

## TERMS AND CONDITIONS OF LICENCE AGREEMENT

**BETWEEN :** WebMCQ Pty Ltd of Suite IN18, Australian Technology Park, Eveleigh, NSW 2430, Australia ("**Supplier**")

**AND :** "**The Customer**" +

### RECITALS

A. The Supplier has agreed provide the Customer with access to its server in order to allow the Customer to use certain software stored on that server.

B. The Customer has agreed to pay for the same.

### THE PARTIES AGREE:

#### 1. DEFINITIONS AND INTERPRETATION

##### 1.1 Definitions

In this Agreement unless the context indicates a contrary intention:

"**Commencement**" means the establishment by the Supplier of an account for the Customer such that the Customer is able to use the Licensed Software.

"**Commencement Date**" means the date upon which Commencement occurs.

"**Force Majeure**" means any act, omission or circumstance over which the Supplier could not reasonably have exercised control.

"**Letter of Offer**" means the letter sent to the Customer by post, fax or email containing the particulars of the agreement between the Customer and the Supplier.

"**Licence**" means the licence granted by the Supplier to the Customer under this Agreement.

"**Licence Fee**" means the fee specified in the letter of offer received by the Customer.

"**Licensed Software**" means the software described in Schedule A to this Agreement.

"**New Releases**" means enhancements and new versions of and functional changes to the Licensed Software released by the Supplier after the commencement of this Agreement.

"**Operation Specifications**" means the document at the World Wide Web address specified in the Letter of Offer which describes the function, operation and capabilities of the Licensed Software.

"**Server**" means the computer hardware maintained by the Supplier and used to store the Licensed Software and to allow the Customer access to the Licensed Software, including any other equipment necessary for the operation of the Server.

"**Server Maintenance**" means maintenance conducted under clause 4.3.

"**Specified Use**" means the use specified in the Letter of Offer.

"**Supplier's Instructions**" means all instructions provided to the Customer by the Supplier (whether provided before or after the Commencement Date) for access to the Server and use of the Licensed Software.

"**Weekly Maintenance Period**" means 6.00 - 7.00 am Australian Eastern Standard Time (GMT +10.00) every Sunday or any other period of 1 hour notified by the Supplier from time to time provided that the total Weekly Maintenance Periods is not more than 2 hours per week.

## 1.2 Interpretation

In this Agreement unless the context indicates a contrary intention:

(a) a reference to any party includes that party's executors, administrators, successors, substitutes and assigns, including any person taking by way of novation;

(b) a reference or implied reference to any legislation or to any section or provision thereof includes any statutory modification or re-enactment or any statutory provision substituted therefor and all ordinances, by-laws, regulations and other statutory instruments issued thereunder;

(c) words importing the singular include the plural (and vice versa) and words denoting a given gender include all other genders;

(d) headings are for convenience only and do not affect interpretation;

(e) a reference to a clause or schedule is a reference to a clause or schedule to this Agreement; and

## 2. PURPOSE OF AGREEMENT

Subject to the terms and conditions of this Agreement, the Supplier:

(a) grants to the Customer a non-transferable and non-exclusive licence to use the Licensed Software for the Specified Use; and

(b) allows the Customer to access the Licensed Software stored on its Server through the World Wide Web.

## 3. LICENSED SOFTWARE

### 3.1 Duration of Licence

(a) **(Period)** this Licence commences on the Commencement Date and will continue for the period specified in the Letter of Offer or until terminated by either party hereunder.

(b) **(Renewal)** if the Customer wants to renew the License, it shall notify the Supplier prior to the end of the license period. The Supplier may grant the Customer of a further license for any period on such terms as the Supplier sees fit.

### 3.2 Operation Specifications

(a) **(Notification and Variation):** the Supplier shall make the Operation Specifications available to the Customer through the World Wide Web at the address specified in the Letter of Offer prior to the Commencement Date provided that the Supplier may alter, substitute or modify any such specifications from time to time.

(b) **(Continuation):** the Licensed Software is subject to this Agreement notwithstanding any such alteration, substitution or modification.

### 3.3 Supplier's Instructions

(a) **(Availability)** the Supplier shall provide the Customer with the Supplier's Instructions through:-

(i) The World Wide Web;

(ii) Email; and

(iii) Instructions which appear when the Licensed Software is used.

