

CARDGATE.NET

MERCHANT AGREEMENT FOR PROVISION OF SERVICES

DATED THIS _____ DAY OF _____ 20_____

Between:

CARDGATE.NET PTY LTD

A.B.N. 83 086 679 950

- and -

THE MERCHANT:

Reference:

SF287 CGN Services Merchant Agr

Issue 12 - 23/11/18

CARDGATE.NET

AGREEMENT FOR PROVISION OF SERVICES

This Agreement is made on the date specified in Schedule Item 1:

BETWEEN:

CARDGATE.NET PTY LTD (ABN 83 086 679 950) a company having its principal place of business at 1/200 Wellington Rd, Clayton in the State of Victoria, Australia (“CardGate.net”)

and

The party whose name, ABN and address are set out in Schedule Item 2 (“the Merchant”)

RECITALS

- A. CardGate.net, the “*Payment Service Provider*” (PSP), has developed, and owns the requisite Intellectual Property Rights to, the *CardGate.net Internet* and *LEMOTO* Payment Services.
- B. To use the Payment Service, the Merchant must have a Merchant facility with the Acquirer, as listed in Schedule Item 3.
- C. CardGate.net and the Merchant have agreed that CardGate.net will supply access to the Merchant for Payment Services for processing Payment Card transactions on the terms of this Agreement.
- D. To support the Merchant, CardGate.net may be required to reference and transmit confidential material to the Acquirer, the Payment Processor and the Merchant. This information may include, but not be limited to, data such as transaction and other references number, transaction value, etc. The Merchant agrees to CardGate.net, storing, transmitting and using this information internally for the purposes of supporting the Merchant.
- E. Cardholder interaction with the Payment Services is conducted directly between the Cardholder’s own web browser/smart device and the Payment Service.
- F. The Merchant agrees to the Payment Services Provider processing payment transactions on their behalf as per the terms of this Agreement.
- G. Provision of the Payment Service is dependent on the Merchant having and maintaining an active Merchant Account facility with the Acquirer. The Merchant agrees to, and shall

be bound by the provision of this account, in order to use the Payment Services. In the event that the Merchant facility is terminated or restricted by the Acquirer, the Merchant acknowledges and agrees that Payment Services will be affected accordingly.

- H. CardGate.net shall not be held liable or responsible in any way, whether financial or otherwise, by the direct or indirect restriction of the Merchant facility. Maintaining the Merchant facility is the Merchant's responsibility at all times and outside the scope of this Agreement.
- I. Transaction history shall be kept for a minimum rolling period of ninety (90) days at which time it may be removed from system.
- J. The Merchant shall not attempt to claim any costs or damages associated with the loss of this information.
- K. CardGate.net and the Merchant agree that the Payment Service is not a certified software application, and therefore shall not be used for the purpose of reporting tax and or preparing financial submissions to any third party or Government departments. Acquirer account statements should be used for such purpose.

IT IS AGREED

1. DEFINITIONS

In this Agreement, unless the contrary intention appears:

“Acquirer” also referred to as “merchant bank”, “acquiring bank” or “acquiring financial institution”. Processes payment card transactions for Merchants.

“API” is an abbreviation of Application Programming Interface. It is how computer applications and services correspond with each other.

“Business Day” shall mean a day when banks are open for business in Melbourne, Victoria, Australia.

“Capture” shall mean the action the Merchant takes to finalise a pre-authorised transaction. This is the settlement instruction to the financial institution for the transaction.

“CardGate.net” shall mean CardGate.net Pty Ltd (ABN 83 086 679 950) of 1/200 Wellington Rd, Clayton in the State of Victoria, its successors and assigns.

“Cardholder” means a person who uses a Payment Card to pay for goods and services from the Merchant.

“Cardholder Data” at a minimum, cardholder data consists of the full Primary Account Number (PAN). Cardholder data may also appear in the form of the full PAN plus any of the following: cardholder name, expiration date and/or service code and sensitive authentication data eg *Card Verification Value / Card Security Code* (“CVV” / “CSC”).

“Cardholder Data Environment (CDE)” people, processes and technology that store, process, or transmit Cardholder Data or sensitive authentication data.

