

TERMS AND CONDITIONS

XPORTMYDATA TERMS AND CONDITIONS OF ACCESS

1. INTRODUCTION & ACCEPTANCE

1.1 We own the software service known as 'XportMyData' a web and application based Software used by members to back up their Xero Financials and files ("**Xero Data**").

1.2 These Terms and Conditions we have provided to you for the provision of the Software Services and apply to your access and use of the Software. Your acceptance of these Terms and Conditions is a condition of registration to access and use the Software.

1.3 We may amend or modify these Terms and Conditions at any time. Any change or variation to these Terms and Conditions shall be posted on our Website and notified to you the next time you access the Software Services and shall become effective on the date so notified.

1.4 Provision of instructions to provide the Software Services will be taken as acceptance of these Terms and Conditions ("Acceptance Date") we will then provide the Software Services in accordance with these Terms and Conditions.

2. DEFINITIONS

2.1 In these Terms and Conditions:

"Acceptance Date" has the meaning given to that term in clause 1.3;

"Application" means the application designed and owned by us for desktop devices will be used to access Xero Software as authorised by the customer;

"Authorised Users" means any persons or entities which have been authorised by you to use and access the software (including your employees, agents, independent contractors and subcontractors);

"Business Day" means any day other than a Saturday, Sunday or statutory public holiday in Hamilton, New Zealand;

"Commencement Date" means the earlier of the date when you have been registered to use the test environment, or the date you started to use your live environment, of the Software;

"Confidential Information" means any information (in any form whether written, electronic or otherwise):

(a) relating to the terms of these Terms and Conditions;

(b) relating directly or indirectly to a party's business, finances, customers, suppliers, processes, inventions, ideas, research, development and technologies;

(c) disclosed by either party to the other party on the express basis that such information is confidential; or

(d) which might reasonably be expected by either party to be confidential in nature, provided that, where information relates exclusively to one party, nothing in these Terms and Conditions will require that party to maintain confidentiality in respect of that information;

"Customer", "you" or "your" means the person who registers to use the 'XportMyData' Service;

"Customer Data" means information or other content uploaded or logged by you, or by us on your behalf, in the course of accessing and using the Services;

"us", "our" or "we" means [XportMyData Limited] being a company incorporated in New Zealand under company number [7385896];

"Fixed Term" means the period commencing on the Commencement Date and ending 12 months later;

"Good Industry Practice" means, in relation to a particular activity, the exercise of a degree of skill, care and diligence which would reasonably be expected from a skilled and experienced person engaged in New Zealand in the same activity, under the same or similar circumstances;

"Improvements" means any developments, modifications, improvements, updates, upgrades, bug fixes and additions (including any changes made as the result of a Change Request) to the Software;

"Intellectual Property Rights" means all worldwide intellectual and industrial property rights (including patents, trademarks, copyright, know-how, trade secrets and other intellectual property) and all rights or forms of protection of a similar nature, whether or not registered, and (where applicable) any application to register any of these rights;

"Law" means any rules of common law, statute, regulation, by-law, ordinance or subordinate legislation orders, injunctions and judgements in force from time to time;

"Loss" means liability, loss, damage, cost or expense and **"Losses"** shall be construed accordingly;

"Malware" means any program code or programming instructions, or any thing or device, which may damage, interfere with, impair or otherwise adversely affect the operation of the Services or the Software, prevent or hinder access to any program or data, or enable unauthorised access to any program or data, impair or disrupt the operation of any program or the reliability of any data (whether by re-arranging, altering or erasing the program or data in whole or part or otherwise), including malicious code, computer viruses, trojan horses, worms, spyware, malware, logic bombs, backdoors, disabling code and other similar things.

"Privacy Policy" means our privacy policy located at www.xportmydata.co.nz/privacy;

"Software" has the meaning given to that term in clause 1.1;

"Software Services" means the Services delivered through the Software;

"Subscription" means the monthly fee payable by you in respect of the Software Services identified in your Proposal as reviewed from time to time in accordance with Clause 7;

"Term" has the meaning given to that term in Clause 16.1; and

"Website" means www.xportmydata.co.nz & www.xportmydata.net or any other website operated by us from which you can access the Services.

