

1. Structure

1.1 This agreement sets out the terms on which Marketplacer provides access to and use of its Platform on a “software as a service” basis and provides related services.

1.2 This agreement takes effect when an order form which incorporates it by reference (“**Order Form**”) is executed by the customer specified in the order form (the “**Operator**”) and Marketplacer Pty Ltd (“**Marketplacer**”), and consists of the following parts:

- (a) the Order Form;
- (b) annexures to the Order Form; and
- (c) this Business Services Agreement,

together the “**Agreement**”. If there is any conflict between the parts of this Agreement, the part listed earlier prevails.

2. Definitions and Interpretation

2.1 In this Agreement, unless the context otherwise requires:

“**Affiliate**” means a related entity of the Operator as that term is defined in the *Corporations Act 2001 (Cth)*;

“**Business Day**” means any day that is not a Saturday, Sunday, gazetted public holiday or bank holiday in Victoria, Australia;

“**Business Hours**” means 9:00am to 6:00pm AEDT on a Business Day;

“**Change Request**” means a written request to change, modify and/or amend the Services, including a request to introduce new features, amend existing features of the Services or engage with an External Provider not listed in the Order Form;

“**Claim**” means any actions, suits, causes of action, proceedings, claims or demands;

“**Confidential Information**” means, in respect of each party (a “**Disclosing Party**”), all:

- (a) information which is proprietary to, about or created by the Disclosing Party including, without limitation, any business plans, pitches, marketing, branding, forecasts, staffing, recruitment and all other information which is used or created by the Disclosing Party in relation to its business;
- (b) information which relates to any actual or potential business, property or transaction (including this Agreement) in which the Disclosing Party may be or has been concerned or interested or information the disclosure of which could be detrimental to the interests of the Disclosing Party;
- (c) information which is designated as being Confidential Information by the

Disclosing Party;

- (d) information which from all the relevant circumstances could reasonably be assumed by the other party to be confidential and proprietary to the Disclosing Party or to any third party with whose consent or approval the Disclosing Party uses that information;
- (e) any such information which is commercially sensitive or price sensitive; and
- (f) the provisions and subject matter of this Agreement;

“**Core Platform Services**” means the service of access to and use of Platform, the hosting of the Operator Marketplace and related integrations, services and applications.

“**Customer**” means a buyer, seller or other user of the Operator Marketplace, including a user or recipient of the goods or services provided by the Operator;

“**External Provider**” means a third party service provider engaged by the Operator in connection with the Services;

“**Event of Default**” means:

- (a) a party breaches this Agreement and such breach is either incapable of remedy or the party fails to remedy the breach (and provide satisfactory evidence of such remedy) within 15 Business Days of receiving a notice specifying the action required to remedy the breach;
- (b) a party persistently behaves in a manner which prevents or impedes the other from complying with the terms and conditions of this Agreement, and such an occasion has occurred at least three times in the past three months and on each occasion the prevention or impediment has lasted for more than seven days after a written notice is issued by the non-breaching party demanding the breaching party to remedy its behaviour;
- (c) in the case of the Operator, the Operator has not made a payment due under this Agreement by the relevant due date or time for payment, the Operator is given notice of such failure to pay, and fails to make the due payment within seven (7) days of receipt of such notice;
- (d) a party has a liquidator or provisional liquidator appointed to it;
- (e) a party resolves to wind up or is subject to an order to wind up (other than for voluntary reconstruction);
- (f) a party has a receiver appointed to it or

in respect of a substantial proportion of its assets or undertakings;

- (g) a court or tribunal makes an order that a party be wound up in insolvency, unless the party successfully appeals such order; or
- (h) in the case of Marketplacer, a court or tribunal makes an order that the Platform infringes a third party's Intellectual Property Rights and Marketplacer is unable to, within 90 days of such order, implement a workaround or arrange an appropriate licence for the Operator to continue to use the Platform or substantially similar platform.

