

Referrer Agreement

Background

- A. simPRO is the owner of the simPRO Software suite of products, delivering a range of software products and mobility solutions for the service industry (the “Products”).
- B. The Referrer wishes to promote, market and advertise the Products to potential simPRO customers (“Referrals”) through its website(s) and other marketing channels, in accordance with this Agreement.

Agreement

1. Definitions

- 1.1. “Agreement” means and incorporates:
 - (a) All schedules, attachments and annexures;
 - (b) The Guidelines;
 - (c) All documented variations to the Agreement which have been agreed in writing by the parties;
 - (d) The Terms of Service; and
 - (e) The Privacy Policy.
- 1.2. “Business Day” means any day other than a Saturday or a Sunday which is not a public holiday in the Referrer’s local area.
- 1.3. “Confidential Information” means:
 - (a) Know-how, trade secrets, technical processes, information relating to products, finances, contractual arrangements with customers or suppliers;
 - (b) Information relating to Referrals; and
 - (c) Other information which by its nature, or by the circumstances of its disclosure to the holder of the information, is or could reasonably be regarded as confidential.
- 1.4. “Effective Date” means the date the Referrer’s offer is accepted by simPRO pursuant to clause 2.
- 1.5. “Force Majeure” means an act, event or cause which is beyond the reasonable control of the relevant Party (but shall not mean include a lack of funds). Without limiting the meaning of this expression it shall include:
 - (a) An act of God, war, sabotage, riot, insurrection, civil commotion, national emergency (whether in fact or law), martial law, peril of the sea, accident of navigation, fire, lightning, flood, cyclone, earthquake, landslide, storm or other adverse weather conditions, explosion, power shortage, strike or other labour difficulty, epidemic,

quarantine, radiation, or radioactive contamination;

- (b) Action or inaction of a government or other competent authority, including expropriation, restraint, prohibition, intervention, requisition, requirement, direction, embargo by legislation, regulation, decree or other legally enforceable order;
 - (c) Breakdown of plant, machinery or equipment or shortages of labour, transportation, fuel, power or plant, machinery, equipment or material; and
 - (d) Improper performance by simPRO's suppliers or defects in objects, materials or software of third parties.
- 1.6. "Guidelines" means simPRO's Trademark Usage Guidelines as amended from time to time and published at <https://simprogroup.com/media/simPRO-Brand-Guidelines.pdf> or as otherwise provided to you by simPRO.
- 1.7. "Initial Term" is defined in clause 11.1.
- 1.8. "Intellectual Property" means the items specified in Schedule A including any copyright in all such material and further includes all replacement of and modifications to the Intellectual Property made from time to time by simPRO.
- 1.9. "Liability" means all liabilities (whether actual, contingent or prospective), losses, damages, costs and expenses of whatever description.
- 1.10. "Marketing Material" means the materials produced by the Referrer in order to promote the Products in accordance with this Agreement.
- 1.11. "Privacy Policy" means simPRO's Privacy Policy as amended from time to time and published at <http://simprogroup.com/nz/legal/privacy-policy/> or as otherwise provided to the Referrer by simPRO.
- 1.12. "Referral" means a potential simPRO customer that the Referrer will refer to simPRO.
- 1.13. "Qualified Referral" means the Referral has been accepted and agreement entered into between the referred customer and simPRO.
- 1.14. "Referral Programme Form" means the Partner Programme Form available at <http://simprogroup.com/nz/partners/> or as otherwise provided to the Referrer by simPRO.
- 1.15. "Referrer" means the referrer specified on the Referral Programme Form.
- 1.16. "Renewal Term" is defined in clause 11.2.
- 1.17. "Referral Fee" means the fee paid to the Reseller by simPRO in accordance with clause 10.
- 1.18. "simPRO" means simPRO Software New Zealand Ltd (Company Number 2440696) of 1/485A Rosebank Road, Avondale, Auckland 1026, New Zealand.
- 1.19. "Term" means the Initial Term and all Renewal Terms.

- 1.20. "Terms of Service" means simPRO's Terms of Service as amended from time to time and published at <http://simprogroup.com/nz/legal/terms-and-conditions/> or as otherwise provided to you by simPRO.

