

# MessageXchange Terms of Use - E- invoicing Connect

Effective date: 01/10/2022





# Terms of Use – E-invoicing Connect

## DISCLOSURE STATEMENT

IF YOU ARE BASED IN NSW, WE MUST MAKE YOU AWARE OF TERMS THAT MAY SUBSTANTIALLY PREJUDICE YOUR INTERESTS. WHILE WE TAKE CARE TO ENSURE THAT OUR TERMS ARE REASONABLE (IN VIEW OF THE FEES WE CHARGE, AND THE RISKS INHERENT IN OUR SERVICES), WE SET OUT BELOW A SUMMARY OF THE MORE ONEROUS TERMS THAT YOU MUST ACCEPT IF YOU WISH TO USE OUR SERVICES:

1. **Suspension of Service:** If You breach these terms or law, We may suspend the Services and/or delete Your data in the System. We may also suspend Our Services for any period during which undisputed Support Services Fees are more than 30 days overdue, if You do not pay for Your Subscription renewal on time, or if Your Credits are exhausted and You do not recharge them by paying a further Prepaid Credit Fee.
2. **Forfeiture of Credits:** If You do not pay Your renewal Subscription Fee on time, any remaining Credits (which would otherwise rollover to Your following Subscription Term) will be forfeited (without refund). To resume Your use of the Services again You must Pay the Subscription Fee and (if you have no remaining Credits) Recharge Your Credits by paying a further Prepaid Credit Fee.
3. **Termination of Service:** If You fail to rectify the issue that caused suspension within a 14 day notice period, we may also terminate Your Subscription.
4. **Continued Payment Due:** You must still pay us the Fees for the remainder of Your Subscription Term if anything in points 1 to 3 occurs.
5. **Subscription Fees:** Subscription Fees are payable for at least a 12 month Subscription Term. You may only terminate within a Subscription Term (other than for convenience as per point 8 below): (a) if We change these terms in a manner not acceptable to You during that period; or (b) for unavailability / defects as described in point 10 below; or (c) if You have a right to terminate for Our breach or insolvency.
6. **No refunds:** In view of the low Fees we charge under this Agreement, refunds, including pro rata refunds of unused, prepaid Fees will not be provided under any circumstances.
7. **Renewal terms:** Subscriptions automatically renew unless either of us gives notice (at least 90 days prior) to prevent such renewal.
8. **Termination for convenience:** If You wish to terminate Your Subscription You must still pay all the Fees for the remaining months/part months of that term.
9. **Our Liability:** Except for liability for:
  - a. breach of the privacy and confidentiality clauses (for which we have uncapped liability), and
  - b. damages awarded for our breach of third party Intellectual Property rights (for which our liability is capped to \$1m),Our total liability will not exceed the Fees paid by You in the 12 months before the cause of that liability occurred. We will also not be liable to You for loss of use or data, loss of profits or revenue or indirect and consequential loss.
10. **Unavailability / defects:** We may temporarily suspend availability of the System if we reasonably consider upgrades, repair or maintenance are required, but will try to notify You via the Services at least 8 hours before doing so. Our sole obligation for unavailability, errors or defects is to try to repair or correct the System, and if We can't do so within a reasonable period, Your sole remedy is to terminate the Subscription, if You do not wish to continue receiving Our Services.
11. **Use of System with 3rd parties:** If you want to use Our System to exchange messages with 3rd parties (with whom We do not have a contract):
  - a. You must pay the Fees relating to such use and ensure that the 3<sup>rd</sup> party complies with these terms,
  - b. You will also be responsible for any negligence or misconduct by the 3<sup>rd</sup> party during such use, as if it was Your own,
  - c. You indemnify Us for any costs, and the like, arising from the 3<sup>rd</sup> party's use of Services (or Your use of Services with them), and
  - d. We exclude responsibility for any damages or loss suffered by You or them (or anyone associated with You or them) arising from such use, unless caused by Our breach of these terms, misconduct or negligence.
12. **Your other indemnities:** You must also indemnify Us against any infringement of third party Intellectual Property rights You cause. Your liability under this indemnity will be capped like Our's is (under point 9.b above).
13. **Privacy:** We may disclose personal information (that You provide to us) to third parties We use to help Us provide the Services (where they need that information to do so). The information as disclosed to them may enable them to identify You.
14. **Modifications to terms:** We may modify these terms or Our policies on reasonable grounds. Where the modification is within our control (and not required by law or Government authorities) we will send You an email notifying You of modifications at least 90 days before the modification becomes effective. The modifications become effective upon the earlier of the following occurring: (a) as soon as You accept them, as prompted to do so when You log-in to our Website; or (b) the end of any notice period We notified to You.

By You accepting these terms and conditions ("**these Terms**") on Our Website, You agree to the terms set out below.

## **1. Definitions and Interpretation**

### **a. Defined terms**

In these Terms:

**"Agreement"** means these Terms.

**"Business Intelligence Data"** means Information extracted from Messages and stored for presentation in dashboards, charts and reports via the Web Portal or for use in other Processing Services.

**"Confidential Information"** means all information disclosed by a party to the other, whether orally or in writing, that is designated as confidential or that ought reasonably to be understood to be confidential, provided that information will not be Confidential Information where:

- a) it is in, or enters into, the public domain without any breach of this Agreement by the Receiving Party;
- b) it was known to the Receiving Party prior to disclosure by the Disclosing Party (without breach of confidence known to the Receiving Party);
- c) it is received from a third party otherwise than in breach of an obligation to the Disclosing Party; or
- d) it was independently developed by the Receiving Party without recourse to the information.

