



# General Business Services Agreement

Magentus Group Pty Limited

[insert date] 2023



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# Business Services Agreement

## 1 Supply of Services

Magentus agrees to supply Services, and the Customer agrees to acquire Services, on the terms of the Business Services Agreement.

### 1.1 The Business Services Agreement

The Business Services Agreement is comprised of the following parts:

- a. this document which sets out the standard terms and conditions on which Magentus supplies the Services to the Customer (General Terms);
- b. the standard terms which apply to each Service type, including a product description of each Service type (Service Schedules);
- c. the standard rates (if any) and service levels which apply to each Service type and which may be set out in a Rates Schedule or Service Level Schedule (as applicable);
- d. the specific details of the Services and any additional information, including the Charges for each Service, which apply to each Service that the Customer is acquiring and which is set out in a Service Order Form; and
- e. any other document or agreement that the parties agree in writing forms part of the Business Services Agreement (Variation).

### 1.2 Formation of a Business Services Agreement

- a. A Business Services Agreement is formed between Magentus and the Customer upon the parties both signing the Service Order Form for the supply of the relevant Service(s).
- b. For the avoidance of doubt, a separate Business Services Agreement is formed between Magentus and the Customer each time a Service Order Form is entered into.

### 1.3 Term of the Business Services Agreement

The Business Services Agreement shall commence on and from the date upon which it is formed pursuant to clause 1.3 and shall continue until it is terminated:

- a. by the Customer giving not less than sixty (60) days' prior written notice to Magentus; or
- b. otherwise, by either party in accordance with the terms of the Business Services Agreement (Term).

### 1.4 Inconsistencies

To the extent of any inconsistency, the components of the Business Services Agreement will be read in the following order of precedence:

- a. any Variation;
- b. the Service Order Form;



- c. the applicable Rates Schedule;
- d. the applicable Service Level Schedule;
- e. the applicable Service Schedules; and
- f. these General Terms,

such that a provision in a document listed higher in the above list shall prevail, to the extent of any inconsistency, over a provision in a document listed lower in the above list.

## 1.5 Customer constituted by more than one party

Where more than one party constitutes the Customer, the Customer acknowledges and agrees that each such party is jointly and individually responsible for all Charges and other obligations under the Business Services Agreement.

## 2 Service Order Forms

### 2.1 Making an application for Service(s)

The Customer must first offer to acquire one or more Service(s) by signing a Service Order Form for the Service(s).

### 2.2 Customer's acknowledgement

Magentus reserves the right to accept or reject a Service Order Form at its sole discretion. The Customer acknowledges that, if Magentus decides to accept the Service Order Form and enter into the Business Services Agreement by countersigning the Service Order Form, Magentus does so having been induced by, and in reliance on, the representations and warranties set out in clause 8.

## 3 Supply of Services

### 3.1 Commencement

- a. Magentus will commence supplying each Service, and the Customer will be liable to pay the Charges for such Service, on the later of:
  - i. the date specified in, or determined in accordance with, the applicable Service Order Form; or
  - ii. the date all Works required for the Service to be made available to the Customer are completed by Magentus, (Billing Start Date),  
provided that the Minimum Period (if any) applicable to all Services ordered in a Service Order Form will commence on the Billing Start Date of the last Service to be supplied under that Service Order Form.



- b. The Customer will be responsible for all reasonable costs incurred by Magentus as a result of any delay by or failure of the Customer to accept delivery of the Service or any related equipment.

### 3.2 Supply standards

Magentus will supply each Service:

- a. with reasonable care and skill; and
- b. in accordance with all applicable laws directly related to its supply of the Service to the Customer.

### 3.3 Service Levels

If the Business Services Agreement sets out Service Levels for a Service then Magentus will use reasonable endeavours to supply that Service in accordance with those Service Levels. Magentus 's liability to the Customer for a failure to meet a Service Level is as set out in the Business Services Agreement, failing which, Magentus will not be liable (whether in contract, tort (including negligence), statute or otherwise) for such failure. If the Business Services Agreement sets out a remedy for such failure, that is the Customer's only remedy for the failure to meet the Service Levels.

### 3.4 Services not fault free

Magentus:

- a. does not represent, warrant or guarantee that any Service will be free of interruptions, delays, faults or errors; and
- b. except as expressly provided in the Business Services Agreement for the relevant Service, is not liable (whether in contract, tort (including negligence), statute or otherwise) to the Customer or any other third party for any interruptions, delays, faults or errors in connection with the supply of a Service (in part or in full) for any reason whatsoever.

## 4 Software

### 4.1 General software terms

Where Magentus provides the Customer with any Software to be used by the Customer in connection with a Service:

- a. Magentus, or its licensor, remains the owner of the Software; and
- b. the Customer:



- i. must use the Software only in connection with the Service in respect of which it is provided;
- ii. by using the Software, accepts the terms of use required by the manufacturer of the relevant Software, and
- iii. without Magentus 's prior written consent, must not:
  - i. assign or otherwise transfer to anyone else the Customer's right to use the Software;
  - ii. except as expressly authorised under the Business Services Agreement or by law, change, merge, adapt or interfere with in any way or, except for backup purposes, copy, the Software; or
  - iii. (except as expressly authorised under the Business Services Agreement or by law), decompile, disassemble, reverse assemble, reverse compile, reverse engineer, translate or in any manner attempt to derive the source code of the Software; and
  - iv. must comply with any further requirements Magentus reasonably directs in relation to the Software or its use or, where relevant, any requirements of any third party licensor of the Software.

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## 4.2 Availability

The Customer acknowledges and agrees that the availability of Software may be dependent on its availability from any licensor of the Software and Magentus is not liable to the Customer or any other person for any delay or any failure of Magentus to obtain any Software from its licensor.

