

## 1. Definitions

In this Agreement:

"*Additional Charges*" means charges which arise over and above the stated fees, consisting of

- i. Additional items for additional work undertaken on a time and materials basis for the customer.
- ii. Additional charges from mobile carriers or any Regulatory Body incurred by Dialogue in connection with the use of the Services by the Customer.

"*Agreement*" means the contract formed when Dialogue, in its absolute discretion, accepts an Order Form submitted by the Customer and agrees to provide the Services on the terms contained therein.

"*Codes of Practice*" means any applicable laws, regulations or requirements of any statutory body, guidelines and service requirements of mobile operators as are issued from time to time and any applicable industry standards or codes whether voluntary or not and the Dialogue Guidelines.

"*Consultancy Fees*" means charges arising from the provision of consulting services as outlined in the Order Form.

"*Customer*" means the customer as outlined in the Order Form.

"*Dialogue Guidelines*" means service guidelines as set out at [www.dialogue.net/terms\\_conditions](http://www.dialogue.net/terms_conditions), as amended by Dialogue from time to time.

"*Dialogue Network*" means Dialogue's host computers, network hubs and points of presence, from the moment messages arrive at Dialogue to the point at which Dialogue has managed transfer to the SMSC of a mobile operator.

"*Documentation*" means any documentation describing any Software licensed hereunder or describing or relating to the use of the messaging Services provided by Dialogue to the customer.

"*Licensed Materials*" means any Software and/or Documentation licensed to the Customer under this Agreement.

"*Order Form*" means the form which the customer uses to order services from Dialogue and signs to signify acceptance of these Standard Terms and Conditions.

"*Premium Revenue*" means revenue generated by the Customer using the Services whereby users of the Customer's services incur charges which are collected by Dialogue net of any mobile operator fees for collection, transmission, claw-backs, regulatory fees or fines or payments withheld due to breaches of a Code of Practice.

"*Premium Revenue Tariffs*" means amount of revenue paid to the Customer in relation to Premium Revenue recovered by Dialogue.

"*Regulatory Body*" means any regulatory body that issues or enforces regulations affecting the Services provided under this Agreement included but not limited to the Australian Communications and Media Authority ([www.acma.gov.au](http://www.acma.gov.au)), the Telecommunications Ombudsmen ([www.tio.com.au](http://www.tio.com.au)), the Telecommunications Information Services Standards Council ([www.tissc.com.au](http://www.tissc.com.au)), and equivalent bodies in other regions that govern the use of premium rate standard rate text messaging and multi-media messaging.

"*Service Commencement Date*" means the actual date Dialogue notifies the customer that the services are enabled.

"*Services*" means the Dialogue Messaging Services or consulting services ordered by the customer in the Order Form.

"*Software*" means any software programs which are supplied by Dialogue to the customer.

## 2. Term of Agreement and Commencement of Service

**2.1** This Agreement shall be effective from the Service Commencement Date for a minimum of 12 months ("the Initial Period") unless otherwise noted in the Order Form. This contract may be cancelled any time after the end of the Initial Period by either party giving the other at least 6 months prior written notice.

## 3. Licensed Materials

If Dialogue supplies software to enable the Customer to connect to the Dialogue Network, Dialogue, hereby grants to the Customer a non-exclusive licence to use the Licensed Materials as permitted herein. The Customer may use the software to connect to the Dialogue Network and use in the manner for which it was designed and make copies of the software for the purpose of backup. The customer may not, sell, lease, grant licenses or distribute the software to third parties without the written permission of Dialogue.

## 4. Service Provisions

**4.1** Dialogue will use its reasonable endeavours to provide prompt and continuing Service. The Customer acknowledges and will not hold Dialogue liable for any loss of data resulting from delays, non-deliveries, missed deliveries, or service interruptions caused by events beyond the control of Dialogue or outside the Dialogue Network, or to the extent of errors or omissions of the Customer.

### 4.2 Scheduled Outages

**4.2.1** From time to time certain servers, or the whole or part of the Dialogue Network used by Dialogue to provide the service may be closed down for routine repair or maintenance work. Dialogue or its authorised representative shall give as much notice as in the circumstances is reasonable and Dialogue shall endeavour to carry out such works during the scheduled maintenance periods as published from time to time.

**4.2.2** Mobile carriers may schedule outages of their equipment from time to time. Dialogue will use reasonable endeavours to notify the Customer of any scheduled outages.

