

# STANDARD FORM OF AGREEMENT AUGUST 2017



## Definitions

1. In this agreement: "Agreement" means the agreement between us and you for the provision of products and/or services, which comprises these General Terms, the Application Form, applicable Service Schedule(s), and any New Orders; "Application Form" means an application lodged by you for provision of Services and accepted by us; "AUP" means our acceptable use policy as published on our website and as may be amended from time to time; "Australian Consumer Law" means the Australian Consumer Law as contained in the Competition and Consumer Act 2010 (Cth); "Business Hours" means 08:30 to 17:30 Monday to Friday in Victoria (excluding days which are bank holidays); "Charges" means the purchase price for any Purchased Equipment and all charges for a Service as notified to you, as may be amended by us in accordance with this Agreement; "Customer Data" means data owned or generated by the Customer, where such data consists of or is a derivative of data relating to the Customer, its customers or its business. Customer Data expressly excludes any material comprising the Services, our data and our intellectual property; "Customer Equipment" means any equipment or facility in your possession, ownership or control of other than Service Equipment; "Defined Abuse" includes misuse of the Service including: (a) giving an unauthorized person your account and password details; (b) deliberately or recklessly disrupting our service; (c) using the Service in an unlawful manner; (d) using the Service to menace or harass others; (e) using the Service to obtain unauthorized access to any network; or (f) as otherwise reasonably determined by us; "General Terms" means the terms contained in this document; "GST" has the same meaning as in the A New Tax System (Goods and Services Tax) Act 1999 (Cth); "Implied Term" means a term implied into this Agreement by consumer protection legislation and which such legislation prohibits from being excluded, restricted or modified, including for example guarantees provided under the Australian Consumer Law; "New Order" means an order by you for additional products or services pursuant to clauses 21 - 23; "Privacy Policy" means our privacy policy as published on our website and as may be amended from time to time; "Purchased Equipment" means the equipment, as set out in the Application Form, a Service Schedule or a New Order, to be supplied by us to you; "Serious Breach" means a breach of clause 18; "Service" means a service to be provided by us to you pursuant to this Agreement, as set out in the Application Form, a Service Schedule or a New Order; "Service Equipment" means any equipment, facility or associated software used by us or any of our suppliers in relation to a Service; "Service Levels" means the service levels (if any) applicable to a Service, as set out in the Service Schedule relating to that Service; "Service Schedule" means any schedule relating to any Service (which may include a service description, Charges, service levels and any terms applicable to that Service); "we, us, our" means Spark Connect Pty Ltd ACN 154 707 310, its successors and assigns; "you, your" means the customer named in the Application Form, its successors and assigns.
2. In this Agreement unless the context otherwise requires: (a) headings are for convenience only and do not affect interpretation; (b) the singular includes the plural and vice versa; (c) no rule of construction applies to the disadvantage of a party because that party was responsible for the preparation of this Agreement; (d) an agreement on the part of two or more persons binds them jointly and severally.

## Services

3. This Agreement commences when we accept (in our discretion) your Application Form and continues for the period specified in the Application Form (or, where applicable, a Service Schedule in respect of a particular Service) or until terminated in accordance with its terms. We shall be under no liability to you or any other person for any delay in the commencement of Services.
4. We agree to perform and you agree to acquire the Services on the terms of this Agreement in consideration for the Charges.
5. We will provide a fault reporting service for the Services, accessible during Business Hours (or otherwise as notified by us from time to time). Unless instructed by us, you may only contact us (but not our suppliers) concerning faults related to the Services. You shall promptly report any faults to us and we may take any action (or non-action) which we consider reasonable.
6. You are responsible for the configuration, operation, performance and security of all equipment and computing resources you use with the Service, including any gateways or other devices you use to connect to the Service.

7. You acknowledge that we may be a reseller of Services provided by one or more wholesale suppliers.
8. For the avoidance of doubt, the Customer Data (including all intellectual property rights in the Customer Data) shall be owned by you. We will return (and if required we will facilitate the return of) Customer Data to you, subject to: (a) all of your accounts first being paid in full; and (b) you paying our reasonable Charges for doing so.