(b) **(Variation)** the Supplier may alter, substitute, or modify the Supplier's Instructions from time to time and will make the modified instructions available to the Customer.

(c) **(Restrictions on Use)** the Supplier's Instructions shall not be used by the Customer except to assist in the Specified Use of the Licensed Software.

(d) **(Additional Instructions)** if the Customer believes that the Supplier's Instructions are not sufficient to enable it to use the Licensed Software, the Customer shall contact the Supplier and request further instructions. The Supplier has the discretion to provide further instructions in the form which it believes is most convenient and appropriate. Any further instructions provided by the Supplier are deemed to be part of the Supplier's Instructions.

### 3.4 Licence

(a) **(Authority):** the Supplier warrants that it has the right and authority to grant the Licence to the Customer.

(b) **(Method of Use):**

(i) The Licensed Software may only be used by accessing it through the World Wide Web and in accordance with the Supplier's Instructions.

(ii) The Customer may only use the Licensed Software for the Specified Use.

(c) **(Equipment used to access)** if the Customer uses equipment to access the Licensed Software which is not configured in accordance with the Supplier's Instructions, then it:-

(i) does so at the sole risk of the Customer; and

(ii) will be liable for any loss to the Supplier as a result of this unauthorized use.

(d) **(Personnel)** The Licensed Software may only be used:-

(i) if the Customer is a natural person, by the Customer and not more than 2 people who are specifically authorised by the Supplier to use the product on behalf of the Customer; and

(ii) otherwise, by not more than 3 people who are employees or agents of the Customer and who are specifically authorised by the Supplier to use the product on behalf of the Customer.

(e) **(Unauthorised Use):** any unauthorised use, alteration, modification, reproduction, publication, disclosure or transfer of the Licensed Software will entitle the Supplier to institute any proceedings as may be appropriate, including for injunctive relief, against the Customer.

### 3.5 Access

(a) The Supplier will on or before the Commencement Date, provide the Customer with a login identification and password for the purpose of the access to the Server enabling the Customer to use the Licensed Software.

(b) The Supplier may make an Additional Charge if in the opinion of the Supplier the costs associated with enabling the Customer to access the Licensed Software are greater than the Supplier could have reasonably contemplated on execution of this Agreement.

(c) The Customer will only be provided with access to the part of the Licensed Software known as the WebMCQ Administration Tools (as defined in Schedule A) until the Licence Fee is paid.

### 3.6 Copying

Subject to the Supplier's prior written consent the Customer shall not copy or reproduce the Licensed Software or any part of the Licensed Software by any means or in any form.

### 3.7 Reverse Engineering

The Customer shall not reverse assemble or reverse compile or directly or indirectly allow or cause a third party to reverse assemble or reverse compile the whole or any part of the Licensed Software.

### 3.8 New Releases

(a) The Supplier may at any time, on 7 days notice in writing or by email to the Customer, substitute software for the Licensed Software which provides functions equal to or better than the Licensed Software,

(b) This Agreement will apply to the substitute Software or to any modification or alteration to the Licensed Software as if it were the Licensed Software.

(c) The Supplier is not liable for any interruption to Access to the Licensed Software or the Server which arises by virtue of the process of replacing the Licensed Software with the substitute program provided the Supplier has given the Customer 7 days notice in writing or by email.

### 3.9 Security

(a) The Customer is solely responsible for the use, dissemination and control of the login and password supplied by the Supplier under clause 3.5(a).

(b) The Customer shall maintain accurate records of disclosure of, the login and password and shall provide copies of all or part thereof to the Supplier upon request. The Supplier may inspect the records or any part thereof at any time during normal business hours.

### 3.10 Intellectual Property Rights

(a) **(Indemnity by Supplier)**: subject to clauses 3.10(b) and 3.10(c) the Supplier shall indemnify the Customer against liability under any final judgment in proceedings brought by a third party against the Customer determining that the Customer's use of the Licensed Software constitutes an infringement of an Australian copyright.

(b) **(Application)**: clause 3.10(a) does not apply unless the Customer:

(i) notifies the Supplier in writing immediately of any infringement, suspected infringement or alleged infringement;

(ii) gives the Supplier the option to conduct the defence of such a claim, including negotiations for settlement or compromise prior to the institution of legal proceedings;

(iii) provides the Supplier with reasonable assistance in conducting a defence of such claim; and

(iv) authorises the Supplier to procure for the Customer the authority to continue the use and possession of the Licensed Software.

