

Popomo Designs Pty Ltd Terms of Business

RECITALS

- A. The Client has requested the Designer to provide the services described in the schedule(s) together with all related services on an ongoing basis or for the period set out in the schedule on the terms and conditions set out in this agreement.
- B. The Designer has agreed to provide the services to Client in accordance with the terms set out in this agreement.

Operative Part

The Parties agree that:

1 DEFINITIONS

Agreement means this Agreement, including the Recitals and Schedules, as amended from time to time.

Commencement Date means the date stated in Schedule 1;

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 Schedule 1;

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

Parties means the Designer and the Client.

Schedules means any Schedule attached to this Agreement.

Services means the services to be performed by the Designer set out in Schedule 2;

Works means the works to be created by the Designer and assigned to the Client as set out in Schedule 2.

2 INTERPRETATION

In this Agreement, unless the context otherwise requires:

- (a) the singular includes the plural and vice versa, and 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, schedule or annexure is a reference to a clause or paragraph of, or schedule or annexure to, this Agreement, and a reference to this Agreement includes its schedules 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 word “including” is not a word of limitation and means ‘including without limitation’; and

(n) the Background forms part of this Agreement.

3 TERMS OF AGREEMENT

(a) This Agreement commences on the Commencement Date and continues on an ongoing basis until the Designer completes the Services or this Agreement is terminated in accordance with clauses 17 or 18.

4 REMUNERATION

(a) In consideration for the Designer providing the Services the Client will pay the Designer all fees in the manner set out in Schedule 1.

(b) Where Schedule 1 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.

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:

(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 or assigned 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 license or assign to the Client copyright in the Works, limited to the purpose and media described in the Services set out in Schedule 2. An assignment of copyright will only be granted if the Designer provides this in writing as set out in Schedule 2.
- (d) In all other respects, the Designer retains copyright and all other intellectual property and moral rights (including the right of adaptation) in the Works.

6 SELF- PROMOTION BY DESIGNER

The Designer retains the right to use and reproduce the Works for the purposes of:

- (a) promoting the Designer's skills and services, including by entering the Works in competitions or design publications relating to professional quality and recognition in the Designer's industry; and
- (b) display of the Works in the Designer's portfolio of work, including for the purpose of soliciting new work from third parties.

7 MORAL RIGHTS

- (a) 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 AND IMAGES

- (a) If, in its provision of the Services, the Designer is required to create or obtain from a third party, an original typeface, photographic image or illustrations for use in the Works, then the Designer or third party retains all rights in relation to that typeface, photographic image or illustration;
- (b) The Designer may, at its discretion, licence or sub-licence any original typeface, photographic image or illustration 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, photographic image or illustration belonging to a third party, then the Client must:
 - (i) pay any license fees to the third party; and
 - (ii) acquire a license to use the typeface, photographic image or illustrations.

9 CLIENTS 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 Schedule 2.

10 ACCEPTANCE

- (a) The Designer will deliver the works to the Client:
 - (i) upon completion of the Works; or
 - (ii) otherwise in accordance with the milestones set out in Schedule 2.
- (b) Following receipt of the Works the Client agrees within 14 days of delivery to examine the Works and to give the Designer notice of acceptance or rejection of the 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 Schedule 1. This clause is subject to Clause 11(b) herein;
- (c) The day upon which the Client gives the Designer notice of acceptance of the Works is deemed to be the Delivery Date;
 - (i) If the client fails to give the designer notice of acceptance within 14 days then the date of acceptance will be deemed to be the day after the expiration of term for acceptance set out in 10(b) above.

11 EXPANSION OR VARIATION 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, but is not limited to:
 - (i) additions to the list of Works;
 - (ii) alterations to text supplied by the Client for use in the Works;

- (iii) additional drafts required in the provision of the Services;
 - (iv) changes to the Client's instructions or the brief;
 - (v) changes to any of the Works after the Delivery Date;
 - (vi) additional consultations; and
 - (vii) conversion, adjustment or manipulation of images;
- (b) Where additional work requested outside of the original scope of the Services, is in the sole and exclusive discretion of the Designer, is considered substantial, then a Schedule of the additional Services and the additional Works may be annexed to this Agreement. 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 "double time" or 100% loading over and above the Designer's ordinary hourly fees as set out in Schedule 1.

12 RETRIEVAL OF WORKS

- (a) The Designer retains electronic archives of completed Works for a period of no longer than 1 year. If the Client requests retrieval and delivery of the Works after the Term has expired, and the Designer provides those services, then the Client must pay the Designer a service charge for those services as set out in Schedule 1;
- (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 DIGITAL COLOUR VARIATION

- (a) The Client acknowledges that digital display monitors vary in how they display colour.
- (b) The Designer accepts no liability whatsoever for colour variation as displayed on digital monitors.
- (c) The Designer recommends that the Client provide Pantone colours so that the designer has a universal standard to follow.

14 PRINT COLOUR VARIATION

- (a) All external printers are different and will read colour differently with a variation

of +/-15%;

- (i) The Client acknowledges that there may be colour variation in printed work and once final approval has been given the Client accepts full responsibility for any colour variation within the range specified in (a) above.
- (b) The Designer accepts no liability whatsoever for colour variation within the range specified in (a) above or for colour variation outside that range for reprints. The Designer recommends that the Client provide CMYK or Pantone breakdowns so that the designer and printer have a universal standard to which colour variation can be kept within the range specified in (a) above.

15 CLIENTS UNDERTAKINGS AND WARRANTIES

By signing this Agreement or instructing the Designer to proceed; 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.

16 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 total compensation received for the scheduled work under this Agreement.

17 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 Schedule 1 and 2 within 14 days of that termination.

18 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 Schedule 1 and 2 within 14 days of the expiry of the period of notice.

19 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 to 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;

20 RELATIONSHIP OF THE 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 Term the Designer may provide, in any capacity, to any third parties, works or services of any description.

21 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 employed contractor of the Designer;
- (b) Clause 21(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 21(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.

22 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 New South Wales 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, 6, 7, 8, 15, 16, 19, 20 and 21 survive termination of this Agreement.
- (g) If the Client requests (either orally or in writing) the Designer to proceed with any work under this Agreement, this will be taken as an acknowledgement and acceptance of this Agreement (even if this Agreement is not signed by the Client), and accordingly this Agreement will be treated as an ongoing Agreement between the parties for any future services provided by the Designer to the Client, and any estimates or fees incurred by the Designer for any future Services or Works will be taken as forming part of this Agreement.

NOTE:

Schedules 1 & 2 are included on each Job Quote/Estimate.