### **Service Levels**

9. The Service Levels shall apply to the Services, subject to the provisions of this Agreement. For the avoidance of doubt, failure by us to meet any Service Levels shall not give you any right or claim against us, including without limitation a right to damages, specific performance or a right of termination of this Agreement, provided that any credit or rebate provided pursuant to the Service Levels shall be the sole remedy available to you.
10. You will not be entitled to a Service Level credit or rebate where our failure to achieve the relevant Service Levels is caused directly or indirectly by, or arises from or in connection with: (a) an event of force majeure; (b) a planned outage; or (c) the exercise of our right to suspend a Service.

### **Purchased Equipment and installation**

11. You agree to acquire and we agree to supply the Purchased Equipment in consideration for the price set out in the Application Form or New Order (as applicable) or as otherwise notified by us to you.
12. We shall install agreed Purchased Equipment and/or Services at a site nominated by you. We may charge you our then current rates (including travel and accommodation expenses) for doing so. We shall use reasonable endeavours to install the Purchased Equipment and/or a Service on or around the installation date requested by you but will not be liable for any loss or damage for failure to do so.
13. You shall prepare the installation site in accordance with our reasonable requirements.
14. The parties may agree from time to time to change the installation site, in which case we shall be entitled to impose an additional charge. To avoid doubt, the provisions of this Agreement shall apply in respect of the new installation site.
15. Title in and over the Purchased Equipment remains with us until payment in full is received.
16. Risk of loss or damage to the Purchased Equipment shall pass to you upon delivery.

### **Service Equipment**

17. In respect of any Service Equipment: (a) the Service Equipment remains the property of us or our supplier; (b) to the extent possible under the terms of your occupation of the premises where the Service Equipment is located, you will allow us to and, where applicable, will ensure that the landlord allows us to, access such premises for the purposes of this clause; (c) we may remove the Service Equipment upon reasonable notice to you; (d) you will not part with possession of the Service Equipment, except to us; (e) you must provide us and our nominees with access to your premises upon reasonable notice to install, inspect, test, modify, maintain, repair, change or recover the Service Equipment; (f) you must ensure that the Service Equipment is not handled, used, maintained, tampered or interfered with by any person, except us or our nominee; (g) if requested by us, you must insure the Service Equipment for an amount and on terms reasonably required by us; and (h) you must return the Service Equipment to us within 14 days of the expiry or termination of this Agreement and, if you do not do so, you shall immediately pay to us the full retail price of the Service Equipment (including the cost of acquiring or renewing any necessary software licences). This clause shall survive termination of this Agreement.

### **Your Responsibilities**

18. You must (and must ensure that all persons who use the Service): (a) ensure there is no unauthorized access to our computer system or network or those of our suppliers; (b) not cause harm or damage to our computer system or network or those of our suppliers; (c) not commit, cause or allow any breach (or do anything which might put us in breach) of any law, regulation, government direction or industry standard or code; (d) not use the Service to breach a person's rights (including committing defamation or infringing a person's intellectual property rights); (e) not commit Defined Abuse; (f) notify us immediately of any security breach (suspected or otherwise) of the Service, or your confidential password or your login; (g) comply with our AUP.
19. You indemnify us and our suppliers from all loss, damage, liability, costs or expenses relating to a breach of clause 18.

20. The Service shall be personal to you and the persons authorized on the Application Form. You must not permit any other person to use the Service and must not re-sell or purport to re-sell the Service.

### **New Orders**

21. You may request additional products and/or services from us and we shall consider the request.
22. We may in our discretion offer to supply such additional products and/or services by giving you a written offer setting out the details and pricing for such additional products and/or services. If you accept that offer, it shall constitute a New Order.
23. A New Order once accepted shall constitute a variation to this Agreement.

