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| Terms and Conditions of Trade  | AbstractThe Client has asked the Developer for a Proposal to develop a website.Elliot TrevailVersion 1 |

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# **Summary**

A.

The Client has asked the Developer for a Proposal to develop a Website.

B.

The Developer agrees to develop the Website for the Client and the Client agrees to accept the Website which the Developer develops according to the Proposal.

C.

The Client agrees to work with the Developer in good faith to enable the Developer to complete the work in a timely and efficient manner.

# **Operation**

## Development of the Website

The Developer agrees to develop the Website for the Client according to the terms and conditions contained in this document.

### Client’s obligations

The Client:

1. agrees to provide clear and accurate instructions to the Developer regarding any changes to the Scope of Work as particularised in the Proposal;
2. agrees that if the Scope of Work changes, that further time will have to be spent and as such the Client will incur further fees based on the Developers Hourly Rates;
3. agrees to work with the Developer to use its best endeavours to provide all things necessary to the Developer to complete the Website within three months (90) business days from the date that the Proposal is accepted. If the client fails to respond to requests for approval, or to provide all necessary material within this period, the Developer reserves the right to activate the Penalty Clause of this contract.
4. agrees that its Authorised Officer will be available for Training in use of the CMS in the manner requested by the Developer.
5. agrees to comply with the Developer’s process for completing Designs and Design Revisions.
6. agrees to abide by any Policy provided by the Developer to assist with the management of the work for the Client as notified from time to time.

### Hourly Rates

Where the Developer has not provided a Proposal or the Client has requested that the Developer provide Services which are not included in a Proposal, the Developers Hourly Rates apply.

The Developer’s Hourly Rates apply to any work completed on an ad hoc basis for the Client after the Website has been delivered unless the Client has elected to enter into a Pre-Paid Maintenance Agreement (Security and Stability Updates) or purchased a Pre-Paid Service Agreement.

## **Acceptance testing**

### Developer must test before delivery

Before the Developer delivers the Website to the Client for Acceptance testing (knon as Client Review), the Developer must carry out its standard works tests to establish that the Website:

1. is in working order;
2. does not contain faults or errors; and
3. complies with the Proposal.

Acceptance testing is intended to expedite the identification and repair of any problems related to execution of the agreed deliverables. Online Medical must implement fixes before publishing the website. Acceptance testing feedback from the client must be provided within 5 working days).

### Cross-browser compatibility tests

Prior to providing a testing environment to the Client, the Developer will undertake best efforts to test the Website for compatibility with Desktop browser’s including:

Microsoft® Internet Explorer® version 11;

Recent versions of Microsoft Edge;

Recent versions of Safari;

Recent versions of Google Chrome; and

Recent versions of Mozilla® Firefox®.

Prior to providing a testing environment to the Client, the Developer will undertake best efforts to test the Website for compatibility with Mobile (Smartphone) browser’s including:

Recent versions of Safari (iOS Devices);

Recent versions of Google Chrome (iOS Devices);

Recent versions of Google Chrome (Android Devices);

Recent versions of Mozilla® Firefox (Android Devices);

Recent versions of Opera Mini/Opera Mobile (Android Devices);

The Developer will not be required to perform testing in Blackberry OS or Blackberry QNX, Symbian or other mobile browsers.

## **Upgrades**

The Client is entitled to receive security and stability patches if they have agreed to and paid for monthly maintenance.

The Client is not entitled to receive any CMS upgrades or patches, unless (at the Developer's discretion) it is considered essential for the operation of its Website.

All upgrades will be installed by Developer to operate the Client’s Website.

## **Specific prohibitions on use of the Program**

### Client Prohibitions

Clients agree that they must not:

1. use the Program in any way that could damage the reputation of the Developer or the goodwill or other rights enjoyed by Developer;
2. Permit any third Party to obtain access to the Program;

### Consent to the provision of information to third parties

Clients acknowledge that:

1. their personal information may be provided to third parties in order for the Program to operate effectively.
2. any information provided to third parties will be confidential and all reasonable efforts to keep the data confidential will be made by Developer.

## **Representations and warranties**

### Developer’s warranties

The Developer warrants that:

1. the Website will be substantially free from physical defects in material and workmanship for 6 months after completion;
2. except that no warranty is provided that the Website will work in all respects on any future versions of browsers which are released after completion.
3. the Website complies with the Proposal; and
4. to the best of its knowledge the Website does not contain any computer virus or other code that is harmful, destructive, disabling or which assists in or enables theft or alteration;
5. the Client should not rely on the Anticipated Delivery Date as particularised at Item 9 of Schedule 1: unless agreed otherwise, as is it a guide only;
6. that any images used in the Website are used according to the terms of the licence where they were obtained from;
7. that the Website developed for the Client will utilise responsive website design techniques to provide an appropriate viewing experience on laptop, tablet and mobile devices.

