



# Client Service Agreement Terms and Conditions

Version 1.6 AU

# eWAY Terms and Conditions

## 1. Recitals

- 1.1 eWAY is the owner of trademarks, patents, trade secrets, copyrights, processes, know how, registered designs or other Intellectual Property and provides payment gateway services to online merchants.
- 1.2 eWAY has agreed to grant You with access to the Site, the Services, and use of certain Intellectual Property and Confidential Information as set out in this Agreement.
- 1.3 All products of eWAY or an affiliate including the eWAY website, payment processing pages and online documentation (collectively, the "Services") are subject to the Terms and Conditions stated below.
- 1.4 By the use of the Site or the Services You agree to be bound by this Agreement. If You do not agree to the Terms and Conditions set out below You must not use the Site or the Services.

## 2. Interpretation - Definitions

- 2.1 In these Terms and Conditions, the following terms have the following meanings:

**"Account"** means Your user name and identifying particulars supplied to eWAY at the commencement of this Agreement.

**"Anniversary Date"** means an anniversary of the Commencement Date.

**"Agreement"** means this agreement as amended from time to time including schedules and terms included by reference.

**"Business"** means all activities associated with on-line gateway transactions including purchases and refunds and includes development of the Site, the Services and Intellectual Property.

**"Card"** means a debit, charge, credit or other financial transaction card (including a virtual card) issued by a bank or financial institution.

**"Cardholder"** means the person acquiring goods or services from You and payment for the goods or services is processed through use of the Services.

**"Cardholder Data"** means information supplied by You to eWAY about the Cardholder, including but not limited to the Cardholder's name, Card details, address and contact details.

**"Card Scheme"** means any scheme for the issue of Cards operated by a bank or financial institution and includes, without limitation, Mastercard, Visa, American Express, JCB, Discover, Diners Club and eftpos Payments Australia (ePAL).

**"Commencement Date"** means the first day of the month in which you register on the Site.

**"Confidential Information"** means all information acquired created or commissioned by eWAY during the course of or in connection with the Business by eWAY, including information about eWAY, the Business, processes, systems, equipment, dealings, transactions, policies, finances, organisation or personnel, or about those of its Customers, Third Party Service Providers, or anyone associated with it or them, unless that information is readily available to the public, and shall include (but not be limited to) eWAY's principles, policies, procedures, Intellectual Property and other documents, or material which eWAY may direct You to treat as Confidential Information.

**"Copyright Material"** means any work or other subject-matter in which copyright subsists or is capable of subsisting under the Copyright Act 1968 (Cth) or equivalent legislation.

**"Customer"** means You and all users of the Site and the Services.

**"Customer Information"** means all customer information about customers including name, address, contact details, use of Services, their arrangements with eWAY and their Internet Merchant Facility details.

**"eWAY"** refers to Web Active Corporation Pty Ltd ABN 32 086 209 403 and its related bodies corporate.

**"Fees"** means the fees charged by eWAY:

- (a) as set out in the Fee Schedule; or
- (b) as set out in any custom quote provided by eWAY.

**"Fee Schedule"** is a schedule of fees set by eWAY at its sole discretion for use of the Site and the Services. The Fee Schedule can be found at <http://www.eway.com.au/plans-pricing>.

**"GST"** means any tax in the nature of a tax on or on the supply of goods, real property, services, or other things (or similar tax) levied, imposed or assessed by the Commonwealth of Australia or any State or Territory of Australia, which may operate at any time during the currency of this Agreement, other than any interest, fine, penalty, fee or other payment imposed on or in respect of such tax.

**"Intellectual Property"** means all intellectual property rights of eWAY whether in relation to the Site or Services or otherwise and includes all or any of the following:

- a. the Trade Marks of eWAY whether in relation to the Site or Services or otherwise;
- b. the Trade Name or any other trade name under which eWAY sells, provides or distributes its Services;
- c. the technical and other information or expertise devised, developed or acquired by eWAY or its employees or others applied in the development, servicing and sale of the Site or Services and in the management and operation of the Business;
- d. copyright of eWAY in any written material, plans, designs, logos, slogans, labels, insignia or other work relating to the manufacture, merchandising, displaying, promotion and selling of the Site or Services; and
- e. the designs, whether or not registered or protected by copyright devised or acquired by eWAY and applied to the Business, the Site or Services.

**"Live Gateway"** a functioning gateway linked to Your Merchant Bank that allows processing of transactions.

**"Merchant Bank"** a financial institution that provides internet merchant facilities for the use of processing credit card transactions via the Internet.

