

1. Definitions

- 1.1 **“Agreement”** means the terms and conditions contained herein, together with any quotation, order, invoice or other document or amendments expressed to be supplemental to this Agreement.
- 1.2 **“Smartcall”** means Smartcall Limited T/A Smartcall, its successors and assigns or any person acting on behalf of and with the authority of Smartcall Limited T/A Smartcall.
- 1.3 **“Customer”** means the person/s, entities or any person acting on behalf of and with the authority of the Customer requesting Smartcall to provide the Services as specified in any proposal, quotation, order, invoice or other documentation, and:
(a) if there is more than one Customer, is a reference to each Customer jointly and severally; and
(b) if the Customer is a partnership, it shall bind each partner jointly and severally; and
(c) if the Customer is a part of a Trust, shall be bound in their capacity as a trustee; and
(d) includes the Customer’s executors, administrators, successors and permitted assigns.
- 1.4 **“Services”** means all Goods (which includes any content, files, information, printed or virtual material, data, hardware, software or applications (whether supplied from a third party software development company or where custom developed or programmed for the Customer), brands, designs, images, graphics, pictures, trademarks, manuals, and other associated documentation and/or goods, accessories or parts) or Services (which includes any advice or recommendations, consultancy, hosting (which includes virtual server hosting, Website hosting, e-mail hosting, etc.), monitoring, data back-up or storage, strategising and analytical services, technical service, support and training, repairs, or installation of Goods, etc.) supplied by Smartcall to the Customer, at the Customer’s request, from time to time (where the context so permits the terms ‘Goods’ or ‘Services’ shall be interchangeable for the other).
- 1.5 **“Live Date”** means the date in which Smartcall provides the Hosting and Support Services as per initial acceptance of Smartcall’s quotation.
- 1.6 **“SNT”** means any Social Network Tool being a social media platform and/or application which is accessible on the internet through the World Wide Web and which provides multimedia content via a graphical user interface (including, but not limited to Facebook, Twitter, LinkedIn, Pinterest, etc.).
- 1.7 **“Service Agreement”** means the Service Agreement payable for the Services as agreed between Smartcall and the Customer in accordance with clause 8 below.
- 1.8 **“Support”** means to provide direct support to the Customer for technical issues. Support includes the following services:
(a) attending onsite at the Customer’s premises;
(b) any time spent to resolve any issues with the Customer’s computer system created by any operator error on the part of the Customer or any action of any third parties whether authorised or unauthorised by the Customer;
(c) resolving any issues which are solely caused by the actions of third parties and originate outside of the Customer’s computer system e.g. problems that relate to the supply of services by the Customer’s internet service provider.
- 1.9 **“Prohibited Content”** means any content on any media (including advertising, posts, comments, etc.) that:
(a) is, or could reasonably be considered to be, in breach of the Broadcasting Act 1989; the Consumer Guarantees Act 1993; or any other applicable law or applicable industry code; or
(b) contains, or could reasonably be considered to contain, any misrepresentations; or is, or could reasonably be considered to be, misleading or deceptive, likely to mislead or deceive or otherwise unlawful; or
(c) is, or could reasonably be considered to be, in breach of any person’s Intellectual Property Rights.
- 1.10 **“Business Days”** means a day on which the major trading banks are open for normal business to be conducted, excluding a Saturday, Sunday or public holiday.
- 1.11 **“Confidential Information”** means information of a confidential nature whether oral, written or in electronic form including, but not limited to, this Agreement, either party’s intellectual property, operational information, know-how, trade secrets, financial and commercial affairs, contracts, client information (including but not limited to, **“Personal Information”** such as: name, address, D.O.B, occupation, driver’s license details, electronic contact (email, Facebook or Twitter details), medical insurance details or next of kin and other contact information (where applicable), previous credit applications, credit history) and pricing details.
- 1.12 **“Charges”** means the Charges payable (plus any Goods and Services Tax (“GST”) where applicable) for the Goods as agreed between Smartcall and the Customer in accordance with clause 8 below.

2. Interpretation

- 2.1 In this Agreement, unless it is stated to the contrary or the context requires otherwise:
(a) words in the singular shall include the plural (and vice versa), words importing one gender shall include every gender, a reference to a person shall include any other legal entity of whatsoever kind (and vice versa) and where a word or a phrase is given a defined meaning in this Agreement, any other part of speech or other grammatical form of that word or phrase has a corresponding meaning; and
(b) a reference to a statute, ordinance, code or other law includes regulations and other statutory instruments under it and consolidations, amendments, re-enactments or replacements of any of them (whether of the same or any other legislative authority having jurisdiction); and
(c) the words ‘include’ and ‘including’, and any variants of those words, will be treated as if followed by the words ‘without limitation’; and
(d) a reference to dollars (\$), is a reference to New Zealand currency; and
(e) this Agreement is not to be interpreted against Smartcall merely because they prepared this Agreement; and
(f) the following order of precedence (in descending order) will be applied to resolve any conflict, ambiguity or discrepancy in this Agreement:
(i) Smartcall’s general Terms and Conditions of Trade; and
(ii) any schedules or Appendix; and
(iii) any additional terms.
(g) any reference (other than in the calculation of consideration, or of any indemnity, reimbursement or similar amount) to cost, expense or other similar amount is a reference to that cost exclusive of GST.

3. Acceptance

- 3.1 The Customer is taken to have exclusively accepted and is immediately bound, jointly and severally, by these terms and conditions if the Customer places an order for or accepts Delivery of the Goods.
- 3.2 In the event of any inconsistency between the terms and conditions of this Agreement, Smartcall's 'Service Agreement', and any other prior document or schedule that the parties have entered into, the terms of this Agreement shall prevail.
- 3.3 Any amendment to the terms and conditions contained in this Agreement may only be amended in writing by the consent of both parties.
- 3.4 The Customer acknowledges that:
- (a) the supply of Goods on credit shall not take effect until the Customer has completed a credit application with Smartcall and it has been approved with a credit limit established for the account;
 - (b) in the event that the supply of Goods request exceeds the Customers credit limit and/or the account exceeds the payment terms, Smartcall reserves the right to refuse Delivery;
 - (c) none of Smartcall's agents or representatives are authorised to make any representations, statements, conditions or agreements not expressed by the manager of Smartcall in writing nor is Smartcall bound by any such unauthorised statements; and
 - (d) once accepted by the Customer, Smartcall's quotation shall be deemed to interpret correctly the Customer's instructions, whether written or verbal. Where verbal instructions only are received from the Customer, Smartcall shall not be responsible for errors or omissions due to oversight or misinterpretation of those instructions.
- 3.5 Where Smartcall gives any advice, recommendation, information, assistance or service provided by Smartcall in relation to Services supplied is given in good faith to the Customer, or the Customer's agent and is based on Smartcall's own knowledge and experience and shall be accepted without liability on the part of Smartcall. Where such advice or recommendations are not acted upon then Smartcall shall require the Customer or their agent to authorise commencement of the Services in writing. Smartcall shall not be liable in any way whatsoever for any damages or losses that occur after any subsequent commencement of the Services.
- 3.6 Electronic signatures shall be deemed to be accepted by either party providing that the parties have complied with Section 226 of the Agreement and Commercial Law Act 2017 or any other applicable provisions of that Act or any Regulations referred to in that Act.

