

Smart-UI Terms and Conditions

1. Term

- 1.1. Term of Agreement. This Agreement will commence on the Commencement Date and subject to earlier termination by either party in accordance with this Agreement will continue from the Commencement Date and then terminate upon the earlier of: (a) the last current Statement of Work expiring; (b) the last current Statement of Work terminating or being terminated; (c) all subscriptions to the Smart-UI Products terminating or being terminated.
- 1.2. Each applicable Statement of Work and your subscription to each of the Smart-UI Products will commence on the date specified in the Fee Schedule and/or Statement of Work (as applicable) for it to commence and will continue for the Initial Term. Upon expiry of the Initial Term, the applicable Statement of Work (if any) and your subscription to each of the Smart-UI Products shall automatically renew for subsequent twelve (12) month consecutive periods (each, a **Renewal Term**) until and unless either party notifies the other party in writing of its intent not to renew the Statement of Work (where applicable) and/or your subscription to each of the Smart-UI Products at least thirty (30) days prior to the expiry of the Initial Term or the then current Renewal Term (as applicable) (time being of the essence), in which case if such notice is provided the SOW (where applicable) and your subscription to each of the Smart-UI Products shall terminate at the end of the then current Initial Term or Renewal Term (as applicable).

2. Non-exclusive relationship

- 2.1. The relationship between you and us pursuant to this Agreement is non-exclusive. Nothing in this Agreement will prevent us from supplying any goods or services to any third party in our absolute discretion.

3. Priority

- 3.1. In the event that any two of the following documents are inconsistent, they will be interpreted in the following order of precedence (highest to lowest):
 - (a) the terms set out in these Smart-UI Terms and Conditions (not including terms set out in any attachments, schedules or annexures);
 - (b) the terms of the Commercial Details;
 - (c) the terms of the Fee Schedule;
 - (d) the terms of any applicable Statement of Work;
 - (e) any other terms set out in any attachments, schedules or annexures to a Statement of Work.

4. Project Management

- 4.1. This Agreement will be managed by an appointed Project Manager from each party as set out in the Commercial Details and:

- (a) your appointed project manager (**Client Project Manager**) shall act as a liaison between you and us, on your behalf, with respect to the overall administration of this Agreement. You must ensure that the Client Project Manager coordinates your resources and any relevant Personnel for the purposes of each Statement of Work; and
- (b) our appointed project manager (**Smart-UI Project Manager**) shall act as a liaison between you and us, on our behalf, with respect to the overall administration of this Agreement. We will ensure that the Smart-UI Project Manager coordinates our resources and any relevant for the purposes of each Statement of Work.

- 4.2. You shall provide us with:

- (a) all necessary cooperation, permissions, authorisations, assistance and consents in relation to this Agreement; and
- (b) all necessary access to such information, Personnel, facilities, documentation, records, equipment, resources, records, systems and premises as may be reasonably required by us in order to perform our obligations under this Agreement or to comply with Applicable Law.

- 4.3. You must ensure that you and your Personnel (including each Authorised End User) complies with all Applicable Laws in the course of performing your obligations and exercising your rights under this Agreement and obtain and maintain all relevant licences, consents, and permissions.

- 4.4. We shall not be liable for any non-performance of our obligations under this Agreement caused by you or your Personnel (including any Authorised End User).

- 4.5. If we are delayed or prevented from complying with an obligation under this Agreement due to any of your acts or omissions, or those of your Personnel (including any Authorised End User), our obligations will be postponed or relieved accordingly to the extent affected by those acts or omissions and you agree that such period of postponement may be non-linear.

- 4.6. You are solely responsible for the payment of your Personnel, including all fees, expenses and employee benefits to, by or on behalf of any of your Personnel and, if applicable, the withholding of income taxes and other applicable taxes. You must ensure that no person who has been convicted of any crime involving, in any way, theft, fraud, bribery or the violation of the *Crimes Act 1900* (NSW) or any similar Applicable Law uses our Services or accesses our Confidential Information. You are solely responsible for conducting all background checks necessary to comply with the foregoing.

- 4.7. We may subcontract all or any of our obligations under this Agreement to any third party or third

parties at any time or from time to time, in the course of providing the Services to you.

5. Statements of Work

- 5.1. We will provide the Services as set out in the Fee Schedule and/or the relevant Statement of Works with all reasonable skill and care.
- 5.2. We are not obliged to provide Smart-UI Products and/or Services under this Agreement other than those Smart UI Products and/or Services specified in the Fee Schedule, until and unless a Statement of Work (or applicable variation to the Fee Schedule) has been executed by you and us in respect of such additional Smart-UI Products and Services. If you wish to obtain any Smart-UI Products and/or Services from us (other than those set out in the Fee Schedule), we will prepare a draft Statement of Work (or draft variation to the Fee Schedule) for those products and services.
- 5.3. When a draft Statement of Work (or draft variation to the Fee Schedule) has been agreed between you and us, you and we will execute the Statement of Work (or draft variation to the Fee Schedule) and the Statement of Work (or variation to the Fee Schedule) will be governed by and form part of this Agreement.

6. Change Control

- 6.1. If either you or we wish to change the Commercial Details, the Fee Schedule, a Statement of Work or any other part of this Agreement (**Requesting Party**), the Requesting Party shall deliver a written notice to the other party pursuant to clause 28 setting out the details of the requested change (**Change Request**).
- 6.2. If either party issues a Change Request, we will provide you with a written estimate (**Change Proposal**) of:
 - (a) the likely time required to implement the changes;
 - (b) any variations to the Fees, Smart-UI Products and Services arising from the changes;
 - (c) any expenses associated with us complying with the change control process; and
 - (d) any other impact of the changes on the terms of this Agreement.
- 6.3. You and we each have no obligation to proceed with any Change Proposal until and unless both parties have agreed in writing to the Change Proposal by executing the Change Proposal. In the absence of our acceptance of a Change Proposal, the parties shall continue to perform each of their respective obligations under this Agreement.
- 6.4. No change to this Agreement shall be effective unless the change is implemented pursuant to this clause 6 or the change is otherwise agreed in writing by the parties.

7. Meetings

- 7.1. Your Project Manager and our Project Manager shall meet from time to time at the frequency specified in the Commercial Details or as set out in a Statement of Work to monitor and review the performance of this Agreement. These meetings shall be minuted by our Project Manager and copies of those minutes will be circulated to your Project Manager.
- 7.2. Before each meeting, your Project Manager must notify our Project Manager, and vice versa, of any issues relating to this Agreement that they wish to discuss at the meeting. At each such meeting, the parties shall agree a plan to address such issues. Progress in implementing any agreed resolution will be included in the agenda for the next meeting.

8. Implementation Services

- 8.1. If a Statement of Work specifies that we will provide Implementation Services, we will develop an implementation workplan (**Implementation Workplan**) for the setup, configuration and implementation of the Smart-UI Products specified in the Statement of Work (**Implementation Services**). The Implementation Workplan shall establish the time frames for performing the Implementation Services that each party will use its best endeavors to comply with. The Implementation Workplan shall include the following information, as applicable:
 - (a) identification of all milestone events and interdependent milestone events;
 - (b) identification of critical path milestones and the commencement and completion dates for such critical path milestones;
 - (c) a detailed description of all activities to be performed by you, and a detailed description of all activities to be performed by us, with respect to the implementation, and the party responsible for, and the location for performance of, such activities;
 - (d) identification of all interdependent activities; and
 - (e) commencement and completion dates for the setup, configuration and implementation of the Smart-UI Products.
- 8.2. Where Cloud Hosting is specified as being provided in the Fee Schedule and/or a Statement of Work, we will monitor the implementation activities performed by any of our third-party hosting suppliers set out in the Implementation Workplan by:
 - (a) monitoring each third-party hosting supplier's performance of its implementation activities; and
 - (b) notifying you of any third-party supplier's failure to perform its duties and obligations with respect to the implementation of the hosting environment as soon as reasonably practicable.

