



AO Labs Terms and Conditions

Version 0.1

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1. AO Limited terms and conditions

This Agreement and its associated Schedules set out the terms and conditions that will apply to the provision of Services by AO Limited, trading as AO Labs, to the Client. The parties to these terms are the person requesting the work ("the Client") and the Vendor, AO Labs, described below as ("AO Limited").

AO Limited may amend these terms and conditions from time to time by publishing a new version on its website at <https://aolabs.nz/terms>

2. Definitions

2.1. In this Agreement, unless the context otherwise requires:

"Agreement" means these terms and conditions and, where applicable, any document into which they are incorporated by reference.

"Business Day" means any day not being:

- a) a Saturday or a Sunday; or
- b) a statutory public holiday in New Zealand (including any regional public holiday applicable to the AO Limited office where the Services are provided).

"Business Hours" refers to the hours of operation, namely 8.30am to 5.30pm New Zealand standard Time or New Zealand Daylight Savings time during its occurrence, on any Business Day.

"Commencement Date" means the date on which this Agreement comes into force between the parties, which will typically be the date on which a contract was formed through offer, acceptance and consideration. Commencement Date may be defined otherwise in any document which incorporates these terms and conditions.

"Confidential Information" of a party means all information which is, or may be, proprietary to that party, or commercially sensitive, and includes, but is not limited to, computer data and personal data including names, addresses, personal, medical or business affairs of persons associated with that party and information relating to the organisation, methods, administration, operation, business affairs, services provided by or to third parties, or financial or commercial arrangements of that party, or persons associated with the party and information of any nature, technical or otherwise, relating to any product or process in which the party or persons associated with the Services on behalf of the party are involved.

It specifically excludes information which:

- a) was rightfully in the possession of the other party prior to the commencement of negotiations leading to this Agreement;

- b) is already public knowledge or becomes so at a future date (otherwise than as a result of a breach of clause 6);
- c) is trivial or obvious;
- d) is contained within a release in the meaning of clause 18.8; or
- e) is required to be disclosed at law or by a parliamentary, governmental or judicial process or convention.

“Deliverables” means and includes all the work to be delivered by AO Limited as a result of providing the Services to the Client in accordance with Requirements, subject to clause 21.6.

“Intellectual Property” means the following industrial and intellectual property rights, whether registered or unregistered, and includes:

- a) trademarks, service marks, trade names, registered designs, design rights, copyright (including all copyright in any designs and computer software), source code, and applications for any of the foregoing;
- b) the copyright in all drawings, plans, specifications, designs, policies, procedures or other documents relating to the Services including rights in computer software;
- c) knowledge connected with the Services including data, specifications and drawings, and technical information; and
- d) rights under any agreement or contracts granted to third parties to use any of the above; but excludes patents registered in a jurisdiction other than the jurisdiction AO Limited Entity is incorporated.

“Maintenance Release” means an update to an existing version of the application containing error corrections or minor functionality enhancements. A Maintenance Release is designated as a numbered service pack for the current version, with no change in the version number.

“New Version Release” means a new version of the application containing new features or enhancements to functionality. A New Version Release is designated by an increase in the version number (e.g. from 1.5 to 1.6 or 2.0).

“Open Source licence” means any software licence identified as a free software licence by the Free Software Foundation, and “Open Source” shall have a corresponding meaning.

“Representative” means for the Client, the nominated representative who has the authority to represent the Client, and for AO Limited, a Director or any other representative as notified from time to time.

“Requirements” means the statement of business and technical requirements for the Products as set out in the referenced documents of the relevant Statement of Work and any other requirements referred to in this Agreement or subsequently agreed between the parties.

“**Services**” means collectively the services to be provided by AO Limited to the Client under this Agreement.

“**Statement of Work**” or “**SOW**” means any document where the parties agree on Requirements to be delivered under this Agreement, for example a work request created through AO Limited's online systems.

