

# Master Services Agreement

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Business Fitness (Accountants) Pty Ltd ACN 098 580 708 (**Business Fitness**)

The party identified as the Customer in the Order Form (**Customer**)

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# Master Services Agreement

Date

January 2019

## Parties

Business Fitness (Accountants) Pty Ltd ACN 098 580 708 (**Business Fitness**)

The party identified as the Customer in the Order Form (**Customer**)

## Background

- A. Business Fitness is a provider of document, email, benchmarking and knowledge management solutions.
- B. The Customer wishes to engage Business Fitness to provide the Customer with one or more Products.
- C. This Agreement sets out general terms which will govern the engagement. The particular Services provided under the Products will be agreed under an Order Form (as is more fully described below).
- D. The parties wish to formalise their agreement on the terms and conditions of this Agreement, as set out below.

## It is agreed

### 1. Definitions and interpretation

#### 1.1 Definitions

In this Agreement:

**Agreement** has the meaning given to it in clause 2.1.

**Authorised Officer** of a party which is a corporation means:

- (a) an employee of the party whose title contains either of the words Director or Manager;
- (b) a person performing the function of any of them;
- (c) a solicitor acting on behalf of the party; or
- (d) a person appointed by the party to act as an Authorised Officer for the purposes of this Agreement and notified to the others.

**Business Day** means:

- (a) if determining when a notice, consent or other communication is given, a day that is not a Saturday, Sunday or public holiday in the place to which the notice, consent or other communication is sent; and
- (b) for any other purpose, a day (other than a Saturday, Sunday or public holiday) on which banks are open for general banking business in Brisbane.

**Business Fitness IP** means all Intellectual Property Rights created, owned or licensed by Business Fitness independently of this Agreement.

**Claim** means, in relation to a person, any action, allegation, claim, demand, judgment, liability, proceeding, remedy, right of action or right of set-off made against the person concerned however it arises whether:

- (a) it is present, unascertained, immediate, future or contingent;
- (b) it is based in contract, tort, statute or otherwise; or
- (c) it involves a third party or a party to this Agreement.

**Change of Control** means a change in: control of the composition of the board of directors of the corporation; control of more than half the voting rights attaching to shares in the corporation; or control of more than half the issued shares of the corporation (not counting any share which carries no right to participate beyond a specified amount in the distribution of either profit or capital).

**Commencement Date** means the date the first Order Form between the parties is executed

**Confidential Information** means, in relation to each party (for the purposes of this definition, **Discloser**), all information disclosed by or on behalf of the Discloser, concerning or relating to:

- (a) the fee and remuneration structure set out in this Agreement;
- (b) know-how, trade secrets, ideas, marketing strategies, operational information, technical information and financial information;
- (c) proprietary software tools, business processes, project management methodologies and tools,



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- software testing and verification methods, solution architecture models and solutions;
- (d) its business affairs (including products, services, customers and suppliers); and
  - (e) other information, which, by its nature or by the circumstances of its disclosure, is or could reasonably be expected to be regarded as confidential,

but excluding any such information:

- (f) which is publicly known;
- (g) which is disclosed to the other party without restriction by a Third Party (other than the Discloser) and without any breach of confidentiality by that Third Party; or
- (h) which is developed independently by other party without reliance on any of the confidential information.

**Consequential Loss** means any of the following:

- (a) loss of revenue;
- (b) loss of profits;
- (c) loss of opportunity to make profits;
- (d) loss of business;
- (e) loss of business opportunity;
- (f) loss of use or amenity, or loss of anticipated savings;
- (g) special, exemplary or punitive damages; and
- (h) any loss which does not directly and naturally flow in the normal course of events from the occurrence of the event giving rise to the liability for such loss, whether or not such loss was in the contemplation of the parties at the time of entry into this Agreement,

including any of the above types of loss arising from an interruption to a business or activity.

**Corporations Act** means the *Corporations Act 2001* (Cth).

**Customer Data** means all data uploaded by the Customer (or its Personnel), or provided to Business Fitness to upload, to infrastructure utilised by Business Fitness to provide the Products to the Customer (excluding anything embodying the proprietary rights, including Intellectual Property Rights, of Business Fitness or its Related Entities).

**Customer IP** means the Intellectual Property Rights of the Customer which are established by the Customer to be created independently of this Agreement.

**Exceptional Circumstance** means a circumstance beyond the reasonable control of the parties which results in a party being unable to observe or perform on time an obligation under this Agreement. Such circumstances include:

- (a) adverse changes in government regulations;
- (b) any disaster or act of God, lightning strikes, atmospheric disturbances, earthquakes, floods, storms, explosions, fires and any natural disaster;

- (c) acts of war, acts of public enemies, terrorism, riots, civil commotion, malicious damage, sabotage and revolution, cyber attacks, viruses or malware, data loss as a result of the actions of a Third Party;
- (d) strikes or industrial disputes;
- (e) materials or labour shortage; and
- (f) acts or omissions of any Third Party network providers (such as internet, telephony or power provider).

**Government Body** means:

- (a) any person, body or other thing exercising an executive, legislative, judicial or other governmental function of any country or political subdivision of any country;
- (b) any public authority constituted by or under a law of any country or political subdivision of any country; and
- (c) any person deriving a power directly or indirectly from any other Government Body.

