



FIRSTRATE5[®] HOUSE ENERGY RATING SOFTWARE LICENCE AGREEMENT

(Effective 1 May 2024)

Version April 2024

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 - (iii) print a summary diagnostic report of each such Assessment,for the Licensee's educational and/or business purposes and subject to all of the terms and conditions of this Licence Agreement (the **Permitted Purposes**).
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- (b) Sustainability Victoria may when notifying the Licensee of any additional version of the FirstRate5 Software under clause 2(a) provide additional terms and conditions that apply to the use of that revised version. The

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- (i) versions of the FirstRate5 Software preceding the versions referred to in clause 2(a) may not create Project Files which are suitable for generating NatHERS Certificates and that it is the Licensee's sole responsibility to ensure that it is using a version of the FirstRate5 Software that creates Project Files which are suitable for generating Assessments which can be used to create NatHERS Certificates;
 - (ii) unless the Licensee has a written request from a regulator to use an older version:
 - i. Class 1 rating can only be started in the latest version of the FirstRate5 Software Application; and
 - ii. Class 2 rating, if it is the first in the development, can only be started in the latest rating of the software; and
 - (iii) the NCC does not permit the use of software in Regulation Mode to demonstrate compliance with the Verification using a Reference Building pathway.

3. NATHERS CERTIFICATES

- (a) The Licensee acknowledges and agrees that to demonstrate compliance with the NCC, an Assessment must be undertaken in accordance with the applicable NatHERS Technical Note as published on the NatHERS website (<https://www.nathers.gov.au/>) and the Licensee must generate a NatHERS Certificate (or NatHERS Rating Report) in accordance with clause 5(a) to demonstrate compliance with the NCC Deemed-to-Satisfy NatHERS pathway or the New South Wales Building Sustainability Index (BASIX).
- (b) The Licensee warrants that it will not represent to any person or purport that any information or material available from or prepared using the Software or the Services, including, without limitation:
- (i) a print-out of the summary diagnostic report referred to in clause 1(a)(iii) above; or
 - (ii) any document or data prepared using such summary diagnostic report or associated diagnostic data,
- constitutes a NatHERS Certificate for the purposes of demonstrating compliance with, or that a dwelling otherwise meets, satisfies or complies with the NCC residential energy efficiency provisions as determined in accordance with the NatHERS.
- (c) The Licensee acknowledges and agrees:
- (i) not to use the FirstRate5 Software in Regulation Mode for any NCC compliance pathway other than NatHERS;

- (ii) that the NCC does not permit use of software accredited or previously accredited under NatHERS, or use of the additional functionality provided in any mode other than Regulation Mode, for the purposes of demonstrating compliance with the Verification Using a Reference Building (**VURB**) pathway for Class 1 or 10 buildings; and
- (iii) that the Software is not suitable for Assessments under the Verification Using a Reference Building Pathway under the NCC for Class 1 to 10 Buildings; and
- (iv) not to alter a NatHERS Certificate after it is generated.

4. LICENSEE ACCOUNTS FOR THE FR5 WEBSITE

- (a) The Licensee must register and maintain a Licensee Account in order to:
 - (i) upload Project Files;
 - (ii) generate NatHERS Certificates to demonstrate compliance with performance requirements of the NCC residential energy efficiency provisions as determined in accordance with the NatHERS;
 - (iii) access and download NatHERS Certificates that have been previously generated;
 - (iv) download the FirstRate5 Software Application; and
 - (v) access and use the Whole of Home Web App.
- (b) The Licensee must:
 - (i) when registering on the FR5 Website to create a Licensee Account, provide Sustainability Victoria with accurate, complete, and up-to-date information as requested on the registration page of the FR5 Website; and
 - (ii) promptly inform Sustainability Victoria of any changes to such information.
- (c) Sustainability Victoria may, in its absolute discretion, refuse registration or close a Licensee Account if:
 - (i) the Licensee breaches this Licence Agreement and, if the breach is capable of remedy, fails to remedy that breach within 7 days of receiving written notice from Sustainability Victoria requesting the Licensee to remedy the breach;
 - (ii) the Licensee opens or attempts to open a Licensee Account using incomplete or falsified details; or
 - (iii) Sustainability Victoria considers that the refusal of registration or closure of a Licensee Account is necessary to comply with Sustainability Victoria's obligations at law.
- (d) The Licensee acknowledges and agrees that:

- (i) passwords are confidential and the Licensee will take reasonable precautions to keep it confidential;
 - (ii) it must not disclose its password to any other person;
 - (iii) it must change its password regularly and take reasonable steps to ensure its password is not readily able to be discovered by a third party;
 - (iv) it must notify Sustainability Victoria if the confidentiality of its password is compromised as soon as the Licensee becomes aware; and
 - (v) the Licensee is solely responsible for all activities that occur on its Licensee Account undertaken by the Licensee or by another person in circumstances where Licensee has failed to comply with any of the requirements referred to in paragraphs (i) to (iv).
- (e) The Licensee acknowledges and agrees that Sustainability Victoria has responsibilities to the NatHERS Administrator and AAOs. Sustainability Victoria may be directed by the NatHERS Administrator or an AAO to take certain steps or actions (including disabling the Licensee's Licensee Account and use of the Software and the Services) if:
- (i) the Licensee breaches or is suspected to have breached this Licence Agreement; or
 - (ii) circumstances arise with respect to a Licensee and their use of the Software in a way that will or may cause detriment to the NatHERS Administrator, the NatHERS reputation, the integrity of the NatHERS Administrator.
- (f) Where applicable, the Licensee must comply with those steps or actions as directed by Sustainability Victoria and may direct inquiries as to these steps or actions to the NatHERS Administrator.

5. GENERATING NATHERS CERTIFICATES USING THE FR5 WEBSITE

- (a) On completion of an Assessment, the Licensee may upload the relevant Project File generated by the Assessment to its Licensee Account and may request generation of one or more NatHERS Certificates through the FR5 Website.
- (b) If the Assessment rating indicated by the FR5 Website is not consistent with the result from the relevant Software, the Licensee must address this discrepancy before generating the relevant NatHERS Certificate (for example, by validating or reuploading the applicable Project File).
- (c) If the Licensee is satisfied with the Assessment indicated by the FR5 Website then the Licensee may generate one or more NatHERS Certificates (but the Licensee must have obtained Certificate Credits in order to do so, as more fully described in clause 6). Each NatHERS Certificate generated by the Licensee will be emailed to the email address

set out in the Licensee Account and will also be available for the Licensee to download from the Licensee Account.

- (d) Once a NatHERS Certificate has been generated by the FR5 Website, the Licensee will not be able to make modifications to the Project File Assessments used to generate that NatHERS Certificate. However, the Licensee may upload a Revised Project File in accordance with clause 5(f), or complete a new Assessment as required.
- (e) All NatHERS Certificates are validated when they are generated. The Licensee may withdraw any NatHERS Certificate stored by the Licensee in the Licensee Account (**Invalidated NatHERS Certificate**). Licensee will not be able to revalidate any Invalidated NatHERS Certificate once withdrawn. The Licensee will need to contact Sustainability Victoria if Licensee wishes to revalidate an Invalid NatHERS Certificate (for example, because it was accidentally withdrawn). To avoid doubt, an Invalidated NatHERS Certificate does not entitle a Licensee to any refund or reinstatement of the Certificate Credits applied in respect of that NatHERS Certificate.
- (f) The Licensee acknowledges and agrees that it may upload a Revised Project File or complete a replacement Assessment and generate a replacement NatHERS Certificate without further Certificate Credits being deducted from Licensee Account only if:
 - (i) the Original NatHERS Certificate was generated on or after 12 July 2021 (9am) and not more than 12 months ago; and
 - (ii) the address of the dwelling in the Revised Project File exactly matches the address of the dwelling in the Original NatHERS Certificate.

