

**DEPARTMENT OF INTERNAL AFFAIRS**

**AND**

**DAON (AUSTRALIA) PTY LIMITED**

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**MASTER SERVICES AGREEMENT**

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Released under the Official Information Act 1982

**AGREEMENT dated:**

**PARTIES**

**HER MAJESTY THE QUEEN IN RIGHT OF NEW ZEALAND** acting by and through the Chief Executive of the **DEPARTMENT OF INTERNAL AFFAIRS** or his or her authorised delegate (**DIA**)

**DAON (AUSTRALIA) PTY LIMITED** (company number ABN 30120521771) Suite 65, Level 1 10-12 Lonsdale Street, Braddon ACT 2612, Australia (**Service Provider**)

**BACKGROUND**

- A. Kiwibank Limited (**Kiwibank**) and Service Provider are party to a Master Agreement, dated 18 August 2016 (**Kiwibank Master Agreement**) under which a Service Delivery Agreement was signed 21 July 2017 (**SDA**).
- B. By novation agreement with an effective date of 26 February 2018, Kiwibank's rights, obligations and liabilities in connection with the SDA, including under the Kiwibank Master Agreement insofar as it relates to the SDA were transferred to DIA (**Transferred SDA**).
- C. DIA and the Service Provider now wish to end the Transferred SDA and enter this Master Service Agreement to govern their ongoing relationship.

**AGREEMENT**

**1. DEFINITIONS AND INTERPRETATION**

- 1.1 Definitions:** In this Agreement, the following terms have the following meanings unless the context requires otherwise:

**Agreement** means this "Master Services Agreement", including the Schedules and Statements of Work;

**Business Day** means any day other than a Saturday, a Sunday or a public holiday (as defined in the Holidays Act 2003) in Wellington, New Zealand;

**Change** has the meaning given to that term in clause 17.1;

**Change Procedure** means the procedure for agreeing changes to this Agreement, including any Schedule or Statement of Work, as set out in clause 17;

**Change Request** has the meaning given to that term in clause 17.2;

**Commencement Date** means the commencement date of this Agreement set out in Schedule 1;

**Confidential Information** means, in relation to a party, all information of any kind, whether written, electronic or otherwise, relating to that party or its business operations that:

- (a) by its nature is confidential;

- (b) is marked by either party as 'confidential', 'in confidence', 'restricted' or 'commercial in confidence';
  - (c) is provided by either party or a third party 'in confidence';
  - (d) either party knows or ought to know is confidential; or
  - (e) is of a sensitive nature or commercially sensitive to either party,
- and, in relation to DIA, includes DIA Data;

**Crown** means Her Majesty the Queen in right of New Zealand, including all:

- (a) ministers of the Crown;
- (b) government departments;
- (c) offices of Parliament;
- (d) Crown entities as defined in the Crown Entities Act 2004; and
- (e) state enterprises as defined in the State-owned Enterprises Act 1986;

**Deliverable** means all documentation, software (including Software), applications, reports and other materials arising from the performance of the Services or otherwise provided, or to be provided, by the Service Provider under or in connection with this Agreement, including as specified in any Schedule or Statement of Work;

**DIA Data** includes:

- (f) data, information (including personal information) and other material made available by DIA for processing, storage, hosting or any other use by the Service Provider in relation to the provision of the Services or Deliverables;
- (g) data, information (including personal information) and other material generated by or through the provision of the Services or Deliverables; and
- (h) information about DIA's systems or networks, and any other such information necessary for system administration, network operations and related purposes.

**DIA Property** means equipment, tools or other property owned or leased by DIA or any Related Party;

**DIA Sites** means the sites specified by DIA from time to time at which the Service Provider will provide the Services or Deliverables;

**Disclosing Party** means the party disclosing the relevant Confidential Information under this Agreement;

**Existing Material** means all documentation, software and other materials used or provided by a party under or in connection with this Agreement:



- (a) owned by, or licensed to, that party prior to the Commencement Date; or
- (b) developed independently from this Agreement by that party,

and that are not developed, commissioned or created under or in connection with this Agreement and including, in the case of DIA, all DIA Property;

**Expiry Date** means the expiry date set out in Schedule 1;

**Fees** means the fees, charges and costs set out in the Schedules and Statements of Work;

**Force Majeure Event** means, in relation to either party (**Affected Party**), an event or circumstance beyond the reasonable control of the Affected Party, including:

- (a) an act of God;
- (b) an act of public enemy, or declared or undeclared war or threat of war; or
- (c) a terrorist act, blockade, revolution, riot, insurrection, civil commotion or public demonstration (other than one caused by the Affected Party),

but not including any event or circumstance, or any failure to comply with any term of this Agreement, arising from such event or circumstance, that could have been avoided by the Affected Party's exercise of business continuity or other practices in accordance with best practice in New Zealand;

**GST** means goods and services tax payable under the GST Act at the rate prevailing from time to time, including any tax levied in substitution for that tax;

**GST Act** means the Goods and Services Tax Act 1985;

**Impact Statement** has the meaning given to that term in clause 17.3;

**Intellectual Property Rights** means all industrial and intellectual property rights whether conferred by statute, at common law or in equity, including all copyright, rights in relation to inventions (including all patents and patent applications), trade secrets and know-how, rights in relation to designs, rights in relation to trade marks, business names and domain names;

**IP Claim** has the meaning given to that term in clause 12.5(a);

**Kiwibank** has the meaning given to that term in paragraph A of the Background;

**Kiwibank Master Agreement** has the meaning given to that term in paragraph A of the Background;

**Mediation** has the meaning given to that term in clause 15.1(b);

**Mediation Notice** has the meaning given to that term in clause 15.1(b);

**Notice** has the meaning given to that term in clause 18.9;

**OIA** means the Official Information Act 1982;

**Personnel** means any employee, agent or representative of the Service Provider, or of any subcontractor of the Service Provider, who provides any Service or Deliverable;

**Project Plan** means the detailed plan applicable to the delivery of Services and/or Deliverables, as defined in Schedule 3 or a Statement of Work;

**Proposal** means any proposal submitted by the Service Provider in response to a request for the supply of Services or Deliverables under this Agreement, together with any written material provided to DIA by the Service Provider to supplement, explain or expand on that proposal;

**Rate Card** means the rate card set out in Schedule 6 as amended from time to time in accordance with clause 8.9;

**Records** means information, whether in its original form or otherwise, including a document, a signature, a seal, text, images, sound, speech, or data compiled, recorded, or stored, as the case may be:

- (a) in written form on any material;
- (b) on film, negative, tape, or other medium so as to be capable of being reproduced; or
- (c) by means of any recording device or process, computer or other electronic device or process;

**Receiving Party** means the party receiving the relevant Confidential Information under this Agreement;

**Related Parties** means:

- (a) the Crown; and
- (b) all contractors and service providers of DIA;

**Schedules** means the schedules to this Agreement as at the Commencement Date and (unless the context otherwise requires) also includes any new schedule or Statement of Work entered into by the parties after the Commencement Date;

**Service Levels** means the standards of service to be delivered by the Service Provider as specified in this Agreement, including in any Schedule or Statement of Work;

**Services** means:

- (a) the services described in this Agreement to be performed by the Service Provider from and after the Commencement Date, including as described in the Schedules or any Statement of Work stated to be effective from and after that date;
- (b) all minor services incidental to, or required for the proper performance of, the services described in paragraph (a) which could reasonably be expected to be provided by the Service Provider without anything other than minor incremental additional cost; and
- (c) all Statement of Work Services agreed in writing by the parties from time to time after the Commencement Date, including all minor services incidental to, or required for the



proper performance of, those Statement of Work Services which could reasonably be expected to be provided by the Service Provider without anything other than minor incremental additional cost;

**Software** means the object code of the software products specified in Schedule 4 or the relevant Statement of Work, as applicable;

**Specified Personnel** means the Personnel specified in a Schedule or Statement of Work;

**Statement of Work** has the meaning set out in clause 2.9;

**Statement of Work Services** has the meaning set out in clause 2.6;

**Support** means support and/or maintenance Services to be provided or procured by the Service Provider under this Agreement, as specified in Schedule 5 or the relevant Statement of Work, as applicable;

**Term** means the term of this Agreement described in clause 14;

**Transferred SDAs** has the meaning given to that term in paragraph B of the Background;

**Valid Tax Invoice** has the meaning given to the term in clause 8.3; and

**Warranty Period** means a specified warranty period set out for Services and/or Deliverables in a Schedule or Statement of Work.

**1.2 Interpretation:** In this Agreement, unless the context requires otherwise:

- (a) headings are for convenience only and have no legal effect unless otherwise specified;
- (b) references to the singular include the plural and vice versa;
- (c) references to a party include that party's successors, executors, administrators and permitted assignees (as the case may be);
- (d) references to clauses, Schedules and Statement of Work are to the clauses, Schedules and Statements of Work applicable to this Agreement;
- (e) where a word or phrase is defined, its other grammatical forms have a corresponding meaning;
- (f) references to a person include:
  - (i) an individual, firm, company, corporation or unincorporated body of persons;
  - (ii) any public, territorial or regional authority;
  - (iii) any government; and
  - (iv) any agency of any government or authority;
- (g) an obligation not to do anything includes an obligation not to suffer, permit or cause that thing to be done;

- (h) references to any statute include any amendment to, or replacement of, that statute and any subordinate legislation made under it;
- (i) wherever the words "includes" or "including" (or similar words) are used, they are deemed to be followed by the words "without limitation";
- (j) except as otherwise expressly stated, monetary references are references to New Zealand currency; and
- (k) if there is any conflict between the terms of this Agreement, the following order of precedence will apply:
  - (i) the terms of the body of this Agreement;
  - (ii) Schedule 1 to this Agreement;
  - (iii) Schedules 2-5 (including their appendices); and then
  - (iv) Statements of Work and other Schedules.

## **2. END OF TRANSFERRED SDA AND APPOINTMENT UNDER THIS AGREEMENT**

**2.1 Termination of transferred SDA:** The parties agree that from the Commencement Date of this Agreement the Transferred SDA is terminated, provided that:

- (a) to the extent clauses 27.5(a) and (d) of the Kiwibank Master Agreement apply to the Transferred SDA, those clauses will apply to this termination but clauses 27.5(b) and (c) will not apply;
- (b) to the extent any confidentiality obligations exist between DIA and the Service Provider in relation to any information under the Transferred SDA, the confidentiality rights and obligations under clause 13 of this Agreement will be deemed to apply to that information; and
- (c) for the avoidance of doubt, the termination of the Transferred SDA is in no way intended to have any impact on the Kiwibank Master Agreement or any other arrangement between Kiwibank and the Service Provider.

**2.2 Appointment:** DIA appoints the Service Provider and the Service Provider agrees to provide to DIA the Services and Deliverables, on the terms and conditions of this Agreement.

**2.3 No minimum level of business:** Nothing in this Agreement will commit DIA to procure any minimum volume of Services or Deliverables from the Service Provider, except as provided for in the Schedules and any Statement of Work.

**2.4 Non-exclusive appointment:** The parties agree that:

- (a) the Service Provider's appointment under this Agreement is non-exclusive, provided Service Provider will be engaged exclusively in relation to the integration and/or customisation of any Deliverables in which the Service provider owns the Intellectual Property Rights; and



- (b) DIA may appoint third parties to provide services or deliverables similar to, or identical with, the Services or Deliverables at any time, or may provide them itself.

**2.5 Reliance:** The Service Provider acknowledges that DIA is relying on the Service Provider's expertise in entering into this Agreement, including on all statements made by the Service Provider in any Proposal or written material provided to DIA regarding the Service Provider's or Personnel's skills, experience and expertise and the quality and performance of the Services and Deliverables. Pursuant to clause 18.7, this Agreement contains the whole of the contract and understanding between the parties.

**2.6 Supply of Services and Statement of Work Services:**

- (a) As at the Commencement Date, the Service Provider will provide any Services and/or Deliverables specified in the Schedules as being to be supplied by the Service Provider with effect from and after the Commencement Date (or such other date as is specified in the relevant Schedule).
- (b) From time to time, during the Term, DIA may also seek Proposals from the Service Provider for the provision of additional services and/or Deliverables under a Statement of Work ("**Statement of Work Services**").

**2.7 Service Provider response:** The Service Provider agrees to respond to DIA's requests under clause 2.6(b) within a reasonable time and in each case to provide a Proposal containing:

- (a) a description of the Statement of Work Services and/or Deliverables to be provided by the Service Provider;
- (b) details of the Service Provider's Fees for those Services and/or Deliverables based on the Rate Card applicable at that time; and
- (c) all other information reasonably requested by DIA relating to those Services and/or Deliverables.

