

**Escrow Agreement**

**Deed of Agreement dated.....20.....**

Between

.....

(the 'Customer')

**Comment [A1]:** Insert name of the beneficiary eg Government Department

And

.....

(the 'Contractor')

**Comment [A2]:** Insert the name of the Contractor

And Software Escrow & Copyright Agents Pty Ltd ABN 68 007 214 708 (the 'Escrow Agent')

**Purpose:**

By contract made on || ('the Contract') the Contractor has agreed to grant or procure a licence to the Customer to use certain software (the 'Licensed Software').

**Comment [A3]:** Insert date of Contract

The Contractor and Customer have agreed to the appointment of an Escrow Agent as an independent person to hold the source code for the Licensed Software for the purposes of this Agreement.

The Escrow Agent has agreed to hold the source code for the Licensed Software, including the software expressed in human-readable language which is necessary for the understanding, maintaining, modifying, correction and enhancing of the Licensed Software and the supporting material being all of the material and data developed and used in and for the purpose of creating the software including (but not limited to) compiled object code, tapes, operating manuals and other items listed in Attachment 3 of this Agreement on the following terms and conditions.

**What is agreed:**

**1. Interpretation**

Where an obligation is imposed on a party under this Agreement, that obligation will include an obligation to ensure no act, error or omission on the part of that party's employees, agents or subcontractors occurs which will prevent discharge of the Escrow Agent's obligation.

**2. Duration**

This Agreement is in force until the source code is released in accordance with the terms of this Agreement.

**3. Appointment of Escrow Agent**

The Escrow Agent is appointed jointly by the Customer and the Contractor and, subject to the terms and conditions of this Agreement, is granted full power and authority to act on behalf of each party to this Agreement.

**4. Contractor's obligations**

4.1 The Contractor will deliver to, and deposit with the Escrow Agent, one copy of the source code and supporting material within seven (7) days of the date of this Contract.

4.2 The Contractor agrees to:

- (a) maintain the source code and supporting material on a quarterly basis following the initial deposit; and

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(b) subject to clause 4.2(a), ensure the source code and supporting material deposited with the Escrow Agent accurately reflects the Licensed Software including all modifications, amendments, updates and new releases made to, or in respect of, the Licensed Software.

4.3 The Contractor warrants that the source code is, to the best of Contractor's knowledge, free from any virus or program device which would:

(a) prevent the Licensed Software from performing its desired function; or

(b) prevent or impede a thorough and effective checking of the Licensed Software.

## **5. Escrow Agent's obligations**

5.1 The Escrow Agent must accept custody of the source code on the date of delivery in accordance with clause 4.1 of this Agreement and, subject to the terms of this Agreement, will hold the source code on behalf of the Customer and the Contractor.

5.2 The Escrow Agent agrees to take all necessary steps to ensure the preservation, care, maintenance, safe custody and security of the source code while it is in its possession, custody or control, including storage in a secure receptacle and in an atmosphere which does not harm the source code and supporting material.

5.3 The Escrow Agent will bear all risks of loss, theft, destruction of or damage to the source code while it is in Escrow Agent's possession, custody or control.

5.4 If the source code is lost, stolen, destroyed or damaged while it is in the possession, custody or control of the Escrow Agent, the Escrow Agent must, at its own expense, obtain from Contractor a further copy of the source code.

5.5 The Escrow Agent is not obliged to determine the nature, completeness or accuracy of the source code lodged with it.

## **6. Escrow fee and expenses**

6.1 The escrow fee will be paid as set out in Attachment 1 to the Escrow Agreement.

6.2 All expenses and disbursements incurred by the Escrow Agent in connection with this Agreement will be borne by the Escrow Agent.

6.3 All expenses and disbursements incurred by the Contractor in connection with this Contract will be borne by the Contractor.

## **7. Testing and verification**

7.1 The Customer may, in the presence of and under the supervision of the Contractor, analyse and conduct tests in relation to the source code and supporting material to verify that the source code and supporting material consists of the material specified in Attachment 2 and Attachment 3 of this Escrow Agreement.

7.2 The Customer may engage an independent assessor who, upon proof of their engagement, will have the same rights of access to the source code and supporting material as the Escrow Agent to undertake analysis and tests of the source code and supporting material for verification purposes, on its behalf.

7.3 The Escrow Agent agrees to release the source code and supporting material to an independent assessor, upon presentation of a release form signed by the Customer and the Contractor stating the material to be released and identifying the person to whom that material may be released.

7.4 The cost of verification pursuant to this clause will be borne by the Customer unless the verification process reveals a discrepancy, in which case the cost will be borne by the Contractor without prejudice to any other rights or remedies of the Customer arising in such circumstances.

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### **8. Release of the source code and supporting material**

- 8.1 The Escrow Agent agrees to not release, or allow access to, the source code and supporting material except in accordance with this Agreement.
- 8.2 Subject to Clause 8.3, the Escrow Agent agrees to release the source code to the Customer upon receipt of written notice from the Customer that:
- (a) the Contractor has become subject to any form of insolvency administration;
  - (b) the Contractor has ceased for any reason to maintain or support the Licensed Software;
  - (c) the license agreement has been terminated by the Customer for breach of Contract by the Contractor; or
  - (d) this Contract is terminated following the default of the Contractor.
- 8.3 The Escrow Agent will not release the source code to the Customer pursuant to Clause 8.2 if, and to the extent that, the Contract Details stipulates an alternative procedure to be adopted upon the occurrence of one or more of the events described in Clause 8.2.
- 8.4 Where the Contract has been terminated by the Contractor or where the Customer has agreed to the release of the source code and so advises the Escrow Agent in writing, the Escrow Agent will, upon written request from the Contractor release the source code and supporting material to the Contractor.

