

**These Terms and Conditions of Trade apply to the provision of all goods and services provided by Rushton Marketing & Promotions Limited to you. By engaging the services of Rushton Marketing & Promotions Limited you, the client, are agreeing to these Terms and Conditions of Trade.**

**1.0 DEFINITIONS**

1.1. "Rushton Marketing" and "us" shall mean Rushton Marketing & Promotions Limited, its Directors and any person acting on behalf of and with the authority of Rushton Marketing and Promotions Limited.

1.2. "Client" and "you" shall mean that client (or any person with the express or implied authority of the client to act on behalf of the client) as described on any quotation, recommendation or other form as provided by or to Rushton Marketing.

1.3. "Formal acceptance" means the client's acceptance under clause 4 and formally accepted shall have the corresponding meaning.

1.4. "Goods" shall include, but not be limited to, all materials, design print work, signage, packaging, stationery, websites, web applications and/or photographs created by Rushton Marketing.

1.5. "Intellectual property" includes, but shall not be limited to, copyright, moral rights, trade marks, websites, creative concepts, strategies, customised designs, illustrations, photography, customised internet or other software applications developed for the client, system information, and/or confidential information.

1.6. "Services" shall include, but not be limited to, consulting work, creative concepts, graphic design, advertising placement, strategies organised by Rushton Marketing, website development, and/or social media management.

1.7. "Party" shall mean either Rushton Marketing or the client, and "parties" shall have a corresponding meaning.

1.8. "Price" shall mean the cost of goods or services as agreed between Rushton Marketing and the client in the formal acceptance.

1.9. "Software", "Application" or "System" shall mean all source code, all interoperability, all keys, tokens, certificates, APIs, the UI and AI, all documentation, specifications, development plans,

knowledge of processes, databases, confidential information, proposals, trade secrets, staff knowledge and experience, and client communications.

## **2.0 PRIVACY**

2.1 You authorise Rushton Marketing to collect, retain and use any information about you and your business for the purpose of assessing your credit worthiness, sending you invoices, reminders, providing you with information on goods and/or services offered by Rushton Marketing, recovering money owed by you or enforcing any rights under this contract.

2.2 You authorise Rushton Marketing to disclose any information obtained by us to any other person, agent or other entity for the purposes set out in clause 2.1.

2.3 When the client(s) is/are a natural person(s) the authorities under clauses 2.1 and 2.2 are authorities or consents for the purposes of the Privacy Act 1993.

## **3.0 QUOTATIONS**

3.1 Where a quotation of goods and/or services is given from Rushton Marketing to you the quotation shall be valid for a maximum of 7 days from the date of issue, shall be exclusive of GST unless specifically stated otherwise and shall be quoted in New Zealand Dollars.

## **4.0 ACCEPTANCE**

4.1 A formal acceptance is required by you before any work shall commence on the goods and/or services. Formal acceptance shall then be deemed to be part of these Terms and Conditions of Trade, subject to clause 12.1 (Risk) and clause 6.2 (Price).

4.2 Formal acceptance shall include your agreement to these Terms and Conditions of Trade, the Price, the goods and/or services to be provided by Rushton Marketing and the estimated timeframe for completion of the goods and/or services by Rushton Marketing.

4.3 Formal acceptance may be communicated to us by written notice, email or verbal communication.

## **5.0 CLIENT APPROVAL OF WORK COMPLETED**

5.1 Rushton Marketing may submit proofs of goods and/or services to you for approval prior to design, print, programming, copywriting, editing, production, publication or delivery, at your request or at the election of Rushton Marketing.

5.2 Additional charges shall be made for any additional proofs that are required as a result of alterations required by you.

5.3 Rushton Marketing is not responsible for any mistakes or deficiencies in goods and/or services not corrected by you upon reviewing a proof under clause 5.1.

## **6.0 PRICE**

6.1 The Price may be increased by the amount of any reasonable increase in the cost of goods and/or services that is beyond the control of Rushton Marketing between the date of formal acceptance and the provision of goods and/or services.

6.2 Where a quote has been provided, the cost is simply an estimate. Unless expressly stated, the final cost will be based on time and materials realistically expended by Rushton Marketing to provide the service.

6.3 If the Price is reasonably required to increase a new formal acceptance will be required by the client.

## **7.0 PAYMENT**

7.1 Payment for goods and/or services shall be made in full on or before the due date stipulated on the tax invoice supplied by Rushton Marketing to the client.

7.2 Interest will be charged on any amount owing after the due date at the rate of 15% per annum until payment is received by Rushton Marketing.

7.3 Packaging will incur a cost and will be payable by you.

7.4 Rushton Marketing reserves the right to cease work on a partially completed project until overdue invoiced amounts have been paid.

7.5 Any expenses, disbursements and legal costs incurred by Rushton Marketing in the enforcement of any rights contained in this contract shall be paid by you, including any reasonable solicitor's fees or debt collection agency fees.

7.6 Rushton Marketing reserves the right to withdraw all services and refuse to supply goods to a client that is overdue with their account.

7.7 You are not entitled to withhold payment or to make any deductions from the Price without Rushton Marketing's prior consent.

7.8 Rushton Marketing reserves the right to require you to pay for all or part of goods and/or services prior to their supply.

## **8.0 RUSHTON MARKETING'S RESPONSIBILITIES TO YOU**

8.1 At your request, Rushton Marketing will inform you of the processes and timeframe required in order to provide you with your requested goods and services.

8.2 At your request, Rushton Marketing will keep you informed about the progress of your work.

8.3 Rushton Marketing will endeavour to give you an accurate cost and delivery estimates but at all times any such estimate given is subject to the terms of these terms of trade.

## **9.0 CLIENT RESPONSIBILITY TO RUSHTON MARKETING**

9.1 The client must deliver to Rushton Marketing formal acceptance before work will commence on the goods and/or services.

9.2 You warrant that any material supplied to Rushton Marketing does not infringe upon the intellectual property rights of a third party, and agrees to ensure that the information you provide meets the legal requirements of the Fair Trading Act 1986, the Copyright Act 1994, the Defamation Act 1992, all other applicable laws and any relevant Advertising Codes of Practice. You further indemnifies Rushton Marketing against any claim that may result from the inclusion of such illegal materials in the goods and/or services.

9.3 You shall supply Rushton Marketing with any aids requested by Rushton Marketing to complete the goods and/or services (aids can include, but not limited to photography, imagery, design content, copy) within a timeframe agreed to between you and Rushton Marketing.

9.4 If you fail to provide material or instructions necessary to advance the production of goods and/or services within the agreed to timeframe under clause 9.3, Rushton Marketing may adjust the time for delivery as it sees fit, cease working on the goods and/or services until such time as the required instruction are provided by you, or Rushton Marketing may give you notice that the project is to be terminated.

## **10.0 INSPECTION**

10.1 You shall give Rushton Marketing notice of any issues with goods or services provided within 7 days of your receipt of the goods or services. If no notice is received by Rushton Marketing within 7 days, you will be deemed to have accepted the goods or services.

10.2 If Rushton Marketing receives a notice under clause 10.1, Rushton Marketing shall endeavour to correct any such issues within 30 days of receiving the notice.

10.3 In respect of any damage to goods and/or services, Rushton Marketing's liability to you is limited to either replacing the goods and/or services or (at its discretion), if the goods and/or services are capable of repair, repairing them.

## **11.0 IMAGE COSTS**

11.1 Unless expressly stated, any costs associated with photography or finding/purchasing licenses associated with images are included in the agreed Price. Costs that exceed the Price will be communicated to you and will be payable in addition to the agreed price.

## **12.0 RISK**

12.1 The time agreed for delivery of goods and/or services shall not be an essential term of any contract. Where you have expressed the importance of a delivery date, Rushton Marketing will give delivery by the date a high priority and keep you informed of progress.

12.2 Risk of any loss, damage or deterioration of or to the goods and/or services is to be borne by you from the date of delivery of the goods and/or services.

12.3 Username and Password access to some products, services or content may require registration or you being allocated a user ID (username) and password that must be used whenever requested. That username and password are personal to you and you agree at all times to maintain the confidentiality of your username and password and not to disclose them to any third party. You agree that you are solely responsible for any use of the products, services, websites and software by any person using your username and password. You agree to indemnify Rushton Marketing against any and all claims arising out of your failure to maintain the confidentiality of your username or password.

## **13.0 TITLE**

13.1 If you have not paid the full Price for any goods and/or services in your possession, property of such goods and/or services shall remain with Rushton Marketing and the goods and/or services shall be held by you as Bailee. If the goods are attached, fixed or incorporated into any property of the client, such as in-house servers set up by Rushton Marketing for you, the title of the goods shall remain with Rushton Marketing until you have made payment for all goods, and where those goods are mixed with other property so as to be part of or a constituent of any new goods, title of these new goods shall be deemed to be assigned to Rushton Marketing as security for the full satisfaction by you of the full amount owing by you to Rushton Marketing.

13.2 You give irrevocable authority to Rushton Marketing to suspend any goods and/or services not paid for in full by the client. Rushton Marketing shall not be liable for costs, damages or expenses or any other losses incurred by you or any third party as a result of this action, nor liable in contract or in tort or otherwise in any way whatsoever.

13.3 You own one license to use the goods and/or services for the purpose for which they were created by Rushton Marketing. Duplication of any goods or services must only be done if agreed to by Rushton Marketing.

#### **14.0 PERSONAL PROPERTY SECURITIES ACT 1999 (“PPSA”)**

14.1 You acknowledge that these terms and conditions create a security interest (“Security Interest”) (as that term is defined in the PPSA) in the goods supplied. You agree that the Security Interest is taken in all of your present and after-acquired property supplied by us to you from time to time as security for all amounts payable by you to us, including but not limited to amounts owed in respect of personal property supplied and credit facilities provided by us to you from time to time.

14.2 You acknowledge and agree (or are deemed to acknowledge and agree) that where title in products passes to you, for any reason whatsoever, these terms and conditions constitute a security agreement providing for both future advances and a security in favour of us in all of your present and after acquired property, but excluding property not supplied by us.

14.3 You:

- a. Must, upon request, promptly give us all assistance and information (which you warrant is complete, accurate and up to date in all respects) as is necessary to register a financing statement and to meet all other requirements under the PPSA in respect of the personal property to ensure that the Security Interest constitutes a Perfected Security Interest (as that term is defined in the PPSA) including executing any variations to these terms and conditions of sale reasonably requested by us;
- b. Agrees to us registering a financing statement to protect our security interest under these terms of trade;
- c. Must not register a financing change statement or a change demand in respect of the personal property (as those terms are defined in the PPSA);
- d. Must pay to us promptly on request the cost of registering or subsequently amending the financing statement and the costs of enforcing or attempting to enforce the contract evidenced by these terms and conditions;

e. Agrees that Sections 114(1)(a), 133, and 134 of the PPSA will not apply to the Security Interests created by these terms of trade, and agrees to contract out of your rights referred to in sections 116, 119, 120(2), 121, 125, 126, 127, 129, 131, 132 of the PPSA;

f. Waives its right to receive a verification statement under Section 148 of the PPSA.

## **15.0 PHOTOGRAPHY**

15.1 The copyright in any photography work resulting from services supplied by Rushton Marketing remains the property of Rushton Marketing. Upon final payment of all monies due under these Terms and Conditions of Trade, limited copyright ownership passes to you on the following conditions:

a. The negatives and/or slides are your property strictly for the agreed use for reproduction and giving of photographs to the agreed parties;

b. You will not re-use or sell the photographs for profit;

c. You acknowledge and agree that we can use the photographs for promotional use and for any other use associated with our normal business activities.

## **16.0 WEBSITES**

16.1 Prior to any websites created by Rushton Marketing going "live" on the internet, you must have made payment for all amounts owing to Rushton Marketing.

16.2 In the event that you owe Rushton Marketing for outstanding payments and a website has already gone live, Rushton Marketing reserve the right to shut down that website until Rushton Marketing has received all outstanding payments.

16.3 If you have retained Ruston Marketing to host your website, Ruston Marketing will charge monthly fees, and if you fall into arrears in relation to those monthly payments, Rushton Marketing reserves the right to pull the website down and will not be liable for any consequences which might arise in the event of such a situation.

16.4 Rushton Marketing is not responsible for any future proofing of a website. The website functionality may be affected by new web browsers that are released after the website completion. Costs incurred to fix any incompatibilities are chargeable to the client.

16.5 Rushton Marketing shall be under no liability whatsoever to maintain, repair or replace software, website(s), web content, databases or database content, design files or any supplied equipment should any of the aforementioned not perform to the specifications of Rushton Marketing as a result of the use by the client or the client's employees, agents or suppliers.

## **17.0 INTELLECTUAL PROPERTY**

17.1 Rushton Marketing owns the intellectual property of all work completed by Rushton Marketing and reserves the right to reuse some or all of the work on other projects as Rushton Marketing sees fit without breaching client copyright.

17.2 You own a license to use internet and software applications, photographic royalties for yourself but do not have the right to sell the application to any other party unless agreed to in writing by Rushton Marketing. The client shall not be permitted to make use of or modify any good and/or service for any other purpose than which they were intended without the written agreement of Rushton Marketing.

17.3 Rushton Marketing reserves the right to use all work sold to a client as part of its own portfolio, marketing activities and to demonstrate its capabilities.

## **18.0 LIABILITIES**

18.1 To the extent permitted by law, Rushton Marketing shall not be liable for the following:

- a. Any loss or damage of any kind whatsoever suffered or incurred by you or another person, whether such loss or damage arises directly or indirectly from goods, services or advice provided by Rushton Marketing to you; and/or
- b. Any downtime in service provision caused by third parties to which Rushton Marketing is reliant on to provide the service to you.

18.2 Except as provided in this contract Rushton Marketing shall not be liable in contract, or in tort, or otherwise for any loss, damage, or injury beyond the value of the goods or services provided by Rushton Marketing to the client.

## **19.0 CONSUMER GUARANTEES ACT**

19.1 The guarantees contained in the Consumer Guarantees Act 1993 are excluded where the client acquires goods or services from Rushton Marketing for business purposes in terms of section 2 and 43 of that Act and in such a case, the client agrees that the Credit (Repossession) Act 1997 shall not apply.

## **20.0 CANCELLATION**

20.1 Rushton Marketing shall, without any liability, and without any prejudice to any other right it has in law or equity, have the right to suspend or cancel in whole or in part any contract for the supply of goods or services to you, by giving notice to you, if the following circumstances occur:

- a. you fail to pay any money owing after the due date;
- b. you enter into a composition or arrangement with your creditors or (if the client is a company) does any act which would render it liable to be liquidated or have a receiver appointed over its property;
- c. you commit an act of bankruptcy as defined in section 19 of the Insolvency Act 1967;
- d. you no longer carry on business or threatens to cease carrying on business; and/or
- e. the ownership or effective control of the client is transferred or the nature of the client's business is materially altered.

20.2 If Rushton Marketing fails to perform its obligations to you under these Terms and Conditions of Trade and the client gives Rushton Marketing notice of such a failure, you may terminate the formally accepted agreement by providing an additional notice in writing to Rushton Marketing if the failure to perform is not corrected within 30 days of being served notice of the failure. All work done and all costs incurred by Rushton Marketing up until cancellation under this clause 20.2, along with all costs associated with ceasing the provision of goods and services, will be charged as outlined in the formal acceptance and be due within 21 days of the notice of cancellation.

20.3 You may terminate any goods and/or services by providing by 14 days notice in writing. The client will be liable, upon the termination date, for all time and costs incurred by Rushton Marketing on any work up until that date or 50% of the Price – whichever is more.

## **21.0 MISCELLANEOUS**

21.1 Failure by Rushton Marketing to enforce any of the terms and conditions contained in these Terms and Conditions of Trade shall not be deemed to be a waiver of any of the rights or obligations Rushton Marketing has.

21.2 Any waiver given may only be in writing and applies only to the right specifically waived and on the occasion specified in the waiver.

21.3 The law of New Zealand shall apply to this contract except to the extent expressed negative or varied by these Terms and Conditions of Trade.

21.4 Where the terms of these Terms and Conditions of Trade are at variance with the order or instruction from the client, this contract shall prevail.

21.5 If any provision of these Terms and Conditions of Trade shall be invalid, void or illegal or unenforceable the validity existence, legality and enforceability of the remaining provisions shall not be affected, prejudiced or impaired.

21.6 You may not assign or transfer any of your rights or obligations under or in connection with these Terms and Conditions to any other person or entity whatsoever.

21.7 Rushton Marketing reserves the right to sub-contract the performance of these Terms and Conditions of Trade to any other person or entity whatsoever.

21.8 Neither party shall be liable for any delay or failure to perform obligations under these Terms and Conditions of Trade where the failure is caused by an event beyond the defaulting party's reasonable control ("force majeure"). In the event of a force majeure event, the defaulting party shall be entitled to an extension of the time for the performance of the obligation(s) in question.

21.9 Any notice given by one party to the other shall be deemed to have been delivered 48 hours after posting to the recipient's registered office or last known address and immediately if forwarded by facsimile or email.

## **22.0 DISPUTE RESOLUTION**

22.1 If a dispute arises between the parties concerning this agreement, no party may start proceedings relating to the dispute (unless that party seeks urgent interlocutory relief) without first complying with this section.

22.2 A party claiming that a dispute has arisen concerning this agreement must give written notice to the other parties specifying the matter in dispute.

22.3 After a party has given a notice under clause 22.2, each party must nominate one person who will have authority to settle the dispute. The nominated persons must try in good faith to resolve the dispute within 10 days of their nomination.

22.4 If the dispute is not resolved under clause 22.3, then any party may at any time in the next 10 Days invite the chairperson of the NZ Chapter of Lawyers Engaged in Alternative Dispute Resolution to appoint a mediator to enable the parties to mediate and settle the dispute. All discussions in the mediation will be without prejudice and will not be referred to in any later proceedings.

22.5 If the dispute is not resolved under clause 22.4 within a further 20 Days after the appointment of a mediator, any party may then require the dispute to be referred to

arbitration. If this clause is invoked the dispute will be referred to arbitration by a sole arbitrator in accordance with the Arbitration Act 1996. If the parties cannot agree on the identity of the arbitrator within 5 days from the date on which the dispute is referred to arbitration, then the arbitrator will be appointed by the President of the Arbitrators' and Mediators' Institute of New Zealand Inc, upon the application of any party. The arbitration will take place in New Zealand and the award in the arbitration will be final and binding on the parties.