

# Activata Prepay Retailer Terms and Conditions



These terms and conditions form the basis of Activata's agreement with the Retailer and apply to all products and services Activata supplies to the Retailer whether as principal or agent. Activata may amend these terms and conditions at any time. This will vary Activata's contract with the Retailer. When Activata does this, Activata will make a copy of the amended terms and conditions available to the Retailer on Activata's website at [www.activata.co.nz](http://www.activata.co.nz). The amendments Activata makes will apply seven days after Activata makes the amended terms available to the Retailer. Activata may interpret the Retailer's ongoing use of Activata's services after that date as constituting the Retailer's acceptance of the amendments.

## 1 Definitions

In this Agreement, unless the context requires otherwise:

"Agreement" means the Front Page, these terms and conditions, the Pricing Plan and any Schedules.

"Authorised Location" means the location and associated phone number or web address at which the Retailer is authorised to sell Activata products.

"Commencement Date" means the date specified on the Front Page or the date Activata first provides the Products to the Retailer, whichever is the later.

"Activata" means Pin Distributor Limited trading as Activata Prepay.

"Front Page" means the document entitled "Activata Retailer Agreement" which is attached to these terms and conditions.

"GST" means Goods and Services Tax, in terms of the Goods and Services Tax Act 1985.

"Initial Term" means the period specified on the Front Page.

"PPSA" means the Personal Property Securities Act 1999.

"Pricing Plan" means the Activata Pricing Plan notified to the Retailer from time to time, as amended from time to time as set out in this Agreement.

"Products" means all mobile top ups, phone cards, other stored value cards and other tokens, stamps or vouchers (including the Redemption GST Products) from time to time supplied by Activata to the Retailer including, without limitation those items provided by Activata and detailed in the Pricing Plan.

"Redemption GST Products" means any tokens, stamps or vouchers ("Vouchers") to which all of the following apply;

1. they are (now or in the future) distributed by Activata;
2. they are redeemable with a Third Party Supplier;
3. Activata (on behalf of the Third Party Supplier as its authorized agent or attorney or as otherwise permitted by law to bind the Third Party Supplier) has agreed with the Retailer that the supply of goods or services in respect of a such Voucher occurs upon redemption instead of the sale of the Voucher.

"Retailer" means the retailer specified on the Front Page.

"Schedule" means a schedule which sets out the terms on which Activata will provide additional services (as described in that schedule) to the Retailer.

"Service" means the delivery of Products from Activata to the Retailer's Terminal(s).

"Set Up Fee" means the set up fee specified on the Front Page or the Schedule(s), plus GST.

"Term" means a period of eighteen (18) months, which follows the Initial Term or Term.

"Terminal" means the EFTPOS terminal or other standalone terminal which Activata has configured to provide the Service to the Retailer.

"Third Party" means any company, person or body that purchases Products or Services from the Retailer for the purpose of resale.

"Third Party Supplier" means the entity supplying Redemption GST Products to Activata.

"Issuer" has the same meaning as Third Party Supplier.

"Weekly Charge" means the weekly charge for Products or Services specified on the Front Page and the Schedule(s), plus GST (provided that no GST will be added in respect of any Redemption GST Products).

## 2 Supply of Products and Services

2.1 Activata will supply the Products and Services to the Retailer for the purpose of reselling the Products to the Retailer's customers subject to the terms set out in this Agreement.

2.2 Activata will supply the Products and Services to the Retailer pursuant to Activata's standard provisioning policies and in accordance with this Agreement.

2.3 Activata will invoice the Retailer for all Products and Services supplied at prices specified in the Pricing Plan.

2.4 All Products supplied shall remain Activata's property until payment is received in full.

2.5 Activata reserves the right to change the Pricing Plan by giving the Retailer 5 days written notice.

2.6 The parties may agree that Activata will provide additional services to the Retailer from time to time, on the terms set out in a Schedule. Each such Schedule, once signed by each party, will form a part of this Agreement. In the event of any inconsistency between any term in this Agreement and any term in a Schedule, the latter will prevail (to the extent of that inconsistency).

