

1. Definitions

- 1.1 **“Agreement”** means the Terms and Conditions contained herein, together with any quotation, order, invoice or other document or amendments expressed to be supplemental to this Agreement.
- 1.2 **“BSS”** means Bay Software Solutions Limited, its successors and assignees.
- 1.3 **“Business Day”** means Monday to Friday 8.00am-5.00pm for normal business to be conducted, excluding a Saturday, Sunday, or public holiday. Outside of these trading hours will be subject to overtime rates (normal hourly rate plus overtime rate) or penal rates (Public Holiday – double time and a half)
- 1.4 **“Charges”** means the Charges and/or fees payable (including any Goods and Services Tax (“GST”) where applicable) for the Services as agreed between BSS and the Client in accordance with clause 5 below and shall be in New Zealand dollars (\$NZ), unless otherwise specified.
- 1.5 **“Client”** means the person/s, entities or any person acting on behalf of and with the authority of the Client requesting BSS to provide the Services as specified in any proposal, quotation, order, invoice or other documentation, and:
 - (a) if there is more than one Client, is a reference to each Client jointly and severally; and
 - (b) if the Client is a partnership, it shall bind each partner jointly and severally; and
 - (c) if the Client is a part of a trust, shall be bound in their capacity as a trustee; and
 - (d) includes the Client’s executors, administrators, successors, and permitted assignees.
- 1.6 **“Cookies”** means small files which are stored on a user’s computer. They are designed to hold a modest amount of data (including Personal Information) specific to a particular client and website and can be accessed either by the web server or the client’s computer. **If the Client does not wish to allow Cookies to operate in the background when ordering from the website, then the Client shall have the right to enable / disable the Cookies first by selecting the option to enable / disable provided on the website, prior to ordering Services via the website.**
- 1.7 **“Documentation”** means the explanatory material that accompanies Services or Software, including the Statement of Work **“SOW”** detailing the Services to be provided (in hardcopy or electronic form).
- 1.8 **“Intellectual Property”** means all existing and future intellectual and industrial property rights throughout the world, including rights in relation to copyright, trademarks, designs, circuit layouts, patents, business names, trade secrets, inventions, know-how (whether registered or not, and including the right to apply for registration of any such rights), and other results of intellectual activity in the industrial, commercial, scientific, literary, or artistic fields.
- 1.9 **“OSS”** means the Client’s Online Support Service to provide direct support to the Client for technical issues. Support includes the following services:
 - (a) attending onsite at the Client’s premises;
 - (b) any time spent to resolve any issues with the Client’s computer system created by any operator error on the part of the Client or any action of any third parties whether authorised or unauthorised by the Client;
 - (c) resolving any issues which are solely caused by the actions of third parties and originate outside of the Client’s computer system e.g. problems that relate to the supply of services by the Client’s internet service provider.
- 1.10 **“Rollover Hours”** means any Agreement where unused or excess consumption of monthly allocated hours carry forward into subsequent periods to either be consumed or offset against future periods or allocated hours.
- 1.11 **“Services”** means all;
 - (a) *Products* (which includes any hardware or software, and/or accessories whether supplied from a third party or where custom developed or programmed for the Client, accessories, or parts, etc.); or
 - (b) *Services* (which includes any advice or recommendations, installation of Products, Product support etc) provided by BSS to the Client at the Client’s request from time to time (where the context so permits the terms ‘Products’ or ‘Services’ shall be interchangeable for the other).
- 1.12 **“Software”** means any branded Software produced and/or supplied by BSS and includes any Software required for operating each individual terminal or application.
- 1.13 **“Website”** means a location which is accessible on the Internet through the World Wide Web and which provides multimedia content via a graphical User Interface.

2. Acceptance

- 2.1 The Client is taken to have exclusively accepted and is immediately bound, jointly and severally, by these Terms and Conditions if the Client places an order (together with a purchase order confirmation) for, or accepts Services provided by BSS, which refers to, or include these Terms and Conditions.
- 2.2 The Client acknowledges and agrees that:
 - (a) the supply of Products or Services on credit is at the discretion of BSS; and
 - (b) BSS may require payment in full, or a deposit, prior to Products or Services being supplied; and
 - (c) the Client shall as soon as practicable make available to BSS all information, documents, software, hardware, and other particulars required by BSS for the provision of Products or Services; and
 - (d) once accepted by the Client, BSS’ quotation shall be deemed to correctly interpret the Client’s instructions, whether written or verbal; and
 - (e) BSS will not accept verbal confirmation alone.
- 2.3 A copy of the written estimate (the final Charges where only an estimate is provided to the Client can only be ascertained upon completion of the Services. Variances in estimated Charges of more than 10% will be subject to Client approval before proceeding with the Services) or quotation is to be signed and dated by the Client to indicate acceptance and should be returned to BSS. As an alternative, the Client may send an official order for the Services via email in reply to the estimate or quotation (subject to this clause 2.3 and clause 6.2) which will imply the Client’s acceptance of BSS’ Terms and Conditions. The Client accepts that no work will be commenced until acceptance has been supplied to BSS as per this clause.
- 2.4 Any advice, recommendations, information, assistance, or service provided by BSS in relation to the Services provided is given in good faith, is based on information provided to BSS, and BSS’ own industry knowledge, and experience and shall be accepted without liability on the part of BSS, human error is possible under these circumstances, and BSS shall make all effort to offer the best solution to the Client. Where such advice or recommendations are not acted upon then BSS shall require the Client or their agent to authorise commencement of the Services in writing. BSS shall not be liable in any way whatsoever for any damages or losses that occur after any subsequent commencement of the Services.
- 2.5 These Terms and Conditions and any associated documents supplied in conjunction:

- (a) sets forth the entire and final understanding of the Client and BSS pertaining to the subject matter hereof and supersedes all prior arrangement, whether oral or written; and
- (b) may only be amended with both parties' consent in writing and shall prevail to the extent of any inconsistency with any other document or agreement between the Client and BSS, unless subject to conditions as defined in clause 30.6.

