

Software as a Service Agreement

1. Purpose of this document

- 1.1 This document concerns the agreement between the Parties for the right of the Customer to use the Hosted Software.
 - 1.2 This document does not address or concern any required software support and maintenance services (including Releases and Updates for any software) or Professional Services. Such services and licences are governed by separate documents respectively entitled Maintenance + Support Services Agreement and Professional Services Agreement, as the same may be amended or apply from time-to-time.
-

2. Right of Use

- 2.1 The Company grants to the Customer a right to use and access the Hosted software as a service for the Term subject to compliance by the Customer with the terms of this Agreement and any Professional Services Agreement, Purchase Order, Statement of Work, Proposal and any other relevant document.
 - 2.2 Subject to payment of the Fees and compliance by the Customer with the terms of this Agreement, the Company agrees to provide the Hosting Services to the Customer for the Term.
 - 2.3 The Company will implement and maintain measuring and monitoring tools and procedures that:
 - 2.3.1 are capable of measuring the Company's performance against the Service Levels; and
 - 2.3.2 permit reporting at a level of detail sufficient to determine compliance with the Service Levels.
 - 2.4 The Company will measure the Company's performance with respect to Service Levels and provide written reports on the Company's performance against the Service Levels.
 - 2.5 The provision of the Hosting Services shall subsist from the Commencement Date for the Term (subject to earlier termination of this Agreement).
 - 2.6 The Customer may not modify, copy, enhance, adapt or merge the Hosted Software with other software or otherwise use the Hosted Software other than expressly allowed by this Agreement or with the prior written consent of the Company.
 - 2.7 The Customer must not do or permit the following:
 - 2.7.1 subject to clause 13, assign or transfer any of its rights under this Agreement or grant sub-licenses of any of its rights under this Agreement;
 - 2.7.2 subject to clauses 13 and 2.8, permit a third party to use the Hosted Software or provide it to a third party directly or indirectly;
 - 2.7.3 reverse engineer or decompile the Hosted Software or any part of it, except where permitted by law;
 - 2.7.4 create, copy, develop or modify, or attempt to create, copy, develop or modify, the source code or any part of it from the Hosted Software or from any other information, except where permitted by law;
 - 2.7.5 use or permit the use of the Software to provide any form of bureau service, third party training or for similar activities;
 - 2.7.6 exploit the Software other than as contemplated by this Agreement;
 - 2.7.7 subject to clause 13, distribute, disclose, market, rent, lease to any third party any portion of the Hosted Software or Tools;
 - 2.7.8 attempt to create any software which has features or functionality the same as or similar to the features and functionality of the Hosted Software for the duration of the Restraint Period; or
 - 2.7.9 demonstrate or give use of the Hosted Software or related system to any Competitor of the Company.
 - 2.8 Despite clause 2.7.2, the Customer may permit a third party to use the Hosted Software or provide it to a third party directly or indirectly with the written consent of the Company, which the Company must not unreasonably withhold.
-

3. Service levels

- 3.1 The Company shall provide the Hosted Software in accordance with the following Service Levels.
 - 3.2 **Services Availability**
 - 3.2.1 Excluding scheduled downtime, the Services will be available to Authorised Users for not less than 98% of the time each calendar year of the Term (**Uptime Percentage**).
 - 3.2.2 If downtime (as detailed below) exceeds the specified percentage (**Uptime Percentage**) 5 (five) times within a contract period (a **Service Level Default**) the Customer may pursue the option of immediate contract termination.
 - 3.3 **Measurement Process**
 - 3.3.1 Downtime is measured on an individual sites basis and is taken as the period from when the client reports the possible downtime to the system being useable again.
-

3.3.2 Downtime does not include:

- A scheduled outages the client is informed of by email.
- B third party outages affecting the system including hardware and network outages.
- C any downtime where a workaround is provided.

3.3.3 Downtime is when the system is unusable and does not relate to functionality or performances.

3.3.4 The Services will be measured annually (on a calendar year basis) by calculating the percentage of the total hours the Services were available (**Actual Uptime**) compared to the total hours the Services were scheduled to be available (**Scheduled Uptime**) according to the usage requirements of the Customer.