4. Cooling off Period

- 4.1 The Customer shall be able to terminate this Agreement (subject to clauses 24.4 or 24.5) within 7 clear Business Days following receipt of the confirmation for the acceptance of Services from Smartcall and/or a signed copy of this Agreement, whichever occurs first.
- 4.2 To terminate this Agreement the Customer must notify Smartcall in writing, which clearly states that the Customer rescinds the Agreement, within the timeframe specified in clause 4.1 above, and:
- (a) gives it to Smartcall, personally; or
 - (b) leaves it at Smartcall's address, as specified in this Agreement; or
 - (c) sends it by registered post to Smartcall's address, as specified in the Agreement.
- 4.3 Once the withdrawal notice is given to Smartcall, then:
- (a) the Agreement is taken to be rescinded from the time it was signed; and
 - (b) Smartcall may retain out of any money already paid to Smartcall by the Customer the amount of any reasonable out of pocket expenses that Smartcall has incurred before the Agreement was rescinded; and
- 4.4 Smartcall shall be entitled to be paid a reasonable amount for any Services undertaken prior to the date the Agreement was rescinded.

5. Credit Card Information

- 5.1 Smartcall will:
- (a) keep the Customer's personal details, including credit card details for only as long as is deemed necessary by Smartcall;
 - (b) not disclose the Customer's credit card details to any third party;
 - (c) not unnecessarily disclose any of the Customer's personal information, except in accordance with the Privacy Act (clause 25) or where required by law.
- 5.2 The Customer expressly agrees that, if pursuant to this Agreement, there are:
- (a) any unpaid fees;
 - (b) other amounts due and outstanding by the Customer;
- Smartcall is entitled to immediately charge the Customer's nominated credit card for these amounts, and is irrevocably authorised to complete any documentation and take any action to recover from the credit card issuer any and all amounts which may be due by the Customer pursuant to the terms of this Agreement.

6. Errors and Omissions

- 6.1 The Customer acknowledges and accepts that Smartcall shall, without prejudice, accept no liability in respect of any alleged or actual error(s) and/or omission(s):
- (a) resulting from an inadvertent mistake made by Smartcall in the formation and/or administration of this Agreement; and/or
 - (b) contained in/omitted from any literature (hard copy and/or electronic) supplied by Smartcall in respect of the Services.
- 6.2 In the event such an error and/or omission occurs in accordance with clause 6.1, and is not attributable to the negligence and/or wilful misconduct of Smartcall; the Customer shall not be entitled to treat this Agreement as repudiated nor render it invalid.

7. Change in Control

- 7.1 The Customer shall give Smartcall not less than 10 Business Days prior written notice of any proposed change of ownership of the Customer and/or any other change in the Customer's details (including but not limited to, changes in the Customer's name, address and contact phone or fax number/s, change of trustees or business practice). The Customer shall be liable for any loss incurred by Smartcall as a result of the Customer's failure to comply with this clause.

8. Charges and Payment

- 8.1 At Smartcall's sole discretion the Charges shall be either:
- (a) as indicated on any invoice provided by Smartcall to the Customer; or
 - (b) the Charges as at the date of Delivery of the Goods for the labour costs associated with the installation according to Smartcall's current schedule of Charges; or
 - (c) Smartcall's quoted price (subject to clause 8.2) which will be valid for the period stated in the quotation or otherwise for a period of 14 Business Days;
 - (d) as per Smartcall's set non-refundable monthly Charges for the Services ("**Service Agreement**"), which will be as stipulated (including when due and payable) by Smartcall in the Service Agreement.

8.2 *Additional and/or Varied Services:*

- (a) Smartcall agrees that there may be charges in the preparation of the initial quotation, which may include Customer discussions, project scoping, research, testing and business analysis, onsite changes to wiring or site location etc. However, in some instances the aforementioned services may be charged to the Customer additionally (at Smartcall's sole discretion) which will be charged for on the basis of Smartcall's standard hourly rates (and double such rate for any Services provided outside Smartcall's normal business hours); and
- (b) Smartcall reserves the right to amend the Charges as a result of increases beyond our reasonable control in the cost of materials or labour (e.g. third-party suppliers' costs, transport, freight, insurance, duty, taxes and levies etc.), or due to currency exchange rate fluctuations.

MOVE ADDRESS		
Connection Type	Contract Term	Charge
Connection Only	New fixed term contract	\$49.00 and new address Installation Fee
	Keep existing contract term	\$99.00 and new address Installation Fee
Connection and Wiring	ALL	Directly pass by
CHANGE SERVICES		
Connection Type	Contract Term	Charge
Connection Only	New fixed term contract	\$49.00 and new address Installation Fee
	Keep existing contract term	\$99.00 and new address Installation Fee
Connection and Wiring	ALL	Directly pass by

- 8.3 Variations will be charged for on the basis of Smartcall's quotation, and will be detailed in writing, and shown as variations on Smartcall's invoice. The Customer shall be required to respond to any variation submitted by Smartcall within 10 Business Days. Failure to do so will entitle Smartcall to add the cost of the variation to the Charges. Payment for all variations must be made in full at the time of their completion.

- 8.4 At Smartcall's sole discretion a non refundable deposit may be required.

- 8.5 Time for payment for the Goods being of the essence, the Charges will be payable by the Customer on the date/s determined by Smartcall, which may be:

- (a) on Delivery of the Goods;
- (b) by way of instalments/progress payments in accordance with Smartcall's payment schedule;
- (c) for certain approved Customers, due 20th of current month (billing period being a calendar month 1st to 31st respectively) in which a statement is emailed to the Customer's address or address for notices (i.e. if invoiced after 19th then due date shall be the 20th of the following month);
- (d) the date specified on any invoice or other form as being the date for payment; or
- (e) failing any notice to the contrary, the date which is 7 days following the date of any invoice given to the Customer by Smartcall.

- 8.6 Payment may be made by electronic/on-line banking, credit card (a surcharge may apply per transaction), direct debit or by any other method as agreed to between the Customer and Smartcall. No cheques will be accepted.

- 8.7 Where payment is to be made by a Direct Debit Request ("DDR") arrangement only, as agreed between the Customer and Smartcall and shall be subject to:

- (a) if a deduction falls due on a non-business day, it will be debited to the Customer's account on the next business day following the scheduled withdrawal date;
- (b) Smartcall will give the Customer not less than 20 Business Days written notice when changes to the initial terms of the arrangement are made. This notice will state any other changes to the initial arrangement;
- (c) If the Customer wishes to discuss any changes to the initial arrangement, then contact Smartcall's representative directly. The changes may include:
 - (i) deferring the monthly deduction;
 - (ii) stopping an individual debit; or
 - (iii) suspending the DDR; or
 - (iv) cancelling the DDR.

- 8.8 Smartcall may in its discretion allocate any payment received from the Customer towards any invoice that Smartcall determines and may do so at the time of receipt or at any time afterwards. On any default by the Customer Smartcall may re-allocate any payments previously received and allocated. In the absence of any payment allocation by Smartcall, payment will be deemed to be allocated in such manner as preserves the maximum value of Smartcall's Purchase Money Security Interest (as defined in the PPSA) in the Goods and/or Services (where applicable).

