

# AGREEMENT EXECUTION DOCUMENT MASTER SERVICES AGREEMENT

REVIEW DATE: MAY 2026



## 1. DEFINITIONS AND INTERPRETATION

### 1.1 Definitions

In this Agreement:

**Agreement** has the meaning given to it in clause 2.1.

**API** means application process interface.

**Australian Consumer Law** means Schedule 2 of the *Competition and Consumer Act 2010* (Cth).

**Authorised Officer** of a party which is a corporation means:

- (a) except in the Customer's case, an employee of the party whose title contains either of the words CEO, Chief Executive, Director or Manager;
- (b) subject to the limitation in paragraph (a), a person performing the function of any of them;
- (c) a solicitor acting on behalf of the party; or
- (d) a person appointed by the party to act as an Authorised Officer for the purposes of this Agreement and notified to the others.

**Business Day** means:

- (a) if determining when a notice, consent or other communication is given, a day that is not a Saturday, Sunday or public holiday in the place to which the notice, consent or other communication is sent; and
- (b) for any other purpose, a day (other than a Saturday, Sunday or public holiday) on which banks are open for general banking business in Brisbane in the State of Queensland.

**Business Fitness IP** means all Intellectual Property Rights created, owned or licensed by Business Fitness under this Agreement and independently of this Agreement.

**Claim** means, in relation to a person, any action, allegation, claim, demand, judgment, liability, proceeding, remedy, right of action or right of set-off made against the person concerned however it arises whether:

- (a) it is present, unascertained, immediate, future or contingent.
- (b) it is based in contract, tort, statute or otherwise; or
- (c) it involves a third party or a party to this Agreement.

**Change of Control** means a change in: control of more than half the voting rights attaching to shares in the corporation; or control of more than half the issued shares of the corporation (not counting any share which carries no right to participate beyond a specified amount in the distribution of either profit or capital).

**Commencement Date** means the date the first Order Form between the parties is executed.

**Confidential Information** means, in relation to each party (for the purposes of this definition, Discloser), all information disclosed by or on behalf of the Discloser, concerning or relating to:

- (a) the fee and remuneration structure set out in this Agreement;
- (b) know-how, trade secrets, ideas, marketing strategies, operational information, technical information and financial information;
- (c) proprietary software tools, business processes, project management methodologies and tools, software testing and verification methods, solution architecture models and solutions;
- (d) its business affairs (including products, services, customers and suppliers); and
- (e) other information, which, by its nature or by the circumstances of its disclosure, is or could reasonably be expected to be regarded as confidential,

but excluding any such information:

- (f) which is publicly known;
- (g) which is disclosed to the other party without restriction by a third party (other than the Discloser) and without any breach of confidentiality by that third party; or
- (h) which is developed independently by other party without reliance on any of the confidential information.

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**Consequential Loss** means any of the following:

- (a) loss of revenue;
- (b) loss of profits;
- (c) loss of opportunity to make profits;
- (d) loss of business;
- (e) loss of business opportunity;
- (f) loss of use or amenity, or loss of anticipated savings;
- (g) special, exemplary or punitive damages; and
- (h) any loss which does not directly and naturally flow in the normal course of events from the occurrence of the event giving rise to the liability for such loss, whether or not such loss was in the contemplation of the parties at the time of entry into this Agreement,

including any of the above types of loss arising from an interruption to a business or activity.

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

**CPI** means the Consumer Price Index Number (All Groups) in Brisbane published by the Australian Bureau of Statistics or, if that index does not exist, the nearest equivalent index.

**Customer** means the party identified as the Customer in an Order Form.

**Customer Data** means all data uploaded by the Customer (or its Personnel), or provided to Business Fitness to upload, to infrastructure utilised by Business Fitness to provide the Products to the Customer (excluding anything embodying the proprietary rights, including Intellectual Property Rights, of Business Fitness or its Related Entities).

**Customer IP** means the Intellectual Property Rights of the Customer which are established by the Customer or developed independently of this Agreement.

**End User** means an individual or a company licensed by the Customer to use the Products pursuant to the End User Terms.

**End User Terms** means the End User Terms detailed at the following link [End User Terms – Business Fitness](#) and updated from time to time by Business Fitness at its sole discretion.

**Exceptional Circumstance** means a circumstance beyond the reasonable control of the parties which results in a party being unable to comply with or perform on time an obligation under this Agreement. Such circumstances include:

- (a) adverse changes in government regulations;
- (b) any disaster or act of God, lightning strikes, atmospheric disturbances, earthquakes, floods, storms, explosions, fires and any natural disaster;
- (c) acts of war, acts of public enemies, terrorism, riots, civil commotion, malicious damage, sabotage and revolution, cyber-attacks, viruses or malware, data loss as a result of the actions of a third party;
- (d) strikes or industrial disputes;
- (e) materials or labour shortage; and
- (f) acts or omissions of any third party network providers (such as internet, telephony or power provider).

**Government Body** means:

- (a) any person, body or other thing exercising an executive, legislative, judicial or other governmental function of any country or political subdivision of any country;
- (b) any public authority constituted by or under a law of any country or political subdivision of any country; and
- (c) any person deriving a power directly or indirectly from any other Government Body.

**GST** means GST as that term is defined in the GST Law, and any interest, penalties, fines or expenses relating to such GST.

**GST Law** means *the A New Tax System (Goods and Services Tax) Act 1999* (Cth) and/or associated Commonwealth legislation, regulations and publicly-available rulings.

