

# Terms of Service Agreement

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## agreement

THIS AGREEMENT is made between:

VSD Creative (VSD) of 5 Adelong Court, Nichols Point, VIC, 3501 (**Designer**)

AND

The person or company named in our Proposal/s (**Client**)

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## background

- A) The **Client** has requested the **Designer** to provide the Services to the **Client**.
  - B) The **Designer** has agreed to provide the Services to the **Client** in accordance with the terms set out in this Agreement.
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## operative part

The Parties agree that:

### 1 Definitions

**Agreement** means this Agreement, including the Background, as amended from time to time.

**Commencement Date** means the date stated in the Project Timelines document.

**Confidential Information** means facts or knowledge that are not in the public domain, including, but not limited to, information relating to the general business operations within the **Client** or the **Designer**, such as:

- a) financial statements;
- b) actual and proposed client lists, customer lists, licensee lists and distributors lists;
- c) cost and selling price information;
- d) trade secrets, know-how, work-in-progress, services and intellectual property;
- e) business and marketing plans; and
- f) third party information disclosed by one party to the other party in confidence.

**Designer's Fee** means the fees set out in our Proposal/s.

**Delivery Date** means the date that acceptance is given under clause 10.

**Parties** means the **Designer** and the **Client**.

**Services** means the services to be performed by the **Designer** set out in the Proposal/s.

**Work/Works** means the work to be undertaken and the deliverable works to be created by the **Designer** and assigned to the **Client** as set out in the Proposal/s.

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## 2 Interpretation

In this Agreement, unless the context otherwise requires:

- a) a gender includes other genders;
- b) a reference to the singular includes the plural and vice-versa;
- c) another grammatical form of a defined word or expression has a corresponding meaning;
- d) a reference to a clause, paragraph, project timeline or annexure is a reference to a clause or paragraph of, or project timeline or annexure to, this Agreement, and a reference to this Agreement includes its project timeline and annexures;
- e) a reference to a document or agreement includes the document or agreement as novated, altered, supplemented or replaced from time to time;
- f) all references to \$ or dollars are references to Australian Dollars.
- g) a reference to a person includes the person's executors, administrators, successors and permitted assigns and substitutes;
- h) a reference to a person includes a natural person, partnership, body corporate, association, governmental or local authority or agency or other entity;
- i) a reference to a statute, ordinance, code, other law or international convention includes regulations and other instruments under it and consolidations, amendments, re-enactments or replacements of any of them;
- j) any obligation in this Agreement on a person not to do something includes an obligation not to agree or to allow that thing to be done;
- k) the meaning of general words is not limited by specific examples introduced by "including" and similar expressions;
- l) a reference to writing or written includes any method of reproducing words, figures, drawings or symbols in a visible and tangible form but excludes a communication by electronic mail;
- m) the words "including" and "includes" are not words of limitation and mean 'including or includes without limitation'; and
- n) the Background forms part of this Agreement.

## 3 Term of agreement

- a) This Agreement commences on the Project Commencement Date and continues until the Designer completes the Services or this Agreement is terminated in accordance with clause 5 (Term).

## 4 Remuneration, payment & default

- a) In consideration for the Designer providing the Services the Client will pay the Designer all fees in the manner set out in the Proposal/s and Terms of Payment document.
- b) Where the Terms of Payment document provides for an upfront payment to be paid by the Client prior to the Designer commencing/providing the Services, that payment is strictly non-refundable.
- c) The Client will reimburse the Designer for such out-of-pocket expenses incurred by the Designer in the course of providing the Services.
- d) Final payment is due upon project completion or two months after the agreed commencement date, whichever comes first.
- e) Accounts which are not paid within 14 days of the date of invoice may incur administration fees. Accounts which remain outstanding for 30 days after the date of invoice may incur additional late payment interest equivalent to that allowable by law.
- f) An account will be considered in default if it remains unpaid for 60 days from the date of invoice or the Client has stated expressly that they do not intend to pay an invoice. The Designer shall at its sole discretion suspend any and all services (including website hosting, website design files, concepts and artwork, printing, photography, sub-contractors) provided to the Client and employ debt collection measures until the total outstanding balance has been paid in full (includes any and all unpaid monies due for Work received as outlined in the Project Timelines document). Suspension of such services does not relieve the client of its obligation to pay monies owing.
- g) The Client whose account is in default agrees to pay the Designer reasonable legal expenses and third party collection agency fees in the enforcement of these Terms and Conditions.
- h) The Designer retains all copyright for Work performed and deliverable Work supplied until full project costs have been paid. The Designer reserves the right to reuse or resell Work undertaken or deliverable Work supplied in the case of payment default.
- i) The Designer accepts no liability or responsibility for loss of income or damage to the Client for deliverable Work removed from third party servers, as a result of non-payment and the Client will not take legal action for any situation arising from invoice disputes or removal of the disputed deliverable Work in such cases.

