

## 1 Introduction

Matrak is a cloud-based materials and logistics tracking software specifically designed for the construction industry. It allows every company on a single project to track and share real-time information at every stage, manufacture, shipping, installation, QA and defects.

## 2 Definitions

The definitions and interpretation section in this Agreement are set out in **clause 21** (*Definitions and interpretation*).

## 3 Parties and agreement

### 3.1 Parties

This Agreement is between you, our customer (referred to as **you** or **your**) and **Matrak Industries Pty Ltd** ABN 85 602 500 363, its successors and assignees (referred to as **us**, **we** or **our**) and collectively the Parties. This Agreement is available at [www.matrak.com.au](http://www.matrak.com.au) (**Site**).

### 3.2 Agreement

This Agreement forms the agreement under which we provide you with the Services. Please read this Agreement carefully. If you have any questions, please contact us using the contact details before you access the Site.

## 4 Services

### 4.1 Services

You have requested the Services. We will supply the Services as set out in this Agreement.

### 4.2 Agreement and conflicting terms

This Agreement is made up of the following documents (in order of priority):

- (a) this document; and
- (b) any terms set out at an URL provided by us for accessing the Services, the **Agreement**.

## 5 Acceptance

### 5.1 Acceptance

You accept this Agreement by:

- (a) signing this Agreement; or
- (b) clicking a box indicating acceptance on the Site; or
- (c) creating an Account; or
- (d) accessing or using the Services.

### 5.2 Authority

By accepting this Agreement, you warrant:

- (a) to us that you have reviewed this Agreement, including our Website Terms of Use and Privacy Policy, available on the Site (with your parent or legal guardian if you are under 18 years of age), and you understand them and will use the Services in accordance with them;
- (b) to us that have the legal capacity to enter into a legally binding agreement or if you are under 18 years of age, you have your parent's or legal guardian's permission to access and use the Services and they have agreed to this Agreement on your behalf;
- (c) to us that you have the authority to act on behalf of any person or entity for whom you are using the Services and you are deemed to have agreed to this Agreement on behalf of any entity for whom you use the Services; and
- (d) to us that you have all hardware, software and services which are necessary to access and use the Services.

## 6 Term

### 6.1 This Agreement Term

This Agreement commences on the Agreement Start Date and continues until the Agreement End Date (**Agreement Term**). Any renewal process for this Agreement is set out on the Site or as otherwise agreed between the parties.

## 7 Accounts

### 7.1 Create Account

We may create an account for you (**Account**), in order for you and your Authorised Users to access and use the Services. You must ensure that any information you provide to us, or we request from you as part of the creation process is complete and accurate.

### 7.2 Account Owner

You are the Account owner and regardless of any change in any contact details, you will remain responsible for your Account as set out in this Agreement. If you wish to change the Account owner, you must provide us with a written request to transfer the ownership of the Account to the incoming party, which must also include the incoming party's written consent to take over full responsibility for the Account in a form acceptable to us.

### 7.3 Usernames, passwords and administration of Authorised Users

We or the Site will provide you with certain Account details (such as usernames and passwords) when an Account is created for you. It is your responsibility to keep your Account details confidential. You are responsible for all activity on your Account, including activity by Authorised Users and for ensuring that any activities on your Account comply with this Agreement. We are not responsible for the management or administration of your Account or your Authorised Users.

## **8 Licence and restrictions on use**

### **8.1 Licence**

In consideration for payment of the Fees, we grant you a non-exclusive, non-transferable, non-sublicensable (except as otherwise permitted under this Agreement), personal and revocable licence to access and use the Services for the Agreement Term (**Licence**).

### **8.2 Licence Restrictions**

You must not (and must ensure your Authorised Users do not) access or use the Services except as permitted by the Licence and you must not and must not permit any other person to:

- (a) use the Services in any way which is in breach of any applicable Laws or which infringes any person's rights, including Intellectual Property rights;
- (b) use the Services to transmit, publish or communicate material that is defamatory, offensive, abusive, indecent, menacing or unwanted;
- (c) use the Services in any way that damages, interferes with or interrupts the supply of the Services;
- (d) introduce malicious programs into our hardware and software or Systems, including viruses, worms, trojan horses and e-mail bombs;
- (e) reveal your Account's password to others or allow others to use your Account (other than Authorised Users);
- (f) use the Services to carry out security breaches or disruptions of a network. Security breaches include accessing data where you are not the intended recipient or logging into a server or account that you are not expressly authorised to access or corrupting any data (including network sniffing/monitoring, pinged floods, packet spoofing, denial of service and forged routing information for malicious purposes);
- (g) use any program/script/command, or send messages of any kind, with the intent to interfere with, or disable, any person's use of the Services;
- (h) send any form of harassment via email, or any other form of messaging, whether through language, frequency, or size of messages or use the Services in breach of any person's privacy (such as by way of identity theft or "phishing"); or
- (i) use the Services to circumvent user authentication or security of any of our networks, accounts or hosts or those of our members or suppliers.

