Hardcat Software Maintenance Agreement

1. This document sets out the terms on which a licensor ('Hardcat' or 'we', 'us', 'our' etc.) agrees to maintain and support ('support') certain software ('the software') licensed to a licensee ('you' 'your' etc.) under a separate licence agreement ('your licence'). The licensor, the licensee, the software and its licence number are identified in the schedule.

2. Your rights under these terms are collectively called 'your maintenance agreement'.

3. If an expression is defined in your licence, it means the same thing in these terms, unless these terms redefine it.

4. Your maintenance agreement is for an initial term of one year starting on the commencement date indicated in the schedule.

5. If you notify us in writing at least 60 days before the term ends ('last cancellation date') that you do not require support for the next successive year your maintenance agreement ends after the current term. Otherwise, this agreement is automatically extended for a year from the end of the current term, and a reference to the term of your maintenance agreement is taken to be a reference to the extended term. We may invoice you for the extended term at any time after the last cancellation date. This clause is subject to clause 23.

6. If we give you notice, at least 90 days before the end of the current term, that the next automatic extension of the term will be on terms set out in or with the notice, and / or at prices and charges set out in or with the notice, then those will be the terms, prices and charges that apply to the next automatic extension of the term. We can give you that notice in any way these terms allow, or by emailing you a web address where the new terms, prices and charges can be found.

7. All our invoices must be paid in full within 30 days of their delivery to you, except that annual fees must be paid before the start of the year they relate to – unless you are in default of payment of another invoice. In that case, invoices are payable immediately until all defaults are rectified.

8. We are not obliged to provide support for as long as:

    8.1. your licence is not in force;

    8.2. you have not paid fees for your maintenance agreement as due;

    8.3. you are substantially in breach of your maintenance agreement or your licence;

    8.4. we reasonably suspect that you are substantially in breach of your maintenance agreement or your licence, and you have not satisfied us (acting reasonably) that there is none;

    8.5. you have not supplied to us a copy of your maintenance agreement executed by you; or

    8.6. you do not provide your licence number on request.

9. During any time when we are not obliged to provide support, the term of your maintenance agreement continues to run.

10. At all times, you must keep us informed of full contact details for (a) representative(s) of you to serve as your administrator(s) for the purpose of dealing with us. Administrators must:

    10.1. be knowledgeable about computers generally and your computer system in particular;

    10.2. be familiar with and competent in the use of the software;

    10.3. be reasonably contactable and available; and

    10.4. be able and authorised to follow our instructions regarding support issues.

11. Support extends to any upgrades, patches or modifications we have provided, as well as all related documentation (e.g. user manuals) that we have provided, in whatever format. It does not extend to issues or problems that are mainly caused by or relate to one or more of:

    11.1. user modifications (even if made with our approval) and their consequences;

    11.2. any software that is owned or licensed by someone other than us;

    11.3. software or hardware that you have obtained other than from us;

    11.4. changes made without our approval to your hardware, software or network after the software was installed;

    11.5. installation or use of the software otherwise than in accordance with our instructions;

    11.6. data loss or corruption other than due to a defect in the software;

    11.7. damage by virus, trojan or other malicious code (unless it was introduced to your computer system by the software);

    11.8. administrator or user error.

12. We may put you on notice at any time in the course of investigating an issue that we consider that it is not of a kind covered by your maintenance agreement. If you continue to have us work on the issue after that point and it is established that we were correct, we may charge you for time expended after we gave notice, at our prevailing rates.

13. You must:

    13.1. use reasonable endeavours to solve problems and issues yourself before requesting support;

    13.2. provide us with any cooperation or information that we reasonably require to provide support;

    13.3. pay us all monies that you owe us, whether or not under these terms, as and when due; and

    13.4. ensure that only administrators contact us regarding support issues.

14. Support consists solely of:

    14.1. telephone support;

    14.2. email support;

    14.3. defect correction;

    14.4. maintenance upgrades.

15. Telephone support will be provided by our help desk staff in response to calls by an administrator to the help desk telephone number(s) specified on our web site. The help desk will be staffed on weekdays (excluding public holidays in Melbourne, Australia) between 9 a.m. and 5 p.m. Australian Eastern Standard Time or Australian Eastern Summer Time, as applicable ('our business hours'). We shall address issues raised with the help desk without unnecessary delay, taking into account the severity of the issue, the time required to deal with it, and the workload of our help desk staff.

16. Email support will be provided by our help desk staff in response to emails to by an administrator to the help desk email address(es) specified on our web site. We shall address issues raised with the help desk by email without unnecessary delay, taking into account the time at which the email is received, the severity of the issue, the time required to deal with it, and the workload of our help desk staff.

