



AANA MASTER MEDIA PLANNING & BUYING SERVICES AGREEMENT

GUIDANCE NOTES

INTRODUCTION

One of the AANA's strategic pillars is to inspire and equip marketers to build stronger brands and therefore businesses. In a media landscape that is experiencing rapid change, this challenge is becoming more complex.

The AANA is firmly convinced that strong contractual relationships, together with capability-development to manage ongoing media agency relationships, are the keys for advertisers to obtain greater transparency and build more trusting and enduring business partnerships.

While the contract law principle of caveat emptor still holds, the AANA has committed to provide advertisers with guidance and tools to obtain greater transparency over the return and effectiveness of their media investment.

These Guidance Notes accompany the AANA Master Media Planning & Buying Services Agreement (AANA Media Contract) and comprise two parts - General Information and Contract Guidance.

PART 1: GENERAL INFORMATION

AANA MEDIA CONTRACT TEMPLATE

The AANA would like to acknowledge the support of the ANA (Association of National Advertisers) in the US for their consent to use the ANA template as a basis for the AANA template. The AANA Media Contract template has been drafted specifically for the Australian market. The suggested terms in the contract are not intended to represent the only methodology by which the contractual relationship between an advertiser and its media agency may be addressed.

The template has been written to equip the advertiser with a starting point to each element of the contract negotiation. The template highlights the myriad of issues that should be openly discussed and resolved between the advertiser and agency in order to ensure transparency and consequent stability in their on-going relationship.

There is no obligation on advertisers or AANA members to

use this template. Advertisers are free to negotiate whatever terms and conditions they deem appropriate. The AANA makes no representation or warranties as to the content of this template.

Anyone using this template is advised to consult with experienced legal counsel before adopting the template in whole or in part.

AANA MEDIA CONTRACT – GUIDANCE NOTES

The purpose of these Guidance Notes is to provide advertisers with a 'long-list' of considerations and questions that give context to complex and emerging issues that need to be considered if the advertiser is to obtain greater transparency in their media dealings. Not all components will be relevant to every advertiser, but this document seeks to encompass all potentially relevant questions into one set of guidance notes.

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Note that the Guidance Notes only address the key provisions of the Media Contract template.

THE IMPORTANCE OF GREATER TRANSPARENCY OF MEDIA DEALINGS

The AANA has acknowledged that transparency in the Australian media market is not where it should be. A significant concern is to ensure that media agencies and all parties in the transactional chain are motivated only to make recommendations on spend that deliver the best outcome for the brand owner.

The ability to 'follow the money' is crucial for advertisers seeking greater transparency. Media is traditionally the single largest marketing expense for a brand owner but understanding how the rationale for allocating an advertiser's investment has been arrived at has become more unclear. The introduction of programmatic trading desks further exacerbates the problem.

The themes of impartiality and objectivity form part of this debate as commercial conflicts of interest are now commonplace and can lead to ineffective planning. It is important that advertisers know that their media partners (including all entities in the buying chain) are operating in the advertisers' best interests at all times, especially those generating the research and data that is used to provide both recommendations and reporting. Advertisers need to know that all media is being accurately and objectively assessed and that no media vehicle is being artificially favoured. Whilst these themes are not the most obvious contractual issues, there is good reason to address these areas during contract negotiations and no reason why these items cannot be included in contractual undertakings.

The overarching objective is to achieve full disclosure. This includes understanding the role of opt-in agreements and the implications on audit access and data ownership. Each advertiser should ascertain the value that may be derived by knowing exactly the breakdown of the investment the agency makes on its behalf i.e. what proportion of its investment is flowing through to the media owner and the media intermediaries, and whether this ratio varies significantly between different media types and individual media outlets. If so, why? A key question the advertiser must address is: should it demand this breakdown from the agency partner and make disclosure an ongoing contractual obligation?

In short, advertisers need to satisfy themselves that the terms of their contractual agreements meet their overall transparency needs.

ADVERTISERS ARE IN THE DRIVING SEAT TO SHAPE THE INDUSTRY

Every brand owner is striving to contribute to their company's profit goal and ideally help grow their bottom line each year. Advertisers should respect that their agencies are no different

in this respect. In striving to obtain greater transparency over media dealings, it is important for advertisers to acknowledge their part in helping their media agency to meet their legitimate business and profit targets.