**GST** means GST as that term is defined in the GST Law, and any interest, penalties, fines or expenses relating to such GST.

**GST Law** means *the A New Tax System (Goods and Services Tax) Act 1999* (Cth) and/or associated Commonwealth legislation, regulations and publicly-available rulings.

**Initial Term** the period of time ending on the latest expiry date detailed in the Order Form(s) in effect between the parties.

**Insolvency Event** means an event of bankruptcy or insolvency, an assignment for the benefit of creditors, the appointment of a receiver, receiver and manager, provisional liquidator, administrator, liquidator and official manager or any similar person to any assets of a person, a failure to comply with a statutory demand, or anything else which occurs which is analogous or has a substantially similar effect, under the laws of any jurisdiction, or the person is otherwise insolvent or unable to pay its debts as and when they fall due.

**Intellectual Property Rights** means all current and future registered and unregistered rights in respect of copyright, circuit layouts, designs, trade marks, know-how, confidential information, patents, inventions, plant breeder's rights and discoveries and all other intellectual property as defined in article 2 of the convention establishing the World Intellectual Property Organisation 1967.

**Law** means any statute, rule, regulation, proclamation, order in council, ordinance, local law or by-law, whether:

- (a) present or future; or
- (b) state, federal or otherwise.

**Liability** means any liability, debt or obligation, whether actual, contingent or prospective, present or future, qualified or unqualified or incurred jointly or severally with any other person. **Liabile** has a corresponding meaning.



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**Loss** means any loss (including Consequential Loss), claims, actions, liabilities, damages, expenses, diminution in value or deficiency of any kind whether direct, indirect, consequential or otherwise.

**Master Services Agreement** means this document, being the master services agreement and its schedules and annexures.

**Material** means property, information, software, firmware, documented methodology or process, documentation or other material in whatever form, including any reports, specifications, business rules or requirements, user manuals, user guides, operations manuals, training materials and instructions, and the subject matter of any category of Intellectual Property Rights.

**New IP** means any and all Intellectual Property Rights created in the course of, or connection with, the provision of the Products and the performance of the Services.

**Order Form** means a document prepared by Business Fitness detailing the specific Products to be provided to the Customer and any other special terms and conditions that apply to those Products.

**Personal Information** has the meaning given in the Privacy Law.

**Personnel** means in relation to a party, any Related Body Corporate, Related Entity, employee, officer, agent, contractor, professional adviser of that party.

**Privacy Law** means the *Privacy Act 1988* (Cth).

**Product(s)** means the software and/or deliverable(s) and/or Services to be provided by Business Fitness to Customer as detailed in any Order Form(s).

**Rate Card** means the rates for ad-hoc additional services, as set out in Schedule 1, and as otherwise advised by Business Fitness from time to time in accordance with clause 6.3(a).

**Related Body Corporate** includes any corporation that is deemed to be related to a person by virtue of the provisions of the *Corporations Act*.

**Related Entity** means a person which is a related entity within the meaning of that term in section 9 of the *Corporations Act*.

**Service Fees** means the fee payable by the Customer for the Products, as set out in each Order Form, and may include, but is not limited to any monthly subscription fees, fees for Support Services, and any fees for additional services pursuant to 4.4.

**Services** means the services to be provided by Business Fitness from time to time during the Term of the Agreement, and include Support Services.

**Site(s)** means those site(s) at which any on-site Support Services will be provided (if applicable), as further set out in an Order Form.

**Support Services** means the Services to be performed by Business Fitness to provide the Customer with support in relation to the software licensed under this Agreement, as detailed in any Order Form(s).

**System Requirements** means the system requirements for the Products as set out in any Order Form(s), and otherwise as advised by Business Fitness from time to time.

**Tax** means any present or future tax, levy, deduction, impost, withholding, charge or duty which is levied or imposed by any Government Body together with any interest, penalty or fine on those amounts.

**Tax Invoice** means a "tax invoice" compliant with the requirements of the GST Law.

**Term** is the Initial Term, as extended under clause 3.2 (if applicable).

**Third Party** means any third party to the Agreement, other than any Related Bodies Corporate of a party to this Agreement.

**Third Party Content** means any software, Intellectual Property Rights or Material which is owned by a Third Party and includes (but is not limited to) open source software.

**User** means any individual licensed to use the Products under this Agreement.

## 1.2 Interpretation

- (a) Unless the contrary intention appears, a reference in this Agreement to:
- (1) this Agreement or another document includes any variation or replacement of it despite any change in the identity of the parties;
  - (2) one gender includes the others;
  - (3) the singular includes the plural and the plural includes the singular;
  - (4) a person, partnership, corporation, trust, association, joint venture, unincorporated body, Government Body or other entity includes any other of them;
  - (5) an item, recital, clause, subclause, paragraph, schedule or attachment is to an item, recital, clause, subclause, paragraph of, or schedule or attachment to, this Agreement and a reference to this Agreement includes any schedule or attachment;
  - (6) a party includes the party's executors, administrators, successors, substitutes (including a person who becomes a party by novation) and permitted assigns;
  - (7) any statute, ordinance, code or other law includes regulations and other instruments under any of them and consolidations, amendments, re-enactments or replacements of any of them;
  - (8) money is to Australian dollars, unless otherwise stated; and
  - (9) a time is a reference to Brisbane time unless otherwise specified.



