
 - 8.4.2 comply with all applicable laws, including the Unsolicited Electronic Messages Act 2007;
 - 8.4.3 ensure that all usernames and passwords required to access the SaaS Services are of reasonable complexity, kept secure and confidential;
 - 8.4.4 correctly identify the sender of all electronic transmissions;
 - 8.4.5 not impersonate another person or misrepresent authorisation to act on behalf of another person;
 - 8.4.6 not resell, supply, license or make available the SaaS Services (or any services which utilise or are derived from the SaaS Services or any of its outputs, reports or databases) to any third party, or otherwise commercially exploit the SaaS Services, without our prior written agreement;
 - 8.4.7 not undermine or attempt to undermine the security or integrity of the SaaS Services and/or the Underlying Systems;
 - 8.4.8 not use, or misuse, the SaaS Services in any way which may impair the functionality of the Underlying Systems or impair the ability of any other user to use the SaaS Services;



- 8.4.9 not attempt to view, access or copy any material or data other than:
- (a) that which you are authorised to access; and
 - (b) to the extent necessary for you to use the SaaS Services in accordance with this Agreement; and
- 8.4.10 neither use the SaaS Services in a manner, nor transmit, input or store any Client Data, that breaches any third party right (including Intellectual Property Rights and privacy rights), is Objectionable, incorrect or misleading, or contains any harmful code, files, scripts or programs (including any viruses, worms, time bombs, trojan horses or other security vulnerabilities).
- 8.5 You must immediately notify ESP of any unauthorized use of your Users' passwords or any other breach of security and ESP will reset the password. You must take all other actions that ESP reasonably deems necessary to maintain or enhance the security of ESP's computing systems and networks and your access to the SaaS Services.
- 8.6 A breach of any of the terms of this Agreement by your personnel, including, to avoid doubt, a User, is deemed to be a breach of this Agreement by you.
- 8.7 You are responsible for procuring all licences, authorisations and consents required for you and your personnel (including Users) to use the SaaS Services, including to use, store and input Client Data into, and process and distribute Client Data through, the SaaS Services.

9.0 USAGE LIMITATIONS

- 9.1 Use of the SaaS Services may be subject to reasonable limitations, including but not limited to monthly transaction volumes and the number of calls you are permitted to make against ESP's application programming interface. Any such limitations will be set out in the Order Form and/or advised by ESP from time to time.

10.0 DATA

- 10.1 You acknowledge and agree that:
- 10.1.1 we may require access to the Client Data to exercise our rights and perform our obligations under this Agreement;
 - 10.1.2 to the extent that this is necessary but subject to clause 17.0, we may authorise a member or members of our personnel to access the Client Data for this purpose;
 - 10.1.3 you shall provide to ESP promptly on request all information reasonably required by ESP relating to the Services and Deliverables; and
 - 10.1.4 you have sole responsibility for the quality of Client Data you provide.
- 10.2 You must arrange all consents and approvals that are necessary for us to access the Client Data as described in clause 10.1. You warrant that ESP's use of Client Data for the purposes of this Agreement will comply with all applicable laws, and will not infringe the rights, including the Intellectual Property Rights, of any third party.
- 10.3 You indemnify us against any liability, claim, proceeding, cost, expense (including the actual legal fees charged by our solicitors) and loss of any kind arising from any actual or alleged claim by a third party that any Client Data infringes the rights of that third party (including Intellectual Property Rights and privacy rights) or that the Client Data is Objectionable, incorrect or misleading.
- 10.4 While we will take standard industry measures to back up all Client Data stored using the SaaS Services, you agree to keep a separate copy of all Client Data uploaded by you onto the SaaS Services.



