

# Hosting Terms and Conditions

K.M.O Design Pty Ltd ACN 100 620 808 (**KMO**)

# Hosting Terms and Conditions

**These terms and conditions apply to the hosting of the Customer's content. If the Customer does not accept these terms and conditions, then it must refrain from using KMO's Hosting Services. These terms and conditions must be read in conjunction with any other applicable terms and conditions.**

## 1. Definitions and interpretation

1.1 In these terms and conditions:

**Agreement** means these hosting terms and conditions, together with the Application.

**Application** means the application made by the Customer directly or by the Customer's Authorised Representative on behalf of the Customer to receive the Hosting Services from KMO.

**Australian Consumer Law** means Schedule 2 of the *Competition and Consumer Act 2010* (Cth).

**Authorised Representative** means the person actually making the Application on behalf of the Customer.

**Business Day** means a day on which banking institutions generally are open in Brisbane but excluding Saturdays, Sundays and public holidays.

**Claim** means any claim, allegation, debt, cause of action, Liability, proceeding, suit or demand of any nature and whether present or future, actual or contingent, fixed or unascertained and arising by operation of law, in equity, by statute or otherwise.

**Commencement Date** means has the meaning given to it in clause 3.1(a).

**Confidential Information** means, in relation to each Party (for the purposes of this definition, the "Discloser"), all information disclosed by or on behalf of the Discloser, relating to:

- (a) know-how, trade secrets, ideas, marketing strategies, operational information, technical information and financial information;
- (b) the business affairs (including products, services, customers and suppliers) or property of the Discloser, including any business, property or transaction in which the Discloser may be or may have been concerned or interested; and
- (c) other information, which, by its nature or by the circumstances of its disclosure, is or could reasonably be expected to be regarded as confidential;

but excluding any such information:

- (d) which is publicly known;
- (e) which is disclosed to the other Party without restriction by a third party (other than the Discloser) and without any breach of confidentiality by that third party; or
- (f) which is developed independently by other Party without reliance on any of the Confidential Information.

**Customer** means a person, firm or corporation, jointly and severally if there is more than one, acquiring the Hosting Services, as specified on the Application.

**Customer Content** means all websites and web applications (including email), as identified on the Application, which will be hosted in accordance with the Hosting Services, and all Data submitted via the Customer Content.

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**Data** means all data or information that Users input, upload or otherwise submit via the hosted Customer Content.

**E-commerce Services** means services connected with the buying and selling of products and services over the Internet.

**Force Majeure** means an event beyond the reasonable control of a party, including an act of war (whether declared or not) or terrorism, the mobilisation of armed forces, civil commotion or riot, natural disaster, industrial action or labour disturbance, currency restriction, embargo, action or inaction by a government agency, a failure of a supplier, public utility or common carrier or computer disruption due to the effects of a virus or other malicious code introduced other than through the acts or omissions of the party seeking relief.

**Government Body** means:

- (g) any person, body or other thing exercising an executive, legislative, judicial or other governmental function of any country or political subdivision of any country;
- (h) any public authority constituted by or under a law of any country or political subdivision of any country; and
- (i) any person deriving a power directly or indirectly from any other Government Body.

**GST** means GST as that term is defined in the GST Law, and any interest, penalties, fines or expenses relating to such GST.

**GST Law** means, where the context requires or permits, the *A New Tax System (Goods and Services Tax) Act 1999* (Cth) and/or associated Commonwealth legislation, regulations and publicly-available rulings.

**Hosting Fees** means the fees charged by KMO for the Hosting Services, as specified in the Pricing Schedule.

**Hosting Services** means the hosting of the Customer Content, email and any application on KMO's servers, or its Supplier's servers, for Users to access the Customer Content, email and/or any application through the Internet.

**Insolvency Event** means:

- (a) in relation to any corporation:
  - (1) its Liquidation;
  - (2) an External Administrator is appointed in respect of the corporation or any of its property;
  - (3) the corporation ceases or threatens to cease to carry on its business;
  - (4) the corporation being deemed to be, or stating that it is, unable to pay its debts when they fall due;
  - (5) any other ground for Liquidation or the appointment of an External Administrator occurs in relation to the corporation;
  - (6) the corporation resolves to enter into Liquidation;
  - (7) an application being made which is not dismissed or withdrawn within 10 Business Days for an order, resolution being passed or proposed, a meeting

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being convened or any other action being taken to cause or consider anything described in sub-paragraphs (1) to (6) (inclusive) above;

- (b) in relation to an individual, that person becoming an insolvent under administration as defined in section 9 of the *Corporations Act 2001* (Cth);
- (c) in relation to any person, anything analogous to or having a similar effect to anything described above in this definition under the law of any relevant jurisdiction.

