

Hosted Services Agreement – Terms and Conditions

1. DEFINITIONS

The following terms have the meaning ascribed throughout this Agreement

Additional Charges means a charge levied to your account in relation to the supply of an Additional Service or product that is not included in the Agreement.

Additional Service means any information technology and telecommunications services that are requested by the Client from time to time in accordance with the provisions of the Agreement that do not, at the time of the Client's request, form part of the Hosted Service.

Business Day means the same as Working Day.

Client means a person or business receiving services from CMTG

Client Data means all data and information relating to the Client and becoming available to CMTG during the term of this Agreement

Client Equipment means any equipment belonging to the Client residing in the CMTG Data Centre for the provision of Hosted Services

Client Material means any Material owned by or licensed to the Client that is used in relation to the provision of the Hosted Services by CMTG

CMTG Equipment means any equipment provided by CMTG Hosting Solutions under this Agreement in respect of the provision of the Hosted Services

Confidential Information means in relation to a party, information

- a) Disclosed or made available by that party to the other party or otherwise obtained by the other party; or
- b) the other party has access to, that
- c) is by its nature confidential
- d) is designated by that party as confidential; or
- e) the other party knows or ought to know, is confidential

Early Termination Fee means a fee payable by the Client to CMTG in respect of the early termination of this Agreement.

Effective Date means the date on which this Agreement is executed or the date on which CMTG commences to provide the Hosted Services.

Event of Default means

- a) an Insolvency Event
- b) a breach of a term of this Agreement

Excusable Delay Event means any:

- a) fire, flood, earthquake, lightning, cyclone, other elements of nature or act of God
- b) riot, civil disorder, war, act of terrorism, rebellion or revolution
- c) failure of power supply or failure of communications services
- d) other similar cause beyond the reasonable control of the non-performing party
- e) Third party service failure.

Expiry Date means the date on which the term of this Agreement expires.

Hosted Services means any information technology and telecommunications services that are carried out in the CMTG data centre for delivery of applications to the Client

Hosted Service Fee means the amount payable by the Client to CMTG in respect of the provision of the Hosted Services.

Hosted Server means a server which resides in CMTG's data centre, whether it be a physical server or a virtual server.

Insolvency Event means the occurrence of any of these events in respect of the Client an order is made that it be wound up; or

- a) an order is made appointing a liquidator or provisional liquidator in respect of it, or one of them is appointed, whether or not under an order; or
- b) except to reconstruct or amalgamate while solvent on terms approved by the other party, it enters into, or resolves to enter into, a scheme of arrangement, deed of company arrangement, or composition with, or assignment for the benefit of, all or any class of its creditors; or
- c) it resolves to wind itself up, or otherwise dissolve itself, or gives notice of intention to do so, except to reconstruct or amalgamate while solvent on terms approved by the other party, or is otherwise wound up or dissolved; or
- d) it is or states that it is insolvent; or
- e) as a result of the operation of section 459F(1) of the Corporations Act, it is taken to have failed to comply with a statutory demand; or
- f) it is, or makes a statement from which it may be reasonably deduced by the other party that it is, the subject of an event described in section 459C(2)(b) or section 585 of the Corporations Act
- g) it takes any step to obtain protection or is granted protection from its creditors, under any applicable legislation or an administrator is appointed to it
- h) a receiver, receiver and manager or analogous person is appointed to, or the Financier or any other person holding a Security Interest takes (or appoints an agent to take) possession of any property of the Company
- i) anything analogous or having a substantially similar effect to any of the events specified above happens under the law of any applicable jurisdiction

Intellectual Property Rights (IPR) means copyright (including future copyright), trademarks (registered and unregistered), industrial designs and patents (whether registered or registrable), semiconductor and circuit layout rights, trade, business and company names, trade secrets, or any other proprietary rights, and any rights to registration of those rights, whether created before or after the Effective Date, and whether existing in Australia or elsewhere.

Losses means all losses, liabilities, damages, fines, costs and expenses (including reasonable legal fees on a solicitor/client basis and disbursements and costs of investigation, litigation, settlement, judgment, interest and penalties).

Response Time means the time that it takes for a technician to respond to a client request after logging the incident with a support technician on the CMTG helpdesk.

