

# SURVEY DYNAMIX TERMS OF USE AGREEMENT

## 1. AGREEMENT FORMATION

These Terms of Use and any other terms and polices referred to in these Terms of Use, (**Agreement**) form the Agreement for the provision of the Services between Contact Dynamix Pty Ltd (ACN 165 445 698) (**Provider**) and the user (**Client**), collectively referred to as the parties or each a party.

The Agreement will become legally binding on the parties when:

- Client acknowledges acceptance of the Agreement electronically via the Survey Dynamix web interface; and
- Provider begins to provide the Services,

(**Commencement Date**).

## 2. TERM OF THE AGREEMENT

Provider will provide the Services to Client from the Commencement Date subject to this Agreement for the Term.

After the Initial Term, this Agreement automatically renews for further Renewal Term/s, unless terminated in accordance with this Agreement, or Client or Provider provides written notice of termination of the Agreement to the other party no less than 7 days before the end of the Initial Term or any Renewal Term. Termination will take effect at the end of the Initial Term or then current Renewal Term, as applicable.

## 3. WHEN AMENDMENTS TAKE EFFECT

Provider may vary the Agreement, including the fees, at its discretion by providing written notice to Client. Any variation will take effect from the commencement of a new Renewal Term. Where Client does not accept such variations it must immediately notify Provider. Such notice of non-acceptance will terminate any automatic Renewal Term of the Agreement, and the Agreement will terminate at the end of the Initial Term, or current Renewal Term, as applicable.

## 4. LICENCE

Provider grants to Client a non-transferrable, non-exclusive and revocable licence to access and use the Services for the Term, subject to the terms of the Agreement.

## **5. RESPONSIBILITIES FOR SETUP AND INSTALLATION**

Client will be responsible for all aspects of setting up the Services except for any inclusions outlined in an Order, as applicable, such as:

- Provision of training services to Client
- Integration of the Software with third party systems such as Genesys Cloud

## **6. PROVISION OF INFORMATION BY CLIENT**

Where an Order specifies that Provider is to provide set-up Services, Client will provide any information reasonably requested by Provider for the purpose of setting up and operating the Services for Client. Client warrants that:

- all of the information that it provides to Provider is accurate and complete in all respects; and
- it will inform Provider whenever any such information changes.

## **7. TRAINING SERVICES FROM PROVIDER**

If Client requires training services (in addition to those agreed and included in the Order), Client may be charged for those training services under a separate Order.

## **8. SERVICES NOT LOCALLY AVAILABLE**

Client agrees and accepts that the Software is hosted by Provider and will only be accessible using the Internet (or other connection to Provider's servers) and an instance of the Software will not be provided or be available "locally" from Client's own servers.

## **9. SERVICES ARRIVE IN PARTS**

Provider may at its sole and absolute discretion provide and charge for the Software in various modules, packages and combinations from which Client may choose as specified in an Order.

## **10. PROVIDER CAN CHANGE SERVICES AT DISCRETION**

Provider reserves the right to upgrade, maintain, tune, backup, amend, add to or remove features from, redesign, improve or otherwise alter the Services at its sole and absolute discretion.

## 11. CLIENT HAS NO BACK END ACCESS

Client agrees that the Services are managed and supported exclusively by Provider and that no “back-end” access to the Software is available to Client unless expressly agreed in writing between the parties.

## 12. UNINTENTIONAL INACCESSIBILITY

From time to time, without notice, access to all or part of the Services may be disrupted or limited. During such an interruption, Provider will use its reasonable endeavours to restore access to the Services as soon as practicable.

## 13. INTENTIONAL INACCESSIBILITY

Provider reserves the right, with notice, to make some or all of the Services inaccessible from time to time as is required for upgrades, maintenance and updates. In the event of unforeseen circumstances, urgent system remediation may require an interruption to services where this notice period cannot be honoured.

## 14. PARTS OF THE SERVICES CONTROLLED BY THIRD PARTIES

Client agrees and accepts that the Services are operated from servers owned and controlled by a third party. As such, Client acknowledges that certain functions are out of the control of Provider, including:

- web servers, storage and email delivery, which is hosted by Amazon Web Services (AWS)
- voice and SMS services, which are provided by Twilio
- voice recording transcription which is provided by Google Cloud Speech API
- any software the Client chooses to integrate our Services with,

and Provider will not be liable for any loss or damage or loss of functionality caused by any failure of such third parties.

