

## Emsisoft Data Processing Agreement

This Data Processing Agreement ("Agreement") forms part of the Emsisoft Terms Of Service ("Principal Agreement") between:

(Name) \_\_\_\_\_

(Address) \_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_

(the "Company"), and:

Emsisoft Ltd  
315a Hardy Street  
Nelson 7010  
New Zealand

(the "Data Processor")

(together as the "Parties").

WHEREAS

(A) The Company acts as a Data Controller.

(B) The Company wishes to subcontract certain Services, which imply the processing of personal data, to the Data Processor.

(C) The Parties seek to implement a data processing agreement that complies with the requirements of the current legal framework in relation to data processing and with the Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation).

(D) The Parties wish to lay down their rights and obligations.

IT IS AGREED AS FOLLOWS:

## 1. Definitions and Interpretation

1.1 Unless otherwise defined herein, capitalized terms and expressions used in this Agreement shall have the following meaning:

1.1.1 "Agreement" means this Data Processing Agreement and all Schedules;

1.1.2 "Company Personal Data" means any Personal Data Processed by a Contracted Processor on behalf of Company pursuant to or in connection with the Principal Agreement;

1.1.3 "Contracted Processor" means a Subprocessor;

1.1.4 "Data Protection Laws" means EU Data Protection Laws and, to the extent applicable, the data protection or privacy laws of any other country;

1.1.5 "EEA" means the European Economic Area;

1.1.6 "EU Data Protection Laws" means EU Directive 95/46/EC, as transposed into domestic legislation of each Member State and as amended, replaced or superseded from time to time, including by the GDPR and laws implementing or supplementing the GDPR;

1.1.7 "GDPR" means EU General Data Protection Regulation 2016/679;

1.1.8 "Data Transfer" means:

1.1.8.1 a transfer of Company Personal Data from the Company to a Contracted Processor; or

1.1.8.2 an onward transfer of Company Personal Data from a Contracted Processor to a Subcontracted Processor, or between two establishments of a Contracted Processor, in each case, where such transfer would be prohibited by Data Protection Laws (or by the terms of data transfer agreements put in place to address the data transfer restrictions of Data Protection Laws);

1.1.9 "Services" means the software products and online platform that the Company provides.

1.1.10 "Subprocessor" means any person appointed by or on behalf of Processor to process Personal Data on behalf of the Company in connection with the Agreement.

1.2 The terms, "Commission", "Controller", "Data Subject", "Member State", "Personal Data", "Personal Data Breach", "Processing" and "Supervisory Authority" shall have the same meaning as in the GDPR, and their cognate terms shall be construed accordingly.

## 2. Processing of Company Personal Data

2.1 Processor shall:

2.1.1 comply with all applicable Data Protection Laws in the Processing of Company Personal Data; and

2.1.2 not Process Company Personal Data other than on the relevant Company's documented instructions.

2.2 The Company instructs Processor to process Company Personal Data.

## 3. Processor Personnel

Processor shall take reasonable steps to ensure the reliability of any employee, agent or contractor of any Contracted Processor who may have access to the Company Personal Data, ensuring in each case that access is strictly limited to those individuals who need to know / access the relevant Company Personal Data, as strictly necessary for the purposes of the Principal Agreement, and to comply with Applicable Laws in the context of that individual's duties to the Contracted Processor, ensuring that all such individuals are subject to confidentiality undertakings or professional or statutory obligations of confidentiality.

## 4. Security

4.1 Taking into account the state of the art, the costs of implementation and the nature, scope, context and purposes of Processing as well as the risk of varying likelihood and severity for the rights and freedoms of natural persons, Processor shall in relation to the Company Personal Data implement appropriate technical and organizational measures to ensure a level of security appropriate to that risk, including, as appropriate, the measures referred to in Article 32(1) of the GDPR.

4.2 In assessing the appropriate level of security, Processor shall take account in particular of the risks that are presented by Processing, in particular from a Personal Data Breach.

## 5. Subprocessing

5.1 Company consents to Processor engaging third party subprocessors to process the Personal Company Data for the Permitted Purpose provided that: (i) Processor maintains an up-to-date list of its subprocessors, which shall be available on its website as part of the Privacy Policy, which it shall update with details of any change in subprocessors at least 30 days prior to the change; (ii) Processor imposes data protection terms on any subprocessor it appoints that require it to protect the Personal Company Data to the standard required by Applicable Data Protection Law; and (iii) Processor remains liable for any breach of this Agreement that is caused by an act, error or omission of its subprocessor. Company may object to Processor's appointment or replacement of a subprocessor prior to its appointment or replacement, provided such objection is based on reasonable grounds relating to data protection. In such event, Processor will either not appoint or replace the subprocessor or, if this is not reasonably

possible, in Processor's sole discretion, Company may suspend or terminate the Agreement without penalty (without prejudice to any fees incurred by Company up to and including the date of suspension or termination).

