

AGREEMENT FOR PROVISION OF  
DESIGN AND DEVELOPMENT SERVICES

DEMING FACTOR PTY LTD  
ACN 608 441 765 (the "Supplier")

AND

You the "Buyer"

SCHURGOTT & CO  
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THIS AGREEMENT comes into effect on the day your first order for services is executed by both parties.

BETWEEN: DEMING FACTOR PTY LTD ACN 608 441 765  
of 215 Angas Street Adelaide 5000 in the State of South Australia

AND: YOU

RECITALS:

- A. The Supplier is a supplier of media design and technology services.
- B. The Buyer has requested the Supplier to provide the Services.
- C. The Supplier has agreed to provide the Services to the Buyer in accordance with the terms and conditions of this Agreement.

NOW THIS AGREEMENT WITNESSES:

**1. DEFINITIONS AND INTERPRETATION**

**1.1 Definitions**

In this Agreement including the recitals the following expressions shall have the following meanings unless inconsistent with the context:

“Additional Services” has the meaning given in clause 5(1);

“Agreement” means this agreement for the provision of information technology services as set out in this Agreement;

“Buyer Confidential Information” includes all information however recorded or retained and whether oral or written or electronically stored about all or any of the following:

- (a) information, ideas and concepts related to the Buyer or the business of the Buyer;
- (b) ideas or concepts, in existence at the date of this Agreement, of any employee or consultant of the Buyer shared with, or disclosed to the

Supplier;

- (c) the affairs of the Buyer;
- (d) trade secrets of the Buyer;
- (e) the management, policies, strategies, practices and procedures of the Buyer;
- (f) any other information or communication that the Buyer notifies the Supplier as being confidential;
- (g) the financial position of the Buyer;

"Claim" includes all manner of losses, damages, liabilities, obligations, actions, suits, causes of action, arbitration, debts, dues, demands, costs, interest, verdicts and judgments whatsoever, at law or in equity, or both, under the written law or unwritten law, or both, whether known or unknown;

"Commencement Date" means the date of this Agreement;

"Completion" means:

- (a) all Tax Invoices have been paid by the Buyer; and
- (b) the Buyer and Supplier agree in writing that the Services are completed;

"Confidential Information" includes Buyer Confidential Information or Supplier Confidential Information, as the case may be;

"Deliverable" means all works and materials developed, created or provided by or on behalf of the Supplier in the course of the performance by the Supplier of obligations of the Supplier under this Agreement, and including but without limitation, products, software, interfaces, designs, reports, specifications, documents, information, programs, text and data stored by any means or other item or any combination of those works or materials;

"Development Hour" means one (1) hour of work time of a single Supplier Personnel;

"Force Majeure" means the circumstances beyond the reasonable control of

a Party which results in a Party being unable to observe or perform on time an obligation under this Agreement. Such circumstances will include but not be limited to acts of God, lightning strikes, earthquakes, floods, storms, explosions, fires and any natural disaster, acts of war, acts of public enemies, terrorism, riots, civil commotion, malicious damage, sabotage, revolution and strikes;

"GST" means the tax imposed or sought to be imposed by the GST Acts;

"GST Acts" means *A New Tax System (Goods and Services Tax) Act 1999* and the related imposition acts of the Commonwealth;

"Intellectual Property Rights" means any and all intellectual and industrial property rights throughout the world (including rights in respect of or in connection with any confidential information, copyright (including future copyright and rights in the nature of or analogous to copyright), moral rights, inventions (including patents), trade marks, service marks, designs and circuit layouts whether or not now existing and whether or not registered or registrable including any right to apply for the registration of such rights and all renewals and extensions;

"Interest Rate" means the rate of one percent (1%) above the Australia and New Zealand Banking Group Limited "ANZ Reference Rate" applicable per annum until the date of payment, but shall not to exceed the maximum amount as allowed by law;

"Order for Additional Services" means the statement of Additional Services to be performed under this Agreement in accordance with clause 5 and signed by the Parties;

"Order for Development Time" means a document which sets out the number of Development Hours to be provided by the Supplier and the fee to be paid per Development Hour by the Buyer, signed by the Parties;

