

TERMS & CONDITIONS: WEBGRAPHS

Registered Users

Access to and use of the WebGraphs System is provided to Customer on these terms and conditions, and the terms of the Quotation agreed between TCA and Customer, which together form a contract between TCA and Customer (referred to below as "this Agreement").

1. WEBGRAPHS SYSTEM

- 1.1 TCA will grant Customer access to and use of the WebGraphs System through the TCA Website to produce WebGraphs Reports.
- 1.2 Customer must obtain an Internet connection, and any other software and equipment TCA notifies Customer from time to time is necessary to enable Customer to access and use the WebGraphs System.
- 1.3 TCA may upgrade, modify or replace the WebGraphs System from time to time.

2. SERVICE EXCLUSIONS

The services to be provided by TCA under this Agreement do not include, and TCA does not represent or warrant that such services include:

- (a) providing the WebGraphs System 24 hours a day, 7 days a week or free of interruptions or errors;
- (b) verifying that the data used on the WebGraphs System is complete, accurate and not out of date;
- (c) ensuring that WebGraphs Reports are complete, accurate and not out of date;
- (d) eliminating physical geographic limitations or variance in allowable CO2 emission trends between different jurisdictions;
- (e) interpreting the WebGraphs Reports for Customer or providing any advice in relation to the use by Customer of WebGraphs Reports;
- (f) ensuring that Customer's use of the WebGraphs System and WebGraphs Reports complies with laws and regulations applicable to Customer;
- (g) the User Instructions, the WebGraphs Reports or any other material downloaded by Customer from the WebGraphs System is free from any virus or computer software routine or hardware components designed to: (i) permit unauthorised access to, or use by third parties of, Customer's or any other person's systems or data; (ii) disable, damage or erase the User Instructions, the WebGraphs Reports, any other material downloaded by Customer from the WebGraphs System, or Customer's or any other person's systems or data; or (iii) perform any other similar actions; or
- (h) ensuring that the WebGraphs System is free from unauthorised access.

3. CUSTOMER OBLIGATIONS

- 3.1 Customer must comply with the User Instructions when accessing and using the WebGraphs System.
- 3.2 Customer must keep confidential any passwords or other login identification used by Customer to access the WebGraphs System, and immediately notify TCA if any such password or login identifier is disclosed to any third party. Customer is responsible for any use of such passwords or other login identification until such time as Customer notifies TCA they have been disclosed to a third party.
- 3.3 Customer must not:
 - (a) use the WebGraphs System except for producing WebGraphs Reports;
 - (b) use WebGraphs Reports except for its own internal business purposes;
 - (c) allow more than one Customer user to access and use the WebGraphs System at any particular time;
 - (d) use the WebGraphs System for the benefit of any third party, including without limitation, through a service bureau arrangement;
 - (e) give any third party access to or possession of the WebGraphs System, the User Instructions or any WebGraphs Report;
 - (f) decompile or reverse engineer the WebGraphs System, or permit any third party to do so, except as expressly permitted under the Copyright Act 1968 (Cth);
 - (g) modify, develop, or create derivative works based on, the WebGraphs System, the User Instructions or the WebGraphs Reports;
 - (h) copy the User Instructions or the WebGraphs Reports, except with the written permission of TCA; or
 - (i) remove any proprietary notices or disclaimers from the WebGraphs System, the User Instructions or any WebGraphs Report, and Customer must reproduce such notices and disclaimers on any copy of the User Instructions or the WebGraphs Reports which TCA permits Customer to make.