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- (b) The words include, including, such as, for example and similar expressions are not to be construed as words of limitation.
- (c) Where a word or expression is given a particular meaning, other parts of speech and grammatical forms of that word or expression have a corresponding meaning.
- (d) Headings and any table of contents or index are for convenience only and do not affect the interpretation of this Agreement.
- (e) A provision of this Agreement must not be construed to the disadvantage of a party merely because that party or its advisers were responsible for the preparation of this Agreement or the inclusion of the provision in this Agreement.

## 1.3 Business Days

- (a) If anything under this Agreement must be done on a day that is not a Business Day, it must be done instead on the next Business Day.
- (b) If an act is required to be done on a particular day, it must be done before 5.00pm on that day or it will be considered to have been done on the following day.

## 1.4 Parties

- (a) If a party consists of more than one person, this Agreement binds each of them separately and any two or more of them jointly.
- (b) An agreement, covenant, obligation, representation or warranty in favour of two or more persons is for the benefit of them jointly and each of them separately.
- (c) An agreement, covenant, obligation, representation or warranty on the part of two or more persons binds them jointly and each of them separately.

## 2. Formation and precedence

### 2.1 Formation and composition

The following are comprised in the Agreement:

- (a) this Master Services Agreement;
- (b) the Order Form(s); and
- (c) any other document forming part of the Agreement as agreed to in writing by the parties,

together the **Agreement**.

### 2.2 Precedence for this Agreement

In the event of any conflict or inconsistency between one or more of the documents making up the Agreement, for interpretation, the following will be the order of precedence:

- (a) the terms of the Master Services Agreement as incorporated under clause 2.1;
- (b) the Order Form(s); and
- (c) any other document forming part of the Agreement as agreed to in writing by the parties.

## 2.3 Changes to this Agreement

Business Fitness may amend the terms of this Agreement at any time upon 30 days' notice in writing to the Customer, and the Customer agrees to be bound to any such amended terms.

## 3. Term

### 3.1 Agreement term

The term of this Agreement:

- (a) commences on the Commencement Date; and
- (b) continues for the Initial Term,

unless otherwise terminated earlier in accordance with this Agreement.

### 3.2 Rollover

Unless:

- (a) one of the parties provides written notice to the other party of an intention to allow the Agreement to expire 30 days prior to the expiration of the Initial Term or a further term under this clause 3.2 (**Expiry Notice**); or
- (b) the Agreement has been otherwise terminated earlier in accordance with clause 16 of this Agreement,

this Agreement shall automatically renew for a further period equivalent to the Initial Term, on the terms and conditions of this Agreement.

### 3.3 Duration

The duration within which the Products are to be provided by Business Fitness to the Customer will be specified in each Order Form, and if no duration is specified, shall be for the duration of the Term.

## 4. Products and Services

### 4.1 Products

Business Fitness agrees to provide the Products to the Customer in accordance with the terms of this Agreement.

### 4.2 Relationship

The parties' relationship is one of principal and independent contractor, not one of employer and employee, agency or partnership.

### 4.3 Scope

- (a) The parties agree that the scope of the Products to be provided to the Customer are as set out in the respective Order Form.
- (b) If the Customer wishes to engage Business Fitness for the provision of any additional Products or Services beyond what is captured under an Order Form, it must enter into a separate Order Form in relation to those Products or Services, otherwise it acknowledges that such additional Products or Services will be charged in accordance with Business Fitness' Rate Card.



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- (c) Subject to the express requirements agreed within an Order Form, Business Fitness is not subject to the direction or control of the Customer as to the manner in which any Services are performed.

## 4.4 Outside scope

Any services, including but not limited to any services provided on a time basis, provided to Customer by Business Fitness, which:

- (a) are not expressly included in an Order Form;
- (b) are performed as a result of a deficiency in the Customer's hardware, software or infrastructure, or the Customer's failure to adhere to the System Requirements of any Product;
- (c) are performed as a result of the Customer's failure to engage Business Fitness for Support Services for any amount of time;
- (d) are performed as a result of undue delay or other deficiency as deemed by Business Fitness (acting reasonably) on the part of the Customer in respect to the Customer's obligations under this Agreement; or
- (e) which are performed as a necessity due to a change in Law not anticipated by this Agreement,

will be charged to the Customer in accordance with the rates and fees contained in the Rate Card, or otherwise as reasonably determined by Business Fitness and disclosed to the Customer by notice in writing.

## 4.5 Order Form

- (a) Content

Each Order Form must:

- (1) be agreed in writing by both parties;
- (2) incorporate the terms of the Master Services Agreement in the manner required by clause 2.1; and
- (3) endeavour to specify the following:
  - (A) a description of the Products or Services to be provided;
  - (B) the number of User(s) (if applicable);
  - (C) any pricing (**Service Fees**) and applicable payment schedule;
  - (D) any terms and conditions contrary to the provisions under this master Services Agreement; and
  - (E) any special terms and conditions not addressed under this Master Services Agreement.

