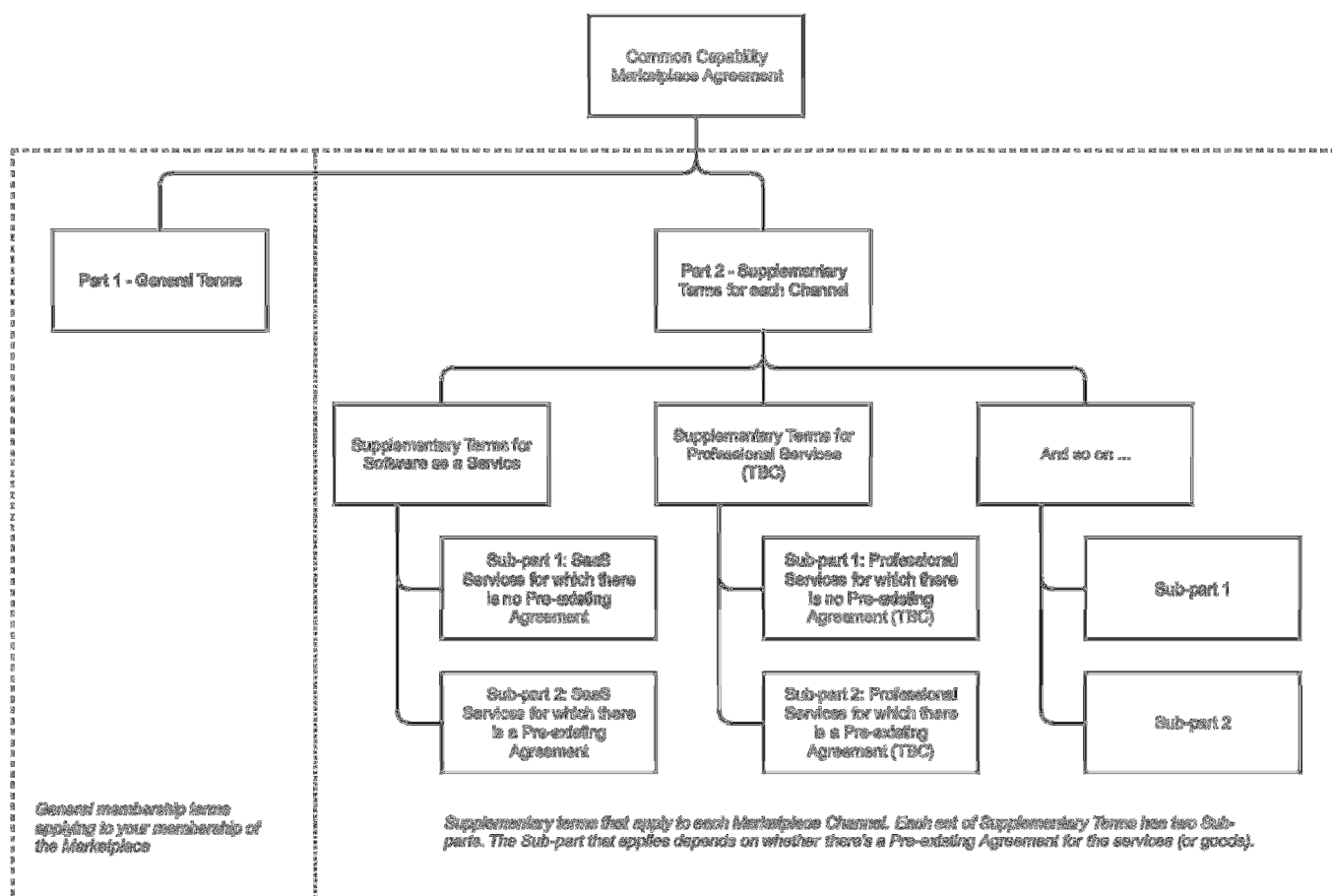


New Zealand Government Marketplace

Common Capability Marketplace Agreement

Overview



Part 1 – General Terms

1. Agreement to terms

- 1.1 Welcome to the New Zealand Government Marketplace (the **Marketplace**) operated by the Department of Internal Affairs on behalf of the New Zealand Government (**DIA, we, our, us**). This Common Capability Marketplace Agreement (the **Marketplace Agreement**) applies to any service provider that applies for membership in the Marketplace. When we use the terms **you** and **your**, we are referring to any such service provider (whether an organisation or individual). Other terms with special meaning are defined in clause 16 below and, where relevant, in the Supplementary Terms. Notes in blue boxes are for your convenience but are not part of this Marketplace Agreement.

The Marketplace Agreement applies to service providers who wish to list services in the Marketplace.

1.2 The Marketplace provides or contemplates separate channels for the sale or promotion of different kinds of capabilities, such as software as a service, professional services, and so on (each a **Channel**).

1.3 The General Terms in Part 1 of this Common Capability Marketplace Agreement apply to your membership of the Marketplace. Part 2 contains Supplementary Terms for each Channel. Each set of Supplementary Terms contains two Sub-parts. Sub-part 1 contains the terms that apply where there is no Pre-existing Agreement governing the purchase of the particular services. Sub-part 2 contains the terms that apply where there is a Pre-existing Agreement governing the purchase of the particular services. Only one Sub-part can apply to any particular service. If you are applying for inclusion of services into a given Channel, the relevant Sub-part of the Supplementary Terms that apply to that Channel will apply to you from the date your services are accepted into that Channel. We may add further Channels to the Marketplace in the future and, if we do, Supplementary Terms for each additional Channel will be set out in Part 2.

The terms in Part 1 apply to all service providers. The terms in Part 2 apply to particular channels of services.

1.4 A person making an application on behalf of an organisation represents to us that he or she is authorised to enter into this Marketplace Agreement on behalf of that organisation.

