

# TERMS OF SERVICE

FOR THE MANAGEMYPHEALTH™ SPECIALIST REFERRAL SERVICE  
LAST UPDATED 1 JUNE 2015

In this Agreement the **Licensor** means Medtech Limited (located at Level 1, 48 Market Place, Auckland).

The **Customer** means you.

By using the Specialists & Referrals Service (incorporating both the Specialist Directory provided by Cervin Media and the ManageMyHealth™ Referral Service), you are agreeing to these terms.

Please read them carefully.

## About these Terms of Service

- A. Medtech Limited (Licensor) and Cervin Media Limited plans to enhance the continuity of care and communication between Patients, GP's and Specialists by providing the ability for GP's using Medtech's practice management system (PMS) to access Cervin Media's electronic version Specialist Directory from within the PMS. GP's will be able to make referrals to specialists using Medtech's ManageMyHealth™ Referral service which is integrated with the Specialist Directory. The patient will also be able to access a copy of the referral via Medtech's ManageMyHealth™ Patient Portal.
- B. The Specialist Directory is provided by Cervin Media Limited, located at 61 Wellington St, Freemans Bay, Auckland. The Specialist Directory is the intellectual property of Cervin Media Limited.
- C. Medtech Limited is providing the ability for GPs using Medtech32 and Medtech Evolution practice management software to electronically refer patients to Specialists using the ManageMyHealth™ referral service by clicking on the 'refer' button on your listing in the electronic version of the Specialist Directory that is integrated with the medtech32 and Medtech evolution practice management software. ("Licensed Software")
- D. In consideration for Medtech Limited ("Licensor") allowing you the right to access and use the Licensed Software, you agree to be bound by these Terms of Use. This right is non-exclusive and non-transferable and limited by these Terms.
- E. These Terms of Service apply to any user of the Licensed Software whether they are a Specialists, Nurses, Receptionists and secretaries of Specialists, and any other staff authorised by you or otherwise.
- F. By using the Licensed Software, you agree to be bound by these Terms of Service, which shall take effect immediately the first time you use the Specialists & Referrals Service. If you do not agree to be bound by all of these Terms of Service, please do not access or use the Licensed Software.
- G. Medtech and Cervin Media may change these Terms of Service from time to time and accordingly you should check these Terms of Service regularly. Your continued use of Licensed Software will be deemed acceptance of the updated or amended Terms of Use. If you do not agree to the changes, you should cease using the Licensed Software.
- H. For the avoidance of doubt, your listing and use of the Specialist Directory is not governed by this agreement. Your listing and use of the Specialist Directory is governed by the Cervin Media Limited terms and conditions agreed to at the time of booking.

## Terms of Service for the use of the Licensed Software

### 1. Definitions

1.1 The following definitions apply:

- 1.1.1 “Agreement” means the whole of this agreement including all its parts, sections and schedules;
- 1.1.2 “Browser” or “Web browser” means a software application used to locate and display web pages, multimedia information, including sound and video;
- 1.1.3 “Code of Conduct” means the code of conduct for the use of ManageMyHealth as published on [www.managemyhealth.co.nz](http://www.managemyhealth.co.nz) from time to time;
- 1.1.4 “Commencement Date” is the commencement date in which you elect to receive electronic referrals;
- 1.1.5 “Customer” means each specialist with a listing in the Specialist Directory you;
- 1.1.6 “Eligible Patients” means patients who are enrolled in a General Practice associated with the Customer;
- 1.1.7 “Force Majeure” means any circumstance beyond the reasonable control of the parties which results in a party being unable to observe or perform on time any obligation under this Agreement. Such circumstance includes but is not limited to any act of God, lightning strikes, earthquakes, floods, storms, explosions, fires and/or any natural disasters;
- 1.1.8 “General Practice” means a health provider organisation providing primary health care services to individuals, families and whanau associated with the Customer;
- 1.1.9 “Licence” means the licence to use the Licensed Software as per the terms granted by the Licensor to the Customer under this Agreement;;
- 1.1.10 “License Term” means the licence term specified in Part 2 – Schedule of Terms;
- 1.1.11 “Licensed Software” means the ManageMyHealth™ Specialist Referral modules specified in Service Specification and all other information, documentation and/or programs provided by the Licensor to the Customer to be used in conjunction with and/or in relation to the Licensed Software, any standard upgrades and new version releases of the Licensed Software which the Licensor generally makes available to its customers;
- 1.1.12 “Licensor” means the licensor specified in Part 1 of this Agreement;
- 1.1.13 “ManageMyHealth™ Authentication Process” means a prerequisite authentication process determined by the Licensor as published from time to time;
- 1.1.14 “ManageMyHealth™ Privacy Statement” means the privacy statement as published on [www.managemyhealth.co.nz](http://www.managemyhealth.co.nz) from time to time;
- 1.1.15 “ManageMyHealth™” means the software, website and service known as ManageMyHealth found at [www.managemyhealth.co.nz](http://www.managemyhealth.co.nz);
- 1.1.16 “ManageMyHealth™ Referral Repository ” means the ManageMyHealth™ software application module that enables a General Practice to share selected parts of their Eligible Patients’ health records with other health providers with the patient’s consent;
- 1.1.17 “ManageMyHealth™ Patient Portal” means the ManageMyHealth software application module that enables a General Practice to interact with their patients. Services that could be

offered by a General Practice using this module to their Eligible Patients include access to their own health record, ability to book non-urgent appointments, get lab result notifications, receive recall notifications and order repeat prescriptions;

- 1.1.18 “New Release” means any newer version of the Licensed Software made available to the Customer by the Licensor, pursuant to Clause 10, which may incorporate minor changes to the program as a result of software ‘bug’ fixes, and enhancements for clarity and ease of use;
- 1.1.19 “Patient Data” means any data that is:
- a supplied by Eligible Patients; or
  - b to which the Licensor is provided access pursuant to this Agreement; or
  - c which may otherwise be generated, compiled, arranged, developed, processed, or stored by the Eligible Patient or Permitted Users pursuant to this Agreement,
- including, Personal Data (except to the extent that such data is provided to the Licensor directly by any third party under a separate agreement).
- 1.1.20 “Permitted Purpose” means to enable the Licensor to supply the Licensed Software and operate ManageMyHealth for the benefit of the Customer, Permitted Users and Eligible Patients as contemplated by this Agreement and any other purpose for which the Customer, Permitted Users or Eligible Patient expressly authorises the Licensor in writing to use any particular Patient Data and/or Shared Health Data;
- 1.1.21 “Permitted Users” means staff of the Customer authorised to use the License Software;
- 1.1.22 “Personal Data” means data which describes the Eligible Patient and may be used as an identifier of the Eligible Patient. This may include, name, date of birth, gender, address, age, NHI and ethnicity;
- 1.1.23 “Program Documentation” means any operating manuals, user instructions, on-line help material, technical literature and all other related documentation and materials in either printed form or machine readable form supplied by the Licensor to the Customer or Permitted Users for aiding in the use of the Licensed Software;
- 1.1.24 “Public Holiday” means any such public holiday as specified within the Holidays Act 2003 (or any succeeding legislation) as applicable within New Zealand;
- 1.1.25 “Referral Data” means data of Eligible Patients health records stored in the ManageMyHealth™ Referral Repository for the Permitted Purpose;
- 1.1.26 “Representatives” means the employees, consultants, contractors and/or any other related party of the Licensor or the Customer;
- 1.1.27 “Service Specification” means the specifications of the Licensed Software as published on [www.managemyhealth.co.nz](http://www.managemyhealth.co.nz) from time to time;
- 1.1.28 “Standard Hourly Rate” means the hourly rate specified in Schedule Seven;
- 1.1.29 “Support Services” means the support services described under clauses 8.3 and 9 and any additional support services specified in Schedule One;
- 1.1.30 “Technical Support Hours” means the hours from 09:00 to 17:00 on any Working Day;
- 1.1.31 “Terms of Use” means the terms of use of ManageMyHealth™ as published on [www.managemyhealth.co.nz](http://www.managemyhealth.co.nz) from time to time;

- 1.1.32 “User” means a user of the Licensed Software;
- 1.1.33 “Working Day” means any day that is not a Saturday or Sunday or a Public Holiday;
- 1.2 In this Agreement, unless the context otherwise requires:
  - 1.2.1 words denoting the singular shall include the plural and vice versa;
  - 1.2.2 words denoting persons shall include any individual, principal, corporation, partnership, joint venture, association, organisation, trust, state, agency of a state, municipal authority, government or any statutory body in each case whether or not having separate legal identity;
  - 1.2.3 any covenant or agreement on the part of two or more persons shall bind those persons jointly and severally;
  - 1.2.4 reference to anything of a particular nature following upon a general statement shall not in any way derogate from or limit the application of the general statement unless the particular context requires such derogation or limitation;
  - 1.2.5 any reference to “month” or “monthly” shall mean respectively calendar month or calendar monthly;
  - 1.2.6 references to sections, clauses and schedules are references to sections, clauses and schedules in this Agreement;
  - 1.2.7 the section headings and clause headings have been inserted for convenience and a guide to the provisions of this Agreement and shall not form part of this Agreement or affect its interpretation in any way;
  - 1.2.8 references to this Agreement or any document or statement (however described) shall include references to that document as modified, novated, supplemented, varied or replaced from time to time;
  - 1.2.9 unless otherwise specified, references to monetary amounts are references to New Zealand dollars;
  - 1.2.10 reference to any statute, regulation, ordinance or bylaw shall be deemed to extend to all statutes, regulations, ordinances or bylaws amending, consolidating or replacing the same.

## **2. Documents forming part of this Agreement**

- 2.1 The following documents are incorporated and form part of this Agreement and bind you as if you were the contracting party directly with the Licensor:
  - 1.1.1 Terms of Use (as published on [www.managemyhealth.co.nz](http://www.managemyhealth.co.nz) from time to time)
  - 1.1.2 Code of Conduct (as published on [www.managemyhealth.co.nz](http://www.managemyhealth.co.nz) from time to time)
  - 1.1.3 Minimum System Requirements (as published on [www.managemyhealth.co.nz](http://www.managemyhealth.co.nz) from time to time)
  - 1.1.4 Service Specification (as published on [www.managemyhealth.co.nz](http://www.managemyhealth.co.nz) from time to time)
  - 1.1.5 Authentication and security policies and protocols notified in writing by Medtech to you from time to time
  - 1.1.6 All privacy policies, other policies and protocols notified by the Licensor from to you from time to time

2.2 You must comply with the terms of the documents referred to above at all times including any amendments and additional documents published on the ManageMyHealth™ website from time to time.

