

General Terms of Service

Pongolabs Pty Ltd ABN: 55 163 894 246 (**Pongolabs**) develops and maintains a number of systems (including without limitation Qlickboard and extensions each defined in their respective Licence Agreements) (**Systems**).

This agreement sets out the terms of a contract between you and Pongolabs under which Pongolabs will provide services to you in relation to your use of the Systems (**Services**). You are not granted a license to use the systems under this agreement. Your licence to use the Systems is subject to the relevant order agreed between you and Pongolabs (**Order**).

Pongolabs may amend these general terms from time to time. Unless agreed otherwise, the general terms current at the time an ORDER is agreed by the parties will apply to that ORDER.

1 DEFINITIONS AND INTERPRETATION

1.1 Defined Terms

Clause 1.1 (Defined Terms) of the Licence Agreement attached to the Order applies to this agreement as if set out in full in this agreement. In addition, in this agreement unless the contrary intention appears:

- (a) **Business Day** means a day other than a Saturday, a Sunday or a public holiday within the meaning of the Public Holidays Act 1993 (Vic);
- (b) **Client Data** means data owned or supplied by a Participant or data generated, compiled, arranged or developed on the Systems for the purpose of using the Systems. Client Data does not include data generated by Pongolabs for the purpose of managing your use of the System including without limitation access and usage logs;
- (c) **Confidential Information** means the existence and contents of this agreement and in relation to a party making disclosure (Discloser), all information (including Client Data and any personal information) disclosed, communicated or delivered by the Discloser to the person to whom the disclosure is made (Recipient) or learnt or accessed by the Recipient from the Discloser, but excludes any such information which the Recipient can establish:
 - (i) is or becomes generally available in the public domain otherwise than through a breach of confidence owed to the Discloser;
 - (ii) was developed by the Recipient independently of the disclosure, communication or access from the Discloser; or
 - (iii) was disclosed or communicated to or accessed by the Recipient from a third party under no obligation of confidence in relation to that information;
- (d) **Corporations Act** means the Corporations Act 2001 (Cth);
- (e) **Deliverable** means anything in material form that is required to be delivered or is delivered to you by Pongolabs under this agreement;
- (f) **Documentation** means any operating manuals, user guides and any other documentation associated with the System which Pongolabs supplies to you including help files contained in the System, and information published on the System;
- (g) **GST Law** has the meaning given by the A New Tax System (Goods and Services Tax) Act 1999 (Cth);
- (h) **Insolvency Event** means, for a person, being:
 - (i) in liquidation or provisional liquidation or under administration, having a controller or analogous person appointed to it or any of its property,
 - (ii) being taken to have failed to comply with a statutory demand, be unable to pay its debts or otherwise insolvent;
 - (iii) dying, ceasing to be of full legal capacity or otherwise becoming incapable of managing its own affairs;

- (iv) subject to any action that could result in the person becoming an insolvent under administration;
- (v) entering into a compromise or arrangement with, or assignment for the benefit of, any of its members or creditors; or
- (vi) any analogous event;

- (i) **Intellectual Property Rights** means all present and future rights conferred by statute, common law, equity or any corresponding law including without limitation in or in relation to any copyright, trade marks, designs, patents, circuit layouts, plant varieties, business and domain names, inventions, Confidential Information and other results of intellectual activity in the industrial, commercial, scientific, literary or artistic fields whether or not registrable, registered or patentable. These rights include all rights in all applications to register these rights, all renewals and extensions of these rights and all rights in the nature of these rights, such as Moral Rights;
- (j) **Moral Right** means a right of attribution of authorship, a right not to have authorship falsely attributed, a right of integrity of authorship or a right of a similar nature, conferred by statute or otherwise, and which exists or comes to exist anywhere in the world;
- (k) **Participant** means the Licensee and each user authorised under an Order. The number of participants is measured as the number of people who data is entered in respect of or who have access to that data in the Initial Term and each Further Term.
- (l) **Requirements** means the requirements agreed to here and in the ORDER (subject to any amendments agreed in writing by the parties);
- (m) **Term** has the meaning given in clause 2; and
- (n) **Unexpected Event** means an event or cause beyond the reasonable control of the party claiming an unexpected event. It includes each of the following, to the extent it is beyond the reasonable control of that party act of God, lightning, storm, flood, fire, earthquake or explosion, cyclone, tidal wave, landslide, strike, lockout or other labour difficulty, interruptions or unavailability of internet connection or telecommunications services, act of public enemy, war (declared or undeclared), terrorism, sabotage, blockade, revolution, riot, insurrection, civil commotion, epidemic, the effect of any applicable laws, orders, rules or regulations of any government or other competent authority, embargo, power or water shortage, lack of transportation and breakage or accident or other damage to machinery. In the case of Pongolabs, interruptions to any hosting services provided by a third party are unexpected events.

