NemSight® End User Licence Agreement

Warning: Use of **NemSight®** is conditional upon you ("the **Customer**") agreeing to the terms of this **Agreement**.   Choosing "I accept the terms and conditions of this **Agreement**" when installing **NemSight®** shall be deemed to be your acceptance of the terms of this **Agreement**.   If you do not agree, then (a) choose "do not accept" and do not proceed to install or use **NemSight®** and (b) contact **Creative Analytics Pty Ltd ABN 54 137 966 520** ("**Creative Analytics**") to arrange for any applicable refund.

Operative Part

1.   Definitions

1.1   In this **Agreement**, unless inconsistent with the context:

(a)   **Agreement** means this agreement, its recitals, provisions, and any schedule of this agreement.

(b)   **Confidential Information** includes information which relates to **NemSight®** including account details, passwords and activation codes, development concepts, source code, object code, specifications, data models and schema, protocols, algorithms, manuals, drawings, and data created or used by **Creative Analytics**.

(c)   **Clause** means a clause of this **Agreement**.

(d)   **Confidential Client Data Information** means information which relates solely to **Customer's** business and does not include any underlying data structures or concepts.

(e)   **Duration** means initially the trial period as advised by **Creative Analytics** but upon payment of the amount specified in an invoice rendered by **Creative Analytics** the **Duration** shall be extended for the period specified in that invoice.

(f)   **Fees** means either the agreed fees of **Creative Analytics** or, if none, the published fees of **Creative Analytics** as amended from time to time.

(g)   **Force Majeure** means an act, omission, or circumstance over which **Creative Analytics** could not have reasonably exercised control including telecommunication failures.

(h)   **Intellectual Property Right** includes any right arising from or capable of arising from the: *Circuits Layout Act 1989* (Cth); *Copyright Act 1968* (Cth); *Designs Act 2003* (Cth); *Patents Act 1990* (Cth); *Trade Marks Act 1995* (Cth); any similar legislation outside the Commonwealth of Australia; any similar unregistered right and **Confidential Information**.

(i)   **Party** and **Parties** means a party to this **Agreement** and their respective successors, trustees and permitted assigns.

(j)   **Sub-clause** means a sub-clause of this **Agreement**.

(k) **Taxes** includes taxes, duties and government charges, fees, levies and any penalty for not paying same.

2. Interpretation

2.1 In this **Agreement**, unless inconsistent with the context:

(a) Words denoting a person shall include corporations, statutory corporations, partnerships, joint ventures, associations, boards, governments or semi-government agencies or authorities.

(b) Words denoting the singular number shall include the plural number and vice versa.

(c) Words denoting any gender shall include all other genders.

(d) A reference to a statute or a regulation also refers to any statute or regulation amending, consolidating, or re-enacting same.

(e) Money references are references to Australian currency.

(f) A reference to "**includes**", "**including**" or "**inclusive**" is to be construed as being a reference to "includes, without limitation", "including, without limitation", and "inclusive, without limitation" respectively.

(g) Headings used in this **Agreement** are for convenience and ease of reference only, are not part of this **Agreement** and shall not be relevant or affect the meaning or interpretation of this **Agreement**.

(h) Every obligation, covenant, agreement, condition express or implied in this **Agreement** and entered into by more than one party shall bind them jointly and each of them severally.

(i) A provision of this **Agreement** shall not be construed adversely to the **Party** that drafted it.

(j) If any provision or part provision of this **Agreement** is held invalid, unenforceable, or illegal for any reason, this **Agreement** shall remain otherwise in full force apart from such provision or part provision which shall be deemed deleted.

(k) No remedy expressly granted to **Creative Analytics** excludes or shall be deemed to exclude or modify any other right or remedy which would otherwise be available to **Creative Analytics**.

3. Customer's Right to use NemSight®

3.1 Subject to the terms of this **Agreement Creative Analytics** grants **Customer** a revocable non-exclusive right to use **NemSight®** for the licenced number of users working for the **Customer** for the **Duration**.

3.2 **Customer** may publish the data or images produced by **NemSight®** in a PDF document as part of a larger report.

3.3 **Customer** may not publish the data or images produced by **NemSight®** in any other form.

