

22 DESIGN LIMITED – TERMS OF TRADE

VERSION 1 – AS AT 22 NOVEMBER 2016

BACKGROUND

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These general Term and Conditions (“**Terms**”) apply to all graphic design and related work undertaken by **22 DESIGN LIMITED**, its employees, contractors or agents (“**22 Design**,” “**we**” and “**us**”) for you as its’ instructing client (including your agents, employees or contractors, “**you**”, “**the Client**”). Any goods supplied to you in connection with that work are in addition and subject to any other specific terms agreed between the parties, including in our quotes, estimates or correspondence between us and in respect of a specific instruction (such other terms in relation to each specific instruction or series instructions, together, a (“**Contract**”). These Terms are intended to create mutual rights and obligations between the parties to ensure a clear framework on which the parties can work together.

1. INTERPRETATION

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1.1 In these Terms and any Contract, unless the context otherwise requires:

“ Additional Services ”	means any additional services described in the Fees Schedule.
“ Client Materials ”	means any materials provided by you for incorporation in the Deliverables, including, but not limited to, any images, photographs, illustrations, graphics, or text and any other materials that are created by us specifically and uniquely for you and contained in the final work product delivered to you under these Terms or any Contract, including software, software designs, code, data and technical components, and creative designs, images, artwork and text.
“ Change Request ”	is any variation to these Terms or to any Contract.
“ Deliverables ”	means the products and/or services to be provided to you set out in the applicable contract.
“ Design Brief ”	means the Design Brief for the Design Product agreed between the parties.
“ Design Concept ”	means the design concept, including any information architecture, design and static web site image designed by us.
“ Design Product ”	means web-ready page/s, print and/or production ready files designed by us in accordance with these Terms or any Contract.
“ Fees Schedule ”	means the schedule of fees agreed between us in respect of any Contract or series of Contracts, including any fees specified in or calculated by reference to any estimate or quotation from us.
“ GST ”	means goods and services tax payable under the Goods and Services Tax Act 1985.
“ 22 Design Materials ”	means any designs, design materials, software, routines, know-how, methodologies, user interface conventions or design patterns, interfaces to third party products and other development and design tools (and all enhancements and derivatives thereto) which 22 Design: (i) developed prior to or otherwise than in the course of any Contract; or (ii) develops during the course of any Contract but which are developed either at 22 Design’s cost or which are not uniquely applicable to the particular specifications, characteristics or functions of the Deliverables.
“ Intellectual Property ”	means, in respect of any person, all intellectual property and industrial property rights and interests (including common law rights and interests) owned or held by that person, or lawfully used by that person, including, without limitation: (i) patents, trademarks, service marks, copyright, registered designs, trade names, symbols and logos; (ii) patent applications and applications to register trademarks, service marks and designs; (iii) all formulae, methods, plans, data, drawings, specifications, characteristics, equipment, designs, inventions, discoveries, improvements, know-how, experience, software products, trade secrets, price lists, castings, brochures and other information used by that person.
“ Payment Terms ”	means the payment terms set out in the Fees Schedule and under clause 5 of these Terms.
“ Services ”	shall mean all services provided by us to you and shall include, without limitation, the provision of all graphic design, magazine and web design, communication services and supplies, all charges for labour and work, hire charges, insurance charges, or any fee or charge associated with the supply of services by us to you.
“ Working Day ”	has same meaning as prescribed by s29 of the Interpretation Act 1999.

- 1.2 In these Terms or any Contract, unless the context otherwise requires:
(a) the singular includes the plural and vice versa; and
(b) reference to a part, section or clause is a reference to that part, section or clause in these Terms, unless specifically stated otherwise.
- 1.3 To the extent that there is any inconsistency or conflict between any Contract and these Terms, the Contract will prevail.
- 1.4 Any reference to an agreement or communication in 'writing' or as being 'written' shall include email or other form of digital communication.

2. AGREEMENT/ACCEPTANCE

- 2.1 Any instructions received by us from you for the supply of goods and/or services shall:
(a) constitute acceptance by you of these Terms; and
(b) be on the basis of the Contract for that supply and these Terms.
- 2.2 In the event of any conflict between these general Terms and the terms and conditions of any Contract, the Contract will prevail.
- 2.3 The acceptance by you of the terms and conditions of a Contract, or any part or variation, is sufficiently evidenced if either:
(a) a signed copy of a written agreement, or
(b) any other form of written acceptance or acknowledgement (whether or not signed), is physically received by us, or received by us via fax, email or in other digital format. The foregoing shall not limit our ability to establish evidence of any other form of acceptance by any other lawful means.
- 2.4 Any form of oral instruction is not a valid form of instruction unless it is sufficiently evidenced in writing and accepted by us or we elect to waive that requirement in any particular case.
- 2.5 Any variation to these Terms or to any Contract ("**Change Request**") may only be made by an agreement in writing which is communicated to you by us and acceptance of which is evidenced in the same manner as specified in clause 2.3.
- 2.6 Where any Contract for the supply of goods or services by us includes goods or services to be provided by third parties:
(a) 22 Design gives no warranty and accepts no responsibility or liability whatsoever in respect of those goods or services as supplied by that third party;
(b) you are solely responsible to that third party for payment for those goods and services; and
(c) you hereby authorise us to act as your agent to contract the provision of those goods and services as contemplated by the applicable Contract.

