

COMMERCIAL TERMS OF TRADE

BACKGROUND

- A. AF organises, compiles and distributes samples of various goods and services (“Samples”), information pamphlets (“Pamphlets”) and Australian Family Magazine to various Early Education centres, ie. Childcare centres/ Kindergartens, for distribution by these centres to parents or adult guardians of Childcare centres/kindergarten children and Childcare centres/kindergarten directors/carers.
- B. The Client wishes to engage AF to provide the Services and AF has agreed to accept the engagement on the terms set out in this Agreement.

AGREEMENTS

1. DEFINITIONS AND INTERPRETATION

1.1 Definitions

1.1.1 Where commencing with a capital letter;

“Agreement” means this Agreement between the Parties including all Schedules attached hereto and Quote;

“Cancellation Fee” means the cancellation fee described under clause 3.4.2 of this Agreement;

“Client Material” means all material provided by the Client to AF for the purpose of this Agreement.

“Contract Material” means all material brought into existence for the purpose of providing the Services or otherwise arising out of the provision of the Services including without limitation sketches, illustrations, paintings, artwork of all kinds, photographs, photographic film, stories, literary works of all kinds, marketing concepts and strategies, advertising of all kinds and promotional and other devices prepared for or provided to or for the Client including without limitation all design versions, variations and alterations to all such material which may be made at some future time;

“Fee” means the fee paid by the Client to AF for the provision of Services and set out under item 3 of the Schedule;

“GST” has the same meaning as in section 195-1 of *A New Tax System (Goods and Services Tax) Act 1999*;

“Intellectual Property Rights” means all intellectual property rights including but not limited to patents, trademarks, designs (whether registered or not) and copyright and any application or right to apply for registration of any of the rights referred to;

“Moral Rights” means the moral rights described in Part IX of the *Copyright Act 1968 (Cth)* or similar rights under the laws of any jurisdiction;

“Party” or “Parties” means a party or parties to this Agreement;

“Quote” means the quote provided by AF to and accepted by the Client prior to the commencement of this Agreement;

“Services” means the services to be provided by AF under a AF Quote or as specified in the schedule to this Agreement;

1.1.1 Where a word or phrase is given a defined meaning another part of speech or other grammatical form in respect of that word or phrase has a corresponding meaning.

1.2 **Presumptions of interpretation**

Unless the context otherwise requires a word which denotes:

- (a) the singular denotes the plural and vice versa; and
- (b) a person includes an individual, a body corporate and a government.

1.3 **Successors and assigns**

A person includes the trustee, executor, administrator, successor in title and assign of that person. This clause must not be construed as permitting a party to assign any right under this Agreement.

2. **PROVISION OF SERVICES**

2.1 AF shall from the commencement date to the completion date (the “Term”) perform the Services and the Client agrees to pay AF the Fee set out in item 3 of the Schedule.

2.2 AF shall supply all personnel, equipment, materials and other things necessary to perform the Services except those items expressed in writing to be supplied by the Client. The Client shall cooperate with AF and shall not interfere with or obstruct the proper performance of the Services.

3. **FEE AND PAYMENT**

3.1 **Fee**

The Client must pay AF the Fee set out in item 3 of the Schedule, in accordance with the payment schedule, for providing the Services.

3.2 **Payment of invoices**

AF shall submit invoices for amounts payable according to item 3 of the Schedule and the Client agrees and undertakes to pay such amounts within seven (7) days of receipt of the invoice. For the avoidance of doubt where such invoicing schedule is not specified in the Schedule or under a Quote accepted by the Client, the client agrees to pay to AF sixty per cent (60%) of the Fee within seven (7) days of the date of this Agreement, on production of an invoice from AF. Twenty percent (20%) of the Fee within seven (7) days of receipt of the invoice from AF. The remaining 20% will be invoiced at the completion of the Services provided to the Client by AF and the Client shall agree to pay the remaining invoice within (7) days of receipt of the invoice. The Client agrees to pay any additional costs incurred by AF that did not form part of the Fee as listed in item 3 of the Schedule and the signed Quote. These costs will be included in the final invoice to the Client at the completion of the Services. Please note that AF will advise the Client

if there are any additional costs to be incurred, and seek approval in writing prior to invoicing the Client.

