

# Terms of Service Agreement

## 1. Application

- 1.1 This is the agreement we use for delivering our IT support services. We encourage you to read and understand this agreement as it explains each of our responsibilities and is designed to protect you as well as us. Our proposal sets out the actual services we have agreed to deliver (in this agreement called 'services') and the fees payable by you.
- 1.2 We can assist you with additional items not already identified in the proposal (for example assisting you with a physical move or expansion, adding on additional users, providing a wider range of services or making changes to your setup) however additional items will attract additional costs so please make sure all of the services you are expecting to be included are correctly detailed in the proposal. If you request additional items or work to be included during the term of our agreement with you, we will charge you additional fees for those items.
- 1.3 By asking us to start work, signing this agreement or checking the 'I agree' box, you are agreeing to be bound by these terms.
- 1.4 These terms and conditions, together with any other related services agreements, define our working relationship with you. Unless otherwise agreed to in writing by both parties, these terms apply from the date of our proposal and cover all the services you ask us to provide.
- 1.5 If you have any questions about the inclusions or charges set out in the proposal or if there is any part of the proposal or this agreement that you do not understand, please let us know before agreeing to these terms.

## 2. Term

- 2.1 Please refer to the proposal for the fixed term we have agreed to provide the services to you. This is the term you are committing to make payments for. For example, if you sign up to a fixed term of 3 years, you are locking yourself into monthly payments for 3 years.
- 2.2 The term starts on the date set out in the proposal (or the date you ask us to start work) and continues for the specified term in the proposal unless terminated earlier in accordance with clause 18. At the end of the fixed term, a fixed term agreement will automatically convert to a month to month agreement unless you give us 30 days' notice prior to the end of the fixed term telling us otherwise.
- 2.3 Without eroding our rights under the above clauses, we recognise that plans and circumstances can change. We do not enjoy working with unhappy clients, it negatively effects both us and our team. So, if there is a problem, please talk with us and we will see what we can arrange with you.

## 3. Suspension of Services

- 3.1 You agree we may suspend our services if you stop making agreed monthly payments, end a fixed term agreement (other than as allowed under these terms and conditions) or do not pay our invoices.

3.2 We will in no circumstances be liable for actions we take relying on clause 3.

#### **4. Non-exclusivity**

4.1 By entering into this agreement, we do not enter into any form of exclusive arrangement with you for the supply of the services. We may at any time supply similar services or the same services to anyone else.

#### **5. Variations**

5.1 You acknowledge that the online environment is constantly changing and that we may change or amend part of the services if we believe that something we have offered is no longer effective, available or financially viable, or there is something better than originally proposed. We will advise you of any changes in the services before they take effect.

#### **6. Payment**

6.1 The Fees listed in the proposal are listed exclusive of GST. If you are exempt from GST, please notify and provide evidence to our team as soon as possible so that we can update any applicable proposals and invoices accordingly.

6.2 Any deposit or setup fee included in the proposal (if applicable) must be paid before work will commence.

6.3 We will provide you with an invoice of monthly fees each month while performing the services, or with progress invoices as outlined in the proposal.

Payment of the monthly fee is due in advance by Direct Deposit (Bank Transfer), Credit Card (via Stripe or Ezidebit) or Direct Debit (Ezidebit). Transactions managed by Stripe or Ezidebit are subject to additional terms and conditions from these providers, which you can find via the links below.

- Ezidebit: <https://www.ezidebit.com/-/media/ezidebit/files/ezidebit-terms-and-conditions-us.pdf>
- Stripe: <https://stripe.com/au/ssa>

6.4 Each invoice we issue must be paid in full and in accordance with its terms (usually 7 days). If payment or part payment is not received within 14 days of the due date, we reserve the right to suspend the services.

6.5 If fees remain unpaid after attempts by us to recover payment, we may pursue legal action and/or forward the debt to a collection agency or lawyer for further action. You agree you will pay for any fees incurred by us for debt collection, administration and/or legal costs (on a solicitor and own client basis).

