

Offis Base Terms & Conditions

Effective Immediately



Virtual.Offis

1. DEFINITIONS.

- 1.1. "Affiliate" shall mean an entity controlled by, controlling, or under common control with a party.
- 1.2. "Customer Equipment" shall mean hardware, software, equipment, systems, cabling and facilities provided by Customer and used (alone or in conjunction with Service Equipment) in connection with a Service, all rights to which shall remain with Customer.
- 1.3. "Network" shall mean those points of presence, network switches, network appliances and host computers owned or operated by OFFIS.
- 1.4. "Service" shall mean the service identified on a Dedicated Service Order and any related Service Equipment, support or consulting provided hereunder.
- 1.5. "Service Activation Date" in relation to a particular Service shall be the date defined in the Dedicated Service Order.
- 1.6. "Service Agreement" shall mean the signed agreement between Customer and OFFIS for services provided in the Dedicated Service Order and the OFFIS Base Terms & Conditions.
- 1.7. "Service Equipment" shall mean the hardware, software, equipment, systems, cabling, and facilities provided by OFFIS for use in connection with a Service, all rights to which shall remain with OFFIS. Service Equipment shall not include the Network or any item that is the subject of a separate contract between OFFIS and Customer.
- 1.8. "Dedicated Service Order" shall mean a document describing a Service to be provided by OFFIS.
- 1.9. "Service Term" shall mean in relation to a particular Service the term set forth in the relevant Dedicated Service Order, such term to commence upon the Service Activation Date.

2. AMENDMENTS.

OFFIS may amend these terms and conditions at any time by posting the amended terms and conditions on its web site and the effective date on which the amended terms are so posted. In addition, OFFIS will email Customer notice of the amended terms.

3. OFFIS RESPONSIBILITIES.

To order a Service, Customer or its Affiliate may sign a Dedicated Service Order and Service Agreement and submit these to OFFIS' designated point of contact. The signed Dedicated Service Order and Service Agreement shall constitute the binding commitment of Customer to purchase the Service described in the Dedicated Service Order on the terms set forth in these terms and conditions, the applicable Dedicated Service Order and Service Agreement. In the event of any inconsistency between in any terms and conditions between these documents, the Dedicated Service Order shall take precedence and then the Service Agreement. Unless expressly stated otherwise in a Dedicated Service Order, activation of a particular Service shall constitute OFFIS' acceptance of the relevant Dedicated Service Order. OFFIS reserves the right to modify any Service from time to time. OFFIS Provisioning Entities may perform some or all of OFFIS' duties and/or obligations hereunder. OFFIS reserves the right to reject any Dedicated Service Order submitted hereunder for any reason, including without limitation due to OFFIS' obligations under applicable laws, regulations, directives, governmental authority or orders, or third party contracts.

4. CUSTOMER RESPONSIBILITIES.

Customer will provide to OFFIS the necessary details to complete the Customer Contact Information Form. Customer will provide OFFIS with such access to Customer Equipment and such technical and administrative assistance OFFIS reasonably requires for the installation and maintenance of any Service and the performance of OFFIS' obligations hereunder. Customer shall;

- (a) maintain the Service Equipment in accordance with the reasonable instructions of OFFIS as may be given from time to time;
- (b) not modify, relocate, or in any way interfere with the Service Equipment; and
- (c) not cause the Service Equipment to be repaired, serviced, or otherwise accessed except by an authorised representative of OFFIS.

Customer shall be liable for any and all damage to Service Equipment caused by the act or omission of Customer, Customer's breach of the terms of this Agreement, or the malfunction or failure of any Customer Equipment. Any Customer Affiliate submitting a Dedicated Service Order hereunder shall be bound by Customer's obligations and responsibilities set forth in this Agreement. Customer will not be permitted to bring in their own racks/cabinets into the OFFIS Data Centre under normal circumstances.

5. FEES AND CHARGES.

Charges and fees for each Service shall be set forth in each Dedicated Service Order. Set-Up Charges shall be invoiced upon OFFIS' acceptance of the Dedicated Service Order. Billing of Monthly Fees for a Service will commence as of the Service Activation Date. Monthly Fees shall be paid monthly in advance unless provided otherwise in the Dedicated Service Order. Usage-based fees shall be invoiced monthly in arrears unless provided otherwise in the Dedicated Service Order. Charges for Equipment shall be invoiced upon shipment. OFFIS reserves the right to change the rates by notifying Customer 30 days in advance of the effective date of the change.