3.3 **GST**

3.3.1 In relation to any GST payable for a taxable supply (as defined under GST law) by a Party under this Agreement, the recipient of the supply must pay the GST subject to the supplier providing a tax invoice (as defined under GST law).

3.3.2 Any amount payable by the Client for anything supplied under this Agreement is expressed exclusive of GST. On issue of a valid invoice from AF the Client will pay AF an amount equal to the GST liability payable by AF on the supply within 7 days of invoice.

3.4 **No Refunds and Cancellation Fee**

3.4.1 The Client agrees and acknowledges that no refunds shall apply to any part of the Fee, in the event the Client cancels or terminates the Agreement for no cause. For the avoidance of doubt this clause 3.4.1 shall apply to a cancellation of Quote or termination of a Quote for no cause.

3.4.2 The Client agrees and acknowledges that in the event of a cancellation or termination for no cause of this Agreement by the Client, AF shall retain the following percentages from the Fee ("Cancellation Fee"):

- (a) Sixty per cent (60%) of the total Fee as outlined in item 3 of the Schedule; and
- (b) Fifty per cent (50%) of the remaining balance of the total Fee outlined in item 3 of the Schedule.

3.5 **Advertising Fee**

The Client agrees and acknowledge that where advertising in Australian Family Magazine is described in a Quote or as an item part of the Fee set out in the Schedule, it is not included in the Fee.

4. **SAMPLES**

4.1.1 The Client must approve the Samples (including any goods and services prepared or to be prepared on behalf of the Client by AF) as set out in the Schedule or with the Quote, in order for the Samples to be finalised prior to the deliverable date specified in the Quote or as set out in the Schedule. For the avoidance of doubt AF shall not be liable to the Client for any delay caused by the Client with approving the Samples.

4.1.2 The Client must, at its own expense, deliver the Samples to a packing centre nominated in writing by AF on the dates specified by AF. The Samples will be deemed as received by AF upon AF or the nominated packing centre signing a receipt acknowledging delivery of the Samples.

4.1.3 At the time of delivery of the Samples the Client must deliver an additional number of Samples totalling in numbers 1.5% of the total number of Samples required to be distributed to allow for any damaged Samples.

4.1.4 In the event the Client does not deliver the required number of Samples by or on the dates specified by AF the Client must pay AF any expenses attributable to such delay.

4.1.5 The Client must collect, at its expense, any surplus Samples not distributed within 10 days of the Sample distribution. Should the Client fail to collect the surplus Samples within the specified period AF shall be entitled to remove and destroy, or donate such excess Samples at the

Client's expense, and such expenses to be automatically added to the Fee in item 3 of the Schedule and deemed to be accepted by the Client.

- 4.1.6 The Client agrees and acknowledges that at no time shall title or risk in the Samples pass from the Client to AF or AF's agents (if any).
- 4.1.7 AF will use its best endeavours to distribute the Samples to the Childcare Centres/ kindergartens in accordance with the deliverable date specified in the Schedule or in the Quote.
- 4.1.8 AF will not distribute, at the same time a sample that may be considered in direct competition with the Client's Sample.
- 4.1.9 AF will not distribute alcohol, tobacco, contraceptives or items which depict violence or are sexually explicit or suggestive in nature.

5. INTELLECTUAL PROPERTY AND CONFIDENTIAL INFORMATION

5.1 Assignment

- 5.1.1 Subject to payment of the total Fee as outlined in item 3 of the Schedule, AF shall assign all Intellectual Property Rights in the Contract Material to the Client.
- 5.1.2 Where AF engages an agent, contractor or other third party to provide any of the Services, AF shall ensure that the agent, contractor or other third party assigns to the Client all Intellectual Property Rights in the Contract Material, subject to the Client's payment of the total Fee in item 3 of the Schedule.
- 5.1.3 AF shall use its best endeavours to provide (and where applicable obtain) the written consent of all authors of the Contract Materials:
 - (a) to the extent permissible by law, to all acts and omissions by the Client which would otherwise infringe the author's Moral Right and to not assert any such Moral Right; and
 - (b) to the following acts and omissions by the Client, any related entity or licensee:
 - (i) the failure to attribute the author;
 - (ii) the use of the Contract Material in advertising in any medium;
 - (iii) the alteration of the Contract Material in any manner authorised by the Client; and
 - (iv) the use of the Contract Material other than as contemplated by this Agreement.
- 5.1.4 Subject to payment of the total Fee in item 3 of the Schedule, AF shall execute all documents (and procure its employees, contractors, agents and other third parties to execute all documents) and render all assistance reasonably required by the Client for the purpose of confirming the Client's title to the Contract Material.