**Initial Term** means the period of time ending on the latest expiry date detailed in an Order Form.

**Insolvency Event** means an event of bankruptcy or insolvency, an assignment for the benefit of creditors, the appointment of a receiver, receiver and manager, provisional liquidator, administrator, liquidator and official manager or any similar person to any assets of a person, a failure to comply with a statutory demand, or anything else which occurs

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which is analogous or has a substantially similar effect, under the laws of any jurisdiction, or the person is otherwise insolvent or unable to pay its debts as and when they fall due.

**Intellectual Property Rights** means all current and future registered and unregistered rights in respect of copyright, circuit layouts, designs, trade marks, know-how, confidential information, patents, inventions and discoveries and all other intellectual property as defined in article 2 of the convention establishing the World Intellectual Property Organisation 1967.

**Law** means any statute, rule, regulation, proclamation, order in council, ordinance, local law or by-law, whether:

- (a) present or future (including applicable common law); or
- (b) state, commonwealth or otherwise.

**Liability** means any liability, debt or obligation, whether actual, contingent or prospective, present or future, qualified or unqualified or incurred jointly or severally with any other person. Liable has a corresponding meaning.

**Loss** means any loss (including Consequential Loss), claims, actions, liabilities, damages, expenses, diminution in value or deficiency of any kind whether direct, indirect, consequential or otherwise.

**Master Services Agreement** means this document and its schedules and annexures.

**Material** means property, information, software, firmware, documented methodology or process, documentation or other material in whatever form, including any reports, specifications, business rules or requirements, user manuals, user guides, operations manuals, training materials and instructions, and the subject matter of any category of Intellectual Property Rights.

**New IP** means any and all Intellectual Property Rights created in the course of, or connection with, the provision of the Products and the performance of the Services.

**Non-Excludable Condition** means an implied condition, warranty or guarantee, including under the *Competition and Consumer Act 2010* (Cth) as applicable from time to time, the exclusion of which from a contract would contravene any applicable

Laws or cause any part of this agreement to be void.

**Order Form** means a document prepared by Business Fitness detailing the specific Products to be provided to the Customer and any other special terms and conditions that apply to those Products which incorporates all the terms of the Master Services Agreement.

**Outputs** means all outputs, records, reports, data and other Material generated from the use of the Products.

**Personal Information** has the meaning given in the Privacy Law including sensitive information (as defined in the Privacy Law).

**Personnel** means in relation to a party, any Related Body Corporate, Related Entity, employee, officer, agent, contractor, professional adviser of that party.

**Privacy Law** means the *Privacy Act 1988* (Cth) as amended from time to time.

**Product** means the software, deliverables or other services to be provided by Business Fitness to Customer as detailed in an Order Form.

**Related Body Corporate** includes any corporation that is deemed to be related to a person by virtue of the provisions of the *Corporations Act*.

**Related Entity** means a person which is a related entity within the meaning of that term in section 9 of the *Corporations Act*.

**Service Fees** means the fee payable by the Customer for the Products, as set out in each Order Form, and may include, but is not limited to monthly subscription fees, fees for Support Services, and any fees for additional services pursuant to clause 4.4.

**Services** means the services specified in an Order Form to be provided by Business Fitness in relation to the Products from time to time during the Term of the Agreement, and includes the Support Services.

**Service Level Agreement** or **SLA** means the Service Level Agreement referenced in an Order Form and which can be found at the following link: [Service Level Agreement \(SLA\) | Active](#)

**Site** means the site at which any on-site Support Services will be provided (if applicable), as further set out in an Order Form.

**Storage Limits** means:

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a) the then-current applicable Active Platform Limits found at this link: [Active Platform limits | Active](#); and

(c) the API limits found at this link: [Business Fitness Active API - Documentation](#)

**Support Services** means the product support services to be performed by Business Fitness in relation to the software Products under this Agreement, as detailed in the applicable Order Form.

**System Requirements** means the system requirements for the Products as set out in an Order Form, and otherwise as advised by Business Fitness from time to time.

**Tax** means any present or future tax, levy, deduction, impost, withholding, charge or duty which is levied or imposed by any Government Body together with any interest, penalty or fine on those amounts.

**Tax Invoice** means a "tax invoice" compliant with the requirements of the GST Law.

**Term** is the Initial Term, as extended under clause 3.2 (if applicable).

**Third Party** means any third party to the Agreement, other than any Related Bodies Corporate of a party to this Agreement.

**Third Party Content** means any software, Intellectual Property Rights or Material which is owned by a Third Party and includes (but is not limited to) open-source software.

**Third Party Service** has the same meaning as in clause 9.2 of this Agreement.

**Usage Limits** includes limits on data storage and other features associated with each Product, as detailed in [Product Usage Limits in an Order Form](#) and amended from time to time by agreement of the parties in writing.

## 1.2 Interpretation

Unless the contrary intention appears, a reference in this Agreement to:

- (a) this Agreement or another document includes any variation or replacement of it despite any change in the identity of the parties;
- (b) one gender includes the others;

(c) the singular includes the plural and the plural includes the singular;

(d) a person, partnership, corporation, trust, association, joint venture, unincorporated body, Government Body or other entity includes any other of them;

(e) an item, recital, clause, subclause, paragraph, schedule or attachment is to an item, recital, clause, subclause, paragraph of, or schedule or attachment to, this Agreement and a reference to this Agreement includes any schedule or attachment;

(f) a party includes the party's executors, administrators, successors, substitutes (including a person who becomes a party by novation) and permitted assigns;

(g) any statute, ordinance, code or other law includes regulations and other instruments under any of them and consolidations, amendments, re-enactments or replacements of any of them;

(h) money is to Australian dollars, unless otherwise stated; and

(i) a time is a reference to Brisbane, Queensland time unless otherwise specified.

