

Terms

1. Definitions & interpretation

1.1 Definitions

In this Agreement, unless the context otherwise requires:

Background IP means Intellectual Property Rights owned or licensed by a party prior to the date of commencement of this Agreement, or subsequent to that date but unrelated to this Agreement;

Client Materials includes, without limitation, any equipment, materials, data or information supplied to ActiveXchange or its contractors by or on behalf of the Client;

Confidential Information means all information of a party or its clients or other suppliers, which would reasonably be regarded as confidential, disclosed to the other party before or after the date of this Agreement, including without limitation information relating to:

Background IP; and

the business, operations products, customers and suppliers of the disclosing party,

whether disclosed verbally, in writing, in electronic form or by any other means, but excluding information which:

the recipient can prove by its own written records that it knew or possessed before the Confidential Information was disclosed or made available to it by the disclosing party;

is or becomes available to the public otherwise than by a breach by the recipient of this Agreement;

is lawfully acquired by the recipient from a third party without restrictions as to its use or disclosure; or

is disclosed as required by law;

Deliverables means the deliverables to be supplied to the Client under this Agreement as specified in the Details;

Details means the matters set out in the table on the front page(s) of this Agreement;

GST means the tax imposed by *A New Tax System (Goods and Services Tax) Act 1999* (Cth) and related tax imposition Acts of the Commonwealth of Australia;

Intellectual Property Rights means all rights resulting from intellectual activity whether capable of protection by statute, common law or in equity, including copyright, discoveries, inventions, innovations, technical information and data, prototypes, processes, specifications, know-how, plant varieties, the right to have confidential information kept confidential and all rights and interests of a like nature, together with any and all documentation and other material relating to such rights and interests;

Key Personnel means the person(s) named in the Details;

Services means the services, including any Deliverables ACTIVEXCHANGE is providing under this Agreement as described in the Details; and

Special Conditions means any conditions noted in Annexure B.

1.2 Interpretation

The Details, these terms, the Special Conditions and any annexures together constitute the Agreement.

If any Special Conditions have been identified, those Special Conditions override the provisions of these terms to the extent of any inconsistency.

2. Term

This Agreement commences on the Commencement Date specified in the Details and continues in force until completion of the Services or until the Agreement is terminated in accordance with its terms.

3. Services

ACTIVEXCHANGE agrees to provide the Services to a standard being that which is reasonably to be expected of a qualified professional person providing the Services and otherwise in accordance with the Agreement.

ACTIVEXCHANGE will ensure that the Services are carried out by the Key Personnel or such other person(s) as may be agreed in writing from time to time.

If, due to circumstances beyond ACTIVEXCHANGE's control, the Key Personnel become unavailable to perform the Services, ACTIVEXCHANGE will use reasonable endeavours to provide a suitably qualified replacement, subject to the Client's approval which will not be unreasonably withheld. If ACTIVEXCHANGE is unable to provide a suitably qualified replacement, ACTIVEXCHANGE will refund fees paid less any fees payable for services already rendered or expenses or liabilities reasonably incurred by ACTIVEXCHANGE.

ACTIVEXCHANGE will use best efforts to complete the Services by the Completion Date and any milestone dates (if any) specified in the Details.

The Client acknowledges that where the Services involve research, development, expert opinion or testing, ACTIVEXCHANGE may produce no results or conclusions, or opinions or results that are unpredictable or which do not favour the Client. ACTIVEXCHANGE makes no promise, prediction or warranty concerning these conclusions, opinions or results.

If the Services include the licence of ACTIVEXCHANGE software for the purposes of accessing outputs, these outputs can be exported at any time and provided to the Client. The software licence remains current for the duration of this agreement. All software will be maintained in accordance with ACTIVEXCHANGE's standard Service Level Agreement <https://activexchange.org/sla>

4. Client's obligations

4.1 Client to perform Client's duties

The Client will comply with or perform the Client Duties (if any) specified in the Details and, at ACTIVEXCHANGE's request, will promptly provide:

the Client Materials required to be incorporated into, or used to perform, the Services;
instructions and responses to ACTIVEXCHANGE's reasonable requests on all matters relating to the Services; and
any other information, ideas or suggestions which ACTIVEXCHANGE is to consider in performing the Services.

4.2 Use of Client Materials

In respect of the Client Materials, the Client will ensure, that, to the extent applicable:

the Client Materials are accurate, complete and current;

the Client is entitled to supply the Client Materials to ACTIVEXCHANGE and its contractors for the purposes of the Services;

the use of the Client Materials in connection with the Services is lawful and does not require the consent, permit or authorisation of any party, including any consent from third parties to use their intellectual property in the performance of the Services;

if the Services include the use, reproduction or adaptation of Client Materials, the Client will obtain all necessary authority for that use, reproduction and adaptation;

unless specified by written notice to ACTIVEXCHANGE, the Client Materials are not reasonably capable of constituting a threat to safety, health, life, property or the environment; and

the Client will give written notice to ACTIVEXCHANGE of any matters affecting the safe, secure and appropriate transportation, use, storage and disposal of the Client Materials.

By signing this Agreement the Client agrees with the terms contained within ACTIVEXCHANGE's standard Data Use Agreement available for download here: <https://activeexchange.org/data-use-agreement>

4.3 No liability if Client duties not fulfilled

ACTIVEXCHANGE will not be responsible for any deficiency or alleged deficiency (including delay) in the performance of the Services attributable to:

a breach by the Client of a material term this Agreement; or

a failure by the Client to provide relevant, accurate or timely information or decisions.

4.4 Occupational health and safety

The Client will ensure that any ACTIVEXCHANGE personnel attending a site inspection or any premises of, or known to, the Client in connection with the provision of the Services is provided a safe place of work in compliance with relevant occupational health and safety legislation or requirements.

