

Owner: BA Corporate Governance

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Author: BA Legal Team

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## Software License Agreement, Terms and Conditions

### SCHEDULE 1

BETWEEN: BURG STEIN GROUP PTY LTD (ACN 148 064 813) of Level 23, 127 Creek Street, Brisbane, in the State of Queensland 4000 (Licensor)

AND: THE LICENSEE: **The entity agreeing to these terms.**

#### IT IS AGREED THAT:

The Licensor has agreed to license the Software to the Licensee, to perform the Maintenance Services (if any) and to deliver the Equipment (if any) and the Licensee has agreed to accept a licence of the Software, accept the provision of the Maintenance Services (if any) and accept delivery of the Equipment in accordance with the terms and conditions contained in Annexure A.

#### REFERENCE DETAILS

ITEM 1	Date of Agreement:	The date you click the "Accept Terms and conditions" checkbox on the Licensor's Checkout Web page and Click on the Process Payment button.
ITEM 2:	Commencement Date:	Date of Agreement
ITEM 3:	Term:	The period of 1 year from the Commencement Date or until terminated in accordance with clause 22, whichever is the earlier.
ITEM 4:	Software: Products:	As described under the Proposed Solution section of this document Licensor's services the Licensee is purchasing as defined in this Licensor's Web Site.
ITEM 5:	Licence Fee:	The respective fees for the Products and Service as specified in the Shopping Cart
	Maintenance Fee:	The respective fees for the Products and Services as specified in the Shopping Cart
	Customisation Fee:	The respective fees for the Products and Services as specified in the Shopping Cart
ITEM 6:	Payment Terms:	Via Credit Card and in advance. Licence Fees will be payable annually in advance Customisation Fees will be payable fortnightly in advance
ITEM 7:	Purpose:	The provision of the Licensor's Product and Services
ITEM 8:	Implementation Date	2 weeks from the Commencement Date

#### ANNEXURE A

##### GENERAL TERMS AND CONDITIONS

### 1

#### TERM

This Agreement commences on the Commencement Date and will continue for the Term.

### 2

#### LICENCE

In consideration of and subject to the Licensee paying the Licence Fee to the Licensor in accordance with the Payment Terms, the Licensor grants to the Licensee a non-exclusive, non-transferable licence, to access the Software in accordance with the terms and conditions of this Agreement during the Term

### 3

#### WHAT THE LICENSEE MAY DO

This license entitles the Licensee to use the Software and any Appliances for the purposes set out in Item 7 of Schedule 1.

### 4

#### WHAT THE LICENSEE MUST NOT DO

Otherwise than as expressly provided in this Agreement the Licensee must not:

- use the Software or any Appliances for any purpose other than for the purpose set out in Item 7 of Schedule 1;
- reverse assemble or reverse compile or directly or indirectly allow or cause a third party to reverse assemble or reverse compile in whole or any part the Software; or
- modify or develop the Software including any versions of the source code for the Software; or

- (d) repackage, distribute, rent, lease, sell, charge, sub-licence, assign, transfer or otherwise deal with the Software.

## 5 WHAT THE LICENSEE MUST PROVIDE

- (a) Except to the extent specified to the contrary in this Agreement, the Licensor will not be obliged, to:
- (i) provide any computer hardware and software (other than the Software) necessary to use the Software;
- (b) The Licensee must ensure that only its employees, sub-contractors and agents use the Software and are aware of the terms of this Agreement.

## 6 SOFTWARE MAINTENANCE SERVICES

The Licensor agrees to provide the Maintenance Services to the Licensee at the location on the terms and conditions contained in this agreement.

## 7 MAINTENANCE SERVICES

- (a) The Licensor shall use all reasonable endeavours to maintain the Software in substantial conformity with the descriptions and specifications contained in the Specifications.
- (b) If the Licensee discovers that the Software fails to substantially conform with the descriptions and specifications, it shall notify the Licensor as soon as reasonably practicable. The Licensee must, to the extent it is able to do so, provide the Licensor with a documented example of the defect or error which constitutes the non-conformity and submit to the Licensor, if requested, a listing of output and any other data which the Licensor reasonably requires in order to reproduce operating conditions similar to those present when the non-conformity was discovered.
- (c) In the event that the Licensee notifies the Licensor in accordance with sub clauses 7(b), the Licensor shall furnish off-site telephone support, in the form of consultations, assistance and advice on the use and maintenance of the Software.

