

# oryTOPLEVEL COMPUTING LIMITED SOFTWARE LICENCE AND SERVICES TERMS AND CONDITIONS to be read in conjunction with the Schedule and Addendum for Hosting Services

## 1 DEFINITIONS

In these Terms and Conditions, unless the context otherwise requires, the following expressions have the following meanings:

**Agreement:** means the agreement comprising the Schedule and these Terms and Conditions.

**Deliverables:** means the deliverables specified in the Schedule and any other documents, reports, software or materials developed or written by Toplevel for the Licensee in the performance of the Services.

**Documentation:** the instruction manuals, user guides and other information relating to Products and Forms made available to Licensee from time to time during this Agreement by Toplevel at its discretion in either printed or machine readable form.

**Forms:** means forms developed or generated by Licensee using the appropriate Products and comprising the Form Template and the underlying coding.

**Form Template:** means the graphical representation of a Form as displayed on the screen, including text, the design of icons and other screen elements designed using the Products together with the positioning of the individual screen elements, but excluding the underlying coding.

**Intellectual Property Rights:** means patents, trade marks, registered designs, applications for any of the foregoing, copyright, design rights, rights in databases, know-how, confidential information, trade and business names and any other similar or analogous rights in any country.

**Licence:** means the licences granted by Toplevel pursuant to clause 4.

**Licence Administrator:** means the Toplevel program which applies licence "stamps" to OFM/ OFW files and works in conjunction with the Licence Key to control the use of the Forms.

**Fees:** means the fees for the Licence and the Services specified in the Schedule.

**Licence Key:** means a device which enables some of the Products, Forms or Documentation to be used, as more particularly described in clause 11.

**Licence Commencement Date:** means the date on which the Licence commences, as specified in the Schedule.

**Licence Term:** means the period of duration of a licence in respect of a Product specified in the Schedule.

**Licensee:** means the legal entity identified as the licensee in the Schedule.

**Network:** means the electronically linked configuration of computers (whether a local or wide area network, intranet or website and whether linked by wire, fibre, interactive television, radio-telecommunication or other media) specified in the Schedule or such other like network as may be agreed between the parties.

**Products:** means the computer programs of Toplevel specified in the Schedule.

**Schedule:** means the signed Schedule detailing (without limitation) the Products, Fees and the Services to which these terms and conditions relate on Toplevel's standard form of schedule from time to time in force.

**Server:** means a computer or a portion or portions thereof performing the function of allowing multiple users simultaneous access to data and services over the Network.

**Services:** means the consultancy, training, upgrade and other services to be provided by Toplevel to Licensee and described in the Schedule.

**Services Commencement Date:** means the date on which the Services commence, as specified in the Schedule.

**Third Parties:** means Licensee's customers and trading partners.

**Toplevel:** means Toplevel Computing Limited whose registered office is 500 Stonehouse Park, Stonehouse, Gloucestershire. GL10 3UT. UK

**Year:** means consecutive periods of 12 months starting on the Commencement Date.

## 2 AGREEMENT

2.1 Toplevel shall licence the Products, the Forms and the Documentation and provide the Services in accordance with the terms set out in these Terms and Conditions and the Schedule to the exclusion of all other terms and conditions (whether brought to Toplevel's attention or not before or after the formation of the Agreement).

2.2 The specific Products and Services to be provided by Toplevel, the corresponding Fees and any further terms, conditions or restrictions on use shall be set out in the Schedule. In the event of a conflict between these Terms and Conditions and any Schedule, the Schedule will prevail.

## 3 DELIVERY AND INSTALLATION

3.1 Toplevel shall supply or the Licensee shall download from Toplevel's website (as determined by Toplevel) the number of copies of the Products and related Documentation as are specified in the Schedule in machine-readable form only.

3.2 Where Toplevel is supplying the Products, the Products shall be supplied on CD or in any other appropriate form (at Toplevel's discretion) to the Licensee's address specified in the Schedule (unless otherwise agreed by Toplevel) on the date specified in the Schedule or as soon thereafter as is possible.

3.3 Except where Toplevel provides installation services as part of the Services, the Licensee is fully responsible for all installations of the Products.

## 4 LICENCE

Toplevel grants the Licensee such non-exclusive non-transferable rights of use or distribution for the purposes of its business in relation to the Products, the Forms and Documentation as are set out in the Schedule subject at all times to these Terms and Conditions and such further terms (if any) as may be specified in any Schedule.

## 5 DURATION OF LICENCES

5.1 Subject to the payment of the appropriate Fees and unless otherwise stated, the licences set out in clause 4 in respect of Products or the right to distribute Forms shall commence on the Licence Commencement Date and shall continue for the Licence Term thereafter until the earlier of the date of its expiry, termination in accordance with Clause 17 or as otherwise provided in this Agreement.

5.2 Upon expiry of a Licence Term in respect of any Product Toplevel may agree to renew such licence for a further Licence Term subject to receipt of payment from Licensee of the appropriate Fees under clause 8 and subject to Toplevel's terms of licensing of software in force at the time.

## 6 SPECIFIC USE LIMITATIONS

6.1 Licensee agrees that, except as otherwise expressly permitted by this Agreement, if:

6.1.1 Products are to be used on more than one computer at a time then Licensee will purchase a separate copy of the Products for each computer. In no event may the total number of computers on which the Products are used exceed one for each copy of the Products purchased;

6.1.2 more than one person wishes to use the Products at the same time on a Network then Licensee will obtain a separate copy of the Products for each additional person.

6.2 Licensee shall not, except as expressly permitted by this Agreement or by applicable law:

6.2.1 allow any Third Party to use the Products, the Documentation, or the Forms nor use the same on behalf of or for the benefit of any Third Party;

6.2.2 rent, lease, sub-license, loan, copy, modify, adapt, merge, translate, reverse engineer, decompile, disassemble or create derivative works based on the whole or any part of the Products, the Documentation or the Forms.

## 8 PAYMENT AND ADDITIONAL CHARGES

8.1 Licence Fees payable to Toplevel shall be paid by Licensee on the Licence Commencement Date and otherwise in accordance with the terms of the Schedule. Where the Licence Fees are payable annually, the first installment of such Fees shall be paid on the Licence Commencement Date and in subsequent years on the anniversary of the Licence Commencement Date.

8.2 Services Fees payable to Toplevel shall, unless specified otherwise in the Schedule, be invoiced to the Licensee in advance starting on the Services Commencement Date.

8.3 Unless expressly provided otherwise in any Schedule, the Services Fees shall exclude the travel, accommodation and subsistence and other expenses of Toplevel's employees (including the cost of time spent traveling) incurred in the provision of the Services, which expenses shall be payable in addition by the Licensee within 30 days of the date of Toplevel's invoice.

8.4 Fees and any additional charges or fees payable under this Agreement are exclusive of value added tax which shall be paid by Licensee at the rate and in the manner for the time being prescribed by law.

8.5 If any sum payable under this Agreement is not paid within 7 days after the due date then (without prejudice to Toplevel's other rights and remedies, including the right to suspend the Services) Toplevel reserves the right to charge interest on such sum on a day to day basis (as well after as before any judgment) from the date or last date for payment thereof to the date of actual payment (both dates inclusive) at the rate of 4 per cent above the base rate of the National Westminster Bank Plc from time to time in force, compounded quarterly. Such interest shall be paid on demand.

8.6 Toplevel may increase the Fees annually such increase taking effect on an anniversary of the Licence Commencement Date and/or the Services Commencement Date and subject to Licensee receiving not less than 30 days' notice of such increase.

## 9 WARRANTY

9.1 Toplevel warrants that the Services will be performed with reasonable skill and care and in a timely and efficient manner.

9.2 Toplevel warrants that for a period of 90 days from the Licence Commencement Date the Products will substantially operate in conformity with the Documentation when properly used.

9.3 The warranty in clause 9.2 shall be subject to:

9.3.1 Licensee's complying with its obligations under the Agreement;

9.3.2 the use of Products and Forms in accordance with the terms of this Agreement; and

9.3.3 on notifying a defect or error, Licensee's provision (so far as it is able) of a documented example of such defect or error.

9.4 Subject to clause 18 Licensee's exclusive remedy and Toplevel's only liability in respect of a breach of the warranty at clause 9.2, shall be the provision of Products or Forms compliant with their Documentation.

9.5 Subject to clause 18 this clause states the entire liability of Toplevel for defects in the Products and Forms.

9.6 Toplevel does not warrant that the operation of the Products or Forms will be uninterrupted or error free or that all errors will be remedied.

9.7 Except as expressly provided in this Agreement, no warranty, condition, undertaking or term, express or implied, statutory or otherwise, as to the condition, quality, performance or fitness for purpose of the Products Forms, Documentation and Services is given or assumed by Toplevel and all such warranties, conditions, undertakings and terms are hereby excluded to the fullest extent permitted by law.

## 10 SERVICES

10.1 Toplevel shall provide the Services (if any) in accordance with such specification (if any) and timetable (if any) as may be developed and agreed by the parties at such location as shall be specified in the Schedule and in accordance with such further terms as may be specified in the Schedule. Toplevel shall use its reasonable endeavours to comply with any dates specified for the performance of Services or the delivery of the Deliverables, but shall not be liable for any failure to do so nor shall it be in breach of this Agreement.

10.2 Toplevel and the Licensee acknowledge that it may be necessary to change the scope of the Services during the term of the Agreement and that any additional services required may not be included in the Fees payable for the Services. The parties accept that:

10.2.1 any changes or additions to the scope of the Services will be valid only if agreed in writing by Toplevel and the Licensee; and

10.2.2 Toplevel reserves the right to revise the Fees for the Services in the event of any changes in the scope of the Services.

10.3 The Licensee shall:

10.3.1 designate a named representative who shall be Toplevel's primary contact in relation to the Services;

10.3.2 provide (where applicable) adequate office accommodation and other facilities, including access to applicable computer systems of the Licensee to enable it to perform the Services;

10.3.3 provide Toplevel with such information (including, without limitation, examples of any faults in the Products), support and co-operation as may be required by Toplevel to perform its obligations under this Agreement.

10.4 In event that any Deliverables are subject to acceptance testing, the tests to be undertaken shall be agreed by the parties in writing and in advance. All Deliverables shall be deemed to have been accepted by the Licensee if no material issues concerning their quality and/or contents have been raised by the Licensee within 10 working days of their delivery by Toplevel. The Licensee shall not in any event unreasonably delay or withhold its acceptance. In the event that any deliverable is not accepted by the Licensee, Toplevel shall remedy any failure at its own cost as swiftly as practicable.

10.5 If compliance with the Licensee's designs, specifications or instructions results in Toplevel being subject to any claim for infringement of any Intellectual Property Rights or any third party rights, the Licensee will indemnify Toplevel against any claims, demands, damages, costs and expenses made against or suffered by Toplevel as a result of any such claim or action.

## 11 COPYING

11.1 Licensee may copy Products, the Forms and the Documentation only as expressly permitted by this Agreement or by law, as reasonably necessary for operational security and use or with Toplevel's prior written consent.

11.2 All such copies and the media upon which they are stored shall be the property of Toplevel and Licensee shall ensure that such copies bear Toplevel's proprietary notices. This Agreement shall apply to the use by Licensee of all such copies as it applies to the Products, Forms and Documentation.

## 12 SECURITY AND CONTROL

12.1 Some of the Products cannot be used without a Licence Key. Toplevel will provide, in accordance with the terms of this Agreement, a Licence Key in order that the Products, the Forms, and the Documentation can be properly used. This Licence Key may be a PC Licence Key enabling the OfficeForms Filler to open and use Forms from a PC, whether or not the particular Form contains a Form Licence Key or it may be a Licence Administrator which Licensee may use to apply Form Licence Keys to Forms so that OfficeForms Filler can use that Form even if there is no PC Licence Key present in the PC on which it is being used.

12.2 Licensee shall, during the continuance of the Licence:

12.2.1 effect and maintain adequate security measures to safeguard the Products, the Forms and the Documentation from access or use by any unauthorised person;

12.2.2 retain the Products, the Forms, and the Documentation and all copies thereof under Licensee's effective control; and

12.2.3 maintain, as far as is practicable, a full and accurate record of Licensee's copying, disclosure and distribution of the Products, Forms and the Documentation and shall produce such record to Toplevel on request from time to time.

## 13 PROPRIETARY RIGHTS

13.1 All Intellectual Property Rights in the Products, the Documentation, the Forms (excepting Form Templates) are vested in Toplevel or its licensors.

13.2 The Intellectual Property Rights in the Form Templates created by Licensee shall vest in Licensee upon creation.

13.3 Unless expressly provided otherwise in any Schedule, all Intellectual Property Rights in the Deliverables shall vest in Toplevel and Toplevel

hereby grants the Licensee a perpetual non-transferable, non-exclusive licence to use the Deliverables for the purposes of its business and subject at all times to the provisions of this Agreement.

13.4 Licensee shall notify Toplevel immediately if Licensee becomes aware of any unauthorised use of the whole or any part of the Products, the Forms or the Documentation by any person.

13.5 Licensee will permit Toplevel to audit the use of the Products, the Forms and the Documentation by Licensee at all reasonable times and for that purpose Toplevel shall be entitled to enter any of Licensee's premises (and so that Licensee hereby irrevocably licenses Toplevel, its employees and agents to enter any such premises for such purpose).

## 14 CONFIDENTIAL INFORMATION

14.1 Licensee undertakes to treat as confidential and keep secret all information contained or embodied in the Products, the Forms (excluding the Form Templates) the Deliverables, the Documentation and all information conveyed to Licensee by training which is either marked as confidential or the equivalent (or stated to be confidential at the time of disclosure and subsequently confirmed in writing to be confidential) or by its nature has the necessary quality of confidence about it ("Confidential Information"), provided that this clause shall not extend to any information which was rightfully in the possession of Licensee prior to the commencement of the negotiations leading to this Agreement or which is already public knowledge or becomes so at a future date (otherwise than as a result of a breach of this clause).

14.2 Licensee shall not without the prior written consent of Toplevel divulge any part of the Confidential Information to any person except to:

14.2.1 Licensee's own employees and then only to those employees who need to know the same;

14.2.2 Licensee's auditors and any other persons or bodies having a right duty or obligation to know the business of Licensee and then only in pursuance of such right duty or obligation;

14.2.3 any person who is from time to time appointed by Licensee to maintain the Network or any equipment on which the Products or the Forms are being used (in accordance with the terms of the Licence) and then only to the extent necessary to enable such person properly to maintain the Network or such equipment.

14.3 Licensee undertakes to ensure that the persons and bodies mentioned in paragraphs 14.2.1, 14.2.2 and 14.2.3 are made aware prior to the disclosure of any part of the Confidential Information that the same is confidential and that they owe a duty of confidence to Toplevel. Licensee shall indemnify Toplevel against any loss or damage which Toplevel may sustain or incur as a result of Licensee failing to comply with such undertaking.

14.4 Licensee shall promptly notify Toplevel if it becomes aware of any breach of confidence by any person to whom Licensee divulges all or any part of the Confidential Information and shall give Toplevel all reasonable assistance in connection with any proceedings which Toplevel may institute against such person for breach of confidence.

