

## SOFTWARE ESCROW & COPYRIGHT AGENTS PTY LTD - SOFTWARE ESCROW AGREEMENT

This **Agreement** is made on **Agreement Date** between **Software Escrow & Copyright Agents Pty Ltd ABN 68 007 214 708** of PO Box 452, Collins Street West, MELBOURNE, VIC 8007 Australia ("**Escrow Agent**") and the parties specified in **Schedule 1** as **Customer** and **Supplier** respectively.

### RECITALS

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

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

### OPERATIVE PART

#### 1. Definitions

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

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

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

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

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

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

#### 2. Interpretation

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

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

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

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

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

(e) Money references are references to Australian currency.

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

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

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

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

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

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

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

#### 3. Duration

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

#### 4. Deposit of Escrow Materials

4.1 **Supplier** shall deposit the **Escrow Materials** within 90 days after the **Commencement Date** with **Escrow Agent**.

4.2 If any modification is made to the executable version of the **Escrow Materials** supplied to **Customer** then **Supplier** shall within 90 days of such modification deposit the modified version of the **Escrow Materials** with **Escrow Agent**.

#### 5. Storage

5.1 **Escrow Agent** shall store the **Escrow Materials** in the manner set out in **Schedule 1**.

#### 6. Details

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

#### 7. Access to Escrow Materials

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

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

#### 8. Loss of Escrow Materials

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

- (a) promptly notify **Supplier** and **Customer**; and
- (b) co-operate in the replacement of the lost, damaged or destroyed **Escrow Materials**.

#### 9. Verification

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

9.2 At the request of **Customer**, **Escrow Agent** may verify the **Escrow Materials** upon payment of additional fees by **Customer**.

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

#### 10. Insurance

10.1 If so specified in **Schedule 1**, **Escrow Agent** shall organise insurance of the **Escrow Materials** at the expense of **Escrow Paying Party**.

#### 11. Release of Escrow Materials to Supplier

11.1 Subject to **Clause 13**, **Escrow Agent** may, at **Supplier's** option, return the **Escrow Materials** to **Supplier** or destroy the **Escrow Materials** if:

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

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

(c) **Customer** becomes or threatens to become or is in jeopardy of becoming subject to any form of insolvency administration.

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

#### 12. Release of Escrow Materials to Customer

12.1 Subject to **Clause 13**, **Escrow Agent** shall provide a copy of the **Escrow Materials** to **Customer** if:

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

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

(c) **Supplier** becomes, threatens to become or is in jeopardy of becoming subject to any form of insolvency administration.

#### 13. Objection to release of Escrow Materials

13.1 A **Party** seeking release of a copy of the **Escrow Materials** pursuant to **Clause 11.1** or **12** shall give 7 days prior notice to other **Party** of such a notice being proposed to be given to **Escrow Agent**.

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

(a) evidence that **Sub-clause 13.1** has been satisfied is provided; and

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

13.3 A **Party** who receives a notice pursuant to **Sub-clause 13.1** may object, by notice in writing to **Escrow Agent** and the other **Party** on the basis that the facts relied upon by the other **Party** are inaccurate.

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

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

#### 14. Escrow Fees and Charges

14.1 **Escrow Paying Party** shall pay **Escrow Fees** to **Escrow Agent**.

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

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

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

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

#### 15. Confidentiality

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

#### 16. Inquiries by Escrow Agent

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

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

**17. Legal Costs and Indemnity**

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

**18. Implied Terms**

18.1 Except as expressly provided to the contrary in this **Agreement** any condition or warranty whether express, implied, statutory or otherwise, relating in any way to the subject matter of this **Agreement** is excluded.  
18.2 Where legislation implies in this **Agreement** any condition or warranty and that legislation avoids or prohibits provisions in a contract excluding or modifying the application of or the exercise of or liability under such term, such term shall be deemed to be included in this **Agreement**. However, the liability of **Escrow Agent** for any breach of such term shall be limited, at the option of **Escrow Agent**, to the supplying of the services again or the payment of the cost of having the services supplied again.

**19. Liability of Escrow Agent**

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

**20. Termination**

20.1 This **Agreement** shall terminate if:  
(a) **Escrow Materials** are released by **Escrow Agent** in accordance with this **Agreement**; or  
(b) **Customer** gives 30 days' notice that this **Agreement** is terminated.  
20.2 **Escrow Agent** may terminate this **Agreement** immediately by notice in writing if any payment due to **Escrow Agent** pursuant to this **Agreement** remains unpaid for a period of 14 days.  
20.3 Upon termination, amongst other things:  
(a) **Escrow Agent** shall, unless directed otherwise, destroy the **Escrow Materials**. A **Party** making a direction otherwise shall pay all fees applicable to complying with that direction; and  
(b) **Escrow Paying Party** shall pay the **Release/Destruction Fee**.

**21. Survival**

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

**22. Force Majeure**

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

**23. Assignment, Novation and Sub-Contracts**

23.1 **Escrow Agent** may sub-contract for the performance or part performance of this **Agreement**.  
23.2 This **Agreement** shall not be dealt with in any way by **Supplier** or **Customer** (whether by assignment, novation, sub-licensing or otherwise) without **Escrow Agent's** written consent.

**24. Waiver**

24.1 No right under this **Agreement** shall be deemed to be waived except by notice in writing signed by each **Party**.  
24.2 Any failure by a **Party** to enforce any provision of this **Agreement**, or any forbearance, delay or indulgence granted by a **Party** will not be construed as a waiver of that **Party's** rights under this **Agreement**.

**25. Governing Law**

25.1 This **Agreement** shall be governed by and construed according to the law of the State of Victoria.  
25.2 The **Parties** irrevocably submit to the exclusive jurisdiction of the courts of Victoria and the Commonwealth of Australia and any courts hearing appeals from such courts. Any proceedings in a Commonwealth court shall be commenced in Victoria.

**26. Notices**

26.1 Notices under this **Agreement** may be delivered by hand, by mail or by facsimile to the addresses specified in **Schedule 1**.  
26.2 Notices shall be deemed given in the case of:  
(a) hand delivery, upon written acknowledgment of receipt by an officer or other duly authorised employee, agent or representative of the receiving party;  
(b) posting, 3 days after dispatch; and  
(c) facsimile, upon completion of transmission.

**27. Entire Agreement**

27.1 This **Agreement** constitutes the entire agreement between the parties for the subject matter referred to in this **Agreement**. Any prior arrangements, agreements, representations or undertakings are superseded.  
27.2 This **Agreement** is not to be construed as creating a joint venture, partnership or agency situation between the parties. No **Party** may represent that there exists such a relationship between the **Parties**.  
27.3 Unless stated expressly to the contrary in this **Agreement**, no **Party** may bind the other **Party** to any agreements, arrangements, contracts or understanding or represent that they have such authority.  
27.4 No modification or alteration of any provision of this **Agreement** shall be valid except in writing signed by each **Party**.

**EXECUTED AS AN AGREEMENT**

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

Steve White  
Director/Secretary

Sarah Pike  
Director

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

Director/Secretary sign here

Director sign here

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

By **Customer Full Name** by being )  
signed by the following persons or if a ) Attach company seal here  
seal is affixed witnessed by the )  
following persons (leave blank for )  
multiple customers): )

Director/Secretary sign here

Director sign here

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

SCHEDULE 1- DETAILS

Agreement Date

Customer Full Name ("Customer")

Customer ABN

Customer Address

Commencement Date

Escrow Fees

Setup Fee: \$500 plus GST plus legal fees incurred, if required, in engaging White SW Computer Law to prepare amendments to escrow agreement, (other than completion of basic Agreement details) at cost (currently [\$320 plus GST] per hour).

Annual Fee: \$500 plus GST per annum in advance commencing on execution of this Agreement. This fee includes quarterly deposits save that:
(a) if more than 4 CDs are held at any time then an additional fee of \$150 plus GST per CD is payable per annum or part thereof;
(b) if more than 4 deposits are made per year then an additional fee of \$150 plus GST per CD per deposit is payable.

Release/Destruction Fee: \$500 plus GST upon receipt of a request to release or destroy the Escrow Materials.

Escrow Materials

Source Code for [insert software details]

Escrow Paying Party

Customer

Insurance Required

Nil

Insurance, if required, to be paid for by

Escrow Paying Party

Master Agreement

Master Agreement Date

Supplier Full Name ("Supplier")

Supplier ABN

Supplier Address

Storage Method of Escrow Materials

Secure Building; or, subject to payment in advance of \$100 plus GST per annum to Escrow Agent in addition to Escrow Fees, Bank Vault.

Multiple Customers Term (do not complete this Agreement a single developer/single customer agreement)

This term applies if Supplier and Escrow Agent have executed this Agreement without specifying a Customer.

By signing this Schedule 1 Customer accepts all the terms and conditions of this Agreement (copy attached) and a new agreement shall be formed between Escrow Agent, Supplier and Customer on the basis set out in this Agreement.

Customer acknowledges that other customers may execute similar agreements incorporating the agreement between Supplier and Escrow Agent and such agreements shall be separate from this Agreement.

Supplier authorises Escrow Agent to accept Customer's acceptance on behalf of Supplier by receiving this Schedule 1.

Escrow Agent may in its sole discretion refuse any acceptance by Customer received 30 days after execution of the Master Agreement.

EXECUTED AS AGREEMENT

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

Director/Secretary sign here

Director sign here

Print Name of Director/Secretary here Director/Secretary

Print Name of Director here Director