

# DEED OF AGREEMENT

## PRONTO SOFTWARE LIMITED – END USER LICENCE

- A. The Customer has received and evaluated a proposal from an Authorised Reseller of the Licensor and the Customer has satisfied itself that the proposal meets its requirements.  
B. The Licensor has agreed to License the Customer to use certain elements of the Pronto Xi software, and requires that the Customer execute this Deed of Agreement for usage of the Licensed Program.  
C. The parties hereto have agreed upon the terms and conditions set out below.

**NOW THIS DEED OF AGREEMENT WITNESSES** as follows:-

### 1. DEFINITIONS

"Associated Documentation" means operating manuals and other printed or electronic materials including user manuals and on-line documentation which are designed to assist or supplement the understanding or use of the Licensed Program and which are published by the Licensor;

"Authorised Reseller" means a party authorised by the Licensor to resell licences of the Licensed Program;

"Commencement Date" means the date of installation of the Licensed Program on the Designated Equipment;

"Designated Equipment" means the particular server (one only) onto which the Customer installs the Licensed Program;

"Force Majeure" means an act, event, non-happening, omission, accident or act of God beyond reasonable control of either party, including strikes, civil strifes, riots, wars, threats of or preparation for war, fire explosion, storm, flood, earthquake, subsidence, epidemics or failure of plant;

"Licence" means the Licence granted by the Licensor to the Customer under this Deed of Agreement;

"Licensed Program" means the computer program(s) designated in Schedule A consisting of a set of instructions or statements in machine readable medium only and any enhancement, modification or new release of these program(s) supplied by the Licensor;

"Software Maintenance Agreement" means the agreement entered into between the Authorised Reseller and the Customer to provide maintenance services in relation to the Licensed Program;

"Specifications" means the features of the Licensed Program detailed in the Associated Documentation;

### 2. SCOPE OF AGREEMENT

2.1 The Licensor hereby grants to the Customer a perpetual (subject to clause 19), non-transferable (subject to clause 2.2) and non-exclusive Licence to use the Licensed Program and the Associated Documentation.

2.2 The Licensed Program may be transferred to another related company of the Customer for the purposes of company re-organisation, with the written consent of the Licensor which shall not be unreasonably withheld.

### 3. DURATION OF AGREEMENT

This Deed of Agreement commences on the Commencement Date and will continue until terminated by either party pursuant to this Deed of Agreement.

### 4. OPERATIONAL CHARACTERISTICS

The Licensor may alter, substitute or modify the operational characteristics of the Licensed Program from time to time but in a manner not inconsistent with the Specifications and provided that the operational characteristics of the Licensed Program are not adversely affected. The Licensed Program will continue to be subject to this Deed of Agreement notwithstanding any such alteration, substitution or modification.

### 5. DOCUMENTATION

5.1 One (1) set of the relevant Associated Documentation shall be supplied with the Licensed Program.

5.2 The Associated Documentation may be copied by the Customer for use only within the Customer's business, and shall not be used by the Customer other than to assist in the normal use of the Licensed Program. Where the Licensor provides the Customer with copies of the Associated Documentation on electronic media, the Customer shall be permitted to incorporate the contents of such documentation in procedure manuals to assist the Customer's staff in the use of the Licensed Program.

5.3 The Licensor warrants that the Associated Documentation contains information that is sufficiently detailed to provide a basic understanding of the operational characteristics of the Licensed Program. Normal business use may require additional services.

### 6. ACCESS TO LICENCE

6.1 The Licensor may provide the Customer with time restricted access to the Licensed Program or to additional software modules and/or increases in concurrent users as provided by clause 7.5, until such time as the Licensor has been advised by the Authorised Reseller that the Customer has complied with its payment obligations to the Authorised Reseller in relation to such Licensed Program, additional software modules and/or increases in concurrent users, when full access will be provided.

6.2 In the event that the Licensor is advised by the Authorised Reseller that the Customer has failed to meet any payment obligations to the Authorised Reseller in relation to the Licensed Program, the Licensor may disable or restrict access by the Customer to the Licensed Program, additional software modules and/or increases in concurrent users related to such failed payment obligation.

### 7. LICENCE

7.1 The Licensor warrants it has the right and authority to grant the Licence to the Customer.

7.2 The Licensed Program may be transferred to a server other than the Designated Equipment with the written consent of the Licensor which shall not be unreasonably withheld, providing the Customer has demonstrated to the reasonable satisfaction of the Licensor that it is no longer using the Licensed Program on the Designated Equipment.