- 8.9 The Customer shall not be entitled to set off against, or deduct from the Charges, any sums owed or claimed to be owed to the Customer by Smartcall nor to withhold payment of any invoice because part of that invoice is in dispute. Once in receipt of an invoice for payment, if any part of the invoice is in dispute then the Customer must notify Smartcall in writing within 10 Business Days prior to the due date, the invoice shall remain due and payable for the full amount, until such time as Smartcall investigates the dispute claim, no credit shall be passed for refund until the review is completed. Failure to make payment may result in Smartcall placing the Customer's account into default and subject to default interest in accordance with clause 22.

Smartcall Limited T/A Smartcall – Terms & Conditions of Trade

8.10 Unless otherwise stated the Charges does not include GST. In addition to the Charges, the Customer must pay to Smartcall an amount equal to any GST Smartcall must pay for any supply by Smartcall under this or any other contract for the sale of the Goods. The Customer must pay GST, without deduction or set off of any other amounts, at the same time and on the same basis as the Customer pays the Charges. In addition, the Customer must pay any other taxes and duties that may be applicable in addition to the Charges except where they are expressly included in the Charges.

9. Delivery of Goods

9.1 Delivery (“**Delivery**”) of the Goods is taken to occur at the time that Smartcall (or Smartcall’s nominated carrier) delivers the Goods to the Customer’s nominated address even if the Customer is not present at the address.

9.2 At Smartcall’s sole discretion the cost of Delivery is included in the Charges.

9.3 Smartcall may deliver the Goods in separate instalments. Each separate instalment shall be invoiced and paid in accordance with the provisions in these terms and conditions.

9.4 The Customer shall ensure that Smartcall has clear and free access to the site at all times to deliver the Goods.

9.5 The Customer acknowledges and accepts that:

(a) Smartcall’s driver may assist with unloading only; and

(b) where access and labour are not available then Smartcall at their discretion may charge a handling fee which be shown as a variation on the invoice; and

(c) Smartcall shall not be liable for any loss or damage to the site (including, without limitation, damage to pathways, driveways and concreted or paved or grassed areas) unless due to the negligence of Smartcall.

9.6 In the event that the Goods are to be installed by Smartcall the Customer agrees to make the premises, and access thereto, available immediately upon request by Smartcall. It is the Customer’s responsibility to provide electricity and have a clear and safe area for the purposes of installation.

9.7 Any time specified by Smartcall for Delivery of the Goods is an estimate only and Smartcall will not be liable for any loss or damage incurred by the Customer as a result of Delivery being late. However both parties agree that they shall make every endeavour to enable the Goods to be delivered at the time and place as was arranged between both parties. In the event that Smartcall is unable to supply the Goods as agreed solely due to any action or inaction of the Customer, then Smartcall shall be entitled to charge a reasonable fee for redelivery and/or storage.

10. Risk and Limitation of Liability for Customer Data

10.1 Risk of damage to or loss of the Goods passes to the Customer on Delivery and the Customer must insure the Goods on or before Delivery.

10.2 If any of the Goods are damaged or destroyed following Delivery but prior to ownership passing to the Customer, Smartcall is entitled to receive all insurance proceeds payable for the Goods. The production of these terms and conditions by Smartcall is sufficient evidence of Smartcall’s rights to receive the insurance proceeds without the need for any person dealing with Smartcall to make further enquiries.

10.3 If the Customer requests Smartcall to leave Goods outside Smartcall’s premises for collection or to deliver the Goods to an unattended location then such Goods shall be left at the Customer’s sole risk.

10.4 The Customer acknowledges that all descriptive specifications, illustrations, drawings, data, dimensions, ratings and weights stated in Smartcall’s or manufacturer’s fact sheets, price lists or advertising material, are approximate only and are given by way of identification only. The Customer shall not be entitled to rely on such information, and any use of such does not constitute a sale by description, and does not form part of the Agreement, unless expressly stated as such in writing by Smartcall.

10.5 The Customer acknowledges and agrees that Smartcall shall not be held responsible or liable for:

(a) any loss, corruption, or deletion of files or data (including, but not limited to, software programmes) resulting from illegal hacking of Services provided by Smartcall. Smartcall will endeavour to restore the files or data (at the Customer’s cost), and it is the sole responsibility of the Customer to back-up any data which they believe to be important, valuable, or irreplaceable prior to Smartcall providing the Services. The Customer accepts full responsibility for the Customer’s software and data, and Smartcall is not required to advise or remind the Customer of appropriate backup procedures (unless included as part of the Services);

(b) any loss or damage to the Customer’s software or hardware caused by any ‘updates’ provided for that software.

10.6 The Customer acknowledges that any advice or recommendations by Smartcall are provided on the basis of Smartcall’s industry knowledge and experience only and shall not be deemed as specialist advice.

10.7 Smartcall, its directors, agents or employees will not be liable in any way for any form of loss or damage of any nature whatsoever suffered, whether arising directly or indirectly, by the Customer or any person related to or dealing with the Customer out of, in connection with or reasonably incidental to the provision of the Services by Smartcall to the Customer.

10.8 The Services (and any associated software) are provided on an “as is, as available” basis. Smartcall specifically disclaims any other warranty, express or implied, including any warranty of merchantability or fitness for a particular purpose.

11. Connection and Installation Set Up Services

11.1 The Customer accepts that Broadband is not available in all areas. Occasionally factors like the distance of Smartcall’s equipment from a particular site or address mean Smartcall may not be able to deliver Broadband, even where Smartcall Broadband is available in the Customer’s area.

11.2 All new Customers require a standard Broadband connection and in some cases the Customer will be required to get Broadband wiring to use Smartcall’s Service. The Customer will be advised of any connection Charges that apply before the Customer agrees to use the Service.

11.3 Where the Customer is to use five (5) or more telephone jackpoints at the Customer’s home, or the Customer has a monitored alarm or an alarm capable of being monitored, the Customer will need to select the “connection and wiring option”. This includes the standard Broadband connection and wiring. A technician approved by Smartcall will visit the Customer’s home to get the Broadband working on the home telephone line. The Customer will be advised of any Charges associated with this connection option before the Customer agrees to use the Smartcall option.

