

# Master Services Agreement

## 1. PURPOSE OF DOCUMENT

1.1 The terms and conditions of this *Master Services Agreement* governs every Agreement (from the effective date stated below) for the supply of goods and/or Services by Evolution to the Customer including as contemplated by any *Proposal* or *Service Schedule*.

1.2 Evolution is not bound by any terms of purchase of the Customer or any other conditions which the Customer seeks to impose on, or that purport to apply to, the supply of goods and/or Services by Evolution, unless and to the extent only that they are expressly stated and agreed in a *Proposal* signed by Evolution.

1.3 The Customer agrees that the submission to Evolution, signing or acceptance of a *Proposal* by it or requesting Evolution to supply goods or Services constitutes acceptance by it of the terms and conditions of this *Master Services Agreement*.

## 2. PROPOSALS

2.1 If the Customer wishes to order any Deliverables, it will notify Evolution of the particular Deliverables it requires and may request that Evolution prepares a *Proposal*.

2.2 Upon acceptance of such a *Proposal* by the Customer (if so capable of acceptance) or acceptance by Evolution (as the case may be in accordance with its terms or the particular circumstances) such *Proposal* shall incorporate the terms and conditions of this *Master Services Agreement* and together with any relevant *Service Schedule* mentioned as well as the *Master Definitions + Interpretation Schedule* form a separate contractual Agreement between the parties.

2.3 A *Proposal* must be signed by Evolution on, or prior to, its acceptance to be valid and the Proposal must not have been withdrawn by Evolution or have lapsed before its acceptance.

2.4 Subject to compliance by the Customer with its obligations, Evolution shall perform the Services and provide relevant other Deliverables in accordance with the signed and accepted *Proposal*.

## 3. ORDER OF PRECEDENCE

3.1 Subject to clause 3.2, if there is any inconsistency between clauses 1 to 34 of this *Master Services Agreement*, any *Proposal* any *Service Schedule* and any other documents referred to in the agreement of which this *Master Services Agreement* forms part or any of them, that inconsistency will be resolved using the following order of precedence:

- (a) clauses 1 to 34 of this *Master Services Agreement*;
- (b) the *Master Definitions + Interpretation Schedule*;
- (c) the relevant *Proposal*;
- (d) the relevant *Service Schedule(s)*;
- (e) the relevant *Plan(s)*; and
- (f) any other documents referred to in the Agreement of which this *Master Services Agreement* forms part.

3.2 The Parties may agree to disapply or vary the above provisions with respect to precedence or any clause in a contractual document. However, in order to do so the relevant *Proposal* or other document must expressly identify the inconsistency, disapplication or variation, call it out by reference to this clause 3.2 and detail any conditionality or

limitations in respect of the application of relevant contractual provisions. The purpose of this clause 3.2 is to ensure flexibility with respect to the ability of the Parties to agree provisions that may differ in effect from the contemplated provisions in clauses 1 to 34 of this *Master Services Agreement* or as otherwise contemplated by clause 3.1.

## 4. TERM

4.1 The relevant term or duration of the Agreement and pertinent obligations under it shall be specified in the Agreement and commence from the Effective Date.

4.2 The obligations under the Agreement shall subsist (subject to any contrary provision or continuing terms) until its expiry or the date on which all Deliverables specified in it have been provided to and (if required) accepted by the Customer, unless terminated earlier in accordance with the provisions of the Agreement.

## 5. DURATION OF SERVICES

5.1 A Service or the provision of any other Deliverable by Evolution to, or for the benefit of, the Customer shall commence on the relevant Service Commencement Date and end on the relevant Service End Date.

5.2 In the absence of any express statement to the contrary in the Agreement (such as for any agreed disengagement assistance or data migration Services, or Services provided for a lesser duration), Services shall automatically terminate and cease to be provided at the end of the Term of the Agreement.

5.3 This shall not affect the operation of clause 19.5.

## 6. FEES + PAYMENT

6.1 The Customer shall pay when due (without deduction or set-off, whether in law or in equity) all Fees detailed in or contemplated by the Agreement.

6.2 If Fees are not specified in the Agreement then the applicable Standard Rates apply.

6.3 While a Customer has an active *Managed Services* subscription in respect of a relevant Service, pertinent Volume Incentive Discounts shall apply to the BAU Services supplied by Evolution with respect to the relevant Service in accordance with the terms and conditions of the *Managed Service Schedule*, the particular *Managed Services Plan* and the relevant *Managed Services Package* at the applicable time.

6.4 All BAU Services supplied by Evolution in respect of a Service during a period when a *Managed Service* subscription is not active are supplied on a chargeable time and materials basis at then applicable Standard Rates.

6.5 Subject to the Customer's rights under law (including under the ACL), Evolution may increase the Fees and amounts payable by the Customer (with effect from, subject as follows, a date reasonably specified by Evolution) concerning the cost of supplying or disbursements concerning Third Party Product(s) specified in or contemplated by the Agreement.

