

**Software Co**

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**TERMS OF ENGAGEMENT**

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## DEVELOPMENT AGREEMENT

**PARTIES**                 **Software Co (ABN: 65 604 234 942) of 300 Barangaroo Ave, Sydney, NSW 2000 (Software Co)**

**AND**

**(Client)**

### RECITALS

A.     Software Co develops custom Software Applications for the Client under the terms of this Agreement.

### OPERATIVE PROVISIONS

#### 1.     DEFINITIONS AND INTERPRETATION

##### 1.1   Definitions

- (a)     **Additional Expenses** means any telephone, postage, courier, storage, copying and printing charges and accommodation, subsistence, travel and other costs and expenses associated with the performance by Software Co of its obligations under this Agreement which are not set out in schedule 3 to this Agreement.
- (b)     **Agile Period** has the meaning attributed to it in schedule 2 to this Agreement.
- (c)     **Agile Process** means the process set out in schedule 2 to this Agreement.
- (d)     **Agreement** means this Agreement and includes the descriptions of parties, recitals, schedules and annexures to this Agreement.
- (e)     **Assignment Notice** means an assignment notice substantially in accordance with the form at schedule 5 to this Agreement.
- (f)     **Business Day** means any day which is not Saturday, Sunday or a public holiday in New South Wales.
- (g)     **Client Requirements** has the meaning attributed to in in schedule 2 to this Agreement.
- (h)     **Client Supplied Material** means any Material provided by the Client to Software Co to develop the Software under this Agreement.
- (i)     **Commencement Date** means the date specified in the schedule 1 to this Agreement.

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- (j) **Confidential Information** means information that is by its nature confidential, but does not include: -
- (i) information already known to the receiving party at the time of disclosure by the other party; or
  - (ii) information in the public domain other than as a result of disclosure by a party in breach of its obligations of confidentiality under this agreement.
- (k) **Design Brief** has the meaning attributed to it in schedule 2 to this Agreement.
- (l) **Document** includes: -
- (i) any paper or other material on which there is writing;
  - (ii) any paper or other material on which there are marks, figures, symbols or perforations having a meaning for persons qualified to interpret them;
  - (iii) any article or material from which sounds, images or writings are capable of being reproduced with or without the aid of any other article or device; and/or
  - (iv) a piece of text or text and graphics stored electronically as a file for manipulation by document processing software.
- (m) **Existing Material** means any Material that is developed: -
- (i) prior to the Commencement Date; or
  - (ii) independent to the Agreement;
- and that is incorporated into the Software under this Agreement.
- (n) **Existing Materials Fee** means the licence fees payable to Software Co by the Client in respect of Software Co's Existing Materials.
- (o) **Fees** means the development fees payable by the Client to Software Co under this Agreement and calculated in accordance with the hourly rates set out in schedule 3 to this Agreement.
- (p) **Force Majeure** means any act, circumstance or omission over which Software Co or the Client could not have reasonably exercised control.
- (q) **GST** means: -
- (i) the same as in GST Law;
  - (ii) any other goods and services tax, or any tax applying to this agreement in a similar way; and

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- (iii) any additional tax, penalty tax, fine, interest or other charge under a law of such a tax.
- (r) **GST Law** means the same as "GST law" in *A New Tax System (Goods and Services Tax) Act 1999* (Cth).
- (s) **Insolvency Event** means in relation to any entity or person:
- (i) a step is taken (including without limitation a resolution is passed or an application is made) which may result in the winding up, dissolution or deregistration of the entity or the appointment of a liquidator, provisional liquidator, administrator, receiver, receiver and manager or other insolvency official to the entity or to the whole or a substantial part of the property or assets of the entity;
  - (ii) the entry by the entity into a compromise or arrangement with its creditors generally;
  - (iii) the entity is or becomes unable to pay its debts when they fall due, suspends or threatens to suspend payment of its debts generally, is declared bankrupt if a natural person or is otherwise presumed to be insolvent under the insolvency laws applying to that entity;
  - (iv) the holder of a security interest taking possession of any of the entity's property; or
  - (v) the occurrence of any event which is analogous or has a similar effect to any of the above in the jurisdiction relevant to the corporation.
- (t) **Intellectual Property Rights** means all intellectual property rights including current and future registered and unregistered rights in respect of copyright, designs, circuit layouts, trademarks, trade secrets, know-how, confidential information, patents, invention and discoveries and all other intellectual property as defined in Article 2 of the *Convention Establishing the World Intellectual Property Organisation 1967*.
- (u) **Maintenance Agreement** means a maintenance agreement substantially in the form set out in schedule 4 to this Agreement.
- (v) **Material** means any Document or other thing in which Intellectual Property Rights subsist.
- (w) **Moral Right** means: -
- (i) a right of attribution of authorship; or
  - (ii) a right not to have authorship falsely attributed; or
  - (iii) a right of integrity of authorship; or
  - (iv) a right of a similar nature;

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which is conferred by statute, and which exists or comes to exist anywhere in the world in a deliverable form comprised within this Agreement.

- (x) **New Material** means any Material that is: -
- (i) newly created by or on behalf of Software Co during the performance of its obligations under this Agreement;
  - (ii) incorporated into the Software; and
  - (iii) delivered to the Client in accordance with this Agreement
- except for any Material that is Existing Material or any adaptation, translation or derivative of that Existing Material.
- (y) **Object Code** means the machine readable code of the Software.
- (z) **PBI** has the meaning attributed to it in schedule 2 to this Agreement.
- (aa) **Services** means the design, creation, development, configuration, customisation and integration of the Software to implement the Client Requirements and the Design Brief.
- (bb) **Software** means the new computer program or application to be developed pursuant to this Agreement comprising Software Co's Existing Material, New Material and Third Party Software.
- (cc) **Source Code** means the source code for the Software, notes, specifications and all other materials and documents necessary to enable a skilled programmer to understand, maintain, amend and enhance the Software.
- (dd) **Tax Invoice** has the same meaning as provided for in the GST Law.
- (ee) **Taxable Supply** has the same meaning as provided for in the GST Law.
- (ff) **Termination Date** has the meaning attributed to it in schedule 2 to this Agreement.
- (gg) **Third Party Software** means the third party proprietary software supplied by Software Co under this Agreement, including the software listed in schedule 1 to this Agreement and any other third party software required in connection with the Software.
- (hh) **Third Party Software Fees** means any fees payable to a third party in respect of the Third Party Software.
- (ii) **Virus** means a computer program, code, device, product or component that is designed to or may in the ordinary course of its operation, prevent, inhibit or impair the performance of the Software, but does not include any code, mechanism or device that is included in the Software by Software Co for the purpose of managing the licensed use of the Software.