14.5 The foregoing obligations as to confidentiality shall remain in full force and effect notwithstanding any termination of the Licence or this Agreement.

## 15 INDEMNITIES

15.1 Toplevel shall indemnify Licensee against any claim that the normal use or possession of the Products, Forms (where provided by Toplevel), Deliverables or Documentation, infringes the Intellectual Property Rights of any third party provided that Toplevel is given immediate and complete control of such claim, that Licensee does not prejudice Toplevel's defence of such claim, that Licensee gives Toplevel all reasonable assistance with such claim and that the claim does not arise as a result of the use of the Products, Forms, Deliverables or Documentation in combination with any equipment or programs not supplied or approved by Toplevel. Toplevel shall have the right to replace or change all or any part of the Products or Forms or Deliverables provided by it or Documentation in order to avoid any infringement. The foregoing states the entire liability of Toplevel to Licensee in respect of the infringement of the Intellectual Property Rights of any third party

15.2 Except to the extent caused by Toplevel's breach of its obligations hereunder, or its negligent or wilful misconduct in connection with this Agreement, and without limiting Toplevel's obligations in sub-clause 15.1 above, Licensee shall indemnify and hold Toplevel harmless from any and all liability, loss and damages Toplevel may suffer as a result of claims demands or judgments by any third party arising out of Licensee's use or operation of the Products, Forms (including the Form Templates), Deliverables, the Documentation and related output. Licensee shall, at its expense, defend any such action, suit or claim against Toplevel.

## 16 PROPERTY AND RISK

Risk and title in the media upon which Products, Forms and Deliverables provided by Toplevel and the Documentation are recorded or printed shall pass to Licensee on delivery. If subsequently any part of the media be destroyed, damaged or lost, Toplevel will, upon request, replace the same (embodying the relevant part of the Products, Deliverables, or Forms provided by Toplevel, or the Documentation) subject to Licensee paying the cost of such replacement media.

## 17 TERMINATION

17.1 Licensee may terminate a Licence at any time by giving at least 30 days' prior written notice to Toplevel.

17.2 Toplevel may terminate this Agreement (including the Licence) forthwith on giving notice in writing to Licensee if:

17.2.1 Licensee shall fail to pay any Licence Fees and such fee remains unpaid for 14 days after written notice from Toplevel that such fee has not been paid;

17.2.2 Licensee commits a material or persistent breach of any term of this Agreement and (in the case of a breach capable of being remedied) shall have failed, within 30 days after the receipt of a request in writing from Toplevel so to do, to remedy such breach;

17.2.3 Licensee shall have a receiver or administrative receiver appointed of it or over any part of its undertaking or assets or shall pass a resolution for winding up (otherwise than for the purpose of a bona fide scheme of solvent amalgamation or reconstruction) or a court of competent jurisdiction shall make an order to that effect or if Licensee shall enter into any voluntary arrangement with its creditors or shall become subject to an administration order or shall cease to carry on business.

17.3 Forthwith upon the termination of this Agreement, Licensee shall return to Toplevel the Products, the Forms, the Documentation and any and all materials or other items belonging to Toplevel and all copies of the whole or any part thereof either in its possession or under its control or in the possession or under the control of a Third Party as a result of Licensee's actions or, if requested by Toplevel, shall destroy or procure the destruction of the same and certify in writing to Toplevel that they have been destroyed. Licensee shall use all reasonable endeavours to contract with Third Parties to ensure it can fulfil the above obligations.

17.4 Any termination of this Agreement (howsoever occasioned) shall not affect any accrued rights or liabilities of either party nor shall it affect the coming into force or the continuance in force of any provision hereof which is expressly or by implication intended to come into or continue in force on or after such termination

## **18 LIABILITY**

18.1 Each party shall indemnify the other and keep the other fully and effectively indemnified against any loss of or damage to any property or injury to or death of any person caused by any negligent act or omission or wilful misconduct of it or its employees.

