

# Radiola Terms of Trade

LAST UPDATED: 13 MAY 2020

These Terms of Trade (together with any applicable order form, quotation, contract and/or other document formally issued by Radiola) represent an agreement (“**Agreement**”) between Radiola Limited, company number 1355987, a New Zealand limited company with its registered office at Level 1, Unit 2, 15 Marina View, Paremata, Porirua 5026 (“**Radiola**”), and the purchaser named in the relevant quotation and/or order form (“**Purchaser**”).

Placement of an order for Goods and/or Services will be deemed to be acceptance by the Purchaser of these Terms of Trade.

## 1. SERVICES

**1.1 License.** Subject to the terms and conditions of this Agreement, Radiola (a) will on acceptance of a quotation operate, maintain and provide the services as set forth in the accepted order form and/or quotation with the Purchaser (“**Services**”), and (b) grants the Purchaser a non-exclusive, non-transferable, terminable sub-license to access and use the Services. Unless otherwise specified by Radiola in writing, any and all rights or licenses granted by Radiola to the Purchaser shall only apply to the Purchaser and not the Purchaser’s related companies (as defined in section 2(3) of the Companies Act 1993), including, without limitation, any parent, subsidiary, or other entity controlled by or under common control with the Purchaser.

**1.2 Service Availability.** Radiola will use commercially reasonable efforts to maintain the Service availability, subject to downtimes resulting from maintenance, repairs, and upgrades. Radiola will attempt to notify the Purchaser in advance of any planned downtime. Notwithstanding the foregoing, Radiola will not be liable for any failures in the Service nor any other problems resulting from, attributable to or otherwise related to (a) outages to any telecommunications or public Internet backbones,

networks or servers, (b) other equipment or service outside of Radiola’s facilities or control, (c) the Purchaser’s or any third party’s products, services, negligence, acts or omissions, (d) any event of force majeure or other cause beyond Radiola’s reasonable control including, without limitation, a pandemic, labour strikes or difficulties, transportation stoppages or slowdowns, or the inability to procure parts or materials, (e) unauthorised access, breach of firewalls or other hacking by third parties; or (f) the Purchaser’s use of the Services not in accordance with this Agreement or any relevant documentation provided by Radiola.

**1.3 Use Restrictions.** Except as expressly permitted in a written agreement, the Purchaser shall not directly or indirectly (a) use any of Radiola’s Confidential Information (defined below) to create any service, software, documentation or data that is similar or competitive to any aspect of the Services and/or Goods (as defined in clause 6.1), or (b) disassemble, decompile, reverse engineer or use any other means to attempt to discover any source code of the Services and/or Goods, or the underlying ideas, algorithms or trade secrets therein, or (c) resell or make available the Services and/or Goods to any third party, or otherwise commercially exploit the Services and/or Goods, or (d) use the Services and/or Goods in a way that breaches any third party right (including intellectual property rights and privacy rights).

**1.4 Third Party Terms.** The Purchaser agrees to comply with any additional terms notified to the Purchaser by Radiola including, without limitation, the Terms of Use and Service in relation to third party hardware and software providers and once notified, those terms are incorporated into this Agreement.

**1.5 Purchaser Content.** As used herein, the term “**Purchaser Content**” includes, without limitation, all raw data created through the Services and Personal Information as that term is defined in the Privacy Act 1993. The

Purchaser acknowledges and agrees that Radiola will not assume any, and hereby disclaims all responsibility and liability for Purchaser Content and any modifications thereto. The Purchaser grants Radiola a worldwide, non-exclusive, royalty-free, fully paid up licence to use, reproduce, perform, display, modify and distribute the Purchaser Content in connection with providing the Services to the Purchaser. The Purchaser must obtain all necessary consents from the relevant individual to enable Radiola to collect, use, hold and process the Purchaser Content. The Purchaser acknowledges that Radiola is acting as an agent of the Purchaser for the purposes of the Privacy Act 1993 and any other applicable privacy law.