"Doing more with less" has been a constant refrain for both brand owners and their agencies for some time now. Those advertisers who increase their demands of agencies while pressuring agency margin structures through reduced fees and extended-term negotiations should understand the impact this subsequently places on the agency's ability to deliver quality services. This includes developing the systems and skill set to be truly agnostic about its media buy recommendations, which should also be considered in contract negotiations.

Each advertiser requires different services from their agency to complement their own marketing team so, clearly, the final contracts will necessarily vary to meet the particular requirements of that client-agency relationship. That said, good practice dictates that the advertiser performs an appropriate amount of due diligence and executes their media contract. As the buyer of services, the advertiser should at the very least begin the contracting process with a version of a contract template that helps deliver the required level of disclosure to achieve their desired level of transparency.

The AANA intends for the AANA Media Contract template and Guidance Notes to be a helpful starting point for advertisers in facilitating a final contract that adequately defines the parameters of value allocation in the media buying flow and reflects the values of the partnership advertisers seek with agency partners.

ACKNOWLEDGEMENTS

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OPEN FOR CONSULTATION

The AANA invites ongoing feedback on the Media Contract template and the Guidance Notes both in terms of improving their current efficacy and in maintaining relevance given the rapidly changing media landscape. Any submissions should be sent to ceo@aana.com.au. The AANA's commitment is to review any submissions and publish updated documents as and when required.

PART 2: CONTRACT GUIDANCE

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CONTRACT CLAUSE 2.0 - APPOINTMENT AND SCOPE OF WORK

As media options proliferate, you may be considering engaging specialist agencies and services that may be part of the media agency and/or group holding company you are contracting with or independent of the agency. Whilst any additional specialist services will be detailed in your Scope of Work (SOW), emphasise that the lead contracting entity understands their obligation to ensure that all transacting

entities both within the media agency group and other third parties are also contractually bound to honour relevant clauses of the Media Contract, including being subject to your audit requirements.

Be cognizant of the conditions and terms of engagement you have with all your media agency partners and aim to ensure consistency with the terms you have detailed in the Media Contract.

If your media agency is part of a holding company, consider seeking acknowledgement from an officer of the group holding company on the terms of this contract and how it impacts all the divisions engaged on your business. The contract needs to include all relevant entities within the agency group and that includes the parent holding company.

The intent is to ensure all relevant entities are covered by the contract terms.

CONSIDERATIONS & KEY QUESTIONS

- Detail the services you’re seeking in the SOW. The SOW is a critical component to the contract as it will form the basis of the agency’s resource allocation and fee structure. The SOW’s schedule can and should be updated regularly to reflect changes. An annual formal review is recommended as a minimum requirement, however, consider a biannual check-in as a process to ensure any changes or issues are captured. There should be a mutual obligation to raise and agree a contract variation to the SOW in particular circumstances.
- Detail the guidelines that should be adhered to by an agency using the services of an associated entity: i.e. this additional service becomes an addendum to the contract and the lead agency ensures relevant third parties are bound by the conditions of the contract.
- Ask your agency to detail the operating guidelines of the contract including an outline of planning processes, frequency of engagement, measurement, deliverables, approvals, reporting and performance reviews etc. Be specific on this for all brand, portfolio and governance needs.
- Ask your agency to clarify all the services being supplied, the entity or business unit that will be providing them and the immediate and ultimate ownership structure of this entity.
- Ask your agency to disclose any interest (financial or otherwise) that it or related group companies may have in any media, technology vendor or subsidiaries that could be a consideration for your business.

CONTRACT CLAUSE 3.0 - TERM

The term of the engagement is an important decision which should be addressed at the outset, as it defines the extent of your commitment to building a partnership and will have

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significant ramifications for the agency as they seek to build a team to service your business.

CONSIDERATIONS & KEY QUESTIONS

- Consider an 'initial' period for the contract as a term of 2 years. Variations to the SOW, subsequent staffing/ service levels and fees should be agreed mutually at least annually.
- A 'subsequent period' could be an open ended agreement beyond the initial period. This sends the signal that the advertiser is committing to a long term partnership. Inherent in the AANA Media Contract are options for termination for both sides should the partnership need to be reviewed.
- To assure yourself of the long term viability of the agency you are seeking to contract and your role in that, ask the agency to disclose the number of clients, categorised by range of spend and tenure arrangements.

