



**POLi™ PAYMENT SERVICES AGREEMENT – AUSTRALIA & NEW ZEALAND
POLi™ DIRECT**

Between

POLi Payments Pty Limited ABN 73 105 393 664 of Level 19, 111 Bourke Street, Melbourne, Victoria, 3000 Australia (**POLi Payments**)

and

the Merchant (whose details are provided as per the POLi Payments merchant sign-up process)

The parties agree:

1 Application.

This Agreement governs the agreement between POLi Payments and the Merchant in connection with the POLi™ Service and any related services. The Merchant's signing this Agreement, using the Software, initiating Transactions using the Software or the POLi™ Service, or accepting payments from customers using the POLi™ Service, shall constitute and evidence the Merchant's unqualified acceptance of this Agreement.

2 Commencement & Term.

This Agreement commences on the Commencement Date, and remains in force for the Initial Term. After the end of the Initial Term, this Agreement will continue in force and either party can terminate this Agreement at any time after the end of the Initial Term without cause, by giving the other party at least 3 months written notice to that effect.

3 Services.

POLi Payments will provide the Merchant with:

- (a) Implementation Services; and
- (b) access to the POLi™ Service using the Software, and Support during the Term.

The Merchant acknowledges that the Implementation Services involve the Merchant (or where specified in the Schedule, POLi Payments or its contractors) integrating the POLi™ Service on the Website and Business Systems.

4 Merchant Obligations.

4.1 Operational Obligations. At all times during the Term, the Merchant will:

- (a) ensure that the Website and Business Systems, and the manner in which the Software and the POLi™ Service are accessed from the Website, comply with the Documentation, and are operated in accordance with reasonable security procedures (including any security procedure contained in the Documentation) to prevent unauthorised access to information, data, the Software or the POLi™ Service;
- (b) only use the Software and POLi™ Service to initiate and process Transactions, in accordance with the Documentation and this Agreement;

- (c) acquire and maintain all equipment, services and software (other than software provided by POLi Payments), and its own banking facilities, as are necessary for the Merchant's customers to access and use the POLi™ Service from the Website;
- (d) ensure that it has sufficient properly trained personnel, who are familiar with the Merchant's obligations under this Agreement and the Website and Business Systems, to maintain the Website and Business Systems and manage Support inquiries;
- (e) keep confidential and safeguard from unauthorised use:
 - (i) any user names and passwords required to access any facility forming part of, or made available while using the POLi™ Service; and
 - (ii) any information that POLi Payments makes available to the Merchant about a Transaction for the purposes of the Merchant providing a refund to the holder of the banking account from which the Transaction was initiated;
- (f) provide POLi Payments and its contractors with reasonable assistance and facilities (including a means of accessing the Business Systems in accordance with agreed protocols, and liaison with the necessary Merchant personnel) in order to permit POLi Payments to provide the Implementation Services and Support;
- (g) provide support to its own customers in relation to the operation and their use of the POLi™ Service (including if POLi Payments requires it, the publication on the Website of a "Frequently Asked Questions" page prepared by POLi Payments, or a link to such a page published by POLi Payments);
- (h) provide POLi Payments with such information and assistance as POLi Payments reasonably requires in respect of Transactions (including failed or attempted Transactions); and
- (i) only use any information that POLi Payments provides to the Merchant about a Transaction, for the purpose of initiating and processing a refund in respect of the Transaction (whether directly to the holder of the banking account from which the original Transaction was initiated, or if POLi Payments agrees, by initiating a Refund Transaction).

4.2 Sales Obligations. The Merchant:

- (a) is responsible for managing and fulfilling all orders for goods or services to which any Transaction relates, including any dispute or issue relating to any transaction, any refund, and any taxes;
- (b) acknowledges that:
 - (i) subject to these terms and conditions; and
 - (ii) upon the receipt of the funds payable for a Transaction (as referred to in sub paragraph (i) above), the Merchant shall, subject to the terms and conditions on which the Merchant contracts with the customer, fulfil any order for goods or services to which any Transaction relates; and
- (c) must not:
 - (i) make any representation in connection with any goods or services or the POLi™ Service that may bind POLi Payments or its contractors;
 - (ii) make any unauthorised representations concerning the Software or the POLi™ Service or POLi Payments products, policies or services;
 - (iii) initiate or process a Transaction on behalf of any other person where the Transaction does not relate to a genuine sale or supply,
 - (iv) initiate or process a Transaction with the knowledge, (or in circumstances where it should reasonably know) that the Transaction is fraudulent or unlawful;

- (v) initiate or process the same Transaction more than once; or
- (vi) initiate or process a Refund Transaction in favour of a person or banking account that is different from the person or banking account from which the original Transaction was originated.
- (vii) charge the end user any additional amounts for the use of POLi without the express written permission of POLi Payments (which will not be unreasonably withheld).

