



# Terms of Service

Effective Date: 24 July 2023

These terms of service ("**Terms of Service**") govern the use by you of the products, websites and services listed at the end of these Terms of Service (the "**Services**") and your relationship with The Messaging Company Pty Ltd (ACN 669 674 382) ("**TMC**") ("**us**", "**we**" or "**our**") and its related entities.

Our website is located at <https://themessaging.co> ("**website**" or "**Site**").

**When you accept these Terms of Service, you are entering into an agreement to purchase goods and services from us or to create an account with us on the basis of these Terms of Service.**

**Please read these Terms of Service carefully as, together with our Privacy Notice located at <https://www.themessaging.co/privacy-notice>, they form your agreement with us.**

If you are under the age of 18, you must have your parent or legal guardian's permission to use our Services and enter into this agreement with us. Please have your parent or legal guardian read these Terms of Service with you and agree to them for you.

If you are a parent or legal guardian, and you allow your child to use the Services, then these Terms of Service apply to you and your child or ward and you are responsible for your child's or ward's activity and use of the Services.

## 1. Definitions

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Some of the words and phrases in these Terms of Service have special meanings. Those words are explained below.

### 1.1 Definitions

In these Terms of Service, the following terms have the following meanings:

- (a) **Account Holder** means the person who is the primary account holder for the Services (who can create email addresses for other users where this is part of the Services).
- (b) **Agreement** means the legally binding agreement between you and us for the Service which is made up of the following:
  - (i) these Terms of Sale;
  - (ii) our pricing, services and support guides published by us from time to time on our website which detail the Basic Services and Premium Services and their pricing and related support;
  - (iii) our latest Privacy Notice (<https://www.themessaging.co/privacy-notice>);

- (iv) the latest version of any other policy we tell you about such as acceptable use policies or support policies.
- (c) **Australian Consumer Law** means Schedule 2 of the Competition and Consumer Act 2010 (Cth).
- (d) **Basic Services** or **Basic Account** means our free or low cost cloud-based services and account which provides a service:
  - (i) enabling you to send and receive email, manage a personal calendar, address book and task list, and store files, with each such email facility allocated **1 GB** of storage on the cloud facility, with a size limit per email message sent or received by that email facility of **32 MB**; and
  - (ii) to pre-scan emails you receive for potential known malware or viruses and automatically block or categorise as suspicious those emails which our software detects as containing or which is likely to contain malware or viruses; and
  - (iii) to pre-scan emails you receive for potential unsolicited content or spam and automatically block or categorise as unsolicited content or spam those emails which our software detects as containing or likely to contain unsolicited content or spam.
- (e) **Business Day** means any day on a Monday to Friday (inclusive) in Brisbane, Queensland, Australia, except for any of those days that are public holidays in Brisbane, Queensland, Australia.
- (f) **Charges** means the fees (if any) you pay for the Service and any Service Features and anything else you agreed to pay in line with the Agreement.
- (g) **Content** means the content of any communications created by you when you use the Services excluding TMC Content.
- (h) **Data** means data you supply to us about you, your employer or legal entity (or if you are a parent or guardian, about the person for whom you are a parent or guardian) including personal information but excluding TMC Data.
- (i) **Excessive or Unusual Use** means for a service a high volume of use outside of normal use patterns or other use which suggests irregularity (for example, where an unusual pattern of messages are sent in a short period of time or an unusually large volume of messages are sent).
- (j) **Force Majeure Event** means an act of God, earthquake, flood, fire or explosions, strike, industrial action, lock-out stoppage, restraint of labour, riot, civil commotion, terrorism, war, revolution, state of emergency, epidemic or pandemic, an act of government, in each case which is not reasonably within the control of the party seeking to rely on the Force Majeure Event to excuse its obligations under this Agreement.
- (k) **Minimum Term** means any initial or additional period where you have agreed to for the duration of the Services as shown in your Order Confirmation.
- (l) **Order Confirmation** means the confirmation we send you by email after we accept your order for the Services which confirms important things such as the description of the Services, the Minimum Term and the Charges (if any).
- (m) **Premium Services** or **Premium Account** means our paid Services or paid account which includes the Basic Services and Basic Account together with any other upgrades or add-ons such as Upgraded Storage or any other purchasable

services offered by us on our website from time to time which you agree to purchase.

- (n) **Services** means the emails services that we provide to you including Basic Services, Premium Services and any other services offered by us on our website from time to time.
- (o) **Service Features** means any products, features, benefits, add-ons or extra services we provide on top of or as part of the Services such as personal calendars, address books, task lists, storage or email pre-scanning.
- (p) **Service Start Date** means the date the Service starts as shown in your Order Confirmation (unless we tell you another date).
- (q) **Terms of Service** means these terms of service as amended from time to time.
- (r) **Third Party Apps and Services means** products, services, websites, links, content, material, games, skills, integrations, bots or applications from third parties which we may provide to you as part of the Services and these will be subject to separate terms and conditions set by those third parties and agreed with you before you use them.
- (s) **TMC Content** means the content of any communications created by us or third parties acting on our behalf in providing you with the Services and any content on our websites.
- (t) **TMC Data** means any data that we supply to you as part of the Services and any Data that we have subsequently de-identified or anonymised so that it no longer contains your Data.
- (u) **TMC ID** – the username that we will give you and a password that you choose for when you use the Services.
- (v) **Upgraded Storage** means a purchasable add-on to your email facility that increases the available storage on the cloud facility of your email facility by the specified amount (for example, by an additional 10 GB, 100 GB, etc) as you and TMC agree from time to time.
- (w) **Users** means the person(s) using an email address and for whom we hold personal security details.
- (x) **“website” or “Site”** means our website located at <https://themessaging.co/>.