2.2. **Interpretation.** In these Terms and Conditions, unless the context indicates otherwise:

- (a) headings are for convenience only and do not affect the interpretation of these Terms and Conditions;
- (b) references to a party include that party's successors and permitted assigns;
- (c) each defined expression has the meaning corresponding to that definition throughout these Terms and Conditions;
- (d) references to persons includes individuals, companies, corporations, partnerships and other entities;
- (e) references to the singular includes the plural and vice versa;
- (f) the use of the terms includes or including does not imply any limitations;
- (g) all references to money are to American dollars; and
- (h) any obligation not to do anything includes an obligation not to permit or cause that thing to be done.

3. ACCESS TO THE SOFTWARE SERVICES

3.1. In consideration of you paying the Subscription Fee in accordance with Clause 7, we grant to you, during the Term and in accordance with the terms and conditions of these Terms and Conditions, the non-transferable and non-exclusive right to access and use the Software Services.

4. CUSTOMER OBLIGATIONS

4.1. You will:

(a) only use the Software Services for the purposes which they are intended;

(b) be responsible for maintaining the confidentiality of any authentication credentials required by you or your Authorised Users to access the Software Services. You must notify us promptly if you become aware of any potential misuse of your account or authentication credentials or any security incident related to the Software Services;

(c) not do, or omit to do, anything which you are aware or ought reasonably to be aware, could have an adverse effect on:

(i) the operation or maintenance of the Software, our operating environment or any other infrastructure, network or system owned or used by us; and/or

(ii) our brand or reputation (or which could otherwise bring our brand or reputation into disrepute);

(d) not knowingly introduce, and take all reasonable precautions to prevent the introduction of, any Malware into our operating environment or any other infrastructure, network or system owned or used by us;

(e) In complying with this obligation, you will ensure that all such rights of access are kept up to date including revoking access in respect of persons no longer associated with an Authorised User.

5. PERMITTED USE OF THE SERVICES

5.1. Other than expressly set out in these Terms and Conditions, you have no right to exercise or otherwise use any of the Intellectual Property Rights in the Software.

5.2. Excluding any liability to the extent contributed to or caused by our failure to comply with our obligations under these Terms and Conditions, you acknowledge and agree that you are responsible for your Authorised Users' use of the Software Services and you will be liable for any Loss suffered by us arising from such Authorised Users use of the Software Services.

5.3. Use of the Software Services may be subject to limitations. Any such limitations will be advised, and may be updated, from time to time.

6. SUPPORT SERVICES & AVAILABILITY

6.1. In the event of issues with accessing or using the Software Services, you must make all reasonable efforts to investigate (including utilising any support information published via the Website), diagnose and resolve the issue before contacting us. If you cannot resolve the issue, you will send us an email to [support@xportmydata.co.nz].

6.2. In the event that you wish any amendment, addition or other modification to the Services or any other additional Services that are related or ancillary to the Services, you may request such amendment, addition or other modification to from us in writing by sending an email to [support@xportmydata.co.nz]. Your requests will be investigated to determine their feasibility. We may enter into a separate software development agreement with you in order to implement any such requests however please note that we are not obligated to fulfil or comply with any such requests.

6.3. We intend that the Services should be available 24 hours a day, seven days a week. It is possible, however, that on occasions the Services may be unavailable to permit maintenance or other development activity to take place or due to issues beyond our control (such as issues with our third party suppliers).

6.4. If for any reason we have to interrupt the Services for longer periods than we would normally expect, we will use reasonable endeavours to notify you.

7. FEES

7.1. In consideration of us providing the Services, you will pay to us the:

(a) for the Fixed Term, the Subscription Fee identified, and in accordance with the payment terms set out upon application; and

(b) following the Fixed Term, the Subscription Fee set out on the Website for the level of Software Services nominated (as amended from time to time in accordance with clause 8).

7.2. All amounts paid by you (including the Subscription Fee) under these Terms and Conditions are non-refundable except as otherwise provided.

7.3. In the event any portion of an invoice is not paid when due and is not the subject of a genuine dispute with you, we will provide written notice to you advising the amount unpaid and we may:

(a) suspend your access to the Software Services; and/or

(b) disable the Software Services.

We will not be obliged to resume performance of the Services or to enable access to the Services until the outstanding invoice is paid.

7.4. The Fees are exclusive of GST and you will pay us the amount of GST chargeable on any taxable supply by us under these Terms and Conditions.