**Intellectual Property Rights** means all current and future registered and unregistered rights in respect of copyright, circuit layouts, designs, trade marks, know-how, confidential information, patents, inventions and discoveries and all other intellectual property as defined in article 2 of the convention establishing the World Intellectual Property Organisation 1967.

**KMO Website** means the KMO website located at [www.kmo.com.au](http://www.kmo.com.au).

**Liabilities** means any liabilities, debts or obligations, whether actual, contingent or prospective, present or future, qualified or unqualified or incurred jointly or severally with any other person. A reference to **Liability** has a corresponding meaning.

**Loss** means loss, damage, liability, charge, expense, outgoing or cost (including all legal and other professional costs on a full indemnity basis) of any nature or kind and includes consequential, direct and indirect loss.

**Party** means either the Customer or us and **Parties** means both of them.

**Pricing Schedule** means the document which describes the various Hosting Fees applicable to the Hosting Services for this Agreement, as amended by the Parties from time to time,

which as at the Commencement Date is set out at <http://www.kmo.com.au/services/hosting> .

**Privacy Policy** means the privacy policy of KMO, as current from time to time, which is located on the KMO Website.

**Privacy Law** means:

- (a) the *Privacy Act 1988* (Cth);
- (b) any legislation from time to time in force in any:
  - (1) Australian jurisdiction (which includes the Commonwealth of Australia and any State or Territory of Australia);
  - (2) non Australian jurisdiction (to the extent that a Party is subject to the laws of that jurisdiction),

affecting privacy, personal information or the collection, handling, storage, processing, use or disclosure of data.

**Submission** means all comments, feedback, suggestions, photos, e-mail and similar information or materials that the Customer submits to KMO regarding its products or services.

**Supplier** means has the meaning given to it in clause 5.1.

**Taxes** means any present or future taxes (including taxes on goods and/or services), rates, levies, imposts, duties (including stamp duties), deductions, charges, compulsory loans and withholdings (other than any such taxes on the overall net income of a party) which may be incurred in any jurisdiction and any interest, penalties, fines or expenses relating to any of them.

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**Term** means the overall term of the Agreement, as set out in clause 3.1.

**User** means a person other than the Parties who seeks access to the Customer Content over the Internet.

**Virus** means any thing or device (including any software, code, file or programme) which may: prevent, impair or otherwise adversely affect the operation of any computer software, hardware or network, any telecommunications service, equipment or network or any other service or device; prevent, impair or otherwise adversely affect access to or the operation of any programme or data, including the reliability of any programme or data (whether by re-arranging, altering or erasing the programme or data in whole or part or otherwise); or adversely affect the user experience, including worms, trojan horses, viruses and other similar things or devices.

1.2 In these terms and conditions, unless the contrary intention appears:

- (a) The expressions "KMO", "we", "us" and "our" are a reference to K.M.O Design Pty Ltd ACN 100 620 808.
- (b) Unless the contrary intention appears, a reference in this Agreement to:
  - (1) this Agreement or another document includes any variation or replacement of it despite any change in the identity of the parties;
  - (2) one gender includes the others;
  - (3) the singular includes the plural and the plural includes the singular;
  - (4) a person, partnership, corporation, trust, association, joint venture, unincorporated body, Government Body or other entity includes any other of them;
  - (5) a party includes the party's executors, administrators, successors, substitutes (including a person who becomes a party by novation) and permitted assigns;
  - (6) any statute, ordinance, code or other law includes regulations and other instruments under any of them and consolidations, amendments, re-enactments or replacements of any of them;
  - (7) money is to Australian dollars, unless otherwise stated;
  - (8) a time is a reference to Brisbane time unless otherwise specified.
- (c) The words include, including, such as, for example and similar expressions are not to be construed as words of limitation.
- (d) Where a word or expression is given a particular meaning, other parts of speech and grammatical forms of that word or expression have a corresponding meaning.
- (e) Headings and any table of contents or index are for convenience only and do not affect the interpretation of this Agreement.
- (f) A provision of this Agreement must not be construed to the disadvantage of a party merely because that party or its advisers were responsible for the preparation of the agreement or the inclusion of the provision in the agreement.
- (g) If an act must be done on a specified day which is not a Business Day, it must be done instead on the next Business Day.