(c) **(No Indemnity)**: clause 3.10(a) does not apply if any infringement, suspected infringement or alleged infringement arises from:

(i) use of the Licensed Software in a combination by means and in any form with computer programs not specifically approved by the Supplier;

(ii) use of the Licensed Software in a manner or for a purpose not authorised by or not reasonably contemplated by the Supplier; or

(iii) any transaction entered into by the Customer relating to the Licensed Software without the Supplier's prior consent in writing.

(d) **(Indemnity by Customer):** the Customer shall indemnify and hold harmless the Supplier against any loss, costs, expenses, demands or liability whether direct or indirect arising out of a claim by a third party alleging such infringement if:

(i) the claim arises from an event specified in clause 3.10(c);

(ii) the ability of the Supplier to defend the claim has been prejudiced by the failure of the Customer to comply with any of the provisos in clause 3.10(b); or

(iii) information provided to the Supplier by the Customer to enable the Supplier to develop the Licensed Software encroaches upon any intellectual or industrial property rights of a third party.

### 3.11 Warranties

(a) **(Specifications):** the Supplier warrants that the Licensed Software will be properly installed on the Server and will satisfy the specifications referred to in clause 3.2.

(b) **(Limitations):** the Supplier makes no warranty that:

(i) the Licensed Software is error free;

(ii) the use of the Licensed Software shall be uninterrupted;

(iii) the Licensed Software shall meet the Customer's requirements other than as set out in the Operation Specifications;

(iv) the Licensed Software will operate in conjunction with any other Software;

(v) the Licensed Software shall operate in combinations which may be scheduled for use by the Customer; or that

(vi) the Licensed Software shall provide any function not designated in the Operation Specifications.

(c) **(Replacement):** where the Supplier finds the Licensed Software to be defective it shall at its own option and expense use its best endeavours to rectify or replace the Licensed Software, provided the

defect has been notified in writing by the Customer within a period of 6 months from the Commencement Date.

(d) **(Limitation)**: the Supplier is not liable to remedy any defect in the Licensed Software if:

(i) the defect does not result in the performance of the Licensed Software significantly deviating from the Operation Specifications referred to in clause 3.2;

(ii) the defect is the result of use of the Licensed Software in combination with equipment, programs or services not authorised in writing by the Supplier;

(iii) the defect is the result of use of the Licensed Software other than in the operating environment recommended by the Supplier or other than in accordance with the Supplier's Instructions; or

(iv) the defect is the result of failure of the Customer to meet its obligations under this Agreement or any other agreement relating to the Licensed Software.

## 4. THE SERVER

### 4.1 Establishment of the Server

The Supplier shall have established the Server and installed the Licensed Software on the Server prior to the Commencement Date.

### 4.2 Access to the Licensed Software

(a) **(Mechanism)** The Supplier shall make the Licensed Software located on the Server available for use by the Customer by means of the World Wide Web.

(b) **(Availability)** Subject to the terms of this agreement the Licensed Software on the Server will be available for use by the Customer at all times.

(c) **(Limits to liability)** The Supplier is not responsible or liable for any delay, interruption or break in the Customer's access to the Server which arises because of the use of the World Wide Web or any failure, however caused, of any component of the World Wide Web other than the Server.

### 4.3 Server Maintenance

(a) **(Necessity)** the Customer acknowledges that from time to time it will be necessary for the Supplier to conduct maintenance on the Server the Licensed Software and associated equipment which will result in an interruption in access to the Server.

(b) **(Routine Maintenance)** the Supplier may, at its option, and without notice suspend access to the Server by the Customer or the general public and use of the Licensed Software during the Weekly Maintenance Period.

(c) **(Notice)** in the event that additional maintenance becomes necessary the Supplier shall give the Customer 24 hours notice by email of its intention to conduct Server Maintenance, specifying:

(i) the time at which the Supplier intends to conduct Server Maintenance; and

(ii) the likely period of interruption to access to the Licensed Software on the Server.

(d) **(Co-operation)** the Supplier shall co-operate with the Customer in order to ensure that, insofar as is reasonably possible and subject also to the requirements of other licencees, the effect of Server Maintenance on the Customer's access to the Licensed Software is minimised.