**2.8 Finalise terms for supply of Statement of Work Services:** Following receipt of the Service Provider's Proposal under clause 2.7, DIA may accept, reject or request changes to the Proposal and the Service Provider will make any changes reasonably requested by DIA.

**2.9 Enter into Statement of Work:** Once the parties have agreed the terms on which the Service Provider will provide the Statement of Work Services and/or Deliverables sought by DIA under clause 2.6(b), the parties will enter into a Statement of Work substantially in the form set out in Schedule 2 ("**Statement of Work**") provided that, until such time as the Statement of Work is signed by the parties, DIA will not be obliged to pay any Fees in respect of those Statement of Work Services or Deliverables.

**2.10 Rules relating to Statements of Work:** Unless otherwise agreed by the parties in writing:

- (a) each Statement of Work is subject to the terms and conditions set out in the body of this Agreement (including Schedule 1), and forms a separate agreement between the parties in relation to its subject matter only;
- (b) the terms of one Statement of Work do not apply to, or affect, the terms of any other Statement of Work;



- (c) the start and end dates of a Statement of Work shall be as set out therein; provided that, no Statement of Work shall have a term that continues beyond the then current Term of this Agreement;
- (d) termination or expiry of one Statement of Work does not result in termination or expiry of any other Statement of Work then in force;
- (e) termination or expiry of this Agreement for any reason has the effect of terminating all Statements of Work in force as at the date of termination or expiration. If, notwithstanding the foregoing, any Statement of Work does survive termination or expiry of this Agreement for any reason, the terms and conditions set out in the body of this Agreement shall continue to apply to that Statement of Work until it is terminated or expires in accordance with its terms.

**2.11 Support:** Support of the Software is provided in accordance with the terms and conditions set out in Schedule 5 or the applicable Statement of Work, as applicable. The Service Provider will provide all reasonable assistance to DIA in relation to any Support issues that arise in relation to DIA's use or the availability of the Software, if requested to do so by DIA.

### **3. SERVICE PROVIDER'S OBLIGATIONS**

**3.1 Performance:** In providing the Services and Deliverables and complying with its other obligations under this Agreement, the Service Provider must:

- (a) provide, at its own cost, all equipment, tools, materials and other resources necessary for the provision of the Services and Deliverables (excluding DIA dependencies such as baseline IT environment);
- (b) take full responsibility for the performance of all tasks and activities necessary to provide the Services and Deliverables in accordance with this Agreement, other than tasks or activities specifically identified as being DIA's or another party's responsibility;
- (c) provide DIA with general advice concerning the operation and use of the Software;
- (d) comply with all reasonable directions given by DIA from time to time;
- (e) comply with all DIA policies and procedures notified to the Service Provider from time to time;
- (f) comply with all of its legal obligations (including under statute, regulation, and contract);
- (g) co-operate with DIA and all other contractors and service providers to DIA, to ensure the Services, Deliverables and all products and services related to them are delivered efficiently and seamlessly to DIA;
- (h) use industry recognised best practice not to damage, disrupt, introduce any computer virus into or otherwise adversely affect any part of DIA's:
  - (i) business or operations; or
  - (ii) information technology or telecommunications systems; and
- (i) promptly notify DIA in writing of:

- (i) any breach of the Service Provider's obligations under this Agreement; and
- (ii) any matter that may impact on the Service Provider's ability to perform its obligations in accordance with this Agreement.

**3.2 Service Levels:** The Service Provider must provide the Services and Deliverables so as to meet or exceed the applicable Service Levels.

**3.3 Failure to meet Service Levels:** Without limiting DIA's other rights and remedies, the parties agree that DIA is entitled to rebates from the Fees paid or payable under this Agreement if the Service Provider fails to meet any Service Level. The details of those rebates and the methods of calculating and paying them are set out in the applicable Schedule or Statement of Work.

**3.4 Maintain reputation:** The Service Provider must not engage in any activity or conduct that might, in DIA's opinion, damage the reputation or image of DIA or the Crown.

**3.5 Conflict of interest:** The Service Provider must not enter into any agreement or arrangement that will, or is likely to:

- (a) prejudice the Service Provider's ability to meet its obligations under this Agreement; or
- (b) create a conflict of interest for the Service Provider.

**3.6 Resolve conflict:** Notwithstanding clause 3.5, the Service Provider must:

- (a) immediately notify DIA in writing if the Service Provider is, or is likely to be, conflicted in the performance of its obligations under this Agreement; and
- (b) take all actions reasonably required by DIA to resolve any such conflict.

**3.7 Add value:** The Service Provider must proactively use its experience and expertise to improve the Services and Deliverables, and the manner of providing them, to more effectively and efficiently meet DIA's requirements both in terms of quality and cost. For the avoidance of doubt, this does not include an obligation to provide Software at no cost.

**3.8 Security:** The Service Provider must maintain ISO 27001 and ISO 27018 certification or industry equivalents.

**3.9 Business continuity:** The Service Provider shall take reasonable precautions to prevent and mitigate any disaster or crisis (including any financial crisis or stress) or any other event or circumstance that may interfere with the operation of its own business, and the provision of the Services or Deliverables (each a Trigger Event). Without limiting the foregoing, the Supplier shall continue to maintain and test its current business continuity plan and implement, maintain and test an appropriate business continuity and disaster recovery plan or plans (together, and including the Service Provider's current business continuity plan, the Business Continuity Plans) to address a Trigger Event impacting the Services or Deliverables. The Business Continuity Plans will address, at a minimum:

- (a) DIA's continued ability to access up to date and accurate Documentation; and
- (b) retention of key resources required to ensure the provision of all Services and Deliverables.



**3.10 Access to Business Continuity Plans:** The Service Provider will provide DIA a copy of a Business Continuity Plan if requested by DIA.

**3.11 Plan implementation:** Upon the occurrence of a Trigger Event, the Service Provider shall promptly implement the relevant portion or portions of the Business Continuity Plans and shall notify DIA of such implementation.

#### **4. DIA'S PROPERTY AND SITES**

**4.1 DIA Property:** If the Service Provider has access to any DIA Property under or in connection with this Agreement, the Service Provider must:

- (a) use the DIA Property:
  - (i) for the sole purpose of complying with its obligations under the applicable Schedule or Statement of Work and for no other purpose; and
  - (ii) only to the extent necessary to comply with its obligations under the applicable Schedule or Statement of Work;
- (b) comply with all directions regarding the use of DIA Property given by DIA from time to time; and
- (c) return all DIA Property to DIA on the earlier of:
  - (i) completion of the Services or Deliverables relating to that DIA Property;
  - (ii) receipt of DIA's request for it to be returned; and
  - (iii) termination or expiry of this Agreement.

**4.2 DIA Sites:** DIA will provide the Service Provider with access to the DIA Sites solely for the purpose of enabling, and to the extent necessary to enable, the Service Provider to comply with its obligations under this Agreement and the applicable Schedule or Statement of Work. The Service Provider must not use or access the DIA Sites or any other premises of DIA for any other purpose without DIA's prior written consent. The Service Provider will comply, and will ensure that all of its Personnel comply, with all of DIA's health, safety, operational and security policies and other requirements while on DIA Sites and any other DIA premises.

**4.3 Health and Safety:** Without limiting any other obligation in this Contract, the Service Provider will:

- (a) consult, cooperate and coordinate with DIA to the extent required by DIA to ensure both parties comply with their respective obligations under the Health and Safety at Work Act 2015 as they relate to the Agreement;
- (b) perform its, and ensure that its Personnel perform their, obligations under the Agreement in compliance with its and their obligations under the Health and Safety at Work Act 2015;
- (c) comply with all reasonable directions of DIA relating to health and safety; and

- (d) report any health and safety incident, injury or near miss to DIA relating to, or affecting, the Agreement.

## 5. PERSONNEL AND SUBCONTRACTORS

### 5.1 Personnel: The Service Provider:

- (a) must ensure the Services and Deliverables are provided using appropriately experienced, skilled and qualified Personnel who are capable of providing the Services and Deliverables to the standards required under this Agreement;
- (b) is responsible for all acts and omissions of the Personnel as if they were the acts or omissions of the Service Provider; and
- (c) must ensure that all Personnel comply with the terms of this Agreement and with all of DIA's policies, procedures and directions.

### 5.2 Specified Personnel: The Service Provider must ensure the Specified Personnel provide the Services and Deliverables under the applicable Schedule or Statement of Work. The Service Provider may only replace any Specified Personnel if:

- (a) that person is unavailable due to resignation, illness or death;
- (b) the replacement person is, in the reasonable opinion of DIA, appropriately experienced, skilled and qualified to perform the applicable role; and
- (c) the Service Provider first obtains DIA's written consent to the replacement person.

### 5.3 Subcontractors:

The Service Provider must not subcontract any of its obligations under this Agreement to any other person without first obtaining DIA's written consent and complying with clause 5.3(a).

- (a) The Service Provider must:
  - (i) ensure each subcontractor complies with the terms of this Agreement;
  - (ii) manage the agreement between the Service Provider and the subcontractor in the best interests of DIA;
  - (iii) authorise DIA to deal with the subcontractor directly;
  - (iv) ensure that an appropriate written agreement is in place between the Service Provider and the subcontractor that is consistent with the terms of this Agreement; and
  - (v) if requested by DIA, ensure that the agreement referred to in clause 5.3(a)(iv) acknowledges the benefit to DIA for the purposes of Subpart 1 of Part 2 of the Contract and Commercial Law Act 2017 and is therefore enforceable by DIA.
- (b) The Service Provider will remain liable to DIA for all acts or omissions of each subcontractor as if they were the acts or omissions of the Service Provider. The entry by the Service Provider into an agreement with a subcontractor will not:



- (i) create a contractual relationship between DIA and the subcontractor except as described in clause 5.3(a)(v); or
  - (ii) relieve the Service Provider from liability for the performance of any obligations under this Agreement.
- (c) The Service Provider must obtain DIA's prior written consent to the replacement of any subcontractor, and clauses 5.3(a) and (b) will apply to all replacement subcontractors.

**5.4 Removal of Personnel:** If DIA considers (acting reasonably) that any of the Personnel or any subcontractor are unsatisfactory or unsuitable then, without limiting any other rights of DIA, DIA may, by written notice, require the Service Provider to replace the relevant Personnel or subcontractor and the Service Provider will do so as soon as possible at its own cost, but in any event no later than ten Business Days after receipt by the Service Provider of the notice. In the case of any replacement of Specified Personnel, clauses 5.2(b) and (c) will apply.

## **6. ACCEPTANCE**

**6.1 Application of this clause:** This clause 6 will apply in relation to the provision by the Service Provider of any Software, modified Software or other Deliverable identified as being subject to acceptance testing in a Schedule or Statement of Work.

**6.2 Pre-Delivery Testing:** Before providing DIA with the Deliverable for Acceptance Testing, the Service Provider must carry out such tests as are reasonably required for the Service Provider to satisfy itself that the Deliverable meets the requirements of this Agreement. When providing DIA with the Deliverable, the Service Provider must notify DIA in writing that the Service Provider is satisfied the Deliverable meets those requirements (**Delivery Notice**).

**6.3 Acceptance Testing:** Following each Delivery Notice, DIA will carry out such tests on the Deliverables as are specified in this Agreement or otherwise agreed to be reasonably required to determine whether the Deliverable meets the requirements of this Agreement. The Service Provider must provide all necessary assistance to enable DIA to carry out those acceptance tests.

**6.4 Successful Completion:** If any Deliverable successfully meets the acceptance tests under clause 6.3, DIA will confirm the same in writing to the Service Provider within 5 Business Days of the successful completion.

**6.5 Unsuccessful Completion:** If any Deliverable fails to meet the acceptance tests under clause 6.3, DIA will notify the Service Provider of such failure in writing and the Service Provider will have fifteen (15) Business Days after receipt of the notice to correct, modify, or improve the Deliverable so that it conforms to the requirements of this Agreement. Thereafter, DIA will have 10 Business Days in which to re-conduct the acceptance tests as specified above. This process will be repeated as may be necessary until the Deliverable is accepted; provided, however, that if the Deliverable is not accepted by the agreed date for completion set out in the applicable Schedule or Statement of Work (after due allowance for any delay on the part of DIA or any other party) then DIA may take the actions specified in clause 6.6.

