

# HIPS Binary Software

## Software Licence Terms and Conditions

THESE TERMS AND CONDITIONS FORM A LEGALLY BINDING AGREEMENT BETWEEN YOU AND THE AUSTRALIAN DIGITAL HEALTH AGENCY ABN [84425496912](#) (THE AGENCY). YOU ACKNOWLEDGE AND AGREE THAT THESE TERMS AND CONDITIONS APPLY TO YOUR ACCESS TO, AND USE OF, THE HIPS SOFTWARE. IN INSTALLING, ACCESSING OR USING THE HIPS SOFTWARE, YOU ACKNOWLEDGE THAT YOU HAVE READ AND UNDERSTOOD, AND AGREE TO BE BOUND BY, THESE TERMS AND CONDITIONS. IF YOU DO NOT ACCEPT THESE TERMS AND CONDITIONS, THEN YOU MUST REFRAIN FROM THE INSTALLATION OF THE HIPS SOFTWARE OR, ONCE INSTALLED, UNINSTALL AND DISCONTINUE ANY USE OF THE HIPS SOFTWARE.

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### 1. Grant of Licence

- 1.1 Subject to these terms and conditions, the Agency grants to You a perpetual, worldwide, non-exclusive, non-transferable, royalty-free licence (without any right to sub-licence) to install, access and use the HIPS Software and Associated Documentation for the sole purpose of integrating clinical information and administration systems with the My Health Record system, the Healthcare Identifier service operated by the Healthcare Identifier service system operator, and some of Australia's other digital health infrastructure services.
- 1.2 The HIPS Software is supplied to You in its binary (object code) form only. Any access to the source code for the HIPS Software is subject to a separate licence agreement between You and the Agency.
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### 2. Licence Conditions

- 2.1 You acknowledge and agree that the HIPS Software and Associated Documentation must only be installed, accessed and used:
- (a) in accordance with the normal operating procedures specified by the Agency included as part of the HIPS Software or as otherwise notified by the Agency from time to time; and
  - (b) in accordance with the Associated Documentation;
  - (c) in compliance with all Applicable Laws (including *My Health Records Act 2012* (Cth), *Healthcare Identifiers Act 2010* (Cth) and *Privacy Act 1988* (Cth)).
- 2.2 You acknowledge and agree that You:
- (a) have obtained the HIPS Software and Associated Documentation from the Agency's website only;
  - (b) are solely responsible for the installation, access, use, supervision, management and control, support and maintenance of the HIPS Software (including the correct installation and operation of the HIPS Software) and Associated Documentation;
  - (c) must ensure that the HIPS Software and Associated Documentation are protected at all times from misuse, damage, destruction or any form of unauthorised access or use; and
  - (d) promptly notify the Agency of any misuse, damage, destruction or any form of unauthorised access to or use of the HIPS Software or Associated Documentation by any person.

## 2.3 You must not:

- (a) transfer, distribute, hire, rent, lease or publish the HIPS Software or Associated Documentation;
- (b) directly or indirectly cause, permit or assist any other person to obtain a copy of the HIPS Software or Associated Documentation through any means other than by directing them to the Agency's website;
- (c) provide use of or access to the HIPS Software or Associated Documentation through any service bureau, timesharing, application service provider or other similar managed or distributed provision of software services via a network. The foregoing shall not prohibit the installation of the HIPS Software in a hosted or cloud computing environment accessible solely by You;
- (d) copy, modify or reproduce the HIPS Software or Associated Documentation except to the extent expressly permitted or authorised by these terms and conditions or under an Applicable Law;
- (e) disassemble, decompile, reverse assemble, reverse compile or otherwise reverse engineer the whole or any part of the HIPS Software except to the extent expressly authorised by an Applicable Law;
- (f) use the Agency's name, logo or trademarks or in a manner that suggests that the Agency endorses, or is associated with Your business or its products or services without the Agency's prior written consent to do so;
- (g) attempt to do any of the above acts in paragraphs (a), (b), (c), (d), (e) and (f); or
- (h) cause, permit or assist any other person directly or indirectly to do any of the above acts in paragraphs (a), (b), (c), (d), (e), (g) and (g),

except and only to the extent expressly permitted by Applicable Law.

- 2.4 Portions of the HIPS Software contain third party software and are subject to separate terms and conditions provided as part of the Associated Documentation (**Third Party Software Licence Terms**). You agree that Your access to and use of the HIPS Software is subject to, and You must comply with, those Third Party Software Licence Terms.