### Client’s warranties

*The Client warrants that:*

1. it’s Authorised Officer will act reasonably and promptly in providing instructions to the Developer regarding their feedback on the Designs presented and Design Revisions.
2. it will not unreasonably withhold any Approval requested by the Developer;
3. should Approval be withheld after the Developer completes testing and the Website works according to the Proposal, then the Client is deemed to have provided Approval five (5) business days after being asked for it;
4. it will provide all required Content for its Website within twenty (20) business days from the date that the Proposal is accepted;
5. it will act reasonably in engaging third party content creators of Content such as public relations consultants and copywriters;
6. it will notify the Developer as soon as it becomes aware that its Authorised Officer is unable to provide instructions to the Developer and agreed to replace that person within three (3) business days;
7. it agrees to abide by any Policy which the Developer provides it with from time to time.
8. that any Content provided to the Developer to be uploaded to the CMS by the Developer is owned by the Client, or they have a right to use the Content and does not infringe the Intellectual Property right of any third party;

Should any of the above Warranties be breached by the Client, then the Developer reserves its right to terminate this Agreement.

### Mutual representations and warranties

Each Party represents and warrants that it has the requisite power and authority to enter into an Agreement and to complete its obligations contemplated therein.

## **Indemnity**

The Client indemnifies the Developer and its personnel against any loss, claim, damage, expense, cost (including legal costs on a full indemnity basis), proceeding, liability or charge of any nature that the Client or its Personnel may sustain or incur as a result or as a consequence of:

a breach of a term of this Agreement or of a warranty;

a claim by a third Party that using the Website in compliance with this Agreement infringes that third Party's Intellectual Property Rights.

## **Limitation and exclusion of liability**

### Implied conditions and warranties

Developer excludes any condition or warranty implied by law (including the Competition and Consumer Act 2011 (Cth)) or custom into an Agreement.

### Consequential loss

The Developer excludes liability to the Client (whether arising in contract or tort (including negligence) or under any statute) for any Consequential Loss suffered by the Client in connection with an Agreement.

### Limitation of liability

Developer limits its liability: for breach of a warranty under this Agreement, or for a breach of a condition or warranty it cannot lawfully exclude, for services, to resupplying the services or paying the cost of having those services resupplied; and

from any operation or non-operation of the Website not covered by clauses 9.2 or 9.3 to the total Fee payable under this Agreement.

### Proportionate liability

A Party's liability is reduced proportionally to the extent that any act or omission of the other Party or its Personnel caused or contributed to the other Party's loss.

## **Dispute resolution**

### No court proceedings unless procedure followed

A Party must not commence legal proceedings (except proceedings seeking interlocutory relief) unless it has complied with this Dispute resolution procedures.

### Notice of Dispute

A Party claiming that a dispute, difference or question arising out of this Agreement, including a question as to whether certain services are in scope or not, has arisen (Dispute) must give the other Party notice of the details of the Dispute (Dispute Notice).

### Negotiated resolution

When a Dispute Notice is given, each Party's chief executive officers (or their nominee) must meet or conduct a teleconference and first attempt to resolve the Dispute.

### Mediation

If the chief executive officers (or their nominee) cannot resolve the Dispute for twenty (20) business days (or longer period agreed between the Parties), the Parties must refer the Dispute for mediation by the Australian Commercial Dispute Centre Limited for resolution in accordance with the Conciliation Rules of the Australian Commercial Dispute Centre.

### Court proceedings if procedure fails

If the Parties cannot resolve a Dispute in accordance with the escalation procedure, each Party may commence court proceedings.

### Obligations continue

The Parties must continue to perform their respective obligations under this Agreement pending the resolution of a Dispute.

### Costs

Each Party must pay its own costs of complying with this clause.

## **Termination**

### Termination for Breach

A Party may terminate all or part of this Agreement by giving the other Party notice if:

the other Party breaches a term of this Agreement and fails to rectify the breach within twenty (20) business days after receiving notice requiring it to do so.

