

Dated: 20<sup>th</sup> August 2010

# **Powerhouse Campus Licence Terms and Conditions**

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**Agreement** dated

**Parties**            **The Educational Institution (Insert Address), (Insert ACN)**  
**(Customer)**

**Mediasphere Holdings Pty Ltd** ACN 120 008 924 of 43 Metroplex Ave, Murarrie  
Brisbane QLD 4172  
**(Developer)**

## **Introduction**

- A.**     The Developer has developed Powerhouse Campus which is a software application to host and manage content on a website.
- B.**     The Customer wishes to license the Powerhouse Campus System to host, manage and maintain an intranet website.

## **It is agreed**

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### **1. Definitions and interpretation**

#### **1.1 Definitions**

In this Agreement:

- (1)     **Agreement** means this document, including any schedule or annexure to it;
- (2)     **Business Day** means a day that is not a Saturday, Sunday or any other day which is a public holiday or a bank holiday in the place where an act is to be performed or a payment is to be made;
- (3)     **Commencement Date** means the date when this Agreement is signed by both parties;
- (4)     **Confidential Information** means the confidential information of a party which relates to the subject matter of this Agreement and includes information relating to:
  - (a)     the design, specification and content of the Website;
  - (b)     information contained on the Customer's computer network systems;
  - (c)     the personnel, policies or business strategies of the Customer;
  - (d)     the Development Tools and Templates;
  - (e)     the terms of this Agreement; and
  - (f)     any other proprietary information of either party that is not publicly available;
- (5)     **Customer Content** means all text, pictures, sound, graphics, video and other data loaded and stored in the Website database;

- (6) **Customer Deliverables** expressly excludes the Developer Tools and Templates and means whether created before or after the date of this Agreement all textual, graphical, audio and other material displayed on the Website which are custom developed by the Developer for the Customer;
- (7) **Developer Tools and Templates** means the software or any portion of it which is:
- (a) software which is not Customer Software and which is capable of general application to works other than the Website; and
  - (b) software which is the platform for the Intranet
- (8) **Installation Date** means the date or period for installation of Software as set out in the Contract Details for the Works;
- (9) **Intellectual Property Rights** means any and all now known or subsequently known tangible and intangible:
- (a) rights associated with works of authorship, including but not limited to copyrights and moral rights;
  - (b) trademark and trade name rights and similar rights;
  - (c) trade secret rights;
  - (d) patents, designs, algorithms and other industrial property rights;
  - (e) all other intellectual and industrial property rights of every kind and nature throughout the universe and however designated (including logos, rental rights and rights to remuneration), whether arising by operation of law, contract, license, or otherwise;
  - (f) all registrations, initial applications, renewals, extensions, continuations, divisions or reissues hereof now or hereafter in force; and
  - (g) all rights and causes of action for infringement or misappropriation of any of the foregoing.
- (10) **Internet** means the world wide connection of computer networks providing for the transmission of electronic mail, on-line information, information retrieval and file transfer protocol;
- (11) **Intranet** means is a private network that uses Internet protocols to securely share any part of an organisation's information or operational systems within that organisation.
- (12) **Order Specification** means a written order from the Customer to the Developer describing the services outside the Works and Software it wishes to obtain from the Developer;
- (13) **Related Bodies Corporate** has the meaning given in section 9 of the *Corporations Act 2001*;
- (14) **Services** means services under this contract for the provision of the works or additional services relating to web hosting, the maintenance of the Website and all other services reasonably required to run the website by the Developer to the Customer;

- (15) **Server System** means the hardware and software system owned or licensed by Customer on which the Website resides and that maintains the Website on the World Wide Web and which may change from time to time;
- (16) **Site** means the agreed hardware system for the hosting of the Server Systems;
- (17) **Software** means the Developer Tools and Templates and any other computer program or programs consisting of a set of instructions or statements in machine readable form, and each and every component thereof to the extent that they are used in relation to the Website or produced under additional services requested by this Agreement;
- (18) **Specifications** means the requirements for the Customer Deliverables;
- (19) **Term** means a period of one (1) year;
- (20) **Third Party Materials** means any software or other material owned by a company or individual other than Developer or Customer which is employed in the Website and is supplied by the Developer;
- (21) **Website** means the application which is accessible on the organisation's Intranet and Internet through the World Wide Web, provides multimedia content through a graphical user interface, and which consists of documents, pictures, sound, graphics, video and other data embodied in the application supplied by Developer pursuant to the terms and conditions of this Agreement;
- (22) **Website Graphics** means the custom graphics developed for the Website by Developer and included in the Customer Deliverables;
- (23) **Works** means this agreement for the design and installation of Customer's Website and as per Customer's Statement of Requirements, Developer's Quotation and the terms of this Agreement; and
- (24) **World Wide Web** means a method of representing and obtaining graphical data and linking data items used by Internet users.

