

Terms and Conditions of Trade for The Measured Marketer

These terms and conditions together with any quotation, proposal or other document submitted to the Client to which these terms are attached or in which these terms are referred together make up a legally binding agreement (the **Agreement**) between: The Measured Marketer Pty Ltd (**TMM, us, our**) AND the person(s) or company named as the client in the attached or previously signed or accepted quotation or proposal (**the Client, you, your**) AND if the Client is a corporation, the directors of the Client who have signed or otherwise agreed to these terms (**the Guarantor**).

This Agreement may be accepted by doing either one or more of the following:

- (a) Signing these terms and conditions of trade; or
- (b) Signing the quotation, proposal or other document issued by TMM in which these terms and conditions were attached or referred to;
- (c) Accepting the quotation or proposal, whether in writing via email or other electronic means or orally after receiving notice of these terms and conditions; or
- (d) Requesting TMM provide you with services (whether via email or other electronic means or orally) in response to the quotation or proposal referred to at (b) above.

THE PARTIES AGREE as follows:

1. Agreement to provide Services

- 1.1 The parties acknowledge that TMM will supply the services outlined in the proposal (varied only by written agreement signed by TMM in accordance with this Agreement) (**Services**) to the Client from time to time pursuant to this Agreement. If any future contract or document between TMM and the Client is inconsistent with this Agreement, then this Agreement will apply unless the subsequent contract is signed by TMM, refers to and specifically alters this Agreement in writing.
- 1.2 Should there be any variation to any of the information supplied by the Client in its credit account application or in the structure of the Client's business (such as a conversion to or from a company or trust or the appointment of new directors or change in shareholders), TMM shall be notified in writing. Until a new credit application form is signed and approved in writing by TMM, the original Client and those person(s) who signed as guarantor(s) shall remain liable to TMM as though all Services were supplied to the original Client.
- 1.3 TMM will not be bound by any terms or conditions expressed in orders or acceptances generated by the Client except to the extent that such terms have been expressly agreed upon between the parties in writing and signed by TMM. For the avoidance of doubt, even where the Client attaches or refers to other terms and conditions in requests for the supply of Services, received after this Agreement has been entered into (**additional terms**), such additional terms are expressly excluded from this Agreement and will be of no force or effect against TMM unless it expressly agrees otherwise (by notice in writing, signed by a director of TMM).
- 1.4 TMM may decline to accept any request to provide the Services without providing a reason in its absolute discretion.

2. TMM's Service obligations

- 2.1 In consideration for your payment of fees, TMM will perform the Services, subject to and in accordance with this Agreement in a proper and workmanlike manner.
- 2.2 TMM will exercise reasonable skill and diligence to deliver the Services within the times and delivery methods detailed in the proposal or otherwise as agreed by both parties.
- 2.3 If a date for completion of the Services is detailed in the proposal or quotation, TMM will use reasonable endeavours to complete by the relevant date (subject to the remaining provisions of this Agreement). Any delay in completion of the Services shall not constitute a breach of this Agreement, nor shall it affect any other provisions of this Agreement to TMM's disadvantage.
- 2.4 You acknowledge and agree that TMM will rely on the accuracy and completeness of all documents and information provided by you or on your behalf in connection with the Services and TMM will not necessarily undertake its own investigation to determine the accuracy of such information. TMM will not be liable, and you release TMM, its officers, employees and agents for any claims, damages, costs or expenses incurred as a result of reliance upon your information and documents, or otherwise arising out of or in connection with the inaccuracy or incompleteness of your information or documents.

3. Your obligations

- 3.1 You will provide to TMM, as soon as practical after commencement of this Agreement, all information, documents, and other particulars relevant to the provision of the Services.
- 3.2 Notwithstanding any other provisions in this Agreement or any proposal to the contrary, we are not obliged to commence providing

the Services until the documents referred to in clause 3.1 have been provided to us.