## 5 Assignment of copyright

- a) The ownership of copyright in all Works produced by the Designer which are not ultimately used remains with the Designer.

The Designer also retains copyright in the following unless otherwise stated in the Proposal/s:

- i) Draft concepts;
- ii) Working notes and any other internal written materials;
- iii) Preliminary drafts, drawings illustrations, photographs, and designs;
- iv) Preliminary electronic Works including website drafts, source code development tools, programs, multimedia applications and programmers' notes;
- v) Draft videos, sound recordings, outtakes, storyboards, scripts, screenplays and character lists;
- vi) Designs which are rejected by the Client; and
- vii) Source files.

- b) No copyright or any other intellectual property rights in the materials will be licensed to the Client until the Designer has been paid in full all of the Designer's Fee.
- c) Once the Designer's Fee is paid in full by the Client, the Designer will licence to the Client copyright in the deliverable Works, limited to the purpose and media described in the Services set out in the Proposal/s. The Designer's Fee is based upon this limited licence of copyright. If the Client requires a more encompassing licence or assignment, this must be the subject of further negotiations between the Client and Designer. An assignment of copyright will only be granted if the Designer provides this in writing.
- d) In all other respects, the Designer retains copyright and all other intellectual property and moral rights (including the right of adaptation) in the deliverable Works.
- e) If transfer of copyright is agreed upon it will take place at the completion of the project. If for any reason a project is terminated prior to completion, either by the Client or Designer, ownership of all copyrights, original Works and any deliverable Works shall be returned and retained by the Designer.
- f) Transfer of copyright from the Designer to the Client grants the Client the right to utilise and adjust that project's deliverable Works at their discretion. Transfer relinquishes the Designer's rights, responsibilities and any associated credits to the deliverable Works. However, unless otherwise specified, transfer of copyright does not grant the Client permission to utilise design elements contained within a project's transferred deliverable Works in separate, unrelated design projects of the Client's own undertaking.

## 6 Self-promotion and design credit

- a) The Designer retains the right to use and reproduce the deliverable Works, or variations of the deliverable Works, for the purposes of:
  - i) promoting the Designer's skills and services, including by entering the deliverable Works in competitions or design publications relating to professional quality and recognition in the Designer's industry; and
  - ii) display of the deliverable Works in the Designer's portfolio of work, including for the purpose of soliciting new work from third parties. The Designer's folio can take many forms including hardcopy, digital files, social media accounts (eg, Facebook, Instagram, LinkedIn) or part of the Designer's own website.

Given projects can be confidential pending release to the public, no projects will form part of a self-promotion until permission is received from the Client.

- b) The Client agrees to allow the Designer to place a small credit on deliverable Works produced for the Client including:
  - i) printed collateral;
  - ii) exhibition displays;
  - iii) advertising; and
  - iv) websites

This credit will be in the form of a small logo or line of text placed toward the bottom of a page, screen or website.

## 7 Moral rights

In relation to all materials in which copyright subsists produced by the Designer in the course of providing the Services, the Client agrees that it will not engage in acts or omissions that are contrary to any of the present or future moral rights of the Designer under Part IX of the Copyright Act 1968 (Cth).

## 8 Typeface

- a) If, in its provision of the Services, the Designer is required to create an original typeface for use in the Works, then the Designer retains all rights in relation to that typeface;
- b) The Designer may, at its discretion, licence any original typeface referred to in the preceding clause to be used by the Client or any third party. Any such licence is not and does not form part of this Agreement;
- c) If, in the provision of the Services, the Designer is required to use an original typeface belonging to a third party, then the Client must agree to:
  - i) pay any licence fees to the third party; and
  - ii) acquire a license to use the typeface.

## 9 Client's performance

- a) The Client must provide the Designer with clear and concise written instructions in a timely manner to allow the Designer to perform the Services in accordance with the Design Proposal and the Project Timelines document.

## 10 Acceptance

- a) The Designer will supply the deliverable Works to the Client:
  - i) upon completion of the deliverable Works; or
  - ii) otherwise in accordance with the dates and milestones set out in the Project Timelines document.

- b) Following completion of the deliverable Works the Client agrees within 14 days of delivery to examine the deliverable Works and to give the Designer notice of acceptance or rejection of the deliverable Works or advise the Designer of the changes or revisions which the Client requires to be made. All changes or revisions will be charged to the Client by the Designer on a time and materials basis as set out in the Terms of Payment document. This clause is subject to Clause 11(b) herein;
- c) The day upon which the Client gives the Designer notice of acceptance of the deliverable Works is deemed to be the Delivery Date.

## 11 Expansion of the scope of work

- a) Work falling outside of the scope of the Services requested by the Client, either orally or in writing, will incur charges additional to the Designer's Fee. Work falling outside of the scope of the Services includes:
  - i) additions to the list of Works;
  - ii) alterations to text supplied by the Client for use in the deliverable Works;
  - iii) additional drafts/proofs required in the provision of the Services;
  - iv) changes to the Client's instructions or the brief;
  - v) changes to any of the deliverable Works after the Delivery Date;
  - vi) additional consultations; and
  - vii) conversion, adjustment or manipulation of images;
- b) Where additional work requested outside of the scope of the Services, is in the sole and exclusive discretion of the Designer, substantial, an itemised account of the additional Services and Works will be provided to the Client. The provision of those Services and Works will be subject to the terms of this Agreement;
- c) Urgent work requested outside of the scope of the Services which is required outside of ordinary business hours will be charged at the Designer's ordinary hourly rate as set out in the Terms of Payment document plus 20%.

## 12 Retrieval of archived work

- a) The Designer retains electronic archives of completed deliverable Works for a period of no longer than 6 years. If the Client requests retrieval and supply of deliverable Works after the deliverable Works are originally supplied, and the Designer provides those services, then the Client must pay the Designer a service charge for those services (\$120.00+gst). Files will be transferred to the Client electronically via email or online file transfer;
- b) To the fullest extent permitted by law, the Designer accepts no liability for any loss or damage that may occur to archived Work.

## 13 Client's undertakings and warranties

By signing this Agreement the Client undertakes and warrants that:

- a) The Client will exercise control over the Works. The Designer will exercise reasonable care, honesty and diligence in providing the Services. The Client nonetheless warrants that it is responsible for ensuring that the Works are not contrary to law, including:
  - i) ensuring that the Works do not infringe the copyright or moral right of any person in relation to any material the Client has provided to the Designer;
  - ii) ensuring that the Works do not infringe the trade mark rights of any person, including by undertaking trade mark searches where appropriate;
  - iii) ensuring that the Works are not by law defamatory of any person;
  - iv) ensuring that the Works are not obscene, blasphemous, offensive or discriminatory; and
  - v) ensuring that the Works do not constitute conduct that is in breach of the provisions of the Competitions and Consumer Act 2010 (Cth) or that gives rise to an action in passing off, including by undertaking trade practices clearances where appropriate;
- b) The Client must ensure that all statements purporting to be facts in the Works are true and correct and that no advice or instructions in the Works will if followed or implemented by any person cause loss, damage or injury to them or any other person;
- c) The Client will use and publish the Works at its own risk.
- d) The Client will indemnify the Designer against all claims arising from the Designer's use of any information or documents supplied by the Client or for any act or thing done by the Designer on the Client's instructions or with the Client's approval.

## 14 Liability

- a) Although the Designer will take all care in providing the Services, it accepts no liability to the fullest extent of the law regarding:
  - i) any consequential loss, damage or injury, however it may arise;
  - ii) any punitive, additional or exemplary damages;
- b) If the Designer is found to be liable for any claims, losses, damages, costs or injuries arising out of this Agreement, the quantum of the sum of all liability or liabilities is strictly limited to the value of this Agreement.

## 15 Termination for breach

- a) Without prejudice to any other right or action or remedy, either party may terminate this Agreement, by written notice to the other with immediate effect, if:

- i) the other party commits a breach of this Agreement or is in default of any warranty and the defaulting party fails to correct such breach or default within 7 days of receiving notice specifying such breach or default;
  - ii) the other party is insolvent or otherwise unable to pay its debts as and when they fall due; or
  - iii) an administrator, trustee in bankruptcy, receiver, liquidator or controller is appointed to the other party;
- b) If the Agreement is terminated under the preceding Clause, the Client agrees to pay the Designer all amounts accrued and owing in accordance with the Project Timelines document within 14 days of that termination. Ownership of all copyrights and the original artwork shall be returned and retained by the Designer. The Designer reserves the right to reuse or resell work undertaken.

## 16 Termination of services

- a) The Designer may terminate this Agreement for any reason whatsoever by giving the Client 30 days' notice in writing;
- b) If the Designer terminates the Agreement under the preceding Clause, the Client agrees to pay the Designer all amounts accrued and owing in accordance with the Design Proposal and Project Timelines document within 14 days of the expiry of the period of notice. Ownership of all copyrights and the original artwork shall be returned and retained by the Designer. The Designer reserves the right to reuse or resell work undertaken.

## 17 Confidentiality

- a) Each party agrees not to disclose to any third party anything about this Agreement or any of its contents unless:
  - i) it has the prior written consent of the other party; or
  - ii) it is required to do so by law; or
  - iii) a third party needs to know the information in order to perform this Agreement;
- b) The Designer agrees that during the term of this Agreement it may have access to the Client's Confidential Information, and agrees to both during and after the Term maintain the Confidential Information and to prevent its unauthorised disclosure to or use by any other person, firm, or company, unless or until authorised in writing to disclose any Confidential Information by the Client;
- c) The Designer agrees that it must not, both during and after the Term, make improper use of the Client's Confidential Information to gain directly or indirectly an advantage for itself or for any other person or to cause detriment to the Client;
- d) The Client agrees that during the term of this Agreement it may have access to the Designer's Confidential Information, and agrees to both during and after the Term maintain the Confidential Information and to prevent its unauthorised disclosure to or use by any other person, firm, or company, unless or until authorised in writing to disclose any Confidential Information by the Designer;
- e) The Client agrees that it must not, both during and after the Term, make improper use of the Designer's Confidential Information to gain directly or indirectly an advantage for itself or for any other person or to cause detriment to the Designer;
- f) In the event of a breach of this clause the Parties agree that damages are not an adequate remedy, and will not contest any application for an urgent interlocutory injunction relating to such a breach and will pay all costs incurred by the other party in bringing any such applications on a solicitor-client basis.

The Designer's employees and contractors are held to a strict confidentiality and non-disclosure agreement. Employees and contractors of the Designer are also bound by a strictly enforced non-solicitation agreement (see Clause 19).

## 18 Relationship of parties

- a) The Designer's relationship with the Client is that of an independent contractor;
- b) Neither the Designer nor the Client will have (and must not represent that it has) the power, right or authority to bind the other, or to assume or create any obligation or responsibility, express or implied, on behalf of the other or in the other's name;
- c) Nothing stated in this Agreement should be construed as constituting the Designer and the Client as partners, in a joint venture, or as creating the relationship of employer and employee, master and servant or principal and agent between the parties;
- d) During the project Term the Designer may provide, in any capacity, to any third parties, works or services of any description.

## 19 Restraint of trade

- a) The Client agrees that in order to protect the goodwill of the Designer the Client will not directly or indirectly at any time, for a period of:
  - i) 1 year after the Delivery Date; or, in the event that this term is deemed unenforceable:
  - ii) 6 months after the Delivery Date; or, in the event that this term is deemed unenforceable:
  - iii) 3 months after the Delivery Date; employ or solicit to employ any person who is or has in the period of 1 year prior to the Delivery Date been an employee or contractor of the Designer;
- b) Clause 19(a) has effect as comprising each of the separate provisions which results from each combination of a period described therein;
- c) If any separate provision referred to in Clause 19(a) is unenforceable, illegal or void that provision is severed and the next sequential provision is in force. Each of the parties acknowledges that each of those separate provisions read separately but set out in this way is a fair and reasonable restraint of trade.

## 20 General

- a) All notices and consents required or permitted to be given under this Agreement must be in writing and given by personal services, pre-paid postage, facsimile transmission at the addresses of the parties set out in this Agreement or to such other address as either party may designate to the other by written notice;
- b) This Agreement must not be assigned or otherwise transferred without the prior written consent of the Parties;
- c) This Agreement is governed by the laws of Victoria and the Parties submit to the jurisdiction of that State;
- d) This Agreement may be modified only in writing and signed by duly authorised persons for both parties;
- e) If any provision of this Agreement is held to be invalid in any way or unenforceable, the remaining provisions are not in any way affected or impaired and this Agreement must be construed so as to give effect to the intent of the parties as it was originally executed;
- f) Clauses 5, 7, 13, 14, 17, 18 and 19 survive termination of this Agreement.
- g) Upon entering into this Agreement or engaging our services, your contact information (eg. email address/s) may be added to our marketing database. Your information will never be shared with third parties unless required under Clause 17(a). A copy of our Privacy Policy can be provided upon request.

## 21 Amendments

All and any amendments to these terms and conditions must be provided in writing by the Client and signed by an authorised representative of the Designer prior to the commencement of work outlined in the Project Timelines document.



# Terms of Service Agreement

## EXECUTED as an Agreement

### Project Name/Description

Executed for and on behalf of the **Designer**

I/we have read this Terms of Service Agreement and confirm acceptance.

VSD Creative

\_\_\_\_\_  
Print Name

\_\_\_\_\_  
Signature

\_\_\_\_\_  
Date

Executed for an on behalf of the **Client**

### Business/Organisation/Company Name

I/we have read this Terms of Service Agreement and confirm acceptance.

\_\_\_\_\_  
Print Name

\_\_\_\_\_  
Signature

\_\_\_\_\_  
Date

\_\_\_\_\_  
Print Name

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Signature

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Date