8. REVIEW OF SUBSCRIPTION FEES & RATES

8.1. Other than during the Fixed Term, we may increase the Subscription Fee at any time in accordance with clause 8.2.

8.2. We will notify you of any change to the Subscription Fee by notice in writing and will also update the Subscription Fee section of our Website. The revised Subscription Fee will come into effect and be payable in the calendar month following the calendar month in which you were notified of the revision to the Subscription Fee.

9. OTHER OBLIGATIONS

9.1. The parties will perform their obligations under these Terms and Conditions in accordance with:

- (a) all applicable Laws; and
- (b) Good Industry Practice.

9.2. You will be responsible for providing any hardware required to access and use the Services including ensuring such hardware satisfy the minimum hardware specifications as notified by us to you from time to time. In the event your hardware does not satisfy the minimum specifications, you may not be able to access the Services.

10. INTELLECTUAL PROPERTY RIGHTS

10.1. Subject to the rights granted under clause 3.1, you acknowledge that all Intellectual Property Rights in the Services and Software, together with any Improvements in respect of same are owned by us and nothing in these Terms and Conditions shall operate to assign or transfer any such Intellectual Property Rights from us to you.

10.2. You covenant and agree that you will not, whether in whole or part:

- (a) work around any technical limitations in the Software;
- (b) make use of the Software in a manner inconsistent with its intended purpose and Application, or not permitted or specified in these Terms and Conditions;
- (c) except as specified in these Terms and Conditions, sell, rent, lease, sublease, licence, sublicense, lend, time-share, transfer, assign or provide the use of, or access to, the Software, or any portion thereof, to persons other than Authorised Users;
- (d) reverse engineer the Software including attempting to determine or re-implementing the technical function or operation of the Software by reference to:
 - (i) the input or output of the Software; and/or
 - (ii) the software's internal structures and workings;
- (e) create any derivative works of the Software or any portion of the Software;
- (f) obscure or remove any copyright or trademark notices from the Software;
- (g) publish the Software for others to copy;
- (h) merge the Software with other software (including open source software); and
- (i) use the Software Services to develop a product that is competitive with the Software Services.

11. DATA OWNERSHIP AND ACCESS

11.1. We may access, modify, download, transfer, view and/or use the Customer Data

- (a) as necessary to perform the Services;
- (b) to administer, maintain and improve the Services;
- (c) for the purposes of aggregating and anonymising such data for incorporation in statistics and other reports which will be published or otherwise used by us for our internal and external business purposes.

11.2. The Customer Data is your property. We may alter, edit or delete the Customer Data in accordance with any request we receive from you. You are not permitted to access or use any data stored or held by us in relation to any of our other customers.

11.3. The Customer Data is owned by the entity (person) to which that data relates. You acknowledge that your access and use of any Customer Data will be in accordance with the terms of the Privacy Policy. In the event you wish to use the Customer Data for any purpose that is not covered by the Privacy Policy, you will be responsible for obtaining the required consents to such use from the applicable entity (person).

11.4. We will, in respect of any Customer Data:

- (a) comply at all times with the Privacy Act 1988 and any other applicable Laws relevant to its possession or use of any Customer Data;
- (b) use such data only in accordance with the Privacy Policy or as otherwise permitted by this Agreement.

11.5. You shall comply with the provisions of the Privacy Act 1988 and any other applicable Laws in its collection and use of the Customer Data. You warrant that you have obtained all required consents to enable us to possess, store and use any Customer Data in accordance with the terms of these Terms and Conditions.

11.6. You acknowledge that all data, information and content held or stored by us, or otherwise forming part of or generated through the Services that is not Customer Data ("Supplier Data") is owned by us and that you have no right to access or use in any way the Supplier Data other than as expressly set out in these terms and conditions.

11.7. If you enable third-party applications for use in conjunction with the Services, you acknowledge that we may allow the providers of those third-party applications to access your Customer Data as required for the interoperation of such third-party applications with the Services. We shall not be responsible for any disclosure, modification or deletion of your Customer Data resulting from any such access by third-party application providers.

12. DATA SECURITY

12.1. The security of your Customer Data is of utmost importance to us. We use Microsoft Azure Services as our hosting supplier which provides a level of security which has been certified as ISO 27001 compliant. In addition to this, XportMyData implements disaster recovery practice such as daily backups. However, we do not accept liability for any damage you may suffer in the event that Microsoft fails to perform any of its data security or recovery obligations or there is otherwise a loss or corruption of any Customer Data.