## 1.2 Interpretation

- (1) Reference to:
  - (a) one gender includes the others;
  - (b) the singular includes the plural and the plural includes the singular;
  - (c) a person includes a body corporate;
  - (d) a party includes the party's executors, administrators, successors and permitted assigns;
  - (e) a statute, regulation or provision of a statute or regulation (**Statutory Provision**) includes:
    - (i) that Statutory Provision as amended or re-enacted from time to time; and
    - (ii) a statute, regulation or provision enacted in replacement of that Statutory Provision; and

- (f) money is to Australian dollars, unless otherwise stated.
- (2) "Including" and similar expressions are not words of limitation.
- (3) Where a word or expression is given a particular meaning, other parts of speech and grammatical forms of that word or expression have a corresponding meaning.
- (4) Headings are for convenience only and do not form part of this Agreement or affect its interpretation.
- (5) A provision of this Agreement must not be construed to the disadvantage of a party merely because that party was responsible for the preparation of this Agreement or the inclusion of the provision in this Agreement.
- (6) If an act must be done on a specified day which is not a Business Day, it must be done instead on the next Business Day.

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## **2. Term**

- 2.1 This Agreement commences and is deemed to have effect on the date that it is signed by both parties and continues for the Term unless terminated in accordance with clause 14.

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## **3. Supply and Installation of the Website**

- 3.1 The Developer must install the Website and provide the Services upon the terms of this Agreement.
- 3.2 The Developer must develop and install by the Installation Dates the Website in a competent, proper, efficient and timely manner in accordance with this Agreement.
- 3.3 The Developer must supply and install the Website to the Site in accordance with any agreed implementation plan and must do so in such a way as to avoid any reduction of or adverse effect on the then current business of the Customer.

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## **4. Assignment, licensing and allocation of rights in the Website**

- 4.1 The Developer and Customer agree that on the Installation Date the Website will consist of:

- (1) Customer Deliverables;
- (2) Developer Tools and Templates; and
- (3) the Terms and Conditions.

### **4.2 Ownership of Developer Tools and Templates**

The Developer and Customer confirm that the Developer retains ownership of all rights, title and interest in and to the Developer Tools and Templates, including, without limitation, all applicable Intellectual Property Rights to the Developer Tools and Templates. The Developer retains all right, title and interest in and to all tools and other information and materials used in the creation or development of the Developer Tools and Templates.

#### 4.3 Developer Tools and Templates Licence

- (1) The Developer grants to the Customer (and its Related Bodies Corporate) a worldwide, fully paid, non-exclusive licence for the Term, to use, publicly perform, publicly display and digitally perform the Developer Tools and Templates solely for the purpose and to the extent necessary to operate the Website.
- (2) The licence granted in clause 4.3(1) is revocable and is only for the Term of this Agreement.
- (3) The Developer may also terminate the licence granted under clause 4.3(1) on 2 months written notice prior to the expiry of the Term where:
  - (a) there are reasonable grounds for alleging the Customer is in breach of a provision of this Agreement (**Breach**);
  - (b) the alleged Breach relates solely to:
    - (i) the failure of the Customer to make a payment under this Agreement or a Purchase Order in excess of \$5,000; or
    - (ii) a material breach of the Developer's Intellectual Property Rights in the Developer Tools and Templates by the Customer or its employees.

#### 4.4 Customer Content and Customer Deliverables Licence

The Customer confirms its grant to the Developer of a non-exclusive, royalty-free licence for the Term to reproduce, distribute and digitally perform any Customer Content or Customer Deliverables only on or in conjunction with the Website, solely for the purpose and to the extent necessary to perform the Developer's obligations under this Agreement.