**"Processes"** include technologies, products, devices, processes or techniques.

**"Services"** means the services provided by eWAY to You under this Agreement.

**"Site"** means eWAY's web site [www.eway.com.au](http://www.eway.com.au)

**"Terms and Conditions"** means these terms and conditions as amended from time to time, and other terms incorporated by reference.

**"Test Gateway"** a gateway that allows You to test the functionality of the Services, without processing transactions to Your Merchant Bank.

**"Third Party Service Providers"** mean those third parties engaged by eWAY to provide services to eWAY or You.

**"Third Party Services"** means those services provided by Third Party Service Providers which You may subscribe to, in accordance with this Agreement.

**"Trade Name"** means eWAY or other trading name of Web Active Corporation Pty Ltd.

**"Trial Period"** a period of 30 days after the earlier of the date you register on the Site or the commencement of Services.

**"Trade Marks"** means the existing or future trade marks owned, used or developed by eWAY during the term of this Agreement

**"You" and "Your"** includes all persons entering this Agreement with eWAY and where the context allows includes your partners, officers, employees, consultants, contractors and agents.

### 3. Interpretation - General

- 3.1 In this Agreement, unless the context otherwise requires:
- 3.1.1 references to any "party" means a party to this Agreement and includes the successors, executors, administrators and permitted assignees (as the case may be) of that party.
  - 3.1.2 where a party consists of more than one person, the liability of those persons under this Agreement is joint and several.
  - 3.1.3 references to any document include references to that document as modified, novated, supplemented, varied or replaced from time to time.
  - 3.1.4 references to a month or a year are references to a calendar month or calendar year.
  - 3.1.5 all references to legislation include any re-enactment of, or amendment to, that legislation and all legislation passed in substitution for that legislation.
  - 3.1.6 references to a "person" include an individual, firm, company, corporation or unincorporated body of persons, any public, territorial or regional authority, any government, and any agency of any government or of any such authority.
  - 3.1.7 a reference to a time of day means the time in the Australian Capital Territory.
  - 3.1.8 headings are for reference purposes only and in no way define, limit, construe or describe the scope or extent of such section.

### 4. Overview of the Services

- 4.1 eWAY provides a gateway to process Card transactions through a Site. The Site has access to an administration area to allow a merchant to view transaction reports, update details, request refunds and perform other administrative tasks relating to transactions processed via eWAY.
- 4.2 eWAY's gateway connects to Your Merchant Bank, allowing You to process Card transactions online through Your website. This operates by You posting specific data to the Live Gateway, which then connects to Your Merchant Bank via various eWAY connections. eWAY then receives the result of the transaction, be it successful or failed, which is then passed back to Your website.
- 4.3 eWAY provides online reports of completed transactions and support to merchants via either phone or email.

### 5. Formation of Contract

- 5.1 You agree and acknowledge that You have entered into a legally binding and enforceable contract with eWAY by transacting with eWAY.
- 5.2 In consideration of eWAY agreeing to Your use of the Site and/or the Services, You agree to comply with this Agreement.
- 5.3 You agree to be bound by any additional terms and conditions ("additional terms and conditions") that you have accepted in subscribing for Third Party Services, and that such additional terms and conditions are incorporated by reference into this Agreement.

## 6. Commencement and Term

- 6.1 Where You have requested the Services be provided on an annual basis, this Agreement:
- 6.1.1 is for a minimum term expiring 12 months after the Commencement Date (unless otherwise agreed in writing);
  - 6.1.2 shall be automatically renewed on the Anniversary Date; and
  - 6.1.3 will continue for successive 12 month periods unless either party gives the other written notice of termination at least 30 days before the expiry of the relevant term.
- 6.2 Where You have requested the Services be provided on a monthly basis, this Agreement will automatically renew each month, until either party gives the other one months' prior written notice of termination.

## 7. Acceptance of Terms

- 7.1 Before using the Site, You should read this Agreement (and any additional terms and conditions and related agreements) carefully and ensure that You understand ALL of the Terms and Conditions. If You do not agree to ALL Terms and Conditions, then You must not use the Site or the Services.
- 7.2 This Agreement and any terms incorporated by reference in this Agreement override any terms or conditions previously published by eWAY.
- 7.3 Each time a transaction is processed on the Live Gateway, through Your Account, whether the transaction result is successful or not, You are agreeing to the Terms and Conditions.
- 7.4 You agree to act in compliance with all applicable laws and Card Scheme rules (including the requirements of the PCI-DSS Standard) (including those relating to privacy and the collection, storage and use of personal and sensitive information, data security, cyber security and electronic transactions) and in accordance with all reasonable directions given by eWAY from time to time which are in compliance with those laws and rules.
- 7.5 Without limiting the requirements of clause 7.4, for any purpose related to the Services, You agree to only use information systems which are fully compliant with all applicable laws and Card Scheme rules.