- 3.3 Prior to commencement of the Services, if requested by us you will nominate a person as your representative to liaise with us on matters involving or incidental to the Services (**Representative**). You may, by written notice to us, replace the Representative from time to time. You agree that the Representative has authority to act on your behalf for all purposes regarding the Services and any other matters detailed in or associated with the proposal. We will not be obliged to accept or respond to instructions given by any person other than the Representative.
- 3.4 You will cooperate with us in all reasonable respects regarding the provision of the Services.
- 3.5 Without limiting the preceding clause, you must ensure that we have access to your premises or other location if this is required for us to perform the Services. Where reasonable access to such locations is delayed or denied we may charge you the reasonable costs incurred by us as a result of that delay at our standard rates for the provision of Services as detailed in our proposal. You must pay these additional costs within 7 days from the date of our tax invoice.

4. Variations

- 4.1 If you request or we deem there to be a variation in the scope of the Services, then we may (but are not obliged to) give you notice of the variation, the price variation, any associated delays in completion of the Services and any other information we deem relevant to that variation.
- 4.2 We are not obliged to commence any supply associated with any variation identified in accordance with **clause 4.1** unless and until you acknowledge and accept in writing the variations and any conditions contained in any variation notice.

5. Payment for Services

- 5.1 You must pay to us the fees and expenses identified in or calculated in accordance with the proposal or quotation (**Fees**) on the date or dates nominated in the proposal or quotation. If no payment dates are nominated in the proposal or quotation, you must pay the Fees within 7 days from the date of any tax invoice that we issue to you.
- 5.2 A proportion of the Fees may be required to be paid on or prior to commencement of the Services, some or all of which may be non-refundable. If a deposit or pre-payment is required, this will be detailed in the proposal and you must pay this amount to us prior to us commencing any work.
- 5.3 We may issue invoice/s to you for any balance of the Fees when the Services are complete and/or at intervals throughout the progress of the Services as detailed in the proposal (and if not detailed, to be determined in our reasonable discretion).
- 5.4 Without limiting clause 5.3, if we have completed the Services to final draft and have submitted those final draft Services to you for review and have not received any further communication, comment or other request for amendment to those completed final draft Services within 30 days we may issue you an invoice for the total Fees detailed in the proposal and you will be liable to pay the total Fees regardless of any draft notation or marking on the completed Services.
- 5.5 You agree to pay interest at the rate of 10% per annum on the unpaid balance of any tax invoice which is not paid strictly in accordance with this Agreement (calculated at daily rests from the due date until the outstanding amounts are paid). We may also charge you for any administration and legal costs associated with any outstanding tax invoices.
- 5.6 Where a tax invoice remains unpaid after the due date for payment, we may in our absolute discretion, and without prior notice to you, immediately suspend the provision of Services until all outstanding amounts are paid. You will also be responsible for any additional expenses incurred (whether by us or you) as a result of the interruption to the provision of Services and you bear the sole responsibility for any loss or damages caused by, or associated with, any such suspension.

6. Term and Termination

- 6.1 This Agreement commences on the date of its acceptance by you and will expire upon completion of the Services or on such earlier termination in accordance with this clause 6.
- 6.2 Without limiting any other rights of TMM under this Agreement or at law, we may immediately terminate this Agreement at any time by giving written notice if you are in default under this Agreement in any way (and you have not rectified that default within 7 days from receipt of our written notice requiring you to so rectify) or you commit an act of insolvency or an external administrator or controller, liquidator or trustee in bankruptcy is appointed to the Client or the Guarantor (or any of them).
- 6.3 TMM may assign or otherwise transfer any of our rights or obligations under this Agreement. You may only assign or otherwise transfer any of your rights or obligations under this Agreement with our prior written consent, which will not be unreasonably withheld.

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- 6.4 Either party may terminate this Agreement at any time without cause provided that it gives the other party not less than 14 days written notice of such termination.
- 6.5 Upon termination of this Agreement for any reason, and without limiting any other rights that TMM has in respect of that termination, you must pay to TMM all Fees and related expenses incurred by or on behalf of TMM in performance of the Services or otherwise under this Agreement up to the date of termination, including without limitation any lease or equipment hire cancellation payments, the costs of all materials or equipment ordered or obtained for or in the provision of the Services and termination costs paid or payable to TMM's subcontractors.
- 6.6 We reserve the right to amend this Agreement, provided such amendments are conveyed to you in writing. You acknowledge that such writing will be (at our election) by ordinary mail to the address set out in the original quotation or proposal or by email to the email address set out in the original quotation or proposal, unless you advise us in writing of a new address or email address, and this new address or email address is acknowledged by return in writing by TMM. Any amendments will be deemed to be accepted by you upon placement of a further request for Services after notice of the amendment, or 28 days, from that notice, whichever occurs first.