3. Purchase Orders/Authorised Representative

- 3.1 All orders must be placed in writing to: support@baysoft.co.nz and are subject to acceptance by BSS.
- 3.2 Orders will not be accepted, unless supported by a valid purchase order. Purchase orders must be sent directly to: support@baysoft.co.nz.
- 3.3 Email acceptance of an accepted quote or estimate alone, is not sufficient confirmation of an order, unless supported by a valid purchase order as stated above.
- 3.4 Once BSS have accepted an order, cancellation of an order may only occur prior to supply of any Products or Services and provided written consent is granted by BSS on such terms as acceptable by BSS.
- 3.5 The Client acknowledges and agrees where the Client does not elect to control their purchases by a Purchase Order and/or a Letter of Authority, then all purchases made by Client and/or any other third party acting on behalf of the Client to which the Products are charged to the Client, shall always remain payable by the Client. All said notices of restrictions pertaining to purchases must be writing and will remain in place until such time as the Client revokes.

4. Electronic Data Transfer

- 4.1 Electronic signatures shall be deemed to be accepted by either party providing that the parties have complied with Section 226 of the Agreement and Commercial Law Act 2017 or any other applicable provisions of that Act or any Regulations referred to in that Act.
- 4.2 If the Client has provided BSS with an email address for communication purposes BSS will fully comply with all requirements under the Unsolicited Electronic Messages Act 2007.

5. Change in Control

- 5.1 The Client shall give BSS not less than fourteen (14) days prior written notice of any proposed change of ownership of the Client and/or any other change in the Client's details (including but not limited to, changes in the Client's name, address and contact phone or fax number/s, change of trustees or business practice). The Client shall be liable for any loss incurred by BSS as a result of the Client's failure to comply with this clause.

6. Charges and Payment

- 6.1 At BSS' sole discretion, the Charges shall be either:
 - (a) as indicated on any invoice provided by BSS to the Client; or
 - (b) the Charges as at the date of Delivery of the Products according to BSS' current price list; or
 - (c) the Subscription Charges as at the date of delivery of Services according to BSS' SOW schedule (Charges are subject to change, thirty (30) days' notice will be provided by BSS of any such Charges adjustments); or
 - (d) BSS' quoted Charges (subject to clause 6.2) which will be valid for the period stated in the quotation or otherwise for a period of seven (7) days.
- 6.2 BSS reserves the right to change the Charges:
 - (a) if a variation to the Products or Services to be provided is requested; or
 - (b) if a variation to the plan of scheduled Services, or Client specifications is requested (including, but not limited to, additional work required due to hidden or unidentifiable difficulties not evident prior to commencement of the Services, any request to investigate and/or repair any faults or defects outside BSS' normal business hours or in the event that BSS is requested to complete additional Services whilst onsite etc); or
 - (c) because of increases to BSS in the cost providing the Services (including, but not limited to, fluctuations in currency exchange, etc.) which are beyond BSS' control.
- 6.3 Variations will be charged for based on BSS' quotation, and will be detailed in writing, and shown as variations on BSS' invoice. The Client shall be required to respond to any variation submitted by BSS within ten (10) working days. Failure to do so will entitle BSS to add the cost of the variation to the Charges. Payment for all variations must be made in full at the time of their completion.
- 6.4 Unless otherwise stated, **any discount included in the quoted Charges shall become null and void**, if payment is not made by the due date stated on the invoice and/or statement. In such an event of late payment BSS reserves the right to vary the Charges where any discounts or special Charges are revoked.
- 6.5 Payment is to be made by a Direct Debit Request ("DDR") arrangement only, unless otherwise as agreed to between the Client and BSS and shall be subject to:
 - (a) if a deduction falls due on a non-business day, it will be debited to the Client's account on the next business day following the scheduled withdrawal date;
 - (b) BSS will give the Client not less than thirty (30) days written notice when changes to the initial terms of the arrangement are made. This notice will state any other changes to the initial arrangement.
 - (c) If the Client wishes to discuss any changes to the initial arrangement, then contact BSS' representative directly. The changes may include:
 - (i) deferring the monthly deduction;
 - (ii) stopping an individual debit; or
 - (iii) suspending the DDR; or
 - (iv) cancelling the DDR.
- 6.6 Time for payment for the Products or Services being of the essence, the Charges will be payable by the Client on the date/s determined by BSS, which will be:
 - (a) unless, prepayment is required as per clause 2.2(b) or otherwise formally agreed and accepted by BSS, all invoices are due for payment on the 20th day of the month immediately following the invoice date; and
 - (b) for the avoidance of doubt, the terms of 6.5(a) above shall prevail over any standard payment terms of the Client.
- 6.7 BSS may in its discretion allocate any payment received from the Client towards any invoice that BSS determines and may do so at the time of receipt or at any time afterwards. On any default by the Client. BSS may re-allocate any payments previously received and allocated. In the

absence of any payment allocation by BSS, payment will be deemed to be allocated in such manner as preserves the maximum value of BSS' Purchase Money Security Interest (as defined in the PPSA) in the Services.