**6.6 Acceptance Testing Failure:** If a Deliverable or any part of a Product fails to satisfy the above acceptance tests by the agreed date for completion, then without prejudice to any other available remedy, DIA at its sole discretion may:

- (a) agree to an extension of time for the completion of those acceptance tests;

- (b) accept the Deliverable upon terms acceptable to DIA and agree with the Service Provider to any variation to the Fees; or
- (c) reject the Deliverable or part of the Deliverable and terminate the relevant Statement of Work in accordance with clause 14.4.

**6.7 No deemed Acceptance:** A failure by DIA to give confirmation pursuant to clause 6.4 or notice of an acceptance test failure under clause 6.5 will not be deemed to be an acceptance of the relevant Deliverable by DIA. If DIA does not give such a notice within a reasonable period of time of DIA completing acceptance testing pursuant to clauses 6.3 and 6.5 (as applicable), the Service Provider may request DIA to confirm whether the Deliverable meets or fails to meet the acceptance tests (and, depending on DIA's response, clause 6.4 or clause 6.5 (as applicable) shall thereafter apply).

## **7. PERFORMANCE REVIEWS AND REPORTING**

**7.1 Performance Reviews:** The parties will meet and conduct performance reviews of the Services and Deliverables in accordance with the details set out in each applicable Schedule or Statement of Work. The meetings and performance reviews will provide the parties with a formal opportunity to review the provision of the Services and Deliverables including, but not limited to, the:

- (a) Service Levels;
- (b) operational and management processes; and
- (c) impact of the Services and Deliverables and assessment of their effectiveness.

**7.2 Reporting:** The Service Provider will report to DIA on the Service Provider's progress in providing the Services and Deliverables as set out in the applicable Schedule or Statement of Work and will also provide such information and reports as and when DIA reasonably requests in relation to the performance of the Service Provider's obligations under this Agreement.

## **8. FEES AND PAYMENT**

**8.1 Fees:** DIA will pay the Fees and GST (if any) to the Service Provider in consideration of the Services and Deliverables.

**8.2 No other amounts payable:** The Service Provider:

- (a) acknowledges that, except as expressly specified in this Agreement, no other payments or benefits will be payable or provided by DIA to the Service Provider, including in relation to any of the Personnel; and
- (b) indemnifies DIA from and against any and all liability, losses, damages, costs and expenses awarded against, incurred or suffered by DIA arising out of any failure to pay compensation, taxes, duties, levies or benefits in respect of any Personnel.

**8.3 Invoices:** The Service Provider will issue DIA with invoices for the Fees on the dates or at the times specified in the applicable Schedule or Statement of Work. Each invoice must be:

- (a) a valid tax invoice for the purposes of the GST Act; and



- (b) accompanied by such information reasonably requested by DIA from time to time to support the Services and Deliverables being invoiced,

(Valid Tax Invoice).

**8.4 Date for Payment:** Subject to clause 8.5, DIA will make payment in respect of each Valid Tax Invoice by the 20<sup>th</sup> day of the month following the month in which the Valid Tax Invoice was received by DIA.

**8.5 Dispute over invoice:** If DIA disputes in good faith the whole or any portion of any Valid Tax Invoice, DIA will pay the portion of the Valid Tax Invoice that is not in dispute, but may withhold payment of the disputed portion until the dispute is resolved.

**8.6 Payment terms:** All sums due to the Service Provider under this Agreement:

- (a) are exclusive of any GST which, where applicable, will be payable by DIA to the Service Provider in addition to the Fees stated; and
- (b) will be paid to the credit of a bank account to be designated in writing by the Service Provider.

**8.7 Expenses:**

- (a) The Service Provider is responsible for all expenses incurred by it under this Agreement, unless otherwise expressly specified in the applicable Schedule or Statement of Work.
- (b) If the applicable Schedule or Statement of Work specifies that DIA is to reimburse the Service Provider for any particular expenses incurred by the Service Provider, then the Service Provider must:
  - (i) produce receipts or other reasonable evidence of such expenses on request;
  - (ii) provide a Valid Tax Invoice for the expenses; and
  - (iii) follow all of DIA's expense guidelines and policies notified to the Service Provider from time to time when incurring the expenses.

**8.8 Set off:** DIA may set-off any refund or other amount owing to DIA from the Service Provider against any amount payable by DIA under this Agreement.

**8.9 Rate Card:** The Service Provider may, on the second anniversary of the Commencement Date and each anniversary thereafter, amend the rates and costs set out in the Rate Card by a percentage increase that is no more than the percentage increase in the New Zealand consumer price index for the previous 12 months. The Service Provider must provide DIA written notice of any change to the Rate Card.

## **9. RECORDS AND AUDIT**

**9.1 Records:** Without limiting its other obligations under this Agreement or at law, the Service Provider must create and maintain, and must ensure that each subcontractor creates and maintains, full, accurate and accessible Records relating to the provision of the Services and Deliverables and the Fees charged under this Agreement, to the standards required under the Public Records Act 2005, as notified by DIA from time to time.

**9.2 Content of Records:** Without limiting clause 9.1:

- (a) the Records created and maintained under clause 9.1 must, at a minimum, describe or specify:
  - (i) the nature and scope of the Services and Deliverables provided under this Agreement;
  - (ii) the transactions that took place in the provision of all Services and Deliverables;
  - (iii) the basis on which each invoice has been prepared and submitted to DIA under this Agreement; and
  - (iv) any other information in connection with this Agreement reasonably required by DIA from time to time; and
- (b) the Service Provider must ensure the Records created and maintained under clause 9.1 are:
  - (i) maintained in an accessible form;
  - (ii) retained for the Term or such longer period as required by law or this Agreement; and
  - (iii) provided to DIA in an accessible form on termination or expiry of this Agreement or the applicable Schedule or Statement of Work and at any other time on DIA's request.

**9.3 Audit:** DIA may at any time notify the Service Provider that DIA wishes to audit any or all of the Service Provider's:

- (a) provision of the Services and Deliverables;
- (b) invoicing in connection with this Agreement; and
- (c) compliance with the terms of this Agreement,

provided that DIA may only conduct an audit once in any 12 month period and at any other time where DIA has reasonable grounds to suspect the Service Provider has not complied, or is not complying, with this Agreement.

**9.4 Notice of audit:** DIA will notify the Service Provider of the date on which the audit will commence, which must be at least ten Business Days after receipt of a notice under clause 9.3. The Service Provider will allow DIA or its nominee to inspect the Service Provider's premises, systems and records in connection with this Agreement on and from the date notified by DIA during the Service Provider's normal business hours for the purpose of conducting the audit. DIA will, and will procure its nominee to, comply with the Service Provider's reasonable security and confidentiality requirements in conducting any audit under this clause 9.4.

**9.5 Assistance:** The Service Provider will, and will ensure its Personnel and subcontractors, assist DIA and its nominee with any audit conducted under clause 9.4, including by making premises, systems and records available to DIA and/or its nominee if requested.



**9.6 DIA Costs:** DIA will meet its own costs of any audit under this clause 9 unless the audit discloses that:

- (a) the Service Provider has overcharged DIA on any invoice by 10% or more; or
- (b) has not complied with the terms of this Agreement,

in which event the Service Provider will meet DIA's audit costs.

**9.7 Non-compliance:** Without limiting any of DIA's other rights or remedies, if any audit conducted under clause 9.4 discloses any failure to comply with this Agreement by the Service Provider, the Service Provider will promptly remedy the non-compliance. The Service Provider will also refund any amounts overcharged by the Service Provider within five Business Days of completion of an audit and delivery of an audit report.

**9.8 OIA:**

- (a) The Service Provider acknowledges that DIA is subject to the OIA.
- (b) The Service Provider agrees to promptly and cooperatively assist DIA, including by providing all relevant information held by the Service Provider to DIA, in connection with any request received by DIA for the release of information under the OIA, or pursuant to questions raised in Parliament or in any Select Committee.
- (c) Where practicable, DIA shall consult with the Service Provider in respect of the proposed release of any commercially sensitive information of or relating to the Service Provider before DIA releases such information under the OIA or to Parliament or any Select Committee and will seek that it receives confidential treatment.
- (d) The Service Provider shall avoid where possible but in any event shall minimise any cost to DIA in connection with the Service Provider's compliance with clause 9.8(b). As soon as practicable after being informed of the request by DIA, the Service Provider shall notify DIA in writing if it proposes to recover costs in connection with dealing with the information request, and the amount it wishes to recover. Unless otherwise agreed in writing by DIA, the Service Provider agrees DIA is not obliged to pay the Service Provider for any costs except to the extent they are consistent with the OIA and any guidelines for charging applicable to DIA in relation to information requests it receives under the OIA.

## 10. WARRANTIES

**10.1 Warranties:** The Service Provider warrants at all times (or, if a Warranty Period is specified in relation to a specific Schedule or Statement of Work, for the specified Warranty Period and that Schedule or Statement of Work) that:

- (a) all information supplied by it to DIA under this Agreement is true, complete and accurate;
- (b) it has full corporate power and has obtained the required authority and authorisations to enter into and perform its obligations under this Agreement;
- (c) the Services, Deliverables will be provided in a timely manner and to a high standard of skill, care and diligence;

- (d) it will comply with all timeframes and milestones set out in this Agreement including each applicable Schedule or Statement of Work or otherwise agreed in writing by the parties, to the extent they are within its control;
- (e) the Services are fit for their purpose as communicated by the Service Provider;
- (f) the Services and Deliverables comply with all specifications and requirements for those Services and Deliverables set out in this Agreement including each applicable Schedule or Statement of Work or otherwise agreed in writing by the parties, provided Support is provided on a continuing basis;
- (g) Service Provider will use industry recognised best practices to ensure no Deliverable contains any computer viruses, interruptions, logic bombs, Trojan horses or other forms of malicious code or performance impediments; and
- (h) all documentation provided by the Service Provider under or in connection with this Agreement will:
  - (i) correctly represent the attributes of the subject matter to which it relates;
  - (ii) provide proper and adequate instructions for its intended purpose; and
  - (iii) be written or delivered in language and at a level appropriate for the intended audience.

All representations or warranties (statutory, express or implied) which are not expressly referred to in this Agreement are excluded to the fullest extent permitted by law.

**10.2 Remedies for failure:** If the Service Provider breaches any warranty set out in clause 10.1(c) to (h), then, without limiting DIA's other rights or remedies:

- (a) the Service Provider must promptly remedy the breach at its cost upon receipt of notice in writing from DIA requiring the breach to be remedied;
- (b) if the Service Provider fails to remedy the breach to DIA's reasonable satisfaction within the reasonable time specified in DIA's notice given under clause 10(a), DIA may, without limiting its other rights and remedies:
  - (i) withhold any related payment due to the Service Provider until the matter is resolved to DIA's reasonable satisfaction; or
  - (ii) remedy the defect itself, or by contracting a third party to do so, at the Service Provider's cost.

**10.3 Third party warranties:** The Service Provider will assign to DIA, or if it is unable to do so, will hold for the sole benefit of DIA, all warranties and guarantees provided by third parties to the Service Provider in respect of the provision of any Services and Deliverables under this Agreement.

## **11. INDEMNITY, LIABILITY AND INSURANCE**

**11.1 Indemnity:** The Service Provider will at all times indemnify DIA and DIA's officers, employees and agents from and against any and all liability, losses, damages, costs and expenses of any



nature whatsoever awarded against, incurred or suffered by them, arising out of or resulting from:

- (a) the non-performance or breach by the Service Provider of any of its obligations under this Agreement; or
- (b) the negligence of the Service Provider or its Personnel or subcontractors.

**11.2 Service Provider's liability:** Subject to clause 11.4:

- (a) the Service Provider's maximum liability under or in connection with any single claim arising under or in relation to this Agreement, whether in contract or tort (including negligence) or otherwise, is limited to an amount equal to the greater of:
  - (i) two times the Fees paid and payable under this Agreement in relation to the Services or Deliverables to which that liability relates, as at the date the relevant cause of action arose; and
  - (ii) the amount set out in Schedule 1; and
- (b) the maximum aggregate liability of the Service Provider under or in connection with all claims made under this Agreement is limited to an amount equal to the amount set out in Schedule 1.

**11.3 DIA's liability:** Subject to clause 11.4, DIA's total aggregate liability under or in connection with this Agreement, whether in contract or tort (including negligence) or otherwise, is limited to an amount equal to the Fees paid and the Fees payable under this Agreement in relation to the Services or Deliverables to which that liability relates, as at the date the relevant cause of action arose.

**11.4 Exclusions:** Neither Party shall be liable to the other for any indirect, consequential or special loss or damage. Nothing in clauses 11.2 or 11.3 or this clause 11.4 limits or excludes:

- (a) the Service Provider's liability under clause 12 in relation to IP Claims;
- (b) DIA's liability under clause 12 for breach of Intellectual Property Rights; or
- (c) either party's liability for breach of clause 13.

