

Micron21 - Master Services Agreement

Parties

Micron 21 Data Centre Pty Ltd of Factory 3, 6-8 Eastspur Court Kilsyth South, Victoria, Australia, 3137 (**Micron21, our, we, us**); and

The party identified in the Schedule as the client (Client, you, your).

Background

- A. Micron21 provides a range of technology solutions and services, including but not limited to, infrastructure, telecommunications, software, consultation and support.
- B. From time to time, the Client may request and Micron21 has agreed to provide, the Services on the terms set out in this Agreement.

Agreed terms

1. Definitions and interpretation

1.1 Definitions

Acceptance Criteria means the criteria specified in a Statement of Work in respect of the Delivered Service, which are to be achieved or satisfied in the course of the Acceptance Tests;

Acceptance Period means the period specified in the Statement of Work for performance of the Acceptance Tests or if the period is unspecified in the Statement of Work, 10 Business Days from the delivery of the relevant Delivered Service to the Client;

Acceptance Tests means Client conformance tests for any relevant Delivered Service specified in the Statement of Work to be performed in accordance with clause 7;

Account Representative means the individual appointed by a Party under clause 6.1;

Agreement means these terms and conditions, a Statement of Work, and any schedules, recitals attachments or annexures;

Background Materials means:

- (a) any material, communications or technology which is pre-existing or created independently of a Statement of Work which a Party makes available for the performance of its obligations in respect of the Services or Delivered Service;
- (b) any Information, communications, technology, software or other materials which are otherwise required for effective exploitation of the Delivered Services; and

- (c) includes any Improvements, enhancements, modifications, adaptations, extensions, developments, application of and all other technical advances made to the materials set out in (a) and (b) above, including those developed in performing the Services, whether or not protected by Law;

Business Day means a day that is not a Saturday, Sunday, public holiday or bank holiday in Melbourne, Victoria;

Change means any variation to all or part of a Statement of Work;

Change Request means a written request by a Party for a Change which will include any additional information reasonably necessary to enable the other Party to properly assess the request;

Confidential Information means:

- (a) the terms of this Agreement, any Statement of Work and their respective subject matter, including Information submitted or disclosed by either Party during negotiations, discussions and meetings relating to this Agreement or a Statement of Work;
- (b) Information that at the time of disclosure by a Disclosing Party is identified to the Receiving Party as being confidential; and
- (c) all other Information belonging or relating to a Disclosing Party, or any Related Entity of that Disclosing Party, that is not generally available to the public at the time of disclosure other than by reason of a breach of this Agreement or which the Receiving Party knows, or ought reasonably to be expected to know, is confidential to that Disclosing Party or any Related Entity of that Disclosing Party;

Controller means, in relation to a person:

- (a) a receiver, receiver and manager, administrator or liquidator (whether provisional or otherwise) of that person or that person's property; or
- (b) anyone else who (whether or not as agent for the person) is in possession, or has control, of that person's property to enforce an encumbrance;

Corporations Act means the *Corporations Act 2001 (Cth)*;

Defect means a material non-conformance of the Delivered Service with material aspects of the agreed specifications set out in a Statement of Work;

Delivered Service means any service, software or other Information or material, configuration (whether in electronic or material form) performed or developed by or on behalf of Micron21 for the Client in the course of providing the Services and is specified in a Statement of Work, but will exclude:

- (a) Micron21's Background Materials; and

- (b) any service, software or other Information or material, configuration (whether in electronic or material form) which is performed or developed by or on behalf of Micron21's Personnel but which Micron21 does not ultimately approve such service, software or other Information or material, configuration for release to the Client;

Disclosing Party means the Party to whom Confidential Information belongs or relates;

Event of Default means, in relation to a Party, the occurrence of any one or more of the following events or circumstances:

- (a) the Party fails to comply with any of its material obligations under a Statement of Work;
- (b) an Insolvency Event occurs in relation to the Party;
- (c) a notice of deregistration of the Party is given under sections 601AA(5) or 601AB(5) of the Corporations Act;
- (d) the Party fails to pay by the due date any amount due and payable by it under a Statement of Work; or
- (e) a material provision of a Statement of Work that purports to impose an obligation on the Party is or becomes void, voidable, illegal, unenforceable or of limited effect (other than because of equitable principles or Laws affecting creditor's rights generally);

Expenses means out-of-pocket expenses incurred by Micron21 in connection with the provision of the Services;

Fees means the fees specified in the Statement of Work and payable by the Client to Micron21 for provision of the Services;

Government Agency means any government or any public, statutory, governmental (including a local government), semi-governmental or judicial body, entity, department or authority and includes any self-regulatory organisation established under statute in the relevant jurisdiction;

Information means any information, whether oral, graphic, electronic, written or in any other form, including:

- (a) forms, memoranda, letters, specifications, processes, procedures, statements, formulae, technology, inventions, research and development information, know-how, designs, plans and data;
- (b) copies and extracts made of or from that information and data, whether translated from the original form, recompiled, partially copied, modified, updated or otherwise altered; and
- (c) samples or specimens disclosed by either Party;

Insolvency Event means, in relation to a Party, any one or more of the following events or circumstances:

- (a) being in liquidation or provisional liquidation or under administration;
- (b) having a Controller or analogous person appointed to it or to any of its property;
- (c) being taken under section 459F(1) of the Corporations Act to have failed to comply with a statutory demand;
- (d) being unable to pay its debts or being otherwise insolvent;
- (e) becoming an insolvent under administration, as defined in section 9 of the Corporations Act;
- (f) entering into a compromise or arrangement with, or assignment for the benefit of, any of its members or creditors; or
- (g) any analogous event or circumstance under the Laws of any jurisdiction,

unless such event or circumstance occurs as part of a solvent reconstruction, amalgamation, compromise, arrangement, merger or consolidation and in the case of the Client is approved by Micron21;

Intellectual Property Rights means all present and future intellectual and industrial property rights conferred by statute, at common law or in equity and wherever existing, including:

- (a) patents, designs, copyright, rights in circuit layouts, plant breeder's rights, trade marks, know how, brand names, domain names, inventions, product names, trade secrets, Confidential Information and any other rights subsisting in the results of intellectual effort in any field, whether or not registered or capable of registration;
- (b) any application or right to apply for registration of any of these rights;
- (c) any registration of any of those rights or any registration of any application referred to in paragraph (b); and
- (d) all renewals and extensions of these rights;