### **3. Licensed Software is offered as a service on a best endeavours basis**

3.1 The Licensed Software is provided free of charge on a software as a service basis on a best endeavours basis but is subject to review by Medtech Limited by giving 30 days' notice. For the avoidance of doubt, Cervin Media Limited is providing the content of the Specialist Directory based on the annual 12 month cycle of the NZ Medical Specialists Directory.

3.2 The Licensed Software is integrated with Cervin Media Limited's Specialist Directory and you acknowledge that Cervin Media will be the first point of contact for any support related to the Licensed Software for the electronic referral service. If you require any additional support from Medtech Limited directly, then you acknowledge that you will be charged for that support.

3.3 The Licensor reserves the right to restrict who can receive referrals using the Licensed Software within the Specialist & Referral Service. The Licensed Software is not available for diagnostic radiology, musculoskeletal radiology, imaging and ultrasound organisations (as the service does not meet the referral and communication needs of all parties).

### **4. Your Obligations**

4.1 The Customer will:

4.1.1 keep all passwords, account names, tokens or log in identifications required to access the Licensed Software secure and confidential;

4.1.2 only use the Licensed Software under this Agreement for the Permitted Purpose;

4.1.3 acknowledge new referrals in a timely manner but no later than two (2) working days from the date of referral;

4.1.4 notify Cervin Media in advance or at the time of any change in referral addresses, or specialists working at an organisation/site you are an account holder for.

4.1.5 refrain from tampering with, hindering the operation of or making unauthorised modifications to the Licensed Software;

4.1.6 refrain from introducing any virus to or from the Licensed Software;

4.1.7 refrain from changing any administration settings on any part of the Licensed Software;

4.1.8 refrain from attempting to gain unauthorised access to data or information on the Licensed Software;

4.1.9 at all times ensure that you meet the Minimum System Requirements specified at [www.managemyhealth.co.nz](http://www.managemyhealth.co.nz);

4.1.10 in regard to the Licensed Software the Customer agrees to:

4.1.10.1 provide all material we require from you promptly, and always by the last date we nominate;

4.1.10.2 make sure all material you provide to us is complete and accurate and meets any other quality or procedural requirements;

4.1.10.3 notify the Licensor in writing within two (2) working days where you discovers any errors or omissions in the information you have provided us;

- 4.1.10.4 notify Cervin Media Limited within two (2) working days, if the you cease to practice and or is no longer not able to receive referrals for any reason;
      - 4.1.10.5 acknowledge each electronic referral sent to the Customer in a timely manner but no later than two (2) working days from the date of referral.
    - 4.1.11 refrain from uploading onto the Licensed Software any data, or using the Licensed Software in any way:
      - 4.1.11.1 that infringes the intellectual property rights of any person;
      - 4.1.11.2 that requires authorisation under this Agreement, the Terms of Use and any other policies and protocols deemed to be included in this Agreement but for which authorisation has not been granted; or
      - 4.1.11.3 that breaches the terms of this Agreement, the Terms of Use and any other policies and protocols deemed to be included in this Agreement; or
      - 4.1.11.4 which is otherwise unlawful or violates any law.
- 4.2 The Customer agrees to the following:
  - 4.2.1 Not to abuse, defame or in any way seek to violate the rights of any User, other Licensed Software user, Customer or other third party;
  - 4.2.2 Not to infringe the privacy rights of any User, Customer or other third party;
  - 4.2.3 Not to engage in any illegal activity using the Licensed Software;
  - 4.2.4 Not to mislead, including supplying data that is falsely made to appear as originating from or being endorsed by ManageMyHealth™ or the Licensor; and
  - 4.2.5 Not to infringe any trademark, patent, trade secret or any other proprietary right of the Licensor or a third party or infringes any other intellectual property right.
  - 4.2.6 You agree that we may collect information about you and your business. The information may be obtained from you and others or generated from equipment used to provide our services when you and anyone else uses our services. You may decide whether to provide any information we seek from you. However if you do not provide it, we may not be able to use the Licensed Software. You may ask to see information we hold about you, so long as we can readily retrieve it, and ask for any details that are wrong to be corrected. We may hold the information and share it with our officers, employees, contractors, agents, partners and customers, with collection agencies and with credit reference agencies, so as to provide services, information and create products for you and others in a variety of formats such as print and digital, send you bills, recover money you owe and keep you informed of services available.
- 4.3 The Customer agrees that the following documents:
  - 4.3.1 The Terms of Use (as published on [www.managememyhealth.co.nz](http://www.managememyhealth.co.nz));
  - 4.3.2 The Code of Conduct (as published on [www.managememyhealth.co.nz](http://www.managememyhealth.co.nz));
  - 4.3.3 All authentication and security policies and protocols notified in writing by the Licensor to the Customer from time to time; and
  - 4.3.4 All privacy policies, other policies and protocols notified in writing by the Licensor to the Customer from time to time.

are incorporated into and form part of this Agreement.