"Force Majeure Event" means strikes, lock-outs, or other labour disputes, riots, civil disturbance, actions or inaction of governmental authorities, epidemics or pandemics, wars, embargoes, storms, floods, fires, earthquakes, acts of God or the public enemy, computer downtime, disruptions to public utilities, nuclear disasters or default of a common carrier, or any Federal or State restrictions on the movements of individuals or goods, orders from government or judicial institutions to halt business activities;

"GST" means the Goods and Services Tax as defined in the *A New Tax System (Goods and Services Tax) Act 1999* (Cth) (as amended);

"Initial Period" means the period commencing on the Start Date and ending on the day that is 12 months after the Start Date;

"Intellectual Property Rights" means any and all intellectual and industrial property rights subsisting in any part of the universe in any and all media (whether now known or created in the future) including, without limitation, rights in the nature of copyright, registered design or other design right, trade mark, patent rights, circuit layout rights, trade secrets and any corresponding proprietary rights (whether registered or common law) under the laws of any jurisdiction;

"Liability" means liability, loss, damage or expense, including legal costs on a full indemnity basis, any monies paid to a third party to settle or compromise a claim or demand, the corruption or loss of Marketplacer's data and the costs of protecting or maintaining any Intellectual Property Rights or any Claim made, threatened or commenced against Marketplacer by a third party;

"Operator Data" means all data and information that is provided to or collected by Marketplacer in connection with the Operator Marketplace and the Services relating to the Operator and its operations, business, Customers, service providers, distributors, personnel, consultants, advisors, assets and transactions in whatever form such information

may exist, regardless of whether such data or information is provided by, or collected from, the Operator or a third party;

"Operator Marketplace" means the Operator's marketplace that allows multiple sellers to sell goods and/or services to multiple buyers;

"Order Form" has the meaning given in clause 1.2;

"Personal Information" has the same meaning as is defined in the Privacy Act, unless otherwise agreed in the Order Form;

"Platform" means Marketplacer's software which enables an Operator to create an online marketplace through which sellers can sell goods and/or services to customers;

"Privacy Act" means the *Privacy Act 1988* (Cth);

"Professional Services" means the Professional Services specified in the Order Form, if any.

"Sales Tax" means the applicable tax(es) chargeable by Marketplacer in respect of supplies made under this Agreement in the relevant jurisdiction, including GST in respect of supplies made in or referable to Australia;

"Service Outputs" means any outputs, documentation, reports or results generated by the Platform or Marketplacer in connection with the provision of the Services;

"Services" means the services described in the Order Form, and includes the Core Platform Services and any Professional Services;

"Service Fees" means the fees and charges payable by the Operator for the Services as set out in the Order Form;

"Service Update" means any update, upgrade, patch, modification or alteration to the Platform, a Service or Marketplacer's business generally, provided that such update is not specific only to the Operator. For example, updates include new features or functionalities and minor changes such as to rectify a bug;

"SLA" means the Service Level Agreement attached to the Order Form that Marketplacer must comply with when providing the Services to the Operator under this Agreement;

"Service Level Credits" has the meaning given in the SLA.

"Start Date" means the date specified in the Order Form;

"Statement of Work" means the document setting out the scope of the services to be provided by Marketplacer to the Operator in response to a Change Request, the terms and conditions on which Marketplacer will carry out

the Change Request and the additional fees and charges which apply, in the form approved by Marketplacer from time to time; and

"Term" has the meaning given in clause 3.1.

2.2 In this Agreement, unless the context otherwise requires:

- (a) headings are for convenience only and do not affect interpretation;
- (b) references to a party also include the party's executors, administrators, substitutes (including persons taking by novation), successors and permitted assigns;
- (c) references to a person include any other entity recognised by law;
- (d) each annexure and schedule form part of this Agreement;
- (e) a document includes any variation or replacement of it;
- (f) references to any legislation or legislative provision will include modifying, consolidating, or replacing legislation or legislative provisions;
- (g) references to a "breach of warranty" include that warranty not being complete, true or accurate;
- (h) references to money are to Australian dollars;
- (i) the words "including", "for example", "such as" or similar are not words of limitation;
- (j) every covenant, provision, representation, warranty, obligation or an agreement applying to, binding or given by more than one person will bind them jointly and each of them severally;
- (k) a provision of this Agreement is not to be construed adversely against the party responsible for the preparation of it; and
- (l) if the day on which any act, matter or thing is to be done under or pursuant to this Agreement is not a Business Day, that act, matter or thing may be done on the next Business Day.

3. Term

This Agreement commences on the Start Date and continues until the End Date (**Term**), unless earlier terminated.