Smartcall Limited T/A Smartcall – Terms & Conditions of Trade

- 11.4 Standard fiber installation will include the work needed to connect the Customer's property to the fiber in the Customer's street. The Customer will be advised of any applicable Charges prior to the Customer agreeing to the commencement of any installation work. This includes installing and connecting:
- (a) the fiber cable from the street (up to two hundred (200m) metres) through the Customer's property;
 - (b) the External Termination Point (ETP);
 - (c) the Optical Network (ONT); and
 - (d) the Fiber Enabled Modem (RGW).
- 11.5 A non-standard installation will require additional Charges. The Customer will be advised on the Charges that apply to the customer's specific installation prior to the commencement of any installation work. Non-standard installations include:
- (a) if the Customer's property is more than two hundred (200m) metres from the fiber access point on the street;
 - (b) if the Customer's RGW is installed at a separate location to the ONT and additional wiring is required.
- 11.6 **Special Mention:**
- (a) if, despite Smartcall's reasonable efforts, the Customer's Smartcall installation fails (e.g. the technician is unable to get the service running), the Smartcall jackpoint and any other equipment will remain at the customer's premises and the Customer will not be charged for the installation;
 - (b) if the Customer decides to cancel the Customer's Smartcall Broadband order, through no fault of Smartcall or the installer, after the Customer has accepted the Customer's order and have been provided an installation date, Smartcall may charge the Customer a cancellation fee. This will not apply in the case of a non-standard installation where the Customer does not agree to any additional work or costs.
 - (c) this Service does not come with a phone line. This means that Services that uses a landline phone line, such as some medial alerts, monitored home alarms, faxes, the interactive features of PABX's is incompatible with this.
- 11.7 Notwithstanding clause 11.1 Broadband speed does vary. Factors which impact on speed include how close the Customer's property is to an exchange, the Customer's computer's capability, connection and wiring, Wi-Fi, interference from electrical devices, the location and quality of the websites, the Customer chooses to view, and any software the Customer may have downloaded (malicious or otherwise). The day to day performance will also be affected by the number of users in the Customer's household and also on Smartcall's network of third parties that Smartcall use to provide the Service to the Customer.
- 11.8 Smartcall will supply a free lease modem (DSL Broadband requires a DSL modem and filters that have a Telepermit) as part of the Services with a complete Broadband Self-Install Kit for the Customer. Upon early termination and/or expiry of the Services, this free lease modem must be returned to Smartcall as per clause 24.6, otherwise, a recovery fee will apply.

12. Hosting and Support Services

- 12.1 Hosting and Support Services shall only be used by the Customer for lawful purposes. Any use which violates any applicable national or international laws is strictly prohibited (e.g. posting or transmitting any unlawful, threatening, abusive, libellous, defamatory, obscene, offensive, indecent, pornographic, profane, or otherwise objectionable information of any kind – including, but not limited to, any transmission constituting or encouraging conduct that would constitute a criminal offense or give rise to civil liability).
- 12.2 Hosting and Support Services exclude domain registrations and SSL Certificates, and where the Customer is changing from another hosting provider the install and set-up, which shall be charged to the Customer additionally.
- 12.3 Smartcall will make best efforts to ensure that the Customer receives continual and uninterrupted Services (including network or hosting servers) during the term of this Agreement, however Smartcall does not in any way warrant or otherwise guarantee the availability of the Services, which shall be subject to regularly scheduled maintenance cycles, and many events/circumstances beyond the control of Smartcall. In no event though, shall Smartcall be liable to the Customer for damages (including loss of income) resulting from or in relation to any failure or delay (including server downtime, programming errors, lack of connection or slow connection) of Smartcall to provide Services under this Agreement, or any loss of data, if such delays or failures are due to circumstances beyond our control. Such a failure or delay shall not constitute a default under this Agreement.
- 12.4 Smartcall may, at their sole discretion, limit or deny access to the Services is, in the judgement of Smartcall, such limitations or denials of access are required to assure the security of the network, the integrity of the network structure, or to prevent damage to the network.
- 12.5 **Customer's Obligations:**
- (a) **the Customer will**, at its sole cost and expense:
 - (i) maintain adequate security precautions in connection with the Customer's use of the Services (including but not limited to failure to use/maintain anti virus software, accessibility to the data via insecure internet connections, insecure passwords or unsecure access to passwords, leaving active connection to the hosted solution unattended or any other event which on the basis of a reasonable test would in the opinion of Smartcall be inadequate etc);
 - (ii) ensure that Smartcall at all times is granted all necessary licences, permissions and access reasonably required by Smartcall to perform the Hosting and Support and Additional Support including without limitation:
 - (A) physical access to any relevant premises and hardware;
 - (B) logon and password access to any relevant computer systems; and
 - (C) remote online access to any relevant computer systems where available.
 - (iii) is responsible for any fees payable and due to previous hosting organisations engaged by the Customer;
 - (b) failure by the Customer to comply with clause 12.5(a) will entitle Smartcall, at its option, to suspend the Hosting and Support and Additional Support without liability until such time as clause 12.5(a) is complied with.
 - (c) **the Customer will not:**
 - (i) logon to an account that the Customer is not authorised to access;
 - (ii) access data or take any action to obtain services not intended for the Customer;
 - (iii) attempt to probe, scan or test the vulnerability of any system, subsystem or network;
 - (iv) tamper, hack, modify or otherwise corrupt or breach security or authenticity measures without proper authorisation;
 - (v) send spam or other duplicative or unsolicited messages in violation of applicable laws including without limitation the Unsolicited Electronic Messages Act 2017;

Smartcall Limited T/A Smartcall – Terms & Conditions of Trade

- (vi) do anything that prevents or hinders Smartcall from providing Hosting and Support Services to any other person.
- (d) the Customer acknowledges that spamming (i.e. the sending of unsolicited email), email address cultivation, or any unauthorised collecting of email addresses without prior notification of the email address owner is strictly prohibited.
- (e) Smartcall at its sole discretion acting reasonably shall be entitled to determine when there has been a breach of clause 12.5(c) and without limiting any other provision of these terms and conditions, Smartcall shall be entitled without liability to take such actions as it deems appropriate in the circumstances.

12.6 Network Traffic:

- (a) Network traffic shall be measured by Smartcall; and
- (b) may include all forms of traffic to and from hosted servers.

12.7 Limitation of Liability for Hosting and Support Services:

- (a) in consideration of clause 30.3, in the event the Hosting and Support Services provided to the Customer are disrupted or malfunction for any reason, Smartcall's liability shall be limited to damages which under no circumstances shall exceed the amount due and payable by the Customer to Smartcall for the Hosting and Support Services during the period of disruption or malfunction.
- (b) the Customer acknowledges that for Smartcall to carry out such Maintenance Services the Hosted Services will not be available during this time. To the best of its ability Smartcall will endeavour to:
 - (i) keep any such down time to the absolute minimum necessary to carry out such maintenance;
 - (ii) wherever reasonably possible to do so, schedule such down time for 3 Business Days prior written notice of any such down time.
- (c) without in any way limiting the effect of clause 10 or any other provision of these terms and conditions, Smartcall will make reasonable efforts to ensure that as part of the Hosting and Support Services nightly backups ("**Backups**") occur which are stored for sixty (60) days and Smartcall, however where the Customer chooses not to accept the option of Backups executed by Smartcall then it shall be the Customer's responsibility to activate regular Backups themselves. Smartcall will not be liable for any loss or damages where the Customer fails to execute the said Backups.
- (d) work required by Smartcall to recover information from any Backup will incur Smartcall's then standard service fee for such work provided that no charge will be made where such recovery is required solely due to the direct fault of Smartcall.

12.8 Maintenance:

- (a) subject to sub-clause 12.8(b), Smartcall will provide the Maintenance Services in accordance with the maintenance terms set out in Smartcall's maintenance schedule.
- (b) the Customer will procure all necessary authorisations, licences and consents to enable Smartcall to have access to the hosted servers in order to provide the Maintenance Services.

