



## **Make-Tracks Secure Hosting Terms of Service Agreement (4 Mar 2003)**

The Service Agreement, and any supplemental Service Order(s) define the scope of Services and fees charged to Client and are hereby attached and incorporated by reference to this Agreement. Client and Make-Tracks Secure Hosting agree to perform the following:

### **Term of Agreement**

The term of an agreement is the period of time the client agrees to pay for services. Cancellation before the end of the term constitutes a forfeiture fees for the term of service. All service order are renewed upon payment of fees for each subsequent term. Agreement Terms are as follows:

- Web Hosting - Monthly
- Application Hosting - Quarterly
- Tools Subscription - Monthly

### **Payment of Fees**

Subject to credit approval, the Client will pay for services on a monthly or annual basis as indicated by the Client. Thereafter the Client will pay for services on a monthly or annual basis as indicated by the Client. The Client will be billed on an advanced monthly basis with payment due to Make-Tracks in Australian dollars fourteen (14) day's from the date of invoice. In the event the Client fails to remit payment a late fee of \$10 or 10.5% of the outstanding balance, whichever is greater, will be due. Make-Tracks may terminate service at any time and for any reason including for non-payment of fees. Client agrees to pay all costs of collection including court costs and attorneys fees. Failure to remit payment when due for a concurrent period of six billing cycles results in the creation of an equitable lien of which Make-Tracks Secure Hosting is the primary creditor in and on all Client property, physical and intangible on Make-Tracks Secure Hosting premises.

### **Goods And Services Tax**

If goods and services tax (GST) is payable on any supply under this Agreement, the fee payable for the supply will be considered exclusive of GST. Unless the parties otherwise agree in writing, the party receiving the supply undertakes to pay the supplying party the amount of such GST in addition to any fee for that supply of the time the fee is payable or at such later time when the amount of the GST becomes known, subject to the supplying party issuing a valid tax invoice to the party receiving the supply in accordance with the relevant GST Legislation

### **Domains**

Any domain that is registered through Make-Tracks Secure Hosting's MelbourneIT reseller account, will adhere to the rules and regulations set forth in the agreements made by the gTLD involved.

PO Box 141  
Windsor NSW 2756, Australia  
Ph: (61 2) 4575 5248

info@make-tracks.com  
<http://www.make-tracks.com>  
ABN: 60 489 078 921

- .com.au registrations
- .com registrations
- .biz registrations
- .info registrations

## Privacy

(a) In this clause “personal information” means information or an opinion (including information or an opinion forming part of a database), whether true or not, and whether recorded in a material form or not, about an individual whose identity is apparent, or can reasonably be ascertained, from the information or opinion.

(b) Client must abide by all relevant National Privacy Principles (NPP) enunciated in the Privacy Act 1988.

(c) Without limiting the generality of clause (c):

(i) Client must not collect personal information unless the information is necessary for one or more of its functions or activities.

(ii) Client must collect personal information only by lawful and fair means and not in an unreasonably obtrusive way.

(iii) Client must take reasonable steps to ensure that any individual whose personal information is collected is aware of: (a) the identity of the organisation collecting personal information; (b) how to contact the organisation collecting personal information; (c) the fact that access is available to this personal information; (d) the purposes for which this personal information is collected; (e) the types of organisations to which personal information of this kind is usually disclosed; and (f) the main consequences for the individual if the personal information is not provided.

(iv) Client must not collect sensitive information (as defined in the Privacy Act 1988) without the consent of the individual whose information is collected or the written approval of Make-Tracks Secure Hosting which will not be given unless Make-Tracks Secure Hosting is satisfied that such collection is permitted under NPP 10.

## Warranties

Client represents and warrants that:

(i) Client's web or Internet site or address including without limitation the products and services offered therein, will not (a) infringe on the copyrights, trademarks, service marks, patents, or other intellectual property or personal rights held by any third party; (b) be defamatory or libellous; (c) be pornographic or obscene; (d) contain any viruses, Trojan horses, worms, time bombs, or other computer programming defects which are intended to damage a user's system or data;

(ii) Client has all power and authority to enter into this Agreement and has duly and validly authorized this Agreement; (iii) Client shall conduct itself responsibly and in accordance with the Federal and State laws, rules, and regulations, including without limitation, the laws and regulations governing export control, that apply to the web and Internet in all jurisdictions that Client appears; and

(ii) there is no outstanding contract, commitment or agreement to which Client is a party, or legal impediment of any kind known to Client which conflicts with this Agreement or might limit, restrict or impair the rights granted hereunder.