**"Contracted Trading Partner"** means any of Your Trading Partners with whom We hold a contract on terms substantially similar to these Terms and relating to the same relevant Services as You have acquired.

**"Credit"** means the Processing Service capacity that is covered by Your Prepaid Credit Fees, as set out on our Website from time to time.

**"Data"** means Information contained in Messages, Information You enter into the System and the results of processing Information as part of Your use of the Services.

**"Disclosing Party"** means a party disclosing Confidential Information to the other.

**"Fee"** means the applicable fees (exclusive of all applicable taxes) payable pursuant to this Agreement including the Subscription Fee, the Support Services Fees (if any) and the Prepaid Credit Fees.

**"Information"** includes, but is not limited to, your Subscription details, Data, records, reports, documents, instruction manuals, code, Message content and other data (including without limitation data in electronic form) provided, uploaded or downloaded by a party in connection with this Agreement.

**"Intellectual Property"** means any intellectual or industrial property including without limitation any patent, trade mark or service mark, copyright, design, business name, trade secret, know-how or business process.

**"Malicious Code"** means code which contains a virus, worm, trojan horse or any other harmful or malicious component or program.

**"Message"** means an electronic data file that has been received or sent by the System.

**"Order"** means an order for Services made by You, by Subscribing for Services on Our Website.

**"Personal Information"** means information about an identifiable individual (including contact name, email address, mailing address and telephone number) provided as part of Your registration for the Services or through Your use of the Services.

**"Prepaid Credit Fees"** means the Fees You pay for Credits, as set out on Our Website from time to time.

**"Processing Services"** means access to the Web Portal, the processing of Messages by the System for the purpose of sending and receiving Messages, the monitoring and controlling of Messages by a business process, and the extraction, storage and use of Business Intelligence Data.

**"Professional Services"** means services provided by Us at Your request to assist You in designing, building and testing solutions using the Services, and which you order (and we provide) under a separate agreement between You and Us (such services not being covered by this Agreement).

**"Receiving Party"** means a party receiving Confidential Information from the other.

**"Services"** means the services We provide through the Website, that are ordered by You or as part of a free trial (where available). The Services comprise the Processing Services and use of Support Access and optional Support Services under this Agreement, and any other services as agreed in writing from time to time under this Agreement. They do not include Professional Services.

**"Software"** means any software which is used to provide any part of the Services.

**"Subscription"** means Your right to use the Services under this Agreement.

**"Subscription Fee"** means an annual fee - the first such fee being payable at the time of Your registration - for Your use of the Services during the Subscription Term to which such fee relates.

**"Subscription Term"** means 12 months from the date of (or specified in) Your Order and any further 12 month term of renewal.

**"Support Access"** means customer service help desk access We provide to You in the form of Our business hours help desk and 24 hour fault reporting phone line.

**"Support Services"** means services provided by Us at Your request to assist You in troubleshooting problems with Your use of the Services, testing solutions using the Services, and/or to assist You in obtaining Your Data after termination of this Agreement, in accordance with clause 19(e).

**"Support Services Fees"** means the Fees You pay for Support Services, as set out on Our Website from time to time.

**"System"** means the Website, Web Portal, Software and all related Information technology infrastructure making up MessageXchange.com.

**"Third-party Services"** are facilities and services (eg, online payment facilities) made available by Us to You and provided by third parties in connection with Your use of the System and Services.

**"Trading Partner"** means any third party which uses the System to exchange Messages with You.

**"User"** means an individual who is authorised to use the Services pursuant to this Agreement and who has been supplied with a login and password by You (or by Us at Your request).

**"Web Portal"** means the browser-based user interface of the Software available from the Website.

**"Website"** means Our website located at [www.messageXchange.com](http://www.messageXchange.com) or any other internet site notified by Us as being subject to these Terms.

**"We, Us, Our"** means eVision Pty Ltd (ABN 73 076 521 161)

**"you"** means the person entering into these Terms on behalf of the company or other legal entity that you represent.

**"You, Your"** means the company or other legal entity on behalf of which you are accepting this Agreement

**"Your Data"** means all Data or Information submitted by You to the System through Your use of the Services.

## b. Interpretation

In these Terms:

- a) Specifying anything after words like "include", "for example" or similar expressions does not limit what else is included;
- b) Other parts of speech and grammatical forms of a word or phrase defined in these Terms have a corresponding meaning;
- c) No provision of this Agreement will be construed adversely to a party because that party was responsible for the preparation of this Agreement or that provision;
- d) A reference to \$ or dollars is to Australian dollars; and
- e) Headings do not affect the interpretation of these Terms.

## c. Customer Forms

You may provide Us with a purchase order, supplier onboarding form or similar document required by Your payment/procurement processes (each a **"Customer Form"**), for Your administrative convenience. If You request Us to do so, We will refer to the Customer Form on Our invoices, provided the Customer Form states that it is issued in relation to the relevant Order and it is received well prior to the date on which we are due to issue Our invoice. Any terms and conditions stated in (or attached to or linked in) any Customer Form will be of no force or effect, even though Our invoice may refer to a reference number of that Customer Form. You acknowledge that nothing in this clause restricts Our ability to issue an invoice and collect payment without any Customer Form.