## 2. Our Services and Your Accounts

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### 2.1 Account Creation, Account Holder and linked email addresses

- (a) In order to use our Services, you must apply to create an account with us.
- (b) You can apply to create an account by signing up with us online via our website and agreeing to be the Account Holder.
- (c) You agree not to give us any false, inaccurate or misleading information when signing up for your account or afterwards. If you create an account with us on behalf of an entity who is the Account Holder (such as your business or employer, or your family members), you represent that you have the legal authority to agree to these Terms of Service on behalf of that other entity or those other people.

- (d) You cannot transfer your account or Account Holder credentials to another User or entity. You must keep your Account Holder credentials secure and keep your account details and password confidential. You are responsible for all user activity that occurs under your account.
- (e) We reserve the right to remove, reclaim, or change a username which we provide to you as a TMC ID you select if we reasonably determine that it is inappropriate, obscene, or otherwise objectionable or infringing of any other person's rights or applicable law.
- (f) You will need to meet our requirements before we accept your application for Services, being:
  - (i) You must be a consumer customer or business customer who is eligible for that Service;
  - (ii) the Service must be available for us to provide to you; and
  - (iii) you must meet our credit requirements (if any) for any Premium Services or paid Service Features provided by us.
- (g) You will need a TMC ID to manage your email through your account.
- (h) The Account Holder may be able to create email addresses for themselves or other Users (who may delete it or upgrade it to a Premium Account or downgrade it to Basic Account at any time). The Account Holder can at any time delink an email address they have created for another User from their account.

## **2.2 When the Service starts and for how long**

- (a) The Service starts on the date shown in your Order Confirmation.
- (b) The Service will last for at least the Minimum Term and will carry on after then unless you or we end the Services in a way set out in these Terms of Service.
- (c) We might agree with you a new Minimum Term during or after your initial Minimum Term.
- (d) If you set up an email address for someone else, the Service will start for that User when they create their own TMC ID and password. They will be responsible for the email address and must comply with these Terms of Service.
- (e) If you are using the Premium Services, the Minimum Term is one month.

## **2.3 You must actively use the Account and Services**

- (a) If you are on using a free account, you must use your account in order to keep your subscription active. This means that must sign into your account and use the Basic Services at least once per month.
- (b) If you do not comply with clause 2.3(a), we will deem your account as inactive and will close it for you after sending you at least thirty (**30**) days' prior notice of our intention to do so and if your account continues to remain inactive during that notice period.
- (c) If you are on a Premium Account, your subscription will remain active regardless of your usage of the account for as long as your subscription remains in effect and the Charges are paid.

- (d) If we reasonably suspect that your account is being, or at risk of being, used by a third party fraudulently, we may suspend your account whilst we investigate this matter or until it is established that it is no longer being, or at risk of being, used in such a manner.

## **2.4 Accounts for Children and Families**

- (a) You must be at least 18 years of age in order to agree to these Terms of Service and create an account with us to use the Services.
- (b) By creating an account with us or using the Services, you agree to comply with these Terms of Service and you represent that you are at least 18 years of age in accordance with clause 2.4(a) or that your parent or legal guardian has agreed to these Terms of Service on your behalf.
- (c) If you are the parent or legal guardian who is the Account Holder for a minor creating an account with us or using the Services, you, and on behalf of your minor or ward, accept and agree to be bound by these Terms of Service and you are responsible for all activities occurring on, and use of, the Services, including purchases, by your minor or ward.
- (d) We may impose a limit on the number of extra email addresses that you can set up using your TMC ID and we will let you know ahead of time in the Order Confirmation if that is the case. You can create email addresses for your family by choosing that option. They will have their own TMC ID and password and you will not access to their emails.

## **2.5 Business and Organisation Accounts**

- (a) You may be able to access and use the Services through a work or business email address or account that your employer or organisation has created with us as Account Holder. If you do, you acknowledge that the Account Holder of your email address or account may be notified of the activities occurring under your account, and may control and administer your account, and access and process your Data, including the contents of your communications and files, and that we may communicate with the Account Holder of your account instead of you relating to matters concerning your and their account.
- (b) You acknowledge that your use of the Services may be subject to and conditional on external agreements we have with you or your employer or organisation and those terms may have the effect that all or part of these Terms of Services may not apply to you.
- (c) We may impose a limit on the number of extra email addresses that you can set up using your TMC ID and we will let you know ahead of time in the Order Confirmation if that is the case. You can create email addresses for your business and organisation. Each User will have their own TMC ID and password.
- (d) Users should be aware that the Account Holder may have an agreement with us which provides the Account Holder with access to each User's emails.

## **2.6 What you must provide in order to access the Services**

- (a) In order to use some of the Services, you will need access to the internet and/or access to a telecommunications network (i.e. a mobile or telephone plan). You may also need equipment depending on the specific Service you are using, including but not limited to computers, mobile devices, headsets, cameras, microphones and external storage devices.

- (b) You are responsible for providing all of your own connections, plans and equipment needed to use the Services and for paying the fees charged by the provider(s) of your connections, plans and equipment. Those fees are in addition to any fees you pay us for the Services and we will not reimburse you for such fees. Check with your provider(s) to determine if there are any such fees that may apply to you.
- (c) We create backups of your Data and your Content for our own purposes to ensure availability of the Services only. You should also have a regular backup plan and regularly backup your Data and your Content as our backups are unavailable to you for your own purposes except where we must provide you with the data under applicable law.

## **2.7 Our Customer Support Services**

- (a) We provide customer support for some Services as set out on our website.
- (b) Certain Services may offer separate or additional customer support, subject to the terms of any agreements between you and TMC outside of these Terms of Service (for example, in relation to a specific additional Service or Service Features or as part of a Premium Account which may attract additional Charges).
- (c) Some support may not be made available from us for Basic Accounts or trial or beta versions or features of the Services. Our website provides details as to what is included in Basic Accounts and what is included in Premium Accounts.
- (d) The Services might not be compatible with your hardware, equipment or devices or other software or services provided by third parties. You are responsible for checking if the Services are compatible with your other such assets.
- (e) If you require customer support in relation to any supported Services, please visit [help.themessaging.co](http://help.themessaging.co).

