

# MESSAGEmanager on Demand Terms and Conditions

These terms and conditions apply to the access and use of the MMOD services by each Customer.

## 1 Definitions and Interpretation

1.1 In these terms and conditions the following definitions apply:

**Business Day** means any day other than a Saturday, Sunday or declared public holiday in New South Wales.

**Confidential Information** of a party is information of a party or its customers which the party identifies as confidential or which would reasonably be regarded as confidential and includes without limitation, information relating to the party's Intellectual Property Rights, organisational structure, financial position, personnel, policies and business strategies.

**Customer** means organisation that engages MESSAGEmanager Solutions to provide the MMOD services.

**EULA** means the end user licence agreement for the Gateway Software.

**Gateway Software** means the software interface to MMOD services.

**Government Agency** means any governmental, semi-governmental, administrative, fiscal, judicial or quasi-judicial body, department, commission, authority, tribunal, agency or entity.

**GST** means the tax imposed or assessed by the GST Act and its related legislation and includes any similar or substitute impost introduced in the future.

**GST Act** means the *A New Tax System (Goods and Services Tax) Act 1999* (Cwth).

**Intellectual Property Rights** means all intellectual property rights including current and future registered and unregistered rights in respect of copyright, designs, trade marks, know-how, confidential information, patents, inventions and discoveries and all other rights (including moral rights) resulting from intellectual activity in the industrial, scientific, literary or artistic fields.

**Job** means a batch of Messages formatted and forwarded by Customer to the MMOD services for delivery to Recipients.

**Managed Service Fee** means the monthly service fee specified in the Proposal.

**Marketing Standard** means any advertising or telemarketing standard that applies to the content included in a Message or the delivery of a Message, issued (and as varied) by any relevant industry body or any Governmental Agency.

**Messages** means the Customer's letters, faxes, e-mails, SMS text messages and other business documents as formatted and sent by Customer to a Recipient using the MMOD services.

**MESSAGEmanager Solutions** means MESSAGEmanager Solutions Pty Limited (ABN 30 002 710 063) of Level 8, 9 Help Street, Chatswood NSW 2067, Australia.

**MMOD e-mail** means the *on Demand* e-mail service more accurately described on the Website.

**MMOD fax** means the *on Demand* fax service more accurately described on the Website.

**MMOD post** means the *on Demand* print and post service more accurately described on the Website.

**MMOD services** means MESSAGEmanager *on Demand* more accurately described on the Website, which Customer wishes to use and includes *on Demand* e-mail, fax, post and sms.

**MMOD sms** means the *on Demand* SMS service more accurately described on the Website.

**Proposal** means the proposal given by MESSAGEmanager Solutions to a prospective Customer in connection with the provision of the MMOD services to that prospective Customer, and upon which the prospective Customer offers to engage MESSAGEmanager

Solutions. A Proposal indicates which MMOD services the prospective Customer wishes to receive and the charges associated with delivery of each MMOD service.

**Service Level Agreement** means the MESSAGEmanager Solutions service level agreement for the MMOD services as notified by MESSAGEmanager Solutions to Customer.

**Start Date** means the date from which the MMOD services will be made available to Customer, as set out in the Proposal or otherwise agreed between the parties.

**Third Party Content** means the content owned by a third party that is validly licensed and supplied for inclusion in the Messages.

**Usage Fee** means the usage fee specified in the Proposal.

**Website** means the MESSAGEmanager Solutions' website currently located at URL <http://www.mmanager.com>.

1.2 In the interpretation of this Agreement, the following provisions apply unless the context otherwise requires:

- (a) the singular includes the plural and vice versa;
- (b) a reference to any legislation or legislative provision includes any statutory modification or re-enactment of, or legislative provision substituted for, and any subordinate legislation issued under, that legislation or legislative provision;
- (c) a reference to an individual, person or organisation includes a corporation, partnership, joint venture, association, authority, trust, state or Government Agency and vice versa;
- (d) a reference to any gender includes all genders;
- (e) a reference to a recital, clause, schedule, annexure or exhibit is to a recital, clause, schedule, annexure or exhibit of or to this Agreement;
- (f) a reference to any party to this Agreement or any other document or arrangement includes that party's executors, administrators, substitutes, successors and permitted assigns;
- (g) headings are for ease of reference only and do not affect interpretation; and
- (h) any indemnity given by a party under this Agreement is not the exclusive remedy of the party holding the benefit of the indemnity, which party may at its option, in addition or in the alternative, pursue remedies at common law, in equity, under statute or other remedies under this Agreement.