6. PAYMENT TERMS AND PRICING.

6.1 Payment Methods. Payments to OFFIS may be made by cheque, money order and accepted credit cards in Australian dollars. OFFIS can refuse payment by credit card for amounts over \$1,000 or charge a 2.5% additional fee for the transaction value. In the event that a cheque is returned as unpayable, Customer may be sent a suspension of Services email which will grant 10 days to make payment and will be charged a \$50.00 returned cheque fee.

6.2 Credit Cards. Payment by Credit Card includes the authorisation to charge all recurring fees and charges to the Credit card on file with OFFIS up to 7 days before the date due. If the Customer's Credit card is declined for any reason, Customer will be sent a notice by email. If payment is not received at OFFIS by the date due, OFFIS may make one final attempt to charge Customer's Credit Card on or around the due date. If payment is not secured by 3:00pm on the due date, Customer will be sent a suspension of Services email, which will grant 10 days to make payment.

6.3 Pricing Disputes. Customer must notify OFFIS in writing of any disputed charges within 14 days of the date of the billing for such charges. If Customer does not notify OFFIS within that time period, Customer has waived any right to dispute such amounts, either directly or indirectly. All accounting issues should be directed to accounts@offis.com.au.

- 7. USER CONTENT AND CONDUCT.** Customer is solely responsible for the content of any postings, data or transmissions using the Services (the "Content"), or any other use of the Services by Customer or by any person or entity Customer permits to access the Services (a "User"). Customer represents and warrants that neither it nor any User will use the services for unlawful purposes (including, without limitation, infringement or copyright or trademark, misappropriation or trade secrets, fraud, invasion of privacy, illegal pornography, obscenity, defamation and illegal use or to interfere with, or disrupt, other network users, network services or network equipment). Disruptions include, without limitation, distribution of unsolicited advertising or chain letters, repeated harassment of other network users, wrongly impersonating another user, falsifying one's network identity for improper or illegal purposes, sending unsolicited mass email, propagation or distribution of computer viruses, using the network to make or attempt to make unauthorised entry to another machine accessible location, via the network, and distributing tools designed for compromising security (i.e. including, but not limited to, password guessing programs, cracking tools or network probing tools). OFFIS may suspend or terminate the Services immediately, without prior notice to Customer, if OFFIS believes, in good faith, that Customer or a User is utilising the Services for any such illegal or disruptive purpose. Customer shall defend, indemnify, and hold harmless OFFIS from and against all liabilities, judgements, claims, damages, settlements, expenses and costs (including legal fees and litigation expenses) arising out of or relating to any and all claims by any person relating to use of the Services, including, but not limited to, use of the Service without consent of the Customer.
- 8. CONFIDENTIAL INFORMATION.** Each party acknowledges that it will have access to certain confidential information of the other party concerning the other party's business, plans, Customer, technology, and products, including the terms and conditions of the Service Agreement. Confidential Information will include, but not be limited to, each party's proprietary software and Customer information. Each party agrees that it will not use in any way, for its own account or the account of any third party, except as expressly permitted by this Agreement, nor disclose to any third party (except as required by law or to that party's attorneys, accountants and other advisors as reasonably necessary), any of the other party's Confidential Information and will take reasonable precautions to protect the confidentiality of such information. This Section shall survive for 2 years after any termination or expiration of this Agreement, unless a longer period is required by applicable law.
- 8.1 Exceptions.** Information will not be deemed Confidential Information hereunder if such information:
- is known to the receiving party prior to receipt from the disclosing party directly or indirectly from a source other than one having an obligation of confidentiality to the disclosing party;
 - becomes known (independently of disclosure by the disclosing party) to the receiving party directly or indirectly from a source other than one having an obligation of confidentiality to the disclosing party;