## 2. Provision of Services

Subject to You complying with Your payment obligations under this Agreement at all times, We will provide the Services to You on the terms of this Agreement during the Subscription Term for so long as You have Credit available (by paying Prepaid Credit Fees once your current Credit expires). We will provide support at no additional charge if it is a fault with Our Services. Other troubleshooting support, which will be charged as set out on our Website, is available on request.

We may make one or more of the Services available to You on a trial basis. If You are provided with any Service on a trial basis, You will be permitted to use that Service on the terms of this Agreement without charge until the end of the free trial period You registered for or the commencement of any Subscription ordered by You for that Service. Notwithstanding clauses 9 (Mutual Warranties and Representations) and 10 (Our Warranties and Representations), during a free trial Services are provided without any warranty or representation (including as to quality, timeliness or fitness for purpose) whatsoever.

We may at any time (acting reasonably) notify You that Your use of the Services is for a purpose which We consider does not comply with this Agreement or is in breach of applicable laws. If We give You such notification, We may delete the offending Data (where it is reasonable for us to do so, for example in order to protect Us from liability that may arise from that data, to protect the security/integrity of the Services or to protect our other customers) and/or temporarily halt providing You Services and give You 14 days to remedy the cause of Our concerns. Your failure to do so within 14 days of such notification will entitle Us to terminate the offending Subscriptions by providing further notification to You.

## 3. Registration

When you register:

- a) you do so
  - i. as authorised representative for, and to bind, the legal entity you nominate during the registration process (so that You, as that legal entity, are the party actually registering for the Services) and
  - ii. in respect of the Privacy Collection Notice in clause 13 (Privacy), on your own behalf; and
- b) you warrant that you are at least 18 years of age and have the legal right and authority to do so.

When You register, You will choose or be provided with a login name and password to enable You to use the Services. You must keep Your login name and password confidential and secure, must not disclose them to any third party and must take all reasonable measures to prevent their disclosure to any third party. You must immediately notify us if You become aware of any unauthorized use of Your password or login name or any other breach of security in relation to Your use of the Services. You are fully responsible and liable for all use which is made of the Services using Your login name and password, where that occurs due to a failure by You to comply with this clause.

## 4. Restrictions on grant of Subscriptions

- a) **(Purpose):**
  - i. this Agreement relates solely to the use of the Services for Your own internal business requirements and does not permit You to use the Services to process Data on behalf of any other person;
  - ii. without limitation, You are not permitted to:
    1. provide the Services on an application service provider basis,
    2. resell the Services, or
    3. use the Services to provide any outsourcing or bureau services.

If You require use of the Services for these purposes You must contact Us so that We may consider granting appropriate rights.

- b) **(User limits)** Services purchased by You under Subscriptions may be used by no more than the number of Users specified on the Web Portal.
- c) **(Credits must be current)** You will not be able to use the Services if You do not have current Credits available. Your use will be reinstated once You buy additional Credits by paying the then current Prepaid Credit Fees.
- d) **(Other usage limitations)** Services may be subject to other limitations (as We may notify to You, in accordance with clauses 16 (Modifications of Terms) and 30 (Notices) such as, for example, the period of time Data may be stored on the Service.

## 5. Use of Services by Trading Partners

- a) You may use the Services (while You have available Credits) to exchange Data with Your Trading Partners, provided that You use all reasonable efforts to ensure that all Trading Partners (who are not Contracted Trading Partners) comply with Your obligations under this Agreement and that the terms of Your agreement with each such Trading Partner are consistent with this Agreement. You will be responsible for:
  - i. Fees (as set out in clause 14 (Payment)) applicable to such use of the Services (except to the extent Your Trading Partner is a Contracted Trading Partner who is responsible for such fees under its agreement with Us);
  - ii. If it is not a Contracted Trading Partner, Your Trading Partner's:
    - 1. compliance with the terms of this Agreement (as if it were You); and
    - 2. negligence or misconduct in relation to the Services.

Where You extend the use of the Services to Your Trading Partners under this clause, You will be entitled to use the relevant Services to send, receive, transform, monitor and control Messages between Your own computer system or systems and the computer system or systems of Your Trading Partner.

- b) We will not be responsible for any damages or loss suffered by You or Your Trading Partner (or anyone associated with You or them) arising (directly or indirectly) from or in connection with their use of the Services, except to the extent caused by Our breach of this Agreement, misconduct or negligence. You indemnify Us and hold us harmless against all actions, claims, loss, damages, costs and expenses (including without limitation legal costs on a full indemnity basis) arising directly or indirectly from or in connection with Your Trading Partner's use of the Services (and Your use of the Services with such a Trading Partner), except to the extent:
  - i. caused by Our breach of this Agreement, misconduct or negligence, or
  - ii. we are able to recover such loss from the Trading Partner as a Contracted Trading Partner because it was the entity that caused the loss (and we will use reasonable efforts to do so in those circumstances).
- c) You are responsible for providing customer service (if any) to Your Trading Partners. We do not provide any support or services to Your Trading Partners unless We have a separate agreement with You or the Trading Partner obligating Us to provide support or services.