- 8.3. We will be entitled to an extension of time for completion of any one or more of the stages of the Implementation Workplan if one or more of the following events occur:
- (a) a Force Majeure Event occurs; or
 - (b) a delay is caused in whole or in part by any third-party supplier's acts or omissions or your acts or omissions or any acts or omissions of your agents or third-party contractors.
- 8.4. Each party will ensure that its Project Manager is fully acquainted with the Implementation Workplan.
- 8.5. Each party must provide all cooperation, access to Personnel and information reasonably required by the other party to perform its obligations under the Implementation Workplan.
- 8.6. Where On-Premise Hosting is specified in the Fee Schedule and/or a Statement of Work, and without limiting your obligations under clause 8.5, you must provide us with physical access to any relevant computer server at the Hosting Location, where the Implementation Workplan requires us to perform Implementation Services for the implementation of Smart-UI Products or Services on that computer server at the Hosting Location or where access to the computer server is otherwise required by us to perform our obligations under this Agreement. You must provide us with all relevant access to such Hosting Location
- 8.7. Upon completion of the Implementation Services, we will test the relevant Smart-UI Products and Services deployed under the Implementation Workplan in accordance with the testing procedures set out in the Implementation Workplan (**Acceptance Tests**) in order to determine and verify that they meet the Specifications in all material respects. We will submit to you a copy of all test results and you will be deemed to have accepted the Implementation Services and the relevant Smart-UI Products and Services upon the relevant Smart-UI Products and Services having successfully passed the Acceptance Tests. You shall not use Smart-UI Products or Services in a live environment until and unless they have successfully passed the Acceptance Tests.
- 8.8. If any of the relevant Smart-UI Products fail to pass the Acceptance Tests in accordance with the Implementation Workplan, and we can demonstrate that the reason for the failure or non-compliance with the Implementation Workplan was caused by an issue or defect in your materials or an issue, incompatibility or defect in or with your technical environment, network or systems, then:
- (a) you must promptly (within 7 days or as otherwise set out in the Implementation Workplan) correct or procure the correction of the relevant issue or defect and we will re-test the relevant Smart-UI Products in accordance with the Implementation Workplan; and
 - (b) if you fail to correct or procure the correction of the relevant issue within the relevant period referred to in clause (a), the relevant Smart-UI Products shall then automatically be deemed to be accepted, notwithstanding the issue or defect.
- 8.9. If any Smart-UI Product fails to pass the Acceptance Tests in accordance with the Implementation Workplan due to our breach of the Implementation Workplan, we will promptly rectify the failure at our sole cost and expense.
- 9. Training Services**
- 9.1. If a Statement of Work specifies that we will provide Training Services, unless as otherwise agreed between the parties, we will provide the allocated number of days of training set out in the Statement of Work in the use of the Smart-UI Products, to be attended by up to three (3) of your employees, at our premises in Sydney, Australia or at such other location as we may agree in writing with you.
- 9.2. The starting date of the training will be determined by you and us.
- 9.3. If the Training is not carried out at our premises, you will be responsible for all costs and expenses of our Personnel and all trainees in connection with travel to and attendance at the training, including with respect to accommodation, meals and transport (**Expenses**). You must reimburse us for all Expenses that we incur within twenty-eight (28) days of the date of any invoice we issue to you for Expenses.
- 9.4. Where required by us, each trainee shall execute a confidentiality undertaking, in a form approved by us before attending the training.
- 10. Smart-UI Products – On Premise Hosting Option**
- 10.1. If On-Premise Hosting is specified in the Fee Schedule or a Statement of Work with respect to any Smart-UI Products, subject to your payment of the Fees in accordance with the Payment Terms and your compliance with this Agreement:
- (a) we shall be deemed to have granted you a non-exclusive, non-sublicensable, non-transferable licence to host one Object Code copy of the applicable Smart-UI Products on one computer server (**On-Premise Server**) during the Subscription Term at the Hosting Location for the Permitted Purpose for use by your Authorised End Users only (**Hosting Licence**);
 - (b) we will, where required by the Implementation Services, install that Object Code copy of the Smart-UI Products on the On-Premise Server;
 - (c) you must not use or permit any person to use the Smart-UI Products except for the Permitted Purpose pursuant to the Hosting Licence;
 - (d) you must not install or permit the Smart-UI Products to be installed on any computer server other than the On-Premise Server at the Hosting Location without our prior written consent;

- (e) we are not responsible for the security or maintenance of the On-Premise Server;
- (f) we are not responsible for any inability of the Smart-UI Products to communicate with our data centres or networks;
- (g) you are responsible for providing or procuring the provision of connectivity and technical support with respect to the applicable Smart-UI Products; and
- (h) you must:
 - (i) maintain a firewall to prevent unauthorised access to the applicable Smart-UI Products and otherwise ensure the security of any communications made to and from the On-Premise Server;
 - (ii) control access to and use of any passwords and other access credentials that we provide to you or that you create or configure using the applicable Smart-UI Products or with respect to any other software on the On-Premise Server or any firewall;
 - (iii) take all steps required to prevent the applicable Smart-UI Products and the On-Premise Server from being subjected to viruses, hacking, pirating, unauthorised access and denial of service attacks (**Attacks**);
 - (iv) if the On-Premise Server becomes subjected to Attacks, you must promptly take all steps required to perform remedial action on the On-Premise Server and to prevent any further Attacks;
- (i) implement and maintain computer and network security at the Hosting Location and on the On-Premise Server; and
- (ii) ensure that the On-Premise Server is ready, compatible with, configured and maintained in accordance with any written instructions that we provide to you from time to time.

10.2. For the avoidance of doubt, we are not obligated to provide any Source Code to you with respect to any Smart-UI Products or otherwise.

11. Smart-UI Products – Cloud Hosting Option

- 11.1. If Cloud Hosting is specified in the Fee Schedule or a Statement of Work, subject to your payment of the Fees in accordance with the Payment Terms and your compliance with this Agreement:
- (a) we shall be deemed to have granted you a non-exclusive, non-sublicensable, non-transferable right for the Subscription Term for each of your Authorised End Users to access one instance of those Smart-UI Products, hosted by us or on our behalf for the Permitted Purpose, on approved devices specified by us, for the Subscription Term (**Approved Devices**) (**Cloud Subscription**);
 - (b) we undertake to use reasonable endeavours to host or procure the hosting of that instance of

the Smart-UI Products during the Subscription Term in accordance with the Availability Target set out in the SLA;

- (c) you must not use or permit Authorised End Users to use the Smart-UI Products except pursuant to the Cloud Subscription;
- (d) we are not responsible for the security or maintenance of the Approved Devices upon which the Smart-UI Products are installed;
- (e) you must control access to and use of any passwords and other access credentials that we provide to you or that you create or configure using the Smart-UI Products;
- (f) you must implement and maintain reasonable security with respect to the Approved Devices; and
- (g) you must ensure that the Approved Devices are ready, compatible with, configured and maintained in accordance with any written instructions that we provide to you from time to time.

11.2. The undertaking in clause 11.1(b) shall not apply if any breach of the Availability Target is caused by your use of the Smart-UI Products in breach of this Agreement or contrary to our instructions.

11.3. Subject to clause 11.2, if we fail to meet the Availability Target, you will be entitled to the Service Availability Credits with respect to the relevant Smart-UI Products, subject to the provisions of the SLA. Subject to clause 11.2, the Service Availability Credits constitute your sole and exclusive remedy for any failure to meet the Availability Target or other non-performance, unavailability or downtime of the Smart-UI Products.

12. Maintenance Releases and New Versions of the Smart-UI Products

- 12.1. You agree and acknowledge that you are not entitled to receive, and that we are not obligated to supply, under this Agreement any version of the Smart-UI Products which from time to time is marketed by us as a new version of the Smart-UI Products (each, a **New Version**). If we release a New Version, we may charge a fee determined by us to provide you with the New Version.
- 12.2. During the Subscription Term, we may release to you updates of the Smart-UI Products that are designed solely to correct faults in the Smart-UI Products (each a **Maintenance Release**), but which do not constitute a New Version. We will not charge you any fee to provide you with any Maintenance Release.
- 12.3. If Cloud Hosting is specified in a Fee Schedule or Statement of Work, we may at any time make Maintenance Releases available to you by automatically updating the instance of the Smart-UI Products that we make available to you pursuant to clause 11.1.

12.4. The provisions of this Agreement that apply to the Smart-UI Products will apply equally to any Maintenance Releases and New Versions that we provide to you.

13. Ownership and use of Client Data

13.1. As between you and us, you own all Client Data including all information, text, graphics, audio or visual material that you and/or any Authorised End User uploads or enters into the Smart-UI Products and/or that is accessed by us during our provision of the Services.