## 8 EXCLUSIONS

Maintenance Services required of the Licensor under sub clause 7(a) do not include the following:

- (a) rectification of defects or errors resulting from any modification of the Software made by any person other than the Licensor or any breach of the terms of this agreement by the Licensee;
- (b) rectification of defects or errors resulting from use of the Software in combination with equipment other than the Designated Computer Equipment;
- (c) rectification of operating errors by the LICENSEE;
- (d) rectification of a fault in the Designated Computer Equipment;
- (e) any modification of the Software which represents a departure from the descriptions and specifications contained in the Specifications; and
- (f) rectification of errors or defects which are the subject of a warranty under another agreement.

## 9 WHAT THE LICENSEE MUST DO IN CONNECTION WITH MAINTENANCE

- (a) The Licensee shall ensure that the Software and the Designated Computer Equipment are used in a proper manner by competent and trained employees only or by persons under their supervision.
- (b) The Licensee shall co-operate fully with the Licensor's personnel in the diagnosis of any alleged non-conformity of the Software.
- (c) The Licensee shall make available to the Licensor free of charge all information, facilities and services reasonably required to enable the Licensor to perform the Maintenance Services effectively.
- (d) The Licensee shall provide such telecommunication facilities, such as an active telephone line and operational telephone equipment as are reasonably required by the Licensor for testing and diagnostic purposes at the Licensee's sole expense.

## 10 UPDATES AND NEW RELEASES

- (a) The Licensor's obligation under this Agreement to provide updates or new releases is as set out in this clause 10.
- (b) During the Term, the Licensor may make available updates (which may include bug fixes and patches) or new release for the Software, which updates and/or new releases may be provided to the Licensee.
- (c) Where an update or new release is provided pursuant to clause 10(b):
- (i) the Licensor will deliver the update or new release to the Licensee, if requested by the Licensee, deploy the update or new release;
  - (ii) the Licensee will give the Licensor such reasonable assistance to ensure satisfactory deployment of the update or new release;
  - (iii) this Agreement will continue to apply to the update or new release which will be deemed to be the Software for the purpose of this Agreement; and

## 11 TRAINING

The Licensor shall provide the Licensee with training in the use of the Software as outlined in Schedule 3 User Training.

## 12 LICENCE FEE

- (a) In consideration of the Licence, the Licensee will pay the Licence Fee on the Payment Terms during the Term.
- (b) The Licence Fee is exclusive of all taxes, duties and surcharges payable in respect of the Software and in respect of this agreement.
- (c) If payment is not made within the Payment Terms, interest will be payable by the Licensee at the rate of 12 per cent per annum on the overdue amount.

## 13 MAINTENANCE FEES

- (a) In consideration of the Licensor's agreement to provide the Maintenance Services, the Licensee shall pay the Licensor the Maintenance Fee on the basis provided by this agreement.
- (b) The Maintenance Fee shall be the amount stipulated in the Schedule 3.
- (c) The Maintenance Fee shall be paid in accordance with the Payment Terms.
- (d) Any Additional Charge payable pursuant to this agreement is in addition to the Maintenance Fee.
- (e) An Additional Charge will be payable if the Licensee requests the Licensor to provide services which are not specified or which are found to be unnecessary, or if the Licensor is requested to provide information or documentation other than the contents of the Specifications.
- (f) The Maintenance Fee is exclusive of all taxes, duties and surcharges payable in respect of the Maintenance Services and in respect of this agreement.

## 14 WARRANTIES

### 14.1 Licensor

- (a) Subject to clause 14.1(b), the Licensor does not warrant that:
  - (i) the Software is or will be complete or free from all errors and the Licensee acknowledges that the existence of any such error does not constitute a breach of this Agreement;
  - (ii) the Software is fit for any purpose, whether or not that purpose has been advised to the Licensor.
- (b) The Licensor warrants that the Software will perform in accordance with and have the functionality specified in any documentation made available by the Licensor to the Licensee in respect of the Software as at the date of this Agreement.
- (c) The Licensor warrants, and indemnifies the Licensee, its officers, employees, agents and contractors, in respect of any breach of this warranty, that the Licensor's granting of the rights granted to the Licensee under this Agreement, and the Licensee's use of the Software, will not infringe the Intellectual Property Rights or other rights of any person, except to the extent that any such infringement is caused or contributed to by the Licensee using the Software other than in accordance with this Agreement.

