



MOBIPOST CUSTOMER USAGE AGREEMENT

This Agreement is effective from the Commencement Date between Third Screen Media Pty Ltd of level 3, 521 Toorak Rd, Toorak Vic 3124 hereinafter referred to as "TSM" and the Customer.

These Terms and Conditions including any Schedules cover the entire arrangements between Third Screen Media Pty Ltd and the Customer. This Agreement is accepted in full and without exclusion by way of explicit signing by the Customer or implicitly by the Customer's use of any TSM Products & Services.

Where Schedules are required to detail more specific arrangements then such Schedules must be explicitly executed, in counterparts or otherwise, with this Agreement forming an attachment and duly initialled on each page by all Parties.

DEFINITIONS

- A. **Address Tags** means the information displayed on a received message which identifies the sending party. Address Tags are normally the sending mobile number (or email address) but may also be an alpha numeric string of up to 11 characters as defined within the TSM Products & Services.
- B. **Approved Purpose** in the context of exchange of confidential information means for the sole and exclusive purposes of working together for a mutual commercial benefit without detriment to either Party.
- C. **Commencement Date** means the earliest date of execution by the Parties or where the Agreement is not executed but accepted by implication through the Customer's use of the TSM Products & Services then the first date upon which the Customer accesses or uses in any manner the Products & Services.
- D. **Commercial Message** has the same meaning as defined in the SPAM Act 2003 under the jurisdiction of the Australian Communications & Media Authority. In other countries the definition will apply as is intended in Australia and within any legislated or required manner of the country in which the TSM Products & Services are being used..
- E. **Confidential Information** means any information provided by either Party or its authorised representatives to the other Party or its authorised representatives for the Approved Purpose, whether such information is in written form, electronic, or communicated verbally.
- For the avoidance of doubt the confidential information includes information that; is by its nature confidential; is designated as confidential; or that the receiving Party knows or ought to know is confidential and includes any information comprised in or relating to any Intellectual Property Rights; information relating to policies, strategies, practices and procedures; and information relating to Customers or suppliers or licensors, and like information.
- F. **Content** means any item of copyrightable or protectable material including words, phrases, images, animations, audio or video. This includes any reproduction, adaptation or copy of an artistic work, ringtone, music score, creation, file or other data.
- G. The **Customer** means the individual or organisation using the TSM Products & Services whether explicitly named and a signatory to this Agreement or implicitly named through the use of the TSM Products & Services and thereby acknowledging and accepting this Agreement as though a formal signatory. Where an individual is signing or using the TSM Products & Services on behalf of others or an organisation then it is the individual's responsibility to ensure that the user is fully aware of their complete obligations under this Agreement.
- H. **Intellectual Property Rights** includes copyright, trade mark, design, patent, trade, business or company names, confidential or other proprietary rights, or any rights to registration of such rights, whether created before or after the date of this Agreement and whether created in Australia, the United States the European Union or elsewhere.
- I. **Products & Services** means any software application, Web service, messaging service, on device application or any other commercial item offered by TSM to the Customer whether provided for a fee or free. This includes any intellectual property, concepts, ideas and innovation of TSM where the Customer is provided access or use.
- Where TSM fully manage the delivery or execution of a process or campaign on behalf of the Customer then this is regarded as a service and also covered by this Agreement. The products developed, owned and licensed by TSM includes but is not limited to mobiPOST™, mobiLINK™, mobiSITE™, mMuscle™, SMS Games, SMS Chat, Mobile Content Adaptation platform and the TSM Mobile Campaign Management Ecosystem encompassing Face Recognition, QR Codes, Ticketing, mVouchers and Coupons.
- J. **Schedule** means any other document executed by both Parties and attached to a copy of this Agreement. Schedules include but are not limited to, defining recitals, additional terms and conditions, special financial arrangements or development specifications.



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TERMS & CONDITIONS

QUOTATIONS

1. A Quotation for Products & Services or any other custom developed or managed services provided by TSM to the Customer is valid for a maximum of 30 (thirty) days from the date of the quotation. However, TSM reserve the right to withdraw the quotation at any time at the sole and exclusive discretion of TSM and without reason.

BILLING

2. TSM may require payment for use of the Products & Services by way of an automated payment system operated by a third party. Such payment system is intended to streamline the billing and payment processes. Where TSM render an invoice then payment must be made within 30 days.

Where accounts remain outstanding for more than 45 days, TSM reserve the right to suspend the Customer's access to the Products & Services without notice, penalty or liability. Such failure to settle outstanding money due to TSM is regarded as a material breach of the Agreement and relieves TSM of all performance and supply obligations until such payments are settled in full. Where custom development or project works are undertaken, TSM reserve the right to require a 35% deposit prior to commencement.

