

Offsite Backup 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 Offsite Backup.

Business Day means Monday to Friday.

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 provided by the client in respect of the provision of the Service

CMTG Equipment means any equipment provided by CMTG under this Agreement in respect of the provision of the Service

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 and is calculated by multiplying the Offsite Backup Fee by the number of months remaining in the Agreement.

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

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

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

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)

NAS means Network-attached Storage device.

Offsite Backups means the backup of data over a network to an off-site server.

Offsite Backup Fee means the amount payable by the Client to CMTG in respect of the provision of the Service

SAN means Storage Area Network or a network of storage devices.

Service means the Offsite Backup to be provided by CMTG to the Client.

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
 - c) paying to CMTG, all outstanding Offsite Backup Fees and any other outstanding invoices for Additional Charges together with the Early Termination Fee.

3. SERVICES

- 3.1 CMTG will supply software to the Client for the purposes of compressing, encrypting and transmitting Client data.
- 3.2 CMTG will store the Client Data in the CMTG Data Centre on CMTG Equipment.
- 3.3 The Client agrees title to CMTG Equipment remains with CMTG and the Client will not lay claim to any CMTG Equipment.
- 3.4 The Client confirms it owns and is permitted to transmit all data to CMTG.
- 3.5 The Client Data is, and will as between the Parties, remain the property of the Client. CMTG will not
 - a) Use the Client's Data for any purpose other than directly in relation to the supply of the Offsite Backup; or
 - b) purport to sell, let for hire, assign rights in or otherwise dispose of any of the Client's data; or
 - c) make the Client's Data available to any third party; or
 - d) commercially or otherwise exploit the Client's Data
- 3.6 The Client agrees to provide a local NAS or SAN to hold a point in time copy of data for the Off-site Backup. The client agrees to provide the required storage space on the NAS or SAN.
- 3.7 The Client agrees for CMTG to install the required software upon the Client Equipment. CMTG retains all rights in any such software, and on termination of this Agreement for whatever reason, CMTG shall remove such software.
- 3.8 The Client will maintain an internet connection of adequate capacity to enable backup data to be transmitted to CMTG. The data traffic required to maintain an up to date backup will consume bandwidth, and may have a detectable effect on the overall performance of your internet connectivity.
- 3.9 CMTG will conduct daily off-site backups at the end of the Business day.
- 3.10 CMTG will provide backup retention as follows:
 - a) Monday, Tuesday, Wednesday and Thursday backups will be retained for 7 days.
 - b) Friday backups will be retained for 4 weeks.
 - c) Monthly backups will be retained for 4 months.
- 3.11 The Client agrees not to backup data which is obscene, illegal, defamatory or which breaches the

rights of any third party and indemnify CMTG from any claims or costs arising out of this breach.

- 3.12 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. LIMITATIONS

- 4.1 Off-site Backup is a service intended to be a reasonable precaution against data loss. Off-site backup is not insurance against data loss not is it a substitute for such insurance.
- 4.2 CMTG will make reasonable endeavours to ensure a current backup is maintained off all Client Data. It is not possible to guarantee that all data files will be fully up to date at all times. Backups occur at the end of the business day and are not continuous. The Off-site Backup can be delayed by, but not limited to, network failures, files locked in use by Client users or applications, or other issues caused by the virtual machine hypervisor.
- 4.3 Backups capture the Client Data at the time the backup is taken. Only the files extant at the time of the backup are capable of being reinstated.

5. SERVICE FEE

- 5.1 In consideration of CMTG providing the Service during the Term, the Client shall pay to CMTG the Offsite Backup Fees
- 5.2 The Offsite Backup Fee shall be calculated on the total amount of storage capacity consumed the by client and charged at the agreed rate.
- 5.3 The Offsite Backup Fee may be adjusted on expiration of this Agreement, and following such adjustment, the adjusted amount shall become the Offsite Backup 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. INVOICING AND PAYMENT

- 6.1 CMTG will invoice the Client
 - a) Monthly in advance, the Offsite Backup Fees.
 - b) In accordance with any requirements specified in the Agreement including identifying any Service Credits (if applicable); and
 - c) For any periodic charges on a calendar month basis and apportioned for any partial month.
- 6.2 The Client will pay invoices within 14 days after receiving the invoice
- 6.3 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.

7. GST

- 7.1 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

- 7.2 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%.

8. RETURNING DATA & INFORMATION

- 8.1 Upon termination or expiry of this Agreement CMTG will:

- a) return all the Client Data on media provided by the Client at the prevailing rate for such services ; or
- b) if requested in writing by the Client destroy the Client Data; and promptly certify to the Client in writing that it has done so; or
- c) retain the Client Data until it expires and invoice the Client the Offsite Backup fee during this period.

9. INDEMNITIES

9.1 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

9.2 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

9.3 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 Offsite Backups Agreement.

10. INTERPRETATION

- 10.1 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.