
BY ENGAGING KMO, YOU AGREE TO THE FOLLOWING TERMS OF THIS AGREEMENT BETWEEN YOU (CLIENT) AND K.M.O. DESIGN PTY LTD ACN 100 620 808 (KMO)

K.M.O. Design Pty Ltd ACN 100 620 808 **(KMO)**

KMO's Address Details	Address: Level 34, 1 Eagle Street, Brisbane Qld 4000
	Electronic Mail: katrina@kmo.com.au

2. Definitions and interpretation

2.1. Definitions

In this Agreement:

Additional Services has the meaning given to it in clause 4.4 and as otherwise provided in an Order Document.

AdWords means the advertising service provided by Google known as 'AdWords' or 'AdWords Express' and available from <http://www.google.com.au/adwords/>.

Agreement has the meaning given to it in clause 2.1.

Authorised Officer of a party which is a corporation means:

- (a) an employee of the party whose title contains either of the words Director or Manager;
- (b) a person performing the function of any of them;
- (c) a solicitor acting on behalf of the party; or
- (d) a person appointed by the party to act as an Authorised Officer for the purposes of this Agreement by notice to the others in writing.

Business Day means:

- (a) if determining when a notice, consent or other communication is given, a day that is not a Saturday, Sunday or public holiday in the place to which the notice, consent or other communication is sent; and
- (b) for any other purpose, a day (other than a Saturday, Sunday or public holiday) on which banks are open for general banking business in Brisbane.

Change of control means a change in: control of the composition of the board of directors of the corporation; control of more than half the voting rights attaching to shares in the corporation; or control of more than half the issued shares of the corporation (not counting any share which carries no right to participate beyond a specified amount in the distribution of either profit or capital).

Claim means, in relation to a person, any action, allegation, claim, demand, judgment, liability, proceeding, remedy, right of action or right of set-off made against the person concerned however it arises whether:

- (a) it is present, unascertained, immediate, future or contingent;
- (b) it is based in contract, tort, statute or otherwise; or
- (c) it involves a third party or a party to this Agreement.

Client Data means all data uploaded by Client (or its Personnel) to infrastructure utilised by KMO for the provision of the Services to Client (excluding anything embodying the proprietary rights, including Intellectual Property Rights, of KMO or its Related Entities).

Client Technology means the Intellectual Property Rights of Client which are established by the client to be created independently of the Agreement.

Commencement Date means the commencement date set out in the Reference Schedule, or if no date is indicated, the date the Master Services Agreement was signed by the last of the parties.

Confidential Information means, in relation to each party (for the purposes of this definition, **Discloser**), all information disclosed by or on behalf of the Discloser, concerning or relating to:

- (a) the fee and remuneration structure set out in this Agreement;
- (b) know-how, trade secrets, ideas, marketing strategies, operational information, technical information and financial information;
- (c) source code, proprietary software tools, business processes, project management methodologies and tools, software testing and verification methods, solution architecture models and solutions;
- (d) its business affairs (including products, services, customers and suppliers); and
- (e) other information, which, by its nature or by the circumstances of its disclosure, is or could reasonably be expected to be regarded as confidential,

but excluding any such information:

- (f) which is publicly known;
- (g) which is disclosed to the other party without restriction by a third party (other than the Discloser) and without any breach of confidentiality by that third party; or
- (h) which is developed independently by other party without reliance on any of the confidential information.

Consequential Loss means any of the following: loss of revenue; loss of profits; loss of opportunity to make profits; loss of business; loss of business opportunity; loss of use or amenity, or loss of anticipated savings; loss of data; special, exemplary or punitive damages; and any loss which does not directly and naturally flow in the normal course of events from the occurrence of the event giving rise to the liability for such loss, whether or not such loss was in the contemplation of the parties at the time of entry into this Agreement, including any of the above types of loss arising from an interruption to a business or activity.

Corporations Act means the *Corporations Act 2001* (Cth).

Deliverables means the specific Materials which are expressly designated in an Order Document to be provided to Client by KMO.

Demonstration Date has the meaning given to it in clause 5.1(b).

Exceptional Circumstance means a circumstance beyond the reasonable control of the parties which results in a party being unable to observe or perform on time an obligation under this Agreement. Such circumstances include:

- (a) adverse changes in government regulations;
- (b) any disaster or act of God, lightning strikes, atmospheric disturbances, earthquakes, floods, storms, explosions, fires and any natural disaster;
- (c) acts of war, acts of public enemies, terrorism, riots, civil commotion, malicious damage, sabotage and revolution, cyber attacks, viruses

or malware, data loss as a result of the actions of a third party;

- (d) strikes or industrial disputes;
- (e) materials or labour shortage; and
- (f) acts or omissions of any third party network providers (such as internet, telephony or power provider).

Expiry Date has the meaning given to it in the Reference Schedule.

Expiry Notice has the meaning given to it in clause 3.3.

GST means GST as that term is defined in the GST Law, and any interest, penalties, fines or expenses relating to such GST.

GST Law means the *A New Tax System (Goods and Services Tax) Act 1999* (Cth) and/or associated Commonwealth legislation, regulations and publicly-available rulings.

Insolvency Event means an event of bankruptcy or insolvency, an assignment for the benefit of creditors, the appointment of a receiver, receiver and manager, provisional liquidator, liquidator and official manager or any similar person to any assets of a person, a failure to comply with a statutory demand, or anything else which occurs which is analogous or has a substantially similar effect, under the laws of any jurisdiction, or the person is otherwise insolvent or unable to pay its debts as and when they fall due.

