

1. Engagement

1.1 Engagement

The Designer's entire agreement with the Client is as set out in the Proposal and these Terms & Conditions (collectively, the **Agreement**). These Terms & Conditions and the Proposal are the only terms which are binding on the Designer except for any further terms agreed by the Designer in writing or terms imposed by statute and which cannot be excluded. The Agreement supersedes any previous arrangement, understanding or agreement relating to its subject matter. There are no express or implied conditions, warranties, promises, representations or obligations, written or oral, in relation to the Agreement other than those expressly stated in these Terms & Conditions or the Proposal, or necessarily implied by statute.

1.2 Provision of Services or Goods without Proposal

Where the Designer provides services or goods without a Proposal, those services or goods are supplied or sold in accordance with these Terms & Conditions.

1.3 Obligations of the Designer

The Agreement commences on the Commencement Date and continues until the Designer has completed delivery of the Services as set out in the Proposal, unless terminated earlier in accordance with these Terms & Conditions.

2. Services and Goods

2.1 Obligations of the Designer

The Designer will:

- (a) perform the Services with due care and skill and in a timely and professional manner;
- (b) endeavour to provide the Services in accordance with the Agreement;
- (c) comply with all applicable laws and maintain any licences or authorisations required for the purposes of providing the Services; and
- (d) to the extent possible, control, co-ordinate, supervise, direct and complete all activities necessary to provide the Services and, to the extent that the Proposal states that the Designer will act as project manager, services provided by other parties.

2.2 Project Management

The Designer will only act as project manager if this is disclosed in the Proposal, or the parties otherwise agree in writing. The Designer is not liable to act in a project management capacity in any other circumstances.

2.3 Goods

The Designer will sell Goods to the Client in accordance with this Agreement.

2.4 Obligations of Client

- (a) The Client will:
 - (i) fully cooperate with the Designer to enable it to provide the Services, including providing approval to further or amend designs in a timely manner;
 - (ii) provide, and ensure its employees, agents and relevant Third Parties provide, the Designer with all necessary information, documentation, instructions and assistance to provide the Services;
 - (iii) co-operate, and ensure its employees, agents and Third Parties co-operate, with the Designer as the Designer reasonably requires; and
 - (iv) obtain and maintain any approvals, permits, licences or authorisations required for the purposes of receiving the Services.
- (b) For the avoidance of doubt, the Designer will not be liable to the Client or Third Parties for any breach or non-performance of the Designer's obligations under the Agreement caused or contributed to by the acts or omissions of the Client, its employees, agents or any Third Parties, including any failure by the Client to provide instructions or approvals to the Designer, in a timely manner.

2.5 Suppliers & Procurement

- (a) Although the Designer endeavours to ensure prices quoted are accurate, it does not control prices charged by suppliers. The Designer does not guarantee prices for materials, suppliers or installation charged by suppliers.

- (b) The Designer is not liable for any false representations or misleading conduct by any other party, including any supplier. It does not warrant or guarantee any Goods or Services provided by any other party.

- (c) The Designer can place orders or procure Goods on the Client's behalf with the Client's instructions or authorisation. Where the Designer procures goods for the Client, the Client appoints the Designer as its agent to do so on behalf of the Client as purchaser of the Goods. The Client will be or will be deemed to be the relevant contracting party in all agreements with suppliers. It is the Client's responsibility to pay for all such Goods, although the Designer may make payment on behalf of the Client and include such amounts in its invoices to the Client. All warranty and other claims in respect of the Goods or the supplier will be the Client's responsibility.

2.6 Materials and tolerances

- (a) The Client acknowledges that:
 - (i) all samples provided are indicative only;
 - (ii) variations in appearance, colour, grain or shade may occur; and
 - (iii) the Designer will not be held liable for any variations between samples and final products provided as part of the Services.
- (b) The appearance of products, materials and Goods may alter over time. Unless these changes are not in accordance with manufacturer guidelines, they cannot be relied upon as a fault in a product or basis for a refund.