 - becomes publicly known or otherwise ceases to be secret or confidential, except through a breach of this Agreement by the receiving party; or
 - Is independently developed by the receiving party.
- 9. RELEASE OF INFORMATION.** OFFIS reserves the right to release the contact information of Customer involved in violations of system security to administrators at other sites, in order to assist them in resolving security incidents. OFFIS will also fully co-operate with any government departments in investigations of suspected violations of law.
- 10. ACCEPTABLE USE.** All use of the Network and the service must comply with the then-current version of the OFFIS Acceptable Use Policy ("Policy") which is made a part of this Agreement and is available from www.offis.com.au. OFFIS reserves the right to amend the Policy from time to time, effective upon posting of the revised Policy at the URL or other notice to Customer. OFFIS reserves the right to suspend the service or terminate this Agreement effective upon notice for a violation of the Policy. Customer agrees to indemnify and hold harmless OFFIS from any losses, damages, costs or expenses resulting from any third party claim or allegation ("Claim") arising out of or relating to use of the service, including any Claim which, if true, would constitute a violation of the Policy.
- 11. DISCLAIMER OF WARRANTIES.** Except as otherwise referenced or provided in this Agreement, any written materials by OFFIS, or information on OFFIS' web site, shall be for informational purposes only and, whether delivered or disseminated before or after the date of this Agreement, shall not create any express or implied warranties, guarantee of performance, or contractual obligations.
- 11.1 Performance.** OFFIS does not and cannot control the flow of data to or from OFFIS' Internet Data Centres, outside border routers and other portions of the Internet. Such flow depends largely on the performance of internet services provided or controlled by third parties. At times, actions or inactions caused by these third parties can produce situations in which OFFIS' Customer' connections to the Internet (or portions thereof) may be impaired or disrupted. Although OFFIS will use commercially reasonable efforts to take actions it deems appropriate to remedy and avoid such events, OFFIS cannot guarantee that they will not occur. Accordingly, OFFIS disclaims any and all liability resulting from or related to such events.
- 11.2 No Other Warranty.** Except for the Service Level Agreement set out in the DSO, the Services are provided on an "as is" basis, and Customer's use of the Services is at its own risk. OFFIS does not warrant that the Services will be uninterrupted, error-free, or completely secure. OFFIS MAKES NO WARRANTIES OF ANY KIND, WHETHER EXPRESS OR IMPLIED, FOR THE SERVICES AND EQUIPMENT IT IS PROVIDING, AND DISCLAIMS ANY WARRANTY OF TITLE, MERCHANTABILITY, NON-INFRINGEMENT OR FITNESS FOR A PARTICULAR PURPOSE. Certain legislation may imply terms, warranties or conditions that cannot be excluded, restricted or modified. This Agreement must be read subject to those statutory provisions. However where such provisions apply and OFFIS is so entitled OFFIS will limit its liability to either of the following options at its sole election:
- in the case of goods, the replacement of the goods or re-supply of equivalent goods, the repair of the goods, the payment of the cost of replacing the goods or acquiring equivalent goods; or the payment of the cost of having the goods repaired; and
 - in the case of services, the supply of the services again or the payment of the cost of having the services supplied again.
- 12. LIMITATION OF DAMAGES.** Neither Party shall be liable for any indirect, incidental, special, punitive or consequential damages that result from Customer's or Customer's Users' use of the OFFIS Network and the Service including, without limitation, any such damages for loss of Data resulting from delays, non-deliveries, misdelivers or service interruptions, even if such Party has been advised of the possibility of such damages. In the event the foregoing limitations are valid, then in no event shall OFFIS' aggregate Liability in connection with this Agreement for claims (whether in Contract, Tort, Statute, or otherwise) exceed the lesser of \$10,000 or the amounts paid to

OFFIS for the Service giving rise to a claim in the Twelve months preceding the date of such claim. Customer agrees and acknowledges that it is in a better position to foresee and evaluate any potential damage or loss it may suffer in connection with the Services and that the fees payable under this Agreement have been calculated on the basis that OFFIS shall exclude liability as set out in this Section.

