



Terms of Trade

October 2020

These Terms will apply to every sale of Goods and provision of Services by the Supplier. Unless expressly accepted in writing by the Supplier, any qualification of these Terms contained in any document issued by the Customer shall be of no force or effect. Subject only to any matters contemplated herein, these Terms constitute the entire agreement between the Supplier and the Customer, and no variation of or addition to these Terms will be binding unless reduced to writing and agreed by the Supplier and the Customer or their duly authorised representatives.

1. Definitions

- 1.1 **APPs** mean the Australian Privacy Principles detailed in Schedule 1 of the Privacy Act;
- 1.2 **Australian Consumer Law** means Schedule 2 to the Competition and Consumer Act (as amended or replaced from time to time);
- 1.3 **Competition and Consumer Act** means the *Competition and Consumer Act 2010* (Cth) (as amended or replaced from time to time);
- 1.4 **Confidential Information** means:
- (a) all information treated by the Supplier as confidential and including, but not limited to:
 - (1) Personal Information;
 - (2) personal, financial, and other information
 - (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); and
 - (b) all copies, notes and records based on or incorporating the information referred to in paragraph (a);
 - (c) the terms of the agreement between the parties;
 - (d) any information designated by the Customer in writing as confidential information and advised to the Supplier;
- disclosed by a party to this agreement to another 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);
- 1.5 **Customer** means the party who enters into these Terms with the Supplier, for the supply of Goods and/or Services from the Supplier to the Customer;
- 1.6 **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 App, 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,
- but excludes DTI;
- 1.7 **DTI** means de-identified transaction information, being records of all transactions processed using the Products but excluding Personal Information;
- 1.8 **End User Licence and Terms of Use** means the Supplier's standard End User Licence and Terms of Use as provided by the Supplier to the Customer (or made available by the Supplier) for the use of apps or software supplied by the Supplier;
- 1.9 **Goods** means goods supplied by the Supplier to the Customer pursuant to these Terms;
- 1.10 **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);
- 1.11 **Personal Information** has the meaning given by the Privacy Act;
- 1.12 **PPSA** means the *Personal Property Securities Act 2009* (Cth) (as amended or replaced from time to time);
- 1.13 **Privacy Act** means the *Privacy Act 1988* (Cth);
- 1.14 **Privacy Law** means:
- (a) the Privacy Act;
 - (b) the APPs or any approved privacy code (as defined in the Privacy Act) that applies to the Supplier, the Customer or both; and
- any other statute, regulation or law in Australia or elsewhere which relates to the protection of Personal Information and which the Supplier or the Customer must observe;
- 1.15 **Services** means services supplied by the Supplier to the Customer pursuant to these Terms;
- 1.16 **Special Conditions** means any specific terms agreed quotation or statement of works agreed between the Supplier and the Customer;
- 1.17 **Supplier** means Echidna International Pty Ltd; and

1.18 **Terms** means these terms of trade.

2. **Documentation**

2.1 The terms of any Special Conditions provided by the Supplier will prevail to the extent of any inconsistency with the terms of these Terms of Trade.

2.2 The Customer acknowledges that unless otherwise agreed in writing the End User Licence and Terms of Use will apply in respect of any supply of any applications or software by the Supplier to the Customer (and prevail to the extent of any inconsistency with these Terms).

2.3 The Customer acknowledges that if they hire any equipment from the Supplier then they do so on the standard Equipment Hire Agreement terms and conditions of the Supplier (and prevail to the extent of any inconsistency with these Terms).

3. **Price**

Prices quoted in the Supplier's price lists, quotes and advertising literature are for guidance only and they are exclusive of GST unless otherwise indicated (which will be included). The contract price of the Goods sold and Services rendered to the Customer will be as agreed in writing between the Supplier and the Customer from time to time.

4. **Payment**

4.1 The contract price of Goods and Services shall be paid without deduction within 30 days of the end of the month in which the Goods or Services were supplied, or on such terms as the Supplier and the Customer may otherwise agree in writing.

4.2 The Customer must make payment in such manner as the Supplier directs from time to time by written notice to the Customer, and where the Supplier has extended credit to the Customer, the Supplier reserves the right to revoke the provision of credit at any time.

4.3 The Supplier reserves the right to suspend or cancel the supply of further Goods and Services if the terms of payment are not strictly adhered to by the Customer, or if the Customer is in breach of or default under any other subsisting agreement between the Supplier and the Customer.

