



MessageMedia  
Level 22  
385 Bourke Street  
Melbourne 3000

www.MessageMedia.com.au  
ABN: 16 095 453 062  
Support: 1800 155 228  
Fax: 03 8612 3689

Please Fax all 5 pages back to MessageMedia, Attention: Rob Smith 03 8612 3689

## RM Asia-Pacific - Customer Application Form

### Acceptance of Terms and Conditions

I, \_\_\_\_\_ (print name), accept the legal terms and conditions of this MessageMedia Service Agreement, effective from / / (today's date), on behalf of the company or organisation listed below:

<b>Company Name:</b>	<b>ABN:</b>
<b>Company Postal Address:</b>	<b>Country:</b> <b>Postcode:</b>

# The Account Administrator handles the day-to-day running of the account and is our primary contact.

\* The Billing contact is the secondary contact who will receive invoices and process account payments (Section 2 & 4 of T&C).

NB - If Administrator and Billing contacts are the same, please write 'as above' in the Billing Contact section.

<b>KEY CONTACT Name</b>		<b>KEY CONTACT Phone</b>	Mobile: Phone:
<b>KEY CONTACT Email</b>		<b>KEY CONTACT Fax</b>	
<b># ACCOUNT ADMINISTRATOR</b>		<b>ADMINISTRATOR Phone</b>	Mobile: Phone:
<b>ADMINISTRATOR Email</b>		<b>ADMINISTRATOR Fax</b>	
<b>*BILLING CONTACT Name</b>		<b>BILLING Phone</b>	Mobile: Phone:
<b>BILLING CONTACT Email</b>		<b>BILLING Fax</b>	

<b>Payment Method*</b> (Please Circle)	<b>CREDIT CARD</b>	<b>Direct Debit - (From Bank Account)</b>	<b>BPAY</b>	<b>CHEQUE</b>
<b>IF CREDIT CARD SELECTED AS PAYMENT METHOD:</b>				
<b>CREDIT CARD</b>	<b>Credit Card Type:</b> (Please Circle)	<b>VISA / MASTERCARD / AMEX / DINERS</b>		
<b>Credit Card Number</b>	* * * * - * * * * - * * * * - * * * *			
<b>Credit Card Expiry Date</b>	MM / YY	<b>Security Code</b>	* Please provide security code when we call you with setup confirmation	
<b>Name of Cardholder</b>				
<b>Signature of Cardholder</b>				

<b>Customer Name</b>		<b>Position</b>	
<b>Customer Signature</b>		<b>Date</b>	

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**SCHEDULE 1**

**Service Fees & Charges (All figures are GST exclusive & in AUS\$)**

**(a) MessageMedia's fees are as follows for the Customer's Account:**

- (i) Account Activation and License Fee: **\$50 + GST** (One Off Fee)
- (ii) Monthly (minimum) Access Fee: **\$25 + GST** - includes \$25 worth of messages
- (iii) Contract period of 12 months from date of signed Agreement.

**(b) SMS Message pricing structure (Monthly):**

- (i) 1 - 5000 messages per month are 15.0 cents each + GST.
- (ii) 5,001 - 10,000 messages per month are 14.0 cents each + GST
- (iii) 10,001 - 50,000 messages per month are 13.0 cents each + GST
- (iv) 50,001 - 100,000 messages per month are 12.0 cents each + GST
- (v) 100,001 + (Plus) messages per month are 11.0 cents each + GST
- (vi) Delivery Reports (if activated) are an additional 6.0 cents each + GST per message

**1. Overview of Key Terms in this Agreement**

- 1.1.** This is a long-term contract – **the Customer is agreeing to an initial minimum term of 12 months** (refer to clause 11.1). Termination of this Agreement during the Initial Term will result in the customer being liable for an Early Termination Fee (refer to clause 11.6).
- 1.2.** MessageMedia offers a 30 day money back guarantee to all customers who sign up via this Agreement.
- 1.3.** MessageMedia commits to provide 100% up time to our Standard Rate SMS Services (refer to MessageMedia's Service Level Agreement).
- 1.4.** The Monthly Access Fee referenced in Schedule 1 above is fully redeemable for message credits each month (refer to clause 4.3).
- 1.5.** Customers agrees to comply with all relevant legislation and guidelines, and not send SPAM or Restricted Content (refer to clause 6).
- 1.6.** Customers who do not pay via credit card direct debit will incur a \$5 monthly surcharge each month (refer to clause 4.2).
- 1.7.** All Customer details and Message content are held in strict confidence by MessageMedia. However MessageMedia can disclose the existence of this agreement for marketing purposes (refer to clause 5).

