

# DATA SERVICES AGREEMENT

## 1 APPLICATION OF THIS AGREEMENT

- 1.1 This Agreement governs the provision of weather forecasts, weather data and related services (**Services**) by Metris (as defined below). By submitting an order for Services to Metris or an authorised Metris reseller or sales or billing agent, clicking *I agree* (or similar) in the course of an online sign-up process for Services, or accessing or using the Services, the Customer (as defined below) agrees to this Agreement.
- 1.2 Metris is not bound by this Agreement until it has accepted it. Metris' acceptance occurs when it notifies the Customer by email that it has accepted the Customer's order, or commences supplying the Services to the Customer (whichever is the earlier).
- 1.3 This Agreement applies to the exclusion of any standard terms the Customer may have for the purchase of goods or services and any terms included, or incorporated by reference, in any request for quote, purchase order or other correspondence between Metris and the Customer.
- 1.4 If the Customer does not agree to this Agreement, it is not authorised to access and use the Services, and it must immediately stop doing so.

## 2 INTERPRETATION

In this Agreement:

*Agreement* means this Data Services Agreement.

*Customer* means a person who submits an order to Metris or an authorised Metris reseller or sales agent.

*Data* means the data (including forecasts, reports and models) supplied by Metris under the Agreement.

*Fees* means the fees for the Services set out in the Customer's order or otherwise agreed with Metris or an authorised Metris reseller or sales agent.

*Force Majeure* means an event that is beyond the reasonable control of a party, excluding an event to the extent that it could have been avoided by a party taking reasonable steps or reasonable care.

*including* and similar words do not imply any limit.

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

*Intellectual Property* has a consistent meaning.

*Metris* means Metris Limited, company number 6264327.

*order* includes an online order for Services.

a *party* includes that party's permitted assigns.

*Services* has the meaning given in clause 1.1.

*Start Date* means the date Metris accepts this Agreement in accordance with clause 1.2.

*Underlying Systems* means the IT solutions, systems and networks (including software and hardware) used to provide the Services, including any third party solutions, systems and networks.

Words in the singular include the plural and vice versa.

### **3 SERVICES**

3.1 Metris will use reasonable efforts to provide the Services:

- a in accordance with the Agreement; and
- b exercising reasonable care, skill and diligence.

3.2 Subject to clauses 3.3 and 3.4, Metris will use reasonable efforts to ensure the Services are made available in accordance with the timeframes agreed with the Customer. However, it is possible that on occasion the Services may be unavailable to permit Metris or a third party supplier to conduct maintenance or development activity to take place, and that during the conduct of such activity the Customer may not be able to access or use some or all of the Services.

3.3 The Services and Data rely on products and services provided by third parties including hardware manufacturers, software suppliers, data suppliers, network providers and cloud service providers. Metris does not and cannot control these products and services and accepts no liability from the failure of one or more of the products or services provided by third parties.

3.4 Without limiting clause 3.3, if a third party product or service provider ceases to provide that product or service or ceases to make that product or service available on reasonable terms, Metris may cease to make available that product or service (or any Service that is dependent on that product or service). To avoid doubt, if Metris exercises its right to cease the availability of a third party product or service (or any Service that is dependent on that product or service), the Customer will not be entitled to any refund, discount or other compensation, other than to have the Fees adjusted to reflect the removal (if applicable) of the relevant Service.

3.5 The Customer must:

- a use the Services and Data in accordance with the Agreement solely for the Customer's own internal business purposes; and

- b not resell, republish, or make available the Services or Data, in whole or in part, to any third party, or otherwise commercially exploit the Services or Data.

3.6 The Customer is responsible for ensuring that it has the appropriate hardware, software, system configuration and internet access to access and use the Services.

#### **4 WARRANTIES**

4.1 To the maximum extent permitted by law:

- a the Services and Data are provided *as is* and *as available*; and
- b all conditions, guarantees or warranties whether expressed or implied by statute or otherwise (including any warranty under the Part 3 of the Contract and Commercial Law Act 2017) are expressly excluded.

4.2 Without limiting clause 4.1:

- a the Customer acknowledges that:
  - i weather-related forecasts and predictions are inherently uncertain;
  - ii the Services comprise a computer model and forecaster assessment of a region-wide nature using computer models and information supplied by reputable third parties, and no site-specific measurements, site specific models nor site-surveys have been carried out in preparing any forecast; and
  - iii information from disease models are based on incomplete information about the biological workings of the pathogen concerned, approximated in-orchard conditions and mathematical approximations of pathogen response to meteorological conditions; and
- b Metris makes no representations or warranties concerning the accuracy, completeness, currency, reliability or quality of the Services or Data and does not promise that the Services or Data will:
  - i meet the Customer's requirements or be suitable for a particular purpose;
  - ii produce any particular outcome or result; or
  - iii be secure, free of viruses or other harmful code, uninterrupted or error free.