4.3 Legal Obligations. The Merchant must comply with all applicable laws including the *Privacy Act 1988* (Cth), and the *Anti-Money Laundering and Counter-Terrorism Financing Act 2006* (Cth).

5 Changes to Software, POLi™ Service or Documentation.

5.1 From time to time, POLi Payments may make new releases of the Software or changes to the POLi™ Service (a “**Release**”) available to the Merchant, or may notify the Merchant of any change to the Documentation (which it will make available to the Merchant for download, or at POLi Payments option will deliver to the Merchant in electronic or hard copy form). POLi Payments will make Releases available for use by the Merchant as soon as reasonably possible after they become commercially available. Releases may, among other things:

- (a) provide a means of using enhanced or added functionality; or
- (b) remove access to functionality or banking facilities that had previously been available.

5.2 The Merchant will give effect to any reasonable changes necessary (including making any necessary changes to the Website or the Business Systems) to accommodate and utilise the new Release within 30 days of receiving notice from POLi Payments that the Release is available (or a longer period if agreed by POLi Payments). If the Release or the change to the Documentation is intended to improve security or comply with any regulatory requirement, the Merchant must install the Release and effect any necessary changes as soon as reasonably possible.

6 Licence.

6.1 Licence Grant. Subject to the terms of this Agreement, POLi Payments grants the Merchant, and the Merchant accepts, a non-transferable, non-exclusive right to access the Software and the POLi™ Service during the Term, in accordance with the terms and conditions of this Agreement. However that right is subject to the following restrictions:

- (a) the Merchant may only access and use the POLi™ Service for the direct benefit of the Merchant in accordance with the Documentation and this Agreement;
- (b) the Merchant may only access the Software and POLi™ Service from the Website using the Business Systems, and may not access the Software or the POLi™ Service from or in relation to any other website or equipment without POLi Payments prior written consent (which will not be unreasonably withheld);
- (c) except as expressly permitted by this Agreement, the Merchant must not directly or indirectly:
 - (i) encumber any of the rights granted under this Agreement;
 - (ii) grant any party a sub-licence to access the POLi™ Service for any purpose;
 - (iii) distribute or resell access to the POLi™ Service to any person, including by supplying access to the POLi™ Service through bureau service processing (except as permitted in **clause 16.4**);
 - (iv) capture, store, record, monitor, intercept or transmit any information that is input or used by any person initiating a Transaction, that might enable unauthorised access to, or the conduct of unauthorised transactions from, any banking account;
 - (v) export or use any Software outside of the territory of Australia or New Zealand (provided that the accessing and use of the POLi™ Service by a customer of the Merchant that is located outside

of Australia or New Zealand to initiate a Transaction from their account held at a Designated Financial Institution within Australia or New Zealand is permitted); or

(vi) circumvent the operation of the POLi™ Service in any way,

nor will the Merchant encourage, assist, or grant the right or ability to, any other party to engage in similar conduct.

7 Support.

7.1 During the Term, POLi Payments will:

- (a) ensure the conduct of regular checks of the Designated Financial Institutions' websites to ascertain whether they have been changed in a way that affects the operation of the POLi™ Service, and take reasonable steps to alter the POLi™ Service to account for any changes as soon as reasonably possible;
- (b) take reasonable steps to ensure the availability of the POLi™ Service during the hours of operation specified in the Documentation;
- (c) provide the Merchant with a web-based facility, which will be accessible by the Merchant using a username and password issued by POLi Payments, listing Transactions undertaken by end users from the Website, and status information concerning those Transactions, as described in the Documentation; and
- (d) provide the Merchant with telephone, e-mail or internet-based assistance with respect to the POLi™ Service, through the Help Desk facility referred to in **clause 7.2**.

7.2 POLi Payments will make available a Help Desk facility during the hours of operation specified in the Documentation. The functions of the Help Desk facility are as set out in the Documentation, but include:

- (a) telephone or e-mail assistance in relation to: functions and features of the POLi™ Service, Documentation;
- (b) guidance in the operation of the POLi™ Service, and in the installation of any Releases as they are made available; and
- (c) a means for the Merchant to report and be provided with answers to inquiries by the Merchant about problems or issues affecting the POLi™ Service (including changes to Designated Financial Institutions' websites).

