

## 1 APPLICATION OF TERMS

- 1.1 These Terms apply to your use of the service. By accessing and using the service:
- a you agree to these Terms; and
  - b where your access and use is on behalf of another person (e.g. a company), you confirm that you are authorised to, and do in fact, agree to these Terms on that person's behalf and that, by agreeing to these Terms on that person's behalf, that person is bound by these Terms.
- 1.2 If you do not agree to these Terms, you are not authorised to access and use the service, and you must immediately stop doing so.

## 2 INTERPRETATION

- 2.1 **Definitions:** In the Agreement, the following terms have the stated meaning:

Term	Meaning
<b>Agreement</b>	This Document, and the Prodigy Business Terms.
<b>Confidential Information</b>	the terms of the Agreement and any information that is not public knowledge and that is obtained from the other party in the course of, or in connection with, the Agreement. The Supplier's Confidential Information includes Intellectual Property owned by the Supplier (or its licensors), including the txtGuard Software. The Client's Confidential Information includes the Data.
<b>Data</b>	all data, content, and information (including Personal Information) owned, held, used or created by or on behalf of the Client that is stored using, or inputted into, the Services.
<b>Force Majeure</b>	<p>an event that is beyond the reasonable control of a party, excluding:</p> <ul style="list-style-type: none"><li>▲ an event to the extent that it could have been avoided by a party taking reasonable steps or reasonable care; or</li><li>▲ a lack of funds for any reason.</li></ul>
<b>Intellectual Property Rights</b>	includes copyright and all rights existing anywhere in the world conferred under statute, common law or equity relating to inventions (including patents), registered and unregistered trade marks and designs, circuit layouts, data and databases, confidential information, know-how, and all other rights resulting from intellectual activity. <b>Intellectual Property</b> has a consistent

Term	Meaning
	meaning, and includes any enhancement, modification or derivative work of the Intellectual Property.
<b>Objectionable</b>	includes being objectionable, defamatory, obscene, harassing, threatening, harmful, or unlawful in any way.
<b>Permitted Users</b>	those personnel of the Client who are authorised to access and use the Services on the Client's behalf in accordance with clause 3.3
<b>Personal Information</b>	has the meaning given in the Privacy Act 2020.
<b>Related Services</b>	any related service described in the Key Details and any further services that the Supplier agrees to provide to the Client under the Agreement.
<b>SaaS Service</b>	The SaaS Service is described in more detail on the Website, as the Website is updated from time to time.
<b>Services</b>	the SaaS Service and any Related Service.
<b>Start Date</b>	the start date set out in the Key Details.
<b>txtGuard</b>	the software owned by the Supplier (and its licensors) that is used to provide the SaaS Service.
<b>Underlying Systems</b>	the txtGuard Software, IT solutions, systems and networks (including software and hardware) used to provide the Services, including any third party solutions, systems and networks.

## 2.2 Interpretation: In the Agreement:

- a clause and other headings are for ease of reference only and do not affect the interpretation of the Agreement;
- b words in the singular include the plural and vice versa;
- c a reference to:
  - i a **party** to the Agreement includes that party's permitted assigns;
  - ii **personnel** includes officers, employees, contractors and agents, but a reference to the Client's personnel does not include the Supplier;
  - iii a **person** includes an individual, a body corporate, an association of persons (whether corporate or not), a trust, a government department, or any other entity;

- iv **including** and similar words do not imply any limit; and
- v a statute includes references to regulations, orders or notices made under or in connection with the statute or regulations and all amendments, replacements or other changes to any of them;
- d no term of the Agreement is to be read against a party because the term was first proposed or drafted by that party.

### **3 SERVICES**

#### **3.1 General:** The Supplier must use reasonable efforts to provide the Services:

- a in accordance with the Agreement and New Zealand law;
- b exercising reasonable care, skill and diligence; and
- c using suitably skilled, experienced and qualified personnel.

#### **3.2 Non-exclusive:** The Supplier's provision of the Services to the Client is non-exclusive. Nothing in the Agreement prevents the Supplier from providing the Services to any other person.