- 13. DATA PROTECTION.** By entering into this Agreement Customer acknowledges that information regarding Customer, its employees, customers, or any user of the Services or Network provided to or otherwise obtained by OFFIS in connection with this Agreement ("Data") may be processed by OFFIS, OFFIS Provisioning Entities, and OFFIS agents in connection with processing Customer's order, and the delivery, installation, support, and maintenance of the Services.
- 14. DOMAIN NAMES AND INTERNET PROTOCOL NUMBERS.** Customer warrants that any domain name registered or administered on its behalf will not violate the trademark or other intellectual property rights of any third party and that Customer will comply with the rules and procedures of the applicable domain name registries, registrars, or other authorities. Customer irrevocably waives any claims against OFFIS that may arise from the acts or omissions of domain name registries, registrars or other authorities. Networks assigned from a OFFIS net-block are non-portable. Network space allocated by OFFIS must be returned to OFFIS in the event Customer discontinues service. Any Internet Protocol numbers ("IP Numbers") assigned to Customer by OFFIS in connection with a Service shall be used only in connection with that Service. In the event Customer discontinues use of a Service for any reason, or this Agreement expires or is terminated for any reason, Customer's right to use the IP Numbers shall terminate and the IP Numbers shall immediately be returned to OFFIS and any change in IP Addresses Customer may need to make after termination of this Agreement shall be the sole responsibility of Customer.. OFFIS reserves the right to suspend the applicable Service or terminate this Agreement upon written notice for any violation of this Section. OFFIS reserves the right to change the IP address designations at any time but in doing so shall use reasonable efforts to minimise inconvenience to Customer, and shall give Customer reasonable notice of changes.
- 15. EXPORT.** Customer will not export, re-export, transfer, or make available, whether directly or indirectly, any regulated item or information to anyone outside Australia in connection with this Agreement without first complying with all export control laws and regulations which may be imposed by the Australian Government and any country or organisation of nations within whose jurisdiction Customer operates or does business.
- 16. FORCE MAJEURE.** Except for the obligation to pay money, neither party will be liable for any failure or delay in its performance under this Agreement due to any cause beyond its reasonable control, including act of war, acts of God, earthquake, flood, fire, embargo, riot, sabotage, labour shortage or dispute, governmental act or failure of the Internet, provided that the delayed party:
- (a) gives the other party prompt notice of such cause, and
 - (b) uses its reasonable commercial efforts to correct promptly such failure or delay in performance.
- 17. SEVERABILITY; SURVIVAL; WAIVER.** If any term of this Agreement, or the application of such term to any person or circumstance, shall be held invalid, the remainder of this Agreement, or the application of such term to persons or circumstances other than those to which it is held invalid, shall not be affected thereby. The parties agree that in such circumstances the parties shall agree in good faith to replace the invalidated term with a similar term that reflects to the maximum extent possible the meaning of the invalidated term. All provisions of this Agreement that, by their nature, should survive the termination or expiration of this Agreement shall survive the termination or expiration of this Agreement. No failure on the part of either party to exercise, and no delay in exercising, any right or remedy hereunder shall operate as a waiver thereof; nor shall any single or partial exercise of any right or remedy hereunder preclude any other or further exercise thereof or the exercise of any other right or remedy granted herein.
- 18. GOVERNING LAW; DISPUTE RESOLUTION.** This Agreement is made under and will be governed by and construed in accordance with the laws of the State of NSW, Australia. Any dispute relating to the terms, interpretation or performance of this Agreement (other than claims for preliminary injunctive relief or other pre-judgment remedies) will be resolved at the request of either party through binding arbitration. Arbitration will be conducted in NSW, Australia. In the event any provision of this Agreement is held by a tribunal of competent jurisdiction to be contrary to the law, the remaining provisions of this Agreement will remain in full force and effect.
- 19. CREDIT ASSESSMENT**
- Consent: Subject to the Privacy Act 1988 and the Act, for the purpose of assessing the Customer's Application for Service, establishing and managing its accounts, assessing its creditworthiness and collecting overdue payments:
- a) The customer's consent to OFFIS disclosing to a credit reporting agency, any of the Customer's personal information in OFFIS's possession, including but not limited to:
 - I. The Customer's name and address
 - II. Details of the Customers Application for Service and/or other services supplied to the Customer;
 - III. Credit limits on the Customer's accounts;
 - IV. The amount of any payments which are overdue for at least 60 days;
 - V. Where an overdue payment has been previously reported;
 - VI. Cheques or credit card payment which have been dishonoured;
 - VII. Information that, in OFFIS reasonable opinion, the Customer has committed a serious credit infringement; and
 - VIII. Information that OFFIS has ceased to provide Services to the Customer, in order to obtain a consumer credit report about the Customer or to allow the credit reporting agency to create or maintain a credit information file about the Customer;
 - b) The Customer consents to OFFIS disclosing a credit report about the Customer to any credit provider, debt collecting agency or Other Supplier;
 - c) The customer authorises OFFIS to obtain information about the Customer from any business which provides information about commercial credit-worthiness;
- 20. MARKETING.** Customer agrees that OFFIS may refer to Customer by trade name and trademark, and may briefly describe Customer's Business, in OFFIS' marketing materials and web site.

