

Dated

30 October 2015

Clearing Manager

MARKET OPERATOR SERVICE PROVIDER AGREEMENT

Electricity Authority

and

Energy Clearing House Limited

and

NZX Limited

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This **Clearing Manager Market Operator Service Provider Agreement** is made on 30 October 2015

between (1) **Electricity Authority**, a Crown entity established under section 12 of the Electricity Industry Act 2010 ("**the Authority**");

and (2) **Energy Clearing House Limited**, company number 871481 ("**the Provider**")

and (3) **NZX Limited**, company number 1266120 ("**the Guarantor**")

INTRODUCTION

- A. The Electricity Industry Act 2010 (the **Act**), the Electricity Industry (Enforcement) Regulations 2010 made under section 112 of the **Act** (the **regulations**) and the Electricity Industry Participation Code 2010 made under section 36 of the **Act** (the **Code**) govern the electricity industry in New Zealand, including the operation of a wholesale electricity market.
- B. The **Authority** was established as an independent Crown entity under section 12 of the **Act**, which came into effect on 1 November 2010.
- C. Pursuant to section 16(1)(h) of the **Act**, the **Authority** has the power to contract for market operation services. Clause 3.1 of Part 3 of the **Code** provides for the **Authority** to appoint market operation service providers (**service providers**), including a clearing manager.
- D. The **Authority** wishes to appoint the **Provider** as, and the **Provider** has agreed to undertake the role of, clearing manager in accordance with the **Act**, on the terms set out in the **regulations**, the **Code** and this **agreement**.

THE PARTIES AGREE as follows:

1. DEFINITIONS

In this **agreement** (including the Introduction), unless the context requires otherwise:

"**Act**" has the meaning set out in paragraph A of the Introduction;

"**additional requirements**" means the requirements set out in schedule 4;

"agreement" means this clearing manager service provider agreement and includes the schedules;

"business day" means a day other than a Saturday, Sunday or a public holiday (as defined in the Holidays Act 2003) in Wellington;

"business process information" means information developed, held or received by the **Provider** relating to how the **services** are provided, including how the **System** and/or **software** is used to provide the **services**, including process diagrams, flowcharts, checklists, operating procedures, validation procedures and training materials;

"Code" has the meaning set out in paragraph A of the Introduction;

"commencement date" means the later of 1 May 2016 and the date when the last party signs this **agreement**, being the date on the front page of this **agreement**;

"confidential data" means:

(a) **data** which is:

- (i) provided by, or to, **participants** for the purpose of complying with the **Code**; or
- (ii) received or created within the **System** or through the **Provider** carrying out the **services**; or
- (iii) any **processed data**; or
- (iv) marked or designated by the disclosing party as being confidential; or
- (v) by its nature clearly confidential to the supplying party; or

(b) the **documentation**,

but excluding:

- (c) information that the **Act**, **regulations**, **Code** or **functional specification** requires to be **published**;
- (d) information which, at the time it was received was, or thereafter without breach of the **Act**, the **regulations**, **Code** or this **agreement** by the **Provider** becomes, in the public domain; and
- (h) information that was, independently of the **Act**, the **regulations**, the **Code** or this **agreement**, acquired or developed by the **Provider**, other than the **documentation**;

"data" means any information (including information in electronic form or transferred into electronic form by the **Provider**) which the **Provider**:

- (a) holds in accordance with this **agreement**; or
- (b) directly or indirectly receives from or provides to **participants** or the **Authority** in relation to this **agreement**;

"**data transfer plan**" has the meaning set out in clause 13.5;

"**documentation**" means:

- (a) the user and technical documentation supplied, or to be developed, by the **Provider** for the **System**, or provided by a third party provider of third party software or equipment forming part of the **System**, to enable **users** to properly use the **System**, and the **Authority** and third party **service providers** to properly use, maintain and operate the **System**;
- (b) the **business process information**; and
- (c) the **user manual**, the **data transfer plan** and any other documents to be supplied pursuant to this **agreement**, and

includes any update of the **documentation**. **Documentation** may be online, hard copy or digital;

"**existing intellectual property rights**" means all **intellectual property rights** of a party or any of its third party licensors that existed as at the **commencement date** and are not developed, commissioned or created under or in connection with this Agreement. For the avoidance of doubt, **existing intellectual property rights** include any **intellectual property rights** developed, commissioned or created under or in connection with any previous service provider agreement between the parties;

"**fees**" means the fees set out in schedule 1, as varied from time to time in accordance with this **agreement**;

"**financial year**" means the **Authority's** financial year, being the twelve-month period beginning on 1 July and ending on 30 June in the following year;

"**force majeure event**" has the meaning set out in Part 1 of the **Code**;

"**functional specification**" means the functional specification in schedule 3 as at the Commencement Date, provided that where such document is amended (under this **agreement**) pursuant to clause 7, the **functional specification** means the then current version of such document;

"**GST**" means goods and services tax payable pursuant to the Goods and Services Tax Act 1985;

"**hardware**" means equipment forming part of the System;

"**hourly rate(s)**" means the hourly rate(s) set out in schedule 1;

"**Industry Best Practice**" means, in relation to any **services**, the exercise of the skill, diligence, prudence, foresight and judgement which would be expected from a highly skilled and experienced and well-resourced person engaged in the same type of undertaking under the same or similar circumstances, applying the best standards and practices currently applied in, as the circumstances require, the relevant industry;

"**installation**" means the loading of **software** or **updates** on the appropriate **hardware** and the carrying out and satisfaction of any applicable testing as required by the **Authority** to confirm the continuing integrity of the **software** and any **updates**, and "**install**" and "**installed**" have corresponding meanings;

"**intellectual property rights**" includes copyright, and all rights conferred under statute, common Law or equity in relation to inventions (including patents), registered and unregistered trademarks, registered and unregistered designs, circuit layouts, confidential information, know-how, and all other rights resulting from intellectual activity in any field, together with all right, interest or licence in or to any of the foregoing;

"**interest rate**" means the 90 day commercial bill rate as published on page BKBM of Reuters monitor service and applying at 10.30am on the relevant day, plus 2%;

"**Law**" means any rules of common law, statute, regulation, order-in-council, by-law, ordinance or other subordinate or secondary legislation in force from time to time;

"**non-functional specification**" means the non-functional specification in schedule 2, provided that where such document is amended (under this **agreement** or the **System Delivery Agreement**) pursuant to clause 7, the **non-functional specification** is the current version of such document;

"**participant**" has the meaning given to it in section 5 of the **Act**;

"**performance standards**" means the performance standards and/or service levels set out in the **non-functional specification**;

"**PPSA**" means the Personal Property Securities Act 1999;

"**processed data**" means **data** which has, by use of the **software** or otherwise, been processed by the **Provider** pursuant to this **agreement**, the **regulations**, or the **Code**;

"**regulations**" has the meaning set out in paragraph A of the Introduction;

"**Rulings Panel**" has the meaning set out in Part 1 of the **Code**;

"**services**" means the services referred to in clause 3.2.1;

"**software**" means the software forming part of the **System** (including object code and source code, but only object code in the case of "**Third Party Software**" as defined in the **Software Licence Agreement**);

"**Software Licence Agreement**" means the Clearing manager Software Licence Agreement dated 30 October 2015 between the parties;

"**specifications**" means:

- (a) the **non-functional specification**, the **functional specification**, the **additional requirements** and the **performance standards**; and
- (b) all third party product descriptions and specifications to the extent that they are not inconsistent with the **specifications** under paragraph (a) of this definition;

"**System**" means the system used to perform the clearing manager role as at the **commencement date** (including **software**, hardware, cabling and infrastructure), as modified from time to time in accordance with this **agreement**;

"**update**" means the object code and source code of all fixes, modifications, revisions, releases and versions of the **software**;

"**users**" means **participants**, the **Authority** or individuals;

"**user manual**" means the instructional documentation to be provided by the **Provider** and agreed with the **Authority** to enable **users** to properly use the **System**; and

"**year**" means a period of 12 consecutive months.

