



# **VMVault**

**SECURE HOSTED VIRTUALISATION**

**Service Agreement**

## RECITALS

- A. The **client** has requested and VMVault Pty Ltd ABN 70 131 552 595, “VMVault”, has agreed to provide, **services** to the **client**.
- B. VMVault will supply, and the **client** will acquire, the **services** on the terms and conditions specified in:
  - (i) this **Service Agreement**; and
  - (ii) the **Schedule to the Service Agreement**; and
  - (iii) any **Orders for Service**; and
  - (iv) any other documents that may be subsequently incorporated into this **agreement**.

## 1. Definitions and Interpretation

It is agreed:

### 1.1. Definitions

The following definitions apply to the whole of this agreement inclusive of this **Service Agreement**, the **Schedule to the Service Agreement**, any **Orders for Service** and any other documents that may be subsequently incorporated into this **agreement**, unless the context requires otherwise:

**Acceptable Use Policy** means the document with that title available for download from the **VMVault Website**.

**Agreement** means this Service Agreement including the Schedule to the Services Agreement, any Orders for Service and any other documents that may be subsequently incorporated into this Agreement.

**Agreement date** means the date of **agreement** nominated at clause 2 of the **Schedule to the Service Agreement**.

**Client** means the client specified in the **Schedule to the Service Agreement** and/or the applicable **Order for Service**.

**End User** means any person who uses the **services** by virtue of the **client's** access to the **services** with or without the **client's** permission.

**Excess Data** means data transfer in excess of the package limit/s combined with any optional extras ordered in the relevant **Orders for Service**.

**Excess Data Charge** means the charges applicable, in addition to the package, optional extras and licensing charges, for **excess data**.

**Force Majeure Event** means an event or cause beyond the reasonable control of the party claiming force majeure including, without limitation, fire, flood, earthquake, elements of nature or acts of God, acts of war, terrorism, riots, civil discords, rebellions or revolutions, strikes and lockouts.

**Order for Service** means a document with that title relating to the **client**.

**Schedule to the Service Agreement** means the document with that title relating to the client that has been signed by both parties.

**Service Agreement** means this document in its entirety including any amendments.

**Service Level Agreement** means the document with that title available for download from the **VMVault Website**.

**Services** means services and/or products VMVault has agreed to provide and the client has agreed to acquire as outlined in the applicable **Orders for Service**.

**VMVault Website** is accessible at [www.vmvault.com.au](http://www.vmvault.com.au).

## 1.2. Interpretation

The following rules apply to the whole of this agreement inclusive of this **Service Agreement**, the **Schedule to the Service Agreement**, any **Orders for Service** and any other documents that may be subsequently incorporated into this agreement, unless the context requires otherwise:

- 1.2.1. The singular includes the plural and the plural includes the singular.
- 1.2.2. The definition of a word or phrase is applicable to its other grammatical forms.
- 1.2.3. A reference to dollars or \$ is to Australian currency.
- 1.2.4. A reference to a “day” or “month” or “year” refers to a calendar day, month or year respectively.
- 1.2.5. Words shown in bold type in this **agreement** are defined in the definitions section at subclause 1.1.

## 2. The Supply and Commencement of Services

- 2.1. VMVault agrees to provide the **services** to the client on the terms and conditions of this **agreement**.
- 2.2. The **client** agrees to use the **services**, and will ensure that its **end users** use the **services**, in accordance with
  - (a) the terms and conditions of this **agreement**; and
  - (b) law in force in Queensland; and
  - (c) the **Acceptable Use Policy**.
- 2.3. The **services** commence as soon as practicable after receipt by VMVault of the initial payment in accordance with clause 4.1.

## 3. Orders for Service

- 3.1. Any **Order for Service** submitted to VMVault by the **client** constitutes a binding offer capable of acceptance by VMVault.
- 3.2. VMVault is not obligated to accept any **Order for Service** submitted to it.

## 4. Payment Terms

### 4.1. Initial Payment

- 4.1.1. An initial payment covering the first 2 **months'** provision of **services** is due within 7 **days** of the **agreement date**.
- 4.1.2. VMVault is not obliged to make the **services** available to the **client** until it has received the initial payment, and the funds have cleared.

### 4.2. Subsequent Payments

- 4.2.1. Payments are to be made monthly in advance for each calendar **month** or part thereof for which **services** are made available to the **client**.