### Termination by Developer

The Developer can terminate this Agreement without notice if:

it no longer has the right to provide the Program to Client’s for any reason which is outside its control;

the Client fails to pay an invoice within fourteen (14) business days of the date on which a valid tax invoice is sent to the Client.

### Termination by Client

The Client may terminate an Agreement by providing thirty (30) business days’ notice in writing to Developer. On termination of the Agreement by the Client, the Parties agree that:

the Developer will invoice the Client for the amount of work which has been completed on the Website up to the point in time when the Developer was notified; or

for the amount of the loss that the Developer suffers because of the termination;

the Client will pay the Developers invoice within fourteen (14) business days of its receipt.

## **Notices and other communications**

### Service of notices

A notice, demand, consent, approval or communication under an Agreement (Notice) must be:

in writing, in English; and

sent by prepaid post or email, to the recipient's address for Notices specified in the Details, as varied by any Notice given by the recipient to the sender.

For the avoidance of doubt, approvals sent from the Developer’s system for managing the development of the Client’s Website are deemed to be valid Notices.

### General provisions

#### Further assurances

Each Party will sign and complete all further documents as may be necessary to effect, perfect or complete the provisions of an Agreement.

#### Governing law and jurisdiction

The laws of New South Wales and Australia govern an Agreement made between parties.

#### Liability of Parties

If a Party consists of more than one person:

an obligation of those Parties is a joint obligation of all of them and a several obligation of each of them;

a Right given to those Parties is a Right given jointly and severally to each of them, and if exercised by one of them, is deemed to be exercised jointly; and

a representation, warranty or undertaking made by those Parties is made by each of them.

#### Survival

The obligation of confidentiality survives termination of an Agreement.

### Deemed acceptance

By signing the Proposal and returning a signed copy to the Developer, by paying the Deposit or by otherwise instructing the Developer to commence the Client agrees to be bound by the terms and conditions contained in this Document.

# **Definitions and Interpretation**

### Definitions

In this document the following terms have the following meanings unless the context requires otherwise:

**Agreement means** the terms and conditions contained in this document, the Proposal and any Annexures.

**Approval** means a communication sent by the Client to the Developer as part of the Developer providing the Services to the Client.

**Annexures** means the additional documents listed in the Details section of this Agreement, which forms part of the contract between the parties.

**Anticipated Delivery Date** means the date that the Website is anticipated to be completed by the Developer as communicated in the Proposal or in other communications sent by the Developer.

**Authorised Officer** means the person authorised by the Client as in the Proposal to provide instructions and directions to the Developer including amendments to the Scope of Work and any Approval by the Client.

**Business Day means:**

1. for receiving a notice under clause 13, a day that is not a Saturday, Sunday, public holiday or bank holiday in the place where the notice is received; and
2. or all other purposes, a day that is not a Saturday, Sunday, bank holiday or public holiday in in New South Wales, Australia.

**Business Hours** means from 9.00am to 5.00pm on a Business Day.

**Consequential Loss** means:

1. any loss of profits, loss of revenue, loss of opportunity, loss of anticipated savings, pure economic loss and increased operating costs; and
2. any consequential or indirect loss, suffered or incurred by any person whether arising in contract or tort (including negligence) or under any statute.

**Client** means a Party to this Agreement who has received a Proposal and agrees to be bound by the terms and conditions contained in these Terms of Business and any Schedules.

**Content** means text, data, speech, music or other sounds, visual images (animated or otherwise), video, or document files in any form used on the Website.

**Content Management System (CMS)** means the system which the Developer will use to develop the Website for the Client.

**Design Mock-ups** mean an indicative only, draft visual representation of a Webpage or Webpage Template. Design Mock-ups are used as a visualisation tool that may indicate proposed mandatory inclusions, page layout, functionality and look and feel of the Website.

**Design** means a distinctive stylistic treatment which includes a number of elements such as typographic treatment, application of colour and layout – all created to meet the brief provided by the Client. A stylistic treatment is considered a separate design if it looks substantially different from other Designs that are provided. The term Design applies to websites, or elements that form part of the website such as custom banner designs or logo designs.

**Design Revision** means a change to a Design which is relatively minor in nature and are referred to as “rounds” of changes – for example: Round 1, Round 2, Round 3. A Design Revision is a response to a set of complete and clearly specified instructions from the Client to change a Design. A change is considered a Design Revision if the requirements are relatively minor in nature and takes no more than 2 hours.

**Developer’s Website** means the Website that the Client may be able to access Documentation and other information from as specified at Item 3 of Schedule 1.

