



## CLICKWRAP SAAS AGREEMENT

## 1. AGREEMENT

- 1.1 This document contains the terms and conditions on which We grant You the right to Access and use Our SAAS Services. You must read the document from start to finish. **Only if You agree with all its terms and conditions should You Access the SAAS Services.**
- 1.2 When You click "I Agree" in the sign up process for the SAAS Services on Our Website an agreement is made between:
- (a) Us; and
  - (b) the person who clicks "I Agree", or if that person is an employee acting in the course of his/her employment, the agreement is made by, and binds, the employer of that person (the employer will be deemed to be the entity that is named as the "customer" in the Contract Details), or if that person is acting as agent for another person, the agreement binds the principal named as the "customer" in the Contract Details. The person who clicks "I Agree" and is acting in the course of his/her employment or as agent warrants to Us that he/she has authority to act on behalf of his/her employer (or the "customer", as applicable) to enter into the Agreement.

## 2. ACCESSING AND USING OUR SAAS SERVICES

- 2.1 We grant to You a non-exclusive, non-transferable, limited right to Access the SAAS Services to receive the features and benefits of the relevant SAAS Services Plan for the Time Period during the Term (and subject to any Minimum Term) for the purpose of processing Your own internal data in a production environment, subject to any other limitations of use, all as specified in the SAAS Services Plan.
- 2.2 If You wish to vary the SAAS Services, the level of SAAS Services Plan, add any components, features, benefits or service items that are offered as part of the SAAS Services that are available from Us, end a particular SAAS Service or terminate the Agreement, including all the SAAS Services, You may make the change using the SAAS Services Management Functionality within the SAAS Services. These changes will become effective on the first day of the following month unless stated otherwise in the SAAS Services Management Functionality within the SAAS Services. No refunds will be made for any SAAS Services paid for in advance when You end the SAAS Services in this way, including where You end a SAAS Services prior to the end of its Minimum Term.
- 2.3 If You do not use all of the Time Period or other components/features/benefits/service items of the SAAS Services during the relevant time set out in the SAAS Services Plan, then, unless expressly stated otherwise in the SAAS Services Plan, such component/feature/benefit/service item is forfeit with no recourse to Us.
- 2.4 You must obtain a valid licence for the Third Party Software that operates with the SAAS Services throughout the Term.
- 2.5 We have appointed a third party who We believe to be a professional and capable contractor to provide us with hosting, disaster recovery and back up service for the SAAS Services and the data entered in it, including Customer Data. The disaster recovery and back up services does not include any Third Party Software. However owing to the nature of hosting, disaster recovery and back ups We do not warrant or guarantee that:
- (a) the SAAS Services will be uninterrupted or error free;
  - (b) any data, including Customer Data will be backed up and/or recoverable by Us.
- 2.6 We may change the features, benefits or service items of any SAAS Services from time to time in Our discretion. If the changed features, benefits or service items will deprive You of more than an insubstantial benefit of the that SAAS Services then You may give Us written notice of that fact within 15 days of the change. If We receive such a notice from You and are unable to agree with You an acceptable alternative within 30 days of the date that We made the change then You may:
- (a) continue to use that SAAS Services and the changed SAAS Services will become the new SAAS Services; or
  - (b) terminate that SAAS Services at any time up 30 days after the change was made. In this case We will provide You with a pro-rata refund of any Fees that have been paid in advance for the SAAS Services that will not be provided (after deducting any monies owed by You to Us), and such payment will be Our entire liability and Your sole remedy in connection with the changed SAAS Services and/or termination.
- 2.7 You acknowledge and agree that You:
- (a) are solely responsible for the creation, posting, accuracy, updating and maintenance of any Customer Data;
  - (b) must manage, renew, create, delete, edit, maintain and otherwise control the editorial content of any Customer Data.
- 2.8 We are not responsible for any delays, delivery failures or any other loss or damage, including breach of Privacy Law, resulting from the transfer of data over communications networks (other than the Network) or facilities, including the internet, and You acknowledge and agree that the SAAS Services may be subject to limitations, delays or other problems inherent in the use of such communications.
- 2.9 During the Term:
- (a) You may notify Us of any defect that You believe is in the SAAS Services using the process set out in the SAAS Services and We will use reasonable efforts to remedy any material defects in the SAAS Services in a timely manner;
  - (b) You may acquire blocks of Support Hours in advance of their use, which You may use by contacting Us and requesting support or advice on how to use the SAAS Services. We will deduct from the Support Hours all the time that We spend addressing your request, whether that time is spent whilst We are in direct contact with You or We spend that time offline doing any resulting investigation or defect correction. Any Support Hours that are not used by the end of the Term are forfeit with no recourse to Us.
  - (c) We may implement any new version of the SAAS Services (including adding new features or removing existing features) as part of Our product roadmap, correct defects in the SAAS Services, perform maintenance, on or vary the Hosted Environment, Network, data center, other infrastructure, hardware, software (including installing updates or new releases) or other material that supports the SAAS Services in Our absolute discretion, and without liability or prior notice to You. We do not guarantee that any change, addition, deletion, error correction, patch, update or new version of the SAAS Services (or any part of it) will be

compatible with any of Your data, applications, Third Party Software, other software or interfaces that connect to or interface with the SAAS Services.

- 2.10 The Term will be renewed automatically at the end of the current Term unless You terminate the SAAS Services in accordance with clause 2.2 or We give You notice at least 7 days' notice prior to the end of the current Term that We do not wish for the SAAS Services to continue. Any renewal of the Term be for the same period of the Term as the previous period (including any Minimum Term) and will be on the terms and conditions, Fees and Taxes, descriptions of the SAAS Services in the SAAS Services Plan (or, where You are paying not using the payment process on Our Website, this information may be provided to You in a Quote at least 15 days prior to the end of the current Term. If We do not provide this information to You within that time frame, then these details will remain the same as for the current Term) and limitations of use that are applicable at the time of renewal.

