



# End User License Agreement

October 2020

### 1. End User Licence and Terms of Use

1.1 **ECHIDNA INTERNATIONAL PTY LTD** ACN 112 649 546 of Suite 19, 120 Melbourne Street, North Adelaide SA 5006 (**Echidna**) is the owner or licensee of the Products and all Intellectual Property Rights in the Products.

1.2 Echidna has agreed to grant, and the Customer by downloading the Products has agreed to accept, a licence to install and use the Products on a Device on the terms of this Agreement.

### 2. Definitions and interpretation

#### 2.1 Definitions

In this Agreement unless the context otherwise requires:

**Agreement** means this End User Licence and Terms of Use and incorporates any statement of works, work order, purchase order or service level agreement between Echidna and the Customer that references this End User Licence and Terms of Use;

**App** means the Echidna Pay application, Sign In application or any other application supplied by Echidna to the Customer;

**APPs** mean the Australian Privacy Principles detailed in Schedule 1 of the Privacy Act;

**Business Day** means any day upon which trading banks in Adelaide, South Australia are open for business not being a Saturday, Sunday or public holiday pursuant to the *Holidays Act 1910* (SA);

**Commencement Date** means the date of acceptance of this Agreement;

**Confidential Information** means:

- (a) all information treated by Echidna as confidential and including, but not limited to:
  - (1) Personal Information;
  - (2) personal, financial, and other information concerning Echidna or its customers;
  - (3) trade secrets and know-how; and
  - (4) financial, accounting, marketing and technical information, customer and supplier lists, know-how, technology, operating procedures, price lists, data bases, sources codes and methodologies, (including software and the features developed within software) of which the Customer becomes aware or generates (both before and after the day this Agreement is signed) in the course of, or in connection with, licensing the Products from Echidna (including confidential information belonging to a third party); and
- (b) all copies, notes and records based on or incorporating the information referred to in paragraph (a); and
- (c) the terms of this Agreement,

but does not include any information that was public knowledge at the date of this Agreement or became so at a later stage (other than as a result of a breach of confidentiality by, or involving, the Customer);

**Customer** means the person downloading or utilising the Products, and if that person represents an organisation includes that organisation and any users of the Products within that organisation as applicable;

**Customer Data** means data and information relating to the Customer, its related entities, and their respective operations, facilities, customers, personnel, assets, products, sales and transactions in whatever form such

information may exist and whether entered into, stored in, generated or processed by the Products, being comprising Personal Information, technical information and transactional data, locational information and any other information available to provide functionality to the Products and includes any:

- (a) database in which such information is contained;
- (b) documentation or records related to such data or information;
- (c) products resulting from the use or manipulation of such data or information;
- (d) any other data and other information generated, stored or processed by any equipment or software; and
- (e) any and all copies of any of the above,
- (f) but excludes DTI;

**Device** means any device that the Products is downloaded to or used on;

**Documentation** means all documents provided by Echidna to the Customer relating to the Products, including instructions for use, manuals, installation instructions and user guides;

**DTI** means de-identified transaction information, being records of all transactions processed using the Products but excluding Personal Information;

**Insolvent** means, in relation to any party:

- (a) it is a body corporate and is unable to pay its debts when they fall due;
- (b) it is a body corporate and is (or states that it is) an insolvent under administration or insolvent (each as defined in the Corporations Act);
- (c) a Liquidation occurs in relation to the party;
- (d) it is subject to any arrangement, assignment, moratorium or composition, protected from creditors under any applicable law or dissolved;
- (e) an application (not being an application that is being contested in good faith and that, is not stayed, withdrawn or dismissed within 30 days of its commencement) is made to a court for an order or an order is made that a body corporate be wound up or that a liquidator be appointed to a body corporate;
- (f) a receiver, receiver and manager, trustee, administrator or similar official is appointed over any or all of the assets or undertaking of a body corporate; and
- (g) something analogous or having a substantially similar effect to any of the events described above happens in connection with that corporation under the law of any applicable jurisdiction;

**Intellectual Property Rights** means:

- (a) inventions, discoveries and designs, whether or not registered or registrable as patents or designs, including developments or improvements of equipment, products, technology, processes, methods or techniques;
- (b) copyright (including future copyright) throughout the world in all literary works, artistic works, computer software, and any other works or subject matter in which copyright subsists and may in the future subsist;
- (c) confidential information and trade secrets;

- (d) trade and service marks (whether registered or unregistered) business names, trade names, logos and get-up; and
- (e) proprietary rights under the *Circuit Layouts Act 1989* (Cth);