(e) **(Liability)** the Supplier shall not be liable for any loss, damage or claim which arises out of Server Maintenance which has been notified to the Customer under this clause, whether or not the time taken for the Server Maintenance conforms with the time notified to the Customer.

#### 4.4 Customer Pages

(a) **(Storage)** Customer Pages created by the Customer using the Licensed Software shall be stored on the Server.

(b) **(Memory)** the Supplier shall provide sufficient memory in its Server for storage of all Customer Pages created by the Customer within the terms of this Agreement.

(c) **(Publication)** the Supplier shall make the Customer Pages which are stored on the Server accessible through the World Wide Web.

(d) **(Restrictions on Access)** access to the Customer Pages over the World Wide Web may, at the option of the Customer, be either unrestricted or restricted to persons who supply a password. However the Supplier makes no warranty with respect to the security of Customer Pages with restricted access and shall not be liable for any breach of that security, however it occurs.

(e) **(Limits to Publication)** the Supplier is not responsible or liable for any delay, interruption or break to access to Customer Pages which occurs because of the operation or failure of any component of the World Wide Web other than the Server.

(f) **(Content)** the Supplier does not accept any responsibility for the content of Customer Pages and the Customer will indemnify the Supplier in respect of any claim, demand, cause of action, suit or proceeding brought by any person against the Supplier arising out of the content of the Customer Pages.

(g) **(Intellectual Property)** insofar as any intellectual property exists in the appearance, typesetting or formatting of Customer Pages as displayed on the World Wide Web, it is the property of the Supplier.

(h) **(Server Maintenance)** the Supplier shall not be liable for any interruption to access to the Customer Pages which occurs because of Server Maintenance during the Weekly Maintenance Period or which has been notified to the Customer under clause 4.3.

(i) **(Warning)** the Supplier will ensure that the main login page on its Website carries warning to the effect that unauthorised use or copying of the Licensed Software or of information contained in the Customer Pages constitutes a breach of copyright, however this warning shall not absolve the Customer from any liability which might arise for interference with intellectual property in the Licensed Software or anything else stored on the Server.

#### 4.5 Retention of Information

(a) **(Backup)** the Supplier shall keep a backup copy of the Licensed Software, including all modifications necessary for the Customer's access, which is not stored on the Server.

(b) **(Timing)** once every 24 hours the Supplier will create a backup copy of all information which has been stored on the Server by virtue of the Customer's authorised use of the Licensed Software or by any access to the Customer's Customer Pages on the World Wide Web and store this backup copy somewhere other than on the Server.

(c) **(Copyright)** the creation of backup copies in accordance with clause 4.3(b) of this Agreement is authorised by the Customer and does not constitute a breach of the Customer's copyright.

(d) **(Retention)** the Supplier will maintain all backup copies created by virtue of this clause for a period of one week after their creation.

(e) **(Exclusion of Liability)** provided that the Supplier has complied with its obligations under this clause the Supplier shall not be liable for any loss of information stored on its Server, however that loss was caused.

#### 4.6 Client Records

(a) **(Saving)** where any member of the general public uses Customer Page to submit information that information will be saved on the Server.

(b) **(Backup)** the information will be backed up in accordance with the backup procedures set out in clause 4.5.

(c) **(Exclusion of Liability)** provided that the Supplier has complied with its obligations under this clause the Supplier shall not be liable for any loss of information stored on its Server, however that loss was caused.

(d) **(Failure of the WWW)** the Supplier shall not be liable for any deficiencies, errors or omissions in information submitted using a Customer Page which are caused by a failure of any component of the World Wide Web.

(e) **(Copyright)** the Customer will indemnify the Supplier against any action, claim or demand brought on the basis that the Supplier's handling of information submitted using a Customer Page constitutes a breach of copyright.

(f) **(Usage Information)** the Customer acknowledges that the Supplier will retain records of usage and agrees that the Supplier may use this information for its own purposes, provided always that the identity of the Customer is not disclosed without its permission.

#### 4.7 Security

(a) Neither the Customer nor the Supplier warrant the security of any information transmitted over the World Wide Web by the Customer, the Supplier or any person accessing the Customer Pages.

(b) The Supplier shall make all reasonable efforts to ensure the security of information stored on the Server, but does not warrant the security of that information and is not liable for any loss, damage claim or expense arising out of unauthorised access to or copying, modification, or dissemination of that information.

