

- 1 GENERAL**
The use by you (the **Customer**) including to download, install, activate, access or otherwise use (**Use**) software, associated documentation and any Updates (**Software**), and the supply of services for that Software (**Services**), by WesTrac Pty Ltd ACN 009 342 572 or its related entities (**WesTrac**), is governed by these terms and conditions (**Terms**).
- 2 THE CONTRACT**
- 2.1 Until WesTrac has accepted an Order in accordance with clause 2.3 of these Terms:
- any quotation, estimate or price prepared or represented by WesTrac (**Quote**) is:
 - indicative only;
 - not an offer to contract; and
 - only valid for 14 days;
 - no Order by the Customer to WesTrac following a Quote will by itself or in association with a Quote bind WesTrac; and
 - all Quotes prepared by WesTrac may be withdrawn or varied by WesTrac prior to acceptance.
- 2.2 If the Customer:
- requests or orders Software or Services from WesTrac; and
 - that order is consistent with a Quote,
- (an **Order**) the Customer offers to contract with WesTrac on the basis of the Order and the Quote.
- 2.3 WesTrac accepts and is deemed to have accepted an Order made by the Customer under clause 2.2 of these Terms on the earlier of:
- when the Software is made available to the Customer or the Services are commenced by WesTrac as the case may be;
 - when notification of acceptance is provided by WesTrac to the Customer; and
 - 7 days after WesTrac receives an Order and does not dispute it or any part of it.
- 2.4 Upon acceptance by WesTrac under clause 2.3, a binding contract comes into existence between WesTrac and the Customer incorporating the following documents (together the **Contract**):
- the terms of any credit facility (if applicable) which the Customer has or may have at any time with WesTrac;
 - any Quote, invoice or other document of WesTrac whether attaching these Terms or not;
 - any notice of acceptance provided by WesTrac in accordance with clause 2.3(b);
 - the terms of any licence entered into between WesTrac and a third party in connection with the Software or Services;
 - these Terms;
 - any document attached or annexed to these Terms by WesTrac; and
 - the Order placed by the Customer including any attached or associated terms and conditions.
- 2.5 In the event of any inconsistency, ambiguity or discrepancy, the order of precedence set out above applies with the first listed document taking the highest priority and so on.
- 2.6 If, after applying the order of precedence, there still remains an inconsistency, ambiguity or discrepancy, either party may give the other party written notice.
- 2.7 If notice is given under clause 2.6, WesTrac shall (acting reasonably) direct the Customer as to the proper interpretation and determine (acting reasonably) liability for any additional costs.
- 3 THE PRICE AND PAYMENT TERMS**
- 3.1 The rates or prices payable for the Software and Services, including any deposits, fees in advance or other advance payments, are as specified in the Contract (the **Fees**). Subject to these Terms, the Fees due to WesTrac from the Customer are non-refundable.
- 3.2 The Fees excludes delivery, consumables, third party licence or consulting fees, taxes and duties and any other necessary or incidental items, work or services unless expressly stated in the Contract.
- 3.3 Any costs for third party software or services incurred by WesTrac (including freight and handling) must be reimbursed by the Customer with a margin (profit and overhead) of 30% on costs unless otherwise expressly stated in the Contract.
- 3.4 (**Payment of deposits and advance payments**) Any applicable deposits, Fees payable in advance or other advance payments must be paid and received by WesTrac in full, cleared and available funds as a condition precedent to any liability or obligation of WesTrac arising under this Contract.
- 3.5 (**Payment on credit**) If the Customer has a WesTrac approved credit account with immediately available and sufficient funds to pay for the full Fees:
- WesTrac may issue an **invoice** or claim for payment on or before the **last day of each month** on account of Software or Services supplied, or undertaken to be supplied, up to and including the date of that invoice;
 - if the Customer disputes the whole or any part of the invoice issued under clause 3.5(a) or claim, the Customer must, **within 14 days** of receiving the invoice or claim, give WesTrac notice in writing including the reasons why; and
 - within 28 days** after the Customer receives an invoice or claim under clause 3.5(a), except to the extent validly disputed under clause 3.5(b), it must pay, and WesTrac must have received, in full, cleared funds, the amount invoiced or claimed.
