



Smartnumbers USE AGREEMENT

THIS AGREEMENT is made on the Commencement Date specified in Item 1 of Schedule One.

BETWEEN:

EXCEL PHONE WORDS PTY LTD (ACN 111 409 066) trading as "1300 TELEBRAND" of Level 1, 530 Little Collins Street, Melbourne VIC 3000 in the State of Victoria ("Telebrand");

and

The company or person named or described in Item 3 of Schedule One to this Agreement ("the Licensee")

RECITALS:

- A. **INFORM NUMBERS AUSTRALIA PTY. LTD (ACN 110 809 133) trading as "1800 TELEBRAND"** as Trustee for the FLY PELICAN UNIT TRUST ("the Holder") is registered as the Rights of Use Holder for the telephone number(s) specified in Item 4 of Schedule One to this Agreement ("the Smartnumber(s)") and has exclusively licensed to Telebrand the rights of use for the Smartnumber(s), including the right to sub-licence, lease and/or provide access to use the Smartnumber(s).
- B. The Licensee wishes to obtain the rights to use of the Smartnumber(s) exclusively only in the Territory for the Term.
- C. The Licensee has agreed to obtain the rights to use of the Smartnumber(s) exclusively from Telebrand only in the Territory for the Term and Telebrand has agreed to grant a licence to the Licensee for the access and use of the Smartnumber(s) exclusively only in the Territory for the Term on the terms and conditions contained in this Agreement.

IT IS AGREED:

1. INTERPRETATION

1.1 Definitions

In this Agreement the following terms will have the meanings assigned to them:

"ACMA" means the Australian Communications & Media Authority or its successor.

"ACMA Instruments" means:

- (a) [Telecommunications Act 1997](#);
- (b) [Telecommunications \(Annual Charge\) Determination 2014](#);
- (c) [Telecommunications \(Charges\) Determination 2012](#);
- (d) [Telecommunications \(Collection of Numbering Charges\) Determination 2014](#);
- (e) [Telecommunications \(Numbering Charges\) Act 1997](#);
- (f) [Telecommunications \(Numbering Charges\) \(Allocation Charge\) Determination 2015](#);

[Telecommunications \(Charges\) Amendment Determination 2015 \(No. 1\)](#); [Telecommunications Numbering Plan 2015](#) (<https://www.comlaw.gov.au/>); and any amendments to those instruments that may be made from time to time, and any further legislation, regulations or policies that may be made, determined or legislated by the Commonwealth Government or the ACMA in relation to "phone words" or "smartnumbers" from time to time.

"Agreement" means this agreement.

"Annual Fee" means the Annual Fee specified in Item 5(b) of Schedule One.

"Business Day" means any day on which banks are open for business in Melbourne, Victoria.

"Carriage Service(s)" means telecommunications services (including installation, connection, rental, calls and other carriage services) specified in Item 7 of Schedule One or in any application for the Smartnumber(s).

"Commencement Date" means the date specified in Item 1 of Schedule One.

"Confidential Information" means all information of a confidential or proprietary nature, in any material form or medium, that is:

- (a) disclosed or communicated by or on behalf of a party ("the discloser") or a related corporation to the other party ("recipient") or a related corporation of the recipient; or
- (b) created, ascertained, discovered or derived by any of the parties to this Agreement, whether directly or indirectly, from any such information disclosed or communicated by or on behalf of the discloser or a related corporation to the recipient;

including, without limitation, information arising from or relating to the employment or the commercial or financial activities, arrangements or position of the discloser or any of the dealings, transactions or affairs of the business of the discloser and any other information the discloser considers confidential and proprietary and makes the recipient aware that it considers

to be of that nature including the form and medium in which that information is given, the unauthorised use or disclosure of which would embarrass, harm or prejudice the discloser. It does not include information already in the public domain unless such information arrived there by unauthorised or unlawful means.

"Event of Force Majeure" means an event or circumstance beyond the reasonable control of the party which seeks to rely upon it including without limitation any strike, lock out or other industrial disturbance, act of God, lightning, storm, flood, fire, earthquake, explosion, war or unavoidable accident.

"Telebrand" means the party specified in Item 2 of Schedule One.

"Fees" means the fees payable for use of the Smartnumber(s) specified in Item 5 of Schedule One, including the Annual Fee specified in Item 5(b) and the Initial Setup Fee specified in Item 5(a).

"Further Terms" means the further terms (if any) specified in Item 9 of Schedule One.

"GST" means Goods and Services Tax within the meaning of the GST Act.

"GST Act" means the A New Tax System (Goods and Services Tax) Act 1999 (Commonwealth) (as amended).

"Initial Term" means the term or period specified in Item 8 of Schedule One.

"Licensee" means the party specified in Item 3 of Schedule One.

"Numbering System Terms of Use" means the General Terms and Conditions of use of the Numbering System imposed and required by the ACMA from time to time.

"Parties" means the parties to this Agreement and "party" means any one of the parties.

"Smartnumber(s)" means the freephone or local rate number or numbers specified in Item 4 of Schedule One, which the parties acknowledge and agree have been allocated under the *Telecommunications Numbering Plan 2015* and which is or are the number(s) to be licensed under this agreement.

"rights of use" means the rights set out under the *Numbering System Terms of Use*.

"Smartnumbers" is a trade mark registered to the Australian Communications Authority.

"sub-licence agreement" means any sub-licence of the Smartnumber(s) from the Licensee to a sub-licensee permitted by Telebrand pursuant to this Agreement.

"sub-licensee" means any sub-licensee of the Smartnumber(s) appointed by the Licensee and approved by Telebrand pursuant to this Agreement.

"Term" means the Initial Term and any Further Terms.

"Territory" means the geographical region or area specified in Item 6 of Schedule One.