## 3 Invoicing and Payment

3.1 Activata will invoice the Retailer for the Products and Services purchased by the Retailer on a weekly basis. The Retailer herein agrees to pay Activata for all invoices by Direct Debit on the Due Date (hereinafter called the Due Date). Weekly invoices will include all Products purchased by the Retailer within the preceding seven day period, being 00:01 Monday ending 24:00 Sunday.

3.2 Late payment fees will apply on any invoice not paid by the Due Date. The late payment fee will be \$7.50 (plus GST) per invoice or 1.66% per week of the outstanding balance (plus GST), which ever is the greater.

3.3 Activata reserves the right to request an alternative payment method and terms thereof in the event that the Retailer's account with Activata falls into arrears.

3.4 Activata reserves the right to impose credit limits on the Retailer's account.

3.5 Activata reserves the right to invoice the retailer on a daily or other basis when the sales to the Retailer exceed the credit limit or when the Retailer sells Products that are invoiced on a different basis. All such invoices will be paid by Direct Debit.

3.6 Activata will apply a \$150 fee (plus GST) for each dishonoured payment (hereinafter called Default). In this case, the Retailer's account will be suspended until payment has been received in full.

3.7 For the second and any subsequent Default within a 6 month period, the provisions of clause 3.6 will apply, except that the minimum fee will be \$300 (plus GST) per Default.

3.8 Any expenses, disbursements and legal costs incurred by Activata in the enforcement of any rights contained in this Agreement shall be paid by the Retailer, including any reasonable solicitor's fees or debt collection agency fees.

3.9 Invoices will be generated and available at no charge via the Eftpos terminal and email.

3.10 Upon any default, Activata may do one or more of the following;

(a) Withdraw the retailer's authority to process any Product through Activata;

(b) Disconnect/remove any terminal rented to the Retailer.

(c) Commence proceedings for recovery of outstanding amounts due by the Retailer to Activata; and

(d) Terminate this Agreement with immediate effect

## 4 Sale of Activata Products

4.1 The Retailer must only sell the Products at Authorised Location(s) and must not accept orders for the Products at any other location.

4.2 The Retailer must use reasonable efforts to notify Activata in writing no less than 20 days before any proposed change of Authorised Location.

4.3 The Retailer must not initiate, issue or handover a Product until payment has been received in full from the customer.

4.4 The Retailer is not permitted to sell the Products to a Third Party.

4.5 If the Retailer accepts payment for any Product by way of Eftpos card, credit card, debit card or cheque, the risk of any loss arising by way of dishonoured payment or otherwise will be borne by the Retailer.

4.6 The Retailer must provide access for Activata to promote and display point of sale material in accordance with the Retailer's policy for merchandising and point of sale material.

4.7 The Retailer must display Activata Products as directed by Activata, without altering the Products displayed or the position in which they are displayed.

4.8 The Retailer will not use display devices provided by Activata for any purpose other than to display the Products.

4.9 Activata reserves the right to charge the Retailer in the event any display device provided to the Retailer is lost, stolen or damaged, whether at the Retailer's premises or when being returned to Activata.

4.10 The Retailer will not (other than pursuant to this Agreement) directly or indirectly sell or market any prepaid mobile top-up, long distance telephone calling cards, pre-paid utilities and services cards, or any other tokens, stamps or vouchers or similar products or other products the same as or of a similar nature to those made available by Activata or able to be sourced by Activata, without Activata's prior written consent.

4.11 The Retailer will not use pre-printed paper containing advertising or other commercial messaging in any terminal processing the Products.

4.12 The Retailer may apply have the sale of a Product voided. Such application must be made to Activata within 4 hours of issue where it relates to the sale of a mobile top up and within 7 days of issue where it relates to the sale of a phone card.

## 5 GST on Redemption

5.1 Subject to clause 5.2 below, prices unless otherwise stated do not include GST. GST in relation to the supply of Products (other than Redemption GST Products) and Services is payable by the Retailer to Activata following receipt of an invoice by the Retailer.