#### **3.3 Availability:**

- a The Supplier will use reasonable efforts to ensure the SaaS Service is available on a 24/7 basis. However, it is possible that on occasion the SaaS Service may be unavailable to permit maintenance or other development activity to take place, or in the event of Force Majeure. The Supplier will use reasonable efforts to publish on the Website and/or notify the Client by email advance details of any unavailability.
- b Through the use of web services and APIs, the SaaS Service interoperates with a range of third party service features. The Supplier does not make any warranty or representation on the availability of those features. Without limiting the previous sentence, if a third party feature provider ceases to provide that feature or ceases to make that feature available on reasonable terms, the Supplier may cease to make available that feature to the Client. To avoid doubt, if the Supplier exercises its right to cease the availability of a third party feature, the Client is not entitled to any refund, discount or other compensation.

#### **3.4 Additional Related Services:**

- a The Supplier may, from time to time, make available additional services to supplement the SaaS Service.
- b At the request of the Client and subject to the Client paying the applicable Fees, the Supplier may agree to provide to the Client an additional Related Service on the terms of the Agreement.

## **4 CLIENT OBLIGATIONS**

### **4.1 General use:** The Client and its personnel must:

- a use the Services in accordance with the Agreement solely for:
  - i receiving SMS based 2-factor authentication codes; and
  - ii lawful purposes; and
- b not resell or make available the Services to any third party, or otherwise commercially exploit the Services.

### **4.2 Access conditions:** When accessing the SaaS Service, the Client and its personnel must:

- a not impersonate another person or misrepresent authorisation to act on behalf of others or the Supplier;
- b correctly identify the sender of all electronic transmissions;
- c not attempt to undermine the security or integrity of the Underlying Systems;
- d not use, or misuse, the SaaS Service in any way which may impair the functionality of the Underlying Systems or impair the ability of any other user to use the SaaS Service;
- e not attempt to view, access or copy any material or data other than:
  - i that which the Client is authorised to access; and
  - ii to the extent necessary for the Client and its personnel to use the SaaS Service in accordance with the Agreement;
- f neither use the SaaS Service in a manner, nor transmit, input or store any Data, that breaches any third party right (including Intellectual Property Rights and privacy rights) or is Objectionable, incorrect or misleading; and
- g comply with any terms of use on the Website, as updated from time to time by the Supplier.

### **4.3 Personnel:**

- a Without limiting clause 4.2, no individual other than a Permitted User may access or use the SaaS Service.
- b The Client may authorise any member of its personnel to be a Permitted User, in which case the Client will provide the Supplier with the Permitted User's name and other information that the Supplier reasonably requires in relation to the Permitted User.
- c The Client must procure each Permitted User's compliance with clauses 4 and 4.2 and any other reasonable condition notified by the Supplier to the Client.

- d A breach of any term of the Agreement by the Client's personnel (including, to avoid doubt, a Permitted User) is deemed to be a breach of the Agreement by the Client.

4.4 **Authorisations:** The Client is responsible for procuring all licences, authorisations and consents required for it and its personnel to use the Services, including to use, store and input Data into, and process and distribute Data through, the Services.

## **5 DATA**

### **5.1 Supplier access to Data:**

- a The Client acknowledges that:
  - i the Supplier may require access to the Data to exercise its rights and perform its obligations under the Agreement; and
  - ii to the extent that this is necessary but subject to clause 7, the Supplier may authorise a member or members of its personnel to access the Data for this purpose.
- b The Client must arrange all consents and approvals that are necessary for the Supplier to access the Data as described in clause 5.1a.

### **5.2 Analytical Data:** The Client acknowledges and agrees that:

- a the Supplier may:
  - i use Data to generate anonymised and aggregated statistical and analytical data (**Analytical Data**); *[and]*
  - ii use Analytical Data for the Supplier's internal research and product development purposes and to conduct statistical analysis and identify trends and insights; and
  - iii supply Analytical Data to third parties;
- b the Supplier's rights under clauses 5.2aii and iii above will survive termination or expiry of the Agreement; and
- c title to, and all Intellectual Property Rights in, Analytical Data is and remains the Supplier's property.