2. Offer and acceptance

- 2.1. Submission of the Referral Programme Form by the Referrer constitutes an offer to simPRO on the terms of this Agreement.
- 2.2. This Agreement is not binding between the parties until simPRO accepts the offer by email to the Referrer or otherwise in writing.
- 2.3. simPRO may accept or reject the Referrer's offer at its sole discretion.
- 2.4. A reference in this Agreement to execution, signing or a similar act is a reference to the acceptance of the Agreement by the relevant Party or Parties.

3. License of Intellectual Property

- 3.1. Subject to this Agreement and its terms, simPRO hereby grants to the Referrer a free, non-exclusive, non-transferable, non-sub licensable, royalty-free and revocable license ("License") for the Term to use the Intellectual Property for the sole purpose of marketing the Products to Referrals.
- 3.2. The License granted herein is subject to, without limitation, the Guidelines.
- 3.3. The Referrer must not modify the Intellectual Property in any way without the written consent of simPRO.
- 3.4. The Referrer must ensure that all Marketing Material in physical or electronic form which is produced by the Licensee:
- (a) Is of a high standard generally;
 - (b) Complies with reasonable and lawful directions, instructions, standards and specifications notified in writing by simPRO from time to time.
 - (c) Displays a copyright symbol;
 - (d) Displays a written statement to the effect that the Marketing Material and Intellectual Property contained therein forms part of the Intellectual Property of simPRO and is produced by the Referrer under license from simPRO.
- 3.5. In its use of the Intellectual Property, the Referrer must:
- (a) Promote and preserve the goodwill and reputation of simPRO's name at all times and co-operate with simPRO in this regard;
 - (b) Use the Intellectual Property in a professional and positive manner.

- (c) Not do or fail to do any act or thing that may bring simPRO's name into disrepute.
 - (d) On request by simPRO, the Referrer must promptly provide to simPRO all information requested by simPRO concerning the use, application or reproduction of the Intellectual Property and the creation, use and application of Marketing Material by the Referrer.
 - (e) Promptly notify simPRO of any unauthorised use of any Intellectual Property of which Referrer has actual knowledge.
- 3.6. simPRO may perform periodic reviews of any Marketing Materials presented by Referrer, and shall have the exclusive authority and discretion to order the removal and/or amendment of any Marketing Materials presented by Referrer.
- 3.7. simPRO reserves the right to modify, add to or remove from the Licence any piece of Intellectual Property on simPRO's written instruction. simPRO may do this at their sole discretion, and the Referrer must use their reasonable endeavours to change their current and future use of Intellectual Property under the Licence to comply with that instruction.

4. Improvement to the Intellectual Property and Creation of Marketing Materials

- 4.1. Any improvements or modifications to the Intellectual Property made or suggested by the Referrer, and all Marketing Material made or suggested by the Referrer, vests in simPRO upon creation.
- 4.2. The Referrer assigns to simPRO all existing and future rights in all creations, improvements or modifications to the Intellectual Property or Marketing Materials made or suggested by the Referrer without restriction, in perpetuity, and without claim to payment by way of royalty or otherwise.
- 4.3. The Referrer agrees to promptly do all things necessary to give effect to such assignment, and otherwise as reasonably required by simPRO to recognise its rights in the Intellectual Property, including causing the employee, agent, director or contractor responsible for the creation, improvement or modification to execute the necessary documents.
- 4.4. To the extent permitted by the *Copyright Act 1994* the Referrer shall cause its employee or agent or director who created the improvement or modification to waive their existing and further moral rights in the improvement or modification made during the Term.

5. Intellectual Property Warranties

Without limiting its other obligations under this Agreement, the Referrer warrants and undertakes to simPRO:

- 5.1. To use the Intellectual Property and Marketing Material only for marketing the Products to Referrals;
- 5.2. Not to use the Intellectual Property or Marketing Material in any manner which might prejudice or would be likely to prejudice simPRO's rights in and to the Intellectual Property or Marketing Material or which might expose simPRO to any liability or potential liability;

- 5.3. Not to use the Intellectual Property or Marketing Material in a manner which would represent that the Intellectual Property concerned is Intellectual Property belonging to the Referrer;
- 5.4. To provide simPRO with any information as to the Referrer's use of the Intellectual Property and Marketing Material which the Licensor may reasonably require;
- 5.5. That the Referrer will at all times:
 - (a) Do all things reasonably necessary to uphold the Intellectual Property Rights that simPRO enjoys in the Intellectual Property and Marketing Material;
 - (b) Refrain from committing any act that in any way might diminish those rights.