“**Taxes**” means any and all taxes (including GST, VAT, income tax and withholding taxes), duties and levies imposed by any competent authority in any jurisdiction.

3. Interpretation

3.1. For the purposes of interpretation and construction of this Agreement:

- a) headings are for convenience only and do not affect the interpretation of this Agreement;
- b) the word “including” shall not imply restriction;
- c) words importing the singular include the plural and vice versa;
- d) a reference to a person includes that person’s successors and permitted assigns;
- e) a reference to any statute, regulation, proclamation, ordinance or by-law includes all statutes, regulations, proclamations, ordinances or by-laws varying, consolidating or replacing them and a reference to a statute includes all regulations, proclamations, ordinances and by-laws issued under that statute;
- f) no rule of construction applies to the disadvantage of a party because that party was responsible for the preparation of this Agreement or any part of it; and
- g) an item listed under a heading “Assumptions” or similar in a Schedule to this Agreement is a condition of this Agreement inserted for the sole benefit of AO Limited. Assumptions are the Client’s responsibility to satisfy.

4. Obligations of the parties

4.1. Each party agrees to co-operate and work with the other in good faith to enable the effective performance of the required Services by AO Limited. This includes the Client making available information, decisions and processes as may reasonably be required to facilitate AO Limited to implement and deliver the Services in accordance with this Agreement.

5. Termination

5.1. This Agreement is terminated by any one or more of the following:

- a) both parties agree in writing;
- b) once the Requirements of all Statements of Work have been completed;
- c) for convenience by AO Limited giving 90 days' written notice to the Client;

- d) if the Client has not paid an invoice within 14 days of it becoming due, and AO Limited gives the Client 14 days notice of its intention to cancel this Agreement, upon the notice period expiring without payment of the said invoice;
 - e) if either party is in breach of this Agreement and either:
 - i. the breach is not capable of being remedied, or
 - ii. the party in breach does not remedy the breach within 40 working days of receiving a notice from the other party stating the details of the breach and what is required to remedy the breach;
 - f) at the election of a party if the other party becomes insolvent, goes into liquidation or bankruptcy, has a receiver appointed in relation to its business assets, or enters into any arrangements with its creditors; and
 - g) pursuant to clause 9.3 by reason of a Force Majeure Event.
- 5.2. If this Agreement is terminated, all existing claims and remedies at law remain extant and may be pursued by either party.
- 5.3. Upon termination of this Agreement, the Client may require AO Limited to provide the Client with copies of their data, usually comprising database, site data and code base. AO Limited will charge its standard hourly rates for providing this to the Client.

6. Confidentiality

- 6.1. Both parties agree that, unless they have the prior written consent of the other, they will not use or disclose to any third party (other than for the purpose of performing their obligations under this Agreement) any information which is Confidential Information of the other party. The obligations of this clause shall survive termination or cancellation of this Agreement.
- 6.2. AO Limited undertakes to ensure that its employees, agents and sub-contractors who need to know the same are aware of and will be legally obliged to comply with the provisions of this clause in relation to the Confidential Information.
- 6.3. AO Limited shall ensure that all sub-contracts will contain confidentiality provisions consistent with this clause 6.
- 6.4. AO Limited shall, upon the termination of this Agreement or if and when otherwise requested by the Client to do so, return to the Client forthwith any Confidential Information of the Client, computer programs, information, data, books, records, papers, Intellectual Property or any other property belonging to the Client, or any copies of the same in AO Limited's possession or control. Where Confidential Information, information, data, computer programs or Intellectual Property of the Client is stored on any computer equipment belonging to AO Limited and it is not convenient to delete it, AO Limited may instead continue to maintain the confidentiality of that Confidential Information.

