

**1. Definitions**

- 1.1 "PWD" means J R Peacock T/A Peacock Web Design, its successors and assigns or any person acting on behalf of and with the authority of J R Peacock T/A Peacock Web Design.
- 1.2 "Client" means the person/s requesting PWD to provide the Services as specified in any invoice, document or order, and if there is more than one person requesting the Services is a reference to each person jointly and severally.
- 1.3 "Services" means all Goods (including web site content, any printed or virtual material, samples, web sites, brands, designs, images, advertising, data, graphics, pictures, trademarks, software, applications, manuals, and other associated documentation and/or Products) and/or Services (which includes any advice or recommendations, consultancy, hosting, backups, design and/or maintenance of web sites, brands, designs, or advertising, project management work, brand integration, and strategising and analytical Services, etc.) or other materials ("Products") supplied, created or deposited incidentally by PWD in the course of it conducting, or providing to the Client, any Services. Where the context so permits the terms 'Services' or 'Products shall be interchangeable for the other. Any Products supplied to the Client by PWD on a loan basis (for the duration of the Services):
- (a) remains PWD's sole property;
  - (b) may be changed, substituted, revoked or repossessed by PWD at PWD's sole discretion at any time; and
  - (c) is not transferable.
- 1.4 "Web Site" means a location which is accessible on the Internet through the World Wide Web and which provides multimedia content via a graphical User Interface.
- 1.5 "Prohibited Content" means any content that:
- (a) is, or could reasonably be considered to be, in breach of the broadcasting standards or any other applicable law or applicable industry code; or
  - (b) contains, or could reasonably be considered to contain, any misrepresentations; or is, or could reasonably be considered to be, misleading or deceptive, likely to mislead or deceive or otherwise unlawful; or
  - (c) is, or could reasonably be considered to be, in breach of any person's Intellectual Property Rights.
- 1.6 "Charges" shall mean the cost of the Services as agreed between PWD and the Client subject to clause 4 of this contract and shall be New Zealand dollars (\$NZ) unless otherwise specified.

**2. Acceptance**

- 2.1 The Client is taken to have exclusively accepted and is immediately bound, jointly and severally, by these terms and conditions if the Client places an order for, or accepts Services provided by PWD.
- 2.2 These terms and conditions may only be amended with the consent of both parties in writing, and shall prevail to the extent of any inconsistency with any other document or agreement between the Client and PWD.
- 2.3 None of PWD's agents or representatives are authorised to make any representations, statements, conditions or agreements not expressed by J R Peacock T/A Peacock Web Design in writing nor is PWD bound by any such unauthorised statements.
- 2.4 Once accepted by the Client, PWD's quotation shall be deemed to interpret correctly the Client's instructions, whether written or verbal. Where verbal instructions only are received from the Client, PWD shall not be responsible for errors or omissions due to oversight or misinterpretation of those instructions.
- 2.5 Any advice, recommendations, information, assistance or service provided by PWD in relation to Services provided is given in good faith, is based on information provided to PWD, and PWD's own knowledge, and experience. Whilst it shall be the responsibility of the Client to confirm the accuracy and reliability of the same in light of the use to which the Client makes or intends to make of the Services, human error is possible under these circumstances, and PWD shall make all effort to offer the best solution to the Client.
- 2.6 Electronic signatures shall be deemed to be accepted by either party providing that the parties have complied with Section 22 of the Electronic Transactions Act 2002 or any other applicable provisions of that Act or any Regulations referred to in that Act.
- 2.7 The Client acknowledges and accepts where the Client wishes to engage a third party consultant to work on a project together with PWD, to carry out part of the Services, then the Client agrees to, in the first instance as an act of good faith, to advise PWD of the proposed action prior to any engagement to ensure there is no issue of a conflict of interest.

**3. Change in Control**

- 3.1 The Client shall give PWD not less than fourteen (14) days prior written notice of any proposed change of ownership of the Client and/or any other change in the Client's details (including but not limited to, changes in the Client's name, address, contact phone or fax number/s, or business practice). The Client shall be liable for any loss incurred by PWD as a result of the Client's failure to comply with this clause.