**2. Definitions**

- 2.1. Account** means the entirety of the Customer's rights and obligations under this Agreement, as well as any usernames, passwords, software, access to MessageMedia services and infrastructure, Dedicated Numbers, Platinum Program Membership and SMS Messaging Services provided by MessageMedia.
- 2.2. Account Activation and License Fee** means the fee set out in schedule 1 and charged by MessageMedia to the Customer to set up each SMS Messaging Service and allow the Customer a non-exclusive license to use the SMS Messaging Service.
- 2.3. Application** means the application attached to the front of this Agreement for use of the Standard Messaging Service.
- 2.4. Business Day** means a day upon which trading banks are open for business in Victoria.
- 2.5. Carrier** means an Australian or international telecommunications carrier and includes in Australia Telstra, Optus, Virgin, Vodafone, Hutchinson or Orange, in New Zealand Telecom NZ and Vodafone NZ, and various other telecommunications carriers throughout the world
- 2.6. Confidential Information** means, in relation to each party (for the purposes of this definition, the **Discloser**):
  - (a) all information relating to or used by the Discloser or its Related Body Corporate, including know-how, trade secrets, ideas, marketing strategies and operational information;
  - (b) all information concerning the business affairs (including products, services, customers and suppliers) or property of the Discloser or its Related Body Corporate, including any business, property or transaction in which the Discloser or its Related Body Corporate may be or may have been concerned or interested;
  - (c) any other information disclosed by or on behalf of the Discloser or its Related Body Corporate which, by its nature or by the circumstances of its disclosure, is or could reasonably be expected to be regarded as confidential;
  - (d) the terms & the actual existence of this Agreement; and
 including any such information made available to the Discloser or its Related Body Corporate by any third party, but excluding any information that:
  - (e) is publicly known or becomes publicly known other than by breach of this Agreement or any other obligation of confidentiality;
  - (f) is disclosed to the other party without restriction by a third party and without any breach of confidentiality by the third party; or
  - (g) is developed independently by the other party without reliance on any of the Discloser's Confidential Information.
- 2.7. Content** means the content or content services to be made available by the Customer for purchase and/or supply to End Users, as described in the Application Form.
- 2.8. Custom Development Fee** means the fee set out in schedule 1 and charged by MessageMedia to the Customer for any development work performed by MessageMedia on behalf of the Customer in order to further enhance the Customer's SMS Messaging Service.
- 2.9. Customer Facilities** means material owned or licensed by the Customer (including its IT systems, documentation, templates and data, and web site) which is used by either party to this Agreement in the performance of their obligations under this Agreement and any modification to same.
- 2.10. Dedicated Number** means a Standard Rate digital mobile service provided by MessageMedia to the Customer under this Agreement for exclusive use as part of the Customers SMS Messaging Service.
- 2.11. End User** means the party who receives Messages sent to their mobile handset or the Customer's application which receives Messages.
- 2.12. Fees** mean the Account Activation and License Fee, Monthly Access Fee, Monthly License Fee, Custom Development Fee, and Platinum Program Fee.
- 2.13. Heartbeat Messages** means automated messages sent by MessageMedia or by the Customer to ensure the SMS Messaging Service is operating in accordance with the Service Levels.
- 2.14. Intellectual Property Rights** means all rights conferred under statute, common law and equity in and in relation to inventions, designs, trade marks, trade names, logos, and get up, circuit layouts, semi-conductor and copyright and any other intellectual property rights including moral rights, confidential or other proprietary rights, or other rights to registration of such rights.
- 2.15. Message** means text or binary content generated from either a mobile telephone or customer application such as a web site, call/contact centre or PC terminal, and received by the mobile telephone or customer application.

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- 2.16. Message Credits** means a credit to the Customer's Account of the Messaging Fee for each Message to a maximum amount no greater than the Monthly Access Fee.
- 2.17. Messaging Fee** means the fee set out in schedule 1 and charged by MessageMedia to the Customer on a monthly basis per Message sent through the Customer's SMS Messaging Service.
- 2.18. MessageMedia Facilities** means MessageMedia's infrastructure, gateway and technology which the Customer will connect to in order to operate the SMS Messaging Service.
- 2.19. Monthly Access Fee** means the fee set out in schedule 1 and charged by MessageMedia to the Customer on a monthly basis for access to the SMS Messaging Service.
- 2.20. Monthly License Fee** means the fee set out in schedule 1 and charged by MessageMedia to the Customer on a monthly basis for a Dedicated Number. This provides the Customer exclusive use of the Designated Number.
- 2.21. Opt Out** means the ability for an End User to stop receiving any further text promotions from the Customer.
- 2.22. Platinum Program Fee** means the fee set out in Schedule 1 and charged by MessageMedia to the Customer for access to MessageMedia's Platinum Program. For further details please consult MessageMedia's Service Level Agreement
- 2.23. Premium SMS Service** means a service provided by MessageMedia which enables the Customer to:
- receive requests from End Users via SMS for Content or Content services available for purchase by an End Users over MessageMedia facilities;
  - supply the Content or Content services purchased by End Users over MessageMedia facilities; and
  - receive from MessageMedia rebates
- 2.24. Service Level** means the service levels set out in the Service Level Agreement provided to the Customer.
- 2.25. SMS Messaging Service** means the service provided by MessageMedia which enables the Customer to send and receive Standard Rate Messages through MessageMedia's SMS gateway, for which the Customer is billed on a per Message sent basis.
- 2.26. Standard Rate Messages** means Messages that are billed by Carriers at standard SMS rates, and in particular are not Premium Rate SMS Messages which are billed by the Carriers at a fixed rate applicable to the particular premium rate service that the Message is being sent to.
- 2.27. Restricted Content** means the Content that:
- is likely to be, having regard to the contemporary attitudes of Australian society, offensive to reasonable adults;
  - is likely to be, having regard to the contemporary attitudes of Australian society, unsuitable for minors;
  - promotes, incites or instructs in matters of crime;
  - describes, incites or promotes unlawful sexual activity;
  - promotes or incites violence against any person or group, or incites racial hatred;
  - causes unnecessary alarm, distress or panic;
  - breaches a code of practice that applies to the Service;
  - is false, misleading or deceptive, or likely to mislead or deceive;
  - provides financial advice to any person;
  - is out of date, having regard to information generally available, subsequently published, or released, or made available; or
  - is for the purpose of providing any warning or notification about a serious risk to the safety of persons or property (for example, emergency services).
- 2.28. Unrestricted Content** means the Content not falling within one of the restrictions in clause 2.27 of this Agreement.

### 3. Background

- 3.1.** Message4U Pty Ltd t/a MessageMedia ("MessageMedia") offers to provide you (the "Customer") multiple licenses for SMS Messaging Services subject to this Standard Rate SMS Service Agreement. The parties to this legal agreement shall be MessageMedia and the Customer.
- 3.2.** The SMS Messaging Service will be used by the Customer exclusively for the provision of Standard Rate Messages and Unrestricted Content by the Customer to End Users.
- 3.3.** The Customer will pay MessageMedia the Fees.
- 3.4.** End users will not be billed by a Carrier for any Messages received from the Customer's SMS Messaging Service.

