

SOA Schedule 5 –

Escrow Agreement

<Contract title and reference number>

<Customer name>

<Supplier name>

<Escrow Agent name>

Contract established under SOA <SOA title and reference number>

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| INSTRUCTIONS FOR USING THIS DOCUMENT (TO BE DELETED IN FINAL EXECUTION VERSION OF SOA SCHEDULE):This is a template Escrow Agreement for use with the SOA Comprehensive Contract Conditions - ICT Products and/or Services. This Escrow Agreement assumes that the Customer and Supplier have entered into a Contract, and that the Customer requires for itself, the Supplier and an escrow agent approved by the Customer to enter into an Escrow Agreement in relation to the Escrow Materials. If an Escrow Agreement is required, and the Supplier has no escrow agreement that already covers the Escrow Materials that the Customer can become a party to or beneficiary under which is satisfactory to the Customer, the Escrow Agreement should be substantially in the form of this SOA Schedule 5 or such other form reasonably acceptable to the Customer.  The yellow highlighted sections need to be completed. |

SOA Schedule 5 template – Issued February 2020 – Version 1.0.0

## General information

| No. | Topic | Details |
| --- | --- | --- |
|  | **Customer** | Name: <<insert>>  ABN or ACN: <<insert>> |
| **Delivery of notices to the Customer** | Physical address: <<insert>>  Postal address: <<insert>>  Email address: <<insert>> |
|  | **Supplier** | Name: <<insert>>  ABN or ACN: <<insert>> |
| **Delivery of notices to the Supplier** | Physical address: <<insert>>  Postal address: <<insert>>  Email address: <<insert>> |
|  | **Escrow Agent** | Name: <<insert>>  ABN or ACN (if applicable): <<insert>>  Street address: <<insert>>  Postal address: <<insert>>  Email: <<insert>> |
| **Delivery of notices to the Escrow Agent** | Physical address: <<insert>>  Postal address: <<insert>>  Email address: <<insert>> |
|  | **Contract** | Contract name: <<insert>>  Contract number: <<insert>>  Date of contract: <<insert>> |
|  | **Escrow Fee** | <<insert>> |
|  | **Escrow Materials** | <<insert description of the source code and/or object code of any software Deliverable and all other relevant software programs owned by the Supplier, documentation, information, drawings and plans, a list of any relevant third party software programs and any necessary development tools used to create the Deliverable), or annex detailed description to the Escrow Agreement>> |

# Background

* 1. The Customer and the Supplier are parties to the Contract.
  2. The Customer and the Supplier have agreed to appoint an escrow agent and the Escrow Agent has agreed to act as an Escrow Agent and hold the Escrow Materials on the following terms and conditions.

# Definitions and interpretation

* 1. **Definitions**

**Business Day** means between 9.00am and 5.00pm on a day other than a Saturday, Sunday or public holiday at the Customer’s address.

**Contract** means the agreement between the Customer and the Supplier described in the ‘General information’ details above.

**Customer** is specified in the ‘General information’ details above.

**Deliverables** means the products, services and documentation to be provided to the Customer under the Contract.

**Escrow Agent** is specified in the ‘General information’ details above.

**Escrow Agreement** means this document titled *‘SOA Schedule 5 – Escrow Agreement’*.

**Escrow Fee** means the fee specified in the ‘General information’ details above.

**Escrow Materials** means the source code and/or object code of any software Deliverable specified in the ‘General information’ details above and all other relevant software, documentation, information, drawings and plans necessary to enable a competent person skilled in the use of the relevant Deliverable (and any necessary development tools used to create the Deliverable) to keep the Deliverables in good order and repair.

**Final Release Notice** has the meaning given in clause 9.3.

**Harmful Code** means any computer program or virus or other code that is harmful, destructive, disabling or which assists in or enables theft, alteration, denial of service, unauthorised access to or disclosure, destruction or corruption of information or data.