3.4 **Availability % = (Actual Uptime (in hours))/(Scheduled Uptime (in hours)) x 100.**

4. Usage Obligations

4.1 The Customer must not:

- 4.1.1 to the extent lawful, attempt to create any software which has features or functionality the same as or similar to the features and functionality of the Hosted Software for the duration of the Restraint Period;
- 4.1.2 demonstrate or give use of the Hosted Software or related system to any Competitor of the Company; or
- 4.1.3 knowingly or recklessly access, store, distribute or transmit any Viruses, or any material in relation to its use of the Hosted Software that:

- A is unlawful, harmful, threatening, defamatory, obscene, infringing, harassing or racially or ethnically offensive;
- B facilitates illegal activity;
- C depicts sexually explicit images;
- D promotes unlawful violence;
- E is discriminatory based on race, gender, colour, religious belief, sexual orientation, disability, or any other illegal activity; or
- F causes damage or injury to any person or property,

and the Company reserves the right, without liability to the Customer, to disable or suspend the Customer's access to the Hosted Software in the event of a breach of the provisions of this clause or for other lawful or reasonable reasons.

4.2 The Customer must:

- 4.2.1 protect the Hosted Software from misuse, or any unauthorised use; and
 - 4.2.2 supervise and control the use of the Hosted Software in accordance with the terms of this Agreement.
-

5. Fees

5.1 The Customer shall pay to the Company all Fees for the Hosting Services when required.

5.2 The Company has no obligation to provide and may suspend the provision of the Hosting Services and any collateral rights and services if a payment is not made when due under this Agreement. Non-payment and suspension of Hosting Services and any collateral rights and services in such circumstances is without prejudice to the rights of the Company.

6. Source code

Nothing in this Agreement gives the Customer any rights in, or to view or access, the source code of the Hosted Software or Tools, unless otherwise permitted by the Company in writing.

7. Audit

7.1 The Customer shall permit the Company to audit the use of the Hosted Software in order to establish the name, location and IP address of each Authorised User (subject to compliance with applicable privacy law and confidentiality obligations). Such audit may be conducted no more than once per quarter (in the absence of evidence of prior default), at the Company's expense, and this right shall be exercised with reasonable prior notice.

7.2 If any of the audits reveal that access to any account has been provided to any individual who is not an Authorised User, then without prejudice to the Company's other rights, the Customer shall promptly disable access to the relevant accounts and the Customer shall take such steps as are reasonably required to notify the relevant individual of his responsibility to keep his account and password secure.

8. Authorised users

- 8.1 The right of the Customer to access and use the Hosted Software is limited to the Authorised Users.
- 8.2 The number of concurrent Authorised Users that a Customer may have may be restricted in accordance with the services provided to the Customer pursuant to a relevant Purchase Order, Statement of Work, Professional Services Agreement or Maintenance + Support Services Agreement.
- 8.3 The Customer shall notify the Company of any known unauthorised use(s) of the Hosted Software, or any known breach of security within the IT infrastructure of the Customer which impacts upon the security of the Hosted Software (**Breach**), forthwith after it becomes aware of the Breach.
- 8.4 The Customer agrees that it will cooperate with the Company and take all reasonable steps in investigating and mitigating the Breach.
- 8.5 The Customer undertakes to the Company that it will not allow or suffer any User Subscription to be used by more than one individual Authorised User unless the User Subscription for that Authorised User:
- 8.5.1 relates to a specific Location and it is agreed in writing that the specific Location may access or use the Hosted Software by a single local machine irrespective of the identity of the Authorised User from time to time; or
- 8.5.2 has been reassigned in its entirety to another individual Authorised User, in which case the prior Authorised User shall no longer have any right to access or use the Hosted Software.
- 8.6 Each Authorised User shall keep a secure password for his or her use of the Hosted Software, such password shall be changed no less frequently than a 90 day cycle and that each Authorised User shall keep his or her password confidential.

9. Warranties + Representations

- 9.1 The Company shall provide the Hosting Services with reasonable skill and care and within a reasonable time.
- 9.2 The Customer acknowledges the dependency of the Hosting Services on the stability of multiple elements and inputs from the Customer's IT infrastructure, all of which are beyond the control of the Company.

