

## CETACEAN SIGHTINGS APPLICATION (APP) - TERMS OF USE

### 1. Legal contract

- (a) These Terms of Use form a legally binding contract (**Agreement**) between you and the Commonwealth of Australia as represented by the Department of the Environment and Energy ABN 34 190 894 983 (**Department**).
- (b) In this Agreement, the following definitions are used:
  - App** means the Cetacean Sightings Application;
  - Data** means standardised sightings and survey data associated with marine mammal sightings, including raw data, which you upload into the App;
  - Material** means information, documents or data or any combination of them;
  - Our Material** means the datasets that may be produced by use of the App or any Material that forms part of, the App;
  - IP Rights** means all intellectual property rights, including the following:
    - (i) copyright, patents, rights in circuit layouts, trade marks, designs, trade secrets, know how, domain names and any right to have confidential information kept confidential;
    - (ii) any application or right to apply for registration of any of the rights referred to in paragraph (i); and
    - (iii) all rights of a similar nature to any of the rights in paragraphs (i) and (ii) which may subsist in Australia or elsewhere,whether or not such rights are registered or capable of being registered.
- (c) In this Agreement:
  - (i) **words** in the singular include the plural and words in the plural include the singular;
  - (ii) a reference to the word "including" in any form is not to be interpreted as a word of limitation; and
  - (iii) capitalised terms that are defined in this Agreement have the same meaning when used elsewhere in this Agreement.
- (d) The App, as updated from time to time, is available for you to download, to upload Data into and to access Our Material in the form of specific datasets that are produced by your use of the App, subject to the terms of this Agreement.
- (e) If you want to install and use the App, you must agree to be bound by this Agreement.
- (f) By accessing or using this App, you irrevocably agree to be bound by this Agreement.

### 2. Licence to use the App

- (a) All IP Rights comprised in or derived from the App and its use, including copyright in Our Material or copyright comprised in the App itself or in Material created through your use of the App, is owned by the Department.
- (b) All logos, icons, brand names or service names that identify the Department remain the property of the Commonwealth of Australia. All other trade marks on this App are the property of their respective owners. Any unauthorised use of Material appearing on the App may violate IP Rights of the Commonwealth or third parties.
- (c) The Department grants you, and you accept, a non-exclusive, non-transferable limited licence to use the App strictly in accordance with this Agreement on a single device for the sole purpose of:
  - (i) uploading Data; or
  - (ii) accessing Our Material in the form of specific datasets that are produced by your use of the App.

- (d) The term of the licence shall be unlimited (but subject to termination under clause 10 of this Agreement).
- (e) The licence provided under this Agreement is personal to you and you must not re-sell, sub-license, rent, lease or otherwise distribute the App. All other rights in respect of the App are reserved to the Department.
- (f) You must not:
  - (i) use, operate, copy, distribute, sell, sublicense, rent or modify the App except as expressly permitted by this Agreement;
  - (ii) use the App in a manner that violates any law or regulation;
  - (iii) reverse engineer, decompile, disassemble or otherwise create or attempt to create the source code of the App;
  - (iv) operate or sub-license the App for the benefit of a third party;
  - (v) remove, alter or add to any copyright notice or similar marking on the App; or
  - (vi) use the App in any way other than as permitted under this Agreement.
- (g) The App is made available to you free of charge. The Department reserves the right to amend or withdraw the App, cease support for the App at any time and for any reason.

### **3. User supplied Data**

- (a) The Department has no control over the Data uploaded by you. The Department accepts no responsibility or risk for the Data provided, printed, sent or received in relation to the App. You, by accessing or using the App accept all responsibility, risk and liability for the content chosen, added, edited, provided, uploaded and modified.
- (b) By uploading Data into the App and to the extent that IP Rights subsist in the Data, you agree to grant (or procure for) the Department a perpetual, non-exclusive and payment-free licence throughout the world to:
  - (i) reproduce, use and exploit the IP Rights in Data to the full extent permitted by law in any jurisdiction in which the App is available to users for all purposes described in this Agreement and any reasonably related secondary purposes; and
  - (ii) allow the Department to sub-license to others the same rights granted to the Department in this clause 3.
- (c) To the extent that any moral rights subsist in any of the Material you submit via the App, you represent and warrant that you consent (and have obtained each other author's consent) to the Department doing any act or omission including editing, changing or deleting some or all of the materials or information, which would, but for this consent, be contrary to the relevant moral rights.

### **4. Disclaimer**

- (a) The Department does not warrant, guarantee or make any representation that:
  - (i) the App, or the servers that make the App available on the Internet are free of software viruses;
  - (ii) the functions contained in any software contained on the App will operate uninterrupted or are error-free; and
  - (iii) errors and defects in the App will be corrected.
- (b) Unless any law avoids or prohibits this Agreement excluding or modifying the exercise of or liability under a condition, warranty or guarantee, then that condition, warranty or guarantee is deemed to be included in this Agreement.

