

These terms of service constitute the agreement between Orca Communications Limited (we or us) and the end user (you, your or customer) of Orca Communications services. By activating or using any of the services, you represent that you are of legal age to enter this agreement and that you have read and understand the terms and conditions of this agreement.

1.1. Additional terms may apply to your use of some of our services, if there is any conflict between these terms and any additional terms, the additional terms will prevail.

2. Our Services

2.1. We, or a carrier or network operator nominated by us, will supply the services that you subscribe to on the basis of the terms set out in this agreement. In the course of supply we will:

- i) use reasonable endeavours to ensure that services are supplied reliably and consistently (but we do not guarantee that the services will operate uninterrupted without any faults);
- ii) if faults do occur, use reasonable endeavours to ensure that they are remedied as quickly as reasonably possible.

2.2. We are not responsible for any losses suffered by you as a result of:

- i) any interruption of services caused by an event outside of our reasonable control, including any restrictions on the service by a carrier; or
- ii) suspension of services for breach of any of the terms of this agreement;
- iii) your use of the services other than in accordance with this agreement.

2.3. You acknowledge that we may suspend or restrict your access to the services at any time when we consider it necessary to protect our own network or that of any third party or we believe that you have breached any of our terms and conditions.

2.4. Charges for services will continue to be payable during a suspension. If services are suspended because of your breach we may charge you a reconnection fee.

2.5. You accept that our services are not required to support emergency calls in the same way as traditional phone lines.

2.6. You agree that you will at all times abide by the requirements of OrcaCom Acceptable Use Policy as published on our website and amended from time to time.

2.7. You acknowledge that we may be obliged to provide assistance to law enforcement agencies in respect of your acquisition or use of the Products and Services and that you will not make any claim against us in relation to that assistance.

3. Charges and payments

3.1. In return for us providing these Products and Services to you, you must pay us the relevant fees, if we increase any rates we will give you as much notice as reasonably possible. The latest rates are available on our website www.orcom.co.nz. If you do not agree to pay those increased Fees you must, within 20 days of receiving that notice from us notify us in writing or by email that you do not accept the increase. Upon receiving that notice from you, unless agreed by us, your right to use the subject Products and Services will cease. In the event that no other Products and Services are then the subject of our agreement, the Agreement will immediately terminate. If we do not receive any notices from you in accordance with this clause and you continue to use the Services after 20 days from our initial notification, you agree that you are deemed to have consented to the increase in Fees.

3.2. Despite the provisions of this clause:

- i) You are solely responsible for the use of the Products and Services and for all payment of any Fees arising from the use or provision of the Products or Services, whether or not the user had your authority.
- ii) Records held and logging procedures adopted by us in relation to usage by or provision of your Products and Services are prima facie evidence that you have used or ordered that Product and Service as indicated.
- iii) We will endeavour to bill you for your use or our provision (as the case may be) of Products and Services as follows:
 - a) in advance for recurring charges
 - b) in arrears for variable usage charges
 - c) where you agree to pay us by credit card or direct debit, your credit card or bank account will be debited the due amount on the due date stated on the invoice;
 - d) where you have arranged a credit account with us, payment will be due on the due date stated on the invoice. If your account is not paid within 10 days of the due date, we reserve the right to charge a late payment fee on any overdue amounts on an invoice at the rate of 15% per annum of the amount overdue, calculated from the due date to the date of actual payment in full. You agree that this late payment fee is a genuine pre-estimate of damage we will suffer as a result of your late payment and is not a penalty. In addition, we may impose a charge on you to cover our reasonable expenses and costs incurred in enforcing any failure or delay in your payment.

3.3. You must pay Goods and Services Tax and any taxes, duties, stamp duties, imposts, levies or government charges relating to the Agreement or the supply or usage of the Services or Products.

3.4. If your account is unpaid in part or in whole for a exceeding one calendar month from the due date, we reserve the right to suspend or terminate your access to the products and/or services at any time at our discretion. If your account remains unpaid for a period exceeding two calendar months from the due date we reserve the right refer your information to a debt collection agency or credit reference agency without notice to you.

3.5. You are responsible for the cost of any communication expenses you incur to access the Products or Services.

3.6. Despite any of the provisions of this clause, in the event that you fail to pay your accounts by the due date and we refer your failure to any debt collection agency or other like body, in the event you seek to reconnect to the Products and Services, you acknowledge and agree that we may require that you initially pay such Fees as represent two months in advance for the Products and Services to be acquired by you. Such Fees are payable at the time of re-connection of your Products and Services.