## 15. PHONE NUMBER REGULATORY REQUIREMENTS

Local country regulations must be adhered to when using phone numbers. This requirement means in some cases you must provide adequate identity documentation to the carriers or local regulator. Failure to provide that information creates a risk of disruption of service. For more detailed information about phone number regulatory requirements, please refer to <https://www.twilio.com/docs/phone-numbers/regulatory/phone-numbers-regulatory-requirements-customers>

- This information will have to be provided to Provider and Provider will handle it on your behalf.
- You can learn more about phone number regulations by visiting <https://www.twilio.com/docs/phone-numbers/regulatory/faq> and be kept up-to-date on changes to local requirements via phone number regulatory changelog - <https://www.twilio.com/docs/phone-numbers/regulatory/changelog>.

## **16. DELIVERY OF SUPPORT AND MAINTENANCE**

Provider will provide support in respect of the Services via email and telephone only, as determined at the sole and absolute discretion of Provider.

## **17. ADDITIONAL WORK**

- If Client requires additional Services outside the scope of the Agreement, Provider may charge Client for it under a separate Order.
- If Provider determines at its sole and absolute discretion that the requirement for any work outside the scope of the Services is caused by the fault or error of Provider, Client shall not pay for that additional work.

Client should engage Provider directly or through a reseller partner depending on the Order in place for such out of scope additional Services.

## **18. CALCULATION OF FEES FOR THE SERVICES**

Client will pay Provider directly or indirectly (through a Partner or Marketplace Partner) for the Services in accordance with the applicable Order.

## **19. TIMING FOR PAYMENT OF THE FEES**

Fees for Services are payable when they are due, based on the Order.

## **20. FEES EXCLUSIVE OF GST**

All fees quoted for the Services by Provider are exclusive of GST unless expressly stated otherwise in the Order. Client will be responsible for paying any taxes or duties, including GST where applicable, that apply to the provision of the Services.

## **21. FAILURE TO PAY**

If Client fails to pay Provider or Partner or Marketplace Partner any amount under the Agreement on the due date for payment, Provider or Partner or Marketplace Partner may immediately do any or all of the following, without any liability, until all overdue fees are paid:

- charge Client interest on the overdue amount at 5% above the Reserve Bank of Australia cash rate per annum, calculated daily and compounding monthly;
- suspend Client's use of any or all of the Services;
- terminate the Agreement without any obligation to refund Client any money in respect of the cancellation, even if the contractual term of the Agreement has not expired;
- initiate proceedings against Client to recover the overdue amount (despite any dispute resolution clause in the Agreement); and
- recover all costs in relation to any action taken against Client to recover overdue amounts, including but not limited to legal costs and outlays on a full indemnity basis.

## 22. AUTHORISED USERS

- Client may designate Authorised Users in accordance with the mechanism at <https://surveydynamix.com/users> or its regional its subdomains.
- Client warrants that all of the information provided to create an Authorised Account (whether that information is provided by an Authorised User or Client) is accurate and complete in all respects, and will update Provider whenever any of this information changes.
- Client is responsible for ensuring that Authorised Users comply with the Agreement to the fullest extent the Agreement applies to the use of Authorised Accounts.
- Each Authorised User will be asked to agree to these terms and the Privacy Policy on the first access to the Services and each time changes require an additional acknowledgement, in which cases the clauses in respect to the payment of fees will not be applicable to Authorised Users.

## 23. CLIENT UNDERTAKINGS IN RELATION TO SERVICES

Client undertakes:

- to use the Services only as they are designed to be used;
- not to use the Services in any way which could interfere with or damage Provider's network, any other operator's network, or another Client's enjoyment of the Services;
- not to use the Services for unsolicited or unreasonably frequent or voluminous communications;
- not to publish or otherwise communicate any review of, or information about, the Services to any third party without the prior written consent of Provider, except as specifically provided for in an agreement with Provider;
- not to disable or circumvent any protection or disabling mechanism related to the Services;
- not to install or store any software applications, code or scripts on or through the Services unless it first obtains the written permission of Provider;
- not to use the Services to bully, harass, degrade, insult or otherwise demean any person (as determined by Provider) or to partake in offensive or indecent conduct; and

- not to store, access or operate any data, code or software on, or in connection with, the Services that could be categorised or identified as:
- a computer virus or malicious code;
- pornographic material; or
- “warez” or associated with “warez”.

