

STANDARD FORM OF AGREEMENT

AGREEMENT BETWEEN CUSTOMER AND SERVICE PROVIDER

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THIS AGREEMENT is made the [date] day of [month] [year].

BETWEEN:

1. [Name], a Department/ agency of the State of New South Wales and having its office at [address], ('Customer')

AND:

2. [Name], a company incorporated in the State of [state] and having its registered office at [place], in the State of [state] ('Service Provider').

RECITALS:

- A. The Customer has requested that the Service Provider provide services to the Customer as provided by a Service Provider in accordance with the Customer's instructions from time to time.
- B. The Service Provider has agreed to serve the Customer as a Service Provider and to provide the Service Provider services on the terms and conditions of this agreement.

THE PARTIES AGREE:

1. Appointment and Term

- 1.1 The Customer appoints the Service Provider to provide the services customarily provided by an Service Provider and listed in Item 1 of the Schedule to this agreement, in connection with the Customer's activities specified in Item 2 of the Schedule to this agreement, in the geographic area specified in Item 3 of the Schedule to this agreement ('the area') and at the rates of remuneration specified in clause 3 of this agreement.
- 1.2 This agreement shall commence on [date] and continue for the period set out in Item 4 of the Schedule to this agreement and thereafter or until such time as this agreement is terminated after that time:
 - (a) by either party given written notice of not less than one (1) month, given so as to expire at any time on or after the period specified in Item 4 of the Schedule (during which period of notice all terms and conditions of this agreement shall continue to apply); or
 - (b) pursuant to clause 12 of this agreement.

2. Relationship

- 2.1 The Service Provider acts as a principal and not as an agent of the Customer in all its dealings with third parties and will be solely responsible for carrying out all its duties under the agreement except where and to the extent that it has obtained the prior written consent of the Customer.

3. Remuneration

- 3.1 For any services, the Service Provider may charge the Customer on the following basis:

- (a) for work done within the Service Provider, shall be charged at an agreed fee or, if no fee is agreed, following an estimate prepared by the Service Provider for the Customer, on the basis of time spent, at the Service Provider's established hourly rates applicable to the Service Provider representatives involved;
- (b) for services obtained outside the Service Provider such as art and design work, production, packaging, sales conference materials and research, such services shall be charged at actual cost;
- (c) the Service Provider shall not be entitled to charge for travel and accommodation charges, courier, postage, telephone or any other out-of-pocket expenses incurred for the Customer's purposes unless as previously agreed with the Customer

4. Terms of Payment

- 4.1 The Service Provider may invoice the Customer only in arrears on the date of each month agreed with the Customer and the Customer shall pay all invoices submitted by the Service Provider within 30 days from the end of the month in which the invoice was submitted.
- 4.2 The Service Provider shall duly credit to the Customer any discounts and/or credits for any and all special arrangements obtained by the Service Provider in connection with the performance of its duties hereunder including without limitation lower media rates.
- 4.3 Payment, in part or in total, of the invoices in accordance with this agreement does not constitute acceptance by the Customer of the Services and does not amount to a waiver of any rights either under this agreement or at law which the Customer may otherwise have at any time against the Service Provider.

5. Service Provider's Undertakings

- 5.1 The Service Provider undertakes as follows:
 - (a) to carry out the general duties of an Service Provider set out in Item 1 of the Schedule to this agreement;
 - (b) to observe the rules, recommendations and guidelines of the Advertising Standards Bureau, the Advertising Standards Board, the Advertising Claims Board, the Federation of Australian Commercial Television Stations, the Federation of Australian Radio Broadcasters, the Australian Competition and Consumer Commission and the Australian Broadcasting Authority and the codes of conduct laid down by those bodies or any other accepted standard of advertising that may be appropriate and will ensure that all services provided under this agreement conform with those bodies and that all advertising placed by it is legal, decent, honest and truthful;
 - (c) to obtain the approval of the Customer to any advertising prepared by the Service Provider and in the case of any television commercial the approval of the Federation of Australian Commercial Television Stations (or any statutory or other body which may hereafter be set up in substitution thereof);
 - (d) to obtain all necessary consents, licences or authorisations required by the Customer, under all relevant legislation of Parliament of the Commonwealth of Australia and all legislation of