1.2 Construction

In this Agreement unless the the context otherwise requires:

- (1) the singular includes the plural and vice versa.
- (2) an agreement, representation, warranty or obligation in favour of two or more persons is for the benefit of them jointly and severally; and if on the part of two or more persons will bind each of them severally, only to the extent of their obligations individually pursuant to this Agreement.
- (3) if a word or phrase is given a particular meaning then similar words and phrases have corresponding meanings.
- (4) No rule of construction applies to the disadvantage of a party because that party was responsible for the preparation of this agreement.
- (5) a reference to:
 - (a) a person includes a firm, body corporate, an unincorporated association or an authority and includes a reference to the person's executors, administrators, successors, substitutes (including but not limited to persons taking by novation) and permitted assigns;
 - (b) a person, body or authority which has ceased to exist or has been reconstituted, amalgamated, reconstructed or merged or the functions of which have become exercisable by any other person, body or authority in its place will be taken to refer to the person, body or authority established or constituted in its place or by which its functions have become exercisable.
- (6) Headings, marginal notes and the index are inserted for convenience and will be ignored in constructing this Agreement.
- (7) The Recitals form part of this Agreement and the parties acknowledge that the Recitals are true and correct.

2. USE OF PHONE WORDS

- 2.1 Upon acceptance of this Agreement and payment of the Fees, Telebrand grants to the Licensee a revocable licence to access and use the Smartnumber(s) exclusively only in the Territory for the Term only from Telebrand as its only provider for the Smartnumber(s) and, subject to clause 2.4 of this Agreement, to sub-licence the rights to access and use of the Smartnumber(s) in the Territory or within parts of the Territory during the Term, and on the terms contained in this Agreement.
- 2.2 In the event that the Licensee is an individual, the Licensee represents that he or she is 18 years of age or older. The Licensee understands that use of Smartnumber(s) provided under the terms of this Agreement may not be permitted by law or by the ACMA for individuals under the age of 18 years.
- 2.3 Unless the Territory is specified to be all states and territories in the Commonwealth of Australia, the Licensee is not the exclusive licensee for the Smartnumber(s) throughout Australia, other persons, companies or entities may be licensed by Telebrand to access and use the Smartnumber(s) in other geographic regions, areas, states or territories outside the Territory and within the Commonwealth of Australia, and calls made to the number comprising the Phone Word will be routed to the appropriate geographic regions, areas, states or territories within the Commonwealth of Australia by means of a key- or pin-prompt system, origin-based routing system or interactive voice response ("IVR") system, or such other inbound call service as may be agreed between Telebrand, the Licensee and the telecommunications carrier or carriage service provider.
- 2.4 The Licensee may be permitted to sub-licence the rights to access and use of the Smartnumber(s) only as follows:
 - (1) The Licensee must advise Telebrand in writing of the name, address and contact details of the proposed sub-licensee, and must provide to Telebrand satisfactory credit and trade references for the proposed sub-licensee;
 - (2) The Licensee must ensure that the proposed sub-licensee signs an agreement in a form acceptable to Telebrand agreeing to be bound by the terms and conditions of this Agreement and such other terms as Telebrand may reasonably require;
 - (3) The Licensee remains principally liable to Telebrand for payment of all Fees to Telebrand in relation to the Smartnumber(s) pursuant to the terms of this Agreement, will continue to be bound by and observe the terms of this Agreement, and remains principally liable to perform and ensure compliance with the terms of this Agreement;
 - (4) The Licensee must ensure that the sub-licensee signs all

documents and does all things necessary within seven (7) days of a request from Telebrand, to establish and protect any of Telebrand's rights of use of any of the Smartnumber(s) or any telephone number obtained pursuant to this Agreement either during the term of this Agreement or at any time after the termination or expiration of this Agreement;

- (5) The sub-licence agreement may be terminated and any active telecommunications service disconnected for or in relation to the Smartnumber(s) immediately by notice in writing to the sub-licensee upon the happening of any of the following events:
 - (a) The sub-licensee fails to pay any amounts payable or to perform and observe any term of the sub-licence agreement on its part to be paid, performed or observed, and:
 - (i) the sub-licensee fails to remedy the same; or
 - (ii) in the case of a breach incapable of remedy, fails to tender reasonable compensation for the breach, within seven (7) days of service on the sub-licensee of a notice containing full particulars of such failure to perform and observe and specifying that the sub-licence agreement can be terminated if it is not complied with within that time;
 - (b) If the licensee or sub-licensee has a receiver, receiver & manager, controller, administrator, liquidator or manager appointed over the whole or any substantial part of its assets or if any order is made or resolution passed for the winding up of the sub-licensee;
 - (c) The licensee or sub-licensee (in the case of an individual) appoints a controlling trustee pursuant to Part X of the *Bankruptcy Act 1966 (Cth)* or a trustee in bankruptcy pursuant to the provisions of the *Bankruptcy Act 1966 (Cth)*;
 - (d) If the licensee or sub-licensee becomes insolvent or makes an assignment for the benefit of creditors;
 - (e) The Licence Agreement between Telebrand and the Licensee is terminated; or
 - (f) If Telebrand is unable in their reasonable opinion to continue to license the Smartnumber(s) to the Licensee or permit the sub-licence of the Smartnumber(s) to the sub-licensee as the result of any event including change in law or the ACMA Instruments, or as the result of any direction or request by the ACMA or any other relevant regulator.
- (6) In the event of termination of this Agreement or of any relevant sub-licence the sub-licensee must do all things necessary to enable Telebrand to disconnect any active telecommunications service for or in relation to the Smartnumber(s), return any rights for use of the Smartnumber(s) to Telebrand and do and sign all things necessary to return the Smartnumber(s) and all rights of use in relation to those number(s) to Telebrand;
- (7) Telebrand will retain all right, title and interest in and to the Smartnumber(s) including rights of use and all copyrights, trademarks and other associated intellectual property rights, including without limitation with respect to all technology and advertised telephone numbers used in connection with or provided as part of the provision or use of the Smartnumber(s); and
- (8) The Licensee must indemnify Telebrand from and against all loss or damage that may be suffered or incurred by Telebrand arising from or as the result of the use or sub-licence of the Smartnumber(s) by or through the Licensee or any sub-licensee or any person or company claiming through them or either of them.