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### 3. New Releases and Updates

- 3.1 The Agency may, in its absolute discretion, offer to You at no charge any new releases or updates of the HIPS Software (**New Release or Update**) that the Agency generally provides to licensees of the HIPS Software as and when they become available.
- 3.2 You must take delivery of, and install, any New Release or Update which the Agency directs You to take delivery of, and install. Without limiting any other provision in these terms and conditions, if You fail to comply with the foregoing:
- (a) The Agency shall have no liability to You in respect of any Loss suffered or incurred by You directly or indirectly arising from or in connection with such failure; and

- (b) You must indemnify and keep indemnified the Agency from and against any and all Loss suffered or incurred by the Agency directly or indirectly arising from or in connection with such failure.

3.3 Where any New Release or Update is provided by the Agency under clause 3.1:

- (a) these terms and conditions will continue to apply in all respects to the New Release or Update, which shall be deemed to form part of the HIPS Software for the purpose of these terms and conditions; and
- (b) You shall delete all previous copies of the HIPS Software (prior to the New Release or Update) or otherwise deal with such copies in accordance with the Agency's directions.

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#### 4. Warranties, liability and indemnities

4.1 Subject to clause 4.3, the HIPS Software is provided to you on an “as is” basis and the Agency makes no express or implied representations, warranties or guarantees in respect of the HIPS Software or the Associate Documentation or their use by You (including any guarantee, condition or warranty of merchantability, acceptable quality, fitness for purpose or fitness for disclosed result).

4.2 Without limiting the generality of clause 4.1, You acknowledge and agree that You are solely responsible for:

- (a) all support and maintenance of the HIPS Software and that the Agency will not provide such services unless it agrees otherwise in writing, in its sole discretion, under a separate agreement with You;
- (b) testing and validating the HIPS Software on and within Your software, systems and infrastructure, whether or not owned by You; and
- (c) ensuring that Your software and products, whether or not used in conjunction with the HIPS Software, meet all applicable conformance requirements of the digital health infrastructure services they connect to or integrate with.

4.3 To the maximum extent permitted by law, the Agency's liability under any guarantee, condition or warranty, or any right or remedy, under any legislation or implied into these terms and conditions by any legislation (**Statutory Warranties**) is hereby excluded. Nothing in these terms and conditions removes or limits any of the Statutory Warranties under consumer protection legislation and which are not permitted to be excluded. To the extent that the Agency has any liability to You under consumer protection legislation and such liability may not be excluded, You agree that the Agency's liability shall be limited, at the exclusive option of the Agency, to:

- (a) in the case of a breach relating to the supply of goods: the replacement of the goods, the repair of the goods, the supply of equivalent goods or the payment of the cost of repairing or replacing the goods or supplying equivalent goods; and
- (b) in the case of a breach relating to the supply of services: resupplying the services or payment of or reimbursement for the cost of having the services resupplied,

and you acknowledge that this limitation of liability is fair and reasonable in all the circumstances.

4.4 To the maximum extent permitted by law:

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- (a) The Agency excludes all liability for Loss (including any consequential or indirect loss, loss of or corruption to data, loss of information, loss of business, loss of profits, loss of revenue, loss of business opportunity or loss of or damage to goodwill or reputation or any economic loss) suffered or incurred by You in connection with your access to and use of the HIPS Software and Associated Documentation; and
- (b) The Agency's total aggregate liability (whether in contract, tort or otherwise) to You under or in connection with these terms and conditions is limited to the amount of \$100.

4.5 You agree to indemnify, and keep indemnified, the Agency and its officers, employees and agents **(those indemnified)** from and against all Loss suffered or incurred by those indemnified in connection with:

- (a) any breach of any obligation or warranty under these terms and conditions by You; or
- (b) any negligent, wrongful or unlawful act or omission by You in connection to your access to, or use of, the HIPS Software and Associated Documentation.

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## 5. Intellectual Property Rights

5.1 You acknowledge that:

- (a) The Agency (or licensors to the Agency) remain the sole owner of all Intellectual Property Rights in the HIPS Software (including any New Release or Update) and Associated Documentation; and
- (b) there is no transfer of title or ownership to You of any Intellectual Property Rights in the HIPS Software or any New Release or Update of the HIPS Software or in the Associated Documentation.