### 3. RESTRICTIONS

3.1 Nothing in this Agreement permits You to:

- (a) copy, adapt, translate, publish, communicate to the public, or create any derivative work or translation of the Software or SAAS Services, unless expressly permitted by law or this Agreement;
- (b) process the data of any third party as part of any time sharing, outsourced service, shared service or other service that uses any of the SAAS Services for the benefit of any other person;
- (c) sub-license, lease, rent, loan, assign, novate or otherwise transfer any part of the Software or SAAS Services or the benefit or burden of this Agreement in whole or in part to any third party;
- (d) disclose the Software or SAAS Services to any third party other than to any of Your contractors who are bound by obligations of confidentiality which are no less restrictive than those specified in clause 8 and who are using the Software or SAAS Services solely for Your authorised use of the SAAS Services;
- (e) reverse engineer, reverse compile, de-compile or disassemble the object code of the Software or any part of the Software, or otherwise attempt to derive the source code of the Software, except to the extent the permitted by law;
- (f) remove, alter or obscure any of Our Marks, or any proprietary or restricted use notice on the Software or SAAS Services;
- (g) use the SAAS Services for the purpose of building a competitive product or SAAS Services or copying its features or user interface;
- (h) attempt to download or Access the object code or source code of the Software;
- (i) use the SAAS Services to display, store, process or otherwise use any data (in any format, and whether readable by humans or by machines, and including data that is Customer Data) that, in Our opinion:
  - i. infringes any person's Intellectual Property Rights, right to privacy, right to keep confidential information confidential, right to publicity or induces any person to breach a contract;
  - ii. is unlawful (including breaching laws relating to the wrongful distribution of email or other electronic messages "spam"), discriminatory, derogatory, defamatory, slanderous, malicious, obscene, contains child pornography or is immoral;
  - iii. contains any virus, Trojan horse or other malicious code, or is used to gain unauthorised access to, does harm to, wrongfully intercepts, expropriates, accesses or uses for any wrongful purpose, any person's hardware, software, network or data;
  - iv. wrongly identifies, or disguises, the sender or place of origin of any communication;
  - v. contains links to any other website that contains information that is of a type described in this clause (i);
- (j) exceeds "fair use" by using a disproportionate or in appropriate amount of the infrastructure or resources that are used to operate the SAAS Services;
- (k) access, monitor or copy any content of the SAAS Services using any robot, spider, scraper or automated process or manual process, or deep link or any part of Our SAAS Services;
- (l) bypass or circumvent, or attempt to bypass or circumvent any measure that is designed to limit access to any part of the SAAS Services, including any SAAS Services Management Functionality;
- (m) frame, mirror or otherwise include any part of the SAAS Services in any other website or application;
- (n) use the SAAS Services in any way that could endanger, disable, impair or compromise Our systems or security, or interfere without other users;
- (o) allow any part of the SAAS Services to become the subject of any charge, lien, encumbrance or security interest; or
- (p) deal in any other manner with any or all of Your rights and obligations under this Agreement.

3.2 You acknowledge and agree that:

- (a) the SAAS Services includes comprehensive audit and verification features, which track and record individual's use of the SAAS Services in detail;
- (b) We may inspect the usage logs, audit and verification features in the SAAS Services for the purposes of ensuring that You are complying with the terms of this Agreement; and
- (c) We may delete the relevant Customer Data and/or suspend or prevent Access to the SAAS Services if:
  - i. You breach the provisions of clause 3.1(i) or the law; or

- ii. We act in good faith to comply with Our understanding of the law as it relates to requiring Us to delete or not display or publish certain data.

#### 4. STANDARDS OF SAAS SERVICES

- 4.1 We will use all commercially reasonable efforts to ensure that the Hosted Environment on which the Software operates and the Network are Available 99.9% of each full calendar month during the SAAS Services Period, but excluding any outage arising from any Scheduled Maintenance or any outage caused or contributed to by any Reasonable Excuse.
- 4.2 We shall measure Availability over each full calendar month and will determine the calculation method for the Availability percentage and Our calculation shall bind the parties conclusively.
- 4.3 We will schedule to perform all Scheduled Maintenance 8pm-Midnight on a Sunday. We will use all commercially reasonable efforts to ensure that Scheduled Maintenance does not exceed 4 hours per calendar month.

##### Warranty against Defects

- 4.4 Where You are entitled to the benefits of the statutory guarantees under clauses 54 to 59 and/or 60 to 62 of the Australian Consumer Law, then Regulation 90 (issued under that Act) applies.
- 4.5 Accordingly, Firefly Hill Pty Ltd trading as Stall Manager provides You with the following information as is required by Regulation 90:

The services that are provided to remedy any defect in the SAAS Services are a "Warranty Against Defects" as defined in Regulation 90. These services are provided by Firefly Hill Pty Ltd trading as Stall Manager (ABN 73 607 461 656) of 395 Glengarrie Rd, Glengarrie NSW 2486, telephone number 0411 097 696, email address info@stallmanager.com.

In order to make use of this service You must contact Us using the email address on Our Website that is designated for contacting Us.

When You make use of these services, We will use Our commercially reasonable efforts to provide a remedy or a workaround for any defect in the SAAS Services in a time period that reflects the impact on Your business.

The costs for this service is included within the Fees stated in this Agreement. No additional fees are payable by You for this service. You are responsible for any expenses You incur in using this service.

***"Our goods come with guarantees that cannot be excluded under the Australian Consumer Law. You are entitled to a replacement or refund for a major failure and for compensation for any other reasonably foreseeable loss or damage. You are also entitled to have the goods repaired or replaced if the goods fail to be of acceptable quality and the failure does not amount to a major failure."***

The benefits that we provide to consumers under Our Warranty Against Defects are in addition to any other rights or remedies a consumer may have in respect of these goods or services under the Australian Consumer Law.