6. CERTIFICATE CREDITS AND CERTIFICATE FEES

- (a) In order to generate a NatHERS Certificate or NatHERS Rating Report, the Licensee must pre-pay for one or more Certificate Credits (by one of the payment methods permitted on the FR5 Website) (**Certificate Fee**). The amount the Licensee must pay for each Certificate Credit, as well as the number of Certificate Credits that the Licensee will need to apply in order to generate a NatHERS Certificate or NatHERS Rating Report, are specified on the FR5 Website. The applicable number of Certificate Credits will be applied against the Licensee's then current Certificate Credit balance when the Licensee generates a NatHERS Certificate or NatHERS Rating Report.
- (b) Sustainability Victoria may vary the amount the Licensee must pay to obtain Certificate Credits from time to time in its absolute discretion (subject to the procedure specified for varying this License Agreement set out in clause 20).
- (c) The maximum number of Certificate Credits that the Licensee may hold in a Licensee Account at any one time is 1,000.

- (d) Certificate Credits will automatically expire on the date that is 12 months from the date on which the Licensee purchased them, except for any Certificate Credit which is stated to expire on the date that is 2 months from the date of purchase, which will expire on the date stated.
- (e) The Licensee acknowledges and agrees that unused Certificate Credits in a Licensee Account are:
 - (i) not transferrable; and
 - (ii) not refundable in any circumstance except as expressly provided for in this Licence Agreement, or if Sustainability Victoria otherwise determines, in its sole and absolute discretion, to refund the Licensee for any unused Certificate Credits.
- (f) If Sustainability Victoria makes a supply under or in connection with this Licence Agreement on which GST is imposed (not being a supply the consideration for which is specifically described as GST inclusive):
 - (i) the consideration payable or to be provided for that supply under this Licence Agreement; and
 - (ii) but for the application of this clause (GST exclusive consideration) is increased by, and the Licensee must also pay to Sustainability Victoria, an amount equal to the GST payable by the Licensee on that supply; and
 - (iii) the amount by which the GST exclusive consideration is increased must be paid to Sustainability Victoria by the Licensee without set off, deduction or counter-claim, at the same time as the GST exclusive consideration is payable or to be provided.
- (g) If a payment to a party under this Licence Agreement is a reimbursement or indemnification, calculated by reference to a loss, cost or expense incurred by that party, then the payment will be reduced by the amount of any input tax credit to which that party is entitled for that loss, cost or expense.

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 - (i) use the Software or the Services for any purpose other than for the Permitted Purposes;
 - (ii) remove or alter any copyright notices displayed on the Software or the Services;
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 - (iv) develop, adapt, enhance, modify or improve the Software or the Services;
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- (vi) make the Software or the Services available to third parties for such unauthorised use, or otherwise attempt to discover the source code of the Software;
- (vii) use or allow the FirstRate5 Software Application to be used on the internet or any other public communications network (including as a software-as-a-service, hosted, bureau or similar service);
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 - (A) misrepresents Assessment (including representing that a preview of a NatHERS Certificate is a final NatHERS Certificate);
 - (B) contravenes any law;
 - (C) is false, offensive, indecent, objectionable, harassing, obscene, pornographic, threatening, abusive, defamatory, libellous, fraudulent, tortious, or invasive of another's privacy or constitutes a breach of a person's legal rights (including Intellectual Property Rights or rights in confidential information); or
 - (D) is detrimental, including any access or use has or could damage, disable or impair any servers, networks or other resources used by Sustainability Victoria or any of their third-party service providers or other users;
 - (E) in a way that constitutes misuse, or resale or other commercial use, of the FirstRate5 Software, the FR5 Website, the Whole of Home Web App and the Services;

- (xii) have, or create, access or use a Licensee Account on the FR5 Website to access or use the FirstRate5 Software or Whole of Home Web App, if any of the Licensee Accounts on the FR5 Website of the Licensee are at that time disabled (unless otherwise permitted by Sustainability Victoria); and
 - (xiii) engage in any action or attempt to circumvent any requirements to pay any applicable fees (including rendering any invoice in a manner designed to circumvent requirements to pay applicable fees).
- (b) The Licensee must:
- (i) comply with any reasonable directions of Sustainability Victoria from time to time in relation to the use of the Software and the Services;
 - (ii) fully participate in and cooperate with any investigation or audit conducted by Sustainability Victoria, the Commonwealth Government administrator of the NatHERS accreditation (NatHERS Administrator) or their nominees in relation to the Licensee's use of the Software and the Services;
 - (iii) use the Software and the Services in good faith; and
 - (iv) at all times comply with all of the terms and conditions of this Licence Agreement and all applicable laws, statutes and regulations in all jurisdictions that relate to the Licensee's use of the Software or the Services (including, without limitation, applicable privacy laws).

