

# TERMS OF SERVICE AGREEMENT

## 1. Overview

This Agreement states the definitions, terms and conditions by which VPS will deliver and Client will receive the deliverables, services, software solutions, professional/support services and content.

## 2. Definitions

- "Bandwidth"** means the amount of information or data (measured in bytes), that can be sent over a network connection in a given period of time.
- "Business Hours"** means Monday to Friday, 9am to 5pm Eastern Daylight Time excluding public holidays in Victoria Australia.
- "Charges"** means the Charges payable by Client to VPS for Web Hosting, use of Software Solutions and any other Services as outlined in the Agreement, calculated in accordance with the rates set out herein.
- "Force Majeure"** means a circumstance beyond the reasonable control of the parties which results in a party being unable to observe or perform on time an obligation under this Agreement. Such circumstances include but are not limited to:
- Acts of God, lightning strikes, earthquakes, floods, storms, explosions, fires and any natural disaster;
  - Acts of war, acts of public enemies, terrorism, riots, civil commotion, malicious damage, sabotage and revolution; and
  - Strikes.
- "Hardware"** means the Processor(s), RAM, hard disk(s), motherboard, NIC card and other related hardware included under this Agreement
- "Gigabyte"** means approximately one billion (1,000,000,000) bytes.
- "VPS Technology"** means VPS's proprietary technology, including VPS Services, software tools, hardware designs, algorithms, software (in source and object forms), user interface designs, architecture, class libraries, objects and documentation (both printed and electronic), network designs, know-how, trade secrets and any related intellectual property rights throughout the world (whether owned by VPS or licensed to VPS from a third party) and also including any derivatives, improvements, enhancements or extensions of VPS Technology conceived, reduced to practice, or developed during the term of this Agreement by either party that are not uniquely applicable to Client or that have general applicability in the art.
- "Initial Term"** means the minimum term for which VPS will provide the Service(s) to Client, as indicated on the Agreement.
- "Intellectual Property Rights"** means copyright, trade mark, design, Patents relevant to:
- Textual, graphical, audio and other material displayed on the Website;
  - The internal interface created by the Development Services (or created by the Supplier at the initial development of the Website) and used by employees of Client including but not limited to screens, organisation, patents and operation or control features; and
  - All software associated with the Development Services or the initial development of the Website.
- "Megabyte"** means approximately one million (1,000,000) bytes
- "Network based intrusion"** means unauthorised access to hardware (or data contained in hardware) through its connection to the VPS Network or third party Networks that are hired by VPS.
- "Network downtime"** means the measure of time from when Client notifies VPS of the network outage to the time the server is once again able to transmit and receive data.
- "Network uptime"** is the total time in a calendar month that VPS network and services delivered herein are available through the internet.
- "Party"** means VPS or Client as the context dictates.
- "Parties"** means collectively both Client and VPS.
- "Professional Services"** means any non-standard professional, consulting or support service provided by VPS to Client.
- "Renewal Term"** means any service term following the Initial Term, as specified in Section 3.2.
- "Rules and Regulations"** means the VPS Acceptable Use Policy (AUP), which can be found at the end of this agreement.
- "Service(s)"** means the specific service(s) provided by VPS as detailed in the Agreement.
- "Service Commencement Date"** means the date VPS will begin providing the Service(s) to Client as indicated on the Agreement or the date VPS generates an e-mail message to Client that provides access codes and passwords for Client use on production.
- "Technical Support"** means advice and guidance offered by VPS to Client, so that Client may undertake its own activities.
- "Terabyte"** means approximately one trillion (1,000,000,000,000) bytes.
- "Third Party Product"** means third party software and/or services outside the terms of this Agreement.
- "Web Hosting"** means the storage of the Website content managed by VPS that are accessible by anyone browsing the internet with normal access restrictions that apply to and understood by browsers. Web Hosting at VPS currently includes the following services:
- Service equipment supplied and/or Hired by VPS
  - The responsibility of maintaining services, hardware and operating system to make the services covered in this Agreement possible.
  - Provision of reliable connectivity to the Internet, A commercial grade Data Centre facility hired by VPS with access limited to approved VPS staff
- "Website"** means the internet based application and published contents that are configured to host on VPS servers covered by this Agreement.

