



Terms and Conditions 2022 By The Way Media Pty Ltd

1 This Agreement

- 1.1 This Agreement is comprised of the Engagement Letter and these Terms and Conditions. These Terms and Conditions apply to all Services provided by the Consultant on or after the Agreement Date and to all other Engagement Letters.
- 1.2 If there is an inconsistency between an Engagement Letter and these Terms and Conditions, the Engagement Letter prevails to the extent of the inconsistency.
- 1.3 An Engagement Letter (including the scope of the Services and any delivery dates) may only be varied by written agreement between the parties. The Consultant is entitled to reject any variation at its sole discretion. The Consultant is entitled to request an increase to the Fees or a change to the delivery date in response to any variation request.
- 1.4 If there are multiple Engagement Letters, then each Engagement Letter constitutes a separate Agreement and a breach in relation to one Agreement does not give a party the right to delay, terminate or suspend the performance of any other Agreement.

2 Services

- 2.1 In consideration of the Fees, the Consultant will provide the Services and Deliverables as set out in the Engagement Letter.
- 2.2 All stated delivery times are estimates only. The Consultant is not liable for any delay in the performance of the Services. The Consultant is also not liable for any delay or failure to perform the Services which is occasioned by any act or omission of the Client or by any circumstances outside of the Consultant's control.
- 2.3 The Client must provide the Client Contribution as soon as possible. If the Client fails to provide any Client Contribution, or if the Client Contribution is inaccurate or incomplete, the Consultant may suspend providing the Services and all delivery times are adjusted to account for the suspension. The Client is solely responsible for reliability, accuracy and completeness of the Client Contribution and the Consultant relies on the same.
- 2.4 The Client must comply with any reasonable direction of the Consultant in relation to the Services.
- 2.5 The Consultant is entitled to utilise the services of subcontractors to perform some or all of the Services, provided however that the Consultant is fully liable to the Client for the performance of any such subcontractor.
- 2.6 The Consultant may engage appropriately skilled independent subcontractors, freelancers or other third parties to perform some or all of the Services, provided however that at all times the Consultant remains fully liable for the Services.

3 Fees

- 3.1 The Client must pay the Consultant the Fees in the amount and payment terms as set out in the Engagement Letter, without setoff or counterclaim. The Engagement Letter may provide for the Fees to be paid in instalments. The Consultant reserves its rights to revise the Fees in case of any change in the specifications of the Services by the Client.
- 3.2 The following payment terms are implied into all Engagement Letters unless expressly written otherwise:
- (a) deposits are non-refundable;
 - (b) invoices must be paid within 14 days; and
 - (c) all prices are exclusive of Taxes.
- 3.3 Where the Engagement Letter includes an upfront deposit, the Client must pay the deposit on or before the Services Start Date. The Client acknowledges that the Consultant may not start providing Services until the deposit is paid, and the Services Start Date and any other delivery dates will be proportionately adjusted until the deposit is paid.
- 3.4 If the Client defaults in the payment of any money under this Agreement:
- (a) the Client must pay the Consultant Default Interest;
 - (b) the Consultant may take any steps necessary to enforce its rights or collect the debt, and the Client must indemnify the Consultant for any Loss incurred by the Consultant as a result, as a liquidated debt;
 - (c) the Consultant may suspend all work until the default is remedied; and
 - (d) the Consultant may terminate this Agreement or the relevant Engagement Letter.

4 Expenses

- 4.1 Upon provision of valid invoices and receipts, the Client will reimburse the Consultant for all reasonable out-of-pocket expenses incurred by the Consultant in the performance of the Services including any travel expenses.
- 4.2 Where possible, the Consultant must make reasonable efforts to obtain the Client's approval prior to incurring any expenses.

4.3 The expenses will be added to the next applicable invoice for the Fees, and if there is no such pending invoice, a separate invoice will be raised by the Consultant for the expenses.