7. Security and PPSA

- 7.1 For the purposes of this clause, "PPSA" means the Personal Property Securities Act 2009 (Cth) as amended from time to time. Where a particular section or term from the PPSA is used in this Agreement, it is deemed to be that section or term as defined or used in the PPSA as amended, renumbered or replaced from time to time.
- 7.2 To the extent permitted by law, and for better securing payment of all amounts owing by the Client to TMM under this Agreement plus any costs or charges, the Client hereby charges all of its real and personal present and after-acquired property in favour of TMM.
- 7.3 The Client acknowledges and agrees that this Agreement constitutes a security agreement in relation to TMM's security interest in all present and after-acquired goods in accordance with the PPSA. The Client agrees to grant a "Purchase Money Security Interest" to TMM.
- 7.4 To the extent permitted by law, the following provisions of the PPSA do not apply, and for the purposes of section 115 of the PPSA are contracted out of this Agreement:
- sections 95 (notice of removal of accession), to the extent that it requires TMM to give a notice to the Client, 96 (retain of accession) and 125 (obligation to dispose of or retain collateral);
 - section 130 (notice of disposal), to the extent that it requires TMM to give a notice to the Client;
 - section 132(3)(d) (contents of statement of account after disposal);
 - section 132(4) (statement of account if no disposal);
 - section 135 (notice of retention);
 - section 142 (redemption of collateral);
 - section 143 (reinstatement of security agreement).
- 7.5 For the purposes of section 14(6) of the PPSA, the Client (and TMM) agree that any payments received from the Client by TMM pursuant to or in any way connected with this Agreement, will be applied in such order as TMM deems fit in its absolute discretion.
- 7.6 You consent to:
- and agrees to execute any other document or instrument required to give effect to the security interests created by this Agreement; and
 - the registration with the relevant authority or public register of any security interest created by this Agreement or any other document required to give effect to a security interest created by this Agreement, including without limitation the registration of a financing statement or financing change statement on the Personal Property Securities Register.
- 7.7 You must, upon request, pay all costs of and incidental to the preparation, execution and registration of any instrument required to give effect to this clause and all costs incidental to the withdrawal, discharge or release of such instrument.

8. Warranties and Liability

- 8.1 You acknowledge that you are responsible for determining whether the Services are suitable for your purpose.
- 8.2 You acknowledge and agree that, to the extent permitted by law, TMM will not be liable for, and you release TMM in respect of, any claim, loss, cost, damage, liability or expense (**Claim**) arising out of any act or omission of TMM or its employees, officers or agents unless that Claim is a direct result of the negligence or breach of this Agreement or a warranty by TMM.
- 8.3 The parties agree that any liability for a Claim against TMM which cannot be excluded will be limited to the lesser of:
- the re-supply or rectification of the defective Services (if applicable);
 - the cost of the re-supply or rectification of the defective services (if applicable); or
 - the Fees paid by the Client for the original supply of the Services.

- 8.4 Notwithstanding any of the above, the parties agree that TMM will under no circumstances be liable to the Client for any indirect or consequential loss, loss of income, profit or opportunity or for any contingent, consequential direct/indirect special, or punitive damages arising out of or in connection with this Agreement, at law or in equity.
- 8.5 Notwithstanding any of the above, TMM shall not be liable for any loss or damage sustained or sustainable by the Client in relation to:
- errors occurring in any reports, releases or other documents not prepared by TMM;
 - errors or inaccuracies in any documents or information provided by you and the incorporation of those inaccuracies in to any material created by TMM;
 - use or reliance by the Client on any additional documents or other information or advice not provided by TMM; and
- 8.6 To the extent permitted by law and unless otherwise expressly agreed, TMM does not provide and expressly excludes all other warranties whether implied by statute or otherwise in respect of the Services. This clause does not attempt to exclude, restrict or modify the application of any applicable laws of the Commonwealth, State or Territory which cannot be excluded, restricted or modified including the Australian Consumer Laws.

