



# Hardcat Dictionary

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## Part A – Introduction

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### Incorporation

When this Dictionary is incorporated by reference into an agreement, then unless the context indicates otherwise:

- (a) a capitalised term in the Agreement has the meaning given in Part B this Dictionary; and
- (b) the Agreement shall be interpreted in accordance with Part C of this Dictionary.

## Part B – Defined terms

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Unless the context indicates otherwise:

**ACL** means the Australian Consumer Law in Schedule 2 of the *Competition and Consumer Act 2010*.

**AEST** means (a) on a day when daylight saving is observed in Sydney and Melbourne – Australian Eastern Daylight Time and (b) otherwise – Australian Eastern Standard Time.

**Agreement** means an agreement that incorporates this Dictionary by reference.

**Appointment Condition** means any condition applicable to the grant to Reseller Rights notified by Hardcat to Reseller at or before the time of the grant.

**Appointment Date** means the date identified as such in the Agreement.

**Approved Pricing** means pricing specified by Hardcat from time to time, including any terms and conditions Hardcat specifies for such pricing.

**Authority** means a Public Authority and/or a Private Authority.

**Branding Materials** means such brand names, trade marks, logos, artwork, product collateral and other branding materials as Hardcat designates from time to time for use in connection with the Software or its marketing or promotion by Reseller.

**Breach** means (as a noun) a breach of the Agreement and (as a verb) to breach the Agreement.

**Budget** means a budget specified in the Reseller Program.

**Bureau Fees** means fees paid or payable to Reseller for a Bureau Project.

**Bureau Project** means Project Work in which Reseller uses the Software to carry out specific tasks for a third party (e.g. a special audit of assets) but the Software is not supplied to the third party as an End User or on an ongoing basis or for installation on the End User's computer systems.

**Business Day** means a day that is not a statutory public holiday in metropolitan Sydney or Melbourne, Australia or a Saturday or Sunday.

**Business IP** means IP Rights in any materials, advertisements or promotional strategies, Marketing Material, documentation, graphics, website/s, content or other documents owned or developed by Reseller for the purpose of or in connection with the Reseller Rights or their exercise.

**Business Report** means a complete, detailed and truthful written report by Reseller on any of the following matters specified by Hardcat in a request:

- Reseller’s customers that are also End Users, including full names and contact details, products and services acquired from Reseller, accounting details including amounts invoiced and paid, and copies of any agreements or correspondence between Reseller and the customer;
- Reseller’s leads and sales pipeline, including full names and contact details;
- Reseller’s advertising, marketing and promotional activities and plans regarding the Software;
- any other matter relevant to the Software, Reseller’s business in relation to the Software or its support or any ancillary services related to the Software or its support, Reseller’s compliance with this Agreement or Reseller’s financial performance.

**Change of Control** means, in relation to a corporation, that without the prior written consent of Supplier: (a) a relevant interest (as defined in the Corporations Act) in more than 25% of the securities of the corporation that in normal circumstance entitle the holder to vote or participate at a meeting of the members of the corporation or to vote or participate in the election or appointment of directors of the corporation, passes to a person or persons who did not have such relevant interest at the Appointment Date; or (b) the ability to control or the actual control (irrespective of whether such control is exercisable on a passive or active basis and irrespective of whether such control is exercisable solely or jointly or directly or indirectly) of the management and policies of the corporation passes to a person or persons who did not have such ability or actual control at the Appointment Date.

**Claim** means any claim, demand, action, proceeding or legal process (including by way of set off, cross-claim or counterclaim).

**Commission** means install and configure the Software such that it operates optimally on an End User’s computer hardware, and provide the End User with sufficient instruction to competently use the key functionality of the Software.

**Confidential Information** of a Party means all information in whatever form (including, verbal, or recorded on paper or by electronic means) relating or belonging to that Party which that Party indicates, or which by its nature, is confidential, but excludes information which (a) is already in the possession of a Disclosee or (b) becomes known or generally available to the public – except if that results from a breach of confidentiality by a Disclosee (in which case it remains Confidential Information) or (c) a Disclosee independently develops, and includes, in the case of Hardcat, the terms of this Agreement.

**Consequential Loss** means (a) economic loss; (b) business interruption; (c) loss of revenue, profits, actual or potential business opportunities or contracts; (d) anticipated savings; (e) loss of profits; (f) loss of data; (g) an obligation to indemnify another person; (h) an obligation to contribute to the compensation of loss or damage suffered by another person and (i) consequential loss within the meaning of *Environmental Systems Pty Ltd v Peerless Holdings Pty Ltd* [2008] VSCA 26.

