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MXDR SPC End User Licence Terms (AWS Marketplace)

PARTIES

SEKURO OPERATIONS PTY LTD (ABN 52 652 187 785) (*Supplier*)

The user of the Service (*Customer*)

BACKGROUND

- A. The Supplier provides the Managed Extended Detection & Response – Sekuro Private Cloud (MXDR SPC) Services (the **Service**).
- B. The Customer wishes to acquire the Service on the AWS Market place, under their AWS Customer Agreement.
- C. The Customer's use of the Service (and each party's associated rights and liabilities in respect of the Service) is governed by the terms of this agreement.

GENERAL TERMS

1. Definitions and interpretation

1.1 Capitalised terms or expressions used in this agreement have the meanings set out in this clause.

Agreement Commencement Date: the date that the relevant AWS Offer is accepted and becomes an AWS Order.

APP: means an Australian Privacy Principle as defined in the Privacy Act.

APP Entity: has the meaning given in the Privacy Act.

Business Hours: the period from 9.00 am to 5.00 pm on any Business Day.

Corporations Act: the *Corporations Act 2001* (Cth).

Customer's Equipment: any equipment, including tools, systems, cabling or facilities, provided by the Customer, its agents, subcontractors or consultants which is used directly or indirectly in the supply of the Services.

Customer Materials: all documents, information, items and materials in any form, whether owned by the Customer or a third party, which are provided by the Customer to the Supplier in connection with the Service.

Customer's Representative: has the meaning given in **Error! Bookmark not defined.Error! Reference source not found..**

Data Breach Investigation: an investigation as required to be carried out in accordance with clause 11.3(c).

Data Incident: an Eligible Data Breach that has, or is reasonably suspected of having, occurred in respect of any Personal Information the Supplier has collected, held, used or disclosed in the course of or relating to this agreement.

Deliverables: any output of the Service to be provided by the Supplier to the Customer as specified in an Order and any other documents, products and materials provided by the Supplier to the Customer in relation to the Service (excluding Hardware and Software and the Supplier's Equipment).

Eligible Data Breach: an eligible data breach as that term is defined in the *Privacy Amendment (Notifiable Data Breaches) Act 2016* (Cth), occurring on or after 22 February 2018.

Excess Usage Fees: Costs incurred by the Supplier resulting from an increase in Log File ingestion into the SPC Platform, over and above the contracted GB/Day limit.

GST: goods and services tax chargeable under *A New Tax System (Goods and Services Tax) Act 1999* (Cth).

GST Law: has the same meaning as "GST Law" in *A New Tax System (Goods and Services Tax) Act 1999* (Cth).

Hardware: any physical product sold to the Customer by the Supplier.

Intellectual Property Rights: patents, rights to inventions, copyright and related rights, trademarks, business names and domain names, technology and all other intellectual property rights, whether registered or unregistered.

Order: means an Offer for the Service that has been accepted by the Customer on the AWS Marketplace.

Personal Information: has the meaning given in the Privacy Act.

Privacy Act: the *Privacy Act 1988* (Cth) as amended from time to time.

Sensitive Information: has the meaning given in the Privacy Act.

Service Fees: the amounts payable for the Service as set out in the Order.

Service: the MXDR SPC services to be provided to the Customer as set out in the Order.

SPC Platform: The AWS infrastructure on which the Service is hosted

Supplier's Equipment: any equipment (other than Hardware), including tools, systems, cabling or facilities, provided by the Supplier to the Customer and used directly or indirectly in the supply of the Service.

Term: has a meaning given in clause 2.1.

1.2 In this agreement, the following rules of interpretation apply unless the contrary intention appears or the context otherwise requires:

- (a) headings and subheadings are for convenience only and do not affect the interpretation of this agreement;
- (b) a reference to a body (other than a party to this agreement), whether statutory or not, that ceases to exist or has its powers or functions transferred to another body is a reference to the body that replaces it or that substantially succeeds to its powers or functions;
- (c) no provision of this agreement will be construed adversely to a party because that party was responsible for the preparation of that provision or this agreement;
- (d) specifying anything in this agreement after the terms "include", "including", "includes", "for example", "such as", or any similar expression does not limit the sense of the words, description, definition, phrase or term preceding those; and
- (e) this agreement includes all Schedules and attachments to it.

2. Commencement and term

2.1 This agreement starts on the Agreement Commencement Date and continues for the later of the agreed term of the supply of the Service for as long as the Customer continues to use the Service (the **Term**).

