

MessageXchange PS Terms and Conditions

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Information
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Professional Services Terms & Conditions





MessageXchange Professional Services Agreement

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 do not reasonably cooperate with us in a professional and courteous manner, we may suspend our performance of our obligations to you under this Agreement.
2. **Continued Payment Due:** You must still pay us any amounts due under Order Forms if anything in point 1 occurs.
3. **Deemed acceptance:** If you do not notify us of any Defect in a Deliverable within 20 Business Days of the Deliverable being delivered to you (other than due to our delays), the Deliverable will be deemed to be accepted and no remedies will be available to you.
4. **Remedy for Defect options:** Remedy options are at our discretion, and include replacement or modification of the Deliverable, the issue of a credit or a fair refund to you.
5. **Payments** Except as specified in these terms or an Order Form, payments are non-refundable and non-cancellable. You may only terminate this Agreement or an Order Form if you have a right to terminate for our breach or insolvency. If you terminate an Order Form, all payments up to the date of termination will become immediately due and payable (ie there will not be the usual 30 day period for you to pay an invoice).
6. **Warranties:** We exclude, as far as we are able to do at law, all warranties for Deliverables under this Agreement. To the extent that law prevents exclusion, our liability will be limited to: repairing or replacing impacted goods, reperforming impacted services, or paying the cost of doing so.
7. **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, in aggregate, the amounts actually paid by you to us under an applicable Order Form. We will also not be liable to you for loss of use or data, loss of profits or revenue or indirect and consequential loss.
8. **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 ours is (under point 7(b)7.b above).
9. **Privacy:** We may disclose personal information (that You provide to us) to third parties We use to help Us provide the Deliverables (where they need that information to do so). The information as disclosed to them may enable them to identify you or your customers.

PART 1: INTRODUCTION

- A. This Professional Services Agreement ("Agreement") is between you ("you" or "Customer"), and us. If you are agreeing to this Agreement not as an individual but on behalf of your organisation, then "Customer" or "you" means your organisation, and you (as an individual) are binding your organisation to this Agreement and represent and warrant that you (as an individual) have all necessary authority to do so.
- B. "**us, we or our**" means eVision Pty Ltd (ABN 73 076 521 161), trading as MessageXchange.
- C. This Agreement sets forth the terms under which we will provide you with certain professional services described in order forms (including online orders) referencing this Agreement ("**Order Forms**" and such services, "**Professional Services**"). This Agreement also includes any of our policies or documents attached to or referenced in this document, as well as any Order Forms entered into by the parties. You agree that, unless otherwise agreed in writing, your purchase of Professional Services is not contingent upon the delivery of any future functionalities or features of our services and is not dependent upon any oral or written public comments made by us with respect to future functionalities or features.
- D. This Agreement is separate from our Terms of Use ("**Terms of Use**") regarding the use of services available from the website www.messageexchange.com or which we otherwise provide to you under the name "eVision" or "MessageXchange", including our mobile applications, premium services, APIs, email notifications, applications, buttons, and widgets ("**MessageXchange Services**") and any content or information, text, graphics, photos or other materials uploaded, downloaded or appearing on or in relation to the MessageXchange Services (collectively referred to as "**Content**").
- E. 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 Form 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.
- F. In this Agreement, "Business Day" means a day other than a Saturday, Sunday or public holiday in the capital city of the jurisdiction whose law governs this Agreement under clause a)i.i.12 (Governing Law).
- G. ***This Agreement does not have to be signed in order to be binding on you. You accept its terms by clicking on any "I***

agree" (or similar button) that is presented to you at the time of your order (if placed online) or by signing an Order Form.

PART 2: PROFESSIONAL SERVICE TERMS

1. Services and Deliverables

We agree to use diligent efforts to render the Professional Services by the delivery dates specified on the applicable Order Form, if any, and as reasonably amended by us in writing if you cause any delays, including delays in providing us with a signed Order Form and/or delays in any milestone date(s)). Subject to Section 5 (MessageXchange Services) below, any reports, documentation or other deliverables provided by us to you as part of the Professional Services are "**Deliverables**".

