

# MERCHANT AGREEMENT



**Between:**

**Merco Limited** of Level 1, Pier 21, Westhaven Drive, PO Box 8258, Symonds St, Auckland.

**[Company]** of **[Registered Address and Mailing Address]** ("the **Merchant**").

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## **Background**

1. Merco has been appointed as the Master Distributor to the Territory of New Zealand for the provision of certain Services in relation to the delivery of the POLi™ Service, the POLi™ System and other systems as agreed from time to time.
2. The POLi Service is made available to the Merchant in the Territory by Merco in accordance with the terms of the Master Distribution Agreement as agreed between Merco and Centricom Pty Ltd (Centricom).
3. The responsibility for the provision of the POLi Service in the Territory with Merco notwithstanding the POLi Service in the Territory is part of a hosted service on infrastructure operated by Centricom (the Licensor).

## **The parties agree:**

### **1 Application.**

These Conditions govern the Contract between Merco and the Merchant in connection with the POLi™ Service and any related services. The Merchant's signing these Conditions, 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 these Conditions.

### **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.**

Merco will provide the Merchant with:

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

The Merchant acknowledges that the Implementation Services involve the Merchant (or where specified in the Schedule, Merco, or someone appointed by them) installing the Software 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 security procedure contained in the Documentation) to prevent unauthorised access to information, data the Software or the POLi™ Service;

- (b) install and use the Software, and 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 or on behalf of Merco), and its own banking facilities, as are necessary for the Merchant's customers to access and use the POLi™ Service;
- (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 customer bank account number details and any other information that Merco 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 Merco, the Licensor, and their respective 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 the Implementation Services and Support to be provided in accordance with this Agreement);
- (g) provide support to its own customers in relation to the operation and their use of the POLi™ Service (including if Merco requires it, the publication on the Website of a "Frequently Asked Questions" page prepared by or on behalf of Merco, or a link to such a page published by Merco or the Licensor).
- (h) provide Merco with such information and assistance as Merco reasonably requires in respect of Transactions (including failed or attempted Transactions); and
- (i) only use any information that Merco provides to the Merchant about a Transaction, for the purpose of initiating and processing a refund in respect of the Transaction.

**4.2 Sales Obligations.** The Merchant 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. The Merchant must not:

- (a) make any representation in connection with any goods or services or the POLi™ Service that may bind or affect Merco, the Licensor or their respective contractors;
- (b) make any unauthorised representations concerning the Software or the POLi™ Service or Merco's products, policies or services;
- (c) initiate or process any Transaction for or on behalf of any other person (other than as permitted under clause 16.5);
- (d) initiate or process any Transaction that has been originated from a website or other source, other than the Website;
- (e) initiate or process a Transaction on behalf of any other person, or where the Transaction does not relate to a genuine sale or supply, or knowing (or in circumstances where it should reasonably know) the Transaction is fraudulent or unlawful;

- (f) initiate or process the same Transaction more than once
- (g) 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.

**4.3 Legal Obligations.** The Merchant must comply with all applicable laws including, but not limited to, the New Zealand *Privacy Act* 1993 and the New Zealand *Financial Transactions Reporting Act* 1996.

## **5 Changes to Software, Documentation**

From time to time, Merco 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 will deliver to the Merchant in electronic or hard copy form). Merco will provide Releases to 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.

The Merchant will effect any changes necessary (including making any necessary changes to the Website or the Business Systems) within 30 days of receiving notice from Merco that the Release is available (or a longer period if agreed by Merco). 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** Merco 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 Merco’s prior written consent;
- (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 16.5);
  - (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 (provided that the accessing and use of the POLi™ Service by a customer of the Merchant that is located outside the Territory to initiate a Transaction from their account held at a Designated Financial Institution within the Territory 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, Merco 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 or on behalf of Merco, listing Transactions undertaken by end users from the Website, and status information concerning those Transactions, as described in the Documentation;

### **7.2 Merco 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, e-mail or Internet based assistance in relation to: functions and features of the POLi™ Service, and the 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 Merco, 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 the systems operated by or on behalf of Merco, or is attributable to a change in a Designated Financial Institution's website, Merco will use commercially reasonable efforts to rectify that problem or manage its effects, in accordance with the Response Levels.**

### **7.4 Merco is not required to provide support and 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 installing or 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 on which the Software is operating;
- (d) a failure by the Merchant to provide qualified and trained staff for the operation the 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 or end user error.