17. We do not promise to provide support outside our business hours. If you ask us to do so, and we agree, we may charge extra fees at our prevailing rates.

18. Defect correction will be provided when you report to us a defect in the software that causes it not to perform in accordance with the performance standard, and we confirm that defect. In that case, we shall include a remedy for that defect in the next maintenance upgrade that it is feasible. You must provide us with all reasonable information and assistance that we need to identify, recreate, diagnose and correct defects.

19. Maintenance upgrades are patches, upgrades and enhancements to your version of the software, as and when we release them. It does not necessarily include new versions of the software, as designated by us. (For instance, if you are a licensed user of version 5.4 and we release an upgrade to version 5.5, you are entitled to that upgrade at no extra charge. But if we release a new version 6.0, we may charge extra licence fees for it. We will give you advance notice of our intentions in that regard.) All maintenance upgrades form part of the software and are subject to your licence.

20. Support will be undertaken exclusively at our premises unless we agree to attend your site and you pay our prevailing fees and out of pocket expenses for doing so. Subject to that, we will not unreasonably decline to provide support at your site if we have suitable staff available. You acknowledge that our help desk is located in Melbourne, Australia.

21. Where we, or anyone on our behalf, attend your site in connection with this agreement, you must provide them with safe and convenient access and conditions.

22. You may also lodge enhancement requests with us. We promise to consider them in good faith, but any decision as to whether, when or how to include them in the software is ours alone. Enhancement requests and any materials associated with them become our sole property on lodgement.

23. We may cease to offer maintenance agreements for your version the software on at least 6 months notice to you, or without notice if the software is being run with an operating system that has ceased to be supported by its supplier. In either case, we shall continue support on a 'reasonable endeavours' basis until the end of the term. At the end of the term you may continue using your current version, which will be unsupported by us, or upgrade to the then current version, which we will support.

24. If you breach these terms, we may terminate your maintenance agreement by notice in writing (and email counts as writing for this purpose).

25. When your maintenance agreement ends, our rights arising from any prior breach of these terms continues.

26. We can assign our interest in these terms on notice to you.

27. As far as the law permits, except for those set out in black and white in these terms, we give no warranty or undertaking, and make no representations or promises regarding software maintenance, and all implied warranties, undertakings, representations, terms, conditions and promises are excluded.

28. We are not responsible for any statement or representation concerning software maintenance made by any other person, and you promise that you have not relied on any such statements or representations.

29. We are not responsible for the consequences of any user modifications, and we are not obliged to support them.

30. We are not responsible for the consequences of anything that is beyond our reasonable control.

31. We may sub-contract any of our responsibilities under this agreement, but we remain responsible for them.

32. You are solely responsible for backing up all your data so that no hardware or software error, defect or malfunction, nor any other event, will cause you data loss.

33. You acknowledge that we have no control how and for what purpose you use the software. In no event will we be liable for any direct, indirect, consequential or incidental loss or damage of any kind however caused by use or misuse of the software.

34. In spite of anything above, where law implies in these terms any condition or warranty that cannot be excluded, then it is included, but our liability for breach of such a condition or warranty is limited, at our option, to one or more of the following:

    34.1. if the breach relates to goods – their replacement or resupply of the same or equivalent goods, or their repair, or payment to you of the cost of replacing the goods with the same or equivalent ones; and

    34.2. if the breach relates to services – resupplying them, or payment of the cost of having them supplied again.

35. Subject to the above provisions, our liability to you under or in connection with the maintenance or support of the software, whether in contract, tort or otherwise, is limited to the fee you have paid for your maintenance agreement in respect of the current year and you otherwise release us from all claims, demands, liability or responsibility in respect of the maintenance or support of the software.

36. These terms are subject to the laws of Victoria, Australia, and the parties submit to the exclusive jurisdiction of the courts of that state in the event of any dispute.

37. We can give any notice to you by email or any way recognised by law, to your last known address. We can give notice about a matter that affects our licensees generally, or substantial numbers of them, by publication on our web site.

38. These terms are to operate to the full extent allowed by law. To the extent that any part is unlawful, it is taken to be read down (to the point of exclusion if necessary) as far as is required to operate lawfully.

39. Any change or amendment to any of the clauses in this Agreement, as agreed between Hardcat and the Licensee, will be noted in the 'Special Conditions' section of the Schedule. The change or amendment will over ride that particular part of a clause, complete clause or clauses of this Agreement only to the extent as noted in the Schedule.

40. On commencement of your maintenance agreement, your Hardcat Software Licence Agreement (if prior to Version 3.0.0) is replaced by Version 3.0.0.