We grant you a worldwide, perpetual, irrevocable, non-exclusive, non-transferable (except to a successor by way of merger, reorganization or sale of assets), royalty-free licence to use and modify such Deliverables solely for your internal business purposes (except as otherwise contemplated by the Order Form and any purpose specified for use of the Deliverables under it) in connection with the applicable MessageXchange Services.

2. Your Materials and Obligations, including Cooperation

You agree to provide us with reasonable access to your materials, personnel, data, or content to the extent such access is necessary for the performance of Professional Services (collectively referred to as "**Customer Materials**"). To the extent that you do not timely provide the foregoing access required for us to perform the Professional Services or deliver the Deliverables, we will be excused from performance until such items are provided.

You own and will retain ownership (including all intellectual property rights) in and to Customer Materials (subject to our ownership of all intellectual property rights in any underlying MessageXchange Services, Content, service descriptions, documentation, and underlying technology (together, "**MessageXchange IP**"). You grant us a worldwide, non-exclusive, non-transferable (but sublicensable to subcontractors), royalty-free licence to use, modify and create derivative works from such Customer Materials solely for the purpose of providing the Professional Services and any applicable MessageXchange Services to you. You must ensure that you have all necessary rights to provide us with access to Customer Materials and to transmit it through, or upload it onto, applicable Deliverables.

We are not responsible for any delays due to changes in scope, scheduling or relevant requirements requested by you unless you and we specifically consent to such changes in writing. In addition, each party agrees to (and will procure that its employees, subcontractors and agents will) reasonably cooperate with those of the other party in a professional and courteous manner in the performance of their duties under this Agreement. Either party may suspend performance hereunder immediately upon written notice should the other party's employees, subcontractors or agents fail to act accordingly.

3. Acceptance

You shall have 20 Business Days after delivery of any Deliverable ("**Acceptance Period**") to test the Deliverable(s) to ensure that they meet your requirements, as set out in the relevant Order Form.

The Acceptance Period will include the first component below (in aggregate with the second component) if it is applicable to your Deliverable(s). Otherwise, the Acceptance Period will consist of just the second component:

1. System integration testing ("**SIT**"), which we perform with you;
2. User acceptance testing ("**UAT**"), which you perform with your trading partner(s), and which we may support if requested by you.

If you notify us in writing of any deficiencies in such Deliverable ("**Defects**") during the Acceptance Period, with all available details regarding the alleged Defects, we will use commercially reasonable efforts to promptly cure any such Defects within a reasonable time from the date you notified us in writing of the Defects, subject to you co-operating with us in assessing the nature and extent of the defects, and to find a suitable remedy.

If we cause any delays in SIT or UAT, the Acceptance Period will be extended by an equal amount of Business Days.

If a Defect(s) are needs more than 3 Business Days to provide a cure ("**Significant Defect**"), the Acceptance Period will begin again upon our delivery of a cured Deliverable to you.

Notwithstanding the above, remedy options, at our discretion, include replacement or modification of the Deliverable(s), the issue of a credit or a fair refund to you.

If you fail to notify us of any Defects in any Deliverable within the Acceptance Period, and in the manner described above, such Deliverable shall be deemed accepted at the end of the Acceptance Period, and we will have no obligation to remedy any Defect in the Deliverable, except to the extent the Deliverable is subject to a fully paid up support agreement between the parties.

4. Ownership of Deliverables; Feedback; Intellectual Property Rights.

We own and will retain ownership (including all intellectual property rights) in and to the MessageXchange IP, the Deliverables and any modifications, improvements and derivative works thereof (including any such materials to the extent incorporating any Feedback, but excluding any Customer Materials). Any feedback, comments, suggestions, ideas, description of processes, or other information to us about or in connection with the MessageXchange Services, Deliverables or Professional Services, including without limitation any ideas, concepts, know-how or techniques contained therein (together, "**Feedback**") provided by Customer are given on an entirely voluntary basis and we will be free to use such Feedback as we see fit and without any obligation to you. You assign the intellectual property rights in any such Feedback to us at the time of submission.

