



CONSULTING, MANAGED SERVICE AND SUPPORT TERMS AND CONDITIONS

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Date: 21 August 2014

Terms and Conditions

Effective, 1 April 2014

By entering into a Statement of Work with Omnivide entity (see Section 14 to see which entity you are contracting with), specifically

A. OMNIVIDE PTY LTD, a company organized under the laws of New South Wales, Australia, with a place of business at 71 Brighton St, Curl Curl, New South Wales, 2096 Australia;
Referred to herein as “**Omnivide**”.

You (“**Client**”) agree to the following Omnivide Consulting, Managed Service and Support Services Terms and Conditions:

1. Definitions and Interpretation

1.1. Defined terms in this Agreement:

Agreement means these Consulting, Managed Service and Support Services Terms and Conditions and any Statement of Works executed as a part of and in connection with the Services specified herein.

Business Day means a day on which banks are open for business in Sydney, other than a Saturday, Sunday or public holiday.

Confidential Information means any information relating to the business or financial affairs of a party or any trade secret, technical knowledge, concepts, ideas, designs, programs, processes, procedures, innovations, databases, customer lists or information, sales plans or marketing plans, research, software, records, intellectual property or other information concerning a party.

Deliverable means any software, equipment, material, solution, report or document agreed to be delivered by Omnivide to the Client in the performance of a Statement of Work, and specifically referred to as a Deliverable in the applicable Statement of Work.

Managed Service and Support Packages means any of the support services packages as more specifically outlined in Section 5 offered by Omnivide that Client may elect to purchase pursuant to a Statement of Work, that provide Client certain incident management and problem management support services.

Fees means the fees payable by the Client for the Services, as specified in the applicable Statement of Work.

Incident Tracking System incorporates the Information Technology Infrastructure Library (ITIL) terminology for incident and problem management. These are defined as follows:

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Incident means any event which is not part of the standard operation of a service and which causes, or may cause, an interruption to, or a reduction in, the quality of that service.

Known Error is a condition identified by successful diagnosis of the root cause of a problem, and the subsequent development of a work-around.

Problem means a condition often identified as a result of multiple Incidents that exhibit common symptoms. Problems can also be from a single significant Incident, indicative of a single error, for which the cause is unknown, but for which the impact is significant.

Insolvent means (a) having generally ceased to pay debts in the ordinary course of business other than as a result of bona fide dispute; (b) being unable to pay debts as they become due; or (c) being insolvent within the meaning of United States federal bankruptcy law.

Intellectual Property means all patents, drawings, discoveries, inventions, improvements, trade secrets, technical data, formulae, computer programs, know-how, logos, designs, circuit layouts, trademarks, domain names, business names, copyright and similar industrial or intellectual property, whether or not now existing, and whether or not registered or unregistered.

Intellectual Property Rights means all intellectual property rights including all rights in the Intellectual Property, moral rights (as recognized under any applicable law), any right to have Confidential Information kept confidential, and any application or right to apply for registration of any of these rights.

Services means the services set forth in a Statement of Work.

Service Levels means the service levels for the Support Services as outlined in the Statement of Work and as part of the Managed Service and Support Package that is purchased by Client.

Specifications means the Client's specifications and requirements for the Services, as set forth in a Statement of Work.

Statement of Work or ***SOW*** means a document agreed by the parties in accordance with Section 2.1.

Support means activities that are provided by Omnivide relating to the Services or Products being provided pursuant to a Statement of Work. Typical examples of support include calls logged directly to the Omnivide Support Centre, incident diagnosis, server restarts, (scheduled or unscheduled) and escalation of support requests. This explanation cannot be interpreted as definitive and Omnivide reserves the right to determine the category of any work carried out under this Agreement. Activities of a consulting nature such as new feature development, design etc. are excluded from the definition of support.

Managed Services means the Incident management and resolution and Problem management services described in a Statement of Work.

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Tax means any sales tax, use tax, goods and services tax, value-added tax or other similar tax under any applicable law, but excludes any tax on income or capital gains.

1.2. Interpretation

Headings are for convenience only and do not affect interpretation. The singular includes the plural and conversely.

2. Services

2.1. Statements of Work

Omnivide and the Client will work together to develop and agree upon one or more Statement of Works in relation to Services provided under this Agreement. The Statement of Work provides an estimate of the time needed to complete the Deliverables.