Review Date means the date agreed by both parties on which adjustments to this agreement can be made to support the needs of the Client and CMTG. This may include changes to the service provision hours or the inclusion of additional client requirements. This is also the opportunity for both parties to discuss the performance of CMTG as the service provider and discuss the technology Pathway the Client will want to take for the next 12 months.

Review Period means the timeframe for meetings to occur to review the services being maintained and determine amendments to the contract to account for additional requirements

Service means the Hosted Services to be provided by CMTG to the Client.

Server Snapshot means a point in time exact backup of the Hosted Server and the data in it

Service Levels means the Service Levels as per the Agreement.

Third Party Equipment means the equipment belonging to a third party for the delivery of a Third Party Service.

Third Party Service means any service provided by a third party to the Client in respect of the provision or otherwise, of the Services.

Third Party Service Failure means a failure in a Third Party Service howsoever arising.

Working Day means Monday to Friday excluding public holidays.

Working Hours means 8:00am to 5pm on Working Days, WST.

2. TERMS

- 2.1 The term of this agreement shall be for the period specified in the Agreement. subject to any earlier termination in accordance with this Agreement
- 2.2 The Client may terminate this Agreement prior to the Expiry Date by:
 - a) providing 30 days' notice in writing to CMTG of such termination; and
 - b) paying to CMTG, all outstanding Hosted Service Fees and any other outstanding invoices for Additional Charges together with the Early Termination Fee.

3. SERVICES

- 3.1 During the Term, CMTG shall provide to the Client the Hosted Service in accordance with the Service Levels.
- 3.2 To the extent that the Service includes Third Party Services, CMTG shall not be liable (including in respect of service credits) for any failure in respect of those Third Party Services, nor for the failure of delivery of the Service to the extent that such delivery is dependent on Third Party Services.
- 3.3 CMTG shall not be liable for any default or delay in performance of its obligations under this Agreement if and to the extent the default or delay is caused, directly or indirectly by an Excusable Delay Event.

4. CHANGES TO HOSTED SERVICES

- 4.1 The Client may request CMTG to supply additional services from time to time, and such additional services shall be provided at CMTG's prevailing rate for the type and volume of such additional services.
- 4.2 The Client may from time to time, by written notice, remove part of the Services ("Removed Service"), in which case:
 - 4.3 The Removed Services will no longer be part of the Service from the date specified on the notice
 - 4.4 The Client shall pay to CMTG the cost to remove the Service which will be charged at CMTG's prevailing hourly rate.

5. SERVICE FEE

- 5.1 In consideration of CMTG providing the Service during the Term, the Client shall pay to CMTG the Hosted Service Fee.
- 5.2 The Hosted Service Fee shall be adjusted on the next invoice if the Client exceeds the parameters for the Servers, and has approved the provision of further resources.
- 5.3 The Hosted Service Fee may be adjusted on expiration of this Agreement, and following such adjustment, the adjusted amount shall become the Hosted Service Fee for the following 12-month period (or part thereof)
- 5.4 CMTG shall be entitled to adjust the Service Fee in accordance with this clause with 30 days' notice to the Client.

6. SERVICE LEVELS

- 6.1 CMTG shall provide the Hosted Service in accordance with the service levels during the Term, but excluding any transition or disengagement period.
- 6.2 Service Levels shall not apply in respect of any Third Party Services or to the Service in circumstances where the Service is not provided to the Client in accordance with the Service Level as a result of a partial or total failure of a Third Party Service.
- 6.3 If CMTG fails to meet a Service Level, CMTG shall on the request of the Client.
 - a) Investigate the underlying causes of the failure to meet the Service Level (Service Problem) and use its best efforts to preserve any data indicating the cause of the Service Problem.
 - b) Take what whatever action is reasonably necessary to minimise the impact of the Service Problem and prevent it from recurring;
 - c) Correct the Service Problem and begin meeting the Service Level;
 - d) Advise the Client of the status of remedial efforts being undertaken with respect to the underlying cause of the Service Problem
 - e) show on the next invoice submitted by CMTG to the Client under clause 8 (Invoicing and Payment), the Service Credits (if any) payable as a result of the Service Problem

7. THIRD PARTY SERVICES, WARRANTY & SUPPORT

- 7.1 CMTG shall not be responsible for providing Third Party Services or maintaining the Service Levels in respect of Third Party Services or Third Party Equipment.
- 7.2 The Client shall not be relieved of its obligations to pay the Hosted Service Fee to CMTG under this Agreement as a consequence of any interruption or failure in any Third Party Service or Third Party Equipment.
- 7.3 The Client acknowledges that CMTG makes no representations or warranties in relation to third party software and that all rights of the Client in relation to third party software are against the Licensor of the third party software.