18.2 Notwithstanding any other provision of the Agreement the liability of the parties for injury to or death of any person caused by negligence is unlimited.

18.3 The respective liability of Toplevel and Licensee under the Agreement in respect of an event or series of connected events shall not exceed the aggregate of the Fees paid or payable for the Year in which the incident or incidents giving rise to liability occurs or £50,000, whichever is the greater.

18.4 Notwithstanding anything else contained in this Agreement Toplevel shall not be liable to Licensee for loss of profits, business, contracts, data or goodwill or for any indirect or consequential loss whether arising from negligence, another tort or breach of contract and howsoever caused.

18.5 Toplevel shall not be liable to Licensee for any loss arising out of any failure by Licensee to keep full and up-to-date security copies of the computer programs and data it uses.

## **19 ASSIGNMENT**

Except as expressly provided herein, Licensee shall not be entitled to assign, sub-license or otherwise transfer this Agreement or the Licence whether in whole or in part without the prior written consent of Toplevel.

## **20 LICENSEE'S WARRANTY**

Except in the case of a fraudulent misrepresentation by Toplevel, Licensee hereby warrants to Toplevel that Licensee has not been induced to enter into

this Agreement by or relied on any prior representations whether oral or in writing, except as specifically contained in this Agreement and Licensee hereby waives any claim for breach of any such representations which are not so specifically mentioned.

## **21 WAIVER**

No forbearance, delay or indulgence by either party in enforcing the provisions of this Agreement shall prejudice or restrict the rights of that party nor shall any waiver of its rights operate as a waiver of any subsequent breach and no right, power or remedy herein conferred upon or reserved for either party is exclusive of any other right, power or remedy available to that party and each such right, power or remedy shall be cumulative.

## **22 ENTIRE AGREEMENT**

This Agreement constitutes the entire agreement and understanding of the parties in and supersedes any previous agreement between the parties relating to the subject matter of the Agreement. Each of the parties acknowledges and agrees that in entering into the Agreement it does not rely on any pre-contractual statement and acknowledges and agrees that the only remedy available to it for breach of this Agreement shall be for breach of contract under the terms of this Agreement and it shall have no right of action against any other party in respect of any pre-contractual statement. No addition to or modification of any provision of this Agreement shall be binding upon the parties unless made by a written instrument signed by a duly authorised representative of each of the parties.

## **23 NOTICES**

23.1 All notices which are required to be given hereunder shall be in writing and shall be sent to the address of the recipient set out in this Agreement or such other address in the United Kingdom as the recipient may designate by notice given in accordance with the provisions of this clause. Any such notice may be delivered personally or by first class pre-paid letter, email or facsimile transmission and shall be deemed to have been served if by hand when delivered, if by first class post 48 hours after posting and if by email or facsimile transmission when dispatched if confirmed by hard copy served by post according to this clause.

23.2 Any notice which affects the validity or existence of this Agreement shall be delivered personally or sent by recorded delivery first class post only.

## **24 HEADINGS**

The headings to the clauses of this Agreement are for reference only and shall not affect the interpretation or construction of this Agreement.

## **25 ILLEGALITY AND SEVERANCE**

If any term or provision of this Agreement shall be held illegal or unenforceable in whole or in part, under any enactment or rule of law, such term or provision or part shall to that extent be deemed not to form part of this Agreement but the validity and enforceability of the remainder of this Agreement shall not be affected.

## **26 RELATIONSHIP**

The relationship between the parties is that of independent contractors. Neither party is an agent for the other and neither party has any authority to make any contract in the name of the other.

## **27 LAW AND JURISDICTION**

This Agreement shall be governed by and construed in accordance with the laws of England and shall be subject to the exclusive jurisdiction of the English Courts.

## **28 THIRD PARTIES**

Except where expressly stated this Agreement is not intended to confer any benefit to any person not a party to it.