“Charges” shall mean the charges made by CardGate.net for providing the Payment Services, as set out in clause 5.1, subject to any variations, additional charges, expenses, taxes or interest as provided by this Agreement

“Intellectual Property” shall mean all or any of the following:

- a. Copyright, Trademarks;
- b. EL rights pursuant to the Circuit Layout Act 1989 (Commonwealth);
- c. Rights in circuit layouts, integrated circuits, or semiconductor chips, including the right to copy and otherwise commercially exploit;
- d. Trade secrets, know-how and confidential information;

“Issuer” is the entity that issues Payment Cards to Cardholders. Also referred to as “issuing bank”, “issuing financial institution” or the “cardholder’s bank”.

“Merchant” shall mean the person or company named in Schedule Item 2, and includes the Merchant’s successors, administrators and permitted assigns.

“Merchant’s Computer System” shall mean the computer hardware, computer peripherals and operating and application software upon which the Payment Application operates on.

“Payment Application” shall mean the computer program (eg point of sale and billing applications) which interfaces with the Payment Service using API’s.

“Payment Card” shall mean a credit, debit or charge card.

“Payment Card Industry Data Security Standard (PCI DSS)” a global payment industry security standard which includes best practice procedures that all entities that process sensitive Cardholder Data must follow.

“Payment Card Transaction” means an attempted payment card pre- authorisation, payment or refund for goods and services to/from the Merchant

“Payment Processor” is the financial service that accepts payment requests and provides the responses from the issuer to a Payment Service Provider.

“Payment request” means an attempted Payment Card payment request initiated by a Merchant using the Payment Service.

“Payment Service” is the service provided by the Payment Service Provider to conduct real time Payment Card transactions with the Cardholder using the Merchant’s Merchant Facility with the Acquirer.

“Pre-authorisation” The practice of verifying electronic transactions initiated with a payment card. The pre-authorisation value is reserved and made unavailable to other merchants until the transaction is either finalised (Captured), voided or expired (which makes the reserved funds available again).

“Services” includes the Payment Service and other computer and professional services.

“Services Agreement” shall mean this Agreement and extends to and includes every renewal, extension, variation or amendment to this Agreement.

“Short Message Service (SMS)” A system for sending and receiving text messages via the mobile telecommunications network.

“Simple Payment Service (SPS)” A service that coordinates and manages the Merchant’s payment request process. It is outside of the Cardholder Data Environment which is handled by the PCI DSS compliant Payment Service Provider.

“Smart Device” Mobile phone or tablet capable of communicating over the Internet using the mobile telecommunications infrastructure. It must provide a world wide web (WWW) **browser** that uses https encryption.

2. INTERPRETATION

- 2.1 The headings used in this Agreement are included for convenience and reference only and shall not be construed as affecting the meaning and interpretation of this Agreement.
- 2.2 A reference in this Agreement to a statute includes all amendments to the statute and any statutes passed in substitution for the statute.
- 2.3 A reference to this Agreement shall extend to and include every renewal, extension, variation or amendment to this Agreement.
- 2.4 Schedules and Annexures form part of and are incorporated in this Agreement.
- 2.5 References to the singular include the plural and vice versa.
- 2.6 A reference to a person includes a body corporate.

3. PROVISION OF PAYMENT SERVICES

- 3.1 CardGate.net will use reasonable commercial endeavours to commence provision of the Payment Services as soon as the Merchant Facility has been enabled by the Acquirer.
- 3.2 The Merchant acknowledges:
 - (a) that it may not be technically or commercially feasible for CardGate.net to commence provision of the Payment Services at all;
 - (b) that the Merchant must notify CardGate.net as soon as practicable of any problems or deficiencies the Merchant becomes aware of in the operation of the Payment Service;
 - (c) that the Merchant is not entitled to compensation or damages on any legal or equitable ground if CardGate.net fails to provide Payment Services.
- 3.3 CardGate.net shall:
 - (a) provide Payment Services;
 - (b) provide support to the Merchant as per this Agreement;
 - (c) provide other Services CardGate.net agrees in writing to provide to the Merchant;
 - (d) meet with the current Payment Card Industry Data Security Standard (PCI DSS);
 - (e) comply with the Notifiable Data Breaches scheme under the *Privacy Act 1988*.