13.2. You warrant, agree, represent and acknowledge that:

- (a) where a Statement of Work or Fee Schedule specifies Cloud Hosting, Client Data entered into the Smart-UI Products will be hosted by us or our suppliers on hardware or infrastructure located at the Data Centre Location as set out in the Statement of Work or Fee Schedule, but we may or may not own or operate the infrastructure upon which the Client Data is hosted, stored, transferred or processed in the course of the provision of the Services;
- (b) you are fully entitled and authorised to (including, by obtaining any necessary consent) upload, input, transfer and disclose the Client Data to us and any Authorised End User;
- (c) the Client Data and our collection, use, storage and/or disclosure of that Client Data in the course of operating our business will not breach any Applicable Law or right of any person;
- (d) it is your responsibility to ensure that the use, hosting, transmission, modification, collection, holding and disclosure of Personal Information in any Client Data through the Smart-UI Products, does not breach any Applicable Law or any person's rights, and that prior to uploading or entering any Personal Information in any Client Data into the Smart-UI Products, all relevant consents will have been obtained by you as necessary for us to collect, hold, disclose and otherwise process that Personal Information in the course of performing our obligations or exercising our rights under this Agreement;
- (e) where a Statement of Work or Fee Schedule specifies Cloud Hosting, we will follow our archiving procedures for Client Data hosted by us with respect to the instance of the Smart-UI Products referred to in clause 11.1, as set out in our Back-Up Policy, and you are otherwise responsible for backing up Client Data;
- (f) in the event of any loss or damage to Client Data, your sole and exclusive remedy shall be to request us to use reasonable endeavours to restore the lost or damaged Client Data from the latest back-up of such Client Data that we maintain (where a Statement of Work or Fee Schedule specifies Cloud Hosting);

(g) we shall not be responsible for any loss, destruction, alteration or unauthorised disclosure of any Client Data.

13.3. You license us and our subcontractors to use Client Data for the purpose of providing the Smart-UI Products and Services to you.

13.4. Notwithstanding any other provision of this Agreement, you agree to maintain your own independent backups of all Client Data.

13.5. Each time you and/or any Authorised End User uses any Smart-UI Product you shall be deemed to have agreed and warranted and represented to us that:

- (a) Client Data will only be uploaded, entered, inputted and transferred into and/or via the Smart-UI Product, and Client Data will only be disclosed to us, which can be uploaded, inputted and transferred into and/or via the Smart-UI Product and disclosed to us without contravening any Applicable Laws or the rights of any person;
- (b) the Client Data and our collection, use, holding and/or disclosure thereof in the course of performing our obligations under this Agreement, will not breach any person's rights or any Applicable Law including the Data Protection Laws).

13.6. As between you and us, you are solely responsible for the accuracy, legality and quality of all Client Data, for any claims arising in respect of Client Data and for obtaining any permissions, consents, licences, rights and authorisations necessary for us and our suppliers to use, host, modify, hold, transmit, store and disclose Client Data in connection with this Agreement.

13.7. Except in respect of any Applicable Law that cannot be contracted out of, you agree that as between you and us, we are not responsible for any loss, unauthorised disclosure or access, corruption or hacking of any Client Data.

13.8. If we receive a request from any person for the provision of Personal Information held about them in the Smart-UI Products, you must provide all assistance that we require in order to comply with our legal obligations in connection with any such request.

13.9. Except as may be otherwise agreed in writing by us, you are solely responsible for security of the Smart-UI Products and your networks and systems, including securing them from unauthorised access, including by way of firewalls, and ensuring that they are protected by passcodes that are regularly changed. You shall promptly inform us if you suspect or uncover any breach of security, and shall use all commercially reasonable endeavors to promptly remedy such breach.

13.10. You must indemnify us in respect of any loss and damage that we incur in respect of any claim that any Client Data is lost, unavailable, deleted or corrupted or that the transmission, storage, hosting, disclosure, access or use of Client Data by

us or our suppliers, or the processing thereof by the Smart-UI Products in connection with this Agreement infringes the Intellectual Property Rights or other rights of any person or breaches any Applicable Law.

14. Authorised End Users

- 14.1. Where a Statement of Work or Fee Schedule specifies that we will provide Smart-UI Products to you, we will provide you with access credentials and details for your Authorised End Users.
- 14.2. We grant you a non-exclusive right to permit your Authorised End Users to use the Smart-UI Products solely for the Permitted Purpose, on Approved Devices in accordance with this Agreement for the Subscription Term.
- 14.3. You must not permit third parties who are not Authorised End Users to use or access the Smart-UI Products and/or Services.
- 14.4. As between you and us, you are responsible for each act and omission of an Authorised End User. Without limiting the foregoing provisions, any act or omission by an Authorised User that if committed by you would be a breach of this Agreement, will be deemed to constitute a breach of this Agreement by you.

15. Software Limits and Restrictions

- 15.1. You may not use or permit any Authorised End User to use the Smart-UI Products except for the Permitted Purpose and may not do or authorise the commission of any act that would or might invalidate or be inconsistent with our Intellectual Property Rights in the Smart-UI Products. Without limiting the foregoing provisions, you agree and acknowledge that except with our prior written consent, you must not, and must not permit any person or entity to:
 - (a) use the Smart-UI Products who is not an Authorised End User;
 - (b) license, sublicense, resell, assign, transfer, distribute, or provide others (other than Authorised End Users) with access to, the Smart-UI Products;
 - (c) "frame", "mirror" or serve the Smart-UI Products on any web server or other computer server over the Internet or any other network (other than as expressly permitted by this Agreement);
 - (d) copy, alter, modify, create derivative works from, reproduce, resell, transfer to a third party, reverse assemble, reverse engineer, reverse compile or enhance the Smart-UI Products (except to the extent that this paragraph (d) contravenes Applicable Law or we expressly authorise you to do so in writing);
 - (e) store, transmit or distribute any virus or Client Data or other material using the Smart-UI Products that is unlawful, harmful, threatening, defamatory, infringing, offensive or in breach of any person's rights;

- (f) mine any data from the Smart-UI Products or any database used by the Smart-UI Products;
- (g) use the Smart-UI Products in any way which is in breach of any right of any person or any Applicable Law;
- (h) use the Smart-UI Products or any part of them (or allow it to be used) (including any component of any graphical user interface or the look and feel of the Smart-UI Products) for the purpose of developing, or contributing to the development of any software competitive with the Smart-UI Products by you or any third party; or
 - (i) alter, remove or tamper with any trade marks, any patent or copyright notices, or any confidentiality legend or notice, or any numbers, or other means of identification, used on or in relation to the Smart-UI Products.
- 15.2. You must not, and must not permit any person to:
 - (a) use the Smart-UI Products to violate all or any legal rights of any person or company or other entity in any jurisdiction;
 - (b) use the Smart-UI Products in relation to crimes such as theft and fraud;
 - (c) use the Smart-UI Products in breach of laws relating to the protection of copyright, trade secrets, patents or other intellectual property and laws relating to spam or privacy and whether such violation is by way of the installation or distribution of "pirated" software or otherwise;
 - (d) introduce malicious programs into our network or servers (e.g., viruses, worms, Trojan horses, e-mail bombs);
 - (e) reveal Smart-UI Products password or other credentials to others or allow use of Smart-UI Products password or other credentials by any person who is not an Authorised End User;
 - (f) use the Smart-UI Products to make fraudulent offers of goods or services;
 - (g) use the Smart-UI Products to carry out security breaches or disruptions of network communication. Security breaches include, accessing data of which you are not an intended recipient, logging into a server or account that you are not expressly authorised to access, corrupting any data, network sniffing, pinged floods, packet spoofing, denial of service, and forged routing information for malicious purposes;
 - (h) use the Smart-UI Products to execute any form of network monitoring which will intercept data not intended for you;
 - (i) use the Smart-UI Products to circumvent user authentication or security of any of our hosts, networks or accounts or those of our customers or suppliers;
 - (j) use the Smart-UI Products to interfere with or deny service to anyone;