10. Statutory Guarantees + Limitation of Liability

- 10.1 Certain provisions of the *Competition and Consumer Act 2010* (Cth) (including, without limitation, the Australian Consumer Law) and other State, Territory or Commonwealth laws in Australia, as amended or replaced from time to time (collectively, **ACL**) provide **consumers** (as that expression is used in the ACL) and others with certain rights (collectively, the **consumer guarantees**) in relation to goods or services purchased by consumers.
- 10.2 The Company does not give any guarantee, indemnity or warranty or make any representation of any kind, express or implied, with respect to the supply by the Company of any goods or services in connection with this Agreement, except as expressly set out in clause 9.1 of this Agreement and by way of consumer guarantee (as may be relevant).
- 10.3 Subject to clauses 10.1, 10.2, 10.4 and 10.5 the aggregate liability of the Company for breach of or liabilities under, in respect of and in connection with this Agreement and any Professional Services Agreement, Purchase Order, Statement of Work, Proposal and Maintenance + Support Services Agreement related to it as well as its duties at law and in equity (however arising) and whether in contract, tort (including without limitation negligence), under statute, under indemnities or on any other basis is limited to the greater of:
- 10.3.1 an amount equivalent to the value of the following remedy or amount:
- A in the case of goods (which for these purposes includes any licensed software or third party software licensed to the Customer) - the replacement of the goods, the supply of equivalent goods, the repair of the goods, the payment of the cost of replacing the goods or of acquiring equivalent goods or the payment of the cost of having the goods repaired; or
- B in the case of services (which for these purposes includes use of any Hosted Software and any hosted third party software) - the supply of the Services again or the payment of the cost of having the Services supplied again; and
- 10.3.2 the amount paid or indemnified by an insurer in favour of the Company in respect of the liability to the Customer under an insurance policy required to be taken out by the Company under a relevant Purchase Order, Proposal, Professional Services Agreement or Statement of Work, or the amount the Company would have been entitled to be paid or indemnified for such liability by such an insurer but for any failure by the Company to effect, maintain or claim under an insurance policy required by this Agreement; or
- 10.3.3 where a dishonest act or omission of the Company results in an insurer lawfully declining the Company's coverage under an insurance policy required to be taken out by the Company under a relevant Purchase Order, Proposal, Professional Services Agreement or Statement of Work (which liability of the Company to the Customer would be, but for the dishonest act or omission, covered by insurance), the amount equal to the indemnity that would have been payable under such insurance coverage in respect of the liability of the Company to the Customer if the dishonest act or omission had not occurred.

10.4 Subject to rights that the Customer may have under the ACL, which are not excluded, modified or restricted (to the extent to do so is unlawful), the Company is not liable to the Customer or any other person, whether in contract, tort or otherwise, for any loss or damages (including without limitation specific, indirect, consequential or economic loss) howsoever caused arising from any event.

10.5 In no circumstances, but subject to clause 10.4, will either Party be liable to the other or its successors in title or permitted assignees for any indirect or special or consequential loss or damage arising out of, in connection with or relating to the performance, breach, termination or non-observance of this Agreement. Each Party agrees that loss of profits, revenue, goodwill, bargain, opportunities, loss or corruption of data or loss of anticipated savings however and whenever occurring, will constitute indirect or consequential loss or damage.

11. Customer Data

11.1 The Customer shall notify the Company in writing if it becomes aware of any infringement of any of the Company's Intellectual Property Rights.

11.2 The Customer shall retain ownership of any data or other content or information relating to its business that the Customer inputs by use of the Hosted Software (**Customer Data**).

11.3 The use of such Customer Data must comply with the Customer's privacy policies and all relevant laws.

11.4 The parties shall respectively comply with relevant laws applicable to them relating to the privacy and security of any relevant personal information.

