

## GENERAL TERMS AND CONDITIONS

Attention is drawn to these Terms and Conditions, and, in particular, the limitation of liability provision under Condition 9 below. By signing an Order Form, the Customer is deemed to have understood and accepted these Terms and Conditions. The supplier of the products and services featured on <http://www.evodigital.com.au> is Smart Traffic, a trading name of Smart Traffic Pty Ltd, registered Office Suite 7, MEAA Building, 245 Chalmers Street, Redfern, Sydney, NSW 2016. ABN: 51 169 416 808.

The contract for the supply of such products and services which are ordered by the Customer shall consist of these General Terms and Conditions and any applicable Specific Terms and Conditions noted in the Order Form. Should any inconsistency or ambiguity exist between a term or condition contained in any component document(s) comprising the Contract, the following precedence shall apply to eliminate such inconsistency or ambiguity:

- (a) the Order Form;
- (b) the General Terms and Conditions;

The Customer may contact Smart Traffic at the above address or by telephone on 02 8205 3133 or by email at [sales@smarttraffic.com.au](mailto:sales@smarttraffic.com.au).

### 1. DEFINITIONS

In these Terms and Conditions:

Conditions mean the relevant Specific Terms and Conditions and these General Terms and Conditions as amended from time to time in accordance with Condition 2.6 or 21.

Contract means the Order Form (incorporating the Proposal) and Smart Traffic's acceptance of it on the terms of these Conditions by the despatch of an Order Confirmation.

Customer means the company its employees, agents, representatives and sub contractors to whom the Services are provided as set out on the Order Form.

Effective Date means the date referred to in Condition 2.4.

Fee(s) mean the amount(s) payable by the Customer for the Services provided by Smart Traffic in accordance with Condition 5.

Force Majeure Event shall have the meaning set out in Condition 12.

Order Form means an order form sent by the Customer to Smart Traffic requesting the supply of Services and which shall incorporate the Proposal.

Proposal means the proposal sent to the Customer, attached as part of the order form, by Smart Traffic and which sets out the services in which Smart Traffic proposes to provide to the Customer.

Services means the services to be provided by Smart Traffic as specified in the Order Form.

Specific Terms and Conditions means the Specific Terms and Conditions Specified in the Order Form.

## **2. APPLICATION OF CONDITIONS**

2.1 Any quotation is valid for a period of 7 days only, and Smart Traffic may withdraw it at any time by notice to the Customer.

2.2 When the Customer wishes to place an order for the Services, it shall send a Signed Order Form (electronically or as otherwise agreed) to Smart Traffic.

2.3 The Customer's order shall be deemed to be an offer by the Customer subject to these Conditions. The Customer shall ensure that the Order Form is complete and accurate.

2.4 The Customer's order shall only be deemed to be accepted when Smart Traffic receives payment in cleared funds from the Customer of the full amount payable for Month 1 as specified in the Proposal, at which point and on which date a binding contract shall come into existence (Effective Date).

2.5 No order which has been accepted by Smart Traffic in accordance with Condition 2.4 may be cancelled by the Customer, except with the agreement in writing of Smart Traffic and provided that the Customer indemnifies Smart Traffic in full against all loss (including loss of profit), costs (including the cost of all labour and materials used), damages, charges and expenses incurred by Smart Traffic as a result of the cancellation.

2.6 These Conditions shall override any inconsistent terms or conditions (if any) contained in or referred to in documents or correspondence from the Customer (with the exception of the Order Form); and no addition to, variation of, exclusion or attempted exclusion of any term of the Contract shall be binding on Smart Traffic unless in writing and signed by a duly authorised representative of Smart Traffic.

2.7 The Contract constitutes the entire agreement between the parties. The Customer acknowledges that it has not relied on any statement, promise or representation made or given by or on behalf of Smart Traffic which is not set out in the Contract.

2.8 Any descriptive matter or advertising issued by Smart Traffic, and any descriptions or illustrations published on Smart Traffic's website, are issued or published for the sole purpose of giving an approximate idea of the Services described in them. They shall not form part of the Contract or have any contractual force.

### **3. SMART TRAFFIC'S OBLIGATIONS**

3.1 Smart Traffic shall be responsible for providing the Services in accordance with the requirements of the Contract.

3.2 Although Smart Traffic will use reasonable endeavours to supply the Services in accordance with any performance date set out in the Order Form, such date shall be an estimate only and time shall not be of the essence of the Contract.

3.2 For the avoidance of doubt, the Services will not include:

- (a) the cost of any third party software upgrades or web development which Smart Traffic advises are required; or

(b) any website, hosting or other technical support.

