

## **CORTEX IT LABS PTY LTD ACN 120 499 176 (“Cortex”) Value Added Reseller Programme Terms and Conditions**

IMPORTANT NOTIFICATION: YOUR APPOINTMENT TO THE CORTEX RESELLER PROGRAMME (“**RESELLER PROGRAMME**”) IS CONDITIONAL UPON YOU AGREEING TO THE TERMS AND CONDITIONS SET OUT BELOW (“**THIS AGREEMENT**”).

AS A PARTICIPANT IN THE RESELLER PROGRAMME, AND AS A RESELLER OF CORTEX’S SOFTWARE, YOU AGREE TO ABIDE BY THE FOLLOWING TERMS AND CONDITIONS.

YOU MAY ENTER INTO THIS AGREEMENT BY CLICKING THE “ACCEPT” BUTTON INDICATING YOUR ACCEPTANCE OF THESE TERMS OR IF THIS AGREEMENT IS PRESENTED TO YOU BY CORTEX IN HARDCOPY, SIGNING A COPY OF THIS AGREEMENT AND RETURNING IT TO CORTEX. IF YOU DO NOT AGREE TO THE TERMS OF THIS AGREEMENT, THEN YOU MAY CLICK THE “DECLINE” BUTTON IN WHICH CASE YOU WILL NOT BECOME BOUND BY THIS AGREEMENT BUT YOU WILL ALSO NOT BE ENTITLED TO PARTICIPATE IN THE RESELLER PROGRAMME OR BE ENTITLED TO ANY OF THE OTHER RIGHTS OF A RESELLER AS SET OUT BELOW.

### **1. Reseller Programme**

- 1.1 The Cortex Value Added Reseller Programme appoints persons as authorised valued added resellers to resell Cortex’s software products (“**Software**”) to end users. This Agreement is between you, the reseller (“**you/Reseller**”), and **CORTEX IT LABS PTY LTD ACN 120 499 176 (“we/ us/ Cortex”)**.
- 1.2 Your appointment as a Reseller is not automatic and must be approved by Cortex. Cortex may either approve or reject your application to be a Reseller in its sole discretion. Your appointment as a Reseller is non-exclusive and non-transferrable.
- 1.3 Unless you are appointed as a Reseller, you must not resell or re-supply any copy of the Software held by you to any person.
- 1.4 As a Reseller, you will pre-purchase licence keys from Cortex for resale to end users. A licence key is a code which when entered into the Software by an end user, registers that copy of the Software for use by the end user, and unlocks any restricted functionality in the Software. Each licence key will activate and licence one or more copies of the Software for use by the end user (the number of copies of the Software which a licence key will enable an end user to activate and use, and the term of the licence for the Software, will be specified by Cortex at the time of sale). The use of each licensed copy of the Software by the end user will then be governed by the Software’s End User Licence

Agreement (“**EULA**”) (and you as a reseller, agree to familiarise yourself with the terms of our EULA). The process relating to the purchase of licence keys is set out in **paragraph 2** below.

- 1.5 For the avoidance of doubt, different versions of the same type of Software (which may include enhanced versions of the Software) will constitute separate software products under these terms, and separate licences will need to be purchased to use them.
- 1.6 The manner through which you may promote or market the Software (i.e., via website, newsletter or other means) must be approved by Cortex before you undertake the promotion or relevant marketing campaign.
- 1.7 You may only supply the Software to an end user by providing a link to the trial version of the Software appearing on the Cortex website (at a URL specified by Cortex from time to time) for the end user to download (or for you to download on their behalf), or by providing a hard copy of the trial version of the Software to the end user. You must not include any Cortex branding or art work on any hard copy of the trial version of the Software which you produce, and provide to an end user (including, without limitation, any DVD or DVD sleeve).
- 1.8 You must only resell the Software and its licence keys to end users. You are not permitted to re-sell or re-supply the Software to any person for the purposes of resale by that person.
- 1.9 If a licence purchased by you for on-supply to an end user is designated by Cortex as a SAAS licence or Managed Service Provider or MSP licence (together a “**SAAS Licence**”) then, in accordance with the EULA for the Software:
  - (a) The end user to whom the SAAS Licence is supplied may receive the right to use the Software for one or more of its personnel, in one or more locations, or across one or more computers or servers (together the “**Permitted SAAS Users**”). The number and type of Permitted SAAS Users will be specified at the time the relevant licence key (or keys) is purchased;
  - (b) A SAAS Licence is granted on a subscription basis, and will continue until the end of the relevant subscription period (“**SAAS Licence Term**”). At the conclusion of the SAAS Licence Term, the SAAS Licence may automatically renew in accordance with its terms of purchase or its EULA.
  - (c) You may, on behalf of an end user customer, transfer a licence for the Software between Permitted SAAS Users. Such transfer may be conducted via the Reseller Portal or other management console provided by Cortex. You cannot transfer a licence between different end users or your different customers.
  - (d) You may, on behalf of an end user customer increase the number of Permitted SAAS Users by paying any applicable purchase price