1.2 Interpretation

In this agreement, unless stated otherwise, an agreement, representation, covenant or warranty in favour of, or given by, two (2) or more persons is in favour of, or given by, them jointly and severally.

2 TERM

This agreement will commence on the date specified in the ORDER and expire on the completion date as specified in the ORDER unless this agreement is terminated in accordance with these terms (**Term**).

3 PROVISION OF SERVICES AND DELIVERABLES

Pongolabs will provide the Services and Deliverables:

- (a) substantially in accordance with the Requirements;
- (b) using the degree of skill, care and diligence reasonably to be expected of experienced personnel in similar circumstances; and
- (c) using appropriately qualified personnel.

Pongolabs' obligations to provide the Services and Deliverables are subject to any assumptions and qualifications specified in the ORDER. If you required Pongolabs to do any additional work that is outside the scope of the ORDER or any of the assumptions relevant to a ORDER are incorrect, you agree that Pongolabs will be entitled to an extension of time for any obligation that Pongolabs is delayed in performing as a result and costs in accordance with clause 6.

Pongolabs may subcontract delivery of its obligations under this agreement but remains responsible for any act or omission of any of its subcontractors.

4 YOUR OBLIGATIONS

You must:

- (a) provide any inputs or assistance specified in the ORDER or reasonably requested by Pongolabs to enable Pongolabs to perform its obligations under this agreement;
- (b) provide Pongolabs with access to your equipment, facilities, systems, documentation, premises or personnel as Pongolabs may reasonably require to enable perform its obligations to you and audit your compliance with your obligations to Pongolabs;
- (c) to the extent that any Pongolabs personnel are required to enter any site owned or occupied by you, provide a safe working environment for Pongolabs's personnel in compliance with any applicable OH&S or other laws (Pongolabs will ensure that its personnel comply with any reasonable policy or procedure relating to access to your sites that are notified by you. Where those policies or procedures cause any delays or additional costs for Pongolabs, Pongolabs will be entitled to an extension of time and costs in accordance with clause 6); and
- (d) only use any Deliverable in relation to the System and for the purposes for which you are permitted to use the System.

You agree to indemnify and hold harmless Pongolabs and its related parties (as defined under the Corporations Act) and their officers, employees and subcontractors from any additional costs, expenses or claims to the extent that they are caused, or contributed to, by a breach of this agreement by you.

5 DELAYS AND COSTS

Pongolabs will use its best endeavours to perform its obligations within in any timeframe and requirements specified in the ORDER and will keep you reasonable informed of any delays or potential delays.

In the event that you cause any delay or additional costs for Pongolabs:

- (a) Pongolabs will be entitled to an equivalent extension of time for performance of any obligation that has been delayed by you; and
- (b) you agree to compensate Pongolabs for any additional costs incurred by Pongolabs (including without limitation paying for any additional work required from Pongolabs's personnel at their standard hourly rate (or the rate agreed in the ORDER for any out of scope work or work relating to subsequent Server/Device changes or upgrades)).

6 FEES

You must pay Pongolabs the licence fees specified in an ORDER or this agreement within 30 days of receipt of an invoice unless expressly agreed otherwise.