## **2.8 Closing Your Account and Ending the Services**

- (a) When you end a paid for Premium Service Your personal email address(es) and the email addresses of other Users you have set up on your account will remain active up until the end of your paid subscription period. After that we may take any of the steps set out in below in clause 2.9;
- (b) If we have sent you an Order Confirmation and we have already started providing the Service for a Premium Account, you will have to pay us the full cost of the Service that you have had including the Charges for the Services for the Minimum Term and anything you have used which was not covered by the Charges.

## **2.9 Effects of the Services ending**

In addition to the provisions of clauses 17.2 and 17.5 (which deal with cancellations of the Services and the effects of termination of this Agreement):

- (a) If any of your email addresses are deleted:
  - (i) you cannot send emails from that email address;
  - (ii) you cannot recover any information held within your email address and linked Services; and

- (iii) all emails sent to your email address will be rejected and the sender will be sent a notice that the email address is invalid.
- (b) If your Services are cancelled or your account with us is closed (whether by you or us):
  - (i) your right to access and use the Services stops immediately and you must immediately stop using the Services;
  - (ii) we will delete your Data or Content associated with your Services, unless we are required by applicable law to keep it, or return it or transfer it to you or a third party nominated by you at the time of cancellation or closure; and
  - (iii) you may lose access to our other products or Services that you have acquired and which are connected or dependent on the cancelled Services or your account with us.

### 3. Your Obligations

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#### 3.1 Acceptable Use

- (a) We may monitor your use of the Services for Excessive or Unusual Use and may tell you if we identify them. You agree to cooperate with us as reasonably necessary for any review, including giving us information and explanations about your use within a reasonable time.
- (b) If we reasonably believe that your use:
  - (i) is unlawful; or
  - (ii) is Excessive or Unusual Use; or
  - (iii) will or may damage our equipment, how our Services operate or lessen their quality or reliability; or
  - (iv) will or may cause significant congestion on our equipment or reduce our ability to provide quality services to other users; or
  - (v) is detrimental to our other customers; or
  - (vi) attempts to manipulate or bypass any Service limitations; or
  - (vii) is to resupply or resell any part of a Service without our written consent; or
  - (viii) is to provide services to another carriage service provider; or
  - (ix) is use as a carrier or carriage service provider; or
  - (x) is not ordinary personal use or internal business use,then we may slow, suspend, cancel or limit your uses of the Services or one or more features of your Services and tell you.
- (c) We will give you a period (not being less than ten (**10**) days and not being more than thirty (**30**) days) to change your use so that it is lawful or no longer damaging and if you do not make those changes then we can suspend, cancel or limit your rights to use the relevant Services.

- (d) Legitimate uses of the Services for their intended purposes will not be a breach of this Agreement.

### **3.2 Other Restrictions on Users**

- (a) You must not, and no User may when using the Services:
  - (i) do anything illegal or in breach of applicable law;
  - (ii) engage in any activity that exploits, harms or threatens to harm another customer or user of the Services or any other person (including transmitting viruses, stalking, communicating hate speech or advocating violence against others);
  - (iii) send spam or engage in phishing activities;
  - (iv) use the Services in connection with any commercial endeavours except those that are specifically endorsed or approved by us;
  - (v) publicly display or use the Services to share unlawful content or material (involving, for example, unlawful nudity, pornography, offensive language, violence, harassment, threatening or stalking conduct or criminal activity);
  - (vi) engage in activity that is fraudulent, false or misleading;
  - (vii) circumvent any of our restrictions on access to or availability of the Services;
  - (viii) infringe our rights or the rights of others (such as unauthorised sharing of copyrighted music or other copyrighted material);
  - (ix) engage in activity that violates the privacy or data protection rights of others or is in breach of applicable privacy laws; and
  - (x) assist others in doing any unlawful activity or any of the prohibited conduct set out in this clause 3.2(a).
- (b) If we reasonably suspect or establish that you as Account Holder or any of your Users have breached this clause 3.2(a), we may review your activities under the Services or your account in order to resolve the issue or to decide to terminate or suspend your account or your Services.
- (c) If our investigations show that you have breached this clause 3.2(a), we may, in our sole discretion, stop providing a part of or all of the Services or close your account with us or take any other action which we need to under applicable law to comply with such law.

## **4. Content**

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### **4.1 Third Party Content Displayed via the Services**

- (a) The Services may display third party content that is not created or owned by us. This third party content is the responsibility of the entity or person that makes it available to you via the Services and displaying it via the Services is not an endorsement of it by us.



- (b) We do not assume responsibility for the unlawful conduct of third parties using our Services, except where we have intentionally or recklessly contributed to that conduct.
- (c) By using or accessing the Services you may be exposed to offensive, indecent, or objectionable content provided by third parties which are displayed via the Services without our endorsement or knowledge.

#### **4.2 Your Content**

- (a) Many of the Services enable you to submit Content or Data. You are solely responsible for any Content or Data that you upload, post, email, transmit, or otherwise make available via the Services.
- (b) We may remove and refuse to display Content or Data that breaches these Terms of Service or applicable laws when we become aware of it.

### **5. Service Availability**

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#### **5.1 Service Availability and Outages**

- (a) All Services that we offer may not be available to be purchased by you or may be offered on a limited basis or may vary in functions, Service Features or specifications depending on your region or device.
- (b) We will use reasonable endeavours to keep the Services up and running.
- (c) We aim to provide a continuous service using reasonable care and skill however we cannot guarantee that all of our Services or any specific Service Features will be available all the time as sometimes there are faults in our or third party networks and this affects the Service.
- (d) However, you acknowledge that the Services may suffer disruptions and outages outside of our reasonable control and may not be available at all times.
- (e) We rely on third party service providers, such as telecommunication providers, to keep operations running and these may not always be available or they may be unreliable or defective from time to time.
- (f) We might have to interrupt, change or temporarily suspend some or all of the Service to maintain, upgrade or repair the networks.
- (g) Where the Services are going to be unavailable and the circumstances are within our knowledge, we will use reasonable endeavours to provide you with prior warning of the unavailability.
- (h) We aim to use effective antivirus software and other security features.
- (i) You alone are responsible for making back-up copies of your Content and Data and other data in case the originals are lost or corrupted or unavailable.

