

ACTIONHRM Terms of Service

Terms and Conditions of Use

Permission to access and use the ActionHRM System (the "System") is conditional upon you, the Subscriber, agreeing to the terms and conditions set out below (the "Agreement"). The System is only offered to you on the condition that you read and accept all the terms of this Agreement and wish to become a Subscriber of the System. Acceptance will bind you and each Authorised Person to the terms of this Agreement. By clicking the "I Accept" button displayed on the initial sign-on screen for your business, you agree to the terms of this Agreement. You are entering into this agreement on behalf of the Subscriber and each Authorised Person and you represent that you have the authority to bind the Subscriber and each Authorised Person to these terms and conditions. If you do not have such authority, or if you do not agree with these terms and conditions, you must not select the "I Accept" button and the Subscriber and each Authorised Person will not be able to use the System.

Welcome

ActionHRM Pty Limited ("ActionHRM"), a company registered in Australia, provides an on-line service referred to as the ActionHRM System. Each company or legal entity that uses the service is referred to as a Subscriber and the service is available only to Authorised Persons of the Subscriber. Set out below are the terms and conditions of use of the System.

1. DURATION OF AGREEMENT

- 1.1 Unless terminated earlier in accordance with the termination rights set forth in this Agreement, the term of this Agreement is 3 months (**Initial Term**).
- 1.2 This Agreement shall be automatically renewed for subsequent terms of similar duration to the Initial Term unless either party gives the other party at least thirty (30) days prior written notice of its intent not to renew the Agreement.

2. SERVICE CONDITIONS

- 2.1 Subject to the terms of this Agreement, ActionHRM grants to the Subscriber, a non-exclusive and non-transferable right for the Authorised Persons to access and use the System in accordance with the terms and conditions of this Agreement.
- 2.2 The Subscriber must:
 - (a) Ensure that only Authorised Persons access the System and use the System in accordance with the terms and conditions of this Agreement;
 - (b) Ensure that the System is accessed and used only in the manner intended by ActionHRM and not in contravention of any law;
 - (c) Pay to ActionHRM a User Fee based on the number of Authorised Persons managed by the System;
 - (d) Immediately advise ActionHRM in writing if it becomes aware of any unauthorised use of the System by any person; and
 - (e) Report to ActionHRM all software errors or interruptions in use of the System, as soon as they come to its attention.
- 2.3 The Subscriber must not:
 - (a) Allow access or use of the System for other than its intended purpose;
 - (b) Alter, modify or adapt the whole or any part of the System, or permit third parties to do the same;
 - (c) Sell, redistribute, rent, transmit, circulate or disseminate the System or Documentation to any person;
 - (d) Make copies of, translate or reduce to or from any electronic medium or machine readable form, the Documentation for any purpose unconnected to this Agreement;
 - (e) Publish, promote, broadcast, circulate or refer publicly to the ActionHRM name or logo, without the prior written consent of ActionHRM; and
 - (f) Commit any act or omission the likely result of which is that ActionHRM's reputation will be brought into disrepute or which act or omission could reasonably be expected to have or does have an adverse effect on ActionHRM's interests.

3. FEES

- 3.1 The Subscriber shall pay the User Fee and any other fees and charges in accordance with the payment terms agreed in writing between ActionHRM and/or its Reseller and the Subscriber
- 3.2 The Subscriber shall pay all taxes, duties and other governmental charges payable in connection with the services supplied by ActionHRM and rights granted to the Subscriber under this Agreement.

4. ACTIONHRM'S AND/OR ITS RESELLERS OBLIGATIONS

- 4.1 ActionHRM agrees that it shall:
 - (a) Provide Application Support to the Subscriber in line with a paid support agreement and support policy;
 - (b) Take all reasonable precautions to keep the Subscriber data secure, and use SSL security wherever commercially practical in transferring data over the Internet;
 - (c) Promptly notify the Subscriber of any material changes to the System; and
 - (d) Use commercially reasonable endeavours to promptly remedy any errors in the System or interruptions in the use of the System.

5. SYSTEM INSTALLATION AND TRAINING

- 5.1 ActionHRM or its reseller will:

- (a) Provide the Establishment Services;
 - (b) Provide training in the use of the System; and
 - (c) Carry out any Customisation,
- at the rate and in the manner agreed in writing between ActionHRM and the Subscriber.

6. SYSTEM RELEASES AND UPDATES

- 6.1** ActionHRM agrees that provided the Subscriber has paid the User Fee and any other fees and charges payable from time to time under this Agreement, the Subscriber is entitled to all Minor Releases and Updates of the System.
- 6.2** For the avoidance of doubt, the Subscriber is not automatically entitled to a Major Release of the System pursuant to this Agreement. Additional fees may be payable for a Major Release.

