

# IT Master Services Agreement

## Terms

### 1 Background

- A. The Company is involved in the provision of IT services and deliverables.
- B. You want to obtain the Deliverables from the Company.
- C. The Company has agreed to provide to you with the Deliverables in accordance with the terms of this Agreement.

### 2 Term and acceptance

#### 2.1 Agreement Term

This Agreement will commence on the Agreement Commencement Date and will end on the Agreement End Date (**Agreement Term**).

#### 2.2 Acceptance

You accept this Agreement by the earlier of:

- (a) signing and returning this Agreement to the Company, including by email or any electronic executions platform acceptable to the Company; or
- (b) confirming by email that you accept this Agreement; or
- (c) confirming that you accept this Agreement via the platforms or applications through which the Company provides this Agreement to you, including the Company's urls, websites and mobile apps; or
- (d) creating an Account; or
- (e) accessing or using the Deliverables; or
- (f) instructing the Company (whether orally or in writing) to proceed with the provision of the Deliverables; or
- (g) making part or full payment of the Fees.

#### 2.3 Authority

By accepting this Agreement, you warrant:

- (a) to the Company that you have reviewed this Agreement, including if applicable, the Company's Website Terms of Use and Privacy Policy at <https://www.dailye.com.au/privacy-policy/>, available on the Site, and you understand them and will use the Deliverables in accordance with them;
- (b) to the Company that you have the legal capacity to enter into a legally binding agreement or if you are under 18 years of age, you have your parent's or legal guardian's permission to access and use the Deliverables and they have agreed to this Agreement on your behalf;
- (c) to the Company that you have the authority to act on behalf of any person or entity for whom you are using the Deliverables and you are deemed to have agreed to this Agreement on behalf of any entity for whom you use the Deliverables; and
- (d) to the Company that you have all hardware, software and services which are necessary to access and use the Deliverables.

#### 2.4 When the Company will start providing the Deliverables

The Company will commence the provision of the Deliverables within a reasonable time after the later of:

- (a) the Agreement Commencement Date; or
- (b) receipt of any relevant Order Form; or
- (c) receipt of payment of the Fees in full.

### 3 Standing offer using Order Forms

#### 3.1 Standing Offer

This Agreement constitutes a "standing offer" under which, during the Term, you may engage the Company to provide the Deliverables under separate Order Forms. Each Order Form is subject to and will be governed by this Agreement and any other conditions agreed to by the Parties in writing.

#### 3.2 Order Form Term

Each Order Form commences on the Order Form Start Date and ends on the Order Form End Date (**Order Form Term**). Any renewal process for an Order Form Term is set out in the Order Form.

#### 3.3 Online

The Company may issue Order Forms online, over the phone or by any other process which the Company may advise to you, from time to time.

#### 3.4 Products

Where an Order Form is for the provision of Products, the Order Form must specify the following information:

- (a) the Products to be supplied and the volume of Products;
- (b) the Party responsible for delivery or collection of the Products;
- (c) if you are to collect the Products from the Company, the relevant Collection Time and Collection Location (if any); and
- (d) if the Company is to deliver the Products to you, the relevant Delivery Time and Delivery Location (if any).

#### 3.5 Agreed Order Form

The Company will only be required to comply with an Order Form if the Company has agreed to the terms of the relevant Order Form in writing.

#### 3.6 Priority

This Agreement is made up of the following documents (in order of priority):

- (a) this document; and
- (b) any Order Form;
- (c) any Schedule; and
- (d) any annexure.

### 4 Deliverables

#### 4.1 Provision of Deliverables

In consideration of your payment of the Fees, the Company will provide the Deliverables in accordance with this Agreement, whether ourselves or through the Company's Personnel.

#### 4.2 Time estimates

If this Agreement expresses a time within which the Deliverables are to be provided, you agree that such time is an estimate only and creates no obligation on the Company to provide the Deliverables by that time.

#### 4.3 Amendment

You agree that the Company may amend the Deliverables or the Fees at any time by providing written notice to you. If you do not agree to any amendment made to the Deliverables or Fees, you may terminate this Agreement in accordance with **clause 25.1** (Termination for convenience).

## 5 Setup Service

The Company will provide the Setup Service.

## 6 Development Services

### 6.1 Development

If you require any changes to the scope, functionality or nature of the Deliverables or the elements of the Software used to provide the Deliverables or any bespoke customisations to the Deliverables, you must notify the Company of the changes you require.

### 6.2 Scoping

Following notification, at the Company's discretion, the Company may provide you with written notice in the form of a statement of work covering:

- (a) the changes required to the Deliverables and the development services required in respect of such changes (**Development Services**); and
- (b) the fees required for the Company to undertake such Development Services (**Development Fee**).

### 6.3 Statement of Work for the Development Services

If you agree to the changes to the Deliverables, the Development Services and the Development Fees then, subject to the Parties signing a statement of work and this Agreement, the Company will provide the Development Services to you in consideration for payment of the Development Fee.

## 7 Support Services

### 7.1 Support

During the Order Form Term, the Company will provide you with technical support services as set out in the Order Form.

## 8 Delivery or collection

### 8.1 Delivery

If this Agreement states that:

- (a) the Company is responsible for delivering the Products to you, the Company will use reasonable endeavours to deliver the Products to the Delivery Location by the Delivery Time; or
- (b) you are responsible for collecting the Products from the Company, the Company will use reasonable endeavours to make available the Products at the Collection Location by the Collection Time.