**4. Charges and Payment**

- 4.1 At PWD's sole discretion the Charges shall be either:
- (a) as indicated on any invoice provided by PWD to the Client; or
  - (b) PWD's quoted Charges (subject to clause 4.2) which will be valid for the period stated in the quotation or otherwise for a period of thirty (30) days.
- 4.2 PWD reserves the right to vary the Charges:
- (a) if a variation to the plan of scheduled Services, or Client specifications is requested (including, but not limited to, additional work required due to hidden or unidentifiable difficulties not evident prior to commencement of the Services, any request to investigate and/or repair any faults or defects outside PWD's normal business hours or any delay caused by the Client in contravention of clause 7.2, etc.);
  - (b) as a result of increases beyond PWD's reasonable control in the cost of materials or labour (e.g. third-party network operator or PWD's costs (e.g. google) or fluctuations in currency exchange rates, etc.).
- 4.3 Variations will be charged for on the basis of PWD's quotation, and will be detailed in writing, and shown as variations on PWD's invoice. The Client shall be required to respond to any variation submitted by PWD within ten (10) working days. Failure to do so will entitle PWD to add the cost of the variation to the Charges. Payment for all variations must be made in full at the time of their completion.
- 4.4 At PWD's sole discretion, a non-refundable deposit may be required, prior to commencement of the Services.
- 4.5 Time for payment for the Services being of the essence, the Charges will be payable by the Client on the date/s determined by PWD, which may be:
- (a) by way of instalments/progress payments in accordance with PWD's payment schedule of:

- (i) forty percent (40%) upon acceptance of the quotation; and
  - (ii) sixty (60%) balance due prior to the date of installation.
  - (b) fourteen (14) days following the date of the invoice in which the invoice is either posted and/or emailed to the Client's current email address provided as agreed between the two parties or to the Client's address for notices;
  - (c) the date specified on any invoice or other form as being the date for payment; or
  - (d) failing any notice to the contrary, the date which is seven (7) days following the date of any invoice given to the Client by PWD.
- 4.6 Payment may be made by cash, electronic/on-line banking, or by any other method as agreed to between the Client and PWD.
- 4.7 Unless otherwise stated the Charges do not include GST. In addition to the Charges the Client must pay to PWD an amount equal to any GST PWD must pay for any provision of Services by PWD under this or any other agreement. The Client must pay GST, without deduction or set off of any other amounts, at the same time and on the same basis as the Client pays the Charges. In addition, the Client must pay any other taxes and duties that may be applicable in addition to the Charges except where they are expressly included in the Charges.

## **5. Provision of the Services and Delivery of Goods**

- 5.1 Any time specified by PWD for provision of the Services is an estimate only and PWD will not be liable for any loss or damage incurred by the Client as a result of provision being late. However, both parties agree that they shall make every endeavour to enable the Services to be provided at the time and place as was arranged between both parties. In the event that PWD is unable to provide the Services as agreed solely due to any action or inaction of the Client, then PWD shall be entitled to charge the Client additionally for re-providing the Services at a later time and date.
- 5.2 The Client acknowledges that, due to the nature of digital display, technical difficulties may arise which could prevent the provision of the Services; and the Client, therefore, agrees to indemnify PWD against any costs or losses incurred by the Client as a result of this.
- 5.3 Delivery of the Goods is taken to occur at the time that:
- (a) the Client or the Client's nominated carrier takes possession of the Goods at PWD's address; or
  - (b) PWD (or PWD's nominated carrier) delivers the Goods to the Client's nominated address, even if the Client is not present at the address.
- 5.4 At PWD's sole discretion, the cost of delivery of the Goods is in addition to the Charges.
- 5.5 The Client must take delivery, by receipt or collection of the Goods, whenever they are tendered for delivery. In the event that the Client is unable to take delivery of the Goods as arranged, then PWD shall be entitled to charge a reasonable fee for redelivery and/or storage.
- 5.6 PWD may deliver the Goods in separate instalments. Each separate instalment shall be invoiced and paid in accordance with the provisions in these terms and conditions.
- 5.7 Risk of damage to or loss of the Goods passes to the Client on delivery, and the Client must insure the Goods on or before delivery. If any of the Goods are damaged or destroyed following delivery, but prior to ownership passing to the Client, PWD is entitled to receive all insurance proceeds payable for the Goods. The production of these terms and conditions by PWD is sufficient evidence of PWD's rights to receive the insurance proceeds without the need for any person dealing with PWD to make further enquiries. If the Client requests PWD to leave Goods outside PWD's premises for collection, or to deliver the Goods to an unattended location, then such Goods shall be left at the Client's sole risk.

## **6. Risk and Limitation of Liability for Client Data**

- 6.1 The Client acknowledges and agrees that PWD shall not be held responsible or liable for:
- (a) anything related to the Web Site or any other Services provided;
  - (b) any supplied content breaching any Acts, legislation or regulations, unless due to the negligence of PWD;
  - (c) any loss, corruption, or deletion of files or data (including, but not limited to software programmes) resulting from illegal hacking or Services provided by PWD. Whilst PWD will endeavour to restore the Web Site, files or data (at the Client's cost), and it is the sole responsibility of the Client to back-up any data which they believe to be important, valuable, or irreplaceable prior to PWD providing the Services. The Client accepts full responsibility for the Client's software and data and PWD is not required to advise or remind the Client of appropriate backup procedures.
- 6.2 The Client acknowledges that any advice or recommendations by PWD are provided on the basis of PWD's industry knowledge and experience only and shall not be deemed as specialist advice.
- 6.3 PWD, agents or employees will not be liable in any way for any form of loss or damage of any nature whatsoever suffered, whether arising directly or indirectly, by the Client or any person related to or dealing with the Client out of, in connection with or reasonably incidental to the provision of the Services by PWD to the Client.
- 6.4 The Services are provided on an "as is, as available" basis. PWD specifically disclaims any other warranty, express or implied, including any warranty of merchantability or fitness for a particular purpose.
- 6.5 *Public Access:*
- (a) The Client understands that by placing information on the Web Site, such information may be accessible to all internet users. PWD does not (unless expressly requested by the Client) limit or restrict access to such information, nor protect such information from copyright infringement or other wrongful activity. The Client assumes full responsibility for their use of the Services, and it is the Client's sole responsibility to evaluate the accuracy, completeness and usefulness or all opinions, advice, services, and other information, and the quality and merchantability of all Services provided by PWD, or on the internet generally.

## **7. Web Site Development**

- 7.1 *PWD's Responsibilities:*
- (a) Upon acceptance of PWD's quotation, and in accordance with this agreement, PWD will:
    - (i) use its best endeavours to develop the Web Site in accordance with the Client's instructions and specifications; and
    - (ii) to the extent specified in the Client's instructions and specifications, negotiate and procure any third-party agreements on behalf of the Client.
  - (b) The Client acknowledges that the development of the Web Site by PWD is based upon current technology platforms (e.g. internet browsers, mobile, android, etc.), and therefore PWD cannot guarantee that Web Site features and /or content will display correctly, and that the overall visual experience will be the same, for use by either superseded or presently undeveloped technology.
- 7.2 *Client's Responsibilities:*
- (a) The Client will, in addition to any other obligations expressed in this agreement, have the following responsibilities:
    - (i) provision of all content (including data, logos, designs and/or graphic and related materials) to be incorporated into the Web Site;

- (ii) provision of any other information, ideas or suggestions which are to be expressly considered by PWD in developing the Web Site.
- (b) The Client will ensure that PWD is given such information and assistance as PWD reasonably, requires to enable PWD to construct and maintain the Web Site.
- (c) It shall be the Client's responsibility to ensure that any specific requirements they may have for mobile web browsers is included in the brief, as, unless otherwise specified therein, the choice of web browsers and technology used in the development of the Web Site shall be at the sole discretion of PWD. In the event that additional Services are requested, or required (as per clause b), in order to meet any specific requirements for mobile web browsers, after PWD has commenced work on the Web Site, shall be treated as a variation to the Charges, and a strict estimation of further work required shall be submitted to the Client for approval before proceeding with the variation work.
- (d) PWD will not be responsible for, and accepts no liability for, any deficiency or alleged deficiency in the Web Site which is attributable to:
  - (i) incorrect information provided by the Client, either pursuant to this clause or otherwise; or
  - (ii) failure by the Client to provide relevant information, either pursuant to this clause or otherwise; or
  - (iii) any third-party products and/or services used by PWD in creation of the Web Site.

**7.3 Additional Services:**

- (a) PWD agrees that there will be no charge in the preparation of the initial quotation, which may include Client discussions, project scoping, research, testing and business analysis, etc. However, in some instances the aforementioned services may be charged to the Client additionally (at PWD's sole discretion). In the event the Client requires proofs, mock-ups, layouts, samples or dummies or printed, typewritten or other good copy and/or edits, this shall be invoiced at PWD's hourly rate unless specified otherwise in the initial quotation, therefore, this variation shall be detailed on the invoice as per clause 4.2.
- (b) All work carried out whether experimentally or otherwise at the Client's request will be charged to the Client.
- (c) Any tabulated work and/or foreign language included in the job but not contained in the manuscript originally submitted for the purpose of estimating may be charged to the Client and shown as extras on the invoice.
- (d) Unless otherwise agreed, the Client shall bear the cost of fonts, or colour proofs, or artwork, specially bought at the Client's request for the job.
- (e) Where the performance of any contract with the Client requires PWD to obtain products and/or services from a third party, the contract between PWD and the Client shall incorporate, and shall be subject to, the conditions of supply of such products and/or services to PWD, and the Client shall be liable for the cost in full including PWD's margin of such products and/or services.
- (f) Whilst every effort will be taken by PWD to match virtual colours with physical colours, PWD will take no responsibility for any variation between virtual sale samples and either the virtual sale sample displayed on the Client's computer and/or the final product. Should a physical sample be required this will be provided on request by the Client and will be charged for as an extra and charged contra against final invoice.

**7.4 Proof Reading:**

- (a) Whilst every care is taken by PWD to carry out the instructions of the Client, it is the Client's responsibility to undertake a final proof reading. PWD shall be under no liability whatever for any errors not corrected by the Client in the final proof reading. Should the Client's alterations require additional proofs this shall be invoiced as an extra.
- (b) When style, type or layout is left to PWD's judgement and the Client makes further alterations, this will be invoiced as an extra.

**7.5 Client's Property and Materials:**

- (a) In the case of property and materials left with PWD without specific instructions, PWD shall be free to dispose of them at the end of twelve (12) months after their receiving them and to accept and retain the proceeds, if any, to cover their own costs in holding and handling them.
- (b) Where materials or equipment are supplied by the Client, PWD accepts no responsibility for imperfect work caused by defects in or unsuitability of such materials or equipment.

**8. Search Engine Optimisation (SEO)**

- 8.1 Although PWD shall use their knowledge and experience to gain the best results possible, PWD gives no guarantee of the quality of visitor or the position / page rank or volume of visits to the Web Site, or warranty that the Web Site will be effective in promoting the Client's business or result in any increase in sales of the products/services of the Client. Periodic reporting will be sent to the Client's nominated email address, at the sole discretion of PWD.

**9. Publicity**

- 9.1 All media releases and public announcements by either party relating to these terms and conditions, or the Services (including subject matter and related Materials), shall be co-ordinated with the other party and approved jointly by the party prior to release.
- 9.2 PWD shall not be held responsible for the use of Services as referred to in by media, once information approved by the Client has been submitted to the media.
- 9.3 When reactive PR is required, the Client agrees that PWD can act on the Client's behalf, if required, in line with the provision of Services under these terms and conditions, based on information previously supplied by the Client and PWD's understanding of the Client's instructions.

**10. Defects and Returns**

- 10.1 The Client shall inspect the Goods on delivery and shall within seven (7) days of delivery (time being of the essence) notify PWD of any alleged defect, shortage in quantity, damage or failure to comply with the description or quote. The Client shall afford PWD an opportunity to inspect the Goods within a reasonable time following delivery if the Client believes the Goods are defective in any way. If the Client shall fail to comply with these provisions the Goods shall be presumed to be free from any defect or damage. For defective Goods, which PWD has agreed in writing that the Client is entitled to reject, PWD's liability is limited to either (at PWD's discretion) replacing the Goods or repairing the Goods.
- 10.2 Goods will not be accepted for return other than in accordance with 10.1 above, and provided that:
  - (a) PWD has agreed in writing to accept the return of the Goods; and
  - (b) the Goods are returned at the Client's cost within seven (7) days of the delivery date; and
  - (c) PWD will not be liable for Goods which have not been stored or used in a proper manner; and
  - (d) the Goods are returned in the condition in which they were delivered and with all packaging material, brochures and instruction material in as new condition as is reasonably possible in the circumstances.
- 10.3 PWD will not accept the return of Goods for credit.
- 10.4 Subject to clause 10.1, non-stocklist items or Goods made to the Client's specifications are not acceptable for credit or return.

## 11. Warranty

- 11.1 For Goods not manufactured by PWD, the warranty shall be the current warranty provided by the manufacturer of the Goods. PWD shall not be bound by nor be responsible for any term, condition, representation or warranty other than that which is given by the manufacturer of the Goods.

## 12. Intellectual Property and Confidentiality

- 12.1 The Client shall indemnify PWD against any claims by third parties for patent, trademark, design or copyright infringement, directly or indirectly arising out of the design, workmanship, material, construction, or use of the Goods or any other deficiency therein. Where the Client has supplied drawings, sketches, files or logo's to PWD, the Client warrants that the drawings, sketches, files or logo's do not breach any patent, trademark, design or copyright, and the Client agrees to indemnify PWD against any action taken by a third party against PWD.
- 12.2 Notwithstanding anything herein, the Intellectual Property Rights in PWD's Services do not vest in the Client and there is no assignment of these Intellectual Property Rights to the Client. PWD hereby grants to the Client an irrevocable, non-exclusive and non-transferable licence to use and reproduce the Services for the purposes of this agreement only, and solely for the operation of the Client's business however, the Client shall not use nor make copies of such Intellectual Property in connection with any work or business other than the work or business specified in writing to PWD unless express approval is given in advance by PWD. Such license shall terminate on default of payment or any other terms of this agreement by the Client.
- 12.3 Each party agrees to treat all information and ideas communicated to it by the other confidentially and agree not to divulge it to any third party, without the other party's written consent. The parties will not copy any such information supplied, and will either return it or destroy it (together with any copies thereof) on request of the other party.

## 13. Default and Consequences of Default

- 13.1 Interest on overdue invoices shall accrue daily from the date when payment becomes due, until the date of payment, at a rate of two and a half percent (2.5%) per calendar month (and at PWD's sole discretion such interest shall compound monthly at such a rate) after as well as before any judgment.
- 13.2 If the Client owes PWD any money the Client shall indemnify PWD from and against all costs and disbursements incurred by PWD in recovering the debt (including but not limited to internal administration fees, legal costs on a solicitor and own client basis, PWD's collection agency costs, and bank dishonour fees).
- 13.3 Further to any other rights or remedies PWD may have under this contract, if a Client has made payment to PWD, and the transaction is subsequently reversed, the Client shall be liable for the amount of the reversed transaction, in addition to any further costs incurred by PWD under this clause 13 where it can be proven that such reversal is found to be illegal, fraudulent or in contravention to the Client's obligations under this agreement.
- 13.4 Without prejudice to PWD's other remedies at law PWD shall be entitled to cancel all or any part of any order of the Client which remains unfulfilled and all amounts owing to PWD shall, whether or not due for payment, become immediately payable if:
- (a) any money payable to PWD becomes overdue, or in PWD's opinion the Client will be unable to make a payment when it falls due;
  - (b) the Client has exceeded any applicable credit limit provided by PWD;
  - (c) the Client becomes insolvent, convenes a meeting with its creditors or proposes or enters into an arrangement with creditors, or makes an assignment for the benefit of its creditors; or
  - (d) a receiver, manager, liquidator (provisional or otherwise) or similar person is appointed in respect of the Client or any asset of the Client.
- 13.5 PWD will not be liable to the Client for any loss or damage the Client suffers because PWD has exercised its rights under this clause 13.

## 14. Cancellation & Termination

- 14.1 Without prejudice to any other remedies PWD may have, if at any time the Client is in breach of any obligation (including those relating to payment) under these terms and conditions PWD may, at their sole discretion:
- (a) suspend or terminate this agreement and/or any of the Services;
  - (b) make an additional charge to the Client; or
  - (c) block access to any part of the Services.
- 14.2 Either party may, cancel these terms and conditions or cancel provision of the Services:
- (a) if there is no contract term specified, at any time by giving thirty (30) days' notice to the other party;
  - (b) if a contract term is specified, at any time after the end of the contract term by giving thirty (30) days' notice to the other party;
- 14.3 PWD may, in addition to their right to cancel under clause 14.1:
- (a) do so at any time:
    - (i) prior to the commencement of the Services, by giving notice to the Client, in the event PWD determine it is not technically, commercially or operationally feasible to provide the Services to the Client;
    - (ii) in the event the Client materially breaches these terms and conditions, and such breach is not capable of remedy.
- 14.4 In the event that the Client:
- (a) cancels the provision of Services prior to the expiry of any specified contract term, then the Client shall be liable to pay for the provision of the Services until the expiration of the contact term;
  - (b) fails to give notice of intention to cancel at least thirty (30) days prior to the expiration date of the contract term, the contract term shall automatically renew on a monthly basis, unless cancelled by way of the Client providing PWD with thirty (30) days' notice.
- 14.5 Should the Client, for any reason, cause the Services to be delayed for more than three (3) months after the acceptance date, this agreement will be terminated by PWD (at their sole discretion) and all Services completed, but not billed or paid, will be payable in full within seven (7) days from the date of the submitted invoice.
- 14.6 Upon termination of this agreement, PWD will immediately delete all files and content relating to the Client and the Services provided thereto.
- 14.7 It is the Client's responsibility to make arrangements for the transfer of their data prior to the termination date. PWD accepts no liability for any loss or damage incurred by the Client as a result of the deletion of such data.
- 14.8 In the event the Services are suspended as per clause 14.1, the Services can be re-instated (at PWD's sole discretion) under a new contract at the prevailing rates; however, no credits or discounts will be granted, and reinstatement costs shall apply.

14.9 Any suspension of the Services by PWD in accordance with clause 14.1 will not constitute a termination of the agreement and PWD may require the Client to pay a reconnection fee to recommence the Services together with the relevant Charges.

**15. Privacy Act 1993**

15.1 The Client authorises PWD or PWD's authorised representative to:

- (a) access, collect, retain and use any information about the Client;
  - (i) (including any overdue fines balance information held by the Ministry of Justice) for the purpose of assessing the Client's creditworthiness;  
or
  - (ii) for the purpose of marketing products and services to the Client.
- (b) disclose information about the Client, whether collected by PWD from the Client directly or obtained by PWD from any other source, to any other credit provider or any credit reporting agency for the purposes of providing or obtaining a credit reference, debt collection or notifying a default by the Client.

15.2 Where the Client is an individual the authorities under clause 15.1 are authorities or consents for the purposes of the Privacy Act 1993.

15.3 The Client shall have the right to request PWD for a copy of the information about the Client retained by PWD and the right to request PWD to correct any incorrect information about the Client held by PWD.

**16. Liability**

16.1 The Client agrees that, in view of their nature, the Client's use of the Services is at their sole risk. Whilst PWD will endeavour to ensure that the Services are of a high quality, neither PWD (nor any of their agents, contractors, licensees, employees or information providers involved in providing the Services) give any guarantee that the Services will be uninterrupted or free from error. Where necessary for commercial, technical or other reasons:

- (a) a network or service provider connected to the Services may suspend or terminate its connection to the Services; and
- (b) the Services may suspend or terminate their connection to another network or service provider.

16.2 The Client agrees that any such suspension or termination referred to in clause b above will not constitute a breach of this agreement by PWD and that the Services are provided on an "as is" basis without guarantee of any kind.

16.3 The Client further agrees that PWD will not be held liable for any costs, expenses, losses, damages or other liabilities (howsoever arising) which you may incur as a result of a suspension of the Services in accordance with clause a above.

16.4 The Client acknowledges that the Internet is separate from the Services and that use of the Internet is at their own risk and subject to any applicable laws. PWD has no responsibility for any goods, services, information, software, or other materials which the Client may obtain from a third party when using the Internet.

16.5 Notwithstanding clause 16.4, the Client acknowledges that PWD may exercise editorial control over the content of their servers, but that PWD does not have the resources to ensure, nor are they capable of checking, the full content of their servers at all times. Neither PWD (nor any of their agents, contractors, licensees, employees and information providers involved in providing the Services), are able to control the content of the Internet. The Client, therefore, agrees that PWD shall not be held responsible for the publication, transmission or reception of any defamatory material or information of any kind, other than information which is inserted by PWD. The Client specifically acknowledges that PWD has given no warranties as to the quality, content or accuracy of information received through, or as a result of the use of, the Services.

16.6 Subject to clause 10, PWD shall be under no liability whatsoever to the Client for any indirect, incidental, special and/or consequential loss and/or expense, claim and/or cost (including legal fees and commissions, loss of profit, business, contracts, opportunity, goodwill, reputation and/or anticipated saving) and/or for any loss or corruption of data suffered by the Client arising out of a breach by PWD of these terms and conditions, caused by any failure by the Client to comply with their obligations under this agreement, or that arise from any claim relating to the Services by any person that the Client authorises to use the Services, or where due to server downtime or programming errors (alternatively PWD's liability shall be limited to damages which under no circumstances shall exceed the Charges).

**17. Title**

17.1 PWD and the Client agree that the Client's obligations to PWD for the supply of Services shall not cease (and ownership of any Goods shall not pass) until:

- (a) the Client has paid PWD all amounts owing to PWD for the Services; and
- (b) the Client has met all other obligations due by the Client to PWD in respect of all contracts between PWD and the Client.

17.2 Receipt by PWD of any form of payment other than cash shall not be deemed to be payment until that form of payment has been honoured, cleared or recognised, and until then PWD's ownership or rights in respect of the Services, and this agreement, shall continue.

17.3 It is further agreed that, until ownership of the Goods passes to the Client in accordance with clause 17.1:

- (a) the Client is only a Bailee of the Goods and must return the Goods to PWD on request.
- (b) the Client holds the benefit of the Client's insurance of the Goods on trust for PWD and must pay to PWD the proceeds of any insurance in the event of the Goods being lost, damaged or destroyed.
- (c) the Client must not sell, dispose, or otherwise part with possession of the Goods other than in the ordinary course of business and for market value. If the Client sells, disposes or parts with possession of the Goods then the Client must hold the proceeds of any such act on trust for PWD and must pay or deliver the proceeds to PWD on demand.
- (d) the Client should not convert or process the Goods or intermix them with other goods but if the Client does so then the Client holds the resulting product on trust for the benefit of PWD and must sell, dispose of or return the resulting product to PWD as it so directs.
- (e) the Client irrevocably authorises PWD to enter any premises where PWD believes the Goods are kept and recover possession of the Goods.
- (f) PWD may recover possession of any Goods in transit whether or not delivery has occurred.
- (g) the Client shall not charge or grant an encumbrance over the Goods nor grant nor otherwise give away any interest in the Goods while they remain the property of PWD.
- (h) PWD may commence proceedings to recover the Charges notwithstanding that ownership of the Goods has not passed to the Client.

**18. Personal Property Securities Act 1999 ("PPSA")**

18.1 Upon assenting to these terms and conditions in writing the Client acknowledges and agrees that:

- (a) these terms and conditions constitute a security agreement for the purposes of the PPSA; and

- (b) a security interest is taken in all collateral (account), being a monetary obligation of the Client to PWD for Services previously provided (if any) and that will be provided in the future by PWD to the Client.
- 18.2 The Client undertakes to:
- (a) sign any further documents and/or provide any further information (such information to be complete, accurate and up-to-date in all respects) which PWD may reasonably require to register a financing statement or financing change statement on the Personal Property Securities Register;
- (b) indemnify, and upon demand reimburse, PWD for all expenses incurred in registering a financing statement or financing change statement on the Personal Property Securities Register or releasing any registration made thereby;
- (c) not register a financing change statement or a change demand without the prior written consent of PWD.
- 18.3 PWD and the Client agree that nothing in sections 114(1)(a), 133 and 134 of the PPSA shall apply to these terms and conditions.
- 18.4 The Client waives its rights as a debtor under sections 116, 120(2), 121, 125, 126, 127, 129, 131 and 132 of the PPSA.
- 18.5 Unless otherwise agreed to in writing by PWD, the Client waives its right to receive a verification statement in accordance with section 148 of the PPSA.
- 18.6 The Client shall unconditionally ratify any actions taken by PWD under clauses 18.1 to 18.5.

## **19. Security and Charge**

- 19.1 In consideration of PWD agreeing to provide Services, the Client charges all of its rights, title and interest (whether joint or several) in any land, realty or other assets capable of being charged, owned by the Client either now or in the future, to secure the performance by the Client of its obligations under these terms and conditions (including, but not limited to, the payment of any money).
- 19.2 The Client indemnifies PWD from and against all PWD's costs and disbursements including legal costs on a solicitor and own client basis incurred in exercising PWD's rights under this clause.
- 19.3 The Client irrevocably appoints PWD as the Client's true and lawful attorney/s to perform all necessary acts to give effect to the provisions of this clause 19 including, but not limited to, signing any document on the Client's behalf.

## **20. Service of Notices**

- 20.1 Any written notice given under this contract shall be deemed to have been given and received:
- (a) by handing the notice to the other party, in person;
- (b) by leaving it at the address of the other party as stated in this contract;
- (c) by sending it by registered post to the address of the other party as stated in this contract;
- (d) if sent by facsimile transmission to the fax number of the other party as stated in this contract (if any), on receipt of confirmation of the transmission;
- (e) if sent by email to the other party's last known email address.
- 20.2 Any notice that is posted shall be deemed to have been served, unless the contrary is shown, at the time when by the ordinary course of post, the notice would have been delivered.

## **21. General**

- 21.1 If the Client is acquiring Goods for the purposes of a trade or business, the Client acknowledges that the provisions of the Consumer Guarantees Act 1993 do not apply to the supply of Goods by PWD to the Client.
- 21.2 The failure by either party to enforce any provision of these terms and conditions shall not be treated as a waiver of that provision, nor shall it affect that party's right to subsequently enforce that provision. If any provision of these terms and conditions shall be invalid, void, illegal or unenforceable the validity, existence, legality and enforceability of the remaining provisions shall not be affected, prejudiced or impaired.
- 21.3 These terms and conditions and any contract to which they apply shall be governed by the laws of New Zealand, the state in which PWD has its principal place of business, and are subject to the jurisdiction of the New Plymouth Courts in New Zealand.
- 21.4 The Client agrees that PWD may amend these terms and conditions by notifying the Client in writing. These changes shall be deemed to take effect from the date on which the Client accepts such changes, or otherwise at such time as the Client makes a further request for PWD to provide Services to the Client.
- 21.5 Neither party shall be liable for any default due to any act of God, war, terrorism, strike, lock-out, industrial action, fire, flood, storm or other event beyond the reasonable control of either party.
- 21.6 The Client hereby disclaims any right to rescind, or cancel the contract or to sue for damages or to claim restitution arising out of any misrepresentation made to them by any servant or agent of PWD and the Client acknowledges that they purchase the Services relying solely upon their own skill and judgement.
- 21.7 PWD may licence and/or assign all or any part of its rights and/or obligations under this contract without the Client's consent.
- 21.8 The Client cannot licence or assign without the written approval of PWD.
- 21.9 PWD may elect to subcontract out any part of the Services but shall not be relieved from any liability or obligation under this contract by so doing. Furthermore, the Client agrees and understands that they have no authority to give any instruction to any of PWD's sub-contractors without the authority of PWD.
- 21.10 Both parties warrant that they have the power to enter into this agreement and have obtained all necessary authorisations to allow them to do so, they are not insolvent and that this agreement creates binding and valid legal obligations on them.