



CUSTOMER TERMS OF TRADE

This Customer Terms of Trade Agreement is between the organisation you are duly authorised to represent and enter into this Agreement on behalf of (**Customer**) and SmartEncrypt Pty Ltd and consists of these terms, applicable End User Licence Agreement and any other additional terms presented to you upon enrolling to access and use SmartEncrypt software.

Background

- (A) SmartEncrypt Pty Ltd (ACN 165 388 796) (**SmartEncrypt**) owns and supplies the SmartEncrypt software product that performs file level encryption and related services (**Products and/or Services**)
- (B) Customer (**you** or **your**) wishes to access and use the Products and/or Services.
- (C) SmartEncrypt agrees to supply you with the Products and/or Services in accordance with the terms and conditions outlined in this Agreement.

Operative provisions

1. Definitions and interpretation

1.1 Definitions

The following definitions apply unless the context requires otherwise:

Affiliates with respect to SmartEncrypt Pty Ltd, means any entity that, directly or indirectly, owns or controls, is owned or controlled by, or is under direct or indirect common control.

Agreement means this Customer Terms of Trade agreement, as updated or varied by SmartEncrypt from time to time.

Business Day means a day that is not a Saturday, Sunday, public holiday or bank holiday in Sydney, New South Wales, Australia and/or Melbourne, Victoria, Australia.

Confidential Information means all information including but not limited to forms, letters, specifications, processes, procedures, statements, formulae, inventions, research and development information, sales or marketing information, financial information, designs, know-how, trade secrets, customer or supplier lists

(including names and details), reports or data including any copies or extracts made from the information, in whatever form:

- (a) relating to the terms of this Agreement and its subject matter;
- (b) disclosed by or on behalf of SmartEncrypt to the Receiver in connection with the transactions contemplated by this Agreement; and
- (c) which SmartEncrypt identifies as confidential at the time of disclosure but does not include Excluded Information.

Corporations Act means the Corporations Act 2001 (Cth).

Eligibility Criteria means the criteria that entities are required to meet in order to access special pricing (if any) that may be varied by SmartEncrypt from time to time.

End User Licence Agreement means the applicable agreement that governs access and use of the SmartEncrypt Products and/or Services.

Excluded Information means information that:

- (a) is part of the public domain (other than as a result of a breach of this Agreement or an obligation of confidence owed); or
- (b) was already known to the Receiver at the time of disclosure subject to the Receiver providing competent evidence.

Government Body means a government or a governmental, semi-governmental or judicial entity or authority including a self-regulatory organisation established under Law or a stock exchange.

Insolvency Event means:

- (a) a winding up, dissolution, liquidation, provisional liquidation, administration or bankruptcy;
- (b) being insolvent under administration or insolvent (each as defined in the Corporations Act);
- (c) having a controller (as defined in the Corporations Act) appointed;
- (d) being otherwise unable to pay debts when they fall due; or
- (e) ceasing to carry on business.

Intellectual Property means all present and future intellectual property rights conferred by statute, at common law or in equity, whether registered or unregistered, that party's trademarks, business names, analysis, business methods, compilations, data, structures, trade secrets, operations and affairs, processes, management systems, systems used in the generation of business, organisational structure and reasons therefore, whether in printed, magnetic or electronic form, or on film.

Law means:

- (a) principles of law or equity established by decisions of courts;
- (b) statutes, regulations or by laws of the Commonwealth of Australia, or any State or Territory of the Commonwealth of Australia or a Government Body; and
- (c) requirements and approvals (including conditions) of the Commonwealth of Australia or any State or Territory of the Commonwealth of Australia or a Government Body that have the force of law.

Loss means, in relation to any person, any loss, liability, damage, cost, charge, expense, outgoing, payment, diminution in value or deficiency of any kind or character, which that person pays, suffers or incurs or for which that person is liable, excluding any indirect or special loss or damage or consequential loss or damage.

Personnel means an officer, employee, agent, contractor or subcontractor.

Personal Information means information or an opinion (including information or an opinion forming part of a database), whether true or not and whether recorded in a material form or not, about an identified individual, or an individual who is reasonably identifiable, and includes anything otherwise defined as personal information or personal data in the Privacy Laws.

Privacy Laws means the Privacy Act 1988 (Cth) and all other laws in Australia which relate to the protection of Personal Information relevant to the parties to this Agreement.

Products means SmartEncrypt software product that performs file level encryption.

Receiver means a party that receives Confidential Information of SmartEncrypt.

Related Body Corporate has the meaning given to that term in section 9 of the Corporations Act.

Reseller means an entity authorised by SmartEncrypt who has the right to licence the Products and/or Services to you.

Services means the services provided by SmartEncrypt including but not limited to Support Services.

