

MESSAGEMANAGER SOLUTIONS TERMS & CONDITIONS OF SALE

1. Definitions

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

- a) **MESSAGEmanager Solutions** means MESSAGEmanager Solutions Pty. Ltd and MESSAGEmanager Solutions Limited.
- b) **Customer** means entity named in the attached Sales Proposal and Investment Schedule or who enters an agreement with an authorised distributor or reseller of the Products to acquire any of the Products or Services.
- 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 core MESSAGEmanager Software and includes MESSAGEmanager client applications, License Keys, third party executables, middleware such as Gateways and Fax, Telex, SMS, Information Delivery and VoiceXML Servers.
- 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 to be provided by MESSAGEmanager Solutions' employees or third parties contracted to MESSAGEmanager Solutions and described in the attached Sales Proposal and Investment Schedule or Price Book and Specification Sheets (as applicable).
- i) **Hardware** means all 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 9(b).

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. Prices quoted exclude any applicable duty and/or Goods and Services Tax or local taxes.

3. Passage of Property

Property in all MESSAGEmanager Software, Custom Software, Third Party elements and Hardware supplied by MESSAGEmanager Solutions under these terms shall not pass to the Customer until the price set out in the attached 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 date of the invoice 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 6(a)(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 90 days from the date of dispatch.

b) MESSAGEmanager Solutions' total liability (excluding 6(a)(i)) shall in all circumstances, whether arising out of its negligence or otherwise, be limited at the option of MESSAGEmanager Solutions to one of the following for any breach of warranty:

- i. the replacement for the defective Hardware or Third Party Elements or part thereof, or
- ii. the repair of the defective Hardware or Third Party Elements or part thereof, or
- iii. the repair or replacement of the MESSAGEmanager Software or Custom Software, or
- iv. in cases of Services, supplying those Services again, or
- v. return of the amount paid (if any).

c) The Customer will receive the remedy elected by MESSAGEmanager Solutions without charge, except that the Customer is responsible for any expenses incurred by MESSAGEmanager Solutions including without limitation any cost of travel incurred in accordance with clause 6(f) and any costs of shipping the Products back to MESSAGEmanager Solutions.

d) To the extent permitted by law, MESSAGEmanager Solutions only gives those warranties or conditions which may not be excluded by law and except as stated in these terms and conditions, MESSAGEmanager Solutions will not be liable to the Customer for any loss or damage including special, indirect or consequential damages or loss of profits arising out of:

- i. a breach by the Customer of these terms and conditions;
- ii. an accident, fire, abuse or misuse, misapplication, abnormal use, water damage or a virus or modification by any person other than MESSAGEmanager Solutions' employees or authorised subcontractors;
- iii. a failure of the Customer to comply with the following:-
 - A. MESSAGEmanager Solutions' MESSAGEmanager End User License Agreement;
 - B. Those instructions in the specification sheets and/or documentation supplied with the items; and

- C. MESSAGEmanager Solutions MESSAGEmanager prerequisites set out in MESSAGEmanager Prerequisites published at <<http://www.mmanager.com>>.
- e) Any replacement MESSAGEmanager Software, Custom Software, Third Party Elements or Hardware supplied at the option of MESSAGEmanager Solutions under clause 6(b) will be subject to the warranty set out in clause 6(a)(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 of the Customer's compliance with the procedure set out in this clause 6.
- f) 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. 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':
 - i. Business Development Manager prior to the Customer offering to purchase the Products described in the attached Sales Proposal and Investment Schedule or Price Book and Specification Sheets (Order Date);
 - ii. 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.

8. Confidentiality

The attached 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 it is confidential and/or proprietary. Therefore, it is hereby agreed that:

- a) For a period of three (3) years from the date of the attached 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 at 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.

9. Acceptance Testing of System

- (a) If MESSAGEmanager Solutions has agreed to supply Custom Software and Services to the Customer, then this clause 9 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 9(c)(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 9(c) it will be deemed to have accepted the system.

10. 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 the 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.