- 10.5 We may store Client Data (including any Personal Information) in secure servers in Australia and/or New Zealand.
- 10.6 You acknowledge and agree that we may:
- 10.6.1 use Client Data and information about your use of the Services to generate anonymised and aggregated statistical and analytical data ("**Analytical Data**"); and
 - 10.6.2 use Analytical Data for our internal research and product development purposes and to conduct statistical analysis and identify trends and insights,
- provided always that ESP shall not publish any Client Data without your consent unless the Client Data has been suitably anonymised and de-identified so that it cannot be directly linked to the Client (or any of its Users) and does not contain Personal Information related to the Client (or any of its Users).
- 10.7 Our rights under clause 10.6 above will survive termination of expiry of the Agreement.
- 10.8 Title to, and all Intellectual Property Rights in:
- 10.8.1 Client Data is and remains your property; and
 - 10.8.2 Analytical Data (including the manner in which it is generated and presented) is and remains our property.
- 10.9 You grant us a worldwide, non-exclusive, fully paid up, transferable, irrevocable licence to use, store, copy, modify, make available and communicate the Client Data for any purpose in connection with the exercise of our rights and/or the performance of our obligations in accordance with this Agreement.

11.0 PRIVACY

- 11.1 Each party shall comply with the Privacy Act 2020 or such other privacy laws as applicable to it in relation to the collection, usage and storage of Personal Information in connection with this Agreement.
- 11.2 You acknowledge and agree that to the extent Client Data contains Personal Information, in collecting, holding and processing that information through the SaaS Service, we are acting as your agent for the purposes of the Privacy Act 2020 and any other applicable privacy law. You must obtain all necessary consents from the relevant individual to enable us to collect, use, hold and process that information in accordance with this Agreement.
- 11.3 ESP maintains a privacy policy that sets out its policies, procedures and obligations in respect of Personal Information. You should read that policy at <https://www.esphq.com/privacy-policy/> and ensure that your Users are made aware of and accept that policy before they use the SaaS Services.

12.0 FEES

- 12.1 You must pay us the Fees.
- 12.2 We will provide you with valid GST tax invoices for the Fees. In respect of Subscription Fees, these will be issued in advance on a monthly instalment or annual basis (as selected in the relevant Order Form or, if not so selected, on an annual basis) for each Subscription Year. Fees for other Services, Deliverables and Equipment will be invoiced at the times and in the manner specified in the relevant Order Form or, if not so specified:
- 12.2.1 Fees for other Services will be invoiced monthly in arrears for all Services performed during the month; and
 - 12.2.2 Fees for Deliverables and Equipment will be invoiced in full upon them being supplied to the Client.



- 12.3 The Fees exclude:
- 12.3.1 any applicable goods and services, value-added or similar taxes (such as GST), which taxes must be paid by the Client in addition to, and at the same time as, the Fees;
 - 12.3.2 import duties or other levies or tariffs, which unless otherwise stated must be paid by the Client in addition to, and at the same time as, the Fees; and
 - 12.3.3 costs of any downstream Emission Reduction Projects, which shall be the Client's sole responsibility to pay.
- 12.4 Payment of invoices is due to ESP by the 20th of the month following the invoice date, electronically in cleared funds without any set off or deduction. If the Client fails to pay the invoice when due, ESP may without prejudice to any of its other rights:
- 12.4.1 suspend the delivery of the Services, Deliverables and/or Equipment in accordance with clause 21.7;
 - 12.4.2 terminate this Agreement, provided ESP has first given the Client written notice of its failure to pay and the Client has failed to pay within 14 days following such notice;
 - 12.4.3 recover the costs of default from the Client (including legal costs on a solicitor and client basis and fees paid to any debt recovery agent); and/or
 - 12.4.4 charge the Client interest on the amount due at the rate of 2% above ESP's bank's commercial overdraft rate until ESP receives payment.
- 12.5 All additional out of pocket expenses reasonably incurred by ESP in provided the Services will be payable by the Client to ESP when invoiced by ESP, including accommodation and meals, travel, telecommunications and postal charges, clerical and copying costs, and freight. These disbursements will be charged to Client at their cost to ESP.
- 12.6 Unless stated otherwise in the Order Form:
- 12.6.1 ESP may increase the Subscription Fee and any other Fees or rates used to calculate Fees by an amount commensurate with any increase in the New Zealand Consumer Price Index (all groups) (as published by Statistics New Zealand) (**CPI**) over the 12 month period covered by the most recent CPI figures; and
 - 12.6.2 ESP may apply such increases once in each 12 month period commencing from the first or any subsequent anniversary of the Agreement Date, by providing written notice to the Client of such Fee increase.
- 12.7 The Client shall consider any other requests for a Fee increase from ESP in good faith.