(j) The words include, including, such as, for example and similar expressions are not to be construed as words of limitation.

(k) Where a word or expression is given a particular meaning, other parts of speech and grammatical forms of that word or expression have a corresponding meaning.

(l) Headings and any table of contents or index are for convenience only and do not affect the interpretation of this Agreement.

(m) A provision of this Agreement must not be construed to the disadvantage of a party merely because that party or its advisers were responsible for the preparation of this Agreement or the inclusion of the provision in this Agreement.

## 1.3 Business Days

(a) If anything under this Agreement must be done on a day that is not a Business Day, it must be done instead on the next Business Day.

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- (b) If an act is required to be done on a particular day, it must be done before 5.00pm on that day or it will be considered to have been done on the following day.

## 1.4 Parties

- (a) If a party consists of more than one person, this Agreement binds each of them separately and any two or more of them jointly.
- (b) An agreement, covenant, obligation, representation or warranty in favour of two or more persons is for the benefit of them jointly and each of them separately.
- (c) An agreement, covenant, obligation, representation or warranty on the part of two or more persons binds them jointly and each of them separately.

## 2. FORMATION AND PRECEDENCE

### 2.1 Formation and composition

The following are comprised in an Agreement:

- (a) this Master Services Agreement;
- (b) an Order Form(s); and
- (c) any other document forming part of the Agreement as agreed to in writing by the parties,

together, the Agreement.

### 2.2 Precedence for this Agreement

In the event of any conflict or inconsistency between one or more of the documents making up an Agreement, for interpretation, the following will be the order of precedence:

- (a) the Order Form(s); and
- (b) the terms of the Master Services Agreement;
- (c) any other document forming part of the Agreement as agreed to in writing by the parties.

## 3. TERM

### 3.1 Agreement Term

The term of this Agreement:

- (a) commences on the Commencement Date; and

- (b) continues for the Initial Term, unless otherwise terminated earlier in accordance with this Agreement.

### 3.2 Rollover

Unless:

- (a) one of the parties provides written notice to the other party of an intention to allow the Agreement to expire 30 days prior to the expiration of the Initial Term or any further term under this clause 3.2 (Expiry Notice); or
- (b) the Agreement has been otherwise terminated earlier in accordance with clause 16 of this Agreement,

this Agreement shall automatically renew for a further term of twelve (12) months and rolling terms of twelve (12) months thereafter, on the terms and conditions of this Agreement and subject to increases in Services Fees pursuant to clause 6.3 unless otherwise varied by written agreement between the parties.

### 3.3 Duration

The duration within which the Products are to be provided by Business Fitness to the Customer will be specified in each Order Form, and if no duration is specified, shall be for the duration of the Term.

## 4. PRODUCTS AND SERVICES

### 4.1 Products

Business Fitness agrees to provide the Products to the Customer in accordance with the terms of this Agreement.

### 4.2 Relationship

The parties' relationship is one of principal and independent contractor, not one of employer and employee, agency or partnership.

### 4.3 Scope

- (a) The parties agree that the Products to be provided to the Customer are as set out in an Order Form.
- (b) The parties acknowledge and agree that the parties may enter into more than one Order Form and that each Order Form operates independently of others.
- (c) If the Customer wishes to engage Business Fitness for the provision of any additional Products or Services beyond what is

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captured under an Order Form, it must enter into a separate Order Form in relation to those Products or Services, otherwise it acknowledges that such additional Products or Services will be charged in accordance with the fees reasonably determined by Business Fitness and disclosed to the Customer by notice in writing prior to commencing any such work.

- (d) Subject to the express requirements agreed within an Order Form, Business Fitness is not subject to the direction or control of the Customer as to the manner in which any Services are to be provided to the Customer.

#### 4.4 Outside scope

Any services, including but not limited to any services provided on a time basis, provided to Customer by Business Fitness, which:

- (a) are not expressly included in an Order Form;
- (b) are performed as the result of a deficiency in the Customer's hardware, software or infrastructure, or the Customer's failure to adhere to the System Requirements of any Product;
- (c) are performed as a result of the Customer's failure to engage Business Fitness for Support Services for any amount of time or the version of the Product used by the Customer is greater than 2 versions behind the most current commercially available version of the Product;
- (d) are requested by the Customer to be performed at the Customer's site;
- (e) are performed as a result of undue delay or other deficiency as deemed by Business Fitness (acting reasonably) on the part of the Customer in respect to the Customer's obligations under this Agreement;
- (f) are provided as a result of the Customer's or Users' use of the Products and/or Services in excess of agreed usage limits (such as the Usage Limits); or
- (g) which are performed as a necessity due to a change in Law not anticipated by this Agreement,

will be charged to the Customer in accordance with the fees reasonably determined by Business Fitness and disclosed to the Customer by notice in

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writing but only with the Customer's prior written consent before performing the Services.

#### 4.5 Order Form

##### (a) Content

Each Order Form:

- (1) must be agreed in writing by both parties;
- (2) incorporates the terms of the Master Services Agreement in the manner required by clause 2.1; and
- (3) must specify the following:
  - (A) a description of the Products or Services to be provided;
  - (B) the number of Product licenses granted (if applicable) and Usage Limits;
  - (C) any pricing (Service Fees) and applicable fee payment schedule; and
  - (D) any terms and conditions contrary to the provisions under this Master Services Agreement.