### **Charges and Billing**

24. All fees and charges which are known in advance (including without limitation recurring or fixed fees or charges) may be invoiced in advance. All other fees and charges may be invoiced monthly in arrears. You shall make all payments within 14 days of the date of invoice.
25. You must reimburse us on demand the amount of all expenses reasonably and properly incurred in the performance of our obligations under this agreement.
26. You shall pay accounts either by credit card standing authorisation, or on account, which may be paid by credit card, BPAY, electronic funds transfer.
27. Payments made by credit card may be subject to a surcharge to cover merchant fees, which fees will be notified to you at the time of payment.
28. You shall pay a fee of \$20 in addition to any other costs or charges (such as financial institution charges) for each dishonoured transaction.
29. We reserve the right to enforce payment by credit card standing authorisation in the event that your monthly charges on a given account are or are reasonably expected to be below \$250 per month, or in the event that you are consistently late in making payment or if you fail to make any payment within the due date.
30. Failure by you to pay any outstanding amount within 30 days of the date of invoice will, without prejudice to our other rights: (a) be deemed a terminating event or, at our discretion, shall entitle us to suspend all or any of our obligations under this Agreement; and (b) entitle us to charge interest on the unpaid amount at a rate equal to 2% per annum above the rate under the Penalty Interest Rates Act 1983 (Vic) on the first business day following the due date for payment (compounding monthly).
31. If we have agreed to provide a Service for a particular term, then to the extent permitted by law: (a) the whole amount payable for the whole of the term is a debt owing to us as at the commencement of the Service, for which we may bill you even if you cancel the Service before the term ends; and (b) if you cancel the Service before the term ends, you will be liable for the remaining Charges.
32. If we provide a Service for a particular term and allow a discount on payment over that term and you cancel the Service before that term ends, then you shall pay us the full undiscounted amount for the period which has elapsed.
33. In the event your payment of our charges under this Agreement remains outstanding for 45 days or more, we reserve the right to vary or remove any discount previously communicated or provided to you.
34. All Charges are non-refundable. You shall pay the Charges in full without any deduction or set-off whatsoever (including whether or not the Service is used by you or any other person).
35. Unless expressly stated otherwise, all references to consideration (including Charges) relating to this Agreement are exclusive of GST.
36. If we have reason to believe that you may be or become unable to pay for any goods or services in full, we will discuss the matter with you in order to find a means to ensure that full and prompt payment of invoices is not jeopardized. Such means might include, for example, shorter invoicing periods.
37. After we have had such discussions with you, if we reasonably consider that full and prompt payment of invoices might be jeopardized, we may require as a precondition to the supply of any further goods or services that you provide security to us for an amount, in a form and within a timeframe reasonably required by us. Such security may take the

form, at our discretion, of a security bond, bank guarantee, parent company guarantee, director's guarantee, or other security.

38. You may not dispute an invoice or claim a refund for overpayment under this Agreement more than 12 months after date of the invoice to which the disputed amount or alleged overpayment relates.

### **Our Warranties**

39. We will supply the Services with all due care, skill and diligence and all our employees or contractors will be adequately trained to execute their duties in order to satisfy or exceed the obligations contained in this Agreement.

40. Where goods or services are re-supplied from a third party, we will endeavour to pass on to you the benefit of any manufacturer's or supplier's warranty.

### **Your Warranties**

41. You warrant to us that: (a) all products and services acquired under this Agreement are to be used by you solely for the purpose of a business carried on by you and are not to be used for any personal, domestic or household use or consumption; (b) you have not relied on any representation made by us which is not expressly set out in this Agreement; and (c) all information supplied by you in relation to this Agreement is true and correct.

### **Liability**

42. All Implied Terms are expressly included in this Agreement. All other terms which might otherwise be implied into this Agreement, are excluded.

43. Our liability in respect of a breach of an Implied Term relating to the supply of any goods or services is to the full extent permitted by law limited to, at our option: (a) in the case of goods, any one or more of the following: the replacement of the goods or the supply of equivalent goods; the repair of the goods; the payment of the cost of replacing the goods or of acquiring equivalent goods; and the payment of the cost of having the goods repaired; and (b) in the case of services: the supply of the services again; or the payment of the cost of having the services supplied again.

44. Subject to the Australian Consumer Law, you agree that our (and any supplier's) maximum aggregate liability in relation to any claim, loss or damage, whether arising under or in relation to this Agreement, any tortious act or omission (including negligence) or under common law or statute, is limited to the Charges actually paid by you in the six months immediately prior to the relevant event occurring.

45. Subject to sub-section 267(4) of the Australian Consumer Law in relation to an Implied Term, in no event will we or our supplier be liable to you or to any other person for any indirect, special, incidental, consequential, punitive or other like loss or damage whatsoever, loss of profit or loss of data, whether or not such person was advised of the possibility of such loss or damage, in relation to this Agreement.

