Software Escrow & Copyright Agents Pty Ltd - Software Escrow Agreement

This **Agreement** is made on the **Agreement Date** between the **Parties** specified in **Schedule 1** as **Escrow Agent**, **Customer** and **Supplier** respectively.

Recitals

A. **Escrow Agent** has the skills and resources to escrow the **Escrow Materials**.

B. **Supplier** proposes to deposit the **Escrow Materials** with **Escrow Agent** and **Customer** proposes to gain access to the **Escrow Materials** on the basis set out in this **Agreement**.

Operative Part

1.   Definitions

1.1   In this **Agreement**, unless inconsistent with the context:

(a)   **Agreement** means this agreement, its recitals, provisions and any schedule of this agreement.

(b)   **Clause** means a clause of this **Agreement**.

(c)   **Force Majeure** means an act, omission or circumstance over which **Escrow Agent** could not reasonably have exercised control.

(d)   **Party** and **Parties** means a party to this **Agreement** and their respective successors, trustees and permitted assigns.

(e)   **Sub-clause** means a sub-clause of this **Agreement**.

2.   Interpretation

2.1   In this **Agreement**, unless inconsistent with the context:

(a)   Words denoting a person shall include corporations, statutory corporations, partnerships, joint ventures, associations, boards, governments or semi-government agencies or authorities.

(b)   Words denoting the singular number shall include the plural number and vice versa.

(c)   Words denoting any gender shall include all other genders.

(d)   A reference to a statute or a regulation also refers to any statute or regulation amending, or consolidating or re-enacting same.

(e)   Money references are references to Australian currency.

(f)   A reference to "**includes**", "**including**" or "**inclusive**" is to be construed as being a reference to "includes, without limitation", "including, without limitation", and "inclusive, without limitation" respectively.

(g)   Headings used in this **Agreement** are for convenience and ease of reference only, and are not part of this **Agreement** and shall not be relevant or affect the meaning or interpretation of this **Agreement**.

(h)   Every obligation, covenant, agreement, condition express or implied in this **Agreement** and entered into by more than one party shall bind them jointly and each of them severally.

(i)   A provision of this **Agreement** shall not be construed adversely to the **Party** that drafted it.

(j)   If any provision or part provision of this **Agreement** is held invalid, unenforceable or illegal for any reason, this **Agreement** shall remain otherwise in full force apart from such provision or part provision which shall be deemed deleted.

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(k)   The recitals, provisions and any schedule to this **Agreement** form part of this **Agreement** and shall be read in the following order of precedence: the recitals and clauses of this **Agreement**; and thereafter in the order specified (if any) in Schedule 1.

(l)   No remedy, expressly granted to **Escrow Agent** excludes or shall be deemed to exclude or modify any other right or remedy which would otherwise be available to **Escrow Agent**.

3.   Duration

3.1   This **Agreement** shall remain in force until **Escrow Materials** are released or destroyed in accordance with this **Agreement** or this **Agreement** is otherwise terminated.

4.   Deposit of Escrow Materials

4.1   **Supplier** shall deposit the **Escrow Materials** within the **Update Frequency** after the **Commencement Date** with **Escrow Agent**.

4.2   If any modification is made to the executable version of the **Escrow Materials** supplied to **Customer** then **Supplier** shall within the **Update Frequency** deposit the modified version of the **Escrow Materials** with **Escrow Agent**.

4.3   **Escrow Agent** shall report to **Customer** any deposits (together with current holdings) when a deposit is received, current holdings once annually and current holdings upon request. **Escrow Agent** shall not be obliged to otherwise report any deposits made, or not made, by the **Supplier**.

5.   Storage

5.1   **Escrow Agent** shall store the **Escrow Materials** in accordance with the **Storage Method**

6.   Details

6.1   **Escrow Agent** shall, upon request, provide a list of all the **Escrow Materials** deposited, stored and released pursuant to this **Agreement**.

7.   Access to Escrow Materials

7.1   Unless required by law or this **Agreement**, **Escrow Agent** shall not permit access to the **Escrow Materials** by any person not authorised in writing by both **Supplier** and **Customer**.

7.2   **Sub-clause 7.1** does not apply to personnel authorised by **Escrow Agent** to perform its obligations pursuant to this **Agreement**.