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- (h) If an act is required to be done on a particular day it must be done before 5.00pm on that day or it will be considered to have been done on the following day.

## 1.3 Parties

- (a) If a Party consists of more than one person, this Agreement binds each of them separately and any two or more of them jointly.
- (b) An agreement, covenant, obligation, representation or warranty in favour of two or more persons is for the benefit of them jointly and each of them separately.
- (c) An agreement, covenant, obligation, representation or warranty on the part of two or more persons binds them jointly and each of them separately.

## 2. Application

### 2.1 Application

The Customer makes an Application by clicking where indicated on the KMO Website or otherwise providing KMO with an Application (whether in hard or soft copy).

### 2.2 Authority to bind

- (a) The Authorised Representative is a party to this Agreement but only to the extent that it is necessary for the Authorised Representative to agree to, be bound by, and comply with, clauses 2.2(b) and 2.2(c) below.
- (b) By making the Application:
  - (1) the Authorised Representative is warranting to us that they have authority to bind the Customer; and
  - (2) the Customer is warranting to KMO that the Authorised Representative has authority to bind the Customer.
- (c) The Authorised Person agrees to fully indemnify KMO as a result of any and all Loss it incurs as a result of their breach of clause 2.2(b).
- (d) You The Customer agrees to fully indemnify KMO as a result of any and all Loss KMO incurs as a result of a breach of clause 2.2(b).

### 2.3 Acceptance

- (a) If KMO accepts the Application, the Customer will become a Customer that will be entitled to receive the Hosting Services.
- (b) KMO reserves the right to accept or reject any Applications in its complete discretion including, but not limited to, if the Customer has not obtained a licence to use the Software at the time of the Application.

## 3. Term

### 3.1 Term

The term of this Agreement:

- (a) commences on the date on which KMO notifies the Customer (by email, post or phone) that the Customer's Application has been accepted (**Commencement Date**);

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- (b) continues initially for the period specified in the Application twelve month; and
- (c) then automatically continues on a month-to-month, rolling basis until terminated in accordance with this Agreement (**Extended Term**),

(collectively known as the **Term**)

## 3.2 Rights upon Extended Term

The Extended Term will be on KMO's standard Hosting Terms and Conditions current as at the commencement date of each Extended Term and KMO's express right to include a new Pricing Schedule.

## 4. Changes to Agreement

### 4.1 Notification of changes

Subject to the terms of this clause 4.1 and to the extent permitted by Law, this Agreement may be updated and modified from time to time and any changes will be effective immediately upon notification on the KMO Website.

### 4.2 Terms KMO cannot change

There are certain terms of this Agreement which KMO cannot change during a Term (subject to its rights upon commencement of an Extended Term under clause 3.2).

### 4.3 Beneficial or neutral changes

If KMO changes the terms of this Agreement and it reasonably believes that such changes will benefit the Customer or be of neutral impact on the Customer, then KMO may immediately implement that change without notice to the Customer.

### 4.4 Minor detrimental changes

If KMO changes the terms of this Agreement and it reasonably believes that such changes will have only a minor detrimental impact, then KMO may make that change without personally notifying the Customer of such a change. Notice will be given as set out under clause 4.7 of this Agreement.

### 4.5 Changes required by Supplier

Subject to clause 4.6, KMO can change the terms of this Agreement (including the Hosting Fees) because of changes made by a Supplier, provided KMO provides the Customer with:

- (a) notice to such changes coming into effect; and
- (b) offer the Customer the right to terminate the Agreement within five (5) days of the date of the notice.

### 4.6 Urgent changes

- (a) Urgent changes are those which are:
  - (1) required by a law; or
  - (2) necessary, in KMO' reasonable view, for technical, emergency or security reasons.

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- (b) If KMO needs to make urgent changes to the terms of this Agreement, then it may immediately implement that change without notice to the Customer.
- (c) KMO will however endeavour to notify the Customer (as set out under clause 4.7 of this Agreement) of urgent changes, although KMO cannot always promise to do so due to the nature of urgent changes (any failure to do so by KMO will not invalidate the change or breach KMO's obligations under this Agreement).