7.3 When reporting a problem or issue to POLi Payments, the Merchant will comply with the procedures and provide the information described in the Documentation. If the problem or issue is attributable to the Software or POLi Payments systems, or is attributable to a change in a Designated Financial Institution's website, POLi Payments will use commercially reasonable efforts to rectify that problem or manage its effects, in accordance with the Response Levels.

7.4 POLi Payments is not required to provide support, or may impose an Additional Fee in relation to problems arising out of:

- (a) the Merchant's failure to implement a current Release;
- (b) the Merchant not using the Software or accessing the POLi™ Service in accordance with the Documentation;
- (c) changes to the Website or the Merchant's Business Systems or environment;
- (d) a failure by the Merchant to provide qualified and trained staff for the operation of Website or the Business Systems and their interaction with the Software and the POLi™ Service;
- (e) accident, negligence, or misuse; or

- (f) operator, Merchant, Designated Financial Institution, Customer or end user error.

8 Invoicing & Payment.

- 8.1 POLi Payments will invoice the Merchant, and the Merchant will pay POLi Payments the following amounts:
- (a) fees for the Implementation Services (which may be specified in the Schedule, or otherwise agreed between the parties);
 - (b) Support Fees;
 - (c) Transaction Fees, and
 - (d) Additional Fees.
- 8.2 If POLi Payments is required to attend the Merchant's premises for any reason pursuant to this Agreement other than a breach by POLi Payments, the Merchant will reimburse POLi Payments for reasonable transport and/or accommodation expenses.
- 8.3 POLi Payments will invoice for the Implementation Services upon the Merchant signing this Agreement. All other fees and charges may be invoiced monthly. The Merchant will pay Support Fees, Transaction Fees and Additional Fees in arrears. Support Fees and Transaction Fees are payable by direct debit from the Merchant Bank Account, and the Merchant will execute a direct debit authority in favour of POLi Payments in respect of the Merchant Bank Account, and do anything else reasonably required to establish and maintain that direct debit facility during the Term. POLi Payments invoices are otherwise payable within 30 days of invoice.
- 8.4 All amounts payable under this Agreement do not include any applicable GST, which may be charged in addition to those fees and charges where applicable. In that event, POLi Payments will render a tax invoice that complies with the law relating to GST. All monetary amounts specified in this Agreement are in Australian dollars and all payments are to be made in Australian dollars unless otherwise agreed.
- 8.5 If the Merchant fails to pay any invoice by the due date for payment, then unless that invoice is the subject of a dispute, without prejudice to POLi Payments rights under this Agreement or otherwise:
- (a) interest is also payable on the outstanding amount at 2% above the overdraft rate available from POLi Payments bankers (which the Merchant must pay at the same time as the outstanding amount); and
 - (b) by written notice to the Merchant, POLi Payments may suspend the provision of any services and/or the Merchant's access to the POLi™ Service until the Merchant pays the outstanding invoice and interest in full. In addition, the Merchant will also pay any dishonour fee or other expense incurred by POLi Payments as a result of any breach of this Agreement by the Merchant.

9 Confidentiality.

- 9.1 Each party acknowledges the confidentiality and the proprietary nature of the other party's Confidential Information and that no right, entitlement or interest in that Confidential Information is extended to or conveyed to it, other than for the purposes contemplated by this Agreement. Each party undertakes and agrees that it will:
- (a) keep all of the other party's Confidential Information confidential;
 - (b) only use the other party's Confidential Information for the purposes contemplated by this Agreement; and
 - (c) not use, or attempt to use, any of the other party's Confidential Information for its own purposes or the purposes of any third party, or do or omit to do any act or thing involving the use of that Confidential Information that may injure or cause loss to the other party, without the other party's prior written consent.
- 9.2 **Clause 9.1** will not apply to Confidential Information of or relating to a party, to the extent that:

- (a) the other party is legally compelled to disclose that Confidential Information or the Confidential Information is required by a regulatory body;
- (b) the disclosure is only to those of its employees or contractors or agents who have a need to know (and only to the extent that each has a need to know); and have been directed to keep confidential that Confidential Information; or
- (c) in the case of Confidential Information relating to a Transaction the Confidential Information of or relating to the Merchant is required to be disclosed to assist in the investigation of a dispute concerning that Transaction; or
- (d) the Confidential Information is publicly available (except due to breach of confidentiality).