### **5.3 Agent:**

- a The Client acknowledges and agrees that to the extent Data contains Personal Information, in collecting, holding and processing that information through the Services, the Supplier is acting as an agent of the Client for the purposes of the Privacy Act 2020 and any other applicable privacy law.

- b The Client must obtain all necessary consents from the relevant individual to enable the Supplier to collect, use, hold and process that information in accordance with the Agreement.
- 5.4 **Backups of Data:** While the Supplier will take standard industry measures to back up all Data stored using the Services, the Client agrees to keep a separate back-up copy of all Data uploaded by it onto the SaaS Service.
- 5.5 **International storage of Data:** The Client agrees that the Supplier may store Data (including any Personal Information) in secure servers in Australia and the USA and may access that Data (including any Personal Information) in Australia, the USA and New Zealand from time to time.
- 5.6 **Indemnity:** The Client indemnifies the Supplier against any liability, claim, proceeding, cost, expense (including the actual legal fees charged by the Supplier's solicitors) and loss of any kind arising from any actual or alleged claim by a third party that any Data infringes the rights of that third party (including Intellectual Property Rights and privacy rights) or that the Data is Objectionable, incorrect or misleading.

## **6 FEES**

- 6.1 **Fees:** The Client must pay the Supplier the Fees.
- 6.2 **Invoicing and payment:**
  - a The Supplier will provide the Client with valid GST tax invoices on the dates set out in the Payment Terms, or if there are none, monthly in arrears for the Fees due in the previous month.
  - b The Fees exclude GST, which the Client must pay on taxable supplies under the Agreement.
  - c The Client must pay the Fees:
    - i on the dates set out in the Payment Terms, or if there are none, by the 20<sup>th</sup> of the month following the date of invoice; and
    - ii electronically in cleared funds without any set off or deduction.
- 6.3 **Overdue amounts:** The Supplier may charge interest on overdue amounts. Interest will be calculated from the due date to the date of payment (both inclusive) at an annual percentage rate equal to the corporate overdraft reference rate (monthly charging cycle) applied by the Supplier's primary trading bank as at the due date (or, if the Supplier's primary trading bank ceases to quote that rate, then the rate which in the opinion of the bank is equivalent to that rate in respect of similar overdraft accommodation expressed as a percentage) plus 2% per annum.

- 6.4 **Increases:** By giving at least 30 days' notice, the Supplier may increase the Fees once each Year (but not the first Year) by the percentage change in the New Zealand Consumer Price Index (or similar or equivalent index if that index ceases to be published) over the 12 months preceding the last quarterly publication of that index issued by Statistics New Zealand prior to the date of the notice. Fees updated under this clause are deemed to be the Fees listed in the Key Details.

## **7 INTELLECTUAL PROPERTY**

### **7.1 Ownership:**

- a Subject to clause 7.1b, title to, and all Intellectual Property Rights in, the Services, the Website, and all Underlying Systems is and remains the property of the Supplier (and its licensors). The Client must not contest or dispute that ownership, or the validity of those Intellectual Property Rights.
- b Title to, and all Intellectual Property Rights in, the Data (as between the parties) remains the property of the Client. The Client grants the Supplier a worldwide, non-exclusive, fully paid up, transferable, irrevocable licence to use, store, copy, modify, make available and communicate the Data for any purpose in connection with the exercise of its rights and performance of its obligations in accordance with the Agreement.

- 7.2 **Know-how:** To the extent not owned by the Supplier, the Client grants the Supplier a royalty-free, transferable, irrevocable and perpetual licence to use for the Supplier's own business purposes any know-how, techniques, ideas, methodologies, and similar Intellectual Property used by the Supplier in the provision of the Services.

- 7.3 **Feedback:** If the Client provides the Supplier with ideas, comments or suggestions relating to the Services or Underlying Systems (together **feedback**):

- a all Intellectual Property Rights in that feedback, and anything created as a result of that feedback (including new material, enhancements, modifications or derivative works), are owned solely by the Supplier; and
- b the Supplier may use or disclose the feedback for any purpose.