13.0 ENERGY EFFICIENCY AND CONSERVATION AUTHORITY FUNDING (EECA)

- 13.1 If EECA funding is applicable, ESP or the Client and EECA may engage in a separate contract where funding may be made directly to the Client or ESP. Where EECA funding is subject to the Client agreeing to achieving targets, if the Client fails to meet the targets, the Client acknowledges it may have to repay some or all the EECA funding. Any cessation of the EECA funding or requirement to pay the EECA funding back to the EECA shall not affect Client's obligation to pay the Fees to ESP.

14.0 DELAYS AND VARIATIONS

- 14.1 While ESP will make every reasonable effort to achieve agreed timetables when completing the Services, ESP does not warrant, promise or guarantee that any timetable will be met. If ESP is affected by delays caused by the Client or circumstances outside ESP's control, then



ESP may apply to the Client for a Variation to the timetable and increase the Fees commensurate with the additional time required and/or the costs incurred. Approval for such Variation will not be unreasonably withheld by the Client.

15.0 HEALTH AND SAFETY

- 15.1 ESP and the Client will comply with any relevant obligations imposed on them under the applicable laws relating to health and safety.
- 15.2 Each party will have adequate health and safety management systems and processes in place to ensure it complies with its obligations under applicable laws relating to health and safety.
- 15.3 When a party visits the site or premises of the other party, the visiting party agrees to comply with any reasonable health and safety processes, procedures and requirements of the other party as applicable, and as notified in writing, to the visiting party from time to time.
- 15.4 Each party will co-operate, consult and co-ordinate activities with the other party in relation to work being carried out under this Agreement in order to meet each other's respective health and safety obligations under applicable legislation, regulations and this Agreement.

16.0 INTELLECTUAL PROPERTY

- 16.1 Both parties acknowledge and agree that all Pre-Existing IP the property of the other Party or its third-party suppliers, is and shall remain, the property of that other Party or its third-party suppliers.
- 16.2 The Client acknowledges that all Intellectual Property Rights in the SaaS Services and all Underlying Systems (excluding the Client Data, the Client's Pre-existing IP and the New IP in Client Specific Materials), together with any improvements, modifications or enhancements in respect of the same are owned by ESP and nothing in this Agreement shall operate to assign or transfer any such Intellectual Property Rights from ESP to the Client. You must not contest or dispute that ownership, or the validity of those Intellectual Property Rights.
- 16.3 ESP acknowledges and agrees that any New IP in Client Specific Materials will vest absolutely in the Customer as it is created, and ESP agrees to execute all documents and do all acts and things reasonably necessary for the purpose of giving effect to this clause.
- 16.4 To the extent not owned by us, you grant us a royalty-free, transferable, irrevocable and perpetual licence to use for our own business purposes any know-how, techniques, ideas, methodologies, and similar Intellectual Property used by us in the provision of the Services.

17.0 CONFIDENTIALITY

- 17.1 Each party must, unless it has the prior written consent of the other party:
 - 17.1.1 keep confidential at all times the Confidential Information of the other party;
 - 17.1.2 effect and maintain adequate security measures to safeguard the other party's Confidential Information from unauthorised access or use;
 - 17.1.3 disclose the other party's Confidential Information to its personnel, professional advisors, auditors, financiers or insurers on a *need to know* basis only and, in that case, ensure that any personnel or professional advisor to whom it discloses the other party's Confidential Information is aware of, and complies with, clauses 17.1.1 and 17.1.2; and
 - 17.1.4 not use the other party's Confidential Information for its own business purposes.



- 17.2 The obligation of confidentiality in clause 17.1 does not apply to any disclosure or use of Confidential Information:
- 17.2.1 for the purpose of performing a party's obligations, or exercising a party's rights, under this Agreement;
 - 17.2.2 required by law (including under the rules of any stock exchange); or
 - 17.2.3 required as part of a *bona fide* investment in or sale of a party's business (assets or shares, whether in whole or in part) to a third party investor or purchaser, provided that that party enters into a confidentiality agreement with the third party on terms no less restrictive than this clause 17.0.

