

# Superfluid Master Terms

With effect from 1 October 2017 – 1 February 2020)

## Background

- A. Superfluid provides a range of information technology services, including:
  - managed services; outsourcing;
  - cloud services; (including Azure, AWS);
  - systems integration; project services;
  - software & licensing procurement
  - intranet solutions; application management; application development;
  - application configuration and deployment
- B. These Master Terms set out the terms and conditions under which Superfluid supplies these services.

## Agreement

### 1. Parties

- 1.1. The parties are:
  - 1.1.1. The company named in a Superfluid Order Form ('Superfluid', 'us', 'we' or 'our');and
  - 1.1.2. the Client named in a Superfluid Order Form ('you' or 'your')

### 2. Product Terms

- 2.1. The services that we are able to provide are described in the Product Terms.
- 2.2. Each of the Product Terms sets out:
  - 2.2.1. the scope of the service;
  - 2.2.2. the fees for the service; and
  - 2.2.3. any special conditions that apply to the service.

### 3. Order Form

- 3.1. You may request a service by submitting a Superfluid Order Form to us.
- 3.2. Each Superfluid Order Form:
  - 3.2.1. must be in our standard form, as current at the time;
  - 3.2.2. must clearly identify the service requested by reference to Product Terms;
  - 3.2.3. must set out the required commencement date and term of the service;
  - 3.2.4. must be completed by you accurately, with all required information; and

3.2.5. is a request for service and not a contract unless and until accepted by us.

#### **4. Service Contracts**

- 4.1. If we accept a Superfluid Order Form in writing, a binding contract is created ('Service Contract') comprising:
  - 4.1.1. the Product Terms, including any special conditions;
  - 4.1.2. the Superfluid Order Form; and
  - 4.1.3. these Master Terms.
- 4.2. Each Service Contract is an independent contract.
- 4.3. If there is any inconsistency between the parts of a Service Contract, the order of priority, from highest to lowest, is:
  - 4.3.1. any special conditions in the Product Terms;
  - 4.3.2. the remainder of the Product Terms;
  - 4.3.3. the Superfluid Order Form; and
  - 4.3.4. these Master Terms.

#### **5. Fees**

- 5.1. The fees for a service are:
  - 5.1.1. the fees specified in the Product Terms;
  - 5.1.2. if none are specified, our then current published fees for that service; or
  - 5.1.3. if there are no current published fees, at our time and materials rates for similar services.
- 5.2. Except where we have agreed fixed fees for services, we may adjust our fees at any time.
- 5.3. If we perform any work that is not covered by the Product Terms, we may charge for that work;
  - 5.3.1. at our current published rates for that type of work; or
  - 5.3.2. if there are no current published rates, at our time and materials rates for similar work.

#### **6. Pre-Paid fees**

- 6.1. If Product Terms require fees to be pre-paid:
  - 6.1.1. we may suspend providing a service if the balance of the pre-paid fees will not cover our fees for the service required; and
  - 6.1.2. we may apply amounts you owe us against the balance of your pre-paid fees in any manner we decide.

6.2. Pre-paid fees are non-refundable.

## 7. Expenses

7.1. Any expenses that may need to be incurred will be approved by you in writing.

## 8. Invoicing and payment

8.1. We will invoice you:

8.1.1. in accordance with any payment schedule specified in the Product Terms;

8.1.2. otherwise:

8.1.2.1. monthly in advance for pre-paid fees; or

8.1.2.2. monthly in arrears.

8.2. You must pay each invoice in full:

8.2.1. by the due date specified in the invoice; or

8.2.2. if no due date is specified, within 14 days of the invoice date.

8.3. Late invoicing does not affect our right to payment or your obligation to pay.

8.4. If a payment is overdue, in addition to our other rights:

8.4.1. we may charge interest on the overdue amount at the Default Rate ('Default Rate' means the overdraft reference rate quoted by our principal banker on the first day of the applicable month plus 2%), calculated daily;

8.4.2. we may withhold providing services under any Service Contract; and

## 9. GST

9.1. Terms in italics in this clause have the same meaning as in the *A New Tax System (Goods and Services Tax) Act 1999*.

9.2. Unless stated otherwise, fees stated under this agreement exclude GST.

9.3. The consideration payable by you under this agreement is the *value* of any *taxable supply* for which payment is to be made.

9.4. Subject to us supplying you with a valid *tax invoice*, if we make a *taxable supply* in connection with a Service Contract for a *consideration*, which represents its *value*, then you must pay, at the same time and in the same manner as the value is otherwise payable, the amount of any GST payable in respect of the *taxable supply*.

## 10. Access

10.1. You must provide us with reasonable and timely access to your facilities, premises, information, equipment, personnel, network and data to enable to fulfil our obligations under the Product Terms.

10.2. We will not be responsible for any delay in providing a service where the delay results from your failure to provide timely access in accordance with clause

## **11. Your Obligations**

11.1. You must:

- 11.1.1. comply with our reasonable and lawful directions in relation to the service;
- 11.1.2. provide a safe working environment for our personnel;
- 11.1.3. ensure that any incumbent provider who is transitioning the service to us
- 11.1.4. makes available the information, resources and facilities required by us to provide the service; and
- 11.1.5. maintain regular and complete backups of all of your data.
- 11.1.6. We will not be responsible for any failure, default or delay to the extent caused by your failure to perform your obligations under this clause.

## **12. Software**

12.1. To the extent that a service involves the creation or licensing of software that we own we warrant that our software will operate substantially in accordance with its accompanying documentation during the warranty period, provided that:

- 12.1.1. you notify us of the defect during the warranty period;
- 12.1.2. you have used the software in accordance with its accompanying documentation and our recommendations;
- 12.1.3. the software has not been used on or in conjunction with equipment or software not approved by us;
- 12.1.4. the software has not been modified by anyone other than us;
- 12.1.5. the defect is not due to a change in your IT or physical environment after delivery of the software; and
- 12.1.6. you are not in breach of this agreement or any Service Contract.

12.2. 'Warranty period' means 90 days from the date of delivery, unless we specify a different period.

12.3. 'Defect' means a reproducible failure of the software to work substantially as described in the documentation that accompanies it.

## **13. Third Party Materials**

13.1. In providing a service we may supply you with materials (including software) licensed by third parties.

13.2. You must comply with the terms of the third party license and you indemnify us against any loss, damage, claim, liability or demand we incur due to your breach of a third party license.

#### **14. Confidentiality**

14.1. A party must not use or disclose the other party's confidential information without prior written approval.

14.2. Each party must take all reasonable steps to ensure that its employees and agents do not use or disclose the other party's confidential information.

14.3. A party may disclose confidential information where required by law or the rules of a stock exchange.

14.4. This clause survives termination of this agreement.

#### **15. Intellectual Property Rights**

15.1. Unless otherwise specified in writing, You own exclusively all intellectual property rights in material, including software, that we design, create, modify, supply or licence

15.2. To the extent necessary for you to receive the benefit of a service, we grant you a non-exclusive, non-transferable, licence to use our materials.

15.3. 'Intellectual property rights' includes all patents, copyright, rights in circuit layouts, registered designs, trademarks, trade, business or company names and the right to have confidential information kept confidential.

#### **16. Limitation of liability**

16.1. We are never liable to you for, and you release us from any Claim for, any Consequential Loss.

16.2. Our maximum aggregate liability under a Service Contract or Claim, whether for breach of these terms or in negligence or in any other tort or for any other common law or statutory cause of action or otherwise is the amount equal to the fees you have paid to us under the Service Contract in the preceding year.

16.3. We will not be liable to you for data loss under any circumstances.

16.4. For the purpose of this Agreement:

16.4.1. Claim means any claim, demand, action, proceeding or legal process (including by way of set off, cross-claim or counterclaim); and

16.4.2. Consequential Loss means any indirect, special, economic or consequential loss or damage or loss of revenue, profits, goodwill, bargain or opportunities or loss or corruption of data or loss of anticipated savings

that you incur or suffer in any way, whether (a) caused by our negligence; or (b) we knew or should have known of the possibility of such loss or damage.

## 17. Warranty and Indemnity

17.1. You warrant that you have not relied on any representation made by us which has not been stated expressly in these Master Terms.

## 18. Termination and suspension of Service Contracts

18.1. We may terminate or suspend performance of a Service Contract immediately if:

- 18.1.1. you breach the Service Contract and fail to remedy the breach within 14 days after receiving a notice detailing the breach and requiring that it be cured;
- 18.1.2. you become insolvent;
- 18.1.3. you fail to pay money owed to us within 30 days of it being due;
- 18.1.4. you cease, or threaten to cease, carrying on your business;
- 18.1.5. we reasonably believe that you have used a service for unauthorised, criminal or unlawful activity; or
- 18.1.6. an administrator or controller (as those terms are defined in the *Corporations Act 2001*) is appointed in respect of any of your assets.

18.2. Your breach of a Service Contract is deemed to be a breach of these Master Terms and all other Service Contracts.

18.3. Termination of a Service Contract does not affect our rights of action based on any breach by you before the termination.

18.4. On termination we may:

- 18.4.1. repossess any of our property in your possession, custody or control;
- 18.4.2. retain all moneys paid to us under the Service Contract;
- 18.4.3. provide you with an invoice for all unpaid fees and expenses and any costs incurred by us as a result of termination; and
- 18.4.4. pursue any additional or alternative remedies provided by law.

18.5. If you terminate a Service Contract prior to its expiry, then you must pay us within 14 days of invoice, the equivalent of the Monthly Service Fee multiplied by the number of months remaining in the Service Contract<sup>1</sup>.

18.6. The termination fee in clause 18.5:

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<sup>1</sup> e.g. if the Monthly Service Fee is \$200 (inc GST), and there are 3 months remaining in the Service Contract, you must pay us \$600.

18.6.1. is a reasonable pre-estimate of our loss and damage arising from an early termination of a Service Contract; and

18.6.2. is without prejudice to any other rights we may have to recover other sums from you.

18.7. Should the Service Contract expire and not be expressly terminated by you it will continue indefinitely on a quarter by quarter basis and you must provide us with 90 days' notice to cancel the service.

18.7.1. Any discount provided to you in relation to the Service Contracts Fixed Term (Generally 25%) shall be revoked and your pricing will revert to the Uncontracted Price

18.8. Upon expiry or termination of a Service Contract each party must return any property belonging to the other party within 7 days.

## **19. Termination for Non-Performance**

19.1. You may terminate the Service Contract immediately if we breach a Service Level Agreement and fail to remedy the breach within 30 days after receiving a notice detailing the breach and requiring that it be cured;

19.2. Termination of a Service Contract does not affect our rights of action based on any breach by you before the termination and is without prejudice to any other rights we may have to recover other sums from you.

19.3. On termination we may retain all moneys paid to us under the Service Contract;

19.4. If you terminate a Service Contract prior to its expiry as per clause 19.1, then no termination fee will be payable.

## **20. Notices**

20.1. All notices must be:

20.1.1. In writing;

20.1.2. signed by the party giving it (or its authorised representative); and

20.1.3. sent to a party's service address.

20.2. A party's service address is any of:

20.2.1. In the case of a corporation, its current registered office;

20.2.2. the parties' business addresses set out in a Superfluid Order Form; or

20.2.3. any other address a party nominates, by written notice to the other party, as a service address.

## **21. Restraints**

- 21.1. Neither party may approach the Employees, Agents or Contractors of the other party to this Agreement, with an offer of employment during the term of this Agreement or for each of the following periods, 2 months, 3 months, 6 months and 12 months after its expiry or termination.
- 21.2. For the avoidance of doubt, nothing in this clause 21.1 prevents either party from employing an employee of the other party as a result of the employee responding to a public notice, in the absence of any solicitation however if this occurs then the employing party will pay a replacement recruitment fee to the other party equivalent to 30% of the Employee's Base Salary + Superannuation + Benefits + Bonus + Commission.

## **22. General matters**

- 22.1. We are an independent contractor and have no authority to bind you by contract or otherwise.
- 22.2. We may sub-contract the performance of this agreement if we obtain your prior written consent (which you must not unreasonably withhold).
- 22.3. We may assign or novate our rights and obligations under this Agreement at any time without your consent.
- 22.4. You may not assign your rights and obligations under this agreement without our prior written consent (which we will not unreasonably withhold).
- 22.5. If a party overlooks a breach of a Service Contract by the other party on one or more occasions, it is not taken to have agreed to any future breach.
- 22.6. These Master Terms, the Product Terms and the Superfluid Order Form are the entire agreement between the parties with respect to the services specified in the Product Terms and all prior agreements regarding those services are superseded. No amendment or modification of a Service Contract is binding unless in writing and executed by the parties.
- 22.7. Anything that is unenforceable must be read down, to the point of severance if necessary.
- 22.8. Anything a party can do, it may do through an appropriately authorised representative.
- 22.9. Any matter in our discretion is in our absolute and unfettered discretion.

## **23. Applicable law and disputes**

- 23.1. This agreement is subject to the laws that apply in Victoria, Australia.



- 23.2. Any dispute or difference arising in connection with this agreement will be submitted to arbitration in accordance with and subject to the Institute of Arbitrators and Mediators Australia Expedited Commercial Arbitration Rules.
- 23.3. Otherwise, legal proceedings relating to this agreement or any dispute about it must be brought in the courts of Victoria, Australia.

## 24. Interpretation

- 24.1. Headings are for navigational assistance only and do not affect the meaning of this agreement.
- 24.2. Where a term is said to 'include' one or more things, the list is not exhaustive and does not limit the natural meaning of the term in any way.
- 24.3. A schedule or attachment to a document (including a schedule or attachment to this agreement) is part of that document, as is any document incorporated by reference.
- 24.4. A reference to the singular includes the plural and vice versa.
- 24.5. There is no significance in the use of gender-specific language.
- 24.6. A 'person' includes any entity which can sue and be sued and any legal successor to or representative of that person.
- 24.7. A reference to 'hardware' or 'Loan Equipment' includes all IT and communication products and equipment including hardware, software and related parts, accessories and other goods.
- 24.8. A reference to a law includes any amendment or replacement of that law.