## 3. Terms and Conditions

### 4. Delivery Items and Services

VPS agrees to provide Client the Standard Services and Supplemental Services as detailed in the quotation.

#### **a. Term of Agreement**

- i. The term for this agreement will commence on the Service Commencement Date as set out in the quotation.
- ii. The Minimum Term for this agreement is as set out in quotation. Early termination of this Agreement is not permitted. If Client wishes to terminate the Agreement during the minimum term, all outstanding monies as set out in Exit in the Minimum Term will become immediately due and payable to VPS.
- iii. Upon expiration of the Initial Term of this Agreement, the term shall be extended automatically for a period of twelve (12) months ("Renewal Term"), unless and until either party gives the other no less than thirty (30) days' written notice of a termination.
- iv. The termination of any individual Service(s) will not affect the Client's obligations to pay for other Service(s) where applicable.

#### **b. Charges**

- i. Client agrees to accept and pay for the services and deliverables covered in this agreement as detailed in the quotation
- ii. VPS will provide a quotation and obtain authorisation for any additional/supplementary deliverables/services that are not covered in this agreement when requested by Client before commencing such deliverables/services.
- iii. Client agrees that VPS can revise and change the charges set out in quotation at anytime with written notice to Client.

#### **c. Payment Terms**

- i. Client Agrees to accept the payment terms as set out in the quotation
- ii. Client Agrees to pay any late payment charges applicable as set out in the quotation for the payments overdue and payable.

#### **d. Payment Defaults**

- i. In the event of a payment default, Client agrees that, upon delivery of written notice to the Client, VPS may:
  - (i) Restrict the Client access to software; and/or
  - (ii) Stop all or part of service for Client and its agents where applicable; and/or
  - (iii) Claim damages including all fees and charges incurred in recovering the undue amounts and relevant interests charges

#### **e. Intellectual Property Ownership**

- i. This Agreement does not transfer any Technology, Software, Designs from VPS to Client, and all right, title and interest in and to VPS will remain solely with VPS.
- ii. This Agreement does not transfer any Data, Designs, Client Documents from Client to VPS, and all right, title and interest in and to Client will remain solely with Client including any published content on the website such as text, images, animations and other Client specific electronic files.
- iii. Client agrees that it will not, directly or indirectly, reverse engineer, decompile, disassemble, copy or otherwise attempt to derive source code or other trade secrets from VPS solutions and/or its third party vendors.

### **5. VPS Obligations**

#### **a. General**

- i. Each of the obligations described in this clause and the service agreement is null and void if the Client fails to follow VPS's Acceptable Use Policy or otherwise breaches this Agreement in any respect.
- ii. VPS agrees to the following:
  - (i) Provide security and protect privacy of Client and its sensitive data
  - (ii) Not to directly approach Client's clients without the permission of Client unless otherwise requested by Client
  - (iii) To use Client brands when communicating with Client's clients for production and processing purposes unless otherwise directed by Client
  - (iv) To provide a minimum software system uptime of 99%
  - (v) To carry out planned maintenance activities on suite of facilities outside business hours and within the scheduled outage times as indicated under the Systems Availability on VPS website.
- iii. VPS does not monitor or exercise control over the content of the information transmitted through its facilities. Use of the services or any information that may be obtained therefrom is at customer's own risk. Client's use of the services is at its own risk.
- iv. Except as provided in this Agreement and to the extent permitted by law, VPS does not make, and hereby disclaims, any and all other express and/or implied warranties.

#### **b. Disclaimer of Actions Caused by and/or Under the Control of Third Parties**

- i. VPS does not and cannot control the flow of information to or from VPS's servers and its hosting network and other portions of the internet. Such flow depends in large part on the performance of internet services provided or controlled by third parties. At times, actions or inactions of such third parties can impair or disrupt Client's service availability. VPS cannot guarantee that such events will not occur. Accordingly, except as provided for in this Agreement, VPS disclaims any and all liability resulting from or caused by such events. VPS will not be liable for any business losses arising from such interruptions by third parties.
- ii. VPS is in no way responsible for other network providers. However, in the event of a failure, VPS will use its best endeavours to switch to a comparative network provider.