### **9. Termination**

- 9.1 The Escrow Agent may, by giving 3 months prior written notice to the Customer and Contractor, terminate this Agreement subject to a pro-rata refund of any advance payment of the escrow fee.
- 9.2 The Customer and Contractor may jointly terminate this Agreement immediately if the Escrow Agent:
- (a) has become subject to any form of insolvency administration; or
  - (b) is in breach of any obligation under this Agreement so that there is a substantial failure by the Escrow Agent to perform or observe this Agreement.
- 9.3 If this Agreement is terminated in accordance with this clause 9 while the licence of the Licensed Software remains in force, the Customer and Contractor will enter into a new escrow agreement on the same terms and conditions as are set out in this Agreement, with an alternative escrow agent who is acceptable to both the Customer and the Contractor.
- 9.4 The Customer and Contractor may, upon giving 30 days prior written notice to the Escrow Agent, jointly terminate this Agreement but no refund of advance payment of the escrow fee will be payable in such circumstances.

### **10. Confidentiality**

- 10.1 The Escrow Agent must not, except as permitted by this Contract, make public or disclose to any person any information about this Agreement, the Contract or the source code.
- 10.2 The Escrow Agent must not reproduce a copy of the source code or any part thereof.
- 10.3 The obligations under this clause 10 will survive termination of this Agreement.

### **11. Compliance with laws**

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

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### 12. Applicable law

12.1 This Agreement will be governed by and construed in accordance with the laws from time to time in force in Australian Capital Territory/New South Wales/Northern Territory/Queensland/South Australia/Tasmania/Victoria/Western Australia.

Comment [A4]: Delete to suit.

### 13. Variation and waiver

13.1 This Agreement will not be varied except by agreement in writing signed by each of the parties.

13.2 A waiver by one party of a breach of a provision of this Agreement by another party will not constitute a waiver in respect of any other breach, or of any subsequent breach of this Agreement.

13.3 Failure of a party to enforce a provision of this Agreement will not be interpreted to mean that the party no longer regards that provision as binding.

### 14. Assignment

14.1 Neither the Contractor nor the Escrow Agent may assign in whole or in part any responsibilities or benefits under this Agreement without the written consent of the Customer.

### 15. Notices

15.1 A notice or other communication is properly given or served if the party delivers it by hand, posts it or transmits a copy electronically (electronic mail or by facsimile) to the address last advised by one of them to the other.

15.2 A notice or other communication is deemed to be received if:

- (a) sent by post, at the time it would have been delivered in the ordinary course of the post to the address to which it was sent; or
- (b) sent by facsimile, at the time which the facsimile machine to which it has been sent records that the communication has been transmitted satisfactorily (or, if such time is outside normal business hours, at the time of resumption of normal business hours);
- (c) sent by electronic mail, only in the event that the other party acknowledges receipt by any means;
- (d) sent by any other electronic means, only in the event that the other party acknowledges receipt by any means; or
- (e) delivered by hand, the party who sent the notice holds a receipt for the notice signed by a person employed at the physical address for service.

#### Address of the Customer

Physical address

Postal address

Phone number

Fax number

Email address

#### Address of the Contractor

Physical address

Postal address

Phone number

Fax number

Email address

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**Address of the Escrow Agent**

Physical address: Suite 604, 109 Pitt Street, SYDNEY NSW 2000/Suite 419, 838 Collins Street DOCKLANDS VIC 3008

Comment [A5]: Delete to suit

Postal address: GPO BOX 2506 SYDNEY NSW 2001/PO BOX 452 COLLINS STREET WEST VIC 8007

Comment [A6]: Delete to suit

Phone number: +612 9233 2655/+613 9629 3534

Comment [A7]: Delete to suit

Fax number: +612 9233 3044/+613 9629 3217

Comment [A8]: Delete to suit

Email address: seca@escrowagent.com.au

**This Agreement has been properly executed if the section below has been completed.**

**Execution - Signed for and on behalf of the**

**Customer's representative**

Name (print)

Position

Signature and date \_\_\_\_\_ / /

**Contractor's representative**

Name (print)

Position

Signature and date \_\_\_\_\_ / /

**Escrow Agent's representative**

Name (print)

Position

Signature and date \_\_\_\_\_ / /

**Escrow Agreement**

**Attachment 1 – Escrow Fees**

The Customer shall pay the following fees:

Setup Fee: \$Nil

Release Fee: \$Nil

Annual Fee: \$1,500 plus GST per annum in advance. This includes 10 DVD/CD/Hard Disk/USB Keys/Electronic Deposits. Each deposit thereafter is \$150 plus GST per annum.

**Attachment 2 - Details of the licences for the Licensed Software covered by this Escrow Agreement (Clause 7)**

The Licensed Software

**Attachment 3 – Supporting Materials (Clause 7)**

Nil