

# EMPIRE MALL MERCHANT CMS AGREEMENT TERMS AND CONDITIONS

## **BACKGROUND:**

- A. Empire Mall provides the **Empire Mall Platform**, a content management system and hosting platform for e-commerce sites, integrated with the **payment processor**.
- B. The Merchant wishes to establish and operate an e-commerce presence on the **Empire Mall Platform** to reach a broader potential market of end customers.
- C. The parties wish to define their rights and obligations on the following terms.

## **OPERATIVE TERMS:**

### **1. TERM**

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#### **1.1 Commencement**

This agreement begins upon the **start date**, being the later of:

- (a) the **start date** specified in the schedule; or
- (b) the date on which all **preconditions** have been satisfied,

and continues until terminated under the provisions of this agreement.

#### **1.2 Preconditions**

- (a) In addition to any **precondition(s)** specified in the schedule:
  - (i) you must enter into an agreement with a **payment processor**, as nominated in the schedule, such that the payment processor will receipt payments from your **end customers** in full; and
  - (ii) you must have or establish an account with a bank or deposit taking institution approved by us.
- (b) The **preconditions** set out in clause 1.2(a) and the schedule (if any), are a condition precedent to the performance of the services. The parties agree to act in good faith and do all things reasonably necessary to satisfy any **preconditions**.
- (c) If the **preconditions** remain unsatisfied 30 days from the start date specified in the schedule, then at any time until all **preconditions** are satisfied and you notify us of same, either party may immediately end this agreement by written notice to the other party.

### **2. EMPIRE MALL PLATFORM**

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#### **2.1 Services Generally**

For the duration of, and subject to the terms of this agreement:

- (a) We will provide the **Empire Mall Platform** as set out in Appendix A.

- (b) Subject to payment of the **additional module fees** when due, we will enable the **additional modules** specified in the schedule for you to incorporate into the **website** through the **Empire Mall Platform**.
- (c) We will ensure the **Empire Mall Platform** integrates with the **payment processor** to facilitate transactions.
- (d) We will provide you with an administrative account and authentication details to administer your website through the **Empire Mall Platform**.
- (e) We will host your website and the **Empire Mall Platform** with a third party cloud server host.
- (f) You are responsible for configuring your domain name to resolve to the **Empire Mall Platform**.
- (g) We will use reasonable endeavours to rectify any faults in the **Empire Mall Platform** for which we are responsible.
- (h) We will take reasonable steps to investigate and restore services where affected by causes beyond **our** control.
- (i) We may modify or update the **Empire Mall Platform** from time to time to ensure you receive the best possible results. We will give you reasonable notice of any changes. Due to the technical nature of the platform, updates are rolled-out to all merchants at once, and you cannot opt-out of any update.

## 2.2 Payment Processor

- (a) We do not receive or store any credit card information. All credit card information is processed securely by the **payment processor**, with whom you have a separate agreement.
- (b) When an **end customer** places an order on your site, the **end customer** must make payment to the **payment processor** in full, who will receipt the full transaction amount.
- (c) **Transaction Fees** are payable on all sales transacted through your **website**, and all payments for such sales must be processed through the **payment processor**.
- (d) Nothing in this agreement prevents you from marketing and selling your goods or services through means other than your website, or accepting payment for such sales in any way you please.

## 2.3 Privacy Matters

- (a) We may use your contact details to promote new services and product offers to you from us or our affiliates, or to notify you about important changes to the **Empire Mall Platform**, subject to our privacy policy here incorporated by reference.
- (b) In the course of processing a transaction, we may receive personal identifying information of your **end customers**, including their name, address and other contact details. You warrant that you have received permission from your **end customers** to provide us with such personal identifying information. We will only use this information as necessary to process the transaction.

## 2.4 Ad-Hoc Services

We may provide additional services upon request at our current hourly rates. The same standards, warranties, intellectual property rights and indemnities apply to such additional services.

