

# Foodworks.online Terms

Last modified: 10 November 2020

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## 1. Background

- (a) Xyris Pty Ltd ACN 637 864 905 (**we/us/our**) operate the Platform and offer the Services.
- (b) We have agreed to grant you Access to the Platform and to provide you with the Services on the terms set out in this Agreement.

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## 2. Term

### 2.1 Initial Term

This Agreement commences on the Acceptance Date and continues for the Term.

### 2.2 Continuation of Term

This Agreement will continue for each Rollover Period, unless terminated in accordance with clause 10.

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## 3. Agreement

### 3.1 Constituent documents and priority

- (a) These Supply Terms and the Subscription Details collectively form the entire agreement between us and you (**Agreement**).
- (b) In the event of any inconsistency between the documents which constitute this Agreement, the order of precedence will be:
  - (i) the special conditions (contained in the Subscription Details);
  - (ii) this document; and
  - (iii) the Subscription Details (other than the special conditions).

### 3.2 Acceptance

- (a) The terms of this Agreement are accepted by you where you:
  - (i) execute the Subscription Details;
  - (ii) gain Access to the Platform after being given a copy of this Agreement; or
  - (iii) otherwise indicate to us, whether directly or indirectly, that you accept this Agreement.
- (b) Any person that accepts this Agreement on your behalf, represents and warrants to us that:
  - (i) they are duly authorised to accept this Agreement and to bind you to this Agreement; and
  - (ii) to the extent that they purport to accept this Agreement on your behalf and are not duly authorised to do so, they will be

personally responsible for all amounts due under this Agreement and will indemnify us against any Loss we suffer as a result of our reliance upon their purported acceptance.

## 3.3 Variation of Subscription Details

Either party may request variations to the Subscription Details at any time including the addition of further Services. If both parties agree to the variation in writing, then the Subscription Details will be deemed to be updated to reflect the change causing a variation to the Agreement.

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## 4. Supply

### 4.1 Licence

- (a) Subject to sub-clause (b), we grant you and your Authorised Users with Access to the Platform on a worldwide, revocable, non-exclusive, non-sublicensable and non-transferable basis during the Term via your Instance (**Licence**).
- (b) The Licence is provided on the following conditions:
  - (i) you must:
    - (A) only use the Platform in accordance with the stipulations of this Agreement and must procure your Authorised Users do the same;
    - (B) only use the Platform in accordance with the User Documentation and for purposes relating to analysing the nutrient composition of food, drink and diet;
    - (C) comply with all reasonable and lawful directions we may give from time to time with respect to your use (or the use of your Authorised Users) of the Platform;
    - (D) protect all our Intellectual Property Rights in the Platform and User Documentation from unauthorised access, use or damage;
    - (E) maintain the security of:
      - (1) account log in information; and
      - (2) all Data that has been Uploaded to the Instance,

and procure your Authorised Users do the same; and

- (F) cooperate with us in remediation of any security breach, unauthorised use or misuse of the Platform and immediately report all such matters that you become aware of to us; and
- (ii) you must not:
- (A) be involved in any business activity that is unlawful or that we reasonably consider would be likely to adversely impact upon our reputation;
  - (B) allow or engage any third party to conduct development work on the Platform or any Features without first obtaining our written consent, which we may withhold in our sole discretion;
  - (C) interfere or disrupt the operation of the Platform nor attempt to do so;
  - (D) grant Access to your Instance to anyone other than Authorised Users, unless we provide you with our express written consent; and
  - (E) subject to any right under, sections 47B(3), 47C, 47D, 47E or 47F of the Copyright Act, either directly or indirectly, modify, attempt to decompile, cross compile, disassemble, reverse engineer, or use any other means to discover the source code, object code or underlying structure, ideas, know-how or algorithms relevant to the Platform or the Services.

#### 4.2 Services

We will provide the Services to you in a professional manner with due care, skill and diligence.

#### 4.3 Additional Modules

We will provide you with a list of Additional Modules and an indication of the cost of activating them upon receipt of Notice from you. If you purchase an Additional Module you are granted a licence to it on the conditions contained in sub-clause 4.1.

#### 4.4 Updates

- (a) From time to time we may update the Platform resulting in New Services. Where practicable, we will provide you with Notice of those New Services. Once the Platform has been updated, the provision

of the New Services will be governed by the terms of this Agreement.