(c) The Customer is responsible for ensuring the security of its password and login and of any password needed to access a Customer Page with restricted access.

#### 4.8 Replacement of the Server

(a) The Supplier reserves the right from time to time to replace the Server with a new server which provides functions equal to or better than the Server, provided that where such replacement is made:

(i) the replacement will be performed at no additional cost to the Customer;

(ii) there will be no change to the Licence Fee under this Agreement except in accordance with the terms of this Agreement; and

(iii) the Agreement will continue to apply in all respects to the replacement server and that server shall be deemed to be the Server for the purposes of this Agreement.

(b) Any interruption to access to the Licensed Software caused by the replacement of the server shall be deemed to be Server Maintenance for the purposes of this agreement, provided that 24 hours notice in writing or by email is given of such replacement.

#### 4.9 Server Failure

(a) In the event that, for any reason, the Server becomes inoperable, the Supplier may, in its absolute discretion transfer all information

stored on the server, including the Licensed Software and Customer Pages, to a temporary locations for the purposes of making it available for access via the World Wide Web, provided that:

(i) the Supplier notifies the Customer immediately of any changes to the Operation Specifications or Supplier's Instructions which are made necessary by the transfer of information; and

(ii) the Supplier makes all reasonable efforts to direct users of the World Wide Web searching for the information to the new location.

(b) In the event any information stored on the Server is lost the Supplier may replace that information with information stored during the last backup provided that it immediately notifies the Customer in writing or by email that this has occurred.

(c) The Supplier is not responsible for any loss to the Customer caused by delays in restoring access after the Server becomes inoperable.

#### 4.10 Warranties

(a) **(Installation)** the Supplier warrants that the Licensed Software will be properly installed on the Server and that the Server will operate in accordance with the Operation Specifications

(b) **(Limitations)** the Supplier makes no warranty that:

(i) the Server is free from manufacturer's defects;

(ii) the Server is fit for purpose;

(iii) the use of the Server shall be uninterrupted;

(iv) the Server shall operate in accordance with the Customer's requirements other than as set out in the Operation Specifications;

(v) the Server shall operate in combination with any other software used by the Customer, other than as specified in the Supplier's Instructions;

(vi) the Server shall provide any function other than those set out in the Operation Specifications.

(vii) any other Customer will use the Licensed Software or the Server in accordance with the Operation Specifications, Supplier's Instructions or any direction of the Supplier.

(c) **(Liability):** the Supplier is not liable to remedy any defect in the Server if:

(i) the defect does not result in the performance of the Licensed Software significantly deviating from the Operation Specifications;

(ii) the defect is the result of alterations or modifications to the Licensed Software not authorised in writing by the Supplier;

(iii) the defect is the result of use of the Licensed Software in combination with equipment programs or services not authorised in writing by the Supplier;

(iv) the defect is the result of use of the Licensed Software other than in the operating environment recommended by the Supplier or other than in accordance with the Supplier's directions; or

(v) the defect is the result of failure of the Customer to meet its obligations under this Agreement or any other agreement relating to the Licensed Software.

#### 4.11 Other Users

(a) **(Acknowledgement)** the Customer acknowledges that other customers will have access to and use the Licensed Software on the Server.

(b) **(Undertaking)** the Customer shall not access or attempt to access information which is placed on the Server by other customers, except to the extent that information is made available for public access on the World Wide Web.

## 5. INNOVATIONS

### 5.1 Ownership of Innovations

The Customer acknowledges that any discoveries, inventions, patents, designs or other rights arising directly or indirectly out of or in the performance of this Agreement are the property of the Supplier.

### 5.2 After Termination

The Customer's obligations under this clause 5 shall survive termination whether pursuant to clause 8 of this Agreement or otherwise.

## 6. LIABILITY OF SUPPLIER

### 6.1 Exclusion

Except as expressly provided to the contrary in this Agreement, all terms, conditions, warranties, undertakings, inducements or representations whether express, implied, statutory or otherwise relating in any way to the Licensed Software or to this Agreement are excluded. Without limiting the generality of the foregoing the Supplier shall not be under any liability to the Customer in respect of any loss or damage, including consequential loss or damage (however caused) which may be suffered or incurred or which may arise directly or indirectly in respect of the Licensed Software or the failure or omission on the part of the Supplier to comply with its obligations under this Agreement.