## 2.5 Service Limitations

- (a) We provide you with the CMS, tools, and a selection of standard templates, but we are not responsible for any website design services under this agreement. You are responsible for migrating, uploading, updating and maintaining the content on the website.
- (b) We host the website with a third party hosting services provider. We do not guarantee that the service will be uninterrupted, error free, lag free or fit for any specific purpose.
- (c) You are responsible for listing and promoting the website to any desired search engine or listing aggregator. We do not provide any search engine optimisation or listing services under this agreement.
- (d) You are responsible for marketing and advertising your business. While you may receive additional exposure and sales from operating the website, we cannot guarantee any increase in sales or profit.
- (e) We do not provide support services under this agreement, however a range of general support information, tutorials and FAQs are available on our website, and through the **Empire Mall Platform**.
- (f) We are not responsible for any defects, delays or interruptions to the services or equipment caused by the delays, action or inaction of any third parties such as hardware suppliers or installers, other carriers, internet service providers, telecommunications companies or service providers or force majeure events.

## 2.6 Right to Sub-contract

We may appoint employees or agents to provide all or part of the services; and such entities are bound by the same obligations as us. It is our responsibility to ensure such entities comply with this agreement.

# 3. YOUR OBLIGATIONS

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## 3.1 General Obligations

- (a) You must respond in a timely manner if we bring an issue to your attention in relation to your software, equipment, data or network that affects the operation of the website, **Empire Mall Platform**, or any other services we provide.
- (b) You must notify us if you make any changes to your software, network or data which are likely to affect the website, **Empire Mall Platform**, or any other service we provide.
- (c) You must take reasonable measures to prevent any unauthorised person from accessing the **Empire Mall Platform**, the website or any other services we provide. You are responsible for any damage caused or fees incurred by any such person.

- (d) You must provide reasonable assistance and co-operation during any periods of scheduled or mission critical maintenance.
- (e) You are responsible for providing any goods or services you promise to your end-customers, through the **website** or otherwise.

### 3.2 Warranties

You warrant that:

- (a) You have all necessary legal rights and licenses to authorise us to provide the services, and following your directions will not cause us to contravene any applicable laws;
- (b) You own all content uploaded to the website, or are otherwise authorised to grant the licence in clause 5.1, and following your directions will not cause us to infringe any third party intellectual property rights;
- (c) All content on the website including any user generated content you permit, complies with all applicable laws, and is not defamatory, infringing upon intellectual property rights, or in breach of any advertising standards or consumer protection laws; and
- (d) Your usage of the services, and any content on the website, complies with our acceptable usage policy notified to you from time to time.

## 4. PAYMENTS

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### 4.1 Payments

- (a) You must pay the **setup fee** and **module fees** in cleared funds by the **start date**. We will issue a tax invoice for the **setup fee** and any **module fees** upon you signing this agreement.
- (b) You must pay us the **transaction fee** for all transactions processed through the **Empire Mall Platform**.
- (c) You must pay the ad-hoc fees for any additional services requested and performed, monthly in arrears.
- (d) All fees are exclusive of GST. For any supply on which GST is imposed, you must pay to us an amount equal to the GST with the fees for the service.
- (e) If any payment is not honoured by the bank, you must reimburse us for any dishonour or other bank fees we incur as a result.

### 4.2 Reversed transactions

- (a) If PayPal reverses a transaction conducted on the Empire Mall Platform, then you will be liable for the transaction fees relating to that transaction.
- (b) If a customer seeks to reverse a transaction conducted on the Empire Mall Platform and you agree, then you will be liable for the transaction fees relating to that transaction.
- (c) If a transaction is conducted on the Empire Mall Platform, and you cannot fulfil that transaction, for any reason, you are still liable to pay the transaction fees.

#### 4.3 Fee disputes

- (a) If you reasonably believe that an invoice contains an error, and you wish to dispute an invoice, you must:
  - (i) notify us within 7 days of the date of the invoice in writing;
  - (ii) pay all undisputed fees on the invoice; and
  - (iii) provide us with detailed information about any disputed fees.
- (b) We will not suspend or terminate the services for non-payment of disputed fees while the dispute is being investigated. Our records are prima facie evidence in relation to calculating fees.

#### 4.4 Default in Payment

If you fail to pay any invoice by the due date, and have not given notice under clause 4.3, then without prejudice to our other rights or remedies:

- (a) until we have been paid in full for the outstanding amount (including any accrued interest), we reserve the right to:
  - (i) immediately suspend the **website** or **Empire Mall Platform**;
  - (ii) charge you for interest on the overdue amount at an annual rate of 15%, accruing and compounding daily from the due date of the relevant invoice; and
  - (iii) hold a lien over and retain all **content**, equipment, materials, data and work in progress belonging to you; and
- (b) you are liable by way of liquidated damages for all amounts payable under this clause 4, plus our costs of debt collection and enforcement, including legal fees on a solicitor and own client basis.

