



# Smartpay Hardware and Services Agreement

Terms and Conditions

# Smartpay Hardware and Services Agreement Terms and Conditions

Smartpay Limited ("**Smartpay**") agrees to provide you with the equipment ("**Equipment**") and services ("**Services**") described on the ASB Accept Application Form (together "**Products**") on the terms and conditions set out in these terms and conditions.

By signing the ASB Accept Application Form you agree to comply with these terms and conditions ("**Agreement**").

## 1. Equipment

- 1.1. Smartpay will arrange for delivery of the Equipment as soon as reasonably possible following the date you sign the ASB Accept Application Form ("**Effective Date**").
- 1.2. You are lessee of the Equipment. Nothing in this Agreement confers on you any other right, property or interest in or to the Equipment and you will not assign, mortgage, charge, encumber or permit any security interest to attach to the Equipment or otherwise deal with or part with possession of or control of the Equipment without Smartpay's prior written consent.
- 1.3. Smartpay may at any time swap the Equipment for alternative equipment offering essentially the same functionality.
- 1.4. You agree:
  - a) to take proper care of the Equipment and ensure the Equipment is not lost, stolen, damaged or destroyed;
  - b) not to alter or otherwise tamper with the Equipment or any identifying number or mark on the Equipment;
  - c) to maintain, with an insurer reasonably acceptable to Smartpay, insurance for the Equipment for its full value, not being less than the amount, if any, specified by Smartpay;
  - d) that you will immediately forward any money received from such insurance to Smartpay; and
  - e) that if you fail to maintain insurance in accordance with clause 1.4(c) that Smartpay may itself insure the Equipment and recover the cost from you.
- 1.5. You must not affix the Equipment to land without Smartpay's consent in writing and you agree:
  - a) that the Equipment is personal property;
  - b) to grant Smartpay, where the Equipment has become affixed to land, an interest in and right of entry to such land for the purposes of removing the Equipment; and
  - c) to obtain an acknowledgement from all mortgagees of the land and, if you are not the owner of the land, from the land owner that the Equipment is personal property and not a fixture.
- 1.6. Smartpay can charge you for repairs to or replacement of any Equipment that is lost, damaged or destroyed while it is in your care.
- 1.7. You must return the Equipment immediately when this Agreement expires or is terminated.

## 2. Services

- 2.1. Smartpay will provide the Services to you at the times shown on the front of the ASB Accept Application Form, but excluding public holidays in Auckland.

## 3. Customer Obligations

- 3.1. In addition to your other obligations under this Agreement, you must do everything reasonably required by Smartpay to

facilitate the provision of the Products, including but not limited to:

- a) permit and facilitate access to relevant sites and equipment;
- b) provide or pay Smartpay for any spare parts, materials, and other consumables required by Smartpay; and
- c) make all relevant operational and technical documentation for the equipment available to Smartpay while Smartpay is performing the Services.

- 3.2. You authorise Smartpay to, on your behalf, make such arrangements with network service providers as Smartpay may determine necessary to install the Equipment or carry out the Services.

## 4. Fees and Payment

- 4.1. You agree to pay the fees for the Products ("**Fees**") to ASB Bank Limited in accordance with the Credit Card Merchant Services Agreement General Terms and Conditions between you and ASB Bank Limited.

## 5. Warranties and Indemnities

- 5.1. Except as expressly provided otherwise in this Agreement, and to the maximum extent permitted by law, Smartpay excludes all express or implied warranties or representations in relation to the Products.
- 5.2. You agree that the Products are acquired for business purposes and that the Consumer Guarantees Act 1993 does not apply to the Products provided under this Agreement.
- 5.3. You agree to indemnify Smartpay against damage, loss or theft of the Equipment.
- 5.4. If you receive any Product under this Agreement provided by a third party supplier to Smartpay then you agree to comply with that third party supplier's terms and conditions relating to the supply of that Product and indemnify Smartpay against all loss, costs or damage suffered or incurred by Smartpay as a result of your failure to comply with such terms and conditions.