#### **c. VPS Written Software**

- i. VPS agrees to provide technical support for VPS written or developed software for rectification of any problems experienced with such software as set out in the Systems Support section in the Schedule

- ii. In the event of software failure, VPS will not be responsible for any consequential losses, including but not limited to business losses.

## **6. Client Obligations**

### **a. Warranties of Client**

- i. The person(s) signs on behalf Client warrant(s) that they are authorised by Client and possesses the legal right and ability to enter into this Agreement.
- ii. The performance of Client obligations and use of the Services (by Client, its clients and users) will not violate any applicable laws, regulations or the Acceptable User Policy or cause a breach of any agreements with any third parties.
- iii. Client assumes all risks related to processing of transactions related to electronic commerce.
- iv. Client agrees not to use the VPS suite of software or any other services provided by VPS or third parties that are covered under this Agreement for anything other than the intended usage and the paid purposes.

### **b. Compliance with Law and Rules and Regulations**

- i. Client agrees that it will use the Service(s) only for lawful purposes and in accordance with this Agreement. Client will comply at all times with all applicable laws and regulations and will indemnify VPS against any claims brought by any third party arising out of any violation of failure of the Client to comply with the **Acceptable User Policy (AUP)**. The AUP are incorporated herein and made a part hereof by this reference.
- ii. VPS may change the AUP upon thirty (30) days' notice to Client, which notice may be provided by sending an email alert to Client.
- iii. Client may request a current copy of the AUP at any time from VPS by email, letter, or fax.

### **c. Website Content**

- i. Client agrees undertakes to ensure that any material included on its website:
  - (a) Do not infringe the Intellectual Property Rights, the Privacy Act 1988 or the privacy of any person;
  - (b) Is not obscene, offensive, upsetting, defamatory or discriminatory;
  - (c) Is not prohibited content or potential prohibited content as defined in the Broadcasting Services Act 1992; and
  - (d) Does not comprise and cannot be used for any purposes or activity of any purposes or activity of an illegal, fraudulent or defamatory nature.
- ii. Client further agrees to indemnify VPS and its affiliates against any Losses which arise out of, or relate to any content provided by the Client or Clients/clients of Client, and Client will reimburse VPS and its affiliates for all legal expenses, including reasonable legal fees, incurred by VPS and its affiliates in connection with any such Losses.
- iii. Without accepting responsibility to police the content of its Client or its clients website, VPS reserves the right to prohibit any conduct or to remove any materials or content in violation of the Acceptable Use Policy or which VPS believes in its sole discretion to be illegal or potentially harmful to others, or which may expose VPS to harm or liability.
- iv. VPS will provide Client with written notification of any illegal or potentially harmful content, following which; Client will have seven (7) days to remedy any breach before VPS takes further action. If the prohibited activity is not stopped within 7 days and the infringing content removed from Client or its client's web sites, VPS reserves the right to suspend or terminate this Agreement immediately. In the event of suspension or termination, any outstanding monies owed to VPS by Client will become due and payable immediately. VPS holds the sole discretion to reinstate Client or its client's services following any suspension or termination.

## **7. Limitations of Liability**

### **a. Delays and Interruptions**

- i. Except as expressly provided for in this Agreement, VPS shall not be liable for any loss of data resulting from delays, corruption of data, non deliveries, misdeliveries or service interruptions.
- ii. Neither VPS nor its network services supplier will be liable for any loss or damage resulting from a network-based intrusion

### **b. Consequential Damages**

- i. Unless otherwise agreed by the parties in writing, except as expressly provided for in this Agreement and except for the parties' indemnity obligations in section 7, in no event will either party be liable or responsible to the other for any type of incidental, punitive, indirect or consequential damages, including, but not limited to, business losses, lost revenue, lost profits, replacement goods, loss of technology, rights or services, loss of data, or interruption or loss of use of service or equipment, even if advised of the possibility of such damages, whether arising under contract, tort (including negligence), product liability, strict liability, trade practices or otherwise.