3.4 The PDF reports must be provided via email or through **Customer's** secure website and must not be freely available.

3.5 **Customer** must clearly attribute the source of the data and images to **NemSight®** by **Creative Analytics**.

3.6 **Customer** may not remove any copyright notices or modify the images in any way.

3.7 **Creative Analytics** shall, from time to time, provide access codes to permit **Customer** to use **NemSight®**.

4.   Customer's Responsibilities

4.1 **Customer** shall:

(a)   pay the **Fees** specified in an invoice;

(b)   keep its user accounts, passwords, and activation codes details confidential and not disclose same to any other party.   **Customer** shall be responsible for all use of same whether authorised by **Customer** or not.   Should any such disclosure occur **Customer** shall report same to **Creative Analytics** in writing as soon as possible;

(c)   comply with the instructions supplied by **Creative Analytics** from time to time;

(d)   provide equipment which **Creative Analytics** considers suitable for **NemSight®**;

(e)   apply, without delay, all updates issued by **Creative Analytics** from time to time to which it is entitled;

(f)   backup its data wherever same is stored;

(g)   comply with the licence terms and conditions of the Australian Energy Market Operator (AEMO) and Bureau of Meteorology (BOM) used by **Creative Analytics** to provide **NemSight®** and which terms and conditions can currently be found at https://www.aemo.com.au/privacy-and-legal-notices and http://www.bom.gov.au/other/disclaimer.shtml and which terms and conditions may be updated at the sole discretion of **Creative Analytics** from time to time and which terms and conditions are hereby incorporated into this **Agreement** with only any necessary changes to give this **Agreement** precedence;

(h)   comply with the terms and conditions of any telecommunications provider chosen by **Creative Analytics** and which terms and conditions can currently be found at https://aws.amazon.com/service-terms/ and which terms and conditions may be updated at the sole discretion of **Creative Analytics** from time to time and which terms and conditions are hereby incorporated into this **Agreement** with only any necessary changes to give this **Agreement** precedence;

(i)   comply with law;

(j)   conduct all appropriate virus and security checks;

(k)   ensure that its customers**,** employees, sub-contractors and other agents who have authorised access to **NemSight®** are made aware of the terms of this **Agreement**;

(l)   supervise and control the use of **NemSight®** in accordance with the terms of this **Agreement**;

(m)   immediately advise **Creative Analytics** in writing upon it becoming aware of any person using **NemSight®** who is not authorised by **Creative Analytics** to do so;

(n)   hereby consents to the use of its information in accordance with **Creative Analytics Privacy Policy** which can be found at http://www.analytics.com.au/PrivacyPolicy.pdf and

(o)   train its staff in the use of **NemSight**®;

4.2   Customer shall not:

(a)   copy, reproduce, translate, adapt, vary, modify, decompile, disassemble, reverse engineer, create derivative works of, sub-license, rent, lease, loan or distribute **NemSight**® other than as expressly authorised by this **Agreement**;

(b)   engage in password sharing, remote desktop access or port aggregation without the express permission of **Creative Analytics**;

(c)   remove any copyright messages on a report produced by **NemSight**® itself

(d)   exceed the licensed number of users or machines;

(e)   use any computer programs with **NemSight**® which have not been checked and are not expressly specified by **Creative Analytics** as suitable;

(f)   interfere with the network or disrupt any other user, service or equipment;

(g)   permit any act which infringes the **Intellectual Property Rights** which subsist in **NemSight**® and which belong to **Creative Analytics**.

(h)   provide or otherwise make available **NemSight**® in any form to any other person;

(i)   use **NemSight**® for any illegal, unauthorised or dangerous purpose including unsolicited commercial e-mail;

(j)   use **NemSight**® for or in connection with a service bureau operation; or

(k)   use **NemSight**® to publish any material of which it is not the **Intellectual Property Right** owner or licensed by the **Intellectual Property Right** owner or is defamatory.

5.   Supplier's rights

5.1 Creative Analytics may at its sole discretion, without notice or giving any reason or incurring any liability for doing so take such action as it sees fit including disabling **NemSight®** if it suspects that malicious, illegal, or unacceptable usage of **NemSight®** is occurring or has occurred, including destruction or disposal of **Customer's** access passwords or activation codes.