### **8.3 You must obtain necessary approvals**

For us to provide the Services to you, you must promptly obtain and provide to us any required licences, approvals or consents necessary for our performance of the Services.

## **9 Authorised Users**

### **9.1 Authorised Users**

If set out on the Site or as otherwise agreed between the parties, you agree that the Licence permits you to access and use the Services in accordance with the number of Authorised Users, as set out on the Site or as otherwise agreed between the parties.

### **9.2 Increasing Authorised Users**

You may, at any time, increase the number of Authorised Users by requesting the increase by email or via your Account and we will apply new Fees (and support fees if relevant) which will be applicable as of the effective date of the increase of the number of Authorised Users.

## **10 Third Parties**

### **10.1 Third Party Inputs**

You acknowledge and agree that:

- (a) the provision of the Services may be contingent on, or impacted by, third parties, other customers' use of our services, suppliers, other subcontractors (**Third Party Inputs**); and
- (b) despite anything to the contrary, to the maximum extent permitted by law, we will not be responsible, and will have no Liability, for any default or breach of this Agreement or law, if such default or breach was caused or contributed to by any Third Party Inputs.

### **10.2 Interoperability with Third Party Inputs**

- (a) You acknowledge that the Services include certain optional functionality that may interface or interoperate with third party software or services.
- (b) To the extent that you choose to use such functionality and they are not a part of the Services, you are responsible for:
  - (i) the purchase of;
  - (ii) the requirements; and
  - (iii) the licensing obligations,related to the applicable third party software and services.

- (c) It is your responsibility to ensure these requirements are met in order for you to benefit from the specific functionality made available to you.

## **11 Setup Services, Data Load, Development Services and Support Services**

### **11.1 Setup Services and Data Load**

If applicable, we will provide the Setup Service and the Data Load as set out on the Site or as otherwise agreed between the parties.

### **11.2 Development**

If you require any changes to the scope, functionality or nature of the Services or the elements of the Software used to provide the Services or any bespoke customisations to the Services, you may request that we undertake additional development work to provide this functionality, at our discretion.

### **11.3 Scoping**

Following notification, at our discretion, we may provide you with written notice in the form of a statement of work covering:

- (a) the changes required to the Services and the development services required in respect of such changes (**Development Services**); and
- (b) the fees required for us to undertake such Development Services (**Development Fee**).

### **11.4 Statement of Work for the Development Services**

If you agree to the changes to the Services, the Development Services and the Development Fees then, subject to the Parties signing a statement of work and this Agreement, we will provide the Development Services to you in consideration for payment of the Development Fee.

### **11.5 Support**

We will provide you with technical support services as set out on the Site or as otherwise agreed between the parties.

## **12 Privacy**

### **12.1 Privacy Act**

We will at all times comply with the Privacy Act, and in relation to Customer Data that contains or is Personal Information, we will only use this Customer Data in the manner permitted by this Agreement and the Privacy Act.

### **12.2 Your obligations**

- (a) You are responsible for the collection, use, storage and otherwise dealing with Personal Information related to your business and all matters relating to the Customer Data.
- (b) You must and must ensure that all of your Personnel and Authorised Users comply, with the requirements of the Privacy Act in respect of all Personal Information collected, used, stored or otherwise dealt with under or in connection with this Agreement.
- (c) Without limiting this **clause 12 (Your obligations)**, you must:
  - (i) notify Authorised Users, Personnel, or other natural persons from whom Personal Information is collected about any matter prescribed by the Privacy Act in relation to the collection, use and storage of their Personal Information;
  - (ii) ensure that any Personal Information transferred to us is complete, accurate and up to date; and
  - (iii) notify us immediately upon becoming aware of any breach of the Privacy Act that may be related to the use of the Personal Information under this Agreement.
- (d) Without limiting this **clause 12 (Your obligations)**, you may only disclose Personal Information in your control to us if:
  - (i) you are authorised by the Privacy Act to collect the Personal Information and to use or disclose it in the manner required by this Agreement;
  - (ii) you have informed the individual to whom the Personal Information relates, that it might be necessary for you to disclose their Personal Information to third parties and you have obtained their consent to do so; and
  - (iii) where any Personal Information is Sensitive Information, you have obtained the specific consent to that disclosure from the individual to whom the Sensitive Information relates.