- (b) We may from time to time unilaterally make modifications to the Services, Platform and the Additional Modules (provided such variations do not limit your rights or enjoyment) and will provide Notice of any changes made, prior to the changes taking effect.
- (c) As a consequence of New Service offerings and/or modifications contemplated in sub clauses (a) and (b), we may need to make reasonable amendments to the provisions of this Agreement. We reserve the right to unilaterally make such changes, along with other minor alterations that do not adversely affect your rights and obligations under this Agreement. You acknowledge and agree that any change made pursuant to this sub clause will apply immediately upon Notice of the variation being provided to you.

#### 4.5 Migration

- (a) Unless otherwise specified in the Subscription Details, you are responsible for migrating or creating your Account Data and Content Data. Where migration is specified, we will migrate all of your data in FoodWorks 10 Professional or FoodWorks 10 Nutrition Labelling to your Instance and ensure its proper configuration in accordance with the Subscription Details.
- (b) The cost of any additional migration beyond that contained in the Subscription Details will be charged at our then prevailing hourly rates.

#### 4.6 User Documentation

We provide User Documentation with sufficient information to enable you to independently make full and effective use of the Platform and the Services.

#### 4.7 Support

- (a) We will use our best endeavours to provide Support Services to you within 1 business day of receipt of a request. Support Services provided under this Agreement do not include any dealing with or responding to issues related to your Systems.
- (b) You may at any time request that we provide expedited or outside of business hours Support Services, training in relation to the Platform or any other maintenance or Establishment Services that are additional to those set out in the Subscription Details (**Additional Support Services**). Our fees for Additional Support Services will be provided to you upon receipt of a written request for Additional Support Services from you.
- (c) For the avoidance of doubt, we are not under any obligation to provide you with Additional Support Services.

#### 4.8 Back-ups

- (a) Our Host is required to conduct automatic backups of your Data on at least a daily basis.
- (b) Despite this, we recommend that you conduct your own daily backups of your Data which you should store locally on your own servers.

#### 4.9 Development

- (a) If you would like us to develop New Services, third party integrations or a tailored variation to the Platform code (**Development**), we may in our sole discretion agree to do so.
- (b) Any Development that you engage us to complete will be an additional cost and will be governed by a separate agreement.

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### 5. Client responsibilities

#### 5.1 Co-operation

You must promptly provide us with all information, assistance and co-operation reasonably necessary to enable us to perform our obligations under this Agreement.

#### 5.2 Accounts

- (a) You must and must procure that each of your Users:
  - (i) properly establish an Account before being granted Access to the Software;
  - (ii) not transfer an Account to anyone else;
  - (iii) not create an Account on behalf of someone else, or create a false or misleading identity; and
  - (iv) ensure everyone that is an Authorised User has the appropriate in-Platform authorisations and that they establish their own user account (altogether **Account Establishment**).
- (b) You acknowledge and agree that the Services provided by us require proper Account Establishment. If this does not occur:
  - (i) the Services may not be able to be provided, or if they are provided, the Service deliverables may be adversely affected;
  - (ii) your Authorised Users may be required to reestablish their accounts before Services are provided; and
  - (iii) we will not be liable to you for any Loss suffered due to the Services not being provided or the Service deliverables being adversely affected.

#### 5.3 Customisation

- (a) Authorised Users with appropriate permissions may make personalisations to the Instance which may impact upon the Platform Services.
- (b) You acknowledge and agree that you are solely responsible for implementing your own controls and record keeping relating to the changes Authorised Users have made to the Instance and the Platform Services. Changes made are not reviewed by us and may consequently promote actions that do not conform with the Objectives of the Platform.

#### 5.4 Your Data

- (a) You grant us a licence to your Data enabling:
  - (i) the Platform to process it; and
  - (ii) our Host to store it,for any purpose related to our obligations under this Agreement.
- (b) Title to your Data remains with you in all respects and we do not obtain ownership of any Intellectual Property Rights in it.
- (c) Subject to 6.1(c) and 6.1(d), your Data will only be accessible by you and your Authorised Users via your Instance.

#### 5.5 Systems

You are responsible for obtaining and maintaining all your Systems.

#### 5.6 Your warranties

You represent, warrant and undertake that:

- (a) you own or have an unrestricted right to use all Content Data that is Uploaded by you or on your behalf to your Instance, including the right to authorise us to process and facilitate storage of the Data and use it in the provision of the Services;
- (b) we are authorised to process, use and facilitate the storage of Account Data and Content Data that has been Uploaded for the purpose of delivering the Services; and
- (c) you have the capacity and authority to enter into and to perform this Agreement; and
- (d) this Agreement is accepted by a duly authorised legal representative of yours and legally binds you.