### 4. Fees and Charges

#### 4.1. Fees:

- 4.1.1. The Account Activation and License Fee and any applicable Custom Development Fees are payable immediately on signing of your contract with MessageMedia.
  - 4.1.2. The Monthly Access Fee, Monthly Licensing Fees and Platinum Program Fees (if applicable) are payable monthly in advance per Account and will be payable on a pro-rata basis in part months.
  - 4.1.3. Any Messages sent by the Customer shall be invoiced to the Customer at the end of the month during which they were sent.
- 4.2. Payments:**
- 4.2.1. MessageMedia will invoice the Customer on a calendar month basis, and the Customer agrees that payment will be made within fourteen (14) days of invoice date.
  - 4.2.2. Payment may be made by the Customer to MessageMedia by:
    - 4.2.2.1. Direct debit of credit card of the Customer (please complete details on page 1). Please note payments processed through Amex or Diner's Club will incur an additional 2% surcharge due to high processing costs.
    - 4.2.2.2. Cheque / direct transfer (additional \$5 monthly fee applies).
  - 4.2.3. The Customer agrees that MessageMedia's records are conclusive evidence of the Customer's order for, and use of the SMS Messaging Service.
  - 4.2.4. The Customer agrees to pay for every Message sent using MessageMedia's SMS Messaging Service irrespective of receipt by the intended recipient. On written request received within 30 days of the Message being sent, MessageMedia will provide documentary evidence to the Customer that the Message in question was successfully delivered to the relevant Carrier. Note that message logs are destroyed after 30 days. Any failures to deliver the Message subsequent to successful delivery to the Carrier is not under the control of MessageMedia and the Customer will not hold MessageMedia liable in respect of any such failure.
  - 4.2.5. The Customer is liable for all reasonable expenses (including contingent expenses such as debt collection commission) and indemnity legal costs incurred by MessageMedia for enforcement of obligations and recovery of moneys due from the Customer under this Agreement.
- 4.3. Message Credits:**
- 4.3.1. the Monthly Access Fee includes Message Credits to a maximum amount of the Monthly Access Fee, which may be redeemed by the Customer on Messaging Fees.
  - 4.3.2. the Message Credits are non refundable and do not roll over in to the next calendar month. That is, unused Message Credits in any given calendar month are forfeited by the Customer.

### 5. Confidentiality

- 5.1.** MessageMedia shall keep confidential any information sent by the Customer using the SMS Messaging Service.
- 5.2.** The Customer does not prevent MessageMedia from disclosing the existence of this Agreement for the purposes of marketing MessageMedia to current and future clients.
- 5.3.** Outside the operation of clause 5.2, each party (Recipient) undertakes that, in respect of Confidential Information disclosed to the Recipient by the other party (Disclosing Party), it will not disclose or allow or make it possible for any person to observe that Confidential Information except:
- 5.3.1. for the purpose for which the Confidential Information was disclosed to the Recipient under the terms of this Agreement;
  - 5.3.2. to those employees, officers and agents of the Recipient who need to know the information for the purposes of this Agreement, if that person undertakes to keep confidential the Confidential Information;
  - 5.3.3. to professional advisers and consultants of the Recipient whose duties in relation to the Recipient require that the Confidential Information be disclosed to them;
  - 5.3.4. with the prior written approval of the Disclosing Party; or
  - 5.3.5. as otherwise required by law to disclose such information.
- 5.4.** The parties acknowledge that monetary damages alone would not be adequate compensation for a breach of the obligations of confidentiality under this Agreement, and a Disclosing Party is entitled to seek an injunction from a Court of competent jurisdiction on a breach or threatened breach of this clause. The parties further agree that the party seeking the injunction is not required to provide an undertaking as to damages for the purposes of obtaining the injunction.
- 5.5.** The party against whom the injunction is sought agrees that it will not object to the grounding of such an injunction.
- 5.6.** Despite anything else contained in this Agreement and in particular in this clause 5, MessageMedia has the unconditional

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and irrevocable right to disclose the identity and address of the Customer and any End User in the event of any complaint received from any regulatory or governmental body or licensed Carrier, in connection with the Content offered by the Customer.

steps, including notifying MessageMedia where the End User is a MessageMedia customer, to ensure that the End User does not receive any further Messages.