## 6. Term

- a) This Agreement commences on the date You accept it by indicating Your acceptance of these Terms on Our Website and, provided You have paid Your Subscription Fee, continues until all Subscriptions granted in accordance with this Agreement have expired or been terminated pursuant to clause 19 (Termination).
- b) Subscriptions commence on the later of (i) the date You accept these Terms, (ii) the date We send You the first Subscription invoice (for Subscription Fee and first Prepaid Credit Fee), or (iii) solution deployment date (if We are providing Professional Services to implement the System/Service for You), and, provided You have paid Your Subscription Fee, will continue for the Subscription Term unless otherwise terminated pursuant to clause 19 (Termination).
- c) If You have opted for automatic renewal when registering for the Service, then unless You notify Us at least 90 days prior to the end of a Subscription Term (in accordance with clause 19b)) or a party otherwise terminates this Agreement under its terms, upon expiry of the Subscription Term, we will debit your nominated account for the applicable Subscription Fee - and provided such debit is successful, Your Subscription will renew for an additional 12 month period (subject to Your Credits being refreshed when they expire).
- d) If You have not opted for automatic renewal when registering for the Service, Your Subscription will expire at the end of the then current Subscription Term, unless You actively renew for an additional 12 month period and pay the applicable Fees under clause 14(a) (Payments).

## 7. Use of the Services

- a) We will use commercially reasonable efforts to make the Services available 24 hours a day, 7 days a week, except for:
  - i. planned downtime for maintenance and upgrades (of which We will give at least 8 hours' notice and which We will schedule to the extent practicable on a Sunday between 6am to 10pm AEST);
  - ii. any unavailability caused by circumstances referred to in clause 18 (Force majeure); and/or
  - iii. periods during which You have no Credits available.
- b) We will maintain appropriate administrative, physical, and technical safeguards for protection of the security, confidentiality and integrity of Your Data. We will not disclose Your Data except as compelled by law or as expressly permitted in writing by You. We will not access or modify Your Data except as permitted by this Agreement or at Your request.
- c) We will make one backup copy of Data each day for disaster recovery purposes. However, You are responsible for maintaining the accuracy and integrity of Your Data at all times, for making backup copies of Data and for archiving Your Data. Except as otherwise provided in this Agreement, We may delete Your Data from the System in accordance with data retention parameters configured for the Services.
- d) We will be entitled to access the System and Your Data at any time in order to:
  - i. perform any maintenance on the System which We consider necessary;
  - ii. perform any work on the System which is required under any applicable laws;

- iii. determine whether You are complying with Your obligations under this Agreement; and
  - iv. remove any material, Information or Data We consider has entered onto the System in breach of the terms of this Agreement.
- e) The Website may contain links to other websites, which are provided for Your convenience only, as a ready reference for searching related content on the internet. We do not endorse (and are not responsible or liable for) those websites, their operators, functionality, content or the goods and services that they describe or make available; nor do We receive any financial incentives for referencing those websites on the Website. If You choose to access these linked sites, You do so at your own risk and subject to the relevant third party's terms and conditions and privacy policies.
- f) In connection with Your use of the System and Services, we may also make available to you certain online Third-party Services for Your convenience (including to help facilitate automated payments). Third-party Services are supplied to You by the relevant third party and are subject to the terms and conditions and privacy notices of that third party. You must ensure that You have read, understood and agreed to those terms and conditions and notices prior to using the relevant Third-party Services. We do not endorse, take any responsibility for, receive any financial incentive, or have any liability for, Third-party Services and Your rights in respect of those services are solely against the relevant third party that supplies them.

## **8. Your Acknowledgements**

You acknowledge and agree that:

- a) the internet is accessible to anyone with the appropriate technical capability and that it is impossible to totally protect the System (including Your Data and any of Your business or other Information contained in Your Data) from the actions of third parties, including other Users of the System – so while We will use industry standard security measures to keep the Services and Your Data secure to the extent reasonably possible, We cannot and do not guarantee the security or confidentiality of these communications, the Services or Your Data;
- b) We have no control over telecommunications networks or services, the internet or other technology or utilities required to make the Website and Services available over the internet – and unless caused by Our own recklessness, misconduct or breach of this Agreement, We accept no responsibility or liability for any direct or indirect loss in any form associated with them, whether due to congestion, technical malfunction, Malicious Code or otherwise;
- c) You are responsible for ensuring that Your own business Information and information technology systems are protected against the actions of third parties – and while We take all reasonable steps to prevent the introduction of Malicious Code to the Services, We do not guarantee or warrant that the Services will not be affected by such destructive features (and We are not liable for any damage caused by such features unless caused by Our own recklessness, misconduct or breach of this Agreement). You must take Your own precautions to ensure that materials You download or that are transmitted to You through

Your use of the Services are free of such features that may interfere with or damage the operations of Your computer systems;

- d) You are responsible for ensuring that Your connection to the System is secure;
- e) except as expressly stated in this Agreement We do not make, and no person acting on Our behalf has made, any warranty or representation as to the Services' performance characteristics, merchantability or suitability for any particular purpose – and all such warranties and conditions are hereby excluded to the maximum extent permitted by law;
- f) Your purchase of Subscriptions has not been made on the basis of any representations made by or on behalf of Us regarding future functionality or features of the Services;
- g) We do not warrant that Your use of the System will be free from any interruption or delay, nor do We warrant that the System will be free from any errors, defects or faults. We may temporarily suspend availability of the System where upgrades, repair or maintenance are (in Our reasonable view) required. We will use reasonable efforts to notify You via the Services at least 8 hours prior to doing so. Our sole obligation in relation to any unavailability, errors or defects affecting the System will be to use commercially reasonable efforts to repair or correct the System (as the case may be), or if We cannot do so within a reasonable period, You may (as your sole remedy) terminate the Subscription;
- h) all rights in the Software are owned by Us or Our licensors and You must not at any time make any statement or do anything which is inconsistent with that ownership; and
- i) We may modify the Services on notice to You, to the extent required in order for the Services to remain compliant with laws and regulations.