for the same. You may also, on behalf of an end user, reduce the number of Permitted SAAS Users, however any reduction will only take effect at the renewal of the SAAS Licence. There will be no refund or pro-rata refund for any unused portion of a cancelled SAAS Licence.

## 2. Ordering and payment

- 2.1 Cortex may grant you access to a password protected area of the Cortex website that contains certain sales, promotional and marketing information (“**Reseller Portal**”). You may order licence keys from Cortex by placing an order via the interface provided in the Reseller Portal or via any other means specified by Cortex from time to time. Cortex may in its sole and absolute discretion refuse any order for a licence key placed by you. The limitations on your use of the Reseller Portal are set out in **paragraph 3** below.
- 2.2 As a Reseller, you are also permitted to renew licence keys on behalf of end users by placing an order via the Reseller Portal. Cortex reserves the right to renew licence keys directly with an end user where the end user contacts Cortex directly.
- 2.3 A licence key will be valid once it is issued to you. A licence key will, unless it is renewed, expire at the conclusion of the term of the licence as specified by Cortex on the date the licence key was issued. The licence key may also place certain limitations on the functionality of the Software, or its term of use, depending on the terms of the relevant EULA and the type of licence key purchased. You will be responsible for collecting any corresponding payment from any end user to whom you resell a licence key. Cortex is under no obligation to deactivate any licence key which you have paid Cortex for, but which you have not in turn been paid for by the end user. Subject to the rights attaching to SAAS Licences, Cortex is also under no obligation to transfer any licence key from you to an end user, from an end user back to you, or from one end user to any other end user.
- 2.4 The purchase price payable by you for each licence key (or any change in Permitted Users of SAAS Licences) shall be determined by Cortex in its sole discretion and unless otherwise separately agreed in writing between you and Cortex, may vary between each purchase of Software made by you.
- 2.5 You acknowledge that Cortex may rely on a third party billing provider for identifying and recording all purchases made by you in accordance with this Agreement.
- 2.6 When you are approved by Cortex as a Reseller, Cortex will provide you with membership of its Reseller programme (“**Reseller Membership**”) and may require you to make a payment for your membership. The Reseller Membership provides you with your on-line Reseller account where you can order products at a discount to their recommended retail price, track orders and payments and manage

licence keys. The payment you make for your Reseller Membership is non-refundable, but will be credited by Cortex against your future purchases of licence keys. This credit however will expire if you do not make any purchases of licence keys from your Reseller account for a continuous period of 12 months or more.

- 2.7 You must pay the purchase price for each licence key ordered by you from Cortex prior to the supply of the licence key to you, or, where applicable, the renewal of the licence key, by Cortex. Subject to clause 2.8 below, Cortex will require you, at the time you become a Reseller, to provide Cortex with your credit card details which you then agree to Cortex charging each time you make a purchase from Cortex.
- 2.8 In some circumstances, Cortex may separately agree in writing to allow you to purchase licence keys on credit, in which case the following additional terms and conditions will apply:
- (a) any grant of credit is at Cortex's sole and absolute discretion. Cortex may withdraw or reinstate credit to you at any time at its discretion, with or without notice to you;
  - (b) you agree that Cortex may obtain a consumer credit report containing information about you from a credit reporting agency for the purpose of assessing your application for credit;
  - (c) you agree to Cortex obtaining personal information about you from other credit providers, whose names you may have provided for Cortex or that may be named in a credit report, for the purpose of assessing your application for credit made to Cortex;
  - (d) Cortex may impose credit limits from time to time for unpaid licence keys held by you. Cortex will not be under any obligation to fulfil a licence key order if the fulfilment of that order will place you above this limit. Cortex may in its discretion increase or decrease this credit limit at any time;
  - (e) unless otherwise agreed in writing by Cortex, payments for licence keys ordered by you will be payable to Cortex on a calendar monthly basis within 15 days of the end of each calendar month (or any other period of credit separately agreed between you and Cortex in writing), irrespective of whether you have collected payment for the licence keys from the relevant end user;
  - (f) Cortex may charge interest at a rate of 15% per annum on any payments found to be owed and not yet paid by the date they are due. Such interest will begin accruing from the date that the payment falls due and will be payable by you to Cortex on demand; and
  - (g) Cortex may outsource the collection of the amount owed and not yet paid on your account to an agency or law firm. Any costs

accrued in the collection of the amount owed and not paid will added to the overall amount owed and be payable on demand; and