Law means:

- (a) principles of law or equity established by decisions of courts;
- (b) statutes, regulations or by-laws of the Commonwealth, a State, a Territory or a Government Agency; and
- (c) requirements and approvals (including conditions) of the Commonwealth, a State, a Territory or a Government Agency that have the force of law;

Party means Micron21 or the Client and **Parties** means both of them;

Personal Information means any information or opinion about a natural person (whether or not true), as defined in the Privacy Act, which either Party deals with in connection with performing its obligations under the Agreement;

Personnel means any individuals, employees, agents, consultants or sub-contractors of the Client or Micron21 (or a Related Entity of Micron21) as applicable and as the context requires;

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

Privacy Law means the Privacy Act (including the Australian Privacy Principles under the Privacy Act), and any other privacy or general legislation which binds the Parties and which relates to the protection of Personal Information;

Receiving Party means the Party to whom Confidential Information is disclosed or who possesses or otherwise acquires Information belonging or relating to a Disclosing Party;

Related Entity has the meaning given to that term in the Corporations Act;

Sensitive Information means 'Sensitive Information' as defined in the Privacy Act;

Services means the services provided by Micron21 to the Client as specified in a Statement of Work and includes any Support Services or any other type of service specified in a Statement of Work;

Site means a location or locations where the Services and/or Delivered Service will be delivered, provided, connected or installed (as applicable) as agreed between the Parties;

Standard Rates means Micron21's standard time and materials rates which are set out in the Statement of Works but are subject to change from time to time as notified in writing to the Client;

Statement of Work means a written statement (including any attachments) for the provision of the Services by Micron21 to the Client;

Support Services means the maintenance and support services as detailed in the Service Level Agreement for support services annexed to each Statement of Work (if any);

Term has the meaning given to that term in clause 2(a);

Third Party means any party other than Micron21 or the Client;

Unauthorised Use means:

- (a) an alteration or modification to the Delivered Service that has not been authorised in writing by Micron21;

- (b) use of the Delivered Service other than in accordance with the documentation published by Micron21, the conditions, requirements or assumptions set out in the Statement of Work or as otherwise recommended or directed by Micron21;
- (c) use of the Delivered Service for a purpose not reasonably contemplated by this Agreement or by Micron21; or
- (d) use of the Delivered Service in combination with equipment, programs or services not set out in the Statement of Work or otherwise authorised, in writing, by Micron21; and

Unavoidable Costs means:

- (a) any costs incurred by Micron21, in connection with the performance of its obligations under this Agreement or any agreement with any Third Party in connection with this Agreement which cannot be cancelled, refunded or re-allocated to Micron21's other operations or business activities (such as contracts entered into with a Third Party to provide specific services);
- (b) the costs of any redeployment or termination of employment of Micron21's Personnel engaged for the purposes of providing the Services; and
- (c) the costs identified by Micron21 for any capital purchases made in connection with the Services,

and includes any costs stated in a Statement of Work.

1.2 Interpretation

In this Agreement, unless the context requires otherwise:

- (a) the singular includes the plural and vice versa;
- (b) a gender includes the other genders;
- (c) the headings are used for convenience only and do not affect the interpretation of the Agreement;
- (d) other grammatical forms of defined words or expressions have corresponding meanings;
- (e) a reference to a document includes the document as modified from time to time and any document replacing it;
- (f) if something is to be or may be done on a day that is not a Business Day then it must be done on the next Business Day;
- (g) the word "person" includes a natural person and any body or entity whether incorporated or not;
- (h) the word "month" means calendar month and the word "year" means 12 months;
- (i) the words "in writing" include any communication sent by letter, or email or any other form of communication capable of being read by the recipient;

- (j) a reference to a thing includes a part of that thing;
- (k) a reference to all or any part of a statute, rule, regulation or ordinance (statute) includes that statute as amended, consolidated, re-enacted or replaced from time to time;
- (l) wherever "include" or any form of that word is used, it must be construed as if it were followed by "(without being limited to)";
- (m) money amounts are stated in Australian currency unless otherwise specified; and
- (n) a reference to any agency or body, if that agency or body ceases to exist or is reconstituted, renamed or replaced or has its powers or functions removed (**defunct body**), means the agency or body which performs most closely the functions of the defunct body.

1.3 Priority of agreement

Wherever there is any inconsistency between the provisions of this Agreement or a Statement of Work and any other agreement or documentation, the order of precedence of the interpretation will be as follows:

- (a) this Agreement; and
- (b) the Statement of Work,
- (c) any appendices to the Statement of Work

and the document higher in the order will take precedence to the extent of any inconsistency.

2. Term

- (a) The head terms of this Agreement has effect on and from the date of execution and continues unless terminated in accordance with its terms.
- (b) A Statement of Work has effect on and from the commencement date specified in the Statement of Work and, unless terminated earlier in accordance with the provisions of the Statement of Work or this Agreement, will continue:
 - (i) for the period specified in the Statement of Work; or
 - (ii) until all the Services specified in the Statement of Work have been provided to the Client.

3. Provision of Services

3.1 Statements of Work

- (a) Any Services to be provided by Micron21 to the Client must be pursuant to an executed Statement of Work.

- (b) Each Statement of Work is a separate agreement and is deemed to incorporate the head terms of this Agreement, and once each Statement of Work is executed, will be deemed to form part of this Agreement.
- (c) Before entering into a Statement of Work, the Parties will discuss and agree any details necessary to complete the relevant Statement of Work. The Parties will negotiate in good faith and not unreasonably delay the execution of any Statement of Work.

3.2 Provision of Services and Delivered Service

- (a) Subject to payment of the Fees, Micron21 will use reasonable endeavours to provide the Services with due care and skill in accordance with the terms of this Agreement, including executed Statements of Work.
- (b) Micron21 will use reasonable endeavours to perform the Services and, where applicable, install or provide the Delivered Service on the milestone dates and in the manner specified in the Statement of Work.
- (c) The Client acknowledges and agrees that the performance of the Services and provision of the Delivered Service may be performed or provided by Micron21's Personnel located in Australia or by Personnel of Micron21 or a Related Entity of Micron21 or a subcontractor located in other countries.
- (d) Micron21 may provide the Client with software or other material which is owned by or is proprietary to a Third Party (**Third Party Material**) and the Client acknowledges that:
 - (i) its use of Third Party Material will be subject to the Third Party licensor's licence agreement; and
 - (ii) all licences with respect to the Client's use of Third Party Material will be between the Client and the Third Party developer.