3. MXDR SPC Service Conditions

3.1 The Service is designed to provide a world class managed extended detection and response service, combining best-of-breed technology and skilled human expertise, whilst ensuring sovereignty of the Customer's Log Files in a Dedicated AWS Instance located in the AWS Infrastructure Region of the Customer's selection.

3.2 The Customers Log Files will be ingested into the SPC Platform', where the third-party software and infrastructure referred to below will be utilised. The Vendor Terms referred to below apply to the provision of that aspect of the Service and prevail in the case of inconsistency with any other term of this Agreement:

- (a) In respect of hosting of the Log Files: AWS – [<https://aws.amazon.com/service-terms/>]
- (b) In respect of routing of the Log Files: Cribl – [<https://cribl.io/legal/cribl-subscription-services-agreement/>]
- (c) In respect of the management of the Log Files: CrowdStrike – [<https://www.crowdstrike.com/terms-conditions/>]

3.3 The Supplier will not intentionally delete any Log Files from the SPC Platform. However, unless explicitly specified in an Order, the Supplier is under no obligation to backup the Log Files and therefore will not be liable for any loss or corruption of Customer Data ingested into the SPC Platform.

3.4 The Customer must identify an 'Onboarding Manager' who is appointed to manage the Customer's obligations with respect to Service onboarding.

3.5 The Customer must assist the Supplier (including but not limited to access to physical sites, networks, infrastructure, documentation, licence information, Customer Material and employees and contractors) to the extent reasonably necessary to enable the Supplier to perform the Service.

3.6 The Customer is responsible for providing all software, telecommunications, network and computer equipment, outside of the SPC Platform, required to create the Log Files.

3.7 The Customer is responsible for configuring, and maintaining all software, telecommunications, network and computer equipment required to create the Log Files

- 3.8 The Customer acknowledges and accepts that the Supplier has no control of the content of the Log Files. Should the Customer require that any of its confidential, private, or personally identifiable information be excluded from the SPC Platform, then it alone is responsible for ensuring that the Log Files do not contain data of that nature.
- 3.9 Whilst the Supplier will make genuine and reasonable attempts to communicate foreseeable Excess Usage Fees, if a verification or usage report reveals that the Customer has exceeded the purchased capacity or usage limits specified in an Order, the Supplier will have the right to recover any resulting third-party fees from the Customer.
- 3.10 Where the Customer permits or authorises its employees, consultants, contractors, or agents to access the SPC Platform, the Customer will be responsible for any of their actions that affect the viability, security, and usage of the Service.
- 3.11 Unless otherwise agreed by the Parties in writing, the Service, will start on the earlier of the date that Service onboarding has been completed, or 12 weeks after the date that the Order was accepted.

4. Supplier's Obligations

- 4.1 The Supplier will endeavour to provide the Service at a professional standard to the Customer in accordance with a Order in all material respects.
- 4.2 The Supplier will endeavour to meet any delivery, performance dates in an Order, but will be excused from any failure to supply which was contributed to by causes beyond its reasonable control (including delay in supply from third parties), and the time specified for completion of supply will be extended commensurately.
- 4.3 The Supplier will abide by the relevant information security laws and regulations applicable in the countries in which it operates.
- 4.4 The Supplier makes no additional warranty in relation to the Service other than those prescribed by law.
- 4.5 The Supplier does not represent or guarantee that the outcome of the Service will meet the Customer's expectations or objectives. The Customer must make independent enquiries about the suitability of the Service for their requirements.
- 4.6 The Supplier will provide the Service using appropriate skills, training and tools; however, the Customer acknowledges that the provision of Service does not guarantee or represent in any way that:
 - a) all threats or non-compliant environments will be identified;
 - b) all damage will be prevented; or
 - c) all responses will be effective.

5. Customer's Obligations

- 5.1 The Customer:
 - (a) must provide assistance to the Supplier (including access to physical sites, networks, infrastructure, documentation, licence information, Customer Materials and employees and contractors) to the extent reasonably necessary to enable the Supplier to perform the Service.
- 5.2 The Customer warrants, throughout the term of this agreement that:
 - (a) there are no legal restrictions preventing compliance with the terms of this agreement;
 - (b) it will cooperate with the Supplier and provide all information that is reasonably necessary to enable satisfactory performance of the Service;
 - (c) the information provided to the Supplier is true, correct and complete;
 - (d) it has obtained any consents, licences and permissions from other parties necessary for the Service to be provided at the Customers cost; and
 - (e) consent is given for the use of the Customer's name and Intellectual Property in relation to the provision of the Service.
- 5.3 The Customer acknowledges by entry into this agreement that no promise, representation, guarantee or undertaking has been made or given by the Supplier or any person on its behalf in relation to the capacity, uses, or benefits to be derived from use, profitability of or any other results to be obtained from the provision of the Service, except as set out in this agreement. The Customer has relied on its own skill and judgment in deciding to acquire the Service and

acknowledges that the Supplier does not and cannot warrant that the Service will be uninterrupted, error-free, or free of harmful components or that any content will be secure or not otherwise lost or damaged.