6.   Disclaimer & Acknowledgments

6.1 Customer acknowledges that:

(a)   deal capture and portfolio analysis and live reporting is a complex area and **NemSight®** is not designed as a substitute in any way for professional advice. **Customer** shall obtain appropriate professional advice and monitor the market independently of **NemSight®** and or before relying upon any data supplied or not supplied by **NemSight®**;

(b)   supplied with **NemSight®** are certain notes and instructions and a failure to follow those instructions or notes carefully could result in erroneous data being produced or actions being taken or not taken or messages sent or not sent by **NemSight®**;

(c)   whilst **NemSight®** may be used by persons without a detailed knowledge of computers, **NemSight®** is designed to be used by persons who are familiar with the Australian electricity industry and the charging for electricity within the industry.   **Customer** shall check all data stored or provided by **NemSight®** for any anomalies and compliance with law;

(d) NemSight® does not check for all anomalies and data incorrectly entered may be processed without question;

(e) NemSight® does not check the accuracy of data supplied by third parties before supplying same to **Customer.   Customer** shall verify the accuracy and suitability of same before using same;

(f) NemSight® does not necessarily comply with any standard or legislation;

(g) NemSight® is licensed on the strict understanding that, subject to the warranties below, **Creative Analytics** is not responsible for the results of any actions taken, either by **Customer** or a third party relying on data supplied or not supplied by **NemSight®**;

(h) Creative Analytics cannot and does not warrant that **NemSight®** shall be available 24 hours a day or that any defect shall be corrected within a specific time frame or that any message from **NemSight®** is on time, accurate, reliable, secure, virus free or without defect;

(i) Creative Analytics is not responsible for:

(i)   ensuring that **NemSight®** is suitable for **Customer's** requirements or fit for any purpose;

(ii) any interruption to **NemSight®** due to equipment failure, the need for routine maintenance, peak demand etc;

(iii) the supply or maintenance of **Customer's** equipment, software or telecommunications infrastructure;

(iv) monitoring, controlling, or ensuring the accuracy, appropriateness or content of any information on the internet or sent in a message and does not do so; and

(v) any software or data available on the internet or supplied by any third parties.

7. Support

7.1 Creative Analytics may, from time to time, make available various support services and other assistance in relation to **NemSight®**.

7.2 Should **Customer** wish to use such services then **Customer** shall pay the then published rate of **Creative Analytics** in relation to such services. Such services are supplied pursuant to the terms and conditions set out in this **Agreement**.

8. Intellectual Property Rights

8.1 Creative Analytics retains the **Intellectual Property Rights** in **NemSight®** and the trade mark **NemSight®**.

8.2 Customer shall retain the **Intellectual Property Rights** in all materials supplied by **Customer** to **Creative Analytics**, however, nothing in this **Sub-clause** grants **Customer** the right to download any **Confidential Client Data Information** until all **Fees** are paid in full.

9. Confidential Information

9.1 To the extent that **Confidential Information** is not in the public domain (other than by way of breach of this **Agreement**) and is not known by the **Customer** at the time of disclosure, **Customer** shall:

(a) keep such information confidential;

(b) not directly or indirectly divulge or communicate or otherwise disclose any **Confidential Information**, in whole or part to any third party;

(c) not use any **Confidential Information**, other than for the express purpose set out in this **Agreement**, without the express written consent of **Creative Analytics**;

(d) take all necessary precautions to prevent any disclosure of **Confidential Information** to unauthorised third parties and inform **Creative Analytics** of any suspected or actual disclosure of **Confidential Information**; and

(e) not remove or cause to be removed from **Creative Analytics'** premises or systems any **Confidential Information** without prior written consent from **Creative Analytics**.

9.2 This **Clause** shall survive the termination of this **Agreement**.

10. Confidential Client Data Information

10.1 To the extent that **Confidential Client Data Information** is not in the public domain (other than by way of breach of this **Agreement** and is not known by **Creative Analytics** at the time of disclosure), **Creative Analytics**:

(a) shall keep such information confidential;

(b) shall not directly or indirectly divulge or communicate or otherwise disclose **Confidential Client Data Information**, in whole or part to any third party; and

(c) shall not use **Confidential Client Data Information** for its own purposes.