Telebrand may approve or refuse to approve any proposed sub-licence in their absolute discretion or may approve a sub-licence subject to and on such terms and conditions as they may in their absolute discretion consider necessary.

3. PAYMENT OF FEES

- 3.1 In consideration of Telebrand agreeing to provide to the Licensee rights to use the Smartnumber(s) pursuant to this Agreement the Licensee hereby agrees to pay the Fees in the amounts and at the times specified in Item 5 of Schedule One.
- 3.2 The Licensor will on or before the Commencement Date provide an invoice to the Licensee for the full amount of the Annual Fee, and the Annual Fee must be paid in full on or before the Commencement Date. Where agreed in writing between the Licensor and the Licensee, the

- Licensor may agree to invoice and accept payment of the Annual Fee and any Option Fee by means of twelve (12) equal instalments payable monthly in advance on the first day of each month by direct debit by means of a signed and binding direct debit authority provided by the Licensee to the Licensor on or before the Commencement Date, and in any event each such invoice for any instalments of the Annual Fee and any Option Fee must be paid by the Licensee in full no later than fourteen (14) days from the date of each invoice each month during the Term or any Further Term or period of overholding under this Agreement.
- 3.3** The amount of the Annual Fee will increase at the fixed rate of 5.0% (five per centum) per annum on each anniversary of the Commencement Date during the Term and any Further Term.
- 3.4** On any overholding or renewal of this Agreement for a Further Term, the Annual Fee for the commencement of the Further Term will be reviewed to a current market fee payable in relation to the Smartnumber(s) in accordance with clause 13.3 of this Agreement.
- 4. SERVICE CHARGES**
- 4.1** Unless otherwise specified, the Fees do not include any Carriage Service fees, costs or charges. The Licensee acknowledges that a carriage service provider may set charges for installation, connection, Carriage Service(s) for the Smartnumber(s), and the Licensee will be solely responsible for payment of all such charges to any such carriage service provider. The amount of such Carriage Service charges which apply will vary depending on which carriage service provider is selected to provide the Carriage Service for use of the Smartnumber(s).
- 4.2** The Licensee will be and remain responsible for prompt payment in full when due of all fees or charges that are or may be payable in connection with or arising from the holding of any rights to access or use the Smartnumber(s) during the Term.
- 4.3** The Licensee acknowledges and agrees that smartnumbers may attract significant call costs charged by the carriage service provider responsible for the provision of any Carriage Service associated with the use of the Smartnumber(s), and the Licensee will be and remain liable for payment of all Carriage Service charges and call costs for every call received on that number during the Term.
- 4.4** The Licensee acknowledges and agrees that there are additional fees and charges which apply to the use of telephone numbers, including, but not limited to call charges, Carriage Service charges and annual numbering charges. More details in respect of such charges can be obtained from a telephone service provider.
- 5. ACTIVE SERVICE REQUIREMENT**
- 5.1** The Licensee acknowledges and agrees that it must activate a telephone service for use of the Smartnumber(s) within a period of no longer than two (2) months from the Commencement Date or such earlier period as may be notified to Telebrand by the ACMA from time to time, must keep such telephone service activated and used for the balance of the Term of this Agreement, and must not disconnect or cancel such telephone service for the use of the Smartnumber(s) during the Term of this Agreement. In the case of any disconnection, cancellation or suspension of the telephone service for use of the Smartnumber(s) or any failure to keep such telephone service connected and activated as required, the Licensee's rights to use the Smartnumber(s) will be cancelled and will automatically revert to Telebrand in full.
- 6. REGISTER OF RIGHTS HOLDERS**
- 6.1** The Licensee acknowledges and agrees that it is not the rights of use holder and is not entitled to be entered on the Register of rights of use of numbers maintained by the ACMA in respect of the rights of use of the Smartnumber(s) used by the Licensee pursuant to this Agreement, and Telebrand remains the exclusive licensee of the rights of use from Inform Numbers as the rights of use holder and entitled to be entered on the Register in respect of the Smartnumber(s).
- 7. OBLIGATIONS OF LICENSEE**
- 7.1** The Licensee is responsible for acquiring a telecommunication service to be associated with and for the use of the Smartnumber(s) from the carrier or carriage service provider (within the meaning of the *Telecommunications Act 1997 (Cth)*) nominated by Telebrand, and must promptly advise Telebrand of the details of the telecommunications service and of any agreement between the Licensee and the carrier and/or carriage service provider.
- 7.2** The Licensee is not permitted to assign, transfer, port or churn the telecommunications service for the Smartnumber(s) to another carrier or carriage service provider at any time without the prior written consent of Telebrand, which such consent may be given or refused in the absolute discretion of Telebrand.
- 7.3** The Licensee will be solely liable for any liability, expense, loss or damage arising from use of the Smartnumber(s). Telebrand has no control over the use of any Smartnumber(s) nor will it be liable for such use. The Licensee must not use the Smartnumber(s):
- (1)** To promote or create or distribute any images, sounds, messages or other materials which are obscene, harassing, racist, malicious, fraudulent, infringing or libellous;
 - (2)** For the supply of prohibited content or adult services within the meaning of the *Telecommunications Act 1997 (Cth)* or the *Telecommunications Numbering Plan 1997*; and
 - (3)** For any activity that may be considered to be or is unethical, immoral, in violation of any third party's rights, or illegal.
- 7.4** The Licensee must abide by all rules, regulations, procedures and policies of Telebrand as notified to the Licensee from time to time and with all applicable rules, regulations, procedures and policies of the ACMA. The Licensee must comply with and at all times ensure that any use of the Smartnumber(s) abides by and is in accordance with the provisions of the *Telecommunications Act 1997 (Cth)*, the ACMA Instruments, the Numbering System Terms of Use and all applicable local, state, national, foreign and international laws and regulations; and the Licensee agrees to abide by and is solely responsible for all acts or omissions that occur under or as a result of the use of its account or password, including the use of the Smartnumber(s).
- 7.5** The Licensee warrants that its use of the Smartnumber(s) or any telephone number obtained pursuant to this Agreement (and any word or phrase which is spelled or sounded through the combination or sequence of numbers making up the Smartnumber(s)) will not:
- (1)** Infringe the intellectual property rights or other legal rights (whether such rights arise as the result of the *Australian Consumer Law* in Schedule 2 of the *Competition and Consumer Act 2010 (Cth)* ("**Australian Consumer Law**"), the *Trade Marks Act 1995 (Cth)* or any other law) of any other person;
 - (2)** Mislead or deceive, or be likely to mislead or deceive any person; and/or
 - (3)** Constitute the tort of passing-off the name, business or reputation of any person.
- 7.6** The Licensee must ensure that its contact details and the contact details of any sub-licensee are up-to-date and accurate at all times. The Licensee acknowledges that Telebrand bears no responsibility and is not liable to the Licensee for any loss or damage which results from the Licensee's failure to receive information or notification when the Licensee's contact details or the contact details of any sub-licensee are not accurate or up to date.
- 8. LICENSEE'S ACKNOWLEDGEMENTS**
- 8.1** The Licensee acknowledges and agrees that:
- (1)** The Smartnumber(s) is/are a number(s) and not a phone word, that each Phone Word may be capable of being translated into many different phone words or combinations of alpha numeric letters and/or numbers, and that there is no connection between any particular smartnumber and any given word.
 - (2)** It is not the rights of use holder for the Smartnumber(s) and that its only rights in or relating to the Smartnumber(s) are as a licensee of the Smartnumber(s), being those rights expressly granted by this Agreement.
 - (3)** Not all telephonic keypads are the same and a number's alpha-numeric equivalent may not be the same for all telephones. To the fullest extent permitted by law, Telebrand is not liable to the Licensee for any damages, costs or liabilities that may result from an inability to use a particular alpha-numeric equivalent on a particular telephone or telephones.
 - (4)** From time to time, the ACMA may release additional telephone number ranges and that this may result in other persons obtaining numbers that have similar alpha-numeric characteristics (for example, the Licensee may obtain the rights of use to the alpha-numeric equivalent phone word '13CATS' and another person may obtain the rights of use in relation to the number '14CATS'). To the fullest extent permitted by law, Telebrand is not liable to the Licensee for any damages, costs or liabilities that may result from the ACMA releasing additional telephone number ranges or from other persons obtaining numbers that have similar alpha-numeric characteristics.
 - (5)** The Licensee has rights to the exclusive use of the Smartnumber(s) only within the Territory, and acknowledges

