

## Terms and Conditions Employment Screening Australia

### 1 Definitions and Interpretation

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#### Definitions

1.1 In this Agreement, unless the contrary intention appears

- (a) **Accredited Body** – means a body accredited by ACIC to provide the goods and services under this Agreement.
- (b) **ACIC** - means Australian Criminal Intelligence Commission the, Accrediting Body and principal provider of Police History Information.
- (c) **Agency Check** – means a security check made on behalf of or about a relevant person who has given Informed Consent and may include police checks, VEVO Checks, Bankruptcy Checks, Nationally Coordinated Criminal History Checks and other checks, verification, document or data file or Agency Information.
- (d) **Agency Information** - includes the information about an individual received by ESA from a Government Agency or other authorised third party in conducting the Services, including, without limitation, Police History Information, Visa Entitlement and/or insolvency information.
- (e) **Agreement** - means this document, any schedules and attachments to it and any document incorporated into it by reference.
- (f) **Australian Consumer Law**: has the meaning given to it under the *Competition and Consumer Act 2010* (Cth) as implemented under the *Fair-Trading Act 1989* (Qld).
- (g) **Australian Privacy Principle Entity (or APP Entity)** - has the same meaning given to the term 'APP entity' in the Privacy Act 1988 (Cth).
- (h) **Bankruptcy Check** - means the document or data file that ESA provides to a Customer containing personal insolvency information received from the Australian Financial Security Authority (AFSA) about an individual.
- (i) **Business Day** - means a day in Queensland, Australia, that is not a Saturday, a Sunday or a gazetted public holiday in the place where:
  - i. EAS's principal place of business is based; and
  - ii. the Customer is based.
- (j) **Business Hours** - means the period between 9.00am and 5.00pm on a Business Day.
- (k) **Claim**: includes any claim, action, demand, application, proceeding, judgment, enforcement hearing and enforcement order.
- (l) **Commencement Date** - means the date that the Customer accepts this Agreement
- (m) **Commonwealth** - means the Commonwealth of Australia and includes ACIC.
- (n) **Confidential Information**: means any information which by its nature is confidential, is received on the express or implied understanding that it is confidential, or is marked as being confidential, and may include:
  - i. information about processes and policies, commercial operations, financial arrangements or affairs;
  - ii. the terms of this Agreement; and
  - iii. Personal Information,but does not include:
  - iv. information that is publicly known for reasons other than as a result of a breach of this Agreement; or

- v. any other information that is received through a third party and which is not governed by an obligation of confidence.
- (o) **Customer** – means an Individual Applicant or a LEC who receives the services provided under this Agreement.
- (p) **Customer Data** - means data and information relating to the Customer and its operations, facilities, Personnel, assets, products, sales and transactions.
- (q) **Customer Request** – means:
  - i. a request submitted by an Individual Applicant; or
  - ii. in the case of a LEC, a request submitted by a LEC, for an Agency Check for a relevant person.
- (r) **Damages** - means all liabilities, losses, damages, costs and expenses (including all legal costs determined on a solicitor and own client basis) whether incurred or awarded against a party, disbursements, costs of investigation, litigation, settlement and judgment, and interest, fines and penalties, regardless of the Claim under which they arise.
- (s) **DIBP** - means the Australian Government Department of Immigration and Border Protection.
- (t) **Disclosing Party** - means a party who discloses or makes available information to a Receiving Party.
- (u) **ESA** – means Cloak Investigations Pty Ltd A.C.N. 153 946 484 trading Employment Screening Australia and as the context requires, includes employees, officers, agents, contractors and subcontractors of Employment Screening Australia.
- (v) **ESA Systems** - means all hardware, software, materials and resources used by (or on behalf of) ESA to provide the Services (and includes the Web Tools).
- (w) **Existing Material**: means any material which contains Intellectual Property Rights in existence before the Commencement Date.
- (x) **External Factors** - has the meaning given in clause 2.4.
- (y) **Fees** - means the fees to be paid by the Customer to ESA at or about the time that the Customer submits a Request for Services.
- (z) **Force Majeure**: means any event beyond the reasonable control of the affected party which:
  - i. adversely affects that party's ability to meet any obligation under this Agreement; and
  - ii. could not be mitigated or prevented by reasonable due diligence or precautionary measures adopted by the affected party,

and may include natural disasters or acts of god, health pandemics, acts of terrorism, deliberate vandalism, riots, civil disturbance, industrial disputes and strikes (other than strikes involving the affected party or its employees, officers, agents, contractors or sub-contractors).
- (aa) **Governmental Agency** - means any governmental, semi-governmental or judicial entity or authority, in Australia or overseas, and including without limitation ACIC and DIBP.
- (bb) **GST**: means goods and services tax imposed through GST Law.
- (cc) **GST Law**: means *A New Tax System (Goods and Services Tax) Act 1999* (Cth), any regulations passed under this Act, or any statutory instrument amending, consolidating or replacing it.

- (dd) **Harmful Code** - means any virus, worm, trojan horse, trapdoor, software switch, time bomb, slicing routine, corruptive code, logic bomb, disabling code, disabling routine or expiration dates as these words are generally understood within the technology industry and any equivalent or similar corruptive mechanism.
- (ee) **Individual Applicant** - is a person who applies for their own personal information via the Agency.
- (ff) **Information Safeguards** - means practices that a professional organisation handling Personal Information would implement to appropriately protect that information as described in Attachment One.
- (gg) **Informed Consent** – means a form of consent that includes the following elements:
  - i. the relevant person is adequately informed about the process and purpose of an Agency Check before giving consent;
  - ii. the relevant person gives consent voluntarily;
  - iii. the consent given by the relevant person is current and specific;
  - iv. the person has the capacity to understand and communicate their consent; and
  - v. which is given by the relevant person completing the model form recommended by ACIC in the correct way.
- (hh) **Intellectual Property Rights:** means all registered and unregistered rights in Australia and throughout the world for:
  - i. copyright;
  - ii. trademarks or service marks;
  - iii. designs;
  - iv. patents;
  - v. semiconductors or circuit layouts;
  - vi. source codes and object codes;
  - vii. trade, business or company names;
  - viii. indications of source or appellations of origin;
  - ix. trade secrets;
  - x. know-how and confidential information;
  - xi. the rights to registration of any of the above; and
  - xii. the right to bring an action for infringement of any of the above,
 but excludes Moral Rights.
- (ii) **International Check** - means the document or data file that ESA provides to a Customer containing Agency Information received by ESA from a Government Agency or other authorised third party located in a jurisdiction outside of Australia.
- (jj) **LEC or Legal Entity Customer** – means a registered business which has;
  - i. entered into an approved services agreement with ESA; and
  - ii. receives Agency Checks from ESA.
- (kk) **Loss:** includes (and is not limited to) any loss, liability, tax, prohibition, penalty, fine or expense.
- (ll) **Moral Rights:** means the moral rights conferred under the *Copyright Act 1968* (Cth), including the right of integrity of authorship, the right of attribution of authorship and the right not to have authorship falsely attributed;
- (mm) **Nationally Coordinated Criminal History Check** – means:

- i. a criminal history check conducted in relation to a relevant person ACIC as part of ACIC Service and carried out in accordance with ACIC Agreement between ACIC and the Accredited Body in relation to ACIC Service; and
  - ii. Police Information about a relevant person provided by ESA to the Customer in a physical or electronic format as a result of the submission of the Nationally Coordinated Criminal History Check Application.
- (nn) **Nationally Coordinated Criminal History Check Application (Application)** - means a form for a relevant person that is submitted to ESA requesting ACIC to conduct a Nationally Coordinated Criminal History Check for the relevant person.
- (oo) **Nationally Coordinated Criminal History Check Category** - means one or more categories listed in Item 5 of Schedule 1 to this Agreement, being the categories and purpose for which the Customer permitted to collect, use or disclose Personal Information and Police Information under this Agreement.
- (pp) **National Policing Information** - has the meaning given in the *Australian Crime Commission Act 2002* (Cth).
- (qq) **Permitted Offshore Transfer** - means the permitted transfer of Personal Information or Police Information to a location outside Australia, where the transfer is necessary to provide a Customer with access to the result of a Nationally Coordinated Criminal History Check in relation to a relevant person, where;
  - i. the Customer is located outside Australia; and
  - ii. the relevant person consented to the transfer or supply of Personal Information or Police Information to a location outside Australia; and/or
  - iii. for the purpose of routing Personal Information or Police Information through servers located outside Australia, where:
    - A the end recipient of that Personal Information or Police Information is located within Australia; and
    - B the Personal Information or Police Information is retained or stored only on databases, servers or systems located within Australia; and/or
  - iv. for the purposes of retaining or storing Personal Information or Police Information on databases, services or systems located outside Australia where;
    - A the relevant person has consented to the retention or storage; and
    - B ACIC has approved, in writing, ESA's ICT environment for the retention or storage of Personal Information or Police Information on databases, services or systems located outside Australia; and/or
    - C for any other purpose for which the Applicant has consented to the transfer or supply of Personal Information or Police Information to a location outside Australia;
- (rr) **Personal Information** - means information or an opinion (including information or an opinion forming part of a database), whether true or not and whether recorded in a material form or not, about an individual whose identity is apparent or can reasonably be ascertained, from the information or opinion.
- (ss) **Personnel** – means;
  - i. in relation to the Legal Entity LEC, the Legal Entity LEC's each employee, each Subcontractor and any officer, contractor, partner, volunteer, agent, director, board member of the Legal Entity LEC or a Subcontractor;
  - ii. in relation to ESA, any authorised officer, Subcontractor, officer, employee, contractor, partner, volunteer, agent, director, board member of ESA or a Subcontractor; and

- iii. in relation to the Commonwealth, officers, employees, volunteers, agents or contractors of ACIC or any entity that is contracted by ACIC other than the persons and entities referred to in paragraph (a) of this definition.
- (tt) **Police Check** - means the document or data file that ESA provides to LEC containing the relevant Police History Information.
- (uu) **Police History Information** - means the police history information received from ACIC about an individual.
- (vv) **Privacy Act** - means the *Privacy Act* 1988 (Cth).
- (ww) **Privacy Laws** – means;
  - i. the Privacy Act, the Health Records Act 2001 (Vic), the Spam Act 2003 (Cth) and the Do Not Call Register Act 2006 (Cth);
  - ii. all codes, guidelines, service standards and procedures issued by a Governmental Authority; and all other laws, rules and regulation in any relevant jurisdiction (including Australia), to the extent they relate to the privacy, protection, use or disclosure of Personal Information or data.
- (xx) **Receiving Party** - means a party to this Agreement who obtains or receives information from a Disclosing Party under this Agreement.
- (yy) **Services** - means the services provided by ESA under this Agreement including specifically the provision of Agency Checks.
- (zz) **VEVO Check** - means the document or data file that ESA provides to Customers containing the relevant Visa Entitlement Information.
- (aaa) **Visa Entitlement Information** - means the visa status, work entitlement(s) and other information received from DIBP about an individual.
- (bbb) **Website** - means the ESA website located at [employmentscreeningaustralia.com.au](http://employmentscreeningaustralia.com.au) (or any successor website as notified to the Customer from time to time).
- (ccc) **Web Tools** - means any software, interface or other tools made available to the Customer by ESA to enable the Customer to receive the benefit of the Services.

## Interpretation

- 1.2 In this Agreement, unless the contrary intention appears;
- (a) headings are for ease of reference only and do not affect the meaning of this Agreement;
  - (b) the singular includes the plural and vice versa and words importing a gender include other genders;
  - (c) other grammatical forms of defined words or expressions have corresponding meanings;
  - (d) a reference to a clause, paragraph, schedule or attachment is a reference to a clause or paragraph of or schedule or attachment to this Agreement and a reference to this Agreement includes any schedules and attachments;
  - (e) a reference to a document or agreement, including this Agreement, includes a reference to that document or agreement as novated, altered or replaced from time to time;
  - (f) a reference to a party includes its executors, administrators, successors and permitted assigns;
  - (g) the meaning of general words is not limited by specific examples introduced by including, for example or similar expressions;
  - (h) any agreement, representation, warranty or indemnity by two or more parties (including where two or more persons are included in the same defined term) binds them jointly and severally;
  - (i) words and expressions importing natural persons include partnerships, bodies corporate, associations, governments and governmental and local authorities and agencies; and

- (j) a reference to any statute or other legislation is to a statute or other legislation as amended or replaced from time to time.

## **2 Service Delivery and Use**

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### **Performance of Services**

- 2.1 ESA will;
  - (a) provide the Services; and
  - (b) permit the Customer to access and use the Web Tools for the purposes of receiving the benefit of the Services.