6. Intellectual Property Acknowledgements

The Referrer acknowledges to, and agrees with simPRO that:

- 6.1. The Intellectual Property and Marketing Material is and will remain the property of simPRO or its successors or assigns;
- 6.2. All warranties which would otherwise be implied into this agreement are excluded to the maximum extent permitted by law and the Referrer agrees that it has made and relies upon its own enquiries and investigations in relation to its decision to conclude this agreement with simPRO, and in relation to the Intellectual Property and the License;
- 6.3. In using the Intellectual Property and Marketing Material, the Referrer will not have, and may not represent in any way that it has, any title or right to the ownership or registration or use of the Intellectual Property or Marketing Material (except as expressly provided in this Agreement).

7. Intellectual Property Indemnity

- 7.1. The Referrer indemnifies simPRO against all Liabilities arising out of or in connection with:
 - (a) The breach of this Agreement by the Referrer or its officers or licensees; or
 - (b) Any negligence, wrongful act or omission of the Referrer or its officers or licensees.
- 7.2. The indemnity in the above clause will not apply to the extent that any of the Liabilities are attributable to:
 - (a) The negligence or wrongful act or omission of simPRO or its officers or licensees;
 - (b) Compliance by the Referrer with any direction, instruction or specifications given by simPRO from time to time regarding the use of the Intellectual Property or Marketing Material; or
 - (c) A failure by simPRO to promptly notify the Referrer of any actual or potential claim arising out of or in connection with the use of the Intellectual Property by the Referrer of which simPRO becomes aware.

8. Protection of Intellectual Property Rights

- 8.1. The Referrer must promptly notify simPRO of any allegation or Claim made or threatened to be made by a third person that the use of any Intellectual Property by the Referrer in accordance with this agreement:
 - (a) Infringes the rights of a third person; or
 - (b) Is misleading or deceptive.
- 8.2. If any threat or claim from a third party comes either to the Referrer's or simPRO's notice, then simPRO is entitled to:
 - (a) Notify the Referrer either verbally or in writing to record the nature of the threat or claim; and
 - (b) Require the Referrer to cease using the relevant Intellectual Property.
- 8.3. If any challenge is made to the Referrer's right to use the Intellectual Property or Marketing Material or to the validity or simPRO's ownership of any Intellectual Property or Marketing Material, simPRO has the right to take such steps as simPRO in its absolute discretion considers appropriate to respond to the challenge or to preserve the Referrer's right to use the Intellectual Property and Marketing Materials.
- 8.4. If any instance of the unauthorised use by a third party of any of the Intellectual Property or Marketing Materials comes to either simPRO's or the Referrer's notice, the parties agree that simPRO has the exclusive right, in its sole and absolute discretion, to determine the action that should be taken in respect of such unauthorised use.
- 8.5. The Referrer agrees to observe any reasonable direction that simPRO gives to it, in connection with the action that simPRO considers should be taken in respect of the unauthorised third party use.
- 8.6. simPRO agrees to meet any reasonable expenses the Referrer incurs in connection with co-operating with any reasonable direction simPRO gives to the Referrer, in this regard.
- 8.7. The Referrer acknowledges and agrees that, in the absence of written agreement otherwise between simPRO and the Referrer, simPRO will be entitled to all monetary amounts (including damages, and all profits arising from any account of profits directed to be taken), in respect of any infringement, or unauthorised third party use of the Intellectual Property or Marketing Materials.
- 8.8. The Referrer must:
 - (a) Provide such assistance to simPRO as simPRO may reasonably require from time to time in protecting and defending the Intellectual Property or Marketing Materials; and
 - (b) Provide to simPRO any evidence that simPRO may from time to time reasonably require for use:
 - (i) In any proceedings either in respect of any infringement or unauthorised use by others of any Intellectual Property or Marketing Materials;

- (ii) In any proceedings involving any challenge to or the defence of simPRO's rights in any of the Intellectual Property or Marketing Materials; or
- (iii) In connection with any application to register any Intellectual Property or Marketing Materials or in any opposition to the registration of any Intellectual Property or Marketing Materials.

