



# Terms and Conditions

**TYTO Group Pty Ltd**  
ACN 666 104 052

(Service Provider)

**The Customer**

(Customer)



**Table of Contents**

- 1. Definitions and Interpretation.....2**
- 2. Term .....5**
- 3. Services .....5**
- 4. Your Rights and Obligations .....7**
- 5. Products .....8**
- 6. Telecommunication Services .....10**
- 7. Fees and Payments .....11**
- 8. Confidentiality .....13**
- 9. Intellectual Property .....14**
- 10. Indemnity .....15**
- 11. Limitation of Liability.....16**
- 12. Default and Termination.....17**
- 13. Non-solicitation .....18**
- 14. Dispute Resolution .....18**
- 15. Unforeseen Events .....18**
- 16. Privacy .....18**
- 17. Special Conditions.....19**
- 18. Guarantee and Indemnity.....19**
- 19. General.....20**



## Terms and Conditions

### Parties

**TYTO Group Pty Ltd ACN 666 104 052**

(Service Provider, us, we, our)

**The Customer**

(Customer, you, your)

### Background

- A. The Service Provider has agreed to provide the Services to the Customer.
- B. The Customer accepts the Services, subject to the terms of this Agreement.

### Operative Provisions

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## 1. Definitions and Interpretation

### 1.1 Definitions

In this Agreement:

- (a) **Agreement** means this agreement, including all schedules and annexures.
- (b) **Business Day** means a day which is not a Saturday, Sunday or public holiday in the place that an act is to be performed.
- (c) **Business Hours** means between 9:00am and 5:00pm on a Business Day.
- (d) **Claim** means a claim, demand, remedy, suit, injury, damage, loss, cost, liability, action, proceeding, right of action, claim for compensation or reimbursement or liability incurred by or to be made or recovered by or against a person, however arising and whether: ascertained or unascertained; immediate, future or contingent; and subject of a dispute, litigation, arbitration, mediation, conciliation or administrative proceedings.
- (e) **Client Materials** means any data, materials, and Intellectual Property Rights that you provide to us in order for us to supply the Services and Products and includes any materials we request from you from time to time.
- (f) **Commencement Date** means the date you started to receive services from Tyto Group Pty Ltd (unless a services agreement has been signed).
- (g) **Confidential Information** means all spoken, written or electronically stored information belonging to or relating to either party and includes without limitation:
  - (i) any kind of technical, financial or business information;
  - (ii) details of employees, suppliers, or customers;
  - (iii) material developed under this Agreement; and

- (iv) Intellectual Property Rights, concepts, know-how and trade secrets;  
but excludes information in the public domain (other than by default under this Agreement) or information independently known to the other party.
- (h) **Deliverable** means material developed by us under this Agreement.
- (i) **Development Services** means any Services which relate to process automation, development of scripts, creation, improvement or modification of software, websites or web platforms.
- (j) **Fees** means the fees for Products or Services purchased by you, as per the invoice unless an services agreement has been signed.
- (k) **GST Law** means the *A New Tax System (Equipment and Services Tax) Act 1999* (Cth).
- (l) **Initial Term** means monthly for subscription services or as needed for services based work.
- (m) **Intellectual Property Rights** means all present and future rights conferred by statute, common law or equity in or in relation to business names, circuit layouts, computer software, confidential information, copyright, designs, domain names, formulas, inventions, knowhow, patents, recipes, trade marks, and other results of intellectual activity in the industrial, commercial, scientific, literary or artistic field, the benefit of any application to register such a right and the benefit of any renewal or extension of such a right.
- (n) **Telecommunication Services** means any internet, fibre, satellite, landline, mobile telephone, mobile data or other telecommunication services provided by the Service Provider to the Customer.
- (o) **Telecommunications Provider** means the third-party provider of Telecommunication Services we notify to you from time to time.
- (p) **Licensing Fees** means any fees payable to third party software vendors, hardware providers or network providers, as required for us to provide the Services and Products.
- (q) **Network** means the network operated by the Telecommunication Provider.
- (r) **Out-of-Scope Fees** means the fees noted for Out-of-Scope Services any services agreement.
- (s) **Out-of-Scope Services** means all services which are not within the scope of the Services set out a signed services agreement, including any maintenance or support which is provided outside of Business Hours.
- (t) **Personal Information** has the meaning given to that term in the *Privacy Act 1988* (Cth).
- (u) **PPS Act** means the *Personal Property Securities Act 2009* (Cth).
- (v) **PPSR, Purchase Money Security Interest, Security Agreement and Security Interest** have the meaning given in the PPS Act.
- (w) **Privacy Law** means the *Privacy Act 1988* (Cth) and any other law that governs the use, disclosure or management of data or information relating to persons
- (x) **Product** means any goods, including equipment and software, that you request, order or purchase from us pursuant to this Agreement.
- (y) **Product Fees** means the fees for any Product that you request, order, or purchase.