TAXES

3. Where applicable, invoices will include Australian GST as legislated and applicable. Where withholding taxes or duties of any kind are incurred then these will be the sole responsibility of the Customer ensuring that the full invoiced amount is received by TSM without deduction. TSM may add taxes and other duties as required in the country to which services are being provided.

CUSTOM WORKS

4. Where TSM undertake custom development work or any form of professional services, Customer will not unreasonably withhold signoff and approval of the completed project including payment of monies due, where TSM are able to reasonably demonstrate they meet the agreed specifications or requirements.

CONTENT RIGHTS

5. Customer warrants that all Content used within the TSM Products & Services in any manner or form including as a response or loaded as a comparative for Image Recognition or Face Recognition is duly licensed or authorised and not in breach of any law, third party rights or trademarks. Customer further accepts without limitation that any fees, royalties or other payments for use of Content is paid by the Customer.

INDEMNITY

6. Customer unconditionally and without limitation fully indemnify TSM and its officers, employees, agents and directors against any loss, expense (including legal expenses), claim, fine, charge or fee whatsoever incurred by TSM arising out of or in connection with the Customer's use of the Products & Services including but not limited to the use of any custom developed tools or interfaces, use of any Content and the distribution of messages to Customer supplied numbers.

SERVICE LEVELS

7. Subject to the relevant provisions, conditions and terms in this Agreement, TSM strive to achieve 99.5% availability in respect of the Products & Services being offered and have implemented appropriate monitoring, tracking and support initiatives in the endeavour to meet these targeted availability levels.

8. Where a material failure in the targeted availability of TSM's Products & Services occurs, the Customer's entire claim is limited to the pro-rata amount of monthly hosting, licensing or support fees that have been fully paid to TSM during the period of interruption and will be rebated to the client subject to approval by TSM by way of credit against future charges upon an accepted written request from the Customer clearly identifying where such failure in the availability had a material impact on the Customer. All data, infrastructure and messaging charges are still due and payable by Customer to TSM.
9. TSM accept no liability or responsibility for any interruptions in the provision of services as a result of any event or circumstance that is beyond the direct control of TSM. This includes events such as failure or delays in the telecommunications network, failures or delays in the Internet connectivity between TSM servers and external parties and the gateway connectivity providers between TSM and the consumer.
10. TSM cannot warrant availability and service levels beyond that of the service providers TSM itself relies upon including but not limited to gateway operators, hosting providers and Telco's;
11. Both parties agree to be reasonable in resolving any availability issues of the TSM Products & Services.
12. TSM have implemented redundancy and disaster recovery processes and will continue to evolve and advance TSM's ability to offer uninterrupted service but Customer acknowledges and accepts that access and availability of the TSM Products & Services is not guaranteed.

DATA PROTECTION

13. Where Products & Services include the retention and storage of data on behalf of the Customer, including but not limited to transaction information, loyalty records, messaging history or contact databases, the Customer acknowledges and accepts that:
 - a. TSM have no obligation to maintain, preserve or store such information notwithstanding the use and implementation of redundant systems, backups and service level initiatives to ensure information availability; and
 - b. TSM provide an interface allowing the Customer to retrieve copies of all log files, history and any other transaction data as often as required or as appropriate and therefore accept the full responsibility in protecting and storing such information; and
 - c. The Customer must take all necessary steps and actions to ensure it retrieves (or receives automatically as required) all backup data of any kind located at TSM or within the TSM Systems that is of a business critical nature to the Customer so as to avoid any losses or damage should the TSM servers be unavailable or damaged

SUPPORT

14. All support is via the Web interface of the Product for which support is requested (eg. Mobipost product support is via the Mobipost web site). The monthly License Fee covers the cost for all normal support issues. Standard Help Desk Hours are 9AM-5PM Monday to Friday excluding Public Holidays Australian Eastern Standard Time. Support outside of hours, or out of normal scope to be charged as quoted. Support does not include generation of MMS contents, TSM provide this on a fee per content basis.

USE OF SYSTEMS

15. Customer must not use the Products & Services for any illegal purpose whatsoever including any breaches of the Australian SPAM Act 2003 or any other similar Act in the country of operation of the Customer. It is the Customers responsibility to seek appropriate advice on use of the Products & Services to ensure all legal requirements are met within the country of use.

SPAM ACT 2003

16. Customer warrants that they will conform to all aspects of the SPAM Act 2003 in respect of legislated messaging requirements to prevent consumers being sent unsolicited Commercial Messages and provide all opt-out and complaint processes as required under the Act.