## 6. Updates to Services

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### 6.1 Updates to Services and their impact on you

- (a) We may update the Services from time to time where reasonably necessary, for example to improve or change the Services, mitigating security threats and concerns and performing investigations and maintenance on the Services.
- (b) You may need to update your software in order to continue using the Services or obtaining its functionality or access to the Service Features.
- (c) You agree that TMC does not guarantee that the version of any of your own purchased or licensed software, apps, content or other products will be compatible now or in the future with:
  - (i) the Services (offered currently or in the future by TMC); or
  - (ii) Third Party Apps and Services; or
  - (iii) other software or services provided by third parties.
- (d) We may change, modify, or remove the contents of the Services at any time. We will alert you about any such changes to the Services by email in advance at least thirty (**30**) days prior to the changes taking effect.
- (e) Where we update the Services or change any part of the Services used or purchased by you, you may terminate this Agreement in writing to us at [support@themessaging.co](mailto:support@themessaging.co) if:
  - (i) a material Service Feature of the Services is changed, discontinued or removed (whether as a result of the bug fixes, patches, upgrades, additional or enhanced functions, plug-ins or new versions) from the Services; and
  - (ii) you can demonstrate that this has more than a minor detrimental impact on you.

### 6.2 Our right to make corrections

- (a) There may be information on the Services that contains typographical errors, inaccuracies, or omissions. We may correct any errors, inaccuracies, or omissions and to change or update the information on the Services at any time.

## 7. Third Party Applications and Services

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### 7.1 Third Party Applications and Services

- (a) The Services may allow you to access or acquire Third Party Apps and Services and these may be subject to separate terms and conditions set by those third parties and agreed with you.
- (b) You should review the third party terms and conditions before acquiring, using, requesting, or linking your account to any Third-Party Apps and Services.
- (c) Any third party terms do not modify these Terms of Service between you and TMC.

- (d) Your acquiring, using, requesting, or linking your account to any Third Party Apps and Services is at your risk and TMC is not responsible for any issues arising out of your use of them or for information or services provided by any of them.

## **8. Payment for Services**

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### **8.1 Payment Terms**

- (a) Subject to any other agreement between you and TMC governing any purchased Services, if you purchase a Service from us, then the payment terms in this clause 8 will apply to that purchase.
- (b) We will normally bill you regularly and in advance (for the period ahead) for Premium Accounts.
- (c) If we need to charge you for anything extra (for example, for going over any usage limit), we may add those Charges to a later bill.
- (d) You must pay any bills as soon as you get them, unless we agree otherwise with you.
- (e) We may bill you:
  - (i) in advance;
  - (ii) at the time of you purchasing or subscribing to the Services;
  - (iii) shortly after the time of you purchasing or subscribing to the Services; or
  - (iv) on a recurring basis for subscription based Services as we agree with you at the time you choose the Services.

### **8.2 Charges**

- (a) You must pay the applicable Charges for the Premium Services, whether you use them or someone else does.
- (b) We will issue you with an invoice for your access to and use of the Services.
- (c) Unless specified otherwise in an invoice from us, you must pay the Charges for the Services:
  - (i) in Australian Dollars; and
  - (ii) in advance of using the Services.
- (d) We normally provide bills online at the Account Holder's account page. Please ask us if you need paper bills. We may charge you for paper bills, but we will tell you about the charge beforehand.
- (e) If you genuinely think we have made a mistake on your bill, we require you to tell us straight away. You must pay the amount you agree that you owe.
- (f) If you do not pay your bill on time, we will send you a reminder. If you still haven't paid within seven (7) days after the date of our reminder or there is a failed payment (e.g. if a direct debit bounces because you do not have enough money in your account), we may suspend or end the Service earlier.

- (g) If you do not pay your bill on time, we may give details including your personal information to a debt-collection agency and ask them to collect the money for us. If we do, you will have to pay extra charges to compensate us (which will not be more than the amount we have to pay to the debt-collection agency, who will add the charge to your debt). We might also transfer your debt to any other business (in which case, your personal information will also be transferred) who may then try to recover the amount in a way it considers suitable.

### **8.3 Billing Account**

- (a) To pay the Charges for the Services, we may require you to provide a payment method at the time you sign up for the Services or open an account with us (for example, a credit card, a debit card, etc) ("**Billing Details**").
- (b) You must ensure that your Billing Details are correct and up-to-date so that we can complete your transactions and contact you as needed in connection with your transactions.
- (c) By providing us with your Billing Details, you:
  - (i) represent that you are authorised to use the payment method you provided and that any payment information you provide is true and accurate;
  - (ii) authorise TMC to charge you for the Services using your payment method in accordance with the fees agreed by you; and
  - (iii) authorise TMC to charge you for any paid features of the Services you choose in accordance with the fees agreed by you.
- (d) At our option, we may permit you to register a bank account with us to use as a payment method and to provide us with a direct debit authority. If you do:
  - (i) you represent and warrant that your registered bank account is held in your name or you are authorised to register and use this bank account as a payment method; and
  - (ii) you authorise TMC (or its payment processing agent) to initiate one or more debits for the amounts of your purchases or subscription charges for the Services from your bank account (and, if necessary, initiate one or more credits to your bank account to correct errors, issue a refund or similar purpose), and you authorise the financial institution that holds your bank account to deduct such debits or accept such credits.

### **8.4 Subscriptions and Recurring Payments**

- (a) When you purchase or subscribe to the Services on a paid subscription basis (e.g., monthly, every 3 months or annually for Services), you acknowledge that you are authorising recurring payments and you will be billed by TMC by the payment method and at the recurring intervals you have agreed to, until your subscription for that Service is cancelled or terminated.
- (b) By authorising recurring payments, you are authorising TMC to process such payments as either electronic debits or fund transfers, or as electronic drafts from your designated account, or as charges to your designated account (for credit card or similar payments).
- (c) You may cancel your subscription for Services at any time yourself within the billing controls of the Service. Your subscription for the Services will effectively be cancelled at the end of the then-current billing period.