3. COLLECTION AND USE OF INFORMATION

- 3.1 You authorise us to collect, retain, disclose and use any information about you to any other party for the purpose of assessing your credit worthiness, enforcing any rights under these Terms or any Contract, or marketing any goods and services provided by us.
- 3.2 Where you are a natural person the authorities under clause 3.1 are authorities or consents for the purposes of the Privacy Act 1993.

4. PRICE

- 4.1 The price of the supply of goods or services provided by us will be calculated at the rate(s) stated on the quotation or estimate provided by us and accepted by you.

5. PAYMENT

- 5.1 Unless otherwise arranged between the parties prior to the provision of goods or services commencing, payment shall be made as follows:
(a) For Deliverables provided to clients in trade, invoices are payable on the 20th day of the month following the date of delivery of our invoice; or
(b) For Deliverables provided to clients not in trade, invoices are payable within 7 days of date of delivery of our invoice.
- 5.2 Interest may be charged on any amount owing after the due date at the rate of 10% per annum and accruing daily.

- 5.3 Any expenses, disbursements and legal costs incurred by us in the enforcement of any rights contained in these Terms (or any Contract) shall be paid by the Client, including any reasonable solicitor's fees or debt collection agency fees.
- 5.4 Receipt of a cheque, bill of exchange, or other negotiable instrument shall not constitute payment until such negotiable instrument is paid in full in cleared funds.
- 5.5 We reserve the right to determine at our sole discretion whether a client is or is not in trade for the purposes of clause 5.1.

6. QUOTATIONS / ESTIMATES

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- 6.1 Where a quotation or estimate is provided by us for goods or services:
 - 6.1.1 The quotation is a quotation of the cost of the services provided by us exclusive of other costs involved; including but not limited to any and all third party costs such as stock image and printing costs.
 - 6.1.2 The quotation or estimate shall be valid for 1 calendar month from the date of issue; and
 - 6.1.3 The quotation or estimate shall be exclusive of Goods and Services Tax unless specifically stated.
- 6.2 Where goods or services are required in addition to the quotation or estimate the Client agrees to pay for the additional cost of goods or services if such additional costs are agreed to in writing between the parties prior to the additional costs being incurred.

7. DESIGN CONCEPT

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- 7.1 Upon agreement of Design Brief of the Design Product, and upon receipt of any Client Materials and any fees payable, we will commence work to develop the Design Concept.
- 7.2 You will have 10 working days, or such other time as we and you agree in writing, from the date of notification of completion of the Design Concept from us to review and request in writing from us revisions to the Design Concept. We will use commercially reasonable efforts to implement such revision request that are within the scope of, and consistent with, the Design Brief.
- 7.3 If you wish to depart in any material respect from the Design Brief, the parties will, in good faith, agree to additional fees to cover those revisions.
- 7.4 If you have not made any requests for revisions by the end of 10 business days from the date of written notice of completion of the Design Concept from us, or upon completion of implementation of such request which were mutually agreed upon by you and us under the revised Design Brief under clause 7.3, then the Design Concept shall be deemed to be accepted by you.

8. DESIGN PRODUCT

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- 8.1 You will provide us with any Client Materials required by the Design Brief in an electronic file format specified and accessible by us or as otherwise specified in the Design Brief. Any services required to convert or input Client Materials not set forth in the Design Brief shall be charged as Additional Services.
- 8.2 Upon acceptance of the Design Concept under clause 7, and provision of any required Client Materials, we will commence work to develop the Design Product. We may use combinations of technology, as we, in consultation with you, deem appropriate to develop any Design Product comprising a web site.
- 8.3 You will have 10 business days, or such other time as we and you agree in writing, from the date of notification of completion of the Design Product from us to review and request in writing from us revisions to the Design Product. We will use commercially reasonable efforts to implement such revision request that are within the scope of, and consistent with, the Design Brief.
- 8.4 If you wish to implement any revisions to the Design Product that depart in any material respect from the Design Brief, the parties will, in good faith, agree to additional fees to cover those revisions.
- 8.5 If you have not made any requests for revisions by the end of 10 business days from the date of written notice of completion of the Design Product from us, or by such time as otherwise agreed by you and us in writing, or upon completion of implementation of such request which were mutually agreed upon by you and us under the revised Design Brief under clause 8.4, then the Design Product shall be deemed to be accepted by you ("Acceptance").

- 8.6 Upon Acceptance of the Design Product, we will transfer any Design Product to you or your designated third party contractor.

9. INTELLECTUAL PROPERTY RIGHTS

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- 9.1 Any and all Client Materials provided by you to us in order for us to carry out our obligations under this agreement must be owned by you or licenced to you for such a purpose.
- 9.2 All materials including, but not limited to any computer software (in object code and source code form), script, programming code, data, information or HTML script developed or provided by us under this agreement, and any trade secrets, know-how, methodologies and processes related to our products or services, shall remain our sole and exclusive property, including, without limitation, all copyrights, trademarks, patents, trade secrets, and any other proprietary rights inherent in the 22 Design Materials. To the extent, if any, that ownership of the 22 Design Materials does not automatically vest in us by virtue of this agreement or otherwise, you hereby transfer and assign to us all rights, title and interest which you may have in and to the 22 Design Materials.
- 9.3 You acknowledge and agree that 22 Design is the sole and exclusive owner of all Intellectual Property in and relating to the Design Products and that you have no rights in or relating to the Design Products other than are expressly provided for in this agreement.
- 9.4 The provisions of this clause shall survive the expiry or termination of this agreement.

10. LICENCES AND RIGHTS TO DESIGN PRODUCTS

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- 10.1 Client Material including all pre-existing trademarks, shall remain the sole property of the Client or its respective suppliers, and the Client or its suppliers shall be the sole owner of all rights in connection therewith. The Client hereby grants to 22 Design a nonexclusive, non-transferable license to use, reproduce, modify, display and publish the Client Materials solely in connection with our provision of the Design Product.
- 10.2 All third-party materials are the exclusive property of their respective owners. We will inform you of all third-party materials that may be required to provide the Deliverables or otherwise integrated into the Design Product. Under such circumstances we will inform you of any need to license, at your expense, and unless otherwise provided for by you, you shall obtain the license(s) necessary to permit the use of the third-party consistent with the usage rights granted herein. In the event you fail to properly secure or otherwise arrange for any necessary licenses or instructs the use of third-party materials, you indemnify us from any and all damages, liabilities, costs, losses or expenses arising out of any claim, demand, or action by a third party arising out of your failure to obtain copyright, trademark, publicity, privacy, defamation or other releases or permissions with respect to materials included in the Design Product.
- 10.3 We retain all rights in and to all Design Concepts. At our written request you will return all Design Concepts within 10 workings days of such request and all rights in and to any Design Concepts shall remain the exclusive property of 22 Design.
- 10.4 Upon completion of the Design Product and expressly conditioned upon full payment of all fees and costs due, 22 Design assigns to the Client all ownership rights, including any copyrights, in and to any artworks or designs comprising the works created by 22 Design for use by the Client as a Trademark. 22 Design shall cooperate with the Client and shall execute any additional documents reasonably requested by the Client to evidence such assignment. The Client shall have sole responsibility for ensuring that any proposed trademarks or Design Product(s) intended to be a Trademark are available for use in commerce and registration and do not otherwise infringe the rights of any third party. Client hereby indemnifies, saves and holds harmless 22 Design from any and all damages, liabilities, costs, losses or expenses arising out of any claim, demand, or action by any third party alleging any infringement arising out of the Client's use and/or failure to obtain rights to use or use of the Trademark.
- 10.5 Upon completion of the Design Product, and expressly subject to full payment of all fees, costs and expenses due, 22 Design assigns to the Client all right, title and interest, including without limitation copyright and other intellectual property rights, in and to the Design Product. 22 Design agrees to reasonably cooperate with the Client and shall execute any additional documents reasonably necessary to evidence such assignment.

11. OUR OBLIGATIONS

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- 11.1 We make the following warranties to you in respect of the products and services provided under this agreement:
- (a) We have the right to grant the licences in respect of the Deliverables under this agreement to you without violating any rights of any third party;
 - (b) The Deliverables will, in all substantial respects, conform to the Design Brief, or as otherwise agreed in writing by the parties; and

(c) Any services provided under this agreement shall be performed in a workmanlike manner.

- 11.2 Our representations in clause 11.1 will not apply where you have used the Deliverables in a manner or for a purpose not reasonably contemplated or not authorised by us or in combination with other goods not specifically approved by us, or where you have made any adaptations, extensions or modifications to the Deliverables.
- 11.3 Your sole remedy in the event of a representation in clause 11.1 being breached, at our option, is the replacement of the defective Deliverables or refund of the licence fee paid for the Deliverables.

12. YOUR OBLIGATIONS

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- 12.1 You acknowledge that we are in the business of graphic design, including designing web site concepts, and that we shall have the right to provide to third parties services which are the same or similar to the services we provide to you and to use or otherwise exploit any 22 Design Materials in providing such services.
- 12.2 You warrant that to the best of your knowledge you own, or are validly licensed to provide under this agreement, all copyright and all other intellectual property rights in and to your Client Materials and our use of your Client Materials will not infringe the intellectual property or other rights of any third party or breach any applicable law, statute or regulation.
- 12.3 You agree to indemnify us against all losses, costs, expenses, demands, or liabilities (including all legal costs and expenses) incurred by us relating to any claim that the provision of your Client Materials, or the use of your Client Materials by us, infringes the intellectual property rights of any third party or any breach of your obligations under this agreement or any wilful, unlawful or negligent act or omission by you.

13. DISCLAIMER AND LIMITATION OF LIABILITY

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- 13.1 We disclaim all warranties and conditions, whether express, implied or statutory, other than those identified expressly in this agreement, including but not limited to warranties of title, non-infringement, merchantability and fitness for a particular purpose. We will not be liable for any services or products provided by third party vendors, developers or consultants referred to you by us unless such third party products or services are provided under written agreement between you and us, and then only to the extent expressly provided in those agreements.
- 13.2 Under no circumstances (including, but not limited to negligence) shall we, or any of our officers, employees, partners, agents or suppliers, be liable for any direct, incidental, special, consequential, indirect or punitive damages (including loss of use, loss of data, loss of profits, loss of anticipated savings, or loss of goodwill) that result from the use of, or the inability to use, or relating to the Deliverables.
- 13.3 If you are using the Deliverables for the purposes of a business, then you agree that the provisions of the Consumer Guarantees Act 1993 shall not apply to you.
- 13.4 You agree that the total liability of us, our officers, employees, agents, partners or suppliers (together) to you or anyone else using the products or services we provide to you (together) or damages, losses, and causes of action (whether in contract, tort, including negligence, under statute or otherwise) shall not exceed the total cost of providing the Deliverables or \$10,000.00 whichever is the lesser amount.

14. RESOLUTION OF DISPUTES

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- 14.1 The parties will use their best endeavours to amicably resolve any dispute between them, which may arise concerning the interpretation of these Terms or any Contract or in relation to any matter arising under these Terms or any Contract. If the parties cannot settle amicably and in good faith any dispute between them within 20 working days, either party may submit the dispute to mediation. The mediation shall be conducted by a single mediator, appointed by the parties or by the President of the Arbitrators' & Mediators' Institute of New Zealand Inc. if the parties fail to agree on such appointment.
- 14.2 Neither party will commence litigation unless clause 14.1 has been complied with. This clause shall not however prevent a party from seeking injunctive relief.
- 14.3 For the avoidance of doubt, the existence of a dispute will not relieve any party from the requirement to perform its obligations under this agreement generally and, notwithstanding the dispute, each party will continue to perform such obligations in accordance with this agreement to the maximum extent possible (having regard to the nature of the dispute).

15. BREACH AND TERMINATION

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- 15.1 Either party may terminate any Contract on 60 days' prior written notice to the other party at any time.

15.2 If you breach any term of these Terms or any Contract, we may, at our discretion, terminate that Contract.

15.3 If you commit an act of bankruptcy, or, where you are a company, if a receiver is appointed or you do anything which would render you liable to be liquidated we may terminate all or any Contracts upon written notice to you.

16. EFFECT OF TERMINATION

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16.1 If any Contract is terminated by you or us under clauses 15.1 to 15.3, that Contract will terminate and the following will apply:

(a) any licence granted under or pursuant to that Contract or these Terms will end and you will not be authorised to use the Deliverables after expiry or termination of that Contract;

(b) you agree to pay us for any unpaid fees arising from your use of the Deliverables up to the date of termination;

(c) you agree to return to us, on our demand, any information to which clause relates which includes, but is not limited to, any manuals, specifications, designs or other information relating to the business of 22 Design, or the services or products provided under these Terms or any Contract ;

(d) termination of any Contract shall be without prejudice to the rights of any party which have accrued prior to, or which arise in connection with, such termination; and

(e) the provisions of these Terms or any Contract intended to apply after termination shall continue to apply.

17. GENERAL PROVISIONS

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17.1 Notices to you may be given by email or by regular mail. Notices will be deemed delivered in the case of regular mail two working days after (but exclusive of) the day of mailing and in the case of email notice on the date shown on our system's email confirmation of delivery (where it is our notice to you) or receipt (where it is your notice to us).

17.2 We will not be liable for any failure to perform these Terms or any Contract if it is due to a cause beyond our reasonable control.

17.3 The provisions of these Terms or any Contract shall not be varied, except by agreement in writing signed by the Parties.

17.4 The parties agree that New Zealand law governs these Terms and any Contract and that New Zealand courts have non-exclusive jurisdiction.

Congratulations, you made it to the end.