18.0 WARRANTIES

- 18.1 Each party warrants that it has full power and authority to enter into, and perform its obligations under, this Agreement.
- 18.2 To the maximum extent permitted by law and subject to clause 18.5:
- 18.2.1 any warranty, right, duty, condition or liability under Part 3 of the Contract and Commercial Law Act 2017 is expressly excluded and
 - 18.2.2 we make no representation concerning the quality of the Services, Deliverables and/or Equipment and do not warrant, promise or guarantee that the Services, Deliverables or Equipment will:
 - (a) meet your requirements or be suitable for a particular purpose, including that the use of the Services, Deliverables or Equipment will fulfil or meet any statutory role or responsibility you may have; or
 - (b) be secure, free of viruses or other harmful code, uninterrupted or error free.
- 18.3 ESP will use commercially reasonable efforts to rectify any material errors that it becomes aware of in the Services in a timeframe according to the severity of the error. ESP reserves the right to suspend access to the SaaS Services whilst any such errors are rectified and for periodic maintenance.
- 18.4 ESP does not accept responsibility to rectify any errors caused by the Client or its Users (including any errors in the Client Information or any incompatibility of the Client's browser or operating environment) and does not accept responsibility for any delays, delivery failures or any other loss or damage caused by telecommunications networks (including the Internet).
- 18.5 Nothing in this Agreement is intended to exclude, contract out of, limit or restrict any right or remedy you may have under the Fair Trading Act 1986, under the Consumer Guarantees Act 1993, under Subpart 3 of Part 2 of the Contract and Commercial Law Act 2017 in relation to misrepresentations which induced your entry into this Agreement, or under any other applicable legislation which cannot be lawfully excluded, contracted out of, limited or restricted. For further information visit <https://comcom.govt.nz/> and <https://www.consumerprotection.govt.nz/>.

19.0 LIABILITY

- 19.1 Neither party will be responsible, liable, or held to be in breach of this Agreement for any failure to perform its obligations under this Agreement or otherwise, to the extent that the failure is caused by the other party failing to comply with its obligations under this Agreement, or by the negligence or misconduct of the other party or its personnel.



- 19.2 Each party must take reasonable steps to mitigate any loss or damage, cost or expense it may suffer or incur arising out of anything done or not done by the other party under or in connection with this Agreement or the Services, Deliverables or Equipment.
- 19.3 Subject to clauses 18.5 and 19.5, where a claim arises out of or in connection with this Agreement (whether in contract, tort (including negligence), breach of statutory duty, or otherwise, and whether caused by a party, its employees or agents or otherwise), neither party will be liable for any:
- 19.3.1 incidental, indirect, special or consequential loss or damage;
 - 19.3.2 costs of procuring substitute services;
 - 19.3.3 loss of revenue, profits, anticipated savings, goodwill or data;
 - 19.3.4 loss of contracts, business, or opportunity;
 - 19.3.5 business interruption; or
 - 19.3.6 loss based on a third-party claim,
- even if such loss was reasonably foreseeable.
- 19.4 Subject to clauses 18.5 and 19.5, each party's total aggregate liability in any 12 month period commencing on the Agreement Date or any anniversary of the Agreement Date shall be limited to the total Fees paid and payable by Client during that 12 month period.
- 19.5 Notwithstanding any other clause of this Agreement, the exclusions and limitations of liability in clauses 19.3 and 19.4 shall not apply to or limit the liability:
- 19.5.1 of either party in relation to any infringement of the other party's Intellectual Property Rights;
 - 19.5.2 of either party in relation to any fraudulent conduct or any wilful breach of this Agreement;
 - 19.5.3 of the Client in relation to any failure to pay Fees when due;
 - 19.5.4 of the Client in relation to any breach clause 8.4;
 - 19.5.5 of the Client under the indemnity in clause 10.3; or
 - 19.5.6 of either party in relation to any breach of clause 17.0.

20.0 INSURANCE

- 20.1 ESP shall maintain insurance throughout the Term to cover its liabilities and obligations under this Agreement in accordance with reasonable commercial practice.