7. Indemnity and liabilities

- 7.1. Neither party to this Agreement shall be liable to the other party for indirect or consequential loss or damages (including but not limited to loss of business profits, business interruption, loss of business information, data, goodwill or other non-pecuniary loss) arising out of or in connection with this Agreement or the provision of the Services, whether arising from negligence, breach of contract or otherwise.
- 7.2. The maximum liability of the Client for any claim under this Agreement (whether arising from negligence, breach of contract or otherwise) shall be the total service costs payable by the Client to AO Limited during the calendar year in which the claim is made.
- 7.3. The maximum liability of AO Limited for any claim under this Agreement (whether arising from negligence, breach of contract or otherwise) shall be the lesser of the annual cost and 500,000 New Zealand Dollars.
- 7.4. Except where one of the parties is subject to the Public Finance Act 1989, each party agrees to defend, indemnify and save the other party, its affiliated and subsidiary corporations, its officers, directors, employees, agents, successors, shareholders and assigns harm from and against all liability, loss, expense, fines, penalties, or damages (including legal costs) to the extent that such claim arises out of or is in any way connected with the non-performance or breach of any obligation imposed on the indemnifying party by this Agreement or other general laws and obligations or by reason of and to the extent of the fraud, negligence or wilful misconduct of the indemnifying party or any agent or employee of the indemnifying party.
- 7.5. For the avoidance of doubt, the limitations and exclusions of liability outlined in this Agreement shall apply to the indemnity obligations of the parties (if any).
- 7.6. No action, regardless of form, arising out of any alleged breach of this Agreement or obligation hereunder may be brought by either party more than two (2) years after the cause of action has occurred.

8. Warranties and disclaimers

- 8.1. A core value of AO Limited is to deliver high quality software and to stand behind that software. However, it is in the nature of software development that bugs occur. That is, from time to time use of the Deliverable may be interrupted, or the Deliverable might not fully perform in accordance with its specifications. Such interruption, bugs or non-conformance do not constitute a breach of this Agreement. Instead, they are dealt with through AO Limited's software warranty set out in clause 8.2.
- 8.2. AO Limited's software warranty is that AO Limited will remedy any non-compliance of a Deliverable with its Requirements, provided that the non-compliance is notified to AO Limited within sixty (60) days from the earlier of delivery to the Client or release to a production environment. However, where the cost to AO Limited of remedying such non-compliance would be excessive and disproportionate to the charge associated with the Deliverable, AO Limited may choose to refund that charge instead of remedying the non-compliance.
- 8.3. The warranty set out in clause 8.2 shall not apply where any non-compliance of a Deliverable with its requirements is attributable to the actions or omissions of the Client or any third party who is not an agent, employee or sub-contractor of AO Limited.

- 8.4. Each representation, condition, indemnification or warranty alleged to be made by AO Limited but not expressly contained in this Agreement is excluded unless it is unlawful to do so.
- 8.5. The Services provided in this Agreement are provided for the purposes of use in a business only. This means that laws designed to protect consumers acquiring goods or services of a kind ordinarily acquired for personal, domestic or household use or consumption, including (but not limited to) the Consumer Guarantees Act 1993 in New Zealand, are expressly excluded from this Agreement, to the full extent permitted by law.
- 8.6. AO Limited makes no representations and gives no warranties, guarantees or undertakings concerning its performance of the Services, except as expressly set out in this Agreement. All other warranties, express or implied, by statute or otherwise (including but not limited to the warranties of merchantability, fitness for a particular purpose, and satisfactory quality) are excluded from this Agreement, to the fullest extent permitted by law.

9. Force majeure

- 9.1. Neither party will be liable for any act, omission, or failure to fulfil its obligations under this Agreement to the extent that such act, omission or failure arises from any cause reasonably beyond its control including acts of God, strikes, lockouts, riots, acts of war, terrorism, loss of mains power or network connectivity, epidemics, localised disease outbreak, governmental action, fire, earthquake or other disasters ("Force Majeure Event").
- 9.2. The party unable to fulfil its obligations under this clause 9 will immediately:
 - a) notify the other party in writing of the reasons for its failure to fulfil its obligations; and
 - b) use all reasonable endeavours to avoid or remove the cause of its failure to perform its obligations.
- 9.3. If a party is unable to perform any of its obligations under this Agreement due to a Force Majeure Event for a period of at least thirty (30) days, either party may terminate this Agreement by giving thirty (30) days' written notice to the other provided that if the Client terminates this Agreement it shall pay to AO Limited a fair and equitable charge for the work performed by AO Limited to the date of termination. Termination of this Agreement under this clause will not prejudice the rights of either party against the other in respect of any matter or thing occurring under this Agreement before its termination.

10. Non-Solicitation

- 10.1. During the Term of this Agreement and for an additional period of six months thereafter, each party agrees not to:
 - a) induce any employee of the other to terminate his or her employment relationship with the other party; and/or

- b) offer employment to any employee of the other party who has performed any Services related to this Agreement without first obtaining the written consent of the other party.

11. Variations

- 11.1. Subject to clause 15, any variation to this Agreement must be in writing and signed by each party's Representative or other duly authorised signatory, provided that:
- a) any facsimile or scanned copy of such signed document duly received from the other party through email or facsimile transmission shall, unless there is clear evidence showing otherwise, have the same effect as the original; and
 - b) offer employment to any employee of the other party who has performed any Services related to this Agreement without first obtaining the written consent of the other party.

12. Not partnership

- 12.1. AO Limited does not have any power, right or authority to bind the Client, or to assume or create any obligation or responsibility, expressed or implied, on behalf of the Client. Nothing contained in this Agreement shall be construed as constituting AO Limited and the Client as partners or joint venturers, or as creating the relationship of employer and employee, or principal and agent between them or otherwise create any other relationship than that of seller and a purchaser as set forth in this Agreement.

13. Disputes and remedies

- 13.1. The parties agree to use their best efforts to resolve any dispute that may arise under this Agreement through good faith negotiations.
- 13.2. A party claiming that a dispute has arisen must give written notice to the other party specifying the nature of the dispute (notice of dispute). If within ten (10) days of receipt of a notice of dispute, the parties have not resolved the dispute, the dispute must be escalated to the chief executive or equivalent of the Client and a director for AO Limited.
- 13.3. Any dispute arising under this Agreement that cannot be settled by negotiation between the parties or their respective representatives shall be submitted to mediation. Either party may initiate mediation by giving written notice to the other party.
- 13.4. If the parties cannot agree on a mediator within five (5) Business Days of the notice, the mediator will be selected by a Director of the Resolution Institute.
- 13.5. Any dispute that cannot be settled by mediation within thirty (30) days of commencement of such mediation shall be referred to arbitration to be conducted in Auckland, New Zealand, and shall be finally settled in accordance with the Arbitration Act 1996.

- 13.6. The parties shall continue to perform their obligations under the Agreement as far as possible as if no dispute had arisen pending the final settlement of any matter referred to mediation.
- 13.7. Nothing in this clause 13 shall preclude either party from taking immediate steps to seek urgent equitable relief before a court of competent jurisdiction.

14. No waiver

- 14.1. No failure, delay or indulgence by either party in exercising any power or right conferred on that party by this Agreement will operate as a waiver of that power or right. Nor will a single exercise of any of those powers or rights preclude further exercises of those powers or rights or the exercise of any other powers or rights under this Agreement.

15. Notices and variations

- 15.1. Any notice required to be given under this Agreement may be sent by email to the representative's email address or posted via registered post or sent by facsimile to the address in each case, set out below, for each party in this Agreement.
- 15.2. Notices will only be deemed to be received:
- a) in the case of personal delivery, when delivered;
 - b) if sent by facsimile, upon production of a transmission report by the machine from which the facsimile was sent, which indicates the facsimile was sent in its entirety to the facsimile number of the recipient;
 - c) if sent by email, upon receipt; and
 - d) five (5) Business Days after they have been posted via registered post within New Zealand.

- 15.3. The contact details for each party's Representative are:

For the Client, the details as maintained by the Client in the AO Limited CRM System.