- and agrees that the Licensor has granted or may in future grant rights to other persons, companies or entities in relation to the Smartnumber(s) in other geographic regions, areas, states or territories within the Commonwealth of Australia.
- (6) Calls made to the number comprising the Smartnumber(s) will be routed to the appropriate geographic regions, areas, states or territories within the Commonwealth of Australia by means of a key-prompt or pin-prompt system, origin-based routing system or interactive voice response (“IVR”) system, or such other inbound call service as may be agreed between Telebrand, the Licensee and the telecommunications carrier or carriage service provider.
- (7) Telebrand is not responsible for the proper routing of inbound calls to the Licensee or to the Territory, and it is possible that some inbound calls intended for the Licensee or the Territory may be routed to the licensee or user of the number for other geographic regions, areas, states or territories within the Commonwealth of Australia, due to error on the part of the caller, the telecommunications carrier or carriage service provider, and/or the routing system, IVR system, inbound call service, technological processes or systems used to route or allocate such calls from time to time.
- 8.2 Telebrand is not liable in any way whatsoever for any loss or damage caused by or arising from any failure of the Licensee or any sub-licensee or person or company claiming through the Licensee to receive any inbound calls intended for the Licensee or the Territory or for incorrect routing or allocation of any inbound calls to the licensee for other geographic regions, areas, states or territories outside the Territory; the Licensee has no cause of action or claim against Telebrand for or in relation to any such failure to receive any inbound calls intended for the Licensee or the Territory, or for incorrect routing or allocation of any inbound calls to the licensee for any geographic regions, areas, states or territories outside the Territory; and the Licensee waives and releases Telebrand from any and all causes of action, suits, claims, demands or liabilities and indemnifies Telebrand from and against any and all causes of action, suits, claims, demands, damages or liabilities caused by or arising from any failure of the Licensee to receive any inbound calls intended for the Licensee or the Territory or for incorrect routing or allocation of any inbound calls to the licensee for any other geographic regions, areas, states or territories.
- 8.3 The Licensee agrees to sign all documents and do all things necessary within fourteen (14) days of a request from Telebrand, to establish and protect any of Telebrand’s rights of use of any of the Smartnumber(s) or any telephone number obtained pursuant to this Agreement either during the term of this Agreement or at any time after the termination or expiration of this Agreement.
- 9. INTELLECTUAL PROPERTY RIGHTS**
- 9.1 Telebrand makes no representation that any advertising or use of the Smartnumber(s) or any telephone number obtained by the Licensee as the result of the use or access of the Smartnumber(s) does not infringe any third party intellectual property rights nor that any intellectual property rights are granted to the Licensee as the result of the Licensee obtaining rights to use a phone word or smartnumber pursuant to this Agreement, and the Licensee acknowledges and agrees that it does not and will not by use of the Smartnumber(s) or any telephone numbers (or their alpha-numeric equivalent) made available pursuant to this Agreement have or acquire any intellectual property rights or ownership of the Smartnumber(s) or any telephone numbers (or their alpha-numeric equivalent) made available pursuant to this Agreement.
- 9.2 The Licensee acknowledges and agrees that the Smartnumber(s) or any telephone numbers (or their alpha-numeric equivalent) made available pursuant to this Agreement may in fact be the intellectual property of another person or entity.
- 9.3 As between the parties, Telebrand will retain all right, title and interest in and to the Smartnumber(s) including rights of use and all copyrights, trademarks and other associated intellectual property rights, including without limitation with respect to all technology and advertised telephone numbers used in connection with or provided as part of the provision or use of the Smartnumber(s).