Intellectual Property Rights means all current and future registered and unregistered rights in respect of copyright, circuit layouts, designs, trade marks, know-how, confidential information, patents, inventions, plant breeder's rights and discoveries and all other intellectual property as defined in article 2 of the convention establishing the World Intellectual Property Organisation 1967.

Law means any statute, rule, regulation, proclamation, order in council, ordinance, local law or by-law, whether:

- (a) present or future; or
- (b) State, federal or otherwise.

Liable or **Liability** means any liability, debt or obligation, whether actual, contingent or prospective, present or future, qualified or unqualified or incurred jointly or severally with any other person.

Loss means any loss (including Consequential Loss), claims, actions, liabilities, damages, expenses, diminution in value or deficiency of any kind whether direct, indirect, consequential or otherwise.

KMO Technology means all Intellectual Property Rights created, owned or licensed by KMO independently of this Agreement, including marketing ideas and concepts, business models, software architecture, solution models, interfaces, graphic design content, code libraries, and design ideas and concepts, but excluding Client Technology.

Master Services Agreement means this document, being the master services Agreement and its schedules and annexures.

Material means property, information, software, firmware, documented methodology or process, documentation or other material in whatever form, including any designs, storyboards, reports, specifications, business rules or requirements, user

manuals, user guides, operations manuals, training materials and instructions, and the subject matter of any category of Intellectual Property Rights.

Milestones means each due dates listed, or referred to, in an Order Document.

Order Document means a document prepared by KMO detailing the scope of Services required to be provided by kmo to the Client and the Service Fee for those Services, which is agreed by both of the parties.

New IP means any and all Intellectual Property Rights created in the course of, or connection with, the performance of the Services.

Payment Gateway means any third party service and interface which facilitates the making of payments via a website.

Personal Information has the meaning given in the Privacy Law.

Personnel means in relation to a party, any Related Body Corporate, Related Entity, employee, officer, agent, contractor, professional adviser of that party.

Privacy Law means the *Privacy Act 1988* (Cth).

Rate Card means the rates for ad-hoc Additional Services, as set out, as at the Commencement Date, at Schedule 1.

Reference Schedule means the schedule at the beginning of this Agreement.

Related Body Corporate includes any corporation that is deemed to be related to a person by virtue of the provisions of the Corporations Act.

Related Entity has the meaning in the Corporations Act.

Services means the services to be provided by KMO from time to time during the Term of the Agreement, as detailed further in this Master Services Agreement and in each Order Document.

Service Fee means the fee payable by Client for the Services, as set out in each Order Document and may include, but is not limited to any Support Fee(s) and any Additional Services.

Site(s) means those site(s) at which on-site Support Services will be provided (if applicable), as further set out in an Order Document.

Software means and includes all source code, object code and/or macros, modifications and developments of that software, and new releases or versions of that software.

Tax Invoice means a "tax invoice" compliant with the requirements of the GST Law.

Term means the duration of the Agreement, until it is terminated or expires in accordance with the terms of the Agreement.

Third Party means any third party to the Agreement, other than any Related Bodies Corporate of a party to this Agreement.

Third Party Content means any Software, Intellectual Property Rights or Material which is owned by a Third Party and includes (but is not limited to) open source Software.

User means any individual licensed to use the Services under this Agreement.

Where a term used in this Agreement appears in bold type in the Reference Schedule, that term has the meaning shown opposite it in the Reference Schedule.

2.2. Interpretation

- (a) Unless the contrary intention appears, a reference in this Agreement to:
 - (1) this Agreement or another document includes any variation or replacement of it despite any change in the identity of the parties;
 - (2) one gender includes the others;
 - (3) the singular includes the plural and the plural includes the singular;
 - (4) a person, partnership, corporation, trust, association, joint venture, unincorporated body, Government Body or other entity includes any other of them;
 - (5) an item, recital, clause, subclause, paragraph, schedule or attachment is to an item, recital, clause, subclause, paragraph of, or schedule or attachment to, this Agreement and a reference to this Agreement includes any schedule or attachment;
 - (6) a party includes the party's executors, administrators, successors, substitutes (including a person who becomes a party by novation) and permitted assigns;
 - (7) any statute, ordinance, code or other law includes regulations and other instruments under any of them and consolidations, amendments, re-enactments or replacements of any of them;
 - (8) money is to Australian dollars, unless otherwise stated; and
 - (9) a time is a reference to Brisbane time unless otherwise specified.
 - (b) The words include, including, such as, for example and similar expressions are not to be construed as words of limitation.
 - (c) Where a word or expression is given a particular meaning, other parts of speech and grammatical forms of that word or expression have a corresponding meaning.
 - (d) Headings and any table of contents or index are for convenience only and do not affect the interpretation of this Agreement.
 - (e) A provision of this Agreement must not be construed to the disadvantage of a party merely because that party or its advisers were responsible for the preparation of this Agreement or the inclusion of the provision in this Agreement.
- ## **2.3. Business Days**
- (a) If anything under this Agreement must be done on a day that is not a Business Day, it must be done instead on the next Business Day.
 - (b) If an act is required to be done on a particular day, it must be done before 5.00pm on that day

or it will be considered to have been done on the following day.

2.4. Parties

- (a) If a party consists of more than one person, this Agreement binds each of them separately and any two or more of them jointly.
- (b) An agreement, covenant, obligation, representation or warranty in favour of two or more persons is for the benefit of them jointly and each of them separately.
- (c) An agreement, covenant, obligation, representation or warranty on the part of two or more persons binds them jointly and each of them separately.