7. CUSTOMER DATA

- 7.1** ActionHRM acknowledges that the Customer Data remains the property of the Subscriber.
- 7.2** ActionHRM shall make backup copies of the Customer Data in line with industry best practises.
- 7.3** ActionHRM shall comply with any federal or state statutory or legal requirement in relation to its collection, storage, use and disclosure of the Customer Data supplied by the Subscriber.
- 7.4** The Subscriber warrants to ActionHRM that the Subscriber has obtained all consents necessary for the collection, storage, use and disclosure of the Customer Data by ActionHRM and its contractors for the purposes of this Agreement, including for any cross-border transfer of data. The Subscriber indemnifies ActionHRM and its officers, employees, contractors and agents from and against all loss, costs, expenses, demands or liability, whether direct or indirect, arising out of a breach of this warranty.

8. CUSTOMER FACILITIES

- 8.1** The Subscriber is responsible for providing and maintaining its own Internet access and all necessary telecommunications equipment, software and other materials at the Subscriber's location as may be required to access the System through the Internet.
- 8.2** ActionHRM accepts no responsibility for any deficiency in the facilities and equipment used by the Subscriber to access the System.

9. ON-LINE HOSTING

- 9.1** The System will be hosted at a data centre at a location and through a supplier as determined by ActionHRM.
- 9.2** ActionHRM will not be responsible for occasional interruptions to the System.
- 9.3** ActionHRM will issue each Authorised Person with a user name and password for access to the System. The Subscriber must ensure that each Authorised Person does not disclose his or her user name and password to any other person.

10. CONFIDENTIALITY

- 10.1** Each party will take all reasonable steps to ensure that its employees, and any sub-contractors and agents engaged for the purposes of this Agreement, do not make public or disclose the other party's Confidential Information.
- 10.2** Each party will keep the Confidential Information of the other party confidential and will not disclose it to any third party or use it otherwise than:
 - (a) For the purposes of this Agreement;
 - (b) As authorised in writing by the other party;
 - (c) As required by any law, judicial body or governmental agency; or
 - (d) By way of disclosure to that party's professional advisers who have agreed to keep the Confidential Information confidential or who are bound by a duty of confidentiality.
- 10.3** On termination of this Agreement, each party will return to the other party all documents or copies of documents containing information which is, at the date of termination, Confidential Information of the other party.

11. PUBLICITY

- 11.1** The Subscriber agrees that, during the term of this Agreement, ActionHRM may reference the Subscriber in ActionHRM's customer listings and may place the Subscriber's name and logo on ActionHRM's website and in marketing materials relating to ActionHRM's products and services.

12. INTELLECTUAL PROPERTY

- 12.1** The Subscriber agrees that ActionHRM and its licensors are the sole and exclusive owners of all the Intellectual Property Rights in the System and the Documentation.
- 12.2** The Subscriber's rights to access and use the System rest in contract only and neither the Subscriber nor its Authorised Persons obtain any proprietary rights or interest in respect of the System.
- 12.3** The Subscriber agrees that in relation to the System:
 - (a) It is only permitted to use the Intellectual Property Rights for the purposes of and during the term of this Agreement;
 - (b) It will not seek to register any Intellectual Property Rights without the express consent of ActionHRM;
 - (c) It will not copy or reproduce the System other than for the purpose of providing a backup unless it has received express consent from ActionHRM;
 - (d) It will not remove, alter or otherwise tamper with any trade marks, trade names, logos, numbers or other means of identification on the System ;
 - (e) It will not do or omit to do, or authorise any third party to do or to omit to do, anything which could invalidate or be inconsistent with the Intellectual Property Rights;
 - (f) It will not attempt to copy the functions of the System or induce a third party to copy the functions of the System; and
 - (g) It will make a statement in any advertising material and promotional literature produced by or for it in connection with the System recognising ActionHRM as the provider of the System.
- 12.4** The Subscriber will not reverse assemble or reverse compile or directly or indirectly allow or cause a third party to reverse assemble or reverse

compile the whole or any part of the of the System except to the extent otherwise authorized by this Agreement or as expressly authorized under Part III Div 4A of the Copyright Act 1968.

13. INTELLECTUAL PROPERTY WARRANTIES

13.1 ActionHRM warrants that:

- (a) At the date of this Agreement it has the rights, power and authority to enter into this Agreement and to grant to the Subscriber the rights to access and use the System in accordance with the terms of this Agreement;
- (b) The Subscriber's access to, and use of, the System in accordance with this Agreement will not infringe the intellectual property rights of any third party; and
- (c) The System will meet the requirements as set out in the System's published specifications.