7.3 The Customer agrees to allow the Licensor and Authorised Reseller to publicly acknowledge that the Customer utilises the Licensed Program in the operation of its business, subject to the Customer's prior approval of the form and content of such public acknowledgement.

7.4 Nothing in this Deed of Agreement shall oblige the Licensor to maintain the Licensed Program, whether by providing upgrades or enhancements or otherwise. Such maintenance shall be the subject of a separate Software Maintenance Agreement between the Customer and the Authorised Reseller. The Customer acknowledges that if it enters into a Software Maintenance Agreement with the Authorised Reseller, the Licensor will have no obligations under that agreement.

7.5 If, after the Commencement Date, the Customer orders from the Authorised Reseller any additional Pronto Xi software modules or increases in the number of concurrent users, these will automatically be included as part of the Licensed Program for the purpose of this Deed of Agreement, such inclusion to occur from the date of installation of such modules or increase in users on the Designated Equipment.

### 8. THIRD PARTY SOFTWARE

The Customer acknowledges that the obligations of the Licensor under this Deed of Agreement are strictly in relation to the Licensed Program as supplied by the Licensor, and do not extend in any way to any software supplied by any third party, including without limitation any software supplied by the Authorised Reseller, which may be used in conjunction with the Licensed Program.

### 9. COPYING

9.1 Except as provided for in clause 9.2, the Customer shall not copy or reproduce the Licensed Program by any means or in any form without the Licensor's prior written consent.

9.2 The Customer may copy the Licensed Program for the purpose of backup and security. Any such copies of the Licensed Program are subject to the terms of this Deed of Agreement.

9.3 The Licensor warrants that it is the owner of, or has the right to license, copyright in the Licensed Program and the Associated Documentation. The Customer shall ensure any copy of the Licensed Program bears notice of such ownership of copyright and a notice stipulating the Licensed Program contains information confidential to the Licensor. The Customer shall comply with any reasonable directions of the Licensor as to the form or content of such notices.

### 10. MODIFICATIONS

10.1 The Customer shall not modify or alter the Licensed Program or merge all or any part of the Licensed Program with other computer program(s).

10.2 The Licensed Program and the intellectual property rights to the Licensed Program remain the property of the Licensor even if modified or altered and this Deed of Agreement will continue to apply to that modified or altered Licensed Program.

### 11. REVERSE ENGINEERING

The Customer shall not reverse assemble or reverse compile or directly or indirectly allow or cause a third party to reverse assemble or reverse compile the whole or any part of the Licensed Program.

### 12. SECURITY

12.1 The Customer will be solely responsible for the use, supervision, management and control of the Licensed Program.

12.2 The Customer will use all reasonable endeavours to ensure that the Licensed Program is protected at all times from access, use or misuse, damage or destruction by any person not authorised by the Licensor for that purpose.

12.3 The Customer shall keep accurate records of copying and modification of the Licensed Program. The Customer shall permit the Licensor or other party authorised by the Licensor to inspect such records at any time during the Customer's normal business hours, provided the Licensor has given the Customer at least forty eight (48) hours prior written notice.

12.4 The Customer acknowledges that the Licensor may from time to time conduct an audit on the Customer's use of the Licensed Program.

12.5 The Licensor uses digital rights management technology contained in the Licensed Program ("DRMT") to protect the integrity of the Licensed Program so that its intellectual property rights, including copyright, are not misappropriated. If the Licensed Program has been used in any way not authorized by this Deed of Agreement, the Licensor may invoke the provisions of clause 19.3. The Customer acknowledges and agrees that the Licensor may automatically check the Licensed Program using DRMT. In conducting such checks, the Licensor will not retrieve any

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personally identifiable information or any other proprietary information from the Customer's Designated Equipment.

## 13. CONFIDENTIALITY

13.1 Each party to this Deed of Agreement shall treat as confidential information which comes into its possession, pursuant to or as a result of or in the performance of this Deed of Agreement, whether such information relates to the business, sales, marketing or technical operations of the other party, or the intellectual or industrial property rights of the other party, or otherwise, and may only disclose such details to those of its employees by whom it is reasonably required to enable them to carry out their obligations under this Deed of Agreement.

13.2 Neither party shall, without the written permission of the other, copy or cause to be copied or disclose such confidential information to a third party.

13.3 The foregoing obligations and commitments not to disclose confidential information shall not apply to:

(a) confidential information which is at the time of disclosure or thereafter becomes part of the public domain through no act or omission by a party to this Deed of Agreement;

(b) confidential information which was otherwise in a party's possession prior to disclosure, as shown by written records; or

(c) confidential information which is hereafter lawfully disclosed to a party by a third party which did not acquire the confidential information under an obligation of confidentiality from or through the other party.

13.4 The obligations of each party under this clause shall survive the termination of this Deed of Agreement.

## 14. EMPLOYEES AND CONTRACTORS

Subject to the laws in force for the time being relating to the validity of restrictive covenants, neither party shall solicit for employment, whether directly or indirectly through an associated or subsidiary company or otherwise, any person who is employed by the other party, during the term of this Deed of Agreement.

## 15. INTELLECTUAL PROPERTY RIGHTS

15.1 The Licensor warrants that the Licensed Program does not infringe the industrial or intellectual property rights of any third party.

15.2 Subject to clauses 15.4 and 15.5, the Licensor shall indemnify the Customer and hold the Customer harmless against any costs, losses, expenses or liability arising out of claims brought by a third party against the Customer for any infringement or any alleged infringement of any industrial and intellectual property rights arising from the use by the Customer of the Licensed Program.

15.3 The indemnity referred to in clause 15.2 shall be granted whether or not legal proceedings are instituted and, if such proceedings are instituted, irrespective of the means, manner or nature of any settlement, compromise or determination.

15.4 The Licensor will not indemnify the Customer as provided in clause 15.2 unless the Customer:

(a) notifies the Licensor in writing as soon as practicable after it becomes aware of any infringement, suspected infringement or alleged infringement;

(b) gives the Licensor the option to conduct the defence of such a claim at its own expense, including negotiations for settlement or compromise prior to the institution of legal proceedings;

(c) provides the Licensor with reasonable assistance in conducting the defence of such a claim at the Licensor's own expense;

(d) permits the Licensor to modify, alter or substitute the Licensed Program, at the Licensor's own expense, to render it non-infringing provided that the Licensed Program as so modified, altered or substituted satisfies the Specifications; and

(e) authorises the Licensor to procure for the Customer the authority to continue the use and possession of the Licensed Program at the Licensor's own expense.

15.5 The Licensor will not indemnify the Customer if such infringement, suspected infringement or alleged infringement arises from modification or alteration of the Licensed Program by any person other than the Licensor, if the unmodified version of the Licensed Program as supplied by the Licensor would not give rise to such an infringement.

15.6 The Customer shall indemnify and hold harmless the Licensor against any loss, costs, expenses, demands or liability, whether direct or indirect, arising out of a claim by a third party alleging such infringement if:

(a) the claim arises from an event specified in clause 15.5;

(b) the ability of the Licensor to defend the claim has been prejudiced by the failure of the Customer to comply with the provisos in clause 15.4; or

(c) information provided to the Licensor by the Customer to enable the Licensor to enhance or develop the Licensed Program encroaches upon any industrial or intellectual property rights of a third party.

15.7 Subject to clauses 15.4 and 15.5, in the event that the Licensed Program infringes the industrial or intellectual property rights of a third party the Licensor shall modify, alter or substitute the Licensed Program to render it non-infringing but so that it still satisfies the Specifications, or shall procure for the Customer the authority to continue the use and possession of the Licensed Program, at the Licensor's own expense.

## 16. WARRANTIES

16.1 The Licensor warrants that the Licensed Program will satisfy the Specifications.

16.2 The Licensor does not warrant that:

(a) the Licensed Program is error free, however the Licensor does warrant that it shall use its best endeavours to ensure the Licensed Program is error free;

(b) the use of the Licensed Program shall be uninterrupted, however the Licensor does warrant that any such interruption shall not be unreasonable;

(c) the Licensed Program shall meet the Customer's total requirements; or

(d) the Licensed Program shall provide any function not in the Specifications.

16.3 The Licensor shall either rectify or replace all or any parts of the Licensed Program at its own expense, which it finds to be defective provided that such defect has been notified in writing by the Customer at any time while the Customer has a current Software Maintenance Agreement in relation to the Licensed Program.

16.4 The Licensor will not be liable to remedy any defect in the Licensed Program if:

(a) the defect is the result of alterations or modifications to the Licensed Program except alterations or modifications made by the Licensor;

(b) the defect is the result of use of the Licensed Program in combination with equipment, programs or services not authorised in writing by the Licensor;

(c) the defect is the result of use of the Licensed Program other than in the operating environment recommended by the Licensor in the Associated Documentation or other than in accordance with the Licensor's directions; or

(d) the defect is the result of failure of the Customer to meet its obligations under this Deed of Agreement or any other agreement relating to the Licensed Program.

## 17. LIABILITY OF LICENSOR

17.1 Except as expressly provided to the contrary in this Deed of Agreement, all terms and conditions, warranties, undertakings, inducements or representations whether express, implied or otherwise relating in any way to the Licensed Program or to this Deed of Agreement are excluded.

17.2 Except for the indemnity given in clause 15.2, or as provided by law, the total liability of the Licensor to the Customer in respect of any loss or damage however caused, which may be suffered or incurred or which may arise directly or indirectly in respect of the Licensed Program or the failure or omission on the part of the Licensor to comply with its obligations under this Deed of Agreement, shall be limited to the amount paid by the Customer to an Authorised Reseller for licence fees for the Licensed Program. The Licensor will have no liability for amounts related to consequential loss or damage.

17.3 Where any Act of Parliament implies in this Deed of Agreement any term, condition or warranty, and that Act voids or prohibits provisions in a contract excluding or modifying the application of an exercise of, or liability under such term, condition or warranty, such term, condition or warranty shall be deemed to be included in this Deed of Agreement. However, the liability of the Licensor for any breach of such term, condition or warranty shall be limited, at the option of the Licensor, having due regard to the best interests of the Customer and the need for all haste in resolving such issues, to any one or more of the following:

(a) if the breach relates to goods;

(i) the replacement of the goods or the supply of equivalent goods;

(ii) the repair of such goods;

(iii) the payment of the cost of replacing the goods or of acquiring equivalent goods; or

(iv) the payment of the cost of having the goods repaired; and

(b) if the breach relates to services:

(i) the supplying of the services again; or

(ii) the payment of the cost of having the services supplied again.

17.4 Where the Licensor has been provided with details of the Customer's requirements, including through the use of a request for proposal or otherwise, the Customer acknowledges that responses by the Licensor to such requirements have been based on the Licensor's reasonable interpretation of those requirements, and that the Licensor reserves the right to amend such responses should the Licensor become aware of additional information which changes or clarifies the Customer's requirements.

## 18. FORCE MAJEURE

18.1 Neither party shall be liable for any delay or failure to perform its obligations pursuant to this Deed of Agreement, if such failure or delay is due to Force Majeure.

18.2 The party to this Deed of Agreement seeking to rely on a circumstance of Force Majeure shall immediately notify the other party of any anticipated delay due to Force Majeure. The performance of the party's obligations under this Deed of Agreement will be suspended for the period of the delay due to Force Majeure.

18.3 If the period of the delay due to Force Majeure exceeds sixty (60) days, the party for whose benefit an obligation remains unperformed may immediately terminate this Deed of Agreement on providing notice to the other party.

## 19. TERMINATION

19.1 Without limiting the generality of any other clause in this Deed of Agreement, the Customer may terminate this Deed of Agreement by giving fourteen (14) days notice in writing if:

(a) the Licensor is in breach of any material clause of this Deed of Agreement and such breach is not remedied within thirty (30) days of written notice by the Customer; or

(b) the Licensor ceases conducting its business or becomes subject to any form of insolvency administration.

19.2 If notice is given to the Licensor pursuant to clause 19.1, the Customer may, in addition to terminating this Deed of Agreement:

(a) be regarded as discharged from any further obligations under this Deed of Agreement, apart from confidentiality provisions under clause 13; and

(b) pursue any additional or alternative remedies provided by law.

19.3 Without limiting the generality of any other clause in this Deed of Agreement, the Licensor may terminate this Deed of Agreement by giving fourteen (14) days notice in writing if the Customer breaches any material clause of this Deed of

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Agreement, and such breach is not remedied within thirty (30) days of written notice by the Licensor.

19.4 If notice is given to the Customer pursuant to clause 19.3, the Licensor may, in addition to terminating this Deed of Agreement:

- (a) retain any moneys paid in relation to this Deed of Agreement;
- (b) be regarded as discharged from any further obligations under this Deed of Agreement, apart from confidentiality requirements under clause 13; and
- (c) pursue any additional or alternative remedies provided by law.

19.5 The Customer may terminate this Deed of Agreement upon giving at least thirty (30) days written notice to the Licensor.

19.6 Upon termination of this Deed of Agreement, the Customer shall immediately on request furnish the Licensor with written certification that all copies of the Licensed Program and of the Associated Documentation have been returned to the Licensor.

## 20. ASSIGNMENT

The Licensor may assign this Deed of Agreement, and the rights and obligations in this Deed of Agreement, upon written notice to the Customer. Except as provided in clause 2.2, the Customer will have no other rights to assign this Deed of Agreement.

## 21. SUB-CONTRACTS

The Licensor shall not sub-contract or otherwise arrange for another party to perform or to discharge any of its obligations under this Deed of Agreement without the prior written consent of the Customer, which consent shall not be unreasonably withheld or delayed.

## 22. WAIVER

22.1 No right or obligation under this Deed of Agreement shall be waived except by notice in writing signed by each party.

22.2 A waiver by either party pursuant to clause 22.1 will not prejudice that party's rights in respect of any subsequent breach of this Deed of Agreement by the other party.

22.3 Subject to clause 22.1, any failure by either party to enforce any of the provisions of this Deed of Agreement, or any forbearance, delay or indulgence granted by one party to the other, will not be construed as a waiver of that party's rights pursuant to this Deed of Agreement.

## 23. ENTIRE AGREEMENT

This Deed of Agreement constitutes the entire agreement between the parties hereto with respect to the subject matter hereof and shall supersede all previous negotiations, commitments, and writing. It may not be released, discharged or modified except by an instrument in writing signed by a duly authorised representative of each of the parties.

## 24. HEADINGS

Headings used in this Deed of Agreement are for convenience and ease of reference only, are not part of this Deed of Agreement and shall not be relevant to or affect the meaning or interpretation of this Deed of Agreement.

## 25. SEVERABILITY

If any provision of this Deed of Agreement is held invalid, unenforceable or illegal for any reason, this Deed of Agreement shall remain otherwise in full force apart from the said provision which shall be deemed deleted.

## 26. GOVERNING LAW

This Deed of Agreement shall be construed and governed in accordance with the laws of the state of Victoria, Australia and the parties agree to submit to the jurisdiction of the courts of the state of Victoria, Australia.

## 27. NOTICES

27.1 All notices under this Deed of Agreement may be delivered by hand, mail or facsimile to the addresses hereinbefore shown, or to such other addresses as the parties may nominate from time to time for the purposes of this clause.

27.2 Notice will be deemed given:

- (a) in the case of hand delivery or registered mail, upon written acknowledgment or receipt by an officer or other duly authorised employee, agent or representative of the receiving party;
- (b) in the case of ordinary mail, on the second business day after posting;
- (c) in the case of facsimile, upon completion of transmission as verified by a transmission record.

## 28. DISPUTES

Any dispute arising in connection with this Agreement which cannot be settled by negotiation between the parties or their representatives may be submitted to arbitration in accordance with, and subject to, the IAMA (Institute of Arbitrators & Mediators, Australia) Arbitration Rules. During such arbitration, both parties may be represented by a duly qualified legal practitioner.

## 29. RIGHTS

Any express statement of a right of either party under this Deed of Agreement is without prejudice to any other right of that party expressly stated in this Deed of Agreement or arising at law.

## 30. PRECEDENCE

In the event of any conflict between the terms of this Deed of Agreement and terms contained in Special Conditions in Schedule B, the terms of the Special Conditions shall take precedence.

## 31. INSURANCE

31.1 For the term of this Deed of Agreement the Licensor will be insured for ten million Australian dollars (A\$10M) in relation to any potential liability, loss or

damages arising as a result of a breach of this Deed of Agreement and one million Australian dollars (A\$1M) in relation to any potential liability, loss or damages arising as a result of a claim that the Licensed Program infringes the intellectual property rights of any third party.

31.2 The Licensor must produce evidence on demand to the reasonable satisfaction of the Customer of the insurance affected and maintained in accordance with this clause.

