

# W.H. Software Maintenance and Technical Support Agreement

## 1. GENERAL TERMS

### 1.1. Definitions

The following expressions shall have the following meanings: -

- "*WHS*" – W.H Software Limited
- "*Licensee*" - the person, firm or company that has purchased the licence for the software.
- "*Services*" - the Services set out in this Software Maintenance and Technical Support Agreement.
- "*Site*" - the location for which the Software may be used.
- "*Software*" - each WHS software program provided by WHS, including software in which WHS has sub-licensing rights, in executable, machine readable, object, printed or interpreted form, including any Software Protection Device and any documentation, modifications, improvements or updates supplied to the Licensee under any Quotation/Order.
- "*Software Protection Device*" - the hardware or software protection key supplied by WHS.
- "*Software Licence*" - the Software Licence supplied separately by WHS.
- "*New Release*" - a New release is a new version of existing software that will change the Version Number.
- "*Version Number*" - Software is numbered using the form "Major.Minor.Release.Build". e.g. "3.17.2.8". The Build number is used for internal purposes and the same combination of "Major.Minor.Release" will not be released with different build numbers. The Release number increases when a New Release is produced to provide a "bug-fix" but does not provide additional functionality. The Minor number increases when a New Release is produced that incorporates new features or additional functionality. The Major number remains constant and is only changed when a new Product Release of the software is offered.
- "*Software Update*" - A Software update is a New Release that has an increase in the Release Version Number. Software updates are made available when WHS deems it necessary to provide a fix for a technical issue in the previous version. e.g. "3.17.3.5" may be provided as a Software Update from version "3.17.2.8". Software Updates can be downloaded from the internet.
- "*Maintenance Update*" - A Maintenance Update is a New Release that has an increase in the Minor Version Number. Maintenance updates are made available to Licensees at no charge for the period of the Maintenance Term. e.g. "3.18.0.2" may be provided as a Maintenance Update from version "3.17.2.8". Maintenance Updates can be downloaded from the internet.

- "*Product Release*" - A Product Release is a completely new product offering. Product releases always start with a new Major Version Number. e.g. "4.0.0.27". Product Releases are not included as a no charge update with a maintenance agreement, however if a Product Release is purchased as an upgrade during the Maintenance Term then the remaining Maintenance Term will be proportionally transferred to the new Product Release

## **1.2. Incorporation Of Terms**

These Terms shall apply to all Software and Services supplied by WHS to the Licensee. In the event of any ambiguity between these terms and the provisions of the Software Licence Agreement, the terms of the Software Licence Agreement shall apply.

## **2. MAINTENANCE TERM**

For a period of one (1) year from the date of delivery of the software (the " Maintenance Term"), WHS will supply the services described in Section 5 below ("Services") to the Licensee with respect to the products for which WHS has granted a license to the Licensee pursuant to a software license agreement (the "Software License Agreement") by and between WHS and the Licensee. The Maintenance Term may be renewed annually. The Licensee will be invoiced for services annually in advance. The Maintenance Term shall be renewed once payment for the renewed Maintenance Term is received by WHS. The renewed Maintenance Term shall commence upon the day following expiry of the expired Maintenance Term. To continue to receive Software Support you must have in effect a valid Software Support Agreement.

## **3. FEES**

3.1. The Service Fee will be a sum in accordance with the then current rates charged by WHS.

3.2. Travel and any accommodation expenses for additional services which are not covered by the terms of this Agreement will be charged at WHS's then current rates.

## **4. PAYMENT**

4.1. If the Licensee is more than 30 days late in the payment of any sum due to WHS pursuant to this Agreement or any other Agreement between WHS and the Licensee WHS may at its discretion suspend performance under this Agreement or any other related agreements.

## **5. DESCRIPTION OF MAINTENANCE & TECHNICAL SUPPORT SERVICES**

5.1. During the Maintenance Term:

- The Licensee agree to designate two persons, one of whom shall be the primary and the other of whom shall be the backup respecting your communications with WHS relating to the Maintenance & Technical Support Services under this agreement. Such persons shall be the only person(s) who WHS is obligated to communicate with under this Agreement. The Licensee shall notify WHS by email of the names, email addresses and telephone numbers of the contact persons. WHS's email address for notification is [support@whsoftware.com](mailto:support@whsoftware.com).
- WHS will use commercially reasonable efforts to assist the Licensee to resolve problems in its use of Products as described in Section 1. WHS makes no guarantee

that it can, or will, solve any problems with respect to the Products presented by Licensee, and further disclaims any warranties above and beyond any limited warranties expressly made by WHS in the Software License Agreement.

