

## **SMS Solutions Pty Ltd Standard TERMS**

By requesting SMS Solutions Australia to supply Services to the Account Holder, or by the Account Holder's assent or agreement to these Terms and Conditions of Trade ("Terms"), as evidenced by the Account Holder's signature on this document which incorporates these Terms, the Account Holder agrees that:

- (a) these Terms apply to each Contract and the supply of all Services by SMS Solutions Australia to the Account Holder including, where applicable, the provision of any incidental services under the Contract; and
- (b) these Terms will be or are deemed to be incorporated into, and form part of, each Contract, as if these Terms were set out or implied therein in full.

### **1. INTERPRETATION**

#### **1.1 In these Terms:**

"Amounts Owning" means all amounts owing by the Account Holder to SMS Solutions Australia from time to time including any unpaid part of the Price and any other amounts which SMS Solutions Australia is entitled to recover under any Contract at any time;

"Business Day" means a day upon which trading banks are open for business in Victoria;

"Content" means the content or messages to be made available or sent by the Account Holder to End Users;

"Contract" means any contract between SMS Solutions Australia and the Account Holder for the supply of Services, whether created by electronic mail, order form or by any other means;

"Contract Date" means:

(a) for a Contract arising from an order placed or booked by the Account Holder by email, electronically or by any other means, the date SMS Solutions Australia accepts the order; or

(b) for a Contract arising from a quotation from SMS Solutions Australia, the date SMS Solutions Australia receives written notification of acceptance of the quotation or, if SMS Solutions Australia receives no written notification of acceptance of the pricing schedule, the date SMS Solutions Australia receives any acceptance which SMS Solutions Australia (in its absolute discretion) treats as a valid acceptance;

"Account Holder" means the person(s) described or referred to on the Contract, or if applicable, the person(s) identified as such on any document which incorporates these Terms;

"End User" means the party who receives the requested Content to their mobile phone, computer or other device;

"Event of Default" means any of the following:

(a) the Account Holder fails to comply with the Contract or any other Contract or agreement with SMS Solutions Australia;

(b) the Account Holder is subject to any event which is in the nature of dissolution, winding up, bankruptcy, liquidation, insolvency or receivership, or which generally precedes such an event;

(c) an event occurs or information becomes known to SMS Solutions Australia, which in SMS Solutions Australia's opinion, might materially affect the Account Holder's credit worthiness, or the Account Holder's ability or willingness to comply with its obligations under the Contract or any other Contractor agreement with SMS Solutions Australia;

(d) any guarantor of the Account Holder's obligations under the Contract is in default under any agreement between the guarantor and SMS Solutions Australia;

"Facilities" means SMS Solutions Australia's infrastructure and technology which the Account Holder will connect to in order to access and operate SMS Solutions Australia's services;

"GST" means Goods and Services Tax;

"Message" means text or binary content generated by the Account Holder and received by the mobile telephone, computer or other device of the End User; "Person" includes a body corporate, an association of persons (whether corporate or not), firm or individual;

"Price" means the price of Services agreed between SMS Solutions Australia and the Account Holder, subject to any variation in accordance with these Terms and, unless specifically agreed otherwise in writing, is expressed before the addition of GST and any other applicable taxes and duties;

"Services" means all services at any time supplied by SMS Solutions Australia to the Account Holder or to the Account Holder's order under the Contract; "Restricted Content" means Content that:

- (a) is likely to be, having regard to the contemporary attitudes of Australian society, offensive to reasonable adults;
  - (b) is likely to be, having regard to the contemporary attitudes of Australian society, unsuitable for minors;
  - (c) promotes, incites or instructs in matters of crime;
  - (d) describes, incites or promotes unlawful sexual activity;
  - (e) promotes or incites violence against any person or group, or incites racial hatred;
  - (f) causes unnecessary alarm, distress or panic;
  - (g) breaches a code of practice that applies to the Service;
  - (h) is false, misleading or deceptive, or likely to mislead or deceive;
  - (i) provides financial advice to any person;
  - (j) is out of date, having regard to information generally available, subsequently published, or released, or made available; and
- "SMS Solutions Australia" means SMS Solutions Pty Ltd;

1.2 Headings do not affect the interpretation of these Terms.

1.3 A reference to an enactment includes that enactment as amended or substituted and includes any regulations made under that enactment.

