

TERMS OF USE FOR SERVICES – CLICK THROUGH

BERS Pro v5 (3.22 & 3.23) End User Licence Agreement – June 2024

1. Before proceeding, the End User will need to carefully read this page.
2. By clicking the “accept” button to download the software, the End User agrees they identify as the End User of the Services and will be bound by the Terms of Use set out below.
3. The Terms of Use constitute a legally binding contract between the user of the Services and **ENERGY INSPECTION PTY LTD ACN 605 277 343**.
4. If the End User does not agree to the Terms of Use, do not proceed. Click on the reject button and exit now.
5. In accepting the Terms of Use and by clicking the “accept” button, the End User warrants to the Licensor that:
 - (a) The Terms of Use have been read in their entirety and agree to them (on behalf of the user of the Services if not entering into them on their own behalf);
 - (b) Authorised to bind the End User of the Services to these Terms of Use (if not entering into them on their own behalf);
 - (c) the End User intends to be bound by these Terms of Use and consent to the electronic communication generated on clicking the “accept” button to stand as their signature upon these Terms of Use; and
 - (d) the End User information provided to the Licensor through this website is accurate and not false or misleading.

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TERMS OF USE FOR SERVICES

1. DEFINITIONS AND INTERPRETATION

1.1 In these Terms of Use, unless the context otherwise requires:

- (a) **“Affiliates”** in relation to a Party means all entities (whether a corporation, association, partnership, trust, joint venture, limited liability company, proprietorship, unincorporated association, individual or other entity incorporated or unincorporated) that now or in the future:
 - (i) directly or indirectly own or control that Party; or
 - (ii) directly or indirectly are controlled by, or are under common control with that Party; and
 - (iii) predecessors, agents, employees, officers, directors, and each of their respective successors and assigns,

FOR PURPOSES OF THIS definition, “control” means the possession, directly or indirectly, of the power to direct, cause or significantly influence the direction of management or policies of an entity whether through the ownership of voting securities, by contract or otherwise;

- (b) **“Application”** means the application submitted by the End User through the Website in accepting these Terms of Use for the Services;
- (c) **“AAO - Assessor Accrediting Organisation”** with the responsibility for accrediting and supporting NatHERS assessors to provide reliable and consistent home energy ratings.
- (d) **“BERS Pro”** means the client software application supplied by the Licensor for installation on one or more personal computers (depending on the licence type) and for use in connection with the Services and includes Updates and New Versions to such application;
- (e) **“Bureau Service”** means a service to third parties enabling access to, or rights of use of, the Services (whether directly or indirectly);
- (f) **“Certificate Coupon”** means a coupon issued under clause 4;
- (g) **“Classroom Licence”** means a Licence where the End User stipulates in Application the sole exploitation of the Services will be limited to the uses set out in clause 2.7(b);
- (h) **“Confidential Information”** means any information of a confidential nature belonging to or in the possession of a Party which relates to financial, technical, business or other commercially valuable information in whatever form including the Software, Documentation, these Terms of Use, trade secrets, business and marketing policies and strategies, but shall not include:
 - (i) information which is already in the public domain or which comes into the public domain other than as a consequence of an unauthorised disclosure pursuant to these Terms of Use,
 - (ii) information which is or becomes available to the recipient Party from a third party lawfully in possession of same and who has the lawful power to disclose such information to the recipient Party, or
 - (iii) information which is rightfully known by the recipient Party (as shown by its written record) prior to the date of disclosure hereunder or otherwise independently developed by an employee of the recipient Party who has no knowledge of the disclosure to it hereunder;

