



# Acorn PLMS

# Terms & Conditions

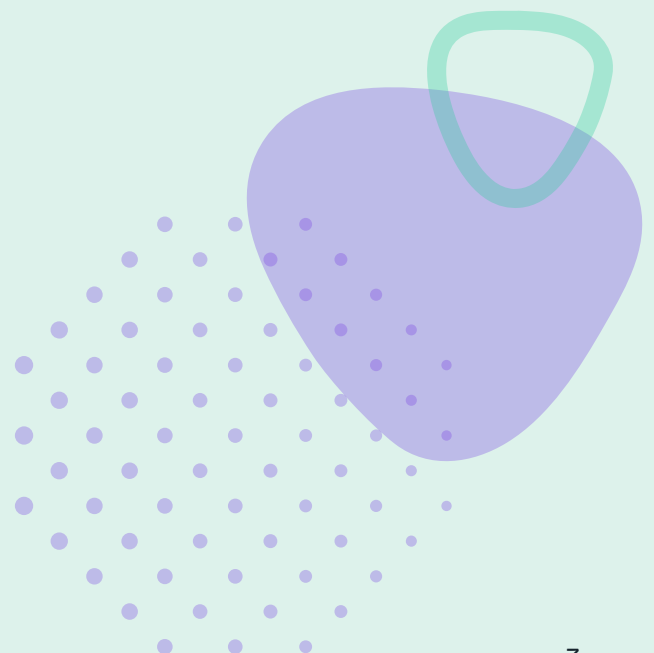
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# Background

- a. Acorn PLMS has developed and owns the Software.
- b. Acorn PLMS has agreed to grant a non-exclusive, non-transferable licence to the Client for the use of the Software and has agreed to provide the Services to the Client.
- c. The Client has agreed to accept a non-exclusive, non-transferable licence for the use of the Software from Acorn PLMS and to accept the Services from Acorn PLMS.
- d. The Parties agree that the Client will make available the Software for use by the End Users as a learning management tool, on the terms of this Agreement and with such use to be monitored by the Client.



# Agreed Terms

## It is hereby agreed:

### 1. DEFINITIONS & INTERPRETATION

1. In this Agreement the following definitions apply, unless the context otherwise requires:
  - 1.1. **“Administrator”** means the persons who are nominated by the Client as administrators of the Acorn Performance Learning Management System who supervise the use of the Acorn Performance Learning Management System by the End Users, and there will be no more Administrators than the number specified in **Item 5** of Schedule 1;
  - 1.2. **“Accompanying Software”** includes Windows operating system, backup software, internet access and network administration software;
  - 1.3. **“Acorn Performance Learning Management System”** means the performance learning management system known as the Acorn Performance Learning Management System, developed by Acorn PLMS;
  - 1.4. **“Active User”** means user who interacts with the Acorn system within a given calendar month. An interaction is initiated when a user logs into the system or if the system interacts with the user through external notifications, such as due date and refresher workflows.
  - 1.5. **“Agreement”** means this licensing and software agreement and includes any Schedules;
  - 1.6. **“Business Day”** means a day other than a Saturday, Sunday, bank holiday or public holiday in the Australian Capital Territory;
  - 1.7. **“Business Hours”** means between 8:30am and 5:30pm Australian Eastern Standard Time on a Business Day;
  - 1.8. **“Commencement Date”** means the commencement date specified in **Item 1** of Schedule 1;
  - 1.9. **“Confidential Information”** means any information that is by its nature confidential, or which is designated by either Party as confidential, and includes:
    - 1.9.1. The following information which is **“the Client’s Confidential Information”**:
      - 1.9.1.1. information concerning the processes and policies, commercial operations, financial arrangements or affairs of the Client;
      - 1.9.1.2. the terms of this Agreement; and