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- (a) Copyright and all other intellectual property rights in the Software are owned by Sustainability Victoria (and/or its licensors) and are protected by Australian and international copyright law.
- (b) The Licensee agrees that nothing in this Licence Agreement transfers or assigns to Licensee any intellectual property rights in the Software, and Licensee must not represent that it owns any such intellectual property rights.
- (c) Any intellectual property rights in a NatHERS Certificate vest absolutely in Sustainability Victoria. Subject to payment by the Licensee of the applicable Certificate Fee, Sustainability Victoria grants the Licensee an irrevocable, perpetual, non-exclusive licence to use each NatHERS Certificate generated by the Licensee for the Licensee's business purposes.

9. FIRSTRATE5 TRADE MARK

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 - (iii) to the extent and in the manner reasonably required by Sustainability Victoria from time to time, must accompany the use of the Trade Mark with words indicating that the Trade Mark is a registered trade mark of Sustainability Victoria;
 - (iv) must comply with the Trade Mark Guidelines (version 2.1) issued by the NatHERS Administrator and available at <https://www.nathers.gov.au/sites/default/files/2023-10/NatHERS%20Trade%20Mark%20Guidelines%2020231024.pdf>; and
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- (c) Subject to clauses 11(d) and 11(e), Sustainability Victoria will use reasonable efforts to assist the Licensee with:
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- (f) Sustainability Victoria may vary the basis on which this support is provided, or terminate the provision of this support entirely, by giving the Licensee notice in accordance with clause 16.
- (g) The Licensee acknowledges that:
 - (i) superseded versions of the Software may not meet the requirements of the NatHERS Software Accreditation Protocol and

may not generate Assessments which are suitable for generating NatHERS Certificates via the FR5 Website; and

- (ii) use of superseded versions of the Software is entirely at the Licensee's own risk.

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 - ii. negligent, malicious or wilful acts or omissions of third parties (including Sustainability Victoria's third party service providers);
 - iii. maintenance or repairs carried out by Sustainability Victoria or any third party service provider in respect of any of the systems used in connection with the provision of the Software and the Services or any Internet Service Provider services;
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 - (ii) information and data that the Software incorporates (either manually or automatically) from external websites and other external sources (**External Inputs**); and
 - (iii) actual energy consumption of the relevant house or dwelling when occupied, which will be dependent on actual appliance use patterns and efficiency.
- (d) The Licensee acknowledges that Sustainability Victoria has no control over such Dependencies and will not be liable for any inaccuracies resulting from Licensee Inputs or External Inputs.
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- (j) For the purposes of clause 12(h), **Indirect or Consequential Loss** means:
- (i) any and all Loss that does not arise naturally (that is, according to the usual course of things) from the event giving rise to the Loss; and
 - (ii) any loss of profit, loss of revenue, loss of savings, loss of business, loss of goodwill, loss of opportunity, loss of or damage to reputation (in each case, whether actual or anticipated), loss of or damage to data and lost or wasted overheads.
- (k) **(Exclusion of implied terms)** Any conditions, warranties, guarantees, rights, remedies, liabilities and other terms implied or conferred by statute, custom or the general law that impose any liability or obligation on Sustainability Victoria are excluded under this Licence Agreement.
- (l) **(Consumer Guarantees)** If any consumer guarantee within the meaning of the Australian Consumer Law (meaning the Australian Consumer Law set out at Schedule 2 to the *Competition and Consumer Act 2010* (Cth)) **(Consumer Guarantee)** applies to any goods or services provided by Sustainability Victoria to the Licensee, Sustainability Victoria limits its liability for any failure to comply with such Consumer Guarantee to:
- (i) in the case of services, the cost of supplying the services again or payment of the cost of having the services supplied again; and
 - (ii) in the case of software or other goods, the cost of replacing the goods, supplying equivalent goods or having the goods repaired, or payment of the cost of replacing the goods, supplying equivalent goods or having the goods repaired.
- (m) Without limiting the generality of any of clauses 12(a) to 12(k), Sustainability Victoria will not be liable to the Licensee for or in respect of any Loss to the extent such Loss is caused, or contributed to, by:
- (i) the Licensee's improper installation or accessing of the Software and the Services;
 - (ii) use by the Licensee of the Software and Services other than in accordance with the documentation supplied by Sustainability Victoria relevant to that Software or Services;
 - (iii) any failure by the Licensee to comply with any reasonable direction given to them by Sustainability Victoria;
 - (iv) any breach by the Licensee of any term or condition of this Licence Agreement;

- (v) any failure by the Licensee to input complete, accurate and non-defective information into the Software or the Services;
 - (vi) any improper act or omission of the Licensee or another person acting under the instruction or control of the Licensee, including any modification or attempted modification of the Software or the Services not authorised by Sustainability Victoria;
 - (vii) use by the Licensee of the Software or the Services with or in combination with any software or equipment that is not approved by Sustainability Victoria; or
 - (viii) any failure or malfunction of any equipment, service (including any power surge); or
 - (ix) interruption to power or telecommunications services or the internet) or software not provided by Sustainability Victoria, whether or not caused by the Licensee.
- (n) None of clauses 12(a) to 12(l) will in each case have the effect of limiting, excluding, restricting or modifying:
- (i) Sustainability Victoria's liability or obligations under this Licence Agreement except to the extent permitted by law; or
 - (ii) the application of any Consumer Guarantee to the extent such limitation, exclusion, restriction or modification is not permitted by the Australian Consumer Law.

13. LICENSEE'S OBLIGATIONS

The Licensee must:

- (a) have a valid Licensee Account on the FR5 Website to use the Software and Services;
- (b) take all reasonable steps to protect the Software and the Services from unauthorised access, copying or use; and
- (c) immediately notify Sustainability Victoria of any actual or potential unauthorised access, copying or use of the Software and Services.

14. LICENSEE INDEMNITY

- (a) The Licensee indemnifies Sustainability Victoria and its officers, employees, agents and contractors (**those indemnified**), and will keep them indemnified, from and against any and all actions, claims, charges, costs (including legal costs on a full indemnity basis), expenses, losses, damages and other liabilities suffered or incurred by any of those indemnified arising directly or indirectly out of or in connection with any

claim by a third party (including, without limitation, a home owner or builder) against Sustainability Victoria relating to Licensee's use of or reliance on the Software, Services or any third party reference libraries or information incorporated into or used as part of the Software or the Services. Sustainability Victoria will take reasonable steps to mitigate any charges, costs, expenses, losses, damages and other liabilities suffered or incurred by any of those indemnified.

- (b) The Licensee is not required to indemnify any of those indemnified to the extent that a relevant action, claim, charge, costs, expense, losses, damage or liability is caused by the negligence, fraud, breach of law or breach of this Licence Agreement of any of those indemnified.
- (c) To the extent that the Licensee indemnifies persons other than Sustainability Victoria under clause 14(a)(the **Beneficiaries**), Sustainability Victoria holds the benefit of the indemnity on trust for and may enforce the indemnity directly against the Licensee for and on behalf of the Beneficiaries, notwithstanding that such persons are not a party to this Licence Agreement.

15. DISCLOSURES BY SUSTAINABILITY VICTORIA

The Licensee agrees and acknowledges that Sustainability Victoria may disclose to:

- (a) its software licensor(s) details of summary diagnostic reports and data generated by the Licensee when using that licensor's software;
- (b) representatives of a relevant AAO, NatHERS, the Australian Building Codes Board or such other body responsible for the National Construction Code and other such relevant bodies, details of the Licensee's use of the Software or the Services for the purposes of any audit, inquiry or investigation into the Licensee's use of the Software; and
- (c) other government departments and entities (for example CSIRO) and their third party partners details of summary diagnostic reports and data generated by the Licensee's use of the Software, or the Services for the purposes of research, analysis, policy development, scientific research and development activities, compliance, auditing, accreditation activities.

16. GRANT OF LICENCE BY LICENSEE

- (a) The Licensee grants to Sustainability Victoria an irrevocable, non-exclusive, nontransferable, worldwide, perpetual, royalty-free licence to use, reproduce, modify, adapt and communicate the data generated by the Licensee's use of the Software and the Services (including any NatHERS Certificate) for any purpose and to sublicense third parties (and permit those third parties to sub-license) to use, reproduce, modify, adapt and communicate the data generated by the Licensee's use of the Software and the Services (including for a fee) for the following purposes:
 - (i) to enable Sustainability Victoria to deliver and improve the Software and the Services; and

- (ii) to enable Sustainability Victoria (or other third parties) to perform research relevant to Sustainability Victoria's (or those third parties') functions and purposes and to publish the results of such research or any analysis, policy development, scientific research and development, compliance, auditing, and accreditation activities in a manner that does not allow the data contained in any individual Project File or otherwise input into the Software and the Services, to be identifiable (**Aggregated Data**) and to license users of the Aggregated Data to use, sublicense, distribute, reproduce, modify, adapt, publish, translate, publicly perform and publicly display the Aggregated Data (in whole or in part) and to incorporate the Aggregated Data into other works in any format or medium now known or later developed.
- (a) The Licensee warrants to Sustainability Victoria that they have all rights necessary to grant the granted under clause 16(a).

17. CONFIDENTIALITY AND PRIVACY

- (a) The Licensee must not disclose to any third party, without the prior written consent of Sustainability Victoria, any confidential information received for the purposes of using the Software or receiving the Services. Sustainability Victoria's confidential information includes its methodologies and tools. The obligations in this clause 17(a) do not apply to information which is or becomes generally available to the public (other than as a result of a breach of an obligation under this clause), is independently developed by the Licensee, or is required by law to be disclosed.
- (b) The Licensee consents, and must obtain all relevant consents of any third parties, to Sustainability Victoria collecting, using and disclosing personal information (as that term is defined in the *Privacy and Data Protection Act 2014* (Vic) and confidential information that is provided to Sustainability Victoria by way of inputs into the Software or use of the Services for the purpose of:
 - (i) providing the Services;
 - (ii) monitoring the Licensee's use of the Software and the Services;
 - (iii) undertaking Assessments and the production of NatHERS Certificates (including payment of Certificate Fees);
 - (iv) evaluating whether the Licensee's use of the Software or the Services are compliant with this Licence Agreement; and
 - (v) undertaking audits, quality assurance activities and investigation activities in relation to Assessments performed by the Licensee and NatHERS Certificates produced using the Software or the Services; and

- (vi) analysis, research and policy development.
- (c) For the purpose of clause 17(b), the Licensee acknowledges that personal information and confidential information may be disclosed by Sustainability Victoria to:
 - (i) any other person, organisation or government agency; and
 - (ii) any nominee, agent or representative of the NatHERS Administrator,to the extent necessary for such persons to conduct the activities and purposes described in this clause 17(b).
- (d) Sustainability Victoria's privacy policy relating to information collected by Sustainability Victoria may be accessed by following the link labelled 'Privacy Policy' on the FR5 Website, and forms part of this Licence Agreement.

18. SUSPENSION OF LICENSEE ACCOUNT

- (a) Sustainability Victoria may at its discretion disable the Licensee Account by providing notice to the Licensee. Such notice will take effect at the date specified in the notice.
- (b) The period of disablement for the Licensee Account will be specified in the notice (**Period of Suspension**).
- (c) The Licensee continues to be bound by this Licence Agreement during any Period of Suspension.
- (d) The Licensee agrees to comply with any notification provided by Sustainability Victoria (including in respect of any warning notice or notice of suspension such as those which may be issued by Sustainability Victoria, or the NatHERS Administrator or on behalf of the NatHERS Administrator).

19. TERMINATION

- (a) Sustainability Victoria may terminate this Licence Agreement wholly or in part if:
 - (i) any of Sustainability Victoria's rights to the licensed Software components are terminated, in which case termination will be immediately on notice;
 - (ii) the Software is no longer accredited, in which case termination will be immediately on notice;
 - (iii) for convenience at any time by giving Licensee at least 6 months' prior notice;

- (iv) the Licensee is or becomes bankrupt (if the Licensee is a natural person) or insolvent, in which case termination will be immediately on notice; or
 - (v) the Licensee is in breach of this Licence Agreement and (if the breach is capable of remedy) fails to remedy that breach within 14 days of receiving written notice from Sustainability Victoria to remedy the breach. If the breach is not capable of remedy, Sustainability Victoria may terminate this agreement immediately on giving written notice to the Licensee.
- (b) The Licensee can terminate at any time for any reason upon provision of notice to Sustainability Victoria.
 - (c) On termination of this Licence Agreement, the Licensee must:
 - (i) immediately cease using the Software and the Services; and
 - (ii) either return to Sustainability Victoria, or destroy, each copy of the Software that is in the Licensee's possession or control.
 - (d) If the agreement is terminated for any reason:
 - (i) Sustainability Victoria will refund to the Licensee any unused valid Certificate Credits in the Licensee Account; and
 - (ii) if Sustainability Victoria terminates under clauses 19(a)(i), 19(a)(ii) or 19(a)(iii) the refund under this clause 19(d)(i) will be Sustainability Victoria's sole obligation and liability to the Licensee in connection with the termination.

20. AMENDMENTS

- (a) Sustainability Victoria may at any time amend the terms and conditions of this Licence Agreement on no less than 7 days' written notice to the Licensee. When changes are made, Sustainability Victoria will make a new copy of the Licence Agreement available at <https://www.fr5.com.au/news>.
- (b) Variations will take effect upon the date specified in the notice provided under clause 20(a) **(Date of Effect)**.
- (c) Licensee understands and agrees that if it:
 - (i) creates a new Assessment; or
 - (ii) logs into their Licensee Account,

in the Software after the Date of Effect, then Sustainability Victoria may treat the Licensee's action as acceptance of the updated terms and conditions. If the Licensee does not accept the variation, the Licensee must cease use of the Software and the Services and notify Sustainability Victoria that it terminates this Licence Agreement.

- (d) If the Licensee terminates this Licence Agreement under clause 20(c):
 - (i) Sustainability Victoria will refund to the Licensee any unused Certificate Credits (as defined in the Licence Agreement) in the Licensee Account at the date of termination; and
 - (ii) such refund will be Sustainability Victoria's sole obligation and liability to the Licensee in connection with the termination by the Licensee.

21. NOTICES

- (a) Sustainability Victoria may provide a written notice under this Licence Agreement:
 - (i) if the notice is to all licensees, by publishing a notice on the FR5 Website; and
 - (ii) if the notice is to the Licensee, by notifying the Licensee by email at the email address specified in the Licensee Account.
- (b) The Licensee may provide a written notice under this Licence Agreement to Sustainability Victoria by emailing support@fr5.com.au.
- (c) Notices published on the FR5 Website will be deemed to have been made on the day that the notice is published. If that day is not a business day in Melbourne, Victoria, or the notice is published after 5pm on a business day in Melbourne, Victoria, the notice will be deemed to have been published on the next business day in Melbourne, Victoria.
- (d) Notices by email will be deemed to have been received by the addressee within one hour of the message leaving the sender's email server, provided that the sender does not receive a notification that the email could not be delivered to the addressee. If the email is sent on a day is not a business day in Melbourne, Victoria, or it is sent after 5pm on a business day in Melbourne, Victoria, the email will be deemed to have been received at 9am on the next business day in Melbourne, Victoria.
- (e) Nothing in this clause 21 limits the means by which a party may otherwise lawfully effect the service of a notice on the other party.

22. GENERAL

- (a) This Licence Agreement is governed by the laws of Victoria, Australia and each party irrevocably and unconditionally submits to the non-exclusive jurisdiction of the courts of Victoria, Australia.
- (b) Failure by Sustainability Victoria to enforce any of the terms or conditions of this Licence Agreement will not be deemed to be a waiver of any of the rights or obligations Sustainability Victoria has under this Licence Agreement.