- (b) Variations

The parties may, by mutual agreement, agree to any variations or revisions to the Order Form.

## 4.6 Subcontractors

Business Fitness may delegate the performance of any of the Services or provision of any of the Products to any of its subcontractors, in its absolute discretion.

## 5. General obligations

### 5.1 Customer's obligations

Customer must (in addition to any other obligations set out in the Order Form(s)):

- (a) ensure that its User(s) have the relevant training to enable interaction with Business Fitness in performing the Services and providing the Products, where applicable;
- (b) provide Business Fitness with all reasonable information and access to its premises, Sites, computers and network systems as required by Business Fitness to provide the Products or Services in accordance with the terms of the Agreement;
- (c) provide Business Fitness with a list of Customer staff authorised to provide instructions and approve any Order Forms or other requests for services subsequent to entering into this Agreement;
- (d) if required, provide adequate conditions for Business Fitness' Personnel at Customer's premises and Sites, including, but not limited to, workspaces, heating, lighting, ventilation, electric current and outlets, internet and long-distance telephone access;
- (e) promptly notify Business Fitness of any event or incident that will, or is likely to, impact on the provision of any Services (if applicable) or the performance by Business Fitness of any obligation (including but not limited to Exceptional Circumstances);
- (f) notify Business Fitness in writing within 5 Business Days of any scheduled or proposed upgrades, patches, or changes to, or installation of, Customer software, which may affect Business Fitness' ability to perform any Services (if applicable);
- (g) depending on the Services provided by Business Fitness (if any), comply with the backup procedures recommended by Business Fitness, to the extent such backup procedures are required for the effective provision of such Services;
- (h) comply with any reasonable direction of Business Fitness relating to, or in connection with, the Products, in order for Business Fitness to supply the Products and comply with its obligations under this Agreement; and
- (i) ensure that its Personnel, and any other person engaged by the Customer, does not use the Products:
  - (1) to engage in any illegal or unlawful act;
  - (2) in any way that could damage the reputation



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of Business Fitness or the goodwill or other rights associated with the Products and Services;

- (3) that constitutes any use of the Products or Services which is not permitted by operation of this Agreement;
- (4) to distribute a volume of emails higher than an amount deemed reasonable by Business Fitness, or otherwise misuse email tools, if applicable;
- (5) to reproduce any part of the Products for sale or incorporation into any other product or service intended for sale;
- (6) to attempt to gain unauthorised access to any materials, documents or code other than those to which the Customer has been given express permission to access, or to the computer system on which the Products are hosted;
- (7) to transmit or upload to the Products or Services any files, code or programs that may damage or corrupt the IT infrastructure, devices, data or software of Business Fitness or any Third Party;
- (8) (where applicable) to make use of any resource supplied by Business Fitness to an excessive extent as deemed by Business Fitness; or
- (9) engage in conduct otherwise deemed inappropriate by Business Fitness.

## 5.2 Third party dealings

- (a) Customer agrees to use the Products for its sole benefit and must not redistribute the Products to a third party unless otherwise expressly included in an Order Form.
- (b) Customer must ensure that User account credentials are not disclosed to any third party or otherwise misused.

## 5.3 Limitation on Business Fitness performance

Customer acknowledges and agrees that:

- (a) Business Fitness' ability, and obligation, to provide the Products is subject to Customer complying with its obligations under clause 5.1 and any other limitation or exclusion set out in this Master Services Agreement and any applicable Order Form;
- (b) unless otherwise expressly included in an Order Form, the cost of Third Party application support consumables, software, network upgrades and any associated products or services are outside the scope of this Agreement and are the full responsibility of the Customer;
- (c) unless otherwise expressly included in an Order Form, the provision of Support Services are outside the scope of this Agreement;
- (d) unless otherwise expressly included in an Order

Form, Business Fitness is under no obligation to backup or otherwise retain data or software not included in the Products or Services; and

- (e) Business Fitness's obligations under this Agreement do not extend to delivering the Products or Services compatible with new platforms or operating environments not specifically detailed in an Order Form or other document forming part of the Agreement as agreed to in writing by the parties (including new versions or releases of operating systems).

## 6. Service Fees and payment

### 6.1 Direct debit

- (a) The Customer agrees that the Service Fees will be debited by Business Fitness monthly via the details provided in the Order Form(s), and authorises Business Fitness to draw the Service Fees in this way.
- (b) The Customer warrants that the account details and authorisation provided in the Order Form(s) are accurate and reflect the account signing instruction held by the relevant financial institution with which the account is held.
- (c) The Service Fees will be drawn pursuant to clause 6.1(a) on the day of the month the original order is received, or otherwise as provided in an Order Form.

### 6.2 Availability of funds

- (a) The Customer must ensure that there are sufficient funds available in the nominated account to meeting drawing at all times during the period specified in clause 6.1(c).
- (b) Where the Service Fees are not able to be drawn by Business Fitness for any month due to a lack of available funds in the Customer's nominated account, the Customer will be liable for all reasonable costs incurred by Business Fitness in recovering the relevant Service Fees.