4.4 If the Customer fails to pay any sum to the Supplier by the due date then, although no demand for payment may have been made, the sum in respect of which such default is made or so much thereof as shall from time to time remain unpaid shall bear simple interest at the rate which is 2% in excess of the maximum rate per annum charged by the Supplier's bank on the due date on overdraft accommodation of the same amount, and such interest shall accrue and be recoverable from day to day.

4.5 All costs and expenses incurred by the Supplier in recovering any outstanding money (including, without limitation, debt collection agency fees or lawyer's costs on a solicitor-own client basis) shall be paid by the Customer.

4.6 The Customer acknowledges that if the Customer agrees or requests to pay any fees or services through any third party (i.e. through the Customer's Telstra Account) then the Customer permits the Supplier to share any reasonably required information with that third party to facilitate the arrangements and will accept any further terms, conditions or costs that may be imposed by that third party.

5. Scope and Variations

The scope of the Goods and Services will be as set out in the agreed quotation or statement of works. In the event that any changes or variations to the scope of the Goods or Services (Variation) are requested by the Customer after the commencement of any job then:

- 5.1 where practical the Supplier will provide a quotation for the Variation in advance of commencing works;
- 5.2 where no prior quotation is provided then the Variation will be undertaken at the Supplier standard applicable rates; and
- 5.3 the Supplier will not be responsible for any delays for the delivery of any Good or Services as a result of any Variation and the parties will re-negotiate in good faith any reasonable amendment delivery timeframes.

6. Customer Responsibilities

- 6.1 The Customer agrees to (at the Customer's costs) except to the extent included in the scope of the Goods and Services:
 - (a) provide any consumables or peripheral devices required to facilitate the provision of the Goods and Services; and
 - (b) provide such reasonable access (including to the Supplier's systems), information or assistance in the Customer's possession or control (including through the Customer's third party suppliers) required by the Supplier to facilitate the provision of the Goods and Services.
- 6.2 Where Good and Services are supplied under this Agreement that are subject to third party terms and conditions, warranties or end user license agreements (**Third Party Terms**) then the Customer, on delivery of the relevant Goods and Services, accepts those Third Party Terms and those Third Party Terms will apply to the extent of any inconsistency with this Agreement.
- 6.3 During the course of the supply of Good and Services under this Agreement and for a period of 12 months after the final delivery of Good and Services the Customer agrees not to:
 - (a) entice away or attempting to entice away whether directly or indirectly from the Supplier any customer of the Supplier;
 - (b) enticing away or attempting to entice away whether directly or indirectly from the Supplier any supplier of the Supplier;
 - (c) enticing away or attempting to entice away whether directly or indirectly from the Supplier any third person from whom the Buyer has any right or licence to distribute (whether as principal or agent and whether by wholesale or retail) any products of that third person in respect of the business of the Supplier; or
 - (d) enticing away or attempting to entice away whether directly or indirectly from the Buyer any employee or agent of the Supplier.

7. Delivery and Risk

- 7.1 Once an order has been placed by the Customer, and accepted by the Supplier, it cannot be cancelled by the Customer. The supply of Goods and/or Services is subject to availability, and the Supplier reserves the right to suspend or discontinue the supply of Goods and/or Services to the Customer.

- 7.2 The Supplier reserves the right to deliver part of an order to the Customer, and the Customer agrees to accept any part order so delivered. Failure by the Supplier to deliver any part of an order shall not entitle the Customer to cancel the balance of the order and in the event of the Customer defaulting on payment of any part of an order, the Supplier shall be entitled to treat the default as a breach of contract relating to the total order or any or all part orders of such order.
- 7.3 Where a time for delivery is agreed, the Supplier will take all reasonable action to deliver the Goods and/or Services on time, but time shall in no circumstances be deemed of the essence, and the Supplier shall not be liable for any loss or damages suffered by the Customer arising out of, or in relation to, a delay in delivery by the Supplier outside the reasonable control of the Supplier (including as a result of any variations).

