Managed Hosting Services Agreement

Parties:

1. **Service Works Global Proprietary Limited** incorporated and registered in the Australia with ABN 11 108 665 818, whose registered office is situated at Suite 2.12, 365 Little Collins Street, Melbourne, Victoria, 3000 ("the Supplier"); and
2. **The Customer** whose details are set out in the Customer Order ("the Customer") and in the Order.

Background

The Supplier has agreed to provide the Services to the Customer and to procure the Managed Hosting Services from the Service Provider on behalf of the Customer.

1 Definitions and Interpretation

1.1 In this Agreement unless the context requires otherwise:

"Acceptable Use Policy" means the Acceptable Use Policy as of the date you sign the Agreement.

"Agreement" means the terms of this Agreement.

"Agreement Date" means the Agreement Date set out in the Order.

"Business Day" or "Business Hours" means 9:00 a.m. to 5:30 p.m. Monday through Friday, Australian Eastern Standard or Australian Eastern Daylight Savings time as applicable, excluding public holidays in Australia.

"Fees" shall mean the Implementation Fees and Managed Hosting Fees.

"Hosted System" means the combination of hardware, software and networking elements that comprise an information technology system as set out in the Order. The Hosted System may consist of a dedicated system for the Customer's use only the right to use certain parts of a shared system, or a combination of dedicated and shared elements.

"Implementation Fees" means the implementation fees as set out on the Order.

"Managed Hosting Delivery Date" has the meaning as set out at clause 3.2 below.

"Managed Hosting Fees" means the managed hosting fees as set out on the Order.

"Managed Hosting Services" means the Managed Hosting Services set out in the Order which shall be procured by the Supplier from the Service Provider.

"Customer Order Form" or "Order" means the attached schedule to this agreement

"Personal Data" means data from which a living individual may be identified.

"Services" means the services set out in Order excluding the Managed Hosting Services.

"Service Level Agreement" means the Managed Hosting Terms as may be amended by the Service Provider from time to time.

"Service Provider" means the organisation retained by the Supplier to provide the Managed Hosting Services.

"Term" means the term of this Agreement as detailed on the Customer Order Form.

"Tickets" means the tickets and other notices provided by the Service Provider in respect of the Hosted System and the Managed Hosting Services.

1.2 Headings shall not affect the interpretation or construction of these terms.

1.3 All times quoted are in Australian Eastern Standard or Australian Eastern Daylight Savings Time as applicable.

1.4 Reference to writing or written includes communications by faxes and email.

1.5 Words denoting the singular shall include the plural and vice versa.

2 Commencement

This Agreement shall commence on the Agreement Date and shall continue for the Term of this agreement unless terminated in accordance with clause 13 below.

3 Services

3.1 The Supplier shall procure the provision of the Managed Hosting Services in accordance with the provisions of this Agreement.

3.2 The Supplier shall use reasonable endeavours to ensure that the Hosted System is implemented and available for a client's access within thirty (30) Business Days of the Agreement Date ("Managed Hosting Delivery Date").

3.3 The Managed Hosting Services shall be provided on an "as is" basis without any warranties of any kind, whether express or implied.

3.4 Unless otherwise specifically provided for in the Order the Managed Hosting Services shall not include backup services.

3.5 The Supplier shall provide the Customer with all Tickets provided by the Service Provider in respect of the Customer's Hosted System within two (2) Business Days of the Supplier's receipt of the Tickets.

3.6 The Customer acknowledges that there are risks inherent in Internet connectivity that could result in the loss of privacy, confidential information and property.

4 Supplier's Obligations

4.1 The Supplier shall:

a) Ensure the Services are provided with reasonable care and skill in a professional manner and in accordance with this Agreement;

b) Provide appropriately qualified and trained personnel to perform the Services; and

c) Comply with all laws, rules and regulations applicable to the supply of the Services.