#### 5.7 Your acknowledgements

You acknowledge and agree that:

- (a) whilst we aim to achieve at least 97% up time, computer and telecommunications services are not fault free and occasional periods of downtime may occur;

- (b) we may publish your branding and testimonials on any of our promotional material for the purpose of representing that you are a client of ours, provided we comply with our confidentiality obligations contained in clause 9; and
- (c) in addition to any other rights or remedies we may have, we may suspend or terminate your Access or the Access of any of your Authorised User's to the Platform at any time and without any liability to you in the event that we are reasonably of the view that you or one of your Authorised User breaches a provision of this Agreement.

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## 6. Our responsibilities

### 6.1 General

We will:

- (a) comply with the *Privacy Act 1988* (Cth), *Information Privacy Act 2009* (Qld), *Health Records and Information Privacy Act 2002* (NSW) and *Health Records Act 2001* (Vic) and any other applicable privacy Laws in relation to your Data;
- (b) provide you and your Authorised Users with reasonable notice of scheduled maintenance to the Platform that may impact use of the Platform;
- (c) only access your Systems and Instance for purposes approved in advance by you;
- (d) facilitate the storage and hosting of all your Data with our Host; and
- (e) ensure that the Platform, Services and the Additional Modules will be provided in accordance with:
  - (i) this Agreement; and
  - (ii) applicable Laws.

### 6.2 Data

- (a) When processing any of your Data, we must:
  - (i) ensure it is stored by our Host located in Australia on your behalf;
  - (ii) subject to any third-party hosting issues, ensure that you have the ability to access your Data in a raw format whilst it is in our possession or control and provide that Data to you within a reasonable time following receipt of Notice; and
  - (iii) if any of your Data is lost, destroyed, corrupted or altered in connection with the provision of the Services, we will use reasonable commercial endeavours to assist you with restoring that Data, but its restoration is not guaranteed.
- (b) When we are able to access any of your Data, we must:

- (i) comply with all reasonable policies relating to data security you have provided to us along with any reasonable directions you make from time to time relating to data security;
- (ii) treat your Data as Confidential Information;
- (iii) implement, maintain and enforce appropriate and industry standard technical and organisational measures to protect the Data from any misuse, loss, interference unauthorised access, modification or disclosure;
- (iv) immediately notify you if we become aware of any suspected or actual misuse or loss of, interference with or unauthorised access to, modification of or disclosure of your Data (a **Data Breach**) or if we are required by Law to disclose any of your Data for any reason;
- (v) comply with any reasonable direction from you with respect to remedying or addressing a Data Breach;
- (vi) inform and co-operate with you in the event of any risk regarding the security of your Data;
- (vii) ensure that our Personnel who have access to your Data comply and agree to comply with this sub clause 6.2 to the same extent as us; and
- (viii) comply with any additional data security requirements set out in the Subscription Details.

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## 7. Intellectual property rights

### 7.1 General

- (a) Each Party retains all right, title and interest in and to its pre-existing Intellectual Property Rights.
- (b) We own all Intellectual Property Rights in the Platform, the User Documentation, the Services and the Additional Modules and nothing in this Agreement affects the Moral Rights in them.
- (c) For the avoidance of doubt nothing in this Agreement prohibits us from using our Intellectual Property Rights to provide the Services and Additional Modules to third parties, even if they are the same or substantially the same as those provided to you.

### 7.2 Improvements

You acknowledge and agree that all Intellectual Property Rights in the variations, additions and alterations (**Improvements**) to the Platform, Additional Modules and the Services are owned by us, even where suggested by you or by any of your Representatives or otherwise developed in conjunction with you or any of your Representatives

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## 8. Fees, Charges and Payments

### 8.1 Fees

- (a) In consideration of us granting you the Licence, providing Access to the Software and delivering the Services, you must pay us the Fees.
- (b) You will be charged the Fees and sent Tax Invoices:
  - (i) for the Services set out in the Subscription Details in accordance with the Subscription Details;
  - (ii) for Services you have requested that are not contained in the Subscription Details, upfront before we commence delivery, unless otherwise agreed.
- (c) You will be charged Fees and sent a Tax Invoice for Services you have requested that are not contained in the Subscription Details, upfront before we commence delivery, unless otherwise agreed.

### 8.2 Expenses

Any costs and reasonable out-of-pocket expenses which are necessary to provide the Services (**Expenses**) will be paid or reimbursed by you. We will submit documentation as evidence where required by you to verify the Expense that has been incurred.

