

# TTCC Guidelines for Using Vendor Terms and Conditions

JULY 2021



## **TTCC Guidelines for Using Vendor Terms and Conditions**

This document is an adaptation of the [QITC Guidelines for supplier terms and conditions - ICT products and services](#) created in 2017 by the Department of Science, Information Technology and Innovation, Queensland Government and is licensed under Creative Commons license [CC BY 4.0](#).

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# I. Overview

## I.1 PURPOSE OF THESE GUIDELINES

Vendor Terms and Conditions (Vendor T&Cs) is a contract type available under the TTCC framework. These guidelines have been designed to assist relevant Tasmanian Government entities, bound by the Treasurer's Instructions issued under the *Financial Management Act 2016* (FMA), to use supplier drafted terms and conditions when procuring ICT products and services.

The purpose of these guidelines is to:

- identify the key legal terms commonly found in Vendor T&Cs;
- explain the risks and potential consequences assumed by your agency in agreeing to such terms in Vendor T&Cs; and
- recommend certain steps you can take to address these risks.

*'Vendor T&Cs' is defined in Treasurer's Instruction PF-6 Definitions. For the purposes of these guidelines and the TTCC framework, 'supplier' and 'vendor' have the same meaning.*

These guidelines focus on the risks of using Vendor T&Cs from a contracting perspective. You will also need to ensure you have reviewed, and accept, all technical, operational and commercial aspects of the products/services to be supplied by the supplier before agreeing to Vendor T&Cs for a particular purchase. For example, you will need to consider interoperability with current systems, and confirm that the ICT products/services are suitable for your requirements.

Given that Vendor T&Cs are often presented by a supplier on a 'take-it or leave-it basis', these guidelines are prepared on the basis that:

- the Supplier will not agree to amend the Vendor T&Cs; and
- customers have an understanding of the key legal terms of Vendor T&Cs and potential consequences.

*This document is a guidance tool and should not be relied upon in place of legal advice. It is not a legally binding document and does not form part of, or affect the interpretation of, any contract established under the TTCC framework.*

*If you have any questions about Vendor T&Cs, contact your agency procurement team or the Office of the Crown Solicitor (OCS) for advice.*

## 1.2 WHEN TO USE VENDOR T&CS

Treasurer's Instruction PP-3 *Procurement processes - goods and services* procurement allows an Accountable Authority (generally your Head of Agency) to authorise the use of Vendor T&Cs in certain circumstances. Review TI PP-3 to ensure all mandatory requirements are met.

Generally, Vendor T&Cs may be used if:

- the cost of the ICT products/services to be purchased will be less than \$100 000; and
- the products and/or services are low risk.

You should undertake a risk assessment when considering if Vendor T&Cs is the right contract type for your particular procurement. The [TTCC Decision Tool](#) and [ICT Risk Matrix](#) may assist.

If you determine that Vendor T&Cs are not appropriate for your procurement, the following options are available:

- If the cost is less than \$1 million and low risk, the *Tasmanian Technology Contract Conditions - General Contract* should be used.
- If the procurement is moderate or high risk the *Tasmanian Technology Contract Conditions - Comprehensive Contract* should be used (regardless of value)
- If the procurement is valued at \$1 million or more and low risk, the *Tasmanian Technology Contract Conditions - Comprehensive Contract* should be used.
- If the procurement is assessed as very high or extreme risk a Bespoke Contract. Contact the OCS if you think this may be required.

Before accepting Vendor T&C and purchasing ICT products/services, you will also need to consider applicable procurement and technical requirements and delegations.

The following items are key potential risks. If any apply to particular Vendor T&Cs or the ICT products/services you are procuring, you should contact your agency procurement team or the OCS before accepting the Vendor T&Cs:

- The Supplier will host a substantive volume of personal information or any sensitive information, confidential information, commercial-in-confidence or other forms of classified or protected information. Refer to guidance in item 2.9 and 2.10.
- The Customer requires the Supplier to meet binding service levels or other performance requirements (because any failure to do so would significantly impact the Customer's core business or functions). Refer to guidance in item 2.3.
- The Vendor T&Cs requires the Customer to provide an indemnity (this may trigger specific limits on authority or approval requirements, or impact or void the Customer's insurance). Refer to guidance in item 2.17.
- The Vendor T&Cs contain wide exclusions of Supplier liability (this may impact or void the Customer's insurance). Refer to guidance in item 2.15.

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- The Customer wishes to own the intellectual property rights in any material or otherwise requires extensive licence rights to Vendor material. Refer to guidance in item 2.12.
- The Vendor T&Cs are governed by the laws of a foreign country. Refer to guidance in item 2.21.

*Always take a screen shot of the Vendor T&Cs before, during and after accepting them. Often, Vendor T&Cs are online and can be subject to change at any time.*

## 2. Key Considerations

### 2.1 BECOMING BOUND TO VENDOR T&CS

The Customer may become bound to Vendor T&Cs simply by accessing or using the relevant product or service, paying the Supplier or by clicking 'I agree' (or similar) on a website.