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## 1.2 Interpretation

- (a) Words importing the singular meaning include the plural and vice versa, any reference to a “person” includes a corporation and words importing one gender import all others.
- (b) Any agreement, covenant, representation or warranty on the part of or in favour of any two or more persons bind them, or is in favour of each of them, both jointly and severally.
- (c) References to any legislation or to any provision of any legislation shall include any modification or re-enactment, or any legislation or legislative provision substituted for or corresponding or similar to, and all legislative and statutory instruments issued under such legislation or such provision.
- (d) A reference to a clause, paragraph, item or schedule is a reference to a clause, paragraph, item or schedule of this Agreement.
- (e) A reference to a party to a document includes that party’s legal personal representatives, heirs, executors, administrators, beneficiaries, successors and permitted assigns.
- (f) A reference to “\$” or “dollars” is to Australian currency.
- (g) Headings and any table of contents or index are for convenience only and do not affect the interpretation of this Agreement.
- (h) Where an expression is defined it has the same meaning throughout the Agreement.
- (i) “Including” and other similar words are not words of limitation.
- (j) General words following words describing a particular class or category are not restricted to that class or category.
- (k) In the event that pursuant to this Agreement an act is due to be performed on a day which is not a Business Day then that act shall be performed on the next Business Day, provided that, if the act involves the payment of money, and holding over the act would cause the payment to be paid in the following month, then the payment must be made on the last Business Day of the month in which the act is due.
- (l) A reference to bankruptcy, or winding up or insolvent includes bankruptcy, winding up, liquidation, dissolution, becoming an insolvent under administration (as defined in Part 1.2, Division 1, *Corporations Act 2001* (Cth)), being subject to administration and the occurrence of anything analogous or having a substantially similar effect to any of those conditions or matters under the law of any applicable jurisdiction, and to the procedures, circumstances and events which constitute any of those conditions or matters.



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- (m) A reference to an accounting term is a reference to that term as it is used in the accounting standards under the *Corporations Act 2001* (Cth), or if not inconsistent with these standards, in accounting principles and practices generally accepted in Australia.
  - (n) A reference to a “subsidiary” of a body corporate is to a subsidiary of that body corporate in accordance with Part 1.2, Division 6 of the *Corporations Act 2001* (Cth).
  - (o) A reference to a “holding company” of a body corporate is to a body corporate of which that body corporate is a subsidiary within the meaning of Part 1.2, Division 1 of the *Corporations Act 2001* (Cth).
  - (p) A reference to a “related body corporate” of a body corporate is to a body corporate which is related to that body corporate within the meaning of Part 1.2, Division 6 of the *Corporations Act 2001* (Cth).

## **2. COMMENCEMENT AND TERM**

This Agreement shall commence on the Commencement Date and shall continue until the Termination Date, unless it is terminated earlier in accordance with clause 15.

## **3. SERVICES**

From the Commencement Date, subject to the payment of Fees, Additional Expenses, Existing Material Fees and Third Party Software Fees, Software Co shall provide the Services to the Client in accordance with the terms of this Agreement.

## **4. PROVISION OF SERVICES**

- (a) The parties shall comply with the Agile Process in the performance, delivery and receipt of the Services.
- (b) The parties each agree to appoint a representative who is authorised to act on behalf of each party in all matter relating to this Agreement. The authorised representatives of Software Co and the Client at the Commencement Date are set out in schedule 1 to this Agreement. Either party may replace the authorised representative at any time by providing the other party with notice in writing.
- (c) During the term of this Agreement, the Client must: -
  - (i) supply Software Co with the Client’s Materials or as otherwise agreed in writing with Software Co;
  - (ii) answer reasonable enquiries made by Software Co relating to the Client Requirements in connection with this Agreement;
  - (iii) perform any responsibilities identified and agreed by the Client through the Agile Process; and

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- (iv) provide Software Co with all information, facilities and services reasonably required by Software Co to enable it to perform its obligations under this Agreement effectively, including the use of the Client's computer equipment and telecommunications facilities if required.
  - (d) Any failure or delay by the Client in performing any of its responsibilities identified in clause 4(c) above will be addressed by the parties through the Agile Process.

## 5. PAYMENT

- (a) In consideration of Software Co providing the Services under the Agreement, the Client must pay Software Co the Fees, Existing Material Fees or Third Party Software Fees in accordance with this clause 5 and calculated at the rates set out in schedule 3 to this Agreement,
- (b) Software Co shall submit a Tax Invoice to the Client for the Services which will be provided to the Client, monthly in advance, setting out: -
  - (i) the Fees payable by the Client and the basis of those calculations by reference to the hourly rates set out in schedule 3 to this Agreement;
  - (ii) a description of the work to be undertaken;
  - (iii) the hours to be worked;
  - (iv) any Existing Material Fees; and
  - (v) any Third Party Software Fees.
- (c) Upon a written request by the Client, Software Co shall provide to the Client a monthly reconciliation of the work undertaken by Software Co and if: -
  - (i) Software Co has received payment of Fees in respect of work which it did not undertake, that payment will be used to set off against any Fees owed to Software Co under any future Tax Invoices; or
  - (ii) Software Co has performed work under the Agreement for which Software Co has not been paid, the Client must pay to Software Co any additional Fees due to Software Co as set out in a Tax Invoice in accordance with clause 5(d) below.
- (d) The Client must pay the Fees, Existing Material Fees and Third Party Software Fees specified in each Tax Invoice within seven (7) days of the date of the Tax Invoice free of any set off.
- (e) In respect of Additional Expenses, Software Co shall submit a Tax Invoice to the Client for Additional Expenses incurred by Software Co monthly in arrears setting out: -
  - (i) the Additional Expenses payable by the Client; and

