

# Nationwide House Energy Rating Scheme®

## NatHERS Software Accreditation Terms and Conditions

### Version History

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**TERMS AND CONDITIONS OF NATHERS SOFTWARE ACCREDITATION**

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**1. BACKGROUND**

- 1.1 This document sets out the Terms and Conditions that apply to a Software Tool Provider and its Software Tool accredited under the Nationwide House Energy Rating Scheme (NatHERS).
- 1.2 These Terms and Conditions form a part of the agreement (as defined below) (Agreement) between the NatHERS Administrator and the Software Tool Provider for the accreditation

of the Software Tool and should be read in conjunction with the Accreditation Notice and the Software Accreditation Protocol. If there is an inconsistency between any of these documents, the documents take the following priority:

- a. Accreditation Notice
  - b. Terms and Conditions and
  - c. the Software Accreditation Protocol (SAP).
- 1.3 Accreditation under these Terms and Conditions relates only to the version or versions of the Software Tool specified in the Accreditation Notice and any Minor Update to that version of the Software Tool that occurs during the Software Accreditation Period in accordance with the Agreement.
- 1.4 Retired versions are the superseded versions and:
- a. are subject to the Terms and Conditions itemised in their initial Accreditation Notice unless specified otherwise; and
  - b. cannot be used to create new Rating Files or create new NatHERS Energy Ratings without written request from a regulator.
- 1.5 The Software Tool Provider agrees to be bound by and will comply with the Agreement as stated in the Accreditation Notice. This is with effect from the date of the Accreditation Notice or other date set out in such Notice.
- 1.6 Extensions and variations to these Terms and Conditions are only permitted during the Software Accreditation Period in accordance with clauses 3 and 23.
- 1.7 The Software Tool Provider is required to comply with the Agreement, including these Terms and Conditions to maintain accreditation of its Software Tool.

**2. DEFINITIONS**

2.1 Except where the contrary intention is expressed, the following definitions are used in this document:

Accreditation Mode	The operation of NatHERS Software using a specific set of defined inputs and parameters for the purposes of completing an Assessment for achieving Deemed-to-Satisfy (DTS) NatHERS pathway compliance with a particular Jurisdiction’s application of the National Construction Code (NCC).
Accreditation Notice	The NatHERS Administrator’s written notice to the Software Tool Provider granting NatHERS accreditation to a particular new Major Version as well as extending continued accreditation to “retired” versions.
AccuRate	The commercial software tool developed by CSIRO comprising a graphical user interface and the Chenath Engine.
Agreement	The agreement between the NatHERS Administrator and the Software Tool Provider comprising the Accreditation Notice, these Terms and Conditions (including the Background and any schedules or annexures), and the Software Accreditation Protocol, and as further described in clause 1.2.

Assessor	A person accredited by an AAO to use the Software Tool for purposes connected with NatHERS.
Assessor Accrediting Organisation (AAO)	An organisation approved by the NatHERS Administrator to accredit persons for the purpose of carrying out NatHERS assessments and whose approval has not been withdrawn. A list of current AAOs is available on the NatHERS Website.
Certificate Portal	The portal used by the Software Tool to generate a NatHERS Certificate or Rating Report, whether a portal that is a part of the Software Tool or separate to and associated with the Software Tool.
Chenath Engine	The calculation engine developed by CSIRO that predicts annual totals of hourly heating and cooling energy requirements for residential buildings.
clause	A clause of these Terms and Conditions.
Climate Zone	One of 69 regions that experience similar climatic conditions into which Australia is divided by NatHERS as described on <a href="http://www.nathers.gov.au/nathers-accredited-software/nathers-climate-zones-and-weather-files">www.nathers.gov.au/nathers-accredited-software/nathers-climate-zones-and-weather-files</a> .
Detrimental Use	Circumstances that arise with respect to a User and their use of the Software or Certificate that will or may cause detriment to NatHERS and its reputation or integrity.
Major Version	A Software Tool Version which either: <ul style="list-style-type: none"> <li>• incorporates a major Chenath version upgrade and must therefore be adopted by the Software Tool — this typically occurs with National Construction Code (NCC) changes; or</li> <li>• is a new Tool accredited for the first time under NatHERS.</li> </ul> Major Versions are confirmed by an Accreditation Notice.
Minister	The Commonwealth Government Minister whose functions include governance of residential energy efficiency.
Minor Update	This includes minor changes, upgrades and bug fixes undertaken by a Software Tool where rating outcomes are not more than $\pm 1$ star in 100% and $\pm 0.2$ stars in 99% of ratings different when compared to pre-change ratings of the most recent Software Tool version approved by the NatHERS Administrator on the market.
Minor Version	The software version that results from Minor Updates. Minor Versions are confirmed in writing by the NatHERS Administrator
Nationwide House Energy Rating Scheme (NatHERS)	NatHERS is the nationwide scheme in Australia that: <ul style="list-style-type: none"> <li>○ provides a star rating system for the potential energy performance of dwellings;</li> <li>○ accredits residential building energy performance modelling software tools; and</li> <li>○ accredits AAOs.</li> </ul>

NatHERS Administrator	The Commonwealth Department of Industry, Science, Energy and Resources or any subsequent Commonwealth Department with administrative responsibility for residential energy efficiency ratings.
NatHERS Certificate	Generated by Accredited Assessors only. An official certificate in such form as determined by the NatHERS Administrator generated by the Software Tool or Certificate Portal that describes the key thermal performance features of the building fabric, the NatHERS Energy Rating and energy loads, details of the Accredited Assessor who carried out the assessment and the accreditation they hold, the building address, and relevant information regarding energy efficiency regulatory requirements. See also NatHERS Rating Report.
NatHERS Rating Report	Generated by Raters (non-accredited assessors). An official certificate in such form as determined by the NatHERS Administrator generated by the Software Tool or Certificate Portal that describes the key thermal performance features of the building fabric, the NatHERS Energy Rating and energy loads, details of the Rater who carried out the assessment, the building address, and relevant information regarding energy efficiency regulatory requirements. See also NatHERS Certificate
NatHERS Energy Rating	A star value (from 0 to 10 stars) determined by a Software Tool for a particular building under the Starband Criteria for the Climate Zone in which the building is located.
NatHERS Integrity Purposes	Activities which underpin NatHERS integrity and quality standards, including quality assurance, audits and investigations and use of data for analysis, research and policy development, and expressly excludes using data for commercial purposes.
NatHERS Steering Committee	The body made up of representatives of the Commonwealth and state and territory government reporting to the Energy Ministers Meeting that oversees the development and administration of NatHERS.
NatHERS Website	The website that contains relevant information about NatHERS: <a href="http://www.nathers.gov.au">www.nathers.gov.au</a>
National Construction Code (NCC)	A performance-based code, containing all Performance Requirements for the construction of buildings. Produced and maintained by the Australian Building Codes Board (ABCB) on behalf of the Australian Government and each state and territory government. The NCC can be accessed at: <a href="https://ncc.abcb.gov.au">https://ncc.abcb.gov.au</a>
Personal Information	Has the meaning given to “personal information” in the Privacy Act.
Privacy Act	The Privacy Act 1988 (Cth).
Privacy Law	As applicable, the <i>Privacy Act 1988</i> (Cth) or the <i>Privacy and Data Protection Act 2014</i> (Vic).

Provider Representative	The representative of a Software Tool Provider who is nominated by the Software Tool Provider to be the primary contact between the NatHERS Administrator and the Software Tool Provider, as updated by the Software Tool Provider by notice to the NatHERS Administrator from time to time.
Rater	A person undertaking a rating using NatHERS accredited software in rating mode but not accredited by an AAO.
Rating File	A software file containing all project information required to generate a star rating and NatHERS Certificate.
Registered Training Organisation	A vocational education and training organisation registered by a state or territory registering body in accordance with the <i>Australian Quality Training Framework (AQTF) Essential Conditions and Standards for Registration</i> within a defined scope of registration (National Quality Council Training Packages glossary) and or as registered under the <i>Tertiary Education Quality and Standards Agency Act 2011 (Cth)</i> .
Retired version	Both Major and Minor Versions of accredited Software Tools superseded by a new Major or Minor Version. Retired versions can only be used for new Ratings if the assessor has a written request from a regulator or persons acting on behalf of a regulating authority, and should not be used for ratings not yet finalised wherever possible. Retired versions will be itemised in the new Accreditation Notices to ensure to ensure their long-term legitimacy.
Regulation Mode	See Accreditation Mode The input and parameter requirements that must be followed when conducting a NatHERS assessment in regulatory mode for demonstrating compliance to the Deemed-To-Satisfy NatHERS Pathway of the National Construction Code (NCC) or the requirements of the Building Sustainability Index (BASIX) in NSW.
Software Accreditation Period	The period determined in accordance with clause 3.
Software Accreditation Protocol	NatHERS Software Accreditation Protocol (SAP) means the NatHERS document(s) (as updated or created from time to time) that outline(s) the technical requirements of NatHERS Software Tools and processes for the accreditation of new software tools and new or amended versions of previously accredited NatHERS Software Tools.
Software Tool	The software tool accredited by the NatHERS Administrator with the designated name and version number detailed in the Accreditation Notice.
Software Tool Provider	The entity specified in the Accreditation Notice that owns or has the legal right to sell or license the use of the Software Tool.
Software Tool User Terms and Conditions	Has the meaning given in clause 9.1, and includes as applicable the terms and conditions for software users set out in Appendix 1.

Stamp	A mini-certificate (or label) including the NatHERS logo, dwelling address, star rating, assessor name and accreditation number generated by the software tool which is placed on design documentation used for the assessment. There are stamps for single dwelling and summary stamps.
Starband Criteria	A total annual heating and cooling energy load (MJ/m <sup>2</sup> ) to star rating conversion table.
Technical Note	The document(s) (as updated or created from time to time) that set(s) out the NatHERS technical requirements for house energy assessors when undertaking the NatHERS Assessment Process.
Terms and Conditions	The terms and conditions set out in this document, and forming a part of the Agreement.
User	A person or entity granted a licence or right by the Software Tool Provider to use the Software Tool. They include accredited assessors, Raters and users not producing ratings for NCC compliance (e.g. researchers).

### 3. COMMENCEMENT AND SOFTWARE ACCREDITATION PERIOD

- 3.1 The Agreement and the accreditation of the Software Tool will commence on the date specified in the Accreditation Notice (or the date of the Accreditation Notice if no other date is specified), and subject to clauses 5.1 and 7.1 will continue until re-accreditation is required as specified in the Accreditation Notice (Software Accreditation Period).
- 3.2 The Software Tool Provider may request to extend the Agreement and the Software Accreditation Period by 12 months once only by giving the NatHERS Administrator at least 60 days' written notice. Subject to the Software Tool Provider being in compliance with the Agreement at the date of such notice and to any conditions on the extension notified in writing by the NatHERS Administrator to the Software Tool Provider (such as those necessary to ensure the continued accuracy of ratings), the Agreement and the Software Accreditation Period will be extended for that further period of 12 months.