8. INVOICING AND PAYMENT

- 8.1 CMTG will invoice the Client
- Monthly in advance, the Hosted Service Fee.
 - In accordance with any requirements specified in the Agreement including identifying any Service Credits (if applicable); and
 - For any periodic charges on a calendar month basis and will not apportion for any partial month.
- 8.2 The Client will pay invoices within 14 days after receiving the invoice
- 8.3 The Client will pay undisputed charges when those payments are due. The Client may only withhold payment of any charges that the Client disputes in good faith.

9. GST

- 9.1 Where this Agreement or anything done or agreed to be done by CMTG under this agreement attracts or creates a liability in which CMTG is required to pay, or remit amounts in respect of GST, any payment to be made or consideration to be given by the Client in respect of such supply must be increased so that CMTG obtains, after paying or remitting the GST, the same payment or consideration as it would in the absence of a GST, and the increase in the payment or consideration is sufficient to cover all of the GST payable in respect of such supply at such increased level of payment or consideration
- 9.2 This clause does not apply to any fee, or any other payment, that is expressed to be or is calculated as being inclusive of GST, except to the extent that the rate of GST payable by CMTG is increased above 10%.

10. DATA SECURITY

- 10.1 The Client's Data is, and will as between the Parties, remain the property of the Client. CMTG will not
- Use the Client's Data for any purpose other than directly in relation to the supply of the Hosted Service; or
 - purport to sell, let for hire, assign rights in or otherwise dispose of any of the Client's data; or
 - make the Client's Data available to any third party except to the extent necessary to enable the third party to perform a part of the Hosted Service; or
 - commercially or otherwise exploit the Client's Data

11. DATA BACKUP

- 11.1 CMTG will conduct daily backups onto backup disk storage.
- 11.2 Backups will be performed at the end of the working day.
- 11.3 CMTG will provide backup retention as follows:
- Monday, Tuesday, Wednesday and Thursday backups will be retained for 7 days.
 - Friday backups will be retained for 4 weeks.
 - Monthly backups will be retained for 4 months.
- 11.4 CMTG will safeguard against server data corruption. Safe Guarding Data
- 11.5 CMTG will establish and maintain safeguards against the destruction, loss or alteration of the Client's Data in its possession. These safeguards will be no less rigorous than the safeguards that can reasonably be expected in well-run data centres of comparable size and nature.

12. CONFIDENTIALITY

- 12.1 Protection of Confidential Information CMTG will:
- keep the Client's Confidential Information confidential and will not (except as expressly permitted under this Agreement or to provide the Hosted Service) disclose the Client's Confidential Information;
 - not make copies of data or material containing the Client's Confidential Information; or
 - not use the Client's confidential Information;
 - implement security practices to guard any unauthorised copying, use, disclosure (whether that disclosure is oral, in writing or in any other form), access and damage or destruction of any the Client's Confidential Information; within a reasonable period, notify the Client if CMTG:
 - ◆ becomes aware of any unauthorised access, copying, use, disclosure, damage or destruction of any of the Client's Confidential Information; or
 - ◆ is required by law to disclose any of the Client's confidential information and
 - take all reasonable steps to enforce any obligation of confidence imposed or required to be imposed by this Agreement.

12.2 Exceptions to obligations of confidentiality

Nothing in this Agreement prohibits the use or disclosure of any Confidential Information by either Party to the extent that:

- The information has been placed in the public domain otherwise than due to a breach of an obligation of confidentiality by that Party;
- the disclosure is expressly required by law, but the Party must use its best efforts to minimise any such disclosure
- the information has been independently developed by the Party and without reference to the Confidential Information of the other Party; or
- the other Party has approved in writing the particular use or disclosure of the Confidential Information

12.3 Equitable relief

- a) The Parties acknowledge that each will be entitled to equitable relief against the other (in addition to any other rights available under this Services Agreement or at law) if the other Party breaches any of its obligations under this clause 13

12.4 Period of confidentiality

- a) The obligations with respect to Confidential Information disclosed under this Hosted Services Agreement will survive termination or expiry of this Hosted Services Agreement and continue for as long as the information remains confidential

13. RETURNING MATERIAL, DATA & INFORMATION**13.1 Upon termination or expiry of this Agreement CMTG will:**

- a) return all the Client's Data on media provided by the Client at the prevailing rate for such services ; or
- b) if requested in writing by the Client destroy Company's Data; and promptly certify to the Client in writing that it has done so.