- (d) You must cancel your Services before the next billing date to stop being charged for your continued use of the Services for the following billing period.
- (e) We will inform you in advance by giving at least thirty days' advance notice of any changes in the amount to be charged for recurring subscription Services.

## 8.5 Refund Policy

- (a) In certain circumstances, you may be entitled to refunds under the Australian Consumer Law as set out in clause 12 below.

## 8.6 Price Changes

- (a) We may change the price of the Charges for the Premium Services or Service Features at any time and if you have a recurring purchase, we will notify you by email, or other reasonable manner, at least:
  - (i) thirty (**30**) days before the price change; or
  - (ii) if your recurring interval is greater, then a period equal to your recurring interval.
- (b) If you do not agree to the price change, you may cancel and stop using the Services before the price change takes effect without incurring any penalty for doing so.
- (c) By not cancelling the Services or by continuing to use the Services after the price change takes effect, you acknowledge and agree to the notice period and price change to the Services used by you after the notice period.
- (d) If there is a fixed term or Minimum Term and price for your Service offer, that price will remain in force for the fixed term or Minimum Term.

## 8.7 Trial and Promotional Offers

- (a) If you are taking part in any trial period offer then, subject to any separate agreements or terms between you and TMC relating to that trial period offer, you may be required to cancel the trial Services within a specified timeframe communicated to you when you accepted the trial period offer in order to avoid being charged to continue the Service at the end of the trial period. If you do not cancel the trial Services within that specified timeframe, then you agree that you have purchased the full Services and that TMC may charge you for the full Charges for the Services from the end of the trial period in accordance with these Terms of Service.
- (b) From time to time, TMC may offer Services for free or for a discounted rate ("**Promotional Offer**") for a promotional period communicated to you before you accept the Promotional Offer. At the end of that promotional period, you agree that we may charge you the full or non-discounted rates for that Service in accordance with these Terms of Service.

## 9. GST

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### 9.1 GST

The following provisions apply:

- (a) terms in bold used in this clause 9 which have definitions in the GST Act will have the meanings given to those terms in the GST Act;
- (b) a reference in to a liability of a party to pay **GST** or an entitlement of a party to **input tax credits** includes a reference to **GST** payable by, or an **input tax credit** entitlement of, the representative member of a **GST** group to which that party is a member;
- (c) where required to give practical effect to this clause 9, a **recipient** includes any party to these Terms of Service that is required to provide **consideration** and a **supplier** includes any party to whom **consideration** must be provided (even if there is never any supply);
- (d) any part of a **supply** that is treated as a separate **supply** for **GST** purposes (including attributing **GST** payable to **tax periods**) is treated as if it were a separate **supply**;
- (e) **GST** has the meaning given by section 195-1 of the GST Act or any replacement or other relevant legislation and regulations; and
- (f) **GST Act** means *A New Tax System (Goods and Services Tax) Act 1999* (Cth) (as amended).

## 9.2 GST Included

- (a) all prices and amounts (including any monetary or non-monetary consideration required to be provided under these Terms of Service) are inclusive of **GST** unless expressed by us as exclusive of **GST**;
- (b) if **GST** is payable in respect of a **supply** made under or in relation these Terms of Service, the **recipient** must pay to the **supplier** an amount (**GST Amount**) equal to the **GST** payable on the **supply**. The **GST Amount** is payable by the **recipient** in addition to and at the same time as any consideration for the **supply**; and
- (c) if an **adjustment event** arises in respect of a **taxable supply**, the **GST Amount** payable by a **recipient** will be recalculated to reflect the **adjustment event** and a payment will be made by the **recipient** to the **supplier**, or by the **supplier** to the **recipient**, as the case requires.

## 9.3 Other Taxes

Except as set out in this clause 9, you will be responsible for your own taxes, charges, fees, levies, customs, duties, insurance or other such costs or contributions which may be payable out of, or as a result of the receipt of any Charges or other monies paid or payable in respect of, the Services.

## 10. Our Warranties

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### 10.1 Disclaimer

NOTHING IN THESE TERMS OF SERVICE EXCLUDES, RESTRICTS OR MODIFIES WARRANTIES, GUARANTEES OR REMEDIES WHICH CANNOT BE EXCLUDED UNDER THE AUSTRALIAN CONSUMER LAW OR OTHER APPLICABLE LAW.

YOUR SERVICES ARE SUPPLIED:

(A) ON THE TERMS AND CONDITIONS EXPRESSLY SET OUT IN THESE TERMS OF SERVICE; AND

(B) SUBJECT TO NON-EXCLUDABLE RIGHTS UNDER CONSUMER PROTECTION LAWS.

NO OTHER TERMS OR RIGHTS APPLY.

YOU USE THE SERVICES AT YOUR RISK. TMC DO NOT WARRANT RESULTS YOU MAY OBTAIN BY USING THE SERVICES OR THAT THE SERVICES DO NOT INFRINGE ANY THIRD PARTY RIGHTS OR ARE FIT FOR ANY PARTICULAR PURPOSE, SAVE FOR THE PURPOSES WHICH WE EXPRESSLY AGREED WITH YOU IN WRITING BEFORE YOU ENTERED INTO THESE TERMS OF SERVICE.

## **11. Limitation of Liability**

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### **11.1 Australian Consumer Law**

- (a) Nothing in these Terms of Service excludes, restricts or modifies remedies which cannot be excluded, restricted or modified under the Australian Consumer Law or other applicable law.