##### (b) Variations

The parties may, by mutual agreement in writing, agree to any variations to the Order Form.

#### 4.6 Subcontractors

- (a) Business Fitness may subcontract the performance of any of the Services or provision of any of the Products to any of its subcontractors.
- (b) Business Fitness:
  - (1) is not relieved from any of its obligations under this Agreement by reason of any subcontract; and
  - (2) is liable and responsible for the acts or omissions of its subcontractors and an act or omission of a subcontractor that would amount to a breach of this Agreement, had that subcontractor been a party, will be taken to be a breach by the Business Fitness.

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- (c) Business Fitness must at all times have and implement adequate internal controls, due diligence procedures and agreements in relation to its subcontractors to ensure all requirements of this Master Services Agreement are met, including compliance with applicable laws.

## 5. GENERAL OBLIGATIONS

### 5.1 Customer's obligations

Customer must (in addition to any other obligations set out in the Order Form):

- (a) ensure that its Users have the relevant training to enable interaction with Business Fitness in performing the Services and providing the Products, where applicable;
- (b) provide Business Fitness with all reasonable information and access to its premises, Sites, computers and network systems strictly to the extent necessary for Business Fitness to install and/or provide the Products or Services in accordance with the terms of the Agreement;
- (c) provide Business Fitness with a list of Customer staff authorised to provide instructions and approve any Order Forms or other requests for services subsequent to entering into this Agreement;
- (d) if required in order to provide the Services, provide adequate conditions for Business Fitness' Personnel at Customer's premises and Sites, including, but not limited to, workspaces, heating, lighting, ventilation, electric current and outlets, internet;
- (e) promptly notify Business Fitness of any event or incident that will, or is likely to, impact on the provision of any Services (if applicable) or the performance by Business Fitness of any obligation (including but not limited to Exceptional Circumstances);
- (f) notify Business Fitness in writing as soon as reasonably practicable of any scheduled or proposed upgrades, patches, or changes to, or installation of, Customer software, which may affect Business Fitness' ability to perform any Services (if applicable);
- (g) comply with any reasonable direction of Business Fitness relating to, or in connection with, the Products, in order for

Business Fitness to supply the Products and comply with its obligations under this Agreement;

- (h) ensure that each End User adheres to the applicable Usage Limits; and
- (i) ensure that its Personnel, and any other person engaged by the Customer or using the Products and/or Services in connection with this Agreement comply with the End User Terms.

### 5.2 Third party dealings

Customer agrees to use the Products for its sole benefit and must not redistribute the Products to a Third Party unless otherwise expressly included in an Order Form.

### 5.3 Limitation on Business Fitness performance

Customer acknowledges and agrees that:

- (a) Business Fitness' ability, and obligation, to provide the Products is subject to Customer complying with its obligations under clause 5.1 and is subject to any other limitation or exclusion set out in this Master Services Agreement and any applicable Order Form;
- (b) unless otherwise expressly included in an Order Form, the cost of third-party application support consumables, software, network upgrades and any associated products or services are outside the scope of this Agreement and are the full responsibility of the Customer;
- (c) unless otherwise expressly included in an Order Form, the provision of Support Services are outside the scope of this Agreement;
- (d) unless otherwise expressly included in an Order Form, Business Fitness is under no obligation to backup or otherwise retain data or software not related to the Customer's use of the Products or Services; and
- (e) Business Fitness's obligations under this Agreement do not extend to delivering the Products or Services compatible with new platforms or operating environments not specifically detailed in an Order Form or other document forming part of the Agreement, as agreed to in writing by the

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parties (including new versions, updates or new releases of operating systems).

## 6. SERVICE FEES AND PAYMENT

### 6.1 Direct debit or credit card

- (a) The Customer agrees that the Service Fees will be debited by Business Fitness monthly via the bank or credit card details provided in the Order Form on a recurring basis, and authorises Business Fitness to draw the Service Fees in this way.
- (b) The Customer warrants that the account details and authorisation provided in the Order Form are accurate and reflect the account signing instruction held by the relevant financial institution with which the account is held.
- (c) The Service Fees will be drawn pursuant to clause 6.1(a) on the day of the month the original order is received.

### 6.2 Availability of funds

- (a) The Customer must ensure that there are sufficient funds available in the nominated account to meeting drawing at all times during the period specified in clause 6.1(c).
- (b) Where the Service Fees are not able to be drawn by Business Fitness for any month due to a lack of available funds in the Customer's nominated account, the Customer will be liable for all reasonable costs incurred by Business Fitness in recovering the relevant Service Fees.

### 6.3 Changes

- (a) Subject to paragraph 6.3(b), the Service Fees will remain unchanged during the Initial Term.
- (b) At any time during the term of this Agreement but no more frequently than once annually, Business Fitness may increase the Service Fees to reflect an increase (if any) in Business Fitness' Service or hosting-related fees on 30 days' written notice to the Customer. Unless otherwise agreed, the increase in the Service Fees under this paragraph (b) will be limited to the greater of 7% or the 12-month rate of rise in the consumer price index (All Groups, Brisbane) published by the Australian Bureau of Statistics.

- (c) Any increase in the Service Fees pursuant to clause 6.3(b) will take effect on the expiry of the notice period provided in that clause.
- (d) In addition to the rights in clause 6.3(b), Business Fitness may review and increase the Service Fees applicable to each rollover term under clause 3.2.
- (e) Clause 6.3(b) does not apply to Products for which a fixed term of greater than one year is agreed in an Order Form.
- (f) The Customer must advise Business Fitness of any changes to nominated account details within ten Business Days of such change.
- (g) Business Fitness may require that alternative account details are provided to it where three or more attempts to debit the Customer's account fail, for whatever reason.

