



# TERMS OF TRADE

## TERMS OF TRADE

These Terms of Trade will apply to all Services to be performed by Beta Ngadiman ABN 64 922 493 361 trading as FIVEN (“Agency”) for the Client unless otherwise agreed in writing. These Terms of Trade will be legally binding on the Agency and the Client upon signing of a Statement of Work (“SOW”) by both parties. By agreeing to these Terms of Trade, the parties agree as follows:

### 1. DEFINITIONS AND INTERPRETATION

**1.1 In these Terms of Trade (also referred to as “this Agreement”) the following terms shall have the following meanings:**

**Action Tag** means a piece of html code, also referred to as a web beacon, that can be placed on a web page, and can enable the Agency server to set and/or read a Cookie to track activity on that page.

**Action Tag Data** means that subset of Cookie Data that is gathered through the recording of the activation of Action Tags on Client’s web sites (i.e. recording the occurrence of an activity by the User that is desired by Client, such as a purchase).

**Business Day** means a day that is not a Saturday, Sunday or a public holiday.

**Client Material** means all materials provided to the Agency by or on behalf of the Client, including without limitation all advertising content, all other content, information, material or images, all material of the Client in which Intellectual Property Rights subsist, and all reports, research, documents, software, equipment, information and data, and all price and product information, offer conditions, performance claims, product claims, research data, sales data and supporting material.

**Commencement Date** means the date set out in the SOW.

**Confidential Information** means any and all information of a confidential nature which is obtained by one party in relation to the other party including without limitation any strategies, concepts, budgets, trading terms, plans, projections, methods, processes, systems, know how, trade secrets, computer software and programs, research data, client lists, intellectual property, business or financial information, employee, customer, financier or supplier information, or any dealings, transactions, affairs or any other information in any form.

**Cookie** means an alphanumeric identifier that is assigned to a User’s computer when such computer is in communication with the Agency’s advertising server or the advertising server of a third party engaged by the Agency, and recorded by the Agency or a third party engaged by the Agency (i.e. when advertisements are served or clicked on and when Action Tags are activated). The Cookie is contained in a file placed on the User’s cookie subdirectory.

**Cookie Data** means data gathered through the recording of advertising impressions delivered, advertisements clicked on, and Action Tags that are activated, through use of the Agency’s technology or the technology of any third party engaged by the Agency and performance of Services hereunder.

**Defect** means any material failure by a Deliverable to meet the agreed specifications as set out in the SOW or to operate effectively.

**Deliverable** means any materials developed by the Agency and provided to the Client in connection with the Services and expressly detailed in any applicable SOW, which may include reports, proposals, research, documents, content, film, footage, designs, concepts, artwork, brands, names, slogans, logos, advertisements, campaign materials, films, graphics, images, layouts, proposals, storyboards, scripts, or other works unless otherwise specified, but excludes Pre-Existing Works or Client Material.

**Development Services** means those of the Services defined as such in the SOW.

**Estimate** means the estimate document provided by the Agency for the Project setting out estimated costs.

**Extended Data** means data sent to the Agency’s server by a Client’s Website (i.e. via activation of Action Tags), regarding information sought by such Client about Users’ interactions with such Client’s Website, which may include without limitation, purchase amounts.

**Force Majeure** means any act of God, war, sabotage, riot, insurrection, civil commotion, national emergencies, strikes, lock-outs or other industrial disturbance, accidents, uncontrollable transportation delays, communications or network failure, or the effect of any applicable laws, orders, rules or regulations, and any other matters beyond the reasonable control of the party claiming force majeure.



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**Intellectual Property Rights** means any and all intellectual property rights worldwide, subsisting whether now or in the future, and whether registered or unregistered including designs, copyright, trade marks and service marks including names and logos, patents, inventions, trade secrets, moral rights, trade, business or company names or other intellectual property rights, or any rights to registration of such rights.

**Loss or Claim** means any damage, loss, liability, cost or expense (including all reasonable professional costs on a full indemnity basis) incurred by a party or a claim, action, proceeding or demand made against a party, however arising and whether present or future, fixed or unascertained, actual or contingent.

**Objectionable Content** means information or content that is obscene, defamatory, discriminatory, indecent, pornographic, false, misleading or deceptive, unlawful, that encourages or incites any unlawful activity, in breach of any third party rights, in breach of the Agency's restrictions or contractual obligations to third parties, or is otherwise deemed objectionable by the Agency in its sole discretion.

**PI or Personal Information** means "personal information" within the meaning of the Australian Privacy Act 1988 or as amended.

**Pre-Existing Works** means materials that are already owned or used by the Agency prior to providing the Services for the Client, or are subsequently created, developed, owned or used by the Agency other than in the course of providing the Services, or are generic re-usable materials, and are then used by the Agency in providing the Services, including any proprietary software, applications, tools, templates, frameworks, code, systems, technologies, property, reports, strategies, manuals, know how, financial approaches, business processes and methodologies and any Intellectual Property Rights vested therein.

**Project** means any job or project which the Client has engaged the Agency to undertake pursuant to this Agreement, via agreement on an agreed SOW.

**SEO** means search engine optimisation.

**Services** means the services set out in the SOW, including but not limited to Development Services.

**SOW** means a statement of work signed by both parties relating to a Project, describing the Services to be provided for the particular Project, the fees for those Services, the duration of those Services and any other agreed matters relating to those Services, in the form agreed between the parties.

**Term** means the period set out in the SOW.

**Third Party Works** means any works produced,

developed, created or owned by a third party including without limitation subcontractors, agencies, freelancers, photographers, stock libraries, media proprietors, software owners, artists, musicians, record labels or film studios.

**User** means a person using the internet.

## 1.2 The following rules of interpretation apply in this Agreement, unless the context requires otherwise:

- (a) Headings are for convenience only and do not affect interpretation.
- (b) The singular includes the plural and conversely.
- (c) Where a word or phrase is defined, its other grammatical forms have a corresponding meaning.
- (d) A reference to a person includes a body corporate.
- (e) A reference to currency, \$ or dollars is to Australian currency.
- (f) A reference to this agreement includes its schedules and annexures.

## 2. SERVICES

### 2.1 Appointment

The Client appoints the Agency to provide the Services pursuant to this Agreement and any SOW. The Agency will provide the Services to the Client during the Term, subject to clause 2.2.

### 2.2 SOWs, Projects and Estimates

Where the Client requires Services to be completed by the Agency, the parties must mutually agree to a SOW and the Agency will only perform the Services as specified in a SOW mutually agreed upon from time to time by the parties. If mutually agreed in writing, in place of a separate SOW the parties may determine that an Estimate is sufficient to act as an SOW, in which case the Estimate will become the SOW and be considered an SOW for the purposes of this Agreement. To the extent that any terms of this Agreement and any SOW conflict, the terms of the SOW will prevail for that SOW to the extent of any inconsistency.



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The Agency will supply to the Client an Estimate for each Project for approval in advance. Once an Estimate is approved by the Client, the parties will execute an SOW in respect of the Project, and the SOW will form part of this Agreement (unless the Estimate acts as the SOW pursuant to clause a) above). To the extent that any terms of this Agreement and any Estimate conflict, the terms of this Agreement will prevail.

Upon execution of an SOW the Agency has the authority to commence the applicable Services. Execution of the SOW must occur before the Agency proceeds with the Services or incurs any charges or expenses on behalf of the Client.

## 2.3 Performance of Services

The Agency agrees that it will perform the Services:

- (a) with the degree of skill, care and diligence expected of a service provider experienced in performing similar services; and
- (b) in accordance with all reasonable directions given by the Client from time to time.

## 2.4 Time frames and Milestones

Deliverable time frames and Milestones will be as set out in the SOW as applicable. While the Agency will use its best efforts to meet these time frames, it reserves the right to extend these time frames including where the Client does not meet its obligations or there is a change in requirements, provided that it will endeavour to keep the Client informed and updated of progress for all steps.

## 2.5 No Agency

The Agency is not the agent of the Client and it will not hold itself out as the agent of the Client in its dealings with third parties. The Agency will not incur any obligations or make any promise, contract, undertaking, warranty or representation on behalf of the Client otherwise than in accordance with this Agreement, or with the prior consent of the Client.

## 2.6 Exclusivity

This appointment is exclusive. The Client agrees not to use any other party to provide services that are substantially similar to the Services during the Term without the Agency's prior consent.

## 3. AGENCY'S REMUNERATION

### 3.1 Remuneration

In consideration of the Services to be provided under this Agreement, the Client will pay the Agency the remuneration as agreed in the relevant SOW ("Fees").

### 3.2 Expenses

The Client will reimburse the Agency for all pre-approved costs, expenses and disbursements incurred by the Agency on its behalf, or otherwise in the course of providing the Services, including without limitation travel and accommodation, couriers, postage, freight,

international calls, other out of pocket expenses, and third party costs ("Expenses").

## 4. INVOICING AND PAYMENT

### 4.1 Payment terms

The Client will be billed by the Agency, and will make payment to the Agency, in accordance with the payment terms agreed in any SOW.

### 4.2 Late payment

If invoices are not paid by the due date, the Agency reserves the right to charge interest at the Default Interest Rate, calculated daily, on late payments that are not the subject of dispute under this clause, and such other additional amounts as may be set out in any SOW.

The Client will also reimburse the Agency for any charges or costs imposed on the Agency because of late payment by the Client. In addition to all other remedies, the Agency is entitled to cancel or refuse any Services under any SOW until any outstanding payments owing to the Agency by or on behalf of the Client are made.

### 4.3 Disputed amounts

If the Client disputes part or all of an invoice it must notify the Agency immediately in writing within 14 days of receipt of the invoice clearly setting out the reasons for the dispute. The Client will pay any undisputed balance of an invoice within the payment terms set out in this Agreement. If the parties still cannot agree, they will resolve the matter in accordance with clause 18 below. If the Client does not dispute an invoice within 14 days of its receipt the Client will be deemed to have accepted the invoiced amount in full.

## 5. GENERAL TERMS

### 5.1 Written Approvals

Upon receipt of a mutually signed SOW the Agency has the authority to commence the applicable Services for that Project under the SOW.

### 5.2 Client Personnel

The Client must advise the Agency in writing of the Client's project team members from time to time. The Agency is entitled to assume that the person who signed this Agreement, or purported to provide any approval to the Agency under this Agreement (whether or not a Client employee or agency acting on its behalf), had the authority to do so and is entitled to take this as a binding authority by the Client to proceed.



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## 5.3 Ownership of Data

The Client will own the Extended Data and Client's Confidential Information. The Client will not own the Cookie, Cookie Data or Agency's Confidential Information.

## 5.4 Use of Cookie Data

The Agency may aggregate Cookie Data with like data collected from third party online advertising campaigns, but only in a manner that does not disclose to any third party that such Cookie Data is linked to Client. The Agency represents and warrants that the Cookie Data collected hereunder will not contain PI. The Agency shall have access to and use of such data in aggregated form on behalf of the Client and the Agency's other clients.

## 5.5 Placement of Action Tags & Sending of Extended Data

The Agency may, if required pursuant to a SOW, provide the Client with the technical information required to enable the Client to insert Action Tags, including Action Tags for collection of Extended Data, on Client web pages selected by the Client. The Client warrants that Extended Data sent to the Agency's server hereunder will not contain any PI, Objectionable Content, data that Users may consider to be sensitive (e.g., pertaining to a User's medical, financial or criminal history, or sexual preference), and that sending of such data does not breach any applicable laws, regulations or codes, including but not limited to, the Australian Privacy Act 1988 or Spam Act 2003 as amended.

## 5.6 Client Responsibilities

The Agency's performance of the Services depends upon Client fulfilling its responsibilities in a timely and sufficient manner. The Client's failure to perform the responsibilities set forth below and in any SOW could negatively impact the schedule and cost of a Project, and may require a Change Order (as defined below).

- (a) Client shall provide relevant information and feedback in a timely manner and in accordance with the agreed upon Project schedule.
- (b) Client shall make its personnel available to actively participate where reasonably required by the Agency.
- (c) Client shall designate a project manager to serve as a counterpart to the Agency project manager, who will help with adherence to Project schedules, administer any Change Order process, and manage issues and risks that arise.
- (d) Client shall manage any third parties the Client employs and be responsible for any acts, omissions, or failures of those third parties.
- (e) If Services are to be performed at Client's facilities, Client will provide to the Agency at no charge appropriate computer hardware and software, communications resources, system and user documentation, office space and supplies, and a safe work environment, as may be reasonably necessary. The Agency's use of and access to Client's facilities will be subject to Client's standard written safety, security and related policies made known to the Agency and its personnel.

- (f) To the extent any portion of the Services rely on any third party specifications or integration with any third party platforms and such third party platform or specification is changed during the course of a Project, the Client shall be responsible for any additional costs or expenses related to such change.

## 5.7 Email Services

In the event that the Agency sends out any email on behalf of its clients, the Agency may facilitate a relationship between the Client and a third party email vendor. The Client represents and warrants that it will be responsible for compliance with applicable laws including the Privacy Act and the Spam Act in relation to the use of email addresses in any campaigns using Services under this Agreement.

## 5.8 Hosting Services

Where agreed, the Agency will procure website hosting services from a third party for the Client as part of the Services ("Hosting Services"). The Hosting Services will be provided subject to the following terms:

- (a) Subject to clause b) the Agency will use its best endeavours to ensure that the third party server is available to the Client 99.5% of the time.
- (b) The Website will not be available to the Client during periods of scheduled maintenance works which will be performed as required outside usual business hours and during periods when upgrades or other works to the Website requested by the Client are being performed by the Agency.
- (c) The Agency will use its best endeavours to respond to unplanned outages within:
  - (i) 2 hours of receipt of notification of the outage where such notification is received during normal business hours; and
  - (ii) 12 hours of receipt of notification of the outage where such notification is received outside normal business hours.
- (d) The Agency will use its best endeavours to restore the Website after any unplanned outage as soon as possible but makes no representation or warranty as to the time in which the Website will be stored. The Agency will use best endeavours to liaise with and communicate with the third party hosting provider where necessary to assist in restoring the Website after any such outage.



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## 5.11 Maintenance Services

Where agreed, the Agency will provide website maintenance services as part of the Services ("Maintenance Services"). The Maintenance Services will be provided subject to the following terms:

- (a) The Agency will perform such maintenance as is reasonably required to maintain the Website, in line with any reasonable instructions from the Client from time to time;
- (b) The Agency and the Client will institute reasonable security procedures including virus-protection procedures and software to restrict the destruction, corruption or unauthorised use of the Website, and will co-operate in this regard as reasonably required. For the sake of clarity, the costs of such procedures and measures will be payable by the Client; and
- (c) The Agency shall ensure the Website provides a reasonable response time for the Client and users of the Website.

## 6. CANCELLATION AND CHANGES

### 6.1 Change Orders

At any time upon reasonable notice either party may, in writing, initiate a change order (Change Order) to request a change to the scope of any SOW. All proposed Change Orders and the implications of the proposed changes, including without limitation scheduling and pricing changes, will be discussed in good faith by the parties. The SOW may only be modified if both parties sign an agreed Change Order. Any change or cancellation will only be accepted by the Agency to the extent that this is permissible within the terms of any contracts between the Agency and any relevant third party. The Agency shall take all reasonable steps to comply with any such Change Order as soon as reasonably practicable, to the extent that the Agency can do so within its contractual obligations to suppliers or other third parties.

### 6.2 Cancellation and Change Costs

In the event of any cancellation or change, the Client shall:

- (a) pay the Agency all amounts incurred in relation to any Services performed up to the date of notice by the Client, including any fees and expenses;
- (b) pay the Agency any charges or costs payable by the Agency (including but not limited to non-cancellable third party costs); and
- (c) indemnify the Agency against any Loss or Claim incurred or suffered by or brought or made or recovered against the Agency which arises as a result of or in connection with the Agency acting in accordance with the Client's original instructions until receipt of the notice under clause 6.1 above, and as a result of acting in accordance with such notice.

## 7. INTELLECTUAL PROPERTY

### 7.1 Client Material

The Client will own all Intellectual Property Rights in the Client Material. Nothing in this Agreement transfers any ownership rights in the Client Material to the Agency. The Client grants to the Agency a revocable, royalty free, non-transferable, non-exclusive license for the Term to use the Client Material solely for the purpose of providing the Services in accordance with this Agreement.

### 7.2 Pre-Existing Works

The parties acknowledge that in connection with providing the Services it may be required or appropriate to use Pre-Existing Works. The Agency will own all Intellectual Property Rights in the Pre-Existing Works. To the extent that any Pre-Existing Works are incorporated into any of the Deliverables, the Agency grants to the Client a perpetual, irrevocable, worldwide, non-exclusive, fully transferable and sub-licensable licence to use those Pre-Existing Works to the extent required to use and exploit the Deliverables in the manner contemplated. For clarity, however, the Client is not permitted to use any such Pre-Existing Works in isolation from the Deliverables into which they were incorporated unless otherwise agreed in writing.

### 7.3 Deliverables

Subject to the payment of all applicable Fees and Expenses and to the provisions of this clause 8, the Agency will assign all Intellectual Property Rights in the Deliverables to the Client. The Agency agrees to execute all documents and do all things necessary to give full effect to the assignments in this clause.

### 7.4 Code, files and software

The Agency expressly retains all right, title and interest in any source or development code, make-up files, Agency proprietary software, other software, programs, tools, templates, and systems used by the Agency or its contractors and agents in providing the Services. The Client acknowledges and agrees that it must not, and must not attempt to, copy, reproduce, republish, transmit, reverse engineer or otherwise access or use such source or development code, make-up files and Agency proprietary software without the express prior written consent of the Agency.



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## 7.5 Third Party Works

The Client acknowledges that in connection with providing the Services it may be required or appropriate to use Third Party Works and there may be limitations and special circumstances that exist with respect to their use.

Accordingly, in this event:

- (a) the Agency shall negotiate to obtain a license to the Client to use the Third Party Work for such purposes and on such terms as may be negotiated;
- (b) any fees associated with such license will be borne by the Client, subject to prior written approval; and
- (c) the Client will comply with any limitations on use as notified to it by the Agency.

## 7.6 Moral Rights

The Agency will procure from all authors of intellectual property who are employees of the Agency unconditional consents to allow the Agency, the Client, its licensees, successors in title or persons authorised by them to do, or omit to do, anything in respect of the intellectual property material assigned to the Client under this Agreement, which would, but for the consent, infringe a moral right of the author. In relation to authors of intellectual property who are not employees of the Agency, the Agency will negotiate such consents as are reasonable from time to time in relation to moral rights after consultation with the Client.

## 7.7 Unused Concepts

The Client acknowledges that in respect of any presentations, submissions, and creative concepts presented to the Client by the Agency and not accepted or adopted by the Client in the development of a campaign or Project, all Intellectual Property Rights subsisting in such material will remain owned by the Agency, and any original ideas or concepts relating to such material will remain the Confidential Information of the Agency.

## 7.8 Self Promotion

The Client hereby agrees that the Agency may use the Client Material (for instance as incorporated into the Deliverables) for self promotional purposes including without limitation in show reels, portfolio, industry or agency internet material, award or competition submissions, internal training and historical archive.

## 8. CONFIDENTIAL INFORMATION

### 8.1 Confidentiality

Each party will ensure that any Confidential Information relating to the other party is treated as strictly confidential, and is not used or disclosed to any other person, other than:

- (a) persons strictly requiring the information for the purpose of properly performing its obligations under this Agreement, provided that they are made aware of the obligations in this clause;
- (b) with the other party's prior consent;
- (c) as required by law;

- (d) to that party's related body corporate if necessary for reporting purposes;
- (e) to that party's professional advisers in confidence; or
- (f) where the information is generally or publicly available other than through a breach of this Agreement.

## 8.2 Survival

This clause 9 survives termination of this Agreement.

## 9. RESPONSIBILITY AND APPROVALS

### 9.1 Approvals

The Agency will obtain approval of the Client for any Deliverables before "going live", broadcast or publication (as applicable).

### 9.2 IP Rights

Subject to the terms of the Agreement (including clause 8), the Agency is responsible for ensuring Deliverables created by it in performing the Services do not infringe the Intellectual Property Rights of any third party.

## 10. WARRANTIES

### 10.1 Client Warranties

The Client represents and warrants that:

- (a) it will not hold the Service Provider liable for failures determined to have been caused solely by the negligence or misconduct of the Client;
- (b) it will be responsible for the accuracy, completeness, rights to use, propriety and truth of the Client Material;
- (c) the Client Material is true, accurate, complete, not misleading and can be substantiated, and complies with any applicable laws, regulations and codes, and will not cause the Agency to breach any applicable law, regulation or code;
- (d) the Client Material will not contain any Objectionable Content, and will not contain any viruses or have any adverse impact on the Agency's systems;
- (e) all third party software and equipment it provides to the Agency is either owned by or licensed to the Client and that the Agency's use of this material pursuant to this Agreement will not breach any third party rights;
- (f) it will provide all information, Client Material, approvals, support and assistance which the Agency reasonably requires in providing the Services;
- (g) it will comply with all applicable laws, regulations and Codes including without limitation privacy, spam and consumer protection laws, in relation to its performance under this Agreement, the use of any Deliverables or Services, any of its services or sites that incorporate the Deliverables, or the collection and use of any data pursuant to this Agreement;



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- (h) it will be responsible for the preparation of any legal notices in connection with the use of the Deliverables and will where legally required, make full disclosure in its privacy policy regarding the collection and use of any data collected or used pursuant to this Agreement;
- (i) it is the owner of, or has all necessary licenses and clearances to use, all keywords in SOWs and the entire content of advertising content, Client Material and any Intellectual Property Rights therein;
- (j) it will not use technology supplied by the Agency to serve ads on any web site, network, downloadable application, or other media product that is unlawful, including those that use deceptive means to install software on computers, or that collect PI without the consent of the User;
- (k) by approving any Deliverables which the Agency provides to the Client, the Client is responsible for the material being true, accurate, complete and not misleading.

## 11. WARRANTY, DELIVERY AND ACCEPTANCE OF DELIVERABLES

### 11.1 Acceptance and testing of Deliverables

Except as otherwise agreed by Agency and Client in the applicable SOW, the following provisions will apply for delivery and acceptance of any Deliverables provided. The standard for acceptance for Deliverables will be material conformity to the specifications set forth in the SOW and as otherwise expressly communicated by the Client in writing, and agreed by the Agency.

- (a) The Client agrees that it will (as soon as practicable after delivery but no later than 7 days after delivery) conduct appropriate testing of the Deliverables against the agreed specifications, and confirm in writing whether the Client accepts or rejects the delivered Deliverable. The Client will notify the Agency in writing of any error, deficiencies or inadequacies in the delivered version within 14 days of receipt of the Deliverable or any corrected version of each version of the Deliverable (see below). If the Client does not notify the Agency of acceptance or rejection within 14 days of delivery, the Deliverable shall be deemed accepted.
- (b) If the Client rejects the initial version or any corrected version of any Deliverable, the Agency will immediately commence using its best efforts to correct all errors, deficiencies or inadequacies specified by the Client and submit a revised Deliverable (unless otherwise agreed). Once the Deliverable is revised, it shall be re-delivered to the Client and the provisions of clause a) above shall apply.

### 11.2 Warranty Period

- (a) the Agency warrants that the Deliverables will be free from Defects, malfunctions or non-conformities and operate in all respects in conformance with the agreed specifications/SOW during the period of 30 days after acceptance of the Deliverable ("Warranty Period"), or any other period agreed in an SOW for Deliverables provided under any specific SOW. The Agency agrees that it will use all reasonable endeavours to remedy any Defect where the Client notifies it of same during the Warranty Period.
- (b) During the Warranty Period, the Agency will not charge the Client for any work deemed to be a bug fix, performance improvement or site downtime not related to third party performance or hosting failure.
- (c) The Client agrees that it will notify the Agency of the existence of all Defects in the Deliverables during the Warranty Period, in writing, in such a form as required by the Agency. The notice will usually require a detailed description of the Defect, the steps taken by the user prior to the Defect, the actual wording of any error notice and / or screen grabs.

## 12. Indemnity

### 12.1 Client Indemnity

The client will indemnify the Agency against any Loss or Claim arising from or relating to:

- (a) the Agency complying with, obeying or acting in accordance with express directions, approvals or instructions issued or provided by the Client in connection with the provision of the Services;
- (b) the Client Material;
- (c) the products or services of the Client;
- (d) a breach of this Agreement by the Client (which shall include failure to pay any amount due and payable by the Client under any applicable SOW by the due date); or
- (e) a negligent act or omission by the Client.

### 12.2 Exclusion

The indemnity in clause 12.1 shall not apply to the extent that the indemnified party caused or contributed to the Loss or Claim in question.

### 12.3 Survival

This clause survives termination of this Agreement.



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## 13. LEGAL LIABILITY

### 13.1 Agency Liability

The agency is not liable for:

- (a) failure to perform any Services, or for any other consequences, which arise directly or indirectly in connection with any delay (including a failure to provide timely approval) or act or omission of the Client;
- (b) any Deliverables breaching any law or infringing upon the rights of any third party arising directly or indirectly in relation to:
  - (i) a modification made to the Deliverables without the Agency's consent,
  - (ii) Client's use of the Deliverables with other materials not approved by Agency, or
  - (iii) the Client's use of the Deliverables for any purpose other than the purpose for which it was delivered by the Agency.
- (c) any third party software or hardware incorporated into or used in the Website or the Website's server;
- (d) any content, context or confidentiality of any communications made from the Website or the Website's server; or
- (e) any spam, bulk emails, viruses, trojan horses, worms, spiders, phishing, hacking, adware or malware of any description introduced onto the Website or the Website's server, or for security breaches of the server or Website.

### 13.2 Consequential Loss

The Agency shall not be liable in any circumstances for any indirect, special, economic or consequential loss or damage suffered by the Client or any other entity including without limitation loss of income, profits, business, goodwill or data, or loss of anticipated savings.

### 13.3 Force Majeure

If, due to Force Majeure, the Agency fails or is unable to provide any Services or complete any task in the manner and within the time required by the terms of the applicable SOW or as otherwise agreed by the parties in writing, the Agency shall not be in breach of the Agreement, and the Agency shall not be held responsible for any loss or damage which may be incurred by the Client or any other person as a result of such failure. For as long as the Force Majeure continues, the obligations of the Agency under this Agreement which cannot be performed shall be suspended.

### 13.4 Limitation of Liability

To the full extent permitted by law, and except as expressly provided in this Agreement, the Agency excludes all liability for costs, loss or damage suffered in connection with this Agreement. To the full extent permitted by law, and except as expressly provided in this Agreement, the Agency excludes all terms and conditions, warranties and representations, whether express or implied. Neither party makes any guarantees, representations or warranties,

express or implied, as to the level of consumer response that shall result from the Services. In relation to any liability that cannot be lawfully excluded, the liability of the Agency is limited in its discretion to the replacement or repair of the goods, or re-supply of the Deliverables affected by the breach, or payment of the cost of replacement or repair of those goods or re-supply of those Deliverables.

### 13.5 Maximum Liability

Without limitation and subject to the terms of this Agreement, the maximum aggregate liability of the Agency to the Client in connection with this Agreement or the provision, performance and/or supply of any Services, shall be limited to a sum equal to the aggregate amount of the fees received by the Agency from the Client up to the event giving rise to the Agency's liability.

### 13.6 Assumption of Risk

Neither party makes, and each party expressly disclaims, any representations, warranties, covenants or guarantees that the use of Cookies, or the collection or use of Cookie Data or Extended Data will not be deemed or held by any legislature, regulatory agency, court, or other tribunal to violate laws governing privacy, data protection, consumer protection or the like. The Client acknowledges that the Agency will bear no liability related to Client's decision to serve advertisements on any particular site, or any particular type of site.

## 14. DEALINGS WITH THIRD PARTIES

### 14.1 Third Parties

The parties acknowledge and agree that:

- (a) accordance with usual practice in the digital and software industry the Agency will be required to and may enter into contracts or incur contractual liabilities to suppliers in its own name;
- (b) the Agency may, at its sole discretion, sub-contract to another party, including its Related Bodies Corporate (as defined in the Corporations Act 2001) or any person affiliated or associated with it to perform any of the Services, provided that the Agency will remain responsible for the performance of any third party subcontractor to the Client; and
- (c) as part of the Services the Agency may enter into contracts with third parties for licensing, hosting and other arrangements on the Client's behalf. The Client warrants that it will comply with the terms of such agreements as if it were a party. The Client will be responsible for any costs incurred pursuant to such agreements and will indemnify the Agency for any breach insofar as this is caused by the Client.





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## 15. TERMINATION

### 15.1 Termination by Convenience

Either party may terminate any SOW by giving 90 days prior written notice to the other party for any reason, unless expressly agreed otherwise in a SOW.

### 15.2 Termination for Cause

Either party may terminate any SOW immediately by written notice if any of the following events occur:

- (a) the other party becomes insolvent under administration as defined in the Corporations Act;
- (b) any step is taken (including without limitation, an application made, proceedings commenced, or resolution passed or proposed in a notice of meeting) for the winding up or dissolution of the other party or for the appointment of an administrator, receiver, receiver and manager or liquidator to the other party or any of its assets, or an administrator, liquidator, receiver, manager, or official manager is appointed to the other party or over part of its property;
- (c) the other party resolves to enter into or enters into a scheme of arrangement or composition with, or assignment for the benefit of all or any class of, its creditors or proposes a reorganisation, moratorium or other administration involving any of them;
- (d) the other party becomes unable to pay its debts when they fall due, is wound up, resolves to wind itself up or otherwise dissolve itself;
- (e) an event analogous to any of those set out in (a) to (d) above occurs; or
- (f) the other party commits a breach of this Agreement (which shall include failure to pay any amount due and payable by it under this Agreement by the due date) unless such breach can be remedied and is remedied within 21 days of the breach being notified to the other party in writing.

## 16. EFFECT OF TERMINATION

### 16.1 Actions upon Termination

Upon termination of any SOW:

- (a) the Agency will immediately cease to provide the Client with the Services, subject to any obligations of either party to discharge in full obligations in relation to the Services accrued prior to the date of termination;
- (b) the Agency shall be entitled to all remuneration relating to any Services provided during the notice period and prior to the effective date of termination;
- (c) the Client will assume any contracts entered into by the Agency on behalf of the Client pursuant to this Agreement prior to the effective date of termination, be responsible for costs or obligations arising under those contracts and indemnify the Agency for any Loss or Claim arising with respect to those contracts; and

- (d) each party will return to the other party all Confidential Information of the other party and such other information and documentation which belongs to the other party and to which the other party is entitled under this Agreement or otherwise.

## 17. DISPUTE RESOLUTION

### 17.1 Resolving Disputes

- (a) Except where a party seeks urgent interlocutory relief, if a dispute arises in relation to the rights and obligations of the parties under this Agreement ("Dispute"), the parties must follow the procedures set out in this clause before escalating the Dispute to litigation or arbitration.
- (b) The dispute resolution procedures in this clause will arise upon a party notifying the other parties in writing providing reasonable details as to the existence and nature of the Dispute and setting out the reasons for its dissatisfaction or claim of breach of the Agreement ("Dispute Notice").
- (c) The parties must use their best endeavours to settle the Dispute within 10 Business Days after service and receipt of a Dispute Notice. If the Dispute remains unresolved after this time, the respective parties must authorise a person or persons holding the required level of authority to meet within 5 Business Days to attempt to resolve the Dispute.

### 17.2 Refer to Mediation

If the Dispute remains unresolved after the procedures in clause 17.1 above have been completed, the parties agree to use their best endeavours to settle the Dispute by mediation administered by a mediator accredited by the Law Institute of Victoria (unless each party agrees otherwise) on the following basis:

- (a) the parties must use their best endeavours to agree on the appointment of a mediator within 5 Business Days, failing which the parties agree to the President of the Law Institute of Victoria appointing the mediator;
- (b) the costs of the mediation and the mediator will be split equally between the parties to the Dispute;
- (c) the parties must conduct the mediation as expeditiously as possible; and
- (d) the mediation will be held in Melbourne in accordance with the laws governing this Agreement.



# TERMS OF TRADE

## 18. NON-SOLICIT

### 18.1 Non-Solicit

During the Term, and for a period of one year thereafter, the Client will not solicit the employment of, employ, or contract with, any Agency current or former personnel with whom the Client had contact under this Agreement, either individually or through another party or employee. The Client will promptly notify the Agency of any communications with any Agency personnel seeking employment with the Client.

## 19. GENERAL

### 19.1 Relationship:

The relationship between the parties is that of independent contractors and nothing in this Agreement will be construed as giving rise to the relationship of principal and agent, trustee and beneficiary, joint venturers or partnership.

### 19.2 Assignment:

A party may not assign its rights under this Agreement without the consent of the other party, other than as provided for under this Agreement.

### 19.3 Entire Agreement:

This Agreement, together with each signed SOW, and any approved Estimate document, constitutes the entire agreement of the parties about its subject matter and any previous agreements, understandings and negotiations on that subject matter cease to have any effect.

### 19.4 Waiver:

A provision in or right created under this Agreement may not be waived except in writing signed by the party granting the waiver.

### 19.5 Variation:

This Agreement and any SOW may not be varied or amended unless in writing and signed by the parties.

### 19.6 Survival:

Each indemnity in this Agreement is a continuing obligation and survives termination of this Agreement.

### 19.7 Severability:

Any term of this Agreement which is fully or partly void or unenforceable is severed to the extent that it is void or unenforceable, and the remainder of this Agreement continues in force.

### 19.8 Further Assurances:

Each party will sign all documents and do everything reasonably required to give effect to any of the transactions contemplated by this Agreement.

### 19.9 Notices:

All notices must be sent in writing to the address on the applicable SOW or the address last notified by the intended recipient to the sender and delivered or sent by post or fax to that address. A notice is taken to be received if hand delivered, on delivery, if sent by post, 3 Business Days after the date of posting, and if sent by fax, when the sender's fax system generates a message confirming successful transmission. If delivery, receipt or transmission is not a Business Day or after 5pm on a Business Day, the notice is taken to be received at 9am the next Business Day.

### 19.10 Governing Law:

This Agreement and the transactions contemplated by this Agreement are governed by the law in force, in Victoria, Australia. Each party submits to the non-exclusive jurisdiction of the Courts of Victoria for determining any dispute concerning this Agreement or the transactions contemplated by this Agreement.