

# MERCHANT AGREEMENT



Draft

**Between:**

**Merco Limited ("Merco")**

**[Merchant] ("Merchant").**

## Contents

Background.....	3
1 Application.....	3
2 Commencement & Term.....	3
3 Services.....	3
4 Merchant Obligations.....	3
5 Changes.....	5
6 Licence.....	5
7 Support.....	6
8 Invoicing & Payment.....	7
9 Confidentiality.....	8
10 Intellectual Property Rights.....	8
11 Warranty & Liability.....	9
12 Termination.....	11
13 Suspension.....	12
14 Marketing & Promotion; Publicity.....	13
15 Dispute Resolution.....	13
16 General provisions.....	13
17 Definitions.....	15
Schedule.....	19

## Background

1. Merco is the owner of the POLi™ Service within New Zealand.
2. Merco wishes to make the POLi™ Service available to the Merchant for use by the Merchant within the Territory in accordance with the terms of this Agreement.

## The parties agree:

### 1 Application

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

### 2 Commencement & Term

This Agreement commences on the Commencement Date and remains in force for the Initial Term unless terminated earlier in accordance with clause 12. After the Initial Term expires, this Agreement will continue in force until either party terminates the Agreement in accordance with clause 12.

### 3 Services

Merco will provide the Merchant with the following during the Term:

- a. Implementation Services;
- b. access to the POLi™ Service to permit the initiation of Transactions; and
- c. Support.

### 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 POLi™ Service is accessed from the Website, comply with the Documentation and any instructions from Merco, and are operated in accordance with reasonable security procedures to prevent unauthorised access to any information, data or the POLi™ Service;
- b. only use the POLi™ Service to initiate and process Transactions, in accordance with the Documentation, this Agreement and any instructions from Merco;
- c. acquire and maintain all equipment, services and software , 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 usernames, passwords and information required to access any facility forming part of, or made available while using the POLi™ Service; and
  - ii. 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 and its 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 required by Merco, 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);
- 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. At all times during the Term 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 or its contractors;
- b. make any representation in connection with any goods or services or the POLi™ Service that may bind or affect Merco or its contractors;
- c. make any unauthorised representations concerning the POLi™ Service or Merco's products, policies or services;
- d. initiate or process any Transaction for or on behalf of any other person (except as permitted in accordance with this Agreement);
- e. initiate or process any Transaction that has been originated from a website or source, other than the Merchant's Systems;
- f. initiate or process a Transaction on behalf of any other person where the Transaction does not relate to a genuine sale or supply;
- g. initiate or process a Transaction with the knowledge (or in circumstances where it should reasonably know) that the Transaction is fraudulent or unlawful;
- h. initiate or process the same Transaction more than once;
- i. initiate Refund Transaction(s) in favour of a person or a banking account that is:
  - i. different from the person or banking account from which the original Transaction was originated; or
  - ii. is greater in value than the original POLi Transaction.

Multiple Refund Transactions may be processed in respect of an original Transaction. However, the sum of Refund Transactions processed in relation to the original transaction must not exceed the amount of the original Transaction.

4.3. Other Obligations and Consents. The Merchant:

- a. must comply with all applicable laws including, but not limited to, the New Zealand Privacy Act 2020 and the Anti-Money Laundering and Countering Financing of Terrorism Act 2009;
- b. acknowledges that Merco may engage service providers to support the provision of the POLi™ Service. The Merchant agrees to comply with any reasonable direction or request given by Merco that relates to its obligations under such arrangements, including providing such relevant information regarding the Merchant's business as reasonably required by Merco and/or its service provider as part of the on-boarding

process or during the Term;

- c. confirms that it has read and agreed to Merco's privacy policy, which is available on Merco's website; and
- d. consents to the use of its name or other business details (or part thereof) (in whichever form decided by Merco) to be referenced in the domain of an account identifier for a Transaction.

## 5 Changes

5.1. Merco may make the following changes to this Agreement from time to time without the consent of the Merchant, if Merco (acting reasonably) deems the change to be necessary for legitimate business purposes (a "Change"):

- a. introducing a new fee or charge;
- b. varying the amount of an existing fee or charge, or how it is calculated or when it is billed;
- c. varying the amount of late payment of fee or charges by the Merchant, how it is calculated or when it is billed;
- d. any change necessary to comply with changes in any relevant law;
- e. any change necessary to deal with significant fraud or security issues;
- f. any change necessary to reflect changes to Merco's business or technological systems; and
- g. any administrative change that is necessary to correct mistakes or omissions or which Merco reasonably believes the Merchant will benefit from.