You must not copy, modify, create derivative works from or otherwise infringe our intellectual property rights in any part of the Deliverables unless expressly permitted by this Agreement.

We will indemnify you against any amount that 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 a Deliverable 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 any Deliverables). For this indemnity to be available, you must:

- i. provide us with sole control of the defence and settlement of the claim 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 intellectual property caused by your modification of the Deliverables or combination of the Deliverables with other infrastructure and processes, and which would not have arisen solely through use of the Deliverables as provided by us.

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 Customer Materials in accordance with this Agreement infringes the intellectual property rights, confidentiality rights or privacy of that third party. For this indemnity to be available, we must:

- iii. provide you with sole control of the defence and settlement under the indemnity and all reasonable assistance and co-operation; and
- iv. use all reasonable efforts to mitigate our loss arising from the alleged infringement claim.

The indemnities under this clause are each party's exclusive remedy and liability for infringement of third party intellectual property rights.

5. MessageXchange Services

For the avoidance of doubt, the rights to and delivery and use of any MessageXchange IP is governed by the terms of the Terms of Use and not the terms of this Agreement, and, even if listed in an Order Form, no MessageXchange IP (including any MessageXchange Services' updates, upgrades, patches and bug fixes) will be considered a Deliverable under this Agreement. You acknowledge that the Professional Services are purchased separately.

6. Payment.

You will pay us the amounts and at the times set forth on the applicable Order Form, as may be amended in accordance with clauses 1 (Services and Deliverables) and 3 (Acceptance). You agree to reimburse us for pre-approved travel, lodging and meal expenses incurred in the course of performing the Professional Services at any location other than our site, unless otherwise specified on the Order Form (including any data sheet incorporated therein by reference).

We will:

- a) invoice you (by sending you an electronic invoice) for amounts due under Order Forms and expenses incurred; and
- b) at your request and expense, provide copies of receipts for such expenses.

All payments are non-refundable and all payment obligations non-cancellable unless otherwise specified on an Order Form. You must pay invoiced amounts without set-off or deduction within 30 days from the date of our invoice. You will be responsible for all taxes, withholdings, duties and levies in connection with the Professional Services. Upon termination of an Order Form for any reason, all payments for Professional Services performed up to the date of termination shall be accelerated and become immediately due and payable. Any late payments shall be subject to a service charge equal to 1.5% per month of the amount due or the maximum amount allowed by law, whichever is less.

Upon request by us, you will pay all of our reasonably incurred legal fees and other costs (on a full indemnity basis) incurred by us in attempting to collect any overdue payments from you.

Unless stated otherwise, the amounts payable under this Agreement are exclusive of 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.

7. Term and Termination.

- a) The "**Effective Date**" of this Agreement is the date on which you accept the terms of this Agreement in accordance with paragraph G of Part 1 (where references to the order form are to your first Order placed).
- b) This agreement will continue until terminated in accordance with this clause 7. The term of each individual Order Form will be specified in that Order Form, or if not specified, will run from the date the Order Form is signed, until the work under it has been completed and all Deliverables accepted (which to avoid doubt, includes Deliverables deemed accepted under clause 3 (Acceptance)).
- c) Either party may terminate this Agreement or any Order Form if the other party:
 - i. fails to cure any material breach of this Agreement within thirty (30) days after written notice of such 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);
 - iv. passes a resolution for or become subject to a winding up order;

- d) Clauses 1 (Services and Deliverables), 4 (Ownership of Deliverables; Feedback; Intellectual Property Rights), 5 (MessageXchange Services), 6 (Payment), 8 (Warranty Disclaimer), 9 (Limitation of Liability), 10 (Confidential Information and Privacy), 11 (Dispute Resolution), 12 (Governing Law), 16 (Contact) and 17 (General), and this clause 7d) will survive any termination or expiration of this Agreement.
- e) Unless termination is for Customer's breach, Customer's right under clause 1 (Services and Deliverables) to use Deliverables will survive so long as Customer has a valid right under the Terms of Use to use the applicable MessageXchange Services and provided that Customer remains in compliance with the applicable use restrictions and confidentiality obligations in clauses 1 and 10 of this Agreement.