6.6 This may arise, without limitation, because a Third Party Product vendor or licensor increases a licence fee or other amount payable for relevant Deliverables. For the avoidance of doubt, this includes not just software but also hardware, whether current or deprecated (including for these purposes software or hardware which, in whole or in part, the relevant

vendor will only support or maintain to some extent conditional on increases of amounts payable. Evolution has no ability to dictate or influence the imposition, scope or amount of any such increase or whether hardware or software becomes deprecated.

6.7 If Evolution increases the Fees and amounts payable by the Customer under clause 6.5, then it may only do by an amount equivalent to the increase imposed or applied by the Third Party Product vendor or licensor. However, in the case of deprecated hardware or software in circumstances in which the Customer is permitted to continue having a right of use or licence to the same, the increase in the Fees or other amount payable may be substantial due to economise of scale (related to the number of customers using the relevant hardware or software), the stance and pricing of the relevant Third Party Product vendor or licensor at the relevant time.

6.8 Any such increase (unless it concerns deprecated hardware or software) may only commence during the period between 31 December and 31 January during the Term and shall require at least 30 days' prior written notice.

6.9 Except as otherwise expressly agreed in the Agreement and subject to the rights contemplated by clauses 6.5, any Fees payable may be increased by Evolution with effect from an anniversary of the Effective Date by the higher of:

- (a) 4%; and
- (b) the increase in the Index in the prior 12 month period (or as close as may be reasonably determined by Evolution at the time by reference to available published data from the *Australian Bureau of Statistics* as Evolution shall reasonably determine).

6.10 All Fees are exclusive of GST and other similar sales taxes.

6.11 Interest is payable on any overdue and unpaid Fees, commencing on the date the amount became overdue, at the rate of 2 per cent of the outstanding balance per calendar month, or the maximum rate permitted by applicable law, whichever is less.

6.12 Unless specified to the contrary in the Agreement, payment is due to Evolution 14 days from the date of the relevant invoice.

6.13 All Fees are to be paid to Evolution by direct credit to the bank account nominated by it (including by EFT or BPay), or as otherwise agreed by the Parties in writing.

6.14 Evolution may in its sole discretion accept the payment of Fees in instalments upon such terms as it sees fit from time to time.

6.15 Evolution reserves the right to revoke at any time any credit extended to the Customer because of its failure to make any payment when due or for any other reason.

6.16 The Customer agrees to pay to Evolution any costs incurred by it in the collection of payment of any Invoice.

6.17 The Customer must also pay to Evolution:

- (a) all out-of-pocket expenses, costs and disbursement (such as, without limitation, for Third Party Products and also food, travel and accommodation) incurred by Evolution or its Personnel in connection with the Agreement;
- (b) all applicable taxes (including GST);

- (c) any relevant insurance (for cover in relation to risks of carriage and delivery) as well as delivery costs; and
- (d) for travel time of Evolution Personnel in accordance with then applicable Standard Rates.

6.18 The *Managed Services* offerings of Evolution aim to provide the Customer, among other things, with responsive and comprehensive remote support. From time to time, site visits may be required for physical works and hardware fixes. In such circumstances, the Customer must pay for travel time at the applicable ViD (Standard Rates apply for any site visits if there is no active *Managed Services* subscription at the time) plus (in any circumstance) the cost of applicable flights, tolls, parking fees and accommodation together with any other relevant expenses and out-of-pocket costs as required or appropriate.

6.19 Evolution will have the option to request that Evolution staff use a taxi or ride share service to or from a relevant site with the costs to be reimbursed by the Customer.

6.20 If the Parties agree a fixed price in respect of Deliverables under the Agreement, the Customer must (if requested by Evolution) pay additional Fees on a time and materials basis for any additional work and/or Services requested by, or agreed with, the Customer outside the scope of work or Services contemplated.

6.21 The Customer acknowledges that any indications as to price, approximations or estimates do not constitute a fixed or maximum amount payable for pertinent goods and/or Services.

6.22 Fees payable may likewise be subject to assumptions as stated in the Agreement.

## 7. DELIVERY + RISK

7.1 In the case of tangible goods, Evolution will deliver them to the Customer, its agent or nominee, to a carrier, address of the Customer or as otherwise agreed in writing.

7.2 Without limiting the Customer's rights at law, delivery of tangible goods is deemed to take place upon the earlier of delivery of them: (a) to the Customer, its agent or nominee, or (b) to a relevant carrier commissioned (whether by Evolution, the Customer or another person) or (c) to the place specified or as otherwise agreed in writing.

7.3 Any arrangement or commissioning of a carrier by Evolution shall be as agent for the Customer and Evolution may charge an administration fee at then applicable Standard Rates.

7.4 The delivery of goods may be made in instalments and each such instalment shall be treated as a severable obligation.

7.5 Evolution will use reasonable efforts to deliver relevant goods to the Customer by the date and to the place or person contemplated. Without limiting clause 16 (*Statutory Rights*), Evolution shall not be liable for late delivery or delay in delivery.

7.6 The risk in tangible goods shall pass to the Customer upon delivery in accordance with the above provisions.

7.7 If requested by Evolution, the Customer shall from the time of delivery until Evolution has received payment for all goods in full, insure the goods for their

full replacement value and promptly provide to Evolution upon its request evidence of such insurance. Evolution reserves the right to take out such insurance (on any terms and in any amount or extent of cover) at the cost of the Customer.