- 9.4 The use or depiction of the “smartnumbers” trade mark and of any other third party trademarks does not imply any licence, authorisation, approval or endorsement by those persons, companies or entities of Telebrand or the services offered or provided by Telebrand, or any licence, authorisation, approval or endorsement by Telebrand of any of those persons, companies or entities or of any associated organisation, product or service.
- 10. TELEBRAND’S WARRANTIES**
- 10.1 Telebrand warrants that it is exclusively licensed by the Holder for the Smartnumber(s) and that as at the Commencement Date the Smartnumber(s) are not licensed or issued to any other person for or within the Territory.
- 10.2 Neither Telebrand nor any of its affiliates, its licensors, its contractors or their respective employees warrant that the use of the Smartnumber(s) will be uninterrupted or error free; nor does Telebrand make any warranty as to the use of the Smartnumber(s). The Smartnumber(s) are PROVIDED ON AN “AS IS” AND “AS AVAILABLE” BASIS WITHOUT WARRANTIES OF ANY KIND, EITHER EXPRESS OR IMPLIED, INCLUDING BUT NOT LIMITED TO WARRANTIES OF TITLE, NON-INFRINGEMENT, IMPLIED WARRANTIES OF MERCHANTABILITY OR FITNESS FOR A PARTICULAR PURPOSE OR ANY WARRANTIES ARISING FROM COURSE OF DEALING OR USAGE OF TRADE. No advice or information given by Telebrand, its affiliates, its licensors, its contractors or their respective employees shall create a warranty unless specifically set out in this Agreement.
- 10.3 *The Australian Consumer Law (Vic), Australian Consumer Law & Fair Trading Act 2012 (Vic)* and the *Australian Consumer Law* provides consumers with certain consumer guarantees and rights in relation to certain transactions concerning goods and/or services (see www.consumerlaw.gov.au). Any rights the Licensee may have as a consumer under the Australian Consumer Law will apply regardless of any inconsistent provisions in this Agreement which will be read down to the extent necessary to comply with the Australian Consumer Law and this Agreement will otherwise apply to the fullest extent legally permissible. Except as provided in this Agreement and to the maximum extent permitted by law, all express and implied warranties, guarantees and conditions under statute or general law as to merchantability, description, quality, suitability or fitness of the Smartnumber(s) or any goods or services supplied by Telebrand to the Licensee or otherwise are expressly excluded.
- 11. LIMITATION OF LIABILITY**
- 11.1 The Licensee acknowledges and agrees that to the fullest extent permitted by law Telebrand is not liable to the Licensee for any damages, costs or liabilities that may result from using or obtaining the Smartnumber(s) pursuant to this Agreement.
- 11.2 The Licensee acknowledges and agrees that to the fullest extent permitted by law Telebrand will not be liable for any injury, loss or damage or for consequential loss or damage of any kind arising out of the supply or caused by or arising out of any negligence of Telebrand or in any way whatsoever.
- 11.3 To the fullest extent permitted by law, UNDER NO CIRCUMSTANCES WILL TELEBRAND, ITS AFFILIATES, ITS LICENSORS, ITS CONTRACTORS OR THEIR RESPECTIVE EMPLOYEES BE LIABLE FOR ANY DIRECT, INDIRECT, INCIDENTAL, SPECIAL, PUNITIVE OR CONSEQUENTIAL DAMAGES THAT RESULT IN ANY WAY FROM THE LICENSEE’S USE OF OR INABILITY TO USE THE SERVICE OR ANY PART THEREOF, OR THE LICENSEE’S RELIANCE ON OR USE OF INFORMATION, SERVICES OR MERCHANDISE PROVIDED ON OR THROUGH THE USE OF THE Smartnumber(s), OR THAT RESULT FROM MISTAKES, OMISSIONS, INTERRUPTIONS, DELETION OF FILES, ERRORS, DEFECTS, DELAYS IN OPERATION OR TRANSMISSION, ANY FAILURE OF PERFORMANCE, COMPUTER VIRUS, COMMUNICATION LINE FAILURE, THEFT OR DESTRUCTION OR UNAUTHORISED ACCESS TO ALTERATION OF OR USE OF THE LICENSEE’S ACCOUNT, WHETHER FOR BREACH OF CONTRACT, NEGLIGENCE OR UNDER ANY OTHER CAUSE OF ACTION. In the event that Telebrand is found liable under any circumstance under the terms of this agreement, Telebrand’s liability will be limited to the unused balance of the Licensee’s payment of annual fees pro-rated to reflect the current term.
- 11.4 If the Licensee is dissatisfied with the Smartnumber(s) or with any terms, conditions, rules, policies, guidelines or practices of Telebrand or the ACMA in using the Smartnumber(s), the Licensee’s sole and exclusive remedy is to discontinue using the Smartnumber(s).
- 11.5 In the event that Telebrand is deemed to supply any goods or services to the Licensee within the meaning of the *Australian Consumer Law (Vic)*, *Australian Consumer Law & Fair Trading Act 2012 (Vic)* and/or the *Australian Consumer Law*, Telebrand’s liability for a breach of any condition or warranty that is or may be implied by the *Australian Consumer Law* and similar provisions of the *Fair Trading Act*