## 6. Customer Obligations

- 6.1. The Customer agrees to comply with any instructions concerning access to and/or use of the SMS Messaging Service that MessageMedia may give to it from time to time and agrees not to do anything that may jeopardise the security or integrity of any part of MessageMedia's systems or platforms.
- 6.2. The Customer accepts responsibility for all aspects of their Account, including the actions of all persons in possession of the Customer's username and password.
- 6.3. The Customer agrees not to transmit any information or material that violates State or Federal law, or transmit any material that is in contravention to any privacy or copyright rules or any other proprietary interest.
- 6.4. Without limiting the operation of Clause 6.3, the Customer agrees not to use or seek to use the SMS Messaging Service for publishing, reproducing or advertising any message, information, symbol or other communication which is offensive or abusive or of an indecent, obscene or menacing character or for the purpose of causing annoyance, inconvenience or needless anxiety to any person, or for any unlawful purpose.
- 6.5. The Customer agrees that the SMS Messaging Service is to be used solely for the provision of general information to End Users and provision of Restricted Content is specifically prohibited. The Customer acknowledges that the Carriers and MessageMedia may audit Content of services from time to time and that a breach of this clause may result in a breach of the Customers obligations under this Agreement, or potentially the termination of this Agreement.
- 6.6. The Customer agrees not to use access to MessageMedia's services, connections, or facilities to:
  - 6.6.1. circulate or send any unsolicited or unauthorised marketing, publicity or advertising material message to any person (including a message that is designed to promote goods or services ("Marketing Message") to any person unless that person has consented to receiving the Marketing Message, has a means to opt-out of receiving such a Marketing Message and the Marketing Message clearly identifies the source or originating entity of the Marketing Message);
  - 6.6.2. transmit computer worms or viruses;
  - 6.6.3. access, any other MessageMedia computer systems or networks without MessageMedia's consent or disrupt or damage any MessageMedia computer systems or network;
  - 6.6.4. forge any messages; or
  - 6.6.5. send any obscene, sexually explicit, abusive or defamatory material or material that violates any Commonwealth, State, Territory or local law or regulation or is contrary to the Guidelines.
- 6.7. In accordance with the Australian Communications Industry Forum ("ACIF") Industry code and the Australian SPAM Act 2003, the Customer agrees that they will not send marketing messages to any person unless:
  - 6.7.1. the recipient has first consented to receiving the marketing message and
  - 6.7.2. the recipient has been provided with a means to opt-out of receiving the marketing message and
  - 6.7.3. the source of the marketing message is clear.
- 6.8. In accordance with the New Zealand Unsolicited Electronic Messages Act 2007 (the "Act"), the Customer agrees that they will not send or cause to be sent messages to any person which contravene the Act in any way or amounts to a Civil Liability Event within the meaning of the Act.

## 7. Provision of Service to Others

- 7.1. The Customer will, to the best of their ability, ensure that any third party using its facilities is bound by the terms and conditions of this Agreement.
- 7.2. The Customer will, to the best of their ability, ensure the End User is provided with all necessary and required terms and conditions for any goods or services that the Customer is providing through the SMS Messaging Service.
- 7.3. The Customer will, to the best of their ability, provide End Users the ability to Opt Out of receiving any further Messages.
- 7.4. The Customer expressly acknowledges that MessageMedia will not, at any time, be responsible for the Content, or the destination of any Content conveyed by or to the Customer.
- 7.5. If the Customer becomes aware of any End User that does not wish to continue to receive Messages, it must take all necessary

## 8. Property Rights

- 8.1. The Customer agrees that MessageMedia's software is protected by copyright and trademark and remains the property of MessageMedia and may not be copied without prior consent in writing from MessageMedia.
- 8.2. The Customer grants to MessageMedia, a non-exclusive, non-transferable license to use the Intellectual Property Rights (including the right to communicate to the public) in and to the Customer's Facilities necessary for MessageMedia to send Messages to End Users through the Customer's SMS Messaging Service.
- 8.3. The Customer acknowledges that by sending Messages through the Customer's SMS Messaging Service, the Customer licences End Users supplied with the Messages to use the Intellectual Property Rights in and to the Messages on terms and conditions to be agreed between the Customer and those End Users directly.
- 8.4. MessageMedia grants to the Customer a non-exclusive, non-transferable licence to use the Intellectual Property Rights in and to the MessageMedia Facilities for the sole purpose of utilising the SMS Messaging Service available to End Users over the MessageMedia Facilities as described in this application form or as otherwise notified by MessageMedia.
- 8.5. MessageMedia will withdraw all SMS Messaging Services should it have reason to believe that the Customer has been, or has been attempting to undermine the Intellectual Property Rights of MessageMedia.

## 9. Indemnities

- 9.1. The Customer indemnifies MessageMedia from all costs (including legal costs on a full indemnity basis), expenses, loss, liabilities, suits, actions, damages or claims arising or in any other way connected with the Customer's use of their Account or the SMS Messaging Service, or any other person using the Customer's username and password.
- 9.2. In particular, the Customer agrees to indemnify MessageMedia in connection with any action, claim or demand which may be instituted against MessageMedia arising out of:
  - 9.2.1. any wilful or negligent act or omission by the Customer, its employees, agents or contractors;
  - 9.2.2. an actual or allegation that the Intellectual Property Rights of any person have been infringed by the use of the Customer's Facilities; or
  - 9.2.3. any Messages sent by the Customer whether or not the claim is brought or made by a MessageMedia customer or another party.
- 9.3. Any indemnity in this Agreement is a continuing obligation, independent of other obligations under this Agreement and continues after this Agreement ends. It is not necessary for MessageMedia to incur expense or make payment before enforcing a right of indemnity under this Agreement.

