

MESSAGEmanager on Premise Terms & Conditions

These terms and conditions apply to the sale of MESSAGEmanager.

1. Definitions

Unless the context requires otherwise, the following expressions have the following meanings:

- a) MESSAGEmanager Solutions means MESSAGEmanager Solutions Pty. Limited (ABN: 30 002 710 063).
- b) Customer means the party named in the Sales Proposal and Investment Schedule, or a party which enters an agreement with an authorised distributor or reseller of the Products to acquire any of the Products or Services and any related bodies corporate (as defined in the *Corporations Act 2001 (Cth)*) of that party as may be notified by the party to MESSAGEmanager Solutions, and only for so long as the related entity remains a related body corporate of the party.
- c) Customer Representative means the person nominated by the customer as the representative of the Customer in connection with the delivery of the Products and the provision of the Services (if applicable).
- d) Project Manager means the person appointed by MESSAGEmanager Solutions to manage the supply of the Products and the provision of the Services (if applicable).
- e) Custom Software means the VoiceXML scripts and other scripts, customised for the Customer's applications but does not include any MESSAGEmanager Software or Third Party Elements.
- f) MESSAGEmanager Software means the FSID and VoiceXML Services, FSID Gateway, FSID Applications Connector, Web Service, PBX Interface, Intelligent Messaging and Alerts, Services Monitor, Voice Mail, Desktop Applications and Management Tools and any other software or components described as MESSAGEmanager Software in the documentation and includes License Keys and third party elements.
- g) Third Party Elements means interpreters, grammars, vocabularies, drivers and any other hardware or software supplied by third party suppliers that MESSAGEmanager Solutions is permitted to license with the MESSAGEmanager Software.
- h) Services means any professional services provided by MESSAGEmanager Solutions' employees or third parties contracted to MESSAGEmanager Solutions and described in MESSAGEmanager Solutions' Sales Proposal and Investment Schedule or Price Book and Specification Sheets.
- i) Hardware means all gateways, interfaces, modems, media processing boards, Pentium and Xeon-branded PC hardware supplied by MESSAGEmanager Solutions.
- j) Products means MESSAGEmanager Software, Custom Software, Third Party Elements and Hardware.
- k) Acceptance Tests means the acceptance tests agreed by the parties.
- l) Acceptance Tests Start Date means the date on which the Customer commences the Acceptance Tests in accordance with clause 10b).

2. Price

- a) The price and description of the Products you may offer to purchase from MESSAGEmanager Solutions are described in the attached Sales Proposal and Investment Schedule or Price Book and Specification Sheets.
- b) Prices are fixed for a period of fourteen days from the date of the Proposal, after which time MESSAGEmanager Solutions reserves the right to vary the prices.
- c) Prices quoted exclude any applicable Goods and Services Tax.

3. Passage of Property

Property in any Hardware bought by the Customer, and the right to use MESSAGEmanager Software, Custom Software and Third Party elements licensed to the Customer, under these terms does not pass to the Customer until the price set out in the Sales Proposal and Investment Schedule or Price Book and Specification Sheets has been paid in full and cleared funds have been received by MESSAGEmanager Solutions.

MESSAGEmanager Solutions has the right to enter any premises used by the Customer to remove any items supplied by it for failure to pay the price in accordance with these terms.

This right shall be in addition to any other rights given or provided by legislation, regulation or common law.

4. Payment

Terms are strictly 30 days from the end of the month in which the invoice is received unless MESSAGEmanager Solutions otherwise agrees in writing.



5. Delivery

MESSAGEmanager Solutions will use reasonable endeavours to meet any timetable for delivery of Products and the provision of Services (if applicable) agreed by the Customer Representative and the Project Manager but it shall not be liable for any failure to comply with the timetable or loss suffered thereby. The risk in the Products shall pass to the Customer at the time of dispatch from MESSAGEmanager Solutions' store.