9. Defaults and Rights

- 9.1 In the event of a default under this Agreement by the Client, the whole of any outstanding balance owned to TMM will become immediately due and payable by the Client to TMM together with all interest and all legal costs and expenses associated with recovery of any amounts on a full indemnity basis.
- 9.2 The certificate of a director or the credit manager of TMM will, in the absence of evidence to the contrary, be conclusive as to the amount of the outstanding balance.
- 9.3 No failure or delay of TMM to exercise any right of TMM or enforce the performance of any obligation of the Client hereunder and no custom or practice of the parties which is at variance with the terms of this Agreement and no waiver by TMM of any particular default by the Client shall affect or prejudice TMM's rights in respect of any subsequent default and no indulgence or forbearance by TMM of its rights under this Agreement shall adversely affect or prejudice TMM's rights in relation to such default or any subsequent default.
- 9.4 If any provision of this Agreement is held to be unlawful, invalid, unenforceable or in conflict with any rule of law, statute, ordinance or regulation, it is to be severed so that the validity and enforceability of the remaining provisions are not affected.

10. Intellectual Property

- 10.1 For the purposes of this Agreement, "Intellectual Property Rights" means copyright, trademark, design, patent, semiconductor or circuit layout rights and any other rights whether or not they are registered or registrable, relevant to, among other things, the textual, graphical, audio and other information, content, data or material used by TMM in respect to this Agreement.
- 10.2 Any pre-existing Intellectual Property Rights owned by TMM before the commencement of this Agreement, will remain vested in TMM. You acknowledge that this Agreement does not transfer to you (or anyone on your behalf) any right in TMM's pre-existing Intellectual Property Rights.
- 10.3 Any pre-existing Intellectual Property Rights owned by you before the commencement of this Agreement, will remain vested in you.
- 10.4 You agree to grant to TMM a non-exclusive, transferable, royalty free licence to use your pre-existing Intellectual Property Rights to the extent that such use relates to any material created by TMM pursuant to this Agreement or such use is reasonably required for TMM to complete the Services under this Agreement.
- 10.5 Unless otherwise agreed in writing by the parties (including as may be set out in the proposal), and subject to any Intellectual Property Rights existing in any third party materials, all Intellectual Property Rights created by TMM on or after the commencement of this Agreement (including any modification, improvements or upgrades) will remain vested in TMM irrespective of whether those Rights were created pursuant to or for use in or with Services supplied or completed by TMM (**Agreement IP**). TMM grants to you a non-exclusive, non-transferrable, limited, revocable, royalty free licence to use the Agreement IP for internal business purposes only.
- 10.6 You warrant that you are the absolute legal and beneficial owner of all of your pre-existing Intellectual Property Rights provided or licenced to TMM under or in connection with this Agreement. TMM will not be liable to you or any third party for any Claim arising out of or in connection with the use of the Client's pre-existing Intellectual Property Rights in connection with this Agreement or the infringement on any third party Right's by or at the direction of the Client and the Client indemnifies TMM in respect of any such Claim.
- 10.7 This clause 10 will survive termination or completion of this Agreement.

11. Confidential Information

- 11.1 Neither party will, without the prior written approval of the other party, disclose the other party's confidential information, which includes the content of this Agreement and the proposal, any

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information of a party which is marked confidential and any information which is by its nature confidential.

- 11.2 A party will not be in breach of this clause in circumstances where it is legally compelled to disclose the other party's confidential information or where such confidential information is already in the public domain other than as a result of that party's breach of this Agreement.
- 11.3 Notwithstanding any other provision of this clause, a party may disclose the terms of this Agreement to its solicitors, auditors, insurers and accountants.
- 11.4 You expressly authorise and consent to TMM disclosing your confidential information to third parties as is desirable or required by TMM to provide the Services under this Agreement (including without limitation employees and contractors engaged by TMM).
- 11.5 This clause 11 will survive the termination of this Agreement.