## 4.7 Acceptance of changes

- (a) The Customer is responsible for ensuring that it is familiar with the latest version of the Agreement.
- (b) If KMO updates or modifies this Agreement, the Customer may, within thirty (30) days of the date of the change to this Agreement, notify KMO that it no longer wishes to receive the Hosting Services.
- (c) The Customer's continued use of the Hosting Services will constitute acceptance of the Agreement as amended.

## 5. Hosting Services

### 5.1 Provision

KMO or its third party service provider who KMO may subcontract the provision of the Hosting Services to in accordance with clause 22 (**Supplier**) will:

- (a) provide the Customer with the Hosting Services in accordance with <http://www.kmo.com.au/website-design-brisbane/hosting/> requested by the Customer;
- (b) install the Customer Content on KMO, or its Supplier's, computer facilities;
- (c) use reasonable endeavours to ensure that sufficient capacity is maintained on KMO, or its Supplier's, computer facilities to enable Users to access the Customer Content in the normal manner intended;
- (d) perform maintenance to KMO's servers from time to time; and
- (e) make modifications to KMO's systems from time to time.

### 5.2 Access to Customer Content

- (a) KMO does not warrant that the Services provided will be uninterrupted or error free;
- (b) KMO does not warrant that the service will meet your requirements,
- (c) KMO does not warrant that the services will not be subjected to external hacking attempts, viruses, worms, denial of service attacks, or other persons gaining unauthorised access to the Service or internal systems.
- (d) Notwithstanding subclause 5.1(c), KMO does not warrant that Users will have continuous access to the Customer Content. KMO will not be liable for any Loss in the event that the Customer Content is unavailable to the Customer or Users due to computer downtime attributable to malfunction, upgrades or preventative, remedial or scheduled maintenance activities or Force Majeure events.



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- (e) In the event of equipment failure or data corruption, KMO will restore Customer Content from the last known good archive. The Customer acknowledges and agrees that it should take all reasonable steps to maintain its own back-ups and archives and, in the event of corruption of all of KMO's archives, or in the event that an old archive is used to restore Customer Content, the Customer should be prepared to upload its last back-up or archive to the Customer Content.

## 6. Customer's obligations

### 6.1 Sub-licence

The Customer grants a non-exclusive and royalty-free licence to KMO and its Suppliers to use, transmit, display, adapt and reproduce the Data and Customer Content.

### 6.2 Customer Content

- (a) The Customer must maintain a recent copy of its Customer Content at its premises at all times. KMO will not be liable for incomplete, out-of-date, corrupt or otherwise deficient Customer Content recovered from KMO's backups.
- (b) The Customer is responsible for the design, development, modification, content and maintenance of the Customer Content.
- (c) The Customer will conduct tests and computer virus scanning as required to ensure that the Customer Content and Data does not contain any computer virus and will not in any way corrupt the data or system of KMO or any other person.
- (d) The Customer will hold for the Term the ownership of the Customer Content or a licence to use the Customer Content in a manner contemplated by this Agreement, on terms consistent with the sub-licence to KMO pursuant to clause 6.1.

### 6.3 Compliance with the law

- (a) The Customer warrants, and undertakes to ensure that, the Customer Content, Data, and Submissions or anything else provided by it or its Users in connection with this Agreement:
  - (1) does not infringe the Intellectual Property Rights of any person;
  - (2) will not at any stage during the Term contain material which contains Viruses, is obscene, offensive, upsetting, defamatory, personally offensive or in any way unsuitable for people under the age of eighteen (18) years;
  - (3) does not comprise and cannot be used for any purpose or activity of an illegal, fraudulent or defamatory nature;
  - (4) does not otherwise contravene a law.
- (b) The Customer must promptly notify KMO of any orders or directions issued by a Government Body which may impact on the delivery of the Hosting Services.

### 6.4 No right of resale

Unless expressed to the contrary in the Agreement or unless KMO's written consent is obtained in advance, the Customer must use the Hosting Services for its own purposes and must not resell or sub-let space such Hosting Services.

### 6.5 Intended purpose

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The Customer must not use the Customer Content or Hosting Services for any purpose other than its intended purpose.

## 6.6 No transfer of title

The Customer acknowledges that it does not obtain any rights to the hardware and other infrastructure and facilities used by KMO or its Supplier to deliver the Hosting Services.

## 6.7 Passwords

The Customer warrants that it will keep confidential and secure any passwords used in relation to the Hosting Services.

