

## CREATIVE SERVICES AGREEMENT

### 1. DEFINITIONS AND INTERPRETATION

#### 1.1. Definitions

**Agreement** means these terms, any attachments hereto (including the annexed Proposal) and any future Proposal agreed by the parties;

**Acceptance** or **Accepted** has the meaning given to it under Clause 4(b);

**MBR Components** means all design tools developed and/or authored by MBR in performing its services and in creating the Deliverables including without limitation pre-existing and newly developed software, web authoring tools, fonts, source files, working files, 3D models, and application tools;

**Change Order** has the meaning ascribed in accordance with Clause 5.2(b)(i);

**Client Content** means elements of any and all materials, information, photography, text, graphics, photos, designs, trademarks, or other artwork furnished by you to MBR for use in the preparation of and/or incorporation in the Deliverables;

**Commencement Date** has the meaning given to it under Item A of the Proposal;

**Confidential Information** means and includes, but is not limited to, proprietary information, business know-how, trade secrets, business plans, strategies, employee and customer information, financial information, designs, patterns, artworks, photography, literary works, musical works, sound recordings, cinematograph films, trademarks, service marks, trade names and logos (whether or not such Confidential Information is registered) and any reproductions, adaptations or derivatives of the Confidential Information;

**Creative Agents** has the meaning given to it under Clause 2.1(c);

**Deliverables** means the final, finished and Accepted work product specified under Item D(2) in the relevant Proposal to be delivered by MBR to you, in the form and media specified in such Proposal;

**Delivery Date** means the date the Deliverables are delivered to you in accordance with the Schedule under Item E of the Proposal, as mutually extended, but in no case shall be less than 30 days from commencement date;

**Disbursements** means any approved out of pocket expense incurred by MBR in the course of performing the obligations under this Agreement or any Proposal, including but not limited to travel expenses, postage, shipping, models, presentation materials, photocopies, equipment rental, photographer's costs and fees, photography licences, font licences, artwork licenses, prototype production costs, talent fees, music licenses, software licenses, online access, "software as a service", hosting fees, and any Third Party Components (as defined herein) fee;

**Fees** has the meaning given to it under Item F of the Proposal;

**Force Majeure** means where the performance of either party's obligations hereunder is delayed or becomes impossible of performance for any reason beyond its reasonable control (including but not limited to war, invasion, act of foreign enemy, hostilities whether war be declared or not, civil war or strife, rebellion, strikes, lock-outs or other industrial disputes or act of God);

**Intellectual Property** means all products, results and proceeds of works made, created and/or developed including, but not limited to, artwork, graphic design work, web site design, flow charts, algorithms, look and feel, applications, software, sound recordings, cinematograph films, photographs, product design, literary work, manufacturing process, business method or other invention or work of creative authorship, including without limitation all copyrights, trademarks, service marks, trade dress, trade secrets, moral rights, contractual rights of non-disclosure, design and patent rights or other proprietary rights throughout the world;

**Modification** has the meaning given to it under Clause 5.1;

**Overdue Amount** means an amount (or part thereof) which has been outstanding for more than 14 days from the issue of a valid tax invoice;

**Project** means the project to which a particular Proposal pertains to;

**Related Bodies Corporate** has the meaning assigned to it in the *Corporations Act 2001*;

**Schedule** means the timeframe over which the Deliverables are expected to be delivered in accordance with Item E of the Proposal;

**Proposal** means the initial Proposal attached hereto and marked Schedule A and any other Proposal embodying such key terms relating to a project between the parties, as mutually amended and extended, individually and collectively;

**Term** has the meaning given to it under Clause 6.1;

**Third Party Components** include external and third party tools, software, services, works and materials for which intellectual property ownership may vest with other parties including but not limited to stock or commissioned photography, film, music, font type, or illustration, and any other third party work, which may be (but is not limited to) a work of an artistic, literary or dramatic nature;

## 1.2. Interpretation

(a) In this Agreement, unless otherwise indicated by the context:

- (i) words importing the singular include the plural and vice versa;
- (ii) headings are for convenience only and do not affect interpretation of this Agreement;
- (iii) a reference to a statute, statutory provision or regulation includes all amendments, consolidations or replacements thereof;
- (iv) a reference to dollars, fees, payments and currency shall be in the currency stated on the Proposal, and where no currency has been expressly stipulated, it shall be in Australian dollars; and
- (v) a covenant or agreement on the part of or for the benefit of two or more persons binds or benefits them jointly and severally.