A person or entity is **Insolvent** if:

* + 1. it is (or states that it is) an insolvent under administration or insolvent (each as defined in the *Corporations Act 2001* (Cth));
    2. it is in liquidation, in provisional liquidation, under administration or wound up or has had a controller appointed to its property
    3. it is subject to any arrangement, assignment, moratorium or composition, protected from creditors under any statute or dissolved (in each case, other than to carry out a reconstruction or amalgamation while solvent on terms approved by the other parties to this agreement);
    4. an application or order has been made (and in the case of an application, it is not stayed, withdrawn or dismissed within 30 days), resolution passed, proposal put forward, or any other action taken, in each case in connection with that person, which is preparatory to or could result in any of (a), (b) or (c) above;
    5. it is taken (under section 459F(1) of the *Corporations Act 2001* (Cth)) to have failed to comply with a statutory demand;
    6. it is the subject of an event described in section 459C(2)(b) or section 585 of the *Corporations Act 2001* (Cth) (or it makes a statement from which another party to this agreement reasonably deduces it is so subject);
    7. it is otherwise unable to pay its debts when they fall due; or

something having a substantially similar effect to (a) to (g) happens in connection with that person or entity under the laws of any jurisdiction.

**SOA Comprehensive Contract Conditions - ICT Products and/or Services** means the document titled *‘SOA Comprehensive Contract Conditions – ICT Products and/or Services’*.

**Supplier** is specified in the ‘General information’ details above.

**Trigger Event** has the meaning given in clause 9.2.

* 1. **Interpretation**

Unless it is expressly stated that a different rule of interpretation will apply:

* + 1. (**agreement**) a reference to an agreement includes any variation or replacement of the agreement;
    2. (**Business Day**) if the due date for any obligation is not a Business Day, the due date will be the next Business Day;
    3. (**currency**) all currency amounts are in Australian dollars;
    4. (**headings**) headings are provided for convenience and do not affect the interpretation of this Escrow Agreement;
    5. (**includes**) “include”, “includes” and “including” must be read as if followed by the words “without limitation”;
    6. (**corresponding meaning**) if a word or phrase is defined its other grammatical forms have corresponding meanings;
    7. (**joint and several**) agreements, representations and warranties made by two or more people will bind them jointly and severally;
    8. (**law**) a reference to any legislation includes any consolidation, amendment, re-enactment or replacement of legislation;
    9. (**person**) a person includes the person’s executors, administrators, novatees and assignees; and
    10. (**construction**) no rule of construction will apply to a provision of a document to the disadvantage of a party merely because that party drafted the provision or would otherwise benefit from it.

# Duration

Subject to the Escrow Fees being paid in accordance with this Escrow Agreement, this Escrow Agreement is in force until the Escrow Materials are released in accordance with this Escrow Agreement or the Escrow Agreement is otherwise terminated in accordance with its terms.

# Appointment of Escrow Agent

The Escrow Agent is hereby appointed jointly by the Customer and the Supplier to hold the Escrow Materials and, if the conditions for release under clause 9 of this Escrow Agreement are met, to release the Escrow Materials in accordance with this Escrow Agreement.

# Supplier’s obligations

* 1. The Supplier must deliver to, and deposit with, the Escrow Agent one copy of the Escrow Materials within 7 days of the date of this Escrow Agreement (or such other time as otherwise agreed by the Customer and Supplier).
  2. The Supplier must:
     1. maintain, amend, modify, update and enhance the Escrow Materials at all times; and
     2. ensure that the Escrow Materials deposited with the Escrow Agent are kept fully up-to-date and accurately reflect the Deliverables including all modifications, amendments, updates and new releases made to, or in respect of, the Deliverables.
  3. The Supplier warrants to the Customer that the Escrow Materials are, to the best of the knowledge of the Supplier, free from any Harmful Code which would prevent the Deliverable from performing its desired function or which would prevent or impede a thorough and effective verification thereof.