### 6.3 Changes

- (a) The Service Fees, as provided in an Order Form and the Rate Card (if applicable), may be varied by Business Fitness during the Term on giving the Customer 14 days' written notice.
- (b) The Customer must advise Business Fitness of any changes to nominated account details within 10 Business Days of such change.
- (c) Business Fitness may require that alternative account details are provided to it where three or more attempts to debit the Customer's account fail, for whatever reason.

## 7. Suspension

### 7.1 Suspension

Business Fitness may temporarily suspend (in part or whole, in the absolute discretion of Business Fitness) the



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provision of the Products to Customer if:

- (a) Business Fitness is required by Law, a court, or any government body to do so;
- (b) Business Fitness believes (acting reasonably) that Customer (or its Personnel) are using the Products to defame, defraud, spam or harass any person or to distribute, view or create any Material that may be pornographic, defamatory, offensive, obscene, illegal or unlawful;
- (c) Business Fitness believes (acting reasonably) that the conduct of the Customer or its Personnel expose Business Fitness to liability for an offence, statutory penalty, or breach of contract;
- (d) Business Fitness believes (acting reasonably) that the Customer (or its Personnel) are using the Products in a way that may infringe the Intellectual Property Rights of Business Fitness or a Third Party;
- (e) an event of Exceptional Circumstances occurs, which affects, or may affect, Business Fitness' ability to provide the Products;
- (f) such suspension is due to any inability to debit the Service Fees per clause 6.2(b), 6.3(b) and 6.3(c); or
- (g) if Customer is in breach of the Agreement.

## 7.2 Effect of suspension

Suspension in accordance with clause 7.1 will not affect any rights which accrue prior to, or after, suspension of Customer's obligations under the Agreement.

## 8. Intellectual Property Rights

### 8.1 Customer IP

- (a) No rights of ownership to the Customer IP are transferred under this Agreement.
- (b) Where the nature of the specific Products provided to Customer under this Agreement requires, Customer grants to Business Fitness a non-exclusive, non-transferable licence to use its Intellectual Property Rights in the Customer IP during the Term, but only for the purpose of Business Fitness providing the Products to the Customer for use for its internal business purposes.

### 8.2 Business Fitness IP

- (a) No rights of ownership to the Business Fitness IP are transferred under this Agreement.
- (b) Business Fitness grants Customer a non-exclusive, non-transferable, irrevocable (except pursuant to clause 16), royalty-free licence (subject to clause 6.1 and 6.2) to the Intellectual Property Rights in the Business Fitness IP, but only to the extent necessary for the Customer to use any Products embodying such rights.

### 8.3 Provision and ownership of New IP

Upon its creation, all New IP will be owned by, vest in, and (to the extent required) be assigned to, Business Fitness.

## 8.4 Customer Data

All Customer Data remains owned by the Customer.

## 8.5 Prohibited activities

- (a) Each party must not do or permit or omit to do any act which infringes the Intellectual Property Rights of the other party (or its licensors).
- (b) The Customer must not attempt to modify, copy, adapt, reproduce, disassemble, decompile or reverse engineer any software used to deliver the Products or Services.

## 8.6 Notification of infringement claim

Each party must notify the other party within 5 Business Days if it becomes aware of:

- (a) any actual or suspected infringement by a Third Party of a party's Intellectual Property Rights; or
- (b) any actual or threatened Claim by a Third Party that its Intellectual Property Rights have or will be infringed by any act or omission by a party in connection with the Agreement.

## 8.7 Indemnity

Customer agrees to indemnify, and keep indemnified, Business Fitness against any and all Loss it occurs as a result of Customer's breach of this clause 8, including but not limited to any Claim by a Third Party as a result of Customer's breach of this clause 8.

## 9. Third Party software licences

### 9.1 Third Party Content

The Customer acknowledges and agrees that:

- (a) Business Fitness can (in its sole discretion) incorporate Third Party Content into the Products, unless otherwise expressly agreed to by the parties in writing; and
- (b) Third Party Content may be subject to licences or other terms and conditions provided by the relevant Third Party.

### 9.2 Compliance

- (a) Customer must comply with the licence terms of all Business Fitness software and Third Party Content installed or used in the provision of the Products.
- (b) Customer must not do or permit to do any act that breaches, or causes Business Fitness to breach, a software licence installed or used in the provision of the Products.

### 9.3 Indemnity

- (a) Customer agrees to indemnify, and keep indemnified, Business Fitness against:
  - (1) any and all Loss it incurs; and
  - (2) any Claim by a third party,as a result of Customer's breach of clause 9.2.

## 10. Confidential Information



# Master Services Agreement

## 10.1 Disclosure

- (a) A party must not, without the prior written approval of the other party, disclose the other party's Confidential Information.
- (b) Each party must take all reasonable steps to ensure that its employees and agents, any sub- contractors, or persons otherwise engaged by either party, do not make public or disclose the other party's Confidential Information.
- (c) A party is not in breach of this clause 10.1 in circumstance where it is legally compelled to disclose the other party's Confidential Information.
- (d) Notwithstanding any other provision of this clause 10.1, the parties may disclose the terms of the Agreement (other than Confidential Information of a technical nature) to its related companies, solicitors, auditors, insurers and accountants.

## 10.2 Return of Confidential Information

Each party must on demand, return to the other party any Confidential Information supplied by the other party in connection with the Agreement.

