



THOUGHTS2BINARY - TERMS AND CONDITIONS

1. DEFINITIONS

In this document, unless otherwise indicated, these terms mean:

Additional Rates - the rates charged by the Developer for any Additional Services as set out in the Scope of Work and/or as may be advised to the Client from time to time.

Additional Services - Services outside of, or in addition to the Scope of Work.

Agreement - means the Scope of Work, these terms and conditions and any other documentation signed by the parties in relation to the work to be performed by the Developer for the Client.

Business Day - any day except a bank or public holiday throughout Victoria, Australia.

Client - the Party or Parties named as the Client in the Scope of Work.

Collection Costs - any reasonable costs of collecting any overdue amounts under this Agreement actually incurred by the Developer, where such costs are allowable by law.

Confidential Information - means all confidential information (however recorded or preserved) disclosed or provided (whether in writing, orally or by any other means and whether directly or indirectly) by any Disclosing Entity to any Receiving Entity before, on or after the date of this Agreement in connection with the Agreement, including:

- (a) any information that would be regarded as confidential by a reasonable person relating to the business, affairs, customers, clients, suppliers, proposals, market opportunities, technologies, products, business and product development plans, financial information, services, pricing, capabilities, capacities, operations, processes, product information or Intellectual Property Rights of the Disclosing Party or any of its Related Entities;

any information acquired by the Receiving Entity, by observation or otherwise, during a visit to the premises or facilities of any Disclosing Entity, including by remote access to a Disclosing Entity's computer systems or databases; and includes any compilation of otherwise public information in a form not publicly known.

Developer - the Party or Parties named as the Developer, in the Scope of Work.

Force Majeure - an exception, event or circumstance which, in respect of the Party claiming Force Majeure:

- a. is beyond its control;
- b. could not reasonably have been insured or provided against before entering this Agreement;
- c. having arisen, could not reasonably have been avoided or overcome; and
- d. is not substantially attributable to the other Party,

such events or circumstances being limited to the following:

- a. war, hostilities (whether the war be declared or not), invasion, act of foreign enemies;
- b. rebellion, terrorism, revolution, insurrection, military or usurped power, or civil war;
- c. riot, commotion, disorder, strike or lockout by persons other than the Party;
- d. the effect of any munition of war, explosive materials, ionizing radiation or contamination;
- e. acts of governmental agencies;
- f. orders of Courts or Governmental Authorities;
- g. Governmental request for requisition for national defence;
- h. plague, epidemic, pandemic, outbreaks of infectious disease or any other public health crisis, including quarantine or other employee restrictions;
- i. act of God or natural disaster such as but not limited to violent storm, cyclone, typhoon, hurricane, tornado, blizzard, earthquake, volcanic activity, landslide, tidal wave, tsunami, flood, damage or destruction by lightning, drought;
- j. explosion, fire, destruction of machines, equipment, factories and of any kind of installation, prolonged break-down of transport, telecommunication or electric current;



- k. general labor disturbance such as but not limited to boycott, strike and lock-out, go-slow, occupation of factories and premises;
- l. cyber attacks, hacking, denial of service attempts (assuming that commercially-reasonable attempts have been made by Developer to prevent such attacks); and
- m. telecommunication and infrastructure disruptions.

GST - the same meaning as in the GST Law.

GST Law - A New Tax System (Goods and Services Tax) Act 1999 (Cth).

Insolvency Event - means, in relation to a Party:

- a. a receiver, receiver and manager, trustee, administrator, other controller (as defined in the Corporations Act) or similar official, appointed over any of the assets or undertaking of the other party;
- b. the party suspends payment of its debts generally;
- c. the party is, or becomes unable to, pay its debts when they are due or is, or becomes unable to pay its debts or is presumed to be insolvent within the meaning of the Corporations Act;
- d. the party enters into or resolves to enter into any arrangement, composition or compromise with, or assignment for the benefit of, its creditors or any class of them;
- e. the party ceases to carry on business or threatens to cease to carry on business;
- f. a resolution is passed or any steps are taken to appoint, or to pass a resolution to appoint, an administrator; or
- g. an application or order is made for the winding up or dissolution of the other party, or a resolution is passed or any steps are taken to pass a resolution for the winding up or dissolution of the other party, otherwise than for the purpose of an amalgamation or reconstruction that has the prior written consent of the first party.

Intellectual Property - all works, inventions and other subject matter, including all customizations, enhancements, improvements and other modifications thereof, and including all trademarks, trade dress, patents, inventions (whether patentable or not), copyrights, copyrightable material, moral rights, ideas, concepts, processes, methodologies, software, know-how, technology, source and object code, algorithms, improvements, developments, discoveries and trade secrets and other intellectual property rights, now or hereafter in existence in any part of the world.