- 6.8 The Client shall not be entitled to set off against, or deduct from the Charges, any sums owed or claimed to be owed to the Client by BSS nor to withhold payment of any invoice because part of that invoice is in dispute.
- 6.9 GST and other taxes and duties that may be applicable shall be added to the Charges except when they are expressly included in the Charges.
- 6.10 If, during the time between the date the estimate is provided and the day the Client accepts the said estimate, the value of the New Zealand Dollar has, in our reasonable opinion, significantly shifted against the USA Dollar or any other foreign currency in which BSS purchase the Products, BSS reserves the right to issue a new estimate, in accordance with clause 6.2(c).

7. Reimbursable Expenses

- 7.1 BSS shall be reimbursed for all expenses reasonably and properly incurred in connection with the provision of the Services, except where such expenses are specifically stated in the quotation, or in writing by BSS, as being non-reimbursable. All reimbursable expenses (e.g. travel, accommodation, communications, couriers, etc.) will be charged at the cost involved (excluding GST) to BSS, plus an administration fee of ten percent (10%) thereof.

8. Provision of the Services

- 8.1 Delivery ("Delivery") of the Products is taken to occur at the time that BSS (or BSS' nominated carrier) delivers the Products to the Client's nominated address even if the Client is not present at the address. It is the Client's responsibility to ensure that BSS have the correct delivery information, including physical address, email address and contact number, for both physical and electronic supply of Products.
- 8.2 BSS will provide the training to selected staff of the Client, as agreed, and specified in the quotation. The Client is to make its staff members, available at times and locations as agreed.
- 8.3 Any further training not set out in the quotation will be at the current charged set by BSS which may subject to change from time to time. The Client will be responsible for all for all travel and accommodation expenses as per clause 7 incurred by BSS in providing any additional training.
- 8.4 Delivery to a third party nominated by the Client is deemed to be Delivery to the Client for the purposes of this Agreement.
- 8.5 Whilst BSS shall make every endeavour to enable the Services to be provided at the time and place as was arranged between both parties (subject to BSS' normal service hours of 9.00am to 5:00pm on business days), the Client acknowledges that any time specified thereby for provision of the Services is an estimate only and BSS will not be liable for any loss or damage incurred by the Client because of any delay. If BSS is unable to provide the Services as agreed solely due to any action or inaction of the Client, then BSS shall be indemnified from any liability for any resulting failure to provide the Services and/or entitled to charge a reasonable fee for re-providing the Services at a later time and date.
- 8.6 Services may be requested outside of the normal working hours of 9.00am to 5:00pm Monday through Friday, and including all public holidays by prior arrangement, but may be subject to additional charges.

9. Exclusions to Services Provided

- 9.1 The Client acknowledges and agrees that the following items are not covered under the scope of the Services provided by BSS:
- (a) office relocation;
 - (b) issues caused by Software installed or modified by persons other than BSS' approved technicians;
 - (c) issues caused by hardware installed or modified by persons other than BSS' approved technicians;
 - (d) issues caused by malicious action by any persons either internal or external to the Client (including but not limited to any persons opening malware therefore causing harm to the scope of the Services etc);
 - (e) migrations;
 - (f) any server, PC or laptop that does not have BSS' remote monitoring and management agent installed;
 - (g) any system with illegally licensed software installed or does not comply with BSS' Software license to use as per clause 19;
 - (h) the connection of the Client's internet service and telephone cabling. This is the responsibility of the Client's telecommunications provider and/or internet service provider. The Client's internet connection should be a business grade connection and have its own service level agreement;
 - (i) the ventilation of PC and/or server location where the operation servers and PC's are outside of the recommended or allowable temperatures especially if confined in cupboards/enclosures without forced ventilation.

10. Client's Obligations and Information

- 10.1 The Client shall provide BSS with all assistance, information, access (remote and onsite) and materials, when reasonably requested, to provide the Services.
- 10.2 The Client warrants that:
- (a) to their best knowledge, they have made full disclosure to BSS of all information within the reasonable and actual knowledge of the Client, which would be in respect of the Software; and
 - (b) the information provided by the Client to BSS with respect to the Software is true, complete, and accurate in all respects, and none of that information is misleading, whether by inclusion of misleading information, or omission of material information, or both.
- 10.3 It shall be the Client's sole responsibility to remove any removable media (including, but not limited to, CDs, DVDs, or PC Cards) prior to BSS providing the Services or installing any Software or add-on Software. BSS will not accept any liability for loss or damage to the Clients terminals that may result because the Client has failed to comply with this clause.
- 10.4 BSS shall not be held liable for any loss or corruption of data or files (including, but not limited to, existing software programmes) resulting from providing the Services. It is the sole responsibility of the Client to back-up any data which they believe to be important, valuable, or irreplaceable prior to BSS providing the Services.

