

AMENDMENT TO PRODUCT LICENCE AGREEMENT WITH BUSINESS FITNESS NZ LTD

Dated the day upon which it is accepted online by an authorised representative of the Licensee

PARTIES

1. Business Fitness NZ Limited ("BFNZ") of 68 Paterson Street, Mount Maunganui, Tauranga; and
2. The entity named in the original Product Licence Agreement with BFNZ and whose authorised representative accepted this amendment ("Licensee")

INTRODUCTION

- A. BFNZ is the exclusive owner of certain content and supporting documentation for accounting practice systemisation and practice management marketed under the brand Business Fitness NZ ("Products").
- B. BFNZ granted the Licensee a licence to use the Products upon the terms of a Product Licence Agreement ("Original Agreement").
- C. The parties have agreed to amend the Original Agreement as set out below:

The parties agree that the operative provisions (being clauses 1 to 21, but not Schedules 1 and 2) of the Original Agreement are deleted, and are replaced with the following provisions:

1. INTERPRETATION

- 1.1 **Definitions:** In this Agreement, unless the context otherwise requires:

"Agreement" means this agreement and all its schedules, appendices and agreed variations.

"Business Day" means any day other than a Saturday or Sunday or a statutory public holiday.

"Business Hours" means 8.30am to 5.00pm on a Business Day.

"Commencement Date" means the date specified as the delivery and installation date in Schedule 1, or if such date is not stated in Schedule 1, the first date on which any Content was delivered to the Licensee or installed on the Licensee's systems.

"Confidential Information" means any information, verbal or written, personal or otherwise including documents, plans, sketches, drawings, software, marketing strategies, market research data, product literature, trade secrets, processes, technical information, know-how and Intellectual Property of either party or any of its related or associated companies (including any such information in electronic form) and any copies thereof but will not include public information (provided such information did not become public as a result of unauthorised disclosure by the other party), information independently developed or acquired without breaching this Agreement or information authorised in writing by the relevant party for disclosure.

"Content" means all documents (in hard copy or electronic form) produced by BFNZ and provided to the Licensee under this Agreement for accounting practice

systemisation and practice management including, but not limited to: work papers, procedures, checklists, process maps, templates, fact sheets, presentations, forms, and guidelines, and includes new releases, versions and updates provided by BFNZ as part of the Enhancement and Support Services.

“Documentation” means the Business Fitness NZ Content Guide and any other user manuals or supporting documentation provided by BFNZ to the Licensee to support the implementation and use by the Licensee of the Content.

“Enhancement and Support Fee” means the Monthly Fee specified in Schedule 2, being the fee payable for the provision of the Enhancement and Support Services.

“Enhancement and Support Services” means:

- (a) the electronic delivery to the Licensee of new releases, versions and updates of the Products as they become available;
- (b) the provision unlimited of off-site support, during Business Hours, for the Products in relation to diagnosis and correction of any errors, omissions or other defects in relation to the Products as and in the form supplied by BFNZ,

but excludes:

- (c) diagnosis and correction of any errors, omissions or other defects in relation to the Products that are, in BFNZ’s opinion (acting reasonably), caused by:
 - (i) modification, alteration or adaptation of the Products by the Licensee;
 - (ii) the Licensee’s hardware and software systems, including compatibility issues resulting from subsequent changes to such systems made by the Licensee after completion of the Integration Training Services;
 - (iii) use of the Products in a manner contrary to any specifications provided by BFNZ;
 - (iv) the Licensee’s failure to install new releases, versions and updates provided by BFNZ as part of the Enhancement and Support Services on a timely basis;
 - (v) Licensee operator error, or use of the Products by the Licensee’s staff who are not suitably qualified or trained to use the Products;
 - (vi) any unauthorised use of the Products; or
 - (vii) any failure of the Licensee to comply with the terms of this Agreement or any agreement between the Licensee and software provider Acclipse Limited.