- 4.4 The Customer covenants to comply with the terms of the documents referred to in clause 4.3 at all times.
- 4.5 The Licensor may from time to time amend the documents referred to in clause 4.3 by giving 30 days' notice.
- 4.6 Upon notification of any changes to documents pursuant to clause 4.5, the Customer shall have twenty (20) Working Days to object to any of the changes. Such objection should be in writing and should set out the Customer's reasons for objection.
- 4.7 Following receipt of the objection notification pursuant to clause 4.6, the Licensor shall use its best endeavours to resolve the objection with the Customer.
- 4.8 Should the parties be unable to resolve the objection in accordance with clause 4.7 within twenty (20) Working Days of the receipt of the objection notification by the Licensor, the Customer shall be entitled to immediately terminate this Agreement with no liability to the Licensor.
- 4.9 Where there is any conflict or inconsistency between this Agreement and the documentation referred to in clause 4.3, then this Agreement shall prevail.

## **5. Licensed Software availability, maintenance and support**

- 5.1 Subject to clauses 5.2, 5.4, 5.5 and 5.6, the Licensor will make the Licensed Software available to the Customer and their Permitted Users in accordance with the Service Specification.
- 5.2 The Licensor shall not be liable to the Customer or Permitted Users for any disruption to the Licensed Software and/or Service Offerings due to any of the following:
  - 5.2.1 Any downtime due to any denial-of-service attack (DoS attack);
  - 5.2.2 Any downtime due to distributed denial-of-service attack (DDoS attack);
  - 5.2.3 Any downtime due to any attack on the internet infrastructure or networks in New Zealand;
  - 5.2.4 Any downtime due to newly invented internet viruses or internet worms which have no protection available from leading commercial anti-virus vendors;
  - 5.2.5 Any criminal internet activity such as hacking;
  - 5.2.6 upstream or 3rd party network outages, war, fire, flood, sabotage, labour disturbance, acts of government;
  - 5.2.7 Any downtime due to preventative steps taken by the Licensor, Data Centre providers or Internet Service Provider to respond to the types of activity described in this clause 8;
  - 5.2.8 Acts of the Customer that breach the Customer's obligations under this Agreement.
- 5.3 The Licensor shall provide advice in respect of technical queries from the Customer's nominated technical contact during the Technical Support Hours specified in this Agreement. . Such advice may be provided by electronic mail, telephone, facsimile transmission or postal mail. For the avoidance of doubt, the Licensor shall not be obliged to provide such technical advice in respect of any difficulties or queries which arise by reason of any of the matters described in clauses 5.2 and 11.
- 5.4 The Licensor may interrupt the Licensed Software at any time for any duration of time, without penalty or liability for any claim by the Customer, where necessary to prevent improper or unlawful use of the Licensed Software.

5.5 The Customer will hold the Licensor without penalty or liability for any claim resulting from a failed backup and/or restore procedure.

5.6 Wherever possible the Licensor shall notify the Customer in advance and in a timely manner of scheduled or planned unavailability of the Licensed Software.

## **6. New Releases**

6.1 The Licensed Software is provided as a software as a service and the Licensor shall install any New Release of the Licensed Software which the Licensor shall from time to time make generally available.

6.2 In reasonable time prior to the installation of a New Release the Licensor shall make available to the Customer a description of all amendments which shall be necessary to properly describe the facilities and functions of the New Release.

6.3 If appropriate and requested by the Customer, the Licensor shall provide training for the Customer's staff in the use of the New Release as soon as reasonably practicable after the delivery of the New Release at the Licensor's standard charges from time to time in force.

6.4 For the avoidance of doubt, the Licensor shall not be under any obligation to, at any time, provide to the Customer any New Release which is specifically requested by the Customer. If the Customer requests or requires a New Release at any time it shall be at the Licensor's sole option whether to supply such New Release and subject to the Licensor's then applicable charges, licence agreement and maintenance agreement.

## **7. Intellectual Property Usage and Ownership**

7.1 The Licensed Software contains confidential information of the Licensor and all copyright, trademarks, rights relating to patents and all other intellectual property rights in the Licensed Software are the exclusive property of the Licensor.

7.2 This Agreement does not transfer to the Customer any right, entitlement or ownership in respect of the Licensed Software other than the rights of usage expressly contemplated in this Agreement.

7.3 The Licensor retains ownership of the Licensed Software, whether in its original form or as modified by the Customer during the term of this Agreement. For the avoidance of doubt, the Specialist Directory which is not part of this agreement, but is integrated with the Licensed Software is the intellectual property of Cervin Media Limited.

7.4 The Customer shall not, and shall procure the Permitted Users do not, at any time during or after the term of this Agreement, directly or indirectly challenge or contest the ownership of the Licensed Software (including all the intellectual property rights of the Licensor).

7.5 For the purposes of this section 7, "ownership" includes any direct and/or indirect interests of the Licensor in and to the Licensed Software and/or any right (whether acquired under licence or otherwise) to deal with the Licensed Software under this Agreement.

7.6 The Licensor and Customer acknowledge that the Patient Data stored in the ManageMyHealth™ Patient Portal shall remain the sole and exclusive property of the respective Eligible Patient.