2012 (Victoria) or other relevant State legislation is hereby limited to any one or more of the following:

- (1) the provision again of the goods or services or the supply of equivalent goods or services; or
- (2) the payment of the cost of providing the goods or services or supplying or providing equivalent goods or services.

12. INDEMNITY

12.1 To the maximum extent permitted by law the Licensee acknowledges and agrees that Telebrand is not liable to refund any monies paid by the Licensee or any entity that the Licensee represents in the event that the Licensee cannot use the Smartnumber(s) obtained pursuant to this Agreement.

12.2 The Licensee agrees to indemnify Telebrand from and against any costs, loss, damage or other sums that may be incurred by Telebrand as a result of the Licensee's use of the Smartnumber(s) pursuant to this Agreement or any breach by the Licensee of the terms of this Agreement, including without limitation any costs, loss or damage arising as a result of any claim by a third party that the use of the Smartnumber(s):

- (1) Infringes the intellectual property rights or other rights of that person;
- (2) Is misleading or deceptive or is likely to mislead or deceive any person; or
- (3) Constitutes the tort of passing off the name, business or reputation of any person,

save and except to the extent that any such claim arises as a result of the licensing or issue of the Smartnumber(s) to another person at the Commencement Date.

12.3 To the maximum extent permitted by law, the Licensee agrees to indemnify and hold Telebrand, its affiliates, its licensors, its contractors or their respective employees harmless from and against any and all liability, loss, claim, demand, suit, action, proceeding, judgment, damage and expense (including without limitation lawyer's fees and costs of litigation) incurred or suffered by Telebrand, its licensors, its affiliates, its contractors, or their respective employees as the result of any and all use of the Smartnumber(s) whether authorised or not authorised or as a result of the negligence, wilful misconduct, or breach of any of the terms of this Agreement by or on behalf of the Licensee or any sub-licensee or person or company claiming through the Licensee, including but not limited to claims, liabilities, losses, damage, judgement and expense which arise out of alleged injury or death of any person or damage to property of every kind and description. The Licensee must promptly notify Telebrand in writing of any claim to which it is or becomes obligated under this indemnity. The Licensee will have the right to assume the defence of any such claim. The Licensee and Telebrand will confer as to and agree on the legal representative(s) to be selected in any such defence.

13. OPTION FOR RENEWAL FOR FURTHER TERM

13.1 In the event that the Licensee does not give written notice to Telebrand to terminate this Agreement at least one (1) month prior to the end of the Term, the licence granted under this Agreement will automatically continue and be renewed for the next of the Further Term(s) specified in Item 9 of Schedule One from the end of the Initial Term, on the same terms as this Agreement (except this clause, unless item 9 in Schedule One of the renewed Agreement provides for a further option to renew the agreement for a further term, in which event this clause may be inserted into that renewed agreement), subject to review of the Annual Fees to a market rate to be determined as set out in clause 13.3 of this Agreement, PROVIDED HOWEVER THAT the Licensee has punctually complied with all the Licensee's obligations and covenants for the use of the Smartnumber(s) during the Term and is not then in breach of any term of the Agreement.

13.2 There will be no initial Setup Fees payable by the Licensee on commencement of any Further Term.

13.3 The amount of the Annual Fees at the commencement of any Further Term or period of overholding will be reviewed to a current market rent or fee payable in relation to the Smartnumber(s) or other phone words of a similar category or rating, as determined by Telebrand. If the Licensee objects in writing to the proposed market rent or annual fee, and in the event that Telebrand and the Licensee have failed to reach agreement as to the amount of the Annual Fee for the Further Term at the commencement of the Further Term fourteen (14) days before this agreement ends then either party may refer the dispute to an independent accountant agreed between the parties (and appointed by the President for the time being of the Institute of Chartered

Accountants in the event that the parties are unable to agree on the accountant to be appointed), acting as arbitrator pursuant to clause 30, for determination of the market rent or fee, and in determining the market fee the arbitrator must:

- (1) Consider any written submissions made by the parties within the period of fourteen days after the appointment of the arbitrator;
- (2) Determine the current market rent or fee for lease or licence of phone words as an expert;
- (3) Take into account the current market rents or fees for lease or licence of comparable phone words of a similar category or rating; and
- (4) Determine a current market fee at least equal to the Annual Fee immediately before the review, and not more than 20% (twenty per centum) higher than the Annual Fee immediately before the review.

14. CONFIDENTIAL INFORMATION

14.1 The Licensee will not from the date of signing this Agreement, during the term of this Agreement or at any time thereafter directly or indirectly disclose to any person, firm or corporation or any other person any Confidential Information, trade secrets, processes or instructions which will be given or disclosed to them by Telebrand, will regard the same as confidential as between them and Telebrand at all times, will guard them as a trade secret and will use the same only in connection with the duties rendered under this Agreement.

14.2 The contractual relationship between Telebrand and the Licensee is founded on trust. Any breach of this trust by the Licensee such as the unauthorised disclosure to a third party of confidential information about Telebrand or the Smartnumber(s) even after termination of this Agreement, will render the Licensee liable to disciplinary action, and/or civil proceedings to restrain the Licensee from disclosing the information to a third party or making personal use of it without written authority from a senior manager of Telebrand or for damages if loss to Telebrand results from the unauthorised disclosure.

14.3 On or before the termination of this Agreement, upon any request by Telebrand or any earlier termination or completion of this Agreement, the Licensee will forthwith within a period of four hours:

- (1) deliver to Telebrand or its nominee all Confidential Information and other property or materials belonging to Telebrand, or any note, email message, report, summary, memorandum or other document containing or referring to the Confidential Information and other property or materials belonging to Telebrand in the possession of the Licensee that is capable of being delivered;
- (2) delete, erase or otherwise destroy all Confidential Information and other property or materials belonging to Telebrand contained in computer memory, magnetic, optical, laser, electronic or other media in their possession or control which is not capable of delivery to Telebrand; and
- (3) sign a document or letter in a form acceptable to Lessee acknowledging the return to Telebrand of all Confidential Information, property and materials, and their compliance with the requirements of this clause.