8. Retention of Title and Security Interest

- 8.1 Property in and legal and beneficial ownership of the Goods shall remain with the Supplier until the Customer has made payment in full in cleared funds of the contract price of those Goods and any other money owing by the Customer to the Supplier, and pending such payment the Customer:
- (a) shall hold the Goods as fiduciary bailee and agent for the Supplier;
 - (b) shall retain the Goods in a manner such that they are readily identifiable as the Supplier's property;
 - (c) shall not in any way deal with, or part with possession of, the Goods or part thereof or attempt to do so;
 - (d) shall not make any new object from the Goods, or mix or incorporate them into or with other Goods;
 - (e) shall handle and store the Goods with due care; and
 - (f) shall not use the Goods for any purpose whatsoever.
- 8.2 If the Customer defaults in payment of the contract price or any other money owing by the Customer to the Supplier:
- (a) the Supplier and its nominees shall have the right to enter the premises where the Goods are believed to be stored to take possession of all or any of the Goods, and for this purpose the Customer shall grant or cause to be granted reasonable access rights and the Supplier shall be entitled to do all things required to secure possession;
 - (b) upon taking possession of Goods, the Supplier shall thereafter be entitled to sell and dispose of them or any of them, either together or in parcels, at such time or times, and place or places, and either by public auction or private contract or partly by one and partly by the other, to any person or persons, for such price or prices as the Supplier may deem proper or expedient, with power for the Supplier to make any other terms and conditions in regard to such sale or sales as the Supplier may think proper, without being answerable or accountable for any loss, diminution in price, costs or expenses occasioned by any such sale;
 - (c) the Supplier shall be entitled to apply the net proceeds of sale in reduction of the money owing by the Customer to the Supplier (including, without limitation, that referred to in clause 8.2(d)(2)), and shall pay any surplus to the Customer;

- (d) if the Supplier exercises any of the rights set out in this clause 8.2, the Customer:
- (1) will not have any claim whatsoever against the Supplier for breach of contract or otherwise;
 - (2) must indemnify the Supplier from and against any claim against the Supplier arising out of its taking possession of the Goods; and
 - (3) must reimburse the Supplier on demand in respect of the costs and expenses incurred by the Supplier in exercising or attempting to exercise those rights including, without limitation, costs of taking possession, storage and transportation.
- 8.3 The Customer acknowledges and agrees that by assenting to these Terms, which constitute a security agreement for the purposes of the PPSA:
- (a) the Customer grants a security interest to the Supplier in all Goods now or in the future supplied by the Supplier to the Customer (or to its account) during the continuance of the relationship between the Supplier and the Customer, and the proceeds of those Goods;
 - (b) any purchase it makes on credit terms or on a retention of title basis pursuant to these Terms, will constitute a purchase money security interest (**PMSI**) for the purposes of the PPSA, and the PMSI will continue to apply to any Goods coming into existence, and the proceeds of the sale of Goods coming into existence, on or after the date of these Terms;
 - (c) the Supplier will continue to hold a security interest in the Goods in accordance with, and subject to, the PPSA, notwithstanding that the Goods may be processed, commingled or become an accession with other goods;
 - (d) any security interest held by the Supplier will be a continuing and subsisting interest in the Goods, which will have priority to the fullest extent permitted by law over all other registered or unregistered security interests;
 - (e) until title in the Goods passes to the Customer, it will keep all Goods supplied by the Supplier free, and will ensure all such Goods are kept free, of any charge, lien or security interest and not otherwise deal with the Goods in a way that will or may prejudice any rights of the Supplier under these Terms or the PPSA; and
 - (f) in addition to any other rights under these Terms or otherwise arising, the Supplier may exercise any and all remedies afforded to it as a secured party under the PPSA, including, without limitation, entry into any building or premises owned, occupied or used by the Customer, to search for, seize, dispose of or retain those Goods in respect to which the Customer has granted a security interest to the Supplier.
- 8.4 The Customer will, whether before or after Goods are supplied under these Terms, do such acts and provide such information (which information the Customer warrants to be complete, accurate and up to date in all respects) as in the opinion of the Supplier (acting in its absolute discretion) may be required or desirable to enable the Supplier to perfect under the PPSA the security interest created by these Terms.
- 8.5 To the extent permitted by law the Customer waives any right to receive a copy of a verification statement under section 157 (or otherwise) of the PPSA and agrees as to any contract between the Supplier and the Customer for the supply of Goods governed by these Terms, to the extent permitted by law, to contract out of each and every provision permitted by section 115(1) of the PPSA, except section 115(1)(g), to the intent that the Supplier will preserve its right to seize collateral, and the Customer agrees to waive its rights referred to in section 115(1).