1.5 When you click to accept these terms you are forming a Marketplace Agreement with the New Zealand Government. The Marketplace Agreement applies as follows:

When you click to accept these terms, you're entering into an agreement with the New Zealand Government.

- (a) prior to DIA granting you Member status, the General Terms in Part 1 will apply;
- (b) if DIA notifies you that you have not been granted Member status for the Marketplace, this Marketplace Agreement terminates on the date of notification; and
- (c) if DIA notifies you that you have been granted Member status, this Marketplace Agreement applies in its entirety, that is, the General Terms in Part 1 continue to apply and the relevant Supplementary Terms in Part 2 that relate to the Channels in which you've been permitted to list services also apply.

1.6 If, after becoming a Member of the Marketplace and being permitted to list services in one Channel, you wish to list services in another Channel, you will need to satisfy the membership requirements for that Channel and click to accept the Supplementary Terms.

2. **Membership**

2.1 At the time you seek membership of the Marketplace, you must also seek membership of at least one Channel.

To sell your services through the Marketplace, you need to become a member and comply with certain requirements.

2.2 To become a Member of the Marketplace you must:

- (a) click to accept these General Terms;

- (b) follow the applicable On-boarding Process and provide all the information we require and in a form that is satisfactory to us;
- (c) pay any applicable On-boarding Fees;
- (d) make any declarations we require;
- (e) satisfy the membership requirements of clause 2.3 in relation to at least one Channel; and
- (f) receive a notification from us in writing that you have been granted Member status of the Marketplace and of at least one Channel.

2.3 To become a Member of a specific Channel you must:

- (a) click to accept the relevant Supplementary Terms for that Channel;
- (b) follow the applicable On-boarding Process for that Channel and provide all the information we require and in a form that is satisfactory to us;
- (c) pay any applicable On-boarding Fees for that Channel;
- (d) make any declarations we require;
- (e) already be a Member of the Marketplace or, at the same time as you apply for and obtain membership in that Channel, also apply for and obtain Marketplace membership under clause 2.2; and
- (f) receive a notification from us in writing that you have been granted Member status for the specific Channel.

2.4 Membership of the Marketplace does not confer any exclusivity in relation to Eligible Agencies' selection of your Services and does not create any minimum purchasing commitment on the part of any Eligible Agency.

There's no exclusivity and no minimum purchasing obligations.

2.5 You will remain a Member of the Marketplace and/or any Channel until such time as either:

- (a) you withdraw your membership by giving us three months' prior notice by emailing us at the address notified on marketplace.govt.nz (your withdrawal will be effective at the end of that 3 month period); or
- (b) your membership terminates or expires in accordance with this Marketplace Agreement.

You can withdraw your own membership or we can terminate it for a range of reasons.

2.6 We may terminate your membership of the Marketplace and/or any Channel, on written notice to you, if:

- (a) you have breached this Marketplace Agreement, one or more Agency Purchase Agreements, applicable and relevant law, or the Marketplace website Terms of Use; or
- (b) your continued membership or inclusion of particular Services is no longer appropriate given performance, financial or security issues that do or are likely to adversely affect Purchasing Agencies' consumption of your Services or your or any Purchasing Agency's reputation.

We will use reasonable endeavours to give you an opportunity to remedy breaches of the relevant agreement or the performance, financial or security issues (as applicable) before terminating your membership.

2.7 We may also terminate your membership of the Marketplace or any Channel, on written notice to you, if:

- (a) we close the Marketplace or that Channel or decide to release a new version of the Marketplace or that Channel under different terms; or
- (b) you undergo a Change of Control that you are reasonably able to notify us of before it occurs but you fail to do so; or
- (c) you undergo a Change of Control and we believe on reasonable grounds that either, as a result of such change, you are unlikely to be able to perform your obligations under this Marketplace Agreement or Agency Purchase Agreements, or the Change in Control raises significant security concerns for us or Purchasing Agencies, provided that before exercising our rights under this clause 2.7(c) we must raise our concerns with you and give you a reasonable opportunity to address those concerns.

2.8 Withdrawal or termination of your membership does not affect the validity of any Agency Purchase Agreement you have entered into with any Eligible Agency.

Withdrawal or termination doesn't affect Agency Purchase Agreements.

2.9 Withdrawal or termination of your membership of the Marketplace will constitute the withdrawal or termination of your membership of all Channels.

2.10 If at any time after you are a Member of the Marketplace, you cease to be a Member of a Channel and are not a Member of any other Channel, your membership of the Marketplace will automatically expire.

3. Marketplace Catalogue and changes

3.1 From the date you become a Member of a Channel:

- (a) you will be entitled to add Services Listings to the Marketplace Catalogue for that Channel; and

When you become a Member, you can start adding Services Listings to the Marketplace Catalogue and Eligible Agencies can order your Services through the applicable Ordering Process.

- (b) any Eligible Agency (or its authorised agent) that has registered for the Marketplace will be entitled to sign up to your Services or otherwise engage with you in accordance with the applicable process for that Channel as set out in the applicable Supplementary Terms (agency registration requires the agency to accept the Agency Participation Marketplace Terms). The applicable process will likely depend on whether there is a Pre-existing Agreement for your Services (in which case Sub-part 2 of the relevant Supplementary Terms applies) or not (in which case Sub-part 1 of the relevant Supplementary Terms applies).

3.2 You undertake, from the date you become a Member of any Channel, to enter and maintain your Services Listings in the Marketplace Catalogue for that Channel and, subject to any requirements set out in any applicable Supplementary Terms, to update them promptly if there are material changes to your Services.

Your Services are listed in the Marketplace Catalogue. You need to keep your Services Listings up to date.

3.3 Changes to your Services Listings must be within the scope of the existing Services Listings for which DIA has granted consent through the On-boarding Process for the applicable Channel and not be entirely new services. If in doubt, please contact us.

3.4 If you wish to list entirely new services for which we have not granted approval for listing in any Channel in the Marketplace, you will need to follow the Marketplace Change Procedure and obtain our consent.