## 8. Amendment

- 8.1 eWAY may amend this Agreement (including, but not limited to, the Services and the Service Fees) at any time by posting the Agreement incorporating the amendments ('Amended Agreement') on the eWAY website, and following provisions apply to any such amendment.
- 8.2 The Amended Agreement will come into effect and apply from the Amendment Effective Date, which is, subject to this clause, immediately on the date the Amended Agreement is posted on the eWAY website.
- 8.3 If an amendment will have a material impact on You, eWAY will give You notice of the amendment at least 30 days before the Amendment Effective Date.
- 8.4 If you do not agree to an amendment which will have a material impact on You, You must before the Amendment Effective Date notify eWAY by written notice setting out the amendment, the material impact and that You do not agree, in which case (i) the Amended Agreement without that amendment will apply to any Service provided to you after the Amended Agreement is posted but before the Amendment Effective Date and (ii) you must cease using the Services on the date immediately prior to the Amendment Effective Date. Your continued use of the Services on or after the Amendment Effective Date constitutes your acceptance of, and agreement to, the Amended Agreement including the amendment.

## 9. Access

- 9.1 eWAY, the developer of the Site and the Services, grants You non-exclusive access to the Site and the Services via an account upon these Terms and Conditions. The Site and the Services, including any upgrades thereof and any code, program or software given to You to enable Your use of the Site or Services, shall remain the property of eWAY.

## 10. Restricted Use

- 10.1 You will not use the Intellectual Property or Confidential Information to manufacture, have made, use or market a similar site or similar services in any location nor will You use the Intellectual Property or Confidential Information for any purpose other than expressly permitted by eWAY in writing. Where eWAY has indicated to You that the whole or any part or parts of the Intellectual Property comprises Confidential Information You will not at any time during this Agreement or after its termination or expiry disclose such Confidential Information to any person without obtaining eWAYs' express prior written consent. You will take such steps as may be necessary to ensure that any of Your servants or agents do not disclose such Confidential Information including any Intellectual Property.
- 10.2 You may not and warrant that You will not:
- 10.2.1 copy, produce, transmit, transcribe, store in a retrieval system, or translate in any language (natural or computer) any part of the Site, the Services, Intellectual Property or Confidential Information;
  - 10.2.2 transfer or attempt to transfer any part of the Site, the Services, Intellectual Property or Confidential Information or Your right to access them or otherwise make them available to any other person;
  - 10.2.3 attempt to discover eWAY's source code;
  - 10.2.4 sublicense, rent or lease any portion of the Site, the Services, Intellectual Property or Confidential Information;
  - 10.2.5 reverse engineer, decompile, disassemble, modify, translate, make any attempt to discover the source code of the Site or Services, or create derivative works from the Site, the Services, Intellectual Property or Confidential Information, except so far as such actions are permitted by applicable law notwithstanding this limitation or are approved in writing by eWAY;
  - 10.2.6 use the Site, the Services, Intellectual Property or Confidential Information for any illegal purpose;
  - 10.2.7 allow Your Account to be used for any illegal purpose; or
  - 10.2.8 allow Your Account to be used by another person for any purpose.

## 11. Password Policy

- 11.1 Your password for access to MYeWAY must:
- 11.1.1 be a minimum of 8 characters long;
  - 11.1.2 contain at least one lowercase letter, one uppercase letter, and one number; and
  - 11.1.3 be unique and must not be the same as your 5 most recent passwords.
- 11.2 Passwords will expire every 60 days and You will be prompted to change your password after logging in.

## 12. Limited Trial

- 12.1 Upon entering into this Agreement eWAY grants You a Trial Period during which eWAY warrants that no termination fees will be payable if You terminate this Agreement in writing and cease all use of the Site and Services.
- 12.2 You must notify eWAY at least seven (7) days prior to the end of the Trial Period if you wish to terminate this Agreement at the end of the Trial Period.
- 12.3 eWAY may refund the payment of the upfront annual fee and transaction fees paid by You, where applicable, if this Agreement is terminated in accordance with clause 12.2.