Milestones - the agreed tasks and/or deliverables as set out in the Scope of Work.

Party - Thoughts2Binary or the Client as the case may be and Parties means both of them.

Project - the outcome desired by or communicated to the Developer for which the Developer's Services have been engaged.

Scope of Work - the whole of the addendums issued to the Client with these terms and conditions and headed 'Scope of Work' to this Agreement, containing the Scope of Work (including the stated fees, communication and contact person if any) or as otherwise provided to the Client and stated to be the Scope of Work.

Services - any services provided under or resulting from the matters in the Scope of Work or any Additional Services.

Suspension Period - the period of time during which Services are suspended by the Developer pursuant to clause 9 of this Agreement.

System Specifications - as defined in clause 4.1.

Third-Party Services - any services, software, applications, add-ons or integrations provided by or sourced from third-party providers.

Term - the period of time specified in the Scope of Work or as worked out in accordance with clause 8.

Termination Date - the date set down in the Scope of Work or otherwise the date in accordance with clause 8.

Work Product - any Intellectual Property created or brought into existence by the Developer pursuant to this Agreement, for the Project, under the Scope of Work or as a result of any Additional Services, including without limitation any software, documentation, or other deliverables, but **excluding** pre-existing Intellectual Property of the Developer, and any processes, methodologies, know-how, and trade secrets employed by the Developer in providing the Services under the Agreement.



2. INTERPRETATION

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

- 2.1. The singular includes the plural and conversely.
- 2.2. A gender includes all genders.
- 2.3. Where a word or phrase is defined, its other grammatical forms have a corresponding meaning.
- 2.4. A reference to a person includes a body corporate, an unincorporated body or other entity and conversely.
- 2.5. A reference to a clause or schedule or attachment is to a clause of or schedule or attachment to this deed.
- 2.6. A reference to a Party includes the Party's successors and permitted assigns.
- 2.7. A reference to any Agreement or document is to that Agreement or document as amended, novated, or replaced from time to time, except to the extent prohibited by this Agreement or that other Agreement or document.
- 2.8. A reference to any legislation or to any provision of any legislation includes any modification or re-enactment of it, any legislative provision substituted for it and all regulations and statutory instruments issued under it.
- 2.9. A reference to dollars or \$ is to AUD currency unless otherwise stated.
- 2.10. A reference to a right or obligation of any two (2) or more persons confers that right, or imposes that obligation, as the case may be, jointly and separately.
- 2.11. A reference to conduct includes any omission and any statement or undertaking, whether or not in writing.
- 2.12. Mentioning anything after 'include', 'includes', 'including' or 'example' does not limit what else might be included.

3. Scope of Work

- 3.1. The Client engages the Developer to develop the products and provide the services described in the Scope of Work, pursuant to the terms set out in the Agreement.
- 3.2. The Developer shall use its best efforts to provide the Services to the Client as described in the Scope of Work. Any timeframe or Milestones set down in the Scope of Work is a guide only, unless otherwise agreed between the Parties in writing.
- 3.3. Any timeframe or Milestones are subject to the Client's compliance with the Warranties and Standards of the Developer set out in clauses 7, and 16.
- 3.4. Additional Services may be:
 - (a) Necessary to complete the Project; or
 - (b) Requested by the Client.
- 3.5. Where Additional Services are requested or required, the Client agrees that those Services are governed by the terms set out in this Agreement and that the Client will pay for those Additional Services in accordance with the terms set out in this Agreement.

4. Specifications

- 4.1. The coding language, software, operating system, operating system requirements, firmware, hardware, versions of any of those or other specifications set out in the Scope of Work or otherwise required to undertake the work in the Scope of Work ("**System Specifications**") may be subject to change, including as a result of:
 - (a) Upgrades, changes to or discontinuance of those System Specifications (for example, a new operating system for hardware being released);
 - (b) The requirements set down by a provider of Third-Party Services, any other service provider, or any platform (for example, an online marketplace or store through which the Project is intended to be sold or distributed);
 - (c) Incorrect or incomplete information being provided by the Client, requiring revision; and/or
 - (d) Security requirements (for example, the System Specifications being compromised or able to be compromised by hackers).

5. Subcontractors

- 5.1. The Client acknowledges and agrees that the Developer may employ subcontractors to provide some or all of the Services in the Scope of Work or Additional Services. The engagement of subcontractors



will be solely at the discretion of the Developer; provided that the Developer shall engage subcontractors on terms that provide for confidentiality, and contain appropriate clauses regarding ownership and assignment of intellectual property.

6. Third-Party Applications, Software and Providers

- 6.1. Unless approved in writing by the Client or identified in the Scope of Work, the Developer shall not include in any Work Product, and operation of all Work Product in accordance with its specifications and documentation shall not require, the cooperation of, or use of software, applications, add-ons or integrations of third-party providers or any other Third-Party Services.
- 6.2. In the event any such third-party materials or Third-Party Services are included in any Work Product, the Developer shall secure, at the Client's cost and expense (unless otherwise agreed by the Parties), all necessary rights, licenses, consents, approvals, and authorizations necessary for the Client to use all such third-party materials or Third-Party Services as incorporated in the Work Product.
- 6.3. The Client acknowledges and agrees that it shall be responsible for compliance with the terms of service of any providers of Third-Party Services, and that the Developer shall not be liable for any breach of such terms of service by the Client.

7. REPRESENTATIONS AND WARRANTIES

- 7.1. Each Party represents and warrants to the other Party that:
 - (a) it is duly organised, validly existing and in good standing as a corporation or other entity under the laws of the jurisdiction of its incorporation;
 - (b) it has the full right, power and authority to enter into, and to perform its obligations and grant the rights and licenses it grants or is required to grant under, this Agreement;
 - (c) the execution of this Agreement by its representative whose signature is set forth at the end of the SOW has been duly authorized by all necessary corporate or organizational action of such Party; and
 - (d) when executed and delivered by both parties, this Agreement will constitute the legal, valid and binding obligation of such Party, enforceable against such Party in accordance with its terms.
- 7.2. The Client represents and warrants that:
 - (a) it acknowledges that the Developer, in entering into the Agreement, relied on all the information and instructions provided by the Client;
 - (b) it has made its own assessment as to the adequacy and appropriateness of the Developer and Services;
 - (c) it will communicate with the Developer
 - i. as set out in the Scope of Work;
 - ii. as reasonably required for the Developer to complete any Milestone, Additional Services or the Project, and
 - iii. as reasonably requested by the Developer from time to time;
 - (d) any materials articles or things provided to the Developer do not, to the knowledge of the Client, infringe any Intellectual Property rights, including the rights of any third party, or constitute a breach of any Agreement with any other person;
 - (e) any point of contact for the Client stated in the Scope of Work, or who otherwise instructs the Developer has authority to provide instructions on behalf of the Client, and will be contactable throughout the Project unless specifically advised to the Developer;
 - (f) it will provide to the Developer any software, access to software or programs, licenses, documents, plans, directions, instructions, artwork or other materials necessary to complete any Milestone, Additional Services or the Project in the format reasonably requested by the Developer and by the time requested by the Developer;
 - (g) it has not entered into this Agreement in reliance on any representation except as set out in this Agreement.
- 7.3. The Developer represents and warrants that:
 - (a) it will perform all Services in a professional and workmanlike manner in accordance with generally recognized industry standards and practices for similar services, using personnel with the requisite skill, experience, and qualifications, and shall devote adequate resources to meet its obligations under this Agreement;
 - (b) it is in compliance with, and will perform all Services in compliance with, all applicable laws;
 - (c) subject to the provisions of clause 15, and any licences identified in the Scope of Work or required to be entered into by the Client in relation to a Third-Party Service, the Client will receive good and valid title to all Work Product, free and clear of all encumbrances and liens of any kind;



- (d) when delivered, no Work Product will contain any
 - i. virus, trojan horse, worm, backdoor, or other software or hardware devices the effect of which is to permit unauthorized access to, or to disable, erase, or otherwise harm, any computer, systems, or software; or
 - ii. time bomb, drop-dead device, or other software or hardware device designed to disable a computer program automatically with the passage of time or under the positive control of any person, or otherwise deprive the Client of its lawful right to use the Work Product, other than as pursuant to an agreement between a Client and a provider of Third-Party Services;

8. TERM AND TERMINATION

Term

- 8.1. This Agreement shall commence on the earlier of:
 - (a) The Client executing the Scope of Work;
 - (b) The Client instructing the Developer to proceed with the Project; or
 - (c) The Client otherwise communicating acceptance of the Agreement.
- 8.2. This Agreement shall continue until terminated by either or both the Parties in accordance with the termination clause 8.3.
- 8.3. This Agreement may be terminated:
 - (a) By written Agreement of the parties;
 - (b) By either Party upon thirty (30) days' written notice;
 - (c) By written notice from the Developer at any time after a single Suspension Period of fifteen (15) days has elapsed, including if the Services resume after a Suspension Period;
 - (d) In accordance with clause 10 of this Agreement;
 - (e) Immediately where there is an Insolvency Event.

9. SUSPENSION OF SERVICES

- 9.1. The Developer may suspend the provision of its Services to the Client hereunder where:
 - (a) The Client has not paid any amount due to the Developer by the due date;
 - (b) The Client has breached any of the warranties in clause 7 of this Agreement;
 - (c) The Client otherwise acts in a manner that adversely affects the ability of the Developer to provide its Services;
 - (d) The Developer's ability to perform the Services is restricted or prevented as a result of any matter referred to in Clause 16.
 - (e) The Client has breached the terms of clauses 18 (Confidentiality) and/or 19 (Publicity).
- 9.2. The Services may be suspended until the Developer is reasonably satisfied that the cause of the suspension has been resolved.
- 9.3. Without limiting any rights or protections afforded to the Developer under this Agreement, the Developer will not be liable for any loss, costs or damage caused or contributed to by delay resulting from the suspension of Services in accordance with this clause 9.
- 9.4. Where Services are suspended, the Developer may withdraw or block access to any portal, Project management tool or software, or other program or Services that the Developer has shared with, given access to, or provided to the Client.
- 9.5. The Client remains liable to pay for any Services undertaken by the Developer up until the suspension of Services, and is also liable to pay for any fees, charges, cancellation charges, subscriptions, recurring payments or other amounts incurred by the Developer either due to the suspension or that arise during the Suspension Period. (For example, the Client will be liable to pay for fees or charges to a 3rd party service provider providing Services related to the Project where those Services cannot also be suspended).

10. BREACH OF AGREEMENT

- 10.1. If a Party is in breach of this Agreement, including any representation or warranty hereunder, the other Party may give the Breaching Party a notice:
 - (a) Specifying the breach; and
 - (b) Requiring the Breaching Party to rectify the breach within ten (10) Business Days of the date the Breaching Party received the notice.
- 10.2. The Party may terminate the Agreement if after the expiry of the notice the Breaching Party has not rectified the breach specified in the notice.



11. CONSEQUENCES OF TERMINATION

- 11.1. If this Agreement is terminated or expires for any reason, then, in addition and without prejudice to any other rights or remedies available, including but not limited to damage for breach of this Agreement:
- (a) The Parties are immediately released from their obligations under the Agreement except those obligations in clauses 11, 12, 13, 14, 15, 18 19 20 21 24 25 26 27 and any other obligations that, by their nature, survive termination;
 - (b) Each Party retains the claims it has against the other;
 - (c) The Client must immediately pay all undisputed amounts due to the Developer under this Agreement; and
 - (d) Each Party to this agreement must not make any disparaging remarks or comments about the other Party in any form, including through the use of pseudonyms, anonymous means, or by inducing or procuring another person to make disparaging remarks.

12. DUTIES ON TERMINATION

- 12.1. Upon the termination or expiration of this Agreement:
- (a) The Developer will, as timely as practicable and in a manner most practicable in the circumstances of the Project, deliver to the Client:
 - i. All deliverables, Work Product, and materials brought into existence for the Client and to which the client is entitled in accordance with the Scope of Work and this Agreement, whether complete or in progress, subject at all times to the Developer first receiving payment in accordance with clause 12(b). If an invoice or part of an invoice is in dispute and is unpaid, the Developer is under no obligation to deliver Work Product to the Client related to the disputed invoice or portion thereof; and
 - ii. Confidential Information in the Developer's possession, custody or control that belongs to the Client, subject to clause 18.6; and
 - iii. Any property, Intellectual Property, software or other materials owned by the Client before the commencement of the Agreement and in the possession, custody or control of the Developer.
 - (b) The Client will immediately:
 - i. Pay any undisputed amounts due to the Developer under this Agreement, including any interest, additional fees or charges, if applicable;
 - ii. Deliver to the Developer any Confidential Information in the Client's possession, custody or control that belongs to the Developer; and
 - iii. Deliver to the Developer any property, Intellectual Property, software or other materials owned by the Developer before the commencement of the Agreement and in the possession, custody or control of the Client.

13. FEES AND EXPENSES

Fees

- 13.1. The Client will pay the Developer for the Services provided by the Developer as stated in the Scope of Work.
- 13.2. Rates and fees will be reviewed on an annual basis and may be adjusted with 30 days written notice to the Client.
- 13.3. The Developer will issue invoices monthly, on the completion of the Milestones, or as stated in the Scope of Work or as otherwise agreed between the parties in writing.
- 13.4. Any Additional Services will be:
 - (a) Charged at the Developer's Additional Rates; and
 - (b) Invoiced at the same time as any relevant Milestone or separately on a monthly basis, as determined by the Developer.
- 13.5. The Client will pay any amounts due under this Agreement within fifteen (15) days of the applicable invoice.
- 13.6. If the Client disputes any invoice or part of an invoice, the Client must pay the undisputed amount in accordance with this Agreement and immediately notify the Developer of the dispute and the reasons supporting the dispute.
- 13.7. Where the agreement is terminated by either party and a Milestone has not been completed as at the date of termination, any Services related to that unfinished Milestone will be invoiced to and payable by the client on the following basis:
 - (a) Where the SOW provides for a Fixed Fee, by the Developer (acting reasonably) charging a proportion of the fee in the SOW relative to the work completed as at termination; or



- (b) Where the SOW provides for an On-Going arrangement with fees calculated on a time and materials basis, payment of time incurred and materials purchased by the Developer as at termination, and partially completed work shall be deliverable to the Client following payment to the Developer.