3.4 Payment Card transactions shall be processed as follows:

- (a) The Payment Application may pass the following information to the Payment Service via API's:
 - (i) Merchant identifier
 - (ii) Unique Merchant order number;
 - (iii) the total price of the goods or services;
- (b) The Cardholder's Smart Device or web browser securely passes the sensitive Cardholder Data to the Payment Service over an encrypted HTTPS link
- (c) the information (a) and (b) above will be used to form a Payment Card transaction request. This request will be securely transmitted via the Payment Processor to the Issuing Bank for authorisation and/or financial capture;
- (d) the Issuing Bank will normally respond with notification of whether the transaction has been approved or not to the Payment Service. This response may be transmitted to the Merchant's Computer System in real-time or stored in a file for later transfer.

3.5 The Merchant acknowledges that :

- (a) the Payment Service stores, processes, and transmits Cardholder Data on their behalf and therefore may impact the security of the Merchant's Cardholder Data Environment;
- (b) they need to meet with their own PCI DSS requirements, which include the completion of an annual PCI DSS Self Assessment Questionnaire.

4. MERCHANT'S PAYMENT APPLICATION

- 4.1 The Merchant's Payment Application must, in CardGate.net's opinion, be suitable to the task of commerce and connectivity with the Payment Service.
- 4.2 If the Merchant is to interface their Payment Application with the Payment Service via the supplied API's then they must install and test their software against the CardGaet.net test Payment Service.

5. CHARGES AND PAYMENT

- 5.1 The charges for any good and Services described in Appendices A and B.
- 5.2 The Merchant shall be responsible for payment of all taxes, duties and other government charges payable in respect of the supply of the Services.
- 5.3 CardGate.net shall invoice the Merchant at the billing address specified in Item 7 of the Schedule for Services provided during each calendar month.
- 5.4 The Merchant shall pay the amount owing to CardGate.net in full within thirty days of the date of the invoice.
- 5.5 If any amount payable to CardGate.net under this Agreement is not paid within thirty days of the due date, the Merchant may pay interest to CardGate.net on the overdue amount at the rate set in accordance with the Penalty Interest Rates Act (Vic).

6. CONFIDENTIAL INFORMATION AND NON-CONFIDENTIAL

- 6.1 The parties have imparted and may from time to time impart to each other confidential information relating to their business and customers and matters relating to this Agreement. The parties shall use such confidential information solely for the purposes of carrying out their obligations under this Agreement, and shall not disclose either directly or indirectly to any third party such information, other than as required to carry out the purposes of this Agreement. Before making such disclosure to any person (other than the acquiring bank), the party making the disclosure will obtain from the third party a binding confidentiality agreement, and will provide the other party with a copy of the confidentiality agreement.
- 6.2 Upon the expiry or termination of this Agreement, neither party shall itself, through any agent or otherwise, use or disclose the confidential information supplied to it by the other party, or acquired by it in any way pursuant to this Agreement, unless authorised by the other party in writing.
- 6.3 The parties acknowledge that the confidential information includes the information set out in Schedule Item 4 but excludes information:
- (a) that is in or enters the public domain other than by breach of this Agreement or the unauthorised disclosure of the confidential information by a third party;
 - (b) that one party can establish was already known to it prior to the disclosure of the information to it by the other party;
 - (c) the unrestricted release and use of which was approved in writing by the party disclosing the information.
- 6.4 The provisions of clauses 6.1 to 6.3 shall survive the termination or expiry of this Agreement by any means.