5.2 Licence to AF

The Client grants AF a royalty free licence to use the intellectual property rights in the Contract Material for its internal purposes.

5.3 **Confidentiality**

- 5.3.1 Both during and after this Agreement, the Parties must not disclose any confidential business, accounting information, trade secrets, or marketing methods or information which it learns about the other party to any other person or entity.
- 5.3.2 The terms of this Agreement are confidential and shall not be disclosed by either party without the prior written consent of the other except for the purpose of performance or enforcement of the obligations contained in this Agreement or for the purpose of communicating with their financial or legal advisers or any statutory authority to whom they are required to disclose this Agreement.
- 5.3.3 The Client may not use any data or any data base collected by or in the possession of AF or any Children Service unless authorised (in writing) to do so by AF.

6. **NO WARRANTY**

- 6.1 AF will exercise all reasonable care and diligence in carrying out the Services, but shall not be liable for any damages direct or consequential and howsoever arising in respect of the performance of the Services prepared pursuant to this Agreement, to the greatest extent permitted by law.
- 6.2 To the fullest extent permitted by law, AF's liability under any condition or warranty which cannot legally be excluded is limited, at the option of AF to:
 - (a) 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 replacing the goods or of acquiring equivalent goods; or
 - (iv) the payment of the cost of having the goods repaired;
 - (b) in the case of services:
 - (i) supplying the services again; or
 - (ii) paying the cost of having the services supplied again.

6.3 Notwithstanding any other clause in this Agreement and to the fullest extent permitted by law, AF's liability arising from or in connection with the performance or non-performance of any or all of its obligations under this Agreement or in any other manner related to this Agreement (and whether in tort, for breach of contract, breach of statute or otherwise) will not in the aggregate exceed the Fee in the Schedule.

7. MATERIAL

7.1 Client Material

The Client Material remains the property of the Client and, on termination or expiry of this Agreement or if requested by the Client, AF must immediately return the Client Material and all copies of it to the Client.

7.2 Contract Material

Subject to payment of the total Fee in item 3 of the Schedule on termination or expiry of this Agreement or if requested by the Client, AF must immediately deliver the Contract Material and all copies of it to the Client, at the Client's expense.

7.3 Safekeeping

AF is responsible for the safekeeping and maintenance of the Client Material and the Contract Material and must ensure that the Client Material and the Contract Material are used, copied, supplied or reproduced only for the purposes of this Agreement.

8. RELATIONSHIP OF THE PARTIES

8.1 No partnership

Nothing contained in this Agreement creates an agency, partnership, joint venture or employment relationship between AF and the Client or any of their respective officers, employees, agents or contractors.

8.2 Commission

AF will not be liable to pay any commission or incur any fees being the responsible of the Client towards any third party or agent acting on behalf of the Client in connection with this Agreement.

9. COMPLAINTS AND RESTRAINT

- 9.1 Any complaint regarding the Samples received by AF shall be referred to the Client. The Client must use its best endeavours to resolve the complaint directly with the complainant within seven (7) days of being notified of the complaint.
- 9.2 The Client will not approach any Children's services to whom AF have in the past or will in the future be distributed to for the purpose of selling or marketing Samples.

10. INDEMNITY AND INSURANCE

- 10.1 The Client indemnifies and holds harmless AF against all claims, suits, demands, actions, proceedings, liabilities, damages, losses, costs and expenses (including solicitor client costs) incurred by AF arising out of:
- (a) any breach by the Client of this Agreement;
 - (b) any act or omission of the Client (including but not limited to any wilful or illegal act, false, misleading, deceptive representations or misrepresentations), its officers or employees, and all agents and contractors in connection with this Agreement or Samples;
 - (c) any breach of law (including federal or state laws, statute, regulations, and by laws);
 - (d) in any way from the use of the Samples including breach of intellectual property rights by the Client, its servants, agents and officers;
 - (e) any defect in the Samples.
- 10.2 The Client will take out and maintain for a period of not less than 6 years after the date of this Agreement an insurance policy with cover of not less than \$10,000,000.00 per claim covering liability for injury or damage to any person or property and product liability in respect of all claims, demands, proceedings or prosecutions which are made or arise as a result of the distribution of the Samples by AF.
- 10.3 Where applicable, AF shall take out and maintain the insurances described in the Schedule under item 2 for the duration of the Term.