- 1.9.1.3. information which identifies or relates to the Client; but does not include:
- 1.9.1.4. information that is publicly known other than as a result of Acorn PLMS's breach of this Agreement; and
- 1.9.1.5. information lawfully in the possession of Acorn PLMS through a source other than the Client;
- 1.9.2. The following information with is **"Acorn PLMS's Confidential Information"**:
  - 1.9.2.1. the terms of this Agreement;
  - 1.9.2.2. information concerning the Software and Services performed by Acorn PLMS, including for the avoidance of doubt information in relation to the Intellectual Property Rights;
  - 1.9.2.3. information concerning the processes and policies, commercial operations, financial arrangements or affairs of Acorn PLMS; but does not include:
  - 1.9.2.4. information that is publicly known other than as a result of the Client's breach of this Agreement; and
  - 1.9.2.5. information lawfully in the possession of the Client through a source other than Acorn PLMS.
- 1.10. **"Corporations Act"** means the *Corporations Act 2001* (Cth);
- 1.11. **"Data"** means all information and materials concerning the Client or its End Users and:
  - 1.11.1. which is entered into a Database or the Acorn Learning Management System; or
  - 1.11.2. which is otherwise capable of being accessed by Acorn PLMS through the Software;
- 1.12. **"Database"** means any database:
  - 1.12.1. concerning the Client or its End Users; or
  - 1.12.2. otherwise forming part of the Services.
- 1.13. **"End Users"** means the person or persons who make use of the Software through the Client;
- 1.14. **"Fee"** means the amount or schedule of rates payable for the performance of the Services, and as set out in **Item 3** of Schedule 1;
- 1.15. **"Intellectual Property Rights"** includes all present and future registered and unregistered rights conferred by statute, common law, equity or any corresponding law in or in relation to copyright, trade marks, designs, patents, Source Software (including source code), trade secrets, semiconductor, know-how, Confidential Information, Moral Rights or circuit layout rights or other proprietary rights, or

any rights to registration of such rights existing in Australia or elsewhere, in the Software and any other intellectual property rights as defined by Article 2 of the *Convention Establishing the World Intellectual Property Organisation 1967*;

- 1.16. **"Item"** means an Item in Schedule 1;
- 1.17. **"Licence Fee"** means the fee specified in **Item 3** of Schedule 1, payable by the Client to Acorn PLMS, for the use of the Software;
- 1.18. **"Moral Rights"** means rights of integrity or authorship and performance, rights of attribution of authorship and performership, rights not to have authorship or performership falsely attributed, and rights of a similar nature conferred by statute, that exist, or that may come to exist, anywhere in the world in relation to the Intellectual Property Rights;
- 1.19. **"Party"** means a party to this Agreement and **"Parties"** has a corresponding meaning;
- 1.20. **"Personal Information"** has the same meaning as in the *Privacy Act 1988* (Cth);
- 1.21. **"Project Officer"** means the person nominated in **Item 4** of Schedule 1, being the person nominated by the Client to oversee and supervise the performance of Acorn PLMS's obligations under this Agreement;
- 1.22. **"Schedule"** means a Schedule attached to this Agreement;
- 1.23. **"Sensitive Information"** has the same meaning as in the *Privacy Act 1988* (Cth);
- 1.24. **"Services"** means the services set out in Schedule 2, unless Schedule 2 contains only the words "Not applicable" in which case no Services are required to be provided by Acorn PLMS, and no Fee is to be paid by the client with regard to services;
- 1.25. **"Software"** means any Acorn Performance Learning Management System software provided or procured by Acorn PLMS and which is utilised in the provision of the Services;
- 1.26. **"Source Software"** means the source code in all parts which forms the Software including programs, paragraphs, field definitions, processes, scripts, screen design and documentation;
- 1.27. **"Term"** means the term of this Agreement, as set out in clause 2; and
- 1.28. **"Termination Date"** means the completion date specified in **Item 2** of Schedule 1.

2. In this Agreement, unless the context otherwise requires:

- 2.1. a reference to any legislation or legislative provision includes any statutory modification or re-enactment of, or legislative provision substituted for, and any subordinate legislation issued under, that legislation or legislative provision;
- 2.2. the singular includes the plural and vice versa;
- 2.3. a reference to an individual or person includes a corporation, partnership, joint

venture, association, authority, trust, state or government and vice versa;

- 2.4. a reference to any gender includes all genders;
- 2.5. a reference to a recital, clause, schedule, annexure or exhibit is to a recital, clause, schedule, annexure, or exhibit of or to this Deed;
- 2.6. a recital, schedule, annexure or a description of the Parties forms part of this Deed;
- 2.7. a reference to any deed or document is to that deed or document (and, where applicable, any of its provisions) as amended, novated, supplemented or replaced from time to time;
- 2.8. a reference to any Party to this Agreement, or any other document or arrangement, includes that Party's executors, administrators, substitutes, successors and permitted assigns;
- 2.9. where an expression is defined, another part of speech or grammatical form of that expression has a corresponding meaning;
- 2.10. a reference to a bankruptcy or winding up includes bankruptcy, winding up, liquidation, dissolution, becoming an insolvent under administration (as defined in section 9 of the Corporations Act), being subject to administration and the occurrence of anything analogous or having a substantially similar effect to any of those conditions or matters under the law of any applicable jurisdiction, and to the procedures, circumstances and events which constitute any of those conditions or matters;
- 2.11. words and expressions defined in the GST Law have the same meaning in clauses concerning GST;
- 2.12. where an expression is defined anywhere in this Deed, it has the same meaning throughout;
- 2.13. the rule of *contra proferentem* does not apply; and
- 2.14. a reference to "dollars" or "\$" is to an amount in Australian currency