## 6.8 No reliance

The Customer warrants that at the time of entering into this Agreement it is not relying on any representation made by KMO or its Supplier which has not been stated expressly in this Agreement.

## 6.9 Complaints and Inquiries

The Customer acknowledges that it is solely responsible for any dealings with persons in relation to complaints or inquiries relating to the Customer's website or Customer Content.

## 7. E-commerce Services

E-commerce Services are supplied to the Customer on the following conditions:

- (a) KMO provides the E-commerce Services software 'as-is' and without warranty of any kind, either express or implied.
- (b) To the extent permitted by law, KMO gives no warranty that:
  - (1) the E-commerce Services will meet the Customer's requirements;
  - (2) the E-commerce Services will be uninterrupted, timely, secure, or error-free;
  - (3) the results that may be obtained from the use of the E-commerce Services will be effective, accurate or reliable; and
  - (4) any errors in the E-commerce Services software obtained from or used through KMO's Website, or any defects in the E-commerce Services, will be corrected.
- (c) KMO and its Supplier will not be liable for acts or omissions of third party e-commerce payment gateway providers such as PayPal, WorldPay, and any other provider who may provide those services as part of the E-commerce Services. The Customer deals with those providers at its own risk.
- (d) The Customer accepts full responsibility for all online transactions the Customer originate or execute using the E-commerce Services with or without credit and/or debit cards.
- (e) The Customer is responsible for and indemnifies KMO and its Supplier in respect of legal obligations the Customer owes to end-users of the E-commerce Services under any legislation, including without limitation the Privacy Law as amended.
- (f) KMO accepts no responsibility for any cost, Loss or Liability that might arise through the Customer's use of the E-commerce Services.

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- (g) The Customer indemnifies KMO and its employees, agents, representatives and its Supplier and holds KMO and its Supplier harmless against any liability in relation to all transactions undertaken using the E-commerce Services, including in respect of claims by or in respect of services provided by payment gateway providers.

## 8. Payment

### 8.1 Hosting Fees

- (a) The Customer will pay KMO the Hosting Fees during the Term.
- (b) The Customer is responsible for ensuring it is aware of notifications placed on the Website in relation to proposed Hosting Fees.
- (c) The terms on which Hosting Fees will be invoiced and be payable as set out below.

### 8.2 Invoices

- (a) KMO may issue invoices for the Hosting Fees from time to time as it sees fit.
- (b) Invoices may be provided to the Customer online, by post or by email.

### 8.3 Payment

- (a) The Customer is required to pay an invoice by the due date specified on the invoice (or, in the case of direct debit, on the 18<sup>th</sup> day of each calendar month).
- (b) The Customer can pay an invoice either by credit card, direct payment into KMO's nominated bank account, or alternate payment methods specified by KMO from time to time.
- (c) The Customer is responsible for its usage of the Hosting Services and the payment of all invoices issued, regardless of whether or not the Customer authorised such use.

### 8.4 Late or non payment of invoices

If the Customer fails to pay an invoice within the time period referred in clause 8.3 above, then, without limitation to any other right of KMO under this Agreement or at law, KMO may do any one or more of the following:

- (a) charge the Customer interest at a rate of 2% per month; and
- (b) suspend or restrict the Hosting Services and/or the Customer's access to the Customer Content or terminate this Agreement in accordance with clauses 12 and 13 below.

### 8.5 Third party costs

In addition the Customer must provide and pay for:

- (a) the installation and use of telephone lines and all other equipment needed to access the Hosting Services; and
- (b) all government taxes, duties and levies (if any) imposed on either the Customer or KMO in respect of the Hosting Services or any other service or goods supplied.

### 8.6 Credit information

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The Customer consents to KMO or its Supplier obtaining a credit reporting agency report containing personal information about the Customer (as well as information concerning commercial creditworthiness and activities) for the purpose of assessment by KMO of an application for credit (whether commercial or personal) or for the purpose of the collection of payments which are overdue.

## **9. Confidentiality**

### **9.1 No disclosure**

- (a) Each Party must not, without the prior written approval of the other Party, disclose the other Party's Confidential Information.
- (b) A Party will not be in breach of sub-clause 9.1(a) in circumstances where it is legally compelled to disclose the other Party's Confidential Information

### **9.2 Ownership**

Each Party retains ownership of their Confidential Information.