### **12.3 Data breach**

To the extent the Notifiable Data Breaches scheme under Part IIIC of the Privacy Act (**Notifiable Data Breaches Scheme**) applies to us, if we become aware of a Data Incident, we will:

- (a) notify you of the Customer Data Incident by telephone or email;
- (b) retain system logs and other information that may be relevant to the Customer Data Incident, or to assessing the cause or impact of the Customer Data Incident;
- (c) provide all information we deem relevant to the Customer Data Incident reasonably requested by you for the purpose of investigating the Customer Data Incident; and
- (d) immediately take all action reasonably necessary to:
  - (i) mitigate the impact of the Customer Data Incident (including to restore or recover any lost data); and
  - (ii) prevent any repeat of the Customer Data Incident in the future.

### **12.4 Assessment**

- (a) If we suspect that a Data Incident has occurred, we will, within 30 days, prepare an assessment to determine whether there are reasonable grounds to believe that a Customer Data Incident has occurred.

- (b) Where you suspect that a Customer Data Incident has occurred, we will, within 30 days of receiving notice from you that you suspect that a Customer Data Incident has occurred, prepare an assessment to determine whether there are reasonable grounds to believe that a Customer Data Incident has occurred, and the costs of such assessment must be paid by you.

## 12.5 Notice to OAIC

If we believe a Customer Data Incident has occurred, we will provide notice to the Office of the Australian Information Commissioner (OAIC) of such Customer Data Incident in accordance with the Notifiable Data Breaches Scheme and we will be the sole Party to notify the individuals who are likely to be at risk of serious harm arising from the Customer Data Incident. Alternatively, where we do not have the contact details of affected individuals, we will provide you with a statement to provide to affected individuals.

## 13 Fees and payment

### 13.1 Fees

You must pay us any Fees and any other amounts payable to us under this Agreement in accordance with the Payment Terms.

### 13.2 Failure to pay invoices

If any payment has not been made in accordance with the Payment Terms, we may (in our absolute discretion):

- (a) immediately cease or suspend the provision of the Services, and recover as a debt due and immediately payable from you any additional costs of doing so;
- (b) charge interest at a rate equal to the Reserve Bank of Australia's cash rate from time to time plus 5% per month, calculated daily and compounding monthly, on any such amounts unpaid after the due date; and
- (c) engage debt collection services and/or commence legal proceedings in relation to any such amounts.

### 13.3 Recommencement of services

If you rectify such non-payment after the Services have been suspended, then we will recommence the provision of the Services as soon as reasonably practicable.

### 13.4 Payment

You must pay us the Fees and any other amount payable to us under this Agreement, without set off or delay, via credit card or any other payment method set out on the Site or as otherwise agreed between the parties. If you do not pay by credit card or direct debit, we may apply an administrative fee to that payment.

### 13.5 Fees

The Fees are subject to change upon 30 days' notice from us to you and will apply to the next billing cycle. Such notice may be provided at any time by posting the changes on our Site, via email or via a notification to your Account.

## 14 GST

### 14.1 GST terminology

The terms "adjustment event", "consideration", "GST", "input tax credit", "recipient", "supplier", "supply", "taxable supply" and "tax invoice" each has the meaning given in the *A New Tax System (Goods and Services Tax) Act 1999* (Cth).

### 14.2 Taxable supply

If GST is payable on any supply made under this Agreement, the recipient of the supply must pay an amount equal to the GST payable on the supply. That amount must be paid at the same time that the consideration is to be provided under this Agreement and must be paid in addition to the consideration expressed elsewhere in this Agreement, unless it is expressed to be inclusive of GST. The recipient is not required to pay any GST until the supplier issues a tax invoice for the supply.

### 14.3 Adjustment events

If an adjustment event arises in respect of any supply made under this Agreement, a corresponding adjustment must be made between the supplier and the recipient in respect of any amount paid by the recipient under this **clause**, an adjustment note issued (if required), and any payments to give effect to the adjustment must be made.

### 14.4 Payments

If the recipient is required under this Agreement to pay for or reimburse an expense or outgoing of the supplier, or is required to make a payment under an indemnity in respect of an expense or outgoing of the supplier, the amount to be paid by the recipient is to be reduced by the amount of any input tax credit in respect of that expense or outgoing that the supplier is entitled to.