### **Access to the Web Tools**

- 2.2 The Customer must;
  - (a) at its cost, provide appropriate access devices, software, operating conditions, cabling, telephone lines, modems and internet connections required for it to access the Web Tools and otherwise receive the benefit of the Services;
  - (b) ensure that no unauthorised use is made of the Web Tools;
  - (c) comply with all of ESA operating and security requirements and procedures relating to;
  - (d) access to the Web Tools;
  - (e) the use of the Services, (including in respect of passwords and other security information) as displayed on the Website or otherwise notified to the Customer from time to time.
  - (f) other than as expressly permitted under this Agreement, not obtain (nor attempt to obtain) any access to, or interfere with;
    - i. any programs or data of ESA or any other client of ESA; or
    - ii. any part of the ESA Systems, hardware, software or networks.
  - (g) not introduce any Harmful Code into the ESA Systems.
  - (h) If the Customer becomes aware of, or suspects that a breach of any of the obligations set out in this clause 2.2 has occurred:
    - i. the Customer must promptly notify ESA; and
    - ii. ESA may take such action as it considers appropriate (which may include changing the Customer's passwords and other security information).

### **No Guarantee of continuity of Services**

- 2.3 Despite anything else in this Agreement, ESA does not undertake, warrant or guarantee that the Services (including access to the Web Tools or other ESA Systems) will be uninterrupted, continuous or error or defect free.
- 2.4 The Customer acknowledges and agrees that its use of the Services is dependent on, and affected by, a number of environmental and other factors outside of the reasonable control of ESA ('External Factors').
- 2.5 To the maximum extent permitted by law ESA (and its directors, employees and agents) will have no liability whatsoever relating to any failure of, or interruption in the performance of, the Services resulting from any external factors.
- 2.6 In the event of failure of the Services, ESA will use reasonable commercial endeavours to restore the Services to an operational state with the minimum practicable delay.
- 2.7 The Customer acknowledges that, from time to time, ESA will conduct routine and other maintenance on the Website and the ESA Systems.
- 2.8 The Customer acknowledges and agrees that ESA may suspend the services (including the Customer's access to the Web Tools) if;
  - (a) ESA is required to do so by Law or any Governmental Agency; or

(b) the Customer breaches any provision of this Agreement.

### **Agency Information**

- 2.9 Agency Information is provided to ESA by Government Agencies and authorised third parties (including ACIC, VEVO and ASIC in Australia), and ESA uses this information to provide Agency Checks to Customers (including, without limitation, Police Checks, VEVO Checks and Bankruptcy Checks).
- 2.10 ESA does not have direct access to any Agency Information and relies on the information provided to it from the relevant Government Agency or authorised third party (as the case may be) to perform the Services and provide Agency Checks to Individual Applicants or Customers.
- 2.11 The Customer acknowledges that:
- (a) ESA does not have direct access to Agency Information (including without limitation Police History Information or Visa Entitlement Information);
  - (b) ESA is not responsible for Agency Information (including without limitation Police History Information or Visa Entitlement Information) provided to Customer on any Agency Check;
  - (c) ESA cannot change, modify or adapt any Agency Information on any Agency Check (including without limitation any Police Check, VEVO Check or Bankruptcy Check); and
  - (d) the accuracy and quality of Agency Information is dependent on the relevant Government Agency or authorised third party (as the case may be), and ESA is not responsible for any inaccurate information provided to Customers.

### **Information provided by the Customer**

- 2.12 Without limitation to any other consent(s) or approval(s) provided in relation to the Services the Customer acknowledges and agrees that;
- (a) relevant persons consent to ESA using and disclosing Personal Information to conduct any Agency Check that is the subject of a Customer Request to provide the services; and
  - (b) to comply with ESA's obligations under any agreement ESA has with ACIC with respect to the provision of the goods and services in accordance with any applicable Laws.
- 2.13 The Customer is solely responsible ensuring that all information provided to ESA about a relevant person (including any Personal Information) is accurate, complete and up to date, is not misleading, does not infringe any other person's rights and is not provided in breach of any applicable Law. ESA is not responsible for any consequences if ESA has relied on information provided by the Customer and such information is inaccurate or incomplete.

## **3 Customer's Obligations**

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### **Licenses and Compliance**

- 3.1 The Customer must;
- (a) comply with all applicable Laws;
  - (b) comply with ESA directions, policies and procedures relating to the use of the ESA Systems and the Service including, but not limited to;
  - (c) any applicable Law (including the Privacy Laws); or
  - (d) any other rules or guidelines posted on the Website or otherwise notified to the Customer by ESA from time to time;
  - (e) not act in any way that may have a detrimental effect on the good will or good standing of ESA;
  - (f) not act in a way that may expose ESA to the risk of any legal or administrative action including prosecution under any Laws; or
  - (g) not act in a way that will interfere with or disrupt ESA's business.

### **Responsibility for Usage of Services**

- 3.2 The Customer is solely responsible for all lodgements of Customer Requests (whether on its own behalf or on behalf of a third party).

- 3.3 The Customer acknowledges and agrees that, notwithstanding paragraph (1), ESA may, in their absolute discretion, monitor Customer Requests being lodged by or on behalf of the Customer using the services.
- 3.4 The Customer must bear all costs arising out of any complaints made in connection with the Customer Requests lodged (including complaints made by any Governmental Agency).
- 3.5 On request by ESA from time to time, the Customer must provide ESA with information that ESA may reasonably request concerning the Customer use of the Services.

#### **4 Payment and Charging**

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##### **Variation to Fees**

- 4.1 ESA may from time to time, in its absolute discretion, vary the Fees with respect to Services.
- 4.2 ESA undertakes to inform the Customer in advance, of any fee increases.
- 4.3 In lodging a Customer Request, the Customer is considered to have acknowledged and accepted the fees that are current on the date of lodgement.

##### **Basis for charging**

- 4.4 The Customer agrees that;
  - (a) each time a Customer Request is lodged the Customer will be charged the Fees (which may be varied by ESA from time to time in accordance with this clause 4);
  - (b) when a Customer Request is received, the Fees will be charged to the Customer as soon as a Customer Request is entered into the ESA Systems and regardless of whether or not the Customer Request has been checked for accuracy or completeness; and
  - (c) the Fees will be set by ESA and as varied by this clause 4.
- 4.5 ESA is under no obligation to provide the services if the Customer has not paid Fees to ESA in clear funds on the due date for payment.
- 4.6 If the Customer fails to comply with any of this Agreement:
  - (a) any money which the Customer has paid to ESA on account of any Customer Request may be forfeited to ESA; and
  - (b) ESA may also take legal action against a Customer to recover the balance of the Fees and any other amounts owing to it under this Agreement.