**4.3 Customer Warranty**

The Customer warrants and undertakes that it:

- a.** may only use the Service for lawful purposes, and it shall observe all applicable Codes of Practice, and all rules of a Regulatory Body throughout the duration of this Agreement.
- b.** must not (nor shall it authorise or permit any other party to) use the Service or the Dialogue network to receive or transmit material which is in violation of any law, or which is obscene, threatening, menacing, offensive, defamatory, in breach of confidence, in breach of any intellectual property right (including copyright), or otherwise unlawful.
- c.** must not knowingly or recklessly transmit any electronic material (including viruses) through the Service which shall cause or is likely to cause detriment or harm, in any degree, to computer or telephone systems owned by Dialogue, mobile carrier networks or mobile phone users.
- d.** must provide Dialogue with a detailed description of each service that it intends to run in a form required by Dialogue, and provides consent for Dialogue to provide this information to any mobile carrier that the Customer requests to be able to launch services on or any Regulatory Body.

**4.4** The Customer acknowledges that a Regulatory Body or mobile carrier may introduce guidelines, regulations or Codes of Practice that affect existing or new services. The Customer indemnifies Dialogue from any claim where Dialogue must terminate or vary an existing service or decline a new service to comply with any revisions or new requirements.

**4.5** Connections to Mobile Networks: The Service is used by the Customer to link into mobile networks worldwide, and the Customer agrees to conform to Codes of Practice in each territory.

**4.6** SMS Address spoofing: The customer may not send messages purporting to come from a Dialogue mobile address, including short code, virtual mobile number, NUA or SMPP address, unless it is via the Dialogue Network.

**5. Fees and Payment**

**5.1** The Customer shall be liable to pay the fees and charges listed in the Order Form together with any Additional Charges ('Charges').

**5.2** Payment shall be made at the times and in the manner specified below:

- a.** Set up and the first months fees are payable at time of order.
- b.** Message fees must be pre-paid. Dialogue will use reasonable endeavours to notify the Customer if message credit is nil.
- c.** Subsequent monthly charges are invoiced in arrears and payable within 30 calendar days of the invoice date.

**5.3 Premium Revenue**

**5.3.1** The Customer acknowledges that Dialogue may receive Premium Revenue from the mobile carriers generated by the Customer's use of the Services.

**5.3.2** Subject to clause 5.3.3 and 5.3.4, Dialogue will endeavour to ensure any Premium Revenue is claimed from the mobile operators. Dialogue will endeavour to pay the Customer the Premium Revenue Tariffs relating to the use of the Service by the Customer within 5 business days of receipt.

**5.3.3** Dialogue may at its discretion set off any Charges outlined in the Order Form against Premium Revenue Tariff payments due to the Customer.

**5.3.4** If the Customer fails to pay any Charges by the due date and failed to raise a bona fide dispute in regards to the Charges or failed pay any other amount due to Dialogue under this or any other agreement, Dialogue may set off any Premium Revenue Tariff payments due and payable to the Customer against the outstanding amounts.

**5.4** Changes to Premium Revenue Tariffs may be affected by the mobile operators revising their charges (interconnect, ringtone etc. and telephony charges) at any time. Dialogue will endeavour to provide reasonable notice of any revision however reserves the right to vary the Premium Revenue Tariffs immediately by notice.

**5.5** Dialogue reserves the right to make additional charges if in the opinion of Dialogue there is a major change affecting this Agreement occasioned by statute or by government body.

**5.6** Where a change pursuant to clause 5.4 or 5.5 results in an increase in charges or a reduction in Premium Revenue Tariff entitlements, the Customer may terminate the Agreement by 30 days notice only if notice in writing is provided to Dialogue within 24 hours of receipt of the change.

**5.7** Consultancy Fees, where applicable, will be due monthly in arrears, and will be at fixed price or at Dialogue's then current rates on a time and materials basis, as agreed for each project.

**5.8** Dialogue may require that the Customer has entered into a direct debit arrangement before the Service Commencement Date, and Dialogue may suspend Service provision without any liability on Dialogue if Customer refuses to enter into such an arrangement, or cancels that arrangement once commenced.

**5.9 GST:** The fees, charges and revenue provided in this Agreement do not include GST. If a Service or anything else provided under this Agreement are a Taxable Supply the charges and revenue in respect of that Taxable Supply will be increased by the applicable GST rate. Where the Service includes charges incurred or revenue generated outside Australia other taxes may be applicable and will be charged as appropriate. Dialogue must provide a valid Tax Invoice for any charges as required by law.