"Out of Pocket Expenses" means all costs and disbursements incurred by the Supplier in connection with providing the Services;

"Party" means a party to this Agreement;

"Service Fee" means the amounts agreed in any Orders for Development Time, plus the amounts agreed in any Orders for Additional Services and Out of Pocket Expenses;

"Services" means the services to be provided by the Supplier:

- (a) as set out in any Orders for Development Time; and
- (b) as set out in any Orders for Additional Services;

"Supplier Confidential Information" means all information, in existence at the date of this Agreement, however recorded or retained and whether oral or written or electronically stored about all or any of the following:

- (a) information, ideas and concepts related to the Supplier or the business of the Supplier;
- (b) ideas or concepts, in existence at the date of this Agreement, of any employee or consultant of the Supplier shared with, or disclosed to the Buyer;
- (c) the affairs of the Supplier;
- (d) trade secrets of the Supplier;
- (e) the management, policies, strategies, practices and procedures of the Supplier;
- (f) any other information or communication that the Supplier notifies the Buyer as being confidential;
- (g) the financial position of the Supplier;

"Supplier Personnel" means the officers, employees, agents or subcontractors of the Supplier;

"Tax Invoice" means a tax invoice which complies with the requirements of the GST Acts if applicable.

## 1.2 INTERPRETATION

In this Agreement unless the context otherwise indicates:

- (1) references to any party to this Agreement shall include the executors administrators successors and permitted assigns of that party;
- (2) references to a clause or schedule or other annexure shall be construed as references to a clause of or schedule or annexure to this Agreement and references to this Agreement shall include its schedules and any annexures;
- (3) references to (or to any specified provision of) this Agreement or another Agreement or document shall be construed as references to (that provision of) this Agreement or that other agreement or document as amended or substituted with the agreement of the relevant parties and in force at any relevant time;
- (4) references to any statute, ordinance or other law shall include all regulations and other instruments thereunder and all consolidations, amendments, re-enactments or replacements thereof;
- (5) words importing the singular shall include the plural and vice versa, words importing a gender shall include other genders and references to a person shall be construed as references to an individual, firm, body corporate, association (whether incorporated or not), government and governmental, semi-governmental and local authority or agency;
- (6) where any word or phrase is given a defined meaning in this Agreement, any other part of speech or other grammatical form in respect of such word or phrase shall have a corresponding meaning;
- (7) headings included in this Agreement are for convenience only and shall be disregarded in the construction of this Agreement; and
- (8) all references to "including" or "includes" are not words of limitation.

**2. TERM**

- (1) This Agreement will commence on the Commencement Date and will end when it is terminated in accordance with clause 11 of this Agreement or where the Parties to this Agreement agree that it is to be terminated.

**3. SUPPLY OF SERVICES**

- (1) The Buyer has requested the Supplier provide the Services and the Supplier has agreed to provide the Services to the Buyer in accordance with the terms and conditions of this Agreement.
- (2) The Supplier:
  - (a) will provide the Buyer with the Services in accordance with this Agreement;
  - (b) will provide the Services in a timely, proper and workmanlike manner;
  - (c) will determine how the Services are provided;
  - (d) may engage subcontractors and other service providers to supply some or all of the Services, provided however that the Supplier remains primarily liable for the acts and omissions of its subcontractors under this Agreement.
- (3) Each of the Buyer and the Supplier acknowledges, agrees and confirms that the Supplier may at any time vary the way in which the Services will be delivered to the Buyer (including without limitation the manner, timing and Supplier Personnel used to deliver the Services) without providing the Buyer notice of such variation.
- (4) Each of the Buyer and the Supplier acknowledges, agrees and confirms that the Supplier is under no obligation to provide any services beyond those set out in any Orders for Development Time and Orders for Additional Services. For the avoidance of doubt this includes the obligation to store Deliverables unless specifically required under an



Order for Additional Services.