## **6. Data Subject Rights**

6.1 Taking into account the nature of the Processing, Processor shall assist the Company by implementing appropriate technical and organisational measures, insofar as this is possible, for the fulfilment of the Company obligations, as reasonably understood by Company, to respond to requests to exercise Data Subject rights under the Data Protection Laws.

6.2 Processor shall:

6.2.1 promptly notify Company if it receives a request from a Data Subject under any Data Protection Law in respect of Company Personal Data; and

6.2.2 ensure that it does not respond to that request except on the documented instructions of Company or as required by Applicable Laws to which the Processor is subject, in which case Processor shall to the extent permitted by Applicable Laws inform Company of that legal requirement before the Contracted Processor responds to the request.

## **7. Personal Data Breach**

7.1 Processor shall notify Company without undue delay upon Processor becoming aware of a Personal Data Breach affecting Company Personal Data, providing Company with sufficient information to allow the Company to meet any obligations to report or inform Data Subjects of the Personal Data Breach under the Data Protection Laws.

7.2 Processor shall co-operate with the Company and take reasonable commercial steps as are directed by Company to assist in the investigation, mitigation and remediation of each such Personal Data Breach.

## **8. Data Protection Impact Assessment and Prior Consultation**

Processor shall provide reasonable assistance to the Company with any data protection impact assessments, and prior consultations with Supervising Authorities or other competent data privacy authorities, which Company reasonably considers to be required by article 35 or 36 of the GDPR or equivalent provisions of any other Data Protection Law, in each case solely in relation to Processing of Company Personal Data by, and taking into account the nature of the Processing and information available to, the Contracted Processors.

## 9. Deletion or return of Company Personal Data

9.1 Subject to this section 9 Processor shall promptly and in any event within

10 business days of the date of cessation of any Services involving the Processing of Company Personal Data (the "Cessation Date"), delete and procure the deletion of all copies of those Company Personal Data.

## 10. Audit rights

10.1 Subject to this section 10, Processor shall make available to the Company on request all information necessary to demonstrate compliance with this Agreement, and shall allow for and contribute to audits, including inspections, by the Company or an auditor mandated by the Company in relation to the Processing of the Company Personal Data by the Contracted Processors.

10.2 Information and audit rights of the Company only arise under section 10.1 to the extent that the Agreement does not otherwise give them information and audit rights meeting the relevant requirements of Data Protection Law.

## 11. Data Transfer

11.1 The Processor shall not transfer the Personal Company Data outside of the European Economic Area ("EEA") unless it has taken such measures as are necessary to ensure the transfer is in compliance with Applicable Data Protection Law. Such measures may include (without limitation) transferring the Personal Company Data to a recipient in a country that the European Commission has decided provides adequate protection for personal data (e.g., New Zealand), to a recipient in the United States that has certified its compliance with the EU-US Privacy Shield, or to a recipient that has executed standard contractual clauses adopted or approved by the European Commission.

## 12. General Terms

12.1 Confidentiality. Each Party must keep this Agreement and information it receives about the other Party and its business in connection with this Agreement ("Confidential Information") confidential and must not use or disclose that Confidential Information without the prior written consent of the other Party except to the extent that:

- (a) disclosure is required by law;
- (b) the relevant information is already in the public domain.

12.2 Notices. All notices and communications given under this Agreement must be in writing and will be delivered personally, sent by post or sent by email to the address or email address set out in the heading of this Agreement at such other address as notified from time to time by the Parties changing address.

## 13. Governing Law and Jurisdiction

13.1 This Agreement is governed by the laws of New Zealand.

13.2 Any dispute arising in connection with this Agreement, which the Parties will not be able to resolve amicably, will be submitted to the exclusive jurisdiction of the courts of Nelson, New Zealand.

IN WITNESS WHEREOF, this Agreement is entered into with effect from the date first set out below.

Your Company

Signature: \_\_\_\_\_

Name: \_\_\_\_\_

Title: \_\_\_\_\_

Date Signed: \_\_\_\_\_

Processor Company

Signature:  \_\_\_\_\_

Name: Christian Mairoll

Title: CEO

Date Signed: October 9<sup>th</sup>, 2019