## 13. Fees

- 13.1 During the term of this Agreement You must pay to eWAY the Fees.
- 13.2 Where applicable, you warrant that You understand and agree to the fee structure as outlined in the Fee Schedule. You warrant that You understand and agree that all transactions sent to the eWAY Test Gateways are FREE of charge, and that any transaction sent to the Live eWAY Gateways, whether successful or unsuccessful, purchase or refund, will be charged the Fees.
- 13.3 eWAY in its sole, absolute and unfettered discretion reserves the right to change any Fees charged for the Services or use of the Site at any time. In the event of an increase in a Fee that amended Fee will become payable at the earlier of:
  - 13.3.1 30 days after a notice in respect of the fee is posted on this Site; or
  - 13.3.2 30 days after notice is given to You.
- 13.4 If eWAY introduces a new Service, any Fees for the use of that Service are applicable from the commencement of the new Service unless otherwise stated and by using that Service You warrant that You agree to the Fees applicable to that Service as set out at <http://www.eway.com.au/plans-pricing>.
- 13.5 Unless otherwise stated Fees are inclusive of GST and quoted in Australian dollars.
- 13.6 No refund of fees is offered after the conclusion of the Trial Period.
- 13.7 You must pay to eWAY on the due date (and unless otherwise agreed by way of Card or direct deposit payment):
  - 13.7.1 all charges specified in this Agreement.
  - 13.7.2 any amount payable by You arising from Your use of the Site or Services.
- 13.8 Any amount for which You are liable to eWAY under this Agreement in respect of any breach of the Agreement or otherwise.
- 13.9 You authorise eWAY to charge all monies payable to eWAY under this Agreement to Your Account.
- 13.10 At its sole discretion, eWAY may set off any transaction funds payable to You against any fees payable to eWAY by You.
- 13.11 eWAY will pay any monies payable to You by such method as eWAY may reasonably choose.

## 14. Infringement

- 14.1 If You learn of any infringement or threatened infringement of the Intellectual Property or Confidential Information; or
- 14.1.1 any common law passing-off which may cause deception or confusion to the public by a third party, or
  - 14.1.2 any infringement or threatened infringement of the Intellectual Property or Confidential Information;
- You must immediately notify eWAY in writing giving particulars of the infringement or threatened infringement.
- 14.2 eWAY will at its sole discretion institute and prosecute an action in respect of the infringement.

## 15. Costs for Breach

- 15.1 If eWAY is required by You or by an order sought by You to participate in any litigation in which You are involved whether under subpoena or order of a court of competent jurisdiction, including complying with any order for discovery or attending court to give evidence, You shall bear all costs incurred by eWAY in connection with the provision of such participation including eWAY's costs for taking legal or other professional advice or representation on a full indemnity basis.
- 15.2 Further, You agree and acknowledge that where You take any action including legal action against or involving eWAY You will provide security for such costs to eWAY upon written demand.

## 16. Termination

- 16.1 Either party may terminate this Agreement at any time and without a reason by giving at least 30 days written notice to the other party.
- 16.2 Any fraudulent or damaging activities or attempts to compromise the eWAY Site or Services will give eWAY a right to immediately terminate this Agreement and Your use of the Site and Services.
- 16.3 eWAY shall have the right to terminate this Agreement immediately by written notice to You if:
- 16.3.1 You become insolvent or unable to pay Your debts in the ordinary course of business.
  - 16.3.2 In the case of an individual, if a petition for bankruptcy is presented or in the case of a company, if a receiver or administrator is appointed.
  - 16.3.3 In the case of a company, You permit an order to be made or a resolution to be passed for the winding up of the company.
  - 16.3.4 You permit or propose a compromise or arrangement to be made between You and any of Your creditors.
  - 16.3.5 You assign all or part of Your assets for the benefit of any creditor.
  - 16.3.6 You or any of Your Directors are convicted of a criminal offence which in the case of an individual could carry a term of imprisonment or in the opinion of eWAY has or has the potential to cause damage or injury to the reputation and standing of eWAY.
  - 16.3.7 You purport or attempt to transfer, assign or deal with this Agreement or the Site or Services without the written consent of eWAY.
  - 16.3.8 In eWAY's reasonable opinion, the processing of Your transactions exposes eWAY to an unacceptable level of risk