7. WARRANTIES, DISCLAIMERS AND LIMITATION OF LIABILITY

- 7.1 CardGate.net provides no express warranties in relation to the Services.
- 7.2 The Merchant acknowledges that CardGate.net may be unable to supply Services, or that the supply of Services may be interrupted, due to:
- (a) the Acquiring Bank refusing to approve or withdrawing approval of the Payment Service;
 - (b) the Acquiring Bank withdraws the Merchant's Merchant Facility, or the Merchant's approval to offer Payment Card transactions to Cardholders;
 - (c) changes made by Payment Processors, banks, other financial institutions or card schemes to their computer systems or terminals, or to the protocols which allow access to their computer systems; or
 - (d) defects or failures in Payment Processors', banks', other financial institutions' or card schemes computer systems or terminals; or
 - (e) operator error or data error; or
 - (f) changes to the Merchant's Payment Application, including the configurations and the operating and application software; or
 - (g) defects or failures in the Internet; or
 - (h) the unavailability of a connection to the Merchant, the Cardholder or CardGate.net;
 - (i) acts of terrorism, war, sabotage, electronic infiltration ("hacking") or software viruses.
- 7.3 Except where:
- (a) conditions or warranties are implied into this Agreement for the supply of goods or services by CardGate.net to the Merchant by the Trade Practices Act 1974 (Cth), other similar laws of the States and Territories of the Commonwealth of Australia or any other applicable laws; and
 - (b) such implied conditions or warranties cannot lawfully be excluded;
- CardGate.net excludes all implied conditions and warranties.

7.4 Where such limitation of liability is not prohibited or avoided by the laws of the Commonwealth of Australia and its States and Territories, the liability of CardGate.net for:

- (a) any breach of any implied conditions and warranties (other than implied conditions and warranties as to title, encumbrance and quiet enjoyment of goods supplied by CardGate.net to the Merchant) in relation to the supply of the Payment Services or any other goods or Services supplied to the Merchant by CardGate.net under this Agreement; and
- (b) any loss or damage arising out of or in relation to the supply of the Payment Services or any other goods or Services supplied to the Merchant by CardGate.net,

shall be limited, to the following:

- (i) in the case of a supply of goods, to any of the following at CardGate.net's option:
 - (A) payment of the cost of replacing the goods or acquiring equivalent goods;
 - (B) payment of the cost of modifying or repairing the goods;
- (ii) in the case of any Services provided under this Agreement, to one of the following, at CardGate.net's option:
 - (A) the re-performance of the Services; or
 - (B) the payment by CardGate.net of the cost of re-performance of the Services.

7.5 The Merchant agrees that to the extent that such liability may be limited under the laws of the Commonwealth of Australia and its States and Territories, CardGate.net shall not be liable on any legal or equitable basis, for any loss or damage incurred by the Merchant in connection with this Agreement or Services, except as set out in clause 7.4. This exclusion of liability includes, but is not limited to, liability for economic loss, loss of custom, loss of profits, loss of use of the Merchant's Payment Application, loss of use of data or information of any kind however caused, failure of the Services to operate at any time for any reason, or any liability of the Merchant to third parties.

7.6 Nothing in this Agreement is intended or shall be construed as excluding or modifying any warranties or conditions implied or any rights or remedies conferred on the Merchant or any liability imposed on CardGate.net by the Trade Practices Act 1974 (C'th) and similar laws of the States and Territories of the Commonwealth of Australia and any other laws applicable to this Agreement with respect to the supply of goods or Services.

8. OWNERSHIP OF INTELLECTUAL PROPERTY AND SOFTWARE LICENCE

- 8.1 CardGate.net grants to the Merchant, and the Merchant accepts, a non-exclusive non-transferable (subject to Clause 8.6) licence to use the Services subject to the terms and conditions set out below.
- 8.2 The terms and conditions of this Agreement will apply to all additional Goods and Services which may be supplied to the Merchant after the date of this Agreement unless the parties agree otherwise in writing.
- 8.3 The Services shall continue into perpetuity, unless terminated in accordance with the provisions of TERMINATION (clause 11).
- 8.4 The Agreement is personal to the Merchant who shall not be entitled to assign, transfer, sub-license or otherwise deal with any of the rights granted hereunder without the prior written consent of CardGate.net.