CONTRACT CLAUSE 4.0 - ADVERTISER'S OBLIGATIONS

The best partnerships are always based on open, honest two-way communication. It's important that advertisers agree to give feedback on inadequate or non-compliant deliverables as soon as possible. Similarly, detailing a process for the agency to give feedback to you is also worth considering. It's worth formalising and documenting this process/timing at the outset. You may wish to invite a mutually-agreed third party vendor to facilitate this process.

Separate to a performance review process for two-way feedback, consider a contractual review process. This will ensure your contract is always current in terms of your relationship and the marketplace.

CONSIDERATIONS & KEY QUESTIONS

- There should be clear relationship and contract owners on both sides. Any contracts should be counter-signed at the highest level (agency side) and any addenda including (opt-in agreements) should also be signed by the main contract signatory.
- Consider including a Code of Conduct which acts as an aide-memoire to everyone involved, to guide the relationship and engender trust.
- Ensure all briefs are fully completed and have the appropriate endorsement from senior management.
- From an agency perspective, a common shortcoming by advertisers is partially completed campaign briefs or briefs that are not fully endorsed by the ultimate decision maker. This can lead to significantly more time investment in developing the response with consequent impacts on profitability and ability to service other clients. Late sign-off on the proposed media plan can also impact on the availability of the preferred media inventory. Consider

agreeing a briefing template and approval process within your contract so that all parties are clear about expectations. Ask your agency at 'feedback times' about whether the briefing process has been appropriate.

- Mutually agree a process for plan development and approvals at all relevant points. Consider defining and agreeing approved time frames that will deliver optimal outcomes in terms of media planning and buying.
- Recognise the importance of the role you play in ensuring that all materials supplied to the agency are accurate and reflect up-to-date licenses and rights. This is a crucial first step to ensure the agency has the right information to perform its duties.
- Give clarity on how you would like to manage the agency invoicing process e.g. approval of MBA's (Media Buying Authority), use of purchase orders etc. Include your expectation of breakdown of agency fees and approved operating expenses, such as travel.

CONTRACT CLAUSE 5.0 - AGENCY'S SERVICE DELIVERY

The agency needs to advise you what information they need in order to deliver the contracted service. Invite the agency to present the full 'wish list' of what they would like to know about your business in order to deliver the service and then incorporate that into an induction process.

CONSIDERATIONS & KEY QUESTIONS

- Ask your agency to supply detailed IT system security plans as an addendum to this agreement, with provisions for regular updates.
- Ask your agency to supply a business continuity and disaster recovery plan as an addendum to this agreement, and update regularly.
- Ask your agency about data security:
 - What processes and care is applied to the information and data you supply?
 - If you provide your agency with data for use in campaign activity, specify and satisfy yourself that this data will be held in a secure location and not used for any benefit other than your own (unless explicitly agreed).
 - Establish what data will be managed internally/ externally, who their data partners are (and any they may also contract) and the criteria the agency proposes using to engage a data partner for your business.
 - Understand what pricing models are in place for all relevant data partners.
 - Who owns the data relating to your campaign?

CONTRACT CLAUSE 6.0 - AGENCY SERVICES AND TRANSPARENCY

With transparency as the goal, it is vital that your contract establishes your right to capture the agency's relationship with relevant 3rd parties right through to the agency relationship with media owners and vendors. This necessitates a contractual requirement to disclose any potential conflict of interest and detail on how such conflicts will be resolved.

Ensure that you fully understand where your media agency or associated entities are taking a 'principal trading' position on media inventory. In a 'principal trading' position the agency purchases inventory from a media supplier on their own account at their own risk. The inventory is then offered to the advertiser at an advantageous price. Understand the implications of signing these 'opt-in' agreements particularly when it comes to audit rights and data ownership. Opt in agreements can allow agencies to pool your 1st party data for their own use.