**11.5 Insurance:** The Service Provider will maintain insurance coverage in amounts and against risks that are normal for businesses similar to that of the Service Provider, and in particular will maintain coverage in respect of public liability, professional indemnity and property damage in the amounts set out in Schedule 1. The Service Provider will, upon request at any time, provide DIA with a certificate from the insurer or insurers confirming the terms of such insurance.

**12. INTELLECTUAL PROPERTY RIGHTS**

**12.1 Ownership:**

- (a) Each party or its licensors retains ownership of all Intellectual Property Rights in Existing Material belonging to that party or its licensors, as applicable. The Service Provider

acknowledges and agrees that all Intellectual Property Rights in the DIA Data will be solely and exclusively owned by DIA.

(b) Subject to clause 12.1(a), all Intellectual Property Rights in all:

- (i) Deliverables;
- (ii) enhancements, modifications or adaptations to any Existing Material specifically requested by DIA in writing, and excluding those developed by Service Provider at its instigation; and
- (iii) other materials,

developed, commissioned or created under or in connection with this Agreement, will be owned by DIA on creation to the extent allowed by the licensing of any Existing Materials. The Service Provider assigns to DIA (including by way of present assignment of future copyright) all of the Service Provider's rights, title and interest in and to such Intellectual Property Rights.

(c) If any Intellectual Property Rights described in clause 12.1(b) do not vest in DIA (either on creation or by the assignment referred to in clause 12.1(b)), the Service Provider will hold such Intellectual Property Rights on trust for DIA and the Service Provider will, if called upon by DIA, assign to DIA absolutely all of the Service Provider's rights, title and interest in and to such Intellectual Property Rights.

**12.2 Licences:** To the extent necessary to enable DIA to receive the full benefit of the Services and the Deliverables, the Service Provider grants or will procure for DIA and the Related Parties:

- (a) a non-exclusive, transferable to New Zealand state sector agencies only license to use, copy, develop and modify:
  - (i) Existing Material of the Service Provider (excluding the Software); and
  - (ii) other material provided under or in connection with this Agreement in which, notwithstanding clause 12.1(b) and (c), DIA does not own the Intellectual Property Rights; and
- (b) a licence to use (and, where permitted, copy, develop and modify) the Software on the terms set out in Schedule 4 or the relevant Statement of Work.

**12.3 Title to and risk in media:** The parties agree that title to, and risk in, any media on which any Deliverable is recorded, will pass to DIA on delivery to DIA, unless otherwise agreed in writing by the parties.

**12.4 Warranty:** The Service Provider warrants that:

- (a) use and/or the possession of any Deliverable by DIA or a Related Party; and
  - (b) the provision of any Service to DIA or any Related Party by the Service Provider,
- will not infringe the Intellectual Property Rights of any person.

**12.5 Intellectual Property Rights indemnity:**



- (a) The Service Provider will fully indemnify DIA against all liability, losses, damages, costs and expenses suffered or incurred by DIA as a result of any claim alleging that any of the Deliverables or Services, or DIA's or a Related Party's use or possession of any of them, infringes the Intellectual Property Rights of any person (**IP Claim**).
- (b) Each party will promptly notify the other party in writing upon becoming aware of any IP Claim.
- (c) Unless otherwise required by DIA, the Service Provider will control the conduct of any IP Claim and all negotiations for its settlement or compromise but in all cases will:
- (i) consult with DIA and keep DIA fully informed of such matters;
  - (ii) obtain DIA's prior written approval to any proposed settlement or compromise (which will not be unreasonably withheld or delayed); and
  - (iii) ensure DIA's name and business reputation are not adversely affected by any such steps taken.
- (d) DIA will, at the Service Provider's cost, co-operate with the Service Provider in defending or settling any IP Claim under this clause 12.5 and, in this regard, will endeavour to make its employees available to give statements, information and evidence if reasonably requested to do so by the Service Provider.
- (e) If any Deliverables or Services, or DIA's or a Related Party's use or possession of any of them, infringe the Intellectual Property Rights of any person, or if DIA is otherwise unable to enjoy the full benefit of the Services and Deliverables as a result of an IP Claim, the Service Provider will, at its expense and without limiting DIA's other rights and remedies:
- (i) modify the Deliverables or Services so DIA can use them on terms acceptable to DIA; or
  - (ii) obtain a licence to enable DIA to use the relevant Deliverables or Services on terms acceptable to DIA, and pay all fees for that licence.

### **13. CONFIDENTIAL INFORMATION**

#### **13.1 Confidentiality obligations:** The Receiving Party must:

- (a) use the Disclosing Party's Confidential Information solely for the purpose of, and solely to the extent necessary for, exercising the Receiving Party's rights and complying with the Receiving Party's obligations under this Agreement;
- (b) only disclose the Disclosing Party's Confidential Information to those of the Receiving Party's employees, agents and contractors to whom, and to the extent that, such disclosure is reasonably necessary for the purpose of exercising the Receiving Party's rights and complying with the Receiving Party's obligations under this Agreement; and
- (c) maintain effective and adequate security measures to:
  - (i) safeguard the Disclosing Party's Confidential Information from access or use by unauthorised persons; and

- (ii) keep the Disclosing Party's Confidential Information under the Receiving Party's control.

**13.2 Exceptions to obligations:** The provisions of clause 13.1 will not apply to any information that:

- (a) was, before the Receiving Party received it from the Disclosing Party, in the Receiving Party's possession without any obligations of confidence;
- (b) is independently acquired or developed by the Receiving Party without breaching any of the Receiving Party's obligations under this Agreement and without use of any Confidential Information of the Disclosing Party;
- (c) is disclosed to the Receiving Party, on a non-confidential, by a third party who has not derived it, directly or indirectly, from the Disclosing Party or any of the Disclosing Party's Confidential Information;
- (d) is or becomes generally available to the public through no act or default of the Receiving Party or any of the Receiving Party's employees, agents or subcontractors; or
- (e) is required to be disclosed by law, or to the courts of any competent jurisdiction, or to any government regulatory or financial authority, provided that:
  - (i) as soon as reasonably practicable, and prior to the disclosure, the Receiving Party will inform the Disclosing Party of the requirement for disclosure and consult with the Disclosing Party; and
  - (ii) at the Disclosing Party's request, the Receiving Party will seek to persuade the court or authority to have the information treated in a confidential manner.

**13.3 Disclosure:** The Receiving Party must ensure that any person to whom the Receiving Party makes any disclosure in accordance with clause 13.1(b):

- (a) is made aware of, and subject to, the Receiving Party's obligations under clause 13.1; and
- (b) has entered into a written undertaking of confidentiality in favour of the Receiving Party or, if requested by DIA, in favour of DIA, that is at least as restrictive as the undertakings set out in clause 13.1 and that applies to the Confidential Information.

The Receiving Party agrees that it is, and will be, wholly responsible for all acts and omissions of each such person concerning any Confidential Information disclosed to them.

**13.4 Misuse or breach:** The Receiving Party will notify the Disclosing Party in writing immediately upon becoming aware of any:

- (a) potential, threatened or actual misuse or unauthorised disclosure of Confidential Information by any person to whom the Receiving Party makes any disclosure in accordance with clause 13.1(b); or
- (b) breach of the Receiving Party's obligations under this clause 13,

and will co-operate with the Disclosing Party in preventing or limiting such misuse, unauthorised disclosure or breach, at the cost of the Receiving Party.



**13.5 Equitable relief:** Each party acknowledges that any breach of this clause 13 by the Receiving Party may cause the Disclosing Party irreparable harm for which damages would not be an adequate remedy. In addition to any other remedy available to it, the Disclosing Party may seek equitable relief (including injunctive relief or specific performance) against any breach or threatened breach of this clause 13 by the Receiving Party.

**13.6 No limitation:** Nothing in this clause limits or restricts any rights granted to DIA under clause 12, notwithstanding, the parties agree that the Software is the Confidential Information of Service Provider.

**13.7 Announcements:** The Service Provider must not make any announcement regarding this Agreement to any person, without DIA's prior written consent.

**13.8 Confidentiality undertakings:** DIA may, at any time during the Term, require the Service Provider to obtain from its Personnel and/or subcontractors who provide Services or Deliverables under this Agreement a signed confidentiality undertaking in favour of DIA. The Service Provider must provide DIA with the original versions of all such signed undertakings.

#### **14. TERM AND TERMINATION**

**14.1 Commencement and initial term:** This Agreement will commence on the Commencement Date and, unless terminated earlier in accordance with its terms, will continue in full force and effect until the Expiry Date.

**14.2 Renewal:** This Agreement may be renewed by DIA for the renewal period or periods (if any) set out in Schedule 1.

**14.3 Termination for convenience:** DIA may terminate this Agreement, or one or more Statements of Work, at any time by giving the Service Provider at least 6 months' prior written notice.

**14.4 Termination for Service Provider's breach:** Without prejudice to any other right or remedy it may have, DIA may immediately terminate this Agreement or one or more Schedule or Statement of Work in whole or in part at any time by notice in writing to the Service Provider if the Service Provider:

- (a) is in breach of this Agreement or the relevant Schedule or Statement of Work and that breach is not remedied within 20 Business Days of the Service Provider receiving written notice specifying the material breach and requiring its remedy;
- (b) ceases or threatens to cease to carry on all or substantially all of its business or operations;
- (c) is declared or becomes bankrupt or insolvent, is unable to pay its debts as they fall due, enters into a general assignment of its indebtedness or a scheme of arrangement or composition with its creditors, or takes or suffers any similar or analogous action in consequence of debt; or
- (d) has a trustee, manager, administrator, administrative receiver, receiver, inspector under legislation or similar officer appointed in respect of the whole or any part of the Service Provider's assets or business, or an order is made or a resolution is passed for the liquidation of the Service Provider.

**14.5 Termination for DIA's breach:** Without prejudice to any other right or remedy it may have, the Service Provider may immediately terminate this Agreement at any time by giving to DIA notice in writing if:

- (a) DIA fails to pay any Fees that are not the subject of a dispute between the parties under clause 8.5 by the due date and:
  - (i) the failure to pay is not remedied within 20 Business Days of DIA receiving written notice from the Service Provider specifying the failure to pay and requiring payment; and
  - (ii) the failure to pay is not remedied within 20 Business Days of DIA receiving a further written notice from the Service Provider noting DIA's failure to pay within the time period set out in clause 14.5(a)(i), and specifying that failure to pay within 20 Business Days of receipt of the notice under this clause 14.5(a)(ii), may result in the Service Provider terminating this Agreement; or
- (b) DIA is in material breach of this Agreement, other than a failure to pay any Fees, and the material breach is not remedied within 40 Business Days of DIA receiving notice specifying the material breach, requiring its remedy and specifying failure to remedy may result in termination.

**14.6 Consequences of termination:** On termination or expiry of this Agreement or any Schedule or Statement of Work for any reason:

- (a) the Service Provider will, subject to clause 14.6(e), cease to provide the relevant Services and Deliverables;
- (b) the Service Provider will return to DIA all DIA Property and other property that DIA has provided to the Service Provider under or in connection with this Agreement or the applicable Schedule or Statement of Work;
- (c) the Receiving Party will, upon receipt of a written request from the Disclosing Party, return or destroy (at the Disclosing Party's option), all Confidential Information in the possession or control of the Receiving Party or any Personnel or subcontractor that relates to this Agreement or the applicable Schedule or Statement of Work. Upon the return or destruction (as the case may be) of such Confidential Information, the Receiving Party will provide to the Disclosing Party a certificate stating that the Confidential Information returned or destroyed comprises all of the applicable Confidential Information in the possession or control of the Receiving Party or any Personnel or subcontractor;
- (d) the Service Provider will provide such information and assistance as DIA reasonably requires to allow DIA to make an orderly transition of all or any of the affected Services and Deliverables to DIA and/or any nominated alternative service provider, including by using its best endeavours to transfer to DIA the benefit of all subcontracts that it has entered in to which relate to the applicable Services and Deliverables where requested to do so by DIA; and
- (e) provided the Agreement is not terminated for DIA breach of Intellectual Property Rights or non-payment, the Service Provider will, for up to six (6) months (or for such further period as may be agreed) after termination or expiry, continue to offer the applicable Services and Deliverables to DIA, under the terms of this Agreement as DIA may



reasonably require while DIA makes the transition to an alternative service provider, and the Service Provider will be entitled to charge DIA reasonable rates (as agreed in writing between the parties) for those Services and Deliverables.