3.5 You must not upload or add any content to the Marketplace that is obscene, defamatory, threatening, invasive of privacy or that is otherwise harmful, objectionable or contrary to the intellectual property or other rights of others. This includes viruses, worms or any code of a destructive nature.

You must not add inappropriate content to the Marketplace.

3.6 You acknowledge and agree that, except for your non-public pricing details, your Services Listings in the Marketplace Catalogue may be made publicly available via the Marketplace. Your non-public pricing details will only be viewable by authorised users of Eligible Agencies once they have logged in to the Marketplace and they are contractually required (under the Agency Participation Marketplace Terms) to keep those details confidential unless you agree otherwise.

Your Services Listings are likely to be made publicly available but your non-public pricing details will only be shown to authorised users of Eligible Agencies.

3.7 You may remove an entire Services Listing from the Marketplace Catalogue.

You can remove a Services Listing if you wish.

3.8 Removal of a Services Listing does not affect the validity and ongoing application of any Agency Purchase Agreement you have entered into with Eligible Agencies.

Removing a Services Listing does not affect your agreements with Eligible Agencies.

4. Access and login security

4.1 To enter and edit your details and Services Listings on the Marketplace, you need to log in with your username and password

You need a login to enter and edit your Services Listings. You need to take good care of it and not share it with others.

for the Marketplace. You are responsible for selecting a secret and strong password and for maintaining the security of your username and password.

- 4.2 You must also provide your full name, a valid email address and any other information we request to complete the registration process and you must keep these details up to date. Fictitious entries are not permitted.
- 4.3 Usernames and passwords are personal to the members of your organisation to whom they are allocated. You are not permitted to share or allow them to be shared with others.
- 4.4 We may suspend or disable your username and password if we consider it necessary for security reasons or if you breach these terms.

5. Assurance

- 5.1 From time to time we may elect to seek assurance on or verify:
 - (a) any relevant statements or claims you may make;
 - (b) the accuracy of your Services Listings and whether they continue to meet the applicable Qualification Criteria;
 - (c) any concerns we or any other Eligible Agency may have in relation to your provision of Services to Purchasing Agencies; and/or
 - (d) your compliance with this Marketplace Agreement, or Agency Purchase Agreements.
- 5.2 If we decide to do so, you must provide us promptly with any explanations, information and documentation, and any assistance, that we reasonably request. You will be responsible for your own costs in relation to these assurance processes.
- 5.3 Without limiting any other rights in this Marketplace Agreement, if you do not comply with this requirement or if we are not satisfied with the outcome of an assurance process, we may suspend or remove:
 - (a) your membership in the Marketplace or one or more Channels; or
 - (b) one or more Services Listings in one or more Channels.

We may undertake assurance processes from time to time. If we do, you'll need to help us out.

6. Warranties

- 6.1 You warrant and represent to DIA and each Purchasing Agency that:
 - (a) where relevant, you have used and shall continue to use reasonable endeavours to prevent the introduction, creation or propagation of any disruptive elements (including any virus, worms and/or trojans, spyware or other malware) into

You're telling us that you take system security seriously, that you have the IP rights you need to provide your Services and that the information you provide is accurate.

systems providing services to data, software or Purchasing Agency Data held in electronic form;

- (b) you own or have obtained valid licences for all Intellectual Property Rights that are necessary to perform your obligations under the Marketplace Agreement and any Agency Purchase Agreement and shall maintain the same in full force and effect for the duration of the Marketplace Agreement and all Agency Purchase Agreements; and
- (c) the information you provide to DIA through the On-boarding Process and to Eligible Agencies through your Services Listings is accurate and current.

7. Intellectual Property Rights in Marketplace content

7.1 DIA and/or its licensors own and will remain the owners of all Intellectual Property Rights in content on the Marketplace, other than content that is your Pre-existing Work and your Services Listings. To the extent that you own the Intellectual Property Rights in content on the Marketplace, you grant DIA and each Participating Party a non-exclusive, perpetual, irrevocable and royalty-free licence to use, copy, amend (without materially affecting its accuracy or meaning), distribute and publish that content for any purpose relating to the Marketplace, Participating Parties' consumption of your Services and our or Participating Parties' record-keeping and archiving requirements and obligations. This licence is subject to the confidentiality obligations in clause 10.

We or our licensors own the content on the Marketplace except your pre-existing content. You agree to license your pre-existing content to us and Participating Parties. This licence does not extend to your IP in your actual services.

7.2 Clause 7.1 is intended to benefit Participating Parties and be enforceable by them under the Contract and Commercial Law Act 2017.

8. Marketplace Analytics

8.1 You:

- (a) acknowledge that the Marketplace generates statistical and reporting information (**Marketplace Analytics**), such as the number of orders submitted for your Services or the aggregate spend across all Eligible Agencies on your Services; and
- (b) subject to clause 8.2, agree that we may use, share with Eligible Agencies and their Personnel and openly publish, these Marketplace Analytics.

The Marketplace generates analytics information and we may share or publish that information.

8.2 If we:

- (a) share specific pricing details for your Services with an Eligible Agency or its Personnel that are not already publicly available, we will inform the recipients of the pricing details'

We will respect the sensitive nature of certain analytics and reporting information.

confidential nature and request that they not disclose it to any person who is not a member of staff of the Eligible Agency (unless required to do so by law); or

- (b) publish Marketplace Analytics, we will not publish specific pricing details for your Services unless they are already publicly available or we have your consent.

This clause 8.2 does not limit our obligations under the Official Information Act 1982.

- 8.3 You agree that Purchasing Agencies may share with us any analytics and reporting information they may have in relation to your Services.

Purchasing Agencies may share information with us.

9. Pricing

- 9.1 The Prices or methods for determining Prices for your Services will be as listed or cross-referenced in the Marketplace Catalogue. Prices listed in the Marketplace Catalogue are GST-exclusive prices. If you are required by law to charge GST, GST will be added to those Prices when Purchasing Agencies are invoiced.