Restrictions on Use

- 8.5 The Merchant shall not:
- a. **allow the Service to be resupplied alone or as a component of any other product;**
 - b. subject to clauses 8.4 and 8.6, sell, hire, loan, licence, distribute or grant any other rights or otherwise transfer or deal with the Services;
 - c. do any acts which circumvent the authentication and security which forms part of the Services;
 - d. reproduce, copy, adapt, modify or otherwise reproduce the Service and/or documentation or part thereof;
 - e. remove, conceal, deface, amend or in any way alter the copyright, trademark and other proprietary notices appearing on or contained within the documentation;
 - f. procure, permit or authorise the doing of the acts referred to in sub-paragraphs (a) - (e) of this clause.
- 8.6 The Merchant shall not finance the acquisition of the Software and Services whether that be as a stand-alone product or Service or as part of a bundled solution by lease or hire purchase arrangement with a third party without first obtaining CardGate.net's consent in writing. CardGate.net may withhold its consent if the third party does not agree to be bound by this Agreement. Either way the lessor or finance company does not have any rights to use the Services and would require its own Agreement to use.

9. MODIFICATIONS, UPGRADES AND ENHANCEMENTS

- 9.1 The Merchant acknowledges and agrees that modifications, upgrades and enhancements will be made to the Service, Software and documentation.
- 9.2 Some enhancements will provide additional functionality which may incur additional charges.
- 9.3 Should the Merchant elect to utilise the chargeable enhancements, the Merchant agrees to pay the applicable fee under the terms of this Agreement.

10. SUPPORT

- 10.1 Technical support and advice services are available during normal business hours 9:00 am - 5:00 pm, Monday to Friday, excluding public holidays in Victoria, Australia.
- 10.2 Technical support is provided outside of business hours, but access to resources will be limited.
- 10.3 In all cases, best endeavours will be used to attempt to provide a first response within two hours. Resolution of the issue may take longer.

11. TERMINATION

- 11.1 Either party may terminate the Agreement at any time by giving the other party thirty days notice in writing.
- 11.2 CardGate.net shall be entitled to terminate this Agreement by giving notice in writing to the Merchant whereupon this Agreement shall absolutely terminate and cease to have effect if:
 - (a) the Merchant breaches clause 8.5 or 8.6 of this Agreement;
 - (b) the Merchant breaches any other term of this Agreement and fails to rectify the breach within ten business days of written notice being given by CardGate.net, requiring rectification thereof;
 - (c) the Merchant defaults in payment of any moneys due and payable to CardGate.net;
 - (d) the Merchant (if a natural person) commits any act of bankruptcy or becomes a bankrupt;
 - (e) the Merchant (if a corporation) goes into liquidation or is wound up (other than for the purposes of reconstruction or amalgamation);
 - (f) the Merchant has a receiver or receiver manager appointed over any of its assets or proposes to enter into any scheme of arrangement or composition with its creditors;

- (g) the Merchant (if a partnership) is dissolved or terminated or the members are changed without prior written notice to CardGate.net or the partnership commits an act of bankruptcy or becomes bankrupt or is in jeopardy of becoming subject to any form of insolvency administration;.

11.3 Any lawful termination of this Agreement shall be without prejudice to the rights and liabilities of the parties arising prior to termination.

11.4 Upon the termination of this Agreement, the Merchant shall immediately cease use of the Services

12. GENERAL

12.1 This Agreement supersedes all prior agreements, arrangements and undertakings between the parties and constitutes the entire agreement between the parties relating to its subject matter.

12.2 This Agreement may only be varied or amended by an instrument in writing signed by duly authorised representatives of the parties.

12.3 In the event that any, or any part of the terms, conditions or provisions contained in this Agreement shall be determined to be invalid, unlawful or unenforceable to any extent, that term, condition or provision shall be severed from the remaining terms, conditions and provisions, which shall continue to be valid and enforceable to the fullest extent permitted by law.

12.4 This Agreement shall be governed by the laws in force in the State of Victoria, Commonwealth of Australia.

13. NOTICES

13.1 Any notice to be given to one party by the other shall be in writing and shall either be delivered in person, or sent by security post or facsimile transmission to the party's address or facsimile number specified in Schedule Item 5.

13.2 A notice shall have effect for the purposes of this Agreement and shall be deemed to have been received by the party to whom it was made:

- (a) if delivered by hand, upon receipt by the party to whom the communication is addressed or upon receipt by any other person then upon the premises at the relevant address who reasonably appears to be authorised to receive post or other message on behalf of the relevant party;
- (b) if sent by facsimile transmission, upon the transmission of the communication to the relevant facsimile number and the receipt by the transmitting facsimile machine of an answerback code showing that the facsimile message has been received properly by the facsimile machine to which it was transmitted;

(c) if sent by security post, five days after the date upon the registration receipt provided by the relevant postal authority.