## 2. TERM

1. The initial Term of this Agreement will be for a minimum of 12 month(s) from the Commencement Date (**Initial Term**) and unless terminated sooner under clause 18, will continue until the Termination Date.
2. At least 30 days prior to the Termination Date, the Client shall notify Acorn PLMS in writing if it wishes to extend the Agreement for a further 12 month(s) on similar terms and conditions in this Agreement (**the Extension**), except for the fees which will be determined in accordance with clause 2.3. Before the Termination Date, the Parties will execute a contract on similar terms and conditions as this Agreement, except for the fees and charges which will be determined in accordance with clause 2.3, for 12 a further 12 months, as elected by the Client.
3. Within 30 days of Acorn PLMS receiving the Client's notice that it wishes to extend the Term of this Agreement, pursuant to clause 2.2, Acorn PLMS will inform the Client of the increase in fees and charges that will apply under the new agreement. The Parties agree to negotiate in good faith the increased fees and charges that will apply under any extension.
4. Any extension exercised in accordance with clause 2.2 takes effect from the end of the Term or the Extension as the case may be.

## 3. LICENCED SOFTWARE

1. Subject to payment of the Licence Fee:
  - 1.1. Acorn PLMS grants to the Client a revocable, exclusive, non-transferable licence during the Term to use the Software in accordance with the terms and conditions of this Agreement; and
  - 1.2. Acorn PLMS will perform the Services during the Term, if applicable.
2. **The Client will make available the Software to End Users and Administrators pursuant to the terms of this Agreement.**
3. **The Client must:**
  - 3.1. not copy, reproduce, modify, distribute, revise, vary, translate, reverse-engineer, use, alter, decompile, disassemble or otherwise attempt to derive the Source Software from object code in any way unless the Client obtains Acorn PLMS's prior written consent and on such conditions which Acorn PLMS may impose, in Acorn PLMS's absolute discretion;
  - 3.2. not sell, rent, lease, license, sublicense, display, time share or otherwise transfer the Software to, or permit the use of the Software by, any third party;
  - 3.3. not, directly or indirectly, cause or allow a third person to copy, reproduce,



- modify, distribute, revise, vary, translate, reverse-engineer, use, alter, decompile, disassemble or otherwise attempt to derive the Source Software from object code;
- 3.4. not remove any copyright or proprietary notice from the Software;
  - 3.5. use reasonable care and protection to prevent the unauthorised use, copying, publication or dissemination of the Software;
  - 3.6. not provide or make the Software available in any form to any person other the Client's employees, subcontractors or agents without Acorn PLMS's prior written consent;
  - 3.7. not sub-contract, novate or assign its rights under this Agreement without Acorn PLMS's prior written consent;
  - 3.8. supervise and control the use of the Software so that it is in accordance with the terms of this Agreement;
  - 3.9. obtain, install and test Accompanying Software required to operate the Software;
  - 3.10. ensure that the Client, the Administrators and the End Users do not post or transmit through the Software any material or content that gives rise to civil or criminal liability or otherwise violates any applicable law;
  - 3.11. ensure that the Client, the Administrators and the End Users do not post or transmit through the Software any material or content that solicits, encourages or promotes the use of illegal substances or activities that are unlawful, threatening, abusing, harassing, defamatory, libellous, invasive of privacy, bigoted, profane, pornographic, indecent or otherwise objectionable;
  - 3.12. provide Acorn PLMS with up to date and accurate information regarding the number and details of all Administrators and End Users, as when requested by Acorn PLMS;
  - 3.13. ensure that its employees, sub-contractors and agents who have access to the Software are made aware of the terms of this Agreement and the clauses relating to the Intellectual Property Rights; and
  - 3.14. The Client agrees that this Agreement binds the Client, the Administrators and the End Users and the Client will ensure that the Administrators, End Users and all of its employees, agents and contractors who are permitted to access or use the Software, at all times comply with the terms of this Agreement and the Client acknowledges that a breach by an Administrator or an End User of this Agreement, will be considered to be a breach of the Client.
4. **By accessing, loading or using the Software, the Client, the Administrators and the End Users agree to be bound by this Agreement.**
  5. **The Client acknowledges that the Administrators and End Users are not entitled to use the Software for any purpose other than that which it is intended and as otherwise specified in this Agreement.**

## **4. UPDATES AND VERSIONS**

1. The Client acknowledges that it will receive the Software, pursuant to the terms of this Agreement in its current state and with the existing capabilities and functionalities.
2. Acorn PLMS will provide access to the Client to any updates to the Software from time to time which may incorporate more functionalities or capabilities in a staged approach.
3. The Client acknowledges that, notwithstanding clause 4.2, Acorn PLMS will provide updates to the Software throughout the contracted period.
4. In the event that Acorn PLMS updates the Software during the Term and makes it available to the Client, then the Client must cooperate with Acorn PLMS to install any upgrades of the Software.