1.4 A reference to any party under these Terms includes that party's successors and permitted substitutes and assigns.

### **2. PRICE AND PAYMENT**

2.1 The Price is SMS Solutions Australia's current price for the Services as at the Contract Date or the Price quoted by SMS Solutions Australia.

2.2 By agreement payment for the Services will be made by either

(a) pre-authorization of credit card or by pre-authorization bank direct debit; or

(b) in arrears on 14 days terms from invoice date.

2.3 All expenses, costs, fees and disbursements incurred by SMS Solutions Australia in recovering or attempting to recover the Price and any other amounts payable under these Terms shall be recoverable from the Account Holder as part of the Price.

2.4 Whenever SMS Solutions Australia provides Keyword Customer List Build Services, resulting in new customer SMS records being created, the Account Holder shall pay the deferred payment fee of 180cents per record on download.

2.5 The Account Holder agrees that SMS Solutions Australia's records are conclusive evidence of the Account Holder's order and the basis for determining all amounts owing.

2.6 Prepaid SMS Credits expire, without refund, if the account is terminated for any reason, including late payment of any amounts due.

2.7 SMS Solutions Australia reserves the right to review the Price at any time and from time to time. If, following any such review, there is any change to the Price that change will take effect 30 days after the date on which SMS Solutions Australia gives notice to the Account Holder of such change.

2.8 Prices quoted per SMS are for delivery of a single standard SMS. The Global Standard for a single SMS is up to 160 characters long. SMS messages can be longer than this, up to 1,000+ characters, but the price increases when the message length exceeds 160 characters.

### **3. CONTRACT**

3.1 The rights, powers and remedies provided for in the Contract (including these Terms) are in addition to, and do not limit or exclude (or otherwise adversely affect), any right, power or remedy provided to Australia by law.

3.2 The Account Holder's obligations to pay amounts (other than the Price) incurred to SMS Solutions Australia prior to termination under these Terms shall be continuing and separate obligations which will survive termination of the Contract and any payment of the Price.

3.4 The Account holder can receive a full download of the database subject to payment of 50cents per record.

3.5 This Contract can be cancelled by either party to the contract by giving not less than ninety days prior written notice of cancellation.

### **4. TAXES AND DUTIES**

Unless expressly included in the quotation from SMS Solutions Australia, the Price will be stated before the addition of GST and any other taxes and duties charged or levied in connection with the supply of the Services to the Account Holder. GST and all such other taxes and duties will be charged to and borne by the Account Holder (in each case, at the rate applicable at the date of any relevant invoice).

### **5. LATE PAYMENT**

5.1 If the Account Holder fails to pay any Amounts Owing on the due date for payment SMS Solutions Australia shall, without prejudice to any other rights or remedies available to it at law:

- (a) Be entitled to treat any such failure as a repudiation of the Contract by the Account Holder and cancel any Contract in full or in part;
- (b) Expire any unused SMS Credits without refund.
- (c) Be under no obligation to deliver any Services to the Account Holder;
- (d) Be entitled to charge the Account Holder default interest at the rate of 1.5% per month on a cumulative basis on all overdue amounts (including on a daily basis on any monies due but unpaid) such interest to be calculated from the date of payment is due and the parties agree that such a default interest is not a penalty but is a true measure of damages incurred by SMS Solutions Australia.

### **6. DELIVERY**

6.1 SMS Solutions Australia accepts no responsibility for delay in delivery of Services caused by circumstances beyond SMS Solution Australia's control.

6.2 Delivery is deemed to occur when the device receives the service.

### **7. LIABILITY**

7.1 SMS Solutions Australia will not be liable for:

- (a) failure to deliver the Services by a specified date;
- (b) an event beyond SMS Solutions Australia's control;
- (c) any negligence, misrepresentation or other act or omission by SMS Solutions Australia or its agents;
- (d) any loss or damage resulting directly, or indirectly from any of the above;
- (e) any loss of business or profits, or any consequential, indirect or special loss, damage or injury whether arising under the Contract, in tort, in equity or otherwise.

7.2 Despite anything else, any liability of SMS Solutions Australia arising under the Contract, in tort, in equity or otherwise, will not exceed the Price of the Services in relation to which the liability has arisen.