- (c) To the extent permitted by law, the Department's liability for failure to comply with any such condition, warranty or guarantee is limited (at the Department's option, and as determined by it) to, in the case of goods, the replacement of the goods or the supply of equivalent goods, the repair of the goods, the payment of the cost of replacing the goods or of acquiring equivalent goods or the payment of the cost of having the goods replaced (as determined by the Department).
- (b) Except as specified in this clause, under no circumstances will the Department be liable to you for any loss, damages, claims or costs whatsoever (including any consequential, indirect or incidental damages) arising under or in connection with this Agreement or your use of the App, regardless of how they arise.

## 5. Acknowledgements

You acknowledge that:

- (a) this Agreement does not require the Department to implement or install the App for you or to provide any maintenance, support or other services in respect of the App.
- (b) this transfer of Data is facilitated by your telecommunications carriage provider using your carriage and data plan;
- (c) the Department is not responsible for the provision of any carriage services;
- (d) the Department is not liable for any costs or charges incurred by you as a result of your use of the App;
- (e) although the App may be used, or may only operate, in conjunction with other products and services offered by the Department (**Related Products and Services**), the Related Products and Services are licensed separately and this Agreement does not affect any rights or obligations in relation to Related Products and Services.
- (f) to the extent permitted by law, the Department neither warrants nor represents that your use or possession of the App will not infringe the rights of third parties.
- (g) the names, icons, words, titles, phrases, logos, trade marks, graphics or designs and other content (together, the **Trade Marks**) displayed through the App are the Department's property or the property of other parties and may be registered or unregistered Trade marks. Nothing contained in this Agreement or the App should be construed as a licence or right to use any Trade Mark without the Department's written permission or the permission of the third party that may own the Trade Mark. Misuse of any Trade Mark is prohibited. The Department reserves the right to enforce its intellectual property rights through civil proceedings.

## 6. App requirements

- (a) In order to use the App, you are required to have a compatible internet access, and the necessary minimum specifications (**Software Requirements**).
- (b) The Software Requirements are as follows:
  - Operating System**  
Windows 2000, XP, Vista or Windows 7
  - Language**  
English.

## 7. Updates and new releases

- (a) The Department may update the App with additional languages and devices from time to time.
- (b) Unless the Department advise you otherwise, this Agreement shall cover any updates and new releases of the App that may be created by the Department during the term of this Agreement.

- (c) The version of the App may be upgraded from time to time to add support for new functions and services.
- (d) Where you accept an update or new release to the App, this Agreement applies in all respects to that update or new release to the extent that it is incorporated in or replaces the App.

## **8. Variation**

- (a) The Department may, at any time, and at the Department's absolute discretion, vary this Agreement by making available a varied copy of this Agreement on the Department's website.
- (b) The Department recommends that you check this from time to time. Your continued use of the App means that you agree to be bound by any changes that may be made by the Department and posted on its website.
- (c) Without limiting your obligations under this clause 8, the Department will use reasonable endeavours to also give you notice of a variation to the terms of this Agreement by sending you an email directing you to review the relevant variation on the Department's website. The notice will be sent to the email address registered by you when you downloaded the App.

## **9. Termination**

- (a) The Department may immediately terminate this Agreement and your right to use the App by notice to you at any time for:
  - (i) breach; or
  - (ii) any reason (in the absolute discretion of the Department), including without limitation where the App is replaced or becomes redundant (as determined by the Department).
- (b) Upon termination of this Agreement, the accrued rights and liabilities of the parties shall not be affected.
- (c) You may terminate this Agreement at any time by written notice to the Department.
- (d) Upon termination of this Agreement you must stop using, uninstall and destroy all copies of the App in your possession or control (including on your Portable Device).
- (e) Notice by the Department to you under this clause will be by the sending of an email to the address registered by you when you downloaded the App.

## **10. Department contact details**

If you have any questions or complaints in relation to the App, you can contact the Department as follows:

Name: Australian Marine Mammal Centre Coordinator

Postal address: Australian Antarctic Division, 203 Channel Highway, Kingston, TAS, 7050

Telephone: (03) 6232 3407

Email: ammccoordinator@aad.gov.au

## **11. General**

- (a) You must not assign, sub-license or otherwise deal in any other way with any of your rights under this Agreement without the Department's prior written approval.
- (b) Each indemnity given by you under this Agreement is a continuing indemnity which shall continue upon expiry or termination of this Agreement.

- (c) If any part of this Agreement is found to be void, unlawful, or unenforceable then that part will be deemed to be severable from the balance of this Agreement and the severed part will not affect the validity and enforceability of any remaining provisions.
- (d) You agree to comply with all laws, rules and regulations (for example, of the Commonwealth, a State or Territory, or local government) applicable to your use of the App, Material stored in the App and Data you upload to, or authorise for upload to, the App.
- (e) This Agreement will be governed by and interpreted in accordance with the law of the Australian Capital Territory.
- (f) You agree to the non-exclusive jurisdiction of the courts of the Australian Capital Territory to determine any dispute arising out of this Agreement.