6. Warranty

- a) MESSAGEmanager Solutions warrants that:
 - i. The MESSAGEmanager Software and Custom Software does not infringe the intellectual property rights of any third party and MESSAGEmanager Solutions:
 - (A) shall indemnify the Customer and keep the Customer indemnified against all claims, actions, proceedings, costs and damages brought by or awarded to any third party for breach of intellectual property rights arising from Customer's use of the MESSAGEmanager Software and/or Custom Software in accordance with these terms and conditions;
 - (B) agrees to defend at its cost proceedings brought against the Customer so far as they are based on a claim that the MESSAGEmanager Software and/or Custom Software infringes the intellectual property rights of a third party; and
 - (C) shall pay all damages and costs finally awarded in those proceedings against the Customer in relation to the infringement. MESSAGEmanager Solutions will not indemnify the Customer under this clause 6a)i. unless the Customer notifies MESSAGEmanager Solutions in writing within 5 business days of becoming aware of the claim or proceedings and gives MESSAGEmanager Solutions full authority, information and assistance (at the Customer's expense) to defend it.
 - ii. The MESSAGEmanager Software, Custom Software, Third Party Elements and Hardware sold or provided to the Customer shall be free from defects in materials and workmanship for a period of ninety (90) days from the date of dispatch.
- b) The Customer's exclusive remedies for breach of the warranty under clause 6b) will be, at the option of MESSAGEmanager Solutions, either the replacement or repair the defective MESSAGEmanager Software, Custom Software, Third Party Elements or Hardware, or in cases of Services, the supply those Services again, or a refund of the amount paid by the Customer (if any) for the defective goods or services. Any claim for breach of warranty must be made within thirty (30) days after the expiry of the ninety (90) day warranty period by the Customer providing written notice of the claim to MESSAGEmanager Solutions together with a detailed explanation of the purported error.
- c) Any replacement MESSAGEmanager Software, Custom Software, Third Party Elements or Hardware supplied at the option of MESSAGEmanager Solutions under clause 6b) will be subject to the warranty set out in clause 6a)ii. for the remainder of the original warranty period or ninety (90) days, whichever is longer, and MESSAGEmanager Solutions will use reasonable efforts to provide the remedy within a reasonable time after receiving notice of the claim from the Customer under clause 6b).
- d) If MESSAGEmanager Solutions is required to attend a site for the performance of its obligations under this warranty and the site is located more than 50 kilometres away from MESSAGEmanager Solutions' offices, the Customer agrees to pay MESSAGEmanager Solutions' travel expenses.

7. Liability

- a) Nothing in these terms and conditions is or should be interpreted as an attempt to modify, limit or exclude terms or warranties which are imposed by statute and which cannot be modified, limited or excluded.
- b) MESSAGEmanager Solutions excludes to the extent permitted by law all other terms, conditions and warranties which might be implied into these terms and conditions, including but not limited to any warranties arising from a course of dealing, usage or trade practice.
- c) The Customer does not rely on any representation, warranty or other provision made by MESSAGEmanager Solutions or on its behalf which is not expressly stated in these terms and conditions.
- d) Subject to clauses 7a), 7e), 7f) and 7g), the maximum aggregate liability of MESSAGEmanager Solutions to the Customer in respect of any one claim or series of connected claims under these terms and conditions, whether arising in or for breach of contract, negligence or other tort, breach of statutory duty, breach of warranty, under an indemnity or otherwise during any 12 month period starting on the date of acceptance of these terms and conditions by Customer or on any anniversary of that date is limited in aggregate to the fees paid by the Customer to MESSAGEmanager Solutions under these terms and conditions during the relevant 12 month period.



- e) Subject to clause 7a), if MESSAGEmanager Solutions is liable to the Customer for a breach of a term, condition or warranty implied into these terms and conditions by Part V, Division 2 of the Trade Practices Act, that liability is limited, at MESSAGEmanager Solutions' option, to:
 - i. in the case of goods, any one or more of the following:
 - (A) the replacement of the goods or the supply of equivalent goods;
 - (B) the repair of the goods;
 - (C) the payment of the cost of replacing the goods or of acquiring equivalent goods;
 - (D) the payment of the cost of having the goods repaired; or
 - ii. in the case of services, any one or more of the following:
 - (A) the supplying of the services again; or
 - (B) the payment of the cost of having the services supplied again.
- f) To the full extent permitted by law, MESSAGEmanager Solutions is not liable to the Customer or any third party for any consequential or indirect losses, lost management or other staff time, any loss of actual or anticipated profit, savings, customers, contracts, revenue, interest or goodwill, or for any incidental or special loss, damage or expense, even if MESSAGEmanager Solutions has been advised of their possible existence and even if such loss damage or expense is caused by the negligence of MESSAGEmanager Solutions, its employees, agents or contractors.
- g) The liability of MESSAGEmanager Solutions for loss or damage sustained by the Customer will be reduced proportionately to the extent that:
 - i. such loss or damage has been caused by the Customer's failure to comply with the following:
 - (A) its obligations and responsibilities under these terms and conditions; or
 - (B) MESSAGEmanager Solutions' MESSAGEmanager End User License Agreement;
 - (C) those instructions in the specification sheets and/or documentation supplied with the items; or
 - (D) MESSAGEmanager Solutions' MESSAGEmanager prerequisites set out in MESSAGEmanager Prerequisites published at <<http://www.mmanager.com>>.
 - ii. the negligence of the Customer has contributed to such loss or damage.