- 8.6 The Customer undertakes to:
- (a) not register or permit to be registered a Financing Change Statement (as defined under the PPSA) in any of the Goods in which the Supplier has a security interest pursuant to these Terms; and
 - (b) provide the Supplier not less than 7 days' prior written notice of any proposed change in the Customer's name, address, contact numbers, business practice or such other change in the Customer's details which are registered on the Personal Property Securities Register, to enable the Supplier to register a Financing Change Statement (as defined by the PPSA), if the Supplier deems it necessary (in its sole discretion).
- 8.7 The Customer agrees to pay the costs, charges and expenses of and incidental to the need for, or desirability of registration of, a financing statement or financing change statement or any action taken by the Supplier to comply with the PPSA or to protect its position under the PPSA. The Customer agrees to pay any costs incurred by the Supplier, including, but not limited to, legal costs on a solicitor-own client basis, arising from any disputes or negotiations with third parties claiming an interest in any Goods supplied by the Supplier.

9. Return of Goods

To the extent permitted by law:

- 9.1 the Supplier will only accept the return of Goods and bear the cost of return freight if the Supplier is legally obliged to repair or replace those Goods or the Goods were delivered to the Customer as a result of the Supplier's error, but not otherwise. If so required by the Supplier, the Customer will return Goods to the Supplier's nominated representative;
- 9.2 the Customer will not return Goods for repair or replacement until, following receipt of the Customer's written notice that Goods require repair or replacement, the Supplier's agent has inspected the Goods and advised the Customer of an authorisation number which the Customer must quote to the Supplier in all subsequent dealings relating to the relevant Goods; and
- 9.3 subject to the foregoing, receipt by the Supplier or by any of its agents or representatives of Goods returned, will not constitute or be deemed to constitute the Supplier's acceptance of the return of those Goods for any purpose, and those Goods will be returned to the Customer at the Customer's expense.

10. Termination of Supply

The Supplier may at any time by written notice to the Customer terminate its obligation to supply Goods or Services to the Customer upon the happening of any of the following:

- 10.1 any action is taken for, or with a view to, the liquidation (including provisional liquidation), winding up, official management, bankruptcy or insolvency (or equivalent) of the Customer and such action remains pending for a period of 21 days thereafter, unless the Customer satisfies the Supplier (in its absolute discretion) of the Customer's solvency;
- 10.2 the Customer becomes insolvent or is unable or deemed to be unable to pay its debts or ceases or threatens to cease to carry on its business or a major part of its business or the Customer enters into dealings with any of its creditors with a view to avoiding, or in expectation of, insolvency or stops or threatens to stop payments generally or a receiver or receiver and manager is appointed to, or an encumbrancee takes or proposes to take possession of, any material part of the assets of the Customer;
- 10.3 the Customer enters into any arrangement, assignment or composition with or for the benefit of its creditors or any class of them;

- 10.4 any distress, attachment or execution is issued, levied or enforced against the Customer which is not satisfied or challenged in good faith by appropriate means within 14 days;
- 10.5 a person is appointed under any applicable law to investigate any part of the Customer's business or affairs or an application is made for the appointment of such an inspector, or an administrator (or equivalent) is appointed to the Customer or any steps are taken for such an appointment; or
- 10.6 any other event occurs or circumstance arises, financial or otherwise, which, in the reasonable opinion of the Supplier, is likely materially and adversely to affect the ability of the Customer to observe any of its payment obligations to the Supplier,

and in any such event the Customer shall be deemed to be in breach of its obligation to purchase those Goods or Services.

11. **Limitation of Liability**

- 11.1 The Customer acknowledges, agrees, represents and warrants that:
 - (a) the use of the Goods is outside the control of the Supplier, and the Customer is satisfied that the Goods have (unless the Goods are returned pursuant to clause 9) the condition, characteristics, quality and attributes that will make them suitable or fit for any ordinary or special purpose required for those Goods, even if that purpose was made known to the Supplier;
 - (b) 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 Goods and any product that is produced from or incorporates them will be without defect and suitable or fit for any purpose required for them; and
 - (c) it has not relied upon any statement, representation, warranty, guarantee, condition, advice, recommendation, information, assistance or service provided or given by the Supplier or anyone on its behalf, or apparently on its behalf, in respect of the Goods, other than those that are expressly contained in these Terms.
- 11.2 Subject to the remainder of this clause 11, the Supplier offers no guarantee or warranty in respect of the Goods and Services it supplies to the Customer, and all representations, conditions and warranties of any nature made in relation to the Goods and Services are expressly excluded from these Terms and shall not bind the Supplier.
- 11.3 To the extent permitted by law, where the Supplier 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, the Supplier's liability will be limited, at the Supplier'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.

- 11.4 If any action is brought by the Customer against the Supplier, pursuant to Part 5.4 Division 1 of the Australian Consumer Law, the Supplier's liability will be as prescribed in Part 5.4 Division 1 of the Australian Consumer Law.
- 11.5 To the extent permitted by law, the Customer releases and indemnifies the Supplier 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 (without limitation) 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 11.1.
- 11.6 To the extent permitted by law, the Supplier will have no liability to the Customer however arising, including, without limitation, under any cause of action or theory of liability, 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 these Terms or any supply made pursuant to them.

12. **Indemnity**

The Customer shall keep the Supplier indemnified against all costs, claims, demands, expenses and liabilities of whatsoever nature, including, without limitation, claims of death, personal injury, damage to property and consequential loss (including loss of profit) which may be made against the Customer or which the Customer may sustain, pay or incur as a result of or in connection with the manufacture, sale, export, import or use of the Goods unless such costs, claim, demand, expense or liability shall be directly and solely attributable to any breach of contract or guarantee by, or negligence of, the Supplier or its duly authorised employee or agent.

13. **Cost Recovery**

Any expenses, costs or disbursements incurred by the Supplier in recovering any outstanding monies owing by the Customer, including, without limitation, debt collection fees and solicitors costs (on a full indemnity basis), shall be paid by the Customer.

14. **Intellectual Property**

- 14.1 The Customer acknowledges that the sale and purchase of the Goods does not confer on the Customer any licence or rights in respect of and Intellectual Property Rights which are the property of the Supplier. The Customer shall not alter, remove or otherwise tamper with any of the trade or other marks or numbers attached to or placed upon the Goods by the Supplier.
- 14.2 The Customer warrants to the Supplier that all documents provided by the Customer are accurate and that the Supplier is entitled to use all such documents for the purposes of these Terms and that such use does not infringe any third party's intellectual property rights. The Customer indemnifies the Supplier against all claims and all losses and damages incurred by the Company as a result of documents provided by the Customer to the Supplier for the purposes of or in the course of the supply of the Goods or Services breaching a third party's intellectual property rights.
- 14.3 If the Customer receives any confidential information from the Supplier the Customer may not use or disclose such information unless it receives the prior written consent of the Supplier, such information

enters the public domain (other than as a result of a breach of this clause) or the use or disclosure is required by law.

15. Confidentiality

15.1 The parties 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) required by law to disclose any Confidential Information.

15.2 Each party 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 the Supplier in respect of all Personal Information;
- (c) promptly follow any reasonable direction of the Supplier in relation to Personal Information and comply with the Supplier's privacy policy as advised from time to time;
- (d) immediately notify the Supplier if it knows of or suspects unauthorised use, copying or disclosure of Personal Information;

15.3 If a party 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 notify the other party promptly.

16. Customer Data

16.1 The Customer acknowledge that the Supplier 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.

16.2 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.

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

17. Subcontracting

The Supplier may subcontract to any person the whole or part of the Supplier's obligations under these Terms at any time. The Supplier will not be relieved of any of its liabilities or obligations under these Terms as a result of any subcontracting, and the Supplier will be liable for the acts and omissions of a subcontractor and any personnel of a subcontractor, as if they were the acts or omissions of the Supplier.

18. Severability

The whole or any part of a clause of these Terms shall be capable of severance without affecting the rest of these Terms.

19. Governing Law

These Terms shall be governed by the laws of the State of South Australia (excluding its conflict of laws provisions) and the Customer must submit to the non-exclusive jurisdiction of the courts of or exercising jurisdiction of that State and the Customer waives, without limitation, any claim or objection based on absence of jurisdiction or inconvenient forum.

20. Waiver

If the Supplier elects not to exercise any of its rights arising as a result of a breach of these Terms, that will not constitute a waiver of any rights of the Supplier relating to any subsequent or other breach.

21. Force Majeure

The Supplier will not be in breach of any contract with the Customer where it results from any act, matter or thing beyond the reasonable control of the Supplier.