## 7. SUSPENSION

### 7.1 Suspension

Business Fitness may temporarily suspend (in part or whole, in the absolute discretion of Business Fitness) the provision of the Products or Services to Customer :

- (a) If Business Fitness is required by Law to do so;
- (b) If Business Fitness believes (acting reasonably) that the Customer, its Personnel, or a user associated with the Customer's subscription to the Products and/or Services is in breach of the End User Terms;
- (c) If an event of Exceptional Circumstances occurs, which affects, or may affect, Business Fitness' ability to provide the Products;
- (d) due to non-payment of the fees for Products or Services in accordance with clause 6; or
- (e) if Customer is in breach of a material term of the Agreement.

### 7.2 Effect of suspension

Suspension in accordance with clause 7.1 will not affect any rights which accrue prior to, or after, suspension of Customer's obligations under the Agreement.

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## 8. INTELLECTUAL PROPERTY RIGHTS

### 8.1 Customer IP

- (a) No rights of ownership to the Customer IP are transferred under this Agreement.
- (b) Where the nature of the specific Products provided to Customer under this Agreement requires, Customer grants to Business Fitness a non-exclusive, non-transferable licence to use the Business Fitness IP specified in an Order Form in conjunction with the Customer IP during the Term, but only for the purpose of Business Fitness providing the Products and Services to the Customer.
- (c) The Customer grants to Business Fitness a non-exclusive, non-transferable licence to use the Customer Data in a de-identified form during the Term, for the following purposes:
  - (1) development and improvement of Business Fitness' products and services;
  - (2) research; and
  - (3) general data analytics, including informing the conduct of marketing activities, such as providing email alerts for new products.

### 8.2 Business Fitness IP

- (a) No rights of ownership to the Business Fitness IP are transferred to the Customer or any third party under this Agreement.
- (b) Business Fitness grants Customer a non-exclusive, non-transferable, irrevocable (except pursuant to clause 17), royalty-free licence (subject to clause 6.1 and 6.2) to the Intellectual Property Rights in the Business Fitness IP, but only to the extent necessary for the Customer to use any Products embodying such rights.

### 8.3 Provision and ownership of New IP

- (a) Upon its creation, all New IP will be owned by, vest in, and (to the extent required) be assigned to, Business Fitness.
- (b) The Customer will do all that is necessary to transfer New IP to Business Fitness, including entering into an assignment

agreement for the transfer of the New IP to Business Fitness.

### 8.4 Customer Data

All Customer Data remains owned by the Customer.

### 8.5 Prohibited activities

Each party must not do or permit or omit to do any act which infringes the Intellectual Property Rights of the other party (or its licensors).

### 8.6 Notification of infringement claim

Each party must notify the other party as soon as reasonably practicable if it becomes aware of:

- (a) any actual or suspected infringement by a third party of a party's Intellectual Property Rights; or
- (b) any actual or threatened Claim by a third party that its Intellectual Property Rights have or will be infringed by any act or omission by a party in connection with the Agreement.

### 8.7 Indemnity

Customer agrees to indemnify, and keep indemnified, Business Fitness against any and all Loss it incurs as a result of Customer's breach of this clause 8, including but not limited to any Claim by a third party as a result of Customer's breach of this clause 8.

## 9. THIRD PARTY SOFTWARE LICENCES

### 9.1 Third Party Content

- (a) The Customer acknowledges and agrees that:
  - (1) Business Fitness can (in its sole discretion) incorporate Third Party Content into the Products and Services, unless otherwise expressly agreed to by the parties in writing; and
  - (2) Third Party Content may be subject to licences or other terms and conditions provided by the relevant Third Party.
- (b) Business Fitness warrants that it has all necessary permissions and authorisations to incorporate Third Party Content into the Products and Services.

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## 9.2 Understanding, Acknowledgement and Agreement Regarding Third Party Service

- (a) Customer understands, acknowledges and agrees that:
- (1) when deciding to use or access any service, product, software, API's or other Third Party Content provided by a Third Party (**Third Party Service**) in connection with any Product or Service provided by Business Fitness, the Customer is solely responsible for any decision to use or receive any Third Party Service, whether in connection with any Business Fitness Products or Services or otherwise, and for the evaluation of any risk arising from or in relation to such use in its own circumstances; and
  - (2) Business Fitness cannot control nor reliably predict the actions of a Third Party providing or potentially providing a Third Party Service and makes no representations as to having any such ability, or as to the scope, features, quality or availability of a Third Party Service, or of the interoperability or compatibility with the Products and Services, by any term of this Agreement.
- (b) Business Fitness is not responsible or liable for any loss and damage suffered by the Customer or any third party arising from the Customer's use or desired use of, or reliance upon, a Third Party Service in connection with a Business Fitness Product or Service.

## 9.3 Compliance

- (a) Customer must comply with the licence terms of all Business Fitness Products, Services and Third Party Content which is installed or used in the provision of the Products and Services that is provided to the Customer (including to Customer's End Users).
- (b) Customer must not do or permit to do any act that breaches, or causes Business Fitness to breach the licence terms of any Third Party Content installed or used in the provision of the Products and Services.

## 9.4 Indemnity

Customer indemnifies, and keeps indemnified, Business Fitness against:

- (a) any and all Loss it incurs; and
- (b) any Claim by a third party,

as a result of Customer's breach of clauses 9.2 or 9.3.