##### **Refunds - Extenuating Circumstances**

- 4.7 ESA only offers refunds where ESA determines, at its discretion, that extenuating circumstances apply to the Customer. Customers will not be eligible for a refund of any amounts paid with respect to the Services if the Customer has not;
  - (a) provided true and correct information with respect to any relevant Customer Request;
  - (b) properly and accurately completed any online application with respect to the relevant Agency Check;
  - (c) properly provided all consents (including by signing and dating any pre-populated informed consent form) required by ESA with respect to the relevant Services; or
  - (d) properly provided all identification information required by ESA with respect to the relevant Services.

##### **No Refund**

- 4.8 ESA is not responsible for, and the Customer acknowledges that the Customer is not entitled to, any refund with respect to;
  - (a) data entry errors that have been made by the Customer, the failure by the Customer to provide required details and other information (including identification information), or the provision by the Customer of false or incorrect information with respect to the relevant Customer Request;



- (b) Customers that have changed their mind after completing a Customer Request;
- (c) selection by the Customer of the wrong Agency Check type and/or reason for the Agency Check when completing the relevant Customer Request; or
- (d) failure by the Customer to properly complete a Customer Request, including by failing to sign, date and return any informed consent form required with respect to the services.

#### **Refund Charge**

- 4.9 ESA may charge a non-negotiable refund-processing fee of \$7.50 (GST inclusive) with respect to any request for a refund.
- 4.10 The refund-processing fee will be subtracted from any refund amount that is approved by ESA and will be retained by ESA.
- 4.11 To request a refund, please email [admin@employmentscreeningaustralia.com.au](mailto:admin@employmentscreeningaustralia.com.au).
- 4.12 Refund requests must include the first name and surname, date of birth for the relevant person for whom the request was made, the reference number with respect to the relevant Services (if possible), and a brief description of why the refund is required. ESA will then assess the refund request and determine if the Customer is eligible for a refund.
- 4.13 To the full extent permitted by Law, ESA reserves the right to reject any application for a refund in its absolute discretion.

#### **5 Termination of Customer Request**

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##### **Right to not proceed with a Customer Request**

- 6 ESA may, at its sole discretion, choose to withdraw and not proceed with completion of a Customer Request if;
  - (a) for individuals applying online, the application process cannot be completed without a valid credit card/ payment
  - (b) fees are not paid in full by the due date; or
  - (c) ESA is unable to contact the Customer for any reason.

##### **Incomplete Customer Requests**

- 6.2 The Customer must complete all Customer Requests within three months after the Commencement Date.
- 6.3 If the Customer fails to complete a Customer Request within this time (including where ESA has requested further information from the Customer and the Customer has failed to respond):
  - (a) ESA may, in its absolute discretion, cancel or archive the Customer Request and any money that has been paid to ESA, on account of that Customer Request, will be forfeited to ESA; and
  - (b) ESA is released from all Claims and any obligations to provide the Services in connection with that Customer Request.

#### **7 GST**

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- 7.1 Terms used in this clause have the meaning given to them in GST Law and all amounts payable under this Agreement are excluding GST.
- 7.2 Where the Goods and Services provided under this Agreement are:
  - (a) a taxable supply; and
  - (b) the consideration for that supply excludes GST,the recipient must pay an amount equal to the GST in addition to the consideration payable for the supply.
- 7.3 The amount of GST will be calculated at the prevailing GST rate.

- 7.4 If the GST rate is varied, the consideration payable for any supply under this Agreement will be varied to reflect the change of rate and any reduction in any other tax, duty or statutory charge connected with the rate change.
- 7.5 Where GST applies to a supply made under this Agreement, the supplier will deliver to the recipient a valid tax invoice or adjustment note at, or before the time payment for the supply is required.
- 7.6 If an adjustment event occurs in connection with any taxable supply made under this Agreement:
- (a) the amount payable by the recipient will be recalculated to reflect the adjustment event; and
  - (b) payment for the adjustment event will be made by the recipient to the supplier or by the supplier to the recipient (as the case requires).
- 7.7 Where a party is required under this Agreement to pay or reimburse an expense or outgoing of another party, the amount to be paid or reimbursed will be the sum of:
- (a) the amount of the expense or outgoing less any input tax credits for the expense or outgoing to which the other party is entitled; and
  - (b) if the payment or reimbursement is subject to GST, an amount equal to that GST.

## **8 Intellectual Property**

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- 8.1 Title to and ownership of all Intellectual Property Rights in New Material developed through services performed under this Agreement, will vest in ESA upon its creation.
- 8.2 In consideration of the receipt of payment and subject to the Customer performing its obligations under this Agreement, ESA gives the Customer a non-exclusive, non-transferrable, royalty free licence to use the New Material for commercial purposes.
- 8.3 To remove doubt, the Customer is not permitted to sub-licence New Material developed through services performed under this Agreement without ESA written consent.
- 8.4 Paragraph 8.1 does not affect the ownership of any Existing Material belonging to another party that is used in connection with performing the Services under this Agreement.
- 8.5 For Existing Material, each party grants the other a perpetual, non-exclusive, non-transferable, royalty free licence to use Existing Material belonging to the other party for purposes related to:
- (a) performing the services under this Agreement; and
  - (b) developing any New Material which may result from the performance of those services under this Agreement.
- 8.6 Each party warrants that it owns or is legally authorised to use all Existing Material provided by it that used in connection with performing the services.
- 8.7 ESA also grants the Customer a non-exclusive, non-transferable, royalty-free licence to use any Existing Material belonging to or relied on by ESA that is incorporated into New Material developed under this Agreement to:
- (a) use, reproduce and adapt the Existing Material in accordance with the licence terms proposed under clause 8.2; and
  - (b) perform any other act in relation to copyright subsisting in the Existing Material (including infringing any Moral Rights in the Existing Material).
- 8.8 This clause survives the expiry or early termination of this Agreement.
- 8.9 To remove doubt, each party warrants that all employees, officers, agents, contractors or sub-contractors involved in delivering any of the Services will be bound by this clause.