13. Support Services

13.1 Customer Requests

- (a) if the Customer requires Support then the Customer must request such Support from Smartcall ("Support Request"), provided that for:
 - (i) non-urgent Support the Customer must contact Smartcall by email on support@smartcall.nz ("Support Email") and provide detailed information outlining the issue in respect of which they require Support and the name and contact details of the person to whom Smartcall should respond or contact for further clarification of the Support Request; and
 - (ii) urgent Support the Customer must contact Smartcall and leave a detailed message outlining the issue in respect of which they require Support and the name and contact details of the person to whom Smartcall should respond or contact for further clarification of the Support Request.
- (b) Smartcall will make efforts to respond to a Support Request received during the support hours of 0900-1800 Monday to Friday ("Support Hours") within two (2) hours unless the Customer is notified otherwise at the time of lodging the Support Request. Smartcall will then make efforts to provide a resolution to the issue in question within a timeframe reflective of the severity of the issue. Any day that is a Saturday, Sunday or public holiday in New Zealand is regarded as being outside of Support Hours, unless otherwise stated.

13.2 After Hours Support

- (a) Subject to any confirmed After Hours Support in accordance with Smartcall's Service Agreement, Smartcall will provide the Customer with after hours support for any incident classified as urgent under the Support requirements;
- (b) Customers that do not have a SLA in place Smartcall will ensure to supply appropriate support when necessary i.e datacentre wide failure;
- (c) After hours Support will only be supplied for issues defined as critical Response Times for the full remote Support or full Support;
- (d) The provision of Support outside of Support Hours in response to a Support Request will be entirely at Smartcall's discretion, acting reasonably, on the basis of:
 - (i) the information provided to Smartcall as part of the Support Request;
 - (ii) Smartcall's current available resources which would enable it to provide the Support as requested and;

	Details	Resolution or Action Time
Critical	Meaning where Smartcall internal system determines system is down	4 hours
Normal	Means Hardware issues	24 hours
Non-Urgent	Means no detectable fault but requires onsite visit to determine what's wrong	48 hours

- (e) whether Smartcall believes such requested Support could be supplied during the next period of Support Hours with a minimum of disruption and inconvenience to the Customer.

13.3 The hours worked after hours will be charged at Smartcall's standard after hours rate specified on the Service Agreement.

14. Fair Use Policy

14.1 For Services that are subject to Smartcall's Fair Use Policy. Smartcall may apply Smartcall's Fair Use Policy where in Smartcall's reasonable opinion the Customer's usage of Smartcall Services is excessive and/or unreasonable as detailed in this paragraph. Smartcall developed their Fair Use Policy by reference to average Customer profiles and estimated Customer usage of Smartcall's Services.

Smartcall Limited T/A Smartcall – Terms & Conditions of Trade

- 14.2 If the Customer's usage of Smartcall's Services materially exceeds estimated use patterns over any month, or is inconsistent with normal patterns, then the Customer usage will be excessive and/or unreasonable.
- 14.3 Fair Use excludes activities such as auto dialing; continuously call forwarding, tele marketing, call centers, and use of Cellular Trucking Units (CTU's). If the Customer's usage is excessive and/or unreasonable Smartcall may contact the Customer to advise the Customer that the Customer's usage is in breach of Smartcall's Fair Use Policy. Smartcall may then request that the Customer stop or alter the Customer's usage to come within Smartcall's Fair Use Policy.
- 14.4 If the Customer's excessive or unreasonable usage continues after receipt of a request to stop or alter the nature of such usage, the Customer may without further notice, apply Charges to the Customer's account for the excessive and/or unreasonable element of the Customer's usage, suspend, modify or restrict the Customer's use of the Services or withdraw the Customer's access to the Services.

15. Title

- 15.1 Smartcall and the Customer agree that ownership of the Goods shall not pass until:
- (a) the Customer has paid Smartcall all amounts owing to Smartcall; and
 - (b) the Customer has met all of its other obligations to Smartcall.
- 15.2 Receipt by Smartcall of any form of payment other than cash shall not be deemed to be payment until that form of payment has been honoured, cleared or recognised.
- 15.3 It is further agreed that until ownership of the Goods passes to the Customer in accordance with clause 15.1:
- (a) the Customer is only a bailee of the Goods and must return the Goods to Smartcall on request;
 - (b) the Customer holds the benefit of the Customer's insurance of the Goods on trust for Smartcall and must pay to Smartcall the proceeds of any insurance in the event of the Goods being lost, damaged or destroyed;
 - (c) the Customer must not sell, dispose, or otherwise part with possession of the Goods other than in the ordinary course of business and for market value. If the Customer sells, disposes or parts with possession of the Goods then the Customer must hold the proceeds of any such act on trust for Smartcall and must pay or deliver the proceeds to Smartcall on demand;
 - (d) the Customer should not convert or process the Goods or intermix them with other goods but if the Customer does so then the Customer holds the resulting product on trust for the benefit of Smartcall and must sell, dispose of or return the resulting product to Smartcall as it so directs;
 - (e) the Customer irrevocably authorises Smartcall to enter any premises where Smartcall believes the Goods are kept and recover possession of the Goods;
 - (f) Smartcall may recover possession of any Goods in transit whether or not Delivery has occurred;
 - (g) the Customer shall not charge or grant an encumbrance over the Goods nor grant nor otherwise give away any interest in the Goods while they remain the property of Smartcall;
 - (h) Smartcall may commence proceedings to recover the Charges of the Goods sold notwithstanding that ownership of the Goods has not passed to the Customer.

16. Personal Property Securities Act 1999 ("PPSA")

- 16.1 Upon assenting to these terms and conditions in writing the Customer acknowledges and agrees that:
- (a) these terms and conditions constitute a security agreement for the purposes of the PPSA; and
 - (b) a security interest is taken in all Goods and/or collateral (account) – being a monetary obligation of the Customer to Smartcall for Services – that have previously been supplied and that will be supplied in the future by Smartcall to the Customer.
- 16.2 The Customer undertakes to:
- (a) sign any further documents and/or provide any further information (such information to be complete, accurate and up-to-date in all respects) which Smartcall may reasonably require to register a financing statement or financing change statement on the Personal Property Securities Register;
 - (b) indemnify, and upon demand reimburse, Smartcall for all expenses incurred in registering a financing statement or financing change statement on the Personal Property Securities Register or releasing any Goods charged thereby;
 - (c) not register, or permit to be registered, a financing statement or a financing change statement in relation to the Goods and/or collateral (account) in favour of a third party without the prior written consent of Smartcall; and
 - (d) immediately advise Smartcall of any material change in its business practices of selling the Goods which would result in a change in the nature of proceeds derived from such sales.
- 16.3 Smartcall and the Customer agree that nothing in sections 114(1)(a), 133 and 134 of the PPSA shall apply to these terms and conditions.
- 16.4 The Customer waives its rights as a debtor under sections 116, 120(2), 121, 125, 126, 127, 129 and 131 of the PPSA.
- 16.5 Unless otherwise agreed to in writing by Smartcall, the Customer waives its right to receive a verification statement in accordance with section 148 of the PPSA.
- 16.6 The Customer shall unconditionally ratify any actions taken by Smartcall under clauses 16.1 to 16.5.
- 16.7 Subject to any express provisions to the contrary (including those contained in this clause 16), nothing in these terms and conditions is intended to have the effect of contracting out of any of the provisions of the PPSA.