## 10. CONFIDENTIAL INFORMATION

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### 10.1 Disclosure

- (a) A party must not, without the prior written approval of the other party, disclose the other party's Confidential Information.
- (b) Each party must take all reasonable steps to ensure that its employees and agents, any sub- contractors, or persons otherwise engaged by either party, do not make public or disclose the other party's Confidential Information.
- (c) A party is not in breach of this clause 10.1 in circumstance where it is legally compelled to disclose the other party's Confidential Information.
- (d) Notwithstanding any other provision of this clause 10.1, the parties may disclose the terms of the Agreement (other than Confidential Information of a technical nature) to its related companies, solicitors, auditors, insurers and accountants.

### 10.2 Return of Confidential Information

Each party must on demand, return to the other party any Confidential Information supplied by the other party in connection with the Agreement, excluding where the party is required to retain by law, professional standards or their reasonable internal insurance, audit or governance obligations or where the Confidential Information is held in automatic electronic back-up or archiving systems, provided that any ongoing confidentiality obligations continue to apply.

### 10.3 Security and unauthorised access

- (a) Each party must ensure that all information and Materials of the other party (or its agents or contractors) in the custody of that party for purposes connected with the Agreement are protected at all times from unauthorised access or use by a third party,

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and from misuse, damage or destruction by any person.

- (b) Customer must ensure compliance with all security regulations, procedures or directions as given by Business Fitness at the date of signing this Agreement or where provided during the term of this Agreement and Customer accepts in writing, relating to the Confidential Information or access to Business Fitness's Confidential Information.

## 10.4 Survival

This clause survives termination of the Agreement.

## 11. LIABILITY

### 11.1 Exclusion of liability

- (a) To the extent permitted by Law, in no event will either party be Liable to the other party for Consequential Loss, even if they have been made aware of the possibility of such Consequential Loss prior to entering into the Agreement.
- (b) The Customer acknowledges and agrees that to the extent a Product or Services includes software, that software is never error or defect free, and that the mere presence of defects or errors in software will not constitute a breach of Business Fitness' obligations under this Agreement.
- (c) The Customer acknowledges and agrees that the effectiveness of any application, methodology or process used by Business Fitness in delivering the Products and Services may be dependent on external factors controlled by Third Parties, and any errors, incompatibilities or adverse effects that occur as a result of Third Party actions including but not limited to:
- (1) changes in algorithms, processes, upgrades, updates, new releases and patches; or
  - (2) any other changes to variables relied on by Business Fitness to deliver the Products and Services,
- do not constitute a breach of Business Fitness' obligations under the Agreement.
- (d) Unless otherwise specified, neither party is liable to Third Parties regarding, or arising out of or in connection with, the Agreement.

- (e) The Customer acknowledges and agrees that:

- (1) the Products and Services are intended to be used as productivity tools, and do not replace the expertise of qualified accountants;
- (2) it is the responsibility of the User to verify the accuracy and legality of all Outputs to discharge their professional duties and legal obligations; and
- (3) Business Fitness disclaims all Liability for any Losses suffered by, or Claims made against, the Customer or User as a result of their failure to independently verify the contents of the Outputs.

### 11.2 Implied terms

- (a) To the full extent permitted by Law, any term which would otherwise be implied into the Agreement is excluded.
- (b) In the event any Law implies or imposes terms into the Agreement which cannot be lawfully excluded, such terms will apply, save that the liability of Business Fitness for breach of any such term will be limited in accordance with clause 11.3(a).

### 11.3 Limitation of liability - Liability cap

To the extent that Business Fitness is Liable in connection with the Agreement (whether in contract, tort, indemnity of statute), then irrespective of anything else in the Agreement, its cumulative Liability in the aggregate (to the fullest extent permitted by Law) shall in no event exceed an amount equal to the sum of the Service Fees and hosting fees attributable to the licence for the Products and Services (as applicable) paid by Customer to Business Fitness under the Order Form to which the Liability relates, in the 12 months before Business Fitness' Liability arose.

### 11.4 Customer acknowledgement

The Customer acknowledges and agrees that an amount of money recoverable by Customer under clause 11.3(b) may be less than the aggregate of moneys recovered under Business Fitness' insurance policies, as Business Fitness' other customers may also have claims to such moneys, and that nothing in this clause 11 or the Agreement

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gives the Customer an exclusive right to that amount recovered.

## 11.5 Effect of Australian Consumer Law provisions

This clause 11 is subject always to the operation of clause 14.3.

## 12. PRIVACY LAW

### 12.1 Customer's consent to transfer of Personal Information

(a) Customer acknowledges that:

- (1) to the extent within its reasonable control, all Customer Data, including any Personal Information comprised in same, will be stored by Business Fitness on servers located within Australia; and
- (2) Customer Data may be transferred to and from third-party providers located outside of Australia for processing in encrypted form; and
- (3) other than the transfers described in clause 12.1(a)(2) above, Business Fitness does not transfer Customer Data outside of Australia.

(b) Customer consents to the transfer of Customer Data by Business Fitness in the manner detailed in clause 12.1(a)(2).

### 12.2 Privacy protection obligations

- (a) In providing the Services, Business Fitness must comply and ensure that its Personnel comply with the Privacy Law.
- (b) The Customer must comply and ensure that its Personnel and End Users comply with the Privacy Law.