11. Defects, Errors, Omissions and Warranty

- 11.1 If a specific term is not provided for in the Agreement or in the "SOW", the Client shall physically inspect the Products and test Services on delivery and shall within thirty (30) days of delivery (time being of the essence) notify BSS of any alleged defect, shortage in quantity, damage, or failure to comply with the description or quote. The Client shall afford BSS an opportunity to inspect the Products and/or test the Services within a reasonable time following delivery if the Client believes the Products and/or the Services are defective in any way. If the Client shall fail to

comply with these provisions the Products and/or Services shall be presumed to be free from any defect or damage. For defective Products or Services, which BSS has agreed in writing that the Client is entitled to reject, BSS' liability is limited to either (at BSS' discretion) replacing or repairing the Products and/or re-supplying or rectifying the Services provided.

- 11.2 Products will not be accepted for return other than in accordance with 11.1 above, and provided that:
- (a) BSS has agreed in writing to accept the return of the Products; and
 - (b) BSS will not be liable for Products which have not been stored or used in a proper manner; and
 - (c) the Products are returned in the condition in which they were delivered and with all packaging material, brochures, and instruction material in as new condition as is reasonably possible in the circumstances.
- 11.3 If BSS is required to rectify, re-provide, or pay the cost of re-providing the Services under this clause, but is unable to do so, then BSS may refund any money, the Client has paid for the Services but only to the extent that such refund shall consider the value of Services which have been provided to the Client which were not defective.
- 11.4 For Products not manufactured by BSS, the warranty shall be the current warranty provided by the manufacturer of the Products. BSS shall not be bound by nor be responsible for any term, condition, representation, or warranty other than that which is given by the manufacturer of the Products.

12. Risk

- 12.1 Risk of damage to or loss of the Products passes to the Client on Delivery and the Client must insure the Products on or before Delivery.
- 12.2 If any of the Products are damaged or destroyed following delivery but prior to ownership passing to the Client, BSS is entitled to receive all insurance proceeds payable for the Products. The production of these Terms and Conditions by BSS is sufficient evidence of BSS' rights to receive the insurance proceeds without the need for any person dealing with BSS to make further enquiries.

13. Title

- 13.1 BSS and the Client agree that the Client's obligations to BSS for the supply of Products or Services shall not cease (and ownership of any Products shall not pass) until:
- (a) the Client has paid BSS all amounts owing to BSS for the Products or Services; and
 - (b) the Client has met all other obligations due by the Client to BSS in respect of all contracts between BSS and the Client.
- 13.2 It is further agreed that, until ownership of the Products passes to the Client in accordance with clause 13.1:
- (a) the Client is only a bailee of the Products and must return the Products to BSS on request.
 - (b) the Client holds the benefit of the Client's insurance of the Products on trust for BSS and must pay to BSS the proceeds of any insurance in the event of the Products being lost, damaged, or destroyed.
 - (c) BSS may commence proceedings to recover the Products supplied notwithstanding that ownership of the Products has not passed to the Client.

14. Personal Property Securities Act 1999 ("PPSA")

- 14.1 Upon acceptance of these Terms and Conditions in writing the Client acknowledges and agrees that BSS at their discretion may:
- (a) these Terms and Conditions constitute a security agreement give rise to a Purchase Money Security Interest ("PMSI") for the purposes of the PPSA; and
 - (b) a security interest is taken in all Products that have previously been supplied and that will be supplied in the future by BSS to the Client, and the proceeds from such Products; and
 - (c) all the Client's present and after acquired property being a charge, including anything in respect of which the Client has at any time a sufficient right, interest, or power to grant a security interest in for the purposes of securing repayment of all monetary obligations of the Client to BSS for Services – that have previously been provided and that will be provided in the future by BSS to the Client or the proceeds from such Products.
- 14.2 The Client undertakes to:
- (a) sign any further documents and/or provide any further information (such information to be complete, accurate and up-to-date in all respects) which BSS may reasonably require to register a financing statement or financing change statement to perfect a first ranking security interest in all Products (supplied by BSS to the Client) on the Personal Property Securities Register;
 - (b) indemnify, and upon demand reimburse, BSS for all expenses incurred in registering a financing statement or financing change statement on the Personal Property Securities Register or releasing any registration made thereby;
 - (c) not register a financing change statement or a change demand statement in relation to the Products or the proceeds of such Products in favour of a third party, without the prior written consent of BSS.
- 14.3 BSS and the Client agree that nothing in sections 114(1)(a), 133 and 134 of the PPSA shall apply to these Terms and Conditions.
- 14.4 The Client waives its rights as a debtor under sections 116, 120(2), 121, 125, 126, 127, 129, and 131 of the PPSA.
- 14.5 Unless otherwise agreed to in writing by BSS, the Client waives its right to receive a verification statement in accordance with section 148 of the PPSA.
- 14.6 The Client shall unconditionally ratify any actions taken by BSS under clauses 14.1 to 14.5.
- 14.7 Subject to any express provisions to the contrary (including those contained in this clause 14), nothing in these Terms and Conditions is intended to have the effect of contracting out of any of the provisions of the PPSA.