11. TERMINATION

11.1 Notice

The Client may, on one (1) month's written notice to AF, terminate this Agreement for no cause. For the avoidance of doubt where the Client terminates the Agreement under this clause, clause 3.4 herein shall apply.

11.2 Default

If AF or the Client:

- (a) goes into liquidation, has a receiver or receiver and manager appointed to it or any part of its assets, enters into a scheme of arrangement with creditors or suffers any other form of external administration;

- (b) fails, within 14 days after receipt of written notice, to remedy any breach of its obligations under this Agreement which is capable of remedy;
- (c) breaches any of its obligations under this Agreement which is not capable of remedy, or
- (d) persistently breaches its obligations under this Agreement, then:

a Party may, by notice in writing to the other Party terminate this Agreement. Where AF is the breaching party under this clause 11.2 and the Client terminates the Agreement AF shall not be entitled to rely on clause 3.4 of this Agreement.

12. DISPUTE RESOLUTION

12.1 Dealing with disputes

12.1.1 The Parties must, without delay and in good faith, attempt to resolve any dispute which arises out of or in connection with this agreement prior to commencing any proceedings.

12.1.2 If a Party requires resolution of a dispute it must do so in accordance with the provisions of this clause 12 and the Parties acknowledge that compliance with these provisions is a condition precedent to any entitlement to claim relief or remedy whether by way of proceedings in a court of law or otherwise in respect of such disputes.

12.2 Resolution by management

12.2.1 If a Party requires resolution of a dispute it must immediately submit full details of the dispute to the Managing Director of the other party.

12.2.2 If the dispute is not resolved within one (1) month of submission of the dispute to them, or such other time as they agree, the provisions of clause 12.3 will apply.

12.3 Mediation

12.3.1 Disputes must be submitted to mediation in accordance with and subject to the then current Institute of Arbitrators and Mediators Australia Rules for the Conduct of Commercial Mediations.

12.3.2 A Party may not commence proceedings in respect of the dispute unless the dispute is not settled by mediation within one (1) month of submission to mediation, or such other time as the parties agree.

12.3.3 Clause 12 shall not apply where a Party seeks urgent interlocutory relief by a Court in relation to any matter in connection with this Agreement.

13. GENERAL

13.1 Notices

13.1.1 A notice under this Agreement must be in writing and may be given to the addressee by:

- (a) delivering it to the address of the addressee;
- (b) sending it by pre-paid registered post to the address of the addressee;
- (c) sending it by fax to the fax number of the addressee;

(d) sending it by email to the email address of the addressee,

and the notice will be deemed to have been received by the addressee on receipt.

13.1.2 A fax is deemed to have been received on production of a transmission report by the machine from which the fax was sent which indicates that the fax was sent in its entirety to the fax number of the addressee.

13.2 **Amendment**

This Agreement may only be varied by the written agreement of the Parties.

13.3 **Assignment**

The Client may only assign a right under this Agreement with the prior written consent of AF.

13.4 **Entire agreement**

13.4.1 This Agreement embodies the entire understanding and agreement between the Parties as to its subject matter.

13.4.2 All previous negotiations, understandings, representations, warranties, memoranda or commitments in relation to, or in any way affecting, the subject matter of this Agreement are merged in and superseded by this Agreement.

13.4.3 For the avoidance of doubt this Agreement takes precedence over any purchase order and/or the Client's agreement / terms and conditions, which the Client seeks to rely upon. The Client agrees to pay the Fee schedule as outlined in item 3 of the Schedule and the Client accepts the payment terms outlined in clause 3 herein.

13.5 **Further assurance**

Each Party must promptly sign all documents and do all things that the other party from time to time reasonably requests to effect, perfect or complete this Agreement and all transactions incidental to it.

13.6 **No Partnership**

Nothing contained in this Agreement creates a partnership at law between the Parties, neither is AF an agent, employee of or joint venturer with the Client.

