

**Vixen Internet Solutions Pty Ltd ACN 109 407 445**

**Vixen Internet Solutions Pty Ltd**

**LICENCE AND HOSTING AGREEMENT  
TERMS AND CONDITIONS**

**1 DEFINITIONS AND INTERPRETATION**

The following words have these meanings in this Agreement:

1.1 "Agreement" means the agreement constituted by:

1.1.1 the Schedule;

1.1.2 these Terms and Conditions;

1.1.3 any proposals or quotations which are incorporated specifically into this Agreement; and

1.1.4 any modifications or variations authorised in accordance with the Terms and Conditions.

1.2 "Business Day" means any day other than a Saturday, Sunday or public holiday in Melbourne.

1.3 "Business Hours" means 9am to 5pm (inclusive) Australian Eastern Standard Time on a Business Day.

1.4 "Client" means the client stated in the Schedule and its successors and permitted assigns, and the expression "you" and "your" have a corresponding meaning.

1.5 "Client Data" means all data provided by you or any Licensed User and entered on Our Site as part of your use of the Software.

1.6 "Confidential Information" means the confidential information of a party which relates to the subject matter of this Agreement and includes:

1.6.1 the design, specifications, and content of the Software and the Documentation;

1.6.2 the personal policies or business strategies of the Client or Vixen Online;

1.6.3 the terms upon which the Software and the Services are supplied to the Client under this Agreement but excludes information which is lawfully in the public domain at the commencement of the Term, or lawfully enters the public domain during the Term.

1.7 "Vixen" means Vixen Internet Solutions Pty Ltd ACN 109 407 445, its successors and permitted assigns and the expressions "we", "us" and "our" have a corresponding meaning.

1.8 "Documentation" means the manuals and other materials published by Vixen to assist Licensed Users in using the Software, as amended from time to time by us.

1.9 "Downtime" means any interruption of 90 seconds or more in the availability to a Licensed User of any application made available through the Services only if that interruption is due to either:

1.9.1 failure by us to manage a situation so as to cause interruption in network availability;

1.9.2 a disruption in the connection between any server and the Internet. For the purposes of this clause, the Internet is deemed to consist of services that commence where we transmit Client Data to our carrier at our border router port, but does not include the connection between our facilities and our carriers;

1.9.3 where a router packet loss is in excess of 50% and is sustained for 120 seconds or longer, and this continues for more than 4 minutes; or 1.9.4 a latency across the Vixen IP network which exceeds 120 milliseconds; or

1.9.5 a fault in the server hardware by which the Services are provided, and where the time between when you formally notify us of that service fault and our acknowledgment and response to begin resolution of the fault exceeds 4 hours. For the purposes of this clause "resolution" means either the replacement of faulty parts or the provision of a new system, or the escalation of the service to professional services, when we deem that a service fault is due to a hardware defect.

1.10 "Fees" means Licence Fees.

1.11 "GST" means the goods and services tax created under GST legislation.

- 1.12 "GST Legislation" means the A New Tax System (Goods and Services Tax) Act 1999 and any related Act.
- 1.13 "Hosting Fee" means the fee payable for the Hosting Services which is specified in the Schedule.
- 1.14 "Hosting Services" means:
- 1.14.1 accommodating the Software and Client Data on Our Site;
  - 1.14.2 subject to the terms of this Agreement, ensuring that the Software operates on Our Site;
  - 1.14.3 subject to the terms of this Agreement, providing you with access to Our Site for the purpose of operating the Software and accessing the Documentation and uploading Client Data; and
  - 1.14.4 delivery (but not installation) of updated versions and enhancements (if any) of the Software and the Documentation as made available by us to Licensed Users generally from time to time during the Term;
  - 1.14.5 the maintenance of a help file and Documentation and providing access to Licensed Users to that help file and Documentation to assist them in using the Software
- 1.15 "Initial Term" means the initial term stated in the Schedule.
- 1.16 "Licensed User" means a user that has access to the administration section of the website.
- 1.17 "Module" means the software modules that allow users to manage their website content.
- 1.18 "Our Site" means the web site posted by us on the Internet from which the Software and the Documentation may be accessed, as varied by us and notified to you from time to time.
- 1.19 "Party" means Vixen and the Client.
- 1.20 "Schedule" means the schedule to this Agreement.
- 1.21 "Software" means the Vixen CMS or Forwarderwebsites.com, including all modifications, updates, enhancements and new releases made available to the Client from time to time.
- 1.22 "Term" means the Initial Term, plus any extension, subject to early termination in accordance with this Agreement.
- 1.23 Reference to one gender mean and include references to all other genders.
- 1.24 A reference to a defined term includes all parts of speech incorporating that defined term.
- 1.25 If the time for compliance with any obligation falls on a day which is not a Business Day, then the time for compliance with that obligation is extended to the next Business Day.
- 1.26 If there is any discrepancy or ambiguity between the Schedule and these Terms and Conditions, then the Schedule prevails.