9.3 Each party acknowledges that a breach by it of this **clause 9.1** may cause the other party irreparable damage for which monetary damages would not be an adequate remedy. Accordingly, in addition to other remedies that may be available, the other party may seek and obtain injunctive relief against such a breach or threatened breach. In addition each party will indemnify the other party and keep the other party indemnified from and against any loss arising as the consequence of a breach by the indemnifying party, its servants or agents, of this **clause Error! Reference source not found..**

9.4 The obligations under this **clause 9.1** survive termination of this Agreement for any reason.

10 Intellectual Property Rights.

10.1 Acknowledgement. The Merchant acknowledges that the Software, POLi™ Service and Documentation are the subject of copyright and other intellectual property rights. The Merchant must not at any time whether during the Term or otherwise, do or permit any act to be done that infringes those intellectual property rights. The Merchant will indemnify POLi Payments and its licensors fully against any loss, liability, cost or expense suffered or incurred by any of them (including liability to any other party) as a result of the Merchant's breach of the provisions of this **clause Error! Reference source not found..**

10.2 Warranty. POLi Payments warrants to the Merchant that it has the right to grant the licences referred to in this Agreement. On becoming aware of any claim or allegation by a third party against the Merchant alleging that an authorised use by the Merchant of the Software or the POLi™ Service infringes the intellectual property rights of that third party, the Merchant must:

- (a) promptly notify POLi Payments in writing, giving full particulars of any infringement, suspected infringement or alleged infringement;
- (b) give POLi Payments or, if POLi Payments directs it, POLi Payments licensors the option to conduct the defence of such a claim, including negotiations for settlement or compromise prior to or after the institution of legal proceedings;
- (c) provide POLi Payments or POLi Payments licensors with reasonable assistance (at the reasonable expense of POLi Payments or POLi Payments licensors as the case may be) in conducting the defence of such a claim;
- (d) permit POLi Payments or POLi Payments licensors to modify the Software or replace components or parts of components, to render the Software or the POLi™ Service non-infringing; and
- (e) authorise POLi Payments or POLi Payments licensors to obtain for the Merchant's benefit the authority to continue the use of the Software and the POLi™ Service.

10.3 If an independent tribunal of fact or law determines that an infringement of third party's intellectual property rights has occurred, POLi Payments will:

- (a) take reasonable steps to obtain for the Merchant the right to continue using the Software and the POLi™ Service; or
- (b) modify the Software or the POLi™ System in order to avoid continuing infringement; or

- (c) if the solutions in either of the preceding paragraphs cannot be achieved using reasonable commercial efforts, POLi Payments may terminate this Agreement (or the relevant part of it) by written notice to that effect, and at no cost to the Merchant.

10.4 Neither POLi Payments nor its licensors will have any liability under **clause 0** with respect to any claim based upon:

- (a) the combination of the Software with, or the use of the POLi™ Service using, other products or software not supplied by POLi Payments;
- (b) any addition to or modification to the Software or POLi™ Service not created or supplied by or on behalf of POLi Payments;
- (c) use of a superseded release or version of the Software or POLi™ Service;
- (d) any use of the POLi™ Service or Software other than in accordance with this Agreement or the Documentation; or
- (e) the Website or the Merchant's systems, including the Business Systems.

10.5 **Clauses 0** and **10.4** set out POLi Payments and its licensors' entire obligations, and the Merchant's sole remedies in respect of any claim that an authorised use by the Merchant of the Software or the POLi™ Service provided by or on behalf of POLi Payments infringes the Intellectual Property rights of any party.

10.6 This **clause Error! Reference source not found.** survives termination of this Agreement for any reason.

11 Warranty & Liability.

11.1 POLi Payments warrants that

- (a) the Software, when operated in accordance with the Documentation, will comply in all material respects with the Documentation; and
- (b) POLi Payments will:
 - (i) provide any Implementation Services and the Support in a professional manner using suitably qualified personnel; and
 - (ii) endeavour to provide Support in accordance with the Response Levels.