SmartEncrypt Terms means any supplemental terms and conditions, including but not limited to this Agreement, EULA or policies as updated us from time to time.

Tax Invoice has the meaning given to that expression in the A New Tax System (Goods and Services Tax) Act 1999

Vendor means SmartEncrypt Pty Ltd.

1.2 Interpretation

In this Agreement:

- (a) headings are for ease of reference only and do not affect interpretation;
- (b) the singular includes the plural and vice versa, and a gender includes other genders;
- (c) another grammatical form of a defined word or expression has a corresponding meaning;
- (d) a reference to a clause, schedule or annexure is to a clause, or schedule or annexure to this Agreement, and a reference to this Agreement includes any schedule or annexure;
- (e) a reference to a document or instrument includes the document or instrument as novated, altered, supplemented or replaced from time to time;
- (f) a reference to time is to Sydney, New South Wales, Australia time;
- (g) a reference to SmartEncrypt includes the party's executors, administrators, successors and permitted assigns and substitutes;
- (h) a reference to a person includes a natural person, partnership, body corporate, association, governmental or local authority or agency or other entity;

- (i) a reference to a statute, ordinance, code or other law includes regulations and other instruments under it and consolidations, amendments, re-enactments or replacements of any of them; and
- (j) the meaning of general words is not limited by specific examples introduced by including, for example or similar expressions.

2. Term

This Agreement commences on the date that you commence using SmartEncrypt's Products and/or Services and continues in effect until you cease using SmartEncrypt's Products and/or Services.

3. Engagement

3.1 Relationship

The parties agree that this Agreement does not constitute and must not be construed as a partnership, joint venture, employer and employee relationship or principal and agent relationship between the parties (including its Personnel).

4. Customer obligations

The Customer:

- (a) must pay for the licenses to use the Products and/or Services to us or to an authorised Reseller, whichever is applicable;
- (b) must comply with the process involved in enrolling to access and use the Products and/or Services whether these processes are imposed by SmartEncrypt or its authorised Resellers;
- (c) must comply with these terms and applicable End User Licence Agreement (EULA) and also comply with any other terms applicable including but not limited to any additional terms and conditions that apply to Products and/or Services;
- (d) must not decompile, disassemble, reverse engineer, edit, alter, modify, create any derivative works from or otherwise change the whole or any part of the Products and/or Services or attempt to do such things;
- (e) must not reproduce, copy, resell, redistribute, sublicense, rent, lease, lend, pledge, or directly or indirectly transfer the Products and/or Services to any third party, and may not permit any third party to have access to and/or use the functionality of the Products and/or Services except for the sole purpose of accessing the functionality of the Products and/or Services in accordance with this Agreement and any SmartEncrypt Terms;
- (f) acknowledges that it is solely responsible for ensuring that it and its Personnel (if applicable) comply with all Laws and the terms of this Agreement;
- (g) must maintain all licences, permits and other regulatory consents required or necessary to perform its obligations under this Agreement;
- (h) must not engage in misleading, deceptive or unconscionable conduct in relation to its obligations under this Agreement;
- (i) must comply with any lawful directions issued by SmartEncrypt in relation to the use of the of any Products and/or Services;

- (j) must comply with all Laws to the extent that it relates to its obligations under this Agreement; and
- (k) must not damage the reputation, goodwill or brand names of the Vendor and its Related Body Corporates.

5. General Licence

- (a) Subject to the terms of this Agreement, EULA and SmartEncrypt's acceptance to provide you with a licence(s), you are granted, a non-exclusive, non-transferable, limited licence to use the Products and/or Services.
- (b) All rights, title, and interest (including all copyrights and other intellectual property rights) in the Products and/or Services belong to us. You acquire no ownership of copyright or other intellectual property rights or proprietary interest in the Products and/or Services or copies thereof.
- (c) You must not use the Products and/or Services in any way that infringes any copyright or other proprietary interests. You must not remove or obscure the copyright notice or other notices contained in Products and/or Services.

6. Fees

6.1 Pricing and payment

- (a) You agree to pay the full amount payable in relation to the use of SmartEncrypt's Products and/or Software by the due date specified on any invoices issued by SmartEncrypt or SmartEncrypt's authorised Reseller.
- (b) Subject to your nominated authorised Reseller, pricing may vary slightly due to foreign exchange rates.

6.2 Variation

- (a) SmartEncrypt may, at any time during the term of this Agreement, serve on the Customer a notice relating to price or fee variations, such notice will be in accordance with clause 16(b).
- (b) If SmartEncrypt serves on the Customer a notice contemplated by clause 6.2(a), the Customer may terminate this Agreement within seven (7) days of receiving such notice, in accordance with clause 14. Continued use of the Product and/or Services following the expiration of seven (7) days following the date our notice to you of any change constitutes acceptance of the change.