### **11.2 Mutual Disclaimers**

Save for your liability to us for the Charges payable by you for the Services,

- (a) no party is liable to the other party for:
  - (i) any indirect loss or damage;
  - (ii) any other loss or damage which the parties did not reasonably expect or which was not considered when entering into this Agreement;
- (b) no party is liable for any loss or damage of the other party to the extent that it:
  - (i) is caused by the other party (for example, through the other party's negligence or breach of contract); or
  - (ii) results from the other party's failure to take reasonable steps to avoid or minimise its loss or damage; or
  - (iii) caused by the first party failing to comply with its obligations under this Agreement where caused by a Force Majeure Event.

### **11.3 What TMC is not responsible for**

TMC is not responsible for the following.

- (a) any loss or damage caused by malware or the unauthorised use of the Services on any of your devices (unless we have failed to provide the Service with reasonable skill and care); or
- (b) any loss of, corruption of or release of your Data or your Content ), unless we have failed to provide the Service with reasonable skill and care); or
- (c) any incompatibility with the Services for your equipment or your use of any equipment or hardware we have not supplied; or
- (d) any cause which is not due to:
  - (i) our fault or breach of this Agreement; or

- (ii) our breach of applicable law.

## **12. Australian Consumer Law**

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### **12.1 Application of the Australian Consumer Law**

- (a) Under the Australian Consumer Law, if you are a consumer customer or a small business customer, you have additional rights and remedies as set out below.
- (b) Notwithstanding anything to the contrary in these Terms of Service, if you acquire goods and services from TMC as a consumer customer, they come with statutory guarantees under the Australian Consumer Law that are not excluded, restricted or modified by any other terms of these Terms of Service.
- (c) The statutory guarantees include (without limitation) the following:
  - (i) goods must be of acceptable quality. This means they must:
    - (A) be safe;
    - (B) be free from defects;
    - (C) be acceptable in appearance and finish;
    - (D) do all the things someone would normally expect them to do;
    - (E) match any demonstration model or sample;
    - (F) be fit for the purpose which TMC has represented to you it would be fit for;
    - (G) match the description of the goods given by TMC; and
    - (H) meet any express warranty given by TMC to you at the time of your purchase about their performance, condition and quality; and
  - (ii) services provided by TMC must:
    - (A) be provided with due care and skill or technical knowledge;
    - (B) be fit for the purpose or give the results that have been agreed to; and
    - (C) be delivered within a reasonable time when there is no agreed end date.
- (d) To the extent that TMC fails to comply with a consumer guarantee to which you are entitled to under the Australian Consumer Law you are entitled to the remedies as set out in the Australian Consumer Law, which include:
  - (i) for major failures with the services provided by TMC, an entitlement to:
    - (A) to cancel your service contract with us; and
    - (B) to a refund for the unused portion, or to compensation for its reduced value; and




- (ii) for major failures with goods provided by TMC, an entitlement to a refund or a replacement of that good.

## 13. Intellectual Property

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### 13.1 Background Intellectual Property

- (a) You agree that TMC owns all intellectual property in the Services and software or other services provided to you by TMC.
- (b) "TMC", "THE MESSAGING COMPANY", , are trade marks of ours or our licensors and you may not copy, imitate, modify or use them or any other of our data, or website content or intellectual property without our prior written consent. In addition, all page headers, custom graphics, button icons, and scripts are service marks, trade marks or trade dress of TMC and you may not copy, imitate, modify or use them without our prior written consent.
- (c) You may use HTML logos provided by us for the purpose of directing web traffic to the TMC services but you may not alter, modify or change these HTML logos in any way, use them in a manner that mischaracterises us or our services or display them in any manner that implies our sponsorship or endorsement.
- (d) All right, title and interest in and to the TMC websites, any content thereon, the Services, the technology related to the Services, and any and all technology and any content created or derived from any of the foregoing is the exclusive property of us and our licensors.
- (e) You agree that, except as expressly provided for in these Terms of Service or in any other agreement between you and TMC governing the provision of goods and/or services to you by TMC, nothing in these Terms of Service or that other agreement transfers or grants to you any right, title or interest in any of TMC's intellectual property in respect of those goods and/or services provided to you.
- (f) Subject to the terms of any other agreement between you and TMC, TMC grants to you a limited, personal, revocable, non-exclusive, non-sublicensable, non-transferable licence to use the Services during the Term of these Terms of Service to the extent necessary for you to use, access and enjoy them as provided by TMC and as contemplated under these Terms of Service or any other agreement between you and TMC.

### 13.2 Developed Intellectual Property

- (a) You acknowledge and agree that any intellectual property created or derived by you from the Services or any intellectual property of TMC or the TMC Content or TMC Data (the **Developed IP**) will belong exclusively to TMC upon its creation and you hereby assign such Developed IP automatically to TMC upon creation.
- (b) You must do all reasonable acts, including signing any documents, reasonably requested by TMC to assist TMC with perfecting its title to and rights in any such Developed IP.

### 13.3 Your License of your Data and Content to us and our Use of it

- (a) We do not claim ownership of your Data or your Content that you provide, upload, submit or send to us. Subject to the next paragraph, when you provide your Data or your Content to us or make public your Data or your Content using our Services, you grant to us (and the third parties that we work with) a non-exclusive, irrevocable, royalty-free, transferable worldwide licence to use your Data and your

Content and associated intellectual property and publicity rights during and after the Term to help us improve, operate and promote our current services and develop new ones. We will not compensate you for any of your Data or Content. You represent to us that our use of your Data or your Content will not infringe any intellectual property or publicity rights and that you own or otherwise control all of the rights of your Data and your Content you provide to us, and you agree to waive your moral rights and promise not to assert such rights against us.

- (b) You grant to us and our related entities a worldwide, non-exclusive, transferable, sublicensable, royalty-free worldwide right to use and display publicly, during the Term of these Terms of Service, your trade mark(s), trade names, service marks, logos, domain names and other designations owned, licensed to or used by you for the purpose of identifying you as a current customer that uses TMC services and any other use to which you specifically consent.

