

Terms of Service

For the provision of hosting and development services

Thank you for choosing Hypothetical Solutions. By engaging Hypothetical Solutions for the provision of hosting or development services, you agree to the following terms, conditions, policies, guidelines or amendments thereto known as the Terms of Service.

1. Agreement

1.1. These Terms of Service will constitute the entire agreement between Hypothetical Solutions and the Client in relation to the provision of website hosting and development services ("Agreement") and supersedes all previous agreements, undertakings and negotiations on the subject matter.

2. Definitions

Client means a person to whom Hypothetical Solutions provides Services.

Project Agreement means an agreement reached between the Client and Hypothetical Solutions on the provision of services for a particular project. This agreement may take the form of a quote, design specification, costing, estimate or other document that describes the services required.

Deliverables means the deliverables specified in the Project Agreement provided to the Client (or, in the absence of such specification, the deliverables resulting from the performance of the Services).

Fees means the fees charged by Hypothetical Solutions for providing the Services (which, if not specified in the Project Agreement, will be Hypothetical Solutions standard fees for the Services as set by Hypothetical Solutions from time to time).

Services means the services defined in the Project Agreement (or, in the absence of such a definition, the services actually performed by Hypothetical Solutions in contemplation of this Agreement).

Unless the context otherwise requires, in this Agreement:

- a) headings are for convenience only and do not affect the interpretation of this Agreement;
- b) the singular includes the plural and vice versa;
- c) the word "person" includes an individual, a firm, a body corporate, a partnership, a joint venture, an unincorporated body or association, or any government agency;
- d) a particular person includes a reference to the person's administrators, successors, substitutes (including persons taking by novation) and assigns; and
- e) a reference to a statute, ordinance, code or other law includes regulations and other instruments under it and consolidations, amendments, re-enactments or replacements of any of them occurring at any time.

3. Role of Hypothetical Solutions

3.1. Hypothetical Solutions will perform the Services in accordance with this Agreement. The Client acknowledges that Hypothetical Solutions' ability to perform the Services is dependent on the Client

complying with its obligations under this Agreement.

3.2. In performing the Services, Hypothetical Solutions will use reasonable efforts to comply with any timetable specified for a project. If no such timetable is specified then Hypothetical Solutions will use reasonable efforts to perform the Services in a timely manner.

3.3. Hypothetical Solutions acknowledges and shall ensure that its staff and subcontractors shall observe all applicable disciplinary rules and regulations while engaged on the Client's premises or on other premises as may be required by this Agreement.

4. Role of Client

The Client must promptly provide Hypothetical Solutions with all such information, documents, access, office facilities, materials and other assistance and co-operation as is reasonably necessary for Hypothetical Solutions to perform the Services. Client will inform Hypothetical Solutions of all issues pertaining to the Services, the Fees or the timetable in a timely manner.

5. Deliverables

5.1. Hypothetical Solutions will prepare and deliver to the Client Deliverables. Delivery may include, but is not limited to, publishing of content or code changes to the Client's websites or web applications.

5.2. Subject to clause 5.3, the Deliverables will be taken to be accepted on the earlier of:

- a) the acceptance criteria in the Project Agreement being met;
- b) the deliverables being productively used; or
- c) 10 working days after delivery of the deliverables.

5.3. In the absence of any acceptance criteria, acceptance of the Deliverables will occur on delivery to the Client.

5.4. Where the Client does not accept the Deliverables, Hypothetical Solutions will take such steps as are necessary to rectify any material non-conformance in a reasonable time.

6. Changes

6.1. Either party may request a change to the scope of the Services, the Fees or the timetable. Any such request must be made in writing and set out the requested change in sufficient detail to enable the other party to assess the impact of the change ("Change Order"). All Change Orders must be mutually agreed by both parties in writing (including as to the costs or other consequences of the Change Order). Until such agreement, the parties will continue to perform their obligations under this Agreement as if such Change Order had not been requested.

7. Provision of Hosting Services

As appropriate and when requested, Hypothetical Solutions can provide website and application hosting services to the Client.