2.2. Service Delivery

Omnivide shall:

- (a) perform the Services in accordance with the applicable Statement of Work;
- (b) perform the Services with due care, skill and judgment, in a proper workmanlike manner, and in accordance with the Specifications;
- (c) ensure that only suitably qualified and experienced personnel work on the provision of the Services;
- (d) use reasonable commercial efforts to perform the Services in accordance with the timeframes set out in the relevant Statement of Work but will not be responsible for delays caused by the Client or for reasons beyond Omnivide's control;
- (e) use reasonable efforts to perform the Managed Service and Support in accordance with the Service Levels but will not be responsible for delays caused by the Client for reason beyond Omnivide's control; and
- (f) in performing the Services, comply with all applicable laws and regulations.

3. Changes to Statements of Work

Either party may request a change to a Statement of Work. No such change is binding upon the parties unless:

- (a) Omnivide's proposal for implementing the change;
- (b) the amount of additional fees, if any, payable by the Client to Omnivide as a result of the change; and
- (c) the impact, if any, on the timeframes and/or the Service Levels for Services, if any, set out in the relevant SOW, as a result of a change, are agreed upon in writing signed by the parties.

4. Fees

4.1 Invoicing

Omnivide will invoice the Client for the Fees monthly in arrears, unless stated in any SOW.

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4.2. Payment

The Client must pay the Fees within 30 Business Days of the date of the relevant invoice.

4.3. Taxes

- (a) Unless expressly included, the consideration for any supply under, or in connection with, this Agreement does not include Tax.
- (b) Subject to the foregoing, each party must comply with its respective obligations under any applicable law in relation to Tax.

5. Managed Service and Support

5.1. Description of the Managed Service and Support Packages

Subject to the applicable monthly or annual upfront payment of the associated subscription fees as outlined on a Statement of Work, Client may elect to purchase from Omnivide, any of those certain Managed Service and Support Packages offered by Omnivide as more specifically outlined at <http://omnivide.com.au>. Omnivide may update the levels of Managed Service and Support (including the Service Levels) offered in such Managed Service and Support Packages from time to time and may change the annual subscription amounts upon reasonable notice to Client. The Support Services offered in the Managed Service and Support Packages are classified as “Services” under this Agreement, and will be more specifically outlined in a Statement of Work.

5.2. Response Times

All requests for Managed Service and Support received by Omnivide’s support centre in accordance with this Agreement will receive a response from Omnivide in accordance with the level of support purchased as detailed in the Statement of Work. This request will be logged by Omnivide in the Incident Tracking System, and the details of the report (including tracking number) will be communicated to Client contact who made the request.

5.3. Repairs

Once a request has been logged in the Incident Tracking System in accordance with Section 5.2, Omnivide will commence work to try and repair the issue in accordance with the timeframes defined in the Statement of Work. To avoid doubt, Omnivide does not guarantee (under this Agreement or otherwise) to be able to resolve any issue.

5.4. Assumptions and Dependencies

Omnivide is only responsible for Service Levels with regard to Supported Applications that Omnivide has agreed to support as set forth in a Statement of Work. Levels of Support provided by Omnivide are subject to the following dependencies:

- (a) Availability of, and accessibility to, the Client’s network and server infrastructure;
- (b) Time waiting for responses from third parties will not be counted towards the response times included in the Service Levels;
- (c) Time waiting for user acceptance sign-off or time delays due to incorrect logging of incidents is not included in determining whether Service Levels have been met; and/or

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(d) The quality of the Support Services depends on the accuracy of up to date information provided by the Client to Omniverse.

5.5. Client Responsibilities

(a) Provision of Support Services by Omniverse is dependent on the Client meeting its responsibilities as set out below:

(b) The Client will organize required account privileges for all systems that Omniverse is required to support as part of the Support Services; and

(c) The Client will provide Omniverse with access to all required resources, including (but not limited to) network and servers. The level of access is at the discretion of Client and may affect the level of Support that Omniverse can provide.

5.6. Hours of Operation

Omniverse's support centre will provide Managed Service and Support for issues raised with it by email or telephone depending on the level of support purchased under a Managed Service and Support Package and as outlined on a Statement of Work.