- (k) 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 Smart-UI Products;
 - (l) send unsolicited email messages through or to users of the Smart-UI Products in breach of the Spam Act 2003 (Cth);
 - (m) use the Smart-UI Products to send any form of harassment via email, or any other form of messaging, whether through language, frequency, or size of messages; or
 - (n) use the Smart-UI Products in breach of any person's privacy (such as by way of identity theft or "phishing").
- 15.3. You acknowledge that the integrity of the Smart-UI Products is protected by technical protection measures (**TPMs**) to prevent Intellectual Property Rights, including copyright, in the Smart-UI Products from being misappropriated. You must not attempt in any way to remove or circumvent any TPM from the Smart-UI Products.
- 15.4. You must comply with any security procedures, policies and standards that we notify you of from time to time with respect to your use of the Smart-UI Products.
- 15.5. You must indemnify us in respect of all and any Loss (including loss of profits, loss of revenue and other consequential loss) that we may suffer as a result of your breach of this clause 15.
- 15.6. If we expressly authorise you in writing to modify any Smart-UI Products, you are liable for all and any Loss that you incur as a result of any such modifications (**Client Modifications**), and we shall have no liability for any failure by us to carry out our obligations under this Agreement to the extent caused by the Client Modifications.
- 15.7. We are not required to provide any warranties or Support Services with respect to any Client Modifications. For the avoidance of doubt, you must not develop, or engage any third party to develop, any Client Modifications except to the extent authorised in writing by us in advance, and subject to any terms and conditions that we impose with respect to any such authorisations.
- 16. Intellectual Property Rights**
- 16.1. Nothing in this Agreement affects the ownership of any Intellectual Property Rights owned by either party prior to the Commencement Date.
- 16.2. As between you and us, we own all Intellectual Property Rights in the Smart-UI Products, the Services and the Documentation and in any updates, upgrades, new versions and other modifications of the Smart-UI Products. You must not represent that you own the Smart-UI Products or any updates, upgrades, new versions and other modifications of the Smart-UI Products and/or the Documentation.
- 16.3. Except as expressly stated herein, this Agreement does not grant you or any third party any rights to or in patents, copyright, database rights, trade secrets, trade names, trade marks (whether registered or unregistered), or any other Intellectual Property Rights or other rights or licences in respect of the Smart-UI Products, the Services or the Documentation.
- 16.4. You must not directly or indirectly do anything that would or might invalidate, jeopardise, limit, interfere with or put in dispute our or our licensors' ownership in or rights with respect to the Smart-UI Products, the Services or the Documentation.
- 16.5. You may not do or authorise the commission of any act that would or might invalidate or be inconsistent with our or our licensors' Intellectual Property Rights in the Smart-UI Products, the Services or any Documentation.
- 16.6. You hereby assign to us all and any Intellectual Property rights that you may have in all and any comments in connection with the Smart-UI Products or requests for new Smart-UI Product features that you or your Personnel may suggest or create (each, an **Improvement Suggestion**). Each Improvement Suggestion becomes our sole and exclusive property. This assignment is effective as soon as you or your Personnel create any Improvement Suggestion or provides an Improvement Suggestion to us including where applicable under section 197 of the Copyright Act 1968 (Cth) and in equity. You further authorise us (or any third parties authorised by us) to infringe any Moral Rights that you have in any Improvement Suggestions. You must execute and procure from your Personnel the execution of any documentation reasonably required by us to give effect to the assignment to us of all Intellectual Property Rights in any Improvement Suggestions and moral rights consents from your Personnel in respect of Improvement Suggestions in our favour.
- 16.7. You must not:
- (a) use any of our trade marks or other marks (**Marks**) except as provided for in this Agreement; or
 - (b) contest any Mark, apply for registration of any Mark or use or apply for registration of any trade mark, trade name, business name, company name or domain name which is or incorporates any element that is confusingly similar to any Mark.
- 16.8. Except as expressly provided in this Agreement, you have no rights in respect of any Marks or their associated goodwill, and you hereby acknowledge that all such rights and goodwill inure for the benefit of, and are (and will remain) vested in, us.
- 17. Confidentiality**
- 17.1. Each party (the **first party**) agrees and acknowledges that it may receive confidential information of the other party during the term of this Agreement (**Confidential Information**).

- 17.2. The first party agrees and acknowledges that the Confidential Information of the other party will be received and held by the first party in strict confidence and will not be disclosed by the first party, except:
- (a) with the prior written consent of the other party;
 - (b) as must be disclosed by Applicable Law;
 - (c) where disclosed to the Personnel on a confidential basis. The first party must use reasonable endeavours to ensure that its Personnel keep the Confidential Information of the other party that the first party provides to its Personnel confidential;
 - (d) as required by the rules of any stock exchange; or
 - (e) as required by a court of competent jurisdiction, and then, only to the extent required, and provided that the first party promptly notifies the other party of such requirement of disclosure and provides full particulars to the other party of the disclosure.
- 17.3. Confidential Information does not include any information:
- (a) that is independently developed, obtained or known by a party, without breaching any obligation of confidence to the other party;
 - (b) that the first party can prove was already rightfully known by it at the time of disclosure to it as shown by contemporaneous records;
 - (c) which is or becomes available to the first party from a third party lawfully in possession of such information and who has the lawful power to disclose such information to the first party on a non-confidential basis; or
 - (d) that is in the public domain or which becomes part of the public domain except where due to a breach of this Agreement or any breach of any obligation of confidence.
- 17.4. Our Confidential Information includes:
- (a) this Agreement;
 - (b) all parts of the Smart-UI Products (including any designs, graphical user interface, the layout of any parts of the Smart-UI Products and the look and feel of the Smart-UI Products and any Custom Software);
 - (c) the Documentation;
 - (d) all Intellectual Property Rights and any proprietary and technical data, trade secrets, patented and unpatented inventions, discoveries, works, improvements, innovations, ideas, concepts, graphs, flow charts, materials, samples, devices, models, know how, techniques, operations, dealings, processes, procedures, secret formula, computer hardware and software programs and designs, drawings, technology, machinery or equipment used or proposed to be used or developed in connection with the Smart-UI Products;
 - (e) all advertising and marketing information and material provided to you; and
 - (f) the Object Code and Source Code in the Smart-UI Products, (collectively, **Smart-UI Confidential Information**).
- 17.5. Smart-UI Confidential Information is not your Confidential Information and you must not use, modify, reproduce, release, perform, display or disclose it except as is strictly necessary for you to use the Smart-UI Products for the Permitted Purpose in accordance with this Agreement.
- 18. Fees and Payment Terms**
- 18.1. You must pay the Fees to us in accordance with the Payment Terms, upon our provision of a valid tax invoice.
- 18.2. The Fees are exclusive of GST and all other taxes, duties and customs and you agree to pay to us all freight, shipping charges, taxes, duties and customs, including GST that we incur in connection with this Agreement. You must pay all applicable taxes, freight, shipping charges, taxes, duties and customs, including GST, at the same time as the Fees in accordance with the Payment Terms.
- 18.3. You shall reimburse us for all reasonable travel and out-of-pocket expenses incurred by us, in compliance with our obligations set out in this Agreement, in an applicable Statement of Work, or as otherwise agreed between the parties, within 30 days of a valid invoice issued by us.
- 18.4. If you fail to make any payment due to us for any undisputed amounts under this Agreement by the due date for payment, then, without limiting our remedies, you shall pay interest on the overdue amount at a rate equal to 2% per annum above the base rate set by the Reserve Bank of Australia from time to time. Such interest shall accrue on a daily basis from the due date until actual payment of the overdue amount, whether before or after judgment and you shall pay the interest together with the overdue amount upon demand by us.
- 18.5. If we have not received payment of any Fees by the due date in accordance with the Payment Terms, then without prejudice to any of our other rights and remedies, we may, without liability to you, suspend the operation of the Smart-UI Products and/or suspend all or any part of our obligations under this Agreement.
- 18.6. The Fees may be increased by us in accordance with the Consumer Price Index, or as otherwise agreed in writing by you and us, every 12 months from the Commencement Date.
- 19. Fee Disputes**
- 19.1. If you, acting reasonably, dispute an amount invoiced by us, you:
- (a) must pay the undisputed amount of the invoice by the due date;

- (b) must notify us of the dispute and the reasons for the dispute within 3 days of receipt of the invoice;
- (c) may withhold payment of the disputed part of the invoice until the dispute is resolved in accordance with clause 29.

19.2. On resolution of the dispute in our favor, you must pay any additional amounts agreed or determined to be payable, plus interest at an annual rate equivalent to 2% per annum above the base rate set by the Reserve Bank of Australia from time to time on that amount, accruing daily from the date when the invoiced amount was due for payment until the date on which payment is actually made.

19.3. You shall pay all legal and debt collection costs incurred by us in enforcing your payment obligations of under this Agreement.

20. Support Services

20.1. If Support Services are specified in a Statement of Work or Fee Schedule, we will provide the Support Services in relation to the Smart-UI Products the subject of the Statement of Work or Fee Schedule, subject to the provisions of the SLA.

21. Software Development Services

21.1. We have no obligation to provide any software development services under this Agreement unless you and us execute a Custom Development Statement of Work specifying the software development services to be provided and the software to be developed (**Custom Software**).

21.2. You will pay, the Fees set out in or referred to in the Custom Development Statement of Work on a time and materials basis for all time spent carrying out our obligations under this clause 21.

21.3. Except as otherwise agreed in a Custom Development Statement of Work, we own all Intellectual Property Rights in all Custom Software. To the extent that we do not automatically own all such Intellectual Property Rights, you hereby assign all such Intellectual Property Rights to us. The assignment pursuant to this clause includes an assignment of future copyright pursuant to section 197 of the *Copyright Act 1968* (Cth) and in equity.