## 10.3 Security and unauthorised access

- (a) Each party must ensure that all information and Materials of the other party (or its agents or contractors) in the custody of that party for purposes connected with the Agreement are protected at all times from unauthorised access or use by a Third Party, and from misuse, damage or destruction by any person.
- (b) Customer must ensure compliance with all security regulations, procedures or directions as may be given by Business Fitness from time to time relating to the Confidential Information or access to Business Fitness's Confidential Information.

## 10.4 Survival and indemnity

- (a) This clause survives the termination of the Agreement.
- (b) Customer agrees to indemnify, and keep indemnified, Business Fitness in relation to any and all Loss it incurs as a result of Customer's breach of this clause 10.

## 11. Liability

### 11.1 Exclusion of liability

- (a) To the extent permitted by Law, in no event will Business Fitness be Liable to Customer for Consequential Loss, even if Business Fitness has been made aware of the possibility of such Consequential Loss prior to entering into the Agreement.
- (b) To the extent permitted by Law, in no event will Business Fitness be Liable to Customer for loss or corruption of Customer Data even if Business Fitness has been made aware of the possibility of

such loss or corruption of Customer Data prior to entering into the Agreement.

- (c) The Customer acknowledges and agrees that to the extent a Product includes software, that software is never error or defect free, and that the mere presence of defects or errors in software will not constitute a breach of Business Fitness' obligations under this Agreement.
- (d) The Customer acknowledges and agrees that the effectiveness of any application, methodology or process used by Business Fitness in delivering the Products may be dependent on external factors controlled by Third Parties, and any errors, incompatibilities, or adverse effects that occur as a result of Third Party actions including but not limited to:
  - (1) changes in algorithms, processes, upgrades, updates, new releases and patches;
  - (2) unavailability of the Products or Services; or
  - (3) any other changes to variables relied on by Business Fitness to deliver the Products,

do not constitute a breach of Business Fitness' obligations under the Agreement.

- (e) Unless otherwise specified, neither party is liable to Third Parties regarding, or arising out of or in connection with, the Agreement.

### 11.2 Implied terms

- (a) To the full extent permitted by Law, and term which would otherwise be implied into the Agreement is excluded.
- (b) In the event any Law implies or imposes terms into the Agreement which cannot be lawfully excluded, such terms will apply, save that the liability of Business Fitness for breach of any such term will be limited in accordance with clause 11.3(a).

### 11.3 Limitation of liability

- (a) Re-performance

To the extent Business Fitness is found Liable in connection with the Agreement, its Liability shall be limited (at the option of Business Fitness) to any one or more of the following:

- (1) re-supplying Products to which the Liability relates or the supply of equivalent products and/or services; or
- (2) reimbursing Customer (subject to clause 11.3(b)) for paying someone else to supply equivalent Products to which the Liability relates.

- (b) Liability cap

If Business Fitness is Liable in connection with the Agreement (whether in contract, tort, indemnity of statute), then irrespective of anything else in the Agreement, Business Fitness's cumulative Liability in the aggregate (to



# Master Services Agreement

the fullest extent permitted by Law) shall in no event exceed the sum of the Service Fees paid by Customer to Business Fitness.

## 12. Privacy Law

### 12.1 Customer's consent to transfer of personal information

- (a) Customer consents, acknowledges and agrees that:
- (1) Any Personal Information disclosed to Business Fitness may be disclosed to, and or stored, on infrastructure used by Business Fitness and its third party service providers outside Australia, or as is otherwise provided in the Order Form(s).
  - (2) By entering into this Agreement, Customer expressly agrees and consents to, and will procure the consent of its Personnel to, the disclosure or use of any Personal Information outside of Australia in the manner permitted by this clause.
- (b) In providing this consent Customer understands and acknowledges that countries outside Australia do not always have the same privacy protection obligations as Australia in relation to Personal Information, however Business Fitness will make commercially reasonable efforts to implement appropriate privacy protections across all of its Products.

### 12.2 Privacy protection obligations

By providing the Customer's consent, under Privacy Law, Australian Privacy Principle 8.1 in Privacy Law does not apply to disclosures referred to in clause 12.1(a).

## 13. Indemnity

Customer indemnifies, and will keep indemnified, Business Fitness against any:

- (a) Claims against Business Fitness; or
- (b) Loss suffered by Business Fitness, arising from:
  - (c) any fraud or wilful misconduct of the Customer or its Personnel under or in connection with the Agreement;
  - (d) the negligent acts or omissions of Customer or its Personnel under or in connection with the Agreement; or
  - (e) any breach of the Agreement by Customer.

## 14. Warranty

### 14.1 Business Fitness warranty

- (a) Business Fitness warrants to the Customer:
- (1) that it has the full right and title to enter into this Agreement and to grant the rights it sets out to the Customer; and

- (2) that the Products will be provided and any Services performed with due care and diligence.

- (b) Business Fitness makes no warranty in relation to the compatibility of any Products it provides with the Customer's infrastructure, IT systems, websites, webpages, or web content including add-ons and widgets.

