

STANDARD TERMS AND CONDITIONS – TRACTIONNEXT PLATFORM

Ovato Technology Pty Ltd ABN 40 092 342 375 (who in these standard terms will be referred to as **Ovato Technology or Supplier**) is pleased to confirm the terms and conditions which will apply to our provision of goods and services to each purchaser or intending purchaser of such goods and services (who in these standard terms will be referred to as **Client**).

1. DEFINED TERMS

This clause 1 defines terms used in this agreement. Other terms are defined elsewhere in this agreement. All capitalised terms appearing in the separately provided Agreement Summary or Schedule that are also used as capitalised terms in the body of this agreement, are taken to be terms defined in the Agreement Summary, as amended from time to time.

1.1. SERVICES, MATERIALS & IP

- (a) **Business Day** means a week day on which banks are open for business in NSW.
- (b) **Client** excludes Related Bodies Corporate of Client unless and to the extent otherwise agreed in writing by the parties.
- (c) **Client Data** means data supplied to Supplier by Client and relating to recipients of Communications.
- (d) **Client Materials** means all subject-matter authored, created, produced or supplied by Client in or to which Intellectual Property or other rights subsist or relate, including Communications content.
- (e) **Communication** means any outbound email, inbound or outbound SMS, or inbound data submission via the web received by (in the case of inbound Communications) or sent by (in the case of outbound Communications) the Ovato Technology Services. Data submission via the web that constitutes a Communication includes a response to a survey question; a vote; a promotion entry; and a custom customer interaction. The development of additional functionality within Ovato Technology may lead to the availability of additional Communication types in addition to those specified above. The Client may request that additional Communication types are included in the definition of a Communication in order to gain access to the additional functionality. The inclusion or exclusion of additional Communication types within the definition of a Communication will be defined in addenda to this Agreement.
- (f) **Competition/Promotion Terms and Conditions** are the Terms and Conditions prepared by Ovato Technology on behalf of the client for any client competition or promotion activity run through the TractionNext Platform.
- (g) **Confidential Information** means any discovery, fact, data (including Client Data and New Data), idea, plan, strategy, method, principle, technique, routine, practice, knowledge, design, trade secret, know-how, information, customer information, Personal Information, product specification, business proposal or marketing plan, that is not presently widely known or available to the public and that is held by Supplier or Client or generated by Supplier or Client in the course of the performance of this agreement.
- (h) **Emergency** means the existence of circumstances affecting the Technology that are causing serious disruption to the ability of Supplier to supply services to clients, being circumstances not planned, caused or directly controlled by Supplier.
- (i) **Expenses** means reasonable expenses (such as travel expenses) that Supplier incurs specifically in order to perform its obligations under this agreement.
- (j) **Force Majeure** means an event or cause beyond the reasonable control of the party claiming force majeure, including acts of God, lightning, storm, flood, fire, earthquake, explosion, cyclone, tidal wave or landslide, strike, lockout or other labour difficulty, acts of a public enemy, war (declared or undeclared), terrorism, sabotage, blockade, revolution, riot, insurrection, civil commotion or epidemic or trade embargo;
- (k) **Insolvency Event** means the happening of any of the following:
 - an application is made to a court for that a party be wound up or liquidator be appointed;
 - a party appoints an administrator, liquidator or receiver;
 - a party becomes insolvent; or
 - anything having a substantially similar effect to any of the above occurs in relation to a party.
- (l) **Intellectual Property** means existing and future copyright, trademarks, designs, patents or circuit layouts, whether registered or not.
- (m) **Laws** means any law in force in Australia:
 - whether derived from statute (including subordinate legislation and legislative instruments), common law, equity, mandatory industry codes or other sources of law, and in relation to statute, includes the Spam Act 2003 (Cth), Do Not Call Register Act 2006 (Cth), Privacy Act 1988 (Cth), Telecommunications Act 1997 (Cth), Broadcasting Services Act 1992 (Cth), Competition and Consumer Act 2010 (Cth), trade promotion lotteries and gaming and gambling legislation; and
 - whether public or private, and in relation to private rights, includes intellectual property, rights conferred under defamation laws, rights conferred under discrimination laws and rights against invasion of privacy.
- (n) **Legal Compliance** means compliance, consistency with and non-contravention of all Laws.
- (o) **Loss** includes any general, direct loss, damage, cost, expense or liability, including legal costs, but excludes special (indirect, incidental) loss.
- (p) **New Data** means data:
 - generated by the Technology as a result of Client's use of the Services;
 - that relates to the recipients of Communications; and
 - that is not Client Data.
- (q) **Personal Information** has the same meaning as in the *Privacy Act 1988* (Cth).
- (r) **Related Body Corporate** has the same meaning as in the *Corporations Act 2001* (Cth).
- (s) **Secure Access Information** means unique Confidential Information supplied by Supplier to Client for the purpose of enabling Client to use the Services, including username and login.
- (t) **Services** means:
 - Access to the TractionNext Platform web browser based user interface and its associated servers, hardware, software and technology in accordance with this

