Make

The Make Collective Terms of Trade

Make

1. Definitions

In these Terms:

We, Us or *Our* mean The Make Collective Limited.

You or *Your* means You as the client and as set out in the Quote or in any other form of instruction provided by You. Where You are more than one person or entity, those persons or entities will be jointly and severally liable under these Terms of Trade.

Confidential Information means any non-public information which has come to a party's knowledge.

Delivery means the date of actual Delivery of the Products to You.

Draft means a Draft copy of the Products or Services You have instructed Us to complete pursuant to the Project Proposal.

Fee Schedule means (all pricing exclusive of GST):

- Strategy, creative: $185.00 / hour
- Copywriting, graphic design: $185.00 / hour
- Web design/development: $185.00 / hour
- Account and project management: $185.00 / hour

Force Majeure means an event that is beyond the reasonable control of a party, excluding an event to the extent that it could have been avoided by A Party taking reasonable steps or reasonable care; or a lack of funds for any reason.

Intellectual Property Rights includes copyright and all rights anywhere in the world conferred under statute, common law or equity relating to inventions (including patents), registered and unregistered trade-marks and designs, Products, data and databases, Confidential information, know-how, and all other rights resulting from intellectual activity. *Intellectual Property* has a consistent meaning, and includes any enhancement, modification or derivative work of the Intellectual Property.

New Intellectual Property means all Intellectual Property Rights prepared or created by Us in providing the Products to You, but not including pre-existing Intellectual Property supplied by You.

A Party includes that party's permitted assigns.

Price means the amount payable by You to Us for the supply of the Services and is exclusive of GST unless otherwise stated.

Project Proposal means the scope of works including all Products and Services to be supplied by Us to You.

Products means the works as specified in the Project Proposal subject to any agreed Variations to be supplied by Us in carrying out the Services including any agreed Variation.

Quote means a written estimate for the cost of the supply of Products and / or Services provided by Us to You.

Services means all Services supplied by Us, such Services including, but not limited to, web design and development, branding, marketing, design, strategy, advertising, and project management and includes all Products supplied by Us in carrying out the Services where the context requires.

Terms means these Terms and Conditions and includes any specific details within Service Contract entered between the parties, the Project Proposal and any agreed Variations.

Variation means a Variation to the Project Proposal in accordance with clauses 6.3 and 6.4.

2. Project Proposal

2.1
Based on Your instructions to Us, We will Draft and provide You with a Project Proposal.

2.2
Before We commence any Services or supply You with any Products You are required to provide written acceptance of the Project Proposal.

2.3
If You accept the Project Proposal, You agree to accept these Terms of Trade which will be binding on You.

3. Our Fees

3.1
Unless otherwise agreed, You will be charged in 15 minute increments in accordance with Our Fee Schedule.

4. Quote

4.1
From time to time We may agree to provide You with a Quote for the Products and / or Services within the Project Proposal.

4.2
If We provide You with a Quote:

a. The Quote will remain valid for acceptance by You for 60 days from the date of the Quote, unless otherwise stated in the Quote;

b. All amounts on the Quote will be exclusive of GST, unless otherwise stated;

c. The Quote may include a deposit payable by You on acceptance of the Quote and in these circumstances, acceptance of the Quote is not complete until payment of the deposit is received by Us.

4.3
If the Quote is incorrect due to circumstances out of Our control or clerical error, We reserve the right to amend the Quote at any time.

5. Price and Payments

5.1
If We do provide a Quote to You then subject to acceptance of the Quote in accordance with clause 4, the Price will be the amount specified in the Quote, subject to any agreed Variation in accordance with clauses 6.3 and 6.4.

5.2
If We do not provide a Quote to You for which You validly accept, the Price will be the cost for providing the Services at the time that We supply the Services calculated in accordance with the Fee Schedule.

5.3
Unless otherwise agreed in writing, We will issue You with invoices in respect of the Price:

a. For any deposit payable if specified in the Quote or otherwise agreed;

b. On completion of the supply of the Products or Services in accordance with the Project Proposal.

5.4
Where Our Quote exceeds $25,000.00, You will be invoiced:

a. The hours worked each month for the duration of the project up to but not exceeding the Price.

b. The final balance of the supply of the Products or Services in accordance with the Project Proposal;

c. On termination in accordance with clause 14;

d. On suspension of the Services in accordance with clause 5.8 of 14.5;

5.5
Where the supply of the Services is ongoing, at Our sole discretion by interim invoices following end of calendar months.

5.6
You agree to pay to Us:

a. The amounts specified on Our invoices by the 20th of the month following the date of the Invoice, or such other date as specified in the Project Proposal or as otherwise agreed between You and Us in writing.

b. Interest on any amount You owe to Us if Our invoice is not paid by the due date at 10% per annum and expenses and costs incurred by Us as a result of Us enforcing any of Our rights contained in these Terms of Trade including, but not limited to PPSR registration and maintenance fees, debt collection and legal fees.

5.7
In addition You will pay Us a fee of $200.00 being a processing fee for the administrative costs associated with Your payment default. You agree that the interest rate and fee specified in this clause reasonably reflects by way of liquidated damages the cost to Us of being held out of the money owing to Us by You in the circumstances of default. The operation of this clause is without prejudice to any other rights We have in respect of late payment or non-payment.

5.8
All payments You are required to make to Us under clause 5 are essential Terms of these Terms of Trade and You acknowledge that if You fail to make any such payment to Us by its due date, then We have the right to suspend the provision of Services and We will not be liable for any loss or damage suffered by You or any third party as a result of such suspension.

6. Our Provision of Services

6.1
Upon Your valid acceptance of the Project Proposal, We will exercise all reasonable care, skill and diligence in providing the agreed Products and Services in accordance with the Project Proposal, within a reasonable timeframe.

6.2
You acknowledge that:

a. our provision of the Products and Services may be delayed by events beyond Our control including but not limited to Your delay in providing any required sign-offs and / or information; and

b. Any date given by Us to You as a date that We will provide the Services is an estimate only and We will not be liable for any loss suffered by You or a third party to provide the Services on that date.

6.3
You may request a Variation to the Products and / or Services as set out in Our Project Proposal to:

a. Increase or decrease the Products and / or Services requested;

b. Omit any part of the Services;

c. Change the character or quality of any Products or Services.

6.4
You acknowledge that any requested Variation is subject to Our approval. If approved the Variation will form part of the Project Proposal and that You will be charged for the Variation in addition to any initial quote, and in accordance with clauses 3, 4 and 5.

7. Your Other Obligations

7.1
It is Your responsibility to ensure that all information You provide Us is correct and complete and in an appropriate format.

7.2
You must deliver all essential information within any agreed timeframes, or where no specific timeframe is agreed – within a reasonable time. If You fail to provide information essential within the timeframe, Delivery deadlines will be re-negotiated.

7.3
You must arrange all consents and approvals that are necessary for any access and use required by Us including any licences to use any of Your relevant pre-existing Intellectual Property Rights.

7.4
You acknowledge and agree that where You provide Us with access to personal information, in collecting, holding and processing that information, We are acting as Your agent for the purposes of the Privacy Act 1993 and any other applicable privacy law. You must obtain all necessary consents from the relevant individual to enable Us to collect, use, hold and process that information in accordance with these Terms.

7.5
You acknowledge and agree that it is entirely Your responsibility to conduct full and thorough Intellectual Property investigations to satisfy Yourself that You have full legal right to use any current or new brand / design / words / images / devices / colours in trade in the desired country/ies that You wish to trade in. It is Your responsibility to obtain any necessary trade mark and domain registration/s and/or licence agreements that You may require. You acknowledge and agree that We are not responsible for any infringement of similar or identical brand design / words / images / devices / colours within any Products or Services which We supply to You under the Project Proposal.

7.6
Unless You have specifically requested otherwise - We will provide You with a Draft for approval prior to finalising and / or publishing. You acknowledge and agree that once You have approved the Draft (or where You have specifically waived Your right to review a Draft), We will accept no liability for any errors which are later discovered.