11.2 The Merchant acknowledges that:

- (a) the Software, operation of the Software or the POLi™ Service, or access to the POLi™ Service or any websites operated by any Designated Financial Institutions will not be uninterrupted or error-free;
- (b) the performance of the POLi™ Service (including response times) will depend on factors outside the parties' control including the design and performance of the Website and the Business Systems and other Merchant systems and Designated Financial Institutions' websites and systems, the state of the relevant telecommunications networks and their interconnections and network congestion;
- (c) Designated Financial Institutions are not obliged to notify POLi Payments of any changes to the layout or functionality of their websites or any outages, faults or errors in the performance of their websites;
- (d) an internet banking receipt, whether issued by a Designated Financial Institution, the Merchant's Bank or the POLi™ Service, is not to be taken as conclusive proof that the Transaction has been processed by the Designated Financial Institution or the Merchant's Bank, or that funds will be, or have been, deposited to the Merchant Bank Account;

- (e) although POLi Payments will implement reasonable security procedures, it cannot warrant that unauthorised access to information and data cannot occur;
 - (f) where POLi Payments provides information to the Merchant about a Transaction, POLi Payments has not checked or verified the accuracy or completeness of that information and it is the Merchant's responsibility to do so; and
 - (g) the Merchant has relied on its own independent assessment and judgment in determining whether the POLi™ Service meets the Merchant's technical and business requirements.
- 11.3 Except for warranties expressly set out in this Agreement, and to the extent permitted by the law (including without limitation the *Competition and Consumer Act 2010* (Cth)), POLi Payments and its licensors expressly exclude all conditions and warranties whether express or implied, statutory or otherwise.
- 11.4 Except for undertakings to indemnify for fraud or wilful misconduct, in no event will a party be liable to any party for any indirect, punitive, special, incidental or consequential loss in connection with or arising out of this Agreement or the Merchant's access to or use of the Software or the POLi™ Service (including for loss of profits, use, data, or other economic advantage), regardless of how it arises, whether for breach of this Agreement or on any other basis, and even if it has been previously advised of the possibility of such damage.
- 11.5 POLi Payments liability arising out of or in connection with this Agreement or the Merchant's access to or use of the Software or the POLi™ Service (whether in contract, equity, negligence, tort or for breach of statute or otherwise) will be reduced by the extent, if any, to which the Merchant contributed to the loss.
- 11.6 To the extent permitted by law (including without limitation the *Competition and Consumer Act 2010* (Cth)), where it is fair and reasonable to do so, the cumulative liability of POLi Payments and its licensors for any breach of any conditions or warranties in this Agreement, or any breach of any statutory guarantees, and the Merchant's sole and exclusive remedy in relation to such breaches shall be limited to:
- (a) in the case of Software or goods supplied by or on behalf of POLi Payments, at POLi Payments' option:
 - (i) replacing or repairing the Software or goods, or supplying equivalent software or goods; or
 - (ii) paying the cost of replacing or repairing the Software or goods or of acquiring equivalent software or goods; and/or
 - (b) in the case of services, at POLi Payments option:
 - (i) supplying the services again; or
 - (ii) paying the cost of having the services supplied again.
- 11.7 Subject to **clause 11.5**, in no event will POLi Payments and its licensors' total aggregate liability in respect of all claims arising under or pursuant to this Agreement (regardless of whether those claims arise out of a single event or a number of different events) exceed the amount paid to POLi Payments under this Agreement during the 12 month period prior to the date the liability arose.
- 11.8 To the extent permitted by law, the Merchant indemnifies POLi Payments and its licensors, and their respective employees, agents and contractors (each an "**Indemnified Party**") against any loss, damage or liability which any of them suffers or incurs as a result of:
- (a) negligence, error or fraud by the Merchant or any employee, contractor or agent of the Merchant, or any end user;
 - (b) a failure by the Merchant, or an employee, contractor or agent of the Merchant, to observe the Merchant's obligations under **clauses 4.1 or 4.2** of this Agreement; or
 - (c) the Merchant's relationship with any end user or customer of the Merchant; provided that the Merchant's obligation to indemnify an Indemnified Party shall be reduced to the extent that the loss, damage or liability suffered is caused by, or materially contributed to by, any unlawful act of the Indemnified Party.

11.9 This **clause Error! Reference source not found.** survives termination of this Agreement for any reason.

12 Termination.

12.1 This Agreement may be terminated in the following circumstances:

- (a) by POLi Payments by written notice to the Merchant on the occurrence of a Regulatory Event; or
- (b) by POLi Payments if the Merchant is operating a prohibited business as reasonably determined by POLi Payments and listed in the list of prohibited businesses which is updated from time to time on www.polipayments.com;
- (c) by POLi Payments by written notice to the Merchant if POLi Payments, acting reasonably, considers that the continued operation of this Agreement would expose POLi payments to reputational or brand damage;
- (d) by the Merchant, in the event of any change under clause 5; or
- (e) by either party by written notice to the other party:
 - (i) if the other party breaches a material term of this Agreement that is incapable of remedy;
 - (ii) if the other party breaches a material term of this Agreement that is capable of remedy, and has not remedied the breach within 14 days after being notified in writing of that breach;
 - (iii) on the happening of an Insolvency Event in respect of the other party, where the Insolvency Event remains in existence in respect of that party when the notice is delivered.