- Agreement to facilitate delivery of Communications to a Recipient and to receive and deliver an Incoming Recipient Communications to the Client;
- the Technology's performance of functions in response to Client's use of the Technology;
- Account Management, Consultancy and Support Services; and
- any other services as agreed in writing between Supplier and Client from time to time.

To be clear, the Services exclude the giving of Legal Compliance advice, performing Legal Compliance services or reviewing or signing off on Communications, other Client Materials or conduct.

- (u) **Services Hours** are for chargeable events requiring the use of Ovato Technology consultancy services team.
- (v) **Start Date** means date that services commence and are charged as specified in schedule A (provided separately). Supplier and Client commit to this meeting this date.
- (w) **Sub-Contractor Service Provider** means a sub-contractor of Supplier who provides a service essential to Client's access to and use of the Technology, such as an SMS messaging service provider.
- (x) **Agreement Summary** means schedule A (provided separately) to this agreement.
- (y) **Supplier Materials** means all subject-matter authored, created, produced or licensed by Supplier in or to which Intellectual Property or other rights subsist or relate, including all software underlying the Technology.
- (z) **Support Services** means the services specified in schedule C (provided separately).
- (aa) **Technical Documentation** means the technical documentation provided to Client, as amended from time to time.
- (bb) **Technology** means the electronic communications software platform specified in the Agreement Summary and accessed via the internet (or other agreed channel) that performs functions in response to Client inputs, as specified in the Technical Documentation.
- (cc) **Third Party Service Provider** means a third party who provides a service essential to Client's access to and use of the Technology, such as a telecommunications carrier.

1.2. SUBSCRIBERS

- (a) **Non-Subscriber Profile Data Record** means a customer record added onto the TractionNext Platform for the purpose of communication and or data storage and is currently not associated with one or more subscription functions or active communications lists.
- (b) **Subscriber Profile Data Record** means a customer record added onto the TractionNext Platform for the purpose of communication and is currently associated with one or more subscription functions or active communications lists.
- (c) **Active Record** means customer records who meet ANY of these conditions:
 - has opened an email,
 - has clicked an email link,
 - within Competitions, Surveys, Votes or Polls, has submitted a successful entry,
 - by Custom Functions (custom competitions) has submitted a successful entry,
 - or sent or received an SMS.

2. SERVICES – SUPPLIER

2.1. SERVICES SUPPLY

- (a) Supplier must supply the Services and, insofar as they are specified in schedules provided separately to this agreement, as specified.
- (b) Supplier must supply the Services with due care and skill and in a professional manner consistently with being a first-class provider of electronic communications services.
- (c) To the extent that Laws apply to Supplier in its supply of the Services, Supplier must not contravene any Laws.

2.2. COMMUNICATIONS AND SERVICE HOURS

- (a) The Service Hours and Communications allowance per month is specified in the Agreement Summary (provided separately).
- (b) If there is a failure in the delivery of a Communication, Supplier must perform as many re-transmissions as reasonably practicable for at least 5 days after the day on which the first failed delivery occurred. Client acknowledges that the number of re-transmission attempts will vary depending on circumstances outside Supplier's control.