8.   Loss of Escrow Materials

8.1   If the **Escrow Materials** are lost, destroyed or damaged whilst in the possession, custody or control of **Escrow Agent**, **Escrow Agent** shall:

(a)   promptly notify **Supplier** and **Customer**; and

(b)   co-operate in the replacement of the lost, damaged or destroyed **Escrow Materials**.

9.   Verification

9.1   **Escrow Agent** shall not be required to verify the **Escrow Materials** deposited pursuant to this **Agreement**.

9.2   At the request of **Customer**:

(a)   **Escrow Agent** may verify the **Escrow Materials** upon payment of additional fees by **Customer**; and

(b) **Supplier** shall provide such reasonable assistance as is requested by **Escrow Agent** from time to time in relation to any such verification.

9.3 The costs of the verification process referred to in **Sub-clause 9.2** shall be paid in advance by **Customer**. However, in the event that the **Escrow Materials** fail the verification process **Supplier** shall pay such costs to **Customer**.

10. Release of Escrow Materials to Supplier

10.1 Subject to **Clause 12**, **Escrow Agent** shall, at **Supplier's** option, return the **Escrow Materials** to **Supplier** or destroy the **Escrow Materials** if:

(a) **Customer** consents to such release;

(b) **Customer** is in material breach of this **Agreement** or the **Master Agreement**; or

(c) **Customer** becomes subject to any form of insolvency administration or is deregistered.

10.2 **Escrow Agent** may at any time provide **Supplier** with a copy of the **Escrow Materials**.

11. Release of Escrow Materials to Customer

11.1 Subject to **Clause 12**, **Escrow Agent** shall provide a copy of the **Escrow Materials** to **Customer** if:

(a) **Supplier** consents to such release;

(b) the events set out in the **Additional Trigger Events** to trigger such release occur;

(c) the events set out in the **Master Agreement** to trigger such release occur; or

(d) **Supplier** becomes subject to any form of insolvency administration or is deregistered.

11.2 If the **Escrow Materials** are released to **Customer** in accordance with this **Clause** then **Customer** shall be entitled to use, modify and copy the **Escrow Materials** solely in accordance with **Customer's** rights and obligations under the **Master Agreement**. **Supplier** warrants that the **Escrow Materials** are sufficient for **Customer** to be able to do same.

> **Comment [A1]:** If there is no Master Agreement (eg. a Software Licence and Support Agreement between Supplier and Customer), replace this text with "to build executable code to be used for Customer's own internal use."

12. Objection to release of Escrow Materials

12.1 A **Party** seeking release of a copy of the **Escrow Materials** pursuant to **Clause 10.1** or **11.1** shall give 7 days prior notice to other **Party** of such a notice being proposed to be given to **Escrow Agent**.

12.2 **Escrow Agent** is under no obligation to release a copy of the **Escrow Materials** unless:

(a) evidence that **Sub-clause 12.1** has been satisfied is provided; and

(b) **Escrow Fees** have been paid in full including any applicable **Release Fee**.

12.3 A **Party** who receives a notice pursuant to **Sub-clause 12.1** may object, by notice in writing to **Escrow Agent** and the other **Party** on the basis that the facts relied upon by the other **Party** are inaccurate.

12.4 Upon receipt of such notice, **Escrow Agent** shall not release a copy of the **Escrow Materials** until the **Parties** consent to such release or a Court makes a declaration in favour of a **Party** seeking such release.

12.5 **Escrow Agent** shall comply with any declaration or direction of the Court.

13. Escrow Fees and Charges

13.1 **Escrow Paying Party** shall pay the **Escrow Fees** to **Escrow Agent**.

13.2 The **Escrow Fees** are non-refundable despite termination of this **Agreement**.

13.3 The **Escrow Fees** may be increased on 30 days' notice in writing. **Customer** or **Supplier** may by notice in writing terminate this **Agreement** within that period.

13.4 Unless stated to the contrary, the **Escrow Fees** are exclusive of all taxes, GST, duties, fees or other government charges which may be imposed on the storage of **Escrow Materials**, this **Agreement** or otherwise. **Escrow Paying Party** shall pay such taxes, GST, duties, fees or other government charges immediately on demand.