## 15 Intellectual Property Rights

### 15.1 Our Intellectual Property

All Intellectual Property in the Software, Services and all Intellectual Property developed, adapted, modified or created by us or our Personnel (including in connection with this Agreement, the Software and the Services and any statistical algorithms output from the Services) is and will remain owned exclusively by us or our third party service providers.

### 15.2 Obligations

You must not, without our prior written consent:

- (a) copy or use, in whole or in part, any of our Intellectual Property;
- (b) reproduce, retransmit, distribute, disseminate, sell, publish, broadcast or circulate any of our Intellectual Property to any third party;

- (c) reverse assemble, reverse engineer, reverse compile or enhance the Services;
- (d) breach any Intellectual Property Rights connected with the Software or the Services, including altering or modifying any of our Intellectual Property;
- (e) cause any of our Intellectual Property to be framed or embedded in another website; or create derivative works from any of our Intellectual Property;
- (f) resell, assign, transfer, distribute or make available the Services to third parties;
- (g) "frame", "mirror" or serve any of the Services on any web server or other computer server over the Internet or any other network;
- (h) alter, remove or tamper with any trademarks, any patent or copyright notices, any confidentiality legend or notice, any numbers or any other means of identification used on or in relation to the Services or Software;

### 15.3 Non identifying analytics

Despite anything to the contrary in this Agreement or elsewhere, we may monitor, analyse and compile statistical and performance information based on and/or related to your use of the Services, in an aggregated and anonymised format (**Analytics**). You agree that we may make such Analytics publicly available, provided that it:

- (a) does not contain identifying information; and
- (b) is not compiled using a sample size small enough to make the underlying Customer Data identifiable.

### 15.4 Rights in Analytics

We and our licensors own all right, title and interest in and to the Analytics and all related software, technology, documentation and content provided in connection with the Analytics, including all Intellectual Property rights in the foregoing.

### 15.5 Your Intellectual Property

As between you and us:

- (a) all Customer Data is and remains your property; and
- (b) you retain any and all rights, title and interest in and to the Customer Data, including all copies, modifications, extensions and derivative works.

### 15.6 Licence

You grant us a limited licence to copy, use, transmit, store and back-up or otherwise access the Customer Data during the Agreement Term solely to:

- (a) supply the Services to you (including to enable you and your Personnel to access and use the Services);
  - (b) diagnose problems with the Services;
  - (c) enhance and otherwise modify the Services; and
  - (d) develop other services, provided we de-identify the Customer Data,
- as reasonably required to perform our obligations under this Agreement.

### 15.7 Customer Data and compliance

- (a) You must, at all times, ensure the integrity of the Customer Data and that your use of the Customer Data is compliant with all Laws.
- (b) You represent and warrant that:
  - (i) you have obtained all necessary rights, releases and permissions to provide all your Customer Data to us and to grant the rights granted to us in this Agreement; and
  - (ii) the Customer Data (and its transfer to and use by us) as authorised by you, under this Agreement does not violate any Laws (including those relating to export control and electronic communications) or rights of any third party, including any Intellectual Property rights, rights of privacy, or rights of publicity; and
  - (iii) any use, collection and disclosure authorised in this Agreement is not inconsistent with the terms of any applicable privacy policies.

### 15.8 Customer Data

We assume no responsibility or Liability for the Customer Data. You are solely responsible for the Customer Data and the consequences of using, disclosing, storing or transmitting it.

## 16 Liability

### 16.1 Liability

Despite anything to the contrary, to the maximum extent permitted by law:

- (a) the maximum aggregate Liability arising from or in connection with this Agreement (including the Services or the subject matter of this Agreement) will be limited to, and must not exceed in the aggregate for all claims the total amount of Fees you paid to us in the 12 month period directly preceding the date on which such Liability arose; and
  - (b) we will not be liable to you for any Consequential Loss,
- whether under statute, contract, equity, tort (including negligence), indemnity or otherwise.

### 16.2 Exclusions to Liability

Despite anything to the contrary, to the maximum extent permitted by law, we will have no Liability, and you waive and release us from and against, all Liability (whether under statute, contract, negligence or other tort, indemnity, or otherwise) arising from or in connection with any:

- (a) loss of, or damage to, any property or any injury to or loss to any person;
  - (b) failure or delay in providing the Services;
  - (c) breach of this Agreement or any Laws; or
  - (d) the Computing Environment,
- where caused or contributed to by any:
- (e) Force Majeure Event;
  - (f) a fault, defect, error or omission in the Computing Environment or Customer Data; or
  - (g) act or omission by you, your related parties, Authorised Users, Personnel or any third party (including customers, end users, suppliers, providers or subcontractors),
- and, in any event, any error, omission or lack of suitability (or the absence of, or reduction in, any anticipated result, outcome or benefit) with respect to the Services.