15. RIGHT OF FIRST REFUSAL

15.1 On the expiration of the Term or any Further Term of this Agreement, in the event that the Licensee has not exercised its option to renew the licence pursuant to this Agreement, before offering the Smartnumber(s) to any other person, company or entity Telebrand will be required to first offer a licence to the Licensee and the Licensee will have the right of first refusal (exercisable only for a period of seven (7) days following the expiration of this Agreement) to obtain a licence from Telebrand for continued access and use of the Smartnumber(s) only within the Territory on terms no less favourable to the Licensee than those terms offered by or to another prospective licensee or user of the Smartnumber(s), SAVE AND EXCEPT in the event of termination of this Agreement by Telebrand for breach by the Licensee for any reason pursuant to clause 26.2, in which event the Licensee does not have any such right of first refusal.

15.2 If the Licensee has elected in Item 10(a) of Schedule One to pay the Option Fee specified in Item 10(b) of Schedule One, then during the Option period specified in Item 10(c) of Schedule One in the event that another prospective licensee or user of the Smartnumber(s) seeks to obtain a licence from Telebrand to access and use the Smartnumber(s) in the Additional Regions specified in Item 10(d) of Schedule One, which have not then been allocated to any other licensee or subsequently become available, Telebrand will be required to first offer a licence to the Licensee

and the Licensee will have the right of first refusal (exercisable only within a period of three (3) business days from the time of any such offer) to obtain a licence from Telebrand for access and use of the Smartnumber(s) in such Additional Regions on terms no less favourable to the Licensee than those terms offered by or to another prospective licensee or user of the Smartnumber(s) in such geographic regions, areas, states or territories within the Commonwealth of Australia, SAVE AND EXCEPT in the event of termination of this Agreement by Telebrand for breach by the Licensee for any reason pursuant to clause 26.2, in which event the Licensee does not have any such right of first refusal.

16. FORCE MAJEURE

16.1 Notwithstanding any other provision of this Agreement none of the parties will have the right to terminate this Agreement or any of the rights granted by this Agreement or to make any claim or demand against any other party in respect of that other party's default or non-performance of any of its agreements or obligations under this Agreement if such default or non-performance is a result of an Event of Force Majeure.

17. MODIFICATION OF RIGHTS

17.1 Any present or future legislation that operates to vary an obligation or right, power or remedy of a person in connection with this Agreement is excluded except to the extent that its exclusion is prohibited or rendered ineffective by law.

18. AUTHORITY

18.1 The parties warrant and represent to each other that each of them has full power and authority to enter into and to perform this Agreement and the entering into and performance of this Agreement does not and will not on or after the signing of this Agreement contravene any contractual, legal or other obligations of either of them whatsoever. This Agreement constitutes a legal, valid and binding obligation on the parties enforceable in accordance with its terms.

19. GOVERNING LAW

19.1 This Agreement will be construed in accordance with and be governed by the laws of the State of Victoria and the parties agree to submit themselves to the jurisdiction of the Courts of that State including the Federal Court of Australia.

20. NOTICES

20.1 Any notice required or authorised to be given by any party to the other concerning any matter or thing relating to this Agreement will be in writing and may (without prejudice to the use of any other method) be given by being sent by prepaid registered letter addressed to the other party at its address hereinbefore appearing or left at the address of any party hereinbefore appearing and any such notice if so posted will be deemed to be given three (3) days following the date of posting.

21. WAIVER

21.1 No variation, modification or waiver of any provision of this Agreement or consent to any departure by any party from the terms of this Agreement, will in any event be of any force or effect unless it is confirmed in writing, signed by the parties, and then any such variation, modification, waiver or consent will be effective only to the extent to which it may be made or given.

21.2 No failure, delay, relaxation or indulgence on the part of any party in exercising any power or rights conferred upon such party in terms of this Agreement will operate as a waiver of such power or right, nor will any single or partial exercise of any such power or right preclude any other or future exercise of such power or right or the exercise of any other power or right under this Agreement.

22. ENTIRE AGREEMENT

22.1 This Agreement embodies the entire agreement between the parties and supersedes any prior agreement or understanding between the parties. There are no agreements representations or warranties oral or written between the parties other than those set forth or provided for in this Agreement. This Agreement may not be modified or changed in whole or in part except by a supplemental Agreement signed by each of the parties.

22.2 The parties agree that each will execute and deliver to the other any and all documents and do or carry out such acts and things as may be reasonably required or requested to effect the transactions contemplated by this Agreement.

23. STAMP DUTY AND COSTS

23.1 The Licensee will bear any stamp duty chargeable on this Agreement but each party will bear their own legal fees for the preparation and completion of this Agreement and the preparation of all assignments required by this Agreement.

24. TIME

24.1 Time will be of the essence as regards any date or period determined under this Agreement save only to the extent that any such date or period may be altered by mutual agreement between the parties, upon which time will then be of the essence for the altered date or period.

25. SEVERANCE

25.1 If any provision of this Agreement is deemed to be invalid or unenforceable in accordance with its terms, all other provisions that are self-sustaining and capable of separate enforcement without regard to the invalid provisions will be and continue to be valid and enforceable in accordance with their terms.

26. TERMINATION

26.1 This Agreement will commence on the Commencement Date for the Term, and will continue until the end of the Term unless earlier terminated by Telebrand or the Licensee in accordance with the provisions of this Agreement.