### 8.3 Declined payment

If you fail to make payment of all amounts rightfully due and owing to us in accordance with this Agreement within the time required, we may:

- (a) immediately suspend both your and your Authorised Users Access to the Platform;
- (b) charge interest on the overdue amount at the Default Rate as from the first day that payment is overdue; and
- (c) charge you an Admin Fee.

### 8.4 Review

You agree that we may reasonably alter our Fees under this Agreement upon providing Notice to you (**Review Notice**). The new Fees and charges will apply 30 days after you have received the Review Notice.

### 8.5 Late Payment

If you fail to make payment within the time required under this Agreement we may:

- (a) enliven our rights under sub clause 5.7(c);
- (b) charge you an Admin Fee;
- (c) charge interest on the overdue amount at the Default Rate as from the first day that payment is overdue to the date we receive payment in full of all overdue amounts; and

- (d) charge you for all costs and expenses incurred by us in recovering any outstanding Fees or charges, including legal fees (on a solicitor and own client basis) and court costs, which you must pay upon demand.

### 8.6 GST

Unless otherwise expressly stated, all amounts under this Agreement are exclusive of GST. If GST is imposed on any supply made under or in accordance with this engagement and GST has not been accounted for in determining the consideration payable for the supply, then we may recover from you an amount on account of GST.

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## 9. Confidentiality and restrictions

### 9.1 Recipient must keep Confidential Information confidential

Each party must:

- (a) keep confidential all Confidential Information;
- (b) only use Confidential Information for the purpose of providing or receiving (as the case may be) the Services; and
- (c) procure that its Personnel comply with sub-clauses (a) and (b).

### 9.2 Disclosure exceptions

The obligations in clause 9.1 do not apply:

- (a) to the extent necessary to enable a party to make any disclosure required by Law;
- (b) to the extent necessary to enable a party to perform its obligations under this Agreement;
- (c) where disclosure is required for any quality assurance or insurance purposes;
- (d) to the extent necessary to take professional (legal or financial) advice;
- (e) to any disclosure agreed in writing between the parties; or
- (f) in respect of any portion of the Confidential Information which has entered the public domain other than as a result of a breach of this Agreement.

### 9.3 Restrictions

The Parties undertake to one another to not during this Agreement or for a period of 12 months after it is terminated or expires:

- (a) solicit, canvass, induce or encourage any person who was at any time during the term of this Agreement an employee, a director, contractor or agent of the other party to leave the other party's engagement, employment or agency; or
- (b) do anything that would or would be likely to interfere with the relationship between the other

party's clients, customers, contractors, employees, partners or suppliers.

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## 10. Termination

### 10.1 Termination by notice

- (a) Either party may terminate this Agreement by Notice to the other (**Termination Notice**). Where a Termination Notice is received by a party, termination will take effect at the end of the billing period in which it was received.
- (b) You may also terminate this Agreement at any time through the Platform. Where you do so, termination will take effect at the end of the current billing period.

### 10.2 Effect of Agreement ending

Upon termination or expiry of this Agreement:

- (a) you acknowledge and agree that we may immediately delete your Data. We will not be liable to you or your Authorised Users in any way where you have failed to obtain your Data prior to expiration or termination of this Agreement and it has been deleted by us;
- (b) you must pay all outstanding Fees, and other charges due to us under this Agreement up to the date of termination;
- (c) each party must, subject to clause 9.2, destroy the other parties Confidential Information received under this Agreement and certify such destruction in writing; and
- (d) any accrued rights or liabilities of either Party or any provision of this Agreement which is expressly or by implication intended to come into or continue in force on or after such termination will not be affected.

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## 11. Indemnity and liability

### 11.1 Your indemnity

You agree to indemnify us and to keep us indemnified against any Loss that may be suffered by us arising from or in connection with (directly or indirectly):

- (a) any breach or default by you, your Authorised Users or your Representatives of this Agreement (including any breach of warranty);
- (b) a negligent act or omission by you, your Authorised Users or your Representatives;
- (c) your failure to comply with any Law; and
- (d) the failure of your Authorised Users or your Representatives to comply with any Law.

### 11.2 Our indemnity

- (a) Subject to sub clause (b), we will indemnify you with respect to any damages awarded against you

in connection with a Claim made by a third party that that the Platform, Services or Additional Modules infringe the Intellectual Property Rights of that third party.

- (b) We will not be liable to you under sub clause (a) if:
  - (i) you do not notify us of the other person's Claim within 10 Business Days after becoming aware of it;
  - (ii) our ability to defend the Claim has been prejudiced by your non-compliance with any of your obligations under this Agreement;
  - (iii) you do not give us reasonable assistance (based on the circumstances) in defending the Claim; or
  - (iv) you do not permit us to have control of the defence of the Claim and all related settlement negotiations.