10.2 This **Clause** shall survive the termination of this **Agreement**.

11. Fees

11.1 Customer shall pay **Creative Analytics** the **Fees** without withholding, deduction or offset of any amounts for any purpose.

11.2 Creative Analytics may increase the **Fees** upon licence extension.

11.3 An account rendered by e-mail or otherwise by **Creative Analytics** shall be prima facie evidence for a Court of the provision of the items referred to in same to **Customer** by **Creative Analytics**.

12. Tax

12.1 Unless expressly stated to the contrary and to the extent permitted by law:

(a) the **Fees** are exclusive of all **Taxes** which may arise in relation to the subject matter of this **Agreement**;

(b) Customer shall immediately pay any applicable **Taxes** to **Creative Analytics**; and

(c) Customer shall indemnify and keep indemnified **Creative Analytics** from payment of the **Taxes** and any penalties arising from non-payment of same.

13. Suspension of Obligations

13.1 If **Customer** breaches any provision of this **Agreement Creative Analytics** may, without further notice to **Customer**:

(a) suspend all its obligations to **Customer** under this **Agreement**; and

(b) disable **NemSight®** using time out codes, remote access or other technological measures;

14. Limited Warranty

14.1 Creative Analytics shall supply **NemSight®** with all due care and skill.

14.2 Creative Analytics shall re-supply **NemSight®** if it is not supplied in accordance with this **Clause** provided that **Customer** notifies **Creative Analytics** of same within a reasonable time. This remedy shall be **Customer's** sole and exclusive remedy for breach of this **Agreement** or any other cause of action against **Creative Analytics**.

15. Limitation of Liability

15.1 To the extent permitted by law and except as expressly provided to the contrary in this **Agreement**, all warranties whether express, implied, statutory or otherwise, relating in any way to the subject matter of this **Agreement** or to this **Agreement** generally, are excluded. Where legislation implies in this **Agreement** any condition or warranty and that legislation avoids or prohibits provisions in a contract excluding or modifying the application of or the exercise of or liability under such term, such term shall be deemed to be included in this **Agreement**. However, the liability of **Creative Analytics** for any breach of such term shall be limited, at the option of **Creative Analytics**, to any one or more of the following: if the breach related to goods: the replacement of the goods or the supply of equivalent goods; the repair of such goods; the payment of the cost of replacing the goods or of acquiring equivalent goods; or the payment of the cost of having the goods repaired; and if the breach relates to services the supplying of the services again; or the payment of the cost of having the services supplied again.

15.2 To the extent permitted by law and except as expressly provided to the contrary in this **Agreement**, **Creative Analytics** shall not be under any liability (contractual, tortious or otherwise) to **Customer** in respect of any loss or damage (including consequential loss or damage) howsoever caused, which may be suffered or incurred or which may arise directly or indirectly in respect to the supply of goods or services pursuant to this **Agreement** or an act, failure or omission of **Creative Analytics**.

15.3 Customer warrants that it has not relied on any representation made by **Creative Analytics** or upon any descriptions or illustrations or specifications contained in any document including any catalogues or publicity material produced by **Creative Analytics**.

16. Indemnity

16.1 To the extent permitted by law, **Customer** shall release, indemnify and keep indemnified **Creative Analytics**, its officers, employees and agents, against any injury, death, damage, loss, costs (including legal costs on an indemnity basis), expenses, interest, taxes or liability whether direct or indirect and whether sustained by **Creative Analytics**, **Creative Analytics'** officers, employees and agents, **Customer**, **Customer's** officers, employees and agents or a third party arising out of:

(a) a breach of this agreement by **Customer**;

(b) any wilful, unlawful or negligent act or omission of **Customer**, its officers, employees or agents;

(c) any injury suffered by **Customer's** officers, employees, or agents.

16.2 This indemnity applies regardless of whether or not legal proceedings are instituted.

16.3 This indemnity applies to any payment, settlement, compromise, or determination regardless of whether same is authorised or not.

16.4 It is not necessary to incur any expense or make any payment before enforcing any right of indemnity under this **Agreement**.