# 5 Customer's obligations and responsibilities

## 5.1 General obligations

The Customer must:

- a. ensure that, for each Service, the Customer meets, and continues to meet for the Term of the Business Services Agreement all pre-requisites or conditions for supply of that Service specified in the Service Schedule for that Service;
- b. use each Service for its intended purpose and without being a nuisance to anyone;
- c. perform all tasks and provide all materials and equipment required of it, and by the dates specified, in the Business Services Agreement;
- d. co-operate with Magentus to allow Magentus to provide each Service;
- e. provide Magentus with all information in the Customer's possession, custody or control that Magentus reasonably requires to perform each Service and ensure that all information it gives to Magentus is correct, current and complete;



- f. comply with all applicable laws, regulations, codes and standards (including any technical standards of a Government Agency) and comply with all Magentus 's reasonable directions in relation to the use of each Service;
- g. comply with all documentation, user manuals and specifications provided by Magentus in respect of each Service;
- h. take all reasonable steps, actions and precautions to stop internal and external threats and malicious software from attacking, being present on or adversely affecting the Services including ensuring that:
  - i. all equipment used in connection with each Service is protected by industry standard anti-virus and anti-malware software from a reputable supplier; and
  - ii. this software is kept up to date and receiving security and signature updates or has such software effectively applied to it at least weekly;
- i. immediately report to Magentus, in writing, any unauthorised use of a Service;
- j. not:
  - i. unreasonably delay any action, approval, direction, determination or decision which is required of the Customer under the Business Services Agreement or for Magentus to perform any Service;
  - ii. engage in, or procure, assist or allow any of its Personnel or any other person to engage in, any fraudulent or unauthorised use of any Service. If the Customer engages in any such use of the Service, the Customer must report such use to Magentus as soon as it becomes aware of such use;
  - iii. interfere with, or procure, assist or allow any of its Personnel or any other person to interfere with, the reasonable use of any Service by any of Magentus 's other customers;
  - iv. resell the Service(s) to any third party; and
- k. without limiting any of the foregoing, notify Magentus of any fact, matter or thing which comes to its attention which is material to the performance by Magentus of any Service.

## 5.2 Customer responsibilities

- a. The Customer is solely responsible for:



- i. understanding how to access and use each Service;
  - ii. each of its Personnel who have access to, or use of, a Service;
  - iii. any use of a Service which is fraudulent or not authorised by the Customer, including unauthorised use of the Service using the Customer's equipment;
  - iv. changing any default password (or any other security safeguard such as a default PIN number) provided to the Customer by Magentus as part of a Service for the access to or use of a Service. The Customer releases Magentus from all liability in connection with any Loss suffered or incurred by the Customer as a result of any third party accessing or using a Service as result of using the default password or other security safeguard; and
  - v. implementing and maintaining the security of the Customer's network and equipment.
- b. The Customer acknowledges and agrees that Magentus is not liable (whether in contract, tort or otherwise) whatsoever for any Loss suffered or incurred by the Customer as a result, whether directly or indirectly, of any fact, matter or circumstance that is within the responsibility of the Customer under this clause 5.2.

### 5.3 Acceptable use

- a. This clause applies where an Acceptable Use Policy is referred to in any Service Order or third party provider's terms that are identified in any Service Order.
- b. The Customer must comply and must ensure that each of its end users complies, with any applicable Acceptable Use Policy connected with a Service.

### 5.4 Third Party Facilities

- a. The supply of a Service may rely on:
  - i. Supplier Networks;
  - ii. equipment, infrastructure and services provided by a third party (whether or not that third party has an agreement or understanding with the Customer) including a third party who provides Carriage Services;
  - iii. the Customer's network and infrastructure; and
  - iv. the Customer's equipment, (Third Party Facilities).
- b. Without limiting any other provision of the Business Services Agreement, the Customer acknowledges and agrees that:





- i. due to reasons beyond Magentus 's control, a defect or failure in one or more Third Party Facilities may cause a delay, failure or interruption to a Service;
- ii. Magentus is not liable to the Customer in any way for any Loss (including Consequential Loss) that the Customer may incur or suffer as a result of any such delay, failure or interruption; and
- iii. if the Customer requires Magentus to undertake any remedial work to repair a Service affected by such a delay, failure or interruption, Magentus may charge the Customer, and the Customer must pay, an additional charge for the remedial work that Magentus undertakes. An additional charge will be payable by the Customer even if Magentus commences such remedial work and only discovers, after commencing such remedial work, that the delay, failure or interruption to a Service was caused by a defect or failure in Third Party Facilities.

## 5.5 End users

The Customer must use all reasonable endeavours to ensure that all end users of each Service comply with this clause 5 as if any reference to "the Customer" were a reference to each "end user".

## 6 Ongoing support

### 6.1 Support

Magentus shall only be obliged to provide support to rectify any defect or fault in a Service to the extent expressly set out in the Service Schedule relevant to that Service.

### 6.2 Exclusions to ongoing support

Magentus has no obligation to the Customer to rectify any defect or fault in a Service caused or contributed to by:

- a. any defect or fault in equipment, software or any network infrastructure on the Customer side of the boundary point for the relevant Service;
- b. any defect or fault in a Service which is caused, or contributed to, by:



- i. the acts or omissions of the Customer or the Customer's Personnel;
- ii. faults or defects that arise in telecommunication services provided to the Customer by a third party supplier (even if such telecommunication services are connected, with Magentus's consent, to a Service); or
- iii. failure by the Customer or any third party to appropriately maintain any equipment or cabling relevant to the supply of the Service;
- iv. electromagnetic interference with any Service;
- v. any Force Majeure Event; or
- vi. scheduled maintenance.

### 6.3 Notice of scheduled maintenance

Unless stated otherwise in a Business Services Agreement, Magentus will endeavour to:

- a. give the Customer at least three (3) days' notice of any scheduled maintenance that is likely to affect any Service; and
- b. not carry out any scheduled maintenance during the Customer's business hours unless otherwise agreed with the Customer.

## 7 Charges, invoicing and payment

### 7.1 Charges

- a. The standard Charges for the Works, Services and equipment are:
  - i. as stated in the applicable Service Order Form and Rates Schedule; or
  - ii. where not so stated, as notified by Magentus to the Customer from time to time as applicable to each Work, Service or equipment.
- b. The Charges shall also include:
  - i. all additional charges;
  - ii. all Termination Charges; and
  - iii. any other Charge specified as payable by the Customer under the Business Services Agreement.