## 10. Disclaimer

- 10.1. MessageMedia (including its affiliates, directors, officers, employees, agents, contractors, successors or assignees) will not be liable for any loss or damage caused to the Customer or anyone else howsoever arising as a result of using MessageMedia's SMS Messaging Service. This includes but is not limited to loss or damage caused by loss or delay of Messages or any loss caused by the negligence of MessageMedia, their employees or contractors.
- 10.2. The Customer accepts that MessageMedia is in part reliant on the Carriers and other 3<sup>rd</sup> Party suppliers (collectively referred to as "Telecommunication Providers") and the Customer will not hold MessageMedia liable in any way whatsoever for MessageMedia's inability to provide service as a result of faults that are the responsibility of the Telecommunication Providers. In the event of a Telecommunication Providers fault, MessageMedia must, to the best of their ability, and upon written request by the Customer, communicate in writing to the Customer all relevant information relating to the Telecommunication Providers's service fault to evidence the consequential damage.
- 10.3. The Customer will be responsible at all times for maintaining the security of its and its End User's data, and MessageMedia bears no liability for the loss or damage in part or whole, of such data, to the extent that such loss or damage has been caused or contributed to by the Customer.
- 10.4. MessageMedia does not warrant that its SMS Messaging Service will be error-free or uninterrupted, or that transmission

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will be instantaneous. Please consult MessageMedia's Service Level Agreement for further information.

- 10.5.** The Customer acknowledges that there has been no reliance by it on MessageMedia's skill or judgement or written or oral representations in deciding whether MessageMedia's SMS Messaging Service is fit for a particular purposes or meet particular criteria.
- 10.6.** The Customer acknowledges that the internet is not an inherently secure system and undertakes responsibility for the protection of its information and data.
- 10.7.** The Customer acknowledges that the internet may contain viruses (including other destructive programs), which may, if not eliminated, destroy parts or all of the data contained within its system, and that MessageMedia has no control over these viruses.
- 10.8.** MessageMedia does not provide any filtering or checking of data to eliminate these viruses, and the Customer agrees to provide its own mechanism for checking its system for viruses, and to hold MessageMedia harmless from any damage caused by viruses obtained through the SMS Messaging Service.

## 11. Term and Termination

- 11.1.** This Agreement commences on the date the Application is executed and will continue for an initial term of 12 months ("**Initial Term**") unless otherwise terminated in accordance with this clause 11.
- 11.2.** No later than 60 days before the end of the Initial Term, MessageMedia and the Customer will enter into good faith negotiations to agree in writing a further term of the Agreement which will be substantially under the same conditions that applied under the Initial Term. If MessageMedia and the Customer have not agreed a further term by the expiry of the Initial Term, this Agreement will hold over until terminated by the provision of 30 days' written notice by either Party.
- 11.3.** MessageMedia may, following consent from the Customer:
- 11.3.1. immediately cease the conveyance of any Messages that it considers is or may be in breach of the Guidelines, this Agreement and/or any applicable laws or regulations; or
- 11.3.2. suspend the Customer's access to the offending service(s) only if it considers that the Customer is or may be in breach of the Guidelines, this Agreement and/or any applicable laws or regulations.
- 11.4.** MessageMedia may terminate this Agreement immediately if:
- 11.4.1. MessageMedia notifies the Customer that all Dedicated Numbers made available for use by the Customer are no longer available;
- 11.4.2. a receiver, liquidator, provisional liquidator or administrator is appointed over any of the Customer's undertakings or assets or if the Customer enters into any arrangement with any creditors or any class creditors;
- 11.4.3. it becomes unlawful for the Customer to perform its obligations under this Agreement or the performance by a party of their obligations under this Agreement is in breach of a law;
- 11.4.4. the Customer sends any Restricted Content to End Users;
- 11.4.5. the Customer threatens the operation, technical integrity or liability of MessageMedia's Facilities in the reasonable opinion of MessageMedia; or
- 11.4.6. MessageMedia notifies the Customer in writing of a breach of this Agreement and the Customer fails to remedy the breach to the satisfaction of MessageMedia within 7 Business Days of notification.
- 11.4.7. any payment due from the Customer remains unpaid for a period of seven (7) days after the due date.
- 11.5.** When this Agreement ends:
- 11.5.1. MessageMedia will immediately remove access to and disconnect the Customer's Facilities from the MessageMedia Facilities;
- 11.5.2. the Customer must return and/or destroy all material provided by MessageMedia to it under this Agreement; and
- 11.5.3. clauses 5, 8, 9 and 10 shall continue to apply.
- 11.6.** If this Agreement is terminated during the Initial Term for any reason (other than by breach of Agreement by MessageMedia or an act of force majeure), the Customer agrees to pay MessageMedia an **Early Termination Fee** equal to the Monthly Access Fees that would otherwise have been invoiced had the Agreement continued until the end of the Initial Term.
- 11.7.** Any termination is without prejudice to any rights, liabilities or obligations accruing as at such termination.