8.9. The Referrer expressly acknowledges that it may not at any time, challenge or call into question in any way:

- (a) SimPRO's ownership of the Intellectual Property or Marketing Materials;
- (b) The validity of any application seeking the registration of, or the registration of, any of the Intellectual Property or Marketing Materials; or
- (c) SimPRO's rights (subject to the terms of this agreement) to grant the License, to grant other parties a license to use the Intellectual Property or Marketing Materials or itself to use the Intellectual Property or Marketing Materials for any purpose.

8.10. The Referrer acknowledges that in order to protect simPRO's rights in the Intellectual Property and Marketing Materials, the Referrer may not in Australia or elsewhere register or attempt to register any of the Intellectual Property or Marketing Materials as its intellectual property.

8.11. Except as provided in any other express provision of this agreement, the parties will negotiate in good faith on a case by case basis, payment of the costs and expenses as between them in relation to the conduct of any action concerning the Intellectual Property or Marketing Materials, including any legal proceeding.

9. Promotion and Referral Activities

9.1. Best Efforts

The Referrer agrees to use its best efforts to engage in continued and active promotion of the Products to potential Referrals.

9.2. Prohibited Activities

- (a) The Referrer agrees not to associate the Intellectual Property, Marketing Material, simPRO or the Products with content or actions that are unlawful in any manner, or which are otherwise harmful, threatening, defamatory, obscene, offensive, harassing, sexually explicit, violent, discriminatory, or otherwise objectionable in simPRO's sole discretion.
- (b) Without limiting the preceding subclause, the Referrer agrees not to send unsolicited electronic messages to multiple unrelated recipients ("Spamming") in promoting the Products, or otherwise to engage in any other form of mass electronic communications prohibited by law in connection with activities contemplated under this Agreement.

9.3. Customer Relations

- (a) During and after the Term, simPRO shall be the exclusive owner of all Referral relations

created via the Referrer.

- (b) The Reseller shall not misrepresent itself as being part of simPRO or affiliated with simPRO in other manner than as a separate entity, nor shall it allow that impression to be implied by clients or other parties associated with the Referrer.

9.4. Referral Procedure.

- (a) Each Referral shall be referred to simPRO by the Referrer through an online form provided by simPRO to Referrer <http://simprogroup.com/nz/partners/> (or by any other method, at the sole discretion of simPRO, that may be made available by simPRO in the future) which Referrer shall fully complete and submit to simPRO ("Referral Form").
- (b) Upon receiving each Referral Form, simPRO shall send an email to the Referral's email address indicated in the Referral Form, detailing the steps to be taken towards registration to receive the Products and becoming a Qualified Referral.
- (c) simPRO shall be responsible for the sales process to all Referrals, subject to the Parties' continued good-faith cooperation in promoting the sales process to Referral.

10. Referral Fees

10.1. Qualified Referrals

"Qualified Referrals" mean Referrals:

- (a) Referred by the Referrer to simPRO and who complete the sign-up procedure in accordance with the procedure described clause 9.4(b);
- (b) Who have not previously had any dealings with simPRO in relation to the Products;
- (c) Who are not, at the time referred to simPRO by the Referrer, in any contractual relations or ongoing negotiations with simPRO in connection with the Products;
- (d) Who are not at, at the time referred to simPRO by Referrer, already registered as a Referral from another partner;
- (e) That have requested that the Referrer register them for a product demonstration and are expecting a phone call or email requesting a meeting; and
- (f) Who are not rejected by simPRO, in its sole discretion; and
- (g) Who make at least one payment in order to receive the Products.

10.2. Responsibilities

simPRO shall collect all fees for the Products directly from Referrals.

10.3. Referral Fee calculation

The Referral Fee shall be 10% of the payments for the Products collected by simPRO from a Qualified

Referral, exclusive of GST, but excluding any payments or portion thereof attributable to hardware or services supplied by a third party.

10.4. Payment of Referral Fee

- (a) Upon a Referral becoming a Qualified Referral, simPRO shall pay the Referrer the Referral Fee for a period of 30 months or from the date that simPRO receives the Referral Form relating to that Qualified Referral.
- (b) The Referral Fee shall be paid to the Referrer within fifteen (15) days of the end of the calendar month in which a payment for the Products by the Qualified Referral is received by simPRO.
- (c) simPRO shall deliver a Recipient Created Tax Invoice (RCTI) to the Referrer with payment of each Referral Fee.