- (h) without limiting any other rights that Cortex may have at law or under this Agreement, if Cortex does not receive payment from you in full for any licence keys ordered by the due date for payment, then Cortex may cancel those licence keys and/or suspend your access to the Reseller Portal and/or suspend the provision of software support to you under **paragraph 6** below.

### 3. Use of the Reseller Portal

- (a) Cortex will provide you with a user name and password, and set up a user account for you to use the Reseller Portal ("**User Account**").
- (b) You agree that in your use of the Reseller Portal and your User Account, you will:
  - (i) keep your user name and password confidential;
  - (ii) only permit your employees to use your User Account and require them to comply with this **paragraph 3** in relation to such use;
  - (iii) be responsible for all use of your User Account and the Reseller Portal by you or your employees, and any transactions with Cortex through the Reseller Portal;
  - (iv) not resell or sublicense the use of the Reseller Portal or your User Account to any other person;
  - (v) only use your User Account for the purposes of accessing the Reseller Portal and transacting with Cortex through the Reseller Portal;
  - (vi) not use your User Account in a fraudulent or illegal manner, or email or send any materials from your User Account which are offensive, unlawful, harassing, libellous, defamatory, abusive, threatening, harmful, vulgar, obscene or otherwise objectionable;
  - (vii) not use your User Account to infringe the copyright, trademark, patent or other Intellectual Property Rights of any person;
  - (viii) not use your User Account in such a way which damages the Reseller Portal or denies access to the Reseller Portal to other users of the Reseller Portal; or
  - (ix) not intentionally or recklessly use your User Account in a way that degrades the performance of the

Reseller Portal for other users.

#### **4. Term/Termination**

- 4.1 This Agreement and your participation in the Reseller Programme will commence from your appointment as a Reseller of Cortex and may be terminated by Cortex at any time with or without notice to you. Your failure to abide with these terms and conditions may result in the immediate termination of this Agreement by Cortex.
- 4.2 You may terminate this Agreement at any time upon written notice given by you to Cortex. Termination will not however relieve you of any obligations stated below to survive termination, including, without limitation, payment of any outstanding fees and charges due to Cortex.
- 4.3 Upon termination of this Agreement, you shall remove all trade marks, logos or artwork of Cortex from your website, and any reference or link from your website to Cortex, the Software or other products owned or marketed by Cortex and/or the Cortex website. You must also remove and destroy any point of sale materials and printed materials and cease any other marketing communications or programs which make reference to your affiliation with Cortex or which include any Cortex logos, artwork or trademarks.
- 4.4 Your obligations under **paragraphs 2, 7, 8 and 9** shall survive the termination of this Agreement.

#### **5. Reseller Obligations**

- 5.1 As a Reseller, you shall:
- (a) only use the Reseller Portal in accordance with this Agreement and any other guidelines or terms of use specified by Cortex from time to time;
  - (b) ensure that all materials presented on your website(s) or in any email or other marketing communications sent by you to promote Cortex or the Software, represents Cortex and the Software in a professional, accurate and positive manner;
  - (c) not use any unsolicited or spam email to promote Cortex and/or the Software;
  - (d) provide your own original website copy, images and navigation to promote Cortex and/or the Software on your website(s) or in any email or other marketing communications and not directly or indirectly copy the Cortex website;
  - (e) subject to **paragraph 8** below, not use ad words or other search engine advertising which include Cortex's company name ("Cortex" or "Cortex IT Labs"), Software names (for example, which would include, without limitation, "BackupAssist" and

“RecoverAssist”) or other Cortex trademarks or copyrighted material in any search engine advertising or otherwise in the promotion of your website(s);

- (f) ensure that your website(s) is regularly maintained with up to date and relevant information and that any direct marketing communications used to promote Cortex or its Software contain up to date information; and
- (g) not endorse Cortex or its Software on any website or in any marketing materials or communications which:
  - (i) are designed to distribute or promote viruses or malware;
  - (ii) contain misleading or deceptive marketing activities;
  - (iii) involve or promote violence;
  - (iv) discriminate against people based on race, sex, religion, nationality, disability, sexual orientation, or age;
  - (v) are in any way involved in illegal activities;
  - (vi) violate the intellectual property rights of Cortex or a third party; and/or
  - (vii) contain any offensive or inappropriate content or is otherwise involved in any matter considered to be offensive or inappropriate by Cortex.