- 16.4 eWAY shall have the right to terminate this Agreement by notice in writing if:
- 16.4.1 You fail to pay monies payable to eWAY on the due date or breach another term of this Agreement.
  - 16.4.2 You purport to or use the Site, the Services, Intellectual Property or Confidential Information in a manner not approved by eWAY.
  - 16.4.3 You (or any of Your directors or anyone on Your behalf) do or neglect to do anything which in eWAY's opinion is likely to bring disrepute upon eWAY.
  - 16.4.4 You engage a competitor of eWAY to provide similar services to those provided by eWAY.
  - 16.4.5 You have not remedied a breach (if it is capable of remedy):
    - 16.4.5.1 in the case of any obligation to comply with any statutory law or regulatory obligation relating to the Business the use of the Site or Services, within 7 days of written notice from eWAY; or
    - 16.4.5.2 in the case of any other obligation, within 14 days of written notice from eWAY.
  - 16.4.6 Your conduct or actions directed to eWAY or its representatives is deemed to be unconscionable, unreasonable, or inappropriate as reasonably determined by eWAY.
- 16.5 Notwithstanding clause 16.3 or 16.4, if You have been guilty of any breach, non-observance or non-performance of the same obligation twice in any one year period, or if eWAY has given notice on not less than two occasions in any 12 month period, eWAY may terminate this Agreement immediately by written notice to You without prior warning or notice if a third or subsequent breach, non-observance or non-performance occurs within a period of 6 calendar months from the second or last of such occurrences.
- 16.6 If You breach this Agreement:
- 16.6.1 eWAY shall be entitled to recover damages from You for breach. Such entitlement shall be in addition to any other right or remedy which eWAY may have. The acceptance by eWAY of arrears of monies shall not constitute a waiver of Your continuing obligation to pay monies on the due date.
  - 16.6.2 in circumstances where eWAY considers damages are not a sufficient remedy eWAY may seek injunctive relief against You and You will not oppose applications seeking injunctive relief as may be brought by eWAY in respect of Your use or proposed use of the Site or the Services.
- 16.7 Termination of this Agreement no matter how arising shall be without prejudice to the rights and obligations of the parties existing up to and including the date of expiry or termination including the right of the party terminating to seek and obtain damages for any breach of this Agreement by the other party or the other party's servants or agents.
- 16.8 Termination on instructions from Your Merchant Bank
- 16.8.1 Without prejudice to any other right of eWAY under this Agreement, if Your Merchant Bank requests that eWAY terminate Your use of the Site and/or the Services or this Agreement for any reason eWAY may do so immediately without Notice being given.
  - 16.8.2 In the event of termination on instructions from Your Merchant Bank You indemnify eWAY and hold eWAY harmless in respect of any loss or damage arising from such termination no matter how such loss or damage arises.

## 17. Rights of Parties on Termination or Expiry

- 17.1 On and from termination or expiry of this Agreement:
- 17.1.1 You shall immediately discontinue the use of the Site and the Services and cease to use the Intellectual Property, Confidential Information, and any other signs, displays or advertising material which contains reference to eWAY.
  - 17.1.2 You shall not represent or advertise that You were formally using eWAY.
  - 17.1.3 All fees previously paid remain the property of eWAY and You agree to make no claim in respect of such Fees. You must further pay to eWAY any fees that have accrued but are unpaid as at the date of the termination or expiration.
  - 17.1.4 You shall immediately pay to eWAY without any deduction or right of set off all sums of money which may be due or payable by You to eWAY.
  - 17.1.5 You shall deliver up to eWAY or its nominated representative all stationery, literature and materials which refer to eWAY or any Intellectual Property, or Confidential Information.
  - 17.1.6 You will ensure that all references to eWAY are removed within 7 days of termination, from all websites, telephone and other directories, directory assistance records, membership rosters and from any other publication.
  - 17.1.7 You shall immediately remove, paint out or cover all notices, display and advertising material which refers to or may be associated with eWAY. If You fail to carry out Your obligations within 7 days of termination, then eWAY shall have the power (without incurring any liability to You) and without Your consent save the authority hereby given by You to remove such references at Your expense which expense You shall pay upon demand.
  - 17.1.8 You shall immediately return to eWAY or its nominated agent all items which may have been loaned to You by eWAY.
  - 17.1.9 eWAY shall retain title and ownership of, and is under no obligation to provide You with any Card data or Cardholder Data, in any form.
  - 17.1.10 The Cardholder Data will be retained by eWAY and held and stored by eWAY in accordance with its obligations as set out in clause 25.1.

## 18. Limit of eWAY Liability

- 18.1 The Site and Services are designed to merely clear transactions or data to Your selected Australian bank using the existing payments network. eWAY accepts no responsibility for the delivery of the transactions to the eWAY server. These transactions may come from a variety of sources (e.g. web, phone operator, database etc). It is Your responsibility to ensure that these details are correct (e.g. correct card number, amount) and securely passed to the eWAY server.
- 18.2 You release and indemnify eWAY from any and all loss or damage arising out of any loss of data or corruption of data during the transfer of such data to eWAY.
- 18.3 To the extent permitted by law, eWAY excludes all representations and warranties, express or implied, other than those contained in this Agreement. Where eWAY is found to be liable for breach of any warranty guarantee or condition implied by statute and which eWAY cannot lawfully exclude, eWAY's liability is limited (to the extent permitted by law) at the option of eWAY to the following:
- 18.3.1 in the case of any programming or software supplied or offered by eWAY:

- 18.3.1.1 to the supply of those programs or software or programs or software of similar functioning again; or
- 18.3.1.2 to the payment of the cost of having those programs or software supplied again; or
- 18.3.2 in the case of Services supplied or offered by eWAY:
  - 18.3.2.1 to the supply of the services again; or
  - 18.3.2.2 to the payment of the cost of having services supplied again.
- 18.4 eWAY, its related bodies corporate, its directors and its employees accept no liability for any loss (including loss of revenue or anticipated profits, loss of goodwill, loss of business, loss of data, computer failure or malfunction), or injury or any direct, indirect, consequential, special, punitive, or other damages caused by or as a result of:
  - 18.4.1 Your use of or inability to use the Site or Services;
  - 18.4.2 any virus or other harmful, or potentially harmful, code which may be transmitted in connection with Your use of the Site or Services;
  - 18.4.3 eWAY 's negligence or the negligence of any of its related bodies corporate, directors, officers, shareholders, employees, providers or agents arising from or related to this Agreement, the Site and the Services;
  - 18.4.4 Your provision of incorrect information; or
  - 18.4.5 Your loss of information or data.
- 18.5 eWAY's liability for any loss or damage under this Agreement or any law is reduced by the extent that You have caused or contributed to such loss or damage.

## 19. eWAY Warranty

- 19.1 eWAY warrants that the use of any or all of the Intellectual Property according to this Agreement in connection with the Site or Services does not result in the infringement of third party intellectual property rights.
- 19.2 eWAY indemnifies You against any losses, costs, actions, claims, demands, expenses, judgments, court orders or other liabilities arising directly out of or in connection with any claim made against You by a third party on the grounds that by virtue of rights to which such third party lays claim, under letters patent or copyright (whether registered as a design or not) or any other similar right or claim, such third party is entitled to prevent or interfere with Your use of any or all of the Intellectual Property pursuant to this Agreement.
- 19.3 The Site is provided by eWAY on an "as-is" basis and the only obligations on eWAY are set out in this Agreement. eWAY gives no warranty or condition, express or implied other than those expressly set out herein. eWAY does not warrant that the functions contained in the Site and the Services provided will be uninterrupted, always available or error free, that defects will be corrected, or that the Site, or eWAY's hardware or computer systems are free of viruses or other harmful components or programs. eWAY does not warrant or make any representations regarding the accessibility or the use or the results of the use of the Site or the Services. You hereby acknowledge that You have relied on Your own enquiries and inspection in relation to the Site and the Services including "Test Gateway" transactions and the use of the Site and Services during the Trial Period before entering into this Agreement and using the Site or the Services.
- 19.4 eWAY does not give a warranty of completion of transactions. eWAY does not warrant that any Merchant Bank or financial institution will complete a transaction. eWAY accepts no liability associated with such risks. You agree that You accept these risks and indemnify and hold harmless eWAY in respect of such risks.

## 20. Your Indemnity

- 20.1 In this clause "eWAY" includes parent companies, subsidiaries, officers, directors, employees and agents of Web Active Corporation Pty Ltd. You indemnify and hold harmless eWAY against any claim, loss, liability, cost or expense, including legal costs on a full indemnity basis, made against or incurred by eWAY in relation to:
- 20.1.1 personal injury or death;
  - 20.1.2 property damage;
  - 20.1.3 economic loss;
  - 20.1.4 civil or criminal penalty;
  - 20.1.5 consequential loss;
  - 20.1.6 or arising out of:
    - 20.1.6.1 any breach by You of this Agreement; or
    - 20.1.6.2 any negligent or criminal act or omission by You.
  - 20.1.7 Your provision of data, including Cardholder Data, to eWAY in order for eWAY to perform the Services.
- 20.2 Your indemnity includes all claims, demands, proceedings, damages (actual, special or consequential) of every kind and nature, known and unknown, including but not limited to demands, proceedings, damages (actual, special and consequential) of every kind and nature taken by any third party due to or arising out of Your breach of this Agreement or by Your violation or breach of any law or any rights of a third party.
- 20.3 You agree and acknowledge that You and not eWAY are liable for all loss and damage no matter how arising which is caused or contributed to by Your use or misuse of the Site or the Services.
- 20.4 You indemnify and hold eWAY harmless in respect of any loss or damage sustained by You as a result of eWAY's refusal to renew or enter into an agreement with You and agree and acknowledge that eWAY's refusal does not amount in anyway to a restraint of trade.
- 20.5 You indemnify eWAY in respect of all loss or damage no matter how arising caused by unauthorised, illegal or improper access to the Site or the Services from any terminals or access points within Your control, custody or power.