**4. SERVICE FEE**

- (1) the Buyer is liable for the Service Fee incurred by or on behalf of the Buyer under this Agreement
- (2) The Buyer must pay to the Supplier the Service Fee at the times and in the manner set out in this clause 4.
- (3) The Supplier will submit a Tax Invoice to the Buyer for the entire Service Fee or for any separate amounts specified in an Order for Development Time or an Order for Additional Services or any amounts incurred as Out of Pocket Expenses;
- (4) An amount due under a Tax Invoice given in accordance with clause 4(3) is to be paid on or before the date or dates for payment set out in that Tax Invoice.
- (5) The Buyer must pay all money due by the Buyer to the Supplier pursuant to this Agreement without any set-off or deduction or withholding.
- (6) The Buyer must pay interest to the Supplier at the Interest Rate on any amount that is overdue by more than thirty (30) days from the date set out in the relevant Tax Invoice.
- (7) Each of the Buyer and the Supplier acknowledge that the Buyer will be responsible for and must reimburse the Supplier for all Out of Pocket Expenses.

**5. ADDITIONAL SERVICES**

- (1) If the Buyer requires the Supplier to perform services or deliver Deliverables, or both, in addition to those which are set out in an Order for Development Time ("Additional Services"), the Buyer shall provide the Supplier with a complete description of those Additional Services, including without limitation:
  - (a) a detailed description of the Additional Services, including a list

of the Deliverables, if any, that the Buyer wishes the Supplier to deliver;

- (b) whether Additional Services are to be supplied on a fixed price basis or on a time and materials basis;
  - (c) the timeframes in which the Buyer wishes the Supplier to perform such Additional Services;
  - (d) any other relevant details agreed between the Buyer and Supplier.
- (2) Based upon information supplied by the Buyer in accordance with this clause 5(1), the Supplier will prepare and deliver to the Buyer a draft Order for Additional Services (in such format as may be reasonably determined by the Supplier from time to time). The draft Order for Additional Services may contain information including but not limited to the following:
- (a) a quote for the Additional Services (where the Buyer has requested the Supplier to perform the Additional Services on a fixed price basis);
  - (b) the hourly billing rates of relevant Supplier Personnel (where the Buyer has requested the Supplier to perform the Additional Services on a time and material basis);
  - (c) the timeframes in which the Supplier can perform those Additional Services.
- (3) When the Buyer accepts a draft Order for Additional Services, both parties will execute the Order for Additional Services and on execution it will become an Order for Additional Services under this Agreement.
- (4) When executed by each of the Buyer and the Supplier, an Order for Additional Services:
- (a) will constitute a separate agreement by the Supplier to provide Additional Services that are specified to be provided or

delivered by the Supplier in that Order for Additional Services on the terms and conditions set out in that Order for Additional Services, subject to the terms and conditions of this Agreement;

- (b) will be deemed to incorporate the terms and conditions of this Agreement subject to any express provision in the Order for Additional Services revoking, altering or adding to the terms and conditions of this Agreement; and
  - (c) subject to the terms and conditions of this Agreement, may include additional terms and conditions, which each of the Buyer and the Supplier acknowledge and agree are binding on both Parties to this Agreement.
- (5) In the event of any conflict between this Agreement and any Order for Additional Services or any other document that forms part of this Agreement, the Order for Additional Services shall prevail to the extent of the conflict or inconsistency.
- (6) The Buyer may request from the Supplier, and the Supplier must provide at no cost to the Buyer, any information that the Buyer reasonably requires to establish the Buyer's requirements for Additional Services under clause 5(1).

## **6. PERSONNEL OF SUPPLIER**

- (1) The Supplier must, in relation to the Services ensure that:
- (a) the Services are provided by Supplier Personnel with appropriate skills, qualifications and experience; and
  - (b) the Supplier Personnel comply with the obligations of the Supplier under this Agreement.
- (2) The Supplier represents and warrants that the Supplier Personnel involved in the provision of the Services will possess the skills and knowledge necessary to perform their designated role.

## **7. DUTIES OF THE BUYER**

- (1) Where Services are supplied at a site of the Buyer, the Buyer agrees to

provide such access to its site including without limitation, access to the premises, computer systems and other facilities of the Buyer.