If you dispute the whole, or any part of, an invoice, you will pay the undisputed portion on the due date. The dispute regarding the remainder may be referred for resolution by way of the dispute resolution procedure prescribed by this agreement. If it is subsequently resolved that the remainder is payable, you will pay that amount together with interest at the rate of 10% per annum calculated from the due date until the payment is made (capitalising monthly).

Without limiting any other rights it may have, Pongolabs may suspend or limit the provisions of Services under this agreement (or suspend or limit access of any Participant to the System under the Order) until you have paid any fees due under this agreement.

7 GST

Words and phrases defined in the GST Law have the same meaning in this clause. If GST is payable on a Taxable Supply made in connection with this agreement, the party providing the Consideration for that Taxable Supply must also pay the GST Amount as additional Consideration. This clause does not apply to the extent that the Consideration for the Taxable Supply is expressly agreed to be GST inclusive. No payment of any amount pursuant to this agreement is required until the supplier has provided a Tax Invoice or Adjustment Note as the case may be to the recipient. Any reference in the calculation of Consideration or of any indemnity, reimbursement or similar amount to a cost, expense or other liability incurred by a party, must exclude the amount of any Input Tax Credit entitlement of that party in relation to the relevant cost, expense or other liability.

8 INTELLECTUAL PROPERTY RIGHTS

You acknowledge that all Intellectual Property Rights in the System and any Deliverables are retained by Pongolabs. You acknowledges that nothing in this agreement transfers or assigns to you any of Pongolabs's Intellectual Property Rights and your right to use and access Pongolabs's Intellectual Property Rights are limited to the operation and the use of the System in accordance with this agreement and the Order. You agrees that its usage of that Intellectual Property Rights and any goodwill established thereby shall inure to the exclusive benefit of Pongolabs.

Subject to payment of all fees by you, Pongolabs grants you and each Participant a revocable, non exclusive and non transferable licence to use any Deliverable (other than Client Data) for the Term of the Order for the limited purpose of using the System for the Licensee's internal business purposes.

You agree that any development of the System (including any developments suggested or contributed to by you) are the property of Pongolabs and you assign and present or future Intellectual Property Rights that you might have in relation to those developments to Pongolabs and waive any Moral Rights that you may have in relation to those developments.

Pongolabs acknowledges that Client Data remains your property and will deal with that data as specified in the Order.

9 REPRESENTATIONS AND WARRANTIES

Pongolabs represents and warrants that it will provide the Services:

- (a) substantially in accordance with the Requirements; and
- (b) with due care and diligence, by a sufficient number of appropriately qualified and experienced personnel.

Except as otherwise expressly provided in this agreement, all other warranties, representations, promises, conditions or statements regarding the System (including without limitation the functionality or performance of the System), whether express or implied, and whether statutory or otherwise are to the full extent permitted by law expressly excluded.

10 LIMITATION OF LIABILITY

- (a) To the extent permitted by law, Pongolabs disclaims all liability for, and you release Pongolabs from any claims (including negligence) in connection with this agreement or the transactions contemplated by it:
 - (i) regarding indirect, consequential or special losses, damages or penalties;
 - (ii) regarding any unauthorised access to your Client Data (other than by any Pongolabs's personnel) nor for any loss or corruption of your Client Data or the costs of recreating or repairing your Client Data (provided that Pongolabs has taken reasonable steps to safeguard your Client Data and ensure that it is not lost or corrupted); or
 - (iii) in excess of the fees paid by you in relation to the ORDER (or in the case of personal injury, death or property damage \$10 million).
- (b) Without limiting paragraph (a), PerformanceCentre's liability relating to any defective supply will be limited to, at the option of Pongolabs, refunding the fees relating to the defective supply, rectifying any defects in the good or service or resupplying the defective good or service.
- (c) Unless otherwise agreed in an Order, the System will be provided using public cloud technology (currently hosted by

Amazon) and third party software. Licensee and each Authorised User acknowledges the additional risks of using public cloud technologies and provided Pongolabs has used reasonable endeavours to negotiate reasonable terms with any cloud service provider or third party software provider, Pongolabs obligations under this agreement in relation to products, services, acts or omissions of those third parties are limited to the rights Pongolabs (or the Licensee) has agreed with those third parties.