11.5 If the Company **processes** (which for these purposes means using, hosting, transferring, disclosing, deleting, archiving, rendering anonymous, using or handling in Australia or overseas) any Personal Information on the Customer's behalf when performing or in connection with its obligations under this Agreement:

11.5.1 the Customer shall ensure that the Customer or other relevant person is entitled to transfer the relevant Personal Information to the Company so that Company may lawfully process the Personal Information in accordance with this Agreement and as may be required by *GoHosting, Microsoft Azure, Amazon Web Services* or any other relevant person or body;

11.5.2 the Customer shall ensure that the relevant third parties, customers, employees, independent contractors and other persons have been informed of, and have given their consent to, such use, processing as required by all applicable data protection and privacy laws in Australia or overseas;

11.5.3 subject to clauses 11.4 and 11.6, the Company shall process the personal information only in accordance with the terms of this Agreement; and

11.5.4 each party shall take appropriate technical and organisational measures against unauthorised or unlawful processing of the Personal Information or its accidental loss, destruction or damage.

11.6 If the Company is required by relevant laws or persons to disclose, delete, amend, render anonymous or otherwise process Personal Information for the purposes of the *Privacy Act 1988* (Cth) or other relevant laws then it may do so and in such circumstances the Customer shall pay to the Company its reasonable costs of compliance at Standard Rates.

12. Termination

12.1 This Agreement terminates immediately if the Maintenance + Support Services Agreement terminates.

12.2 The Company may terminate this Agreement by notice in writing to the Customer if:

12.2.1 the Customer fails to pay any sum payable under or in connection with this Agreement, the Maintenance + Support Services Agreement, a Statement of Work, a Proposal, a Professional Services Agreement, a Purchase Order or other relevant agreement or document on or before the due date for payment of that sum; or

12.2.2 the Customer materially breaches any term of this Agreement, the Maintenance + Support Services Agreement, a Statement of Work, a Proposal, a Professional Services Agreement, a Purchase Order or other relevant agreement not otherwise mentioned in this clause 12.2.2 and the Customer does not remedy the default or breach (if capable of remedy) to the full satisfaction of the Company within 10 days after receipt by the Customer of a notice from the Company specifying the relevant material breach.

12.2.3 Termination under clauses 12.2.1 and 12.2.2 becomes effective on the date that notice in writing is delivered to the Customer stating that a sum has not been paid or that a material breach has occurred which is not capable of remedy or has not been remedied within the relevant 10 day period.

12.3 If a breach occurs pursuant to clauses 12.2.1 and 12.2.2, the Company may exercise its rights:

12.3.1 notwithstanding the prior acceptance of any part of any amount payable under this Agreement;

12.3.2 notwithstanding the occurrence of any previous or other breach; and

12.3.3 without the necessity for any notice to or of any consent or concurrence on the part of any other person.

12.4 Upon termination of this Agreement neither Party will have any further obligations under this Agreement other than:

12.4.1 in respect of any liability for antecedent breach; or

12.4.2 any liability in respect of provisions of this Agreement which are expressed to continue in full force and effect notwithstanding termination.

12.5 Upon termination of this Agreement, the Customer must immediately:

12.5.1 subject to clause 12.6, cease to use the Software and certify in writing to the Company that it has done so; and

12.5.2 promptly take such further steps as the Company may reasonably require to vest in the Company all its relevant Intellectual Property Rights.

12.6 After termination of this Agreement, at the Customer's request, the Company will use reasonable efforts to allow the Customer to download or access the Customer Data which may be made available to the Customer by the Company allowing the Customer to retain in a non-production environment one archive copy of the Software with Customer Data embedded. The Customer must download or access the Customer Data within 6 calendar months of termination after which the Company may delete the Customer Data and/or as appropriate direct the deletion of the archive copy of the Software and embedded Customer Data.

12.7 Any access or hosting charges payable for the continued use of or access to the archive copy of the Software for these purposes only will be payable by the Customer at relevant rates.

12.8 Services for the archive copy of the Software can be purchased on an *ad hoc* basis at Standard Rates and must be paid prior to the provision of such support services.

12.9 The following clauses of this Agreement shall continue in full force and effect notwithstanding termination of this Agreement: clauses 10 (*statutory guarantees + limitation of liability*), 12 (*termination*), 13 (*assignment*), 14 (*force majeure*), 15 (*governing law*) and 16 (*definitions*).