10.5. Associated charges

The Referrer shall be responsible for payment of all taxes, duties, governmental charges and other like charges levied on the Referral Fee, and the Referrer shall indemnify, defend and hold simPRO harmless from and against any claims arising out or relating to all charges emanating from simPRO's payment of the Referral Fee.

10.6. Sales/Commissions Reports.

- (a) simPRO shall provide or make available to the Referrer a monthly report summarizing the sales activities of the Referrer and the Referral Fee payable.
- (b) simPRO reserves the right not to reveal the names or other personal information about Referrals and Qualified Referrals in the monthly report.

11. Term

11.1. Initial Term

This Agreement shall become effective as of the Effective Date and shall continue for twelve (12) months thereafter ("Initial Term").

11.2. Renewal Term

Following expiration of the Initial Term, this Agreement will be automatically renewed for additional consecutive terms of twelve (12) months each ("Renewal Term"), unless a Party gives written notice of termination to the other Party at least thirty (30) days' prior to the end of the Initial Term or any Renewal Term.

12. Termination

12.1. Without Cause

simPRO shall have the right to terminate this Agreement at any time for any or no reason by giving ten (10) days prior written notice to Referrer.

12.2. With Cause

Either Party may terminate this Agreement at any time, effective immediately upon written notice to the other Party who has materially breached this Agreement, provided that prior to terminating this Agreement the terminating Party shall provide written notice of such material breach and thirty (30) days opportunity for the breaching Party to cure such breach.

12.3. Effect of Termination

From and following the date of termination of this Agreement, the Referrer's rights under this Agreement shall terminate, and the Referrer shall not be entitled to receive any Referral Fees or any other payments under this Agreement other than commissions or payments earned or accrued prior to termination of this Agreement.

13. Liabilities

- 13.1. The Referrer shall be solely responsible for liabilities incurred in performing and complying with this Agreement, including, without limitation, the legality of Referrer's operations and materials created and used in connection with this Agreement.
- 13.2. The Referrer acknowledges and agrees that simPRO is not responsible for the development, operation or content of the Referrer's Marketing Materials and the Referrer agrees to defend, indemnify and hold simPRO harmless against any and all claims, actions, causes of action, damages, or expenses (including attorney fees) relating to the development, operation, content and maintenance of Referrer's Marketing Materials.

14. Variation

- 14.1. simPRO may vary this Agreement from time to time at its reasonable discretion by giving written notice to the Referrer, which for the purpose of this clause includes publishing the variation on its website at <http://simprogroup.com/nz/partners/>
- 14.2. If the Referrer objects to the variation, the Referrer may terminate this Agreement for cause pursuant to clause 12.2. by providing written notice to simPRO within seven (7) days of the variation.
- 14.3. If the Referrer does not object to a variation pursuant to clause 14.2, it will be deemed to have accepted the variation and shall be bound by the Agreement as amended.

15. Assignment

- 15.1. simPRO may assign its rights under this Agreement at any time without giving notice to the Referrer.
- 15.2. The Referrer may not assign its rights under this Agreement without the written consent of simPRO, which must not be unreasonably withheld.

16. Confidentiality

- 16.1. The Referrer acknowledges and agrees that the Privacy Policy forms part of this Agreement and that the obligations of this clause do not derogate from or limit those contained in the Privacy Policy.
- 16.2. The parties shall keep confidential and shall not disclose to any third party the Confidential Information, except:
- (a) To any agent named in the Agreement;
 - (b) Where both parties consent to such disclosure;
 - (c) To the solicitors acting on behalf of the parties; and
 - (d) To any consultant engaged by either party for advice in relation to any matter contained in the Agreement.
- 16.3. Prior to disclosing any Confidential Information, the party making the disclosure shall obtain a written agreement of the third party to keep such matters confidential unless that other party is a professional advisor who is bound by a duty of confidentiality.
- 16.4. Neither party will make press or other announcements or releases relating to this Agreement, nor the transactions the subject of this Agreement without the approval of the other to the form and manner of the announcement or release is required to be made by law.
- 16.5. This clause continues to be binding and effective notwithstanding termination or completion of this Agreement.