### 14.2 Express or implied warranties

Other than as contained in this agreement, and to the extent permitted by law, all express or implied warranties in respect of the Software are excluded. In the event that any statute implies terms into this Agreement which cannot be excluded, such terms will apply to this Agreement. However, the liability of the Licensor for breach of any such implied term will be limited, at the option of the Licensor, to any one or more of the following:

- (a) if the breach relates to goods:
  - (i) the replacement of those goods or the supply of equivalent goods;
  - (ii) the repair of such goods;
  - (iii) the payment of the cost of replacing the goods or acquiring equivalent goods; or
  - (iv) the payment of the cost of having the goods repaired; and
- (b) if the breach relates to services:
  - (i) supplying those services again; or
  - (ii) the payment of the cost of having the services supplied again.

## 15 LIMITATION OF LIABILITY

### 15.1 Licensor's liability

- (a) Except for liability under clause 14.1(b) and subject to clauses 14.2 and 15.1(b), Licensor's liability to the Licensee in contract, tort, statute or in any other way (whether arising from negligence or otherwise) for any damage or loss of any kind whatsoever (including, without limitation, any liability for direct, indirect, special or consequential loss or damage):
- (i) sustained by the Licensee, its officers, employees, agents, contractors and/or any other person; or
  - (ii) for any costs, charges or expenses incurred by the Licensee, its officers, employees, agents and/or contractors;
- arising from or in connection with:
- (iii) the Licensee's use (or any third party's use) or attempted use of the Software;
  - (iv) any failure by the Licensor to perform any obligation under this Agreement; or
  - (v) any act or omission or failure, (and whether negligent or not) of the Licensor, its officers, employees, agents and/or independent contractors;
- is excluded.
- (b) The exclusion of liability in clause 15.1(a) does not apply in respect of any liability the Licensor may have under the indemnity given in clause 14.1(c).

### 15.2 Survival

This clause 15 will survive the termination or expiration of this Agreement.

## 16 INTELLECTUAL PROPERTY RIGHTS

- (a) The Licensee acknowledges and agrees that:
- (i) the Intellectual Property Rights and other proprietary rights in the Software, and any modifications, updates or new releases of the Software, and the source code of the Software are owned exclusively by the Licensor;
  - (ii) the Licensee has no right, title or interest in the Software other than the rights as licensee under this Agreement;
  - (iii) the Licensor may in its absolute discretion deal with the Software (including all Intellectual Property Rights in the Software) as the exclusive owner of the Software; and
  - (iv) there is no transfer of title or ownership to the Licensee of the Software or any modifications, updates or new releases of the Software or the source code of the Software.
- (b) If the Licensee learns that a third party is infringing the Intellectual Property Rights in the Software, it will promptly notify the Licensor in writing.
- (c) The Licensee warrants that, in using the Software, the Licensee will:
- (i) act at all times to protect the value in the Software and use its best endeavours to ensure that the Intellectual Property Rights and other proprietary rights in the Software are not infringed by its use of the Software in accordance with the terms of this Agreement;
  - (ii) comply with the reasonable directions of the Licensor in relation to the use of the Software; and
  - (iii) immediately cease to use the Software in every manner whatsoever upon expiration or termination of this Agreement.

This clause 16 will survive the termination or expiration of this Agreement.

## 17 INDEMNITY

The Licensee agrees to indemnify the Licensor and keep the Licensor indemnified against any loss, damage (including special or consequential loss or damage), costs (including legal fees), expenses, demands or liability for any claim or claims by a third party or parties as a result of or arising from the Licensee's use of the Software other than in accordance with the terms of this Agreement. This clause 17 will survive the termination or expiration of this Agreement.

## 18 GST

### 18.1 Definitions

Words used in this clause that are defined in the GST Law have the meaning given in that legislation.

### 18.2 Consideration is GST-exclusive

Unless otherwise specified, all amounts payable under this agreement are exclusive of GST and must be calculated without regard to GST.

## 18.3 GST payable on taxable supply

- (a) If a supply made under this agreement is a taxable supply, the recipient of that taxable supply (Recipient) must, in addition to any other consideration, pay to the party making the taxable supply (Licensor) the amount of GST in respect of the supply.
- (b) The Recipient will only be required to pay an amount of GST to the Licensor if and when the Licensor provides a valid tax invoice to the Recipient in respect of the taxable supply.
- (c) If there is an adjustment to a taxable supply made under this agreement then the Licensor must provide an adjustment note to the Recipient.
- (d) The amount of a party's entitlement under this agreement to recovery or compensation for any of its costs, expenses or liabilities is reduced by the input tax credits to which that party is entitled in respect of those costs, expenses or liabilities.