## **2 Proposals and engagement**

2.1 A Proposal submitted by MESSAGEmanager Solutions to Customer is an invitation to Customer to engage MESSAGEmanager Solutions to provide the MMOD services. MESSAGEmanager Solutions issues each Proposal based on information supplied by Customer. If the information supplied by Customer is not correct, Customer may engage MESSAGEmanager Solutions to provide services that are not suitable for Customer's purpose.

2.2 If Customer offers to engage MESSAGEmanager Solutions to provide the MMOD services based on a Proposal, then Customer's offer is subject to these terms and conditions.

2.3 MESSAGEmanager Solutions is not obliged to accept an engagement from Customer. If Customer offers to engage MESSAGEmanager Solutions then the engagement becomes binding from the moment MESSAGEmanager Solutions indicates the engagement has been accepted, either by notice or by providing the MMOD services to Customer.

## **3 Application of these terms and conditions**

3.1 These terms and conditions apply to supply of the MMOD services to Customer, unless otherwise clearly agreed in writing signed by an authorised officer of MESSAGEmanager Solutions and Customer.

3.2 If there is any conflict between these terms and conditions and any special conditions referred to in a Proposal, these terms and conditions prevail.

#### **4 Term**

- 4.1 MESSAGEmanager Solutions' engagement to provide the MMOD services will start from the Start Date and will continue for an initial term of twelve (12) months. The engagement will automatically extend for successive periods of twelve (12) months, unless either party gives the other notice of termination at least sixty (60) days before the next anniversary of the Start Date.

#### **5 Service**

- 5.1 Subject to Customer's compliance with these terms and conditions, MESSAGEmanager Solutions grants Customer a limited non exclusive right to access and use the MMOD services.
- 5.2 To use the MMOD services, Customer must accept the terms of the EULA for the Gateway Software provided by MESSAGEmanager Solutions.
- 5.3 MESSAGEmanager Solutions will provide Customer with a password and account designation, which will enable Customer to access and use the MMOD services.
- 5.4 Customer agrees that:
- (a) Customer is responsible for maintaining the confidentiality of its password and account;
  - (b) Customer is responsible for all activities that occur under its password and account;
  - (c) Customer must immediately notify MESSAGEmanager Solutions of any unauthorised use of Customer's password and account or any other breach of security;
  - (d) MESSAGEmanager Solutions or its agents may require access to Customer's account to respond to service or technical issues.

#### **6 Messages**

- 6.1 Customer is responsible for the content of each Message and must ensure that each Message:
- (a) does not breach any local or foreign law, regulation or Marketing Standard, including without limitation, any laws relating to spam, privacy and direct marketing;
  - (b) does not violate or infringe upon the rights (including Intellectual Property Rights) of any other person;
  - (c) is not unlawful, threatening, abusive, defamatory, obscene, vulgar, profane or indecent or sexual or pornographic in nature;
  - (d) does not vilify, insult or humiliate any person on the basis of race, religion, ethnicity, gender, age, sexual orientation or any physical or mental disability;
  - (e) does not contain a virus or other harmful component;
  - (f) is not false, misleading or deceptive or likely to mislead or deceive; and
  - (g) complies with any guidelines MESSAGEmanager Solutions may publish on the Website.
- 6.2 Customer warrants that all right, title and interest in the content of each Message sent to Recipients using the MMOD services is owned by Customer or lawfully licensed to Customer.
- 6.3 To the extent necessary, Customer grants MESSAGEmanager Solutions the right (including the right to sublicense) to reproduce, distribute or communicate to the public each Message in order to provide the MMOD services.
- 6.4 Customer is responsible for sourcing and securing necessary rights in any Third Party Content that is included in any Message and for the payment of royalties (if any) for any use of that Third Party Content.
- 6.5 Customer must adopt reasonable measures to limit its exposure to the potential loss and damage of its Messages, including examination and confirmation of Message quality and format before Customer's use of the MMOD services, provision for the identification and correction of errors and omissions, preparation and storage of backup data, replacement of lost or damaged data or media, and reconstruction of data.