- 3.6 Any invoice or claim issued by WesTrac before or after the last day of each month is taken to be issued on the last day of the month in which it is issued.
- 3.7 (**Payment not on credit**) If the Customer does not have a WesTrac approved credit account with immediately available and sufficient funds to pay the full Fees, the Customer must pay the Fees **upfront and in full**, cleared and available funds before any Software is made available or the carrying out of any Services (including travel) will take place.
- 3.8 If the Customer fails to pay WesTrac any amount when due, WesTrac is, without limitation, entitled to payment of interest at the rate of 10% per annum above the Reserve Bank of Australia target cash rate in simple interest calculated daily from the time the amount falls due to the extent and for the duration that it remains unpaid.
- 4 LICENCE**
- 4.1 Subject to payment of the Fees, WesTrac grants to the Customer a non-exclusive, revocable, non-transferable (with no right to sublicense of provide access to third parties) and limited right to Use the Software for internal business operations for the term.
- 4.2 The Customer may permit its third party business partners to Use the Software or Services if such use is solely on behalf of the Customer, for the Customers' internal operations, limited to screen access, and in compliance with this Contract.
- 4.3 The Customer agrees that it will supervise and control the use of the Software by it or on its behalf and ensure that its directors, officers, employees, agents and contractors to whom it provides access comply with the terms of this Contract.
- 4.4 Other than as expressly provided for in this Contract, the Customer must not:
- sell, transfer, rent, lease, sublease, sublicense, lend, time-share, assign or provide the use of or access to the Software or Services, or any portion thereof, to unlicensed persons;
 - assign, mortgage, charge or otherwise encumber either the Software or Services or Customer's rights under this agreement;
 - make the functionality of the Software or the Services available to third parties, whether as an application service provider, or on a rental, service bureau, cloud service, hosted service, or other similar basis;
 - except as permitted elsewhere in the Contract, make additional copies of the Software or Services or Documentation or any portion thereof, or publish the Software or Services for others to copy;
 - reverse engineer, de-compile, decrypt or disassemble the Software or Services, or seek to establish the technical processes and operations of the Software or Services by any means; or
 - modify, adapt, exploit or create derivative works of the Software, Services, user or technical manuals, training materials, specifications or other documentation created in connection with their supply.
 - post or transmit any material which contains viruses, malicious code, or other computer code, files or programs which are design to limit or destroy the functionality of other computer software or hardware.
- 5 TIME FOR PERFORMANCE**
- 5.1 WesTrac will carry out its Services during the usual business hours of the branch from which the Services are to be supplied from unless otherwise agreed.
- 5.2 If no place for the carrying out of Services is specified in the Contract, they will be carried out at a suitable and convenient location as determined by WesTrac acting reasonably.
- 5.3 The Customer must ensure that WesTrac has access to its site, computers, network, software, infrastructure and environments as is reasonably necessary for WesTrac to supply the Software and the Services.
- 5.4 If a date or dates for access to the Software or completion of the Services is specified in the Contract, WesTrac will provide such access or complete as the case may be by those dates.
- 5.5 If no date or dates for access or completion are specified in the Contract, WesTrac will provide access to the Software and complete the Services with due diligence and without delay.
- 5.6 WesTrac will make the Software available to the Customer by the time required and in the manner specified in the Contract, or if no method for the provision of access is specified:
- WesTrac will notify the Customer promptly how the Software may be accessed; and
 - the Customer must promptly (and within 48 hours) access the Software in the manner and time prescribed, and the Customer is deemed to have accessed the Software by the expiry of that time.
- 6 ACCEPTANCE**
- 6.1 The Use of any Software is deemed to have occurred and to be in accordance with these Terms when WesTrac provides the Customer with access to the Software.