11 UNEXPECTED EVENTS

Non performance by either party of its respective obligations under this agreement will be excused during the time and to the extent that performance is prevented, wholly or in part, by an Unexpected Event.

If an Unexpected Event affecting a party prevents that party ('Precluded Party') partially or wholly from complying with its obligations under this agreement then as soon as reasonably possible after the Unexpected Event arises, the Precluded Party:

- (a) must notify the other party of the Unexpected Event, specifying the cause and the extent to which it is unable to perform its obligations under this agreement and the likely duration of such non-performance;
- (b) take all reasonable steps to remedy or mitigate the effects of the Unexpected Event; and
- (c) keep the other party informed, both at reasonable intervals and upon request of the likely duration of the Unexpected Event, the action taken or proposed to be taken by the Precluded Party, the cessation of the Unexpected Event or the successful mitigation or minimisation of the effects of the Unexpected Event and any other matter the other party may reasonably request in respect of the Unexpected Event.

12 DISPUTE RESOLUTION

If a dispute arises between Pongolabs and you in relation to this agreement, either of the Parties may by notice to the other party specifying reasonable details of the dispute ("Dispute Notice"), refer the dispute for resolution in accordance with this clause. If a Dispute Notice is given under this clause, the parties must promptly meet and engage in good faith discussions with the bona fide objective of resolving the dispute by agreement. If after a period of 10 Business Days (or such other period as may be agreed) from the date on which a Dispute Notice is delivered to a party, the parties have not been able to resolve the dispute, either of them may then (but no earlier), by notice, escalate the dispute to a meeting of the senior executives of the Licensee and Pongolabs. If after a period of 10 Business Days (or such other period as may be agreed) from the date on which such a meeting of senior executives took place, the party's delegates have not been able to resolve the dispute, either party may pursue any remedy available at law. Neither Pongolabs nor you may commence legal proceedings (other than for urgent interlocutory relief) in relation to any dispute unless the dispute resolution procedures set out in this clause have been followed. Only the Licensee is entitled to manage any dispute or take any action against Pongolabs on behalf of any Participant in connection with the System and this agreement.

13 TERMINATION AND EXPIRY

- (a) You may terminate this agreement by written notice to Pongolabs, if Pongolabs materially breaches this agreement and fails to rectify that breach within 10 Business Days of receiving a written notice to rectify the breach or if Pongolabs becomes subject to an Insolvency Event.
- (b) Pongolabs may terminate this agreement or suspend your access (or the access of any other Participant) by written notice to you if:
 - (i) a Participant breaches a material obligation under this agreement and fails to rectify that breach within 10 Business Days of receiving a written notice from Pongolabs;
 - (ii) if you fail to pay any amount due to Pongolabs under this agreement or in connection with any services relating to the System;
 - (iii) the Order is terminated;
 - (iv) you or the Licensee is subject to an Insolvency Event; and
 - (v) a Participant breaches a term of the Order (if applicable) or clause 8 .

- (c) On termination or expiry:
 - (i) you must pay Pongolabs for any work completed under this Agreement up until the date of termination;
 - (ii) subject to your rights to access Client Data after the Term under clause 13, you must cease using the Deliverables and destroy or return all copies of the Deliverables or Pongolabs's Confidential Information on your systems or under your control; and
 - (iii) if requested by the Licensee, Pongolabs will permanently delete your Client Data.
- (d) Any termination of this agreement shall not affect any accrued rights or liabilities of either party, nor shall it affect any provision of this agreement which is expressly or by implication intended to continue in force after such termination, including clauses 8, 9, 10, 12, 13 and 14.

14 CONFIDENTIALITY

A party will not, without the prior written approval of the other party, disclose the other party's Confidential Information. A party will not be in breach of this clause in circumstances where it is legally compelled (but not by contract) to disclose the other party's Confidential Information.