14. INTELLECTUAL PROPERTY INDEMNITY

14.1 Subject to subclauses 14.2, 14.3 and 14.4, ActionHRM will indemnify the Subscriber and its officers, employees and agents ("those indemnified") from and against any loss or against liability under any final judgment in proceedings brought by a third party against those indemnified on the basis that the use of the System by those indemnified constitutes an infringement of Australian Intellectual Property Rights. The total indemnity is limited in aggregate for any and all claims to the total User Fee paid to date by the Subscriber in the calendar year in which the claim is made.

14.2 ActionHRM will not indemnify the Subscriber as provided in subclause 1 unless the Subscriber:

- (a) Notifies ActionHRM in writing as soon as practicable of any infringement, suspected infringement or alleged infringement;
- (b) Gives ActionHRM the option to conduct the defence of such a claim, including negotiations for settlement or compromise prior to the institution of legal proceedings;
- (c) Provide ActionHRM with all necessary co-operation, information or assistance in conducting the defence of such a claim; and
- (d) Permits ActionHRM to modify, alter or substitute the infringing part of the System, at its own expense, to render the System non-infringing or authorises ActionHRM to procure for the Subscriber on reasonable commercial terms the authority to continue the use and possession of the infringing portion of the System.

14.3 ActionHRM will not indemnify the Subscriber if such infringement, suspected infringement or alleged infringement arises from:

- (a) Failure by the Subscriber to comply with its obligations under this Agreement;
- (b) Without limiting paragraph (a), the provision by the Subscriber of infringing materials for inclusion on the System;
- (c) Use of the System in combination by any means and in any form with other goods not specifically approved by ActionHRM;
- (d) Use of the System in a manner or for a purpose not reasonably contemplated or not authorized by ActionHRM;
- (e) Any transaction entered into by the Subscriber relating to the System without ActionHRM's prior consent in writing; or
- (f) Modification or alteration of the System by the Subscriber, its employees, agents or contractors without prior consent in writing of ActionHRM.

14.4 In the event that proceedings are brought or threatened by a third party against the Subscriber alleging that the Subscriber's use of the System constitutes an infringement of Intellectual Property Rights, ActionHRM (or its licensors) may at its option and at its own expense conduct the defense of such proceedings. The Subscriber will provide all necessary co-operation, information and assistance to ActionHRM (or its licensors) in the conduct of the defense of such proceedings.

14.5 The Subscriber will indemnify ActionHRM and its officers, employees, contractors and agents from and against any loss, costs, expenses, demands or liability, whether direct or indirect, arising out of a claim by a third party alleging such an infringement if:

- (a) The claim arises from an event specified in subclause 14.3; or
- (b) The ability of ActionHRM to defend the claim has been prejudiced by the failure of the Subscriber to comply with the provisions of subclauses 14.2 or 14.4.

15. LIABILITY AND INDEMNITY

15.1 If under any law any terms, conditions or warranties which apply to the supply of goods or services under this Agreement cannot legally be excluded, restricted or modified then those terms, conditions and warranties (**Non-excludable Conditions**) apply to the extent required by that law.

15.2 ActionHRM excludes:

- (a) From this Agreement all conditions, warranties and terms implied by statute, general law, international convention or custom, except any Non-excludable Conditions;
- (b) All liability to the Subscriber in contract for special, consequential or indirect damages, lost profits, loss of revenue, loss of data and damage suffered as a result of claims by any third party arising out of or in connection with this Agreement even if:
 - (i) ActionHRM knew they were possible; or
 - (ii) They were otherwise foreseeable; and
- (c) All liability to the Subscriber in negligence or other non-contractual cause of action in respect of which liability can be excluded for acts or omission of ActionHRM, its officers, employees, agents and contractors arising out of or in connection with this Agreement.

15.3 ActionHRM's liability to the Subscriber for breach of any express provision of this Agreement or any Non-excludable Condition is limited at the option of ActionHRM, to any one of:

- (a) The supplying of the services again; or
- (b) The payment of the cost of having the services supplied again.

15.4 Other than liability accepted by ActionHRM in subclause 15.3 and to the maximum extent permitted by law, ActionHRM's total liability for loss or damage of any kind not excluded by subclause 15.2, however caused, in contract, tort (including negligence), under any statute or otherwise arising from or relating in any way to this Agreement is limited in aggregate for any and all claims to the total User Fee paid to date by the Subscriber in the calendar year in which the claim is made.