- 
- (ii) a description of the Additional Expenses,
  - (f) The provision of a Tax Invoice in conformity with clause 5(e) is prima facie evidence that Software Co has incurred the Additional Expenses identified in the Tax Invoice.
  - (g) The Client must also pay Software Co any Additional Expenses within thirty (30) days of date of the Tax Invoice free of any set off.
  - (h) If the Client disputes the whole or any part of the amounts claimed in a Tax Invoice submitted by Software Co under this Agreement, the Client must still pay to Software Co all amounts claimed in a Tax Invoice and refer the dispute relating to the Tax Invoice to the dispute resolution procedure prescribed in clause 19 of this Agreement. If it is subsequently determined that any monies are to be refunded to the Client, Software Co will pay that amount to the Client within seven (7) Business Days of any such determination.
  - (i) Where the payment of any Tax Invoice is not made within the time stipulated in clause 5(d) or 5(g) above, Software Co will be entitled to charge the Client interest at the rate of ten (10) per cent per annum on any amount outstanding after the due date for payment.
  - (j) The Client may pay any amount due under a Tax Invoice by credit card. If payment is made by credit card, Software Co is entitled to charge the Client a further 2.4% in addition to the amount due on the Tax Invoice by way of credit card fees.

## **6. GST**

- (a) The Client must pay any GST that is payable in respect of any Taxable Supply made under the Agreement in addition to the amount payable (exclusive of GST) for the Taxable Supply. GST is payable at the same time as the amount payable for the Taxable Supply to which it relates.
- (b) Software Co must, within thirty (30) days of request from the Client, issue a Tax Invoice (or an adjustment note) to the Client for any supply under or in connection with this Agreement.

## **7. SOFTWARE CO WARRANTIES**

- (a) Software Co warrants that: -
  - (i) to the best of its knowledge and belief, the Software will not infringe the Intellectual Property Rights of any person, including any Moral Rights and Software Co is entitled to grant the Client the right to use the Software.
  - (ii) it will exercise its best endeavours to ensure that the Software conforms substantially with the Design Brief.

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- (iii) it has all necessary insurances and will maintain these for the duration of this Agreement. If requested by the Client, Software Co will provide acceptable proof of currency.
    - (iv) it will not use the Client Supplied Materials for purposes not connected with the Agreement without the prior consent of the Client.
  - (b) To the fullest extent permitted by law, Software Co expressly disclaims all implied warranties and conditions including without limitation implied warranties as to merchantability, fitness for purpose of the Software and materials.
  - (c) To the fullest extent permitted by law, Software Co makes no representation or gives any warranty in respect of the Services except that it will carry out the Services competently, professionally and to the best of its ability having regard to the terms of this Agreement.
  - (d) Software Co expressly excludes any warranty that: -
    - (i) the Software will be error free, free from Viruses or free of bugs;
    - (ii) the Software will operate without interruption;
    - (iii) it will correct all program errors; and
    - (iv) the Software will be compatible with any hardware, software or data not supplied by Software Co.
  - (e) To the extent that the *Competition and Consumer Act 2010 (Cth)* (**ACL**) apply to the goods or services supplied under this Agreement, then the provisions of this Agreement are subject to the provisions of the ACL.
  - (f) To the extent that there is a failure to comply with a guarantee under sections 54 to 59 of the ACL in respect of goods which are not goods of a kind that are ordinarily acquired for personal, domestic or household use or consumption, then to the extent permitted by law, Software Co's liability is limited to one or more of the following, at the election of Software Co: -
    - (i) the replacement of the Software;
    - (ii) the repair of the Software;
    - (iii) the payment of the cost of replacing the Software; or
    - (iv) the payment of the cost of having the Software repaired.
  - (g) To the extent that there is a failure to comply with a guarantee in respect of the supply of services under sections 60 to 62 of the ACL, then to the extent permitted by law, Software Co's liability is limited to one or more of the following, at the election of Software Co: -
    - (i) supplying the Services again; or

- 
- (ii) refund of the Fees paid under this Agreement.

## 8. CLIENT WARRANTIES

The Client warrants that: -

- (a) it will supply Software Co with the Client Materials stated in schedule 1 to this Agreement.
- (b) it is responsible for the acts and omissions of its employee and/or agents as if they were its own acts and omissions.
- (c) it is responsible for the matters identified in clause 3 of schedule 2 to this Agreement.
- (d) to the best of its knowledge and belief, the Client has the necessary Intellectual Property Rights and has procured the necessary consents in relation to Moral Rights, to grant Software Co the rights to use any Client Supplied Materials for the performance of performing its obligations under the Agreement.

## 9. MUTUAL WARRANTIES

Each party warrants to the other party that during the term of this Agreement, it will: -

- (a) co-operate with the other party and its respective personnel to ensure timely progress and fulfilment of the agreement, provided that nothing in this clause 9 requires the disclosure of a party's Confidential Information or granting of any Intellectual Property Rights;
- (b) act reasonably and in good faith with respect to matters that arise out of, or in connection with, the Agreement;
- (c) work together in a collaborative manner;
- (d) to the extent that it is reasonably possible, perform its obligations so as to avoid hindering the performance of the other party; and
- (e) hold meetings (including meetings related to planning, review and issue resolution) as necessary and report to the other party on a regular basis to ensure the other party is fully informed of the progress of work under the Agreement.

## 10. INTELLECTUAL PROPERTY RIGHTS

- (a) All Intellectual Property Rights in
  - (i) any Existing Material remain vested in the party that owns the Intellectual Property Rights at the Commencement Date (**Owner**); and
  - (ii) any adaptation, translation or derivative of that Existing Material, vests in, or is hereby transferred or assigned to the Owner, immediately upon creation.