TELECOMMUNICATIONS ACT 1997

17. The Customer must conform to the Australian Telecommunications Act 1997 in all aspects including taking all reasonable steps to avoid sending Commercial Messages between the hours of 9pm and 8am Monday to Friday and 9pm to 9am on weekends unless the recipient has expressly requested such Commercial Message or opted in to a service where delivery times are expressly stated as a condition of opting in to the service. Further, where the Commercial Message could reasonably be deemed to be age sensitive the Customer must take reasonable steps to ensure recipients are legally entitled to view, participate or use the product or service being promoted.

PERMITS

18. Where Customer runs any form of competition, trade promotion or lottery, Customer undertakes to ensure all permits and licences are obtained for all relevant locations where the activity is being promoted. Unless TSM have been directly engaged to assist with regulatory processes, TSM reserve the right to request conformance evidence if the Products & Services are being used in a manner that would require permits, approvals or any other form of legislative approval.

INTELLECTUAL PROPERTY

19. Unless agreed in writing between TSM and Customer, TSM retain all intellectual property (IP) rights in any custom development or modification to the TSM products & Services to cater for Customer's special requirements. Where integration with Customer systems is also undertaken, then the Customer retains all rights (IP) in their systems. In principle, the IP rights of each party remain as they were prior to any modifications or custom developments.

LISTS

20. Where Customer secures third party lists of mobile numbers to undertake outbound messaging activity using the TSM Products & Services the Customer warrants that the owners of the individual mobile numbers have all "opted in" to receive such messages and that all the relevant conditions of the SPAM Act 2003 are adhered to in respect of identifying the promoter and where necessary the source of the list of mobile numbers.

MOBILE NUMBERS

21. All mobile numbers and other private information in the possession of TSM in any form as a result of the Customer's use of the Products & Services remains the sole property of the Customer. TSM have no right to use in any way whatsoever, the mobile numbers or other information received by way of the Customer's use of the Products & Services but Customer acknowledges and accepts that TSM must retain all such information for purposes of audit, complaints handling and or other legal obligations or investigations.

HANDSET SUPPORT

22. TSM undertake to deliver a mobile experience on the widest range of mobile handsets possible. However, every handset make & model varies with new releases occurring regularly. Therefore, TSM of use of the Products & Services as it relates to handset specific conversion or delivery on a best endeavours basis.

INTEGRATION

23. Where required, the Customer must only connect and integrate Customer systems with the TSM Products & Services in accordance with the specifications, guidelines and specific instructions provided by TSM. Such integration guidelines and processes will be provided to Customer at time of planning and development of interfaces.

ONGOING DEVELOPMENT

24. TSM may at any time modify any of the TSM Products & Services but in so modifying shall use every effort to ensure that such modification will not have an adverse effect on the Customers usage of the TSM systems.

CONDUCT

25. Customer must not use, or permit others to use, the systems, services or products offered by TSM; to circulate or send any unsolicited or unauthorised marketing, publicity or advertising material message to any person (including a message Commercial Message) unless that person has consented to receiving in a manner as defined in the SPAM Act 2003; for the sending of messages without a reasonable intent or for the purpose of causing annoyance, inconvenience or distress to any person; that in any way may have a detrimental effect to the goodwill and good standing of TSM or any of the partners & associates of TSM; to transmit computer worms or viruses or anything else which may cause harm to the Products & Services; to access any other TSM computer system or network without TSM's consent or disrupt or damage any TSM computer systems or network; to forge any messages; to send any material that is likely to be, having regard to the contemporary attitudes of Australian society, offensive to reasonable adults (or other applicable Countries); to send any obscene, menacing, sexually explicit, abusive, offensive or defamatory material or any material that violates any Commonwealth, State, Territory or local law or regulation or any law, rule or guideline applicable to any country where the Service is marketed, provided or received or is contrary to any Code of Conduct issued by the Telephone Information Services Standards Council.

SUSPEND

26. TSM may immediately suspend Customer's access to the Products & Services if Customer misuses the Products & Services or fails to comply with Customer obligations under these Terms & Conditions. Such suspension does not remove any financial obligations the Customer has to TSM during the suspension period or the remaining term of the Agreement.

TERMINATION

27. At the sole discretion of TSM, TSM may terminate this Agreement for any reason whatsoever including but not limited to; material breach of any clause and a failure to rectify within a 30 (thirty) day period; misuse of the Products & Services; or failure to pay accounts within agreed timeframes. Upon termination, the Customer's obligations under this Agreement relating to confidentiality and non-disclosure survive for a period of 3 (three) years. Further, TSM have the right to seek compensation, outstanding fees, damages or costs if appropriate and subject to the reasons for termination.