7.7
You indemnify Us against any liability, claim, proceeding, cost, expense (including the actual legal fees charged by Our solicitors) and loss of any kind arising from any actual or alleged claim by a third party that any access to or use by Us as described in these Terms infringes the rights of that third party (including Intellectual Property Rights and privacy rights) or that Our access to or use by Us as described in these Terms is Objectionable, incorrect or misleading.

8. Title And Risk In Products

8.1
The legal and beneficial ownership in any Products We deliver to You remains with Us until We have received payment of the in full, or if these Terms are terminated earlier, upon payment of Our invoice in accordance with clause 14.3.

8.2
The risk of loss of or damage in the Products will pass from Us to You on Delivery.

8.3
Despite the transfer of risk of the Products as specified in clause 8.2, We may at Our sole discretion electronically store the Products for a period of 12 months following Delivery. During this time, if You request We may at Our sole discretion re-supply the Products to You at a reasonable fee.

9. Personal Property Securities Act 1999

9.1
You acknowledge these Terms grant to Us a security interest ("Security Interest") (as that term is defined in the Personal Property Securities Act 1999 ("PPSA")) in the Products.

9.2
You will at Our request promptly execute any documents, provide all necessary information and do anything else required by Us to ensure that the Security Interest constitutes a Perfected Security Interest (as that term is defined in the PPSA) and which will have priority over all other Security Interests in the Products.

9.3
You agree, to the extent permitted by law, that You shall waive any rights You may have under sections 116, 119, 120 (2), 121 125, 126, 127, 129, 131 and 132 of the PPSA and enforcement of any security interest.

9.4
You agree that nothing in sections 113, 114(1)(a), 117(1)(c), 133 and 134 of the PPSA apply to these Terms.

9.5
You waive the right to receive a copy of any Verification Statement in accordance with section 148 of the PPSA.

10. Intellectual Property

10.1
Title to all New Intellectual Property which is comprised in the Products, will pass to You in accordance with clause 8.1 and shall be jointly owned by You and Us. We agree to grant You an unrestricted royalty-free exclusive licence in perpetuity to copy or use such New Intellectual Property. You agree to grant Us an unrestricted royalty-free transferable, irrevocable licence in perpetuity to use such New Intellectual Property for Our own business purposes including but not limited to business advertising.

10.2
If You provide Us with ideas, comments or suggestions relating to the Products and the Products ("Feedback"):

a. all Intellectual Property Rights in that Feedback, and anything created as a result of that Feedback (including new material, enhancements, modifications or derivative works), are owned solely by Us; and

b. We may use or disclose the Feedback for any purpose.

10.3
Subject to clause 10.2, all pre-existing Intellectual Property shall remain the property of the original owner. You warrant that You hold the rights to any pre-existing Intellectual Property You provide to Us, including the rights to assign those rights to Us to the extent reasonably required to enable Us to create and provide the Products to You and You hereby indemnify Us in this regard. You grant Us an unrestricted royalty-free transferrable irrevocable licence to use and copy Your pre-existing Intellectual Property to the extent reasonably required to enable Us to create and provide the Products to You.

11. Confidentiality

11.1
Each party must, unless it has the prior written consent of the other party keep confidential at all times the Confidential Information of the other party. Both parties will remain bound by their obligations of confidentiality following termination of these Terms of Trade.

11.2
The obligation of confidentiality in clause 11.1 does not apply to any disclosure or use of Confidential Information:

a. for the purpose of performing a party's obligations, or exercising a party's rights, under these Terms;

b. required by law (including under the rules of any stock exchange);

c. which is publicly available through no fault of the recipient of the Confidential Information or its personnel; and

d. which was rightfully received by A Party from a third party without restriction and without breach of any obligation of confidentiality.

12. Warranties

12.1
Each party warrants that it has full power and authority to enter into, and perform its obligations, under these Terms.

12.2
To the maximum extent permitted by law Our warranties are limited to those set out in these Terms of Trade. All other guarantees or warranties whether expressed or implied by statute or otherwise (including any warranty under the Contract and Commercial Law Act 2017) are expressly excluded and, to the extent that they cannot be excluded.