## **8 Invoicing & Payment.**

**8.1** Merco will invoice the Merchant, and the Merchant will pay Merco the following amounts as agreed between the parties:

- (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,
- (d) Minimum Transaction Charge, and
- (e) Additional Fees.

If Merco or anyone engaged by Merco is required to attend the Merchant's premises for any reason pursuant to this Agreement, the Merchant will reimburse Merco for all reasonable transport and/or accommodation expenses.

**8.2** The fees for the Implementation Services will be payable upon the Merchant signing this Agreement. All other fees and charges may be invoiced monthly. The Merchant will pay Support Fees, Transaction Fees, Minimum Transaction Charge and Additional Fees in arrears. Support Fees and Transaction Fees are payable by direct debit from the Merchant's Bank Account, and the Merchant will execute a direct debit authority in favour of Merco in respect of the Merchant's Bank Account, and do anything else reasonably required to establish and maintain that direct debit facility during the Term. Merco's invoices are otherwise payable within 30 days of invoice.

**8.3** 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, Merco will render a tax invoice that complies with the law relating to GST. All monetary amounts specified in this Agreement are in New Zealand dollars and all payments are to be made in New Zealand dollars unless otherwise agreed.

**8.4** If the Merchant fails to pay any invoice by the due date for payment, then without prejudice to Merco's rights under this Agreement or otherwise:

- (a) interest is also payable on the outstanding amount at 2% above the overdraft rate available from Merco's bankers (which the Merchant must pay at the same time as the outstanding amount); and
- (b) by written notice to the Merchant, Merco 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 Merco as a result of any breach of this Agreement by the Merchant.

**8.5** If the Merchant requests enablement of the Australian Designated Financial Institutions, all fees will be quoted and applied in Australian currency. If the Merchant requests the Australian currency fees be paid in New Zealand currency in New Zealand, the Australian currency fees shall be converted by Merco at the mid-rate as calculated by the Reserve Bank of New Zealand (<http://www.rbnz.govt.nz/statistics/exandint/b1/data.html>) from the Australian currency to the New Zealand currency equivalent. The conversion of currency shall occur within a period of one week prior to the date of the relevant invoice. This provision also applies to any other fees payable by the Merchant in New Zealand which are expressed in the Australian Currency.

## **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 to and agrees with each other party 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;
- (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 or 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 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 9.

**9.4** The obligations under this clause 9 shall survive termination of this Agreement for any reason.

## **10 Intellectual Property Rights.**



**10.1** The Merchant acknowledges that the Software and Documentation is 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 Merco and the Licensor 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 **10**.

**10.2** Merco 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 Merco in writing, giving full particulars of any infringement, suspected infringement or alleged infringement;
- (b) give Merco or, if Merco directs it, the Licensor 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 Merco or the Licensor with reasonable assistance (at the reasonable expense of Merco or the Licensor as the case may be) in conducting the defence of such a claim;
- (d) permit Merco, or the Licensor to modify the Software or replace components or parts of components, to render the Software or the POLi™ Service non-infringing; and
- (e) authorise Merco or the Licensor to obtain for the Merchant's benefit the authority to continue the use of the Software and the POLi™ Service.

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

- (f) take reasonable steps to obtain for the Merchant the right to continue using the Software and the POLi™ Service;
- (g) modify the Software or the POLi™ System in order to avoid continuing infringement; or
- (h) if the solutions in either of the preceding paragraphs cannot be achieved using reasonable commercial efforts, Merco may terminate this Agreement (or the relevant part of it) by written notice to that effect.