## **5. ROLE OF THE PROJECT OFFICER**

1. The Project Officer will be the primary liaison and contact officer between the Client and Acorn PLMS and is authorised to give notices and consents under this Agreement on the Client's behalf.
2. Acorn PLMS must:
  - 2.1. liaise with and report to the Project Officer about the performance of the Services;
  - 2.2. attend meetings with, or provide briefings to, the Project Officer as and when required from time to time; and
  - 2.3. promptly comply with any request or direction given by the Project Officer about the performance of the Services.

## **6. ACCESS**

1. The Client must provide Acorn PLMS with:
  - 1.1. if requested by Acorn PLMS, a suitably qualified employee or agent of the Client to assist Acorn PLMS in carrying out its obligations or performing the Services under this Agreement.

## **7. PROVISION OF THE SERVICES**

1. **Acorn PLMS agrees to provide the Services for the Term;**
  - 1.1. to the best of Acorn PLMS's ability and in good faith;
  - 1.2. in a competent and professional manner; and
  - 1.3. in accordance with any reasonable directions given by the Client from time to time.
2. **Acorn PLMS authorises the Client to make such copies of any documents, software or other materials containing Intellectual Property Rights as are reasonably required for:**
  - 2.1. operational use, backup and security; and
  - 2.2. evaluation and testing purposes.
3. **All reproduction rights in respect of the Intellectual Property Rights within the Software and the Services are retained by Acorn PLMS and the Client agrees that the Intellectual Property Rights subsisting in the Services may not be reproduced in any form without consent from Acorn PLMS.**
4. **Acorn PLMS will provide the Services, on the condition that the Client:**
  - 4.1. has internet access with adequate speed as determined at Acorn PLMS's discretion from time to time; and
  - 4.2. allows Acorn PLMS to access the Client's equipment via internet or remote access to investigate and resolve any difficulties which arise in the Client's use of the Software.
5. **The Client acknowledges that during the Term of this Agreement, Acorn PLMS's role is limited to:**
  - 5.1. providing the Services;
  - 5.2. correcting any reported malfunctions in the Software if, in Acorn PLMS's view, they are a departure from the intended functioning of the Software; and
  - 5.3. providing such assistance as is reasonably required under this Agreement to perform the Services.
6. **Where Acorn PLMS is to perform Services during the Term which require dedicated access to the Client's equipment, Acorn PLMS will provide at least 48 hours' notice to the Client unless otherwise requested by the Client.**
7. **Where Acorn PLMS is required to travel to the Client's business in order to provide the Services or any requested assistance, the Client must pay the reasonable travel, food and accommodation costs, of no less than 4-star accommodation incurred by Acorn PLMS's staff. The Client must also pay travel charges quoted by Acorn PLMS from time to time.**

## **8. FEES**

1. The Client must pay Acorn PLMS the Licence Fee in consideration for receiving the Software and licences granted under this Agreement.
2. In consideration for Acorn PLMS providing the Services in accordance with this Agreement, the Client will pay Acorn PLMS the Fee in the manner and at the times specified in Item 3 of Schedule 1.
3. The Client is not obliged to pay Acorn PLMS for any part of the Services until:
  - 3.1. Acorn PLMS has given the Client a correctly rendered invoice in accordance with clause 9.6; and
  - 3.2. the Project Officer has certified that the Services covered by the invoice have been performed in accordance with this Agreement, and the Project Office must not unreasonably withhold acceptance of the Services provided by Acorn PLMS.
4. Acorn PLMS agrees to promptly provide, or provide again, any part of the Services that are certified by the Project Officer as not having been provided in accordance with this Agreement, upon receipt of notice from the Client informing Acorn PLMS of those matters.
5. The Client must give Acorn PLMS a reasonable period of time to attend to providing any part of the Services which the Client considers, acting reasonably, have not been provided, in part or in whole, in accordance with this Agreement.
6. Invoices submitted by Acorn PLMS must:
  - 6.1. be a valid tax invoice;
  - 6.2. identify the title of the Services and the name of the Project Officer; and
  - 6.3. for work carried out on a time basis, be supported by records of time spent by individuals on the Services, verified by Acorn PLMS.
7. Upon receipt of an invoice, the Client may within 14 days:
  - 7.1. require Acorn PLMS to provide additional information to assist the Client to determine whether or not an amount is payable; or
  - 7.2. advise Acorn PLMS that the invoice has not been correctly rendered.
8. The Client will make payment of a correctly rendered invoice within 14 days after receipt of the invoice or, if additional information is required by the Client under clause 9.7(a), 7 days after receipt of the additional information.
9. If an invoice is found, after the Client has paid the invoiced amount to Acorn PLMS, not to have been correctly rendered, the Client, as the case requires:
  - 9.1. will pay any amount still owed to Acorn PLMS within 14 days of receipt of a correctly rendered invoice; or
  - 9.2. may deduct any amount owed by the Client from the next invoiced payment or, if

no other payment is due to Acorn PLMS pursuant to this Agreement, recover the amount from Acorn PLMS as a debt due to the Client.