5. Payment

5.1 Fees

The Client will pay ACTIVEXCHANGE the fees at the rate or amount and in the manner specified in the Details.

5.2 Expenses

The Client must pay at cost all reasonable travel, accommodation, courier and administrative expenses which ACTIVEXCHANGE incurs in performing the Services including those specified in the Details.

5.3 Invoices

ACTIVEXCHANGE will submit a tax invoice to the Client monthly or otherwise in accordance with the Details.

The Client must pay those tax invoices within 14 days of the date of issue of each tax invoice.

5.4 Overdue payments

ACTIVEXCHANGE may suspend performance of the Services or its other obligations under this Agreement until all overdue amounts are paid.

6. Taxes

Unless otherwise stated in the Details, all charges and expenses payable by the Client under this Agreement are exclusive of GST but inclusive of any other applicable taxes, duties, imposts and other similar charges payable in respect of the Services.

If GST is payable on any supply made by ACTIVEXCHANGE under this Agreement, the Client will pay to ACTIVEXCHANGE, an additional amount equivalent to the GST at the time payment to ACTIVEXCHANGE is due.

7. Intellectual Property Rights

Each party retains its rights in any Background IP and those rights will not be transferred or changed by the use of Background IP in connection with the Services or its disclosure by one party to this Agreement to the other.

Intellectual Property Rights created in the course of performing the Services will be owned by ACTIVEXCHANGE.

On full payment by the Client of all fees and expenses due under clause 5 ACTIVEXCHANGE grants to the Client a non-exclusive, non-transferable, royalty free, perpetual licence to use the Intellectual Property Rights in the Deliverables for the Client's internal business purposes.

8. Confidential Information, privacy and publications

8.1 Obligation of confidentiality

Both parties must (except as may be required by law or with the other party's prior written consent):

maintain the secrecy and confidentiality of any Confidential Information of the other party; and

refrain from copying, transmitting, retaining or removing any Confidential Information of the other party, or attempting to do so, except to the extent necessary to perform the Services.

8.2 Privacy

Each party must comply with the *Privacy Act 1988* (Cth) and the reasonable directions of the other party in relation to the handling of any personal information that that party holds or has held and used in connection with this Agreement.

8.3 Publications

No information related to the Services will be published by ACTIVEXCHANGE without prior consent of the Client. The Client is permitted to publish outputs of the Service.

ACTIVEXCHANGE business intelligence partner. Both parties are permitted to use each other's organisation logo to reference the partnership without disclosing specifics of the Services being provided.

9. Liability & warranties

9.1 Non-excludable liability

Nothing in this Agreement is to be read as excluding, restricting or modifying the application of any legislation which by law cannot be excluded, restricted or modified.

Subject to 0, any representation, warranty, condition or undertaking which, but for this clause, would be implied in this Agreement by law is excluded.

9.2 Exclusion of certain losses

Neither party will be liable for any loss of profits, loss of data, loss of business opportunity and liabilities in respect of third parties, or special, incidental, indirect or consequential loss or damages, which may be suffered or incurred or which may arise directly or indirectly in connection with any material or services supplied under this Agreement or in connection with any act or omission (negligent or otherwise) on the part of a party, or otherwise out of the relationship created by this Agreement.

9.3 Remedies for terms implied by law

To the extent permitted by law, the liability of ACTIVEXCHANGE for any claim arising directly or indirectly from a breach of any non-excludable term or condition implied by statute is limited, at the option of ACTIVEXCHANGE, to one or more of the following: the supplying of the Services again; or the payment of the cost of having the Services supplied again.

9.4 Liability cap

Subject to clauses 9.1-9.3 inclusive:

the total liability of ACTIVEXCHANGE to the Client for loss or damage of any kind whether arising in tort (including negligence), contract, statute, law, equity or under an indemnity is limited to the fees paid by the Client under this Agreement;

each party's liability under this Agreement is reduced to the extent that any damage, liability, loss or cost arises from or is attributable to any act or omission of the other party, their employees, agents, contractors or students.

9.5 Representations and effect of clause

The Client acknowledges that it has not relied on any representations made by ACTIVEXCHANGE which are not set out in this Agreement.

References to ACTIVEXCHANGE in this clause 9 include ACTIVEXCHANGE's officers, employees, agents, and contractors.

This clause 9 applies regardless of anything else in this Agreement, to the extent permitted by law.

10. Termination

Either party may terminate this Agreement immediately by written notice if the other commits a material breach of this Agreement which it fails to correct within 30 days of being notified of the breach, or if the other party becomes the subject of any insolvency administration. The Agreement has a minimum 3 month term (3 months of retainer fees).

The Client may terminate the Agreement or reduce the scope of Services by no less than 7 days written notice to ACTIVEXCHANGE but the Client must pay all fees and expenses incurred by ACTIVEXCHANGE in connection with the Services up to the date of receipt by ACTIVEXCHANGE of notice from the Client and all future unavoidable costs and expenses ACTIVEXCHANGE incurs in relation to the Agreement.

Clauses 0, 4.3, and 7-9 inclusive survive the expiration or earlier termination of this Agreement.

11. General

This Agreement contains the entire understanding between the parties concerning its subject matter and supersedes all prior oral and written representations and agreements.

This Agreement is governed by and must be construed in accordance with the laws of New South Wales, Australia. The parties submit to the non-exclusive jurisdiction of the courts of that State and the Commonwealth of Australia.

This Agreement may only be varied in writing by the parties.

The relationship established by this Agreement between ACTIVEXCHANGE and the Client is one of principal and independent contractor and not one of employment, partnership or joint venture.