## **6. Provision of Software Support**

- 6.1 You will provide software support to end users to whom you resell the Software. You may install and use the Software on your own computers for the purposes of providing such software support and or use those copies of the Software for demonstration purposes (“**NFR Copies**”). The number of licences for NFR Copies which you may use for this purpose will be separately specified by Cortex from time to time. Upon the termination of this Agreement, you agree to delete all NFR Copies in your possession and Cortex will deactivate all licence keys in respect of the same. You agree that NFR Copies given to you are for your use only, and may not be resold or sublicensed to any other person.
- 6.2 You may contact Cortex for software support in respect of any end user queries or issues which you are unable to resolve. The particular software support to be provided to you by Cortex will, unless separately agreed between you and Cortex in writing, be to the same level as generally provided by Cortex to its other Resellers.
- 6.3 You acknowledge that Cortex may elect to provide software support to any end user to whom you sell the Software who contacts Cortex

requesting software support.

- 6.4 You acknowledge and agree that Cortex has not made any warranty or representation that any software support provided by Cortex will be provided in any fixed period of time or to any particular standard, nor will Cortex be able to rectify the particular issue for which you are seeking software support. Cortex will only provide software support in respect of the Software and will not be under any obligation to provide software support where the relevant issue is not caused by the Software.

## 7. **Taxes and third party charges**

Unless specified to the contrary at the time you order any licence keys from Cortex in respect of the Software, all monies payable by you to Cortex under this Agreement ("**Consideration**") are exclusive of all third party bank charges charged by your bank on payments made to Cortex, and exclusive of all taxes (including, without limitation, any GST, VAT, withholding taxes or other taxes) which are levied, charged or imposed in respect of the supply, sale or licensing of the Software to you. You will pay an additional amount to Cortex on account of such taxes and charges, at the same time as paying the Consideration, to ensure that following the deduction of such taxes and charges, Cortex receives no less than the Consideration.

## 8. **Use of Cortex Intellectual Property**

- 8.1 Cortex hereby grants you a limited licence to make use of the Cortex name and logo on your website(s) which relate to the Software and in any marketing materials or communications for the Software. The Cortex name and logo may only be used on your website and in such marketing materials in accordance with the instructions of Cortex as may be specified by Cortex from time to time. Such licence will terminate upon the termination of this Agreement.
- 8.2 You acknowledge and agree that your appointment as a Reseller in no way grants you any intellectual property rights or other rights in the Software, other than the right to re-sell the Software as granted by this Agreement. Any rights not granted to you under this Agreement in respect of the Software are expressly reserved by Cortex.

## 9. **Liability/Indemnity**

- 9.1 In the event any terms, conditions, representations or warranties are implied by statute (including without limitation, the *Competition and Consumer Act 2010 (Cth)* or any state based consumer legislation), common law or equity ("**Prescribed Terms**") into this Agreement which cannot be lawfully excluded, such Prescribed Terms will apply, save that Cortex's liability for breach of any such Prescribed Terms will be limited, to the extent permitted by law, at our option, to any one or more of the following:



- (a) in the case of goods:
    - (i) the replacement of the goods to which the breach relates or the supply of equivalent goods;
    - (ii) the repair of the goods;
    - (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) in the case of services:
    - (i) the supplying of the services again; or
    - (ii) the payment of the cost of having the services supplied again.
- 9.2 If our liability for breach of any Prescribed Terms are capable of exclusion, they are hereby excluded to the fullest extent permitted by law.
- 9.3 Except as provided by the Prescribed Terms (if any), which are not capable of exclusion or limitation, or as expressly set out in this Agreement:
- (a) we make no warranties in relation to the Reseller Programme or the Software, including warranties as to the performance or fitness for purpose of the Software (other than we are entitled to grant to you the rights set out in this Agreement); and
  - (b) you will not under any circumstances have any cause of action against, or right to claim or recover from us for or in respect of any loss, damage or injury (including without limitation any loss of profit, indirect or consequential loss, damage or injury) arising from your membership of the Reseller Programme and the promotion of Cortex's Software or any breach of this Agreement by Cortex.
- 9.4 We will not be liable for any indirect or consequential damages (including loss of profits, loss of data or economic loss) arising out of a breach of this Agreement or arising from your member of the Reseller Programme or the promotion of Cortex's Software.
- 9.5 You agree that the maximum liability that we may have to you for any and all breaches of this Agreement will be, for any one breach, the amount paid by you to Cortex for the 3 month period occurring prior to the breach and, for all breaches, capped at the total amount paid by you to Cortex under this Agreement.
- 9.6 You acknowledge that you have exercised your independent judgment in