- 7.1. Hosting Services includes the provision of system resources (memory, CPU, file storage and bandwidth) and the continuation of server processes such that the website or application is available for its intended purpose.
- 7.2. If additional services or products are required to perform the Services or as support for the website or application (including but not limited to domain name transfer or configuration, modification of DNS records, purchase of additional IP addresses, general support and configuration of SSL and certificates), then these shall be payable by the Client at an amount or rate as specified in the Project Agreement or as otherwise stated in this Agreement.
- 7.3. Hypothetical Solutions assumes responsibility for maintaining the application environment in a state where the website or application is available and functioning in the required manner.
- 7.4. Unless specified otherwise in a Project Agreement, Hypothetical Solutions will only host applications or services that it has developed, including any third party applications or resources that Hypothetical Solutions has installed or configured for approved use with the website or application.
- 7.5. Only Hypothetical Solutions personnel and authorised service providers and sub-contractors will be granted direct access to Hypothetical Solutions' systems. Access is granted solely for the purposes of performing the Services.
- 7.6. Hypothetical Solutions routinely monitors all hosted applications for performance, resource usage, error detection and availability issues. If an issue is identified, Hypothetical Solutions will analyse and resolve the issue in a timely manner.
- 7.7. Hypothetical Solutions performs routine maintenance on systems and applications. If it is determined that this maintenance may affect website or application availability, Hypothetical Solutions will notify the Client two business days prior to the work.
- 7.8. Hypothetical Solutions' hours of operation are 08:30 to 17:30, Monday to Friday, excluding Public Holidays. Direct customer support is available during these times.
- 7.9. Hosting fees and charges must be paid at least one month in advance.
- 7.10. If the Agreement is terminated by either party, the party terminating the Agreement must provide one month's written notice of the termination. Any unused hosting fees and charges will be refunded to the Client in full.
- 7.11. If the Agreement is terminated, Hypothetical Solutions will provide to the Client copies of the source code of the website or application, files and documents belonging to the application code and databases. Hypothetical Solutions will provide all reasonable assistance in locating another suitable service provider (if required) and transferring the website or application to the new service provider.
- 7.12. Hypothetical Solutions evaluates its provision of hosting services each month. If Hypothetical Solutions determines that additional resources or tools are required

in order to ensure continued availability or performance of the website or application, it will provide the Client with one month's written advance notice regarding the changes in service provision, including any changes to fees and charges.

8. Acceptable Conduct

- 8.1. Where applicable, the Client assumes responsibility for the maintenance of the website or application content. Hypothetical Solutions reserves the right, but does not assume the responsibility, to monitor or review any content on Hypothetical Solutions' services.
- 8.2. The Client agrees that it is responsible for the conduct of all users of accounts created using the Deliverables or Services and any content that is created, transmitted, stored, or displayed by, from, or within these accounts while using Hypothetical Solutions' services and products and for any consequences thereof.
- 8.3. The Client agrees to use the Services and Deliverables only for purposes that are legal, proper and in accordance with the Terms of Service and any applicable policies or guidelines.
- 8.4. The Client agrees that it will not engage in any activity that interferes with or disrupts Hypothetical Solutions' services or servers or networks connected to Hypothetical Solutions' services.

9. Prohibited Usage

The Client agrees that any of the below activities are considered prohibited usage and will result in immediate termination of this Agreement:

- 9.1. Unsolicited Communications: The use of Hypothetical Solutions Deliverables or Services to send unsolicited email. Email is unsolicited if you have no pre-existing relationship with the recipient, unless the recipient has published or otherwise provided his or her email address in a manner which implies consent to receive the email.
- 9.2. Access to Other Computers or Networks without Authorisation: Attempting unauthorised and/or illegal access of computers, networks and/or accounts not belonging to the party seeking access. Any act which interferes with the services of another user or network. Any act relating to the circumvention of security measures.
- 9.3. Other Activities viewed as Illegal or Harmful: Engaging in illegal activities or engaging in activities harmful to the operations of Hypothetical Solutions, the Client or Hypothetical Solutions other clients.

10. Payment

- 10.1. Hypothetical Solutions will issue invoices as Tax Invoices and in accordance with any payment schedule agreed between Hypothetical Solutions and the Client. In the absence of such a payment schedule, Hypothetical Solutions will at its discretion invoice the Client either 14 days in arrears or at the completion of the project work.
- 10.2. If Hypothetical Solutions is liable to pay GST on a supply made in connection with this Agreement and it has not priced the supply to include GST, then the Client agrees to pay Hypothetical Solutions an additional amount equal to the consideration payable for the supply multiplied by the prevailing GST rate.