**10.3** Neither Merco, nor the Licensor will have any liability under clause 10.2 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 Merco;
- (b) any addition to or modification to the Software not created or supplied by or on behalf of Merco;
- (c) use of a superseded release or version of the Software;
- (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.

**10.4** Clauses 10.2 and 10.3 set out Merco's, and the Licensor's 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 Merco infringes the Intellectual Property rights of any party.

**10.5** This clause 10 shall survive termination of this Agreement for any reason.

## **11 Warranty & Liability.**

**11.1** Merco warrants that:

- (a) the Software, when installed and operated in accordance with the Documentation, will comply in all material respects with the Documentation; and
- (b) it will:
  - (i) provide any Implementation Services and the Support in a professional manner using suitably qualified personnel; and
  - (ii) take reasonable steps to 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 and 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 Merco or the Licensor 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 Merco and the Licensor will implement reasonable security procedures and measures, including those described in the Documentation, it cannot warrant that unauthorised access to information and data cannot occur;
- (f) where Merco provides information to the Merchant about a Transaction, Merco 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, to the extent permitted by the law, Merco excludes all conditions and warranties whether express or implied, statutory or otherwise.
- 11.4** Except for undertakings to indemnify or fraud, in no event will a Merco or the Licensor 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** Merco's 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 or any other party contributed to the loss.
- 11.6** The Merchant acknowledges and agrees that it is acquiring the right to access and use the POLi™ Service and associated services (including the licences granted under this document) for business purposes, and that accordingly the provision of the *Consumer Guarantees Act* 1993 (NZ) will not apply to this Agreement or to the supply of such access or use.
- 11.7** The cumulative liability of Merco and the Licensor for any breach of any conditions or warranties in this Agreement, and the Merchant's sole and exclusive remedy in relation to such breaches shall be limited to:
- (a) in the case of the Software or any goods supplied by or on behalf of Merco, at Merco's 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 Merco's option:
    - (i) supplying the services or licences granted under this document.
    - (ii) paying the cost of having the services supplied again.
- 11.8** In no event will Merco's 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 total amount paid to Merco under this Agreement during the 12 month period prior to the date the liability arose or \$50,000.00 (whichever is the lesser amount).
- 11.9** To the extent permitted by law, the Merchant indemnifies Merco, and the Licensor, 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.

**11.10** This clause 11 shall survive termination of this Agreement for any reason.

## **12 Termination.**

**12.1** This Agreement may be terminated in the following circumstances:

- (a) by Merco by written notice to the Merchant on the occurrence of a Regulatory Event or if the Master Distribution Agreement between Merco and the Licensor is terminated for any reason whatsoever; or
- (b) by any 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;

a copy of any such notice must also be served on any third party to this Agreement.

**12.2** On termination of this Agreement for any reason:

- (a) Merco may invoice the Merchant for all services provided but not yet invoiced, and all unpaid moneys will immediately become due and payable;
- (b) Merco 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 the Software or the POLi™ Service.

## **13 Suspension.**

**13.1** Merco may suspend the POLi™ Service or the Merchant's access to it at any time, by written notice to the Merchant if Merco 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 Merco 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.

**13.2** If Merco suspends the POLi™ Service or the Merchant's access to it:

- (a) Merco is not obliged to process any Transactions using the POLi™ Service;
- (b) the parties will work together in good faith to resolve the issue or issues which resulted in the suspension; and
- (c) Merco will reinstate the POLi™ Service or the Merchant's access to it, once the issue which resulted in the suspension is resolved.

If the issue is not resolved within 3 months after the suspension commenced, Merco may terminate this Agreement by written notice to the Merchant.

**14 Marketing & Promotion; Publicity.**

If Merco 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. The Merchant shall remain solely responsible for all content appearing on the Website and for the maintenance, and updating of all information on the Website. The Merchant consents to Merco referring to the Merchant as a user of the POLi™ Service and grants Merco a licence to use the Merchant's name and any logos for that limited publicity purpose only.