17. Security and Charge

- 17.1 In consideration of Smartcall agreeing to supply the Goods, the Customer charges all of its rights, title and interest (whether joint or several) in any land, realty or other assets capable of being charged, owned by the Customer either now or in the future, to secure the performance by the Customer of its obligations under these terms and conditions (including, but not limited to, the payment of any money).
- 17.2 The Customer indemnifies Smartcall from and against all Smartcall's costs and disbursements including legal costs on a solicitor and own client basis incurred in exercising Smartcall's rights under this clause.
- 17.3 The Customer irrevocably appoints Smartcall and each director of Smartcall as the Customer's true and lawful attorney/s to perform all necessary acts to give effect to the provisions of this clause 17 including, but not limited to, signing any document on the Customer's behalf.

18. Defects

- 18.1 The Customer shall inspect the Goods on Delivery and shall within 5 Business Days of Delivery (time being of the essence) notify Smartcall of any alleged defect, shortage in quantity, damage or failure to comply with the description or quote. The Customer shall afford Smartcall an opportunity to inspect the Goods within a reasonable time following Delivery if the Customer believes the Goods are defective in any way. If the Customer shall fail to comply with these provisions the Goods shall be presumed to be free from any defect or damage. For defective Goods, which Smartcall has agreed in writing that the Customer is entitled to reject, Smartcall's liability is limited to either (at Smartcall's discretion) replacing the Goods or repairing the Goods.
- 18.2 Goods will not be accepted for return other than in accordance with 18.1 above, and provided that:
- (a) Smartcall has agreed in writing to accept the return of the Goods; and
 - (b) the Goods are returned at the Customer's cost within 30 Business Days of the Delivery date; and
 - (c) Smartcall will not be liable for Goods which have not been stored or used in a proper manner; and
 - (d) the Goods are returned in the condition in which they were delivered and with all packaging material, brochures and instruction material in as new condition as is reasonably possible in the circumstances.

19. Warranty

- 19.1 To the extent permitted by statute, no warranty is given by Smartcall as to the quality or suitability of the Goods for any purpose and any implied warranty, is expressly excluded. Smartcall shall not be responsible for any loss or damage to the Goods, or caused by the Goods, or any part thereof however arising.
- 19.2 For Goods not manufactured by Smartcall, the warranty shall be the current warranty provided by the manufacturer of the Goods. Smartcall shall not be bound by nor be responsible for any term, condition, representation or warranty other than that which is given by the manufacturer of the Goods.
- 19.3 Notwithstanding clause 19.2, Smartcall shall not be liable under any circumstances for any defects as a result of:
- (a) use or operation of the Goods other than in accordance with the guidelines provided by Smartcall;
 - (b) modifications of to the Goods or any of its components other than as authorised by Smartcall;
 - (c) conflict arising from the installation of other systems or components by the Customer;
 - (d) use of the Goods other than by trained operators; or
 - (e) the Customer's failure or refusal to install modifications or enhancements recommended by Smartcall.

20. Consumer Guarantees Act 1993

- 20.1 If the Customer is acquiring Goods for the purposes of a trade or business, the Customer acknowledges that the provisions of the Consumer Guarantees Act 1993 do not apply to the supply of Goods by Smartcall to the Customer.

21. Intellectual Property

- 21.1 Where Smartcall has designed, drawn or developed Services for the Customer, Smartcall retains full "Intellectual Property" ownership of the Services, including the copyright in any designs and drawings and documents, and Smartcall hereby grants to the Customer an irrevocable, non-exclusive and non-transferable licence to use the Services solely in relation to the operation of the Customer's own business, conditional upon the Customer fulfilling their obligations under this Agreement (including, but not limited to, the full payment of the Charges).
- 21.2 Notwithstanding anything herein, the Intellectual Property rights in Smartcall's Services do not vest in the Customer and there is no assignment of these Intellectual Property rights to the Customer. Smartcall hereby grants to the Customer an irrevocable, non-exclusive and non-transferable licence to use and reproduce the Services for the purposes of this Agreement only, and solely for the operation of the Customer's business however, the Customer shall not use nor make copies of such Intellectual Property in connection with any work or business other than the work or business specified in writing to Smartcall unless express approval is given in advance by Smartcall. Such license shall terminate on default of payment or any other terms of this Agreement by the Customer.
- 21.3 The Customer agrees that Smartcall may (at no cost) use for the purposes of marketing or entry into any competition, any documents, photographs, designs, drawings or Goods which Smartcall has created for the Customer or produced whilst undertaking the Services.

22. Default and Consequences of Default

- 22.1 An event of default ("Default Event") occurs if:
- (a) any money payable under this Agreement is not paid before or on the due date for payment;
 - (b) the Customer has exceeded any applicable credit limit provided by Smartcall;
 - (c) the Customer fails to observe and perform any of the Customer's covenants, other than the failure to pay money, and such failure continues for more than 5 Business Days after Smartcall had given the Customer notice requiring the Customer to remedy the breach;
 - (d) the Customer, being an individual, commits an act of bankruptcy, is declared mentally ill or is convicted of a criminal offence or dies;
 - (e) a receiver, or an agent in possession for a mortgagee, is appointed in respect of any property of the Customer;
 - (f) a mortgagee takes possession of any property of the Customer;
 - (g) any execution or similar process is made against the property of the Customer;
 - (h) an application is made, a resolution is passed or a meeting is convened for the purpose of considering a resolution for the Customer to be wound up, unless the winding up is for the purpose of reconstruction or amalgamation;
 - (i) a compromise or arrangement is made between the Customer and its creditors;
 - (j) a resolution is passed, or a meeting is convened for the purpose of considering a resolution for the Customer to be placed under official management;
 - (k) the Customer admits in writing its inability to pay its debts;
- 22.2 On the occurrence of an Default Event:
- (a) Smartcall may:
 - (i) take possession of the Goods with, or without notice to the Customer, in accordance with clause 15.3(c);

Smartcall Limited T/A Smartcall – Terms & Conditions of Trade

- (ii) charge interest on overdue invoices, which shall accrue daily from the date when payment becomes due, until the date of payment, at a rate of two and one half percent (2.5%) per calendar month (and at Smartcall's sole discretion such interest shall compound monthly at such a rate) after as well as before any judgment;
- (b) if the Customer owes Smartcall any money, the Customer shall indemnify Smartcall from and against all costs and disbursements incurred by Smartcall in recovering the debt (including but not limited to internal administration fees, legal costs on a solicitor and own client basis, Smartcall's collection agency costs, and bank dishonour fees);
- (c) further to any other rights or remedies Smartcall may have under this Agreement, if the Customer has made payment to Smartcall and the transaction is subsequently reversed, the Customer shall be liable for the amount of the reversed transaction, in addition to any further costs incurred by Smartcall under this clause 22.2(c) where it can be proven that such reversal is found to be illegal, fraudulent or in contravention to the Customer's obligations under this Agreement.