## **2. PROVISION OF SERVICES**

### **2.1. Deliverables**

- (a) In consideration of payment of the Fees, MBR will deliver the Deliverables in accordance with the relevant Proposal.
- (b) MBR will deliver the Deliverables by well-trained and well-qualified personnel on a professional basis, consistent with the best practices in the creative industry and in a diligent, workmanlike manner.
- (c) MBR may hire third party designers, creatives, developers, or other service providers as independent contractors (**Creative Agents**) in connection with the provision of the Deliverables. MBR shall be responsible for Creative Agents' compliance with this Agreement.

### **2.2. Exclusions**

- (a) MBR will not be required to deliver any Deliverable not expressly described in the relevant Proposal.

### **2.3. Schedule**

- (a) MBR will use its best endeavours to adhere to the Schedule.
- (b) You understand and agree that MBR is not responsible if the Schedule is or is required to be extended for reasons beyond MBR's control, including but not limited to a Force Majeure event or if you fail to provide instruction, information, Acceptance, Client Content etc in a timely manner or as reasonably requested by MBR.
- (c) If the Schedule is or is required to be extended or suspended for any reason (including for any reason outlined in Clause 2.3(b)), you agree that MBR may follow the Modification process and issue a Change Order to take into account the additional timeframe and resources required.
- (d) In the event that the Schedule is or is required to be suspended or extended at no fault of MBR, you acknowledge that MBR's availability may be affected which may result in further delays in MBR's ability to deliver the Deliverables.
- (e) MBR will use reasonable endeavours to highlight any likely extension of the Schedule in a timely manner.

## **3. CLIENT RESPONSIBILITIES**

### **3.1. You agree to promptly:**

- (a) provide clear instructions and Client Content to MBR within the timeframe nominated by MBR;
- (b) provide Client Content in a format and resolution reasonably required by MBR;
- (c) coordinate your decision-making activities with applicable decision makers;
- (d) provide finished and proofread Client Content in a form suitable for reproduction or incorporation into the Deliverables; and
- (e) proofread Deliverables.

### **3.2. You shall nominate no more than one (1) creative contact as the key decision maker and point person to provide directions and instructions to MBR.**

### **3.3. You warrant and unconditionally guarantee that all Client Content provided by you to MBR is owned and/or controlled by you, or that you have full right and authority from the rightful owner to use such elements.**

### **3.4. You agree that you are responsible for complying with the licence terms and conditions and payment of associated licence fees for any Third Party Components embodied in the Deliverables.**

#### 4. ACCEPTANCE

- (a) At various stages throughout the Term of this Agreement, MBR will ask you to confirm your acceptance of any aspect of the Deliverables (**Acceptance Request**). Acceptance is important as it will be relied on by MBR in the course of fulfilling its obligations under this Agreement.
- (b) Acceptance will occur upon the earlier of:
  - (i) you providing written acceptance to MBR; or
  - (ii) two (2) days after MBR issuing you with a Acceptance Request; or
  - (iii) the date the Deliverables are launched, reproduced, communicated to the public, or otherwise used by you.
- (c) If you do not wish to give Acceptance in relation to a Deliverable:
  - (i) you must not launch, reproduce, use or communicate to the public such Deliverable; and
  - (ii) within two (2) days of the date of the Acceptance Request, you must give written notice that you are not giving your Acceptance and concurrently request a Modification in accordance with Clause 5.
- (d) If you have given your Acceptance in respect of any aspect of the Deliverables and such Acceptance is relied on by MBR and you then change your mind MBR will follow the Modification process as outlined in Clause 5.