### **7.4 Third party Intellectual Property Rights indemnity:**

- a The Supplier indemnifies the Client against any claim or proceeding brought against the Client to the extent that claim or proceeding alleges that the Client's use of the SaaS Service in accordance with the Agreement constitutes an infringement of a third party's Intellectual Property Rights (**IP Claim**). The indemnity is subject to the Client:
  - i promptly notifying the Supplier in writing of the IP Claim;
  - ii making no admission of liability and not otherwise prejudicing or settling the IP Claim, without the Supplier's prior written consent; and

- iii giving the Supplier complete authority and information required for the Supplier to conduct and/or settle the negotiations and litigation relating to the IP Claim. The costs incurred or recovered are for the Supplier's account.
- b The indemnity in clause 7.5a does not apply to the extent that an IP Claim arises from or in connection with:
  - i the Client's breach of the Agreement;
  - ii use of the SaaS Service in a manner or for a purpose not reasonably contemplated by the Agreement or otherwise not authorised in writing by the Supplier; or
  - iii any third party data or any Data.
- c If at any time an IP Claim is made, or in the Supplier's reasonable opinion is likely to be made, then in defence or settlement of the IP Claim, the Supplier may (at the Supplier's option):
  - i obtain for the Client the right to continue using the items which are the subject of the IP Claim; or
  - ii modify, re-perform or replace the items which are the subject of the IP Claim so they become non-infringing.

## **8 CONFIDENTIALITY**

**8.1 Security:** Each party must, unless it has the prior written consent of the other party:

- a keep confidential at all times the Confidential Information of the other party;
- b effect and maintain adequate security measures to safeguard the other party's Confidential Information from unauthorised access or use; and
- c disclose the other party's Confidential Information to its personnel or professional advisors on a *need to know* basis only and, in that case, ensure that any personnel or professional advisor to whom it discloses the other party's Confidential Information is aware of, and complies with, the provisions of clauses 8.1a and 8.1b.

**8.2 Permitted disclosure:** The obligation of confidentiality in clause 8.1 does not apply to any disclosure or use of Confidential Information:

- a for the purpose of performing the Agreement or exercising a party's rights under the Agreement;
- b required by law (including under the rules of any stock exchange);
- c which is publicly available through no fault of the recipient of the Confidential Information or its personnel;



- d which was rightfully received by a party to the Agreement from a third party without restriction and without breach of any obligation of confidentiality; or
- e by the Supplier if required as part of a *bona fide* sale of its business (assets or shares, whether in whole or in part) to a third party, provided that the Supplier enters into a confidentiality agreement with the third party on terms no less restrictive than this clause 8.

## **9 WARRANTIES**

9.1 **Mutual warranties:** Each party warrants that it has full power and authority to enter into and perform its obligations under the Agreement which, when signed, will constitute binding obligations on the warranting party.

9.2 **No implied warranties:** To the maximum extent permitted by law:

- a the Supplier's warranties are limited to those set out in the Agreement, and all other conditions, guarantees or warranties whether expressed or implied by statute or otherwise (including any warranty under Part 3 of the Contract and Commercial Law Act 2017) are expressly excluded and, to the extent that they cannot be excluded, liability for them is limited to NZD1,000.00; and
- b the Supplier makes no representation concerning the quality of the Services and does not promise that the Services will:
  - i meet the Client's requirements or be suitable for a particular purpose; or
  - ii be secure, free of viruses or other harmful code, uninterrupted or error free.

9.3 **Limitation of remedies:** Where legislation or rule of law implies into the Agreement a condition or warranty that cannot be excluded or modified by contract, the condition or warranty is deemed to be included in the Agreement. However, the liability of the Supplier for any breach of that condition or warranty is limited, at the Supplier's option, to:

- a supplying the Services again; and/or
- b paying the costs of having the Services supplied again.

## **10 LIABILITY**

10.1 **Maximum liability:** The maximum aggregate liability of the Supplier under or in connection with the Agreement or relating to the Services, whether in contract, tort (including negligence), breach of statutory duty or otherwise, must not in any Year exceed NZD1,000.00. The cap in this clause 10.1 includes the cap set out in clause 9.2a.