**Consumer Guarantee** means the consumer guarantees provided for by sections 51 to 63 of the ACL. Where they apply, Consumer Guarantees are Non-excludable Rights.

**Consumer Guarantee Rights** means the Consumer Guarantees, together with the rights and remedies associated with them. Where they apply, Consumer Guarantee Rights are Non-excludable Rights.

**Contact Address** means, in relation to a party, the postal or business address, fax number, email address or other address or identifier most recently notified as the party's address for communications (being as notified in the Agreement, until further notice.)

**Corporations Act** means the *Corporations Act 2001*.

**Cured** means, in relation to a Breach, that the Breach is remedied in all material respects after the Hardcat gives Reseller written notice that outlines the Breach.

**Details** means the section of the Agreement with that title.

**Dictionary** means this list of defined terms (including the Rules of Interpretation) as updated by Hardcat from time to time. An updated Dictionary takes effect 7 days after it is published on Hardcat's website.

**Disclosee** means a person who receives the Confidential Information of a Discloser.

**Discloser** means a person whose Confidential Information is disclosed to a Disclosee.

**Electronic Messaging** means Email and/or Instant Messaging.

**Email** includes web mail and any similar store and forward messaging service by which Hardcat and Reseller can exchange messages.

**End User** means an entity that acquires a Licence for the Software for its own internal business purposes only, and does not make available directly or indirectly to any other entity the Software or services facilitated by the Software.

**Financial Year** means a year from 1 July to 30 June next.

**Future IP Rights** means IP Rights that arise or are created after the Appointment Date and includes future copyright within the meaning of the *Copyright Act 1968*.

**Gold Partner** means a Reseller that is allocated Gold Partner status under the Hardcat Reseller Program.

**GST** means goods and services tax under the GST Law.

**GST Act** means the *A New Tax System (Goods and Service Tax) Act 1999*.

**GST Law** means the same as in the GST Act.

**Hardcat** means the entity identified as such in the Agreement.

**Hardcat Audit** means an audit of any aspect of Reseller's business or activities in connection with this Agreement or the Reseller Rights or the Software, to be conducted when and as Hardcat determines.

**Hardcat Fee** means a fee calculated in accordance with the Reseller Program (which may, without limitation, depend on Reseller's assigned status under the Reseller Program and/or its Targets and/or other factors that Hardcat deems appropriate.

**Hardcat Reseller Program** means Hardcat's document/s so titled that set out further benefits and entitlements (if any) to which Reseller is entitled (conditionally or otherwise)

and any further rules, requirements and conditions applicable to the Reseller Rights and any Targets applicable to Reseller (either specifically or in common with other resellers) and any other matter that Hardcat deems fit in the interests of managing its Reseller network. Hardcat may vary the Reseller Program on four months' notice (in case of variation of a Target or the Hardcat Fee) or two months' notice (in case of any other variation).

**Hardcat Training Program and Rules** means Hardcat's training program for staff and/or resellers of Software and/or persons responsible for marketing, selling, Commissioning or supporting Software (together with any associated rules issued by Hardcat with respect to such matters) as varied by Hardcat from time to time.

**Initial Maintenance Fee** means the Maintenance Fee paid by an End User at the same time as the End User acquires a Software Licence, in respect of the first year of the End User's Maintenance Agreement.

**Insolvency Event** means in relation to a person, means the happening of any one or more of the following events: (a) the person being unable to pay their debts as and when they fall due; (b) a receiver, receiver and manager, administrator, liquidator, trustee for creditors or trustee in bankruptcy or analogous person being appointed over the person's undertaking or assets or any of them; (c) if the person is a natural person, an application and filing for bankruptcy being made in respect of the person; or (d) if the person is a corporation – (i) an application for winding up or other process seeking orders which, if granted, would render the person an externally-administered body corporate being filed and not being withdrawn within 20 Business Days; (ii) the person being or becoming the subject of an order, or a resolution being passed, for the person's winding up or dissolution; or (iii) the person entering into, or resolving to enter into, a deed of company arrangement, or an arrangement, composition or compromise with, or assignment for the benefit, of its creditors generally or any class of creditors, or proceedings being commenced to sanction such a deed of company arrangement, or arrangement, composition or compromise, other than for the purposes of a bona fide scheme of solvent reconstruction or amalgamation.

**Instant Messaging** includes SMS, iMessage and any similar instant messaging service by which Hardcat can cause messages to be delivered to Reseller.