8. Supply of Services and Custom Software

- a) MESSAGEmanager Solutions acknowledges and agrees that the customer may ask questions pertaining to function, performance and availability of services. MESSAGEmanager Solutions will only be bound by its written answers to questions posed by customers, where the written answers are given to the Customer by MESSAGEmanager Solutions':
 - iii. Business Development Manager prior to the Customer offering to purchase the Products described in the Sales Proposal and Investment Schedule or Price Book and Specification Sheets (Order Date);
 - iv. Project Manager on or after the Order Date.
- b) The Customer will, at all times, provide MESSAGEmanager Solutions with reasonable access to all such data, records, information and facilities to enable MESSAGEmanager Solutions to perform its obligations under these terms and conditions.
- c) The Customer acknowledges that its use of the MESSAGEmanager Software, the Custom Software and the Third Party Elements is conditional upon the Customer accepting the terms of the MESSAGEmanager End User License Agreement. Where the Services being provided by MESSAGEmanager Solutions under these terms includes installation of the MESSAGEmanager Software, Custom Software and/or Third Party Elements, the Customer authorises MESSAGEmanager Solutions' nominee who effects the installation to accept the terms of the MESSAGEmanager End User Licence Agreement on the Customer's behalf.
- d) The Products and Services may be used by the Customer's related bodies corporate (as defined in the *Corporations Act 2001 (Cth)*) subject to each of those entities using the Products and/or Services complying with the End User Licence Agreement. For the avoidance of doubt, the related bodies corporate of the Customer do not constitute a "third party" for the purposes of the End User Licence Agreement.

9. Confidentiality

The Sales Proposal and Investment Schedule or Price Book and Specification Sheets have been prepared by MESSAGEmanager Solutions in response to a request by the Customer. In order to achieve this purpose, either party may disclose information that is confidential and/or proprietary. Therefore, it is hereby agreed that:

- a) For a period of three (3) years from the date of the Sales Proposal and Investment Schedule or Price Book and Specification Sheets, the receiving party will consider as confidential, any information it receives from the disclosing party that:
 - i. is marked "Company Confidential", "Confidential" or "Proprietary Information"; or



- ii. (whether the information is disclosed in writing or orally) a reasonable person in the position of the recipient would consider the information to be confidential.
- b) Each party agrees to receive and maintain all Confidential Information in the strictest confidence using reasonable care and, except as provided herein, shall not use or disclose Confidential Information to third parties without written consent of the disclosing party.
- c) Upon request, the receiving party shall immediately return all copies of any Confidential Information including, but not limited to, drawings, documents, software and media without retaining any copies, notes or extracts.
- d) Neither party shall have any obligations with respect to information which:
 - i. is already known to the receiving party or is publicly available at the time of disclosure;
 - ii. is disclosed to the receiving party by a third party (who is not in breach of an obligation of confidentiality);
 - iii. becomes publicly available after disclosure through no act of the receiving party; or
 - iv. is developed by the receiving party independently without reference to any material received from the other party; or
 - v. is required to be disclosed by law.

10. Acceptance Testing of System

- a) If MESSAGEmanager Solutions has agreed to supply Custom Software and Services to the Customer, then this clause 10 shall apply.
- b) Within 5 days of MESSAGEmanager Solutions notifying the Customer in writing that installation of the MESSAGEmanager Software, Custom Software, Third Party Elements and Hardware (if applicable) has been completed, the Customer must test the system in accordance with the Acceptance Tests.
- c) The Customer must notify MESSAGEmanager Solutions in writing within 7 days of the Acceptance Test Start Date whether:
 - i. the Customer has satisfactorily completed the Acceptance Tests and accepts the system; or
 - ii. the Acceptance Tests have identified defects in the system.
- d) If the Customer notifies MESSAGEmanager Solutions under clause 10c)ii. that there are defects in the system, MESSAGEmanager Solutions must remedy the defects until such time as the Customer notifies MESSAGEmanager Solutions in writing that it accepts the system (acting reasonably) which notice must be given within 2 days of the satisfactory completion of the Acceptance Tests.
- e) If the Customer fails to notify MESSAGEmanager Solutions in accordance with clause 10c) it will be deemed to have accepted the system.