3.7. If you have a genuine dispute in relation to amounts we have charged you, you must pay the undisputed charges and notify us immediately you become aware of any disputed charges. You must give us full details for the reason of dispute as well as evidence of the grounds of dispute. We will investigate the issue and you agree to comply with our good faith decision on any disputes.

3.8. You are responsible for your account and must pay our charges regardless of whether you or someone else uses those services.

3.9. No refunds will be provided for any unused credit balances. A credit balance for an account that has been inactive for 6 months will be lost.

4. Using our services

4.1. You must not use our services (or permit our services to be used) in a way that: breaks any laws or infringes anyone's rights or in a way which is malicious, obscene or offensive.

4.2. You agree to provide us with accurate and correct information so we can provide you with the necessary services or contact you if required from time to time.

4.3. Unlimited local and worldwide minutes on Orca Communications business plans are available on the basis of reasonable use. If you use the service in a way that is inconsistent with the normal use for your service or plan we may:

- i) monitor and investigate your usage; and
- ii) suspend and/or withdraw the Service; or
- iii) charge our standard per minute rate for additional calls

4.4. You must keep secure any password or PIN number which is used by you to access our services and ensure that it is not disclosed to any unauthorised person. You must also change your password or PIN number if we ask you to do so.

4.5. If your service is cancelled, terminated or reallocated you will relinquish and discontinue use of any numbers, voicemail access numbers and/or web portals assigned to you by Orca Communications.

5. Phone Numbers

5.1. Any phone number that we allocate to you does not become your property and does not constitute any transfer of property rights.

5.2. If we need to change your number we will send you notification by email and give you as much notice as possible

5.3. We can withdraw or terminate any number at any time without liability, particularly if you do not comply with the instructions for use provided by Orca Communications Limited.

5.4. You may be able to port your Orca Communications number to another service provider. If you wish to do so you must contact the other service provider directly and you will be responsible for completing the Porting requirements of that service provider. We will comply with our obligations under the Terms for Local and Mobile Number Portability in relation to the porting of your number. You will be responsible for all costs associated with porting the number.

5.5. If your account is inactive for more than 6 months or disconnected and you have not ported the associated phone number(s), we may at our sole discretion reallocate the numbers associated with your account.

6. Term & Termination

6.1. These Terms and Conditions will commence on the earlier of the date we accept your application or the date on which you start to use the Product or Service

6.2. These Terms and Conditions will continue to apply indefinitely unless terminated under one of the following events in which case only outstanding payments will be due at the end of the required thirty (30) day notice period:

- i) Upon the expiration of the initial or any successive term by you notifying us at least thirty (30) days prior to the expiration of the then current term that you desire to terminate the Agreement. the date we accept your application or
- ii) If OrcaCom's service cannot be reasonably used for the purpose of making and receiving telephone calls and is not caused by service failures beyond our reasonable control in accordance with clause 2.2.
- iii) By us notifying you with at least thirty (30) days notice that we desire to terminate the Agreement, with or without cause.
- iv) Despite the above paragraph, we may terminate the Agreement immediately in relation to any or all Products and Services provided by us to you if:
 - a. in our sole discretion we deem that you are in breach of these Terms and Conditions and/or the Agreement and have not remedied such breach within 10 days of being notified of such breach by us;
 - b. if a receiver, provisional liquidator, administrator or other like person is appointed over any of your undertakings or assets or if you enter into arrangement with any of your creditors or any class of your creditors or you become insolvent or otherwise are unable to pay your debts when they fall due.
 - c. If in our sole discretion you have contravened our Acceptable Use Policy.
 - d. you resell any of our services
 - e. you do not use the service sensibly and within our reasonable use guidelines set out in 4.4
- i) If you wish to terminate the Agreement following notification of a modification to these terms and conditions in accordance with clause 7 below within 7 days of receiving notification.
- ii) If the Agreement is terminated in accordance with clause 3.
- iii) If your account is unpaid and overdue in accordance with clause 3.4.
- iv) Where you desire to terminate the agreement prior to the expiration of the initial term, by you notifying us with at least thirty (30) days notice provided that you pay us the Fees which would have been due until the expiration of the initial term, such fees to be calculated according to the formula:

$$(B \times C) + (B/A) \times D = \text{Termination Fees}$$

Where:

A = Total contract term

B = Months remaining in contract term

C = Monthly Fee

D = Waived Setup Fee

6.3. On termination of the Agreement, we will cease providing the Product or Service to you, and all amounts which you owe to us will immediately become due and payable.