“Force Majeure Event” means an event or occurrence:

- (a) which is beyond the reasonable control of either party; and
- (b) which a party could not have reasonably foreseen and taken reasonable measures to prevent,

but will not include any form of labour dispute or delay caused by contractual or labour relations between the parties and any of their employees, agents, sub-contractors or suppliers, or inability to perform due to lack of available funds.

“GST” means goods and services tax payable under the Goods and Services Tax Act 1985.

“Insolvency Event” means (other than for the purposes of solvent reconstruction or amalgamation) in relation to a party:

- (a) a receiver, liquidator, trustee or manager (including a statutory manager) is appointed in respect of that party or all or any of its property; or
- (b) being unable to pay its debts as they fall due, or is presumed to be unable to pay its debts as they fall due, in terms of section 287 of the Companies Act 1993 (whether that party is incorporated under that Act or not); or
- (c) its primary, or all of its, business activities are suspended or cease for more than five consecutive Business Days; or
- (d) making an assignment for the benefit of, or entering any arrangement or composition with, its creditors; or
- (e) passing any resolution or any proceeding is commenced for the winding up or liquidation of that party (whether on a voluntary or involuntary basis); or
- (f) any event which is analogous to those listed in paragraphs (d) or (e) occurring.

“Integration Training Fee” means the fee payable for the provision of the Integration Training Services as specified in Schedule 2.

“Integration Training Services” means:

- (a) the provision of email, telephone or other remote means of communication-based training and advice to ensure the Products are properly installed and operational on the Licensee’s systems; and
- (b) the provision of email, telephone or other remote means of communication-based training and advice to ensure the Acclipse Document Management software is properly installed and operational on the Licensee’s systems.

“Intellectual Property” means, in respect of any person, all intellectual and industrial property rights and interests (including common law rights and interests) owned or held by that person, or lawfully used by that person, including:

- (a) patents, trade marks, service marks, copyright, registered designs, trade names, symbols and logos;
- (b) patent applications and applications to register trade marks, service marks and designs; and
- (c) all formulae, methods, plans, data, drawings, specifications, characteristics, equipment, designs, inventions, discoveries, improvements, know-how, experience, software products, source codes, object codes, algorithms, trade secrets and other information used by that person.

“Licence” means the licence granted to the Licensee pursuant to clause 2.1.

“Licence Fee” means the fee payable for the Licence of the Products as specified in Schedule 2.

“Products” means the Content and the Documentation

“Term” means the Initial Term and any Extended Term as specified in clause 13.

- 1.2 **Interpretation:** In this Agreement, unless the context otherwise requires:
- (a) the word "person" includes a natural person and any body or entity whether incorporated or not;
 - (b) "including" and similar words do not imply any limitation;
 - (c) a reference to The Licensee or BFNZ is also a reference to that party's permitted assigns or successors
 - (d) references in this Agreement to a party or parties are references to the parties to this Agreement;
 - (e) references in this Agreement to sections and clauses are references to sections and clauses in this Agreement;
 - (f) all amounts are plus GST (if any); and
 - (g) all amounts are in New Zealand dollars unless expressly stated otherwise.

2. GRANT OF LICENCE

- 2.1 **Software Licence:** Subject to the terms and conditions of this Agreement, BFNZ grants to the Licensee, and the Licensee accepts a non-transferable, non-exclusive licence to install and use the Products on the number of user workstations specified in Schedule 1 ("**Licence**").
- 2.2 **Licence limitations:** The Licensee may use the Products to support the provision of services to its own clients, but may not sub-licence, sell or otherwise transfer or dispose of the Products in whole or in part, or otherwise use or deal with the Products in any way that could diminish BFNZ's Intellectual Property rights in the Products.
- 2.3 **Additional Licence:** In the event that the Licensee wishes to use the Products on a greater number of user workstations than that set out in Schedule 1 (including as a result of a merger with another business), the Licensee must notify BFNZ. BFNZ may agree to grant additional licences, and may charge an additional Licence Fee based on the increased number of user workstations. Any such agreement will be recorded in writing by way of amendment to Schedule 1.