**1.6 Access.** Upon acceptance of a quotation in accordance with clause 2, Radiola will provide the Purchaser with a unique login and password to access the Services web pages. The Purchaser shall be responsible for the acts and omissions of any person who accesses the Services using logins provided to or created by the Purchaser. Radiola reserves the right to modify or discontinue any part of the Services at any time. In the event such modification or discontinuance materially reduces the functionality of the Services, the Purchaser may terminate this Agreement by giving Radiola at least thirty (30) days' prior written notice, and Radiola shall provide the Purchaser with a pro-rated refund of any pre-paid fees for Services not performed by the effective date of termination. From time to time, Radiola personnel may log into the Service under the Purchaser's account in order to maintain or improve the Service. The Purchaser hereby acknowledges and consents to such access.

## 2. QUOTATIONS AND ORDERS

Any purchase price quotations shall apply for a period of 30 days from the date of the quotation unless otherwise stated. Acceptance of Radiola's quotation by the Purchaser shall be deemed to be a correct interpretation of the Purchaser's specifications by Radiola. Variations in costs, taxes, tariffs, duties, freight or insurance charges or subsequent alterations to the Purchaser's specifications shall be to the Purchaser's account.

The Purchaser acknowledges that some components of the Goods and/or

Services are sourced from third party suppliers in foreign currency ("Foreign Components"). In the event there is a foreign exchange fluctuation between the date of the quotation and the date Radiola settles invoices for the Foreign Components, resulting in the rate of conversion fluctuating by more than 5%, Radiola may adjust any purchase price quotations to take into account the fluctuation and shall notify the Purchaser of the adjusted purchase price quotation and the due date for payment.

Giving at least 30 days' notice Radiola may increase any fees, at the end of each 12 month period from the date the Services and/or Goods are first provided to the Purchaser, by the percentage change in the New Zealand Consumer Price Index (or similar or equivalent index if that index ceases to be published) over the 12 months preceding the last quarterly publication of that index issued by Statistics New Zealand prior to the date of the notice.

Acceptance of orders is subject to Radiola's written order confirmation. Oral agreements, modifications and amendments shall not be valid unless confirmed by Radiola in writing.

Radiola's quotation excludes all taxes (including Goods and Services Tax levied under the Goods and Services Tax Act 1985), duties, licenses, or fees, unless specifically stated therein. Any fees, import duties, taxes or licenses shall be for the account of the Purchaser.

## 3. PROPRIETARY RIGHTS

Subject to the rights and licenses expressly granted hereunder, the Purchaser shall retain all rights, title, and interest (including all intellectual property and proprietary rights) in and to the Purchaser Content. Subject to the limited rights and licenses expressly granted hereunder, Radiola (and its licensors) shall retain all rights, title and interest (including all intellectual property and proprietary rights) in and to the Services, Radiola's platform provider ("**Platform**"), the application programming interfaces that may be used to access the Services (each an "**API**"), all text, images, data, software and other content (excluding the Purchaser Content), all

Radiola trademarks, names, logos, all copies, modifications and derivative works thereof, and all rights to patent, copyright, trade secret and other proprietary or intellectual property rights therein. Additionally, all of the Purchaser's (a) suggestions for correction, change or modification to the Services, (b) evaluations, and (c) other feedback, information and reports provided to Radiola hereunder (collectively, "**Feedback**"), will be the property of Radiola, and the Purchaser shall and hereby does irrevocably and unconditionally assign any rights in such Feedback to Radiola. The Purchaser agrees to assist Radiola, at Radiola's expense, in obtaining intellectual property protection for such Feedback, as Radiola may reasonably request.

## 4. CONFIDENTIALITY

**4.1 Definition.** The Purchaser agrees that the business, technical and financial information, including without limitation, the Services, the Platform, and the API, and all software, source code, inventions, algorithms, know-how and ideas, designated in writing as confidential or disclosed in a manner that a reasonable person would understand the confidentiality of the information disclosed, shall be the confidential property of Radiola and its licensors ("**Confidential Information**"). Confidential Information does not include information that (a) is previously rightfully known to the Purchaser without restriction on disclosure, (b) is or becomes known to the public, through no act or omission on the part of the Purchaser, (c) is disclosed to the Purchaser by a third party without breach of any separate nondisclosure obligation, or (d) is independently developed by the Purchaser.

