

# IBM Australia Limited

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## Agreement for Power Systems Elastic Capacity on Demand

By clicking “I Accept”, Client (Client) accepts the terms of this Agreement on behalf of Client's company's Enterprise. The entity of International Business Machines Corporation operating in Client's country (“IBM”) accepts this Agreement when IBM provides Client with an Elastic Capacity on Demand (“ECoD”) Activation Key for an ECoD Machine.

\*\*\*\*\* MARKER: Start of Business Partner Related Terms \*\*\*\*\*

### IBM Business Partner Acquisition

Acquisition by an IBM Business Partner (BP) for remarketing to another Business Partner or to a Client, is subject to the terms of the IBM Business Partner Agreement. This Agreement governs Client's use of IBM Power Systems Elastic Capacity on Demand.

The following sections of this agreement apply only to Client and not to IBM Business Partner.

### Client Acquisition from an IBM Business

ECoD Unit are available from IBM directly and from IBM Business Partners (BP). If Client has chosen to order ECoD Unit through a BP, Client authorises IBM to provide the information that IBM receives through the Monitoring Program to such BP each ECoD Billing Month to allow the BP to invoice Client for applicable charges.

Client agrees that unless Client revokes such BP authorisation or designates a different BP with at least 60 days notice to IBM, Client continues to authorise IBM to provide this information to the BP. In the event Client revokes authorisation without designating another BP, IBM will invoice Client directly for applicable charges.

When Client acquires ECoD from a BP those terms in this document addressing acquisition, charges, billing and collection are not applicable. The IBM Business Partner established their own prices and terms and invoice their Clients when providing IBM Products and Services.

\*\*\*\*\* MARKER: END of Business Partner Related Terms \*\*\*\*\*

This IBM Agreement for Power Systems Elastic Capacity on Demand (“Agreement”), governs Client's use of the IBM Power Systems Elastic Capacity on Demand offering (“Offering”).

## 1. Definitions

**Activate(s), Activated, Activation(s)** – to enable On-Demand Capacity for use.

**Monitoring Program** -- software IBM licenses to Client (e.g., the IBM Electronic Service Agent Program) that monitors Activation of Elastic Capacity.

**On-Demand Capacity** – the amount of resources, such as processors, storage, memory, that is installed on an ECoD Machine but not enabled for use (e.g., resources which IBM documentation refers to as “on-demand processors”).

**Requested Units** -- ECoD Units Client specifies when Client Activates On-Demand Capacity.

**ECoD Billing Month** -- a calendar month for which Client's Activation of Elastic Capacity is monitored for billing purposes.

**ECoD Activation Key(s)** -- (i) authorises Client to perform Activations and use Elastic Capacity on the ECoD Machine, and (ii) provides a key to enable Client Activations and Client management of Elastic Capacity on the ECoD Machine.

**ECoD Machine** -- an IBM Power Systems Machine that supports Elastic Capacity on Demand (“ECoD”) (which may also be referred to in IBM literature or otherwise known as “Temporary Capacity on Demand”, “TCoD”, “On/Off Capacity on Demand,” “On/Off CoD,” “On/Off Capacity Upgrade on Demand,” or “On/Off CUoD”) and for which IBM offers ECoD keys.

**ECoD Units** -- the duration and amount of On-Demand Capacity that is Activated. For example, "Processor Days" (number of Activated processors multiplied by the number of 24-hour periods plus any partial 24-hour period), or "Memory Days" (the amount of Activated memory multiplied by the number of 24-hour periods plus any partial 24-hour period) are the ECoD Units measuring Activation of processors and memory, respectively. ECoD Units include both Requested Units and Unreturned Units.

**Elastic Capacity** -- On-Demand Capacity that has been Activated.

**Unreturned Units** -- ECoD Units that remain Activated after expiration of the duration Client specified when Client Activated On-Demand Capacity.

**Enterprise** – Enterprise companies include: (i) companies within the same country that Client or IBM control (by owning greater than 50% of the voting shares); and (ii) any other entity that controls, is controlled by or is under common control as Client or IBM and has signed a participation agreement.

## 2. **Applicable ECoD Machines**

Each serial numbered ECoD Machine authorised under terms of this Agreement as specified by the Client when ordering ECoD Units.