# Escrow Agent's obligations

* 1. The Escrow Agent must accept custody of the Escrow Materials on the date of delivery in accordance with clause 5 of this Escrow Agreement and, subject to the terms and conditions of this Escrow Agreement, must hold the Escrow Materials on behalf of the Customer and the Supplier.
  2. The Escrow Agent must take all necessary steps to ensure the preservation, care, maintenance, safe custody and security of the Escrow Materials while in the possession, custody or control of the Escrow Agent, including storage in a secure receptacle and in an atmosphere which does not harm the Escrow Materials.
  3. If the Escrow Materials are lost, stolen, destroyed or damaged while in the possession, custody or control of the Escrow Agent, the Escrow Agent must immediately notify the Customer and the Supplier.
  4. Unless the Escrow Agreement is terminated in accordance with clause 10.2(b) of this Escrow Agreement, the Supplier must, upon receipt of a notice from the Escrow Agent under clause 6.3 of this Escrow Agreement, promptly deposit a replacement copy of the Escrow Materials with the Escrow Agent.
  5. Upon receipt of the replacement copy of the Escrow Materials, the Escrow Agent must promptly advise the Customer and Supplier in writing of its receipt of the replacement copy of the Escrow Materials.
  6. Without limitation to any other rights the Supplier and/or the Customer may have under this Escrow Agreement or at law, where the loss, damage or destruction of the Escrow Materials under clause 6.3 is caused by the negligent, wilful or unlawful act or omission of the Escrow Agent, the Escrow Agent must, at its own expense, reimburse the Supplier for the reasonable cost of replacing the Escrow Materials.
  7. The Escrow Agent is not obliged to determine the nature, completeness or accuracy of the Escrow Materials lodged with it.

# Escrow Fee and expenses

* 1. The Customer must pay the Escrow Fee within 30 days of receipt of a correctly rendered tax invoice from the Escrow Agent.
  2. All expenses and disbursements incurred by the Escrow Agent in connection with this Escrow Agreement will be borne wholly and completely by the Escrow Agent.
  3. All expenses and disbursements incurred by the Supplier in connection with this Escrow Agreement will be borne wholly and completely by the Supplier.

# Testing and verification

* 1. The Customer may, in the presence of and under the supervision of the Supplier, analyse and conduct tests in relation to the Escrow Materials to verify that the Supplier has complied with its obligations under this Escrow Agreement.
  2. The Customer may engage an independent assessor to undertake analysis and tests of the Escrow Materials for verification purposes, on its behalf.
  3. The Escrow Agent must release the Escrow Materials to the independent party upon presentation of a release form signed by the Customer and the Supplier specifying the material to be released and identifying the person to whom that material may be released.
  4. The Escrow Materials released pursuant to clause 8.3 of this Escrow Agreement must be returned to the Escrow Agent or its employees or agents and the Customer must ensure that the confidentiality of the Escrow Materials so released is preserved and that the Escrow Materials are not used for any purpose other than verifying that the Supplier has complied with its obligations under this Escrow Agreement.
  5. All costs that Escrow Agent incurs in assisting the assessment under this clause 8 will be borne by the Customer, and must be paid within 30 days of receipt of a correctly rendered tax invoice from the Escrow Agent.

# Release of the Escrow Material

* 1. The Escrow Agent must not release, or allow access to, the Escrow Materials except in accordance with the provisions of this Escrow Agreement.
  2. If:

1. the Supplier is Insolvent;
2. the Supplier has ceased for any reason to maintain or support the Deliverables;
3. the Contract has been lawfully terminated by the Customer for the Supplier’s breach or other default; or
4. this Escrow Agreement is terminated (other than in accordance with clause 10.4 of this Escrow Agreement) and a new Escrow Agreement is not entered into within 30 days in accordance with clause 10.3 of this Escrow Agreement,

(**Trigger Event**) and the Customer wishes the Escrow Agent to release the Escrow Materials to it, the Customer must within 20 Business Days of the Trigger Event provide written notice to both the Escrow Agent and the Supplier stating which Trigger Event has occurred.