13.3 Each party shall be obliged to send a notice to the other party in accordance with this clause of any changes in its address or facsimile number.

14. AUTHORITY TO EXECUTE

14.1 Each of the parties warrants its power to enter into this Agreement.

14.2 Any individual executing this Agreement on behalf of the parties represents and warrants that he or she has been fully empowered to execute this Agreement and that all necessary action to authorise the execution of this Agreement has been taken.

SCHEDULE

Item 1: **Date of Agreement:** _____ day of _____ 20_____

Item 2: **The Merchant** (ie who the CardGate.net is dealing with):

Trading Name: _____

Company Name: _____

A.B.N./A.C.N: _____

Contact: _____

Address: _____

Telephone: _____ Fax _____

Email: _____

Nature of business: _____

Item 3: **Merchant Facility:**

Acquirer:

Commonwealth Bank Of Australia

Other: _____

Merchant Number (as supplied by the Acquirer):

Item 4: **Confidential Information:**

(Clause 6.3) CardGate.net Confidential Information includes the following:

1. all information relating to the Services and the business of any third party which is marked or identified as "confidential";
2. all correspondence between CardGate.net and the Merchant which is marked or identified as "confidential";
3. the terms and conditions of this Agreement including price schedules;
4. CardGate.net documentation;
5. any information which CardGate.net or its employees disclose, and identify as "confidential", whether verbally or in writing;
6. any information communicated to the Merchant in circumstances where the Merchant should realise that the information is being communicated in confidence.

The Merchant's Confidential Information includes the following:

- A. Customer names, email addresses and mobile numbers
- B. Transaction volumes
- C. Business practices
- D. Product Pricing
- E. Suppliers
- F. Merchant's Payment Application
- G. _____
- H. _____
- I. _____
- J. _____

Item 5:

Notices to:

CardGate.net Pty Ltd (ABN 83 086 679 950)

PO Box 4297

Mulgrave, Vic, 3170

Australia

Tel: (03) 9582 7090 Fax: (03) 9582 7001

The Merchant (ie where Notices are to be sent):

[] As Item 2 above, or, [] As Item 7 below, or,

Name: _____

Address: _____

Telephone: _____ Fax _____

Email: _____

Item 6:

Price Schedule:

Appendices A and B attached

Item 7: **Billing Details** (ie where invoices are to be sent):

[] As Item 2 above, or

Trading Name: _____

Company Name: _____

A.B.N./A.C.N: _____

Contact: _____

Address: _____

Telephone: _____ Fax _____

Email: _____

SIGNED by:

Name: _____

Position: _____

on behalf of CardGate.net

Signature _____ Date: ____/____/20__

SIGNED by:

Name: _____

Position: _____

on behalf of the Merchant

Signature _____ Date: ____/____/20__

Appendix A – SERVICES FEE SCHEDULE

This schedule sets out the fees and charges payable by the Merchant to the CardGate.net in respect to the provision and use of the Services as per the terms of this Agreement.

This schedule may be amended from time to time, in accordance with the general terms and conditions, without affecting said terms and conditions of services.

All amounts are in Australian dollars and shall be billed to the Merchant monthly in arrears.

Issue No.: _____

Date: ____/____/20____

Merchant Initials: _____

CardGate.net Initials: _____

<p>Service(s) :</p> <p><u>Payment Service</u></p> <ul style="list-style-type: none"> • Minimum Charge / month • Includes • • Per approved authorisation • Per transmitted SMS message (if used) • Service fee <p>NOTE: The Acquirer will also charge their Merchant separate <i>Merchant Service</i> (% of sale) and Authorisation Fees</p>	<p>Fee:</p> <p>\$20.00 ex GST 100 transactions</p> <p>\$0.20 ex GST</p> <p>\$0.10 ex GST</p> <p>_____ % of the total value of each financially captured transaction, ex GST</p>
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Other Services	Cost (ex GST)
One time setup fee	
Professional Services	