5.2. From time to time, Merco may make new releases of the POLi™ Service or the Documentation ("a Release"). Releases may, among other things:

- i. provide a means of using enhanced or added functionality in respect of the POLi™ Service; or
- ii. remove access to functionality or banking facilities that had previously been available in respect of the POLi™ Service.

5.3. Merco requires the Merchant to undertake any action to accommodate, implement or otherwise give effect to a Release or Change (including making any necessary changes to the Website or the Business Systems), the Merchant must undertake any such necessary action within 30 days of receiving notice from Merco under clause 5.1 or 5.2 of a Change or Release (or a longer period if agreed by Merco, acting reasonably). However, if the Change or Release is intended to improve security or comply with any regulatory requirement, the Merchant must give effect to any Change or Release (as applicable) as soon as reasonably practicable, and no later than 30 days after receiving notice from Merco of the Release.

## 6 Licence

6.1. Merco grants the Merchant, and the Merchant accepts, a non-transferable, non-exclusive right to access and use the POLi™ Service during the Term, in accordance with the terms and conditions of this Agreement, 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 not access the POLi™ Service from or in relation to any other Website, Business Systems 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 Service through bureau service processing (except as permitted in clause 16.7);
- 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 the POLi™ Service outside of the Territory (provided that the accessing and use of the POLi™ Service by a Merchant Customer 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 the same or similar conduct.

## **7 Support**

- 7.1. During the Term, and subject to clause 12 of this Agreement, 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; 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. 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 Release as it is 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 must comply with the procedures and provide the information described in the Documentation. If the problem or issue is attributable to any systems operated by or on behalf of Merco, or is attributable to a change in a Designated Financial Institution's website, Merco will use its best endeavours 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 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 POLi™ Service 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 POLi™ Service;
- e. accident, negligence, misuse or abuse;
- f. operator, Merchant, Designated Financial Institution, the Merchant's Customers or end user error; or
- g. the Merchant breaching the terms of this Agreement.

## **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 Monthly Charges;
  - e. Additional Fees;
  - f. Merco's reasonable transportation and/or accommodation expenses incurred by or on behalf of Merco if Merco (or anyone engaged by Merco) is required to attend the Merchant's premises for any reason pursuant to this Agreement; and
  - g. all other amounts that may be incurred by the Merchant under clause 8.4.
- 8.2. The Merchant must pay any fees or charges incurred pursuant to this Agreement in accordance with the following terms:
- a. Merco's invoices are payable within 30 days of the invoice date, unless otherwise stated;
  - b. The fees for the Implementation Services will be invoiced upon the Merchant signing this Agreement and payable immediately;
  - c. the Support Fees, Transaction Fees, Minimum Monthly Charges and Additional Fees and any other fees or charges are payable in arrears; and
  - d. The Support Fees and Transaction Fees are payable by direct debit from the Merchant's Bank Account and the Merchant must execute a direct debit authority in favour of Merco in respect of this and do all other things reasonably necessary to establish and maintain that direct debit facility during the Term.
- 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 amount 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% per annum above the overdraft rate available from Merco's bankers (which the Merchant must pay at the same time as the outstanding amount);
  - b. the Merchant will pay any fees and expenses (including dishonour, debt recovery and legal fees) incurred by Merco as a result of the failure to pay or a breach of this Agreement by the Merchant; and

- c. by written notice to the Merchant, Merco may suspend the provision of any of the services and/or the Merchant's access to the POLi™ Service until the Merchant pays the outstanding amount together with interest and expenses in full.

## **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 POLi™ Service and Documentation are the subject of copyright and other intellectual property rights and that Merco owns all of the existing and new Intellectual Property arising from the provision of the POLi™ Service and the Documentation. The Merchant must not at any time whether during the Term or otherwise, do or permit any act or omission that infringes on those Intellectual Property rights. The Merchant will fully indemnify Merco fully against any loss, liability, cost or expense suffered or incurred by Merco (including liability to any other party) as a result of the Merchant's breach of the provisions of this clause 10.
- 10.2. 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 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 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 with reasonable assistance (at the reasonable expense of Merco) in conducting the defence of such a claim;
- d. permit Merco to modify the POLi™ Service or replace components or parts of components, to render the POLi™ Service non-infringing; and
- e. authorise Merco to obtain for the Merchant's benefit the authority to continue the use of 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 POLi™ Service;
- g. modify the POLi™ Service 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. Merco will not have any liability under clause 10.2 with respect to any claim based upon:

- a. the use of the POLi™ Service, with other products or software not supplied by Merco;
- b. any addition to or modification to the POLi™ Service not created or supplied by or on behalf of Merco;
- c. use of a superseded release or version of the POLi™ Service;
- d. any use of the POLi™ Service 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 entire obligations, and the Merchant's sole remedies in respect of any claim that an authorised use by the Merchant of 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. Subject to clause 11.2, Merco warrants that:

- a. The POLi™ Service 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 operation of the POLi™ Service or access to the 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:
  - i. the design and performance of the Website and the Business Systems;

- ii. other Merchant systems;
  - iii. the websites, mobile applications, systems, processes, rules, codes, procedures and policies (including in relation to security or risk related checks, clearing and settlement processes and timeframes) of the Merchant's Bank and the Merchant's Customer's Designated Financial Institutions;
  - iv. the state of the relevant telecommunications networks and their interconnections and network congestion; and
  - v. the occurrence of a Force Majeure Event impacting the business of Merco or that of its service providers or contractors which in turn impacts on the provision of the POLi™ Service;
- c. Designated Financial Institutions are not obliged to notify Merco of any changes to the layout or functionality of their websites or any outages, faults or errors in the performance of their websites or mobile applications;
- d. an internet banking receipt, whether issued by a Designated Financial Institution or the Merchant's Bank, and/or a completed Transaction status reported by 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 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 expressly excludes all conditions and warranties whether express or implied, statutory or otherwise.
- 11.4. 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 Agreement) for business purposes, and that accordingly the provision of the New Zealand Consumer Guarantees Act 1993 will not apply to this Agreement or to the supply of such access or use.
- 11.5. Except for undertakings to indemnify or fraud, in no event will Merco 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 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.
- 11.6. Merco's liability arising out of or in connection with this Agreement or the Merchant's access to or use of 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.
- 11.7. The Merchant represents and warrants to Merco that:
- a. to the best of its knowledge and belief, the processing by Merco of any payment instructions given by the Merchant or the Merchant's Customers will not breach any laws; and
  - b. It will comply with all its obligations under this Agreement and perform all its obligations under this Agreement in compliance with all applicable laws.
- 11.8. To the extent permitted by law, the cumulative liability of Merco 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:

1. in the case of goods supplied by or on behalf of Merco, at Merco's option:
  - a. replacing or repairing the goods, or supplying equivalent goods; or
  - b. paying the cost of replacing or repairing the goods or of acquiring equivalent goods; and/or
2. in the case of services, at Merco's option:
  - a. supplying the services or licences granted under this document again; or
  - b. paying the cost of having the services supplied or licences granted again.

11.9. 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).

11.10. To the extent permitted by law, the Merchant indemnifies Merco and its 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.

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

## 12 Termination

12.1. This Agreement may be terminated by written notice in the following circumstances:

- a. with at least three months' notice by either party without cause at any time after the end of the Initial Term;
- b. immediately by Merco on the occurrence of a Regulatory Event;
- c. immediately by Merco if the Merchant is operating a prohibited business as reasonably determined by Merco;
- d. immediately by Merco if Merco, acting reasonably, considers that the continued operation of this Agreement would expose Merco to reputational or brand damage;
- e. immediately by Merco pursuant to clause 13.2;
- f. upon reasonable notice by the Merchant, in the event of any Change under **clause 5** that is materially adverse to the Merchant; or
- g. immediately 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 under clause 12.1 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 Documentation and to access the POLi™ Service automatically ceases; and
- d. the Merchant must promptly remove the POLi™ Service from the Business System, and update the Website or Business Systems so as not to refer to Merco or the POLi™ Service.

12.3. Termination under this clause 12 will not affect either party's claim for any amount due at the time of termination, damages for any breach of obligations under this Agreement and any other legal rights either party may have.

### **13 Suspension and Blocking and unblocking the POLi™ Service upon a Merchant's Customer's request**

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 or a Transaction, including any suspected, alleged or actual security or fraud or compliance related issues relating to 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;
- 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; or
- d. the Merchant has breached a material term of this Agreement; or Merco considers, acting reasonably, that the operation of this Agreement or the POLi™ Service is exposing Merco to reputational or brand damage.