11. Warranties

Hypothetical Solutions warrants that it will perform the Services with reasonable care and skill. Except for this warranty and any terms, conditions or warranties implied by law which cannot be excluded ("Prescribed Terms"), Hypothetical Solutions makes no warranties with respect to its performance of the Services and expressly excludes all conditions, warranties and terms which would be implied by law, conduct or otherwise into this Agreement. Hypothetical Solutions limits its liability for a breach of the above warranty and, to the extent permitted by law, its liability for a breach of a Prescribed Term, at its option to the repair or resupply of the relevant goods or services, or payment of the costs of repair or resupply of the relevant goods or services.

12. Liability

To the maximum extent permitted by law:

- a) in no circumstances will Hypothetical Solutions be liable for any indirect or consequential loss, damage, liability, costs or expenses (including without limitation loss of profits, transaction losses, opportunity costs, interruption of business, loss of use, loss of goodwill, or loss or corruption of data) arising out of or in connection with this Agreement, whether such liability arises under contract, tort (including negligence), law or otherwise;
- b) Hypothetical Solutions' total liability under or in connection with this Agreement for loss, damage, liability, costs or expenses of a kind not excluded by paragraph (a), whether arising under contract, tort (including negligence), law or otherwise is limited in aggregate to an amount equal to the fees paid by the Client for the Services under this Agreement.

13. Intellectual Property

- 13.1. All pre-existing copyrights and other intellectual property rights of a party will continue to be owned by that party and except as may otherwise be specifically provided in this Agreement nothing in this Agreement confers on the other party any rights in relation to such copyrights and other intellectual property rights.
- 13.2. The Client licenses Hypothetical Solutions to use, reproduce, modify and adapt all information, data and documents and to use all software provided by the Client to Hypothetical Solutions, for the purpose of Hypothetical Solutions' performance of the Services (and warrants that such use does not infringe any third party intellectual property rights).
- 13.3. Unless provided to the contrary in a Project Agreement, Hypothetical Solutions will own all copyright and other intellectual property rights subsisting in the Deliverables or any other work created by Hypothetical Solutions in its performance of the Services (but excluding any pre-existing intellectual property of the Client or intellectual property of a third party incorporated in such deliverables or work). Hypothetical Solutions grants the Client a perpetual international licence to use and reproduce (subject to other licence conditions ("Special Conditions") as may be specified in other Project Agreements) the deliverables (or such other work as Hypothetical Solutions may deliver to the Client as part of Services) for purposes as stated in the Project Agreement, but if this is not stated, then for the Client's own internal business

purposes.

- 13.4. Each party indemnifies the other against any claim by a third party that any intellectual property licensed by it to the other infringes that third party's intellectual property rights.

14. Confidential Information

- 14.1. Any information provided to one party ("Recipient") by the other ("Discloser") in connection with this Agreement and treated by the Discloser as confidential and advised to the Recipient as being confidential will be confidential information of the Discloser ("Confidential Information") unless it is public knowledge at the time it is provided to the Recipient or becomes public knowledge subsequently (other than through a breach of an obligation of confidence by the Recipient) or is in the Recipient's lawful possession prior to its provision to the Recipient or is independently developed by the Recipient.
- 14.2. Each party must keep the Confidential Information of the other confidential, safe and secure and not disclose it to any person (except the agents, advisors, contractors and personnel of a party who have a need to know provided they are subject to an obligation to keep such Confidential Information confidential). The Recipient may disclose the Confidential Information when required to do so by law.
- 14.3. Hypothetical Solutions will use the Confidential Information of the Client solely for the purposes of performing the Services. The Client will use the Confidential Information of Hypothetical Solutions solely to assist Hypothetical Solutions in its performance of the Services and to use the deliverables for its internal business purposes (or such other purposes ("Approved Purposes") as may be specified in the Project Agreement).
- 14.4. At the request of the Discloser, on the termination or expiration of this Agreement the Recipient will return to the Discloser all material forms embodying the Confidential Information (other than the Deliverables when all Fees are paid).