13.7 **Waiver**

The failure of either Party at any time to enforce any of the terms or provisions of this Agreement or to exercise any right under this Agreement does not constitute a waiver of any such right or affect the Party's privilege to enforce that right.

13.8 **Severance**

If any provision of this Agreement is deemed to be or is adjudicated to be unlawful or unenforceable, such provision is to be severed from this Agreement and all other remaining provisions remain in force.

13.9 **Governing law and jurisdiction**

This Agreement is governed by and must be construed in accordance with the laws of Victoria. Nothing in this clause is intended to oust the jurisdiction of the Federal Court of Australia.

SCHEDULE

1. Services

- (a) Sampling
- (b) Management of sampling
- (c) (insert any other services completed by AF)

2. Insurance

(Remove below wording if not applicable)

Professional indemnity insurance: \$2.5 million in total coverage

Public and Product liability insurance: \$20 million in total coverage

3. Fee

In regards to payment terms, also outlined in clause 3, they are

- (a) Sixty Percent (60%) of the total Fee, as outlined in the table below, on engagement of this Agreement, payment to be made within seven (7) days of receipt of the invoice. AF to provide to Client the invoice on signing of this Agreement.
- (b) Twenty Percent (20%) of the total Fee, as outlined in the table below, mid way through this Agreement, payment to be made within seven (7) days of receipt of the invoice from AF.
- (c) Twenty Percent (20%) of the total Fee, as outlined in the table below, after completion of the Services of this Agreement. This includes any additional costs incurred by AF during the Agreement that was not included as part of this Agreement. Payment to be made within seven (7) days of the receipt of the invoice from AF. Additional costs incurred will need to be agreed to by both parties prior to AF invoicing.

Invoice No.	Amount	Invoice Dated	Payment Due Date
1 – 60%	\$	Date of signed Agreement	Within seven days
2 – 20%	\$	Mid way through Agreement	Within seven days
3 – 20% plus any additional costs incurred by AF	\$	At completion of the services provided within this Agreement	Within seven days
Total of Fee	Insert total Fee for this Agreement		

Notes:

1. All fees are exclusive of GST. GST will be added at time of invoicing.
2. All design work is based upon 2 author's corrections. Subsequent author's corrections will be charged at the rate of \$135 per hour where AF can establish that the corrections are at the request of the Client and extra to previously approved final layout.
3. Author Corrections mean:
 - a) Copy that has been approved will be sent to the designer.
 - b) First draft layout is received by Client.
 - c) All interested parties at the Client are to make corrections before returning the first set of author corrections.
 - d) Second draft layout is received by the Client with corrections made.
 - e) All interested parties at the Client are to make corrections before returning the second set of author corrections.
 - f) Second draft layout is received by the Client with corrections made.
 - g) For changes as referred to in paragraph 2 above after this point the hourly rate will commence.
4. Design work does not include photography. All photographic images are to be supplied by the Client, otherwise an hourly fee will apply.
5. All costs of individual elements will change if broken up or any elements omitted in any way to reflect reduction of that element as per our final quote.
6. Due to the nature of sampling, if changes are made to the campaign after the Client has signed this Agreement, AF reserve the right to re-quote on the change of specifications.
7. If in the event the Client wishes to cancel the agreed sampling campaign, AF reserves the right to charge the cancellation fees as outlined in clause 3.4 which will include loss of earnings and any cost of goods AF has already purchased plus costs for work already undertaken up until the cancellation notification.
8. Couriers and incidental postage approved by the Client will be charged at cost plus 10% handling fee, as part of additional costs and invoiced as part of the final invoice.
9. Due to the nature of custom publishing, if changes are made to illustrations after they have commenced, an hourly rate of \$540.00 per hour will be charged where AF can establish that further corrections are at the request of the client, and extra to previously approved final layout.
10. Standard Trading Terms for sampling includes the mandatory signing of a service agreement.
11. Sampling booking by a media buying agency is non-commissionable.
12. Advertising costs are payable within 30 days of on-sale date if booked direct and 45 days from end of month if booked via a media buying agency.
13. Advertising costs booked through a media buying agency are commissionable.
14. All web/online advertising payable on 14 days.
15. Advertising cancellation policy - fees will be refunded if cancelled no later than 60 days prior to deadline.