## 19 CONFIDENTIALITY

- (a) The Parties agree not to disclose or cause or permit to be disclosed the Confidential Information of the other party during the term of this Agreement or thereafter, except as specified in this Agreement.
- (b) Notwithstanding clause 19(a), each Party is entitled to disclose the other Party's Confidential Information as follows:
  - (i) to its professional advisers, but only to the extent required for the purposes of obtaining necessary professional advice from such advisers in relation to this Agreement and provided that such Confidential Information is disclosed subject to confidentiality;
  - (ii) as required by law;
  - (iii) to any other person with the prior written consent of the other Party, which consent may be withheld at the absolute discretion of the other Party and if granted will be subject to such conditions as required by the other Party.
- (c) Either Party may upon termination of this Agreement by notice in writing to the other Party demand the return of all tangible property comprising the Confidential Information of that Party including all copies and records thereof in the possession of the other Party or any other person authorised to possess the Confidential Information of that Party pursuant to clause 19(b). The other Party must comply with the demand within 14 days of service of the demand.
- (d) Nothing contained in this Agreement excludes the right of either Party at common law or in equity to protect its Confidential Information by application to any court for injunction or otherwise.
- (e) This clause **Error! Reference source not found.** will survive the termination or expiration of this Agreement.

## 20 RELATIONSHIP

- (a) Nothing in this Agreement constitutes either Party a partner agent, employee or representative of the other Party or creates any trust, association or partnership at law or for any purpose whatsoever nor do the Parties intend that their activities under this Agreement constitute a business, financial operation or venture.
- (b) Neither Party has power or authority (expressed or implied) to bind the other Party or to act as agent, employee or servant of any other party or to incur any obligation or otherwise pledge the credit of another party except as expressly provided in this Agreement.

## 21 ASSIGNMENT AND NOVATION

- (a) This licence is personal to the Licensee who does not have the right to assign in whole or in part its rights or obligations under this Agreement without the prior written consent of the Licensor.
- (b) The Licensor may assign or novate its rights, interests or obligations in or under this Agreement by notice in writing to the Licensee.

## 22 TERMINATION

- (a) The Licensor is entitled by notice in writing to the Licensee to terminate this Agreement upon the happening of any of the following events:
  - (i) any material breach or non-observance of any of the terms and conditions contained in this Agreement and on the part of the Licensee to be performed or observed not being rectified within 14 days after the giving of notice by the Licensor to the Licensee specifying such breach or non-observance and requiring rectification thereof;
  - (ii) the Licensee for any reason destroys or disposes of or loses custody of the Software;
  - (iii) a petition or other application being presented or resolution being passed for the winding up, liquidation or dissolution of the Licensee or notice of intention to propose such a resolution being given, or the entry of the Licensee into a scheme of arrangement or compromise with any of its creditors;
  - (iv) the appointment of a receiver or receiver and manager, administrator or official manager or agent of a secured creditor to any of the Licensee's property; and



- (v) the Licensee ceasing to carry on business or stopping or wrongfully suspending payment to any of its creditors or stating its intention so to do.
- (b) The Licensee is entitled to terminate this Agreement by 30 days notice in writing
- (c) Upon termination or expiration of this Agreement:
  - (i) the licence granted under this Agreement immediately ceases and the Licensee must immediately cease using the Software in any manner whatsoever;
  - (ii) the Licensee must account to the Licensor and transfer to it any and all rights which the Licensee may have to the Software;
  - (iii) the Licensee must deliver to the Licensor all copies (including the original) of the Software in the possession, custody or control of the Licensee; and
  - (iv) the Licensor may remove the Licensee's rights of access to the Software via on-line means.
- (d) Termination of this Agreement does not release either Party from any liability or obligation which has accrued prior to such termination which remains to be performed under the terms of this Agreement or release either Party from any obligation which is intended to survive termination of this Agreement.

## 23 MISCELLANEOUS

### 23.1 Notices

Any notice, demand or other communication to be given or required to be made pursuant to this Agreement is to be in writing and is to be given by post, facsimile or hand to a Party at the Party's address or facsimile number as set out in Schedule 1 or at such other address or facsimile number as is notified in writing by one Party to the other Party.

### 23.2 Governing Law

This Agreement is governed by and construed in accordance with the laws in the State of Queensland and the parties submit to the non-exclusive jurisdiction of the courts in that State.

### 23.3 Licensor's Rights

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

### 23.4 Waiver

- (a) No right under this Agreement will be deemed to be waived except by notice in writing signed by each Party.
- (b) A waiver made by the Licensor pursuant to sub-clause 23.4(a) will not prejudice its rights in respect of any subsequent breach of the Agreement by the Licensee.
- (c) Subject to sub-clause 23.4(a), any failure by the Licensor to enforce any clause of this Agreement, or any forbearance, delay or indulgence granted by the Licensor to the licensee, will not be construed as a waiver of the Licensor's rights under this Agreement.