3. Formation and precedence

3.1. Formation and composition

The following are comprised in the Agreement:

- (a) this Master Services Agreement;
- (b) the Order Document(s); and
- (c) any other document forming part of the Agreement as agreed to in writing by the parties,

together the **Agreement**.

3.2. Precedence for this Agreement

In the event of any conflict or inconsistency between one or more of the documents, for interpretation, the following will be the order of precedence:

- (a) the terms of the Master Services Agreement as incorporated under clause 2.1;
- (b) the Order Document(s); and
- (c) any other document forming part of the Agreement as agreed to in writing by the parties.

4. Term

4.1. Master Services Agreement Term

The term of this Agreement:

- (a) commences on the Commencement Date;
- (b) subject to a further rollover term under clause 3.2, continues until the Expiry Date,

unless otherwise terminated earlier in accordance with clause 3.2 of this Agreement.

4.2. Rollover

Unless:

- (a) one of the parties provides written notice to the other party of an intention to allow the Term to expire prior to the expiration of the Term or a further term under this clause 3.2 (Expiry Notice); or
- (b) the Agreement has been otherwise terminated earlier in accordance with clause 17 of this Agreement,

this Agreement shall automatically renew for a further period equivalent to the initial Term, on the terms and conditions of this Agreement.

4.3. Expiry Notice

If a party provides an Expiry Notice to the other party in accordance with clause 3.2, the Term shall expire on the Expiry Date or the next anniversary of the Commencement Date (as the context requires).

4.4. Duration

The duration within which the Services are to be provided by KMO will be specified in each Order Document.

4.5. Services after expiry

If part of an Order Document fixes a term and, for whatever reason, KMO is engaged by Client to perform the Services after the expiry of the term, then the terms and conditions of this Agreement and the Order Document will continue to apply to the engagement but as Additional Services in accordance with the Rate Card, unless otherwise varied in accordance with this Agreement as the circumstances of the continuing engagement require.

5. Services

5.1. Services

KMO agrees to provide the Services to Client in accordance with the terms of this Agreement and any Order Document(s).

5.2. Relationship

The parties' relationship is one of principal and independent contractor, not employer and employee, agency or partnership.

5.3. Scope

- (a) The parties agree that the scope of the Services provided by KMO will be those Services as set out in the respective Order Document.
- (b) If Client wishes to add any Additional Services, it must enter into a separate Order Document in relation to those Services or it otherwise acknowledges that such Additional Services will be chargeable in accordance with the Rate Card.
- (c) Where the Services provided under an Order Document include the provision of services involving or relating to AdWords, the parties acknowledge that the Services extend (where necessary) to the creation of an AdWords account by KMO on behalf of the Client.
- (d) Subject to the express requirements agreed within an Order Document, KMO is not subject to the direction or control of Client as to the manner in which the Services are completed.

5.4. Outside scope

Any services, including but not limited to any services provided on a time basis, provided to Client by KMO, which:

- (a) are not expressly included in the Services under an Order Document and have not been included in the Service Fee;
- (b) are performed as a result of undue delay or other deficiency as deemed by KMO (acting reasonably) on the part of the Client in respect to the Client's obligation under this Agreement;

- (c) are performed as a result of a deficiency in hardware, Client software or infrastructure affecting any performance or obligation under this Agreement, whether on the part of the Client or a Third Party engaged by the Client;
- (d) are performed due to a change of design of any Deliverables, if that change is requested or directed by the Client (or its Personnel); or
- (e) which are performed as a necessity due to a change in Law not anticipated by this Agreement,

(all of the above being **Additional Services**), will be charged to Client in accordance with the rates and fees pursuant to the Rate Card or otherwise as reasonably determined by KMO and disclosed to Client by notice in writing.

5.5. Order Document

- (a) Content

Each Order Document must:

- (1) be agreed in writing by both parties;
- (2) incorporate the terms of the Master Services Agreement in the manner required by clause 2.1; and
- (3) endeavour to specify the following:
 - (A) a description of the Services;
 - (B) if applicable, the number of User(s) (if applicable);
 - (C) the Deliverables (if applicable);
 - (D) the Milestones (if applicable);
 - (E) any pricing (**Service Fees**) and applicable payment schedule; and
 - (F) any special terms and conditions.

- (b) Variations

The parties may, by mutual agreement, agree to any variations or revisions to the Order Document, whether requested by KMO or Client.

5.6. Subcontractors

KMO can delegate the performance of any of the Services to any of its subcontractors, in its discretion.

6. Timetable and delay

6.1. Milestones

- (a) Both parties must use their reasonable endeavours to provide their responsibilities in accordance with the Milestones. The parties acknowledge that a delay by one party must cause the other party to delay in achieving their Milestones.
- (b) When KMO reaches a Milestone for which it is responsible, it will demonstrate how such Milestone has been reached by demonstrating the relevant Milestone to the Client (**Demonstration Date**).
- (c) The Client has three (3) Business Days from the Demonstration Date to accept or reject that a Milestone has been satisfied otherwise it will be

deemed to have accepted that the Milestone has been satisfied.

- (d) If the Client rejects that a Milestone has been satisfied then:
- (1) The Client must provide KMO with a written response, detailing its reasons for such rejection; and
 - (2) KMO will either:-
 - (A) seek to rectify the alleged defects detailed by the Client; or
 - (B) reject the reasons detailed by the Client by notice in writing.
- (e) The Client must when invoking the procedure at clause 5.1(d):
- (1) continue to pay KMO the Fees in accordance with clause 6.1(h); and
 - (2) at all times act in good faith to KMO.