- (z) **Related Entity** has the meaning given in the *Corporations Act 2001* (Cth).
- (aa) **Representative** includes an employee, agent, officer, director, auditor, advisor, researcher, partner, consultant, contractor, sub-contractor or Related Entity of that person or of a related body corporate of that person.
- (bb) **Services** means services that you request, order or purchase.
- (cc) **Term** means the term of this agreement in accordance with clause 2.2, including the Initial Term and any renewals.
- (dd) **Unforeseen Event** means pandemic or epidemic, an act of war (whether declared or not) or terrorism, the mobilisation of armed forces, civil commotion or riot, natural disaster, industrial action or labour disturbance, currency restriction, embargo, action or inaction by a government, a failure of a supplier, public utility or common carrier or computer disruption due to the effects of any virus, malware, or malicious code.

## 1.2 Interpretation

The following rules of interpretation apply unless the context requires otherwise:

- (a) headings are for convenience only and do not affect interpretation;
- (b) if a party consists of more than one person, this Agreement binds them jointly and each of them severally;
- (c) an obligation, representation or warranty in favour of more than one person is for the benefit of them separately and jointly; and
- (d) “person” includes an individual, the estate of an individual, a corporation, an authority, an association or a joint venture (whether incorporated or unincorporated), a partnership and a trust;
- (e) a reference to a party includes that party's executors, administrators, successors and permitted assigns;
- (f) a reference to a document (including this document) is to that document as varied, novated, ratified or replaced from time to time;
- (g) a reference to a statute includes its delegated legislation and a reference to a statute or delegated legislation or a provision of either includes consolidations, amendments, re-enactments and replacements;
- (h) a word importing the singular includes the plural (and vice versa);
- (i) a word indicating a gender includes every other gender and no gender;
- (j) a reference to a party, clause, schedule, exhibit, attachment or annexure is a reference to a party, clause, schedule, exhibit, attachment or annexure to or of this document, and a reference to this document includes all schedules, exhibits, attachments and annexures to it;
- (k) if a word or phrase is given a defined meaning, any other part of speech or grammatical form of that word or phrase has a corresponding meaning;
- (l) no doctrine or rule of construction of documents will apply to the disadvantage of a party, on the basis that the party put forward this Deed or any relevant part of it;
- (m) if an act must be done on a specified day which is not a Business Day, it must be done instead on the next Business Day; and

- (n) "includes" in any form is not a word of limitation.

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## 2. Term

### 2.1 Application

This Agreement is binding on you from the earlier of:

- (a) the Commencement Date;
- (b) the date you sign this Agreement;
- (c) the date you, having received a copy of these terms, instruct us to commence any Services or purchase any Product,

and applies to all Services and Products we supply to you.

### 2.2 Term

- (a) This Agreement will continue for Initial Term, unless terminated earlier under clause 12.
- (b) This Agreement will automatically renew for further periods equal to the Initial Term unless either party gives notice in writing to the other at least 30 days before the expiry of the Term.

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## 3. Services

### 3.1 Services

We will provide the Services, subject to the terms of this Agreement.

### 3.2 Hours of operation

Our personnel are available during Business Hours on Business Days. Services requiring personnel involvement will be carried out during these hours unless otherwise agreed.

### 3.3 Performance

- (a) We agree to provide the Services:
  - (i) in a timely manner using our reasonable endeavours;
  - (ii) to all relevant Australian standards; and
  - (iii) in accordance with industry best practice.
- (b) In performing the Services, we will:
  - (i) act diligently, ethically, soberly and honestly;
  - (ii) comply with all relevant occupational health and safety policies;
  - (iii) comply with all relevant laws including State and Federal laws and local government laws and regulations;
  - (iv) observe your reasonable directions in relation to security or use of any facilities or equipment;
  - (v) use reasonable endeavours to rectify any faults in the Services for which we are responsible; and



- (vi) take reasonable steps to investigate and restore Services where affected by causes beyond our control; and
- (vii) maintain prudent insurance policies.

### **3.4 Service limitations**

We will use reasonable efforts in providing the Services, however other than as set out in this Agreement, to the fullest extent permitted at law:

- (a) we do not warrant or guarantee the Services are uninterrupted or error-free;
- (b) we do not take any responsibility for faults, delays, or interruptions to the Services caused by:
  - (i) misuse or user error;
  - (ii) your software or equipment;
  - (iii) the delays, action, or inaction of any third party;
  - (iv) the delays, action, operation, inaction, or failure of any third-party service, Telecommunication Provider, software, software provider, contractor, or equipment;
  - (v) the delay in any content provided or required to be provided by you; or
  - (vi) any Unforeseen Event,and you are solely responsible for faults in your software, equipment, or network;
- (c) we do not warrant or guarantee the Deliverables for any fitness of purpose, performance, or compatibility other than as set out in this Agreement; and
- (d) we do not warrant or guarantee that use of the Deliverables will bring you into compliance with any law or standard.

### **3.5 Out-of-Scope Services**

- (a) We may at our discretion, upon your request, provide Out-of-Scope Services.
- (b) The same standards, warranties and indemnities apply to Out-of-Scope Services as apply to the Services.
- (c) We will charge the Out-of-Scope Fees for any Out-of-Scope Services we provide.