### 11.3 Disclaimer

- (a) In light of the limitations of computerized nutrition analysis and external data from various external sources, you acknowledge and agree that:
  - (i) the Platform, Platform Services and Composition Data are supplied on an "as is" and "as available" basis; and
  - (ii) to the maximum extent permitted by Law, we exclude all liability for inaccurate, incomplete, out of date or unavailable Composition Data and Platform Services.
- (b) You acknowledge and agree that our Services are designed to assist you with using reference Composition Data to calculate the nutritional composition of human food and drink, in particular:
  - (i) determining the micronutrient composition of food and drink;
  - (ii) analyzing the nutritional composition of recipes, meal plans and diets; and
  - (iii) developing legally compliant nutrition labelling information for products (**Objectives**),

but are not a substitute for professional judgement or independent enquiry, analysis, testing or other similar activities a skilled nutritionist or food technologist would be expected to make in the circumstances.

- (c) In light of paragraph (a), we will not be liable in any manner and you hereby release and hold us harmless where Loss is suffered by you as a consequence of over reliance on the Platform Services, without you or your Authorised Users taking a professional level of diligence and care, in light of actual circumstances.

#### 11.4 Exclusion of consequential loss

To the maximum extent permitted by Law, we will not be liable for any Consequential Loss arising in connection with this Agreement, the delivery of our Services or the use of the Platform by you or any of your Authorised Users, even if we were appraised of the likelihood of such loss or damage occurring.

#### 11.5 Limit of liability

- (a) Except as expressly provided by this Agreement, the Platform is provided on an "as is" basis without any representation, warranty or guarantee as to quality, condition or fitness for purpose and we do not warrant that the Platform will be free of defect, uninterrupted, accurate, complete, current, stable, bug free, error free or available at any time in respect of its operation.
- (b) Except in relation to liability for personal injury (including sickness and death), property damage or an infringement of confidentiality or Intellectual Property Rights, our liability in damages (including special, indirect or consequential damages, which damages will be deemed to include loss or revenue, loss or profit and opportunity loss) in respect of any act or omission of us in connection with our obligations under this Agreement will not exceed the net payment received by us from you in the immediately preceding 12 months from when the cause of action arose.
- (c) We have no responsibility or liability whatsoever as a consequence of any Loss suffered by you as result of:
  - (i) any Data being lost, destroyed or damaged by the Platform or a third-party provider of cloud-based storage or hosting; or
  - (ii) any third-party software malfunctions or malfunctions in the Platform caused as a result of interference by third party software.

#### 11.6 Exclusion of other Terms

- (a) Subject to sub-clause (b), any condition, guarantee or warranty which would otherwise be implied in this Agreement is hereby excluded.
- (b) Liability for breach of a guarantee conferred by the Australian Consumer Law (other than those conferred by ss 51 to 53 of the Australian Consumer Law) is limited (at our election) to us providing the Services again (including providing the Service deliverables again) or the payment of the cost of having the Services supplied again.

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#### 12. Notices

Any Notices given under or in connection with this Agreement:

- (a) must be in legible writing and in English;

- (b) must be either:
  - (i) addressed to a party's contact address as specified in this Agreement or as otherwise notified by a party to the other party from time to time; or
  - (ii) in our case, sent to the:
    - (A) Authorised Representative's contact address you have provided; or
    - (B) Authorised Representative by internal mail or notification within the Platform;
- (c) must be:
  - (i) delivered to that party's address;
  - (ii) sent by pre-paid mail to that party's address;
  - (iii) issued via the Platform to the Authorised Representative; or
  - (iv) sent by email to that party's email address;
- (d) will be deemed to be received by the addressee:
  - (i) if delivered by hand, at the time of delivery;
  - (ii) if sent by post, on the third Business Day after the day on which it is posted, the first Business Day being the day of posting;
  - (iii) if sent by email, at the time that would be the time of receipt under the *Electronic Transactions Act 1999* (Cth); or
  - (iv) if sent via the Platform at the time it is sent.