6.6 You agree to pay interest at a rate of 8% per annum calculated from the date of invoice on any outstanding debt (both prior to and after judgement, if applicable).

- 6.7 Fees once paid are not refundable. Fees that are due will still be due even if you change your mind about the project, decide you do not have the time or resources to commit to the project, become unresponsive or miss scheduled meetings.
- 6.8 For payments by credit card or direct debit:
- (a) You must ensure that sufficient cleared funds are available in your nominated account;
  - (b) You hereby authorise us to direct debit the annual or monthly fee from your nominated account. If you are on a fixed term plan (for example 12 or 24 months), you agree you will not attempt to cancel your nominated account or otherwise stop the monthly payments from being charged to your nominated account;
  - (c) If the relevant financial institution reverses an automatic payment, we will contact you to re-try the payment. If the amount remains outstanding, the charge will be re-processed within 14 days of the reversal;
  - (d) In addition to the outstanding balance, you authorise us to debit your nominated account or payment method an additional amount equivalent to the amount our bank charges for reversal fees or dishonour fees;
  - (e) If payment is declined, you acknowledge we may recover payment by any other means.

## **7. What is not included**

- 7.1 Our fees do not include disbursements or actual costs for items (for example, ink, hardware or pay for use/licensed software updates). These will require your additional expenditure.

## **8. Sub-contracting**

- 8.1 We may subcontract part or all of the services or use external suppliers. Any subcontractors or external suppliers will be bound by the terms of this agreement.

## **9. Promotion**

- 9.1 By entering into this agreement, you consent to our use of your name, business name and logo, the work we completed for you and/or any testimonial provided by you for the ongoing promotion of our business.

## **10. Client responsibilities**

- 10.1 You agree you will:
- (a) pay our Fees on time and in full;
  - (b) provide access to your operating systems when we need access;
  - (c) co-operate with us so that we can complete the services in a timely and efficient manner;
  - (d) provide timely responses to information or requests for information;
  - (e) inform us of any changes to account names, passwords, technical setup or any material information which may affect delivery of the services;

- (f) obtain and keep up-to-date virus protection on your computers and other electronic hardware;
- (g) check the work we have completed for accuracy in all respects;
- (h) attend all agreed meeting times and dates or give at least 3 business days' notice if it is necessary to reschedule a meeting. We cannot guarantee that a new meeting time will be available if a meeting time is missed without notice;
- (i) immediately tell us about any information (existing or new) that could have an impact on the success of the services we are providing so that rapid action can be considered; and
- (j) not request us to complete work for you that we reasonably believe is either immoral or unlawful. We reserve the right to refuse to complete work in this scenario and our refusal will not be considered to be a breach of this agreement.

10.2 You authorise us to access your accounts, databases and applications that are relevant to the services and you agree to provide us with necessary passwords and all other resources of yours that we reasonably require to complete the services set out in the proposal, including access to third-party applications and accounts as required.

## **11. Your Data**

- 11.1 Title to and proprietary rights in the material you supply us, including your intellectual property in your business name, logo, content and videos, any personal information about your customer's (your data), remains your property.
- 11.2 You grant us a license to use, copy, transmit and store your data for the purpose of providing the services.
- 11.3 While all care is taken with your data, we will not be responsible or liable for the theft, deletion, correction, destruction, damage, loss or failure of any of your data. If we are hosting your data, including regularly performing back-ups, we do rely on third party providers (for example Microsoft Azure) for storage and other services and we make no warranty that our backups will be accessible by you or that your data will be safe.
- 11.4 All information or data uploaded is the sole responsibility of you or the person providing the data. We are not responsible for this content and will have no liability in respect of the quality of the data, or any third-party rights in respect of that data.
- 11.5 If this agreement is terminated, we will hold your data for a maximum period of ninety (90) days from the date of termination. At your request, your data will be accessible by you during this period. Fees may apply for provision of data by request. At the end of the ninety (90) day period, your data will be permanently deleted from our platform, storage and/or operating systems.