10. In addition to any other remedy available to Acorn PLMS, if the Client delays payment under this Agreement for any reason, including without limitation, as a result of any Fee under payment, interest will accrue and be payable from the time payment in full was due until the time paid at a rate of 7% per annum, with interest accruing on a daily basis. If payment is not made within the required timeframes specified in this clause 9, Acorn PLMS reserves the right to terminate this Agreement and cease providing the Services by providing the Client with 30 days' prior written notice of such intention to terminate this Agreement and cease providing the Services.

## 9. GST

1. In this clause, "**GST**", "**supply**", "**supplier**" and "**tax invoice**" have the same meaning as defined in *A New Tax System (Goods and Services Tax) Act 1999* (Cth).
2. The Parties agree that any consideration otherwise paid under this Agreement is exclusive of any GST unless the context expressly indicates otherwise.
3. The Parties agree that if any GST is imposed on any supply made under this Agreement, then the Party making the supply will collect from the recipient the amount of the GST in addition to any consideration otherwise due for the supply.
4. The right of the supplier to recover any amount in respect of GST under this Agreement is subject to the issuing of a valid tax invoice.

## 10. INTELLECTUAL PROPERTY RIGHTS AND RECORDS

1. The Client acknowledges that Acorn PLMS owns all rights, title and interest in the Software and in all customisations of the Software and its related documentation and any Intellectual Property Rights created in the course of providing the Services, either jointly or separately, from time to time.
2. The Client acknowledges that it must not modify the Software, or any customisation of the Software as created by Acorn PLMS pursuant to this Agreement.
3. The Client must immediately notify Acorn PLMS in writing if it becomes aware of any actual or suspected infringement of Acorn PLMS's Intellectual Property Rights or Moral Rights.
4. The Client is entitled to any and all data uploaded into the Software that is not protected under the Intellectual Property Rights of Acorn PLMS.
5. Acorn PLMS retains the right to use the Software and completed Services and

any preliminary designs without limitation.

6. The Client will indemnify Acorn PLMS if any End Users infringe on Acorn PLMS's Intellectual Property Rights or Moral Rights, including but not limited to infringement by any of the above proscribed actions.
7. The Intellectual Property Rights in the Source Software and the object code together with any related materials or documentation are and shall remain the property of Acorn PLMS.

## **11. DISCLOSURE OF INFORMATION AND PRIVACY**

1. Each Party must ensure that Confidential Information of the other Party is kept confidential and not disclosed to any person except:
  - 1.1. to its employees, officers and agents to the extent necessary for the performance of this Agreement;
  - 1.2. where required by law; or
  - 1.3. with the prior written consent of the other Party to whom the Confidential Information relates, prior to disclosing the Confidential Information.
2. **Acorn PLMS must:**
  - 2.1. immediately notify the Client if it becomes aware of a breach of this clause or if a disclosure of the Client's Confidential Information is required by law;
  - 2.2. if requested by the Client (either during the term of this Agreement or upon termination or expiry of this Agreement) to deliver to the Client, or destroy if so directed, all of the Client's Confidential Information in Acorn PLMS's possession or control;
  - 2.3. if requested by the Client, Acorn PLMS must at its own cost obtain from its officers, employees and subcontractors a deed of confidentiality in a form acceptable to the Client;
  - 2.4. take all reasonable steps to protect information that is, or Acorn PLMS suspects to be, the Client's and End User's Confidential Information, Personal Information or Sensitive Information.
3. **The Client must:**
  - 3.1. immediately notify Acorn PLMS if it becomes aware of a breach of this clause or if a disclosure of Acorn PLMS's Confidential Information is required by law;
  - 3.2. if requested by Acorn PLMS (either during the term of this Agreement or upon termination or expiry of this Agreement) deliver to Acorn PLMS, or destroy if so directed, all of Acorn PLMS's Confidential Information in the Client's possession or control;
  - 3.3. if requested by Acorn PLMS, the Client must at its own cost obtain from its officers,

employees and subcontractors a deed of confidentiality in a form acceptable to Acorn PLMS;

- 3.4. ensure that its End Users keep confidential Acorn PLMS's Confidential Information, comply with the Privacy Act 1988 (Cth), whether or not the End User is personally required to comply, and ensure that its End Users have complied with their professional obligations in relation to any information that is stored, used or disclosed on the Software.
  