### **8. DEFAULT**

8.1 If an Event of Default occurs, and without prejudice to any other rights, powers or remedies SMS Solutions Australia may have:

- (a) SMS Solutions Australia may suspend or terminate the supply of Services to the Account Holder and any of its other obligations under the Contract (and any other Contract), or cancel all or any part of any order with the Account Holder which remains unperformed;

(b) all Amounts Owing shall immediately become due and payable notwithstanding that the due date for payment has not arisen.

8.2 SMS Solutions Australia will not be liable to the Account Holder for any loss or damage the Account Holder suffers because SMS Solutions Australia exercises any rights, powers or remedies after the occurrence of an Event of Default including under this clause.

### **9. PATENTS AND COPYRIGHT**

9.1 Copyright in all technical information provided by SMS Solutions Australia concerning the Contract is vested in SMS Solutions Australia.

9.2 If the Services are to be supplied to the Account Holder's design, the Account Holder warrants that the supply of the Services by SMS Solutions Australia will not infringe any patent, copyright, registered design or other rights of any other person. The Account Holder agrees to indemnify SMS Solutions Australia against any liability it incurs (including any costs and expenses) as a result of any claim that the supply of the Services by SMS Solutions Australia infringes any patent, copyright, registered design or other rights of any other person.

9.3 The Account Holder agrees that SMS Solutions Australia's software is protected by copyright and trademark and remains the property of SMS Solutions Australia and may not be copied without prior consent in writing from SMS Solutions Australia.

9.4 SMS Solutions Australia will withdraw all services should it have reason to believe that the Account Holder has been, or has been attempting to undermine the Intellectual Property Rights of SMS Solutions Australia.

### **10. CONFIDENTIALITY**

10.1 SMS Solutions Australia shall keep confidential any information sent by the Account Holder.

10.2 The Account Holder does not prevent SMS Solutions Australia from disclosing the existence of this Contract for the purposes of marketing SMS Solutions Australia to current and future clients.

10.3 SMS Solutions Australia has the unconditional and irrevocable right to disclose the identity and address of the Account Holder in the event of any complaint received from any regulatory or governmental body or licensed Carrier, in connection with the Content offered by the Account Holder.

### **11. PRIVACY**

SMS Solutions Australia expectation is that our Customers should NOT upload or add any identifying or personal data to the SMS Solutions platform - specifically: including data that includes 'sensitive information', 'health information', 'credit information', 'employee information', or 'tax file information' as defined by the Australian Privacy Act 1988.

If any customer decides to add any identifying or 'Sensitive' information to the SMS Solutions platform, they must inform us (at admin@smssa.com.au) beforehand.

The parties acknowledge that SMS Solutions Australia may from time to time receive or have access to personal information in connection with the performance of this Agreement. As such, SMS Solutions Australia agrees to:

11.1 Comply with all Privacy Laws including but not limited to the Privacy Act 1988 and the Privacy Amendment (Notifiable Data Breaches) Act 2017;

11.2 Perform its obligations under this Agreement in compliance with the Privacy Law;

11.3 Only use the Personal Information provided by The Account Holder for the purposes of performing its obligations under this Agreement;

11.4 Deal with the Personal Information in accordance with the Account Holder's reasonable instructions, including a request from the Account Holder to permanently destroy or de-identify the data;

11.5 Take reasonable steps to protect the personal information held by

it under this Agreement from misuse, interference and unauthorised access, modification or disclosure;

11.6 Unless expressly prohibited by law, notify The Account Holder as soon as reasonably practicable after it becomes aware that it may be required by law to use or disclose and personal information provided to it by The Account Holder under this Agreement;

11.7 Immediately notify The Account Holder if it becomes aware of a breach or potential breach by it and cooperate with The Account Holder to address any such breach; and

11.8 Ensure that it does not communicate with any third party, unless required by law, regarding any such breach or potential breach related to The Account Holder data, without the prior written consent of The Account Holder.

## **12. ACCOUNT HOLDER OBLIGATIONS**

12.1 The Account Holder agrees to comply with any instructions concerning access to and/or use services that SMS Solutions Australia may give to it from time to time and agrees not to do anything that may jeopardise the security or integrity of any part of SMS Solutions Australia's systems or platforms.