## **12. Security, Accessibility and Integrations**

- 12.1 Any data stored in or processed by us is primarily stored or processed in Australia (if this is an option with our service provider) or the United States. However, due to the nature of the internet and the way data is transmitted, some data may be stored, mirrored or transferred to other countries overseas at times.

- 12.2 If we are providing hosting services, continuous access to your website is dependent on third party services. As a result, your website may be inaccessible from time to time. There may also be times your website is inaccessible when we need to complete maintenance or upgrades (if applicable).
- 12.3 We cannot guarantee that your website will always be error free. We will not be liable for any periods that your website is not functioning or is malfunctioning.
- 12.4 Where our (or a third party's) software or systems integrates with your software, systems or website, we accept no liability for the integration process, the pushing of information (for example, if your system does not accept information due to a malfunction, our system will continue to attempt to push the information across) or the loss of information if integration is unsuccessful. Where we make application program interfaces (API's) available to you, you accept the API's on an 'as is' where is basis without any warranty of any kind and accept all liability for their use.
- 12.5 We disclaim all liability for any computer virus or technological problems that were not intentionally caused by us or are beyond our control. While we take reasonable commercial efforts to secure your website and cloud services, you are encouraged to install and maintain up-to-date security software on your systems.

### **13. Contract Administrator**

- 13.1 You agree, if required by us, to appoint within your business a Contract Administrator who will be responsible for:
- (a) Liaising with us in relation to this agreement.
  - (b) Lodging support requests with our help desk.
  - (c) Arranging information, content or data we require.
  - (d) Providing us with approvals, directions or feedback in a collated format.
  - (e) Providing security access, passwords or physical access, where this is required to perform the services.
- 13.2 We reserve the right to liaise only with the Contract Administrator if we continually receive conflicting instructions, information or feedback from multiple parties.
- 13.3 You may change the nominated Contract Administrator by giving 14 days written notice.

### **14. Guaranteed response time**

- 14.1 Other than response times in clause 14.2, any guaranteed response time we offer starts from the time you log a support request with us.
- 14.2 Where a guaranteed response time nominates that you should call us directly (for example for critical and high priority requests), the guaranteed response time starts from the time you talk to one of our support team and log the support request with them over the phone.
- 14.3 A guaranteed response time means we will have a suitably qualified technician respond to your request within the nominated response time to assess the problem and start working toward a

resolution. It does not mean we will be able to fix the problem within the response time (some problems can take time depending on what has happened).

## **15. Limitation of liability**

15.1 We will not be liable for any loss or damage suffered by you as a result of integration with your system or website by third-party applications, even if we initiated the integration.

15.2 Monitoring of firewalls, servers, routers and back-ups is completed by us by utilising third-party applications, we will not be liable for any failures in monitoring that are caused by factors outside our control.

15.3 If any clause in this agreement amounts to a warranty against defects then, our services (and/or the products we sell) come with guarantees that cannot be excluded under the Australian Consumer Law. For major failures with the service, you are entitled:

(a) to cancel your service contract with us; and

(b) to a refund for the unused portion, or to compensation for its reduced value.

You are also entitled to choose a refund or replacement for major failures with goods. If a failure with the goods or a service does not amount to a major failure, you are entitled to have the failure rectified in a reasonable time. If this is not done, you are entitled to a refund for the goods and to cancel the contract for the service and obtain a refund of any unused portion. You are also entitled to be compensated for any other reasonably foreseeable loss or damage from a failure in the goods or service.

15.4 Notwithstanding clause 15.3 above, if a guarantee is imposed under the ACL, we limit our liability for major or minor failures with our service or product (at our election and as allowed by s64A of the ACL) to:

(i) the supplying of the services or product again; or

(ii) the payment of the cost of having the services or product supplied again.

15.5 Notwithstanding any other clause in this agreement, and without limiting the application of the Australian Consumer Law (ACL), you agree that our total maximum aggregate liability to you for any action or claim or group of actions or claims is the amount actually paid by you for services under this agreement rendered in the three months immediately preceding the date of dispute (or latest in time dispute if more than one dispute) or the amount actually paid for a product where the product is the cause of the dispute.