3. INTEGRATION TRAINING SERVICES

- 3.1 **Integration Training Services:** BFNZ will provide the Integration Training Services in accordance with any timetable agreed between the parties.

4. ENHANCEMENT AND SUPPORT SERVICES

- 4.1 **Enhancement and Support Services:** BFNZ will provide the Enhancement and Support Services during the Term.
- 4.2 **Additional Enhancement and Support Services:** In the event that the Licensee wishes to use the Products on a greater number of user workstations than that set out in Schedule 1 (including as a result of a merger with another business), the Licensee must notify BFNZ. BFNZ may agree to grant additional licences, but may charge increased Enhancement and Support Services Fees based on the increased number of user workstations. Any such agreement will be recorded in writing by way of amendment to Schedule 1.
- 4.3 **Suspension of Enhancement and Support Services if fees overdue:** BFNZ may (without prejudice to its other rights and remedies) suspend delivery of the

Enhancement and Support Services during any period in which the Licensee is in arrears for payment of any fees payable under this Agreement.

5. ADDITIONAL SERVICES

- 5.1 **Additional Services:** If requested by the Licensee, BFNZ may provide additional services outside the scope of the Integration Training Services and Enhancement and Support Services. The scope of such additional services, the fees and payment terms shall be agreed in writing from time between the parties, but shall otherwise be subject to the terms and conditions of this Agreement. In the absence of any written agreement on the price of the additional services, such additional services shall be charged at BFNZ's then current standard rates charged for equivalent services across its client base.

6. FEES

- 6.1 **Fees:** The Licensee will pay the Licence Fee, Integration Training Fee, and Enhancement and Support Fees in accordance with the terms set out in Schedule 2.
- 6.2 **Fee review:** BFNZ may review the Enhancement and Support Fees at any time after the expiry of the Initial Term under clause 13 and shall give the Licensee written notice of the outcome of any such review. Any such review will take effect one month after receipt of such notice by the Licensee in accordance with clause 15.
- 6.3 **On-site services:** In the event that BFNZ provides any services under this agreement at any of the Licensee's premises, then BFNZ shall also be entitled to charge the Licensee for related travel, accommodation and other disbursement costs.
- 6.4 **Payment in event of insolvency or breach:** The Licence Fee, the Integration Training Fee, and any uncharged or unpaid Enhancement and Support Fees shall become immediately due and payable if:
- (a) the Licensee becomes subject to an Insolvency Event; or
 - (b) this Agreement is terminated by BFNZ as a result of a breach by the Licensee of the terms of this License in accordance with the provisions of clause 14.2.
- 6.5 **Disputed invoices:** If the Licensee disputes the whole or any portion of any invoice submitted to it by BFNZ, the Licensee agrees to:
- (a) notify BFNZ within 10 Business Days of receipt of the invoice of the dispute and the reasons for it; and
 - (b) pay that portion of the invoiced amount (if any) that is not in dispute by the due date.
- 6.6 **Default interest:** If any amount due and payable under this Agreement remains unpaid after the due date for payment, BFNZ may (without prejudice to its other rights and remedies) charge:
- (a) a late payment penalty of 10% of the overdue amount; and
 - (b) default interest, from the due date for payment until payment in full of the overdue amount, on the total amount payable to BFNZ under the terms of this Agreement at the rate of 2% per month.

- 6.7 **Debt recovery:** If any amount due and payable under this Agreement remains unpaid more than 45 Business Days after the due date for payment, BFNZ may (without prejudice to its other rights and remedies) engage the services of a debt recovery agency, and the Licensee agrees to pay all costs incurred by BFNZ in doing so (including in particular any commission or fees charged by such agency) in addition to the amount being recovered.