### 5. INTELLECTUAL PROPERTY

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#### 5.1 Customer Materials and Third Party IP

- (a) You (or where applicable, the third party owner) retain ownership of:
  - (i) all **content** you host on the website; and
  - (ii) the domain name of the website;and such rights are not assigned or transferred under this agreement.
- (b) You grant us a royalty-free licence to use, copy, modify or adapt the **content** as reasonably necessary to perform our rights and obligations under this agreement, including the right to grant sub-licences where reasonably necessary.
- (c) You warrant that you have full legal right and authority to grant this licence, and our use or modification of the **content** does not infringe upon any third party intellectual property.

## 5.2 Empire Mall Platform

- (a) We own, or are licensed to use, all components of the **Empire Mall Platform**, including all templates, and additional modules.
- (b) Subject to payment of all applicable fees, for the duration of this agreement we grant you a licence to use, enjoy, adapt, modify, commercialise and exploit the **Empire Mall Platform** to market your products and services to **end customers** via the **website**.

## 5.3 Publicity Rights

We reserve the right to display or link to the **website**, including use of your brand name or trade marks, to promote the **Empire Mall Platform** and our related services.

## 5.4 IP Created Under This agreement – Default Provision

Unless otherwise agreed in writing:

- (a) all intellectual property rights and materials developed under this agreement vest in and are owned by us upon creation; and
- (b) from acceptance of the services and payment of all applicable fees in full, for the duration of this agreement, we grant you a non-exclusive world-wide licence to use, enjoy, modify, manufacture, market, commercialise and exploit such intellectual property; and
- (c) you may sub-licence such intellectual property rights in the ordinary course of conducting your business operations through the **website**.

## 6. CONFIDENTIALITY

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- (a) Each party acknowledges that in the course of performing its obligations under this agreement it may receive **confidential information** which is proprietary or confidential to the other party.
- (b) Each party agrees not to use or disclose **confidential information** of the other party. However, a party may disclose **confidential information** of the other party to its officers, employees or contractors bound by the same confidentiality obligation, and only to the extent necessary for the party to carry out its obligations under this agreement.
- (c) Despite sub-clauses (a) and (b) above, either party may use or disclose **confidential information** only to the extent necessary to:
  - (i) Comply with any law, binding directive of a regulator or a court order;
  - (ii) Comply with the listing rules of any stock exchange on which its securities are listed; or
  - (iii) Obtain professional advice in relation to matters arising under or in connection with this document where the advisors agree to be bound by the same obligation of confidentiality.

## 7. SUSPENSION AND TERMINATION

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### 7.1 Suspension

- (a) You may take your website offline (disable public access) at any time through the administrative panel of the **Empire Mall Platform**.
- (b) We may conduct scheduled or mission critical maintenance of the **Empire Mall Platform** during which time the services may be interrupted. We will give you reasonable notice of such maintenance and take reasonable efforts to keep any disruption to a minimum.
- (c) We may suspend the services at any time and give you a written notice of default if:
  - (i) you do not make any payment when due, or any payment is dishonoured or subject to chargeback; or
  - (ii) we have reason to suspect illegal or unethical activity in relation to your data or **content**; or
  - (iii) in our reasonable opinion your **content**, data, network, software or equipment may be causing damage to any person or property,
- (d) Suspension of services under this clause does not affect your liability to make any payment under this agreement.

### 7.2 Termination for default

We may terminate this agreement immediately by written notice if:

- (a) you fail to remedy a material breach despite receiving 7 days written notice of default from us;
- (b) you are guilty of dishonesty, serious misconduct or serious neglect of duty; or
- (c) you experience an **insolvency event**.

### 7.3 Termination for Convenience

Either party may end this agreement by 30 days notice in writing for any reason.

### 7.4 Consequences of Termination

Upon termination of this agreement for any reason, in addition to any other rights or remedies:

- (a) we may immediately disable your access to the **Empire Mall Platform** and take your website offline (disable public access);
- (b) we may issue an invoice for any fees not previously invoiced;
- (c) all fees to date, including fees invoiced under sub-clause (b) above are immediately due and payable;
- (d) your licence to use the **Empire Mall Platform** under clause 5.2(b) immediately ends;

- (e) we retain a lien over and may retain all data, materials and work in progress belonging to you until all outstanding invoices are paid (including any invoice issued under this clause);
- (f) we may reserve the right to delete or destroy any data that remains in our possession 60 days from termination; and
- (g) a party not in default may pursue any other rights or remedies available at law against a defaulting party in default subject to clauses 8 and 9.

## **8. INDEMNITY AND LIMITATION OF LIABILITY**

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### **8.1 Indemnity**

- (a) Each party shall release and hold harmless the other party and its employees, officers, agents, contractors and directors against any and all losses, costs, expenses and damages, including but not limited to reasonable legal fees, resulting from its own negligence, or reckless or intentional misconduct.
- (b) You release and indemnify us, our officers, employees and contractors against any action, proceeding, claim, demand or prosecution arising from or in connection with:
  - (i) any acts or omissions of anyone whom you allow to access the equipment or the services from time to time, whether deliberately or otherwise;
  - (ii) any loss or damage to persons or property belonging to us or anyone else, caused by usage of the services by you or anyone whom you allowed to access the **website** or **Empire Mall Platform**;
  - (iii) your failure to perform any of your obligations and responsibilities under this agreement;
  - (iv) your breach of any law or infringement of any third party rights including intellectual property rights;
  - (v) if your instructions to us cause us to be in breach of any law or infringement of any third party rights including intellectual property rights, in particular in relation our use, modification or hosting of any **content**; or
  - (vi) our reasonable actions in denying anyone access to the **website** or **Empire Mall Platform** for security reasons or non-payment.
- (c) To the fullest extent allowable at law, even if we knew or should have known about the possibility of loss:
  - (i) All services are provided under this agreement on an 'as is' basis and all warranties that may otherwise be implied by law or statute are excluded;
  - (ii) Our liability under this agreement for any defect in the services is limited to (at our election) provision of further services at no charge to rectify any defect, payment of the cost of rectifying any defect, or a refund of the amount you paid us for those services;

- (iii) We are not liable for any loss or potential loss of sales or income from any outage of the **Empire Mall Platform**;
  - (iv) We are not liable for any failure or delay by any third party, including any payment processor, host, ISP or service provider;
  - (v) We are not liable for any hardware or software failure, interruption to services, loss of data or any other similar loss or damage of any kind that you may suffer, whether directly or indirectly arising in connection with the **website** or **Empire Mall Platform**; and
  - (vi) We are not liable for indirect, special, economic or consequential loss or damage or loss of revenue, profits, goodwill, bargain or opportunities you suffer in any way.
- (d) You agree that under no circumstances will our total liability to you under this agreement exceed an amount equal to the total transaction fees received by us from you in the preceding three months.

## **9. DISPUTE RESOLUTION**

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### **9.1 Mediation**

- (a) If a dispute arises between the parties in relation to this agreement, either party may give the other party a written notice that they intend to arrange mediation.
- (b) The parties must refer the dispute to an independent mediator within 21 days of the written notice.
- (c) If the parties cannot agree on a suitable mediator, either party may contact the Law Society (or equivalent) in their state and request that they provide a mediator.
- (d) The costs of mediation must be paid by the parties in equal shares.

### **9.2 Legal Proceedings**

No party may commence court proceedings unless the dispute remains unresolved after 28 days from the date of the written notice provided under clause 9.1(a).

## **10. GENERAL**

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### **10.1 Assignment and Novation**

- (a) You may not assign any of your rights or obligations under this agreement without our written approval; such approval must not be unreasonably withheld.
- (b) We may assign or novate our rights and obligations under this agreement upon 7 days written notice.
- (c) Upon assignment or novation, the parties' obligations and benefits under this agreement are binding on and shall benefit their respective successors and assigns.

## **10.2 Costs**

You are responsible for all duties, charges and legal fees (on a solicitor own client basis) incurred in enforcing this agreement.

## **10.3 Currency and Taxation**

Unless otherwise stated, all monetary amounts are expressed in Australian dollars exclusive of GST. If any supply under this agreement is or becomes subject to GST, we will issue a tax invoice itemising GST in addition to the monetary amounts set out in this agreement.

## **10.4 Enduring Clauses**

The parties' obligations under clauses 2.3, 3.2, 4, 5, 6, 7.4, 8 and 9 shall survive the termination of this agreement for whatever reason.