### 4. NATURE OF ACCREDITATION

- 4.1 Accreditation of the Software Tool by the NatHERS Administrator applies to:
  - a. the new Major Version of the Software Tool specified in the Accreditation Notice and any Minor Update to that version of the Software Tool that occurs during the Software Accreditation Period in accordance with this Agreement;
  - b. Retired versions including subsidiary minor updates as itemised in Accreditation Notices; and
  - c. the use of these Software Tools in 'Accredited Mode'.

### 5. MAINTAINING SOFTWARE TOOL ACCREDITATION

- 5.1 The NatHERS Administrator provides accreditation to Major Versions of an accredited Software Tool by issuing an Accreditation Notice.
- 5.2 Accreditation of a Software Tool or one or more of its current or Retired versions may be suspended or revoked as provided in the NatHERS Administrator's written notice when:

- a. ownership or control of the Software Tool is transferred to a new entity as set out in clause 7.1;
- b. the Software Tool Provider breaches a material term of the Agreement as set out in clause 8.2;
- c. the Software Tool Provider does not have (or ceases to have) a valid licence to incorporate the Chenath Engine into the Software Tool;
- d. the Software Tool fails to meet the requirements of the Technical Note or to enable Users to comply with the Technical Note when undertaking a NatHERS assessment;
- e. the Software Tool Provider fails to comply with its obligations under clause 9.4, including without limitation failing to take all reasonable steps to enforce the applicable Software Tool User Terms and Conditions; or
- f. the Software Tool or a new version of a Software Tool produces inaccurate or unreliable results or is otherwise incapable of being used to produce NatHERS Energy Ratings.

## 6. SOFTWARE TOOL VERSIONS

- 6.1 Whenever a new Major version of a Software Tool is accredited:
- a. the NatHERS Administrator, following consultation with the Software Tool Provider, will determine the date on which the prior Accreditation Notice issued in respect of the retired Software Tool and this Agreement will end;
  - b. a new Agreement will commence between the parties with respect to the new Major Version of the terms of accreditation that prevail at that time (including the issuing of a new Accreditation Notice);
  - c. the Software Tool Provider must promptly notify all Users of:
    - i. which versions of the Software Tool are accredited by the NatHERS Administrator (if any);
    - ii. which versions of the Software Tool are retired and
    - iii. the terms of use of any retired accredited Software Tool.
- 6.2 The Software Tool Provider must back-up all current and retired Major and Minor versions of the Software Tool and maintain these in a state that allows them to be used to recalculate an assessment where required by the NatHERS Administrator or a regulator for seven years from the date on which each version was last used by a User. The Software Tool Provider must give the NatHERS Administrator 90 days' notice before permanently deleting a back-up version and provide a copy of the back-up version (with all relevant documentation) to the NatHERS Administrator prior to the final deletion with a perpetual, royalty free, irrevocable licence to use and sublicense the version for NatHERS Purposes.
- 6.3 The Software Tool Provider must use its best endeavours to ensure the Software Tool is capable of opening a file created in previous versions. At a minimum this must include the two most recent versions of the Software Tool.
- 6.4 If the Software Tool Provider ceases offering the Software Tool for sale or licensing, the Software Tool Provider must allow existing Users of the Software Tool to continue using the Software Tool for the purposes of NatHERS assessments six months after the Software Tool ceases to be available for sale or licensing.
- 6.5 This clause 6 survives the expiry or termination of the Agreement.



## **7. TRANSFER OF OWNERSHIP OF THE SOFTWARE TOOL**

- 7.1 If ownership or control of the Software Tool is transferred from the Software Tool Provider to another entity, the accreditation of the Software Tool may, with NatHERS Administrator prior approval, also be transferred. The new owner may seek re-accreditation of the Software Tool in accordance with principles of the Software Accreditation Protocol.
- 7.2 The Software Tool Provider must give at least 30 days' notice to the NatHERS Administrator of any proposed change in the ownership or control of the Software Tool.

## **8. MATERIAL BREACH**

- 8.1 If the Software Tool Provider breaches any material term of the Agreement, the NatHERS Administrator may give written notice to the Provider Representative specifying details of the breach (and which may further include the steps required by the NatHERS Administrator to rectify the breach), and provide the Software Tool Provider with eight weeks to rectify the breach.
- 8.2 If the Software Tool Provider does not rectify the breach to the satisfaction of the NatHERS Administrator (acting reasonably) within eight weeks of receiving notice under clause 8.1, the NatHERS Administrator may withdraw or vary the accreditation of the Software Tool at its absolute discretion.
- 8.3 If the Software Tool's accreditation is withdrawn under clause 8.2, the Software Tool Provider may reapply for accreditation of its Software Tool, at its own expense, in accordance with the Software Accreditation Protocol or as directed in writing by the NatHERS Administrator.
- 8.4 The NatHERS Administrator, at its absolute discretion, may decide that any future re-accreditation of the Software Tool under clause 8.3 is conditional on the resolution or rectification of the material breach or breaches of the Agreement that resulted in the withdrawal of the accreditation of the Software Tool.