6. Resale Products

6.1 Where the Supplier provides the Customer with products or services provided by third-party vendors, either directly or incorporated as part of the Service, those products or services will be subject to any Vendor Terms referred to the Customer prior to or at the time of accepting or using the Service. By placing an Order, the Customer accepts those Vendor Terms. The Customer agrees that the Supplier has no control over third-party provided products or services, and to the extent permitted by law, and without limiting the Customer's rights against the Supplier, if it has a claim in respect of the products under the applicable Vendor Terms or otherwise as available at law (including the Competition and Consumer Act 2010 (Cth) if applicable) it will, along with any redress it chooses to seek, pursue that claim against the relevant vendor.

6.2 A failure of the Customer to comply with its obligations under the Vendor Terms is grounds for the Supplier to suspend, or if irreparable, terminate the provision of the Service. In this event, the Customer will remain liable for the Service Fees set out in the relevant Order.

7. Service Fees and Payment

7.1 The Customer will pay the Service Fees and payment process will be as set out in the Order, and the Customer's AWS Customer Agreement (or other relevant AWS agreement).

7.2 The Customer must pay invoices submitted to it by the Supplier for any Excess Usage Fees.

7.3 The Supplier is entitled to be reimbursed by the Customer for the full costs of recovery of overdue amounts on an indemnity basis.

7.4 Without limiting the Supplier's rights to terminate or take other action under this agreement, if the Customer fails to pay any amount due in accordance with clause 7, which are not legitimately in dispute under clause 7.5 the Supplier may cease or suspend providing a Service and any credit facility to the Customer.

7.5 Subject to the AWS Customer Agreement, If the Customer disputes the whole or any portion of an invoice:

- (a) the Customer will pay any amount in the invoice which is not in dispute;
- (b) within 5 Business Days of receipt of the invoice, the Customer will notify the Supplier in writing of the reasons for disputing the remainder of the invoice; and
- (c) within 5 Business Days of that notification, the parties must meet with a view to resolving the dispute.

7.6 Subject to the AWS Customer Agreement, all sums payable to the Supplier under this agreement:

- (a) are exclusive of GST (unless expressly stated otherwise), and the Customer must, in addition, pay an amount equal to any GST chargeable on those sums on delivery of a GST invoice; and
- (b) must be paid in full without any set-off, counterclaim, deduction or withholding (other than any deduction or withholding of tax as required by law).

8. Intellectual Property Rights

8.1 Each party retains ownership of all its pre-existing Intellectual Property Rights.

8.2 Unless the contrary is expressly set out in the relevant Order:

- (a) the Supplier and its licensors will retain ownership of all Intellectual Property Rights in the Deliverables (except to the extent of any Customer Materials contained therein); however
- (b) the Supplier grants to the Customer a non-exclusive, royalty-free licence during the term of this agreement to use the Deliverables for the sole purpose of receiving and using the Services.

9. Privacy

9.1 If the Supplier collects, holds, uses or discloses Personal Information in the course of or relating to this agreement, the Supplier must:

- (a) handle all Personal Information in accordance with the Supplier's privacy policy;
- (b) only use Personal Information for the purpose of performing its obligations under this agreement; and
- (c) not disclose Personal Information to any third party (including any subcontractor) without the Customer's prior written consent or as required by law.

9.2 The Customer warrants that it:

- (a) will not provide any Sensitive Information to the Supplier unless that information is necessary for the Supplier to perform its obligations under the agreement and then only with the Supplier's specific written consent;
- (b) has:
 - (i) made all necessary notifications required by APP 5, on behalf of itself and the Supplier to; and
 - (ii) obtained all necessary consents required by APP 6 from, the individuals whose Personal Information it is disclosing to the Supplier in the course of this agreement to enable to the Supplier to lawfully use the Personal Information and perform its obligations in accordance with this agreement; and
- (c) the Supplier may provide access to the Personal Information to people located overseas for the purpose of enabling it to perform the Service and perform back of house functions including billing.