6.2. Regular communications

Each party agrees to provide the other party with regular updates as to the progress of their activities in relation to the project and to provide as much notice as possible of any actual or potential delays. A party may call a progress meeting as and when reasonably required by that party and both parties must attend such meeting, provided reasonable notice has been given.

6.3. Notice of delay

If a party becomes aware that it will not be able to perform any of its Responsibilities in accordance with the Milestones, it must provide the other party with written notice:

- (a) setting out the reasons for the delay; and
- (b) requesting an extension of time for the duration of the delay.

6.4. Client requested extension

If Client requests an extension of time then:

- (a) KMO will grant the extension of time requested by Client;
- (b) the relevant Milestone (and all subsequent Milestones) will be extended by the relevant period;
- (c) any additional services performed as a result of the delay will constitute Additional Services; and
- (d) Client will pay KMO for any additional costs properly incurred in accordance with clause 5.6.

6.5. KMO delay outside of its control

If KMO requests an extension of time and the delay is due to circumstances outside of KMO's reasonable control (including a Force Majeure Event, a failure by Client to perform any of its responsibilities or an act or omission of the Client or a third party) then:

- (a) Client will grant the extension of time requested by KMO, provided that the extension of time is reasonable in light of the reasons provided by KMO for the delay;
- (b) the relevant Milestone (and all subsequent Milestones) will be extended by the relevant period;

- (c) Client will pay KMO for any additional costs properly incurred in accordance with clause 5.6; and
- (d) Client will not be entitled to claim and additional costs or compensation from KMO in respect of the delay or extension of time.

6.6. Costs of delay

If any of clauses 5.4 or 5.5 apply, Client will pay KMO for any additional costs incurred by KMO (including amounts charged by subcontractors and any internal costs) caused by the delay and any extension of time.

7. General obligations

7.1. Client's obligations

Client must (in addition to any other Client's obligations set out in the Order Document(s)):

- (a) ensure that its User(s) have the relevant training to enable interaction with KMO in performing the Services and providing any Deliverables, where applicable;
- (b) provide KMO with all reasonable information and access to its premises, Sites, computers, websites, social media accounts and network systems as required by KMO to provide the Services or Deliverables in accordance with the terms of the Agreement;
- (c) if required, and only where deemed deficient by KMO, agree to purchase and install any resources necessary to enable proper provision of the Services or the installations, maintenance or use of any Deliverables;
- (d) provide KMO with a list of Client staff authorised to provide instructions and approve Services requests;
- (e) if required, provide adequate conditions for KMO's Personnel at Client's premises and Sites, including, but not limited to, workspaces, heating, lighting, ventilation, electric current and outlets, internet and long-distance telephone access;
- (f) promptly notify KMO of any event or incident that is likely to, or will impact on the provision of the Services, Deliverables or any other obligation of KMO (including but not limited to Exceptional Circumstances);
- (g) notify KMO in writing within 5 Business Days of any scheduled or proposed upgrades, patches, or changes to, or installation of, Client Software, infrastructure or applications which may affect KMO's ability to deliver the Services;
- (h) pay the Service Fees in accordance with the term of this Agreement and as otherwise set out in the applicable Order Document;
- (i) depending on the Services provided by KMO, comply with the backup procedures recommended by KMO, to the extent such backup procedures are required for the effective provision of the Services by KMO;
- (j) comply with any reasonable direction of KMO, in order for KMO to perform the Services and comply with its obligations under the Agreement; and

- (k) ensure that its Personnel, and any other person engaged by the Client, does not use the Services to:
- (1) engage in any illegal or unlawful act;
 - (2) distribute a volume of emails higher than an amount deemed reasonable by KMO, or otherwise misuse email tools, if applicable;
 - (3) where applicable, make use of any resource supplied by KMO to an excessive extent as deemed by KMO; or
 - (4) engage in conduct otherwise deemed inappropriate to KMO.

7.2. Third party dealings

Client agrees to use the Services for its sole benefit and must not redistribute the Services to a Third Party unless otherwise expressly included in an Order Document.

7.3. Service limitation

Client acknowledges and agrees that:

- (a) KMO's ability, and obligation, to provide the Services is subject to Client complying with its obligations under clause 6.1 and any other limitation or exclusion set out in this Master Services Agreement and any applicable Order Document;
 - (b) unless otherwise expressly included in an Order Document, the cost of third party application support consumables, software, network upgrades and any associated services are outside the scope of the Services and are the full responsibility of the Client;
 - (c) unless otherwise expressly included in an Order Document, the maintenance or support of any Deliverables, any server upgrades, network device upgrades and software upgrades are outside the scope of this Agreement;
 - (d) unless otherwise expressly included in an Order Document, KMO is under no obligation to backup or otherwise retain data or applications not included in the Services;
 - (e) if an Order Document dictates that KMO is to perform any search engine optimisation services, KMO's obligations extend only to the algorithm used by Third Party search engine operators to determine the relevant search engine ranking at the commencement date of the Order Document. Changes to any search engine algorithms connected with the Services to be provided under an Order Document subsequent to the commencement date of the Order Document are outside of the scope of this Agreement;
 - (f) where KMO is engaged under an Order Document to provide digital marketing services via the management of Client social media accounts or the provision of AdWords services, such services do not extend to:
 - (1) the moderation of any content posted on the Client's social media pages by social media users other than KMO;
 - (2) ensuring compliance with any industry-specific rules, Laws or guidelines or similar concept governing Client's conduct on social media, advertising practices or interactions with its clients or customers; and
- (3) advising Client on, or ensuring compliance with, the legality or legal ramifications of any content it posts, shares, endorses, or directs KMO to post, share or endorse, on its social media pages;
- (g) Where KMO is engaged under an Order Document to provide digital marketing services via the management of marketing emails, such services do not extend to compiling or maintaining Client contact or customer lists;
 - (h) KMO's obligations under this Agreement do not extend to delivering the Services or Deliverables which work on, or are compatible with, new platforms or operating environment not specifically detailed in an Order Document (including new versions or releases of operating systems); and
 - (i) Payment Gateways are the responsibility of third parties and KMO makes no warranty in relation to their functionality, performance, availability of interoperability with the Services.

8. Service Fees and Payment

8.1. Payment

- (a) Client agrees to pay KMO the Service Fees at such times and in the manner specified in the Order Document, or as otherwise provided by this Agreement.
- (b) The Service Fees, as provided in an Order Document, may be varied by KMO during the Term on giving Client 14 days' written notice.

8.2. Third party charges

Where KMO has been engaged to provide digital marketing services via the management of Client's social media accounts or AdWords accounts, Client agrees to pay any charges incurred on these accounts, whether incurred as a result of KMO's use or otherwise.

8.3. Credit terms

Client agrees to pay KMO the Service Fees owing pursuant to clause 7.1 or any other fees owing under the Agreement, within 14 days of being provided with a Tax Invoice from KMO.

8.4. Late or non payment of invoices

If Client fails to pay an invoice within the time period referred to in clause 7.3, KMO may do any one or more of the following:

- (a) charge interest on the amount owing at 2 percent per month;
- (b) restrict or suspend the Services in accordance with clause 8 below; and/or
- (c) terminate the Agreement, in accordance with its terms.

8.5. Indemnity

Client agrees to indemnify, and keep indemnified, KMO in relation to any and all Loss it incurs as a result of Client's breach of any of its obligations in clause 7.

9. Suspension

9.1. Suspension

KMO may temporarily suspend (in part or whole, in the absolute discretion of KMO) the provision of the Services to Client if:

- (a) KMO is required by Law to do so;
- (b) KMO believes (acting reasonably) that Client (or its Personnel) are using the Services to defame or harass any person or to distribute, view or create any Material that may be pornographic, defamatory, offensive, obscene, illegal or unlawful;
- (c) KMO believes (acting reasonably) that the Client (or its Personnel) are using the Services to infringe the Intellectual Property Rights of a third party;
- (d) an event of Exceptional Circumstances occurs, which affects or may affect KMO's ability to provide the Services;
- (e) such suspension is pursuant to clause 7.4 (late payment of invoice); or
- (f) if Client is in breach of the Agreement.

9.2. Effect of suspension

Suspension in accordance with clause 8.1 will not affect any rights which accrue prior to, or after, suspension of Client's obligations under the Agreement.

10. Intellectual Property Rights

10.1. Client Technology

- (a) No rights of ownership to Client Technology are transferred under this Agreement.
- (b) Client grants to KMO a non-exclusive, non-transferable licence to use its Intellectual Property Rights in Client Technology during the Term, but only for the purpose of it performing the Services for Client.

10.2. KMO Technology

- (a) No rights of ownership to KMO Technology are transferred under the Agreement.
- (b) KMO grants Client a non-exclusive, non-transferable, irrevocable (except pursuant to clause 17.1(a)), royalty-free licence (subject to clause 7.1) to its Intellectual Property Rights in the KMO Technology, but only to the extent necessary for Client to use any Deliverable embodying any such rights.

10.3. Provision and ownership of New IP

- (a) If New IP is to be owned by KMO, as indicated either by electing "KMO-owned" on the Order Document or by making no election, then:
 - (1) upon its creation, all New IP will be owned by, vest in, and (to the extent required) be assigned to, KMO; and
 - (2) Client will be granted a perpetual (subject to clause 17.1(a)), non-exclusive, revocable, non-transferable licence to use that New IP for its business purposes (but only as embedded within a Deliverable).

- (b) If New IP is to be owned by the Client, as indicated by electing "Client-owned" on the Order Document, then, upon its creation all New IP:

- (1) will be owned by, and vest in, and (to the extent required) be assigned to, the Client; and
- (2) will be automatically licensed to KMO to use, modify and commercialise in other products and services (including software development services), in the sole discretion of KMO; and
- (3) the licence in clause 9.3(b)(2) expressly includes a right of sub-licence and a right to grant licences which include a right of sub-licence.

10.4. Client Data

All Client Data remains owned by the Client.

10.5. Prohibited activities

Each party must not do or permit or omit to do any act which infringes the Intellectual Property Rights of the other party (or its licensors).

10.6. Notification of infringement claim

Each party must notify the other party within 5 Business Days if it becomes aware of:

- (a) any actual or suspected infringement by a third party of a party's Intellectual Property Rights; or
- (b) any actual or threatened Claim by a third party that its Intellectual Property Rights have or will be infringed by any act or omission by a party in connection with the Agreement.

10.7. Indemnity

Client agrees to indemnify, and keep indemnified, KMO in relation to any and all Loss it occurs as a result of Client's breach of this clause 9, including but not limited to any Claim by a third party as a result of Client breach of this clause 9.

11. Third Party software licences

11.1. Third Party Content

The Client acknowledges and agrees that:

- (a) KMO can (in its sole discretion) make use of Third Party Content when performing the Services, and incorporate such Third Party Content into Deliverables (unless otherwise expressly agreed to by the Parties in writing); and
- (b) Third Party Content may be subject to licences or other terms and conditions provided by the relevant Third Party.

11.2. Compliance

- (a) Client must comply with the licence terms of all KMO software and Third Party Content installed or used in the provision of the Services.
- (b) Client must not do or permit to do any act that breaches, or causes KMO to breach, a software licence installed or used in the provision of the Services.

11.3. Indemnity

- (a) Client agrees to indemnify, and keep indemnified, KMO in relation to any and all Loss it incurs as a result of Client's breach of clause 10.2.
- (b) Client agrees to indemnify, and keep indemnified, KMO against any Claim by a third party as a result of Client's breach of clause 10.2.

12. Confidential Information

12.1. Disclosure

- (a) A party must not, without the prior written approval of the other party, disclose the other party's Confidential Information.
- (b) Each party must take all reasonable steps to ensure that its employees and agents, any sub-contractors, or persons otherwise engaged for the purposes of the Agreement, do not make public or disclose the other party's Confidential Information.
- (c) A party is not in breach of this clause 11.1 in circumstance where it is legally compelled to disclose the other party's Confidential Information.
- (d) Notwithstanding any other provision of this clause 11.1, the parties may disclose the terms of the Agreement (other than Confidential Information of a technical nature) to its related companies, solicitors, auditors, insurers and accountants.

12.2. Return of Confidential Information

Each party must on demand, return to the other party any Confidential Information supplied by the other party in connection with the Agreement.

12.3. Security and unauthorised access

- (a) Each party must ensure that all information and Materials of the other party (or its agents or contractors) in the custody of that party for purposes connected with the Agreement are protected at all times from unauthorised access or use by a third party, and from misuse, damage or destruction by any person.
- (b) Client must ensure compliance with all security regulations, procedures or directions as may be given by KMO from time to time relating to the Confidential Information or access to KMO's Confidential Information.

12.4. Survival and indemnity

- (a) This clause survives the termination of the Agreement.
- (b) Client agrees to indemnify, and keep indemnified, KMO in relation to any and all Loss it incurs as a result of Client's breach of this clause 11.

13. Liability

13.1. Exclusion of liability

- (a) To the extent permitted by Law, in no event will KMO be Liable to Client for Consequential Loss, even if KMO has been made aware of the possibility of such Consequential Loss prior to entering into the Agreement.

- (b) To the extent permitted by Law, in no event will KMO be Liable to Client for loss or corruption of Client Data even if KMO has been made aware of the possibility of such loss or corruption of Client Data prior to entering into the Agreement.

- (c) The Client acknowledges and agrees that, where KMO is engaged under an Order Document to provide digital marketing services via management of the Client's social media accounts, the provision of services relating to AdWords or via other means, KMO is not liable for any loss incurred by the Client as a result of:
 - (1) the content of, or errors or omissions in, any pages, advertising or posts made or published via the Client's social media accounts or AdWords account;
 - (2) server downtime or other accessibility issues to the social media or AdWords accounts;
 - (3) unauthorised access to a Client's social media or AdWords account by an employee of the Client or a Third Party;
 - (4) the cancellation, deletion or deactivation of any AdWords or social media accounts by the provider of those accounts;
 - (5) any unexpected or excess charges incurred via use by the Client or KMO of the Client's AdWords or social media accounts;
 - (6) any errors on the platforms provided by AdWords or social media providers;

- (d) The Client acknowledges and agrees that to the extent a Deliverable includes software, that software is never error or defect free, and that the mere presence of defects or errors in software will not constitute a breach of KMO's obligations under the Agreement.

- (e) The Client acknowledges and agrees that the effectiveness of any application, methodology or process used by KMO in delivering the Services may be dependent on external factors controlled by Third Parties, and any errors, incompatibilities or adverse effects that occur as a result of Third Party actions:
 - (1) after the Commencement Date; or
 - (2) on or before the Commencement Date, that could not be ascertained or foreseen by KMO (to be determined by KMO, acting reasonably),

including but not limited to:

- (3) changes in algorithms, processes, upgrades, updates, new releases and patches; or
- (4) any other changes to variables relied on by KMO to deliver the Services,

do not constitute a breach of KMO's obligations under the Agreement.

- (f) The Client agrees that, upon successful delivery to Client of the Deliverables (and the provision to Client of any related access) under the Agreement, KMO relinquishes any responsibility or Liability in relation to said Services and/or

Deliverables, such that the operability, configuration and functionality of any Deliverables becomes the sole responsibility of Client.

- (g) Unless otherwise specified, neither party is liable to Third Parties regarding, or arising out of or in connection with, the Agreement.

13.2. Implied terms

- (a) To the full extent permitted by Law, and term which would otherwise be implied into the Agreement is excluded.
- (b) In the event any Law implies or imposes terms into the Agreement which cannot be lawfully excluded, such terms will apply, save that the liability of KMO for breach of any such term will be limited in accordance with clause 12.3(a).

13.3. Limitation of liability

- (a) Re-performance

To the extent KMO is found Liable in connection with the Agreement, its Liability shall be limited (at the option of KMO) to any one or more of the following:

- (1) re-supplying services to which the Liability relates or the supply of equivalent services; or
- (2) reimbursing Client (subject to clause 12.3(b)) for paying someone else to supply the services which the Liability relates.

- (b) Liability cap

If KMO is Liable in connection with the Agreement (whether in contract, tort, indemnity of statute), then irrespective of anything else in the Agreement, KMO's cumulative Liability in the aggregate (to the fullest extent permitted by Law) shall in no event exceed the sum of the Service Fees paid by Client to KMO.

14. Indemnity

Client indemnifies, and will keep indemnified, KMO against any:

- (a) Claims against KMO; or
- (b) Loss suffered by KMO, arising from:
- (c) any fraud or wilful misconduct of the Client or its Personnel under or in connection with the Agreement;
- (d) the negligent acts or omissions of Client or its Personnel under or in connection with the Agreement; or
- (e) any breach of the Agreement by Client.

15. Warranty

15.1. KMO warranty

- (a) KMO warrants to Client:
- (1) that it has the full right and title to enter into the Agreement and to grant the rights it sets out to Client; and
- (2) that the Services will be performed with due care and diligence.

- (b) KMO makes no warranty in relation to actual search engine rankings where KMO has been engaged for digital marketing services, including social media management services, AdWords services, or search engine optimisation services under an Order Document.

- (c) KMO makes no warranty in relation to the compatibility of any service it provides with the Client's infrastructure, IT systems, websites, webpages, or web content including add-ons and widgets.

- (d) Where KMO has been engaged to provide digital marketing services under an Order Document, whether via the management of Client social media accounts, the provision of services relating to AdWords or otherwise, KMO makes no warranty that providing such services will result in:

- (1) an improvement in traffic on the Client's webpages or social media accounts; or
- (2) an increase in any leads, conversions or sales generated by customer use of the Client's webpages or social media accounts.

15.2. Client warranty

Client warrants to KMO:

- (a) that it has full right and title to enter into the Agreement and to grant the rights it sets out to KMO;
- (b) that no information has been withheld from KMO that may affect its decision to enter into this Agreement; and
- (c) that it has satisfied itself of the content of this Agreement and, if necessary, obtained independent advice from a relevant expert to confirm same before entering into it.

16. Privacy Law

16.1. Client's consent to transfer of personal information

- (a) Client consents, acknowledges and agrees that:
- (1) Any Personal Information disclosed to KMO may be disclosed to, and or stored, on infrastructure used by KMO outside Australia, or as is otherwise provided in the Order Document.
- (2) By entering into the Agreement, Client expressly agrees and consent to, and will procure the consent of its Personnel to, the disclosure or use of any Personal Information outside of Australia in the manner permitted by this clause.
- (b) In providing this consent Client understands and acknowledges that countries outside Australia do not always have the same privacy protection obligations as Australia in relation to Personal Information, however in order to ensure that all Personal Information is protected, KMO has agreed to implement the protections set out in clause 15.2.

16.2. Privacy protection obligations

By providing the Client's consent, under Privacy Law, Australian Privacy Principle 8.1 in Privacy Law does not apply to disclosures referred to in clause 15.1(a).

17. Emergency action

17.1. Damage by Client resources

Should KMO form the opinion that any resources owned or operated by the Client may damage any KMO or Third Party Services, KMO may do anything within its power and control necessary to cause the damaging resources to cease operation.

17.2. Emergency repairs

Any emergency repairs, whether as a result of the circumstances described in the above clause 16.1 or at the fault of the Client, are the responsibility of the Client to pay in a timely manner to ensure proper operation of the Services.

18. Termination

18.1. Termination of Master Services Agreement

- (a) Either party may terminate the Master Services Agreement immediately by written notice upon the occurrence of one of the following events:
 - (1) if the other party is in breach of this Master Services Agreement and that other party has failed to remedy that breach within thirty (30) days of a written notice to it from the first-mentioned party, specifying the breach and requiring it to be remedied;
 - (2) an Insolvency Event occurs in respect of the other party.
- (b) The Master Services Agreement may be terminated by the mutual written agreement of the parties.
- (c) KMO may terminate the Master Services Agreement for any reason, upon providing Client with 30 days' prior written notice of such termination. In this case, the Master Services Agreement terminates at the expiration of the period of notice.

18.2. No prejudice of rights

Termination shall not prejudice or affect any right or action which shall have accrued or shall thereafter accrue to either party.

18.3. Survival

The following clauses survive termination of the Agreement: Clause 9 (Intellectual Property Rights), Clause 10 (Third Party Software), Clause 11 (Confidentiality), Clause 12 (Liability), Clause 13 (Indemnity), Clause 15 (Privacy), Clause 18 (Consequences of Termination) and this clause 17.3.

19. Consequences of Termination

Upon termination or expiration of the Master Services Agreement:

- (a) KMO will cease performing the Services;
- (b) all money due by Client to KMO under any Order Document(s) must be paid in full;

- (c) each party must return to the other party of (if requested by the other party) destroy, all Confidential Information belonging to the other party;
- (d) where KMO has been engaged under an Order Document to provide digital marketing services via AdWords, KMO will delete any AdWords accounts, advertisements and keywords relating to those services; and
- (e) Client must grant KMO and/or its authorised representatives or agents, the right of reasonable access to any of its records, sites and Materials that are related to the Master Services Agreement or any Order Document(s).

20. Force Majeure

20.1. Suspension of obligations

If a party (**Affected Party**):

- (a) is prevented from, or delayed in, performance of an obligation (other than an obligation of Client to pay money) by an event of Exceptional Circumstance; and
- (b) the Affected Party, as soon as possible after the event of Exceptional Circumstance notifies the other party providing particulars of:
 - (1) the event of Exceptional Circumstance;
 - (2) the anticipated period of delay; and
 - (3) the action (if any action is reasonably possible) the Affected Party intends to take to mitigate the effect of the delay,

then those obligations of the Affected Party are suspended for the duration of the event of Exceptional Circumstance.

20.2. Obligations on other party

The party which is not the Affected Party must use all reasonable endeavours to remove or mitigate its Loss arising from, and the effects of, the event of Exceptional Circumstance.

21. Goods and Services Tax

21.1. GST exclusive

Unless expressly stated to the contrary, all amounts expressed in the Agreement are exclusive of GST.

21.2. Recipient to pay Supplier

- (a) If a party (the Supplier) is obliged under the GST Law to pay an amount of GST for a taxable supply made by the Supplier to another party (the Recipient) under the Agreement, the Recipient must pay the Supplier an amount equal to the GST payable on the supply by the Supplier.
- (b) The Recipient must pay the amount referred to in clause 20.2(a) and any interests, penalties, fines or expenses relating to the GST, in addition to and at the same time as the consideration otherwise payable by the Recipient for the supply.

21.3. Tax Invoice

If requested by the Recipient, the Supplier must provide the Recipient with a Tax Invoice on or before payment of the amounts required by clause 20.2.

22. Notices

22.1. Form

Any notice or other communication to or by any party must be:

- (a) in writing and in the English language;
- (b) addressed to the address of the recipient in the Reference Schedule or to any other address as the recipient may have notified the sender; and
- (c) be signed by the party or by an Authorised Officer of the sender.

22.2. Manner

In addition to any other method of service authorised by law, the notice may be:

- (a) personally served on a party;
- (b) left at the party's current address for service;
- (c) sent to the party's current address for service by prepaid ordinary mail or if the address is outside Australia by prepaid airmail; or
- (d) sent by electronic mail to the party's electronic mail address.

22.3. Time

If a notice is sent or delivered in the manner provided in clause 21.2 it must be treated as given to or received by the addressee in the case of:

- (a) delivery in person, when delivered;
- (b) delivery by post:
 - (1) in Australia to an Australian address, the second Business Day after posting; or
 - (2) in any other case, on the tenth Business Day after posting; or
- (c) electronic mail, when the sender's computer reports that the message has been delivered to the electronic mail address of the addressee.

22.4. Initial details

The addresses and numbers for service are initially as set out in the Reference Schedule.

22.5. Changes

A party may from time to time change its address or numbers for service by notice to each other party.

23. Miscellaneous

23.1. Governing law

This Agreement is governed by and construed in accordance with the laws of Queensland.

23.2. Exercise rights

A single or partial exercise or waiver by a party of any right under or relating to this Agreement will not prevent any other exercise of that right or the exercise of any other right.

23.3. Assignment

- (a) Assignment by KMO

KMO can assign its obligations in this Agreement by providing the Client with 30 days prior written notice of such assignment.

- (b) Assignment by Client

The Client must not assign, transfer or novate all or any part of its rights or obligations under or relating to this Agreement or grant, declare, create or dispose of any right or interest in it, without the prior written consent of KMO. KMO may withhold its consent in its sole discretion.

- (c) Change of Control

For the purposes of this clause 22.3, a Change of Control in respect of the Client will be deemed to be an assignment enlivening the operation of clause 22.3(b).

23.4. Severability

If a provision of this Agreement is illegal, invalid, unenforceable or void in a jurisdiction it is severed for that jurisdiction and the remainder of this Agreement has full force and effect and the validity or enforceability of that provision in any other jurisdiction is not affected.

23.5. Further assurance

Each party must promptly at its own cost do all things (including executing and delivering all documents) necessary or desirable to give full effect to this Agreement and the transactions contemplated by it.

23.6. Application of indemnities

Subject to any other provision of the Agreement, the indemnities in the Agreement are continuing obligations, independent from the other obligations of the parties under the Agreement and continue after the Agreement ends. It is not necessary for a party to incur expense or make payment before enforcing a right of indemnity under the Agreement.

23.7. Variation

An amendment or variation to this Agreement is not effective unless it is in writing and signed by the parties.

23.8. Publicity

- (a) Client authorises KMO to make public announcements in newspapers, trade journals and other printed and electronic publications regarding the existence of the Agreement and to identify Client as a client or customer of KMO in advertising or marketing Materials.
- (b) If the Services captured within the provisions of an Order Document relate to development services by KMO on Client's associated website, KMO may incorporate an acknowledgement on Client's website, along with words, images, and a link to KMO's website, to indicate that KMO is the designer and developer of the website.
- (c) Client agrees that, for the period that Client uses or benefits from any Services or Deliverables licensed to Client under this Agreement, it will not remove or obscure any form of acknowledgement set out in clause 22.8(b); and
- (d) KMO may acknowledge that it was the designer and developer of any product of the Services on its own website and use and reproduce extracts solely for the purpose of marketing.

23.9. Waiver

- (a) A party's waiver of a right under or relating to this Agreement, whether prospectively or retrospectively, is not effective unless it is in writing and signed by that party.

- (b) No other act, omission or delay by a party will constitute a waiver of a right.

23.10. **Counterparts**

This Agreement may be executed in any number of counterparts each of which will be considered an original but all of which will constitute one and the same instrument. A party who has executed a counterpart of this Agreement may deliver it to, or exchange it with, another party by emailing a pdf (portable document format) copy of the executed counterpart to that other party.

23.11. **Whole agreement**

This Agreement:

- (a) is the entire agreement and understanding between the parties relating to the subject matter of this Agreement; and
 - (b) supersedes any prior agreement, representation (written or oral) or understanding on anything connected with that subject matter.
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