46. Subject to any law to the contrary and any Service Levels, you: (a) acknowledge and agree that all products and services supplied under or in relation to this Agreement are not suitable for (and are not supplied for the purpose of) supporting any application which needs continuous or fault free service; (b) are responsible for making your own assessment of whether you need continuous and fault free services and obtaining and implementing advice about alternative services suitable for such purposes.

47. You acknowledge and agree that: (a) we shall not be obliged to supply any goods or services on any terms more favourable to you than the terms on which such goods or services are supplied to us; (b) we may at any time impose on you any term, condition, warranty, limitation or exclusion which our supplier imposes on us; (c) if our supplier increases the price at which it supplies any necessary or relevant goods or services to us, we may immediately alter any applicable charges to reflect such increase; and (d) we may immediately suspend or terminate this Agreement without any liability to you if for any reason we no longer acquire any necessary or relevant goods or services from a supplier (including if a supplier suspends or terminates its arrangements with us).

48. You acknowledge, agree and covenant that the limitations of liability provided in this agreement shall apply for the benefit of us and our upstream providers.

### Data Backup and Security

49. The level and degree of data backup and security measures that we take in relation to any single customer depend upon the service options chosen by that customer; each customer must play an active role in determining and maintaining its own data backup and security. You must ensure that appropriate data backup and security measures are taken in relation to your data, having regard to the criticality of the data, including using appropriate firewall and encryption technologies, applying latest security patches, disabling any unnecessary ports, routine backup, having multiple backups and/or redundant backups, archiving your data, and conducting regular security audits.
50. Subject to the service options that you have selected, we aim to comply with or exceed peer industry practice in relation to data backup and security, including in relation to: regular rotating backups; firewalls; encryption; redundancy; access control; and intrusion detection and prevention. Notwithstanding these efforts, however, no data is entirely secure and safe from a breach or failure of data backup and security. Accordingly, whilst we take reasonable steps in relation to data backup and security, we exclude all warranties and disclaim to the full extent permitted by law all liability in relation to data backup and security.

### Suspension and Termination

51. We may immediately suspended or terminate all or part of this Agreement: (a) in the event of a Serious Breach; (b) if the Charges are not paid in accordance with this Agreement or if your payment is refused or dishonoured by your nominated financial institution; (c) if there is a significant change or likely significant change in your financial position including without limitation bankruptcy, insolvency, a winding-up application or the appointment of a receiver or administrator; or (d) if you (being a natural person) die or (being a company) is wound up or (being a partnership or association) is dissolved.
52. We reserve the right to suspend the Services in an emergency if we consider it necessary to do so to safeguard the provision of services to other customers or for any other reasonable reason.

### Transfer of Services and authority

53. You authorise us to act as agent on your behalf as disclosed principal for the purposes of us managing your internet connection or any online resources you are using or may require. We may require you to execute an appropriate authority for such purposes and you agree to execute such authority immediately upon request.
54. You authorise us to sign on your behalf and in your name any form of authority to your current supplier of services and to do all other things necessary to transfer your account into our name.
55. You shall remain responsible (and you indemnify us) in relation to all amounts owing to another supplier for any services supplied by that other supplier, to you.

### Disclosure

56. You consent to us, our employees and agents making such enquiries as we deem necessary to investigate your creditworthiness from time to time including without limitation the making of enquiries of persons nominated as trade referees, bankers or any other credit providers (the "information sources") and you hereby authorise the information sources to disclose to us such information concerning you which is within their possession and which is requested by us. You also consent to us obtaining a credit report from a credit reporting agency containing personal information (as well as information concerning commercial creditworthiness and activities) for the purpose of assessment of an application or for the purpose of the collection of overdue payments in respect of any credit provided by us, as permitted under the Privacy Act 1988 (Cth).
57. You agree that we may give to or obtain from another credit provider, any information derived from a report to assess an application for service, your creditworthiness and your continuing creditworthiness. Items of personal information about you (including information in an Application Form and information arising from the conduct of an account) and permitted to be kept on a credit information file, may be disclosed to a credit reporting agency. For the avoidance of doubt, we may provide to a credit reporting agency details regarding your refusal or failure to pay accounts in accordance with this Agreement.
58. You authorise us to provide personal information to our suppliers to the extent necessary to fulfil our obligations under this Agreement.
59. We may also collect your personal information and use it to provide information about other goods or services which we



or our affiliates may offer.