Expenses

- 13.8. Any amount stated as payable on completion of a Milestone does not include fees or charges payable for Third-Party Services (for example, SMS charges, Hosting costs, Email Account costs, Payment Gateway Charges) or any other fees or charges made known to and agreed in writing by the Client.
- 13.9. Third-Party Services will be payable separately by the Client unless the Developer agrees in writing to pay those costs and charge them to the Client as a disbursement.
- 13.10. The cost of any subcontractors who are providing Work Product will be borne by the Developer unless otherwise agreed between the Developer and Client in writing.
- 13.11. Any travel, accommodation, and related expenses required for the completion and/or delivery of any Services will be paid by the Client. The Developer will first receive pre-approval from the Client of the estimated cost for those expenses. The Developer may invoice those expenses separately from any Service invoices.

Cost Variations

- 13.12. The Client acknowledges and agrees that:
 - (a) Any fees, expenses or any other amount payable by or liable to be paid by the Client may increase over the course of the Project or over the time when the Services are provided to the Client; and
 - (b) The Client will be liable for any such increase in fees or charges where the Developer has provided the Client with at least 30 days' notice of the increase.

14. INTEREST AND RECOVERY CHARGES

Interest

- 14.1. The Client must pay interest on any amounts due to the Developer that are outstanding at the rate of 12% per annum, calculated on the daily outstanding balance from the due date of the amount, which will continue to accrue until the amount outstanding (including any interest) is paid in full.

Recovery of overdue amounts

- 14.2. If the Developer engages a mercantile agency, recovery agent, or other service provider to assist in collecting any overdue amount under this Agreement, the Client agrees to pay any Collection Costs associated with that recovery action.

Credit reporting

- 14.3. Each Party to this agreement agrees that the other Party may give information about the Party to a Credit Reporting Agency to obtain a consumer credit report about the Party or to allow the Credit Reporting Agency to create or maintain a file regarding the Party.

15. INTELLECTUAL PROPERTY

- 15.1. Subject to clause 15.3 below and save for any software owned by providers of Third-Party Services, software involving a licence and/or as may be specified in any Scope of Work, all right, title and interest in the Work Product will vest exclusively in the Client following payment to the Developer for the Work Product in accordance with the Scope of Work and this Agreement.
- 15.2. The Client acknowledges that their ability to use the Work Product may be dependent on their compliance with terms they have entered into with the provider of Third-Party Services, and their continued use of those Third-Party Services.
- 15.3. The Intellectual Property of a Party existing prior to the date of this Agreement remains the sole and exclusive property of that Party. In addition, clause 15.1 does not operate to:
 - (a) vest any Intellectual Property of the Developer that predates this Agreement or is created by the Developer during the term of this Agreement but is not Work Product, in the Client;
 - (b) entitle the Client to claim ownership of any processes, methodologies, know-how, technology or trade secrets of the Developer that the Developer utilises or develops to provide the Work Product to the Client.



- 15.4. The Intellectual Property of any Third-Party Service provider remains the sole and exclusive property of that person or entity.
- 15.5. The Client agrees to provide all reasonable assistance as requested by the Developer to protect any Intellectual Property of the Developer or the Third-Party Service provider.

16. STANDARDS AND CONDUCT OF THE DEVELOPER

- 16.1. The Developer has the right to refuse to incorporate into any deliverables or materials to be brought into existence as part of its Services, any material, text, graphic, sound or animation in any form that, without limitation, may be, in the sole discretion of the Developer, obscene, defamatory, harassing, grossly offensive, or malicious, or that may infringe or misappropriate the copyright, trademark, service mark, or proprietary or other Intellectual Property right of any person, or otherwise may be contrary to law.
- 16.2. The performance of the Developer's Services may be limited by:
- (a) Permits, licences, authorisations, accreditations, industrial awards;
 - (b) The requirements and policies of any Third-Party Service provider;
 - (c) The requirements and policies of any online marketplace, store or distribution channel; and
 - (d) Any laws, regulations, or Australian or international governmental directives applicable to the Services.