- (2) The Buyer shall appoint a contact person to supply the Supplier with any necessary or relevant information and make decisions expeditiously and where required obtain decisions from other Buyer personnel expeditiously.
- (3) The Buyer acknowledges, agrees and confirms that:
  - (a) the performance by the Supplier of the obligations of the Supplier under this Agreement is dependent on the timely and effective performance by the Buyer of the obligations of the Buyer under this Agreement;
  - (b) the Supplier will be entitled to rely on all decisions and approvals by the Buyer or its representative in connection with the Services.

## **8. INTELLECTUAL PROPERTY RIGHTS**

- (1) The Supplier warrants that:
  - (a) the performance by the Supplier of obligations of the Supplier under this Agreement; and
  - (b) the use by the Buyer and the employees, agents, advisers and subcontractors of the Buyer of the Deliverables,will not infringe the Intellectual Property Rights of any person.
- (2) All Intellectual Property Rights arising from the provision of the Services and all Intellectual Property Rights in or in relation to all work included in each Deliverable shall vest in the Supplier and the Buyer undertakes to execute such documentation as necessary to pass title to such rights to the Supplier.
- (3) The Supplier grants the Buyer the personal non-exclusive, non-transferable right to use, reproduce and adapt any Deliverables for the internal use of the Buyer.
- (4) On Completion all Intellectual Property Rights arising from the provision of the Services and all Intellectual Property Rights in or in relation to all work included in each Deliverable shall vest in the Buyer

and the Supplier shall have the unfettered right to use these Intellectual Property Rights for the conduct of its business thereafter.

## 9. CONFIDENTIAL INFORMATION

- (1) The Supplier must treat as confidential all Buyer Confidential Information which comes into possession of the Supplier, pursuant to or as a result of or in the performance of this Agreement, whether such information relates to the business, sales, marketing or technical operations of the Buyer, or the Intellectual Property Rights or industrial property rights of the Buyer, or otherwise, and may only disclose such details to those employees of the Supplier who need to know such Buyer Confidential Information to enable them to carry out their duties to the Supplier for performance of the obligations of the Supplier under this Agreement.
- (2) The Buyer shall treat as confidential Supplier Confidential Information which comes into the possession of the Buyer, pursuant to or as a result of or in the performance of this Agreement, whether such information relates to the business, sales, marketing or technical operations of the Supplier, or the Intellectual Property Rights or industrial property rights of the Supplier, or otherwise, and may only disclose such details to those of its employees who need to know such Supplier Confidential Information to enable them to carry out their duties to the Buyer for the performance of the obligations of the Buyer under this Agreement.
- (3) The Supplier must not, without the written permission of the Buyer, copy or cause to be copied or disclose Buyer Confidential Information to a third party, or otherwise use or exploit Buyer Confidential Information.
- (4) The Buyer must not, without the written permission of the Supplier, copy or cause to be copied or disclose Supplier Confidential Information to a third party, or otherwise use or exploit Supplier Confidential Information.
- (5) 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 Agreement;

- (b) Confidential Information which was otherwise lawfully in the possession of a party, prior to disclosure, as shown by written records;
  - (c) Confidential Information which is after the date of this Agreement 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; or
  - (d) disclosure is required by law or a regulatory body (including a relevant stock exchange).
- (6) The obligations of each Party under this clause shall survive the termination of this Agreement.

#### **10. LIMITATION OF LIABILITY**

- (1) The Supplier shall have no liability whatsoever to the Buyer in respect of any loss or damage (including consequential loss or damage) which may be suffered or incurred or which may arise directly or indirectly from or in respect of any Services supplied pursuant to this Agreement or in respect of a failure or omission on the part of the Supplier to comply with the obligations of the Supplier under this Agreement.
- (2) The Buyer warrants that the Buyer does not rely on any representation made by the Supplier which has not been expressly stated in this Agreement.
- (3) The Buyer acknowledges that the Supplier has made no representation other than those expressly stated in this Agreement.
- (4) The Buyer will at all times indemnify and hold harmless the Supplier and the officers, employees and agents of the Supplier (the "Indemnified") from and against any and all loss (including reasonable legal costs and expenses) or liability incurred or suffered by any one or more of the Indemnified arising from any Claim against any one or more of the Indemnified where such loss or liability arises out of or is in any way connected with:

- (a) a breach by the Buyer of any of its obligations under this Agreement; or
- (b) any wilful, unlawful or negligent act or omission of the Buyer or any officers, employees and agents of the Buyer.