Formal execution or a signature by the Customer may not be required in order for the Vendor T&Cs to take effect and become legally binding on the Customer.

 **Guidance:**

Do not use a product/service or make any payment to a Supplier without first obtaining a copy of the applicable Vendor T&Cs for review and seeking advice from the OCS or your agency's procurement team. You should also ensure that any purchase complies with your agency and Tasmanian Government procurement policies. Ensure the individual making the purchase on behalf of the Customer has the necessary authority or delegation to do so.

You should not click any types of 'I agree' notices unless you have reviewed the Vendor T&Cs and obtained the necessary authority to use those terms. Just because there is a low or no cost for the product/service, does not mean that there is no risk involved in agreeing to Vendor T&Cs. For example, software licensed to the Customer may process and store personal information (refer to the guidance at item 2.9 regarding privacy).

You will also need to check that the correct Customer legal entity is specified as the purchaser in the Vendor T&Cs, and the individual making the purchase on behalf of the Customer is not specified as the purchaser in their personal capacity. Please contact your agency procurement team or the OCS for advice regarding specifying the correct Customer legal entity.

### 2.2 AUTOMATIC RENEWAL AND ROLL-OVER CONTRACT PERIOD

Vendor T&Cs often provide for automatic renewal or automatic roll-over once the initial contract period is complete, unless the Customer gives notice of non-renewal prior to expiry of the initial period.

Automatic roll-over provisions are designed to ensure that the services are not cut-off at the expiry of the contract period.

 **Guidance:**

If the Vendor T&Cs contain an automatic roll-over provision, this means that the contract period will automatically extend for a further period (often 12 months) unless the Customer provides notice to the Supplier within a specified timeframe or notice period.

If the Customer fails to provide this notice, it will be committed under the contract for the further period (and to pay fees for that further period). This is undesirable where the Customer does not require the services for the full further period, the Supplier performance is lacking or the Customer can source comparable products/services at a cheaper cost.

TI PP-3 includes requirements related to contracts that include automatic renewal provisions.

You should have a contract management system in place which alerts it in advance of when notice for opting-out of further renewal is due. This should allow time to liaise with the relevant Customer stakeholders and determine whether there is an ongoing requirement for the products/services.

You should look out for any Vendor T&Cs which requires the Customer to follow any separately-documented Supplier process for providing a non-renewal notice, and review any such process. Ensure your agency revisits this process document prior to the expiry of the initial contract period to ensure compliance with it.

Refer also to the guidance in item 2.18 regarding termination rights.

### 2.3 PRODUCT/SERVICE DESCRIPTION

Vendor T&Cs often describe the products or services to be supplied with insufficient detail at a high-level only, and without any detailed technical, operational or functional specifications that the products/services will meet.

Vendor T&Cs may also qualify the performance obligations of a Supplier as being on a 'best endeavours' basis (such as service levels).

#### **Guidance:**

Without a sufficiently detailed description of the products/services the Supplier is required to supply under the Vendor T&Cs, there is no certainty as to the functionality and performance requirements of the Supplier or the products/services that you are purchasing. If the Supplier or products/services then fail to perform as expected, it may be difficult for you to assess whether the Supplier has complied with its performance obligations.

For example, Vendor T&Cs may state that the services will be provided in accordance with the Supplier's then-current service description for those services (which is subject to change at any time). This means that there is no obligation on the Supplier to provide the services in accordance with any firm or set specifications.

You should ensure that the Supplier performance obligations and the requirements or specifications for the products/services are clearly set out in sufficient detail. For example, do the Vendor T&Cs clearly state:

- what the Supplier is supplying (i.e. the description of the product/service being supplied) and applicable performance requirements (including service levels);
- when the Supplier is required to supply the product/service (including commencement date of services and delivery dates for products); and
- where and/or how the Supplier is required to deliver the product or supply the services?

If time is limited and specification documents cannot be prepared, it can be useful to attach to the Vendor T&Cs any applicable description of requirements or specification from a request for proposal/tender and proposal/response received from the Supplier which have led to the contract. However, it is important to check that any such documents or proposals are not expressly excluded by the Vendor T&Cs, and if not, which terms (i.e. the Vendor T&Cs or the attached documents) take precedence if they are inconsistent. Be wary of



simply attaching any Supplier marketing material to the Vendor T&Cs as specifications, because such material typically contains limited detail and no firm commitments as to the supply of the product/service. If Supplier marketing material is attached to the Vendor T&Cs as specifications, ensure that the material contains sufficient detail regarding the products/services to be performed by the Supplier.