### **3.6 Changes to Services or Products**

Technology and business environments are constantly evolving, and we may make adjustments to the Services or Products to ensure you continue to receive the best possible results. We will give you reasonable notice of any changes.

### **3.7 Identifying data**

We reserve the right to:

- (a) attach labels to your data or index your data for identification purposes; and
- (b) remotely measure your usage of the Services and Products to ensure billing accuracy and technical efficiency.

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## 4. Your Rights and Obligations

### 4.1 Instructions, Equipment and materials

- (a) You must supply any agreed Client Materials in a timely manner.
- (b) You must supply clear instructions regarding the scope and specifications of the Services and Products and respond to our queries promptly and clearly.
- (c) You must respond in a timely manner if we bring an issue to your attention in relation to your software, equipment, data or network that affects the Services or Products.
- (d) You must notify us if you make any changes to your software, network or data which may affect the Services or Products.

### 4.2 Data Security

- (a) You must take reasonable measures to protect your software, equipment, data and network from cyber threats and unauthorised access, including:
  - (i) the Australian Cyber Security Centre's *Strategies to Mitigate Cyber Security Incidents* ("Essential Eight"), details of which may be found at <https://www.cyber.gov.au/acsc/view-all-content/essential-eight>; and
  - (ii) industry best practice; and
- (b) To the extent permitted by law, we do not warrant or guarantee that your compliance with any guidelines or suggestions provided by us will prevent or reduce the risk of any cyber threat or unauthorised access to your software, equipment, data or network.
- (c) You are solely responsible for any Claim caused or incurred due to your failure to comply with this clause 4.2.

### 4.3 Warranties

- (a) You warrant and undertake that:
  - (i) you and your representatives have all necessary licences and legal right(s) to permit and authorise us to provide the Services.
  - (ii) providing the Services in accordance with your directions will not contravene applicable laws.
  - (iii) you and all of your contractors maintain prudent and comprehensive insurance policies.
- (b) You must provide adequate assurances of these warranties, including providing copies of any licences or insurance policies upon request.

### 4.4 Access

Where we require access to your premises or any other location under your direction or control to perform the Services, or to exercise any other rights under this Agreement, you must provide or arrange such access and a safe working environment in compliance with all occupational health and safety laws.

### 4.5 Nominated representative

You agree upon our request to nominate a key representative to liaise with us and who has the authority to make decisions and give us instruction on your behalf in relation to the Services.



#### 4.6 Client responsibilities

- (a) You are responsible for, and expressly agree that we are not responsible for the following, unless otherwise agreed by us in writing:
  - (i) providing any installation or integration services;
  - (ii) importing data or otherwise implementing the Deliverables;
  - (iii) training your staff or users in how to use the Deliverables;
  - (iv) ongoing support, maintenance or hosting of the Deliverables; or
  - (v) providing any backup, disaster recovery and business continuity practices, including backup of the Deliverables (to avoid doubt, you may make such limited copies of the Deliverables as necessary for your prudent business continuity and backup purposes).
- (b) Unless otherwise agreed by us in writing, you are responsible for, and expressly agree that we are not responsible for:
  - (i) any performance outcomes from your use of the Services;
  - (ii) any issues or defects arising in relation to your data, business processes, software, equipment or network; or
  - (iii) any third-party software or services, including any that integrate with the Deliverables, unless such functionality is expressly agreed to by us.

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## 5. Products

### 5.1 Application of clause

This clause 5 applies where we agree to provide Products to you.

### 5.2 Warranties & Risk

- (a) To the extent permitted by law:
  - (i) we do not warrant that the Products are fit for any purpose; and
  - (ii) we do not offer any warranties in respect of the Products, other than those offered by the relevant manufacturers.
- (b) You bear all risk, charges and freight from the time the Product is dispatched from our offices or from our supplier.

### 5.3 Delivery

- (a) We will arrange for the Product to be delivered to your address or another address specified by you (**Delivery Address**). We are not responsible for unloading the Product at the Delivery Address. We may deliver the Product in instalments and these conditions apply to the delivery of each instalment.
- (b) You are responsible for ensuring that the Delivery Address is correct. If the Delivery Address is unattended or if we cannot complete delivery due to circumstances beyond our control, then we may at our sole discretion store the Product at your risk and expense or take such other steps as we consider appropriate, including without limitation delivering the Product to other premises you occupy (which is then deemed the Delivery Address under this Agreement);

- (c) You will be deemed to have accepted the Product upon delivery unless you otherwise notify us within 2 Business Days. Our records are prima facie evidence of delivery.
- (d) We are not responsible for any delays, frustrations, or interruptions to the delivery of the products caused by the delays, action or inaction of any third party (including any Unforeseen Event), and we are not liable in any way for any loss of trade or profit occurring to you if delivery of the Product is delayed, frustrated, or interrupted.
- (e) We may, at our discretion delay ordering Product from our suppliers, or delay shipment or delivery to you, until we have received payment for the Product in full.