#### 5. MODIFICATIONS

- 5.1. MBR understands that sometimes the Project scope and/or Deliverables or other aspect of the Proposal will need to be modified, changed or updated (**Modification**). You acknowledge and agree that any Modification may impact the Proposal which will likely affect the Fees and/or Schedule. MBR agrees to provide up to three (3) sets of revisions to the agreed upon Proposal with reasonable limitations as set out below. MBR's hourly rate shall apply in the event any additional revisions are required by you.
- 5.2. If, in MBR's sole reasonable opinion:
  - (a) the Modification falls within the Project scope of the Proposal or is a minor Modification, then MBR will modify the Deliverables in accordance with the Proposal; or
  - (b) the Modification falls outside the Project scope of the Proposal, has been Accepted, is not a minor Modification, or is likely to otherwise affect the Proposal then:
    - (i) MBR will prepare a written assessment of the impacts of the Modification which shall include an estimate of any additional Fees and/or other implications of such change to the Proposal (**Change Order**).
    - (ii) You will then have two (2) days (or as otherwise stipulated in the Change Order) to indicate your (A) acceptance of the Change Order; and (B) agreement to amend the Proposal to the extent necessary to give effect to such Change Order.
    - (iii) Upon receipt of your acceptance of the Change Order, the Change Order shall immediately form part of this Agreement and supersede the applicable parts in the relevant Proposal.
    - (iv) In the event that:
      - 1. you notify MBR that you do not agree to any part or whole of the Change Order; or
      - 2. fail to notify MBR that you either agree or do not agree with the Change Order within the stipulated time period, then MBR may in its reasonable discretion:
        - 1. suspend the relevant Proposal until such time as a revised Change Order is approved; or
        - 2. continue the Project in accordance with the then current relevant Proposal.
- 5.3. At the completion of any Modification, the Modification will be provided to you for Acceptance.

#### 6. TERM

- 6.1. The Term of this Agreement shall commence on the Commencement Date and shall continue until the Delivery Date whichever occurs later, unless terminated in accordance with Clause 11.

#### 7. FEE AND PAYMENT TERMS

- 7.1. You agree to pay MBR the Fees in accordance with the relevant Proposal.
- 7.2. You agree to pay MBR the Disbursements upon presentation of an invoice by MBR.

- 7.3. If any payment is not received in accordance with the Proposal, MBR may:
- (a) charge simple interest on any Overdue Amount, at the rate of seven percent (7%) per annum; and
  - (b) exercise a lien against any of the Deliverables under the Proposal;
  - (c) suspend working on the Deliverables until such time that all outstanding payments are paid; and
  - (d) retain all related work until payment is received in full.

## 8. TRAVEL EXPENSES

- 8.1. MBR shall not incur any Travel Expenses without your prior approval. Where you expressly require MBR's employees, Creative Agents, and/or representatives to attend a location further than 15kms from MBR's normal business premises (**Travellers**), you agree to pay MBR's Travel Expenses, subject to your pre-approval of such Travel Expenses in each instance. For the avoidance of doubt, if you do not approve the Travel Expenses, the Travellers shall not be required to travel.

## 9. INTELLECTUAL PROPERTY

- 9.1. Subject to Clause 3 herein, MBR represents and warrants that as at the Delivery Date and to the best of MBR's knowledge, the Deliverables do/does not infringe upon the intellectual property rights of any third party, however, MBR will not conduct nor be required to conduct any type of intellectual property clearance search (for example, copyright, trademark, patent or design patent clearance search) to verify the same.
- 9.2. The Parties agree that:
- (a) all Intellectual Property made, created and/or developed by MBR in connection to this Agreement is solely and exclusively owned by MBR upon creation (**MBR Intellectual Property**);
  - (b) where Third Party Components are embodied in the Deliverables, MBR shall sub-licence you sufficient rights to enable you to use the Deliverables in the manner contemplated by the Proposal, subject always to the licence terms and conditions of the owner and/or controller of such Third Party Components;
  - (c) Upon full payment of the Fees, MBR shall grant you the following rights in the Deliverables:
    - (i) MBR shall assign you all right, title and interest in the Deliverables (excluding any MBR Components and Third Party Components); and
    - (ii) Where MBR Components are embodied in the Deliverables, MBR shall grant you a royalty-free, perpetual, worldwide, non-exclusive licence to use the MBR Components as part of the Deliverables in the manner contemplated by this Proposal; and
  - (d) for the avoidance of doubt, Deliverables shall not be released in high resolution or otherwise launched to the public until full payment of the Fees.
- 9.3. For the avoidance of doubt, MBR reserves the rights in and to all MBR Intellectual Property that is not incorporated into a Deliverable.
- 9.4. In the event any MBR Component is incorporated into any Deliverable, then MBR grants you a licence to use the MBR Component in accordance with the relevant Proposal. For the avoidance of doubt, you acknowledge that MBR reserves all other rights in and to the MBR Components and that MBR may re-use the MBR Components for any other use, including but not limited to licensing to other clients of MBR without reference to you.
- 9.5. MBR may, upon first launch of the Project reproduce, publish, perform and communicate to the public, the Deliverables and MBR's role in the Project, MBR's portfolios and websites, in galleries and other exhibits, and in design periodicals, blogs, columns, and awards, for the purposes of professional recognition.