5 Customer's Obligations

5.1 The Customer shall:

a) Use reasonable security precautions in connection with its use of the Managed Hosting Services;

b) Comply with the Acceptable Use Policy at all times when using the Hosting System;

c) Provide such information and access as is reasonably necessary to enable the Supplier to perform the Services and to enable the performance of the Managed Hosting Services;

d) Identify and maintain at least one (1) designated IT infrastructure specialist per site who will be responsible for receiving Tickets and for any action taken which is reasonably necessary to fulfil the requests or instructions set out in the Tickets;

e) Not use the Services in any situation where failure or fault of the Services could lead to death or serious bodily injury of any person, or to physical or environmental damage. For example, the Customer may not use, or permit any other person to use, the Managed Hosting Services in connection with aircraft or other modes of human mass transportation, nuclear or chemical facilities, or medical life support devices; and

f) Not permit its use of the Services to unreasonably interfere with similar services provided by the Supplier to third parties or to the business operations of the Supplier or the Service Provider.

6. Service Levels

6.1 The Supplier shall use reasonable endeavours to ensure that the Managed Hosting Services are provided to the Customer in accordance with the Service Level Agreement.

6.2 The Supplier shall notify the Customer of any material changes in the Service Level Agreement within five (5) Business Days of the changes.

7 Fees and Payment

7.1 In consideration of the Services and the Managed Hosting Services under this Agreement the Customer shall pay the Supplier the Fees as detailed in the Order.

7.2 All Fees detailed in the Order are stated exclusive of GST and the Customer shall be responsible for the payment of GST thereon.

7.3 All Fees shall be payable by the Customer within thirty (30) days from invoice date and annually in advance.

7.4 Payments shall be made in Australian dollars unless otherwise stated on the Order.

7.5 Interest may be charged on late payments at a rate of five per cent (5%) per day from the due payment date until the date the Fees are paid.

7.6 In the event any of the Fees due under the Agreement are not paid on their due date(s) then the Supplier reserves the right to suspend provision of the Services and/or the Managed Hosting Services. Prior to any suspension of the Services and/or the Managed Hosting Services the Supplier will provide the Customer with reasonable prior notice of its intention to suspend and will give the Customer three (3) Business Days to remedy the non-payment.

7.7 The Managed Hosting Fees will be increased by the Supplier annually in accordance with the indexation stated in the Order.

8 Amendments

Amendments to the Agreement shall be agreed by the parties, recorded in writing in and signed by the representatives of each of the parties.

9 Intellectual Property Rights and Ownership

9.1 All hardware, networks, network infrastructure, technology and other equipment and Intellectual Property Rights ("IPR") belonging to the Supplier or Service Provider shall remain in the ownership of the relevant party.

9.2 Ownership of IPR belonging to the Customer, licences of applications and, where applicable, licences of bespoke software, provided to the Customer remains in the ownership of the Customer.

9.3 Each party grants to the other a non-exclusive, non-transferable licence to use the items specified in 9.1 and 9.2, as appropriate, during the Term of the Agreement solely for the purposes of the provision and receiving of the Services and Managed Hosting Services. In the case of the Supplier this licence includes a right to sub-licence any such necessary rights to the Service Provider.

9.4 Ownership in any IPR created or developed by the Supplier or Service Provider during the performance of its obligations under the Agreement shall vest in the Supplier or Service Provider, as appropriate.

10 Software Licences

10.1 Unless otherwise indicated in the Agreement the Customer shall be responsible for obtaining appropriate licences of any third party software which forms part of the Hosting System. The Customer shall:

a) advise the Supplier of the terms (but excluding any information as to fees payable) on which the third party software is provided;

b) ensure that the licence grants sufficient rights to the Supplier to enable the Supplier or Service Provider, as appropriate, to use the third party software in order to provide the Managed Hosting Services;

c) ensure that the third party software licences are effective throughout the Term of the Agreement including obtaining additional licences, where appropriate, to take account of any changes in user and/or processor numbers; and

d) provide Service Works with satisfactory written evidence of the existence of such licences within 30 days of the Agreement Date.