5.2 The following arrangements exist in respect of Redemption GST Products:

(a) Activata (on behalf of each Third Party Supplier as its authorised agent or attorney or as otherwise permitted by law to bind the Third Party Supplier) and the Retailer agree that the supply of goods and services takes place on redemption (and not the sale) of the Redemption GST Products in accordance with section 5(11G) of the Goods and Services Tax Act 1985 (the GST Act).

(b) The Retailer acknowledges that Activata has the authority to agree on behalf of each Third Party Supplier that the supply of goods and services take place on redemption of the Redemption GST Products (for the purposes of section 5(11G) of the GST Act).

(c) Activata agrees to immediately notify the Retailer if this authority is revoked or the GST treatment of any Redemption GST Product is changed.

(d) Activata and the Retailer agree that all Redemption GST Products will be itemised separately from other Products on all invoices from Activata to the Retailer.

## 6 Disputed Accounts

If the retailer wishes to dispute any item appearing on an invoice, the Retailer must write to Activata and seek resolution of the disputed amount within one month of receipt of the Retailer's invoice. The Retailer must pay all undisputed amounts invoiced in full by the Due Date. If Activata agrees there is a mistake the necessary amendment will be made.

## 7 Term

7.1 Unless terminated early as a result of provisions herein provided for, this Agreement will commence on the Commencement Date and will continue for the Initial Term. At the expiry of the Initial Term this contract will automatically roll on for further Terms of 18 months.

7.2 If either party does not notify the other party in writing not less than sixty (60) days prior to the expiry of the Term, this Agreement will be deemed to be extended automatically for successive eighteen (18) month periods (Terms) on each subsequent anniversary of the Commencement Date (subject to each party's right to terminate this Agreement with effect on each subsequent anniversary of the Commencement Date by not less than 60 days' prior written notice to the other party prior to the date of that anniversary.)

## 8 Trade Names and Trademarks

All trade names, trademarks and Product marks owned or employed by Activata (hereinafter called Marks) or any subsidiary or affiliate of Activata, including but not limited to the name "ACTIVATA" and any names which include this name or similar names, are hereby acknowledged to be the sole and exclusive property of Activata or such subsidiary or affiliate. The Retailer shall immediately discontinue and relinquish any use of such Marks upon execution of this Agreement and continuing after termination of this Agreement, and shall only use such Marks or names on behalf of Activata and as directed by Activata. The Retailer shall have the same protection on all registered trademarks, trade names and product marks owned or employed by the Retailer as long as such marks do not infringe on Activata, in which event the Retailer is required to relinquish such marks and allow Activata to use such marks at Activata's request.

#### 9 Disclaimer of Warranties

Activata makes no promises or warranties about the description, quality, merchantability, completeness or fitness for any purpose of the Products or Services provided hereunder (except as expressly set out in this Agreement) or as to any other matter all of which promises and warranties are hereby excluded and disclaimed.

#### 10 Indemnification/Limitation of Liability

10.1 Subject to clauses 10.2 and 10.3, the Retailer and Activata are each to indemnify the other and to save the other harmless from any and all claims, losses, liabilities and expenses, including reasonable attorney's fees (hereinafter called Losses) occasioned by any breach by either of us of its obligations under this Agreement, provided however in no event shall Activata be liable (i) to the Retailer or to any other person in any respect for Losses of any kind, including any lost profits arising out of any circumstances not amounting to bad faith or wilful misconduct by Activata or (ii) for interruptions to the provision of any Products or Services or (iii) defects in transmission or delays.

10.2 Activata's liability to the Retailer in respect of any Product which is faulty or defective is limited to the replacement by Activata of that Product or refunding to the Retailer the value of that Product (at Activata's discretion).

10.3 Where the relevant Product is issued by a third party (not being Activata), Activata will not be liable to the Retailer for any failure by that issuer to honour that card or any value on that card (for any reason, including due to that issuer going out of business).

#### 11 Default, Termination and Termination Fee

11.1 Except for violations by the Retailer of sections 3, 7, or 12 and wilful or intentional violations of any provisions of the Agreement as to which there shall be no right of cure by the Retailer, neither the Retailer or Activata shall be deemed to be in default unless the other has received written notice of the default and shall not have cured the same within 7 days thereof, provided however that any subsequent default of the same nature shall have no right of cure.