3.4 Smart Traffic will not make any changes to a Customer's website without the Customer's prior consent and the Customer, as the website owner, agrees to and takes full responsibility for the changes made.

3.5 Where the Services being provided require, Smart Traffic will liaise with the relevant web agency, hosting company or other third party, but Smart Traffic will have no liability to the Customer under the Contract if it is prevented or delayed from performing its obligations under the Contract by any act or omission of the relevant web agency, hosting company or other third party.

3.6 Smart Traffic shall not be liable for any failure to comply with the Contract if such failure arises as a result of an action or omission by the Customer or a third party including, by way of example and not limitation, any of the following occurrences:

- (a) the Customer changes the website or in any way hinders the progress of the website;
- (b) the Customer has removed any of the products or services, changed keywords, changed domains, interfered with the link building or not complied with the request and advice of Smart Traffic;
- (c) the Customer has acted in a way that Smart Traffic considers, at its sole discretion, is detrimental to achieving the first page listing or top rankings;
- (d) the Customer has interfered with or impaired the product or service;
- (e) the Customer has not maintained a 99% uptime at all times of the Customer's website for the duration of the Contract;
- (f) the Customer has breached any applicable law;
- (g) the Customer has breached any term of the Contract;

- (h) Smart Traffic is prevented from or inhibited in its ability to perform its obligations under the Contract due to a Force Majeure Event;
- (i) the Customer fails to provide FTP access for Smart Traffic to implement the onsite recommendations;
- (j) changes or updates to third party software or analytics data that affects or prevents Smart Traffic from reporting or tracking any data; and
- (k) any action by a search engine provider, internet service provider or other third party including, without limiting the generality of the foregoing, the application of a so called "penalty" or any change to an algorithm or rules or terms of a search engine, internet service provider or other third party which results in the Customer's website appearing lower in search result listings than was the case at the date of the Order Form or lower than the position which Smart Traffic represented may be possible after providing the Services.
- (l) The Customer has not implemented Smart Traffic's onsite recommendations (Onsite Recommendations) to Smart Traffic's satisfaction within 1 month of receipt of Smart Traffic's notice of such Onsite Recommendations (Recommendations Notice).
- (m) The Customer has failed to disclose within 14 days of the Effective Date
  - (i) all domain names they own or have owned within the preceding 12 months that currently have, or have had, a live websites on them. This includes partner firms /resellers, franchisees and international websites
  - (ii) all website(s) or domain name(s) that redirect to the website(s) or URLs Smart Traffic have been engaged to work on.
  - (iii) any website or local listings that are copies of, or an attempt to pass themselves off as, any of the website(s) or URL's Smart Traffic have been engaged to work on.
  - (iv) If any content (written, visual or audio) on any website or URL Smart Traffic have been engaged to work on has been copied from another source.
  - (v) Any work carried out a previous SEO company or any website / URL activity that may affect

future results – examples include, but are not limited to, bulk link buying, manual penalties, automated penalties and website infection with malware.

3.7 Smart Traffic shall not be liable for any links being removed by a third party or any penalties incurred by the Customer.

3.8 If any of the events referred to in paragraphs (a) to (m) of clause 3.6 occur (a "3.6 Event"), any relevant representation or contractual term regarding the results which may be achieved by providing the Services is withdrawn and will have no force or effect pending a review of the effect of the 3.6 Event by Smart Traffic which has the right at its sole discretion to substitute a new representation or contractual term which will be deemed to be accepted by the Customer.

3.9 If a 3.6 Event occurs and the Customer requests Smart Traffic to take steps to offset the adverse effect of the 3.6 Event, in the absence of written agreement regarding the additional costs of taking such steps:

- (a) Smart Traffic is entitled to charge extra for the additional time spent and work done at the rate which it charges at that time for such work; and
- (b) the contract is deemed to be extended for such time as it takes to complete the additional work

## 4. CUSTOMER'S OBLIGATIONS

4.1 The Customer shall:

- (a) provide Smart Traffic with:
  - (i) all necessary cooperation relating to the Services;
  - (ii) direct and remote access to the Customer's website and such other facilities as reasonably required by Smart Traffic; and
  - (ii) all necessary access to such information as may be required by Smart Traffic in order to render the Services, including but not limited to security access information and software interfaces to the Customer's other business applications;

- (b) comply with all applicable laws and regulations with respect to its activities; and
- (c) carry out all the Customer's tasks set out in the Contract in a timely and efficient manner. In the event that the Customer fails to perform such tasks, Smart Traffic may adjust any timeline set out in the Contract as reasonably necessary.