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- (b) On the Termination Date, termination or expiry of this Agreement and subject to the payment by the Client of the Fees, Existing Material Fees, Third Party Software Fees and Additional Expenses to Software Co: -
    - (i) Software Co will assign all the Intellectual Property Rights in the New Material to the Client by providing the Client with an Assignment Notice; and
  - (c) Subject to the restrictions on disclosure of Confidential Information: -
    - (i) Software Co will retain all right, title and interest in and to all know-how, Intellectual Property Rights, methodologies, processes, technologies, algorithms, software development tools or forms, templates or output used in performing its obligations under the Agreement which are based on trade secrets or proprietary information of Software Co; and
    - (ii) Software Co will be free to use the ideas, concepts, methodologies, processes and know-how that are used, developed or created in the course of performing the obligations under this Agreement and may be retained by Software Co in intangible form.
  - (d) Subject to payment of the Existing Materials Fee, Software Co grants to the Client a non-exclusive, non-transferable licence to use Software Co's Existing Material.

## **11. THIRD PARTY SOFTWARE**

- (a) In addition to the Fees set out in the Agreement, the Client must purchase any applicable Third Party Software and pay all Third Party Software Fees that are necessary for Software Co to design and develop the Software.
- (b) Any failure or delay by the Client in purchasing any Third Party Software will be addressed by the parties through the Agile Process.

## **12. SOFTWARE MAINTENANCE AGREEMENT**

At the Termination Date, if the Client requires maintenance or support services for the Software, the Client grants Software Co a first right of refusal to supply the Client with maintenance or support services in accordance with the Maintenance Agreement.

## **13. LIMITATION OF LIABILITY**

- (a) To the extent permitted by the law, Software Co's liability in contract (including under an indemnity), tort (including negligence), breach of statutory duty or otherwise in respect of any loss, damage or expense arising out of or in connection with this Agreement shall not exceed in aggregate for all claims that arise out of or in connection with this Agreement an amount equal to the Fees paid under this Agreement.
- (b) Notwithstanding any other clause in this Agreement, neither party is liable to the other party for any indirect, consequential or special loss arising out of or in

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connection with this Agreement without limitation the loss or corruption of the Software, loss of revenue, loss of profits, failure to realise expected profits or savings and any other commercial or economic loss of any kind arising from this Agreement.

- (c) Nothing in this Agreement excludes or limits: -
  - (i) Software Co's liability for death or personal injury caused by it (or its agent's or sub-contractor's) negligence; or
  - (ii) any other liability that cannot be excluded or limited by law.
- (d) The parties must use their reasonable efforts to mitigate any loss arising out of or in connection with this Agreement.

#### **14. INDEMNITY**

- (a) Software Co shall indemnify the Client from and against any loss, liability, costs or expense that the Client suffers directly or indirectly because of an Intellectual Property Right claim in the Software.
- (b) Software Co shall not have any liability for any claim of infringement of Intellectual Property Rights caused by: -
  - (i) the Client's use of the Software in combination with software not supplied or approved in writing by Software Co;
  - (ii) any unauthorised modification of the Software made by, or on behalf of the Client;
  - (iii) Software Co's use in connection with the Services of any software, Material, data, know-how, instructions or scripts provided by the Client that contain any errors or omissions;
  - (iv) Software Co's use of any designs, specifications or instructions provided by the Client or a third party on behalf of the Client; or
  - (v) the continued use of the Software after Software Co has provided the Client with a new software version, patch or correction that would have overcome the infringement.
- (c) The Client shall indemnify Software Co from and against any loss, liability, costs or expense that Software Co suffers directly or indirectly because of an Intellectual Property Right claim in the Client Supplied Materials.

#### **15. TERMINATION**

- (a) Without prejudice to any other right or remedy which Software Co may have under this Agreement, Software Co may at any time by notice in writing and without incurring any liability to the Client, terminate this Agreement on giving written notice to the Client at the end of any Agile Period.

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- (b) Without prejudice to any other right or remedy available to it, either party may terminate this Agreement with immediate effect by giving written notice to the other party if: -
- (i) the other party suffers an Insolvency Event;
  - (ii) the other party fails to pay any amount due under this Agreement and remains in default not less than fourteen (14) days after being notified in writing to make such payment;
  - (iii) the other party commits a material breach of this Agreement and that party has not remedied that breach within fourteen (14) days after being notified in writing to remedy such a breach; or
  - (iv) any warranty given by the other party in this Agreement is found to be materially untrue or misleading.
- (c) Unless otherwise provided in this Agreement, upon termination of the Agreement, the Client shall pay to Software Co all outstanding Fees, Existing Material Fees, Third Party Software Fees, Additional Expenses and all other monies due to Software Co up to and including the date of termination or expiry of this Agreement.

## **16. CONSEQUENCES OF TERMINATION**

- (a) On the Termination Date, termination or expiry of this Agreement: -
- (i) any rights, remedies, obligations or liabilities of the parties that have accrued up to the Termination Date, termination or expiry of this Agreement, including the right to claim damages in respect of any breach of the Agreement which existed at or before the Termination Date, termination or expiry, shall not be affected;
  - (ii) each party shall return and make no further use of any Confidential Information or Material of the other party which is in its possession within five (5) Business Days; and
  - (iii) upon receipt of notice in writing from the Client and subject to payment of Fees, Existing Material Fee, Third Party Software Fees and Additional Expenses, Software Co will within ten (10) Business Days of Termination Date, termination or expiry of this Agreement, deliver to the Client the Object Code and the Source Code for the Software in their current state of development.



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- (b) The following clauses shall survive the termination or expiry of this Agreement: -
    - (i) clause 12, limitation of liability;
    - (ii) clause 13, indemnity;
    - (iii) clause 15, termination;
    - (iv) clause 16, consequences of termination; and
    - (v) clause 18, confidentiality.

