



Day3 Hosted Services—Terms & Conditions

Day3 Hosted Services Terms and Conditions

This is a contract between you and Day3 Pty. Ltd.

(Effective 1 July 2004)

These are the standard terms and conditions of supply of the Day3 web hosting and other services offered from time to time on the Day3 web sites ("the Service"). These terms apply to you as a user of the Service ("Client" or "you"). Please read these terms and conditions carefully.

In addition, please note that your access to, use of or acceptance of a product, service or benefit through web sites, web pages and web services operated by Day3 Pty. Ltd., its affiliates or partners (the "Day3 Sites") may be subject to additional terms, policies and rules contained within the Day3 Sites or otherwise made available to you.

By opening a Day3 Internet Services account under your name or by using the Day3 Internet Services you are agreeing to be legally bound by and abide by the terms of this Agreement.

IF YOU DO NOT AGREE TO BE BOUND BY THIS AGREEMENT, YOU MAY NOT SUBSCRIBE FOR, ACCESS OR USE THE DAY3 INTERNET SERVICES AND YOU MUST IMMEDIATELY TERMINATE YOUR DAY3 INTERNET SERVICES ACCOUNT.

1. Terms and Amendment Procedure

2.1 These are the terms upon which we agree to provide the Service to the Client. The agreement made between us with these terms commences on the date listed in the Web Host Manager/Mission Control panel when your order for Services was accepted by Day3.

1.2 We may vary these terms, the amount we charge for any Service, or the terms of the operation of the Service, at any time by general notice on a page of the internet referred to on the home page of our web site at <http://www.Day3.com.au>. The changes will become effective upon publication of the notice. Where we vary the prices for Services, we will give at least 14 days notice of the change by the same means, and the new prices will apply at the end of that period.

1.3 If you use the Service after that publication, your use will constitute an acceptance of the amended terms.

1.4 These terms constitute the agreement in its entirety and supersede prior agreements.

1.5 We may from time to time run promotions and make special offers of limited time duration ("Promotions"). All Promotions are offered subject to their terms and may be withdrawn or altered at Day3's discretion. The terms of a promotion will override these terms to the extent of any inconsistency.

2. Service

2.1 We will assign the Client a logon name ("Login") and password which will provide you with access to the Day3 Web Host Manager/Mission Control panel (which is used by you to configure various features of your web site/email service). We will provide the Client with Web and Email Services as per the Web Host service level you have selected in the Mission Control panel.

2.2 We will advise the Client of correct operational procedures via the Manager/Mission Control User Guide.

2.3 Scheduled Maintenance - We must perform scheduled maintenance to servers from time to time. We will attempt to perform all scheduled maintenance at times which will affect the fewest customers. If scheduled maintenance requires the service to be offline for more than 30 minutes we will post details of the scheduled maintenance to the Web Host System News at least 48 hours in advance of the maintenance.

2.4 Unscheduled Maintenance - We may need to perform unscheduled maintenance. If unscheduled maintenance requires the Service to be offline for more than 30 minutes,

we will post details of the event to the Web Host System News after the maintenance has been completed.

2.5 Archiving of Data - We will archive your data onto backup mechanisms on a regular basis for the purposes of disaster recovery. In the event of equipment failure or data corruption, we will restore from the last known good archive. In the event of corruption of all of our archives, or in the event that an old archive is used to restore data, you should be prepared to upload your data to your web site. You must maintain a recent copy of your data at your premises at all times. We will not be liable for incomplete, out-of-date, corrupt or otherwise deficient client data recovered from our backups.

2.6 The Service is provided by Day3 from its data centres in Australia. Day3 will determine in its absolute discretion from time to time the data centre location from which your Service is provided. Day3 reserves the right to migrate your web site to a new operating system platform if our operating system supplier ceases to provide support for the legacy operating system, or if the server from which the service is provided fails or, in Day3's opinion becomes unreliable. Day3 will use reasonable endeavours to notify you via the contact details in our database but does not take any responsibility for web site failure if you have failed to keep your contact details up-to-date or if you have not checked the operation of your web site post-migration and notified us of any required changes to the web site configuration.