7.7 The Licensor and Customer acknowledge that the Referral Data stored in the Licensed Software shall remain the sole and exclusive property of the respective General Practice that supplied the data. The Licensor shall not use, store, disclose or otherwise deal with the Referral Data except as in accordance with sections 9.4 and 9.5 or as expressly authorised by the Customer in writing from time to time.

7.8 The Customer acknowledges that Referral Data sourced from a General Practice is a copy of data stored in the practice management software system of the respective General Practice from which it was sourced.



- 7.9 The Customer acknowledges that Licensor does not warrant the completeness or accuracy of the Referral Data as it is sourced from the practice management software system of the General Practice.
- 7.10 Other than as permitted by clauses 9.4 and 9.5, the Customer shall ensure third parties do not gain on-line or physical access to Patient Data without the prior consent of the Eligible Patient or in accordance with the Health Information Privacy Code.
- 7.11 The Customer shall ensure third parties do not gain on-line or physical access to Referral Data without the prior consent in writing of the Customer or in accordance with the Health Information Privacy Code.
- 7.12 The Licensor's rights under this section 7 are in addition to all other rights Licensor may have under this Agreement or at law.

## **8. Reverse Engineering**

- 8.1 The Customer shall not adapt, decompile and/or reverse engineer the Licensed Software or any part of the Licensed Software.

## **9. Copying of Licensed Software and use of Referral Data**

- 9.1 The Customer shall not be entitled to copy or reproduce any part of the Licensed Software at any time or for any purpose without the prior written consent of the Licensor.
- 9.2 Other than as provided for in the Agreement, no copies or recordings may be made by the Customer of the Licensed Software, Program Documentation or confidential information provided by the Licensor without the prior written consent of the Licensor. Other than as provided for in this Agreement, no copies or recordings may be made by the Licensor of the confidential information provided by the Customer without the prior written consent of the Customer.
- 9.3 The Customer shall promptly notify the Licensor if it becomes aware of the existence of any copies of the Licensed Software and/or Program Documentation and/or any confidential information belonging to the Licensor which have been or the Customer suspects have been made in breach of the provisions of this clause.
- 9.4 The Customer shall use the Referral Data for the Permitted Purpose only and the Customer shall only use the Patient data with the Patient's consent only.
- 9.5 The Customer will not directly or indirectly disclose the Referral Data, Patient Data, or permit the Referral Data, Patient Data to be disclosed, to any person at any time except:
- 9.5.1 to the Customer's Permitted Users, Eligible Patients or any other medical services provider in accordance with this Agreement;
  - 9.5.2 with the Patients' prior written consent in each particular case;
  - 9.5.3 as required by law provided that the Customer has first given the Licensor notice of the requirement for disclosure and has secondly, assisted the Licensor in obtaining a confidentiality order or similar protection limiting the persons to whom and manner in which the disclosure of the Referral Data is made; and
  - 9.5.4 with the Licensor's prior written consent in each particular case.

## **10. Indemnity**

- 10.1 The Customer indemnifies the Licensor and the Licensor's Representatives (each an **Indemnified Person**) from and against any liability, damage, loss, cost or expense suffered or incurred as a direct or indirect result of any negligence or recklessness of the Customer or its Representatives. The Customer acknowledges that for the purposes of the Contracts (Privity) Act 1982, the indemnity in this clause has

been inserted for the benefit of each Indemnified Person, and is enforceable by each of them. The Licensor indemnifies the Customer, the Customer's Representatives, and the Permitted Users (each an **Indemnified Person**) from and against any liability, damage, loss, cost or expense suffered or incurred as a direct or indirect result of any negligence or recklessness of the Licensor or its Representatives. The Licensor acknowledges that for the purposes of the Contracts (Privity) Act 1982, the indemnity in this clause has been inserted for the benefit of each Indemnified Person, and is enforceable by each of them.

- 10.2 The Customer shall defend, indemnify and hold harmless the Licensor and its officers, directors, employees, and agents from and against any and all damage, loss, cost, liability and expense whatsoever (including legal fees on a solicitor own-client basis) incurred by reason of any use or disclosure of the Patient Data and Referral Data by the Customer in breach of this Agreement.
- 10.3 Notwithstanding any other provision of this Agreement, the Licensor will indemnify the Customer against any liability suffered or incurred by the Customer (including any liability of the Customer to any Permitted User) as a direct result of a claim, suit, action or proceeding (each an "Action") brought against the Customer or any Permitted User that the supply or authorised use of the Licensed Software or Program Documentation or any component of the Licensed Software or Program Documentation constitutes an infringement of any intellectual property rights of a third party and will at its cost defend or settle any such claim. The Customer will (and shall procure that its Permitted Users will):
  - 10.3.1 co-operate with the Licensor in defending or settling the Action and will make its employees available to give statements, advice and evidence as the Licensor may reasonably request, subject to the Customer (and any Permitted User) being reimbursed for all reasonable costs and expenses occasioned by the Customer's (and any Permitted User's) co-operation in such defence;
  - 10.3.2 notify the Licensor in writing upon becoming aware of any Action; and
  - 10.3.3 give the Licensor sole control of the conduct of any Action and all negotiations for its settlement or compromise.
- 10.4 Should any item subject to the indemnity in clause 10.2 become or, in the reasonable opinion of the Customer, be likely to become the subject of a claim of infringement of a third party's intellectual property rights, the Licensor will at the request of the Customer, in order to mitigate any damages suffered by the Customer:
  - 10.4.1 obtain for the Customer, at no cost to the Customer, the right to continue to use the item; or
  - 10.4.2 replace or modify the item, at no cost to the Customer, to make it non-infringing in a manner that does not impair the performance of the Licensed Software supplied to the Customer.
11. **Force Majeure**
  - 11.1 If a party is wholly or partially precluded from complying with its obligations under this Agreement by an event of Force Majeure, then that party's obligation to perform in accordance with this Agreement will be suspended for the duration of the event of Force Majeure.
  - 11.2 As soon as practicable after an event of Force Majeure arises, the party affected by the event must notify the other party of the extent to which the affected party is unable to perform its obligations under this Agreement.
  - 11.3 The party affected by the event of Force Majeure must recommence the performance of its obligations under this Agreement immediately after the cessation of the event of Force Majeure and must immediately notify the same to the other party.