## 8. ACCEPTANCE

8.1 The Customer is deemed to have accepted goods supplied when the Customer intimates to Evolution that the Customer has accepted them, or subject to section 37 of the *Sale of Goods Act 1923* (NSW), when the goods have been delivered to the Customer and the Customer does any act in relation to them which is inconsistent with the ownership of Evolution (or other relevant person), or when after the lapse of a reasonable time the Customer retains the goods without intimating to Evolution that the Customer has rejected them.

8.2 The Agreement may detail agreed arrangements in respect of the Acceptance Testing of any relevant goods or other Deliverables.

8.3 Unless the Agreement provides to the contrary, Deliverables will be deemed accepted by the Customer (in any event) when used in a production environment.

## 9. DATA PROCESSING

9.1 If forming part of the Agreement, the *Data Processing Service Schedule* and the *Data Processing Annexure* shall apply with respect to the Processing of *Personal Data*.

9.2 In any event, the Customer acknowledges and agrees that if Evolution Processes the *Personal Data* of any person in connection with the Service provided to the Customer, the Customer is responsible for and undertakes to provide all legally adequate privacy notices, obtain all necessary consents and approvals as well as comply with all relevant laws applicable to it with respect to the Processing of such *Personal Data* by Evolution.

## 10. ASSOCIATED SERVICES

10.1 In respect of a Service, the Customer may be able to use or be required to use one or more other Services (each, an **Associated Service**).

10.2 Use of an Associated Service, constitutes an agreement by the Customer to be bound by the relevant terms and conditions (whether in one or more *Service Schedules* or not) and to pay the Fees that apply from time to time to that Associated Service.

## 11. WARRANTIES

11.1 Evolution shall provide the Services and other relevant Deliverables with reasonable skill and care using reasonable commercial endeavours (subject to clauses 7.5 and 13.3) to provide them by the time stated in the Agreement and if no such time is stated then within a reasonable time.

11.2 Evolution warrants to the Customer that:

- (a) it has all rights and powers necessary to enter into and perform the Agreement; and
- (b) the Deliverables shall be of acceptable quality (unless stated to the contrary in the Agreement).

## 12. SERVICE LEVELS

12.1 Service Levels are detailed in the applicable *Proposal*, *Service Schedule(s)* and *Plan(s)* (as the case may be).

12.2 Service Credits may be available in respect of service levels or guarantees of that nature. To the extent offered (if at all) in the Agreement, a Service Credit is the sole remedy of the Customer for a failure to meet a service level or guarantee of that nature and the parties agree that they represent a genuine pre-estimate of the losses arising in respect of such a failure or breach.

## 13. ACCESS + DELAYS

13.1 The Customer must, at its own expense, provide Evolution with:

- (a) such access to the premises and relevant equipment of the Customer or a Customer RBC (including Permitted Operating Environment), upon application to the Customer's IT Personnel, during Business Hours as is reasonably necessary for Evolution to supply the Deliverables and comply with its obligations under the Agreement;
- (b) all information reasonably required by Evolution to comply with its obligations under the Agreement; and
- (c) all reasonable assistance required by Evolution.

13.2 Evolution must ensure that, when accessing the Customer's premises, its Personnel shall comply with the Customer's reasonable and lawful rules in relation to workplace health and safety matters.

13.3 If the Customer, a Third Party service provider or any other person (not being a sub-contractor of Evolution) causes a delay in the provision of Services then the time period for performance by Evolution (including any milestones) shall be extended by an equivalent period of time plus any additional period as is reasonable in all the circumstances.

## 14. SUSPENSION RIGHTS

Without prejudice to any other rights or remedies available to Evolution, if any Fees are not paid when due (excepting any *bona fide* good faith dispute for not more than A\$5,000 (ex GST)) or if the Customer is subject to an Insolvency Event, then Evolution shall be entitled, in its sole discretion, to cease or suspend providing all or any part of any Deliverables with immediate effect. Any resumption or reinstatement of the suspended Deliverable(s), in whole or in part, will be at Evolution's sole discretion.

## 15. INDEMNITIES

15.1 The Customer indemnifies and shall keep indemnified Evolution against all Losses that Evolution sustains or incurs in connection with:

- (a) the personal injury or death to any person or damage to, or loss of any property caused or contributed to by the Customer or any of its Personnel in connection with the performance by Evolution of its obligations under the Agreement;
- (b) any misleading, deceptive or dishonest conduct, act or omission by the Customer or any of its Personnel;
- (c) a breach of this the Agreement by the Customer;

- (d) a failure by the Customer to comply with an obligation under any relevant Third Party licence or right of use;
- (e) any negligent, dishonest, fraudulent or unlawful act or omission of the Customer or any of its Personnel in connection with the Agreement; and
- (f) any failure by the Customer or its Personnel to comply with any Regulatory Requirements.

## 16. STATUTORY RIGHTS

16.1 Certain provisions of the *Competition and Consumer Act 2010* (Cth) (including, without limitation, the 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.