4.2 The Customer accepts that Smart Traffic will have the exclusive right to provide it with the Services which it has contracted to buy and that it will not purchase services which compete with any of those provided by Smart Traffic from any third party for the duration of the Contract. For clarification, the reason for clause 4.2 is to avoid the sort of problems which occur when a third party which provides services similar to the Services provides those services at the same time as Smart Traffic.

4.3 The Customer warrants that the use of material provided by the Customer or its agents to Smart Traffic to enable Smart Traffic to provide the Services shall not infringe the intellectual property or other rights of whatever nature of any third party.

## 5. FEES

5.1 Subject to Conditions 5.9 and 5.10, the Customer shall pay the Fees set out in the Order Form for the Services.

5.2 All amounts and Fees stated or referred to in the Contract are inclusive of GST, which shall be added to Smart Traffic's invoice(s) at the appropriate rate.

5.3 Subject to Conditions 5.9 and 5.10, Smart Traffic shall invoice the Customer for Fees which have become payable in accordance with the Contract.

5.4 The Customer shall pay each invoice submitted by Smart Traffic within the time period specified in the Specific Terms and Conditions, and time for payment shall be of the essence of the Contract.

5.5 Without limiting any other right or remedy of Smart Traffic, if the Customer fails to make any payment due to Smart Traffic under the Contract by the due date for payment (Due Date) Smart Traffic shall have the right to:

(a) charge interest on the overdue amount at the rate of 4 per cent per annum above the then current Commonwealth Bank base rate accruing on a daily basis from the Due Date until the date of actual payment of the overdue amount, whether before or after judgment, and compounding quarterly; and

(b) suspend all Services until payment has been made in full.

5.6 The Customer shall pay all amounts due under the Contract in full without any deduction or withholding except as required by law and the Customer shall not be entitled to assert any credit, set off or counterclaim against Smart Traffic in order to justify withholding payment of any such amount in whole or in part. Smart Traffic may, without limiting its other rights or remedies, set off any amount owing to it by the Customer against any amount payable by Smart Traffic to the Customer.

5.7 Without limiting any other right or remedy of Smart Traffic, cheques and direct debits returned unpaid by the Customer's bank and credit card payments returned unpaid will incur an administration charge which under all circumstances shall be paid by the Customer.

5.8 In the circumstances envisaged in Condition 3.6 Smart Traffic shall be entitled to charge the Customer a fee for resolving the issue. Such fee shall be subject to agreement and shall be in addition to the sums due under the Contract in respect of the Services.

5.9 Following receipt by Smart Traffic of notice from the Customer to terminate the Contract for convenience as may be permitted under the Specific Terms and Conditions, Smart Traffic shall be entitled to invoice the Customer the remaining instalments of the full value of the fees payable for the Services during the notice period without any deduction, discount or reduction.

## 6. TERMINATION OF SERVICE

6.1 The service may be cancelled by either party, by providing written notice for the period stipulated on the order form. If no cancellation period is stipulated on the order form then the standard cancellation terms are 90 days. At the end of any contract agreed for three months or longer, your contract will auto renew



onto a rolling monthly contract. For clients on rolling contracts or moving onto an auto renew monthly contract, the cancellation period is set at 30 days. In order to cancel the Contract under this paragraph 6, the Customer must send an email to [apac.accounts@smarttraffic.com.au](mailto:apac.accounts@smarttraffic.com.au) or a letter by registered post to Smart Traffic Pty Ltd, registered Office Suite 7, MEAA Building, 245 Chalmers Street, Redfern, Sydney, NSW 2016 and receive an acknowledgement from a Director of Smart Traffic confirming that Smart Traffic has received and accepted the cancellation.

6.2 Without prejudice to any other right or remedy available to Smart Traffic, Smart Traffic may, at its sole discretion, terminate the Contract if the Customer:

- (a) fails to pay any sum due under the Contract and such sum remains unpaid for 15 days after written notice from Smart Traffic that such sum has not been paid; or
- (b) ceases to carry on business or becomes insolvent, or has an administrator or receiver appointed or enters into liquidation or enters into any agreement with its creditors; or
- (c) commits a breach of any of the terms of the Contract and (if such a breach is remediable) fails to remedy that breach within 15 days of the Customer being notified in writing of the breach; or
- (d) interferes with or impairs the Services, or Smart Traffic's ability to deliver the Services.

6.3 Termination of the Contract, however arising, shall not affect or prejudice the accrued rights of the parties as at termination or the continuation of any provision expressly stated to survive or implicitly surviving termination.

6.4 On termination of the Contract for whatever reason, the Customer shall immediately pay all of Smart Traffic's outstanding invoices and interest, and in respect of Services supplied but for which no invoice has been submitted, Smart Traffic may submit an invoice which shall be immediately payable on receipt.