### **9.3 Further steps**

Each Party must take all reasonable steps to ensure that their employees and agents, and any sub-contractors engaged for the purposes of this Agreement, do not make public or disclose the other Party's Confidential Information.

### **9.4 Passwords**

The Customer must not provide its passwords in connection with the Hosting Services or account information to third parties who is not employed by the Customer.

### **9.5 Survival**

This clause will survive the termination of this Agreement.

## **10. Intellectual property rights**

### **10.1 Customer Content**

All Intellectual Property Rights in the Customer Content belong to, and remain vested in, the Customer or its nominated entities and the Customer remains solely responsible for such Customer Content to the extent permitted by the law.

### **10.2 Submissions**

- (a) Submissions will not be confidential and all Intellectual Property Rights in such Submissions vest and, and are assigned to, KMO upon submission to KMO. The Customer agrees to take all further steps necessary (if any) to give full force and effect to this assignment.
- (b) The Customer warrant to KMO that any Submissions by it will not infringe the Intellectual Property Rights of any other person, or be defamatory or offensive.

### **10.3 Hosting Services**

All Intellectual Property Rights created by KMO or its Supplier in connection with its performance of the Hosting Services will be owned by, and vest in, KMO.

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## 10.4 Prohibited activities

Each Party must not do or permit or omit to do any act which infringes the other Party's Intellectual Property Rights.

## 10.5 Notification of infringement claim

Each Party must notify the other Party within three (3) Business Days of the date it become aware of:

- (a) any actual or suspected infringement by a third party of the other Party's Intellectual Property Rights; or
- (b) any actual or threatened claim by a third party that its Intellectual Property Rights have or will be infringed by any act, omission or permission by a Party in connection with this Agreement.

## 10.6 Indemnity

Each Party agrees to indemnify the other Party fully against all Liabilities and Losses which it incurs or may incur (including, but not limited to, to any third party) as a result of its breach of clauses 10.1, 10.3 or 10.5.

## 11. Replacement of the Supplier

- (a) Where KMO supplies the Hosting Services to the Customer through a Supplier, KMO may terminate and replace such Supplier at any time without notice. KMO will, however, endeavour to replace such Supplier:
  - (1) with no or minimal disruption to the supply of the Hosting Services, and
  - (2) on substantially the same terms as are set out in this Agreement.
- (b) Where KMO is unable to comply with sub-clause 11(a)(2) above it will provide the Customer with a copy of the new terms and conditions. If the Customer is not satisfied with the new terms and conditions it may terminate this Agreement on providing KMO with 30 day written notice.
- (c) If the Customer terminates the Agreement under sub-clause 11(b) above, KMO will refund the Customer it fees paid for unused Hosting Services on a pro rata basis.

## 12. Suspension

### 12.1 Suspension

KMO may immediately temporarily suspend (in part or in whole) its provision of the Hosting Services to the Customer if:

- (a) KMO is required by law to do so;
- (b) due to any technical failure, modification or maintenance (whether preventative, remedial, scheduled or unscheduled);
- (c) KMO reasonably suspect that the Hosting Services are being used in connection with fraud or other illegal activity;
- (d) KMO reasonably considers that the Customer poses an unacceptably high credit risk to KMO (by, for example, the late payment of invoices);
- (e) breaches any terms or conditions applicable to this Agreement or the Hosting Services.

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## 12.2 Effect of suspension

Suspension in accordance with clause 12.1 will not effect any right which accrues prior to, or after, suspension, nor does it discharge KMO's obligations or the Customer's obligations under this Agreement.

## 13. Termination of Hosting Services

### 13.1 Termination by either party

Either party may terminate this Agreement on providing 30 days written notice (by way of letter or email) to the other party.

### 13.2 Termination by KMO

Without limiting the generality of any other clause in the Agreement, KMO may terminate the Agreement the Hosting Services in respect of the Website, immediately by notice in writing if:

- (a) if the Customer is in breach of this Agreement and has failed to remedy the breach within 20 days of a written notice to it from KMO, specifying the breach and requiring its remedy;
- (b) if the Customer is in breach of this Agreement and that breach is not capable of remedy;
- (c) an Insolvency Event occurs in respect of the Customer;
- (d) KMO is required to do so pursuant to any action taken by a competent legal or regulatory authority, or if it believes, acting reasonably, that the continuation of the Hosting Services in respect of the Website may damage its reputation or otherwise cause it any kind of Loss or Liability.