6. Confidentiality

6.1. Acknowledgement

Each party acknowledges that in the course of their association with each other they will have access to Confidential Information.

6.2. Obligation

Each party will, and will procure that their respective employees and contractors:

(a) treat all Confidential Information as confidential, not use such confidential information except as permitted hereunder, and not make public or disclose to any other person that Confidential Information without the prior written consent of the disclosing party;

(b) prevent third parties from gaining access to Confidential Information;

(c) immediately return all of the disclosing party's Confidential Information (including all copies) upon written request of the disclosing party.

6.3. Exceptions

This Agreement imposes no obligation on the receiving party with respect to Confidential Information which:

(a) was in the receiving party's possession before receipt from the disclosing party;

(b) is or becomes a matter of public knowledge through no fault of such receiving party;

(c) is rightfully received by such receiving party from a third party without a duty of confidentiality;

(d) is independently developed by the receiving party;

(e) is required by law to be disclosed by the receiving party in response to a valid order of a court of competent jurisdiction or authorized government agency, provided that the receiving party cooperates with the disclosing party's efforts to seek a protective order or other appropriate remedy; or

(f) is disclosed by receiving party with the disclosing party's prior written approval.

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6.4. Equitable Relief

Each party acknowledges that money damages may not be sufficient compensation for a breach of this Section 6, and each party agrees that the other may seek and obtain equitable relief, in the form of specific performance, or temporary, preliminary or permanent injunctive relief, or any other equitable remedy to stop Confidential Information from becoming public in breach of this Section 6.

6.5. Survival

Each party's obligations under this Section 6 shall survive the termination of this Agreement for any reason whatsoever.

7. Software Licenses

7.1. Client software licenses

The Client will be responsible for obtaining all software licenses for use of software on equipment owned by the Client. This Agreement is not an agreement by Omnivide to license any commercially available Omnivide or third party software.

7.2. Application specific software licenses

Where the Client requires Omnivide to use an application specific software license for the purposes of the Services, the Client will be responsible for obtaining such license and ensuring that it can be validly used by Omnivide for the purposes of performing the Services. Unless otherwise agreed, all such licenses will be held by the Client.

8. Intellectual Property

8.1. Pre-Existing and General Intellectual Property

The Intellectual Property Rights owned by each party before Omnivide commences providing the Services shall remain the property of that party. Any ideas, concepts, techniques or other intellectual property developed by Omnivide in the course of producing a Deliverable remain the property of Omnivide.

8.2. Client Intellectual Property

Unless otherwise agreed in a Statement of Work, and subject to Section 8.1, ownership of all Intellectual Property Rights in a Deliverable will vest in the Client upon receipt of the final payment for IP Rights transfer by Omnivide for the deliverables as detailed in the SOW.

8.3. Third Parties

Third party Intellectual Property Rights will remain the property of such third party.

9. Non-Solicitation

To the extent permitted by applicable law, each party is prohibited, during the period of 12 months after the expiration or termination of this Agreement, from soliciting or endeavouring

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to entice away from the other party any employee of the other party or any contractor engaged by that other party at any time without the prior written consent of the other party.

10. Disclaimer of Warranties and Limitation of Liability

10.1. Disclaimer of Warranties

THE CLIENT ENTERS INTO ANY AGREEMENT WITH OMNIVIDE FULLY AWARE OF THIS DISCLAIMER OF WARRANTIES. THE SERVICES AND DELIVERABLES ARE PROVIDED “AS IS” AND WITH ALL FAULTS. IN PARTICULAR, OMNIVIDE DOES NOT REPRESENT OR WARRANT THAT THE SERVICES OR DELIVERABLES WILL MEET CLIENT’S REQUIREMENTS OR WILL BE UNINTERRUPTED, TIMELY, SECURE OR ERROR-FREE. TO THE MAXIMUM EXTENT PERMITTED BY LAW, OMNIVIDE DISCLAIMS ANY AND ALL WARRANTIES OR CONDITIONS OF ANY KIND, WHETHER EXPRESS, IMPLIED OR STATUTORY, INCLUDING, BUT NOT LIMITED TO, WARRANTIES OR CONDITIONS OF MERCHANTABILITY AND FITNESS FOR A PARTICULAR PURPOSE. IF AND TO THE EXTENT ANY WARRANTIES OR CONDITIONS CANNOT BE EXCLUDED, RESTRICTED OR MODIFIED, OMNIVIDE’S SOLE AND EXCLUSIVE LIABILITY AND CLIENT’S SOLE AND EXCLUSIVE REMEDY IN RESPECT OF ANY CLAIM UNDER SUCH WARRANTY OR CONDITION SHALL BE, AT THE OPTION OF OMNIVIDE, SUPPLYING THE SERVICES AGAIN OR REFUNDING TO CLIENT ALL AMOUNTS PAID BY THE CLIENT FOR THE AFFECTED SERVICE OR DELIVERABLE.