## **12. Confidentiality**

- 12.1 Each of the parties to this Agreement undertakes to the other to keep confidential any information (written or oral) concerning the business and affairs of the other which was obtained during the course of this Agreement and its negotiations.
- 12.2 The confidentiality obligations set out in clause 12.1 shall not apply to the extent that:
- (a) the consent of the other party to this Agreement has been obtained in relation to the disclosure of any such confidential information;
  - (b) such confidential information has become public knowledge other than as a result of unauthorised disclosure by any party to this Agreement (or its associated persons) or its directors, officers, employees, agents, contractors, representatives and/or advisers, or where such information is already in the public domain;
  - (c) such confidential information is required to be disclosed to the auditors of either party or to any governmental agency or otherwise required by law; and/or
  - (d) the disclosure of such confidential information is reasonably required by a party to fulfil any conditions or obligations arising under this Agreement.
- 12.3 In performing their respective obligations under this Agreement, each of the parties must comply with all provisions of the Health Information Privacy Code 1994 in relation to Personal Data.

## **13. Warranties**

- 13.1 The Licensor warrants that:
- (a) the Licensed Software (including updates and/or any modifications or variations provided by the Licensor to the Customer) will, during the term of this agreement will perform in accordance with the Service Specification; and
  - (b) it is entitled to grant the Licence to the Customer and the Licensor further warrants that the supply of the Licensed Software and the Customer's use thereof will not infringe any rights of any person; and
  - (c) all Support Services will be performed with due care and skill, in a diligent and professional manner and in accordance with best professional practice and in a manner that meets all requirements specified in the Service Specification.
- 13.2 The Licensor shall not be liable to the Customer under clauses 13.1 if the Customer's claim has arisen, directly or indirectly, out of the use for a purpose not reasonably contemplated or authorised by the Licensor or this Agreement.
- 13.3 Subject to the foregoing, all conditions, warranties, terms and undertakings, expressed or implied, statutory or otherwise in respect of the Licensed Software and the provision of the Support Services are excluded. Without prejudice to this the Licensor does not warrant:
- (a) that the use of the Licensed Software (in accordance with this Agreement or otherwise) will meet the Customer's data processing, reporting or analytical requirements, or;
  - (b) that the use or operation of the Licensed Software in accordance with this Agreement will be uninterrupted or error free.
- 13.4 For the avoidance of doubt, the Licensor makes no warranties, undertakings, expressed or implied, statutory or otherwise in respect of the Specialist Directory (sourced from the Cervin Media Limited) which is integrated with the Licensor's practice management software.

- 13.5 The Customer warrants that:

- (a) all information and material you have provided to the Licensor and Cervin Media Limited is complete and accurate and meets any other quality or procedural requirements; and
- (b) all information published in your listing in the Specialist Directory is true, accurate, adequate and up-to-date and free from of any errors and omissions and is suitable for the intended use; and
- (c) it will notify Cervin Media Limited in writing within two (2) working days where it discovers any errors or omissions in the information published in the Specialist Directory ; and
- (d) it will notify Cervin Media Limited within two (2) working days, if the Customer ceases to practice and or is no longer not able to receive referrals for any reason; and
- (e) it will acknowledge each electronic referral sent to the Customer in a timely manner but no later than two (2) working days from the date of referral; and
- (f) comply with the Fair Trading Act 1986, the Copyright Act 1994, the Defamation Act 1992, and all other applicable laws and any relevant Advertising Codes of Practice; and
- (g) you will never make inappropriate use of information provided to you by directory users (e.g. for unauthorised direct marketing) or breach anyone's legal rights (e.g. intellectual property rights, contractual rights or rights to privacy).