If the Vendor T&Cs require the Supplier to use 'best endeavours' or 'commercially reasonable efforts' (or similar language) to perform certain obligations, those obligations are not firm or mandatory. For example, Vendor T&Cs often require the Supplier to use 'best endeavours' to meet the service levels, or describe the service levels only as 'targets'. If it is important for the Customer and its operations that the Supplier meets binding minimum service levels or other performance requirements, Vendor T&Cs drafted on this basis will generally not be appropriate.

## 2.4 INCORPORATION OF ADDITIONAL DOCUMENTS

Vendor T&Cs may incorporate additional documents into the contract by referring to documents which are available on the Supplier's website or on request.

### **Guidance:**

The incorporation of additional documents may result in the Customer being subject to additional obligations (or the Supplier having additional rights) which are not set out in the Vendor T&Cs.

These additional documents are often expected to be subject to change at any time by the Supplier without first notifying the Customer or obtaining the Customer's consent.

Where the Supplier wishes to incorporate additional documents into the Vendor T&Cs, you should locate and review the additional documents before accepting the Vendor T&Cs, so you understand all applicable terms including any additional requirements or procedures it must follow.

As a practical measure, you should also retain a separate copy of any online documents (such as saving the online document as a PDF or taking a screen shot) that are incorporated into the Vendor T&Cs (as the website links may change over time).

## 2.5 INCORPORATION OF THIRD PARTY TERMS

Vendor T&Cs may incorporate third party terms and conditions which are stated to apply to the Customer's use of the products or services. This may also be because the Supplier is a reseller of third party products or services.

### **Guidance:**

The Supplier may not be the manufacturer of the products, and may use other parties' services to supply the services under a contract. In these circumstances, the Vendor T&Cs may reference or incorporate the manufacturer's or other supply party's terms and conditions (e.g. third party software licence terms), and require the Customer to comply with these conditions.

If the Vendor T&Cs refer to additional third party terms and conditions, you should review those terms and conditions to confirm they are acceptable, before accepting the Vendor T&Cs.

## 2.6 CHANGES

Vendor T&Cs may allow the Supplier to vary:

- the Vendor T&Cs;
- the description of the products/services; and/or
- the fees payable for the products/services,

at any time or periodically during the contract period without the Customer's agreement or consent. In some cases such changes may only be published on the Supplier's website.

### **Guidance:**

If the Supplier is able to vary the Vendor T&Cs, the product/service description or the fees payable under the Vendor T&Cs without the Customer's agreement, the Customer will not have certainty as to the supply of the products/services or the fees payable during the contract period.

If the Supplier has such a right, you should consider whether a minimum notice period applies and whether the Vendor T&Cs allow the Customer to terminate the contract if it does not accept the relevant variation (without any liability or obligation to pay the Supplier).

## 2.7 WARRANTIES

Vendor T&Cs often contain very limited warranties in relation to the supply of the product/services, or their suitability for the Customer.

Vendor T&Cs can also contain broad exclusions from any warranties provided.

In the case of licensed software and hardware, Vendor T&Cs will often specify a warranty period during which time the relevant warranties apply and the Supplier agrees to repair or replace any defective software or hardware at no additional cost.

### **Guidance:**

A warranty is a contractual remedy that allows the Customer to recover damages from the Supplier for loss suffered by the Customer if the Supplier fails to supply the products/services in accordance with the warranty. If the Vendor T&Cs do not contain warranties in relation to the supply of the product/service, this may limit the ability of the Customer to bring a claim for damages.

While there are certain statutory guarantees set out in the Australian Consumer Law (schedule 2 of the *Competition and Consumer Act 2010 (Cth)*) which apply to the supply of the products/services, they may not apply to all purchases of ICT products and services under the Vendor T&Cs. If these statutory guarantees apply, they cannot be excluded or modified by the Vendor T&Cs.

Where the Vendor T&Cs specify a warranty period, you should consider the duration of the warranty period and confirm it is sufficient, taking into account the period during which defects are most likely to arise or be discovered in the products/services supplied. If a longer warranty period is required, or support after the warranty period, you may need to consider purchasing additional support services from the Supplier.

You should also carefully review any exclusions from warranties (and defect repair/replace obligations) so that it understands the circumstances in which the Customer's remedies will not apply (e.g. a defect caused by a Customer's modification to licensed software).

## 2.8 FEES AND PAYMENT

Vendor T&CS may require fees to be paid:

- in a foreign currency; or
- on short payment terms (such as 7 days following an invoice) with interest charged for late payment.

Some Vendor T&Cs also require the Customer to commit to a minimum spend, often linked to a minimum contract period.

### **Guidance:**

If fees are payable under the Vendor T&Cs in a foreign currency, the price in Australian dollars will vary with any fluctuations in the applicable foreign exchange rate. This foreign exchange risk will be borne by the Customer.

You may need to discuss payment terms with your finance or accounts team to confirm these reflect your internal policies and procedures (including any particular requirements for invoicing or tax issues associated with payment in foreign currency), and that invoices can be processed and paid by the Customer within the required time.