15.6 Neither party will be liable for lost revenues, profits or savings, nor for any indirect, exemplary, punitive, special or consequential loss or damages of any party, including third parties, even if a party has been advised of the possibility of that loss or damages.

15.7 This limitation of liability applies to the fullest extent permitted by law, and survives any termination or expiration of this agreement, or your use of the services.

## 16. Intellectual Property Indemnity

- 16.1 It is your responsibility to ensure that you have the right to use and display any content, including without limitation, text, image or photographs, that you provide to us for incorporation into the services, and that the content does not infringe upon the intellectual property rights of any other person or entity.
- 16.2 We reserve the right not to publish content unless you are able to provide adequate proof of permission to use that material, although we are not obliged to consider or exercise this discretion.
- 16.3 We do not claim any copyright or ownership in the materials provided by you to us.
- 16.4 You are responsible for managing any intellectual property complaint made in regard to any of the content or operation of your social media platforms, website or promotional campaigns.
- 16.5 You agree to indemnify us from any liability (including legal fees and costs) threatened or actual, arising from the use of any content published on your behalf, whether supplied by you or us.

## 17. Intellectual Property

- 17.1 We own the intellectual property rights in the materials we use to deliver the services, or we have permission to use that material and share it with you for the purpose of providing the services.
- 17.2 You agree that all intellectual property rights in our materials, proprietary software, any design, code or document created, or discoveries made in the course of creating your website or used to provide the services to you, vest in us upon creation ('our IP'). You do not have any right to use open source software or our IP for any purpose other than use of the end product we create for you, for its intended use and in accordance with this agreement.
- 17.3 During a fixed term agreement and/or until our fees have been paid for in full, we retain ownership of all content that we create for you (including derivative work derived from your source material), for example text, webpage design or content. Upon payment in full, ownership of the created content transfers to you. Note that 'created content' does not include our IP, licensed or paid for items including themes, licensed images or music, software or plug-ins.

## 18. Termination

- 18.1 For fixed term agreements:
- (a) You may not terminate this agreement until the end of the fixed term. If you attempt early termination, you acknowledge that the balance of fees not previously invoiced for the fixed term will immediately become due and payable in full.
  - (b) If we have suspended our services and the reason for the suspension has not been resolved, we may elect to terminate this agreement by giving 7 days written notice and we may then invoice you for the balance of fees due for the fixed term.

18.2 For all month-to-month agreements:

- (a) Subject to clause 18.2(b), either party may terminate this agreement on giving 30 days written notice to the other.
- (b) Notice to pause, suspend or stop performing the services must be given at least 30 days prior to the date of your direct debit or credit card payment for your request to take effect otherwise you may be required to pay for the next month's services.

18.3 For all other services, you may not terminate this agreement until all agreed work detailed in the proposal has been completed and paid for.

18.4 If you are in default under this agreement or have become unresponsive to our communications, we may provide written notice to you setting out the details of your default or unresponsiveness and allowing you 7 days to rectify the same. If you do not rectify the default or unresponsiveness in the 7 day period, we may give you written notice suspending the services we provide. If, after 7 days of our services being suspended, you have not rectified the default or unresponsiveness, we may terminate this agreement by giving you written notice, with termination effective as at the date of the written notice.

18.5 If we are in default under this agreement, you may provide written notice to us setting out the details of our default. If we agree there is a default and we do not fix the default within 21 days of the date of your notice, you may give written notice to us terminating this agreement and the date of termination will be the date we receive your lawful termination notice.

18.6 Following notice of termination by either party:

- (a) all Fees and other charges you have agreed to pay, will become immediately due and payable;
- (b) we will hand over and/or securely destroy all login and access details which you have supplied to us;
- (c) you must cancel any PayPal subscriptions, automated direct deposits, direct debit, or credit card facilities in place at the time of termination.
- (d) we are not responsible for any 3<sup>rd</sup> party fees incurred by you after the termination date.

## 19. Third Party Platforms

19.1 The services that we provide can or may rely upon the continued operation of online facilities that it uses. We will not be liable for any third-party failures affecting the provision of the services.