10.2. Limited Liability

THE CLIENT ENTERS INTO ANY AGREEMENT WITH OMNIVIDE FULLY AWARE OF THIS LIMITATION OF LIABILITY. TO THE MAXIMUM EXTENT PERMITTED BY LAW, UNDER NO CIRCUMSTANCES WILL OMNIVIDE BE LIABLE TO THE CLIENT ON ACCOUNT OF ANY CLAIM (WHETHER BASED IN CONTRACT, NEGLIGENCE OR OTHER TORT, BREACH OF ANY STATUTORY DUTY OR OTHERWISE) FOR ANY SPECIAL, CONSEQUENTIAL, INDIRECT, INCIDENTAL OR EXEMPLARY DAMAGES, OR FOR ANY LOSS OF PROFITS, REVENUE, INTEREST, GOODWILL, LOSS OR CORRUPTION OF DATA OR FOR ANY LOSS OF OR INTERRUPTION TO THE CLIENT’S BUSINESS, OR FOR ANY DAMAGES OR SUMS PAID BY THE CLIENT TO THIRD PARTIES, EVEN IF OMNIVIDE HAS BEEN ADVISED OF THE POSSIBILITY OF SUCH DAMAGES. IN THE EVENT OF ANY BREACH BY OMNIVIDE OF THIS AGREEMENT THAT RESULTS IN DIRECT DAMAGES OMNIVIDE’S LIABILITY FOR SUCH DAMAGES SHALL NOT EXCEED THE TOTAL AMOUNT PAID BY CLIENT TO OMNIVIDE HEREUNDER.

11. Indemnification

11.1. Third Party IP Infringement Claim

Omniverse shall indemnify Client against any third party claim that Omniverse’s provision of

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the Services or any Deliverable infringes upon or violates any Intellectual Property Rights of third parties, and shall pay those costs and damages awarded by a court of law in a final non-appealable order against Client that are specifically attributable to such claim. The foregoing obligations are conditioned on Client notifying Omnivide promptly in writing of such claim.

11.2. Limitation on Omnivide Indemnification

Notwithstanding the foregoing, Omnivide shall have no obligation under this Section 11 or otherwise with respect to any infringement claim based upon (i) any use of the Deliverables not in accordance with this Agreement, (ii) any use of the Deliverables in combination with other products, equipment, software, or data not supplied by Omnivide, (iii) Client's continued use of any non-current, unaltered version of the Deliverables following notification by Omnivide of the requirement that Client must use a more recent version of the Deliverables, or (iv) any modification of the Deliverables by any person other than Omnivide.

11.3. Omnivide's Rights to Procure, Replace or Refund

In addition to and not in lieu of Omnivide's obligations above, if any third party claim is made against Client, and/or Omnivide reasonably believes, that Client's use of the Deliverables violates the Intellectual Property Rights of any third party, Omnivide may, at its option and expense: (a) procure for Client the right to continue using the Deliverables as provided herein or (b) replace or modify the Deliverables so that they become non-infringing, or (c) refund to Client all fees paid by Client to Omnivide hereunder for such Deliverables. This Section 11 sets forth Omnivide's entire liability and Client's exclusive remedies in the event of a claim of infringement.

12. Termination

12.1. Breach

Either party may terminate this Agreement immediately by written notice to the other party if the other party breaches any provision of this Agreement, and the breach has not been remedied within 20 Business Days after service of written notice of the breach.