16.5 This clause survives termination of this **Agreement**.

17. Waiver

17.1 No right of **Creative Analytics** under this **Agreement** shall be deemed to be waived or estopped except by notice in writing signed by **Creative Analytics**. Any such waiver or estoppel shall be limited to its express terms.

17.2 Any failure by **Creative Analytics** to enforce any provision of this **Agreement**, or any forbearance, delay or indulgence granted by **Creative Analytics** shall not be construed as a waiver of **Creative Analytics'** rights.

18. Survival

18.1 The provisions of this **Agreement** which are capable of having effect after the expiration of this **Agreement** shall remain in full force and effect following the expiration of this **Agreement**.

19. Assignment, Novation and Sub-Contracts

19.1 **Customer** shall not sub-contract, sub-licence, assign or novate, in whole or part, any entitlement or obligation under this **Agreement** without the prior written consent of **Creative Analytics**.

19.2 **Creative Analytics** may:

(a) sub-contract for the performance or part performance of this **Agreement**; and

(b) assign this **Agreement** to a third party without notice and in such circumstances, **Creative Analytics'** rights and obligations under this **Agreement** shall be immediately terminated upon assignment.

20. Notices

20.1 Notices under this **Agreement** may be delivered by hand, by mail or by facsimile.

20.2 Notices shall be deemed given in the case of:

(a) hand delivery, upon written acknowledgment of receipt by an officer or other duly authorised employee, agent or representative of the receiving party;

(b)   posting, 3 days after dispatch; and

(c)   facsimile, upon completion of transmission.

21. Termination

21.1 Creative Analytics may terminate this **Agreement** immediately by notice if:

(a)   any payment due from **Customer** to **Creative Analytics** remains unpaid for a period of 14 days;

(b)   Customer breaches any provision of this **Sub-clause** and such breach is not remedied within 14 days of notice by **Creative Analytics**;

(c)   Customer becomes, threatens or resolves to become or is in jeopardy of becoming subject to any form of insolvency administration;

(d)   Customer, being a partnership, dissolves, threatens or resolves to dissolve or is in jeopardy of dissolving;

(e)   Customer being a natural person, dies; or

(f)   Customer ceases or threatens to cease conducting its business in the normal manner.

21.2   In addition to terminating this **Agreement, Creative Analytics**:

(a)   may repossess any copies of **NemSight®** in the possession, custody or control of **Customer** which was supplied by **Creative Analytics** and has not been paid for in full;

(b)   may disable **NemSight®** using time out codes, remote access or other technological measures;

(c)   may retain any moneys paid;

(d)   may charge a reasonable sum for any un-invoiced items;

(e)   shall be regarded as discharged from any further obligations under this **Agreement**;

(f)   shall be under no liability to **Customer** for damages or compensation or any other payment whatsoever;

(g)   may immediately erase all **Confidential Client Data Information** stored by **Creative Analytics**; and

(h)   may pursue any additional or alternative remedies provided by law.

22. Entire Agreement

22.1   Unless stated expressly to the contrary in this **Agreement**:

(a) this **Agreement** constitutes the entire agreement between the **Parties** for the subject matter referred to in this **Agreement**.   Any prior arrangements, agreements, representations or undertakings are superseded;

(b) this **Agreement** is not to be construed as creating a joint venture, partnership or agency situation between the **Parties**.   No **Party** may represent that there exists such a relationship between the **Parties**;

(c) no **Party** may bind the other **Party** to any agreements, arrangements, contracts or understanding or represent that they have such authority; and

(d) no modification or alteration of any provision of this **Agreement** shall be valid except in writing signed by each **Party** save that **Creative Analytics** may on 30 days notice change any term of this **Agreement** and in such a case **Customer** may terminate this **Agreement** during that notice period without further obligation.

23. Governing Law

23.1 This **Agreement** shall be governed by and construed according to the law of Victoria, Australia**.**

23.2 The **Parties** irrevocably submit to the exclusive jurisdiction of the courts of Victoria, Australia and the Commonwealth of Australia and any courts hearing appeals from such courts.   Any proceedings in a Commonwealth court shall be commenced in Victoria, Australia.