## 21. Authorisation for Corrections

- 21.1 You authorise eWAY to correct any errors on Your account. You acknowledge that such correction does not create any obligation on the part of eWAY to ensure the ongoing accuracy (or to warrant the previous accuracy) of the information on Your account.

## 22. Marketing

eWAY reserves the right to use Your company or trading name in any promotional or marketing material it deems fit. This may be in the of form print, TV, radio or multimedia (including web). Example uses may include promotional flyers, or website case studies.

You have the right to unsubscribe from marketing or promotional emails from eWAY.

## 23. Confidentiality

- 23.1 You acknowledge and undertake to eWAY that:
- 23.1.1 all information, documents, data and any other material which is provided by eWAY to You or Your directors, officers, employees and agents in connection with this Agreement and all copies of such information, documents, data and material made by You or Your directors, officers, employees and agents or a third-party is and remains the property of eWAY;
  - 23.1.2 You will use the Confidential Information for the sole purpose of the exercise of the rights and performance of the obligations under this Agreement;
  - 23.1.3 You will only disclose the Confidential Information to such of Your officers, employees, agents and advisers to whom it is necessary to disclose the Confidential Information for the purposes of this Agreement and the use of the Site and the Services;
  - 23.1.4 You will not, and will ensure that Your officers, employees, agents and advisers will not, use, provide or disclose the Confidential Information to any person, other than as expressly permitted in this clause;
  - 23.1.5 You will take all steps necessary to prevent or stop, and comply with all reasonable directions of eWAY in respect of, suspected or actual breaches of, or defaults under this clause;
  - 23.1.6 You will promptly notify eWAY if You suspect, or become aware of, any unauthorised access, use or disclosure of any of the Confidential Information and will give eWAY (at Your cost if the unauthorised access, use or disclosure is as a result of a breach of, or default under, this Agreement) all reasonable assistance in connection with any action which eWAY may take, or proceedings which eWAY may institute, in respect of the unauthorised access, use or disclosure; and
  - 23.1.7 You will, and will procure that Your employees, officers, agents and advisers will, return to eWAY all Confidential Information and delete all electronic copies upon termination or expiry of this Agreement.
- 23.2 You agree that You will not during the term of the Agreement, or at any time after the termination of the Agreement (howsoever this may occur) disclose to any other person (without the previous consent in writing by eWAY) either directly or indirectly, any Confidential Information relating to eWAY of which You became possessed whilst subject to this Agreement, nor use of any such Confidential Information in any manner which may cause or be calculated to cause injury or loss to eWAY howsoever arising.
- 23.3 You must treat as confidential all information gained during the term of this Agreement that relates to Customers of eWAY and utilise Your best efforts to ensure that any employees or agents under Your supervision or control comply with the terms of this clause 23.

## 24. Intellectual Property

- 24.1 This Agreement does not grant You any proprietary rights in the Intellectual Property.
- 24.2 You will not at any time during or after the expiry or termination of this Agreement, contest or challenge in any legal proceedings or otherwise the proprietorship of eWAY in the Intellectual Property.
- 24.3 You shall not in any manner represent that You have any proprietary rights in the Intellectual Property.
- 24.4 In so far as the Intellectual Property or any components of the Intellectual Property are the subject of registrations or applications for registrations under applicable statutes, You shall do nothing to challenge, oppose, dispute or impugn the validity of such applications or registrations and shall take all necessary steps as may be required by eWAY to assist in maintaining or obtaining such registrations.

- 24.5 If You become aware of any claims against or infringements of any rights associated with the Intellectual Property, then You shall immediately notify eWAY and eWAY at its sole discretion may elect to defend or prosecute any action relating to the Intellectual Property. In relation to any proceedings or claims to protect or defend the Intellectual Property, You, if required by eWAY, shall render all assistance including if necessary, providing evidence and being named as a party to any legal proceedings.
- 24.6 At the expiry or termination of this Agreement, all of Your rights to use the Intellectual Property shall cease.
- 24.7 eWAY may change the Intellectual Property which You are permitted to utilise at any time for any reason.
- 24.8 You may not use the Intellectual Property in a manner which may, as determined by eWAY, place the Intellectual Property at risk of loss or loss of value to eWAY.