21.4. Smart-UI Products will be deemed to include Custom Software for the purposes of this Agreement, except as otherwise expressly specified to the contrary in the applicable Custom Development Statement of Work.

22. Force Majeure Event

22.1. Each party will not be liable to the other party for any breach of this Agreement to the extent that it is caused or contributed to by a Force Majeure Event. In the event that a Force Majeure Event continues for a period of thirty (30) days, either party may, without liability, cancel one or more impacted Services on seven (7) days written notice to the other party.

23. Third Party Tools

23.1. There may be third party-owned software, applications, products, platforms and other third party-owned copyrighted material as set out in the Commercial Details, Fee Schedule and/or a Statement of Work that you may use in connection with, or that we supply to you as part of, the Smart-UI Products (**Third Party Tools**).

23.2. You must indemnify us from and against any Loss that we incur as a result of your use and/or interfacing Smart-UI Products with any Third Party Tools, and you agree and acknowledge that:

- (a) the providers of the applicable Third Party Tools, and not us, are the suppliers and publishers of the Third Party Tools;
- (b) we are not responsible for the accuracy, quality or correctness of any Third Party Tools and/or their providers;
- (c) your use of Third Party Tools is pursuant to a contract between you and the applicable Third Party Tool provider(s), and not pursuant to a contract between you and us;
- (d) your use of Third Party Tools is at your sole risk, and not our risk;
- (e) we do not make any representations or warranties with respect to any Third Party Tools (whether as to their performance, availability, compatibility with the Smart-UI Products and/or otherwise) and/or with respect to any providers of Third Party Tools;
- (f) we are not responsible for the practices, and/or terms and/or policies of Third Party Tool providers;
- (g) you warrant that you have read, understood and consented to all and any third party end user agreements, terms, conditions and policies set out in the Commercial Details, Fee Schedule or any applicable Statement of Work (**Third Party Terms**) and that any warranties provided in this Agreement is subject to the terms and conditions of any Third Party Tools;
- (h) you will comply with, and ensure that each of your Authorised End Users comply with, the Third Party Terms;
- (i) you must indemnify us from any Loss that we suffer as a result of your or any Authorised End Users' breach of any Third Party Terms;
- (j) you agree that we have no obligation to provide any technical support or other assistance in connection with any Third Party Tools and that if we do provide any such technical support or other assistance, you will pay us for all time that we incur in connection therewith at a rate agreed prior to commencement of the technical support or other assistance, to be paid by you into our nominated bank account listed in the Fee Schedule within thirty (30) days of invoice by us from time to time;

- (k) you shall be deemed to have irrevocably released us from any claims that you may otherwise have had against us with respect to any non-performance of the Smart-UI Products, and with respect to any loss, damage or corruption of any Client Data, caused by Third Party Tools and/or the interfacing of any Third Party Tools with Client Data and/or Smart-UI Products;
- (l) except where we otherwise expressly specify in writing to the contrary, the providers of Third Party Tools are not our partners, co-joint venturers, representatives or agents and any link to any Third Party Tool from the Smart-UI Products and/or interfacing and/or integration of the Smart-UI Products with a Third Party Tool does not imply that we are affiliated with or sponsor, endorse or approve the Third Party Tool and/or its provider;
- (m) we are not responsible for any downtime in the Smart-UI Products that occurs because a third party who operates software that the Smart-UI Products connects to, modifies any part of that software; and
- (n) we are not responsible for any loss and/or damage that may be incurred by you directly as a result of claims that your use of Third Party Tools breaches the Intellectual Property Rights of any third party.

24. Liability

- 24.1. Subject to clause 15.5, neither party is liable to the other party for any indirect, special or Consequential Loss incurred by the other party, including liability for loss of profits, loss of business opportunity, loss of savings or loss of data and whether arising in contract, tort (including for negligence) or otherwise, and whether the Consequential Loss is foreseeable or not. This clause does not apply to limit your liability with respect to any indemnity specified in this Agreement or with respect to any liability that cannot be excluded under Applicable Law.
- 24.2. For any loss or damage that is not otherwise excluded by the provisions of this Agreement, we are only liable for loss or damage that you directly incur as a result of one or more breaches by us of our obligations under this Agreement ("direct loss and damage"). However, our liability for all such direct loss and damage in respect of any one or more events (whether or not pursuant to an indemnity or other provision hereof) and regardless of the legal or equitable theory (whether under contract, tort or otherwise) is capped, in the aggregate for all claims and all events, to the value of the Fees paid by you in the three (3) months prior to the last event which caused the loss or damage, and which cap is reduced to the extent that you or your Personnel was responsible for, or any Force Majeure Event caused such loss or damage.

- 24.3. We shall not be liable for any non-performance of our obligations under this Agreement where caused by your acts or omissions. If we are delayed or prevented from complying with an obligation under this Agreement due to any of your acts or omissions or those of your Personnel, in such circumstances our obligations will be postponed or relieved accordingly to the extent affected by that act or omission.

25. Warranties and implied guarantees

- 25.1. Each party warrants that:
- (a) it has full capacity, authority and all necessary consents to enter into and to perform this Agreement and to grant the rights referred to in this Agreement and that this Agreement is executed by its duly authorised representative and represents a binding commitment on it;
 - (b) it shall comply with all Applicable Laws in the performance of its obligations under this agreement; and
 - (c) if it is not subject to the Privacy Act 1988 (Cth), it will comply with the Privacy Act 1988 (Cth) as if it were an APP Entity for the purposes of that legislation.
- 25.2. You warrant that your entering into and/or performance of your obligations under this Agreement does not and will not violate or conflict with or result in a breach of, or constitute a default under, or result in the imposition of, any encumbrance under the provisions of your constitution or any contract or other instrument. If any such conflict, breach or default occurs or is likely to occur:
- (a) you must immediately disclose full particulars of the actual and/or likely conflict, breach or default and you must indemnify us for any Loss that we may incur as a result thereof;
 - (b) we may terminate this Agreement by notice to you.
- 25.3. You warrant that you have made full disclosure to us of all information which would be material to our decision as to whether or not to enter into this Agreement and that the information given by or on your behalf to us to date is true, complete and accurate in all respects and none of that information is misleading whether by inclusion of misleading information or omission of material information or both.
- 25.4. The goods and services supplied under this Agreement may come with implied non-excludable guarantees which are regulated by the Australian Consumer Law. The extent of the implied guarantees depends on whether you are a 'consumer' of goods or services within the meaning of that term pursuant to the Australian Consumer Law as amended. Where you are a 'consumer' for the purposes of the Australian Consumer Law, we are required to provide and shall be deemed to have provided the following mandatory statement to

you: "Our goods come with guarantees that cannot be excluded under the Australian Consumer Law. You are entitled to a replacement or refund for a major failure and for compensation for any other reasonably foreseeable loss or damage. You are also entitled to have the goods repaired or replaced if the goods fail to be of acceptable quality and the failure does not amount to a major failure."

25.5. If the goods or services supplied by us to you are supplied to you as a 'consumer' of goods or services within the meaning of that term in the Australian Consumer Law as amended you will have the benefit of certain non-excludable rights and remedies in respect of the goods or services and nothing in this Agreement excludes or restricts or modifies any condition, warranty, guarantee, right or remedy which pursuant to the *Competition and Consumer Act 2010* (Cth) is so conferred. However, if the goods or services are subject to a non-excludable condition, warranty, guarantee, right or remedy implied by the Australian Consumer Law and the goods or services are not ordinarily acquired for personal, domestic or household use or consumption, then pursuant to section 64A of the Australian Consumer Law, we limit our liability for breach of any such non-excludable warranty, guarantee, right or remedy implied by the Australian Consumer Law (other than a guarantee implied by sections 51, 52 or 53 of the Australian Consumer Law) or expressly given by us to you, in respect of each of the goods and services, at our option, to one or more of the following:

- (a) if the breach relates to goods:
 - (i) the replacement of the goods or the supply of equivalent goods;
 - (ii) the repair of such goods;
 - (iii) the payment of the cost of replacing the goods or of acquiring equivalent goods; or
 - (iv) the payment of the cost of having the goods repaired; and
- (b) if the breach relates to services:
 - (i) the supplying of the services again; or
 - (ii) the payment of the cost of having the services supplied again.

25.6. Any warranty against defects that may be provided by us to you as a 'consumer' under the Australian Consumer Law is in addition to your other rights and remedies under a law in relation to the goods or services to which the warranty relates.