7. THE LICENSEE'S RESPONSIBILITIES

- 7.1 **General Responsibilities:** The Licensee acknowledges that it is solely responsible for the use, management and control of the Products licensed to it under this Agreement, and must:
- (a) ensure that the Products are used by competent trained employees of the Licensee or of contractors or consultants to the Licensee, or by persons under the supervision of such persons;
 - (b) observe the licence limitations specified in clause 2.3;
 - (c) install new releases, versions and updates provided by BFNZ as part of the Enhancement and Support Services on a timely basis;
 - (d) ensure that appropriate electronic back-ups are made of the Products;
 - (e) co-operate with BFNZ personnel in respect of any reasonable request made by BFNZ for the purposes of BFNZ fulfilling its obligations under this Agreement; and
 - (f) make available to BFNZ, free of charge, in-house information, facilities and services as reasonably required including the provision of regular updates as to the number of persons employed by the Licensee and using the Products.
- 7.2 **Use of Content:** To support the provision of services to its own clients, the Licensee may copy, modify, alter or adapt the Content, but in doing so must always ensure that BFNZ's Intellectual Property rights subsisting in the Content are fully protected. In particular, whenever requested by BFNZ, the Licensee must incorporate in any copied, modified or altered Content, any statement specified by BFNZ claiming Intellectual Property rights.

8. WARRANTIES AND LIABILITY LIMITATIONS

- 8.1 **Business purposes and the Licensee's Own Investigations:** The Licensee acknowledges that it enters into this Agreement for business purposes; that it has undertaken its own investigations into the Products; and that it enters into this Agreement in reliance on those investigations and not on the basis of any warranty or representation by BFNZ (except for any warranty or representation expressly set out in this Agreement).
- 8.2 **No Warranty:** BFNZ does not warrant that the Products are free of errors, omissions or other defects.
- 8.3 **Remedy of Defects:** If, during the Term, the Licensee discovers any error, omission or other defect in relation to the Products as and in the form supplied by BFNZ, then BFNZ shall, as part of the Enhancement and Support Services, diagnose and remedy such error, omission or other defect.
- 8.4 **No Breach of Third Party Rights:** BFNZ warrants that, to the best of its knowledge, none of the Products or the granting by BFNZ of rights pursuant to

this Agreement, shall breach the intellectual property rights of any third party, **provided that:**

- (a) the Licensee notifies BFNZ in writing as soon as practicable of any actual, suspected or alleged infringement ("**Claim**") and provides all reasonable assistance to perform its obligations under this Clause 8.4;
- (b) BFNZ has sole control of the defence or settlement of any Claim;
- (c) the Licensee has not, through any admission, statement or conduct, prejudiced BFNZ's defence of any Claim;
- (d) the Claim does not result from any modification, alteration or adaptation of the Products by the Licensee; and
- (e) the Claim does not result from any failure by the Licensee to perform any of its obligations under this Agreement.

8.5 **Warranties Excluded/Liability Limited:** Except as set out in this Agreement, all warranties implied by customary practice, at law or under statute are excluded to the extent legally permitted. BFNZ shall not be responsible for any cost, loss, damage or claim arising directly or indirectly in relation to this Agreement or the Products (whether arising in contract, tort (including negligence), statute or otherwise) except for damages under contract only suffered by the Licensee as a result of breach by BFNZ of the terms of this Agreement up to a maximum of the total amount of the fees paid to BFNZ under clause 6.1. Without limiting the foregoing, BFNZ shall not be liable for consequential loss, punitive, exemplary or general damages. This clause shall prevail over the other clauses in this Agreement to the extent of any inconsistency.

9. INTELLECTUAL PROPERTY

- 9.1 **Rights Reserved:** The Licensee acknowledges that all Intellectual Property rights and proprietary rights subsisting in, or relating to, the Products (including any Products that are modified, altered or adapted by the Licensee) shall at all times remain the exclusive property of BFNZ.
- 9.2 **Licensee to assist BFNZ:** The Licensee will do everything reasonably required by BFNZ in order to protect BFNZ's Intellectual Property, including acknowledging BFNZ's Intellectual Property rights in any document it produces that contains BFNZ Intellectual Property.
- 9.3 **No Use of Trade Names:** The Licensee shall not use or permit to be used any of BFNZ's trade marks or trade names except with the prior written consent of BFNZ.
- 9.4 **Licensee Trade Names:** BFNZ shall be entitled to use the trade marks and trade names of the Licensee on its website or reference list and to make them available to third parties for information purposes only.
- 9.5 **Upon termination:** Upon expiry or termination of this Agreement for any reason, clauses 14.3(b),(c) and (e) shall apply in relation to BFNZ's Intellectual Property.