23. Confidentiality

- 23.1 Subject to clause 23.2, each party agrees to treat as confidential the other party's Confidential Information, and agree not to divulge it to any third party, without the other party's written consent.
- 23.2 Both parties agree to:
 - (a) use the Confidential Information of the other party only to the extent required for the purpose it was provided; and
 - (b) not copy or reproduce any of the Confidential Information of the other party in any way; and
 - (c) only disclose the other party's Confidential Information to:
 - (i) employees and third-party providers who need access to the information and who have agreed to keep it confidential; and
 - (ii) its legal advisers and insurance providers if those persons undertake to keep such information confidential; and
 - (iii) not disclose the other party's Confidential Information to any person not referred to in this clause except with the other party's prior written consent or if required by law, any stock exchange or any regulatory body.
- 23.3 Either party must promptly return or destroy all Confidential Information of the other party in its possession or control at the other party's request unless required by law to retain it.
- 23.4 Confidential Information excludes information:
 - (a) generally available in the public domain (without unauthorised disclosure under this Agreement); and
 - (b) received from a third party entitled to disclose it; and
 - (c) that is independently developed.
- 23.5 The obligations of this clause 23 shall survive termination or cancellation of this Agreement.

24. Cancellation and Termination

- 24.1 Without prejudice to any other remedies Smartcall may have, if at any time the Customer is in breach of any obligation (including those relating to payment) under these terms and conditions Smartcall may suspend or terminate the supply of Goods to the Customer. Smartcall will not be liable to the Customer for any loss or damage the Customer suffers because Smartcall has exercised its rights under this clause.
- 24.2 Either party may, cancel these terms and conditions or cancel provision of the Services:
 - (a) if there is no Agreement term specified, at any time by giving 1 months notice to the other party; and
 - (b) if a contract term is specified, at any time after the end of the Agreement term by giving 1 months notice to the other party.
- 24.3 Smartcall may, in addition to their right to cancel under clause 24.1:
 - (a) do so at any time:
 - (i) prior to the commencement of the Services, by giving notice to the Customer, in the event Smartcall determine it is not technically, commercially or operationally feasible to provide the Services to the Customer; and
 - (ii) in the event the Customer materially breaches these terms and conditions, and such breach is not capable of remedy.
- 24.4 The Customer may cancel the Agreement for breach if Smartcall materially fails to:
 - (a) provide the Services as agreed and fail to remedy the breach within 10 Business Days of receiving notification of the failure from the Customer; or 20 Business Days of receiving notification of the failure from the Customer; and
 - (b) the Customer accepts that Smartcall shall be entitled to claim from the Customer, all monies due and payable up to the date of termination (including but not limited to, any substantiated costs reasonably incurred by Smartcall, such as third party disconnection charges etc.).
- 24.5 **Service Agreement:**
 - (a) where this Agreement relates to a Service Agreement, all payments shall fall due, as per the payment schedule; and
 - (b) to terminate the Service Agreement on, or after the current annual term, the Customer must give Smartcall not less than 60 Business Days notice prior to the current anniversary date of this Agreement; and
 - (c) Early Termination Charges (ETC) may apply where the customer terminates all or part of the Agreement prior to expiry of a fixed term period (if any). For ADSL, Broadband, Ultra-Fast Broadband and VDSL Broadband there is a fee refer Smartcall's schedule of Charges. The Customer acknowledges that such fees represent a genuine pre-estimate of the losses that will be caused to Smartcall, if all or part of, this Agreement is terminated before the expiration of its term. The Customer agrees that such fees are not penalties.
 - (d) the Services will then terminate at the end of the then current annual term. If the Customer does not terminate the Services on expiry of the current annual term, the Services shall revert to a month-by-month basis charge until otherwise agreed by both parties. Any additional Services shall become due and payable until notice (as herein) is received; or
 - (e) where in the event of the premature termination of Service Agreement by Smartcall, as a result of Default by the Customer, the Customer shall be responsible for the immediate payment of the following sums:
 - (i) all monies due and payable up to the date of termination; and
 - (ii) all other sums owing by the Customer under the Service Agreement due directly as a result of the default and termination of the Service Agreement, which shall be calculated on the basis of any substantiated costs reasonably incurred by Smartcall, or a minimum of twenty percent (20%) of the remainder of the Charges under the Service Agreement, whichever is the lesser, where a fixed term applies (to cover such costs imposed by Smartcall's third party suppliers that form part of, the Service Agreement, without any margin added by Smartcall thereto); or

Smartcall Limited T/A Smartcall – Terms & Conditions of Trade

- (f) where in the event of the premature termination of the Service Agreement by the Customer, as a result of Default by Smartcall, Smartcall shall be responsible for the immediate payment of all losses, costs or other liabilities incurred by the Customer directly as a result of the Default and termination of the Service Agreement, which shall be calculated on the basis of any substantiated costs reasonably incurred by the Customer directly as a result of the Default or termination of the Service Agreement, including without limitation all costs associated with sourcing and procuring the Services of the same or substantially similar nature and quality to the Services from a third party service provider, or a minimum of twenty percent (20%) of the remainder of the Charges payable by the Customer to Smartcall under the Service Agreement, whichever is the lesser, where a fixed term applies.
- 24.6 The free leased Customer Premises Equipment (“CPE”) must be returned to Smartcall, if the Customer chooses to terminate Smartcall’s Services. Otherwise, at the discretion of Smartcall, a CPE recovering fee will be charged, where Smartcall have not received the Customer’s CPE within 10 Business Days after termination of the Service.
- 24.7 Cancellation of orders for Goods made to the Customer’s specifications, or for non-stocklist items, will definitely not be accepted once production has commenced, or an order has been placed.

25. Privacy Policy

- 25.1 All emails, documents, images or other recorded information held or used by Smartcall is Personal Information as defined and referred to in clause 25.3 and therefore considered confidential. Smartcall acknowledges its obligation in relation to the handling, use, disclosure and processing of Personal Information pursuant to the Privacy Act 1993 (“the Act”) including Part II of the OECD Guidelines and as set out in Schedule 5A of the Act and any statutory requirements where relevant in a European Economic Area “EEA” then the EU Data Privacy Laws (including the General Data Protection Regulation “GDPR”) (collectively, “EU Data Privacy Laws”). Smartcall acknowledges that in the event it becomes aware of any data breaches and/or disclosure of the Customers Personal Information, held by Smartcall that may result in serious harm to the Customer, Smartcall will notify the Customer in accordance with the Act and/or the GDPR. Any release of such personal information must be in accordance with the Act and the GDPR (where relevant) and must be approved by the Customer by written consent, unless subject to an operation of law.
- 25.2 Notwithstanding clause 25.1, privacy limitations will extend to Smartcall in respect of Cookies (meaning small files which are stored on a user’s computer. They are designed to hold a modest amount of data (including personal information) specific to a particular client and Website, and can be accessed either by the web server or the client’s computer).where any browsing by the Customer is transpires directly from Smartcall’s Website. Smartcall agrees to display reference to such Cookies and/or similar tracking technologies, such as pixels and web beacons (if applicable), such technology allows the collection of Personal Information such as the Customer’s:
- (a) IP address, browser, email client type and other similar details;
 - (b) tracking Website usage and traffic; and
 - (c) reports are available to Smartcall when Smartcall sends an email to the Customer, so Smartcall may collect and review that information (“collectively Personal Information”)
- In order to enable / disable the collection of Personal Information by way of Cookies, the Customer shall have the right to enable / disable the Cookies first by selecting the option to enable / disable, provided on the Website prior to viewing the Services offered on Smartcall’s Website.
- 25.3 The Customer authorises Smartcall or Smartcall’s agent to:
- (a) access, collect, retain and use any information about the Customer;
 - (i) (including, name, address, D.O.B, occupation, driver’s license details, electronic contact (email, Facebook or Twitter details), medical insurance details or next of kin and other contact information (where applicable), previous credit applications, credit history or any overdue fines balance information held by the Ministry of Justice) for the purpose of assessing the Customer’s creditworthiness; or
 - (ii) for the purpose of marketing products and services to the Customer.
 - (b) disclose information about the Customer, whether collected by Smartcall from the Customer directly or obtained by Smartcall from any other source, to any other credit provider or any credit reporting agency for the purposes of providing or obtaining a credit reference, debt collection or notifying a default by the Customer.
- 25.4 Where the Customer is an individual the authorities under clause 25.3 are authorities or consents for the purposes of the Privacy Act 1993.
- 25.5 The Customer shall have the right to request Smartcall for a copy of the Personal Information about the Customer retained by Smartcall and the right to request Smartcall to correct any incorrect Personal Information about the Customer held by Smartcall.
- 25.6 Smartcall will destroy Personal Information upon the Customer’s request (by e-mail) or if it is no longer required unless it is required in order to fulfil the obligations of this Agreement or is required to be maintained and/or stored in accordance with the law.
- 25.7 The Customer can make a privacy complaint by contacting Smartcall via e-mail. Smartcall will respond to that complaint within 5 Business Days of receipt and will take all reasonable steps to make a decision as to the complaint within 20 Business Days of receipt of the complaint. In the event that the Customer is not satisfied with the resolution provided, the Client can make a complaint to the Information Commissioner at <http://www.privacy.org.nz/comply/comptop.html>.