## **7 Restrictions**

- 7.1 Customer must only use the MMOD services for lawful purposes, in accordance with these terms and conditions, any directions given by MESSAGEmanager Solutions and with all local and foreign laws and regulations.
- 7.2 Customer must not, nor cause or permit a third party to:
- (a) use the MMOD services in combination with any other goods and services not approved by MESSAGEmanager Solutions;
  - (b) use the MMOD services in a manner or for a purpose which is improper, immoral or fraudulent, which infringes any person's Intellectual Property Rights, or which restricts or interferes with the provision of the MMOD services by MESSAGEmanager Solutions to any other Customers or users;
  - (c) reverse engineer, reverse assemble or reverse compile all or part of the MMOD services or Gateway Software or both;
  - (d) enter into any transaction relating to the MMOD services with a party other than MESSAGEmanager Solutions, without the written consent of MESSAGEmanager Solutions; or
  - (e) attempt to gain unauthorised access to the MMOD services, computer systems or networks connected to the MMOD services, through hacking, password mining or any other means.

## **8 Use of the MMOD services**

- 8.1 Customer is responsible for Messages while in transit to the MMOD services. Each Job must be received by the MMOD services in its entirety and properly formatted.
- 8.2 MESSAGEmanager Solutions may refuse to process, and may return to Customer, any Messages that in MESSAGEmanager Solutions' opinion:
- (a) are not of a quality or condition suitable for processing based on MESSAGEmanager Solutions' applicable standards, specifications and procedures; or
  - (b) are otherwise not in proper machine-readable form. Customer is responsible for correcting rejected Messages and resubmitting them to MESSAGEmanager Solutions for transmission.
- 8.3 MMOD fax will automatically attempt to resend Messages that are not successfully sent the first time, using a resend algorithm developed by MESSAGEmanager Solutions. If the last attempt fails, the Message will be considered undeliverable and Customer will be notified of non-delivery.
- 8.4 Customer must abide by all relevant anti-spam laws and regulations when using MMOD e-mail or MMOD sms. If Customer is an MMOD e-mail or MMOD sms user, Customer agrees to include an unsubscribe mechanism and a valid physical address of the sender in each Message sent using MMOD e-mail or MMOD sms.
- 8.5 Customer must obtain prior consent from the Recipient for any Message sent using MMOD e-mail or MMOD sms. Each Recipient must be able to promptly withdraw any consent previously given.
- 8.6 Customer releases MESSAGEmanager Solutions from all liability under the anti-spam laws and regulations in connection with Customer's use of the MMOD services.
- 8.7 If the delivery of Messages using the MMOD services is delayed due to reasons other than Customer's request or fault, MESSAGEmanager Solutions will notify Customer's nominated technical contact of the nature of the delay and MESSAGEmanager Solutions' planned course of action.
- 8.8 MESSAGEmanager Solutions has no obligation to process and send Customer's Messages to Recipients using the MMOD services if Customer has failed to pay any overdue MESSAGEmanager Solutions invoice.
- 8.9 Customer must make its own precautions to ensure that the process which it uses to access the MMOD services does not expose it to the risk of viruses, malicious computer code or other forms of interference which may damage Customer's computer system.

- 8.10 MESSAGEmanager Solutions does not accept responsibility for any interference or damage to Customer's computer system which arises in connection with Customer's use of the MMOD services.

## **9 Maintenance and Support**

- 9.1 Customer must notify MESSAGEmanager Solutions promptly of all defects or malfunctions in the MMOD services or Gateway Software which adversely affects Customer's use of the MMOD services.
- 9.2 The support roles and responsibilities between the parties are set out in the Service Level Agreement which forms part of these terms and conditions. The Service Level Agreement will not change except as agreed by the parties in writing.
- 9.3 The technical support described in the Service Level Agreement is included with the payment of the Managed Service Fee.
- 9.4 Non-compliance with the Service Level Agreement does not give rise to a claim for damages nor to a right to terminate the engagement.
- 9.5 MESSAGEmanager Solutions may temporarily limit or suspend the availability of all or part of the MMOD services if it is necessary for reasons of public safety, security or maintenance of the MMOD services, interoperability of services, data protection or to perform work that is necessary for operational or technical reasons.