25.7. Other than with respect to any non-excludable guarantees implied into this Agreement under the Australian Consumer Law, to the maximum extent permitted by Applicable Law (if any and if permitted by Applicable Law):

- (a) all conditions, warranties and guarantees implied in this Agreement are excluded, to the extent possible by Applicable Law;
- (b) we will not have any liability to you for any Loss howsoever incurred in relation to

Authorised End Users' use or inability to use the Smart-UI Products;

- (c) we do not warrant that the Smart-UI Products are error-free or will operate accurately, correctly or without interruption or will achieve your intended results; and
- (d) you accept sole responsibility for the selection of the Smart-UI Products to achieve your intended results and for any results that you or any Authorised End Users obtain therefrom.

25.8. You must indemnify us from and against all and any Loss that we may incur resulting from any claim by any Authorised End User against us in connection with any Smart-UI Products.

25.9. Notwithstanding any other provisions in this Agreement, nothing in this Agreement excludes your liability for Loss relating to:

- (a) a breach of Applicable Law;
- (b) use of the Smart-UI Products in combination with any Third Party Tools or other software not supplied or approved in writing by us;
- (c) unauthorised use, collection, disclosure, modification or processing of Client Data;
- (d) any modification or enhancement of Smart-UI Products made by you or any third party;
- (e) use of any version of a Smart UI Product other than the latest version supplied by us, if such liability could have been avoided by the use of such latest supplied version;
- (f) a breach of any provision of this Agreement concerned with Client Data, privacy and/or personal information;
- (g) wilful misconduct;
- (h) breach of any provision of this Agreement concerning Confidential Information and/or Intellectual Property Rights; and/or
- (i) repudiatory conduct.

26. Insurance

26.1. We will, at our own cost and expense, obtain and maintain during the term of this Agreement and for seven (7) years thereafter, the following insurances:

- (a) professional liability insurance in the sum of twenty million dollars (\$20,000,000) in respect of each claim; and
- (b) public liability and products liability insurance in the sum of twenty million dollars (\$20,000,000) in the aggregate.

26.2. You must at your own cost and expense, obtain and maintain during any Trial Period and during the term of this Agreement and for seven (7) years thereafter, the following insurances for all and any claims arising in connection with the performance of this Agreement:

- (a) workers compensation insurance in accordance with applicable legislation for all or your employees;
- (b) public liability insurance in the sum of twenty million dollars (\$20,000,000) in respect of each claim; and

- (c) cyber liability and privacy protection insurance in the amount of five million dollars (\$5,000,000) in respect of each claim covering losses for unauthorised access to data and systems, business interruption, data breaches, any damage to or loss of data, cyber extortion and network security events.

26.3. In respect of each of the insurances referred to in clause 26.2, you must:

- (a) pay any cost necessary for obtaining and maintaining any insurance;
- (b) procure each insurance with an independent, reputable and solvent insurer approved by us;
- (c) provide to us upon request any certificate of currency and upon request any other specific information reasonably requested by us in relation to any insurance;
- (d) not perform or permit any action which may cause any prejudicial effect to any insurance or potential claim under any insurance;
- (e) perform any action and provide any document, evidence and information necessary to enable us to recover any moneys due at any time under any insurance;
- (f) notify us of any fact giving rise to any claim under any insurance, and any material amendment to any insurance, immediately following notice of that fact or amendment by you;
- (g) not perform or permit any action which may cause the termination of, or a material change or reduction in, any insurance without our prior written consent; and
- (h) permit us without liability to procure any insurance at your full cost in the event of any default by you to obtain that insurance under this Agreement or the invalidity of any insurance.

26.4. For each insurance policy taken out by you in accordance with this Agreement, you must provide us with a certificate of currency which identifies the insurer, policy number, term of the policy, type of insurance and limits of liability for the cover upon request by us from time to time. In addition, you must provide us with a copy of the policy wording as and when requested by us.

27. Suspension and Termination

27.1. We may temporarily and/or permanently suspend and/or disable the performance of the whole or any part of the Smart-UI Products and/or Authorised End User's access to or use of the Smart-UI Products by way of TPM or otherwise if we know or reasonably suspect that:

- (a) you or they are in breach of any of your obligations under this Agreement;
- (b) you fail to pay the Fees in accordance with the Payment Terms and the amount unpaid remains unpaid for thirty-five (35) or more days after the date that the invoice was issued

by us to you, whether or not a portion or the whole of the Fees is disputed under clause 19, or otherwise;

- (c) any Authorised End User has not used or is not using the Smart-UI Products in compliance with the Permitted Purpose;
- (d) we determine that you or any Authorised End User's use of the Smart-UI Products is likely to lead to any third-party instituting or threatening legal proceedings against us or any other person.

27.2. A party may terminate this Agreement, an SOW or your subscription to any Smart-UI Product by written notice to the other party (the **defaulting party**) if the defaulting party is in material breach of this Agreement which is not remediable, or if capable of remedy and the defaulting party fails to remedy the breach within twenty-eight (28) days of written notice from the other party requiring the remedying of the breach.

27.3. Either party may terminate this Agreement, an SOW or your subscription to any Smart-UI Product by written notice to the other party if the other party suffers an Insolvency Event, except where such termination would contravene the *Corporations Act 2001* (Cth) or any other Applicable Law.

27.4. We may terminate this Agreement, an SOW or your subscription to any Smart-UI Product if you undergo a change of Control without our prior written consent.

27.5. If this Agreement, an SOW or your subscription to any Smart-UI Product is terminated or expires for any reason:

- (a) any rights or obligations that, by their nature, survive termination shall so survive;
- (b) you shall at our option either promptly return all copies of any applicable Smart-UI Confidential Information and Documentation in your possession or control or destroy all such copies of such Smart-UI Confidential Information and Documentation and provide us with a certificate executed by one of your directors based on that director's actual knowledge that all copies of the Smart-UI Confidential Information Documentation in your possession or control have been deleted and/or destroyed;
- (c) in absence of any direction from you within 7 days following termination or expiry of this Agreement, we shall delete all applicable Client Data in our possession or control;
- (d) we do not have any obligation to provide you with any refund, except to the extent that we must do so pursuant to Applicable Law;
- (e) your right to use and access the Smart-UI Products and Documentation immediately ceases; and
- (f) any licences granted by us pursuant to this Agreement, the SOW or your subscription to

any Smart-UI Product (as applicable) immediately cease.

27.6. If this Agreement is terminated, each Statement of Work and your subscription to each of the Smart-UI Products will automatically terminate.

27.7. If a Statement of Work or your subscription to any Smart-UI Product is terminated prior to the expiry of the Initial Term or any then current Renewal Term (other than due to our breach of this Agreement), then without prejudice to any of our other rights, you must pay any amounts (collectively, the **Outstanding Amount**) which we calculate or reasonably estimate would have been payable by you under the Statement of Work or Fee Schedule for the remainder of the Initial Term (or then current Renewal Term, if applicable) had the Statement of Work or subscription not been terminated. If an Outstanding Amount is payable, we will send you a tax invoice in respect of the Outstanding Amount and you will pay this invoice within twenty eight (28) days. You agree that payment under this clause is not intended to be, and will not be punitive and is intended to compensate us for reasonable losses that we will suffer resulting from the early termination of the Statement of Work or subscription.

28. Notices

28.1. All notices required or permitted to be made under this Agreement shall be in writing and shall be considered properly given if:

- (a) delivered in person;
- (b) sent to the respective addresses identified in this Agreement by post; or
- (c) sent by email.

28.2. Notice given under clause 28.1 shall be effective upon delivery, except as set out in clause 28.3.

28.3. For email notice to be effective, the sender must receive a read or delivery receipt confirming delivery or receipt of the email or the sender must receive a reply to the email, in order for the email to be deemed to be delivered.

28.4. Any party may change its address for notice hereunder by giving seven (7) days' written notice to the other party.

28.5. Text messages, instant messages, messages sent through social media websites, and similar messages are not considered "written" or "in writing" for the purposes of this Agreement.

29. Dispute Resolution

29.1. If a dispute arises between the parties out of or relating to this Agreement (**Dispute**), each party must seek to resolve it strictly in accordance with the provisions of this clause 29. Compliance with the provisions of this clause is a condition precedent to seeking relief in any court in respect of the Dispute, except as otherwise provided in this clause.

29.2. A party seeking to resolve a Dispute must notify the existence and nature of the Dispute to the other

party (**Notification**). Upon receipt of a Notification, each party must refer resolution of the Dispute to their chief executives (or nominees).

29.3. If the Dispute has not been resolved within one (1) calendar month of the Notification, then each party will be entitled to pursue such course of action as it determines.

29.4. Nothing in this clause 29 shall limit either party's right to seek urgent interlocutory relief from any court of competent jurisdiction at any time.