- 6.2 WesTrac will notify the Customer, orally or in writing, promptly when it considers (acting reasonably) that the Services have been completed.
- 6.3 The Customer must:
- promptly inspect the Software on being given access in accordance with clause 6.1 and the Services following the notice under clause 6.2; and
 - notify WesTrac of any non-compliance with the Contract in writing within fourteen (14) days of access or from the notice given as applicable.
- 6.4 Unless WesTrac receives a notice under clause 6.3(b) within the time required by that clause, the Customer is deemed, to the extent relevant, to have:
- accepted that the Software complies with, and has been supplied in accordance with, the Contract; and
 - certified that the Services are complete, and that they have been completed in accordance with, the Contract,
- and WesTrac may claim and invoice for, and is entitled to payment of, the Fees (to the extent not already paid in advance) for that Software and Services.
- 6.5 If WesTrac receives a written notice from the Customer under clause 6.3(b) within the time required by that clause:
- WesTrac must promptly rectify the Software and Services so that they comply with the Contract;
 - notify the Customer again under clause 6.2 when they are rectified or re-delivered as applicable; and
 - following that notification, follow the process under this clause 6 again.
- 7 UPDATES**
- 7.1 WesTrac is not required to provide updates, upgrades, versions, releases, supplements, bug fixes, error corrections, enhancements or other modifications to the Software or Services (**Updates**) but may:
- use Updates to add, remove, modify or otherwise alter features of the Software or Services in its sole discretion;
 - require the Customer to install Updates in order to continue using the Software or Services;
 - suspend or terminate the Customer's access to the Software or Services if the Customer does not install Updates that WesTrac requires;
 - require acknowledgement of the Customer's agreement to any revised Terms as a condition of using any Update; and
 - provide Updates in such a manner that the Software or Services are unable to be reverted to their previous state, or such that previous versions may no longer work.
- 7.2 WesTrac will not be held liable for any loss or damage suffered as a result of the Customer not accepting or implementing a mandatory Update required by WesTrac.
- 8 SUPPORT**
- 8.1 Subject to clause 10 (Warranty), WesTrac will not be obliged to provide support for the Software or Services, whether by providing advice, training, error-correction, modification, updates (including Updates), new releases or enhancements or otherwise, or to provide any hosting, telecommunication, internet or other services in relation to the Customer's use of the Software or Services (**Support**).
- 8.2 In the event that the Customer requires WesTrac to prepare Updates to the Software or Services to increase functionality or improve its features or other forms of Support or maintenance, such Updates or Support, unless required by WesTrac in accordance with clause 7, will be subject to separate additional Fees and terms and conditions.
- 9 THIRD PARTY SERVICES**
- 9.1 The Customer may be required to use or update its, or third-party internet connection, software (such as the operating system on its computer), environment, infrastructure and hardware which may be subject to separate and additional fees and terms and conditions.
- 9.2 If the Customer is unable or unwilling to obtain or install such third-party services, software or updates, it may be unable to obtain, install, update, access, Use, or continue to access or Use the Software or the Services.
- 9.3 WesTrac is not liable, including for warranty under clause 10, for any inability of the Customer to successfully deploy, implement, integrate or Use the Software or Services with hardware, software, or other system, environment, infrastructure or services used by the Customer supplied by third party services.
- 10 WARRANTY**
- 10.1 WesTrac does not warrant that the Software or Services will operate uninterrupted or that they will be free from minor defects or errors, or that the applications are designed to meet any of the Customer's business requirements.
- 10.2 WesTrac warrants:
- in relation to the **Services**, that for a 3 month period following the date of completion of those Services, that those Services were carried out and completed with due skill and care, in a proper and workmanlike manner and in accordance with all relevant law;
 - in relation to **Software designed and built by WesTrac**, that for a 3 month period (unless otherwise specified) from the date that access is provided to the Customer, the Software will operate substantially in accordance with its specifications;
 - in relation to **Software of a third party to which a third party warranty applies**, that the benefits and obligations of that third party's warranty apply in all respects and is the sole and exclusive warranty in relation to that Software;
 - in relation to **Software of a third party to which a third party warranty does not apply**:
 - that Software is supplied on an "as is where is" basis with all existing or future inadequacies, faults or defects, if any, whether known or unknown;
 - WesTrac does not warrant such Software to any extent or that it is fit for any purpose or free from any defects; and
 - to the extent permitted by law, the Customer releases WesTrac from all liability arising from or in connection with any defects, faults or inadequacies in such Software.