- 9.2 You acknowledge that DIA may charge Purchasing Agencies an administration fee when they procure your Services through the Marketplace. The Marketplace does this and requires no input on your part. If DIA is already charging or collecting an administration fee for the same Services under a Pre-existing Agreement, it will only collect one such fee.

10. Confidentiality

- 10.1 Except as expressly permitted by an applicable agreement or the other party, each party will treat as confidential and not disclose to any third party or use for its own benefit (other than for the purposes of an applicable agreement or provision or consumption of the Services) any Confidential Information of the other party. This clause 10.1 does not prevent a party from disclosing Confidential Information:

Confidential Information needs to be protected. Disclosure in specified circumstances is allowed.

- (a) that is or becomes publicly known through no conduct of the recipient;
- (b) that the recipient lawfully knew about before it was received;
- (c) that the recipient develops independently;
- (d) that the recipient must, by law or any stock exchange listing rules, disclose;
- (e) that the recipient needs to disclose to Ministers of the Crown or Parliament (including any committee or office of Parliament); or
- (f) as expressly allowed by this agreement or the Information Rules (provided that the Information Rules shall not permit

DIA or any Eligible Agency to openly publish your non-public pricing details without your consent).

10.2 DIA may also disclose your Confidential Information in the Marketplace Catalogue in accordance with clause 3.6 and DIA and each Purchasing Agency may also disclose Confidential Information to:

We may need to disclose Confidential Information to certain people.

- (a) any Government Officer upon request; and
- (b) any staff, contractors or professional advisers in connection with the Marketplace Agreement or any Agency Purchase Agreement; and
- (c) any Eligible Agency,

as long as the recipients are made aware of its confidential nature.

10.3 You may also disclose Confidential Information to staff, contractors or professional advisers who need to know it solely to perform obligations or advise on or exercise rights under the Marketplace Agreement or any relevant Agency Purchase Agreement (as long as they are made aware of its confidential nature and that they must not use or disclose it for other purposes).

11. Purchasing Agency Data

11.1 You will only use Purchasing Agency Data in accordance with the terms of the Marketplace Agreement and the relevant Agency Purchase Agreement. You will use all reasonable endeavours to provide written notice, as soon as practicable, to the Purchasing Agency where:

You must not use Purchasing Agency Data for unauthorised purposes.

- (a) you become aware of any unauthorised access to, or use or disclosure of, any Purchasing Agency Data; or
- (b) any Purchasing Agency Data is required to be disclosed to any government agency or regulatory body in any jurisdiction, whether directly or through any entity that has control of you or your organisation, except to the extent that providing notice is not permitted under the law of that jurisdiction and you are bound by such law.

11.2 You acknowledge that the Purchasing Agency and/or its licensor(s) are and remain the owner(s) of the Intellectual Property Rights in the Purchasing Agency Data.

Purchasing Agencies own and will continue to own their data.

12. Personal Information

12.1 You agree that you will only use and disclose Users' Personal Information provided to you in connection with their use of your Services in accordance with your published privacy statements or policies, as applicable. You will also use your best endeavours to

You need to respect Users' privacy.

comply with the Privacy Act 1993 (NZ) or any successor privacy legislation in New Zealand when providing Services to Purchasing Agencies.

13. Liability

- 13.1 The maximum aggregate liability of each party to the Marketplace Agreement to the other for all losses under or in connection with the Marketplace Agreement is \$100,000.
- 13.2 Neither party to the Marketplace Agreement will be liable to the other for any Indirect or Consequential Loss, or any loss of profits, arising under or in connection with the Marketplace Agreement or its formation (regardless of how liability arises). Each party to the Marketplace Agreement has a duty to the other party to take reasonable steps to mitigate its losses.
- 13.3 The liability of parties to an Agency Purchase Agreement depends on the terms of the Agency Purchase Agreement.

Our liability and your liability under the Marketplace Agreement is limited.

14. Amendments

- 14.1 Except as stated in clause 14.2, we reserve the right to change this Marketplace Agreement (including its Supplementary Terms) at any time (including, without limitation, amending existing terms and adding further Supplementary Terms for new Channels) and will provide you with at least 30 days' notice of the change (or, if a security issue needs to be addressed quickly, a shorter period if we consider that appropriate) (the **Notice Period**), either by publishing it on the Marketplace or by email. You accept that a notice of change on the Marketplace will be deemed to be notice to you (you can subscribe to site updates if you wish) and that the changes will be binding on you from the effective date stated in the notice. If we change a Government Term that applies to Agency Purchase Agreements you have with Purchasing Agencies, you and each Purchasing Agency agree that it will apply automatically to Agency Purchase Agreements (Purchasing Agencies' agreement is obtained through their Agency Participation Marketplace Terms with us). If you do not like a change we propose to make to the terms of this Marketplace Agreement, you may discuss the matter with us during the Notice Period and/or withdraw your membership from the Marketplace or any Channel in accordance with clause 2.5(a).
- 14.2 Clause 14.1 does not authorise us to make any unilateral change to:
- (a) your Prices;
 - (b) the application of your Standard Terms (where, under any Supplementary Terms, those Standard Terms apply);
 - (c) ownership and licensing of your Intellectual Property Rights;
 - (d) the limitations on your liability set out in this Marketplace Agreement; or

We can change these terms without your consent but not in specified ways that could significantly affect your business.

- (e) where relevant, any Pre-existing Agreement or any Agency Purchase Agreement whose terms are prescribed by the Pre-existing Agreement.

15. General

- 15.1 New Zealand law governs all matters relating to this Marketplace Agreement, including its interpretation and any disputes in relation to it or its formation.
- 15.2 Without limiting clause 15.1 you agree to submit to the non-exclusive jurisdiction of the New Zealand courts in relation to any dispute regarding the Marketplace Agreement or its formation and you agree that the New Zealand courts are an appropriate forum for such disputes and that you will not seek to argue to the contrary. We and you are entitled to seek interim relief in any relevant jurisdiction.