### 7.2 Calculating and adjusting Charges

- a. Magentus may round up any Charge to the nearest cent.
- b. If the Service Order Form or any other provision of the Business Services Agreement provides that:



- i. a Minimum Period of twelve (12) months or more applies to a Service, Magentus may adjust, each 1 July during the Term of the Business Services Agreement, the Charges by the amount representing the CPI Increase at that date;
  - ii. a Minimum Period applies to a Service and Magentus continues to provide the Service after the end of the Minimum Period, Magentus may adjust the Charges by giving not less than one (1) month's notice to the Customer;
  - iii. a Service is supplied to the Customer at a discounted rate on the basis of the Customer meeting any minimum usage of the Service and, at any time, the Customer does not meet that minimum usage, Magentus may, at its discretion, charge the Customer the standard, undiscounted Charges for the Service on and from the date that the Customer failed to meet the minimum usage;
  - iv. a Minimum Monthly Commitment applies to a Service, the Customer must pay the greater of the Minimum Monthly Commitment or the Charges for that Service based on actual usage; or
  - v. the Customer receives any discount on Charges relating to bundled Services, the discount shall only apply for the period whilst those bundled Services are supplied to the Customer. If the Customer cancels any Service forming part of the bundled Services, Magentus may, at its discretion, charge the Customer the standard, undiscounted Charges for each remaining Service on and from the date that the Customer cancelled a Service forming part of the bundled Services.
- c. If the parties have agreed to a Variation, the Charges will be adjusted in accordance with any changes to the Charges agreed in that Variation.
- d. Magentus may vary any Charge or the Rates Schedules if, and to the extent that:
- i. there is an increase in Taxes imposed by law or new Taxes imposed by law come into place;
  - ii. there is a change to the costs of ancillary services (such as an increase in credit card or direct debit transactions fees imposed on Magentus by third parties) as long as it has provided the Customer with a reasonable alternative at no additional charge;
  - iii. there is an increase in the charges imposed on Magentus by its Suppliers; or
  - iv. a Charge must be increased by law, regulation, code or standard (including any determination or declaration of a Government Agency).

### 7.3 Termination Charges

- a. The Customer will be liable to pay a Charge (Termination Charge) if a Service is cancelled (other than as a result of termination of the Business Services Agreement by the Customer) in accordance with clause 14.1(a).
- b. Except as expressly provided to the contrary in any Service Schedule for that Service, the Termination Charge for each Service shall be the sum of:



- i. the unrecovered proportion of the costs Magentus has incurred in provisioning the Service (including where those costs have been amortised on a straight line basis over any Minimum Period);
  - ii. any costs that Magentus will incur in connection with the cancellation of that Service to the extent that Magentus is unable to avoid such costs after taking reasonable steps to do so;
  - iii. an amount equal to thirty percent (30%) of the Customer's average of the greater of the actual monthly Charges or Minimum Monthly Commitment (if any) for that Service for the three (3) months immediately preceding the month of cancellation, multiplied by the number of months, or part thereof, between the date of cancellation and the end of the Minimum Period (if applicable); and
  - iv. reimbursement to Magentus of any rebates, credits, technology funds, refunds or discounts, including volume rebates, loyalty discounts and service credits on the full amount of Magentus 's standard Charges, provided to the Customer or any of its end users in connection with the Service.
- c. The Customer agrees that the Termination Charge is a reasonable and genuine estimate of Magentus 's likely financial loss if a Service is cancelled.

#### 7.4 GST

- a. Unless expressly stated otherwise, all Charges for supplies made, or to be made, under the Business Services Agreement are exclusive of GST.
- b. If any supply by Magentus under, or in connection with, the Business Services Agreement constitutes a taxable supply for the purposes of the GST Law, the Customer must pay Magentus an amount equal to the GST payable on that supply in addition to, and at the same time as, the amount payable for that supply.
- c. Where the Customer is required under a Business Services Agreement to pay or reimburse an expense or outgoing incurred by Magentus , the amount to be paid or reimbursed by the Customer will be the sum of:
  - i. the amount of the expense or outgoing less any input tax credits in respect of the expense or outgoing to which Magentus , or to which the representative member for the relevant GST group, is entitled; and
  - ii. if the payment or reimbursement is subject to GST, an amount equal to that GST.

#### 7.5 Invoicing and payment

- a. The Customer must make payment of all amounts invoiced by Magentus by the due date stated in the relevant invoice.
- b. All payments of invoices by the Customer must be:
  - i. by electronic funds transfer or any other means specified on the invoice; and
  - ii. without any set-off or deduction by the Customer.
- c. The payment of any amount by the Customer is not made until the amount is received by Magentus in immediately available, clear funds.



- d. The Customer's obligation to make payments of an invoice is not affected by:
  - i. the Customer being unable to use the whole or any part of a Service, the Network or an item of equipment to which the invoice relates; or
  - ii. any equipment required to use a Service to which the invoice relates being damaged, not being in the Customer's possession or not working at any given time.
- e. If the Customer does not pay an invoice in full by its due date, Magentus may charge the Customer:
  - i. interest on the unpaid amount calculated at the Default Rate from the due date until the date of payment (including interest) is made in full; and
  - ii. an amount representing the costs and expenses of Magentus in seeking payment of the overdue amount (including any legal or debt recovery expenses incurred by Magentus and paid to third parties to obtain payment of the overdue amount).
- f. Where the Customer receives a Service from more than one member of Magentus, each member may invoice the Customer individually for all Charges and other amounts payable in connection with the Service it has provided and the Customer must make payment to the member who has issued the invoice.

## 7.6 Dishonouring of payments

If the Customer's financial institution fails to honour any payment by the Customer, the Customer must pay the amount owing directly to Magentus, together with an additional amount notified by Magentus relating to time, effort and expenses (including any charges Magentus is liable to pay to any financial institution as a result of such failure) incurred by Magentus in rectifying such failure.