## 7. DISPUTE RESOLUTION PROCEDURE

7.1 If any dispute arises in connection with the Contract, each party will give authority to a representative who holds a senior position in their business to settle the dispute and those representatives will, within 7 days of

a written request from one party to the other, meet promptly or arrange a teleconference in good faith to resolve the dispute. Compliance with this requirement is a precondition to commencing litigation.

7.2 If the dispute is not resolved at that meeting or teleconference, the dispute resolution process set out in Condition 7.1 shall be deemed to have been exhausted in respect of the matter in dispute, and each party shall be free to pursue the rights granted to it by the Contract in respect of such matter.

## 8. PRIVACY POLICY

8.1 The Privacy Policy of Smart Traffic, which may vary from time to time, can be found on the website here.

## 9. LIMITATION OF LIABILITY

9.1 The following provisions set out the entire liability of Smart Traffic (including any liability for the acts or omissions of its employees) to the Customer in respect of any breach of the Contract and any representation, statement or tortious act or omission (including negligence) arising out of or in connection with the Contract.

9.2 All warranties, conditions and other terms implied by statute or common law are excluded from the Contract to the fullest extent permitted by law.

9.3 Nothing in these Conditions excludes or limits the liability of Smart Traffic for death or personal injury caused by Smart Traffic's negligence or fraud or fraudulent misrepresentation.

9.4 Subject to Condition 9.3, Smart Traffic shall not be liable for any loss of profits, loss of business, depletion of goodwill or similar losses or for any special, indirect or consequential loss, costs, damages, charges or expenses howsoever arising; and Smart Traffic's total liability in contract, tort (including negligence or breach of statutory duty), misrepresentation, restitution or otherwise, arising in connection with the performance or contemplated performance of the Contract shall be limited to 100% of the total Fees received by Smart Traffic in the calendar year in which the incident occurs.

- 9.5 Provided that Smart Traffic performs the Services with reasonable care and skill, it shall have no liability or obligation whatsoever in relation to the links that it builds up via the Services, any keywords that it may propose in order to build up those links or any website (including without limitation any website content) involved in or affected by the Services.
- 9.6 For the avoidance of doubt, Smart Traffic shall not be liable for any links being removed by a third party or any penalties incurred by the Customer.
- 9.7 The DA of a link, when DA is used as a metric is based on the live date of the link, not the reported date of the link.
- 9.8 The Customer shall indemnify Smart Traffic against any claims, actions, proceedings, losses, damages, expenses and costs (including any direct, indirect or consequential losses, loss of profit, loss of reputation and all interest, penalties and legal and other reasonable professional costs and expenses) arising out of or in connection with (i) the Customer's use of the Services (ii) any breach by the Customer of any term of or warranty given under the Contract or (iii) Smart Traffic's use of any materials or data or other items supplied by the Customer to Smart Traffic under the Contract.
- 9.9 The provisions of this Condition 9 shall continue to apply notwithstanding the termination or expiry of the Contract.

## **10. CONFIDENTIALITY**

- 10.1 Except as expressly provided in the Contract, each party shall keep in strict confidence all technical or commercial know how, specifications, inventions, processes or initiatives which are of a confidential nature and have been disclosed by one party to the other. Each party shall restrict disclosure of such confidential material to such of its employees as need to know the same for the purpose of discharging its obligations under the Contract and shall ensure that such employees are subject to corresponding obligations of confidentiality.
- 10.2 All intellectual property rights and title in and to materials, drawings, specifications and data supplied by Smart Traffic to the Customer shall at all times be, and remain, the exclusive property of Smart Traffic, but

shall be held by the Customer in safe custody at its own risk until returned to Smart Traffic, and shall not be disposed of or used other than in accordance with Smart Traffic's written instructions or authorisation.

10.3 The parties shall be entitled to disclose such information to their professional advisers and to the extent necessary for the purposes of enforcing their rights under the Contract.

10.4 This Condition 10 shall survive termination of the Contract, howsoever caused.

## **11. NON-SOLICITATION**

Neither party shall, during the continuance of the Contract, or within 12 months of its termination, whether on behalf of itself or via a third party, solicit or seek to entice away any employee of the other. In the event of breach of this Condition 11 the party in default shall pay the other a sum equal to 6 months gross pay of the employee concerned being a pre estimate of the cost of recruitment and training a replacement.