26. Service of Notices

- 26.1 Any written notice given under this Agreement shall be deemed to have been given and received:
- (a) by handing the notice to the other party, in person;
 - (b) by leaving it at the address of the other party as stated in this Agreement;
 - (c) by sending it by registered post to the address of the other party as stated in this Agreement;
 - (d) if sent by facsimile transmission to the fax number of the other party as stated in this Agreement (if any), on receipt of confirmation of the transmission;
 - (e) if sent by email to the other party’s last known email address.
- 26.2 Any notice that is posted shall be deemed to have been served, unless the contrary is shown, at the time when by the ordinary course of post, the notice would have been delivered.

27. Trusts

- 27.1 If the Customer at any time upon or subsequent to entering in to the Agreement is acting in the capacity of trustee of any trust (“Trust”) then whether or not Smartcall may have notice of the Trust, the Customer covenants with Smartcall as follows:
- (a) the Agreement extends to all rights of indemnity which the Customer now or subsequently may have against the Trust and the trust fund;
 - (b) the Customer has full and complete power and authority under the Trust to enter into the Agreement and the provisions of the Trust do not purport to exclude or take away the right of indemnity of the Customer against the Trust or the trust fund. The Customer will not release the right of indemnity or commit any breach of trust or be a party to any other action which might prejudice that right of indemnity;
 - (c) the Customer will not without consent in writing of Smartcall (Smartcall will not unreasonably withhold consent), cause, permit, or suffer to happen any of the following events:
 - (i) the removal, replacement or retirement of the Customer as trustee of the Trust;
 - (ii) any alteration to or variation of the terms of the Trust;
 - (iii) any advancement or distribution of capital of the Trust; or
 - (iv) any resettlement of the trust property.

28. Dispute Resolution

- 28.1 Where a dispute arises between the two parties, it will be referred to Smartcall and Customer directors for resolution. Smartcall and the Customer agree to solve any disputes amicably and in good faith and on a without prejudice basis and not begin court proceedings or mediation or arbitration proceedings until the dispute resolution channel provided in this clause has been exhausted.
- 28.2 The dispute resolution process will be as follows:
- (a) a party may give notice to the other party about the nature of the dispute (a “Dispute Notice”) and the parties will seek to reach settlement amongst themselves within 10 Business Days of receipt of the Dispute Notice (“Negotiation Period”). Should the Parties fail to determine the dispute within the Negotiation Period, the Parties may seek within a further period of 10 Business Days (or such longer period as agreed in writing between the Parties) to reach agreement on:
 - (i) a mediation procedure out of courts and arbitration proceedings, (such as mediation, reconciliation or expert determination process);
 - (ii) the steps to be taken by each party and the timing of those steps;
 - (iii) who will be the independent person/body conducting the mediation process and who will pay for such independent person’s/ body’s professional fees and expenses.20 Business Days (or any other period agreed in writing) from the date of the Dispute Notice, either Smartcall or the Customer may commence court proceedings or arbitration proceedings to resolve the dispute.

29. Compliance of Laws

- 29.1 The Customer and Smartcall shall comply with the provisions of all statutes, regulations and bylaws of government, local and other public authorities that may be applicable to the services. Furthermore, Smartcall warrants that any Services and/or content produced are fully compliant with said statutes, regulations and bylaws and SNT requirements.
- 29.2 The Customer shall obtain (at the expense of the Customer) all licenses, permits and/or approvals pertaining to the Goods to be installed prior to the Delivery date.

30. General

- 30.1 The failure by either party to enforce any provision of these terms and conditions shall not be treated as a waiver of that provision, nor shall it affect that party’s right to subsequently enforce that provision. If any provision of these terms and conditions shall be invalid, void, illegal or unenforceable the validity, existence, legality and enforceability of the remaining provisions shall not be affected, prejudiced or impaired.
- 30.2 These terms and conditions and any contract to which they apply shall be governed by the laws of New Zealand and are subject to the jurisdiction of the Auckland Courts, New Zealand.
- 30.3 Smartcall shall be under no liability whatsoever to the Customer for any expenses, claims, costs (including but not limited to legal fees and commissions), damages suffered or incurred by Smartcall, or indirect and/or consequential loss and / or expense (including loss of profit) suffered by the Customer arising out of a breach by Smartcall of these terms and conditions, caused by any failure by the Customer to comply with their obligations under this Agreement, or that arise from any claim relating to the Services by any person that the Customer authorises to use the Services, or where due to server downtime or programming errors (alternatively Smartcall’s liability shall be limited to damages which under no circumstances shall exceed the Charges for Services provided during the preceding three (3) months period).
- 30.4 Smartcall may licence and/or assign all or any part of its rights and/or obligations under this Agreement without the Customer’s consent.
- 30.5 The Customer cannot licence or assign without the written approval of Smartcall.
- 30.6 Smartcall may elect to subcontract out any part of the Services but shall not be relieved from any liability or obligation under this Agreement by so doing. Furthermore, the Customer agrees and understands that they have no authority to give any instruction to any of Smartcall’s sub-contractors without the authority of Smartcall.
- 30.7 The Customer agrees that Smartcall may amend their general terms and conditions for subsequent future contracts with the Customer by disclosing such to the Customer in writing. These changes shall be deemed to take effect from the date on which the Customer accepts such changes, or otherwise at such time as the Customer makes a further request for Smartcall to provide Goods to the Customer.
- 30.8 Neither party shall be liable for any default due to any act of God, war, terrorism, strike, lock-out, industrial action, fire, flood, storm or other event beyond the reasonable control of either party.
- 30.9 Both parties warrant that they have the power to enter into this Agreement and have obtained all necessary authorisations to allow them to do so, they are not insolvent and that this Agreement creates binding and valid legal obligations on them.