**4.2 Confidentiality.** Except for the specific rights granted by this Agreement, the Purchaser shall not access, use or disclose any of Radiola's Confidential Information without its written consent, and shall use at least the standard of care used to protect its own Confidential Information, but not less than reasonable care to protect Radiola's Confidential Information, including ensuring that its employees and contractors with access to such Confidential Information (a) have a need to know for the purposes of this Agreement and (b) have been apprised of

and agree to restrictions at least as protective of Radiola's Confidential Information as this Agreement. The Purchaser shall be responsible for any breach of confidentiality by its employees and contractors.

**4.3 Required Disclosure.** Nothing herein shall prevent the Purchaser from disclosing any Confidential Information as necessary pursuant to any applicable court order, law, rule or regulation; provided that prior to any such disclosure, the Purchaser shall use reasonable efforts to (a) promptly notify Radiola (to the extent legally permitted) in writing of such requirement to disclose and (b) cooperate with Radiola in protecting against or minimizing any such disclosure or obtaining a protective order.

**4.4 Communication with suppliers.** The Purchaser agrees not to communicate or negotiate, directly or indirectly, with Radiola's existing or previous suppliers including, without limitation, third party software providers, during the term of the Agreement and for the period of six (6) months from the date of termination of the Agreement.

## 5. PAYMENTS

The Purchaser shall pay to Radiola all monies as set forth in an applicable quotation /Agreement in accordance with the terms therein, or if there are none, by the 20th of the month following the date of invoice. Past due amounts shall bear a late payment charge, until paid, at the rate of 4% per annum above the Indicator Lending Rate of Radiola's bank. All amounts received will be applied first in payment of default interest (if any). All payments must be made to Radiola's nominated bank account.

## 6. INVENTORY PURCHASES

**6.1 F.O.B.** Where a quotation includes hardware, equipment or other goods offered for sale by Radiola (including signage and display screens) ("**Goods**"), delivery shall be FOB country of origin unless otherwise stated in the relevant quotation. Radiola may engage a carrier to deliver the Goods to the Purchaser and delivery shall be when the Purchaser acknowledges receipt of Goods from the carrier. Dates given for shipment or delivery are stated in good faith but are not to be treated as conditions

of the sale. No claim shall be made by the Purchaser because of late shipment or delivery however caused.

**6.2 Title.** Radiola and the Purchaser agree that ownership of the Goods supplied shall not pass to the Purchaser until the Purchaser has paid for the Goods in full in accordance with the terms of the applicable quotation and the terms of this Agreement.

**6.3 Warranty.** Radiola shall, for a period of 12 months from the date of shipment (“**Warranty Period**”), replace or at its discretion, repair faulty components or modules at no additional charge to the Purchaser where in Radiola’s opinion, the Good is deemed to be defective or faulty. This warranty shall not apply to the repair or replacement of parts where in Radiola’s opinion, the failure is due to normal wear and tear or is, for example, a result of improper handling, maintenance, or operation, excessive stress, modification of software, or other causes such as power surges, lightning, or other Acts of God or other use outside the scope of intended use (as defined by Radiola). Radiola reserves the right to charge for handling “no fault found” repairs. Unless otherwise stated all warranted Goods shall be returned to Radiola’s nominated service Centre (as specified on the quotation, or notified to the Purchaser) and all shipping costs shall be paid by the Purchaser. Returned Goods will not be accepted without the prior written approval of Radiola. Any work carried out by Radiola outside the terms of the Warranty Period may be charged at an hourly rate plus parts to the Purchaser.