4. RETAILER CUSTOMERS

- 4.1 If Customer is an energy retailer, and TCA has agreed in writing to permit Customer to resupply the goods and services provided by TCA under this Agreement to Customer's customers:
 - (a) Customer may:
 - (i) distribute copies of the User Instructions to its customers;
 - (ii) sub-license its customers the rights to access and use the WebGraphs System, User Instructions and WebGraphs Reports granted to Customer under this Agreement (but not the rights granted under this clause);
 - (iii) use the WebGraphs System, User Instructions and WebGraphs Reports to advise Customer's customers in relation to their energy consumption;

- (b) Customer must ensure that each customer to whom it resupplies the goods and services provided under this Agreement complies with the terms and conditions of this Agreement as if it was the Customer under this Agreement; and
 - (c) Customer must indemnify TCA against any claim or action by any customer of Customer in relation to the WebGraphs System, WebGraphs Reports or any WebGraphs Report, and any loss, liability, damage, cost, charge, outgoing or expense suffered or incurred by TCA in connection with any such claim.
- 4.2 Any sub-licence to access and use the WebGraphs System, the User Instructions granted by Customer to any of its customers automatically terminates on termination or expiry of this Agreement.

5. FEES & PAYMENT

5.1 Customer must pay TCA:

- (a) the Fees;
 - (b) the amount TCA reasonably believes reflects the additional costs and expenses incurred by TCA due to:
 - (i) any information supplied by Customer and relied on by TCA when preparing the Quotation being incorrect, misleading or incomplete;
 - (ii) the delivery of goods or services under this Agreement being interrupted or delayed by Customer; or
 - (iii) any change in any law or regulatory requirement.
- 5.2 TCA may, in its absolute discretion, increase the Fees:
- (a) on each anniversary of the Commencement Date, by a percentage not exceeding the percentage increase, if any, in the Consumer Price Index (All Groups) Sydney over the preceding 12 months;
 - (b) on the commencement of any term subsequent to the Minimum Term, to TCA's then current fees for the goods and services provided under this Agreement.

5.3 TCA will invoice Customer monthly in arrears for all amounts owing to TCA under this Agreement.

5.4 Customer must pay the amount specified in each invoice issued by TCA within 21 days of receipt of the invoice or within such other period as may be agreed by the parties.

5.5 Customer must pay interest on any overdue amount calculated daily at the rate equal to 1% per annum above the Commonwealth Bank of Australia Corporate Overdraft Reference Rate as published from time to time, or if that rate does not exist for any reason, such other similar rate as agreed by the parties.

6. GST

6.1 Words used in this clause which have a defined meaning in the GST Law have the same meaning as in the GST Law unless the context indicates otherwise.

6.2 The Fees and other amounts payable by Customer under this Agreement do not include GST.

6.3 To the extent that any supply made by TCA under or in connection with this Agreement is a taxable supply, the consideration for that supply must be increased by an amount equal to the amount of that consideration multiplied by the rate at which GST is imposed in respect of the supply.

6.4 TCA must issue a Tax Invoice to the Customer no later than 7 days after payment of GST inclusive fees or other amounts under this Agreement.

6.5 If either party is entitled under this Agreement to be reimbursed or indemnified by the other party for a cost or expense incurred in connection with this Agreement, the reimbursement or indemnity payment must not include any GST component of the cost or expense to the extent to which an input tax credit may be claimed by the party entitled to be reimbursed or indemnified, or by its representative member.

7. TERM & TERMINATION

7.1 This Agreement:

- (a) commences on the commencement date specified in the Quotation, or if no commencement date is specified in the Quotation, on the date the parties entered into this Agreement ("**Commencement Date**"); and
- (b) continues until the expiry of the minimum term specified in the Quotation ("**Minimum Term**"), unless terminated earlier or renewed in accordance with this Agreement.

7.2 This Agreement will be renewed for successive terms of the same duration as the Minimum Term. If either party wishes this Agreement not to be renewed at the expiry of the Minimum Term or any subsequent term, it must give the other party at least 30 days notice of such wish.

7.3 TCA may terminate this Agreement by giving 7 days notice to Customer if TCA ceases to provide to its customers the goods and services provided under this Agreement.

7.4 TCA may terminate this Agreement by notice to Customer if any overdue Fees are not paid within 10 days of a notice requiring the Customer to pay such Fees.