## 14. Consequences of termination

### 14.1 Effects of termination

Upon termination or expiration of this Agreement:

- (a) KMO will cease performing, and providing the Customer with access to, the Hosting Services and Website;
- (b) KMO will not refund the Customer any payments paid to KMO under this Agreement;
- (c) the Customer must pay KMO for the Hosting Services up to and including the termination date;
- (d) any licences issued to the Customer by KMO will cease;
- (e) KMO or its Supplier may delete the Customer Content;
- (f) the Customer agrees not to take any action in respect of any damage or Loss it asserts it has sustained arising from the termination or suspension of the Hosting Services;
- (g) KMO may repossess any of its property in the possession, custody or control of the Customer;
- (h) KMO may be regarded as discharged from any further obligations under the Agreement; and

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- (i) KMO may pursue any additional or alternative remedies provided by law.

## 15. Force Majeure

- (a) To the extent that a party's delay or inability to perform under this Agreement is due to the existence and its notification of a Force Majeure, the affected obligations of that party under this Agreement will be suspended until the passing of that Force Majeure event. A party must take all reasonable steps to minimise any disruption to and resume the performance of its affected obligations.
- (b) If substantially all of a party's obligations under this Agreement are suspended by a Force Majeure event under sub-clause 15(a) above by more than 21 days, either party may elect to terminate this Agreement without penalty, or the parties may enter into discussions to modify the affected obligations by variation of the Agreement.

## 16. Limitation of liability

### 16.1 Limited Liability

- (a) KMO (or its agents or sub-contractors) will not be liable under any circumstances whatsoever, to the full extent permitted by law, for any Loss suffered or Liability incurred by the Customer as a result of the Hosting Services.
- (b) The Customer acknowledges that the Hosting Services may be subject to limitations, delays and other problems inherent in the use of the Internet. KMO is not responsible for any delay, delivery failures, or other damage resulting from such problems that are outside of KMO's control.
- (c) KMO will not be liable for any loss of profits, indirect or consequential damages arising out of a breach of the Agreement to the full extent permitted by law.
- (d) To the extent that KMO is liable under the Agreement, the aggregate of its liability in connection with the Agreement will in no event exceed the sum of the Hosting Fees paid to KMO under this Agreement.

### 16.2 Implied terms

Subject to clause 16.3, to the full extent permitted by law, any term which would otherwise be implied into this Agreement is excluded. In the event any statute implies terms into this Agreement which cannot be lawfully excluded, such terms will apply to this Agreement, save that the liability for KMO's breach of any such implied term will be limited (at KMO's option) to any one or more of the following:

- (a) the replacement of goods or services to which the breach relates or the supply of equivalent goods or services;
- (b) the repair of such goods or services;
- (c) the payment of the cost of replacing the goods or services or of acquiring equivalent goods or services; or
- (d) the payment of the cost of having the goods or services repaired.

### 16.3 Australian Consumer Law

KMO will comply with the warranties contained in the Australian Consumer Law to the extent that they apply to the Customer.

### 16.4 Customer's acknowledgement

# Hosting Terms and Conditions

The Customer acknowledges that it has exercised independent judgement in entering into the Agreement and has not relied on any representation made by KMO which has not been stated expressly in the Agreement or upon any descriptions or illustrations or specifications contained in any document (including, without limitation, catalogues or promotional material that KMO produced).

## 17. Indemnity

### 17.1 Events

The Customer, during the Term and after the termination or expiration of this Agreement, indemnifies on a full indemnity basis (including legal costs), KMO and its Suppliers against any Claims or Liabilities suffered or incurred by KMO and its Suppliers as a result of:

- (a) a breach or non-performance of this Agreement by the Customer;
- (b) all costs, Loss, expenses, taxes or Liabilities of the Customer in respect of the Customer Content, business, goods and services;
- (c) any injury to any person or any loss of property or damage in connection with the Customer Content;
- (d) the use of the Customer Content or Submissions;
- (e) failure of the Customer to comply with any law; and
- (f) any negligent or wilful act or omission on the part of the Customer or its employees or contractors.

### 17.2 Payment not necessary

In relation to any indemnity given by a party (**Indemnifier**) in favour of another party (**Indemnified Party**) it is not necessary for the Indemnified Party to make any payment before enforcing the right of indemnity against the Indemnifier.