## 3. **Authorised Use of Elastic Capacity**

Client agrees to the following:

- a. Client is responsible for the charges associated with each ECoD Unit purchased. This responsibility is satisfied when Client submits payment for the ECoD Units ordered during the ECoD Billing Month and billed to the client at the end of the ECoD Billing Month. The amount due will be the total of all ECoD Units ordered during the ECoD Billing Month;
- b. ECoD Units may only be used in the country where acquired and are non-transferable outside the Client's Enterprise;
- c. Client will install (unless preinstalled), configure, and maintain the Monitoring Program on each ECoD Machine in the manner specified by IBM in the Monitoring Program's documentation, for the purpose of monitoring usage of ECoD Units;
- d. if Client uses ECoD Units in excess of quantity previously acquired as reported by the Monitoring Program, orders for new ECoD Units will immediately deduct such excess quantity from the ECoD Units available for future use. For example, Client previously ordered 1000 ECoD Units, but used 1015 ECoD Units before placing the next order for 500 ECoD units. The 500 ECoD Units invoiced would be reduced by the previous 15 excess ECoD Units and the Client would receive an ECoD Activation Key for 485 ECoD Units;
- e. if (a) Client removes, disables, disconnects, or otherwise prevents the Monitoring Program from accurately monitoring ECoD Units; or (b) the Monitoring Program becomes removed, disabled, disconnected or otherwise unable to accurately monitor usage of ECoD Units Client will promptly notify IBM and allow IBM (or IBM's agent) to access the ECoD Machine for the sole purpose of determining, if possible, the measurement of ECoD Units for which Client is responsible. If Client fails to promptly notify IBM and allow access the Client will be responsible for ECoD Units as if all of the associated ECoD Machine's available On-Demand Capacity was Activated during the entire period for which the Monitoring Program did not monitor ECoD Units. IBM retains all other remedies it may have in the event of such actions, including without limitation termination of Client's right to use Elastic Capacity; and
- f. upon reasonable notice, during normal business hours Client agrees to grant IBM sufficient access ECoD Machines, including without limitation information regarding the use of IBM Programs on ECoD Machines, for the sole purpose of verifying Client's compliance with the terms of this Agreement and IBM Program license terms.

## 4. **Client's Additional Responsibilities**

Client agrees to the following:

- a. Client represents and warrants that when an ECoD Unit is ordered, that the Client is either the owner of the ECoD Machine or Client has the permission from the owner and any lien holders for placing order and Activating On-Demand Capacity;
- b. IBM is not responsible to notify any of Client's suppliers (for example, other software vendors who license their product on a per-processor basis) when Client Activates On-Demand Capacity;

- c. in addition to charges for Activation of On-Demand Capacity, Client is also responsible for any charges resulting from, or necessary for, the Activation, including those for requisite hardware, software, (e.g, software license upgrades) or services (e.g., additional maintenance charges);
- d. IBM reserves the right to change the process by which Elastic Capacity is made available for Client's use. Client will install (or if specified by IBM, allow IBM to install) and implement any such change on each applicable ECoD Machine within a commercially reasonable time period following receipt of notice from IBM or Client's IBM Business Partner;
- e. IBM reserves the right to change the Monitoring Program or the means by which IBM monitors Activation of On-Demand Capacity. Client will install (or if specified by IBM, allow IBM to install) and implement any such change within a commercially reasonable time period following receipt of notice from IBM or Client's IBM Business Partner;
- f. this offering is comprised solely of the computer resource identified as On-Demand Capacity available for an ECoD Machine. Client is responsible for providing all other computing resources (e.g., memory, storage) that Client may require, adequate in type and quantity, to satisfy the needs of Client's computing environment;
- g. Client authorises IBM and its subsidiaries (and their successors and assigns, contractors, and IBM Business Partners) to store and use Client's business contact information wherever they do business in connection with IBM Products and Services or in furtherance of IBM's business relationship with Client.

## **5. Charges, Taxes, and Payments**

If Client has an IBM Client Relationship Agreement "CRA" or equivalent agreement in effect with IBM, the Charges, Taxes, and Payment terms of that agreement will apply, however, all Clients will be responsible for tax adjustments that result from using Elastic Capacity in a different taxing jurisdiction than where originally ordered. If no CRA is in effect with IBM, Client agrees to promptly pay all applicable charges specified by IBM, charges for use in excess of authorisations, any customs or other duty, tax, levy, or fee imposed by any authority resulting from Client's acquisitions under the Agreement, and any late payment fees. Amounts are due upon receipt of the invoice and payable within 30 days of the invoice date to an account specified by IBM. IBM does not give credits or refunds for any prepaid, one-time charges, or other charges already due or paid.

## **6. Termination**

Client may terminate this Agreement by providing written notice to IBM. Termination is effective on the date of termination Client specifies in notice

Client's rights under this Agreement for an ECoD Machine terminate upon the earliest of the following: i) Client transfers possession or control of the ECoD Machine to another party (e.g., Client returns the ECoD Machine to a lessor); ii) this Agreement terminates.

Either party may terminate this Agreement if the other fails to comply with any of its terms, provided the one who is not complying is given written notice and reasonable time to comply, not to exceed 30 days.

This Agreement terminates upon the filing of any petition or proceeding by or against Client under any bankruptcy or insolvency law.

Any terms of this Agreement which by their nature extend beyond termination remain in effect until fulfilled and apply to both of our respective successors and assignees.