Client will be responsible for the breach of any undertaking or warranty in this clause regardless of whether that breach is caused by a security breach of any kind.

## 24. CLIENT WILL USE SERVICES IN ACCORDANCE WITH THE LAW

Client undertakes:

- to ensure that all electronic communications sent through or in connection with the Services feature an unsubscribe facility, and that they comply with the requirements of the *SPAM Act 2003* (Cth) (or other such applicable foreign law) when sending electronic communications through the Services; and
- not to store or access any Data on the Services if such access or storage would:
- breach any Intellectual Property Right;
- breach the *Privacy Act 1988* (Cth), or if the Client processes data about EU residents, the General Data Protection Regulation (GDPR), or if the Client processes data UK residents, the *Data Protection Act*; or
- breach any other law or applicable code (including any common law, statute, delegated legislation, rule or ordinance of the Commonwealth, or a State or Territory).
- to obtain consent from any individual whom it collects Personal Information from through the Services.
- to notify Provider if an individual requests Client to remove that individual's Personal Information from the Services or Software.

## 25. PROVIDER RIGHT TO SUSPEND

Provider reserves the right to:

- limit or suspend Client's access to the Services; and
  - remove Data or content uploaded to the Services by Client,
- if Client breaches any of its obligations or undertakings in the Agreement; and
- remove Personal Information from the Services or Software about an individual if requested by that individual.

## 26. TECHNICAL INFORMATION

- All Technical Information is for informational purposes only, and is to be used or relied on at Client's own risk.

- Provider makes no warranty or representations as to the accuracy of the Technical Information.
- There may be technical or administrative errors in the Technical Information.
- Provider reserves the right to correct any errors in the Technical Information and on the Services interface without any notice to Client.

## **27. THIRD PARTY CONTENT**

The inclusion of any third party link does not imply any endorsement or recommendation of a linked website by Provider. Provider will not be responsible for any third party advertising content displayed on the interface of the Services. Clicking any link on the Services to a third party website, or decision to accept any third party offer, is entirely at Client's own risk.

## **28. PROVIDER SECURITY RESPONSIBILITIES**

Provider will take reasonable steps to ensure that the Data in the Services is secure from unauthorised access consistent with generally accepted industry standards in Provider's industry.

## **29. CLIENT SECURITY RESPONSIBILITIES**

Client is solely responsible for:

- keeping any usernames and passwords associated with its account for the Services secure; and
- the use of its account, irrespective of who is using it, even if it is used without Client's permission.

## **30. DATA STORAGE WITH THIRD PARTY**

- Provider may subcontract the storage of the Data (except Personal Information) to a third party (or multiple third parties) without notification to or consent from Client.
- When Data is Personal Information, Provider may subcontract the storage of that Data to a third party (or multiple third parties) without consent from Client but will notify Client of such subcontracting arrangement where required by law.

## **31. BACKUP**

- Provider makes no warranties or guarantees, implied or express, in respect of the retention of or continued accessibility of any backups in connection with the Services.
- Client acknowledges that Provider has recommended Client take reasonable steps to back up its Data separately from the Services.

- Provider will put in place and manage backup procedures to backup the Data including backing up all client data twice daily until the end of the Agreement. Backups are retained on a 2 week rolling period.

## 32. DATA MANAGEMENT AFTER TERMINATION

- Provider will delete any Data 3 months after the Agreement is terminated (**Retention Period**).
- Client may obtain the Data within the Retention Period if it bears the costs of the hardware and incidental costs reasonably required by Provider to effect a transfer of the Data to Client (**Return Costs**).
- Provider will not be obliged to return Data to Client until Client has paid the Return Costs in advance to Provider, as well as any outstanding payments owed to Provider.
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## 33. CONFIDENTIALITY

- A party will not, without the prior written approval of the other party, disclose the other party's Confidential Information.
- A party will not be in breach of this confidentiality clause in circumstances where it is legally compelled to disclose the other party's Confidential Information.
- Notwithstanding any other provision of this clause, a party may disclose the terms of the Agreement (other than Confidential Information of a technical nature) to its related companies, solicitors, auditors, insurers and accountants.
- Each party will take all reasonable steps to ensure that its employees and agents, and any sub-contractors engaged for the purposes of the Agreement, do not make public or disclose the other party's Confidential Information.