4. Core Platform Services

4.1 Marketplacer grants the Operator during the Term a non-exclusive, non-transferable, non-sublicensable and terminable right and license to access and use the Platform on a 'software-as-a-service' basis and in accordance with the

terms of the Agreement. This licence is subject to the Operator's compliance with this clause 4 and the Acceptable Use Policy in clause 6, both of which are essential terms of this Agreement.

4.2 The licence granted to the Operator in clause 4.1 is subject to the further condition that the Operator agrees that Marketplacer may collect, aggregate, use and disclose Operator Data provided such data is de-identified, meaning that it cannot be attributed or connected to an individual, and subject to clause 10. Marketplacer owns all right, title and interest in any inferences, analytics or databases created using the de-identified data.

4.3 The Operator is responsible for the accuracy, quality and legality of Operator Data, the means by which the Operator acquired Operator Data, Operator's use of Operator Data with the Services, and the interoperation of any third party applications with which Operator uses the Platform or Services.

4.4 Operator acknowledges and agrees that:

(a) Marketplacer retains all right, title, and interest in and to the Platform and the Services (including to corrections, updates, adaptations, enhancements or authorised copies of the Services), and Operator does not acquire any rights, express or implied in the Intellectual Property Rights; and

(b) any modifications to the Services made for Operator's benefit in no way affect or diminish Marketplacer's right, title, and interest in and to the Intellectual Property Rights.

4.5 The Operator will immediately notify Marketplacer in writing of any breach or alleged breach of any rights, including but not limited to the Intellectual Property Rights, in or to the Platform or the Services by any third party of which the Operator becomes aware and will cooperate with Marketplacer in relation to any investigation or action that Marketplacer takes to protect its rights.

4.6 As between Marketplacer and the Operator, the Operator is responsible for any transactions which occur through or as a result of the Operator Marketplace. Marketplacer is not a party to such transactions and the Operator agrees Marketplacer has no liability in connection with them, nor does it have control over the goods and services transacted through the Operator Marketplace or the acts or omissions of Customers (such as failure to pay or failure to process a refund). The Operator must ensure that the Operator Marketplace is operated, and is responsible for taking reasonable steps to ensure users of the Operator Marketplace use it, in a manner that complies with applicable laws.

- 4.7 Subject to clause 4.7, Marketplacer will give the Operator notice in advance of implementing a Service Update if Marketplacer reasonably believes that the Service Update will (or may) significantly prejudice the Operator's ability to use the Services or significantly reduce the quality or content of the Services being provided to the Operator.
- 4.8 Marketplacer may implement a Service Update with no notice or less notice than specified in clause 4.6 if it reasonably believes that the Service Update is critical for maintaining the integrity and/or security of the Platform or a Service and that compliance with clause 4.6 is inappropriate due to the urgency with which the Service Update must be implemented.
- 4.9 Marketplacer is not required to give the Operator notice of Service Updates except as set out in clause 5.1 or agreed in a SLA.
- 5. Professional Services**
- 5.1 Marketplacer must provide the professional services with a reasonable level of care and to industry standards.
- 5.2 The Operator acknowledges that the ability of Marketplacer to provide the Professional Services requires Operator's cooperation in providing Marketplacer with timely, adequate and accurate responses to requests for data, documents, information, materials, access, decisions or approvals. Marketplacer is excused from performing the Professional Services to the extent that Operator delays or refuses to provide Marketplacer with such cooperation.
- 5.3 The Operator must:
- (a) comply with any policies, specifications, limitations or other technical documentation or instructions given to it by Marketplacer in connection with the use of the Services, including in respect of registration and administration of any website domain name connected with the Operator Marketplace; and
 - (a) provide Marketplacer with access to facilities and information, including Operator Data, within the Operator's possession or control which is reasonably required by Marketplacer to allow Marketplacer to review and assess the integrity or performance of the Services.
6. **Acceptable Use Policy**
- 6.1 The Operator must not, directly or indirectly:
- (a) use the Platform or the Services for any purpose other than in accordance with this Agreement;
 - (b) reverse-engineer, decompile, translate or disassemble the Platform;
 - (c) bypass, or attempt to bypass, any security features of the Platform and Services, or introduce, upload or transmit any "back door", "time bomb", "logic bomb", "Trojan Horse", "worm", "drop dead device", "DoS attacks", "DDoS attacks", "virus" or any other malware, spyware or computer software routine having the effect of permitting unauthorised access to or use of any of Marketplacer's systems, networks, data or software or disabling, damaging, corrupting, interrupting or erasing, or disrupting or impairing the normal operation of any part of Marketplacer's systems, networks, data or software to the Platform and Services;
- (d) copy, reproduce, distribute, publish or otherwise use the Platform in any manner or for any purpose not expressly authorised by this Agreement;
 - (e) assign, transfer, sell, lease, licence or sub-licence the Platform to any third party or dispose of, encumber or charge the Platform in favour of a third party;
 - (f) provide any third party with access to the Platform or Services other than as expressly permitted under this Agreement;
 - (g) infringe, challenge or repudiate or take any action to impair, prejudice or diminish the Intellectual Property Rights in the Platform or Services;
 - (h) make any representations to a third party or the public in regards to the Platform, Services and/or the Intellectual Property Rights in the Platform or Services;
 - (i) remove or interfere with any copyright or trade mark notices contained within the Platform and Services;
 - (j) demonstrate the Platform and Services for the purpose of engaging a person to replicate the functionality or features contained in the Platform and Services; or
 - (k) modify any documentation or manuals provided or made available in relation to the Platform and Services.
- 6.2 For the avoidance of doubt, the obligations and
- 7. Fees, Payments and Invoicing**
- 7.1 Marketplacer will issue the Operator an invoice for the Service Fees plus applicable Sales Tax in accordance with the Order Form.
- 7.2 The Operator must pay the Service Fees and Sales Tax to Marketplacer within 30 days of the date of invoice or such other due date specified in an Order Form. The requirement to pay the Service Fees within the time limit(s) as set out