## **9. SOFTWARE TOOL USER TERMS**

- 9.1 When demonstrating compliance with the NCC Deemed-to-Satisfy NatHERS pathway or the New South Wales Building Sustainability Index (BASIX), Users must adhere to the Software Tool User Terms and Conditions in NatHERS Regulation Mode in Appendix 1.
- 9.2 Users not using the tool to demonstrate compliance with the NCC Deemed-to-satisfy NatHERS Pathway or the NSW BASIX pathway, must adhere to Terms and conditions in Appendix 1.
- 9.3 Software Tool Providers may include other User terms and conditions provided they are consistent with NatHERS required terms and conditions.
- 9.4 Software Tool Provider acknowledges that a User's compliance with the applicable Software Tool User Terms and Conditions is essential to the operation and integrity of NatHERS. Accordingly, the Software Tool Provider:
  - a. must take all reasonable steps to ensure that each User complies with the applicable Software Tool User Terms and Conditions;
  - b. must notify the NatHERS Administrator in writing within 7 days after becoming aware of a User breaching the applicable Software Tool User Terms and Conditions; and
  - c. must take all reasonable steps to enforce the applicable Software Tool User Terms and Conditions.

- 9.5 Without limitation to the Software Tool Provider's obligations under this clause 9, the Software Tool Provider acknowledges that circumstances may arise with respect to a User and its use of the Software Tool that will or may cause detriment to NatHERS and its integrity (Detrimental Use).
- 9.6 Subject to clause 9.7, the Software Tool Provider agrees that where the NatHERS Administrator reasonably determines that there has been Detrimental Use, the Software Tool Provider must:
- a. on written notice from the NatHERS Administrator, promptly provide to the NatHERS Administrator access to all documents and data within the Software Tool Provider's possession or control that relate to the Detrimental Use described in the notice; and
  - b. comply with all reasonable directions of the NatHERS Administrator that seek to remedy or mitigate the Detrimental Use, including without limitation, the prompt suspension or termination of a User's access and rights to use the Software Tool and Certificate Portal.
- 9.7 If the Software Tool Provider disputes:
- a. that there has been Detrimental Use; or
  - b. that the directions given by the NatHERS Administrator under clause 9.6b are reasonable,
- then the Software Tool Provider may refer the issue for resolution in accordance with clause 27.

## **10. INCORPORATION OF REASONABLE CHANGES TO THE SOFTWARE TOOL**

- 10.1 The NatHERS Administrator may require the Software Tool Provider to incorporate reasonable changes into the Software Tool during the Software Accreditation Period to address software bugs, improve the functionality of the Software Tool or the consistency of the Software Tool with NatHERS requirements (including standardising the formats of the NatHERS Certificates).
- 10.2 The Software Tool Provider will advise the NatHERS Administrator by notice in writing within 28 days after receiving the requirement under clause 10.1 of the cost, difficulty and time of implementing the required changes.
- 10.3 If the NatHERS Administrator and the Software Tool Provider agree that the changes to the Software Tool are reasonable, the Software Tool Provider will implement the agreed changes within 20 business days of its notice under clause 10.2 or such longer period as agreed by the parties.
- 10.4 If the NatHERS Administrator and the Software Tool Provider cannot reach agreement on the required changes, the NatHERS Administrator will:
- a. seek a decision from the NatHERS Steering Committee as to what changes the Software Tool Provider must make;
  - b. table the Software Tool Provider's concerns regarding the cost, difficulty, and time of implementing the changes to the NatHERS Steering Committee, and the NatHERS Steering Committee will take such concerns into reasonable consideration when making its decision, together with the reasons for the NatHERS Administrator's requested changes and the responses from any other affected provider of NatHERS software tools; and

- c. subject to 10.4.b, if the Software Tool Provider is not satisfied with the Steering Committee's decision then they may table their case directly to the Steering Committee
- d. the Software Tool Provider must implement the changes fairly and reasonably decided by the NatHERS Steering Committee made in accordance with this clause 10.4.

## 11. APPROVAL OF MINOR UPDATES

- 11.1 Prior to implementing a Minor Update the Software Tool Provider must provide the NatHERS Administrator with a completed *NatHERS Software Minor Update Request form*, which includes:
- a. specifications of the change detailed to the satisfaction of the NatHERS Administrator;
  - b. simulation test results or other rating data demonstrating level of impact on rating outcomes are not more than  $\pm 1$  star in 100% and  $\pm 0.2$  stars in 99% of ratings different when compared to pre-change ratings of the most recent Software Tool version approved by the NatHERS Administrator on the market;
  - c. any changes to support or training material; and
  - d. free access to a complete, operational version of the updated Software Tool before that version is commercially released.
- 11.2 The Software Tool Provider must not release the changed Software Tool for public use until the NatHERS Administrator has approved the new Minor Version of the Software Tool that includes any Minor Updates, in writing.
- 11.3 Within 14 days, or another period agreed by the parties, after receiving a notice under clause 11.1, the NatHERS Administrator may, in its absolute discretion, give written notice to the Software Tool Provider that it:
- a. approves the proposed Minor Update to the Software Tool and that it may be implemented; or
  - b. does not approve the proposed Minor Update to the Software Tool and that it may not be implemented.
- 11.4 In deciding whether to grant approval, the NatHERS Administrator may consider whether the results generated by the Software Tool continue to comply with the Software Accreditation Protocol and any other matter it considers relevant.