7.5 Either party may terminate this Agreement by giving notice to the other party if:

- (a) the other party is in material breach of this Agreement and fails to rectify the breach within 10 days of being given notice requiring it to do so;
- (b) an Insolvency Event occurs with respect to the other party; or
- (c) a Force Majeure Event affecting a party continues for a period of 30 days or more.

8. EFFECT OF TERMINATION

8.1 If this Agreement is terminated:

- (a) Customer must immediately cease accessing and using the WebGraphs System and the User Instructions;

- (b) Customer must immediately destroy all records of the passwords and other login identifiers used by Customer to access the WebGraphs System; and
 - (c) Customer must immediately return, or if requested by TCA, destroy all copies of the User Instructions in Customer's possession or control.
- 8.2 If this Agreement is terminated by TCA pursuant to clause 7.5(a) or (b), Customer must immediately pay any Fees due at the date of termination, together with the present value of any Fees that would have become due in the period between the date of termination and the date of expiry of the then current term of this Agreement.

9. WARRANTIES

Except as expressly provided by this Agreement and apart from any condition or warranty implied by law which may not be excluded, restricted or modified, TCA makes no representations, conditions or warranties, express or implied, under this Agreement.

10. LIMITATION OF LIABILITY

10.1 Subject to clauses 10.2 and 10.3, TCA is not liable for any loss or damage, however caused (including, but not limited to, by the negligence of TCA), suffered by the Customer in connection with this Agreement, including without limitation, any loss or damage suffered or incurred in connection with the use of the WebGraphs System or any WebGraphs Report.

10.2 If the Trade Practices Act 1974 ("**TPA**") or any other legislation implies a condition or warranty into this Agreement in respect of goods or services supplied, and TCA's liability for breach of that condition or warranty may not be excluded but may be limited, clause 10.1 does not apply to that liability and instead TCA's liability for any breach of that condition or warranty is limited to:

- (a) in the case of a supply of goods, TCA doing any 1 or more of the following (at its election):
 - (i) replacing the goods or supplying equivalent goods;
 - (ii) repairing the goods;
 - (iii) paying the cost of replacing the goods or of acquiring equivalent goods;
 - (iv) paying the cost of having the goods repaired; or
- (b) in the case of a supply of services, TCA doing either or both of the following (at its election):
 - (i) supplying the services again;
 - (ii) paying the cost of having the services supplied again.

10.3 Nothing in this Agreement is intended to exclude, restrict or modify rights which the Customer may have under the TPA or any other legislation which may not be excluded, restricted or modified by agreement.

11. INDEMNITY

Customer indemnifies and holds harmless TCA against all losses, damages, liabilities, claims, costs, charges, outgoings, expenses, harm or injury which any of them may suffer or incur in connection with:

- (a) any breach by Customer of this Agreement; or
- (b) any misrepresentation, misleading or deceptive conduct, negligence or any other wrongful act or omission of Customer, its employees, agents or contractors.

12. COVENANT NOT TO SUE

Customer covenants not to make any claim or take any action against any officer, employee, agent, contractor, licensor or supplier of TCA in relation to this Agreement.

13. INTELLECTUAL PROPERTY

Except for any licence rights expressly granted to Customer under this Agreement, Customer obtains no title or Intellectual Property Rights in the WebGraphs System, the User Instructions or the WebGraphs Reports.

14. CONFIDENTIALITY

14.1 Customer agrees to keep confidential, and not to use or disclose, any Confidential Information of TCA, including Confidential Information provided to or obtained by Customer prior to the Commencement Date, except as expressly permitted under this Agreement.

14.2 The obligations of confidence in this clause 14 do not apply to Confidential Information:

- (a) that is in the public domain otherwise than as a result of a breach of this Agreement or other obligation of confidence; or
- (b) that is already known, rightfully received or independently developed, by Customer free of any obligation of confidence.