### 4.3. Overdue payments

- 4.3.1. Payments are due 14 **days** after the invoice date.
- 4.3.2. If VMVault has not received payment in full 14 **days** after the invoice date, the payment is deemed to be overdue.
- 4.3.3. An additional "late fee" of \$33 for overdue payments will be payable by the **client**.
- 4.3.4. Upon discovery of an overdue payment, VMVault may make a demand for payment in writing to the **client**.
- 4.3.5. If payment of the overdue payment and late fee is not received by VMVault within 7 days of making the demand in 3.3.4, VMVault may, in its sole discretion, immediately cease provision of **services** to the **client**.
- 4.3.6. VMVault's rights pursuant to clauses 4.3.4 and 4.3.5 exist in addition to its rights pursuant to clause 7.

### 4.4. Excess Data Charges

- 4.4.1. **Excess data** will be charged **monthly** in arrears.

### 4.5. Payments made by credit card may incur an additional processing fee equal to any fee VMVault incurs for processing the **client's** credit card payment.

### 4.6. Updated Charges

- 4.6.1. If, at any time, there is an increase in VMVault's cost of providing the **services** VMVault may review and modify the charges by giving the **client** 10 business days prior notice ("the notice period").
- 4.6.2. Upon receipt of a notice provided pursuant to clause 4.6.1, the **client** may elect to terminate **services** affected by the change in charges, by giving VMVault no less than 10 business days notice of its intention to terminate pursuant to this clause.
- 4.6.3. If the **client** terminates affected **services** pursuant to clause 4.6.2, that termination is effective either, on the date that the amendment was to be effective (as notified by VMVault pursuant to clause 4.6.1), or the date 10 business days after VMVault receives notice of the **client's** intention pursuant to clause 4.6.2, whichever is the latter.
- 4.6.4. If, after the conclusion of the notice period notified pursuant to clause 4.6.1, the **client** has not made an election pursuant to clause 4.6.2, the **client** is deemed to have accepted the amendments notified pursuant to clause 4.6.1 and to have forfeited its right of termination under clause 4.6.2.

## 5. Service Level Agreement

- 5.1. The **Service Level Agreement** prescribes the service level that VMVault is expected to meet and the compensation VMVault will provide to clients if its service level targets are not met.
- 5.2. The **client** acknowledges that VMVault may at any time amend the **Service Level Agreement**, or cancel and introduce a replacement **Service Level Agreement** and such amendment, cancellation and/or replacement will be binding on the **client** on and from the date that it is published on the **VMVault website**.

## 6. Method of Communication

- 6.1. By providing VMVault with the **client's** email address, the client consents to receiving communications from VMVault via email.
- 6.2. By providing VMVault with the **client's** facsimile number, the client consents to receiving communications from VMVault via facsimile.

## 7. Acceptable Use Policy

- 7.1. The **client** will comply, and will ensure that each of its **end users** complies with the **Acceptable Use Policy**.
- 7.2. The **client** confirms that it has read and understood the **Acceptable Use Policy** prior to signing the **agreement**.
- 7.3. The **client** acknowledges that VMVault may at any time amend the **Acceptable Use Policy**, or cancel and introduce a replacement **Acceptable Use Policy** and such amendment, cancellation and/or replacement will be binding on the **client** on and from the date that it is published on the **VMVault website**.

## 8. Breach of Contract by the Client

Without limitation, if the **client** breaches any term of this contract, VMVault, may, in its sole discretion, exercise any of, any combination of or all of the rights afforded to it by this clause or take no action.

- 8.1. VMVault may notify the **client** in writing of the breach and give the **client** 7 days to remedy the breach.
  - 8.1.1. If the **client** fails to remedy the breach to the satisfaction of VMVault within the period specified, VMVault may exercise any of the rights afforded to it by this clause or take no further action.
  - 8.1.2. If the **client** does remedy the breach to the satisfaction of VMVault within the period specified, the parties remain bound by the **agreement**.
- 8.2. VMVault may terminate the contract and cease provision of **services** to the **client**.
- 8.3. VMVault may pursue any remedy available to it at law.

## 9. Breach of Contract by VMVault

- 9.1. The **client** may terminate **services** on written notice to VMVault if VMVault materially breaches the **agreement** in relation to those **services** and fails to remedy that breach within **14 days** of receipt of written notice from the **client** defining the breach and requesting that the breach be remedied.