16.2 Customers in a consumer transaction (as defined in the ACL) may have additional entitlements. In such circumstances, the Customer shall take notice of the following mandatory text:

*Our goods and services come with guarantees that cannot be excluded under the Australian Consumer Law. For major failures with the service, you are entitled:*

- (1) to cancel your service contract with us; and
- (2) to a refund for the unused portion, or to compensation for its reduced value.

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

Further details of any such warranty against defects (including the period within which a defect to which the warranty relates must appear if the consumer is to be entitled to claim the warranty) shall be included in a pertinent document given to the Customer, including details of the person giving the warranty against defects, its business address, telephone number and any email address plus procedure for a claim and how any expenses incurred in making the claim may be claimed.

16.3 Nothing in the Agreement excludes, restricts or modifies any condition, warranty, consumer guarantee, right or remedy implied or imposed by common law, statute or regulation which cannot be lawfully excluded, restricted or modified.

16.4 If section 23 of the ACL applies to any provisions in the Agreement, any such provision(s) shall be void to the extent they are unfair within the meaning of section 24 of the ACL.

## 17. LIMITATION OF LIABILITY

17.1 Evolution does not (to the extent lawful and subject to clause 16) give any guarantee, indemnity or warranty or make any representation of any kind, express or implied, written or oral, arising by statute, operation of law, course of dealing, usage or trade or otherwise with respect to the supply by Evolution of any goods or Services in connection with the Agreement, except as expressly stated in it or any

collateral pertinent document concerning warranties against defects (as may be relevant).

17.2 Except as expressly agreed to the contrary in the Agreement and subject to clauses 16, 17.3, 17.4, 17.5, 17.6 and 17.8 the aggregate liability of Evolution for breach of and all liabilities under, in respect of and in connection with the Agreement, 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 concerning the same is limited to an amount equivalent to the Fees paid by the Customer in the last 12 months under the Agreement (calculated by reference to the date when the cause of action first arose or in the case of multiple causes of action with respect to related facts or claims then the first such date).

17.3 To the extent that Evolution has failed to comply with a consumer guarantee under the ACL which cannot be excluded, the liability of Evolution is limited (to the extent lawful) to, at Evolution's option:

- (a) in the case of goods - 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 - the supply of the Services again or the payment of the cost of having the Services supplied again.

17.4 To the extent lawful, Evolution shall have no liability to the Customer for, or concerning, any Third Party Products in respect of which the applicable terms and conditions of the Third Party Product supplier shall apply.

17.5 To the extent lawful, Evolution shall have no liability to the Customer for or concerning any Customer-induced Issue.

17.6 Except in respect of an indemnity under clause 15, in no circumstances will either Party be liable to the other or its successors in title or permitted assignees for Consequential Loss arising out of, in connection with or relating to the performance, breach, termination or non-observance of the Agreement.

17.7 Nothing in the Agreement shall prevent a claim by Evolution or limit or exclude a liability of the Customer to pay the Fees.

17.8 Nothing in the Agreement shall exclude or limit the liability of a Party for:

- (a) death or personal injury caused by negligence;
- (b) fraud, deceit or fraudulent misrepresentation; or
- (c) any breach of any applicable licence terms or provisions regarding ownership or licensing of IPRs.

17.9 Nothing in the Agreement shall be construed as an agreement to be bound by or submit to any laws or jurisdiction not mentioned in clause 33.

17.10 No person other than a named Party may enforce the Agreement.

## 18. TERMINATION

18.1 In addition to any other express termination rights specified in the Agreement, a Party may by

notice in writing terminate the Agreement if the other Party:

- (a) commits a material breach of the Agreement (as the case may be):
  - (i) that cannot be remedied; or
  - (ii) if capable of being remedied, it has not been remedied within 20 Business Days after a notice from the non-defaulting Party requiring the defaulting Party to do so; or
- (b) suffers an Insolvency Event.

18.2 Evolution may by a notice in writing terminate the Agreement (in whole or in part) if:

- (a) Evolution reasonably forms the opinion that supplying goods or Services to the Customer may have a negative impact upon its business or commercial reputation or image;
- (b) Evolution' relationship with a third-party partner, vendor or licensor who provides software or other technology that Evolution uses or relies upon to provide a relevant Service or other Deliverable expires, terminates or requires Evolution to change the way it provides the software or other technology as part of the Service or other Deliverable;
- (c) required in order to comply with relevant laws or requests of governmental entities;
- (d) any Fees are not paid when due by the Customer (excepting any *bona fide* good faith dispute for not more than A\$5,000 (ex GST)); or
- (e) the Customer breaches a licence or the terms of use of any software or other relevant Deliverables or an obligation of confidence.

18.3 A termination under clauses 18.1 or 18.2 will take effect on the date when the notice is deemed to have been given under clause 25.

## 19. CONSEQUENCES OF TERMINATION

19.1 Termination or expiry of the Agreement will not prejudice any right of action or remedy which may have accrued to either Party prior to that termination or expiry (including the right to seek injunctive relief or any other remedy).