10. CONFIDENTIALITY

- 10.1 **Confidential Information:** Each party acknowledges and agrees that all Confidential Information which is disclosed to, prepared, made available or otherwise received by it, or on its behalf by any advisor or agent, as a result of

performance of this Agreement constitutes commercially sensitive and valuable information and will be held by the receiving party in the strictest confidence.

- 10.2 **Non-disclosure:** Each party agrees that it will not directly or indirectly disclose, nor permit the disclosure by its directors, employees agents and advisors (if any) of, any of the other party's Confidential Information whether verbally or in writing to any person other than permitted pursuant to this Agreement or with the prior written consent of that other party. Each party's Confidential Information will at all times remain that party's exclusive property.
- 10.3 **Covenants:** In consideration of one party disclosing or otherwise disclosing Confidential Information to the other party, that other party covenants that it will keep indemnified and hold harmless the disclosing party against all losses, damages, costs or expenses which it may incur as a result of any unauthorised disclosure or use of the Confidential Information by the other party.

11. FORCE MAJEURE

- 11.1 **Obligations Suspended:** Where BFNZ is unable, wholly or in part, by reason of a Force Majeure Event, to carry out any obligation under this Agreement and:
- (a) gives the Licensee immediate written notice of the nature and expected duration of, and the obligation affected by, the Force Majeure Event; and
 - (b) uses all reasonable endeavours to:
 - (i) mitigate the effects of the Force Majeure Event on BFNZ's obligations under this Agreement; and
 - (ii) perform BFNZ's obligations under this Agreement despite the Force Majeure Event,
- then that obligation is suspended so far as it is affected by the Force Majeure Event during its continuance.

12. ASSIGNMENT

- 12.1 **Limitations on Assignment by Licensee:** This Licence is personal to the Licensee. The Licensee shall not sell, transfer, subcontract, declare itself trustee of, or otherwise directly or indirectly transfer any interest in, this Agreement except with the prior written consent of BFNZ.
- 12.2 **Assignment by BFNZ:** BFNZ shall be entitled to assign, transfer, subcontract or otherwise directly or indirectly transfer its interest in this Agreement to a third party.

13. TERM

- 13.1 **Term:** The term of this Agreement ("**Term**") shall comprise the Initial Term under clause 13.2, together with any Extended Term under clause 13.3, unless this Agreement is terminated earlier under clause 14.
- 13.2 **Initial Term:** This Agreement shall commence on the Commencement Date and shall continue for a period of 18 months ("**Initial Term**").
- 13.3 **Extended Term:** After the expiry of the Initial Term, this Agreement shall continue in full force and effect unless and until the Licensee gives written notice that it wishes to terminate the Agreement, in which case this agreement shall terminate one month following receipt of such notice by BFNZ. ("**Extended Term**").

14. TERMINATION

14.1 **Default events:** The Licensee shall be in default of this Agreement where:

- (a) it breaches, or fails to properly or promptly perform, any of its obligations under this Agreement, and fails to remedy that failure within 30 Business Days after receiving written notice (inclusive of the date of receipt) from BFNZ requiring the failure to be remedied; or
- (b) it breaches a material obligation under this Agreement which is incapable of remedy; or
- (c) it assigns, transfers or otherwise disposes of any right, interest, obligation or liability in contravention of this Agreement; or
- (d) it is subject to an Insolvency Event.

14.2 **Right to Terminate on Default:** BFNZ may terminate this Agreement immediately by written notice to the Licensee if the Licensee is in default as specified in clause 14.1.