4. **Acorn PLMS will comply with the *Privacy Act 1988 (Cth)*, and any the Client policies of which Acorn PLMS has been given prior written notice, relating to privacy, in relation to the collection, retention, management, use, quality or disclosure of Personal Information:**
  - 4.1. provided by the Client to Acorn PLMS; or
  - 4.2. contained in Data.
  
5. **The Client acknowledges that information uploaded on the Software about or relating to the End Users, or information uploaded by the Client, the Administrators or the End Users will be accessible by Acorn PLMS.**
  
6. **The Client acknowledges that Acorn PLMS may use, process or store information on the Software for purposes relating to the function of the Software and the Client consents to such use, processing and storage.**
  
7. **The Client must obtain the consent of all End Users for Acorn PLMS's use, disclosure, processing and storage of all information, including any Personal Information and Sensitive Information, disclosed on the Software.**
  
8. **The Client acknowledges that Acorn PLMS may use or disclose Personal Information and Sensitive Information stored on the Software in order to:**
  - 8.1. manage and administer the Services and the Software;
  - 8.2. enable third parties engaged by Acorn PLMS to provide Services on Acorn PLMS's behalf;
  - 8.3. assist the Client with enquiries;
  - 8.4. charge the Fees; and
  - 8.5. ensure that Acorn PLMS's internal business operations are running smoothly including any reporting or legal requirements it may be required to fulfil.
  
9. **This clause 11 will survive termination or the expiry of this Agreement.**

## 12. INDEMNITY

1. In this clause:
  - 1.1. "claim" includes any claim, action, proceeding, demand, liability, obligation, costs, loss, damages and expenses; and
  - 1.2. a reference to a Party includes its officers, employees, agents or sub-contractors.
2. **Acorn PLMS releases, discharges and indemnifies the Client against any claim by any person which may be brought against or made upon or incurred by the Client arising from or in connection with:**
  - 2.1. any wilful, unlawful or negligent act or omission of Acorn PLMS in the course of the performance or attempted or purported performance of the Services;
  - 2.2. a breach by Acorn PLMS of this Agreement; or
  - 2.3. an actual breach of any third party's Intellectual Property Rights or Moral Rights relating to the Services,

**except to the extent that any act or omission by the Client caused or contributed to the claim.**
3. **The Client releases, discharges and indemnifies Acorn PLMS against any claim by any person which may be brought against or made upon or incurred by Acorn PLMS arising from or in connection with:**
  - 3.1. any wilful, unlawful or negligent act or omission of the Client in the course of the performance or attempted or purported performance of the Services;
  - 3.2. a breach by the Client of this Agreement; or
  - 3.3. the collection, use, Storage or disclosure of Personal Information or Sensitive Information uploaded on the Software by the Client, an Administrator or by an End User,

**except to the extent that any act or omission by Acorn PLMS caused or contributed to the claim, other than in the course of complying with its obligations pursuant to the terms of this Agreement.**
4. **If any statute implies terms into this Agreement which cannot lawfully be excluded, such terms will apply to this Agreement but the liability of Acorn PLMS for breach of any such implied term will be limited, at the option of Acorn PLMS, to any one of the following:**
  - 4.1. in the case of goods:
    - 4.1.1. the replacement of the goods to which the breach relates or the supply or equivalent goods;
    - 4.1.2. the repair of the goods;
    - 4.1.3. the payment of the cost of replacing the goods or of acquiring equivalent goods; or



- 4.1.4. the payment of the cost of having the good repaired; and
  - 4.2. in the case of services:
    - 4.2.1. supplying the Services again; or
    - 4.2.2. paying the cost of having the Services supplied again.
- 5. **Acorn PLMS will not be liable for any indirect or consequential loss arising out of:**
  - 5.1. a breach of this Agreement;
  - 5.2. the supply of the Software; or
  - 5.3. the provision of the Services.
- 6. **Acorn PLMS's liability under this Agreement will be capped at 100% of the Fees.**

## **13. INSURANCE**

- 1. **Acorn PLMS must take out and maintain for the duration of this Agreement:**
  - 1.1. any workers' compensation insurance that Acorn PLMS is required to effect and maintain by law;
  - 1.2. public liability insurance if specified in Item 6 of Schedule 1, for the amount specified; and
  - 1.3. professional indemnity insurance if specified in Item 7 of Schedule 1, for the amount specified.
- 2. **The insurances must be effected with an insurer that is authorised and licensed to operate in Australia.**
- 3. **Acorn PLMS must promptly produce evidence to the Client of the existence and currency of any of the insurances required by this clause upon request in writing at any time by the Client.**