CARRIERS

28. TSM use a range of delivery strategies for MMS picture or multimedia format messages to carriers in Australia and overseas. Our ability to effectively detect the handset and to manage the content conversion and failover processes is reliant on certain technical capabilities within the mobile network and within the carrier themselves. Some carriers including but not limited to Virgin Mobile require us to use a method of delivery where the comprehensive analytics are not necessarily available and therefore TSM cannot provide the subsequent depth of information pursuant to the specific message sent to a subscriber. The TSM MMS delivery capability and subsequent analytics and failover processes are performed on a best endeavours basis due to the carrier issues beyond our direct control.

DEDICATED NUMBERS

29. Where Customer makes an application for any form of number (premium or long code) which is approved, TSM will make the telephone numbers available for Customer use subject to the provisions of the Telecommunications Numbering Plan 1997. Consequently, TSM does not warrant that any telephone number made available for use will be continuously available.

ADDRESS TAGS

30. Information provided by the Customer at time of registration to use certain Products & Services is used to define the Address Tag of outbound messages. Customer warrants that supplied information including contact mobile number and company name are true and correct and are not in breach of any legislation in being used as the Address Tag. Where Customer has been provided the ability to define their own Address Tag, Customer accepts full liability without limitation and will ensure that any Address Tag does not breach the rights of any person or company in any manner whatsoever and does not contravene any law or legislation including the SPAM Act 2003. The use of custom Address Tags can be withdrawn unconditionally at the sole discretion of the carriers at any time and therefore TSM offer this capability only whilst TSM are able.

PROTECT CONFIDENTIALITY

31. The recipient of Confidential Information from the other party must keep confidential all Confidential Information; and use all Confidential Information and Intellectual Property Rights solely for the Approved Purpose; and not copy or record in any other form any part of the Confidential Information except as is strictly necessary for the Approved Purpose; and not apply for, or assist any other person, directly or indirectly, to apply for any patents, designs or other registered Intellectual Property Rights based on or utilising any part of the Confidential Information; and not contest or seek to invalidate any patents, designs or other registered Intellectual Property Rights or applications for Intellectual Property Rights that are based on or that utilise any part of the Confidential Information; and not directly or indirectly exploit the Confidential Information in any way for the benefit, profit or advantage of the recipient or any other person without the prior written consent of the disclosing party.

PERMITTED DISCLOSURE

32. The recipient of Confidential Information is not bound to keep confidential any information if and to the extent that the

information is required by law to be disclosed or in the public domain other than as a result of a breach of this agreement.

RETURN OF CONFIDENTIAL INFORMATION

33. On request by the discloser of Confidential Information, the recipient must at the disclosers request immediately return all the Confidential Information in its possession, destroy it or delete it in the case of computer records except where such Confidential Information is contained in statutory documents & records such as board papers. Where such Confidential Information is contained in statutory documents, the recipient remains obligated to protect and preserve the Confidential Information to the best of the recipient's ability.

AMENDMENTS

34. TSM reserve the right to amend or change any aspect of these terms and conditions including but not limited to any pricing with a minimum of 14 days notice. Where such changes are made TSM will notify the Customer of the changes and provide a revised copy of this Agreement. Where prices are quoted and agreed in separate Schedules, TSM at all times retain the right to amend pricing with 14 (fourteen) days notice for any reason including but not limited to TSM's supply cost increases. Further, some aspects of the Products & Services are provided by third party suppliers to TSM including carriers and as such TSM have no direct control or liability over their continued provision including but not limited to Dedicated Numbers, Address Tags and International connectivity.

DEFAULTS & REMEDIES

35. Where a party is in breach of any clause of this Agreement or Schedules both Parties agree to work reasonably together to resolve such a breach with the defaulting party agreeing to do all this reasonable to rectify the breach within 30 (thirty) days of being made aware of the breach. Failure by a party to exercise a right or delay in exercising that right does not prevent its exercise or operate as a waiver.

TERM

36. Unless otherwise stated in an attached duly executed Schedule, the Term of this Agreement and the ongoing obligations of the Customer, is for a minimum period of 12 (twelve) months from Commencement Date. The Agreement is automatically renewed for a further 12 (twelve) months if no notification of termination is received from the Customer by TSM within 60 (sixty) days of expiry.

JURISDICTION

37. This Agreement is governed by the laws of the State of Victoria and the Commonwealth of Australia. Each party submits to the jurisdiction of the courts of Victoria and the Commonwealth of Australia.

INTERNATIONAL

38. Where clauses refer to specific legislation, guidelines or operational constraints of Australia but the Customer is using or TSM is supplying Products & Services in other countries then such clauses shall be read and interpreted in an equivalent or similar manner so as to ensure their effect or meaning in the country of use or deployment is as originally intended in Australia.