## 18. Privacy

### 18.1 Privacy policy

KMO will comply with the terms of its Privacy Policy. The Customer agrees and consents to the terms of that Privacy Policy.

### 18.2 Privacy Law

The Customer must comply with all Privacy Laws in relation to any and all personal information that it collects, or otherwise deals with, via the Hosting Services.

### 18.3 Trans-border data-flows

- (a) The Customer acknowledges and agrees that the Hosting Services, due to their nature, may necessarily involve the trans-border transfer of personal information. The kmo design servers are located in United States of America and Australia.
- (b) The Customer agrees to obtain any and all consent of any third parties who it induces to use the Hosting Services, as is necessary in order for the Hosting Services to serve their normal function.
- (c) The Customer expressly consents to, and understands, that KMO's or its Suppliers' servers may be located outside of Australia.



# Hosting Terms and Conditions

## 19. Communication

### 19.1 Email

All communication from us will be sent via email only. The Customer must ensure that the email address it provides to KMO is correct at all times.

### 19.2 Storage of communications

KMO will preserve the content of any e-mail the Customer sends KMO if it believes that it has the legal requirement to do so. The Customer's e-mail message content may be monitored by KMO for trouble-shooting or maintenance purposes or if any form of e-mail abuse is suspected.

## 20. Security of information

Unfortunately, no data transmission over the Internet can be guaranteed as totally secure. Whilst KMO strives to protect such information, KMO does not warrant and cannot ensure the security of any information which is transmitted or received in connection with the Hosting Services or that the Customer transmits to KMO. Accordingly, any information which the Customer transmits to KMO or is made available for access on the Website is transmitted or made available, at the Customer's own risk.

## 21. GST

### 21.1 GST exclusive

Unless expressly stated to the contrary:

- (a) all amounts expressed in this Agreement are exclusive of GST; and
- (b) all terms in this clause 21, unless otherwise defined, have the same meaning as those terms have in the *A New Tax System (Goods and Services Tax) Act 1999 (Cth)* and/or associated Commonwealth legislation, regulations and publicly available rulings ("the GST Law").

### 21.2 Recipient to pay

If a party ("the Supplier") is obliged pursuant to the GST Law to pay an amount of GST in respect of a Taxable Supply made by the Supplier to another party ("the Recipient") pursuant to the provisions of this Agreement, the Recipient shall pay the Supplier on demand that amount of GST upon production of a valid Tax Invoice by the Supplier in addition to the moneys otherwise payable by the Recipient to the Supplier on account of that Taxable Supply.

## 22. Subcontractors of KMO

### 22.1 Right to subcontract

KMO reserves the right to sub-contract all or any of its obligations under this Agreement to a sub-contractor or independent contractor, at its sole discretion.

### 22.2 Benefit of limits on liability

Any clause of this Agreement which excludes or limits the liability of KMO extends to protect KMO's employees, agents and sub-contractors and any servant or agent or the sub-contractor and any other person or persons providing any or all of the Services to be performed pursuant to this Agreement. For the purposes of, and to give effect to, this clause:

- (a) KMO will hold the benefit of these conditions for its employees and agents and for any sub-contractor and its employees;

# Hosting Terms and Conditions

- (b) all such employees, agents and sub-contractors shall be deemed to be parties to this Agreement; and
- (c) KMO remains primarily responsible for its obligations despite that KMO has sub-contracted or assigned the performance of any part of such obligations.

## **23. Assignment and sub-contracting**

Except as expressly otherwise provided in this Agreement the Customer must not assign or otherwise deal with any part of its rights or obligations under this Agreement without KMO's prior written consent.

## **24. Governing law**

This privacy policy is governed by the laws in force in Queensland, Australia. The Customer agrees to submit to the exclusive jurisdiction of the courts of that jurisdiction.

## **25. Whole Agreement**

This Agreement supersedes all prior representations, arrangements, understandings and agreements between the parties and represents the entire complete and exclusive understanding and agreement between the parties relating to the subject matter of this Agreement.

## **26. Miscellaneous**

- 26.1 A party's waiver of a right under or relating to this Agreement, whether prospectively or retrospectively, is not effective unless it is in writing and signed by that party. Further, no other act, omission or delay by a party will constitute a waiver of a right.
- 26.2 If anything in this Agreement is or is determined to be unenforceable, illegal, voidable or void in a jurisdiction then it is severed for that jurisdiction and the rest of this Agreement remains in full force and effect in all other jurisdictions.