11.2 Upon default, whoever is non-defaulting shall have the right to terminate this Agreement at any time by notice to whoever is defaulting.

11.3 Notwithstanding clause 7.1 or clause 7.2, this Agreement may be terminated if either the Retailer or Activata become insolvent, bankrupt, liquidated or have a receiver appointed.

11.4 In the event of termination the Retailer will be liable for any payments due under this Agreement.

11.5 In the event of termination or cancellation of this Agreement or of any component of this Agreement for any reason, except as provided for in 6.1 and 6.2, a termination fee will apply. The termination fee will be calculated as any Set-up Fee that has been waived, any other waived fees that have been documented in this Agreement plus the total Weekly Charge for each week remaining in the Term. Where termination or cancellation relate to a component of this Agreement, the termination fee shall be calculated as the total Weekly Charge for that component for each week remaining in the Term.

11.6 Upon expiry or termination of this Agreement (for any reason):

- (a) Such termination will not affect any prior rights which either the Retailer or Activata have against the other which arose prior to that termination;
- (b) The Retailer will pay to Activata all amounts due and owing in respect of the period up to the date of such termination (including the termination fee pursuant to clause 11.5); and
- (c) Clauses 8, 10, 11 and 13 will remain in full force and effect for such termination.

#### 12 Personal Property Securities Act 1999

12.1 The Retailer acknowledges that this Agreement creates a security interest in the Products as security for the Retailer's obligations to Activata under this Agreement and this security interest may be registered in the Personal Property Securities Register.

12.2 The Retailer must sign and deliver any documents and do anything else that Activata require to ensure that Activata has a perfected first ranking security interest in the Product under the PPSA and the Retailer agrees to indemnify Activata for any costs that Activata incur in registering or maintaining that security interest and/or (if applicable) exercising the rights in Part 9 of the PPSA.

12.3 The Retailer waives any rights to receive a verification statement in respect of any financing statement or financing charge statement registered by Activata.

12.4 The Retailer agrees that it will have no rights under or by reference to sections 114(1)(a), 116, 120(2), 121, 125, 126, 127, 129, 131, 133 and 134 of the PPSA.

#### 13 Confidentiality

13.1 During and after the term of this Agreement and in perpetuity the Retailer shall retain in confidence and shall not use (except on Activata's behalf) or disclose to others and shall require the Retailer's directors, officers, employees, contractors, consultants, representatives and agents to similarly retain in confidence and not use or disclose proprietary information. For the purpose of this Agreement proprietary information means confidential information relating to the business and operations of Activata, Activata's subsidiaries, affiliates, suppliers and customers including but not limited to all technical information, pricing plans, methods, processes, financial data, statistics, business plans, programs, research, development or related information of Activata's.

13.2 Neither the Retailer nor Activata shall disclose the terms and conditions of this Agreement to any person or entity excepting employees, agents or partners unless disclosure is required by law or court order without the prior written consent of the other party (which consent shall not be unreasonably withheld).

#### 14 Force Majeure

Neither the Retailer or Activata shall be liable to the other for any delay or failure to perform hereunder which delay or failure is due to acts of God, acts of a public enemy, acts of terrorism, acts of any government fires, floods, epidemics, quarantine restrictions, strikes or freight embargoes. Any delay in the performance of the obligations hereunder due to a force majeure occurrence shall extend the period for performance for the duration of the delay.

#### 15 Responsibility for the Retailer's Employees and Others

15.1 The Retailer shall be fully responsible for the acts and omissions of the Retailer's directors, officers, employees, contractors, consultants, representatives and agents and for their compliance with this Agreement.

15.2 The Retailer acknowledges that the Retailer is responsible for any use of the Service by any third party (whether authorised by the Retailer or not) on the Retailer's premises or over whom the Retailer has control.

#### 16 Faults & Outages

16.1 Where any Service has a fault or outage Activata will use reasonable endeavours to remedy that fault or outage within a reasonable time period.

16.2 Where remedial action is required as a result of any act or omission by the Retailer or by failure or replacement of equipment owned by the Retailer or rented from a third party, Activata may charge the Retailer at Activata's standard rates for the cost of remedying the fault or outage.