5.2 Without limiting clause 2.3(d), if the HIPS Software or any New Release or Update of the HIPS Software or any Associated Documentation is modified by You, on Your behalf or with any third party (whether or not authorised pursuant to these terms and conditions):

- (a) all Intellectual Property Rights in the HIPS Software and any Associated Documentation so modified shall vest in, or remain with, the Agency on and from the date of its creation;
- (b) to the extent that the You have any right or interest in the HIPS Software or any Associated Documentation so modified, You assign to the Agency all Intellectual Property Rights arising out of any modifications to the HIPS Software and Associated Documentation; and
- (c) You agree to execute all such documents and perform such other acts as are necessary or desirable to give effect to this clause 5.

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## 6. Confidentiality

6.1 Each Party must keep the Confidential Information of the other party (**Disclosing Party**) confidential. A party who receives the Disclosing Party's Confidential Information (**Receiving Party**) must not, without the Disclosing Party's prior written consent:

- (a) directly or indirectly disclose any part of the Confidential Information to any third party; or

- (b) use any of the Confidential Information for any purpose other than in accordance with these terms and conditions.
- 6.2 A Receiving Party must take all reasonably necessary precautions to prevent any unauthorised disclosure or use of the Disclosing Party's Confidential Information and inform the Disclosing Party of any suspected or actual unauthorised disclosure or use.
- 6.3 A Receiving Party will not be in breach of its obligations under this clause 6 if it discloses information:
- (a) that is, or subsequently enters, the public domain, other than through a breach by it of its obligations under this clause 6;
  - (b) that is required to disclose by law;
  - (c) was developed independently by it; or
  - (d) was provided to it by a third party who was not subject to any obligation or duty of confidentiality at the time it was provided to the Receiving Party.

## **7. Termination**

- 7.1 The Agency may immediately terminate these terms and conditions if You are in breach of any of these terms and conditions or otherwise by giving You not less than three (3) days' written notice.
- 7.2 Upon any termination of these terms and conditions:
- (a) You must uninstall and irretrievably delete all copies of the HIPS Software and any Associated Documentation in Your possession, custody or control; and
  - (b) the Receiving Party of Confidential Information will immediately destroy or return to the Disclosing Party all such Confidential Information in its possession, custody or control.
- 1.2 Termination of these terms and conditions shall not affect any accrued rights and obligations of the parties that have arisen prior to the date of termination.
- 1.3 The provisions of clauses 4, 5, 6, 7 and 8 survive termination of these terms and conditions.

## **8. General**

- 8.1 The Agency may vary the terms of these terms and conditions and the Associated Documentation by giving you not less than fourteen (14) days' notice in writing. Publication of those varied terms and conditions and Associated Documentation on the Agency's website shall be sufficient notice in writing to You. Your continued access to, or use of, the HIPS Software or any Associated Documentation after that fourteen (14) day period shall be deemed to be acceptance by You of these terms and conditions and Associated Documentation as varied.
- 8.2 If a dispute arises with respect to these terms and conditions, the party claiming a dispute must give the other party written notice of the dispute and such notice must set out the nature of the dispute arising. The Agency and You will promptly try to resolve the dispute by direct negotiation, by referring the matter to persons who have authority to intervene and resolve the dispute on behalf of each party. If the parties have not reached a resolution within one (1) month of the date of the notice of dispute, the dispute must be promptly submitted to mediation in accordance with the rules for mediation as published by the Australian Disputes Centre, and the following will apply.

- (a) The parties will bear the costs of the mediation equally.
- (b) The parties will jointly agree on the mediator but, failing agreement within 6 weeks of the date of the notice of dispute, the mediator will be a qualified mediator to be nominated by the President of the Law Society of New South Wales.
- (c) If the parties have not been able to resolve the dispute by mediation within three (3) months of the date of the notice of dispute, then either party may commence legal proceedings.
- (d) Nothing in this clause 8.2 prevents a party from seeking ex parte or urgent injunctive relief.