17. Notices and Other Communications

- 17.1. A notice, demand, consent, approval or communication under this Agreement ("Notice") must be in writing signed by a person duly authorised by the sender, and hand delivered, sent by prepaid post, facsimile or electronic mail to the recipient's address specified below or last notified to the sender.
- 17.2. The parties consent to them and their respective solicitors receiving, by electronic communication, information and documentation with respect to this agreement and all transactions contemplated by it.
- 17.3. A Notice takes effect when deemed to be received or at a later time specified in the Notice. A Notice is deemed to be received:
- (a) If hand delivered then on delivery;
 - (b) If sent by prepaid post to or from an address outside Australia then on the seventh Business Day after the date of posting;
 - (c) If sent by prepaid post both to and from an address inside Australia then on the second Business Day after the date of posting;
 - (d) If sent by facsimile then when the sender's facsimile system generates a message confirming successful transmission of the entire Notice unless, within eight Business

Hours after the transmission, the recipient informs the sender that it has not received the entire Notice.

- (e) If sent by electronic mail then when the sender does not receive a notice of “delivery failure” or “delivery delay” or other notice to the effect that the email has not reached the intended recipient within 2 hours of the time of sending.

17.4. Notwithstanding the above, if the delivery, receipt or transmission is not on a Business Day or is after 5.00pm on a Business Day, the Notice is taken to be received at 9.00am on the next Business Day.

17.5. The Parties’ addresses for notice are:

simPRO Software NZ
PO Box 19222
Avondale
Auckland 1026
Attention: General Manager

Email: admin@simpro.co.nz, Facsimile: +64 9 925 1129

Referrer

As set out in the Referral Programme Form.

18. GST

18.1. The parties agree that unless otherwise specified, the consideration for the supply of goods and services under this Agreement is exclusive of GST.

18.2. The parties further agree that if either party is liable for GST in respect of the supply of goods or services under this Agreement, then the consideration payable shall (unless it is otherwise expressed to be inclusive of GST) be increased by an amount calculated as follows:

$A \times R$

Where:

A = the amount of consideration payable.

R = the rate of GST.

18.3. The party making the supply shall provide to the recipient of that supply a valid tax invoice at or prior to the time for payment of the GST amount.

18.4. If an Adjustment Event arises under the GST Law, the Supplier must promptly create an Adjustment Note for any overpayment or underpayment and, where applicable, apply to the Commissioner of Taxation for a refund of any overpayment by the Supplier for GST.

18.5. The Supplier must refund to the Recipient any such overpayment and the Recipient must pay the Supplier an amount equal to any underpayment of GST.

18.6. This clause shall not merge on completion of the transactions contemplated by this Agreement.

18.7. In this clause:

- (a) "GST" means the goods and services tax as provided for by the GST law;
- (b) "GST law" means the Goods and Services Tax Act 1985 as amended or replaced from time to time and any associated legislation;
- (c) "Rate of GST" means 15% or such other rate of GST as is payable under the GST law; and

18.8. Any expression used that is defined in the GST law has that defined meaning in this Agreement.

19. Dispute Resolution

- 19.1. Subject to subclause 19.10, unless a party has complied with the following subclauses (2) to (9) that party may not commence court proceedings or arbitration relating to any dispute with any other party to this Agreement.
- 19.2. Where a dispute arises between simPRO and the Reseller ("the parties"), the complainant will set out in writing the nature of the dispute.
- 19.3. Both parties will make every effort to resolve the dispute by mutual negotiation.
- 19.4. In the event that the parties are unable to reach a resolution of the dispute within twenty one (21) days of the dispute first being raised by one party with the other, either party may by notice in writing ("the Mediation Notice") notify the other party that it seeks to have the dispute resolved by mediation.
- 19.5. If the parties have not agreed within ten (10) days of the issue of the Mediation Notice on the choice of a mediator then either of them may at any time apply to the Chairperson for the time being or other proper officer of the New Zealand Law Society to nominate a Mediator for the purpose of the dispute.
- 19.6. The proceedings of the Mediator will be as informal as is consistent with the proper conduct of the matter and shall allow the Mediator to communicate privately with the respective parties and their lawyers and the parties shall be entitled but not obliged to be legally represented. The Mediator may co-opt other expert assistance.
- 19.7. In any mediation the following shall apply:
 - (a) everything that occurs before the Mediator will be in confidence and in closed session;
- 19.8. all discussions will be on a "without prejudice" basis;
- 19.9. no documents brought into existence specifically for the purpose of the mediation process shall be called into evidence in any subsequent litigation by either party;
- 19.10. each party to the mediation shall be given proper opportunity to present its case;
- 19.11. the Mediator shall be required to act fairly, in good faith and without bias for the purpose of seeking a resolution of the dispute and to treat all matters in confidence and to have regard to the fairness and reasonableness of all matters relating to the dispute including the need for simPRO to maintain the integrity of its name, image and other Intellectual Property and the reasonable interests of other resellers;
- 19.12. the parties to the mediation and the Mediator shall co-operate with a view to the mediation being determined as speedily as possible and within fourteen (14) days after referral to the Mediator;
- 19.13. the costs of the mediation will be borne by the parties equally unless otherwise agreed or