## **14. WARRANTY**

- 1. **As at the Commencement Date, Acorn PLMS warrants that:**
  - 1.1. the Software will not contain any virus;
  - 1.2. the media on which the Software is stored is free from defects in manufacture; and
  - 1.3. that the Software will in all material respects perform in accordance with any manuals and documentation.
- 2. **Acorn PLMS does not warrant that:**
  - 2.1. the Software is error free;

- 2.2. any enclosed or related documentation or manuals will allow a full understanding of the operational characteristics of the Software;
  - 2.3. the use of the Software will be uninterrupted; or
  - 2.4. the Software will meet the Client's, or any other person's, requirements.
3. The Client acknowledges that it has exercised its independent judgment in acquiring the Software and has not relied on any representation made by Acorn PLMS which has not been stated expressly in this Agreement or upon any descriptions or illustrations or specifications contained in any document including catalogues or publicity material produced by Acorn PLMS or any third party.
4. The Client acknowledges that hardware problems are the responsibility of the hardware supplier and the Client's warranty provider, and that it is the Client's responsibility to ensure hardware is adequate for the proper performance of the Software.
5. It is the Client's responsibility to advise Acorn PLMS of hardware and software changes before they occur to enable Acorn PLMS to advise on compatibility with the Software.

## **15. DISCLAIMER**

1. The Client acknowledges that Acorn PLMS does not independently verify data or information provided by third parties or the Client.
2. Acorn PLMS is not liable:
  - 2.1. for any errors or omissions in data or information provided by third parties, Administrators, End Users or the Client;
  - 2.2. to the extent that a defect in the Software is caused by the Client, an Administrator, an End User or a third party;
  - 2.3. for the failure of the Client, an Administrator, an End User or a third party to maintain the designated operating environment;
  - 2.4. for any server crashes conflicts, incompatibilities or other circumstances which may impair the performance of the Software or arise from a shared server; or
  - 2.5. for the failure of the Client, an Administrator or an End User to use the Software otherwise than in accordance with this Agreement and the specifications issued by Acorn PLMS from time to time.

## 16. TERMINATION

1. The Client may immediately terminate this Agreement by notice in writing to Acorn PLMS if Acorn PLMS:
  - 1.1. fails to remedy a breach of this Agreement within 30 days after a notice, specifying the breach and requesting that it be remedied, has been given by the Client to Acorn PLMS.
  - 1.2. becomes insolvent;
  - 1.3. becomes subject to any form of external administration;
  - 1.4. enters into an arrangement with its creditors or otherwise takes advantage of any laws in force in connection with insolvent debtors; or
  - 1.5. is wound up, voluntarily or involuntarily.
2. Acorn PLMS may immediately terminate this Agreement by notice in writing to the Client, if the Client fails to remedy a breach of this Agreement within 60 days after a notice, specifying the breach and requesting that it be remedied, has been given to the Client by Acorn PLMS.
3. If, by reason of any fact, circumstance, matter or thing beyond the reasonable control of Acorn PLMS, and Acorn PLMS is unable to perform in whole or in part any obligation under this Agreement, and that continues in excess of 30 days, Acorn PLMS may terminate this Agreement, without any penalty or claim by the Client.
4. Termination of this Agreement will not affect any claim or action either Party may have against the other by reason of any prior breach of this Agreement and will not relieve either Party of any obligation under this Agreement which is expressed to continue after termination.
5. The Client may terminate this Agreement on its Termination Date by notice in writing to Acorn PLMS at least 30 days prior to the Termination Date.
6. The Client may terminate this Agreement before its Termination Date by mutual written agreement between Acorn PLMS and the Client with at least 30 days notice.

## **17. CONSEQUENCES OF TERMINATION**

1. **Upon the expiration or termination of this Agreement:**
  - 1.1. all rights granted to the Client under this Agreement will cease immediately and the Client will return all Software provided under this Agreement, if requested by Acorn PLMS;
  - 1.2. Acorn PLMS will deliver to the Client a copy of any Database and Data relevant to the Services;
  - 1.3. Acorn PLMS will, upon written notice from the Client, delete all known copies of the Database and Data in its possession or control;
  - 1.4. Clauses 9, 11, 12, 13, 14, and 19 will survive the expiration or termination of this Agreement; and
  - 1.5. Acorn PLMS will be entitled to be paid for all work done and Services rendered prior to, and including, the date of termination.

## **18. NOTICES**

1. **Any notice, request, notification, consent or approval (a “notice”) under this Agreement must be in writing and may be sent by prepaid postage or email or delivered by hand to the following respective addresses:**
  - 1.1. for the Client – as set out in Item 8 of Schedule 1;
  - 1.2. for Acorn PLMS – as set out in Item 9 of Schedule 1; or
  - 1.3. such other address as a Party may subsequently notify to the other.
2. **A notice will be deemed to be given:**
  - 2.1. if posted – three business days after the date of posting;
  - 2.2. if hand delivered – on the date of delivery; or
  - 2.3. if emailed – on the date of the email;
  - 2.4. except that an email received after 5:00 pm on a particular Business Day, or at any time on a day other than a Business Day, will be deemed to be given on the next Business Day.

## **19. DISPUTE**

1. If a dispute arises in relation to this Agreement, one or more Parties may give written notice to another Party (together the “Disputing Parties”) requiring that an attempt be made to resolve the dispute and the Disputing Parties agree to use their best endeavours to first settle the dispute by discussions in good faith between the Disputing Parties (or a person a Disputing Party nominates as its representative).
2. If the dispute is not resolved within 30 Business Days (or such period as agreed in writing by the Disputing Parties) after written notice of the dispute has been given, any Disputing Party may give the other a written notice requiring that the dispute be resolved by an arbitrator appointed jointly by the Disputing Parties (the “Arbitration Notice”).
3. If the Disputing Parties do not agree on an arbitrator within 5 Business Days after the Arbitration Notice is given, the arbitrator is to be appointed by the Resolution Institute (“the Institute”).
4. Each of the Disputing Parties must co-operate fully with the arbitrator.
5. The arbitration is to be conducted in accordance with the Institutes Rules for the Conduct of Commercial Arbitrations and those rules are binding on the Disputing Parties.
6. The decision of the arbitrator shall be binding on the Disputing Parties.
7. Each of the Disputing Parties must pay an equal share of the fees and expenses the arbitrator is entitled to unless that arbitrator finds that a Disputing Party is at fault and therefore should be responsible for the full amount of fees of both the arbitrator and the Disputing Party not at fault.
8. Any Party must attempt to resolve a dispute in accordance with the procedures set down in this clause before commencing legal proceedings against another Party.
9. Nothing in this clause 19 prevents a Party from seeking urgent injunctive, declaratory or other interlocutory or equitable relief before an appropriate Court.

## **20. PRECEDENCE**

1. In the event of any inconsistency between the terms of this Agreement, any Schedule or annexure to this Agreement, the following order of precedence will apply to the extent of the inconsistency:
  - 1.1. the terms of this Agreement;
  - 1.2. the Schedules to this Agreement; and
  - 1.3. any appendices, exhibits or annexures to this Agreement.

## 21. GENERAL PROVISIONS

1. The relationship of the Parties under this Agreement is one of principal and contractor and the Parties are not, by virtue of this Agreement in partnership or joint venture nor does this Agreement constitute or imply any agency, fiduciary relationship or other relationship between the Parties other than the contractual relationship expressly provided for in this Agreement. Neither Party will represent itself or allow itself to be represented as a partner or joint venturer, employee or agent of the other.
2. Any failure by a Party at any time to enforce a clause of this Agreement, or any forbearance, delay or indulgence granted by a Party to the other, will not constitute a waiver of the Party's rights.
3. No provision of this Agreement will be deemed to be waived unless that waiver is in writing and signed by the waiving Party.
4. A waiver by a Party of a breach of any provision of this Agreement will not operate as a waiver of any subsequent breach of the same provision or as a waiver of any other provision.
5. This Agreement is governed by the laws of the Commonwealth of Australia and the Australian Capital Territory and each Party submits to the jurisdiction of the courts operating the Australian Capital Territory.
6. Acorn PLMS must comply with all relevant laws in the performance of the Services.
7. If any part of this Agreement is determined to be invalid, unlawful or unenforceable for any reason then that part, to the extent of the invalidity, unlawfulness or unenforceability, will be severed from the rest of this Agreement and the remaining terms and conditions will continue to be valid and enforceable to the fullest extent permitted by law
8. Each Party must promptly do all things reasonably required to give effect to this Agreement.
9. Acorn PLMS may not assign or novate its interest in this Agreement, except with the prior written consent of the Client.
10. Acorn PLMS must not sub-contract the provision of the Services without the prior consent of the Client such consent not to be unreasonably withheld.
11. The Client has entered into this Agreement without relying on any representation by Acorn PLMS or any person purporting to represent Acorn PLMS.
12. This Agreement may be executed in any number of counterparts and all of those counterparts taken together constitute one and the same document.
13. This Agreement constitutes the entire agreement between the Parties and supersedes all prior negotiations, arrangements and agreements between the Parties.