## **10 Fees**

- 10.1 Customer must pay the Managed Service Fee to MESSAGEmanager Solutions for the provision of the MMOD services monthly in advance. MESSAGEmanager Solutions will issue an invoice for the Managed Service Fee at the beginning of each month.
- 10.2 Customer must also pay the Usage Fee to MESSAGEmanager Solutions monthly in arrears. MESSAGEmanager Solutions will issue an invoice for the Usage Fee after the end of each month.
- 10.3 Usage fees are based on the destination number and per page rates for fax messages sent and received.
- (a) For outgoing facsimiles fees are calculated on the basis that each page takes 60 seconds or less to transmit. Each page that takes more than 60 seconds to transmit will incur a fee at a rate of 1 page per 60 seconds where increments of less than 60 seconds shall be rounded up to the next minute. For example, if one page takes 130 seconds to transmit, then the Usage Fee shall be 3 pages (2 times 60 seconds for two pages, and the additional 10 seconds would signify a third page).
  - (b) This applies both when faxes are successfully sent and when they have failed but involved telecommunications transmission time (for example a fax can fail but incur telecommunication transmission time when the fax machine runs out of paper).
  - (c) Received facsimiles incur a per page and monthly Direct Indian Number fee.
- 10.4 Invoices are payable within thirty (30) days after the date of invoice.
- 10.5 If any invoice is disputed in good faith by Customer, Customer must give written notice to MESSAGEmanager Solutions of the dispute, which must include the reasons for the dispute (**Dispute Notice**), within 10 Business Days after receiving the invoice. If Customer has issued a Dispute Notice by the due date for payment, Customer may withhold only those amounts that are directly related to disputed elements of the invoice. The parties will use reasonable endeavours to resolve any invoice dispute as quickly and efficiently as possible, and:
- (a) where the dispute is determined to be unfounded by both parties, Customer must pay to MESSAGEmanager Solutions in full the amount withheld within seven (7) days of such determination; or
  - (b) where the dispute is determined to be founded by both parties and Customer has already paid the disputed amount, MESSAGEmanager Solutions must pay to Customer in full the relevant amount within seven (7) days of such determination.

## **11 Late payment**

- 11.1 If Customer does not pay the Managed Service Fee, Usage Fee or any other amount owing to MESSAGEmanager Solutions by the due date, MESSAGEmanager Solutions may do one or more of the following:
- (a) charge and require Customer to pay interest on any overdue amount calculated daily, from its due date until the date of payment, at a rate of 5% above the cash rate target specified by the Reserve Bank of Australia on each day that the payment is due;
  - (b) suspend supply of the MMOD services to Customer; and
  - (c) terminate this Agreement under clause 20.

## **12 Taxes**

- 12.1 Customer must reimburse MESSAGEmanager Solutions for any sales, GST, value-added, transfer, privilege, excise or other taxes and all duties, whether international, national, state or local which are levied or imposed by reason of the supply of the MMOD services to Customer.

## **13 Intellectual Property**

- 13.1 Except where expressly stated otherwise, all ideas, concepts, know-how, data processing techniques, data compilations, software, documentation, trade marks, trade secrets, copyright and inventions comprising the MMOD services and Gateway Software are owned by MESSAGEmanager Solutions or its licensors.
- 13.2 Customer must not claim any right or title to use the Intellectual Property Rights in the MMOD services and Gateway Software except for use permitted under these terms and conditions. Customer must not dispute or challenge the entitlement of MESSAGEmanager Solutions to the Intellectual Property Rights in the MMOD services and Gateway Software or join any third parties to challenge or contest the validity of those Intellectual Property Rights.
- 13.3 Customer agrees to notify MESSAGEmanager Solutions promptly of any infringement, or suspected or threatened infringement, of the Intellectual Property Rights in the MMOD services and Gateway Software.