determined by the Mediator and the parties shall grant immunity from liability to the Mediator;

- 19.14. the parties to the mediation shall each report back to the Mediator within fourteen (14) days of the end of the mediation hearings on actions taken, based on the outcome of the mediation; and
- 19.15. subject to the other provisions of this clause, the Mediator shall have the right to determine procedures relating to the conduct of the mediation.
- 19.16. If the dispute is not resolved within forty five (45) days of referral to mediation any party which has complied with the provisions of this clause may by written notice terminate the dispute resolution process and may then commence Court proceedings and/or take any other action it sees fit relating to the dispute.
- 19.17. The parties may by agreement in writing between them agree to extend any of the time periods referred to in the previous provisions of this clause and, if they do, the extended time periods shall apply and be binding on the parties in substitution for the relevant time period contained in this clause.

Nothing contained in these provisions shall prevent a party from seeking injunctive relief from an appropriate Court, where failure to obtain such relief would cause irreparable damage to the party concerned or to the Intellectual Property. Further, these dispute resolution procedures will not apply to events giving rise to rights to the immediate termination of this Agreement where such events are clearly specified in this Agreement.

20. General

20.1. No Waiver

A party does not waive a right, power or remedy if it fails to exercise or delays in exercising the right, power or remedy. A single or partial exercise of a right, power or remedy does not prevent another or further exercise of that or another right, power or remedy. A waiver of a right, power or remedy must be in writing and signed by the party giving the waiver. A waiver or consent is only effective in the specific instance and for the purpose for which it is given.

20.2. Costs

Each party must pay its own costs of negotiating, preparing and executing this but all stamp duty on this Agreement (if any) or any transaction contemplated by this Agreement shall be payable by the Referrer.

20.3. Binds Personal Representatives Etc

This Agreement shall be binding upon and endure to the benefit of the parties and (unless such interpretation shall be repugnant to the sense or context) their respective successors/personal representatives and permitted assigns.

20.4. Limited Warranty

Both Parties warrant that at all times during the Term they will comply with all applicable laws, regulations, codes of practice, as well as this Agreement. During and after the Term, the Referrer expressly undertakes not to do anything that might reasonably be expected to damage the business, interests or reputation of simPRO and will not make, publish or allow to be made or published any disparaging remarks concerning simPRO, its representatives, or the Products.

20.5. Disclaimer of Warranty

Other than any express warranty given in this Agreement, simPRO makes no other warranty, express or implied, of any kind and simPRO expressly disclaims any and all warranties and conditions, including but

not limited to any implied warranty of merchantability, fitness for a particular purpose, availability, security, title, and/or non-infringement of the subject matter of this Agreement.

20.6. Limitation of Liability

- (a) Neither simPRO nor any officer, employee, director or any other representative of simPRO shall be liable towards Referrer or towards any third party, under or in connection with this Agreement or its termination, in contract, pre-contract, tort or otherwise for:
 - (i) Any economic loss (including loss of revenues, profits, contracts, business or anticipated savings); or
 - (ii) Any loss of goodwill or reputation.
- (b) Such losses include, without limitation, any special, indirect, incidental, statutory, punitive or consequential losses or damages as well as any losses or damages caused by interruption of operations.
- (c) Notwithstanding any other circumstances or understandings surrounding any relations among the Parties, simPRO's entire liability to Referrer under this Agreement shall not exceed AUD \$100 for any and all claims for damages of any kind made by Referrer under this Agreement, and by entering this Agreement Referrer recognises the limitations herein on simPRO's liability.