Where Merco exercises its rights under this clause 13.1, Merco will use its reasonable endeavours to provide reasonable prior notice to the Merchant, other than where it reasonably considers the immediate suspension of the POLi™ Service or the Merchant's access to it is required without notice having regard to the material or immediate impact it may otherwise have on Merco's business, the POLi™ Service and/or its end users.

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

1. Merco is not obliged to process any Transactions using the POLi™ Service;
2. if possible, the parties will work together in good faith to resolve the issue or issues which resulted in the suspension; and
3. 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.

13.3. If the suspension arises as a consequence of any act or omission of the Merchant, Merco will be entitled to continue to charge the Merchant fees for Support in attempting to resolve the issue which resulted in the suspension.

13.4. Suspension under this clause 13 will not affect either party's claim for any amount due at the time of suspension, damages for any breach of obligations under this Agreement and any other legal rights either party may have.

- 13.5. The Merchant agrees and acknowledges that Merco may block or unblock (for the relevant period(s) determined by Merco) a Merchant Customer's use of or access to the POLi™ Service for that Merchant Customer in accordance with Merco's Terms and Conditions or otherwise in the following circumstances:
- a. At the request of a Merchant Customer, with their consent;
  - b. Without the consent of a Merchant Customer, if Merco considers in its sole and absolute discretion that in respect of any Transaction by, from or to a Merchant Customer, any such Transaction(s):
    - i. which were previously processed, have been deemed fraudulent;
    - ii. which have been received but not yet processed, may be fraudulent;
    - iii. may be associated with any other illegal activity; or
    - iv. may in any other way be rejected by that Merchant Customer's bank or Designated Financial Institution.

The Merchant agrees to work collaboratively and in good faith with Merco to facilitate any such request from a Merchant Customer to block and unblock their use of or access to the POLi™ Service and any instructions from Merco (acting reasonably) relating to this process.

#### **14 Marketing & Promotion; Publicity**

- 14.1. If Merco provides the Merchant with any logos, trademarks, signs or other promotional or instructional material relating to the 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 ("Expert"). 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 that the Expert's decision on a matter determined under this clause 15.1 is final and binding as to both matters of law and fact.
- 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: Neither party may transfer any right or liability under this Agreement without the other party's prior written consent, except where this Agreement provides otherwise.
- 16.2. Subcontracting: 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.
- 16.3. Waiver: 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.
- 16.4. Amendment: Subject to the changes that Merco may make in respect of this Agreement as set out in clause 5, the parties may amend this Agreement by way of:

- a. Merco making available the proposed changes to this Agreement to the Merchant via the merchant console, portal, website or email, and having provided the relevant notice to the Merchant of the same in accordance with this Agreement where applicable, and either: (i) the Merchant clicking a link or button to confirm its acceptance of the proposed new terms on such merchant console, portal, website or email; or (ii) the Merchant agrees in writing to the change (including by email or other electronic means); or (iii) where the Merchant is unable or chooses not to do so, the Merchant's continued use of the POLi™ Service, initiating Transactions using the POLi™ Service, or accepting payments from the Merchant's Customers using the POLi™ Service after being notified of such revised or new terms by Merco. In the case described in paragraph (iii) of this clause, any such action by the Merchant shall constitute and evidence the Merchant's unqualified acceptance of the revised or new terms of this Agreement; or
  - b. A document signed (including by way of electronic signature) by the parties, if applicable.
- 16.5. Audit and Information Gathering Rights: Merco may, by itself or an authorised representative, audit the Merchant's records and/or request the Merchant promptly provides information relating to any or all of the Merchant's business activities, the Website and the Transactions, as considered reasonably necessary by Merco to confirm the Merchant's compliance with the terms and conditions of this Agreement, or to assist Merco to meet its obligations or in connection with other arrangements Merco has to facilitate the provision of the POLi™ Service, by giving the Merchant at least 7 days' prior written 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. Each party will bear its own costs relating to such audit and inspection under this clause unless audit reveals that the Merchant has failed to comply with this Agreement, in which case the Merchant will be liable to pay for all costs and expenses relating to that audit and inspection
- 16.6. Capacity: The Merchant agrees and acknowledges that Merco acts on its own behalf and does not act on behalf of the Merchant or the Merchant's Customers in facilitating the Transactions, nor does Merco provide the means of payment or a custodial or depository service to the Merchant or the Merchant's Customers.
- 16.7. 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.
- 16.8. 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 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. Both parties warrant that at the date of this Agreement they each have the full power and authority of any nominated Related Companies to enter into this Agreement on its own behalf, and for those nominated Related Companies.
- 16.9. Notices:
- a. Any notice to or by a party under this Agreement must be in writing and must be addressed to the postal or email address specified by the relevant party for that purpose, as amended from time to time.
  - b. 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. In addition, the Merchant agrees that Merco may communicate to it by making it available on its website, console or portal and a notice is duly given if it is being made available in such ways (in which case Merco will notify the Merchant by way of email or other electronic messaging that the information is available for perusal, retrieval and / or download).
  - c. A notice is taken to be received as follows:
    - i. A notice hand delivered before 5.00pm on a Business Day is taken to have been given on that day. Otherwise, a hand delivered notice is taken to have been given on the following Business Day.
    - ii. A notice sent by post is taken to have been given on the third Business Day after posting (from and