## **2 TERM**

- 2.1 This Agreement continues for the Initial Term of 12 months from date of the first payment. After the initial term
- 2.2 The Term will be automatically extended by subsequent terms, each Subsequent term is a 3 month period.

## **3 LICENCE OF SOFTWARE**

- 3.1 We grant you a non-exclusive non-transferable licence to use the Software and the documentation provided that such use is in accordance with this Agreement.
- 3.2 Your right to use the Software and the Documentation is limited as follows:
- 3.2.1 the Software may only be used in the manner described in the Documentation;
  - 3.2.2 you may not make or allow any other person to make a copy of the Software or the Documentation, or any part of them;
  - 3.2.3 you may not use any part of the Software on behalf of another person, or allow any person who is not a Licensed User to use the Software or the Documentation;
  - 3.2.4 you may not assign or transfer the Licence to any other person;

3.2.5 you must not make or attempt to make or allow to be made any alteration to the Software or the Documentation or attempt or allow any other person to attempt to decompile or reverse engineer or any part of the Software;

3.2.6 the number of Licensed Users of the Software is limited to the amount set out in the Schedule, which depends on the Licence Fee paid by you.

#### **4 HOSTING SERVICES**

4.1 Subject to payment of the Licence Fee we will provide you with the Hosting Services throughout the Term.

4.2 Notwithstanding clause 4.1, we will provide you with updates of all core applications that form part of Version 1 of Vixen as and when they become available.

4.3 We must use all reasonable endeavours to ensure that the Software, the Documentation and Client Data are available to Licensed Users via the Internet on a 24 hour, 7 day a week basis. We undertake to respond to unplanned outages within 1 hour during Business Hours and within 3 hours from notification outside Business Hours. We will be entitled to disrupt our Services in order to carry out planned maintenance on our equipment.

4.4 We do not and cannot control the flow of data to or from our Internet Data Centre and other portions of the Internet. Such flow depends in large part 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 your connection to the Internet may be impaired or disrupted. Although we will use commercially reasonable efforts to take actions we deem appropriate to remedy and avoid such events, we cannot guarantee that they will not occur and your release us from all liability resulting from or related to such events.

#### **5 SERVICE LEVEL AGREEMENT**

5.1 Subject to clauses 4.44, 4.55, 8.3 and 11 we guarantee a minimum proportion of uptime per month of 99.85% based on a 24-hour day. If any Downtime occurs, we will at your request credit your account with us as follows:

5.1.1 if the total Downtime in any calendar month is more than 7.2 hours, but does not exceed 14.4 hours, we will grant you a one-off credit equivalent to 25% of the monthly Licence Fee;

5.1.2 if the total Downtime in any calendar month is more than 14.4 hours, but does not exceed 21.6 hours, we will grant you a one-off credit equivalent to 50% of the monthly Licence Fee;

5.1.3 if the total Downtime in any calendar month is more than 21.6 hours, we will grant you a one-off credit equivalent to 75% of the Licence Fee.