5 Intellectual Property

5.1 Unless otherwise specified in the Engagement Letter, the Client agrees that all title and property in any Intellectual Property in the Services and Deliverables vests solely in the Consultant. However, provided that the Client pays all Fees and to the extent specified in the Engagement Letter, the Client will be granted a perpetual, non-transferable, non-exclusive licence to use the Deliverables only to the extent required to receive the intended benefit of this Agreement.

5.2 The Client acknowledges that Consultant owns or holds a license to use and sublicense the Background IP and that the Consultant retains all right, title and interest in the Background IP. Nothing in this Agreement creates a transfer or license from the Consultant to the Client of the Background IP (and if such a license exists it is only to the extent required by the Agreement).

5.3 In relation to any Client Contribution:

- (a) The Client shall retain ownership of any Client Contribution.
- (b) The Client grants to the Consultant a non-exclusive, irrevocable, royalty-free licence to use any content provided by the Client to the Consultant in order to enable the Consultant to provide the Services, together with the right to sub-license those rights to the Consultant's subcontractors and other service providers to the extent reasonably necessary.
- (c) The Client represents and warrants that the Client owns (or has a valid licence to) all right, title, interest and authority in the Client Contribution, and warrants that the Client Contribution does not infringe the rights of any third party (including Intellectual Property rights) nor give rise to any liability to make royalty or other payments to any third party.

5.4 The Client acknowledges that during the term of this Agreement and afterwards the Consultant is entitled to showcase some or all of the Services and Deliverables and use the Client's name and logo on the Consultant's website, social media, portfolios and other platforms for marketing purposes.

6 Term and Termination

6.1 This Agreement will commence on the day it is signed and expire at the end time set out in the Engagement Letter, once all of the Services are completed, or as otherwise terminated under this clause 6 (whichever is earlier). The Consultant must start the Services at the start date set out in the Engagement Letter.

6.2 A party (**Terminating Party**) may terminate this Agreement if the other party (**Defaulting Party**):

- (a) fails to make any payment under this Agreement on the due date for payment and such failure continues for more than five (5) Business Days (whether or not the Terminating Party has demanded payment or not);
- (b) breaches the Agreement (other than as per clause 6.2(a)) and fails to remedy the breach within 7 days after notice from the Terminating Party;
- (c) becomes Insolvent, or if the Terminating party suspects the Defaulting Party to be Insolvent on reasonable grounds;
- (d) (in the case of the Consultant only):
 - (i) if the Client has made any false, inaccurate or misleading statement having a material effect in relation to the making of this Agreement; or
 - (ii) if, in the reasonable opinion of the Consultant, the Client acts in a manner which (or is likely to) adversely affects the business or reputation of the Consultant.

6.3 In addition to any other termination right under this Agreement, each party is entitled to terminate this Agreement without reason by providing the Notice Period set out in Engagement Letter.

6.4 On termination of this Agreement for any reason, the Client must immediately pay for all Services, Deliverables and work performed by the Consultant up to that date, including any part performance (on a pro-rata basis) and irrespective of whether the work, Service or Deliverable was delivered prior to the event of default or termination occurring. Default Interest will be applied to this amount accruing daily until the outstanding amount is fully paid.

6.5 On termination of this Agreement by the Consultant under clause 6.2, or if the Client wrongly terminates this Agreement, the Client must pay the Fees and expenses as per the Cancellation Policy.

7 Return of Property

On the termination of this Agreement, each party must return to the other party:

- (a) all material on which Confidential Information or Intellectual Property subsist or are recorded, copied or modified (whether in documentary, visual, oral, digital or electronic format, or in any other readable or reproducible format);
- (b) any computer hardware and software, passwords, keys, security passes, mobile telephones and accessories, and equipment of the other party; and
- (c) any other property and documents of the other party.