60. You give your consent to us sending electronic messages (including commercial electronic messages) within the meaning of the Spam Act 2003 (Cth), to you.

## General

61. The terms of this Agreement including without limitation the Charges and the Services are subject to change by us. We shall give not less than 30 days' written notice to you of any changes. In the event that the Services are substantially limited by such changes, you shall be entitled to terminate this Agreement by written notice to us, provided you must pay us for any goods supplied or services performed up to the time of termination.
62. An up-to-date version of the General Terms may be found at our website, [www.sparkconnect.com.au](http://www.sparkconnect.com.au).
63. To the extent required by law, the telecommunications customer service guarantee applies to the Services. Further information may be found at [www.acma.gov.au](http://www.acma.gov.au).
64. In the event of a dispute arising under this Agreement, you may have rights under the Telecommunications Industry Ombudsman scheme. Further information may be found at [www.tio.com.au](http://www.tio.com.au).
65. You do not own or have any legal interest or goodwill in any telephone number, IP address, domain name, PIN or other locator or identifier issued to you ("Public Addressing Identifier"). You acknowledge and agree that the terms of use of any Public Addressing Identifier may be subject to regulatory requirements (including requirements relating to changes to or termination of a Public Addressing Identifier) and we shall not be liable or responsible for the operation or consequences of any such requirement.
66. We are not obliged to review or monitor any of your data, although we may do so if permitted or required by law.
67. Each party must treat as confidential, keep secret and not use or disclose any information relating to the trade secrets, know-how, business practices, network or service configuration, operational or procedural information, charges, discounts or clientele, of the other party. Any such disclosure may only be made with the prior written consent of the other party. Any confidential information must be returned to the other party upon demand and/or at the termination or expiry of this Agreement. This clause shall survive termination of this Agreement.
68. Any provision which by its nature would survive termination or expiry of this Agreement (including without limitation any exclusion or limitation of liability or indemnity in this Agreement) shall survive termination or expiry of this Agreement.
69. The forbearance on the part of a party from exercising any right under this Agreement (including without limitation any right to suspend or terminate all or any part of this Agreement) on the first date it is entitled to do so shall not constitute any waiver of its rights under this Agreement.
70. We will not be responsible for any delay or failure to perform our obligations under this Agreement caused by any act beyond our control including without limitation acts of God, wars, strikes, natural disasters, failures of any other supplier or network operator's services and interruptions to power supply.
71. This Agreement contains the entire understanding and agreement between the parties as to its subject matter. All previous negotiations, understandings, representations warranties (other than warranties set out in this Agreement), or commitments in relation to the subject matter of this Agreement are superseded by this Agreement and shall be of no force or effect whatever and no party shall be liable to any other party in respect to those matters. No oral explanation or information provided by any party to another shall affect the meaning or interpretation of this Agreement or constitute a collateral agreement, warranty or understanding between the parties.
72. We may assign or novate the parties' rights and obligations under this Agreement if such assignment is made as part of a sale or reorganization of all or part of our business and you shall be deemed to consent to such assignment or novation.
73. In the event of any inconsistency between the documents comprising this Agreement, the order of precedence shall be as follows: (a) the Service Schedule(s); (b) any Service Level agreement; (c) these General Terms; (d) the Application Form (or New Order); and (d) any other attachment to these General Terms.
74. If any clause or part of this Agreement is held to be void, illegal or unenforceable for any reason, it shall be deemed to be severed from this Agreement without affecting any other clause or part of this Agreement.
75. We may sub-contract our obligations under this Agreement.

76. Each party must do all things necessary to give effect to this Agreement and any thing contemplated by this Agreement.
77. The person purporting to enter into this Agreement on behalf of a party warrants to the other party that he/she is duly authorized to enter into this Agreement in that capacity.
78. Each party agrees that the laws of Victoria shall govern this Agreement and each party irrevocably submits to the jurisdiction of Victorian courts and tribunals.

**Local Number Portability**

79. Local Number porting is available as an option for customers changing their phone company away from Spark who want to keep their existing numbers.
80. An administrative charge will apply if you wish to port away your local numbers. These charges are as follows:  
First batch (up to 100 numbers) \$840 inc GST; each additional 100 numbers \$387 inc GST