Key elements to establish full disclosure include:

- Details of all entities within the group that will derive revenue or profit from your business and the role that they will play. It includes any entity within the group including the ultimate holding company. State whether this applies to fees for service only or revenue earned through other sources e.g. 3rd party mark ups.
- Actual or potential conflicts of interest that exist between any entity within the media agency group and any media owner or vendor.
- Ongoing commitment to detail all remuneration agreements and policies with media owners and vendors, including but not limited to cash rebates, gifts, research projects etc. Include details on how these policies are monitored and enforced along with an agreement not to vary them without your authorisation.
- Disclosure on rebates with an undertaking that your media spend does not contribute to rebates or incentives from a media owner or vendor, without your authorisation.
- Disclosure on Inventory Mark-Ups/Principal Trades. Should an agency or holding company member purchase inventory on their own account, the agency should provide proof and certification that the media inventory is legitimate, that the price charged to the client is mutually agreed and that your spend had no influence on the provision of this inventory.
- Detail a requirement for the agency to provide ongoing training to their staff on the obligations they have as your agent, adhering to ethical, contractual and confidential obligations.

CONSIDERATIONS & KEY QUESTIONS

- Consider establishing a structured governance approach

to regularly address reporting requirements on disclosure and conflict of interest issues.

- Request to be consulted on or invited to attend the negotiation process with media vendors with regards to the charges and conditions offered for a campaign.
- Ask to see the training and development program agency staff undertake on business ethics. Ask the agency what systems and processes are in place to validate media placement.
- Programmatic is a fast emerging efficiency and targeting technology which also relies, in most cases, on a real time bidding marketplace. Advertisers should understand market trading dynamics in order to allocate spend that is both effective and efficient.
- For most agencies, the programmatic operating models on offer are different to traditional buying systems and processes. Advertisers need to understand what the benefit to their business is of using programmatic, which is the right model and how much digital activity is proposed to be transacted through a programmatic solution.
- Ensure a transparent audit is in place covering all transactions from start to finish.

CONTRACT CLAUSE 7.0 - CONTENT VERIFICATION, BRAND SAFETY AND STANDARDS

Achieving accountability in the digital and online space is compounded by issues of viewability, bot fraud, independent audience measurement metrics and brand safety.

Every day new web pages are developed. Staying ahead of the 'blacklist' is a challenging but important task. It is vital that your agency is progressive and vigilant in continuously updating their approach to content verification and brand safety, including evaluating the potential of new technology.

Given it is difficult to verify the difference between human behaviour, robots and fake users (bots), understanding whether or not your advertisement has actually been seen by human eyeballs is an increasing challenge. The greater the total interactions on a site, the more revenue the vendors/ media owner stand to make. In a global study released in January 2016 by the Association of National Advertisers (ANA) and White Ops, it was estimated that the impact of bots globally in 2016 would be \$7.2 Billion USD in wasted advertising.

To counteract this wastage, most agencies engage the use of third party technology to verify viewability. This is represented as a technology fee built into clients' media plans.

The agency's 'technology stack' collects vast amounts of data not only to verify ad placement and viewability but also to target different messages to customer clusters in different environments. The supporting analytics to campaigns can

be extremely insightful, not only in validating the agency's reporting but also in understanding data paths of existing and prospective customers and prospects.

CONSIDERATIONS & KEY QUESTIONS

- What access will you be given to your campaign analytics that pass through the agency's 'ad tech stack'?
- Consider establishing a direct relationship with an independent third-party technology company to help ensure complete disclosure on pricing and media delivery.
- Consider working with your agency to establish viewability benchmarks i.e. are the Media Ratings Council (MRC) Guidelines appropriate?
- Ask your agency to demonstrate how they deliver a 'best in class' approach to driving accountability across the digital space, including frequent review of the following:
 - Brand Safety
 - Viewability
 - Advertising Fraud
 - White Lists/ Black Lists
- Ask how your brand is protected when purchasing programmatic inventory.
- Ask your agency to validate that their technology partners use industry accredited solutions (Media Rating Council).

CONTRACT CLAUSE 8.0 - REBATES AND INCENTIVES

Agencies must be prepared to be accountable to advertisers for the proper management of media spend. What happens to that investment and the flow of benefits (including any incentives, gifts, rebates or other commercial arrangement with media owners and vendors) with both the direct agency or elsewhere in the group, should be transparent and fully disclosed. The disclosure should allow you to determine the extent your media spend has influenced the quantum of those benefits.

Advertisers should then stipulate how the benefit is to be allocated back to the relevant brand(s) in a timely, cost-effective way.

CONSIDERATIONS & KEY QUESTIONS

- Get clarity on the agency's policy and practices regarding value banks. This practice may go by another name but it relates to space, time, impressions etc awarded by media owners and/or affiliated companies to agencies (often at group level) as a reward for volume commitments.
- Ask if the agency gains financially from using value banks.

- Ask how value banks operate on your business. Describe in detail the end to end process including distribution of benefits.
- Ask the agency how the annual group volume and share commitments are constructed and what the implications would be of a change in your business or marketing strategy that alters the original commitment.
- Ask your agency to provide a detailed report on incentives offered and benefits received, which are side deals that are based on your spend, including as part of group trading. These are often referred to as Service Level Agreements between media agency and media vendors.
- Ask if all rebates and value banks can be audited.
- Ask if and how value bank activity has been factored into the pricing. Ask if you can control where value bank pricing is delivered on your business.
- Ask your agency how they or any other entity in the marketing services group, domestically or overseas, benefits from the media dollars associated with your business.
- Ask your agency how they or holding group benefit from the volume of media that is passed through a technology supplier that they engage on your business.
- Ask your agency to explain their volume/share deals with media owners and if there is a benefit to the agency or holding group in selecting one media supplier over another.
- Ask if there are any rebate arrangements with vendors on a global basis, particularly with digital where the medium is borderless.
- Consider making it a contractual condition for the agency to seek your permission before including your spend as part of the agency's volume commitment to media vendors.
- Seek to understand how you are gaining the benefit from your media investment when the benefit flows back to the agency.
- Ask to see a profile of your investment relative to the benefits received, so that an accurate calculation can be made of your contribution, and the benefit owed.
- Consider if you are prepared to gain assurances from specific media or technology entities to validate the agency's position on benefits.

CONTRACT CLAUSE 9.0 - UNBILLED MEDIA

The traditional monthly invoicing cycle doesn't always facilitate a full reconciliation of billed versus unbilled media. As the agency is the intermediary between the media and the

advertiser, it is inevitable that the billing cycles won't always align.

CONSIDERATIONS & KEY QUESTIONS

- Agree a fair process for reconciling unbilled media with your agency.
- Establish when you will receive any credits.
- Are rate differences held by the agency or are they returned to you at time of reconciliation?
- As a guide, consider asking your agency to instigate a 6 month rolling reporting cycle and a reconciliation in accordance with your fiscal year.

CONTRACT CLAUSE 10.0 - RELATIONSHIP; EXCLUSIVITY

CLIENT ROLE

When it comes to structuring the exclusivity and non-compete parameters of a contract there are clear benefits to both parties. There are a lot of benefits for advertisers in centralising their business and having planning and investment/ negotiations with media vendors all consolidated through one agency.

However, as media proliferates and specialist companies are emerging (particularly in digital) it may be more beneficial for advertisers to have specialist agencies. For example, a client may engage a specialist SEO or a specialist social media buying agency.

AGENCY ROLE

It is reasonable for an agency to be restricted in its ability to work on directly competing businesses. However, the restrictions on exclusivity have, in instances, restricted agencies from competing in adjacent or complementary categories. Consider what restrictions are necessary and reasonable for your agency relationship.

CONSIDERATIONS & KEY QUESTIONS

- Be clear on the specific roles/services that the agency is to be engaged and therefore the areas that call for an exclusive arrangement. These should form an addendum to the contract.
- Impose reasonable restrictions on the areas that count i.e. key personnel working on your business as well as clear protocols surrounding information and data security.
- Be reasonable in outlining the business categories that are restricted to the agency. Detail these in the contract.
- Ensure that there is a process in place for the agency to

formally notify you of any new business wins in adjacent or complementary categories.

- Ask your agency for a detailed plan for how they manage conflict, including but not limited to:
 - Data Management
 - IT Systems and Processes
 - Research

CONTRACT CLAUSE 11.0 – ASSOCIATES & KEY INDIVIDUALS

On every piece of business there are key individuals who perform roles that require an in-depth knowledge of an advertiser's business. Having the right people in these roles can be instrumental in determining the success of the agency-client partnership.

Not everyone working on your business will constitute "key individuals". Determining which roles warrant this classification is for negotiation, but would likely include senior account management, investment, digital and strategy roles.

It is the agency's responsibility to successfully manage the transition of key individuals onto and off your business and the notice period for key individuals should be clarified. The agency in return has the right to expect that any notice period for termination of contract will reflect the agency's employment commitment to retain such personnel.

CONSIDERATIONS & KEY QUESTIONS

- Determine the roles that would constitute "key individuals" at the outset of the relationship. This should be detailed in the contract and reviewed regularly as staff change on your business.
- Detail all key individuals that are engaged to deliver the SOW, and the percentage time they are retained. Any changes to the team should be signaled in advance where possible and certainly immediately a change occurs.
- Agree on a protocol to communicate performance issues and transition plans.
- Consider stipulating being consulted on recruitment of key senior team members.

CONTRACT CLAUSE 12.0 - SCOPE OF WORK AMENDMENTS AND PROJECT CANCELLATIONS

Sometimes projects or campaigns get cancelled before execution. It is important to acknowledge that the agency would have already delivered a number of head hours

and costs against cancelled projects and will need to be compensated accordingly.

CONTRACT CLAUSE 13.0 - APPROVALS AND AUTHORITY

Determining the appropriate definitions of “approval” is important at the outset, and needs to be acknowledged and respected by all parties. Given the significant amount of money involved in media buying, it’s important to distinguish between approvals for strategy and approvals for media buying. In addition, it is vital to clarify which personnel on your side are authorised to provide what level of approval. Best practice is that all approval processes should be documented in writing. From time to time, these may need to be verbal for expediency, but should always be confirmed subsequently in writing.

CONSIDERATIONS & KEY QUESTIONS

- As part of establishing operating procedures, the agency should be able to supply a breakdown of approvals required at each stage of the media process and their timing.
- Establish a clear approvals protocol that addresses the key personnel/level of approval (spend) and the format of the approval.

CONTRACT CLAUSE 14.0 - RELATIONSHIP MANAGEMENT AND CONTACT REPORTS

In any partnership, taking time to review the health of the relationship is important. It may seem unnecessary when things are going well, but invariably the foundations established in the good times will hold all parties in good stead when things aren’t as solid.

CONSIDERATIONS & KEY QUESTIONS

- Establish a format and a mutually agreed timeline to conduct reviews. Consider quarterly reviews during the initial phase.
- Consider using an independent third party, jointly funded by both the agency and the client, to deliver a program or format for regular review.
- Ensure that the reviews and feedback processes are two-way.

CONTRACT CLAUSE 15.0 - REPORTING

The volume of reporting an agency is often asked to produce is substantial. As more and more channels are used, it stands to reason that more and more reports may be generated. Producing reports is time consuming and contributes to the agency retainer costs so the key consideration in

commissioning such reports is whether they add sufficient value to justify the expenditure.

Third party technologies can deliver reports in real time and in a secure location. These options, along with any other digitally produced options, should be considered for relaying key information in a timely manner.

CONSIDERATIONS & KEY QUESTIONS

- Determine what level of information is required, in what format and frequency.
- Review reporting requirements regularly and understand the expenditure/value equation.
- Upon agreeing an annual scope of work, diarise the dates for receipt of the various reports. You should notify the agency of incidents of non-reporting and consequences of repeated failures of non-reporting.

CONTRACT CLAUSE 16.0 - FEES, THIRD PARTY COSTS AND INVOICING

Adhering to an agreed payment schedule for all fees, and expenses is fundamental to a successful partnership. As the agency is acting as a principal at law they themselves are liable for full payment to media owners/vendors. Understand that delays in payment to your agency can incur real costs to the agency and associated financial stress. The prompt payment of invoices needs to be treated as a priority.

CONSIDERATIONS & KEY QUESTIONS

- Ensure that payment and reconciliation of agency invoices is a priority.
- Establish a process for approvals and invoice payments. For example, the personnel authorised to approve media plans should be the same personnel authorised to approve payments relating to the approved plan.
- Supply the agency with a contact list for escalation of non-payment of invoices.
- Agree a process for resolving invoice disputes in a timely manner and consider specifying a timeframe within which queries should be raised.
- Ensure media credits are provided at time of reconciliation for rate differences and agree on an agreed timing schedule for unbilled media.

CONTRACT CLAUSE 17.0 - THIRD PARTY COSTS

All third party costs, including media placement, should be charged at net cost paid by the agency, without any mark up. The agency agrees to submit invoices for verification on request.

CONTRACT CLAUSE 18.0 - AUDIT AND ACCESS TO RECORDS

Advertisers have the right to choose both their preferred independent auditor(s) (performance and contract compliance), the methodologies to be employed and the access to the necessary data. This would apply for both:

- A financial audit to ensure adherence to the terms of the agreement;
- A performance audit, including the benchmarking of media placements.

The financial audit should extend to all relevant companies within a marketing services group, including the holding company, if it derives additional value from your media spend. Accurate records need to be maintained and held for the duration of the engagement, and for seven years following.

It therefore follows that each relevant agency within the group needs to support the audit process and submit all relevant documents.

CONSIDERATIONS & KEY QUESTIONS

- Engage a range of third party specialists to audit and conduct a contract compliance audit or a “spot check” on media services delivered. Determine the frequency required and clear objectives for a review.
- Invite the agency partners to all auditor presentations to facilitate open and transparent business dealings.

CONTRACT CLAUSE 19.0 - CONFIDENTIALITY

It is not unusual for both parties to share “confidential information.” It needs to be respected as such, and appropriate measures enforced, including data security.

Often, media owners and vendors are engaged on a brief or strategy to use their assets to amplify a campaign idea. Their contribution can be extremely valuable. In order to be able to do this effectively some key information about you or the campaign needs to be shared. In this instance, no ill intent is intended by the agency in sharing client information. Rather, the agency is seeking to achieve the best outcome for the client.

Establish up front which elements of your business can and can't be shared, and in which environments a non disclosure agreement should be utilised on your behalf.

CONSIDERATIONS & KEY QUESTIONS

- For the avoidance of doubt, ensure that all confidential information is clearly marked as such.

- Establish an “Advertiser Information Protocol” which outlines information that you are comfortable with your agency discussing with a third party, and what components will always require additional security by way of a NDA executed by the agency on your behalf.

CONTRACT CLAUSE 25.0 - TERMINATION

Terminating an agreement will invariably result in a degree of upheaval, certainly in the short term. Therefore, due consideration needs to be given to terminating an agreement. Typically, within a contract there are 3 options for termination:

- Beyond the initial agreed period, you can terminate this agreement without cause by giving 90 days' written notice.
- A change of agency ownership can trigger termination at any time.
- Either party can terminate subject to Force Majeure, material breach of the agreement, failure to pay debts and/or solvency issues.

Importantly, a cancellation of a project does not typically terminate an agreement.

CONSIDERATIONS

- Consider including as a cause for an immediate termination, a failure to perform the services or actions/inactions that could damage your reputation.
- Consider including a termination clause if the agreed performance criteria are consistently under-achieved, there is a material change in personnel or there are persistent contract breaches which are revealed through contract compliance audits.

CONTRACT CLAUSE 29.0 - ASSIGNMENT AND SUB-CONTRACTING

Unless written approval is obtained, typically the agency will not be entitled to sub-contract the performance of services. This would include sub-contracting the planning and buying of a specialist media service to another company within a marketing services group.

In the event that a sub-contractor is authorised to perform services, the terms of the agreement should continue to apply with the lead agency being liable for the sub-contractor and the sub-contracted services.

CONTRACT CLAUSE 30.0 - PUBLICITY

The success of an agency is often measured by the calibre of the clients it services. A high calibre client roster is reassuring for current clients and can be a new business draw card for potential clients.

However, under no circumstances should your logo, brand names or executives be used in any form of public disclosure without written consent. Public disclosure in this instance includes business presentations, media releases, web sites, customer or client lists, promotional materials and public announcements. From your side, such approval should not be unreasonably withheld.

CONSIDERATIONS & KEY QUESTIONS

- Define the boundaries surrounding publicity upfront in the partnership and, importantly, assign approvals on your side.
- Be explicit on exactly what is approved and what is not. Is it OK for the agency CEO to refer to your business in an interview with an industry publication? Is it OK to have your company logo on the agency list of current clients? What about a new business presentation?
- One area that needs to be considered is the disclosure made in awards' entries. In submitting an award entry, detailed strategies and results are often required. Winning awards can be beneficial for both parties but parameters for disclosure should be explicitly agreed.

CONTRACT CLAUSE 31.0 - PRIVACY AND DATA

The definitions and boundaries surrounding the collection, storage and use of data are legally binding. The agency is acting on an advertiser's behalf and in a digital environment has access to detailed information on the 'footprint' of customers and prospects. The protection of this information is paramount.

To ensure that this data is suitably protected, you should consider stipulating the criteria for vendor selection and/or stipulate the use of a specific vendor.

CONSIDERATIONS & KEY QUESTIONS

- The collection, storage and use of data can often extend beyond the role of marketing. It could well be prudent to engage your CIO/Legal and IT Management to ensure broad acceptance of the privacy and data rules enforced on your agency. Specifically seek assurances on data security on the agency side.
- Be specific with your agency and contract that in using third party data platforms, all information/data collected and generated is owned by the advertiser and for the sole benefit of the advertiser.

CONTRACT SCHEDULE 1

SCOPES OF WORK

The annual SOW provided by the advertiser is an important document as it forms the base for agencies to determine the staffing levels required to service your business.

CONSIDERATIONS & KEY QUESTIONS

- It is critical to be as clear as possible on what services you are seeking, including breaking down digital media requirements.
- Review and revise the scope of work regularly. Agree a time frame with the agency to ensure this document is current.

FEES AND EXPENSES

The overall goal is to establish a transparent model that optimises the quantum of the advertiser's investment used for "working media", i.e. media investment used to deliver the message. Over time, with the increasing reliance on multiple channels and multiple pieces of technology and different layers of fees, advertiser's investment into "non-working media" has dramatically increased. Building a model that achieves the right balance is key. Generally, one of the following methods or a combination is most commonly used:

- **Retainer Based Model:** Payment for the people/ team who work on the business, together with an agreed overhead rate and profit margin. Staffing and retainer amount agreed annually and charged monthly.
- **Commission:** A percentage of the 'net media' spend added onto each media plan.
- **Performance:** Payment terms based on the overall performance against agreed metrics.

CONSIDERATIONS & KEY QUESTIONS

- As media becomes more automated the fee structure for digital media often includes different charges. Sometimes, a "service fee" will apply to a digital service. It's important to understand the components of the service fee vs retained services approach.
- Ask your agency for a breakdown of overhead charges for clarity on what is, and isn't, included.
- Using a fee combination may result in unintended double payments. Ensure that if you are paying for a person to perform a service under the retained model, you are not also being charged a commission or fee on the media spend.
- Performance metrics can be mutually beneficial but the metrics must be crystal clear to both parties.

TECHNOLOGY FEES & CHARGES

Increasingly, agencies are using multiple pieces of advertising technology to deliver services. The use of these technologies can be highly beneficial, however they come at a price. It's important to understand the role of each piece of technology and the benefit that it brings to your activity.

CONSIDERATIONS & KEY QUESTIONS

- Ask your agency to list all of the components of the 'technology stack' that they will be using to deliver proposed services, including any services delivered by any sister or holding company. Detail the key benefits of each technology, the operating structure and the cost model that will apply, including but not limited to proprietary tools, reporting dashboards, Demand Side Platforms, Demand Management Platforms, Ad Serving, Verification and Brand Safety.
- List all fees and pricing components associated with delivering services such as:
 - A programmatic operating model (disclosed and undisclosed)
 - SEO services
 - SEM services
 - Mobile Media Buying Services
 - Social Media Buying Services
 - Social Media Community Management
- Ask your agency to list all fees associated with their trading desk:
 - If agreeing to an undisclosed model, ask the agency for the average difference between client charged price and vendor cost
 - Detail the fee construct of a disclosed model.
- Ask your agency to detail any additional fees associated with delivering the proposed services, including but not limited to media levies, monitoring fees and post-campaign analysis.