**Documentation** means any user operating manual, explanatory notes or memoranda that may or may not be supplied with the Content Management System provided by the Developer as updated from time to time on its Website.

**Fee** means that amount of money the Client is to pay the Developer to develop the Website specified in the Proposal.

**Force Majeure** means an act of God, fire, lightning, explosions, flood or other natural disaster, subsidence, act of terrorism, insurrection, civil disorder or military operations, power or gas shortage, government or quasi-government restraint, expropriation, prohibition, intervention, direction or embargo, inability or delay in obtaining governmental or quasi-governmental approvals, consents, permits, licences or authorities, strikes, lock-outs or other industrial disputes of any kind and any other cause, whether similar or not to the foregoing, outside of the affected Party’s control.

**Hourly Rates** mean the amount of money that the Developer charges per hour to provide Services and Support.

**Intellectual Property** means all industrial and intellectual property rights including, without limitation, patents, copyrights, right to extract information from databases, design rights, trade secrets, rights of confidence, and all forms of protection of a similar nature or having similar effect to any of them which may subsist anywhere in the world (whether or not any of them are registered and including applications and the right to make applications for registration of any of them).

**Moral Rights** means any moral Rights including the Rights described in Article 6 is of the Berne Convention for Protection of Literary and Artistic Works 1986 (as amended and revised from time to time), being "droit moral" or other analogous Rights arising under any statute (including the Copyright Act 1968 (Cth) or any other law of the Commonwealth of Australia), that exist or that may come to exist, anywhere in the world.

**Program** means the Content Management System (CMS) used by the Developer to develop the Website.

**Proposal** means a document provided to the Client by the Developer that includes a summary of the work to be completed which the terms and conditions contained in this Agreement apply to.

**Services** means any work necessary to complete the Website including graphic design, copywriting, logo development, photography, which the Client has instructed the Developer to complete as provided in a Proposal.

**Proposal Exclusions** mean the list of specific matters which are not included as part of this Agreement as specified in the Annexure with this name.

**Policy** means any document prepared by the Developer and communicated to the Client to assist the Client to understand and comply with the processes utilised by the Developer.

**Sitemap** means a list of all Webpages to be included in the Website that is to be built for the Client.

**Tax** means all taxes, charges, fees and other imposts payable in connection with this Agreement.

**Terms of Business** means the terms and conditions contained in the Proposal provided to the Client and this Agreement and any Schedules.

**Training** means instruction provided by the Developer to the Client’s employees, officers or agents, which is designed to enable the Client to perform basic Content editing on the Client’s Website.

**Webpage** means a page on the Website, created from approved content supplied by the Client to the Developer.

**Website** means the Client’s Website which uses the Program hosted on the Developer’s servers as described on the Proposal.

**Works** means the source, algorithms and system logic subject to this Agreement which copyright subsists as a literary work and any illustrations, graphics or photographs (taken by the Developer or its agents) that have been created by the Developer for the Client as specified in the Proposal to build the Website including all representations, variations, modifications and prior versions of the Works.

**Upgrades** means any modifications, new or revised versions of the code that the website or the hosting services requires to operate more efficiently or effectively as determined by Developer at its sole discretion.

### Interpretation

In this Document, except where the context otherwise requires:

1. the singular includes the plural and vice versa, and a gender includes other genders;
2. a reference to a document or instrument includes the document or instrument as novated, altered, supplemented or replaced from time to time;
3. a reference to A$, $A, dollar or $ is to the currency of the Australia;
4. a reference to time is to the time specified in New South Wales, Australia.
5. a reference to a Party is to a Party to this Agreement, and a reference to a Party to a document includes the Party's executors, administrators, successors and permitted assigns and substitutes;
6. a reference to a person includes a natural person, partnership, body corporate, association, governmental or local authority or agency or other entity;
7. a reference to a statute, ordinance, code or other law includes regulations and other instruments under it and consolidations, amendments, re-enactments or replacements of any of them;
8. the meaning of general words is not limited by specific examples introduced by including, for example or similar expressions;
9. any agreement, representation, warranty or indemnity by two or more Parties (including where two or more persons are included in the same defined term) binds them jointly and severally;
10. any agreement, representation, warranty or indemnity in favour of two or more Parties (including where two or more persons are included in the same defined term) is for the benefit of them jointly and severally;
11. if a day on or by which an obligation must be performed or an event must occur is not a Business Day, the obligation must be performed or the event must occur on or by the next Business Day; and
12. headings are for ease of reference only and do not affect interpretation.