**IP Rights** means all industrial and intellectual property rights of any kind which may subsist in Australia or anywhere else in the world, including without limitation: (a) patents, copyright, rights in circuit layouts, designs, trademarks (including goodwill in those marks) and domain names; (b) any application or right to apply for registration of any of the rights referred to in paragraph (a) of this definition; and (c) all rights of a similar nature to any of the rights in paragraphs (a) or (b) of this definition – whether or not such rights are registered or capable of being registered; and (d) Future IP Rights.

**Item** means a numbered item in the Details.

**Law** means any law, Act, regulation, binding code or industry standard relevant to this Agreement, as updated or replaced from time to time, and includes a direction of an Authority.

**Level 1 Support** means promptly handling, and to the fullest extent feasible, resolving all End User service queries and complaints in the first instance by telephone and or other personal response.

**Level 2 Support** means handling by email or other reasonable means of communication of End User service queries and complaints in the English language where all reasonable efforts by Reseller to resolve the complaint or query have failed.

**Licence** or **Software Licence** means Hardcat's terms and conditions for the use of Software, as notified to Reseller from time to time.

**Loss** means loss or damage suffered by a person and arising in connection with or out of the Agreement or any supply made under it (whether pleaded in contract, tort, breach of statutory duty or on any other basis, and whether arising from acts or omissions, and whether or not loss or damage the risk of which another person was or should have been aware), including but not limited to Consequential Loss and an obligation to contribute to or indemnify against loss or damage suffered by a third party.

**Maintenance Agreement** means a software support agreement for the Software in a form approved by Hardcat from time to time containing at least the minimum terms, standards and / or service entitlements and / or levels set out in the Reseller Program.

**Maintenance Fees** means fees paid or payable by End Users to Reseller for maintenance and support of the Software, including under a Maintenance Agreement.

**Market** means a market for the Software as defined in the Agreement (eg by reference to a geographic territory and/or an industry and/or a size or scale of business) as amended in accordance with this Agreement from time to time. Hardcat's certificate as to what Market/s apply to Reseller at any time is final and binding on Reseller.

**Marketing Guidelines** means any guidelines issued or updated by Hardcat from time to time and regulating the promotion or marketing of Software or Services, the contents or use of Branding Materials or any other aspect of Reseller's marketing in its capacity as a reseller of Software.

**Marketing Material** means any material used for the advertising, marketing or promotion of the Software or in connection with the Reseller Rights.

**Material Discrepancy** means that Hardcat Fees have been underpaid by 5% or more since the last Hardcat Audit (or, if there has been none, since the Appointment Date) or there has otherwise been a substantial failure by Reseller to comply with the Agreement.

**Minimum Order Requirement** means a requirement in the Reseller Program that Reseller places a specified number, volume or value of orders for Software in a specified period.

**Monthly Report** means a report on Reseller's activities and performance in a form, and containing such data, as Hardcat specifies from time to time.

**New Software Sales Fees** means amounts payable to Reseller in consideration for an End User's order for a new Licence (excluding any part of such amount required by the Agreement to be remitted to Hardcat and disregarding any orders for which the End User has not in fact made full payment).

**Non-excludable Rights** means (a) in the case of any term, provision, right or remedy that by law cannot be excluded or limited by contract – the whole of that term, provision, right or remedy and (b) in the case of any term, provision, right or remedy that by law may be excluded or limited by contract only to an extent – so much of that term, provision, right or remedy as cannot be excluded or limited. Where they apply, Consumer Guarantee Rights are Non-excludable Rights.

**Party** means Hardcat and Reseller.

**People** means, in relation to a Party, the Party's management, employees, contractors and agents and, in relation to Reseller, the End Users.

**Platinum Partner** means a Reseller that is allocated Platinum Partner status under the Hardcat Reseller Program.

**Private Authority** means an authority, administrator, regulator or body that is not a Public Authority but has authority in relation to Supplier, Customer or a Service eg .au Domain Administration Ltd in relation to Australian domain names.

**Probation Condition** means a condition that Reseller's appointment is subject to probation for a specified period, and unless Hardcat specifies otherwise, is deemed to provide that Hardcat may terminate this Agreement in its absolute discretion during, or within 60 days after, the specified period.

**Project Fees** means amounts paid or payable by an End User for Project Work, other than Bureau Fees.

**Project Work** means a special project involving the Software.

**Public Authority** means any governmental, semi-governmental, administrative, fiscal, statutory, judicial or quasi-judicial body, department, commission, authority, tribunal, agency or entity operating or having jurisdiction in the countries where Services are supplied, and includes ACMA.