## 34. PRIVACY POLICY

Client agrees and consents to Provider's use of Personal Information in accordance with Provider's Privacy Policy, available at [https://surveydynamix.com/privacy\\_policy](https://surveydynamix.com/privacy_policy).

## 35. DATA DISCLOSURE

Provider may access, review or copy on its own account, or disclose and transfer to any third party, any Data or Personal Information, to the extent required:

- to permit third party service providers to perform their services in connection with Provider's business;
- to interact with Provider's related bodies corporate;
- to effect a sale (or proposed sale) of all or part of Provider's business;
- to satisfy any contractual obligation that Provider has to any third party;
- where Client has overdue fees, to debt collection agencies or its legal advisers to recover the amount due;
- for Provider to ensure that Client is not in breach of the Agreement; and

- as required or permitted by any law that Provider and its related bodies corporate may be subject to.

## **36. NO PRIVACY WARRANTY**

Provider makes no warranty as to whether Client's use of the Services will comply with Client's obligations under any applicable privacy or data protection law. It is Client's responsibility to determine whether the Services are appropriate for Client's circumstances.

## **37. CHANGES IN RESPONSE TO PRIVACY LAW**

Provider may make any changes to the Services that it considers, at its sole and absolute discretion, to be beneficial for compliance with:

- any applicable privacy legislation or code; or
- any guidance issued by the Office of the Australian Information Commissioner,

and will immediately notify Client of any such change.

## **38. CLIENT'S NOTIFICATION OBLIGATIONS**

Client undertakes that when it stores any Personal Information on the Services, it will notify the relevant individuals that such information may be accessible by Provider and is handled in accordance with Provider's privacy policy.

## **39. OWNERSHIP OF DATA**

Client shall at all times during the course of the Agreement be the exclusive owner of the Data.

## **40. LICENSE OVER DATA**

The Client grants to the Provider a limited licence to copy, transmit, store and back-up or otherwise access, use or make reference to any Intellectual Property Rights in the Data:

- to supply the Services including to enable the Client and any Authorised Users to access and use the Services;
- for diagnostic purposes;
- to test, enhance and otherwise modify the Services whether requested by the Client or not;
- to develop other Services; and
- as reasonably required for the performance of the Provider's obligations under this Agreement.

Notwithstanding the above, when Data is Personal Information, the rights associated with that Data can be terminated at the request of the individual.

## **41. PROVIDER INTELLECTUAL PROPERTY**

Provider owns the Product IP, and in any circumstances where it does not automatically have such ownership, Client will transfer it to Provider and will do all things necessary to ensure that full legal ownership of the Product IP passes to Provider.

## **42. UNDERTAKINGS REGARDING INTELLECTUAL PROPERTY**

Client warrants that it and its Authorised Users will not do any of the following, or permit any person over whom it has effective control to do so:

- copy or reproduce, or create an adaptation or translation of, all or part of the Product IP in any way, except to the extent that reproduction occurs automatically through the ordinary use of the Services in accordance with the Agreement;
- incorporate all or part of the Product IP in any other webpage, site, application or other digital or non-digital format;
- (subject to other rights explicitly granted under the Agreement) sell, license, sublicense, lease, rent, distribute, disclose, permit access to, or transfer to any third party, whether for profit or without charge, any portion of the Services on any medium; or
- directly or indirectly copy, recreate, decompile, reverse engineer or otherwise obtain, modify or use any source or object code, architecture, or algorithms contained in the Services or any documentation associated with them.

## **43. EXCLUSION OF EXPRESS WARRANTIES**

Provider makes no warranties or guarantees:

- that the Services will be accessible at all times, uninterrupted or error free;
- that any of the Software is without bugs or viruses;
- that any of the Technical Information is without error or inaccuracy;
- that the Services are immune to unauthorised access or security breach; and
- in respect of the retention of, or continued accessibility of, any Data.