The Marketplace Agreement is governed by New Zealand law. The governing law of Agency Purchase Agreements depends on their terms.

16. Defined terms and interpretation

- 16.1 In this Marketplace Agreement, unless the context requires otherwise:

The terms defined here have special meaning.

Agency Participation Marketplace Terms means the DIA terms that an Eligible Agency must agree to if it wishes to register for and consume Services from the Marketplace, available at marketplace.govt.nz or any successor URL;

Agency Purchase Agreement means any agreement between you and an Eligible Agency arising within a Channel of the Marketplace as described in the applicable Sub-part of the Supplementary Terms for that Channel and, depending on the applicable Channel, may include (without limitation) a subscription agreement, participating agency agreement, services agreement or sale and purchase agreement as the case may be;

Change of Control means, in relation to a body corporate, where a person acquires Control of the body corporate or where a person who Controls the body corporate ceases to do so;

Channel means a channel for the sale or promotion of different kinds of capabilities, such as software as a service, professional services, and so on, as described in clause 1.2;

Confidential Information means, in relation to a party, all information of a confidential or otherwise sensitive nature, whether written, electronic or otherwise, and whether marked or identified as being confidential, relating to that party or its business operations and, in relation to the Purchasing Agency, includes the Purchasing Agency Data and any information relating to any Eligible Agency or its business operations;

Control means, in relation to a body corporate, the ability of a person to ensure that the activities and business of the body corporate are conducted in accordance with the wishes of that person, whether through ownership of voting shares, contract or

otherwise. Without limitation, the direct or indirect beneficial ownership of more than 50% of the voting shares of a body corporate is deemed to constitute Control;

DIA means the Department of Internal Affairs;

Eligibly Agency means:

- (a) each Public Service department and departmental agency, as defined in section 27A of the State Sector Act 1988;
- (b) the New Zealand Defence Force, the New Zealand Police, the New Zealand Security Intelligence Service, the Parliamentary Counsel Office, the Clerk of the House of Representatives and the Parliamentary Service;
- (c) each Crown Entity, as defined in section 7 of the Crown Entities Act 2004;
- (d) each organisation listed in the fourth schedule to the Public Finance Act 1989;
- (e) the Reserve Bank of New Zealand;
- (f) the Office of the Controller and Auditor-General, the Office of the Ombudsmen, and the Office of the Parliamentary Commissioner for the Environment;
- (g) each corporation listed in the first schedule to the State Owned Enterprises Act 1986;
- (h) each local authority, as defined in section 5 of the Local Government Act 2002; and
- (i) any other organisation, agency or collection of persons that does not fall within the above categories but which DIA and MBIE determine should be treated as an eligible agency,

unless, in relation to particular Services covered by a Pre-existing Agreement or an Alternative Common Capability Marketplace Agreement, a different definition applies, in which case that different definition will apply to consumption through the Marketplace of those particular Services;

GETS means the Government Electronic Tenders Service at <http://gets.govt.nz>;

Government Officer means any governmental or statutory person, body or agency that has a role, function or duty in relation to the protection and/or security of official information or personal information, including the Government Chief Digital Officer, the Government Chief Privacy Officer, the Privacy Commissioner, the Government Communications Security Bureau and the New Zealand National Cyber Security Centre;

GST means goods and services tax payable under the Goods and Services Tax Act 1985 at the rate prevailing from time to time;

Indirect or Consequential Loss means loss that does not arise as a direct, natural and/or probable result of the act or omission complained of;

Information Rules means the rules and requirements published on the Marketplace relating to:

- (a) the analytics and reporting information that will be generated by the Marketplace; and
- (b) additional circumstances in which Confidential Information may be disclosed as contemplated by clause 10.1(f);

Intellectual Property Rights means all industrial and intellectual property rights whether conferred by statute, at common law or in equity, including all copyright, rights in relation to inventions (including all patents and patent applications), trade secrets and know-how, rights in relation to designs, rights in relation to trade marks, business names and domain names;

Marketplace means the New Zealand Government Marketplace at marketplace.govt.nz or any successor URL;

Marketplace Catalogue means the catalogue of Services available for consumption by Eligible Agencies;

Marketplace Change Procedure means the change procedure described at marketplace.govt.nz as may be updated from time to time;

MBIE means the Ministry of Business, Innovation & Employment, a department of the New Zealand Government;

Member means, in relation to the Marketplace or any Channel, a service provider to whom DIA has granted member status for the Marketplace or that Channel in accordance with this Marketplace Agreement;

On-boarding Fees means fees payable as a condition of becoming a Member (if any) as published on the Marketplace and/or in the standing notice of procurement on GETS from time to time;

On-boarding Process means the steps referred to in clauses 2 (Membership), and any applicable Supplementary Terms in relation to membership of any Channel, as may be described in more detail or supplemented from time to time on the Marketplace and/or a standing notice of procurement on GETS;

Order means a request for Services;

Order Form means an ordering form on the Marketplace that Eligible Agencies may need to complete to submit an Order for Services;

Ordering Date means the date on which a Purchasing Agency submits an Order;

Ordering Process means the applicable process described on the Marketplace through which Eligible Agencies submit Orders for Services;

Participating Party means an Eligible Agency that has registered with the Marketplace;

Personal Information means information about an identifiable individual;

Personnel means employees of or contractors to an Eligible Agency;

Pre-existing Agreement means a current and separate software framework agreement, cloud framework agreement, common capability agreement or other collaborative agreement that a Service Provider either has with the New Zealand Government or is required to enter into with the New Zealand Government if it wishes to join an existing open panel of service providers to which such a collaborative agreement applies;