#### 4.5 Ownership of Customer Content

As between the Developer and Customer, any Customer Content stored or delivered on the website under this Agreement or otherwise, and all Intellectual Property Rights therein, at all times remains the property of the Customer or its licensor or Website subscribers. The Developer has no rights to such Customer Content, other than the limited right to use such content for the purpose expressly set out in this Agreement.

#### 4.6 Non-exclusive arrangement

The Customer acknowledges that any services of any description (including the Services) performed by the Developer under this Agreement are provided on a non-exclusive basis, and nothing in this Agreement is interpreted to restrict the Developer from providing the same or similar services to other customers.

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### 5. Access to Server Systems

- 5.1 The Customer agrees to provide the Developer with reasonable information and access to its relevant Server Systems (including without limitation, read, write and execute privileges where such privileges relate to the Website).

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## **6. Developer's warranties**

- 6.1 The Developer warrants that all Software, supplied under this Agreement, will upon installation conform in all material respect to their Specifications and for the period of this agreement.
- 6.2 The Developer will take all the reasonable steps to ensure that the software operates in accordance with the contract.

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## **7. Warranties and covenants**

### **7.1 Website**

The Developer warrants as at the Commencement Date that:

- (1) the Customer Deliverables and Developer's Tools and Templates used in relation to the Website do not infringe the Intellectual Property Rights of any third party;
- (2) no proceedings have been instituted by any third party against the Developer for the infringement of that party's Intellectual Property Rights by the Developer's Intellectual Property;
- (3) no proceedings have been instituted by any third party against the Developer seeking to challenge the validity of the Developer's Intellectual Property Rights in the Development Tools and Templates;
- (4) the Website (excluding Customer Content) will perform in accordance with the contract; and
- (5) the Documentation will be adequate to enable a reasonably competent professional computer operator to operate the Website.

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## **8. Services**

- 8.1 From the Commencement Date, the Developer agrees to perform the Services for the customer in return for the Services Fee.
- 8.2 On and from the Commencement Date and until terminated in accordance with its terms, the Developer warrants that:
- (1) it will perform all Services in a professional manner, using appropriately qualified and trained personnel and in accordance with prevailing industry standards;
  - (2) performance of the Services by the Developer does not violate the terms of any other agreement between the Developer and a third party.

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## **9. Customer warranties**

- 9.1 Customer warrants that:
- (1) it has full power, right and authority to enter into this Agreement and the Customer is not subject to any obligations that would prevent or otherwise restrict the Customer from performing its obligations under this Agreement.

- (2) the Customer Content does not infringe the Intellectual Property Rights of any person;
- (3) the Customer Content is not obscene, offensive, upsetting, or defamatory; and
- (4) the use of the Customer Content by the Developer in connection the performance of its obligations under this Agreement is not illegal, fraudulent or of a defamatory nature.

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## **10. Indemnities**

- 10.1 Each party fully indemnifies the other against any loss, costs, expenses, demands or liability, whether direct or indirect, arising out of a breach of any warranty given in clauses 7, 8 and 9 above.
- 10.2 Without limiting the obligations of the Developer under this clause 10, if a determination is made by any independent tribunal of fact or law or if it is agreed between the parties to the dispute that an infringement of Intellectual Property Rights has occurred, the Developer must at its sole expense:
- (1) replace or modify the infringing product in a manner acceptable to the Customer such that the quality, performance or usefulness of the Website is not degraded and so that the infringement ceases; or
  - (2) procure for the Customer the right to possess and continue to use the whole or the relevant part of the Website or what was required under a Purchase Order.

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## **11. Personally Identifiable Information**

The Developer must adhere to all privacy and data protection laws applicable to its gathering, processing, storing and transmitting of user information. The Developer must maintain the strict confidentiality of all user information.

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## **12. Independent Contractors**

The Developer and Customer are each independent contractors, and no agency, partnership, joint venture or employee-employer relationship is intended or created by this Agreement. Neither party has the power to obligate or bind the other party. Personnel supplied by the Developer must work exclusively for the Developer and must not, for any purpose, be considered employees or agents of the Customer and vice versa.