* 1. If the Supplier does not, within 20 Business Days of receiving the notice under clause 9.2 of this Escrow Agreement, rectify the Trigger Event or provide another remedy that is satisfactory to the Customer, the Customer may provide the Escrow Agent with a further written notice confirming that the Supplier has not rectified the Trigger Event in the required time or provided another remedy that is satisfactory to the Customer, and require the Escrow Agent to immediately release the Escrow Materials to the Customer (**Final Release Notice**). The Escrow Agent must release the Escrow Materials to the Customer promptly after receiving the Final Release Notice.
  2. Where the Contract has been terminated by the Supplier or where the Customer has agreed to the release of the Escrow Materials, the Escrow Agent must, upon written request from the Supplier, release the Escrow Materials to the Supplier.
  3. The Escrow Agent is not obliged to verify or otherwise test the validity of any notice received, or its contents.
  4. If the Escrow Materials are released to the Customer under this Escrow Agreement, the Customer:
     + - 1. is granted a perpetual, non-exclusive, royalty-free limited licence to:

use and exercise the Intellectual Property Rights in the Escrow Materials:

to the same extent as has been granted to the Customer under the Contract; and

to modify and develop, and to correct any defects or issues in, the relevant Deliverables; and

grant a sub-licence of its rights under clause 9.69.6(i) to any contractor thatis providing outsource or support services to the Customer that includes the use of the Deliverables;

* + - * 1. subject to 9.6(c), must use the Escrow Materials subject to all the other terms of the Contract (as applicable); and
        2. must not use the Escrow Materials for any purpose other than that referred to in clause 9.6(a).
  1. The obligations under this clause 9 survive the termination of this Escrow Agreement under clause 9.2(d).

# Termination

* 1. The Escrow Agent may, by giving 3 months prior written notice to the Customer and the Supplier, terminate this Escrow Agreement subject to a pro-rata refund of any advance payment of the Escrow Fee.
  2. The Customer and the Supplier may jointly terminate this Escrow Agreement immediately if the Escrow Agent:

1. is Insolvent; or
2. is in breach of any obligation under this Escrow Agreement such that there is a substantial failure by the Escrow Agent to perform or observe this Escrow Agreement.
   1. If this Escrow Agreement is terminated in accordance with this clause 10 while the Contract remains in force, the Customer and the Supplier must enter into a new Escrow Agreement on the same terms and conditions as are set out in this Escrow Agreement, with an alternative escrow agent who is acceptable to both the Customer and the Supplier.
   2. The Customer and the Supplier may, upon giving 30 days prior written notice to the Escrow Agent, jointly terminate this Escrow Agreement, however no refund of advance payment of the Escrow Fee will be payable.

# Confidentiality

* 1. The Escrow Agent must not, except as permitted by this Escrow Agreement, make public or disclose to any person any information about this Escrow Agreement or the Escrow Materials.
  2. The Escrow Agent must not reproduce, or cause to have reproduced, a copy of the Escrow Materials or any part thereof, except as may be necessary to electronically store (and maintain a backup) of the Escrow Material.
  3. The obligations under this clause 11 survive the termination of this Escrow Agreement.

# Compliance with laws

The Escrow Agent shall in carrying out this Escrow Agreement comply with the provisions of any relevant statutes, regulations, by-laws and the requirements of any Commonwealth, State or local authority.

# Resolution of disputes

* 1. If any dispute arises concerning this Escrow Agreement, it must be resolved according to this clause 13 (other than where urgent interlocutory relief is required).
  2. Either party may give the other a notice in writing (**dispute notice**) setting out the details of the dispute. Within 5 Business Days after the date on which a party gives the other party a dispute notice (**dispute notice date**), representatives of the parties must meet and use reasonable endeavours to resolve the dispute.
  3. If the dispute is not resolved under clause 13.2, senior management representatives of the parties must, within 10 Business Days after the dispute notice date, meet and use reasonable endeavours to resolve the dispute.
  4. If the dispute is not resolved under clause 13.3 within 30 Business Days after the dispute notice date (or such other time as agreed between the parties), the dispute must be referred to mediation according to clause 13.5.
  5. Where the dispute is referred to mediation, the parties:

1. will conduct the mediation in Brisbane;
2. will jointly appoint the mediator, or if the parties cannot agree on the mediator within 5 Business Days of referral to mediation, the Chairperson of the Queensland Chapter of the Resolution Institute will determine the mediator;
3. may be legally represented at the mediation;
4. will each bear their own costs concerning the mediation, and will bear the costs of the mediation venue and the mediator equally; and
5. will continue to perform their obligations under the Escrow Agreement notwithstanding the existence of a dispute.