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- (i) **“Commencement Date”** means the date the Licensor makes the Services available to the End User after acceptance of these Terms of Use;
- (j) **“Copyright Act”** means the Copyright Act 1968 (Commonwealth) and all amendments, and regulations thereto;
- (k) **“CSIRO”** means Commonwealth Scientific and Industrial Research Organisation
- (l) **“Developed Intellectual Property”** means all Intellectual Property Rights created by or on behalf of the Licensor (including by its employees, agents, contractors Affiliates and licensors) in performing its obligations under these Terms of Use and otherwise in the course or for the purpose of supplying the Services to the End User and includes developments, enhancements, extensions to and adaptations of the End User Data;
- (m) **“Documentation”** means any material accompanying the Software or otherwise provided to the End User by the Licensor in the course of supplying the Services and includes video presentations, webinars and training material in any format;
- (n) **“Education Licence”** means a Licence where the End User stipulates in Application that the sole exploitation of the Services will be limited to the uses set out in clause 2.7(a);
- (o) **“Encumbrance”** means an interest or power whether legal or equitable and:
 - (i) reserved created or otherwise arising in or over any property and includes a Security Interest, or
 - (ii) any agreement to grant confer or create and interest referred to in (i),and **“Encumber”** shall have a corresponding meaning;
- (p) **“End User / User”** means the person who has been issued with a licence and agreed to be bound by the Terms of Use within the agreement as user of the Services.
- (q) **“Fees”** means the licence fees set out in the Application and in respect of any renewal, as published by the Licensor from time to time;
- (r) **“Force Majeure”** means any event beyond the reasonable control of the Licensor which prevents the Licensor from performing one or more of its obligations and includes but is not limited to:
 - (i) acts of God, natural disasters, fire, flood, lightning strikes, earthquakes, storms, explosions,
 - (ii) acts of war, terrorism, riot, civil disturbance, third Party criminal activity and sabotage,
 - (iii) industrial action including pickets, work to rule, work bans and strikes; and
 - (iv) any action by the NatHERS Administrator to suspend or disaccredit the BERS Pro software.
- (s) **“GST”** has the meaning given in section 195-1 of the GST Act;
- (t) **“GST Act”** means the A New Tax System (Goods and Services Tax) Act 1999 (Cth) and any regulations made thereunder;
- (u) **“Individual Licence”** means a Licence other than an Educational or Classroom Licence;
- (v) **“IPR - Intellectual Property Rights”** means statutory and other proprietary rights in respect of trademarks, patents, circuit layouts, copyrights, confidential information and all other intellectual property rights as defined in Article 2 of the Convention establishing the World Intellectual Property Organisation of July 1967, as amended and **“Intellectual Property”** shall have a concomitant meaning;

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- (w) **“Losses”** includes claims, losses, liabilities, damages, costs, and expenses of any kind, including those which are prospective or contingent and those the amount of which is not ascertained or ascertainable;
- (x) **“Licence”** means the licence granted to in accordance with clause 2;
- (y) **“Licensor”** means **Energy Inspection Pty Ltd ACN 605 277 343** of Level 8, 15 Castlereagh Street, Sydney NSW 2000 Australia;
- (z) **“Minimum System Requirements”** means the minimum or other stated requirements, if any, for computer hardware and software required to access the Services and published by the Licensor from time to time;
- (aa) **“NatHERS”** means Nationwide Housing Energy Rating Scheme which sets national standards for software used to rate the thermal performance capabilities of Australian homes;
- (bb) **“NatHERS Administrator”** administers the NatHERS on behalf of all Australian states and territories. The Administrator aims to support efforts of Australian Governments to reduce the energy and greenhouse gas impact of residential buildings through Scheme Management, Maintaining the benchmark software tool, Software Accreditation and Assessor Accreditation.
- (cc) **“New Version(s)”** means a new version of the Software (together with appropriate Documentation) that incorporate(s) a significant change to the operating platform, additional or new capability, capacity, functionality or interoperability and which Licensor may offer from time to time to replace a previous version (although New Versions do not include Updates);
- (dd) **“Party”** means either party to these Terms of Use;
- (ee) **“Portal”** means the website located at [www. https://www.hstar.com.au/](http://www.https://www.hstar.com.au/) or such other website as may be made available by or through the Licensor for the generation and supply of Universal Certificates from time to time;
- (ff) **“Project File”** means a data file generated by BERS Pro for the purpose of generating of a Universal Certificate for a residential home defined by reference to a discrete property address;
- (gg) **“Purpose”** means the purpose of the generation of a Universal Certificate using the Portal, and in the case of an Educational Licence or Classroom Licence has the extended meaning set out in clause 2.7;
- (hh)
- (ii) **“Universal Certificates”** means a NatHERS compliant universal certificate;
“Software” means software programs distributed, published or otherwise made available by the Licensor in connection with the Services and includes BERS Pro, Updates and New Versions but does not include Source Code;
- (jj) **“Source Code”** means, in relation to software, the complete high level language computer programs in human readable alphanumeric characters, which when compiled, generate the object and executable program that constitutes a usable software product and any relevant documentation;
- (kk) **“Services”** means the services delivered via the Website and the Portal and includes the Software, the Documentation, Universal Certificates supplied through the Portal and as may be amended or substituted by the Licensor from time to time;
- (ll)
- (mm) **“Term”** has the meaning given in clause 5;
“Third Party Intellectual Property Claim” means an actual or threatened claim that the End User use of the Services infringes the Intellectual Property Rights (**IPR**) of a third person;

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- (nn) **“Data”** means information that the “End User” supplied so that the Licensor can supply the Services, and includes (but is not limited to) information contained in Project Files, information supplied using the Website or Portal and information supplied before the Commencement Date whether under the same similar or different terms;
- (oo) **“Update”** includes fixes patches and changed functionality as deemed necessary by the Licensor in its absolute discretion (however Updates do not include New Versions);
- (pp) **“User Account”** means the End User Account made available by the Licensor through the Website to access the required Services;
- (qq) **“User Account Credentials”** means the credentials issued by the Licensor to the End User to access the End Users Account (including any credential used in combination with any credential held by the End User, such as a token);
- (rr) **“Valid Tax Invoice”** means a tax invoice that complies with the GST Act; and
- (ss) **“Website”** means the website(s) maintained by the Licensor for the purpose of accessing and managing the End Users User Account, purchasing Certificate Coupons and delivery of BERS Pro by download (amongst other things).