## **12. FORCE MAJEURE**

Neither party shall be liable for any failure or delay in performing its obligations under the Contract to the extent that such failure or delay is caused by a Force Majeure Event. For the purposes of these Conditions, Force Majeure Event means any event beyond a party's reasonable control, which by its nature could not have been foreseen, or, if it could have been foreseen, was unavoidable, including strikes, lock outs or other industrial disputes (whether involving its own workforce or a third party's), failure of energy sources or transport network, acts of God, war, terrorism, riot, civil commotion, interference by civil or military authorities, national or international calamity, armed conflict, malicious damage, breakdown of plant or machinery, nuclear, chemical or biological contamination, sonic boom, explosions, collapse of building structures, fires, floods, storms, earthquakes, loss at sea, epidemics or similar events, natural disasters or extreme adverse weather conditions.

## **13. REMEDIES**

Except as expressly provided in the Contract, the rights and remedies provided under the Contract are in addition to, and not exclusive of, any rights or remedies provided by law.

## 14. WAIVER

A waiver of any right under the Contract is only effective if it is in writing and signed by or on behalf of the waiving party, and it applies only to the party to whom the waiver is addressed and the circumstances for which it is given.

## 15. ENTIRE AGREEMENT

15.1 The Contract constitutes the whole agreement between the parties and supersedes all previous agreements between the parties relating to its subject matter.

15.2 Each party acknowledges that, in entering into the Contract, it has not relied on, and shall have no right or remedy (other than for breach of contract) in respect of any statement, representation, assurance or warranty (whether made negligently or innocently) other than as expressly set out in the Contract.

15.3 In the event of any part of the Contract being held inapplicable or unreasonable, the remainder of the Contract shall remain in full force and any clause held inapplicable or unreasonable shall be enforced to the fullest extent possible.

## 16. ASSIGNMENT

16.1 The Customer shall not, without the prior written consent of Smart Traffic, assign, transfer, charge, sub contract or deal in any other manner with all or any of its rights or obligations under the Contract.

16.2 Smart Traffic may at any time assign, transfer, charge, sub contract or deal in any other manner with all or any of its rights or obligations under the Contract.

## 17. THIRD PARTY RIGHTS

The Contract is made for the benefit of the parties to it and (where applicable) their successors and permitted

assigns, and is not intended to benefit, or be enforceable by, anyone else.

## **18. NOTICES**

18.1 Any notice required to be given pursuant to the Contract shall be in writing and shall be sent by email or delivered by hand or sent by pre paid first class post or recorded delivery post to the address of the party as set out in these Conditions, or, in each case, such other address as may be notified by one party to the other.

18.2 A notice delivered by hand is deemed to have been received when delivered (or, if delivery is not in business hours, 9.00 am on the first business day following delivery). A correctly addressed notice sent by pre paid first class post or recorded delivery post shall be deemed to have been received at the time at which it would have been delivered in the normal course of post. An e mail shall be deemed to have been delivered at the time it is sent if receipt is acknowledged by the recipient or if the recipient actually receives the email within 25 hours from the time of being sent.

## **19. GOVERNING LAW AND JURISDICTION**

19.1 The Contract and any disputes or claims arising out of or in connection with it or its subject matter or formation (including non contractual disputes or claims) shall be governed by and construed in accordance with the laws of New South Wales.

19.2 The parties irrevocably agree that the courts of New South Wales shall have exclusive jurisdiction to settle any dispute or claim that arises out of or in connection with the Contract or its subject matter or formation (including non contractual disputes or claims).

## **20. NO PARTNERSHIP OR AGENCY**

Unless combined with a partner or referral agreement, nothing in the Contract is intended to, or shall be deemed to, constitute a partnership or joint venture of any kind between any of the parties, nor constitute any party the agent of another part for any purpose. No party shall have authority to act as agent for, or to bind, the party in any way.

## **21. CHANGES TO THE CONTRACT**

- 21.1 Smart Traffic may modify the Contract, where it is required to do so, by notifying the Customer in writing, and giving 30 days' notice where possible, in order to accommodate changes to the law or to rules applied by any governmental or regulatory authority which require Smart Traffic to modify its procedures, policies or services.
- 21.2 If the Customer wishes to vary any part of the Contract, the request shall be sent in writing to Smart Traffic Pty Ltd, Suite 7, MEAA Building, 245 Chalmers Street, Redfern, Sydney, NSW 2016. Smart Traffic shall respond to the Customer within 5 working days as to whether it is prepared to agree to the change and, if so, details of the cost of the change, any effect on any other part of the Contract including any change in timescales. The Customer may accept such proposal within such time as Smart Traffic may specify or, if none, within 7 days, failing which it shall be deemed rejected. Pending acceptance or rejection Smart Traffic may continue to perform the Contract without reference to the request.