Notwithstanding any other provision of this clause, a party may disclose the terms of this agreement (other than Confidential Information of a technical nature and Client Data) to its employees, related companies, solicitors, auditors, insurers and accountants providing that such parties give an undertaking to abide by the terms of confidentiality imposed on the parties by this agreement.

Each party acknowledges that damages alone are unlikely to be an adequate remedy in respect of any breach of that party's obligations under this clause. Accordingly, in addition to other remedies that may be available, a Discloser may seek urgent interlocutory relief to protect its rights and interest in its Confidential Information against any actual or potential breach of this clause by the Recipient, without proof of actual damages, in addition to any other remedy to which the Discloser would be entitled.

You agree that Pongolabs may make reasonable reference to the fact that Pongolabs has (or does) provide services to you (including reasonable use of your logo) in its marketing materials..

15 PRIVACY

Pongolabs agrees to treat any personal information in accordance with its privacy policy available at [insert website]. You consent to the collection, storage and use of any of your personal information by Pongolabs in accordance with its privacy policy. Where any Client Data submitted by you includes the personal information of any other person, you are responsible for ensuring that they have provided any consents required to enable Pongolabs to collect, use and store that information in accordance with its privacy policy.

16 NOTICES

A notice required or permitted to be given by one party to another under this agreement must be in writing and is treated as being duly given if it is delivered or sent by pre-paid mail to that other party's address as specified in this agreement or notified in writing from time to time. Pongolabs's current details are 13/243 Collins Street MELBOURNE VIC 3000. Any notice to you is effective if given to the Licensee. A notice given to a party in accordance with clause is treated as having been received when delivered (in the case of it being left at that party's address) and on the third Business Day after posting (in the case of it being sent by pre-paid mail).

17 MISCELLANEOUS

- (a) This agreement may only be varied in writing, signed by each party to this agreement.
- (b) A waiver of any right, power or remedy under this agreement must be in writing signed by the party granting it. A waiver is only effective in relation to the particular obligation or breach in respect of which it is given. It is not to be taken as an implied waiver of any other obligation or breach or as an implied waiver of that obligation or breach in relation to any other occasion.
- (c) This agreement constitutes the entire agreement between the Parties in relation to the matters dealt with. No party

can otherwise rely on an earlier document or anything said or done by or on behalf of another party before this agreement was executed.

- (d) Any provision in this agreement which is invalid or unenforceable is to be read down, if possible, to such an extent as is reasonable in the circumstances so as to be valid and enforceable, and is otherwise capable of being severed to the extent of the invalidity or unenforceability, without affecting the validity of the remainder of this agreement or the enforceability of that provision in any other jurisdiction.
- (e) Neither party may assign or transfer any of its rights or obligations under this agreement without the prior consent in writing of the other party (such consent not to be unreasonably withheld or delayed). However, Pongolabs may assign its rights and obligations under this agreement to a purchaser of substantially all of its business relating to the System.
- (f) This agreement is governed by the law in force in the State of Victoria. Each party submits to the non-exclusive jurisdiction of the courts of the State of Victoria and any Courts which may hear appeals from those courts.
- (g) This agreement shall be binding on the executors, administrators, successors, substitutes and permitted assigns of each of the Parties.
- (h) Where a term of this agreement has the effect of requiring anything be done on or by a day which is not a Business Day, it must be interpreted as if it required it to be done on or by the next Business Day
- (i) A provision or any part of a provision in this agreement must not be construed to the disadvantage of a party merely because that party was responsible for the preparation of this agreement and/or the inclusion of the provision or part of the provision.
- (j) Each party must do, at its own expense, everything reasonably necessary (including executing documents) to give full effect to this agreement and any transactions contemplated by it.
- (k) Where this agreement contemplates that a party may agree or consent to something (however it is described), that party may agree or consent, or not agree or consent, in its absolute discretion and agree or consent subject to conditions, unless this agreement expressly contemplates otherwise.