- 21. NON-SOLICITATION.** During the period beginning on the Installation Date and ending 1 year after the termination or expiration of this Agreement in accordance with its terms, Customer agrees that it will not, and will ensure that its affiliates do not, directly or indirectly, solicit or attempt to solicit for employment any persons employed by OFFIS during such period.
- 22. ASSIGNMENT; NOTICES.** Customer may not assign its rights or delegate its duties under this Agreement either in whole or in part without the prior written consent of OFFIS, except that Customer may assign this Agreement in whole as part of a corporate reorganisation, consolidation, merger, or sale of substantially all of its assets. Any attempted assignment or delegation without such consent will be void. Customer will not resell or in any way transfer any Service except as expressly set forth in a Dedicated Service Order or agreed in writing by OFFIS. OFFIS may assign this Agreement in whole or part. This Agreement will bind and inure to the benefit of each party's successors and permitted assigns. Any notice or communication required or permitted to be given hereunder may be delivered by hand, deposited with an overnight courier, sent by confirmed facsimile, or mailed by registered or certified mail, return receipt requested, postage prepaid, in each case to the address of the receiving party indicated on the signature page hereof, or at such other address as may hereafter be furnished in writing by either party hereto to the other. Such notice will be deemed to have been given as of the date it is delivered, mailed or sent, whichever is earlier.
- 23. RELATIONSHIP OF PARTIES.** OFFIS and Customer are independent contractors and this Agreement will not establish any relationship of partnership, joint venture, employment, franchise or agency between OFFIS and Customer. Neither OFFIS nor Customer will have the power to bind the other or incur obligations on the other's behalf without the other's prior written consent, except as otherwise expressly provided herein.
- 24. SUBSTITUTION.** OFFIS may substitute, change or modify the Software or Hardware at any time, but shall not thereby substantially alter the technical parameters of the Services.
- 25. TERM AND TERMINATION.**
- 25.1 Term.** This Agreement shall come into effect set out in the Dedicated Service Order Form and will commence on the Effective date. Service shall continue in force for the period of set out in the Dedicated Service Order Form, and shall continue thereafter until terminated by either party giving no less than thirty (30) days written notice.
- 25.2 Termination.**
- (a) For Convenience. Customer may terminate any Dedicated Service Order after the expiration of the Dedicated Service Order Contract by giving OFFIS no less than thirty (30) days written notice. If Customer fails to give less than thirty (30) days written notice, then Customer will be billed for Services until 30 days after such notice. OFFIS may terminate any Dedicated Service Order by giving at least fourteen (14) days prior written notice of the date of termination of Services. All amounts due from the Customer for the account to which the Dedicated Service Order relates must be paid in order for Customer to terminate a Dedicated Service Order.
- (b) For Cause. OFFIS will have the right to terminate this Agreement if:
- (i) the Customer breaches any material term or condition of this Agreement and fails to cure such breach within thirty (30) days after receipt of written notice of the same, except in the case of failure to pay fees, which must be cured within ten (10) days after receipt of written notice from OFFIS;
 - (ii) the Customer becomes the subject of a voluntary petition in bankruptcy or any voluntary proceeding relating to insolvency, receivership, liquidation, or composition for the benefit of creditors; or
 - (iii) The Customer becomes the subject of an involuntary petition in bankruptcy or any involuntary proceeding relating to insolvency, receivership, liquidation, or composition for the benefit of creditors, if such petition or proceeding is not dismissed within sixty (60) days of filing.