1.2 In these Terms of Use headings are inserted for convenience only and shall not affect interpretation. Unless expressly provided otherwise:

- (a) words importing the singular include the plural and vice versa;
- (b) a word importing a gender includes the other genders;
- (c) other grammatical forms of defined words or expressions have corresponding meanings;
- (d) the meaning of general words shall not be limited by specific examples;
- (e) a reference to a person, corporation, trust, partnership, unincorporated body or other entity includes any of them;
- (f) a reference to a document or agreement, including these Terms of Use, includes a reference to that document or agreement as novated, altered or replaced from time to time;
- (g) a reference to a Party or a person includes the Party’s or the person’s executors, legal personal representatives, successors, permitted transferees and assigns;
- (h) a reference to a month means a calendar month and a reference to a quarter shall mean three consecutive months;
- (i) a reference to any legislation or statutory instrument or regulation shall be construed in accordance with the Acts Interpretation Act 1901 (Cth) or the equivalent State legislation as applicable;
- (j) a reference to “\$” or dollars means Australian dollars and a reference to payment means payment by cash in Australian dollars; and
- (k) a reference to conduct includes an omission, statement and undertaking, whether or not in writing.

1.3 If the doing of any act, matter or thing under these Terms of Use is dependent on the consent or approval of a Party or is within the discretion of a Party, the consent or approval may be given or the discretion may be exercised conditionally or unconditionally or withheld by the Party in its absolute discretion, unless these Terms of Use expressly provides otherwise.

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2. LICENCING TO END USERS

2.1 Any licence of the Software to the End User must be granted under a written licence agreement which includes the following provisions:

- (a) the licence is granted on a non-exclusive, non-transferable basis and without any further right to sell, rent, distribute or sub-licence the Software;
- (b) the licence terminates automatically if the Licensee's licence expires;
- (c) the End User may only use the Software for the Application;
- (d) the End User must not circumvent (or attempt to circumvent) use of the Web Portal to generate certificates for the purpose of demonstrating compliance with the performance requirements set in the National Construction Code (as it may be amended or replaced from time to time);
- (e) the End User is prohibited from
 - (i) copying the software (except to make back up copies of the Software for law);
 - (ii) adapting, extending, decompiling, modifying or improving the Software;
 - (iii) reverse engineering, decompiling, disassembling or otherwise to discover the source code of the Software;
 - (iv) using the Software to make derivatives or functionally equivalent Software;
 - (v) making the Software available to third parties for such unauthorised purposes; or
 - (vi) hosting the Chenath Engine on the internet or any other public communications network.
 - (vii) Attempt to interfere with, obstruct, defeat or block the functionality described in clause 2.9.

2.2 The End User consents (and must obtain further consent of any other individual or entity whose personal information or confidential information is input into the Software) to the Licensee maintain, and disclosing to CSIRO (or NatHERS), the data for the purposes of enabling:

- (a) The Licensee to calculate payment to CSIRO under this agreement;
- (b) CSIRO to use such data to audit the Licensee's compliance with its obligation under this Agreement, including without limitation to payment obligations;
- (c) CSIRO to use, reproduce, modify, adapt and communicate the Data for the agreed purpose;
- (d) CSIRO to provide details of the Certificate (including Scratch File, Project File and Summary Diagnostic Report) to:
 - (i) Building inspectors for the purpose of accuracy and currency of the Certificate provided to demonstrate compliance.
 - (ii) Accrediting organisations for thermal assessors to audit energy ratings completed by their member where necessary.
 - (iii) The National Administrator, and any person, organisation or government agency authorised by the National Administrator to enable the Nation Administrator to perform audit-related activities, statistical analysis or research, policy development or to reevaluate the NatHERS Scheme.