(Third Party Licence).

- (e) Title in any Third Party Material remains at all times with the Third Party.
- (f) The Client is solely responsible for its compliance with the Third Party Licence and Micron21 will not be responsible for, or have any obligation to ensure, that the Client agrees to or complies with the Third Party Licence, save for where the Client is otherwise notified in writing by Micron21.
- (g) Where requested by the Client, Micron21 will use reasonable endeavours to provide the Client with a copy of the Third Party Licence.
- (h) Where notified in writing by Micron21, or by request of a Third Party licensor, the Client will submit to an audit of its use and number of installations of the Third Party Licence.

- (i) In order to provide the Services to the Client Micron21 may from time to time collect Client data related to the Services including, but not limited to, power usage (amps, kWh, volts, etc), network bandwidth (data used, speed, etc), performance data (CPU & RAM utilisation and Disk I/O), access data (logins, IP addresses accessed, etc). Micron21 will collect, use and manage this data as part of the Services and retain this data as part of its security requirements and applicable laws.

4. Change requests

- (a) Either Party may request a change in a Statement of Work (**Amending Party**) by preparing a Change Request at the Amending Party's cost.
- (b) The Amending Party must prepare the necessary amendments required to a Statement of Work and Micron21 will then provide the Client with a written estimate of the cost of performing the Change Request.
- (c) If the Parties are unable to sign off on the proposed amendments to a Statement of Work within 10 Business Days of Micron21 providing the estimate referred to in clause 4(b), the Change Request is deemed to be rejected.
- (d) Where Micron21 has proposed a change which has been rejected the Client accepts the risk, including potential loss, which may arise from not completing the change.

5. Support

Where specified in a Statement of Work including annexures, Micron21 will use reasonable endeavours to provide the Support Services at the times, in the manner and for the Fees specified in the Statement of Work.

6. Relationship governance

6.1 Account Representatives

During the Term, both Parties will appoint an employee, representative or agent (as specified in the Statement of Work and may be updated by written notice from time to time) who:

- (a) will be the primary contact for the other Party's Account Representative in dealing with matters under this Agreement and Statements of Work;
- (b) will have overall responsibility for managing and coordinating the Services;
- (c) will meet as discussed and agreed to with the other Party's Account Representative; and
- (d) will have the authority to make decisions with respect to actions to be taken by that Party in the ordinary course of day-to-day management of the Services in accordance with this Agreement.

7. Acceptance testing

- (a) The Client must conduct and complete the Acceptance Tests during the Acceptance Period and (unless otherwise specified in a Statement of Work) will be solely responsible for providing all data, facilities and other conditions to conduct the Acceptance Tests.
- (b) If the Delivered Service is not acceptable to the Client on the basis that the Acceptance Tests conducted in accordance with clause 7(a) reveal that the Delivered Service does not reasonably satisfy the Acceptance Criteria, then the Client must provide to Micron21 during the Acceptance Period notice of the reason(s) why it considers that the Delivered Service does not meet the Acceptance Criteria (**Reject Notice**) as well as all necessary and relevant Information in support of such reason(s).
- (c) To the extent that the Client's non-acceptance of the Delivered Service is reasonable and not due to any act or omission of the Client or any Third Party, Micron21 must at its reasonable cost use best endeavours to ensure that the relevant Delivered Service meets the Acceptance Criteria within 30 Business Days of receipt of the Reject Notice.
- (d) To the extent that the Client's non-acceptance of the Delivered Service is unreasonable, due to a failure by the Client to perform its obligations in accordance with this Agreement, due to an act or omission of the Client or any Third Party, or any cause outside Micron21's reasonable control, Micron21 will identify the steps necessary to overcome the failure of the relevant Delivered Service to meet the Acceptance Criteria and will be entitled to charge the Client in accordance with its Standard Rates for implementation of those steps.
- (e) Notwithstanding anything to the contrary in any provision of this Agreement, the Delivered Service is deemed to be accepted by the Client if:
 - (i) the Client has not completed the Acceptance Tests by the expiry of the Acceptance Period; or
 - (ii) the Delivered Service is used in a live or production environment.

8. Client obligations

- (a) The Client undertakes to:
 - (i) do all things necessary to enable Micron21 to perform its obligations under this Agreement including performing any works, providing any equipment or connecting any services as reasonably required by Micron21 from time to time;
 - (ii) provide Micron21 with assistance and co-operation in the performance of this Agreement as reasonably required by Micron21 including, but not limited to, providing Micron21 with:

- (A) access to the Site as and when required by Micron21;
 - (B) access to relevant Personnel of the Client;
 - (C) access to computer systems and equipment as and when required by Micron21; and
 - (D) all Information, software, systems and documentation as requested by, or as otherwise necessary for, Micron21,
- for the purposes of performing its obligations under this Agreement;
- (iii) appoint and maintain sufficient numbers of appropriately qualified Personnel to liaise with Micron21 in relation to the performance of this Agreement;
 - (iv) negotiate in good faith and not unreasonably delay performance of its obligations, including consents, under this Agreement; and
 - (v) perform any obligations specified in a Statement of Work.
 - (vi) The Client must comply with all Micron21 policies in relation to the Services as modified by Micron21 from time to time.
 - (vii)
 - (b) The Client will, at its own expense, prepare Sites in accordance with any specifications for the Sites and within the timing set out in a Statement of Work.
- (ii) if Micron21 is required to provide the Services in circumstances other than those expressly or reasonably anticipated in this Agreement or stated in the relevant Statement of Work;
 - (iii) a Site has not been prepared in accordance with the relevant Statement of Work, or in any event to the satisfaction of Micron21;
 - (iv) if there is a change in the timing or complexity of the Services;
 - (v) any of the project assumptions or the scope relating to the provision of the Services set out the Statement of Work (**Assumptions**) is incorrect, subject to change or is altered, including during the course of the provision of the Services; or
 - (vi) as a result of any act or omission by the Client, its agents, contractors or suppliers,
- then the Client acknowledges and agrees that:
- (vii) the dates for provision and acceptance of Delivered Service as set out in the Statement of Work or otherwise agreed, may be delayed or changed as reasonably necessary;
 - (viii) Micron21 may need to charge the Client an amount equal to its reasonable loss, damage or expense incurred as a result of the delay or change in Assumptions or as it otherwise requires in order to provide the Services. Micron21 must notify the Client of any additional costs to be charged to the Client and seeks the Client's consent to those costs before an invoice is rendered by Micron21 in these circumstances; and
 - (ix) Micron21 may increase the Fees relating to the provision of any amended or revised Services which are required as a result of any of the events listed in clauses 9(c)(i) to 9(c)(vi) provided Micron21 notifies the Client of any additional costs to be charged to the Client and seeks the Client's consent to those costs before the Services are rendered by Micron21.