21.0 TERMINATION AND SUSPENSION

- 21.1 Either party may, by notice to the other party, immediately terminate this Agreement if the other party:
- 21.1.1 commits a material breach of this Agreement and the breach is not:
 - (a) remedied within 20 days of the receipt of a notice from the first party requiring the other party to remedy the breach; or
 - (b) capable of being remedied; or
 - 21.1.2 becomes insolvent, goes into liquidation, is adjudicated bankrupt, has an administrator, receiver, liquidator, statutory manager, mortgagee's or chargee's agent appointed, becomes subject to any form of insolvency action or external administration, or ceases to continue business for any reason.



- 21.2 Termination or expiry of this Agreement does not affect either party's rights and remedies that accrued before that termination.
- 21.3 On termination or expiry of this Agreement, the Subscription Term will terminate and you must pay all Fees for the provision of the Services, Deliverables and Equipment provided prior to that termination.
- 21.4 No compensation is payable by either party as a result of termination or expiry of this Agreement for whatever reason, and you will not be entitled to a refund of any Fees that you have already paid, provided that:
- 21.4.1 nothing in this clause 21.4 will preclude you from seeking, as part of a damages claim, recovery of or compensation in relation to any Fees paid; and
- 21.4.2 if this Agreement is terminated in the circumstances described in clause 2.2.1, we will provide you with a pro rata refund of any Subscription Fee previously paid in advance which relates to a period ending after the date of termination, calculated as:
- Subscription Fee x (A ÷ B)
- where "A" is the number of days (from the date of termination) remaining in the period for which the Subscription Fee has been paid in advance (being generally a year or a month), and "B" is the total number of days in the period for which the Subscription Fee has been paid in advance.
- 21.5 Except to the extent that a party has ongoing rights to use the other party's Confidential Information, at the other party's request following termination or expiry of this Agreement but subject to clause 16.0, a party must promptly return to the other party or destroy all Confidential Information of the other party that is in the first party's possession or control.
- 21.6 At any time prior to one month after the date of termination, you may request:
- 21.6.1 a copy of any Client Data stored using the SaaS Services, provided that you pay our reasonable costs of providing that copy. On receipt of that request, we must provide a copy of the Client Data in a common electronic form. We do not warrant that the format of the Client Data will be compatible with any software; and/or
- 21.6.2 deletion of the Client Data stored using the SaaS Services, in which case we must use reasonable efforts to promptly delete that Client Data. To avoid doubt, we are not required to comply with clause 21.6.1 to the extent that you have previously requested deletion of the Client Data and are not required to delete any Analytical Data.
- 21.7 Without limiting any other right or remedy available to us, we may restrict or suspend our supply of and/or your or any of your Users access to and use of any Services, Deliverables and/or Equipment, and/or delete, edit or remove the relevant Client Data, if :
- 21.7.1 we consider (on reasonable grounds) that you or any of your personnel (including Users) have committed a breach of clause 8.4;
- 21.7.2 you have failed to pay any Fees when due and have not remedied that failure within 14 days of us sending you notice;
- 21.7.3 such action is forced or implemented by, or we consider (on reasonable grounds) is required under the contractual arrangements with, one or more of ESP's third party service providers (such as its hosting provider) which ESP relies on to provide any Services, Deliverables and/or Equipment;
- 21.7.4 we consider (on reasonable grounds) that such action is required by law;



- 21.7.5 we consider (on reasonable grounds) that such action is reasonably necessary to preserve the security or integrity of the SaaS Services and/or the Underlying Systems;
 - 21.7.6 we consider (on reasonable grounds) that you or any of your personnel (including Users) have used, or attempted to use, the Services:
 - (a) for improper purposes; or
 - (b) in a manner, other than for normal operational purposes, that materially reduces the operational performance of the Services;
 - 21.7.7 we consider (on reasonable grounds) that any Client Data breaches or may breach this Agreement or any third party right (including Intellectual Property Rights and privacy rights), or is or may be Objectionable, incorrect or misleading; or
 - 21.7.8 we consider (on reasonable grounds) that you or any of your personnel (including Users) have otherwise materially breached this Agreement and, if the breach if capable of remedy, have not remedied the breach within 14 days of us sending you notice.
- 21.8 We will lift any applicable restriction or suspension under clause 21.7 as soon as reasonably practicable when the circumstances that gave rise to the restriction or suspension have ceased or been remedied or resolved to our reasonable satisfaction.

22.0 ENTIRE AGREEMENT

- 22.1 This Agreement sets out the entire agreement by the parties relating to the Services, Deliverables and Equipment, and (subject to clause 18.5) supersedes and cancel anything discussed, exchanged or agreed prior to the Agreement Date.

23.0 FORCE MAJEURE

- 23.1 If a party is unable to perform its obligations under this Agreement due to a Force Majeure, then the requirement to perform those obligations will be suspended for so long as the Force Majeure (or its effects) persist, and that party will not have any liability to the other party in respect of the non-performance of those obligations, but without prejudice to any pre-existing claim, liability or responsibility in respect of this Agreement.
- 23.2 If ESP is unable to perform its obligations (to a material extent) under this Agreement due to a Force Majeure for a period of more than 60 days, then either party may terminate this Agreement immediately on notice to the other.

24.0 GENERAL

- 24.1 No person other than you and us has any right to a benefit under, or to enforce, this Agreement.
- 24.2 For a party to waive a right under this Agreement, that waiver must be in writing and signed by that party.
- 24.3 Subject to clause 5.0, we are your independent contractor, and no other relationship (e.g. joint venture, agency, trust or partnership) exists under this Agreement.
- 24.4 If we need to contact you, we will do so by email. You agree that this satisfies all legal requirements in relation to written communications. You may give notice to us under or in connection with this Agreement by emailing support@esphq.com.
- 24.5 This Agreement, and any dispute relating to this Agreement or the Services, Deliverables and/or Equipment, are governed by and must be interpreted in accordance with the laws of



New Zealand. Each party submits to the exclusive jurisdiction of the Courts of New Zealand in relation to any such dispute.

- 24.6 Clauses which, by their nature, are intended to survive termination or expiry of this Agreement, including clauses, 10.3, 10.6, 10.8, 10.9, 12.4, 16.0, 17.0, 19.0, 21.2 to 21.6, 24.6 and 25.0 continue in force following the termination or expiry of this Agreement.
- 24.7 If any part or provision of this Agreement is or becomes illegal, unenforceable, or invalid, that part or provision is deemed to be modified to the extent required to remedy the illegality, unenforceability or invalidity. If modification is not possible, the part or provision must be treated for all purposes as severed from this Agreement. The remainder of this Agreement will be binding on the parties.
- 24.8 Except as provided in clause 24.9, neither party may assign, novate or transfer any right or obligation under this Agreement without our prior written consent of the other party (which consent must not to be unreasonably withheld).
- 24.9 A party (**Assignor**) may assign or novate some or all of its rights and/or obligations under this Agreement to any third party (**Assignee**) which acquires all or any material part of the Assignor's business. If requested to do so by the other party, the Assignor must deliver to the other party a deed, duly executed by the Assignee, pursuant to which the Assignee covenants in favour of the other party to perform the obligations of the Assignor under this Agreement.

25.0 DISPUTES

- 25.1 In the event of any dispute between the parties relating to the Services, Equipment and/or the Deliverables or this Agreement, the parties shall engage relevant representatives from their senior management to attempt to resolve the dispute as quickly and amicably as possible.
- 25.2 To the extent that any dispute is not settled within 30 days of either party giving written notice of the dispute to the other, the dispute shall be referred to mediation. The mediator will be as agreed between the parties in writing or, in the absence of such agreement within 14 days of either party first proposing a mediator to the other party in writing, will be as nominated by the president of the New Zealand law society (or his or her delegate). In the event of mediation:
- 25.2.1 the mediator will not be acting as an expert or as an arbitrator;
- 25.2.2 the mediation will be held in Auckland, New Zealand or such other location as the parties may agree in writing;
- 25.2.3 the mediator will determine the procedure and timetable for the mediation; and
- 25.2.4 the parties will share equally the mediator's cost.
- 25.3 No party may issue any legal proceedings relating to any Dispute, unless that party has first taken all reasonable steps to comply with clauses 25.1 and 25.2. However, nothing in this Agreement prevents a party from seeking injunctive relief from a court of competent jurisdiction.



Schedule – Equipment

The terms in this Schedule – Equipment apply (in addition to the General Terms) if ESP agrees to supply, and the Client agrees to buy from ESP, any Equipment.

1.0 DEFINITIONS:

“PPSA” means the Personal Property Securities Act 1999

2.0 EQUIPMENT FEES

- 2.1 Unless otherwise stated, Fees are for Equipment supplied and prepared for installation to ESP’s specification, and are exclusive of the actual installation and support and maintenance costs and expenses for such Equipment.

3.0 SITE SURVEY & EQUIPMENT

- 3.1 Supply points to be metered and monitored will be set out in the Order Form. ESP will source appropriate Equipment on behalf of the Client, as required to enable monitoring of the supply points.
- 3.2 Occasionally, additional Equipment will be required for the installation which cannot be identified by the initial surveys or analysis and the Client acknowledges that any additional Equipment requirements may result in additional costs to the Client.
- 3.3 In some instances, aerials will be required to collect data from more remote meters such as those for gas and water.

4.0 DELIVERY & INSTALLATION OF EQUIPMENT

- 4.1 Delivery will be deemed to have occurred upon delivery of the Equipment to the Client’s place of business as stated in the Order Form, unless otherwise agreed between the parties in writing.
- 4.2 ESP may engage a carrier to deliver Equipment to the Client. Any dates given for shipment or delivery are stated in good faith but are not to be treated as conditions of sale. No claim shall be made by the Client on account of late shipment or delivery, however caused. All freight charges within New Zealand shall be at the cost of Client, unless stated otherwise in the Order Form.
- 4.3 The Client will ensure that it holds at its premises any Equipment that is owned by ESP in safe keeping and free from loss or damage.
- 4.4 ESP shall arrange for installation of the Equipment at a time agreed with the Client and subject to the Client preparing the installation site in accordance with any environmental or other specifications supplied by ESP. ESP may engage contractors to install Equipment, unless otherwise agreed.
- 4.5 The Client will provide ESP with the name and contact details of an authorised person on site to arrange access. The Client will ensure access arrangements for ESP are communicated to the authorised person.
- 4.6 ESP will advise the Client, in a timely fashion, of any issues which might delay the installation of Equipment which are within the Client’s control. The Client will either resolve the issue or agree a Variation to the installation process and timeframe.
- 4.7 If any Equipment is supplied and ESP advises the Client of the intended use and purpose for which the Equipment is supplied (that use and purpose being the “authorised



purposes”), the Client will ensure that the Equipment is used only for the authorised purposes in accordance with the reasonable instructions of ESP given from time to time.

- 4.8 The Client will give ESP immediate notice if it considers the Equipment is not suitable and on the becoming aware of any loss of, defect in, maintenance required to, or damage to the Equipment (as applicable).

5.0 THIRD-PARTY METERS

- 5.1 ESP will liaise with the Client and any third-party metering or utility supply companies as necessary, and is responsible for meeting their requirements when affixing monitoring devices to retail meters.
- 5.2 Installation of Equipment may require a pulse capable retail meter. If retailer meter access, upgrade or inspection is required, ESP will advise the Client of the approval process and any costs associated.
- 5.3 Gas metering installations must be completed by the gas retailer. Any costs associated with the activity of third parties under this clause are payable by the Client when invoiced by ESP in addition to the Fees.

6.0 RISK AND SECURITY INTEREST

- 6.1 The risk in the Equipment shall pass to the Client upon delivery.
- 6.2 The Client acknowledges and agrees that ESP may register a security interest in the Equipment and its proceeds on the Personal Property Securities Register and that such security interest survives until the Equipment is paid for in full. Until ESP has received payment in full for the Equipment, the Client acknowledges and agrees that:
- 6.2.1 ESP supplies the Equipment to the Client on the condition that ESP has a purchase money security interest in the Equipment;
- 6.2.2 If the Client sells or transfers possession of any Equipment before paying ESP for it, the Client shall retain records so that those proceeds remain identifiable and traceable to that sale of the Equipment. For example, the Client agrees that there will be no other funds in the account that the proceeds are credited to. If the Client further deals with such proceeds, the Client will manage those dealings in a manner so that the proceeds remain identifiable or traceable to the original Equipment. If the Client sells any of the Equipment to third parties before paying ESP for it, all claims which the Client holds against those third parties shall be assigned to ESP;
- 6.2.3 If ESP perfects any security interest that it has in relation to the Equipment, the Client will not do anything that results in ESP having less than the security or priority position in respect of the PPSA that ESP assumed at the time of perfection. If ESP is a secured party under the PPSA:
- (a) the parties contract out of Part 9 of the PPSA so that the rights and obligations contained in sections 114(1)(a), 116, 120(2), 125, 127, 129, 133 and 134 of that Part do not apply between ESP and the Client; and
- (b) the Client waives its rights under section 121 and 131 of the PPSA. Further, in accordance with section 148 of the PPSA, the Client waives its right to receive any financing statement or financing change statement from ESP.
- 6.3 The Client will assist ESP by completing any formalities or providing any information required by ESP to establish and maintain the best security position that it is entitled to under the PPSA.



- 6.4 The Client acknowledges and agrees that this Agreement is a security agreement securing all present and future Equipment supplied by ESP (and the proceeds of such Equipment). Each purchase will create or creates in favour of ESP a security interest in the Equipment which is the subject of the purchase and the security interest granted by the Client to ESP secures payment by the Client to ESP of all amounts the Client may owe ESP from time to time and at any time.
- 6.5 The Client must notify ESP at least 10 days before it makes any change to its name.

7.0 TITLE & REPAIR

- 7.1 On ESP receiving full payment for the Equipment, the Equipment will be owned by the Client.
- 7.2 ESP will pass on the manufacturer's warranties, which include a 12-month warranty on meters from time of installation, unless stated otherwise in the Order Form.
- 7.3 Warranty and repair and/or replacement obligations are dependent on the proper use and care of the Equipment in line with manufacturer guidance (where applicable) and do not cover components which have been modified or repaired without ESP's prior written consent. If ESP makes repairs to the Equipment it will do so by using components which are new or equivalent to new, in accordance with usual industry standards and practice.
- 7.4 Unless otherwise agreed, replaced or repaired parts are warranted only until the end of the original warranty period provided by the manufacturer. Parts not critical to Equipment function, including frames and cosmetic features, will not be serviced and/or repaired or replaced.
- 7.5 Your sole remedy in respect of a breach of a manufacturer's warranty in relation to matters notified during the warranty period shall be:
- 7.5.1 for ESP to, at the cost of ESP, repair or replace the Equipment; or
 - 7.5.2 if the repaired or replacement Equipment is not provided, ESP will refund the Client the Fees for the Equipment.

8.0 SALE OR VACATION OF PREMISES

- 8.1 In the event that the Client sells or vacates, or intends to sell or vacate, the premises where the Equipment is installed, the Client shall give written notice to ESP at the earliest reasonable opportunity.
- 8.2 In this case, if requested to by the Client, ESP will (acting reasonably) consider granting the Client a full or partial release from its obligations under this Agreement. ESP may decline such a release if (without limiting the reasons for which ESP may decline granting a release):
- 8.2.1 the purchaser or new occupier of the premises has not agreed (in a form acceptable to ESP) to assume all of the liabilities and obligations of the Client pursuant to this Agreement; or
 - 8.2.2 other Services and Deliverables not directly connected to or associated with the Equipment are also being provided to the Client under this Agreement.
- 8.3 However, upon receiving notice of the sale or vacation of the premises, ESP may (at its sole discretion) choose to terminate this Agreement immediately without incurring any liability to the Client or the purchaser of the premises. If this Agreement includes other Services and Deliverables not directly connected to or associated with the Equipment, such termination must be limited in scope to the supply of the Equipment and Services and Deliverables directly connected to or associated with the Equipment (in which case such termination will constitute an amendment to this Agreement to remove the relevant Equipment, Services and Deliverables from its scope).



9.0 TERMINATION:

- 9.1 Upon termination or expiry of this Agreement (or the part of this Agreement which concerns the supply of the Equipment and Services and Deliverables directly connected to or associated with the Equipment), ESP will be entitled to repossess (and shall be entitled to enter Client's premises to repossess) and resell any unpaid for Equipment. ESP will return to the Client any proceeds from the sale of any Equipment after deducting any outstanding charges owed to ESP and the costs and expense of undertaking the repossession and sale.