14. INTELLECTUAL PROPERTY RIGHTS (IPR)**14.1 Ownership of pre-existing IPR**

- a) This Agreement does not assign any IPR existing as at the Effective Date.
- b) Neither Party may assert ownership of all or part of the other Party's pre-existing IPR.

14.2 Protection of CMTG's rights

The Client must not at any time do anything or cause anything to be done which would prejudice CMTG's right, title and interest in any CMTG IPR or third party IPR with respect to the provision of Services.

15. REPRESENTATIONS & WARRANTIES BY CMTG**15.1 CMTG represents and warrants to the Client as follows:**

- a) Subject to clause 15.2, CMTG will supply the Hosted Service in a professional manner, in accordance with the practices and professional standards used in operations performing services similar to the Hosted Service.

15.2 CMTG:

- a) owns or has the right to use to the extent necessary to supply the Hosted Services, and will at all relevant times own or have the right to use, all Intellectual Property Rights in the Equipment, Software and CMTG Material; and
- b) will not infringe any person's Intellectual Property Rights in supplying the Hosted Services.
- c) Other than as expressly provided in this Agreement, neither CMTG nor any of its information providers, licensors, employees, officers or agents warrant that the Hosted Services will be uninterrupted or error free; nor does CMTG or any of its information providers, licensors, employees or agents make any warranty as to the results obtained from the use of any of the Services.

16. REPRESENTATIONS & WARRANTIES BY THE CLIENT

Represents and warrants to CMTG that it will at all times use the CMTG Equipment and Hosted Services in accordance with all Laws, CMTG procedures, policies, instructions and conditions.

17. LIABILITY**17.1 Liability Cap**

This clause does not modify or exclude any condition or warranty implied into this Agreement or any liability imposed on CMTG by any Law (including by the Trade Practices Act) if to do so would contravene that Law or make any part of this clause void. CMTG:

- a) Excludes all conditions and warranties implied into this Agreement
- b) Limits its liability for breach of any implied condition or warranty that it cannot exclude to (at its option):
 - ◆ for goods
 - ◆ repairing or replacing those goods
 - ◆ paying the cost of having those goods repaired or replaced; and
 - ◆ for services
 - ◆ resupplying the services; or
 - ◆ paying the cost of having the services resupplied
- c) excludes all liability for any and all Losses associated with any Claim that any content or information carried or hosted by CMTG for or on behalf of the Client that is defamatory
- d) excludes any and all liability (regardless of the cause of action under which that liability arises) for any and all loss of opportunity, loss of revenue, loss of profits, loss of anticipated savings, pure economic loss and increased operating costs; and
- e) limits its liability (regardless of the cause of action under which that liability arises) to an amount equal to half of the total Hosted Service Fees paid under this Agreement by the Client

17.2 Exclusion of liability

Notwithstanding any other provision of this Agreement, each party will be liable only for direct damages arising from a Party's failure to perform its obligations in accordance with this Agreement, and neither party will be liable for any economic, indirect, incidental or consequential loss, even if a party has been notified of the possibility of such potential loss, in respect of, arising out of or in connection with any cause of action or this Agreement

17.3 Reducing Liability

The liability of a Party for a cause of action will be reduced proportionally to the extent of the other Party's failure to comply with its obligations under this Services Agreement, being obligations that relate to the liability, provided that such failure is not caused, or contributed to, by any act or omission of the first-mentioned Party

18. INDEMNITIES**18.1 Indemnity by the Client**

The Client must indemnify, defend and hold harmless CMTG and its employees, agents, and successors, and assigns from any and all Losses

and threatened Losses arising from, in connection with, or based on, allegations of any of the following

- a) the Client's breach of this Agreement
- b) any negligent or otherwise wrongful act or omission by the Client, or its employees
- c) any failure by the Client or its employees to comply with any Law
- d) any loss of or damage to, property of CMTG

18.2 Indemnity by CMTG

CMTG must indemnify and hold harmless the Client and its employees, agents, and successors, and assigns from any and all Losses to the extent caused or contributed by:

- a) CMTG's breach of this Agreement
- b) any negligent or otherwise wrongful act or omission by CMTG, or its employees
- c) any failure by CMTG or its employees to comply with any Law
- d) any loss of or damage, to property of the Client

18.3 Enforcement of indemnities

It is not necessary for a Party to incur expense or make payment before enforcing a right of indemnity conferred by this Hosted Services Agreement.