8.3 In these terms and conditions, unless the context otherwise requires:

- (a) headings do not affect interpretation;
- (b) singular includes plural and plural includes singular;
- (c) words of one gender include any gender;
- (d) another grammatical form of a defined expression has a corresponding meaning;
- (e) use of the word “including” and similar expressions are not, nor are they to be interpreted as, words of limitation;
- (f) reference to legislation includes any amendment to it, any legislation substituted for it, and any subordinate legislation made under it;
- (g) reference to a person includes a corporation, joint venture, association, government body, firm and any other entity;
- (h) reference to a party includes that party's personal representatives, successors and permitted assigns; and
- (i) a provision must not be construed against a party only because that party prepared it.

8.4 The relationship between the parties is that of independent contractors and these terms and conditions do not constitute, and shall not be interpreted as, an agency, partnership or joint venture between the Agency and You.

8.5 You must not assign, novate, encumber or otherwise deal in any way with any of Your rights and obligations under these terms and conditions without the prior written consent of the Agency. The Agency may, without the need to obtain Your prior written consent, assign or novate (and You agree to execute all documents reasonably required by the Agency to novate) its rights and obligations under these terms and conditions.

8.6 A provision of these terms and conditions or a right created under these terms and conditions may not be waived except in writing, signed by the party giving the waiver.

8.7 These terms and conditions are governed by the law of the State of New South Wales. The parties irrevocably submit to the non-exclusive jurisdiction of the courts of the State of New South Wales and the division of the Federal Court of Australia in that jurisdiction, and the courts of appeal from them. No party may object to the jurisdiction of any of those courts on the ground that it is an inconvenient forum or that it does not have jurisdiction.

- 8.8 If any provision of these terms and conditions is held to be unlawful, invalid, unenforceable or in conflict with any rule of law, statute, ordinance or regulation it must be read down so that is valid and enforceable (or, if it cannot be so read down, severed) so that the validity and enforceability of the remaining provisions are not affected.

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## 9. Definitions

- 9.1 In these terms and conditions, unless the context otherwise requires:

**Applicable Laws** means any and all statutes, regulations, by-laws, ordinances or subordinate legislation in force from time to time which relate, in any way, to your access to or use of the HIPS Software or Associated Documentation or any data or information obtained from them.

**Associated Documentation** means all documentation made available to You at the time you download the HIPS Software from the Agency website in relation to the HIPS Software, including all installation guides, evaluation guides, HL7<sup>TM1</sup> Message Profiles, module guides, service catalogues and third party licence terms (including those set out in the documents referred to in clause 10).

**Confidential Information** means the confidential information of a party which relates to the subject matter of these terms and conditions and includes, in the Agency's case, information relating to the Agency, the HIPS Software that is not available in the public domain, but expressly does not include these terms and conditions.

**Disclosing Party** has the meaning given to the term under clause 6.1.

**HIPS Software** provides services for clinical information systems that integrate with Australia's My Health Record system, the Healthcare Identifiers Service and other Australian digital health infrastructure, and is deemed to include New Releases or Updates when they become available to You on the Agency website.

**Healthcare Identifier** has the same meaning as in the *Healthcare Identifiers Act 2010* (Cwth).

**Healthcare Identifier service system operator** has the same meaning as "system operator" in the *Healthcare Identifiers Act 2010* (Cwth).

**Intellectual Property Rights** means any and all:

- (a) current and future registered and unregistered rights in respect of copyright, designs, semiconductor or circuit layouts, trade marks, trade names, business names, trade secrets, know-how, confidential information, patents, inventions and discoveries;
- (b) applications for grant of any of the above;
- (c) other rights of a similar nature arising (or capable of arising) under statute or at common law in the Commonwealth of Australia or anywhere else in the world; and
- (d) other intellectual property as defined in Article 2 of the Convention Establishing the World Intellectual Property Organisation 1967.

**Loss** means any loss, damage, cost, expense, charge or liability (including, without limitation, liability to a third party) of any kind.

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<sup>1</sup> HL7 is a trademark of Health Level Seven International and is registered with the United States Patent and Trademark Office.

**My Health Record** has the same meaning as in the *My Health Records Act 2012* (Cwth).

**My Health Record system** has the same meaning as in the *My Health Records Act 2012* (Cwth).

**New Release or Update** has the meaning given to that term in clause 3.1.

**Receiving Party** has the meaning given to the term under clause 6.1.

**You** means the person, business, company or organisation installing, accessing or using the HIPS Software.

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## **10. Third Party Software Licence Terms**

As set out in the Agency document “HIPS 7.0 – Third-Party Software Licences” made available to You when you download the HIPS Software from the Agency website, as updated from time to time.