12.2. Failure to Pay, Insolvency and Cessation of Business

Either party may terminate this Agreement immediately by written notice to the other party if that other party:

- (a) fails to make a payment within the time period specified under this Agreement;
- (b) becomes, threatens or resolves to become Insolvent; or
- (c) ceases or threatens to cease conducting business in the normal manner.

12.3. Convenience

Either party may terminate this Agreement by providing 30 days' advance written notice to the other party and in the case of Client, paying in full all amounts due and owing hereunder, without liability to pay any termination fee, except if a Statement of Work has not been completed.

13. Consequence of Termination

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13.1. Payments on Termination

Upon termination of this Agreement, the Client shall pay to Omnivide any outstanding amounts (either billed or accrued) which are payable to Omnivide as of the date of termination.

13.2. Return of Information on Termination

Upon termination of this Agreement, each party must return, or destroy, at the other party's option, all documentation and information relating to the other party's business (in whatever form it is held including but not limited to written, graphic or electromagnetic form, and all copies) in that party's possession or control. Such information includes, without limitation, any Confidential Information and any records relating to a party's Intellectual Property.

13.3. Effect of Termination

Termination of this Agreement will not prejudice any rights or any claim that either party may have accrued against the other party up to the date of termination including, without limitation, any claim for damages as a result of the occurrence of an event which gives rise to a right of termination.

14. General

14.1. Notices

Notices given under this Agreement:

- (a) must be in writing addressed to the intended recipient at the address last notified by the intended recipient to the sender;
- (b) must be signed by a person duly authorized by the sender; and
- (c) will be taken to be served when delivered, received or left at the intended recipient's address, but if delivery or receipt occurs on a day on which business is not generally carried on in the place to which the notice is sent, or later than 5pm on that date at that place, it will be taken to have been served at the commencement of business on the next day on which business is generally carried on in that place.

14.2. Entire Agreement

This Agreement embodies the entire agreement between the parties with respect to its subject matter and supersedes any prior negotiation, arrangement, understanding or agreement with respect to the subject matter or any term of this Agreement.

14.3. Nature of engagement

Omnivide is engaged by the Client as an independent contractor. Nothing in this Agreement creates a relationship between the parties of employer and employee, principal and agent, partnership or joint venture.

14.4. Amendment

All additions or modifications to this Agreement must be made in writing and must be signed by both parties.

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14.5. Assignment

Neither party may assign or otherwise transfer its rights under this Agreement without the prior written consent of the other party.

14.6. Precedence

The terms of a Statement of Work will take precedence over this Agreement to the extent of any inconsistency in relation to that Statement of Work. Any pre-printed or other standard terms set forth on any Client purchase order, acknowledgment or other form will be deemed void and of no force or effect, irrespective of whether such form is countersigned by Omniverse. In the event of a conflict between this Agreement and any Omniverse or third party licenses included within any software or Deliverables, the provisions of those licenses will control.

14.7. Severance

Any provision of this Agreement which is prohibited or unenforceable in any jurisdiction will be ineffective in that jurisdiction to the extent of the prohibition or unenforceability, but will not invalidate the remaining provisions of this Agreement nor affect the validity or enforceability of that provision in any other jurisdiction.

14.8. No Waiver

No failure to exercise and no delay in exercising any right, power or remedy under this Agreement will operate as a waiver, nor will any single or partial exercise of any right, power or remedy preclude any other or further exercise of that right, power or remedy.

14.9. Governing Law

This Agreement is governed by the laws of the countries specified in the table in Section 14.10 without giving effect to (i) its conflict of laws provisions, or (ii) the United Nations Convention for Contracts for the International Sale of Goods, which is explicitly excluded. The parties submit to the non-exclusive jurisdiction of such courts.

14.10. Who You Are Contracting With, Notices, Governing Law and Jurisdiction

Who you are contracting with under this Agreement, Who you should direct notices to under this Agreement and what law will apply in any lawsuit arising out of, or in connection with this Agreement and which courts have jurisdiction over any such lawsuit, depend on where you are located.

If you are domiciled in	You are contracting with	Notices should be addressed to	The Governing Law is	The courts having exclusive jurisdiction are
Australia New Zealand	Omniverse Pty Ltd	71 Brighton St, Curl Curl, New South Wales, 2096, Australia	New South Wales, Australia	State Courts of New South Wales, Federal Court of Australia