## 12. CYBER SECURITY

- 12.1 The Software Tool Provider must maintain appropriate cyber security systems in accordance with industry best practice standards as outlined on the Australian Cyber Security Centre (ACSC) <https://www.cyber.gov.au/acsc/view-all-content/ism/cyber-security-guidelines> website to protect the operation of the Software Tool and all data and information that is input into, displayed on, or processed by the Software Tool.
- 12.2 The Software Tool Provider must provide notice to the NatHERS Administrator of any cyber security incidents that affect the Software Tool within 72 hours of an incident.
- 12.3 The Software Tool Provider must report any cyber security incidents that affect the Software Tool to the ACSC at [www.acsc.gov.au/incident.html](http://www.acsc.gov.au/incident.html).

### **13. SOFTWARE SUPPORT**

13.1 The Software Tool Provider must:

- a. maintain a Users' helpdesk;
- b. with respect to commercial Users (that is, Users who pay a fee to the Software Tool Provider for use of the Software Tool or for generation of a NatHERS Certificate) the helpdesk must, as a minimum, be able to receive email requests from such Users on the operation of the Software Tool and provide 80 percent of responses within two working days, respond within five working days to all requests, and give adequate notice of any holiday shutdown periods to such Users;
- c. publish a sufficiently detailed and up-to-date electronic user manual or help files that are freely accessible to Users while the Software Tool is being used;
- d. keep the Software Tool user manual and help files up-to-date to reflect approved changes and updates to the Software Tool;
- e. provide, on reasonable commercial terms, an operational version of the Software Tool and information about its use to Registered Training Organisations that can be used for the development and conduct of relevant units in the 'Certificate IV in Home Energy Efficiency and Sustainability' or similar courses through which Assessors are accredited by AAOs; and
- f. provide basic licensing support to all Users.

### **14. NATHERS CERTIFICATES, RATING REPORTS AND STAMPS**

- 14.1 The Software Tool Provider must ensure that NatHERS Certificates, Rating Reports and Stamps through use of the Software Tool and associated Certificate Portal, can only be generated when the assessment is done in Regulation Mode.
- 14.2 The Software Tool Provider must ensure that NatHERS Certificates can only be generated by Accredited Assessors.
- 14.3 The Software Tool Provider must provide and ensure required fields are populated fields as specified in the Software Accreditation Protocol and ensure Assessors or Raters using the Software Tool or Certificate Portal enter their names and a valid AAO assessor accreditation number (if accredited) in order to produce a NatHERS Certificate or Rating Report.

### **15. ASSESSOR ACCREDITING ORGANISATIONS**

- 15.1 To enable the AAO or their nominee to conduct quality assurance activities of its Assessors, the AAO will send a written request to the Software Tool Provider with respect to any Assessor that is or was accredited by that AAO. The Software Tool Provider must within seven days of the request give the AAO and any person, organisation or government agency authorised by the AAO in accordance with the AAO Protocol, free and full access to:
  - a. all Rating Files and NatHERS Certificates generated by the Assessor through use of the Software Tool and Certificate Portal;
  - b. all data and information in the material in 15.1.a;
  - c. all relevant Software Tool versions; and
  - d. the applicable Software Tool user agreements.
- 15.2 The Software Tool Provider may require the AAO to enter a confidentiality and non-disclosure agreement on standard and reasonable terms consistent with clauses 15.1 one

business day prior to the Software Tool Provider providing the material and information to the AAO under clause 15.1.

- 15.3 If, following the AAO's conduct of quality assurance activities, the AAO determines to suspend or terminate an Assessor's accreditation with the AAO, then the AAO may on written notice to the Software Tool Provider direct that the Assessor's access to the Certificate Portal of the Software Tool is suspended or terminated. The Software Tool Provider will comply with such direction from the AAO within three business days of receipt of the notice from the AAO. If the AAO subsequently reinstates the Assessor's accreditation, the AAO will promptly inform the Software Tool Provider in writing following which the Assessor's access to the Software Tool may be similarly reinstated.
- 15.4 Without limitation to clauses 9 and 25.2, the Software Tool Provider must ensure it is a condition of the Software Tool User Terms and Conditions that each User must grant to the Software Tool Provider the rights and consents necessary for the Software Tool Provider to comply with its obligations under clauses 15.1 and 15.3.
- 15.5 This clause 15 survives the expiry or termination of the Agreement.

## **16. NATHERS ADMINISTRATOR'S ACCESS TO DATA AND SOFTWARE**

- 16.1 To enable the NatHERS Administrator to undertake audits, quality assurance activities and investigations for NatHERS Integrity Purposes, the NatHERS Administrator will send a written request for information to the Software Tool Provider. The Software Tool Provider must within three business days of the request make available and provide access to the NatHERS Administrator and to any person, organisation or government agency authorised by the NatHERS Administrator to:
  - a. all Rating Files and NatHERS Certificates generated by the Assessor through use of the Software Tool and Certificate Portal;
  - b. all data and information in the material in 16.1.a;
  - c. all relevant Software Tool versions; and
  - d. the applicable Software Tool user agreements.
- 16.2 The Software Tool Provider must provide reasonable assistance to the NatHERS Administrator and any person, organisation or government agency authorised by the NatHERS Administrator for NatHERS Integrity Purposes.
- 16.3 If, following the NatHERS Administrator's conduct of quality assurance activities or investigations of an Accredited Assessor or a Rater, determine that incompetent, fraudulent or dishonest activities may have occurred, then the NatHERS Administrator may on written notice to the Software Tool Provider direct that the User's access to the Certificate Portal of the Software Tool is suspended or terminated. The Software Tool Provider will comply with such direction from the NatHERS Administrator within three business days of receipt of the notice from the NatHERS Administrator.
- 16.4 If the Software Tool Provider becomes aware of any fraudulent or dishonest activities in connection with NatHERS it must immediately notify the NatHERS Administrator of such activities and provide all information requested by the NatHERS Administrator in connection with such activities.
- 16.5 Without limitation to clauses 9 and 25.2, the Software Tool Provider must ensure that it is a condition of the Software Tool User Terms and Conditions that each User must grant to the Software Tool Provider the rights and consents (including client consents) necessary for the Software Tool Provider to comply with its obligations under this clause 16.