## 10. RESTRICTIONS

### 10.1. Confidentiality

- (a) Subject to Clause 10.1(b), each party acknowledges that during the Term of this Agreement, a Party may disclose (**Discloser**) Confidential Information to the other Party (**Recipient**). Each party agrees that both during and for a period of two years after the Term it shall:
  - (i) maintain, keep and use the Confidential Information in the strictest confidence;
  - (ii) take preventative measures to ensure that it does not disclose any Confidential Information to any other person, firm or company unless and until authorised in writing to disclose such Confidential Information

- by a duly authorised officer of the other party;
  - (iii) not make improper use of the Confidential Information to cause detriment to the other party;
  - (iv) only disclose the Confidential Information on a need-to-know basis and only reveal particular parts of such Confidential Information to the:
    1. company officers, employees and contractors;
    2. employees, contractors and company officers of Related Bodies Corporate; and
    3. professional advisors,
 who need to know such particular parts of the Confidential Information for the purposes of the Project;
  - (v) return (or destroy as directed by the Discloser) all Confidential Information received from the other party upon the request of the other party or expiry of the Term (whichever occurs earlier).
- (b) The obligations of confidentiality set out in Clause 10.1(a) will not apply to Confidential Information:
- (i) that the Recipient can prove was in the public domain or comes into the public domain otherwise than as a result of a breach of this Agreement or any obligation of confidence owed by the Recipient; or
  - (ii) that the Recipient can prove was lawfully received by the Recipient from a third party provided that such third party was not known by the Recipient as being bound by a duty of confidentiality to the Discloser; or
  - (iii) which is required to be disclosed by law (provided the Recipient gives the Discloser enough advance notice to enable it to lawfully object to the disclosure of the Confidential Information) and the Recipient reveals only such part of the Confidential Information that the Recipient is required to disclose; or
  - (iv) disclosed with the prior written consent of the Discloser; or
  - (v) independently developed by the Recipient (or other third party) without the benefit of Confidential Information.

## 10.2. Non-solicitation

- (a) Each party acknowledges that during the Term and for 12 months after the expiry thereafter, neither party may canvass, solicit or attempt to entice away from other party, any employee or contractor of other party who was an employee or contractor of the other party during the Term.

## 11. TERMINATION AND EFFECT OF TERMINATION

### 11.1. Termination

- (a) If either party fails to fulfil its material obligations under this Agreement or any Proposal to the reasonable satisfaction of the other party and such default is not rectified within seven (7) days after written notice of the breach or default is received by the defaulting party, the aggrieved party may (in addition to all of its other rights and remedies at law or otherwise) terminate the Term of this Agreement on giving written notice to the defaulting party.
- (b) Either Party may immediately terminate this Agreement, if the other Party either enters into voluntary or compulsory administration, liquidation, receivership or bankruptcy or admits in writing its inability to meet its debts or other obligations as they become due.

### 11.2. Effect of Termination

- (a) In the event of termination:
  - (i) you shall immediately pay to MBR all Fees and Disbursements incurred as of the date of termination;
  - (ii) you acknowledge that the Initiation Deposit is non-refundable; and
  - (iii) Subject to Clause 11.2(a)(i), MBR shall licence and/or assign (as applicable) to you the relevant Intellectual Property in the Deliverables as at the date of termination, in accordance with Clause 9 herein and the relevant Proposal.

## 12. MAINTENANCE PERIOD

- 12.1. Subject to Clause 12.2, MBR shall fix any bugs, errors or omissions in the Deliverables which are solely attributable to MBR prior to the end of the Term (**Maintenance**).

12.2. MBR will not be required to perform Maintenance where:

- (a) the Deliverables have been altered, modified, edited or otherwise changed in any way by a person other than MBR; or
- (b) MBR is not provided adequate access to files, folders or databases in order to perform Maintenance.

12.3. If you or any party other than MBR attempts to update the Deliverables and you subsequently require MBR to repair the Deliverables, you and MBR agree to follow the Modification process under Clause 5 of this Agreement.