## 10. No Waiver

- 10.1. No failure to exercise and no delay in exercising any right, power or remedy under this **agreement** will operate as a waiver.
- 10.2. No single or partial exercise of any right, power or remedy under this **agreement** will preclude any other right, power or remedy.

## 11. Amendment of Agreement

- 11.1. Except as expressly provided for in this **agreement**, this **agreement** may be amended only by another agreement executed by all parties.
- 11.2. Where, in VMVault's reasonable opinion, the amendment does not have a material adverse impact upon the **client's** rights under this agreement, VMVault may amend any part of this **agreement** at any time without the **client's** consent by giving the client not less than 10 business days notice in writing.
- 11.3. Where, in VMVault's reasonable opinion, the amendment relates to improvements in the **services**, VMVault may amend any part of this **agreement** at any time without the **client's** consent by giving the client not less than 10 business days notice in writing.
- 11.4. Where VMVault wishes to amend the **agreement** otherwise than in accordance with clauses 11.2 or 11.3, it may do so at any time by giving the **client** 10 business days prior notice ("the notice period").
- 11.4.1. Upon receipt of a notice provided pursuant to clause 11.4, the **client** may elect to terminate this **agreement**, or where the amendment is to be made to one or more **Schedule(s)** and/or **Order(s) for Service**, the relevant **Schedule(s)** or **Order(s) for Service**, by giving VMVault no less than 10 business days notice of its intention to terminate pursuant to this clause.
- 11.4.2. If the **client** terminates the **agreement** or the relevant **Schedule(s)** or **Order(s) for Service** pursuant to clause 11.4.1, that termination is effective either, on the date that the amendment was to be effective (as notified by VMVault pursuant to clause 11.4), or the date 10 business days after VMVault receives notice of the **client's** intention pursuant to clause 11.4.1, whichever is the latter.
- 11.5. If, after the conclusion of the notice period notified pursuant to clause 11.4, the **client** has not made an election pursuant to clause 11.4.1, the **client** is deemed to have accepted the amendment(s) notified pursuant to clause 10.4 and to have forfeited its right of termination under clause 10.4.1.

## 12. Obligations

- 12.1. Each party will take all steps, execute all documents and do everything reasonably required by the other party to give effect to any of the transactions contemplated by this **agreement**.
- 12.2. The **client** will not exercise any rights or perform any obligations pursuant to this **agreement** through any person other than the employees or officers of the **client** without the prior written consent of VMVault.
- 12.3. Irrespective of whether VMVault has provided its consent pursuant to clause 12.2, the **client** will remain responsible for the exercise of its rights and the performance of its obligations under this **agreement**.
- 12.4. The **client** will provide and maintain its own network security.
- 12.5. The **client** will not do, or permit to be done, any act which could or does damage the reputation of VMVault.

## 13. Warranties

Each party warrants that:

- 13.1. it is duly incorporated under the jurisdiction of its incorporation, with all requisite corporate power and authority to own, lease and operate its assets and to carry on its business as currently owned, leased, operated and conducted; and
- 13.2. it is capable of entering into this **agreement** and able to perform its obligations according to the terms of the **agreement**.

## 14. Fault Reporting

- 14.1. Any faults in relation to the **services** should be notified to VMVault by the **client** upon discovery.
- 14.2. VMVault reserves the right to charge the **client** at its commercial rate (current at the time of the fault notification), for time spent responding to a request from the **client** for fault restoration where VMVault was not responsible for the fault.

## 15. VMVault Sub-Contracting

- 15.1. VMVault may sub-contract or assign any of its obligations, or any part of its obligations under the **agreement** without the **client's** consent.

## 16. VMVault Set-off

- 16.1. VMVault may, without prior notice to the **client**, set-off any amount owing by the **client** to VMVault against any liability of VMVault to the **client**.