# Governing law

* 1. The Escrow Agreement is governed by and is to be construed in accordance with the laws applicable in Queensland.
  2. Each party irrevocably and unconditionally submits to the exclusive jurisdiction of the courts of Queensland.

# General

* 1. The Escrow Agreement may only be varied by written agreement between the parties signed by authorised representatives of the parties.
  2. Clauses and rights in the Escrow Agreement can only be waived in writing signed by the waiving party. Failure or delay of a party in exercising a right under the Escrow Agreement does not waive the party’s rights. A waiver will only waive the particular rights in the particular circumstances and will not waive any other rights, or the same rights in other circumstances.
  3. Neither the Supplier or the Escrow Agent may assign, transfer or novate any of its rights or obligations under the Escrow Agreement without the Customer’s prior written consent.
  4. If any part of the Escrow Agreement is invalid, unlawful or unenforceable, the invalid, unlawful or unenforceable part of the Escrow Agreement (and any parts of the Escrow Agreement which are dependent on those parts) will not apply but the other parts of the Escrow Agreement will not be affected.
  5. Any notice or other form of communication (“**notice**”) which may be given to or served on either the Customer, Supplier or Escrow Agent under this Escrow Agreement must be in writing and must be sent by prepaid postage, delivered by hand or emailed to the addresses specified in the ‘General information’ details above.
  6. A notice will be deemed to be given:

1. if posted:
2. within Australia to an Australian postal address, 5 Business Days after the date of posting; or
3. outside of Australia to an Australian postal address or within Australia to an address outside of Australia, 10 Business Days after posting;
4. if delivered by hand during a Business Day – on the date of delivery;
5. if emailed – subject to clause 15.7 below, on the date recorded on the device from which the party sent the email, unless the sending party receives an automated message that the email has not been delivered,

except that a delivery by hand or email received after 5:00pm (local time of the receiving party) will be deemed to be given on the next Business Day.

* 1. A notice under clause 9 or 10 which is sent via email must also be sent by post or hand delivery, and will not be deemed to be given until the notice is deemed to be delivered by post or hand delivery.

The parties to the Escrow Agreement have executed the Escrow Agreement on the dates set out below.

**Execution by Escrow Agent**

|  |  |  |
| --- | --- | --- |
| Date ……………………………………..  **EXECUTED** for and on behalf of:    Name of Escrow Agent  by its authorised representative, in the presence of:    Signature of witness    Name of witness (block letters) | )  )  )  )  )  )  )  )  )  )  )  )  ) | Signature of authorised representative  By executing this Escrow Agreement the signatory warrants that the signatory is duly authorised to execute this Escrow Agreement on behalf of the Escrow Agent    Name of authorised representative (block letters)    Position of authorised representative |

**Execution by Supplier**

|  |  |  |
| --- | --- | --- |
| Date ……………………………………..  **EXECUTED** for and on behalf of:    Name of Supplier  by its authorised representative, in the presence of:    Signature of witness    Name of witness (block letters) | )  )  )  )  )  )  )  )  )  )  )  )  ) | Signature of authorised representative  By executing this Escrow Agreement the signatory warrants that the signatory is duly authorised to execute this Escrow Agreement on behalf of the Supplier    Name of authorised representative (block letters)    Position of authorised representative |

**Execution by Customer**

|  |  |  |
| --- | --- | --- |
| Date  **EXECUTED** for and on behalf of:    Name of Customer  by its authorised representative, in the presence of:    Signature of witness    Name of witness (block letters) | )  )  )  )  )  )  )  )  )  )  )  ) | Signature of authorised representative  By executing this Escrow Agreement the signatory warrants that the signatory is duly authorised to execute this Escrow Agreement on behalf of the Customer    Name of authorised representative (block letters)    Position of authorised representative |