

Terms Of Service

1. Acceptance

- a. These Terms of Service apply to and are incorporated into your acquisition of the Services pursuant to the Accepted Proposal and are incorporated into the Agreement of the parties.
- b. You will be taken to have accepted, and will be legally bound by, these Terms of Service if you:
 - i. reply electronically to us confirming that you agree to the proposal for Services provided to you by us;
 - ii. sign the proposal and return it to us electronically or by any other means; and/or
 - iii. provide us with further instructions for the Services after receiving a proposal and a copy of these Terms of Service electronically or by any other means.
- c. These Terms of Service apply to all transactions between Heartbeat Digital Marketing Pty Ltd ABN 64 631 757 134 trading as Heartbeat Digital Marketing (Heartbeat Digital, us, we or our) and you relating to the provision of the Services and constitutes a separate legal agreement in respect of each Accepted Proposal.
- d. We may amend these Terms of Service from time to time, by providing reasonable written notice to you.
- e. You must not enter into an agreement with us for the supply of the Services, and we will be under no obligation to supply the Services, if you do not agree to and accept these Terms of Service or if you do not have authority to act on behalf of any person or body corporate for whom you are acquiring the Services.

2. Basis of engagement

We are a non-exclusive independent contractor to you. Nothing in this Agreement is intended to create an employment or agency relationship between us and you, or any of our employees, agents or contractors and you.

3. Term

For projects:

- a. This Agreement commences on the Commencement Date and continues until the Services under the relevant Accepted Proposal are completed, unless terminated earlier in accordance with these Terms of Service.

For retainers:

- b. This Agreement commences on the Commencement Date and continues indefinitely until terminated in accordance with clause 16.

4. Client Obligations

- a. You must:
 - i. comply with all applicable laws and regulations;
 - ii. co-operate with and provide all assistance and information reasonably required by us;
 - iii. only use the Materials for the purpose of receiving or using the Services from us;
 - iv. give us access to the Client System as reasonably required by us to provide the Services;

- v. ensure that you do not cause or contribute to any matter or circumstance that is likely to give rise to an Infringement Claim;
 - vi. not provide access to the Materials to persons other than you Representatives; and
 - vii. not interfere with our access to the Client System under clause 4(a)(iv).
- b. You acknowledge and agree that our ability to provide the Services to you relies on your reasonable cooperation and assistance. We will not be liable to you if we are not able to provide the Services to you or achieve the timeframes set out in the Accepted Proposal as a direct or indirect result of your failure to cooperate with or assist us. We will use best endeavours to notify you of any expected or anticipated delays in performance of the Services.

5. Heartbeat Digital Marketing' Obligations

We will:

- a. perform our obligations under this Agreement with due care, skill and diligence and ensure that our employees, agents or contractors are appropriately skilled and qualified;
- b. provide the Material in accordance with the Specifications;
- c. (where relevant) upload the Material on the Client System;
- d. perform the Services in accordance with the Specifications, including doing all things necessary or ancillary to the Services and the provision of the Material; and
- e. comply with all applicable laws and regulations.

6. Fees and GST

Fees: In consideration of us providing the Services, you will pay us the Fees in accordance with the Payment Terms.

- a. Invoices
 - i. We will issue you an invoice for the Fees:
 - 1. for projects, in accordance with the Payment Terms or timetable in the Acceptable Proposal; and
 - 2. for retainers, monthly in advance on and from the commencement date of the retainer.
 - ii. Unless otherwise provided, you must pay an invoice within 7 days of the date of the invoice (Due Date).
- b. All deposits for projects are non-refundable.
- c. Expenses
 - i. You must reimburse us any expenses or other costs that we incur on your behalf (such as domain registration or application subscription fees) and as incidental to the Services.
 - ii. Such costs will generally be disclosed in the Accepted Proposal and acceptance of the proposal will also constitute approval of the expenses. Where we have not previously disclosed such costs to you, we will obtain your written approval before we incur any costs.
- d. Disputed fees
 - i. If you dispute any invoice issued under clause 6 a, b or c, you must:
 - 1. notify us of the amount in dispute and the reason for the dispute by the Due Date; and
 - 2. pay any amounts not in dispute.
 - ii. The parties must resolve any dispute under this clause 6.3 in accordance with clause 15.
 - iii. If it is resolved that some or all of the amount in dispute should have been paid by the Due Date, you must pay the amount finally resolved together with interest on that amount calculated in accordance with clause 6.5(a).
- e. Failure to pay