2.7 In contracting with Day3 for the Services, the Client obtains no rights to the hardware and other infrastructure and facilities used by Day3 to deliver the Service.

2.8 In the absence of any additional written agreement, these terms and conditions (as varied from time to time) will apply to any further Services you acquire from Day3.

3. Payment

3.1 You must pay for the Service as notified to you by Day3 in accordance with Day3's published prices for Services from time to time. If you elect to pay your fees on a yearly basis, and fail to make payment within 30 days of invoice, you will not be entitled to receive the yearly fee discount.

3.2 You must pay all Service time charges, minimum charges and other amounts incurred by you or any designated users or incurred as a result of any use of your password (whether authorised or not) in accordance with the billing option selected and in advance. Where a billing option does not specify otherwise, all Service charges are payable within 14 days of the date of invoice (whether online or paper invoice).

3.3 Prices published on our web site are inclusive of any government taxes or charges unless otherwise noted, and exclusive of any registration or delegation charges imposed by domain name authorities.

3.4 In addition you must provide and pay for:

(a) the installation and use of telephone lines and all other equipment needed to access the Service; and

(b) all government taxes, duties and levies (if any) imposed on either you or us in respect of the Services or any other service or goods supplied.

3.5 You must pay all amounts billed in accordance with your billing option. No credit terms are given to credit card accounts. Upon registration of a credit card account, you give us authorisation to debit your credit card for all charges. Billing period is on a monthly cycle beginning when you register. If you register after the 28th of each month, your billing date becomes the first of the next month.

3.6 You consent to us obtaining a credit reporting agency report containing personal information about you (as well as information concerning commercial creditworthiness and activities) for the purpose of assessment by us of an application for credit (whether commercial or personal) or for the purpose of the collection of payments which are overdue.

3.8 You agree that if you elect to receive a paper invoice rather than online invoice you will be charged an additional invoice fee of AUD\$5.00 per month.

3.8 The invoice fee will be charged per customer account identified with a unique "customer" number. If a customer has multiple accounts with Day3, the account keeping fee will be charged on each account for which monthly invoices are issued.

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3.9 No refunds will be given for unused portions of payments in advance (including payment of yearly contracts) unless the account has been terminated due to Day3's breach of these terms and conditions.

4. Warranties and Liabilities

4.1 We do not warrant that:

- (a) the services provided under this agreement will be uninterrupted or error free;
- (b) the services will meet your requirements, other than as expressly set out in this agreement; or
- (c) the Services will be free from external intruders (hackers), virus or worm attack, denial of service attack, or other persons having unauthorised access to the services or systems of Day3.

4.2 Except as expressly provided to the contrary in this agreement, all warranties whether express, implied, statutory or otherwise, relating in any way to the subject matter of this agreement, are excluded. Where any statute implies any term into this agreement, and that statute avoids or prohibits provisions in a contract excluding or modifying the application of or liability under such a term, then the term will be taken to be included in this agreement. However, our liability for any breach of the term will, if permitted by that statute, be limited, at our option, to the resupply of the services again; or payment of the cost of having the services supplied again.

4.3 Except as provided under clause 4.2, none of Day3, its subsidiaries, officers, directors, employees, partners or suppliers will be liable to you or any third party for:

- (a) any special, punitive, incidental, indirect or consequential damages of any kind;
- (b) any damages whatsoever, including, without limitation, those resulting from:
 - (i) loss of use, data or profits, on any theory of liability, arising out of or in connection with the use of or the inability to use the Services;
 - (ii) the statements or actions of any employee or agent of Day3;
 - (iii) any unauthorised access to or alteration of your web site, transmissions or data;
 - (iv) any information that is sent or received or not sent or received;
 - (v) any failure to store or loss of data, files or other content;
 - (vi) your fraudulent, negligent or otherwise unlawful behaviour;
 - (vii) information, data or other material provided to Day3 by you or on your behalf; or
 - (viii) any Services that are delayed or interrupted.