## **11. TERMINATION**

- (1) Without limiting the generality of any other clause in this Agreement, the Supplier may terminate this Agreement immediately by notice in writing to the Buyer if:
  - (a) The Buyer fails to pay in full the Service Fee due under this Agreement within sixty (60) days of the date of issue of a Tax Invoice;
  - (b) The Buyer is in breach of any material term of this Agreement and such breach is not remedied within ninety (90) days of notice in writing from the Supplier;
  - (c) The Buyer becomes, threatens or resolves to become or is in jeopardy of becoming subject to any form of insolvency administration;
  - (d) a liquidator or provisional liquidator is appointed to the Buyer; or
  - (e) an administrator, receiver or receiver and manager is appointed to all or any of the assets or undertaking of the Buyer.
- (2) Without limiting the generality of any other clause in this Agreement, the Buyer may terminate this Agreement immediately by notice in writing to the Supplier if:
  - (a) the Supplier is in breach of any material term of this Agreement and such breach is not remedied within ninety (90) days of notice in writing from the Buyer;
  - (b) the Supplier becomes, threatens or resolves to become or is in jeopardy of becoming subject to any form of insolvency

administration;

- (c) a liquidator or provisional liquidator is appointed to the Supplier; or
  - (d) an administrator, receiver or receiver and manager is appointed to all or any of the assets or undertaking of the Supplier.
- (3) Upon receipt of notice of termination of the Services or this Agreement for any reason:
- (a) the Supplier may cease providing the Services with immediate effect;
  - (b) all charges and any other amounts owing by the Buyer for those Services, are immediately due and payable
  - (c) the Supplier may charge the Buyer a reasonable amount for any Services performed in respect of which no amount has been previously charged;
  - (d) the Supplier may repossess any property of the Supplier in the possession, custody or control of the Buyer;
  - (e) all Deliverables and all Intellectual Property Rights arising from the provision of the Services shall vest in the Supplier;
  - (f) the Supplier will be regarded as discharged from any further obligations under this Agreement.

## **12. FORCE MAJEURE**

- (1) Neither the Buyer nor the Supplier will be liable for any delay or failure to perform their respective obligations pursuant to this Agreement if such delay is due to Force Majeure.
- (2) If a delay or failure of a Party to perform the obligations of that Party under this Agreement is caused or anticipated due to Force Majeure, the performance of the obligations of that Party under this Agreement will be suspended for the duration of the Force Majeure.
- (3) If a delay or failure by a Party to perform the obligations of that Party



under this Agreement due to Force Majeure exceeds ninety (90) days, the Buyer or the Supplier may immediately terminate the Agreement by providing notice in writing to the other.

### **13. DISPUTE RESOLUTION**

- (1) A Party will not start arbitration or court proceedings (except proceedings seeking interlocutory relief) in respect of a dispute arising out of this Agreement ("Dispute") unless it has complied with this clause 13.
- (2) A Party claiming that a dispute has arisen must notify the other Party, giving details of the Dispute.
- (3) During the seven (7) day period after a notice is given under clause 13(2) (or longer period agreed in writing by the parties to the Dispute) ("Dispute Period") each party to the Dispute ("Disputant") must use its best efforts to resolve the Dispute.
- (4) If the Disputants are unable to resolve the Dispute within the Dispute Period, each disputant agrees that the Dispute must be referred for mediation in accordance with the Mediation Rules of the Law Society of South Australia, at the request of any Disputant, to:
  - (a) a mediator agreed on by the Disputants; or
  - (b) if the Disputants are unable to agree on a mediator within seven days (7) after the end of the Dispute Period, a mediator nominated by the then current Chairman of the Resolution Institute or the Chairman's nominee.
- (5) The role of any mediator is to assist in negotiating a resolution of the Dispute. A mediator may not make a decision that is binding on a Disputant unless that Disputant has so agreed in writing.
- (6) Any information or documents disclosed by a Disputant under this clause:
  - (a) must be kept confidential; and

(b) may not be used except to attempt to resolve the Dispute.