8. Warranty Disclaimer.

All services and deliverables are provided "as is" and we expressly disclaim, to the fullest extent possible under applicable law, any and all 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) repairing or replacing impacted goods; or
- b) reperforming impacted services; or
- c) paying the cost of doing so.

9. LIMITATION OF LIABILITY

9.1 Exclusion of liability for Consequential Damages. To the fullest extent allowed by law, neither party (nor our suppliers) shall be liable for any loss of use, lost data, lost profits or revenues (except on the fees due and payable), savings or opportunity, failure of security mechanisms, 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 informed of the possibility of such damages in advance.

9.2 Liability Cap. Subject to clause 9.4 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 amounts actually paid by you to us for the professional services under the relevant order form.

9.3 Benefit held in trust. For the purposes of this clause 9, we are, or will be taken to be, acting as agent or trustee on behalf of and for the benefit of our subcontractors and suppliers.

9.4 Exclusions from cap: The limitation of liability in clause 9.2 above will not apply to:

- (i) your obligation to pay amounts under Order Forms when due and payable under this Agreement;

(ii) any breach of privacy or confidentiality;

(iii) liability under the indemnities in clause 4 (Intellectual Property),

provided that liability under sub-paragraphs (ii) and (iii) of this clause 9.3 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.

9.5 Proportionate liability and mitigation. Neither party will be liable under or in connection with this Agreement (including under an indemnity) for any loss, damage or claim to the extent caused or contributed to by the other party's negligence, wilful misconduct or breach of this Agreement. Each party will use all reasonable efforts to mitigate its loss arising from any breach of (or event to which any indemnity applies under) this Agreement.

10. Confidential Information and Privacy

Each party must hold the other's Confidential Information in confidence, and not use or disclose such Confidential Information other than (i) as required for performance of its obligations or the proper exercise of its rights under this Agreement, (ii) as disclosed to a party's subcontractors (where permitted by this Agreement) and/or professional advisers, including legal, financial, and insurance advisers, provided those persons undertake to keep disclosed information confidential; or (iii) as allowed by this clause 10.

"Confidential Information" means all confidential or proprietary information disclosed orally or in writing by one party (or its agent or subcontractors) to the other (or its agent or subcontractors) that is identified as confidential or the confidential nature of which is reasonably apparent due to the nature of the information disclosed and the circumstances surrounding the disclosure.

The Deliverables and any software, documentation or technical information provided by us (or our agents or subcontractors) will be deemed our Confidential Information without any marking or further designation. The nondisclosure obligation of the party receiving Confidential Information ("**Receiving Party**") from the other party shall not apply to information which the Receiving Party can document:

- a) was rightfully in its possession or known to it prior to receipt of the Confidential Information;
- b) is or has become public knowledge through no fault of the Receiving Party;
- c) is rightfully obtained by the Receiving Party from a third party without breach of any confidentiality obligation; or
- d) is independently developed by employees or subcontractors of the Receiving Party who had no access to such information.

The Receiving Party may also disclose Confidential Information of the other party if so required pursuant to a regulation, law or court order (but only to the minimum extent required to comply with such regulation or order and with sufficient advance notice (where

possible) to the Disclosing Party to allow it to object to the disclosure requirement).

Each party must comply with the *Privacy Act 1988* (Cth) when accessing, collecting, storing, using or otherwise handling personal information (including when making it available to the other party). The parties must also ensure that their personnel (including subcontractors) do so.