## **44. LIMITATIONS, EXCLUSIONS AND INDEMNITIES SUBJECT TO THE LAW**

All limitations, exclusions and indemnities in the Agreement are subject to Non Excludable Conditions to the extent of any inconsistency, and apply to the fullest extent permissible by the law.

## 45. EXCLUSION OF IMPLIED CONDITIONS

To the fullest extent available under the law, Provider excludes all implied guarantees, conditions and warranties from the Agreement and the Services, except any Non Excludable Condition.

## 46. LIMITATION OF LIABILITY

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

- (a) Provider's maximum aggregate liability arising from or in connection with this Agreement (including the Services or the subject matter of this Agreement) arising in contract, tort, in equity or under statute will be limited to, and must not exceed in any Contract Year, in Provider's sole discretion:
  - the total amount of fees paid by Client to Provider in the current Contract Year;
  - or Provider resupplying the Service; and
- (b) Neither party is liable to the other party for any Consequential Loss suffered or incurred by that party in connection with this Agreement or the Services. This limitation applies whether such Consequential Loss arises in contract, tort (including the Indemnifying Party's negligence), or under statute.
- (c) Provider excludes all liability to Client for any Costs, including Consequential Loss, suffered or incurred directly or indirectly by Client in connection with:
  - (1) the Services being inaccessible to Client for any reason;
  - (2) incorrect or corrupt data, lost data, or any data inputs or outputs of the Services;
  - (3) computer virus, trojan and other malware in connection with the Services;
  - (4) any breach of security that results in unauthorised access to or corruption of data;
  - (5) any unauthorised activity by any third party in relation to the Services;
  - (6) failure of any third party component including, without limitation, hardware failure, network failure, or power failure;
  - (7) failure of any third party software including, without limitation, the operating system and any other software;
  - (8) Client's use of or reliance on the Services for a purpose other than the business purposes of Client or the reasonably expected purpose of the Services;
  - (9) the use of or reliance on the Services by persons other than Client or authorised users of the Services;
  - (10) Client or any authorised user's infringement of any third party Intellectual Property Rights by use of the Services;

- (11) Client's use of or reliance on the Services where the Services have not been updated to the most recent version of the Services with all updates, upgrades, fixes and other improvements as released by Client as of that date;
- (12) failure of Client to maintain hardware sufficient to meet minimum hardware requirements for the Services; or
- (13) any loss or damage to property arising directly or indirectly from the Client's use of the Services.

## 47. OPERATION OF COMPULSORY CONDITIONS

Where a Non-Excludable Condition is deemed to apply, to the fullest extent possible under the law, to the following will apply:

*Our services come with guarantees that cannot be excluded under the Australian Consumer Law. For major failures with the service, you are entitled:*

- *to cancel your service contract with us; and*
- *to a refund for the unused portion, or to compensation for its reduced value*

*You are also entitled to be compensated for any other reasonably foreseeable loss or damage.*

*If the failure does not amount to a major failure, you are entitled to have problems with the service rectified in a reasonable time and, if this is not done, to cancel your contract and obtain a refund for the unused portion of the contract.*

## 48. GENERAL INDEMNITY

Client indemnifies the Indemnified against all Costs suffered or incurred by the Indemnified, however caused, arising wholly or partially, directly or indirectly, in connection with the Client's use of the Services.

## 49. SPECIFIC INDEMNITIES

Without limiting the generality of the "General indemnity" in the Agreement, the Client indemnifies the Indemnified against any Costs arising directly or indirectly from:

- Client's breach of the Agreement;
- Client or any authorised user's infringement of any third party Intellectual Property Rights while using the Services;
- Client's failure to fulfil any of its obligations in the "Privacy" clause of the Agreement;

- Client's breach of the *Privacy Act 1988* (Cth) or if the Client processes data about EU residents, the General Data Protection Regulation (GDPR), or if the Client processes data about UK residents, the *Data Protection Act*, or any similar foreign law;
- a breach of the *SPAM Act 2003* (Cth) or any similar foreign law;
- any harm to or claim by a third party arising directly or indirectly from Client's use of the Services;
- any negligent or unlawful act or omission by Client in connection with the Services;
- Provider's or a third party's reliance on a misleading representation made by a Client;
- a contract in force between Client and a third party connected with the Services;
- Provider's enforcement of its rights in connection with the Agreement, including legal costs on a full indemnity basis;
- Client storing Data on the Service.

## 50. CONDITIONS OF INDEMNITY

- The Indemnified may make a claim under indemnities in the Agreement in relation to a Cost before having incurred the Cost, or before making a payment in relation to the Cost.
- The indemnities in the Agreement shall be in addition to any damages for breach of contract to which Provider may be entitled. Nothing in the indemnities in the Agreement will be construed so as to prevent Provider from claiming damages in relation to Client's breach of any term of the Agreement.

## 51. PROVIDER TERMINATION FOR CONVENIENCE

- Provider reserves the right to withdraw from or cancel the Agreement at any time without giving reasons, by providing Client notice in writing no less than 2 weeks before the cancellation is to take effect.
- If Provider exercises its right to terminate without giving reasons in accordance with the Agreement, Client will receive a pro-rated refund of money paid for Services yet to be performed for the remainder of the Agreement.

## 52. TERMINATION ON INSOLVENCY

Provider may immediately terminate the Agreement by notice to Client if Client suffers an Insolvency Event to the extent permitted by law, or undergoes a change of control.

## 53. TERMINATION FOR BREACH

If a party breaches any provision of the Agreement (Breaching Party), the other party may give written notice requiring the Breaching Party to remedy the breach. If the Breaching Party does not remedy the breach within 14 days of receiving such a notice, the other party may terminate the Agreement.

If Provider exercises its right to terminate for unremedied breach by Client in accordance with the Agreement, Provider will not be obliged to refund any money to Client.

## 54. DISPUTE RESOLUTION PROCEDURE

### Initiation of Dispute

If there is a Dispute, then either party may notify the other with a Resolution Notice, which:

- includes, or is accompanied by, full and detailed particulars of the Dispute; and
- is delivered within 14 days of the circumstances giving rise to the Dispute first occurring.

### Meeting to resolve Dispute

Within 14 days after a Resolution Notice is given, a representative (with the authority to resolve the dispute) of Client and Provider must meet and seek to resolve the Dispute.

### Binding arbitration

If the Dispute is not settled within 30 days of the parties first meeting to resolve the Dispute, it will be submitted to final and binding arbitration in accordance with, and subject to, *The Australian Centre for International Commercial Arbitration (ACICA) Expedited Arbitration Rules*.

The seat of arbitration shall be Brisbane, Australia. The language of the arbitration shall be English.**Costs for mediation / arbitration process**

When the Dispute is submitted to arbitration, each party will pay its own Costs for the proceedings. The parties will share equally the Costs payable to *ACICA*.

### Court proceedings not to be brought before process

Subject to this section, a party must not bring court proceedings in respect of any Dispute unless it first complies with the requirements of the dispute resolution mechanism outlined in this clause.

### Parties can seek urgent injunctive relief

Nothing in the Agreement prevents either party from instituting court proceedings to seek urgent injunctive, interlocutory or declaratory relief in respect of a Dispute.

### Obligations and rights remain current during dispute

Despite the existence of a Dispute, the parties must continue to perform their respective obligations under the Agreement and any other agreement between the parties.

### Dispute resolution provisions subject to non-excludable conditions

The obligations set out in the Agreement in relation to dispute resolution are available to the fullest extent available under the law, and subject to the Non Excludable Conditions to the extent of any inconsistency.

## 55. DISPUTE RESOLUTION PROCEDURE NOT TO APPLY TO DEBT ENFORCEMENT

The dispute resolution procedure set out in this clause will not apply in any instance where Provider seeks to enforce a debt in connection with the Agreement.

## **56. UNFORESEEN EVENTS**

- The obligations of a party under the Agreement is suspended to the extent that an Unforeseen Event prevents it from performing its obligations under this Agreement for so long as the Unforeseen Event continues. The occurrence of an Unforeseen Event does not suspend the obligation of Client to pay any money under the Agreement.
- A party claiming an Unforeseen Event must use their best endeavours to remove, overcome or minimise the effects of that Unforeseen Event as quickly as possible.
- If an Unforeseen Event continues for more than 60 days, either party may terminate this Agreement by notice in writing to the other party of not less than 14 days.

## **57. COMMUNICATIONS**

- Communications must be in writing.
- Either party may serve any Communication on the other party by sending it to that party's email address. A Communication by email will be taken to have been received by the addressee 24 hours after the email was sent, unless the party sending the email knows or reasonably ought to suspect that the email was not delivered to the addressee's domain specified in the email address or receives an undelivered notice.

## **58. ENTIRE AGREEMENT**

The Agreement represents the entire agreement between Provider and Client in relation to the Services and supersedes all previous discussions, communications, negotiations, understandings, representations, warranties, commitments and agreements, in respect of its subject matter.

## **59. RELIANCE**

Neither party has entered into the Agreement in reliance on or as a result of any representation, promise, statement, conduct or inducement by the other unless it is set out in the Agreement.

## **60. DUTIES AND TAXES**

Client will pay all stamp duties and any related taxes, fines and penalties in respect of the Agreement and the Services.

## **61. USE OF CLIENT LOGO**

Provider may use Client's logos and trade marks in any advertising or marketing material to denote that Client is or has been a client of Provider without the consent of Client.

## **62. ASSIGNMENT AND NOVATION**

- Client cannot assign, novate or otherwise transfer any of its rights or obligations under the Agreement without the prior written consent of Provider.
- Provider may assign, novate or otherwise transfer any of its rights or obligations under any Agreement to a third party without notice to, or the prior consent of, Client, but if Provider requires, Client will sign any documents to give effect to an assignment, novation or transfer by Provider under this clause.

## **63. ELECTRONIC EXECUTION**

The parties agree that acknowledgement by the Client through the web interface, when prompted, means that both parties have entered into this Agreement.

## **64. COUNTERPARTS**

The Agreement may be executed with any number of counterparts and by the parties on separate counterparts.

## **65. GOVERNING LAW**

The laws of the state of Queensland Australia govern the Agreement and each party submits to the non-exclusive jurisdiction of the courts in that jurisdiction and any courts entitled to hear appeals from those courts and waives any right to object to proceedings being brought in those courts.

## **66. WAIVER**

No right of Provider will be deemed waived and no breach excused unless such waiver or consent is provided in writing.

## **67. 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 in this Agreement.

## **68. RELATIONSHIP OF PARTIES**

The relationship between Provider and Client under any Agreement does not form a joint venture or partnership.

## **69. INTERPRETATION**

In this document, headings are for convenience only and do not affect the interpretation. Unless the context indicates a contrary intention:

- a reference to any party includes that party's executors, administrators, successors and permitted assigns, including any person taking by way of novation and, in the case of a trustee, includes any substituted or additional trustee;
- an obligation or liability assumed by, or a right conferred on 2 or more parties binds or benefits all of them jointly and each of them severally;
- a reference to a statute or to any statutory provision includes any statutory modification or re-enactment of it or any statutory provision substituted for it, and all ordinances, by-laws, regulations, rules and statutory instruments (however described) issued under it;
- a reference to any document (including this document) is to that document as varied, novated, ratified or replaced from time to time;
- words importing the singular include the plural (and vice versa), and words indicating a gender include every other gender; and
- the word "includes" in any form is not a word of limitation.

## **70. DEFINITIONS**

### **AGREEMENT**

means the legally binding contract arising between the parties under this document, including any Order under the definition of paragraph (a) of Order and any side letter agreement varying this document.

### **AUTHORISED ACCOUNT, AUTHORISED ACCOUNTS**

means a sub-account, under the auspices of Client's overall account with Provider, which is operable by an employee, agent or contractor of Client.

### **AUTHORISED USER, AUTHORISED USERS**

means

- an employee, agent or contractor of Client; or
- any other third party,

authorised by Client to use an Authorised Account.

### **COMMUNICATION, COMMUNICATIONS**

means any written communication including each notice, consent, approval, request and demand under or in connection with the Agreement.

### **CONFIDENTIAL INFORMATION**

means information that is by its nature confidential, including but not limited to information relating to the:

- personnel, policies, practices, clientele or business strategies of the parties;
- Intellectual Property Rights of either party; and

- the terms of the Agreement,

but does not include information:

- already rightfully known to the receiving party at the time of disclosure by the other party; or
- in the public domain other than as a result of disclosure by a party in breach of its obligations of confidentiality under the Agreement.