**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 New Zealand Law Society 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 parties agree to accept the Expert's decision as final and binding as to both matters of law and fact..

**15.2** Should any dispute arise over any provision or interpretation of this agreement such dispute shall be determined by the President for the time being of the New Zealand Law Society or his or her nominee and the parties agree to accept such decision as final and binding as to both matters of law and fact.

**15.3** 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 Merco's prior written consent, except where this Agreement provides otherwise. Merco may subcontract the provision of any services under this Agreement to another party including Implementation Services and Support Services and the operation of the Help Desk.

- 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 Rights. Merco may, by itself or an authorised representative, audit the Merchant's records to confirm the Merchant's compliance with the terms and conditions of this Agreement by giving the Merchant at least 7 days notice to that effect. Any such audit will be conducted on the Merchant's premises during business hours. Merco 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, 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 New Zealand, regardless of the principles of conflict of laws thereof, and the parties submit to the exclusive jurisdiction of the courts of New Zealand over all disputes arising in connection with this Agreement.
- 16.5** Party acting for Related Companies. If the Merchant enters into this Agreement on behalf of itself and its other Related Companies (such Related Companies to be specified in writing in the Schedule, or otherwise agreed in writing by Merco from time to time), the Merchant may use the Software and access the POLi™ Service, and may permit those nominated Related Companies 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 Companies, and the Merchant and those Related Companies 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 Companies to enter into this Agreement both on its own behalf, and for those nominated Related Companies.
- 16.6** The Licensor. The Merchant acknowledges that:
- (a) the releases, undertakings and indemnities made by the Merchant in clauses 9, 10 and 11 are made for the benefit of Merco and the Licensor and their respective employees ("**Merco Representatives**"), and may be enforced by each of the Merco Representative pursuant to any legislation permitting the enforcement of third party promises and at common law;
  - (b) in accepting the releases, undertakings and indemnities made by the Merchant in clauses 9, 10 and 11, Merco is acting as agent of each of the Merco Representatives;
  - (c) Merco has entered into this Agreement in reliance on the Merchant's warranty and representation that the releases, undertakings and indemnities made by the Merchant in clauses 9, 10 and 11 are binding and effective on the Merchant and that the Merchant shall make no claims of any nature against any of the Merco Representatives; and
  - (d) The Merco Representatives do not owe the Merchant any separate duty of care arising out of or in connection with this Agreement, the Software, or the POLi™ Service.
- 16.7** 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 facsimile transmission 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 three business days of posting (if sent by post) from and to a place within New Zealand 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).

**16.8** 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, understanding, communication or agreement by or between the parties in relation to that subject-matter or any term of that agreement.

**16.9** 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.

**16.10** Counterparts. This Agreement and all ancillary documents may be executed in any number of counterparts. A party who has executed a counterpart of this Agreement may exchange that counterpart with another party by faxing or emailing the counterpart executed by it to that other party and, on request by that other party, will therefore promptly deliver to that other party the executed counterpart exchanged by fax or email. However, delay or failure by that party to deliver a counterpart of this Agreement executed by it will not affect the validity of the Agreement.

**16.11** 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.]

**16.12** Electronic Transactions. This Agreement may be executed by way of an electronic transaction in terms of the Electronic Transaction Act 2002.

## **17** Definitions and Interpretation.

In this Agreement, the terms:

**Additional Fee** means a charge at Merco's then-current charge-out rates (as applicable) for work undertaken on a "time and materials" basis (including work referred to in clause 7.4);

**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 Company or the Licensor (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 Company or the Licensor 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 Implementation Plan. Merco may change the list of Designated Financial Institutions from

time to time. If Merco amends the list of Designated Financial Institutions it will issue a new list to the Merchant;

**Documentation** means the Schedule and the documents entitled “Merchant Implementation Guide”, “Console User Guide for Merchants”, “Merchant Style Guide” and Customer Service Level Agreement as issued and amended from time to time by Merco;