**5.10** Pursuant to Subdivision 153B of A New Tax System (Goods and Services Tax) Act 1999 as varied or replaced from time to time the parties agree that for the purposes of supply of services and content by the Customer to mobile operator customers, the parties agree that for GST Law only, Dialogue will be treated as making supplies to the mobile operators and the Customer will be treated as making corresponding supplies to Dialogue.

**5.11** In the case of supplies made by the Customer to mobile operator customers for the Premium Revenue, Dialogue will issue recipient created tax invoices in respect of the supplies and the Customer will not issue tax invoices in respect of the supplies.

**5.12** For the purposes of clauses 5.9 and 5.10, each of Dialogue and the Customer warrants that it is registered for GST and each undertakes to inform the other if it ceases to be registered for GST.

**5.13** Dialogue reserves the right to charge interest at 1 per cent above the published lending rate of the ANZ Bank for amounts greater than \$100,000 on any sum not paid on the due date, together with all costs of recovery. Such interest shall run from day to day and accrue until full payment has been made.

**5.14** The Customer is required to notify Dialogue within ten (10) working days of its receipt of an invoice if it has any question, which would lead it to dispute an invoice or part thereof.

**5.15** Whilst the Customer may withhold any disputed payment in respect of the whole or any part of an invoice, it shall not be entitled to withhold any payment of the whole or any part of any invoice properly raised and which is properly due on the ground that it has any dispute over the whole or part of any other invoice, or has an alleged claim, counterclaim or set-off against Dialogue.

**5.16** Dialogue reserve the right to withhold payment of Premium Revenues in the event of complaints which are investigated by a Regulatory Body directly with Dialogue or indirectly with a mobile carrier until the complaint is resolved, and may retain money to pay fines and administrative costs associated with processing the complaint.

## **6. Changes**

Dialogue shall provide the Services which may be varied, modified or extended from time to time by Dialogue.

## **7. Security**

Dialogue reserves the right to alter security measures, including passwords, for the services at any time and advise the Customer of these changes as soon as it is able.

## **9. Confidentiality**

**9.1** The Customer shall treat as confidential all information obtained from Dialogue pursuant to this Agreement and shall not divulge such information to any person without the prior written consent of Dialogue. The foregoing obligations as to confidentiality shall continue to apply notwithstanding the termination of this Agreement.

**9.2** Dialogue may disclose the Customer's confidential information if required to supply the services or in connection to a legal, regulatory or governmental investigation, in respect of legal proceedings or actions to recover debt, or in the prevention, detection or prosecution of a crime or fraud.

## **10. Limitation of Liability**

**10.1** Except as provided in this Agreement, no warranty, expressed or implied, is given or assumed by Dialogue. Services are provided on an 'as is' basis and Dialogue is not liable to Customer or any third party for any inadequacy, lack of merchantability or unfitness for purpose.

**10.2** Notwithstanding any other provision of this Agreement, in no event shall either party be liable to the other for any loss of profit, business data, contracts, revenues, or anticipated savings or any indirect or consequential loss of whatever nature, howsoever caused, whether occurring in contract, tort, negligence, or otherwise.

**10.3** The Customer indemnifies Dialogue against any claim or action made or brought by a third party and any damage, loss, expense or cost Dialogue suffers, incurs or is becomes liable for in connection with the claim or action including but not limited to:

- a.** A breach of the law or the Agreement by the Customer or any of its users of the services.
- b.** Any negligence or unauthorised or fraudulent act or omission of the Customer or its users of the services
- c.** Any action taken or regulatory fees imposed by a mobile operator, Regulatory Body or other third party in relation to the Customers use of the Services or users use of the services provided by the Customer.
- d.** The Customer failing to ensure that it is running services which fully comply with Codes of Practice and the rules of the Regulatory Body.
- e.** The Customer failing to provide Dialogue with full descriptions of their service, including marketing details.
- f.** All losses, Dialogue's and those of the Customer and other customers, arising from short codes becoming barred as a result of the Customer failing to adhere to Codes of Practice and the rules of the Regulatory Body.
- g.** Termination of the Agreement due to the Customer's breach of any obligation or clause of this Agreement.

**10.5** Without prejudice to any term of the Agreement, Dialogue's aggregate liability in contract, tort or otherwise arising in connection with the Agreement is limited to in respect of each unconnected or series of connected events over a period of 12 months is the lower of the Charges paid by the Customer during that period or \$10,000.

**10.6** To the extent permitted by law, Dialogue limits any liability it may have under the Trades Practices Act (1974) arising in connection with this Agreement which cannot be excluded, at its option, to:

- a. The re-supply of the service;
- b. Payment of the cost to re-supply the service;
- c. Refund of the charge to supply the service.

#### **11. Patents, Trademarks and Intellectual Property Rights**

**a.** The Customer acknowledges that any and all of the trademarks, trade names, copyrights, patents and all other intellectual property rights used or embodied in or in connection with the provision by Dialogue of the Licensed Materials and the Services are and shall remain the sole property of Dialogue and/or its licensors.

**b.** The Customer shall indemnify Dialogue fully against all liabilities of any nature whatsoever, including (without limitation) all costs and expenses which Dialogue may incur as a result of the Customer's infringement of any patent or other proprietary right of any third party provided that the Customer is given, insofar as it can be, immediate and complete control of any such claim, that Dialogue does not prejudice the Customer's defence of such claim and that Dialogue gives the Customer all reasonable assistance with such claim (for which the Customer shall reimburse all costs or expenses properly incurred by Dialogue in providing such assistance), and the Customer shall pay all damages and costs finally assessed against the Customer or Dialogue or payable by Customer or Dialogue in relation to such infringement. The Customer shall not have any liability to Dialogue to the extent that any infringement or claim thereof is based (a) on activities or information provided by Dialogue; and/or (b) on following specifications of Dialogue.

#### **12. Relationship of the Parties**

**a.** In the performance of its obligations hereunder, each party hereto will at all times be an independent contractor, and this Agreement shall not constitute, or be deemed to constitute, either party as being the agent, partner or joint venture partner of the other.

**b.** The Parties undertake on behalf of themselves and their employees, agents and permitted subcontractors that they will keep confidential and will not use for their own purposes (other than fulfilling their obligations under this Agreement) nor without the prior written consent of the other disclose to any third party any information of a confidential nature relating to the other (including, without limitation, any trade secrets, confidential or proprietary technical information, trading and financial details and any other information of commercial value) which may become known to the other under or in connection with this Agreement. Confidential information will be designated as such when transmitted; if on written support, the word confidential shall be displayed in a prominent place. In case of oral transmission, Confidential Information will be identified in writing within 30 days of disclosure. This clause shall not apply to any such information which either Party can show is public knowledge or was already known to it at the time of disclosure (without restriction as to disclosure or use) or subsequently becomes public knowledge other than by breach of this Agreement or subsequently comes lawfully into its possession from a third party who was not restricted from disclosing it. If an administrative body or a court under proceedings asks for such information, the Parties shall contact each other in order to limit together possible adverse effects of such disclosure. Both Parties shall return to the other all confidential information of the other in written or tangible form or on any other media on the termination of this Agreement. The terms of this clause shall survive the expiry or earlier termination of this Agreement and any agreed renewal of this Agreement.

#### **13. Inconsistency**

Where there is an inconsistency between the Standard Terms and Conditions and the terms contained in the Order Form, the Order Form prevails to the extent of the inconsistency.

#### **14. Injunctive Relief**

Because a party's breach of any of its obligations hereunder may irreparably harm the other and/or its licensors and substantially diminish the value of the proprietary rights of the other and/or its licensors, the parties hereto each agree that if they breach any of their obligations the other party shall, without limiting its other rights or remedies, be entitled to seek equitable relief (including but not limited to injunctive relief) to enforce the obligations of the party in breach hereunder and to protect the other's and/or its licensors' proprietary rights.

#### **15. Force majeure**

Neither party shall be liable to the other for any breach of its obligations hereunder resulting from any cause beyond its reasonable control including but not limited to fire, strikes, delays in transportation, inability to obtain supplies, hostilities, regulations of any civil or military authority. The party whose performance is affected by force majeure shall use all reasonable efforts to avoid or overcome the causes affecting performance as soon as it becomes practical to do so.

## **16. Termination & Suspension of Service**

**16.1** Without prejudice to any rights accrued to Dialogue, Dialogue may immediately suspend access to the Services or in part, or disconnect a service at any time if:

- a. Dialogue reasonably considers the Customer may be in breach of the Agreement.
- b. The Customer's use of the Service is subject to a complaint by a user.
- c. Requested by a Regulatory Body or a mobile operator.
- d. Any technical failure within the Dialogue Network affecting the Services or failure in any mobile operator network or system relied upon for the delivery of the Services.

**16.2** The Customer remains liable to pay any Charges despite any suspension or disconnection of the Services under Clause 15.1.