Pre-existing Work means all works existing prior to the Marketplace Agreement or Agency Purchase Agreement, as applicable, and all works developed or otherwise obtained by or for the party independently of this Marketplace Agreement or Agency Purchase Agreement and any modifications to them;

Price means the price(s) payable for Services as specified in the Marketplace Catalogue, and **Pricing** has a corresponding meaning;

Purchasing Agency means an Eligible Agency that submits an Order to a Member;

Purchasing Agency Data means any content, materials, data and information that a Purchasing Agency or its Users provide to or enter into a Service;

Qualification Criteria means any minimum mandatory requirements set out in the standing notice of procurement for the Marketplace on GETS and/or on the Marketplace itself;

Services means the services or goods in relation to which you have sought and obtained consent for Services Listings in the Marketplace pursuant to the On-boarding Process or the Marketplace Change Procedure, as applicable;

Services Listings means entries in the Marketplace Catalogue for particular Services available for purchase, subscription or consumption by Eligible Agencies;

Standard Terms means the service provider's standard terms of service for its services, regardless of the name given to them;

Supplementary Terms means the additional terms set out in Part 2 of this Marketplace Agreement that apply to specific Channels; and

User means an individual that uses a Service on behalf of, in the course of employment or other work for, or to receive a service from, a Purchasing Agency.

16.2 In this Marketplace Agreement, unless the context requires otherwise:

- (a) references to the singular include the plural and vice versa;
- (b) where a word or phrase is defined, its other grammatical forms have a corresponding meaning;
- (c) references to a person include an individual, firm, company, agency, government, corporation or unincorporated body of persons;
- (d) references to any statute include any amendment to, or replacement of, that statute and any subordinate legislation made under it;
- (e) wherever the words “includes” or “including” or “such as” (or similar words) are used, they are deemed to be followed by the words “without limitation”;
- (f) where relevant, references to “services” or “Services” include goods that DIA has permitted to be listed in the Marketplace;
- (g) references to “in writing” include by electronic means; and
- (h) unless expressly stated otherwise, a reference within these General Terms to any clause is a reference to a clause within these General Terms and a reference within any Supplementary Terms is a reference to a clause in those Supplementary Terms.

These rules apply to the interpretation of the agreement.

Part 2 – Supplementary Terms for each Channel

Explanation

This Part 2 of the Marketplace Agreement contains Supplementary Terms that apply to specific Channels. As noted in clause 1.3 of Part 1, each set of Supplementary Terms for a given Channel contains two Sub-parts. Sub-part 1 contains the terms that apply where there is no Pre-existing Agreement governing the purchase of the particular services. Sub-part 2 contains the terms that apply where there is a Pre-existing Agreement governing the purchase of the particular services. Only one Sub-part can apply to any particular service. .

Part 2 supplements the General Terms in Part 1. There are Supplementary Terms for each Channel.

Supplementary Terms for Software as a Service (SaaS)

General

1. Introduction

- 1.1 Welcome to the Software as a Service Channel. This Channel is part of the New Zealand Government Marketplace as described in, and is subject to, the terms of the Marketplace Agreement.
- 1.2 To become a Member of this Channel you must be or become a Member of the Marketplace, you must click to accept these Supplementary Terms and otherwise meet the On-boarding requirements for this Channel as described in clause 2 of the General Terms.

These are additional terms for software as a service.

Sub-part 1: SaaS Services for which there is no Pre-existing Agreement

2. Definitions

- 2.1 This Sub-part 1 of these Supplementary Terms for Software as a Service incorporate all definitions included in the General Terms of the Marketplace Agreement and, in addition, for the purpose of this Sub-part 1:

Pre-existing Agreement has the meaning in clause 16.1 of Part 1;

Software as a Service (or SaaS Services) means the software or software-related services (including cloud licensing or other related services) in relation to which you have sought and obtained consent for Services Listings in the Marketplace pursuant to the On-boarding Process for this Channel or the Marketplace Change Procedure, as applicable; and

Subscription Agreement means an Agency Purchase Agreement arising under this Channel.

The terms defined here have special meaning.

- 2.2 References in these Supplementary Terms for Software as a Service to **software or software-related services** include, where relevant, licences for the deployment of software in cloud computing environments and professional services relating to the use of SaaS

services, as long as they are capable of being listed in a subscription that a Participating Party can procure through the Marketplace.

3. Application of this Sub-part 1

3.1 Except as stated in clause 3.2, this Sub-part 1 applies to SaaS Services for which there is no Pre-existing Agreement. If the SaaS Services that you list or wish to list in the Marketplace are services available under a Pre-existing Agreement, then Sub-part 2 of these Supplementary Terms for Software as a Service apply instead of this Sub-part 1.

This Sub-part 1 applies to you if you're providing SaaS Services other than under a Pre-existing Agreement or an Alternative Common Capability Marketplace Agreement.

3.2 In a minority of cases we may consider that the nature, risk profile or value of some or all of your services warrants more detailed contractual terms than the terms in this Sub-part 1 and, for a Purchasing Agency, the applicable Subscription Agreement. In such cases we may elect, after discussion with you, to require you to enter into a different form of common capability agreement (an **Alternative Common Capability Marketplace Agreement**) for the relevant services or licensing. In that event, you will not be able to list and provide the relevant services or licensing through the Marketplace until you have entered into an Alternative Common Capability Marketplace Agreement with us (entry into such an agreement remains your choice).

In a minority of cases we may need to ask you to enter into a more detailed agreement with us as a pre-requisite to your being able to list your services in the Marketplace.

4. Ordering SaaS Services

4.1 If an Eligible Agency decides to purchase SaaS Services, it will select the relevant service(s) and service provider(s) and, where relevant, choose between them and submit an Order in accordance with the Ordering Process for SaaS Services (which is described on marketplace.govt.nz).