13.5 If any payment is not made within 7 days of the due date, **Escrow Agent** may, without further notice to **Supplier** or **Customer**, suspend further services or its remaining obligations to **Supplier** and **Customer** under this **Agreement**.

14. Confidentiality

14.1 All **Parties** shall treat as confidential the terms of this **Agreement**, the **Escrow Materials** and any other related information, which comes into their possession, control or custody pursuant to this **Agreement**. The obligations under this **Clause** survive the termination of this **Agreement**.

15. Inquiries by Escrow Agent

15.1 **Escrow Agent** shall not be bound to inquire about the validity of the grounds for any notice or direction to it.

15.2 If **Escrow Agent** is in any doubt as to its obligations under this **Agreement** it shall seek directions from **Supplier** and **Customer**. If **Supplier** and **Customer** cannot agree on directions to be given to **Escrow Agent** within 7 days of being requested to do so, **Escrow Agent** shall wait for directions from a Court.

16. Legal Costs and Indemnity

16.1 **Customer** and **Supplier** jointly and severally indemnify and shall keep **Escrow Agent** indemnified for all costs, taxes and expenses on a solicitor and own client basis incurred in connection with this **Agreement** and any dispute in relation to this **Agreement**.

17. Implied Terms

17.1 Except as expressly provided to the contrary in this **Agreement** any condition or warranty whether express, implied, statutory or otherwise, relating in any way to the subject matter of this **Agreement** is excluded.

17.2 Where legislation implies in this **Agreement** any condition or warranty and that legislation avoids or prohibits provisions in a contract excluding or modifying the application of or the exercise of or liability under such term, such term shall be deemed to be included in this **Agreement**. However, the liability of **Escrow Agent** for any breach of such term shall be limited, at the option of **Escrow Agent**, to the supplying of the services again or the payment of the cost of having the services supplied again.

18. Liability of Escrow Agent

18.1 Except as expressly provided to the contrary in this **Agreement**, **Escrow Agent** shall not be under any liability to **Supplier** or **Customer** in respect of any loss or damage (including consequential loss or damage) however caused, which may be suffered or incurred or which may arise directly or indirectly in respect to the supply of goods or services pursuant to this **Agreement** or the failure or omission on the part of **Escrow Agent** to comply with its obligations under this **Agreement**.

> **Comment [A2]:** If required each of these clauses can be deleted. The pricing in such a case is that the **Annual Fee** increases by $400 +GST per annum.

19. Termination

19.1 Upon payment in full of all **Escrow Fees**, **Customer** may terminate this **Agreement** on 30 days' notice.

19.2 **Escrow Agent** may terminate this **Agreement** immediately by notice in writing if any payment due to **Escrow Agent** pursuant to this **Agreement** remains unpaid for a period of 30 days.

19.3 Upon termination, amongst other things:

    (a) **Escrow Agent** shall, unless directed otherwise, destroy the **Escrow Materials**. A **Party** making a direction otherwise shall pay all fees applicable to complying with that direction; and

    (b) **Escrow Paying Party** shall pay the **Release Fee**.

20. Survival

20.1 The provisions of this **Agreement** which are capable of having effect after the expiration of this **Agreement** shall remain in full force and effect following the expiration of this **Agreement**.

21. Force Majeure

21.1 **Escrow Agent** shall not be liable for any delay or failure to perform its obligations if such failure or delay is due to **Force Majeure**.

22. Assignment, Novation and Sub-Contracts

22.1 **Supplier** or **Customer** shall not sub-contract, sub-licence, assign or novate, in whole or part, any entitlement or obligation under this **Agreement** without the prior written consent of **Escrow Agent**.

22.2 **Escrow Agent** may sub-contract for the performance or part performance of this **Agreement**.

23. Waiver

23.1 Any failure by a **Party** to enforce any provision of this **Agreement**, or any forbearance, delay or indulgence granted by a **Party** will not be construed as a waiver of that **Party's** rights.

23.2 No right under this **Agreement** shall be deemed to be waived except by notice in writing signed by each **Party**. Such a waiver by a **Party** shall not prejudice its rights in respect of any subsequent breach of this **Agreement** by the other **Party**.