#### **5.4 Product release and indemnity**

You agree to release and hold harmless us and our Representatives against any Claim arising from or in relation to:

- (a) any loss or damage to persons or property (including data) caused by the inability to use the Product, or by use of the Product by you or anyone whom you allow to access the Product;
- (b) your acts or omissions, and those of your agents, contractors and employees, in connection with the Product;
- (c) any acts or omissions of anyone whom you allow to access the Product, whether intentionally or unintentionally; and
- (d) any failure of you or your Representatives to comply with any policy or reasonable direction in connection with the Product;

whether directly or indirectly arising in connection with the Product.

#### **5.5 Retention of Title**

- (a) All Products we supply to you shall remain our sole and absolute property as legal and beneficial owner until you have paid us the agreed price for such Products in full.
- (b) Until title in the Products passes to you in accordance with clause 5.5(a) above:
  - (i) you must hold the Products on a fiduciary basis as bailee for us;
  - (ii) you must not, without our prior written consent:
    - A. assign, sub-let, charge, mortgage, pledge or create any form of Security Interest over, or otherwise deal with the Products in any way;
    - B. alter, modify, tamper with, damage or repair the Products; or
    - C. deface, remove, vary or erase any identifying marks, plate, number, notices or safety information, on the Products;
  - (iii) you must keep the Products in their own exclusive possession, in a safe and secure location, separately from the property of any other person and in a manner which leaves them readily identifiable as our Products;
  - (iv) you shall be responsible for any loss or damage to the Products caused following delivery of the Products to you and must insure the Products for their full value. You must provide us evidence of insurance on request; and
  - (v) if you sell the Products or use them to create a product which prevents the Products being identifiable to us, you are taken to hold the proceeds of sale of

the Products or any product containing them on trust for us and account to us for those proceeds.

## 5.6 PPSR

In order to secure your obligations under this Agreement, including any obligation to pay any amount to us, you:

- (a) acknowledges that this Agreement constitutes a Security Agreement for the purposes of the PPS Act;
- (b) grant to us a Security Interest in respect of all Products sold, supplied, leased, bailed or otherwise provided or made available to you by us and any proceeds thereof;
- (c) consent to us perfecting such Security Interest by registration on the PPSR, including as a Purchase Money Security Interest;
- (d) undertake to do all things reasonably necessary or required by us to assist us in perfecting the registration of the Security Interest on the PPSR; and
- (e) waive, to the extent permitted by the PPS Act, its right to receive any notice of a verification statement or any other notice us would otherwise be required to give under the PPS Act.

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## 6. Telecommunication Services

### 6.1 Provision of Telecommunication Services

This clause **Error! Reference source not found.** applies if we have agreed to provide you with Telecommunication Services.

### 6.2 Subscription Period

- (a) You have requested, and we have agreed to provide, Telecommunication Services for the period specified in this Agreement, or otherwise agreed between us in writing (**Subscription Period**).
- (b) Unless you request in writing otherwise, the Telecommunication Services will automatically renew at the end of the Subscription Period for an additional Subscription Period.

### 6.3 Our obligations

Subject to you complying with your obligations under this Agreement, for the Subscription Period, we will endeavour to:

- (a) provide and maintain the Telecommunication Services, to the extent that we have control over the Telecommunication Services and the Network;
- (b) notify you of any potential disruptions to the Network that we are aware of.

### 6.4 The Network

- (a) You acknowledge that:
  - (i) the Network is operated and owned by the Telecommunication Provider, who is not controlled by us; and
  - (ii) from time to time, the Telecommunication Provider may vary, modify or change the Network at its discretion. While we will endeavour to contact you where such changes occur, we accept no responsibility for any such changes.

- (b) We have permission from the Telecommunication Provider to sell the Telecommunication Services to you. However:
  - (i) we do not hold any licences for operating a carriage service under the *Telecommunications Act 1997* (Cth) (**Telecommunications Act**), or any other related legislation;
  - (ii) we will not be responsible for the Telecommunication Provider's compliance with any warrants, notices or surveillance instruments under law, including the Telecommunications Act, and you release and indemnify us for any Claim involving the same; and
  - (iii) we are not responsible for the Telecommunication Provider's compliance with any applicable laws.

## 6.5 No Guarantee or Warranty

- (a) To the extent permitted by law, we do not guarantee or warrant the level or quality of a Telecommunication Service.
- (b) You acknowledge and agree that we do not exercise any control over, authorise, or make any warranty regarding:
  - (i) the availability, response times or other characteristics of a Telecommunication Service, except as set out in this Agreement or any related agreements between us;
  - (ii) the accuracy or completeness of any content which you or your Representatives may use, obtain, access or transmit through the Telecommunication Services, including any data which we or the Telecommunication Provider may cache as part of the Telecommunication Services;
  - (iii) the consequences of you or your Representatives using, accessing or transmitting any content using Telecommunication Services; or
  - (iv) any charges which a third party may impose on you in connection with use of the Telecommunication Services by you or your Representatives.

## 6.6 Connections

- (a) Some Telecommunication Services require a request for activation by means of a written request of activation form must be submitted prior to any activation being completed.
- (b) We exclude any Claims you may suffer or incur to the extent that they were caused by you failing to activate a Telecommunication Service.
- (c) Telecommunication Services may not be available in all locations and are contingent upon Network availability.