## 6.2 Liability to Third Parties

(a) **(Exclusion)** unless specifically provided for in this Agreement, the Supplier is not liable to the Customer for any action, demand, claim or proceedings brought by third parties against the Customer in respect of any use by the Customer of the Licensed Software or the Server, to provide some facility, service or information to a third party or the general public.

(b) **(Indemnity)** the Customer will indemnify the Supplier in respect of any demand, claim, cause of action, suit or proceedings brought by a third party which arises out of the Customer's use of the Licensed Software to provide a facility, service or information to a third party or the general public.

## 6.3 Terms Implied By Statute

(a) Where any Act of Parliament implies in this Agreement any term, condition or warranty and that Act avoids or prohibits provisions in a contract excluding or modifying the application of or exercise of or liability under such term, condition or warranty, such term condition or warranty shall be deemed to be included in this Agreement.

(b) The liability of the Supplier for any breach of such term, condition or warranty shall be limited, at the option of the Supplier, to any one or more of the following:

(i) if the breach relates to goods:

A. the replacement of the goods or the supply of equivalent goods;

B. the repair of such 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; and

(ii) if the breach relates to services:

A. the supplying of the services again; or

B. the payment of the cost of having the services supplied again.

## 6.4 Customer Warranty

The Customer warrants that it has not relied on any representation made by the Supplier which has not been stated expressly in this Agreement, or upon any descriptions, illustrations or specifications contained in any document including any catalogues or publicity material produced by the Supplier unless they are consistent with the Operating Specifications and the Supplier's Instructions.

## 7. FEES AND CHARGES

(a) **(Payment of Licence Fee):** the Customer shall pay the Licence Fee within 21 days of the Commencement Date and then in accordance with the requirements for payment specified in the Letter of Offer.

(b) **(Other Costs)**: the fees and charges payable by the Customer under this Agreement are exclusive of any taxes including a goods and services tax, duties, fees or other government levies or charges which may be imposed on or in respect of the Licensed Software, its use or its maintenance under this Agreement or otherwise. Such taxes, duties, fees or other government charges will be the responsibility of the Customer and shall be paid by the Customer immediately they become due and in any event not later than 28 days after notice by the Supplier requiring such payment. The Customer shall fully indemnify and hold harmless the Supplier against all payments made by the Supplier which are the Customer's responsibility under this clause.

## 8. TERMINATION

### 8.1 Breach by Customer

(a) Without limiting the generality of any other clause in this Agreement, the Supplier may terminate this Agreement immediately by notice in writing or by email if:

(i) any payment due from the Customer to the Supplier pursuant to this agreement remains unpaid for a period of 28 days; and

(ii) the Customer breaches any clause of this Agreement and such breach is not remedied within 14 days of written notice by the Supplier.

(b) In its absolute discretion, the Supplier may instead of terminating the Agreement under clause (a) elect to suspend the provision of access to the Licensed Software and the Server under this Agreement until such time the breach is rectified. Such an election shall not operate as a waiver of the Supplier's right to terminate and the Supplier expressly reserves that right.

### 8.2 Termination by Supplier other than for Breach

Notwithstanding clause 8.1(a), the Supplier may terminate this Agreement immediately on notice in writing or by email to the Customer if:

(a) the Customer becomes, threatens or resolves to become, or is in jeopardy of becoming subject to any form of insolvency administration;

(b) the Customer, being a partnership, dissolves, threatens or resolves to dissolve, or is in jeopardy of dissolving;

(c) the Customer, being a natural person, dies or becomes mentally ill or otherwise incapable of managing its affairs; or

(d) the Customer ceases or threatens to cease conducting its business in the normal manner.

### 8.3 Additional rights of Supplier

If notice is given to the Customer pursuant to clause 8.1(a) the Supplier may in addition to terminating the Agreement:

(a) retain any money paid;

- (b) charge a reasonable sum for service provided for which no sum has previously been charged;
- (c) be regarded as discharged from any further obligations under this Agreement; and
- (d) pursue any additional or alternative remedies provided by law.

## 9. ARBITRATION

Any dispute or difference arising between the parties regarding the construction of this Agreement or the rights, duties or obligations of either party hereunder or any other matter arising out of or concerning the same, other than any entitling a party to proceed for equitable relief, shall be submitted to arbitration in accordance with the provisions of the Commercial Arbitration Act 1984 (NSW).