- 16.6 Nothing in this Agreement limits the Software Tool Provider's obligation to share data with the CSIRO in accordance with the Software Tool Provider's licence agreement with the CSIRO for the use of the Chenath Engine, and where applicable the 'HStar Web Portal'.
- 16.7 This clause 16 survives the expiry or termination of the Agreement.

**17. LIMITATION OF LIABILITY AND INDEMNITY**

- 17.1 The NatHERS Administrator will not be liable for any loss or damage suffered by the Software Tool Provider, arising out of, or relating to, or in connection with the accreditation of the Software Tool, the withdrawal of the accreditation of the Software Tool, or the use and commercialisation of the Software Tool and Certificate Portal.
- 17.2 The NatHERS Administrator does not guarantee, and accepts no legal liability whatsoever arising from, or connected to, the accuracy, reliability, currency or completeness of the results generated by the Software Tool and Certificate Portal.
- 17.3 Subject to clauses 17.4 and 17.5, the Software Tool Provider indemnifies and will hold harmless the NatHERS Administrator, its officers, employees and contractors from and against any claim, loss or damage that would be suffered by the NatHERS Administrator, its officers, employees and contractors arising in connection with the Agreement (including in connection with the accreditation of the Software Tool and Certificate Portal) but for the operation of this clause.
- 17.4 The Software Tool Provider's obligation to indemnify the NatHERS Administrator, its officers, employees and contractors will reduce proportionally to the extent any act or omission involving fault on the part of the NatHERS Administrator, its officers, employees and contractors contributed to the claim, loss or damage.
- 17.5 If the Software Tool Provider is the Commonwealth, or a State or Territory of Australia it is excluded from the obligation under clause 17.3 to indemnify the NatHERS Administrator, its officers, employees and contractors. This clause 17.5 does not exclude or reduce the liability of, or benefit to, the Commonwealth or the State or Territory of Australia that may arise by operation of the common law or breach of statute.
- 17.6 This clause 17 survives the expiry or termination of the Agreement.

**18. INSURANCE**

- 18.1 Subject to clause 18.3, the Software Tool Provider must have and maintain during the Software Accreditation Period:
- a. workers' compensation insurance as required by applicable law;
  - b. public liability insurance covering legal liability (including liability assumed under contract) for loss or damage to property or injury or death to persons arising out of or in connection with the Software Tool Provider's activities and obligations under the Agreement for an insured amount of \$10 million per occurrence and not less than \$20 million in aggregate; and
  - c. either professional indemnity or errors and omissions insurance for an insured amount of \$5 million per occurrence and not less than \$10 million in aggregate.
- 18.2 The Software Tool Provider must, on request, provide to the NatHERS Administrator any relevant insurance policies and certificates of currency for inspection, by the date specified in the request.
- 18.3 If the Software Tool Provider is the Commonwealth, or a State or Territory of Australia it may act as its own insurer.

**19. USE OF NATHERS TRADE MARKS**

- 19.1 The NatHERS Administrator grants to the Software Tool Provider a non-exclusive, royalty-free licence during the Software Accreditation Period to:
- a. use the NatHERS trade marks detailed in [Name of Document] strictly in accordance with the terms set out in [Name of Document]; and
  - b. grant sub-licences to use such trade marks only to Users who are Assessors in accordance the terms set out in [Name of Document].

**20. RECORDS**

- 20.1 During the Software Accreditation Period, the Software Tool Provider must keep complete and proper records, books of account, documents, and information including without limitation copies of all Rating Files and their associated floor plans in relation to the Software Tool, the licensing to and use of the Software Tool by Users, and the Software Tool Provider's compliance with its obligations under the Agreement.
- 20.2 Upon written request and within a reasonable period, the Software Tool Provider will provide the NatHERS Administrator and any person, organisation or government agency authorised by the NatHERS Administrator with access to (and where relevant, copies of) the Records which the NatHERS Administrator reasonably considers necessary to satisfy itself that the Software Tool Provider is continuing to comply with the requirements of NatHERS and the Agreement.
- 20.3 The Software Tool Provider must retain the Records for seven years.

**21. RESPONSIBILITY FOR COSTS**

- 21.1 The Software Tool Provider will be responsible for the costs of implementing any changes in its Software Tool and Certificate Portal, including any changes necessary to obtain or maintain the accreditation of the Software Tool and Certificate Portal and any changes required by any variations to the Agreement.
- 21.2 The Software Tool Provider will be responsible for all costs incurred by the Software Tool Provider in connection with its own administration of the Agreement.

**22. NO OBLIGATION TO PROMOTE OR USE SOFTWARE TOOL**

- 22.1 Nothing in the Agreement places any obligation on the NatHERS Administrator to promote the Software Tool, engage the services of the Software Tool Provider, or to use the Software Tool.