17. RELATIONSHIP OF THE DEVELOPER AND CLIENT

- 17.1. The Developer is performing the Services as an independent contractor.
- 17.2. Neither Party, nor its employees and independent contractors, shall have any claim against the other Party as a result of this Agreement or otherwise for any employee entitlements they would otherwise be entitled to if they were to be an employee of such Party, including annual leave, sick leave, retirement benefits, social security, workers compensation, health or disability benefits, unemployment insurance benefits, or employee benefits of any kind.
- 17.3. Nothing in this Agreement shall be construed to constitute the Parties as partners, agent, employer/employee, or joint ventures, nor shall either Party have any right, power or authority to act or create any obligation, express or implied, on behalf of the other Party or otherwise bind the other.
- 17.4. This Agreement does not prevent the Developer from performing Services for other parties while providing Services to the Client.

18. CONFIDENTIALITY

- 18.1. Notwithstanding any other provision of this Agreement, if the parties have entered into a deed or agreement with respect to Confidential Information prior to the date of this Agreement, that agreement shall continue in force between the parties.
- 18.2. In connection with this Agreement, each party (the "Discloser") may disclose or make available Confidential Information to the other Party (the "Recipient"). The Recipient shall:
- (a) not access, exploit or use Confidential Information other than as necessary to exercise or perform its rights or perform its obligations under and in accordance with this Agreement;
 - (b) keep the Confidential Information confidential;
 - (c) not disclose or make available the Confidential Information in whole or in part to any third party, unless such disclosure is required to perform its obligations under this Agreement, and the Recipient ensures that the third-party agrees to:
 - i. comply with the obligations in this clause as if each of them was a party to this agreement in the place of the Recipient; and
 - ii. do not do, or omit to do, anything which, if done or omitted to be done by the Recipient, would constitute a breach of this agreement by the Recipient; and
 - (d) safeguard the Confidential Information from unauthorised use, access or disclosure using at least the degree of care it uses to protect its Confidential Information and in no event less than a reasonable degree of care, and
 - (e) ensure its representatives' compliance with, and be responsible and liable for any of its representatives' non-compliance with, the terms of this section.
- 18.3. Subject to clause 18.4, the obligations in clause 18.2 shall not apply to any Confidential Information which (as shown by appropriate documentation and other evidence in the Recipient's possession):
- (a) was already known to a Receiving Entity on a non-confidential basis prior to the time of its first disclosure by a Disclosing Entity to a Receiving Entity, unless it came to be so known as a direct or indirect result of having been:
 - i. unlawfully obtained by a Receiving Entity, whether from a third party or otherwise; or



- ii. received by a Receiving Entity from a third party that owed a confidentiality obligation to the Disclosing Party in respect of that information at the time of such receipt, in circumstances in which the Recipient knew, or ought reasonably to have known after due enquiry, that the third party owed that confidentiality obligation to the Disclosing Party;
 - (b) is or becomes generally available to the public, unless it became so generally available as a direct or indirect result of having been disclosed by any person:
 - i. in circumstances that constitute a breach of this agreement by the Recipient (for the avoidance of doubt, including any breach by the Recipient of its obligations under clause 18.2(c) to ensure that third party recipients comply with the obligations in this agreement as if they were parties to this agreement in the place of the Recipient); or
 - ii. that owed a confidentiality obligation to the Disclosing Party in respect of that information at the time of such disclosure, in circumstances in which the Recipient knew, or ought reasonably to have known after due enquiry, that the person owed that confidentiality obligation to the Disclosing Party;
 - (c) is, after the time of its first disclosure by any Disclosing Entity to any Receiving Entity, lawfully received by any Receiving Entity from a third party that is not a Disclosing Entity, and the Recipient reasonably believed, after due enquiry, that the information was not so received as a direct or indirect result of a breach by any person of a confidentiality obligation owed to the Disclosing Party;
 - (d) is required by law or court order to be disclosed, provided that the Recipient must:
 - i. promptly notify the Disclosing Party in writing in advance of any such disclosure, if reasonably practicable; and
 - ii. reasonably assist the Disclosing Party in obtaining confidential treatment for, or avoiding or minimising such disclosure of, the relevant Confidential Information to the extent reasonably requested by the Disclosing Party;
 - (e) is independently developed by a Receiving Entity without any direct or indirect use of, reference to, or reliance on any Confidential Information; or
 - (f) is authorised for release or use by the written pre-approval of the Disclosing Party but only to the extent of such written pre-approval.
- 18.4. If the Receiving Party or any of its Representatives is compelled by applicable law to disclose any Confidential Information then, to the extent permitted by applicable law, the Receiving Party shall:
- (a) promptly, and prior to such disclosure, notify the Disclosing Party in writing of such requirement so that the Disclosing Party can seek a protective order or other remedy; and
 - (b) provide reasonable assistance to the Disclosing Party, at the Disclosing Party's sole cost and expense, in opposing such disclosure or seeking a protective order or other limitations on disclosure. If, after providing the notice and assistance required under this section, the Receiving Party remains required by law to disclose any Confidential Information, the Receiving Party shall disclose only that portion of the Confidential Information that, on the advice of the Receiving Party's legal counsel, the Receiving Party is legally required to disclose and, upon the Disclosing Party's request, shall use commercially reasonable efforts to obtain assurances from the applicable court or other presiding authority that such Confidential Information will be afforded confidential treatment.
- 18.5. Unless clause 18.6 applies, upon the written request of the Disclosing Party, the Recipient must:
- (a) return all Confidential Information received in tangible form by any Receiving Entity;
 - (b) destroy any copies, summaries and/or extracts of Confidential Information (including derivative analysis based on Confidential Information); and
 - (c) certify in writing to the Disclosing Party that it has complied with the requirements of this agreement.
- 18.6. If the Recipient is required to retain documentation or records that contain Confidential Information pursuant to:
- (a) Professional standards, laws or regulations applicable to the profession or business of the Recipient;
 - (b) Any requirements of professional indemnity insurance held by the Recipient;
- the Recipient may advise the Disclosing Party of this when responding to a request at clause 18.5 of in relation to clause 12 and ensure any Confidential Information retained is stored securely.
- 18.7. The Recipient's use and evaluation of the Confidential Information shall be at its own risk. All Confidential Information is provided 'as is' and, except as may otherwise be expressly provided in the SOW:



- (a) the Disclosing Party makes no representations or warranties, express, implied or otherwise, regarding:
 - i. the accuracy or completeness of the Confidential Information; or
 - ii. to the extent permitted by law, the fitness of the Confidential Information for any purpose; and
 - iii. neither the Disclosing Party nor any of the other Disclosing Entities shall have any liability of any nature, whether:
 - a. in law or equity;
 - b. under contract or tort (including in negligence); or
 to the extent permitted by law, under statute, to any person whatsoever for, or in respect of, the Confidential Information or its use for any purpose.
- 18.8. Clause 18.7 does not apply to the extent that:
 - (a) the Developer relies on Confidential Information provided to it by the Client to provide an estimate of costs of work to the Client or an outline of the work required to be performed, in circumstances where the Confidential Information is inaccurate or complete resulting or contributing to an increase in the cost of work or a variation being required in respect of the work required to be performed; and
 - (b) the Client seeks to rely on clause 18.7 in respect of a Claim in relation work performed by the Developer for the Client where such work was performed in reliance by the Developer on the accuracy or completeness of Confidential Information provided to it by the Client.
- 18.9. Subject to clause 18.10, the Recipient shall indemnify and forever keep fully indemnified the Disclosing Party (for itself and as agent and trustee for and on behalf of each of its Related Entities) at all times against any and all Losses that are:
 - (a) suffered or incurred by the Disclosing Party or any of its Related Entities; and
 - (b) caused, whether directly or indirectly, by any breach of this agreement by the Recipient (for the avoidance of doubt, including any breach by the Recipient of its obligations under clause 18.2(c) to ensure that third parties comply with the obligations in this agreement as if they were parties to this agreement in the place of the Recipient).
- 18.10. The indemnity in clause 18.9 does not absolve the Disclosing Party or any of its Related Entities of its duty to mitigate its damages in respect of any breach of this agreement by the Recipient. For the avoidance of doubt, the test of causation will apply in respect of any such damages but, by virtue of the indemnity in clause 18.9, the remoteness of damage test will not apply in respect of any such damages.

19. PUBLICITY

- 19.1. A Party will not, without the prior written consent of the other Party:
 - (a) Make any media release or public statement about the development or timeframe regarding the Project which is the subject of any Services under this Agreement; or
 - (b) Use the name, trade name or trademark of the other Party in any way, except as set out in clause 19.2.
- 19.2. The Client grants to the Developer a non-exclusive, royalty free licence for the Developer to display the Client's logo and/or trading name in any promotional materials produced by the Developer in connection with advertising its Services.

20. INDEMNITY

- 20.1. The Client shall indemnify, defend and hold harmless the Developer and its officers, directors, employees, agents, successors and assigns from and against any and all losses incurred by any them in connection with any action in connection with, arising out of, or in any way related to:
 - (a) the Client's breach of any representation or warranty, or any of its obligations, under this Agreement;
 - (b) any gross negligence or willful misconduct by the Client; or
 - (c) the Developer's use of any materials provided by the Client in accordance with this Agreement.

21. LIMITATION OF LIABILITY

- 21.1. To the full extent permitted by law, the Developer excludes:
 - (a) all representations, warranties or terms (whether express or implied) other than those expressly set out in this Agreement.
 - (b) all liability in respect of any loss to the Client or any consequential or incidental damages.