## **14. Privacy**

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### **14.1 Privacy and Personal Information**

- (a) Our privacy notice located at <https://www.themessaging.co/privacy-notice> details how we collect, hold, use, disclose and otherwise process your personal information (as that term is defined in the *Privacy Act 1988* (Cth)).
- (b) You must read and agree to our privacy notice prior to using our Services and the privacy notice is incorporated automatically by reference into these Terms of Service.
- (c) By continuing to use our Services, you represent that you have read our privacy notice and agree to it.

### **14.2 Identity authentication**

- (a) You authorise us, directly or through third parties, to make any inquiries we consider necessary to verify your identity. This may include:
  - (i) asking you for further information;
  - (ii) requiring you to take steps to confirm ownership of your email address or financial instruments;
  - (iii) ordering a credit report from a credit reporting agency, or verifying your information against third party databases or through other sources; or
  - (iv) requiring you to provide your driver licence or other identifying documents.
- (b) Anti-money laundering and counter-terrorism financing laws may require that we verify your identity and we have the right to close, suspend, or limit access to your account or the Services if, after reasonable enquiries, we are unable to obtain information about you required to verify your identity.

## **15. Confidentiality**

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### **15.1 Your Confidential Information**

- (a) Subject to clause 15.1(b), we will:

- (i) keep your confidential information confidential; and
  - (ii) not use or disclose your confidential information for purposes other than to perform our obligations or exercise our rights under these Terms of Service or any other agreement between you and TMC, or to provide our Services to you.
- (b) We may disclose your confidential information to others where:
- (i) you have consented to us disclosing your confidential information;
  - (ii) it is necessary for us to disclose your confidential information in order to provide you with our Services or comply with these Terms of Service;
  - (iii) it is to our personnel, employees, officers, service providers, subcontractors, professional advisers or our related bodies corporate who have a need to know in order to provide, or assist in providing, our Services to you and who are bound by similar obligations of confidentiality in respect of your confidential information; and
  - (iv) we are required to do so by a court, a governmental agency, regulatory body or other such authority or under applicable law.

## **15.2 TMC's Confidential Information**

- (a) You must:
- (i) keep our confidential information confidential at all times; and
  - (ii) not use or disclose our confidential information except to the extent necessary to use, access and enjoy our Services as contemplated for under these Terms of Service or any other relevant agreement between you and TMC.

## **16. Audit**

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### **16.1 Audits**

- (a) We may, if we reasonably suspect that you are in material breach of these Terms of Service, carry out an audit on you and your account with us to investigate.
- (b) You must provide us with all reasonable assistance reasonably requested by us or a third party auditor engaged by us in carrying out the audit.
- (c) Where the audit finds that you are in material breach of these Terms of Service, you must promptly rectify that breach at your cost.

## **17. Term, Suspension and Termination**

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### **17.1 Term**

- (a) These Terms of Service commence on the Service Start Date and, except where earlier terminated in accordance with this Agreement, continue in full force and effect for as long as you receive or use our Services (the **Term**).

- (b) If neither you nor we cancel these Terms of Service at the end of any fixed period or Minimum Term of this Agreement that we have mutually agreed to be the Term, then we will continue to supply the Services to you on a month-to-month basis.

## **17.2 Cancelling the Services**

- (a) You may cancel a Service at any time, with or without cause.
- (b) Cancelling paid Services stops future charges to continue the Service as set out in these Terms of Service.
- (c) You acknowledge and agree that, if we or you cancel a Service:
  - (i) clauses 2.9 and 17.5 apply and any other provisions which expressly or by implication survive; and
  - (ii) you may be required to pay cancellation Charges where you have agreed to such obligations under a separate agreement for the Services with TMC.
- (d) If you cancel the Services, your access to the Services ends at the end of your current Service period or, if we bill your account on a periodic basis, at the end of the period in which you cancelled.

## **17.3 Suspension**

- (a) We may suspend the provision of our Services to you if:
  - (i) you have breached a material term of these Terms of Service;
  - (ii) where you are delayed or have failed to make payment of the Charges for the Services when due in accordance with these Terms of Service; or
  - (iii) we suffer a Force Majeure Event (as set out in clause 18 below).
- (b) Where we have suspended our Services to you under clause 17.3(a)(i) or 17.3(a)(ii), we may resume our provision of the Services to you upon you rectifying the material breach or failure to pay.

## **17.4 Termination for Material Breach**

Either party may terminate these Terms of Service upon written notice to the other party if the other party:

- (a) breaches a material term of these Terms of Service and that breach is incapable of being remedied; or
- (b) breaches a material term of these Terms of Service that is capable of remedy, and fails to remedy that material breach within thirty (30) days after being requested to do so.

## **17.5 Effects of Termination**

In addition to clause 2.9, on termination of your account or the Services or this Agreement, all licences granted to you under these Terms of Service for the Term cease and your rights will cease (and you will no longer be able to use) any email address(es) issued to you for use in connection with our Services which were issued to you for use during the Term of your acquisition of the Services. All Data and Content associated with your use of the Services will be handled in accordance with the account closing process set out in clause 2.8.

## 18. Force Majeure Events

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### 18.1 Force Majeure Events

- (a) Except for any payment obligations, a party that suffers a Force Majeure Event may suspend the performance of its obligations under these Terms of Service or extend the time for performance of those obligations, in each case only to the extent that those obligations are affected or inhibited by the Force Majeure Event.
- (b) A party that suffers a Force Majeure Event must take all reasonable steps to mitigate the effects of the Force Majeure Event and cooperate in good faith with the other party to do so.

### 18.2 Termination for Force Majeure Event

- (a) If after thirty (**30**) days from the commencement of the Force Majeure Event the party seeking relief is prevented from recommencing its performance of its obligations under these Terms of Service, the other party may terminate these Terms of Service immediately on written notice to the first party.

## 19. Notices

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### 19.1 Notice to You

- (a) We may send you notices:
  - (i) by posting a letter to your mailing address (if you have provided us with those details);
  - (ii) by email to your email address; and/or
  - (iii) via SMS or MMS messages to your registered mobile number or device.