11. Dispute Resolution

- a) If any dispute arises out of or relates to this Agreement, either party may notify the other of the dispute, outlining the details of that dispute ("**Dispute Notification**"). The parties shall then consult and negotiate with each other in an attempt to reach a solution satisfactory to both parties.
- b) If the parties do not resolve the dispute within 20 Business Days after the time of receipt of the Dispute Notification (or such further period as may be agreed in writing), either party may refer the dispute to final and binding arbitration administered by the Institute of Arbitrators and Mediators Australia ("**IAMA**"), conducted in private in Melbourne (unless otherwise agreed in writing between the parties), and in accordance with the arbitration rules developed by IAMA (including as to appointment of the arbitrator(s)).
- c) The parties will bear their own costs of the arbitration and will each bear half the costs of the arbitrator(s).
- d) Notwithstanding the foregoing, either party may immediately bring a proceeding seeking preliminary injunctive relief which shall remain in effect until a final award is made in the arbitration.
- e) Despite the existence of a dispute, each party must continue to perform its obligations under this Agreement, including payment for any amounts due under an Order Form, unless those obligations are the subject of the dispute.

12. Governing Law

The terms of this Agreement will be governed by the laws of Victoria, Australia and the parties submit to the exclusive jurisdiction of the Courts of Victoria and Federal Courts of appeal.

13. 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 but not limited to any strike, blockade, war, act of terrorism, riot, natural disaster, pandemic, failure or diminishment of utilities (including electricity) or of telecommunications or data networks or services, or 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.

14. Subcontractors

We may use the services of subcontractors for performance of Professional 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 Professional Services as required under this Agreement.

15. Assignment

You may not assign this Agreement without our prior written consent (which consent will not be unreasonably withheld), provided that the assignee agrees to be bound by the terms and conditions contained in this Agreement. We may assign our rights and obligations under this Agreement in whole or in part without your consent. Any permitted assignee shall be bound by the terms and conditions of this Agreement.

16. Contact

If you have any questions about this Agreement, please contact us at:

Phone: +61 3 8622 0200

Email: sales@messageexchange.com

Web: www.messageexchange.com

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

17. General.

- a) No Order Form or other document that purports to modify or supplement this Agreement will add to or vary the terms of this Agreement. This Agreement, including all Order Form(s), is the entire agreement between you and us relating to the Professional Services and supersedes all prior or contemporaneous oral or written communications, proposals and representations with respect to the Professional Services or any other subject matter covered by this Agreement.
- b) If any provision of this Agreement is held to be void, invalid, unenforceable or illegal, the other provisions shall continue in full force and effect.
- c) No supplement, modification, or amendment of this Agreement shall be binding, unless executed in writing by a duly authorized representative of each party to this Agreement.
- d) As used in this Agreement, "including" (and its variants) means "including without limitation" (and its variants).
- e) If either party to this Agreement breaches any provision of this Agreement relating to Confidential Information or intellectual property rights, there may not be an adequate remedy available solely at law; therefore, an injunction, specific performance or other form of equitable relief or monetary damages or any combination thereof may be sought by a party to this Agreement.
- f) No failure or delay by a party to this Agreement in exercising any right, power or privilege hereunder shall operate as a waiver thereof, nor shall any single or partial exercise thereof preclude any other or further exercise thereof or the exercise of any right, power or privilege hereunder at law or equity.
- g) The parties are independent. This Agreement shall not be construed as constituting either party as a partner of the other or to create any other form of legal association that would give one party the express or implied right, power

or authority to create any duty or obligation of the other party.

- h) Any notice to be given under this Agreement by us will be sent by e-mail to the email address you provide in your Order Form, and you must direct any notices to us to our email address in clause 16 (as may be updated by us by written notice). Subject to 17(i) 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.
- i) 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 received by you regardless of whether we receive confirmation that there has been a successful transmission
- j) No rule of construction will apply to the disadvantage of a party merely because that party put forward the relevant drafting or would otherwise benefit from it.



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