**Related Body Corporate** means the same as in the Corporations Act.

**Reseller** means the entity identified as such in this Agreement.

**Reseller Fee** means, in respect of an End User, the amount paid by that End User to Reseller, less all Hardcat Fees and other debts owed by Reseller to Hardcat.

**Reseller Incentive** means payments and benefits listed as 'Reseller Incentives' in the Reseller Program.

**Reseller Program** means the Hardcat Reseller Program.

**Reseller Rights** has the meaning set out in the Agreement.

**Rules of Interpretation** means the rules in Part C of this Dictionary.

**Sales Target** means a sales target described in Reseller Program.

**Services** means the services specified by the Agreement and/or the Reseller Program.

**Software** means the software identified as such in the Reseller Program, provided that Hardcat may add or subtract software from time to time by notice to Reseller, in which case the Agreement is taken to have been amended accordingly. Hardcat's certificate as to what constitutes the Software at any time is final and binding on Reseller.

**Software Licence** or **Licence** means any terms and conditions for the use of Software notified to Customer, as updated from time to time.

**Special Condition** means a condition of the Agreement that is expressly specified as a Special Condition.

**Target** means a Minimum Order Requirement or a Sales Target or a Budget.

**Term** means from the Appointment Date to the Termination Date.

**Termination Date** means the date on which the Agreement terminates.

**Termination Event** means (a) Reseller suffers an Insolvency Event; (b) Reseller undergoes a Change of Control without Hardcat's prior written approval; (c) Reseller commits any act of dishonesty or lack of good faith in its dealings with Hardcat; (d) Reseller does not Cure a Breach within 14 days; (e) Hardcat has given at least 60 days' notice that it intends to terminate this Agreement; (f) Hardcat reasonably considers that Reseller has caused, or is likely to cause, significant damage to the reputation of Hardcat or the Software; (g) Reseller is subject to a Change of Control without Hardcat's prior written consent; (h) an Appointment Condition is breached or not satisfied; (i) any other circumstance applies which, under this Agreement, gives Hardcat a right to terminate.

**Update** means, in relation to the Software, any update, upgrade, revision, patch or fix that Hardcat makes available to an End User.

**Use Licence** means a worldwide, perpetual, irrevocable, royalty free, assignable, sub-licensable, non-exclusive licence to copy, adapt, modify, use, exploit, commercialise, distribute or communicate to the public.

## Part C – Rules of interpretation

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### 1. Rules

- (a) Words importing the singular include the plural and vice versa.
- (b) Words that are gender neutral or gender specific include each gender.
- (c) If a word or phrase is defined its other grammatical forms have corresponding meanings.
- (d) 'Includes' means includes without limitation.
- (e) No rule of construction will apply to a clause to the disadvantage of a Party merely because that Party put forward the clause or would otherwise benefit from it.
- (f) A reference to:
  - (i) a person includes a firm, unincorporated association, corporation and an Authority;
  - (ii) a person includes the person's legal personal representatives, successors and assigns and persons substituted by novation;
  - (iii) a right includes a benefit, interest, remedy, discretion, authority or power.
- (g) An obligation of more than one person binds them all jointly and severally.
- (h) An obligation includes a warranty or representation and a reference to a failure to observe or perform an obligation includes a breach of warranty or representation.
- (i) Time is in AEST.
- (j) '\$' or 'dollars' is a reference to Australian currency.

- (k) 'Costs' includes charges, expenses and legal costs (on full indemnity basis).
- (l) Writing includes any mode of representing or reproducing words in tangible and permanently visible form, and includes electronic and fax transmissions.
- (m) Anything (including any amount) is a reference to the whole or any part of it and a reference to a group of things or persons is a reference to any one or more of them.
- (n) A document includes the document as novated, varied or replaced and despite any change in the identity of the Parties.
- (o) If the date on or by which any act must be done is not a Business Day, the act must be done on or by the next Business Day.
- (p) Where time is to be calculated by reference to a day or event, that day or the day of that event is excluded.

### **2. Discretion and approvals**

A matter within a Hardcat's discretion, including the giving of any consent or approval, is taken to be in its absolute and unfettered discretion.

### **3. Reading down**

If at any time any provision is held to be invalid, illegal or unenforceable then, to the extent permitted by law:

- (a) the provision must be read down, or severed if necessary; and
- (b) the validity, legality and enforceability of the remaining provisions will not in any way be affected or impaired thereby.