in this Agreement is an essential term of this Agreement. Without limiting its other rights and remedies, Marketplacer is entitled to charge a reasonable late fee in the event of overdue invoices except that Marketplacer will not exercise this right if Operator is disputing the relevant invoice reasonably and in good faith and is cooperating to resolve the dispute.

- 7.3 The parties acknowledge and agree that:
- (a) unless otherwise expressly stated in this Agreement, the Service Fees are exclusive of Sales Tax;
 - (b) if any Sales Taxes are imposed on any supply made under this Agreement, the supplying party, Marketplacer, may recover from the recipient party, the Operator, in addition to any consideration payable for the supply, the amount of Sales Taxes provided that the supplying party has provided to the recipient party an invoice; and
 - (c) if the recipient party is required to pay any amount of Sales Taxes in accordance with this clause 7 or in connection with any goods, services or any other things under this Agreement, the recipient party will pay the amount of Sales Taxes at the same time as the consideration is due for the supply of goods, service or any other thing under this Agreement.
- 7.4 The Operator agrees to pay the Service Fees in Australian Dollars by electronic funds transfer into Marketplacer's nominated bank account, or by such other method as Marketplacer may specify from time to time.
- 7.5 All amounts due under or in relation to this Agreement are non-refundable and must be paid in full without any deduction or withholding other than as required by law and the Operator is not be entitled to assert any credit, set off or counterclaim against Marketplacer in order to justify withholding payment of any such amount in whole or in part.
- 8. Change Request**
- 8.1 From time to time during the Term, the Operator may submit a Change Request to Marketplacer.
- 8.2 As soon as reasonably practicable following receipt of the Change Request, Marketplacer will notify the Operator whether, or to what extent, Marketplacer (in its absolute discretion) is willing to carry out the Change Request and, if willing, Marketplacer will issue the Operator a Statement of Work.
- 8.3 The parties may discuss and agree changes to a Statement of Work, and any agreed changes will be incorporated into the Statement of Work prior to signing. For the avoidance of doubt, neither party is obliged to negotiate or sign a Statement of Work issued by Marketplacer.
- 8.4 Unless Marketplacer otherwise agrees in

writing, the following terms apply to a Statement of Work:

- (a) a Statement of Work issued by Marketplacer must be accepted by the Operator within 10 Business Days of the date on which it was issued by Marketplacer;
 - (b) Marketplacer may withdraw a Statement of Work at any time prior to its acceptance by the Operator;
 - (c) subject to this clause, the Statement of Work takes effect on signing by both parties;
 - (d) a Statement of Work that is designated or described as a "draft" (or any other similar term) is not capable of acceptance by the Operator.
- 8.5 For the avoidance of doubt and unless a Statement of Work states otherwise, any changes, modifications or amendments to the Services introduced by a Statement of Work that has been duly accepted and signed in accordance with this clause constitute part of the Services provided by Marketplacer under this Agreement and the Statement of Work is deemed to be a variation to this Agreement.
- 9. Security**
- 9.1 The Operator must not do anything to prejudice the security or privacy of Marketplacer's systems, software or Services or the information stored on the same.
- 9.2 If the Operator (or any of its personnel) become aware of any actual or potential compromise of the security of the Operator Marketplace or the Operator Data or suspect that any "back door", "time bomb", "logic bomb", "Trojan Horse", "worm", "drop dead device", "DoS attacks", "DdoS attacks", "virus" or any other malware, spyware or computer software routine having the effect of permitting unauthorised access to or use of any of Marketplacer's systems, networks, data or software or disabling, damaging, corrupting, interrupting or erasing, or disrupting or impairing the normal operation of any part of Marketplacer's systems, networks, data or software has been transmitted, uploaded or introduced, Operator must notify Marketplacer immediately.
- 9.3 Operator must promptly comply with any reasonable directions and instructions given by Marketplacer in connection with the Operator's use of the Services for the purpose of protecting the security of systems, networks, data or software.
- 9.4 Marketplacer will make reasonable efforts to ensure that the Operator Data is stored and transmitted according to accepted industry standards and in a secure manner, including by maintaining appropriate administrative, physical and technical safeguards designed to protect Operator Data against unauthorised

- access, destruction, loss, alteration or misuse.
- 9.5 Marketplacer will perform backups of the Operator Data in the manner at such times and intervals as is reasonable for its business purposes. Marketplacer does not warrant that it is able to backup or recover specific Operator Data beyond its explicit commitments in this Agreement. The Operator is responsible for securing and maintaining its own backup of the Operator Data as required for its business purposes.
- 9.6 If either party becomes aware of any actual or suspected breach of security to the Operator Marketplace or the Services or in the case of the Operator, a compromise of the Operator's account, that party will:
- (a) promptly notify the other party in writing with reasonable details regarding the breach of security or compromise;
 - (b) reasonably cooperate with, and provide reasonable information to, the other party to enable that party to comply with its data breach notifications under applicable laws; and
 - (c) not disclose details about the breach of security to any third party without the other party's prior written consent, unless required by law.
- 10. Privacy**
- 10.1 In connection with this Agreement, each party must comply with any applicable laws related to the protection of personal data, including the Privacy Act, in respect of Personal Information processed under this Agreement.
- 10.2 Operator must obtain all necessary rights and consents required under applicable law or contractual obligations to third parties in order to disclose to Marketplacer, and allow Marketplacer to collect, use, retain, and disclose, any information that is provided to Marketplacer or which Marketplacer is authorised to collect in its provision of the Services, including Operator Data, or which is licensed to Marketplace under clause 4.2.
- 10.3 Operator must make its terms, including its privacy policy, easily accessible to any person accessing the Operator Marketplace and such terms must clearly disclose how Marketplacer will collect and process any Personal Information.
- 11. Confidentiality**
- 11.1 Each party ("**Recipient**") agrees at all times during and for so long as is legally permissible after the Term to keep confidential the Confidential Information of the other party and will not disclose or discuss the same without the prior written approval of that other party, except:
- (a) as specifically provided by this Agreement;
 - (b) to the extent permitted or required by law;
 - (c) to the extent required to perform any of the Recipient's obligations under this Agreement;
 - (d) to the extent required to instruct the Recipient's professional advisers in relation to the preparation, completion and performance of this Agreement;
 - (e) where the information is or becomes public knowledge other than through fault of the Recipient;
 - (f) where the information was known to the Recipient before the date of this Agreement and such prior knowledge is notified and agreed in writing between the parties; or
 - (g) where the information becomes known to the Recipient after the date of this Agreement other than as the result of a breach of duty of confidentiality to the other party.
- 11.2 The Recipient must not sell, transfer, assign or otherwise dispose of or grant any licence in relation to any Confidential Information or make available copies (whether by photocopying, photographic reproduction or by electronically recorded data) of any Confidential Information to any person other than with the prior written consent of the other party.
- 11.3 Unless otherwise advised by the Operator or an exception applies under this Agreement, Marketplacer will treat all Operator Data which has not been de-identified as Confidential Information.
- 12. Insurance**
- 12.1 Each party agrees to effect and maintain insurance policies with reputable insurers which are appropriate and prudent given the nature of the party's liabilities under this Agreement.
- 13. Warranties**
- 13.1 Each party warrants to the other that:
- (a) it has the full right, power and authority to enter into and perform this Agreement and to grant and license all rights and benefits hereby granted and licensed to the other party;
 - (b) it will not do anything which violates or infringes the rights, title or interest, including the Intellectual Property Rights, of the other party; and
 - (c) it will comply with any applicable laws, regulations, standards and guidelines applicable to the provision or use of the Services.
- 13.2 The Operator warrants to Marketplacer that it will take reasonable steps to ensure the Operator Marketplace and any listings or