4.4 You warrant that:

- (a) at the time of entering into this agreement you are not relying on any representation made by us which has not been stated expressly in this agreement, or on any descriptions or specifications contained in any other document, including any catalogues or publicity material which we have produced;
- (b) you will conduct such tests and computer virus scanning as may be necessary to ensure that data uploaded by you onto or downloaded by you from the Server does not contain any computer virus and will not in any way, corrupt the data or systems of any person;
- (c) you will keep secure any passwords used to upload data to the Server; and,
- (d) you hold and will continue to hold the copyright in the Client Data or that you are licensed and will continue to be licensed to use the Client Data.

4.5 You accept responsibility for all information and material you issue over any Service, and indemnify us and hold us harmless against any liability in relation thereto. In particular you undertake that you shall not publish or issue any information which is illegal or defamatory. You also acknowledge that we do not vet or approve any information or material available through the Service. We do not accept any liability for any loss, claim or damages arising from or relating to information and material available through the Service, to the full extent permitted by law. You access and use such information and material at your own risk.

4.6 You agree to abide by our Acceptable Use Policy which follows these Terms and Conditions and our Privacy Policy which is located at URL <http://www.Day3.com.au/privacy/> and you agree that the terms of those two policies form part of this agreement between you and Day3.

4.7 You are solely responsible for dealing with persons who access the Client Data, and must not refer complaints or inquiries in relation to such data to us.

4.8 Except as provided in clause 4.2, we are not liable to you or any other person for:

- (a) cost, loss or liability (including loss of profit or other consequential damage) arising from our supply or failure or delay in supplying the Service;
- (b) the content, context or confidentiality of any communications made using the Service;
- (c) loss or damage caused by third party software applications forming part of the Service.

4.9 You indemnify us against all costs, expenses, loss or liability that we may suffer (directly or indirectly) resulting from:

- (a) your breach of these terms;
- (b) your use or misuse of the Service;
- (c) the use or misuse of the Service by any person using your account; and,
- (d) publication of defamatory, offensive or otherwise unlawful material on any web site forming part of your service.

5. Suspension and Termination of Service

5.1 We may from time to time without notice suspend the Service or disconnect or deny your access to the Service:

- (a) during any technical failure, modification or maintenance involved in the Service provided that we will use reasonable endeavours to procure the resumption of the Services as soon as reasonably practicable; or
- (b) if you fail to comply with any provision in this agreement (including failure to pay charges due), or do, or allow to be done, anything which in our opinion may have the effect of jeopardising the operation of the Service, until the breach (if capable of remedy) is remedied.

notwithstanding any suspension of any Service under this clause you shall remain liable for all charges due throughout the period of suspension.

5.2 Day3 may without notice to you remove, amend or alter your data upon being made aware of:

- (a) any claim or allegation; or
- (b) any court order, judgment, determination or other finding of a court or other competent body, that the data is illegal, defamatory, offensive or in breach of a third party's rights.

5.3 We may end our agreement with you and cease providing Services for any reason, on 30 days written notice to you. You may close your account with Day3 on 30 days written notice to Day3.

5.4 If your account is closed you must pay all outstanding charges immediately and we may delete all Client Data from any storage media.

5.5 We are under no obligation to provide you with a copy of the Client Data if we have suspended or terminated your access to the Service for your breach. If we provide you with a copy of Client Data, we are entitled to charge a fee for service.

6. Domain Names

6.1 If you have requested that Day3 register a .com, .net, .org, .biz, or .info domain name (TLDs or Top Level Domains) on your behalf, you agree that you have read and accept the TLD Policy applicable to .com, .net, .org, .biz and .info domain names issued by the registrar MelbourneIT Limited located at <http://www.melbourneit.com.au/policies/gtldtermcond.php3>.