### 16.3 Indemnity

To the maximum extent permitted by law, you indemnify and continue to indemnify us against all Liability we suffer or incur arising from or as a consequence of a breach of **clause 12 (Privacy)**, **clause 15 (Intellectual Property Rights)**, **clause 19 (Confidential Information)** and your Authorised Users' use of the Services contrary to this Agreement, including from any claim relating to the Customer Data.

### 16.4 ACL

Certain legislation, including the Australian Consumer Law (**ACL**) in the *Competition and Consumer Act 2010* (Cth), and similar consumer protection Laws and regulations may confer you with rights, warranties, guarantees and remedies relating to provision of our services which cannot be excluded, restricted or modified (**Statutory Rights**). Nothing in this Agreement attempts to exclude, restrict or modify your Statutory Rights as a consumer under the ACL. Any and all other warranties or conditions which are not guaranteed by the ACL are expressly excluded where permitted, except to the extent such warranties and conditions are fully expressed in this Agreement.

### 16.5 Acknowledgement

You acknowledge and agree that:

- (a) you are responsible for all users using the Services, including your Personnel and any Authorised Users; and
- (b) your use the Services and any associated programs and files at your own risk;
- (c) the technical processing and transmission of the Services, including your Customer Data, may be transferred unencrypted and involves:
  - (i) transmissions over various networks; and
  - (ii) changes to conform and adapt to technical requirements of connecting networks or devices;
- (d) we may use third party service providers to host the Services. If the providers of third party applications or services cease to make their services or programs available on reasonable terms, we may cease providing any affected features without Liability or entitling you to any refund, credit, or other compensation;
- (e) the Services may use third party products, facilities or services. We do not make any warranty or representation in respect of the third party products, facilities or services;
- (f) we do not guarantee that any file or program available for download and/or execution from or via the Services is free from viruses or other conditions which could damage or interfere with data, hardware or software with which it might be used;
- (g) we are not responsible for the integrity or existence of any data on the Computing Environment, network or any device controlled by you or your Authorised Users; and
- (h) we may pursue any available equitable or other remedy against you if you breach any provision of this Agreement.

## 17 Termination

### 17.1 Mutual Termination

The Parties may terminate this Agreement by a mutually signed agreement.

### 17.2 Termination for cause of this Agreement

To the extent permitted by law, either Party may terminate this Agreement, if the other Party:

- (a) has breached a material term of this Agreement and has failed to remedy such breach within 20 Business Days of receiving notice to do so, subject to any other express right of termination;
- (b) ceases operation without a successor; or
- (c) is subject to an Insolvency Event.

### 17.3 Termination for failure to pay

We may terminate this Agreement by providing you with five Business Days' notice, in our sole discretion, if you fail to pay an invoice within 30 days of the invoice payment date.

### 17.4 Effect of termination

On termination of this Agreement:

- (a) you must cease using the Services and we will cease to provide the Services;

- (b) you agree that any payments made are not refundable;
- (c) you must pay for all Services provided under this Agreement including Services which have been performed and have not yet been invoiced to you, and all other amounts due and payable under this Agreement, including under an indemnity, within 5 Business Days of termination;
- (d) you must promptly return (where possible) or delete or destroy (where not possible to return), our Confidential Information and Intellectual Property, and/or documents containing or relating to our Confidential Information and Intellectual Property;
- (e) we must promptly return (where possible) or delete or destroy (where not possible to return), your Confidential Information and Intellectual Property, and/or documents containing or relating to your Confidential Information and Intellectual Property unless we are required by Law or regulatory requirements to retain such information;
- (f) for the avoidance of doubt, any provisions of this Agreement that by their nature survive the termination of this Agreement will remain in force after this Agreement Term; and
- (g) we may remove Customer Data within one month of the date of termination or expiry of this Agreement.

#### 17.5 Removal of Customer Data

You must, within 3 months of the date of termination or expiry of this Agreement, copy all Customer Data and we will allow you access to the Services during this time solely for that purpose. After this time, we will be entitled to permanently delete all Customer Data.