### **13. WARRANTIES**

- 13.1. Once you have indicated your Acceptance in relation to the Deliverables, MBR makes no warranty that the Deliverables will meet your requirements.
- 13.2. To the full extent permitted by law, MBR excludes all representations, warranties or terms (whether express or implied) other than those expressly set out in this Agreement.
- 13.3. If any legislation operates to prohibit or restrict the exclusion, restriction or modification of any implied warranties, conditions or obligations, then to the full extent permitted by law, MBR limits its liability in respect of any such claim to, at its option:
  - (a) in the case of services:
    - (i) the supply of the services again; or
    - (ii) the payment of the cost of having the services supplied again.
  - (b) in the case of goods:
    - (i) the replacement of the goods or the supply of equivalent goods;
    - (ii) the repair of the goods;
    - (iii) the payment of the cost of repairing the goods, or replacing the goods or of acquiring equivalent goods.

### **14. INDEMNITY/LIABILITY**

- 14.1. You agree to fully indemnify and hold MBR, its subsidiaries, Related Bodies Corporate, directors, officers, employees, contractors, agents and licensors harmless from any loss, damage, proceeding and cost (including all reasonable legal costs), whether in contract, tort, under statute or otherwise, directly or indirectly as a result of your use of or in connection with the Deliverables, your breach of any provision or warranty of this Agreement or any Proposal, or your violation of any applicable law or the rights of any third party.

### **15. NOTICES**

- 15.1. All notices issued under this Agreement must be in writing and sent to persons and addresses detailed in the applicable Proposal, and if no such person is stated, then the notice shall be sent to the CEO of the respective party to the address noted above.
- 15.2. The parties agree that Acceptance, Modifications and Change Order notices may be sent and received by digital communications e.g. email.

### **16. TAXES**

- 16.1. All Fees are exclusive of good and services tax (GST). Subject to MBR providing you with a tax invoice for the appropriate amount which complies with *A New Tax System (Goods and Services) Act 1999*, you agree to pay an additional amount of GST if and to the extent the Fee is considered a taxable supply for which MBR must account for GST.
- 16.2. If you are required by law to deduct withholding tax from any payment due hereunder to MBR, you shall be entitled to deduct such withholding tax from the Fees payable to MBR, provided that within thirty (30) days of payment by you to the relevant tax authority, you shall so advise MBR and shall provide MBR with an original receipt (or other documentation as necessary) evidencing payment of such withholding tax, and such assistance as MBR may reasonably require for MBR to claim a tax credit for such amount. The parties shall cooperate in good faith and use reasonable efforts to minimise the withholding tax due and obtain benefits under applicable tax treaties without undue delay (including the submission by MBR of the relevant tax form to the relevant tax authority, as applicable).



## 17. GENERAL

- 17.1. If there is any conflict between these terms and anything contained in the Proposal, the provisions of these terms will prevail.
- 17.2. The parties are independent entities and nothing in this Agreement constitutes or creates any relationship of employment, joint venture, trust or legal partnership between them nor makes either of them a partner, agent, employee or representative of the other and agree that the Deliverables have not been made or created as a "work for hire" under any copyright law.
- 17.3. Each party warrants that it has the full right, power and authority to enter into this Agreement.
- 17.4. If any provision of this Agreement shall be held to be invalid in any way or unenforceable the remaining provisions shall not in any way be affected or impaired thereby and this Agreement shall be construed so as to most nearly give effect to the intent of the parties as it was originally executed.
- 17.5. Failure or omission by either party to enforce or require strict performance or timely compliance with any provision of this Agreement will not affect or impair that provision, or its rights thereto and shall not constitute a waiver of such rights or remedies and shall not relieve either party from compliance with such obligations.
- 17.6. This Agreement and any document expressly referred to in them represent the entire understanding and agreement between the parties and may only be amended in writing.
- 17.7. Either Party may assign, license or otherwise dispose of or deal with any or all of its rights under this Agreement or any Proposal without notice or reference to the other party.
- 17.8. Each Party must at its own expense do everything reasonably necessary to give full effect to this Agreement.
- 17.9. This Agreement and each Proposal may be executed in several counterparts, and transmitted via facsimile or digital scan, each of which will be deemed to be an original, all of which, when taken together, shall constitute one and the same instrument.
- 17.10. This Agreement shall be read and construed according to the laws of the State of New South Wales, Australia and the parties submit to the jurisdiction of that State.