2.3. MAINTENANCE & MODIFICATION

- (a) Supplier must maintain the Technology in good order and repair.
- (b) Supplier may upgrade the Technology or modify or substitute Services.
- (c) When maintaining or upgrading the Technology or modifying or substituting Services, Supplier must comply with any minimum service levels contained in any schedule and must in any event use its best endeavours to minimise disruption to Client's use of the Services in the course of maintaining or upgrading the Technology.
- (d) When modifying or substituting Services, Supplier must not modify or substitute Services with the result that the modified or substituted Services are materially inferior or fundamentally different to the Services to be supplied at the Start Date.
- (e) Client acknowledges that:
 - Supplier's maintaining or upgrading of the Technology or modifying or substituting Services may cause minor disruption to Client's use of the Services; and
 - Supplier's modifying or substituting Services may result in different (but equivalent and not fundamentally different) or superior Services.

2.4. EMERGENCY

- (a) Client acknowledges that the Services are reliant on Third Party Service Providers and that an Emergency may occur at any time.
- (b) In the event of an Emergency, Supplier may suspend the supply of or disable Services for the duration of the Emergency.

- (c) Supplier must suspend the Services for the shortest time practicable and must use its best endeavours to resolve the Emergency as quickly as possible.
- (d) If it would be reasonably practicable for Supplier to give Client notice prior to suspending Services, Supplier must give Client that notice.
- (e) Supplier excludes any liability to Client for loss suffered by Client as a result of an Emergency.
- 3. SERVICES – CLIENT**
- 3.1. SERVICES ACQUISITION & USE**
- (a) Subject to this clause 3, Client may access the Platform and Services.
- (b) Client acknowledges that the capacity of Sub-Contractor and Third Party Service Provider's services may be reached during peak times, such as New Year's Eve, and that, during those peak times, the transmission of Communications may be delayed.
- (c) Client may refer to Supplier and use the Supplier Trade Mark in the footer of a Communication, but only if such reference and use does not represent that Supplier is acting in any capacity other than to transmit the Communication on Client's behalf.
- 3.2. POSITIVE OBLIGATIONS**
- (a) To the extent that Client wishes to transmit Communications, Client must produce the content of the Communications.
- (b) Client must ensure that all Communications (including their content) is consistent with Legal Compliance, including in relation to transmission, storage or dissemination.
- (c) Client must ensure that all materials and information required to successfully transmit a Communication are accurate and complete.
- (d) Client must notify Supplier as soon as practicable upon becoming aware that its Secure Access Information has been mislaid, compromised or stolen.
- (e) Client must obtain, and continuously warrants that it has obtained, all necessary consents for the purposes of sending electronic messages to any person consistently with Legal Compliance, especially in compliance with its obligations under the Spam Act 2003 (Cth).
- Note: The Australian Direct Marketing Association provides guidance about compliance with Australia spam law, including at the following URL: <http://www.adma.com.au/regulatory/compliance-tools/spam-act>.*
- 3.3. NEGATIVE OBLIGATIONS**
- (a) Client must not share Secure Access Information with any third party without Supplier's prior approval in writing.
- (b) Client must not modify, replace, copy, reverse-engineer, gain unauthorised access to restricted areas within or sabotage the Technology or otherwise do any act that is not contemplated under this agreement as a legitimate use of the Technology.
- (c) Without limiting paragraphs (a)-(b), when using the Services Client must not do any act that is inconsistent with Legal Compliance or do any act that otherwise unreasonably interferes with, harasses, offends any person or is reasonably likely to bring Supplier or any of its Related Bodies Corporate into disrepute.
- 3.4. TRADE PROMOTION LOTTERIES**
- If the Services relate to any trade promotion lottery (TPL), the terms at <http://www.traction-digital.com/promotions-terms-conditions/> apply, including in circumstances where the Technology includes TPL functionality that Client accesses and manages.
- 4. FEES & EXPENSES**
- 4.1. FEES**
- (a) Supplier may charge to Client the following fees (Fees) as specified in the Agreement Summary – Schedule A (provided separately):
- an account set-up fee upon creating Client's basic account;
 - a sub-account set-up fee on each occasion Supplier creates a sub-account of the basic account;
 - the Subscription Fee (usually a monthly fee);
 - an additional fee for each Communication that Client uses the Technology to transmit in excess of the Communications allowance; and
- an additional fee for each service hour that the client uses in excess of those included in the subscription fee
- (b) Supplier may also charge any other fees as specified in the Schedule A (provided separately).
- 4.2. VARIATION**
- (a) Supplier may vary the Fees from time to time. However, if Supplier intends to increase the Fees, Supplier must:
- give Client at least 21 days' notice in writing;
 - not increase the Fees by more than the CPI All Groups Weighted Average of Eight Capital Cities Index Numbers for the previous 12 months to the end of the last quarter, plus 2%.
- 4.3. EXPENSES**
- (a) Supplier must not incur any expense without Client's prior approval in writing.
- 5. PAYMENT**
- 5.1. AMOUNT**
- (a) Client must pay all Fees to Supplier.
- (b) Client must also pay to Supplier the GST required to be paid under Australian GST law.
- (c) All payments must be in full and without any set-off.
- 5.2. TIME**
- Client must pay to Supplier all invoiced amounts within the time period specified in the Agreement Summary or within 30 days of the date of the invoice if no period is specified in the Agreement Summary.
- 5.3. METHOD**
- Client must pay all amounts in accordance with the payment method set out in each invoice.
- 5.4. LATE PAYMENT**
- (a) Supplier may charge simple interest on unpaid invoices at 2% per annum above the National Australia Bank's prevailing commercial loan rate. Supplier may charge the interest on a daily basis from the date an invoice becomes overdue.
- (b) Client must pay to Supplier all interest charged pursuant to paragraph (a) as though the interest had been invoiced on the day the payment of the unpaid invoice is paid.
- (c) Notwithstanding anything else in this agreement, Supplier may suspend its supply of the Services until all amounts due and owing have been paid.
- 6. RELATIONSHIPS**
- 6.1. SUB-CONTRACTORS**
- (a) This clause operates notwithstanding clause 18.5 (assignment and novation).
- (b) Supplier's liability for the performance of its obligations under this agreement is unaffected by its engagement of sub-contractors. To be clear, as against Client, Supplier remains the primary contractor.
- 7. INTELLECTUAL PROPERTY**
- 7.1. OWNERSHIP**
- (a) Except as expressly provided in this agreement, Supplier acknowledges that, as between it and Client:
- Supplier does not own any Intellectual Property in Client Materials or Client Data;
- (b) As between Client and Supplier and in relation to Supplier Materials, Client gives the same acknowledgement as Supplier gives to Client in paragraph (a).
- 7.2. LICENCES**
- (a) Supplier hereby grants Client a licence to use Supplier Materials as required to acquire the Services. The licence is:
- for the term of this agreement;
 - revocable for so long as Supplier exercises its rights to suspend the Services pursuant to this agreement;
 - non-transferable and non-sublicensable, other than to Client's Related Bodies Corporate by agreement in writing between the parties.
- (b) Client hereby grants Supplier a licence to use Client Materials and Client Data as required to supply the Services. The licence is:
- for the term of this agreement;
 - revocable for so long as Supplier exercises its rights to suspend the Services pursuant to this agreement;
 - non-transferable and non-sublicensable other than to Supplier's Related Bodies Corporate and sub-contractors.
- 7.3. INFINGEMENT**
- (a) Client warrants that Supplier's use of Client Materials and Client Data as contemplated by this agreement will not infringe the Intellectual Property or other rights of any third party.
- (b) Supplier must not do any act that infringes Intellectual Property or other rights in Client Materials or Client Data.
- (c) Supplier warrants that Client's use of Supplier Materials in accordance with this agreement will not infringe the Intellectual Property or other rights of any third party.
- (d) Client must not do any act that infringes Intellectual Property or other rights in Supplier Materials.
- 8. DATA**
- 8.1. OWNERSHIP**
- Except as expressly provided in this agreement, Supplier acknowledges that, as between it and Client, Supplier does not own any rights in electronic copies of Client Data or New Data.
- 8.2. STORAGE**
- (a) Client acknowledges that Sub-Contractor Service Providers may include data storage service suppliers. In that regard, Supplier must:
- use only reputable suppliers of data storage services;
 - ensure that each data storage service provider has access controls in effect that will protect Client Data and New Data from unauthorised access, to a level of protection consistent with the reasonable expectations of a first-class commercial organisation; and
 - ensure that each data storage service provider has recovery systems in effect such that Client Data and New Data is protected from primary systems failure, to a level of protection consistent with the reasonable expectations of a first-class commercial organisation.
- 8.3. COPIES**
- (a) Upon Client's request, Supplier must deliver up to Client all copies of Client Data and New Data in Supplier's possession, custody or control. Supplier reserves the right to use service hours for this effort.
- (b) Supplier is under no obligation to provide such copies in any particular format.
- 8.4. DESTRUCTION**
- Upon Client's request, but only to the extent that it is reasonably practicable, lawful and does not expose Supplier to commercial or legal risks associated with a failure to keep records, Supplier must permanently destroy or disable access to all copies of Client Data and New Data in Supplier's possession, custody or control.
- 8.5. PRIVACY**
- Nothing in this agreement affects the parties' obligations under privacy laws.
- Note: Clause (c) provides that Supplier must not contravene any Laws and clause 1.1(b) relates to Personal Information. Supplier's privacy policy can be viewed at this URL: <http://www.traction-digital.com/privacy/>*
- 9. CONFIDENTIAL INFORMATION**
- (a) The parties acknowledge that, in the course of performing this agreement, one party (Discloser) may disclose Confidential Information to the other (Recipient).
- (b) Subject to the express provisions of this agreement, a Recipient must not:
- disclose any of Discloser's Confidential Information to any person; or
 - use any of Discloser's Confidential Information for any purpose other than exercising its rights or performing its obligations under this agreement,
 - without Discloser's express written authorisation.
- (c) Each Recipient may disclose Discloser's Confidential Information to its directors, officers, employees, contractors, sub-contractors and agents as, and only as, reasonably necessary for the purposes of Recipient's performance of this agreement.