9. Client acknowledgements

- (a) Micron21 is not responsible for any failure to perform any of its obligations under this Agreement where such failure is caused or contributed to by the Client or any Third Party;
- (b) The actual performance of the Service may be affected by factors outside the control of Micron21 including, but not limited to, the Client's internet connection;
- (c) The Client acknowledges that if the completion of Delivered Service or the provision of the Services is delayed or is required to be altered as a result of the following:
 - (i) if Micron21 suspends the provision of the Services in accordance with its rights under this Agreement;

10. Payment

10.1 Fees

- (a) The Client must pay Micron21 the Fees and any other amounts payable under this Agreement in the manner and on the date(s) specified in a Statement of Work. Micron21 will provide the Client with a tax invoice for all amounts due in respect of a Statement of Work.
- (b) The Parties acknowledge and agree that Micron21 will be reimbursed on demand at the actual cost for Expenses, provided that such expenses are approved in advance by the Client, documented

and receipts are attached to Micron21's tax invoice, where applicable.

10.2 Overdue amounts

- (a) If any amount payable to Micron21 under this Agreement has not been paid by the Client by the due date for payment, Micron21 may charge interest on the amount outstanding at the rate of 4% above the overdraft index rate charged by the National Australia Bank (or such other bank as Micron21 may nominate) calculated per annum from the due date for payment until such time as full payment of the outstanding amount is made by the Client (which interest must be paid by the Client on demand by Micron21).
- (b) If any amount payable to Micron21 under this Agreement has not been paid by the Client by the due date for payment, Micron21 may also:
 - (i) suspend performance of this Agreement (in part or in full) until the amount outstanding is paid in full; or
 - (ii) suspend or terminate all or any Statements of Work.
- (c) Micron21 may transfer or assign any amount owing to Micron21 by the Client to any third party without the prior notification or approval of the Client.
- (d) Micron21 may keep any physical equipment owned by the Client which is in the possession of Micron21 until payment of any outstanding invoice(s) is made by the Client. Micron21 reserves the right to sell any physical equipment owned by the Client which is in the possession of Micron21 if any outstanding invoice(s) are not paid as and when they fall due.
- (e) The exercise by Micron21 of any of its rights under this clause 10.2 does not affect:
 - (i) the Client's obligation to pay any money due and payable; or
 - (ii) any other rights or remedies Micron21 may have in relation to any failure by the Client to pay an amount due,

under this Agreement or any other agreement between Micron21 and the Client.

11. GST

11.1 Definitions

In this clause 11:

- (a) the expressions **Consideration**, **GST**, **Input Tax Credit**, **Recipient**, **Supply**, **Tax Invoice** and **Taxable Supply** have the meanings given to those expressions in the *A New Tax System*

(*Goods and Services Tax*) Act 1999 (**GST Act**); and

- (b) **Supplier** means any Party treated by the GST Act as making a Supply under this Agreement.

11.2 Consideration is GST exclusive

Unless otherwise expressly stated, all prices or other sums payable or Consideration to be provided under or in accordance with this Agreement are exclusive of GST.

11.3 Payment of GST

- (a) If GST is imposed on any Supply made under or in accordance with this Agreement, the Recipient of the Taxable Supply must pay to the Supplier an additional amount equal to the GST payable on or for the Taxable Supply, subject to the Recipient receiving a valid Tax Invoice in respect of the Supply at or before the time of payment.
- (b) Payment of the additional amount must be made at the same time and in the same way as payment for the Taxable Supply is required to be made in accordance with this Agreement.

12. Confidentiality

12.1 Obligations of confidentiality

Each Party (**Receiving Party**) receiving, possessing or otherwise acquiring Confidential Information of any other Party (**Disclosing Party**) acknowledges that the Disclosing Party's Confidential Information is the property of and confidential to or a trade secret of the Disclosing Party. Subject to clause 12.2, the Receiving Party must:

- (a) keep the Disclosing Party's Confidential Information confidential and not directly or indirectly disclose, divulge or communicate that Confidential Information to, or otherwise place that Confidential Information at the disposal of, any other person without the prior written approval of the Disclosing Party;
- (b) take all reasonable steps to secure and keep secure all Disclosing Party's Confidential Information coming into its possession or control; and
- (c) not memorise, use, modify, reverse engineer or make copies, notes or records of the Disclosing Party's Confidential Information for any purpose other than in connection with the performance by the Receiving Party of its obligations under this Agreement.

12.2 Exceptions

The obligations of confidentiality under clause 12.1 do not apply to any information that:

- (a) is generally available, or becomes available, to the public (other than by reason of a breach of this Agreement); or
- (b) is required to be disclosed by Law.

12.3 Residual information

Nothing in this Agreement will prevent a Party from using in any way it sees fit and disclosing to its other customers, clients and suppliers any generic knowledge, skills and expertise retained in the memories of its employees, and any programming tools, problem-solving methodologies and associated checklists, templates or forms developed in performance of the Services which may have general application in the fields of information technology and business management. It is however understood that the foregoing shall in no circumstances extend to use or disclosure of Confidential Information of the other Party.

13. Privacy

13.1 Collection and use

- (a) The Client acknowledges and agrees that it is responsible for the collection, use, storage and otherwise dealing with Personal Information related to the Client's business and all matters relating to the Delivered Service. The Client will comply and ensure that all of its Personnel comply, with the requirements of any Privacy Law in respect of all Personal Information collected, used, stored or otherwise dealt with under or in connection with this Agreement.
- (b) Without limiting clause 13.1(a), the Client undertakes for itself, and on behalf of its Personnel, to:
 - (i) notify its customers, clients or other natural person to whom Personal Information it collects relates of any matter prescribed by any Privacy Laws in relation to the collection, use and storage of their Personal Information;
 - (ii) ensure that any Personal Information transferred to Micron21 is complete, accurate and up to date; and
 - (iii) notify Micron21 immediately upon becoming aware of any breach of any Privacy Law that may be related to the use of the Personal Information under this Agreement.