26.2 Telebrand will have the right to terminate this Agreement and to disconnect any active telecommunications service for or in relation to the Smartnumber(s) immediately by notice in writing to the Licensee upon the happening of any of the following events:

- (1) The Licensee fails to perform and observe any term of this Agreement on its part to be performed or observed, and:
 - (a) the Licensee fails to remedy the same; or
 - (b) in the case of a breach incapable of remedy, fails to tender reasonable compensation for the breach,

within seven (7) days of service on the Licensee of a notice containing full particulars of such failure to perform and observe and specifying that this Agreement can be terminated if it is not complied with within that time;

- (2) If the Licensee has a receiver, receiver & manager, controller, administrator, liquidator or manager appointed over the whole or any substantial part of its assets or if any order is made or resolution passed for the winding up of the Licensee;
- (3) The Licensee (in the case of an individual) appoints a controlling trustee pursuant to Part X of the *Bankruptcy Act 1966 (Cth)* or a trustee in bankruptcy pursuant to the provisions of the *Bankruptcy Act 1966 (Cth)*;
- (4) If the Licensee becomes insolvent or makes an assignment for the benefit of creditors; or
- (5) If Telebrand is unable in their reasonable opinion to continue to license or sub-license the Smartnumber(s) to the Licensee as the result of any event including change in law or the ACMA Instruments, or as the result of any direction or request by the ACMA or any other relevant regulator.

26.3 The Licensee will have the right to terminate this Agreement by notice in writing to Telebrand if Telebrand fails to perform and observe any material term of this Agreement and fails to remedy the same within fourteen (14) days of service on Telebrand of a notice containing full particulars of such failure to perform and observe and specifying that this Agreement can be terminated if it is not complied with within that time.

27. RIGHTS ON TERMINATION

27.1 The Licensee must on termination of this Agreement forthwith cease using the Smartnumber(s), do all things necessary to enable Telebrand to disconnect any active telecommunications service for or in relation to the Smartnumber(s), return any rights for use of the Smartnumber(s) to Telebrand and do and sign all things necessary to return the Smartnumber(s) and all rights of use in relation to those number(s) to Telebrand.

27.2 In the event of termination of this Agreement by Telebrand for breach by the Licensee for any reason pursuant to clause 26.2, all monies paid to Telebrand by the Licensee will be forfeited; if any fees or charges have not been paid or are then payable for any part of the balance of the then current Term remaining unexpired, Telebrand may demand and obtain recovery of any such amounts paid or payable until the end of the then current Term; and in addition, if the Smartnumber(s) is or are quarantined or restricted from being reallocated, assigned or transferred to another licensee or user for any period of time following termination, Telebrand may recover from the Licensee an amount equal to the Annual Service Fee for any part of that period extending beyond the end of the then current Term, on a pro-rata basis for that period.

27.3 Clauses 8, 9, 11, 12 and 14 of this Agreement will continue to operate and be observed, and remain enforceable following termination of this Agreement notwithstanding the expiration or termination of this Agreement.

28. PERFORMANCE BY THIRD PARTIES

- 28.1** SAVE AND EXCEPT for any sub-licence that may be permitted and approved pursuant to clause 2.4 of this Agreement, the Licensee will not be entitled to assign their rights or obligations, or to appoint a third party to perform any one or more of its obligations pursuant to this Agreement in its behalf or in its name, without the prior consent in writing of Telebrand, which such consent may be given or withheld in the absolute discretion of Telebrand, and provided always that the Licensee remains liable to Telebrand for performance of their obligations pursuant to this Agreement.
- 28.2** Telebrand is permitted to assign its rights and obligations under this Agreement to a third party, without obtaining the consent of the Licensee.

29. RELATIONSHIP BETWEEN THE PARTIES

- 29.1** Nothing contained in the Agreement will constitute or create or be deemed or construed so as to constitute or create any partnership, agency or trust between the parties and neither party will commit or incur any liability on the part of the other party, nor pledge or attempt to pledge its credit in any way whatsoever, and the Licensee will be and will be deemed to be an independent contractor and not an agent or employee of Telebrand.

30. DISPUTES

- 30.1** If there is a dispute between the parties concerning this Agreement, either party may give written notice of the dispute to the other party ("the notice") which will state that it is a notice under this part and will specify the dispute concerned ("the dispute").
- 30.2** If the dispute is not settled by agreement within twenty-one (21) days of the service of the notice, the dispute will be referred to an Arbitration in Melbourne by a single Arbitrator appointed by agreement of the parties, and if they fail to agree, by the President of the Law Institute of Victoria acting on the request of a party.
- 30.3** An Arbitrator will not be a present or former member, officer, employee or agent of either party.
- 30.4** The Arbitration will be conducted in accordance with the *Commercial Arbitration Act 1984 (Victoria)* ("the Arbitration Act") except that:
- (1) the Arbitrator will observe the rules of natural justice and rules of evidence;
 - (2) a party may be represented by a qualified Legal Practitioner or another representative;
 - (3) the Arbitrator will not have the power conferred by Sections 25 and 27 of the Arbitration Act;
 - (4) the Arbitrator will include in the arbitration award the findings on material questions of law and of fact, including references to the evidence on which the findings of fact were based; and
 - (5) the parties consent to an appeal to the Supreme Court of Victoria on any question of law arising in the course of the Arbitration or out of the arbitration award.

31. GOODS AND SERVICES TAX

- 31.1** Each party warrants to the other that at all material times under this Agreement it has and will maintain its registration with the Australian Taxation Office as a business or entity which has an Australian Business Number for the purposes of the GST Act.
- 31.2** Except where stated otherwise in this Agreement:
- (1) each amount payable by a party under this Agreement in respect of a taxable supply by the other party is expressed as a GST exclusive amount and does not include any amount that the recipient of the supply must pay to the supplier in respect of any GST payable in relation to the supply;
 - (2) the recipient of a taxable supply made under this Agreement must pay to the supplier at the time of payment of the consideration for the supply, the GST payable in respect of the taxable supply; and
 - (3) the supplier of a taxable supply under this Agreement must provide to the recipient a valid tax invoice for the supply.