5. Agreements with Purchasing Agencies for SaaS Services

5.1 Where this Sub-part 1 applies, the contract that applies between you and a Purchasing Agency for the Purchasing Agency's consumption of your SaaS Services shall be an agreement that comprises:

- (a) your Standard Terms applying on the Ordering Date; but
- (b) subject to and as modified by the terms specified in clause 6 below (the **Government Terms**).

We call this agreement a **Subscription Agreement**. If there is any inconsistency between the Government Terms and your Standard Terms, the Government Terms prevail.

If an Eligible Agency wishes to procure SaaS Services, it does so through an Ordering Process that creates a Subscription Agreement between you and the relevant Eligible Agency. When that Subscription Agreement is formed, the Eligible Agency becomes a Purchasing Agency.

5.2 The Subscription Agreement is formed upon the Purchasing Agency's submission of an Order Form to you for the relevant SaaS Services (which entails a click to accept process that obtains the Purchasing Agency's agreement to the terms of the Subscription Agreement).

6. Government Terms

- 6.1 Despite any provision to the contrary in your Standard Terms, you agree in relation to every Subscription Agreement that:
- (a) **indemnities:** no Purchasing Agency shall be under any obligation to indemnify or grant any guarantee to you or any other person or entity (and for this purpose “indemnify” includes any obligation in the nature of an indemnity);
 - (b) **entire agreement:** a Purchasing Agency’s Subscription Agreement constitutes the entire agreement between the Purchasing Agency and you;
 - (c) **control of claims:** any reference in your Standard Terms to your having any form of control over the defence or settlement of any third party claim against the Purchasing Agency (in relation to which you have an obligation such as an indemnity vis-a-vis the Purchasing Agency) is subject to any applicable directions provided to the Purchasing Agency pursuant to the New Zealand Government’s ["Cabinet Directions for the Conduct of Crown Legal Business 2016"](#) or their successor;
 - (d) **unilateral changes:** except as required by law, if you make a unilateral change to your Standard Terms from the Ordering Date that is prejudicial to a Purchasing Agency’s or its Users’ rights or interests, that change shall be unenforceable against the Purchasing Agency and its Users (this clause does not prevent you from amending your Standard Terms for all of your customers or adapting and evolving your Services as you see fit and it doesn’t require you to issue bespoke communications to Purchasing Agencies and their Users if you amend your Standard Terms for all of your customers; it only limits the enforceability of unilateral changes that are prejudicial to a Purchasing Agency’s or its Users’ rights or interests). This clause is intended to benefit Users and be enforceable by them under the Contract and Commercial Law Act 2017 and you agree not to assert in any communications or proceedings, whether in New Zealand or elsewhere, that Users are bound by such unilateral changes;
 - (e) **governing law and jurisdiction:**
 - (i) New Zealand law governs all matters relating to the Government Terms of each Subscription Agreement and the formation of each Subscription Agreement, including interpretation of the Government Terms and any disputes relating to them;
 - (ii) you agree to submit to the non-exclusive jurisdiction of the New Zealand courts in relation to any dispute regarding the Government Terms of each

These Government Terms modify the application of your Standard Terms.

The Cabinet Directions for the Conduct of Crown Legal Business apply to Ministers and government departments. Under the directions, the Attorney-General and Solicitor-General have specific roles and powers vis-à-vis departments in relation to litigation involving the Crown.

Subscription Agreement or the formation of the Subscription Agreement and you agree that the New Zealand courts are an appropriate forum for such disputes and that you will not seek to argue to the contrary;

- (iii) you and any Purchasing Agency will be entitled to seek interim relief in any relevant jurisdiction; and
- (iv) except as stated in this clause 6.1, the governing law and jurisdiction clauses in your Standard Terms continue to apply.

6.2 You also agree that, despite any provisions to the contrary in your Standard Terms, the following clauses apply in relation to each Subscription Agreement:

- (a) 2.4 of the General Terms (no exclusivity or minimum purchasing requirement);
- (b) 2.8 of the General Terms (withdrawal or termination does not affect existing Agency Purchase Agreements);
- (c) 3.8 of the General Terms (removal of Services Listing does not affect existing Agency Purchase Agreements);
- (d) 6 of the General Terms (Warranties);
- (e) 9 of the General Terms (Pricing) and clause 8 of these Supplementary Terms (Additional pricing terms);
- (f) 10 of the General Terms (Confidentiality);
- (g) 11 of the General Terms (Purchasing Agency Data);
- (h) 12 of the General Terms (Personal information);
- (i) 14 of the General Terms (Amendments); and
- (j) 16 of the General Terms (Defined terms and interpretation).

6.3 You must:

- (a) name your Standard Terms and your published privacy statements or policies and provide URL(s) to them in the Marketplace Catalogue and upload them to the Marketplace Catalogue; and
- (b) update these names, URLs and uploads in the Marketplace Catalogue if you amend your Standard Terms or your published privacy statements or policies.

You need to add details of your Standard Terms and privacy policies to the Marketplace and keep them up to date.

6.4 You may only amend the terms of the Subscription Agreement for a *particular* Purchasing Agency:

- (a) if you and the particular Purchasing Agency agree to the amendments outside of the Marketplace Ordering Process

You and a particular Purchasing Agency may agree to amend the default terms of a Subscription Agreement in certain respects.

(the Ordering Process for SaaS Services is standardised and does not accommodate ad hoc amendments); and

- (b) the amendment is not a Prohibited Amendment (defined below).

This clause 6.4 does not limit clause 6.1(d) of these Supplementary Terms.

6.5 For the purposes of clause 6.4, amendments that seek to:

- (a) increase the Price for your SaaS Services for a particular Purchasing Agency (unless you are doing so for all or the majority of your customers either worldwide or within a particular country pursuant to a right in your Standard Terms); or
- (b) make changes that are prejudicial to a Purchasing Agency's rights or interests or otherwise detract from the protections, safeguards or entitlements of the Government Terms,

are **Prohibited Amendments** unless you obtain DIA's prior written consent.