Parliament of the State in which the services are provided under this agreement and will ensure that all services provided under this agreement conform therewith;

- (e) to obtain all necessary consents, performance rights, licences or authorisations from all and any third party who has the capacity to give the same in relation to any photograph, drawing or other representation of a living individual or any facsimile signature or any photograph, drawing or other representation of any animal or any inanimate object or for the engagement of any person as artist, model, actor (collectively referred to as the 'artist') or otherwise used for the purposes of providing the services under this agreement, the artist to execute an agreement in a form approved by the Customer's solicitors;
- (f) to ensure that any third party who is identified by name as endorsing the Customer's activities ('the endorser') executes an agreement in a form approved by the Customer or its solicitors verifying the contents of or material contained in any and all advertisements made by the endorser and that the endorser consents to any abridgment, alteration or addition to the content or material contained in any and all advertisements made by the endorser and where the endorser is represented as having particular qualifications or credentials that the representation is true in every respect;
- (g) to the best of its knowledge and ability to guard against any loss the Customer may incur through failure of media or suppliers to properly execute their commitments provided that the Service Provider shall not be responsible for any such failure by media or suppliers;
- (h) to the best of its knowledge and ability to guard against any loss the Customer may incur through loss, damage or destruction other than reasonable deterioration to any negatives, video tapes, photographs or other materials in the possession of suppliers or other third parties and used or to be used for the purpose of providing the Service Provider's services hereunder provided that the Service Provider shall not be responsible for any such loss, damage or destruction to any negatives, video tapes, photographs or other materials in the possession of suppliers or other third parties;
- (i) to indemnify the Customer against any loss the Customer may incur through loss, damage or destruction other than reasonable deterioration to any negatives, video tapes, photographs or other materials in the possession of the Service Provider and used or to be used for the purpose of providing its services under the agreement;
- (j) to procure at no additional cost to the Customer the delivery to the Customer of all material created or related to campaign or program in the possession of the Service Provider or suppliers or other third parties and used or to be used for the purpose of providing its services under the agreement as and when the Customer may request such delivery including without limitation any such material in which the Service Provider may have any right or interest;
- (k) not to undertake any campaign, prepare any communications material or publicity or cause publication of any advertisement or article which would be false, misleading, deceptive, indecent, libellous, defamatory, unlawful or otherwise prejudicial to the Customer's interests;
- (l) to adhere to and comply with the Customer's trade mark and/or copyright standards and policies which are in effect from time to time.

- 5.2 Before entering into any binding obligation with any third party the Service Provider must submit to the Customer for written approval full details of all services and related costs which it proposes to incur on the Customer's behalf. The Service Provider will not enter into any such binding obligation unless and until it has the prior written approval of the Customer.
- 5.3 The Service Provider represents and warrants that no conflict of interest exists or is likely to arise in the performance of the Services at the date of this agreement.
- 5.4 The Service Provider warrants and undertakes to notify the Customer, in writing, immediately upon becoming aware of the existence, or possibility, of a conflict of interest. On receipt of such notice the Customer may approve the Service Provider undertaking any work which the Principal considers might give rise to a conflict of interest or refuse to approve whereby the Service Provider will refrain from undertaking any such work. The Principal may thereupon exercise its rights of termination under this agreement. Failure by the Service Provider to adhere to the provisions of this clause will give rise to a ground for termination pursuant to clause 12 without prejudice to any accrued rights or remedies of the Principal.
- 5.5 The Service Provider warrants and undertakes not to, at any time, breach or infringe any Intellectual Property rights of the Customer or of any other person whether in the course of providing the Services or otherwise. Without limiting the generality of clause 9, the Service Provider agrees to indemnify and keep indemnified and to hold harmless and defend the Customer (which term includes in this clause, its officers, employees and agents) from and against any actions, claims, proceedings, demands, costs, expenses, losses and damages brought against or made upon the Customer, arising from or incurred by reason of or in connection with an infringement or alleged infringement of any Intellectual Property rights and hereby agrees to release and discharge the Customer from any such actions, claims, proceedings or demands. The Service Provider acknowledges that the Customer may take legal proceedings including but not limited to injunctive proceedings against the Service Provider if there is any actual, threatened or suspected breach of this clause. The Service Provider acknowledges that, in the event of a breach of this clause, the Customer may terminate the agreement in accordance with clause 12 of this agreement without prejudice to any accrued rights or remedies of the Customer.

6. Indemnity and Insurance

- 6.1 Indemnity
- Without limiting the generality of clause 5.1(i) of this agreement, the Service Provider must indemnify and hold the Customer harmless from and against any and all claims, demands, regulatory proceedings and/or causes of action, and all damages, liabilities, costs (including without limitation settlement costs) or expenses (including without limitation legal fees) arising from:
- (a) any breach by the Service Provider of any of the undertakings, terms or conditions of this agreement;
 - (b) any alleged:
 - (i.) misleading or deceptive conduct;
 - (ii.) infringement of trade mark, copyright, title, slogan, trade indicia or other proprietary rights;
 - (iii.) piracy, counterfeiting, plagiarism, unfair competition or idea misappropriation; or
 - (iv.) invasion of the right of privacy, which is in any way connected with any advertising or other materials covered by this agreement, in connection with advertising or other materials covered by this agreement;

- (c) the preparation or presentation of any advertising or other materials covered by this agreement.
- 6.2 The indemnity in clause 6.1 shall be reduced in so far as any loss arises directly arising from any information or material supplied by the Customer or from the use or consumption of the Customer's products or from any act or thing done on the Customer's specific instructions or with the Customer's specific approval.
- 6.3 The indemnities contemplated by clauses 5 and 6 of this agreement shall survive the termination or expiration of this agreement.
- 6.4 The Service Provider shall not engage any third party to produce or assist in the production of any work or service for the Customer unless and until the third party has executed an agreement in writing with the Service Provider which contains terms similar in effect to those contained in sub-clauses 5.1(b), 5.1(c), 5.1(d), 5.1(e), 5.1(f), 5.1(i), 5.1(l) and clauses 9, 10 and 11 of this agreement and copies of any such agreement must be provided to the Customer.
- 6.5 Insurance
- (a) The Service Provider shall, and shall ensure that any sub-contractors will, arrange and maintain with a reputable insurance company for the term of the agreement:
- i) a public liability policy of insurance to the value of at least \$10 million in respect of each claim;
 - ii) workers' compensation insurance as required by all relevant laws of Australia relating to workers' compensation; and
 - iii) if requested by the Customer, a professional indemnity insurance policy:
 - A. if the Service Provider is a member of an approved scheme under the Professional Standards Act, insurance to the value of the amount prescribed under that scheme; or
 - B. if the Service Provider is not a member of an approved scheme under the Professional Standards Act, insurance to the value of at least \$10 million in respect of each claim.
- b) The Service Provider shall, on request from time to time by the Customer, produce to the Customer, satisfactory evidence of insurance.
- e) The insurances referred to in this clause shall be effective from the start date of this agreement and shall be maintained for the period of the agreement provided however, where applicable, professional indemnity insurance shall, unless the Customer otherwise agrees in writing, be continued to be maintained for a period of one year following the expiration or earlier termination of this agreement.

7. Approvals and Authority

7.1 Approvals

After obtaining the Customer's general approval of a campaign, the Service Provider shall submit to it for specific approval, as appropriate to the Services:

- (a) Including but not limited to copy, layouts, artwork, storyboards and/or scripts, work in progress including office edits, rough cuts, communication strategies;
- (b) informed and accurate estimates of the cost of the various items of the advertising.

7.2 Authority:

- (a) where applicable, the Customer's written approval of copy and layouts authorises the Service Provider to purchase production materials and prepare proofs and the Customer's approval of proofs authorises the Service Provider to publish;
- (b) where applicable, the Customer's approval of television, cinema and radio scripts and/or storyboards, digital content with estimated costs authorises the Service Provider to make production contracts and engage artists and/or endorsers and the Customer's approval of films and recordings authorises the Service Provider to transmit;
- (c) where applicable, the Customer's approval of schedules and estimates authorises the Service Provider to make reservations and contracts for space, time and other facilities under the terms and conditions required by suppliers.

8. Amendments

- 8.1 The Customer may request the Service Provider to change, reject, cancel or stop any and all plans, schedules or work-in-progress and the Service Provider shall take all steps to comply provided that it can do so within its contractual obligations to media, supplies or other third parties.
- 8.2 In the event of any cancellation or amendment by the Customer, the Customer shall reimburse the Service Provider for any charges or expenses to which it is committed and also to pay the fees covering these items provided that the Customer has given prior approval to the charges and expenses which the Service Provider has committed to pay.

9. Copyright and Other Rights

- 9.1 In consideration of the payment by the Customer to the Service Provider of the payments made under this agreement (receipt of which is hereby acknowledged):
 - (a) the Service Provider as beneficial owner assigns to the Customer absolutely and for the full term of the copyright therein all and any copyright in all the world in or arising out of any literary, dramatic, musical or artistic work or in any cinematographic film or sound recording or in any television or sound broadcast or any other work capable of being the subject of copyright including any work commissioned by the Customer or prepared for it by the Service Provider at any time prior to the date of this agreement (the 'copyright work') which is produced by the Service Provider on behalf of the Customer at any time;
 - (b) the Service Provider shall take all such steps and execute all such documents as are necessary to transfer such copyright absolutely for the full term of the copyright to the Customer at no extra cost to the Customer. Where copyright in the copyright work is not already vested in the Service Provider it shall use its best endeavours to ensure that such copyright is transferred to and becomes vested in the Customer;
 - (c) where the production of any copyright work for the Customer will involve making use of any copyright work already in existence ('existing work') the Service Provider shall, prior to commencing such production for the Customer, obtain the necessary licence to use the existing work together with an indemnity from the licensor against any claims or proceedings which may be issued or threatened by any third party against the Service Provider and/or the

Customer for infringement of copyright in respect of the Service Provider's use of the existing work for the purposes of providing its services under this agreement;

- (d) the Service Provider undertakes to ensure that the existing work will be available throughout the life of the advertising campaign in which the existing work is used and negotiate terms for an extension to the campaign if required to do so by the Customer;
- (e) where musical works are used for the purpose of providing the Service Provider's services under this agreement the Service Provider shall give the required notices to copyright owners and pay all royalties as they fall due;
- (f) the Service Provider undertakes to obtain so far as is possible from copyright owners of existing works an undertaking in writing and for valuable consideration that the copyright owner of any such existing copyright does not make use of the same without the Customer's written authority;
- (g) the Service Provider hereby assigns all the future copyright in all the world in all future copyright work to the Customer so that the same shall, on its coming into existence, vest in the Customer absolutely for the full term of the copyright therein;
- (h) the Service Provider undertakes not to make use of any copyright work produced for the Customer whether by the Service Provider or on its behalf or any copies thereof, other than for the purpose of providing its services under the agreement, without the prior written consent of the Customer.

9.2 The assignments referred to in this clause 9 shall not in any way be affected by any disputes between the parties nor by the termination or expiration of this agreement for whatever reason.

9.3 The Service Provider warrants to the Customer that it has obtained all necessary consents from the authors of all copyright works such as to allow the Customer to perform any act which would otherwise constitute an infringement of those authors' moral rights in such copyright works.

10. Ownership of Property

10.1 Any and all communications material and property including, without limitation ideas, designs, concepts, original compositions, artwork, finished advertisements, radio and television commercials, digital content and all trade marks, trade names, brand names, trade symbols, logos, slogans or other trade indicia purchased, prepared or developed in the performance of this agreement (collectively referred to as the 'trade indicia') shall be the absolute property of the Customer and the Service Provider shall not use such property or material in any media without the prior written consent of the Customer PROVIDED THAT nothing in clause 10, shall prevent the use of such property and material by the Service Provider for the purpose of providing its services under this agreement subject to and in accordance with the terms and conditions of this agreement.

10.2 No right is given to use the trade indicia except in connection with the promotion and advertising of the goods of the Customer in a form approved by the Customer without any change or modification by the Service Provider.

10.3 Clauses 10.1 and 10.2 do not grant to the Service Provider any proprietary right or interest in the trade indicia and the Service Provider acknowledges the validity of the Customer's title in and to the trade indicia.

10.4 The Service Provider will promptly bring to the attention of the Customer any improper or wrongful use of any trade indicia of the Customer or of any other rights of the Customer which may come to its notice.

11. Confidentiality

11.1 The Service Provider hereby undertakes:

- (a) to treat as confidential and not to disclose, duplicate, use or permit the use at any time in any way, other than for the purpose of providing its services under the contract, and then only in such a way as shall first have received the express prior written consent of the Customer, and shall protect fully the confidentiality of the information of any confidential or commercially sensitive information of which it may become aware for the purpose of providing its services under this agreement or otherwise ('information') including, without limitation, information concerning or relating to the past, present or contemplated manufacturing process, marketing strategies, internal or external business operations or other information of the Customer or which may either directly or indirectly be relevant to the Customer's business and including also any compilations or otherwise public information in a form not in the public domain;
- (b) to limit the disclosure of the information within its own organisation to those of its officers and employees to whom such disclosure is strictly necessary for the purpose of providing its services under this agreement and to ensure that they are bound by obligations of secrecy in respect of the information equal and like to those contained in this agreement and to use its best endeavours to ensure that such officers and employees abide by such obligations of secrecy;
- (c) to accept full liability and to hold the Customer harmless against all wrongful use, duplication or disclosure of the information contrary to this agreement and to return to the Customer upon termination of this agreement all documents or material of any kind containing or alluding to the information, whether directly or indirectly, together with all copies of such material, whether prepared by the Service Provider or provided by the Customer which are then in its possession or under its control;
- (d) not to use the name of the Customer in publicity releases, advertising or promotion of the Service Provider's services including client lists unless the Customer shall first have given its written consent which shall not be unreasonably withheld;
- (e) that all the obligations set out in the preceding sub-clauses of clause 11, will apply at all times both during and after the termination of this agreement.

12. Termination

12.1 In addition to any other rights it has under this agreement and without in any way limiting any right of termination the Customer has or may have at common law or otherwise, the Customer may terminate this agreement in whole or in part at any time during the term without incurring any liability, by notifying the Service Provider in writing that this agreement or a part of this agreement is terminated from the date specified in the notice (which date will not be a date earlier than the date on which the notice is received by the Service Provider), and in that event, the Customer may give to the Service Provider such directions as it thinks fit in relation to subsequent performance of this agreement. The Service Provider will immediately comply with any directions given under clause 12.1 and will do everything possible to mitigate any losses arising in consequence of termination of this agreement under this clause. Termination pursuant to clause

12.1 will not expose the Customer to any liability for any claim for damages whether direct, indirect, special or consequential by reason of such termination and the Customer will pay fees for services rendered up until the date specified in the notice of termination.

- 12.2 The Customer may terminate the agreement in the event of a breach by the Service Provider of this agreement which is not rectified by the Service Provider within thirty (30) days of receipt of a written notice by the Customer relying on such breach to terminate the agreement, or in the event the Service Provider attempts to assign any of its rights or obligations hereunder (other than any delegation of its obligations to recognised suppliers producing work under the supervision of the Service Provider) or in the event the Service Provider merges with or is acquired by another agency or in the event the Service Provider becomes insolvent or any insolvency proceedings are instituted by or against it.
- 12.3 The rights, duties and responsibilities of the Service Provider and the Customer will continue in full force and effect during any period of notice given pursuant to 12.1 of this agreement.
- 12.4 Upon termination of this agreement, the Service Provider will transfer to the Customer, all property and materials in its possession or control paid for by the Customer and all contracts and reservations for time, space, talent and other advertising adjuncts entered into by the Service Provider for the Customer at no cost to the Customer.
- 12.5 The Customer agrees to reimburse the Service Provider for production costs (plus the agreed service fee of [percentage]) of any incomplete work previously authorised by the Customer and the Customer will have the right to complete and use such material and ideas in its future advertising.
- 12.6 Any uncancellable contract made on the instructions of the Customer and still existing at the expiration of the notice of termination shall be carried to completion by the Service Provider and paid for unless mutually agreed in writing to the contrary, in accordance with the provisions set out in this agreement.
- 12.7 Subject to the provisions of this agreement the rights, duties and responsibilities of the Service Provider shall cease from the date of expiration of notice of termination.

13. Rejection of Services

- 13.1 The Customer will inspect and approve the Services provided by the Service Provider and will give notice to the Service Provider as to any Services which the Customer deems to be Deficient Services and the Customer may deduct from the invoiced amount a sum which pro rata reflects the cost charged with regard to such Deficient Services. In any other case the Service Provider must reimburse the Customer to the value of Deficient Services already paid by the Customer.
- 13.2 If the Customer has not inspected or approved the Services at the time of payment and subsequently discovers Deficient Services, the Service Provider will compensate the Customer by reimbursing it the sum calculated on a pro rata basis to reflect the cost of such Deficient Services ("the reimbursable sum").
- 13.3 The Service Provider acknowledges and agrees that for any sum to be repaid to the Customer under this clause the certificate of [insert title of person e.g. Director- General] will be final and conclusive as to amount.
- 13.4 The Service Provider hereby irrevocably authorises the Customer to deduct an amount representing the reimbursable sum referred to in subclause 13.2 from any amount due and owing by the Customer to the Service Provider in payment of the reimbursable sum.
- 13.5 The Service Provider acknowledges and agrees that:
 - (a) upon receipt of a notice in writing from the Customer setting out Deficient Services ("the notice") the Service Provider will rectify the Deficient Services within the time specified by the Customer in the notice at its own cost and expense;

(b) The Customer is entitled to withhold payment to the Service Provider for future Services until the Deficient Services are rectified to the reasonable satisfaction of the Customer and until the reimbursable sum is paid to the Customer by the Service Provider.

13.6 The Service Provider acknowledges and agrees that in no circumstances whatsoever will the Customer be liable to accept the balance of any Deficient Services or Deficient Contract Material as provided or delivered.

14. Notices

14.1 All notices to be served pursuant to the terms of this agreement shall be served personally or shall at the option of the party giving notice be sent by registered prepaid post addressed to the other party at the address of that party mentioned in this agreement and notice shall be deemed to have been given on the date it is posted.

15. Governing law

15.1 The agreement shall be governed by and construed in accordance with the laws for the time being in force in the State of New South Wales.

16. Severability

16.1 If any part of this agreement is found to be invalid or of no force or effect under any applicable laws, executive orders or regulations of any government authority having jurisdiction, this agreement shall be construed as though such part had not been inserted herein and the remainder of this agreement shall retain its full force and effect.

17. GST

17.1 If GST is payable on any supply under this agreement, the fee payable for the supply will be considered exclusive of GST. Unless the parties otherwise agree in writing, the party receiving the supply undertakes to pay the supplying party the amount of such GST in addition to any fee for that supply of the time the fee is payable or at such later time when the amount of the GST becomes known, subject to the supplying party issuing a valid tax invoice to the party receiving the supply in accordance with the relevant GST legislation.

18. Disclosure of Details of Customer Contracts With the Private Sector

18.1 The Service Provider acknowledges that the Customer may be required to publish certain information concerning this agreement in accordance with ss 27 - 35 of the Government Information (Public Access) Act 2009 (NSW), Premier's Memorandum 2007-01 and the NSW Government Tendering Guidelines, available at:

<http://www.procurepoint.nsw.gov.au/policies/nsw-government-procurement-information>

18.2 If the Service Provider reasonably believes that any part of this agreement contains information which is commercial-in-confidence or could reasonably be expected to affect public safety or security, then the Service Provider should immediately advise the Customer in writing, identifying the provisions and providing reasons so that the Customer may consider seeking to exempt those provisions from publication.

EXECUTED AS AN AGREEMENT

SIGNED by [*name of Customer*])
by its authorised officer)
)
in the presence of)

.....
[*Signature of Witness*]

.....
[*Authorised Officer*]

SIGNED by [*name of Service Provider*])
by its authorised officer)
)
in the presence of)

.....
[*Authorised Officer*]

.....
[*Authorised Officer*]

Schedule

Item 1

The services to be provided by the Service Provider include:

- (a)
- (b)
- (c)
- (d)
- (e)
- (f)
- (g)

Item 2

Activities of the Customer

Item 3

Geographic area of the agreement

Item 4

Period of agreement

Item 5

Agreed costs