### 14.2 Customer warranty

Customer warrants to Business Fitness:

- (a) that it has full right and title to enter into the Agreement and to grant the rights it sets out to Business Fitness;
- (b) that no information has been withheld from Business Fitness that may affect its decision to enter into this Agreement; and
- (c) that it has satisfied itself of the content of this Agreement and, if necessary, obtained independent advice from a relevant expert to confirm same before entering into it.

## 15. Emergency action

### 15.1 Damage by Customer resources

Should Business Fitness form the opinion that any resources owned or operated by the Customer may damage any Business Fitness or Third Party software or products, Business Fitness may do anything within its power and control necessary to cause the damaging resources to cease operation.

### 15.2 Emergency repairs

Any emergency repairs, whether as a result of the circumstances described in the above clause 15.1 or at the fault of the Customer, are the responsibility of the Customer to pay in a timely manner to ensure proper operation of the Services.

## 16. Termination

### 16.1 Termination of Agreement

- (a) Either party may terminate this Agreement immediately by written notice upon the occurrence of one of the following events:
- (1) if the other party is in breach of this Agreement and that other party has failed to remedy that breach within 30 days of a written notice to it from the first-mentioned party, specifying the breach and requiring it to be remedied; or
  - (2) an Insolvency Event occurs in respect of the other party.
- (b) Subject to 16.1(c), either party may terminate the Agreement, or any Product or Service to which an Order Form relates, for any reason, upon providing the other party with 30 days' prior written notice of such termination. In this case, the Agreement, or the relevant Product or Service (as the case may be) terminates at the expiration of the period of notice.



# Master Services Agreement

- (c) Products specified as “fixed term” in an Order Form may not be terminated by the Customer under clause 16.1(b), and the terms of this Agreement survive termination by the Customer under clause 16.1(b) until expiration of the fixed term.
- (d) For the avoidance of doubt, where a party terminates a particular Product or Service only under an Order Form, all other remaining Products and/or Services subject of this Agreement are to remain on foot for the Term.

## 16.2 No prejudice of rights

Termination shall not prejudice or affect any right or action which shall have accrued or shall thereafter accrue to either party.

## 16.3 Survival

The following clauses survive termination of the Agreement: Clause 8 (Intellectual Property Rights), Clause 9 (Third Party Software), Clause 10 (Confidentiality), Clause 11 (Liability), Clause 12 (Indemnity), Clause 13 (Privacy), Clause 17 (Consequences of Termination) and this clause 16.3.

## 17. Consequences of Termination

Upon termination or expiration of the Agreement:

- (a) Business Fitness will cease providing the Products;
- (b) all money due by Customer to Business Fitness under any Order Form(s) must be paid in full;
- (c) (subject to any Transition Out Services to be provided by Business Fitness) Business Fitness may delete all Customer Data from its systems; and
- (d) each party must return to the other party, or if requested by the other party) destroy all Confidential Information belonging to the other party.

## 18. Transition out

### 18.1 Transition out services

In the event that Customer gives Business Fitness notice that it intends to transition-out all or part of the Products to Customer or another person prior to termination or expiration of this Agreement, then, provided the Customer is in full compliance with its obligations under this Agreement, the following provisions will apply:

- (a) such notice will not affect the Customer’s obligations under clause 6 or any other obligations to pay money to Business Fitness under the Agreement;
- (b) Business Fitness will provide the Customer and/or the third party with a means of downloading or obtaining the Customer Data stored on any Business Fitness software making up the Products for a reasonable period of time, such means and period of time being at Business Fitness’ absolute discretion; and
- (c) Business Fitness agrees to answer questions and

provide such other information as may be reasonably sought in relation to the transition by an alternative service provider or by Customer,

together, (b) and (c) are the **Transition Out Services**.

### 18.2 Limitation

The Customer may only require Business Fitness to provide the Transition Out Services during the period of time:

- (a) commencing on the date of termination or expiry of the Agreement; and
- (b) until 1 month after the date in 18.2(a),

unless Business Fitness otherwise agrees in writing to provide the Transition Out Services for a longer period of time.

### 18.3 Fees

Customer acknowledges and agrees that the fees for the Transition Out Services will be provided pursuant to the Rate Card, or otherwise at the rates agreed between the parties, and that such fees are payable to Business Fitness under clause 6.1.

### 18.4 Effect of Transition Out Services

On completion of the Transition Out Services, Business Fitness may remove any and all Customer Data relating to the Products from its servers.

## 19. Force Majeure

### 19.1 Suspension of obligations

If a party (**Affected Party**) is prevented from, or delayed in, performance of an obligation (other than an obligation of the Customer to pay money) by an event of Exceptional Circumstance; and the Affected Party, as soon as possible after the event of Exceptional Circumstance notifies the other party providing particulars of:

- (a) the event of Exceptional Circumstance;
- (b) the anticipated period of delay; and
- (c) the action (if any action is reasonably possible) the Affected Party intends to take to mitigate the effect of the delay,

then those obligations of the Affected Party are suspended for the duration of the event of Exceptional Circumstance.

### 19.2 Obligations on other party

The party which is not the Affected Party must use all reasonable endeavours to remove or mitigate its Loss arising from, and the effects of, the event of Exceptional Circumstance.

## 20. Goods and Services Tax

### 20.1 GST exclusive

Unless expressly stated to the contrary, all amounts expressed in the Agreement are exclusive of GST.