## **17. FORCE MAJEURE**

- (a) Where a party is affected by a Force Majeure event, that party must immediately notify the other party of the fact, such notice to include full particulars of the event, an estimate of its likely duration, the extent to which the event affects delay on that party's obligations and the steps (if any) undertaken to rectify or minimise the delay.
- (b) Where a party has given Notice under clause 17(a) above: -
  - (i) that party's obligations under this Agreement are suspended to the extent they are affected by the Force Majeure event for so long as the Force Majeure event continues; and
  - (ii) that party will use its best endeavours to minimise, overcome or remove the effects of the Force Majeure event as quickly as possible.
- (c) If the affected party is prevented from performing its obligations under the agreement by a Force Majeure event for sixty (60) days or such other period agreed in writing, then the other party may in its absolute discretion immediately terminate the Agreement by giving notice in writing to the other party.
- (d) Where the Agreement is terminated in accordance with clause 17(c) above: -
  - (i) Software Co is entitled to payment for work performed in accordance with the Agreement up to the date of termination; and
  - (ii) the parties must otherwise bear their own costs and will be under no further liability to perform the Agreement.

## **18. CONFIDENTIALITY**

- (a) The parties agree to keep any Confidential Information received from each other confidential and comply with the terms of this clause 18. Software Co and the Client shall:-
  - (i) use the disclosing party's Confidential Information solely for the purpose of fulfilling its obligations under this Agreement;

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- (ii) keep the disclosing party's Confidential Information secure and take no lesser security measures and degree of care to protect the disclosing party's Confidential Information than the recipient party applies to its own Confidential Information; and
    - (iii) not disclose to any third party any of the disclosing party's Confidential Information except with the prior written consent of the disclosing party or in accordance with this clause 18.
  - (b) Notwithstanding clause 18(a), either party may disclose either party's Confidential Information to its directors, officers, employees, sub-contractor or a third party who are directly involved in, and need to know such Confidential Information for the purpose of providing or receiving the Services or performing its obligations under this Agreement, including its professional advisers or auditors.
  - (c) If either party discloses Confidential Information to a sub-contractor or a third party pursuant to clause 18(b), that party shall require the sub-contractor or any other third party engaged by that party, to enter into a confidentiality undertaking containing obligations equivalent to those set out in this Agreement and only to use the Confidential Information to the extent necessary for the performance of that party's obligations under this Agreement.
  - (d) The obligations of confidentiality set out in this clause 18 do not apply to: -
    - (i) the disclosure of information that is required by law;
    - (ii) information that was obtained from a third party without obligation of confidentiality;
    - (iii) information that was already in the public domain at the time of disclosure otherwise than by a breach of this Agreement; or
    - (iv) information that is independently developed without access to the other party's Confidential Information.

## **19. DISPUTE RESOLUTION**

- (a) If at any time during the term of this Agreement a dispute arises between the parties in relation to this Agreement, the parties will first attempt to resolve any dispute through the Agile Process. If they are unable to resolve the dispute, the parties will attempt to resolve the dispute through the dispute resolution mechanism in this clause 19.
- (b) If a dispute cannot be resolved through the Agile Process, then any party may give written notice to the other party if such dispute, the notice in writing must adequately identify and provide details of the dispute and the desired outcomes within three (3) Business Days after the dispute is unable to be resolved through the Agile Process.

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- (c) The parties must confer and consult with each other to endeavour to settle the dispute within five (5) Business Days after receipt of the written notice referred to in clause 19(b). If the dispute is not resolved within five (5) Business Days, then either party may give notice to the other party that the matter be referred to expert determination. The expert is to be agreed between the parties.
  - (d) If the parties cannot agree within five (5) Business Days on an expert to determine the dispute, the expert is to be nominated by the Chief Executive Officer, Australian Commercial Disputes Centre of NSW upon application by either party.
  - (e) The expert nominated must be a person who is an experienced Australian legal practitioner or a person with practical experience of the technology that is the subject of the dispute.
  - (f) The parties are entitled to make submissions to the expert and will provide that expert with such assistance and documents the expert reasonably requires for the purpose of reaching a decision.
  - (g) The expert may, in his reasonable discretion, determine such other procedures to assist with the conduct of the determination as he considers just or appropriate, including the appointment of professional advisers to assist the expert in reaching a determination.
  - (h) The costs of the expert determination will be borne by the parties in equal shares.
  - (i) The Expert shall act as an expert and not as an arbitrator. The Expert shall determine the dispute and the expert's decision on the disputer referred to the expert shall be final and binding on the parties in the absence of manifest error or fraud.
  - (j) The provisions in this clause 19 do not apply where a party seeks urgent or interim interlocutory relief.
  - (k) Notwithstanding the existence of a dispute, each party must continue to perform its obligations under this Agreement during the dispute resolution process set out in this clause 19.

## **20. NOTICES**

### **20.1 Address for service**

All notices, consents, approvals, demands and other instruments required or permitted to be served under this Agreement must, unless otherwise in this Agreement expressly provided, be in writing, signed by or on behalf of the party serving the same or by that party's solicitor and may be served upon the party at the address below, or such alternate address as notified by one party to the other:

- 
- (a) Software Co:  
GPO Box 200, Sydney, NSW 2001

**Attention:** Director

**Email:** admin@softwareco.com

- (b) Client's Address: (As provided by the client)

## **20.2 Service**

Service will be sufficient if any such notice is:

- (a) delivered personally to the party to be served;
- (b) emailed to the party at the above email address; or
- (c) sent by ordinary pre-paid post to either the above address or to a registered office. If a notice is posted, it is deemed to have been duly served on the second Business Day after postage, or if service of the notice is to an address outside Australia, on the fifth Business Day after postage.

## **21. GENERAL**

### **21.1 Entire Agreement**

This Agreement constitutes the sole and entire agreement between the parties and a warranty, representation, guarantee or other term or condition of any nature not contained or recorded in this Agreement is of no force or effect.

### **21.2 Legal advice**

Each of the parties acknowledges that they have obtained independent legal advice about the nature and effect of this Agreement and understands the full purport and effect of this Agreement.

### **21.3 Amendment**

No variation or waiver of, or any consent to any departure by a party from, a provision of this Agreement is of any force or effect unless it is confirmed in writing signed by the parties and then that variation, waiver or consent is effective only to the extent for which it is made or given.