15. Security and Charge

- 15.1 In consideration of BSS agreeing to supply Services, the Client charges all of its rights, title and interest (whether joint or several) in any land, realty or other assets capable of being charged, owned by the Client either now or in the future, and the Client grants a security interest in all of its present and after-acquired property, to secure the performance by the Client of its obligations under these Terms and Conditions (including, but not limited to, the payment of any money). The terms of the charge and security interest are the terms of Memorandum 2018/4344 registered pursuant to s.209 of the Land Transfer Act 2017.
- 15.2 The Client indemnifies BSS from and against all BSS' costs and disbursements including legal costs of a solicitor and own client basis incurred in exercising BSS' rights under this clause.

- 15.3 The Client irrevocably appoints BSS and each director of BSS as the Client's true and lawful attorney/s to perform all necessary acts to give effect to the provisions of this clause 15 including, but not limited to, signing any document on the Client's behalf.

16. Limitation of Liability

- 16.1 In providing the Services, BSS only undertakes to exercise the degree of skill, care and diligence normally exercised by managed IT consultants and companies in similar circumstances. There shall be no liability whatsoever in respect of any failure to exercise any degree of skill, or level of care beyond the skill, care and diligence normally exercised by managed IT consultants or companies in similar circumstances.
- 16.2 The Client acknowledges and agrees that:
- (a) BSS does not supervise the work of others; and
 - (b) the Client will not show/supply to a third party any report or document prepared by BSS, unless otherwise agreed to in writing by BSS.
- 16.3 Where verbal advice or approval is given 'on-site' by personnel employed by BSS, and whilst such advice or approval may be given in good faith, BSS will not accept any responsibility or liability for any 'on-site' advice unless the advice is subsequently confirmed in writing.
- 16.4 The Client indemnifies BSS (including BSS' personnel) against all claims, losses, liabilities, damages, costs, and expenses of any kind incurred by BSS that relates to personal injury or death or property or damage the Client (including the Client's personnel) causes or contributes to.
- 16.5 The liability of BSS to the Client shall expire twelve (12) months from the date of either completion or termination of the Services, unless in the meantime the Client has made a claim in writing to BSS, specifying a negligent act, omission or statement said to have caused alleged loss or damage sustained or sustainable.
- 16.6 Notwithstanding clauses 16.1 and 16.3, BSS shall not be liable for any loss or damage sustained or sustainable by a Client in relation to:
- (a) errors occurring in any Products, materials, documentation, information, etc. not created or prepared by BSS; or
 - (b) errors occurring during any services which are not provided by, nor the responsibility of, BSS; or
 - (c) the use of any information or advice without the approval of BSS.

17. Confidential Information

- 17.1 Each party agrees to treat all information and ideas communicated to it by the other confidentially and agree not to divulge it to any third party, without the other party's written consent. The parties will not copy any such information supplied and will either return it or destroy it (together with any copies thereof) on request of the other party.
- 17.2 The Client shall only use any such Confidential Information for the purpose of using the Services according to the Agreement and any associated Documentation, and BSS shall only use any Confidential Information of the Client to perform their obligations under this Agreement. Additionally, both parties are required to put together, and maintain, effective security measures to keep the other party's Confidential Information safe and secure and notify the other party as soon as practically possible in the event of any suspected or actual unauthorised use or disclosure of their Confidential Information.
- 17.3 Each party may disclose the other's Confidential Information to:
- (a) their officers, employees and contractors who need to be disclosed the information in relation to this Agreement. Those persons must first be bound by a confidentiality agreement no less stringent than this clause; and
 - (b) any person if required by law.

18. Intellectual Property

- 18.1 Despite any reference to 'purchase' or 'sale' in these Terms and Conditions or in any estimate, quotation or any other document relating to the supply of the Products or Services, the copyright in the Software and associated Documentation (including, but not limited to, designs or specifications) shall remain vested in BSS and shall only be used by the Client as per BSS' "Licence to Use".
- 18.2 Where BSS has designed, drawn or written Software for the Client, then the copyright in those designs and drawings and documents shall remain vested in BSS, and shall only be used by the Client at BSS' discretion.

19. Licence to Use

- 19.1 BSS gives the Client a non-exclusive licence to use the Software in New Zealand for business purposes and for up to the number of authorised users as specified by BSS.
- 19.2 The Client is entitled to use the Software as described on the invoices, quotation, work authorisation or any other forms as provided by BSS to the Client and the Software can be installed on additional terminals, however additional dongle/keys/licenses will need to be purchased from BSS to enable the activation and use of the Software.
- 19.3 The Client acknowledges that a code (for the USB/dongle/key/licenses use supplied with the Software) will be required to release the Software for use. BSS will release the Software for the Client's use provided the Client complies with the Terms and Conditions herein. The dongle/keys/licenses are timed and will expire every three (3) months. BSS will supply codes to extend the timed dongle/keys/licenses within a reasonable time before the expiration date. Codes will not be provided where the Client is in default of payment.
- 19.4 The Client must not:
- (a) use or rely on the Software for any purpose or in any manner for which the Software are not purported to be designed or suitable for;
 - (b) copy, decompile, reverse engineer, disassemble, translate, change or create derivative works of the Software or associated documentation;
 - (c) sell, sub-licence, rent, lease, distribute or lend the Software or associated documentation;
 - (d) sell, market, network, transfer, lease, licence, sub-licence, rent, lend or otherwise dispose of or distribute the Software in any way whatsoever.