12.2 On termination of this Agreement for any reason:

- (a) POLi Payments may invoice the Merchant for all services provided but not yet invoiced, and all unpaid moneys will immediately become due and payable;
- (b) POLi Payments may terminate the Merchant's access to the POLi™ Service;
- (c) the Merchant's right to use the Software and the Documentation, and to access the POLi™ Service automatically ceases; and
- (d) the Merchant must promptly remove the Software from the Business System, and update the Website so as not to refer to POLi Payments, the Software or the POLi™ Service.

13 Suspension.

13.1 POLi Payments may suspend the POLi™ Service or the Merchant's access to it at any time if POLi Payments reasonably believes that:

- (a) any third party (including a Designated Financial Institution) is taking, or has taken, steps to interfere with the proper operation of any part of the POLi™ Service;
- (b) any action taken or required to be taken in accordance with this Agreement contravenes or may contravene any law or code of conduct; or
- (c) a Regulatory Event has occurred or is likely to occur. When exercising this right POLi Payments will endeavour to keep the Merchant informed of any date upon which the suspension is expected to end, and will advise the Merchant when the suspension has ended; or
- (d) the Merchant has breached a material term of this Agreement; or
- (e) POLi Payments considers, acting reasonably, that the operation of this Agreement is exposing POLi payments to reputational or brand damage.

- 13.2 If POLi Payments suspends the POLi™ Service or the Merchant's access to it:
- (a) POLi Payments is not obliged to process any Transactions using the POLi™ Service;
 - (b) if possible, the parties will work together in good faith to resolve the issue or issues which resulted in the suspension; and
 - (c) POLi Payments will reinstate the POLi™ Service or the Merchant's access to it, if the issue which resulted in the suspension is resolved.
- 13.3 If the issue is not resolved within 3 months after the suspension commenced, either party may terminate this Agreement by written notice to the other party.
- 13.4 If the suspension arises as a consequence of any act or omission of the Merchant, POLi Payments will be entitled to continue to charge the Merchant fees for Support in attempting to resolve the issue which resulted in the suspension.

14 Marketing & Promotion; Publicity.

If POLi Payments provides the Merchant with any logos, trade marks, signs or other promotional or instructional material relating to the POLi™ Service ("**Materials**"), the Merchant will display them on the Website in accordance with the Documentation. Subject to the previous sentence, the Merchant is solely responsible for any content that appears on the Website and for the maintenance of, and update of information on, the Website. The Merchant consents to POLi Payments referring to the Merchant as a user of the POLi™ Service, and to this end grants POLi Payments a licence to use the Merchant's name and any logos during the Term for that limited publicity purpose.

15 Dispute Resolution.

- 15.1 If a dispute arises between the parties in connection with this Agreement, the parties' relevant representatives will meet and conduct good faith discussions in an attempt to resolve the dispute. If those discussions fail, the parties will refer it to their respective Managing Directors or equivalent (or their nominees), who will meet within 7 days of the referral, and take reasonable steps to resolve the matter within 14 days of the referral. If those discussions fail, either party may refer the matter to expert determination by an agreed expert, or failing agreement by a person chosen by the President of the Law Institute of Victoria or his or her nominee. The parties may make written submissions to the Expert, but must give a copy at the same time to the other party. The parties will instruct the Expert to determine the dispute as an expert and not as an arbitrator, and to deliver a determination within 30 days of the appointment. The Expert's decision on a matter determined under this **clause 15** is final and binding.
- 15.2 Nothing in this **clause 15** will prevent a party from applying to a Court for injunctive relief.