2.7 Location of Service

- (a) The Designer will perform the Services in such places as the Designer considers appropriate to the work at hand, including at the Project Location.
- (b) In relation to the Project Location, the Client will:
 - (i) fully cooperate with the Designer to provide access;
 - (ii) provide a safe working environment for the Designer, its employees and representatives; and
 - (iii) comply with all relevant health and safety laws.
- (c) The Client acknowledges and agrees that it will be responsible for the payment of any travel expenses associated with the Designer attending the Project Location, including but not limited to flights and accommodation.

2.8 Basis of Engagement

The Designer is a non-exclusive independent contractor to the Client. Nothing in this Agreement is intended to create an employment or agency relationship between the Designer and the Client.

2.9 Third Party Services

- (a) The Designer may engage Third Parties to carry out specialist work to facilitate the delivery of the Services.
- (b) The Client may engage Third Parties to carry out specialist work with the written approval of the Designer.
- (c) The Designer may refer specialist Third Parties to the Client in order to perform the Services in accordance with these Terms & Conditions from time to time. The Client is not obliged to engage any Third Parties referred by the Designer.
- (d) The Designer is not liable for any works performed or services provided by Third Parties (**Third Party Works**) engaged by the Client as a result of the Designer's referral.
- (e) If the Client chooses to engage Third Parties: regardless of whether the Third Party was referred by the Designer, the Designer is not responsible for:
 - (i) the quality of Third Party Works;
 - (ii) fitness for purpose of Third Party Works;
 - (iii) any instruction misunderstood or incorrectly carried out by any Third Party, including any changes made by a Third Party to the Designer's plans; or
 - (iv) any delays caused in connection with or as a result of any Third Party Works.
- (f) The Client will be responsible for all payments to the Third Party and any Third Party Works are not included in the Fees.

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- (g) For the avoidance of doubt, the extent of the Designer's responsibility in relation to any Third Party engaged, is limited to providing them with instructions with the purpose of providing the Services.

2.91 Existing Construction

The Client accepts the risk of defects or deficiencies in the site. The Designer is not required to investigate the suitability, quality or fitness for purpose of existing or proposed building materials, drainage or drainage infrastructure on the site.

3. Terms of Payment

3.1 Fees

In consideration for the supply of the Services and/or Goods, the Client will pay the Designer the Fees in accordance with the Payment Terms and otherwise in accordance with this Agreement.

3.2 Payment Terms

- (a) The Designer may issue periodic invoices to the Client for the Fees.
- (b) Unless otherwise provided, the Client must pay an invoice within 14 days of the date of the invoice (**Due Date**).

3.3 Dispute as to Payment

- (a) If the Client disputes any invoice issued by the Designer, then the Client must:
- (i) notify the Designer of the amount in dispute and the reason for the dispute by the due date for payment of the invoice; and
 - (ii) pay the undisputed amount of the invoice.
- (b) The parties must resolve any dispute under this clause 3.3 and in accordance with clause 5.

3.4 Failure to Pay

If the Client does not make payment by the Due Date, then, in addition to any other rights or remedies, the Designer is entitled in its sole discretion to:

- (a) charge the Client interest on amounts not paid at a rate equivalent to 2% per annum plus the cash rate set by the Reserve Bank of Australia, calculated daily from the due date to the day of payment of the debt;
- (b) suspend all or any part of its obligations under the Agreement without notice to the Client; and/or
- (c) terminate the Agreement in accordance with clause 4.3.

3.5 Refunds

If the Agreement is terminated due to a change of mind, the Fees will be calculated on a pro-rata basis, including any costs incurred by the Designer to the termination date, and the pro-rata amount plus costs incurred will be immediately due and payable.

4. Default and Termination

4.1 Termination on Notice

Either party may terminate the Agreement in whole, or in part by reference to a particular schedule of works, at will by giving at least 1 months' written notice to the other party.