### 20.2 Recipient to pay Supplier

- (a) If a party (the **Supplier**) is obliged under the GST



# Master Services Agreement

Law to pay an amount of GST for a taxable supply made by the Supplier to another party (the Recipient) under the Agreement, the Recipient must pay the Supplier an amount equal to the GST payable on the supply by the Supplier.

- (b) The Recipient must pay the amount referred to in clause 20.2(a) and any interests, penalties, fines or expenses relating to the GST, in addition to and at the same time as the consideration otherwise payable by the Recipient for the supply.

## 20.3 Tax Invoice

If requested by the Recipient, the Supplier must provide the Recipient with a Tax Invoice on or before payment of the amounts required by clause 20.2.

## 21. Notices

### 21.1 Form

Any notice or other communication to or by any party must be:

- (a) in writing and in the English language;
- (b) addressed to the address of the recipient in clause 21.4 or to any other address as the recipient may have notified the sender; and
- (c) be signed by the party or by an Authorised Officer of the sender.

### 21.2 Manner

In addition to any other method of service authorised by law, the notice may be:

- (a) personally served on a party;
- (b) left at the party's current address for service;
- (c) sent to the party's current address for service by prepaid ordinary mail or if the address is outside Australia by prepaid airmail;
- (d) sent by facsimile to the party's current numbers for service; or
- (e) sent by electronic mail to the party's electronic mail address.

### 21.3 Time

If a notice is sent or delivered in the manner provided in clause 21.2 it must be treated as given to or received by the addressee in the case of:

- (a) delivery in person, when delivered;
- (b) delivery by post:
- (1) in Australia to an Australian address, the second Business Day after posting; or
  - (2) in any other case, on the tenth Business Day after posting;
- (c) facsimile, when a transmission report being printed by the sender's facsimile machine stating that the document has been sent to the recipient's facsimile number; or
- (d) electronic mail, when the sender's computer reports

that the message has been delivered to the electronic mail address of the addressee,

but if delivery is made after 5.00pm on a Business Day it must be treated as received on the next Business Day in that place.

### 21.4 Initial details

The addresses and numbers for service are initially per the details contained in the Order Form.

### 21.5 Changes

A party may from time to time change its address or numbers for service by notice to each other party.

## 22. Governing law and jurisdiction

### 22.1 Governing law

This agreement is governed by and construed in accordance with the laws of Queensland.

### 22.2 Jurisdiction

Each party irrevocably:

- (a) submits to the non-exclusive jurisdiction of the courts of Queensland and the courts competent to determine appeals from those courts, with respect to any proceedings which may be brought at any time relating to this Agreement; and
- (b) waives any objection it may now or in the future have to the venue of any proceedings, and any claim it may now or in the future have that any proceedings have been brought in an inconvenient forum, if that venue falls within paragraph 22.2(a).

## 23. Miscellaneous

### 23.1 Exercise rights

A single or partial exercise or waiver by a party of any right under or relating to this Agreement will not prevent any other exercise of that right or the exercise of any other right.

### 23.2 Assignment

- (a) Assignment by Business Fitness

Business Fitness can assign its obligations in this Agreement by providing the Customer with 30 days' prior written notice of such assignment.

- (b) Assignment by Customer

The Customer must not assign, transfer or novate all or any part of its rights or obligations under or relating to this Agreement or grant, declare, create or dispose of any right or interest in it, without the prior written consent of Business Fitness. Business Fitness may withhold its consent in its sole discretion.

- (c) Change of Control

For the purposes of this clause 23.2, a Change of Control in respect of the Customer will be deemed to be an assignment enlivening the operation of clause 23.2(b).



# Master Services Agreement

## 23.3 Severability

If a provision of this Agreement is illegal, invalid, unenforceable or void in a jurisdiction it is severed for that jurisdiction and the remainder of this Agreement has full force and effect and the validity or enforceability of that provision in any other jurisdiction is not affected.

## 23.4 Further assurance

Each party must promptly at its own cost do all things (including executing and delivering all documents) necessary or desirable to give full effect to this Agreement and the transactions contemplated by it.

## 23.5 Costs

Each party is responsible for all its own costs incurred in the negotiation and performance of this Agreement including legal costs.

## 23.6 Publicity

Customer authorises Business Fitness to make public announcements regarding the existence of the Agreement and to identify Customer as a client or customer of Business Fitness in advertising or marketing Materials.

## 23.7 Waiver

- (a) A party's waiver of a right under or relating to this

Agreement, whether prospectively or retrospectively, is not effective unless it is in writing from that party.

- (b) No other act, omission or delay by a party will constitute a waiver of a right.

## 23.8 Counterparts

This agreement may be executed in any number of counterparts each of which will be considered an original but all of which will constitute one and the same instrument. A party who has executed a counterpart of this Agreement may deliver it to, or exchange it with, another party by:

- (a) faxing; or
- (b) emailing a pdf (portable document format) copy of, the executed counterpart to that other party.

## 23.9 Whole agreement

This Agreement:

- (c) is the entire agreement and understanding between the parties relating to the subject matter of this Agreement; and
- (d) supersedes any prior agreement, representation (written or oral) or understanding on anything connected with that subject matter.

# Master Services Agreement