## 17. Force Majeure Events

- 17.1. This clause applies to obligations under the **agreement** other than an obligation to pay money.
- 17.2. Subject to clause 17.1, neither party will be liable for any default or delay in the performance of its obligations under the **agreement** which is due to a **Force Majeure Event**, provided that the party affected complies with clauses 17.3 and 17.4.
- 17.3. Subject to clause 17.1, any party who is unable to perform any of its obligations under the **agreement** because of a **Force Majeure Event** must provide the other party with:
- (a) notice that the party is unable to perform its obligations, specifying which obligations are affected; and
  - (b) a description of the **Force Majeure Event** preventing the party from performing its obligations; and
  - (c) a description of how the **Force Majeure Event** is preventing the party from performing its obligations; and
  - (d) a description of the steps the party plans to take to remedy the situation and ensure performance of its obligations under the **agreement**; and
  - (e) an estimate that is reasonable in the circumstances, of the time the party anticipates it will take to perform its obligations under the **agreement**.
- 17.4. A party who wishes to rely on clause 17.2 and/or 17.5 must perform clause 17.3 a minimum of once every 7 **days** during the **Force Majeure Event** to ensure that the other party is kept up to date as to the party's anticipated performance of its obligations pursuant to the **agreement**.
- 17.5. Subject to clause 17.1, a party who is unable to perform any of its obligations under the **agreement** because of a **Force Majeure Event** and who complies with clauses 17.3 and 17.4, will be excused from performance or observance of the obligations affected by the **Force Majeure Event** for as long as the **Force Majeure Event** prevails.

## 18. Severability

If any clause or subclause of this **agreement** is deemed prohibited or unenforceable, that clause or subclause is severed from the **agreement** and replaced with a clause or subclause that, to the extent permitted by law, has the most similar effect as the intended effect of the prohibited or unenforceable clause or subclause.

## 19. Indemnity and Liability

- 19.1. The **client** indemnifies and will keep fully indemnified, VMVault and each of its officers, agents, employees and contractors, from and against any losses, damages, costs or expenses, including legal costs assessed on a solicitor client basis, suffered or incurred by VMVault or any of its officers, agents, employees and contractors, arising out of or in connection with an action or claim brought by any third party against VMVault or any of its officers, agents, employees and contractors, which is a result of:
- 19.1.1. any breach of this **agreement** by the **client**; or
  - 19.1.2. any breach of the **Acceptable Use Policy** by the **client** or any of its **end users**;
- or



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- 19.1.3. any illegal, fraudulent or negligent act or omission perpetrated by the **client** or any of its **end users**; or
  - 19.1.4. the transmission of or presence of any illegal, fraudulent or offensive material by the **client** or any of its **end users**; or
  - 19.1.5. any defect, fault or problem whatsoever with equipment or services used by the **client** that is not provided by VMVault.
- 19.2. Liability
- 19.2.1. VMVault, its officers, agents, employees, contractors and any third party will not be responsible for any loss or damage to the **client's** business which may result from any interruptions, delays, faults or errors in the supply of the **services**.
  - 19.2.2. All terms, conditions or warranties which may be implied into this **agreement**, statutory or otherwise, relating to the provision by VMVault and any third party of the **services** are excluded to the fullest extent permitted by law.
  - 19.2.3. VMVault's liability and the liability of any third party for breach of any term, condition or warranty or under any remedy implied by law which cannot be excluded will be:
    - (a) Limited, to the extent permitted by law, to the refund of the cost paid by the **client** for the affected **services** or to the re-supply of the affected **services**, at the election of VMVault; and
    - (b) Reduced to the extent that such liability is caused by the **client's** negligent acts or omissions, or the **client's** breach of the terms of the **agreement**.
  - 19.2.4. The aggregate of VMVault's liability and the liability of third parties to the **client** for all direct, indirect and consequential losses, damages, costs, expenses, actions and claims arising out of or otherwise in connection with the **agreement**, whether based on an action or claim in contract, equity, negligence, intended conduct, tort or otherwise, is limited to the total fees paid by the **client** for the affected **services** under the **agreement** or the total fees paid by the **client** for **services** under the **agreement** in the **12 months** preceding the relevant cause of action accruing (or if there is more than one, the last cause of action accruing), whichever is less.
  - 19.2.5. VMVault has no liability to the **client** or any other person for:
    - (a) the acts or omissions or any third party; or
    - (b) faults or defects in **services** caused by the **client's** own conduct or misuse; or
    - (c) faults or defects in **services** caused by the equipment not provided by VMVault pursuant to this **agreement**.

## 20. Governing Law

The parties irrevocably submit to the jurisdiction of Queensland and agree that the governing law of the **agreement** is that in force in Brisbane, Queensland, Australia.

## 21. Entire Agreement

This **agreement** contains the entire agreement between the parties with respect to its subject matter. This **agreement** sets out the only conduct, warranties and representations relied on by the parties and supersedes all earlier conduct, warranties and representations made by the parties with respect to its subject matter.