10.2 **Unrecoverable loss:** Neither party is liable to the other under or in connection with the Agreement or the Services for any:

- a loss of profit, revenue, savings, business, use, data (including Data), and/or goodwill; or

- b consequential, indirect, incidental or special damage or loss of any kind.

### 10.3 **Unlimited liability:**

- a Clauses 10.1 and 10.2 do not apply to limit the Supplier's liability:

- i under the indemnity in clause 7.5a; or
- ii under or in connection with the Agreement for:
  - ▲ personal injury or death;
  - ▲ fraud or wilful misconduct; or
  - ▲ a breach of clause 8.

- b Clause 10.2 does not apply to limit the Client's liability:

- i to pay the Fees;
- ii under the indemnity in clause 5.6; or
- iii for those matters stated in clause 10.3aii.

10.4 **No liability for other's failure:** Neither party will be responsible, liable, or held to be in breach of the Agreement for any failure to perform its obligations under the Agreement or otherwise, to the extent that the failure is caused by the other party failing to comply with its obligations under the Agreement, or by the negligence or misconduct of the other party or its personnel.

10.5 **Mitigation:** Each party must take reasonable steps to mitigate any loss or damage, cost or expense it may suffer or incur arising out of anything done or not done by the other party under or in connection with the Agreement.

## 11 **TERM, TERMINATION AND SUSPENSION**

### 11.1 **Termination rights:**

- a Either party may, by notice to the other party, immediately terminate the Agreement if the other party:
  - i breaches any material provision of the Agreement and the breach is not:
    - ▲ remedied within 10 days of the receipt of a notice from the first party requiring it to remedy the breach; or
    - ▲ capable of being remedied;
  - ii becomes insolvent, liquidated or bankrupt, has an administrator, receiver, liquidator, statutory manager, mortgagee's or chargee's agent appointed, becomes subject to any form of insolvency action or external administration, or ceases to continue business for any reason; or

- iii is unable to perform a material obligation under the Agreement for 30 days or more due to Force Majeure.
- b If the remedies in clause 7.5c are exhausted without remedying or settling the IP Claim, the Supplier may, by notice to the Client, immediately terminate the Agreement.

#### 11.2 Consequences of termination or expiry:

- a Termination or expiry of the Agreement does not affect either party's rights and obligations that accrued before that termination or expiry.
- b On termination or expiry of the Agreement, the Client must pay all Fees for Services provided prior to that termination or expiry.
- c Except to the extent that a party has ongoing rights to use Confidential Information, at the other party's request following termination or expiry of the Agreement and subject to clause 11.4d, a party must promptly return to the other party or destroy all Confidential Information of the other party that is in the first party's possession or control.
- d At any time prior to one month after the date of termination or expiry, the Client may request:
  - i a copy of any Data stored using the SaaS Service, provided that the Client pays the Supplier's reasonable costs of providing that copy. On receipt of that request, the Supplier must provide a copy of the Data in a common electronic form. The Supplier does not warrant that the format of the Data will be compatible with any software; and/or
  - ii deletion of the Data stored using the SaaS Service, in which case the Supplier must use reasonable efforts to promptly delete that Data.

To avoid doubt, the Supplier is not required to comply with clause 11.4di to the extent that the Client previously requested deletion of the Data.

**11.3 Obligations continuing:** Clauses which, by their nature, are intended to survive termination or expiry of the Agreement, including clauses 5.6, 7, 8, 9, 11.4, 11.5 and 12, continue in force.

**11.4 Rights to restrict:** Without limiting any other right or remedy available to the Supplier, the Supplier may restrict or suspend the Client's access to the SaaS Service and/or delete, edit or remove the relevant Data if the Supplier considers that the Client (including any of its personnel) has:

- a undermined, or attempted to undermine, the security or integrity of the SaaS Service or any Underlying Systems;
- b used, or attempted to use, the SaaS Service:
  - i for improper purposes; or

- ii in a manner, other than for normal operational purposes, that materially reduces the operational performance of the SaaS Service;
- c transmitted, inputted or stored any Data that breaches or may breach the Agreement or any third party right (including Intellectual Property Rights and privacy rights), or that is or may be Objectionable, incorrect or misleading; or
- d otherwise materially breached the Agreement.