30. General

30.1. **Assignment:** You shall not assign, transfer, license or novate its rights or obligations under this Agreement without our prior written consent (not to be unreasonably withheld).

30.2. **Amendments:** This Agreement may be amended only by a written document signed by all parties and a provision of or a right under this Agreement may not be waived or varied except in writing signed by the party to be bound.

30.3. **Australian Consumer Law:** The exclusions and limitations of liability set out in this Agreement shall apply to the fullest extent permissible at law, but the parties do not exclude or limit liability which may not be excluded or limited by law. Without limiting the foregoing provisions, we do not exclude liability under the Australian Consumer Law which is prohibited from being excluded. The parties acknowledge and agree that the limitations and exclusions of liability contained in this Agreement constitute an allocation of risk that forms part of the negotiated commercial terms of this Agreement.

30.4. **Further Steps:** Upon a party's reasonable request, the other party shall, at the requesting party's sole cost and expense, execute and deliver all such documents and instruments, and take all such further actions, necessary to give full effect to this Agreement.

30.5. **Severability:** If any provision of this Agreement or its application to any party or circumstance is or becomes invalid or unenforceable to any extent, the remainder of this Agreement and its application shall not be affected and shall remain enforceable to the greatest extent permitted by law.

30.6. **Waiver:** No exercise or failure to exercise or delay in exercising any right or remedy by a party shall constitute a waiver by that party of that or any other right or remedy available to it.

30.7. **Entire Agreement:** This Agreement constitutes the entire agreement of the parties about its subject matter and supersedes all other proposals, prior agreements, oral or written, arrangements, agreements and all other communications between the parties about its subject matter.

30.8. **Relationship:** Nothing contained in this Agreement creates any relationship of partnership, employment, joint venture or agency between the parties.

30.9. **Jurisdiction:** This Agreement is governed by the laws of New South Wales and each party irrevocably submits to the exclusive jurisdiction of the courts located in New South Wales, and the courts of appeal from them in relation to any dispute concerning this Agreement.

30.10. **Counterparts:** This Agreement may be executed in counterparts provided that no binding agreement shall be reached until the executed counterparts are exchanged. A counterpart of a document exchanged by email shall constitute evidence of the execution of the original.

31. Interpretation

31.1. In this Agreement, the following rules of construction applies, unless the context otherwise requires:

- (a) headings and underlinings are for convenience only and do not affect the construction of this Agreement;
- (b) a provision of this Agreement will not be interpreted against a party because the party prepared or was responsible for the preparation of the provision, or because the party's legal representative prepared the provision;
- (c) currency or "\$" refers to Australian Dollars;
- (d) a reference to a statute or statutory provision is a reference to it as amended, extended or re-enacted from time to time;
- (e) a reference to a clause, subclause or paragraph is a reference to a clause, subclause or paragraph of this Agreement;
- (f) a reference to a subclause or paragraph is a reference to the subclause or paragraph in the clause in which the reference is made;
- (g) a reference to time is to time in New South Wales;
- (h) a reference to a person includes a reference to an individual, a partnership, a company, a joint venture, government body, government department, and any other legal entity;
- (i) words in the singular shall include the plural and in the plural, shall include the singular;
- (j) a provision of this Agreement shall not be construed against a party merely because the party or its solicitors prepared the provision;
- (a) the phrases "specified in the Commercial Details", "specified in the Statement of Work" and similar, means specified as being applicable or in the affirmative in the Commercial Details or relevant Statement of Work;
- (b) this Agreement shall not bind you or us until and unless the "Acceptance" section of the Commercial Details has been executed by both you and us; and
- (k) the words 'such as', 'including', 'includes' and similar expressions are not used as, nor are intended to be, interpreted as words of

limitation and shall be interpreted as if the words "but not limited to" immediately followed them in each case.

32. Definitions

32.1. In this document, terms in bold font in brackets have the meanings given thereto as set out in the applicable clauses in which they are defined and any word starting with a capital letter that is not otherwise defined in this document, shall have the meaning given to it in the Commercial Details, the Fee Schedule, a Statement of Work and the SLA. In addition, in this document the following words have the following meanings:

'Ad Hoc Rates' means the hourly and daily rates set out in the Fee Schedule or a Statement of Work.

'Agreement' means the Commercial Details, Fee Schedule, Smart-UI Terms and Conditions and Service Level Agreement and any Statements of Work.

'Applicable Law' means any applicable act, law, legislation, rule of the general law, including common law and equity, judicial order or consent or requisition from, by or with any governmental agency, including any Data Protection Law in any applicable jurisdiction.

'Associated Entity' has the meaning given in the Corporations Act 2001 (Cth).

'Australian Consumer Law' means schedule 2 to the *Competition and Consumer Act 2010* (Cth).

'Authorised End User' means an individual that is authorised to use the Smart-UI Products as set out in the applicable Fee Schedule or Statement of Work.

'Back-Up Policy' means any backup policy that we institute from time to time with respect to Client Data hosted by us, if applicable.

'Business Days' means Monday to Friday in New South Wales, excluding public and bank holidays in New South Wales.

'Business Hours' means 9:00AM – 5:00PM on Business Days.

'Commencement Date' means the commencement date as set out in the Commercial Details.

'Commercial Details' means the document entitled "Commercial Details" that you and we expressly agree forms part of the Agreement.

'Consequential Loss' means any loss or damage which is:

- (a) indirect or consequential to another loss;
- (b) a loss of revenue, loss of profits, loss of anticipated savings or business, loss of data, loss of opportunity or expectation loss;
- (c) a special, punitive or exemplary loss or damage (including, without limitation, any penalty or fine imposed); or
- (d) a pure economic loss.

'Consumer Price Index' or **'CPI'** means the percentage from the corresponding quarter of the previous year in the CPI for Sydney, Australia (All

Groups) as published by the Australian Bureau of Statistics (or any similar index published by and replacement thereof) for the quarter preceding the commencement date.

'Control' has the meaning given in section 50AA of the *Corporations Act 2001* (Cth).

'Custom Development Statement of Work' means a document executed by you and us entitled "Custom Development Statement of Work".

'Custom Software' means as set out in clause 21.1.

'Client Data' means any data transmitted by you, any Authorised End User or any of your Personnel into or via the Smart-UI Products or Services and includes all and any Personal Information.

'Data Protection Law' means all applicable data protection and privacy laws in any applicable jurisdiction, including the *Privacy Act 1988* (Cth).

'Documentation' means any information, materials or documents (whether in electronic form or not) referring to or describing the Smart-UI Products and/or Services that we provide to you from time to time. Documentation also includes any written specifications, Statements of Work and manuals.

'Fee Schedule' means the document entitled "Fee Schedule" that you and we expressly agree forms part of the Agreement.

'Fees' the fees, rates and charges that are payable by you to us under this Agreement as set out in the Fee Schedule.

'Force Majeure Event' means any act, event, omission, accident or circumstance beyond our reasonable control. For the avoidance of doubt, a Force Majeure Event does not include any event that results in or contributes to your non-payment of the Fees.

'GST' has the meaning given in the A New Tax System (Goods and Services Tax) Act 1999 (Cth) as amended or replaced from time to time.

'Hosting Location' means the location designated by you for the provision of on premise hosting services as set out in the Fee Schedule or a Statement of Work.

'Initial Term' means the initial term of the subscription to the Smart-UI Product as specified in the Fee Schedule or applicable Statement of Work.

'Insolvency Event' means, in respect of a party: (a) the party ceases to carry on business, is unable to pay its debts as and when they fall due, or is deemed to be insolvent or bankrupt; (b) a receiver or a liquidator or provisional liquidator or an administrator is appointed to the party, or an application (including voluntary application filed by that party) is lodged or an order is made or a resolution is passed for the winding up (whether voluntary or compulsory) or reduction of capital of that party; (c) the party enters into an arrangement with its creditors; (d) where the party is a partnership, the partnership is dissolved or an application is made for its dissolution; (e) the party suspends payment of its debts to the other party or

a third party, or the party takes the benefit of any law for the relief of insolvent debtors; or (f) anything analogous or having a substantially similar effect to any of the events described in (a) through (e) above occurs under the law of any applicable jurisdiction.

'Intellectual Property Rights' means all current and future intellectual property rights, including all copyright, patents, trade marks, design rights, trade secrets, domain names, and other rights of a similar nature and all other rights to intellectual property as defined under Article 2 of the convention establishing the World Intellectual Property Organization, whether registrable or not and whether registered or not, and any applications for registration or rights to make such an application, anywhere in the World.