20. Support and Training

- 20.1 BSS will offer the Client Software and add-on Software patches and updates as they are general made available by BSS during the term of any Software Service Agreement.
- 20.2 Training on the use of the Software is not included in the Subscription Charges but is available to the Client at a time as agreed by both parties and will be charged out at BSS' current hourly rate and shall be invoiced in accordance with clause 6.2. The Client must provide the venue and training facilities at their own cost and is responsible for ensuring that the relevant personnel (who use the Software) will be available to attend.
- 20.3 The Client shall be responsible for its call connection and email costs in contacting BSS' help desk.
- 20.4 OSS' do not include support for defects that relate to:
- (a) installation, implementation or removing BSS' Software or add-on Software;

- (b) end-user or technical training;
- (c) incorrect configuration of Software or add-on Software (unless configured by BSS);
- (d) migration of data;
- (e) customisations other than the supported customisations;
- (f) where the Client has given BSS misleading, deceptive, incomplete or incorrect information;
- (g) errors or problems with other Software, hardware, networks, internet connections and power failures;
- (h) combining BSS' Software, and add-on Software, with other Software or hardware not approved in the Documentation;
- (i) the Client's breach of this Agreement;
- (j) the Client not using a patch update;
- (k) modification of the Software, or add-on Software, without BSS' consent;
- (l) resulting from user error, or use of the Software (or add-on software) contrary to the Documentation;
- (m) resulting from the Client not following BSS' instructions correctly;
- (n) use of the Software, or add-on Software, to break the law.

21. Subscription Software Licence Agreement "SSLA"

- 21.1 The Client is required to pay a recurring fee for the on-going use of the Software. The monthly licence fee payable for the SSLA is stipulated and is due and payable as per the Client's quotation. BSS may adjust the Subscription Charges from time to time (as per clause 6.2 upon thirty (30) days written notice to the Client. The SSLA shall include the Client's OSS and includes access to the Software and updates as per the SSLA.
- 21.2 The SSLA shall continue for the term stipulated on the SSLA and, upon expiration of this term, will continue a month-by-month basis, unless the SSLA is terminated by way of the Client providing BSS with written notification. Following receipt of notice from the Client, the SSLA and the licence shall both terminate at the end of the then current monthly billing period.
- 21.3 If the Client wishes to terminate the SSLA during the term stipulated, the Client must pay to BSS the remaining SSLA Subscription Charges which would otherwise have been payable to BSS during the SSLA term.
- 21.4 Where the Client defaults in payment of the SSLA Subscription Charges (of any part thereof), BSS shall suspend the licence and deactivate the Software.
- 21.5 In order to, inter alia, protect the integrity of the Software, it is a condition of the licence that all Client's maintain a OSS in accordance with the terms of the Licence to Use.
- 21.6 BSS may adjust the Subscription Charges from time to time (as per clause 6.2) upon thirty (30) days written notice to the Client.
- 21.7 In the event the Client's OSS has lapsed (due to non-payment) and support is required (either on-site or via telephone/internet), the Client shall be charged, and agrees to pay, BSS' current hourly rate for such support.
- 21.8 It is the responsibility of the Client to ensure an appropriate internet connection is available for updates to the Software and to provide OSS. BSS will be under no obligation to provide technical support for problems which relate to the Client's internet connection, or any failure thereof.
- 21.9 If on-site Services are required, BSS' current hourly rate will be charged plus travel time.
- 21.10 Technical support is included for those that have received Software training from BSS. Under no circumstance is technical support to be used for the purposes of re-training of new management or new staff. Such training will be provided at BSS' current hourly rate including any call-out fees or travel costs.

22. Activation and Verification

- 22.1 The Software contains technology to protect it from illegal copying, and as a result the Client may be required to:
 - (a) have the Software reactivated periodically during the term of the licence by verifying (either via phone or internet connection) the Client's licence details or any other details relating to the Software as may be required by BSS in order to confirm the Client is using the Software in accordance with the licence terms;
 - (b) have the Software reactivated by BSS if the Client wishes to re-install the Software (for example, if the Client would like to install the Software on a new computer).
- 22.2 At BSS' sole discretion, a reactivation charge shall apply for each licence in respect of BSS' Software per computer if:
 - (a) BSS' Software is being re-installed on a computer other than the computer on which it was previously installed;
 - (b) Software has been deleted accidentally by the Client, either in part or in full;
 - (c) the licence has been suspended due to outstanding monies owed to BSS, exceeding fourteen (14) days.
- 22.3 Notwithstanding the above, no reactivation charges will apply if:
 - (a) re-activation is required by BSS to verify proper use of the Software under the Licence to Use; or
 - (b) the Client has no overdue monies owing to BSS.