7. Modification

7.1. We may modify any of the terms and conditions contained in these Terms and Conditions at any time and in our sole discretion. You will be notified by email or in writing. Modifications may include, but are not limited to, changes in the scope of available services, pricing schedules and payment procedures. If any modification is unacceptable to you, you may terminate the Agreement as provided in clause 6; should you so terminate, the changes we have announced shall nevertheless become effective unless we agree, in writing, to the contrary. Your continued use of the Products or Services following our notification of the changes will constitute binding acceptance of the change.

8. Liability

8.1. We exclude all of our liability to you in connection with us providing services to you or failing to provide services to you. Without limiting this, we are not liable to you (and nor are any of our officers, employees, contractors or agents liable to you):

- i) if any communication is intercepted, not properly transmitted or received;
- ii) for any disruptions or delays with the use of our services;
- iii) for any incompatibility with other services;
- iv) if any software we supply does not operate properly; and
- v) for any equipment or network failures.

8.2. We are not liable to you for any fault in, delay or non-provision of services which is caused by an event beyond our reasonable control.

8.3. If you use another service provider during any period when our service is not fully operational, we are not liable to pay any amount you are charged by that service provider.

8.4. You acknowledge that no third party whose network or services we use to supply services to you (nor any officer, employee, contractor or agent of such third party) is in any way liable to you in connection with our services.

8.5. The parties acknowledge that the services are provided for a business purpose and accordingly the provisions of the Consumer Guarantees Act 1993 are specifically excluded.

9. Software

9.1. To the extent that any of our Products or Services contain any software that we supply to you, we licence that software to you on a non-exclusive, non-

transferable basis for the term of the Agreement, solely for your use of that Product or Service.

9.2. You must use the software only on such equipment as we may designate for its use. We are not responsible for the installation or support of the software. You must use the software in accordance with any directions we provide to you from time to time.

9.3. We or our suppliers retain ownership of the software at all times, whether in its original form or as modified. You must not, in whole or in part, copy, attempt to reverse-engineer or modify, or attempt to combine or incorporate in any other program or system, the software without our written consent.

9.4. You must protect the software and related documents at all times from unauthorised access, use or damage.

10. Privacy

10.1. We will collect personal information from customers to provide and provision services, including but not limited to name, physical address, email address, contact phone number and credit card information.

10.2. Any personal information we collect is kept at our offices at 17 Marie Avenue Red Beach, Auckland. You are entitled to see any information we hold about you, although you must pay our reasonable charge for making it available.

10.3. We utilise the public internet and third party networks to transmit voice and other communications and we are not liable for any lack of privacy with the service.

11. Changing these terms

11.1. We can change these terms from time to time by giving you as much notice as reasonably possible. We will inform you of any change to our terms by providing relevant information on our website. The latest terms and conditions are available at www.orcacom.co.nz.

12. Notices

12.1. Orca Communications will communicate with you primarily via email. Notices to you will be sent to the email address specified by you during sign up for service or as subsequently specified by you as your contact email address. We may also obtain personal information from your use of our services.

12.2. If your contact email address changes you must advise us of the new details as soon as possible.

12.3. You agree that sending a message to your contact email address is the agreed means of providing notification. Notifications include information about the service, billing, changes to services and other information.

12.4. You will be deemed to have received a notice sent by any method two days after we send it.

13. Confidentiality

13.1. You must keep any information we provide to you, which is marked confidential or which you ought reasonably to know is treated by us as confidential, from disclosure to any third party and use that information solely for the purposes of using the Products or Services. You consent to us obtaining urgent interlocutory relief to restrain any breach or anticipated breach by you of these confidentiality obligations.

13.2. You acknowledge that all intellectual property rights obtained or provided by us that are directly related to the provision of the Products and Services are and shall remain our sole property and you shall do all such things as are necessary to perfect our title to these intellectual property rights. You must return or delete from media, all those intellectual property rights at our request.

14. Other Matters

14.1. These terms are to be interpreted in accordance with the laws of New Zealand. Any dispute regarding the provision of our services under these terms is to be determined by New Zealand courts.

14.2. We may assign or transfer our rights and responsibilities under these Terms and Conditions and the Agreement to any person. We will give you written notice in advance if we intend to do this.

14.3. We may subcontract the performance of any of our responsibilities under these Terms and Conditions and the Agreement to any person.

14.4. You may not assign or transfer any of your rights or responsibilities under these Terms and Conditions and Agreement to any person without our prior written consent. This consent will not be unreasonably withheld. A delay in exercising any right is not a waiver of that right. A failure to exercise a right on any occasion does not prevent any subsequent exercise of that right.

14.5. We will send relevant invoices and notices, if and as required under this agreement to the preferred contact address last notified to us by you.