14.3 **Termination:** Upon expiry or termination of this Agreement for any reason, the Licensee shall:

- (a) pay all outstanding moneys in accordance with this Agreement;
- (b) uninstall, return to BFNZ or destroy all Products and BFNZ Intellectual Property (under supervision of BFNZ or its nominated agent should BFNZ so request);
- (c) not make any further use of the Products or BFNZ's Intellectual Property, including to the extent that any Intellectual Property resides in modifications, alterations or adaptations made by the Licensee to the Products, without prior written consent from BFNZ; and
- (d) cease all use of, and return to BFNZ, any BFNZ Confidential Information that is held by the Licensee; and
- (e) if requested by BFNZ:
 - (i) provide BFNZ or its nominated agent access to its premises in order to verify compliance with clauses 14.3(b), (c) and (d);
 - (ii) provide BFNZ with a written and signed confirmation that it has complied fully with clauses 14.3(b), (c) and (d).

14.4 **Survival:** The provisions of the Agreement that are intended to continue beyond termination shall survive termination and continue in force including the following provisions of this Agreement: clauses 6.1, 6.3, 6.5, 6.6 (payment, default and debt recovery), 8 (warranties), 9 (intellectual property), 10 (confidentiality), and this clause 14 (termination).

15. NOTICES

- 15.1 **Service:** Every notice or other communication given under or in connection with this Agreement will be in writing and addressed to the relevant party and delivered, posted by pre-paid registered mail or sent by facsimile to the address or facsimile number of that party specified in the cover page to this Agreement, or such other address or facsimile number as is notified by that party to the other parties.
- 15.2 **Receipt:** Every notice or other communication sent by prepaid letter will be deemed to have been received when delivered personally or three days after it has been put into the post.
- 15.3 **Facsimile Communications:** In the case of any notice or other communication sent by facsimile, it will be sufficient proof of the fact that such notice or communication was received by the intended recipient if the sender is able to produce a facsimile machine record indicating that the entire facsimile was sent to the relevant number.
- 15.4 **Unsolicited Electronic Messages Act:** The Licensee gives its consent for BFNZ to send it electronic messages containing commercial marketing and promotional information about BFNZ's products and services. BFNZ agrees not to disclose the Licensee's email address to any other person for commercial purposes.

16. MISCELLANEOUS

- 16.1 **Compliance with Laws:** Each party will, in performing its respective obligations under and in connection with this Agreement, comply with all relevant statutes and other laws.
- 16.2 **Entire Agreement:** This Agreement constitutes the entire agreement, understanding and arrangement (express and implied) between the parties relating to the subject matter of this Agreement and supersedes and cancels any previous agreement, understanding and arrangement relating thereto, whether written or oral.
- 16.3 **Severability:** Where any provision of this Agreement is void, illegal or unenforceable, it may be severed without affecting the enforceability of the other provisions in this Agreement and the parties must attempt to replace that severed party with a legally acceptable alternative clause that meets the parties' objectives.
- 16.4 **Variations:** This Agreement may only be amended, supplemented or novated in writing executed by both parties.
- 16.5 **Costs:** Each party will pay its own costs of, and incidental to, the negotiation, preparation and execution of this Agreement. The Licensee shall indemnify BFNZ for all costs and liabilities incurred by it in enforcing or attempting to enforce this Agreement.
- 16.6 **No Waiver by Action:** Any delay, failure or forbearance by a party to exercise (in whole or in part) any right, power or remedy under, or in connection with, this Agreement will not operate as a waiver of such right, power or remedy.
- 16.7 **Waiver to be in Writing:** The waiver of any breach of any provision of this Agreement will not be effective unless that waiver is in writing and is signed by

the party against whom that waiver is claimed. A waiver of any breach shall not be, or be deemed to be, a waiver of any other or subsequent breach.

- 16.8 **Payments Without Deductions or Set-off:** All payments required to be made by the Licensee under the terms of this Licence shall be made without any set-off or deduction whatsoever.
- 16.9 **Non-solicitation of employees:** During the Term, neither party shall solicit for employment any person who is employed by the other party.
- 16.10 **New Zealand Law:** This Agreement is governed by New Zealand Law. New Zealand Courts have non-exclusive jurisdiction.