19.2 All third-party platforms used in the provision of the services are available pursuant to their own terms and conditions of service. You agree to adhere to these terms and conditions and agree that any liability arising from the use of those platforms remains your sole responsibility.

19.3 You acknowledge that third party platforms may change their policies, algorithms, regulations or systems at any time. We cannot be held liable for loss or damage incurred by you as a result of changes made to third party platforms, this includes for example, our inability to provide the services as planned or the closure of an account by the platform provider without notice or explanation.



19.4 You acknowledge that third party browsers and devices may change their policies and systems at any time. Our services are aimed toward appropriate appearance on the most common browsers and mobile formats. We cannot guarantee that the services will appear perfectly on every available device or that the services will continue to appear perfectly if browsers or devices change in the future.

## **20. Recommendations**

20.1 We may advise you on, recommend, or obtain for you, goods and services from third parties, including software, hardware or finance arrangements. You acknowledge that this is provided in good faith, for expediency and because to the best of our knowledge, what we have recommended is a suitable match for your needs. We make no warranty though that the products or services will be suitable for your needs, error free or the best or most cost-effective solution available.

20.2 You are still required to do all due diligence to protect your company, staff and legal rights. If you purchase a product or enter into an agreement with a third party as a result of our recommendation, it is your responsibility to make sure the product matches your needs and to understand and negotiate your own terms of agreement with any third party.

20.3 You acknowledge that we may earn or pay commission or referral fees from or to third parties or on products we sell.

20.4 You agree not to hold us liable for any loss or damage suffered by you as a result of your use of third-party goods or services referred to in this clause 20.

## **21. Force Majeure**

21.1 Other than for payments due, neither party will be liable for delay or failure to perform its obligations under this agreement if that delay or failure is due to a Force Majeure Event.

21.2 Other than for payments due, if a delay or failure of a party to perform its obligations is caused or anticipated due to a Force Majeure Event, the performance of that party's obligations will be suspended.

21.3 Other than for payments due, if a delay or failure by a party to perform its obligations due to a Force Majeure Event exceeds 60 days, either party may immediately terminate the agreement on providing notice in writing to the other party.

21.4 If a delay or failure due to a Force Majeure Event causes a suspension or termination of this agreement, you agree that payment of all services or work completed up to the date of suspension or termination are still payable by you.

## **22. Personal Property Securities Act 2009 (Cth) Australia**

22.1 You acknowledge and agree that this agreement is a security agreement and creates a security interest in the collateral for the purposes of the Personal Property Securities Act (Cth) Australia ('PPSA'). For the purpose of this clause, collateral means our interest in any product we have supplied or sold to you and that you have not yet paid for in full (we retain title to the product until it has been paid for in full).

22.2 You agree to:

- (a) promptly provide any additional information (which must be complete, up-to-date and accurate) and/ or sign any further document(s) which we may reasonably require to:
  - (i) register our security interest on the Personal Property Securities Register (“PPSR”);
  - (ii) register any other document required to be registered (by the PPSA or by us) on the PPSR; or
  - (iii) correct a defect in a statement or document referred to in this clause.
- (b) pay to us all expenses incurred by us in registering or releasing any statements or documents referred to in this clause;
- (c) not register, or permit to be registered, any interest in the collateral in favour of a third party without our prior written consent; and
- (d) complete all steps necessary for us to update our security interest if we provide additional products to you on a retention of title basis.

22.3 To the extent section 115(1) allows, sections 95, 125, 130, 132(3)(d), 132(4), 142 and 143 of the PPSA will not apply to any security interest registered or intended to be registered by us under this agreement.

22.4 To the extent section 115(7) allows, sections 127, 129(2), 132, 134(2), 135, 136(3), (4) and (5) and 137 of the PPSA will not apply to any security interest registered or intended to be registered by us under this agreement.

22.5 Further, in relation to any security interest registered or intended to be registered by us under this agreement, you waive any right to receive any notice which would otherwise be required to be provided under the PPSA, including under sections 144 and 157 (unless the requirement to give the notice cannot be waived or excluded).