entering into the Reseller Programme and have not relied upon any representations made by us which have not been stated expressly in this Agreement or upon any descriptions or illustrations or specifications contained in any document including catalogues or publicity material produced by us.

- 9.7 Notwithstanding this **paragraph 9**, for Australian consumers, Cortex's products come with guarantees that cannot be excluded under the Australian Consumer Law. If you are an Australian consumer, you may be entitled to a replacement or refund for a major failure and for compensation for any other reasonably foreseeable loss or damage. You may also be entitled to have any goods or services Cortex supplies you repaired or replaced if they fail to be of acceptable quality and the failure does not amount to a major failure. For more information about these rights please go to [www.accc.gov.au](http://www.accc.gov.au).

## **10. General terms**

- 10.1 Cortex may amend the terms of this Agreement at any time upon written notice to you. Any amended terms will take effect from the date of Cortex's notice and will apply to all orders of licence keys made by you from that date. You agree that you will be bound by such amendments from the date that you receive our notice. If you do not agree to the amendments contained in our notice, then you must advise Cortex in writing of your disagreement within 7 days of receiving the notice of amendment in which case your appointment as a Reseller will immediately terminate.
- 10.2 Any notice given under this Agreement must be in writing. Unless a later time is specified in a notice, the notice takes effect from the time it is received. A notice is taken to be received:
- (a) in the case of a notice delivered by hand, when so delivered;
  - (b) in the case of a notice sent by pre paid post, on the fourth after the date of posting;
  - (c) in the case of a notice sent by facsimile, upon the receipt by the sender of a transmission report from the despatching facsimile machine which confirms that all of the pages comprised in the notice have been successfully sent to the receiving party's facsimile number; and
  - (d) in the case of a notice sent by email, within 24 hours of the time that the email is sent, unless the recipient can prove that the email was never received or was received at a later time.
- 10.3 You agree that neither you nor Cortex is the partner, agent, employee or representative of the other and neither you nor Cortex has the power to incur any obligations on behalf of, or pledge the credit of, the other.
- 10.4 There are no other representations, promises, warranties, covenants or

undertakings between the parties and this Agreement supersedes all previous agreements in respect of its subject matter and embodies the entire agreement between the parties.

- 10.5 The covenants, conditions, provisions and warranties contained in this Agreement will not merge or terminate upon completion of the transactions contemplated by this Agreement, but to the extent that they have not been fulfilled and satisfied or are incapable of having effect will remain in full force and effect.
- 10.6 A provision of or a right created under this Agreement may not be waived or varied except in writing signed by the party or parties to be bound by the waiver or variation. No single or partial exercise by any party of any right, power or remedy under this Agreement will preclude any other or further exercise of that or any other right, power or remedy. The rights, powers or remedies provided in this Agreement are cumulative with and not exclusive of any rights, powers or remedies provided independently of this Agreement, and cannot be assigned by the Reseller without the prior written consent of Cortex.
- 10.7 If any provision of this Agreement is judged invalid or unenforceable for any reason whatsoever by a court of competent jurisdiction, such invalidity or unenforceability (unless deletion of such provision would materially adversely affect one of the parties) will not affect the operation or interpretation of any other provision of this Agreement to the intent that the invalid or unenforceable provision will be treated as severed from this Agreement.
- 10.8 The parties acknowledge and agree that no rule of construction applies to the disadvantage of a party because that party was responsible for the preparation of this Agreement or part of it.

## **11. Governing Law**

These terms and conditions shall be governed by and construed according to the laws in force in the State of Victoria, the Commonwealth of Australia. The parties hereby irrevocably submit to and accept the exclusive jurisdiction of the Courts of the State of Victoria and their Courts of appeal.

If you have any questions or require clarification relating to the above terms and conditions, please contact Cortex online at [resellersupport@backupassist.com](mailto:resellersupport@backupassist.com)

Last updated: March 2016