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#### 13. Disputes

- (a) If a dispute (**Dispute**) arises between the parties to this Agreement (**Participants**) in connection with this Agreement (including any dispute as to the validity of this Agreement) which they cannot resolve, then the parties agree that before any court or arbitration proceedings (other than for urgent interlocutory relief) are commenced with respect to the Dispute, the following steps must be taken to attempt to resolve the Dispute.
- (b) The party claiming that a Dispute has arisen must deliver to the other parties a notice containing particulars of the Dispute (**Dispute Notice**).
- (c) During the period of 10 Business Days after delivery of the Dispute Notice, or any longer period agreed in writing by the parties to the Dispute (**Initial Period**), the Participants must use their reasonable endeavours and act in good faith in an attempt to resolve the Dispute.
- (d) If the Participants cannot resolve the Dispute within the Initial Period then unless they all agree otherwise, the Participants must refer the Dispute

to the Resolution Institute for the facilitation of a mediation according to the Resolution Institute's Mediation Rules.

- (e) If within 10 Business Days after the referral of the Dispute to the Resolution Institute the parties have not agreed upon the mediator or any other relevant particular, the mediator and the particular not agreed will be determined in accordance with the Resolution Institute's Facilitation Rules.
- (f) All Participants must participate in the mediation in good faith and cooperate with the Resolution Institute as a facilitator.

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## 14. General matters

### 14.1 Essential terms

Clauses 4, 5, 6, 7, 8 and 9 are essential terms of this Agreement.

### 14.2 Amendments

Subject to the provisions of this Agreement, this Agreement may only be varied by a further written agreement accepted by or on behalf of each of the parties.

### 14.3 Force majeure

Neither party will be liable for any delay or failure to perform its obligations pursuant to this Agreement if such delay is due to Force Majeure. If a delay or failure of a party to perform its obligations is caused or anticipated due to Force Majeure, the performance of that party's obligations will be suspended. If a delay or failure by a party to perform its obligations due to Force Majeure exceeds thirty (30) days, either party may immediately terminate this Agreement on providing Notice to the other party.

### 14.4 Assignment

- (a) We may, upon Notice in writing to you, assign or otherwise transfer the benefit of all or any part of this Agreement to any other person or entity.
- (b) No rights, benefits or liabilities relating to this Agreement may be assigned by you without our prior consent, which will not be unreasonably withheld.

### 14.5 Consents

Unless this Agreement expressly states otherwise, a party may in its absolute discretion, give conditionally or unconditionally or withhold, any consent under this Agreement. To be effective any consent under this Agreement must be in writing.

### 14.6 Costs

Each party will pay their respective costs and expenses in connection with the negotiation, preparation, execution, and performance of this Agreement.

### 14.7 Entire Agreement

This Agreement contains the entire agreement between the parties about its subject matter. Any previous

understanding, agreement, representation or warranty relating to that subject matter is replaced by this Agreement and has no further effect. You warrant that you have not relied on any representation made by us which has not been stated expressly in this Agreement.

### 14.8 Further acts

Each party must promptly do all further acts and execute and deliver all further documents required by Law or reasonably requested by another party to give effect to this Agreement.

### 14.9 Jurisdiction

This Agreement is governed by the Law in force in the State of Queensland Australia and each party submits to the non-exclusive jurisdiction of the courts of Queensland and the courts competent to determine appeals from those courts, in relation to any proceedings that may be brought at any time relating to this Agreement.

### 14.10 No Merger

No right or obligation of any party will merge on completion of any transaction contemplated by this Agreement.

### 14.11 Severability

Any provision of this Agreement that is illegal, void or unenforceable will be severed without prejudice to the balance of the provisions of this Agreement which shall remain in force.

### 14.12 Waiver

- (a) Failure to exercise or enforce or a delay in exercising or enforcing or the partial exercise or enforcement of any right, power or remedy provided by Law or under this Agreement by any party will not in any way preclude, or operate as a waiver of, any exercise or enforcement, or further exercise or enforcement of that or any other right, power or remedy provided by Law or under this Agreement.
- (b) Any waiver or consent given by any party under this Agreement will only be effective and binding on that party if it is given or confirmed in writing by that party and no waiver of a breach of any term of this Agreement will operate as a waiver of another breach of that term or of a breach of any other term of this Agreement.

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## 15. Definitions and Interpretation

### 15.1 Definitions

In this Agreement:

**Acceptance Date** means the date that acceptance occurs under clause 3.2.

**Access** means to make a fully functioning version available for Use.

**Account Establishment** has the meaning given in sub clause 5.2(a).



**Account Data** means information and material captured as part of Account Establishment in respect of each of your Authorised Users that is Uploaded to the Instance along with Platform configuration and in-Platform authorisations of each of your Authorised Users.

**Activity Data** means all logs that relate to Authorised User's use of the Platform and receipt of the Platform Services.