**Intended Purposes** means the purposes for which the Products are designed and intended to be used;

**Licence Fee** means the licence fee paid for the download and continuing use of the application as agreed with Echidna and advised by Echidna from time to time;

**Payment Terms** means any terms for the payment of the Licence Fee (whether one off or on a periodic subscription basis) as agreed;

**Personal Information** has the meaning given by the Privacy Act;

**Privacy Act** means the *Privacy Act 1988* (Cth);

**Privacy Law** means:

- (a) the Privacy Act;
- (b) the APPs or any approved privacy code (as defined in the Privacy Act) that applies to Echidna, the Customer or both; and
- (c) any other statute, regulation or law in Australia or elsewhere which relates to the protection of Personal Information and which Echidna or the Customer must observe;

**Products** means and Software or Apps supplied by the Echidna to the Customer;

**Software** means the Echidna ERP or any other software supplied by Echidna to the Customer;

**Special Conditions** means any specific terms agreed quotation or statement of works agreed between Echidna and the Customer and the supplier's standard Terms of Trade; and

**Term** means the term of this Agreement, being the period commencing on the Commencement Date and expiring on the day this Agreement is terminated pursuant to clause 6.

## 2.2 Interpretation

In this Agreement unless the context otherwise requires:

- (a) where a word or phrase is defined, other parts of speech and grammatical forms of that word or phrase have corresponding meanings;
- (b) words denoting natural persons include bodies corporate and vice versa;
- (c) references to clauses are to clauses of this Agreement;
- (d) a reference to any party to this Agreement or to any other document includes that party's executors, administrators, successors and permitted assigns (as the case may be);
- (e) references to any document include references to such document as amended, novated, supplemented, varied or replaced from time to time;
- (f) references to any legislation or to any provision of any legislation include any modification or re-enactment of that legislation or legislative provision or any legislation or legislative provision substituted for, and all regulations and instruments issued under, such legislation or provision;

- (g) specifying anything in this Agreement after the words 'including', 'includes' or 'for example' or similar expressions does not limit what else is included unless there is express wording to the contrary;
- (h) unless expressly stated, no party enters into this Agreement as agent for any other person (or otherwise on their behalf or for their benefit);
- (i) the Annexures and/or Schedules to this Agreement form part of this

### 2.3 Construction

- (a) A provision of this Agreement must not be construed to the disadvantage of a party merely because that party was responsible for the preparation of this Agreement or the inclusion of the provision in this Agreement.
- (b) If any provision of this Agreement is found to be invalid or unenforceable in accordance with its terms in any relevant jurisdiction, all other provisions which are self sustaining and capable of separate enforcement without regard to the invalid or unenforceable provisions will be and will continue to be valid and enforceable in accordance with their terms in that jurisdiction.
- (c) The terms of any Special Conditions provided by Echidna will prevail to the extent of any inconsistency with the terms of this End User Licence Agreement and Terms of Use.

## 3. Licence

- 3.1 Subject to the Customer's compliance with the terms and conditions of this Agreement, Echidna grants to the Customer a non-exclusive, non-transferable licence to use the Products and accompanying documentation (whether in electronic, paper or any other form, if any) on a Device (**Licence**).
- 3.2 The Licence will extend and apply to any updates, additions or modifications to the Products by Echidna during the Term (unless the update, addition or modification is accompanied by separate licence terms, in which case they will apply to the extent of any inconsistency with this Agreement).

## 4. Licence Conditions

The Customer acknowledges and agrees that it will only use the Products for the Intended Purposes, to the extent permitted by law and unless expressly authorised:

- 4.1 it must not sell, transfer, licence, sub-licence, redistribute or otherwise deal with the Products or any Documentation in any way without Echidna's prior written consent;
- 4.2 it must not copy, decompile, reverse engineer, disassemble, derive (or attempt to derive) the source code of, modify, or create derivative works of, the Products (including any updates and any part of it) or any Documentation;
- 4.3 it must only use the Products for its intended purpose; and
- 4.4 Echidna may at any time change, remove or disable access to the Products or any part of the Products at any time without notice to the Customer.

## 5. Licence Fee

In consideration for the grant of the Licence, the Customer must pay Echidna the Licence Fee in accordance with the Payment Terms.