12. Force Majeure

- 12.1 A Force Majeure event means anything outside reasonable control of a party, including but not limited to power, data or communication outages; acts of God or the public enemy, national emergencies, radioactive contamination, insurrection, riot, hostile or warlike action or sabotage; a transaction embargo; industrial action (including a picket); and any legislation or regulation and any action or inaction of any government or government agency.
- 12.2 If TMM is wholly or partially unable to perform its obligations under this Agreement because of a Force Majeure event, then:
- as soon as reasonably practicable after the Force Majeure event arises, TMM will notify you of the extent to which it is unable to perform its obligations; and
 - TMM's obligation to perform will be suspended for the duration of the delay arising out of the Force Majeure event.

13. Applicable Law

- 13.1 The parties expressly agree that this Agreement will be governed by and interpreted in accordance with the laws of the State of New South Wales and the parties submit to the non-exclusive jurisdiction of the Court of New South Wales.

14. Guarantor and Client's Warranties

- 14.1 The Guarantor and Client (and each director and office bearer if the Client is a company) separately warrants that:
- In the case of a natural person, they have never been a bankrupt or entered into a deed of arrangement or compromise or any other arrangement under Part X of the *Bankruptcy Act* or otherwise assigned their assets for the benefit of creditors.
 - In the case of a corporation, it has never been under external administration or subject to the appointment of an external receiver or controller or entered into a deed of company arrangement and that it is solvent and able to pay its debts as and when they fall due.
 - They are not executing this Agreement as a result of or by reason of or in reliance upon any promise, representation, statement or information of any kind whatever given or offered to them by or on behalf of TMM whether in answer to an enquiry or otherwise.

- Prior to the acceptance of a quotation or proposal from TMM they have made their own independent enquiries and satisfied themselves as to the quality and fitness for purpose of the Services and, to the extent permitted by law, unless otherwise set out in this Agreement, they acknowledge that TMM makes no warranty, promise or representation in relation to the Services, either expressly or impliedly and any such warranties, whether implied by statute or otherwise is, to the extent permitted by law, hereby excluded.

15. TMM Relies on Guarantor and Client's Warranties

- 15.1 In entering into this Agreement, TMM relies upon the warranties provided at clause 16 and upon any information supplied by the Client.
- 15.2 TMM relies upon the representation that the person signing this Agreement has authority to execute it on behalf of the Client.

16. Personal Information

- 16.1 The Client and Guarantors consent to TMM from time to time, seeking, advising, exchanging and verifying any personal or commercial information of the Client or the Guarantors with any third party and to carrying out any further pertinent investigation about the Client's or Guarantor's contact or address details, credit arrangements, trading terms, credit worthiness, credit standing, credit history or credit capacity, financial status and other similar matters.

17. Goods and Services Tax (GST)

- 17.1 GST will be charged to all relevant goods and services and will be payable by the Client at the time of payment of the price for those goods or services, including but not limited to the Fees and any other amounts that become payable by operation of this Agreement.

18. Guarantee and Indemnity by Director(s), Trustee(s) and Guarantor

- 18.1 In consideration of TMM agreeing to supply Services to the Client:
- The Guarantors unconditionally guarantee to TMM the due and punctual performance by the Client of all the Client's obligations under this Agreement including, without limiting the generality of the foregoing, the payment by the Client of all moneys, which term includes, without limitation, Fees, interest and costs payable or repayable (whether presently or in the future, actually or contingently) under this Agreement and the Guarantors promise to pay to TMM on demand all moneys which the Client defaults in paying under this Agreement including all moneys arising by way of costs, expenses, bank charges, losses or damages incurred by arising from any default by the Client under or relating to any Agreement.
 - I/We also acknowledge and agree in my/our capacity as Guarantor that the Guarantee and Indemnity that I/we may have previously given continues to secure any and all liabilities and obligations of the Client/debtor.