to a place within New Zealand) or otherwise within ten Business Days of posting (from and to a place outside of New Zealand) unless it was actually received before that date.

- iii. A notice sent by email before 5.00pm (recipient's time) on a Business Day is taken to have been given on that day. Otherwise a notice sent by email is taken to have been given on the following Business Day. However, this clause does not apply where the person sending the transmission has evidence that the transmission was unsuccessful.
  - iv. A notice that was made by Merco on its website, merchant console or portal will be taken to be received at the time the Merchant is taken to receive the email or other electronic messaging that Merco has sent to the Merchant to advise the Merchant that the notice is available for perusal, retrieval and / or download.
- d. The Merchant agrees to promptly notify Merco of any updates to its contact or notice details from time to time during the Term.
- 16.10. Entire Agreement: 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.
- 16.11. 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.
- 16.12. 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 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 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.
- 16.13. 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.
- 16.14. Electronic Transactions: This Agreement (and any variations to the same) may be executed by way of electronic signature in accordance with the terms of the New Zealand Contract and Commercial Law Act 2017.

## 17 Definitions

In this Agreement:

**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 Day** means a day other than a Saturday, Sunday, or public holiday in Auckland, New Zealand, beginning at 9.00am and ending at 5.00pm;

**Business Systems** means the hardware and software environment with which the POLi™ Service is to be primarily implemented as specified in the Schedule acknowledging that the hardware and software environment cannot be completely specified but in doing so the Business Systems specified in the schedule reflect the means by which the Merchant's Customers shall gain access to or use the POLi™ Service or the Merco Service. The Merchant shall advise Merco prior to any change to the Business Systems specified in the Schedule;

**Commencement Date** means the date specified in the Schedule or such other date as the parties may agree date in writing(which may be via email);;

**Confidential Information** of a party (the **Owning Party**) means all information of or relating to the Owning Party, or any Related Company (including the POLi™ Service in source and object code form and the Documentation), relating to the

business, operations or affairs and goods and services of the Owning Party or any Related Company;

**Designated Financial Institutions** means the financial institutions whose systems are accessible from time to time by a 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 available here <https://polipayments.statuspage.io/>. Merco may change the list of Designated Financial Institutions from time to time and any such changes will be updated in Merchant console and/or here <https://polipayments.statuspage.io/>;

**Documentation** means the Schedule and the documents titled "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;

**Force Majeure Event** means any act or omission outside the reasonable control of the affected party and could not have been prevented or avoided by that party taking all reasonable steps and includes:

- a. act of God, earthquake, cyclone, fire, explosion, flood, landslide, lightning, storm, tempest, drought or meteor;
- b. war (declared or undeclared), invasion, act of a foreign enemy, hostilities between nations, civil insurrection or militarily usurped power;
- c. act of public enemy, sabotage, malicious damage, terrorism or civil unrest;
- d. ionising radiation or contamination by radioactivity from any nuclear waste or from combustion of nuclear fuel;
- e. confiscation, nationalisation, requisition, expropriation, prohibition, embargo, restraint or damage to property by or under the order of any government or government authority;
- f. strikes, blockades, lockout or other industrial disputes; or
- g. pandemic as declared by the relevant New Zealand health authority and/or WHO, including restrictions imposed as a result of pandemic;

**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 Services** means the provisioning of the POLi™ Service for the Merchant as outlined in the "Merchant Implementation Guide" as issued and amended from time to time by Merco;