For: AO Limited

Address:

AO Limited, 32 Domain Crescent, Waimauku, Auckland 0881

Email: enquiries@aolabs.nz

- 15.4. Each party may from time to time change its Representative's contact details by serving written notice on the other party pursuant to this clause.
- 15.5. A new version of these terms will be deemed to be agreed between the parties upon publication.

15.6. In the event the Client requests that AO Limited carry out work in addition to that contained in the Statement of Work, AO Limited will not carry that work out until the Client has put through an additional Work Request, and further charges will apply at AO Limited's usual charge out rates for that type of work.

16. Entire agreement

16.1. There are no conditions, warranties or other terms affecting the arrangements between the parties other than those referred to in this Agreement and this Agreement contains the whole of the contract between the parties and supersedes all prior agreements and understandings, if any, with respect to the transactions contemplated herein.

17. Survival

17.1. Clauses 2, 3, 5.2, 5.3, 6, 7, 8, 9, 10, 13, 17, 18, 19 and 20 of this Agreement shall remain in full force and effect following the termination of this Agreement.

18. Intellectual property

18.1. The Client owns and retains all rights, title and interest in and to all its pre-existing Intellectual Property which shall in no event be affected by this Agreement.

18.2. AO Limited will not deal with the Client's Intellectual Property in a manner which is contrary to the Client's interest and in particular, shall not use, copy, disclose or dispose of any such information, data or documentation except as necessary for the performance of obligations under this Agreement or with the Client's prior written consent and shall deliver all such items into the possession of the Client upon request within a reasonable time.

18.3. The Client will ensure that it has all necessary rights and licences in relation to Intellectual Property subsisting in any matter, thing or process supplied by the Client pursuant to this Agreement for use by AO Limited in providing the Services to the Client under this Agreement.

18.4. AO Limited owns and retains all rights, title and interest in and to all Intellectual Property that may subsist in any materials, programs, documentation, data and information owned by AO Limited prior to the commencement of this Agreement.

18.5. AO Limited may incorporate its own or third-party Intellectual Property into a Deliverable where that Intellectual Property is Open Source and therefore the Client has a perpetual right to use the Intellectual Property provided that the Client respects the Open Source licence terms.

18.6. Exclusive ownership and title to all Intellectual Property Rights relating to all the Deliverables will be vested in the Client as and when they are being created or as those Intellectual Property rights arise.

- 18.7. AO Limited hereby warrants that, save and except any components which are as a matter of fact subject to the terms and conditions of an Open Source licence, the Deliverables do not infringe the Intellectual Property rights of any third party.
- 18.8. In keeping with the underlying public benefit principles of Open Source, Intellectual Property created by AO Limited for the Client may be released by AO Limited back to the open source software development community, unless otherwise directed by the Client. Such release shall occur for the sole purpose of advancing the availability of better code, in a manner consistent with the prevailing software licences. This clause 18.8 applies only where the release does not contain or imply trade secrets or confidential business processes.

19. Restriction of use of data

- 19.1. AO Limited and any of its agents, employees, or sub-contractors shall not use any Confidential Information or opportunities gained in connection with the Services provided to the Client under this Agreement for any reason other than the provision of the Services to the Client, including, without limitation, to gain an advantage for commercial benefit where other persons or entities do not and could not have the same advantage without such Confidential Information or opportunities.

20. Governing law

- 20.1. This Agreement shall be governed by the laws of New Zealand, and the courts of New Zealand shall have exclusive jurisdiction to hear and determine all issues that may arise under or in relation to this Agreement.
- 20.2. Clause 20.1 does not limit AO Limited's right to seek orders in overseas courts for recovery of debts owed by the Client.