### **c. Maximum Liability**

- i. In the event of a breach of this Agreement by VPS, VPS will compensate Client by paying to Client a reasonable compensation as agreed by VPS and Client or in the event agreement cannot be reached, such amount as is determined by an Arbitrator from the National Institute of Arbitrators.
- ii. Notwithstanding anything else to the contrary contained in this Agreement, VPS's maximum aggregate liability to Client for any claim related to, or in connection with, this Agreement, whether in contract, tort or otherwise, shall be limited to all unused portions of the money received from Client to VPS.

### **d. Third Party Products and Vendors**

- i. VPS may provide Client access to Third Party Products through reseller relationships VPS has established with certain commercial vendors, including without limitation, Microsoft Corporation ("Third Party Vendors").
- ii. Client expressly acknowledges and agrees that use of Third Party Products is at Client's sole risk. Third Party Products are provided without representation or warranty of any kind from VPS, including without limitation, any implied warranty of merchantability, fitness for a particular purpose, lack of viruses, accuracy or completeness of responses or results, correspondence to description, or non-infringement of third party rights.
- iii. To the maximum extent permitted by applicable law, VPS will not be legally responsible for any damages, whether direct, indirect, or consequential, arising from the use of or inability to use any Third Party Product. This clause shall not affect the applicability of any manufacturer's warranty that may exist for that product or service.
- iv. Client agrees to observe the terms of any license and/or applicable end user subscriber agreement for any Third Party Products and that Client shall be fully liable to Third Party Vendors and VPS with respect to any improper use of such Third Party Products or violation of license agreements with them and/or applicable end user subscriber agreements.
- v. Without accepting any liability for third party software (including, but not limited to software or scripts written by Client and the Microsoft Operating System), in the event of software failure VPS will assist Client in fixing or rebuilding Services and Applications. VPS's assistance in this regard is considered a Supplemental Service, and the applicable rate for such services will apply.
- vi. This Agreement should not be read in contradiction with section 74 of the Trade Practices Act 1974 (Commonwealth) or the relevant sections of the Victorian legislation.

## 8. Indemnification

- a. Each Party agrees to indemnify the other Party against any losses, costs, expenses (including, but not limited to, reasonable legal fees), claims, damages, liabilities, penalties, actions, proceedings or judgments (collectively, "Losses") resulting from any claim, suit, action, or proceeding brought by any third party against the other Party or its affiliates related to or arising out of any infringement or misappropriation or alleged infringement or misappropriation of any Australian and corresponding International copyright, trade secret, patent, trademark, or other proprietary right related to any hardware or software utilised in connection with any of the Services (but excluding any infringement to which the other party contributed).
- b. Client further agrees to indemnify VPS with respect to any breach of this clause.
- c. Client agrees not to use or allow their website to be used for any illegal activity and agrees to fully indemnify VPS in respect to any liability, loss or damage suffered by VPS as a result of any such illegal activity, including but not limited to the payment of legal costs incurred by VPS and any penalties or fines that VPS is liable to pay as a result of such illegal activity.
- d. In addition to the foregoing, Client agrees to indemnify VPS for any violation of this Service Agreement, VPS's Acceptable Use Policy or the law, that results in loss to VPS or the bringing of any claim against VPS by any third-party. This means that if VPS is sued because of Client's or a customer of Client's activity, Client will pay any damages awarded against VPS, plus costs and reasonable legal fees.

## 9. Termination

### a. Termination Without Cause During Renewal Term

- i. This Agreement may be terminated by either party at end of the Initial Term or at the end of any subsequent Renewal Terms by giving a written notice to the other party with no less than thirty (30) days prior to the end of the term.
- ii. Regardless which Party terminates the Agreement pursuant to this clause, any and all payment obligations of Client under this Agreement for Service(s) provided up to and including the date of termination will immediately become due.

### b. Termination For Cause

- i. In the event of
  - (i) A Payment Default; or
  - (ii) Client's breach or failure to comply with any other obligation of Client under this Agreement including, but not limited to, its failure to comply with the AUP, VPS will provide Client with 14 days notice to rectify the breach. Following the expiry of 14 days, VPS will have the right, in its sole discretion, to suspend or terminate Client's Services immediately and without further notice. VPS's right to suspend or terminate Services is in addition to any other remedies available at law or in equity.
- ii. Client may terminate this Agreement if VPS breaches any material term or condition of this Agreement and fails to cure such breach within ten (10) days after receipt of written notice of same. If Client terminates the Agreement as a result of VPS's default, VPS will take reasonable steps to ensure Client's smooth transition to another service provider.
- iii. If this Agreement is terminated by VPS under this clause, all remaining monthly recurring and other charges specified on the applicable Services for the balance of the then current term shall immediately become due and payable.