## **7. Warranty**

Standard IBM warranty terms apply. The warranty period for On-Demand Capacity commences upon the Date of Installation of the On-Demand Capacity, regardless of when or whether Client Activates the On-Demand Capacity.

## **8. Machine Code**

Client's use of Machine Code on an ECoD Machine is subject to the terms and restrictions governing use as specified in the Machine Code license available at

[https://www.ibm.com/systems/support/machine\\_warranties/machine\\_code.html](https://www.ibm.com/systems/support/machine_warranties/machine_code.html). Client's use of Elastic Capacity is governed by the terms and restrictions that govern Machine Code except as expressly provided in this Agreement. Machine Code does not include any Program or code provided under a separate license agreement, including without limitation an open source license agreement.

## 8.1 Elastic License

For the purpose of an Activation, IBM grants Client an Elastic license to use the Machine Code on the ECoD Machine to support Client's use of Elastic Capacity, as authorised in this Agreement. Client's Elastic license to use the Machine Code on an ECoD Machine will commence on the date Client performs the Activation and will terminate upon the earlier of the following: i) Client's deactivation of the Elastic Capacity, and ii) expiration or termination of Client's rights under this Agreement for the ECoD Machine.

## 9. General

- a. Neither party is responsible for failure to fulfill any non-monetary obligations due to events beyond its control.
- b. To the extent permissible under applicable law, the parties consent to the use of electronic means and facsimile transmissions to send and receive communications in connection with our business relationship arising out of this Agreement, and such communications are acceptable as a signed writing. The parties agree that an identification code (called a "user ID") contained in an electronic writing between the parties is sufficient to verify the sender's identity and the document's authenticity.
- c. IBM reserves the right to change the process through which ECoD usage information is monitored by IBM, or through which enablement keys are provided by IBM. Client agrees to implement any such change for each Eligible Machine.
- d. If any provision of this Agreement is held to be invalid or unenforceable, the remaining provisions of this Agreement remain in full force and effect.
- e. Nothing in this Agreement affects any statutory rights of consumers that cannot be waived or limited by contract.
- f. Neither party may assign this Agreement, in whole or in part, without the prior written consent of the other. Any attempt to do so is void. Neither of us will unreasonably withhold such consent. The assignment of this Agreement within the legal entity of which either of us is a part or to a successor organisation by merger or acquisition does not require the consent of the other. IBM is also permitted to assign its rights to payments under this Agreement without obtaining Client's consent. It is not considered an assignment for IBM to divest a portion of its business in a manner that affects all of its similarly situated Clients.
- g. Each party will allow the other reasonable opportunity to comply before it claims that the other has not met its obligations under this Agreement. The parties will attempt in good faith to resolve all disputes, disagreements, or claims between the parties relating to this Agreement. Unless otherwise required by applicable law without the possibility of contractual waiver or limitation, (i) neither party will bring a legal action, regardless of form, arising out of or related to this Agreement or any transaction under it more than two years after the cause of action arose; and (ii) after such time limit, any legal action arising out of this Agreement or any transaction under it and all respective rights related to any such action lapse. Further, each party waives any right to a jury trial in any proceeding arising out of or related to this Agreement.
- h. No right or cause of action for any third party is created by this Agreement or any transaction under it, nor is IBM responsible for any third party claims against Client except as permitted by the Limitation of Liability terms incorporated herein under Section 10 for bodily injury (including death) or damage to real or tangible personal property for which IBM is legally liable to that third party.
- i. The rights, duties, and obligations of each party are valid only in the country in which Offering transactions are performed, except that all licenses are valid as specifically granted.
- j. Once this Agreement is accepted by both parties, any reproduction of the Agreement made by reliable means (for example, electronic image, photocopy or facsimile) is considered an original.

## 10. Incorporated Terms

If an IBM CRA, or an equivalent master agreement, is in effect between Client and IBM, the terms of this Agreement are incorporated by reference into the CRA. If no CRA is in effect between Client and IBM, the terms regarding Limitation of Liability, Governing Law, and Jurisdiction found in the ECoD Machine's IBM Statement of Limited Warranty, available at [https://www.ibm.com/systems/support/machine\\_warranties/](https://www.ibm.com/systems/support/machine_warranties/) are incorporated by reference into this Agreement. To the extent there is a conflict between the terms of this Agreement and the CRA or the SOLW Terms, those of this Agreement prevail over the other agreements.

## **11. Complete Agreement**

This Agreement and either the CRA or SOLW Terms, as applicable under terms of Section 10 above, are the complete agreement regarding the Offering and replace all prior oral or written communications, representations, undertakings, warranties, promises, covenants, and commitments between Client and IBM regarding the Offering. In entering into this Agreement, neither party is relying on any representation that is not specified in this Agreement. Additional or different terms in any written communication from Client (such as a purchase order) are void.