- 4.6 Where You are entitled to a statutory guarantee under clauses 54 to 59 of the Australian Consumer Law then to the extent that We fail to comply with such guarantee, Our liability for a failure to comply with such statutory guarantee is limited to one or more of the following, at Our option:
  - (a) the replacement of the goods or the supply of equivalent goods;
  - (b) the repair of the goods;
  - (c) the payment of the cost of replacing the goods or of acquiring equivalent goods;
  - (d) the payment of the cost of having the goods repaired,unless it is not fair or reasonable for Us to rely on this term of the Agreement.
- 4.7 Where You are entitled to a statutory guarantee under clauses 60 to 62 of the Australian Consumer Law then to the extent that We fail to comply with such statutory guarantee, Our liability for a failure to comply with such statutory guarantee is limited to one of the following, at Our option:
  - (a) supplying the services again; or
  - (b) payment of the cost of having the services supplied again,unless it is not fair or reasonable for Us to rely on this term of the Agreement.

#### 5. FEES AND TAXES

- 5.1 Where We provide you with a Quote for the SAAS Services then:
  - (a) You must pay Us the Fees and related Taxes on the Quote, within 7 days of receipt of a tax invoice for such Fees and related Taxes. We will issue You with a tax invoice for the SAAS Services promptly after the start of each period of the Term.
  - (b) Where You renew the Term, We will send You a tax invoice for the new Term promptly after the first day of the renewed Term and You must pay Us the Fees and related Taxes for the renewed Term, within 7 days of receipt of a tax invoice for such Fees and related Taxes.
- 5.2 Where Our Fees are charged based on a Time Period or other components/features/benefits/service items of the SAAS Services then at the end of each month. We will calculate the Fees due based on Your usage of the SAAS Services and:
  - (a) where You are paying Us without using the process on Our Website, We will issue You with a tax invoice for such usage charges immediately after the end of the month to which the charge relates, and You must pay us the Fees and related Taxes within 7 days of receipt;

- (b) where We enable You to pay using the process on Our Website, You must immediately pay Us (or We may deduct from Your Approved Card,) the Fees and related Taxes due for such usage charges.
- 5.3 Where You wish to acquire blocks of Support Hours, then:
- (a) where You are paying Us without using the process on Our Website, We will issue You with a tax invoice for the Support Hours prior to the start of the month in which the Support Hours are to be made available to You, and You must pay us the Fees and related Taxes within 7 days of receipt;
- (b) where We enable You to pay using the process on Our Website, You must immediately pay Us (or We may deduct from Your Approved Card,) the Fees and related Taxes for the Support Hours.
- 5.4 Where We enable You to pay using the process on Our Website then You must pay Us the Fees and related Taxes by Approved Card, in the currency stated on the Website, in accordance with the payment process on the Website. We will issue You with an invoice/receipt at the time of payment/receipt.
- 5.5 We may change the Fees for any SAAS Services at any time by giving at least 30 days prior written notice. The updated Fees will apply to the relevant SAAS Services from the beginning of the next calendar month or from the end of any Minimum Term, whichever is the later.
- 5.6 All amounts that are payable under this Agreement by You are non-cancellable and non-refundable and must be paid without set off or deduction.
- 5.7 In addition to the Fees payable in accordance with the Agreement, You must pay to Us an additional amount equal to the GST that is payable on the supply (GST Amount), such GST amount must be paid at the same time as the relevant Fees.
- 5.8 If a party has to reimburse or indemnify another party for a loss, cost or expense, the amount to be reimbursed or indemnified is reduced by any input tax credit the other party is entitled to for the loss, cost or expense, and then increased in accordance with clause 5.7.
- 5.9 If the GST payable by You on any supply arising out of or in connection with the Agreement varies from the GST Amount paid or payable by You under clause 5.7 such that the further amount of GST is payable in relation to the supply or a refund or credit of GST is obtained in relation to the supply, then You will provide a corresponding refund or credit to, or will be entitled to receive the amount of that variation from You.
- 5.10 Any payment, credit or refund under clause 5.9 is deemed to be a payment, credit or refund of the GST Amount payable under clause 5.7.
- 5.11 You must pay a late charge for any failure to make any payment by the date required under the Agreement, calculated daily using a rate that is 0% over the Reserve Bank of Australia's Cash Rate, from the date that the payment first becomes overdue, to the date that the payment is received by Us, both dates inclusive.
- 5.12 Where the Fees, expenses and Taxes are denominated in a currency other than the currency that is used as the default currency of Your Approved Card (i.e. Your Approved Card is not issued in the country which uses the currency of payment), You agree:
- (a) to pay any charge from the provider of the Approved Card for an international transaction;
- (b) to use the exchange rate used by the provider of the Approved Card for the conversion of the Fees, Taxes or other amounts payable under this Agreement into the currency We use;
- (c) that the net amount that is to be received by Us must always be the Fees, Taxes and other amounts that are dominated in the local currency specified in this Agreement or on the Website (as applicable).
- 5.13 You irrevocably authorise Us to deduct from any Approved Card that You have used to pay any amount under this Agreement or for which You have provided the details to Us, any:
- (a) Fees and Taxes that are due under this Agreement;
- (b) charge backs or fees, including any related Taxes, incurred by Us for any failed transaction from the Approved Card, as well as Our then current administration fee for dealing with any failure to receive payment; and
- (c) amount payable as damages, losses or expenses, or any amount payable under an indemnity, arising out of or in connection with this Agreement.
- 5.14 If there is any failure to make payment by the Approved Card by the due date for any reason, including that the Approved Card ceases to be valid, ceases to be authorised for debiting any amount stated in this Agreement or there is insufficient funds in the relevant account, then You must within 7 days:
- (a) provide an alternative Approved Card and authorise all amounts due to be deducted from that Approved Card; and/or
- (b) make payment of all amounts due by another payment method agreed with Us.