19. FURTHER ASSURANCES

19.1 Each party must:

- a) perform, execute, acknowledge and deliver all such further acts, documents, deeds and assurances as are reasonably required to give full effect to this Agreement; and
- b) refrain from doing anything that might hinder the performance of this Agreement

20. NOTICES

20.1 Any notice given under this Agreement must be in writing and addressed to the party concerned at that party's address indicated in this Agreement.

20.2 A notice may be served by delivering it to the other party's address, or by posting it by prepaid registered post or sending it by facsimile transmission to that party's facsimile transmission number.

20.3 A notice is deemed to be duly served:

- a) if left at the party's address, when delivered;
- b) if sent by registered post, 2 business days after posting;
- c) if sent by facsimile transmission, on the day of transmission if a correct and complete transmission report for that transmission is received from the sender's machine.

21. RELATIONSHIP

21.1 Nothing in this Agreement or its performance gives rise to any relationship of agency or partnership between the parties or between any personnel of the parties.

22. COSTS & STAMP DUTY

22.1 Each party must pay its own costs (including legal and accountancy fees) incurred in the negotiation and preparation of this Agreement.

23. GOVERNING LAW & JURISDICTION

23.1 This Agreement is governed by and construed in accordance with the laws of Western Australia.

23.2 Each party irrevocably and unconditionally submits to the exclusive jurisdiction of the courts of Western

Australia and waives any immunity or any objection it may have to any action of those courts and to a claim that any action has been brought in an inconvenient forum or to those courts not having jurisdiction.

24. COUNTERPARTS

24.1 This Agreement may be executed in any number of counterparts and all such counterparts taken together are deemed to constitute one instrument.

25. BINDING AGREEMENT

25.1 This Agreement and its provisions ensure to the benefit of and be binding upon the successors and permitted assigns of each party.

26. VARIATION & WAIVER

26.1 No variation of this Agreement is effective unless in writing signed by the parties.

26.2 If a party:

- a) has a right arising from another party's failure to comply with an obligation under this Agreement; and
- b) delays in exercising or does not exercise that right, whether knowingly or not, that delay in exercising or failure to exercise is not a waiver of that right or any other right.

27. ENTIRE AGREEMENT

27.1 This Agreement:

- a) constitutes the entire agreement between the parties as to its subject matter;
- b) in relation to that subject matter, supersedes all prior negotiations, understandings, representations, warranties, memoranda or commitments between the parties or given or made by a party, and no party is liable to the other party by reason of those matters.

28. INTERPRETATION

28.1 In this Agreement, unless the context otherwise requires a reference to:

- a) a document, including this Agreement, includes any variation, novation or replacement of it notwithstanding any change in the identity of the parties;
- b) any statute, ordinance, code or other law includes regulations and any other statutory instruments under any of them and consolidations, amendments, re-enactments or replacements of any of them;
- c) the singular includes the plural and vice versa;
- d) a gender includes all other genders;
- e) an individual includes associations, partnerships, corporations, joint ventures, unincorporated associations or trusts, states or any statutory authority or government department;
- f) a party is a reference to a party to this Agreement and includes that party's executors, administrators, successors and permitted assigns;
- g) "includes" or "including" means "without limitation";
- h) a time is to the time of the place where any thing is to be done or document is to be received;
- i) "writing" includes any mode of representing or reproducing words in a tangible and visible form,

- and includes a facsimile transmission and electronic mail;
- j) a "right" includes a remedy, authority or power;
 - k) "\$" or "dollars" means an amount in Australian currency;
 - l) headings are for convenience only and do not affect the construction of this Agreement;
 - m) if a word or phrase is defined, cognate words and phrases have a corresponding meaning;
 - n) where the day on or by which an act, matter or thing is to be done under this Agreement is not a business day, the act, matter or thing must be done on the next day which is a business day.
 - o) No rule of construction will apply in the interpretation of this Agreement to the disadvantage of one party on the basis that such party put forward or drafted this Agreement or any provision of this Agreement.