10. EXCLUSIONS

10.1. EXCLUSIONS GENERALLY

(a) Client acknowledges that the Services exclude:

- reviewing content in relation to formatting or typographical errors;
- reviewing or 'signing off' on any client functional specifications;
- reviewing or 'signing off' on Client's Legal Compliance generally or providing professional or legal advice in relation to Legal Compliance, even if Supplier supplies a 'spam assessment' or similar tool to Client, which Client acknowledges is merely a guide to assist Client to manage its own Legal Compliance;

10.2. LIABILITY

(a) Client acknowledges that it is at all times solely liable for the:

- accuracy and integrity of Communications content and Client Data;
- Legal Compliance of Communications and Client's commercial conduct and affairs;
- configuration of user-configurable aspects of its account; and
- any loss or damage suffered by Client as a result of any failure on its part in relation to the matters in this paragraph (a), including any failure in the delivery of Communications.

(b) The parties acknowledge that in relation to Client Data that is also Personal Information, then as between Client and Supplier, and to the maximum extent within the meaning of the Privacy Act 1988 (Cth), Client alone collects, stores, uses and discloses the Personal Information.

10.3. SUPPLIER'S RIGHT TO REFUSE

(a) Supplier may refuse to supply the Services or otherwise act on Client's directions to the extent that:

- Supplier reasonably believes that doing so would likely involve Supplier's or Client's engaging in conduct inconsistent with Legal Compliance; or
- Client's directions are incomplete, ambiguous or contradictory;
- Client Data is not fully fit for purpose.

(b) Supplier must promptly notify Client if it exercises its rights under paragraph (a) and must specify the reason for exercising them.

Note: Clause 5.4(c) (late payment) provides another ground on which Supplier may refuse to supply the Services.

11. ADDITIONAL WARRANTIES

11.1. ADDITIONAL WARRANTIES CLIENT GIVES

In addition to and without limiting any warranty Client gives elsewhere in this agreement, Client warrants that:

- Supplier's performing this agreement will not cause Supplier to act inconsistently with Legal Compliance by reason merely of Supplier's supply of the Services in accordance with this agreement and otherwise following Client's feedback and directions and relying on information supplied by Client to Supplier;
- Client does not rely on any representation from Supplier that is not expressly contained in this agreement; and
- any representative of Client who signs this agreement, purports to vary this agreement or provides directions to Supplier is authorised by Client to do so and bind Client under this agreement.

11.2. ADDITIONAL WARRANTIES SUPPLIER GIVES

In addition to and without limiting any warranty Supplier gives elsewhere in this agreement, Supplier warrants that any representative of Supplier who signs or purports to vary this agreement is authorised by Supplier to do so and bind Supplier under this agreement.

11.3. ADDITIONAL WARRANTIES SUPPLIER DOES NOT GIVE

In addition to warranties expressly disclaimed elsewhere in this agreement, Supplier gives no warranty that:

- the Services will not fail in circumstances where a Third Party Service Provider fails;
- the Services will confer on Client any particular commercial objective, outcome or benefit;
- the Services may be relied upon in circumstances affecting the health, safety or protection of persons or property.

12. INDEMNITY

(a) Supplier indemnifies Client against any Loss suffered by Client:

- as a result of any breach of this agreement (including its warranties) by Supplier or any other unlawful conduct engaged in by Supplier in relation to the performance of its obligations under this agreement; and
- including where such loss arises from legal action brought against Client by a third party or brought by Client against a third party.

(b) Without limiting clause 10.2, Client indemnifies Supplier against any Loss suffered by Supplier:

- as a result of any breach of this agreement (including its warranties) by Client or any other unlawful conduct engaged in by Client in relation to the acquisition or use of the Services; and
- including where such loss arises from legal action brought against Supplier by a third party, including a regulator, or brought by Supplier against a third party.

(c) Paragraphs (a) and (b) do not apply to the extent that the Loss suffered was caused or contributed to by the party who suffered the loss.

13. LIMITATION OF LIABILITY

(a) Without limiting clauses 2.4, 10.2 and 12:

the liability of each party to the other is limited to the extent to which the other party caused the liability to arise by reason of its own negligence, breach of contract or other unlawful conduct;

the liability of each party to the other is further limited to Loss; and

- Supplier's liability to Client is further limited to supplying the Services again or paying the cost of having the concerned Services supplied again.

(b) Paragraph (a) does not apply to the extent that the liability was caused by the fraud or wilful misrepresentation of the party seeking to limit its liability.

14. FORCE MAJEURE

(a) In the event that a party is prevented in fact or by law from performing any of its obligations under this agreement by reason of an event beyond its reasonable control, then those obligations of that party are suspended for the period of time that the party remains so prevented.

(b) A party which is, by reason of Force Majeure, unable to perform any obligation or condition under this agreement must use commercially reasonable endeavours to remedy or abate the Force Majeure as quickly as possible.

(c) Paragraph (a) does not apply to an obligation to pay money nor to an event that was caused by an act of default by the party so prevented.

15. INSURANCE

Supplier must maintain appropriate levels of professional indemnity, public and product liability and workers' compensation insurances.

Client acknowledges that Supplier recommends that Client acquire an insurance policy to cover the conduct of any trade promotion lottery in relation to which there is a risk that an unexpectedly high volume or intensity of Communications transmitted by recipients may exceed the capacity or agreed limits of the Technology or services supplied by Sub-Contractor or Third Party Service Providers.

16. TERM & TERMINATION

16.1. TERM

This agreement commences on the Start Date and continues for the Initial Term. Following the Initial Term, this Agreement will renew automatically for successive one (1) year periods unless either party gives notice of termination as provided herein.

16.2. TERMINATION AT END OF TERM

Either party may terminate this agreement at the end of the current term (whether the Initial Term or a Renewing Term) by giving the other party no less than 90 days' notice in writing. Should the Client terminate the agreement, Client must continue to pay the Service Fee during the notice period.

16.3. TERMINATION FOR BREACH

Without prejudice to any other right, action or remedy, if a party (the first party) breaches this agreement and:

- (a) the breach is reasonably capable of being remedied by the first party and the first party does not remedy the breach within 14 Business Days of the other party's notifying the first party in writing about the breach; or
- (b) the breach is material and not reasonably capable of being remedied by the first party, then the other party may terminate this agreement with immediate effect by giving the first party notice in writing.

16.4. TERMINATION FOR OTHER EVENT

(a) Either party may terminate this agreement with immediate effect if an Insolvency Event occurs in relation to the other party.

(b) Either party may terminate this agreement with immediate effect if:

- a party has been relieved of any of its obligations pursuant to clause 14 (force majeure) for at least 3 consecutive months; and
- the obligations of which the party has been relieved are fundamental to that party's performance under this agreement.

16.5. CONSEQUENCES OF TERMINATION

Client must continue to pay the Service Fee until this agreement terminates.

16.6. NOTICE IN ADVANCE

To be clear, any notice in writing given under this clause 16 is notice given in advance.

17. FIRST AND LAST RIGHT OF REFUSAL

17.1. NEW AGREEMENT

(a) This clause 17 does not apply where this agreement is terminated by Client in accordance with clause 16.3 or clause 16.4. Otherwise, this clause 17 survives termination of this agreement.