4.3 The Customer agrees and represents that it is acquiring the Services for the purposes of trade. The parties agree that:

- a to the maximum extent permissible by law, the New Zealand Consumer Guarantees Act 1993 does not apply to the supply of the Services, Data or the Agreement; and

b it is fair and reasonable that the parties are bound by this Agreement, including this clause 4.3.

4.4 Where legislation or rule of law implies into this Agreement a condition or warranty that cannot be excluded or modified by contract, the condition or warranty is deemed to be included in this Agreement. However, Metris' liability for any breach of that condition or warranty is limited supplying the relevant Services or Data again.

## **5 INTELLECTUAL PROPERTY**

5.1 Title to, and all Intellectual Property Rights in, the Services, Data, and all Underlying Systems is and remains the property of Metris (and its licensors). The Customer must not contest or dispute that ownership, or the validity of those Intellectual Property Rights.

5.2 If the Customer provides Metris with ideas, comments or suggestions relating to the Services, Data or Underlying Systems (together **feedback**):

a all Intellectual Property Rights in that feedback, and anything created as a result of that feedback (including new material, enhancements, modifications or derivative works), are owned solely by Metris; and

b Metris may use or disclose the feedback for any purpose.

## **6 FEES**

6.1 The Customer must pay the Fees to Metris or its authorised reseller or sales or billing agent.

6.2 Metris or its authorised reseller or sales or billing agent will provide the Customer with valid GST invoices in accordance with the invoicing terms set out in the Customer's order or otherwise agreed with the Customer, or if there are none:

a monthly in advance for Services provided on a subscription basis or for a fixed monthly fee;

b monthly in arrears for Services invoiced on an ad hoc or usage basis.

6.3 The Fees exclude GST, which the Customer must pay on taxable supplies.

6.4 The Customer must pay invoices for the Services:

a in accordance with the payment terms set out in the Customer's order or otherwise agreed with Metris or (where applicable) the authorised Metris reseller or sales or billing agent, or if there are none by the 20<sup>th</sup> of the month following the date of invoice; and

b electronically in cleared funds without any set off or deduction.

6.5 Metris or its authorised reseller or sales or billing agent may charge interest on overdue amounts payable. Interest will be calculated from the due date to the date of payment (both inclusive) at an annual percentage rate equal to the corporate overdraft reference rate (monthly

charging cycle) applied by Metris', or its authorised reseller or sales or billing agent's, primary trading bank as at the due date (or if such primary trading bank ceases to quote such a rate, then the rate which in the opinion of the bank is equivalent to that rate in respect of similar overdraft accommodation expressed as a percentage) plus 2% per annum.

- 6.6 By giving at least 30 days' notice, Metris may increase the Fees not more than once annually. If the Customer does not wish to pay the increased Fees, it may terminate the Agreement on no less than 10 days' notice, provided the notice is received by Metris before the effective date of the Fee increase. If the Customer does not terminate the Agreement in accordance with this clause, it is deemed to have accepted the increased Fees.

## **7 LIABILITY**

- 7.1 To the maximum extent permitted by law:

- a the Customer accesses and uses the Services and Data at its own risk; and
- b Metris and its authorised reseller or sales or billing agent is not liable or responsible to the Customer or any other person for any claim, damage, loss, liability and cost under or in connection with the Agreement, the Services, the Data or the Customer's access and use of (or inability to access or use) the Services or the Data. This exclusion applies regardless of whether Metris' and its authorised reseller or sales or billing agent's liability or responsibility arises in contract, tort (including negligence), equity, breach of statutory duty, or otherwise.

- 7.2 To the maximum extent permitted by law and only to the extent clause 7.1 does not apply, the maximum aggregate liability of Metris and its authorised reseller or sales or billing agent under or in connection with the Agreement, whether in contract, tort (including negligence), breach of statutory duty or otherwise, must not exceed the Fees paid by the Customer under the Agreement in the 1 month period preceding the first event giving rise to liability.