19.2 On termination or expiry of the Agreement, the Customer must immediately pay all Fees that have accrued prior to the termination or are otherwise due to Evolution. This includes any Recurring Fees and any amount payable in respect of any minimum period or duration that may otherwise extend beyond termination or which is payable on deferred terms.

19.3 Subject to any applicable laws, the Customer shall not be entitled to any refund of Fees paid prior to termination of the Agreement.

19.4 Any indemnity or any obligation of confidence is independent and survives termination.

19.5 Termination or expiry of the Agreement shall not affect the continuance of any perpetual licence of software that is fully paid up for the duration of such licence unless the relevant licence provides to the contrary.

19.6 In the event of termination or expiry of any licence or a right of use of or access to any software, Service, Deliverable, hardware, documentation, materials or thing the Customer must immediately

cease using the same and likewise any confidential information of Evolution.

19.7 The Customer must in such circumstances, at its own cost and expense, to the extent relevant and as may be directed by Evolution, return, erase or destroy all copies of such any software, Deliverable, documentation, materials or thing and (as may be demanded by Evolution) confidential information of Evolution. It must also certify to Evolution within 10 Business Days following termination that it has done so.

19.8 The Customer acknowledges and agrees that loss, termination or expiry of a right of use of, licence or access to any software, hardware, service, Deliverable, documentation or material (including any reduction of service scope) may necessitate additional work by Evolution concerning the Customer's IT which is affected by such event. This may include modifications, de-installation, re-configuration or other work as Evolution may reasonably determine.

19.9 Unless agreed in writing to the contrary, any such de-installation or modification work or Services supplied by Evolution (including any transition out, migration, data transfer or other termination or expiry-related Services) will be supplied by Evolution (if Evolution so agrees or has agreed) on a chargeable time and materials basis at then applicable Standard Rates.

19.10 Termination or expiry for any reason of the Agreement shall not bring to an end any provision which is expressed, needed or required to survive termination (including, without limitation, a provision in the Agreement to give effect to meaning) and such provisions shall remain in full force and effect until they are satisfied or by their nature expire.

19.11 For the avoidance of doubt, the following clauses of this document survive termination of the Agreement: clauses 1 (*purpose of document*); 3 (*order of precedence*); 6 (*Fees*); 7.7 (*insurance*); 8 (*acceptance*); 9 (*data processing*); 12.2 (*service credits sole remedy*); 15 (*indemnities*); 16 (*statutory rights*); 17 (*limitations of liability*); 19 (*consequences of termination*); 21 (*infosec*); 22 (*customer data*); 23 (*audit rights*); 24 (*GST*); 25 (*notices*); 26 (*security interest*); 27 (*force majeure*); 28 (*assignment*); 29 (*general*); 32 (*disputes*); 33 (*governing law*); and 34 (*definitions + interpretation*), together with (unless the contrary is stated) any provisions reliant on such clauses.

## 20. INSURANCE

20.1 Evolution must effect and maintain during the relevant term or duration of a *Proposal*:

- (a) professional indemnity insurance cover for not less than \$5 million per claim and \$5 million *per annum* in the aggregate;
- (b) public liability insurance cover for not less than \$5 million *per occurrence* and in the aggregate; and
- (c) workers' compensation and any other insurance required by Regulatory Requirements.

## 21. INFORMATION SECURITY

21.1 Evolution adopts information security controls with respect to hosted Services in accordance with ISO27001.

21.2 The Customer acknowledges and understands that any such controls are not a guarantee of

information or data security and may be impacted by the activities of third persons (including of a foreign person, state or country) and the conduct of the Customer and its Personnel. To the extent lawful, Evolution accepts no liability with respect to information security other than to implement (insofar as it is within its control) the above security controls.

## 22. CUSTOMER DATA + USE OF SYSTEMS

22.1 The Customer shall retain ownership of any data or other content or information relating to its business that the Customer inputs into any relevant software which is hosted as a service by Evolution (**Customer Data**).

22.2 The Customer shall ensure that no Customer Data is unlawful and may not use any systems, hardware, software, Services or other Deliverables made available or facilitated by Evolution for unlawful or immoral purposes (in any relevant jurisdiction).

22.3 No unlicensed software or other Intellectual Property Rights may be used on (or in conjunction with) systems, hardware, software, Services or other Deliverables made available by Evolution.

22.4 Evolution shall use reasonable endeavours (which for these purposes includes the application of information security controls), subject to clause 21 and the *Data Processing Service Schedule* and the *Data Processing Annexure*, to keep confidential any Customer Data which comes into its possession or control.

22.5 In any event, clause 22.4 does not apply to information that (whether before or after the Effective Date or other time):

- (a) is rightfully known by or in the possession of Evolution and not subject to a confidentiality obligation;
- (b) is public knowledge otherwise than as a result of a breach of an obligation of confidentiality by Evolution; or
- (c) has been obtained without any restraints as to secrecy from a Third Party and Evolution has no knowledge that the Third Party does not have a *bona fide* right to disclose the same on a non-confidential basis.