**CLIENT ACKNOWLEDGES AND AGREES THAT EXCEPT FOR THE EXPRESS WARRANTIES PROVIDED IN THIS AGREEMENT ALL WARRANTIES WHETHER EXPRESS OR IMPLIED OR STATUTORY AND ALL OBLIGATIONS AND REPRESENTATIONS AS TO PERFORMANCE INCLUDING ALL WARRANTIES THAT MIGHT ARISE FROM COURSE OF DEALING OR CUSTOM OR TRADE AND INCLUDING ALL IMPLIED WARRANTIES OF MERCHANTABILITY OF FITNESS FOR A PARTICULAR PURPOSE ARE HEREBY EXPRESSLY EXCLUDED AND DISCLAIMED BY MAKE-TRACKS SECURE HOSTING.**

**CLIENT ACKNOWLEDGES AND AGREES THAT IN NO EVENT SHALL MAKE-TRACKS SECURE HOSTING OR ITS RESPECTIVE DIRECTORS, OFFICERS, EMPLOYEES, TECHNOLOGY PARTNERS, AFFILIATES, OR AGENTS BE LIABLE FOR SPECIAL, INCIDENTAL, EXEMPLARY, CONSEQUENTIAL OR INDIRECT DAMAGES, OR FOR THE LOSS OF ANTICIPATED PROFITS TO CLIENT, OR ITS CUSTOMERS, OR ANY OTHER PERSON UNDER ANY PROVISION OF THIS AGREEMENT.**

### **Confidential Information**

(a) Definition. "Confidential Information" means all non-public confidential and proprietary information that the disclosing party identifies in writing as confidential.

The parties acknowledge that it will be necessary for each of them to disclose or make available to each other information and materials (collectively Confidential Information) that may be confidential or proprietary or may contain valuable trade secrets. Prior to disclosure, the disclosing party shall use reasonable efforts to designate all Confidential Information by marking the information with the word "Confidential" or similar legend.

(b) Non-Disclosure. Both during and after the term of this Agreement, each of the parties agrees: (i) to use commercially reasonable efforts to protect the Confidential Information of the other party from unauthorised use or disclosure and to use at least the same degree of care with regard thereto as it uses to protect its own Confidential Information of a like nature; (ii) to use and reproduce the Confidential Information of the other party only as permitted under this Agreement or as needed to perform its duties under this Agreement; and (iii) not to disclose or otherwise permit access to the Confidential Information of the other party to any third party, without the other party's prior written consent.

(c) Exceptions. Information will not be considered to be Confidential Information if it: (i) is already, or otherwise becomes, publicly known by third parties as a result of no act or omission of the receiving party; (ii) is lawfully received, after disclosure hereunder, from a third party having the right to disseminate the information without restriction on disclosure; (iii) is furnished to others by the disclosing party without restriction on disclosure; (iv) can be shown by the receiving party to have been independently developed by such party prior to the execution of this Agreement; or (v) is disclosed with the prior written consent of the disclosing party.

Furthermore, it is understood that each party shall be free to use any ideas, concepts, know-how and techniques related to the scope of its practice, provided they contain no specific or identifiable elements unique to the other party hereto or its operations.

(d) Return. Upon the disclosing party's request, Make-Tracks Secure Hosting will promptly return to the disclosing party all tangible items containing or consisting of the disclosing party's Confidential Information.

(e) Injunctive Relief. The parties agree that any breach by either party or any of its officers, directors, or employees, of any provisions of this section may cause immediate and irreparable injury to the other party and that, in the event of such breach, the injured party will be entitled to seek injunctive relief as well as any and all other remedies available at law or in equity.

### **Acceptable Use Policy**

During the period that Make-Tracks Secure Hosting provides Services Client shall not distribute on the Web site or over the system any content that (a) violates intellectual property rights of any third party or any rights of publicity or privacy; (b) violates any law statute, statute ordinance or regulation, including without limitation the laws and regulations governing export control, unfair competition, antidiscrimination, unsolicited e-mail (known as "spam"), postings that violate Usenet newsgroup charters or false advertising; (c) is defamatory, trade libelous, unlawfully threatening or unlawfully harassing; or (d) contains any viruses, trojan horses, worms, time bombs, cancelbots or other computer programming routines that are intended to damage, detrimentally interfere, surreptitiously intercept or expropriate any system, data or personal information. Any alleged or actual violation of the above may result in immediate termination of services.

### **Limited Performance Warranty**

Make-Tracks Secure Hosting warrants that it will perform its services in a competent and workmanlike manner and to ensure the technological aspects operate substantially according to the agreed to specifications. Make-Tracks Secure Hosting does not warrant that it will be able to correct all reported defects or that services will be error free. Make-Tracks Secure Hosting makes no warranty regarding features or services provided by third parties or web "browser" software that are provided "as is" and "as available."

### **Indemnification**

Client will defend, indemnify, and hold harmless Make-Tracks Secure Hosting, and their respective directors, officers, technology partners, employees, affiliates, and agents from all claims, actions, losses, liability, damages, costs, and expenses (including reasonable attorney's fees and expenses) arising from any provision or claim of this Agreement. Without limiting the generality of the foregoing, Client shall indemnify and hold harmless Make-Tracks Secure Hosting against liabilities arising from the following: (i) the products or services provided by Client in connection with Make-Tracks Secure Hosting; (ii) any actual or alleged defamatory or illegal material provided by Client for placement on, or in connection with Make-Tracks Secure Hosting; and (iii) any material provided by Client on, or in connection with Make-Tracks Secure Hosting, that actually or allegedly infringes on the intellectual property or personal rights of a third party. Each party agrees to (i)

promptly notify the other party in writing of any indemnifiable claim and give the other party the opportunity to defend or negotiate a settlement of any such claim at the party's sole expense, and (ii) cooperate fully with the other party in defending or settling such claim; Make-Tracks Secure Hosting reserves the right, at its own expense, to assume the exclusive defense and control of any matter otherwise subject to indemnification by FS hereunder.