## 7. PURCHASER WARRANTIES

**7.1** The Purchaser represents and warrants that: (a) it has full power and authority, and has obtained all approvals, permissions and consents necessary, to enter into this Agreement and to perform its obligations hereunder; (b) this Agreement is legally binding upon it and enforceable in accordance with its terms; (c) the execution, delivery and performance of this Agreement does not and will not conflict with any agreement, instrument, judgment or understanding to which it is a party or by which it may be bound; and (d) it will perform its obligations hereunder in

accordance with all applicable laws.

**7.2** The Purchaser further represents and warrants that (a) it has all rights to grant the licences to Radiola as set forth herein, including without limitation to Purchaser Content, without infringement or violation of any applicable laws or third party rights, including without limitation, any privacy rights, copyrights, trade marks, contract rights or any other intellectual property or proprietary rights, and (b) the Purchaser shall not make available through the Services any content that is disparaging, obscene, offensive, or otherwise inappropriate or that contains any viruses or any other harmful code.

## 8. DISCLAIMER

To the fullest extent permitted by law, Radiola hereby disclaims all warranties, whether express or implied, oral or written, with respect to the Services, including, without limitation, all implied warranties of title, non-infringement, quiet enjoyment, integration, merchantability, fitness for any particular purpose, reliability, or that their operation will be uninterrupted or error-free, as well as all warranties arising from course of dealing, course of performance or usage of trade.

The Purchaser acknowledges that the Services and/or Goods are acquired by the Purchaser in trade and for the purposes of a business and the provisions of the Consumer Guarantees Act 1993 (CGA) are expressly contracted out of to the maximum extent permitted by the CGA. Nothing in the terms of the Agreement is intended to have the effect of contracting out of the provisions of the CGA except to the extent permitted by the CGA and the terms of the Agreement are to be modified to the extent necessary to give effect to that intention.

## 9. INDEMNIFICATION

**9.1** The Purchaser hereby indemnifies and will keep Radiola indemnified against all costs, expenses, obligations and liabilities (including reasonable lawyer’s fees) incurred by any act or omission of the Purchaser, its agents, or subcontractors in relation to this Agreement.

**9.2** Where Radiola supplies Goods and/or Services in response to a specification or design provided by the Purchaser, its agents, or subcontractors, Radiola will not be responsible for additional costs or time overruns where the specification or design proves to be incomplete or inaccurate or otherwise will not meet the requirements of the Purchaser. All additional costs incurred by Radiola to modify, replace, or remove equipment or systems as a consequence will be reimbursed by the Purchaser including Radiola's normal profit margin.

**9.3** Each party indemnifies the other party ("Receiving Party") against any liability, claim, proceeding, cost, expense (including the actual legal fees charged by the Receiving Party's solicitors) and loss of any kind arising from any actual or alleged claim by a third party that any Purchaser Content (if Radiola is the Receiving Party) or the Services (if the Purchaser is the Receiving Party) infringes the rights of that third party (including intellectual property rights and privacy rights), provided that the Receiving Party:

- (a) notifies the other party promptly in writing, not later than ten (10) days after the Receiving Party receives notice of the claim;
- (b) hands the other party sole control of the response to the claim; and
- (c) gives the other party the information, authority, and assistance the other party needs to defend against or settle the claim.

## 10. PERSONAL PROPERTY SECURITIES ACT 1999 ("PPSA")

**10.1** In respect of the security interest created by clause 6.2 of this Agreement, the Purchaser and Radiola acknowledge and agree that:

- (a) the security interest shall apply to all Goods supplied from time to time by Radiola to the Purchaser;
- (b) the Purchaser waives its right to receive any verification statement in respect of any financing statement or financing change statement relating to any security interest created under these Terms of Trade;
- (c) to the extent permitted by law, the parties contract out of sections 114(1)(a), 133 and 134 of the PPSA;
- (d) the parties contract out of (and the Purchaser waives its rights under)

sections 120(2), 121, 125, 129 and 131 of the PPSA.