**23. VARIATION OF AGREEMENT**

- 23.1 Subject to clauses 23.3 to 23.5, the Agreement may only be varied during the Software Accreditation Period with the written agreement of both parties.
- 23.2 The NatHERS Administrator will give the Software Tool Provider 30 days, or a longer time if agreed by the NatHERS Administrator, to make any necessary adjustments to the Software Tool to meet the requirements of any agreed changes to the Agreement.
- 23.3 If the NatHERS Administrator, acting reasonably and with the approval of the NatHERS Steering Committee, determines that it is necessary to vary the terms and conditions that apply to all providers of NatHERS accredited software (including the Agreement) during the Software Accreditation Period (other than any variations necessary to implement changes to the Software Tool which are subject to clause 10), then the NatHERS Administrator will notify the Software Tool Provider in writing, providing details of the variations to the Agreement (**Agreement Variation Notice**).

- 23.4 Unless the Software Tool Provider provides written notice to the NatHERS Administrator within 30 days of the date of the Agreement Variation Notice that it objects to the variations, the Software Tool Provider will be deemed to have consented to the variations set out in the Agreement Variation Notice, which will take effect at the expiry of 30 days from the date of the Agreement Variation Notice.
- 23.5 If the Software Tool Provider objects to the variations detailed in the Agreement Variation Notice within the period set out in clause 23.4, then the Agreement will continue on the same terms for a period of 6 months from the date of the Agreement Variation Notice (or such other period as agreed by the parties in writing), following which the accreditation of the Software Tool and the Agreement will end.

## **24. CONFIDENTIALITY**

- 24.1 Any information, data or documents provided by one party to the other in connection with the accreditation of the Software Tool or under the Agreement must be kept confidential in accordance with this clause 24.
- 24.2 The NatHERS Administrator will not make commercial use of any information, data or documents provided by the Software Tool Provider or give access to the information to any other organisation to use such Information for commercial use.
- 24.3 The NatHERS Administrator may publish statistical reports on assessments produced by the Software Tool and Certificate Portal, but must not publish details of individual assessments or other market sensitive data.
- 24.4 If the Software Tool Provider considers that certain Information is commercially sensitive, the Software Tool Provider will notify the NatHERS Administrator in writing prior to providing the Information to the NatHERS Administrator.
- 24.5 The obligations on the parties under this clause 24 will not be taken to have been breached to the extent that Information subject to clause 24.1:
- a. is disclosed by a party to its advisers or employees solely in order to comply with obligations, or to exercise rights, under the Agreement, provided that such advisers or employees are informed of the confidential nature of the Information;
  - b. is disclosed to a party's internal management personnel, solely to enable effective management or auditing of NatHERS related activities;
  - c. is disclosed by the NatHERS Administrator to its responsible Minister;
  - d. is disclosed by the NatHERS Administrator, in response to a request by a House or a Committee of the Parliament of the Commonwealth;
  - e. is shared by the NatHERS Administrator within the NatHERS Administrator's organisation, or with another agency, where this serves the Commonwealth's, a State's, or a Territory's legitimate interests;
  - f. is authorised or required by law to be disclosed;
  - g. is authorised or required under the Agreement to be disclosed, including without limitation under clauses 15 and 16 of these Terms and Conditions; or
  - h. is in the public domain otherwise than due to a breach of this clause 24.
- 24.6 This clause 24 survives the expiry or termination of the Agreement.



## 25. PRIVACY

25.1 If the Software Tool Provider deals with Personal Information which it collected or received in connection with NatHERS, the Software Tool, Certificate Portal, or the Agreement, the Software Tool Provider must:

- a. use or disclose Personal Information only for the purposes of the Agreement and in accordance with applicable privacy law;
- b. not do any act or engage in any practice that would, breach an Australian Privacy Principle under the Privacy Act; and
- c. immediately notify the NatHERS Administrator if the Software Tool Provider becomes aware of an actual or possible breach of any of its obligations under this clause 25.

25.2 The Software Tool Provider must ensure that:

- a. Users provide appropriate consent to the disclosure and use of their Personal Information collected by the Software Tool Provider, the Software Tool, or the Certificate Portal; and
- b. Users obtain from clients for whom the Users undertake a NatHERS assessment through use of the Software Tool or Certificate Portal appropriate consent to the disclosure and use of the client's Personal Information, to and by the AAOs, the NatHERS Administrator, and any person, organisation or government agency authorised by the AAOs or the NatHERS Administrator, to the extent necessary for such persons to conduct the activities and purposes described in clause 15.1 (AAOs) and clauses 9.6 and 16.1 (NatHERS Administrator).
- c. The User's confirmation that the consents detailed in clause 25.2 have been obtained is to be recorded by the Software Tool or Certificate Portal prior to the generation of a NatHERS Certificate and the signed consents are to be uploaded as part of the Rating File.

25.3 This clause 25 survives the expiry or termination of the Agreement.

## 26. NOTICE

26.1 All notices, approvals, consents or other communications under the Agreement must be provided in writing to:

- a. in the case of the Software Tool Provider - the Provider Representative; and
- b. in the case of the NatHERS Administrator - the contact details provided in the Accreditation Notice, or such other contact details as are provided by the NatHERS Administrator from time to time.

26.2 Such notice must be either:

- a. delivered to the property address of the receiver;
- b. sent by prepaid post to the property address of the receiver; or
- c. sent by email to the email address of the receiver.

26.3 Such notice is taken to be received if:

- a. given or served by hand, at the time of delivery;
- b. posted, on the third business day after posting (or the seventh business day if posted to or from a place outside Australia); or

- c. emailed at the time that would be the time of receipt under the Electronic Transactions Act 1999 (Cth).