### **Force Majeure**

Either party shall be excused from performance and shall not be liable for any damages or delay in whole or in part, caused by the occurrence of any contingency beyond the reasonable control either of the excused party or its sub-contractors or suppliers including, but not limited to, war, sabotage, insurrection, riot or other act of civil disobedience, act of public enemy, failure or delay in transportation, act of any government or any agency or sub-division thereof affecting the terms hereof, accident, fire, explosion, flood, severe weather or other act of nature, or shortage of labour or fuel or raw materials.

### **Term and Termination**

This Agreement has a term as specified on your contract and is subject to automatic renewal periods equal to the contracted period. Client may terminate this agreement by thirty day written notice prior to contract expiration to Make-Tracks Secure Hosting. Notice is accepted the day of receipt by either Australia Post or e-mail to [cancel@make-tracks.com](mailto:cancel@make-tracks.com). At no time shall fees be prorated for unused service. Make-Tracks Secure Hosting does not refund or credit client for unused, cancelled service.

### **Assignment**

Neither party may assign or delegate any or all of its rights (other than the right to receive payments) or its duties or obligations hereunder without the consent of the other party, which consent shall not be unreasonably withheld or delayed; provided, however, that either party may assign this Agreement, without the need to obtain consent of the other party, to an affiliate of such party or to a successor in interest to substantially all of the business of that party to which this Agreement relates. An assignee of either party authorised hereunder shall be bound by the terms of this Agreement and shall have all of the rights and obligations of the assigning party set forth in this Agreement.

### **Complete Agreement**

This Agreement is the complete and exclusive statement of the agreement of the parties with respect to the subject matter hereof and supersedes and merges all prior proposals and agreements, oral or written, between the parties with respect to the subject matter hereof. This Agreement may not be modified except by a written instrument duly executed by the parties hereto.

### **Headings and Subclauses**

Clause headings are provided for convenience of reference and do not constitute part of this Agreement. Any references to a particular clause of this Agreement shall be deemed to include reference to any and all subclauses thereof.

## **Severability - No Waiver**

If any provision of this Agreement is held to be invalid or unenforceable for any reason, the remaining provisions will continue in full force without being impaired or invalidated in any way. The parties agree to replace any invalid provision with a valid provision which most closely approximates the intent and economic effect of the invalid provision. The waiver by either party of a breach of any provision of this Agreement will not operate or be interpreted as a waiver of any other or subsequent breach.

## **Enforceability**

If any part of this Agreement shall be adjudged by any court of competent jurisdiction to be invalid, illegal or unenforceable, the validity, legality and enforceability of the remaining provisions shall not be affected or impaired thereby and shall be enforced to the maximum extent permitted by applicable law. If any remedy set forth in this Agreement is determined to have failed of its essential purpose, then all other provisions of this Agreement, including the limitations of liability and exclusions of damages, shall remain in full force and effect.

## **No Third Party Benefit**

The provisions of this Agreement are for the sole benefit of the parties hereto. This Agreement confers no rights, benefits, or claims upon any person or entity not a party hereto.

## **No Construction Against Drafter**

If an ambiguity or question of intent arises with respect to any provision of this Agreement, the Agreement will be construed as if drafted jointly by the parties and no presumption or burden of proof will arise favouring or disfavouring either party by virtue of authorship of any of the provisions of this Agreement.

## **Notices**

Any notice required or permitted under this Agreement to the parties hereto will be deemed to have been duly given only if in writing and delivered by: (a) certified mail, return receipt requested or via overnight courier, postage prepaid, to the address of the receiving party as set forth on the initial page hereof or such other address as may be specified by such party in a notice delivered to the other party in accordance with this clause; or (b) via hand delivery. Notices shall be deemed delivered when received by the party being notified.

## **Governing Law**

This Agreement will be governed by and construed and interpreted in accordance with the laws of New South Wales and in the event of any dispute, the parties submit to the non-exclusive jurisdiction of the Courts of that State.

## **Legal Fees**

If any legal action is brought to construe or enforce any provision of this Agreement,

the prevailing party shall be entitled to receive its reasonable attorney's fees and court costs in addition to any other relief it may receive.

**Counterparts**

This Agreement may be executed in one or more counterparts, each of which shall be deemed an original and all of which shall be taken together and deemed to be one instrument.

**Signed as an Agreement**

Signed by (for Make-Tracks Secure Hosting)

.....  
Authorized Signatory

.....  
Date

.....  
Name of Signatory

Signed by (for .....)  
ACN

.....  
Authorized Signatory

.....  
Date

.....  
Name of Signatory