### **21.4 Assignment**

- (a) The Client may not assign its rights under this Agreement without the written consent of Software Co.
- (b) Software Co may assign its rights under this Agreement without the written consent of the Client.

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- (c) Any purported assignment or novation which does not comply with this clause 21.4 is a material breach of this Agreement and, as between the parties to this Agreement, null and void.

### **21.5 Sub-Contracting**

Subject to clause 18(c) above, Software Co is permitted to sub-contract the performance of any of its obligations under this Agreement without the prior written consent of the Client.

### **21.6 No Reliance**

The parties warrant that they have made their own enquiries in respect of the matters contained in this Agreement and do not rely on any representation by any party or any other person whatsoever.

### **21.7 No Merger**

- (a) Nothing in this Agreement merges, extinguishes, postpones, lessens or otherwise prejudicially affects any right, power or remedy that a party may have against another party or any other person at any time.
- (b) No provision of this Agreement which requires action by a party after completion shall merge on completion.

### **21.8 Waiver**

The failure, delay, relaxation or indulgence on the part of any party in exercising any power or right conferred upon that party by this Agreement does not operate as a waiver of that power or right, nor does any single exercise of any power or right preclude any other or further exercise of it or the exercise of any other power or right under this Agreement.

### **21.9 Severance**

If any provision of this Agreement is invalid and not enforceable in accordance with its terms, other provisions which are self-sustaining and capable of separate enforcement without regard to the invalid provision, are and continue to be valid and enforceable in accordance with their terms.

### **21.10 Further Assurance**

Each party must do, sign, execute and deliver all deeds, documents, instruments and acts reasonably required of it or them by notice from another party effectively to carry out and give full effect to this Agreement.

### **21.11 Attorneys**

Where this Agreement is executed on behalf of a party by an attorney, that attorney by executing declares that the attorney has no notice of the revocation of the power of

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attorney under the authority of which the attorney executes this Agreement on behalf of that party.

#### **21.12 Counterparts**

This Agreement may be executed by any number of counterparts and all of those counterparts taken together constitute one and the same instrument.

#### **21.13 Remedies Cumulative**

The rights, powers and remedies provided in this Agreement are cumulative with and not exclusive of any other rights, powers or remedies provided by law.

#### **21.14 Liability of parties**

If any party to this Agreement consists of more than one person, then the liability of those persons in all respects under this Agreement is a joint liability of all those persons and a separate liability of each of those persons. If any covenant or agreement given by any party to this Agreement is given jointly with any one or more other parties to this Agreement, then such covenant or agreement shall also be a separate obligation of each party.

#### **21.15 Governing law and jurisdiction**

This Agreement is governed by, and is to be construed in accordance with, the laws of New South Wales and the parties submit to the non-exclusive jurisdiction of the courts of New South Wales and any court hearing appeals from those courts.

#### **21.16 Relationship of the parties**

Nothing in this Agreement will constitute or be construed to constitute a party as the partner, agent, employee or representative of any other party or to create any trust relationship between them.

#### **21.17 Legal Fees**

Each party to this Agreement shall be responsible for its own legal costs in negotiating and executing this Agreement.

**Schedule 1: General Details**

<p><b>Commencement Date</b> (clause 1.1(g))</p>	<p>As mutually agreed</p>
<p><b>Software Co representative</b> (clause 4(b), clause 1(h) of schedule 2)</p>	<p>As nominated by Software Co</p>
<p><b>Client representative</b> (clause 4(b), clause 1(d) of schedule 2)</p>	<p>As nominated by Client</p>
<p><b>Development Team</b> (clause 1 of schedule 2)</p>	<p>Software Co's staff</p>
<p><b>Client Materials</b> (clause 8)</p>	<p>As nominated by Client</p>
<p><b>Software Co's Existing Material</b> (clause 1.1(m) and 1.1(n))</p>	<p>As provided by Client</p>
<p><b>Third Party Software</b> (clause 11)</p>	<p>As provided by Software Co</p>

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## Schedule 2: Agile Process

### 1. DEFINITIONS

In this Agreement: -

- (a) **Acceptance Criteria** means the criteria for acceptance of a PBI.
- (b) **Acceptance** means when the Client confirms in writing to Software Co that the Software has been delivered and installed on the Client Environment.
- (c) **Agile Period** means a Development Sprint.
- (d) **Agile Team** means the following persons: -
  - (i) the Client's Representative;
  - (ii) Software Co's Representative; and
  - (iii) the Development Team,
- (e) **Agile Team Member** means a member of the Agile Team.
- (f) **Client Representative** means the person identified in schedule 1 to this Agreement and any replacement from time to time.
- (g) **Client Environment** means the Client's computing environment on which the Software is to be installed for the purpose of productive use.
- (h) **Client Requirements** means the PBIs.
- (i) **Deemed Acceptance** means where the Client uses the Software for its business purpose and/or on a production environment.
- (j) **Design Brief** means the design brief for the Software set out in clause 2 of this schedule 2.
- (k) **Development Meeting** means the meetings between the members of the Agile Team during the term of this Agreement scheduled at intervals as agreed between Software Co and the Client.
- (l) **Development Sprint** means the period (as agreed between the Client Representative and the Software Co Representative) during which PBIs are developed, tested and delivered in accordance with this Agreement.
- (m) **Development Team** means the individuals identified in schedule 1 to this Agreement and any replacements from time to time.
- (n) **Software Co's Representative** means the person identified in schedule 1 to this Agreement and any replacement from time to time.