## **9 Confidential Information**

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- 9.1 Parties must ensure that Confidential Information is kept confidential and is not disclosed to any person except:
- (a) to its employees, officers, agents, contractors and sub-contractors to the extent needed for the performance of this Agreement;
  - (b) where disclosure is authorised or required by law; or
  - (c) with the Disclosing Party's consent.
- 9.2 Each party must:
- (a) ensure that all Confidential Information is kept reasonably secure;
  - (b) ensure that all Confidential Information is only used for purposes directly related to the provision and use of Goods and Services, and only the relevant purpose for which it is originally disclosed;
  - (c) immediately notify the other party if it becomes aware of any breach of this clause, or if a disclosure of Confidential Information is required by law;
  - (d) if requested by the Disclosing Party:
    - i. deliver or destroy all documents, records or files in its possession or control which contain Confidential Information in accordance with the Disclosing Party's instructions; or
    - ii. obtain from its officers, employees, agents and sub-contractors a deed of confidentiality in a form acceptable to the Customer.
- 9.3 To remove doubt, each party warrants that:
- (a) all employees, officers, agents, contractors or sub-contractors involved in the provision or receipt of Goods and Services under this Agreement will be bound by this clause; and
  - (b) they will immediately notify the other party upon discovering there has been a breach of this clause.

## **10 Personal Information**

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- 10.1 This clause 10 applies if the goods and services under this Agreement will involve:
- (a) the transfer of Personal Information; or
  - (b) the provision of services to a third party for a relevant person to whom the Personal Information belongs.
- 10.2 Unless authorised by law, each party must:
- (a) ensure that Personal Information is protected against loss and unauthorised access, use, modification, disclosure or other misuse;
  - (b) not use Personal Information other than for the purposes directly related to providing the Goods and Services under this Agreement;
  - (c) not disclose Personal Information without the prior written consent of the relevant person to whom it belongs;
  - (d) ensure that access to Personal Information is restricted to those persons who require access in order to perform their duties under this Agreement;
  - (e) ensure that its employees, officers, agents, contractors and sub-contractors comply with the same obligations imposed on ESA under this clause;
  - (f) fully and promptly cooperate with the Disclosing Party in order to respond to any applications or privacy complaints which require access to, or amendment of, a document containing a person's Personal Information;
  - (g) immediately notify the Disclosing Party if the Receiving Party becomes aware of any unlawful use or disclosure of Personal Information in its possession or control;

- (h) comply with such other privacy and security measures as agreed to in writing from time to time; and
- (i) if requested by the Disclosing Party, promptly return or destroy any record, document or file which contains Personal Information.

10.3 Each party must also:

- (a) ensure its employees, officers, agents, contractors and sub-contractors are bound by this clause; and
- (b) immediately notify the Disclosing Party upon becoming aware of any breach of this clause.

## 11 Data Protection

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11.1 ESA will, in accordance with its information security policy only use Customer Data held by ESA (or to which ESA has access):

- (a) for the purpose of fulfilling its obligations under this Agreement;
- (b) as required by Law and, where applicable, under any agreement ESA has with a Government Agency in relation to the provision of the Services (including specifically any agreement ESA has with ACIC with respect to the National Police Checking Service established by ACIC); and
- (c) where applicable, in accordance with ESA's Privacy Policy.

11.2 ESA will also:

- (a) establish and maintain reasonable safeguards against the destruction, loss or alteration of Customer Data in the possession, custody or control of ESA; and
- (b) use its best endeavours to protect the Customer Data from destruction, loss, alteration or security breaches while the Customer Data is stored in the ESA Systems.

## 12 Customer Warranties

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12.1 The Customer warrants to ESA that;

- (a) it has the requisite power and authority to enter into this Agreement and to carry out the obligations contemplated by this Agreement;
- (b) the transmission of Customer Requests (or related data or information) will not infringe the Intellectual Property Rights or other rights of any person, it holds (and will at all times continue to hold) all rights permits, licences, authorisations and accreditations required for it to perform its obligations under this Agreement; and
- (c) the performance of its obligations under this Agreement will comply with all such rights, permits, licences, authorisations and accreditations; and
- (d) not contravene any applicable Laws.

## 13 Limitation of Warranties and Liability

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13.1 Subject to clauses 13.1 - 13.5 and to the fullest extent permitted by law, the sole obligation of the ESA under this Agreement is to:

- (a) use its best endeavours to provide the goods and services; or
- (b) where statutory conditions or statutory warranties are applicable, to:
  - i. supply the services again;
  - ii. repair or replace (at the ESA's discretion) any part of a goods which is found to be defective during the relevant warranty period; or
  - iii. where (i) or (ii) are not capable of providing an appropriate remedy, to provide a refund equal to the value of the amount paid for a Customer Request.

13.2 In no event shall the ESA be liable for any Loss that is the subject of any Claim related to:

- (a) faulty design;
- (b) the negligent or faulty use of the goods and services supplied by ESA to the Customer;
- (c) negligent or misleading advice;

- (d) direct Loss resulting from the Customer's actual, attempted or failure to use or rely the relevant services; and
  - (e) any indirect, special or consequential Loss or injury to any person, corporation or other entity that arises through the ESA's negligence, breach of contract or under any other theory of liability.
- 13.3 If any goods supplied under this Agreement are supplied to the Customer as a 'consumer' under the Australian Consumer Law:
- (a) the consumer will have the benefit of certain non-excludable rights and remedies for those goods or services; and
  - (b) nothing in this Agreement excludes or restricts or modifies any condition, warranty, right or remedy available under the Australian Consumer Law.
- 13.4 If the Goods are not acquired for ordinary personal, domestic or household use under the Australian Consumer Law, the Seller limits its liability for payment to the Customer (or any person claiming through the Customer) of an amount equal to the lowest of:
- (a) supplying the services again;
  - (b) the cost of replacing the goods or supplying equivalent goods;
  - (c) the cost of repair of the goods;
  - (d) the cost of having the goods repaired or replaced; or
  - (e) where (a)-(d) are not capable of providing an appropriate remedy, to provide a refund equal to the value of the Customer Request.
- 13.5 The Customer also acknowledges that if the ESA suffers a loss in connection with attending to and servicing a request from the Customer that is not covered by:
- (a) a voluntary warranty; or
  - (b) a statutory warranty under Australian Consumer Law,
- the Customer must reimburse the Seller for reasonable losses suffered and other costs incurred in connection with attending to such requests.