13. CONFIDENTIALITY

13.1. Subject to Clause 13.2, each party will keep confidential all Confidential Information of the other party, and will not at any time, directly or indirectly:

- (a) disclose or permit to be disclosed to any other person;
- (b) use for itself, or use to the detriment of the other party, other than to fulfil its obligations under, or as otherwise envisaged, by these Terms and Conditions, the Confidential Information.

13.2. Notwithstanding Clause 13.1, a party may disclose Confidential Information to another person if:

- (a) the disclosure is authorised in writing by the other party;
- (b) the disclosure is required by Law;
- (c) the Confidential Information already is, or becomes, public knowledge, other than as a result of a breach of these Terms and Conditions; or
- (d) the disclosure is made to that party's officers, employees or professional advisers, to the extent required for that party to obtain the benefits of, and perform its obligations under, these Terms and Conditions.

14. LIMITED WARRANTIES

14.1. Each party warrants to the other party that:

- (a) it has the legal right and authority, and has taken all necessary actions, to enter into and perform its obligations under these Terms and Conditions;
- (b) these Terms and Conditions constitutes a binding obligation which is enforceable against it in accordance with its terms; and
- (c) it has obtained all necessary consents required for it to perform its obligations under these Terms and Conditions.

14.2. Except as expressly and specifically provided in these Terms and Conditions:

- (a) you assume sole responsibility for results obtained from the use of the Services by you, and for conclusions drawn from such use. We shall have no liability for any damage caused by errors or omissions in any information provided by you in connection with the Services; and
- (b) in entering into these Terms and Conditions, you acknowledge you do not do so in reliance on any representation, warranty, term or condition other than as expressly set out in these Terms and Conditions and any conditions, warranties or other terms implied by statute or common law are excluded from these Terms and Conditions to the fullest extent permitted by Law.

15. LIMITATION OF LIABILITY

15.1. Subject to Clause 15.3, we will not be liable to you (whether in contract, tort, equity or otherwise) for any Loss of any kind arising out of or in connection with these Terms and Conditions including your or any Authorised Representative's access to and use of the Services, regardless of the cause of such Loss or whether you have been advised of the possibility of such Loss.

15.2. To the extent that liability cannot be excluded under clause 15.1, our aggregate liability in respect of all Losses incurred by you under or in connection with these Terms and Conditions (whether in contract, tort (including negligence) or otherwise) in any 12 month period shall in no event exceed the sums actually paid by you to us during such 12 month period.

15.3. None of the exclusions or limitations set out in these Terms and Conditions will have the effect of limiting or excluding any form of liability:

- (a) arising as a result of any fraudulent or unlawful act or omission of a party, or any deliberate or wilful breach of these Terms and Conditions by a party; or
- (b) where such liability cannot be so limited or excluded under applicable Law.

16. TERM & TERMINATION

16.1. Term. Your contract with us will commence on the Acceptance Date and will continue until terminated in accordance with this Clause 16 ("Term").

16.2. Termination for Convenience. Following the 12 month minimum term, your contract with us may be terminated at any time by either party providing to the other 1 month's notice in writing.

16.3. Termination for Cause. Either party (First Party) may immediately terminate your contract with us by written notice to the other party (Second Party) if:

- (a) a Default Event occurs in respect of the Second Party;
- (b) the Second Party commits a material breach of these Terms and Conditions which is not capable of being remedied; or
- (c) the Second Party commits a material breach of these Terms and Conditions that is reasonably capable of being remedied, but has not been remedied by the Second Party within 20 Business Days after receiving a notice from the First Party requiring it to remedy the relevant breach.

16.4. Default Event. Each of the following events will be a Default Event for the purposes of clause 16.3(a):

- (a) the Second Party goes into liquidation, or a receiver, administrator, statutory manager or similar officer is appointed to all or any part of the business or assets of the Second Party;
- (b) the Second Party becomes or is deemed by Law to be insolvent;
- (c) the Second Party ceases, or threatens to cease, to carry on all or substantially all of its business; and/or
- (d) the Second Party makes any composition, arrangement or assignment with or for the benefit of, its creditors.

16.5. Survival: Expiry or termination of these Terms and Conditions will not affect clauses, 10.2, 13, 15, 16.5, 17 and 18, or any provision of these Terms and Conditions which is expressly or by implication intended to come into force or continue on or after expiry or termination.