22.6 Evolution may disclose or transmit such confidential Customer Data to such persons as required by Regulatory Requirements, the rules of any relevant stock exchange, as directed or permitted by the Customer or its Personnel, for the purpose for which it is disclosed or provided (including the provision of the Services and any permitted Processing activities) and as contemplated (if it forms part of the Agreement in respect of a relevant Service) by the *Data Processing Service Schedule* and the *Data Processing Annexure*.

## 23. AUDIT RIGHTS

23.1 The Customer shall allow, at no cost to Evolution, access between 9am and 5pm on Business Days to the IT system(s) (including, without limitation, any Permitted Operating Environment), premises, facilities, records, files, computing devices and data centres of and used by the Customer including relevant users) so that Evolution, a relevant Third Party (including a licensor or vendor) and/or their respective representatives can verify compliance by the Customer with its obligations under a relevant licence, rights of use terms, *Service Schedule*, *Proposal* or Agreement otherwise. The Customer will promptly

on request and at the Customer's cost provide all relevant information and assistance in respect of the audit.

23.2 If, following an audit Evolution (or a Third Party Product vendor, licensor or rights holder) reasonably determines that an additional or further or revised or enhanced licence or rights of use to use any relevant software, hardware, Service or other Deliverable is, or was, required at any relevant time, the Customer agrees (if so demanded by Evolution) to pay Evolution immediately for such additional, enhanced, further and/or revised licence or rights of use as may be appropriate to rectify the unlicensed or infringing use to date and any relevant future periods of contemplated use (including for relevant periods prior to the audit for all users and functionality), together with the costs of the audit and any amounts payable by Evolution or the Customer to a Third Party Product vendor, licensor or rights holder in consequence of any unlicensed or infringing use as may be relevant. Evolution must invoice the Customer accordingly. Nothing in this clause prejudices the rights of Evolution (including a claim for damages or under any indemnity) with respect to any unlicensed use or infringement of the rights of Evolution or any other person (including a Third Party or with respect to Third Party Products).

## 24. GST

24.1 If GST is imposed on a Supply made under or in connection with the Agreement, then, to the extent that:

- (a) the consideration for that Supply is not already stated to include an amount in respect of GST; or
- (b) the amount of GST stated to be included in the consideration is less than the amount of the GST liability actually incurred by the Supplier in respect of that Supply,

the Supplier of the Supply may increase the consideration by the applicable amount of GST and the Recipient must pay that increased amount at the same time and in the same manner as any part of the consideration is payable to the Supplier in respect of the Supply.

24.2 Where any expenses incurred by a Supplier are to be reimbursed by the Recipient under the Agreement the reimbursable amount shall be determined as follows:

- (a) first, any amount which the Supplier is entitled to claim as an Input Tax Credit shall be deducted from the cost to the Supplier of the expense item to arrive at an actual cost; and
- (b) second, the actual cost shall be increased by and to the extent of the amount of GST payable by the Supplier in respect of the Supply to the Recipient for which the expense item is consideration.

24.3 If the GST payable by the Supplier on a Taxable Supply is varied pursuant to any change in legislation, the consideration payable under this *Master Services Agreement* must be increased or decreased to reflect that variation of the GST.

24.4 The Recipient is not required to pay any amount of GST to the Supplier unless the Supplier has provided a Tax Invoice to the Recipient.

24.5 For the purposes of this clause 24 and, unless the context otherwise provides, any other clauses

using the defined terms, Input Tax Credit, Recipient, Supplier, Supply, Tax Invoice and Taxable Supply have the meanings attributed to those terms in *A New Tax System (Goods and Services Tax) Act 1999* (Cth).

## 25. NOTICES

25.1 All notices and consents required or permitted to be given in relation to the Agreement (**Notice**) must be in writing and given by personal service, mail (postage prepaid with proof of despatch retained and airmail if to or from an address overseas) or email to the relevant Party at its address stated in the Agreement) or to a registered office address or such other address as a Party may designate to the other by written notice or to its registered address or an ostensibly operable email address (which for these purposes means that a bounce back message of non-delivery is not given within 1 hour of sending) of that Party.

25.2 A Notice is taken to be given and received (unless evidence sufficient to raise material doubt is adduced to the effect that the Notice was not actually delivered):

- (a) in the case of a pre-paid posted letter posted by registered or recorded mail, on the 3rd (or 7th, if posted to or from a place outside Australia) Business Day after posting;
- (b) if delivered by personal service on, or before, 5.00pm on a Business Day at the place of delivery, upon delivery, and if later that day then on the next Business Day; and
- (c) in the case of email, when an electronic message is sent to the information system of the recipient Party using the email address provided by that recipient Party but if after 5:00pm or not a Business Day in the place of receipt then on the next Business Day.

## 26. SECURITY INTEREST + TITLE

26.1 This clause 26 sets out the Security Agreement between Evolution and the Customer.

26.2 The Customer (**Grantor**) grants to Evolution (**Secured Party**) a Security Interest in all present and after-acquired goods (**Collateral**) as security for all or part of the payment for goods supplied by Evolution. This shall also create a Purchase Money Security Interest (**PMSI**).