16 General provisions.

- 16.1 Assignment; Subcontracting. The Merchant must not transfer any right or liability under this Agreement without POLi Payments prior written consent (which will not be unreasonably withheld), except where this Agreement provides otherwise. POLi Payments may subcontract the provision of any services under this Agreement, including Implementation Services and Support Services and the operation of the Help Desk, but POLi Payments will remain primarily liable for the provision of such services.
- 16.2 Waiver; Amendment. Failure, delay or neglect by a party to enforce a term of this Agreement is not to be construed as a waiver of that term or the party's rights, or a consent to, waiver of, or excuse for any other different, continuing, or subsequent breach. Any amendment to this Agreement has no force or effect, unless effected by a document signed by the parties.
- 16.3 Audit and Information Gathering Rights. POLi Payments may, by itself or an authorised representative, audit the Merchant's records and/or request the Merchant promptly provide information relating to any or all of the Merchant's business activities, the Website and the Transactions as considered reasonably necessary by POLi Payments to confirm the Merchant's compliance with the terms and conditions of this Agreement, by giving the Merchant at least 7 days' prior notice to that effect. Any such audit will be conducted on the Merchant's premises

during business hours. POLi Payments and its authorised representatives will treat as confidential any confidential information that is contained in the records or other information provided by the Merchant during such audit or in response to such request, and only use such information for the purposes of ensuring the Merchant's compliance with this Agreement, and enforcing the conditions of this Agreement.

- 16.4 Governing Law. This Agreement and the licence granted under it, shall be governed and construed in accordance with the laws of Victoria, Australia, regardless of the principles of conflict of laws thereof, and the parties submit to the non-exclusive jurisdiction of the Victorian courts over all disputes arising in connection with this Agreement.
- 16.5 Party acting for Related Corporations. If the Merchant enters into this Agreement on behalf of itself and its other Related Corporations (such Related Corporations to be specified in writing in the Schedule, or otherwise agreed in writing by POLi Payments from time to time), the Merchant may use the Software and access the POLi™ Service, and may permit those nominated Related Corporations to do so, in accordance with this Agreement. In that event, the Merchant enters into this Agreement on its own behalf and on behalf of those nominated Related Corporations, and the Merchant and those Related Corporations will be jointly and severally liable under this Agreement. Nothing releases the Merchant from any liability in its personal capacity. The Merchant warrants that at the date of this Agreement it has the full power and authority of its nominated Related Corporations to enter into this Agreement both on its own behalf, and for those nominated Related Corporations.
- 16.6 Notices. Any notice to or by a party under this Agreement must be in writing and signed by the sender or, if a corporate party, an authorised officer of the sender. Notices may be served by delivery in person, by post, or by email to the address or number of the recipient specified in the Schedule, or as most recently notified by the recipient to the sender. A notice is taken to be given (unless the contrary is proven) upon delivery to the recipient (in the case of personal delivery), within four business days of posting (if sent by post) from and to a place within Australia or otherwise within ten business days or on production to the sender of a facsimile transmittal confirmation report (if sent by facsimile, provided that if the report is produced after 4.00 pm local time on a business day in the place to which the facsimile transmission is sent, it will be taken to have been delivered at 9.00 am on the next business day).
- 16.7 Pre-Contractual Negotiations. This Agreement and the documents referred to in it:
- (a) express and incorporate the entire agreement between the parties in relation to its subject-matter, and all the terms of that agreement; and
 - (b) supersedes and excludes any prior or collateral negotiation, or agreement by or between the parties in relation to that subject-matter or any term of that agreement.
- 16.8 Severability. Any provision of this Agreement which is invalid in any jurisdiction is invalid in that jurisdiction to that extent, without invalidating or affecting the remaining provisions of this Agreement or the validity of that provision in any other jurisdiction.
- 16.9 Counterparts. This Agreement may be executed in any number of counterparts, all of which taken together are deemed to constitute one and the same document.
- 16.10 Party Acting as Trustee. If a party enters into this Agreement as trustee of a trust, that party and its successors as trustee of the trust will be liable under this Agreement in its own right and as trustee of the trust. Nothing releases the party from any liability in its personal capacity.

17 Definitions and Interpretation. In this Agreement, the terms:

Additional Fee means a charge at POLi Payments then-current charge-out rates for work undertaken on a “time and materials” basis (including work referred to in **clause 7.3**);

Business Systems means the hardware and software environment with which the Software is to be implemented as specified in the Schedule;

Commencement Date means the date specified in the Schedule;

Confidential Information of a party (the **Owning Party**) means all information of or relating to the Owning Party, or any Related Corporation or licensor of the Owning Party (including the Software in source and object code form

and the Documentation), relating to the business, operations or affairs of the Owning Party or any Related Corporation of the Owning Party;