10.2 Where the Supplier provides such third party software:

a) the Customer warrants that it will comply with the provisions of the appropriate licence(s) copies of which are have been provided to the Customer;

b) the Customer must not remove, modify or obscure any copyright, trademark or other proprietary rights notice that appears on the third party software or that appear during their use; and

c) the Customer shall keep The Supplier informed as to any changes which might affect the number of licences required to take account of, for example, any changes in user and/or processor numbers.

11 Confidentiality

11.1 Each party undertakes to use the same degree of care in preventing the disclosure of information which concerns the business and affairs of the other or its clients which it shall have obtained or received during the course of the provision of the Services ("the Confidential Information") as it uses in connection with its own information of a like kind except where:

a) the Confidential Information was already lawfully known or became lawfully known to the other party quite independently of its involvement in this Agreement;

b) the Confidential Information is or becomes within the public domain other than due to the wrongful use or disclosure by the other party;

c) disclosure or use is necessary for the proper and effective performance and/or the lawful exercise of the other party's rights under this Agreement;

d) information was developed by the other party independently without reference to the Confidential Information.

11.2 Each party agrees to use the Confidential Information solely in connection with the implementation of this Agreement and not for that party's own benefit or the benefit of any third party.

11.3 These obligations shall not prohibit disclosure to the extent that it is required by law or ordered by a court of competent jurisdiction. In the event that the recipient is required to make such a disclosure it will immediately notify the discloser.

11.4 Each of the parties hereby undertakes to the other to make all relevant employees, agents and sub-contractors aware of the confidentiality of the Confidential Information and the provisions of this Clause 11 and without limitation to the forgoing to take all such steps as shall from time to time be necessary to ensure compliance by its employees, agents and sub-contractors with the provisions of this Clause 11.

12 Limitation of Liability

12.1 Neither party excludes or limits liability to the other party for death or personal injury caused by its negligence or any fraudulently made statement or representation.

12.2 The liability of either party to the other in any circumstances, whether in contract or tort or otherwise shall be subject to the financial limits set out in this Clause 12.2:

a) The aggregate liability of either party for all defaults resulting in direct loss of or damage to the tangible property of the other under the Agreement shall in no event exceed two hundred and fifty thousand dollars ($250,000); and

b) The aggregate liability under the Agreement of either party for all loss, damages, costs or expenses arising out of or in connection with the default other than a default governed by Clause 12.2(a) shall in no event exceed one hundred and twenty five per cent (125%) of the aggregate total Fees payable in the year during which the liability arose.

12.3 Subject to Clause 12.1 neither party nor their directors, employees and sub-contractors shall be liable to the others in any circumstances whether in contract, tort or otherwise for any loss of goodwill, use, revenue, profit, production, anticipated savings, business, reputation, loss of contracts or any type of indirect or consequential loss, damage, injury or expense.

12.4 The Customer acknowledges that it cannot hold the Service Provider liable in any circumstances whether in contract, tort or otherwise for any direct, indirect or consequential loss, damage, injury or expenses.

12.5 This Clause 12 states each party’s total liability whether in contract, tort or otherwise in respect of their respective obligations and liabilities under the Agreement and are in lieu of and exclude any conditions and warranties implied by statute, law or otherwise insofar as the law allows.

13 IPR Indemnity

13.1 Each party will indemnify the other against any claim for alleged infringement of its IPR or other items supplied by that party under the Agreement provided that indemnifying party is given immediate and complete control of any such claim and that the alleged infringement does not arise as a result of:

13.1.1 the indemnifying party acting on the instruction of the other party;

13.1.2 the negligence or wilful misconduct of the other, its employees, agents or contractors;

13.1.3 the use of the IPR or other items in combination with any software, equipment or devices not supplied by the indemnifying party; or

13.1.4 the use by the other of the IPR and other items in a manner or manners for which they were not designed.