## 2.9 PERSONAL INFORMATION AND PRIVACY COMPLIANCE

Vendor T&Cs often include limited or no express obligations on the Supplier to handle any personal information received from or accessed through the Customer in accordance with the *Personal Information Protection Act 2004* (Tas) or the *Privacy Act 1988* (Cth). A Supplier may only agree to handle any personal information in accordance with its own privacy policy (usually contained in a separate document or a website).

### **Guidance:**

Suppliers may have access to or receive 'personal information' from the Customer (such as names, contact details, credit card details or health information about Customer personnel or customers) in the course of providing the products/services. In particular, cloud services typically involve the Supplier hosting and storing the Customer's data, which may include personal information.

You should consider whether the Vendor T&Cs enable the Customer to meet its obligations under the *Personal Information Protection Act 2004* (Tas) and other applicable privacy legislation. In particular, if the Vendor T&Cs do not require the Supplier to comply with the *Personal Information Protection Act 2004* (Tas), the Customer may be responsible for any breach of the *Personal Information Protection Act 2004* (Tas) by the Supplier without recourse to the Supplier. This means that an affected individual can make a privacy complaint against the Customer (rather than the Supplier) if the Supplier misuses or mishandles their personal information.

If the Supplier will have access to or receive 'personal information' from the Customer, please contact the OCS for advice regarding whether the Vendor T&Cs enable the Customer to meet its obligations under the *Personal Information Protection Act 2004* (Tas).

The Customer should always conduct privacy due diligence of the Supplier as part of its evaluation of the Supplier's products/services, including asking the Supplier to provide details of its privacy law compliance, information governance arrangements, and controls relating to software security, access security and network security.

Higher caution is required when the Supplier will host a substantive volume of personal information, sensitive information, confidential information, commercial-in-confidence or other form of classified or protected information. In these circumstances, it will generally not be appropriate to use Vendor T&Cs and the Customer should consider using a General or Comprehensive Contract.

### **Disclosure of personal information outside Tasmania**

Services provided by the Supplier may involve personal information being disclosed outside Tasmania. For example, a Supplier of cloud services may store the Customer's personal information (and other data) in a data centre located overseas or personal information may be accessed from outside Australia as part of the provision of support services. The *Personal Information Protection Act* allows personal information to be disclosed to an entity outside Tasmania only on certain conditions (refer to Personal Information Protection Principle 9). The transfer of information elsewhere within Australia will satisfy the relevant conditions, however this may not be the case where information is disclosed outside Australia.

You will therefore need to consider whether the *Personal Information Protection Act* permits the Customer to transfer or disclose the personal information to the Supplier outside Australia, on the terms contemplated in the Vendor T&Cs.

### **Other guidance**

You should consider the requirements of other applicable Tasmanian government policies and standards regarding personal information and information security classification. This includes the policies managed by the Digital Strategy and Services Division of the Department of Premier and Cabinet.

## **2.10 CONFIDENTIAL INFORMATION**

TI C-1 will apply to any Vendor T&Cs. Consequently, Vendor T&Cs cannot be used if the terms and conditions themselves, or any part of them, purport to be confidential. An Accountable Authority may approve the inclusion of a confidentiality provision in accordance with TI C-1.

You should also consider the requirements of other applicable Tasmanian government policies and standards regarding personal information and information security classification. This includes the policies managed by the Digital Strategy and Services Division of the Department of Premier and Cabinet.

### **Guidance:**

If the Supplier will have access to the Customer's confidential information, you should consider whether the Vendor T&Cs contain terms which require the Supplier to maintain the confidentiality of that information and not disclose the information to third parties

except in limited circumstances including where required by law or with the Customer's consent.

Where the Vendor T&Cs defines 'confidential information' as only information which is marked or designated as confidential, you should ensure that any confidential information is clearly marked with the words 'confidential information.'

If the Vendor T&Cs allows the Supplier to include the Customer's name in marketing and publicity documents, you should confirm whether this is consistent with the applicable policy of your department or agency.

## 2.11 CUSTOMER DATA

The Supplier may have access to the Customer's data as part of supplying the products/services to the Customer.

Vendor T&Cs often provide that the Supplier is not responsible or liable if it loses the Customer's data.

### **Guidance:**

Consider whether the Vendor T&Cs provide that the Supplier can only access and use the Customer's data for the purpose of providing the products/services to the Customer. The Vendor T&Cs should provide that the Customer (and not the Supplier) retains ownership of the Customer's data and that it cannot be used for any commercial or other purpose by the Supplier.

If the Supplier will host the Customer's data, you should check whether the Supplier is required to maintain regular back-ups of the Customer data which can be provided to the Customer on request at any time, and in the format required by the Customer. If the Supplier is not required to maintain regular back-ups of the Customer data, the Customer should implement measures to back-up the data itself.

You should consider whether the Vendor T&Cs enable the Customer to meet its record handling obligations under legislation including the *Archives Act 1993* (Tas). Contact the OCS for advice regarding this.

Refer to the guidance in item 2.19 regarding retrieval of data at the end of a contract.

## 2.12 INTELLECTUAL PROPERTY RIGHTS (IPR)

Vendor T&Cs often provide that:

- all IPR in the products/services supplied remain owned by the Supplier;
- the Supplier owns the IPR in any new material developed by the Supplier for the Customer or in the course of the contract; and
- the Supplier grants the Customer a limited licence to use the IPR in new material.

The Vendor T&Cs may also grant the Supplier a licence to use the Customer's existing IPR where such existing IPR is incorporated in new material.

These licence rights are distinct from the licence rights the Customer may obtain to use the products/services supplied (e.g. licensed software).

### **Guidance:**

#### **Ownership of IPR in new material**

Where the Supplier owns the IPR in any new material, the Customer's right to use such new material will be limited to use in accordance with the conditions set out in the Vendor T&Cs. This means that the Supplier will retain the right to use any new material for any purpose (including allowing use by third parties).

This position may be acceptable to a Customer where:

- the Customer does not intend to exploit, commercialise or use the IPR in the new material in any other projects, and it can obtain the necessary rights to use the new material from a licence granted by the Supplier;
- the IPR in new material are not of significant value to the Customer and the Customer is not concerned with limiting the Supplier or any other third parties from using or exploiting that IPR; or
- the Customer provides minimal resources and input into the development of the new material or IPR.

#### **Customer licence to IPR**

You should review the licence rights granted to it under the Vendor T&Cs in respect of new material to ensure its intended use of such new material is within the scope of those licence rights (e.g. further development or modification of new material). Use outside the scope of the licence will generally require the Supplier's approval.

#### **Product/service licence rights**

In the case of licensed software and cloud services, licence and subscription rights granted to the Customer may be on a per user or per device basis (rather than on an enterprise-wide basis for all of the Customer's users). You should review the licence basis proposed and confirm it reflects the Customer's proposed actual use, and the licence basis the Customer requires.

The Vendor T&Cs may allow the Customer to increase its licence and subscription rights (i.e. to increase the number of users or devices) but may not allow the Customer to decrease its usage during the contract term. In the event that your usage requirements reduce during the contract term (including as a result of a machinery of government change), you may not be able to reduce your usage and so you will be required to continue to pay the licence fees for the original number of users or devices for the remainder of the contract term.

The Vendor T&Cs may only grant the Customer a licence to use the products/services, or new material, for the duration of the contract or while the Customer continues to pay for support or maintenance. This means the Customer will not have the right to use the products/services or new material once the contract or support/ maintenance ends. This may be appropriate for use of certain licensed software or cloud services, because the Customer typically pays the Supplier for a licence to use the software or cloud services for the contract period, however the limitation may also affect other outputs of products or services.

Other common licence types and rights granted to a Customer under Vendor T&Cs include:

- Perpetual means the licence is granted for an indefinite period (i.e. in perpetuity, not a set term or for the contract period).
- Perpetual and irrevocable means the licence is granted in perpetuity and the Supplier cannot terminate the licence rights granted.
- Revocable means that the Supplier can withdraw the Customer's licence rights (e.g. where the Customer does not comply with the licence conditions).

Non-transferable means the licence is personal to the Customer and the Customer cannot sub-license or transfer its licence rights to another party (such as another Government department) or agency. (Refer also to the guidance in item 2.22 regarding assignment and machinery of government changes.)

## 2.13 REVIEW AND ACCEPTANCE TESTING

Vendor T&Cs may contain limited or no rights for the Customer to conduct review or testing of the products/services supplied by the Supplier, or to reject any products which do not meet the requirements of the Vendor T&Cs.

The Vendor T&Cs may also provide that the Customer will be 'deemed' to have accepted the products if it uses them in a production environment for a specified period, or if the Customer does not notify the Supplier of any defects within a specified timeframe (usually a short period).

### **Guidance:**

If the Vendor T&Cs contain 'deemed' acceptance provisions, you will need to ensure you conduct testing of the products within the timeframe(s) specified in the Vendor T&Cs.

If the Vendor T&Cs do not contain provisions for review and testing of the products or the Customer does not notify the Supplier by the relevant 'deemed' acceptance date, the Customer will need to rely on its rights under:

- the warranty provisions to require the Supplier to remedy any defects (provided that these provisions contain appropriate warranties that the products are fit for purpose and meet the specifications for the products set out in the Vendor T&Cs); or
- general law to seek damages for the Supplier's failure to supply the products in accordance with the requirements of the Vendor T&Cs (provided the scope and specifications are sufficiently defined – see the guidance in item 2.3 regarding product/service descriptions).

## 2.14 TITLE AND RISK

Vendor T&Cs often provide that:

- title in deliverables (particularly hardware) does not pass to the Customer until the price for the deliverables is paid in full; and
- risk in the deliverables passes to the Customer once they have been delivered or otherwise left the Supplier's possession.