**6. Term and Termination**

- 6.1 This Agreement will commence on the Commencement Date and continue until terminated in accordance with this clause 6.
- 6.2 Unless otherwise agreed, either party may terminate this Agreement by providing 30 days' written notice to the other party.
- 6.3 Echidna may terminate this Agreement immediately if:
- (a) the Customer becomes Insolvent;
  - (b) the Customer breaches its obligations under this Agreement (including to pay the Licence Fee).
- 6.4 Upon termination of this Agreement, the Customer must (at its own cost in all things), at Echidna's discretion, either:
- (a) uninstall and destroy all copies of the Products and Documentation in its possession or control; or
  - (b) deliver all copies of the Products and Documentation in its possession or control to Echidna.
- 6.5 All obligations of the Customer which are capable of surviving termination of this Agreement will continue and survive termination of this Agreement.

**7. Intellectual Property**

The Customer acknowledges that the Licence does not confer on the Customer any Intellectual Property Rights in the Products (including any source code), the Documentation or under any patent, trade mark, domain name, trade secrets, know-how, design or copyright which is the property of, or licensed by, Echidna. The Customer shall not alter, remove or otherwise tamper with any of the trade or other marks or numbers attached to or placed upon or within the Products by Echidna.

**8. Limitation of Liability**

- 8.1 The Customer acknowledges, agrees, represents and warrants that:
- (a) the use of Products is outside the control of Echidna, and the Customer is satisfied that the Products has the condition, characteristics, quality and attributes that will make it suitable or fit for any ordinary or special purpose required for Products, even if that purpose was made known to Echidna;
  - (b) the Customer will require their own internet connection to operate the Products and provide any consumables or peripheral devices required by the Customer and any other third party Software as advised by Echidna;
  - (c) the Products may enable access to third party services and websites which may require internet access and that the Customer accepts additional terms of use or service;
  - (d) Echidna does not warrant or endorse and does not assume and will not have any liability or responsibility to the Customer or any other person in respect of third party materials, services or websites;
  - (e) any financial information displayed by the Products is for general information purposes only and is not intended to be relied upon as investment or financial advice;
  - (f) it uses the Products at its sole risk, and the Products is provided on an "as-is" basis with (to the extent permitted by law) no guarantee that its use will be uninterrupted or error-free;

- (g) to the extent permitted by law, Echidna offers no warranty or guarantee in respect of the performance of the Products, and accepts no liability for the performance of the Products or any function or content made available by or through the Products;
  - (h) the Customer has or will in a timely manner conduct all mandatory or prudent tests and apply all mandatory or prudent quality control checks and procedures to ensure the Products and any product that is produced from it will be without defect and suitable or fit for any purpose required for them; and
  - (i) it has not relied upon any statement, representation, warranty, guarantee, condition, advice, recommendation, information, assistance or service provided or given by Echidna or anyone on its behalf, or apparently on its behalf, in respect of the Products, other than those that are expressly contained in this Agreement.
- 8.2 Subject to the remainder of this clause 8, Echidna offers no guarantee or warranty in respect of the Products or the Documentation it supplies to the Customer, and all representations, conditions and warranties of any nature made in relation to the Products and the Documentation are expressly excluded from this Agreement and shall not bind Echidna.
- 8.3 To the extent permitted by law, where Echidna becomes liable to the Customer in any manner for any breach of any condition or warranty expressed or implied in relation to the supply of goods or services to the Customer, Echidna's liability will be limited, at Echidna's sole discretion to either:
- (a) in relation to the supply of goods:
    - (1) the replacement of the goods or the supply of equivalent goods;
    - (2) the repair of the goods;
    - (3) the payment of the cost of replacing the goods or of acquiring equivalent goods; or
    - (4) the payment of the cost of having the goods repaired; and
  - (b) in relation to the supply of services:
    - (1) the supplying of the services again; or
    - (2) the payment of the cost of having the services supplied again.
- 8.4 If any action is brought by the Customer against Echidna, pursuant to Part 5.4 Division 1 of the Australian Consumer Law, Echidna's liability will be as prescribed in Part 5.4 Division 1 of the Australian Consumer Law.
- 8.5 To the extent permitted by law, the Customer releases and indemnifies Echidna and its officers, employees, consultants and agents from and against all actions, claims, proceedings and demands (including those brought by third parties) which may be brought against it or them, whether on their own or jointly with the Customer and whether at common law, under tort (including negligence), in equity, pursuant to statute or otherwise, in respect of any loss, death, injury, illness, cost or damage arising out of or in relation to any breach by the Customer of any warranty provided by it under clause 8.1.
- 8.6 To the extent permitted by law, Echidna will have no liability to the Customer however arising, including, without limitation, under any cause of action or theory of liability (including negligence), in respect of special, indirect or consequential damages, loss of profit (whether direct or indirect) or loss of business opportunity, arising out of or in connection with this Agreement.