13.2 The other party shall, at the request of the indemnifying party, assist the indemnifying party in the management of any claim for alleged infringement and where the other does so assist:

13.2.1 the indemnifying party shall reimburse the other for any reasonable costs and expenses incurred in providing such assistance; and

13.2.2 the other shall not make any admissions which could be prejudicial to the defence or settlement of the claim (or could increase the indemnifying party's liability).

13.3 If a final injunction is obtained against the use of any part of the IPR and/or other items by reason of infringement of such intellectual property right, the indemnifying party shall, at its option and expense, either:

13.3.1 procure for the other the right to continue to use the IPR and/or other items; or

13.3.2 modify the IPR and/or other items so that it/they become non-infringing.

14 Termination

14.1 This Agreement may be terminated:

14.1.1 by the Customer at the end of the initial period as stated on the Order upon giving not less than three (3) months' written notice to the Supplier and having paid in full all applicable Fees.

14.1.2 by either party if the other party:

a) is in breach and shall have failed to remedy such breach within (thirty) 30 days of a written request requiring it to remedy the breach; or

b) commits an act of insolvency, namely, a petition is presented for its winding up or an administrative receiver, administrator or liquidator be appointed over all or part of its assets.

14.1.3 by Supplier if the Customer fails to pay any sums due hereunder following a final notice period of thirty (30) days to the Customer to make payment.

15 General

15.1 **Third party rights:** A person who is not a party to the Agreement has no right under the Contracts (Rights of Third Parties) Act 1999 to enforce any term of the Agreement but this does not affect any right or remedy of a third party which exists or is available apart from that Act.

15.2 **Data Protection Act:** Each of the parties agrees to comply with its obligations under the Data Protection Act 1998. “Data Controller” and “Data Processor” shall each have the meaning set out in the Data Protection Act 1998.

The Customer shall own all Personal Data on the Hosting System and is the Data Controller under this Agreement.

The parties acknowledge that the Supplier is a Data Processor and shall only process Personal Data in accordance with the Agreement and as required in order to perform the Services. The Supplier shall ensure or shall procure that the Service Provider shall ensure that all appropriate technical and organisational security measures shall be taken against unauthorised or unlawful processing of Personal Data and against accidental loss or destruction of, or damage to Personal Data in relation to the Services provided under the Agreement.

15.3 **Viruses** Each party agrees to use its respective reasonable endeavours to avoid the introduction of viruses to any part of the Hosted System.

15.4 **Force Majeure:** Neither party shall be liable for any delay in meeting or for failure to meet any of its obligations under this Agreement due to any cause outside its reasonable control. If either party is prevented from meeting any of its obligations due to any cause outside its reasonable control it shall promptly notify the other party in writing of the circumstances and the other party shall grant a reasonable extension for the performance of its obligations under the agreement. In the event that either party is so prevented meeting its obligations for a period of sixty days beyond date of the notice then either party may terminate the Agreement forthwith on written notice.

15.5 **Relationship of the Parties** The parties acknowledge and agree that this Agreement shall not constitute, create or otherwise give effect to a joint venture or partnership, nor shall it be construed to create a relationship of agency between the parties.

15.6 **Sub-contracting** The Supplier may sub-contract its obligations under the Agreement. Notwithstanding such sub-contracting the Supplier shall remain responsible for the performance of the Service in accordance with the Agreement.

15.7 **Entire Agreement** This Agreement constitutes the entire understanding between the parties relating to the subject matter of this Agreement and, save as expressly referred to or referenced herein, supersedes all prior representations, writings, negotiations or understandings with respect hereto, except in respect of any fraudulent representation made by either party.

15.8 **Waiver** Failure by either party at any time to require the performance of any provision of the Agreement shall not affect the right of such party to require full performance thereof at any time thereafter.

15.9 **Law and Jurisdiction** This Agreement shall be considered as a contract made in Australia in the state of Victoria and accordance to Australian Law and shall be subject to the exclusive jurisdiction of the Australian Courts to which both parties hereby submit.