- (f) DIA will make payment in full of all Fees payable by DIA under this Agreement for all Services performed through to the effective date of the termination or expiry of this Agreement, provided that this clause 14.6(f) will not limit DIA's rights under clause 8.5, clause 8.8 or otherwise, including where this Agreement is terminated under clause 14.4.

**14.7 Survival of provisions:** Upon termination or expiry of this Agreement for any reason, the provisions of clauses 5.1(c), 8.2, 9.1, 9.2, 9.5 to 9.8, 10, 11, 12, 13.1 to 13.7, 14.6 to 14.8 and 18 and any other clauses intended to survive termination or expiry, together with those other provisions of this Agreement that are required in order to give effect to those clauses, will remain in full force and effect.

**14.8 Accrued rights:** Termination or expiry of this Agreement will be without prejudice to the rights and remedies of the parties accrued prior to termination or expiry, including in respect of any prior breach of this Agreement.

## 15. DISPUTES

**15.1 Procedure:** Subject to clause 15.2, if a dispute arises in relation to this Agreement, the parties will attempt to resolve the dispute using the dispute resolution process set out below before pursuing any other remedies available at law or otherwise:

- (a) if either party receives notice of a dispute, the parties will work together in good faith to resolve the dispute via negotiation and will escalate the dispute to appropriate levels within their respective organisations; and
- (b) if the dispute is not resolved within 20 Business Days of receipt of a notice under clause (a), either party may, by written notice to the other party (**Mediation Notice**), require the dispute to be submitted to mediation in New Zealand in accordance with the Resolution Institute's Mediation Rules (**Mediation**); and
- (c) the Mediation will be conducted by a mediator, and at a fee, agreed by the parties. If the parties fail to agree such matters within 10 Business Days following the date of the delivery of the Mediation Notice, the Chair for the time being of Resolution Institute (or his or her nominee) will select the mediator and determine the mediator's fee. The parties will share equally the cost of the mediator's fee.

**15.2 Interlocutory relief:** Nothing in this clause 15 will prevent either party, at any time, from seeking any urgent interlocutory relief from a court of competent jurisdiction in relation to any matter that arises under this Agreement.

**15.3 Other remedies:** Subject to clause 15.2, a party to the dispute will only be entitled to pursue other remedies available to it at law or otherwise, if the parties have failed to resolve the dispute within 20 Business Days after commencement of the Mediation.

**15.4 Continuity:** In the event of a dispute between the parties concerning this Agreement, the Service Provider will continue to provide the Services and Deliverables unless DIA requires otherwise in writing and DIA will continue to pay all undisputed fees.



## 16. FORCE MAJEURE

**16.1 Force Majeure Events:** If, and to the extent to which, a party is unable to perform any of its obligations under this Agreement because of a Force Majeure Event (such party being referred to in this clause 16 as the "**Affected Party**") the Affected Party will have no liability to the other party in respect of the non-performance by the Affected Party of those obligations provided that and to the extent the Affected Party:

- (a) as soon as reasonably practicable after becoming aware of the Force Majeure Event, notifies the other party in writing of the occurrence of the event (such notice must include details of the Force Majeure Event, the date of its commencement, the expected effect or duration of it and the Affected Party's proposal for mitigating its effect and duration);
- (b) where reasonably practicable, has continued to provide the other party with regular written updates about its efforts to overcome or avoid the effect of the event for so long as it continues to prevent the Affected Party from carrying out obligations under this Agreement;
- (c) uses its best endeavours to overcome or avoid the effect of the Force Majeure Event, to mitigate the effects of the Force Majeure Event and to complete its obligations under this Agreement on time (provided that, nothing in this clause 16.1(c) shall be construed to require the Affected Party to settle a strike, lockout or other industrial disturbance by acceding against its judgment to demands made to it); and
- (d) as soon as reasonably practicable after becoming aware of the cessation of the Force Majeure Event, notifies the other party in writing of that fact and re-commence performance of all of its obligations in accordance with this Agreement.

Notwithstanding the foregoing:

- (a) neither party shall be released from any liability which accrued before the date of commencement of the Force Majeure Event; and
- (b) this Agreement shall otherwise remain in effect in all respects.

**16.2 Termination for Force Majeure Event:** If a Force Majeure Event is of such magnitude or will be of such duration that it is, or is reasonably likely to be, impossible or impractical for the Affected Party to comply, to a material extent, with the Affected Party's obligations under this Agreement or a Statement of Work for a period of one consecutive month or longer, the non-affected party may terminate this Agreement or that Statement of Work (as the case may be) by giving a written notice to the Affected Party that:

- (a) describes the Force Majeure Event that the non-affected party considers to have led to, or to be reasonably likely to lead to, the impossibility or impracticality referred to in this clause 16.2 (the "**Relevant Force Majeure**");
- (b) states the non-affected party has concluded that the Relevant Force Majeure will have that effect, including giving the reasons that support that conclusion; and
- (c) states this Agreement or the relevant Statement of Work will terminate on the date which is 20 Business Days (or such longer period as may be specified in the notice) after the date on which the notice is received by the Affected Party.



Clauses 14.6 - 14.8 will apply in the event of termination of this Agreement or any Statement of Work pursuant to this clause 16.2.

## **17. CHANGE MANGEMENT**

**17.1 Change Procedure:** Unless otherwise agreed between the parties, the parties will comply with the Change Procedure set out in this clause 17 for any change to this Agreement, including any change to any Service or Deliverable or other aspect of any Schedule or Statement of Work where such change cannot clearly be accommodated by another process in this Agreement (each a **Change**).

**17.2 Change Requests:** Either party may, at any time, request a Change by submitting a written request to the other party substantially in the form to be agreed between the parties (a **Change Request**) that describes the Change and the reasons for it.

**17.3 Impact Statement:** For each Change Request that the Service Provider is willing to consider, the Service Provider will undertake an assessment of the Change and provide to DIA a written statement describing the Change and its impact (the **Impact Statement**):

- (a) if the Service Provider is submitting the Change Request, with its Change Request; or
- (b) if DIA has submitted the Change Request, within 10 Business Days of receiving the Change Request (or such other period as may be agreed by the parties).

**17.4 Requirements for Impact Statement:** Subject to the requirements of paragraphs 17.6, each Impact Statement will specify, in reasonable detail:

- (a) the Change, its feasibility, and how and when it will be implemented;
- (b) the impact of the Change on the terms of this Agreement and the ability of the Service Provider to perform its obligations under this Agreement;
- (c) a full breakdown of the cost of the Change into its constituent elements (such as unit cost, Personnel, delivery, etc.);
- (d) alternative solutions for implementation of the Change, wherever practicable (including pricing);
- (e) the implications of not implementing the Change; and
- (f) any other matter reasonably requested by DIA or that is likely to be relevant to DIA in its consideration of the Change,

and the Service Provider will attach to the Impact Statement a draft change authorisation agreement, setting out any change required to this Agreement.

**17.5 DIA response:** Within 10 Business Days (or such other period as may be agreed by the parties) of receiving an Impact Statement from the Service Provider (including an updated Impact Statement under paragraphs 17.5(b) or 17.5(c)), DIA will notify the Service Provider whether it:

- (a) approves the Impact Statement, in which case DIA and the Service Provider will sign the change authorisation agreement approved in the relevant Impact Statement, following which the Change will be deemed to be an amendment to, and will form part of, this Agreement;

- (b) requests changes to the Impact Statement (including the addition of further relevant information), in which case the Service Provider will promptly (and in any event within 10 Business Days or such other period as may be agreed by the parties) provide to DIA an updated Impact Statement that incorporates DIA's reasonably requested changes;
- (c) wishes to negotiate the Impact Statement, in which case the parties will use their best endeavours to negotiate and agree the Impact Statement as soon as is practicable (and in any event within five business days), and the Service Provider will provide to DIA an updated Impact Statement that incorporates the parties' agreed Changes upon the parties reaching such agreement; or
- (d) at its sole discretion:
  - (i) in relation to a Change Request initiated by DIA, withdraws that Change Request; or
  - (ii) in relation to a Change Request initiated by the Service Provider, rejects the Impact Statement,

in which case the Service Provider will not implement the Change, and the Change Request and Impact Statement will be of no effect.

**17.6 Truncated process:** Where the parties have agreed that a Change is:

- (a) relatively minor (in terms of cost and impact); or
- (b) urgent,

and does not involve a material alteration or deviation from this Agreement, the parties may agree in writing to a truncated change control process to deal with that Change.

**17.7 Costs:**

- (a) Unless expressly agreed otherwise in writing by the parties, each party will be responsible for its own costs and expenses incurred in complying with this Change Procedure (including, in the case of the Service Provider, the preparation of the Impact Statements).
- (b) DIA will have no liability for any costs or expenses in relation to any Change, and the Service Provider will not undertake any Change, until both parties have agreed to the details of the Change in a change authorisation agreement signed by both parties.

**17.8 Change Register:** The Service Provider must prepare and maintain an electronic register that is available to DIA and that details all the current and past Changes that are or have been subject to the Change Procedure.

**18. GENERAL**

**18.1 Variations:** No amendment to this Agreement (including any Schedule or Statement of Work) will be effective unless it is in writing and signed by the parties.

**18.2 Assignment:** The parties may not assign, transfer, novate, subcontract, charge, pledge or otherwise encumber this Agreement or any part thereof, or any of its rights or obligations under this Agreement, without first obtaining the other party's written consent.



Notwithstanding, DIA may assign this Agreement to any office of the Crown, without such consent.

**18.3 No waiver:** A delay, neglect or forbearance by a party in enforcing any provision of this Agreement against the other will not waive or limit any right of that party.

**18.4 Invalid clauses:** If any part of this Agreement is held to be invalid, unenforceable or illegal for any reason, this Agreement will be deemed to be amended by the addition or deletion of wording necessary to remove the invalid, unenforceable or illegal part, but otherwise to retain the provisions of this Agreement to the maximum extent permissible under applicable law.

**18.5 Costs:** Each party will bear its own legal costs and expenses incurred in connection with the preparation, negotiation and execution of this Agreement.

**18.6 Relationship:** The parties will perform their obligations under this Agreement as independent contractors to each other.

**18.7 Entire agreement:** This Agreement contains the whole of the contract and understanding between the parties in respect of the matters covered by it and supersedes all prior representations, agreements, statements and understandings between the parties in respect of those matters, whether verbal or in writing.

**18.8 Remedies cumulative:** The rights of the parties under this Agreement are cumulative. The parties do not exclude any rights provided by law, unless otherwise expressly stated in this Agreement.

**18.9 Notices:** Each notice or other communication to be given under this Agreement (**Notice**) must be in writing and sent by post, email or personal delivery to the addressee at the postal address, email or physical address, and marked for the attention of the person or office holder (if any), set out in Schedule 1. No Notice will be effective until received. A Notice is, however, deemed to be received:

- (a) in the case of posting, on the third Business Day following the date of posting;
- (b) in the case of personal delivery, when received; and
- (c) if sent by email, at the time the email leaves the sender's information system and it is not returned undelivered or as an error,

provided that any Notice personally delivered or sent either after 5pm on a Business Day or on any day that is not a Business Day will be deemed to have been received on the next Business Day.

**18.10 Governing Law:** This Agreement is governed by New Zealand law. The parties submit to the non-exclusive jurisdiction of the New Zealand courts in respect of all matters relating to this Agreement.




**18.11 Counterparts:** This Agreement may be signed in any number of counterparts (including facsimile copies) all of which, when taken together, will constitute one and the same agreement. A party may enter into this Agreement by signing any counterpart.

**18.12 Further assurances:** Each party will do all things and execute all documents reasonably necessary to give effect to the terms of this Agreement.

**18.13 Non merger:** The warranties, undertakings and indemnities given under this Agreement will not merge on any completion or settlement under this Agreement or any other agreement between the parties, but will remain enforceable to the fullest extent permissible, despite any rule of law to the contrary.