7. Additional provisions relating to service changes

7.1 When you're proposing to make changes to a SaaS Service, you need to consider whether the changes will adversely affect:

- (a) the security or other controls;
- (b) your compliance with any standards (e.g., coding standards); and/or
- (c) the ongoing validity of any certifications you have for the SaaS Service,

that you notified to DIA when applying for inclusion of the SaaS Service in the Marketplace and obtaining the level of assurance for which the SaaS Service is listed in the Marketplace Catalogue. If there will be an adverse effect:

- (d) you must inform DIA of the adverse effect with sufficient information to enable DIA to understand the potential risk and impact; and
- (e) you must follow DIA's reasonable directions to address the adverse impact; if you do not, we may elect to downgrade the assurance level for the affected SaaS Service (if greater than the base level) or require you to withdraw the SaaS Service from the Marketplace.

8. Additional pricing terms

8.1 The initial Prices for your SaaS Services and the currency in which they are charged will be the pricing and currency notified to us

If you're changing a SaaS Service, you need to think about some security and related matters.

during the On-boarding Process for this Channel or otherwise agreed with us during that On-boarding Process. These initial Prices must be either:

- (a) the prices you usually apply to equivalent New Zealand customers (or tiers of customers) for those SaaS Services; or
- (b) reduced prices for Eligible Agencies.

The initial Prices must not be greater than the prices you usually charge for equivalent non-government customers.

8.2 Subject to clause 8.3, you may alter the Prices for your SaaS Services at any time and, if you do, you must update your Services Listings promptly to show the altered Prices (which, as noted in clause 3.6, if non-public will only be viewable by authorised users of Eligible Agencies once they have logged in to the Marketplace).

You can alter your pricing at any time.

8.3 If you propose to increase the Price for a SaaS Service:

- (a) the increase must not be only for government customers and must not be greater than the increase you propose to make for equivalent non-government customers; and
- (b) you must give DIA and Purchasing Agencies at least 30 days' prior notice of the increase.

8.4 Pricing for a Purchasing Agency's consumption of your SaaS Services must be based on the Prices stated in the relevant Services Listings at the time the Purchasing Agency executes an Order Form for the SaaS Services, unless you have agreed to reduced pricing for that Purchasing Agency in accordance with clause 6.4. If you alter your pricing in accordance with clause 8.2, the altered pricing will apply to each Purchasing Agency's consumption of the relevant SaaS Services from the next applicable billing cycle.

Services Listing Pricing applies unless you agree with a Purchasing Agency to reduce it.

8.5 Your charges for your SaaS Services will be processed through the Marketplace, as described in more detail on marketplace.govt.nz.

Sub-part 2: SaaS Services for which there is a Pre-existing Agreement

9. Definitions

9.1 This Sub-part 2 of these Supplementary Terms for Software as a Service incorporate all definitions included in the General Terms of the Marketplace Agreement and, in addition, for the purpose of this Sub-part 2:

Agency Agreement means the affiliate agreement, subscription agreement, participating agency agreement or other agreement, as applicable, that individual Eligible Agencies enter into to consume services pursuant to the terms of a Pre-existing Agreement;

Eligible Contract means a Pre-existing Agreement, specified services under which we allow to be listed in the Marketplace, as stated on marketplace.govt.nz;

Pre-existing Agreement has the meaning in clause 16.1 of Part 1; and

Software as a Service (or **SaaS Services**) has the meaning in clause 2.1 of these Supplementary Terms for Software as a Service.

10. Application of Sub-part 2

10.1 This Sub-part 2 applies to SaaS Services for which there is a Pre-existing Agreement (that is an Eligible Contract) that a service provider lists or wishes to list in the Marketplace. If this Sub-part 2 applies, then Sub-part 1 does not apply.

11. Application of Pre-existing Agreements

11.1 If you are already, or will become (when joining a pre-existing open panel), a party to a Pre-existing Agreement that covers the SaaS Services you would like to list in the Marketplace, and that Pre-existing Agreement is an Eligible Contract, you can list those services in this Channel within the Marketplace.

11.2 If you have or enter into a Pre-existing Agreement and we grant you Member status for this Channel:

- (a) your Pre-existing Agreement will apply to the services it covers and you will contract with relevant Eligible Agencies on the terms of the applicable Agency Agreement;
- (b) if there is any inconsistency between the terms of your Pre-existing Agreement or an Agency Agreement and the applicable terms in Part 1 of this Marketplace Agreement, your Pre-existing Agreement or the relevant Agency Agreement will prevail to the extent of the inconsistency;

The terms defined here have special meaning.

This Sub-part 2 applies to you if you are or will be providing SaaS Services under a Pre-existing Agreement.

To list services that are or will be available under a Pre-existing Agreement in the Marketplace, we need to have said that the Pre-existing Agreement is an Eligible Contract. You can find out by checking marketplace.govt.nz. If it is, you'll need to follow the On-boarding Process but the requirements are less than usual.

- (c) applicable Supplementary Terms will prevail over your Pre-existing Agreement; and
- (d) your Pre-existing Agreement will have “common capability” status in relation to the services that you are authorised to and do list in this Channel within the Marketplace. Under the Government Rules of Sourcing, this enables Eligible Agencies to purchase those services from you without having to undertake a full open procurement process on GETS. They would only have to follow the applicable Ordering Process using a secondary procurement process appropriate for the service being procured.

12. Ordering Services under Pre-existing Agreements and the agreement that applies

- 12.1 The Ordering Process for Eligible Agencies’ purchase of SaaS Services under Pre-existing Agreements and the manner in which your charges are paid depend on the particular Pre-existing Agreement under which the SaaS Services are being purchased. This may entail completion of the paperwork required by the applicable Agreement. Details can be found on marketplace.govt.nz.
- 12.2 The agreement that applies between you and an Eligible Agency that orders Services will take the form of the Agency Agreement prescribed by the applicable Pre-existing Agreement.