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

**GST and Tax Invoice** have the meanings given to those terms in the New Zealand *Goods and Services Tax Act 1985*;

**Implementation Plan** means the plan for the integration of the Software into the Website, as outlined in the “Merchant Implementation Guide” as issued and amended from time to time by Merco;

**Implementation Services** means the provisioning of the POLi™ Service for the Merchant (which may be further detailed in the Implementation Plan) as outlined in the “Merchant Implementation Guide”;

**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 Companies Act 1993, or the equivalent legislation 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 Merchant’s account held in a bank in the Territory whose details are specified in the Customer Information Record (or as varied by the parties in writing from time to time), into which funds from Transactions are to be deposited, and an account from which fees payable to Merco are to be transferred by direct debit in accordance with clause 8.2.;

**Merchant’s Bank** means the bank at which the Merchant Bank Account is held;

**Minimum Transaction Charge** means: the minimum Transaction Fee payable by the Merchant each month. If the sum of the monthly Transaction Fees calculated for a month is less than the Minimum Transaction Charge specified in the schedule, the Minimum Transaction Charge will be the difference between the monthly Transaction Fees and the Minimum Transaction Charge specified in the schedule. The rate for the calculation of the Minimum Transaction Charge is fixed during the Initial Term. Thereafter, Merco may vary those rates by giving the Merchant at least 3 months’ written notice to that effect;

**POLi™ Service and POLi™ System** mean the transaction processing platform operated by or on behalf of Centricom, 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;

**Region** means any country within the Territory;

**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 the Territory which would prevent or impair Merco's ability to provide or operate the POLi™ Service or the Software in the Territory;

**Related Company** means a "related body corporate" as defined in section 2(3) of the Companies Act 1993;

**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 a Customer, its customers and a financial institution in the Designated Currencies, to facilitate a transfer of value between the Customer and its customers

**Schedule** means the schedule to this Agreement;

**Software** means the Intellectual Property and 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 7;

**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, Merco 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 2;

**Territory** means the territory consisting of the Regions described in Schedule 1;

**Transaction** includes:

(a) a Sales Transaction (being the supply of goods or services or both);

(b) a Refund Transaction

that is initiated using the POLi™ Service;

**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, Merco may vary those rates by giving the Merchant at least 3 months' written notice to that effect;

**Vector** means the Software specifically designed to initiate a connection to, login at, and navigation of a particular Designated Financial Institution's website;

**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).

## **SCHEDULE**

<b>The Merchant:</b>  Name:  Address for Service:  Company Number:  Contact: Name:  Phone:  eMail:  Website:	
<b>Merco Ltd:</b>  Address for Service:  Company Number:  Contact: Name:  Phone:  eMail:	
<b>Commencement Date:</b>	
<b>Initial Term:</b>	12 Months
<b>Fees:</b>  <b>Implementation Services Fee:</b>  <b>Transaction Fee:</b>  <b>Minimum Transaction Charge:</b>  <b>Support Fees:</b>	\$0.00  Xero payments - \$0.50 plus GST per completed transaction.  Retail payments - 1% of the transaction value, plus GST. Maximum fee per transaction \$3.00 plus GST.  \$5.00 per Month  \$0.00 per month
<b>Related Corporations:</b> <b>refer Clause 16.5</b>	

<b>Regions forming the Territory:</b>	
<b>New Zealand Designated Financial Institutions:</b>	<b>Vectors enabled</b> Yes or No [Delete one]
<b>Australian Designated Financial Institutions:</b>	<b>Vectors enabled</b> Yes or No [Delete one]

## Executed by the Parties:

\_\_\_\_\_  
Signed on Behalf of  
Merco Ltd

\_\_\_\_\_  
Signed on Behalf of  
the Merchant

\_\_\_\_\_  
Name

\_\_\_\_\_  
Name

\_\_\_\_\_  
Title

\_\_\_\_\_  
Title

\_\_\_\_\_  
Date

\_\_\_\_\_  
Date