6.3 Suspension

- (a) If you fail to pay for the use of SmartEncrypt Products and/or Services within sixty (60) days from the due date of an invoice, we or our authorised Reseller will be entitled to suspend your access and use of SmartEncrypt Products and/or Services.
- (b) The suspension in clause 6.3(a) will continue for a period until you pay the full amount outstanding or until we or our authorised Reseller decides to lift the restriction, whichever is earlier.

7. GST

7.1 Consideration is exclusive of indirect taxes

Unless otherwise expressly stated, all amounts payable or consideration to be provided under or in accordance with this Agreement is expressed exclusive of sales, value added or other government-imposed transactional charges or taxes (Indirect Tax), however described.

7.2 Indirect taxes payable

If Indirect Tax is imposed on any supply made under or in accordance with this Agreement, you must pay to the supplier an additional amount equal to the Indirect Tax payable on the supply.

8. Confidential information

- (a) You acknowledge that you may receive, possess or otherwise acquire Confidential Information that is the property of SmartEncrypt.
- (b) You must:
 - (i) not disclose to any third-party, any details referred to in clause 8(a) above or of this Agreement;
 - (ii) keep all Confidential Information confidential and do not directly or indirectly disclose, divulge or communicate Confidential Information to any other person;
 - (iii) take all reasonable steps to secure and keep secure, all the Confidential Information in your possession;
 - (iv) not deliberately memorise, use, modify, reverse engineer or make copies, notes or records of the Confidential Information without our prior written approval.

9. Intellectual Property

- (a) Any Intellectual Property created by SmartEncrypt including but not limited to copyright, source code and any other intellectual property rights of whatever nature including any modifications or upgrades, for the purposes of this Agreement or is made available to you pursuant to this Agreement, remains the property of SmartEncrypt.
- (b) You must not use the Software Product in any way that infringes any copyright, proprietary interest or intellectual property rights.
- (c) You acquire no ownership of copyright or other intellectual property rights or proprietary interest in the Products and/or Services or copies thereof.

10. Privacy

- (a) The Customer will not do or omit to do anything to breach any Privacy Law or cause SmartEncrypt to breach any Privacy Law, including in the Software's use.
- (b) The Customer must immediately notify SmartEncrypt of any suspected, threatened or actual privacy breach and comply with SmartEncrypt's reasonable direction.

11. Force Majeure

- (a) We may cancel or suspend the Products and/or Services in the event of any delay or non-performance due directly or indirectly to act of God, wars, strikes, lockouts, industrial action, floods, fires, accident, earthquake, riot, explosion, terrorism, acts of government, military, civil or regulatory authority, delays or defaults of manufacturers or suppliers, change in any law or regulation, disruption or interruption to the supply of communications, internet, power or other utility or any other cause beyond our reasonable control (**Force Majeure Event**).
- (b) We will not be liable for any delay or failure to perform any obligations under this Agreement or any SmartEncrypt Terms as a result of any Force Majeure Event. We will notify you as soon as practicable of any anticipated delay or impact on the Products and/or Services or our obligations under this Agreement or SmartEncrypt Terms.

12. Termination

12.1 Termination by Customer

- (a) If you cancel your licences to SmartEncrypt Products and/or Services, this Agreement will automatically terminate.
- (b) You will not be entitled to any unused amounts relating to any licences paid in advance if you choose to terminate prior to the end of the subscription term.

12.2 Termination by SmartEncrypt

- (a) We may terminate this Agreement at any time on thirty (30) days written notice to you.
- (b) We may terminate the Products and/or Services with immediate effect if you are unable to pay debts as and when they become due and payable.

12.3 Consequences of termination

On termination of this Agreement:

- (a) your access to the Products and/or Services, any licence granted under such agreement also terminates; and
- (b) you must:
 - (i) pay all money owed to SmartEncrypt or its authorised Reseller; and
 - (ii) cease using SmartEncrypt Products and/or Services.

12.4 Accrued rights and liabilities

This Agreement does not affect any rights or liabilities which have accrued to SmartEncrypt before termination, nor any liabilities which may arise from damages deriving from a breach of this Agreement before termination.

12.5 Survival

Clauses 1, 8, 9, 10, 13, 14, 15 and 16 continue after termination of this Agreement for any reason.

13. Warranties and Guarantees

- (a) To the full extent permitted by law, all guarantees and implied and express warranties in respect of the Software Product are excluded. SmartEncrypt does not give any express or implied warranties or make any representations that the Software Product will be available at any given day, or in respect of the quality, accuracy, completeness, reliability, suitability, acceptability, title, merchantability or fitness for purpose of the Software Product, or that the operation of the Software Product will be uninterrupted, free from errors, fail- safe or free from defects or that the Software Product will protect against all possible threats.
- (b) The Software Product is provided on an “as is” and “as available” basis and, unless expressly stated to the contrary in this Agreement, we exclude all representations, warranties or guarantees, whether express or implied, by statute, trade or otherwise, including without limitation that the Software Product is or will be complete or free from errors or that information will continue to be available to us to enable us to keep the Software Product up-to-date.