#### 17.6 Disengagement services

On termination of this Agreement, we may offer to provide you with disengagement support services at our then current rates, and such disengagement support services must be agreed in writing by the Parties.

#### 17.7 Accrued rights

The accrued rights, obligations and remedies of the Parties are not affected by the termination of this Agreement.

### 18 General Warranties

#### 18.1 Our warranties

We warrant and agree that:

- (a) we are properly constituted and have the right and authority to enter into this Agreement;
- (b) we will provide the Services in accordance with all applicable Laws; and
- (c) we will use reasonable effort to ensure all of our obligations under this Agreement will be carried out:
  - (i) by suitably competent and trained Personnel; and
  - (ii) in an efficient and professional manner.

#### 18.2 Your warranties

You warrant and agree that:

- (a) there are no legal restrictions preventing you from agreeing to this Agreement;
- (b) you are not subject to an Insolvency Event;
- (c) you will cooperate with us and provide us with all assistance, resources, data, people, information, facilities, access and documentation that is reasonably necessary to enable us to perform the Services, and as otherwise requested by us, from time to time, and in a timely manner;
- (d) all information and documentation that you provide to us in connection with this Agreement is true, correct and complete and that we will rely on such information and documentation in order to provide the Services;
- (e) you will inform us if you have reasonable concerns relating to our provision of the Services under this Agreement, with the aim that the Parties will use all reasonable efforts to resolve your concerns;
- (f) you are responsible for obtaining any consents, licences, authorities and permissions from other parties necessary for the Services to be provided in accordance with this Agreement, at your cost, and for providing us with the necessary consents, licences, authorities and permissions;
- (g) you will maintain the confidentiality and security of any of your Account details or passwords;
- (h) if applicable, you hold a valid ABN which has been advised to us; and
- (i) if applicable, you are registered for GST purposes.

### 19 Confidential Information

#### 19.1 Confidential

Each Party (**Recipient**) must keep confidential, and not disclose, any Confidential Information of the other Party (**Discloser**) except:

- (a) where permitted by this Agreement;
- (b) with the prior written consent of the Discloser;
- (c) where the Confidential Information is received from a third party, except where there has been a breach of confidence;
- (d) on a confidential, "needs to know" basis to the Recipient's Personnel, auditors, insurers, agents and professional advisors; or
- (e) where the Recipient is compelled to do so by Law, provided that it gives the other Party written notice prior to disclosure.

#### 19.2 Use

The Recipient must only use the Confidential Information of the Discloser for the purpose for which it was disclosed and in connection with this Agreement.

## 20 General

### 20.1 Amendment

This Agreement may only be amended by a written instrument executed by both Parties.

### 20.2 Assignment

Neither Party may assign, transfer or otherwise deal with all or any of its rights or obligations under this Agreement without the prior written consent of the other Party. Any purported dealing in breach of this clause is of no force or effect.

### 20.3 Delay

- (a) If the provision of the Services depends upon or includes the provision of information, materials, consents or approvals by you or your Personnel, or requires your cooperation, action or response (or that of your Personnel), you must provide that information, cooperation and those materials, consents or approvals in a timely manner.
- (b) If you breach this obligation, we will be entitled to an extension of time in respect of any deadline or milestone to the extent of the delay caused by you and we will have no Liability for a failure to perform the Services caused by you.
- (c) If we are delayed from performing our obligations due to such a circumstance for a period of at least two months, we may terminate this Agreement with you by giving you five Business Days' notice in writing.

### 20.4 Disputes and notices

- (a) Neither Party may commence court proceedings relating to any dispute arising from, or in connection with, this Agreement without first meeting with a senior representative of the other Party to seek (in good faith) to resolve that dispute (unless that Party is seeking urgent interlocutory relief or the dispute relates to compliance with this provision).
- (b) Any notice required or permitted to be given by either Party to the other under these conditions will be in writing addressed to the Party at the address as set out on the Site or as otherwise agreed between the parties. A Party may change its notice details by written notice to the other Parties. Any notice may be sent by standard post or email, and notice will be deemed to have been served on the expiry of 48 hours in the case of post, or at the time of transmission in the case of transmission.

### 20.5 Entire agreement

This Agreement contains the entire understanding between the Parties, and supersedes all previous discussions, communications, negotiations, understandings, representations, warranties, commitments and agreements, in respect of its subject matter.

### 20.6 No Exclusivity

The Services will be provided to you on a non-exclusive basis.