**SIGNED** as an agreement

For <b>HER MAJESTY THE QUEEN IN RIGHT OF NEW ZEALAND</b> acting by and through the Chief Executive of the <b>DEPARTMENT OF INTERNAL AFFAIRS</b> or his or her authorised delegate:	
	
Name:	<b>David Philp</b>
Position:	General Manager, Partners and Products
(Authorised signatory)	
Date:	9/1/19

For <b>DAON (AUSTRALIA) PTY LIMITED:</b>	
9(2)(a) 	
Name:	9(2)(a) 
Position:	9(2)(a) 
(Authorised signatory)	
Date:	4/1/19

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**SCHEDULE 1  
AGREEMENT DETAILS**

The items specified below apply for the purposes of this Agreement:

Clause	Specified Items	
<b>Service Provider's liability cap (Clause 11.2(a) and (b))</b>	(a) Per claim: N/A	
	(b) Maximum aggregate liability amount: NZ\$ <sup>9(2)</sup> <sub>(b)(ii)</sub> million	
<b>Insurance requirements (Clause 11.5)</b>	<b>Insurance type</b>	<b>Amount</b>
	Professional indemnity	NZ\$ <sup>9(2)</sup> <sub>(b)(ii)</sub> million
	Public liability	NZ\$ <sup>9(2)</sup> <sub>(b)(ii)</sub> million
<b>Commencement Date (Clause 14.1)</b>	1 January 2019	
<b>Expiry Date (Clause 14.1)</b>	Two (2) years from the Commencement Date.	
<b>Renewal period (Clause 14.2)</b>	DIA may extend the term of this Agreement for up to two periods of up to one year each by giving the Service Provider notice in writing at least 20 Business Days before the Expiry Date, or the expiry of the relevant renewal period, as the case may be. If the Agreement is renewed, the Expiry Date shall become the date on which that renewal period expires.	
<b>DIA's notice details (Clause 18.9)</b>	Address for Notices:	45 Pipitea St Wellington New Zealand
	Phone	<sup>9(2)(a)</sup>
	Attention:	
	email	
<b>Service Provider's notice details (Clause 18.9)</b>	Address for Notices:	Suite 65, Level 1 10-12 Lonsdale Street Braddon ACT 2612 Australia
	Phone	<sup>9(2)(a)</sup>
	Attention:	Legal Department
	email	<sup>9(2)(a)</sup>

**SCHEDULE 2**  
**STATEMENT OF WORK TEMPLATE**

If the parties wish to enter into a Statement of Work, it will be documented in substantially the following form:

**STATEMENT OF WORK**

**HER MAJESTY THE QUEEN IN RIGHT OF NEW ZEALAND** acting by and through the Chief Executive of the **DEPARTMENT OF INTERNAL AFFAIRS** or his or her authorised delegate (**DIA**)

**DAON (AUSTRALIA) PTY LIMITED (Service Provider)**

**1. INTRODUCTION**

**1.1 Subject to Agreement:** This Statement of Work is entered into under, and is governed by, the Master Services Agreement dated *[insert date]* between DIA and the Service Provider (**Agreement**).

**1.2 Background:** This Statement of Work relates to:

*[Insert brief background to the Services and Deliverables (including Software) and the Service Provider's role.]*

**1.3 Interpretation:** Unless the context otherwise requires, terms defined in the Agreement have the same meaning in this Statement of Work and the rules of interpretation set out in the Agreement apply to this Statement of Work (except that references to paragraphs and appendices in this Statement of Work are references to the paragraphs and appendices of this Statement of Work).

**2. TERM**

**2.1 Term:** This Statement of Work will commence on *[insert date]* (**Statement of Work Start Date**) and, unless otherwise terminated in accordance with the provisions of the Agreement, will continue until DIA notifies the Service Provider in writing that the Service Provider has completed the provision of the Services and Deliverables in accordance with this Statement of Work to the satisfaction of DIA (**Statement of Work Term**).

**2.2 Consistent with Term of Agreement:** Notwithstanding any other provision of this Statement of Work, this Statement of Work will terminate immediately upon the termination of the Agreement.

**3. SERVICES AND DELIVERABLES**

**3.1 Services:** The Services that the Service Provider will provide to DIA include:

*[Insert a detailed description of the Services to be provided].*

**3.2 Deliverables:** The Deliverables the Service Provider will provide to DIA include:

*[Insert a detailed description of the Deliverables to be provided].*

**3.3 Specifications:** The specifications for the Deliverables are:



*[Insert a detailed description of the business purposes and/or uses for which DIA is obtaining the Deliverables and the functions that they are to perform].*

The Services and Deliverables will be provided in accordance with the requirements and timeframes set out in the plan attached as Appendix A.

**3.4[Software:** The Software that the Service Provider will license to, or procure for, DIA is:

*[Insert a detailed description of the Software to be provided].*

**[Support:** The Support Services that the Service Provider will provide to DIA include:

*[Insert a detailed description of the Support Services to be provided].*

**[Warranties:** The following Warranties apply to the Services and Deliverables:

*[Insert a detailed description of any applicable Warranties.]*

**3.5 Service Levels:** [The Service Provider will meet or exceed the following Service Levels:

*[Insert details].*

**3.6 Service Level rebates:** In addition to any other rights or remedies DIA may have under the Agreement or at law, the Service Provider agrees to pay the following rebates in relation to its failure to meet or exceed the Service Levels:

*[Insert as applicable].*

#### **4. ACCEPTANCE TESTING**

*[Insert applicable acceptance testing process.]*

#### **5. DOCUMENTATION**

The Service Provider will supply the following documentation to DIA:

*[Insert a detailed description of the documentation to be supplied by the Service Provider and any related requirements. See template in Schedule 3 for examples of what might be required.]*

#### **6. SPECIFIED PERSONNEL**

The Specified Personnel and their respective functions are:

<b>Specified Personnel</b>	<b>Component of Deliverables/Services for which Specified Personnel is responsible</b>
<i>[Insert name]</i>	<i>[Insert details]</i>

#### **7. MEETINGS, PERFORMANCE REVIEW AND REPORTING REQUIREMENTS**

**7.1 Meeting and Performance Review Requirements:** The Service Provider's designated representatives will attend the following meetings at the following times:

<b>Meetings &amp; Performance Review</b>	<b>Designated representatives of the Service Provider required</b>	<b>Frequency/Date</b>
--	--	-----------------------

Details	to attend	
[Insert details]	[Insert details]	[Insert details]

**7.2 Reporting Requirements:** The Service Provider will provide to DIA the following reports at the following times:

Report Details	Frequency/Date
[Insert details of report]	[Insert date/frequency]

**8. FEES**

**8.1 Invoicing:** The Service Provider is to invoice the Fees:

[Choose an invoicing approach – some examples are set out below.]

*In accordance with clause 8 of the Agreement.*

OR

*On completion of the Services and supply of the Deliverables to DIA's satisfaction.*

OR

*At the end of each month for Services and Deliverables provided during that month to DIA's satisfaction.*

OR

[For fixed Fees]

*In instalments on the dates set out below, subject to completion of the relevant milestones to DIA's satisfaction:*

Instalment (excluding GST)	Date	Milestone
[Insert amount of instalment] \$	[Insert date of invoice]	[Describe Services or Deliverables to be provided before invoice is issued]

**8.2 Fees:**

[Specify the fees payable and the method and timing of payments, including if any fees are only payable after acceptance of completion of milestones.]

*Fixed Fee of \$X excluding GST.*

OR

*[Use all or a percentage of the budgeted amount figure for the Services as the maximum Fee. Specifying the maximum Fee protects DIA from overspending the budgeted amount.]*

*Hourly Rate of \$X excluding GST, up to a maximum Fee of \$X excluding GST.*

OR

*Daily Rate of \$X excluding GST, for each full day's attendances of 8 or more hours, reduced pro rata for attendance of less than 8 hours, up to a total maximum Fee of \$X excluding GST.*

OR

*[Hourly/Daily Rates] for each of the Personnel in accordance with the following table of rates up to a total maximum Fee of \$X excluding GST:*



**Personnel**

**[Hourly/Daily Rate] (excluding GST)**

[Insert name of Personnel]

[Insert either hourly or daily rate as applicable]

**8.3 Expenses:**

[Choose one option, delete other.]

No reimbursement of expenses.

OR

Reimbursement for reasonable third party expenses incurred in the provision of the Services and Deliverables provided that:

- (i) DIA has given its prior written consent to the Service Provider incurring the expenses; and
- (ii) the expenses are charged at cost.

**9. ASSUMPTIONS, DEPENDENCIES AND RISKS**

[To be limited as far as practicable.]

**10. OTHER TERMS**

[Delete this paragraph 10 if no additional terms are applicable.]

**SIGNED**

For **HER MAJESTY THE QUEEN IN RIGHT OF NEW ZEALAND** acting by and through the Chief Executive of the **DEPARTMENT OF INTERNAL AFFAIRS** or his or her authorised delegate:

Name: [Insert Person with Financial Delegation]

Position:

(Authorised signatory)

Date:

Witnessed by:

Signature:

Name:

Occupation:

Location:

Date:

For **DAON (AUSTRALIA) PTY LIMITED:**

Name:

Position:

(Authorised signatory)

Date:

Signature:

Name:

Occupation:

Location:

Date:

**SCHEDULE 3 – THE SERVICES AND DELIVERABLES TO BE PROVIDED AS AT THE COMMENCEMENT DATE**

**1. BACKGROUND**

- 1.1 This Statement of Work is entered into under, and is governed by, the Master Services Agreement dated on or about 20 December 2018 between DIA and the Service Provider (Agreement).
- 1.2 This Statement of Work relates to the provision of services in relation to the ongoing availability, improvement and support of Software defined below.

**2. DEFINITIONS**

- 2.1 In this Statement of Work the terms defined in the Agreement have the same meaning and the following terms have the following meanings unless the context requires otherwise:

**Approved Equipment** means infrastructure with the following specifications:

Server	os	JRE	DB Software
Database Server	9(2)(k)	n/a	Oracle
IdentityX SRP Server	9(2)(k)	Oracle Java + 9(2)(k)	n/a
Onboarding Server	9(2)(k)	Oracle Java 9(2)(k)	n/a

**Documentation** means the written material including guides, release notes and designs produced by the Service Provider to support DIA's use of the Software and System. These include, but are not limited to

- (a) Product Release Notes
- (b) Database Installation and Maintenance Guides
- (c) Product Installation, Configuration and High Availability Guides
- (d) Admin Console and Monitoring Guides
- (e) SOAP / REST interface specification guides
- (f) Integration guides and best practices
- (g) Android/iOS Development and Integration Guides. Full access to IdentityX Best Practices and Help Centre Portal
- (h) Release Notes describing the changes implemented in a Revision

**Revision** means a modification to a Version that is generally released and is an improvement made to the Software to correct program faults or other defects or to effect minor



enhancements to the functionality of the Software (and any Documentation associated with such modification);

**Scheduled Outage** means a maintenance/outage window or period agreed in writing in advance by the parties and occurring outside business hours.

**Software** means, for the purpose of this Schedule 3 and Schedule 4, the Identity X SRP application software provided under the Transferred SDAs as described in the appendix to this Schedule 3 and includes all improvements, updates and new versions of that software;

**System** means the Software and all existing equipment, software and cabling owned, licensed or used by or on behalf of DIA to which the Software is connected, or integrated, working in combination together to meet the requirements of DIA in providing the RealMe Now solution and any other facial recognition identity service;

**User** means a person that uses the RealMe Now solution or other facial recognition identity services provided by DIA utilising the Software; and

**Version** means an additional version of the Software that is generally released which introduces materially new functionality to a previous version of the Software and which goes beyond the scope of a Revision.

### 3. SERVICES

3.1 The Service Provider shall provide the Services set out below in accordance with the Service Levels set out below. The Service Provider will provide the support and maintenance services set out in Schedule 4.

Services	Description	Service Level
Service Availability, Performance and Security	Ensure the Software and services provided by the Software in production environments satisfy the availability, performance and security requirements of this Agreement, including paragraph 4 below.	As described in paragraph 4 below
Revisions and New Versions	Provision of revisions and new versions of licensed software in accordance with paragraph 5 below.	
Training	The Service Provider will provide sufficient training for specialist staff of DIA to enable them to use the System and to train others.	
Problem Management and Support	Algorithm tuning, update release management, communications and integration support with third level issue resolution for the Base Software and project specific customisations as set out in paragraph 6 below and schedule 4.	As described in paragraph 6 and schedule 4
Roadmap	Planning for ongoing releases and extended uses for IdentityX — such as biometric authentication, push notification and mobile ID.	

### 4. AVAILABILITY, PERFORMANCE AND SECURITY

**4.1 Availability:** Subject to paragraph 4.4, the Service Provider will ensure the Software and services provided by the Software in production environments:

- (a) is available 99% of the time during the calendar month, based on 24 x 7 usage, excluding Scheduled Outages;
- (b) without limiting the above, ensure no more than one unplanned outage (not being a Scheduled Outage) per calendar month; and
- (c) without limiting the above, ensure no more than 10 transactions fail per month for up to three concurrent users at any given time.

**4.2 Performance:** Subject to paragraph 4.4, the Service Provider will ensure the Software meets the following performance requirements:

- (a) for processing video, 85% return a successful result to the User within one minute, for up to three concurrent Users at any given time; and
- (b) for processing video, 99% return a successful result to the User within two minutes, for up to three concurrent Users at any given time.