**9. Confidentiality and Privacy**

9.1 The Customer must:

- (a) use Confidential Information only for the purposes of this Agreement; and
- (b) keep confidential all Confidential Information except to the extent (if any) the Customer is required by law to disclose any Confidential Information.

9.2 The Customer must:

- (a) only use Personal Information for the purpose of this Agreement and not for unrelated purposes;
- (b) observe and comply with the Privacy Law and any privacy policy or protocol which is provided to the Customer by Echidna in respect of all Personal Information;
- (c) promptly follow any reasonable direction of Echidna in relation to Personal Information and comply with Echidna's privacy policy as advised from time to time;
- (d) immediately notify Echidna if it knows of or suspects unauthorised use, copying or disclosure of Personal Information;

9.3 The Customer must:

- (a) ensure that each person to whom it discloses Confidential Information under this clause complies with the terms of this clause 9; and
- (b) notify Echidna of, and take all steps to prevent or stop, a suspected or actual breach of a term of this clause 9.

9.4 If the Customer is required by law to disclose any Confidential Information to a third person (including, but not limited to, Federal or State government agencies or bodies) the Customer must:

- (a) before doing so:
  - (1) notify Echidna;
  - (2) give Echidna a reasonable opportunity to take any steps that Echidna considers necessary to protect the confidentiality of that information; and
- (b) notify the third person that the information is Confidential Information of Echidna.

9.5 The Customer must provide assistance reasonably requested by Echidna in relation to any proceedings Echidna may take against any person for unauthorised use, copying or disclosure of Confidential Information.

9.6 The Customer will indemnify and keep indemnified Echidna against any loss, cost, expense, damage or liability Echidna may suffer arising out of a breach by the Customer of this clause 9.

**10. Customer Data**

10.1 The Customer acknowledge that Echidna may collect and use data and related information, including but not limited to Personal Information, technical information and transactional data, locational information and any other information available to provide functionality to the Products for the Intended Purposes.

10.2 The Customer is responsible for compliance with the provisions of these terms by user of the Products and for any and all activities that occur in their use of the Products including ensuring that use of the service to store and transmit data in accordance with this Agreement is compliant with all applicable laws and regulations.



- 10.3 Echidna will maintain commercially reasonable administrative, physical and technical safeguards to protect the security, confidentiality and integrity of the Customer Data. Echidna may retain DTI indefinitely to the extent reasonably required by Echidna for system integrity, analysis, improvement, marketing or associated commercial purposes.

**11. Goods and services tax**

- 11.1 The terms used in this clause have the same meanings as those terms and phrases in the *A New Tax System (Goods and Services Tax) Act 1999* (Cth).
- 11.2 The amount payable for any taxable supply made under or in accordance with this Agreement is exclusive of GST (unless otherwise stated).
- 11.3 The amount payable for any taxable supply made under or in accordance with this Agreement shall be increased by the rate of GST, if any, imposed by law.
- 11.4 A party making a taxable supply under or in accordance with this Agreement must give to the party receiving the taxable supply a tax invoice. The tax invoice must be given at the same time payment is received or if that is not practicable, within five Business Days after receiving payment.

**12. Governing law**

- 12.1 This Agreement will be governed by and interpreted in accordance with, the laws for the time being in force in South Australia and each party submits to the non-exclusive jurisdiction of the Courts of or exercising jurisdiction of, that State and waives any right it might have to claim that those Courts are an inconvenient forum.
- 12.2 The parties covenant that none of them will institute or attempt to institute any proceedings in relation to any dispute or any matter or thing arising out of, or in connection with, this Agreement other than in a Court of South Australia or, in respect of any proceeding in a Federal Court, in the registry of the relevant Federal Court. A party will not, without the consent of the other parties, request that proceedings instituted in a Federal Court in South Australia be heard outside of South Australia.

**13. Waiver**

A waiver by a party of a provision of this Agreement is binding on the party granting the waiver only if it is given in writing and is signed by the party or an authorised officer of the party granting the waiver. Further, a waiver is effective only in the specific instance and for the specific purpose for which it is given. The failure of a party to enforce at any time any of the provisions of this Agreement or the granting of any time or other indulgence will not be construed as a waiver of that provision or of the right of that party to subsequently enforce that or any other provision.

**14. Assignment**

The Customer must not assign its right, title and interest in this Agreement to any person without the prior written consent of the other party.

**15. Costs**

Each party must bear its own legal and other costs arising out of the negotiation, preparation, execution and completion of this Agreement.

**16. Survival of agreement**

The provisions of this Agreement which are capable of having effect after the expiration or termination of this Agreement shall remain in full force and effect following the expiration or termination of this Agreement.