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- (e) The Licensee must, within 7 days of request by CSIRO, provide CSIRO with a copy of the End User licence terms where necessary for the purposes of Clause 2.1(a)
 - (f) The parties agree that the provisions of Clause 2.1(a) which relate to the Web Portal do not need to be included in any licence of the Software to the End Users, where those End Users will not be granted access to the Web Portal.
- 2.3 In addition to the rights set out in clause 2.1 the End User may reproduce a Universal Certificate for the purpose for which the End User obtained it.
- 2.4 Without limitation to clause 2.1, BERS Pro shall only be used to generate Project Files for the purpose of generating Universal Certificates. Use of BERS Pro for any other purpose shall constitute a breach of these Terms of Use.
- 2.5 Unless otherwise expressly permitted under these Terms of Use, no other use of the Services is permitted.
- 2.6 The number of instances of BERS Pro that may be installed is:
- (a) in the case of an Individual Licence, on up to two personal computers;
 - (b) in the case of an Education Licence on up to two personal computers;
 - (c) in the case of a Classroom Licence, on up to 20 personal computers.
- 2.7 Additional restrictions:
- (a) if the End User holds an Education Licence the Services must only be used for the purpose of education, research and learning in the field of residential building thermal performance assessment and rating and not for a commercial purpose; and
 - (b) if the End User holds a Classroom Licence the Services must only be used for accreditation or training of thermal assessors in respect of residential building thermal performance assessment and rating and not for a commercial purpose.
- 2.8 The End User acknowledge that BERS Pro contains technology which will periodically send usage reports, including in relation to the Portal, to the Licensor over the internet without further notice to the End User.
- 2.9 If the Licensor reasonably believes the End User installation or use of the Services (including BERS Pro) breaches these Terms of Use, then without prejudice to any other rights it may have, including the right to terminate these Terms of Use, the Licensor reserves the right to remotely disable any BERS Pro software licensed to the End User and / or suspend the End User access to the Services.
- 2.10 The End User acknowledge that a breach of these Terms of Use shall, in addition to any other remedy, entitle the Licensor to any available equitable remedy against the End User, including injunctive relief.

3. UNIVERSAL CERTIFICATE GENERATION

- 3.1 Subject to clause 4, the End User may upload a Project File to the Portal to generate a Universal Certificate.
- 3.2 Before generating a Universal Certificate using the Portal the End User must satisfy themselves that the indicative thermal performance assessment indicated by BERS Pro is consistent with results the End User expects.
- 3.3 A Project File may be amended and uploaded to the Portal more than once within 12 months of first being uploaded. In that case a further Universal Certificate may be generated without the redemption of an additional Coupon Certificate.

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- 3.4 Upon generation a Universal Certificate may be downloaded through the End User Account and the Portal.
- 3.5 Universal Certificates are generated and supplied on an “as is” basis based upon the Project File the End User supply. Users are not entitled to a refund, credit or any other allowance in respect of the generation of a Universal Certificate.

4. CERTIFICATE COUPONS

- 4.1 The End User may purchase from the Licensor one or more Certificate Coupons to redeem against the creation of Universal Certificates.
- 4.2 A Certificate Coupon that the End User purchase shall be credited to the End User Account.
- 4.3 Certificate Coupons may be redeemed against a Universal Certificate through the Portal at the time of generating a Universal Certificate.
- 4.4 The fees payable to the Licensor for purchasing a Certificate Coupon may be as published by the Licensor or CSIRO.
- 4.5 The maximum number of Certificate Coupons that may be credited to an End User Account at any one time is 10,000.
- 4.6 A Certificate Coupon shall remain valid for redemption for a period of 3 years and shall thereafter expire.

5. TERM

- 5.1 The Term shall commence on the Commencement Date and shall continue for the period in respect of which the End User have elected to pay the Fees; for example monthly, quarterly or annually.
- 5.2 The End User may subscribe for a further term by payment of a further Fee before the expiration of the current term.

6. MINIMUM SYSTEM REQUIREMENTS

- 6.1 In order to access and use the Services at the End User’s cost:
 - (a) shall be responsible to supply and maintain computer hardware and software capable of accessing the Website and the Portal over the internet.
 - (b) shall be responsible for obtaining and maintaining at the End Users own cost suitable connection to the internet. The Licensor shall not be liable for any delay, disruption, inability or failure by users to establish or maintain a connection to the Services (or any part of them) over the internet, regardless of cause.
- 6.2 The Minimum System Requirements may be amended by the Licensor from time to time. The Licensor shall not be liable to the End User in respect of any change to the Minimum System Requirements.

7. UPDATES

- 7.1 The Services are provided to the End User on an “as is” basis.
- 7.2 From time to time the Licensor may release Updates without notice to the End User. Updates may change, extend, limit, increase or reduce certain functionality in respect of the Services. The End User shall have no claim against the Licensor in respect of Updates.
- 7.3 New Versions may be offered to the Licensee if they are released by the Licensor.

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- 7.4 Where the Licensee is in compliance with these Terms of Use and the Licensor releases a New Version, the Licensee may elect to upgrade to the New Version.
- 7.5 If the Licensee elects to proceed with the New Version, these terms of these Terms of Use will continue to apply.
- 7.6 If the Licensee declines to proceed with the New Version, the Licensor's obligation to provide Updates in relation to the old version of the Services will cease 12 months from the date on which the New Version was first offered to the Licensee or the expiry of the Term, whichever occurs first.
- 7.7 The End User will be solely responsible for any costs associated with changes or upgrades to computer equipment, additional training and new or upgraded third party software made necessary or desirable as a result of an Update or New Version.