15.5 Subject to subclause 15.6, the Subscriber warrants that it has not relied on any representation made which has not been stated expressly in this Agreement, or upon any descriptions, illustrations or specifications contained in any document including catalogues or publicity material.

15.6 The Subscriber acknowledges that to the extent that any representation which has been made is not otherwise expressly stated in this Agreement, the Subscriber has been provided with an opportunity to independently verify the accuracy of that representation.

16. TERMINATION

16.1 Termination for cause

Either party may terminate this Agreement at any time immediately by giving written notice to the other party where:

- (a) **Breach:** the other party breaches a term of this Agreement, and that breach is not remedied within thirty (30) days of the defaulting party receiving a notice which requests that the breach be remedied; or
- (b) **Insolvency Event:** an Insolvency Event occurs in relation to that other party.

16.2 Either party may terminate this Agreement at any time by giving ninety (90) days written notice.

17. EFFECTS OF TERMINATION

17.1 On termination of this Agreement for any reason, the Subscriber must immediately cease using the System.

17.2 On termination of this Agreement for any reason, ActionHRM agrees to assist the Subscriber to migrate the Customer Data from the System on a time and materials basis at the prevailing rate charged by ActionHRM for its professional services.

17.3 Termination of this Agreement does not affect any accrued rights or liabilities of either party and in particular does not affect any provision, which is expressly or by implication, intended to operate after termination, including:

- (a) any and all limitations of liability and indemnities granted by either party herein,
- (b) any covenant granted herein for the purpose of protecting the Intellectual Proprietary Rights or Confidential Information of either party or any remedy for breach thereof, and
- (c) the payment of any fees, taxes and duties.

18. ACKNOWLEDGEMENTF

18.1 The Subscriber acknowledges that no information contained within the System constitutes the provision of legal advice. The Subscriber further acknowledges that whilst ActionHRM will use commercially reasonable efforts to ensure the accuracy, completeness, timeliness and integrity of the System, ActionHRM gives no representation or warranty that such information is correct.

19. ASSIGNMENT

19.1 The benefit of this Agreement will not be assigned by the Subscriber without ActionHRM's written consent.

19.2 ActionHRM may consent to the assignment or novation of this Agreement subject to such conditions as it chooses to impose.

19.3 ActionHRM may, at any time, assign or novate part or all of its rights or obligations under this Agreement to any party and, to the extent required, the Subscriber hereby consents to any such novation, assignment or transfer.

19.4 At ActionHRM's request, the Subscriber agrees to enter into an agreement to formalise the novation, assignment or transfer on terms specified by ActionHRM.

20. SUB-CONTRACTING

20.1 ActionHRM may, at any time, sub-contract part or all of its obligations under this Agreement to any party and, to the extent required, the Subscriber hereby consents to any sub-contract. ActionHRM is responsible for ensuring that any obligations which it sub-contracts are performed by the sub-contractor concerned. ActionHRM will ensure that each sub-contractor is aware of and complies with the provisions of this Agreement relevant to the obligations which the sub-contractor is to perform.

21. ENTIRE AGREEMENT

21.1 This Agreement constitutes the entire Agreement between the parties in relation to the matters contained herein and supersedes all prior representations, Agreements, statements and understandings, whether oral or written. No addition to or modification of any provision of this Agreement will be binding upon the parties unless made by written instrument signed by a duly authorised representative of the party.

22. WAIVER

22.1 No right under this Agreement is waived or deemed to be waived except by notice in writing signed by the party waiving the right.

22.2 A waiver by one party under subclause 1 does not prejudice its rights in respect of any subsequent breach of this Agreement by the other party.

22.3 Subject to subclause 1, any failure by one party to enforce any clause of this Agreement, or any forbearance, delay or indulgence granted by one party to the other, will not be construed as a waiver of rights under this Agreement.

23. SEVERANCE OF INEFFECTIVE PARTS

23.1 If any provision of this Agreement is held invalid, unenforceable or illegal for any reason, the Agreement will remain otherwise in full force apart from such provisions which will be deemed deleted.

24. NOTICES

24.1 Notices under this Agreement shall be delivered by email to the email address of the Subscriber's representative that has agreed to these terms and conditions by clicking the "I Accept" button and, in the case of ActionHRM, to admin@ActionHRM.com.au.

24.2 Notices under this Agreement may also be delivered by post or by hand delivery to the principal place of business of the Subscriber or ActionHRM (as the case may be)

24.3 Notice will be deemed given, in the case of email, when the sender's computer indicates that the message has been sent and that it has not bounced, and in the case of delivery by post,, 3 business days after posting. Notice is given, in the case of hand delivery, on the date delivered.