## 27. DISPUTE RESOLUTION

- 27.1 If a dispute arises in relation to the Agreement (**Dispute**), a party must comply with this clause 27 before starting arbitration or court proceedings (except proceedings for urgent interlocutory relief). After a party has sought or obtained any urgent interlocutory relief that party must follow this clause 27.
- 27.2 A party claiming a Dispute has arisen must give the other party notice setting out details of the Dispute.
- 27.3 The parties will work together to resolve Disputes as follows:
  - a. During the period of 14 days after notification of a Dispute is given under clause 27.2 (or longer period if the parties agree in writing) the parties shall attempt to resolve the Dispute by negotiation at the officer level.
  - b. If the parties cannot resolve the Dispute at the officer level within that period, each party to the Dispute must use its reasonable efforts through a meeting of CEOs, agency heads, or equivalent level, to resolve the Dispute.
  - c. If the parties cannot resolve the Dispute within 14 days at the CEO, agency head or equivalent level, they must refer the Dispute to a mediator if one of them requests.
- 27.4 If the parties to the Dispute cannot agree on a mediator within seven days after a request under clause 27.3, the chairperson of the Resolution Institute (ABN 69 008 651 232) or the chairperson's nominee will appoint a mediator.
- 27.5 The role of a mediator is to assist in negotiating a resolution of the Dispute. A mediator may not make a binding decision on a party to the Dispute except if the party agrees in writing. Unless agreed by the mediator and the parties, the mediation must be held within 21 days of the request for mediation in clause 27.3. The parties must attend the mediation and act in good faith to genuinely attempt to resolve the Dispute.
- 27.6 Any information or documents disclosed by a party under this clause 27:
  - a. must be kept confidential; and
  - b. may only be used to attempt to resolve the Dispute.
- 27.7 Each party to a Dispute must pay its own costs of complying with this clause 27. The parties to the Dispute must equally pay the costs of any mediator.
- 27.8 A party to a Dispute may terminate the dispute resolution process by giving notice to the other party after it has complied with clauses 27.1 to 27.5. Clauses 27.6 and 27.7 survive termination of the dispute resolution process.
- 27.9 If a party to a Dispute breaches any of clauses 27.1 to 27.8, the other party does not have to comply with those clauses in relation to the Dispute.
- 27.10 Despite the existence of a Dispute, the parties must continue to perform their obligations under the Agreement.

## 28. SURVIVAL

- 28.1 Any term of the Agreement that is expressed or by its nature is intended to survive expiry or termination of the Agreement survives expiry or termination of the Agreement. Without limitation to the foregoing, the following clauses will survive the expiry or termination of the Agreement: clauses 9, 15, 16, 17, 18, 20, 24, 25, 26, 27 and this clause 28.

## APPENDIX 1 Software Tool User Terms and Conditions in NatHERS Regulation Mode

The Software Tool Provider must ensure that the Software Tool User Terms and Conditions that govern the use of the Software Tool in Regulation Mode contain the following terms and conditions:

1. The User agrees that, unless they have a written request from a regulator to use an older version:
  - a. Class 1 rating can only be started in the latest version of the software
  - b. Class 2 rating, if it is the first in the development, can only be started in the latest version of the software.
2. The User must comply with the following NatHERS documents:
  - a. the Technical Note
  - b. Certified Trade mark guidelines
  - c. the NatHERS trade mark terms of use set out in The Guidelines for Using the NatHERS logo any state and territory requirements (e.g. BASIX requirements)
3. The User must generate a NatHERS Certificate when demonstrating compliance with the NCC Deemed-to-Satisfy NatHERS pathway or the New South Wales Building Sustainability Index (BASIX).
4. The User agrees not to use the software for the National Construction Code Verification Using Reference Building compliance pathway, in neither Regulation nor non-Regulation Mode.
5. The User must not alter a NatHERS Certificate after it is generated.
6. For the purpose of quality assurance or audit activities, the User agrees for the Software Tool Provider to give the NatHERS Administrator and applicable AAO (or their nominees) all information (including Personal Information) and material relevant to the User's use of the Software Tool, the assessments performed, and the NatHERS Certificates generated. These may be forwarded to the relevant regulatory authority.
7. The User expressly agrees to fully participate in and cooperate with any investigation or audit conducted by the NatHERS Administrator of NatHERS and the User's activities in relation to NatHERS.
8. The User performing NatHERS assessments must inform their client that they will collect personal information, including their name, email address, telephone number, ABN (where applicable), NatHERS assessments and design documentation used for the assessment. This information:
  - a. will be disclosed to software providers, and
  - b. may be disclosed the NatHERS Administrator and applicable Assessor Accrediting Organisation (AAO) for the purposes of quality assurance, investigation and audits including consent for these persons/entities to contact the client in relation to any findings relevant to the assessment.

9. The User acknowledges that the Software Tool Provider has responsibilities to the NatHERS Administrator and the AAOs. The Software Tool Provider may be directed by the NatHERS Administrator or an AAO to take certain steps or actions. Where applicable, the User will comply with those steps or actions and may direct inquiries as to these steps or actions to the NatHERS Administrator.
10. A right for the Software Tool Provider to terminate the User's right to use the Software Tool and the Certificate Portal (including forfeiting of the user's credits that could have been used to generate NatHERS Certificates) if the User breaches the Software Tool User Terms and Conditions.
11. A right for the NatHERS Administrator to direct the Software Provider to suspend, terminate or investigate a User under circumstances where Detrimental Use is identified.