transactions on the Operator Marketplace comply with applicable laws, regulations, standards and guidelines.

14. Indemnity

14.1 The Operator indemnifies Marketplacer and its directors, officers, employees and agents (each an “**indemnified party**”) from and against all Liability which the indemnified party suffers or incurs in connection with:

- (a) any dispute between the Operator and a third party;
- (b) use of the Platform or Services by the Operator, another person under authority of the Operator or a Customer in a manner that is illegal or materially inconsistent with this Agreement; or
- (c) infringement of the rights of a third party, including Intellectual Property Rights or data privacy.

14.2 Both parties will use their reasonable endeavours to mitigate any loss, damage, liability, expenses and costs suffered by them under or arising out of this Agreement.

14.3 Each party's liability to the other is reduced proportionally to the extent that the liability arises as a direct result of an act or omission of the other party.

15. Limitations on Liability

15.1 To the maximum extent permitted by law, neither party shall be liable to the other party for any loss suffered or incurred by the other party in connection with this Agreement that does not arise naturally (that is, according to the ordinary course of things) from the event giving rise to the loss, including but not limited to loss of reputation, loss of goodwill, lost profits, lost revenue, loss of use by Customers, failure to realise anticipated savings and loss of opportunities.

15.2 The Operator acknowledges that the Services are not provided free of defects nor will they be available at all times and uninterrupted, and Marketplacer makes no warranties, guarantees or undertakings in this regard except that Marketplacer will use commercially reasonable endeavours to deliver the Services and make the Platform available in accordance with the SLA.

15.3 If Marketplacer fails to provide the Services in accordance with the SLA, Marketplacer will remit the applicable Service Level Credits (as defined in the SLA) to the Operator. The Operator agrees that the Service Level Credits contain the Operator's sole remedy in relation to Marketplacer's failure to provide the Services in accordance with the SLA.

15.4 In respect of Service Outputs, the Operator acknowledges and agrees that:

- (a) the mere generation of Service Outputs

does not mean that Marketplacer has validated or verified the correctness of the Operator Data comprised in the Service Outputs;

- (b) Marketplacer has not expressed an opinion or provided advice that use of the Services by the Operator will produce any particular Service Outputs or other results, including the generation of any financial gains for the Operator or the avoidance of any financial losses for the Operator; and

- (c) Marketplacer is under no obligation to interpret, extrapolate, construe, represent, decipher, analyse, comment, translate, apply or advise on the Service Outputs.

15.5 To the maximum extent permitted by law and subject to Marketplacer's obligation to comply with this Agreement, the Services are provided “as is” and all express or implied representations, conditions, statutory guarantees, warranties and provisions (whether based on statute, common law or otherwise) that are not expressly contained in this Agreement are excluded.

16. Liability Cap

16.1 Without limiting clause 15 and subject to clauses 16.2 and 17, Marketplacer's maximum, aggregate liability to the Operator for any Claims under, arising from, or in relation to this Agreement, regardless of form of action, whether in contract, tort (including negligence), under product liability and consumer protection legislation, under any other statute or regulation, breach of warranty or other legal or equitable grounds (including in each case negligence), is limited to:

- (a) in relation to Claims arising in respect of the Operator Data, at Marketplacer's reasonable election

- (i) reconstruction or recovery of the relevant Operator Data (or so much of it as possible in the circumstances);

- (ii) provision of a copy of the relevant Operator Data to the Operator; or

- (iii) payment to the Operator of the reasonable costs required to recover or reconstruct (but not to re-collect) the relevant Operator Data,

or a combination of the foregoing; and

- (b) in respect of other Claims, the Service Fees paid by the Operator in the 12 months leading up to the date on which the relevant Claim first accrues.