- (c) Neither party will be liable to the other for any failure to fulfil, or delay in fulfilling, its obligations caused by circumstances outside of its reasonable control. However, this clause does not apply to any obligations on the Licensee to pay for Services provided by Sustainability Victoria.
- (d) If any part of this Licence Agreement is held to be invalid, illegal, unenforceable or void for any reason or reasons, all of the remaining terms and conditions will remain in full force and effect.
- (e) Clauses 12 (Disclaimer, Limitations and Exclusions), 14 (Licensee Indemnity), 17 (Confidentiality and Privacy), 19(c) and 19(d) (Termination) and 22 (General) survive termination or expiration of this Licence Agreement.
- (f) Sustainability Victoria may by notice assign its rights, transfer its obligations or novate this Agreement. The Licensee may not assign or transfer their rights under this Licence Agreement, or attempt or purport to do so, without Sustainability Victoria's prior written consent (which may be given or withheld at its absolute discretion).

23. DEFINITIONS

In this License Agreement:

AAO means an **Assessor Accrediting Organisation** accredited under the NatHERS Protocol for Assessor Accrediting Organisations, being an organisation which accredits Thermal Performance Assessors.

Assessment is either a thermal performance assessment using the FirstRate5 Software Application, or a thermal performance, appliance and energy generation assessment using both the FirstRate5 Software Application and the Whole of Home Web App. It includes the input of data to assess a design at any stage, including partial or incomplete projects started by a Licensee, and completed projects that have a NatHERS Certificate issued.

Certificate Credits means the credits provided to a Licensee upon payment of the Certificate Fee which permits a Licensee to generate NatHERS Certificates.

Certificate Fee has the meaning given in clause 6(a).

FirstRate5 Software Application means the FirstRate5 software which may be downloaded from the Site and executed locally.

FR5 Website means the FirstRate5 website located at <www.fr5.com.au>.

Intellectual Property Rights means all intellectual property rights, including patents, copyright, rights in circuit layouts, registered and unregistered designs, moral rights, registered and unregistered trade marks, service marks, trade names and any right to have confidential information kept confidential (together with any application or right to apply for registration of any of the rights referred to in this paragraph).

Invalidated NatHERS Certificate means a NatHERS Certificate which has been purchased and issued but has subsequently been withdrawn.

Licensee Account means the account created by a Licensee to use the Software.

NatHERS means the Nationwide House Energy Rating Scheme.

NatHERS Administrator means the Commonwealth Department of Industry, Science, Energy and Resources or any subsequent Commonwealth Department with administrative responsibility for residential energy efficiency ratings.

NatHERS Certificate means 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, appliances, Whole of Home rating, 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. The NatHERS Certificate may also contain information about the energy performance of the building's appliances and on-site energy generation and storage.

NatHERS Rating Report means the report generated by non-accredited assessors), which is 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, appliances, Whole of Home rating, details of the Rater who carried out the assessment, the building address, and relevant information regarding energy efficiency regulatory requirements. The NatHERS Rating Report may also contain information about the energy performance of the building's appliances and on-site energy generation and storage.

National Construction Code or **NCC** means 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: <https://ncc.abcb.gov.au>.

Original NatHERS Certificate means the first NatHERS Certificate generated with respect to a dwelling for which Certificate Credits were deducted from the Licensee Account.

Project File means a data file in a format approved by Sustainability Victoria (as described on the Site) which the Licensee may upload to the Site in order to generate a NatHERS Certificate.

Regulation Mode means the operation of 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 NCC.

Revised Project File means a Project File that is uploaded to replace an existing Project File.

Services means the services provided by Sustainability Victoria via the Software relating to the generation of NatHERS Certificates.

Software means any software provided by Sustainability Victoria to the Licensee and includes the:

- (a) FirstRate5 Software Application;
- (b) FirstRate5 Website; and
- (c) Whole of Home Web App.

Thermal Performance Assessor means a person accredited by an AAO to assess the thermal performance of dwellings and/or the appliances and onsite power generation using the Whole of Home Web App.

Whole of Home Web App means the FirstRate5 Whole of Home application located at < <https://woh.frplus.au> > to collect appliance data to generate NatHERS Certificates.