## **14 Confidentiality**

- 14.1 Each party must treat, and ensure that its employees, contractors and agents treat, as confidential the Confidential Information of the other.
- 14.2 The party who receives Confidential Information must not without the written consent of the other party:
- (a) use it except in performing its obligations under these terms and conditions; or
  - (b) disclose it to any person except its approved employees and subcontractors and then only to those who need to know the same and who agree to be bound by these obligations of confidentiality.
- 14.3 The exceptions are where:
- (a) disclosure is required by law, stock exchange, judicial or parliamentary body or Government Agency;
  - (b) Confidential Information is in the public domain through no fault or action of the recipient, its employees, contractors or agents; or
  - (c) Confidential Information was received by the recipient on a non-confidential basis from a third party who is not prohibited from disclosing it.
- 14.4 If a party breaches, or threatens to breach, its confidentiality obligations under this clause, an award of damages may not be adequate compensation and the other party will be entitled to an injunction restraining the party threatening to breach, or breaching, this clause without showing or proving that it has sustained any actual damage.

## **15 Privacy**

- 15.1 The parties will comply with the privacy laws of Australia in respect of all personal information collected or disclosed by either party during the performance of their respective obligations under these terms and conditions.

15.2 Customer warrants that all data and information provided by it, including but not limited to personal information, in connection with its use of the MMOD services is accurate and has been collected and used in compliance with all relevant privacy laws of Australia, including the *Privacy Act 1988* (Cwth).

## **16 Force Majeure**

16.1 Customer acknowledges that the supply of the MMOD services by MESSAGEmanager Solutions is dependent on a number of factors outside MESSAGEmanager Solutions' control. For example, the communication connections between Customer, the MMOD service and Recipients are the property and responsibility of third parties. Those connections are subject to suspension without notice due to events beyond MESSAGEmanager Solutions' control.

16.2 Except for any payment obligations, neither party is liable for any delay or failure to perform any of its obligations under these terms and conditions to the extent that the delay or failure is caused by an event beyond that party's reasonable control. Those events include but are not limited to war, labour disputes, unavailability or interference with communication networks, equipment failure or acts of government.

## **17 Warranties**

17.1 Customer represents and warrants that:

- (a) it has the power and authority to enter into and perform its obligations under these terms and conditions;
- (b) it has taken all necessary steps, including any corporate action necessary if it is a corporation, to authorise its entry into and performance of all of its obligations under these terms and conditions and to carry out the transactions contemplated under them.

## **18 Limitation of liability**

18.1 Terms conditions and warranties implied by law which cannot be excluded, restricted or modified apply to MESSAGEmanager Solutions' engagement to provide the MMOD services under these terms and conditions to the extent required by that law.

18.2 MESSAGEmanager Solutions excludes to the extent permitted by law all other terms, conditions and warranties which might be implied into these terms and conditions.

18.3 To the extent permitted by law, MESSAGEmanager Solutions' sole liability for breach of contract, breach of statutory duty, negligence, or other tort is limited at its option to:

- (a) the supplying of the MMOD services again; or
- (b) the payment of the cost of having the MMOD services supplied again.

18.4 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.

18.5 MESSAGEmanager Solutions is not liable for any damage, economic loss, loss of revenue, loss of saving on overheads, loss arising from business interruption, loss of goodwill or loss of profits whether direct, indirect, general, special or consequential from any cause except as set out in this clause 18.

## **19 Suspension**

19.1 In addition to clause 9.5, MESSAGEmanager Solutions may without notice suspend Customer's access to the MMOD services if:

- (a) the Customer breaches these terms and conditions; or
- (b) MESSAGEmanager Solutions reasonably believes that something on the Customer's side of its connection with the MMOD services will cause technical incapacity to the MMOD services which will continue unless access or use is suspended.

19.2 Customer may not object to any delay in restoring access to the MMOD services when a suspension is lifted. MESSAGEmanager Solutions will act promptly to restore access when it is satisfied that the reason for suspension has been removed.