23. Cancellation

- 23.1 BSS may cancel any contract to which these Terms and Conditions apply or cancel delivery of Services at any time before the Services are delivered by giving written notice to the Client. On giving such notice BSS shall repay to the Client any money paid by the Client for the Services. BSS shall not be liable for any loss or damage whatsoever arising from such cancellation.
- 23.2 If the Client cancels delivery of Services, the Client shall be liable for all losses incurred (whether direct or indirect) by BSS as a direct result of the cancellation (including, but not limited to, any loss of profits).
- 23.3 Notwithstanding clause 23.1, BSS may provide the Client with one months (1) written notice if there are substantial changes which makes it impracticable for BSS to continue to provide the Services in accordance to the Contract (including but not limited to, changes to the Client's business location and/or to the site where the Services are to be conducted etc). BSS shall not be liable for any loss or damage whatsoever arising from such cancellation.

24. Expiry/Termination

- 24.1 The Client may terminate this Agreement by giving BSS at least thirty (30) days' written notice . Where the Client provides such notice before the end of the initial term, BSS shall be entitled to charge the Client a "break fee" (calculated by: remaining term x annual fees / 365). It is agreed by both parties that this calculation represents a realistic pre-estimate of the loss and damage BSS is likely to suffer because of the Agreement ending before the end of the initial term.

- 24.2 Subject to clause 24.1, the initial term (being either twelve (12), twenty-four (24) or thirty-six (36) months) as agreed between both parties shall revert to a monthly roll over basis automatically, thereafter, unless agreed otherwise until terminated by either party by giving at least thirty (30) days required notice as defined in the Agreement prior to the expiration date of the initial term or any “additional” term, except:
- (a) termination by the Client of the “additional term” shall not incur a “break fee”;
 - (b) if BSS notifies the Client of a change to the Subscription Charges at thirty (30) days prior to the end of the “initial term”, those new Charges will take effect from the start of the “additional term”.
- 24.3 On the expiry/termination of this Agreement, the Client must delete all copies of BSS’ supplied Software and add-on software, destroy documentation and any Confidential Information. If BSS requests it, the Client must, within five (5) business days, confirm in writing that they have complied with this clause and not breached confidentiality obligations.
- 25. Consumer Guarantees Act 1993**
- 25.1 If the Client is acquiring Services for the purposes of a trade or business, the Client acknowledges that the provisions of the Consumer Guarantees Act 1993 do not apply to the supply of Services by BSS to the Client.
- 26. Default and Consequences of Default**
- 26.1 Interest on overdue invoices shall accrue daily from the date when payment becomes due, until the date of payment, at a rate of two and a half percent (2.5%) per calendar month (and at BSS’ sole discretion such interest shall compound monthly at such a rate) prior to any judgment.
- 26.2 If the Client owes BSS any money the Client shall indemnify BSS from and against all costs and disbursements incurred by BSS in recovering the debt (including but not limited to internal administration fees, legal costs on a solicitor and own client basis, BSS’ collection agency fees).
- 26.3 Further to any other rights or remedies BSS may have under this contract, if a Client has made payment to BSS, and the transaction is subsequently reversed, the Client shall be liable for the amount of the reversed transaction, in addition to any further costs incurred by BSS under this clause 26 where it can be proven that such reversal is found to be illegal, fraudulent or in contravention to the Client’s obligations under this Agreement.
- 26.4 Without prejudice to any other remedies BSS may have, if at any time the Client is in breach of any obligation (including those relating to payment, whether the payment is due or not to BSS) BSS may suspend or terminate the provision of Products and/or Services to the Client and any of its other obligations under the Terms and Conditions. BSS will not be liable to the Client for any loss or damage the Client suffers because BSS has exercised its rights under this clause.
- 26.5 Without prejudice to BSS’ other remedies at law BSS shall be entitled to cancel all or any part of any order of the Client which remains unfulfilled and all amounts owing to BSS shall, whether due for payment or not, become immediately payable if:
- (a) any money payable to BSS becomes overdue, or in BSS’ opinion the Client will be unable to make a payment when it falls due;
 - (b) the Client has exceeded any applicable credit limit provided by BSS;
 - (c) the Client becomes insolvent, convenes a meeting with its creditors or proposes or enters an arrangement with creditors, or makes an assignment for the benefit of its creditors; or
 - (d) a receiver, manager, liquidator (provisional or otherwise) or similar person is appointed in respect of the Client or any asset of the Client.
- 27. Privacy Policy**
- 27.1 All emails, documents, images, or other recorded information held or used by BSS is Personal Information as defined and referred to in clause 27.3 and therefore considered confidential. BSS acknowledges its obligation in relation to the handling, use, disclosure, and processing of Personal Information pursuant to the Privacy Act 2020 (“the Act”) including Part II of the OECD Guidelines and as set out in the Act and any statutory requirements where relevant in a European Economic Area “EEA” then the EU Data Privacy Laws (including the General Data Protection Regulation “GDPR”) (collectively, “EU Data Privacy Laws”). BSS acknowledges that in the event it becomes aware of any data breaches and/or disclosure of the Clients Personal Information, held by BSS that may result in serious harm to the Client, BSS will notify the Client in accordance with the Act and/or the GDPR. Any release of such Personal Information must be in accordance with the Act and the GDPR (where relevant) and must be approved by the Client by written consent, unless subject to an operation of law.
- 27.2 To enable / disable the collection of Personal Information by way of cookies, the Client shall have the right to enable / disable the cookies first by selecting the option to enable / disable, provided on the website prior to utilising BSS’ website.
- 27.3 The Client authorises BSS or BSS’ agent to:
- (a) access, collect, retain and use any Personal Information about the Client;
 - (i) (including, name, address, D.O.B, occupation, driver’s license details, electronic contact (email, Facebook, or Twitter details), and other contact information (where applicable), previous credit applications, credit history or any overdue fines balance information held by the Ministry of Justice) for the purpose of assessing the Client’s creditworthiness; or
 - (ii) for the purpose of marketing Products or Services to the Client.
 - (b) disclose Personal Information about the Client, whether collected by BSS from the Client directly or obtained by BSS from any other source to any other credit provider or any credit reporting agency for the purposes of providing or obtaining a credit reference, debt collection or notifying a default by the Client.
- 27.4 Where the Client is an individual the authorities under clause 27.3 are authorities or consents for the purposes of the Privacy Act 2020.
- 27.5 The Client shall have the right to request (by e-mail) from BSS:
- (a) a copy of the Personal Information about the Client retained by BSS and the right to request that BSS correct any incorrect Personal Information; and
 - (b) that BSS does not disclose any Personal Information about the Client for the purpose of direct marketing.
- 27.6 BSS will destroy Personal Information upon the Client’s request (by e-mail) or if it is no longer required unless it is required to fulfil the obligations of this BSS or is required to be maintained and/or stored in accordance with the law.
- 27.7 The Client can make a privacy complaint by contacting BSS via e-mail. BSS will respond to that complaint within seven (7) days of receipt and will take all reasonable steps to reach a decision, as to the complaint within twenty (20) days of receipt of the complaint. If the Client is not satisfied with the resolution provided, the Client can make a complaint to the Privacy Commissioner at <http://www.privacy.org.nz>.