14.3 Customer will not be in breach of the obligations of confidence in this clause 14 by disclosing Confidential Information that is required to be disclosed under compulsion of law by a court or governmental agency, provided that, prior to disclosing such information, Customer has promptly notified TCA in writing and Customer has exhausted all reasonable steps (whether required by TCA or not) to maintain such Confidential Information in confidence.

14.4 Customer must not make or cause to be made any unauthorised disclosure, use or access in relation to TCA's Confidential Information. If Customer becomes aware of any such unauthorised disclosure, use or access, Customer must: notify TCA immediately; promptly provide TCA with full details of, and assist TCA in investigating, such disclosure, use or access; cooperate with TCA in any investigation or litigation against third parties deemed necessary by TCA to protect its rights in its Confidential Information; and use its best endeavours to prevent a recurrence of the unauthorised disclosure, use or access.

14.5 Customer acknowledges that TCA and its licensors and other associates may suffer financial and other loss or damage in relation to a breach of this clause 14, and that monetary damages may be an insufficient remedy. Customer also acknowledges that in addition to any other remedy available at law or in equity, TCA is entitled to injunctive relief to prevent a breach of, and to compel the specific performance of, this clause 14.

15. FORCE MAJEURE

TCA will not be liable for any delay or failure to perform its obligations under this Agreement caused by any Force Majeure Event.

16. DISPUTE RESOLUTION

16.1 If a dispute arises in relation to this Agreement and the parties have not resolved the dispute within 7 days of one party giving written notice of the dispute to the other, the parties must, before commencing legal proceedings, endeavour to resolve the dispute through mediation.

16.2 The mediator must be a person appointed by LEADR and the mediation shall be conducted in accordance with the mediation rules of LEADR.

16.3 If the dispute is not resolved within 28 days of the appointment of a mediator, either party may, after giving written notice to the other party, commence court proceedings.

16.4 Nothing in this clause restricts the right of TCA or Customer to seek urgent interlocutory relief or to terminate this Agreement in accordance with its terms and conditions.

17. NOTICES

17.1 Subject to clause 17.2, any notice given by either party in relation to this Agreement must be:

- (a) addressed to the other party;
- (b) signed by a person duly authorised by the party giving the notice; and
- (c) either:
 - (i) delivered by hand or posted to the address of the other party; or
 - (ii) sent by facsimile transmission to the facsimile number of the other party.
- (d) Any notice sent by facsimile will be deemed to have been given on receipt by the sender of a transmission control report from the dispatching machine showing the correct number of pages, the correct facsimile number and the result of the transmission is 'OK', provided that, if the time of delivery or completion of the facsimile transmission is after 4p.m. on any Business Day or during any day that is not a Business Day, the notices will be deemed to have been given on the next Business Day.

17.2 TCA may give notice to Customer in relation to matters affecting users of the WebGraphs System generally by posting the notice on the TCA Website, and such notices will be effective from the time of posting.

18. VARIATION

TCA may amend these terms and conditions from time to time by notice posted on the TCA Website effective from the time of posting.

19. ASSIGNMENT

19.1 Customer may not assign its rights or obligations under this Agreement without the prior written consent of TCA.

19.2 TCA may assign its rights, and may novate its rights and obligations, under this Agreement. If TCA wishes to novate its rights and obligations under this Agreement to a third party, Customer must enter into a novation agreement with TCA and the relevant third party on terms specified by TCA to give effect to such novation.

20. PRECEDENCE

If there is an inconsistency between the Quotation and these terms and conditions, these terms and conditions prevail to the extent of the inconsistency.

21. ENTIRE AGREEMENT

The Quotation and these terms and conditions are the entire agreement of the parties in relation to the subject matter of this Agreement and supersede all other statements, representations, negotiations, arrangements, understandings, quotations, tenders and agreements, whether verbal or in writing.

22. SEVERANCE

22.1 If any provision of this Agreement is void, unenforceable or illegal in a jurisdiction, it is severed from the remainder for the purposes of enforcement in that jurisdiction.