5.2 For the purposes of clause 5.1, Downtime is calculated as beginning at the time you report a service failure to us. If you do not report a service failure to us before we resolve the problem, then the relevant period of outage will not be accumulated towards to the total Downtime for the relevant month.

5.3 You acknowledge that in order to maintain and upgrade our IP network infrastructure, we perform scheduled maintenance on our equipment from time to time. We will make all commercially reasonable efforts to provide you with reasonable prior notice of all scheduled and emergency maintenance procedures, but any outages or performance degradation during these times as a result of router, switch or server maintenance will not be counted as Downtime.

5.4 At your request, we will investigate any report of Downtime, and attempt to remedy any Downtime as soon as possible. If we reasonably determine that all facilities, systems and equipment are functioning properly, and that Downtime arose for some other cause, we will continue to investigate the Downtime at your request only, and provided you pay us at our then current prevailing time and materials rate.

5.5 The conditions set out in this clause 5 will be the Client's sole remedy and Vixen's sole obligation in respect of Downtime

## **6 FEES AND PAYMENT**

6.1 You must pay the Licence Fee on or before the commencement of this Agreement.

6.2 The payment of the Licence Fee will entitle you to authorise the number of Modules you have access to accordance with this Agreement, as is specified in the Schedule. If any time during the Term you wish to increase the number of Modules, you must pay an additional Licence Fee calculated in accordance with the table set out in the Schedule, calculated pro rata, according to the unexpired period of the Term.

6.3 You acknowledge that we will not be obliged to refund any portion of a Fee if this Agreement is terminated before the end of the Term for any reason.

6.4 Payment is quarterly in advance on the first of each quarter being January, April, July and October.

6.5 Should payment not be received within 7 days, your account will be suspended. Once payment has finally been received a \$150 reactivation fee will be applied to that invoice.

## **7 YOUR OBLIGATIONS**

7.1 You warrant to us that:

7.1.1 you have cleared all rights required to place all of Client Data on Our Site, and that the storage and hosting of Client Data on Our Site will not cause us to breach any person's rights or any laws;

7.1.2 that in accessing Our Site and using the Software and the Documentation you will not infringe the rights of any person, or breach any laws.

7.2 All of your obligations under clause 7.1 apply in respect of your own conduct, acts or omissions, and the conduct, acts and omissions of all Licensed Users, and all of your employees, agents or contractors.

7.3 You must indemnify and continue to indemnify us against all actions, claims, proceedings or liabilities which we may in any way incur by reason of:

7.3.1 any breach by you or any Licensed User of this Agreement including a breach of any warranty under this Agreement; or

7.3.2 your negligence or the negligence of your agents, employees or subcontractors, or any Licensed User in connection with this Agreement.

## **8 WARRANTIES**

8.1 We warrant that:

8.1.1 we will provide the Maintenance Services and the Hosting Services to you in a professional and businesslike manner, and in accordance with our obligations under this Agreement; and

8.1.2 the Software will perform substantially in accordance with the specifications set out in the Documentation. If at any time during the Term you believe that there is a defect in the Software or the Documentation such that either one of them does not comply with the specifications, you must notify us of that perceived defect. We must then investigate the perceived defect and upon verification of that defect, rectify or cause that defect to be rectified without any additional charge to you.

8.2 We do not warrant that:

8.2.1 the provision of the Services or any part of them will be continuous or uninterrupted;

8.2.2 the data transmitted or received by you through the use by you of the Software or the Services will be accurate or virus free;

8.2.3 the Software is free from defects;

8.2.4 Licensed Users will have continuous access to Our Site or to the Software; or

8.2.5 Client Data is secure from interference by third parties.

8.3 You acknowledge that:

8.3.1 performance of the Software and the Services depend on a number of factors outside our control, including traffic on, and technical difficulties with, the Internet; and

8.3.2 Our Site is secure within certain technical boundaries which you have considered and you agree that all liability which you or any third party may incur which is caused wholly or partly by one or more of these factors is your responsibility.

