



TERMS AND CONDITIONS

These terms and conditions (**Terms & Conditions**) shall govern the provision of all goods and/or services by BirdBrain. The meaning of capitalized words is given at the end of these Terms & Conditions.

1. TERMS OF AGREEMENT

- 1.1. An Agreement in respect of any Work or proposed Work shall constitute the entire agreement between BirdBrain and the Client in respect of such Work or proposed Work and shall supersede any prior written or oral agreements, arrangements or understanding between the parties relating to such Work or proposed Work.
- 1.2. In the event of any inconsistency in an Agreement between these Terms & Conditions and a relevant Proposal, the terms of the Proposal shall prevail to the extent of the inconsistency.
- 1.3. In the event of any inconsistency between these Terms & Conditions and any terms of trade or ordering customarily adopted by the Client (including the terms of any order form used by the Client) these Terms & Conditions shall prevail.
- 1.4. Any amendment to any part of these Terms & Conditions, a Proposal or a Credit Application must be made in writing.

2. PRICE

- 2.1. Unless otherwise stated in writing, prices for Work or proposed Work contained in any Proposal or Work Instructions are exclusive of GST.
- 2.2. Prices for Work or proposed Work contained in any Proposal or Work Instructions shall be taken to be an estimate unless they are stated to be an quotation.
- 2.3. Prices contained in quotations are valid for 90 days; however BirdBrain may amend a quotation prior to acceptance in the event of any increase in the cost of relevant products or services supplied by third parties.
- 2.4. In the event of any increase in the cost of relevant goods or services supplied by third parties after acceptance of a quotation by the Client BirdBrain may pass that increase on to the Client.
- 2.5. Prices for proposed Work do not include costs of couriers or other third party modes of delivery. Couriers will be used by BirdBrain to deliver Work Product in accordance with its standard practices and these Terms & Conditions. Costs of couriers will be charged to the Client as extras.
- 2.6. Prices for Work or proposed Work do not include labour costs and other costs and expenses incurred by BirdBrain as a result of:
 - (a) Variations; or
 - (b) progress delays for reasons not attributable to BirdBrain.

Unless otherwise agreed in writing, such costs and expenses will be charged to Clients at BirdBrain's then prevailing prices and/or hourly rates in relation to the relevant Work and invoiced at BirdBrain's discretion.

- 2.7. Where a Work Instruction has been given verbally, BirdBrain will use its best endeavours to produce Work Product in accordance with that instruction. However BirdBrain shall not be responsible for any changes required by the Client to such Work Product and such changes shall be deemed to be Variations and chargeable as such.
- 2.8. BirdBrain may outsource to third party suppliers the supply of certain goods or services (for example: photography, printing, advertising and manufacturing). The price charged by BirdBrain to the Client in relation to these goods and/or services may exceed the price of supply negotiated by BirdBrain with the original manufacturer or supplier of the products and/or services.

3. INVOICING AND PAYMENT

- 3.1. Unless otherwise agreed in writing in a relevant Proposal or Work Instruction, BirdBrain may issue invoices to the Client:
 - (a) fortnightly;
 - (b) upon the completion of a relevant item of Work Product; and/or
 - (c) at its discretion in the event the value of the Work then undertaken exceeds the credit limit contained in a Credit Application made by the Client.
- 3.2. Where any invoiced amount is not paid on or before its due date for payment, interest at 5% above the Cash Rate Target specified by the Reserve Bank of Australia from time to time will accrue on the overdue amount. Such accrued interest must be paid by the Client to BirdBrain upon demand by BirdBrain.
- 3.3. The Client shall be responsible for all legal and collection costs of BirdBrain incurred in relation to overdue invoices.

4. TITLE, POSSESSION, DELIVERY AND RISK

- 4.1. Ownership of and title in Work Product remains with BirdBrain until BirdBrain receives payment of all amounts due in respect of that Work Product (notwithstanding any earlier delivery to, or possession by, the Client of such Work Product).
- 4.2. Unless otherwise specified in writing in a relevant Proposal or Work Instruction, or unless BirdBrain has agreed to grant credit terms to a relevant Client, BirdBrain may retain possession of any Work Product until it has received payment in full for such Work Product.
- 4.3. Subject to clause 4.2, in respect of Work Product comprising tangible goods:
 - (a) unless BirdBrain is given notice of an alternative address, such Work Product may, at the Client's expense, be consigned by BirdBrain to a courier (of its choosing, unless the Client gives BirdBrain notice of the Client's designated carrier) for delivery to any address specified for the Client in a Credit Application, Proposal or other Work Instruction; or
 - (b) BirdBrain may notify the Client that such Work Product is available for collection from BirdBrain's premises.
- 4.4. Subject to clause 4.2, in respect of Work Product which does not comprise tangible goods, BirdBrain may notify the Client that such Work Product is complete and available for transmission and/or handover to the Client by appropriate means.
- 4.5. Delivery of any item of Work Product will be deemed to have occurred:

- (a) in the event that clause 4.3(a) applies, when such goods are collected by a carrier from BirdBrain's premises; or
 - (b) in the event that clauses 4.3(b) or 4.4 apply, upon the date upon which the notice is given.
- 4.6. Risk in respect of any item of Work Product passes upon delivery or deemed delivery in accordance with clause 4.5.
- 4.7. In the event that clauses 4.3(b) or 4.4 apply, the Client shall collect and/or accept handover of such Work Product within 7 days of the date of the notice. If the Client does not do so and:
- (a) the Client has paid for the Work Product in full, BirdBrain may: (i) charge the Client a reasonable amount for storage of such Work Product; and (ii) upon the expiry of 60 days after the date of the notice, resell the Work Product or any part of it and pay the proceeds to the Client; or
 - (b) the Client has not paid for the Work Product in full, BirdBrain may: (i) charge the Client a reasonable amount for storage of any such Work Product; and (ii) upon the expiry of 21 days after the date of the notice, resell the Work Product or any part of it and apply the proceeds towards the amount due from the Client.

5. TIME AND QUANTITIES FOR DELIVERY

- 5.1. Delivery of Work Product shall be made in accordance with any relevant provision in any Proposal or Work Instruction or, if there is no such provision, within a reasonable time.
- 5.2. BirdBrain shall not be responsible for delivery delays resulting from Variations or payment delays by the Client.
- 5.3. In the event that the Client requires Work to be undertaken on an expedited basis, BirdBrain will use its best efforts to secure freedom from artwork errors and production/manufacturing problems such as wet ink but cannot warrant that such errors or problems will not occur. Additional costs may apply for overtime being worked or other additional costs or expenses being incurred by BirdBrain to necessitate such expedited Work.
- 5.4. Every endeavour will be made to deliver the correct quantity of printed items, but owing to the difficulty of producing exact printed quantities, an Agreement to produce a given quantity of printed items, irrespective of the number of colours, shall be subject to a margin of 10 percent being allowed for shortages which, on request of the Client and upon verification of the shortage, will be deducted in proportion to the price of those items.

6. CLAIMS

- 6.1. Any claim by the Client relating to the quality, quantity or any other aspect of any Work Product must (subject to any contrary right given to a consumer by the *Australian Consumer Law*) be made in writing within 7 days of collection of the Work Product by, or actual delivery of the Work Product to, the Client.
- 6.2. Any claim by the Client relating to the amount of any invoice or part thereof must be made in writing within 14 days of the invoice date.

7. INTELLECTUAL PROPERTY

- 7.1. The Client warrants that no text or imagery supplied by the Client to BirdBrain for the purposes of Work or proposed Work will breach any law (written or unwritten) or infringe any intellectual property right of any third party or result in BirdBrain otherwise becoming liable to any third party. Without limiting such warranty, BirdBrain may at its absolute discretion refuse to set up, print or deliver any matter which in its opinion may expose BirdBrain or any of its employees or agents to any action, claim, demand, or proceeding whatsoever.
- 7.2. Where the Client has informed BirdBrain of the intended use of Work Product, the Client warrants the accuracy of such information.
- 7.3. BirdBrain will not, in the creation or production of Work Product for the Client, knowingly infringe any other person's intellectual property rights. However BirdBrain does not warrant that anything that it utilizes in the creation or production of Work Product for a client, or embodied in the Work Product created or produced for a Client, does not infringe any other person's intellectual property rights.
- 7.4. Upon receipt by BirdBrain of payment in full for any Work Product BirdBrain shall, upon reasonable request by the Client, enter into any written assignment, or other acknowledgment of the Client's ownership, of copyright in such Work Product sought by the Client (provided that the Client must pay BirdBrain's legal costs, if any, of seeking advice on such assignment or acknowledgment).
- 7.5. Where more than one concept, design or other option has been presented to the Client, options other than that selected by the Client as the final Work Product shall remain the property of BirdBrain unless otherwise agreed in writing. Fees may apply to granting of further usage rights in respect of such concepts and designs.
- 7.6. If Work involves photographs being created by BirdBrain on behalf of the Client, then the Client will own full usage rights for such photographs upon receipt of payment in full for the Work Product in which the photographs were used. If Work involves photographs being commissioned from third parties, then usage rights for such photographs shall be governed by the terms under which those photographs are supplied by the third parties.
- 7.7. If Work involves images sourced from image libraries, then use of those images will be subject to the terms of those image libraries. If BirdBrain informs the Client of the source of such images the Client shall be deemed to be aware of such terms and must comply with them.
- 7.8. Notwithstanding any other provision in these Terms & Conditions, Author Materials used by BirdBrain or its suppliers in creation of Work Product shall remain the sole and exclusive property of BirdBrain or the relevant supplier(s).
- 7.9. Unless otherwise agreed in writing, the Client grants to BirdBrain standard authorship acknowledgement and permission to use its Work Product to promote its services. In relation to digital presentations and web-based systems or sites designed or developed by BirdBrain, the authorship acknowledgement includes hyperlink(s) to BirdBrain's designated website.

8. WEBSITES AND WEB-BASED SYSTEMS

- 8.1. Unless otherwise stated in a relevant Agreement, websites and related systems designed by BirdBrain are transportable and may be moved to another hosting provider upon receipt of full payment for the relevant Work Product. To enable the Client to copy or move a website BirdBrain shall, upon request by the Client, provide in a timely manner either: a digital copy of the complete

website; or FTP access details for the host-server to enable the Client to arrange copying or moving the website.

- 8.2. BirdBrain will make reasonable efforts to propose a hosting plan that is appropriate to the Client's needs as communicated to BirdBrain by the Client in writing. However, it is the Client's responsibility to ensure that any proposed hosting plan is acceptable and appropriate to its needs. BirdBrain is unable to predict exact disk space needs or potential data transfer generated by a website.
- 8.3. Where BirdBrain provides hosting services for a Client, those services are subject to BirdBrain's hosting terms and conditions and acceptable use policy, available on request or online at www.BirdBrain.com.au. Those terms and conditions and policy shall, to the extent of any inconsistency, prevail over these Terms & Conditions.
- 8.4. The Client acknowledges and agrees that BirdBrain is in the business of designing and hosting websites and that BirdBrain will have the right to provide to third parties services which are the same or similar to services provided to the Client and to use or otherwise exploit any Author Materials in providing such services.
- 8.5. Unless otherwise stated in a website proposal, pricing only includes bug-fixes and support for up to 2 months (60days) after the site is live. Any further fixes or support after this time will be charged on an hourly basis. All fixes required as a result of client edits/errors in the CMS will be chargeable.

9. PROOFS AND AUTHORS CORRECTIONS

- 9.1. Any quotation given to the Client involving typesetting and/or imagery is given on the assumption that legible copy and/or images will be supplied (with accents, if applicable, clearly marked). Quotations provide for only one proof and the cost of additional copies will be charged to the Client. The cost of any additions or alterations to the copy, re-arrangements of type, layout, cancelled matter etc. requested by the Client once the finished or manufacturer's proof is submitted will be charged to the Client. No responsibility will be accepted by BirdBrain for errors in Work Product where such errors appeared in proofs approved by the Client. The cost of additional proofs requested by the Client or required by BirdBrain to facilitate approval of a proof without Client/author corrections will be charged to the Client.
- 9.2. Quoted prices include PDF mock-ups or proofs of designs and artwork prior to manufacturing/print production. Mock-ups and proofs of large format items will be scaled down. If hardcopy proofs or mock-ups, or actual-sized proofs are required, then these must be requested and paid for by the Client in addition to quoted prices.
- 9.3. If the Client does not request, or wish to pay or wait for, a digital proof of an item to be manufactured using a digital imaging process, then the Client accepts full responsibility for the cost of reprinting or other manufacturing costs resulting from: design, artwork, tooling, reproduction or manufacturing faults or errors.
- 9.4. The Client acknowledges that due to differences in digital and mechanical colour reproduction methods and differences between colour reproduction on different materials, colours may vary between colour proofs and the final printed item.

10. MATERIALS SUPPLIED BY CLIENTS

- 10.1. All materials (logos, images, text or other material) supplied by the Client must be of a quality and to the specifications required by BirdBrain. Additional costs apply for any additional Work required to be performed to attain such quality or specifications.
- 10.2. BirdBrain and the Client must agree on deadlines for delivery of materials to be supplied by the Client. The Client will be responsible for all costs incurred by BirdBrain in the loss of production time due to such deadlines not being met by the Client or due to the materials supplied not being of a quality or to the specifications required by BirdBrain.
- 10.3. BirdBrain accepts no responsibility for imperfect work caused by defects in or the unsuitability of materials supplied by the Client.
- 10.4. All materials supplied to BirdBrain by or on behalf of the Client (including goods in transit) shall remain at the Client's risk and BirdBrain accepts no liability whatsoever for loss of or damage to such materials.
- 10.5. Where property or materials supplied by the Client are left with BirdBrain after completion of relevant Work, BirdBrain shall be permitted to dispose of them at the expiration of 60 days following the date of completion of such Work and to apply the proceeds, if any, to cover storage costs and payment of the balance to the Client.

11. WARRANTIES AND LIMITS OF LIABILITY

- 11.1. Subject to clause 11.3 and to the maximum extent permissible by law, BirdBrain excludes:
 - (a) all conditions, warranties, duties and rights implied by statute relating to the supply of any goods and services under or in respect of an Agreement or otherwise; and
 - (b) all liability to the Client for any acts or omissions of BirdBrain in tort (including negligence), contract or otherwise resulting in costs, losses, liabilities or damage suffered by the Client.
- 11.2. BirdBrain gives no representation, warranty or guarantee whatsoever as to the success or effectiveness of, or the results that may be achieved by Work Product, including, but not limited to, any branding, marketing, advertising material or web-based solutions that BirdBrain develops for the Client. The Client acknowledges that it is responsible for the content of all Work Product and ensuring that the Work Product and any solutions developed by BirdBrain are adequate and appropriate for its needs.
- 11.3. In the event that the supply of goods and/or services to the Client is a supply of goods or services to a consumer as defined in the *Australian Consumer Law*, nothing contained in these Terms & Conditions excludes, restricts or modifies in relation to such supply of goods and/or services the consumer guarantees provided therein provided that to the extent that the *Australian Consumer Law* permits BirdBrain to limit its liability for a breach of a consumer guarantee, then BirdBrain's liability for such breach will be limited to:
 - (a) in the case of the supply of goods:
 - (i) the replacement of the goods or the supply of equivalent goods;
 - (ii) the repair of the goods;
 - (iii) the payment of the cost of replacing the goods or of acquiring equivalent goods; and/or

- (iv) the payment of the cost of having the goods repaired; and
 - (b) in the case of the supply of services:
 - (i) the supplying of the services again; or
 - (ii) the payment of the cost having the services supplied again.
- 11.4. The exclusions and releases in these Terms & Conditions extend, to the maximum extent permissible by law, to loss of profits or anticipated proceeds from sales or marketing or any other indirect or consequential damage and to economic loss and even if BirdBrain knows such loss or damage is possible or foreseeable.

12. FORCE MAJEURE

Work may be suspended or cancelled by BirdBrain in the event of any strike, lockout, trade dispute, fire, tempest, breakdown, riot, theft, crime, civic disturbances, war, legislation, Act of God, the inability of BirdBrain to procure necessary materials or articles or any other cause beyond the control of BirdBrain and no responsibility will be attached to BirdBrain for any delay, loss or damage occasioned thereby.

13. ELECTRONIC STORAGE

- 13.1. Unless otherwise agreed in writing, BirdBrain shall have no responsibility to archive, store or otherwise maintain a record of Work Product once that Work Product has been delivered to the Client. In the event that, notwithstanding the above, BirdBrain is asked to search for and, if found, re-supply such a record to the Client, BirdBrain will have the right to charge for such services.
- 13.2. If BirdBrain is provided with data on storage devices by the Client, BirdBrain will assume that such storage devices contain duplicate copies of material stored elsewhere and shall accept no responsibility for the loss of data which may occur during the handling of such storage devices.

14. INDEMNITY

The Client shall indemnify and hold BirdBrain harmless from and against, all costs, losses, charges, expenses, liabilities, damages, fees and disbursements (including all reasonable legal costs) paid or incurred by BirdBrain in respect of or incidental to:

- (a) any claim, action, demand or proceeding by any third party in connection with Work undertaken or Work Product created or produced for the Client, including without limitation any alleged infringement of intellectual property rights arising from such Work or Work Product ; and
- (b) the recovery of amounts owed to BirdBrain by the Client.

This indemnity survives termination of this Agreement.

15. NO WAIVER

A waiver by BirdBrain of any provision of these Terms & Conditions shall not operate as a waiver of any other provision of these Terms & Conditions.

16. SEVERABILITY

If any provision in these Terms & Conditions, or if the application of any such provision to any person or circumstances, is invalid or unenforceable, the remaining provisions of these Terms &

Conditions are not affected and each such remaining provision is valid and enforceable to the fullest extent permitted by law.

17. GOVERNING LAW

This Agreement is governed by the laws of Western Australia. The Client submits to the non-exclusive jurisdiction of the courts of Western Australia and any courts which may hear appeals from those courts in respect of any proceedings in connection with this Agreement.

18. DEFINITIONS and INTERPRETATION

18.1. In these Terms & Conditions:

"Agreement" means, in respect of any Work or proposed Work:

- (a) these Terms & Conditions; and
- (b) any applicable Credit Application; and
- (c) either (i) any applicable Proposal; or (ii) any applicable Work Instructions.

"Australian Consumer Law" means, as the context requires, the Australian Consumer Law contained in Schedule 2 of the *Competition and Consumer Act 2010* (Cth) or as adopted in Western Australia by the *Fair Trading Act 2010* (WA).

"Authors Materials" means trade secrets, know-how, methodologies, intellectual property, programming code, templates, processes, systems and digital working-files related to Work undertaken by BirdBrain.

"Client" means:

- (a) where a Proposal has been accepted in writing, the person or entity named as the Client in the written acceptance; or
- (b) where a Proposal has been impliedly accepted, the person or entity to whom the Proposal was addressed; or
- (c) where BirdBrain undertakes Work as a result of Work Instructions given by a person or entity who has signed a Credit Application, the person or entity named on the Credit Application; or
- (d) where BirdBrain undertakes Work as a result of Work Instructions given by a person or entity who has not signed a Credit Application, the person or entity by or on behalf of whom the Work Instructions were given.

"Credit Application" means any application for a credit account made to and accepted by BirdBrain.

"BirdBrain" means Digital Journey Pty Ltd ACN 603 410 699 trading as BirdBrain.

"Proposal" means any document or documents provided by BirdBrain to the Client in respect of proposed Work concerning either or both of:

- (a) the scope; and
- (b) the price

of the proposed Work and either expressly or impliedly accepted by the Client, including any amendments thereto made in writing.

"Variations" means changes to Work Product or proposed Work Product that result from:

- (a) directions which are not included in the relevant Proposal or Work Instructions; or
- (b) changes made (after acceptance of a Proposal by a Client or receipt of Work Instructions by BirdBrain) to project specifications, creative briefs, approved designs, and/or text, content or instructions provided by the Client; or
- (c) assumptions, requirements or preferences not specifically detailed in any Proposal or Work Instructions; or
- (d) poorly prepared content in any specifications, roughs, layouts or samples, given to BirdBrain; or
- (e) omissions, oversights, changes or errors by the Client.

"Work" means any work undertaken by BirdBrain for the Client including but not limited to any step in the production of designs, creative concepts, images, written works, digital artwork, digital files, programming code, printed items and/or manufactured items.

"Work Instruction" means a direction given to BirdBrain to undertake Work for the Client other than by means of provision and acceptance of a Proposal.

"Work Product" means finished designs, creative concepts, images, written works, digital artwork, digital files, programming code, printed items and/or manufactured items created or produced by BirdBrain for a Client (but, for the avoidance of doubt, does not include drafts, interim work, rejected concepts and similar work product not intended to be delivered to the Client).

18.2. Whenever in these Terms & Conditions the term "in writing" is used in respect of:

- (a) an agreement, it means by document signed by BirdBrain and the Client, or by exchange of letter, fax or email or by such other means as are agreed by the parties; or
- (b) notice, it means written notice given by means of letter, fax or email.