**Additional Support Services** has the meaning given in sub clause 4.7(b).

**Additional Modules** mean software modules and 3<sup>rd</sup> party integrations (API's) offered by us from time to time that are additional to the base Platform and Platform Services.

**Admin Fee** means a fee payable by you as a consequence of a late payment which is calculated based on the reasonable costs incurred by us relating to recovery.

**Agreement** means this document, the Subscription Details and includes any annexures, schedules and appendixes to them.

**Australian Consumer Law** means Schedule 2 of the *Competition and Consumer Act 2010* (Cth).

**Authorised Representative** means the suitably qualified, authorised and informed representative that has been nominated to act on your behalf with respect to this Agreement.

**Authorised Users** means any user of the Instance that you have provided with authority to use the Platform in accordance with this Agreement.

**Business Day** means a day on which banks are open for business excluding Saturdays, Sundays and public holidays in Brisbane, Australia.

**Claim** includes a demand, claim, action, dispute or proceeding made or brought by or against the person, however arising and whether present, unascertained, immediate, future or contingent.

**Composition Data** means nutrient composition data of human food and drink.

**Content Data** means all information and data that is Uploaded to the Instance by you or generated by the Platform Services including Composition Data and any data relating to your clients, meal plans, product formulations, recipes, ingredients, food labels and any other related food information or data.

**Confidential Information** means information that is by its nature confidential and is designated by a party as confidential or a party knows or ought to know is confidential, other than information which is or becomes public knowledge otherwise than by breach of this Agreement or any other confidentiality obligation.

**Consequential Loss** means indirect economic loss, loss of income or profit, loss or damages resulting from wasted management time, damage to goodwill or business reputation, loss of contract, loss of data, liability under other agreements or to third parties, loss of opportunity or any other special, indirect, remote or punitive loss or damage.

**Corporations Act** means the *Corporations Act 2001* (Cth).

**Copyright Act** means the *Copyright Act 1968* (Cth).

**Data** means Account Data, Activity Data and Content Data collectively.

**Data Breach** has the meaning set out in 6.2.

**Default Rate** means the compound interest rate of 10% per annum which is taken to accrue on a daily basis.

**Defect** means an error in the Platform or a Feature to the functionality in accordance with the User Documentation due to an issue we are responsible for.

**Development** has the meaning given in sub-clause 4.9.

**Establishment Services** means migration and other Platform set up establishment activities.

**Expenses** has the meaning given in clause 8.2.

**Fees** mean the fees payable to us for our provision of Access to the Platform and our rendering of Services, which as at the Agreement Date are equal to an amount specified in the Subscription Details or published on the Platform.

**Force Majeure** means any cause beyond the reasonable control of a party and which that party is unable to overcome by the exercise of reasonable diligence and at a reasonable cost, including an act of God, fire, earthquake, storm or flood, and the failure of third-party equipment, software, technology or other services necessary for the performance of a party's obligations under this Agreement.

**GST** means a goods and services tax, or a similar value added tax, levied or imposed under the GST Law.

**GST Law** has the meaning given to it in the *A New Tax System (Goods and Development Services Tax) Act 1999* (Cth).

**Host** means the cloud server host that we have engaged to store all your Data and enable your Authorised User's Access to the Platform.

**Insolvent** means if a person is insolvent or an insolvent under administration, or has a controller appointed (each as defined in the Corporations Act), are in receivership, in receivership and management, in liquidation, in provisional liquidation, under administration, wound up, subject to any arrangement, assignment or composition, protected from creditors under any statute, dissolved (other than to carry out a reconstruction whilst solvent) or otherwise unable to pay debts when they fall due.

**Intellectual Property Rights** means all intellectual property rights, including the following rights:

- (a) copyright, patents, rights in circuit layouts, trademarks, designs, trade secrets, know how, and any right to have confidential information kept confidential;
- (b) any application or right to apply for registration of any of the rights referred to in paragraph (a); and
- (c) all rights or a similar nature to any of the rights in paragraphs (a) and (b) which may subsist,

whether or not such rights are registered or capable of being registered.

**Improvement** has the meaning given in sub clause 7.2.

**Instance** means your designated copy of the Platform that you and your Authorised Users can use, customize and Upload Data to.

**Law** includes any requirement of any statute, rule, regulation, proclamation, ordinance or by-law, present or future, and whether state, federal or otherwise.

**Loss** includes any damage, loss, cost, liability or expense of any kind and however arising (including as a result of any Claim) including penalties, fines and interest whether prospective or contingent and any amounts that for the time being are not ascertained or ascertainable.