## **CONSEQUENTIAL LOSS**

means loss of revenue, loss of profits, loss of anticipated savings or business, pure economic loss, loss of data, loss of value of equipment (other than the cost of repair), loss of opportunity or expectation loss, and any other form of consequential, special, indirect, punitive or exemplary loss or damages.

## **CONTRACT YEAR**

means a 12-month period commencing on: (i) the commencement date of this Agreement in accordance with paragraph 1; and (ii) each subsequent anniversary of the commencement Date, during the term of this Agreement.

## **COST, COSTS**

means any costs, expenses, losses, damages, claims, demands, proceedings, and other liability.

## **DATA**

means any data uploaded by Client or any user associated with Client to the Services or any other electronic servers and infrastructure used to provide the Services.

## **DISPUTE**

means any dispute, controversy or claim arising out of, relating to or in connection with this Agreement, including any questions regarding its existence, validity or termination.

## **INDEMNIFIED**

means Provider and its directors, employees, contractors and agents.

## **INITIAL TERM**

means the initial term of this Agreement, or as otherwise set out in an Order.

## **INSOLVENCY EVENT**

means in respect of a party:

- the appointment of an administrator, a receiver or receiver and manager in respect of that party;
- an application to a court or an order for the winding up of the party; or
- the occurrence of anything analogous or having a substantially similar effect to any of the preceding events.

## **INTELLECTUAL PROPERTY RIGHT, INTELLECTUAL PROPERTY RIGHTS**

means all present and future rights conferred by statute, common law or equity in or in relation to business names, circuit layouts, computer software, confidential information, copyright, designs, domain names, formulas, inventions, knowhow, patents, plant varieties, recipes, trade marks, and other results of intellectual activity in the industrial, commercial, scientific, literary or artistic field, the benefit of any application to register such a right and the benefit of any renewal or extension of such a right.

## **MARKETPLACE PARTNER**

means a marketplace partner of Provider's Partner.

## **NON EXCLUDABLE CONDITION, NON EXCLUDABLE CONDITIONS**

means any guarantee, condition or warranty (such as the consumer guarantees implied by the *Australian Competition and Consumer Act 2010 (Cth)*), which cannot by law be excluded.

## **ORDER**

means any order or quote for the provision of the Services between:

- (a) Provider and Client where Client has directly purchased the Services from Provider; or
- (b) Provider's Partner and Client where Client has purchased the Services from Provider's Partner; or
- (c) A Marketplace Partner and Client where Client has purchased the Services from the marketplace partner of Provider's Partner.

## **PARTNER**

means a partner or reseller of Provider which has entered into a reseller agreement for the resale of the Services to Client.

## **PERSONAL INFORMATION**

has the meaning given to that term in the *Privacy Act 1988 (Cth)*, or where the GDPR applies to Provider the meaning given to personal data in the GDPR, or where the *UK Data Protection Act* applies to Provider, the meaning given to personal data in the *Data Protection Act*.

## **PRODUCT IP**

means all Intellectual Property Rights subsisting in:

- the Software or any part of it; or
- any additions or alterations made to the Software, including those made with the input of Client.

## **RESOLUTION NOTICE**

means a notice of Dispute served by a party in relation to the Agreement.

## **RENEWAL TERM**

means any renewal term.

## **SERVICES**

means:

- the Software;
- any support in respect of the Software;
- any installation services provided; and
- any other service rendered by Provider to Client within the scope of the Agreement.

## **SOFTWARE**

means:

- the software application found at the URL <https://surveydynamix.com> and all of its subdomains, derived URLs and associated URLs; and
- electronic infrastructure and configuration used to provide the Services.

## **TECHNICAL INFORMATION**

means information used, provided and created by the Services, including:

- performance analytics; and
- comparative analytics.

## **TERM**

means the Initial Term and any Renewal Term.

## **UNFORESEEN EVENT**

means an act of war (whether declared or not) or terrorism, the mobilisation of armed forces, civil commotion or riot, natural disaster, industrial action or labour disturbance, currency restriction, embargo, action or inaction by a government provider, a failure of a supplier, public utility or common carrier or computer disruption due to the effects of a virus or other malicious code, or government imposed pandemic restrictions, or other event beyond the reasonable control of a party.