If you do not make payment in accordance with the Payment Terms, we are entitled to do any or all of the following:

- i. charge interest on the outstanding amount at a rate of 10% per annum, accruing daily;
- ii. require you to pay in advance for any Services which have not yet been performed; and
- iii. not perform any further Services.

GST

- a. You acknowledge that the Fees are exclusive of GST.
- b. If GST is payable in respect of a supply made under or in relation to this Agreement, the recipient must pay to the supplier an amount equal to the GST payable on the supply (GST Amount). The GST Amount is payable by the recipient in addition to and at the same time as any consideration for the supply, provided the supplier has given the recipient an invoice.

7. Confidential Information

- a. Protection of Confidential Information. Each party must keep confidential any Confidential Information disclosed to it or made available to it by the other party.
- b. Removal of Confidential Information
At the request of the party to whom the Confidential Information belongs, each party must deliver, erase or destroy all electronic and physical documents in its possession or control that contain Confidential Information.

Return exceptions

If a party must retain the other party's Confidential Information for the purpose of:

- a. complying with any law;
- b. litigation;
- c. internal quality assurance and record-keeping; or
- d. performing its obligations or exercising its rights under this Agreement, it may retain and use it solely for this purpose but must deal with the Confidential Information in accordance with clause 7.2 promptly after it is no longer required for this purpose.

8. Intellectual Property

Background Intellectual Property

- a. Background Intellectual Property will remain the sole property of the owner. Neither party acquires any right, title or interest in or to the Background Intellectual Property of the other party by virtue of this Agreement or the disclosure or use of the Background Intellectual Property in the course of the performance of the Services, other than as expressly set out in this Agreement.
- b. You grant us a royalty free, revocable, worldwide, personal, non-exclusive licence to use, copy, duplicate or print your Background Intellectual Property for the purpose of performing the Services and our obligations under this Agreement, and without the right to re-sell, share or commercially exploit your Background Intellectual Property.
- c. Material retained by Heartbeat Digital Marketing
 - i. Where the Accepted Proposal indicates that we will retain ownership of all Material, then we own all Intellectual Property rights in and to the Material and Heartbeat Digital Marketing' Background Intellectual Property (together, Heartbeat Digital Marketing IP).
- d. We grant you a royalty free, revocable, worldwide, personal, non-exclusive licence, to use, copy, duplicate or print the Heartbeat Digital Marketing IP strictly for the purpose of receiving the Services under this Agreement and without the right to sub-license, transfer, assign, re-sell the Heartbeat Digital Marketing IP.

- e. You must not use, copy, duplicate or print the Heartbeat Digital Marketing IP for any purpose other than that permitted under clause 8.2(b).

Material transferred to you

Where the Accepted Proposal indicates that ownership of the Material will pass to you, then:

- (a) we retain ownership of and title to the Material until all outstanding Fees for the Material have been paid in full by you;
- (b) on full payment of the all outstanding Fees, all rights, title or interest in or to the Material will be transferred to you and we will take all reasonable actions necessary to facilitate the transfer, including providing with you full administration credentials (as applicable); and
- (c) we are not responsible or liable for backing up any Materials after they have been transferred to you.

8.4 Attribution of websites

Where the Materials are a website that we develop for you, you acknowledge and agree that we will include "©Heartbeat Digital Marketing" or "Built by Heartbeat Digital Marketing" with a link to our website at the bottom of the website (Attribution). You must not, in any circumstances, remove or modify the Attribution or engage any third party to remove or modify the Attribution.

8.5 Amendments or updates to Materials after handover

- (a) On and from the transfer of the Material to you in accordance with clause 8.3, we will not be responsible or liable to you or any third parties for any actions, updates or modifications that you take in relation to the Material, or that you engage any third party to take.
- (b) We do not guarantee that the Material will continue to operate if you undertake, or if you engage a third party to undertake, such changes.
- (c) Any further work or changes to the Materials that we are required to take as a result of any action taken by you or a third party after the Materials have been transferred to you will be a separate scope of works and subject to additional fees.

8.6 Use of Materials for marketing and promotional purposes

You grant us a royalty free and irrevocable licence to use any Materials that we develop or provide for you, including any Materials that are transferred to you in accordance with clause 8.3, for marketing and promotional purposes including via our website, portfolio, marketing material, social media channels and any other medium we deem fit without further notice to or consent from you.

9. Warranties

9.1 Mutual warranties

Each party represents and warrants to the other party that during the Term:

- (a) it has full corporate power and authority to enter into, perform and observe its obligations under this Agreement, and that its execution, delivery and performance of this Agreement has been duly and validly authorised by all necessary corporate action; and
- (b) its obligations under this Agreement are valid, binding and enforceable.

9.2 Heartbeat Digital Marketing' warranties to you

We represent and warrant to you that, at all times during the Term:

- (a) to the best of our knowledge, we have the right and power to grant you the licences under this Agreement;
- (b) we, and each of our employees, agents or contractors, has the level of skill, knowledge, experience and ability which may be reasonably expected of a professional organisation or individual, as applicable, experienced in providing services of the type and complexity of the Services;
- (c) to the best of our knowledge and to an extent reasonably expected of the type and complexity of the Services, all Services supplied will be in conformity with the Specifications and will be fit for the purpose explicitly communicated by you and fit for any purpose for which they are commonly acquired; and
- (d) we will do all things reasonably necessary to ensure the Services are completed and the Materials are delivered in accordance with the terms of the Accepted Proposal.

9.3 No warranties in relation to completion or content

- (a) We provide no warranty that any result or objective can or will be achieved or attained at all as a result of the provision of the Services.
- (b) We provide no warranty as to the suitability of the content of the Materials for any purpose other than that specified in the Accepted Proposal, which we may interpret, and apply using its experience, skill and judgment, in order to prepare the Materials and determine the content.

10. Indemnity and Infringement Claim

10.1 Mutual indemnities

Subject to the limitation of liability under clause 17.1, each party (Indemnifying Party) indemnifies the other party (Indemnified Party) and their Representatives against all and any claims (including, but not limited to, reasonable legal costs and defence or settlement costs) directly or indirectly arising out of, or in connection with:

- (a) any fraudulent or unlawful act or omission of the Indemnifying Party or its Representatives;
- (b) any damage to or loss or destruction of real or personal property caused or contributed to by any act or omission of the Indemnifying Party or its Representatives;
- (c) any third-party claim; and
- (d) any Infringement Claim,

except to the extent the loss, damage or cost is caused or contributed to by the to the act or omission of the Indemnified Party or its Representatives.

10.2 Conduct of Infringement Claims

If an Infringement Claim is made:

- (a) the Indemnified Party must promptly notify the Indemnifying Party and provide assistance at the Indemnifying Party's expenses to manage the Infringement Claim, as reasonably requested by the Indemnifying Party; and
- (b) the Indemnifying Party is responsible for and will have the right solely to control the defence and settlement of the Infringement Claim.

11. Subcontracting

We may subcontract any or all of our obligations under this Agreement to a third party at any time, provided that we remain liable for the provision of the Services to you in accordance with this Agreement.

12. Restraint

You must not, at any time during the term of this Agreement and for a period of 12 months from the termination or expiry of this Agreement, either directly or indirectly, approach, canvass, solicit or entice away or attempt to approach, canvass, solicit or entice away any employee, contractor or agent of Heartbeat Digital Marketing.

13. No exclusivity

You acknowledge that you are not, and will at no time be, the exclusive client to Heartbeat Digital Marketing for the kinds of services contemplated by this Agreement and any Accepted Proposal.

14. Force Majeure

- (a) If a Force Majeure Event prevents us from providing the Services, we will provide you a written notice of the Force Majeure Event and the anticipated impact on our performance of the Services.
- (b) If a Force Majeure Event continues for more than 15 business days, either party may terminate the Agreement by written notice to the other without liability for damages of any kind, including for Consequential Loss.

15. Dispute Resolution

- (a) The parties must use reasonable endeavours to resolve any dispute, controversy or claim arising out of, relating to or in connection with the Agreement through negotiation between them.
- (b) If, after 15 business days of the disputing party notifying the other party, the dispute cannot be negotiated between the parties, either party may refer the dispute for arbitration through the Australian Disputes Centre (ADC).

- (c) The arbitration will be conducted in Melbourne, Victoria in accordance with the ADC Rules for Domestic Arbitration operating at the time the dispute is referred to the ADC (the Rules).
- (d) The terms of the Rules are deemed incorporated into this Agreement.
- (e) This clause shall survive termination of the Agreement.

16. Termination

16.1 Termination for convenience

For retainers only, neither party may terminate the Agreement in the Minimum Term. Following the expiry of the Minimum Term, either party may terminate this Agreement in whole or in part at will by giving at least 30 days written notice to the other party.

For projects, either party may cancel or postpone a project in whole or in part at will prior to the commencement of the project, provided that if you cancel or postpone a project with less than 14 days' notice, then you must pay an administration fee of \$250 and reimburse us for any fees that we incur from third parties (including contractors) as a result of the cancellation or postponing. Neither party may terminate or cancel a project for convenience once the project has commenced.

16.2 Termination for cause

Either party may terminate this Agreement by 14 days' written notice if the other party:

- (a) commits a material breach of the Agreement that is not capable of remedy;
- (b) commits a material breach of the Agreement capable of remedy, and does not remedy that breach within 10 business days after receipt of notice of the breach; or
- (c) suffers an Insolvency Event.

16.3 Consequences of termination by you for our default

(a) If you terminate this Agreement under clause 16.2 then, without limiting any other rights, you:

- (i) will not be required to make any payment in respect of Services not yet supplied on the effective date of termination; and
 - (ii) may recover from us all money paid for any Services, or part of a Service, not yet supplied.
- (b) After exercising its rights under clause 16.2, you must pay the net amount outstanding to us for the Services, or part of a Service, supplied on or before the effective date of termination.

16.4 Termination by us for your default

We may immediately terminate this Agreement by notice to you, if:

- (a) you fail to pay one or more undisputed amounts due and payable; and
- (b) we issue a notice to you that it intends to terminate this Agreement pursuant to this clause 16.4 if payment of the outstanding amount, plus interest, is not received within 10 business days of you receiving the notice; and
- (c) you fail to make payment of the outstanding amount plus interest within 10 business days of receiving a notice in accordance with the clause 16.4.

16.5 Consequences of termination by us for your default

If this Agreement is terminated by us under clause 16.1, 16.2 or 16.4, all money owing by you to us under this Agreement, will immediately become due and payable.

16.6 Withholding of Materials

If this Agreement is terminated for any reason, we may withhold delivery or transfer of the Materials to you until all money owing by you to us has been paid in full.

17. Liability and exclusion

17.1 Limitations on liability

To the fullest extent permitted by law, the total liability of a party under or in connection with this Agreement in respect of all claims will not exceed the fees paid or payable for the Services in the 12 months prior to the claim.

17.2 Implied terms

- (a) Subject to clause 17.2(b), any condition or warranty which would otherwise be implied in this Agreement is excluded.
- (b) Pursuant to s64A of the Australian Consumer Law, this clause applies regarding any services that are not of a kind ordinarily acquired for personal, domestic or household use or consumption. Liability for breach of a guarantee conferred by the Australian Consumer Law is limited:
 - (i) to re-supplying the Services; or

(ii) making full payment for the cost of having the services supplied again

17.3 Exclusion of consequential loss

Neither party is liable to the other for any kind of indirect or Consequential Loss or damage, including loss or corruption of the Confidential Information, copies or backups, arising out of or in connection with this Agreement.

17.4 Australian Consumer Law

Nothing in this Agreement is intended to limit or exclude your consumer guarantees under the Australian Consumer Law.

18. General

18.1 Notice

(a) A notice, consent, approval, waiver or other communication provided in connection with this Agreement must be in writing.

(b) A notice may be given by hand delivery, post or by email and is effective upon receipt.

18.2 Entire agreement

The Agreement represents the entire agreement between the parties and supersedes all prior discussions, negotiations, understandings and agreements in relation to the subject matter of this Agreement.

18.3 Assignment

(a) You must not assign or otherwise deal with all or any part of its rights or obligations under the Agreement without our prior written consent (which may not be unreasonably withheld but which may be given subject to reasonable conditions).

(b) We may assign or otherwise deal with any of our rights or obligations under the Agreement without your prior consent.

18.4 Waiver and variation

A provision of the Agreement, or right, power or remedy created under it, may not be varied or waived except in writing signed by the party or parties to be bound.

18.5 Severability

If any provision is unenforceable or invalid, it will be ineffective to the extent it is unenforceable or invalid, without affecting the validity or enforceability of the remaining provisions of the Agreement.

18.6 Survival

Termination or expiration in whole or in part of the Agreement does not affect those provisions and those obligations of a party which by their very nature survive termination, including clause 7 (Confidential information), clause 8 (Intellectual property), clause 9 (Warranties), clause 10 (Indemnity and infringement claims), clause 15 (Dispute resolution), clause 16.3 (Consequences of termination), clause 17 (Liability and exclusion) and clause 18.7 (Governing law and jurisdiction).

18.7 Governing law and jurisdiction

This Agreement is governed by the laws in force in Victoria, Australia and the parties submit to the exclusive jurisdiction of the courts of Victoria, Australia.

19. Definitions and interpretation

19.1 Definitions

The following definitions apply to this Agreement:

Accepted Proposal means a proposal fully particularising the Services, in its final form which is accepted by you.

Agreement means the agreement between you and us for the supply of Services under and in accordance with the Accepted Proposal and these Terms of Service.

Australian Consumer Law means Schedule 2 of the Competition and Consumer Act 2010 (Cth).

Background Intellectual Property means Intellectual Property developed, owned by or licensed to a party as at the Commencement Date, or acquired or developed by a party during the Term, other than for the sole purpose of this Agreement, which that party has the right to license to third parties and which are necessary or desirable for the performance of the Services.

Client, you, your means the party acquiring the Services from us as identified in the Accepted Proposal and, as the context requires, its Representatives.

Client System means any computer, software or other technology system owned or operated by you which is relevant to the Services.

Confidential Information of a party means:

- (a) this Agreement and the information within this Agreement;
- (b) all information, know-how, ideas, concepts, technology, data, source or object code, designs, functions, features and performance notes, technical data and marketing information such as customer lists, financial information and business plans which is disclosed, communicated or delivered to, learnt by, or which otherwise comes to the knowledge of or into the possession of the other party under or in connection with this Agreement, but does not include:
 - (c) information which is or becomes available in the public domain (other than through breach of confidence);
 - (d) information received by the other party other than as a result of a breach of any duty of confidence owed to the first party; or
 - (e) information which has been independently developed by the other party.

Consequential Loss means the following, however arising and even if it is reasonably contemplated by the parties at the Commencement Date as a likely result of breach of the Agreement:

- (a) incidental, special, remote or unforeseeable loss;
- (b) loss of revenue, profit, income, bargain, opportunity, use, production, business, contract, goodwill, or anticipated savings, loss caused by business interruption, or the cost of obtaining new financing or maintaining existing financing, but excluding loss of any amounts that would, but for the act or omission of a party, have otherwise been payable under this Agreement;
- (c) costs or expenses incurred to prevent or reduce loss or damage which otherwise may be incurred or suffered by a third party; or
- (d) loss or damage of the nature set out above in clauses (a) to (c) (inclusive) that is incurred or suffered by or to a third party.

Commencement Date means the date on which you enter into the Agreement with us by accepting the Accepted Proposal, or these terms in accordance with clause 1.

Fee means the fees for the Services, as specified in the Accepted Proposal.

Force Majeure means anything outside the reasonable control of a party regardless of whether it is reasonably contemplated by the parties at the Commencement Date as a likely result of breach of the Agreement.

GST means the goods and services tax imposed by the A New Tax System (Goods and Services Tax) Act 1999 (Cth).

Infringement Claim is any actual, threatened or potential claim, demand, proceeding, suit, objection or other challenge:

- (a) affecting either parties' ownership of, or rights in, that party's Background Intellectual Property; or
- (b) claiming that the supply or other use of the Material or Background Intellectual Property, infringes or may infringe the Intellectual Property rights of a third party.

Insolvency Event means bankruptcy, a liquidation or winding up, the appointment of a controller, administrator, receiver, manager or similar insolvency administrator to a party, or any substantial part of its assets or any event that has a substantially similar effect to the above events.

Intellectual Property means all rights conferred under statute, common law or equity, wherever in the world subsisting, in relation to trade marks, copyright, patents, patentable inventions and designs, whether existing now or in the future and whether or not registered or registrable, and includes any rights subsisting in or relating to Confidential Information, trade secrets, know-how, inventions, discoveries, geographical indications of origin, semiconductor and circuit layouts, programming tools, object code, source code, microcode, mask works, methods, techniques, recipes, formulae, algorithms, modules, libraries and databases and further includes the right to apply for the registration or grant of any such intellectual property.

Material means all material other than Background Intellectual Property, in whatever form, including documents, specifications, reports, products, equipment, information, data, graphic layouts, images and software, prepared and provided by us in connection with the Services, and which may be more particularly described in the Accepted Proposal.

Minimum Term means the minimum term of a retainer as set out in the Accepted Proposal.

Payment Terms means the terms for payment of the Fees as specified in the Accepted Proposal.

Representative means, any person acting for or on behalf of a party and includes any director, officer, employee, agent, contractor or sub-contractor of the party.

Heartbeat Digital, us, we or our means Heartbeat Digital Marketing Pty Ltd ABN 64 631 757 134 trading as Heartbeat Digital Marketing.

Services means the services to be provided by us to you, as more particularly described in the Accepted Proposal.

Special Conditions means those terms (if any) listed in the Accepted Proposal, which may include assumptions or prerequisites for the Client System.

Specifications means the details of the Services and any deliverables, as set out in the Accepted Proposal.

Term means the period from the Commencement Date and the date that this Agreement is terminated or expires in accordance with its terms.

Terms of Service means these terms and conditions, as amended by us from time to time.

19.2 Interpretation

In this Agreement:

- (a) no provision of this Agreement will be construed to the disadvantage of a party merely because that party was responsible for preparing this Agreement or including the provision in this Agreement;
- (b) all monetary amounts are expressed in Australian Dollars (\$AUD); and
- (c) the parties must perform their obligations on the dates and times fixed by reference to Melbourne, Victoria.