16.2 Subject only to clause 15.1, nothing in this Agreement operates to limit or exclude either

- party's liability to the other for:
- (a) death or personal injury caused by that party's negligence;
 - (b) any fraudulent or reckless conduct by the other party, or conduct that is otherwise misleading or deceptive; or
 - (c) any other liability which cannot be limited or excluded by law.
- 17. Non-excludable consumer guarantees**
- 17.1 Nothing in this Agreement excludes, restricts or modifies any condition, warranty, statutory guarantee, right or remedy implied or imposed by common law, statute or regulation which cannot be lawfully excluded, restricted or modified, which may include the *Competition and Consumer Act 2010* (Cth) and corresponding provisions of State or Territory legislation containing implied terms and/or statutory guarantees which operate to protect the purchasers of goods and services in various circumstances.
- 17.2 If any condition, statutory guarantee or warranty is implied into this Agreement or applies by operation of law (which may include the *Competition and Consumer Act 2010* (Cth) and corresponding provisions of State or Territory legislation) and cannot be excluded but Marketplacer is able to limit its liability for a breach of such condition, statutory guarantee or warranty, the liability of Marketplacer for breach of that condition, statutory guarantee or warranty is limited, to the extent permitted by law, at Marketplacer's discretion, to:
- (a) in the case of goods: the replacement or repair of goods; or the supply of equivalent goods; or the payment of the cost of replacing the goods or having the goods repaired or of acquiring equivalent goods; and
 - (b) in the case of services: the supply of the services again or the payment of the cost of having the services supplied again.
- 18. Termination and Suspension**
- 18.1 Where an Event of Default occurs in relation to a party, the other party may terminate this Agreement by notice in writing to the party in respect of whom an Event of Default has occurred, and such termination becomes effective on the date that it is served on the relevant party.
- 18.2 In addition to its rights of termination, Marketplacer may suspend the provision of the Services to the Operator if an Event of Default occurs and the Event of Default is either incapable of remedy or the Operator fails to remedy it (and provide satisfactory evidence of such remedy to Marketplacer) within 5 Business Days of receiving a notice in writing from Marketplacer party specifying the action required of the Operator to remedy the Event of
- Default.
- 18.3 After the expiry of the Initial Period, either party may terminate this Agreement by giving at least 3 months' written notice to the other and such termination will take effect from the end of that notice period. For the avoidance of doubt, Marketplacer will continue to provide the Services and the Operator will continue paying the Service Fees prior to the termination of this Agreement under this clause taking effect.
- 18.4 On termination or expiration of this Agreement for any reason:
- (a) the Operator must cease using, and Marketplacer may cease making available, the Platform, unless the parties mutually agree otherwise;
 - (b) Marketplacer will retain the Operator Data for thirty (30) days following the later of:
 - (i) the serving of the notice under clause 18.1, in the case of an Event of Default;
 - (ii) the end of the notice period, in the case of termination for convenience under clause 18.3; or
 - (iii) the payment of all outstanding Services Fees due and payable under this Agreement by the Operator;
 - (c) in addition to its other rights to retain data under this Agreement, Marketplacer may retain copies of the Operator Data to the extent required by any law, regulation or an industry code of practice or as otherwise permitted by this Agreement;
 - (d) Marketplacer will not have any further obligations to the Operator under this Agreement and is not otherwise required to provide any assistance to the Operator for the purposes of migrating or transitioning to another service, system or software unless the parties agree otherwise in writing; and
 - (e) provided that the Operator makes the request in writing within 30 days of the date of termination and on the condition that Operator warrants that its access to and processing of such data is compliant with all applicable laws, Marketplacer will provide a copy of Operator Data in Marketplacer's possession to the Operator. Marketplacer will act in good faith to provide the Operator Data within a reasonable timeframe following receipt of the request.
- 18.5 On termination or expiry of this Agreement, the Operator will pay to Marketplacer all amounts due and payable at the date of termination.