13.2 Disclosure of Personal Information to Micron21

Without limiting clause 13.1(a), the Client may only disclose Personal Information in its control to Micron21 if:

- (a) the Client is authorised by applicable Privacy Laws, including any privacy policy or code of the Client, to collect the Personal Information and to use or disclose it in the manner required by this Agreement;
- (b) the Client has informed and has obtained the consent of the individual to whom the Personal

Information relates that in order to provide goods or services to them it might be necessary for the Client to disclose their Personal Information to a third party, including to a third party located outside of Australia; and

- (c) where any Personal Information is Sensitive Information, the Client has obtained the specific consent to that disclosure from the individual to whom the Sensitive Information relates.

13.3 Indemnity

The Client indemnifies and must keep indemnified Micron21 against all actions, claims, proceedings, demands, liabilities, losses, damages, expenses and costs (including legal costs on a full indemnity basis) that may be brought against Micron21 or which Micron21 may pay, sustain or incur as a direct or indirect result of any breach or non-performance of the Client's obligations under this clause 13.

14. Intellectual Property Rights

14.1 Licence to use Background Materials

- (a) Micron21 may make available to the Client, and use its Background Materials where necessary to perform the Services or provide the Delivered Service.
- (b) Upon providing its Background Materials, and unless otherwise specified in a Statement of Work, Micron21 grants a non-transferable, non-exclusive, worldwide, revocable and royalty-free licence to the Client to allow the Client to use, reproduce, modify, adapt and communicate Micron21's Background Materials for the sole purpose of the Client deriving the full benefit of the Delivered Service.
- (c) The Client will make available its Background Materials to Micron21 where necessary for Micron21 to perform the Services or provide the Delivered Service.
- (d) The Client hereby grants Micron21 a non-exclusive, worldwide, transferable, fully-paid up, royalty-free licence (with the right to grant sub-licences to Related Entities of Micron21) for the Term to use, reproduce, modify and communicate the Client's Background Materials in order to perform the Services and provide the Delivered Service.
- (e) As part of the Services Micron21 may pool the Information the Client and other users of Micron21's services provide to Micron21 (**Comparative Information**) and use that information in a de-identifying manner which complies with the Privacy Law. The Comparative Information will be general information about the operations of users of Micron21's services. The Comparative Information Micron21 gathers and which Micron21 may publish will not refer to, or be identifiable to, any particular user of Micron21's services.
- (f) The Client grants a non-exclusive, royalty-free license to Micron21 to use the Comparative Information for any such other purposes as

Micron21 deems necessary provided use of the Comparative Information conforms with the Privacy Law and all other applicable Laws.

- (g) Unless otherwise specified in a Statement of Work, the Client acknowledges that all of Micron21's Background Material, and all existing and future Intellectual Property Rights which is derived or arises from, or is connected with, Micron21's Background Material, is the property of and will at all times remain vested in Micron21.
- (h) To the extent that any Intellectual Property Rights referred to in clause 14.1(e) do not automatically vest in Micron21, the Client immediately assigns to Micron21 absolutely and beneficially the whole of its rights, title and interest in and to those Intellectual Property Rights, whether presently existing or which arise at a date after the date of this Agreement, with effect from the date a Statement of Work is signed by the Client.
- (i) The Client agrees to do all things necessary or desirable, and will ensure its Personnel do all things necessary or desirable, to effect the assignment referred to in clause 14.1(h).

14.2 Ownership of Delivered Service

- (a) The Client acknowledges that all Intellectual Property Rights in the Delivered Service which exists at the time of creation of the Delivered Service, and all future Intellectual Property Rights which is derived or arises from, or is connected with, Intellectual Property Rights in the Delivered Service, is the property of and will at all times remain vested in Micron21; and
- (b) Subject to the Client's ongoing compliance with this Agreement and payment of the relevant Fees (and subject to any variation in a Statement of Work), Micron21 grants the Client a non-exclusive, worldwide, non-transferable, fully-paid up, royalty-free license to use, reproduce, modify and communicate the Intellectual Property Rights in the Delivered Service which exist at the time of creation of the Delivered Service.

15. Micron21 Warranties

15.1 Micron21 warranties

Micron21 warrants that:

- (a) it will use reasonable endeavours to provide the Services to a high professional standard, in accordance with accepted industry practice, using due skill and care and otherwise in accordance with this Agreement and any applicable Laws;
- (b) it has all necessary consents to perform the Services and provide the Delivered Service; and

- (c) any Delivered Service and Micron21's Background Materials do not knowingly infringe any Australian-registered Intellectual Property Rights of any Third Party.

15.2 Delivered Service Defects warranty

- (a) Subject to any applicable Law, Micron21 warrants that the Delivered Service will operate as specified in a Statement of Work, without Defect for a period of 30 days or such other period specified in the Statement of Work following acceptance pursuant to clause 7 (**Warranty Period**).
- (b) Where a Defect occurs in the Delivered Service during the Warranty Period, Micron21 will use reasonable endeavours and will take reasonable steps to respond to and rectify the Defect (**Defect Rectification**) for no additional fee to the Client. The Client agrees that this will be its sole remedy against Micron21 for Defects under this Agreement.
- (c) Micron21 will be relieved of its Defect Rectification responsibilities under clause 15.2(b) where:
 - (i) Micron21 can reasonably establish that a Defect was caused due to a defect or fault in the software, Sites or computer systems of the Client;
 - (ii) the Defect was caused by the Client's Unauthorised Use; or
 - (iii) the Defect is due to any act or omission of the Client or a Third Party or a cause outside Micron21's reasonable control.
- (d) Following the expiration of the Warranty Period, Micron21 shall rectify Defects in accordance with the Support Services obligations agreed under a Statement of Work.
- (e) In order to make a warranty claim the Client must contact Micron21 on 1300 769 972 or by email: support@micron21.com.
- (f) Micron21 acknowledges that:

Our goods and services come with guarantees that cannot be excluded under the Australian Consumer Law. For major failures with the service, you are entitled:

- (i) to cancel your service contract with us; and
- (ii) to a refund for the unused portion, or to compensation for its reduced value.