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

**Intellectual Property** means copyright, all rights in relation to inventions (including patents), registered and unregistered trademarks, registered and unregistered designs, confidential information, software (whether in object code or source code), and all other rights anywhere in the world resulting from intellectual activity in relation to Merco, the POLi™ Service and the Documentation;

**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 New Zealand 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, as notified by the Merchant to



Merco, and approved by Merco (or as varied by the parties in writing from time to time), into which funds from Transactions are to be deposited. Merchant Bank Accounts must be associated with the Merchant and comply with the guidelines as specified by Merco in the Documentation;

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

**Merchant Customer** means a customer of the Merchant who initiates a Transaction;

**Merchant's Systems** means the Merchant's Business Systems and Website, as described in the Schedule,

**Minimum Monthly Charge** means: the minimum Transaction Fee payable by the Merchant to Merco each month. If the sum of the monthly Transaction Fees calculated for a month is less than the Minimum Monthly Charge specified in the Schedule, the Minimum Monthly Charge will be the difference between the monthly Transaction Fees and the Minimum Monthly Charge specified in the schedule. The rate for the calculation of the Minimum Monthly 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 Merco in New Zealand, delivering a variety of payment applications and functions in support of the transmission of funds. 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 any part of the POLi™ Service in the Territory;

**Related Company** means a "related body corporate" as defined in section 2(3) of the New Zealand 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 POLi™ System, between the Merchant, a Merchant Customer, a Designated Financial Institution, and related intermediary entities (if applicable) to facilitate support the transmission of monetary value from an account held with that Designated Financial Institution, in return for the Merchant agreeing to provide goods and or services as ordered by a Merchant Customer, or in payment by a Merchant Customer for goods or services that have already been provided by the Merchant;

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

**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 the period following the Initial Term to the date of termination;

**Terms and Conditions** mean the terms and conditions which apply to a Merchant Customer's use of the POLi™ Service, and which are displayed to a Merchant Customer during a Sales Transaction and available to view here <https://www.polipayments.com/terms-and-conditions/>, as amended by Merco from time to time;

**Territory** means the territory in which the Merchant has the right to use the POLi™ Service as described in Schedule 1;

**Transaction** includes:

- a. a Sales Transaction (being orders for goods, the supply of goods or the supply of 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;

**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).

Draft

**Schedule**

<b>The Merchant:</b>	
Address for Service:	
Company Number:	
Contact	
Name:	
Phone:	
eMail:	
<b>Merco Ltd:</b>	
Address for Service:	C/-Lockhart Muir Level 1, 7 Owens Road, Epsom, Auckland 1023 PO Box 74295, Greenlane, Auckland 1546
Company Number:	2208567
Contact	
Name:	Jeff Skidmore
Phone:	+64 09 363 6726
eMail:	jeff.skidmore@merco.co.nz
<b>Commencement Date:</b>	
<b>Initial Term:</b>	12 Months
<b>Fees:</b>	
Implementation Services Fee:	\$0.00
<b>Standard POLi Fees:</b>	1% of the transaction value. Maximum fee per transaction \$3.00
<b>Stripe Fees:</b>	\$0.25 + 0.2%, plus Stripe transaction fees *
Stripe with Xero, Pay now with POLi Links and Forms	* Stripe fees are only charged if the Merchant has elected to accept Stripe payments with Xero or Pay Now with POLi. Stripe transaction fees are charged separately by Stripe
Minimum Monthly Charge:	\$10.00
Support Fees:	\$0.00
<b>The Merchant's Systems</b>	
Website:	
Business Systems (for POLi Link only):	
<b>Services</b>	POLi™ Service POLi - Check out POLi - Link POLi - Xero  Services are not limited to the above and include new and varied services developed by Merco as described from time to time on Merco's Website websites <a href="http://www.merco.co.nz">www.merco.co.nz</a> , <a href="http://www.polipay.co.nz">www.polipay.co.nz</a> and <a href="http://www.polipayments.com">www.polipayments.com</a> and any other website operated by Merco
<b>Related Corporations</b>	refer Clause 16.8
<b>Regions forming the Territory</b>	New Zealand
<b>Designated Financial Institutions</b>	Vectors Enabled - Yes

Draft

**Executed by the Parties:**

\_\_\_\_\_  
Signed on behalf of Merco Limited

You have already accepted the terms and conditions of this agreement when you applied for your POLi account.

Returning a signed agreement to Merco is not necessary, but please retain a copy for your records

\_\_\_\_\_  
Name

\_\_\_\_\_  
Title

\_\_\_\_\_  
Date

Draft