## 13. INDEMNITY

Customer indemnifies, and will keep indemnified, Business Fitness against any:

- (a) Claims against Business Fitness; or
- (b) Loss suffered by Business Fitness, arising from:
- (c) any fraud or wilful misconduct of the Customer or its Personnel under or in connection with the Agreement;

- (d) the negligent acts or omissions of Customer or its Personnel under or in connection with the Agreement; or
- (e) any breach of a material term of the Agreement by Customer.

## 14. WARRANTIES

### 14.1 Business Fitness warranty

- (a) Business Fitness warrants to the Customer:
  - (1) that it has the full right and title to enter into this Agreement and to grant the rights it sets out to the Customer; and
  - (2) that the Products will be provided and any Services performed with due care and diligence.
- (b) Business Fitness makes no warranty in relation to the compatibility of any Products it provides with the Customer's infrastructure, IT systems, websites, or web content including add-ons and widgets, except where these have been specified in the System Requirements.
- (c) This clause 14.1 is subject always to the operation of clause 14.3 (Australian Consumer Law).

### 14.2 Customer warranty

Customer warrants to Business Fitness:

- (a) that it has full right and title to enter into the Agreement and to grant the rights it sets out to Business Fitness;
- (b) that no information has been withheld from Business Fitness that may affect its decision to enter into this Agreement; and
- (c) that it has satisfied itself of the content of this Agreement and, if necessary, obtained independent advice from a relevant expert to confirm same before entering into it.

### 14.3 Australian Consumer Law

To the extent the Australian Consumer Law applies to the supply by Business Fitness of Products and/or Services to the Customer under this agreement:

- (a) Business Fitness acknowledges the application of the *Competition and Consumer Act 2010* (Cth) to the provision of

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Products and/or Services to the Customer, and will comply with all Non-Excludable Conditions; and

- (b) the following applies where any warranties against defects are offered to the Customer by Business Fitness under this agreement:
- (1) Business Fitness's goods and services come with guarantees that cannot be excluded under the Australian Consumer Law;
  - (2) for major failures with the service the Customer is entitled:
    - (A) to cancel the service contract with Business Fitness; and
    - (B) to a refund for the unused portion of, or to compensation for its reduced value.
- (c) Customer is 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, Customer is 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. EMERGENCY ACTION

### 15.1 Damage by Customer resources

Should Business Fitness form the opinion (acting reasonably) that any resources owned or operated by the Customer may damage any Business Fitness or Third Party software or products, Business Fitness may do anything within its power and control and necessary to cause the damaging resources to cease operation.

### 15.2 Emergency repairs

If Business Fitness, acting reasonably, determines that it must make such emergency repairs as are necessary to ensure proper operation of the Services, whether as a result of the circumstances described in the above clause 15.1 or otherwise at the fault of the Customer, the reasonable costs of such repairs are the responsibility of the Customer

to pay (or to reimburse Business Fitness for its payment of such costs) in a timely manner.

## 16. TERMINATION

### 16.1 Termination of Agreement or a Product/Service

- (a) Business Fitness may terminate this Agreement immediately upon notice under the circumstances described in the End User Terms.
- (b) Either party may terminate this Agreement immediately by written notice upon the occurrence of one of the following events:
  - (1) if the other party is in breach of this Agreement and that other party has failed to remedy that breach within 30 days of a written notice to it from the first-mentioned party, specifying the breach and requiring it to be remedied; or
  - (2) an Insolvency Event occurs in respect of the other party.
- (c) Subject to clause 16.1(d), either party may terminate the Agreement, or any Product or Service to which an Order Form relates, for any reason, upon providing the other party with 30 days' prior written notice of such termination. In this case, the Agreement, or the relevant Product or Service (as the case may be) terminates at the expiration of the period of notice.
- (d) Products or Services specified as "fixed term" in an Order Form may not be terminated by the Customer under clause 16.1(c), and the terms of this Agreement survive termination by the Customer under clause 16.1(c) until expiration of the fixed term.
- (e) For the avoidance of doubt, where a party terminates a particular Product or Service only under an Order Form, all other remaining Products and/or Services subject of this Agreement are to remain on foot for the Term.

### 16.2 No prejudice of rights

Termination shall not prejudice or affect any right or action which shall have accrued or shall thereafter accrue to either party.

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## 16.3 Survival

The following clauses survive termination of the Agreement: clause 8 (Intellectual Property Rights), clause 9 (Third Party Software), clause 10 (Confidentiality), clause 11 (Liability), clause 12 (Privacy), clause 13 (Indemnity), clause 17 (Consequences of Termination) and this clause 16.3.

## 17. CONSEQUENCES OF TERMINATION

Upon termination or expiration of the Agreement:

- (a) Business Fitness will cease providing the Products;
- (b) all money due by Customer to Business Fitness for Services properly provided to the Customer up to the date of termination or for Products specified as "fixed term" under an Order Form must be paid in full; and
- (c) each party must return to the other party, or (if requested by the other party) destroy, all Confidential Information belonging to the other party excluding where the party is required to retain by law, professional standards or their reasonable internal insurance, audit or governance obligations or where the Confidential Information is held in automatic electronic back-up or archiving systems, provided that confidentiality obligations continue to apply.