## 7.7 Reissuing of invoices

- a. Magentus may reissue an invoice if any error in the invoice is later discovered.
- b. If the Customer has overpaid any Charges as a result of such an error, the Customer's account will be credited with the overpayment or, if the Customer has stopped acquiring any Service from Magentus, Magentus will refund the overpayment promptly after the Customer's request but after deduction of any other amounts due by the Customer.
- c. If the Customer has underpaid any charges as a result of the error, the Customer will be required to pay the correct amount to Magentus after the invoice is reissued in accordance with the timeframes specified in clause 7.7(a).

## 7.8 Disputing invoices

- a. The Customer may dispute any amount of a Charge invoiced by Magentus but only if:



- i. the Customer requests in writing that Magentus investigate the Charge disputed within nine (9) months of the date of the invoice in which the Charge is invoiced;
  - ii. the Customer provides, at the same time, specific evidence which demonstrates that the particular Charge is incorrect; and
  - iii. the Customer pays the relevant invoice relating to the Charge in full.
- b. If the Customer validly disputes any amount, Magentus will conduct investigations which are reasonably necessary and appropriate in the circumstances of the dispute. Magentus 's records are sufficient proof of the Customer's usage of the Services, unless the Customer otherwise provides proof, to Magentus 's reasonable satisfaction, that they are incorrect.
- c. At the end of Magentus 's investigations:
- i. if any disputed amount has been shown to be, or the parties agree was, incorrectly invoiced, Magentus will refund the disputed amount within thirty (30) days of the amount being shown or agreed to be incorrect; or
  - ii. if any disputed amount has not been shown to be, and the parties do not otherwise agree was, correctly invoiced, the procedure under clause 13 must be followed.

## 7.9 Time

Time is of the essence in respect of all amounts payable under the Business Services Agreement.

## 8 Warranties

### 8.1 Warranties as to capacity

Each party represents and warrants to the other that, as at the date the Business Services Agreement is formed:

- a. no Insolvency Event affects that party and that party is not aware of any circumstances likely to cause it to become subject to an Insolvency Event;
- b. that party's execution, delivery and performance of that Business Services Agreement has been properly authorised by it and its obligations under that Business Services Agreement are valid, binding and are enforceable against it in accordance with its terms;
- c. the execution and delivery of that Business Services Agreement or the transactions contemplated by it do not conflict with or result in any breach of that party's constituent documents, any applicable law to that party or any obligation or undertaking to which that party is bound; and
- d. it does not enter into that Business Services Agreement as trustee of any trust or settlement.



## 8.2 Customer specific warranties as to capacity

- a. The Customer represents and warrants to Magentus that, as at the date the Business Services Agreement is formed:
  - i. the signatory to the Business Services Agreement agrees to guarantee the performance of the Customer's obligations set out the Business Services Agreement in the event that the Business Services Agreement is not enforceable against the Customer because the signatory did not have the appropriate authorisation referred to in clause 8.1(b);
  - ii. it has had the opportunity to obtain independent professional advice in relation to the legal, taxation, accounting and financial consequences of the Business Services Agreement, and has not relied on Magentus in relation to any of those matters; and
- b. it does not rely on any representation, warranty or undertaking made by Magentus (or any other person) in connection with the Business Services Agreement that is not expressly set out in that Business Services Agreement and acknowledges that Magentus has been induced to enter into that Business Services Agreement on that basis.

## 8.3 Warranties about information

The Customer represents and warrants to Magentus on a continuing basis that:

- a. all information in the Service Order Form is true, accurate, complete and is not misleading or deceptive or likely to mislead or deceive; and
- b. where the Customer has provided Magentus with information about any of the Customer's Personnel, each of the Personnel has consented to the Customer disclosing the information to Magentus and for Magentus to use, or disclose, the information to provide the Services and exercise any rights and perform any obligations in respect of the Services.

# 9 Confidentiality

## 9.1 Obligation of confidence

Subject to clause 9.2, each party must:

- a. keep confidential the Confidential Information of the other party and must ensure that it does not disclose or permit the disclosure of that Confidential Information to any person; and
- b. take all steps and do all things that are reasonably necessary or prudent or desirable in order to safeguard the confidentiality of the Confidential Information of the other party.

## 9.2 Permitted disclosure

- a. A party may disclose the Confidential Information of the other party:



- i. to its Affiliates, employees, agents, advisers or financiers (each a Recipient) if, and only if:
    - the Recipient reasonably needs to know that Confidential Information in order for that party to comply with its obligations under the Business Services Agreement;
    - that party has informed the Recipient of the obligations of confidentiality under the Business Services Agreement; and
    - the Recipient has accepted the obligation to treat the Confidential Information as confidential in the same manner and to the same extent as required of that party;
  - ii. with the consent of the other party;
  - iii. in connection with legal or other proceedings relating to the Business Services Agreement; or
  - iv. if compelled by law or by a Government Agency, court, tribunal or by the rules of any stock exchange.
- b. Notwithstanding clause 9.2(a), Magentus may:
- i. disclose the Customer's Confidential Information to any Supplier where it is necessary to enable the Supplier to provide any service to Magentus in connection with a Service;
  - ii. use or disclose the Customer's Confidential Information where expressly permitted under any other provision of the Business Services Agreement;
  - iii. use or disclose the Customer's Confidential Information to make contact with, or to deal directly with, the Customer's end users and other Personnel in connection with the Services and the invoicing of those Services; and transmit information about the Customer's location in emergency situations.

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### 9.3 Survival

The rights and obligations of each party pursuant to this clause 9 survive the expiry or termination of the Business Services Agreement.

## 10 Personal Information

### 10.1 Collection

During the Term, Magentus or its Suppliers may collect Personal Information from the Customer.

### 10.2 Use

The Customer agrees that each member of the Magentus Group may:

- a. hold the Personal Information and share it with its employees, contractors and agents, but only to the extent necessary to enable Magentus to perform the Services, send the Customer invoices, check that the Customer's responsibilities are being met or otherwise to administer and enforce the Business Services Agreement;





- b. share with Magentus 's Suppliers any information needed to provide certain Services to the Customer or to enable the Customer to send or receive messages of any kind;
- c. use any information about the Customer for statistical purposes, so long as the Customer is not identified; and
- d. use any information about the Customer for the purposes set out in any privacy policy (including the privacy policies of any Supplier) notified in writing to the Customer from time to time.

### 10.3 Parties must comply

Each Party must comply with its obligations under the Privacy Act. If the Customer is a small business operator under the Privacy Act, the Customer must choose to be treated as an organisation under section 6EA of the Privacy Act during the Term of the Business Services Agreement and otherwise comply with the obligations under the Privacy Act as if the Customer was an organisation under the Privacy Act.

## 11 Non-solicitation

- a. This clause 11 applies when Magentus provides professional services to the Customer.
- b. During the Restraint Period, a party must not, except with the prior written consent of the other party:
  - i. solicit or entice any person who is employed or contracted by the other party for the purposes of hiring, employing or otherwise engaging that person; and
  - ii. hire, employ or otherwise engage any person who is employed or contracted by the other party.
- c. A party must promptly notify the other party in writing if a person who is employed or contracted by the other party seeks to be hired, employed or otherwise engaged by the first-named party at any time prior to the expiration of the Restraint Period.

## 12 Liability

### 12.1 Exclusions of representations, guarantees or warranties

Subject always to clause 12.2, to the maximum extent permitted by law, Magentus makes no representation nor gives any guarantee or warranty (including of merchantability, acceptable quality, fitness for any particular purpose or fitness for disclosed result) in connection with any Service.

### 12.2 Liability under consumer protection laws not excluded



- a. There may be non-excludable statutory guarantees, implied conditions, and warranties or liabilities that Magentus has to the Customer under the Competition and Consumer Act and other consumer protection laws that may apply to the Services and that cannot be excluded (Non-Excludable Conditions or Liabilities).
- b. Nothing in the Business Services Agreement removes or limits any of the Non-Excludable Conditions or Liabilities.
- c. However, to the extent that Magentus 's liability can be limited under the Competition and Consumer Act and other consumer protection laws that may apply to the Services, Magentus limits its liability to the Customer, at our sole discretion, to:
  - i. in the case of a breach relating to the supply of a Service: resupplying the Service or payment of or reimbursement for the cost of having the Service resupplied,
  - ii. and the Customer acknowledges that this limitation of liability is fair and reasonable in all the circumstances.

### 12.3 Exclusions and limitations of liability

- a. Magentus excludes all liability to the Customer for any Consequential Loss suffered or incurred by the Customer under, or in connection with, the Business Services Agreement (whether based in contract, tort (including negligence), statute or otherwise).
- b. Magentus 's total liability to the Customer for any and all Loss the Customer suffers or incurs, and for which Magentus is liable under, or in connection with, the Business Services Agreement is equal to the sum of all Charges paid or payable by the Customer under the Business Services Agreement in the twelve (12) month period immediately preceding the event(s) or circumstance(s) which gave rise to that liability.
- c. The exclusions and limitations of liability in this clause 12.3 do not apply to any Loss arising from death or personal injury or loss of, or damage to, real or tangible property or equipment to the extent it is directly caused or contributed to by a negligent act or omission of Magentus or its employees, agents or contractors in connection with the supply of the Services.

### 12.4 Contribution and mitigation

- a. Magentus 's liability for any Loss suffered or incurred by the Customer under, or in connection with, the Business Services Agreement (whether based in contract, tort (including negligence), statute or otherwise) is reduced to the extent that:
  - i. the acts or omissions of the Customer or the Customer's Personnel;
  - ii. the use of any Third Party Facilities; or
  - iii. the acts, omissions or equipment of a third person, caused or contributed to that Loss.
- b. Magentus 's liability to the Customer will be reduced to the extent that the Customer has not taken reasonable steps to mitigate or avoid the Loss flowing from the event giving rise to Magentus 's liability to the Customer.



## 12.5 The Customer's indemnities

- a. The Customer must indemnify, and keep indemnified, Magentus and its Personnel, from and against any Loss (including reasonable legal costs) that any of those indemnified may suffer or incur arising out of or in connection with the Customer's breach of the Business Services Agreement or arising out of or in connection with wilful misconduct or unlawful, fraudulent or negligent acts or omissions by the Customer (or the Customer's employees, agents, contractors or Affiliates) and which relate to the access to, and use of, the Service
- b. The Customer must indemnify, and keep indemnified, Magentus and its employees, agents, contractors and Affiliates from and against any claim by a third party arising from the use by the Customer or its Personnel of the Services (including any claims for infringement of intellectual property rights).

## 13 Dispute Resolution

### 13.1 Dispute resolution procedure

- a. Where a dispute under, or in connection with, the Business Services Agreement arises between the parties (Dispute), it must be resolved in accordance with the procedure set out in this clause 13.
- b. Either party may refer, by written notice to the other party, the Dispute to each party's Representative for resolution. If the Representatives cannot resolve the dispute within fourteen (14) days of the notice of dispute being given, either party may escalate the dispute to the respective group managers.
- c. If the dispute is not resolved within fourteen (14) days of such escalation, either party may refer the dispute to mediation in accordance with, and subject to, the Institute of Arbitrators and Mediators Australia Mediation and Conciliation Rules. During any such mediation, both parties may be legally represented.

### 13.2 Neither party to commence legal proceedings

- a. Subject to clause 13.2(b), no party may commence legal proceedings in relation to any Dispute without first following the procedure set out in this clause 13.
- b. Notwithstanding any other provision of the Business Services Agreement, nothing in this clause 13 prevents either party from seeking urgent interlocutory relief.

### 13.3 Continuing performance of obligations during dispute

Despite the existence of a Dispute, the parties must continue to perform their respective obligations under the Business Services Agreement.

## 14 Termination

### 14.1 Termination by Customer



- a. Without limiting any other provision of the Business Services Agreement, the Customer may terminate:
  - i. the whole of the Business Services Agreement with immediate effect by notice in writing to the Magentus if:
    - Magentus breaches any material obligation under the Business Services Agreement which:
      - if capable of being remedied, is not remedied within thirty (30) days after receipt of a written notice from the Customer requiring it be so remedied; or
      - is incapable of remedy; or
- b. if an Insolvency Event occurs in respect of Magentus;
- c. that part of the Business Services Agreement relating to a particular Service in the manner contemplated by clause 1.4.