## **9. Mutual Warranties and Representations**

Each party warrants and represents that:

- a) it has the full power and authority to enter into this Agreement and perform their obligations hereunder;
- b) it will not intentionally, or through its recklessness, wilful misconduct or breach of its security obligations under this Agreement, transmit to the other any Malicious Code.

## **10. Our Warranties and Representations**

We warrant and represent that (subject to clauses 7 (Use of the Services) and 8 (Your Acknowledgements)):

- a) the Services will perform in all material respects in accordance with the specifications referred to on Our Website;
- b) the functionality of the Services will not be materially decreased during a Subscription Term (unless required to comply with laws); and
- c) to the best of Our knowledge, the Services do not infringe any third party Intellectual Property rights.

To the extent permitted by law, Your exclusive remedy for a breach of the warranties contained in this section are as set out in clause 19 (Termination) and 20(e).

## **11. Your Warranties and Representations**

You warrant and represent that:



- a) Your registration details (and all other Information You submit to us in respect of Your Subscriptions) are current, complete and correct and You will maintain their currency by promptly updating them as required, through the online registration facility;
- b) You will not change, modify, delete, interfere with or otherwise deal with any third party's data in connection with Your use of the Services, except as expressly allowed by that third party;
- c) You will ensure that all people who use the System with Your permission or consent comply with the terms of this Agreement;
- d) all material uploaded, displayed or transmitted by You in connection with Your use of the Services will not be false, offensive, defamatory, threatening, obscene, unlawful or infringe any third party's rights (including their Intellectual Property rights);
- e) You will not use the Services in a way which disrupts, interferes with or restricts the use of the System by any third party or otherwise contravenes any applicable laws (including laws relating to privacy) or otherwise than as contemplated by this Agreement;
- f) You will not obtain or attempt to obtain a copy of the Software or upload any codes or scripts onto the System or transmit via the Services any Information which (through Your recklessness, misconduct or breach of this Agreement) contains Malicious Code;
- g) You are solely responsible for maintaining the confidentiality and security of Your password(s) and You will be responsible for any loss or damages arising as a result of Your failure to do so;
- h) You will not do anything which is inconsistent with Our rights in the System, the Software or under this Agreement, including removing any trade marks, copyright or other proprietary notices:
  - i. contained in or appearing on any material You download from the System or
  - ii. appearing when You download the Software from the System; and
- i) You will not do any other thing in connection with the Software or the System which is not expressly authorized by this Agreement.

## 12. Implied Warranties

EXCEPT AS EXPRESSLY STATED IN THIS AGREEMENT, TO THE FULLEST EXTENT POSSIBLE UNDER APPLICABLE LAW, (INCLUDING THE AUSTRALIAN CONSUMER LAW), WE MAKE NO WARRANTIES OF ANY KIND OR NATURE, WHETHER EXPRESS, IMPLIED OR STATUTORY, INCLUDING WITHOUT LIMITATION THE IMPLIED WARRANTIES OF TITLE, NON-INFRINGEMENT, MERCHANTABILITY AND FITNESS FOR A PARTICULAR PURPOSE. TO THE EXTENT THAT ANY SUCH IMPLIED OR STATUTORY WARRANTIES CANNOT BE EXCLUDED BY CONTRACT, OUR LIABILITY FOR THEIR BREACH WILL BE LIMITED TO:

- a) REPERFORMING IMPACTED SERVICES; OR
- b) PAYING THE COST OF DOING SO.

## 13. Privacy

When you register for and use the Services, We will collect Personal Information. We will collect this information in order to process Your registration, to provide You with the Services, to exercise Our rights and perform Our obligations under this Agreement and for any other purposes set out in our privacy policy at

<https://home.messageexchange.com/privacy-policy/> (**Privacy Policy**).

We may disclose any of that information to third parties We use in providing the Services to the extent they need it for that purpose - for example, Our IT, telecommunications, hosting and other suppliers and Our business consultants and partners - and as required by law. If you fail to provide this information, we may be unable to provide You with the Services.

Our Privacy Policy sets out Our practices regarding information We collect about identifiable individuals (including staff and customers of Our clients) through the Services. It explains

- a) how We store and use that information, and how the relevant individuals can access and correct it;
- b) how to lodge a complaint about how We handle that information; and
- c) how We address any such complaint. Please contact Us at <https://home.messageexchange.com/contact/> for any further information you require about our privacy policies or practices.

By using the Services and providing Personal Information to Us, you consent, and You undertake that You have received the consent (to the extent required by applicable privacy laws) of Your relevant customers or other third party individuals (whose personal information is disclosed to Us by You) to Our collection, use, storage and disclosure of that information in accordance with these Terms (including Our Privacy Policy). If You provide Personal Information to Us about Your customers or any other another third party individual, You must, to the extent required by applicable privacy laws:

- a) ensure that they have authorised You to provide that information to Us, so that We can use and disclose it for the purposes described in these Terms, without having to take any further steps required by applicable privacy laws;
- b) take reasonable steps to ensure they are aware of and consent to the matters set out in Our Privacy Policy, including that their personal information is being collected, the purposes for which it is being collected, the intended recipients of that information, the person's right to access that information, Our identity, and how to contact Us; and
- c) provide them with a copy of our Privacy Policy;

and if We request, help Us with any requests by that person to access or update their personal information entered into the Services.