## 6. TRADE MARKS

- 6.1 You acknowledge and agree that We are the owner and/or licensor of Our Marks and that all goodwill arising out of Your use of Our Marks under this Agreement shall inure to Us. You will not acquire any right to, or interest in, any of Our Marks. You must not at any time or in any way indicate Your ownership of, or any right in, Our Marks and You must not contest the right of Us or any of Our Affiliates to the use of any of Our Marks.
- 6.2 You agree to allow reference to You and Our relationship under the Agreement in Our marketing presentations, marketing materials, lists of customers and websites, as well as in discussion with prospective resellers and customers, and industry/financial analysts. We

may use Your logos and trade marks in connection with such materials and websites, with Your prior written consent, such consent not to be unreasonably withheld.

## 7. PROPRIETARY RIGHTS

- 7.1 As between You and Us, You own all Customer Data.
- 7.2 You grant Us, Our Affiliates and their respective contractors the right to use, copy, modify and otherwise deal with any Customer Data in so far as is necessary, convenient or desirable for Us to perform Our obligations, or exercise Our rights, under this Agreement or for Us to meet any obligation under the law.
- 7.3 All Intellectual Property Rights that are created by any person that are adaptations, translations and derivative works in the Software or SAAS Services are and shall remain the exclusive property of Us (and Our licensors, if any) or shall vest in or be transferred to Us immediately upon creation, as the case may be.
- 7.4 Except for the rights expressly granted by Us to You under this Agreement:
- (a) We and Our licensors, if any, reserve all right, title and interest in or to the Software or SAAS Services and all Intellectual Property Rights in them;
  - (b) no right, title or ownership interest in or to the Software or SAAS Services, whether by implication, estoppel or otherwise, is granted, assigned or transferred to You under or in connection with this Agreement.
- 7.5 You acknowledge and agree that the unauthorised disclosure, use, reproduction or copying of the Software and/or SAAS Services may cause Us serious financial loss that may not be adequately compensated by monetary damages. Accordingly, in the event of any unauthorised disclosure, use, reproduction or copying of the Software and/or SAAS Services You agree that We shall have the right to seek injunctive relief to stop such unauthorised disclosure, use or copying.
- 7.6 If You provide Us with any feedback, comments or suggestions relating to the Our products or SAAS Services (**Feedback**), You grant Us an irrevocable, non-cancellable, worldwide, royalty-free, license to use, copy, adapt, translate, create derivative works from, sub-license or otherwise exploit in any way (including without hindrance, restriction or subject to any exercise of any person's moral rights) that Feedback for any purpose, including to assist Us to develop or improve current products or SAAS Services or to assist Us develop or improve future products and services.

## 8. CONFIDENTIAL INFORMATION AND PRIVACY

### Confidential Information

- 8.1 The Recipient must not use any of the Discloser's Confidential Information except in connection with the performance of its obligations specified in this Agreement.
- 8.2 The Recipient must not disclose the Discloser's Confidential Information to any third party without obtaining the Discloser's prior written consent, provided that the Recipient may disclose the Discloser's Confidential Information to:
- (a) its employees, agents and contractors, and those of any of its Affiliates, who have entered into a written agreement with the Recipient that is no less protective of the Discloser's Confidential Information than this Agreement provided those persons have a need to know such information for the purposes of this Agreement;
  - (b) its lawyers, bankers, auditors, accountants and insurers, who have a need to know the information in order to provide professional advice to the Discloser relating to this Agreement.
- 8.3 You must ensure that each person who is issued with a password to access the SAAS Services does not disclose their password to any other person.
- 8.4 The Recipient must use, and must ensure that any person to whom it is permitted by this Agreement to disclose the Discloser's Confidential Information to uses, the same measures to protect the Discloser's Confidential Information as it uses to protect its own confidential information, but in no event less than reasonable measures.
- 8.5 The restrictions of this clause 8 shall not apply to information that:
- (a) is independently developed by the Recipient without any access to the Confidential Information of the Discloser;
  - (b) becomes known to the Recipient without restriction, from a third party who, to the Recipient's knowledge, was not bound by a confidentiality agreement with the Discloser, or otherwise prohibited from disclosing the information to the Recipient, or had the right to disclose it;
  - (c) was available to the Recipient on a non-confidential basis prior to disclosure by the Discloser;
  - (d) was lawfully in the possession of the Recipient before the information was disclosed to it by the Discloser;
  - (e) is or becomes in the public domain through no act or omission of the Recipient;
  - (f) the parties agree in writing is not confidential or may be disclosed; or
  - (g) is required to be disclosed under an order or requirement of a court, administrative agency, or other governmental body (but only to the minimum extent required to comply), provided however, that Recipient shall provide prompt notice to Discloser of any potential disclosure and shall use its reasonable efforts to prevent disclosure of such information.



## Privacy

- 8.6 Each party must:
- (a) comply with the requirements of any Privacy Law in the state, territory or country in which the party (and/or the individual about whom the Personal Information relates) is located, and in any state, territory or country to which the Personal Information is to be sent;
  - (b) only use, manipulate, store, process and handle Personal Information for the purposes of performing its obligations, or exercising its rights, under this Agreement or as may be required by law;
  - (c) take all reasonable steps to:
    - i. ensure that the Personal Information that it holds is accurate, up to date and complete;
    - ii. protect the Personal information from misuse, interference, loss, damage, unauthorised access, modification or disclosure, unlawful use or processing, including by taking appropriate technical and organisational measures;
  - (d) promptly delete Personal Information that is no longer required for a permitted purpose under this Agreement or the law;
  - (e) allow the individual about whom Personal Information is kept to obtain access to that Personal Information, inspect it and ensure that it is kept accurate and up to date (including requiring errors to be corrected), at no cost to the individual;
  - (f) ensure that at the time the party collects Personal Information from the individual, that the party has that individual's consent to the parties' collection, use, manipulation, storage, processing, handling and transfer interstate and/or overseas of the Personal Information for any purposes that are reasonably contemplated by this Agreement.
- 8.7 You warrant to Us that You have obtained the express informed consent from each individual about whom We will obtain Personal Information from You in connection with this Agreement (including Your employees, contractors and customers) for Us, Our Representatives and their permitted successors, assignees and sub-licensees to use that individual's Personal Information in any manner that may be reasonably contemplated by this Agreement and/or as stated in Our privacy policy (as available on Our Website), including a transfer interstate and/or overseas to the countries stated in the privacy policy.
- 8.8 You consent to:
- (a) Us obtaining from a credit reporting agency, or any person You authorise Us to contact, any of Your personal or corporate information, including information relating to creditworthiness, credit standing, credit history or credit capacity (**Credit Information**), for the purposes of assessing Your creditworthiness and/or deciding whether to grant or continue to provide credit approval to You; and
  - (b) the provision by Us of any of Your personal or corporate information, including Credit Information and any information concerning the status of Your account or any default, to a credit reporting agency, credit provider or person You authorise Us to contact, in connection with Our use of the credit reporting agency's services, on the understanding that such information may be held by the credit reporting agency to provide its/their credit reporting services (including the provision of such services to other customers of the credit reporting agency). You consent to Us being given a consumer credit report to collect overdue payment on commercial credit.

## 9. LIMITATION OF LIABILITY

- 9.1 For any claim that is not provided for in clauses 4.6 or 4.7, then to the extent permitted by law, and subject to clause 9.1, Our liability to You for any claim whether it be in contract (including under an indemnity), tort (including negligence), breach of statutory duty or otherwise, arising out of or in connection with Agreement shall be limited to the greater of:
- (a) \$1,000; or
  - (b) the Fees paid for the SAAS Services in the month prior to the date that the claim first arose.
- 9.2 We are not liable for any loss, damage or expense which is:
- (a) lost profits, lost revenue, failure to realise expected savings, lost or damaged data or business interruption or loss of goodwill; or
  - (b) indirect, consequential, special, punitive or exemplary, even if We have been advised of, knows of, or should have known of the possibility of such loss, damage or expense.
- 9.3 You acknowledge and agree that owing to the nature of the Software and SAAS Services, We do not represent or warrant that:
- (a) the Software or SAAS Services will meet Your or any users' particular needs or purposes;
  - (b) the Software or SAAS Services will be fit for any particular purpose or be of merchantable quality;
  - (c) the quality, accuracy, features, functions, benefits or availability of any Third Party Software;
  - (d) the Software will be, or remain compatible with, any Third Party Software;
  - (e) Access to the Software or SAAS Services will be continuously available; or
  - (f) the Software or SAAS Services will be error free.

- 9.4 You must indemnify Us, Our Affiliates and all their respective contractors and pay any loss, damage or expense (including reasonable lawyers' fees) suffered or incurred by any of them arising out of or in connection with:
- (a) breach of any of the provisions in clauses 2.1, 2.3, 3.1, any clause that provides You with an obligation to make payment to Us, 12.5 or 12.6;
  - (b) any action taken by Us in connection with clause 3.2(c),
- except to the extent that the loss, damage or expense was directly caused by Our breach of contract or negligence.

## 10. INTELLECTUAL PROPERTY RIGHT INDEMNIFICATION

- 10.1 In addition to any rights You may have under the Australian Consumer Law, We undertake at Our own expense to indemnify and defend You or, at Our option, settle any claim or action brought against You alleging that the use of the Software and/or SAAS Services in accordance with this Agreement infringes any Intellectual Property Right that is enforceable in Australia (an "**Infringement Claim**") and shall be responsible for any losses, damages, expenses or costs (including reasonable lawyers' fees) incurred by, or awarded against You as the result of, or in connection with, any such Infringement Claim, provided that:
- (a) You promptly notify Us of the Infringement Claim in writing, specifying the nature of the claim in reasonable detail and providing access to, and copies of, documents, software any other material, that are relevant to the Infringement Claim, as well as providing prompt access to any Representative who may be relevant to Our defence of the Infringement Claim;
  - (b) You do not make any admission of liability, agreement or compromise in relation to the Infringement Claim without Our prior written consent;
  - (c) You grant Us the sole right to defend, negotiate and settle the Infringement Claim, at Our expense;
  - (d) You provide Us with reasonable assistance, at Our expense, to defend, negotiate and settle the Infringement Claim.
- 10.2 We will have no obligation under this clause 10 or otherwise with respect to any Infringement Claim based upon:
- (a) any use of the Software or SAAS Services not in accordance with this Agreement or documentation provided by Us;
  - (b) the combination, operation or use of the Software, or SAAS Services with any other product, equipment, business method, software (including any Third Party Software) or data; or
  - (c) any modification of the Software or SAAS Services by any person other than Us or Our authorised agents or contractors.
- 10.3 If an Infringement Claim is made based on one of the exclusions in clause 10.2, You must indemnify Us and pay for all losses, damages, expenses or costs (including reasonable lawyers' fees) We suffer or incur arising out of or in connection with such an Infringement Claim.
- 10.4 If any Infringement Claim is made, or in Our opinion is likely to be made, then We may (at Our sole option and expense) either:
- (a) procure for You the right to continue using the affected Software or SAAS Services or substantially similar software or service that does not substantially affect the functionality or features of the Software or SAAS Services in accordance with this Agreement;
  - (b) replace or modify the affected Software or SAAS Services so that it becomes non-infringing but performs substantially the same functions or has the same features; or
  - (c) if neither (a) or (b) is commercially reasonable, as determined in Our discretion, then We may terminate Your rights to use the affected Software or SAAS Services and pay damages of the greater of (1) \$1,000 or (2) an amount equal to the Fees that You paid for the relevant SAAS Services in the month prior to the date that the claim first arose.
- 10.5 To the extent permitted by law, this clause 10 states Our entire liability and Your sole and exclusive remedy for any claims related to any infringement of the Intellectual Property Rights in respect of the Software or SAAS Services.