#### **14. Limitation on liability**

- 14.1 The following provisions set out each party's entire liability (including any liability for the acts and omissions of its employees, agents and sub-contractors) to the other in respect of:
- (a) any breach of contractual obligations under this Agreement; and
  - (b) any representation, statement or tortuous act or omission including negligence (but excluding any of the same made fraudulently) arising under or in connection with this Agreement.
- 14.2 Any act or omission on the part of a party or its representatives falling within clause 14.1 above shall for the purposes of this clause 14 be known as an "Event of Default".
- 14.3 Subject to clause 14.4 and 15.5 below, to the extent permitted by law, neither party shall be liable to the other in respect of any Event of Default for any indirect or consequential loss, cost, expense, claim or liability, incurred and/or suffered by the other party or any third party in connection with any of the goods and/or services supplied under this Agreement even if such loss was reasonably foreseeable or the first party had been advised of the possibility of the other party incurring the same.
- 14.4 To the extent permitted by law, the licensor's liability to the other for death or personal injury resulting from its Representatives' negligence shall be limited in aggregate to the total amount of \$1,000.00 (one thousand dollars only), irrespective of the number of claims.
- 14.5 Subject to the limits set out in clause 14.6 below, both parties shall accept liability to each other in respect of damage to the tangible property of a party resulting from the negligence of the other party or its Representatives.
- 14.6 Subject to the provisions of clauses 14.3 and 14.4 above, the Licensor's and the Customer's liability to each other in respect of an Event of Default, shall be limited to damages of an amount equal to the aggregate of the License Fee paid under this Agreement in the period of 12 months immediately preceding the Event of Default. Where the Customer is not paying any License Fee's for the use of the Licensed Software, then the Licensor's total liability to the Customer shall be \$1 (one dollar) in total.
- 14.7 The Licensor acknowledges and agrees that where the Licensor does (or causes or allows to be done) any act, omission, matter or thing to a Permitted User which if done to the Customer would constitute:

- (a) a breach of this Agreement by the Licensor; or
- (b) negligence by the Licensor,

the Customer will be entitled to the remedies available to it under this Agreement in respect of such breach or negligence, or deemed breach or negligence, and loss suffered by a Permitted User shall be recoverable by the Customer as if it were loss suffered by the Customer. The Customer shall notify the Licensor promptly of any claim or allegation brought to its attention by its Permitted Users that the Licensor has breached its obligations under this Agreement.

- 14.8 If a number of Events of Default give rise substantially to the same loss then they shall be regarded as giving rise to only one claim under this Agreement.
- 14.9 Each party will afford the other party not less than thirty (30) Working Days (following notification thereof by the notifying party) in which to remedy an Event of Default.
- 14.10 Except in the case of an Event of Default arising under clause 18.4 above, a party shall have no liability to the other in respect of any Event of Default unless the notifying party shall have served notice of the same upon the other party within 1 year of the date the notifying party became aware of the circumstances giving rise to the Event of Default or the date it ought reasonably to have become so aware.
- 14.11 Nothing in section 14 shall limit the Licensor's liability in relation to:
  - (a) any indemnity set out in section 10; or
  - (b) any breach of confidentiality obligations set out in section 122.
- 14.12 Nothing in this clause 18 shall confer any right or remedy upon any of the parties to which they would not otherwise be legally entitled.

## **15. Termination**

- 15.1 Either party may terminate this agreement upon giving the other one months' notice in writing. For the avoidance of doubt, any termination of this agreement does not constitute a termination of your advertising booking with Cervin Media Limited. You must terminate that separately by contacting Cervin Media Limited.
- 15.2 The Licensor may terminate this agreement, at its sole discretion if:
  - (a) the Customer fails to pay to the Licensor within 21 days after the due date for payment, any fee and/or charge payable under this Agreement; or
  - (b) the Customer breaches its obligations under clauses 7,8 or 9; or
  - (c) the Customer is in breach of any of its material obligations under this Agreement and such breach has not been remedied within 21 days of the date the Licensor notifies the Customer of such breach, requiring that the breach be remedied (or such longer period as the Licensor may stipulate); or
  - (d) an event of Force Majeure which precludes the Customer from complying with its obligations under this Agreement occurs and continues for more than 21 days; or
  - (e) the Customer becomes, threatens or resolves to become, or is in jeopardy of becoming, subject to any form of insolvency administration or

- (f) the Customer fails to acknowledge the each electronic referral as per clause 12.4 more than 3 times in any calendar month or more than 10 in any calendar year.
  - (g) The Licensor reserves the right to withdraw, suspend, restrict or terminate any entry in the Specialist Directory service at any time if we consider your advertising order is unauthorised. We may edit, or refuse to publish, material at any time if we consider it to be unauthorised, in breach of our advertising policy, misleading, offensive, defamatory, illegal or detrimental to our products in our opinion.
  - (h)
- 15.3 The Customer may also terminate this Agreement pursuant to clause 4.8.
- 15.4 The Customer shall, within 14 days of the termination of this Agreement, at the sole option of the Licensor:
- (a) return to the Licensor all the original and copies of the Program Documentation and permanently delete any electronically and/or digitally stored copy of all such materials from any media in or on which it is stored, and shall certify in writing to the Licensor that they have been so deleted; or
  - (b) destroy and/or permanently delete all passwords and shall certify in writing to the Licensor that they have been so destroyed and/or deleted.
- 15.5 Any termination of the Agreement shall not affect any accrued rights or liabilities of either party to this Agreement, nor shall it affect any provision of this Agreement which is expressly or by implication intended to continue in force after such termination.