4.2 Termination for Breach

Either party may terminate the Agreement by notice with immediate effect if the other party:

- (a) commits a material breach of the Agreement that is not capable of remedy;
- (b) commits a material breach of the Agreement capable of remedy, and does not remedy that breach within 10 business days after receipt of notice of the breach from the other party; or
- (c) is bankrupt, or is liquidated or wound up, or if a controller, administrator, receiver, manager or similar insolvency administrator is appointed to a party, or over any substantial part of its assets.

4.3 Termination by the Designer for the Client's default

The Designer may immediately terminate the Agreement by notice to the Client, if:

- (a) the Client fails to pay one or more undisputed amounts that are due and payable;
- (b) the Client fails to provide timely instructions and approvals for a period of 21 days; or

- (c) the Designer issues a notice to the Client that it intends to terminate the Agreement pursuant to this clause 4.3 if payment of the outstanding amount, plus interest, is not received within 10 business days of the Client receiving the notice and the Client fails to make payment of the outstanding amount plus interest within that period.

4.4 Consequences of Termination

If the Agreement is terminated under clause 4.1, 4.2 or 4.3, all money owing by the Client to the Designer under the Agreement will immediately become due and payable by the Client to the Designer.

4.5 Preservation of rights

Expiry or termination of the Agreement for any reason does not affect any rights of either party against the other which arose prior to the time at which such termination or expiry occurred, or which otherwise relate to or which may arise at any future time for any breach or non-observance of obligations under the Agreement occurring prior to the termination or expiry.

5. Dispute Resolution

- (a) If a dispute arises between the Designer and the Client, the dispute must be dealt with in accordance with this clause.
- (b) Any party that claims a dispute exists must notify the other party to the dispute in writing of the nature of the dispute.
- (c) If the dispute is not resolved by agreement within thirty business days of the other party receiving notice of the dispute, either party may refer the matter to mediation conducted by a mediator agreed between the parties within a further ten business days or failing agreement within that period, as appointed by the president of the Law Institute of Victoria. The costs of the mediator must be borne equally between the disputing parties. The chosen mediator must determine the procedures for the mediation. The chosen mediator will not have the power or authority to make any other determination in relation to the dispute.
- (d) If the parties have not mediated a resolution to the dispute within twenty business days of the selection of a mediator, neither party is obliged to continue any attempt at mediation under this clause, and either party may then commence such legal proceedings as it thinks fit in relation to the dispute.

6. Intellectual Property

- (a) Background IP will remain the sole property of the owner. Neither party acquires any right, title or interest in or to the Background IP of the other party by virtue of this Agreement or the disclosure or use of the Background IP during the performance of the Services, other than as expressly set out in the Agreement.
- (b) The Designer owns all Intellectual Property rights existing or created in connection with the provision of the Services, the Material and the Designer's Background IP (together, the Designer's IP).
- (c) The Designer grants the Client a royalty free, revocable, worldwide, personal, non-exclusive licence, to use, copy, duplicate or print the Designer's IP strictly for the purpose of facilitating the Designer's provision of the Services and without the right to sub-license, transfer, assign, re-sell, share or commercially exploit the Designer's IP.
- (d) The Client must not use, copy, duplicate or print the Designer's IP for any purpose other than that permitted under clause 6(c).

7. Moral Rights

- (a) The Client must attribute the Designer as the author of any Material unless otherwise agreed in writing between the parties.

8. Publicity

- (a) The Client agrees that that the Designer can promote or publicise the Project and the provision of Services for marketing/promotion purposes via the Designer's website, marketing material, social media channels and any other medium the Designer sees deem fit.
- (b) Without limiting the application of clause 8(a), the Designer is permitted to take and publish photographs and videos displaying and promoting the Project in any manner the Designer deems fit.

- (c) Any promotion or publication will not publicly identify the Client.