### c. No Liability for Termination

- i. Neither party will be liable to the other for any proper termination or expiration of any Service or this Agreement in accordance with its terms.

### d. Survival

- i. The following provisions will survive any expiration or termination of the Agreement: Clauses 3.2, 3.4, 3.6, 6, 7, 8 and 9

### e. IP Addresses

- i. Upon expiration, cancellation or termination of this Agreement, Client shall relinquish any Internet protocol ("IP") numbers, addresses or address blocks assigned to Client by VPS or its network services supplier (but not the URL or top level domain connected therewith).
- ii. Client understands that IP addresses mapped to the top level domains that belong to Client could be shared with other clients of VPS. VPS reserves, in its sole discretion, the right to change or remove any and all such IP numbers, addresses or address blocks.

## **10. Miscellaneous Provisions**

### **a. Force Majeure**

- i. VPS shall not be deemed to be in default of any provision of this Agreement or be liable for any delay, failure of performance or interruption of the provision of Services to Customer resulting, directly or indirectly, from any unforeseen or force majeure event.

### **b. Jurisdiction**

- i. This Agreement is made under and will be governed by and construed in accordance with the laws of the State of Victoria, Australia (except that body of law controlling conflicts of law). All disputes arising out of or relating to this Agreement shall be submitted to the exclusive jurisdiction of the state and federal courts in Victoria, Australia, and each party irrevocably consents to such personal jurisdiction and waives all objections.

### **c. Severability**

- i. In the event that any provision of this Agreement is held by a tribunal of competent jurisdiction to be contrary to the law, the remaining provisions of this Agreement will remain in full force and effect. The waiver of any breach or default of this Agreement will not constitute a waiver of any subsequent breach or default, and will not act to amend or negate the rights of the waiving party.

### **d. Assignment or Transfer of Rights**

- i. Client may not sell, assign or transfer its rights or delegate its duties under this Agreement either in whole or in part without the prior written consent of VPS, and any attempted assignment or delegation without such consent will be void. VPS shall not unreasonably withhold such consent.
- ii. VPS may assign this Agreement in whole or part. VPS also may delegate the performance of certain Services to third parties, including VPS's wholly owned subsidiaries or Partners. VPS will endeavour to provide Client with fourteen (14) days written notice of such changes.

### **e. Notice**

- i. All notices, demands, requests or other communications required or permitted under this Agreement shall be deemed given when delivered personally, sent by facsimile upon confirmation, sent and received by return receipt email, or upon receipt of delivery of overnight mail.

### **f. Independence of Parties**

- i. VPS and Client are independent contractors and this Agreement will not establish any relationship of partnership, joint venture, employment, franchise or agency between VPS and Client. Neither VPS nor Client will have the power to bind the other or incur obligations on the other's behalf without the other's prior written consent, except as otherwise expressly provided herein.

### **g. Entire Agreement**

- i. This Agreement, including all documents incorporated herein by reference, constitutes the complete and exclusive agreement between the parties with respect to the subject matter hereof, and supersedes and replaces any and all prior or contemporaneous discussions, negotiations, understandings and agreements, written and oral, regarding such subject matter.
- ii. This Agreement may be executed in one or more counterparts, each of which will be deemed an original, but all of which together shall constitute one and the same instrument.
- iii. Once signed, any reproduction of this Agreement made by reliable means (e.g., photocopy, facsimile) is considered an original. Except as expressly provided in this Agreement, this Agreement may be changed only by a written document signed by authorised representatives of VPS and Client.

### **h. Authorised Representatives**

- i. Authorised representatives of Client and VPS have read the foregoing and all documents incorporated therein and, by executing the Service Agreement, agree and accept such terms effective as of the date indicated below the authorised signature for Client on the last page of this agreement.