## 11. TERMINATION

- 11.1 We may immediately terminate this Agreement and/or suspend Access to the SAAS Services by giving You written notice if:
- (a) You breach any of the provisions of clauses 2.1, 2.3, 3, 6.1, 7.3, 8, 12.5 and 12.6;
  - (b) You breach any other provision of the Agreement and You do not remedy it within 7 days of Us providing You written notice of the breach;
  - (c) if You are a company, You cease to carry on business, are unable to pay Your debts as they fall due, enter into liquidation or has a controller, managing controller, liquidator or administrator appointed or suffers any similar event in any jurisdiction;
  - (d) if You are a partnership, You have the partnership dissolved or wound up (or a similar event occurs to You in Your jurisdiction); or
  - (e) You merge with another entity, sell substantially all of Your assets or You are subject to a change of control. A "change of control" shall be deemed to occur when an entity acquires fifty percent (50%) or more of Your voting shares or equity interest or fifty percent (50%) or more of Your assets, in the event of a change of a majority of Your Board of Directors (or majority of the partners if a partnership) or if there is any other effective change of control.
- 11.2 In addition to Your right to terminate the Agreement for convenience as set out in the clause 2.2., You may immediately terminate this Agreement for cause by giving Us written notice if We:



- (a) breach any provision of this Agreement and We do not remedy it within 30 days of You providing Us written notice of the breach; or
  - (b) cease to carry on business, are unable to pay Our debts as they fall due, enter into liquidation or has a controller, managing controller, liquidator or administrator appointed.
- 11.3 You may also terminate this Agreement in accordance with any rights You may have under the Australian Consumer Law.
- 11.4 If this Agreement terminates:
- (a) any right to Access and use the SAAS Services terminates immediately;
  - (b) any unpaid instalments or periodic payments must be paid immediately;
  - (c) each party must immediately return to the other (or at the other party's request destroy) any of the other's Confidential Information.
- 11.5 You are solely responsible for ensuring that You have extracted any of Your information, including Customer Data that is in the SAAS Services prior to the end of the Term. If You provide Us with written notice requesting a copy of your Customer Data within 7 days of the end of the Term, then subject to:
- (a) You pay the then current Fees for such service; and
  - (b) You paying all monies that are owing under this Agreement,
- We will provide You with a copy of whatever Customer Data that can readily be extracted from the SAAS Service, and provide that data to You in csv format.
- 11.6 We may, but are under no obligation to, delete all Your information, including Customer Data that is in the SAAS Services at any time after 7 days after the end of the Term.
- 11.7 Any termination of this Agreement shall not prejudice, limit or restrict any other rights or remedies either party may have arising prior to such termination. To the extent permitted by law, We shall be under no obligation to refund any amounts paid by You for any of the SAAS Services that have been provided or performed prior to any termination of this Agreement.
- 11.8 We may use technological means to enforce this Agreement, including suspending Access to the SAAS Services.

## 12. GENERAL

### Notices

- 12.1 Any notice that is given under this Agreement:
- (a) by Us; may be:
    - i. posted using pre-paid priority letter post to You at any address that You have provided Us for sending any invoice or Your registered office;
    - ii. emailed to You at any email address provided by You;
    - iii. posted on the Website; or
    - iv. included on any invoice (which may be emailed or posted to You);
  - (b) by You; must be posted to Us using pre-paid priority letter at the address stated on the Our Website as Our global head office and addressed to the Chief Executive Officer.
- 12.2 A notice is deemed to be received:
- (a) when posted from Australia to an address in Australia using pre-paid priority letter; within 5 Business Days after the date when it was posted;
  - (b) when posted with pre-paid post internationally, within 7 Business Days of the date when it was posted;
  - (c) when emailed; within 1 Business Day of the time that the email was sent, provided no notice of failure has been received by the sender within that Business Day; or
  - (d) within 10 days of being posted on the Website. You are responsible for ensuring that You check Our Website regularly to see any notice that is posted there.
- 12.3 You may send Us any notice relating to a claim under the Australian Consumer Law in accordance with the Australian Consumer Law.

### Relationship of Parties

- 12.4 The parties to this Agreement are independent contractors. Nothing in this Agreement shall be deemed to create an employment, association, partnership, fiduciary or joint venture relationship between the parties, constitute any party the agent of another party, nor authorise any party to make or enter into any commitments for or on behalf of any other party. Except as expressly stated in this Agreement, neither party is authorised to act as the legal agent of the other.

### Compliance with Laws

- 12.5 You must comply with all laws which are relevant to You performing its obligations under this Agreement.

### Assignment

- 12.6 You must not assign or transfer this Agreement or any rights or obligations under this Agreement, in whole or part, without Our prior written consent.
- 12.7 We may assign or transfer this Agreement, in whole or part, without Your consent. This Agreement will bind and inure to the benefit of each party's permitted successors and assigns. Notwithstanding clause 8, We may disclose any of Your Confidential Information or Personal Information which is reasonably necessary to affect any assignment or transfer.

### Waiver

- 12.8 No failure or delay by a party to exercise any right or remedy provided under this Agreement or by law shall constitute a waiver of that or any other right or remedy, nor shall it preclude or restrict the further exercise of that or any other right or remedy. No single or partial exercise of such right or remedy shall preclude or restrict the further exercise of that or any other right or remedy.