21. Service rates and approvals

- 21.1. Where AO Limited agrees to provide Services within Business Hours, AO Limited's standard hourly rates will apply. Unless otherwise specified or when the context requires otherwise, requests for Services made during Business Hours will be treated as requests for Services to be performed within Business Hours.
- 21.2. Where AO Limited is requested to provide Services outside Business Hours, unless otherwise specified in a Statement of Work or a Service Level Agreement, AO Limited's standard after-hours rate will apply, which at 06 March 2017 was three times the standard hourly rate.
- 21.3. A minimum charge of one hour applies to all requests, including those for which an estimate or quote is requested.
- 21.4. Each request by the Client to provide Services provides implied approval to expend four hours of effort.

- 21.5. Where AO Limited expects work to take more than four hours, AO Limited will seek approval from the Client, unless in the circumstances that is impractical.
- 21.6. Services involving the creation of software based on formally stated requirements will normally result in a Deliverable. Systems administration Services, including Services contemplated by clause 22, will not result in a Deliverable.

22. Ongoing services

- 22.1. This section 22 only applies where AO Limited provides ongoing services, such as Software as a Service or Managed Services under this Agreement.
- 22.2. Where a monthly rate applies to ongoing services and the ongoing services include applying software updates, the rate includes the application of Maintenance Releases of software, but not of New Version Releases.
- 22.3. Where alerted by monitoring, or when necessary for security reasons, AO Limited may perform mandatory services at the Client's expense without prior approval by the Client, such as system hardening, software reconfiguration, installation of New Version Releases, or modification of third party or Client software, for example to seek to address security vulnerabilities. The Client will be advised as soon as is reasonably practicable. Such circumstances shall be deemed to be a request by the Client under clause 21.
- 22.4. AO Limited will use its best efforts to minimise costs to the Client under clause 22.3, including performing the services within Business Hours where that is reasonably practicable and any such delay does not compromise either security or the functionality of AO Limited or AO Limited's Clients' systems.
- 22.5. Where AO Limited has invoked mandatory services under clause 22.3, the Client may opt to terminate the ongoing services on one (1) Business Day's notice. Any time reasonably expended by AO Limited in decommissioning the ongoing services will be chargeable to the Client.

23. Payment for services

- 23.1. The Statement of Work will state whether AO Limited will charge on a monthly basis at its usual hourly rates, or whether a set price will apply for the project. In either case, AO Limited will invoice either monthly, or at the completion of services if this occurs before the end of the month. If the Statement of Work is silent about the amount to be paid each month, an apportionment will be made by AO Limited based on the amount of project completed and the anticipated time for completion of the project, and an apportioned invoice will be rendered each month.
- 23.2. The due date for payment is either the date specified on the invoice as the due date, or 14 days from the date the invoice is rendered if there is no due date specified on the invoice.
- 23.3. In the event an invoice remains unpaid after the due date then;

- a) AO Limited will be entitled to stop any work being carried out for the Client without penalty; and
- b) interest will become payable on the outstanding fees and any disbursements at the rate of 3% per month; and
- c) AO Limited will be entitled to recover from the Client all debt recovery costs, including any legal costs at the full solicitor/Client rate and any disbursements including all costs incurred by AO Limited using a debt recovery agency; and
- d) AO Limited will not be required to transfer any work or any Intellectual Property rights in work to the Client until the full sum owing is paid.

23.4. Any quote or estimate provided by AO Limited will lapse 30 days from the date it is issued unless the quote or estimate states otherwise.

23.5. Where any fees or charges for Services include work that involves AO Limited interacting with or depending on a Client-supplied or third-party component, any variance from the estimated or quoted effort required is at the Client's risk and is chargeable at AO Limited's standard hourly rates.

23.6. Unless otherwise specified, all prices, quotes and estimates are exclusive of Taxes. The Client will pay Taxes in respect of all fees and charges payable by the Client under this Agreement.

23.7. If the Client is required by law to make any deductions or withholdings, the Client must pay the required amount to the relevant authority, provide AO Limited with documentation evidencing the payment, and pay AO Limited any additional amounts necessary to ensure that the net amount AO Limited actually receives equals the full amount that AO Limited would have received, had no deduction or withholding been required.