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- (o) **Product Backlog** means the list of PBIs required to deliver the Design Brief, which is prepared and maintained by the Client that comprises: -
    - (i) the PBIs to be completed, listed in order of priority by the Client; and
    - (ii) the PBIs delivered to date.
  - (p) **PBI** means a description of an individual specific functional or non-functional requirement requested by the Client to the developed, which specifies: -
    - (i) the intended operation, function, performance or other characteristics of such requirement;
    - (ii) the Acceptance Criteria for determining whether the requirement has been satisfactorily developed.
  - (q) **Release Plan** means the plan which sets out the proposed dates for the Software to be released for use on the Client Environment.
  - (r) **Sprint** means a Development Sprint.
  - (s) **Sprint Backlog** means the document which defines the work to be undertaken in a Development Sprint which specifies: -
    - (i) the list of PBIs to be progressed by the Development Team during the Development Sprint;
    - (ii) the list of tasks required to be carried out by the Development Team in order to complete each PBI; and
    - (iii) the Acceptance Criteria for each PBI.
  - (t) **Termination Date** means the date on which the Software has reached Acceptance or Deemed Acceptance.

## 2. DESIGN BRIEF

The Client has represented to Software Co that the design brief is **as per their verbal conveyance and client material (attached)**.

## 3. CLIENT RESPONSIBILITIES

- (a) On the Commencement Date, the Client will appoint a Client Representative to fulfil and carry out the following responsibilities: -
  - (i) be the Client's representative for all decisions concerning the Software; and
  - (ii) be authorised by the Client to give final approval for all decisions in respect of the Software.

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- (b) During the term of this Agreement, the Client Representative will: -
    - (i) be responsible for agreeing to any changes to the Design Brief;
    - (ii) make decisions on all queries relating to the inclusion, deletion and priority of PBIs in the Product Backlog;
    - (iii) maintain and update the Product Backlog on a continuous basis by: -
      - (A) refining PBIs;
      - (B) deleting PBIs which are no longer required to achieve the Product Vision;
      - (C) adding new PBIs identified as being required to achieve the Product Vision;
      - (D) reviewing and resetting the priorities assigned to the PBIs
    - (iv) actively participate and lead Development Meetings;
    - (v) maintain and update the Release Plan on a continuous basis to reflect changes to the Product Backlog or changes proposed by the Client to the PBI;
    - (vi) make decisions on all queries relating to the development of the Software; and
    - (vii) use their best endeavours to resolve any disputes in good faith by agreement with the Software Co Representative and the Development Team at Development Meetings.

#### **4. SOFTWARE CO RESPONSIBILITIES**

On the Commencement Date, Software Co will appoint a Software Co Representative to carry out and fulfil the following responsibilities: -

- (a) be responsible for managing the timely development of the Software and delivery of the Design Brief;
- (b) facilitate the collaboration and co-operation between the Agile Team Members;
- (c) provide assistance to any member of the Development Team or the Client Representative; and
- (d) use their best endeavours to resolve any disputes in good faith by agreement with the Client Representative and the Development Team at Development Meetings.

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## 5. DEVELOPMENT TEAM

- (a) On the Commencement Date, Software Co will appoint the Development Team to carry out and fulfil the following responsibilities: -
  - (i) be responsible for the design, creation and development of the Software, to implement the PBI and to deliver the Design Brief; and
  - (ii) use reasonable endeavours to deliver the PBIs requested by the Client Representative for each Sprint on the date specified in the Release Plan.
- (b) Each member of the Development Team must: -
  - (i) collaborate with all Agile Team Members; and
  - (ii) use all reasonable endeavours to resolve any disputes in good faith by agreement with the Client Representative and the Software Co Representative at Development Meetings.

## 6. PRODUCT BACKLOG

- (a) The initial Product Backlog agreed between the Client and Software Co is set out in annexure A to schedule 2 to this Agreement.
- (b) The Client Representative, the Software Co Representative and the Development Team will hold a meeting before the commencement of a Sprint to update the Product Backlog by: -
  - (i) amending any PBIs which require amendment;
  - (ii) removing PBIs which no longer meet the Design Brief;
  - (iii) including PBIs which are identified as being necessary to meet the Design Brief; and
  - (iv) reviewing and reprioritising the priority of PBIs.

## 7. SPRINTS

- (a) The development of the Software will be conducted in a series of Sprints until either: -
  - (i) the Client Representative gives notice in writing to the Software Co Representative that: -
    - (A) all PBIs have been met and that there are no outstanding PBIs; or
    - (B) the Software has reached Acceptance;
    - (C) the Software has reached Deemed Acceptance; or

- 
- (ii) this Agreement is terminated in accordance with clause 15(a).
  - (b) At a meeting for a Development Sprint: -
    - (i) the Client Representative will propose the PBIs to be undertaken in the Development Sprint;
    - (ii) the Client Representative and the Development Team will agree the PBIs to be included in the Sprint;
    - (iii) the Software Co Representative and the Development Team will agree a list of the tasks required to be carried out by the Development Team in order to deliver each PBI; and
    - (iv) the Software Co Representative and the Development Team will create the Sprint Backlog.
  - (u) at the end of a Development Sprint: -
    - (i) the Development Team demonstrate the PBIs progressed during the Development Sprint to the Client Representative;
    - (ii) the Client Representative will return to the Product Backlog: -
      - (A) any PBI that was not developed during the Sprint; and
      - (B) any PBI that the Client Representative has determined to be incomplete; and
      - (C) re-prioritise any outstanding PBIs.
  - (v) Subject to Software Co terminating the Agreement under clause 15(a), the Agile Team shall: -
    - (i) promptly commence the next Development Sprint; and
    - (ii) the applicable provisions in this schedule 2 shall apply to that Development Sprint mutatis mutandis.

## **8. INSTALLATION AND ACCEPTANCE**

- (a) Software Co will install the Software and provide services or support in respect of the installation of the Software on the Client Environment.
- (b) Upon installation of the Software, the Client will be responsible for ensuring that the Software operates substantially in accordance with the Design Brief.

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## **Annexure A: Product Backlog Items**

As provided by Software Co and accepted by Client at the commencement of the project.

In addition, ongoing backlog item lists will be produced and considered part of the said agreement. These items will be presented in form of projected work and emailed through to the nominated contact.