#### 17 Succession and Assignment

17.1 This Agreement shall be binding upon and be for the benefit of the Retailer and the Retailer's successors and assigns provided however that the Retailer may not assign the Retailer's rights, nor may the Retailer delegate the Retailer's duties hereunder, except with Activata's prior written consent. A change of ownership or control of the Retailer's business will be deemed an assignment for the purposes of this clause.

17.2 The Retailer must provide Activata with 7 working days notice of a change of ownership. This notification must be accompanied by a change of ownership application form signed by the Retailer and the new owner. Acceptance is subject to satisfactory credit criteria. Such change of ownership will take effect in Activata's billing system on the first Monday following the expiration of the notice period and Activata will charge an administration fee of \$85 (plus GST) to the Retailer on their final invoice. Any transfer of funds between the Retailer and the new owner are the responsibility of the Retailer.

17.3 Activata reserves the right to assign Activata's rights under this Agreement without the Retailer's written consent.

#### 18 Notices

Any notice given pursuant to this Agreement will be deemed to be validly given if personally delivered, posted, emailed or forwarded by facsimile transmission to the address given in this Agreement or such other address as the Retailer may designate by written notice given to Activata.

#### 19 Waiver

Failure or delay by either the Retailer or Activata to exercise any right, power or privilege hereunder shall not operate as a waiver thereof. A waiver of one obligation hereunder shall not operate as a waiver of any other obligation.

#### 20 Partial Invalidity

If any provision of this Agreement shall be deemed unenforceable it shall not affect the remaining provisions.

#### 21 Entire Agreement

The Agreement constitutes the complete and entire agreement between the parties and supersedes any prior communications, representations, agreements or understandings between the Retailer and Activata, whether oral or written, except insofar as the same are expressly incorporated herein.

#### 22 No Waiver

None of the provisions of this Agreement shall be regarded as waived or amended by either the Retailer or Activata unless the same be agreed in writing and signed as a separate memorandum by both the Retailer and Activata. No waiver by either the Retailer or Activata of any right or default hereunder shall be deemed a waiver of any subsequent right or default whether of like or different character.

#### 23 Governing Law

This Agreement shall be governed by, and is construed in accordance with New Zealand law.

#### 24 Disputes and Arbitration

Any dispute between the Retailer and Activata concerning this Agreement that cannot be resolved within 7 days by discussions will be referred to mediation. The mediation must be conducted in terms of the LEADR New Zealand Inc Standard Mediation Agreement, by a mediator and at a fee agreed by Activata. If a dispute remains unresolved 30 days after being referred to mediation then either the Retailer or Activata may take whatever steps it considers fit in relation to the dispute. Nothing in this clause precludes either the Retailer or Activata from seeking urgent interlocutory relief at any time.

#### 25 Privacy

If the Retailer is an individual, the personal information in this Agreement and any other personal information that the Retailer may provide at any time, may be used by Activata for the purposes of checking the Retailer's credit and introducing other products and services. The Retailer has the right at any time to request an update or correction of the information held by Activata, or to have Activata remove the Retailer's name from any of Activata's mailing lists.

#### 26 Security

26.1 Activata may provide confidential information relating to the encryption of cards, the Activata system and related matters (Security Information) to the Retailer, and Activata may also require the Retailer to provide Security Information to Activata which will enable the Retailer to access and use the relevant Product or Service. The Retailer must treat all Security Information as strictly confidential, and not disclose it to anyone. Activata is entitled to rely on the provision of the Retailer's Security Information without further enquiry, as evidence of the Retailer's identity and authority to use the relevant Product or Service. As a result, the Retailer will be liable for the costs and charges in relation to all such use. Any Security Information which is generated by Activata and supplied to the Retailer remains the property of Activata at all times.

26.2 The Retailer agrees to notify Activata immediately of any actual or suspected unauthorised use of the Security Information relating to the Retailer. Such notice will not release the Retailer from any liability the Retailer may have to Activata in relation to the relevant product or service, but Activata will use all reasonable endeavours to mitigate the effects of that unauthorised use from the Retailer's perspective.