6.2 You agree that in the event of a dispute about a TLD, you will submit to and are bound by the Uniform Domain Name Dispute Resolution Policy (UDNDRP) located at <http://www.melbourneit.com.au/policies/gtlddispute.php3> and the Rules for UDNDRP located at <http://www.melbourneit.com.au/policies/gtldrules.php3>.

6.3 If you have requested that Day3 register a .com.au, .id.au, .net.au or .org.au domain name (2LDs or Second Level Domains) on your behalf, you agree that you have read and accept the published policies applicable to 2LDs issued by the registrar MelbourneIT located at <http://www.melbourneit.com.au/policies/aupolicy.php>.

6.4 You agree that in the event of a dispute in registering a 2LD or about a 2LD after registration you will submit to and are bound by the .au Dispute Resolution Policy (auDRP) and any variations to it from time to time bind Day3. The auDRP can be viewed at <http://www.auda.org.au/policy/>.

6.5 In registering or renewing a domain on your behalf, Day3 is acting as a reseller of
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the registrar, MelbourneIT.

6.6 You agree that by maintaining the registration of a domain name after changes or modifications to the applicable policies become effective, you are confirming your continued acceptance of these changes and modifications.

6.7 You agree that you must pay for any registration or delegation charges in advance at Day3's list price. You understand that you cannot register a domain name without paying for it in advance. Day3 is not obliged to provide you with information or assistance in respect of the domain name until we have received payment of our domain name charges.

6.8 Day3 makes no representation and gives no warranty about your chosen domain name being available for registration or use by you.

6.9 You expressly authorise and direct Day3 to:

(a) be nominated as authorised billing contact for your domain name with the domain name registrar;

(b) renew your domain name registration upon receipt of renewal notification from the domain name registrar and invoice you for the relevant charge in accordance with Day3's list price from time to time.

6.10 In respect of 2LDs, you acknowledge that Day3 is not liable for any loss or damage resulting from non-renewal of your domain name if you have failed to provide the appropriate warranty in respect of your continued eligibility to hold the domain name.

6.11 You indemnify Day3 against all claims arising out of your registration and use and renewal of registration of your chosen domain name, unless and to the extent that the claim arises out of Day3's breach of this contract, or its negligent act or omission.

7. E-commerce Services

7.1 Day3's E-commerce Services and all upgrades and additional products provided by Day3 ("E-commerce Services"), are offered by Day3 and purchased by you on following conditions:

(a) Day3 provides the E-commerce Services software 'as-is' and without warranty of any kind, either express or implied.

(b) Day3 gives no warranty that:-

(i) the E-commerce Services will meet your requirements;

(ii) the E-commerce Services will be uninterrupted, timely, secure, or error-free;

(iii) the results that may be obtained from the use of the E-commerce Services will be effective, accurate or reliable; and

(iv) any errors in the E-commerce Services software obtained from or used through Day3's site, or any defects in the E-commerce Services, will be corrected.

(c) Day3 will not be liable for acts or omissions of third party e-commerce payment gateway providers such as Camtech, NewsConnect SafePay, WorldPay, Dialect, and any other provider who may provide those services as part of the E-commerce Services. You will deal with those providers at your own risk.

(d) You accept full responsibility for all online transactions you originate or execute using the E-commerce Services with or without credit and/or debit cards.

(e) You are responsible for and indemnify Day3 in respect of legal obligations you have to end-users of the E-commerce Services under any legislation, including without limitation the Privacy Act (Cth) 1998 as amended.

(f) Day3 accepts no responsibility for any cost, loss or liability (including loss of profit or other consequential damage) that might arise through your use of the E-commerce Services.

(g) You indemnify Day3 and hold us harmless against any liability in relation to all transactions undertaken using the E-commerce Services, including in respect of claims by or in respect of services provided by payment gateway providers.

7.2 Unless otherwise agreed in writing, you acknowledge that Day3 is acting as a reseller of E-commerce Services and is not the agent, partner or joint venturer of the supplier of the E-commerce Services to Day3.