28. Dispute Resolution

28.1 BSS and the Client will negotiate in good faith and use their reasonable efforts to settle any dispute that may arise out of, or relate to, this Agreement, or any breach thereof. If any such dispute cannot be settled amicably through ordinary negotiations, the dispute shall be referred to the representatives nominated by each party who will meet in good faith to attempt to resolve the dispute. Nothing shall restrict either party's freedom to commence legal proceedings to preserve any legal right or remedy or protect and proprietary or trade secret right.

29. Employees of Bay Software Solutions/Non-Solicitation

29.1 The Client agrees that during the term of the Agreement and for a period of two (2) years following the termination of the Agreement for any reason, the Client will not:

- (a) attempt to solicit, canvass, approach, encourage or persuade any contractor/s, employee, or consultant of BSS to terminate their Agreement or employment with BSS or utilise in any way an employee or past employee of BSS (other than through BSS); and
- (b) the Client acknowledges that the restraints are fair and reasonable for the proper preservation of the goodwill of the business of BSS.

30. General

30.1 The failure by either party to enforce any provision of these Terms and Conditions shall not be treated as a waiver of that provision, nor shall it affect that party's right to subsequently enforce that provision. If any provision of these Terms and Conditions shall be invalid, void, illegal or unenforceable the validity, existence, legality, and enforceability of the remaining provisions shall not be affected, prejudiced, or impaired.

30.2 These Terms and Conditions and any contract to which they apply shall be governed by the laws of New Zealand and are subject to the jurisdiction of the Napier Courts in New Zealand.

30.3 BSS shall be under no liability whatsoever to the Client for any expenses, claims, costs (including but not limited to legal fees and commissions), damages suffered or incurred by BSS, or indirect and/or consequential loss and/or expense (including loss of profit) suffered by the Client arising out of a breach by BSS of these Terms and Conditions, caused by any failure by the Client to comply with their obligations under this Agreement, or that arise from any claim relating to the Services by any person that the Client authorises to use the Services, or where due to server downtime or programming errors (alternatively BSS' liability shall be limited to damages which under no circumstances shall exceed the Charges).

30.4 BSS may licence and/or assign all or any part of its rights and/or obligations under this Agreement without the Client's consent.

30.5 The Client cannot licence or assign without the written approval of BSS.

30.6 BSS may elect to subcontract out any part of the Services but shall not be relieved from any liability or obligation under this Agreement by so doing. Furthermore, the Client agrees and understands that they have no authority to give any instruction to any of BSS' sub-contractors without the authority of BSS.

30.7 The Client agrees that BSS may amend their general Terms and Conditions for subsequent future Agreements with the Client by disclosing such changes via BSS' Web Site: <http://www.baysoft.co.nz/terms>. These changes shall be deemed to take effect from the date on which the Client accepts such changes, or otherwise at such time as the Client makes a further request for BSS to provide Services to the Client.

30.8 Neither party shall be liable for any default due to, acts of God, earthquake, fires, flood, storm, government act, strike, lock-out, terrorism, explosions, industrial disputes, insurrection, requirements or regulations, national or global pandemics and/or the implementation of regulation, directions, rules or measures being enforced by Governments or embargo, including but not limited to, any Government imposed border lockdowns (including, worldwide destination ports), etc, ("Force Majeure") or failure or outage of any telecommunications links or other connections forming part of the Internet which are beyond the reasonable control of either party. This clause does not apply to a failure by the Client to make a payment to BSS.

30.9 Both parties warrant that they have the power to enter this Agreement and have obtained all necessary authorisations to allow them to do so, they are not insolvent, and that this Agreement creates binding and valid legal obligations on them.