9.3 If the Supplier becomes aware that a Data Incident has occurred, the Supplier must:

- (a) take reasonable steps to contain the Data Incident and prevent any further serious harm to affected individuals;
- (b) notify the Customer in writing without undue delay, stating the:
 - (i) nature and details of the Data Incident;
 - (ii) specific Personal Information affected; and
 - (iii) actions taken by the Supplier at clause 11.3(a);
- (c) identify whether the Data Incident is an Eligible Data Breach by conducting a thorough investigation of the Data Incident within 20 days of becoming aware of the Data Incident (**Data Breach Investigation**);
- (d) provide a copy of the report of the Data Breach Investigation to the Customer on completion;
- (e) engage in discussions with the Customer regarding:
 - (i) the conduct and outcomes of the Data Breach Investigation; and
 - (ii) in the case of an Eligible Data Breach, whether the Customer or the Supplier will make the relevant notifications under the Privacy Act; and
- (f) where it is agreed by the parties that the Supplier is making the relevant notifications, the Customer must approve the notifications before they are made (such approval to be given promptly and not to be unreasonably withheld).

9.4 The Customer:

- (a) acknowledges that the Supplier is reliant on the Customer for direction as to the extent to which the Supplier is entitled to use Personal Information disclosed to it in the course of and for the purpose of this agreement;
- (b) indemnifies the Supplier for any claim brought by any third party in connection with any act or omission by the Supplier in relation to a third party's Personal Information to the extent that such act or omission resulted directly from the Customer's instructions or the Customer's breach of this agreement; and
- (c) acknowledges that from time to time it may provide information to third parties in order to assess the Customer's credit standing, credit history and financial capacity.

10. Confidentiality

10.1 Each party (**Recipient**) must keep secret and confidential and not disclose any information relating to another party or its business (which is or has been disclosed to the Recipient by the other party, its representatives or advisers) or the terms of this agreement, except:

- (a) where the information is in the public domain as at the date of this agreement (or subsequently becomes in the public domain other than by breach of any obligation of confidentiality binding on the Recipient);
- (b) if the Recipient is required to disclose the information by applicable law or the rules of any recognised securities exchange, provided that the Recipient has to the extent practicable, having regard to those obligations and the required timing of the disclosure, consulted with the provider of the information as to the form and content of the disclosure;

- (c) where the disclosure is expressly permitted under this agreement;
- (d) if the disclosure is made to its officers, employees and professional advisers to the extent necessary to enable the Recipient to properly perform its obligations under this agreement or to conduct their business generally, in which case the Recipient must ensure that such persons keep the information secret and confidential and do not disclose the information to any other person;
- (e) where the disclosure is required for use in legal proceedings regarding this agreement; or
- (f) if the party to whom the information relates has consented in writing before the disclosure.

10.2 Each Recipient must ensure that its directors, officers, employees, agents, representatives and related bodies corporate comply in all respects with the Recipient's obligations under this clause 12.

10.3 On termination of the Agreement, the customer may provide the Supplier with a written direction requiring the Supplier to either destroy or return its confidential information, subject to the Supplier being able to retain such information required in order to maintain good corporate and accounting practices.

11. Limitation of remedies and liability

11.1 Nothing in this agreement limits or excludes either party's liability:

- (a) for death or personal injury; or
- (b) for fraud by it or its employees.

11.2 Subject to clause 13.1, the parties exclude any liability to each other, whether in contract, tort (including negligence) or otherwise, for any special, indirect or consequential loss arising under or in connection with this agreement, including any loss of profits (except to the extent contained in the Service Fees), loss of sales or business, loss of production, loss of agreements or contracts, loss of business opportunity, loss of anticipated savings, loss of or damage to goodwill, loss of reputation, loss of use or corruption of software, data or information.

11.3 If the supply of any goods or services under this agreement constitutes a supply of goods or services to a consumer as defined in the *Competition and Consumer Act 2010* (Cth), as amended or replaced, or relevant State or Territory legislation ("the Acts"), nothing contained in this agreement excludes, restricts or modifies any condition, warranty or other obligation where to do so is unlawful. Where permitted, the Supplier's liability for breach of any such condition, warranty or other obligation, including any consequential loss which the Customer may sustain or incur, shall be limited to the resupply of the affected Service, or payment for the cost of having the Service resupplied.