## 12. General

- 12.1.** This Agreement shall be governed and interpreted according to the laws of Victoria.
- 12.2.** In the event that any provision of this Agreement proves to be illegal or unenforceable that provision is deemed to be omitted from this Agreement without affecting the legality of the remaining provisions. The remaining provisions of this Agreement shall continue in full force and effect.
- 12.3.** Neither party is liable for any delay or failure to perform its obligations under this Agreement due to any event beyond its reasonable control including an act of god, inclement weather, flood, lightning, fire, industrial action the act or omission of any government, terrorism, war, military operations or riot.

### 12.4. Notices

- 12.4.1. Notices under this Agreement may be delivered by hand, by mail or by facsimile to:

MessageMedia  
Attention: Grant Rule  
Address: Lvl 22/385 Bourke St Melbourne VIC 3000  
Telephone: +61 3 9600 0777  
Facsimile: +61 3 9602 5940

- 12.4.2. Unless a later time is specified in it, a Notice takes effect from the time it is actually received or taken to be received.
- 12.4.3. A Notice delivered by hand or sent by post or facsimile is taken to be received:
- (a) in the case of delivery by hand, on the day of delivery if delivery is before 5.00pm on a Business Day otherwise on the next business day;
- (b) in the case of a Notice sent by prepaid post on the second Business Day after posting;
- (c) in the case of a facsimile, on production of a transmission report by the machine from which the facsimile was sent, which indicated that the facsimile was sent in its entirety to the facsimile number of the recipient notified for the purpose of this clause, if produced before 5.00pm on a Business Day, otherwise on the next Business Day.

## 13. Interpretation

- 13.1.** In this Agreement unless the context indicates a contrary intention:
- (a) words denoting the singular number shall include the plural and vice versa;
- (b) words importing persons shall include corporations and other entities recognised by law and where a person is referred to as the trustee of any Trust or Settlement the reference is to that person in his capacity as such;
- (c) headings are for convenience only and shall not affect interpretation;
- (d) references to clauses are references to clauses of this Agreement and references to sub-clauses are references to sub-clauses of this Agreement;
- (e) references to this Agreement shall be deemed to include references to this Agreement as amended novated supplemented varied or replaced from time to time;
- (f) references to any party to this Agreement shall include its transferees, successors or permitted assigns;
- (g) words denoting any gender shall include all genders;
- (h) each Schedule and Appendices (if any) to this Agreement hereby incorporated into this Agreement, provided that if there is any inconsistency between any such Schedule and the provisions of this Agreement, the provisions of this Agreement shall prevail;
- (i) reference to "\$" and "dollars" are to Australian currency;
- (j) a reference to an Act of Parliament, ordinance, code or other law includes regulations and other statutory instruments under it and shall include any amendment, consolidation, modification or re-enactment thereof or any replacement legislation;
- (k) a reference to a party binds if a corporation its liquidators, controllers, receivers, managers and administrators and if an individual their executors, trustees and beneficiaries; and
- (l) no provision of this agreement will be construed adversely to a party solely on the ground that the party was responsible for the preparation of this agreement or that provision.