2. CONSTRUCTION

2.1 **Interpretation:** The following rules of interpretation apply in this **agreement** unless the context requires otherwise:

2.1.1 **clauses, schedules and paragraphs:** a reference to a clause or a schedule is to a clause or schedule of this **agreement**, a reference in a schedule to a paragraph is to a paragraph in that schedule, the schedules to this **agreement** form part of this **agreement** and a reference to a schedule includes a reference to that schedule as amended or replaced from time to time;

2.1.2 **defined terms:** words or phrases appearing in this **agreement** in bold type are defined terms and have the meanings given to them in this **agreement**, or, if not defined in this **agreement**, have the meanings given to them in the **Act**, the **regulations** or Part 1 of the **Code** (as the case may be);

- 2.1.3 **documents:** a reference to any document, including this **agreement**, includes a reference to that document as amended or replaced from time to time;
- 2.1.4 **headings:** headings are included for convenience only and do not affect the construction of this **agreement**;
- 2.1.5 **inclusions:** references to inclusions or examples do not imply any limitation;
- 2.1.6 **joint and several liability:** any provision of this **agreement** to be performed or observed by two or more persons binds those persons jointly and severally;
- 2.1.7 **negative obligations:** a reference to a prohibition against doing any thing includes a reference to not permitting, suffering or causing that thing to be done;
- 2.1.8 **no contra proferentem construction:** the rule of construction known as the *contra proferentem* rule does not apply to this **agreement**;
- 2.1.9 **number and gender:** words importing the singular include the plural and vice versa, and words importing one gender include the other genders;
- 2.1.10 **parties:** a reference to a party to this **agreement** or any other document includes that party's personal representatives, successors and permitted assigns;
- 2.1.11 **currency:** a reference to dollars or "\$" is a reference to New Zealand currency;
- 2.1.12 **person:** a reference to a person includes any individual, corporation, unincorporated association, government department or local authority;
- 2.1.13 **related terms:** where a word or expression is defined in this **agreement**, other parts of speech and grammatical forms of that word or expression have corresponding meanings; and
- 2.1.14 **statutes, regulations, rules and codes:** references to a statute, regulation, rule or code include reference to regulations, orders, directions or notices made under or pursuant to such statute, regulation, rule or code and all amendments to that statute, regulation, rule or code whether by subsequent statute, regulation, rule, code amendment or otherwise and a statute, regulation, rule or code amendment passed in substitution for the statute, regulation, rule or code provision referred to or incorporating the relevant provisions.

- 2.2 **Conflict:** Unless specified otherwise in this **agreement** or the context requires otherwise, If there is a conflict between any of this **agreement**, the schedules to

this **agreement**, the **Act**, the **regulations** or the **Code**, the following order of priority will prevail (in descending priority):

- 2.2.1 the **Act**;
- 2.2.2 the **regulations**;
- 2.2.3 the **Code**;
- 2.2.4 this **agreement**; and
- 2.2.5 the schedules to this **agreement**.

3. APPOINTMENT

3.1 **Appointment:** The **Authority** appoints the **Provider** as clearing manager from the **commencement date** pursuant to clause 3.1 of the **Code** on the terms and conditions set out in this **agreement**, and in accordance with the **Act**, the **regulations** and the **Code**, and the **Provider** accepts such appointment.

3.2 **Services:** The Provider agrees to:

3.2.1 undertake the following **services** in accordance with the **Act**, the **regulations**, the **Code** (as applicable) and this **agreement**:

- (a) the duties and obligations to be undertaken by the clearing manager under the **Code**;
- (b) the services contemplated in the **non-functional specification**, the **functional specification** and the **additional requirements**; and
- (c) all other duties of the **Provider** under this **agreement**;

3.2.2 promptly perform the **services** with diligence, efficiency and skill, and to **Industry Best Practice**;

3.2.3 comply with all applicable **Law** and obtain, maintain and comply with all consents, permits, standards and licences (whether statutory, regulatory, contractual or otherwise) necessary for the provision and receipt of the **services**;

3.2.4 provide the **services** in accordance with the **Code**, **performance standards** and such additional or substitute **performance standards** as are agreed between the parties:

- (a) at the beginning of each **financial year** in accordance with clause 3.12 of the **Code**; or
- (b) at any other time during a **financial year** following a request by the **Authority** to alter the **performance standards**.

Agreement to additional or substitute **performance standards** may not be unreasonably withheld. If the parties cannot agree on **performance standards** within 20 **business days** of the beginning of each **financial year** or a request by the **Authority**, the matter may be referred to dispute resolution under clause 16;

- 3.2.5 promptly inform the **Authority** if:
- (a) the **Provider** breaches the **Act**, the **regulations** or the **Code** or any requirement of the **specifications**; or
 - (b) the **Provider** becomes aware of any error or ambiguity in or in respect of the **non-functional specification**, the **functional specification** or the **additional requirements**;
- 3.2.6 co-operate with the **Authority's** other service providers and **participants** to facilitate effective provision of, and changes to, the **services** and all other services provided to the **Authority**;
- 3.2.7 provide the **services** from New Zealand; and
- 3.2.8 maintain a substantial presence and office in New Zealand; and
- 3.2.9 from the **commencement date**, ensure that the **System**, on a continuing basis:
- (a) functions, operates and performs so that the **services** are provided in accordance with this **agreement**;
 - (b) meets and satisfies the **specifications**; and
 - (c) is free from:
 - (i) viruses, to the extent reasonably possible (which includes the **Provider** using its best endeavours to protect against and eliminate viruses); and
 - (ii) material defects and errors.
- 3.2.10 continually plan and cater for the evolution of the **services** and seek to improve its performance under this **agreement** without additional cost to the **Authority** including performing the **services** more efficiently so as to reduce costs to the **Authority**, reduce the costs of providing the **services** and reduce costs to **participants**. Without limiting the foregoing, the **Provider** must:
- (a) produce and provide to the **Authority** for its approval, within 12 months after the **commencement date**, a documented roadmap for the evolution of the **services** to ensure that the **services** are improved over the term of this **agreement**;

- (b) ensure that it has in place a defined process as to how it intends to develop and deliver innovation regarding the **services** by incorporating such innovation into the **services** during the term of this **agreement** for the benefit of the **Authority** and the electricity industry as a whole and by encouraging innovation on the part of **participants**; and
- (c) invest in research and development and technology innovation specifically in respect of the **services** in order to reduce costs to the **Authority** while sharing the benefits; and

3.2.11 provide the **documentation** to the **Authority**.

3.3 **Provider's representative:**

3.3.1 The **Provider** will at all times during the term of this **agreement** provide a representative approved by the **Authority** (such approval not to be unreasonably withheld) to be the **Provider's** representative. The representative will:

- (a) be authorised to receive all directions and instructions in connection with provision of the **services** on behalf of the **Provider**;
- (b) monitor the performance of the **services**;
- (c) proactively identify and resolve any issues that may affect the provision of the **services**; and
- (d) review risks and agree risk management actions.

3.3.2 The representative (or a delegate appointed by the representative) will be contactable by the **Authority** from 8.30am to 5.00pm on **business days** (including by mobile telephone and email).

3.3.3 The representative (or a delegate appointed by the representative) will be contactable by the **Authority** at any time outside the hours in clause 3.3.2 in the event of any situation which the **Authority** reasonably considers requires immediate action by the **Provider**.

3.3.4 The **Provider** may appoint a replacement representative with the **Authority's** prior written consent, such consent not to be unreasonably withheld.

3.3.5 The **Authority** may at any time by notice to the **Provider** object on reasonable grounds to any representative (or any delegate appointed by the representative). The **Authority's** notice will state the grounds upon which the objection is based. As soon as practicable the **Provider** will, subject to clause 3.3.1, appoint a replacement representative (or delegate as applicable).

3.4 **Records, reviews and reporting:**

- 3.4.1 The **Provider** shall keep full, accurate and up-to-date records relating to the performance of the **services**.
- 3.4.2 The **Provider** will review its performance of the **services** in accordance with clause 3.13 of the **Code** and provide reports to the **Authority** in accordance with clause 3.14 of the **Code**. Such reports will include such other information as the **Authority** reasonably requests.
- 3.4.3 The **Provider** will provide other reports required by the **specifications**.
- 3.4.4 The **Provider** will provide any ad hoc reports to the **Authority** at the **Authority's** reasonable request, such reports to be paid for at the **hourly rates**.
- 3.4.5 All reports provided under this clause 3.4 must be presented in a format that is determined by the Authority, acting reasonably.

3.5 **Meetings:** The **Provider** will ensure that the representative appointed in accordance with clause 3.3 of this **agreement** attends monthly and annual meetings with the **Authority** (and additional meetings as reasonably required by the **Authority**), to discuss matters relating to the **services**. Meetings will be held at venues and times reasonably specified by the **Authority**. Without limitation the annual meetings shall include discussion of the outcome of any review conducted by the **Authority** and the **performance standards** to apply for the coming year.

3.6 **Audits:**

- 3.6.1 The **Authority** may conduct (and the **Provider** must co-operate with) audits of the **Provider's** performance of the **services** in accordance with this clause 3.6.
 - (a) Audits may be held annually or at a greater frequency as required in good faith by the **Authority**.
 - (b) The **Authority** will give the **Provider** reasonable prior notice of any audit, unless the circumstances are such that it is unreasonable for the **Authority** to be required to give prior notice.
 - (c) Any audit will be conducted in a manner that does not unreasonably disrupt the **Provider's** business or staff.
 - (d) The costs of conducting audits will be borne by the **Authority** (except the **Provider's** costs of co-operating with any audit in connection with clause 3.6.1) unless any material non-compliance with this **agreement** is disclosed, in which case the **Provider** must reimburse the **Authority** for the reasonable cost of the audit.

- (e) The Authority will keep all information obtained from the **Provider** as a result of an audit confidential, except as required by **Law**.
- (f) The Authority will provide the **Provider** with a copy of the draft audit report and give the **Provider** a reasonable opportunity to comment on the draft before the audit report is finalised.
- (g) The Authority will provide the **Provider** with a copy of the final audit report once the audit report is finalised.
- (h) To avoid doubt, audits under this clause 3.6 are in addition to the **software** audit required by clause 3.17 of the **Code**.
- (i) The Provider must implement any changes necessary to give effect to any reasonable recommendations made by an auditor, with the objective of constantly improving the **services**.

3.6.2 During the term of this **agreement**, the **Provider** must, at its own cost conduct two audits of its systems and processes. The first audit must be conducted, and the audit report finalised, between 30 April 2020 and 30 October 2020 and the second audit must be conducted between 30 April 2023 and 30 October 2023.

- (a) The auditor must be independent from the part of the **Provider's** business that provides the **services**, and must be approved by the **Authority**;
- (b) **Provider** initiated audits are to cover the full end to end scope of the **services**. The scope brief to the auditor is to be agreed with the **Authority** prior to the audit commencing;
- (c) If the **Provider** has annual business assurance audits that cover part or all of the scope and those business assurance audits are approved by the **Authority**, then the **Provider** may include the results of these business assurance audits in place of auditing that part of the **services**;
- (d) The **Provider** will provide a copy of the audit report to the **Authority** within five **business days** of the audit report being finalised. The audit report must include a description of the resolution and completion timeframes for all non-compliances, conditions and recommendations made by the auditor;
- (e) The **Authority** may, at its sole discretion and cost, meet the auditor to discuss the audit results. The **Authority** may at its sole discretion hold such meetings without the **Provider** being present and without reporting the results of such meetings to the **Provider**; and

- (f) If the term is extended in accordance with clause 4.2, a third **Provider** initiated audit must be conducted between two years and two years six months from the expiry of the **initial term**.

3.6.3 The **Provider** will conduct an annual software audit and software change audits as required by clause 3.17 of the **Code**.

3.7 **Warranties:**

3.7.1 The **Provider** warrants that:

- (a) All information provided by the **Provider** to the **Authority** under or in connection with the **services** or this **agreement** is:
 - (i) if prepared or generated by the **Provider**, true, accurate and not misleading in any material respect (including by omission); and
 - (ii) if prepared for or on behalf of the **Provider** by a third party, or provided to the **Provider** by a third party, to the best of the **Provider's** knowledge and belief true, accurate and not misleading in any material respect (including by omission);
- (b) its employees, contractors and agents have the suitable skills, training and experience for, and are properly supervised in, the provision of the **services**;
- (c) it is not aware as at the **commencement date** of anything within its reasonable control which might or will adversely affect its ability to perform its obligations under this **agreement**, the **regulations**, the **Act**, or the **Code**;
- (d) all **documentation** provided by the **Provider** under or in connection with this **agreement** will:
 - (i) contain sufficient information for the full and efficient operation of the **System** or relevant **services** to which the documentation relates;
 - (ii) correctly represent the attributes of the subject matter to which it relates;
 - (iii) provide proper and adequate instructions for its intended purpose; and
 - (iv) be written or delivered in language and at a level appropriate for the intended audience; and
- (e) each such warranty will be deemed to be repeated continuously by the **Provider** during the term of this **agreement**.

3.7.2 Without limiting the **Authority's** remedies, the **Provider** acknowledges that if, whilst performing the **services**, it omits to include all **data** made available to it at the relevant time in accordance with this **agreement**, the **regulations** and the **Code**, then it will re-perform the **services** in respect of all of that **data**, at no cost to the **Authority** or the **participants**.

3.8 **Personnel:** If the **Authority** is at any time dissatisfied on reasonable grounds with the conduct or performance of a particular person providing the **services**, the **Authority** may, after consulting with the **Provider**, require the person to be replaced at the **Provider's** cost.

3.9 **Use of the System:** From the **commencement date**, the **Provider** shall use the **System** as required to provide the **services** to the **Authority** in accordance with this **agreement**.

4. TERM

4.1 **Term:** This **agreement** will come into effect on the **commencement date** and, subject to clause 4.2, unless otherwise terminated under this **agreement**, or the **Code**, will expire on 30 June 2024 (the "**Initial Term**").

4.2 **Renewal:** The **Authority** may, at its discretion, by giving notice to the **Provider** at any time up to six (6) months before the expiry of the Initial Term, renew this **agreement** for a further term of three (3) years from the expiry of the Initial Term (the "**Second Term**").

5. NOT USED

6. FEES

6.1 **Invoicing:** The **Provider** will provide the **Authority** with a valid tax invoice for the relevant **fees** for the **services** by the 5th **business day** of the month following provision of the relevant **services**.

6.2 **Payment:** The **Authority** will pay the **Provider** the **fees** for the **services** monthly in arrears by:

6.2.1 the 20th of the month, or if that is not a **business day** the next **business day**, provided that the **Provider** has complied with clause 6.1; or

6.2.2 if the **Provider** does not comply with clause 6.1, the 20th of the month, or if that is not a **business day** the next **business day**, of the month following receipt of a valid tax invoice from the **Provider**.

6.3 **Interest on default:** If the **Authority** does not comply with clause 6.2, the **Provider**, upon written notice to the **Authority**, will be entitled to charge, and the **Authority** will be liable to pay if the **Authority** has not remedied the non-compliance by close of business two **business days** after that notice is issued, interest on the relevant **fees** at the **interest rate** from the due date until payment.

- 6.4 **Payment method:** The **Authority** will pay the **fees** for the **services** by means of direct credit of immediately available funds to the **Provider's** bank account as notified by the **Provider** to the **Authority**, or in such other manner as may be mutually agreed in writing from time to time.
- 6.5 **Total fees:** Subject to clause 7, the **fees** are fixed and will not change unless agreed in writing between the parties. The **Authority** will not be liable to pay the **Provider** any fees or charges for the **services** other than the **fees**.
- 6.6 **No charge to participants:** The **Provider** may not charge any **participant** for the **services** except as approved by the **Authority**.
- 6.7 **Disputed invoices:** The **Authority** may withhold payment of an invoice or part of an invoice if:
- 6.7.1 the **Authority** disputes, on reasonable grounds, any invoice or part of any invoice submitted by the **Provider** provided that the **Authority** promptly notifies the **Provider** of the reasons for the dispute but must not delay payment of any undisputed portion provided the **Provider** complies with the Authority's administrative requirements in relation to the payment of the undisputed portion; or
- 6.7.2 the **services** to which the invoice relates have not been supplied in accordance with this **agreement** and the non-performance has not been remedied to the **Authority's** reasonable satisfaction within 10 **business days** of the **Provider** receiving written notice of the non-performance,
- 6.8 Any dispute under clause 6.7 must be dealt with in accordance with the dispute resolution procedures set out in clause 16. If the outcome of any dispute under clause 6.7 is that the **Provider** was not at fault, then the **Authority** shall pay to the **Provider** the withheld amount plus interest on the withheld amount at the **interest rate** from the due date for payment until the date of payment.
- 6.9 **Overcharging:** If it is found at any time that the **Authority** has been overcharged for any reason and the **Authority** has actually paid the invoice containing such overcharge then, within 10 **business days** after such error has been discovered and the amount has been agreed to by the parties or determined in accordance with clause 16, the **Provider** must refund to the **Authority** the amount of any such overcharge. The **Provider** will issue a **GST** credit note in accordance with the Goods and Services Tax Act 1985 in order to correct the incorrect invoice. In addition, the **Provider** will pay interest on the overcharged amount at the **interest rate** calculated from the date of payment of the invoice to the date of repayment of the overcharged amount.
- 6.10 **GST:** The **fees** do not include GST, which if due must be paid by the **Authority** in addition to the **fees**. Such GST will be payable to the **Provider** at the same time as the payment in respect of which the GST is payable.

- 6.11 **Other taxes:** The **Provider** will bear the cost of all withholding and income taxes on payments made by the **Authority** to the **Provider** under this **agreement** and customs and other duties on or in respect of the services supplied by the **Provider** under this **agreement** (together referred to as "Taxes").
- 6.12 **Deductions:** Should any Taxes be levied and should they be required to be paid, deducted or withheld by the **Authority**, the **Authority** must make such payment, deduction or withholding and obtain appropriate receipts for such payment, deduction or withholding from the proper authority in the name of the **Provider** and must promptly forward the originals to the **Provider**.
- 6.13 **Obligations to employees:** The **Provider** must meet all legal requirements in respect of its employees engaged in the supply of the services including payment of all wages, salaries, holiday pay or allowances, Accident Compensation levies, PAYE and other taxes, duties, redundancy compensation and any other item of remuneration or compensation due in respect of those employees.

7. CHANGES

- 7.1 **Authority-initiated change:** The **Authority** may, by notice to the **Provider**, require a variation to the terms of this **agreement**, the **services**, or the **System** as required to meet:
- 7.1.1 changes to the **Act**, the **regulations** or the **Code** or making of new regulations under the **Act**; or
 - 7.1.2 material changes to the **performance standards** under clause 3.2.4; or
 - 7.1.3 the **Authority's** reasonable requirements in connection with the clearing manager role.

The parties will, as applicable, carry out the change control process in the **non-functional specification** for variations to the **services** notified under this clause 7.1 (if applicable given the nature of the variation). The **Provider** will not unreasonably refuse any variation to the terms of this **agreement**, the **services**, or the **System** that falls outside the scope of this clause 7.1.

- 7.2 **Variation:** If the **Authority** requires a variation in accordance with clause 7.1, the parties will negotiate in good faith and act reasonably to try to reach agreement on the terms of the variation, and the process and plan for implementation of the variation, including any appropriate increase or decrease in the **fees** to reflect such variation.
- 7.3 **Pricing principles:** The following pricing principles will apply in respect of any variation:
- 7.3.1 the **Provider** will only charge the **Authority** for a variation to the extent the variation cannot reasonably be considered already within the scope of this **agreement**;

7.3.2 if there is a cost impact of the variation then the parties will use genuine efforts to agree a reasonable price for the variation (taking into account the nature and extent of the variation) in accordance with the rest of this clause 7.3;

7.3.3 the pricing for any variation must be:

7.3.3.1 reasonable;

7.3.3.2 competitive;

7.3.3.3 based on the rates specified in paragraph 4 of schedule 1 (to the extent applicable);

7.3.3.4 no higher than pricing the **Provider** offers its most preferred customers for products or services the same or similar to the products or services proposed to be provided to the **Authority** as part of the variation; and

7.3.3.5 no higher than the price at which the **Authority** would be able to procure similar products or services from another service provider; and

7.3.4 without limiting clause 7.4, if requested by the **Authority**, the **Provider** will obtain and provide (at its cost) a certificate from an auditor confirming that any pricing of a variation complies with the requirements of this clause 7.3.

7.4 **Disputes:** If the parties cannot reach agreement on any matter under clause 7.2 within 10 **business days** of the **Authority's** notice under clause 7.1 then the matter will be resolved under clause 16, such resolution to reflect the principles of clause 7.3 in respect of an inability to reach agreement on a variation to the **fees**. The **Provider's** costs and profit will be assessed on a fully transparent open book basis and the **Provider** will make available to the **Authority** and any mediator, expert or arbitrator appointed under clause 16 all information required for this purpose.

7.5 **Additional work:** Notwithstanding clauses 7.2 and 7.3, where there is a variation to the **services** or the **System** under clause 7.1 that requires the **Provider** to carry out additional work, the **Authority** may (at the **Authority's** sole discretion) elect to pay for such additional work at the rates no higher than the applicable **hourly rates**. Where the **Provider** is providing **services** at the **hourly rates** (under this or any other clause):

7.5.1 the **Provider** will keep proper records of the hours worked by its personnel and provide such records to the **Authority** on request; and

7.5.2 the number of hours worked by its personnel must be reasonable in the circumstances.

- 7.6 **Changes to Act, Code, regulations:** Notwithstanding anything else in this **agreement**, any change to the **Act, regulations** (including the making of new regulations under the **Act**), the **Code**, and/or **specifications** after the date of this **agreement** will not affect the **Provider's** obligations or liability under this **agreement**, except to the extent expressly provided in a variation to the terms of this **agreement** implemented in accordance with this clause 7.
- 7.7 **Provider-initiated changes:** The **Provider** may, by notice to the **Authority**, request a variation to the terms of this **agreement**, the **services**, or the **System**. The Authority will consider any such request in good faith, provided that the Authority shall not be obliged to accept such variation request. If the Authority accepts a variation request under this clause then clauses 7.2 to 7.5 will apply as if the Authority had required the variation.

8. FORCE MAJEURE

- 8.1 **Force majeure in Code:** The force majeure provisions in clauses 3.7 to 3.10 of the **Code** inclusive apply in respect of the parties' obligations under this **agreement** as if those provisions were set out in full in this **agreement** (with such changes as are necessary to make them applicable to the parties' obligations under this **agreement**, rather than under the **regulations** and the **Code**).
- 8.2 **Relief:** To the extent that the **Provider** does not perform any of the **services** as a result of a **force majeure event**, the **Authority** is relieved of its obligation to pay the **Provider** any **fees** in respect of any such **services**.

9. INTELLECTUAL PROPERTY

- 9.1 **Warranties:** The **Provider** warrants that:
- 9.1.1 any material provided as part of the **services**, including the **documentation**, does not and will not infringe any **intellectual property rights** of any third party; and
- 9.1.2 the provision of the **services** and the use of the **services** by the **Authority** and the **participants** does not and will not infringe any third party's **intellectual property rights**.

provided that this warranty shall not apply to **data** which the **Provider** received pursuant to the **Code** in circumstances where the **Provider** had no knowledge, and could not reasonably be expected to have known, of any infringement of third party **intellectual property rights** in respect of such **data**.

- 9.2 **Indemnity:** The **Provider** indemnifies the **Authority** in respect of any costs (including legal costs on a solicitor-client basis), expenses, claims, liabilities, damages or losses incurred by the **Authority** as a result of a breach of any of the warranties in clause 9.1.

9.3 **Existing rights:** All **existing intellectual property rights** will be owned and remain owned by the relevant party or its third party licensors. The trademarks of the **Authority** comprise **existing intellectual property rights** of the **Authority**.

9.4 **New rights:** Except as set out in this clause, all new **intellectual property rights** that are developed, commissioned or created for the purposes of this **agreement** or the **services**, including all new **intellectual property rights** in:

9.4.1 the schedules to this **agreement (including the functional specification, non-functional specification and additional requirements)**, together with all modifications, adaptations and additions to the same; and

9.4.2 modifications, adaptations and additions to a party's **existing intellectual property rights** that are developed, commissioned or created for the purposes of this **agreement** or the **services**,

will be owned by the **Authority** as such rights arise. To the extent such rights vest in the **Provider** from time to time, the **Provider** shall, upon request of the **Authority**, assign such rights to the **Authority** or its nominee for nominal consideration. This clause:

9.4.3 is subject to the terms of the **Software Licence Agreement** that relate to ownership of **intellectual property rights** in the **software** and **documentation**; and

9.4.4 does not apply to:

(a) the **Provider's** corporate publications or the **Provider's** business planning documents; or

(b) the parties' know-how developed in the course of this **agreement** or the **services**.

9.5 **Trademarks:** The **parties** agree that:

9.5.1 the **intellectual property rights** in any and all trademarks used in relation to the **services** shall be the absolute property of the **Authority** as such rights arise, other than:

9.5.1.1 third party trademarks; and

9.5.1.2 the **Provider's** trade marks in general use by the **Provider** before the date of this **agreement**; and

9.5.2 the **Provider** must not apply its own or a third party's trade marks to the **services** except with the **Authority's** prior written approval.

9.6 **Licence:** The **Authority** grants to the **Provider** a royalty free, non-exclusive licence (for the term of this **agreement**) to use the **Authority's** trademarks solely to the extent necessary to perform the **services** in accordance with this

agreement. The **Provider** agrees to comply with the **Authority's** brand guidelines as issued and amended from time to time when using the **Authority's** trademarks.

9.7 **No interest in data:** The **Provider** acknowledges that it will not:

9.7.1 obtain any rights to, interest in or ownership of any **data**, including any **processed data** derived from that **data**;

9.7.2 except with the **Authority's** prior written consent, use **data** or **processed data** as described in clause 9.7.1 for any purpose other than for providing the **services**, provided that no written consent will be required if such **data** or **processed data** has entered the public domain (that is, the data is able to be obtained by any member of the public without charge, such as from a website).

10. CONFIDENTIALITY AND SECURITY OF INFORMATION

10.1 **Restraints on use or disclosure:** Each party agrees that it will not without the prior written consent of the other use **confidential data** or disclose **confidential data** to any person other than those of its officers, employees and advisers essential to the implementation of the provisions contained in it or as required by law (including by the **Act, regulations** or **Code**) or under the Standing Orders of the New Zealand House of Representatives. Except to the extent it is transferred under clause 10.6, the **Provider** must at its own expense store all **data** and **processed data** held by the **Provider** as clearing manager.

10.2 **Personnel compliance:** Each party shall use its best endeavours to ensure those of its officers, employees and advisers to whom **confidential data** is disclosed in terms of clause 10.1 are aware of and comply with the confidentiality obligations imposed by that paragraph.

10.3 **Standard of protection:** In fulfilling the obligations in clauses 10.1 and 10.2 each party will as a minimum standard use the same degree of care to avoid disclosure as it uses to protect its own **confidential data**.

10.4 **Disclosure required by law:** If a party is required by law (including by the **Act, regulations** or **Code**) to disclose any **confidential data** it will immediately, to the extent legally permissible, and prior to such disclosure, advise the other party.

10.5 **Survival:** The obligations under this clause shall survive termination or cancellation of this **agreement**.

10.6 **Transfer of data:**

10.6.1 The **Authority** may at any time during the term of this **agreement** request that the **Provider**, at the **Provider's** own cost, either transfer to the **Authority** copies of, or grant the **Authority** access to, the **data, processed data** or **documentation**. Upon receipt of such a request from the

Authority, the **Provider** will promptly transfer copies of the **data**, **processed data** and/or **documentation** to the **Authority** in a format(s) reasonably determined by the **Authority**.

10.7 **No announcements:** The **Provider** must not make or release public or media statements, or publish material related to this **agreement** or the **services**, without the **Authority's** prior written approval (such approval not to be unreasonably withheld).

10.8 **Publicise agreement:** The **Authority** will be entitled to **publicise** this **agreement** (including the schedules) as required by clause 3.5 of the **Code**.

10.9 **Documentation:** The fact that the **documentation** comprises or contains **confidential data** shall not prejudice or limit the **Authority's** rights under this **agreement** or the **Software Licence Agreement** or the **Provider's** obligations under this **agreement**.

11. BUSINESS CONTINUITY PLANS

11.1 **Business continuity plan:** The **Provider** must have in place at the **commencement date** and maintain and comply with throughout the term of this **agreement**:

11.1.1 business continuity plans for the continuance of the **services** in the event of any unplanned interruption to the **Provider's** ability to provide the **services**. The business continuity plans must assist the **Provider** to continue to fulfil its duties and obligations with the minimum of practical disruption; and

11.1.2 back-up procedures for all **data** and **processed data** held by the **Provider** that comply with the **non-functional specification**.

11.2 **Business continuity plan and procedure requirements:** The business continuity plan must:

11.2.1 be aligned with the current version of ISO 22301 or NFPA1600 or another recognised standard for business continuity planning;

11.2.2 be regularly tested (at least annually, but may be more frequently if **required**) and the results of each test reported by the **Provider** to the **Authority** in the following month's report, as required under clause 3.4.2;

11.2.3 be provided to the **Authority** before the initial business continuity plan or any changes are implemented, and the **Provider** will consider any feedback provided by the **Authority**;

11.2.4 contain contact details for the nominated contact person, including backup contacts. Such contact details to include multiple methods of contact

including physical location and access details for all physical locations where the contact may be located when providing the **services**.

11.3 **Invoking the business continuity plan:** Whenever the business continuity plan is invoked, the **Provider** will:

11.3.1 notify the **Authority** as soon as possible. Such advice is to include the time of invocation, the reason for invocation, and the estimated time of restoration to business as usual **services**;

11.3.2 provide regular updates, at least once a day, of progress towards restoration while the business continuity plan is invoked;

11.3.3 notify the **Authority** as soon as possible after business as usual **services** are restored.

11.4 **Back-up copies:** Without limiting clause 11.1, the **Provider** will ensure that back-up copies of the **software** are kept off-site in a location at least 100 kilometres from the **Provider's** premises from which the **Provider** provides the **services**.

11.5 **Requirements of agreement:** Without limiting clause 11.1, the **Provider** must perform and comply with the requirements set out in this **agreement**, including the **non-functional specification**, in respect of:

11.5.1 back-up of all **data** and **processed data** and the **software** (including complying with the back-up policy agreed in accordance with the **non-functional specification**); and

11.5.2 business continuity.

12. TERMINATION

12.1 **Immediate termination by Authority:** The **Authority** may terminate this **agreement** with immediate effect on written notice to the **Provider** if:

12.1.1 the **Provider** ceases, or it becomes apparent that the **Provider** intends to cease, to carry on its business;

12.1.2 the **Provider** passes a resolution to be wound up or goes or is put into receivership, liquidation or statutory management or circumstances arise which entitle a Court or a creditor to appoint a receiver or manager or which would entitle a Court to make a winding up order, or suffers any other form of insolvency administration;

12.1.3 the **Provider** makes any arrangement for the benefit of its creditors;

12.1.4 at any time the limit on the **Provider's** liability to the **Authority** specified in clause 14.3 is exceeded; or

12.1.5 the **Act, regulations** or **Code** changes so that the clearing manager ceases to exist.

12.2 **Termination by Authority for material breach:** The **Authority** may terminate this **agreement** by giving not less than 15 **business days'** notice to the **Provider** if the **Provider** commits a material breach, or a series of breaches that when taken together constitute a material breach, of this **agreement**, the **regulations**, the **Act**, or the **Code**, and the **Provider** does not within 15 **business days** of the **Authority** requiring it to do so rectify the breach(es), or despite the **Provider** remedying the breach(es), the number of breaches causes the **Authority**, acting reasonably, to lose faith in the **Provider's** ability to provide the **services** in a manner that is substantially compliant with the **Act, regulations, Code** or this **agreement**.

12.3 **Provider termination:** The **Provider** may terminate this **agreement** by giving not less than 15 **business days'** notice to the **Authority** if the **Authority** has not paid the **Provider** the relevant **fees** within one month after the due date for those **fees** provided that:

12.3.1 the **Provider** is not in material breach of this **agreement**, the **regulations** or the **Code** which breach remains unremedied;

12.3.2 the **Provider** notified the **Authority** within 8 **business days** after the due date that the **Authority** had not paid the **Provider** the relevant **fees**;

12.3.3 the unpaid amount is not disputed by the **Authority**; and

12.3.4 such notice will not be effective if the **Authority** pays the outstanding amount, plus interest in accordance with clause 6.3, before expiry of the 15 **business days'** notice period.

12.4 **Accrued rights and liabilities:** Termination of this **agreement** is without prejudice to the rights and liabilities accrued up to and including the effective date of termination.

12.5 **Mitigation:** Each of the parties must take reasonable steps to mitigate any claim for loss or damage it may have against the other under or arising out of this **agreement**, howsoever such claim may arise.

12.6 **Survival:** Expiry or termination of this **agreement** does not affect rights and obligations which by their nature survive expiry or termination including those contained in clauses 9, 10, 12.4, 12.5, 13, 14, 15, 16 and 17.

13. DISENGAGEMENT SERVICES

13.1 **Disengagement services:** On expiry or termination of this **agreement**, the **Provider** must provide all disengagement services requested by the **Authority** and/or specified in the **non-functional specification** for up to 18 months after expiry or termination, and will reasonably co-operate with the **Authority** or the

Authority's nominated new provider (as the case may be) to ensure an orderly transition of the **services** to the **Authority's** new provider in a timely fashion with minimal disruption to the **Authority's** business and to **participants'** respective businesses. Those disengagement services will include, if requested by the **Authority**:

13.1.1 the continued provision of the **services**, or part of the **services**, being provided to the **Authority** prior to termination as requested by the **Authority** in accordance with this **agreement**. The **Authority** must continue to pay the **fees** for such **services** in accordance with the **agreement** (or a reasonable proportion of those **fees** if only part of the **services** are required). For the purposes of this clause 13.1.1, the reasonable proportion of such **fees** shall reflect:

- (a) the **Provider's** actual costs of continuing to perform the relevant **services** (as revised); plus
- (b) a reasonable profit, consistent with the nature and quantum of fees that would be payable to a provider of services comparable to the **services** (as revised) provided under this **agreement**.

If there is any disagreement between the parties as to the reasonable proportion of such **fees** payable by the **Authority** the dispute shall be resolved by mediation and, if necessary, expert determination in accordance with clause 16 (Dispute Resolution) of this **agreement**. Each party agrees to provide to the mediator or expert all information and assistance required for this purpose. Each party will bear an equal share of the costs and expense of the mediation or expert determination. The costs and profit referred to in this clause 13.1.1 will be assessed on a fully transparent, open book basis.

13.1.2 the supply to the **Authority** for its ongoing use up to date copies of the **documentation**; and

13.1.3 training for the **Authority** and the new provider's personnel in respect of the relevant **services** provided by the **Provider** under this **agreement**.

13.2 **Payment**: The **Authority** will pay the **Provider** for any disengagement services that are in addition to the **services** being provided to the **Authority** prior to termination at the **hourly rates**.

13.3 **Data transfer**: Subject to clause 13.1, the **Provider** will, at the **Provider's** own cost, transfer all **data** and **processed data** (in a form reasonably required by the **Authority** and in accordance with the **data transfer plan**) that the **Provider** holds as clearing manager to the **Authority** or if the **Authority** requests, to the incoming clearing manager, and will provide a certificate to the **Authority** confirming that the **data** it has transferred is all the **data** and **processed data** it is required to transfer under this clause 13.3.

- 13.4 **Retention for compliance:** Notwithstanding any obligation on the **Provider** under this **agreement** to transfer **data** and **processed data**, the **Provider** will be entitled to retain a copy of such **data** to comply with any obligations it has at **Law**.
- 13.5 **Data transfer plan:** The parties will negotiate in good faith to agree a data transfer plan (the "**data transfer plan**") which sets out the timing and other requirements for the transfer of **data** and **processed data** in accordance with clause 13.2. When determining timing, the parties will take into account the volume of **data** and **processed data** to be transferred.
- 13.6 **Disputes:** If the parties are not able to agree a **data transfer plan** within 20 **business days** after the expiry or termination of this **agreement**, either party may refer the matter to expert determination under clause 16.2 (which determination, notwithstanding clause 16.3, shall be final).
- 13.7 **Co-operation:** The **Provider** agrees to work in good faith with any incoming **service provider** in relation to the transfer of **data** and **processed data** under clause 13.3, in accordance with the **data transfer plan**.
- 13.8 **Re-tender:** On request by the **Authority** at any time the **Provider** must promptly provide to the **Authority** all required information on the **System** and the provision of the **services**, including **documentation**, **business process information** and source and object code to enable the **Authority** to prepare and conduct procurement processes in connection with the clearing manager and other market operation service provider roles under the **Code**. Such information may include, if requested by the **Authority**, the supply to the **Authority** for its ongoing use of up to date copies of the **documentation**.
- 13.9 **Non-compete:** On expiry or termination of this **agreement**, the **Provider** shall not enforce against any personnel any provision of any contract with such personnel which would prevent them from ceasing their engagement or employment with the **Provider** following termination or expiry of this **agreement** and entering to any contract (employment or otherwise) with the **Authority** or any third party contracted by the **Authority** in connection with the **System** or the **services**.

14. GENERAL LIABILITY AND INDEMNITY

- 14.1 **Indemnity:** The **Provider** indemnifies and keeps indemnified the **Authority** from and against any loss, claim, demand, damage, cost, expense and liability incurred or suffered by the **Authority**:
- 14.1.1 in respect of damage to property or in respect of personal injury to, or the death of, any person arising out of, or in the course of, the provision of the **services** by the **Provider**, its personnel, agents or subcontractors;
- 14.1.2 arising from the wilful breach of this **agreement** by acts or omissions of the **Provider**, its personnel, agents or subcontractors; or

14.1.3 arising from the **Provider's** breach of any obligation under clause 10,

except to the extent the **Authority's** loss, claim, demand, damage, cost, expense or liability directly resulted from breach of this **agreement** by the **Authority** or negligent or wilful acts or omissions of the **Authority**, its personnel, agents or contractors (other than the **Provider**).

14.2 **Obligations owed to the Authority:** The **Provider's** obligations and duties under this **agreement** are obligations and duties owed solely to the **Authority** and are not obligations or duties for the benefit of any other person.

14.3 **Provider cap:** Subject to clause 14.4, the **Provider's** liability to the **Authority** for all claims under or in connection with this **agreement** in respect of all events occurring in any **financial year**, whether in contract, tort (including for negligence), breach of statutory duty or otherwise is limited to \$10,000,000

14.4 **Wilful breach and fraud:** Clause 14.3 does not apply to limit the **Provider's** liability arising from any wilful breach or fraud by the **Provider** or the **Provider's** liability under clauses 9.2, 10 or 14.1, nor does it limit the **Authority's** liability to pay any of the **fees** properly due and payable.

14.5 **Relationship to Code liability:** It is intended that the total liability of the **Provider** in respect of all events occurring in any **financial year** for all breaches of the **regulations** and the **Code** in its capacity as clearing manager, and under or in connection with this **agreement**, (with the exception of liability arising from any wilful breach or fraud on the part of the **Provider** or for liability arising under clauses 9.2 or 10 of this **agreement** or for liability under regulation 67 of the **regulations**) will be limited to the amount set out in clause 14.3. If the **Provider** incurs any liability in excess of such limit for all events in any **financial year** (whether in breach of the **regulations** or the **Code** or under or in connection with this **agreement**):

14.5.1 the liability of the **Provider** under this **agreement** will be reduced accordingly; and

14.5.2 the **Authority** will refund to the **Provider** any payments already made by the **Provider** to the **Authority** in respect of liability under this **agreement** to the extent required to give effect to this clause 14.5.

14.6 **Indirect loss:** In no circumstances will the **Authority** be liable to the **Provider**, whether in contract, tort (including negligence) or otherwise, for any loss of profit, loss of revenue or for any indirect or consequential loss arising out of a breach of this **agreement**, or otherwise in connection with this **agreement** (provided that this clause will not limit the **Authority's** obligation to pay any **fees** for the **services** which are properly due).

14.7 **Authority cap:** The maximum aggregate liability of the **Authority** in respect of all claims or liability of the **Authority** to the **Provider** for any matter arising under

or in connection with this **agreement** (whether based on any action or claim in contract, equity, tort, including negligence or otherwise) in any year is limited to an amount equal to the total **fees** payable by the **Authority** in the first 12 months of this **agreement** (and if the liability arises within that first 12 months the total will be calculated on the basis of the average monthly charges multiplied by the balance of the 12 months). This clause 14.5 will not apply to:

- (a) any liability arising for wilful breach or fraud by the **Authority**;
- (b) the **Authority's** obligation to refund any payments to the **Provider** under clause 14.5; and
- (c) the **Authority's** obligation to pay the **fees** for the **services** under clause 6.

15. INSURANCE

15.1 **Obligation to insure:** The **Provider** will, from the **commencement date** until at least 2 years following the end of any disengagement period under clause 13, maintain adequate insurance cover (in respect of this **agreement**, its own business, the **hardware** and the supply of the **services**) for all normal commercial risks and in respect of any potential liability it may incur under this **agreement** or under the **regulations**, the **Act** or the **Code**, to ensure that any problems encountered by the **Provider** will not result in the disruption of the efficient performance of this **agreement** (except to the extent such cover is not reasonably available in the market). Such insurance will be in a form, and with an insurer, approved by the **Authority**, such approval not to be unreasonably withheld, and will be accompanied by a letter from the insurer confirming that the insurance cover is adequate to satisfy the requirements of this clause 15.1. The **Authority** may request a copy of such insurance at any time.

15.2 **Certificates of insurance:** The **Provider** shall promptly following each annual renewal of its insurance provide to the **Authority** a copy of its certificate(s) of insurance in respect of each insurance policy maintained pursuant to this clause 15 in order to establish compliance with clause 15.1.

15.3 Fidelity insurance:

15.3.1 In addition to the requirements of clause 15.1, the **Provider** will, from the **commencement date**, maintain a fidelity insurance policy, on terms and in respect of risks approved by the **Authority**, with an insurer approved by the **Authority**, in relation to any direct financial loss the **Provider** may sustain from any acts of fraud or dishonesty committed by it in its capacity as **clearing manager** or by any of its employees, contractors, or agents.

15.3.2 Without limiting clause 15.3.1, the **Provider** will:

- (a) provide to the **Authority** a copy of the final fidelity insurance policy within 30 **business days** after the **commencement date**; and

- (b) provide to the **Authority** a certificate of currency within 5 **business days** after each anniversary of the **commencement date** and each renewal date of the policy, and a copy of the policy in relation to the fidelity insurance policy within 30 **business days** after each anniversary of the **commencement date** and each renewal date of the policy.

15.3.3 If any change is proposed to be made to the fidelity insurance policy, the **Provider** will be required to:

- (a) provide to the **Authority** a copy of the proposed change at least 20 **business days** prior to the proposed change taking effect; and
- (b) obtain from its insurer and provide to the **Authority** within 5 **business days** after the change takes effect a copy of, and a certificate of currency in relation to, the fidelity insurance policy as varied.

15.3.4 comply with an equivalent process to that in clause 15.3.2(a) and (b), provided that the relevant date will be the date the change is proposed to take effect.

15.3.5 The **Provider** will also:

- (a) ensure that the fidelity insurance policy provides that all claim payments are to be paid into the **operating account**;
- (b) provide the **Authority** with all information requested by the **Authority** from time to time as to **Provider's** risk management policies and practices in relation to settlement funds received by the **Provider** in the course of providing the **services**, and the **Provider's** compliance with such policies and practices;
- (c) comply with the terms of the fidelity insurance policy and not do anything to prejudice the success of any claim under the policy;
- (d) notify the **Authority** immediately should it become aware of any event or circumstance that could give rise to a claim under the fidelity insurance policy;
- (e) keep the **Authority** informed of all developments regarding any matter notified under paragraph (d) above (including providing the **Authority** with any report(s) received from an investigator in connection with such event or circumstance); and
- (f) in the event of a claim, consult with the **Authority** on the steps the **Provider** proposes to take to recover the amount insured.

16. DISPUTE RESOLUTION

- 16.1 **Notice of disputes:** The parties agree to use their best endeavours to resolve any dispute which may arise under this **agreement** through good faith negotiations. Either party may provide notice to the other of a dispute arising under this **agreement** (“Disputes Notice”). Except as provided in clause 16.6, no party shall commence any arbitration or litigation in relation to this **agreement** unless it has first invited the chief executive (or equivalent) of the other party to meet with its own chief executive (or equivalent) for the purpose of endeavouring to resolve the dispute on mutually acceptable terms.
- 16.2 **Mediation:** Any dispute arising under this **agreement** which cannot be settled by negotiation between the parties pursuant to clause 16.1 within 15 **business days** of the **disputes notice** may be referred by either party to non-binding mediation or, if agreed by the parties, to expert determination. Any mediation shall be held at a location to be agreed by the parties and conducted in accordance with the standard mediation agreement of LEADR (New Zealand) Inc. or its successor. If the parties cannot reach agreement as to the identity of the mediator or the expert within 10 **business days**, the mediator or expert, as the case may be, will be appointed at the request of either party by the chairperson or any other equivalent office holder for the time being of LEADR (New Zealand) Inc. or its successor. The mediator’s or experts costs will be borne equally by the parties. The parties agree that nothing in this clause 16.2 will oblige either party to mediate a dispute for a period exceeding 10 **business days** from the date on which the mediation commences.
- 16.3 **Arbitration:** Any dispute which is not settled pursuant to clause 16.2 within 60 **business days** shall be submitted, by written request of either party, to arbitration to be held in Wellington under the Arbitration Act 1996 before a single arbitrator who will decide the dispute. In the absence of agreement concerning the appointment of an arbitrator within 5 **business days** of referral to arbitration, either party may request for a suitably qualified, independent arbitrator to be appointed:
- 16.3.1 in the case of a dispute as to fees, operating costs or accounting matters, by the President for the time being of Chartered Accountants Australia and New Zealand; or
- 16.3.2 in all other cases or if it the parties do not agree that the dispute relates to fees, operating costs or accounting matters, by the President for the time being of the New Zealand Law Society,
- to hear and determine the dispute and every arbitration will otherwise be conducted under and in accordance with the provisions of the Arbitration Act 1996. The arbitrator’s costs will be borne equally by the parties.

- 16.4 **Continued performance:** The parties shall continue to perform their obligations under this **agreement** as far as possible as if no dispute had arisen pending the final settlement of any matter referred to arbitration.
- 16.5 **Final and binding:** The decision of any arbitrator appointed under clause 16.3 shall be final and binding.
- 16.6 **Urgent relief:** Nothing in this clause 16 shall preclude either party from taking immediate steps to seek urgent equitable relief before a New Zealand Court.
- 16.7 **Breach of Act, regulations or Code:** Any breach of the **Act, regulations** or the **Code** will be dealt with in accordance with the procedures under the **Act, regulations** or the **Code**, as applicable.

17. MISCELLANEOUS

17.1 No assignment:

17.1.1 The **Provider** must not assign or transfer any of its rights or obligations under this **agreement** without the prior written consent of the **Authority** (such consent not to be unreasonably withheld).

17.1.2 For the purposes of clause 17.1.1, a change in the beneficial ownership of 40% or more of the voting shares of the **Provider** from the ownership at the date of this **agreement**, or any change in the effective control of the **Provider** from the ownership at the date of this **agreement** will be deemed to be an assignment by the **Provider**, however a change in a **Provider's** shareholding Ministers (if applicable) will not be deemed to be an assignment by the **Provider**

17.2 **Non-solicitation:** The **Authority** and the **Provider** agree that, during the term of this **agreement**, neither party will approach the other's employees or contractors who are directly involved in the provision or receipt of the **services** with an unsolicited offer of employment. For the avoidance of doubt, this clause does not prevent either party from publicly advertising employment positions or contract work and then offering employment or contracts to employees or contractors of the other party as a result of such public advertising.

17.3 **Relationship:** The relationship between the **Provider** and the **Authority** is that of independent contractor and nothing in this **agreement** will be taken as constituting the **Provider**, or its agents or employees, as agents, employees, joint venturers or partners of the **Authority**. Neither party has the power or authority to act for or on behalf of the other party other than as expressly authorised in writing and signed by the authorised representatives of the parties.

17.4 **Reliance:** The **Provider** acknowledges that:

17.4.1 it has entered into this **agreement** in reliance entirely on its own judgment and not on any representation or warranty made or information provided by

the **Authority** or by any of its officers, employees or agents or any other person in the negotiation of this **agreement**; and

17.4.2 the **Authority** has entered into this **agreement** in reliance on the representations in the **Provider's** proposal dated 25 March 2015 and all other representations in writing made by the **Provider** or its officers, employees or agents relating to such proposal or this **agreement**.

17.5 No third party benefits:

17.5.1 Only the parties to this **agreement** may pursue any remedies or redress under or in connection with this **agreement**.

17.5.2 However, notwithstanding clause 17.5.1, nothing in this **agreement** will prevent any **participant** or the **Rulings Panel** from pursuing any remedies provided for in the **Act, regulations** or the **Code** in connection with a breach of the **Act, regulations** or the **Code** by the **Provider**.

17.6 **Waiver:** Any failure or delay by any person in exercising any of its rights under this **agreement** will not operate as a waiver of its rights and will not prevent such party from subsequently enforcing such rights or treating any breach by the other party as a repudiation of this **agreement**. Neither party is deemed to have waived any right under this **agreement** unless the waiver is in writing.

17.7 **No amendments:** Except as expressly set out in this **agreement**, the **Act, regulations** or the **Code**, this **agreement** may only be amended in writing and signed by both parties.

17.8 **Entire Agreement:** This **agreement** constitutes the entire understanding and agreement of the parties relating to the matters dealt with in it and supersedes and extinguishes all prior agreements between the parties relating to the matters dealt with in this **agreement**. To avoid doubt, this clause does not limit clause 17.4.2.

17.9 **Notices:** Any notice relating to this **agreement** must be in writing, delivered to the designated address of the person to whom the notice is to be given by hand, pre-paid mail or email to the relevant person at the addresses set out below, or such other address as is specifically designated by a party by notice to the other party in substitution for it. Any such notice is deemed to have been given as soon as it is personally delivered, two **business days** following posting or, if sent by email, when actually received in readable form by the recipient provided that any communication received after 5pm or on a day which is not a **business day** is deemed not to have been received until the next **business day**.

Authority:

Electricity Authority
PO Box 10041
Level 7, ASB Tower

2 Hunter Street
Wellington

Email: marketoperations@ea.govt.nz
Attention: General Manager Market Services

Provider/Guarantor:

Energy Clearing House Limited/NZX Limited
Level 1, NZX Centre
11 Cable Street
Wellington

Email: cmanager@nzx.com
Attention: Head of Energy

17.10 **Severability:** If any clause or provision of this **agreement** is held illegal or unenforceable by any judgment or award of any arbitrator, court or tribunal having competent jurisdiction, such judgment or award will not affect the remaining provisions of this **agreement** which will remain in full force and effect as if such clause or provision held illegal or unenforceable had not been included in this **agreement**, to the extent permitted by Law.

17.11 **Further assurances:** Each party shall, at its own expense, promptly sign and deliver any documents and do all things, which are reasonably required to give full effect to the provisions of this **agreement**.

17.12 **Governing law:** This **agreement** is governed by New Zealand law and New Zealand courts have non-exclusive jurisdiction.

18. GUARANTEE

18.1 The **Guarantor** guarantees to the **Authority** the due and punctual performance of the duties and obligations and due and punctual payment of the liabilities of the **Provider**. Although as between the **Provider** and the **Guarantor** the liability of the **Guarantor** may be that of surety only, as between the **Guarantor** and the **Authority** its liability will be deemed to be that of a principal and such liability will not be discharged, affected or diminished by anything that might discharge the liability of a **Guarantor** or a surety including without limitation:

18.1.1 the dissolution of the **Provider**;

18.1.2 any alteration to the **regulations**, the **Act**, the **Code** or this agreement; or

18.1.3 any indulgence, waiver, concession or omission by the **Authority**.

- 18.2 At all times during the performance of this agreement the **Guarantor** will ensure that the **Provider** has adequate personnel available to it (whether on a full or part time basis) and resources provided to it to perform the clearing manager role.
- 18.3 The guarantee contained in clause 18.1 will continue for only such period as the **Provider** has duties, obligation or liabilities under this agreement that remain unfulfilled and only to the extent that those duties, obligations or liabilities arise during the terms of this agreement.

EXECUTED as an agreement:

Signed for and on behalf of the
Electricity Authority by:

Thomas Brankley
[name]



Chair
[role/position]

in the presence of:

FRASER WARK

Name: FRASER WARK

Occupation: GENERAL MANAGER

Address: 13A PUKETIRO AVE, WELLINGTON

Signed for and on behalf of **Energy
Clearing House Limited** by:



[Name, position]

TIM BENNETT
CEO

in the presence of:

Shane Dinnan

Name: Shane Dinnan

Occupation: Manager

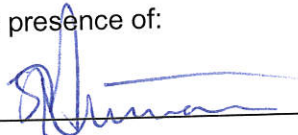
Address: Wellington

Signed for and on behalf of NZX Limited
by:



[Name, position]

in the presence of:



Name: Shane Dinnar

Occupation: Manager

Address: Wellington