12.2 The Account Holder accepts responsibility for all aspects of their Account, including the actions of all persons in possession of the Account Holder's username and password.

12.3 The Account Holder agrees not to transmit any information or material that violates State or Federal law, or transmit any material that is in contravention to any privacy or copyright rules or any other proprietary interest.

12.4 Without limiting the operation of Clause 11.3, the Account Holder agrees not to use or seek to use SMS Solutions Australia's service for publishing, reproducing or advertising any message, information, symbol or other communication which is offensive or abusive or of an indecent, obscene or menacing character or for the purpose of causing annoyance, inconvenience or needless anxiety to any person, or for any unlawful purpose.

12.5 The Account Holder agrees that the SMS Solutions Australia service is to be used solely for the provision of general information to End Users – and provision of Restricted Content is specifically prohibited. The Account Holder acknowledges that SMS Solutions Australia may audit messages from time to time and that a breach of this clause may result in the immediate cancellation of the contract.

12.6 The Account Holder agrees not use access to SMS Solutions Australia's services, connections, or facilities to:

12.7 circulate or send any unsolicited or unauthorised marketing, publicity or advertising material message to any person (including a message that is designed to promote goods or services ("Marketing Message")) unless that person has consented to receiving the Marketing Message, has a means to opt-out of receiving such a Marketing Message and the Marketing Message clearly identifies the source or originating entity of the Marketing Message;

12.8 transmit computer worms or viruses;

12.9 access any other SMS Solutions Australia computer systems or networks without SMS Solutions Australia's consent or disrupt or damage any SMS Solutions Australia computer systems or network;

12.10 forge any messages; or

12.11 send any obscene, sexually explicit, abusive or defamatory material or material that violates any Commonwealth, State, Territory or local law or regulation or is contrary to the Guidelines.

12.12 In accordance with the Australian Communications Industry Forum ("ACIF") Industry code and the Australian SPAM Act 2003, the Account Holder agrees that they will not send marketing messages to any person unless:

12.13 the recipient has first consented to receiving the marketing message and

12.14 the recipient has been provided with a means to opt-out of receiving the marketing message and

12.15 the source of the marketing message is clear.

## **13. END USER COMPLAINTS**

13.1 If an End User makes an enquiry about Content to SMS Solutions Australia, SMS Solutions Australia may refer it to the Account Holder for resolution. The Account Holder must then resolve this enquiry within one (1) Business Day. If after SMS Solutions Australia's referral that End User makes another enquiry about Content to SMS Solutions Australia, SMS Solutions Australia may again refer it to the Account Holder and the Account Holder must resolve the enquiry within a further one (1) Business Day of that second referral, and provide written confirmation to SMS Solutions Australia that the matter has been resolved.

13.2 SMS Solutions Australia will assist the Account Holder in resolving an End User complaint.

## **14. ASSIGNMENT AND CHANGE OF NAME ETC**

14.1 The Account Holder may not assign any of the Account Holder's rights or obligations under the Contract without SMS Solutions Australia's prior written consent.

14.2 SMS Solutions Australia may assign any of SMS Solutions Australia's rights under the Contract without the Account Holder's consent.

14.3 The Account Holder must give SMS Solutions Australia not less than fourteen days prior written notice of any proposed change in the Account Holder's name and/or any other change in the Account Holder details (including, but not limited to, changes in the Account Holder's address, facsimile number, trading name or business practice).

## **15. REVIEW OF TERMS**

SMS Solutions Australia reserves the right to review any of these Terms at any time and from time to time. If, following any such review, there is any change to these Terms that change will take effect 30 days from the date on which SMS Solutions Australia gives notice to the Account Holder of such change.

## **16. GOVERNING LAW**

16.1 The Contract and these Terms are governed by the law of Victoria.

16.2 In the event that any provision of this Contract proves to be illegal or unenforceable that provision is deemed to be omitted from this Contract without affecting the legality of the remaining provisions. The remaining provisions of this Contract shall continue in full force and effect.



SMS Solutions Pty Ltd. ABN: 25 123 177 382  
6/25 Claremont St, South Yarra, Vic 3141. Ph: 03 8640 0905  
Email: [enquiries@smssa.com.au](mailto:enquiries@smssa.com.au)  
Web: [www.smssolutionsaustralia.com.au](http://www.smssolutionsaustralia.com.au)

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