### 20.7 Feature sets

We reserve the right at any time and from time to time to change or remove features of the Services provided that, where there is any material negative alteration to the functionality of the Services in accordance with this clause, we will provide you with 20 Business Days' notice and you may terminate this Agreement by written notice without Liability to us.

### 20.8 Overseas access

The Services may be accessed in Australia and overseas. We make no representation that the Services complies with the Laws (including Intellectual Property laws) of any country outside of Australia. If you access the Services from outside Australia, you do so at your own risk and are responsible for complying with the laws in the place you access the Services.

### 20.9 Publicity

With your prior written consent, we may use advertising or publicly announce that we have undertaken work for you, including in website testimonials and in our marketing material.

### 20.10 Subcontracting

We may engage subcontractors to perform the Services on our behalf. Despite this, we retain responsibility for all our obligations under this Agreement.

### 20.11 Waiver

Any failure or delay by a Party in exercising a power or right (either wholly or partly) in relation to this Agreement does not operate as a waiver or prevent a Party from exercising that power or right or any other power or right. A waiver must be in writing.

### 20.12 Severance

If a provision of this Agreement is held to be void, invalid, illegal or unenforceable, that provision is to be read down as narrowly as necessary to allow it to be valid or enforceable, failing which, that provision (or that part of that provision) will be severed from this Agreement without affecting the validity or enforceability of the remainder of that provision or the other provisions.

### 20.13 Counterparts

This Agreement may be executed in any number of counterparts that together will form one instrument.

## 21 Definitions and interpretation

### 21.1 Definitions

Unless defined on the Site or as otherwise agreed between the parties, the following words will mean:

**ACL** is defined in **clause 16.4 (ACL)**;



**Account** is defined in **clause 7 (Accounts)**;

**Agreement** means is defined in **clause 4.2 (Agreement and conflicting terms)**;

**Agreement End Date** means the end date set out on the Site or as otherwise agreed between the parties.

**Agreement Start Date** means the date set out on the Site or as otherwise agreed between the parties;

**Agreement Term** is defined in **clause 6.1 (This Agreement Term)**;

**Analytics** is defined in **clause 15.3 (Non identifying analytics)**;

**Business Day** means a day which is not a Saturday, Sunday or bank or public holiday in the Victoria;

**Business Hours** means 9am to 5pm on a Business Day;

**Computing Environment** means your computing environment including all hardware, software, information technology and telecommunications services and Systems;

**Confidential Information** includes confidential information about a Party's business, structure, programs, processes, methods, operating procedures, activities, products and services, trade secrets, know how, financial, accounting, marketing and technical information, customer and supplier lists (including prospective customer and supplier information), ideas, concepts, know-how, Intellectual Property, technology, and other information whether or not such information is reduced to a tangible form or marked in writing as "confidential" but does not include any information which is in the public domain other than through a breach of confidence. Our Confidential Information includes our Intellectual Property including the Software. Your Confidential Information includes the Customer Data;

**Consequential Loss** includes any indirect loss, incidental loss, consequential loss, loss of profits, loss of revenue, loss of production, loss of opportunity, loss of access to markets, loss of goodwill, loss of reputation, loss of use, abnormal or unforeseeable loss, loss of use and/or loss or corruption of data, any loss or damage relating to business interruption, or otherwise, suffered or incurred by a person, arising out of or in connection with this Agreement (whether involving a third party or a Party to this Agreement or otherwise);

**Customer Data** means the information, logos, documents and other data inputted by you, your Personnel or Authorised Users into the Software or stored by the Services or generated by the Services as a result of your use of the Services;

**Customer Data Incident** means any actual or suspected:

- (a) breach of our obligations relating to the protection of Personal Information under this Agreement;
- (b) suspected (by us) unauthorised access to, or unauthorised disclosure of, any Personal Information;
- (c) suspected (by us) loss of Personal Information, including where Personal Information is damaged or corrupted so that it becomes unusable,

where, as determined by us, the access or disclosure is likely to result in serious harm to one or more individuals and we have not been able to prevent the likely risk of serious harm with remedial action;

**Data Load** means the loading of required drawings including material take-off and drawing digitization.

**Development Fees** is defined in **clause 11.3 (Scoping)**;

**Development Services** is defined in **clause 11.3 (Scoping)**;

**Fees** means the fees set out on the Site or as otherwise agreed between the parties, including the Development Fees, Subscription Fees and Setup Fees;

**Force Majeure Event** means an event which is beyond a Party's reasonable control including a fire, storm, flood, earthquake, explosion, accident, act of the public enemy, terrorist act, war, rebellion, insurrection, sabotage, epidemic, quarantine restriction, transportation embargo, and strike by employees of a third person;