(b) Subject to clause 17.1(a), prior to Client entering into any agreement for provision of any services the same as or substantially similar to those services specified in paragraphs 1 and 2 of the definition of "Services" in clause 1.1 (New Services) with a third party, which agreement is to take effect on, or within the [3 months] period following, termination of this agreement (New Services Agreement), Client must comply with the succeeding provisions of this clause 17.

17.2. FIRST RIGHTS

(c) Client must give written notice to the Supplier that it proposes to enter into an agreement with a third party for the provision of New Services (New Services Notice). The New Services Notice must set out Client's requirements for the New Services including the specific nature of the New Services required.

(d) Within [30 days] of the Supplier's receipt of a New Services Notice given in accordance with clause 17.2(a), the Supplier may give to Client its proposal for the provision of the relevant New Services, including its pricing proposal and complete details of the terms and conditions on which it proposes to supply the New Services (Proposal).

(e) Client must give a written response (Response) to the Supplier in relation to the Proposal within [14 days] of receiving the Proposal.

17.3. LAST RIGHTS

Without limiting clause 17.2, Client must not enter into a New Services Agreement:

(a) without first:

- (i) providing the Supplier a written notice containing details of the principal terms of the proposed New Services Agreement including the applicable price and key commercial terms (New Services Agreement Notice);
- (ii) allowing the Supplier [10 Business Days] after receipt of the New Services Agreement Notice to make an offer in writing to provide the relevant New Services on the same principal terms as the terms set out in the New Services Agreement Notice (Matching Offer);

(b) in contravention of clause 17.4.

17.4. IF MATCHING OFFER PROVIDED

If the Supplier has provided to Client a Matching Offer, Client must not enter into the New Services Agreement but must enter into an agreement to supply the relevant New Services with the Supplier on the terms of the Matching Offer.

17.5. IF NO MATCHING OFFER PROVIDED

If no Matching Offer is made to Client by the Supplier within the period specified in clause 17.3(a)(ii), then Client may enter into a New Services Agreement with a third party on the same terms as set out in the New Services Agreement Notice. If Client enters into a New Services Agreement with a third party, it must not make or agree a material variation to the terms set out in the New Services Agreement Notice for a period of 6 months from the date that the New Services Agreement is entered into.

18. THIS AGREEMENT

18.1. FORMATION

The communication of an execution copy of this agreement to Client is the making of a contractual offer by Supplier to Client. Client may accept the offer by signing this agreement. By accepting Supplier's offer, Client enters into an agreement with Supplier on the terms recorded in this agreement.

18.2. TERMS

- (a) This agreement includes the Agreement Summary and any other schedules (provided separately) to this agreement, but excludes Technical Documentation. To the extent there is any irreconcilable inconsistency between the body of this agreement and the Agreement Summary or a schedule (provided separately), the terms of the Agreement Summary or schedule (provided separately) prevail.
- (b) Subject to paragraph (a) and clause 18.3, this agreement supersedes or excludes all other agreements, arrangements, understandings and representations, written or oral, in relation to Client's engagement of Supplier to supply the Services.

18.3. VARIATION

The parties may vary this agreement only by agreement in writing.

18.4. WAIVER

Subject to this agreement, no waiver of rights, actions or remedies is effective unless in writing. To be clear, the failure of any party to exercise or enforce a right, action or remedy under this agreement, or otherwise, does not constitute a waiver of the relevant right, action or remedy.

18.5. ASSIGNMENT & NOVATION

Neither party may assign its rights or novate its rights and obligations under this agreement without the other party's written consent, which consent must not be unreasonably refused.

18.6. SURVIVAL

The following matters survive the termination of this agreement:

- clauses 5, 7, 8.3-8.4, 9, 12, 16.5 and 18.6;
- all accrued obligations, including an obligation to pay fees and charges; and
- all terms necessary to construe and give effect to the foregoing matters.

18.7. GOVERNING LAW & JURISDICTION

- (a) The laws of the state of New South Wales, Australia, govern this agreement.
- (b) The parties acknowledge that the courts of NSW are an appropriate forum for the settlement of disputes arising under or in relation to this agreement.
- (c) To the extent they come before any court, all disputes arising under or in relation to this agreement will be determined in the courts of NSW.