- 21.2. The Developer's liability for any claim relating to this Agreement will be reduced to the extent to which the other Party contributed to the damage arising from the claim.
- 21.3. This Agreement is to be read subject to any legislation which prohibits or restricts the exclusion, restriction or modification of any implied warranties, conditions, guarantees or obligations. If such legislation applies, to the extent possible, the Developer limits its liability in respect of any claim to, at the Developer's option:
- (a) In the case of goods:
 - i. The replacement of the goods or the supply of equivalent goods;
 - ii. The repair of the goods;
 - iii. The payment of the cost of replacing the goods or of acquiring equivalent goods; or
 - iv. The payment of having the goods repaired, and
 - (b) In the case of Services:
 - i. The supply of the Services again; or
 - ii. The payment of the cost of having the Services supplied again.

22. FORCE MAJEURE

- 22.1. If a Party becomes unable, wholly or partly, by Force Majeure, to carry out any duty or obligation under this Agreement, that Party:
- (a) must give the other Party prompt written notice of the Force Majeure with reasonably full particulars of it and the probable extent to which that Party will be unable to perform, or be delayed in performing, that duty or obligation;
 - (b) cannot be required to carry out that duty or obligation so far as it is affected by the Force Majeure during, but no longer than, the continuation of the Force Majeure; and
 - (c) must do everything possible to resolve the Force Majeure as quickly as possible.
- 22.2. The requirement that any Force Majeure must be overcome or remedied by doing everything possible does not require a Party to settle any strike, or other labor dispute on terms contrary to that Party's wishes or to contest the validity or enforcement of any law, regulation or order by way of legal proceedings.
- 22.3. Either party may terminate this Agreement if a Force Majeure event continues substantially uninterrupted for a period of thirty (30) days or more.

23. NOTICES

- 23.1. Any notices or other communications contemplated or required under this Agreement, in order to be valid, shall be in writing and shall be given via email, personal delivery, registered post, overnight carrier or fax. Such notices or other communications shall be deemed given when actually delivered or, if earlier, seven (7) business days after mailing.

24. SEVERABILITY

- 24.1. Any provision of this Agreement which is invalid or unenforceable, or when interpreted in a particular manner can be invalid or unenforceable:
- (a) Is to be read down, if possible, so as to be valid and enforceable; and
 - (b) Is otherwise to be severed to the extent of the invalidity or unenforceability, without affecting the remaining provisions of this Agreement. co
- 24.2. If any provision of this Agreement is invalid, illegal, or unenforceable in any jurisdiction, such invalidity, illegality, or unenforceability will not affect any other term or provision of this Agreement or invalidate or render unenforceable such term or provision in any other jurisdiction.

25. NO WAIVER

- 25.1. No failure to exercise and no delay in exercising any right, power or remedy under this Agreement by the Developer will operate as a waiver thereof, nor will any single or partial exercise of any right, power or remedy preclude any other or further exercise of that or any other right, power or remedy.

26. NON-SOLICITATION

- 26.1. The Client agrees that during the Project and for a period of twelve (12) months after the termination of this Agreement, the Client will not directly or indirectly, on its own behalf or on behalf of or in conjunction with any person or legal entity, recruit, solicit, or induce, or attempt to recruit, solicit, or induce, any employee or contractor of the Developer to terminate their employment or contract and/or accept an offer of employment or contract from the Client.
- 26.2. the Client agrees and acknowledges that its non-solicitation obligations under this agreement are essential to the protection of the Developer's business.



- 26.3. the Client agrees that, should it breach this clause 26, the Developer is entitled to claim liquidated damages equal to twelve (12) months' pay of the relevant employee from the Client.
- 26.4. the Client agrees that the damages outlined in this clause 26 are reasonable and directly referable to the loss and expense suffered by the Developer and that the damages are payable regardless of whether the employee or contractor:
 - (a) Serves a notice period; or
 - (b) Is replaced by the Developer within six (6) months.
- 26.5. the Client agrees to pay on demand the Developer's reasonable costs, including legal costs on an indemnity basis, arising out of or connected with the Client failing to comply with this clause.

27. DISPUTES AND GOVERNING LAW

- 27.1. This Agreement is governed by the laws of Victoria, Australia.
- 27.2. The Parties submit to the non-exclusive jurisdiction of the courts exercising jurisdiction there.
- 27.3. The Client agrees that it will not make any claim or take any legal action or other action against the Developer in respect of matters governed by this Agreement without first:
 - (a) Providing written notice to the Developer of the nature of the dispute; and
 - (b) Allowing the Developer a reasonable time to remedy the subject matter of the dispute.