15. Term and Termination

This Agreement (where it applies to Hosting Services or alternatively Development Services) will continue (unless terminated earlier) until Hypothetical Solutions has completed its performance of the Services. This Agreement may be terminated immediately by either party upon notice in writing if:

- a) the other party is in material breach of this Agreement and has failed to remedy such breach within 14 days of receiving notice to do so; or
- b) the other party becomes insolvent, has a controller (as defined in Corporations Law) or receiver appointed, enters into liquidation, provisional liquidation or administration, is subject to an arrangement for protection from its creditors, fails to comply with a statutory demand, is otherwise unable to pay its debts when they fall due or something having a similar effect to the foregoing happens in connection with the party.

16. Survival of Clauses

Clauses 2, 10, 11, 12, 13, 14 and 16 of this Agreement will survive termination or expiration of this Agreement.

17. General

- a) Assignment. The Client may not assign this Agreement without prior written consent of Hypothetical Solutions. Hypothetical Solutions may subcontract its performance of this Agreement.
- b) Notices. All notices regarding this Agreement will be in writing and will be addressed to the representative of either party with responsibility for managing this Agreement. A notice will be deemed to be received upon personal delivery; if faxed or sent by email, upon production of a recipient report; or, if posted, within three days of mailing (if posted from or to a place within Australia) or within seven days of mailing (if posted from or to a place outside Australia).
- c) Force Majeure. An obligation of a party under this Agreement (other than an obligation to pay money) will be suspended during the time and to the extent that the party is prevented from or delayed in complying with that obligation by an event beyond that party's control.
- d) Warranties and representations. The Client acknowledges that in entering this Agreement it has not relied on any representations or warranties about its subject matter except as expressly provided by the written terms of this Agreement.
- e) Further Assurances. Each party will give its full cooperation to the other in achieving and fulfilling the terms of this Agreement, and to that each party shall give all consents and information and execute all such documents as may be reasonably required to so fulfil and achieve these purposes, including such as may be required by governmental laws or regulations.
- f) Discretion in exercising rights. A party may exercise a right or remedy or give or refuse its consent in any way it considers appropriate (including imposing conditions) unless this Agreement or the Project Agreement expressly states otherwise.
- g) Partial exercising of rights. If a party does not exercise a right or remedy fully or at a given time, the party may exercise it later.
- h) Arbitration. If a dispute arises out of or in relation to this Agreement (including any dispute as to breach or termination of the Agreement), a party may not commence any court proceedings relating to the dispute unless it has complied with this cause except where the party seeks urgent interlocutory relief. Any dispute shall be subject to arbitration conducted in accordance with the provisions of the Commercial Arbitration Act 1984 (New South Wales) and under the rules of the Australian Centre for International Arbitration. The arbitration shall be conducted in front of one arbitrator; provided, however, if the amount in dispute exceeds \$100,000.00, the arbitration shall be conducted by three arbitrators, one of whom shall be appointed by the Client, one of whom shall be appointed by Hypothetical Solutions, and the third of whom shall be appointed by the first two arbitrators. The arbitrator(s) shall award costs to either party in arbitration if the arbitrator(s) determine that the positions advanced by that party have been

substantially adopted by the arbitrator(s). Otherwise, the parties shall bear equally the cost of the arbitration (exclusive of independent legal fees and expenses which shall be borne by the parties individually).

- i) Variation and waiver. A provision of this Agreement or a right created under it may not be waived or varied except in writing, signed by the party or parties to be bound.
- j) Precedence. In the event there is any conflict between these standard terms and conditions and the terms and conditions of a particular project, the terms and conditions of the project will prevail to the extent of the inconsistency.
- k) No partnership. Nothing contained or implied in this Agreement constitutes a party the partner, agent or joint venturer of the other. The relationship of the parties is that between independent contractors.
- l) Governing Law. This Agreement is governed by the laws of the State of New South Wales.
- m) Execution. Where this Agreement is executed by an authorised person on behalf of a party to this Agreement, the person so signing or accepting warrants that they are authorised to enter into this Agreement and execute it on that party's behalf and that the party intends by their acceptance of this Agreement to be bound by the terms and conditions of this Agreement.