8. INTELLECTUAL PROPERTY RIGHTS

- 8.1 As between the Parties, and subject only to the licences set out in clauses 2.1, 2.2 and 9.31:
 - (a) all Intellectual Property Rights in the Services (including without limitation in the Software, Documentation and Universal Certificates) and in the Developed Intellectual Property shall be and remain the absolute and unencumbered property of the Licensor and its licensors;
 - (b) all Intellectual Property Rights in End User Data shall be and remain the absolute and unencumbered property of the End User and End User licensors. Developed Intellectual Property (which definition includes development, enhancements, extensions to and adaptations of End User Data are owned by Inspection Energy.
- 8.2 The End User agree to use the Services solely for the Purpose and will not do anything which might damage the Intellectual Property Rights of the Licensor or its licensors.
- 8.3 Other than the rights expressly granted under clauses 2.1 & 2.2, no right title or interest is granted in or to the Intellectual Property of the Licensor or its licensors.

9. USE OF DATA

- 9.1 The Licensee:
 - (a) Acknowledges that CSIRO will receive Data automatically via the Web Portal; and
 - (b) Agrees to provide any other data to CSIRO, on the first day of each month during the Term (or such other timeframe agreed to in writing between the Parties), and otherwise in a format agreed to between the parties.
 - (c) Grants CSIRO an irrevocable, non-exclusive, non-transferable, worldwide, perpetual, royalty licence use, reproduce, modify, adapt, communicate the Data for the Agreed Purpose and to sublicense third parties (including the fee) to do those things.
- 9.2 The End User shall be responsible for:
 - (a) the costs of supplying the End User Data to The Licensor; and
 - (b) supplying Project Files containing the information and in a format both specified by the Licensor.

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9.3 The End User grants to the Licensor a worldwide irrevocable perpetual royalty-free non-exclusive sub-licensable licence to retain, use, host, reproduce, adapt, analyse, extend, enhance, modify, create derivative works, incorporate in other works including compilations, publish, disclose and communicate the End User Data for the purposes of The Licensor:

- (a) supplying the Services to the End User;
- (b) supplying the Services to any person to whom the End User provides User Account Credentials;
- (c) analysing the End User Data for the Licensor’s internal business purposes;
- (d) sub-contracting any or all of the Services to another person;
- (e) collaboration with third parties for the purpose of the Licensor and or such third parties offering to supply or supplying the End User with additional or enhances services (including but not limited to enhancements to and new Services);
- (f) supplying the Services to other subscribers (including but not limited to providing analyses of or including the End User Data);
- (g) publishing or supplying the End User Data including analyses of the End User Data to government or governmental agencies for educational research analysis or other purposes connected with the proper function of such governmental agency, and whether for reward or otherwise;
- (h) publishing or supplying analyses of or including the End User Data whether for reward otherwise; and
- (i) promoting the Services or any other business that it conducts from time to time.
- (j) The NatHERS Administrator can use, reproduce, analyse and disclose the data supplied by the user for purposes connected with the proper function of the NA. This licence is irrevocable and perpetual and survives expiry or termination of the Terms of Use. The user warrants that the grant of the licence and the use of the user’s data will not infringe the IPR of any person. To the extent that the user’s data contains confidential information, then this may be disclosed for the purposes of clause 9.2(g) licence (including the NA) and in turn by the NA to regulators etc.
- (k) The End User shall be solely responsible for ensuring that the End Users Data is regularly backed up and that its integrity is preserved and the Licensor shall have no liability whatsoever to users in respect of any loss of or damage to user’ Data howsoever caused.
- (l) End Users agree to fully participate in any investigation or audit conducted by the NatHERS Administrator.
- (m) AAO’s & CSIRO will maintain security protocols when accessing, downloading and storing the End User Data, specifically the use of plans by the NatHERS Administrator in the licence grant, and in the warranty regarding use of IPR and ensure all employees, subcontractors have read, understood and accept this Agreement.

10. SECURITY

10.1 The End User must ensure that the Services and Documentation are protected at all times from misuse, damage, destruction or any form of unauthorised use.

10.2 The End User must:

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- (a) not knowingly introduce any virus or malicious code into the Services whether via the Website, Portal or otherwise; and
 - (b) must take reasonable precautions to ensure that any computer hardware and software that the End User use to access the Services is protected against the execution and transmission of any virus or other malicious code.
- 10.3 The End User is responsible for use of the Services by anyone using the End User's Account Credentials, even if used by an unauthorized person. The End User must notify the Licensor immediately if the user suspects or know that:
- (a) the End User Account Credentials have been compromised or become known to an unauthorised person;
 - (b) or the Services have been, are being or may be used by an unauthorised person.