8 Confidentiality & Non-Disparagement

- 8.1 Each party must:
- (a) keep the Confidential Information confidential and not disclose it or allow it to be disclosed to a third party except:
 - (i) with the prior written approval of the other parties; or
 - (ii) to officers, employees, contractors, subcontractors, and consultants or advisers of the party (or its related bodies corporate) who have a need to know (and only to the extent that each has a need to know) for the purposes of this Agreement and are aware that the Confidential Information must be kept confidential; and
 - (b) take or cause to be taken reasonable precautions necessary to maintain the secrecy and confidentiality of the Confidential Information.
- 8.2 No announcement, press release or other communication of any kind relating to the negotiations of the parties or the subject matter or terms of this Agreement must be made or authorised by or on behalf of a party without the prior written approval of the other party unless that announcement, press release or communication is required to be made by law or any order of any court, tribunal, authority or regulatory body.
- 8.3 The Client must not, and also must ensure that its associates do not, during the term of this Agreement or any time thereafter, make any statements, comments or communications in any form, oral, written or electronic to any person or entity that criticise, ridicule or are derogatory to the Consultant, the Services or any Deliverable.

9 Limitation of Liability

- 9.1 To the maximum extent permitted by law, the Consultant excludes all warranties and representations other than those expressly set out in this Agreement, including but not limited to any warranties about its qualifications, expertise or the Services.
- 9.2 Notwithstanding any other provision of this agreement and to the extent permitted by law:
- (a) The Consultant's total aggregate liability (including liability for negligence) under or in any way related to this Agreement or the Services is limited to the Fees actually paid to the Consultant by the Client under the concerned Engagement Letter in the 12 months period prior to the liability arising;
 - (b) The Consultant excludes liability (including liability for negligence) for any Consequential Loss; and
 - (c) The Consultant excludes all implied conditions and warranties except any implied condition or warranty the exclusion of which would contravene any statute or cause any part of this clause to be void (**Non-Excludable Condition**), and the Consultant's liability for breach of any Non-Excludable Condition (other than an implied warranty of title) is limited to:
 - (i) The supplying of the Services again; or
 - (ii) The payment of the cost of having the Services supplied again.
 - (d) The Consultant excludes all liability for anything the Client was aware of for longer than 6-months and the Client did not commence a civil proceeding;

10 Indemnity

- 10.1 **Indemnity by Client:** The Client agrees to indemnify the Consultant from any Claim and Loss insofar and to the extent that the Claim and Loss arise because of a Relevant Matter.
- 10.2 In this clause, **Relevant Matter** means:
- (a) any wilful, unlawful, reckless or negligent act or omission by the Client or its officers, employees, contractors, or agents.
 - (b) use of the Services or any Deliverable by any person other than the Client, its employees or agents, or for any purpose other than as agreed between the parties;
 - (c) the Client declining or not acting on the basis of any advice, recommendation, or approval of the Consultant;
 - (d) any untrue statements made, or any statements omitted to be made by the Client, its agents or employees;
 - (e) any breach of this Agreement by the Client;
 - (f) any personal injury or death; and
 - (g) the Client's failure to observe any Law.
- 10.3 It is not necessary for the Consultant to incur any expense or make a payment before the Consultant enforces a right of indemnity.

11 Tax

- 11.1 Unless Taxes are expressly included, the consideration expressed to be payable under any other clause of this Agreement for any supply made under or in connection with this Agreement does not include any Taxes.
- 11.2 If a party makes a supply under or in connection with this Agreement in respect of which Taxes are payable, the consideration for the supply but for the application of this clause 11.2 (**Tax Exclusive Consideration**) is increased by an amount equal to the Tax Exclusive Consideration multiplied by the rate of Tax prevailing at the time the supply is made.

11.3 A party need not make a payment for a taxable supply made under or in connection with this Agreement until it receives a tax invoice for the supply to which the payment relates.

12 **Competition**

12.1 Nothing in this Agreement imposes a restraint of trade on the Consultant and no clause is to be interpreted as a non-compete clause of any kind. The Consultant is entitled to provide services or be affiliated with any competitors of the Client, so long as such a supply of services does not result in a breach of clauses 5 and 8.

13 **Force Majeure**

13.1 If a party (**Affected Party**) becomes unable, wholly or in part, by Force Majeure to carry out an obligation placed on it under this Agreement (other than on obligation to pay money):

- (a) the Affected Party must give the other party prompt notice of:
 - (i) reasonable particulars of the Force Majeure; and
 - (ii) so far as is known, the probable extent to which the Affected Party will be unable to perform or be delayed in performing its obligation;
 - (iii) the relevant obligation, so far as it is affected by the Force Majeure, will be suspended for the duration of the Force Majeure; and
- (b) the Affected Party must use all possible diligence to overcome or remove the Force Majeure as quickly as possible.

13.2 Any other specific provisions relating to cancellations or refunds due to a Force Majeure event specified in the Engagement Letter will apply.

14 **General**

14.1 The Client agrees that the Consultant may recover any monies owed to it by the Client in connection with this Agreement (including all Loss incurred) by setting off such amounts against any sum owed to the Client by the Consultant.

14.2 If anything in this Agreement is unenforceable, illegal or void then it is severed and the rest of this Agreement remains in force.

14.3 All notices must be in writing. The parties agree to accept notices by email. Notices are taken to be read on the day they are received, unless they are received after 5 PM or not on a Business Day, in which case they are deemed to be received on the next Business Day.

14.4 The Client may not assign its rights and obligations under this Agreement without the Consultant's prior written consent, which will not be unreasonably withheld. The Consultant is entitled to assign its rights (including any debts or cause of action) without the Client's consent.

14.5 A party may exercise a right, remedy or power in any way it considers appropriate.

14.6 If a party does not exercise a right, remedy or power at any time, this does not mean that it cannot exercise it later.

14.7 Any exercise of a party's rights under this Agreement is without prejudice to any other rights which it may have under contract or Law.

14.8 This Agreement constitutes the entire agreement of the parties about its subject matter and supersedes all previous agreements, understandings and negotiations on that subject matter.

14.9 Nothing in this Agreement may be construed as creating a relationship of employment, partnership, trust or agency between the parties, and such intention is expressly denied. The Consultant does not owe any fiduciary obligations towards the Client.

14.10 The obligations under clauses 5, 6, 7, 8, 9, 10 and 14 survive the expiry or termination of this Agreement.

14.11 This Agreement is governed by the Laws of the State. The parties submit to the exclusive jurisdiction of the courts of the State.

15 **Definitions**

15.1 In this Agreement:

15.2 **Agreement** means this Services Agreement, which includes the Engagement Letter and the Terms and Conditions.

15.3 **Agreement Date** means the date this Agreement is signed.

15.4 **Background IP** means any Intellectual Property:

- (a) in know-how of the Consultant relating to the performance of or delivery of the Services;
- (b) subject to an "open source" licence or available on the public domain;
- (c) in boilerplate, precedents, templates or systems developed by the Consultant;
- (d) the creation of which pre-dates this Agreement;
- (e) developed by the Consultant independently of, or not specifically for, this particular Agreement, or not related to the Services.

15.5 **Business Day** means a day on which banks are open for general banking business in the State (excluding Saturdays, Sundays and public holidays).

15.6 **Cancellation Policy** is the cancellation policy for the Services as specified in the Engagement Letter.

- 15.7 **Claim** includes any claim, including a notice, demand, debt, account, action, expense, damage, loss, cost, lien, liability, proceeding, litigation (including reasonable legal costs), investigation or judgment of any nature, whether known or unknown.
- 15.8 **Client** is defined in the Engagement Letter.
- 15.9 **Client Contribution** means any information, access, brief, support, feedback or other resources or contribution to be provided by the Client to the Consultant, set out in the Engagement Letter, or deemed as required by the Consultant after the date of this Agreement.
- 15.10 **Confidential Information** means:
- (a) the existence and terms of this Agreement;
 - (b) all information provided by a party (**Discloser**) to the other party (**Recipient**) under this Agreement;
 - (c) any business processes, technical, scientific, commercial, financial or other information of or about the Discloser, its business or any of its goods or services
- of which the Recipient becomes aware in connection with this Agreement but excludes information which:
- (d) is in or becomes part of the public domain other than through a breach of this Agreement or an obligation of confidence owned by one party to the other party;
 - (e) is acquired by either party from a third party entitled to disclose it;
 - (f) is independently developed by a party;
 - (g) the Recipient can demonstrate by evidence in writing, was in the Recipient's possession as at the date of this Agreement (other than on a confidential basis); or
 - (h) the Recipient is required by Law to disclose.
- 15.11 **Consequential Loss** means remote, special, indirect or consequential loss, including loss of profits, savings or business opportunity.
- 15.12 **Consultant** is defined in the Engagement Letter.
- 15.13 **Corporations Act** means the Corporations Act 2001.
- 15.14 **Default Interest** means interest on any unpaid amounts, charged at a rate of 1.5% per month.
- 15.15 **Deliverable** means any material which is to be provided by the Consultant to the Client in accordance with the Services and the Engagement Letter, including without limitation any course material, training material, written advice or report.
- 15.16 **Engagement Letter** means the form setting out the commercial terms for the supply of Services and Deliverables for the Client, which constitutes a part of this Agreement.
- 15.17 **Fees** means the total Fees set out in the Engagement Letter and any agreed variations of it.
- 15.18 **Force Majeure** means any act of God, war, terrorism, fire, flood or any other extreme weather conditions, loss of power, pandemic, epidemic, implementation of travel, movement, and large-gathering restrictions as a result of the pandemic or epidemic, industrial disputes, slow-downs or other strike activities, riots or civil disturbances, acts of government, semi-government or other Authorities.
- 15.19 **Insolvent** means, in relation to a person or company:
- (a) is:
 - (i) **insolvent** as that term is defined in Section 9 of the Corporations Act; or
 - (ii) the subject of an event described in Sections 459C(2) (a) to (f) or Section 585 of the Corporations Act (or it makes a statement from which another party to this Agreement may reasonably deduce it is so subject); or
 - (iii) an **insolvent under administration** or suffers the appointment of a **controller, administrator, liquidator or provisional liquidator** as those terms are defined in Section 9 of the Corporations Act; or
 - (iv) dissolved;
- other than to carry out an amalgamation or reconstruction while solvent; or
- (b) is otherwise unable to pay its debts as and when they become due and payable; or
 - (c) being a natural person, commits or suffers an act of bankruptcy; or
 - (d) takes or suffers a similar under the law of any jurisdiction.
- 1.2 **Intellectual Property** means all common law, statutory and other proprietary rights in respect of all intellectual or industrial property including all trademarks, patents, copyright, confidential information and all other intellectual property as defined by Article 2 of the Convention Establishing the World Intellectual Property Organisation of July 1967.
- 1.3 **Law** means any law applicable including legislation, ordinances, regulations, by-laws and other subordinate legislation.
- 1.4 **Loss** means a damage, loss, cost, expense or liability incurred by the person concerned however arising, including without limitation penalties, fines, and interest and including those which are prospective or contingent and those the amount of which for the time being is not ascertained or ascertainable.
- 1.5 **Notice Period** is defined in the Engagement Letter.

- 1.6 **Service** means the services set out in Engagement Letter, and also includes the provision of any Deliverable.
- 1.7 **State** is defined in the Engagement Letter.
- 1.8 **Tax** means GST, value added tax (VAT) or any other sales, goods and services tax or consumption tax as set out in Law.