11. Taxes

- a) Subject to clause 12 of these terms and conditions, MESSAGEmanager Solutions will be solely liable for payment of all taxes (including but not limited to corporate taxes, personal income tax, fringe benefits tax, payroll tax, stamp duty, withholding tax, PAYG, turnover tax and excise and import duties, and any subcontractor's taxes) which may be imposed in relation to the MESSAGEmanager Software, Custom Software, Services, or the payments made under these terms and conditions.
- b) If the Customer is required in its opinion to withhold any amount in respect of tax from a payment to be made to MESSAGEmanager Solutions under these terms and conditions, it is entitled to do so and such withholding and payment to the relevant taxing authority will be a good discharge of its obligation to pay the relevant amount to MESSAGEmanager Solutions. In the event that the Customer pays an amount to MESSAGEmanager Solutions without withholding an amount in respect of tax, the Customer will be indemnified by MESSAGEmanager Solutions for any loss suffered by it as a result of failing to withhold.

12. GST

Notwithstanding any other provision in these terms and conditions, if the Supplier is or becomes liable to pay **GST** in connection with any Supply:

- a) the Recipient must pay to the Supplier, in addition to the Agreement Price, an additional amount equal to the amount of that **GST**;
- b) the Recipient must pay the Agreement Price plus the additional amount on account of **GST** within 30 days of the end of the month in which a **tax invoice** is received from the Supplier for that Supply or as otherwise provided in these terms and conditions;
- c) if the **GST** payable in relation to a Supply made under or in connection with these terms and conditions varies from the additional amount paid or payable by the Recipient under clause 12a) such that a further amount of **GST** is payable in relation to the Supply or a refund or credit of **GST** is obtained in relation to the Supply, then the Supplier will provide a corresponding refund or credit to, or will be entitled to receive the amount of that variation from, the Recipient. Any payment, credit or refund under this paragraph is deemed to be a payment, credit or refund of the additional amount payable under clause 12a). If an **adjustment event** occurs in relation to a Supply, the Supplier must issue an **adjustment note** to the Recipient in relation to that Supply within 14 days after becoming aware of the adjustment;
- d) where a party reimburses the other party for an expense or other amount incurred in connection with any wholly or partly **creditable acquisition** or any wholly or partly **creditable importation** made by that other party, the amount reimbursed shall be net of any **input tax credit** claimable in respect of that acquisition or importation (as the case may be);



In this clause, all italicised and emboldened terms, have the same meaning as in the *A New Tax System (Goods and Services Tax) Act 1999* and in the **GST law**.

In addition:

"Agreement Price" means the **consideration** to be provided under these terms and conditions for the Supply (other than under this clause);

"Recipient" means the party that receives the Supply from the Supplier;

"Supplier" means the party that provides the Supply to the Recipient and includes the **representative member** of the **GST Group** if the Supplier is a member of a **GST Group**;

"Supply" means any **supply** to the Recipient by the Supplier pursuant to these terms and conditions. However, if the **GST law** treats part of a **supply** as a separate **supply** for the purpose of determining whether **GST** is payable on that part of the **supply** or for the purpose of determining the tax period to which that part of the **supply** will be attributable, such part of the **supply** will be treated as a separate **supply** for the purposes of this clause.

13. Dispute resolution

- a) A party must not start court proceedings about a dispute arising out of these terms and conditions unless it first complies with this clause, except where a party seeks urgent injunctive relief.
- b) If a dispute arises (including a breach or an alleged breach) under these terms and conditions then the party disputing the issue must give the other party written notice of the nature and details of the dispute. If the dispute is not resolved at an operational level or is sufficiently serious that it cannot be resolved at the operational level, the senior management representatives of each of the parties will endeavour to agree upon a resolution. The parties acknowledge that it is in their respective interests to resolve disputes at this level.

14. General

- a) Inconsistency
To the extent of any inconsistency between these terms and conditions and attached or associated documents including the End User Licence Agreement, these terms and conditions will prevail.
- b) Amendment
These terms and conditions may not be amended except by a document in writing signed by the parties.
- c) Applicable law
These terms and conditions are governed by and will be construed in accordance with the laws of New South Wales, Australia and the parties agree to submit to the exclusive jurisdiction of the courts of that State.
- d) Severability
If any provision of these terms and conditions are held invalid, unenforceable or illegal for any reason, these terms and conditions will remain otherwise in full force and effect apart from the severed provision which will be deemed to be deleted.
- e) Waiver
No delay, neglect or forbearance on the part of either party in enforcing against the other party any term or condition will either be or be deemed to be a waiver or any way prejudice any right of that party under these terms and conditions. No right, power or remedy in these terms and conditions conferred on or reserved for either party is exclusive of any other right, power or remedy available to that party.
- f) Force Majeure
If either the Customer or MESSAGEmanager Solutions is prevented or impeded from performing its obligations under these terms and conditions due to any event or circumstances beyond its reasonable control, it must promptly give notice in writing to the other party advising of the nature of the force majeure and the extent and likely duration of it, whereupon the obligations of that party will be suspended for so long as the force majeure may continue.