8. SQL Database Services

If you purchase SQL database Services, you agree that you have read and will be bound by the terms of the SQL Policy and Terms set out at http://www.day3.com.au/terms/sql_policy.htm.

9. Virtual Dedicated Hosting (VDS)

If you purchase Virtual Dedicated Hosting Services (VDS Services), you agree that you have read and will be bound by the Virtual Dedicated Server Terms and Conditions set out at http://www.day3.com.au/terms/terms_conditions_vds.htm.

10. Other Services

If you purchase other services provided by Day3, you agree that you have read and will be bound by the terms of the relevant Policy and Terms following in Addendum A.

11. Miscellaneous

11.1 The Client grants to Day3 a license to use and reproduce all Client Data in order to fulfil its obligations under this agreement. In this agreement "Client Data" means all information, data, text, logos, images, audio, movie clips and/or content in any form that

forms part of the Client's web sites or emails.

11.2 A provision of, or a right created under this agreement, may not be waived except in writing signed by the party granting the waiver, or varied except in writing signed by the parties.

11.3 The law in force in Victoria governs this agreement and the transactions contemplated by this agreement.

11.4 You may not resell Services or assign your rights and obligations under this agreement without our prior written consent.

Addendum A—Hosted SureMessage Services

These Terms are in addition to the Day3 Hosted Services Terms and Conditions of Sale. Please read our Standard Terms and Conditions carefully as they contain exclusions of liability and also include indemnities from you to Day3.

1. Hosted SureMessage requires Internet Explorer 5.01 with Service Pack 2 or higher or Netscape Navigator 6.2 or higher.

2. Hosted SureMessage charges exclude any domain name registration charges imposed by domain name registration authorities.

3. Pricing of domains is beyond Day3's control and may be changed without notice.

4. A AUD\$3.50 per invoice account keeping fee applies to Hosted SureMessage. This fee does not apply if payment is made by auto debit credit card.

5. Additional Mail Accounts for SureMessage may be purchased.

6. SureMessage

6.1. SureMessage will scan all incoming emails to your designated MX Record and automatically trap all messages identified by Day3 as probable bulk, unsolicited email ("spam") and ("virus") by our system. Day3 does not represent or warrant that the Service will trap all or any certain proportion of the spam and virus that are sent to your email account.

7. Access To Your MX Record Account

7.1. By using the Service, you authorise us and our Supplier to:

7.1.1. communicate with the Company's systems to access your MX Record;

7.1.2. process your email using the Service's system which involves comparing the content of the email electronically against a template of spam messages;

7.1.3. trap emails identified by our systems as probably spam;

7.1.4. delete emails identified as spam, as contemplated by clause 6;

7.1.5. access your email and information to the extent necessary to ensure the proper functioning of our and the Supplier's system and in the delivery of technical support and maintenance to our and the Supplier's systems;

8. Security

8.1. In providing you with the Service, the Company securely retains your MX Record user identification and your MX Record setting. This information is only used by our technicians to modify your Service settings.

9. Report And Review Of Deleted Messages

9.1. The Company will keep your email address to allow it to send you reports on your use of the Service, and advise you of any changes to the Service. The Supplier will hold the trapped messages free in a trap file accessible by you online for 30 days during which time you may view the messages to ensure that there are no messages which you would like to retain. You may forward any message to yourself from the spam email during the 30 days. You acknowledge that neither Day3 nor the Supplier checks trapped messages and after 30 days, messages in the trap file are automatically deleted, whether reviewed by you or not. You agree that if a message that is not spam is filtered from your mailbox, your only remedy is to view the message within the 30 days during which it is held in the trap file.

10. What the Service Does Not Do

10.1. The Service does not provide anti-virus software, protection from a denial of service attack or protection from other malicious code or conduct.

11. Termination

11.1. We reserve (for ourselves and our Supplier) the right to terminate or modify the Service at any time:

11.1.1. for technical maintenance or support;

11.1.2. if your MX Server account becomes the subject of a denial of service attack; or

11.1.3. if your MX Server account is otherwise the source of emails which may in any way damage or overload our system;