12.3
If We are supplying Products and / or Services to You for the purposes of trade or a business You agree that the provisions of the Fair Trading Act 1986, the Consumer Guarantees Act 1993 and any other applicable customer protection legislation do not apply to the extent permissible by law.

12.4
If the Consumer Guarantees Act 1993 applies to the supply of Services, You have all of the rights and remedies provided under that Act.

13. Liability

13.1
Our maximum aggregate liability under or in connection with these Terms or relating to the provision of the Products, whether in contract, tort (including negligence), breach of statutory duty or otherwise, is limited to supplying the Products or Services again, and/or paying the costs of having the Products and / or Services supplied again. In either case, Our liability is capped at an amount equivalent to the Price.

13.2
We will not be liable to You under or in connection with these Terms or the Products for any loss of profit, revenue, savings, business, use, and/or goodwill; or consequential, indirect, incidental or special damage or loss of any kind.

13.3
We will not be held responsible, liable, or held to be in breach of these Terms for any failure to perform Our obligations under these Terms or otherwise, to the extent that the failure is caused by You failing to comply with Your obligations under these Terms, or by the negligence or misconduct of You or Your personnel.

13.4
You indemnify Us against any loss or liability whether direct or consequential or costs of any nature whatsoever incurred or suffered by Us, arising from or in relation to any breach of Your obligations to Us whether under these Terms or otherwise in contract, or in tort (including negligence), breach of any statute or for any other reason.

14. Termination

14.1
We may, by notice to You, terminate these Terms of Trade immediately if You:

a. breach any material provision of these Terms of Trade and the breach is not:

   i. remedied within 10 days of the receipt of a notice from Us requiring You to remedy the breach; or

   ii. capable of being remedied; or

b. become insolvent, liquidated or bankrupt, have an administrator, receiver, liquidator, statutory manager, mortgagee's or chargee's agent appointed, becomes subject to any form of insolvency action or external administration, or cease to continue business for any reason.

14.2
You may terminate these Terms of Trade at any time in writing to Us. As soon as notice is received by Us, We shall cease all work for You under these Terms.

14.3
On the termination of these Terms of Trade, We will invoice You for the work We have completed to the date of termination which may include Our reasonable costs incurred solely as a result of a breach of the Terms by You or early termination by You. Provided all invoiced amounts are paid and You have complied with all of Your other obligations under these Terms, We will provide reasonable assistance in the transfer of the Products to the extent that they are completed to You, but We give no warranty that the Products are completed to any particular stage of completion that allow Us to transfer them to You.

14.4
You acknowledge that no compensation is payable by Us to You as a result of termination of these Terms of Trade for whatever reason, and You will not be entitled to a refund of any money that You have already paid to Us.

14.5
Termination under these clauses 14.1 to 14.5 or suspension under clause 5.8 will not affect Our rights at the time of termination or suspension, to claim any amount due to Us, damages, or any other losses or costs suffered by Us.

15. Disputes

15.1
If any dispute arises, the parties will in good faith and in the first instance use their best endeavours to resolve such dispute themselves.

15.2
If the dispute is not settled within a reasonable time the parties may commence legal proceedings.

16. General

16.1
Neither party is liable to the other for any failure to perform its obligations under these Terms to the extent caused by Force Majeure.

16.2
If We need to contact You, We may do so by email. You agree that this satisfies all legal requirements in relation to written communications.

16.3
These Terms, and any dispute relating to these Terms or the Products, are governed by and must be interpreted in accordance with the laws of New Zealand.

16.4
Clauses which, by their nature, are intended to survive termination of these Terms, including clauses 7.4, 7.5, 7.6, 7.7, 8.1, 8.3, 9, 11, 12.2, 13, 14.3 and 14.4 continue in force.

16.5
If any of these Terms of Trade are determined to be invalid, void, illegal or unenforceable, the remaining Terms will remain valid and binding.

16.6
You may not assign any right or obligation under these Terms without Our prior written consent and You acknowledge that You will remain liable for Your obligations under these Terms despite any approved assignment. We may assign any right or obligation under these Terms without Your prior written consent.

16.7
These Terms of Trade together with the Project Proposal (if validly accepted by You) and any Variation (if applicable) supersede all prior agreements, representations and warranties.