13. Assignment

13.1 Subject to the following provisions of this clause 13, the Customer may not assign, dispose of or otherwise transfer this Agreement or any rights or obligations under this Agreement without the prior written permission of the Company.

13.2 The Customer may in no circumstances assign or transfer any rights or obligations under this Agreement.

13.3 The Company may assign, in part or in full, its rights and/or obligations under this the Agreement without the consent of the Customer.

13.4 Subject to this clause 13, this Agreement shall be binding on the Parties to it and their respective successors and permitted assigns.

14. Force Majeure

14.1 Notwithstanding any other provision in this Agreement, no default, delay or failure to perform on the part of the Company will be considered a breach of this Agreement if such default, delay or failure to perform is shown to be due to causes beyond the reasonable control of the Company, including, but not limited to a Force Majeure Event.

14.2 If a Force Majeure Event arises, the time for performance required by the Company under this Agreement will be extended for any period during which performance is prevented by the event.

15. Governing law

This Agreement is governed by the laws of New South Wales, Australia which shall have non-exclusive jurisdiction with respect to any disputes.

16. Definitions

In this Agreement, unless the context otherwise requires or provides:

ACL has the meaning given in clause 10.1.

Actual Uptime has the meaning given in clause 3.

Agreement means this agreement which is entered into by virtue of and pursuant to any relevant Statement of Work, Proposal, Purchase Order or other relevant document or agreement, but is severable as to its terms and terminable in its own right in accordance with its provisions.

Authorised Users means those employees, agents and independent contractors of the Customer who are authorised by the Customer to use the Software.

Business Day means a day which is not a Saturday, Sunday or public or statutory holiday in Sydney, Australia.

Business Hours means 8.30am to 5.00pm (Sydney, Australia time) on Business Days, and for the avoidance of doubt, includes support hours.

Commencement Date means the date stated in a relevant Statement of Work, Proposal, Purchase Order or other relevant document accepted by the Company or as otherwise agreed or applicable.

Company means Productivity Development Solutions (ACN 147 900 641) of c/- Level 1, 192 Pacific Highway, Charlestown NSW 2290 but for the purposes of this Agreement shall include its permitted assigns from time to time.

Competitor means another software vendor or developer that is or may reasonably be considered by the Company to be a competitor of the Company.

Consequential Loss means any Losses suffered by a party to this Agreement as a result of a breach of this Agreement that cannot reasonably be considered to arise naturally from that breach. Each party agrees that loss of profits, revenue, loss or corruption of data, goodwill, bargain, opportunities and loss of anticipated savings however and whenever occurring, will constitute Consequential Loss.

Consumers and consumer guarantees have the meanings given in clause 10.1.

Customer means the relevant entity identified in a Statement of Work, Proposal, Purchase Order or other relevant document.

Customer Data has the meaning given in clause 11 and includes the data of the Customer which is relevant to the use of the Hosted Software.

Customisation(s) means a development, enhancement or other Modification to relevant software which is undertaken by us at the request of the Customer pursuant to a Statement of Work, Proposal, or other relevant document.

Fees means the fees payable by the Customer to the Company for the Software, and where relevant the standard published fees of the Company for relevant goods and/or services (as the case may be) as stated in a Purchase Order, Proposal, Statement of Work or other relevant document.

Force Majeure Event means strikes, lock-outs or other labour disputes, riots, civil disturbance, actions or inaction of governmental authorities, epidemics, wars, computer or network downtime, failure or delay of communications infrastructure, embargoes, storms, floods, fires, earthquakes, acts of God or the public enemy, nuclear disasters or default of a carrier or any other event which is not within the Company's reasonable control.

Frequency of Payment means the frequency of payment of Fees specified in a relevant Purchase Order, Proposal, Statement of Work, Proposal or other document and in the absence of any stated frequency shall be payable in full in advance of the provision of the Hosting Services for the Term.

Hosted Software means the software which is hosted by the Company (or on its behalf) made available and provided as a service to and accessible remotely by the Customer (not being third party software) as stated in a Purchase Order, Proposal, Statement of Work or other relevant document, including each Release, Update and Customisation of that software.

Hosting Services means the hosting services in respect of the Hosted Software as agreed between the Parties (as may be relevant) under a Statement of Work, Purchase Order, Proposal or other document or agreement (in each case, not being services to be performed within the scope of a relevant Maintenance + Support Services Agreement, or Professional Services under a Professional Services Agreement), and includes storage of data connected to the Hosted Software (up to 2 GB).

Intellectual Property Rights means all present and future intellectual and industrial property rights subsisting in any and all media and materials (whether now known or created in the future), conferred by statute, at common law or in equity and wherever existing.

IT means information technology.

Location means the relevant location or place of business of the Customer.

Losses means all liabilities, losses, damages, costs and expenses, including:

- (a) legal costs and disbursements, whether incurred or awarded against a party, including costs of investigation, litigation, settlement and compliance with judgments; and
- (b) interest, fines and penalties,

suffered or incurred by any person, whether arising in contract or tort (including negligence) or under any statute.

Maintenance + Support Services Agreement means an agreement in writing between the Company and the Customer for the maintenance, support and upgrade (comprising Updates and Releases) of the Hosted Software.

Modification means, in relation to software, any adaptation or derivative of the software within the meaning of the *Copyright Act 1968* (Cth).

Parties means the Company and the Customer.

Personal Information means any information or an opinion (including information or an opinion forming part of a database), whether true or not and whether recorded in material form or not, about an individual whose identity is apparent, or can be reasonably ascertained, from the information or opinion.

Professional Services Agreement means an agreement in writing between the Company and the Customer for the provision to the Customer of professional services.

Proposal means an agreement in writing for the provision of goods and/or services which may include certain deliverables and/or Customisations in respect of the Hosted Software. Such agreement in writing may incorporate or comprise the terms of or be subject to a Professional Services Agreement of the Company.

Purchase Order means an order form or purchase order (howsoever expressed) submitted by the Customer to the Company.

Related Bodies Corporate means as defined in the *Corporations Act 2001* (Cth).

Release means software which has been produced primarily to extend, alter or improve the Hosted Software by providing additional functionality or performance enhancement (whether or not defects in the Hosted Software are also corrected) while still retaining (in whole or in part) the original or substantial similar designated purpose of the Hosted Software, but for the avoidance of doubt shall not include new software products so designated by the Company (even if the new software has some or all of the same functionality).

Restraint Period means a period of 12 months following the termination or expiration of this Agreement. If the duration of this restraint period is found to be unenforceable by a court or tribunal, then the restraint period will automatically be reduced to the maximum period enforceable by applicable law, with the intent that the restriction remains enforceable and reasonable. In no event shall the restraint period exceed 12 months, and in the event that the primary restraint period of 12 months is deemed unenforceable, the period will automatically reduce to 6 months, or to the shortest duration necessary to make the restraint enforceable. This restraint is intended to protect the legitimate business interests of the Company, including but not limited to its Intellectual Property Rights, the Hosted Software, and its customer relationships.

Scheduled Uptime has the meaning given in clause 3.

Services means the services contemplated by clause 3.

Service Level means the service levels contemplated by clause 3.

Standard Rates means the Company's then current standard consultancy rates for professional services.

Statement of Work means an agreement in writing for the provision of goods and/or services which may include certain deliverables and/or Customisations in respect of the Hosted Software. Such agreement in writing may incorporate or comprise the terms of or be subject to a Professional Services Agreement of the Company.

Term means the term specified in the Statement of Work, Purchase Order, Proposal or other relevant document but if a term is not so specified, the remainder of the calendar year from the Commencement Date (**Initial Term**), and thereafter (subject to renewal in writing and payment of relevant Fees and other amounts owing or due) on a rolling annual basis for a full calendar year (each a **Subsequent Term**).

Territory means Australia or as otherwise specified in the Purchase Order, Proposal or other relevant document

Tools means the underlying architecture from which the Hosted Software and other relevant software is designed and includes software application programming tools and code.

Update means software which has been provided to overcome defects in the Hosted Software and includes patches.

Uptime Percentage has the meaning given in clause 3.

User Subscriptions means the user subscriptions purchased by the Customer which entitle Authorised Users to access and use Hosted Software in accordance with this Agreement.