26.3 This security interest attaches to the Collateral by virtue of the Customer's possession of the goods as bailee under clause 26.7.

26.4 Evolution may, without notice, apply to register a financing statement with respect to the Security Interest described in this clause 26.

26.5 Until full title in goods has passed to the Customer, the Customer will ensure that the goods are identifiable and distinguishable:

- (a) from any other goods that may be in the Customer's possession; and
- (b) as to each particular invoice of goods.

26.6 Evolution will retain absolute title over the goods until:

- (a) it has received payment in full in respect of the goods; or
- (b) the Customer sells the goods in the manner prescribed under clause 26.9.

26.7 After delivery of the goods, until full payment has been made the Customer shall possess the goods as bailee only.

26.8 Until payment in full for the goods has been received by Evolution, it may, without notice, seize the goods if:

- (a) a right to terminate any Agreement has arisen in favour of Evolution; or
- (b) the Customer is in breach of any Agreement.

26.9 For the purposes of carrying out seizure under clause 26.8, Evolution may without notice, enter the Customer's premises (or relevant other place) and seek any and all remedies provided under Chapter 4 of the PPSA and any other remedies provided at law or in equity or otherwise.

26.10 The Customer may only sell all or any of the goods in respect of which full payment has not been received to a Third Party if:

- (a) Evolution has not exercised its right to seize the goods under clause 26.8;
- (b) the sale is a *bona fide* transaction at market value in the ordinary course of business; and
- (c) all proceeds of sale of those goods is:
  - (i) immediately paid to Evolution; or
  - (ii) held on trust for Evolution in a separate account, payable immediately on demand.

26.11 Notice requirements under sections 95, 118, 121, 130, 132 and 135 of the PPSA shall not apply and not place any obligations on Evolution in favour of the Customer.

26.12 The Customer agrees to waive its right to receive from Evolution a copy of any financing statement, financing change statement or verification statement that is registered, issued or received at any time in relation to the Agreement and this Security Agreement.

26.13 The Customer shall immediately notify Evolution in writing of any change of name.

26.14 The Customer acknowledges receipt of a copy or due notice of this Security Agreement.

## 27. FORCE MAJEURE

27.1 Notwithstanding any other provision in the Agreement, no default, delay or failure to perform (excepting an obligation of payment) on the part of either Party will be considered a breach if such default, delay or failure to perform is shown to be due to a Force Majeure Event.

27.2 If a Force Majeure Event arises, the time for performance required of the Party subject to the Force Majeure Event will be extended for any period during which performance is prevented by the Force Majeure Event.

27.3 Nothing in this clause 27 entitles a Party to any relief from its obligations which are not affected by the Force Majeure Event.

## 28. ASSIGNMENT

28.1 The Customer may not assign, dispose of or otherwise transfer any rights or obligations under the Agreement without the prior written permission of Evolution.

28.2 Evolution may assign, in part or in full, its rights under the Agreement without the consent of the Customer.

## 29. GENERAL

29.1 If a Party suffers Losses in connection with the Agreement for which the other Party is liable (including under an indemnity), the Party suffering the Losses must use reasonable endeavours to mitigate its loss.

29.2 Any provision of the Agreement that is prohibited or unenforceable in any jurisdiction is ineffective as to that jurisdiction to the extent of the prohibition or unenforceability. That does not invalidate the remaining provisions nor affect the validity or enforceability of that provision in any other jurisdiction.

29.3 A Party does not waive a right, power or remedy if it fails to exercise or delays in exercising the right, power or remedy. A single or partial exercise of a right, power or remedy does not prevent another or further exercise of that or another right, power or remedy. A waiver of a right, power or remedy must be in writing and signed by the Party giving the waiver.

29.4 The rights and obligations of the parties do not merge on completion of any transaction contemplated by the Agreement.

29.5 Each Party must, at its own expense, do all things and execute all documents necessary to give full effect to the Agreement and the transactions contemplated by it.

29.6 The Customer agrees that Evolution may publicly refer to the Customer as a customer of Evolution, including in marketing materials and public relations communications without reference to the Customer. The Customer grants to Evolution a non-exclusive, royalty free licence to use the Customer's name and trade marks for such purposes only.

29.7 Each Party must pay its own costs of negotiating, preparing and entering into the Agreement.

29.8 Neither Party has relied on any statement by any other Party not expressly included in the Agreement.

29.9 Except where expressly stated otherwise, the Agreement does not create a relationship of employment, trust, agency or partnership between the Parties.

## 30. VARIATIONS, CHANGES + DISCONTINUANCE

30.1 Subject to the following provisions of this clause 30, a variation of the Agreement must be in writing and signed by the parties (including, as may be relevant, pursuant to any Change Request or relevant change control procedure set out in a *Proposal or Service Schedule*).