**4.3 Security:** Subject to paragraph 4.4, the Service Provider will warrant that it will use commercial best practice to ensure there are no security intrusion events caused by the Software or any failure of the Software.

**4.4 Limitations:** The availability, performance and security requirements in paragraphs 4.1 to 4.3 will not apply to the extent the Software or Service is not available use to:

- (a) the rectification of errors caused by incorrect use of the Software by DIA;
- (b) defects in any equipment, system or data provided by DIA, Datacom or Sush;
- (c) rectification of error caused by changes to the Deliverables where such changes have not been authorised by Service Provider, or caused by changes to the System and:
  - (i) the Service Provider was not made aware of that change; or
  - (ii) if the Service Provider was made aware of that change:
    - A. less than 10 business days has passed since the Service Provider became aware of the change and the Service Provider has not approved the change; or
    - B. the Service Provider has advised DIA that it does not approve of the change;
- (d) DIA (or DIA contractor) failing to accept and implement any revision or patch for the Software within a reasonable time;
- (e) DIA or third party interventions in the Software not authorised by the Service Provider;
- (f) failure of the telecommunications or electricity networks supplied by DIA or third parties which affects the operation of the Software; or



- (g) remedying problems caused by viruses uploaded to the Software anyone other than the Service Provider,

**4.5 Review:** Without limiting any other right or obligation under this Agreement, DIA may run tests of the availability and/or performance of the Software for the above requirements or Service Levels. The Service Provider will provide DIA such information and assistance as is reasonably required for the purpose of that review and will promptly respond to the outcome of any review, including by correcting any failure identified that is attributable to the Service Provider.

## **5. REVISIONS AND NEW VERSIONS:**

**5.1** For so long as the Software is licensed to DIA:

- (a) the Service Provider shall promptly supply all Revisions and Versions of the Software (and all associated Documentation) at its cost and, where requested by DIA will integrate and install Revisions and Versions, with support of Datacom, at DIA's cost (such cost to be agreed in writing advance, based on the Rates Card in this Agreement)
- (b) the Service Provider shall advise DIA of the impact of any new Version or Revision in sufficient time to allow DIA to decide if it wishes to implement that new Version or Revision;
- (c) new Revisions and Versions will be available for installation at the same time as the new Revision or Version in its generally-released form is available for installation in any of the Service Provider's other customer environments;
- (d) DIA, in its absolute discretion, may elect to not install any new Version or Revision, or to delay the installation. DIA acknowledges and agrees that a decision not to install any new Version or Revision may impact Service Provider's ability to effectively support DIA, and
- (e) the Service Provider reserves the right to review the Fees should DIA fail to maintain the Software which is more than two Versions behind the current Version of the Software provided that no account shall be taken of Revisions or Versions not installed by DIA for the following reasons:
  - (i) a Revision or Version which in any significant respect is not applicable or suitable for the New Zealand environment; or
  - (ii) any Revision or Version that the Parties agree is not subject to this obligation.

**5.2 Installation:** Where there is a Revision which the Service Provider is required to install in terms of paragraph 5.1 of this Appendix or DIA elects to install any new Version:

- (a) the installation and any required integration with DIA's systems (including computer hardware) shall be undertaken by the Service Provider, with support of Datacom, at agreed times in order to cause least disruption to DIA's business operations, as agreed between the Parties. Should DIA require after hours installation, the Service Provider may charge for any additional labour charges at its after-hours rates;

- (b) unless otherwise required by DIA or as otherwise agreed between the Service Provider and DIA, any new Version shall incorporate all functions and facilities, be that in a new form or otherwise, of the Version (including Revisions) then in use by DIA immediately prior to installation of the new Version; and
- (c) this Agreement shall continue to apply, unless mutually agreed otherwise, in all respects to the new Version and all Revisions and the new Versions and Revisions shall be deemed to be part of the relevant item or items of Software to which they relate.

**5.3 Superseded versions:** DIA will be entitled to keep sufficient copies of superseded Revisions or Versions for the purpose of audit and archive recovery.

**5.4 Acceptance testing:** Where the Parties agree (acting reasonably), the implementation of each Revision or Version shall be subject to an agreed acceptance testing regime.

## **6. PROBLEM MANAGEMENT AND SUPPORT**

**6.1 Support:** Service Provider will provide the support services described in, and in accordance with Schedule 4 of this Agreement, including the provision of:

- (a) remedy or work around for any errors, defects or problems in or with the Software which are notified by DIA (or Datacom on DIA's behalf) to the Supplier or which the Supplier otherwise becomes aware;
- (b) web and email support for problem reporting, progressing resolution and general help;
- (c) the supply and management of the Revisions or Versions if requested by DIA and facilitating the successful implementation of Versions and Revisions; and
- (d) if the web and email support has not remedied any defect or problem, remote support to assist DIA with usage problems and suspected errors or defects in the System.

**6.2 Problem management:** Where DIA, or Datacom on DIA's behalf, identifies any incident or collection of incidents that are recurring or have a common cause (**Problem**) that relate to, or are contributed to by, the Software or Services of the Service Provider, then the Service Provider will:

- (a) follow the reasonable directions of Datacom in running the problem management process in relation to that Problem;
- (b) provide information and/or carry out investigation into any problems relating to Daon's Software or Services if requested by Datacom, within 5 working days.
- (c) assist Datacom in drafting any problem reports.

If a problem resolution requires any additional services from Service Provider then this will be handled as a separate work request.

**6.3 Limitations on support and problem management:** The provision of the Services by the Service Provider under paragraphs 6.1 and 6.2 does not include:

- (a) the rectification of errors caused by incorrect use of the System by DIA;



- (b) defects in DIA supplied equipment or System;
- (c) rectification of error caused by changes to the System or the Deliverables where such changes have not been authorised by Service Provider;
- (d) DIA or third party interventions in the System not authorised by the Service Provider (such authorisation not be unreasonably withheld);
- (e) failure of the telecommunications or electricity networks supplied by DIA or third parties which affects the operation of the System;
- (f) remedying problems caused by viruses uploaded to the System by anyone other than the Service Provider or its Personnel;
- (g) remedying problems caused by unauthorised intervention in the Service Provider Software or Third Party Software by anyone other than the Service Provider or its Personnel; and
- (h) use by DIA of the Software in conjunction with equipment other than the Approved Equipment.

## **7. REGULATORY DEVELOPMENTS**

- 7.1** From time to time DIA may request the Service Provider to amend, modify, customise or enhance the Software to address regulatory or technological changes or developments affecting New Zealand digital identities. The Service Provider agrees to give the consideration and performance of such requests its highest development priority over and above all other current and planned developments except those other developments to address regulatory changes or developments in territories where the Service Provider has a higher number of users. The Service Provider undertakes to apply appropriate resources to the performance of DIA's requests under this paragraph.

## **8. DIA RESPONSIBILITIES**

### **8.1** DIA will:

- (a) use a Version that is within two Versions of the current Version (n-1) of the Software as issued by the Service Provider from time to time, unless otherwise agreed in writing by the Parties;
- (b) keep full security copies of the Software and applicable data in accordance with good computing practice;
- (c) not request, permit or authorise anyone other than the Service Provider (or DIA or Datacom to the extent permitted) to provide any maintenance services in respect of the Software, unless otherwise agreed;
- (d) co-operate with the Service Provider in the diagnosis of any error or defect in the Software; and
- (e) provide appropriate access to Software located at Datacom. Each Party shall be responsible for all connection and usage charges in respect of such telecommunication facilities utilised in its country.

**9. MEETINGS AND REPORTING REQUIREMENTS**

**9.1 Designated Contact:**

- (a) For DIA:
- (b) For Service Provider:

**9.2 Meeting Requirements:** The Service Provider’s designated representatives will attend the following meetings:

- (a) monthly RealMe Operational Governance Meeting remotely. DIA will organise and run the meeting;
- (b) fortnightly RealMe Operations meeting. Datacom will organise and run the meeting;
- (c) Relationship Meetings twice yearly. DIA will organise and run the meeting; and
- (d) Security Meetings – after any major security incident, and/or quarterly. DIA will organise and run the meeting.

**9.3 Reporting Requirements:** The Service Provider will provide to DIA the reports and other information set out or referred to in this Statement of Work.

**10. INVOICING AND FEES**

**10.1 Invoicing:** The Service Provider is to invoice the Fees in accordance with clause 8 of the Agreement.

**10.2 Fee**

Fee structure at commencement	Fee
Fixed Annual Fees	9(2)(b)(ii) -
Infrastructure and maintenance of an AWS Virtual Private Network for development, integration and demonstration purposes	9(2)(b)(ii)
User Fee	
For first 15,000 Users	Included in fixed annual fee
For each User beyond the first 15,000	\$ <sup>9(2)(b)(ii)</sup> per User

For the avoidance of doubt, no additional Fees are payable for the Support Services described in Schedule 4.

User numbers will be checked on a quarterly basis. Fees for Users in excess of 15,000 not covered within the Fee for 15,000, will be invoiced on a quarterly basis.



On each anniversary of the commencement date, DIA may elect to transition from the above pricing arrangement to the following:

<i>Potential future Fee structure</i>	<i>Fee</i>
<i>IdentityX Annual Server Fee</i>	9(2)(b)(ii)
Infrastructure and maintenance of an AWS Virtual Private Network for development, integration and demonstration purposes	9(2)(b)(ii)
<i>User Fee</i>	
<i>For first 50,000 Users</i>	<i>Included in fixed annual fee</i>
<i>For each User beyond the first 50,000</i>	9(2)(b)(ii) <i>per User</i>

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**APPENDIX**  
**SOFTWARE SPECIFICATION**

**IdentityX Server Software**

Server software which:

9(2)(k)

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9(2)(k)

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**Mobile Framework & SDKs**

9(2)(k)

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**Liveness Server**

9(2)(k)

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9(2)(k)



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#### SCHEDULE 4 – SOFTWARE AND DOCUMENTATION LICENCE TERMS AND CONDITIONS

1. **Grant:** The Service Provider grants to DIA an annual non-exclusive, non-transferable licence (unless permitted hereunder) to use the Software and the Documentation relating to the Software for the purposes of:
  - (a) testing the Software, and System;
  - (b) operating the Software, and System;
  - (c) interfacing the Software and System with DIA's own information technology environment and any external third party systems;
  - (d) training any person in connection with the Software;
  - (e) doing any other reasonable thing consistent with the possession, operation and use of the Software and System in and for the purpose of DIA's business as contemplated for the relevant Statement of Work;
  - (f) permitting hosting and support of the System by Datacom provided that Datacom must be subject to confidentiality obligations that protect the Software;
  - (g) using the System to provide services to clients and partners of DIA (and enable such partners' customers to also use the System; and
  - (h) creation of copies of the Software and Documentation as may be necessary to enable use of the System and the maintenance of a reasonable number of back-up and test copies of the Software. Any such copies must carry identical copyright notices to those on the originals.
2. **Restricted acts:** Except as stated in this Schedule, DIA shall have no right to:
  - (a) make or permit any other person to make a copy of the Software or Documentation, or any part thereof, except as expressly set out in this Agreement;
  - (b) use the Software or Documentation on behalf of another person or permit any other person to use the Software except as permitted and contemplated by this Agreement;
  - (c) make or permit to be made any alterations to the Software or Documentation without the prior written consent of the Service Provider; or
  - (d) attempt in any manner to reverse engineer, reverse assemble or reverse compile any part of the Software.
3. **Warranty:** The Service Provider warrants that the Software meets the requirements of the Specification set out in the Appendix to Schedule 3 and will perform in accordance with that Specification subject to the terms of this Agreement.
4. **Revisions and Versions:** Any Revisions or Versions to the Software supplied by the Service Provider under this or any other agreement shall be governed by the same terms and conditions as set out in this Appendix.
5. **Documentation and maintenance material:** The Service Provider shall provide and supply free of charge all Documentation applicable to and normally supplied with the Software and any



other items required to be supplied in accordance with this Schedule.