- (7) Each Disputant must bear its own costs of complying with this clause and the Disputants must bear equally the costs of any mediator engaged.

#### **14. GST**

- (1) Terms defined in the GST law have the same meaning in this clause 14 unless provided otherwise.
- (2) The parties acknowledge that the consideration provided in this Agreement for a supply made under this Agreement does not include an amount in respect of GST on the supply.
- (3) If GST is or will be imposed on a supply made under or in connection with this Agreement, the supplier may increase the consideration otherwise provided for that supply under this Agreement by the amount of that GST or otherwise recover from the recipient the amount of that GST.
- (4) The recovery of any amount in respect of GST by the Supplier under this Agreement is subject to the issuing of the relevant tax invoice to the Buyer. The Buyer must pay any amount in respect of GST within the time specified in the Tax Invoice issued to the Buyer.
- (5) If there is an adjustment event in relation to a supply which results in the amount of GST on a supply being different from the amount in respect of GST recovered by the Supplier, as appropriate, the Supplier:
- (a) may recover from the Buyer the amount by which the amount of GST on the supply exceeds the amount recovered; or
  - (b) must refund to the Buyer the amount by which the amount recovered exceeds the amount of GST on the supply.
- (6) Costs required to be reimbursed or indemnified under this Agreement

must exclude any amount in respect of GST included in the costs for which an entitlement arises to claim an input tax credit.

**15. SUB-CONTRACTS**

The Supplier may sub-contract the performance of this Agreement or any part of this Agreement to a third party, without the consent of the Buyer.

**16. ASSIGNMENT**

- (1) The Buyer shall not assign, whether in whole or part, the benefit of this Agreement or any rights or obligations under this Agreement, without the prior written consent of the Supplier.
- (2) The Supplier may assign its rights and obligations under this Agreement without the prior approval of the Buyer.

**17. ENTIRE AGREEMENT**

This Agreement constitutes the entire Agreement between the Parties and supersedes all prior representations, agreements, statements and understanding, whether verbal or in writing.

**18. GENERAL**

- (1) This Agreement is governed by the law in force in South Australia.
- (2) Each party irrevocably and unconditionally submits to the non-exclusive jurisdiction of the courts of South Australia and courts of appeal from them. Each party waives any right it has to object to an action being brought in those courts, to claim that the action has been brought in an inconvenient forum or to claim that those courts do not have jurisdiction.
- (3) Without preventing any other mode of service, any document in an action including, without limitation, any writ of summons or other originating process or any third or other party notice may be served on a party by being delivered to or left for that party at its address for service of notices under clause (4).
- (4) A notice, approval, consent or other communication in connection with

this Agreement:

- (a) must be in writing unless expressly specified otherwise; and
  - (b) must be left at or sent by prepaid ordinary post to the address of the addressee and in the case of a Party to this Agreement the address which is specified on page 1 of this Agreement, or such other address as that Party may notify other Parties.
- (5) Unless a later time is specified in it a notice, approval, consent or other communication takes effect from the time it is received.
  - (6) A letter is taken to be received on the third day after posting.
  - (7) Any present or future legislation which operates to vary an obligation or right, power or remedy of a person in connection with this Agreement is excluded except to the extent that its exclusion is prohibited or rendered ineffective by law.
  - (8) A party may give conditionally or unconditionally or withhold its approval or consent in its absolute discretion unless this Agreement expressly provides otherwise. In considering requests for its approval or consent a party must act with reasonable expedition.
  - (9) A party may exercise a right, power or remedy at its discretion and separately or concurrently with another right, power or remedy. A single or partial exercise of a right, power or remedy by a party does not prevent a further exercise of that or of any other right, power or remedy. Failure by a party to exercise or delay in exercising a right, power or remedy does not prevent its exercise.
  - (10) A provision of or a right created under this Agreement may not be waived or varied except in writing signed by the party or parties to be bound.
  - (11) This Agreement may be executed in any number of counterparts and by the different parties hereto on separate counterparts, each of which when so executed and delivered shall be an original but all the counterparts shall together constitute one and the same instrument.