 **Guidance:**

Title in a deliverable passing to the Customer means that legal ownership of the deliverable passes. Risk in a deliverable passing to the Customer means it becomes the responsibility (e.g. for loss or damage and insurance purposes) of the Customer.

If risk in a deliverable (such as hardware) passes to the Customer on delivery, but title hasn't passed because the price for the deliverable hasn't been paid at that time, this may impact the Customer's ability to insure the deliverable until title does pass.

If risk in a deliverable passes to the Customer once the deliverable has left the Supplier's possession (such as delivery by the Supplier to a freight provider), the Customer will bear the cost if the deliverable is lost or damaged during transit to the Customer. In these circumstances, it may be appropriate for the Customer to obtain appropriate insurance.

## 2.15 LIMITATIONS OF LIABILITY

Vendor T&Cs will usually limit or 'cap' the Supplier's liability under the contract to a specified amount. This amount is often set by reference to the price payable under the contract, and may be set at a relatively low cap in order to limit the Supplier's risk.

Common Supplier liability caps include:

- one times the total price paid by the Customer during the contract period; and
- one times the total price paid by the Customer in the 12 months before the claim is made.

Vendor T&Cs often do not include any limitation or 'cap' on the Customer's liability to the Supplier.

 **Guidance:**

Limitation of liability clauses are used as a risk allocation tool to reduce or limit the financial obligations of a party under a contract. These are distinct from exclusion of liability clauses (refer item 2.16) which seek to exclude liability altogether for certain specified losses.

### **Amount of Supplier's liability cap**

Determining the appropriate Supplier's liability cap involves you undertaking a risk assessment. The amount of the cap will also depend on the nature of the products/services provided by the Supplier and their intended use by the Customer. The Supplier's liability cap should be considered holistically as part of a broader procurement risk management process, taking into account:

- the nature and circumstances of the particular transaction;
- the Customer's assessment of the risks involved in the products/services; and
- the potential liabilities the Customer may incur as a result of any failure to perform on the Supplier's part including any failure of the products/services.

It is important not to confuse risk with contract value. Just because the price payable for products/services under Vendor T&Cs is low does not mean that the risk of loss or damage the Customer may potentially suffer is also low. You will need to consider any losses or costs it may incur if the Supplier fails to supply the products/services in accordance with the Vendor T&Cs. It may not always be appropriate for the Supplier's liability to be capped at an amount equal to the price payable under the Vendor T&Cs.



If the risk assessment identifies that the particular risks of the transaction are not low, it will not be appropriate to use Vendor T&Cs and you should consider using the General or Comprehensive Contract.

### **Exclusions from Supplier's liability cap**

Where the Supplier limits its liability under Vendor T&Cs, consider whether the liability cap applies to the Supplier's liability for intellectual property rights infringement (refer item 2.17), personal injury, death, property loss/damage or breach of privacy (refer to item 2.17). The potential liability of the Customer in these circumstances could be substantial, and is generally beyond the control of the Customer and insurable by the Supplier. If these items are not excluded from the Supplier's liability cap, the amount the Customer can recover from the Supplier will be limited to the amount of the liability cap (which may not be sufficient to cover the total losses and costs incurred by the Customer).

### **Customer's liability cap**

If the Customer's is not capped to a specified amount liability under the Vendor T&Cs, the Customer's liability to the Supplier will be unlimited. You should consider the likelihood and extent to which it could cause the Supplier loss under a contract, and whether it should seek to limit that by a liability cap.

### **Impact on insurance**

You will need to check that any limitation of liability provisions in the Vendor T&Cs do not impact on the Customer's insurance (e.g. by voiding cover). Please contact your agency procurement team or the Government's insurance broker for advice.

Contact details for the Government's insurance broker are:

Jardine Lloyd Thomson (JLT)  
 GPO Box 126  
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## **2.16 EXCLUSION OF INDIRECT AND CONSEQUENTIAL LOSS**

Vendor T&Cs often exclude the Supplier's liability for a broad range of indirect or consequential losses a Customer may incur such as:

- any special, indirect or consequential loss or damage of any nature;
- loss of profit or revenue;
- loss of data; or
- loss of reputation.

### **Guidance:**

It is common in most Vendor T&Cs for the Supplier to exclude its liability for all losses other than direct losses. Where the Vendor T&Cs include an indirect or consequential loss

exclusion, the Supplier will not be liable to the Customer for any losses which fall within the types of indirect and consequential loss described or specified.

Vendor T&Cs which seek to exclude a broad range of loss types should be considered carefully by the Customer and having regard to the risk under the contract. Any broad exclusions of liability for loss could significantly reduce the amount of damages the Customer could recover from the Supplier.