You are also entitled to choose a refund or replacement for major failures with goods. If a failure with the goods or a service does not amount to a major failure, you are entitled to have the failure rectified in a reasonable time. If this is not done you are entitled to a refund for the goods and to cancel the contract for the service and obtain a refund of any unused portion. You are also entitled to be compensated for any other reasonably

foreseeable loss or damage from a failure in the goods or service.

15.3 Client warranties

The Client warrants that:

- (a) it has all necessary consents and is authorised to allow Micron21 to perform the Services and provide the Delivered Service;
- (b) not knowingly upload or make available any material that is illegal, that contains viruses or any other computer code, files or programs designed (intended or otherwise) to interrupt, destroy, or limit the functionality of any Micron21 Service and the Client acknowledges that, to the extent to which such material is uploaded or made available, there may be an impact on the performance of the Micron21's Services);
- (c) use reasonable efforts to prevent unauthorised access to, or use of, the Delivered Service, and to promptly notify Micron21 of any such access; and
- (d) its Background Materials do not infringe any Intellectual Property Rights of any Third Party.

15.4 Generally

- (a) Any representation, warranty, condition or undertaking that would be implied in this Agreement by legislation, common law, equity, trade, custom or usage is excluded to the maximum extent permitted by Law.
- (b) Nothing in this Agreement excludes, restricts or modifies any condition, warranty, guarantee, right or remedy conferred on the Client by the *Competition and Consumer Act 2010 (Cth)* or any other applicable Law that cannot be excluded, restricted or modified by agreement. To the fullest extent permitted by Law, the liability of Micron21 for a breach of a non-excludable condition, warranty or guarantee referred to in this clause 15.4(b) is limited, at Micron21's option, to:
 - (i) in the case of goods, any one or more of the following:
 - (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; or
 - (D) the payment of the cost of having the goods repaired; or

(ii) in the case of services:

- (A) the supplying of the services again; or
- (B) the payment of the cost of having the services supplied again.

16. Limitation of liability

- (a) Subject to any applicable Law, Micron21 is not liable to the Client or to any other person for any indirect, incidental, special, exemplary or consequential loss or damage, loss of profits or anticipated profits, loss of revenue, economic loss, loss of business opportunity, damage to goodwill, loss of data, deletion or corruption of electronically or digitally stored Information or loss or damage resulting from wasted management time irrespective of whether:
 - (i) the loss or damage is caused by or relates to breach of contract, statute, tort (including negligence) or otherwise;
 - (ii) the possibility of such loss or damage was foreseeable; or
 - (iii) Micron21 or any other person was previously notified of the possibility of the loss or damage.
- (b) Subject to any applicable Law, Micron21 is not liable for any loss or damage howsoever caused to any property or person of the Client or any Third Party as a result of any defect in the Services or Delivered Service.
- (c) Subject to any applicable Law, the maximum aggregate liability of Micron21 for all proven losses, damages and claims arising out of this Agreement, including liability for breach, in negligence or in tort or for any other common law or statutory action, is limited in the following manner:
 - (i) if the liability arises in relation to a Statement of Work, it is limited to the sum of the amounts paid by the Client to Micron21 under that Statement of Work in the 6 month period immediately before the notice of the then current claim; and
 - (ii) in all other cases, it is limited to the sum of the amounts paid by the Client to Micron21 under this Agreement in the 6 month period immediately before the notice of the then current claim.
- (d) The Client indemnifies Micron21 for any and all loss and damage (including legal fees) arising out of or in connection to:
 - (i) any breach by the Client of their obligations under this Agreement, any Statement of Work or any Micron21 policies;

- (ii) any injuries, damages or loss suffered by Micron21 or its Personnel whilst at the Site;
- (iii) any wilfully negligent, wrongful or unlawful act or omission by the Client;
- (iv) all and any claims whatsoever and howsoever arising made by any Third Party in connection with or arising out of the Client's use of the Delivered Service; and
- (v) any failure by the Client to obtain a consent necessary for Micron21 to provide the Services.

17. Force majeure

Neither Party will be liable to the other for any delay or failure to perform its obligations under this Agreement as a result of a cause beyond its reasonable control (**Force Majeure**). If the Force Majeure continues for a period of more than 30 days, the Party not affected by the Force Majeure may terminate this Agreement by written notice to the affected Party.

18. Default notice

If an Event of Default occurs in relation to a Party (**Relevant Party**), the other Party may give a notice (**Default Notice**) to the Relevant Party specifying the Event of Default and requiring the Relevant Party to remedy the default within 15 Business Days after the Default Notice is given to the Relevant Party.

19. Termination notice

19.1 Termination by Default

If a Party (**Defaulting Party**):

- (a) receives a Default Notice and does not comply with the notice within the relevant period referred to in clause 18; or
- (b) is the subject of an Insolvency Event,

then the other Party, without limiting its other rights and remedies, may terminate a Statement of Work to which the Event of Default relates, by giving to the Defaulting Party notice with immediate effect.

19.2 Termination by Notice

Micron21 may terminate a Statement of Work or this Agreement at any time for any reason and without prejudice to any right or action or remedy which has accrued or which may accrue in favour of Micron21, by giving the Client 90 days written notice to that effect.

19.3 Consequences of expiry or termination

- (a) On the expiry or termination of a Statement of Work for any reason:

- (i) the Statement of Work is at an end as to its future operation except for the enforcement of any right or claim in relation to the Agreement that arises on, or has arisen before, the expiry or termination;
 - (ii) in respect of the terminated Statement of Work, the Client must immediately pay Micron21 all outstanding Fees which will become immediately due and payable and any invoice provided for work completed but not invoiced before termination;
 - (iii) the Client must pay to Micron21 any Unavoidable Costs;
 - (iv) subject to the Client complying with its obligations in clauses 19.3(a)(ii) and 19.3(a)(iii), the Client will be entitled to retain and use that part of the Delivered Service provided by Micron21 and paid for in full by the Client on or before the date of termination;
 - (v) in circumstances where:
 - (A) a Statement of Work has been terminated as a result of a breach of the Statement of Work (or this Agreement) by the Client; and
 - (B) Micron21 offered the Client a reduced fee for Services in a Statement of Work,
- the Client is liable to pay the difference between the full fee stated in a Statement of Work and the reduced fee previously invoiced by Micron21 for those Services.
- (vi) the Client must immediately cease using and return to Micron21 any part of the Delivered Service that is not paid for by the Client, at the Client's risk and cost; and
 - (vii) the Client must immediately cease using and return to Micron21 any of Micron21's Background Material and Confidential Information, at the Client's risk and cost, or if such Background Material or Confidential Information is incapable of being returned, permanently destroying it.