We agree to handle Personal Information at all times in compliance with applicable privacy laws and Our Privacy Policy.

## 14. Payment

### a) Fees Payable

The following Fees will be payable under this Agreement.

- i. **(Initial Fees)** When You register, You will pay:
  - a. the Subscription Fee; and
  - b. the first Prepaid Credit Fee
 in advance.

- ii. **(Renewal and Recharge Fees)** Unless a party terminates a Subscription in accordance with the terms of this Agreement, You will pay the following ongoing Fees:
  - a. the (renewal) Subscription Fee upon expiry of the Subscription Term; and

- b. Prepaid Credit Fees to recharge Your Credits, once they are exhausted.

You are responsible for ensuring that Your renewal and recharge Fees are paid, whether you have opted to renew and recharge manually or automatically. If You have opted to automatically renew and recharge You are responsible for ensuring that Your automatic payment details are kept up to date.

We may suspend Our Services under Clause 14(e) if You do not promptly pay renewal and recharge Fees.

iii. If:

- a. Your Credits are exhausted, You must recharge them by paying another Prepaid Credit Fee in order to be able to resume Your use of the Services;
- b. Your Subscription expires, is terminated, or is suspended by Us under clause 14(e), any unused Credit will be forfeited without refund; and
- c. You renew Your Subscription (by paying the Subscription Fee at the required time), any unused Credits will roll over and be available for use in the new Subscription Term.

- iv. **(Support Services)** Where You register for or request Support Services, if You use them, You must pay the applicable Support Services Fees (in arrears).

b) Fee Conditions

- i. Fees are quoted in Australian dollars;
- ii. Fees are non-refundable;
- iii. Subscription Fees are based on annual periods that begin on the Subscription commencement date and each anniversary thereof;
- iv. Fees may be changed after the expiry of the initial Subscription Term, if You continue to use the Services after such expiry. If there is any change to the Fees that will be applicable after the then current Subscription Term, We will send You an email notifying You of that change, at least 90 days before the end of Your Subscription Term. The changed Fees will take effect upon renewal of Your Subscription Term, unless You notify us that You wish to terminate this Agreement, within 30 days before the expiry of the then current Subscription Term (in which case, Your Subscription Term will terminate on such expiry). Otherwise, you must pay the increased Fees from the effective date, and clause 19 (Termination) applies.

c) Invoices

We will invoice You, by sending electronic invoices for Subscription and Prepaid Credit Fees by email, promptly after You have paid them in accordance with clause 14(a).

We will invoice You in arrears for any Support Services You have requested from Us, and which We provided. You must pay the Fees for such Support Services within 7 days.

d) Overdue Fees

If any Fees are not paid by You by the due date, and are not the subject of a bona fide dispute (with You having notified us of the dispute promptly after receipt of the invoice), we may charge You interest at the rate of 1.5% per month on the outstanding

balance. Interest may be charged in respect of an overdue payment from its due date until the date it is paid.

e) Suspension

We may suspend Services to You if:

- Your Credits are exhausted and You do not recharge them by paying a further Prepaid Credit Fee; and/or
- You do not pay Your Subscription Fee on time.

If You do not pay Your Subscription Fee on time, any remaining Credits will be forfeited. To resume Your use of the Services again You must:

- Pay the Subscription Fee; and
- Recharge Your Credits, by paying a further Prepaid Credit Fee.

We may also terminate this Agreement for your breach, in accordance with clause 19.

If any other Fees (including Support Service Fees) are not paid by You within 30 days of the due date, and are not the subject of a bona fide dispute (again, with You having notified us of the dispute promptly after receipt of the invoice), We may suspend Our Services to You until such Fees and any interest applied under clause (d) are paid in full. We may also give notice of material breach under clause 19(a)(i).

f) Legal Fees

Upon request by Us, You shall pay all of Our reasonably incurred legal fees and other costs (on a full indemnity basis) incurred by Us in attempting to collect such overdue Fees from You.

## 15. Taxes

Unless stated otherwise, the amounts payable under this Subscription Agreement are exclusive of the Australian Goods and Services Tax (where applicable). You acknowledge that it is Your responsibility to pay any sales tax, goods and services tax, value added tax, or similar tax arising from this Agreement which becomes due in any jurisdiction. If You are required by any law to pay withholding tax on the monies payable to Us under this Agreement, the total amount of the monies payable to Us under this Agreement will be increased by an amount such that the amount which You will in fact pay to Us after the deduction of withholding tax is equal to the amount stated as being payable to Us under this Agreement.

## 16. Modification of Terms

We reserve the right to modify the terms and conditions of this Agreement or Our policies relating to the Services at any time on reasonable grounds (including to accommodate changes to the Services (subject to clause 10(b)) or to comply with or implement changes in laws or new schemes implemented by or on behalf of Government authorities). Subject to any required modifications beyond our control, which may require a shorter notice period, We will send You an email notifying You of modifications at least 90 days before the modification becomes effective. The modifications become effective upon the earlier of the following occurring: (a) as soon as you accept them, as prompted as an action option, when You log-in to our Website; or (b) the end of any notice period We notified to You.