14. Limitation of Liability

- (a) Subject to clause 13 of this Agreement and to the fullest extent permitted by law, SmartEncrypt Pty Ltd and its Affiliates and any officers, directors, employees, contractors, agents, successors or assigns will not be liable to you for loss, injury, claim, liability, damage of any kind resulting in any way from any errors in or omissions from the Software Product, the unavailability or interruption to the supply of the Software Product, your use or misuse of the Software Product, your use of any equipment in connection with the Software Product, any delay or failure in performance beyond SmartEncrypt’s reasonable control, or any negligence of SmartEncrypt in connection with the performance of our obligations under this Agreement (other than liability for death or personal injury).
- (b) Subject to clause 13, SmartEncrypt will not be liable to you for any special, indirect, incidental, or consequential damages of any kind whatsoever (including, without limitation, legal fees and loss of profits, contracts, business, revenue, goodwill, anticipated savings, business information or data) in any way due to, resulting from, or arising in connection with the Software Product.
- (c) The maximum aggregate liability of SmartEncrypt for all losses or claims arising out of, or in connection with this Agreement, whether arising in or under contract (including for liability under any indemnity), statute, tort (including negligence), equity or otherwise at law, is limited to the sum of the amounts paid by you to us under this Agreement in the six (6) month period immediately prior to the notice of the then current claim.
 - (i) SmartEncrypt liability to you for loss or damage of any kind (including loss or damage caused by negligence) is reduced to the extent that you caused or contributed to that loss or damage.

15. Indemnity

- (a) You will indemnify and continue to indemnify, defend and hold harmless SmartEncrypt Pty Ltd, its affiliates, and their officers, directors, employees, contractors and agents (each a SmartEncrypt Indemnified Party) against any claims, proceedings, liabilities, losses, damages, awards, costs (including reasonable legal costs) and expenses that a SmartEncrypt Indemnified Party incurs as a result of or in connection with any claims arising from:
 - (i) your use of the Software Product in a manner not expressly permitted by this Agreement or any other SmartEncrypt Terms;

- (ii) any breach by you of any relevant laws including intellectual property rights;
- (iii) wilful misconduct or a fraudulent act or omission in relation to this Agreement;
- (iv) death, bodily injury or loss or damage to tangible property to the extent caused by a breach by you or the negligence, or unlawful conduct; and
- (v) any liability to a third party arising because of any act or omission by you.

16. Notice

- (a) Any notices to be served in connection with this Agreement to the Vendor must be served by prepaid post to the following address:

Level 19, 100 Miller Street,
North Sydney, NSW 2060

and will be deemed to have been given two (2) Business Days after the date of posting, but if the delivery or receipt is on a day which is not a Business Day or is after 4:00pm it is deemed to have been received at 9:00am on the next Business Day.

- (b) Any notices to be served to Customers in connection or association with this Agreement will be served on SmartEncrypt's website.

17. General

17.1 No assignment

You may not assign or otherwise transfer your rights or duties under this Agreement.

17.2 Variations

SmartEncrypt may, at its sole discretion, update or vary the terms in this Agreement by providing you with fourteen (14) days' notice, if you do not accept the varied terms, you may terminate this agreement in accordance with clause 7 of this Agreement.

17.3 Construction

No rule of construction operates against SmartEncrypt merely because it put forward the drafting of a clause or seeks to rely on a particular clause within this Agreement.

17.4 Severability

Any provision of this Agreement which is invalid in any jurisdiction must, in relation to that jurisdiction be read down to the minimum extent necessary to achieve its validity, if applicable and be severed from this Agreement in any other case, without invalidating or affecting the remaining provisions of this Agreement or the validity of that provision in any other jurisdiction.

17.5 Waiver

A right may only be waived in writing, signed by the parties giving the waiver, and:

- (a) no other conduct of a party (including a failure to exercise, or delay in exercising, the right) operates as a waiver of the right or otherwise prevents the exercise of the right;
- (b) a waiver of a right on one or more occasions does not operate as a waiver of that right if it arises again; and
- (c) the exercise of a right does not prevent any further exercise of that right or of any other right.

17.6 Governing law

- (a) This Agreement is governed by and must be construed in accordance with the laws in force in New South Wales.
- (b) The parties submit to the exclusive jurisdiction of the courts of that State and the Commonwealth of Australia in respect of all matters arising out of or relating to this Agreement, its performance or subject matter.