### 8.2 Your collection

If this Agreement states that you are responsible for collecting the Products from the Collection Location, you will:

- (a) collect the Products from the Collection Location and by the Collection Time; and
- (b) comply with any policies and procedures which apply at the Collection Location from which you collect the Products.

### 8.3 Delivery costs

If this Agreement states that the Company is responsible for delivering the Products to the Delivery Location, you agree to pay for all Delivery Costs.

## 9 Variations

### 9.1 Variation

Subject to **clause 9.2** (Obligations), you may request a variation or change to the Deliverables, including the timing for the provision of the Deliverables, by providing written notice (including by email) to the Company, with details of the variation or change (**Variation Request**).

### 9.2 Obligations

The Company will not be obliged to comply with a Variation Request unless the Company:

- (a) accepts the Variation Request, including any variation to the Fees to affect the Variation Request (**Fees Variation**), in writing; and
- (b) the Fees have been adjusted to reflect the Fees Variation.

### 9.3 Amendment

If the Company considers that any instruction or direction from you constitutes a variation, then the Company will not be obliged to comply with such instruction or direction unless a Variation Request has been issued in accordance with **clause 9.1** (Variation).

### 9.4 Change in Deliverables

Where the Deliverables are varied, changed or the costs of providing the Deliverables increases (**Variation Event**) and the cause of that Variation Event relates to, or is connected with, an External Circumstances Event, you agree to pay the Company's reasonable additional costs and expenses that the Company may suffer or incur as a result of the Variation Event, as a debt due and immediately payable.

## 10 Your obligations

You agree to:

- (a) comply with this Agreement, the Company's reasonable requests or requirements, and all applicable Laws; and
- (b) provide all assistance, information, documentation, access, facilities, authorities, consents, licences and permissions reasonably necessary to enable the Company to comply with its obligations under this Agreement or at Law.

## 11 Acceptance Testing

### 11.1 Acceptance testing

If an Order Form specifies that certain elements of the Deliverables are subject to acceptance testing by you:

- (a) the Company must give you notice when the Deliverables are ready for testing;
- (b) the parties must decide on a suitable time and place for testing;
- (c) you must:
  - (i) at your own cost, prepare all relevant facilities and equipment for testing;
  - (ii) at your own cost, perform the tests to determine if the Deliverables meet the specifications and requirements set out in the relevant Order Form; and
  - (iii) give the Company notice of the results of those tests.

### 11.2 Failure to pass acceptance tests

If you reasonably believe that all or some of the Deliverables do not meet the specifications and requirements set out in the relevant Order Form, you must clearly state in the notice given under **clause 11.1(c)(iii)** how the Deliverables do not meet those specifications and requirements.

### 11.3 Rectifying Deliverables that fail acceptance tests

If the Company agrees with your determination in **clause 11.2** (Failure to pass acceptance tests), the Company must, within 10 Business Days from the date of the notice under **clause 11.1(c)(iii)** or any other time

agreed between the parties in writing:

- (a) ensure that the Deliverables have been corrected; and
- (b) give you notice when the Deliverables have been corrected; and
- (c) allow you to repeat acceptance testing in the manner set out in **clause 11.1** (Acceptance testing).

#### **11.4 Repeat of testing and rectifying procedure**

The parties must repeat the procedures in **clause 11.1** (Acceptance testing) and **clause 11.3** (Rectifying Deliverables that fail acceptance tests) until the Deliverables comply with the specifications and requirements set out in the relevant Order Form.

#### **11.5 Acceptance**

Deliverables are taken to have been accepted by you if:

- (a) the Company does not receive notice from you within 10 Business Days after any acceptance testing (or any repeat acceptance testing) of those Deliverables;
- (b) you do not conduct acceptance testing within 2 weeks after the date on which those Deliverables are ready for testing; or
- (c) you make use of any Deliverables (other than performing acceptance testing as set out in this **clause 11** (Acceptance Testing)).

### **12 Payment**

#### **12.1 Payment**

You agree to pay the Company:

- (a) the Fees;
- (b) all Delivery Costs;
- (c) all Expenses; and
- (d) any other amount payable to the Company under this Agreement,

in accordance with the Payment Terms.

#### **12.2 Credit limit**

The Company may impose a credit limit for you and, if you exceed such a credit limit, the Company may:

- (a) require you to pay in advance for any Deliverables; or
- (b) suspend the supply of the Deliverables or any part of the Deliverables until your account is brought within such credit limit.

#### **12.3 Late payments**

If any payment has not been made in accordance with the Payment Terms, the Company may (at the Company's absolute discretion):

- (a) immediately cease providing the Deliverables, and recover, as a debt due and immediately payable from you, the Company's additional costs of doing so; and
- (b) charge interest at a rate equal to the Reserve Bank of Australia's cash rate, from time to time, plus 5% per annum, calculated daily and compounding monthly, on any such amounts unpaid after the due date for payment in accordance with the Payment Terms.

#### **12.4 Upfront payments**

You will not be entitled to any part of the Deliverables until all amounts under **clause 12.1** (Payment) have been paid in full.

#### **12.5 Direct Debit**

Unless specifically stated in the Order Form, all payments under this Agreement must be paid via direct

debit into the Company's nominated bank account (**Direct Debit Option**). A surcharge of 2% will be added to the total amount of the Fees payable, when not using the Direct Debit Option.

#### **12.6 Review of Fees**

Unless otherwise agreement between the Parties, the Fees will be reviewed and where necessary adjusted on each anniversary of the Agreement Commencement Date to reflect the amount of any increase of the Consumer Price Index (Australia) in the previous 12 month period.

### **13 Premises**

If required to provide the Deliverables, you agree to provide the Company and the Company's Personnel with unfettered access to the Premises (and the facilities at the Premises), and any other premises reasonably necessary, free from harm or risk to health or safety:

- (a) at the times and on the dates requested by the Company; and/or
- (b) to enable the Company to comply with the Company's obligations under this Agreement or at Law,

and you agree to pay the Company any additional costs that the Company may suffer or incur if you fail to do so.

### **14 Title and Risk**

Title in the Products will pass to you on the date that you pay the Fees in full in accordance with this Agreement. Risk in the Products will pass to you when the Company has delivered the Products to the Delivery Location.

### **15 Contractual lien and security interest**

#### **15.1 Lien**

You agree that the Company holds a general lien over any Products owned by the Company that are in your possession, for the satisfactory performance of your obligations under this Agreement.

#### **15.2 Security interest**

You agree that this Agreement and your obligations under this Agreement create a registrable security interest in favour of the Company, and you consent to the security interest (and any other registrable interest created in connection with this Agreement) being registered on any relevant securities register (and you must do all things to enable the Company to do so).

### **16 Your Warranties**

You represent, warrant and agree that:

- (a) all information and documentation that you provide to the Company in connection with this Agreement is true, correct and complete;
- (b) you have not relied on any representations or warranties made by the Company in relation to the Deliverables (including as to whether the Deliverables are or will be fit or suitable for your particular purposes), unless expressly stipulated in this Agreement;
- (c) the Deliverables are provided to you solely for your benefit and you will not (or you will not attempt to) disclose, or provide access to, the Company's Deliverables to third parties without the Company's prior written consent;
- (d) any information, advice, material, work and services (including the Deliverables) provided by the

Company under this Agreement does not constitute legal, financial, merger, due diligence or risk management advice;

- (e) you will be responsible for the use of any part of the Deliverables, and you must ensure that no person uses any part of the Deliverables:
  - (i) to break any Law or infringe any person's rights (including Intellectual Property Rights);
  - (ii) to transmit, publish or communicate material that is defamatory, offensive, abusive, indecent, menacing or unwanted; or
  - (iii) in any way that damages, interferes with or interrupts the supply of the Deliverables;
- (f) you are not and have not been the subject of an Insolvency Event;
- (g) if applicable, you hold a valid ABN which has been advised to the Company; and
- (h) if applicable, you are registered for GST purposes.

## **17 Intellectual Property**

### **17.1 Pre-existing Intellectual Property**

As between the Parties:

- (a) the Company owns all Intellectual Property Rights in Our Materials; and
- (b) you own all Intellectual Property Rights in Your Materials, and
- (c) nothing in this Agreement constitutes a transfer or assignment of any Intellectual Property Rights in Our Materials or Your Materials.

### **17.2 New materials**

- (a) As between the Parties, ownership of all Intellectual Property Rights in any New Materials or Improvements will at all times vest, or remain vested, in the Company upon creation.
- (b) To the extent that ownership of such Intellectual Property Rights in any New Materials or Improvements do not automatically vest in the Company, you will do all acts necessary or desirable to assure the Company's title to such rights.

### **17.3 Licence**

The Company grants you a non-exclusive, revocable, worldwide, non-sublicensable and non-transferable right and licence, for the duration of the Term, to use Our Materials that the Company provides to you and the New Materials and Improvements, solely for the purposes for which they were developed and for your use and enjoyment of the Deliverables, as contemplated by this Agreement (**Licence**).

### **17.4 Moral rights**

If you or any of your Personnel have any Moral Rights in any material provided, used or prepared in connection with this Agreement, you agree to (and agree to ensure that your Personnel) consent to the Company's use or infringement of those Moral Rights.

### **17.5 Breach**

In the use of any Intellectual Property Rights in connection with this Agreement, you must not (and you must ensure that your Personnel do not) commit any Intellectual Property Breach.

### **17.6 Licence for on premises installation**

- (a) If you ordered a copy of the Software for download and installation on your premises as part of the Deliverables, the Company grants you (subject to this Agreement):

- (i) the right to install the Software on your own servers, during the Order Form Term; and
- (ii) the right to make 1 copy of the Software solely for back-up purposes,

**(On Premises Installation).**

- (b) You must pay the On Premises Installation Fees as set out in the Order Form.

### **17.7 Licence Restrictions**

You must not (and must ensure your users do not) access or use the Deliverables except as permitted by the Licence or this Agreement and you must not and must not permit any other person to:

- (a) use the Deliverables in any way which is in breach of any applicable Laws or which infringes any person's rights, including Intellectual Property rights;
- (b) use the Deliverables to transmit, publish or communicate material that is defamatory, offensive, abusive, indecent, menacing or unwanted;
- (c) use the Deliverables in any way that damages, interferes with or interrupts the supply of the Deliverables;
- (d) introduce malicious programs into the Company's hardware and software or Systems, including viruses, worms, trojan horses and e-mail bombs;
- (e) use the Deliverables to carry out security breaches or disruptions of a network. Security breaches include accessing data where you are not the intended recipient or logging into a server or account that you are not expressly authorised to access or corrupting any data (including network sniffing/monitoring, pinged floods, packet spoofing, denial of service and forged routing information for malicious purposes);
- (f) use any program/script/command, or send messages of any kind, with the intent to interfere with, or disable, any person's use of the Deliverables;
- (g) if applicable, send any form of harassment via email, or any other form of messaging, whether through language, frequency, or size of messages or use the Deliverables in breach of any person's privacy (such as by way of identity theft or "phishing"); or
- (h) use the Deliverables to circumvent user authentication or security of any of the Company's networks, accounts or hosts or those of the Company's members or suppliers.
- (i) copy, modify, adapt, translate, create a derivative work of, reverse engineer, reverse assemble, disassemble or decompile the Deliverables or any part of Deliverables or otherwise attempt to discover any part of the source code (if any) of the Deliverables;
- (j) use any unauthorised modified version of the Deliverables, including (without limitation) for the purpose of building similar or competitive Deliverables or for the purpose of obtaining unauthorised access to the Deliverables;
- (k) use the Deliverables in a manner that is contrary to any Laws or in violation of any Intellectual Property Rights or privacy rights;
- (l) publish, post, upload or otherwise transmit data that contains any viruses, trojan horses, worms, time bombs, corrupted files or other computer

programming routines that are intended to damage, detrimentally interfere with information or property of any person;

- (m) use or knowingly permit the use of any security testing tools in order to probe, scan or attempt to penetrate or ascertain the security of the Deliverables;
- (n) unless authorised under this Agreement, use the Deliverables in a web enabled form for the purposes of third party analysis or view via the internet or other external network access method;
- (o) rent the use of the Deliverables to any third parties;
- (p) gain revenue, profit or benefit from the use of any trial Deliverables;
- (q) take any action that may compromise or jeopardise the Company's Intellectual Property Rights in the Deliverables or otherwise;
- (r) remove or deface any confidentiality, copyright or other proprietary notice placed on the Deliverables or documentation;
- (s) make any representations or warranties to any third parties that could be construed as being representations or warranties from the Company in relation to the Deliverables or any other matter;
- (t) use the Deliverables in any way that involves service bureau use, outsourcing, renting, reselling, sublicensing, concurrent use of a single user login, or time-sharing of the Deliverables; or
- (u) do any other thing in relation to the Deliverables specifically prohibited by the Company in the documentation or otherwise communicated by the Company to you in writing as being prohibited.

#### **17.8 No rights**

Subject to **clause 17.3** (Licence), nothing in this Agreement grants to you, or any member of the your Personnel, any Intellectual Property Rights in respect of the Company's Intellectual Property Rights.

#### **17.9 Infringement**

You will provide the Company with immediate written notice if you become aware of any actual or threatened infringement of the Company's Intellectual Property Rights.

#### **17.10 Assistance**

You will provide the Company with all reasonable assistance in relation to preventing any actual or threatened infringement of the Company's Intellectual Property Rights.

#### **17.11 Value**

You acknowledge and agree:

- (a) the value of the Intellectual Property Rights is such that an award of damages or an account of profits might not be an adequate remedy for a breach of this **clause 17** (Intellectual Property); and
- (b) the Company may, without having to prove any actual damage, take any action or seek any remedy including but not limited to seeking an injunction in relation to any actual or threatened breach of this **clause 17** (Intellectual Property).

#### **17.12 Survival**

This **clause 17** (Intellectual Property) will survive termination or expiry of this Agreement.

### **18 Third Parties**

#### **18.1 Third Party Inputs**

You acknowledge and agree that:

- (a) the provision of the Deliverables may be contingent on, or impacted by, third parties, other customers' use of the Company's services, suppliers, other subcontractors (**Third Party Inputs**); and
- (b) despite anything to the contrary, to the maximum extent permitted by law, the Company will not be responsible, and will have no Liability, for any default or breach of this Agreement or law, if such default or breach was caused or contributed to by any Third Party Inputs.

#### **18.2 Interoperability with Third Party Inputs**

- (a) You acknowledge that the Deliverables include certain optional functionality that may interface or interoperate with third party software or services.
- (b) To the extent that you choose to use such functionality and they are not a part of the Deliverables, you are responsible for:
  - (i) the purchase of;
  - (ii) the requirements; and
  - (iii) the licensing obligations, related to the applicable third party software and services.
- (c) It is your responsibility to ensure these requirements are met in order for you to benefit from the specific functionality made available to you.

### **19 Insurance**

#### **19.1 Insurance**

Each party will effect and maintain:

- (a) public liability insurance in the amount of no less than \$5 million;
- (b) professional indemnity insurance in the amount of no less than \$1 million; and
- (c) workers compensation insurance in accordance with all Laws.

#### **19.2 Certificate of currency**

Each party will provide to the other party a certificate of currency for each insurance policy referred to in **clause 19** (Insurance) on request.

### **20 Privacy**

#### **20.1 Privacy:**

The Company agrees to comply with the legal requirements of the Australian Privacy Principles as set out in the Privacy Act 1988 (Cth) and any other applicable legislation or privacy guidelines.

#### **20.2 Email**

You agree that the Company is able to send electronic mail to you and receive electronic mail from you. You release the Company from any Liability you may have as a result of any unauthorised copying, recording, reading or interference with that document or information after transmission, for any delay or non-delivery of any document or information and for any damage caused to your system or any files by a transfer.

### **21 Confidential Information**

#### **21.1 Use**

Each Receiving Party agrees:

- (a) not to disclose the Confidential Information of the Disclosing Party to any third party;
- (b) to use all reasonable endeavours to protect the Confidential Information of the Disclosing Party from any unauthorised disclosure; and

- (c) to only use the Confidential Information of the Disclosing Party for the purposes for which it was disclosed or provided by the Disclosing Party, and not for any other purpose.

#### **21.2 Exceptions**

The obligations in **clause 21.1** (Use) do not apply to Confidential Information that:

- (a) is required to be disclosed in Order Form for the Parties to comply with their obligations under this Agreement;
- (b) is authorised to be disclosed by the Disclosing Party;
- (c) is in the public domain and/or is no longer confidential, except as a result of a breach of this Agreement; or
- (d) must be disclosed by Law or by a regulatory authority, including under subpoena.

#### **21.3 Remedy**

Each Party agrees that monetary damages may not be an adequate remedy for a breach of this **clause 21** (Confidential Information). A Party is entitled to seek an injunction, or any other remedy available at law or in equity, at its discretion, to protect itself from a breach (or continuing breach) of this **clause 21** (Confidential Information).

#### **21.4 Survival**

This **clause 21** (Confidential Information) will survive the termination of this Agreement.

## **22 Australian Consumer Law**

### **22.1 ACL**

Certain legislation, including the Australian Consumer Law, and similar consumer protection laws and regulations, may confer you with rights, warranties, guarantees and remedies relating to the provision of the Deliverables by the Company to you which cannot be excluded, restricted or modified (**Statutory Rights**).

### **22.2 Failures**

Our Deliverables come with guarantees that cannot be excluded under the Australian Consumer Law. For major failures with the Services, you are entitled:

- (a) to cancel this Agreement with the Company; and
- (b) to a refund for the unused portion, or to compensation for its reduced value.

### **22.3 Refund**

You are also entitled to choose a refund or replacement for major failures with Products. If a failure with the Products or a Services does not amount to a major failure, you are entitled to have the failure rectified in a reasonable time. If this is not done, you are entitled to a refund for the Products and to cancel the contract for the Services and obtain a refund of any unused portion. You are also entitled to be compensated for any other reasonably foreseeable loss or damage from a failure in the Products or Services.

### **22.4 Consumers**

If the ACL applies to you as a consumer, nothing in this Agreement excludes your Statutory Rights as a consumer under the ACL. You agree that the Company's Liability for the Deliverables provided to an entity defined as a consumer under the ACL is governed solely by the ACL and this Agreement.

### **22.5 Exclusions**

Subject to your Statutory Rights, the Company excludes all express and implied warranties, and all material,

work and services (including the Deliverables) are provided to you without warranties of any kind, either express or implied, whether in statute, at Law or on any other basis.

### **22.6 Survival**

This **clause 22** will survive the termination or expiry of this Agreement.

## **23 Exclusions to liability**

### **23.1 Exclusions**

Despite anything to the contrary, to the maximum extent permitted by law, the Company will not be liable for, and you waive and release the Company from and against, any Liability caused or contributed to by, arising from or connected with:

- (a) your or your Personnel's acts or omissions;
- (b) any use or application of the Deliverables by a person or entity other than you, or other than as reasonably contemplated by this Agreement;
- (c) any works, services, products, materials or items which do not form part of the Deliverables (as expressed in this Agreement), or which have not been provided by the Company;
- (d) any Third Party Inputs;
- (e) the storage of any uncollected or undelivered Products, including any Liability for any loss, damage, spoilage or theft of or to those stored Products;
- (f) the Deliverables being unavailable, or any delay in the Company providing the Deliverables to you, for whatever reason;
- (g) any software, hardware, internet or other components outside the Company's network;
- (h) failures in a single datacentre location, when your network connectivity is explicitly dependent on that location in a non-geo-resilient manner;
- (i) your failure to adhere to any required configurations, use supported platforms, follow any policies for acceptable use, or your use of the Deliverables in a manner inconsistent with the features and functionality of the Deliverables (for example, attempts to perform operations that are not supported) or inconsistent with the Company's published guidance;
- (j) your use of a Deliverable after the Company advised you to modify your use of the Deliverable (if you did not modify your use as advised);
- (k) with respect to preview, pre-release, beta or trial versions of a Deliverable, feature or software (as determined by the Company);
- (l) use of a Deliverable that is provided free of charge;
- (m) your unauthorised action or lack of action when required, or from your employees, agents, contractors, or vendors, or anyone gaining access to our network by means of your passwords or equipment, or otherwise resulting from your failure to follow appropriate security practices such as two factor authentication;
- (n) your attempts to perform operations that exceed any prescribed quotas or that resulted from our throttling of suspected abusive behavior;
- (o) suspension or termination of your right to use the Deliverable in accordance with this Agreement;

- (p) any action that was taken by the Company or the Company's suppliers to comply with a requirement of a Regulator, or under any applicable Law;
- (q) unavailability required in order to respond to, or deal with the consequences of, an Emergency Situation;
- (r) Scheduled Maintenance; or
- (s) any External Circumstances Event.

### **23.2 Survival**

This **clause 23** (Exclusions to liability) will survive the termination or expiry of this Agreement.

## **24 Limitations on liability**

### **24.1 Limitation**

Despite anything to the contrary, to the maximum extent permitted by law:

- (a) the Company will not be liable for Consequential Loss;
- (b) a Party's liability for any Liability under this Agreement will be reduced proportionately to the extent the relevant Liability was caused or contributed to by the acts or omissions of the other Party (or any of its Personnel); and
- (c) the Company's aggregate liability for any Liability arising from or in connection with this Agreement will be limited to the total amount of Fees you paid to the Company in the 3 month period directly preceding the date on which such Liability arose, in respect of the supply of the relevant Deliverables to which the Liability relates.

### **24.2 Survival**

This **clause 24** will survive the termination or expiry of this Agreement.

## **25 Termination**

### **25.1 Termination for convenience**

The Company may terminate this Agreement at any time by giving 30 days' notice in writing to you.

### **25.2 Termination for cause**

This Agreement or the relevant Order Form will terminate immediately upon written notice by:

- (a) the Company, if:
  - (i) you (or any of your Personnel) breach any provision of this Agreement and that breach has not been remedied within 10 Business Days of being notified by us;
  - (ii) you fail to provide the Company with clear or timely instructions or information to enable the Company to provide the Deliverables;
  - (iii) for any other reason outside the Company's control which has the effect of compromising the Company's ability to provide the Deliverables; or
  - (iv) you are unable to pay your debts as they fall due; and
- (b) you, if the Company:
  - (i) are in breach of a material term of this Agreement, and that breach has not been remedied within 10 Business Days of being notified by you; or
  - (ii) is unable to pay the Company's debts as they fall due.

### **25.3 Effect of expiry or termination**

Upon expiry or termination of this Agreement:

- (a) the Company will immediately cease providing the Deliverables;
- (b) you are to pay for all Deliverables provided prior to termination, including Deliverables which have been provided and have not yet been invoiced to you, and all other amounts due and payable under this Agreement;
- (c) pursuant to **clauses 25.2(a)(i), 25.2(a)(ii) or 25.2(a)(iv)**, you also agree to pay the Company's additional costs arising from, or in connection with, such termination;
- (d) you agree to grant the Company such rights of access to any premises where the Products are located to allow the Company (or the Company's Personnel) to immediately recover or repossess any Products belonging to the Company;
- (e) you agree not to disparage or otherwise make any unfavourable statements or comments regarding the Company, the Company's Personnel, the Company's clients, either directly or by implication, verbally or in writing;
- (f) you agree to promptly return (where possible), or delete or destroy (where not possible to return), the Company's Confidential Information, Our Materials, New Materials and the Company's Intellectual Property, and/or documents containing or relating to the Company's Confidential Information, Our Materials, New Materials and the Company's Intellectual Property; and
- (g) you must, within 3 months of the date of termination or expiry of this Agreement or relevant Order Form, copy all Customer Data and the Company will allow you access to the Deliverables during this time solely for that purpose. After this time, the Company will be entitled to permanently delete all Customer Data.

### **25.4 Order Forms**

- (a) Unless otherwise agreed between the Parties, if this Agreement is terminated, then any current Order Form will also terminate on the date of termination.
- (b) The Parties may terminate Order Form by a mutually signed agreement. Terminating an Order Form does not automatically terminate the Agreement or any other Order Form in effect.

### **25.5 Documents**

The Company will retain your documents (including copies) as required by law or regulatory requirements. Your express or implied agreement to this Agreement constitutes your authority for the Company to retain or destroy documents in accordance with the statutory periods, or on expiry or termination of this Agreement.

### **25.6 Accrued rights**

Termination of this Agreement will not affect any rights or liabilities that a Party has accrued under it.

### **25.7 Survival**

This **clause 25** (Termination) will survive the termination or expiry of this Agreement.

## **26 GST**

### **26.1 GST**

If GST is payable on any supply made under this Agreement, the recipient of the supply must pay an amount equal to the GST payable on the supply. That amount must be paid at the same time that the

consideration is to be provided under this Agreement and must be paid in addition to the consideration expressed elsewhere in this Agreement, unless it is expressed to be inclusive of GST. The recipient is not required to pay any GST until the supplier issues a tax invoice for the supply.

#### **26.2 Adjustment**

If an adjustment event arises in respect of any supply made under this Agreement, a corresponding adjustment must be made between the supplier and the recipient in respect of any amount paid by the recipient under this clause, an adjustment note issued if required, and any payments to give effect to the adjustment must be made.

#### **26.3 Outgoings**

If the recipient is required under this Agreement to pay for or reimburse an expense or outgoing of the supplier, or is required to make a payment under an indemnity in respect of an expense or outgoing of the supplier, the amount to be paid by the recipient is to be reduced by the amount of any input tax credit in respect of that expense or outgoing that the supplier is entitled to.

#### **26.4 GST Definitions**

The terms “**adjustment event**”, “**consideration**”, “**GST**”, “**input tax credit**”, “**recipient**”, “**supplier**”, “**supply**”, “**taxable supply**” and “**tax invoice**” each has the meaning which it is given in the *A New Tax System (Goods and Services Tax) Act 1999* (Cth).

### **27 General**

#### **27.1 Publicity**

You agree that the Company may advertise or publicise the broad nature of the Company’s provision of the Deliverables to you, including on the Company’s website or in the Company’s promotional material.

#### **27.2 Amendment**

This Agreement may only be amended by written instrument executed by the Parties.

#### **27.3 Counterparts**

This Agreement may be executed in any number of counterparts that together will form one instrument.

#### **27.4 Online execution**

This Agreement may be executed by means of such third party online document execution service as the Company nominates subject to such execution being in accordance with the applicable terms and conditions of that document execution service.

#### **27.5 Disputes**

A Party may not commence court proceedings relating to any dispute, controversy or claim arising from, or in connection with, this Agreement (including any question regarding its existence, validity or termination) (**Dispute**) without first meeting with a senior representative of the other Party to seek (in good faith) to resolve the Dispute. If the Parties cannot agree how to resolve the Dispute at that initial meeting, either Party may refer the matter to a mediator. If the Parties cannot agree on who the mediator should be, either Party may ask the Law Society of Victoria to appoint a mediator. The mediator will decide the time, place and rules for mediation. The Parties agree to attend the mediation in good faith, to seek to resolve the Dispute. The costs of the mediation will be shared equally between the Parties. Nothing in this **clause** will operate to prevent a

Party from seeking urgent injunctive or equitable relief from a court of appropriate jurisdiction.

#### **27.6 Further assurance:**

Each Party must promptly do all things and execute all further instruments necessary to give full force and effect to this Agreement and their obligations under it.

#### **27.7 External Circumstances Event**

The Company will not be liable for any delay or failure to perform the Company’s obligations under this Agreement if such delay is due to any circumstance beyond the Company’s reasonable control (**External Circumstances Event**).

#### **27.8 Notices:**

Any notice given under this Agreement must be in writing addressed to the relevant address last notified by the recipient to the Parties. Any notice may be sent by standard post or email and will be deemed to have been served on the expiry of 3 Business Days in the case of post, or at the time of transmission in the case of transmission by email.

#### **27.9 Governing law:**

This Agreement is governed by the laws of Victoria. Each Party irrevocably and unconditionally submits to the exclusive jurisdiction of the courts operating in Victoria and any courts entitled to hear appeals from those courts and waives any right to object to proceedings being brought in those courts.

#### **27.10 Severance**

If a provision of this Agreement is held to be void, invalid, illegal or unenforceable, that provision is to be read down as narrowly as necessary to allow it to be valid or enforceable, failing which, that provision (or that part of that provision) will be severed from this Agreement without affecting the validity or enforceability of the remainder of that provision or the other provisions in this Agreement.

### **28 Definitions**

In this Agreement, unless the context otherwise requires, capitalised terms have the meanings given to them in the Schedule, and:

**ACL or Australian Consumer Law** means the Australian consumer laws set out in Schedule 2 of the *Competition and Consumer Act 2010* (Cth), as amended, from time to time.

**Agreement** means these terms and conditions and any agreed Order Form issued under it and any documents attached to, or referred to in, each of them.

**Agreement Commencement Date** is defined in **clause 2.1** (Agreement Term).

**Agreement End Date** is 2 years from the Agreement Commencement Date.

**Agreement Term** is defined in **clause 2.1** (Agreement Term).

**Business Day** means a day on which banks are open for general banking business in Victoria, excluding Saturdays, Sundays and public holidays.

**Collection Location**, if any, is defined in an Order Form.

**Collection Time**, if any, is defined in an Order Form.

**Confidential Information** includes information which:

- (a) is disclosed to the Receiving Party in connection with this Agreement at any time;
- (b) is prepared or produced under or in connection with this Agreement at any time;



- (c) relates to the Disclosing Party's business, assets or affairs; or
- (d) relates to the subject matter of, the terms of and/or any transactions contemplated by this Agreement, whether or not such information or documentation is reduced to a tangible form or marked in writing as "confidential", and howsoever the Receiving Party receives that information.

**Consequential Loss** includes any consequential loss, indirect loss, real or anticipated loss of profit, loss of benefit, loss of revenue, loss of business, loss of goodwill, loss of opportunity, loss of savings, loss of reputation, loss of use and/or loss or corruption of data, whether under statute, contract, equity, tort (including negligence), indemnity or otherwise.

**Customer Data** means the information, logos, documents and other data inputted by you, your Personnel into the Software or stored by the Deliverables or generated by the Deliverables as a result of your use of the Deliverables.

**Deliverables** means the Products and/or the Services.

**Delivery Costs** means the costs associated with the delivery or provision of the Deliverables, including any insurance, customs, tariffs, duties or other such charges that may apply to the Deliverables.

**Delivery time** means the delivery time as set out in an Order Form.

**Delivery Location** means, if any, the delivery location as set out in an Order Form.

**Development Services** is defined in **clause 6.2** (Scoping).

**Development Fee** is defined in **clause 6.2** (Scoping).

**Disclosing Party** means the party disclosing Confidential Information to the Receiving Party.

**Emergency Situation** means a situation that could jeopardise human life or safety, or result in damage to property, unless immediate action is taken.

**Expenses** means any disbursements, including travel and accommodation costs and third party costs, reasonably and directly incurred by the Company for the purpose of the provision of the Deliverables.

**External Circumstances Event** is defined in **clause 27.7** (External Circumstances Event).

**Fees** means the Fees set out in the Order Form and includes, On-Premises Installation Fee, the Development Fee and the Setup Fee, if any.

**Improvements** means any development, modification, adaptation or improvement of Our Materials or any New Materials made by or on behalf of either Party (or any of their respective Personnel), or in respect of which Intellectual Property Rights are acquired by, either Party during the Term.

**Insolvency Event** means any of the following events or any analogous event:

- (a) a Party disposes of the whole or any part of the Party's assets, operations or business other than in the ordinary course of business;
- (b) a Party ceases, or threatens to cease, carrying on business;
- (c) a Party is unable to pay the Party's debts as the debts fall due;
- (d) any step is taken by a mortgagee to take possession or dispose of the whole or any part of the Party's assets, operations or business;

- (e) any step is taken for a party to enter into any arrangement or compromise with, or assignment for the benefit of, a Party's creditors or any class of a Party's creditors; or

- (f) any step is taken to appoint an administrator, receiver, receiver and manager, trustee, provisional liquidator or liquidator of the whole or any part of a Party's assets, operations or business.

**Intellectual Property** means any domain names, know-how, inventions, processes, trade secrets or Confidential Information; or circuit layouts, software, computer programs, databases or source codes, including any application, or right to apply, for registration of, and any improvements, enhancements or modifications of, the foregoing.

**Intellectual Property Rights** means for the duration of the rights in any part of the world, any industrial or intellectual property rights, whether registrable or not. Including in respect of Intellectual Property.

**Intellectual Property Breach** means any breach by you (or any of your Personnel) of any of the Company's Intellectual Property Rights (or any breaches of third party rights including any Intellectual Property Rights of third parties), including, but not limited, to you (or your Personnel):

- (a) copying, altering, enhancing, adapting or modifying any of the Company's Intellectual Property;
- (b) creating derivative works from the Company's Intellectual Property;
- (c) providing or disclosing the Company's Intellectual Property to, or allowing the Company's Intellectual Property to be used by, any third party;
- (d) assigning or transferring any of the Company's Intellectual Property Rights or granting sublicenses of any of the Company's Intellectual Property Rights, except as expressly permitted in this Agreement;
- (e) reverse engineering or decompiling any of the Company's Intellectual Property Rights, except where permitted by Law; or
- (f) using or exploiting the Company's Intellectual Property for purposes other than as expressly stated in this Agreement (including, without limitation, using the Company's Intellectual Property for commercial purposes or on-selling the Company's Intellectual Property to third parties).

**Laws** means all applicable laws, regulations, codes, guidelines, policies, protocols, consents, approvals, permits and licences, and any requirements or directions given by any person with the authority to bind the relevant Party in connection with this Agreement or the provision of the Deliverables.

**Liability** means any expense, cost, liability, loss, damage, claim, notice, entitlement, investigation, demand, proceeding or judgment (whether under statute, contract, equity, tort (including negligence), indemnity or otherwise), howsoever arising, whether direct or indirect and/or whether present, unascertained, future or contingent and whether involving a third party or a Party to this Agreement or otherwise.

**Licence** is defined in **clause 17.3** (Licence).

**Order Form** means an Order Form placed by you, for the provision of the Deliverables.

**Order Form Term** is defined in **clause 3.2** (Order Form

Term).

**Our Materials** means all work, models, processes, technologies, strategies, materials, information, documentation, specifications and services that the Company may provide to you under this Agreement, and which may contain material which is owned by or licensed to the Company, and is protected by Australian and international laws.

**Moral Rights** has the meaning given in the *Copyright Act 1968* (Cth).

**New Materials** means all Intellectual Property developed, adapted, modified or created by or on behalf of the Company or you or any of your or the Company's respective Personnel in connection with this Agreement or the provision of the Deliverables, whether before or after the date of this Agreement.

**Personnel** means, in respect of a Party, any of its employees, consultants, suppliers, subcontractors or agents.

**Products** means the products that the Company provides to you under this Agreement.

**Receiving Party** means the party receiving Confidential Information from the Disclosing Party.

**Regulator** means relevant Government agency or regulatory authority.

**Schedule** means the schedule to this Agreement.

**Scheduled Maintenance** means if applicable, any outage windows scheduled by the Company when maintenance is required.

**Services** means the services the Company provides to you under this Agreement.

**Statutory Rights** has the meaning given in **clause 22** (Australian Consumer Law).

**Site** means the website as set out in the Agreement Details.

**Third Party Inputs** means third parties or any Deliverables provided by third parties, including customers, end users, suppliers, transportation or logistics providers or other subcontractors which the provision of the Deliverables may be contingent on, or impacted by.

**Variation Request** is defined in **clause 9.1** (Variation).

**Your Materials** means all work, models, processes, technologies, strategies, materials, information, documentation and services (including Intellectual Property), owned, licensed or developed by or on behalf of you or your Personnel before the Agreement Commencement Date and/or developed by or on behalf of you or your Personnel independently of this Agreement.

## 29 Interpretation

In this Agreement, unless the context otherwise requires:

- (a) a reference to this Agreement or any other document includes the document, all schedules and all annexures as novated, amended, supplemented, varied or replaced from time to time;
- (b) a reference to "Deliverables" or "Products or Services" includes "Products and/or Services";
- (c) a reference to any legislation or law includes subordinate legislation or law and all amendments, consolidations, replacements or re-enactments from time to time;

- (d) a reference to a natural person includes a body corporate, partnership, joint venture, association, government or statutory body or authority or other legal entity and vice versa;
- (e) no **clause** will be interpreted to the disadvantage of a Party merely because that Party drafted the **clause** or would otherwise benefit from it;
- (f) a reference to a party (including a Party) to a document includes that party's executors, administrators, successors, permitted assigns and persons substituted by novation from time to time;
- (g) a reference to a covenant, obligation or agreement of two or more persons binds or benefits them jointly and severally;
- (h) a reference to time is to local time in Victoria; and
- (i) a reference to \$ or dollars refers to the currency of Australia from time to time.