22.2 The remainder of this Agreement has full force and effect, and the validity or enforceability of that provision in any other jurisdiction is not affected.

22.3 This clause 22 has no effect if the severance:

- (a) alters the basic nature of this Agreement; or
- (b) is contrary to public policy.

23. WAIVER

23.1 Waiver of any right, power, authority, discretion or remedy arising on a breach of this Agreement must be in writing and signed by the party granting the waiver.

23.2 This clause 23 may not itself be waived except in writing.

24. GOVERNING LAW

24.1 This Agreement is governed by the laws of New South Wales.

24.2 Each party submits to the non-exclusive jurisdiction of the courts of New South Wales.

25. DEFINITIONS

In these terms and conditions:

"Business Day" means a day on which banks are open for general business in Sydney, excluding Saturdays, Sundays and public holidays;

"**Commencement Date**" has the meaning given to it in clause 7.1;

"**Confidential Information**" means any confidential information of TCA (whether contained in tangible or intangible form, including, without limitation, written or printed documents, oral statements and any digital media) which relates to TCA or the subject matter of this Agreement and includes, without limitation: (a) the WebGraphs System, the User Instructions and the WebGraphs Reports; (b) any information relating to the personnel, policies or business strategies of TCA; (c) any information passed to TCA by a third party, including business partnerships, counter parties and related bodies corporate which is in itself confidential as between TCA and the third party or otherwise subject to agreed conditions of non-disclosure; and (d) the Quotation;

"**Customer**" is the customer specified in the Quotation;

"**Fees**" means the fees set out in the Quotation, as varied pursuant to clause 5.2;

"**Force Majeure Event**" means any event beyond the reasonable control of TCA, including any failure in the telecommunications network which prevents the transmission of metering data;

"**GST**" means goods and services tax or similar value added tax levied or imposed in Australia under the GST Law or otherwise on a supply;

"**GST Act**" means A New Tax System (Goods and Services Tax) Act 1999 (Cth);

"**GST Law**" has the meaning given to it in the GST Act;

"**Insolvency Event**" in relation to a party (**insolvent party**) means: (a) the insolvent party ceases, or takes steps to cease, to conduct its business in the normal manner; (b) the insolvent party enters into or resolves to enter into any arrangement, composition or compromise with, or assignment for the benefit of, its creditors or any class of them; (c) the insolvent party is unable to pay its debts when they are due or is deemed under the Corporations Act 2001 to be insolvent; (d) a liquidator or provisional liquidator is appointed to the insolvent party or a receiver, receiver and manager, administrator, trustee or similar official is appointed over any of the assets or undertakings of the insolvent party; or (e) an application or order is made, or a resolution is passed, for the winding up of the insolvent party;

"**Intellectual Property Rights**" means all industrial and intellectual property rights throughout the world and includes rights in respect of copyright, patents, trade marks, designs, trade secrets, know-how, confidential information and circuit layouts;

"**LEADR**" means the organisation known as Lawyers Engaged in Alternative Dispute Resolution;

"**Minimum Term**" has the meaning given to it in clause 7.1;

"**Quotation**" means a written TCA quotation attached to or referring to these terms and conditions;

"**Tax Invoice**" includes any document or record treated by the Commissioner of Taxation as a tax invoice or as a document entitling a recipient to an input tax credit;

"**TCA**" means Testing and Certification Australia, a business unit of EnergyAustralia (ABN 67 505 337 385);

"**TCA Website**" means the website operated by TCA at <http://www.tcaust.com/>, pages within that site or such other website as may be nominated by TCA from time to time;

"**User Instructions**" means the instructions provided by TCA for use of the WebGraphs System from time to time;

"**WebGraphs Reports**" means reports on Customer's energy consumption produced using the WebGraphs System; and

"**WebGraphs System**" means the system known as WebGraphs made available by TCA through the TCA Website, as may be modified or replaced by TCA from time to time.