You should consider the particular types of losses and/or claims the Customer might incur as a result of the Supplier's failure or default under the contract. For example, Vendor T&Cs for cloud services may seek to exclude the Supplier's liability for any 'loss of data'. If the Supplier is responsible for storing or hosting the Customer's data, the Customer will need to assess the risks of the Supplier not being liable for any loss of data, and take steps to address and mitigate this risk (such as maintaining regular back-ups of the Customer's data).

Also consider whether the Supplier's liability for intellectual property rights infringement (refer item 2.17) is subject to an exclusion of indirect or consequential loss. Certain types of loss incurred by a Customer in these circumstances will often be indirect or consequential, and will generally be beyond the control of the Customer.

## 2.17 INDEMNITIES

Indemnities (if any) given by the Supplier under Vendor T&Cs may be limited, and will often be conditional on the Customer complying with certain requirements such as:

- notifying the Supplier of any claim within a specified (usually short-period) or as soon as possible; and
- allowing the Supplier the control of the defence and settlement of the claim,

and if the Customer does not comply with these requirements, the Supplier is not required to indemnify the Customer.

The Vendor T&Cs may also require the Customer to indemnify the Supplier for a range of events and loss.

### **Guidance:**

An indemnity is a promise by one party to hold the other party harmless against (i.e. pay) specified losses which arise in particular circumstances. Indemnities from the Supplier give the Customer a clear contractual right against the Supplier for specified losses, which puts the Customer in a better position than relying on its general law rights to recover damages.

### **Supplier indemnities**

You should consider the types of risks or losses your agency may incur under the particular transaction with the Supplier, and having regard to the nature of products/services supplied by the Supplier. Consider whether the Vendor T&Cs require the Supplier to indemnify the Customer for any infringement or alleged infringement of third party intellectual property rights. The Supplier will generally provide a product/service which includes intellectual property rights. If the Vendor T&Cs do not contain an infringement indemnity, the Customer risks being subject to and liable for claims by third parties that use of the products/services infringes that party's intellectual property rights.

Further, if the Supplier will provide any products/services on the Customer's premises or will have access to any property/materials of the Customer, check whether the Vendor

T&Cs requires the Supplier to indemnify the Customer from any personal injury, death or property loss/damage.

The indemnity given by the Supplier may seek to limit the extent of legal and other costs the Customer can recover under the indemnity (e.g. 'reasonable' legal costs). Legal costs can be a major expense incurred by a Customer in connection with a claim (particularly where the claim is made in a foreign jurisdiction), and so there may be some costs for which the Customer will not be reimbursed with such a limitation.

Where the indemnity is subject to conditions or requirements on the Customer's part, you should review these conditions carefully and confirm that your agency is in position to comply with them and that they are consistent with any policy of the Customer as to indemnities and the handling of indemnified claims.

If the Supplier does not provide any indemnities, the Customer will instead need to rely on its general law rights. The damages the Customer may recover under its general law rights in connection with a claim may be less than under a contractual indemnity, because damages assessments consider factors such as remoteness, causation and mitigation. You will also need to confirm your agency has adequate insurance for any risks or losses which are not covered by the indemnities given by the Supplier.

### **Customer indemnities**

If Vendor T&Cs include an indemnity in favour of the Supplier, you should conduct a risk analysis of the proposed indemnity considering the purpose for which the products/services are supplied and will be used, and the likelihood that the Customer's actions could cause the Supplier any loss. Any indemnity should be limited to those issues or events the Customer can control. A broad indemnity may expose the Customer to greater liability than it would otherwise have under general law. This can also be an issue under the Customer's insurance and impact cover.

If the Vendor T&Cs require the Customer to provide an indemnity, please contact your agency procurement team or the OCS for advice.

## **2.18 TERMINATION RIGHTS**

### **Customer termination rights**

Vendor T&Cs may contain limited or no termination rights for the Customer. The Customer may only have the right to terminate for the Supplier's material, unremedied default, or if the Supplier is or becomes insolvent.

The Customer will often not have the ability to terminate for convenience (i.e. any reason), unless it effectively 'pays out' the contract for the unexpired term.

### **Supplier termination rights**

Vendor T&Cs often give the Supplier the ability to suspend or terminate if the Customer has not paid any invoice by the due date for payment.

Vendor T&Cs may allow the Supplier to terminate for convenience (i.e. any reason) or if a product/service is discontinued, typically after a specified initial or minimum term. This right may be able to be exercised by the Supplier on short notice.

 **Guidance:**

### **Customer termination rights**

If the Vendor T&Cs do not provide the Customer with a contractual right to terminate for the Supplier's default, the Customer will need to rely on its general law rights to terminate. It can be more difficult to establish under the general law that the Supplier has breached the contract in a manner that entitles the Customer to terminate.

As a general rule, and as a minimum, you should confirm that the Vendor T&Cs allows the Customer to terminate if the Supplier:

- is in breach which is incapable of remedy, or has failed to remedy a breach within a reasonable period; and
- is or becomes insolvent.