## **10.5 Entire agreement**

This agreement contains the entire agreement between the parties and supersedes all previous negotiations or agreements in relation to the services.

## **10.6 Force majeure**

Neither party is liable for any delay or failure to perform its obligations under this agreement to the extent that such failure is caused by anything beyond its reasonable control, including without limitation the failure of third party telecommunications providers. Nothing in this clause excuses payment of any money due.

## **10.7 Jurisdiction**

The laws of the State of Queensland, Australia apply to this agreement and the parties submit exclusively to the courts of that jurisdiction.

## **10.8 Relationship between the parties**

Nothing in this agreement constitutes a partnership. It is the express intention of the parties to deny any such relationship.

## **10.9 Severability**

If any provision of this agreement is ruled by a court to be illegal, invalid, unenforceable or in conflict with any law, it will not affect the validity and enforceability of the remaining provisions.

## **10.10 Varying the agreement**

Any variation or amendment to this agreement must be in writing signed by all parties.

## **10.11 Waiver**

Any delay or failure to enforce any rights in relation to a breach by the other party will not be construed as a waiver of those rights.

## 11. INTERPRETATION

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### 11.1 Interpretation

- (a) Where applicable, all terms used in this document have the same meaning as defined in the schedule to this agreement.
- (b) Includes, including and like terms are not words of limitation.

### 11.2 Definitions

In this agreement:

- (a) **Confidential Information** means all information in any form, including verbal, written or electronically stored information, belonging or relating to either party, and includes without limitation:
  - (i) any kind of technical, financial or business information;
  - (ii) details of employees, suppliers, or customers;
  - (iii) material developed by either party under this agreement; and
  - (iv) intellectual property, concepts, know-how and trade secrets;but excludes information in the public domain, other than by default of an obligation of confidentiality, or information independently known to the other party.
- (b) **Content** means any images, text, content, software, or other files on the website, including user generated content and content uploaded from any third party, but excluding any part of the **Empire Mall Platform**, provided templates and modules.
- (c) **End Customers** means customers and potential customers of your products and services through your website.
- (d) **Empire Mall Platform** means the content management system and hosting platform for e-commerce sites, including the features set out in Appendix A.
- (e) **GST** means goods and services tax under *A New Tax System (Goods and Services Tax) Act 1999 (Cth)*.
- (f) **Insolvency Event** in relation to a party means any of the following:
  - (i) an application is made to a court for an order that the party be wound up and the order is not disposed of within 30 business days or an order is made that the party be wound up;
  - (ii) an application is made to a court for an order appointing a liquidator or provisional liquidator or a liquidator or provisional liquidator is appointed in respect of either party and that order or appointment is not disposed of within 30 business days;
  - (iii) the party enters into, or resolves to enter into, a scheme of arrangement, deed of company arrangement or composition with, or assignment for the benefit of, all or any classes of its creditors, or it proposes a reorganisation, moratorium or other administration;

- (iv) the party resolves to wind itself up, or otherwise dissolve itself, or gives notice of the intention to do so, or is otherwise wound up or dissolved;
  - (v) any step is taken to appoint an administrator, a receiver, and/or manager or other like person over the whole or any part of the party's assets or business;
  - (vi) judgement is entered against the party for more than \$20,000.00, which remains unsatisfied or unappealed for more than 21 days; or
  - (vii) if the party is placed under official management, commits an act of bankruptcy or is charged with a criminal offence.
- (g) **Payment Processor** means the **payment processor** specified in the **schedule**, or if no entity is specified, PayPal Australia Pty Ltd, ABN 93 111 195 389, or another alternative provider approved by us in writing. Such payment processor must be willing and able to provide suitable interoperability and connectivity with the Empire Mail Platform.
- (h) **Suspend** means to deny or restrict access to the services or part of it.
- (i) **Website** means the website specified in the schedule, to be hosted by us on the **Empire Mall Platform** under this agreement.

## **12. APPENDIX A: EMPIRE MALL PLATFORM SPECIFICATION**

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### **12.1 Empire Mall CMS**

Content management system

### **12.2 Included Modules**

Page Management

Image gallery

Product Management

Inventory Management

Sales Management

### **12.3 Included Templates**

Default template

### **12.4 Included Hosting**

We define 'Unlimited Hosting' as within a reasonable scale.

Hosting is included up to the following specifications

20Gb storage space and Hosting Included

200Gb Bandwidth included