- 10.3 Subject to the terms of any third party warranties, the exclusive remedy for breach of the foregoing warranties is for WesTrac to repair, modify or replace (in its sole discretion) the defective Software or Services, and excludes liability for costs in connection with:
- labour (including overtime labour) other than is reasonable or customary to rectify the defect; and
 - standby, freight, transportation, travel, travel time, demobilisation and re-mobilisation.
- 10.4 The remedies provided under this clause are the sole and exclusive remedies for breach of warranty under this Contract. WesTrac disclaims all other warranties express or implied, including any warranties of merchantability or fitness for purpose, except to the extent that any warranties implied by law cannot be excluded.
- 11 WARRANTY CLAIM PROCEDURE**
- 11.1 The Customer must notify WesTrac of any event or circumstance which may give rise to a warranty claim by the **earlier of**:
- the time expressly required by any third party warranty for the notification of claims, if any such time applies; or
 - if no such time applies, within 21 days of the event or circumstance occurring that gave rise to the warranty claim, and in any event, within the relevant warranty period stipulated in clause 10.
- 11.2 If the Customer fails to notify in accordance with clause 11.1, WesTrac may, in its sole discretion, rectify the defect but otherwise has no liability to do so.
- 11.3 The Customer must send a warranty claim to:
- WesTrac Pty Ltd
128-136 Great Eastern Highway, South Guildford, WA
Telephone: 08 9377 9444 (or local branch)
Fax: 08 9377 1791
Email: warranty@westrac.com.au.
- 11.4 The Customer warrants that any claim made by it on warranty is valid and one to which the warranty responds. To the extent that the Customer makes an invalid warranty claim, it must pay WesTrac for its investigation of that claim at list rates and prices.
- 12 DELAY AND DISRUPTION**
- 12.1 To the extent that WesTrac is, or is likely to be, delayed or disrupted in the supply of any Software or Services, and that is due to:
- any fact, event, matter or circumstance beyond WesTrac's reasonable control; or
 - any breach, act or omission of the Customer, its agents or contractors,
- WesTrac is entitled to a reasonable extension of time to supply those Software or Services.
- 12.2 To the extent that WesTrac is delayed or disrupted under clause 12.1(b), the Customer must pay WesTrac its reasonable additional costs caused by the delay or disruption including (without limitation) licence and support costs for any Software and a reasonable daily rate for personnel involved in the Services.
- 12.3 If a delay or delays under clause 12.1(b) exceed a single or aggregated period of 90 days, WesTrac may terminate the relevant Order or part thereof in its sole discretion by written notice to the Customer, in which case, that termination is deemed to be a termination for convenience in accordance with clause 17.2 of this Contract and WesTrac is entitled to the consequent compensation.
- 13 VARIATIONS AND EXTRAS**
- 13.1 The Customer may request that WesTrac add, delete, omit, or change the nature, quality, or quantity of any Software or Services (**Variation**).
- 13.2 To the extent that WesTrac can reasonably comply with the Variation, WesTrac will endeavour to do so and if it does agree to carry out the Variation, will be entitled to payment as follows:

- (a) an amount as agreed between the parties;
- (b) failing agreement, an amount calculated according to the Contract rates and prices to the extent reasonably applicable; or
- (c) to the extent that rates and prices in the Contract do not exist or reasonably apply:
- for additions, an amount based on reasonable rates or prices (including profit and overhead of 30% on costs); and
 - for deletions or omissions, deducting reasonable rates or prices from the Fees including profit but retaining an allowance for overhead of 5% on the original costs.
- 13.3 WesTrac may at any time and from time to time request a Variation, and the Customer will acting reasonably and in good faith, determine whether such a Variation should apply and agree to it accordingly.
- 13.4 Unless otherwise expressly stated in the Contract, WesTrac is entitled to increase or decrease the rates or prices under the Contract as a Variation in the following circumstances:
- for **Services**, by applying rise and fall calculated on 1 January and 1 July of each year proportional to the change in the relevant WesTrac employees' salary increase;
 - for **Software**:
 - a reasonable increase in accordance with a relevant index published by the ABS on 1 January and 1 July of each year; and
 - in accordance with any other Caterpillar Inc (USA) price changes which may occur from time to time after the date of the Quote; and
 - to the extent WesTrac incurs additional costs due to a change in law that was not reasonably anticipated by WesTrac as at the date of Contract; and
 - to the extent that any conditions of the Customer system, infrastructure, software or other environment conditions could not reasonably have been anticipated by WesTrac as at the date of Contract.
- 14 RISK AND TITLE**
- 14.1 Risk in connection with any Software or Services sold or supplied to the Customer passes upon first Use of the Software in accordance with clause 6.1 or completion under clause 6.4 of these Terms.
- 14.2 Title, property and ownership in any Software or Services supplied by WesTrac, including any Intellectual Property Rights, under this Contract remains with WesTrac and does not pass to the Customer.
- 15 INDEMNITY AND INSURANCE**
- 15.1 Subject to clause 18.6, each party indemnifies the other, its employees and agents against losses for physical destruction of or damage to property and death, injury, illness or disease, arising out of or in connection with the carrying out its respective obligations under this Contract, save to the extent caused or contributed to by the other party.
- 15.2 WesTrac will effect and maintain, in relation to Services, for the duration of carrying out the Services, and for Software, while risk in the Software rests with WesTrac:
- a **public liability insurance** policy for at least the amount of **\$20,000,000** for any one occurrence;
 - a **products liability insurance** policy for at least the amount of **\$20,000,000** limited in the aggregate during any single term of insurance; and
 - such insurances as are required by law including workers compensation insurance.
- 15.3 Whenever requested by a party, the other party will promptly provide the first party with copies of the certificates of currency for insurances required under this Contract.
- 15.4 The parties shall be responsible for and must pay any excess or deductible under insurance policies required by these Terms to the extent of their respective contributions to the loss or damage.
- 16 TERMINATION FOR CAUSE**
- 16.1 WesTrac may terminate the Contract, or any part of it, immediately by giving written notice to the Customer if the Customer:
- commits a material breach of the Contract which is not remedied to WesTrac's satisfaction within seven (7) days of written notice from WesTrac; or
 - fails to access the Software pursuant to clause 5.6, which is not remedied within twenty-four (24) hours after receipt of written notice from WesTrac.
- 16.2 Either party may terminate the Contract, or any part of it, effective immediately, if the other party:
- commits a material breach which is not remedied within fourteen (14) days after written notice from the other party;
 - is the subject of an insolvency event meaning:
 - the party becomes insolvent or is otherwise unable to pay its debts as and when they fall due;
 - proceedings are commenced to appoint an external administrator or liquidator to the party;
 - the party is placed under official management or administration;
 - the party is presumed to be insolvent under the Corporations Act following a statutory demand; or
 - circumstances occur which, in WesTrac's sole discretion, indicate the Customer's inability to pay.
- 16.3 If either party terminates under this clause 16, its rights will be as if the other party had repudiated and the first party elected to treat the Contract as at an end, and in the case of WesTrac terminating:
- any deposits, Fees paid in advance and any other advanced payments paid, or required to be paid, will be forfeited to WesTrac;
 - all amounts owing to WesTrac or already invoiced by WesTrac to the Customer, shall immediately become due and payable;
 - the Customer shall immediately cease Use of all Software and Services and any documentation, and WesTrac may, without liability, limit or disable the Customer's access to, or Use of, the Software and Services, and discontinue any Services, data, reports or other material stored in or generated by the Software or Services; and
 - the Customer will destroy or, if requested by WesTrac, deliver to WesTrac any and all remaining copies of the Software, Services or documentation and related programs tools, systems, and to the extent technically possible, all other WesTrac materials and Confidential Information in the manner directed by WesTrac.
- 16.4 For the purpose of enabling WesTrac to do anything required to achieve the entitlements under clause 16.3, the Customer irrevocably:
- authorises WesTrac to enter any of the Customer's sites or premises in which the Software or Services may be located; and
 - appoints WesTrac as its agent to enter any sites or premises in which Software or Services may be located.
- 17 TERMINATION FOR CONVENIENCE**
- 17.1 Either party may, in its sole discretion and for any reason whatsoever, cancel or terminate this Contract, or any part of it, by giving the other party 60 days' prior written notice.
- 17.2 If the Customer cancels or terminates this Contract, or any part of it, under clause 17.1, the Customer must pay to WesTrac as compensation for termination:
- the Fees for any Software already accessed by the Customer and Services (or part thereof) already completed;
 - the cost of any hardware, components and materials ordered by WesTrac which it is liable to accept and cannot reasonably avoid or cancel;
 - any costs or losses arising due to the cancellation or termination of third party contracts including contract break-costs, cancellation fees and necessary redundancies; and
 - reasonable demobilisation costs and any additional transport, freight, insurance or other additional costs reasonably incurred,
- subject to WesTrac mitigating its losses including by endeavouring to on-sell any hardware, components or materials and minimising all costs payable.
- 17.3 If WesTrac cancels or terminates this Contract or any part of it under clause 17.1, the Customer may raise a dispute in accordance with clause 21 of this Contract.
- 18 LIMITATION OF LIABILITY**
- 18.1 To the extent permitted by law, WesTrac is not liable for any loss or damage incurred or suffered by the Customer arising from or in connection with:
- the Software or Service being delayed, terminated, interrupted or operating in a way reasonably unanticipated due to events beyond the reasonable control of WesTrac; and
 - use of the Software or Services contrary to the manual, training or other documentation of, provided, or otherwise endorsed by WesTrac.
- 18.2 (**Limit and overall cap**) To the extent permitted by law, the liability of WesTrac, if any, arising out of or in connection with the supply of Software or Services under this Contract, including for negligence, is limited:
- in the case of Software or Services to which a third party warranty applies or has applied but expired, to that warranty;
 - for any other Software or Services, at the option and in the (reasonable) discretion of WesTrac:
 - to the replacement of the Software or Services or the supply of equivalent Software or Services;
 - to the payment of the cost of replacing the Software or Services or of acquiring equivalent Software or Services; or
 - to the repair of the Software or Services by WesTrac or payment of the cost of having the Software or Services repaired; and
- in any event and notwithstanding any other provision of this Contract, to an amount in aggregate of all claims up to 35% of the Fees.
- 18.3 (**Mutual time limit**) Each party must notify the other of any claim, right, obligation or liability whatsoever arising under or in connection with the Contract within 12 months of when the party claiming was aware or ought reasonably to have been aware of the events or circumstances giving rise to the claim. Any failure to do so, releases the other party from all liability in connection with that claim and its subject matter.
- 18.4 (**Exceptions to limits**) The limitations in clauses 18.2 and 18.3 do not apply in relation to, or limit to any extent, a liability by one party to the other party in relation to the damage or destruction of any property (including third party property), injury, illness, disease or death or breach of intellectual property rights.
- 18.5 (**Consequential loss**) WesTrac shall not be liable to the Customer for any consequential, indirect or incidental loss, loss of profits, lost production or revenue, corruption or loss of data, loss of anticipated savings, loss of opportunity, business reputation or damage to goodwill arising from or in connection with its supply under this Contract.
- 18.6 (**Insurable losses**) The total liability of either party to the other party arising out of or in connection with any damage to or destruction of property (including third party property), death, injury, illness or disease is limited to amounts recoverable, or that should have been recoverable, if the insurance policies required by the Contract are in place, or should have been in place.
- 19 INTELLECTUAL PROPERTY**
- 19.1 Except where specified otherwise in this Contract, WesTrac is the owner or licensee of all of the Intellectual Property Rights in the Software and Services created or coming into existence prior to the date of this Contract, and after the date of this Contract unless created predominantly for the purpose of providing the Software or Services.
- 19.2 In relation to any Intellectual Property Rights coming into existence after the date of this Contract and predominantly for the purpose of it including any Updates, modifications, adaptations or derivative work, ownership and all rights, title and interest in the Intellectual Property Rights are irrevocably and perpetually assigned and vest in WesTrac.
- 19.3 WesTrac licenses to the Customer its Intellectual Property Rights in the Software and Services, whether coming into existence before or after the date of this Contract, limited to the extent necessary to enable the Customer to Use the Software and the Services in accordance with this Contract.
- 19.4 WesTrac warrants to the Customer that it is entitled to grant the rights and licenses under this clause, and indemnifies the Customer against any costs or losses in connection with any breach of Intellectual Property Rights granted under this Contract, save to the extent caused by the Customer.
- 20 ANTI-POACHING**
- 20.1 For the purpose of this clause, employing or employment includes being engaged as an employee, agent, contractor, or consultant, or in any other capacity and whether for remuneration or not.
- 20.2 While WesTrac carries out the Services or makes the Software available for Use, and for a period of 6 months after, each party is prohibited from employing any individual of the other engaged (directly or indirectly) in the Services or the Software including to solicit, induce or entice an employee of the other party.
- 20.3 The parties agree that to establish a breach of clause 20.2 it is only necessary to show that the relevant employee was engaged in the Services or the Software by the first party and then commenced employment with the second (breaching) party.
- 20.4 If a party breaches this clause, it must pay to the innocent party the equivalent of 6 months of the employee's remuneration (with the first employer) to the other party on being notified of the breach by the other party, as a debt due and payable.
- 21 COMPLAINTS AND DISPUTES**
- 21.1 WesTrac takes complaints, disputes and differences very seriously. If either party wishes to raise a dispute or difference in connection with the Contract, it must promptly give the other notice in writing.
- 21.2 Within 14 days of a party giving notice under clause 21.1, the other party must provide to the first party a written response stating its position and thereafter:
- within 7 days of that response, the respective involved managers must meet in person at least once to try to resolve the dispute in good faith in a **first meeting**;
 - failing a resolution within 7 days of that meeting, within a further 7 days, more senior delegates of each manager must meet in person to try to resolve the dispute in good faith in a **second meeting**;
 - failing a resolution within 7 days of the second meeting, within a further 7 days from that meeting, the managing director of the Customer and a General Manager of WesTrac must meet in person to try to resolve the dispute in good faith in a **third meeting**.
- 21.3 Except for urgent interlocutory or declaratory relief, as a condition precedent to the commencement of any court or tribunal proceedings, if a dispute or difference arises under or in connection with this Contract and the aggregated amount of either party's claims (excluding interest and costs) exceeds \$100,000 (exc GST), the dispute or difference shall be, and is hereby, referred to expert determination.
- 21.4 Failing agreement within 14 days of referral under clause 21.3, the President of the Institute of Arbitrators and Mediators Australia (IAMA) shall nominate and appoint the expert. The expert's determination will be final and binding in all respects and not an arbitration. Each party must bear its own costs of the determination and half of the expert's. The expert determination will be conducted in accordance with the IAMA Expert Determination Rules.
- 22 CONFIDENTIALITY AND PRIVACY**
- 22.1 WesTrac respects the privacy of personal information (**Personal Information**) including personal and contact information, such as an individual's name, street, postal and email addresses and telephone and fax numbers, professional information, financial and bank account details and consumer credit information.