**Schedule 3: Fees**

**1. FEES**

(a) The Fees payable by the Client to Software Co for the provision of the Services by Software Co are as follows: -

<b>Title</b>	<b>Rate (per hour exclusive of GST)</b>
CTO	\$250
Project Director	\$200
Development Manager	\$200
Senior UI/UX Designer	\$160
Digital Producer	\$140
UI/UX Designer	\$120
Project Manager	\$120
Business Analyst	\$120
Web Developer	\$100
IOS Application Developer	\$120
Android Application Developer	\$120
Web Application /API Developer	\$120
Software Tester	\$65
Data Entry	\$45

(b) Software Co may vary the hourly rates identified in clause 1(a) of schedule 3 from time to time by providing the Client with notice in writing thirty (30) days before any variation.

**2. THIRD PARTY SOFTWARE FEES**

(a) To be advised as part of the relevant development sprint and conveyed in writing.

**3. EXISTING MATERIALS FEES**

(a) As nominated by Software Co.

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## Schedule 4 – Maintenance Agreement

### Services and Deliverables

The services listed within this agreement will commence upon execution of this agreement by CLIENT and upon confirmation of receipt of the first payment of the selected support package.

#### 1. Roles

##### Client

- Raise issues in a timely manner.
- Keeps key contacts up to date.
- Provides information (within reason) that has been requested by SOFTWARE CO's Project Support Team for the purposes of Incident, Problem, feature development and Change Management.

##### SOFTWARE CO

- Delivers Support in accordance with SOFTWARE CO's maintenance & support standards.
- Progresses any ongoing product development and enhancements upon presenting time and cost estimates and receiving formal acceptance and approvals from CLILENT.
- Inform CLIENT of any improvements and additional reports that may become available to them during the lifetime of the Support Agreement.

#### 2. Support Standards & Credit Packages

Requirement Severity, definitions & Response times.

ITEMS	Description	Response	Resolution
Severity Level 1	Critical defect that renders the system, or part of the system, inoperable.	5 hours within service hours. Written updates daily to stakeholders	Development resources allocated ASAP.
Severity Level 2	High priority defect where the defect is a direct result of code not executing against the requirements.	5 hours within service hours. Written updates daily to stakeholders	Development resources allocated within 2 working day.
Severity Level 3	Medium priority defect where the code matches the requirements, however the desired	Business hours within 2 days	Negotiated, or within next release cycle.

	<b>result is not achieved and a change in the requirements is needed.</b>		
<b>New Change or Feature Request</b>	<b>Desired change, enhancement of a current screen or feature or the development of a new feature</b>	<b>Business hours within 2 days</b>	<b>Negotiated, or within next release cycle.</b>
<b>Pre-emptive testing of New Devices</b>	<b>The Support Team can proactively test your application on new devices of your choosing.</b>	<b>Business hours within 2 days</b>	<b>Negotiated, or within next release cycle.</b>
<b>Pre-emptive Testing on new OS</b>	<b>The Support Team can proactively test your application against new operating system releases.</b>	<b>Business hours within 2 days</b>	<b>Negotiated, or within next release cycle.</b>

Support Credit Top-Up Packages:

<b>SUPPORT PACKAGE</b>	<b>MAN HOUR CREDITS</b>	<b>PRICE</b>
<b>Basic</b>	<b>50</b>	<b>\$5,500 Plus GST</b>
<b>Care</b>	<b>100</b>	<b>\$9,000 Plus GST</b>
<b>Premium</b>	<b>160</b>	<b>\$13,600 Plus GST</b>
<b>Custom</b>	<b>160 +</b>	<b>As per the agreed SLA</b>

Suitable Support Package will be proposed by SOFTWARE CO based on the estimated hours per month required to support your digital property/s.

**Unused support credit hours will carry forward and be valid for up to 3 months.**

**3. Payment Terms**

CLIENT is required to pay in full for one of the above support packages upon commencement of this support & maintenance agreement. Thereafter, progress invoices will be raised by SOFTWARE CO as support credits are nearing completion. As long as support package top-up payments are made in a timely manner, the support & maintenance work will continue interrupted.

**4. Cancellation.**

60 Days' notice is required for the cancellation of the support & maintenance package. Unused credits will be refunded upon cancellation.



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## 5. Quality Assurance

SOFTWARE CO's support & maintenance package includes functional testing to cover the code SOFTWARE CO creates.

As part of the testing process, SOFTWARE CO expects the CLIENT to execute acceptance testing against the agreed requirements in a timely fashion (within 14 days). If CLIENT is unable to execute acceptance testing in a timely fashion (within 14 days), SOFTWARE CO will appoint an internal quality analyst to complete the testing and produce reports to the client.

Any defects that are accepted for release by the customer at the end of testing, will be logged as known issues and addressed on an ad-hoc basis by the Software Engineering team once the app is in production. Issues will be addressed in order of severity and rolled up into the next release of the app.

## 6. Warranty

SOFTWARE CO will provide CLIENT with a 30-day warranty period against all Severity Level 1 & 2 defects in the app(s). During the warranty period, if CLIENT identifies a potential Severity Level 1 or 2 defect SOFTWARE CO will work to validate the defect and its classification level, per the definition of defect severity and action it accordingly.

Any defect raised that does not meet the Severity Level 1 or 2 definition is considered outside the scope of the warranty. Any defects raised outside of the 30-day warranty period are considered out of scope of the warranty. Upon resolving a severity 1 or 2 defect within the warranty period, SOFTWARE CO expects CLIENT to execute User Acceptance Testing (UAT) against the solution prior to deployment or release to the app store. Any issues raised during the UAT phase for a warranty fix are restricted to issues directly resulting from the Warranty defect, and will follow the typical Quality Assurance (QA) process.

## 7. Reporting

Reports will be delivered on timescales upon request as defined by the service level.

Service management reporting will draw from a number of different data sources which may include:

- Activity reports maintained by Software Co's project managers
- iTunes Crash Reports and Usage Statistics
- Android Crash Reporting
- Formal Incident Reports for all P1 and P2 incidents
- Summary of all incidents since last report
- Summary of pending Problem and Change requests
- Status Report detailing downloads and traffic, comments in the Application Store
- Push Notification data where available/applicable