11. TRAINING

- 11.1 The Licensor will at its own cost make suitable Documentation available to the End User to enable users to fully enjoy the Services.
- 11.2 The End User will ensure that all persons permitted to access the Services using The End User Account Credentials are appropriately trained in use of the Services.

12. PAYMENT TERMS

- 12.1 The End User must pay the Fees and purchase Certificate Coupons both in advance to use the Services.
- 12.2 Payment shall be made using the payment gateway made available by the Licensor from the Website.
- 12.3 The Licensor may, without prejudice to any of its other rights, suspend the End User's access to the Services if found in default of obligation to specifically pay the Fees.

13. THIRD PARTY CLAIMS

- 13.1 The End User must promptly notify the Licensor in writing of any Third Party Intellectual Property Claim received by the End User or of which have knowledge.
- 13.2 If the use of the Services or any part of them is found by a court of competent jurisdiction to infringe the intellectual property rights of a third person, the Licensor may at its election:
- (a) modify such Intellectual Property so that it is non-infringing;
 - (b) procure a licence to use such Intellectual Property; or
 - (c) modify terminate limit or restrict the license granted under clause 2.1 or 2.2.
- and in each case the End User shall not be entitled to any compensation or damages howsoever described.

14. WARRANTIES

The End User warrant to The Licensor, and continue throughout the Term to warrant to The Licensor, that:

- (a) Users are duly authorised to grant the Intellectual Property licences granted to the Licensor under these Terms of Use;

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- (b) use of the End User Data by the Licensor will not infringe the Intellectual Property Rights of any person.

15. EXCLUSIONS

- 15.1 Other than as expressly provided for in these Terms of Use, the Licensor has not made and (to the full extent permitted by the laws of the Commonwealth of Australia or of any state or territory of Australia having jurisdiction) excludes all warranties, terms, conditions or undertakings, whether express or implied (by legislation or otherwise) including any implied warranty as to fitness for purpose or merchantability in relation to the Services.
- 15.2 Without limitation to clause 15.1, the End User acknowledges that the Licensor gives no warranty express or implied that the Services shall:
 - (a) be free from error;
 - (b) be free from disruption; or
 - (c) be available at all times.
- 15.3 The Services and the results users obtain from them shall be entirely subject to, and the limitations of the End Users Data. Users are solely responsible for the integrity, accuracy and completeness of generated Data at all times.
- 15.4 The thermal performance analysis generated using BERS Pro and implicit or explicit in a Universal Certificate represents a model of energy use based on defined parameters and the actual thermal performance may differ. Users must not make any representations as to energy consumption or savings in connection with any Universal Certificate or users use of the Services.

16. LIMITATION OF LIABILITY

- 16.1 The End User use the Services at their own risk.
- 16.2 In no case shall the Licensor be liable to the End User or any person claiming through for any Losses in connection with:
 - (a) loss of profits,
 - (b) loss of data (including but not limited to users Data), or
 - (c) special, indirect, or consequential losses.
- 16.3 In no case shall the Licensor's liability to the End User (or any person claiming through the End User) for Losses in respect of the supply of the Services exceed, in respect of all claims in the aggregate, the sum of Fees received by the Licensor as at the date any cause of action giving rise to such liability first arose.
- 16.4 Where any legislation implies in these Terms of Use any condition or warranty and that legislation avoids or prohibits provisions in a contract excluding or modifying the application or exercise of, or any liability under, such condition or warranty, the condition or warranty will be deemed to be included in these Terms of Use. However, the liability of the Licensor for any breach of such condition or warranty will be limited, at The Licensor' option, to one or more of the following:
 - (a) if the breach relates to goods:
 - (i) the replacement of the goods with equivalent goods or the supply of equivalent goods;
 - (ii) the repair of such goods;

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- (iii) the payment of the cost of replacing the goods or of acquiring equivalent goods; or
 - (iv) the payment of the cost of having the goods repaired; and
 - (b) if the breach relates to services:
 - (i) the supplying of the services again; or
 - (ii) the payment of the cost of having the services supplied again.
- 16.5 The Parties agree that any legislation which has the effect of apportioning liability, is hereby excluded and negated insofar as it would apportion liability to the Licensor which liability would not have been apportioned but for such laws.

17. INDEMNITIES

- 17.1 The End User will at all times indemnify and keep indemnified the Licensor and its Affiliates and licensors from and against any Losses incurred by any of those indemnified and arising out of or in connection with:-
- (a) any breach of these Terms of Use by the End User;
 - (b) the End User use of the Services.

18. CONFIDENTIALITY

- 18.1 The Parties may make public announcements in relation to the supply of the Services under these Terms of Service with the consent of the other Party, such consent not to be unreasonably withheld.
- 18.2 In relation to the Confidential Information of a Party, each recipient Party will:
- (a) use the Confidential Information only for the purpose for which it was disclosed;
 - (b) take or cause to be taken reasonable precautions to maintain the confidentiality of the Confidential Information and to prevent disclosure except to the extent:
 - (i) such information becomes public other than as a result of a breach of this clause;
 - (ii) disclosure is permitted with the written consent of the owner of the Confidential Information;
 - (iii) disclosure is made to its officers and employees to the extent that each has a need to know;
 - (iv) disclosure is required under the order of the Supreme Court of an Australian State or Territory or the Federal Court of Australia;
 - (v) disclosure is required by the law in force in the State Victoria, Australia; and
 - (vi) disclosure is made to its legal and User Accounting advisers who are under an obligation to keep such Confidential Information confidential.
- 18.3 Nothing in this clause 18 shall prevent the Licensor from using and disclosing the End Users Confidential Information for any purposes set out in clause 9.3.
- 18.4 The rights and obligations set out in these Terms of Use with respect to Confidential Information will survive termination of these Terms of Use.

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19. DISPUTE RESOLUTION

- 19.1 A Party will not start arbitration or court proceedings (except proceedings seeking interlocutory relief) in respect of a dispute arising out of these Terms of Use ('dispute') unless it has complied with this clause.
- 19.2 A Party claiming that a dispute has arisen must notify the other Party giving details of the dispute.
- 19.3 During the 10 days after a notice is given under clause 19.2 (or longer period agreed in writing by the Parties) ('Initial Period') each Party to the dispute ('Disputing Parties') will use its best efforts to resolve the dispute.
- 19.4 If the Disputing Parties are unable to resolve the dispute within the Initial Period, each of the Disputing Parties agrees that the dispute must be referred for mediation at the request of any of the Disputing Parties, to:
- (a) a mediator agreed on by the Disputing Parties; or
 - (b) if the Disputing Parties are unable to agree on a mediator within 10 days after the end of the Initial Period, a mediator nominated by the Mediation Appointing Agency.
- 19.5 The role of any mediator is to assist in negotiating a resolution of the dispute. A mediator may not make a decision that is binding on a Disputing Party unless that Disputing Parties has so agreed in writing.
- 19.6 Any information or documents disclosed by a Disputing Party to another Party under this clause:
- (a) must be kept confidential by such other Party; and
 - (b) may not be used by such other Party except to attempt to resolve the dispute.
- 19.7 Each Disputing Party must bear its own costs of complying with this clause and the Disputing Parties must bear equally the costs of any mediator engaged. The charges for the mediation may be fixed by the mediator.
- 19.8 It will be a term of the engagement of the mediator that the Parties release the mediator from any Court proceedings relating to these Terms of Use or the mediation.
- 19.9 If the dispute is not resolved within 20 days after the appointment of the mediator, the mediation will cease unless otherwise agreed, in writing, by the Disputing Parties.
- 19.10 Nothing in this clause will affect or limit a Party's rights to obtain injunctive relief.

20. TERMINATION

- 20.1 The Licensor may terminate these Terms of Use at any time without notice to the End User.
- 20.2 The End User may terminate these Terms of Use by giving 7 days written notice to the Licensor at any time and without cause.
- 20.3 In the case of termination under clause 20.1 or clause 20.2, the End User:
- (a) shall have no further access to or right to use the Services (provided however that they may retain a copy of any Universal Certificates than in possession for use consistent with the Purpose); and
 - (b) shall not be entitled to a refund of the Fees or in respect of any Certificate Coupon.
- 20.4 The Licensor may suspend its performance under these Terms of Use in the case of Force Majeure.
- 20.5 Termination of these Terms of Use will not affect the accrued rights of any Party.

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20.6 If Users default in payment of any moneys under these Terms of Use then interest at a rate being 3% higher than the cash target rate set by the Reserve Bank and computed upon the money overdue during the period of default will be paid on demand made by the non-defaulting Party without prejudice to any of its other rights under these Terms of Use and without being required to give notice of the demand.

21. GST

21.1 The amount or value of any payment or other consideration payable or to be provided under or in connection with these Terms of Use is the value for GST purposes of any taxable supply to which that payment or other consideration relates.

21.2 Unless expressly provided to the contrary in these Terms of Use, any payment or other consideration payable or to be provided under or in connection with these Terms of Use:

- (a) stated as a figure, is stated exclusive of GST; or
- (b) described (by formula or otherwise), is described and must be calculated without regard to GST.

21.3 If in connection with these Terms of Use a Party (the "First Party") makes a supply that is taxable for the purposes of GST to another Party (the "Second Party"), the First Party may, subject to and upon issuing a Valid Tax Invoice, in addition to any consideration provided or to be provided to the First Party by the Second Party in respect of such supply, recover from the Second Party a payment on User Account of GST, such payment to be calculated by multiplying the value of such taxable supply by the prevailing GST rate.