20.7. Independent Contractors

The Parties herein act on their own behalf as independent contractors. Nothing in this Agreement shall create any joint venture, agency, franchise, sales representative, employment or any other relationship between the Parties beyond the relations set out in this Agreement, and the Referrer is expressly precluded from acting on simPRO's behalf or holding themselves out to be part of simPRO.

20.8. Indemnification

The Referrer will indemnify, defend and hold simPRO and its subsidiaries, affiliates, officers and employees (the "simPRO Indemnified Parties") harmless from and against any and all costs, liabilities, losses and expenses (including but not limited to reasonable attorneys' fees) resulting from any claim, suit, action, demand or proceeding brought by any third party against the simPRO Indemnified Parties arising from any of the following:

- (a) A breach of the Agreement by Referrer, its employees, agents or contractors;
- (b) The negligence, gross negligence or willful misconduct of Referrer or its employees, agents or contractors; or
- (c) A failure by Referrer or its employees, agents, contractors or invitees to comply with the laws and regulations referenced hereinbefore.

20.9. Prohibition on Raiding

Neither Party shall for the duration of this Agreement and for one year after termination thereof hire,

employ or solicit any employee of the other Party, have such employee work for the Party, or encourage or cause such employee to cease employment with the other Party, whether directly or indirectly.

20.10. Parties to Take all Steps

The parties shall execute and deliver all such deeds and other agreements and do all such acts and things as shall be necessary or desirable in order to implement and give full effect to the provisions and purposes of this Agreement.

20.11. Force Majeure

If a party becomes unable, wholly or in part, by Force Majeure to carry out an obligation placed on it under this Agreement:

- (a) That party must give to the other parties prompt written notice of:
 - (i) The Force Majeure; and
 - (ii) The extent to which the party expects that it will be unable to perform or be delayed in performing its obligation;
 - (iii) The relevant obligation, so far as it is affected by the Force Majeure, is to be suspended during the period that the Force Majeure prevents the party from performing its obligations; and
- (b) The relevant party must use its best endeavours to overcome or remove the Force Majeure as quickly as possible provided that the relevant party need not settle any labour or other dispute creating the Force Majeure on terms contrary to its wishes or to contest the validity or enforceability of any law, regulation or decree by way of legal proceedings.
- (c) If a Force Majeure lasts for more than thirty (30) days, either Party may terminate this agreement upon written notice to the other Party pursuant to clause 12.

20.12. Entire Agreement - Reliance on Own Information

Each party represents and warrants to the other parties that:

- (a) The party is executing this Agreement voluntarily upon their own information, investigation and legal advice and that the party is not relying upon any statement or representation made by another party or their employees, agents, professional advisors or other consultants or contractors that is not contained in this Agreement; and
- (b) That the conditions and stipulations in this Agreement constitute the only agreement between the parties.

20.13. Severability

Each provision of this Agreement shall be deemed to be separate and severable from the others of them. If any provision of this Agreement is determined to be invalid or unenforceable in any jurisdiction, such determination and the consequential severance (if any) shall not invalidate the rest of the Agreement which shall remain in full force and effect as if such provision had not been made a part thereof, nor shall it affect the

validity or enforceability of such provision in any other jurisdiction.

20.14. Counterparts

This Agreement may be executed in any number of counterparts. All those counterparts taken together shall be deemed to constitute one and the same Agreement.

20.15. Applicable Law

This Agreement shall be governed by and construed in accordance with the laws of New Zealand. The parties hereby submit to the non-exclusive jurisdiction of courts of or exercising jurisdiction in New Zealand and all courts competent to hear appeals therefrom.

20.16. Business Day

Where, by virtue of the provisions of this agreement, the day on or by which any act, matter or thing is to be done is not a business day in the place in which the act, matter or thing is to be done, it may be done on the first business day after that day.

20.17. Agents, Employees and Contractors Etc

The Reseller warrants that its agents, employees and contractors performing services under or in connection with this Agreement shall comply with the Agreement in all respects.

20.18. Currency

All values in this Agreement are in New Zealand Dollars (NZD) unless otherwise indicated.

By checking the "I agree to the Terms & Conditions" box, the Referrer represents and warrants that it has read, understood and accepted this Agreement.