In certain circumstances, it may be appropriate for the Customer to have a right to terminate for convenience (i.e. for any reason). Without such a right, the Customer will be committed to the contract for the entire contract period subject to its other termination rights (e.g. the Supplier's breach). A termination for convenience right gives the Customer flexibility to terminate the contract for any reason. This may be useful where there is a long contract period, and the Customer no longer requires the services provided by the Supplier.

However, the Supplier may require the Customer to pay the compensation (e.g. specified fees or costs, or the fees applicable to the remaining contract period) if the Customer exercises its termination for convenience right. In these circumstances, it is important that the Customer clearly understands the fees that may be payable to the Supplier upon termination for convenience.

### **Supplier termination rights**

The Customer should manage its payment obligations under a contract carefully to avoid the risk of the Supplier suspending or terminating which may interrupt Customer functions and operations. Ideally the Supplier's termination rights will be limited to breach by the Customer which is not remedied within a reasonable notice period, or the Customer's insolvency (which will typically not be an issue for Tasmanian Government Customers).

A Supplier right of termination for convenience or during the contract period if a product/service is discontinued by the Supplier is generally not appropriate, and may be problematic as the Customer will not have certainty of supply or continuity of services. However, where the Supplier is a reseller of ICT products and services, the Supplier may require this termination right (in the event that their reseller arrangement with the manufacturer is terminated). If the Vendor T&Cs contain such termination rights for the Supplier, you should consider whether the notice period for such termination provides a sufficient timeframe to find replacement services.

## **2.19 CLOUD SERVICES - END OF CONTRACT ARRANGEMENTS**

Vendor T&Cs for cloud services will often provide a short timeframe for the Customer to retrieve its data stored by the Supplier at the end of the contract period, after which additional costs may be charged to store the data or the data may be permanently deleted.

Vendor T&Cs will usually contain no other provisions regarding transition-out arrangements (such as terms which require the Supplier to assist the Customer to transition from the existing system to a new system or service provider).

 **Guidance:**

You will need to confirm that the time period provided to retrieve data stored by the Supplier is sufficient and enables the Customer to meet its record handling obligations under legislation including the *Archives Act 1983* (Tas). You should also check that there are provisions in the Vendor T&Cs which provide the Customer with the right at any time to access and retrieve its data during the contract period, taking into account its own operations and resources.

Consider also whether the Vendor T&Cs specifies the form and media on which the Customer's data will be made available or returned to the Customer, consistent with the Customer's requirements.

If the Customer requires the Supplier to provide transition-out assistance (which is more extensive than the return of data stored by the cloud system), it will generally not be appropriate to use Vendor T&Cs and you should consider using the General or Comprehensive Contract.

## 2.20 SUBCONTRACTING

Vendor T&Cs will often allow the Supplier to subcontract the supply of part or all of the products/services to a third party subcontractor without obtaining the Customer's consent, or even notifying the Customer.

 **Guidance:**

If the Supplier can subcontract the supply of any products/services, it is very important that the Vendor T&Cs provide that the Supplier is responsible for any acts or omissions of the subcontractor. This is because there is no privity of contract between the Customer and the Supplier's subcontractors.

## 2.21 GOVERNING LAW AND JURISDICTION

Where the Supplier is not based in Australia, Vendor T&Cs may provide that the contract is governed by the laws of a foreign country. The Vendor T&Cs may also be governed by the laws of another state or territory in Australia (i.e. not Tasmania).

 **Guidance:**

If the Vendor T&Cs are governed by a laws of another country, this means that:

- the operation and interpretation of the contract will not be governed by Australian laws but rather the laws of the foreign country will apply (and the Customer's rights under foreign laws may be very different from the position under Australian laws); and
- any disputes arising between the parties will be determined by the laws of another country, and the Customer may need to initiate and attend dispute resolution proceedings overseas (which can be protracted and very costly).

Further, if the Vendor T&Cs are governed by the laws of another Australian state or territory, this is preferable to the Vendor T&Cs being governed by the laws of another country. However, there are some differences between the laws of each Australian state or territory. Practically, this may also require the Customer to attend dispute resolution proceedings outside of Tasmania.

## 2.22 ASSIGNMENT

Vendor T&Cs may allow the Supplier to assign or transfer the contract to a third party without the Customer's consent. This is common where the Supplier's business has been acquired by or merged with another organisation.

Vendor T&Cs often do not allow the Customer to assign or transfer the contract (or any licence rights) to another party whether for a machinery of government change or otherwise.

### **Guidance:**

If the Supplier can assign or transfer the supply of the products/services, the Customer will not have certainty as to who will be supplying the products/services. If the contract is assigned to a third party, the Customer may find itself in a contract with a different party which the Customer has not selected to supply the products/services and has not performed any investigations or due-diligence.

Restrictions on the Customer assigning the contract can be problematic in the event of a machinery of government change.