21.4 If an amount ("amount") payable by a Party ("the Paying Party") to the other Party ("the Other Party") comprises or would otherwise comprise a component of GST paid or payable by the Other Party, then to the extent that the Other Party is entitled to an input tax credit or refund of such GST:

- (a) the Other Party will in determining such amount first deduct a sum equal to such refund or credit where the refund or credit can be calculated at that time; and
- (b) in all other cases, pay or credit the value of such credit or refund to the Paying Party when it is able to be determined.

22. NOTICES

22.1 A notice required or permitted to be given by one Party to another under these Terms of Use will be in writing and will be treated as being duly given and received if it is:

- (a) delivered personally to that other Party;
- (b) transmitted by facsimile to that other Party; or
- (c) transmitted by email to that other Party.

22.2 A notice given to a Party will be duly given and received:

- (a) when delivered (in the case of it being delivered personally or left at that Party's address) provided that a notice delivered after 5.00 p.m. on any day or on a day which is not a day will be treated as having been duly given and received at 9.00 am on the next day;
- (b) on the day of transmission if given by facsimile or email (and provided that no intimation has been received by the sender that the notice has not been delivered, whether that intimation comes from that Party or from the operation of the facsimile or email transmission mechanism or otherwise), provided that a notice transmitted after 5.00 p.m. on any day or on a day which is not a day will be treated as having been duly given and received at 9.00 am on the next day.

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For the purposes of this clause, the End User address is that given by within the Application.

This clause 22 is subject to clause 30 (amendment).

23. FURTHER ASSURANCES

Each Party will sign, execute, deliver and do and will procure that each of its officers, employees and agents signs, executes, delivers and does, all deeds, documents, instruments and acts reasonably required of it or them by notice from another Party to effectively carry out and give full effect to these Terms of Use and the rights and obligations of the Parties under them.

24. NO MERGER

The rights and obligations of the Parties in respect of agreements, indemnities, covenants and warranties contained in these Terms of Use will remain in full force and effect, be continuing agreements, indemnities, covenants and warranties and not be merged or extinguished by or upon termination of, or completion of any obligations under, these Terms of Use.

25. ENTIRE AGREEMENT

These Terms of Use constitutes the entire agreement between the Parties with respect to their subject matter and supersedes all previous communications, representations, inducements, undertakings, agreements or arrangements between the Parties or their respective officers, employees or agents.

26. WAIVER

26.1 The failure, delay, relaxation or indulgence on the part of a Party in exercising any power, right or remedy conferred upon that Party by these Terms of Use will not operate as a waiver of that power, right or remedy, nor will the exercise or any single or partial exercise of any power, right or remedy preclude any other or further exercise of such power, right or remedy or the exercise of any other power, right or remedy under these Terms of Use.

26.2 Any waiver of a breach of these Terms of Use will be in writing signed by the Party granting the waiver and will be effective only to the extent expressly set out in such waiver.

27. APPLICATION OF LAW

27.1 These Terms of Use will be deemed to have been made in Victoria, Australia and the construction, validity and performance of these Terms of Use will be governed in all respects by the law for the time being in force in that State.

27.2 The Parties hereby submit themselves to the non-exclusive jurisdiction of the Courts of Victoria (and any court hearing appeals from those Courts in respect of any dispute, proceeding or matter relating to these Terms of Use) and the Courts of the Commonwealth of Australia.

28. SURVIVAL

28.1 All representations and warranties in these Terms of Use will survive the execution and delivery of these Terms of Use and the completion of transactions contemplated by it.

28.2 The expiry or termination of these Terms of Use shall not affect:

- (a) accrued rights and obligations;

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- (b) the rights and obligations of the parties under clauses, **Error! Reference source not found.**, 8, 9.3 16, 17, 18, 19, 20.5, 20.6, 21, 27, 28, 29 & 30, or that are otherwise expressed to survive these Terms of Use.

29. ENCUMBRANCES

29.1 The End User must not:

- (a) Encumber the Intellectual Property of the Licensor, its Affiliates and licensors;
- (b) Encumber any collateral if the effect of that Encumbrance would be to Encumber any Intellectual Property of the Licensor, its Affiliates and licensors.

29.2 The Licensor may Encumber its rights or obligations under these Terms of Use, including the proceeds arising from any collateral the subject of these Terms of Use, without the End Users consent.

30. AMENDMENT

These Terms of Use may be amended from time to time by the Licensor giving Users notice in writing. Notice of such variation shall be effective when published on the website of the licensor.

31. ASSIGNMENT

31.1 the Licensor may assign or deal with its rights under these Terms of Use without the End Users consent.

31.2 the Licensor may subcontract the performance of its obligations under these Terms of Use without the End Users consent.

31.3 ensure all employees, subcontractors have read, understood and accept this Agreement