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## 14.2 Termination by Magentus

Without limiting any other provision of the Business Services Agreement, Magentus may terminate:

- a. the whole of the Business Services Agreement with immediate effect by notice in writing to the Customer if:
  - i. the Customer breaches any material obligation under the Business Services Agreement (or any other Business Services Agreement between the parties, as the case may be) which:
    - if capable of being remedied, is not remedied within thirty (30) days after receipt of a written notice from Magentus requiring it be so remedied; or
  - ii. is incapable of remedy.
- b. the Customer vacates the Site;
- c. it is required to do so by law; or
- e. if an Insolvency Event occurs in respect of the Customer;
- f. that part of the Business Services Agreement relating to a particular Service, with immediate effect by notice in writing to the Customer if:
  - i. the Customer fails, at any time, to satisfy any pre-requisite for the supply of the Service;
  - ii. it required to do so by law; or
- g. that part of the Business Services Agreement relating to a particular Service in the manner contemplated by clause 1.4.

## 14.3 Consequences of expiration or termination



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- a. If all of the Business Services Agreement expires or is terminated, all Services under that Business Services Agreement are cancelled on and from the date that the Business Services Agreement so expires or terminates.
- b. If only part of the Business Services Agreement is terminated relating to a particular Service only that Service is cancelled on and from the date that part of the Business Services Agreement so terminates.
- c. If all or part of the Business Services Agreement expires or is terminated:
  - i. the Customer must pay Magentus all amounts due under the Business Services Agreement in respect of all Services cancelled within thirty (30) days of the date that the Business Services Agreement so expires or terminates;
  - ii. each party must:
    - as directed by the other party, return to the other party (or in the case of documents or data, destroy), all originals and copies of the other party's written materials, documentation, data and Confidential Information (including all materials derived therefrom) and all Equipment or other tangible items owned by the other party which relate to the Services cancelled; and
    - if applicable, co-operate with the other party to facilitate Magentus's continued performance of its obligations in relation to any Services which are not cancelled;
- d. the rights and obligations of the parties under the Business Services Agreement cease or, if only part of the Business Services Agreement is terminated, only those rights and obligations of the parties under the Business Services Agreement relating to the Services cancelled cease, except for:
  - i. any accrued rights and obligations that have arisen prior to the date of termination; and
  - ii. any rights and obligations which are expressed, or by their nature are intended, to continue after termination, including those referred to in this clause 14.3 and clauses 3.4(b), 5.2(b), 7.1(b)(2), 7.3 to 7.7 inclusive, 9, 10, 11, 12, and 14.
- e. If, within thirty (30) days of the date that the whole or part of the Business Services Agreement expires or is terminated, the Customer fails to return to Magentus any item it is required to return, the Customer agrees that Magentus, as its agent, may enter any premises where Magentus believes that item may be located, during normal business hours, to recover that item. Provided Magentus acts with reasonable care, the Customer must reimburse Magentus for any costs it incurs in exercising its rights under this clause 14.3(d).
- f. If a Service is terminated in accordance with this clause 16, Magentus cannot guarantee the Customer that it will be able to return any of the Customer's data that is stored by Magentus on the Network, differentiate and separate the Customer's data from the other data stored on the Network or remove the Customer's data from the Network.

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## 15 General

### 15.1 Entire agreement

The Business Services Agreement:

- a. constitutes the entire understanding between the parties; and
- b. in good faith supersedes all previous agreements, understandings, commitments, representations and warranties, whether written or verbal,

in relation to its subject matter.

### 15.2 Force majeure

If, by reason of a Force Majeure Event, Magentus is prevented, hindered or delayed in the performance of any of its obligations under a Business Services Agreement, Magentus will not be liable to the Customer for not performing, or for the manner of its performance of, such obligation to the extent to which, and for the period of time during which, Magentus is so prevented, hindered or delayed.

### 15.3 Consents and approvals

Unless a Business Services Agreement expressly provides otherwise, a party may conditionally or unconditionally give or withhold any consent or approval to be given under the Business Services Agreement and is not obliged to give its reasons for doing so.

### 15.4 Enforceability

If, at any time, any provision of the Business Services Agreement is held to be invalid, illegal or unenforceable then, to the extent permitted by law, it must be read down to the extent necessary to be valid and, if it cannot be so read down, it will be severed. The validity, legality and enforceability of the remaining provisions will not in any way be affected or impaired.

### 15.5 Assignment

The Customer must not assign any its rights or otherwise deal with, or transfer, any of its obligations under the Business Services Agreement, without the prior written consent of Magentus.

### 15.6 No waiver

No failure or delay on the part of either party in exercising any power or right, and no grant of any indulgence or forbearance by that party, under a Business Services Agreement will prejudice any of the rights or powers of that party under the Business Services Agreement or be construed as a waiver of any warranty or obligation on the part of the other party under the Business Services Agreement.



## 15.7 Changes in the Customer's details and notices

- a. The Customer must notify Magentus in writing of any change to the Customer's details (including its ABN, its contact details and/or the details of its Representative).
- b. Any notice that Magentus gives to the Customer under the Business Services Agreement will be effectively served if:
  - i. the notice is sent by hand or mail to:

unless Magentus has been notified by the Customer that the address no longer applies, any address listed in the Service Order Form (including any Site);  
any address notified by the Customer to Magentus as its current address from time to time (whether or not the address is the registered address of the Customer); or  
if the Customer is a corporation, its registered address or principal place of business as registered with the Australian Securities and Investments Commission; or
  - ii. the notice is sent by email to an email address listed in the Service Order Form or as subsequently notified to Magentus .
- c. Notice is deemed to be received by a person:
  - i. when delivered by hand;
  - ii. if sent by mail, two (2) Business Days after posting; or
  - iii. if sent by email, one (1) hour after sending unless the sender receives a report or notice indicating the email has not been delivered within that one (1) hour period.
- d. However, if the notice is deemed to be received on a day which is not a Business Day or after 5.00 pm at the addressee's location, it is deemed to be received at 9.00 am on the next Business Day.

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## 15.8 Commission or rebates

Magentus may pay or receive commission or rebates in connection with the Business Services Agreement.

## 15.9 Representatives

- a. Each party appoints its Representative as its agent (non-exclusively) to:
  - i. exercise powers;
  - ii. perform duties; and
  - iii. carry out the overall supervision and co-ordination of the obligations, of that party under the Business Services Agreement.
- b. Each party's Representative is entitled to act entirely in the interests of the party who appointed them.
- c. A party may at any time, by written notice to the other party, replace the person then acting as the party's Representative.



- d. If a party's Representative knows of a matter, that knowledge is taken to also be within the knowledge of that party.

## 15.10 Intellectual Property Rights

- a. Any Intellectual Property Rights owned by either party prior to entry into a Business Services Agreement, or developed independently of any Business Services Agreement by either party, will continue to be owned by that party.
- b. None of Magentus 's Intellectual Property Rights are transferred to the Customer and, unless specifically authorised by a Business Services Agreement, the Customer cannot and will not use or reproduce such Intellectual Property Rights for any purpose unconnected with the Business Services Agreement.
- c. The rights and obligations of each party pursuant to this clause 18.10 survive the expiry or termination of a Business Services Agreement.

## 15.11 Relationship

Magentus is an independent contractor to the Customer. No partnership, employment, agency, or joint venture relationship is created or evidenced by the Business Services Agreement.

## 15.12 Counterparts

A Business Services Agreement may consist of a number of copies, each signed by one party to the Business Services Agreement. If so, the signed copies are treated as making up the one document and the date on which the last counterpart is executed will be the date of the Business Services Agreement.

## 15.13 Governing law

This Business Services Agreement is governed by and construed in accordance with the laws of Victoria. The courts of Victoria (to whose non-exclusive jurisdiction the parties irrevocably submit) have jurisdiction to settle any disputes that may arise out of or in connection with this Business Services Agreement.

# 16 Definitions and Interpretations

## 16.1 Definitions

**Acceptable Use Policy** in relation to a Service, means the policy so described in the applicable Service Schedule for that Service or as otherwise notified by Magentus in writing from time to time.

**Access Tasks** has the meaning given to that term in clause 7.5.

**Affiliate** means, in respect of a party:





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- a. the party's related bodies corporate (as that term is defined in the Corporations Act) or any other bodies corporate associated with the party (including any body corporate one of whose directors is also a director of the party); and
- b. without limiting paragraph (a) of this definition, if the Customer is a franchisee, its franchisor and each of the franchisor's related bodies corporate.

**Business Day** means a day which is not a Saturday, Sunday or bank or public holiday in Canberra or in Melbourne, Australia.

**Business Services Agreement** means the agreement between Magentus and the Customer for the supply of one or more Services which comprises the parts set out in clause 1.2.

**Carriage Service** has the meaning given in the Telecommunications Act.

**Charges** means any charges or fees (which, except where otherwise stated, are exclusive of any Taxes or withholdings) applicable to any Works, Service or equipment.

**Magentus** means the Magentus Group Affiliate identified on a Service Order Form under which Services are provided.

**Magentus Group** means The Magentus Group Pty Limited ACN 127 151 026.

**Confidential Information** of a party, means all information in whatever form (including verbal information, or information recorded on paper or by electronic means) relating to that party which that party indicates, or which by its nature, is confidential but excludes information which:

- a. is already in the possession of that party; or
- b. becomes known or generally available to the public, except as a result of a breach of any obligation of confidence under the Business Services Agreement (in which case, it remains Confidential Information); or
- c. that party independently develops.

**Consequential Loss** means any Loss that is suffered or incurred by a party as a result of a fact, matter or circumstance which does not arise naturally (that is, according to the usual course of things) from the fact, matter or circumstance giving rise to the Loss and expressly includes loss of revenue, loss of profits, loss of anticipated savings or business, pure economic loss, loss of data, loss of value of equipment (other than cost of repair), loss of opportunity or expectation loss even if any of that Loss arises naturally (according to the usual course of things) from the fact, matter or circumstance giving rise to the Loss and any penalties imposed by a Government Agency.

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

**CPI** means the All Groups, Consumer Price Index for Sydney, NSW published from time to time by the Australian Bureau of Statistics (ABS) for all groups (national) or, if the index is no longer published or if ABS ceases to exist, the published index which most closely resembles it.

**CPI Increase** means, as at an adjustment date, the percentage amount of the increase in CPI as at the adjustment date from the end of the same quarter in the previous calendar year or, if there has been no increase in CPI during that period, zero (0) percent.



**Force Majeure Event** means a circumstance beyond Magentus 's reasonable control, including acts or omissions of third party network operators or service providers, fire, flood, earthquake, elements of nature or acts of God, acts of war, terrorism, riots, civil disorders, rebellions or revolutions, strikes or lockouts.

**General Terms** means the terms and conditions of this document.

**Government Agency** means any governmental, semi-governmental, administrative, fiscal, statutory, judicial or quasi-judicial body, department, commission, authority, tribunal, agency or entity having operation or jurisdiction within Australia or anywhere else in the world.

**GST** has the meaning given to that term in the GST Law.

**GST Law** has the meaning given to that term in the A New Tax System (Goods and Services Tax) Act 1999 (Cth).

**Insolvency Event** in relation to a person, means the happening of any one or more of the following events:

- a. the person being unable to pay its debts as and when they fall due;
- b. a receiver, receiver and manager, administrator, liquidator, trustee for creditors or trustee in bankruptcy or analogous person being appointed over the person's undertaking or assets or any of them;
- c. if the person is a natural person, an application and filing for bankruptcy being made in respect of the person; or
- d. if the person is a corporation:
  - i. an application for winding up or other process seeking orders which, if granted, would render the person an externally-administered body corporate being filed and not being withdrawn within twenty (20) Business Days;
  - ii. the person being or becoming the subject of an order, or a resolution being passed, for the person's winding up or dissolution; or
  - iii. the person entering into, or resolving to enter into, a deed of company arrangement, or an arrangement, composition or compromise with, or assignment for the benefit, of its creditors generally or any class of creditors, or proceedings being commenced to sanction such a deed of company arrangement, or arrangement, composition or compromise, other than for the purposes of a bona fide scheme of solvent reconstruction or amalgamation.