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## **13. A party must not, without the prior written approval of the other party, disclose the other party's Confidential Information.**

- 13.1 A party is not in breach of clause 13 in circumstances where:
- (1) it is legally compelled to disclose the other party's Confidential Information;
  - (2) the information disclosed is generally available to the public (other than as a result of the wrongful disclosure by such party);
  - (3) such party obtained the Confidential Information from a third party without breach by that third party of any obligation of confidence concerning the Confidential Information; or

- (4) the Confidential Information was already in such party's possession (as evidenced by written records) when provided by or on behalf of the other party.
- 13.2 Each party must take all reasonable steps to ensure that its employees and agents, and any sub-contractors engaged for the purposes of this Agreement, do not make public or disclose the other party's Confidential Information.
- 13.3 Either party may at any time require the other to arrange for its employees, agents or sub-contractors engaged in the performance of this Agreement to execute a suitable confidentiality deed and a party so requested must arrange for the deed to be executed within the time frame reasonably required by the other party.
- 13.4 Each party must on demand return to the other party any documents supplied to that party in connection with this Agreement.
- 13.5 Despite any other provision of this clause, the Developer may disclose the terms of this Agreement (other than Confidential Information of a technical nature) to its related companies, solicitors, auditors, insurers or accountants, but must ensure that every person to whom that disclosure is made uses that information solely for the purposes of advising or reporting to the Developer.
- 13.6 This clause survives for a period of 2 years from the date of termination of this Agreement.

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## **14. Termination**

- 14.1 Subject to clause 4.3(2), without prejudice to any other rights either party may have under this Agreement or at law or in equity, either may terminate this Agreement, in whole or in part, upon:
- (1) the other party becoming subject to any form of insolvency administration (whether voluntary or otherwise);
  - (2) the other party being in breach of any clause of this Agreement and such breach not being remedied with 14 days of written notice by the Customer of that breach; or
  - (3) the other party purporting to or proposing to assign this Agreement or, contrary to clause 4 its rights or interests in any relevant Intellectual Property, without the owner or licensor's prior written consent.
- 14.2 Upon termination of this Agreement, the Customer agrees to use all reasonable endeavours to assist the transfer of the Developer Tools and Templates to the Developer.
- 14.3 Any transfer or migration that occurs under clause 14.2 must be carried out at the Developer's expense.

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## **15. Inconsistency**

- 15.1 To the extent that there is an inconsistency between a provision in a clause in the body of this Agreement and a provision in a Schedule:
- (1) a specific provision takes precedence over a general provision; and
  - (2) otherwise, to the extent necessary to resolve the inconsistency the following order of precedence applies:

- (a) the clauses of this Agreement;
- (b) the Schedules; and
- (c) any Purchase Orders.

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## **16. Further assurance**

Each party must promptly at its own cost do all things (including executing all documents) necessary or desirable to give full effect to this Agreement.

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## **17. Severability**

If anything in this Agreement is unenforceable, illegal or void then it is severed and the rest of this Agreement remains in force.

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## **18. Entire understanding**

18.1 This Agreement:

- (1) is the entire agreement and understanding between the parties on everything connected with the subject matter of this Agreement; and
- (2) supersedes any prior agreement or understanding on anything connected with that subject matter.

18.2 Each party has entered into this Agreement without relying on any representation by any other party or any person purporting to represent that party.

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## **19. Variation**

An amendment or variation to this Agreement is not effective unless it is in writing and signed by the parties.

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## **20. Waiver**

20.1 A party's failure or delay to exercise a power or right does not operate as a waiver of that power or right.

20.2 The exercise of a power or right does not preclude either its exercise in the future or the exercise of any other power or right.

20.3 A waiver is not effective unless it is in writing.

20.4 Waiver of a power or right is effective only in respect of the specific instance to which it relates and for the specific purpose for which it is given.

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## **21. Goods and Services Tax**