## 11. LIMITATION OF LIABILITY

In respect of any breach of the Agreement by Radiola or any claim whether in contract or tort or otherwise arising out of the Agreement:

- (a) Radiola's entire liability to the Purchaser shall be limited to the total fees paid by the Purchaser under the Agreement in the twelve (12) month period preceding the breach (or, if there is more than one breach, the date of the first breach).
- (b) to the maximum extent permitted by law, Radiola shall not be liable for any indirect, incidental or consequential loss or damages whatsoever (including, without limitation, damages for loss of business profits, business interruption, loss of business information, loss of data, or other pecuniary loss) arising out of the Agreement or the use of or inability to use the Services.

## 12. GENERAL PROVISIONS

**12.1 Publicity.** The Purchaser hereby consents to inclusion of its name and logo in client lists and marketing materials that may be published as part of Radiola's marketing and promotional efforts. From time to time upon Radiola's request, the Purchaser agrees it will provide reasonable cooperation and assistance in connection with such efforts (such as, for example, by acting as a reference, issuing press releases, and writing testimonials and case studies with statements attributed to a named employee of the Purchaser).

**12.2 Modification and Waiver.** No change, consent or waiver under this Agreement will be binding on Radiola unless made in writing and physically signed by an authorized representative of Radiola. The failure of Radiola to enforce its rights under this Agreement at any time for any period will not be construed as a waiver of such rights, and the exercise of one right or remedy will not be deemed a waiver of any other right or remedy.

**12.3 Severability.** If any provision of this Agreement is determined to be illegal or unenforceable, that provision will be limited or eliminated to the minimum extent necessary so that this Agreement will otherwise remain in full force and effect and enforceable.

**12.4 Governing Law.** This Agreement shall be governed by and construed under the laws of New Zealand. The parties submit to the exclusive jurisdictions of the New Zealand Courts.

**12.5 Term.** Unless otherwise specified in an applicable quotation or order form, this Agreement shall commence on the date that an applicable quotation is accepted and shall continue until terminated in accordance with this Agreement.

**12.6 Termination.** Unless otherwise specified in an applicable Order Form or terminated as provided herein, this Agreement shall commence on the Effective Date and shall continue for one (1) year from the Effective Date. The term shall automatically renew for successive one (1) year terms, unless either party notifies the other party of its intent not to renew at least thirty (30) days prior to the end of the then current term.

This Agreement may be terminated (a) by Radiola by giving the Purchaser sixty (60) days written notice of termination; or (b) by either party if the other party materially breaches a provision of this Agreement and fails to remedy such breach within sixty (60) days after receiving written notice to remedy from the other party. Upon expiry or termination of this Agreement, all corresponding rights, obligations and licences of the parties shall cease and each party shall return to the other party or destroy all Confidential Information of the other party in the first party's possession or control. The provisions of this clause and of clause 3 (Proprietary Rights), clause 4 (Confidentiality), clause 7 (Purchaser Warranties), clause 8 (Disclaimer), clause 9 (Indemnification) and clause 11 (Limitation of Liability) shall survive.

**12.7 Assignment.** This Agreement and the rights and obligations hereunder may not be assigned, in whole or in part, by the Purchaser without Radiola's written consent. This Agreement shall be binding upon, and inure to the benefit of, the successors, representatives and permitted

assigns of Radiola.

**12.8 Independent Contractors.** The parties shall be independent contractors under this Agreement, and nothing herein will constitute either party as the employer, employee, agent, or representative of the other party, or both parties as joint venturers or partners for any purpose.

**12.9 Disputes.** The parties agree to use their best efforts to resolve any dispute which may arise under the Agreement through good faith negotiations. Any dispute arising under the Agreement which cannot be settled by negotiation between the parties or their respective representatives shall be submitted to arbitration in accordance with the Arbitration Act 1996.

**12.10 Variation.** Subject to clauses 1.4 and 2, any variation to the Agreement must be in writing and signed by both parties.

**12.11 Entire Agreement.** The Agreement constitutes the entire understanding and agreement between the parties in relation to the subject matter it deals with, and supersedes all previous agreements and understandings between the parties whether written, oral or both relating to the same subject matter.