16.6. Consequences of Termination. In the event of termination of these Terms and Conditions for any reason, your account will be maintained for a period of 6 months from the date of termination following which it may be permanently deleted by us. You may request a copy of any Customer Data held by us within this 6-month period provided that we reserve the right to charge you a reasonable fee to supply you with such Customer Data.

16.7. Obligations on Termination: In the event these Terms and Conditions is terminated for any reason, you will:

- (a) immediately cease to access and use the Services; and
- (b) within ten (10) Business Days of the date of such termination, remove, delete or otherwise destroy all copies of the Application installed on your devices and you will promptly certify that this has occurred upon request from us.

17. DISPUTES

17.1. Upon any dispute, controversy or claim between the parties, relating in any way to these Terms and Conditions, (except as it relates to a confidentiality violation or an intellectual property right), each of the parties will designate a representative from the senior management, who (to the extent practicable) does not devote substantially all of his or her time to performance under the Agreement, to attempt to resolve such matter.

17.2. The designated representatives will negotiate in good faith in an effort to resolve the dispute over a period of 30 days. If the dispute is not resolved in this 30-day period the parties may take such lawful action as they consider desirable or necessary.

17.3. Regardless of any dispute, each party shall continue to perform its obligations under these Terms and Conditions to the extent practicable, but without prejudice to their respective rights and remedies.

18. GENERAL

18.1. Force Majeure. A party will not be liable for any failure or delay in complying with any obligation under these Terms and Conditions, if:

- (a) the failure or delay arises directly from a cause reasonably beyond that party's control;
- (b) that party gives written notice of the occurrence or event to the other party as soon as possible after becoming aware of the occurrence or event; and
- (c) that party uses all reasonable endeavours to overcome or mitigate the effects of the event.

18.2. Rights and Remedies. The rights, powers and remedies in these Terms and Conditions are cumulative and are in addition to any rights, powers or remedies provided at Law or in equity, unless specifically stated otherwise. Each party may pursue any remedy that it is entitled to pursue by Law.

18.3. Assignment. Subject to Clause 18.4, neither party will assign or otherwise transfer any of its rights or obligations under these Terms and Conditions to any other person without the other party's prior written consent (not to be unreasonably withheld or delayed) provided that we may novate our rights and obligations under these Terms and Conditions to a related company (as defined in the Companies Act 1993).

18.4. Subcontractors: We may subcontract the performance of our obligations under these Terms and Conditions, provided that it will at all times remain primarily liable for all that subcontractor's acts or omissions.

18.5. Variation. In order to be effective, any variation or amendment of these Terms and Conditions must be agreed in writing by the parties.

18.6. Counterparts. These Terms and Conditions may be signed in counterparts (including by copy sent via email in PDF format), and such copies may be relied upon by the other party as though it were an original copy. All signed counterparts together will constitute one document.

18.7. Costs. Each party will bear its own costs in connection with these Terms and Conditions.

18.8. Entire Agreement. These Terms and Conditions constitutes the entire agreement between the parties in respect of its subject matter and supersedes and extinguishes all prior negotiations, arrangements, understanding, course of dealings or agreements made between the parties in relation to its subject matter, whether written or oral.

18.9. No warranty. Neither Party has been given, nor entered into these Terms and Conditions in reliance on, any warranty, statement, promise or representation other than those expressly set out in these Terms and Conditions

18.10. Further Assurances. Each party will promptly sign all documents and perform any other acts that may be reasonably required to give effect to the provisions and intent of these Terms and Conditions.

18.11. Law and Jurisdiction. These Terms and Conditions is governed by, and construed in accordance with the law of New Zealand. Each party irrevocably and unconditionally submits to the exclusive jurisdiction of the courts of New Zealand in connection with these Terms and Conditions.

18.12. Waiver. A party will not be deemed to have waived any provision of these Terms and Conditions unless that waiver is in writing and signed by that party. Any such waiver will not be, or deemed to be, a waiver of any other right under these Terms and Conditions. Any failure or delay by a party to enforce any provision of these Terms and Conditions will not be considered to be a waiver of that provision.

18.13. Severability. If any provision of these Terms and Conditions is held to be illegal, invalid or unenforceable, then (to the maximum extent permitted by Law), that provision will be severed from these Terms and Conditions and this will not affect the validity or enforceability of the other provisions of these Terms and Conditions.