## **14 Indemnity**

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- 14.1 The Customer indemnifies ESA and its Personnel (those indemnified), from all Loss resulting from any Claim that directly or indirectly arises out of or in connection with:
- (a) a breach of this Agreement by the Customer;
  - (b) the transmission of any Customer Requests or Agency Checks;
  - (c) any negligent or fraudulent act, error or omission on the part of the Customer or its Personnel;
  - (d) loss of or damage to any property or injury to or death of any person caused by any act or omission of the Customer; or
  - (e) any Claim by a third party against ESA relating to the Services or the subject matter of this Agreement.
- 14.2 The Customer's indemnity under clause 14.1 is proportionately reduced to the extent that ESA has caused or contributed to the Loss that is the subject of the Claim.

## **15 Termination and Suspension of Service**

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### **Termination by the LEC for convenience**

- 15.1 If the Customer is a LEC, the LEC may terminate this Agreement at any time, for convenience, by giving ESA five business days' notice in writing to that effect.

### **Termination by ESA**

- 15.2 Notwithstanding any other provision in this Agreement, ESA reserves its right to withdraw or suspend any Services for any reason that ESA deems appropriate.
- 15.3 ESA may, at its absolute discretion and without giving any reason, refuse to provide Services to a Customer or any person or persons.

### **Termination by ESA for cause**

- 15.4 ESA may terminate this Agreement immediately by notice to the Customer if;
- (a) the Customer commits any breach of this Agreement that is;
    - i. capable of remedy and the Customer fails to remedy the breach within 14 business days after receiving written notice requiring it to do so; or
    - ii. incapable of remedy.
  - (b) the Customer ceases to be able to pay its debts as they become due or fails to comply with a statutory demand;
  - (c) any step is taken by a mortgagee to take possession or dispose of the whole or part of the Customer's assets, operations or business;
  - (d) any step is taken to enter into any arrangement between the Customer and its creditors;
  - (e) any step is taken to appoint a receiver, a receiver and manager, a trustee in bankruptcy, a provisional liquidator, a liquidator, an administrator or other like person of the whole or part of the Customer assets, operations or business;
  - (f) the Customer disposes of the whole or part of its assets, operations or business other than in the ordinary course of business;
  - (g) the Customer ceases to carry on business; or
  - (h) where the Customer is a partnership, any step is taken to dissolve that partnership; or
  - (i) the ESA is satisfied on reasonable grounds that the Customer is unable or unwilling to satisfy the terms of this Agreement.
- 15.5 This clause 15.4 does not affect ESA's other rights under this Agreement or otherwise at law.

#### **Termination of Website access**

- 15.6 Access to the Website may be terminated at any time by ESA without notice. Any provisions of this Agreement that can survive termination will nevertheless survive any such termination.

#### **Termination of Accredited Body's Agreement with ACIC**

- 15.7 ESA may terminate this service or reduce the scope of the service (including by reducing or removing any Nationally Coordinated Criminal History Check categories) by notice at any time, as a result of a termination or reduction of Scope of ESA's agreement with ACIC.
- 15.8 The LEC will not be entitled to any compensation whatsoever including for loss of prospective profits or loss of any benefits that would have been conferred on the LEC if the termination or reduction had not occurred. ESA will only be liable for repayment of any outstanding nationally coordinated criminal history checks requested, and paid for, by the LEC prior to the effective date of termination.
- 15.9 This clause 15 does not affect ESA's other rights under this Agreement or otherwise at law.

#### **16 Consequences of Termination**

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- 16.1 On expiry or termination of this Agreement for any reason the Customer must;
- (a) promptly return or delete all materials, information and documentation provided to it by ESA in connection with this Agreement;
  - (b) refrain from accessing or using any ESA Systems (including the Web Tools), and ensure that none of its Personnel access or use any of the ESA Systems
- 16.2 Subject to this Agreement, ESA may;
- (a) retain any Fees that have been paid to it;
  - (b) terminate all means or modes of access and use of the ESA Systems by the Customer and its Personnel; and be regarded as discharged from any further obligations under this Agreement.
- 16.3 The Customer acknowledges and agrees that ESA may keep a reasonable number of copies of;
- (a) the Customer's Confidential Information disclosed to ESA under this Agreement; and

- (b) the Customer Data, for record keeping and quality control purposes, to allow ESA to comply with all applicable Laws.

## **17 Dispute Resolution**

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### **Criminal History Check Disputes**

- 17.1 Disputes arising from the goods and services provided under this Agreement are to be handled by ESA in accordance with ESA's ACIC Agreement.
- 17.2 The Customer agrees to provide ACIC with any information or materials reasonably requested by ACIC, in order to allow ACIC to resolve any dispute between itself and ESA.

### **Terms and Conditions Disputes**

- 17.3 This clause 17 applies only to disputes about this Agreement.
- 17.4 If the parties have a dispute about this Agreement or any dispute arising under this contract that is not related 17.1 - 17.2:
  - (a) the Party claiming that there is a dispute will send the other Party a notice setting out the nature of the dispute (**Dispute Notice**); and
  - (b) the Parties will try to resolve the dispute through direct negotiation, including by referring the matter to persons who have the authority to intervene and direct some form of resolution.

## **18 Accrued Rights and Remedies**

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- 18.1 Termination of this Agreement will not prejudice any right of action or remedy which may have accrued to either party prior to such termination.

## **19 Notices and Other Communications**

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### **Service of notices**

- 19.1 Except as otherwise provided under this Agreement, a notice, demand, consent, approval or communication under this Agreement (Notice) must be:
  - (a) in writing, in English and signed by a person duly authorised by the sender; and
  - (b) hand delivered or sent by prepaid post or email to: PO Box 908, Maroochydore Q4556 OR [admin@employmentscreeningaustralia.com.au](mailto:admin@employmentscreeningaustralia.com.au)

### **Effective on receipt**

- 19.2 A notice given in accordance with this clause takes effect when taken to be received (or at a later time specified in it), and is taken to be received:
  - (a) if hand delivered, on delivery;
  - (b) if sent by email, two hours after the time that the email is sent (unless the sender receives notification during that time that delivery of the email was not successful);
  - (c) if sent by prepaid post, on the second Business Day after the date of posting (or on the seventh Business Day after the date of posting if posted to or from a place outside Australia); or
  - (d) if sent by facsimile, when the sender's facsimile system generates a message confirming successful transmission of the entire notice.