### Remedies

- 12.9 Except as specifically provided otherwise in this Agreement, the rights and remedies provided under this Agreement are cumulative and in addition to, and not exclusive of, any rights or remedies provided by law.

### Severability

- 12.10 If any part of this Agreement is determined to be invalid, illegal or unenforceable by any court or competent authority, such part will be severed from the remainder of the Agreement and the remaining provisions will continue in force.
- 12.11 If any invalid, unenforceable or illegal provision of this Agreement would be valid, enforceable and legal if some part of it were deleted, the provision shall apply with the minimum modification necessary to make it legal, valid and enforceable.

### Force Majeure

- 12.12 Except for Your obligations to pay Us under this Agreement, neither party shall be in breach of this Agreement nor liable to the other party for any failure or delay in performance caused by events beyond its reasonable control.

### Agreement

- 12.13 Subject to clauses 2.2 and 2.10, this Agreement, or any part of it, may be varied by the parties agreeing to the Variation in writing (and the Variation will be binding when both parties have signed the Variation).
- 12.14 The parties are entitled to rely on any notice or communication in electronic format, including any facsimile or email, that on its face appears authentic, and that has the purported author's name on it to the same extent as if it were a document written by the author. The parties consent to this Agreement being signed or varied through electronic communication.
- 12.15 To the extent permitted by law this Agreement constitutes the entire agreement between the parties regarding the subject matter and supersedes all prior or contemporaneous agreements, arrangements, understandings and communications, whether written or oral.
- 12.16 All clauses which naturally survive termination of the Agreement will survive termination of this Agreement.

### Export

- 12.17 You acknowledge and agree that the Software may be subject to applicable export and import laws. You agree not to export the Software or any direct product thereof, directly or indirectly in violation of these laws, nor will they be used for any purpose prohibited by these laws, including nuclear, chemical or biological weapons proliferation.

### Governing Law

- 12.18 This Agreement will be governed by the laws of NSW, without regard to its conflict of law principles. The parties submit to the exclusive jurisdiction of the court in NSW, Australia.

## 13. DEFINITIONS

In this Agreement the following capitalised words have the following meaning given to them, unless the context requires otherwise.

- 13.1 **Access** means obtaining access to the SAAS Services via the internet.
- 13.2 **Agreement** means the terms and conditions in this document and the Contract Details and the SAAS Services Plan completed or selected by You when You sign up for the SAAS Services on Our Website, as may be amended from time to time, and if a Quote has been provided, the details stated on the Quote. To the extent that there is a conflict between the terms and conditions set out on a Quote and the terms and conditions set out on Our Website, the former shall prevail.
- 13.3 **Affiliate** means any entity that is under the effective control of the entity that ultimately has effective control of the first-mentioned entity.
- 13.4 **Approved Card** means any Visa, MasterCard, debit card, charge card or other payment mechanism that We support from time to time as an acceptable payment method.
- 13.5 **Australian Consumer Law** means the *Competition and Consumer Act 2010* (Cth).
- 13.6 **Availability (and Available)** means any period when the Hosted Environment on which the Software is running and the Network are operating in accordance with the manufacturer's or supplier's documentation.
- 13.7 **Business Day** means any weekday that is not a public holiday in NSW.
- 13.8 **Confidential Information** means any non-trivial information however recorded, preserved, disclosed or communicated (whether directly, indirectly, orally or by writing), disclosed by either party or its Representatives to the other party or its Representatives in connection with this Agreement that, if disclosed in writing is marked as "Confidential" or "Proprietary," or, if disclosed orally is identified as "Confidential"

or "Proprietary" at the time of disclosure and is specifically identified as confidential in a written document provided by Discloser to Recipient within thirty (30) days after the oral disclosure, or which is, or ought to have been, understood by the parties, using reasonable business judgment, to be confidential.