9. Confidentiality

9.1 Mutual Confidentiality

Each party must:

- (a) keep the Confidential Information confidential and not disclose it or allow it to be disclosed to a third party except with the prior written consent of the other party; and
- (b) take and cause to be taken all reasonable precautions necessary to maintain the secrecy and confidentiality of the Confidential Information.

9.2 Removal of Confidential Information

At the reasonable request of the party to whom the Confidential Information belongs, each party must deliver, erase or destroy all electronic and physical documents in its possession or control that contain Confidential Information.

9.3 Exceptions

The obligations of confidentiality do not extend to information (whether before or after the Commencement Date):

- (a) disclosed to a party but, at the time of disclosure, is rightfully known or in the possession or control of that party and not subject to an obligation of confidentiality on the party;
- (b) that is public knowledge (other than because of a breach of the Agreement or any other obligation of confidence);
- (c) required to be disclosed by Law or any order of a Governmental Agency or in connection with the enforcement of the Agreement or by the rules of a recognised stock exchange.

10. Warranties

10.1 Mutual warranties

Each party represents and warrants to the other party as at the Commencement Date and during the Term that:

- (a) it has full power and authority to enter into, perform and observe its obligations under the Agreement, and that its execution, delivery and performance of the Agreement has been duly and validly authorised by all necessary corporate action; and
- (b) its obligations under the Agreement are valid, binding and enforceable.

10.2 No warranties in relation to completion or content

- (a) The Designer provides no warranty that any result or objective can or will be achieved or attained through the provision of the Services.
- (b) To the maximum extent permitted by law, the Designer disclaims all conditions, representations and warranties (whether express or implied, statutory or otherwise) in relation to the Services or Goods, including any implied warranty of merchantability, fitness for a particular purpose or non-infringement. Without limiting the foregoing, the Designer makes no representation and provides no warranty or guarantee that:
- (i) the Client will achieve any particular results from the provision of the Services or Goods;
- (ii) the Services or Goods will be:
- (A) error-free or that errors or defects will be correct, or
- (B) meet the Client's requirements or expectations.

The Client agrees that, in entering into the Agreement or selecting or using the Services, it has not relied on any representation or warranty made by the Designer or on its behalf.

11. Disclaimer

The Designer will use its reasonable endeavours to provide the Services in accordance with any timeline agreed between the parties. However, any such timeline is indicative only and the Designer makes no warranty or representation that the Services will be provided according to that timeline.

12. Indemnity and Infringement Claim

12.1 Mutual indemnities

Subject to the limitation of liability under clause 13, each party (**Indemnifying Party**) indemnifies the other party (**Indemnified Party**) and their representatives (together, **Indemnified Persons**) against all and any Claims (including, but not limited to, reasonable legal costs) directly or indirectly arising out of, or in connection:

- (a) any fraudulent or unlawful act or omission of the Indemnifying Party or its representatives;
- (b) any damage to or loss or destruction of real or personal property caused or contributed to by any act or omission of the Indemnifying Party or its representatives;
- (c) any third-party Claim; and
- (d) any Infringement Claim,
- except to the extent the liability, loss, damage, cost or reasonable expense is caused or contributed to by the act or omission of the Indemnified Persons or its representatives.

12.2 Conduct of Infringement Claims

If an Infringement Claim is made:

- (a) the Indemnified Party must promptly notify the Indemnifying Party of the Infringement Claim and provide assistance at the Indemnifying Party's expenses for the purposes of managing the Infringement Claim, as reasonably requested by the Indemnifying Party; and
- (b) the Indemnifying Party is responsible for and will have the right solely to control the defence and settlement of the Infringement Claim.

13. Liability and Exclusions

13.1 Limitations on liability

To the fullest extent permitted by law, the total liability of a party to the other party under or in connection with the Agreement in respect of all Claims will not exceed the fees paid or payable for the Services in the 12 months prior to the Claim.