## **20 Verification Functionality**

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- 20.1 ESA may embed, incorporate or use verification functionality or features with respect to Agency Checks, which may include:
  - (a) the provision of access to an online verification of the Agency Information contained in the relevant Agency Check; or
  - (b) other security or integrity measures as determined by ESA.
- 20.2 The Customer consents to and agrees that:

- (a) such third party may also access the relevant Agency Information of the relevant individual (being the subject of the Agency Check); and
- (b) the use such verification functionality or features with respect to Agency Checks.

20.3 The Customer agrees that providing such third parties with access to the relevant Agency Information in accordance with such verification functionality or features is appropriate and reasonable, and required to maintain security and integrity of the relevant Agency Check.

## **21 Police Checks**

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21.1 The Customer must:

- (a) not provide use of the Service or access to Nationally Coordinated Criminal History Checks other parties;
- (b) not send any Police Information or Personal Information about a relevant person to an overseas recipient unless the Customer has the prior approval of the relevant person;
- (c) act as if it were an APP Entity;
- (d) grant ESA a right of access to the Customer's premises (and to data, records and other material relevant to the use of the Service and the handling of Police Information, including the right to copy), which ESA must exercise reasonably and subject to the Customer's reasonable safety and security requirements;

21.2 ESA will not submit to ACIC any request for a Nationally Coordinated Criminal History Check unless it has collected the relevant person's application and Informed Consent in accordance with the requirements set out in ACIC national security and intelligence framework.

## **22 Limitations of Service**

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22.1 The Customer agrees that the provision of a Nationally Coordinated Criminal History Check to the Customer is for use on the following conditions:

- (a) ACIC makes no representation or warranty of any kind in respect to accuracy; and
- (b) ACIC does not accept responsibility or liability for any omission or error in the Nationally Coordinated Criminal History Check.

## **23 ACIC Suspension**

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23.1 If:

- (a) ACIC suspends or reduces ESA's level of access to, or use of, the service; and
- (b) that suspension or reduction affects ESA's ability to provide the Service to the Customer,

the Customer's level of access to, or use of, the service may be suspended or reduced by ESA or ACIC.

## **24 Protection of Police Information and other Personal Information**

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24.1 The Customer acknowledges that its use of the service involves the collection, use and possible disclosure by the Customer of Personal Information or Police Information.

24.2 The Customer must in its use of the Service;

- (a) collect, use or disclose Personal Information and Police Information only for the Nationally Coordinated Criminal History Check Category and related administration;
- (b) not collect, transfer, store or otherwise use Police Information outside Australia, or allow parties outside Australia to have access to Police Information, unless a Permitted Offshore Transfer circumstance applies;
- (c) not disclose Police Information other than for the purpose for which the relevant person gave Informed Consent unless it has the prior written approval of ACIC;
- (d) not commit any act, omission or engage in any practice which is contrary to Privacy Law;
- (e) not do any act or engage in any practice that would be a breach of the Australian Privacy Principles to the extent they are applicable;



- (f) implement Information Safeguards to keep Personal Information and Police Information secure;
  - (g) comply with any directions or guidelines in relation to the treatment of Personal Information and Police Information, notified to the Customer by ESA; and
  - (h) ensure that all Personnel who are required to deal with Personal Information and Police Information are made aware of the obligations of the Customer set out in this clause.
- 24.3 The Customer must, on request by the ESA or ACIC, promptly provide ESA or ACIC with a copy of the Customer's privacy policy to the extent that it is required to have one.
- 24.4 The Customer must not alter the content of a Nationally Coordinated Criminal History Check provided to the Customer by ESA or by ACIC, including;
- (a) any Police Information; and
  - (b) any Personal Information
- 24.5 The Customer must destroy or securely dispose of all hard and electronic copies (including backed up versions held on servers or other media) of each Nationally Coordinated Criminal History Check within fifteen (15) months following the receipt of the nationally coordinated criminal history check.
- 24.6 The Customer must notify ESA immediately if the Customer becomes aware of a breach or possible breach of any of the obligations contained in or referred to in this clause 24.

## **25 Audits and Access to Premises and Information.**

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- 25.1 ACIC may conduct audits relevant to the Customer's compliance with this Agreement.
- 25.2 Audits may be conducted of:
- (a) the Customer's operational practices and procedures as they relate to police checks.
  - (b) the Customer's compliance with its privacy and confidentiality obligations under this Agreement including that the Nationally Coordinated Criminal History Check has been used only for the Nationally Coordinated Criminal History Check Category; and
  - (c) any other matters determined by ACIC to be relevant to the use of the Services or the performance of the service.
- 25.3 The Customer must participate promptly and cooperatively in any audits conducted by ACIC or its authorised Personnel.
- 25.4 Each Party must bear its own costs associated with any audits.
- 25.5 For the purposes of ACIC conducting audits under this clause 20 (5), the Customer must, as required by ACIC or its authorised Personnel;
- (a) grant ACIC and its authorised Personnel access to the Customer's premises and data, records and other material relevant to the performance of this Agreement; and
  - (b) arrange for ACIC and its authorised Personnel to inspect and copy data, records and other material relevant to the performance of this service.
- 25.6 The rights referred to in this clause are, wherever practicable, subject to the Customer's reasonable security requirements or codes of behaviour, except where ACIC or its authorised Personnel believes that there is a suspected or actual breach of law.
- 25.7 The rights of ACIC under this clause apply equally to;
- (a) the Auditor-General or a delegate of the Auditor-General;
  - (b) the Privacy Commissioner or a delegate of the Privacy Commissioner;
  - (c) the Commonwealth Ombudsman or a delegate of the Commonwealth Ombudsman, for the purpose of performing the Auditor-General's, Privacy Commissioner's or the Commonwealth Ombudsman's statutory functions or powers.

## **26 Access to Documents**

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- 26.1 If the Commonwealth receives a request for access to a document created by or in the possession of the Customer that relates to the services provided by ACIC or ESA, they may at any time by notice require the Customer to provide the document to ACIC and the Customer must, at no additional cost to the Commonwealth or ESA, promptly comply with the notice.
- 26.2 If the Customer receives a request for access to a document in its possession that relates to this Service, the Customer must consult with ESA and ACIC upon receipt of the request.