## 18. TRANSITION OUT

### 18.1 Transition out services

In the event that Customer gives Business Fitness notice that it intends to transition-out all or part of the Products to Customer or a nominee within 30 days of the effective date of termination or expiration of this Agreement (Transition Out Notice), then, provided the Customer is in full compliance with its obligations under this Agreement, the following provisions will apply:

- (a) such Transition Out Notice will not affect the Customer's obligations under clause 6 or any other obligations to pay money to Business Fitness under the Agreement;
- (b) within 60 days of receipt of the Transition Out Notice, Business Fitness will provide the Customer and/or the Customer's nominee with a means of downloading or obtaining the Customer Data stored on any Business

Fitness software making up the Products, such means being at Business Fitness' absolute discretion; and

- (c) for a period up to 60 days of receipt of the Transition Out Notice, Business Fitness agrees to answer questions and provide such other information as may be reasonably sought in relation to the transition by an alternative service provider or by Customer,

together, (b) and (c) are the Transition Out Services.

### 18.2 Fees

Customer acknowledges and agrees that the Transition Out Services will be provided pursuant to the fees agreed between the parties, and that such fees are payable to Business Fitness under clause 6.1.

### 18.3 Effect of Transition Out Services

On completion of the Transition Out Services (including where the timeframes in clauses 18.1(b) and 18.1(c) have elapsed), or where no Transition Out Notice is provided in accordance with clause 18.1, Business Fitness may (but is not obligated to) permanently remove or delete any and all Customer Data from its servers.

## 19. FORCE MAJEURE

### 19.1 Suspension of obligations

If a party (Affected Party):

- (a) is prevented from, or delayed in, performance of an obligation (other than an obligation of the Customer to pay money) by an event of Exceptional Circumstance; and
- (b) the Affected Party, as soon as possible after the event of Exceptional Circumstance notifies the other party providing particulars of:
  - (1) the event of Exceptional Circumstance;
  - (2) the anticipated period of delay; and
  - (3) the action (if any action is reasonably possible) the Affected Party intends to take to mitigate the effect of the delay,

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then those obligations of the Affected Party are suspended for the duration of the event of Exceptional Circumstance.

## 19.2 Obligations on other party

The party which is not the Affected Party must use all reasonable endeavours to remove or mitigate its Loss arising from, and the effects of, the event of Exceptional Circumstance.

## 20. GOODS AND SERVICES TAX

### 20.1 GST exclusive

Unless expressly stated to the contrary, all amounts expressed in the Agreement are exclusive of GST.

### 20.2 Recipient to pay Supplier

- (a) If a party (the Supplier) is obliged under the GST Law to pay an amount of GST for a taxable supply made by the Supplier to another party (the Recipient) under the Agreement, the Recipient must pay the Supplier an amount equal to the GST payable on the supply by the Supplier.
- (b) The Recipient must pay the amount referred to in paragraph (a) and any interests, penalties, fines or expenses relating to the GST, in addition to and at the same time as the consideration otherwise payable by the Recipient for the supply.

### 20.3 Tax Invoice

If requested by the Recipient, the Supplier must provide the Recipient with a Tax Invoice on or before payment of the amounts required by clause 20.2.

## 21. MISCELLANEOUS

### 21.1 Notices

The parties may give each other notice under this Agreement by email or other electronic communication, or by post, at the party's Address Details or as otherwise notified to the other party from time to time.

### 21.2 Governing law; jurisdiction

These terms will be governed by and construed in accordance with the laws of the State of Queensland and the parties submit to the non-exclusive jurisdiction of the Courts of Queensland.

### 21.3 Exercise rights

A single or partial exercise or waiver by a party of any right under or relating to this Agreement will not prevent any other exercise of that right or the exercise of any other right.

### 21.4 Assignment

#### (a) Assignment by Business Fitness

Business Fitness can assign its obligations in this Agreement by providing the Customer with 30 days' prior written notice of such assignment.

#### (b) Assignment by Customer

The Customer must not assign, transfer or novate all or any part of its rights or obligations under or relating to this Agreement or grant, declare, create or dispose of any right or interest in it, without the prior written consent of Business Fitness. Business Fitness may withhold its consent in its sole discretion.

#### (c) Change of Control

For the purposes of this clause 21.4 (Assignment), a Change of Control in respect of the Customer will be deemed to be an assignment enlivening the operation of clause 21.4(b).

### 21.5 Severability

If a provision of this Agreement is illegal, invalid, unenforceable or void in a jurisdiction it is severed for that jurisdiction and the remainder of this Agreement has full force and effect and the validity or enforceability of that provision in any other jurisdiction is not affected.

### 21.6 Further assurance

Each party must promptly at its own cost do all things (including executing and delivering all documents) necessary or desirable to give full effect to this Agreement and the transactions contemplated by it.

### 21.7 Costs

Each party is responsible for all its own costs incurred in the negotiation and performance of this Agreement including legal costs.

### 21.8 Publicity

Business Fitness must receive prior written consent from Customer to make public announcements regarding the existence of the Agreement and to identify Customer as a client or customer of

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Business Fitness in advertising or marketing  
Materials.

## **21.9 Waiver**

- (a) A party's waiver of a right under or relating to this Agreement, whether prospectively or retrospectively, is not effective unless it is in writing and signed by that party.
- (b) No other act, omission or delay by a party will constitute a waiver of a right.

## **21.10 Counterparts**

This Agreement may be executed in any number of counterparts each of which will be considered an original but all of which will constitute one and the same instrument. A party who has executed a counterpart of this Agreement may deliver it to, or exchange it with, another party by emailing a pdf (portable document format) copy of the executed counterpart to that other party.

## **21.11 Whole agreement**

This Agreement:

- (a) is the entire agreement and understanding between the parties relating to the subject matter of this Agreement; and
- (b) supersedes any prior agreement, representation (written or oral) or understanding on anything connected with that subject matter.