'Level 1 Technical Support' means first level support services including:

- (a) providing a suitable mechanism for Authorised End Users to be able to report a fault to you for diagnosis (i.e support hotline, support emails etc);
- (b) basic investigation of faults reported by Authorised End Users.

'Loss' means any direct or indirect loss, cost, expense, penalties, fines, liability or damage including legal costs on a solicitor/client basis and any claim, demand or proceedings brought, or judgment or order obtained, by a third party.

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

'Object Code' means computer code in a form that a computer can execute, when compiled or converted from its Source Code version.

'Parties' or **'parties'** means you and us and **'Party'** or **'party'** means either you or us as the context dictates.

'Payment Terms' means any payment terms and conditions set out in the Fee Schedule or the applicable Statement of Work.

'Personal Information' has the meaning given in Privacy Act 1988 (Cth), as amended from time to time.

'Personnel' means officers, agents, employees and subcontractors. For the avoidance of doubt, we are not your Personnel and you are not our Personnel.

'Smart-UI Products' means the Smart UI SaaS Platform and/or software set out in the Fee Schedule or applicable Statement of Work.

'Smart-UI Terms and Conditions' means this document entitled "the Smart-UI Terms and Conditions".

'Schedule Outage' means any downtime of the Smart-UI Products scheduled by us or any of our suppliers in advance with respect to the hosting of the Smart-UI Products.

'Service Availability Credits' means the Availability Target Service Credits set out in the SLA.

'Service Level Agreement' or **'SLA'** means the document entitled "Service Level Agreement (SLA)"

attached to these Smart-UI Terms and Conditions.

'Services' means the services that we expressly agree to provide to you, as set out in the Fee Schedule or an SOW.

'Source Code' means computer code in human-readable form, that when compiled becomes Object Code.

'Specifications' means any written specifications set out in the Fee Schedule or a Statement of Work.

'Statement of Work' or 'SOW' means a document entitled "Statement of Work" executed by you and us. The SOW will be substantially in the form approved by us and include any such information as reasonably required by us.

'Subscription Term' means the Initial Term and each Renewal Term.

'Third Party Software' means software comprising or which is installed on any Smart-UI Products in respect of which the Intellectual Property Rights are not owned by you or us.

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Service Level Agreement (SLA)

1. Definitions and Interpretation

1.1. In this Service Level Agreement (SLA), definitions and any rules of construction in the attached Commercial Details, Fee Schedule and the Smart-UI Terms and Conditions, are hereby incorporated into this SLA by reference. For the avoidance of doubt, a reference made to a clause in this SLA is a reference to the clause of this SLA and not to a clause of the Smart-UI Terms and Conditions.

2. Availability Target (Cloud Hosting Only)

2.1. If Cloud Hosting is specified in the Fee Schedule or a Statement of Work, we will use our best endeavours to make the relevant Smart-UI Product Available, as measured over the course of each calendar month during the Subscription Term (each such calendar month, a **Service Period**), at least 99.00% of the time, excluding only the time the Smart-UI Product is not Available solely as a result of your breach of this Agreement or a Scheduled Outage or Force Majeure Event (the **Availability Target**). 'Available' means the Smart-UI Product is available and operable for access by you materially in accordance with the Specifications. 'Availability' has a corresponding meaning. 'Actual Uptime' means the number of minutes in the Service Period that the Smart-UI Product is Available. 'Percentage Uptime' = [Actual Uptime + Total Minutes in Service Period the Smart-UI Product is not Available Due to Scheduled Outages or Force Majeure Events or your breach of this Agreement] ÷ Total Minutes in Service Period x 100.

3. Provision of Support Services

3.1. Where Support Services are specified in a Fee Schedule or Statement of Work, we shall use our best endeavours to respond to any request for technical support with respect to any reproducible malfunction in the Smart-UI Products that you report to us that prevents the Smart-UI Products from performing materially in accordance with the Specifications (**Error**) in accordance with the applicable response times set forth in clauses 6.3 and 6.4 of this SLA, during the Subscription Term (collectively, the **Support Services**).

4. Support Services Conditions

4.1. You agree to:

- provide us with prompt access to your and each of your Authorised End User's technical environment, including any software, systems, equipment, hardware and networks (via physical or remote access, as determined

by us), as reasonably required by us to provide the Support Services;

- provide us with access to all of your necessary Personnel and/or documentation as reasonably required by us to answer questions reported by you regarding the Smart-UI Products.

5. Technical Support

5.1. The Support Services are limited to the provision of telephone and email support during Support Hours to two (2) of your designated Personnel approved by us (**Designated Support Staff**) to answer questions from your Designated Support Staff about the Error.

5.2. The Support Services will be provided through our technical support hotline (via telephone or email) which operates during Support Hours. A support phone number and a support email address will be provided to you by us through which your Designated Support Staff can request the technical support referred to in clause 5.1.

5.3. For us to provide the Support Services, you must notify us that you require technical support (**Support Request**) in accordance with the following procedure:

- you must issue a Support Request to us in accordance with clause 5.2;
- when issuing a Support Request, you must ensure that you provide to us:
 - the name and contact details of the Personnel or Authorised End User who is experiencing the Error;
 - a detailed description of the Error;
 - details of the version number of the Smart-UI Product that the Personnel or Authorised End User is experiencing the Error with;
 - evidence of the Error; and
 - any other information reasonably required by us.

5.4. We shall have no obligation to provide any Support Services with respect to the Smart-UI Products to any of your Personnel or Authorised End Users, other than your Designated Support Staff.

5.5. You must provide Level 1 Technical Support to Authorised End Users.

5.6. For the avoidance of doubt, we have no obligation to provide Support Services unless the Fee Schedule expressly specifies that we will provide them.

5.7. We may temporarily suspend the operation of the Smart-UI Products as reasonably required by us to perform the Support Services.

6. Technical Support Service Levels

6.1. We will prioritise technical support requested by you under this SLA in accordance with the following severity code classification (as determined by us in our absolute discretion):

- **Extreme (1)** – A complete loss in production functionality resulting in critical business impact to your business.
- **Very High (2)** – A significant loss of system functionality resulting in major or substantial (but not critical) business impact.
- **Medium (3)** – A loss of system functionality resulting in some business impact to your business.
- **Low (4)** – An impact on system functionality resulting in little to minor business impact to your business
- **Immaterial (5)** – A slight impact on your system functionality resulting in no business impact to your business

6.2. We will use reasonable endeavors to observe all of your occupational health and safety and security policies (annexed to this Agreement and executed by you and us) whilst on your premises where we are required to attend your premises in order to provide Support Services.

6.3. We will use reasonable endeavors to acknowledge the receipt of any relevant request for Support Services pursuant to this SLA within the following timeframes:

Severity	Response*
1	Within one (1) hour
2	Within two (2) hours
3	Within three (3) hours
4	Within four (4) hours
5	On a mutually agreed/ best effort basis

*Measured from the time a technical support request is received by us. If a support request is sent outside Support Hours it shall be deemed to be received by us at 9.00 am on the next Business Day.

6.4. We will use reasonable endeavors to resolve the Error (including by providing a workaround to the Error) the subject of any Support Request to enable the continuation of your business operations within the following timeframes:

Severity	Resolution**
1	Within eight (8) Business Hours

2	Within two (2) Business Days
3	Within two (3) Business Days
4	Within four (4) Business Days
5	Within ten (10) Business Days

**Measured from the time we acknowledge a technical support request. If a support request is sent outside Support Hours it shall be deemed received by us at 9.00 am on the next Business Day.

7. Exclusions

7.1. We shall have no obligation to provide any technical support with respect to Smart-UI Products other than as expressly required pursuant to this SLA. In addition, and without limiting the foregoing provisions, we shall have no obligation to provide Support Services:

- (a) for Errors occurring during a planned or scheduled outage by us, our subcontractors, hosting providers;
- (b) with respect to any Error resulting from your and/or your Personnel or Authorised End Users’ action or inaction;
- (c) for errors caused by or in connection to a Force Majeure Event;
- (d) any Errors caused by use of the Smart-UI Products in conjunction with any Third-Party Tool;
- (e) for Errors caused by use of the Smart-UI Products after we have advised you to modify the use of the Smart-UI Products, or if for any reason your and/or your Personnel or Authorised End Users have failed to modify such usage as advised or recommended by us;
- (f) for Errors resulting from third party software bugs and defects;
- (g) with respect to Errors caused by or relating to any On-Premise Server or your technical environment;
- (h) with respect to any Error caused by your and/or your Personnel or Authorised End Users’ breach of this Agreement; or
- (i) where you have failed to pay any Fees to us as and when due and payable.