### 23.5 Provisions severable

If any provision of this Agreement is invalid, illegal or unenforceable in any respect the validity, legality and enforceability of the remaining provision will not be affected and such invalid, illegal or unenforceable provision is to be severed from this Agreement.

### 23.6 Variation

No part of this Agreement may be amended or modified unless reduced to writing making specific reference to this Agreement and signed by the Parties or their authorised representatives.

### 23.7 Severability

If any provision in this Agreement is held invalid, unenforceable or illegal for any reason, the Agreement will remain otherwise in full force apart from such provisions which will be deemed deleted.

### 23.8 Entire agreement

This Agreement sets out the entire agreement and understanding between the Parties with respect to the subject matter of this Agreement and supersedes all prior agreements, understandings and representations.

## 24 INTERPRETATION

### 24.1 Definitions

In this Agreement unless the subject or context otherwise requires:

Additional Charge means a charge in accordance with the Licensor's published rate in effect from time to time;

Commencement Date means the date specified in Item 2 of Schedule 1;

Confidential Information means the terms and conditions of this Agreement and, in relation to a Party, all trade secrets, ideas, concepts, know how, knowledge and any other information whether in writing or otherwise, relating to any of that Party's products, services, systems, affairs, businesses, strategies, or employees whether owned by, licensed to, or otherwise in possession or control

of that Party, which are disclosed to the other Party by that Party or otherwise obtained by the other Party, its employees, agents, or contractors under, in contemplation of, or in connection with this Agreement but excluding any information which is generally and readily available in the public domain other than as a result of a breach of this Agreement;

Designated Computer Equipment means the equipment on which the software is to be installed as specified in the Specifications;

Intellectual Property Rights means all rights whatsoever in present and future copyright (including moral rights), registered and unregistered trademarks, designs and patents, semi-conductor or circuit layout rights, rights in Confidential Information and all other rights resulting from intellectual activity in the electronic, industrial, scientific, literary or artistic fields, including all rights conferred under statute, common law or equity in relation to the foregoing;

Licence means the licence of software granted pursuant to this agreement;

Licence Fee means the licence fee specified in Item 5 of Schedule 1, payable by the Licensee to the Licensor for the use of the Software;

Maintenance Fee means the maintenance fee specified in Item 5 of Schedule 1, payable by the Licensee to the Licensor for the provision of the Maintenance Services;

Maintenance Services has the meaning given by clause 7 but excludes those services excluded by clause 8;

Media means the media on which the software is recorded or printed;

New release means software which has been provided primarily to implement an extension, alteration, improvement or additional functionality to the software;

Party means the Licensor and/or the Licensee as the context dictates;

Payment Terms means the payment terms specified in Item 6 of Schedule 1;

Specifications means the written specifications for the Software supplied by the Licensor to the Licensee including those published on any websites maintained by the Licensor in connection with the Software including sites utilising "wikis". Standard operating requirement for the Software are:

- a) a Broadband or higher grade Internet Service;
- b) Web Browser - Internet Explorer 7+, Mozilla Firefox 3+, Safari 4+ and Google Chrome 2+; and
- c) Web Browser must have Cookies and JavaScript enabled

Software means the Software specified in Item 4 of Schedule 1;

Term means the period specified in Item 3 of Schedule 1 or such shorter period where this Agreement is terminated earlier in accordance with clause 22 of this Agreement; and

Update means software which has been produced primarily to overcome defects in the software.

## 24.2 Construction

In this Agreement, unless the subject or context otherwise requires:

- (a) words importing the singular include the plural and vice versa;
- (b) words importing one gender include the other genders and references to persons include corporations and vice versa;
- (c) a reference to any party or other person includes that person's successors and permitted assigns;
- (d) a reference to a recital, clause or schedule is a reference to a recital, clause or schedule of this Agreement;
- (e) a reference to writing includes all means of reproducing words in a tangible and permanently visible form;
- (f) a reference to a person includes a natural person, company, corporation, partnership, trust, estate, joint venture, sole proprietorship, government (including branches or subdivisions thereof), governmental or municipal agency, association, co-operative and any other entity or person whatsoever;
- (g) where a party comprises two or more persons any Agreement or obligation to be performed or observed by that party binds those persons jointly and each of them severally, and a reference to that party is deemed to include a reference to any one or more of those persons;
- (h) the headings in this Agreement are not to affect its interpretation;
- (i) the recitals and Schedule 1 form part of this Agreement.