**Moral Right** means moral rights as defined in the *Copyright Act 1968* (Cth).

**New Services** means services offered by us in addition to the Services described in this Agreement (including services which extend, alter, improve or add functionality to the Services).

**Notice** means a notice given under or in connection with this Agreement that adheres to the requirements in clause 12.

**Objective** has the meaning set out in clause 11.3.

**Personnel** means employees and/or contractors.

**Platform** means our cloud-based food analysis software through which we provide the Platform Services which is known as Foodworks.online, Foodworks and Foodworks Online.

**Platform Services** mean each of the following services:

- (a) computerised calculation of the nutritional composition of human food and drink;
- (b) development of food and drink labels with allergen notices; and
- (c) aggregation of macronutrients, micronutrients, and other nutritional related components consumed as part of a diet.

**Representative** of a person means an officer, employee, contractor, professional adviser or agent of that person

**Review Notice** has the meaning given in clause 8.4.

**Rollover Period** means a duration of time equal to the initial billing period specified in the Subscription Details that arises:

- (a) at the expiration of the initial billing period; and
- (b) again, in perpetuity on the expiry of each earlier Rollover Period.

**Services** mean Establishment Services, Platform Services and Support Services individually, jointly or collectively as the context requires.

**Subscription Details** means the statement of supply setting out our offer of Services to you which may take different forms and be made up of separate parts (which are to be taken as joined and to form one single instrument).

**Support Services** mean services rectifying Defects in the operation and function of the Platform and the delivery of the Platform Services but does not include Establishment Services.

**Support Documentation** means our documentation which sets out our support obligations to you, particularly, our specific support duties and our response times.

**System** means all computer firmware, middleware, protocols and other computer programs and all computer hardware, peripheral equipment, networks, communications systems and other equipment of whatever nature that are in anyway related to your receipt of the Services or to your Access to the Platform.

**Term** means the period of time set out in the Subscription Details.

**Upload** means to input, upload or import.

**User Documentation** means any material we have provided or made available to you containing technical and/or practical information regarding use by you and your Authorised Users of the Platform and receipt of the Services.

## 15.2 Interpretation

In interpreting this Agreement, unless the context provides otherwise:

- (a) the singular includes the plural and vice versa, and a gender includes other genders;
- (b) another grammatical form of a defined word or expression has a corresponding meaning;
- (c) a reference to a rule, paragraph or schedule is to a rule or paragraph of, or schedule to, this Agreement and a document or instrument includes the document or instrument as novated, altered, supplemented or replaced from time to time;
- (d) a reference to dollar or \$, is to Australian currency unless otherwise stipulated in the Subscription Details or published on the Platform;
- (e) a reference to time is to time in Brisbane Queensland, Australia;
- (f) a reference to a person includes a natural person, partnership, body corporate, association, and any Government Agency;
- (g) a reference to a party means a party to this Agreement and includes the party's executors, administrators, successors, substitutes (including by novation) and assigns;
- (h) a reference to a group of persons is to any 2 or more of them taken together and to each of them individually;
- (i) a reference to the whole is to each part of it;

- (j) a reference to a statute, regulation, code or provision of a statute, regulation or code includes any modification or re-enactment of it, a legislative provision substituted for it and a regulation or statutory instrument issued under it;
- (k) "including" and similar expressions are not words of limitation;
- (l) costs and expenses include legal costs and expenses on a full indemnity basis;
- (m) conduct includes an omission, statement or undertaking, whether or not in writing;
- (n) "property" or "asset" includes all property and assets of any nature, including a business, and all rights, revenues and benefits;
- (o) a rule of construction does not apply to the disadvantage of a party because the party was responsible for the preparation of this document or any part of it;
- (p) if a day on or by which an obligation must be performed or an event must occur is not a Business Day, the obligation must be performed, or the event must occur on or by the next Business Day;
- (q) where time is to be calculated by reference to a day or event, that day or the day of that event is excluded;
- (r) a word or expression defined in the Corporations Act has the meaning given to it in the Corporations Act; and
- (s) headings and table of contents are for ease of reference only and do not affect interpretation.

### **15.3 Parties**

- (a) If a party comprises 2 or more persons, a reference to that party includes each and any 2 or more of them, and this Agreement binds each of them separately and any 2 or more of them jointly.
- (b) A party that is a trustee is bound both personally and in its capacity as a trustee.
- (c) The relationship between the parties is an independent contracting relationship.
- (d) Nothing in these Terms will be construed as creating a partnership or any other relationship between the Parties or provide any exclusivity in the relationship between the Parties or the provision of the Services.