**16.3** This Agreement may be terminated immediately:

- a. By Dialogue by written notice to the Customer if the Customer fails to pay any sum due hereunder within seven (7) calendar days of the due date.
- b. By Dialogue by written notice to the Customer if the Customer is in breach of Codes of Practice or the rules of the Regulatory Body.
- c. By either party by written notice to the other if the other commits any breach of any term of this agreement (other than one falling within a or b. above) and which (in the case of a breach capable of being remedied) shall not have been remedied within thirty (30) calendar days of a written request to remedy the same or within such other time as may be expressly provided herein; and
- d. By either party by written notice to the other if the other shall convene a meeting of its creditors or a proposal for any other composition scheme or arrangement with (or assignment for the benefit of) its creditors or that tends to show the other is insolvent or if a trustee, receiver, administrator or similar officer is appointed in respect of all or any part of the other's business or assets or if a petition is present or the suspension or termination of the other's business activities.

**16.4** Without limitation to Dialogue's rights at law or under the Agreement to recover damages upon the termination of the Agreement under Clause 15.3, the Customer must immediately pay any Charges current at time of Termination.

**16.5** The provisions of Clauses 3, 5, 9, 10, 11, 13, 15, 16, 18, 21 and 22 shall survive termination of this Agreement.

**16.6** Upon termination of this Agreement, howsoever caused, the Customer shall immediately stop all use of any Licensed Materials (if any) and use of Services provided by Dialogue and promptly return to Dialogue (or at Dialogue's option destroy and certify in writing to Dialogue that it has destroyed) the original and all copies of any Licensed Materials, including but not limited to all archival copies, compilations, translations, partial copies, updates, and modifications, if any, and delete all copies of any such items from the Customer's computer hardware and any other hardware or storage facilities.

## **17. Notices**

Any notice of termination, breach or other notice of a legal nature, or any other correspondence required to be given by either party under this Agreement shall be written and will be in writing and delivered by hand, facsimile, receipt requested email or by post to the addressee at the address provided in the Order Form or as notified in writing. Notice shall be effective on delivery to the recipient or production of a facsimile report or email receipt confirmation prior to 4pm or 9am on the following business day if delivered after 4pm.

## **18. Invalidity and severability**

If any provision of this Agreement is held invalid, unenforceable or illegal, this Agreement remains otherwise in full force apart from that provision, which is deemed deleted. The parties hereby agree to attempt to substitute for an invalid or unenforceable provision a valid or enforceable provision that achieves to the greatest extent possible the economic, legal and commercial objectives of the invalid or unenforceable provision.

## **19. Entire agreement and Amendment**

**19.1** This Agreement between Dialogue and the Customer constitutes the entire agreement between the parties and supersedes all prior communications, representations and agreements relating to the subject matter, whether written or oral, and supersedes all prior written or oral agreements relating to that subject matter.

**19.2** Dialogue reserves the right from time to time, by notice in writing of not less than 30 days, to issue to the Customer variations to these terms and conditions. Variations shall be binding on the Customer unless the Customer notifies Dialogue to the contrary in writing, in which case the original notice issued by Dialogue pursuant to this clause 19.2 shall be deemed to be notice of termination pursuant to clause 16.3.

**20. Assignment and Sub contract**

The Customer shall not be entitled to assign this Agreement (or any part thereof) nor all or any of its rights and obligations hereunder nor sub-license the use (in whole or in part) of the Licensed Materials. Dialogue shall be entitled to subcontract any part of this Agreement but such shall in no way reduce Dialogue's liability to the Customer hereunder. Dialogue in its absolute discretion may assign part or whole of this agreement to a related body corporate.

**21. Press, Publicity and Public Announcements**

Neither party shall make any press statement, publicity statement or announcement nor publish or actively participate in any article concerning the subject matter of this Agreement without advising the other party hereto and agreeing with the other the content of such. However, shortly after entering into this Agreement Customer consents to agreeing with Dialogue a brief statement, which Dialogue may issue on or shortly after the Service Commencement Date. Dialogue may later request Customer to agree to more detailed statements, but shall only produce such after the Customer's agreement thereto. The foregoing shall not prevent basic disclosure by either party in accordance with financial, investment or auditing disclosures required by law or regulatory authorities, nor disclosure by Dialogue of message content or sender details as may be required by law or regulatory authority.

**22. Waiver**

A party may not waive any of its rights under this agreement except in writing. A waiver by either party does not prejudice the rights of that party for any subsequent breach. A failure or delay to take action for breach does not constitute a waiver.

**23. Law**

The construction, validity and performance of this Agreement shall be governed by and will be construed according to the laws of New South Wales. Each party submits to the exclusive jurisdiction of the courts of New South Wales.

Signed on behalf of the customer:

Name:

Date:

Signed on behalf of Dialogue:

Name:

Date: