



Encoo Pty Ltd

General Terms and Conditions

(v3.1 2017)

General Terms and Conditions

1 Definitions and interpretation

1.1 Definitions

In these General Terms:

- (1) **Additional Products** means any software, hardware, equipment, accessories, cables or other products to be supplied by Encoo to the Customer under a Statement of Work;
- (2) **Additional Services** means any other services that are outside the scope of the Services and which are to be provided by Encoo to the Customer under a Statement of Work;
- (3) **Business Day** means a day that is not a Saturday, Sunday or any other day which is a public holiday or a bank holiday in the place where an act is to be performed or a payment is to be made;
- (4) **Confidential Information** means, in relation to a party (**Discloser**), any information including all know-how, financial information and other valuable or sensitive information of any nature, trade secrets, formulae, graphs, drawings, designs, samples, devices, functional specifications and other material of whatever description provided to the other party (**Recipient**) by the Discloser for the purposes of this Agreement, in any form whatsoever (including oral, written, and electronic information) of a technical, business, corporate, commercial or financial nature of or in relation to the Discloser, its related bodies corporate, associated entities and its business, shareholders or unitholders, or which the Discloser makes the Recipient or its agents aware is considered by it to be confidential and / or proprietary, or which is evident on its face as being confidential and / or proprietary, and includes:
 - (a) customer lists and contact details;
 - (b) reports or advice from professional advisers or other experts;
 - (c) marketing, sales and pricing information;
 - (d) financial information and records;
 - (e) supplier information;
 - (f) employee information and records;
 - (g) product information; and
 - (h) trade secrets;
- (5) **Customer Software** means any computer software owned or licensed by the Customer and provided by the Customer to Encoo for hosting by Encoo as part of the Hosting Services;
- (6) **Customer Site** means the location(s) specified in Item 1 of Schedule 1;
- (7) **Customer Supplied Items** means the Customer Software and any hardware, software, equipment, accessories or services (including telecommunications and utilities connections but excluding any Telecommunications Services provided by Encoo to the Customer) necessary for it to use and fully enjoy the benefits of the Encoo Software, the Services, any Additional Products and any Additional Services;
- (8) **Delivery Date** means, in respect of any Encoo Software, the delivery date for that software as specified in Item 2 of Schedule 1
- (9) **Early Termination Charges** means any charges specified in Item 4 of Schedule 1 as being payable by the Customer for the termination of any Services prior to the end of the service term for that service as specified in Item 4 of Schedule 1;
- (10) **Encoo Documentation** means any manuals, training materials or other documents provided by Encoo (whether electronically, in hard copy or made available online) to the Customer relating to the Encoo Software or any of the Services;
- (11) **Encoo Software** means the computer software to be provided or made available by Encoo to the Customer as specified in Item 3 of Schedule 1;
- (12) **Fees** mean the Licence Fees, the Price, the Services Charges and any other fees or amounts payable by the Customer to Encoo under this Agreement;
- (13) **Force Majeure Event** means any cause or condition beyond the reasonable control of the party relying on it, including fire, flood, act of God, war, insurrection, sabotage, acts of terrorism, industrial disturbance, failure of electrical or telecommunications networks, acts of vandalism and changes in legislation or regulations of any government;
- (14) **Further Term** means the period commencing on the day after the expiry of the Initial Term or the immediately preceding Further Term (as the case may be) and continuing for a period of the same duration as the Initial Term;
- (15) **General Terms** means these general terms and conditions;
- (16) **GST** means the same as in the GST Law;
- (17) **GST Law** means the same as **GST law** means in the *A New Tax System (Goods & Services Tax) Act 1999* (Cth);
- (18) **Hardware** means any products, equipment, accessories, cables or other goods to be supplied by Encoo to the Customer as set out in Item 2 of Schedule 1;

- (19) **Hosting Services** means the hosting services, if any, set out in Item 4 of Schedule 1 and being indicated as being provided by Encoo;
- (20) **Initial Term** means the period commencing on the Start Date and continuing for the period specified as the 'Initial Term' on the first page of this document;
- (21) **Insolvency Event** means the happening of any of these events in relation to a party (**Defaulting Party**):
- (a) execution or other process of a court or authority or distress is levied for an amount exceeding \$10,000 upon any of the Defaulting Party's property and is not satisfied, set aside or withdrawn within 7 days of its issue;
 - (b) an order for payment is made or judgment for an amount exceeding \$10,000 is entered or signed against the Defaulting Party which is not satisfied within 7 days;
 - (c) the Defaulting Party suspends payment of its debts or threatens to do so;
 - (d) where the Defaulting Party is a body corporate:
 - (i) the Defaulting Party becomes an externally-administered body corporate under the *Corporations Act 2001* (Cth);
 - (ii) steps are taken by any person towards making the Defaulting Party an externally-administered body corporate (but not where the steps taken consist of making an application to a court and the application is withdrawn or dismissed within 14 days);
 - (iii) a controller (as defined in section 9 of the *Corporations Act 2001* (Cth)) is appointed of any of the property of the Defaulting Party or any steps are taken for the appointment of a controller (but not where the steps taken are reversed or abandoned within 14 days);
 - (iv) the Defaulting Party is taken to have failed to comply with a statutory demand within the meaning of section 459F of the *Corporations Act 2001* (Cth);
 - (v) the Defaulting Party enters into, or resolves to enter into, a scheme of arrangement, deed of company arrangement or composition with, or assignment for the benefit of, all or any classes of its creditors, or it proposes a reorganisation, moratorium or other administration;
 - (vi) the Defaulting Party resolves to wind itself up, or otherwise dissolve itself, or gives notice of the intention to do so, or is otherwise wound up or dissolved; or
 - (vii) a resolution is passed for the reduction of capital of the Defaulting Party or notice of intention to propose such a resolution is given, without the prior written consent of the other party;
 - (e) where the Defaulting Party is a natural person:
 - (i) the Defaulting Party authorises a registered trustee or solicitor to call a meeting of his or her creditors or proposes or enters into a deed of assignment or deed of arrangement or a composition with any of his or her creditors;
 - (ii) a person holding a security interest in assets of the Defaulting Party enters into possession of or takes control of any of those assets or takes any steps to enter into possession of or take control of any of those assets; or
 - (iii) the Defaulting Party commits an act of bankruptcy; or
 - (f) any step is taken to appoint an administrator, a receiver, and/or manager or other like person over the whole or any part of the Defaulting Party's assets or business;
- (22) **Intellectual Property Rights** means copyright, trade mark, design, patent, semiconductor or circuit layout rights, moral rights, know-how, trade, business or company names or other proprietary rights, together with any rights to the registration of such rights, the renewals of such registrations and any applications to register such rights (anywhere in the world);
- (23) **Licence Fees** means the licence fees specified in Item 3 of Schedule 1, which are payable by the Customer in relation to the licensing of the Encoo Software by Encoo to the Customer;
- (24) **Material** means any equipment, hardware, computer software, data, documentation, designs, drawings, reports, notes, calculations, specifications, photographs, audio-visual materials, recordings, manuals, tools and anything else which is in a material form (which, for the avoidance of doubt, includes information stored in an electronic form);
- (25) **Personnel** means, in relation to a party, any director, employee, agent or subcontractor of that party;
- (26) **Price** means the price set out in Item 2 of Schedule 1, which is payable by the Customer for any Hardware supplied by Encoo;
- (27) **Rates** has the meaning given in clause 5(3) of the Specific Terms;
- (28) **Related Body Corporate** has the same meaning as in the *Corporations Act 2001* (Cth);
- (29) **Service Charges**:
- (a) in respect of the Telecommunications Services, means the Rates; and
 - (b) otherwise means the fees as specified in Item 4 of Schedule 1, which are payable by the Customer for the provision of the Services by Encoo;
- (30) **Service Level** means, in respect of a Service, the service levels for that Service (if any) set out in Schedule 2;

- (31) **Service Level Consequence** means the consequence (if any) set out Schedule 2 in respect of the failure to achieve a Service Level;
- (32) **Service Start Date:**
 - (a) means the date specified in the Contract Details Schedule that a Service is to be provided from; and
 - (b) if no date is specified, means the Start Date;
- (33) **Services** means the services to be provided by Encoo to the Customer as specified in Item 4 of Schedule 1;
- (34) **Specific Terms** means the Specific Terms and Conditions set out in Schedule 4;
- (35) **Start Date** means the date so specified on the first page of this document;
- (36) **Statement of Work** means a statement of work in the form of the template attached as Schedule 5 and entered into by Encoo and the Customer in accordance with the procedure set out in clause 6 of these General Terms;
- (37) **Support and Maintenance Services** means the support and maintenance services, if any, set out in Item 4 of Schedule 1 and being indicated as being provided by Encoo;
- (38) **Telecommunications Services** means the telecommunications services, if any, set out in Item 4 of Schedule 1 and being indicated as being provided by Encoo;
- (39) **Term** means the Initial Term, together with any Further Terms;
- (40) **Third Party Supplier** means any person or entity who supplies or provides Software, Services, Additional Products or Additional Services to Encoo for re-sale (whether alone or bundled with other products or services) to Customers; and
- (41) **Third Party Supply Terms** means the agreement or other terms and conditions on which a Third Party Supplier supplies or provides Software, Services, Additional Products or Additional Services to Encoo for re-sale to Customers.

1.2 Interpretation

- (1) Reference to:
 - (a) the singular includes the plural and the plural includes the singular;
 - (b) a person includes a body corporate;
 - (c) a party includes the party's executors, administrators, successors and permitted assigns;
 - (d) a statute, regulation or provision of a statute or regulation (**Statutory Provision**) includes:
 - (i) that Statutory Provision as amended or re-enacted from time to time; and
 - (ii) a statute, regulation or provision enacted in replacement of that Statutory Provision; and
 - (e) money is to Australian dollars, unless otherwise stated.
- (2) "Including" and similar expressions are not words of limitation.
- (3) Where a word or expression is given a particular meaning, other parts of speech and grammatical forms of that word or expression have a corresponding meaning.
- (4) Headings are for convenience only and do not form part of this Agreement or affect its interpretation.
- (5) 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 the Agreement or the inclusion of the provision in the Agreement.
- (6) If an act must be done on a specified day that is not a Business Day, it must be done instead on the next Business Day.

2 Term

- 2.1 This Agreement commences on the Start Date and continues for the Initial Term unless terminated earlier or extended in accordance with this Agreement.
- 2.2 Unless the Customer notifies Encoo in writing at least 30 days prior to the expiry of the Initial Term or the then-current Further Term (as the case may be) that the Customer does not want to extend this Agreement, the Term of this Agreement will automatically be extended for a Further Term.

3 Software and documentation

- 3.1 From the Service Start Date, Encoo will provide the Customer with access, but only at the Customer Site, to:
 - (1) the Encoo Software through the Hosting Services; and
 - (2) the Encoo Documentation through its website.
- 3.2 Encoo grants to the Customer a non-exclusive, non-transferable licence to access and use the Encoo Software and the Encoo Documentation at the Customer Site for the Term for the Customer's internal business use only.

- 3.3 The Encoo Software and the Encoo Documentation remains the property of Encoo or its licensors (as the case may be). The Customer acknowledges that it does not own any Intellectual Property Rights in the Encoo Software or the Encoo Documentation.
- 3.4 The Customer grants to Encoo a worldwide, royalty-free license for Encoo, its Related Bodies Corporate and its sub-contractors and agents to use, reproduce, publish, adapt, or sub-license the Customer Software for the purpose of providing the Services to the Customer.
- 3.5 The Customer warrants that either:
- (1) it owns, and will retain ownership of, all rights, title and interest in and to the Customer Software; or
 - (2) it has, and will at its own cost maintain, sufficient rights of use in the Customer Software to grant Encoo the rights and licences set out in this Agreement.
- 3.6 In relation to all Encoo Software or Additional Products that are supplied or made available to the Customer under this Agreement, the Customer must not:
- (1) modify, vary, improve or adapt the Encoo Software without Encoo's prior written consent;
 - (2) reverse engineer, disassemble, decompile or otherwise reduce the Encoo Software into any human-readable form, except to the extent authorised by any applicable law; or
 - (3) sub-license, sell or distribute the Encoo Software or any Additional Products.

4 Services

- 4.1 The Customer appoints Encoo as, and Encoo accepts its appointment as:
- (1) the exclusive supplier of Encoo Software; and
 - (2) a non-exclusive supplier of the Services,
- to the Customer for the duration of the Term.
- 4.2 Commencing from the Service Start Date and continuing for the remainder of the Term, Encoo will provide the Services to the Customer for the Customer's use, benefit and enjoyment at the Customer Site.
- 4.3 Unless agreed otherwise by Encoo or permitted elsewhere in this Agreement:
- (1) the Services and any Additional Services are intended for the Customer's internal business use only; and
 - (2) the Customer must not re-sell, on-sell or provide access to the Services or any Additional Services in whatever form to any third party.
- 4.4 Except as set out expressly set out in this Agreement, a Statement of Work or otherwise agreed by the Customer in writing, the Customer will not be required to provide any resources, assistance or other items to Encoo in order for Encoo to perform its obligations under this Agreement or a Statement of Work.

5 Service Levels

- 5.1 Encoo will use its best endeavours to meet the Service Levels (if any) in performing the Services.
- 5.2 Subject to clause 5.3 of these General Terms, if Encoo fails to meet a Service Level, then the Service Level Consequence (if any) in respect of that Service Level will apply. The Service Level Consequences are the Customer's sole and exclusive remedy (and Encoo's entire liability) for any failure by Encoo to meet the applicable Service Level.
- 5.3 Encoo will not be regarded as having failed to achieve a Service Level or to have otherwise breached this Agreement to the extent to which that failure or breach is caused or contributed to by a Customer Supplied Item (including but not limited to the failure of, a defect in or the non-availability of a Customer Supplied Item).
- 5.4 The parties agree that the Service Level Consequences represent a reasonable and genuine pre-estimate of the anticipated or actual loss or damage which would be incurred by the Customer as a result of Encoo not meeting a Service Level. The parties want to avoid the difficulties of proof of damages and agree that the Service Level Consequence (if any) payable to the Customer are reasonable and not a penalty.
- 5.5 Encoo will apply all monetary Service Level Consequences as credits against future invoices issued under this Agreement. If there are any unapplied monetary Service Level Consequences at the expiry or termination of this Agreement, Encoo will pay the Customer the balance as a sum of money on demand.
- 5.6 If no Service Level Consequence is specified in respect of a Service Level, then ordinary legal principles will apply in relation to a failure to meet that Service Level.

6 Additional Products and Additional Services

- 6.1 The Customer may from time to time request the supply of Additional Products and/or Additional Services from Encoo by notifying Encoo of the Customer's requirements (**Change Request**).
- 6.2 A Change Request must contain (as a minimum):
- (1) a detailed explanation and specification of the Additional Products and/or Additional Services that the Customer requires;
 - (2) the desired date of supply for the Additional Products (if relevant); and

(3) the proposed timing (if relevant) of the Additional Services.

6.3 On receipt of a Change Request, Encoo will:

- (1) meet with the Customer on reasonable notice to discuss the Customer's requirements and the Change Request; and
- (2) within a reasonable time (or any time frame agreed between the parties), notify the Customer as to whether Encoo is willing to provide the requested Additional Products and/or Additional Services.

6.4 If Encoo gives notice under clause 6.3(2) of these General Terms that it is willing to provide the requested Additional Products and/or Additional Services, then Encoo will within a reasonable time prepare a draft Statement of Work (in a form substantially similar to that in Schedule 5).

6.5 Within 10 Business Days (or such other period agreed by the parties) of receiving a draft Statement of Work, the Customer must give Encoo a notice in writing (**Response Notice**) whether:

- (1) the Customer accepts the draft Statement of Work;
- (2) the Customer rejects the draft Statement of Work; or
- (3) the Customer wishes to negotiate the draft Statement of Work (in which case the parties must use their reasonable endeavours to negotiate in good faith an agreed Statement of Work within a reasonable timeframe),

provided however that the Customer will be deemed to have rejected the draft Statement of Work if the Customer does not give a Response Notice within the time period specified in this clause.

6.6 If the Customer accepts a draft Statement of Work (either in a Response Notice or after negotiations conducted under clause 6.5(3) of these General Terms), both parties must promptly execute the document. Each Statement of Work that has been executed by the parties will be governed by and subject to, the terms and conditions of this Agreement.

6.7 In respect of each executed Statement of Work:

- (1) Encoo will provide the Additional Products and/or Additional Services as set out in that Statement of Work, in accordance with the terms of the Statement of Work;
- (2) the Customer must pay Encoo the Fees set out in that Statement of Work;
- (3) each party must perform their other obligations described in that Statement of Work (if any); and
- (4) the "Additional Terms" (if any) set out in the Statement of Work will apply, but only in respect of that Statement of Work. The Additional Terms will take precedence over all terms set out in this Agreement.

7 Variation

7.1 Subject to clauses 7.2 and 7.3 of these General Terms, an amendment or variation to this Agreement is not effective unless it is in writing and signed by the parties.

7.2 If at any time during the Term any relevant Third Party Supply Terms are varied or amended, then (unless the variation or amendment relates to any Fees payable, in which case clause 7.3 of these General Terms will apply) Encoo may vary or amend the terms of this Agreement to the extent necessary to give effect to the variation or amendment of the relevant Third Party Supply Terms by giving at least 14 days prior written notice to the Customer of such variation or amendment. The variation or amendment will take effect on the date specified in the notice.

7.3 Subject to clause 7.5, at any time during the Term, Encoo may vary the Fees by giving at least 14 days prior written notice to the Customer. Unless this Agreement is terminated in accordance with clause 7.4 of these General Terms, the variation will take effect on the date specified in the notice.

7.4 The Customer may terminate this Agreement by giving written notice of such termination at any time within 7 days of Encoo giving a notice increasing the Fees under clause 7.3 of these General Terms. If the Customer does not give a notice of termination under this clause within the timeframe specified, then the Customer is deemed to have accepted the variation of the Fees and agrees to pay those Fees when invoiced by Encoo.

7.5 Clauses 7.3 and 7.4 of these General Terms will not apply to any variations in the Rates payable by the Customer in respect of any Telecommunications Services. Instead, clause 10 of the Specific Terms will apply in relation to the Rates for any Telecommunications Services.

8 Customer's obligations

8.1 The Customer must promptly provide information, assistance or access to any of the Customer's premises, facilities or personnel that Encoo reasonably considers to be necessary or desirable to assist Encoo to perform its obligations under this Agreement or a Statement of Work.

8.2 Unless agreed otherwise by the parties in a Statement of Work, the connection, configuration and installation of any Software or Additional Products supplied by Encoo will be sole responsibility of the Customer.

8.3 Except to the extent that Encoo has agreed, under this Agreement or in a Statement of Work, to provide any item or service, the Customer is solely responsible for purchasing, installing, connecting, providing, operating and maintaining any Customer Supplied Items.

8.4 If the Customer wishes to change the location of any Customer Site, then:

- (1) Customer must give Encoo at least 14 days notice in writing of its request to change the location of any Customer Site and must include in such a notice the location of the proposed new Customer Site;

- (2) within 7 days of receipt of a notice from the Customer under clause 8.4(1) of these General Terms, Encoo must notify the Customer in writing if it will be able to provide the Services and any Additional Services to that new Customer Site;
- (3) if Encoo is able to provide all of the Services and all Additional Services to that new Customer Site, then the parties will promptly agree in writing to vary this Agreement to substitute the new Customer Site for the current Customer Site; and
- (4) if Encoo is unable to provide any of the Services, any part of the Services or any Additional Services to that new Customer Site, then Encoo may immediately terminate this Agreement in respect of those Services or any Additional Services that it is unable to provide at that proposed new Customer Site under clause 20.1(3) of these General Terms.

8.5 The Customer must:

- (1) use all reasonable endeavours to keep all passwords used by it in connection with the Services secure;
- (2) comply with the terms of any policies or procedures notified to it by Encoo; and
- (3) comply with all applicable laws relating to the use of the Encoo Software, the Services, any Additional Products and any Additional Services.

9 Personnel

- 9.1 In providing the Services to the Customer, Encoo will only engage Personnel who are appropriately trained, qualified and experienced to perform the duties allocated to them.
- 9.2 Nothing in this Agreement or any Statement of Work creates any employment, contractual or other like relationship between the Customer and any of Encoo's Personnel. Encoo remains responsible at all times under this Agreement and at law for the payment of salaries, wages, fees for services or any statutory entitlements of Encoo's Personnel arising in connection with their performance of the Services.

10 Fee and payment

- 10.1 The Customer will pay the Fees to Encoo as set out in Schedule 1 and in each Statement of Work, as well as any other costs, fees, expenses or other amounts associated with the provision of the Services and notified to the Customer.
- 10.2 Where a Statement of Work or this Agreement specifies that any Services are to be provided so as to achieve any milestones set out in a project plan or similar document, Encoo agrees that it will only invoice the Customer for any Fees upon the achievement of any milestones.
- 10.3 Unless clause 10.2 of these General Terms applies, Encoo will invoice the Customer for the Fees on a monthly basis in arrears. Invoices will be sent by Encoo to the Customer's contact person as specified on the first page of this document.
- 10.4 The Customer must pay all invoices within 14 days of the date of the invoice by electronic funds transfer into Encoo's bank account as specified on the invoice or as otherwise notified by Encoo to the Customer in writing.
- 10.5 All amounts payable by the Customer to Encoo under this Agreement must be paid without set-off or counterclaim of any kind.
- 10.6 If the Customer fails to pay any invoice in full by the due date for payment, then, without limiting Encoo's rights and remedies (including its right to terminate under clause 20.1 of these General Terms):
- (1) Encoo may suspend the provision of any or all of the Services without liability to the Customer (and all Service Levels will not apply during the period of suspension); and
 - (2) the Customer must, on demand, pay Encoo interest calculated at the rate of 12% per annum, calculated and compounded daily, on that amount until the date of payment.
- 10.7 If Encoo suspends the provision of any Services under clause 10.6(1) of these General Terms, then Encoo will only be obliged to reinstate the suspended Service(s) within a reasonable time of full payment by the Customer of all outstanding invoices, together with the interest (if any) demanded by Encoo under clause 10.6(2) of these General Terms.

11 Goods and services tax

- 11.1 In this clause 11:
- (1) words or expressions used in this clause which have a particular meaning in the GST Law have the same meaning, unless the context otherwise requires;
 - (2) any reference to GST payable by a party includes any corresponding GST payable by the representative member of any GST group of which that party is a member;
 - (3) any reference to an input tax credit entitlement by a party includes any corresponding input tax credit entitlement by the representative member of any GST group of which that party is a member; and
 - (4) if the GST Law treats part of a supply as a separate supply for the purpose of determining whether GST is payable on that part of the supply or for the purpose of determining the tax period to which that part of the supply is attributable, such part of the supply is to be treated as a separate supply.
- 11.2 Unless GST is expressly included, the consideration to be paid or provided under any other clause of this Agreement for any supply made under or in connection with this Agreement does not include GST.
- 11.3 To the extent that any supply made under or in connection with this Agreement is a taxable supply, the GST exclusive consideration to be paid or provided for that taxable supply is increased by the amount of any GST payable in respect of that taxable supply and that amount must be paid at the same time and in the same manner as the GST exclusive consideration is to be paid or provided.

11.4 A party's right to payment under clause 11.3 of these General Terms is subject to a valid tax invoice being delivered to the party who is the recipient of the taxable supply.

11.5 To the extent that a party is required to reimburse or indemnify another party for a loss, cost or expense incurred by that other party, that loss, cost or expense does not include any amount in respect of GST for which that other party is entitled to claim an input tax credit.

12 Warranties and disclaimers

12.1 Encoo warrants that:

- (1) it will perform all Services under the Agreement:
 - (a) in a professional and timely manner;
 - (b) with reasonable care and skill; and
 - (c) otherwise in accordance with the Agreement;
- (2) it has all necessary licences, permits and consents to enter into and to perform the Services and has full capacity to grant the licence to use the Encoo Software to the Customer;
- (3) the Encoo Software and the use and enjoyment of the Services by the Customer does not infringe the Intellectual Property Rights of any person; and
- (4) it will comply with all applicable laws while providing the Services.

12.2 The Customer acknowledges and agrees that Encoo has not made any warranty, representation or undertaking, and Encoo expressly disclaims any warranty, representation or undertaking, that the Encoo Software, the Support and Maintenance Services and the Hosting Services will be free from:

- (1) error, defect, fault or interruption; or
- (2) virus or worm attack, denial of services attack, unauthorised intrusions or similar.

12.3 The Customer warrants that the Customer Software and its hosting and use by Encoo do not infringe the Intellectual Property Rights of any person.

13 Confidentiality

13.1 A party must not, without the prior written approval of the other party, disclose the other party's Confidential Information or use the other party's Confidential Information other than for the purposes of this Agreement.

13.2 A party is not in breach of clause 13.1 of these General Terms if:

- (1) it is required by law to disclose the other party's Confidential Information;
- (2) the information disclosed is generally available to the public (other than as a result of the wrongful disclosure by the party);
- (3) the party obtained the Confidential Information from a third party on non-confidential basis without breach by that third party of any obligation of confidence concerning the Confidential Information; or
- (4) the Confidential Information was already in the party's possession (as evidenced by written records) when provided by or on behalf of the other party.

13.3 Each party:

- (1) may disclose the other party's Confidential Information to officers, employees and agents, and any subcontractors engaged for the purposes of this Agreement, for the purpose of performing that party's obligations under this Agreement;
- (2) must take all reasonable steps to ensure that its officers, employees and agents, and any subcontractors engaged for the purposes of this Agreement, do not make public or disclose the other party's Confidential Information or use the other party's Confidential Information other than for the purposes of this Agreement; and
- (3) agrees that a breach by that party's officers, employees, agents or subcontractors of such obligations of confidence will be deemed to be a breach of this Agreement by that party.

13.4 Despite any other provision of this clause 13, each party may disclose the terms of this Agreement (other than Confidential Information of a technical nature) to its Related Bodies Corporate, solicitors, auditors, insurers or accountants, but must ensure that every person to whom that disclosure is made uses that information solely for the purposes of advising or reporting to the party.

13.5 Each party acknowledges that:

- (1) a breach of this clause 13 would be harmful to the business interests of the party whose Confidential Information is disclosed;
- (2) monetary damages alone would not be a sufficient remedy for a breach of this clause 13; and
- (3) in addition to any other remedy which may be available in law or equity, the party whose Confidential Information is disclosed is entitled to interim, interlocutory and permanent injunctions or any of them to prevent breach of this clause 13 and to compel specific performance of it.

13.6 Each Party's obligations and undertakings under this clause 13 continue indefinitely and are not diminished or terminated by the expiry or termination for any reason of this Agreement.

14 Privacy

14.1 In this clause 14:

- (1) **Personal Information** has the meaning given in section 6 of the Privacy Act; and
- (2) **Privacy Act** means the *Privacy Act 1988* (Cth).

14.2 The Customer agrees to comply with its obligations contained in the Privacy Act in relation to the collection of Personal Information which it collects and discloses to Encoo under this Agreement.

14.3 The Customer agrees that Personal Information about the Customer or its Personnel may be used and disclosed by Encoo for any purpose connected with the supply to the Customer of Software, Services, Additional Products or Additional Services by Encoo, including in relation to conducting credit checks on the Customer. The Customer acknowledges and agrees that Encoo may disclose such Personal Information:

- (1) to Third Party Suppliers, to the extent necessary to enable by Encoo to supply any Software, Services, Additional Products or Additional Services; and
- (2) third party credit reporting agencies in accordance with the requirements of the Privacy Act.

15 Intellectual Property Rights

15.1 Nothing in this Agreement affects the ownership of any Intellectual Property Rights owned by either party prior to the Start Date.

15.2 The parties acknowledge and agree that any Intellectual Property Rights in any Materials created or developed by Encoo in the course of providing the Services (**Developed Materials**) will be owned by Encoo from the date of such creation or development.

15.3 Encoo grants to the Customer a non-exclusive, non-transferrable, royalty-free licence to use and copy the Developed Materials for the duration of Term, but only to the limited extent necessary for the Customer to enjoy the full benefit of the Services.

16 Indemnity

16.1 The Customer will indemnify Encoo against any loss, costs (including legal costs on a solicitor/own client basis), expenses, demands or liability arising out of or in connection with:

- (1) a breach of the warranty given by the Customer in clause 12.3 of these General Terms; or
- (2) any act or omission of the Customer that causes Encoo to breach any agreement it may have with, or otherwise incur any liability to, any Third Party Supplier.

16.2 Subject to the Customer complying with clause 16.3 of these General Terms and the limitations and exclusions in clause 17 of these General Terms, Encoo will indemnify the Customer against any loss, costs (including legal costs on a solicitor/own client basis), expenses, demands or liability directly arising out of a claim by a third party against the Customer alleging that the Encoo Software or the Services infringes any Intellectual Property Rights of such third party (**IP Claim**).

16.3 If an IP Claim is made against the Customer:

- (1) the Customer must promptly notify Encoo of the IP Claim;
- (2) the Customer must not make any concessions or otherwise prejudice Encoo's position in relation to the IP Claim;
- (3) the Customer must, on request, provide all reasonably requested information and assistance to Encoo to defend such the IP Claim (at the cost and expense of Encoo); and
- (4) the Customer gives Encoo the right to defend and settle the IP Claim (at Encoo's own cost).

16.4 If an IP Claim is successful, or if it is agreed that there is an infringement of the Intellectual Property Rights of the relevant person, then Encoo may (at its cost and discretion):

- (1) modify the affected part of the Encoo Software or the Services (but without adversely affecting its functionality or performance) to render it, or its use, non-infringing; or
- (2) render the relevant activity non-infringing by procuring the right or consent to exercise the relevant Intellectual Property Rights.

16.5 The liability of Encoo under clause 16.2 of these General Terms is reduced to the extent that the infringement of Intellectual Property Rights or the IP Claim is attributable to the Customer Software or any other Materials provided to Encoo by the Customer.

17 Liability

17.1 Despite any other provision of this Agreement and to the maximum extent permitted by applicable law, Encoo will not be liable (including under an indemnity) to the Customer in respect of any indirect or consequential loss (including economic and financial loss) incurred or sustained by the Customer party as a result of any act or omission of Encoo or its officers, employees, sub-contractors or agents or any breach by a party of this Agreement. For the purpose of this clause 17.1:

- (1) it is agreed that the following losses are not included in the term indirect or consequential loss:
 - (a) property damage or loss or losses arising from third party claims in respect of property damage, personal injury, illness (including mental illness), nervous shock or death;
 - (b) a party's liability to:

- (i) to pay any amount of any fees required by this Agreement (including any interest and GST on any such fees); and
 - (ii) to reimburse any costs or expenses required by this Agreement to be paid or reimbursed by it (including under an indemnity) to the other party in relation to its performance of its obligations under this Agreement (which expressly includes any interest and GST on any costs or expenses); and
 - (c) payment of liquidated sums under this Agreement; and
 - (2) it is agreed that the following losses are included in the term indirect or consequential loss: loss of profits, loss of anticipated earnings or savings, loss of business or goodwill, loss of business opportunity, loss of production or loss of data.
- 17.2 Subject to clause 17.3 of these General Terms and any laws the application of which may not be lawfully excluded, Encoo's total liability to the Customer (including under an indemnity given by Encoo in this Agreement) arising out of this Agreement or the use of any Encoo Software or Services by the Customer will not exceed the amount paid by the Customer for the Encoo Software or Services.
- 17.3 All statutory or implied conditions, guarantees and warranties are excluded by Encoo to the maximum extent permitted by applicable law. To the extent permitted by law, liability under any condition, guarantee or warranty which cannot legally be excluded is limited to:
- (1) in the case of goods (including the Encoo Software and any Additional Products):
 - (a) the replacement of the goods or the supply of equivalent goods;
 - (b) the repair of the goods;
 - (c) the payment of the cost of replacing the goods or of acquiring equivalent goods; or
 - (d) the payment of the cost of having the goods repaired; and
 - (2) in the case of the services (including the Services and any Additional Services):
 - (a) supplying the services again; or
 - (b) paying the cost of having the services supplied again.

18 Force Majeure

- 18.1 If a party to this Agreement is affected, or likely to be affected, by a Force Majeure Event:
- (1) that party must promptly give the other party notice in writing of that fact and include the following details:
 - (a) full particulars of the Force Majeure Event;
 - (b) an estimate of the likely duration of the Force Majeure Event;
 - (c) the obligations affected by the Force Majeure Event and the extent of its effect on those obligations; and
 - (d) the steps taken to rectify the Force Majeure Event; and
 - (2) the obligations under this Agreement of the party giving the notice are suspended to the extent to which they are affected by the relevant Force Majeure Event as long as the Force Majeure Event continues.
- 18.2 A party claiming a Force Majeure Event must use commercially reasonable endeavours to remove, overcome or minimise the effects of that Force Majeure Event as quickly as possible. However, this does not require a party to settle any industrial dispute in any way it does not want to.

19 Dispute resolution

- 19.1 Subject to clause 19.2 of these General Terms, the parties must use their respective best endeavours to resolve in good faith any dispute, difference or disagreement arising out of or in connection with this Agreement (Dispute). Each party must follow the procedures in this clause before starting court proceedings (except for urgent injunctive or similar interim relief).
- 19.2 Nothing in this clause 19 prevents a party seeking urgent injunctive or similar interim relief from a court.
- 19.3 Despite the existence of a Dispute, the parties must continue to perform their other obligations under this Agreement that are not affected by the Dispute.
- 19.4 Any party (**Initiating Party**) claiming that a Dispute has arisen must give the other party (**Recipient Party**) a notice in writing setting out brief details of the Dispute (**Dispute Notice**).
- 19.5 If the Customer is the Initiating Party and the Dispute relates to the payment of an invoice, then at the same time that the Customer gives a Dispute Notice the Customer must also deposit the disputed amount of the invoice in an interest-bearing account in the joint names of Encoo and the Customer. Upon the resolution of the Dispute, this amount, together with any interest earned, will be paid out as determined or agreed in accordance with this clause. Clause 22.3 of these General Terms applies in relation to such steps and actions as are necessary to give effect to this clause.
- 19.6 Within 10 Business Days of service of a Dispute Notice, the Recipient Party must give the Initiating Party a notice in writing setting out brief details of the Recipient Party's position on the Dispute (**Reply Notice**).
- 19.7 If a Dispute Notice and Reply Notice are given, the parties must make representatives with authority to settle the Dispute available for the purpose of meeting in an effort to resolve the Dispute. At least one meeting of the authorised representatives must take place within 15 Business Days of service of a Reply Notice.

19.8 If:

- (1) the Dispute is not resolved in accordance with clause 19.7 of these General Terms within 20 Business Days after the Reply Notice is given; or
- (2) the Recipient Party does not:
 - (a) give a Reply Notice within 10 Business Days of service of a Dispute Notice; or
 - (b) make its authorised representative available for a meeting within 15 Business Days of service of a Dispute Notice,

then the parties by this clause agree to refer the Dispute to mediation, to be conducted in Melbourne, Victoria and administered by the Australian Commercial Disputes Centre according to its Mediation Guidelines. These Guidelines set out the procedures to be adopted, the process of selection of the mediator and the costs involved.

19.9 If the Dispute is not settled within 28 days after the appointment of the mediator, then either party may commence legal proceedings in relation to the Dispute.

20 Termination

20.1 Encoo may, without incurring any liability whatsoever to the Customer, cease providing any particular Service or Additional Service (or part of a Service or Additional Service):

- (1) immediately, if it becomes illegal for Encoo to provide that particular Service or Additional Service (or part of a Service or Additional Service);
- (2) immediately, if:
 - (a) the relevant Third Party Supplier is the subject of an Insolvency Event; or
 - (b) the Third Party Supply Terms between Encoo and the relevant Third Party Supplier are:
 - (i) terminated or expires for any reason; or
 - (ii) varied or amended by the Third Party Supplier by notice to Encoo and such variation or amendment, in Encoo's reasonable opinion, would result in a detrimental impact on Encoo's rights or obligations under this Agreement; or
- (3) by giving as much notice in writing as is reasonably possible if Encoo otherwise ceases to provide, or is otherwise unable to provide, any particular Service or Additional Service (or part of a Service or Additional Service).

20.2 Encoo may, without incurring any liability whatsoever to the Customer, terminate this Agreement immediately upon the expiry of 30 days from the date of notice in writing to the Customer of its intention to terminate this Agreement under this clause 20.2.

20.3 The Customer may terminate this Agreement immediately upon the expiry of 30 days from the date of notice in writing to Encoo of its intention to terminate this Agreement under this clause 20.3, provided however that if the Customer gives a notice under this clause during the Initial Term, then it must pay any Early Termination Charges (if applicable) to Encoo.

20.4 The other party may terminate this Agreement at any time by written notice to a party (**Defaulting Party**) if any of the following apply:

- (1) the Defaulting Party fails to carry out any provision of this Agreement, the failure is capable of remedy and the Defaulting Party does not remedy that failure within 14 days after written notice to the Defaulting Party requiring it to be remedied;
- (2) the Defaulting Party fails to carry out any material provision of this Agreement and the failure is not capable of remedy;
- (3) the Defaulting Party fails to carry out any provision of any agreement to which both it and the other party to this Agreement are parties, in existence or entered into after this Agreement, the failure is capable of remedy and the Defaulting Party does not remedy that failure within 7 days after notice to the Defaulting Party requiring it to be remedied; or
- (4) an Insolvency Event occurs in relation to the Defaulting Party.

20.5 On termination of this Agreement under clause 20.2 of these General Terms each party retains its rights against the other party in respect of any past breach, in addition to any other rights, powers or remedies provided by law.

20.6 Upon the expiry or termination of this Agreement for any reason:

- (1) Encoo's obligation to provide any Software or Services immediately ceases;
- (2) any Statements of Work issued under clause 6 of these General Terms immediately terminate and Encoo's obligations to provide any Additional Products and/or Additional Services immediately ceases;
- (3) the licences granted under clause 3 of these General Terms immediately cease;
- (4) Encoo may charge a reasonable sum for Services performed but for which no Fees have been previously charged; and
- (5) any outstanding Fees that have not been paid by the Customer become immediately due and payable.

20.7 Clauses of this Agreement that are expressed or intended to survive termination will survive termination or expiry of this Agreement.

21 Notices

21.1 A notice or other communication connected with this Agreement (**Notice**) has no legal effect unless it is in writing.

21.2 In addition to any other method of service provided by law, the Notice may be:

- (1) sent by prepaid post to the address of the addressee set out in this Agreement or subsequently notified;
- (2) sent by facsimile to the facsimile number of the addressee set out in this Agreement or subsequently notified;
- (3) sent by electronic mail to the electronic mail address of the addressee set out in this Agreement or subsequently notified; or
- (4) delivered at any physical address of the addressee set out in this Agreement or subsequently notified.

21.3 A Notice must be treated as given and received:

- (1) if sent by post, on the 2nd Business Day (at the address to which it is posted) after posting;
- (2) if sent by facsimile or electronic mail before 5pm on a Business Day at the place of receipt, on the day it is sent and otherwise on the next Business Day at the place of receipt; or
- (3) if otherwise delivered before 5pm on a Business Day at the place of delivery, upon delivery, and otherwise on the next Business Day at the place of delivery.

21.4 Despite clause 21.3(2) of these General Terms:

- (1) a facsimile is not treated as given or received unless at the end of the transmission the sender's facsimile machine issues a report confirming the transmission of the number of pages in the Notice; and
- (2) an electronic mail message is not treated as given or received if the sender's computer reports that the message has not been delivered.

21.5 A Notice sent or delivered in a manner provided by clause 21.2 of these General Terms must be treated as validly given to and received by the party to which it is addressed even if:

- (1) the addressee has been liquidated or deregistered or is absent from the place at which the Notice is delivered or to which it is sent;
- (2) the Notice is returned unclaimed; or
- (3) in the case of a Notice sent by electronic mail, the electronic mail message is not delivered or opened (unless the sender's computer reports that it has not been delivered).

22 General

22.1 Assignment and novation

Neither party may assign or otherwise deal with this Agreement without the prior written consent of the other party (not to be unreasonably withheld or delayed).

22.2 Independent contractors

Encoo and the Customer are each independent contractors, and no agency, partnership, joint venture or employee-employer relationship is intended or created by this Agreement. Neither party has the power to obligate or bind the other party. Personnel supplied by Encoo work exclusively for Encoo and will not, for any purpose, be considered employees or agents of the Customer and vice versa.

22.3 Further assurance

Each party must promptly at its own cost do all things (including executing all documents and providing all information) that are necessary or desirable to give full effect to this Agreement.

22.4 Severability

If any provision in this Agreement is unenforceable, illegal or void or makes this Agreement or any part of it unenforceable, illegal or void, then that provision is severed and the rest of this Agreement remains in force.

22.5 Entire understanding

- (1) This Agreement (together with each Statement of Work) is the entire agreement and understanding between the parties on everything connected with the subject matter of this Agreement and Statements of Work and supersedes any prior agreement or understanding on anything connected with that subject matter.
- (2) Each party has entered into this Agreement without relying on any representation by any other party or any person purporting to represent that party.
- (3) Without limiting clause 22.5(2) of these General Terms, Encoo expressly excludes any representations (whether through the use of the calculator hosted on Encoo's website at <http://www.encoo.com.au/plans-rates/> or otherwise) in relation to any cost savings or reduction in expenses that a Customer may make as a consequence of acquiring the Encoo Software, the Services, any Additional Products or any Additional Services from Encoo.

22.6 Subcontracting

Encoo may subcontract the performance of this Agreement or any part of it at its discretion and without prior notice to the Customer. However, Encoo remains fully responsible for the performance of its obligations under this Agreement and must continue to comply with each and every one of its obligations under this Agreement.

22.7 Waiver

A party's failure or delay to exercise a power or right does not operate as a waiver of that power or right. The exercise of a power or right does not preclude either its exercise in the future or the exercise of any other power or right. A waiver is not effective unless it is in writing. Waiver of a power or right is effective only in respect of the specific instance to which it relates and for the specific purpose for which it is given.

22.8 Costs and disbursements

Each party must pay its own costs and outlays connected with the negotiation, preparation and execution of this Agreement.

22.9 Governing law and jurisdiction

The law in force in the State of Victoria governs this Agreement. The parties submit to the jurisdiction of the courts exercising jurisdiction in the State of Victoria and any court that may hear appeals from any of these courts, for any proceedings in connection with this Agreement.

22.10 Financial Hardship

- (1) The Telecommunications Consumer Protections Code C628:2015 defines Financial Hardship as a situation where a customer is unable to discharge of the financial obligations in relation to our services but where the customer expects to be able to do so over time if payment arrangements are changed.
- (2) We encourage you to contact us if you experience any difficulties paying our services. Please contact us by calling 03 8740 2278 if you would like to discuss any Financial Hardship matters with us. You can do so from 9am – 5pm during business hours.
- (3) When assessing your eligibility for Financial Hardship, we may ask you to provide certain documents such as
 - A statutory declaration or official written communication from a person or support group that is familiar with your circumstances,
 - Evidence that you consulted a recognised financial counsellor,
 - A statement of your financial position.

We may not be able to make an assessment of your circumstances if you do not provide us with the requested information. We may use the information you provide as well as other information available to us. Once we received all required information, we will let you know within 7 working days whether you are eligible for assistance under our Financial Hardship Policy.

If you are eligible, will work with you to come to an arrangement that allows you to pay your outstanding charges in a way that does not worsen your financial position. Where appropriate we will discuss means with you how to limit your spend (this may include barring some service features) during the time of our arrangement and thereafter.

Once we come to an agreement we will put this in writing via letter or email to you. You must inform us if your circumstances change (for better or for worse) during our arrangement.

We will not charge you for assessing your Financial Hardship circumstances or for administering the matter.

- (4) You can talk to a phone financial counsellor from anywhere in Australia by ringing 1800 007 007 (minimum opening hours are 9.30 am – 4.30 pm Monday to Friday). This number will automatically switch through to the service in the State or Territory closest to you.

Alternatively, you can find the financial counselling service nearest to you by visiting <http://www.financialcounselingaustralia.org.au/Corporate/Find-a-Counsellor>.

Schedule 1 – Specific Terms and Conditions

Part A Supply of Hardware and Encoo Software

1 Application of this Part

This Part A of the Specific Terms will only apply where the Contract Details Schedule specifies that Encoo is to supply Encoo Software or Hardware to the Customer.

2 Supply of Hardware

- 2.1 Encoo will supply the Hardware to the Customer at the Prices listed in the Contract Details Schedule.
- 2.2 Encoo will, at the Customer's cost, use its best endeavours to deliver the Hardware and any associated Encoo Documentation to the Customer Site by the delivery date specified in Item 2 of the Contract Details Schedule. Delivery times listed in the Contract Details Schedule are estimates only and Encoo will not be liable for any loss, damage or delay suffered or incurred by the Customer arising from late or partial delivery of any Hardware. Late or partial delivery of Hardware will not entitle the Customer to reject delivery of the Hardware.
- 2.3 Encoo will issue an invoice to the Customer for the Price at the time that it delivers, or has delivered, the Hardware to the Customer.
- 2.4 Risk of loss and damage to the Hardware and the Encoo Documentation will pass to the Customer upon delivery. Title to the Hardware will only pass to the Customer upon full payment of the Price.
- 2.5 To the full extent permitted by law, Encoo expressly excludes all warranties, conditions and representations, whether express or implied, in relation to the Hardware (including as to performance, quality or fitness for use or purpose, non-infringement of Intellectual Property Rights or that the Hardware will be free from defects).
- 2.6 Certain legislation may imply warranties or conditions or impose obligations upon Encoo which cannot be excluded, restricted or modified except to a limited extent. These Specific Terms must be read subject to those statutory provisions. If those statutory provisions apply, to the extent to which Encoo is able to do so, its liability will be limited, at its option, to:
 - (1) replacement of the Hardware or supply of equivalent goods;
 - (2) repair of the Hardware;
 - (3) payment of the cost of replacing the Hardware or acquiring equivalent goods; or
 - (4) payment of the cost of having the Hardware repaired.

3 Supply of Encoo Software

- 3.1 Encoo grants the Customer a non-exclusive, non-transferable licence to use the Encoo Software and the Encoo Documentation for the Term.
- 3.2 Encoo will:
 - (1) if the Encoo Software is to be hosted by Encoo, make the Encoo Software available through the Hosting Service; or
 - (2) otherwise deliver the Encoo Software to the Customer by:
 - (a) electronic transmission to the Customer's computer systems;
 - (b) making available the Encoo Software for download on its website; or
 - (c) delivering physical media containing the Encoo Software to the Customer.
- 3.3 Unless the Encoo Software is to be hosted as part of the Hosting Services, the Customer will be responsible for installing the Encoo Software on its computer systems.
- 3.4 Unless agreed otherwise in a Statement of Work, Encoo will have no obligations to develop, integrate, install or test any Encoo Software for the Customer.
- 3.5 Unless the Customer acquires Support and Maintenance Services from Encoo, Encoo will have no obligation to support the Encoo Software (including correction of any defects or errors) or to provide updates or patches for, or to otherwise maintain, the Encoo Software.
- 3.6 The Encoo Software is provided to the Customer 'as is'. To the full extent permitted by law, Encoo expressly excludes all warranties, conditions and representations, whether express or implied, in relation to the Encoo Software (including as to performance, quality or fitness for use or purpose, non-infringement of Intellectual Property Rights or that the Encoo Software will be free from defects, faults or errors).
- 3.7 Certain legislation may imply warranties or conditions or impose obligations upon Encoo which cannot be excluded, restricted or modified except to a limited extent. These Specific Terms must be read subject to those statutory provisions. If those statutory provisions apply, to the extent to which Encoo is able to do so, its liability will be limited, at its option, to:
 - (1) replacement of the Encoo Software or supply of equivalent software;
 - (2) rectification of any defects of the Encoo Software;
 - (3) payment of the cost of replacing the Encoo Software or acquiring equivalent software; or
 - (4) payment of the cost of having any defects in the Encoo Software rectified.

Part B Telecommunications Services

4 Application of this Part

This Part B of the Specific Terms will only apply where the Contract Details Schedule specifies that Encoo is to provide Telecommunications Services to the Customer.

5 Additional definitions

In this Part B:

- (1) **DID Number** means the direct inward dialling telephone number(s) allocated to the Customer by Encoo for use in connection with the Customer's VOIP Connection;
- (2) **Internet Connection** means a telecommunications connection to the Internet, as provided to the Customer by Encoo;
- (3) **Rates** means Encoo's fees and rates for providing the Telecommunications Services as set out on Encoo's website at <http://www.encoo.com.au/plans-rates/> and updated by Encoo from time to time;
- (4) **ROU Code** means Communications Alliance Ltd's Code on the Rights of Use of Numbers (C566:2004);
- (5) **Telecommunications Laws** means:
 - (a) the *Telecommunications Act 1997* (Cth);
 - (b) the *Telecommunications Number Plan 1997* (Cth);
 - (c) the *Telecommunications (Consumer Protection and Service Standards) Act 1999* (Cth); and
 - (d) the ROU Code; and
- (6) **VOIP Connection** means a voice-over-internet-protocol connection that allows the Customer to make and receive telephone calls over Encoo's computer networks and system and which is capable of connecting to a public switched telephone network.

6 Service requirements

- 6.1 Encoo's provision of the VOIP Connection and the Customer's ability to use the VOIP Connection is conditional upon the Customer having an internet connection of at least 64kpbs upload and 64kpbs download per voice channel and either:
 - (1) a voice over internet protocol (VOIP) telephone handset connected to an Internet connection; or
 - (2) a soft phone capability on the Customer's computer.
- 6.2 Unless Encoo also provides an Internet Connection to the Customer under this Agreement, Encoo is not responsible for, and to the maximum extent permitted by law excludes all liability for, the Customer's inability to access or use its VOIP Connection due to a failure in, or degradation of performance of, the Customer's Internet connectivity.
- 6.3 The Customer acknowledges and agrees that any person who the Customer allows to make telephone calls using the VOIP Connection is deemed to be authorised by the Customer to make those calls and the Customer will be responsible for all charges incurred by such persons.

7 Voice Over Internet Protocol

- 7.1 If specified in the Contract Details Schedule, Encoo will:
 - (1) provide the VOIP Connection to the Customer; and
 - (2) allocate DID Numbers to the Customer.
- 7.2 If requested by the Customer, Encoo will use its reasonable endeavours to 'port' any DID Numbers in accordance with the requirements of the ROU Code.
- 7.3 Unless Encoo has expressly agreed in the Contract Details Schedule to provide such, the Customer will be solely responsible for providing the telecommunications connections, modem, computer, hardware, software and all other equipment required to access and use the VOIP Connection.

8 Internet connectivity

- 8.1 If specified in the Contract Details Schedule, Encoo will:
 - (1) provide the Customer with the Internet Connection by such means as Encoo determines;
 - (2) use its best endeavours to provide the Internet Connection on a continuous basis during the Term of this Agreement. Encoo will endeavour to inform the Customer if the Internet Connection is unavailable for access and use by the Customer due to maintenance or fault; and
 - (3) provide the Customer with all identification and log-in information required to access and use the Internet Connection.
- 8.2 Unless Encoo has expressly agreed in the Contract Details Schedule to provide such, the Customer will be solely responsible for providing the telephone line (or other telecommunications connection), modem, computer, hardware, software and all other equipment required to access and use the Internet Connection.

- 8.3 Encoo may, at its discretion, retain and assess any data or information concerning the Customer's use of the Internet Connection.
- 8.4 The Customer acknowledges that Encoo does not and cannot in any way supervise, edit or control the content and form of any information or data accessed through the Internet Connection and that Encoo will not be held responsible for, and to the maximum extent permitted by law excludes all liability for, any content or information accessed via the Internet Connection.
- 8.5 Encoo excludes all or any liability for any material on the Internet that the Customer or its Personnel finds offensive, upsetting, defamatory, personally offensive or in any way unsuitable for persons under the age of 18.

9 Duration

- 9.1 Encoo will:
- (1) provide the Telecommunications Services to the Customer in accordance with the Agreement for the Initial Term, unless the Telecommunications Services are terminated in accordance with this Agreement; and
 - (2) if neither party cancels the Telecommunications Services before the end of the Initial Term, continue to supply the Telecommunications Services to the Customer on a month-to-month basis in accordance with this Agreement until those Telecommunications Services are cancelled or terminated in accordance with this Agreement.
- 9.2 After the expiry of the Initial Term, either party may cancel any of the Telecommunications Services by giving 30 days prior written notice to the other.

10 Rates

- 10.1 At any time during the Term of this Agreement, Encoo may vary the Rates by giving at least 21 days prior notice to the Customer.
- 10.2 If the Customer receives a notice under clause 10.1 of these Specific Terms (**Rates Change Notice**), then Customer may by notice in writing to Encoo terminate this Agreement in relation to any Telecommunications Services affected by the Rates Change Notice within 42 days of the date of the Rates Change Notice without incurring any additional charges (including Early Termination Charges, if applicable) other than normal usage or network access charges up until the effective date of termination of the Telecommunications Services affected by the Rates Change Notice.

11 Use

- 11.1 Unless Encoo expressly provides the Telecommunications Services to the Customer for re-sale, the Customer must not distribute, re-sell, wholesale, offer to distribute, re-sell or wholesale or otherwise provide access to the Telecommunications Services (or part of the network or system involved in the provision of the Telecommunications Services) to any third parties who are not the Personnel of the Customer.
- 11.2 When using the Telecommunications Services, the Customer must comply with:
- (1) all applicable laws, including the Telecommunications Laws;
 - (2) all applicable directions by the Australian Communications and Media Authority; and
 - (3) all reasonable written directions or policies issued by Encoo to the Customer relating to the use of the Telecommunications Services.
- 11.3 The Customer must not use, or attempt to use, the Telecommunications Services:
- (1) to break any law or to infringe another person's rights, including any Intellectual Property Rights;
 - (2) to transmit, publish or communicate material which is defamatory, offensive, abusive, indecent, menacing, unwanted or otherwise unlawful or unauthorised
 - (3) in any way that may expose Encoo to liability; or
 - (4) in any way which or which may damage, interfere with or interrupt the Telecommunications Services, Encoo's network or a supplier's network used to supply the Telecommunications Service.
- 11.4 The Customer must ensure that all equipment used in connection with the Telecommunications Service and the way the Customer uses that equipment complies with:
- (1) all applicable laws, including the Telecommunications Laws;
 - (2) all applicable directions by the Australian Communications and Media Authority; and
 - (3) all reasonable written directions issued by Encoo to the Customer.

12 Privacy

- 12.1 The Customer acknowledges that Encoo, or any supplier whose network is used to supply the Telecommunications Service, may be required to intercept communications over the Telecommunications Service and may also monitor the Customer's usage of the Telecommunications Service and communications sent over it.
- 12.2 Encoo may be permitted or required by applicable laws to collect, use or disclose personal information about the Customer, including to:
- (1) the operator of the Integrated Public Number Database, which is an industry wide database of all listed and unlisted public numbers in Australia;
 - (2) emergency services organisations; and

(3) law enforcement agencies and government agencies for purposes relating to the enforcement of criminal and other laws.

13 Complaints and disputes

13.1 You have a right to complain, and if you do we will deal with your complaint in a fair, efficient, objective manner and through a transparent process. We strive to solve any problems you may have during your first contact with us.

Our complaint handling process complies with the requirements of the Telecommunications Consumer Protections Code C628:2015 (TCP Code) and responsibility for compliance with the process lies with our Chief Executive Officer.

13.2 If the Customer has any complaints in connection with any Telecommunications Service the Customer may complain in writing or by calling Encoo via admin@encoo.com.au or 03 8740 2278

13.3 We will not charge you for dealing with your complaint in most instances, and we will never charge you without telling you first.

13.4 We may charge you to recover our costs in very specific circumstances only, i.e. we may charge you where you request information that was collected more than two years ago or where you request information that is not free of charge as per our Standard Form Customer Contract or our Critical Information Summary.

13.5 If cost recovery charges apply, we will tell you before charging you (and you may of course choose not to pay and discontinue your complaint) and we will inform you about your options for external dispute resolution, e.g. the Telecommunications Industry Ombudsman (TIO).

13.6 Encoo will use its best endeavours to resolve all complaints, however if Encoo is not able to resolve a complaint to the Customer's satisfaction, the Customer may take other action, such as informing the Telecommunications Industry Ombudsman or the Department of Fair Trading or Department of Consumer Affairs in the relevant state or territory.

14 Telecommunications Service Levels

14.1 Encoo will provide the Telecommunications Services to the Customer in accordance with Service Levels (if any) specified in clause 1 of Schedule 2.

14.2 If no Service Levels are specified for a particular Telecommunications Service, then Encoo is only obliged to perform that Service in accordance with the General Terms.

Part C Hosting Services

15 Application of this Part

This Part C of the Specific Terms will only apply where the Contract Details Schedule specifies that Encoo is to provide Hosting Services to the Customer.

16 Provision of Hosting Services

16.1 Encoo will:

- (1) at its own cost, arrange for the installation of the Encoo Software and any agreed Customer Software on Encoo's systems, which are located at its data centre, located in North Melbourne, Victoria, Australia (**Designated Equipment**);
- (2) bear sole responsibility for the operation and maintenance of the Designated Equipment and any software, hardware or utilities necessary for the operation of the Designated Equipment and the provision of the Hosting Services; and
- (3) use its best endeavours to ensure that sufficient capacity is at all times maintained on the Designated Equipment and its other computer facilities to enable the Customer's Personnel to use and access the Encoo Software and any agreed Customer Software in accordance with the Service Levels set out in clause 18 of these Specific Terms.

16.2 The Customer must provide (or acquire from Encoo) any and all equipment (including telecommunications connections, equipment, computer hardware and software and any ancillary services) necessary to receive the benefit of the Hosting Services.

16.3 Subject to clause 16.5 of these Specific Terms, Encoo does not warrant that the Customer or its personnel will have continuous access to the Encoo Software and any agreed Customer Software. Encoo will not be liable in the event that the Encoo Software or any agreed Customer Software is unavailable to the Customer or its personnel due to computer downtime attributable to malfunction, upgrades or preventative or remedial maintenance activities. However, Encoo will use its best endeavours to promptly notify the Customer when the Encoo Software or any agreed Customer Software is unavailable as soon as Encoo becomes aware of such an occurrence.

16.4 Subject to clause 16.5 of these Specific Terms, the Hosting Services do not include maintenance or support of the Encoo Software and any agreed Customer Software. Without limiting the foregoing, Encoo accepts no responsibility for any loss, deficiency or inaccuracy in the Encoo Software and any agreed Customer Software attributable to a lack of maintenance or support.

16.5 Where the Customer acquires Support and Maintenance Services, Encoo will support and maintain the Encoo Software in accordance with Part D of these Specific Terms but will have no obligation to support or maintain any Customer Software.

17 No acceptance testing

17.1 If the Customer wishes for any of the Services, Encoo Software, Additional Products or Additional Services to be subject to acceptance testing, then a Statement of Work for the acceptance testing regime must be agreed under clause 6 of the General Terms.

17.2 If clause 17.1 of these Specific Terms does not apply, then no item of Services, Encoo Software, Additional Products or Additional Services are to be subject to acceptance testing and Encoo will have no obligation to conduct any acceptance tests. The Customer will be deemed to have accepted such items 'as is' and to have irrevocably waived any rights to conduct acceptance testing at any future time.

18 Hosting Service Levels

18.1 Encoo will provide the Hosting Services to the Customer in accordance with the Service Levels (if any) specified in clause 2 of Schedule 2.

18.2 If no Service Levels are specified for a particular Hosting Service, then Encoo is only obliged to perform that Hosting Service in accordance with the General Terms.

Part D Support and Maintenance Services

19 Application of this Part

This Part D of the Specific Terms will only apply where the Contract Details Schedule specifies that Encoo is to provide Support and Maintenance Services to the Customer.

20 Provision of Support and Maintenance Services

20.1 Encoo will:

- (1) provide, or procure the provision of, all maintenance necessary to ensure continuity of all elements of the Designated Equipment;
- (2) in performing any maintenance work, use its best endeavours to avoid any interruption to the provision of the Hosting Services, except for outages permitted for preventative maintenance; and
- (3) bear all costs associated with performing maintenance, except where any maintenance is required as a direct result of a negligent act or omission of the Customer or a breach of this Agreement by the Customer, in which case such costs will be paid to Encoo on demand by the Customer.

20.2 Encoo will:

- (1) correct errors in the Encoo Software identified by the Customer or which otherwise come to the attention of Encoo in accordance with the Service Levels set out in clause 21 of these Specific Terms;
- (2) ensure that the Encoo Software remains in conformity with its specifications;
- (3) ensure that the provision of the Encoo Software continues to comply with the Service Levels set out in clause 21 of these Specific Terms;
- (4) provide the following support as required in relation to errors and defects in relation to the Encoo Software:
 - (a) telephone and email support in the form of consultations, assistance and advice;
 - (b) remote support over the Internet; and
 - (c) conduct such tests as may be reasonably necessary to demonstrate the relevant defects or errors have been corrected or to otherwise implement the relevant changes or modifications.

20.3 Encoo is not required to provide any services involving:

- (1) correction of errors or defects caused by operation of the Encoo Software or the Designated Equipment in a manner other than that expressly or by implication authorised by Encoo;
- (2) rectification of errors caused by misuse or incorrect use of the Encoo Software by the Customer;
- (3) correction of errors or defects in any Customer Software; or
- (4) maintenance of the Customer's hardware or other equipment.

21 Support Service Levels

21.1 Encoo will provide the Support and Maintenance Services to the Customer in accordance with Service Levels (if any) specified in clause 3 of Schedule 2.

21.2 If no Service Levels are specified for a particular Support and Maintenance Service, then Encoo is only obliged to perform that Service in accordance with the General Terms.