Designated Financial Institutions means the financial institutions whose internet banking facilities are accessible from time to time by the Merchant's customer to initiate a payment Transaction to the Merchant from the Website using the POLi™ System. As at the date of this Agreement, the Designated Financial Institutions and the URLs of their websites are set out in the Schedule. POLi Payments may change the list of Designated Financial Institutions available to the Merchant from time to time. If POLi Payments amends the list of Designated Financial Institutions it will issue a new list to the Merchant;

Documentation means the:

- Schedule, and
- "Style Guide" (available at <https://www.polipayments.com/assets/docs/MerchantStyleGuide.pdf>), and
- "Merchant Implementation Guide" (available at <http://www.polipaymentdeveloper.com/doku.php?id=start>), and
- "POLi SLA"

as issued and amended from time to time by POLi Payments (provided that the Merchant is given prior notice of any material amendment to the Documentation);

Help Desk means the facility to be provided by POLi Payments, whose functions are described in **clause 7.2**;

GST and Tax Invoice have the meanings given to those terms in the Australian *A New Tax System (Goods And Services Tax) Act 1999* (Cth);

Implementation Services means the provisioning of the POLi™ Service for the Merchant;

Initial Term means the initial term of this Agreement, as specified in the Schedule;

Insolvency Event means in respect of a party:

- (a) the party commits an act of insolvency or is unable or is deemed to be unable to pay its debts as and when they fall due;
- (b) the party enters into, or resolves to enter into, a scheme of arrangement or composition with, or assignment for the benefit of its creditors, or proposes a reorganisation, moratorium or other administration involving it;
- (c) the party enters into a debt arrangement or composition with its creditors pursuant to the *Corporations Act 2001* (Cth) (or its equivalent in the place the party is incorporated);
- (d) the party goes into liquidation; or
- (e) a receiver or manager is appointed over the assets of the Merchant;

Merchant Bank Account means the account held in an Australian bank whose details are specified in the Schedule (or as varied by the parties in writing from time to time), into which funds from Transactions are to be deposited, and from which fees payable to POLi Payments are to be transferred by direct debit in accordance with **clause 8.3**;

Merchant's Bank means the Australian bank at which the Merchant Bank Account is held;

POLi™ Service and **POLi™ System** mean the transaction processing platform operated by or on behalf of POLi Payments, delivering a variety of payment applications and functions. The current features of the POLi™ Service for the purposes of this Agreement are specified in the Documentation;

Refund Transaction means a Transaction that is intended to refund (in whole or in part) moneys that have previously been transferred to the Merchant's Bank Account as the result of a previous Sales Transaction;

Regulatory Event means a determination by any regulatory authority or judicial body, or a change or ruling under any law or regulations or policy in Australia or elsewhere, or a new interpretation of existing laws or regulations or policy which would prevent or impair POLi Payments ability to provide or operate the POLi™ Service or the Software in Australia;

Related Corporation means a “related body corporate” as defined in section 50 of the *Corporations Act 2001* (Cth);

Response Levels are the times for responding to reports of errors reported by the Merchant in accordance with this Agreement, as specified in the Documentation;

Sales Transaction means an electronic message facilitated by the System, between the Merchant, its Customer and a Designated Financial Institution, to facilitate a transfer of monetary value to the Clearing Account from an account held with that Designated Financial Institution, in return for the Merchant agreeing to provide goods and or services as ordered by the Customer, or in payment by the Customer for goods or services that have already been provided by the Merchant;

Schedule means the schedule to this Agreement;

Software means the messaging and other software designed to be integrated with a website to permit a connection to the POLi™ Service to initiate a connection to, login at, and navigation of a particular Designated Financial Institution’s website by the POLi™ Service to cause a Transaction to be initiated and processed;

Support means the services described in **clause Error! Reference source not found.** and the Merchant Operating Guide;

Support Fees means the fees payable for Support. As at the Commencement Date, the Support Fees are as specified in the Schedule. At the end of the Initial Term, POLi Payments may vary the Support Fees by giving the Merchant at least 3 months’ written notice to that effect;

Term means the term of this Agreement, being the Initial Term and any further period referred to in **clause 1**;

Transaction includes:

- (a) a Sales Transaction; and
- (b) a Refund Transaction.

Transaction Fees means a fee per Transaction, to be calculated in accordance with the Transaction Fee formula set out in the Schedule. The rates for the calculation of the Transaction Fees are fixed during the Initial Term. Thereafter, POLi Payments may vary those rates by giving the Merchant at least 3 months’ written notice to that effect;

Website means the website operated by or on behalf of the Merchant, whose URL is as specified in the Schedule (and such further or replacement websites as the parties agree in writing from time to time).