- 7.3 Except for the Customer's liability to pay the Fees, neither party (including Metris' authorised reseller or sales or billing agent) is liable to the other under or in connection with the Agreement for any loss of profit, data, savings, business, revenue, and/or goodwill, or any indirect, consequential, incidental or special loss or damage of any kind.

- 7.4 Clauses 7.1 to 7.3 do not apply to limit Metris' liability for:

- a personal injury or death; or
- b fraud or wilful misconduct.

- 7.5 Clause 7.3 does not apply to limit the Customer's liability for those matters stated in clauses 7.4a and 7.4b.

- 7.6 Neither party or Metris' authorised reseller or sales or billing agent will be responsible, liable, or held to be in breach of the Agreement for any failure to perform its obligations under the Agreement or otherwise, to the extent the failure is directly caused by the other party failing to

comply with its obligations under the Agreement, or by the negligence or misconduct of the other party or its personnel.

- 7.7 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 the Agreement.

## **8 TERM AND TERMINATION**

8.1 Unless terminated under this clause 8, the Agreement:

- a starts on the Start Date; and
- b continues until a party gives at least 30 days' notice that the Agreement will terminate on the expiry of that notice.

8.2 Subject to clause 6.6, if an initial term is set out in the Customer's order or otherwise agreed with Metris or (where applicable) the authorised Metris reseller or sales or billing agent, the earliest date for termination under clause 8.1 will be the expiry of that initial term.

8.3 Either party may, by notice to the other party, immediately terminate the Agreement if the other party:

- a breaches any material provision of the Agreement and the breach is not:
  - i remedied within 10 days of the receipt of the notice from the first party requiring it to remedy the breach; or
  - ii capable of being remedied; or
- b has an administrator, receiver, liquidator, statutory manager, mortgagee's or chargee's agent appointed, becomes subject to any form of external administration, or ceases to continue business for any reason.

8.4 Expiry or termination of the Agreement does not affect each party's rights and obligations accrued before the expiry or termination date.

8.5 The Customer must pay for Services provided before the expiry or termination date.

8.6 Clauses which, by their nature are intended to survive expiry or termination, including clauses 7 and 8, continue in force.

## **9 DISPUTES**

9.1 Before taking any court action, a party must use best efforts to resolve any dispute under, or in connection with, the Agreement through good faith negotiations.

9.2 Each party must, to the extent possible, continue to perform its obligations under the Agreement even if there is a dispute.

9.3 This clause 9 does not affect either party's right to seek urgent interlocutory and/or injunctive relief.

## **10 GENERAL PROVISIONS**

10.1 Neither party or Metris' authorised reseller or sales or billing agent is liable to the other for any failure to perform its obligations under the Agreement to the extent caused by Force Majeure, provided that the affected party:

- a immediately notifies the other party and provides full information about the Force Majeure;
- b uses best endeavours to overcome the Force Majeure; and
- c continues to perform its obligations as far as practicable.

10.2 To waive a right under the Agreement, that waiver must be in writing and signed by the waiving party.

10.3 A notice given by a party under the Agreement must be delivered via email to an email address notified by the other party for this purpose. If the notice is given under clause 8, a copy of that email must be immediately delivered (by hand or courier) to the Chief Executive or equivalent officer of the other party at the other party's last known physical address.

10.4 Any illegality, unenforceability or invalidity of a provision of the Agreement does not affect the legality, enforceability or validity of the remaining provisions of the Agreement.

10.5 Any variation to the Agreement must be in writing and signed by both parties.

10.6 The Agreement sets out everything agreed by the parties relating to the Services and Data and supersedes and cancels anything discussed, exchanged or agreed prior to the Start Date. The parties have not relied on any representation, warranty or agreement relating to the subject matter of this Agreement that is not expressly set out in this Agreement, and no such representation, warranty or agreement has any effect from the Start Date. Without limiting the previous sentence, the parties agree to contract out of sections 9, 12A, and 13 of the Fair Trading Act 1986, and it is fair and reasonable that the parties are bound by this clause 10.6.

10.7 The Customer must not assign or transfer any right or obligation under the Agreement without Metris' prior written approval. The Customer remains liable for its obligations under the Agreement despite any approved assignment or transfer.

10.8 The Agreement is governed by, and must be interpreted in accordance with, the laws of New Zealand. Each party submits to the non-exclusive jurisdiction of the Courts of New Zealand in relation to any dispute connected with the Agreement.

10.9 The Agreement may be signed in counterparts, each of which constitutes an original and all of which constitute the same agreement. A party may enter the Agreement by signing and sending (including by email) a counterpart copy to the other party.