6. **Approved Equipment:** DIA shall use the Software on or in conjunction with the Approved Equipment:
  - (a) at the sites at which such equipment is installed at the date of this Agreement or such other place to which the Approved Equipment may be moved (provided the Service Provider is given 30 days' notice of such move and the new location of the Approved Equipment);
  - (b) at any live disaster back-up site approved by the Service Provider in writing from time to time (such approval not to be unreasonably withheld); or
  - (c) as part of development or test systems at any site or sites notified in writing to the Service Provider from time to time.
7. **Replacement of Approved Equipment:** DIA may replace the Approved Equipment with new equipment at any time at its discretion subject to the Service Provider agreeing and certifying that such equipment is able to run the Software (such agreement and certification not to be unreasonably withheld). Service Provider may charge Customer for the reasonable costs of any such certifications, which costs will be agreed in writing prior to the certification being carried out. The new equipment, once certified, shall be deemed to be Approved Equipment for the purposes of this Agreement. On an ongoing basis the Service Provider shall ensure that the Software and each new Version or Revision of the Software is suitable for use on the Approved Equipment.
8. **Consequence of Termination:** If this licence is terminated in accordance with the terms of this Agreement, DIA shall return to the Service Provider all copies of the Software (and Documentation relating to the Software) in the possession of DIA on media belonging to the Service Provider and erase all copies of the Software and Documentation relating to the Software, if any, on media owned by DIA and certify to the Service Provider that such erasure has occurred.
9. **Third Party Software:** The Service Provider must ensure that:
  - (a) the Third Party Software is supplied to DIA lawfully and on terms materially similar to this Appendix A unless expressly provided other-wise in writing; and
  - (b) the licence terms imposed by the third party permit full and unrestricted use of the Third Party Software in accordance with the purpose of this Schedule.

## SCHEDULE 5 – SUPPORT

This Support schedule applies in relation to Software and any other Deliverables developed and provided to DIA under the Transferred SDAs of Kiwibank Master Agreement and licensed under Schedule 4, including any improvement or iteration of that Software or Deliverable provided under this Master Service Agreement.

### 1. DEFINITIONS

1.1 In this Schedule terms defined elsewhere in the Master Agreement have the meanings given to them and the following terms have the following meanings:

**Business Hours** means 8am to 5pm each day of the week other than Saturday or Sunday or a statutory public holiday in Canberra Australia;

**Incident** means any error or failure with any Software or other Deliverable for which the Service Provider is responsible;

**Resolution Time** means, in respect of any Support Request relating to an Incident for which the Service Provider is responsible, the period from the time at which DIA (or Datacom on DIA's behalf) advises the Service Provider of that Support Request until the time at which that Support Request has been Resolved (inclusive);

**Resolved** means:

(a) in respect of any Support Request relating to an Incident:

(i) that the Incident has been corrected to DIA's reasonable satisfaction, such that all components and functions of the relevant Software or Deliverable (individually and as a whole):

(1) are operating in good working order;

(2) are operating in accordance with, and comply with, the relevant Specifications and any other requirements set out in this Statement of Work; and

(3) comply with all of the requirements of the Master Agreement; or

(ii) where the Incident has been referred to the Service Provider incorrectly (because it does not relate to the Software or a Deliverable and is not otherwise the responsibility of the Service Provider) the Service Provider has referred the matter back to Datacom and Datacom has confirmed it will resolve the matter or will refer the matter to the party correctly responsible for resolution; and

(b) in respect of any Requests for Information, that the information or advice requested has been provided to the reasonable satisfaction of DIA,

(and **Resolve** and **Resolution** have corresponding meanings);



**Response Time** means, in respect of any Support Request, the period from the time at which DIA (or Datacom on DIA's behalf) advises the Service Provider of that Support Request until the time at which the Service Provider commences action to Resolve that Support Request and advises this to DIA (or Datacom, as the case may be) inclusive;

**Request for Information** means a request made by DIA to the Service Provider for information or advice relating to the application of New Releases or use of the Software;

**Service Desk** means the service desk as set out in paragraph 2.1 of this Schedule;

**Severity Level** means a level of severity for any Support Request, determined in accordance with paragraph 6.1 of this Schedule;

**Support Centre** means the Support Centre described in paragraph 2 of this Schedule;

**Support Request** means:

- (a) a Request for Information; or
- (b) a request made by DIA (or Datacom on DIA's behalf) for Resolution of Incidents.

## 2. SUPPORT CENTRE SERVICES

2.1 **Service Desk:** The Service Provider will maintain a Service Desk which will accept, log, respond to and manage the Resolution of any Support Requests raised by DIA. The Service Desk will be available to DIA (or Datacom as DIA's representative) by telephone and email during the hours specified in paragraph 2.4 of this Statement of Work. The Service Desk will be manned by an adequate number of fully trained and adequately qualified personnel. The contact details are as follows:

2.2 Support Website: 9(2)(b)(ii)

2.3 E-Mail: 9(2)(b)(ii)

2.4 Telephone: 9(2)(b)(ii)

2.5 **Availability:** The Support Centre will be available:

- (a) via email and via the Support Website 24 hours a day, 7 days a week, 365 days a year;
- (b) via telephone to a the Australian free call number 9(2)(b)(ii) during the Business Hours.

2.6 **Resolution:** The Service Provider will Resolve any Support Requests during the following hours:

- (a) for P1 and P2 calls (defined below) – 24 hours per day, 7 days per week;
- (b) for P3 and P4 calls (defined below) – between 8am and 5pm each business day (being any day other than a Saturday, Sunday or statutory public holiday in Canberra Australia).

2.7 **Logging:** Upon receipt of any Support Request by the Support Centre, the Service Provider will:

- (a) log the Support Request; and
- (b) assign the Support Request the Severity Level specified by the relevant Designated Contact. The Service Provider will ensure that the Designated Contract specifies a Severity Level.

### 3. SUPPORT ERROR RESPONSE AND RESOLUTION

3.1 **Response Time:** Following receipt of any Support Request reporting an Incident, the Service Provider will within the relevant Response Time:

- (a) diagnose the cause of and commence action to Resolve that Incident; and
- (b) advise the Designated Contact by telephone or email of:
  - (i) the Severity Level of the Support Request;
  - (ii) the support case tracking number; and
  - (iii) the cause of the Incident if known and the action taken by the Service Provider to Resolve that Incident.

3.2 **Resolution Time:** The Service Provider will Resolve any Incident reported to it by DIA (or Datacom on DIA's behalf) as soon as reasonably possible and within any applicable Resolution Time.

3.3 **Reporting:** The Service Provider will provide DIA with:

- (a) regular detailed reports, by telephone or email, on the progress of the Resolution of any Incident reported to the Service Provider in a Support Request (each an **Update Report**) in accordance with the reasonable requirements notified by DIA from time to time. In relation to all P1 Incidents (and on written request in relation to any P2 Incident), within 5 days of the Resolution of that Incident, the Service Provider will provide Datacom a post incident review report highlighting the incident and the steps taken to Resolve that Incident; and
- (b) monthly operating reports within 10 days of the end of each calendar month reporting on performance against service levels for that month.

3.4 **Failure to meet Resolution Time:** Without limiting the rights or remedies of DIA, where the Service Provider becomes aware that any Incident is unlikely to be Resolved within the relevant Resolution Time, it will:

- (a) notify DIA of this fact as soon as reasonably possible;
- (b) where applicable comply with the escalation procedure of this Statement of Work; and
- (c) continue to carry out all work reasonably necessary until such Incident is Resolved.



4. **REQUESTS FOR INFORMATION**

4.1 **Resolution Time:** The Service Provider will Resolve any Request for Information reported to it by DIA (or Datacom on DIA's behalf) within the relevant Resolution Time.

4.2 **Failure to Meet Resolution Time:** Without limiting the rights or remedies of DIA, where the Service Provider becomes aware that any Request for Information is unlikely to be Resolved within the relevant Resolution Time, it will:

- (a) notify DIA of this fact as soon as reasonably possible and, without limiting the rights of DIA; and
- (b) where applicable comply with the escalation procedure set out in paragraph 6 of this Statement of Work; and
- (c) continue to carry out all work reasonably necessary to meet DIA's Request for Information as soon as possible.

5. **ESCALATION PROCESS**

The escalation procedure for the purposes of paragraph 3.4 of this Statement of Work is.

Incident/Severity	Target Resolution Time	Escalated to
Production Down (Severity 1)	4 hours	IVS Product Owner or RealMe Product Owner
Critical Impact (Severity 2)	8 hours	IVS Product Owner or RealMe Product Owner
Standard Impact (Severity 3)		IVS Product Owner or RealMe Product Owner
Request for Information		IVS Product Owner or RealMe Product Owner

6. **SUPPORT REQUESTS**

6.1 The following Service Levels will apply for any Support Requests:

Severity/ Priority Level	Description	Response Time Action	Response Time to Contact DIA	When to Escalate & Provide Status Update	Escalation Groups	Target Resolution Times
<b>P1 Critical</b>	Impact is enterprise-wide to production services. Including: Major components of an agreed service (or services) are not functioning as required. An outage resulting in an interruption to an agreed service or services. Will affect large numbers of multiple users of the service. Any security issue which is likely to put daily business operations of the department at risk.	Immediate upon call being logged	Within 15 minutes of call being logged if logged during Business Hours. Within 60 mins if logged outside business hours	Every 60 minutes after first response	Groups 1, 2 and 3	4 hours (core)

<b>P2 Major Impact</b>	The agreed service (or services) is substantially slowed or reduced. An outage resulting in an interruption to an agreed service. Multiple users will usually be affected. Management escalation - urgent attention requested. Might otherwise be classified as a P3. Any security issue which has the potential to put daily business operations of the department at risk.	Within 60 minutes of call being logged	Within 60 minutes of call being logged if logged during Business Hours. Within 60 mins if logged outside business hours	Every 120 minutes after first response	Groups 2 and 3	8 hours (core)
<b>P3 Minor Impact</b>	Minor interruption to an agreed service An individual user is affected Likely to have a significant impact on the user's ability to receive service	Within 4 business hours of call being logged	Within 8 business hours of call being logged	Every week, or as agreed.	Group 3	No target
<b>P4 Very Minor</b>	Very minor interruption to an agreed service. An individual user is affected. Likely to have a minimal impact on the user's ability to receive service.	Within 8 business hours of call being logged	Within 24 business hours of call being logged	Every week, or as agreed.	Group 3	No target

## 7. Service Level Credits

7.1 The Charges for the Services will be reduced by any Service Level Credits payable by The Service Provider.

7.2 DIA is entitled to claim Service Level Credits in respect of any actual failure to meet the Service Levels, unless DIA waives its right to claim the Service Level Credits. In such a case:

- (a) DIA's obligation to pay the invoice to which those Service Level Credits relate will be reduced by the amount of the Service Level Credits; and
- (b) the Service Provider will issue a credit note in respect of the Service Level Credits.

7.3 Service Level Credits will be calculated as follows:

- (a) At the end of each month, the Service Provider will measure the actual month's performance, in relation to each the following performance indicators and the Service Provider will report this measurement to DIA together with The Service Provider's assessment of associated Service Level Credits, and current Service Level Credits status.
  - (i) the Service Provider will achieve the Performance Response Time for all Priority 1 Incidents for which it is responsible. If it fails to do so in any month a single Service Level Credit of  $\frac{9(2)}{(b)(ii)}$  of Services Charges for that month will be awarded to DIA provided the performance level failure is attributable to the Service Provider's acts or omissions in performing the Services; and
  - (ii) the Service Provider will achieve 99% availability for production systems in any month. If it fails to do so in any month a single Service Level Credit of  $\frac{9(2)(b)}{(ii)}$  of Services Charges for that month will be awarded to DIA provided the performance level failure is attributable to The Service Provider's acts or omissions in performing the Services. Service Provider can only cover outages caused by



Service Provider Product related issues or defects. Service Provider is not hosting the production system and we cannot be responsible for hardware/infrastructure/integration related issues, or improper maintenance of Service Provider products

- 7.4 The maximum monetary amount that will be at risk where the Service Provider fails to meet Service Levels in any given month is <sup>9(2)(b)</sup><sub>(iii)</sub> of the aggregate total Charges payable for Services provided under this Schedule in that month.
- 7.5 The parties agree that the Service Level Credits are not penalties and that they are not intended to compensate DIA for the loss it would suffer if the Performance Indicators are not met but are an adjustment to the Charges to reflect the value received by DIA based on the level of performance by the Service Provider. The parties agree that any entitlement to Service Level Credits shall be without prejudice to any rights or remedies available to DIA including the right to seek recovery of damages in respect of its loss.
- 7.6 DIA's right to claim Service Level Credits does not limit any other right it has under this agreement or at law.

**SCHEDULE 6 – RATE CARD**

Personnel	Standard Day Rate (NZD)
Associate Technical Consultant	9(2)(b)(ii)
Technical Consultant	
Senior Technical Consultant	
Principal Technical Consultant	
Project Manager	
Delivery Manager	
Program Manager	

Note: Discounts may be applicable when the volume and nature of work for a given SDA is taken into consideration

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