## **20 Termination**

- 20.1 A party may terminate the engagement of MESSAGEmanager Solutions under these terms and conditions immediately by a written notice if the other party breaches these terms and conditions in a material way and (if the breach is capable of remedy) fails to remedy it within thirty (30) days after receipt of a written notice to do so. The notice must give particulars of the breach. A breach is considered capable of remedy if it can be remedied in all respects other than as to the original time of performance (if time for performance is not essential).
- 20.2 A party is deemed to breach these terms and conditions in a material way if:
- (a) the party suspends payment of its debts or is insolvent;
  - (b) a receiver or a manager or a receiver and manager is appointed for the whole or part of the party's undertaking or assets;
  - (c) a mortgagee or a party with similar rights takes possession of the whole or part of the party's undertaking or assets or appoints an agent to exercise its rights;
  - (d) the party is subject to an administration order or makes any voluntary arrangement with its creditors;
  - (e) the party goes into liquidation (except for an amalgamation or reconstruction where the new company takes over the party's responsibilities); or
  - (f) the party ceases to carry on business.
- 20.3 Customer is deemed to breach these terms and conditions in a material way if Customer is in default under another agreement with MESSAGEmanager Solutions.

## **21 Effect of termination**

- 21.1 Termination does not affect any accrued rights or liabilities of either party nor does it affect any provision which is expressly or by implication intended to operate after termination.
- 21.2 On termination:
- (a) Customer must immediately stop accessing and using the MMOD services;
  - (b) Customer must promptly delete or destroy all copies of the Gateway Software from all computers within its control;
  - (c) Customer remains liable to pay MESSAGEmanager Solutions all outstanding Monthly Service Fees, Usage Fees or other amounts owing; and
  - (d) MESSAGEmanager Solutions is entitled to recover from Customer all money due and payable for the MMOD services provided whether or not invoiced at the date of termination.

## **22 Subcontracting**

- 22.1 MESSAGEmanager Solutions may appoint agents and sub-contractors to carry out any of its obligations under these terms and conditions without referring to Customer.

## **23 Assignment**

- 23.1 The engagement of MESSAGEmanager Solutions to provide the MMOD services may not be assigned by Customer without the prior written consent of MESSAGEmanager Solutions, which may be withheld at the absolute discretion of MESSAGEmanager Solutions.
- 23.2 MESSAGEmanager Solutions may, at any time, novate, assign or transfer part or all of its rights and obligations under its engagement to provide the MMOD services to any third party and to the extent required Customer consents to the novation, assignment or transfer. Customer agrees to enter into a novation, assignment or transfer agreement on terms specified by MESSAGEmanager Solutions.

## **24 General**

- 24.1 Nothing in these terms and conditions creates a partnership, or the relationship of principal and agent, between the parties.
- 24.2 These terms and conditions, the EULA, the Service Level Agreement and the Proposal contain the entire agreement between MESSAGEmanager Solutions and Customer with

respect to the supply of the MMOD services and may not be modified except by an agreement in writing signed by the duly authorised representatives of the parties.

- 24.3 If any provision of these terms and conditions is found to be unlawful, invalid or unenforceable for any reason, these terms and conditions will remain in force apart from that provision which is deemed to be deleted.
- 24.4 Each party must do everything, and sign and deliver all documents, reasonably required by the other to give full effect to these terms and conditions.

## **25 Notices**

- 25.1 Notices must be in writing. A notice may be delivered to a party by hand, by pre-paid ordinary post, by fax or by e-mail to that party's address shown in Proposal or to the alternate address notified to the party giving the notice.
- 25.2 A notice will be taken to be duly given and received -
- (a) if delivered by hand, when delivered;
  - (b) if delivered by pre-paid ordinary post, on the second business day after posting;
  - (c) if delivered by fax, upon completion of transmission and receipt by the sender of the appropriate transmission report; and
  - (d) if delivered by e-mail, as soon as the sender receives confirmation from the intended recipient that it has received the e-mail or as soon as the sender receives a "read receipt" from the recipient's e-mail server confirming that the e-mail has been read.

## **26 Governing Law**

- 26.1 These terms and conditions are governed by the laws of the state of New South Wales, Australia and the parties submit to the non-exclusive jurisdiction of the courts of New South Wales, Australia.