## **27 Miscellaneous**

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### **Amendments**

- 27.1 ESA reserves the right to amend this Agreement from time to time.
- 27.2 Amendments will be effective immediately upon uploading on the Website. The Customer's continued use of the Website (or submission of any Customer Requests) following such uploading will represent an agreement by the Customer to be bound by this Agreement as amended.
- 27.3 The Customer agrees that it is responsible for checking the Website and reviewing the latest version of this Agreement to ensure that it is satisfied with the terms and conditions as applicable at any given time.

### **Approvals and consents**

- 27.4 Except where this Agreement expressly states otherwise, a party may, in its discretion, give conditionally or unconditionally or withhold any approval or consent under this Agreement.

### **Assignment**

- 27.5 The Customer may only assign its rights under this Agreement with the prior written consent of ESA.

### **Force Majeure**

- 27.6 Neither party is liable for any failure to perform or delay in performing its obligations under this Agreement if that failure or delay is due to anything beyond that party's reasonable control.
- 27.7 This clause does not apply to any obligation to pay money.
- 27.8 The deadline for any obligation that is affected by the Force Majeure will be extended by a period equivalent to the period for which the Force Majeure has prevented that obligation being performed.

### **Further action**

- 27.9 Each party must do, at its own expense, everything reasonably necessary (including executing documents) to give full effect to this Agreement and any transaction contemplated by it.

### **Survival**

- 27.10 Any indemnity or any obligation of confidence under this Agreement is independent and survives termination of this Agreement.
- 27.11 Any other term by its nature intended to survive termination of this Agreement survives termination of this Agreement.

### **Severability**

- 27.12 Each clause of this Agreement and each part of each clause must be read as a separate and severable provision.
- 27.13 If any provision is found to be void or unenforceable, that provision may be severed and the remainder of this Agreement will continue in force.

### **Waiver**

- 27.14 A party does not waive a right, power or remedy if it fails to exercise or delays in exercising the right, power or remedy.
- 27.15 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.

27.16 A waiver of a right, power or remedy must be in writing and signed by the party giving the waiver.

27.17 If we waive any rights available to us under this Agreement on one occasion, this does not mean that those rights will automatically be waived on any other occasion.

#### **Relationship**

27.18 Except where this Agreement expressly states otherwise, it does not create a relationship of employment, trust, agency or partnership between the parties.

#### **Governing law and jurisdiction**

27.19 This Agreement are governed by the laws of Queensland, Australia, and each party irrevocably and unconditionally submits to the non-exclusive jurisdiction of the courts of Queensland, Australia.

#### **Links**

27.20 The Website may contain links to other websites (linked websites). Those links are provided for convenience only and may not remain current or be maintained.

27.21 ESA is not responsible for the content or privacy practices associated with linked websites.

27.22 The links with linked websites should not be construed as an endorsement, approval or recommendation by ESA of the owners or operators of those linked websites, or of any information, graphics, materials, products or services referred to or contained on those linked websites, unless and to the extent stipulated to the contrary.

## Attachment One (Information Safeguards)

### 28 Introduction

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- 28.1 In accessing the service, LECs must implement the security management measures set out in Attachment Two to ensure against:
- (a) misuse, interference, loss, unauthorised access, modification or disclosure of a relevant person's Personal Information;
  - (b) unauthorised access to and use of the service;
  - (c) unauthorised access to Police Information in the Service Support National Police Checking Service Support System (NSS); and
  - (d) loss and unauthorised access, use, modification or disclosure of Police Information stored outside of NSS.
- 28.2 This information is provided to assist LECs to understand their obligations and comply with ACIC's security management standards.

### 29 Information Security Policy

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- 29.1 The LEC must develop, document and maintain an Information Security Policy (**Policy**) that clearly describes how it protects information and which is consistent with this Agreement.
- 29.2 The Policy should be supported by the LEC's senior management and be structured to include any legal framework relevant to the Policy, such as the Australian Crime Commission Act 2002 (Cth) and this Agreement.
- 29.3 The Policy must include adequate details on how it is enforced through physical, technical and administrative controls, including details on:
- (a) the type or class of information that the Policy applies;
  - (b) information security roles and responsibilities relating to the Service;
  - (c) security clearance requirements and its Personnel's responsibilities;
  - (d) configuration and change control;
  - (e) technical access controls;
  - (f) staff training;
  - (g) networking and connections to other systems;
  - (h) physical security (including media security); and
  - (i) incident management.
- 29.4 The LEC's privacy policy must reference the Policy, in terms of how Personal Information is held.

### 30 Technical Access

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- 30.1 The LEC's ICT environment must be secured in accordance with the Policy and should:
- (a) be protected by appropriately configured gateway environment (including firewalls);
  - (b) include technical access controls protecting any National Police Information stored electronically outside of NSS, for example, restricted file system permissions; and
  - (c) maintain a static IP address to avail web services (if applicable).

### 31 Technical Infrastructure

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- 31.1 Workstations and server infrastructure involved in the storage or processing of National Police Information and Personal Information should be secured in accordance with the Policy and should:
- (a) run current and patched operating systems;
  - (b) run current and patched software, including browsers (N-1 on browsers is acceptable providing patching is maintained);

- (c) have anti-virus software application installed up-to-date virus definition files; and
- (d) run application whitelisting software (desirable).

31.2 Administrative or privileged access to infrastructure is to be minimised and only used when an administrative function is required.

## **32 Password policy**

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32.1 System accounts that are involved in the storage or processing of National Police Information should be subject to a password policy that sets out;

- (a) no less than 10-character passwords including a minimum of one numerical and one upper case character;
- (b) password reset cycle no longer than 90 days;
- (c) users to select strong passwords (avoid dictionary words);
- (d) ensure unused accounts are disabled and removed; and
- (e) computers lock after 15 minutes of inactivity.

## **Training**

32.2 All LEC Personnel involved in storage or processing of National Police Information and Personal Information must be provided with the information security awareness training related to;

- (a) their responsibilities as defined in the Policy;
- (b) what constitutes authorised access to information; and
- (c) their obligations with regard to reporting of information security issues or incidents.

## **33 Incident Management**

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33.1 Any information security issues or incidents must be reported immediately to ESA where the consequence may impact or has impacted on ESA or ACIC's systems or information. This includes loss or compromise of digital certificates or associated passwords.