### 19.2 Notices to TMC

- (a) You may send notices to us:
  - (i) by posting a letter to our offices at Suite 251, Level 18, 324 Queen Street, Brisbane, Queensland, 4000, Australia; or
  - (ii) by emailing us at [billing@themessaging.co](mailto:billing@themessaging.co).

### 19.3 When Notices are Received

Notices sent by a party under this clause 19 are deemed to be received by the other party:

- (a) if served by hand or in person, then on delivery of the notice;
- (b) if by post, then three (**3**) business days after posting the notice (or six (**6**) business days if posting from outside of Australia);
- (c) if by email, then upon receipt by the recipient's email system; or
- (d) if by SMS or MMS, then upon receipt by your mobile number or device.

## 20. Changes to these Terms of Service, Charges, Services or Service Features

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Changes will not apply retroactively.

### 20.1 Changes to these Terms of Service or Charges

We:

- (a) may with advance notice at any time make non-material changes to these Terms of Service at any time where the change will not adversely affect you; or
- (b) may with advance notice at any time make material changes to these Terms of Service; or
- (c) may mutually agree with you to change these Terms of Service at any time; or
- (d) may introduce or vary a Charge to pass on a tax or levy imposed on us under applicable law with advance notice at any time; or
- (e) may introduce or vary a Charge associated with a service where we rely on a third party for the service and the third party increases its price to us with advance notice at any time; or
- (f) withdraw any plans/packages with advance notice at any time (to take effect from the end of your current Term); or
- (g) change the way we structure our Charges,

and we will post any such changes on our website or inform you in writing by email or with your invoice with not less than thirty (30) days' notice of the change.

### 20.2 Changes to Services or Service Features

- (a) We may change a Service, a Service Feature, and if we do this in a way that significantly disadvantages you:
  - (i) we will inform you (by writing to you or advertising the change another way such as on our website) at least thirty (30) days before the change, unless we can't reasonably do that (for example, if the change is for legal or regulatory reasons and in this case we will give you as much notice as possible); and
  - (ii) you may end that Service without having to pay any extra Charges for leaving early.
- (b) We may change a Service, a Service Feature or this Agreement to do the following:
  - (i) make the agreement clearer or easier for you to understand, or change it in another way that does not significantly disadvantage you;
  - (ii) change, improve, update or add to the Service or Service Features;
  - (iii) add to or change the way we provide the Services or Service Features;
  - (iv) withdraw, replace or remove all or part of the Service or a Service Feature;
  - (v) reorganise the way we manage or run our business; or

(vi) reflect a change to any applicable law that applies to us,

and we will give you at least thirty **(30)** days prior warning and you may be able to end the service in line with clause 20.2(a)(ii).

## 21. General Provisions

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### 21.1 Entire Agreement

Except where expressly provided otherwise in these Terms of Service or any other agreement between you and TMC, or where you and TMC have prior agreed in writing that prior representations or discussions apply to these Terms of Service, these Terms of Service represent the entire agreement between you and TMC, and replace all previous representations, communications, negotiations, agreements and understandings between us and you relating to its subject matter.

### 21.2 Relationships

Nothing in these Terms of Service is intended to or will operate to create a partnership, joint venture or employment relationship between the parties, or authorise either party to act as agent for the other, and neither party will have the authority to act in the name or on behalf of or otherwise to bind the other party in any way.

### 21.3 Waiver

No failure or delay by a party to exercise any right or remedy provided under these Terms of Service or by applicable law will constitute a waiver of that or any other right or remedy, or prevent or restrict the further exercise of that or any other right or remedy. No single or partial exercise of such right or remedy will prevent or restrict the further exercise of that or any other right or remedy.

### 21.4 Invalidity

Any parts of these Terms of Service which is or becomes void or unenforceable will, to the extent of such invalidity, be severable and will not affect the other provisions or the remainder of the affected provision of these Terms of Service.

### 21.5 Assignment

(a) We may assign, novate or transfer our rights, benefits, obligations and/or liabilities under these Terms of Service to another person (the **New Service Provider**) provided that:

- (i) the New Service Provider is a related entity of ours who will assume those rights, benefits, obligations and/or liabilities;
- (ii) your rights and the Services provided to you under these Terms of Service will not be adversely impacted as a result of the assignment, novation or transfer;
- (iii) the assignment, novation or transfer is occurring as part of a sale of our business or business restructure; and
- (iv) we have given you thirty **(30)** days' advance notice of any novation, assignment or transfer.

You must accept performance by the New Service Provider in place of performance by us and if you do not want to do so then you may terminate or

cancel your contract with us in accordance with these Terms of Service without penalty for such termination.

- (b) You cannot transfer your rights or obligations for your Service without our consent but we will not unreasonably withhold that consent.

#### **21.6 Subcontracting**

TMC may, from time to time, subcontract any part of its obligations under these Terms of Service or its provision of the Services to you, at TMC's own expense.

#### **21.7 No Exclusivity**

You acknowledge that these Terms of Service do not create any exclusive relationship between you and TMC, and that TMC is free to deal with third parties in respect of any of the Services.

#### **21.8 Cumulative Rights**

The rights, powers, authorities, discretions and remedies of a party under these Terms of Service do not exclude any other right, power, authority, discretion or remedy of that party, whether under these Terms of Service or under applicable law.

#### **21.9 Consent**

Except to the extent the context requires otherwise, where an act, right or obligation under these Terms of Service is subject to the consent of a party, that party may grant or withhold that consent in its sole discretion and is not required to provide a reason for that grant or withholding.

#### **21.10 Further Assurances**

Each party must at its own expense take any action which the other party reasonably requests to carry out the intended purpose of these Terms of Service.

#### **21.11 Governing Law and Jurisdiction**

These Terms of Service (and any non-contractual obligations arising out of or in connection with it) will be governed by, and construed in accordance with the laws of Queensland, Australia and the parties hereby agree to submit to the exclusive jurisdiction of the courts of Queensland, Australia.