**Intellectual Property Rights** means all industrial and intellectual property rights of any kind which may subsist in Australia or anywhere else in the world, including:

- a. patents, copyright, rights in circuit layouts, designs, trademarks (including goodwill in those marks) and domain names;
- b. any application or right to apply for registration of any of the rights referred to in paragraph (a) of this definition; and
- c. all rights of a similar nature to any of the rights in paragraphs (a) or (b) of this definition, whether or not such rights are registered or capable of being registered.

**Loss** includes all loss, damage or liability (including liability to a third party) of any kind.



**Minimum Monthly Commitment** means, in relation to a Service, any minimum amount as may be specified for that Service in the Service Order Form.

**Minimum Period** means, in relation to a Service, the minimum period over which the Magentus will supply, and the Customer will be liable to pay for, the Service.

**Network** means the network used by Magentus to perform a Service from time to time as further described in the applicable Service Schedule for the Service.

**Non-excludable Conditions or Liabilities** has the meaning given to that term in clause 15.2(a).

**Personal Information** means information or opinion about a person from which the person's identity is apparent or can reasonably be ascertained.

**Personnel** means, in respect of a party, the employees, agents, contractors and Affiliates of the party and the employees, agents and contractors of the party's Affiliates and includes, in the case of the Customer, the Customer's end users of the Services.

**Privacy Act** means the Privacy Act 1988 (Cth) and all regulations made under it.

**Rates Schedule** means any standard rates of charges or fees which apply to Works, Services or equipment that the Customer is acquiring.

**Recipient** has the meaning given to that term in clause 12.2(a)(1).

**Representative** means the individual identified by a party as its representative in the applicable Service Order Form, as may be replaced by that party under clause 18.9(c).

**Restraint Period** means:

- a. the duration of the Business Services Agreement; and
- b. thereafter, for the period of twelve (12) months commencing on the expiry or termination of the Business Services Agreement.

**Service** means an individual service ordered by the Customer in a Service Order Form and which Magentus agrees to supply to the Customer.

**Service Levels** means, in relation to a Service, the service levels (if any) applicable to that Service as may be specified in the Service Level Schedule.

**Service Level Schedule** means any document setting out the standard Service Levels which apply to the Service(s) the Customer is acquiring.

**Service Order Form** means a duly completed document in a form approved by Magentus from time to time providing all relevant details in relation to a Service, which may include a purchase order.

**Service Schedule** has the meaning given to that term in clause 1.2(b).

**Software** means any computer programs, whether incorporated in equipment or delivered independently, and any firmware embedded in equipment, supplied by Magentus for use the Customer in connection with a Service.

**Supplier** means a third party supplier that Magentus uses to directly or indirectly supply the Services to the Customer and expressly includes, any third party who provides Carriage Services for resale by Magentus to the Customer.

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**Supplier Network** means any telecommunications network, equipment, facilities or cabling of a Supplier.

**Tax** means any tax, rate, levy, impost or duty (other than a tax on the net overall income of any person) and any interest, penalty, fine or expense relating to any of them.

**Telecommunications Act** means the Telecommunications Act 1997 (Cth).

**Term** has the meaning given to that term in clause 1.4.

**Termination Charge** has the meaning given to that term in clause 10.4.

**Third Party Facilities** has the meaning given to that term in clause 8.6(a).

**Variation** has the meaning given to that term in clause 1.2(e).

**Works** in relation to a Service, means any design, installation, commission or other works required to enable the performance of that Service.

## 16.2 Interpretation

In these General Terms, unless the context otherwise requires:

- a. words importing the singular include the plural and vice versa;
- b. words that are gender neutral or gender specific include each gender;
- c. if a word or phrase is defined its other grammatical forms have corresponding meanings;
- d. 'includes' means includes without limitation;
- e. no rule of construction will apply to a clause to the disadvantage of a party merely because that party put forward the clause or would otherwise benefit from it;
- f. a reference to:
  - i. a person includes a firm, unincorporated association, corporation and a Government Agency;
  - ii. a person includes the person's legal personal representatives, successors and assigns and persons substituted by novation;
  - iii. 'law' includes:
    - statutes, regulations or by-laws of the Commonwealth, a State, a territory or a Government Agency; and
    - rules, proclamations, ordinances, orders, decrees, requirements or approvals (including conditions) of foreign, state, territorial or local jurisdiction or a Government Agency that have the force of law;

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- iv. a right includes a benefit, interest, remedy, discretion, authority or power;
  - v. an obligation of more than one person binds them all jointly and severally;
  - vi. an obligation includes a warranty or representation and a reference to a failure to observe or perform an obligation includes a breach of warranty or representation;
  - vii. provisions or terms of these General Terms or another document, agreement, understanding or arrangement include a reference to both express and implied provisions and terms;
  - viii. time is AEST - Australian Eastern Standard Time;
  - ix. month is a reference to a calendar month;
  - x. '\$' or 'dollars' is a reference to Australian currency;
  - xi. 'costs' includes charges, expenses and legal costs (on full indemnity basis);
  - xii. writing includes any mode of representing or reproducing words in tangible and permanently visible form, and includes electronic transmissions;
  - xiii. any thing (including any amount) is a reference to the whole or any part of it and a reference to a group of things or persons is a reference to any one or more of them;
  - xiv. the General Terms or any other document includes the document as novated, varied or replaced and despite any change in the identity of the parties;
  - xv. a clause or paragraph is a reference to a clause or paragraph, as the case may be, of these General Terms; and
- g. if the date on or by which any act must be done under these General Terms is not a Business Day, the act must be done on or by the next Business Day;
  - h. where time is to be calculated by reference to a day or event, that day or the day of that event is excluded; and
  - i. a term or expression:
    - i. given a meaning in the Corporations Act that is not otherwise defined in these General Terms, has the same meaning in these General Terms as in the Corporations Act; and
    - ii. given a meaning in the GST Law, that is not otherwise defined in these General Terms or in the Corporations Act, has the same meaning in these General Terms as in the GST Law.