

**SOFTWARE LICENCE  
TERMS AND CONDITIONS**  
**ImproMation PTY LTD**

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**SOFTWARE LICENCE  
TERMS AND CONDITIONS**  
**ImproMation PTY LTD**

**SOFTWARE LICENCE  
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**1 Definitions**

1.1 In this agreement the following words and expressions have the following meanings:

*'acceptance date'* means the date upon which the software is accepted as provided by clause 10;

*'commencement date'* means the date the customer begins using the software;

*'customer'* means the customer or Customer;

*'licence'* means the licence of software granted pursuant to this agreement;

*'licence fee'* means the amount so specified in the annual invoice;

*'location'* is defined as a single school or educational site;

*'Supplier'* means the Supplier or Supplier of the software;

*'schedule'* means the Licence Fees;

*'schedule of rates'* means the schedule of rates currently advertised by the company;

*'software'* means concepts, designs, drawings, tables, software programs and other intellectual property created by the Supplier to be used to manage school and student data;

*'supplier'* means ImproMation Pty Ltd;

*'support fees'* means the amount so specified in the annual invoice;

*'support services'* means the services set out in Attachment B to the extent specified as being provided in the *schedule*

*'term of the licence'* means the term of the licence specified in the *schedule*;

**2 Interpretation**

In this agreement unless the context otherwise requires:

2.1 a reference to one gender shall include any or all genders and a reference to the singular may be interpreted where appropriate as a reference to the plural and vice versa.

2.2 in connection with any benefit given by this agreement, a reference to a party includes reference to its parent company, affiliates and subsidiaries.

2.3 a reference to a paragraph or schedule is to a paragraph or schedule to this agreement unless the context otherwise requires. The schedules form part of this agreement.

2.4 the headings to the paragraphs and schedules (if any) to this agreement are inserted for convenience only and do not affect the interpretation.

2.5 any agreement by any party not to do or omit to do something includes an obligation not to allow some other person to do or omit to do that same thing.

2.6 a reference to the knowledge, information, belief or awareness of any person shall be deemed to include the knowledge, information, belief or awareness that person would have if he had made reasonable inquiries.

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- 2.7 all money sums mentioned in this agreement are calculated net of GST, which will be charged when payment is due.
- 2.8 this agreement is made only in the English language. If there is any conflict in meaning between the English language version of this agreement and any version or translation of this agreement in any other language, the English language version shall prevail. If a version of this agreement has been supplied to you in some language other than English, that is a courtesy only and that translated version is of no legal effect.

### **3 Warranties for authority**

- 3.1 Each of the parties warrants that it has power to enter into this agreement and have obtained all necessary approvals to do so.
- 3.2 Each of the parties warrants and undertakes that it is not aware of anything within its reasonable control which might or will adversely affect its ability to fulfil its obligations under this agreement.
- 3.3 Each of the parties warrants that it is not insolvent and knows of no circumstance which would entitle any creditor to appoint a receiver or to petition for winding up or to exercise any other rights over or against its assets.
- 3.4 Each of the parties warrants that its performance of this agreement will not:
- 3.4.1 conflict with or result in the breach of any provision of its memorandum and articles of association or constitution of the company or any comparable document regulating the conduct of the Customer or the framework within which it must operate;
  - 3.4.2 conflict with any law or governmental regulation in any jurisdiction in which it intends to conduct business;
  - 3.4.3 constitute a default (or event which with the giving of notice or lapse of time, would become a default) under any contract or agreement by which the Supplier is bound.

### **4 Relationship of parties**

- 4.1 Nothing in this agreement shall create a partnership, agency or other relationship between the parties, other than the contractual relationship expressly provided for in this agreement.
- 4.2 Neither party shall have, nor represent that it has, any authority to make any commitment on the other party's behalf, except as provided in this agreement.

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## **5 Entire agreement**

- 5.1 This agreement contains the entire agreement between the parties and supersedes all previous agreements and understandings between the parties.
- 5.2 Each party acknowledges that, in entering into this agreement, he does not rely on any representation, warranty, information or document or other term not forming part of this agreement.
- 5.3 No implied licence of ImproMation software is granted to the Customer other than the express licences granted in this agreement.
- 5.4 Conditions, warranties or other terms implied by statute or common law in any country are excluded from this agreement to the fullest extent permitted by law.
- 5.5 As an exception to the last previous sub paragraphs, the parties do rely on information provided in writing as follows:

Schedule A: Products and Price List

Schedule B: Maintenance and Support

Schedule C: Data Security Management

## **6 Supplier's representations as to Intellectual property**

The Supplier represents and warrants that as of today:

- 6.1 the Supplier is either the Supplier of the entire right, title and interest in and to ImproMation software or it has been granted a licence to those rights and that any such licence includes the right to grant the rights to the Customer as are set out in this agreement;
- 6.2 to the best of the knowledge of the Supplier, none of ImproMation software has been adjudged invalid or unenforceable in whole or part;
- 6.3 use of ImproMation software by the Customer does not infringe any right of any other person.

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## **7 The Licence**

- 7.1 The Customer acknowledges that the Supplier owns all right, title and interest in and to ImproMation software and that the Customer has no right to use any of it outside the express terms of this agreement.
- 7.2 Subject to payment of the Licence Fee and to the other terms of this agreement, the Supplier grants to the Customer a licence to use ImproMation software throughout the World. The Licence is:
- 7.2.1 not sub-licensable;
  - 7.2.2 non-exclusive;
  - 7.2.3 for an initial term of one year, renewable annually upon payment of the annual renewal fee then currently charged by the Supplier;
  - 7.2.4 restricted to use for the Use Allowed.
- 7.3 The Licence may not be assigned nor transferred
- 7.4 If any renewal payment is not made before the annual renewal date, the Supplier may treat this agreement as having been terminated with effect from the renewal date. If that happens the effect shall be the same as if the agreement had terminated by expiry of time.
- 7.5 the Customer may not allow any other person to use ImproMation software except as a contractor or customer or sales agent of the Customer.
- 7.6 No express or implied licence of ImproMation software or any other material is granted to the Customer other than the express Licence granted in this agreement.
- 7.7 ImproMation requires the provision of complete and accurate information to be entered when registering an account for the service. If any information the Customer gives to the Supplier is inaccurate, the Licence is automatically terminated and no refund of money will be due to the Customer.
- 7.8 The licence is limited to the use of the software by the customer and by employees of the customer on personal computers and devices.
- 7.9 Upon initial setup of the software on the customer's behalf, the customer shall be deemed to have accepted the software.

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## **8 Limitations and permissions on the Licence**

- 8.1 The Customer must not Copy or Publish ImproMation software except as specifically allowed in this agreement.
- 8.2 The Customer may not allow any other person to use ImproMation software except in the situation or context for which the Customer has bought it.
- 8.3 The Customer may not represent or give the impression that the Customer is the Supplier or originator of ImproMation software.
- 8.4 The Customer may not remove any identification or reference number or other information which may be embedded in any file produced by ImproMation software.
- 8.5 Every publication or appearance of any part of ImproMation software must be protected as far as the law allows by separate, specific or general provisions against copying or publishing.

## **9 Third party infringement**

- 9.1 If either party becomes in any way aware of any infringement or potential infringement of any right relating to ImproMation software, it shall immediately notify the other of them.
- 9.2 The Supplier shall have the first right, but not the obligation, to take action against others, at its own cost, in whatever way it chooses, to protect ImproMation software.
- 9.3 The Supplier must notify the Customer within 28 days of any action it decides to take, specifying its proposed heads of claim and the damages and other remedies claimed.
- 9.4 The Customer agrees to co-operate with the Supplier in any litigation or other enforcement action that the Supplier may undertake to enforce or protect any of ImproMation software. Such co-operation includes provision of documents, witness statements and data and for the Customer to be named as a party to proceedings if that is reasonably required.
- 9.5 All reasonable lawyers' fee and other expenses incurred by the Customer in connection with such co-operation shall be reimbursed by the Supplier within four weeks of submission to it by the Customer of proof of payment.
- 9.6 The Customer shall have the right to participate and be represented in any such action, suit or proceeding by its own legal team at its own expense.
- 9.7 The Customer shall have no recourse against the Supplier arising out of the Supplier's handling of or decisions concerning any such proceeding or settlement of it. However, the Supplier shall not agree any settlement or compromise of any claim which might affect the

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business of the Customer without its consent. That consent shall not be withheld unreasonably.

- 9.8 If the Supplier fails to take action on a matter which affects or may affect the business of the Customer, then the Customer may do so. If that happens the above provisions apply, *pari passu*, the alternative way around.
- 9.9 The Customer may at any time discontinue or settle its action or claim if it so decides, without reference to the Supplier.
- 9.10 If a party brings an action under this paragraph and subsequently ceases to pursue or withdraws from that action, it shall immediately inform the other party whereupon that other party may substitute itself for the withdrawing party under the terms of this paragraph.
- 9.11 All money recovered through any proceeding or claim, or from any settlement of it, shall belong to the party that brought the proceeding or claim. However, if both parties have been involved in bringing or continuing a claim, the sum recovered shall be divided between them, in approximate proportion to their losses or potential losses had the claim not been brought.

## **10 Fees**

- 10.1 In consideration of the licence and support services, the customer shall pay the licence fee and the support fees to the supplier on the dates and/or at the intervals specified in the schedule of rates.
- 10.2 The licence fee and the support fees are exclusive of all taxes, duties and surcharges payable in respect of the software and the support services.
- 10.3 If any payment is not made within 14 days of any due date for payment the supplier shall be entitled, at its discretion, to:
- 10.4 suspend its remaining obligations under this agreement until the payment (and any interest due thereon) has been paid; and/or
- 10.5 terminate the licence; and/or
- 10.6 cease to provide the support services.

## **11 Goods and Services Tax**

- 11.1 Unless otherwise expressly stated, the licence fees set out in the schedule of rates do not include Goods and Services Tax ("GST") and:

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- 11.2 the customer shall, in addition to the licence fees, pay to the supplier an amount equal to the GST payable by the supplier for any taxable supply made by the supplier to the customer pursuant to this agreement;
- 11.3 the supplier will furnish the customer with a GST tax invoice complying with the regulations in force from time to time, in respect of each taxable supply upon which GST is charged pursuant to this agreement;
- 11.4 the customer shall pay the GST to the supplier on the same due dates as the dates for payment of any consideration payable pursuant to this agreement or if no such dates are specified, upon receipt of a GST tax invoice from the supplier.

## **12 Modifications**

- 12.1 The customer shall not modify the whole or any part of the software or combine or incorporate the whole or any part of the software in any other program or system without the prior consent in writing of the supplier.
- 12.2 The customer shall fully indemnify and hold harmless the supplier against any liability incurred if the said modifications infringe the intellectual property rights of a third person.
- 12.3 The software as modified remains the property of the Supplier.
- 12.4 This agreement shall continue to apply to the software as modified.

## **13 Material you post to our website**

The following restrictions and reservations apply to all material posted or uploaded to the Supplier's website, including all text posted or uploaded by the Customer:

- 13.1 The Supplier has no claim over any material which the Customer posts to his website and will not protect the rights of the Customer in it.
- 13.2 The Customer may not upload material which contains:
  - 13.3 hyperlinks, other than those specifically authorised by us;
  - 13.4 keywords or words repeated, which are irrelevant to the material uploaded;
  - 13.5 the name, logo or trademark of any organisation other than yours;
  - 13.6 inaccurate, false, or misleading information;

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- 13.7 The information you submit must be accurate and complete;
- 13.8 When this agreement terminates for whatever reason, the Supplier shall be free to delete all personal and other information [and documents] supplied by the Customer.

**14 Disclaimers and limitation of liability**

- 14.1 The law differs from one country to another. This paragraph applies so far as the applicable law allows.
- 14.2 All implied conditions, warranties and terms are excluded from this agreement.
- 14.3 The Supplier makes no representation or warranty that ImproMation software will be:
- 14.3.1 useful to the Customer;
  - 14.3.2 of satisfactory quality;
  - 14.3.3 fit for a particular purpose;
  - 14.3.4 available or accessible, without interruption, or without error.
- 14.4 The Supplier claims no expert knowledge in any subject. The Supplier disclaims any obligation or liability to the Customer arising directly or indirectly from information the Customer take from the Supplier's Website.
- 14.5 The Customer agree that in any circumstances when the Supplier may become liable to the Customer, the limit of the Supplier's liability is the amount the Customer has paid to the Supplier in the immediately preceding 12 month period for ImproMation software.
- 14.6 The Supplier shall not be liable to the Customer for any loss or expense which is:
- 14.6.1 indirect or consequential loss; or
  - 14.6.2 economic loss or other loss of turnover, profits, business or goodwill even if such loss was reasonably foreseeable or the Supplier knew the Customer might incur it.
- 14.7 This paragraph (and any other paragraph which excludes or restricts the Supplier's liability) applies to the Supplier's directors, officers, employees, subcontractors, agents and affiliated companies as well as to ourselves.
- 14.8 If the Customer becomes aware of any breach of any term of this agreement by any person, please tell the Supplier in writing. The Supplier welcomes the Customer input but does not guarantee to agree with the Customer judgement.
- 14.9 Nothing in this agreement shall be construed as limiting or excluding the Supplier's liability for death or personal injury caused by the Supplier's negligence.

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## **15 Indemnity**

- 15.1 The supplier warrants that it has the right to grant the licence to the customer.
- 15.2 Subject to clause 15.3, the supplier shall indemnify and hold harmless the customer against any claim made against the customer by a third party alleging that the software infringes the copyright of that third party.
- 15.3 The supplier shall not be liable to the customer under clause 15.1 or clause 15.2 if -
- 15.3.1 the customer does not notify the supplier of the other person's claim or of infringement of copyright within seven days after becoming aware of the claim;
  - 15.3.2 the supplier's ability to defend the claim has been prejudiced by the customer's non-compliance with any of its obligations under this agreement;
  - 15.3.3 the customer does not give the supplier reasonable assistance in defending the claim;
  - 15.3.4 the claim has arisen because of the use of the software in combination with equipment, materials or computer programs not supplied or approved by the supplier; or
  - 15.3.5 the customer does not permit the supplier to have control of the defence of the claim and all related settlement negotiations.

## **16 Indemnity by Customer**

The Customer agrees to indemnify the Supplier against all costs, claims and expense arising directly or indirectly from:

- 16.1 its failure to comply with the law of any country;
- 16.2 its breach of this agreement;
- 16.3 any act, neglect or default by any of its agents, employees, Customers or customers;
- 16.4 a contractual claim arising from its use of ImproMation software;
- 16.5 a breach of the intellectual property rights of any person;
- 16.6 This paragraph (and any other paragraph which excludes or restricts liability or provides an indemnity to the Supplier) applies to the Supplier's directors, officers, employees, subcontractors, agents and affiliated companies as well as to the Supplier.

## **17 Copyright and other Intellectual Property**

- 17.1 The Customer agrees that at all times it will notify the Supplier of any suspected infringement of the Intellectual Property.
- 17.2 If the Customer uses ImproMation software in a way not allowed by this agreement the Supplier may take legal action anywhere in the World. If loss to the Supplier or any other

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person results from the Customer's wrongful action, the Customer shall be liable to pay damages.

- 17.3 If the Supplier terminates the Licence on account of the Customer's breach, the Customer agrees that it shall:
- 17.3.1 immediately stop using ImproMation software;
  - 17.3.2 destroy all copies of ImproMation software in the Customer's possession or control;
  - 17.3.3 destroy any work of the Customer derived from ImproMation software.
- 17.4 To give assurance both to the Customer and to the Supplier that the Customer is using ImproMation software in accordance with the terms of the Licence, the Customer agrees that on 14 days notice by the Supplier, it shall:
- 17.4.1 give the Supplier copies of the Customer's works and materials containing or using ImproMation software
  - 17.4.2 provide access to relevant pages which have restricted access or are fire-walled.
- 17.5 If the Supplier reasonably believes that the Customer is using ImproMation software outside the scope of this Licence, the Customer agree to provide written confirmation of the Customer's compliance, in a form to be drawn by the Supplier.

## **18 Confidential Information**

- 18.1 The Customer now agrees that it will:
- 18.1.1 keep all records of the Confidential Information in all media separate from other records;
  - 18.1.2 use its best endeavours to keep confidential (and to make sure that your employees and agents shall keep confidential) any Confidential Information which it may acquire;
  - 18.1.3 not store, copy, or use the Confidential Information in any place or in any electronic form which may be accessible to any other person;
  - 18.1.4 not use or disclose Confidential Information except with our consent;
  - 18.1.5 from today until the expiry of five years from the termination of this agreement, keep the Confidential Information secret and not divulge or make it known to anyone nor use it for the benefit of yourself or any other person.
- 18.2 This paragraph does not apply to disclosure:
- 18.2.1 made with the consent of the proper officers of the Company or under the authority of the board or by order of the court;
  - 18.2.2 of information or knowledge which comes into the public domain otherwise than by reason of our default;
  - 18.2.3 as may be minimally necessary to give effect to the purposes of this agreement whilst ever the agreement is operational.

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- 18.3 Nothing in this paragraph shall permit disclosure of any part of ImproMation software to any person whose registered office or principal place of business is the Commonwealth of Australia or to any person whose business competes in any way with the business of the Supplier.
- 18.4 The obligations set out in this paragraph shall continue to be fully effective indefinitely.

## **19 The measure of damages**

- 19.1 The measure of damages for breach of this agreement shall be the figure for sales lost or likely to be lost by the party claiming breach.
- 19.2 Without prejudice to any other rights or remedies which a party may have, the parties now acknowledge and agree that damages would not be an adequate remedy for any breach of the terms of this agreement and that in the event of breach, the party claiming shall be entitled, in addition to damages, to the remedies of injunction, specific performance and other equitable relief.

## **20 Exclusion of Liability**

- 20.1 The supplier is not liable to the customer or any third party under this agreement or under general law to the extent that any loss or damage is caused or contributed to:
- 20.1.1 by the negligence of the customer or any third party;
  - 20.1.2 by any breach by the customer of the terms and conditions of this agreement;
  - 20.1.3 by the use of the software in conjunction with any other software not approved in writing by the supplier for use with the software;
  - 20.1.4 by the use of the software in a manner or for a purpose not disclosed by the customer to the supplier prior to the commencement date;
- 20.2 The supplier shall in no circumstances be liable to the customer or any third party for any loss of profits or indirect economic loss caused by or arising from the supply of the software or the use of the software by the customer or any third party.
- 20.3 Except to the extent provided and as otherwise required by the Trade Practices Act, all statutory warranties and warranties implied by law on the part of the supplier are hereby excluded.

## **21 Force Majeure**

- 21.1 Neither party shall be liable for the consequences of an occurrence of any event beyond its reasonable control.

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## **22 Termination**

This licence is effective until terminated. The Licence granted by this agreement shall terminate with immediate effect in the following event:

- 22.1 the Customer fails to make the payment of the licence fee; or
- 22.2 the Customer is in default of the any terms of this agreement and fails to correct such default within 28 days after written notice thereof from the Supplier; or
- 22.3 the ownership rights of the Supplier in respect of ImproMation software are challenged by third party in any court of law or before competent authority.

## **23 Entire Agreement**

- 23.1 This agreement supersedes all prior agreements, arrangements and undertakings between the parties and constitutes the entire agreement between the parties relating to the software. No addition to or modification of any provision of this agreement shall be binding upon the parties unless made by written instrument signed by a duly authorised representative of the party.

## **24 Assignment**

- 24.1 Neither party shall assign, whether in whole or part, the benefit of this agreement or any rights or obligations hereunder, without the prior written consent of the other party.

## **25 Law**

- 25.1 This agreement shall be governed by and construed in accordance with the laws for the time being in force in the State of New South Wales Australia and the parties agree to submit to the jurisdiction of the courts and tribunals of that State.

## **26 Waiver**

- 26.1 No forbearance, delay or indulgence by a party in enforcing the provisions of this agreement shall prejudice or restrict the rights of that party, nor shall any waiver of those rights operate as a waiver of any subsequent breach.

## **27 Severability**

- 27.1 Should any part of this agreement be or become invalid, that part shall be severed from this agreement. Such invalidity shall not affect the validity of the remaining provisions of the agreement.

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## **28 Dispute resolution**

- 28.1 If a dispute arises between the parties, each party will nominate a representative with authority to negotiate and those representatives must meet promptly to discuss the dispute and to attempt to resolve the dispute. Both parties shall negotiate in good faith.
- 28.2 Unless the parties agree to a different form of dispute resolution, any dispute arising in connection with this agreement which is not resolved within 21 days of written notice of the dispute being given by one party to the other party shall be submitted to mediation by a mediator agreed by the parties or, failing agreement within a further 7 days, a mediator nominated by the Australian Commercial Disputes Centre Sydney (ACDC). The mediation will be conducted in Sydney in accordance with the ACDC Mediation Guidelines and unless otherwise agreed, each party must pay half of the mediator's and the ACDC's fees. If the dispute is not resolved within 60 days after notice of the dispute, the mediation will terminate unless the parties otherwise agree. During such arbitration, both parties may be represented by a duly qualified legal practitioner.
- 28.3 Nothing in this clause prevents a party from seeking any urgent equitable relief from an appropriate court having jurisdiction over this agreement

## **29 Miscellaneous matters**

- 29.1 In addition to the rights of the Supplier under the law of a jurisdiction with authority to interpret this agreement, the Supplier shall be entitled to claim damages for breach of this agreement in such sum as any one or more third parties have received, or are likely to have received, for sales made as a result, directly or indirectly, of the breach. This right is an alternative to a claim for damages based on loss of profit. The Customer agrees that this provision is reasonable and likely to reduce the time and cost of litigation.
- 29.2 the Customer undertake to provide to the Supplier, the Customer's current land address, e-mail address, telephone and fax numbers as often as they are changed together with all information that the Supplier may require, to enable the Supplier to fulfil its obligations under this contract.
- 29.3 No amendment or variation to this agreement is valid unless in writing, signed by each of the parties or his authorised representative.
- 29.4 The parties acknowledge and agree that this agreement has been jointly drawn by the parties and accordingly it should not be construed strictly against either party.
- 29.5 If any term or provision of this agreement is at any time held by any jurisdiction to be void, invalid or unenforceable, then it shall be treated as changed or reduced, only to the extent minimally necessary to bring it within the laws of that jurisdiction and to prevent it from being void and it shall be binding in that changed or reduced form. Subject to

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that, each provision shall be interpreted as severable and shall not in any way affect any other of these terms.

- 29.6 The rights and obligations of the parties set out in this agreement shall pass to any permitted successor in title.
- 29.7 For the purposes of the Privacy Act 1988 and any comparable law of any other country having jurisdiction and relating to the location of data processing, the Customer consents to the processing of the Customer's personal data (in manual, electronic or any other form) relevant to this agreement, by the Supplier and/or any agent or third party nominated by the Supplier and bound by a duty of confidentiality. Processing includes but is not limited to obtaining, recording, using and holding data and includes the transfer of data to any country.
- 29.8 Any obligation in this agreement intended to continue to have effect after termination shall so continue.
- 29.9 No failure or delay by any party to exercise any right, power or remedy will operate as a waiver of it nor indicate any intention to reduce that or any other right in the future.
- 29.10 Any communication to be served on either of the parties by the other shall be delivered by hand or sent by first class post or recorded delivery or by e-mail.

It shall be deemed to have been delivered:

- 29.10.1 if delivered by hand: on the day of delivery;
- 29.10.2 if sent by post to the correct address: within four working days of posting to an address in Australia and eight working days to any other address;
- 29.10.3 If sent by e-mail to the address from which the receiving party has last sent e-mail: within 24 hours if no notice of non-receipt has been received by the sender.

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**SCHEDULE A**

**ImproMation Pty Ltd - PRODUCTS AND PRICE LIST (Available from ImproMation Pty Ltd)**

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**SCHEDULE B**

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MAINTENANCE AND SUPPORT**

Support and maintenance terms are for bug fixes and issue resolution for existing functionality. Support and maintenance also includes any updates released by the supplier to its customers generally during the term of this agreement. All other requests for specific enhancements or new functionality will be considered on a case by case basis and may be subject to an additional charge.

Unless otherwise expressly stated, the support provided is telephone support, email and on-line support.

On site support may be arranged by agreement and may be subject to an additional charge. If any payment is not made within 14 days of any due date for payment of annual licence/s or support agreements the supplier shall be entitled, at its discretion, to suspend its remaining obligations under this agreement until the payment has been paid; and/or

1. terminate the licence; and/or
2. cease to provide the support services; and/or
3. remotely deny access to the software.

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**SCHEDULE C**

**ImproMation Pty Ltd – DATA SECURITY MANAGEMENT (Available from  
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