If you not accept the modified terms You may terminate this Agreement by providing Us with at least 30 days' written notice, but no refund for any pre-paid Fee will be provided to you. This termination right is in addition to clause 19 (Termination).

## 17. Liability

- a) To the fullest extent allowed by law, neither party (nor its directors, servants, agents, licensors and other suppliers), is liable for any lost data, lost profits, revenues, savings or opportunity, interruption of business, or any indirect, special, incidental, or consequential damages of any kind, regardless of the form of action, whether in contract, tort (including negligence), strict liability or otherwise, even if aware of the possibility of such damages in advance.
- b) Subject to paragraph (c) below, to the fullest extent allowed by law, each party's entire liability under or in connection with this agreement (regardless of the form of action, whether in contract, tort (including negligence), strict liability or otherwise) shall not exceed in aggregate, the total amount paid by you under this agreement in the 12 months preceding the incident that gave rise to such liability.
- c) The limitation of liability in paragraph (b) above will not apply to:
  - (i) Your obligation to pay Fees when due and payable under this agreement;
  - (ii) any breach of privacy or confidentiality (in each case, that does not occur because of a security breach, in circumstances where the party has complied with its obligations under this agreement in respect of security);
  - (iii) liability under the indemnities in clause 20, provided that liability under sub-paragraphs (ii) and (iii) of this clause 17(c) will not exceed in aggregate (regardless of the form of action, whether in contract, tort (including negligence), strict liability or otherwise) \$1m; and
  - (iv) Your liability for breaching Our Intellectual Property rights.
- d) For the purposes of this clause 17, a party is, or will be taken to be, acting as agent or trustee on behalf of and for the benefit of its directors, servants, agents, licensors and other suppliers.
- e) Neither party will be liable under or in connection with this agreement (including for negligence and/or under an indemnity) for any loss, damage or claim to the extent caused or contributed to by the other party's (or any of its Users') negligence, wilful misconduct or breach of this agreement.

## 18. Force majeure

Neither party will be liable to the other for any delay or failure to perform any obligation under this Agreement (except for a failure to pay Fees) if the delay or failure is due to events which are beyond the reasonable control of such party, including any strike or other labour problems (other than those involving the party's employees), blockade, war, act of terrorism, civil unrest, riot, pandemic, flood, fire, earthquakes or other acts of God, failure or diminishment of utilities (including electricity) or of telecommunications, data or payments networks or services (including Third-party Services), or acts of government (including refusal of approval or a license by a government agency). The party affected must notify the other party as soon as possible of such circumstance.

## 19. Termination for breach and without cause

- a) **(Termination for Breach)** A party may terminate this Agreement with immediate effect where the other party:

- i. materially breaches any of its obligations under this Agreement and fails to remedy such breach within 14 days of receiving written notice of the breach;
  - ii. becomes insolvent, makes any assignment in or proposal under bankruptcy law, or makes any other assignment for the benefit of creditors;
  - iii. has a receiver appointed (except for the purposes of reorganisation or amalgamation); or
  - iv. passes a resolution for or become subject to a winding up order.
- b) **(Termination for Convenience)** You may terminate this Agreement for convenience at any time after expiry of the initial 12 months of Your Subscription Term by giving Us 90 days' written notice prior to the end of a Subscription Term, in accordance with clause 6, and paying Us any outstanding Fees for the remainder of Your Subscription Term.
  - c) **(Your Termination Duties)** Upon receiving notice of termination of this Agreement from Us, You must:
    - i. cease using the Services from the effective date of termination and delete all copies of any electronic documentation and scripts You received from Us relating to the Services; and
    - ii. pay all Fees and which are payable to Us as at the date of termination. Termination will not relieve You of the obligation to pay any Fees due to Us prior to termination. Termination of this Agreement will not limit Our pursuit of any other remedies available to Us.
  - d) **(Your Data)** You are responsible for ensuring that You maintain Your own records. You will not be permitted any access to the Services after the effective date of termination. However, subject to you paying Support Services Fees, We will provide You with a download of Your Data, if requested by You within 60 days of the effective date of termination. We shall have no obligation to maintain or provide any of Your Data to You after 60 days. After 60 days We will, as far as permitted by law and to the extent practicable, delete all of Your Data in Our possession or under Our control.

## 20. Intellectual Property Rights

- a) All Intellectual Property rights in the Services and the technology used to provide the Services (including the Software, System, Website, Web Portal and any materials We provide to You under this Agreement) are owned by Us and will not be transferred to You under this Agreement.
- b) You must not copy, modify, create derivative works from or otherwise infringe Our Intellectual Property rights in, any part of the Services or the technology used to provide or documentation relating to the Services except as expressly permitted by this Agreement.
- c) Subject to applicable copyright laws, You will exclusively own the Intellectual Property rights in Your Data that is created by You as part of Your use of the Services. You must ensure that You have all necessary rights to provide Us with access to Your Data and to transmit it through, or upload it onto, the Service. You grant Us a licence to use Your Data to the extent required for Us to provide the Services, to maintain our System used to provide the Services and to enforce these Terms.
- d) The Intellectual Property rights in any feedback, comments, suggestions or enhancement requests, You may provide regarding Us, Our Systems, or the Services are given on an entirely voluntary basis and We will be free to use such

feedback, comments suggestions or enhancement requests as We see fit and without any obligation to You. The Intellectual Property rights in any such feedback, comments, suggestions or enhancement requests are assigned by You to Us from the time of their submission to Us.