- 13.9 **Contract Details** means Your identity, the identity of Your employer, billing details and other details that are selected or completed by You at the time when You complete the sign on process to the SAAS Services on the Website or at the time that You make a change using the SAAS Services Management Functionality.
- 13.10 **Customer Data** means any software, materials, code, data, text (whether or not perceptible by users), metatags, multimedia information (including sound, data, audio, video, graphics, photographs, or artwork), e-mail, chat room content, bulletin board postings, or any other items or materials that are provided by or otherwise permitted by, You to be entered in, or processed by, the SAAS Services (including data accessed from or in connection with Third Party Software).
- 13.11 **Discloser** means the party that makes a disclosure of Confidential Information.
- 13.12 **Fees** means the amount payable for the SAAS Services, including any features, benefits or other service items set out in the SAAS Services Plan, as well as any Fees for using an Approved Payment Mechanism, exclusive of Taxes, as specified on the Website.
- 13.13 **Hosted Environment** means the server and/or processing capacity operating system software, database and other equipment provided as part of the Hosted Environment, (whether using shared, virtual or dedicated software and/or equipment) on which the Software operates.
- 13.14 **Intellectual Property Rights** means copyright, moral rights, trade mark, design rights, service marks, patent, semiconductor or circuit layout rights, trade secrets, know-how, database rights or other rights in the nature of intellectual property rights (whether registered or unregistered), or any right to registration of such rights, existing in anywhere in the world, or protected by statute from time to time.
- 13.15 **Minimum Term** means the minimum period for which You must pay to Access and use the relevant SAAS Services, feature, benefit or service item.
- 13.16 **Network** means the telecommunications network comprised of equipment, wiring and circuits within and between the network backbone nodes (points of presence) and the servers in the Hosted Environment. The term Network does not include any:
- (a) circuits to a backbone node, customer premises or any network or equipment not owned or controlled by Us; or
  - (b) third party networks or equipment not owned or maintained by Us, including connections to peer networks and the internet.
- 13.17 **Online Help Documentation** means the documentation related to the SAAS Services that is available online as part of the SAAS Services, which We may change from time to time, in Our discretion.
- 13.18 **Our Marks** means all trade marks, service marks, logos or other words or symbols identifying the Software, SAAS Services or Our business.
- 13.19 **Personal Information** means any information or data that is subject to any Privacy Law.
- 13.20 **Privacy Law** means any law, regulation or common law which governs the use of information that is about, identifies or can be used to identify, any identifiable individual, or which is generally understood in the relevant jurisdiction to protect an individual's privacy and/or to govern the collection, use, disclosure or transmission of Personal Information or data.
- 13.21 **Quote** means a document issued by Us that sets out the Contract Details, the Term (including any Minimum Term), any limitations of use, the Fees, including the metric used to calculate the Fees, related Taxes, and the SAAS Services Plan that You may acquire when You:
- (a) use the process on the Website to order our SAAS Services, and enter into this Agreement;
  - (b) renew the SAAS Services for a further Term.
- 13.22 **Reasonable Excuse** means:
- (a) a failure or degradation of performance or malfunction resulting from scripts, data, applications, equipment, infrastructure, software, penetration testing, performance testing, or monitoring agents directed or provided or performed by You;
  - (b) planned outages, Scheduled Maintenance or announced maintenance or maintenance windows, or outages initiated by Us at the request or direction of You for maintenance, activation of configurations, backups or other purposes that require the service to be temporarily taken offline;
  - (c) unavailability of management, auxiliary or administration services, including administration tools, reporting services, utilities, or other services supporting core transaction processing;
  - (d) outages occurring as a result of any actions or omissions taken by Us at the request or direction of You;
  - (e) outages resulting from Your equipment, third party equipment or the data center infrastructure (including the data centers' network connections to Our Network) not within Our sole control;
  - (f) events resulting from an interruption or shut down of the services due to circumstances reasonably believed by Us to be a significant threat to the normal operation of the services, the operating infrastructure, the data center from which the services are provided, access to, or the integrity of Customer Data (e.g., a hacker or a virus attack);
  - (g) outages due to system administration, commands, or file transfers performed by Your users or representatives;
  - (h) outages due to denial of service attacks, natural disasters, changes resulting from government, political, or other regulatory actions or court orders, strikes or labor disputes, acts of civil disobedience, acts of war, acts against parties (including carriers and Our other vendors) and other force majeure events;

- (i) inability to access the services or outages caused by Your conduct, including negligence or breach of Your obligations under the Agreement, or by other circumstances outside of Our control;
- (j) lack of availability or untimely response time of You to respond to incidents that require Your participation for source identification and/or resolution, including meeting Your responsibilities for any services;
- (k) outages caused by failures or fluctuations in electrical, connectivity, network or telecommunications equipment or lines due to Your conduct or circumstances outside of Our control.

- 13.23 **Recipient** means the party that receives a disclosure of Confidential Information.
- 13.24 **Representatives** means the employees, agents, contractors of a party, or those of any Affiliate, and the professional representatives of a party providing advice in relation to the Agreement, including the lawyers, bankers, auditors, accountants and insurers of a party.
- 13.25 **SAAS Services** means:
- (a) being granted Access to the Software specified on the SAAS Services Plan, and any new version of the Software that may be implemented into the SAAS Services by Us, in Our discretion and related Online Help Documentation, from the Hosted Environment via the Network (but excludes the internet and any data center facility networking that connects the end users' device to Our Network);
  - (b) the provision of the website through which You Access the SAAS Services via the internet;
  - (c) any other feature, benefit or service item that is specified in the SAAS Services Plan.
- 13.26 **SAAS Services Plan** means the description of the SAAS Services, the SAAS Services levels, the features, benefits or other service items, the Term, the Minimum Term (if any), any limitations of use, the Fees, including the metric used to calculate the Fees, related Taxes, and other details that are selected or completed by You at the time when You complete the sign on process to the SAAS Services on the Website or at the time that You make a change using the SAAS Services Management Functionality.
- 13.27 **Scheduled Maintenance** means the routine maintenance for the Software, Network and Hosted Environment that is recommended by the manufacturer or supplier of the Hosted Environment, Network or data center facility to prevent failures or defects, and includes any Software updates or new releases, and any updates, new releases, engineering changes or replacement/substitutions to any part of the Hosted Environment, Network or data center facility.
- 13.28 **Software** means the object code version of Our software program (including the Online Help Documentation) that is part of the SAAS Services, and any update and new release that may be made available by Us in Our discretion. The term **Software** does not include any Third Party Software.
- 13.29 **Taxes** includes goods and services taxes, sales taxes, duties, withholding taxes, levies, imposts, charges or duties levied by any federal, state or local government which arise out of or in connection with the Software, SAAS Services or this Agreement, and any interest, penalties or liabilities incurred on such amounts, but excludes taxes based on Our net income.
- 13.30 **Term** means the period for which You have acquired the right to Access the SAAS Services, which shall be a month unless specified otherwise in the SAAS Services Plan. The Term may be renewed in accordance with clause 2.10.
- 13.31 **Third Party Software** means software that is owned by any person other than Us or Our Affiliates and with which the SAAS Services is designed to integrate with, as well as any data that is stored in or processed by the Third Party Software which is accessed or used in any way by the SAAS Services, and the details of which are set out in the Online Help Documentation.
- 13.32 **Time Period** means the maximum number of minutes/hours/calendar days/24 hour periods or other time based metric set out in the SAAS Services Plan for which You are entitled to Access the relevant SAAS Services, feature, benefit or service item.
- 13.33 **Variation** means any addition, deletion or substitution to any part of this Agreement that is made in accordance with this Agreement.
- 13.34 **You** (and other grammatical forms of You) means the entity referred to in clause 1.2(b).
- 13.35 **We, Us, Our** means Firefly Hill Pty Ltd trading as Stall Manager.
- 13.36 **Website** means Our website, currently at <https://stallmanager.com.au>.