## 25. Cardholder Data

- 25.1 eWAY will hold and store the Cardholder Data in accordance with the requirements of the Privacy Act 1988 (Cth) ("Privacy Act"), the Australian Privacy Principles ("APPs") and applicable industry standards, including but not limited to, the Payment Card Industry Data Security Standard ("PCI") and eWAY's data retention policy.
- 25.2 You acknowledge and agree that:
- 25.2.1 you have no right to the Cardholder Data or to access the Cardholder Data; and
  - 25.2.2 eWAY has no obligation to provide you with the Cardholder Data or access to the Cardholder Data.

## 26. Privacy

- 26.1 In this clause, "Personal information" has the same meaning as it has in the Privacy Act.
- 26.2 eWAY agrees, in relation to Personal Information which You disclose to eWAY pursuant to these Terms and Conditions:
- 26.2.1 not to do an act, or engage in a practice, that would breach an APP contained in the Privacy Act; and
  - 26.2.2 not to authorise any subcontractor to do an act, or engage in a practice, that would breach an APP.
- 26.3 You agree that an act done or a practice engaged in by eWAY, or by a subcontractor, for the purposes of meeting (directly or indirectly) an obligation under these terms and conditions is authorised by this clause for the purposes of sub-sections 6A(2) and 6B(2) of the Privacy Act, even if the act or practice is inconsistent with an APP contained in the Privacy Act or an approved privacy code that applies to eWAY or a subcontractor.
- 26.4 You warrant that all Personal Information which You disclose to eWAY is up-to-date, complete and relevant to the purpose for which it was disclosed to eWAY, and that the disclosure of the Personal Information by You is not a breach of an APP contained in the Privacy Act.

## 27. Prior Agreements

- 27.1 This Agreement supersedes any prior agreement between the parties whether written or oral. Any such prior agreements are cancelled but without prejudice to any rights which have already accrued to either of the parties under those agreements.

## 28. Rights Cumulative

28.1 All rights granted to either of the parties shall be cumulative and no exercise by either of the parties of any right under this Agreement shall restrict or prejudice the exercise of any right granted by this Agreement or otherwise available to it.

## 29. Costs

29.1 You shall pay Your own costs of entering into and complying with this Agreement.

## 30. Set Off

30.1 eWAY shall have the right to set-off against any payment due by eWAY to You against any amount owed to eWAY by You. Upon termination or expiration of this Agreement for any reason, You shall pay any amount due to eWAY immediately with no right to set-off.

## 31. Waiver

31.1 The failure by eWAY to enforce at any time or for any period any one or more of the Terms or Conditions of this Agreement shall not be a waiver of them or of the right at any time subsequently to enforce all Terms and Conditions of this Agreement and no custom or practice of the parties at variance with the terms of this Agreement shall constitute any waiver of eWAY's rights.

## 32. Force Majeure

32.1 Neither party shall be considered in breach of this Agreement where performance of its obligations under the Agreement is by any cause beyond the reasonable control of the parties rendered impossible or delayed.

32.2 If the reason for the inability to perform or delay in performance referred to in clause 32 continues for a continuous period of 30 days, either party may by written notice to the other terminate this Agreement without penalty.

## 33. Bank Referrer

33.1 eWAY may act as a referrer for a bank or financial institution. As a referrer, eWAY may receive a referral fee from the bank or financial institution.

## 34. Severability

34.1 Any provision of this Agreement, which is or becomes unenforceable for any reason will be ineffective or severable to the extent only of such unenforceability or invalidity and will not invalidate the remaining provisions.

## 35. Performance

35.1 Each party must take all steps, execute all documents and do everything reasonably required by any other party to give effect to the transactions contemplated by this agreement.

## 36. Notices

- 36.1 All notices must be in writing and be given to a Party by any one of the following means:-
- 36.1.1 by delivering it to the physical address of the party,
  - 36.1.2 by sending it to the mailing address of the party by pre-paid mail,
  - 36.1.3 by emailing it to the email address of the party,
- as notified in writing by the party to the other party who is giving the notice.
- 36.2 A notice is deemed to have been given
- 36.2.1 if given in accordance with 36.1.1, the next business day after the day of delivery.
  - 36.2.2 if given in accordance with 36.1.2, 3 business days after the date of posting.
  - 36.2.3 if given in accordance with 36.1.3, the next business day after sending provided that the recipient acknowledges receipt of the email.

## 37. Governing Law and Jurisdiction

- 37.1 This Agreement is subject to the laws of the Australian Capital Territory.
- 37.2 Each party irrevocably and unconditionally submits to the non-exclusive jurisdiction of the courts of the Australian Capital Territory.





## For Further Information

**Call:** 1300 10 65 65

**Visit:** [www.eway.com.au](http://www.eway.com.au)

**Email:** [supportheros@eway.com.au](mailto:supportheros@eway.com.au)

**ACN** 32086209403