13.2 Implied terms

- (a) Subject to clause 13.2(b), any condition or warranty which would otherwise be implied in the Agreement is excluded.
- (b) To the greatest extent permitted, the Designer's liability for a breach of a condition or warranty implied by part 3-2 division 1 of the ACL is limited to:
- (i) in the case of goods:
- (A) the replacement of the goods or the supply of equivalent goods;
- (B) the repair of the goods;
- (C) the payment of the cost of replacing the goods or of acquiring equivalent goods; and
- (D) the payment of the cost of having the goods repaired; or
- (ii) in the case of Services:
- (A) to re-supplying the Services; or
- (B) making full payment for the cost of having the services supplied again.

13.3 Exclusion of consequential loss

Neither party is liable to the other for any kind of Consequential Loss arising out of or in connection with the Agreement.

13.4 Australian Consumer Law

The ACL may give to the Client certain consumer guarantees which cannot be restricted, limited or varied. Nothing in the Agreement is intended to limit or exclude the Company's consumer guarantees under the ACL in any way not permitted by the ACL.

14. Force Majeure

- (a) For the purposes of the Agreement, Force Majeure means anything outside the reasonable control of a party regardless of whether it is reasonably contemplated by the parties at the Commencement Date as a likely result of breach of the Agreement.
- (b) If a Force Majeure event prevents the Designer from providing the Services, the Designer will notify the Client of the Force Majeure event and the anticipated impact on the Designer's performance of the Services.

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- (c) If a Force Majeure event continues for more than 30 business days, either party may terminate the Agreement by written notice to the other without liability for damages of any kind, including for Consequential Loss.

15. General

15.1 Notice

- (a) A notice, consent, approval, waiver or other communication provided in connection with this Agreement must be in writing (**Notice**).
- (b) A Notice may be given by hand delivery, post or by email and is effective upon receipt.

15.2 Entire Agreement

The Agreement represents the entire agreement between the parties and supersedes all prior discussions, negotiations, understandings and agreements in relation to the subject matter of the Agreement.

15.3 Assignment

- (a) The Client must not assign or otherwise deal with all or any part of its rights or obligations under the Agreement without the Designer's prior written consent (which may not be unreasonably withheld but which may be given subject to reasonable conditions).
- (b) The Designer may assign or otherwise deal with any of its rights or obligations under the Agreement without the Client's prior consent.

15.4 Waiver and Variation

A provision of the Agreement, or right, power or remedy created under it, may not be varied or waived except in writing signed by the party or parties to be bound.

15.5 Severability

If any provision is unenforceable or invalid, it will be ineffective to the extent it is unenforceable or invalid, without affecting the validity or enforceability of the remaining provisions of the Agreement.

15.6 Costs

Each party must bear its own legal, accounting and other costs associated with the preparation and execution of the Agreement.

15.7 Survival

Termination or expiration in whole or in part of the Agreement does not affect those provisions and those obligations of a party which by their very nature survive termination, including clause 6 (Intellectual Property), clause 4.4 (Consequences of Termination), clause 5 (Dispute Resolution), clause 9 (Confidentiality), clause 10 (Warranties), clause 12 (Indemnity and infringement claims), clause 13 (Liability and Exclusions) and clause 15.8 (Governing Law and Jurisdiction).

15.8 Governing Law and Jurisdiction

The Agreement is governed by the laws in force in Victoria, Australia and the parties submit to the exclusive jurisdiction of the courts of Victoria, Australia.

1. Interpretation and precedence

1.1 Definitions

In this Agreement the following definitions apply:

ACL means the Australian Consumer Law.

Agreement means this agreement including any schedule or annexure to it and includes the Proposal.

Background IP means Intellectual Property developed, owned by or licensed to a party as at the Commencement Date, or acquired or developed by a party during the Term, other than for the sole purpose of this Agreement, which that party has the right to license to third parties and which are necessary or desirable for the performance of the Services.

Claim means any allegation, debt, cause of action, liability, claim, proceeding, suit or demand of any nature whether present or future, fixed or unascertained, actual or contingent, at law, in equity, under statute or otherwise.

Commencement Date means the date on which the Agreement commences, as particularised in the Proposal, or where no Commencement Date is particularised in the Proposal, when the Designer first provides the Services or the Goods. .

Confidential Information of a party means all information of a confidential nature, including financial, customer and employee information, supplier information, specifications, processes, statements, formulae, trade secrets, designs and data, which is not

in the public domain, except by a breach of the confidentiality obligations arising under this Agreement.

Consequential Loss means the following, however arising and even if it is reasonably contemplated by the parties at the Commencement Date as a likely result of breach of the Agreement:

- (a) incidental, special, remote or unforeseeable loss or damage;
- (b) loss of revenue, profit, income, opportunity, use, business, contract, goodwill, or anticipated savings, loss caused by business interruption, but excluding loss of any amounts that would, but for the act or omission of a party, have otherwise been payable under this Agreement;
- (c) costs or expenses incurred to prevent or reduce loss or damage which otherwise may be incurred or suffered by a third party; or
- (d) loss or damage of the nature set out above in clauses (a) to (c) (inclusive) that is incurred or suffered by or to a third party.

Fees means fees for the Services as specified in the Proposal.

Goods means the goods that the Designer sells to, or procures for, the Client pursuant to this Agreement whether from time to time or as described in the Proposal.

GST means the goods and services tax imposed by *A New Tax System (Goods and Services Tax) Act 1999* (Cth).

Infringement Claim is any actual, threatened or potential claim, demand, proceeding, suit, objection or other challenge:

- (a) **affecting** either parties' ownership of, or rights in, that party's Background IP; or
- (b) **claiming** that the supply or other use of the **Material** or Background IP, infringes or may infringe the Intellectual Property rights of a third party.

Intellectual Property means all rights conferred under statute, common law or equity, wherever in the world subsisting, in relation to trademarks, copyright, patents, patentable inventions and designs, whether existing now or in the future and whether or not registered or registrable, and includes any rights subsisting in or relating to Confidential Information, trade secrets, know-how, inventions, discoveries, geographical indications of origin, code, source code, microcode, methods, techniques, formulae, algorithms, modules, libraries and databases and further includes the right to apply for the registration or grant of any such intellectual property.

Material means all material other than Background IP, in whatever form, including documents, designs, drawings, specifications, products, equipment, information, data, graphic layouts, images and software, prepared and provided by the Designer in connection with the Services, and which may be more particularly described in the Proposal.

Payment Terms means the terms set out in clause 3.2.

Project means the Client's project to which the Services relate.

Project Location means the location of the Project to which the Services relate, if applicable.

Proposal means the Designer's proposal document setting out the scope of the Services and Fees.

Services means the services to be provided by the Designer to the Client, as more particularly described in the Proposal and any scope of works or design proposal provided by the Designer.

Term means the term of the Agreement in accordance with these Terms & Conditions and the Proposal.

Third Parties includes, but is not limited to, the Designer's suppliers, manufacturers, vendors and any contractors or consultants engaged by either Party to assist with or be involved with the Project to which the Services relate.

1.2 Interpretation

In this Agreement:

- (a) words such as including or for example do not limit the meaning of the words preceding them;
- (b) a reference to a document or instrument, including this Agreement, includes all of its clauses, paragraphs, recitals, parts, schedules and annexures;
- (c) an obligation or liability assumed by, or a right conferred on, two or more parties binds or benefits them all jointly and severally;
- (d) no provision of this Agreement will be construed to the disadvantage of a party merely because that party was

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responsible for preparing this Agreement or including the provision in this Agreement;

- (e) all monetary amounts are expressed in Australian Dollars (\$AUD); and
- (f) parties must perform their obligations on the dates and times fixed by reference to Melbourne, Victoria.

1.3 Precedence

If there is any inconsistency between provisions or the documents comprising this Agreement, this order of precedence applies:

- (a) the Proposal;
- (b) these Terms & Conditions;
- (c) any Schedules.