30.2 The Customer acknowledges and accepts that:

- (a) IT is not a perfect or complete technology and is continually evolving, often updated, replaced, superseded, changed or improved and suffers obsolescence and incompatibility or detrimental consequences (including with respect to interoperability, functionality and capability) on a fairly frequent basis;
- (b) security risks and other issues in respect of relevant hardware and software are continually

emerging and being found (often pre-existing, unknown or not appreciated);

- (c) in this context, Evolution periodically updates, seeks to improve and evolve the *Evolution Private Cloud*;
- (d) nothing in the Agreement prevents Evolution from, whenever it thinks fit, upgrading, updating, replacing, re-configuring, adding to, disapplying, removing, changing, disabling, ameliorating, suspending or implementing any part of the *Evolution Private Cloud* or any other hardware or software or in respect of or connected with any Deliverables as Evolution in its absolute discretion thinks fit (including, any hardware or software specified, mentioned or contemplated by the Agreement); and
- (e) the Agreement shall be construed accordingly despite any contrary terms or expectations.

30.3 Evolution may, in that context but for any reason whatsoever, change or discontinue any Services from time to time.

30.4 Subject to clause 30.5, Evolution will use reasonable endeavours to provide the Customer with at least 3 months' prior written notice if it discontinues material functionality of a Service that is being used by a Customer, or materially alters a customer-facing API that the Customer is using in a backwards-incompatible fashion.

30.5 A notice will not be required if the minimum 3 month notice period:

- (a) would pose a security or Intellectual Property Rights issue of concern to Evolution or in respect of the relevant Services;
- (b) is economically or technically burdensome to Evolution; or
- (c) would cause Evolution to breach a law or applicable agreement, right of use or licence.

30.6 If Evolution terminates a Service under clause 30.3, it shall discuss the matter with the Customer and (unless agreed otherwise) use reasonable endeavours to provide an alternative service of similar equivalence (in the reasonable opinion of Evolution), subject to the payment of such Fees as Evolution considers appropriate, if in all the circumstances it is commercially appropriate for Evolution and reasonable to do so.

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### 31. AUTHORISED REPRESENTATIVE

31.1 Each Party must nominate one or more officers or employees who shall be an Authorised Representative of such Party, until otherwise advised in writing. Each Party warrants that its Authorised Representatives are duly authorised to provide approvals, instructions, authorisations and consents in relation to the Agreement.

31.2 In any event, any person who holds themselves out as an officer of a Party at any relevant time shall be deemed an Authorised Representative of that Party for the purposes of the Agreement, unless the Party shall notify the Party in writing to the contrary.

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### 32. DISPUTES

32.1 All Disputes must be resolved as set out in this clause 32.

32.2 Subject to clause 32.3, a Party must not commence any court proceedings unless it has first complied with this clause 32.

32.3 Nothing in this clause 32:

- (a) prevents a Party from instituting proceedings to seek urgent injunctive, interlocutory or declaratory relief; or
- (b) affects a Party's right to terminate the Agreement (including a licence or right of use).

32.4 A Party claiming that a Dispute has arisen must notify the other Party in writing giving details of the Dispute and stating that the notification is given pursuant to this clause 32.4 (**Dispute Notice**).

32.5 The Parties must attempt to resolve all Disputes which are the subject of a Dispute Notice by negotiations using the following escalation procedure:

- (a) the Dispute must first be referred to the persons named in the Agreement for the purposes of this clause 32 who must attempt to resolve the Dispute within 20 Business Days; and
- (b) if the Dispute is not resolved within 20 Business Days of an escalation under clause 32.5(a) then either Party may refer the Dispute to the CEO (or equivalent senior management) of each of the Parties.

32.6 If the Parties cannot resolve a Dispute in accordance with the escalation procedure in clause 32.5 within 20 Business Days of the Dispute Notice being given under clause 32.4, then either Party may commence legal proceedings to have the Dispute resolved in a court of competent jurisdiction.

32.7 The Parties in writing may agree to the extension of any of the time periods set out in this clause 32 for the sending of any notice or the doing of any act, subject to the maximum extension permitted being equal to the original time period as set out in this clause 32 in respect of each such notice or act.

32.8 Each person involved in the escalation process described in clause 32 must use their reasonable endeavours to seek to resolve all issues escalated to them, in a way that attempts to preserve the relationship between the Customer and Evolution.

32.9 Nothing in this clause 32 requires a Party to act contrary to its interests.

32.10 If, in relation to a Dispute, a Party breaches any provision of this clause 32, the other Party need not comply with this clause 32 in relation to that Dispute.

32.11 Unless expressly agreed in writing to the contrary, each Party will continue to perform its obligations during the attempted resolution of any Dispute unless such obligations are terminated or cease to apply (as relevant).

32.12 Each Party must bear its own costs of complying with this clause 32.

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### 33. GOVERNING LAW

33.1 This *Master Services Agreement*, the *Master Definitions + Interpretation Schedule*, each *Service Schedule* and each *Proposal* (including, for the avoidance of doubt, the Agreement) are governed by the laws of New South Wales, Australia.

33.2 The *U.N. Convention on Contracts for the International Sale of Goods* does not apply.

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### 34. DICTIONARY + INTERPRETATION

34.1 In this document, unless otherwise provided, capitalised terms shall have the meaning as specified in the *Master Definitions + Interpretation Schedule*.

34.2 The rules of interpretation in the *Master Definitions + Interpretation Schedule* shall apply.