## 6. Limitation of Liability

- 6.1. In no event will Smartpay be liable (whether in contract, tort including negligence, or otherwise):
  - a) for loss of revenue or profit, loss of anticipated savings, loss of goodwill or opportunity, loss of production, loss or corruption of data or wasted management or staff time; or
  - b) loss, damage, cost or expense of any kind whatsoever that is indirect, consequential, or of a special nature, arising directly or indirectly out of this Agreement, even if Smartpay had been advised of the possibility of such damages, and even if such loss, damage, cost or expense was reasonably foreseeable by Smartpay.
- 6.2. Subject to clause 6.1, the maximum liability of Smartpay to you arising out of any and all claims under this Agreement, or relating to the Products, will not in any circumstances exceed the Fees actually paid for the Products to which the claim relates.

## 7. Termination and Renewal

- 7.1. This Agreement will come into force on the Effective Date and will expire on the date that your Merchant Services Agreement with ASB Bank Limited expires or, if no expiry date is stated, will continue until terminated.
- 7.2. Where this Agreement and your Merchant Services Agreement with ASB Bank Limited expires, but you intend to continue use of any of the Products, or substantially similar products from another supplier, you agree to renew this Agreement provided Smartpay can match or better the price offered to you in writing by any third party for the same or substantially similar products to the Products you require on an ongoing basis.

- 7.3. Notwithstanding termination or expiry of this Agreement, your obligations under this Agreement will continue in full force and effect until Smartpay agrees, in its sole discretion, that the Equipment has been returned in good working order.
- 7.4. Smartpay may terminate this Agreement:
- a) in the case of a material breach of this Agreement by you, immediately by notice in writing;
  - b) where you become insolvent, are declared bankrupt or you have applied for entry to or you have been admitted to the no asset procedure under the Insolvency Act 2006, immediately by notice in writing;
  - c) an order is made by the Court, or you pass a resolution, for the winding up of your business, or a receiver, administrator or similar officer is appointed in respect of any of your assets; or
  - d) in any case, by giving you at least three months notice in writing.
- 8. General**
- 8.1. PPSA: Smartpay may register a financing statement under the Personal Property Securities Act 1999 ("PPSA") over the Equipment and you will do everything reasonably required by Smartpay to enable such registration.
- 8.2. Contracting out of the PPSA: You agree, under s107 of the PPSA, that you waive your right under s116, to receive a copy of any verification statement, under s119, to recover any surplus, under s114(1)(a), to receive notice about the sale of secured goods, under s120(2), that Smartpay intends to retain collateral, under s125, not to have goods damaged should Smartpay remove an accession, under s129, to receive notice of intent to remove an accession, and under s131, to apply to the court for an order in relation to our removal of an accession.
- 8.3. Assignment: Smartpay may, at its sole discretion assign or novate its rights and obligations to a third party, including any purchaser of Smartpay's business, and you agree to do everything necessary to effect that assignment or novation. Smartpay may also engage third parties to fulfil any of its obligations under this Agreement. You may not assign any of your rights or obligations under this Agreement without Smartpay's permission in writing.
- 8.4. Force majeure: Neither party will be liable to the other for any breach of, or failure to perform, any of its obligations under this Agreement where such breach or failure is caused by anything beyond that party's reasonable control, including (without limitation) war, civil commotion, hostility, act of terrorism, strike, lockout, other industrial act, weather phenomena or other act of God, or governmental regulation or direction.
- 8.5. Variations: Smartpay may vary this Agreement from time to time and the varied Agreement will become effective immediately when it is provided to you.
- 8.6. Waiver: No failure or delay by either party to exercise any right or remedy under this Agreement will be treated as a waiver of such right or remedy. No single or partial exercise of any right or remedy will prevent the further exercise of such right or remedy.
- 8.7. Severability: If any provision of this Agreement is held invalid, unenforceable or illegal for any reason, this Agreement will remain otherwise in full force apart from such provisions, which will be deemed deleted.
- 8.8. Entire agreement: This Agreement contains the whole of the contract and understanding between the parties relating to the matters covered by it. This Agreement supersedes all prior representations, agreements, statements and understandings between the parties relating to those matters, whether verbal or in writing.