- 18.6 The parties waive any rights of termination not expressly stated in this Agreement.
- 19. Dispute Resolution**
- The parties agree that in the event of any dispute, controversy or claim arising out of or in connection with this Agreement, including any question regarding its existence, validity or termination (“**Dispute**”), a party must not commence any court or arbitration proceedings relating to the Dispute (other than for urgent injunctions or interlocutory applications) until it has issued a notice to the other party and made reasonable attempts to resolve the Dispute by negotiation of senior management. This clause 19 does not apply in relation to the payment or non-payment of Service Fees under this Agreement.
- 20. Relationship of Parties**
- 20.1 Marketplacer’s relationship with Operator is that of an independent service provider. Neither Marketplacer nor Operator will have (and will not represent that it has) any power, right or authority to bind the other, or to assume or create any obligation or responsibility, express or implied, on behalf of the other or in the other’s name.
- 20.2 Operator will not, without the prior written consent of Marketplacer, for the Term and a 6 month period after the Term, directly or indirectly solicit or offer employment or otherwise engage any employee of Marketplacer. Nothing in this clause will prevent a party from employing a person who responds to a general advertisement or recruitment agency seeking applications.
- 21. Force Majeure**
- 21.1 Notwithstanding any other provision in this Agreement, no default, delay or failure to perform on the part of any party will be considered a breach of this Agreement if such default, delay or failure to perform is shown to be due entirely to causes beyond the reasonable control of the party charged with such default, including, but not limited to a Force Majeure Event.
- 21.2 If a Force Majeure Event occurs, the time for performance required by a party under this Agreement will be extended for any period during which performance is prevented by the event.
- 21.3 If a Force Majeure Event prevents a substantial part of the Services being provided by Marketplacer to the Operator, the Operator is exempted from paying the relevant Service Fees that would otherwise be payable during the period in which that Force Majeure Event occurs.
- 21.4 Notwithstanding the above, if a delay or failure by a party to perform its obligations under this Agreement due to a Force Majeure Event exceeds 60 days, and that delay or failure prevents a substantial part of the Services from being provided by Marketplacer to the Operator, any party may immediately terminate this Agreement on providing notice to the other party, such notice to take effect 10 Business Days after the date of such notice.
- 22. Notices**
- All notices and consents required or permitted to be given under this Agreement must be in writing and given by personal service, mail (postage prepaid) or email or) to the parties at the address for notices set out in the Order Form or to such other address as either party may designate to the other by written notice.
- 23. Assignment**
- 23.1 Subject to clause 23.2, neither party may assign or otherwise transfer its rights or obligations under this Agreement without the prior written consent of the other party, such consent not to be unreasonably withheld.
- 23.2 Marketplacer may assign or otherwise transfer its rights or obligations under this Agreement to any of its Affiliates or in connection with a change in ownership without the prior written consent of the Operator.
- 24. General**
- 24.1 This Agreement may only be amended, supplemented or replaced by a document in writing signed by the parties.
- 24.2 Any failure or delay by one party to compel performance by another party of any of the terms and conditions of this Agreement does not constitute a waiver of those terms or conditions, nor does it affect or impair the right of the first party to enforce them against the other party at a later time or to pursue remedies it may have for any subsequent breach of those terms or conditions.
- 24.3 A single or partial exercise of a right by a party does not preclude another or further exercise of that right or the exercise of any other right.
- 24.4 A party may give its approval or consent conditionally or unconditionally or withhold its approval or consent in its absolute discretion unless this Agreement expressly provides otherwise.
- 24.5 This Agreement constitutes the entire agreement and supersedes all previous agreements, understandings, negotiations and representations in respect of all matters dealt with in this Agreement.
- 24.6 Any provision of this Agreement which is prohibited, unenforceable or invalid in whole or in part is only ineffective to the extent of the prohibition, unenforceability or invalidity and this does not affect the remaining part of that provision or the other provisions of this Agreement, which will continue in full force and

- effect.
- 24.7 This Agreement may be executed in one or more counterparts executed by one or more of the parties, each of which counterparts will constitute the one agreement which will be binding on all the parties when one such counterpart has been executed by each party.
- 24.8 Each indemnity in this Agreement is a continuing obligation, separate from the other obligations of a party, and survives termination of this Agreement.
- 24.9 All representations and warranties in this Agreement will survive the execution and delivery of this Agreement and the completion of the transactions contemplated by it.
- 24.10 The terms of this Agreement are governed by and construed in accordance with the laws of the State of Victoria, Australia and the parties submit to the non-exclusive jurisdiction of the Courts of Victoria, Australia.