- 22.2 The Customer acknowledges, accepts and agrees:
- to WesTrac's privacy statement available from <http://www.westrac.com.au/pages/privacy.aspx>; and
 - that WesTrac and its Business Partners may acquire and use Personal Information of the Customer; and
 - that without using such information, WesTrac may not be able to properly provide the Software or the Services.
- 22.3 Subject to clause 22.4, neither party may disclose, or allow any person to disclose, confidential information to third parties including:
- the subject matter, correspondence in respect of, and contents of this agreement (but not its actual existence);
 - information regarding a customer's machine;
 - the subject matter and the existence of any dispute or difference; and
 - the Fees and any discounts, rebates or cost saving measures.
- 22.4 The obligations to maintain confidentiality under clause 22.3 apply except for a disclosure:
- permitted with the prior written consent of the other party;
 - required by law, any stock exchange or court order; or
 - to the parties' respective Business Partners.
- 23 AUDIT**
- 23.1 WesTrac may access records, logs or other such documentation in the Services or Software in order to verify the Customer's Use in compliance with this Contract at any time and without notice to the Customer.
- 23.2 If an audit carried out in accordance with clause 23.1 reveals a non-conformance with the terms of the Contract, the Customer will reimburse WesTrac for its costs incurred in connection with that audit.
- 24 GOODS AND SERVICES TAX**
- Unless otherwise stated expressly all prices are exclusive of GST and the Customer must on demand pay to WesTrac all GST payable in respect of the supply of the Software and the Services to the Customer.
- 25 LAW AND JURISDICTION**
- The Contract is governed by and will be construed in accordance with the laws of the State in which the WesTrac office or depot from which the Software or Services were ordered, is located.
- 26 AMENDMENT**
- Subject to the Customer notifying WesTrac that it objects to any changes notified in writing within 30 days, any such changes notified in writing will bind the Customer in respect of any supply of Software or Services from the date of notification.
- 27 SUBCONTRACTING AND ASSIGNMENT**
- 27.1 Neither party may assign, novate or transfer, the Contract or any payment, obligation, right, benefit or interest it has under the Contract without the prior written consent of the other party.
- 27.2 WesTrac may supply Software or Services of Caterpillar Inc. (USA) and its related entities and subcontract any part of its obligations under this Contract without the consent of the Customer.
- 28 ENTIRE AGREEMENT**
- The Contract constitutes the entire agreement between the parties relating in any way to its subject matter. All prior negotiations, agreements, communications, understandings, representations about the subject matter of the Contract are of no effect.
- 29 MISCELLANEOUS**
- 29.1 If any part of the Contract is void or unenforceable, that part is severable from the Contract and the balance remains enforceable.
- 29.2 The words including, inclusive of, or similar expressions are not words of limitation.
- 29.3 If the Customer is more than one person or entity, each person or entity (as applicable) shall be jointly and severally liable to WesTrac.
- 29.4 Each party must bear its own legal, accounting and other costs of and incidental to the preparation and entering into the Contract.
- 29.5 Nothing constitutes a joint venture, agency, partnership or other fiduciary relationship between the Customer and WesTrac.
- 30 DEFINITIONS**
- 30.1 **Business Partners** means consultants, agents, financiers, lawyers and in the case of WesTrac, Caterpillar Inc (USA), its subsidiaries, affiliates and related parties including agents and contractors.
- 30.2 **Intellectual Property Rights** means any and all intellectual and industry property rights anywhere in the world (including present and future intellectual property rights) including rights in connection with:
- any related confidential information, know-how or any right to have information kept confidential;
 - copyright (including future copyright and rights in the nature of or analogous to copyright);
 - inventions (including patents);
 - trade marks, service marks and other related marks;
 - designs;

- (f) business names, domain names and company names; and
- (g) software (including the Software), software programs and source code (including the Source Code); and

whether or not existing at the date of this document and whether or not registered or registrable and includes any and all variations, modifications or enhancements to each of them together with any application or right to apply for registration of those rights and includes all renewals and extensions.

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