24. Governing Law

24.1 This **Agreement** shall be governed by and construed according to the law of **Jurisdiction**.

24.2 The **Parties** irrevocably submit to the exclusive jurisdiction of the courts of **Jurisdiction**. Any proceedings in a Commonwealth court shall be commenced in **Jurisdiction**.

25. Notices

25.1 Notices under this **Agreement** may be delivered by hand, by mail or by facsimile to the addresses specified in **Schedule 1**.

25.2 Notices shall be deemed given in the case of:

    (a) hand delivery, upon written acknowledgment of receipt by an officer or other duly authorised employee, agent or representative of the receiving party;

    (b) posting, 3 days after dispatch; and

    (c) facsimile, upon completion of transmission.

26. Entire Agreement

26.1 Unless stated expressly to the contrary in this **Agreement**:

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(a)   this **Agreement** constitutes the entire agreement between the **Parties** for the subject matter referred to in this **Agreement**. Any prior arrangements, agreements, representations or undertakings are superseded;

(b)   this **Agreement** is not to be construed as creating a joint venture, partnership or agency situation between the **Parties**. No **Party** may represent that there exists such a relationship between the **Parties**;

(c)   no **Party** may bind the other **Party** to any agreements, arrangements, contracts or understanding or represent that they have such authority; and

(d)   no modification or alteration of any provision of this **Agreement** shall be valid except in writing signed by each **Party**.

Executed as an Agreement

By **Supplier**   )
by being signed by the following persons   ) Attach company seal here
or if a seal is affixed witnessed by the following persons:)
)

Director/Secretary sign here   Director sign here

Print Name of Director/Secretary here   Print Name of Director here
Director/Secretary   Director

By **Customer**   )
by being signed by the following persons   ) Attach company seal here
or if a seal is affixed witnessed by the following persons:)
)

Director/Secretary sign here   Director sign here

Print Name of Director/Secretary here   Print Name of Director here
Director/Secretary   Director

By **Escrow Agent**   )
by being signed by the following persons   )
or if a seal is affixed witnessed by the following persons:)
)
)

Steve White   Sarah Pike
Director/Secretary   Director

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Schedule 1 – General Details

Agreement Date

Additional Trigger Events

Customer

Customer ABN

Customer Address

Commencement Date

Escrow Agent	Software Escrow & Copyright Agents Pty Ltd ABN 68 007 214 708
Escrow Agent Address	Australian Capital Territory/New South Wales/ Northern Territory/Queensland:
	GPO BOX 2506 SYDNEY NSW 2001 Australia
	Suite 604, 109 Pitt Street SYDNEY NSW 2000 Australia
	Facsimile: + 612 9233 3044
	South Australia/Tasmania/Victoria/Western Australia:
	PO Box 452 COLLINS STREET WEST VIC 8007 Australia
	Suite 419, 838 Collins Street, DOCKLANDS VIC 3008
	Facsimile: + 613 9629 3217
Escrow Fees	**Setup Fee**: $Nil
	Annual Fee: $900 plus GST per annum in advance commencing on execution of this **Agreement** plus if more than 4 DVDs/CDs/Hard Disks/USB Keys/Electronic Deposits are held then an additional fee of $150 plus GST per additional deposit held per annum is payable.
	Release Fee: $Nil upon receipt of a request to release or destroy the **Escrow Materials**.
Escrow Materials	Source Code for [insert details]/Data for /UserIDs/Passwords for a SaaS instance/As specified in the **Master Agreement**
Escrow Paying Party	**Customer/Supplier**
Jurisdiction	Australian Capital Territory/New South Wales/Northern Territory/Queensland/South Australia/Tasmania/Victoria/Western Australia/New Zealand
Master Agreement	[insert details of the master agreement] and all further renewals or extensions thereof.
Storage Method	Bank Vault/SaaS solution.
Supplier	
Supplier ABN	
Supplier Address	
Update Frequency	90 days (or such later period as may be specified in the **Master Agreement**)

Comment [A3]: If unlimited deposits are required please use this wording "**Annual Fee**: $1,500 plus GST per annum in advance commencing on execution of this **Agreement.** This fee includes unlimited deposits."

Comment [A4]: Delete to suit.

Comment [A5]: This is typically a software licence and support agreement or similar document.

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