- WHS will provide access on its web site to all Maintenance Updates of Products to Licensee as soon as practical in the ordinary course of business after commercial release of the same. Upon request, WHS will ship compact discs of the same to the Licensee, a charge will apply.
- WHS will provide the Licensee with Maintenance Updates, which, in WHS's sole determination, correct application problems that are reasonably likely to prevent substantially full utilization of Product(s).
- WHS will offer Services for the then current release of Product(s). WHS will also offer Services for the release of Product(s) immediately preceding the then-current release for not less than twelve (12) months from the date of such release.
- The Licensee is responsible for its (i) hardware, (ii) operating systems, (iii) network setup, (iv) network maintenance and (v) setup and use of any file access control systems.
- The Licensee shall operate the current version of the Software. Updates are available for downloading from [www.whsoftware.com](http://www.whsoftware.com).
- The Licensee is responsible for ensuring that its personnel have sufficient training to attain and maintain competence in the operation of the Products.
- The Licensee shall provide its personnel access to, and require its personnel to review, the relevant online documentation (supplied with all Products) before calls are made to WHS Telephone Support.
- If WHS determines, in its sole discretion, in responding to a Licensee request for Telephone Support, that the solution is provided in the Online Documentation, WHS may direct Licensee's personnel to the Online Documentation for the solution to the problem.
- In the event that Licensee does pay for a Maintenance Term extension, WHS makes no guarantee that Services will be supplied.
- After expiration, Licensee may resume the Services by payment of the then current annual Maintenance and Support Fee plus the list price of the most recent Product update or upgrade released by WHS.

5.2. For the avoidance of all doubt Maintenance & Technical Support Services shall not include the diagnosis and rectification of any fault arising from:-

- The improper use, operation or neglect of the Software;
- The modification of the Software or its merger (in whole or in part) with any other software;
- The failure by the Licensee to implement recommendations in respect of the solutions and faults previously advised by WHS;
- Any repair, adjustment, alteration or modification of the Software by any person other than WHS without WHS's prior written consent;

- Any breach by the Licensee of its obligations under this Agreement or the Licence;
- The use of the Software for a purpose for which it was not designed.

5.3. WHS may on the request of the Licensee provide support notwithstanding that the fault results from any circumstances described in clause 5.2 above or that the support requested is not covered by the terms of this Agreement. WHS shall in such circumstances be entitled to charge for such service at WHS's rates from time to time for work undertaken on a time and materials basis or fixed quote at the discretion of WHS.

5.4. Without prejudice to clauses 5.2 and 5.3 above WHS shall be entitled to levy reasonable charges if support is provided in circumstances where any reasonably skilled and competent data processing operator would have judged the Licensee's request to have been unnecessary.

## **6. Disclaimer; Limitation of Liability**

There are no warranties, express or implied, by operation of law or otherwise, relating to products or services furnished to licensee hereunder. WHS specifically disclaims and excludes all implied warranties, including without limitation those of fitness for a particular purpose, merchantability or non-infringement. No representation or other affirmation of fact, whether made by WHS employees or otherwise, which is not contained in this agreement will be deemed to be a warranty by WHS for any purpose or give rise to any liability of WHS whatsoever.

In no event (i) shall WHS's maximum liability for all damages exceed actual direct damages caused by the specific product or service complained of, (ii) shall WHS's maximum liability for all damages exceed the total amount of fees paid hereunder, or (iii) shall WHS be liable for incidental, consequential, exemplary, special or indirect damages (including but not limited to lost business profits and the loss, damage or destruction of data) even if WHS has been advised of the possibility of the same. No limitation as to damages for personal injury is hereby intended. Some states do not allow the exclusion or limitation of incidental or consequential damages under certain circumstances and the above exclusion or limitation may not apply.

## **7. Termination**

7.1. WHS may terminate this Agreement if the Licensee fails to comply with the Terms or any related agreement between WHS and the Licensee.

7.3. The Licensee may terminate this Agreement if WHS fails to comply with the Terms or any related agreement between WHS and the Licensee provided that WHS has been given 30 days prior written notice during which WHS has failed to correct the breach where such breach is capable of remedy.

7.4. This Agreement shall be terminated with respect to any particular item of Software on the date any such Software Licence expires or the Licence is terminated for any reason.

## **8. Miscellaneous**

WHS and Licensee are independent parties, and nothing in this Agreement shall be construed as making them partners or as creating the relationships of employer and employee, master and servant, or principal and agent between them, for any purpose whatsoever.

Neither party shall make any contracts, warranties or representations or assume or create any other obligations, express or implied, in the other party's name or on its behalf.

All notices given under this Agreement shall be effective upon receipt and shall be in writing and sent to the address of the other party set out at the beginning of this Agreement or to any replacement address of which the other party has been given notice in accordance with this Section.

In no event shall either party be liable for any delay or failure to perform under this Agreement which is due to causes beyond the reasonable control of such party. This document contains the entire agreement between the parties relating to the matters covered by it, superseding all other oral or written representations, understandings, proposals or other communications between the parties.

This Agreement may be modified only by a written instrument signed by an authorized representative of each party. In the event that any provision of this Agreement is for any reason void or unenforceable in any respect, such provision shall be without effect to the extent of the voidness or unenforceability without affecting such provision in any other respect and without affecting any other provision.

No action, regardless of form, arising out of this Agreement may be brought by either party more than one year after the cause of action has been or reasonably should have been discovered, or, in the case of an action for non-payment, more than two years after the date the last payment was due.

This Agreement shall be governed by the laws of New Zealand. The parties submit to the exclusive jurisdiction of the courts of New Zealand.