## **16. Relationship Between the Parties**

- 16.1 Nothing in this Agreement shall create or constitute, or be deemed to create or constitute, a partnership between the parties for any purpose whatsoever, or to constitute or create, or be deemed to create or constitute, a party as an agent of the other party except and to the extent as expressly provided for in this Agreement.
- 16.2 The Customer acknowledges and agrees with the Licensor that where any Permitted User and/or related party of the Customer does any act, matter or thing which if done by the Customer would constitute a breach of the obligations of the Customer under this Agreement, the Customer will be, or will be deemed to be, in breach of this Agreement.
- 16.3 The Customer acknowledges and agrees that all of the Licensor's obligations under this Agreement are owed to it by the Licensor (and any of its assignees), and not by any other party.

## **17. No Assignment**

- 17.1 The Customer may not assign or purport to assign (whether in whole or in part) its interest in this agreement without the prior written consent of the Licensor which consent may be withheld at the absolute discretion of Licensor.

## **18. Disputes**

- 18.1 If any dispute or difference arises between the parties, or if any matter or issue arises which the parties wish to have resolved or remedied (a "**Dispute**") a party may serve a notice of Dispute on the other ("**Dispute Notice**"). For the purposes of this and the following clauses the term "**Dispute Notice**" means a written notice issued by either party on the other:
- 18.1.1 specifying reasonable details of the nature of the Dispute;
  - 18.1.2 designating the person with authority to negotiate and settle the matter or issue specified in the notice of behalf of the issuer of the notice; and

- 18.1.3 requiring the recipient of the notice to enter into negotiations with the issuer of the notice to resolve the matter or issue specified in that notice and, for that purpose, to appoint a representative with authority to negotiate a settlement.
- 18.2 Upon service of a Dispute Notice, the following procedures will apply:
- 18.2.1 no party may commence any arbitration or court proceedings relating to any Dispute unless that party has complied with the procedure specified in this clause 18.2.
- 18.2.2 upon the issue of a Dispute Notice the parties will enter into negotiations in good faith to resolve a course of action for resolution of the Dispute within 14 days (or such longer period as the parties may agree) of the issue of a Dispute Notice;
- 18.2.3 where any course of action for resolution of the Dispute is not resolved via the process in clause 18.2.2:
- 18.2.3.1 the party that initiated the Dispute the (“**First Party**”) must provide written notice to the other party (the “**Other Party**”) nominating in that notice the First Party’s representatives for negotiations. The Other Party must within seven days give written notice to the First Party naming their representative for negotiations. Each representative nominated will have authority to settle or resolve the Dispute acting in good faith;
- 18.2.3.2 if the parties are unable to resolve the Dispute by discussions and negotiations within seven days of receipt of notice from the Other Party then the parties must immediately refer the Dispute to mediation;
- 18.2.3.3 any mediation must be conducted in terms of the LEADR New Zealand Inc. Standard Mediation Agreement. The mediation must be conducted by a mediator and at a fee agreed by the parties. Failing agreement by the parties as to appointment of a mediator within seven days of reference to mediation as set out above, the mediator will be selected and his/her fee determined by the President for the time being of LEADR New Zealand Inc. (or any suitable replacement organisation);
- 18.2.3.4 if the Dispute remains unresolved after mediation then the Dispute must be submitted to arbitration of the single arbitrator agreed on between the parties or in fault of agreement to be nominated by the President of the New Zealand Law Society. The arbitration will be conducted in accordance with the New Zealand Arbitration Act 1996 other than the provisions of clauses 3(1)(a), 5(1)(a) and 7 of Schedule 2 to the Arbitration Act 1996. The parties reserve the right to appeal to the High Court on any question of the law arising out of an award.
- 18.3 Nothing in this clause will prevent any party from taking immediate steps to seek urgent interlocutory relief before an appropriate Court.

## 19. Governing Law

- 19.1 This agreement will be governed by, and construed in accordance with, the laws of New Zealand.
- 19.2 The parties irrevocably submit to the exclusive jurisdiction of the courts of New Zealand, with respect to any legal action, suit or proceeding or any other matter arising out of or in connection with this Agreement.
- 19.3 Each party irrevocably waives any objection it may now or in the future have to the venue of any proceedings, and any claim it may now or in the future have that any proceedings have been brought in an inconvenient forum, where that venue falls within clause 18.2.

**20. General**

- 20.1 No waiver of any breach or failure to enforce any provision, of this Agreement at any time by either party shall in any way limit or waive the right of that party to subsequently enforce and compel strict compliance with this Agreement.
- 20.2 Nothing expressed or implied in this Agreement shall constitute either party as the partner, agent, employee or officer of, or as a joint venture with, the other party, and neither party shall make any contrary representation to any other person.
- 20.3 If any provision of this Agreement is or becomes invalid or unenforceable, that provision shall be deemed deleted from this Agreement and such invalidity or unenforceability shall not affect the other provisions of this Agreement, all of which shall remain in full force and effect to the extent permitted by law, subject to any modifications made necessary by the deletion of the invalid or unenforceable provisions.
- 20.4 Each party shall do all things and execute all documents reasonably required in order to give effect to the provisions and intent of this Agreement.
- 20.5 This Agreement records the entire arrangement between the parties relating to the matters dealt with in this Agreement and supersedes all previous arrangements, whether written, oral or both, relating to such matters.
- 20.6 The rights, powers and remedies provided in this Agreement are cumulative and not exclusive of any rights, powers and remedies provided by law.