11.4 Subject to clause 13.1 and 13.3, a party's aggregate liability in respect of claims:

- (a) based on events in any calendar year arising out of or in connection with an Order under this agreement, whether in contract or tort (including negligence) or otherwise, will in no circumstances exceed 100% of the total Service Fees (including collection costs and interest) payable by the Customer to the Supplier under that Order in that calendar year; or
- (a) where not in connection with an Order, whether in contract or tort (including negligence) or otherwise, will in no circumstances exceed 100% of the total Service Fees (including collection costs and interest) payable by the Customer to the Supplier under this agreement in the 12 months prior to the claim arising.

11.5 The Supplier will take all reasonable measures to preserve the Log Files and Customer Data that it has access to while providing the Service, however, the Customer accepts that it must maintain viable backup data to avoid any loss or damage arising from any corruption or erasure of that data, and the Supplier's obligation and liability where it caused the loss or damage to that data is limited to performing the restore from that backup to the extent it is available.

11.6 The Supplier will not be liable in relation to any proceeding or claim which:

- (a) was caused by any act or omission of the Customer or its employees or agents; or
- (b) relates to actions of the Supplier which were expressly or impliedly authorised by the Customer or by the Customer's employees or agents.

12. Termination

Unless this agreement is terminated as a result of the Supplier's material breach, the Supplier will have no obligation to refund any of the Service Fees paid prior to termination and the Customer will be obliged to pay the Service Fees had the Service continued for the committed term in the Order or any subsequent renewal period that has begun.

The Supplier may suspend or on reasonable notice terminate the Service where the Customer fails to pay the Service Fee in accordance with the terms of this agreement. **Force Majeure**

- 12.1 Neither party is in breach of this agreement or is liable to the other party for any loss incurred by that other party as a direct result of a party (**Affected Party**) failing or being prevented, hindered or delayed in the performance of its obligations under this agreement where such prevention, hindrance or delay results from events, circumstances or causes beyond the Affected Party's reasonable control (**Force Majeure Event**).
- 12.2 The Affected Party will be entitled to a reasonable extension of time for performing its obligations under the agreement. However, the Affected Party must continue to use all reasonable endeavours to perform those obligations.
- 12.3 The performance of the affected obligations must be resumed as soon as practicable after such Force Majeure Event is removed or has ceased.

13. Assignment and subcontracting

Neither party may assign any right arising out of this agreement, or novate the agreement, without the other party's prior written consent, which must not be unreasonably withheld. The Supplier may subcontract any of its obligations under this agreement and remains responsible for the performance of the Service under this agreement.

14. Variation

An amendment or variation of any term of this agreement must be in writing and signed by each party.

15. Modern Slavery

- 15.1 In this clause 18, Modern Slavery has the same meaning as it has in the *Modern Slavery Act 2018 (Cth)*.
- 15.2 The Supplier must take reasonable steps to identify, assess and address the risks of Modern Slavery practices in the operations and supply chains used in the provision of the Service.
- 15.3 If at any time the Supplier becomes aware of Modern Slavery practices in the operations and supply chains used in the performance of the Service, the Supplier must, as soon as reasonably practicable, take all reasonable action to address or remove these practices, including where relevant by addressing any practices of other entities in its supply chains.

16. Waiver

No party may rely on the words or conduct of any other party as being a waiver of any right, power or remedy arising under or in connection with this agreement unless the other party or parties expressly grant a waiver of the right, power or remedy. Any waiver must be in writing, signed by the party granting the waiver and is only effective to the extent set out in that waiver.

17. Severability

If the whole or any part of a provision of this agreement is or becomes invalid or unenforceable under the law of any jurisdiction, it is severed in that jurisdiction to the extent that it is invalid or unenforceable and whether it is in severable terms or not.

18. Entire agreement

This agreement states all the express terms agreed by the parties about its subject matter. It supersedes all prior agreements, understandings, negotiations, proposals and discussions in respect of its subject matter.

19. Relationship of the parties

Nothing in this agreement gives a party authority to bind any other party in any way or imposes any fiduciary duties on a party in relation to any other party.

20. Notices

- 20.1 All notices under this agreement must be in writing.
- 20.2 A notice will be taken to be received:

- (a) If hand delivered, on delivery; or
- (b) If sent by email, on receipt of a non-automated reply or other form of communication confirming or indicating that the notice has been received.

21. Counterparts

This agreement may be executed in any number of counterparts.

22. Governing law and jurisdiction

- 22.1 This agreement is governed by the law in force in New South Wales.
- 22.2 Each party irrevocably submits to the exclusive jurisdiction of courts exercising jurisdiction in New South Wales and courts of appeal from them in respect of any proceedings arising out of or in connection with this agreement.