- e) We will indemnify You against any amount You are finally ordered to pay to a third party by a Court of competent jurisdiction (or settlement agreed by Us) which arises from a claim alleging that Your use of the Services in accordance with this Agreement infringes the Intellectual Property rights of that third party (although always excluding any Intellectual Property rights in any open source components embedded in our System).

As a requirement to this indemnity, You must:

- i. provide Us with sole control of the defence under the indemnity and all reasonable assistance and co-operation; and
- ii. use all reasonable efforts to mitigate Your loss arising from the alleged infringement claim.

We are not liable to You under this indemnity if the claim relates to infringement of a patent caused by Your combination of the Services with other infrastructure and processes, and which would not have arisen solely through use of the Services.

- f) You will indemnify Us against any amount We are finally ordered to pay to a third party by a Court of competent jurisdiction (or settlement agreed by You) which arises from a claim alleging that Our access to or use of Your Data in accordance with these Terms infringes the Intellectual Property rights, confidentiality rights or privacy of that third party. As a requirement to this indemnity, We must:
- i. provide You with sole control of the defence under the indemnity and all reasonable assistance and co-operation; and
  - ii. use all reasonable efforts to mitigate Our loss arising from the alleged infringement claim.
- g) The indemnities under this clause are each party's exclusive remedy and liability for infringement of third party Intellectual Property rights.

## 21. Confidentiality

Each party must hold the other's Confidential Information in confidence, and not use or disclose such Confidential Information other than

- a. as required for performance of its obligations or the proper exercise of its rights under this Agreement, or
- b. as allowed by this clause. A party may disclose any of the Confidential Information to:
  - i. its professional advisers, bankers, financial advisers, financiers and insurers, provided those persons undertake to keep Information disclosed confidential;
  - ii. comply with any applicable law or requirement of any governmental agency; or
  - iii. any of either party's employees or Trading Partners to whom it is necessary to disclose the Information for purposes consistent with this Agreement, provided that those persons undertake to keep the Information confidential.

Where Confidential Information is disclosed as a result of a legal compulsion, the party making the disclosure must notify the

Disclosing Party in writing prior to the disclosure, giving the Discloser reasonable opportunity to challenge the need for disclosure.

## 22. Subcontractors

We may use the services of subcontractors for performance of Services under this Agreement, provided that We remain responsible for:

- a) compliance of any such subcontractor with the terms of this Agreement; and
- b) for the overall performance of the Services as required under this Agreement.

## 23. Assignment

Neither party may assign or otherwise transfer their rights or obligations under this Agreement without the prior written consent of the other party, which must not be unreasonably withheld.

## 24. Waiver

Failure by either party to exercise or enforce any term of this Agreement will not be deemed a waiver of enforcement of that term or any other term. Other than as stated in this Agreement, the remedies provided are in addition to any other remedies available to a party at equity or law.

## 25. Entire Agreement

This Agreement constitutes the entire agreement of the parties with respect to its subject matter and supersedes all prior agreements, communications, representations and understandings related to its subject matter. No amendment or waiver of any provision of this Agreement shall be effective unless made in writing and either signed or accepted electronically by the party against whom the amendment or waiver is to be asserted.

## 26. Governing Law

Each party agrees that this Agreement is governed by and will be construed in accordance with the laws of the State of Victoria, Australia, and is subject to the exclusive jurisdiction of the courts of Victoria and of the Commonwealth of Australia. The 1980 United Nations Convention on Contracts for the International Sale of Goods does not apply to this Agreement.

## 27. Enforceability

Any provision of this Agreement that is prohibited or unenforceable in a jurisdiction is ineffective and will be severed from this Agreement relation to that jurisdiction only, to the extent of the prohibition or unenforceability. That does not invalidate the remaining provisions of this Agreement nor affect the validity or enforcement of that provision in any other jurisdiction.

## 28. Survival

The following clauses will survive termination or expiration of this Agreement: Clauses 3, 5, 8, 11 to 15 (inclusive), 17, 18, 19, 20, 21, 26, 27, this clause 28 and clause 29.

## 29. Notices

(a) Any notice to be given under this Agreement by Us will be sent by e-mail to the email address You provide for registration (or otherwise as updated on our Website), and You must direct any notices to Us to Our email address below. Subject to (b) below,

notices will be deemed to have been received by the addressee upon the sender receiving confirmation from the addressee or the addressee's computer system of successful transmission. The contact details for Us are as follows:

Phone: +61 3 8622 0200

Email: [sales@messageXchange.com](mailto:sales@messageXchange.com)

Web: [www.messageexchange.com](http://www.messageexchange.com)

Address: Level 3, 488 Bourke St Melbourne, Vic 3000 Australia

(b) Further to clause 11(a), You are responsible for keeping your email address up to date. Any notices sent to You, using the latest Email address You have provided to Us, will be deemed to be have been received by You regardless of whether We receive confirm that there has been a successful transmission.



Level 3, 488 Bourke St  
Melbourne VIC 3000  
Australia

1300 769 414

[sales@messageexchange.com](mailto:sales@messageexchange.com)

[messageexchange.com](http://messageexchange.com)