22.6 You unconditionally ratify any actions taken by the us under this clause 22.

## 23. Assignment

23.1 Either party may assign or transfer its rights or obligations under this agreement provided that all services and payments are up to date and the party seeking to assign their rights has provided 14 days prior written notice to the other party.

## 24. Confidentiality

24.1 You may provide information to us that is important and confidential to your business. We will only use that information to provide services to you and will not share it outside of our business or related businesses.

24.2 If information that you provide will be for publication as part of the services, that information is likely to be published.

- 24.3 Our contracts and business methods are confidential to our business, and you agree to keep them confidential.
- 24.4 These obligations of confidence will cease to apply in relation to information that either party is required to disclose by any law, or which becomes part of the public domain other than as the result of a breach by the disclosing party of its obligations of confidence under this agreement.

## 25. Definitions and interpretation

25.1 In this agreement the following definitions apply:

- (a) **Business day** means a day that is not a Saturday or Sunday or a public holiday in Victoria.
- (b) **Client/you** means you, our valued client as identified in the proposal, and includes your successors and assigns.
- (c) **Fees** means the amount payable by you to us for provision of the services as set out in the proposal (or as updated between us in writing).
- (d) **Force Majeure Event** means an event that is beyond a party's control, including but not limited to, fire, earthquake, labour dispute, act of God, death or serious injury or illness, unavailability of any electricity or other utilities, or unavailability or material change in any third party technologies or platforms (or the rules governing such technologies or platforms) and any local, state, federal, national or international law or governmental order.
- (e) **Monthly Fee** means the amount of any set out in the proposal that is paid monthly by you to us.
- (f) **Proposal** means a document prepared specifically for you outlining the scope of work to be undertaken by us, as well as an estimate of Fees to be charged for that work.
- (g) **Services** means the work we will complete on your behalf in exchange for the fees, as specified in the proposal.
- (h) **We, our, us or Discover** means Discover Pty Ltd ABN 50 096 880 947 and includes its officers, employees, contractors, successors and assigns.

25.2 In the interpretation of this document the following provisions apply unless otherwise stated:

- (a) Headings are inserted for convenience only and do not affect interpretation.
- (b) If the day on which any act, matter or thing is to be done is not a business day, the act, matter or thing must be done on the next business day.
- (c) A reference to dollars or \$ means Australian dollars and all amounts payable are payable in Australian dollars, unless otherwise specified in the proposal.
- (d) A reference to a party to this agreement or any other document includes that party's personal representatives/successors and permitted assigns.

## 26. General

### 26.1 Notices

- (a) Any required notice between the parties, including a notice of dispute, may be provided electronically in writing to the email contact details notified in the proposal, or as later notified in writing.
- (b) Notices sent electronically are deemed to have been received on the same business day if sent prior to 4.00pm on that business day and otherwise, the next business day.

### 26.2 Severability

If any of these terms and conditions are determined to be invalid or unenforceable, then the invalid or unenforceable provision will be deemed replaced by a valid, enforceable provision that most closely matches the intent of the original provision and the remainder of the terms and conditions will continue in effect.

### 26.3 Waiver

Any time or other indulgence granted by us will not in any way amount to a waiver of any of its rights or remedies under this agreement.

### 26.4 Enforceability

Even if you do not sign this agreement, you agree to these terms if you request our services and we provide those services.

### 26.5 Counterparts

This agreement may be executed in several counterparts (including email copies (in PDF or other agreed format)), all of which when signed and taken together constitute a single agreement between the parties.

### 26.6 Entire Agreement

Whatever ends up in this document is the agreement between the parties and anything else discussed before and or afterward is not part of the agreement or fees charged, unless it was included.

### 26.7 No Relationship

We are providing services to you as an independent contractor and nothing in this agreement should be interpreted to suggest otherwise.

### 26.8 Governing Law

This agreement is governed by the laws of Victoria, Australia and the parties agree to be subject to the jurisdiction of the courts of Victoria, Australia.

End.