## **9 LIABILITY**

9.1 To the maximum extent permitted by law, all terms, conditions, warranties, undertakings, inducements or representations which are not expressly set out in this Agreement are expressly excluded from this Agreement.

9.2 Any liability which might be imposed by law on us which cannot be legally excluded is, where permitted by law, limited solely to the performance of Services again, the resupply of goods, or the cost of re-performing, repairing or re-supplying goods or Services

9.3 Notwithstanding any other provision of this Agreement or law, we will not be liable to you or any person claiming through you for any special, indirect, or consequential loss which may arise directly or indirectly out of this Agreement, the provision of any Services, or any failure by us to comply with this Agreement.

9.4 You warrant that you have not relied on any representation made by us which has not been stated expressly in this Agreement, or as to any profits or benefits which you may obtain from entering into this Agreement, and that you have relied on your own skill and judgement in deciding to enter into this

Agreement.

### **DEFAULT AND TERMINATION**

9.5 In addition to any entitlement to Fees we:

9.5.1 are entitled to recover an amount equal to our reasonable legal costs (on a solicitor/client basis), expenses, and interest at the rate fixed from time to time under the Penalty Interest Rates Act 1982 (Vic) on any overdue Fees; and

9.5.2 may (without prejudice to our other rights and remedies under this Agreement, and at law) if you fail to make any payment in accordance with this Agreement, suspend performance of any or all of our obligations under this Agreement until payment is made in full.

9.6 If either Party goes into liquidation, is declared bankrupt, or has a receiver or receiver and manager appointed to its affairs, or enters into voluntary administration, then this Agreement will terminate.

9.7 If either Party commits a material breach of its obligations under this Agreement and then fails to remedy that breach within 14 days of notification from the other Party, then the Party giving notice may at its election terminate this Agreement by further written notice.

## **10 CONFIDENTIALITY**

The Parties will maintain as confidential all Confidential Information belonging to the other Party that may be provided to them. In our case this includes all Confidential Information that may be contained in Client Data. The Parties will further ensure that any employee or agent who needs to know any Confidential Information will be placed under a similar obligation of confidentiality directly to the Party disclosing the Information. The obligations under this clause will survive termination of this Agreement for any reason.

## **11 CIRCUMSTANCES BEYOND CONTROL**

We will not be liable for any failure or delay in performing our obligations under this Agreement which is due to circumstances beyond our reasonable control, including acts of any government authority, war, sabotage, fire, flood, strike or other labour disturbance, interruption of or delay in transportation, unavailability of or delay in telecommunications or third party services, failure of third party software or inability to obtain power.

## **12 GOODS AND SERVICES TAX**

Where either Party is entitled to any payment (whether by way of damages, indemnity, set-off, reimbursement or otherwise) from the other Party in relation to anything done or omitted to be done under this Agreement, that Party will also be entitled to recover the amount of the GST on any Supply (within the meaning of the GST Legislation) made by that Party.

## **13 GENERAL**

13.1 You may not assign or sub-licence your rights or obligations under this Agreement without our consent.

13.2 We may assign or subcontract our rights or obligations under this Agreement by written notice to you.

13.3 The law of Victoria governs this Agreement and the transactions contemplated by it.

13.4 Any notices to be served under this Agreement may be served upon a Party at the address listed in the Schedule and may be served by hand, post, facsimile or electronic mail. In the case of a facsimile or electronic mail transmissions, notices will be deemed served at the time of dispatch by the sending Party if and only if no notice of default of transmission is received within 24 hours of dispatch. Change of address, facsimile number or email address must be notified in the same manner as service of notices.

13.5 This Agreement alone constitutes the entire agreement between us in relation to the provision of the Software, the Documentation and the Services, and supersedes and overrides all prior discussions between the Parties and their respective employees and agents.

14 If any provision of this Agreement is found to unlawful, void or unenforceable, then that provision will be severed from this Agreement and will not affect the validity and enforceability of the remaining provisions.