21.1 In this clause:

- (1) “**GST**” means the GST as defined in the A New Tax System (Goods and Services Tax) Act 1999.
  - (2) Words used in this clause which have a defined meaning in the *A New Tax System (Goods and Services Tax) Act 1999* and associated acts and legislative instruments (collectively, “**GST Law**”) have the same meaning as in the GST Law, unless the context otherwise requires.
- 21.2 Unless expressly included, the consideration for any supply made under or in connection with this Agreement does not include GST.
- 21.3 To the extent that any supply made under or in connection with this Agreement is a taxable supply, the consideration for that supply is increased by an amount equal to that consideration multiplied by the rate at which GST is imposed in respect of the supply.
- 21.4 Each party agrees to do all things, including providing tax invoices and other documentation, that may be necessary or desirable to enable or assist the other party to claim any input tax credit, adjustment or refund in relation to any amount of GST paid or payable pursuant to any supply made under or in connection with this Agreement.
- 21.5 If either party (**Claiming Party**) is entitled under this Agreement to be paid, reimbursed or indemnified by the other party (**Reimbursing Party**) for an amount, cost or expense received or incurred by the other party in connection with this agreement and the Claiming Party may claim an input tax credit in relation to the GST component of that amount, cost or expense, then:
- (1) the Claiming Party must calculate the amount claimed from the Reimbursing Party net of any GST component of the amount, cost or expense, to which net amount GST will then be added;
  - (2) the Reimbursing Party must pay the net amount and GST on that net amount.

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## 22. Costs and disbursements

- 22.1 Each party must pay its own costs and outlays connected with the negotiation, preparation and execution of this Agreement.
- 22.2 Customer as the purchaser of goods and services pursuant to this Agreement must pay all stamp duty and other government imposts payable in connection with this Agreement and all other documents and matters referred to in this Agreement when due or earlier if requested in writing by the Developer.

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## 23. Notices

- 23.1 A notice or other communication connected with this Agreement (**Notice**) has no legal effect unless it is in writing.
- 23.2 In addition to any other method of service provided by law, the Notice may be:
- (1) sent by prepaid post to the address of the addressee set out in this Agreement or subsequently notified;
  - (2) sent by facsimile to the facsimile number of the addressee
  - (3) sent by electronic mail to the electronic mail address of the addressee; or

- (4) delivered at the address of the addressee set out in this Agreement or subsequently notified.
- 23.3 A Notice must be treated as given and received:
- (1) if sent by post, on the 2nd Business Day (at the address to which it is posted) after posting;
  - (2) if sent by facsimile or electronic mail before 5 p.m. on a Business Day at the place of receipt, on the day it is sent and otherwise on the next Business Day at the place of receipt; or
  - (3) if otherwise delivered before 5 p.m. on a Business Day at the place of delivery, upon delivery, and otherwise on the next Business Day at the place of delivery.
- 23.4 Despite clause 23.3(2):
- (1) a facsimile is not treated as given or received unless at the end of the transmission the sender's facsimile machine issues a report confirming the transmission of the number of pages in the Notice; and
  - (2) an electronic mail message is not treated as given or received if the sender's computer reports that the message has not been delivered.
- 23.5 A Notice sent or delivered in a manner provided by clause 23.2 must be treated as validly given to and received by the party to which it is addressed even if:
- (1) the addressee has been liquidated or deregistered or is absent from the place at which the Notice is delivered or to which it is sent;
  - (2) the Notice is returned unclaimed; or
  - (3) in the case of a Notice sent by electronic mail, the electronic mail message is not delivered or opened (unless the sender's computer reports that it has not been delivered).
- 23.6 Any Notice by a party may be given and may be signed by its solicitor.
- 23.7 Any Notice to a party may be given to its solicitor by any of the means listed in clause 23.2 to the solicitor's business address, facsimile number or electronic mail address.
- 23.8 A party may change its address for service or facsimile number by giving Notice of that change to each other party.

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## **24. Governing law and jurisdiction**

- 24.1 The law of Queensland governs this Agreement.
- 24.2 The parties submit to the non-exclusive jurisdiction of the courts of Queensland and the Federal Court of Australia.

**Executed as an Agreement**

\_\_\_\_\_  
Website Owner

\_\_\_\_\_  
Advertiser

\_\_\_\_\_  
Name

\_\_\_\_\_  
Name

**Executed** as an agreement.

**Executed by the Website Owner (Insert Name) (Insert ABN) in accordance with section 127 of the *Corporations Act 2001*:**

\_\_\_\_\_  
Name of authorised school signatory  
(BLOCK LETTERS)

\_\_\_\_\_  
Position  
(BLOCK LETTERS)

\_\_\_\_\_  
Signature of authorised school signatory

Executed by **Mediasphere Holdings Pty Ltd** ACN 120 008 924 in accordance with section 127 of the *Corporations Act 2001*:

ANTHONY CARRUCAN

\_\_\_\_\_  
Chief Operating Officer

\_\_\_\_\_  
Signature