

Terms & Conditions | 202507 v2

The Legal Terms

This document contains important legal Terms and Conditions (Terms) which affect your rights, including our process and fees associated with cancellation and delays. Please ensure you read these Terms carefully.

These Terms apply to, and are incorporated in, any quote, proposal or scope of work ("Proposal") provided to you by Smith Brothers Media ABN 21 160 467 345 ("We" or "us").

Please let us know if you do not agree with any part of these Terms. Any changes must be agreed in writing. If you continue to engage us to perform the services (including by paying the deposit) after receiving these Terms, you are agreeing to these Terms.

These Terms take effect from the date that you instruct us to proceed with the works set out in the Proposal ("Project") and will finish on the date that the Project is complete ("Term"), unless cancelled or terminated in accordance with these Terms.

1. Proposals

1. The estimate of fees provided to you in the Proposal are valid for 30 days, unless otherwise extended by us.
2. The Proposal has been prepared following initial discussions with you and are based on:
 - o the inclusions and exclusions as listed in the Proposal;
 - o the number of hours or nature and number of deliverables that we have estimated in the Proposal; and
 - o whether there will be revisions permitted to our deliverables, and the number and nature of such revisions (if applicable). Where no reference is made to the number of permitted revisions in the Proposal, our initial deliverables will be determined as final and not subject to revision.
3. If you change your mind, vary the scope, add extra content, require further feedback rounds or the underlying assumptions used by us to form the fee estimate change, these and similar events will be treated as additional works.
4. Additional works are governed by these Terms and will be charged on the basis of the hourly rates set out in the Proposal or as otherwise agreed, with all changes to the scope and fees to be agreed in writing prior to commencement. Additional Works will not commence until you have approved the revised fee in writing.
5. We will carry out the works with reasonable care and skill according to the standards customary in the industry.

2. Fees

1. A deposit payment or payment of the first Monthly Services invoice, as set out in the proposal or sale agreement is payable in order to secure the commencement of our services.
2. All fees for services and the relevant milestones for payment are listed in the Proposal. All invoices must be paid by the due date set out on the invoice, and if no date is stipulated within 7 days of the date of the invoice, unless otherwise agreed.

3. If you are on a Monthly Services arrangement, you may choose to pay this under a direct debit arrangement. Invoices for Monthly Services are sent 30 days in advance and must be paid within 14 days of the date of invoice.
4. We are entitled to prompt reimbursement for all expenses noted in the Proposal within 7 days of notification, including by provision of a tax invoice or receipt. Any additional expenses must be pre-approved by you.
5. You agree that we may stop providing you with our services and withhold all services, files, artwork, code and content if you do not pay an invoice by the due date unless otherwise agreed. This would include removing any live online content in our control or decommissioning third party services that we have arranged on your behalf.
6. We may charge interest on all overdue amounts calculated daily from the due date for payment at the rate of Penalty Interest Rates Act 1983 (Vic) plus 2% p.a.
7. We may also charge you for any costs that we incur in the event that the collection of unpaid monies is referred to a third-party collection agency or requires legal recovery.
8. All Fees are exclusive of GST unless otherwise agreed.

3. Cancellation or Pause of Monthly Services

1. If our Proposal specifies that you receive "Monthly Services" you must provide at least 30 days notice in writing to cancel those services. In the event of cancellation, you will be charged for any work we have performed up to and including the date of termination and, if relevant, any third party costs that we have incurred prior to termination that cannot be cancelled.
2. Pause of Monthly Services
 - a. You may request that Monthly Services be put on hold be put on hold ("Pause") for any of the following bona-fide reasons:
 - i. A force-majeure event that materially affects your ability to trade
 - ii. A regulatory requirement, industry code or platform policy that compels a temporary halt
 - iii. A reputational risk identified by either party's compliance team
 - iv. Halt in trading due to significant holiday, security incident, budget constraint or health reason
 - b. You must give at least 7 days written notice, specifying the cause and providing reasonable evidence if requested.
 - i. You must ensure all invoices are paid and up to date.
 - ii. Ongoing service or platform charges may still apply during the Pause period
 - c. A Pause may last for up to 90 consecutive days and no more than 120 days in any rolling twelve-month period.
 - d. All project milestones and performance targets will be reasonably impacted and adjusted by the duration of the Pause.
 - e. We will reactivate the Monthly Services within 7 days after you give written notice that the cause of Pause has ceased or on the agreed date.
 - f. If a Pause continues beyond the limit or if you fail to pay invoices when due, we may treat the Monthly Services as terminated by you.
 - g. In the event a Monthly Service in Pause is terminated all costs associated with the services can be recovered.

4. Delays or Disruption

1. We will carry out the Project in accordance with any agreed schedule, and you will give us all materials, information, approvals and access we reasonably need. Both parties must act promptly and in good faith to avoid delay.
2. If either party (the Delaying Party) fails to meet any date in the Project Schedule, the other party (the Non-Delaying Party) may issue a written notice identifying the missing item and proposing a revised date (Delay Notice).
3. Within 7 days after the Delay Notice, the parties will use best endeavours to agree and implement a catch-up plan.
4. If the cause of delay is not remedied within 30 days after the original due date, the Non-Delaying Party may suspend the Project by written notice (Suspension).
5. If you remedy the delay and pay all outstanding amounts, we will issue a revised schedule and recommence work as soon as reasonably practicable. If a Project resumes after 90 days or more, we may either
 - a. (a) apply a one-off rescheduling charge equal to 5% of the remaining unpaid portion of the fixed fee set out in the Proposal or
 - b. (b) re-scope the remaining work and issue a new proposal.
6. If we are the Delaying Party, we will request your approval of a revised schedule and recommence promptly once you consent.
7. If our own acts or omissions (other than force majeure) delay the Project by more than 30 days, you may suspend the Project until we remedy the delay.
 - a. If the delay is not remedied within a further 30 days, you may terminate the Project with 7 days written notice and we will refund any portion of the fixed fee that relates to work not yet performed, excluding third-party or platform costs already incurred.
8. If a Suspension endures for 60 days in one period or in aggregate, either party may terminate the Project on 7 days written notice. On termination:
 - a. you must pay for all work performed up to the termination date, calculated from the Proposal or agreed rates;
 - b. you must reimburse any third-party or platform costs we cannot cancel or recover; and
 - c. where the Suspension was caused by you, you must also pay any reasonable, evidenced costs of standing down or reassigning personnel.
9. During a Project we may incur third party costs including but not limited to setup, installation, hosting, storage, cloud-based software subscriptions, integration, photography, venue hire, equipment hire, talent fees, contractor fees and other costs necessary to provide our services to you. If you reschedule, delay, amend or cancel any part of the services, you are solely responsible for any agreed third party costs that we have committed on your behalf which cannot be cancelled. An invoice for these costs will be issued to you and will be payable by 14 days.
10. We will use our reasonable endeavours to complete the Project within a reasonable timeframe or, if agreed, by a specified date. However, from time to time delays may occur including due to factors outside of our control. To the extent allowed by law, we will have no liability for delays in the completion of any of the works in these circumstances.

5. Your Responsibilities

You agree that:

1. You will provide any written approvals and instructions in a timely manner and submit any and all revisions within 14 days of receiving drafts, unless otherwise agreed in writing or set out in the Proposal;
2. you will provide any information that we need to complete the project including final copy, imagery, content and other information in the format that we ask for in a timely manner;
3. where you provide us with any content or materials for inclusion in the works, that those materials are: true, accurate, complete, not misleading, can be substantiated, do not breach of any third-party rights and comply with all laws and regulations;
4. you must seek your own legal advice in relation to protecting your intellectual property rights in any branding, design, logos or other images or content that may arise as a result of the performance of the Project by us as well as satisfying yourself that the use of any of these materials will not infringe any third party intellectual property rights;
5. you are responsible for the final proof reading of any content provided by us; and
6. where applicable, you must include in all displays or publication of any website or app that we create for you a notice attributing the design and development of that website to us.

6. Background Intellectual Property

1. You guarantee to us that any text, graphics, photos, designs, trademarks or any other artwork, materials or data (Content) that you provide us for inclusion in the deliverables that we create, or which you provide to us in order for us to provide you with services, is either owned by you or that you have permission to use them (including any consents required for use of any personal information). You remain the owner or licensee of your Content. You grant to us a non-exclusive, fee free, limited licence to use the Content for the purposes of providing the services under this Agreement.
2. Nothing in these terms affects the ownership of any Content which is owned by us or which we have permission to use. We remain the owner or authorised user of our Content.
3. You are solely responsible for the storage of any content that you provide to us including, but not limited to, backups and retention of all works.

7. Developed Intellectual Property – Licence

1. Where the Proposal indicates that Developed Intellectual Property is licensed or where the Proposal is silent, this clause 7 applies.
2. All intellectual property developed in the course of providing the services (Developed Intellectual Property) is owned by or will, on its creation, be owned by us.
3. Upon payment in full of all amounts owing to us under these Terms, we grant to you a personal, non-transferrable, royalty free licence to use, reproduce and display the Developed Intellectual Property for marketing, promotional and internal business purposes worldwide. The licence is granted on a perpetual basis or any shorter period in circumstances where there are limitations on the term of the final works by third parties. If the Proposal sets out licence terms which are different to this clause 7(c), the terms of the Proposal will prevail. The author irrevocably consents to any act or omission that would otherwise infringe their moral rights in the Developed Intellectual Property.
4. Where you have engaged us to create a Website, only one copy of the Website may be published. The Developed Intellectual Property may only be used by the entity which is listed as the client.
5. Any additional uses will require a separate proposal and pricing. All other rights, including copyright, are reserved by us.

6. You acknowledge that we can only licence the content and materials which we have created. There may be limitations on the use of the final works by third parties (clause 12 below sets out further information about licences and open-source software).
7. You may alter, adapt, change, edit, cut, take from, add to, or carry out any other activity in relation to the Developed Intellectual Property, where such activities would otherwise infringe the moral rights of the author of the works, but only to the extent necessary to give effect to the licence set out above and in accordance with the terms of any third party licences.
8. Without limiting the above, you must not distribute, transfer, assign or sublicense the Developed Intellectual Property, or allow any other person to use it outside of its express purpose without our prior written consent.

8. Developed Intellectual Property – Assignment

1. Where the Proposal indicates that the Developed Intellectual Property is assigned, this clause 8 applies.
2. Upon payment in full of all amounts owing to us under these Terms and subject to clause 8(c), we assign to you all intellectual property rights, including copyright, in the works created in the course of providing the services (Developed Intellectual Property). The author irrevocably consents to any act or omission that would otherwise infringe their moral rights in the Developed Intellectual Property.
3. You acknowledge that we can only assign the content and materials which we have created. There may be limitations on the use of the final works by third parties (clause 12 below sets out further information about licences and open-source software).
4. Where you have engaged us to create a Website, only one copy of the Website may be published, unless we agree otherwise in writing.
5. You may alter, adapt, change, edit, cut, take from, add to, or carry out any other activity in relation to the final works, where such activities would otherwise infringe the moral rights of the author of the work, and subject to the terms of any third party licences.

9. Termination

1. In addition to any other termination rights set out in these Terms, a party may terminate the agreement made by these Terms by notice in writing to the other party if:
 - a. the other party commits a material breach of these Terms that is capable of remedy (including failure to pay any amount due under this agreement) and fails to remedy that breach within 21 days after receiving notice from the other party to do so;
 - b. the other party commits a material breach of these Terms that is not capable of remedy;
 - c. the other party becomes insolvent bankrupt or enters into liquidation; or
 - d. by mutual agreement.
2. Upon termination of the agreement made by these Terms, and after receipt of an appropriate invoice from us, you will pay us the amount of any fees owing pursuant to these Terms, including any fees incurred up to and including the date of termination and all third party costs which we have incurred or will incur which cannot be cancelled.
3. Each party must return to the other all equipment, records, documents, and materials provided by the other party for the purposes of the Agreement.
4. All rights and obligations accrued up to the date of the termination are not affected. This clause and any other clause which by its nature is intended to survive termination, will survive termination.
5. If you terminate the project after commencement and our reasonably expected net profit (calculated from the Proposal) is reduced by more than 50%, we may invoice the lesser of:

- a. the proven shortfall or
- b. five per cent (5%) of the total Proposal.

10. Liability

1. Nothing in this Agreement excludes, restricts or modifies any right or remedy you have under the Competition and Consumer Act 2010 (including the Australian Consumer Law) or any other legislation that cannot lawfully be excluded ("Non-Excludable Rights"). If there is any inconsistency between this clause 10 and a Non-Excludable Right, the latter prevails.
2. Where a failure in the Goods or Services is not a "major failure" for the purposes of the Australian Consumer Law, and to the extent permitted by law, our liability is limited (at our election) to:
 - a. resupplying the Goods or re-performing the Services; or
 - b. paying the cost of having the Goods or Services resupplied or re-performed.
3. If the Goods or Services suffer a "major failure", you are entitled to the remedies set out in the Australian Consumer Law.
4. To the maximum extent permitted by law, neither party is liable for any:
 - a. loss of profit, revenue, business, data or reputation; or
 - b. indirect, special or consequential loss,

in each case arising out of or in connection with this Agreement, whether the loss was foreseeable or not.

5. We indemnify you against any amount finally awarded by a court, or agreed in settlement with our written consent, arising from a claim by a third party that the Developed Intellectual Property, as supplied by us and used in accordance with this Agreement, infringes an Australian patent, registered trade mark, design or copyright. The indemnity does not apply to the extent the claim arises from:
 - a. materials, instructions or specifications that you supplied;
 - b. modifications to the Developed Intellectual Property not made or authorised by us; or
 - c. your breach of this Agreement.
6. If a claim is made, we may at our cost
 - a. procure for you the right to continue using the item;
 - b. replace or modify it in a commercially reasonable manner so the infringement ceases; or
 - c. require its return and refund the price you paid for the infringing item (pro-rated where only part of a deliverable is affected).
7. We indemnify you for your direct but not indirect or consequential loss caused solely by our fraud, wilful misconduct or gross negligence in performing the Services.
8. Our obligations under clauses above are conditional on you:
 - a. giving us written notice of the claim within 7 business days of becoming aware of it;
 - b. not admitting liability, compromising or settling the claim without our consent; and
 - c. allowing us to conduct and control the defence and any settlement.
9. Subject always to clause 10.1, our total aggregate liability to you, including under the indemnities above is limited to the lesser of:
 - a. Our insured liability cover
 - b. 100% of the Fees actually paid and payable under this Agreement
10. These caps do not apply to liability for death, personal injury, fraud or acts that cannot lawfully be limited
11. You indemnify us for any claim by a third party to the extent it arises from materials you supply, your instructions or your breach of this Agreement.

11. Confidentiality and Privacy

We each must take all reasonable steps to ensure that we do not disclose or use the confidential information of the other party, other than for the purpose for which it was disclosed. This does not apply if one of us is required to comply with any law or regulation or with the other party's prior written consent or to the extent that the confidential information was already known to it. Each of us will comply with applicable data protection and privacy laws in respect of the provision and use of the services.

12. Specific Requirements

Licences: Throughout the course of the Project, we may be required to obtain licences for software (including website components, plugins, or extensions) or other assets (including stock imagery, commercial fonts, audio or video and other assets) which will incur a licence fee, either perpetual or recurring. You will be liable for the full cost of any such licences. It is your responsibility to enter into a licence and maintain these licences. You indemnify, and agree to keep us, our directors, officers and employees indemnified, against all loss arising out of the breach of these licences.

Open Source Software: Open source software not owned by us is subject to separate licence terms. A copy of these terms is available from us upon request. The applicable open source software licences will not materially or adversely affect your ability to exercise your rights in the applicable Developed Intellectual Property.

Project Back Up: We will backup and retain an archive of all finished files created by us during the Project for a maximum of 12 months, subject to the Privacy Act 1988 and any applicable record-keeping law, from the commencement of the Project. You authorise us to permanently delete any materials held by us at the expiry of 12 months. The backup of files does not extend to any ICT systems or website backup unless we are providing those services and it is expressly included.

Promotion: We may reproduce or refer to the completed works for our promotional purposes with your prior written consent, not to be unreasonably withheld. This may include but not limited to our social media accounts, our website, portfolio, case studies, public relations and media announcements, as well as for industry competitions.

13. Complaints & Dispute

1. If our work does not meet your expectations, you must tell us in writing ("Dispute") within 14 days of becoming aware of the issue. Address your Dispute to a member of our executive team and your project manager. We will acknowledge your Dispute and work with you in good faith to resolve it promptly.
2. We will each nominate a senior representative who has authority to settle the matter and who will meet, in person or by video, within 7 days after we receive your Dispute. Both parties will use their best endeavours to resolve the Dispute at that meeting.
3. If we cannot agree on a resolution within 14 days after your initial notice, we will refer the Dispute to mediation. The mediation will:
 - a. be conducted in Melbourne or online if we both agree
 - b. be administered under the rules of the Victorian Small Business Commission or other mutually agreed body
 - c. use an independent mediator we jointly appoint, or, if we cannot agree a mediator you select from a list of three qualified mediators that we propose.
 - d. We must attend the mediation in good faith and with authority to settle the dispute.

e. Each party will bear its own costs and share the mediator's fees equally.

4. If the dispute is not resolved within 60 days after the mediation begins, or any longer period we agree in writing, either party may commence litigation only in the courts of Victoria, Australia. Each party irrevocably submits to the non-exclusive jurisdiction of those courts and any courts entitled to hear appeals from them.
5. While a Dispute is being resolved under this clause, both parties will continue to perform their obligations under the Agreement to the extent they are not the subject of the Dispute, unless that performance is impossible.
6. Nothing in this clause prevents a party from seeking urgent interlocutory relief from a court of competent jurisdiction in Victoria where that relief is reasonably necessary to protect that party's rights.

14. Other

1. A party will not be liable for any failure of or delay in the performance of its obligations under these Terms (other than the obligation to make payments for services performed) for the period that such failure or delay is: beyond the reasonable control of a party; materially affects the performance of any of its obligations under these Terms; and could not reasonably have been foreseen or provided against. The affected party must promptly notify the other in writing of the event and its expected duration.
2. These Terms are intended as a contract for the provision of services. Nothing in these Terms creates a partnership, joint venture, relationship of employment, agency, or similar relationship between us.
3. To the extent allowed by law, these Terms and the Proposal forms the entire agreement between us and supersedes any other agreements, whether or not in writing. The Proposal will prevail to the extent of any inconsistency between these Terms and the Proposal.
4. We will not subcontract any element of the services that involves access to your confidential information or Developed Intellectual Property without your prior written consent, not to be unreasonably withheld.
5. We will ensure that all subcontractors are bound by obligations of confidentiality and data security materially equivalent to those in this Agreement.
6. These Terms cannot be varied except when we both agree in writing to do so. If you wish to assign the Terms, you must obtain our written approval.
7. These Terms are governed by the laws of Victoria and any dispute will be heard in the courts of that place.

ADDITIONAL TERMS (DEVELOPMENT AND HOSTING)

These Additional Terms and Conditions ("Additional Terms") apply to, and are incorporated in and as part of the Terms and any Proposal (as referred to in the Terms) where we provide you with development and/or hosting services. These Additional Terms take precedence over the Terms to the extent of any inconsistency.

15. Development Services

1. Where we agree to provide you with development services in a Proposal, each of us agrees to perform our respective responsibilities as set out in the Proposal, including in respect of the timely provision by you of Content to be used as part of the development services or hosted by us, and in any developer testing and user acceptance testing (Testing).
2. In respect of Content you agree that:
 - It will comply with all applicable laws, be lawfully obtained and provided to us, and not infringe the rights of any person (including any rights of privacy or intellectual property rights);

- You grant us a licence to use Your Content for the purpose of fulfilling our obligations and providing services to you; and
 - You are solely responsible for all of Your Content and will indemnify us in respect of any breach of either of the above 2 paragraphs and/or any third party claims arising from any such breach(es).
1. You agree that unless otherwise stated in a Proposal:
 - If the services or deliverables fail to pass Testing, that we may undertake work to rectify the failure and resubmit for further testing within a reasonable period of time.
 - Testing (for any user acceptance tests) will be deemed successful if you do not notify us of any failures within 7 days of us submitting to you for testing.
 - We will use our reasonable endeavours to rectify any defects or bugs in the services or deliverables that you notify to us within 30 days of completion of Testing (or such other period as may be set out in a Proposal), at no additional cost.
 - Subject to the above paragraph, support and maintenance is priced as set out in a Proposal or otherwise at our then standard rates for professional services on a time and materials basis.

16. Hosting Services

1. Where we provide you with hosting services in a Proposal, we will use our reasonable endeavours to provide the services to you in accordance with any uptime or other service targets as set out in a Proposal, and we and our service providers will use appropriate industry standard data security measures to protect your data.
2. You agree that:
 - We may use third party service providers to host your data and that you may be required to agree to their terms.
 - Access to your hosted data and services is subject to scheduled and unscheduled maintenance, is provided over third party networks, equipment and carriage services, and accordingly may not be uninterrupted or error free.
 - You are responsible for all access and use of the hosted services except to the extent that use or access is by us or our employees, contractors or agents.
 - You will use the hosted services in accordance with our applicable policies, including any acceptable use policies notified to you from time to time, and all applicable laws.
 - We may suspend your access to or use of the hosting services if we reasonably suspect that you may have breached our Agreement. We will notify you of the breach in writing and restore service promptly if remedied.
3. Upon termination, and provided that any amounts due and payable are up to date, we will provide you with a copy of your then current data in its native format, together with any associated database (if applicable) upon your request for up to 30 days from the date of termination