- (b) Termination of a Statement of Work will not affect this Agreement and any other Statements of Work which are in effect between Micron21 and the Client at the time of the termination and such other Statements of Work will continue in accordance with their respective terms.

- (c) Upon the termination or expiration of all Statements of Work issued under this Agreement, either Party may terminate these head terms of the Agreement by written notice to the other Party on 30 Business Days prior written notice.

19.4 Survival of obligations

This clause 19.4 together with clauses 10, 11, 12, 13, 14, 15.4, 16, 19.2, 20, 21 and 22 survive termination or expiration of this Agreement.

20. No Solicitation

- (a) During the Term and for a period of 12 months following the end of the Term, the Client will not directly or indirectly:
 - (i) solicit or encourage any employee of Micron21 who was involved in performing any Statement of Work, to leave the employ of Micron21; or
 - (ii) solicit or encourage any consultant or other contractor under contract with Micron21 who was involved in performing any Statement of Work, to cease work for Micron21.
- (b) If the Client breaches clause 20(a), it agrees to pay Micron21 an amount equal to 12 month's remuneration of that person when last engaged by Micron21, and the Client agrees to pay such amount on demand. The Parties agree that this amount is a genuine pre-estimate of the loss suffered by Micron21 as a result of the Client's conduct.

21. Dispute resolution

- (a) A Party claiming that a dispute has arisen must give written notice to the other Party specifying the nature of the dispute and the Parties must submit themselves to the dispute resolution procedure specified in this clause 21.
- (b) The Parties agree that if a dispute arises out of or relates to this Agreement, a Party may not commence any legal proceedings relating to the dispute unless it has complied with the provisions of this clause 21 except to seek urgent equitable or interlocutory relief. The procedures in this clause 21 must be completed within 60 days from the giving of notice referred to in this clause 21. After expiry of this time a Party may commence legal proceedings relating to the dispute.
- (c) When a dispute arises between the Parties in relation to this Agreement, then:
 - (i) all amounts payable by the Client to Micron21 which are not in dispute must be paid in accordance with the Statement of Work;
 - (ii) if the Parties cannot resolve the dispute within 10 Business Days after notice has been given, then the dispute is to be referred to the respective chief executive officers or their nominees of each Party (jointly referred to in the remainder of this

clause 21 as **Chief Executive Officers**) for resolution; and

- (iii) if the Chief Executive Officers cannot resolve the dispute within 10 Business Days after referral, then the Parties must submit the Dispute to a mediator for consideration in accordance with the Mediation and Conciliation rules of the Institute of Arbitrators and Mediators Australia, which Rules are taken to be incorporated into this Agreement.

- (d) Each Party must pay its own internal and legal costs in relation to complying with this clause 21. The mediator's costs are to be shared equally between the Parties.

22. General

22.1 Nature of obligations

- (a) Any provision in this Agreement or a Statement of Work which binds more than one person binds all of those persons jointly and each of them severally.
- (b) Each obligation imposed on a Party by this Agreement or a Statement of Work in favour of another is a separate obligation.

22.2 Entire understanding

This Agreement and each individual Statement of Work contains the entire understanding between the Parties concerning the subject matter of this Agreement or the relevant Statement of Work and supersedes all prior communications, agreements, proposals, work orders or correspondence between the Parties.

22.3 No adverse construction

This Agreement and each Statement of Work is not to be construed to the disadvantage of a Party because that Party was responsible for its preparation.

22.4 Further assurances

A Party, at its own expense and within a reasonable time of being requested by another Party to do so, must do all things and execute all documents that are reasonably necessary to give full effect to this Agreement and to each Statement of Work.

22.5 No waiver

- (a) A failure, delay, relaxation or indulgence by a Party in exercising any power or right conferred on the Party by this Agreement or a Statement of Work does not operate as a waiver of that power or right.
- (b) A single or partial exercise of the power or right does not preclude a further exercise of it or the exercise of any other power or right under this Agreement or a Statement of Work.
- (c) A waiver of a breach does not operate as a waiver of any other breach.

22.6 Severability

Any provision of this Agreement or a Statement of Work which is invalid in any jurisdiction must, in relation to that jurisdiction:

- (a) be read down to the minimum extent necessary to achieve its validity, if applicable; and
- (b) be severed from this Agreement or the relevant Statement of Work in any other case,

without invalidating or affecting the remaining provisions of this Agreement or the Statement of Work or the validity of that provision in any other jurisdiction.

22.7 Successors and assigns

This Agreement and each Statement of Work binds and benefits the Parties and their respective successors and permitted assigns under clause 22.8.

22.8 No assignment

The Client cannot assign or otherwise transfer the benefit of this Agreement or a Statement of Work without the prior written consent of Micron21.

22.9 Consents and approvals

Where anything depends on the consent or approval of a Party then, unless this Agreement or a Statement of Work provides otherwise, that consent or approval may be given conditionally or unconditionally or withheld, in the absolute discretion of that Party.

22.10 No variation

- (a) This Agreement cannot be amended or varied except in writing signed by the Parties.
- (b) A Statement of Work can only be amended or varied in accordance with clause **Error! Reference source not found..**

22.11 Costs

Each Party must pay its own legal costs of and incidental to the preparation and completion of this Agreement and each Statement of Work.

22.12 Governing Law and jurisdiction

- (a) This Agreement and each Statement of Work is governed by and must be construed in accordance with the Laws in force in Victoria.
- (b) The Parties submit to the exclusive jurisdiction of the courts of Victoria and the Commonwealth of Australia in respect of all matters arising out of or relating to this Agreement and each Statement of Work, its performance or subject matter.

22.13 Notices

Any notice or other communication to or by a Party under this Agreement:

- (a) may be given by personal service, post, or sent electronically by email;
- (b) must be in writing, legible, signed (including by way of electronic signature) by the relevant Party's authorised representative and in English addressed (depending on the manner in which it is given) to the relevant contact and address, or email specified in the Statement of Work or to any other address facsimile number or email last notified by the Party to the sender by notice given in accordance with this clause; and
- (c) is deemed to be given by the sender and received by the addressee:
 - (i) if delivered in person, when delivered to the addressee;
 - (ii) if posted, 3 Business Days (or 10, if addressed outside Australia) after the date of posting to the addressee whether delivered or not;
 - (iii) if sent by facsimile transmission, on the date and time shown on the transmission report by the machine from which the facsimile was sent which indicates that the facsimile was sent in its entirety and in legible form to the facsimile number of the addressee notified for the purposes of this clause; or
 - (iv) if sent electronically by email and confirmation is received from the relevant internet service provider that the transmission was successfully delivered, on the day of transmission,

but if the delivery or receipt is on a day which is not a Business Day or is after 4.00 pm (addressee's time), it is deemed to have been received at 9.00 am on the next Business Day.

22.14 Counterparts

If this Agreement or a Statement of Work consists of a number of signed counterparts, each is an original and all of the counterparts together constitute the same document.

22.15 Non merger

A term or condition of, or act done in connection with, this Agreement does not operate as a merger of any of the rights or remedies of the Parties under this Agreement and those rights and remedies continue unchanged.

22.16 Operation of indemnities

Unless this Agreement expressly provides otherwise:

- (a) each indemnity in this Agreement or the relevant Statement of Work survives the expiry or termination of this Agreement or the Statement of Work; and
- (b) a Party may recover a payment under an indemnity in this Agreement or a Statement of Work before it makes the payment in respect of which the indemnity is given.

22.17 Relationship of Parties

- (a) Each Party is an independent contractor and, unless this Agreement or a Statement of Work expressly provides otherwise, has no authority to bind or commit the other Party.
- (b) Unless this Agreement or a Statement of Work expressly provides otherwise, nothing in this Agreement or a Statement of Work may be construed as creating a relationship of partnership, of principal and agent or of trustee and beneficiary.

Schedule 1

Agreement Details

Item 1	Client: [insert] Address: [insert] Phone: [insert] Email: [insert]
Item 2	Date of execution [insert]

[Note: The Client will still need to separately execute a Statement of Work for each project that you provide.]

Client:

On behalf of the Client, I hereby agree to the terms and conditions set out in the Statement of Work and confirm I have due authority and capacity to act on behalf of the Client in entering into this Agreement.

Signed:

Name:

Position:

Date:

Micron21:

On behalf of Micron21, I hereby agree to the terms and conditions set out in the Statement of Work and confirm I have due authority and capacity to act on behalf of Micron21 in entering into this Agreement.

Signed:

Name:

Position:

Date:

Micron21 Statement of Work

Statement of Work number: [Insert Identification Number]

The parties agree that this Statement of Work is made pursuant to and incorporates the terms of the Master Services Agreement (**Agreement**) executed between Micron 21 Data Centre Pty Ltd of [Factory 2/7 Eastspur Court, Kilsyth South, Victoria 3137] and [Client] on [Tuesday, 26 June 2018].

Unless specified in the following list, any defined terms used in this Statement of Work and the rules of interpretation will be the same as in the Agreement.

- **Service Levels** means the service levels set out in this Statement of Work;
- [insert further definitions]

Client contact details:	
Client	[insert full name and ABN/ABN]
Client Representative	[insert name]
Contact number	[Insert phone number]
Address	[insert postal address for receipt of notices]
Email	[insert email address]

Micron21 contact details:	
Representative	[insert name]
Contact number	[Insert phone number]
Address	[insert postal address for receipt of notices]
Email	[insert email address]

Services and Delivered Service			
Term:			
- Commencement Date	[Insert the date on which Services are to commence]		
- Expiry Date (if any)	[Insert the date (if any) on which Services are to expire]		
	[
Description of Services	[Insert general overview of the services Micron21 will be provided including timing.]		
Delivered Service	Description of Delivered Service	Initial delivery date	Final delivery and acceptance date
	[Insert description including formats.]	[insert]	[insert]
Support Services	[Insert the specific support services to be provided including timing (if applicable)]		
Acceptance Tests	[Insert Acceptance Test description (if applicable)]		
Acceptance Period	[Insert Acceptance Period (if applicable)]		
Acceptance Criteria	[Insert Acceptance Criteria (if applicable)]		
Exemptions or exclusions from the Services	[Insert if applicable.]		

Services and Delivered Service	
Project Assumptions	[Insert if applicable.]
Site (if applicable)	[Insert if applicable.]
Third Party Material to be supplied by Micron21 to the Client (clause 3.2(d))	[Insert if applicable. Note that Third Party Material would include software licensed by a Third Party. Note "Unavoidable Costs" below which addresses Third Party costs.]
Service levels	<p>For Support Services</p> <p>Priority ranking criteria and response times for Issues are as indicated below:</p> <p><i>Priority 1 – Critical</i> An Issue that impacts critical system functions and severely impacts operations e.g. system down, data corruption.</p> <p><i>Priority 2 – Major</i> An Issue that significantly impacts user experience but does not prevent end to end operations.</p> <p><i>Priority 3 – Minor</i> An Issue which does not impact upon the functionality or data integrity of the system.</p> <p>The priority of each Issue is determined by Micron21 in consultation with the Client. Where there is a disagreement on the priority to be allocated to an Issue then Micron21's decision will prevail.</p>

Fees			
Fees	Services/Delivered Service Item	Full Fee	Reduced Fee
Unavoidable Costs			
Payment Terms			
Support Services and Fees			
Standard Rates (clause 7(d))			
Other Expenses			
Special conditions			

Execution of Statement of Work

Client:

On behalf of the Client, I hereby agree to the terms and conditions set out in the Statement of Work and confirm I have due authority and capacity to act on behalf of the Client in entering into this Agreement.

Signed:

Name:

Position:

Date:

Micron21:

On behalf of Micron21, I hereby agree to the terms and conditions set out in the Statement of Work and confirm I have due authority and capacity to act on behalf of Micron21 in entering into this Agreement.

Signed:

Name:

Position:

Date: