

Propeller Marketing Terms & Conditions of Service

1. Definitions and Interpretation

(a) In these Terms and Conditions the following terms shall have the following meanings:

Agency means Propeller Marketing (a division of HC Marketing Group Pty Ltd, ABN 42 919 023 401), of Unit 8, 11-15 Rocklea Drive, Port Melbourne, VIC., 3207

Business Day means a day which is not a Saturday, Sunday or public holiday in the State of Victoria.

Client means the individual/company listed in the Services Quote.

Client Material means all facts, materials, documents and information including price and product information, offer conditions, performance claims, product claims, research data, sales data and supporting material provided to the Agency by or on behalf of the Client.

Commencement Date means the date set out in the Services Quote.

Confidential Information means any and all information of a confidential nature which is obtained by one party in relation to the other party in connection with these Terms and Conditions including without limitation any strategies, concepts, budgets, trading terms, plans, projections, methods, processes, systems, know how, trade secrets, computer software and programs, research data, client lists, intellectual property, business or financial information, employee, customer, financier or supplier information, or any dealings, transactions, affairs or any other information in any form.

Force Majeure means any act of God, war (declared or undeclared), blockade, explosion, sabotage, riot, insurrection, civil commotion, national emergency, strikes, lock-outs or other industrial disturbance or interference with work, accidents, uncontrollable transportation delays or delays in the provision of goods, communications or network failure, government or quasi-government restraint, delays in the obtaining of government or quasi-government approvals/licences/permits/allocations (as required) or the effect of any applicable laws, orders, rules or regulations, and any other matters beyond the reasonable control of the party claiming force majeure.

Intellectual Property Rights means any and all intellectual property rights worldwide, subsisting whether now or in the future, including designs, copyright, registered and unregistered trade marks and service marks including names and logos, patents, inventions, trade secrets, moral rights, trade, business or company names or other intellectual property rights, or any rights to registration of such rights.

Merchandise means any goods, products or merchandise provided by the Agency to the Client in conjunction with the Services, as set out in the Services Quote.

Pre Existing Works means materials, property, tools, templates, methodologies, reports and systems that are already owned or used by, the Agency prior to providing the Services for the Client, or subsequently created, developed, owned or used by the Agency other than in the course of providing the Services for the Client, and that are used by the Agency in providing the Services.

Services means the services set out in the Services Quote.

Term means the period set out in the Services Quote.

Terms and Conditions means these **Terms and Conditions of Service**.

Third Party Merchandise means merchandise supplied to the Agency by a third party.

Third Party Works means any Works produced, developed, created or owned by a third party including without limitation subcontractors, agencies, freelancers, photographers, stock libraries, media proprietors, artists, musicians, record labels or film studios.



Works means any materials and/or property produced, developed or created on behalf of the Client pursuant to these Terms and Conditions including designs, concepts, artwork, brands, names, slogans, logos, advertisements, campaign materials, films, graphics, images, layouts, proposals, storyboards, scripts, or other works.

- (i) The following rules of interpretation apply in these Terms and Conditions, unless the context requires otherwise:
 - i. Headings are for convenience only and do not affect interpretation.
 - ii. The singular includes the plural and vice versa.
 - iii. Where a word or phrase is defined, its other grammatical forms have a corresponding meaning.
 - iv. A reference to a person includes a body corporate.
 - v. A reference to currency, \$ or dollars is to Australian currency (unless stipulated otherwise).
 - vi. A reference to these Terms and Conditions includes any schedules and annexures.
 - vii. A reference to a document includes the document as modified from time to time (and any document replacing it).
 - viii. Wherever 'include' or any form of that word is used it must be construed as meaning 'including but not limited to'

1. Services

- (a) The Client wishes to appoint the Agency to provide selected advertising, marketing and/or promotional services (as set out in the Services Quote).
- (b) By appointing the Agency to provide selected advertising, marketing and/or promotional services (as set out in the Services Quote), the Client agrees to these Terms and Conditions.
- (c) The Agency agrees that it will perform the Services with the degree of skill, care and diligence expected of a service provider experienced in performing similar services.

2. The Term

- (a) These Terms and Conditions shall commence on the Commencement Date and shall continue for the Term, subject to the termination provisions below.

3. Payment

- (a) The Agency will supply the Client with a written quote, setting out the Services requested by the Client and all monies payable by the Client to the Agency for the provision of such Services ("Services Quote"). The Services Quote will be provided to the Client once the Agency has been fully briefed by the Client with regard to the required Services.
- (b) The Services Quote must be completed, signed and returned to the Agency by the date set out in the Services Quote. In the event that the Services Quote is not completed, signed and returned to the Agency by this date, the fees outlined in the Services Quote cannot be guaranteed by the Agency.
- (c) The Client will be required to pay the Agency: (a) the security deposit ("Security Deposit") and the services fee ("Services Fee") (as specified in the Services Quote). The Services Quote will stipulate the date by which the Security Deposit and the Services Fee are payable.
- (d) Payment of the Security Deposit is deemed approval for the Agency to proceed with the Services.
- (e) The Security Deposit and the Services Fee can be paid in any of the following ways:
 - i. direct bank transfer;
 - ii. credit card, bank card, VISA or MasterCard; or
 - iii. cheque.

If payment is made via credit card, bank card, VISA or MasterCard, a surcharge may be incurred on top of the Security Deposit/Services Fee.

If payment is made via cheque, the cheque must be received by the Agency no later than seven (7) working days before the final date that payment is required.

- (f) Unless expressly stated in the Services Quote, the Security Deposit and the Services Fee are exclusive of any Goods and Services Tax ("GST") payable. In the event that GST is payable, the Client must pay the GST in addition to the Security Deposit or the Services Fee (and at the same time the Security Deposit or Services Fee is paid, as applicable).



- (g) All payments must be made in accordance with any additional conditions outlined in the Services Quote.
- (h) In the event that the scope, nature or extent of the Services vary once the Services Quote has been completed, signed and returned to the Agency, the Agency reserves the right to adjust the Security Deposit and/or the Services Fee payable. In this instance, any additional fees payable must be paid by the Client by the date stipulated by the Agency.
- (i) In the event that any special or discounted rate applies to any Services provided by the Agency, such special or discounted rate shall only apply to the Services outlined in the Services Quote (and shall not extend to any additional Services performed by the Agency, unless otherwise stipulated).
- (j) In the event that the Client fails to make any payment, the Agency may:
 - i. Suspend the performance of the Services until all payments due and payable are paid in full; and
 - ii. Charge interest on any payments owing at the rate equal to the prevailing rate fixed by the *Penalty Interest Rate Act 1983* (VIC), which shall be calculated from the date upon which the payment becomes due and payable (until payment is made).
- (k) In the event that the Agency suspends performance of the Services as a result of failure to pay by the Client, all applicable fees will still remain payable by the Client.
- (l) In the case that the Client is engaging the Agency for the first time, the Client will be required to complete the Credit Application Form, as provided by the Agency. In no circumstances shall the Agency be required to offer credit to the Client at any time.

4. Outsourcing to Third Parties

- (a) The Agency reserves the right to engage or employ any sub-contractor or agent or alternative supplier in order to provide the Services (or any part thereof) without the prior written consent of the Client.
- (b) In the event that the Agency does engage or employ any sub-contractor or agent or alternative supplier in order to provide the Services (or any part thereof) the Agency shall not be relieved of its obligations under these Terms and Conditions.

5. Merchandise

- (a) In some instances, the Agency will be required to source and supply to the Client Merchandise as part of the Services.
- (b) The Agency will procure the Merchandise required by the Client, the quantity and product details of which will be set out in the Services Quote.
- (c) In the event that Merchandise is supplied by the Agency to the Client, title to such Merchandise will only pass to the Client when the Security Deposit and the Services Fee (and any other applicable fee/s) have been paid in full by the Client (even in the event that the Merchandise become a fixture of the Client's premises).
- (d) Until the time that the Security Deposit and the Services Fee (and any other applicable fee/s) have been paid in full by the Client, the Client acknowledges that it:
 - i. holds the Merchandise as a bailee for the Agency;
 - ii. owes the Agency the duties and liabilities of a bailee; and
 - iii. agrees that this bailment continues until the Security Deposit and the Services Fee (and any other applicable fee/s) have been paid in full by the Client.
- (e) In the instance that the Client is holding the Merchandise as a bailee for the Agency, the Client agrees to keep all Merchandise stored in a manner that enables the Merchandise to be identified as belonging to the Agency and distinguished from the goods and/or merchandise of the Client.
- (f) The Agency reserves the following rights in relation to any Merchandise supplied to the Client until the time that the Security Deposit and the Services Fee (and any other applicable fee/s) have been paid in full by the Client:
 - i. ownership of and title to the Merchandise;
 - ii. the right to enter the Client's premises (or the premises of any associated company or agent of the Client where the Merchandise is located) without liability for trespass or any resulting damage in order to retake possession of the Merchandise; and
 - iii. to keep or resell any repossessed Merchandise.
- (g) Notwithstanding anything in this Clause 6, the Agency reserves the right to maintain any action against the Client for any monies owing and recover any costs incurred in retaking possession of any Merchandise or recovering of any monies.
- (h) Risk in any Merchandise passes to the Client when the Merchandise is delivered to the Client.
- (i) The Client must insure and indemnify the Agency against any loss arising from theft or damage (including accidental damage) to the Merchandise from the time that the Merchandise is delivered to the Client until the time that the Security Deposit and the Services Fee (and any other applicable fee/s) are paid in full.



- (j) In the case that the Agency provides the Client with Third Party Merchandise, the only guarantee accompanying such Third Party Merchandise will be the guarantee of the manufacturer.
- (k) In the event that any Third Party Merchandise comes with a warranty from the manufacturer, upon written request by the Client, the Agency will, where possible, assign that warranty to the Client (except in the case that any error, flaw, defect or fault in the appearance or functionality of the Third Party Merchandise was caused by a mistake, misrepresentation or non-disclosure of the Client).
- (l) Except as otherwise provided for in these Terms and Conditions, all express and implied warranties, guarantees and conditions under statute or general law that relate to any Merchandise (including any Third Party Merchandise) or Services as to merchantability, description, quality, suitability or fitness for purpose or as to design, assembly, installation, materials or workmanship or otherwise are to the maximum extent permitted by law, expressly excluded.
- (m) All descriptions, specifications, illustrations, drawings, data, dimensions and weights provided by the Agency or otherwise contained in any other material are approximately only and intended to give a general description of the Merchandise in question. Any such material does not form part of these Terms and Conditions (or the description of the Merchandise outlined in the Services Quote).

6. Cancellations and Amendments

- (a) The Client may request that the Agency cancel, amend, revise or stop any or all of the Services. Any such request must be made in writing and in accordance with clause 18(l). The Agency shall take all reasonable steps to comply with any such request to the extent that the Agency can do so within its contractual obligations to media, suppliers or other third parties.
- (b) In the event of any such cancellation or amendment, the Client shall reimburse the Agency for any charges or expenses to which the Agency has committed, and shall pay the fees for work done up to the time of such cancellation or amendment, by the date notified by the Agency. The Client shall indemnify the Agency against each claim incurred or suffered by or brought or made or recovered against the Agency which arises as a result of or in connection with the Agency acting in accordance with the Client's original instructions until receipt of the notice under Clause 7(a) (and as a result of acting in accordance with such notice).
- (c) In the event that the Client requests that the Agency cancel, amend, revise or stop any or all of the Services, any Security Deposit paid will be forfeited by the Client (notwithstanding any fees payable by the Client under Clause 7(b) above).

7. Insurance

- (a) The Client will be required to take out insurance policies in the manner required by the Agency (and for the amount of cover required by the Agency) in the event that such a request is made by the Agency.

8. Intellectual Property

- (a) Subject to this Clause 9 and to the extent permitted by law, the Agency agrees to assign to the Client all right title and interest in any Intellectual Property Rights in respect of any Works created by the Agency for the Client pursuant to these Terms and Conditions, upon payment of the applicable Security Deposit and Services Fee (and any other applicable fee/s) relating to such Works. The Agency agrees to execute all documents and do all things necessary to give full effect to the assignments in this clause.
- (b) The Client acknowledges that the Agency can only assign such Intellectual Property Rights which the Agency owns. The Client acknowledges that in providing the Services it may be required or appropriate to use Third Party Works including without limitation photography, stock images, film footage, illustrations, art or music. It may not be possible to secure full assignments of Intellectual Property Rights for these Third Party Works and there may be limitations and special circumstances that exist with respect to the use and ownership of these Third Party Works. Accordingly, in the event that the Agency cannot assign the Client Intellectual Property Rights in Third Party Works:
 - i. The Agency must obtain a license for the Client to use the Third Party Works for such purposes and on such terms as may be negotiated;
 - ii. any fees associated with such assignment or license will be borne by the Client, subject to prior written approval; and
 - iii. the Client will comply with any limitations on use of the Third Party Works, as specified by the Agency (or the owner of the Third Party Works).
- (c) The parties acknowledge that in providing the Services, the Agency may use Pre Existing Works. The Client agrees that any Intellectual Property Rights in the Pre Existing Works are owned by the Agency and no ownership is vested in the Client in such Pre Existing Works at any time.



- (d) The Agency expressly retains all right, title and interest in any source or HTML code, make-up files and proprietary software used by the Agency or its contractors and agents in providing the Services. The Client acknowledges and agrees that it must not copy, reproduce, republish, transmit, reverse engineer or otherwise access or use such source or HTML code, make-up files and proprietary software without the express prior written consent of the Agency.
- (e) In the event that intellectual property is developed by an employee of the Agency in conjunction with the Services, the Agency will procure from that employee unconditional consent to allow the Client (and its licensees) to do (or omit to do) anything in respect of such intellectual property, which would, but for the consent, infringe the moral right of the creator. In the event of any Third Party Works, the Agency will negotiate such consents as are reasonable from time to time in relation to moral rights (after consultation with the Client).
- (f) The Client acknowledges that in the event that any presentations, submissions and/or creative concepts presented to the Client by the Agency and not accepted or adopted by the Client, all copyright subsisting in such material will remain owned by the Agency, and any original ideas or concepts relating to such material will remain the Confidential Information of the Agency.
- (g) The Client hereby agrees that the Agency may use the Works for self promotional purposes including without limitation in show reels, portfolio, industry or agency internet material, award or competition submissions, internal training and historical archive.
- (h) The Client also agrees that the Agency may use its name, trade marks, images or likenesses for its own advertising, marketing and promotional purposes at any time.

9. Confidential Information

- (a) Each party will ensure that any Confidential Information relating to the other party is treated as strictly confidential, and is not used or disclosed to any other person, other than:
 - i. persons strictly requiring the information for purposes contemplated by these Terms and Conditions;
 - ii. with the other party's consent;
 - iii. as required by law;
 - iv. when providing the Confidential Information to that party's professional advisers in confidence; or
 - v. where the information is generally or publicly available other than through a breach of these Terms and Conditions.
- (b) The obligations of confidentiality set out in these Terms and Conditions shall survive termination of these Terms and Conditions or completion of the Services by the Agency.

10. Privacy

- (a) Each party must comply with the *Privacy Act 1988* (as amended by the *Privacy Amendment (Private Sector) Act 2000*), and any other applicable laws and codes dealing with privacy, in relation to any personal information:
 - i. collected, handled, used for or disclosed to the other party in performing obligations in these Terms and Conditions; or
 - ii. used in any Works produced under these Terms and Conditions.

11. Warranties and Acknowledgements

- (a) The Client represents and warrants that it has exercised independent skill and judgement and has carried out its own investigations in its decision to acquire the Services.
- (b) The Client represents and warrants that it has not relied on any advice, promise or representation made by the Agency which has not been expressly included in these Terms and Conditions.
- (c) The Client represents and warrants that the Client Material is true, accurate, complete, not misleading, capable of substantiation, not in breach of any third party rights and complies with any applicable laws, regulations or codes and will not cause the Agency to breach any applicable law, regulation or code.
- (d) The Client must respond fully and accurately to all reasonable requests by the Agency for further information or materials as required by the Agency in providing the Services.
- (e) By approving any advertising material and other Works which the Agency provides to the Client, the Client represents and warrants that:
 - i. each element in the advertisement is true, accurate, complete, not misleading and can be substantiated; and
 - ii. the information in the advertisement including the claims made complies with any applicable laws, regulations and codes.



12. Indemnity

- (a) The Client will indemnify the Agency against any and all claims, demands, regulatory proceedings or causes of action, and all damages, liabilities, fines, costs or expenses associated therewith (including legal fees) arising from or relating to:
 - i. the Agency complying with, obeying or acting in accordance with express directions or instructions issued or provided by the Client in connection with these Terms and Conditions and the provision of the Services;
 - ii. the Client Material; or
 - iii. a material breach of these Terms and Conditions or a negligent act or omission by the Client.
- (b) The Agency will indemnify the Client against any and all claims, demands, regulatory proceedings or causes of action, and all damages, liabilities, fines, costs or expenses associated therewith (including legal fees) arising from or relating to a material breach of these Terms and Conditions or a negligent act or omission by the Agency.

13. Legal Liability

- (a) Nothing in this Clause 14 is to be read as excluding, restricting or modifying the application of any legislation which, by law, cannot be excluded, restricted or modified. To the maximum extent permitted by law, any representation, warranty, condition or undertaking which (but for this clause) would be implied in these Terms and Conditions by law, is excluded.
- (b) The Agency shall not be responsible or liable for failure to perform any Services or for any other consequences, which arise directly or indirectly in connection with or as a result of any delay, act or omission of or by or on behalf of the Client.
- (c) The Agency shall not be liable in any circumstances for any indirect, special, economic or consequential loss or damage suffered by the Client or any other entity including without limitation business interruption, loss of income, loss of profits, indirect costs, loss of business, loss of goodwill or data or loss of anticipated savings arising directly or indirectly out of these Terms and Conditions or the performance of the Services by the Agency.
- (d) The Agency shall not be liable for any error, law or fault in any Merchandise (including Third Party Merchandise) provided (or the appearance or functionality of any such Merchandise, including Third Party Merchandise, provided) which is caused as a result of any misinformation, mistake, misrepresentation or non-disclosure of the Client at any time.
- (e) If, due to a Force Majeure event, the Agency is unable to wholly or partly provide the Services, the Agency will be excused from carrying out the Services insofar as the provision of the Services is affected by the Force Majeure event and the Agency may, at its option, terminate these Terms and Conditions and the agreement between the parties.
- (f) To the maximum extent permitted by law, the Agency shall not be liable to the Client for any claim which might arise directly or indirectly out of these Terms and Conditions, tort, statute or otherwise including as a result of:
 - i. any act or omission beyond the Agency's reasonable control; or
 - ii. any act, omission or default or misrepresentation of the Agency (or its employees, agents or contractors), whether negligent or otherwise.
- (g) The Agency's liability for any breach of a non-excludable condition or warranty implied by the Competition and Consumer Act 2010 (Cth) in relation to the Services is limited, at the Agency's option, to:
 - i. in the case of Merchandise (including Third Party Merchandise), replacing, repairing or paying the cost of replacing or repairing the Merchandise;
 - ii. in the case of services, supplying the services again or paying the cost of having the services supplied again.
- (h) To the extent permitted by law and subject to these Terms and Conditions, the Agency's maximum aggregate liability in relation to all claims arising out of the performance of the Services (including liability for breach in negligence or in tort or for any other common law or statutory action) is limited to the total fees paid by the Client to the Agency.

14. Termination

- (a) The Agency reserves the right to terminate these Terms and Conditions and the agreement between the parties by notice in writing to the Client in the event that the Client:
 - i. enters into any composition or arrangement with its creditors or has a receiver appointed over any of its assets or, in the event that the Client is the subject of any resolution or petition for winding up or judicial management (other than for the purposes of an amalgamation or reconstruction); or

- iii. has committed a breach of these Terms and Conditions and fails to rectify such breach (if the breach is capable of rectifying) within seven (7) days of notification in writing by the Agency, requiring the Client to rectify the breach; or
 - iv. fails to make any payments by the dates set out in the Services Quote (or as otherwise required by the Agency).
- (b) The Agency shall be entitled to all remuneration relating to any Services provided up until the date of termination.
 - (c) In the event of termination, the Security Deposit will be forfeited by the Client (regardless of the level of Services already provided by the Agency up until the point of termination).

15. Accounts and Records

- (a) The Agency shall keep up to date and accurate records and accounts in respect of its Services to the Client. Upon reasonable request by the Client and with reasonable notice, the Agency will produce such accounts and records that relate to the Services to the Client pursuant to these Terms and Conditions.

16. Dispute Resolution

- (a) Except where a party seeks urgent interlocutory relief, if a dispute arises in relation to the rights and obligations of the parties under these Terms and Conditions ("Dispute"), the parties must follow the procedures set out in this clause before escalating the Dispute to litigation or arbitration.
- (b) The dispute resolution procedures in this clause will arise upon a party notifying the other parties in writing providing reasonable details as to the existence and nature of the Dispute and setting out the reasons for its dissatisfaction or claim of breach of these Terms and Conditions ("Dispute Notice").
- (c) The parties must use their best endeavours to settle the Dispute within 10 Business Days after service and receipt of a Dispute Notice. If the Dispute remains unresolved after this time, the respective parties must authorise a person or persons holding the required level of authority to attempt to resolve the Dispute.
- (d) If the Dispute remains unresolved after the procedures outlined above have been completed, the parties agree to use their best endeavours to settle the Dispute by mediation administered by a mediator accredited by lawyers engaged in Alternative Dispute Resolution (LEADR) (unless each party agrees otherwise) on the following basis:
 - i. the parties must use their best endeavours to agree on the appointment of a mediator within 5 Business Days, failing which the parties agree to the Victorian Law Institute appointing the mediator;
 - ii. the costs of the mediation and the mediator will be split equally between the parties to the Dispute;
 - iii. the parties must conduct the mediation as expeditiously as possible; and
 - iv. the mediation will be held in Victoria in accordance with the laws governing these Terms and Conditions.

17. General

- (a) Any provision of these Terms and Conditions which binds more than one person binds all of those persons jointly and each of them individually.
- (b) The relationship between the parties is that of independent contractors and nothing in these Terms and Conditions will be construed as giving rise to the relationship of principal and agent, trustee and beneficiary, joint venturers or partnership.
- (c) A party may not assign its rights under these Terms and Conditions without the consent of the other party, other than as provided for under these Terms and Conditions.
- (d) These Terms and Conditions constitutes the entire agreement of the parties regarding the provision of the Services and any previous agreements, understandings and negotiations on that subject matter cease to have any effect. Each party acknowledges that, except where expressly stated in these Terms and Conditions, it has not relied on any representation, warranty or undertaking of any kind made by or on behalf of the other party in relation to the subject matter of these Terms and Conditions.
- (e) A provision in or right created under these Terms and Conditions may not be waived except in writing signed by the party granting the waiver.
- (f) A failure, delay, relaxation or indulgence by a party in exercising any power or right conferred by these Terms and Conditions does not operate as a waiver of that power or right. A waiver of a breach does not operate as a waiver of any other breach (or the same breach being repeated).
- (g) These Terms and Conditions may not be varied or amended unless in writing and signed by the parties.
- (h) Each indemnity in these Terms and Conditions is a continuing obligation and survives termination of these Terms and Conditions and the agreement between the parties.



- (i) These Terms and Conditions bind and benefit the parties and their respective successors and permitted assigns.
- (j) Any part of these Terms and Conditions which is fully or partly void or unenforceable shall be read down as to give it a valid and enforceable operation (where possible) or otherwise severed to the extent that it is void or unenforceable, and the remainder of these Terms and Conditions continue in force.
- (k) Each party will sign all documents and do everything reasonably required to give effect to any of the transactions contemplated by these Terms and Conditions.
- (l) All notices must be sent in writing to the address of the recipient outlined in the Services Quote or the address last notified by the intended recipient to the sender and delivered or sent by post or fax to that address. A notice is taken to be received if hand delivered, on delivery, if sent by post, 2 Business Days after the date of posting (unless posted from outside Australia, in which case the notice will be taken to have been received within 6 Business Days of the date of posting), and if sent by fax, when the sender's fax system generates a message confirming successful transmission. If delivery, receipt or transmission is not a Business Day or after 4pm on a Business Day, the notice is taken to be received at 9am the next Business Day. Any notices provided by a corporation must be signed by an officer of the corporation or under the common seal of the sender.
- (m) These Terms and Conditions are not to be construed as to the disadvantage of a party because that party was responsible for their preparation.

These Terms and Conditions and the transactions contemplated under these Terms and Conditions are governed by the law in force, in Victoria. Each party submits to the non-exclusive jurisdiction of the Courts of Victoria for determining any dispute concerning these Terms and Conditions or the transactions contemplated by these Terms and Conditions.