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## 7. Fees and Payments

### 7.1 Fees

- (a) Unless otherwise agreed in writing, we will invoice, and you must pay the Fees for Services monthly in advance.
- (b) In addition, we will issue invoices separately for the following Fees where applicable:
  - (i) Out-of-Scope Services;

- (ii) Development Services, which will be billed on an hourly basis at our current rates;
  - (iii) the price of any Product ordered, which must be paid in full before it is ordered from our suppliers;
  - (iv) any pre-approved expenses for travel time at current daily rates if we are required to travel to a site more than 15 km from our offices; and
  - (v) any pre-approved expenses if we are required to travel to a site more than 100 km from our offices, including travel time at current daily rates, and all travel expenses including flights, accommodation and meals at our current daily rates
- (c) We may vary the Fees, including the Out-of-Scope Fees, at any time by giving you at least 30 days' notice in writing. Any change will apply only to Services requested and performed or Products ordered after the effective date of the change.

## 7.2 Licencing Fees

- (a) If specified or otherwise agreed, you are also responsible for paying Licencing Fees for use of third-party software, hardware, networks and platforms.
- (b) You acknowledge and agree that:
  - (i) the Licencing Fees are set by third parties, and are subject to change by the relevant vendor; and
  - (ii) if this Agreement is terminated by any reason other than our default or election, you remain liable for Licencing Fees for the remainder of the Term.

## 7.3 Payments

- (a) Unless otherwise stated, each tax invoice must be paid within 14 days from the date of the tax invoice.
- (b) Payment must be made by direct debit to our nominated account unless we agree otherwise.
- (c) All amounts under this Agreement must be paid in full, without set-off or deduction.
- (d) You are responsible for and must reimburse us for any transaction, processing, dishonour or charge-back fees issued by a financial institution or payment gateway in the course of making payment.

## 7.4 Failure to Pay

If you fail to pay any amount under this Agreement by the due date for payment, we may (without limiting our other rights) immediately do any or all of the following, without any liability, until all overdue fees are paid:

- (a) charge you interest on the overdue amount at a rate of interest per annum equal to the standard contract default rate published by the Queensland Law Society from time to time;
- (b) to immediately suspend delivery of Services or Products under this Agreement, or any other agreement between you and us;
- (c) terminate this Agreement without any obligation to refund you any money in respect of the cancellation, even if the contractual term of this Agreement has not expired;

- (d) initiate proceedings against you to recover the overdue amount (despite any dispute resolution clause in this Agreement); and
- (e) recover all costs to recover overdue amounts, including but not limited to legal costs and outlays on a full indemnity basis.

## 7.5 GST

- (a) In this clause 7.5, **adjustment note**, **GST**, **tax invoice** and **taxable supply** have the meaning given to them in the GST Law.
- (b) For each taxable supply under or in connection with this Agreement:
  - (i) we will be entitled to charge you for any GST payable by us in respect of the taxable supply;
  - (ii) you must pay us the amount of the GST at the same time as the relevant charge applicable to the supply becomes payable under this Agreement; and
  - (iii) we must provide a valid tax invoice or adjustment note to you in respect of the taxable supply.
- (c) The price of all Services is exclusive of GST unless expressly stated to be inclusive of GST.

## 7.6 Duties

You are responsible for paying all government charges, or duties of any kind incurred in or in connection with this Agreement. Such charges include without limitation all stamp duties, financial institution duties, and any other charges or duties of a like kind.

## 7.7 Our Set-off rights

We may, after demanding payment of any overdue amount in accordance with clause 7.4, apply any payment you make against: our costs and disbursements in recovering the amount due, any interest accrued, or the amount overdue.

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## 8. Confidentiality

- (a) Each party acknowledges that in the course of performing its obligations under this Agreement, it may receive Confidential Information which is proprietary and confidential to the other party and any of that party's Representatives.
- (b) Each party agrees not to use or disclose Confidential Information of the other party and any of that party's Representatives.
- (c) Despite clauses 8(a) and 8(b) above, either party may use or disclose Confidential Information strictly to the extent necessary to:
  - (i) carry out its obligations under this Agreement;
  - (ii) comply with any law, binding directive of a regulator or a court order;
  - (iii) comply with the listing rules of any stock exchange on which its securities are listed; or
  - (iv) obtain professional advice where the advisors agree to be bound by the same obligation of confidentiality.
- (d) At the request of a party, the other party must return all Confidential Information received and must not retain any copies of, or other reproductions or extracts of, the Confidential

Information, except as it may retain in accordance with prudent business practices. Any retained material will remain subject to the provisions of this Agreement without any time limit.

- (e) You acknowledge and agree that we do not make any representation or warranty, express or implied, as to the accuracy, correctness or completeness of Confidential Information. You agree that neither we nor any of our Representatives have liability to you resulting from the use of Confidential Information by you or your Representatives.

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## **9. Intellectual Property**

### **9.1 Client Materials**

- (a) You (or where applicable, any third-party owner) retain ownership of all relevant Intellectual Property Rights in the Client Materials and such rights are not assigned or transferred to us.
- (b) You grant us and our Representatives an irrevocable, royalty-free, perpetual licence to use, copy, modify and adapt any Intellectual Property Rights in the Client Materials as is reasonably necessary for us to provide the Services or Deliverables.

### **9.2 Pre-existing IP**

Unless otherwise agreed, each party retains ownership of all Intellectual Property Rights in material owned or created by that party independently of this Agreement (even if incorporated into a Deliverable), and no such Intellectual Property Rights are assigned or transferred by way of this Agreement.

### **9.3 Third party material**

We may incorporate third-party materials as necessary to provide the Services or Deliverables. Use of third-party materials may be subject to creative commons or open-source licensing terms, or such third-party licensing terms as notified by us to you.

### **9.4 Our IP**

- (a) All Intellectual Property Rights in:
  - (i) the Deliverables and any other material developed by us under this Agreement; and
  - (ii) any improvements, modifications or enhancements to the Deliverables, and any other material developed by us in the course of providing the Services,will vest in and are owned by us upon creation, even if based on your new feature request or user feedback.
- (b) subject to you complying in full with the terms of this Agreement, we grant you a limited non-exclusive, revocable, royalty-free licence to use our Intellectual Property Rights to the extent that they are incorporated as part of the Services and Deliverables under this Agreement.
- (c) Without limiting your rights at law, and subject to any conflicting rights granted by this Agreement, you must not, without our written consent:
  - (i) sell, sublicense, rent, lease, lend, modify, alter, translate, reproduce, transmit, distribute, publicly display, publicly perform, publish, adapt, or edit any part of the Deliverables;

- (ii) reverse engineer, decompile or disassemble any part of the Deliverables, or disclose the algorithmic nature or describe any part of the source code or inner workings of any part of the Deliverables;
- (iii) combine or incorporate the Deliverables in any program or system without our consent in writing;
- (iv) copy the Deliverables, in whole or in part, except to the extent you reasonably require for your internal needs and for business continuity and data security;
- (v) use the Deliverables in any way which is not in accordance with the specifications and this Agreement;
- (vi) use the Deliverables for any unlawful purpose; or
- (vii) authorise any other party to do any of the acts in clauses 9.4(c)(i) to 9.4(c)(vi).

## 9.5 Publicity Rights

For the Term of this Agreement, you grant us, and our contractors and agents, a non-exclusive, royalty-free licence to:

- (a) use your logo, trade marks and other branding rights to advertise or promote the Services and Products;
- (b) publish general case studies describing your use of the Services and Products in general terms for promotional purposes; and
- (c) display, link to, or promote your business as part of our portfolio.

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## 10. Indemnity

### 10.1 Scope of Indemnity

You agree to release, indemnify, defend, and hold harmless us and our Representatives against any Claim arising from or in relation to:

- (a) misuse of the Services, Products or Deliverables by you or your Representatives;
- (b) any acts or omissions of anyone who you allow to access the Services, Products or Deliverables from time to time;
- (c) any loss or damage to persons or property (including data) caused by the Client Materials;
- (d) your failure to follow our recommendations, or industry best practice;
- (e) any negligent or unlawful act or omission by you or your Representatives;
- (f) your infringement of any third-party rights including Intellectual Property Rights;
- (g) any breach of your warranties under this Agreement;
- (h) any downtime, interruption, or software failure caused by third parties or an Unforeseen Event;
- (i) data loss;
- (j) third-party materials or software incorporated in any Deliverables;



- (k) us being required under Privacy Law to correct any data, respond to any complaint, or address any other matter raised by a person;
- (l) any fraudulent, misleading or false information provided by you or your Representatives; and
- (m) any reasonable legal expenses we incur as a result of your breach of this Agreement, including expenses for enforcing payment, on a solicitor and own-client basis.

## 10.2 Conditions of indemnity

- (a) We may make a claim under indemnities in this Agreement in relation to a cost before having incurred the cost, or before making a payment in relation to the cost.
- (b) The indemnities in this Agreement shall be in addition to any damages for breach of contract to which we may be entitled. Nothing in the indemnities in this Agreement will be construed so as to prevent us from claiming damages in relation to your breach of any term of this Agreement.
- (c) Each indemnity in this Agreement is a continuing obligation, separate and independent from the other obligations of the parties and survives termination of this Agreement for whatever reason.

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## 11. Limitation of Liability

- (a) You acknowledge and agree that you are acquiring the Services under this Agreement for commercial purposes and not for domestic, personal or household use.
- (b) If you are a consumer within the meaning of the *Competition and Consumer Act 2010 (Cth)*, there are certain rights and guarantees which cannot by law be excluded (**Non-Excludable Conditions**). This clause is subject to those Non-Excludable Conditions.
- (c) Subject to the application of any applicable Non-Excludable Conditions and to the maximum extent permitted by law, we:
  - (i) exclude from this Agreement all guarantees, conditions and warranties that might but for this clause be implied into this Agreement;
  - (ii) exclude all liability to you for any Claims suffered or incurred directly or indirectly by you in connection with this Agreement, including use of the Services, whether that liability arises in contract, tort or under statute; and
  - (iii) will not, under any circumstances, be liable to you for any loss of revenue, loss of profits, loss of anticipated savings or business, pure economic loss, loss of data, loss of value of equipment (other than the cost of repair), loss of opportunity or expectation loss, and any other form of consequential, special, indirect, punitive or exemplary loss or damages.
- (d) If our liability under this Agreement cannot be lawfully excluded, to the maximum extent permitted by law, our liability for breach of any Non-Excludable Conditions is limited:
  - (i) in the case of services, to (at our option) the supplying of the services again; or the payment of the cost of having the services supplied again; and
  - (ii) in the case of goods, to (at our option) the replacement of the goods or the supply of equivalent goods; the repair of the goods; the payment of the cost of replacing the goods or of acquiring equivalent goods; or the payment of the cost of having the goods repaired.
- (e) Despite any other provision to the contrary, our total liability and the total liability of our Representatives in connection with this Agreement whether under contract, tort, statute

or otherwise will not in any circumstances exceed an amount equal to the total fees received by us from you under this Agreement.

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## 12. Default and Termination

### 12.1 Default

You will be in default if you:

- (a) fail to pay any amount to us by its due date;
- (b) fail to provide us with clear and timely instructions;
- (c) provide us with information which you know or have reasonable grounds to suspect is false, incomplete or misleading;
- (d) are insolvent under the definition in the *Corporations Act 2001* (Cth), in liquidation or provisional liquidation, under administration or external control, become bankrupt, fail to comply with a statutory demand, cease or suspend a material part of your business, or are affected by any analogous event,
- (e) breach any provision of this Agreement which is incapable of remedy; or
- (f) breach any provision of this Agreement which is capable of remedy and fail to remedy that breach within 10 Business Days.

### 12.2 Suspension due to default

We may suspend delivery of Services or Products if you are in default. Suspension does not affect your liability to make payment to us.

### 12.3 Termination due to Default

We may terminate this Agreement immediately by written notice to you if you:

- (a) are in material breach of this Agreement; or
- (b) are in default for more than 10 Business Days.

### 12.4 Termination for convenience

We may terminate this Agreement for any reason by giving you at least 60 days' notice in writing.

### 12.5 Termination does not affect obligation to pay

Termination of this Agreement does not affect your obligation to pay any outstanding amounts or other amounts in relation to the Services and Products.

### 12.6 Effects of Termination

On termination of this Agreement, you must immediately:

- (a) pay all of our outstanding invoices whether or not due;
- (b) cease all activities related to the Services, Products and Deliverables;
- (c) upon request, destroy all documents and other materials (including all copies) in your possession relating to the Services, Products and Deliverables;
- (d) return all Products which have not been paid for in full or permit us to collect these Products from you. For this purpose, you grant us and our Representatives a perpetual,

irrevocable licence to enter any property owned or occupied by you or your Representatives for the purpose of recovering such Products, and you shall release, indemnify and hold us harmless against any Claim arising from such entry; and

- (e) do any further things as we may reasonably require to protect our right, title and interest in the Services, Products and Deliverables.

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### 13. Non-solicitation

- (a) You agree that we are involved in a highly strategic and competitive business. You further acknowledge that you would gain substantial benefit and we would be deprived of such benefit, if you were to directly hire any personnel employed by us. Accordingly, during the term of this Agreement and for 3 years thereafter, you must not solicit, entice, hire or interfere with:
  - (i) any of our employees or contractors; or
  - (ii) any of our customers, or cause them to decrease their dealings with us,either directly or through an intermediary entity or entities.
- (b) If you breach clause 13(a)(i), you must pay us an amount equal to 75% of the employee's or contractor's new annual remuneration package. The parties agree that this is not a penalty but represents a reasonable estimate of fair compensation for the costs to us of recruiting, hiring and training a suitable replacement for the employee or contractor.
- (c) If the obligations in this clause are determined to be void as unreasonable for protection of legitimate commercial interests but would be valid if part of the wording was deleted, or the period or percentage was reduced, the obligations will apply with the modifications necessary to make them effective.

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### 14. Dispute Resolution

- (a) The parties agree to deal with any dispute between them (**dispute**) in accordance with this clause 14 before commencing any court proceedings against the other.
- (b) Representatives of the parties must meet and in good faith attempt to resolve the dispute.
- (c) If the dispute is not resolved within 30 days, either party may refer the matter to mediation with a mediator appointed by agreement or failing such agreement a mediator as appointed by the President of the Resolution Institute. The parties will share the costs of the mediator equally.
- (d) This clause 14 does not prevent either party from seeking urgent injunctive or similar urgent relief from a court, or us seeking to recover any outstanding amounts you owe us.

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### 15. Unforeseen Events

If a party is affected by an Unforeseen Event, they must immediately notify the other party of the circumstances. The parties' obligations under this Agreement are suspended for the duration of and to the extent that they are affected by the Unforeseen Event. However, either party may end this Agreement if the Unforeseen Event continues for more than 60 days.

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### 16. Privacy

- (a) You authorise us to collect, retain, record, use and disclose commercial and consumer information about you, in accordance with Privacy Law, to persons and/or legal entities,

including a solicitor or any other professional consultant engaged by us, a debt collector, credit reporting agency and/or any other individual or organisation which maintains credit references and/or default listings.

- (b) We may give information about you to a credit reporting agency for the purposes of obtaining consumer and commercial credit reports and/or lodging consumer and commercial defaults on your credit file. This information may be given before, during or after the provision of credit to you and will be in accordance with Privacy Law.
- (c) Where applicable, you authorise us to collect, retain, record, use and disclose your Personal Information to the extent required to provide the Services. All Personal Information will be handled in accordance with our privacy policy.

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## 17. Special Conditions

- (a) Special Conditions operate as terms in addition to these standard terms.
- (b) If there is any inconsistency between any Special Condition and any other term contained in this Agreement, the Special Condition prevails over any inconsistent term to the extent of that inconsistency.

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## 18. Guarantee and Indemnity

### 18.1 Guarantee

- (a) The Guarantor guarantees:
  - (i) payment to the Service Provider of all fees charged for the supply of Services or Products to the Customer from time to time, without any deduction or setoff whatsoever;
  - (ii) payment of any other amounts currently owed or which may be payable in the future by the Customer to the Service Provider; and
  - (iii) the performance of the obligations of the Customer.
- (b) If the Customer fails to pay any amount under this Agreement, the Guarantor will fulfil the obligations of the Customer by paying the outstanding monies to the Service Provider on demand.

### 18.2 Indemnity

The Guarantors release, indemnify and hold harmless the Service Provider against all Claims which the Service Provider incurs or suffers as a result of any default by the Customer.

### 18.3 Survival of Guarantee and Indemnity

The guarantee and indemnity in this Agreement:

- (a) will survive termination of this Agreement;
- (b) will be a continuing obligation and constitute a separate and independent obligation for parties giving the guarantee and indemnity, from its obligations under this Agreement;
- (c) is not capable of being revoked by the Guarantor until the Customer has repaid every amount due under this Agreement; and
- (d) will not be affected or discharged by any circumstances whatsoever, which might operate to release or otherwise exonerate the Guarantor from its obligations.

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## 19. General

### 19.1 Communications

- (a) All notices and communications must be in writing, and may be sent by mail, hand delivery or by email. However, if communications are sent by means other than email, a copy must also be sent by email.
- (b) Notices must be sent to the address notified by that party, or that party's last known address.
- (c) A communication by email will be taken to have been received by the addressee at the earlier of the time stated in a read receipt sent by the recipient's computer or when the message has been delivered to the email address of the addressee.
- (d) A communication that is received after 5pm on a Business Day, or on a non-Business Day, shall be deemed to be received at 9am on the next Business Day.

### 19.2 Electronic communications and counterparts

- (a) A party may sign this Agreement, and any variations to it, by electronic means where permitted by law. Each other party consents to that party signing by electronic means.
- (b) The parties agree that if any party signs this Agreement under clause 19.2(a), then:
  - (i) an electronic form of this Agreement with that party's electronic signature(s) appearing will constitute an executed counterpart; and
  - (ii) a print-out of this Agreement with that party's electronic signature(s) appearing will also constitute an executed counterpart.

### 19.3 Inconsistency with other documents

If this Agreement is inconsistent with any other document between the parties, this Agreement prevails to the extent of the inconsistency.

### 19.4 Enduring clauses

The parties' rights and obligations under clauses 3.4, 3.7, 4.3, 4.6, 5.4, 9, 10, 13, 14 and 18 will survive the termination of this Agreement for whatever reason.

### 19.5 Severability

Any clause of this Agreement, which is invalid or unenforceable, is ineffective to the extent of the invalidity or unenforceability without affecting the remaining clauses of this Agreement.

### 19.6 Assignment

- (a) You may not assign your rights or obligations under this Agreement without our prior written consent.
- (b) We may assign our rights or obligations in this agreement without your prior written consent.

### 19.7 Amendment

Except to the extent permitted under clause 7.1(c), this Agreement may only be amended by both parties agreeing in writing.



**19.8 No waiver except in writing**

No part of this Agreement will be deemed waived, and no breach excused unless such waiver or consent is provided expressly and in writing.

**19.9 Giving effect to this document**

Each party must do anything (including execute any document) and must ensure that its employees and agents do anything (including execute any document), that the other party may reasonably require to give full effect to this document.

**19.10 Reliance**

Neither party has entered into any contract under this Agreement in reliance on or as a result of any representation, promise, statement, conduct or inducement by the other otherwise than as set out in this Agreement.

**19.11 Relationship between the parties**

The relationship of the parties does not form a joint venture, partnership or agency, or create any form of employment relationship.

**19.12 Governing law**

The laws of Queensland, Australia govern this Agreement. The parties submit to the non-exclusive jurisdiction of courts exercising jurisdiction there.