25. GOVERNING LAW

25.1 This Agreement is to be governed by and interpreted in accordance with the law in New South Wales and the parties submit to the non-exclusive

jurisdiction of the Courts of that State.

26. DEFINITIONS

In this Agreement, unless a contrary intention appears:

Agreement means the terms and conditions for the relationship between the parties as stated in this document.

Application means the human resource management software referred to as the ActionHRM Team Management System which may include updates, releases, Customisation or enhancements, and the related Documentation which is to be made available by ActionHRM to the Subscriber pursuant to this Agreement.

Authorised Person means an individual who is an employee, contractor, or consultant of the Subscriber and for whom information is stored or available for storage on the System. If an Authorised Person is terminated from the System, but the record is retained on the System and is accessible to an administration user, then this person shall be counted as an Authorised Person and used in the calculation of the User Fee. In general, such a person's level of access should be downgraded, by the Subscriber, to that of Employee Self Service so that the User Fee will then be charged at that level.

Business Day means a day on which the trading banks are open for business in the state of New South Wales.

Confidential Information of a party means all trade secrets, ideas, know-how, concepts and information whether in writing or otherwise relating in any way to either party, agents, employees, Intellectual Property Rights, its affairs or businesses, financial, sales, marketing or promotional information, customer lists, databases, the terms of this Agreement, and including any such information in the party's power, possession or control concerning or belonging to any third party. However it does not include information:

- a) Where the information is, or becomes part of the public domain, otherwise than by breach of this Agreement;
- b) Where the information is lawfully obtained from another person without any restriction as to use and disclosure; or
- c) Where the information was in either party's possession prior to disclosure to it by the other party.

Customer Data means data owned or supplied by the Subscriber pursuant to this Agreement.

Customisation means any work that involves modification to the code of the existing Application.

Documentation means human-readable material in hardcopy or electronic format which forms a part of training or support material for the System.

Establishment Services means the services to be provided by ActionHRM pursuant to an additional agreement between the parties to set-up the System for first use by the Subscriber.

Insolvency Event means the happening of any of the following events in relation to a party:

- a) Liquidator, provisional liquidator, official manager, company administrator, administrator, receiver, manager, or receiver and manager or similar officer is appointed in respect of it;
- b) It enters into, or resolves to enter into, a scheme of arrangement or composition with or assignment for the benefit of, or it proposes a reorganisation, moratorium or other administration, involving its creditors or a class of its creditors;
- c) It enters into a deed of company arrangement;
- d) It resolves to wind itself up or otherwise dissolve itself, or gives notice of intention to so resolve, except by way of bona fide solvent reconstruction or amalgamation on terms approved by the other party;
- e) It suspends payments of its debts generally; or
- f) It is or becomes unable to pay its debts when they are due or becomes unable to pay its debts.

Intellectual Property Rights includes (both in Australia and throughout the world):

- a) Any copyright, trade or service mark, design, patent, semiconductor or circuit layout right, trade, business or company name, indication or source or appellation of origin or other proprietary right;
- b) Any right to registration or application for registration of the rights referred to in paragraph (a); and
- c) Trade secrets, ideas, concepts, methods, know-how and techniques.

Major Release means a release of the Application that may include without limitation, incremental new functionality, new user interfaces and the ability to access new media sources. Major Releases are indicated by an increase in the leftmost digit of the Application reference code (eg. 2.n.n.n).

Minor Release means a release of the Application that may include bug fixes and enhancements to existing Application functionality. Minor Releases are indicated by an increase in the middle two digits of the Application reference code (eg. n.2.2.n).

System means the human resource management service provided by ActionHRM and includes servers and other equipment on which the Application is installed and includes the Application.

Subscriber means the legal entity that has entered into this Agreement.

Update means a release of the Application that may include a bug fix or minor enhancement. Updates are indicated by an increase in the last digit of the Application reference code (eg. n.n.n.2).

User Fee means the fee paid by the Subscriber for access to and use of the System in accordance with a written agreement between the Subscriber and ActionHRM, and which is exclusive of any training, Establishment Services, and Customisation charges.

26.1 Interpretation

In this Agreement:

- a) Headings and underlinings are for convenience only and do not affect the interpretation of this Agreement;
- b) Explanatory comments do not form part of this Agreement and are not legally binding;
- c) A reference to this Agreement includes an Annexure or Schedule to this Agreement;
- d) A word or expression in the singular includes the plural and vice versa.