**Insolvency Event** means the occurrence of any one or more of the following events in relation to either Party:

- (a) it is or states that it is insolvent or is deemed or presumed to be insolvent under any applicable Laws;
- (b) an application or order is made for its winding up, bankruptcy or dissolution or a resolution is passed or any steps are taken to pass a resolution for its winding up or dissolution;
- (c) an administrator, provisional liquidator, liquidator or person having a similar or analogous function under the Laws of any relevant jurisdiction is appointed in respect of it or any action is taken to appoint any such person and the action is not stayed, withdrawn or dismissed within 10 Business Days;
- (d) a controller is appointed in respect of any of its property;
- (e) it is deregistered under the Corporations Act or other legislation or notice of its proposed deregistration is given to it;
- (f) a distress, attachment or execution is levied or becomes enforceable against it or any of its property;
- (g) it enters into or takes action to enter into an arrangement, composition or compromise with, or assignment for the benefit of, all or any class of its creditors or members or a moratorium involving any of them;
- (h) a receiver or manager (or both) or trustee in bankruptcy is appointed in respect of it or its property;
- (i) a petition for the making of a sequestration order against its estate is presented and the petition is not stayed, withdrawn or dismissed within 10 Business Days or it presents a petition against itself; or

- (j) anything analogous to or of a similar effect to anything described above under the law of any relevant jurisdiction occurs in respect of the relevant Party;

**Intellectual Property** includes any and all intellectual and industrial property rights throughout the world, whether subsisting now or in the future and includes all copyright and analogous rights, all rights in relation to inventions (including patent rights), registered and unregistered trademarks, designs (whether or not registered or registrable), circuit layouts, trade names, trade secrets, business names, customer names or internet domain names. Our Intellectual Property includes the Software;

**Laws** means acts, ordinances, regulations, rules, code and by-laws of the Commonwealth or any state or territory and includes the Privacy Act and the Spam Act 2003 (Cth);

**Liability** means any loss, liability, cost, payment, damages, debt or expense (including reasonable legal fees);

**Party** means either party to this Agreement;

**Personal Information** is defined in the Privacy Act;

**Personnel** means, in relation to a Party, the officers, employees, contractors, sub-contractors and agents of that Party;

**Privacy Act** means the Privacy Act 1988 (Cth);

**Licence** is defined in **clause 8.1** (*Licence*);

**Sensitive Information** is defined in the Privacy Act;

**Service** means the Matrak cloud-based materials and logistics tracking software specifically designed for the construction industry.

**Setup Service** means (if applicable) the services as described on the Site or as otherwise agreed between the parties to set up the Services.

**Setup Fees** means the setup fees set out on the Site or as otherwise agreed between the parties;

**Software** means the software used to provide any of the Services, and includes any instructions in hard copy or electronic form and any update, modification or release of any part of that software after this Agreement is entered into by the Parties;

**Subscription Fees** means the fees as set out on the Site or as otherwise agreed between the parties;

**System** means all hardware, software, networks and other IT systems used by a Party from time to time, including a network; and

**Third Party Inputs** is defined in **clause 9** (*Authorised Users*).

## 22 Interpretation

In this Agreement, unless the context otherwise requires:

- (a) the singular includes the plural and vice versa;
- (b) headings are for convenience only and do not affect interpretation;
- (c) a reference to this Agreement or any other document includes the document, all schedules and all annexures as novated, amended, supplemented, varied or replaced from time to time;
- (d) if any act which must be done under this Agreement is to be done on a day that is not a Business Day then the act must be done on or by the next Business Day;
- (e) the word "**month**" means calendar month and the word "**year**" means 12 months;
- (f) the words "**in writing**" include any communication sent by letter or email or any other form of communication capable of being read by the recipient;
- (g) a reference to any legislation or law includes subordinate legislation or law and all amendments, consolidations, replacements or re-enactments from time to time;
- (h) the word "**includes**" and other similar words mean "**includes without limitation**";
- (i) a reference to \$ or dollars refers to the currency of Australia from time to time;
- (j) a reference to any agency or body, if that agency or body ceases to exist or is reconstituted, renamed or replaced or has its powers or functions removed (defunct body), means the agency or body that performs most closely the functions of the defunct body; and
- (k) no **clause** will be interpreted to the disadvantage of a Party merely because that Party drafted the **clause** or would otherwise benefit from it.