## 10. MISCELLANEOUS

### 10.1 Force Majeure

(a) The Supplier shall not be liable for any delay or failure to perform its obligations if such failure or delay is due to Force Majeure, provided that the Supplier shall notify the Customer of any anticipated delay due to Force Majeure as soon as is reasonably practicable, whereupon the Supplier's obligations hereunder shall be suspended for the period of the delay so caused.

(b) If a delay due to Force Majeure exceeds 28 days the Supplier may terminate this Agreement immediately on providing notice to the Customer of its intention to do so, whereupon:

(i) the Supplier shall refund money previously paid by the Customer under this Agreement for which no goods or services have been provided;

(ii) the Customer shall pay the Supplier a reasonable sum in relation to services rendered or costs and expenses incurred prior to termination;

(iii) the Supplier may deduct the charge or part of the charge referred to in clause 10.1(b)(ii) from the sum, if any, referred to in clause 10.1(b)(i).

### 10.2 Entire Agreement

This Agreement together with the Letter of Offer constitutes the entire agreement between the parties for the Licensed Software. Any prior arrangements, agreements, representations or undertakings are superseded. No modifications or alterations of any clause of this Agreement will be valid except in writing signed by each party.

### 10.3 Severability

Each party acknowledges that the covenants, obligations and restrictions herein contained are reasonable and each and every one of the covenants, obligations and restrictions in whole or in part is deemed to be severable and independent. Any provision of this Agreement which is determined to be unreasonable shall be ineffective to the extent only of such unreasonableness without invalidating the remaining provisions hereof.

#### 10.4 Assignment and Sub-Contracts

(a) The benefit of this Agreement shall not be dealt with in any way by the Customer, whether by assignment, sub-licensing or otherwise, without the Supplier's prior written consent.

(b) The Supplier may sub-contract for the performance of this Agreement or any part of this Agreement.

#### 10.5 Governing Law and Jurisdiction

This Agreement shall be governed by and construed and taken into effect in accordance with the laws of New South Wales and the parties irrevocably and unconditionally submit to the jurisdiction of the courts of New South Wales and courts entitled to hear appeals therefrom.

#### 10.6 Notices

(a) Any notice, approval, covenant or other communication required by this Agreement shall be in writing and shall be delivered personally or given by prepaid post or email to a party at the address of the party indicated in the Letter of Offer or in response to the Letter of Offer or such other address as the party may from time to time notify to the other party.

(b) The Customer shall notify the Supplier of any change in email or postal address within 14 days of that change.

(c) Proof of posting by prepaid post or email:

(i) in the case of a letter, on the third day after posting;

(ii) in the case of email on the day of despatch.

#### 10.7 Supplier's Rights

Any express statement of a right of the Supplier under this Agreement is without prejudice to any other right of the Supplier expressly stated in this Agreement or arising at law.

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### Schedule A: Description of Licensed Software

For the purposes of this Agreement the Licensed Software refers to the following modules of binary code, scripts and marked-up documents used in the provision of the WebMCQ Service:

A. **WebMCQ Server Software**, comprised of server-side binary code, Hyper Text Mark-Up Language ("HTML") documents and images that:

(i) authorise requests by members of the general public for access to the Customer Pages through the World Wide Web using password validation to deny authorisation if the Customer has decided on this approach; and

(ii) dynamically generate and distribute Customer Pages through the World Wide Web according to content previously created by the Customer and stored on the Server using WebMCQ Administration Tools, for the general purpose of presenting multiple choice questions and associated information to users who have been authorised according to (i) above; and

(iii) validate and record information about authorised users' responses to questions and associated information presented through the World Wide Web as described in (ii) above.

**B. WebMCQ Administration Tools**, comprised of server-side binary code, Java classes, client-side JavaScript, HTML documents and images that:

(i) authorise by password-validation requests from Customers to access WebMCQ Administration Tools features.

(ii) provide Customers authorised according to (i) above with access to tools required to create and manage multiple choice questions and to store the content of those questions in a form suitable for subsequent World Wide Web distribution as Customer Pages by WebMCQ Server Software; and

(iii) provide the Customer authorised according to (i) above with access to the tools required to generate reports on records of responses to Customer Pages which have been accessed by the general public using WebMCQ Server Software.