#### 11.5 **Process:**

- a The Supplier must notify the Client where it restricts or suspends the Client's access, or deletes, edits or removes Data, under clause 11.6.
- b Clause 11.4di will not apply to the extent that it relates to Data deleted or removed under clause 11.6.

## 12 **DISPUTES**

- 12.1 **Good faith negotiations:** Before taking any court action, a party must use best efforts to resolve any dispute under, or in connection with, the Agreement through good faith negotiations.
- 12.2 **Obligations continue:** Each party must, to the extent possible, continue to perform its obligations under the Agreement even if there is a dispute.
- 12.3 **Right to seek relief:** This clause 12 does not affect either party's right to seek urgent interlocutory and/or injunctive relief.

## 13 **GENERAL**

- 13.1 **Force Majeure:** Neither party is liable to the other for any failure to perform its obligations under the Agreement to the extent caused by Force Majeure, provided that the affected party:
  - a immediately notifies the other party and provides full information about the Force Majeure;
  - b uses best efforts to overcome the Force Majeure; and
  - c continues to perform its obligations to the extent practicable.
- 13.2 **Rights of third parties:** No person other than the Supplier and the Client has any right to a benefit under, or to enforce, the Agreement.
- 13.3 **Waiver:** To waive a right under the Agreement, that waiver must be in writing and signed by the waiving party.
- 13.4 **Independent contractor:** Subject to clause 5.3, the Supplier is an independent contractor of the Client, and no other relationship (e.g. joint venture, agency, trust or partnership) exists under the Agreement.

13.5 **Notices:** A notice given by a party under the Agreement must be delivered to the other party via email using the email address set out in the Key Details or otherwise notified by the other party for this purpose. If the notice is a notice of termination, a copy of that email must be immediately delivered (by hand or courier) to the Chief Executive or equivalent officer of the other party at the other party's last known physical address.

13.6 **Severability:**

- a If any provision of the Agreement is, or becomes, illegal, unenforceable or invalid, the relevant provision is deemed to be modified to the extent required to remedy the illegality, unenforceability or invalidity.
- b If modification under clause 13.6a is not possible, the provision must be treated for all purposes as severed from the Agreement without affecting the legality, enforceability or validity of the remaining provisions of the Agreement.

13.7 **Variation:** Subject to clause 6.4, any variation to the Agreement must be in writing and signed by both parties.

13.8 **Entire agreement:** The Agreement sets out everything agreed by the parties relating to the Services, and supersedes and cancels anything discussed, exchanged or agreed prior to the Start Date. The parties have not relied on any representation, warranty or agreement relating to the subject matter of the Agreement that is not expressly set out in the Agreement, and no such representation, warranty or agreement has any effect from the Start Date. Without limiting the previous sentence, the parties agree to contract out of sections 9, 12A and 13 of the Fair Trading Act 1986, and that it is fair and reasonable that the parties are bound by this clause 13.8.

13.9 **Subcontracting and assignment:**

- a The Client may not assign, novate, subcontract or transfer any right or obligation under the Agreement without the prior written consent of the Supplier, that consent not to be unreasonably withheld. The Client remains liable for its obligations under the Agreement despite any approved assignment, subcontracting or transfer. Any assignment, novation, subcontracting or transfer must be in writing.
- b Any change of control of the Client is deemed to be an assignment for which the Supplier's prior written consent is required under clause 13.9a. In this clause **change of control** means any transfer of shares or other arrangement affecting the Client or any member of its group which results in a change in the effective control of the Client.

13.10 **Law:** The Agreement is governed by, and must be interpreted in accordance with, the laws of New Zealand. Each party submits to the non-exclusive jurisdiction of the Courts of New Zealand in relation to any dispute connected with the Agreement.

13.11 **Counterparts:** The Agreement may be signed in counterparts, each of which constitutes an original and all of which constitute the same agreement. A party may enter the Agreement by signing and emailing a counterpart copy to the other party.